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RECENT CASES

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WORKMEN'S COMPENSATION — Liability for Injury Arising Out of Horseplay. — Claimant while unloading material from a truck for employer was suddenly and without warning jokingly seized by one of his legs by a fellow employee who was on the ground and pulled off truck. As result claimant suffered permanent arm injury. Claimant applied for workmen's compensation. The Industrial Commission made an award of workmen's compensation to claimant which was reversed by the lower court, whence this appeal. HELD, reversed. Injury resulted from accident which arose out of and was incidental to employment and was compensable. *Allsep v. Daniel Construction Co.*, 57 S. E. 2d 427 (S. C. 1950).

The Workmen's Compensation Laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents. Courts have generally held that they should be accorded a liberal interpretation and inclusion of employees and employers rather than exclusion is favored in order to promote justice and the public welfare. *Cokely et al v. Robert Lee, Inc.* 197 S. C. 157, 14 S. E. 2d 889, (1935). *Ham v. Mullins Lumber Co., et al,* 193 S. C. 66, 7 S. E. 2d 712, (1939); *Willson & Co. v. Matthews,* 170 Va. 164, 195 S. E. 490, (1938). But the Act must not be construed so as to work a hardship on the employer and/or the insurance carrier. *Hill v. Skinner et al,* 195 S. C. 330, 11 S. E. 2d 386, (1939). The Supreme Court is not at liberty to extend the meaning found in Workmen's Compensation Act in order to provide a more liberal rule of compensation than that which the Legislature has seen fit to adopt. *Rudd v. Fairforest Finishing Co., et al,* 189 S. C. 188, 200 S. E. 727, (1938). CODE OF LAWS OF SOUTH CAROLINA, 1942, No. 7035-2(f) states that " 'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall include a disease in any form, except where it results naturally and unavoidably from the accident." "The two parts of the phrase 'arising out of and in the course of the employment' are not synonymous, and both must exist simultaneously before any Court will allow recovery under a compensation act so worded. 'Arising out of' refers to the origin and cause of the injury, whereas 'in the course of' refers to the time, place, and circumstances of the occurrence." *Branch et al. v. Pacific Mills et al,* 205 S. C. 353, 355, 32 S. E. 2d 1, (1944). An injury to a workman does not have to be foreseen or expected to "arise out of employment" but need only to have been reasonably incidental and

connected to his employment or occurred within the period of his employment, at a place where employees reasonably may be in the performance of his duties. *Eargle v. S. C. Electric & Gas Co. et al,* 205 S. C. 423, 32 S. E. 2d 240, (1944). *Johnson v. Merchant's Fertilizer Co. et al,* 198 S. C. 373, 17 S. E. 2d 695, (1940). "The word 'accident' as used in workmen's compensation has been defined as an unlooked for and untoward event which is not expected or designed by the person who suffered the injury." *Green v. City of Bennettsville,* 197 S. C. 313, 15 S. E. 2d 334, (1941). HONNOLD ON WORKMEN'S COMPENSATION, Vol. I, Sect. 85, Page 85. The older cases denied recovery for injury resulting from "horesplay" as not "arising out of and in the course of employment". *Pacific Employers' Ins. Co. v. Div. of Ind. Accidents & Safety,* 209 Cal. 656, 289 P. 619, (1930). But more recent cases ruled that a workman is entitled to recover irrespective of fault if the injury arises out of and in the course of the employment or if there is substantial doubt of the propriety of such conclusion. *Pelfrey v. Oconee County,* 207 S. C. 433, 36 S. E. 2d 297, (1945); *Chambers v. Union Oil Co.,* 199 N. C. 28, 153 S. E. 594, 596, (1920). The majority of courts today still give lip-service to the doctrine that "aggressors" cannot "profit by their own wrong" but the modern trend is clearly towards a more liberal view as to compensability of injuries to employees. This is especially true in construing the phrase "arising out of" the employment. *Mack v. Branch, No. 12,* 207 S. C. 258, 35 S. E. 2d 838, (1945); *Pelfrey v. Oconee County, supra.* Today it is common knowledge that when men are gathered together at work they are given to pranks which sometimes result in injuries and it is one of the anticipated risks of employment. These things are not unnatural, but natural, and the ordinary outcropping of industrial contact between men of all classes and types and such risks therefore are incident to the business and grow out of it. *Leonbruno v. Champlain Silk Mills,* 229 N. Y. 470, 128 N. E. 711, 13 A. L. R. 522, (1920); *Chambers v. Union Oil Co., supra.* Courts thus hold that practical joking or skylarking does not usually break the course of employment. *Payne v. Industrial Commission,* 129 N. E. 122, 295 Ill. 388, 13 A. L. R. 518, (1920). The greater weight of authority today is to entitle compensation to non-participants or innocent victims injured as the result of horseplay and the modern trend is to even allow recovery to aggressors although on this the courts are split. *Pacific Employers' Ins. Co. v. Industrial Accident Commission,* 158 P. 2d 9, 159 A. L. R. 319, 325-32, (1945). *Industrial Commission v. McCarthy,* 295 N. Y. 443, 68 N. E. 2d 434, (1946).

