Denver Law Review

Volume 31 | Issue 7 Article 4

January 1954

Notes and Comments

Dicta Editorial Board

good rule. Certainly the past decisions of some courts would still be good law under this rule. This is illustrated by the enjoining of strikes in two hospitals on the grounds that such strikes were contrary to the best interests of the general public.[26]

Both statutory law and judicial decisions discriminate arbitrarily against a large group of Americans by excluding them from labor legislation and enacting statutes limiting their rights and privileges. It is clear that there should be an extension of the definition of public interest to include employees of private industry where cessation of work results in great harm to the public interest. Strikes should be banned when the public interest is harmed whether the strike be by private or public employees. It is important that public employees have the right to strike when the public interest is not harmed and when the government is engaged in proprietary and not sovereign activities.

NOTES AND COMMENTS

TORTS — INTERPRETATION AND OPERATION OF COLORADO'S GUEST STATUTE CLARIFIED IN SEVERAL RECENT CASES—The latest, and perhaps the most important, of the recent guest statute cases is *Pettingell v. Moede.*[1] In this case the plaintiff's injury resulted from an automobile accident which occurred when the defendant driver, who was inexperienced in mountain driving, applied his brakes and slid off of an icy highway on a mountain pass. He had been warned to put on chains, but had not done so as there were "winter" tires on the jeep that he was driving. The plaintiff, who was a guest and the only passenger, had made no protest on the defendant's driving. There were only minor variations in the testimony, and the case was submitted to a jury which returned a verdict for the plaintiff. The defendant appealed from the judgment entered on this verdict, and the Supreme Court reversed with directions to dismiss the action.

The Court states that recent presentations made to it have revealed that there is still a good deal of uncertainty and confusion as to the provisions of our guest statute.[2] The statute specifies three instances where the driver of a vehicle may be liable to his guest. Neither intentional accident nor intoxication are here involved, so if there is a liability, it has to be on "negligence consisting of a wilful and wanton disregard of the rights of others." Admitting that it has previously been said that this phrase is self-evident,[3] the Court undertakes to clarify the interpretation of it.

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[26] Society of N. Y. Hospital v. Hanson, 59 N. Y. S. (2d) 91 (1945); Jewish Hospital of Brooklyn v. Doe, 252 App. Div. 581.

[1] — Colo. —, 1953-54 C. B. A. Adv. Sh. No. 15, p. 358.

[2] '35 C. S. A., c. 16, §371.

[3] Foster v. Redding, 97 Colo. 4, 45 P. (2d) 940 (1935).

The Court defines negligence as "failure to exercise for the protection of others that degree of care and caution that would, under the prevailing circumstances, be exercised by an ordinarily prudent person." Continuing, the Court says:

> For the purpose of properly construing this statute, ordinary or simple negligence should be considered as resulting from a passive mind, while a wilful and wanton disregard expresses the thought . . . of an active and purposeful intent. Wilful action means voluntary . . . Wantonness signifies . . . that it is wholly disregardful of the rights, feelings and safety of others . . . To be 'wilful and wanton' there must be some affirmative act purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others . . . The demarcation between ordinary negligence, and wilful and wanton disregard, is that in the latter the actor was fully aware of the danger and should have realized its probable consequences, yet deliberately avoided all precaution to prevent disaster. A failure to act in prevention of accident is but simple negligence; a mentally active restraint from such action is wilful. Omitting to weigh consequences is simple negligence; refusing to weigh them is wilful. Performance of a dangerous act wilfully, under certain circumstances, . . . is permissible, and will not subject the actor to liability even under the guest statute; . . . to be actionable under that statute the conduct of the driver of the vehicle must be both wilful and wanton, because a wanton act is never excusable.

A number of Colorado cases are cited as being in conformity with this.[4]

The Court next considers an instruction which tells the jury that it may take into consideration whether the defendant, from the surrounding circumstances and existing conditions, *"should have known* that to continue his course of conduct would naturally and probably result in injury." *Should have known* has appeared in previous cases,[5] but it was there never approved by itself and it has to be taken together with the complete instructions in those cases. The meaning of those instructions is that the jury can find from the surrounding circumstances and facts an inference that the defendant did in fact know of the danger. This is the same as the method by which *intent* is determined. Further, the Court feels that it is possible, under the instructions given in this case, that the jury might have based liability on the basis of simple

[4] Millington v. Hiedloff, 96 Colo. 581, 45 P. (2d) 937 (1935); Pupke v. Pupke, 102 Colo. 337, 79 P. (2d) 290 (1938); Bashor v. Bashor, 103 Colo. 232, 85 P. (2d) 732 (1938); Helgoth v. Foxhoven, 125 Colo. 446, 244 P. (2d) 886 (1952).

