Washington Law Review

Volume 6 | Number 3

7-1-1931

Recent Cases

D. W.

rule is that equity will grant relief against criminal prosecutions under an invalid statute wherever the facts are such as to state a case for ordinary injunctive relief, viz., injury to property for which there is no adequate remedy at law Yet the present manner of stating the rule, by finding a general rule denying relief, and then an exception which permits relief in all cases where there is an injury to property for which there is no adequate remedy at law, is so well settled, that no change by the courts in the manner of stating the rule is to be expected. In any event, the same result is reached, and it is the universal rule at the modern day, that equity will take jurisdiction to relieve against threatened or pending criminal prosecutions, under an invalid statute, where there will be a direct invasion of a property right for which the remedy at law is inadequate.

FREDERICK G. HAMLEY.

RECENT CASES

SCHOOLS AND SCHOOL DISTRICTS — LIABILITY — TORTS — NEGLIGENCE OF OFFICER. One of the teachers of the school district, with the knowledge and consent of the directors, acted as coach and trainer of the football squad. A student of the school was induced, persuaded and coerced by the coach to train and practice as a member of the squad and as a result sustained injuries, of which the coach knew or in the exercise of ordinary care should have known. While still suffering from such injuries the student was permitted, persuaded and coerced by the coach to play on the football team. He received additional injuries and the father brings this action against the school district to recover for the reasonable and necessary expenses for caring for his son and for loss of services. *Held*: Under Rem. Comp. Stat. 951, providing that an action may be maintained against a school district for an injury to the rights of the plaintiff arising from some act or omission of such district, it is liable for the negligent act of its officer or agent in supervising a football team maintained by the district. *Morris v. Union High School District*, 60 Wash. Dec. 5, 294 Pac. 998 (1931).

There has been no other case where liability was fastened on a public school because of injury or death to a pupil who participated in an athletic contest. In all the years that athletic contests have played their important part in American school and college life, with all the many injuries that have been sustained by playing, not one reported case has gone to an appellate court seeking damages therefor. The case is novel and a most far-reaching decision in its possible effect on future litigation in this state.

The general rule in this country is that a school district, municipal corporation or school board is not, in the absence of a statute imposing it, subject to liability for injuries to pupils of public schools suffered in connection with their attendance thereat, since such district, corporation or board in maintaining schools acts as an agent of the state and performs a purely public or governmental duty, imposed upon it by law for the benefit of the public and for the performance of which it receives no profit or advantage. *Lane v. Woodbury*, 58 Iowa 462, 12 N. W 478 (1882) *Bigelow v. Randolph*, 14 Gray (Mass.) 541 (1860) *School Dist. v. Fuess*, 98 Pa. 600, 42 Am. Rep. 627 (1881). Cases are collected in 9 A. L. R. 911. Another ground for non-liability is that such educational agencies have no means to pay damages for such claims, and all funds placed under their control are appropriated by law to strictly school purposes and cannot be diverted.

Ernst v. West Covington, 116 Ky. 850, 76 S. W 1039, 3 Ann. Cas. 882 (1903). But the rule in England is contrary, the local educational authority being held when the injuries are shown to have resulted from its negligence, or that of its agents or servants. *Crisp v. Thomas*, 63 L. T. N. S. 756, 55 J. P. 261 (1890) *Ching v. Surrey County Council*, 1 K. B. 736, 102 L. T. N. S. 414 (1910).

