Denver Law Review

Volume 19 | Issue 5 Article 3

January 1942

Scope of the Right of Way Privilege

Leland E. Modesitt

Scope of the Right of Way Privilege

BY LELAND E. MODESITT*

In traffic cases the import of the right of way is commonly misconceived. Frequently the law by which such a right is conferred is misconstrued, particularly by the lower courts. The courts so consistently decline to define the phrase "right of way" that one readily infers it to be a matter of common knowledge. Various definitions of the right of way privilege have been drafted:

> "Right of way is the privilege of immediate use of the street or highway."[1]
>
> "Right of way merely means a preference to one of two vehicles asserting right of passage at the same place and at approximately the same time."[2]
>
> "Right of way means the right of a vehicle to proceed uninterruptedly in a lawful manner in the direction in which it is moving in preference to another vehicle approaching from a different direction into its path."[3]

These definitions serve to describe generally a relative right which is inherently a nebulous conception and which becomes a concrete right only in the light of the circumstances of each case.

The regulation with which we are chiefly concerned is that which provides that every driver of a vehicle approaching an intersection shall yield the right of way to the driver of the vehicle approaching from the right. This is the Denver ordinance[4] and the usual rule adopted in municipalities. The Colorado statute[5] and the ordinances of some of the smaller communities vary materially from this in their practical application.

---

*Of the Denver bar.

[1]Denver Municipal Traffic Code, §1; Ordinance No. 16, Series of 1932, §1; COLO. STAT. ANN. (1935 c. 16, §76 (dd). In the statutory definition the word "street" is omitted.

[2]Cowan v. Market Street Ry. Co., 8 Cal. App. (2d) 642, 646, 47 P. (2d) 752, 754 (1935).

[3]Kling v. George Ast Candy Co., 33 Ohio App. 177, 179, 168 N. E. 761 (1929).

[4]*Supra* note 1, §65 (a).

[5]COLO. STAT. ANN. (1935) c. 16, §208.

That the driver on the left is at a disadvantage from the beginning, is a certainty, but the cases and decisions indicate clearly that the driver on the right is amenable to all of the laws created for public safety. The driver on the right has no license to proceed with reckless abandon; sometimes he has no right to proceed at all. His privilege is conditional upon his ability to exercise it with reason and discretion.

In *Ward v. Clark*,[6] Mr. Justice Cardozo stated:

> "The plaintiff [the driver on the left] in shaping his own course might act upon the assumption that common skill and prudence would shape the defendant's also. He was not required to foresee the defendant's blind and uncompromising adherence to an undeviating line. The supreme rule of the road is the rule of mutual forbearance."

The Colorado decisions on the right of way question are not numerous, but are adequate to furnish an understandable perspective.

In *Golden Eagle Dry Goods Company v. Mockbee*[7] the court stated that it was the duty of every driver on approaching a street intersection to see whether there was liklihood of a collision with another car approaching from the right, and if there was, to yield the right of way and to keep his car under such control that he could do so. The plaintiff was driving an automobile southward on South University Boulevard in Denver. As she was crossing the intersection at East Evans Avenue[8] a motor delivery car of the defendant, driven eastward by defendant's servant, collided with plaintiff's car and injured her. The plaintiff recovered damages in the lower court, but the decision was reversed because of an erroneous instruction. This was one of the first cases involving the Denver right of way ordinance, and the instruction complained of was based upon language in the ordinance similar to that of the present Colorado statute which confers a privilege upon the automobile first reaching the intersection. The instruction was considered erroneous, because in effect it would repeal the Denver ordinance and because it was impracticable. It was stated, however, that the lower court was clearly right in warning the jury that one having the right of way is not absolved from the duty of exercising reasonable care and may not approach the intersection at a negligent rate.

---

[6]232 N. Y. 195, 198, 133 N. E. 443 (1921).

[7]68 Colo. 312, 189 Pac. 850 (1920).

