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# Supreme Court Decisions

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# Supreme Court Decisions

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS—PROCEEDINGS—REVIEW BY COURT—*Lockard v. Industrial Commission, et al.*—No. 13302—*Decided August 2, 1933—Opinion by Mr. Justice Burke.*

Plaintiff in error was plaintiff below. Plaintiff petitioned the Industrial Commission to reopen as of its own motion his claim for compensation, which case had been theretofore closed. The petition was denied. Thereafter plaintiff filed a claim with the Commission for subsequent disabilities, other than those mentioned in his original claim, but which arose out of the same accident. The Commission entered its award denying relief to the plaintiff. On appeal by the plaintiff to the District Court the award was affirmed. Plaintiff sued out writ of error.

1. Plaintiff's claim for subsequent disabilities was no more than another petition to the Commission to reopen the case as of its own motion. Such a petition is discretionary with the Commission, and its decision will be reversed only for fraud or a clear abuse of that discretion.—*Affirmed.*

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WATERS—CHANGING POINT OF DIVERSION—SENIOR AND JUNIOR APPROPRIATORS—RIGHTS OF—TERMS IMPOSED IN DECREE CHANGING POINT OF DIVERSION—*The Farmers Reservoir and Irrigation Company vs. Town of Lafayette, et al.*—No. 12896—*Decided August 2, 1933.—Opinion by Mr. Justice Burke.*

The town of Lafayette brought this action to change the point of diversion of certain of its water which it uses for domestic purposes. The plaintiff company having an appropriation for irrigation from the same stream, South Boulder Creek, and claiming that such change would be detrimental to it, demurred, which demurrer was overruled, the cause tried to the court, which permitted the change in point of diversion under terms and conditions which did not injuriously affect the vested rights of other appropriators.

The plaintiff company insists that its demurrer should have been sustained because the application of the town of Lafayette shows a contemplated enlarged use of a different character; that the decree shows that the same was adjudged to its injury; that the Howard Ditch Co. should have been made a party and its claim of the latter's abandonment of a portion of its decreed priority litigated.

1. The town of Lafayette had the burden of showing no injury.

2. Return waters should be taken into consideration in determining the right of lower senior appropriators to have their full decreed priorities pass the headgate of upper junior appropriators.

3. Abandonment, heretofore excluded as an issue in actions to change the point of diversion, may be shown.

4. Junior appropriators cannot complain of changed conditions which inflict no substantial injury upon them.

5. The right of petitions to such changes depends largely upon the facts of each particular case and a decree granting a change, based upon competent testimony, will not be disturbed.

6. It was alleged that the Howard company had abandoned a portion of its original appropriation and it is contended that the company's motion to make it a party should have been granted but there is no contention that the particular water whose point of diversion is changed by this decree, has been abandoned.—*Judgment affirmed.*

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WORKMEN'S COMPENSATION—WAIVER OF TIME LIMIT ON FILING CLAIMS—CONCLUSIVENESS OF COMMISSION'S FINDINGS OF FACT—*Industrial Commission of Colorado and Frank X. Meile vs. Co-Operative Oil Company*—No. 13276—*Decided August 7, 1933.—Opinion by Mr. Justice Bouck.*

Claim for compensation by an injured employee under the Workmen's Compensation Act of Colorado. On the original hearing before the referee the claim was denied on the ground that at the time of the injury the company employed less than four persons and so was not subject to the Act. On employee's petition for review the Commission held a further hearing, determined that the company did employ as many as four persons, and allowed compensation. The company sued in the District Court to set aside the award, interposing there for the first time the defense that notice of claim for compensation had not been filed with the Commission within six months after the injury, as required by the Act. The court overruled this defense but held that the company did not employ as many as four employees and set aside the award. Employee assigns error and the company assigns cross-error.

Held:

1. By its delay in pleading the bar of the statutory six-months limitation, the company waived this defense.

2. The determination of the Commission that the company employed as many as four employees was based on conflicting evidence, and therefore cannot be disturbed by the courts. Judgment reversed, with directions to reinstate the Commission's award.