Some states have considered it better policy to spread the loss of the individual over the taxing district and this has been done in Washington. Rem. Comp. Stat. 950, 951, and California, St. 1923 p. 675 No. 2. Under the Washington statute a school district has been held liable where: teacher negligently left a water bucket so that a child tripped over it. *Redfield v. School Dist. No.* 3, 48 Wash. 85, 92 Pac. 770 (1907) child hurt on exercise ladder. *Howard v. Tacoma School District*, 88 Wash. 167, 152 Pac. 1004 (1915) injury on teeter board due to inadequate supervision. *Bruenn v. North Yakima School Dist.* 7, 101 Wash. 374, 172 Pac. 569 (1918) injury from swing. *Kelly v. School District* 71, 102 Wash. 343, 173 Pac. 333 (1918) the same in *Holt v. School District No.* 71, 102 Wash. 442, 173 Pac. 26 (1918) fall from tank on grounds. *Stovall v. School District* 49, 110 Wash. 97, 188 Pac. 12, 9 A. L. R. 908 (1920). Other cases holding the same as to injury from physical objects are: *Smith v. Seattle School District No.* 1, 112 Wash. 64, 191 Pac. 858; *Hutchins v. School District No.* 81, 114 Wash. 548, 195 Pac. 1020 (1921) *Rice v. School District* 302, 140 Wash. 189, 248 Pac. 348 (1926).

Although the instant case involves no physical object, the liability of the principal for the negligence of the agent should be the same.

School athletics are part of the curriculum of state schools in view of Rem. Comp. Stat., Sec. 4683, requiring schools of the state to emphasize work in physical education and requiring a minimum of time to be spent in such activities. The development of a student physically is as much within the school routine as mental development. *State ex rel. School District No.* 56 *v. Superior Court*, 69 Wash. 189, 124 Pac. 484 (1912) *Sorenson v. Perkins & Co.*, 72 Wash. 16, 129 Pac. 577 (1913). Athletic activities may be distinguished from medical and dental care in *McGilvra v. Seattle School District*, 113 Wash. 619, 194 Pac. 187 (1921), holding that rendering of medical surgical and dental services to the pupils is foreign to powers to be exercised by school district.

Rem. Comp. Stat., Sec. 951, 950 has been changed by Chap. 92, Laws of '17, p. 332 (R. C. S. 4706), but only to the extent of relieving from liability for athletic apparatus and manual training equipment. *Stovall v. School District* 49, *supra.*

None of the Washington cases cited hold the school district to other than ordinary care; limiting liability to cases where the agent of the district was negligent in permitting the injury to occur or was negligent in not observing the dangerous situation. *Bruenn v. Yakima, supra.* This rule is adopted in California under a similar statute. *Dawson v. Tulane Union High School*, 98 Cal. A. 138, 276 Pac. 424 (1929) *Ahern v. Livermore Union High School District*, 208 Cal. 770, 284 Pac. 1105 (1930). But under the holding of a very recent case when the district undertakes to carry pupils to and from school it is held to the same care required of passenger carriers generally, that is, a high degree of care. If the rule of highest degree of care arises, as all authorities say, from the nature of the employment and on the grounds of public policy, there is no reason why it should not be applied to a school district the same as any passenger carrier. *Phillips v. Hardgrove et al.*, 61 Wash. Dec. 123, 296 Pac. 559 (1930)

D. W

SALES—WARRANTIES—IMPLIED WARRANTY OF QUALITY—FOOD FOR STOCK. Plaintiff ordered some "No. 1 first cutting alfalfa" hay, to be used as food for stock. He had made similar purchases from defendant before, and the latter knew the purpose for which plaintiff purchased the hay. The hay contained a foreign, deleterious or poisonous substance, and as a result of eating the hay, three of plaintiff's cows died. *Held*: Under Rem. 1927 Sup., Sec. 5836-15 (Uniform Sales Act) there was an implied warrant of

fitness for food for stock and defendant is liable for the resulting damages. *Larson v. Farmers Warehouse Co.*, 61 Wash. Dec. 562, 297 Pac. 753 (1931).

