

1961

John G. Hendrie Co. v. Industrial Commission of Utah et al : Plaintiff's Petition for Rehearing and Supporting Brief

Utah Supreme Court

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Young, Thatcher & Glasmann; Fugate, Mitchem, McGinley and Hoffman; Attorneys for Plaintiff;

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Case No. 9368

**IN THE SUPREME COURT
of the
STATE OF UTAH**

JOHN G. HENDRIE COMPANY, INC.,
a corporation,

Plaintiff,

vs.

INDUSTRIAL COMMISSION OF
THE STATE OF UTAH, LAURETTE
M. GLADDEN, widow, and LOUISE
GLADDEN, for and on behalf of DAR-
LENE LOUISE GLADDEN, minor
child of CLARENCE ROLAND GLAD-
DEN, deceased.

FILED

JUL 31 1961

*Clerk, Supreme Court, Utah
Defendants.*

**Plaintiff's Petition for Rehearing, and
Supporting Brief**

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IN THE SUPREME COURT of the STATE OF UTAH

JOHN G. HENDRIE COMPANY, INC.,
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Plaintiff,

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M. GLADDEN, widow, and LOUISE
GLADDEN, for and on behalf of DAR-
LENE LOUISE GLADDEN, minor
child of CLARENCE ROLAND GLAD-
DEN, deceased.

Defendants.

PLAINTIFF'S PETITION FOR REHEARING

The petition of John G. Hendrie Company, Inc., the plaintiff above named, respectfully shows to the Honorable Supreme Court:

1. The above entitled court filed its decision in favor of defendants and against plaintiff on June 19, 1961.

2. By order of the Court duly entered herein, on good cause shown and pursuant to Rule 76 (e) (4), Utah Rules of Civil Procedure, the time in which plaintiff

might petition for a rehearing has been extended to and including the date of the filing hereof.

3. By its decision, aforesaid, the court erred on the following points, to-wit:

A. In finding and deciding the plaintiff's Superintendent of construction, Smith, was the "alter ego" of plaintiff and that said Smith appeared to have had plenary power to act for it; because the same are against the law and are unsupported by any competent evidence.

B. In ruling that plaintiff's superintendent of construction, Smith, was acting within the scope of his authority in making the alleged statements upon which the defendant Industrial Commission based its award; because the same is contrary to the law and the evidence.

C. In finding and deciding that the statements made by Smith to defendant Lauretta Gladden and others, were not hearsay as to plaintiff, for the reason that such finding and decision is against the law.

D. In failing to vacate the award made by the Industrial Commission to the defendant Gladden, for the reason that such award is not supported by any competent evidence.

WHEREFORE petitioning plaintiff prays that the court reconsider its said decision and recall the same and enter its judgment and decision vacating the award to the defendants Gladden, or, in the alternative, direct a new argument and new hearing upon the issues and upon such hearing to vacate said award as aforesaid, and that

the court enter such other and further order and judgment as may be just and proper.

PAUL THATCHER of
YOUNG, THATCHER & GLASMANN,

and

FUGATE, MITCHEM, McGINLEY,
and HOFFMAN,

Attorneys for Plaintiff

BRIEF IN SUPPORT OF PETITION FOR
REHEARING

STATEMENT OF FACTS

The essence and basis of the decision of the court affirming the award of Workmen's Compensation benefits to the individual defendants herein is found in the following excerpts from the court's opinion:

"As to 3): The plaintiff is a foreign corporation and was constructing the swimming pool in Utah *by its alter ego, Smith, the construction superintendent*. The record indicates that he was the top employee of the company here and *he appears to have had plenary power to act for it. We cannot say that he was acting without the scope of authority in attending to an inquiry*, whether at the request of the Gladdens or anyone else, where responsibility of his company may or may not be involved. Moreover, plaintiff's claim that any statement he may have made were hearsay and therefore inadmissible in evidence, implying that, being thus, the Commission could not base an award solely on hearsay, is not with

merit. *Smith* was present at the conversation with the widow and the others, and *being an authorized agent of the plaintiff, such statements as he may have made certainly would not be hearsay, . . .*" (Emphasis supplied.)

The writer of this brief feels that he must have somehow failed, perhaps through overconfidence, to be of adequate assistance to the court in its consideration of the matters discussed in the quoted excerpts from the court's decision, for the underscored and critical portions of the court's opinion are not based upon any facts or law, but are contrary to the facts and the law, and, it is very respectfully submitted, reflect a complete misapprehension of the nature and significance of the legal issues involved.

