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CONCURRENT AND CONFLICTING REGULATIONS BY STATE AND MUNICIPALITY — VIOLATION AND ENFORCEMENT OF REGULATIONS

The defendant was charged with violating a municipal ordinance[1] of the City of Colorado Springs for reckless driving, which included, as a lesser offense, the charge of careless driving. This action was to be brought before the Colorado Springs Municipal Court, but the defendant contended that the offense was one of state-wide concern with a counter-part criminal statute[2] enacted by the General Assembly of the State of Colorado which, consequently, required that the case be tried under rules prescribed for the conduct of criminal cases for violation of the state criminal statute. The city contended that reckless driving was a matter of municipal, not state-wide, concern; and it was asserted that the provision in the ordinance, which makes exceeding fifty-five miles per hour within the city prima facie evidence of reckless driving, cannot be enforced under the state statute because no identical counter-part of the ordinance on reckless driving was in the state statutes. The city alleged that as a twentieth amendment home-rule city[3] it had jurisdiction to try this case since the intention of the amendment was to give the people of any municipality coming within its provisions the full right of self-government in both local and municipal matters. The question to be determined by the court was whether reckless driving was a matter of municipal and local concern to the exclusion of the jurisdiction of the state court. The court held that reckless driving was a municipal matter because it is a relative thing that is dependent upon many variable and local circumstances. *Retallack v. City of Colorado Springs*, 351 P.2d 844 (Colo.1960).

The state legislature invested municipalities with control of vehicular traffic prior to the adoption of article XX of the constitution of Colorado.[4] After the adoption of section 6 of article XX, municipalities were given the power essential to the full exercise of the right of self-government in both local and municipal matters. The state statutes still applied to these cities, except in so far as they were replaced or superseded by city charters or ordinances; and, when so replaced, the cities were undoubtedly given the power to reasonably regulate vehicular traffic.[5]

Generally, matters of state-wide concern can be readily distinguished from matters of local and municipal scope, but there is a wide range of cases that overlap into these two distinct areas that cannot readily be discerned. There is no question that such matters as homicide, rape, burglary, and other such offenses are of state-wide concern.[6] Similarly, there is no controversy that such matters as are

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1 Colorado Springs, Colo., Ordinance 2432 § 1. The ordinance makes it an offense for any person to drive any vehicle in the City of Colorado Springs in such a manner that the safety of persons or property is willfully or wantonly disregarded, and exceeding the speed of fifty-five miles per hour shall be prima facie evidence of reckless driving.

2 The statute was not cited in the opinion, but is believed to be Colo. Rev. Stat. § 13-4-31 (amend. 1957).

3 Colo. Const. art. XX, § 6 provides: "Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith."

4 C. L. 1921, p. 2290, § 8987, par. 7.

5 Staley v. Vaughn, 92 Colo. 6, 17 P.2d 299 (1932).

6 Retallack v. City of Colorado Springs, 351 P.2d 884 (Colo. 1960). This was dictum in the principal case and was referred to in Mr. Justice Hall's dissenting opinion.

enumerated in the Colorado Revised Statutes[7] are of local concern. These matters are: regulation of standing or parked vehicles, regulation of traffic by traffic control signals or police officers, regulation of processions or assemblages on the highways, establishing one-way streets, regulating the speed of vehicles, and setting up through streets. Other matters, by adjudication, have been determined to be of either statewide[8] or local concern.[9]

An early Colorado decision[10] established the doctrine that a violation of a municipal ordinance which imposed a fine or imprisonment as the penalty was to be tried as a civil action. The rule established by this decision persisted and had been cited as authority for many years, despite the opposition it had encountered from several judges.[11] The courts complied with this doctrine, after it had been established, principally because they felt bound by precedent. In 1958, the Colorado Supreme Court took a bold stand by sustaining a trial court decision which held that a person on trial for violation

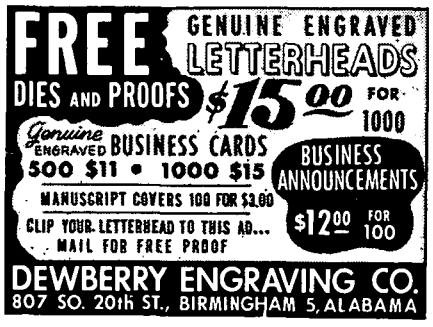
7 Colo. Rev. Stat. § 13-4-7(a) to (f) (1953).