The result reached in the instant case is undoubtedly correct as the claimant was an innocent victim of the horseplay of his fellow-employee. The courts feel that horseplay when resulting in injury and incidental to the employment should be compensable in meeting the spirit of the compensation act. The courts recognize throughout the cases that the Workmen's Compensation Act is a form of social legislation and primarily for the benefit and protection of the employee and thus accord a very liberal and broad interpretation in order to carry out the purpose of the act.

MELTON KLIGMAN.

CONSTRUCTION OF FEDERAL PENAL STATUTES – Application of Doctrine of "Ejusdem Generis" in Light of Congressional Purpose. – Defendant was charged with the shipment of obscene phonograph records in interstate commerce in violation of Section 245 of the United States Criminal Code which makes illegal the interstate shipment of any "obscene . . . book, pamphlet, letters, writing, print or other matter of indecent character". Defendant was found guilty by the District Court and assessed a fine. By applying the doctrine of "ejusdem generis" the Court of Appeals reversed this decision. Upon a writ of certiorari to the U. S. Supreme Court HELD, Reversed. The doctrine of "ejusdem generis" is not applicable where its application would defeat the obvious purpose of the legislature. *U. S. v. Alpers,* 70 S. Ct. 352 (1950).

In the construction of statutes, the rule of "ejusdem generis" is that where general words follow the enumeration of particular persons or things, the general words shall be construed as applicable only to persons or things of the same general nature or kind as those enumerated. *Hise v. City of North Bend et al,* 138 Ore. 150, 6 P. 2d 30 (1931). The rule finds support in the conviction that if the legislature had intended the general words to be used in an unrestricted sense the particular classes would not have been mentioned. CRAWFORD, STATUTORY CONSTRUCTION, Sec. 191. It is particularly applicable to statutes defining crimes and regulating their punishment. *First National Bank of Anamoose v. U. S.* 206 F. 374 (1913). However, the doctrine of "ejusdem generis" is a rule of construction, to be used in ascertaining the intent of the legislature, and not for the purpose of subverting such intention when ascertained. *Mid-Northern Oil Co. v. Walker et al,* 268 U. S. 45 (1925). As all other aids or rules of statutory construction, its prime purpose is to determine the intention of the law making body. *Grosjean v. American Paint Works,* La.

App., 160 So. 449 (1935). It cannot control where the plain purpose and intent of the legislature would thereby be hindered or defeated. *State v. Gallagher,* 101 Ark. 593, 143 S. W. 98 (1912). It is a mistake to allow the rule to pervert the construction. *City of Fort Smith v. Gunter,* 106 Ark. 371, 154 S. W. 181 (1913). When the words of the act are clear in meaning and require no interpretation, the doctrine of "ejusdem generis" will not be applied. *Mills et al v. City of Barbourville et al,* 273 Ky. 490, 117 S. W. 2d 187 (1938). The rule of "ejusdem generis" was not applied where defendant induced a miscarriage in a woman by having her run up and downstairs, and he was held to have violated a statute which read "medicine, drugs, . . . or shall use or employ any instrument whatsoever". *State v. Miller,* 90 Kan. 230, 133 Pac. 878 (1913). The U. S. Supreme Court would not apply the doctrine when it said that the holding of an officer to avoid arrest is a holding in violation of a statute making it unlawful to transport in interstate commerce any persons unlawfully seized "and held for ransom or reward or otherwise". *Gooch v. U. S.,* 297 U. S. 124 (1936).

The intent of the legislature in passing this act is obvious and unquestionable. It was to prevent the transmission in interstate commerce of any indecent matter. To have applied the doctrine of "ejusdem generis" in this case would have frustrated the purpose of the act. The Court correctly held that the doctrine of "ejusdem generis" is only a rule of construction and should be used as such. To apply it where the intent of the legislature needs no interpretation or explanation would enfeeble the penal attempts of the law making bodies. If the doctrine of "ejusdem generis" had been applied in this case it would have served to place a premium on the invention of new mechanical processes with which to evade the law.

