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## A VIOLATION OF A MUNICIPAL ORDINANCE —IS IT FISH OR FOWL?\*

HON. MITCHEL B. JOHNS, *Judge of the Superior Court,  
City and County of Denver*

And it came to pass that in the Court of General Sessions in the City and County of Denver, on the 20th day of September in the Year of our Lord Nineteen Hundred and Fifty-Five, there was called up for trial before the Honorable Pontius Pilate the case of the City and County of Denver v. John J. Lazarus.

And the Honorable Judge, clothed in the black raiments of his office, saith unto the defendant who stood before him:

"Defendant Lazarus, thou art charged by the City of Denver with the violation of assault, how answerest thee?" And the Defendant sayeth: "I answer *nil debet*, Your Most Worshipful Magistrate."

To which the learned Court replied: "Thou canst not answer thus. Thou must reply '*guilty*, or *not guilty*' as is the wont in such cases."

And Lazarus looketh with fear into the eyes of the noble judge and saith: "How can I answer thee thus? Is it not written in the Book of Law, in the Case of *City of Greeley v. Hamman*, 12 Colo. 94, that a prosecution for the violation of a Municipal Ordinance punishable by fine or imprisonment is not a criminal proceeding, but a civil action in the nature of an action in debt. And has it not been verily said that in reply to an action in debt, one who is not so indebted answereth '*nil debet*.'"

And the distinguished jurist saith unto Lazarus: "So it is written in the Book of Law that this is a civil case, and so is it the practice in pleadings to answer thus to an action in debt. But the law giveth and the law taketh away. And in the book to which thou referrest there is not permitted such a reply to the violation of a Municipal Ordinance. Verily thou must plead to the charge, guilty or not guilty."

And Lazarus replieth to the Court: "Thou art learned, and thou art the Judge." And the Judge stateth: "I am the judge."

And Lazarus took unto himself two minutes for deliberation, while the attendants of the Court waited for Lazarus and marvelled at his audacity. And he finally spake unto the Judge on this wise: "This most humble defendant desireth not to affront the dignity of this esteemed Court, but inquireth of the learned Judge if the lowly defendant be permitted to file an answer as is the custom in all well established civil tribunals."

Whereupon the black-robed Judge answereth with finality and saith unto Lazarus: "Thou art permitted no right to formally answer, for it was thus decided by the worthy justices in *Rinn v.*

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\* Address given by Judge Johns before the Law Club in Denver on September 26, 1955.

*Boulder*, and it is written in *Dietz v. City of Central*, 1 Colo. 323, that the subtillties of the common law action of debt do not apply to cases of this type."

And the defendant Lazarus looketh earnestly to the Judge and saith unto him: "Likewise, is it not practiced in the law that all actions for violation of Municipal Ordinances are in the name of the Municipality, and actions in crimes in the name of the People?"

And the Judge replieth unto Lazarus, saying: "Lazarus, thou art keen in the ways of the law—so it is practiced in the procedures."

And Lazarus, kneeling, imploreth the Judge: "I am thy ignorant servant, without counsel, and with fear in the premises; how saith thee that for breaches of the ordinances there was brought before the Judges two cases in the name of the People, to-wit: "*People v. Braisted*, 13 Colo. App. 532, and *Davis v. The People*, 47 Colo. 1; thou art learned and sagacious, thou art the Judge. How sayest thee?"

And the Honorable demandeth: "I am the Judge. How pleadest thou, guilty or not guilty?"

And Lazarus, hearing the exhortation, trembled and asked meekly of the Judge: "In the trial in these cases, how balanceth thee the scales? Requireth thou the quantum of preponderance, or the quantum of reasonable doubt?"

And the Jurist replieth: "It has long been established that the rule of preponderance prevaileth."

And Lazarus regardeth the Judge with much apprehension and saith: "My liberty thou mayest deprive, and my property thou mayest take by a preponderance—how then, O Justice, doest thou levy an execution against the body and sell at public sale? The practice of slavery thou are forbidden. Lincoln did so speak, and our fathers have so declared by blood."

And the Judge replieth to Lazarus, "There shall be no selling of the body, for these are the days of enlightenment."

And Lazarus inquireth of the Judge: "How then doest thou do satisfaction—if a fine be duly imposed and I be without funds—hath the plaintiff an empty judgment as is the case in the majority of actions civil?"

And the Judge answereth: "The Chief Justice Steele in 1909 hath declared in *Davis v. People*, in a prosecution for a violation of a Municipal Ordinance, the Defendant may be fined and committed until the fine is paid."

And Lazarus exclaimeth: "Oh, Most Worshipful and Esteemed Magistrate, thou hast stated aforetime that the action is civil and one in debt, and now thou wouldest impound the body. Have not our forefathers in the ages of the past forbidden imprisonment for debt as well as the star chamber, the rack, and the screw? This lowly and uninformed defendant has long so understood the proscriptions. Thou are learned and thou art wise. Explainest thou

that in this modern day a man may be imprisoned for debt—O Learned Judge?"