[8]At the date of this case both Evans Avenue and University Boulevard were designated as "streets" and neither was a stop or through street.

In *Rosenbaum v. Riggs*[9] the plaintiff, who was the driver on the left, was denied recovery because his own admissions established his contributory negligence. He testified that he was going from eight to ten miles an hour and could have stopped within five or six feet had he desired. However, he saw no reason why he should give the right of way to the defendant, who was some one hundred feet away when plaintiff proceeded into the intersection. The rule handed down placed a duty upon the driver to look to the right when nearing a crossing, and if he sees, or could have seen an approaching car in time to stop and neglects to do so, he is guilty of contributory negligence. The court stated that the plaintiff should have assumed that the defendant, having the right of way, would probably continue at a high rate of speed, and therefore was negligent in not stopping when he could easily have done so.

In *St. Mary's Academy v. Newhagen*[10] the court considered the plaintiff negligent as a matter of law in not looking to the right immediately before she proceeded into the intersection. She had seen the defendant's car on the right some 300 feet from the intersection, when her own car was about 80 feet therefrom. Fearing danger from the left because of a building which intercepted her view from that direction, she did not look again to the right, because, she said, she did not have time, but continued to look to the left until the car she was driving was struck by defendant's car. The negligence of the driver of the car on the right was conclusively established, but the plaintiff was denied recovery because of her own carelessness in not looking again to the right to ascertain defendant's position at the moment she entered the intersection. Whether the defendant had abused the privilege, or had lost his right of way because of reckless driving was not considered.

In each of the Colorado cases previously considered the defendant won a judgment by virtue of the right of way ordinance, and the right of way as a defense in a negligence action was almost unquestioned until *Boyd v. Close*[11] was decided. In this case the cars did not meet while crossing an intersection at right angles; they were proceeding in opposite directions along the same street, and the accident occurred when the plaintiff turned to the left in front of the defendant's oncoming

[9]75 Colo. 408, 222 Pac. 134 (1924).
[10]77 Colo. 471, 238 Pac. 21 (1925).
[11]82 Colo. 150, 257 Pac. 1079 (1927).

car. The defendant contended that he had the right of way because the plaintiff became the driver on the left in making the left turn. Corroborated testimony showed the defendant's car was in fact approaching at 45 miles an hour, its driver was drunk and reckless, he did not signal, slow down, turn or use his brakes. He covered the intervening 300 feet while the plaintiff was going 90 feet. The court held for the plaintiff, stating that it could not fix responsibility in every case of automobile crossing collisions in favor of the car having the right of way under the strict provisions of the ordinance or statute notwithstanding drunkenness, gross negligence, excessive speed and every reasonable caution exercised by the other.

Golden Eagle Dry Goods Company v. Mockbee,[12] *Rosenbaum v. Riggs,*[13] and *St. Mary's Academy v. Newhagen,*[14] which were cited by defendant, were held not to sustain his contention. The court stated that *Rosenbaum v. Riggs* was not applicable because the plaintiff there knew that defendant was approaching at an excessive speed, knew that a collision was imminent, could have avoided it but did not even make the attempt, and that the same facts existed in *St. Mary's Academy* case. The court stated in *Boyd v. Close,* that to deny the plaintiff recovery under the circumstances there set forth would be in effect to outlaw every driver on the left and give *carte blanche* to every driver on the right to run him down. It considered the mere statement of such a proposition its own refutation.

Failure to observe what a reasonably prudent person in her position could have observed was considered contributory negligence on the part of the plaintiff in *Kracaw v. Micheletti.*[15] The undisputed evidence showed that the plaintiff was traveling at a moderate speed and when she reached a point about 15 feet from the intersection she saw defendant's car approaching about 200 feet distant. She continued to watch defendant's car, but could not ascertain its speed. She thought she had time to cross ahead of it, but as a consequence of making an attempt a collision ensued. The accident occurred in broad daylight. The court held that plaintiff negligently proceeded to take the right of way, and upheld a directed verdict for the defendant, even though the

[12] *Supra* note 7.
[13] *Supra* note 9.
[14] *Supra* note 10.
[15] 85 Colo. 384, 276 Pac. 333 (1929).

latter's excessive and negligent speed was clearly established by the evidence.

