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RECENT CASES

CONFLICT OF LAWS—JURISDICTION TO MODIFY CUSTODY DECREE AFTER CHILD'S DOMICILE CHANGES—FULL FAITH AND CREDIT IN THIRD STATE

A 1946 Nevada divorce decree awarded custody of the only child of the marriage and payments for his support to the mother. Subsequently, the mother and child became domiciled in Florida. In 1949, the Nevada court, by a modification of the original decree, awarded custody to the father and ordered a reduction in payments until such custody was effected. The wife was served constructively, and the child was never delivered into the father's care. Later the father moved to Kentucky, and in 1953, the wife filed suit in the Kentucky Circuit Court seeking past-due support payments. The father answered and counterclaimed for the custody of the child. The plaintiff's motion to dismiss the counterclaim for lack of jurisdiction was overruled, and the plaintiff in the instant case seeks an original writ from the Court of Appeals of Kentucky to prohibit the circuit judge from determining the custody question. *Held,* writ to issue. In order for the Nevada court to have made a valid custody determination, entitled to full faith and credit in Kentucky, the child must have been domiciled within the jurisdiction of the court at the institution of the custody proceedings. As the Nevada order is invalid, the domicile of the child is still in Florida with the mother rather than in Kentucky with the father, and Kentucky has no jurisdiction to determine the question of custody. *Rodney v. Adams,* 268 S.W.2d 940 (Ky. 1954).

Some courts have contended that a child must be domiciled within the jurisdiction in order for a valid custody determination to be made,[1] a view finding support in the treatises.[2] In fact, however, courts frequently will assert power to make an award if they have a substantial interest in the child's custody.[3] But, assuming a valid original award, the question arises as to whether a court has power to make legally effective modifications once the child has removed from the

1. Harris v. Harris, 115 N.C. 587, 20 S.E. 187, 44 Am. St. Rep. 471 (1894); Vetterlein, Petitioner, 14 R.I. 378 (1884); Lanning v. Gregory, 100 Tex. 310, 99 S.W. 542, 10 L.R.A. (N.S.) 690, 123 Am. St. Rep. 809 (1907).

2. RESTATEMENT, CONFLICT OF LAWS § 117 (1934); BEALE, CONFLICT OF LAWS § 144.3 (1935); GOODRICH, CONFLICT OF LAWS § 136 (3d ed. 1949).

3. Stansbury, *Custody and Maintenance Across State Lines,* 10 LAW & CONTEMP. PROB. 819, 827 (1944), citing cases. But see De La Montanya v. De La Montanya, 112 Cal. 101, 44 Pac. 345, 32 L.R.A. 82, 53 Am. St. Rep. 165 (1896).

state and a new domicile has been established elsewhere.[4]

Continuing jurisdiction is generally recognized in actions *in personam*,[5] so that a court may modify a decree of support, even though one or both of the parties to the action may be outside the jurisdiction.[6] The instant case presents the question of whether continuing jurisdiction may exist in those situations in which power over something other than the persons of the parents is needed to enable the court to make a valid custody award. The holdings on the issue are squarely in conflict. Those courts which assert a continuing jurisdiction, even though the child may have left the state and become domiciled elsewhere, do so on one of several theories—either the removal is said not to effect a change in domicile;[7] or the parents are said to be bound by the original order and all modifications thereof;[8] or the original order is said to be merely interlocutory and final only on the death of the child or his reaching majority;[9] or, most often, the jurisdiction which attached on the first determination is said not to be defeated by the removal of the child from the state, even though the domicile is changed.[10] Other courts, including Kentucky, have adhered strictly to the view that domicile of the child is always necessary to support jurisdiction for the determination of custody,[11] and that when the child has a new domicile established outside of the state making the award, any jurisdiction that the awarding court might have had is ended.[12] These courts, insisting that domicile is the essential basis for jurisdiction to award custody, generally fix the child's domicile as that of the parent receiving custody as a result of the last "valid" award.[13] But in all of the above cases, the validity of the modification was contested either in the jurisdiction making the original award,[14] or in the jurisdiction of the child's subsequent domicile.[15] In the instant case the validity of the modification is questioned in a third state, which neither

4. If the removal from the state was in violation of a court order or governing statute, the removal seldom defeats jurisdiction. Hersey v. Hersey, 271 Mass. 545, 171 N.E. 815 (1930), 70 A.L.R. 518 (1931); Morrill v. Morrill, 83 Conn. 479, 77 Atl. 1 (1910), 24 HARV. L. REV. 142 (1910). See Note, 70 A.L.R. 526 (1931).

5. Michigan Trust Co. v. Ferry, 228 U.S. 346 (1912).

6. Commonwealth *ex rel.* Milne v. Milne, 149 Pa. Super. 100, 26 A.2d 207 (1942).

7. Person v. Person, 172 La. 740, 135 So. 225 (1931).

8. Conrad v. Conrad, 296 S.W. 196 (Mo. App. 1927).

9. Hersey v. Hersey, *supra* note 4. See also Note, 70 A.L.R. 526 (1931).

10. Morrill v. Morrill, *supra* note 4; Roosma v. Moots, 62 Idaho 450, 112 P.2d 1000 (1941); Stetson v. Stetson, 80 Me. 483, 15 Atl. 60 (1888); Tinker v. Tinker, 144 Okla. 97, 290 Pac. 185 (1930).