8 People v. Denver, 60 Colo. 370, 153 Pac. 690 (1915) (regulating the traffic in intoxicating liquors); Holyoke v. Smith, 75 Colo. 286, 226 Pac. 158 (1924) (fixing rates of a public utilities commission); Denver v. Tihen, 77 Colo. 212, 235 Pac. 777 (1925) (cemeteries are expressly excluded by state statute from paying special assessments for local improvements); Denver v. Bossie, 83 Colo. 329, 266 Pac. 214 (1928) (the building of a county court house and the preference of Colorado materials in its construction); Armstrong v. Johnson Co., 84 Colo. 142, 268 Pac. 978 (1928) (imposing additional state license fees on motor trucks); People v. McNichols, 91 Colo. 141, 13 P.2d 266 (1932) (the office of, and appointments to, local registrar); Denver v. Highlander Foundation, 102 Colo. 365, 79 P.2d 361 (1938) (statute requiring county treasurers, upon request, to furnish statements of taxes due); Denver v. People, 103 Colo. 565, 88 P.2d 89 (1939) (control of the manufacture and sale of intoxicating liquors and the collection of statutory fees); People Ex Rel. v. Newton, 106 Colo. 61, 101 P.2d 21 (1940) (regulation of the statute enacted in compliance with the Federal Housing Act); People v. Graham, 107 Colo. 202, 110 P.2d 256 (1941) (the Uniform Safety Code is effective throughout the state); Ray v. Denver, 109 Colo. 74, 121 P.2d 886 (1942) (regulation of the Small Loans Act); Spears Hospital v. State Board, 122 Colo. 147, 220 P.2d 872 (1950) (the licensing of hospitals); People Ex Rel. v. Denver, 125 Colo. 167, 243 P.2d 397 (1952) (intra city business conducted by a telephone company); Zerobnick v. Denver, 337 P.2d 11 (Colo. 1959) (power to punish vagrancy and keeping a gambling house); Davis v. Denver, 342 P.2d 674 (Colo. 1959) (driving a car in a city after one's license is suspended or revoked).

9 County Com'nrs v. City, 66 Colo. 111, 180 Pac. 301 (1919) (special assessments may be collected for local improvements); City of Pueblo v. Kurtz, 66 Colo. 447, 182 Pac. 884 (1919) (the impounding of animals running at large and charging fees for estray animals); City and County of Denver v. Stenger, 277 F. 865 (1921) (regulation of rates to be charged by street railways within the city); Clough v. Colorado Springs, 70 Colo. 87, 197 Pac. 896 (1921) (a city has the power to call a special election for voting on bonds for paving contracts); People v. Pickens, 91 Colo. 109, 12 P.2d 349 (1932) (a city council may establish a municipal court); McNichols v. Denver, 101 Colo. 316, 74 P.2d 99 (1937) (the issuance of bonds for the purchase of a bombing field to be donated to the federal government); McCormick v. Montrose, 105 Colo. 493, 99 P.2d 969 (1939) (ordinance restricting the operations of peddlers at private residences); Fishel v. Denver, 106 Colo. 576, 108 P.2d 236 (1940) (the condemnation of land for the use of a bombing range); Brodhead v. Denver, 126 Colo. 119, 247 P.2d 140 (1952) (purchase of revenue bonds to finance off-street parking facilities); Kingsley v. Denver, 126 Colo. 194, 247 P.2d 805 (1952) (purchase of voting machines); Heron v. Denver, 131 Colo. 501, 283 P.2d 647 (1955) (requiring plans and specifications for buildings of a public or semi-public nature to be prepared and submitted by an architect); Denver v. Pike, 342 P.2d 688 (Colo. 1959) (speeding upon the Valley Highway through Denver).

10 Dietz v. City of Central, 1 Colo. 323 (1871).

11 36 DICTA 11 (1959).



of a municipal ordinance, punishable by fine or imprisonment, was entitled to all the constitutional guarantees traditionally surrounding criminal trials. This was the famous *Merris* decision[12] which arose from the violation of a city ordinance forbidding the operation of a motor vehicle on the streets of Canon City, Colorado, while under the influence of intoxicating liquor. The holding of this case guarantees a defendant, who is charged with the violation of a municipal ordinance which has a counter-part state statute, with the following rights and privileges: the right to appear and defend in person and by counsel, to be informed of the nature of the charges against him, to meet the witnesses against him, to compel the attendance of witnesses in his behalf, and the right to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.[13] Thus, the advantages of trying a case that is of state-wide concern, rather than local, can be recognized.

The courts are now left with the problem of determining the scope of various municipal ordinances and state statutes, whose limits of applicability have not, as yet, been established. Therefore, the question to be answered by the courts is whether the conduct complained of is a matter of *exclusive* local or state-wide concern.[14] There is no simple solution to this problem, and its complicity is increased by the fact that so many matters partake of some, or all, of the qualities of both the state and local categories.[15] Only by determining which category predominates, can the courts arrive at a just decision.