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WORKMEN'S COMPENSATION—DEATH BENEFIT TO WIDOW NOT RESIDING IN UNITED STATES—HUSBAND AND WIFE—DOMICILE—*The Colorado Fuel and Iron Company vs. The Industrial Commission*—No. 13234—*Decided August 7, 1933.—Opinion by Mr. Justice Bouck.*

1. Employee, who had been regularly receiving compensation for injury which he had suffered in 1925, died in 1931 from cause not

resulting from such injury. At time of his death there was still unpaid $2,172.58 of compensation awarded him for permanent partial disability. His widow applied for payment to her of entire unpaid balance and Industrial Commission awarded it to her. District Court affirmed such award.

2. If court can say, under the evidence, that widow was residing in Mexico when her husband died, she was entitled to only one-fourth of unpaid and unaccrued portion of awarded compensation under C. L. 1921, Sec. 4440, as amended by Ch. 201, S. L. 1923, Sec. 11 (C. L. Suppl. 1932, Sec. 4440).

3. In absence of affirmative evidence to contrary, wife's domicile is presumed to merge in that of husband; she is presumed to live with her husband in his home. Underlying thought of dependency is duty to support and under Workmen's Compensation Act wife is "conclusively presumed to be wholly dependent" unless it is shown that she is voluntarily separated and living apart from husband at time of husband's injury or death and was not dependent.

4. Under facts shown and with no evidence to overcome the usual presumptions, it sufficiently appears that widow resided in Mexico with her husband up to time of his death.

5. The residence at time of injury is not the only residence to be considered on question of non-residence in United States; C. L. 1921, Sec. 4431, as amended by S. L. 1923, Ch. 201, Sec. 9 (C. L. Suppl. 1932, Sec. 4431) has to do with fact of dependency and not with amount to be paid.—*Judgment reversed.*

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REPLEVIN — FACTS REQUIRE REVERSAL — *Randall vs. Mansfield* — No. 13300—*Decided August 7, 1933.—Opinion by Mr. Justice Bouck.*

Mrs. Mansfield brought replevin against Carrie Randall and her husband and she recovered first before a justice of the peace and then in the County Court of Pueblo County, George B. Baker, judge.

The evidence disclosed that plaintiff had a claim against Mrs. Randall's husband but none against Mrs. Randall. The property reached belonged to Mrs. Randall and she was not liable. The judgment was reversed on the facts. No principle of law was announced, as none was involved.

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PLEADINGS—COMPLAINT—SUFFICIENCY OF—*People for the Use of County Commissioners vs. Brown, et al.*—No. 12762—*Decided August 7, 1933.—Opinion by Mr. Justice Hilliard.*

1. Defendants were the County Treasurer of Montezuma County and the sureties upon his bond. Defendant Brown, the Treasurer, upon learning that certain properties were to be redeemed from tax sales, without making this fact known to the Board of Commissioners,

obtained from them authority to settle the tax claims at a figure less than the full amount due. He then, in a dummy name, bought the certificates for the smaller amount. When the properties were redeemed, he kept to his own use the difference between the amount he had paid and the amount redeemed for. Defendant filed motion to make more specific the facts upon which it was contended that the owners of the properties were about to redeem. The court sustained the motion. The plaintiffs refused to amend as directed and elected to stand on the complaint, whereupon judgment was given for the defendant, to which error is assigned.

2. The details contemplated in the court's ruling would be but evidence of ultimate facts already appearing, to plead it would be subversive of recognized rules of pleading. Although the complaint could have been more simply drawn, it does state a cause of action.

3. A County Treasurer is not permitted to be interested in tax sales. He should be disinterested in the discharge of his official duties. —*Judgment reversed and remanded.*

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CONDITIONAL SALES — CONFLICT OF LAWS — NOTICE — *American Equitable Assurance Co. v. Hall Cadillac Co.*—No. 12853—*Decided August 7, 1933.—Opinion by Mr. Justice Bouck.*

1. Where one unauthorizedly removes an automobile which was covered by a conditional sales agreement from another state to Colorado, and here disposes of said automobile to an innocent purchaser, the rights of such purchaser are paramount to those of the claimant under the conditional sales agreement.