Accordingly, the record has again been very carefully searched for all of the evidence bearing on the key issue, which is the nature and extent of the authority of plaintiff's superintendent of construction, Smith. All of the evidence bearing on Smith's relationship to the plaintiff corporation is set out in the following:

At the commencement of the hearing Smith, who was present as a witness, volunteered the statement (not under oath) "I'm the superintendent of construction, and was on the job at the time of the accident." R 16, lines 23 and 24. When sworn as a witness, he testified that he was "employed" by plaintiff. R 19, lines 20 to 24. He also testified that he was employed in the "capacity" of "superintendent of construction." R 20, lines 2 to 5. He had the deceased Gladden under his supervision. R

20, lines 6 to 8. At the time of and immediately preceding the accident (on the same day) there was no other person on the job in charge and authorized to give orders to decedent. R 32, lines 17 to 19. (It is to be noted that this testimony was a "follow up" to his answer that he had never changed the order directing Gladden to stay out of the ditch.) At the place and time of the accident, there were only three men on plaintiff's payroll, Smith, the witness Kahre, and Gladden. R 36, lines 3 to 7.

According to the witness Terkelson, Smith, after ordering Gladden to stay out of the ditch, left the immediate scene of the accident and only came running back thereafter. R 60, lines 17 to 19.

The witness Kahre, who was on the scene to do some work and also to learn the swimming pool business with a view to joining the owners therein, testified that John Hendrie was the president of the company, and had wanted the witness Kahre to go to Clearfield, and sent Smith along to show Kahre the principles of pool construction. He testified that Smith was "you might say, a superintendent." R 69.

After the accident certain relatives of the decedent Gladden came to Kahre on the job and asked him if he was "the foreman," and he told them, "No, that Bill Smith was out in the tool shed."

The foregoing is *all* of the evidence whatsoever relating to the position or authority of Smith with the plaintiff or as to the identity of the officers or agents. It is to be noted that Mr. Hendrie, the president of the com-

pany which bears his name, was in general charge and in control of Smith, and that Smith, when asked as to those having the direction of the defendant, stated that he was the only one there "at the time" who had authority to give Gladden orders.

There is not one scintilla of evidence that Smith had any authority to negotiate claims or to make statements or representations of fact. He was characterized either as "foreman" or "superintendent of construction," and there is no evidence that he ever performed any duties outside of the direction of construction during the hours he was on the job. It will be recalled that the job had closed down after the accident, that Smith had gone home, showered and had dinner and did not even go to the place where the alleged statements were made until some six hours or more after the accident. There is nothing to show that he attended the meeting at the home of the Gladden's relatives as superintendent of construction or that he was authorized to attend in behalf of the company. He did not go there pursuant to any order, but at the request of the relatives of Mrs. Gladden. There is nothing to show that he was on the payroll and drawing any pay for the time he spent with them. As we say, there is not a scintilla of evidence that the statements were made as superintendent of construction or foreman, or that the superintendent of construction or foreman had any authority to make the alleged declarations or admissions for or in behalf of the plaintiff company.

We most earnestly invite the court and each indivi-

dual justice thereof to satisfy themselves and himself of the truth of these statements of fact by a personal inspection and search of the record.

STATEMENT OF POINTS

POINT I

UNDER THE EVIDENCE AND THE LAW, SMITH HAD NO AUTHORITY TO REPRESENT OR BIND PLAINTIFF CORPORATION IN MAKING THE ALLEGED ADMISSIONS AND DECLARATIONS AGAINST PLAINTIFF'S INTEREST, AND THE SAME ARE HEARSAY AND INCOMPETENT AS TO PLAINTIFF.

POINT II

THEREFORE THE AWARD IS UNSUPPORTED BY COMPETENT EVIDENCE, AND MUST BE VACATED.

ARGUMENT

POINT I

UNDER THE EVIDENCE AND THE LAW, SMITH HAD NO AUTHORITY TO REPRESENT OR BIND PLAINTIFF CORPORATION IN MAKING THE ALLEGED ADMISSIONS AND DECLARATIONS AGAINST PLAINTIFF'S INTEREST, AND THE SAME ARE HEARSAY AND INCOMPETENT AS TO PLAINTIFF.