No definite test has yet been established to aid the courts in the determination of whether a matter is predominately state-wide or local in nature. Prior to the *Merris* case a test was applied[16] to determine whether a municipal ordinance superseded a state statute, but no solution to the problem of whether a matter is predominately state-wide or local was given. Consideration, then must be given to related matters to resolve this problem; determining the dependency of any particular matter upon such elements as time and circumstance[17] may aid in this resolution. Whatever method the courts devise to solve this problem, it is certain that definite and inflexible rules cannot be established. If this were done, the Supreme Court would be continually called upon to rule whether a subject is local or state-wide.[18] Consequently, it is apparent that in the future each particular case will have to be decided independently and upon its merits.

In the recent case of *Davis v. Denver*,[19] the Colorado Supreme Court offered a suggestion that may prove to be a workable solution to the problem of distinguishing state-wide matters from those that are local. The court suggested that the state be allowed to delegate certain police powers to cities in the areas where the sub-

12 Canon City v. Merris, 137 Colo. 169, 323 P.2d 614 (1958).
13 Colo. Const. art. 11, § 16.
14 30 Rocky Mt. L. Rev. 267, 271 (1958).
15 37 DICTA 45 (1960).
16 Ray v. Denver, 109 Colo. 74, 121 P.2d 886 (1942), states that if a municipal ordinance of a home-rule city is in conflict with general state law, the test to determine if one shall supersede the other is whether the ordinance permits or licenses that which the statute forbids or vice versa.
17 People v. Graham, 107 Colo. 202, 110 P.2d 256 (1941), states that what is local, as distinguished from general and state-wide, depends somewhat upon time and circumstances.
18 Davis v. Denver, 342 P.2d 674 (Colo. 1959).
19 *Ibid.*

ject matter of the controversy, while predominately general, is to some extent municipal.[20] Whether this can be accomplished, remains to be seen.

The *Merris* case opened the door to the question of jurisdiction between municipalities and the state when both city ordinances and state statutes provide for identical matters. The *Retallack* case, which holds that reckless driving within the boundaries of a home-rule city is a municipal concern, is but one step in the course of litigation that is certain to arise over similar matters.

One Colorado case has already appeared subsequent to the Retallack decision which held that larceny is not a matter of local or municipal concern.[21] In this decision, which contained two concurring opinions, all the cases relating to the state-wide v. local matters that have arisen since the *Merris* case were considered. This decision gives one a clue as to what the courts will consider before arriving at a definite conclusion that a matter is either local or state-wide in nature; the courts are likely to consider the historical and analytical factors involved in each particular area of law, and the field of regulation sought to be enforced.[22] This cannot be considered a test, for, at most, it is merely obiter dictum.

There are, I believe, many other factors to be considered before arriving at a decision in cases which attempt to determine the local or state-wide nature of an action. Some factors that are likely to be considered are: the interests of the community as contrasted to those of the state, the illegal activity from which the action arose, the historical development of the right of pre-emption within the state, and the desirability of both expedience and the preservation of the right of trial by jury in the settlement of a case. Undoubtedly, other factors will also be used to decide cases that involve concurrent regulations established by both the municipality and the state. It is certain that in the near future, much litigation will arise concerning questions similar to the issue involved in the principal case.

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20 *Id.* at 677.
21 Gazotti v. City and County of Denver, 352 P.2d 963 (Colo. 1960).
22 *Id.* at 966, 967. This was brought out in Mr. Justice Doyle's concurring opinion.

A MEMORIAL TO DEAN

GEORGE C. MANLY

Many of the graduates from the University of Denver College of Law remember the late dean George C. Manly who helped found the Denver Law School in 1892 and was one of its sixteen original faculty members. He was a beloved dean of the College of Law from 1910 to 1926, president of the Denver Bar Association in 1913, president of the Colorado Bar Association in 1921, and a member of the general council of the American Bar Association from 1908 until 1912.

Many of his past students and friends have expressed a desire to honor dean Manly by establishing a memorial in his name in the new University of Denver Law Center. It has been suggested that a fund to endow an annual outstanding lecture series to inspire the practicing attorney, the law teacher, and the law student would be a fitting memorial to dean Manly.

We ask you to join us in establishing a memorial to him who so capably served our legal fraternity until his death in 1936.

The sponsoring committee of:
THE DEAN GEORGE C. MANLY MEMORIAL FUND

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