Denver Law Review

Volume 32 | Issue 7 Article 4

January 1955

Property Law

William B. Paynter

H.B. 182 effects a substantial revision of the income tax laws relating to corporate distributions, liquidations and reorganizations, so as to bring them generally in line with the 1954 Internal Revenue Code.

H. B. 232 amends the Colorado inheritance tax law so that it is in conformity with the 1954 Revenue Code with respect to the credit against the federal estate tax for the inheritance tax paid. It also requires the filing of a copy of the Federal estate tax return with the Inheritance Tax Commissioner in every estate where such a return was filed.

Several other statutes were passed relating to the general property tax but in general they effected only procedural changes.

PROPERTY LAW

By WILLIAM B. PAYNTER, *of the Colorado Bar*

(1) BUILDING RESTRICTIONS—USED CAR LOTS AND HOUSE TRAILERS

Cases which deal with building restrictions are *Taylor v. Melton,* 1954-55 C.B.A. Adv. Sh. No. 1, p. 23 and *Pagel v. Gisi,* 1954-55 C.B.A. Adv. Sh. No. 13, p. 478. Both involved the question of the effect of actual notice of building restrictions contained in an original deed but omitted in subsequent deeds.

In *Taylor v. Melton,* supra, plaintiffs alleged in substance, that one Fairley who was the owner of a parcel of land, platted and subdivided same and a map thereof was filed February 4, 1941, in the office of the County Clerk and Recorder; that Fairley sold a portion of the tract to Nesbitts, the deed to which was dated March 20, 1941, and thereafter recorded and which deed provided that neither the grantees nor their successors and assigns would construct a residence on the land of a cost less than $2,500; the grantor covenanting that he would not build or permit to be built upon any of the land standing in his name in the particular subdivision, any structure other than a residence of construction value of not less than $2,500; the above restrictions being a covenant running with the land and binding upon the grantor, his successors and assigns forever.

It was further alleged that plaintiffs were the owners of certain lots in said Fairley Addition and defendants the owners of Lot Three thereof; that plaintiffs and defendants respectively acquired their titles to said lots or parcels of land with notice and knowledge of the restrictions set forth in the deed to the Nesbitts and notwithstanding said restrictions, the defendants in February, 1952, planned and commenced and intended to complete a structure to be utilized as a used car lot, in violation of said restrictions.

The trial judge inspected the premises and found thereon a one room small building used as an office, a number of cars parked on the lot and the same was being used as a used and new automobile sales lot and that in addition thereto defendants had built

a cinder block building with a composition roof, being a building of proper size for a home, but that same had not been completed, there being no floors or partitions built therein and which was intended to be used as an office building for the used and new car lot or as a filling station.

Defendants denied that they had knowledge of any restrictions and alleged that none were contained in the deed conveying Lot Three to them. The Court found that the defendants purchased Lot Three with knowledge that there were certain restrictions which covered the larger portion of the ten acre tract of which said lot was a portion, both as a result of conversations with Fairley and constructive notice of said restrictions as set out in the abstract of title.

Among other things the defendants contended that the only covenant made by a grantee in any deed containing restrictions was not to build a residence costing less than $2,500 and that this did not prevent business use of the property; that when the grantor Fairley provided in the deed to the Nesbitts he would not build nor permit to be built upon the land retained by him "any structure other than a residence," subsequent grantees who acquired property without restrictions in their deeds of conveyance were not bound by Fairley's promise and further that the deed from Fairley to Nesbitt did not create a restriction against a business use enforceable by those plaintiffs who held lots under deed from Fairley, which contained no specific restrictions. The lower court found that the restrictions applied to all property owned by Fairley at the time of the deed to Nesbitts and that the plain meaning of same was that no structure other than a dwelling and necessary outbuildings could be constructed, a dwelling being defined in its ordinary meaning as a house occupied as a residence and that such restriction would be violated by the uses contemplated by defendants.

The Supreme Court in affirming the decision of the lower court, held that the common grantor Fairley, imposed the restriction in question, in pursuance of a general plan for the development and improvement of all lots included within his plat and further that the defendants who purchased lots from Fairley subsequent to the latters deed to the Nesbitts, were bound by the covenant.

The Court, quoting Thompson on Real Property, determined the applicable rule to be that a subsequent grantee is required to take notice of a building restriction contained in the original deed even though such restriction does not appear in the subsequent deeds and that "Where the deed to the first lot sold, provides for a building restriction on the grantors other lots in the same subdivision, the purchasers of such other lots will take title subject to such restrictions."