2. A conditional sale contract, even though valid outside of Colorado, cannot be here asserted against one who, in good faith and without notice of defect in title, purchases such property from one having open possession of articles sold.—*Judgment affirmed.*

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EMPLOYMENT—QUESTIONS OF FACT—CONTRACT—*John N. Stoddard and The Exploration Company vs. Philip Kuhn*—No. 12812—*Decided August 15, 1933.—Opinion by Chief Justice Adams.*

Defendant in error was allegedly employed to do certain acts in and about the office of plaintiff in error for which claim is made of quite substantial salary.

1. Where defense is based upon the contention that the salary claimed is ridiculous and impossible considering services to be performed, this is exclusively a matter for the jury to decide, and the Supreme Court will not reverse such decision once it has been given. —*Judgment affrmed.*

MOOT QUESTIONS—ACTIONS IN PERSONAM AND IN REM—*Lehrman Mercantile Company v. C. M. Ireland*—No. 13321—*Decided August 15, 1933.—Opinion by Chief Justice Adams.*

Plaintiff paid unto defendant the amount ordered in the judgment previously rendered by the District Court, and subsequently prosecutes a writ of error.

1. Court will not give its opinion on moot questions or abstract propositions.

2. It is immaterial whether previous judgment was in rem or in personam, for it is now moot.—*Writ dismissed.*

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NEGOTIABLE INSTRUMENTS—DEFENSES THERETO—SET-OFF—*J. M. Daugherty vs. The White Eagle Oil Corporation*—No. 13351—*Decided August 15, 1933.—Opinion by Chief Justice Adams.*

Plaintiff in error purchased gasoline at a certain price, which price was subsequently increased. However, the defendant continued to buy the gasoline, and later gave his note for the amount owed, for which note the plaintiff brought suit, and obtained judgment. Defendant counterclaims for difference in the two purchase prices.

1. No fraud or mistake is alleged, and the defendant's voluntary signature to note fixes the amount of his obligation.

2. "One who gives a note for the payment of a debt after the same was contracted waives all defenses of which he had full knowledge at the time such settlement was made."—*Judgment affirmed.*

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RESISTING OFFICER—JUDGMENTS AND DECREES OF COURTS—*P. C. Feste vs. People*—No. 13319—*Decided August 15, 1933.—Opinion by Mr. Chief Justice Adams.*

1. Defendant Feste resisted and hindered a constable in the latter's attempt to execute a writ of restitution in unlawful detainer, issued by a justice of the peace. Defendant was not a party to the unlawful detainer proceedings. The writ showed on its face that plaintiff in the forcible entry and detainer proceedings had obtained a judgment. Defendant was convicted of obstructing, opposing and resisting an officer in the execution of his duties. He assigns error on several points of evidence (on each of which the Supreme Court finds that he is not sustained by the record) and on the ground that the unlawful detainer proceedings were irregular for lack of proof of a written demand for possession or payment of rent.

Held: Defendant not being a party to the unlawful detainer proceedings, and the writ of restitution appearing on its face to have been issued from competent authority and with legal regularity, any lack of proof in the unlawful detainer proceedings of a proper demand for possession or rent does not concern the present defendant and does not constitute any defense.—*Judgment affirmed.*

HABEAS CORPUS—WRONGFUL CONVICTION—JUVENILE COURT—JURISDICTION OF—DISTRICT COURT—JURISDICTION OF—*Petition of Phillips for Writ of Habeas Corpus*—No. 13283—*Decided August 15, 1933.—Opinion by Mr. Chief Justice Adams.*

1. Petitioner was convicted in the Juvenile Court. Inasmuch as he was an adult at the time of his conviction, the conviction was unlawful, the Juvenile Court having exceeded its jurisdiction. Pursuant to the petition, the District Court ordered the prisoner brought before it. The warden of the penitentiary acknowledged service of the writ and moved to quash it on the ground that the District Court had no jurisdiction. Petitioner assigned error.

