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One Year Review of Property

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ONE YEAR REVIEW OF PROPERTY

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I. INTRODUCTION

The volume of business brought before the Colorado Supreme Court is greater than that of most other state supreme courts, and is increasing. Many of the comments made herein about particular decisions are critical. The criticism should rightfully be directed, as well, to the system that has left our supreme court the only appellate tribunal for almost all of the judicial determination made throughout the entire state. The court simply does not have time to do the job it should, and would like to do, with the cases that come before it. Its function is too important to let it continue under this burden. Serious consideration should be given to an intermediate appellate court that would let the supreme court fulfill its greatest duty of deciding those important and difficult cases that are not routine, by exercising a discretionary jurisdiction.

Only those cases that seem to add something new to the law of property, or contain statements or holdings that the author considers questionable are discussed herein.

II. TAX DEED

A. *Virgin Title Doctrine*

In 1938 U.S. Highway 6 was constructed around the town of Silver Plume. Since the old road had been the main street of the town, a connection between the main street and the new highway was needed. Acquisition of the necessary land was entrusted to an employee of the town. Apparently the employee failed to purchase the land or a right-of-way across it, but the connecting road was built just the same. Construction was done under an arrangement between the town, *the county* and the state of Colorado.

For more than twenty years this connecting road was used by the public without any suggestion that the town did not own the right-of-way. In 1960 one of the plaintiffs attempted to block the road. When the town refused to allow this, legal action resulted.

In *Town of Silver Plume v. Hudson*,[1] the plaintiffs claimed title under a tax deed from the county executed in 1945. The town claimed a public highway by twenty years adverse use under a 1953 statute, applying specifically to public rights-of-way.[2]

The trial court held that the public had not used the road adversely the requisite twenty years because between 1938 and 1945 the County of Clear Creek held a tax certificate for the land in question, and it was not until 1945 that the plaintiff took from the county by treasurer's deed. There could be no *adverse* use against the county because the county had cooperated in constructing the

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1 380 P.2d 59 (Colo. 1963).

2 Colo. Rev. Stat. § 120-1-1 (1953). This section provides in pertinent part: "The following are hereby declared to be public highways: . . . . (3) All roads over private lands that have been used adversely without interruption or objection on the part of the owners of such lands for twenty consecutive years."

highway. Adverse use began in 1945 when the plaintiffs took by tax deed, and in 1960 sufficient time had not elapsed to create an interest in the town.

The Supreme Court of Colorado rejected this reasoning. The judgment was reversed on the basis of two holdings: (1) A tax certificate (as distinguished from a tax deed) does not pass title, and thus the county was never the owner of the land in question;[3] and (2) the doctrine that a tax deed creates a new title unaffected by defects in the previous chain does not apply to a public highway obtained under the provisions of Colo. Rev. Stat. 120-1-1 (1953).

The virgin character of a valid tax deed was established early.[4] An exception was recognized for mineral interests transferred prior to the tax deed.[5] Now there is a new exception for public highways obtained by adverse use. Because no reason is given for this new exception, it is difficult to know whether other similar exceptions can be expected in the future.

It is not difficult, however, to guess the reason for the *Silver Plume* decision. It was a "hard case." The plaintiffs were attempting to block public access to a street that was the chief avenue into town from the highway. Presumably the plaintiffs knew of the street when they took the tax deed, and had no expectation of acquiring the land free of this burden. The entire situation smacks of opportunists discovering a "legal technicality" and trying to use it to hold up the public as a windfall for themselves.

Although we may applaud the court for reaching the decision it did, we nevertheless wish that guidelines had been drawn by which to judge the future of the tax deed doctrine. The conclusion that is drawn after the *Silver Plume* case is that tax deeds create new titles unaffected by occurrences in the previous chain except in hard cases, highways obtained under Colo. Rev. Stat. 120-1-1 (1953) and mineral right transfers. Of course the future may bring 120-1-1 cases in which there would be nothing shocking or hard in applying the tax deed doctrine, but the court would now seem stuck with the *Silver Plume* holding so far as 120-1-1 cases are concerned.

