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Supreme Court Decisions

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Supreme Court Decisions

WORKMEN'S COMPENSATION—LIABILITY OF CORPORATION WHICH MERELY CONTRACTS WITH ANOTHER CORPORATION TO HANDLE ITS PRODUCTS—*Bukowich, et al. vs. The Ford Motor Company, et al.*—No. 13843—*Decided June 29, 1936—Opinion by Mr. Justice Bouck.*

Bukowich was granted an award of compensation by the Industrial Commission against the Ford Motor Company, which award was vacated by the District Court. Bukowich was an employee of Mansfield Motors, Inc., a corporation, at Glenwood Springs. This corporation was merely a dealer in Ford automobiles and trucks. The Mansfield Motors, Inc., purchased and paid for a truck in Denver, Colorado, and the plaintiff was injured while driving this truck from Denver to Glenwood Springs and fell asleep at the wheel while approaching Glenwood Springs and the truck ran off the road into the Colorado River, whereby he suffered injuries.

1. The claimant first filed his claim solely against the Mansfield Motors, Inc., a corporation, by whom he was employed. He plainly regarded himself as an employee of that corporation and not of the Ford Motor Company. The evidence clearly establishes that he was never an employee of the Ford Motor Company but was solely an employee of Mansfield Motors, Inc., a Ford dealer, and he had no cause of action against the Ford Motor Company.

2. Mansfield Motors, Inc., although selling Ford products, was in no sense a dealer exclusively in these products as this company while selling Ford products contracted for and sold the products of various other companies.

3. Under the evidence in this case, the Ford Motor Company was not a corporation operating, engaging in, or conducting a business by contracting out any part or all of the work within the meaning of Section 49 of the Industrial Act.

4. Therefore, Bukowich was not an employee of the Ford Motor Company and the judgment below adjudging that the Ford Motor Company was not liable for compensation was right.—*Judgment affirmed.*

DISMISSAL—PRACTICE—EX PARTE DISMISSAL—POWER OF COURT TO SET ASIDE—*Pittman, et al. vs. Marshall*—No. 13948—*Decided June 29, 1936—Opinion by Mr. Justice Bouck.*

Plaintiff below issued a summons which was duly served. The summons was issued before a complaint was filed. Within the ten days for filing the complaint negotiations were had toward a settlement. An

ex parte application of defendant for dismissal for failure to file the complaint was made and cause dismissed. Plaintiff filed a motion to set aside the dismissal and the order of dismissal was set aside.

1. Where a cause has been dismissed ex parte on application of the defendant for failure to file the complaint within ten days after the issuance of the summons it was proper for the court to set aside the dismissal and permit the plaintiff to dismiss without prejudice in order that he might be entitled to bring another suit on the same cause of action.—*Judgment affirmed.*

Mr. Chief Justice Campbell not participating.

DEEDS—MORTGAGES—CONSTRUCTION—ONCE A MORTGAGE ALWAYS A MORTGAGE—ACCOUNT—*Taylor, et al. vs. Briggs, et al.* —No. 13455—*Decided June 29, 1936—Opinion by Mr. Justice Hilliard.*

A suit was filed June 1, 1931, by Taylor and his wife to have an instrument, absolute in terms, under which Briggs and Land Investment Company claim to hold, adjudged to be a mortgage, with privilege to redeem. Continental Oil Company held an oil lease under Briggs and Land Company, cancellation of which the Taylors prayed, but during trial it was agreed that the lease should be recognized and follow the title. Judgment of dismissal of the Taylor complaint was entered below.

1. Where a mortgagor and mortgagee arrange for a friendly foreclosure of a second mortgage against the property for the benefit of the mortgagor as well as the mortgagee any title acquired thereby by the mortgagee will be deemed to be held for the benefit of the mortgagor under such agreement.

2. Under such circumstances the title acquired by the mortgagee through the foreclosure of the mortgage, while absolute on its face, is in effect a mortgage. It became so, not because of fraud or mistake, but because by competent evidence an equity superior to its terms was established.