2. It was settled in Abbott vs. People, 91 Colo. 510, that the Juvenile Court exceeded its jurisdiction when it tried and convicted adults.

3. The contention of the Attorney General that the District Court could not by habeas corpus review the decision of courts over which it has no appellate jurisdiction is unsound. The Juvenile Court had no jurisdiction at all.—*Judgment reversed.*

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CRIMINAL LAW—SUFFICIENCY OF EVIDENCE—*Reger v. The People*—No. 13366—*Decided August 24, 1933—Opinion by Mr. Justice Butler.*

Fred Reger was found guilty of statutory rape of a girl 15 years old and was sentenced to confinement in the penitentiary for not less than three years nor more than four and one-half years. The only assignment of error argued on application for supersedeas is the insufficiency of the evidence.

1. From the evidence it appears beyond any reasonable doubt that Reger, a married man, and the father of three children, had sexual intercourse repeatedly with a girl only 15 years old. On the main facts, her testimony was unshaken on cross-examination, and her testimony was corroborated by disinterested witnesses. Reger himself did not take the witness stand. The evidence was sufficient to sustain the conviction.—*Judgment affirmed.*

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SHERIFF—DEPUTY—LIABILITY OF SURETY ON SHERIFF'S BOND FOR ACTS OF DEPUTY—*Fidelity & Deposit Company of Maryland v. Hershey*—No. 12930—*Decided September 5, 1933—Opinion by Mr. Justice Bouck.*

The Surety Company was on the official bond of Hershey, Sheriff of the City and County of Denver. A person charged with commission of a crime in Oklahoma was, at the request of the Oklahoma authorities, and pursuant to application of Oklahoma authorities, for his

arrest, and in accordance with appointment by the Governor of Colorado issued to Hershey's deputy, by the deputy arrested, and delivered in Oklahoma.

Suit was brought in Oklahoma against the Surety and the Denver Sheriff and his deputy, but no service was had upon the Denver Sheriff or his deputy. This action was brought by the Surety Company against the Denver Sheriff for expenses incurred in defending such action.

1. The deputy sheriff was not acting in his official capacity as deputy sheriff in making the arrest, but by virtue of his appointment as agent made the arrest at the request of the Governor.

2. The Surety on the Sheriff's official bond could not be subjected to liability even though Sheriff was guilty of false arrest or false imprisonment, even if the extrastate act was unauthorized.

3. The Surety on the bond cannot hold Hershey, the Sheriff, liable for its expenses in defending suit.

4. Neither the official bond of the Sheriff nor the indemnity agreement is broad enough or clear enough to cover any of the above acts.

5. The deputy sheriff acted altogether independently of his office as deputy sheriff and beyond the territorial limits of his official status. —*Judgment affrimed.*

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WORKMEN'S COMPENSATION—MANDAMUS—*Roper v. The Industrial Commission of Colorado, et al.*—No. 13249—*Decided September 5, 1933—Opinion by Mr. Justice Bouck.*

This is a mandamus proceeding brought in the District Court of Pueblo County against the insurer of an employer under the workmen's compensation act. The petitioner sought to compel payment of an amount which he alleged to be due under a certain rule of procedure adopted by the Industrial Commission in 1928, but now superceded. The Court below declined to issue a writ and the petitioner asked for a reversal.

1. Where questions of fact exist, which have not been determined by the Industrial Commission, the Commission itself is the only body that can determine such questions.

2. A writ of mandamus is not the proper method of reviewing the acts of the Industrial Commission.

3. The Industrial Commission Act contains the exclusive remedies by which the acts of the Commission can be reviewed.

4. Mandamus may not be invoked for the purpose of testing

the meaning or validity of a rule of procedure framed by the Industrial Commission.

5. Since the petition herein shows there is neither a clear legal right in the petitioner nor a clear legal duty corresponding thereto, the mandamus writ was properly denied.—*Judgment affirmed.*

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Buchhalter v. Meyers, 85 Colo. 419, 439.

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