One might wonder whether saving the town of Silver Plume the expense of condemning a right-of-way was worth unsettling the tax deed doctrine.

B. *Effect Upon Boundary Dispute*

There has been one other recent case concerning the doctrine that tax deeds create a new title. *Williams v. Wilk*[6] was a contest between two adjoining land owners. For some fifty years a building had stood on defendant's land, with two pilasters supporting one wall encroached on plaintiff's lot. Plaintiff sued to have the pilasters removed. Defendant's answer was, of course, adverse possession of the land upon which the pilasters had stood for over fifty years, and the plaintiff's reply was that a tax deed in defendant's chain

3 Although the court cited no authority for this proposition, it seems to have been recognized for some time in Colorado. Rach v. Fastenau, 122 Colo. 41, 219 P.2d 781 (1950); Morris v. St. Louis Nat'l Bank, 17 Colo. 231, 29 Pac. 802 (1892).

4 Jacobs v. Perry, 135 Colo. 550, 313 P.2d 1008 (1957); Harrison v. Everett, 135 Colo. 55, 308 P.2d 216 (1957); Henryln Irr. Dist. v. Patterson, 65 Colo. 385, 176 Pac. 493 (1918).

5 Mitchell v. Espinosa, 125 Colo. 267, 243 P.2d 412 (1952).

6 368 P.2d 558 (Colo. 1962).

of title less than eighteen years before suit, wiped the slate clean and destroyed the adverse possession upon which the defendant relied. Presumably on the basis of this reply the trial court held for the plaintiff and ordered the pilasters removed.

The reply was clearly inappropriate. The tax deed was in defendant's chain of title while the land that defendant claimed by adverse possession was in the plaintiff's chain of title. Therefore, the tax deed that plaintiff claims wiped out the title by adverse possession, did not describe the land adversely possessed. It gave a "new" title in the land described, but certainly not in any other land.

This defect in the reply was demonstrated to the supreme court by the defendants,[7] but the court expressly refused to either accept or reject the argument. Instead the court referred to the general statute of limitations upon recovering the possession of real estate, Colo. Rev. Stat. 118-7-1 (1953), and stated that this statute had run and thus the plaintiff could not recover possession of the land upon which the pilasters stood.

In effect this amounted to holding for the defendant on the basis of its argument of adverse possession, and completely ignoring both

[7] *Id.* at 560.

the defense and the reply to it.[8] One could logically infer that the court was rejecting the tax deed doctrine for all cases, since that was the defense which the court chose to ignore. However, it seems safe to say that the court intended no such implication.

III. TRUST DEED

Set-Off in "foreclosure proceeding"

Robinson and Riepen entered into an arrangement whereby Riepen would operate Robinson's uranium mine. As a part of the deal Riepen loaned Robinson $6,660.00, and took a promissory note for that amount from Robinson. The note was to mature in five years but would not be payable as long as the mining agreement was still in full force and effect. As security for the note, Robinson executed a trust deed on certain real estate.

Riepen apparently failed to carry out the mining operations according to the contract, and shortly before the note matured he permanently changed his domicile from Colorado to Arizona. When Robinson defaulted on the note, Riepen asked the public trustee to sell the real estate which he held as security. Two days before the actual sale Robinson filed this rather unique law suit: *Riepen v. Robinson.*[9] In his complaint Robinson sought to enjoin the trustee's sale, and to "set-off" his damages because of the alleged breach of the mining agreement, against Riepen's recovery from the trustee's sale. In fact Robinson claimed that his damages would amount to more than his debt to Riepen, and asked that, therefore, the sale be permanently enjoined and the trust deed canceled.