CHARLES S. BERNSTEIN.

WORKMEN'S COMPENSATION — Employee's Right of Election Under Compensation Acts. — Plaintiff filed a claim against employer under Workmen's Compensation Act, S. C. CODE ANN. 7035-11 (1942), to recover compensation for accidental injury inflicted by third party tort feasor. Plaintiff had previously signed a release to the third party without the knowledge of his employer, after receiving a compromise settlement. Compensation was awarded Plaintiff by the South Carolina Industrial Commission and was upheld by lower court. On appeal, HELD, Reversed. Employee who is injured in the course of his employment and who, without the consent of his employer, makes a binding release to the third party is barred

from recovery under the Workmen's Compensation Act, CODE 1942, SECS. 7035-et seq. 7035-11. His release constituted an election of remedies and destroyed his employer's statutory right of subrogation. *Gardner v. City of Columbia Police Department,* 57 S. E. 2d 308 (1950).

The Workmen's Compensation Act was adopted to protect workers from the hazards of their employment. *Cokely et al. v. Robert Lee, Inc.,* 197 S. C. 157, 14 S. E. 2d 889 (1941). It is not based on the principal of tort liability but may be considered as an operating expense. See Behrendt, THE RATIONALE OF THE ELECTION OF REMEDIES UNDER WORKMEN'S COMPENSATION ACTS, 12 U. of Chi. L. Rev. 231, 235 (1945). It created a new right in the employee and is part of his contract of employment. CODE SEC. 7035-6. *Brown v. Town of Patrick,* 212 S. C. 236, 24 S. E. 2d 365 (1943). The Compensation Act should be liberally construed in order to carry into effect its beneficial purposes, but a court should not do violence to the Act in order to aid either party. *Taylor v. Mount Vernon Woodberry Mills,* 211 S. C. 414, 45 S. E. 2d 809 (1947). An injured employee may at his option either claim compensation or proceed at law against third party tort feasor to claim damages, but he should not be entitled to collect from both. *Walters v. Eagle Indemnity Co.,* 166 Tenn. 383, 61 S. W. 2d 666, 88 A. L. R. 654 (1933). If employee procures a judgment in action at law, he is barred by remedy for an award under Workmen's Compensation. *Tuller et al. v. Southern Electric Service Co.,* 200 S. C. 246, 20 S. E. 2d 707, 710 (1942). A release was tantamount to the procurement and collection of a judgment in an action at law as provided by Sec. 7035-11 of the Code. *Taylor v. Mount Vernon Woodberry Mills,* 211 S. C. 414, 45 S. E. 2d 809 (1947). An injured employee by accepting a settlement from a third party releases the employer from liability since the release destroys the insurer's right of subrogation against the third party. *Texas Employer's Ins. Ass. v. Brandon,* 89 S. W. 2d 982 (Tex. 1936).

In light of the fact that the Compensation Act was enacted primarily for the protection and benefit of the worker, the majority decision of the court seems neither just nor equitable. In opposition to the South Carolina ruling, many states have held that a release to a third party without the knowledge of the employer neither bars the employee's right to Workmen's Compensation nor the insurer's right of subrogation. *Rosenblum v. Hartford News Co.,* 92 Conn. 398, 103 A. 120 (1918), *Renner v. Model Laundry, Cleaning & Dyeing Co.,* 91 Iowa 1288, 184 N. W. 611 (1921). It is well known that many people will pay a nominal sum in order to obtain a release and avoid

litigation. In many instances the injured employee will compromise the settlement not realizing that he is barring himself from Workmen's Compensation. A more just and equitable decision would appear to allow the injured party to recover the difference between the amount he received from the third party tort feasor and the amount he would have received under the Compensation Act. *Maryland Cas. Co. v. McCrary,* 29 F. Supp. 950 (1939).

SAM P. MANNING.