The case of *Pagel v. Gisi,* supra, from the District Court of Yuma County, was a class action brought by plaintiffs to enforce a general plan of restriction as to the use of the land in Hoch Park

Addition to the Town of Yuma, Colorado. In their complaint, plaintiffs alleged that a house trailer parked upon a lot belonging to defendant, Pagel, violated a restriction that the premises, "will be used for dwelling houses only and that any dwelling which is hereafter erected by the party of the second part, his successors and assigns on this lot to be at a cost of not less than $4,000, or to be upon plans to be approved by the grantor, his heirs and assigns, should said dwelling be of less value."

The evidence disclosed that plaintiffs were the owners of lots the deeds to which contained the restrictions mentioned or that they were the owners of lots conveyed without written restrictions, but who recognized and conformed to the general plan of restricted use.

The trial court found that defendant, Pagel, was fully advised of the restricted conditions concerning the property before he acquired same and that in addition the general development of the area disclosed unmistakably that it was being developed for the use of new permanent homes.

For the reversal of the case it was argued that no general or specific plan of restrictions was ever shown to exist; that said restrictions were personal to the grantor, Hoch; that the defendant was using his property for a dwelling house only and because the restrictions were not contained in his deed, they were not binding upon him.

The court held that as a general rule the omission of a restrictive covenant contemplated by the general plan of development of a subdivision, through inadvertence or otherwise, in a conveyance of one of the lots by the subdivider, does not prevent enforcement of the restriction against the immediate grantee of such lot or his successor in title, if either took with notice of the restriction or knowledge of the general plan; that there was ample competent evidence in the record to sustain the finding of the trial court that the area was being used exclusively for construction of new permanent homes and that a house trailer is not a permanent home, but "a portable unit designed to be hauled from place to place by an automobile or truck."

(2) COLORABLE TRANSFERS—RIGHTS OF SPOUSE AND OTHER PROSPECTIVE HEIRS

In two cases the Supreme Court affirmed the rule of *Thuete v. Thuete,* 128 Colo. 54, 260 P. 2d 604, decided in 1953, in which it was again held that in Colorado, the owner of property has the right to convey same without the consent or knowledge of the spouse or other prospective heirs and that the mere fact that such conveyance will deprive a surviving spouse of the right to inherit an interest in the property does not make the conveyance fraudulent or invalid; that such deed may be manually delivered to a third person, with instruction to deliver to the grantee upon the grantors death and that it is not essential to valid delivery to a

third person that the grantee know of the existence of the deed before the grantors death.

In *Moedy v. Moedy,* 1954-55 C.B.A. Adv. Sh. No. 3, Della Moedy commenced a divorce action against her husband, Otto in which she joined as defendant, George O. Moedy, son of Otto, in order that the property previously conveyed by Otto to George might be subjected to her claim for support and maintenance. During the pendency of the action Otto died and the suit proceeded against George as grantee in the deed. Della and Otto were married September 17, 1946, at which time Otto owned property near Fort Collins, rated to have a valuation of approximately $10,000, which was the subject of the action. In January, 1950, Otto conveyed the property to himself and George in joint tenancy. It was contended that if the deed was executed by the husband with intent to deprive the wife of support and right of maintenance it should be considered a fraud on the wife's rights and void under Section 17, Chapter 71, 1935, C.S.A., now 59-1-17, 1953, C.R.S., providing that every conveyance made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits and demands, forfeited debts or demands shall be void. Reliance was had by the wife on *Smith v. Smith,* 22 Colo. 480, 46 Pac. 128; 24 Colo. 527, 52 Pac. 790, followed in *Grover v. Grover,* 69 Colo. 72, 169 Pac. 578, in which it was held that where it appears that the husband's conveyance of his property was colorable merely and was made with intent to deprive the wife of these benefits, it is as much of a fraud on the part of the husband as it for a debtor to put his property beyond his control. The Court in *Moedy v. Moedy* said that while the theory as so announced in the Smith case has not been definitely overruled by our Court, it has been disapproved by not being followed in *Norris v. Bradshaw,* 96 Colo. 594, 45 P. 2d 638 and *Burton v. Burton,* 100 Colo. 567, 569, 69 P. 2d 307. Therefore it would seem that a wife does not stand in the position of a judgment creditor, and reference is made to *Phillips v. Phillips,* 30 Colo. 516, 71 Pac. 363, where the basis of the present rule was announced, that a husband may dispose of his property for the express purpose of defeating his wife's right to maintenance and to share in his estate unless the transaction be colorable merely, which is defined in *Ellis v. Jones,* 73 Colo. 516, 216 Pac. 257, as being "counterfeit, feigned, having the appearance of truth (Webster) not really intended as a deed."

