Hastings Law Journal

Volume 14 | Issue 4 Article 12

1-1963

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tion. In *Mapp* v. *Ohio*[45] the only evidence leading to defendant's conviction was that which was illegally obtained, thereby resulting in a miscarriage of justice. California, in similar cases,[46] has supported this decision. The effect of Article VI, section 4½ of the California Constitution is that if there is evidence, entirely independent of that illegally obtained, that convincingly, if not overwhelmingly, establishes guilt, the conviction should be affirmed.[47] It, therefore, would appear that the California provision does not conflict with the United States Supreme Court decision in the *Mapp* case.

Conclusion

Recent decisions in California have analyzed the problem and have limited the power of search, indicating that when the traffic violation is serious enough there may be reason to believe there are additional circumstances which would give rise to a reasonable search. It does not seem unreasonable that an officer should have some justification for search. The primary purpose of the constitutional guarantees relating to searches and seizures is to prevent unreasonable invasions of the privacy of the people. Therefore, in the area of traffic violations a balance between effective law enforcement and the protection of constitutional rights to which all citizens are entitled must be made. "[T]he constitutional provisions make no distinction between the guilty and the innocent and it would be manifestly impossible to protect the rights of the innocent if the police were permitted to justify unreasonable searches and seizures on the ground that they assumed the victims were criminals."[48]

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[45] *Ibid.*

[46] People v. Gale, 46 Cal. 2d 253, 294 P.2d 13 (1956); People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

[47] People v. Tarantino, 45 Cal. 2d 590, 290 P.2d 505 (1955).

[48] People v. Cahan, 44 Cal. 2d 434, 439, 292 P.2d 905, 910 (1955).

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RIGHT OF WAY STATUTES

The "rules of the road" are criminal statutes. There is no provision in the California Vehicle Code for civil liability based on violations of traffic control regulations.[1] It is California law, however, that these statutes are the standards by which to judge the conduct of the parties in civil actions.[2] Cases treating

[1] To the contrary, the 1935 Vehicle Code contained a provision that "[n]o record of the conviction of any person for any violation of this code . . . shall be admissible as evidence in any court in any civil action." This provision was repealed by Cal. Stat. 1957, c. 1956 § 1, p. 3497, but the courts continue to exclude admission of conviction of traffic violations in civil actions. Mooren v. King, 182 Cal. App. 2d 546, 6 Cal. Rptr. 362 (1960).

[2] Satterlee v. Orange Glenn School Dist., 29 Cal. 2d 581, 177 P.2d 279 (1947). This position has not been accepted by all courts. See Eisenhuth v. Moneyhon, 161 Ohio St. 367, 372-73, 53 Ohio Op. 274, 277, 119 N.E.2d 440, 443 (1954), where the court said: "When such standard of conduct is so fixed [by legislative enactment], it is final and conclusive except in cases where the enactment is so vague or so dependent upon a variety of facts and circumstances as to require definition by a court or jury before it may be applied to the facts of a particular case. . . . However, a legislative enactment which does not purport to define a

the duty of a motorist entering a highway[3] from a private drive indicate a failure to apply the statutory standard intended by the legislature.

Section 21804 of the vehicle code[4] states that a motorist entering a highway from a private drive must yield the right of way[5] to all vehicles approaching upon the highway. It was decided early, in *Wakefield* v. *Horn*,[6] that a literal interpretation of the statute would be unreasonable; for it would require the motorist not to enter from a private drive whenever there was a vehicle approaching on the public way, irrespective of the distance. Therefore, the court reasoned, the legislature must have meant that no motorist could enter a highway from a private road while a vehicle was approaching so near as to constitute an immediate hazard.[7]

The driver entering a public way from a private drive is confronted with a situation similar to that faced by the driver entering from a stop street. His duty has also been prescribed by the legislature.[8] Section 21802 of the vehicle code states that a motorist entering a through highway[9] must stop and yield the right of way to all vehicles approaching so close as to constitute an immediate hazard, and that, having yielded, he obtains the right of way over all other vehicles approaching on the through highway. The courts have not thought that a literal interpretation of this statute would be unreasonable. It is the duty of a motorist approaching a through street to stop and not to enter while a vehicle is approaching so close as to constitute an immediate hazard.[10]

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civil liability but merely makes provision to secure the safety or welfare of the public is not to be construed as establishing such a liability. In such cases, no standard of care other than the common law standard of due care under the circumstances is fixed by the enactment, and the standard of due care is that exercised by a reasonably prudent person under the circumstances of the particular case." The court concluded that the traffic regulation requiring a motorist to give a signal before turning his vehicle was of the latter type of legislative enactment. See also the dissenting opinion of Justice Carter in *Satterlee* 29 Cal.2d at 601, 177 P.2d at 290.