UNITED STATES — Liability of the Government on Contracts Made by It's Agents. — On March 7, 1942, a prisoner was shot and seriously wounded by agents of the Treasury Department while attempting to escape arrest. He was immediately taken to Plaintiff hospital for treatment, the agents agreeing on behalf of the Treasury Department to assume all costs necessary for treatment. About seven months later the indictment against the prisoner was dismissed and he was released from constructive custody. On September 17, 1942, the U. S. Marshall served Plaintiff with a copy of the order which provided that the U. S. would no longer be responsible for any bills incurred by this man. On November 21, 1942, the Treasury Department made full payment for services rendered up to September 16, 1942. The patient, not in a condition to be moved, was treated until January 1, 1949. Plaintiff, relying upon the original contract by the agents, brought this action to recover for the services rendered between September 17, 1942, and January 1, 1949. Defendant moved to dismiss the action on the ground that the complaint failed to state a claim against the Defendant upon which relief could be granted. HELD, Motion granted. Defendant accepted liability for the prisoner during custody, paid all expenses during that time, and neither Federal officers nor anyone else had authority to enter into a contract or bind the Government to any greater degree, for the United States is not liable for the continuing care of a prisoner once out of custody. *Columbia Hospital of Richland County v. U. S.,* 87 Fed. Supp. 535. (E. D. S. C. 1949).

A private agent may subject his principal to liability to a third person where he is acting within the implied or apparent scope of his authority, as if he had personally entered into the transaction, even if the act was done in excess of actual authority and instructions. RESTATEMENTS, AGENCY, § 140, (1933). Furthermore, if an unforeseen situation arises for which the terms of the authorization make no provision and it is impracticable for the agent to communicate

with the principal, he is authorized to do what he reasonably believes necessary to remedy the situation. Although he is at fault for the creation of the situation which causes his to depart from the letter of his instructions, he is authorized to act. RESTATEMENTS, AGENCY, § 47, (1933). Where the exigencies are of so pressing a nature that immediate action must be taken to relieve the injured party or to preserve his life, the agent has authority to bind the principal to pay for such services as the emergency demands. *Vandalia Ry. v. Bryan,* 60 Ind. App. 223, 110 N. E. 218 (1915); *Ohio & M. Ry. v. Early,* 141 Ind. 73; 40 N. E. 257, 28 L. R. A. 546 (1895). However, the principal is not liable for the services rendered after the emergency has passed. If the Plaintiff wishes to hold him liable for subsequent services, he must make a special contract with him. *Holmes v. MacCallister,* 123 Mich. 493; 82 N. W. 220, 48 L. R. A. 396 (1900); *Salter v. Neb. Telephone Co.,* 73 Neb. 373; 112 N. W. 600, 13 L. R. A. (n. s.) 545 (1907). The principle that the Government is not bound by the unauthorized acts of its agents was set forth in the landmark case of *Lee v. Munroe,* 7 Cranch 366, (U. S. 1813), and has been followed uniformly by later decisions. *Strasbury v. U. S.,* 8 Wall. 33, (U. S. 1869); *Whitesides v. U. S.,* 93 U. S. 247, (1876); *Jacob Reed's Sons v. U. S.,* 273 U. S. 200, (1927); *Fries v. U. S.,* 170 F. 2d 726 (C. C. A. 6th 1948). The Government is neither bound nor estopped by the acts of its agents outside the limits of their authority. *Utah Power & Light Co. v. U. S.,* 273 U. S. 389, (1917); *Federal Crop Insurance Co. v. Merrill,* 332 U. S. 380, (1947); see 34 VA. LAW REVIEW 477-9. And it can only be bound by the acts of an agent which are within limitations of his authority, not only with respect to express contracts but to implied contracts as well. *Eastern Ext. Australasia & China Tel. Co. v. U. S.,* 251 U. S. 355, (1920); *Fries v. U. S., supra.* Furthermore, it is well settled that since the powers and duties of public officers are defined and limited by public law, all persons dealing with the Government are chargeable with notice as to the extent of the agent's authority and it is the duty of such persons to ascertain the power and authority of these agents. *Whitesides v. U. S., supra; Hume v. U. S.,* 132 U. S. 406, (1889); *U. S. v. North American Co.,* 253 U. S. 330, (1920); *U. S. v. Willis,* 164 F. 2d 453, (C. C. A. 4th 1947).