The question of burden of proof was also involved, it being contended that plaintiff established a prima-facie case and that thereupon the burden was on defendant to prove the transaction was bona fide. The Court held that while such rule may be applied in certain other types of action it was not applicable here. It pointed out that mental competency was not a issue, that while it was claimed the deed was a result of undue influence there was no direct evidence to this effect and that in addition to the rule which forbids speculating upon the evidence, there is another

which demands that a deed may be declared void only upon proof of undue influence, the burden thereof resting upon the one asserting it to prove that the degree of improper influence upon the grantor sufficient to overcome his will and cause him to do that which as a free agent he would not have done. In addition to blood relationship between Otto and George it was contended that other badges of fraud were that the conveyance was made without the consent of the wife; that it deprived her of rights to support and inheritance and that the deed was delivered to a third party and not the grantee, which, said the Court, are answered adversely to the wife's position in the recent cases of *Thuete v. Thuete,* supra, and *Bostron v. Bostron,* 128 Colo. 535, 265 P. 2d 230.

Kauffman v. Kauffman, 1954-55 C.B.A. Adv. Sh. No. 5, involved a written contract for the purchase by a son from his father of irrigated land in Routt County. The purchase price was $5,600 payable $600 at the time of the execution of the contract and the balance in five equal annual installments of $1,000 each.

The contract provided that in case of the death of the seller all payments due thereon should be cancelled and deed delivered to the purchaser; that in case of death of the purchaser prior to the full payment of the contract, the seller might pay to the estate of the purchaser, all payments which had been made by him and upon such payment the contract should be null and void and of no effect.

The agreement also provided that failure to make one or more of the payments by the purchaser, or failure in performance of any covenants to be performed by the purchaser, the agreement might be terminated at the election of the seller, upon thirty days notice of intention so to do.

The seller departed this life and suit was filed by the purchaser against the administratrix of the decedent's estate, who was purchaser's step-mother and widow of the seller and against the bank also, for delivery of the deed. It was further alleged that the purchaser and deceased had entered into verbal modification of the contract sale to the effect that decedent was to have the use of the property and pay all expenses incidental to its use in lieu of the annual payments as provided.

The administratrix filed her answer, in which she alleged that the execution of the agreement was an attempted testamentary disposition of property instead of a bona fide agreement; she further denied the alleged modification agreement and alleged that it was void, since it was not to be performed within one year of the making thereof, concerned the sale of lands; was not in writing and was not subscribed by the deceased.

Upon the proposition that the contract was in effect a testamentary disposition of the property, the Court again cited *Thuete v. Thuete,* supra, and held that the deed having been delivered in escrow, subject only to the performance of the contract by the vendee, was irrevocable on the part of the grantor and further the grantor in the absence of default could not forbid its delivery.

The Court, further, held that nothing was in the record that even suggested the transaction was colorable because it was not attended with any circumstance indicative of fraud and the other elements that make a transaction colorable, such as secrecy and deprivation of the defendants surviving wife, coupled with a retention of possession and control of the property.

The Court disposed of the proposition that the modification agreement was void under the statute of frauds by ruling that the terms of payment under the contract had been fully performed and that the statute of frauds did not operate against executed oral contracts, *Barnes v. Spangler,* 98 Colo. 407, 56 P. 2d 31.