No injunction was issued, and the public sale was held on schedule over the protests of Robinson. The property was purchased by a third party for more than the amount owed. Robinson then asked that his damages be adjudicated, and if found to exceed the amount of the note held by Riepen, that the trustee's sale be set aside. Service of process was made on Riepen by mail at his new residence in Arizona. Riepen appeared specially and moved to quash service. The trial court overruled the motion, upholding its jurisdiction, and Riepen brought an original action in the supreme court under rule 106 asking the trial judge to show cause why motion to quash should not be sustained.

Although there had been no personal service on Riepen in Colorado, the supreme court discharged the rule to show cause, without opinion, thereby upholding the trial court's jurisdiction.[10] The trial court's answer to the order to show cause argued that it had jurisdiction without personal service in Colorado because the

8 To make the opinion even more confusing, the court said that it did not have to decide upon the defense of adverse possession either:

> Though there may be merit to defendant's argument as to the nonapplicability of Harrison [case holding that tax deed gives a new title] it is unnecessary to consider either it or the defense of adverse possession, because their defense is clearly substantiated by CRS '53 118-7-1. . . .

Williams v. Wills, 368 P.2d 558, 560.

The statute relied upon by the court is one of the principal statutes defining adverse possession in Colorado. If the plaintiff's suit was barred by this statute, it must follow that the defendant had obtained title by adverse possession.

At least one modern writer has argued that in boundary disputes the doctrine of adverse possession should be treated as nothing more than a statute of limitation upon suits to recover the possession of real esate, thus eliminating such problems as the character of the possession, etc. It seems too much to hope that the court had this development in mind in writing this opinion. See Callahan, Adverse Possession (1961).

9 372 P.2d 456 (Colo. 1962).

10 Riepen v. District Court of Larimer County, Colo. Supreme Court Docket No. 19583 (1960).

proceeding was in rem and asked for a set-off in the trustee's sale, which was analogized to a mortgage foreclosure. The fact that the trustee's sale was not a judicial proceeding at all did not seem to deter the court from accepting the argument.[11] At this point the plaintiff's theory of set-off was the same theory which the court later held could not be brought in a mortgage foreclosure (or analogous proceeding).

Its jurisdiction over the complaint having been affirmed by the supreme court, the trial court proceeded to try the substantive issues. It found that Riepen had in fact breached the mining agreement, and that Robinson's damages did exceed the amount of Robinson's debt to Riepen. It, therefore, ordered the trustee's sale set aside and the note canceled. The supreme court then reversed this judgment on the basis of the general rule that a set-off will be allowed in a mortgage foreclosure only if the amount of the set-off is liquidated.[12] It was apparently admitted by all parties that the Robinson claim was unliquidated.

Counter actions are generally divided into set-off and recoupment. "Set-off" is the term used to describe claims (often restricted to contract) that do not arise out of the same transaction that gave rise to the principal action. Since a set-off will require a trial of issues extraneous to the principal action, it is generally limited to liquidated claims.[13] "Recoupment" is the term used for claims that do arise out of the same transactions as the principal claim, and since the issues tried are all connected, recoupment is usually allowed for unliquidated as well as liquidated claims.[14] Robinson's contract claim in this case arose out of the same transaction that gave rise to the note and trust deed. If the court had treated the claim as a recoupment, it might have been able to view the matter differently.

Indeed, if we accept the court's own statement that it reversed the trial court because Robinson's claim was unliquidated, we have a rather surprising example of judicial administration. The question of jurisdiction was before the supreme court, before the trial, in the original proceeding under rule 106. In affirming the trial court's decision overruling the motion to quash, the court must have been sustaining jurisdiction on some basis. The Robinson claim was un-

11 The holding, although unsupported by reasons, has interesting implications. On the basis of the result reached one could argue that a trustee's sale in Colorado which is not a judicial proceeding will nevertheless support ancillary jurisdiction.

12 The court cited, 37 Am. Jur. Mortgages § 728, 1941, in support of the general rule. Actually, the rule applies to set-offs in general and not just set-offs in a foreclosure proceeding.