[5] Clark v. Small, 80 Colo. 227, 250 P. 385 (1926); Clark v. Hicks, 127 Colo. 25, 252 P. (2d) 1067 (1953).

negligence alone; it is of course improper to speculate that a jury selected a correct theory and disregarded a wrong one.

Once it has been established that a plaintiff is a guest, he then has the burden of proving one of the situations for a recovery under the statute. Reviewing the evidence in this case, the Court holds that, as a matter of law, the plaintiff has not sustained this burden. "If it appears clear that the law is such that the evidence presented is insufficient, it is the duty of the court to direct a verdict; if, on the other hand, the evidence is such that reasonable minds might draw different conclusions therefrom, it is proper that a jury decide the issue." Accordingly this case was reversed for dismissal with one dissent on the issue of submission of this particular case to a jury determination.

Another recent guest statute case is *Lewis v. Oliver* [6] in which a judgment on a verdict for the plaintiff is reversed for a new trial. The court states that there is merit in eight of the specifications of error but discusses only the misconduct of counsel (statements made in front of the jury) and the giving of an instruction on simple negligence. While in the *Pettingell* case the giving of such an instruction is unnecessary and confusing, in this case it says that it is reversible error under the circumstances. While the word "negligence" is used in the statute, it is well established that each of the three elements that allow recovery by a guest are something more and beyond negligence as it is ordinarily understood. An instruction on simple negligence has no place in an action under the guest statute.

A third recent guest statute case is *Loeffler v. Crandall* [7] in which a directed verdict for the defendant is affirmed. This case holds, as do the others, that simple negligence will not sustain a recovery when it has been established that the plaintiff was a guest. Here it was properly held by the trial court that, as a matter of law, the plaintiff did not sustain the necessary proof. The case has an additional element in that it was contended that the guest statute is not applicable as the plaintiff had agreed to pay a share of the expense. The Court quotes from a California case [8] and follows the rule that a tangible benefit to the driver must be the motivating influence in furnishing the transportation to take the passenger out of the guest statute.[9] Where the main purpose of the trip is joint pleasure, an incidental agreement for sharing the expense does not overcome the statute.

It is not felt that these cases make any radical changes in the law of this state; rather it is felt that for the most part they reiterate existing rules. They do, however, expand on them, and it is believed that the clarification, which is the announced intention

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[6] — Colo. —, 1953-54 C. B. A. Adv. Sh. No. 15, p. 356.
[7] — Colo. —, 1953-54 C. B. A. Adv. Sh. No. 14, p. 319.
[8] Druzanich v. Criley, 19 Cal. (2d) 439, 107 P. (2d) 445 (1940).
[9] *cf.* Klatka v. Barber, 124 Colo. 588, 239 P. (2d) 607 (1951).

of the *Pettingell* opinion, should be achieved to a considerable extent.

T. H. CHRYSLER.

REAL PROPERTY—SAND AND GRAVEL ARE NOT MINERALS—In the case of *Farrell v. Sayre*,[1] the action was brought in the form of a request for a declaratory judgment to adjudicate the rights of the respective parties in regard to certain sand and gravel located on the plaintiff's property situated in Gilpin County. The sand and gravel in question cover the entire surface of the plaintiff's property. It was the contention of the defendant, Sayre, that the sand and gravel were included in a mineral reservation which he held in the plaintiff's land. The reservation was in the following general terms:

> . . . and excepting and reserving all mineral and mineral rights and rights to enter upon the surface of the land and extract the same . . .

Prior to the commencement of this action the plaintiff and defendant had entered into an agreement whereby the defendant purported to lease his interest in the sand and gravel to the plaintiff in return for the payment of certain royalties for any gravel removed. Apparently the trial court felt that this purported lease, rather than the original reservation, was sufficient evidence of the intention of the parties to support a finding that the mineral reservation did in fact include the sand and gravel. That is, because the plaintiff entered into this agreement with the defendant, his act amounted to a recognition of the defendant's rights in the sand and gravel.

The Supreme Court in reversing the decision of the trial court announced the rule to be followed in Colorado in this type of situation as follows:

> The mineral reservation here involved is in general terms and does not expressly include sand and gravel. It seems to be the general rule that where the surface of the land is sand and gravel, a straight mineral reservation does not include the sand and gravel, and where a similar situation has arisen, the cases turn upon the intent of the parties at the time of the execution of the deed containing the reservation, when such reservation is in general terms, and virtually every decision is to the effect that where the grant in the deed, as here, is nothing but sand and gravel, it surely was not contemplated that the parties intended to nullify the grant without some direct specification in the reservation.

The Supreme Court cites the case of *Waring v. Foden*[2] as controlling authority for the following principles: (1) That the

[1] — Colo. —, 1953-54 C. B. A. Adv. Sh. No. 14, p. 312.
[2] 86 A. L. R. 969, 1 Ch. 276 (1932).

word "minerals" when found in a reservation clause includes those substances which are exceptional in use, value, and character (2) That in determining whether a certain substance is exceptional you must look to the meaning of the word in the vernacular of the mining world, the commercial world, and whether or not the parties considered it a mineral at the time of their agreement.

