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# Trial Court Decisions

Dicta Editorial Board

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*The City and County of Denver vs. Donald Lowary. In the County Court,* No. 74977. *Decision by Judge George A. Luxford.*

Defendant was fined in the Denver Police Court for violation of Denver city ordinance 119, Series 1931, and appealed to the County Court. Said ordinance forbade any person to engage in the business of selling and/or delivering coal, coke, wood, or charcoal in the City of Denver without having a license, and further provided that no license should be granted to any person not actually maintaining a coal yard with an office, scales of at least five tons capacity, reasonable storage facilities, etc.

The evidence in the case showed that several hundred individuals, including defendant, had been engaged in hauling coal from adjoining coal fields into the City of Denver and selling it, and that it was impossible for such individuals to comply with the coal yard requirements of the ordinance.

*Held:* That the ordinance imposes an unreasonable burden upon individuals desiring to haul coal, etc., into Denver and sell the same, and it is therefore in violation of the constitution and void. Defendant discharged and case dismissed.

The Court relied principally upon *Moffitt v. Pueblo,* 55 Colo. 112.

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*Nixon vs. Continental Oil Company. In the District Court for the City and County of Denver,* No. A 2382. *Decision by Judge C. C. Sackmann.*

Plaintiff sues for damages from the death of her husband which resulted from a collision of his automobile with an automobile operated by defendant at the intersection of 17th Avenue and the Esplanade.

The second count of the complaint alleged that the agent of defendant, who was operating its automobile, failed to yield to plaintiff's husband the right of way, as is required by Section 1949 of the Municipal Code of the City of Denver. Defendant moved to strike that paragraph of plaintiff's complaint which set forth Section 1949 on the ground that the same was "superseded and made void by act of the Legislature," meaning thereby the Motor Vehicle Act of 1931. The defendant also demurred to the second count of plaintiff's complaint on the ground that it stated no cause of action.

*Held:* Section 1949 of the Municipal Code is valid and controlling in this case. Motion denied and demurrer overruled. Under the Twentieth Amendment and its charter the City of Denver has exclusive jurisdiction over the regulation of traffic within its corporate limits. While cases from other jurisdictions have held that the regulation of traffic is not a municipal matter so as to come within the exclusive jurisdiction of a home rule city, Denver's charter gives it exclusive jurisdiction over municipal and *local* matters.

The regulation of traffic and the rules for right of way within the city of Denver are essentially local to it, the conditions within the city being very different from conditions on country highways. The provisions of the 1931 Motor Vehicle Act which purport to give the right of way to the vehicle first entering "the intersection" are very indefinite in that it cannot be told what kind of an intersection is meant or at what point a vehicle enters an intersection. The ordinance of the City in this case being very specific on the point, it is possible to uphold both the 1931 act and the ordinance, which is always done whenever possible, in accordance with well settled principles.

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*F. Everett Fields vs. Gladys Oneal Fields. In the District Court,* No. A 3580. *Decision by Judge Geo. F. Dunklee. Ruling of Court on Motion to Reassign Case.*

THE COURT: The above case is a suit for divorce.

The defendant duly appeared within the time to plead and filed a motion entitled, "Motion to reassign," in the following words, to-wit:

"Comes now the defendant by her attorneys, Van Cise and Robinson and Philip S. Van Cise, and under the provisions of Rule Two, Section Three, Rules of the Court, moves the Court to order the re-assignment of the above entitled action."

Said motion was duly set for hearing and the attorney for the plaintiff appeared and objected to the granting of the motion.

The Court having heard argument thereon took the matter under advisement, and now being sufficiently advised in the premises rules as follows:

*First.* Since the time when the business of the District Court increased to the extent that more than one Judge was provided by law to discharge the judicial duties of the Court there has been more or less contention among some of the attorneys to get cases before some particular Judge, or some particular Division, with the result that certain Rules as amended, to-wit, Rule II, Sec. 2, requires all cases to be assigned by lot by the Presiding Judge in open Court, thereby preventing the juggling of cases.

Sec. 3 of Rule II is as follows:

"The Judge of any Civil Division to which a case has been assigned may order the reassignment thereof, which reassignment shall be made in the manner provided by Section 2 hereof, except that said case shall retain its same number."

Sec. 4 of said Rule is as follows:

"Where all parties agree, the Judge of any Civil Division may transfer a case to another Civil Division upon consent of the Judge of the Division to which it is proposed to transfer the case."

*Second.* Sec. 32, being in Chapter 2, Civil Code of Procedure, C. L. 1921, at Page 107, provides among other things:

"If either party in any civil action which may be depending in any District or County Court, shall fear that he will not receive a fair trial in the Court in which the action is pending, on account that the Judge is interested or prejudiced, or is related to or shall have been of counsel for either party, or is related to the counsel for either party, * * * such party may apply to the Court in Term time, or the Judge thereof in vacation, by petition setting forth the cause of application and praying a change of venue, accompanied by an affidavit verifying the facts in the petition stated and reasonable notice of the application having been given to the other party or his attorney."

*Third.* The legal question presented is as to whether said Section Three shall be construed as giving the right to a party to a suit to have in effect a change of venue, or reassignment of a case, and have the same tried in another Division and before another Judge without assigning any reason therefor as provided by the said Section of the Code.

*Fourth.* The Court finds from the records and files of the Clerk's Office, that a custom or practice has started since the adoption of said "Rule II," by one of the attorneys for plaintiff or defendant going to the Judge of the Division where the case fell by lot and asking that the case be reassigned to another Division, or by filing a written motion under said Sec. 3.

The Judges usually in a spirit of good fellowship not wishing to try a case where one party has made such a request or motion, orders it reassigned over the objection of the other party.

Among the files and records of such cases I have one before me where the opposing attorney objected and assigned it as error in a motion for a new trial.

In another, the case was so transferred so that it was in three different Divisions of this Court before finally tried. The legal effect of this custom and practice of reassigning of cases where reassignment is asked without pointing out any cause, if permitted to continue by the Court, is to permit cases to be juggled from Division to Division and from Judge to Judge contrary to law and the Rules of Court.

My position as a matter of law and public policy is stated in Judge Butler's Opinion in the case of *People v. District Court,* 84 Colo. 367, Opinion 368.

*Fifth.* The Court FINDS and RULES, in this case, that said Sec. 3 of Rule II, does not, and was not intended to take the place of said Sec. 32 of the Civil Code.

Said Sec. 3 was intended, and is hereby construed, to mean that if the Judge knows of any reason why he should not properly hear or try the case, that the Judge, upon his own motion, should order it reassigned.

*Sixth.* I know of no reason why I should not hear or try this case, and none has been pointed out. Therefore, for the reasons heretofore stated the objection is sustained and the motion denied.