It is most distressing to the writer to find that in his original brief he so far failed to communicate clearly

and accurately to the court the true theory and basis of plaintiff's case that the same was very obviously completely misapprehended by the court. It is hoped that the court will bear with him while he attempts to correct, as best he can, this failure, for, it is submitted, the record and the established law of Utah overwhelmingly require a ruling that the superintendent of construction, Smith, was without authority, and was outside the scope of his employment as a superintendent of construction in discussing legal liability and questions of fault as to a past transaction.

On the other hand, it is respectfully submitted that the statement of the court that Smith, was the "alter ego" of the plaintiff corporation is completely and absolutely gratuitous and without any foundation in fact or law. It is believed that this statement in the opinion of the court surely must have been a mere inadvertence, and an adherence thereto would be a manifest miscarriage of justice.

John Hendrie is the President and head of the corporation which bore his name. It is admitted that Smith was in charge and direction of the *construction of the swimming pool* and could and did give orders to plaintiff's employees while they were on that job performing construction work. One of the employees regarded him as the "foreman." The title of "superintendent of construction," is obviously a mere example of salesmanship in employer-employee relations: a man with a fine sounding title is presumed to be happier and more dili-

gent and responsible. Smith was not “superintendent of claims”; neither was he an officer of the corporation; neither was he a claims adjuster; neither was he an attorney for the corporation; neither was he its auditor authorized to negotiate or settle claims or to discuss liabilities with claimants. He was only a superintendent *of construction*. There is not one iota of evidence that he had any authority to give anyone any orders after the end of the working day, or to represent his employer off the job site, or even on the job site with respect to anything except those matters *bearing directly on construction*, and even this must be implied from his title as “construction superintendent.”

It is clear that under the law or agency a principal may employ a general agent and give him some general powers and authority about a particular phase of the principal’s business *without giving him “plenary” power, or making the agent the “alter ego” of the corporation*. One may give *some* power without giving *all*. To hold that a corporation cannot employ a superintendent of construction and entrust to him the supervision of construction work without also losing control of authority to negotiate claims and confess legal liability or legal fault would be a most mischievous rule and would open wide the gates for all kinds of fraud; yet that is the effect of the decision herein. It is not the rule of law in Utah, or even elsewhere, except where modified by statute.

Defendants and respondents in their brief (to which plaintiff had no opportunity to reply effectively) beginning on page 10, quote copiously “*Wigmore on Evidence*.”

Without indicating the deletion, they did, however, delete that portion of Wigmore's discussion which deals with the facts and the situation here before the court. It is to be noted that Wigmore, the expert on evidence, in the second quoted paragraph referred to, declares that the question turns on the scope of authority and depends upon the doctrine of agency applied to the circumstances of the case, *and not upon any rule of evidence*. We should like at this point to supply a portion of the deleted material (pausing to note that we have not included that portion of Dean Wigmore's quotation dealing with *res gestae* declarations made by an agent while he is actually engaged in the performance of his primary functions and duties as an agent, as that is not, of course, the case before the court). See

Wigmore on Evidence, Third Edition, Section
1078:

"The common phrasing of the principle is well represented in the following passages.

'1839, Buchanan, C. J., in *Franklin Bank vs. Pennsylvania D. & M. S. N. Co.*, 11 G & J. 28, 33:

... But declarations or admissions by an agent, of his own authority, and not accompanying the making of a contract, or the doing of an act, in behalf of his principal, nor made at the time he is engaged in the transaction to which they refer, are not binding upon his principal, not being part of the "*res gestae*," and are not admissible in evidence, but come within the general rule of law, excluding hearsay evidence; being but an account or statement by an agent of what has passed or been done or omitted to be done,—not a part of

the transaction, but only statements or admissions respecting it. ’ ’ ”

A little later in the same section Dean Wigmore comments that :

“Upon the application of the prinple to specific instances, it would be useless to enter, for only the rules of the substantive law of agency are involved.”

He then cites many illustrative cases, including some of the Utah cases hereinafter referred to.

See also 31 C. J. S. Evidence,
Section 343, Page 1113,

where the general rules and distinctions applicable are stated as follows :

“As it has been said to have been well stated in Corpus Juris, an admission of an agent or employee may be received in evidence against his principle, if relevent to the issues invloved, where the agent, in making the admission, *was acting within the scope of his authority, and the transaction or negotiation to which the admission relates was pending at the time when it was made.* (Emphasis Supplied).

“Conversely, a declaration of an agent not within the scope of his authority nor in the course of the negotiation to which it refers, is not admissible against the principal. . . .” (Citing a multitude of cases, including several from Utah hereinafter referred to).