13 City of Grand Rapids, Mich. v. McCurdy, 136, F.2d 615 (6th Cir. 1943); Pennsylvania R.R. v. Miller, 124 F.2d 160 (5th Cir. 1941); Francisco v. Francisco, 120 Mont. 468, 191 P.2d 317 (1948); Stern v. Sunset Road Oil Co., 47 Cal. App. 334, 190 Pac. 651 (1920); Lysle Milling Co. v. North Alabama Grocery Co., 201 Ala. 222, 77 So. 748 (1918).

14 Crossett Lumber Co. v. United States, 87 F.2d 930 (8th Cir. 1937); Curtis-Warner Corp. v. Thirkette, 99 N.J. Eq. 806, 134 Atl. 299 (1926); Alley v. Bessemer Gas Engine Co., 228 S.W. 963 (Tex. 1921); Lysle Milling Co. v. North Alabama Grocery Co., 201 Ala. 222, 77 So. 748 (1918). See the note preceding Restatement of Judgments § 56.

liquidated at this point, and if it could not be brought as a set-off and properly attached to the "foreclosure" proceedings, this would have destroyed the court's jurisdiction then and there. After the substantive issue of breach of contract was tried Robinson's damages were no longer unliquidated. They had been judicially found to exceed the amount of the secured note. After the primary reason for not allowing an unliquidated set-off (the trying of extraneous issues in an unliquidated claim) had been obviated by actually conducting the trial, and after the damages were no longer unliquidated, the court decided the whole thing had been a mistake and held that since it shouldn't have been done in the first place it would have to be undone now.

This kind of jurisdiction is subject to some degree of judicial discretion, and one would think that after the issues had been fully tried with the blessing of the supreme court, that discretion would be exercised in favor of the alleged set-off. Especially since courts have often exercised their discretion in favor of a true set-off on the sole ground that the person against whom the set-off was brought could not otherwise be sued in the jurisdiction.[15] This was, of course, such a case.

When we bring the various threads of this case together we find that there was questionable jurisdiction to begin with since there was no judicial proceeding to support the "set-off," and the requirements of rule 102 had not been complied with.[16] Jurisdiction having been asserted, the suit was finally not allowed because of the general rule that a set-off must be of a liquidated amount. The entire chain of events is distressing since this was not properly a set-off but a recoupment which *can* be allowed for unliquidated damages (except that there were no action here to attach it to). But in addition, the damages *were* liquidated at the time of the supreme court's decision. However, the propriety of a set-off or counter-claim was not the primary issue presented by the situation. The plaintiff was seeking to set aside the trustee's sale not merely to try a counter-claim with it. Thus, the difficult question of the protection to be accorded the reliance of purchasers at a tax sale was potentially involved. The decision to set a trustee's sale aside would seem to require stronger provocation than the decision to try a counter-claim with it.

The court properly pointed out that if the plaintiff's suit was not even a proper set-off it was certainly not grounds for setting the sale aside.[17] But since the statement about a proper set-off is at least questionable, perhaps the issue of setting the tax sale aside could have been profitably discussed.

IV. DESCRIPTION IN DEED

Result of Erroneous Federal Survey

The court reached a puzzling result in *Ashley v. Hill*,[18] assuming that all the operative facts are set out in the opinion.

15 Heller & Co. v. Lindsay, 146 Colo. 452, 361 P.2d 979 (1961); Plattner Implement Co. v. Bradley Alderson & Co., 40 Colo. 95, 90 Pac. 86 (1907). This argument was made to the court for the first time in the petition for rehearing. Record, vol. 2, p. 1, Plaintiff's petition for rehearing, Riepen v. Robinson, 372 P.2d 456 (Colo. 1962).

16 The plaintiff might have viewed the defendant's interest in the trustee's sale as property and attached such interest under rule 102 of the Colorado rules of civil procedure. If the plaintiff had complied with the requirements of rule 102, jurisdiction in rem could have been acquired.

17 375 P.2d 337 (Colo. 1962).