Subdivision (1) of this section of the statute reads: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not) there is an implied warranty that the goods shall be reasonably fit for such purpose." Aside from the actual requirements of knowledge on the part of the seller, and reliance on the part of the buyer it has been held that in order to come within the provisions of this section there must be privity of contract between the parties, *Chysky v. Drake Bros. Co.*, 235 N. Y. 468, 139 N. E. 576, 27 A. L. R. 1533 (1923) *Pelletier v. Dupont*, 124 Me. 269, 128 Atl. 186, 39 A. L. R. 972 (1925) *Carlson v. Turner Centre System*, 236 Mass. 339, 161 N. E. 245 (1928) *Wisdom v. Morris Hardware Co.*, 151 Wash. 86, 274 Pac. 1050 (1929). In construing the section, the "particular" purpose mentioned has been held to be the general purpose for which the article is sold, or it may relate to a more specific purpose, *Minneapolis Steel & Machinery Co. v. Casey Land Agency*, 51 N. D. 832, 201 N. W 172 (1924). *Keenan v. Cherry & Webb*, 47 R. I. 125, 131 Atl. 309 (1925). Whether a given set of circumstances comes within the provisions of subdivision (1) is always a question of fact. In the instant case the evidence was held to support such a finding, and this being the only real question in the case, it should have been readily disposed of. The court has seen fit, however, to raise the additional questions of sale of food for animals, sale of goods by trade names (subdivision 4) and inspection (subdivision 3).

Prior to the adoption of the Sales Act the courts were willing to find implied warranties in the sale of food for present human consumption, the reason given therefor by the American courts being the necessity of protecting human health and life, *Hart v. Wright*, 17 Wend. (N. Y.) 267 (1837) *Lukens v. Freund*, 27 Kan. 664, 51 Am. Rep. 429 (1882) *Chapman v. Roggenkamp*, 182 Ill. App. 117 (1913) *Heinemann v. Barfield*, 136 Ark 500, 207 S. W 62 (1918) *Flessher v. Carstens Pkg. Co.*, 93 Wash. 48, 160 Pac. 14 (1916) *Los Angeles Olive Growers' Ass'n v. Pacific Grocery Co.*, 119 Wash. 293, 205 Pac. 375 (1922) a few jurisdictions extended the doctrine to the sale of food for stock, *Coyle v. Baum*, 3 Okl. 695, 41 Pac. 389 (1895) *Houk v. Berg*, 105 S. W 1176 (Tex. Civ. App. 1907) *Poovey v. International Sugar Feed No. 2 Co.*, 191 N. C. 722, 133 S. E. 12 (1926), while others refused to do so, holding that in such cases a property right only was involved, and not the protection of human health and life, *Lukens v. Freund, supra, National Cotton Oil Co.* v. Young, 74 Ark. 144, 85 S. W 92, 109 A. S. R. 71, 4 Ann. Cas. 1123 (1905) *Dulaney v. Jones & Rogers*, 100 Miss. 835, 57 So. 225 (1912) The Sales Act makes no distinction, as far as warranties are concerned, between the sale of foodstuffs, or any other articles or goods which may be the subject of sale. It would seem, therefore, that in those jurisdictions where the Sales Act has been adopted and is in force, it is not necessary for the courts to discuss the distinctions and rules existing prior to that time, relative to a state of facts covered by the act. It should be observed that in dealing with the food cases, that courts have been inclined to find liability, either through a classification based on absolute liability because of inherent danger, reaching the result in tort without the requisite proof of negligence, or through implied warranty without the usual requirement of privity of contract. Although such classifications seem to conflict with the established rules requiring proof of negligence and privity of contract, it should be remembered that these rules are merely arbitrary, employed to reach a just or desirable end, and that if the application of the usual rules fails to do justice in a particular class of cases, it is inevitable that exceptions will be made. Some such concept seems to have motivated the court in reaching their decisions in the cases of *Mazetti v. Armour* 75 Wash. 622, 135 Pac. 663, 48 L. R. A. (n.s.) 213, Ann. Cas. 1915C 140 (1913) and *Flessher v. Carstens Pkg. Co., supra*, wherein contract and tort liability were discussed, and a consumer permitted to recover against the manufacturer or pro-

ducer, holding that the obligation of the manufacturer should not be based alone on privity of contract, but upon "the demands of social justice." These cases were decided prior to the adoption of the Sales Act in this state, but their salutary effect should not be lost sight of in view of that fact, especially since the retailer or dealer against whom recovery can be had under the Act is in no better position than the consumer in discovering defects in canned or bottled goods. See also, 29 Mich. L. R. 793.