3. It is the spirit of the original transaction, not the form, that enables the court to perceive and moves it to declare the refinements of justice.

4. The character of the transaction is fixed at its inception and is what the intention of the parties makes it. The form of the transaction and the circumstances attending it are the means of finding out the intention. If it was a mortgage in the beginning it remains so, in accordance with the maxim "once a mortgage always a mortgage."

5. Where it appears that the mortgagee's claim was less than $5,000 and in selling the oil lease on the property he was given a down payment of $25,000 and reserved royalties in excess of $12,000 he could not arbitrarily dispose of Taylor's recognized equity in the prop-

erty. He was not at liberty thus to deal with his helpless debtor where he had failed to invoke his remedy of foreclosure.

6. Under the facts in this case Briggs was only entitled to half of the principal and interest on his debt, taxes on the property paid by him, expense of foreclosure and other proper expenditures allowed and should be required to account for the excess above this received from the oil lease.—*Judgment reversed.*

Mr. Justice Holland dissents.

BANKS—CORPORATIONS—WHAT CONSTITUTES PRACTICE OF LAW BY CORPORATIONS—*The People vs. The Denver Clearing House Banks, et al.*—No. 13583—*Decided June 29, 1936—Opinion by Mr. Justice Burke.*

Original proceedings against certain banks to prevent them from practicing law.

1. Corporations cannot practice law.
2. Practice of the law is not limited to practice before the courts.
3. Practice of the law includes the drafting of documents which of necessity must be presented to, and their legality passed upon by, the courts.
4. The drawing of wills is the practice of law.
5. The drafting of living trust indentures and life insurance trust agreements, and giving legal advice to the executors of such documents, is the practice of law.
6. The following rule was adopted by the supreme court effective September 1, 1936: "Practicing law, forbidden to persons not thereto duly licensed, is not limited to practice before the courts. Corporations shall not practice law. The practice of drafting wills, living trust indentures and life insurance trust agreements is the practice of law and counsel for executors and trustees named therein may not act as counsel for their testators or creators."

Mr. Chief Justice Campbell not participating. Mr. Justice Bouck, desiring time to consider the question, did not vote, but reserved the right to file a separate opinion.

EMBEZZLEMENT — SUFFICIENCY OF EVIDENCE — INSTRUCTIONS — RECORD OF BOARD OF DIRECTORS—VERBAL EVIDENCE THEREOF—*Lewis, et al. vs. The People*—No. 13614—*Decided June 29, 1936—Opinion by Mr. Justice Young.*

Thomas L. Lewis, Miles G. Saunders and Ethel L. Westcott were convicted of embezzlement of certain monies from the Railway Savings and Building Association, a corporation.

1. Evidence examined and held sufficient to submit to the jury the question of conversion of the monies of the Railway Savings and Building Association.

2. In order to constitute the crime of embezzlement there must not only be a conversion of the monies or personal property, but there must be evidence of a criminal intent in making the conversion.

3. Evidence examined and held to be insufficient to prove a criminal intent in making the conversion.

4. In a criminal action of embezzlement where the defendant believed that he had a right to a part of the money as compensation and so converted it he would not be guilty of embezzlement, because his action is predicated on a mistake as to his right in the thing taken which negatives the specific intent to do what the law inhibits, namely, the taking of the property of another with intent to convert it to his own use.

5. An unlawful conversion alone is never conclusive as against the defense of good faith supported by evidence of an honest claim of right.

6. The court properly refused defendant's motion for an instructed verdict of not guilty.

7. Evidence of independent transactions in nowise connected with the alleged act of embezzlement were erroneously admitted.

8. Evidence by an accountant, which shows on its face an incomplete investigation, was improperly admitted.

9. Where copies of the public record duly sworn to by the officer of the corporation were admitted in evidence it was error to permit the district attorney on cross-examination to attempt to impeach the public record so introduced by him that the officer swearing to the report knew nothing in regard to the matter therein set forth.