18 *Ibid.*

In 1883 a federal survey and plat were completed. In 1887 a federal patent was issued to the plaintiff's ultimate predecessor in title. The description was taken from the 1883 survey and included a certain millsite. In 1904 a federal patent was issued to the defendant's ultimate predecessor in title, and presumably the description was also taken from the 1883 survey since there was no other survey in existence at that time. In 1927 a new federal survey was made showing that the survey of 1883 was incorrect. Using the correct 1927 survey the millsite was not on land described in the patent taken by plaintiff's predecessor, but rather on land described in the patent granted to the defendant's predecessor.

Apparently subsequent deeds in both plaintiff's and defendant's chains of title simply copy the descriptions found in previous deeds, even after the new survey of 1927. Thus, in 1960 the situation was that plaintiff had record title to land which according to the 1883 survey included the millsite, and which under the 1927 survey did not include the millsite. Defendant had record title to land which under the 1927 survey included the millsite and which under the 1883 survey did not. It is admitted that the 1927 survey is correct. Both parties ask that their alleged interest in the millsite be quieted. The trial court found for the defendant.

In affirming judgment for the defendant the supreme court made its decision a foregone conclusion by the way in which it put the issue before it:

> The question for determination is whether a land resurvey which established that an error was made in the legal description of the millsite in a United States patent which was issued under an earlier survey, worked an ouster of a subsequent patentee and his successors in interest of that portion of real property conveyed by a later patent which is embraced within the corrected description of the millsite.[19]

By asking whether anything occurred to oust the defendant rather than asking whether anything happened to oust the plaintiff, the court seems to have started with the assumption that the defendant has a better right. The opinion does not indicate who, if anyone, was in possession of the millsite, and possession was not made an issue in the case.

On the basis of the facts recited in the opinion it seems that both of the original patents were based upon the 1883 survey, which was the only one in existence at that time. Thus, the intent of grantor and grantee in both cases can only be determined by looking at the 1883 survey.

Whether this survey was correct or not, it was the survey the original parties looked at to determine how to describe the land they intended to convey. It seems clear, then, that the patent granted to the plaintiff's predecessor was *intended* to describe land containing the millsite. It is difficult to know how that land ever got into the defendant's chain of title. If the decision is not a miscarriage of justice, the justification for it does not appear in the opinion.

The case would seem to stand for the proposition that the

19 *Ibid.*

description in a deed means what the latest (and presumably correct) survey says it means rather than what the parties thought it meant at the time they executed the deed. We trust, however, that the case will not be successfully cited in support of such a proposition.

V. CHATTEL MORTGAGE

Interest of Mortgagee in the Property Mortgaged

The defendant purchased an automobile and gave a note and chattel mortgage which were purchased by plaintiff. Defendant defaulted on the note, was granted a discharge in voluntary bankruptcy proceedings, and then lost the automobile in an inaccessible canyon in Utah. Although the loss of the automobile was not due to defendant's negligence, the chattel mortgage recited that defendant would not take the vehicle out of Colorado without he mortgagee's permission. Defendant did not obtain such permission. The plaintiff was granted permission to sell the automobile to pay the amount of the note, but with the virtual destruction of the car (apparently without adequate insurance coverage), the plaintiff was trying to hold the defendant liable for the value of the car despite the discharge. The court, in *Finance Corp. v. King*,[20] held that the note was discharged in the bankruptcy proceedings, and that the defendant had no special duty to preserve the mortgaged property beyond due care.[21]

VI. DEEDS

Presumption of Delivery

The decedent widow had eleven children. She deeded the family ranch to one of the children shortly before she died. This grantee was the only child still living at home at the time. The other children sought to set the deed aside on the grounds that the grantee exercised undue influence on their mother at a time when she was ill and unable to form the necessary intent to transfer the land. The trial court dismissed the complaint and the supreme court

20 370 P.2d 432 (Colo. 1962).