As for the sale of an article by its trade name, the language of the act seems clear enough that, "In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose." Subdivision (4) has been held to be a limitation on subdivision (1), *Matteson v. Lagace*, 36 R. I. 223, 89 Atl. 713 (1914) *Ward v. Great Atlantic & Pacific Tea Co.*, 231 Mass. 90, 120 N. E. 225, 5 A. L. R. 242 (1918) *Aetna Chemical Co. v. Spaulding*, 98 Vt. 51, 126 Atl. 582 (1924) *Barenam v. Kane*, 228 App. Div. 396, 240 N. Y. S. 123 (1930) *Ohio Electric Co. v. Wisconsin-Minnesota Light & Power Co.*, 161 Wis. 632, 155 N. W 112 (1915). Under a strict interpretation of the act, the buyer has no recourse if he purchases an article by its trade name, either against the dealer or the manufacturer, unless it can be classed as a dangerous instrumentality, in which case he has an action sounding in tort if he is injured thereby. Since the basis of liability in warranty cases is justifiable reliance by the buyer on the skill or judgment of the seller, it may be questioned, even where the buyer asks for some one brand, whether he has thereby decided to rely on his own skill and judgment and to release the seller, or whether he is not still relying on the seller's skill and judgment—especially in contemplation of the large number of articles being sold under trade names modernly, and the apparent injustice of placing on the buyer the burden of exercising his own judgment as to the fitness of articles, particularly foods, concerning the production and manufacture of which he generally knows very little, if anything.

Subdivision (3) provides that, "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed." Inspection is indicative of the reliance of the buyer on the skill or judgment of the seller, but not conclusive, *Keenan v. Cherry, supra*, and the buyer should not be held to have relied on his own skill and judgment as to defects which a reasonable inspection would not have disclosed.

The court cites many authorities discussing these problems, which although they are interesting historically, are not of any particular utility in arriving at the conclusion reached, which is a desirable one. In view of the purpose of such acts as the Sales Act—to make more uniform the law governing those subjects in the various states—it would perhaps be a saving of time and effort to confine the authorities to jurisdictions which have decided the question under the provisions of the Uniform Sales Act.

S. D. H.

EVIDENCE—OPINION EVIDENCE—EXAMINATION OF EXPERTS—HYPOTHETICAL QUESTIONS. Defendant shot and killed one Engstrom. Defendant put in a plea of mental irresponsibility at the time of doing the act. At the request of the prosecution, a specialist of mental diseases examined the defendant before the trial. This specialist was in court during the trial, and heard all the evidence of defendant's witnesses. The specialist was then put on the stand and asked, "Assuming all the testimony given by the defendant's witnesses is true and having heard the statements and testimony of the defendant regarding the shooting, what is your opinion as to whether or not the defendant was sane or insane at the time of the shooting?" To this the court added, "Assuming all the testimony to be absolutely true." The specialist then answered that he believed the defendant to be sane.

Held: That this form of hypothetical question was admissible where the witnesses are few and the testimony is not voluminous, complicated or conflicting. *State v. Eggleston*, 61 Wash. Dec. 431, 297 Pac. 162 (1931).