And the Jurist, casting down his eyes, saith: "Yes, I am the Judge. How answereth thee, guilty or not guilty?"

And Lazarus, gravely and with timidity, sayeth unto the noble Court: "It is spoken in the market place among the debtors that a plaintiff cannot have judgment without proof of damages. How wilt the Court measure proof of damages for assault—if one striketh lightly or heavily—doest thou measure severity on the scales of dollars and cents and in days of imprisonment? How can it be so? And if there be the swearing in of an expert on assault, what shall be the foundation proper for the receipt of the testimony expert? Thou art just. Thou will require proof of damages as in action in debt, O worthy Justice. Thou art learned in the laws of evidence. Thou art the Judge."

And the Honorable Justice Pilate replieth on this wise: "I am the Judge—how sayest thee, Lazarus, guilty or not guilty?"

And Lazarus looketh from side to side and supplicateth unto the Judge: "I beseech thee for a jury, that I may lay before my fellow men my guilt or my innocence."

And the Judge in compassion spake thusly: "Woe unto thee, Lazarus, a jury thou canst not have."

And Lazarus, his eyes large with disbelief, crieth out: "Is it not written in the great book of Constitutions that an accused shall enjoy the right to a speedy and public trial by an impartial jury?"

And the Honorable spake with authority: "A speedy trial thou shall surely have, for the rule has long been provided in *City of Greeley v. Hamman*, 'The public welfare demands a summary and speedy prosecution of offenders against municipal ordinances,' but a jury trial thou shalt not have."

And Lazarus pleadeth: "How can this be? The writing of the Constitution is the fundamental and paramount law of the land—the protection of the individual liberty and life of man—the shield against the onslaught of tyrants and despots. The sages of past times have so recognized and so upheld. Who dareth to strike down these inalienable rights, these guarantees so long preserved? Who dareth?"

And the Judge picketh up the Book of the Law and spake on this wise unto Lazarus, saying: "Hearken unto thee—take heed that ye be not deceived, for much has come to be said in the name of the Book of Constitutions, but little is understood. It was written in the year 1892 by the Justice Helm in *McInerney v. City of Denver*, 17 Colo. 302, on the subject of which thou speakest, and which I now read to you:

The proposition is urged by counsel that the following offenses against municipal ordinances be prosecuted by jury trial, *viz.*: The injuring or obstructing of streets or alleys, the obstructing or polluting of sewers, the es-

tablishing of offensive trades or manufactories, assaults, assaults and batteries, disturbance of the peace, unlawful assemblages, riots, routs, indecent exposures, the keeping of gambling houses, of houses of prostitution, soliciting on the street by prostitutes, carrying concealed weapons, disturbances of Sunday worship, bunco and confidence steering, the practice of fakiring devices in fraudulently selling articles on the sidewalk, etc., etc.

It is needless to say that a judicial recognition of the right to a trial by jury in all the local offenses above enumerated, would seriously impair the usefulness and efficiency of city governments. Whatever may be the view concerning the gravity of the offense against a state law, the very fact that the legislature authorizes the city to deal with the same subject by ordinance indicates that to the legislative mind, the act also properly constitutes one of those petty offenses regarded as local injuries. The public welfare, requiring the maintenance of peace and good order as well as of careful sanitary regulations in cities and towns, renders summary proceedings in many cases a necessity. And we are not now prepared to inaugurate the revolution that must follow the announcement of the doctrine that a jury trial is an indispensable prerequisite. It is hardly necessary to say that such a trial is not always essential to "due process of law," or that it is not implied in the principle that every man judicially adjudged against shall have "his day in court".

And Lazarus listeneth intently and spake: "He speaketh much gobbledy gook, and he mentions not the Book of Constitutions."

And the black-robed Judge riseth in his judicial seat and rebuked Lazarus, saying: "Talk not to me of gobbledy gook. Thou speakest in another century. It is demanded of thee this hour: how answereth thou, guilty or not guilty."

And Lazarus spake: "They whittle away at the rights of man. The Book of Constitutions saith that in cases criminal thou shalt not be called to be a witness against thyself. Wilt thou rule, then, that if the worthy City Prosecutor calls me to the stand, by the rule I must answer?"

And the Judge replieth: "The illustrious justices have spoken not on this matter. I will require thee, if called, to state thy name, and permit thee to claim thy privilege."

And it came to pass that with this saying the face of Lazarus lighted up with joy, and he exclaimeth further: "Thou hast a kind and kindred soul, Your Honor, but thou followest not the Rules of Civil Procedure. The action is proclaimed civil, as thou hast said."