(3) DEED OF MENTAL INCOMPETENT

In *Eaton v. Husher,* 1954-55 C.B.A. Adv. Sh. No. 10, the facts disclosed that a lunacy complaint was filed in Elbert County Court against one Hamilton on September 20, 1952; the hearing was not completed and letters of conservatorship were not issued until November 7, 1952. On October 3, 1952, Hamilton conveyed to the defendants a tract of land in Elbert County in exchange for a small house in Limon, Colorado and payment of $300 in cash. On December 18, 1952, plaintiff conservator filed suit seeking the cancellation of the deed. The evidence established that the value of the ranch was $3,475 to $6,675 and the house in Limon from $1,500 to $3,000. The Court determined that the evidence supported the conclusions of the trial court, that the consideration was grossly inadequate; that Hamilton was a mental incompetent and the defendants knew his mental condition and incapacity and that by their dealing had precluded themselves from having the $300 restored to them, especially in view of the fact that they had disposed of some personal property on the premises. Among other circumstances in the case it appeared defendants had talked with the County Judge on October 2, 1952, and he had informed them of the pending proceeding and that the only way the land could be sold was by public sale to the highest bidder. It was contended that a greater burden of proof rested upon plaintiff than is applicable in other civil cases and that the plaintiff had to prove his case beyond a reasonable doubt. The court said such is not the rule in Colorado citing *House v. Smtih,* 117 Colo. 305, 187 P. 2d 587.

(4) EASEMENTS—THE OLD LOGGING ROAD

A question of easement was involved in *Turner v. Anderson,* 1954-55 C.B.A. Adv. Sh. No. 2, and from reading the opinion of the Supreme Court it turned principally on questions of fact. In July, 1937, the Turners who were the owners of some mountain property in Gilpin County conveyed an irregularly shaped plot of ground to Anderson with the following provision: "The purchaser shall have a right to pass in and out through the L. E. Turner property to state highway No. 72, where designated by L. E. Turner."

It appeared that about the time of the conveyance, L. E. Tur-

ner designated what was more or less a roadway, across the Turner property, connecting with the highway. Mrs. Anderson, the grantee, however, used another road for egress and ingress to the highway, referred to as the old logging road. At the time of the conveyance no part of this logging road was on the Turner property; in 1947 the Turners acquired more property including that on which the old logging road ran and in 1949 they erected a fence around all of their property, which obstructed a part of said road.

The Supreme Court held that the conveyance spoke for itself in no uncertain terms, to the effect that plaintiff was to have the right to pass in and out of defendant's property at such a place as was to be designated by defendant, L. E. Turner and that at the time of the conveyance the defendant, Turner, did not own the tract traversed by the old logging road nor did he own same until 1947, so that there was no adverse use as far as Turner was concerned, except between 1947 and 1949. Mrs. Anderson testified that she had the right of way across the road which Turner said he designated and that she had the right of way over the old logging road; in other words, that she had the right to use either or both roadways regardless of any designation. It appeared that some logging work had been done over the old logging road by former owners for their own convenience and that it traversed their land only and that same was occasionally used by hikers, picnic parties, etc. The Court described the use as irregular, infrequent, sporadic and far more permissive than adverse and said it required more than the irregular use which had been made of same, for it to become a public highway or to vest a prescriptive right to its use in Mrs. Anderson.

(5) LANDLORD AND TENANT

"TRIVIAL" VIOLATIONS; FORCIBLE ENTRY AND DETAINER NOT EXCLUSIVE REMEDY; PAYMENT FOR STRUCTURAL CHANGES.

Union Oil Company of California v. Lindauer, 1954-55 C.B.A. Adv. Sh. No. 8, involved, not an oil and gas lease, but a lease of certain lands in part for livestock grazing and part for farming; the lease provided among other things that the use of the leased premises was personal to lessees and that they should not allow the use of all or any part of the leased premises to other parties without first obtaining the written consent of lessor, provided that nothing should be construed to preclude the lessees from making or entering into contracts or agreements for the pasturage of livestock of third parties so long as the livestock were in the exclusive control of the lessee and further that in the event of the failure or refusal on the part of lessees to comply with any of the terms and conditions of the lease same should at the option of lessor become in default and lessor take necessary action to cancel the lease and retake full possession of the leased premises.

It was alleged that defendants had permitted certain parties to run sheep on the leased premises for consideration without lessors

consent. There was no abuse or overgrazing shown and the defendant lessees supervised the grazing operations to some extent, but not exclusively.

The lower court found that the violations were inconsequential, insufficient to work a forfeiture of the lease, and that it would be unconscionable to forfeit lessees rights on account of violations shown.

The Supreme Court held that this was an action to terminate the written lease for violations of its terms; that while defendants answer was a denial of the violations, no claim was made that the violations were trivial, but only a denial of any violations charged. That the plaintiff was within its rights in terminating the lease.