The specific question passed upon in the above case has been frequently discussed by other courts with much contrariety of opinion, but it has not been before directly adjudicated in Washington although the foregoing result was forecast in a dictum in *State v. Spangler* 92 Wash. 636, 159 Pac. 810 (1916)

The general theory of the authorities seems to be the same, namely that the jury must know what facts the expert is assuming as the basis of his opinion, where he does not testify from personal observation. *Kempsey v. McGinnass*, 21 Mich. 123 (1870). The cases also agree that where there is substantial conflict in the evidence, it is reversible error to ask an expert his opinion based "on the testimony he has heard." *Choice v. State*, 31 Ga. 424 (1859) The reason is that before the witness can answer he must resolve the conflict in the testimony in his own mind, by weighing the credibility of the witnesses and thus usurp the fact-finding function of the jury. *Elgin Tract Co. v. Wilson*, 217 Ill. 47, 75 N. E. 436 (1905). Likewise where the testimony is so voluminous as to be not easily retained in memory by the jury, it would seem to be error to put the question to an expert "upon the evidence." *Porter v. Hetherington*, 172 Mo. A. 502, 158 S. W 469 (1913). The reason is that it would be impossible for the jury to know which facts the expert used as his basis and whether or not he had forgotten some important one which might influence his opinion.

The point of divergence of the authorities is in those cases in which there appears to be no substantial conflict in the evidence, and the evidence is not voluminous. Those which admit the question to be put, as in the main case, do so upon the ground that there is little likelihood of the expert and the jury having a different view of the facts upon which the expert's answer is based. In *Jones v. Chicago R. Co.*, 43 Minn. 279, 45 N. W 444 (1890), the court said that this being true, the practice would be countenanced for convenience and to save time. It seems that a majority of the courts have adopted this rule of convenience. However, there are many jurisdictions which have refused to bend to this practice.

Among these is the English case of *Regina v. Frances*, 4 Cox. C. C. 57 (1849), where Alderson and Cresswell refused to allow a man of medical science to pass upon the insanity from "facts stated by the witnesses assuming them to be true." But see *Macnaghten's Case*, 10 Cl. & Fin. 200, 1 C. & K. 130 (H. L. 1843). The federal courts appear to follow the English rule. *Mfgr's Acc. Indemnity Co. v. Dorgan*, 58 Fed. 945, 22 L. R. A. 620 (1893) The same is true of New York. *Link v. Sheldon*, 136 N. Y. 1, 32 N. E. 696 (1892).

It may be well argued with the majority of cases and the main case that it is not reversible error to admit such questions where clearly there is no conflict and there is no great amount of evidence, for likely the expert and jury will understand alike, but it is submitted that as a matter of good practice this method should not be pursued. The argument of convenience and time-saving should not carry much weight, for in a case so simple as to permit the form of question it would be equally as simple to restate the facts in the hypothetical question, in which event, of course, all doubt is removed, whether the jury has in mind the facts upon which the opinion is based. H. R. S.

ADVERSE POSSESSION—COLOR OF TITLE—CLAIM OF RIGHT IN GOOD FAITH. Defendant bought two forty-acre tracts less a strip of land on which plaintiff maintained a canal with a fence alongside. From the facts that defendant used land up to this fence for cultivation and pasturage, planted a row of cherry trees and constructed permanent irrigation ditches, the trial court found that defendant thought the fence to be the true boundary and for more than ten years prior to suit held this land "with color of title and claim of right." The Supreme Court held: "The evidence in this case preponderates in favor of the findings of fact, all of which sustain the judgment" for the defendant. *Pacific Power & Light Co. v. Bailey*, 60 Wash. Dec. 444 (1931).

Washington has two statutes under which one may obtain title by adverse possession; these are generally known as the seven-year statute

(Pierce's Code §7538) and the ten-year statute (Pierce's Code §8161), the latter statute being the one on which the defendant relied. The requirements of the former as set forth in *Lara v. Sandell*, 52 Wash. 53, 100 Pac. 166 (1909), are: (1) Claim and color of title made in good faith; (2) actual, open and notorious possession continued for seven successive years, and (3) payment of all taxes legally assessed during that time. This note will be confined to the first division.