The case was distinguished from *Boyd v. Close*[16] on the basis of a materially different fact situation. In *Boyd v. Close* the accident occured at night, during a snow storm, and the cars were approaching head on. Under these circumstances the court felt that the plaintiff could not properly be charged with notice of defendant's excessive speed, and not having actual notice to the contrary, could assume that the defendant was driving in a lawful manner. In other words, he drove according to the hypothetical standard of a reasonably prudent person under the same circumstances and could not be charged with negligently taking the right of way. In *Kracaw v. Micheletti* the plaintiff could have ascertained by the exercise of reasonable diligence that the defendant's car was approaching at a high rate of speed, and her failure to yield the right of way under these circumstances was considered manifest negligence. She had no right to proceed across the intersection on the assumption that the defendant was driving in a careful and prudent manner when she should have had positive notice to the contrary.

In *Campion v. Eakle*,[17] the court set forth the rule that although one driving an automobile may have the right of way, he is not absolved from the duty of exercising reasonable care. However, this was a guest case and the negligence of the driver to the left in not yielding the right of way was not directly in issue.

In *Hicks v. Cramer*,[18] an instruction to the effect that even if the plaintiff had the right of way, if he failed to exercise due care, and such failure was a contributing cause of the accident, he could not recover, was held to be the applicable law.

The interpretation of the right of way rule was a cardinal point in *Stocker v. Newcomb*.[19] The plaintiffs' car was proceeding across the intersection at less than twelve miles per hour when it was struck by defendant's automobile approaching from the right. Plaintiff did not even see defendant's car when she started to cross the intersection, but saw it coming very fast when it was almost upon her. Defendant's

[16] *Supra* note 11.
[17] 79 Colo. 320, 246 Pac. 280 (1926).
[18] 85 Colo. 409, 277 Pac. 499 (1929).
[19] 91 Colo. 479, 15 P. (2d) 975 (1932).

estimated speed was about 50 miles per hour. However, defendant contended that the plaintiff was contributorily negligent in taking the right of way. The court felt otherwise, stating:

> "The rule that an automobile driver on the left should yield the right of way to one on the right does not carry with it a license for excessive speed or reckless driving on the part of anyone. Drivers on the right are as amenable to the law as those on the left; the rule is one of safety and to facilitate traffic; it is promulgated for the use of the traveling public and not for abuse. The rule does not deprive others of their right to the use of the public highways. In *Boyd v. Close* . . . we repudiated the notion that there is such a thing as an unlawful right of way, and we have not changed our minds."[20]

A recent case of considerable significance to the profession and of great moment to the press was *Buerger Brothers Supply Company v. Denver Fire Reporter and Protective Company.*[21] There the plaintiff had the right of way and was traveling 8 to 10 miles per hour as he proceeded into the intersection. He kept looking to the right because there was a building on the corner which obstructed his vision. His vision to the left was clear but he did not look to the left until he entered the intersection. When he did so, he saw the defendant's car entering the intersection. He stepped on the accelerator in an attempt to avoid a collision but his increased speed was insufficient to cause his car to clear and it was struck in the left rear portion.

The defendant in support of its motion for a nonsuit urged that plaintiff's driver was guilty of contributory negligence as a matter of law in not looking to the left before he entered the intersection, and the lower court must have reached that conclusion, although it made no specific finding to that effect. The Supreme Court reversed the holding of the lower court granting the defendant's motion for nonsuit and said:

> "* * * contributory negligence is not shown, because under the ordinance the plaintiff had a right to be where he was, and at the time owed no legal duty to yield the right of way to defendant * * *

---

[20] *Supra* note 19, at 485, 15 P. (2d) at 977.
[21] 113 P. (2d) 671 (Colo. 1941).