[3] CAL. VEH. CODE § 360: "'Highway' is a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel. Highway includes street."

[4] CAL. VEH. CODE § 21804: "The driver of a vehicle about to enter or cross a highway from any private property, or private road or driveway or from an alley not exceeding a width of 22 feet or from any alley as may be defined by local ordinance shall yield the right-of-way to all vehicles approaching on the highway."

[5] CAL. VEH. CODE § 525: "'Right-of-way' is the privilege of the immediate use of the highway."

[6] 109 Cal. App. 325, 293 Pac. 97 (1930).

[7] *Id.* at 327, 293 Pac. at 98.

[8] CAL. VEH. CODE § 21802: "(a) The driver of any vehicle shall stop at the entrance to a through highway and shall yield the right-of-way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard. (b) A driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right-of-way to the vehicle so about to enter or cross the through highway. . . ."

[9] CAL. VEH. CODE § 600: "A 'through highway' is a highway or portion thereof at the entrance to which stop signs have been erected and vehicular traffic from intersecting highways is required by law to stop before entering or crossing the same."

[10] Grasso v. Cunial, 106 Cal. App. 2d 294, 235 P.2d 32 (1951).

Reciprocally, it is the duty of the driver on the through street to yield the right of way to a vehicle entering from a stop street, if his vehicle does not constitute an immediate hazard when the latter enters.[11]

That a literal interpretation of section 21802 has been deemed reasonable prompts an inquiry to determine what a literal interpretation of section 21804 would mean. Since right of way is "the privilege of the immediate use of the highway,"[12] questions of right of way arise only where there is danger of a collision if the motorists involved continue on their respective paths without delay.[13] Clearly, there can be no violation of a right of way statute if no question of right of way is involved. Equally clearly, the mere fact that a vehicle is approaching on the public way does not mean that there is danger of a collision if a motorist enters from a private drive. A truly literal interpretation of section 21804, then, would require a motorist not to enter a highway from a private road while there is danger of a collision. This should be contrasted with the "immediate hazard" test of *Wakefield*,[14] which implies *probability* of collision,[15] *i.e.*, something more than mere danger, and is therefore less strict when applied to the motorist entering from a private road.

The cases treating section 21804 reflect the influence of the language in *Wakefield* to the effect that a literal interpretation of the statute would be unreasonable. In *McDougall* v. *Morrison*[16] the court said that it is the duty of the driver of an automobile entering a public way from a private drive not to proceed if a car is approaching on the highway unless he believes, as a reasonably prudent and cautious person, that he can pass in front of the other car in safety.[17] The court cited only *Wakefield* as authority for the rule; and since an immediate hazard exists when a reasonably prudent person would apprehend the probability of a collision were he to continue on his intended course,[18] the statement of duty in *McDougall* seems to be equivalent to that in *Wakefield*. Nevertheless, formulation of a duty as that of "a reasonably prudent and cautious person" marks a major departure from the terms of a statute which on its face imposes an absolute duty to yield.

Section 21804 received a slightly different treatment in *Todd* v. *Standfield*.[19] The trial court instructed as follows: "If you find from the evidence in this case that the defendant Standfield drove his vehicle from a private driveway onto a public highway at a time when the plaintiff's vehicle was sufficiently

[11] Graf v. Garcia, 117 Cal. App. 2d 792, 256 P.2d 995 (1953).

[12] CAL. VEH. CODE § 525.

[13] People v. McLachlan, 36 Cal. App. 2d Supp. 754, 93 P.2d 280 (App. Dept., Super. Ct., Los Angeles, 1939).

[14] See note 7 *supra*.

[15] See Washam v. Peerless Automatic Staple Mach. Co., 45 Cal. App. 2d 174, 113 P.2d 724 (1941).

[16] 55 Cal. App. 2d 92, 130 P.2d 149 (1942).

[17] *Id.* at 96, 130 P.2d at 151. This language first appears in Kemmish v. McCoid, 193 Iowa 958, 964, 185 N.W. 628, 630 (1922), where the court defined the duty of a driver entering a highway from a private drive according to common law principles; there being no statute applicable at the time.

[18] See Washam v. Peerless Automatic Staple Mach. Co., 45 Cal. App. 2d 174, 113 P.2d 724 (1941).