10. Oral evidence is admissible to prove what actually occurred at a meeting of the board of directors of the corporation notwithstanding there are no written minutes of the action taken.

11. It was error for the court to refuse to submit to the jury an instruction to the effect that an order or resolution made or adopted by a board of directors at a meeting of such board which has been omitted from the minutes, if proved to have been made or adopted, it is as valid and effective as if entered in minutes. The defendant was entitled to an instruction that if the defendant was informed and advised by the attorney for the Railway Savings and Building Association that such defendant had the legal right to take and receive commissions on the sales of stock made in the office of the association, and overriding commissions on stock sold by sub-agents, and that such defendant in good faith believed and relied upon such advice so received the money charged in the information to have been embezzled, relying upon such information and advice of such attorney, then and in that event a verdict of not guilty should be returned as to said defendant.—*Judgment reversed.*

Mr. Justice Hilliard, Mr. Justice Bouck and Mr. Justice Holland concur. Mr. Chief Justice Campbell, Mr. Justice Burke and Mr. Justice Butler dissent.

MUNICIPAL CORPORATIONS—LIABILITY FOR ACCUMULATION OF ICE ON SIDEWALK CAUSING INJURY—*City of Alamosa vs. Johnson* —No. 13749—*Decided June 29, 1936*—*Opinion by Mr. Justice Butler.*

In a personal injury action, Julia E. Johnson recovered judgment against the City of Alamosa. The city seeks a reversal of the judgment. She fell on rough ice permitted to remain on the sidewalk at the end of a bridge where she was required to step down some eight inches off the bridge walk and broke her right leg.

1. The fact that there is ice on a sidewalk, due to natural rather than artificial cause, and that it is slippery, unless there is a bunch or projection or a pile of it that makes the walk uneven and likely to cause stumbling, does not ordinarily indicate such negligence on the part of a municipality as to make it liable.

2. A municipality is required to exercise ordinary care to keep its sidewalks in a reasonable safe condition for travel.

3. What is ordinary care in a given case must be determined by the locality, climate, weather conditions, and other circumstances.

4. Under the circumstances of this case it was a jury question whether the city's conceded failure to take any steps to obviate or lessen the danger was or was not the exercise of ordinary care.

5. Lack of funds with which to repair is no defense.

6. Refusal of the court to give requested instruction is proper. —*Judgment affirmed.*

WORKMEN'S COMPENSATION—STATUTE OF LIMITATIONS—ISSUES TO BE DETERMINED BY COMMISSION—EFFECT OF FORMER OPINION—*Black Diamond Fuel Company, et al. vs. Frank, et al.* —No. 13910—*Decided June 29, 1936*—*Opinion by Mr. Justice Holland.*

Frank filed a claim with the Industrial Commission for compensation. The claim was rejected because no notice of claim was filed within six months. This was affirmed by the district court and upon review the supreme court reversed it and remanded the case solely on the issue of how much compensation should be awarded. Thereupon further hearing was had and dispute arose as to what the issues were. The claimant rested solely on the amount of compensation on the theory that the question in statutes of limitations had been decided in the former proceedings in error.

1. Where the commission did not take the opportunity to fully hear in the term of the issues this court should not have precluded the parties from following the issues first presented to a conclusion, nor should the commission have done so.

2. It should have been determined first whether the injury occurred in the course of employment; whether it was compensable;

whether the medical treatment received by claimant could properly be held the payment within the statute precluding the running of the statute of limitations on the question of notice.

3. Our former decision in Frank vs. Industrial Commission is overruled and the judgment in the present case is reversed and the cause remanded and to be transmitted to the commission to hear and determine all three questions.—*Judgment reversed.*

Mr. Justice Young concurs in part and dissents in part. Mr. Justice Hilliard and Mr. Justice Bouck dissent.