> We think that the plaintiff, under the doctrine announced in *Golden Eagle Co. v. Mockbee* * * * and *City and County of Denver v. Henry* * * * made out a *prima facie case* and that the motion for a nonsuit should have been overruled."[22]

In citing *Golden Eagle Dry Goods Company v. Mockbee*[23] as authority for its decision the court indicates an affirmance of the principle there laid down that the driver on the right is not absolved from the duty of exercising due care. In other words, the question of reasonable care on the part of the driver on the right should always be considered, but at the same time it was error under the circumstances of the *Buerger Brothers* case to find contributory negligence as a matter of law and to direct a nonsuit based on that finding. It is true that the opinion contains language which might be construed as relieving the driver from the duty of looking to the left, but it would seem that that language should be construed in the light of the particular facts of the case.

> "The language used in a court opinion must be interpreted in the light of its use in the case under consideration, and confined to the questions presented therein."[24]

One week after the *Buerger Brothers* case was decided the Supreme Court handed down an opinion in *Bauserman v. White*.[25] The factual situation there was that Mrs. White was riding as a guest in a car driven by a Miss Berger, which was proceeding in a westerly direction on Glenarm Place. As the car approached the intersection of 13th Street and Glenarm Place, Miss Berger stopped at the cross walk before proceeding into the intersection in order to yield the right of way to a southbound automobile stopped on 13th Street to her right. The driver of this car motioned for Miss Berger to proceed across the intersection. She complied, and when almost across the southbound car tracks the defendant's car, driven southerly on 13th Street at a speed of 25 to 35 miles per hour, came around the left of the car that was stopped, and struck the rear portion of Miss Berger's car. The case was decided on the basis of section 65 (d) of the Denver Traffic Code,[26] which reads as follows:

---

[22] *Supra* note 21, at 672.
[23] *Supra* note 7.
[24] City and County of Denver v. Henry, 95 Colo. 582, 585, 38 P. (2d) 895, 896 (1934).
[25] 114 P. (2d) 557 (Colo. 1941).
[26] *Supra* note 1.

"Any driver or operator, while driving without lights at such times as lights are required under Section 52 of this ordinance, or while driving to the left of the center of the street, and reckless driving, shall have no right of way whatever."

The court held that a driver approaching an intersection from the right loses the right of way if he either drives to the left of the center of the street or drives recklessly. Defendant's speed and his passing another car near the intersection were accepted as ample proof of recklessness.

This was the first case to establish the relative or conditional nature of the right of way privilege. In *Rosenbaum v. Riggs*[27] and *St. Mary's Academy v. Newhagen*[28] the right of way was the basis of the defense of contributory negligence, notwithstanding the unlawful manner in which the defendant exercised the right. *Bauserman v. White*, at least in actions covered by the Denver ordinance, eliminated that basis if the privilege was recklessly exercised.

In any attempt to harmonize the Colorado decisions on the right of way rule it is imperative that the conditions and circumstances of each case be analyzed and compared. *Boyd v. Close*[29] can be reconciled with *Rosenbaum v. Riggs*[30] because of the different circumstances under which the collision occurred in each case. It is also important to note whether the person upon whom the right of way privilege is conferred is the plaintiff or defendant. In a case where the defendant has the right of way, a verdict might be directed for the defendant absolving him from liability to the plaintiff, but this would not necessarily mean that the defendant could recover his own damage from the plaintiff. In other words, both parties might be guilty of negligence precluding either from recovering from the other.

In conclusion it seems that the right of way privilege should never constitute a license to abuse the other laws enacted for public safety. It should be a conditional privilege existing only when the one upon whom it is conferred can exercise it reasonably and solicitously; not blindly and heedlessly. Such a construction would effect a more equitable disposition of the many traffic cases involving the right of way privilege.

---

[27] *Supra* note 9.
[28] *Supra* note 10.
[29] *Supra* note 11.
[30] *Supra* note 9.