[19] 111 Cal. App. 2d 615, 245 P.2d 331 (1952).

distant from the intersection as not to constitute an immediate hazard, then I instruct you that the defendant Standfield had the right of way and *it was the duty of the plaintiff under such circumstances to yield the right of way to said defendant* and to slow down and stop, if necessary, in order to avoid a collision"[20] (italics added). Since the verdict was for the plaintiff, there was no objection to the instruction on appeal. The court said merely that the instruction given sufficiently covered another instruction requested by the defendant but refused by the trial court.[21] Nevertheless, the court in *Pandell* v. *Hischier*[22] construed the language in *Todd* to express approval of the instruction. In passing upon the refusal to give an instruction substantially the same as that given in *Todd*, the court in *Pandell* said: "The proffered instruction undoubtedly states a correct principle of law,"[23] and cited *Todd* as authority.

The ruling in *Pandell* marks the culmination of a series of successively more liberal interpretations of 21804, beginning with *Wakefield*. The result is that it is the duty of a driver on a public way to yield the right of way to a driver entering from a private road, if his vehicle does not constitute an immediate hazard when the latter enters,[24] despite the omission from 21804 of any provision to that effect. The courts have construed the section to mean that the duty of the motorist entering a through street from a private drive is the same as that of the motorist entering from a stop street.[25] Reciprocally, the duty of a motorist on a public way approaching a private drive is the same as that of a motorist approaching a stop street.[26]

The primary consideration in statutory construction is to give effect to legislative intent.[27] One of the principles by which legislative intent is determined is the maxim that where a provision included in one statute is omitted from another statute relating to a similar subject, the intention behind the statutes is not the same unless no other interpretation would be reasonable.[28] A true literal interpretation of 21804 would require the motorist entering from a private drive to yield only when there is danger of a collision, which does not seem unreasonable.[29] It follows from the rule of statutory construction that the legislature probably did not intend that the duty of the driver entering a through highway from a private drive be the same as that of the driver entering from a stop street. It appears that the intent was to impose greater care upon the motorist emerging from private property.

[20] *Id.* at 617-18, 245 P.2d at 333.

[21] *Id.* at 618, 245 P.2d at 333.

[22] 166 Cal. App. 2d 693, 333 P.2d 762 (1958).

[23] *Id.* at 695, 333 P.2d at 763.

[24] *Ibid*; see also Neyens v. Sellnow, 21 Cal. Rptr. 151 (1962).

[25] *Compare* McDougall v. Morrison, 55 Cal. App. 2d 92, 130 P.2d 149 (1942) *with* Grasso v. Cunial, 106 Cal. App. 2d 294, 235 P.2d 32 (1951).

[26] *Compare* Pandell v. Hischier, 166 Cal. App. 2d 693, 333 P.2d 762 (1958) *with* Graf v. Garcia, 117 Cal. App. 2d 792, 256 P.2d 995 (1953).

[27] California Toll Bridge Authority v. Kuchel, 40 Cal. 2d 43, 251 P.2d 4 (1952); Dickey v. Raisin Proration Zone, 24 Cal. 2d 796, 151 P.2d 505, 157 A.L.R.2d 324 (1944), *cert. denied* 324 U.S. 869 (1945).

[28] People v. Valentine, 28 Cal. 2d 121, 169 P.2d 1 (1946).

[29] An Ohio statute, OHIO REV. CODE, § 4511.44 (1953), similar to CAL. VEH. CODE § 21804, has been interpreted literally to confer an absolute right of way upon the vehicle on the highway. Beers v. Wills, 172 Ohio St. 569, 18 Ohio Op. 2d 128, 179 N.E.2d 57 (1962).

That this should be so follows from the purpose implicit in traffic regulations, *i.e.*, rules of conduct to promote the orderly and safe flow of traffic.[30] If safety were the only consideration, no motorist would be allowed to enter a highway, from either a private drive or a stop street, whenever there was any possibility of a collision. In the case of the stop street, such a rule would defeat the other purpose of traffic regulations, promotion of the orderly flow of traffic, since it would unduly restrict traffic movement on the stop street.

On the other hand, the intermittent traffic entering the highway from private property would not be unreasonably obstructed by allowing precedence to vehicles on the highway.[31] But it can be argued that requiring the highway driver to be prepared to yield to traffic emerging from private property would unreasonably obstruct traffic on the highway. In fact, awarding the motorist on the public way an absolute right of way over the vehicle entering from private property would decrease the danger of collision, and thus promote an orderly, as well as safe, flow of traffic.