21 The arguments of plaintiff, which were rejected by the court, were: (1) The defendant is a trustee for the plaintiff because he took the car out of Colorado in violation of the chattel mortgage; (2) That the defendant having defaulted prior to the bankruptcy proceeding, title to the car vested in plaintiff, subject only to defendant's right of redemption, and defendant therefore held car as trustee for plaintiff; (3) Even though obligation on the note was discharged, in the bankruptcy proceeding, the defendant was still liable for the security either by returning it to plaintiff or paying its value.

affirmed.[22] The supreme court held that the fact that defendant had possession of the deed was prima facie evidence of delivery, putting the burden of proving nondelivery upon the plaintiffs.[23]

Plaintiffs tried to rely upon the general rule that " . . . Where a fiduciary relationship is shown to exist between parties to a transaction and the fiduciary is enriched thereby, the law presumes that the transaction was produced as a result of undue influence on the part of the fiduciary . . . . "[24] The supreme court held that no fiduciary relationship exists between mother and son under normal circumstances, as here. The plaintiffs were unable to produce evidence of lack of competence in their mother.

VII. Restrictive Covenant Specifically Enforced

In *Smith v Nelson*,[25] the court affirmed a judgment specifically enforcing a restrictive covenant in defendant's chain of title. The suit was successfully brought by neighbors whose property was subject to similar covenants. The restrictions concerned the distance of buildings from front and side lot lines; the number of residences per lot; the cost of buildings and square feet contained within each building. The court rejected defenses of waiver and laches because the plaintiffs had complained to the defendant as soon as they learned of his building plans, and because suit was filed promptly.

VIII. Tort

Duty of Property Owner re Condition of Street Adjoining Owner's Land

A motion for summary judgment was granted and affirmed in *Ellsworth v. Colorado Beverage Co.*[26] The plaintiff claimed damages for personal injuries allegedly suffered when he slipped on the icy street immediately adjacent to a building owned and occupied by defendants. There was no sidewalk between the street and defendants' building, and defendants' customers parked on this portion of the street. Plaintiff was a business invitee of the defendants, and was injured while getting out of his car which was parked on the street adjacent to defendants' building. Plaintiff did not claim that defendants had caused ice to be on the street, but rather that they had failed to remove it or warn business invitees of it.

The court distinguished the case from *Sill v. Lewis*,[27] in which the property owner's premises were so constructed as to discharge water upon the street where it froze, and the injured plaintiff was allowed to recover.

IX. Eminent Domain

It has long been held that one whose property is cut off from a reasonable access by the vacation or barricading of a street is

22 White v. White, 368 P.2d 417 (Colo. 1962). Also discussed in Yegge, *One Year Review of Civil Procedure and Appeals*, 40 Denver L.C.J. 66, 86 (1963), and Cantwell, *One Year Review of Wills, Estates and Trusts*, 40 Denver L.C.J. 122, 124 (1963).

23 This portion of the holding was based directly upon Colo. Rev. Stat. 118-6-1(4) (1953).

24 368 P.2d 417, 419, citing Lesser v. Lesser, 128 Colo. 151, 250 P.2d 130 (1952), and Hilliard v. Shellabarger, 120 Colo. 441, 210 P.2d 441 (1949).

25 368 P.2d 556 (Colo. 1962).

26 370 P.2d 159 (Colo. 1962).

27 140 Colo. 436, 344 P.2d 972 (1959).

entitled to compensation. The courts have experienced difficulty when only one of two or more means of access is blocked. It has generally been held that the property owner who is left in a *cul de sac* by the closing of one end of his sole avenue of access is entitled to such damages as he can prove.[28]

In Colorado a property owner was allowed to recover from a private corporation which constructed railroad track and facilities that blocked his principal and only convenient access to the downtown area.[29] The fact that plaintiff could get into his property did not prevent his recovery.

This area has been developed further in a recent case. In *Gayton v. Department of Highways*,[30] the supreme court affirmed the dismissal of a complaint which alleged that the only access to plaintiff's property was an alley and that one of the two ends of the alley had been permanently blocked by the defendant. The complaint failed to allege facts which would show special as opposed to general damages. Special damages are damages greater than those accruing to the community in general from the change.