The defendants contended that the action should conform to the requirements of the forcible entry and detainer statute which would require a verified complaint, but the Court stated it was not pleaded as a case in equity and quoted 22 Am. Jur. p. 917, Sec. 13, to the effect that "Ordinarily, in the absence of express provision or necessary implication, a statutory action of forcible entry and detainer it not exclusive, but is cumulative with respect to any other remedy that a party may have." Also that the pleading in the case clearly indicated that it was instituted under Rule 105, R.C.P. Colo., relating to title and possession of real estate. Judgment for the defendant was reversed. On petition for rehearing this opinion was adhered to, with a slight modification as to the amount to be paid into the trial court on account of rentals paid by the defendants for the unused part of the lease.

Another case of landlord and tenant was *Ell and L. Investment Company v. International Trust Company, et al.*, 1954-55 C.B.A. Adv. Sh. No. 12. The leased premises consisted of a two story building at 17th and Larimer Streets in Denver, constructed about 1890. The lease was for a term of 20 years and provided in substance that the lessors should receive a net annual rental of $750 and that all other expenses of every nature whatsoever in connection with the demised premises including taxes, special improvement assessments, insurance premiums, repairs, alterations and maintenance, water assessments, heat and light, shall be paid by the lessee and under no circumstances should the lessors be required or called upon to expend any sum in connection with maintenance of the demised premises during the time thereof.

There was also another provision in the lease that the lessee would not make any alterations, changes or improvements in the demised premises of a major nature or which should change or affect the structural soundness of the demised premises without first having such alterations, improvements or repairs approved by the lessor and that the lessor would not in any way be liable for the expense of making any alterations, improvements or repairs of any nature whatsoever.

The city building inspector served notice upon the lessor to vacate the premises unless certain alterations were made, because

the structure was unsafe, in a dilapidated condition and a fire menace. The question arose as to whether the lessor or lessee should pay for the structural alterations required by the public authority to make the building safe. The Court cited various provisions of the lease and determined that it was evident from the language employed and the circumstances appearing in the record, that the general intent of the parties was that the expense of all changes or repairs, structural, as well as otherwise, in this old building, devolved upon the tenant.

(6) MECHANICS LIENS—FROM SUBCONTRACTOR TO PRINCIPAL CONTRACTOR

Barr Lumber Company v. Thompson, 1954-55 C.B.A. Adv. Sh. No. 9, involved particularly Sections 15, 16 and 23, Chapter 101, '35 C.S.A., now 86-3-1, 2, 9, '53 C.R.S.

The Company had furnished materials to Thompson the principal contractor. The owner had failed to comply with the statute, in not having a written contract recorded, which made the position of the Company that of a principal contractor. The Court held under these circumstances that since a principal contractor has three months under the statute in which to file lien claims, the filing of such a claim after the expiration of the two months' period ordinarily allowed to subcontractors and before the expiration of the three months period allowed to principal contractors is sufficient. The Court further held it was not necessary that the materialmen contract personally with the owner for the furnishing of materials in order to have more than the two months within which to file; that privity of contract between owners of the property and materialmen is created by the statute wherein the contractor is made the agent of the owner and obviates the necessity of the materialmen contacting the owner in any matter whatsoever and the fact of the selling of the material to the contractor and charging same to his account does not operate as an estoppel to claim a lien under the mechanic's lien statute. The Court followed *Western Roofing Company v. Fisher*, 85 Colo. 5, 273 Pac. 19, wherein the rule was laid down that where the contract was not filed of record, the lien claim status of the subcontractor changed with respect to the time for filing a lien so that it becomes a principal contractor and is given three months from the completion of the work within which to file the lien statement.

(7) OPTION TO PURCHASE—TIMELY TENDER

The case of *Abrahamson v. Wilson*, 1954-55 C.B.A. Adv. Sh. No. 11, was an action for decree of specific performance upon an option for the purchase of real estate for $9,000 of which $6,500 was to be paid when the option was exercised and the balance within one year. The option, dated April 11, 1953, provided that it was understood that the buyer was attempting to have the property rezoned for business purposes and in view of this, the time of the option should be twenty days from the time said property