On first impression, the result reached in the principal case seems inequitable, as Plaintiff, through the unauthorized acts of Government agents, has been saddled with the burden of care and treatment for an indefinite period of time of a patient whose permanent disability was caused by these agents. There is little hope to recover

for services rendered after the patient was released from constructive custody, for the patient could ill afford to pay. Also, it seems harsh to say that Plaintiff had constructive notice of the Federal statutes dealing with the expenses and subsistence of prisoners or to say that Plaintiff should have investigated to see whether the United States was liable or not before undertaking to aid the man in such an emergency situation. However, even if this were a case involving private agents, the principal would only be liable for those services rendered during the emergency and there would have to have been a special contract made with him to render him liable for any subsequent services. The courts are not prone to depart from the well-established and long-followed principles. A departure from these principles would mean a veritable deluge of litigation, for our Government today is far-reaching and there are thousands and thousands of officers and agents. Such departures would tend to undermine the immunity of the sovereignty. Although in the application of these principles we sometimes gain harsh results which affect our emotional tendencies, there are many results reached in applying the same principles that arouse within us no sense of injustice whatsoever. If you are to have a workable rule or principle, you must follow it as closely as possible and not riddle it or undermine it with numerous exceptions.

H. P. SMITH.

MALICIOUS PROSECUTION — Effect of Compromise as a Favorable Termination. — Defendant caused a warrant to be issued against plaintiff, manager of a turkey farm belonging to defendant. Plaintiff, having been placed in jail and later released on bond, entered into a cash settlement with defendant, voluntarily, in order to secure the dismissal of the criminal case. Plaintiff protested his innocence at the time of payment and stated that he was making payment under protest because he had to report for work on a new job on the next day. After the compromise, plaintiff brings suit for malicious abuse of process and malicious prosecution. In the U. S. District Court the plaintiff received a verdict in both cases. An appeal was taken in the malicious prosecution case. On appeal, HELD, Reversed. Plaintiff, by voluntarily entering into a compromise in order to secure the dismissal of the criminal charge, and not having been under duress at the time, estops himself from bringing an action for malicious prosecution. *Leonard, et al v. George,* 178 F. 2d 312 (1949).

In order to maintain a suit for malicious prosecution, plaintiff must allege and prove that the prosecution has terminated in his favor. *Brantley v. Rhodes-Haverty Furniture Co.,* 131 Ga. 276, 62 S. E. 222 (1908). Termination of the prosecution by a compromise between the parties is not such a favorable termination as to allow the defendant to later bring an action for malicious prosecution. *Waters v. Winn, et al,* 142 Ga. 138, 82 S. E. 537, (1914); *Jennings v. Clearwater Mfg. Co.,* 171 S. C. 498, 172 S. E. 870, (1934). But the Compromise must have been understandingly and voluntarily made. *White v. International Text Book Co.,* 56 Iowa 210, 136 N. W. 121, (1912). If payment is made by the person arrested, under protest and for the sake of obtaining his liberty from duress, he is not estopped from showing the want of probable cause in a subsequent action for malicious prosecution. *Morton v. Young,* 55 Me. 24, 92 Am. Dec. 565, (1867). In a compromise, the question of the guilt or innocence of the accused is left open. Having bought peace, the accused may not thereafter assert that the proceedings have terminated in his favor. RESTATEMENT, TORTS § 660 (1938). Where substantial issues of fact have been presented, upon conflicting evidence, it may be proper, or even necessary to submit such issues to a jury. *White v. International Text Book Co., supra.* But the fact that the accused initiated the negotiations which resulted in the compromise, after he had been admitted to bail, on a charge of obtaining goods by false pretenses, was held to negative the theory that the settlement was made under coercion or duress, rather than being voluntary. Under these conditions, there is no necessity for sending the case to the jury. *Jones v. Donald Co.,* 137 Miss. 602, 102 So. 540, (1925). The weight of authority is, however, that there is no necessity of showing that the plaintiff procured the settlement. A showing that the compromise was made voluntarily and with the consent of plaintiff, will prevent the case from going to the jury, and will raise the presumption that it was not under duress or coercion. *Glidewell v. Murray-Lacey Co.,* 124 Va. 563, 98 S. E. 665, (1919); *Bell Lumber Co. v. Graham,* 74 Colo. 149, 219 Pac. 777, (1923).

It is submitted that, on the facts involved in this case, the Court reached the only correct and just decision possible. The law seems well settled that, in the absence of coercion or duress, a compromise made to secure a release of a prior action, will estop the accused from later bringing an action for malicious prosecution. Certainly it cannot be maintained that plaintiff was under any duress when he voluntarily agreed to the compromise. True, he might have been inconvenienced slightly, but that amount of inconvenience is to be

expected in any litigation. Although protested his innocence at the time, the effect of these protestations was negatived by the compromise. The court correctly ruled as a matter of law that the compromise was not such a favorable termination as would allow plaintiff to bring an action for malicious prosecution.

EUGENE L. NETTLES.