It is the second quoted paragraph which is obviously applicable here, because Smith, in talking to decedent’s

family the night after the accident, was not dealing with construction nor was he in the course of negotiation for construction nor engaged in anything which would promote construction in any way, but merely expressing an opinion (if defendants' witnesses are to be believed) with respect to what he should or should not have done, from which opinion the individual defendants here seek to infer a statement that he did send Gladden to the trench. If he had made this direct statement, namely, that he had sent Gladden back into the trench, this would have been, of course, a narrative statement about a past event, and under the rule is totally inadmissible; an inferred *post hoc* narrative statement should be even more clearly inadmissible. See:

31 C. J. S., Evidence,
Section 364, Note 94.

The rule is the same whether the principal is a corporation or a natural person.

See 19 C. J. S., Corporations,
Sections 1068 and 1070, pages 607 and 608.

In Section 1070, it is declared, in accordance with the general rule, that "authority to make admissions as to past events is not inferred from the powers of a general agent to superintend the company's business."

See also 2 Fletcher, Cyclopedia of the Law of
Private Corporations (1954 revised volume)
Sections 733, 735, 740 and 745.

There the learned author, citing some samples from a multitude of court decisions, declared that admissions by officers and agents of corporations are not admissible

against the corporations unless the admission itself (as distinguished from the act to which it refers) is within the scope of the agent's employment and authority, is a part of the *res gestae*, or is admissible under some other exception to the hearsay rule, such as the "shopbook" rule, or where it is contained in a record or report incident to and constituting a part of his ordinary and regular employment, or is a part of a communication which he is specifically employed, authorized and directed to make. He notes that the rule is particularly applicable as to the admissions of officers and agents relating to past events, which are normally excluded as being outside the scope of a corporate agent's or officer's employment.

Fletcher, Cyclopaedia of the Law of Private Corporations, Vol. 2, (1954 Rev. Vol.), Section 745, Page 1046, comments that

"The cases holding the *extreme* doctrine that a managing officer or agent of a corporation is its alter ego, and that his declarations, whether made casually or in line with his duties, or whether connected in time or place with the matter to which they relate or entirely dissociated therefrom, are competent evidence against the corporation, *are against the overwhelming weight of authority.*" (Emphasis supplied)

In view of the fact that the decision here characterizes a "superintendent of construction" as the corporation's "alter ego," it is most interesting to observe the opinion of Fletcher that this is an extreme rule, even when applied to a "managing officer or agent."

In view of Dean Wigmore's comment, above quoted,

that the controlling principle is one of the substantive law of Agency, rather than the law of Evidence, we would do well to turn to an honored standard work on the law of Agency. In the

American Law Institute, Restatement of the Law :
Agency 2d, Sections 286 and 288

we find that the learned members of the Institute and their reporters have adopted the rules for which we here contend.

Section 286 reads as follows :

“In an action between a principal and a third person, statements of an agent to a third person are admissible in evidence against the principal to prove the truth of facts asserted in them as though they were made by the principal, if the agent was authorized to make the statement or was authorized to make, on the principal’s behalf, any statements concerning the subject matter.”
(Emphasis supplied)

In this case, there is absolutely no evidence that Smith was authorized to “blab or tattle” concerning, or to make any statement whatsoever about his principal’s business to any person whomsoever. It is submitted that the court should take judicial notice that employers generally abhor indiscriminate talk or tattle about the employer’s business by subordinate or petty foremen or superintendents, or any by employees or officers, for that matter. Accordingly, it is the universal and salutary rule that proof of authority to make a statement is necessary before a statement by an agent is admissible against his principal, and that authority to do an act does not

imply or include authority thereafter to “tattle” or make statements about the act. This is the rule adopted by the *Restatement* in Section 288, above referred to :

“When agent has authority to make statements:

“(1) The general rules concerning the interpretation of authority are applicable in determining whether an agent has authority to make statements concerning operative or other facts.

“(2) Authority to do an act or to conduct a transaction does not, of itself, include authority to make statements concerning the act or transaction.

“(3) Authority to make statements of fact does not of itself include authority to make statements admitting liability because of such facts.”

Obviously, *paragraph two of Section 288* is controlling here, and Smith’s *authority to supervise construction of the swimming pool at Clearfield did not include authority to make statements concerning his supervision thereof.*

See also the discussion under *Sections 286 and 288 of the Restatement of the Law; Agency 2d*, where the rule is explained and applied. See also the *Appendix thereto* and the cases therein cited.