was rezoned or within ninety days from date, whichever was shorter. That sellers were to tender abstract of title showing clear title in themselves upon demand of the buyer, after the property had been rezoned or if it was not so rezoned and the option was exercised, then upon ten days notice from buyer; the contract further providing that after the buyer gave notice of intention to exercise the option, sellers would tender good and sufficient warranty deed and the abstract of title and give buyer a reasonable time to examine same. On May 4th the Board of County Commissioners adopted a resolution, the purpose of which was to rezone the property in question. On May 26th the purchaser called the seller on the phone and was informed by the seller that the option had expired. On May 27th the purchaser made a tender of $6.500 in cash and made formal demand for performance which tender was refused. The Court pointed out that more than twenty days had elapsed before the tender of the cash and demand for deed, but found that the evidence in the case, without dispute, established that plaintiff gave notice of intention to exercise the option, prior to the date on which the zoning resolution was adopted by the Board of Commissioners and indicated that grave doubt existed whether any real issue was taken with the testimony of purchaser and another witness that demand for an abstract was made on the sellers within the twenty day period of time. The opinion states it would be unreasonable for the Court to construe the instrument to mean that the purchaser should pay the sum of $6,500 to the sellers before an opportunity had been afforded to examine the abstract of title to the property involved. A decree of specified performance was directed.

(8) TAX DEED—"HEREAFTER"

The case of *Wigton v. Bedinger*, 1954-55 C.B.A. Adv. Sh. No. 10, was an action brought by the holder of a tax deed to quiet title. The defendants claimed that there was no compliance with the mandate of C.R.S. '53, 137-10-28 in that the notice of the County Treasurer did not provide for a time limit of more than five months or at least three months before the time of issuance of the treasurers deed. The tax deed and notice were in the record and disclosed that the property was sold for general taxes of 1931 on December 12, 1932, and that the property was assessed for that year at a sum less than $100. Notice of application for the tax deed was issued by the County Treasurer on October 19, 1953, reciting tax deed would be issued December 30, 1953, "unless the same has been redeemed prior to the issuance of said tax deed."

The Court determined that prior to an amendment, being Chapter 227, S. L. 1937, p. 1053, there was no statutory requirement for notice, except in cases where the property was assessed for more than $100 and that instant deeds or deeds without notice were issued at any time after the expiration of three years from the date of sale for taxes, in accordance with provisions of C.R.S.

'53, 137-10-20; further that prior to the 1953 revision of the Colorado Statutes, Sec. 255 of said Chapter 227 of the 1937 Session Laws contained the word "hereafter" providing among other things that before any purchaser of land *hereafter* sold for taxes receives a tax deed, the County Treasurer shall send notice to parties in interest, not more than five months and at least three months before the time of issuance of the tax deed. The Court points out that in the 1953 revision the word "hereafter" was omitted, but in any event the revision was not in effect on the date application was made by plaintiff for a deed and the land was sold for 1931 taxes and tax certificate issued in 1932, prior to the 1937 amendment now part of 137-10-28.

The Court said that it was obvious that its decision must be that the property was sold for taxes prior to 1937 amendment of 137-10-28; that the records showed that the assessed valuation was less than $100 and that no notice was required to be given prior to the issuance of the tax deed.

TORTS

By RICHARD D. HALL *of the Denver Bar*

Many interesting and significant decisions in the field of torts have been handed down by the Colorado Supreme Court during the past year. The most important of these cases, in my opinion, are the following:

(1) IMPUTATION OF NEGLIGENCE

In *Moore v. Skiles*, 130 Colo. ...., 274 P. 2d 311, the plaintiff, a passenger in a truck owned jointly by her and her husband, was injured when the husband drove the truck into a collision with the defendant's car. The plaintiff, Mrs. Moore, and her husband were returning home after an evening with friends.

The trial court, over the objection of plaintiff's counsel, instructed the jury that if it found "that the accident would not have occurred but for the combined negligence of both drivers, then the plaintiff can not recover for the damages which she claims to have suffered . . ." The jury returned a verdict in favor of the defendant, and the appeal followed. The Colorado Supreme Court, after noting the general rule that the negligence of a driver is not to be imputed to a passenger in the car, *Colorado and Southern Railway Company v. Thomas*, 33 Colo. 517, 81 P. 801; *Parker v. Ullom*, 84 Colo. 433, 271 P. 187; *Phillips v. Denver City Tramway Company*, 53 Colo. 458, 128 P. 460, then proceeded to hold that the case at bar fell within a well recognized exception. Thus, where the passenger by reason of joint ownership of the vehicle was in a position to exercise control over the driver, and was physically present in the automobile, which was being used for a common purpose, the negligence of the driver, if any, was imputed to the joint owner