The decision seems a proper one in view of the fact that if the reservation had included the sand and gravel, which admittedly covered the entire surface of the land, then all that the plaintiff had obtained by his deed was a layer of sub soil below the sand and gravel with an implied easement to use the surface layer which was the property of the defendant. It is clear that the general terms in which the reservation was couched does not warrant such a result without clear evidence of a contrary intent. This position is further strengthened by the fact that it was admitted that the defendant, Sayre, had no knowledge that the sand and gravel had commercial value and that he did not contemplate any use of it at the time the reservation was made.

The decision illustrates that the word "mineral" is not subject to exact definition but rather is susceptible to limitation or expansion according to the intention of the parties and the circumstances surrounding its use. The effect of the decision would appear to be that if a grantor intends to reserve sand and gravel covering the surface of the land he will have to make a specific reservation to that effect.

CLYDE J. COOPER, JR.

REAL PROPERTY—AN ADVERSE CLAIM MUST BE HOSTILE AT ITS INCEPTION OR THE CLAIMANT MUST SET UP TITLE IN HIMSELF BY SOME CLEAR, POSITIVE AND UNEQUIVOCAL ACT.—In the case of *Lovejoy v. School District No.* 46 *of the County of Sedgwick and State of Colorado* [1] the School District claimed that it was the owner in fee simple of certain land and that it was deprived of lawful possession thereof on or about August 1, 1952, by the defendants, Ben and Phyllis Lovejoy. It appears that School District No. 68 comprised a large area of sparsely settled land, and in order to provide accommodations for children of the District, three separate schools were established known as North 68, Middle 68 and South 68. The School in question is South 68. No evidence was submitted whatever on the question of the manner and conditions under which the District was allowed to enter the land in 1866; however, in 1908 the State issued its patent to the land to Bessie and Frank W. Sherman and that patent contained no reservations or exceptions. Numerous conveyances of the property were had thereafter from 1900 to March 2, 1951, when the defendants, Lovejoy, acquired title by deed; none of the conveyances of the land, with one negligible exception, contained reservations or exceptions. In

[1] — Colo. —, 1953-54 C. B. A. Adv. Sh. No. 13, p. 285.

1952 School District No. 68 by consolidation became part of School District No. 46.

In reversing the District Court which held for the plaintiff, the Supreme Court said:

> The very essence of adverse possession is that the possession must be hostile not only against the true owner, but against the world as well. An adverse claim must be hostile at its *inception,* because, if the original entry is not openly hostile or adverse, it does not become so, and the statute does not begin to run as against a rightful owner until the adverse claimant disavows the idea of holding for, or in subservience to another, it actually sets up an exclusive right in himself by some clear, positive and unequivocal act. The character of the possession must become hostile in order that it may be deemed to be adverse. And this hostility must continue for the full statutory period. 1 Am. Jur., p. 871, Sec. 137. The statute begins to run at the time the possession of the claimant becomes adverse to that of the owner, and this occurs when the claimant sets up title in himself by some clear, positive and unequivocal act.
>
> No one representing School District No. 68 ever asserted that the District owned the land until immediately before the commencement of this action. The District, without color of title to possession, had to be in possession under an open and notorious claim of ownership. Under the circumstances here, mere occupancy was not sufficient to put any of the true owners on notice that the District claimed the land . . .

It appears that by this case Colorado follows the rule that where one is claiming title to land by adverse possession without color of title the claim must be hostile at its inception or if not then it must later become hostile to the true owner's interests. In this case the land appears to have been public domain before 1908 when the state issued its patent; therefore the District, itself a governmental organization, could not have made a claim adverse to the state, for this would have been tantamount to asserting an adverse claim against itself. Therefore, any time after 1908 the District could have by an affirmative act put the true owners of the land on notice. This never occurred and it appears that mere possession of the land was not enough to put the owners on notice that the land was claimed by the District.

It is clear that by this holding if the owner acquiesed in the mere occupancy of the land the adverse claimant would be precluded from acquiring title. It seems logical to assume that if the true owner and the claimant both thought that the land involved belonged to the latter, the statute [2] would not begin to run be-

[2] '35 C. S. A., c. 40, §136.

cause, although this might not amount to acquiesence, no act by the claimant would have put the owner on notice. Therefore, when the original entry is not adverse to the interests of the true owner in Colorado there must be a later act done by the claimant which would put the owner on notice and this act must be "clear, positive, and unequivocal" before the statute would begin to run—even though the claimant had been in exclusive possession of the land for more than the statutory period.

JOHN BROOKS, JR.

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It is the sincere hope of the students of the University of Denver College of Law who have effected the compilation, and of those members of the Bar who helped with useful suggestions, that this publication will become an asset to you in your use of DICTA.

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