Whereupon the Judge instructeth Lazarus more perfectly on this wise: "The Court Supreme hath many times stated that violation of a Municipal Ordinance although civil is also in the nature

of a quasi-criminal proceeding. In *Green v. Denver*, 111 Colo. 390, the learned Justice Jackson pronounceth as follows, even though prosecution for the offense may be in the nature of a civil action, the imposing of a penalty under a municipal ordinance has the same purpose as the imposition of a penalty under the criminal law."

And with impatience Lazarus remarketh: "It is civil when the wind bloweth east and criminal when the wind bloweth west; how be it in a cyclone? And if it should come to pass that the City Prosecutor with much zeal presenteth his case and this unfortunate defendant standeth convicted before the Honorable Court, hath he no recourse to the echelons judicial?"

And the Jurist spoke with knowledge: "Thou canst appeal to the Court of Superiority."

Whereupon Lazarus inquireth: "And if this lowly defendant convince you most worshipful and judicial self of his innocence, canst the City Prosecutor hie him before the tribunal higher and make him a second time answer to the process?"

And the Justice Pilate knowingly replieth: "This he cannot do, for it was so passed by the Body Legislature in the Session Laws of '53."

And the defendant commenteth wearily: "And so the law travelleth to the side criminal. And in the Court of Superiority, is there provided for the trial by jury, or doth the review consist of the record not recorded? How be it, O Magistrate? I am without knowledge, and slow to learn."

And the Judge, perceiving the dilemma of the lowly defendant, replieth to him with compassion: "In the Court of higher judicial authority there is preserved to thee the right to trial by jury. Thou wilt be granted a trial *de novo*, just as if thou hadst never been tried before this tribunal."

And Lazarus gravely remarketh: "They spend much of the people's money and give a fancy name to twice try an accused. And if thy servant desireth to climb the ladder judicial, and being without monies or property to place security, how sayest the law, is he deprived the right of appeal because he is poor?"

And the Judge, by this time being already much wearied of such questioning, answereth: "In the days of old such was the practice, but it came to pass that on a certain day a poor defendant with children eleven found himself in such plight, and threw himself on the mercy of the Court of Superiority, and prayed that he be allowed his appeal without the posting of bond. And the Judge, having mercy on that much burdened and overworked defendant did permit him to so appeal. And the good legislature looketh down across the commons and saith: 'These things should not be,' and therefore it verily changeth the law in the year of our Lord 1955."

And Lazarus spake unto the Judge on this wise: "It is good." But being in a quandry, inquireth further: "How wilt thou say, O Judge. If I prevail not here and take my cause to the tribunal higher, and impanel a jury, doth the law permit the wind criminal

to blow over the trial so that if I be guilty and confess my sins to the jury and appeal to their passions, doth the law permit the talismen to exercise their compassions and return a verdict of not guilty as is the wont in cases criminal?"

And the Judge answereth the defendant: "Lazarus, thou art learned in the ways of the world, but the law worketh not thus. As it is written in *Lloyd v. Canon City*, 46 Colo. 195, that the cause being civil, the Court hath the power to a verdict direct on a confession given."

And Lazarus respondeth: "Thou hast verily stated, 'The law giveth and the law taketh away.' Thou art learned and wise in the law, distinguished and esteemed Judge. I pray thee, wilt thou explain to thy humble servant how can this be, and yet be denominated by the high justices as criminal on the quasi-extremity. Thou art learned and wise and thou art the Judge. How sayest thee thus?"

And the Judge commandeth: "I am the Judge, how pleadeth thee, guilty or not guilty?"

Whereupon the defendant further emploteth the noble Court: "Of personal liberty the civil law worketh not the severity as in the criminal law. I see many of the clients of the lawyers criminal walk free in the market place, breathing the air in and out. If this poor subject be convicted, wilt thou permit him the right of probation?"

And the Court answereth Lazarus: "Lazarus, thou art searching, but it is not so provided. If thou wert convicted of a crime, probation thou mightest have, but not so in the Courts Municipal. If sentenced there, thou wilt be hied to the dungeon."

And despairingly Lazarus cried out: "The wind changeth."

And the Judge commandeth: "Lazarus, my patience thou hast expended. I hereby demand of thee, guilty or not guilty?"

And thereupon Lazarus spake unto the Judge: "Most worshipful justice, I pray thee, it is provided in the Book of Statutes that if a defendant criminal be fined for his wrong doing and he be a pauper and without means, upon the filing of an affidavit proper he may be relieved. What sayest this proceeding? Wilt thou give the same right to a violator of the by-law ordinance—the civil action?"

And Justice Pilate, with finality spake: "O unfortunate defendant, I make not the law. I interpret and administer the statutes. Abide by them I must, lest I be stricken down with castigation by the great justices. I adjure thee upon the penalty of contempt, thou must reply, guilty or not guilty?"

And Lazarus crieth out, "Thou requireth me to answer to a mutation, an incongruity, a hybrid. It is neither fish nor fowl. Honestly Judge, I answer *nil debet*."