It is interesting, and we believe, persuasive to note in passing that even though the Utah Supreme Court’s Committee on Rules of Evidence, appointed to consider and report upon the advisability of adopting rules of evidence, made a report and recommendation to the court which greatly liberalized the rules of evidence, even the recommended liberalized rules would not permit the ad-

mission in evidence of Smith's declarations here relied upon. See the *Proposed Final Draft of the Rules of Evidence*, submitted to this court under date of March 2, 1959, *Rule 63 (9) (a)*. The proposed rule reads:

"Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except: . . .

(9) *Vicarious Admissions*. As against a party, a statement which would be admissible if made by the declarant at the hearing if (a) *the judge finds the declarant is unavailable as a witness* and that the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship." (Emphasis supplied)

The declarant, Smith, of course, was available, and testified at the hearing, so that even under the proposed liberalized rule, the declaration would be hearsay and incompetent.

So much for general statements of the law as set out by legal scholars and encyclopedists. Let us turn now to a consideration of the law as it has been established in Utah by judicial precedent binding on this court.

Until the filing of the decision under consideration here, there has never been any doubt as to what the law was in Utah. From its first consideration of the problem in

Idaho Forwarding Company vs. Fireman's Fund
Insurance Company (1892)
8 Utah 41, 29 Pac. 826,

to and including the last case,

S. W. Bridges & Company vs. Candland (1936)

88 Utah 373, 54 Pac. 2d 842,

(referred to in the original brief herein, but not in the opinion of the court), the decisions of this court have been many and uniform, and *all* have held that evidence of an agent's or employee's declarations subsequent to the event and unconnected with the performance of the agent's duties are outside of his authority, are not binding on his principal, are hearsay and are incompetent as to the principal. There has been no variation and no dissent.

In hope that it will be of assistance to the court, we shall now briefly refer to and discuss the Utah cases we have been able to find dealing with the question confronting us.

In

Idaho Forwarding Company vs. Fireman's Fund Insurance Company, *supra*,

an issue was drawn as to whether or not a contract of insurance was consummated. The court says:

Witnesses were permitted over the objection of the defendant's counsel, to testify to admissions of the agent Mallory, made long after the alleged contract was made, to the effect that the property was insured. To the ruling of the court in overruling such objections, the counsel for the defendant excepted and assigned the same as error. A witness may testify to the language of an agent in making an oral contract, because such language is within the agent's authority. But being authorized to make the contract, his language in

making it is authorized by the principal. But authority to make a contract does not empower the agent at a subsequent time to admit away his principal's rights. The admissions of an agent are admissible so far as the principal has authorized them to be made, and no further. . . . The court said in the case of *Railroad Company vs. O'Brien*, 119 U. S. 99, . . . "Referring to the rule as stated by Mr. Justice Story in his *Treatise on Agency*, (Section 134) that, 'where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject matter will also bind him, if made at the same time, and constituting a part of the *res gestae*.' The Court, speaking by Mr. Justice Strong said: 'A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified, or explained either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period. The reason is that the agent to do the act is not authorized to narrate what he had done, or how he had done it, and his declaration is no part of the *res gestae*.' For the reasons, above indicated, the court is of the opinion that the judgment of the court below should be reversed and that a new trial should be granted.

And this Court, in the case of

Moyle vs. Congregational Society of Salt Lake City (1897)

16 Utah, 69, 83; 50 Pac. 630,

considered the principles, the authorities and the jurists very carefully, and ruled that the admissions and declara-

tions of an agent, made several days after he had consummated a contract for his principal, and involving an admission of breach of contract alleged to have occurred previously, were hearsay, incompetent and inadmissible as to the agent's principal. Their admission in evidence was held error.

And in the case of

Meyers vs. San Pedro,
L.A. & S.L. Railroad Co. (1909)
36 Utah 307, 104 Pac. 736;
Second appeal:
37 Utah 198, 116 Pac. 1119,

this court held that, in the absence of affirmative proof of the authority of a "superintendent" of a railroad division to make admissions and statements concerning the cause of his acts, admissions in a letter of discharge given a conductor after an accident were not admissible against the railroad. In the second appeal, after a second trial the court held that proof that it was an established duty of the superintendent to make a record of such accidents and to declare the facts relative to the cause of discharge of the conductor, and proof that the recording and reporting of such facts were within the scope of his duties and authority supplied the deficiency in evidence which existed in the first appeal. The letter in question was therefore admissible at the second trial, because of such additional proof. The court, however, adhered to the principle announced in the first appeal; namely, that the position of superintendent did not imply any authority to make admissions, and that authority to make admissions would not be inferred or implied from the title of superintendent

or from the admitted duty to direct operations of the railroad, the making of admissions being quite separate from the direction of operation. It is believed that a careful reading of these two appeals will be most helpful to the court in clarifying the existing confusion.