The difference between the facts in *Gayton* and the first Colorado case mentioned,[31] where recovery was allowed, is the difference between blocking one of two equally convenient access routes, and blocking the only convenient route. The plaintiff, in Colorado, must plead and prove injury amounting to more than a reduction of the number of reasonably convenient means of access. He must show a detrimental change in the *kind* of access, to the point at which the court will say that his access has been made unreasonably difficult. And if he does not plead this he is subject to a motion to dismiss for failure to state a cause of action.

X. ZONING

In the area of zoning the court reaffirmed its position in several cases that zoning is an administrative function, and that the courts will review the zoning agency's determinations only for abuse of discretion. *Board of County Comm'rs v. Shaffer*[32] and *Denver v. American Oil Co.*[33] were discussed in this year's review of constitutional law.[34]

In one other case, however, the court held that the district court in reviewing a determination of the Zoning Commission could hear new evidence that had not been before the Commission, on the question of whether the plaintiff's constitutional rights had been violated by the zoning regulation as applied to him. In *Morris v. Board of County Comm'rs*,[35] the plaintiff claimed that the Jefferson County Planning Commission had approved his plan, but that the county commissioners had denied it. Plaintiff claimed to be deprived of his constitutional rights in that the zoning regulations placed

28 For collected cases see Annot. 93 A.L.R. 639 (1934) supplementing 49 A.L.R. 330 (1927).
29 Denver Union Terminal Ry. v. Glodt, 67 Colo. 155, 186 Pac. 904 (1920).
30 367 P.2d 899 (1962). The procedural aspects of the dismissal of the complaint in this case are discussed in Yegge, *One Year Review of Civil Procedure and Appeals*, 40 Denver L.C.J. 66, 74 (1963).
31 *Supra* note 29 and accompanying text.
32 367 P.2d 751 (Colo. 1962).
33 374 P.2d 357 (Colo. 1962). To the same effect is Levy v. Board of Adjustment of Arapahoe County, 369 P.2d 991 (Colo. 1962).
34 Gitelman, *One Year Review of Constitutional Law*, 40 Denver L.C.J. 134, 151 (1963).
35 370 P.2d 438 (Colo. 1962).

upon his land deprived him of the only reasonable use to which it could be put.

The plaintiffs filed the action in the District Court of Jefferson County to review the action of the county commissioners and to seek a declaratory judgment stating their right to construct the facilities under question. Plaintiffs sought to introduce evidence which had not been before the county commissioners and the district court refused to hear it. The supreme court, in reversing, held that the new evidence should have been heard in connection with th request for a declaratory judgment.

Judicial review of an administrative zoning decision apparently goes beyond looking for an abuse of the discretion of the zoning authority on the basis of the record before it, where a constitutional claim is made. The claim that a zoning decision denies all reasonable use of certain land is treated as a constitutional claim, and it seems inevitable that the courts should have the last word on what use is reasonable. It is to be hoped, however, that the good start the court has made in leaving zoning to the agencies that have the technical competence and continuing interest in it, will be continued and that only a clear denial of constitutional rights will justify a judicial reversal of the administrative determination.

One question has apparently been ignored in the *Morris* opinion. The case was remanded to the district court to hear additional evidence on a constitutional question which boils down to a question of fact that is clearly within the zoning authority's competence, *i.e.* can the plaintiff put his land to any reasonable use other than the forbidden use?

When the constitutional quesiton is based upon a determination of facts not within the agency's competence—*e.g.* the constitutionality of the statute creating the agency and giving it its powers—there may be good reason for not letting the agency make the initial decision. But when the question, as here, is one within its competence, the agency should hear the evidence and make the first determination. Specifically in the *Morris* case the county commissioners should be allowed to make their decision on whether the plaintiffs can make more than one reasonable use of this land. If there is new evidence on this question, the case should be remanded to the commissioners rather than to the district court.