WORKMEN'S COMPENSATION—PERMANENT INJURY FROM TWO DIFFERENT ACCIDENTS—APPORTIONING AWARD BETWEEN TWO DIFFERENT INSURANCE CARRIERS—*The Century Indemnity Company vs. Klipfel, et al.*—No. 13904—*Decided June 29, 1936—Opinion by Mr. Justice Young.*

Klipfel was injured in the course of his employment and compensation was carried by The Century Indemnity Company. The insurance carrier paid temporary disability. The claimant returned to work and was thereafter injured in a second accident at which time the Travelers Insurance Company was carrying the compensation. At a hearing it was determined, based upon medical testimony, that the claimant suffered permanent injury which was a result of both accidents which could not be segregated and each insurance carrier was ordered to contribute one-half and the Travelers thereupon made a settlement with claimant and The Century Indemnity Company brought proceedings in error.

1. Any party to a judicial proceeding, against whom a several award or judgment has been entered may accept that award or judgment as final and make a settlement thereon.

2. The commission was acting within its jurisdiction in making an award on a rehearing where it finds a mistake in a former award and there is evidence to support the findings that such mistake has been made.

3. In this case, the commission did not act in the matter of changing its award until after it had heard additional evidence and there being sufficient additional evidence to show a mistake the award was properly made.

4. The medical testimony is sufficient to sustain the findings of the commission that the claimant was suffering a ten per cent disability as a working unit by reason of these two accidents.

5. The liability of each of the two insurance carriers to pay compensation is a contractual liability and is a several and not a joint obligation.

6. Each insurance carrier contracted to indemnify the employer for a portion of a disability caused by two accidents for which the employer is unquestionably liable and it was within the province of the

commission to prorate the liabilities between them.—*Judgment affirmed.*

Mr. Justice Bouck dissents.

HUSBAND AND WIFE—RIGHT OF ACTION OF WIFE WHERE SHERIFF SHOOTS HUSBAND—*People vs. United States Fidelity & Guaranty Company*—No. 13723—*Decided July 6, 1936*—*Opinion by Mr. Justice Bouck, acting Chief Justice.*

Mrs. George Putnum, as relatrix, in the name of the people brought suit in the court below to recover on the official bond given by the sheriff of Costilla county. Besides alleging the execution and delivery of the bond the complaint alleged that while her husband was traveling by automobile on the highway of Costilla county that the sheriff and his deputies in attempting to arrest her husband as a bandit shot and killed him; that they were without any warrant for his arrest and that he had not violated any law and that the officers were entirely without knowledge or information that he was a bandit and that he was the sole support of the relatrix and of his minor child. Demurrer to the complaint was sustained in the court below.

1. No right was given at common law to the wife for the killing of her husband.

2. The only right in the wife to pursue a remedy for wrongful death of her husband is that given by compiled laws of 1921, section 6302.

3. Under the Colorado statute, no right is given to the wife to recover for loss of support occasioned by the death of her husband outside of the remedy provided by the above statute and this case was not covered by the statute.

4. No right is given in Colorado to any contracting party to recover for loss resulting from the incidental interference with his or her contractual rights by the killing of the person with whom he or she has entered into contract, whether that person be his or her spouse or not.

5. Since the legislature has not seen fit to grant a right of recovery in such case there is no power in the court to grant a right of recovery.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—BANK EMPLOYEE CARRYING DEPOSITS FROM ONE TOWN TO ANOTHER—INJURY BY ACCIDENTAL DISCHARGE OF GUN IN AUTOMOBILE—ACCIDENT ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*The Security State Bank at Sterling, et al. vs. Propst, et al.*—No. 13829—*Decided July 6, 1936*—*Opinion by Mr. Justice Young.*

This is a case in which the widow of a deceased employee filed with the Industrial Commission a claim for compensation. The claim was allowed. Subsequently suit was instituted in the district court

by the employer and insurer to vacate the award and judgment was for claimant. Claimant's husband was assistant cashier of the bank at Sterling, Colorado. He lived at Merino twelve miles distant and frequently brought deposits from the bank's customers at Merino on his daily trips to Sterling. He was injured by the accidental discharge of a revolver that he carried in the automobile from the result of which he died.