Of course, in the case now at Bar, there is absolutely no evidence that this plaintiff's superintendent was required to make any statements to the family of the decedent or that the statements were made in the course of, or pursuant to any duty whatsoever existing in connection with his employment as superintendent of construction.

The same problem was before this court in the case of

Utah Foundry and Machine Company v. Utah Gas
& Coke Company (1912, cert. den. April 30, 1913)
42 Utah 533, 131 Pac. 1173.

The matter there under consideration was defendant's counterclaim for conversion of certain iron, and the counterclaiming defendant offered in evidence certain statements made by an officer of the plaintiff, to-wit: the secretary, who is also its bookkeeper and collector, with respect to the purpose of issuing certain checks by plaintiff. The statements tended to support defendant's counterclaim. This court held that these admissions by the secretary, bookkeeper and collector of the corporation with respect to the purpose of the checks issued were incompetent, hearsay, and inadmissible, and could not support a judgment on the counterclaim. The judgment

was ordered vacated. In the course of its opinion, the court said,

"The rule is well settled that, to bind the principal with an admissions of his agent, the declaration or statement of the agent must have been made within the scope of his employment and during the transaction of business by him for the principal and in relation to such business; that is, the declaration, or statement, of the agent must be contemporaneous with or in the course of the business or transaction and in relation thereto conducted by the agent for the principal within the scope of the agency. The declarations or statements of the agent here were not made under any such circumstance. They were made long after the transactions with respect to which they were declared had wholly ended, long after the business had been conducted, and were not made in the course of or in relation to any business which the agent was then transacting or conducting for the principal. Certainly, an agent not in the course or transaction of any business for his principal, may not on the public mart or elsewhere make binding admissions of fact against his principal by a mere narration of facts relating to transactions wholly ended and long past. Property rights of the principal cannot be bartered away in any such manner as that.

Croft (the secretary of plaintiff) of course, could have been called as a witness and permitted to testify to any fact within his knowledge. But his admission under the circumstances was not evidence against his principal, the plaintiff. He was called as a witness, not by the defendant, but by the plaintiff, and gave testimony, not only in dispute with the admission, but of facts wholly

at war with it. We think the evidence insufficient to sustain the defendant's counterclaim. The judgment, therefore, cannot be sustained. . . ." (Emphasis supplied.)

The same question was once more presented to this court in the case of

Tyng vs. Constant-Lorraine Investment Company (1916) 47 Utah 330, 154 Pac. 766.

This court there once more affirmed the rule which plaintiff here contends for, and held that *even the president* of a corporation had no authority by virtue of his office, to make admissions against his corporation as to past events. Certainly, if the president of a corporation cannot make such admissions by virtue of his office, a mere employee, or foreman, even though called a "superintendent of construction," cannot make such admissions. The court held that the admissions of the president were hearsay and incompetent as to the corporation itself, as not being within the scope of the employment and authority of the president.

Once more, this question of law was before this court in the case of

White vs. Utah Condensed Milk Company 50 Utah 278, 167 Pac. 656, 660.

This court again affirmed the rule for which plaintiff contends, and extended its operation to a corporation's general manager. The evidence which the trial court received, improperly as this court held, was to the effect that plaintiff, after suffering an injury to his eyes, applied to defendant's general manager for re-employment and was told that, "they did not feel safe with me in the

boiler room with my vision in that condition.” This was introduced to prove an admission of incapacitating damage to plaintiff’s vision. The court said the general manager was neither qualified nor authorized to make admissions respecting the seriousness of plaintiff’s injury at the time and under the circumstances shown in the record. His declarations outside of the scope of his employment were not admissible against his principal, the defendant. The judgment for plaintiff was reversed upon the authority of the *Meyers vs. San Pedro, etc., Railroad Company case, supra*.

Certainly, if a general manager has no authority implied from the fact of his position, a mere superintendent of construction, a mere employee foreman, has no such authority implied by reason of his position.