In California, violation of a statute designed to protect against a certain kind of harm creates a presumption of negligence on the part of the person guilty of the violation.[32] This presumption may be rebutted by proof that the conduct of the party who violated the statute was that which might be expected of a reasonable man of ordinary prudence desiring to comply with the law, acting under similar circumstances.[33] The effect of the presumption is to relieve the party desiring to prove negligence from the burden of proving that the party who violated the statute failed to act as a reasonably prudent man. The burden of going forward is cast upon the party guilty of the violation to present evidence justifying an excuse for violation.[34]

There is an inconsistency between the "rebuttable presumption of negligence" rule and the courts' construction of section 21804. This is illustrated by *McAllister* v. *Cummings*,[35] where the decisive issue was the duty of a motorist entering a highway from a private drive. Plaintiff was a motorcycle policeman traveling eastward in the inside lane of a four lane highway. Defendant motorist entered the highway from a private drive intending to turn left and proceed westward on the highway. The vehicles collided and plaintiff suffered severe injuries. At plaintiff's request the jury was instructed in the language of section 21804 that it is the duty of a driver about to enter a highway from a private drive to yield the right of way to all vehicles approaching on the highway. They were also instructed that the violation of a statute raises a presumption of negligence which may be rebutted by evidence showing that, under the circumstances, the conduct of the party who violated the statute was excusable or

[30] Dembicer v. Pawtucket Cabinet & Builders Finish Co., 58 R.I. 451, 193 Atl. 622 (1937).

[31] See Uhl v. Fertig, 56 Cal. App. 718, 725, 206 Pac. 467, 469 (1922), where the court said, "The casual machine that might emerge upon the highway from private property aligning the same could better suffer the small delay by allowing precedence to the highway traffic, and so not only avoid obstructing the latter, but decrease the danger of injury by collision."

[32] Satterlee v. Orange Glenn School Dist., 29 Cal. 2d 581, 177 P.2d 279 (1947).

[33] Ornales v. Wigger, 35 Cal. 2d 474, 218 P.2d 531 (1950).

[34] Satterlee v. Orange Glenn School Dist., 29 Cal. 2d 581, 592-93, 177 P.2d 279, 285 (1947).

[35] 191 Cal. App. 2d 1, 12 Cal. Rptr. 418 (1961).

justifiable; and that excusable or justifiable conduct would be that which might be expected of a person of ordinary prudence who desired to comply with the law, but acting under given circumstances. The verdict was for the plaintiff, necessarily implying a finding that he was not guilty of contributory negligence. On appeal it was ruled error to refuse defendant's qualifying instruction that it is the duty of an automobile driver entering a highway from a private driveway not to enter if a car is coming unless he believes, as a reasonably prudent and cautious person, that he can pass in front of the other car in safety.

Defendant's instruction was correct on the authority of *Wakefield* v. *Horn*[36] and *McDougall* v. *Morrison*.[37] But by approving the instruction the court denied the plaintiff even the possibility of the benefit of the presumption of negligence which arises upon violation of a statute. In order to raise the presumption under the ruling of *McAllister*, the plaintiff must show that the defendant failed to act as a reasonably prudent man. If the plaintiff so proves, he has proved the negligence of the defendant, and the presumption of negligence is superfluous.

If the statutory duty of the defendant in *McAllister* were to yield the right of way to all vehicles approaching on the highway, the result would be quite different. While operating his vehicle lawfully upon the highway, the plaintiff collided with the defendant who was entering from a private drive. His failure to yield the right of way would establish defendant's violation of the statute and thereby raise a presumption that he was negligent. The burden of going forward would be shifted to the defendant to show that his conduct was that of a reasonably prudent man, notwithstanding his violation of the statute.

Although a truly literal interpretation of section 21804 would confer an absolute right of way upon the highway driver, it does not follow that the motorist entering from the private drive would be held strictly liable for a collision. His breach of duty to yield might be excusable or justifiable so that his conduct would not be negligent.[38] Such circumstances have arisen where the motorist entered the public way from a blind road,[39] or on a foggy and rainy night.[40] The driver on the highway might himself be guilty of negligence, precluding recovery by either party.[41] If the highway driver were guilty of gross negligence or wilful disregard of the consequences of his actions, the driver emerging from the private road would recover despite his own negligent violation of the statute.[42] It is difficult to see how a true literal interpretation of the statute would work an injustice upon the unfavored driver.

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[36] 109 Cal. App. 325, 293 Pac. 97 (1930).

[37] 55 Cal. App. 2d 92, 130 P.2d 149 (1942).

[38] See Ornales v. Wigger, 35 Cal. 2d 474, 218 P.2d 531 (1950); PROSSER, TORTS, § 34 (2nd ed. 1955).

[39] Armstrong v. Studer, 2 Cal. App. 2d 166, 37 P.2d 475 (1934).

[40] Dickison v. La Thorpe, 124 Cal. App. 2d 190, 268 P.2d 164 (1954).

[41] Hackey v. Luckehe, 19 Cal. App. 2d 130, 65 P.2d 77 (1937); PROSSER, TORTS, § 51 (2nd ed. 1955).

[42] See Alabam Freight Lines v. Phoenix Bakery, 64 Ariz. 101, 166 P.2d 816 (1946); PROSSER TORTS, § 51 (2nd ed. 1955).

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