"Claim of title," expressed in the seven-year statute as "claim of right," may be defined as the use of property as one's own, indicated by such means as cultivation, fences, improvements, drainage, clearage; *Kent v. Holderman*, 140 Wash. 353, 248 Pac. 882 (1926) or buildings; *People's Savings Bank v. Bufford*, 90 Wash. 204, 155 Pac. 1068 (1916) possession alone not being sufficient; *White v. Branchick*, 60 Wash. Dec. 473, 295 Pac. 929 (1931). A mere squatter is not deemed to have a claim of right; *Lohse v. Burch*, 42 Wash. 156, 84 Pac. 722 (1906) nor a party who enters after being refused permission, and five years later in a tax foreclosure proceeding names the defendant as owner. *Cameron v. Bustard*, 119 Wash. 266, 205 Pac. 385 (1922) though a mistaken belief as to a true boundary is sufficient basis of a claim of right; *King v. Bassindale*, 127 Wash. 189, 220 Pac. 777 (1923) *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936 (1901). From the facts of the principal case it would seem that the defendant had a claim of right to the strip of land in dispute.

"Color of title" does not appear to be completely defined by any Washington case. It is quite necessary, however, that the adverse claimant have a paper title; Pierce's Code 7538; *Skansi v. Novak*, 84 Wash. 39, 146 Pac. 160 (1915). Such a paper title has been held to be supplied by a void tax deed; *Ward v. Huggins*, 7 Wash. 617, 32 Pac. 740 (1893) a void guardian's deed; *Hamilton v. Witner*, 50 Wash. 689, 97 Pac. 1084, 126 A. S. R. 921 (1908) a void sheriff's certificate of sale; *Philadelphia Mortgage and Trust Co. v. Palmer*, 32 Wash. 455, 73 Pac. 501 (1903) a state deed overlapping a prior Federal grant; *Aspinwall v. Allen*, 144 Wash. 198, 257 Pac. 631 (1927) an administrator's deed; *Miller & Sons v. Simmons*, 67 Wash. 294, 121 Pac. 462 (1912) and the court intimates that a deed issued by a squatter would be sufficient if there was complete proof of it; *Northern Pacific Railway v. Concannon*, 75 Wash. 591, 135 Pac. 652 (1913) 96 Wash. 699, 165 Pac. 657 (1917) but a will does not give color of title to executors, since they are limited by the terms of the will; *Korsstrom v. Barnes*, 156 Fed. 280 (Wash.) (1907). An instrument to operate as color of title must purport to convey title to the grantee or those with whom he is in privity, and must describe and purport to convey the land in controversy. it cannot be aided by parol evidence. *Schmitz v. Klee*, 103 Wash. 9, 173 Pac. 1026 (1918). The defendant in the principal case did not produce a deed purporting to convey the land in controversy. so it would seem that either the court has made an incorrect finding, or color of title means something different under the ten-year statute than under the seven-year statute.

But in distinguishing our two statutes under which one may obtain property by adverse possession, our court has held that color of title is not needed under the ten-year statute; *Hesser v. Siepmann*, 35 Wash. 14, 76 Pac. 295 (1904), it being sufficient that the claimant show that he was holding under a claim of right; *Williamson v. Horton*, 157 Wash. 621, 289 Pac. 1026 (1930). However, our court has manifested that the requirement of color of title could be substituted for claim of right under the ten-year statute having said, " there must be a disseizin at some particular time and under color of title *or* claim of right ". *McNaught-Collins Improvement Co. v. May*, 52 Wash. 632, 101 Pac. 237 (1909). As the defendant is claiming under the ten-year statute, which we have just seen does not require color of title; *Hesser v. Siepmann, supra*, the decision in the principal case is probably correctly decided; *King v. Bassindale* (and authorities there established), 127 Wash. 189, 220 Pac. 777 (1923) but it is unfortunate that the courts permitted the words "color of title" to slip into the opinion.

A. D.