Finally, in 1936, in the case of

S. W. Bridges and Company vs. Candland, 88
Utah 373, 54 Pac. 2d 842,

this court positively and finally held

(1) that the opinion of an agent involving consciousness of liability or fault is admissible against the principal as an admission *only* where made within the scope of the agent’s authority, and

(2) that although the principal is bound by acts or statements of the agent done or made within his authority or apparent authority, the act or statement of the agent showing on its face that it is adverse to the principal, presents notice to the third person that there is no authority therefor, and

(3) that in the action on a brokerage contract for the sale of wool, statements of the agent of the plaintiff that plaintiff had failed to carry out the contract and caused loss to defendant *are not admissible as admissions of the plaintiff since not within the authority of the agent*. The court quotes at length from *Wigmore on Evidence*, Section 1078, above mentioned, and from the case of *Franklin Bank v. Pennsylvania, etc., Co.*, quoted by Wigmore and above quoted in part, and follows the *Franklin Bank* case, with approval. From then until now, so far as we have been able to ascertain, this firmly established rule has never been challenged in Utah, apparently being regarded as settled for all time in accordance with sound policy and universal precedent. It should not now be set aside *or ignored* by this court or any other tribunal in Utah.

We have saved until the last, the final case which our research has disclosed, decided by this court in 1929, because it seems to us to be *exactly in point and controlling*. It is the case of

Fishlake Resort Company v. Industrial Commission of Utah, 73 Utah 479, 275 Pac. 580.

We have checked this case in *Shepard's Pacific Reporter Citator Service* and find that the rule established by that case has never been overruled, limited or challenged, and still states the law of the State of Utah with respect to the facts involved.

In the *Fishlake Resort Company* case, *supra*, the Industrial Commission made an award of compensation to a widow for the death of her husband, who was alleged

to have drowned in the course of employment fishing in Bear Lake for the plaintiff company, the operator of a hotel and dining room. The decedent was and for three months had been, admittedly employed by the plaintiff company as a handy man. He made repairs to boats, did carpenter work, attended to the boathouse and did other odd jobs. One Dan Baker was the boathouseman, apparently in charge of the boathouse and boats. On the day of his death, the decedent had worked the morning shift and was then relieved by Dan Baker. Upon being relieved at the boathouse, the decedent obtained from Baker a company boat and fishing tackle and went out in the lake to fish, where he was drowned when a sudden windstorm arose.

At the trial, a witness was permitted to testify to a conversation with Baker two days after the accident, in which Baker, in response to a question, was said to have replied, "No; they (decedent and a companion) were fishing for the resort company." The admission of this evidence was assigned as error. The court says:

It will be noted that all of the testimony to the effect that the deceased was actually engaged in the business of fishing for the resort company at the time of the accident is hearsay. It is urged however, by defendant, that the declaration, testified as having been made by Dan Baker, that Busk and his companion were fishing for the resort company, was made by him "as agent for the plaintiff company, and his statement was an admission against the interest of the resort company." The evidence shows that Dan Baker was an employee of the company, had charge of the

boathouse, and rented boats to whomsoever might apply for them. It does not appear that the declarations made by him were within the scope of his agency, if he be regarded as an agent, nor were they made in the course of his employment, nor the performance of any act within the scope of his authority. They were no part of the *res gestae*, either of the accident causing Busk's death, or of any transaction Baker was then engaged in on behalf of his principal. Under the settled law in this State, such statements are incompetent and cannot bind the principal.

. . . We are of the opinion that all of the testimony to the effect that Busk was within the scope of his employment while engaged in the fishing enterprise on the day of the accident rests upon hearsay or incompetent evidence. It is well settled that a material finding of fact based entirely upon hearsay or incompetent evidence cannot stand and will not support an award. (Citing several cases).

It is submitted that this case is exactly in point and binding here. In that case Baker was a boathouseman in charge of handling a boathouse in which decedent was also an employee and apparently a subordinate one. In this case Smith is a "superintendent" in charge of building a single swimming pool, and the decedent was also an employee and a subordinate one. In that case, the alleged admissions of Baker were contradicted by him and were held to be incompetent. In this case, Smith's alleged admissions were contradicted by him and should be held to be incompetent. It is very respectfully submitted that we cannot see how the members of this Honorable Court can overrule or ignore this established authority.

Perhaps it will be of assistance to the court if a word or two is said about the authorities cited by defendants on pages 12 and 13 of their original brief.

Only two Utah cases are cited there by defendants. They are

Fishlake Resort Company vs. Industrial Commission, *supra*,

and

Spring Canyon Coal Company v. Industrial Commission, 58 Utah 608, 615, 616, 201 Pac. 173.