1. Where a bank employee, in accordance with a custom approved by hsi superiors, brings deposits of money from a town other than that in which the bank is located and is injured before arriving at the bank, his place of work, such injury occurred in performing his services arising out of and in the course of his employment.

2. If, at the time of the injury, the deceased was doing what he expressly or impliedly was directed by his superiors to do and the latter were vested with the authority to give him directions, then he was acting within the course of his employment.

3. Where an employee is doing something which, though not strictly in the line of his obligatory duty, is still doing something incidental to his work, and while doing the same is injured, the accident causing the injury may properly be held to arise out of and in the course of employment.

4. The fact that he was injured by a gun carried in his car and when it further appears that the president of the bank knew of the gun being carried and made no objection to it and it further appearing that he had obtained a permit from the sheriff for the carrying of the gun and it further appearing that the gun was for the protection of the deposits that the employee had gathered up, the carrying of the gun in the car was a reasonable precaution for the employee to adopt in carrying out his duties.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—DETERMINING AMOUNT OF COMPENSATION—DEDUCTING TIME SPENT IN COLLEGE—*The Lindner Packing and Provision Company, et al. vs. The Industrial Commission of Colorado, et al.*—No. 13970—*Decided July 20, 1936*—*Opinion by Mr. Justice Young.*

The district court sustained an award of compensation to the dependents of Joseph M. O'Grady, whose death was proximately caused by an accident arising out of and in the course of his employment. The only issue involved is the amount to which the dependents are entitled. For eight months of the year immediately preceding the accident the deceased was registered as a student and attended Regis College. During vacation periods he worked for his father. The commission found his wages earned by such employment to be the sum of $352.36. The question is whether the time spent in college which was 32 3/7 weeks shall be considered as time in which he was engaged in business for himself.

1. The workmen's compensation statute provides, among other things, that in case where the injured employee has been ill and unable to work in consequence of such illness or has been in business for himself during the twelve months immediately preceding the accident, his average weekly earnings shall be computed by dividing the total amount earned during such twelve months by the sum representing the difference between fifty-two and the number of weeks during which such employee was so ill or in business for himself.

2. Deceased's services were not on the labor market while he was in school. Since his services were withdrawn from the labor market for a part of the year by reason of a definite and regular program that occupied his time, such as going to college, a program that the claimant adopted and made it his business to carry out, a program that under the record excluded the possibility of his services being on the labor market while it was being carried out, the deceased may reasonably be said to have been in business for himself while he was attending college.—*Judgment affirmed.*

ESTATES—RIGHT OF ADMINISTRATRIX TO BRING SUIT TO RECOVER REAL PROPERTY—MOTION TO DISMISS—*Weaver, as Administratrix vs. Weaver*—No. 13968—*Decided July 13, 1936—Opinion by Mr. Justice Hilliard.*

The administratrix brought suit in the district court to recover certain real estate claimed to have belonged to her intestate for the purpose of being available for the payment of debts allowed against the estate. The suit was authorized by the probate court. Subsequent to lodging the record on error, the defendant in error died and thereafter counsel representing him at the trial moved that the administrator of his deceased client's estate be substituted and counsel for plaintiff in error consented and substitution was ordered. Thereafter, defendant in error moved to dismiss the writ of error on two grounds. First, that the action does not survive as against the administrator of an estate, and second that the administrator has no cause of action as the heirs are the only persons who can maintain proceedings to recover real estate.

1. While the administratrix could maintain the suit in the first instance, the question of whether she may do so on error, which is a new suit against the administrator of defendant in error, not decided at this time, but the question reserved for final determination later.

2. Where it appears that there was not sufficient assets in an estate to pay claims the administratrix with permission of the county court may bring suit to recover real estate claimed to have belonged to her intestate for the purpose of paying the debts of the estate.

3. Motion to dismiss denied.