The Fishlake Resort Company case has already been discussed. It is in point, *but it supports the rule for which plaintiff here contends, not defendants.*

The *Spring Canyon Coal Company* case is not in point. It held that an award of compensation may *not* be based upon one of two available and contrary inferences which may be made from established facts, and also that the burden is on the claimant for Workmen's Compensation to prove that the death occurred by reason of an accident arising out of and in the course of the employment. To the extent that it is in point, it supports plaintiff's position, not the defendant's.

The cases from California are decided by District Courts of Appeal, not by the court of last resort. Hence, under familiar rules they are not entitled to consideration as authority here. Moreover, they are based upon a California statute, and not upon the common law, which, as we have hereinbefore demonstrated, is firmly established in Utah as contrary to the rule which has been

deduced by the California District Courts of Appeal from the California statutes.

Other cases, while they may be good law in the jurisdictions from which they come, are contrary to the established law in Utah, and, of course, should not, and indeed cannot, be followed by this court. A mere cursory reading of the other cases will indicate that few, if any, are in point. They deal with the performance of acts and the making of statements which have been previously proved to be within the scope of employment, or with declarations in the course of the performance of duty, or they deal with clear cases of *res gestae*, none of which is the case here. For these reasons, it is respectfully submitted they can furnish no support to the defendants' position, and no comfort to them.

It is very respectfully submitted that under the authorities here and in the original brief of the plaintiff cited, the only purported evidence that the decedent Gladden was in the course of his employment when he died is hearsay and incompetent and cannot support the award, and that this court should recall its original opinion and direct that the award be vacated.

POINT 2.

THEREFORE THE AWARD IS UNSUPPORTED
BY COMPETENT EVIDENCE, AND MUST BE VA-
CATED.

Under the authority of

Ogden Iron Works vs. Industrial Commission, 102
Utah 492, 132 Pac. 2d 373,

cited on page 18 of plaintiff's original brief and also referred to in the court's opinion herein, under the authority of the case of *Fishlake Resort Company v. Industrial Commission, supra*, and under the under the authorities cited in the *Fishlake Resort Company* case, the award of the Commission cannot be sustained upon hearsay and incompetent evidence and must be vacated.

For these reasons, the original decision of the court, being based upon a misapprehension of the issues, facts and law, should not, and cannot be allowed to stand.

CONCLUSION

We are sure that the members of the court will appreciate that it is with some diffidence that the writer of this brief has pointed out what plaintiff believes to have been an inadvertent but complete misapprehension of the basic issues, facts and law which should control the decision in this case, and which require the court in the discharge of its duty under the constitution and to the people to reverse itself. However, it is believed that the writer's duty to the court no less than his duty to his client would not permit him to do less under the circumstances.

As Dean Wigmore points out in the excerpt from his work on evidence hereinabove quoted, the controlling point is one of the substantive law of evidence. The applicable rule has been established in this State since 1892 without question or substantial controversy, and the Legislature to whom the people have, in the division of powers of government under the Constitution, delegated

the authority to modify substantive rules of law have never seen fit to question the correctness of the rule announced by the predecessors in office of the present members of the court. Under such circumstances, it seems certain that the present members of the court would not want to overturn this established rule of substantive law, or to bring about an apparent conflict in the decisions of the court through any failure of counsel appearing before the court to speak frankly and forcefully once the issue is clearly drawn. This the writer has attempted to do, as in duty bound. It might well be added here that the rule of *stare decisis* is a salutary one, the existence of which makes the judiciary the "balance wheel" in the maintenance of social and legal stability so necessary for the preservation of a working democratic republic. It is believed that it would be most unfortunate if pressure of business, or the failure of counsel to press home a point, or any other cause whatsoever should give rise to any seeming approval by the court of a practice of deciding cases by ignoring and failing to consider or cite judicial opinions which have established the controlling rule of law.

It is respectfully submitted that the prayer of the petition herein should be granted and the award vacated, or failing that, a complete rehearing should be granted, and that upon such rehearing, the award of the Industrial

Commission should be vacated, as required by the established rule of law in the State of Utah.

Very respectfully submitted,

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I, Paul Thatcher, one of the attorneys for plaintiff certify that on July 28th, 1961, I mailed two copies of the within and foregoing petition and brief to each of the attorneys for defendants, directed as follows:

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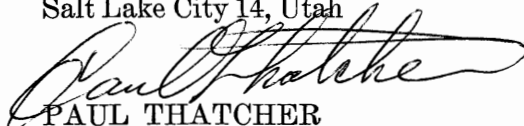
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