11. Abbott v. Abbott, 304 Ky. 167, 200 S.W.2d 283 (1947); see note 1, *supra*.

12. People *ex rel* Wagner v. Torrence, 94 Colo. 47, 27 P.2d 1038 (1933); *Ex parte* Alderman, 157 N.C. 507, 73 S.E. 126 (1911), 39 L.R.A. (N.S.) 988 (1912); Barnes v. Lee, 128 Ore. 655, 275 Pac. 661 (1929); Groves v. Barto, 109 Wash. 112, 186 Pac. 300 (1919), 20 COL. L. REV. 491 (1920).

13. Allen v. Allen, 200 Ore. 678, 268 P.2d 358 (1954).

14. *E.g.*, Conrad v. Conrad, *supra* note 8.

15. *E.g.*, Abbott v. Abbott, *supra* note 11.

framed the original decree nor later became the domicile of the child.

Should, then, the constitutional full faith and credit generally due to the judgments of one state by the courts of another[16] be required for custody modifications? It is well settled that any court finding a child within its jurisdiction may upon application determine anew the custody question if it is found that conditions surrounding the parent and child are materially changed from those existing at the time of the original award.[17] This redetermination, however, does not purport to disregard the pre-existing decree, but rather modifies it, just as the court making the original award might modify it for changed circumstances, were the child within its jurisdiction, on the theory that an award is *res judicata* only as to the facts before the court at the time of the judgment.[18] If the court originally seeking to make the determination has no jurisdiction to do so, the decree is invalid and therefore need not be recognized by courts in other jurisdictions.[19] But is the jurisdiction of a court to modify its own awards to be defined by itself or by the court in which the modification is sought to be enforced?

As there is no allegation of changed conditions in the instant case, and as the latest determination of the Nevada court carries a finding of jurisdiction, the issue of full faith and credit is squarely presented to the Kentucky court. If Kentucky had chosen to recognize Nevada's assertion that its jurisdiction was not defeated by the child's becoming domiciled outside the state, there would probably be no constitutional problem. But since the Nevada court has asserted a jurisdiction that the Kentucky court denied, an issue is raised which can be finally and properly adjudicated only by the United States Supreme Court. If, under Nevada law, the Nevada court had jurisdiction to enter the decree of modification, and if this Nevada law is constitutional, it would appear under the rule announced in *Adam v. Saenger*[20] that Kentucky must give full faith and credit to the Nevada decree, despite the fact that under Kentucky law the Nevada court would not have had jurisdiction to enter the modified decree. It is to be hoped that sometime soon the Supreme Court will indicate whether this principle is applicable to custody proceedings.

16. U.S. CONST. Art. IV, § 1.
17. Goldsmith v. Salkey, 131 Tex. 137, 112 S.W.2d 165, 116 A.L.R. 1293 (1938); Goodrich, *Custody of Children in Divorce Suits*, 7 CORNELL L.Q. 1, 7 (1921); Beale, *op. cit. supra* note 2, § 147.1. See also 116 A.L.R. 1306 *ff.* (1938).
18. New York *ex rel.* Halvey v. Halvey, 330 U.S. 610, 614-16 (1947).
19. May v. Anderson, 345 U.S. 528 (1953).
20. 303 U.S. 59 (1937). It is to be noted, however, that the *Adam* case was concerned with personal jurisdiction, while the instant case is concerned with jurisdiction over the subject matter. Quaere: whether this distinction is of any significance?

CONSTITUTIONAL LAW—FREEDOM OF SPEECH—"PRIOR RESTRAINT" OF MOTION PICTURES

Acting under the authority of the municipal code, the Commissioner of Police of Chicago determined that the motion picture "The Miracle" was "immoral" and "obscene," and refused to grant a permit for its exhibition.[1] The distributors brought suit asking that the code provision be declared unconstitutional and that an injunction be granted restraining the Commissioner from preventing exhibition of the film. The injunction was granted and the City of Chicago appealed directly to the Illinois Supreme Court. *Held,* reversed. The First and Fourteenth Amendments do not forbid the suppression by censorship of all motion pictures; the term "obscene" sufficiently defines one class of films upon which a "prior restraint" may properly be imposed. *American Civil Liberties Union v. City of Chicago,* 3 Ill.2d 334, 121 N.E.2d 585 (1954).

No form of state and local control of the showing of motion pictures, which began in Chicago in 1907,[2] was successfully challenged until 1952, when the Supreme Court in *Joseph Burstyn, Inc. v. Wilson*[3] held that a statute which authorized the banning of "sacrilegious" films violated the guarantee of freedom of speech and press inherent in the Due Process Clause of the Fourteenth Amendment. In earlier decisions the Court had upheld movie censorship prior to exhibition as a proper exercise of the state's police power,[4] on the ground that motion pictures are not a part of the press.[5] The *Burstyn* case, while establishing that movies are to be considered, for purposes of determining constitutional protection, as any other medium of expression,[6] left unanswered the question whether a state has the power to impose by a clearly drawn statute any restraint upon the exhibition of objectionable films.[7] The Court found only that the term "sacrilegious" is too vague to be used as a basis for classification.

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1. Instant Case at 587. "The Commissioner is required to issue the permit upon application and payment of the prescribed fee unless he determines that the picture is 'immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, or creed, or religion and exposses them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being. . . .'"

2. INGLIS, FREEDOM OF THE MOVIES 70 (1947).

3. 343 U.S. 495 (1952).

4. Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230 (1915). United Artists v. Thompson, 339 Ill. 595, 171 N.E. 742 (1930). *But cf.* Winters v. New York, 333 U.S. 507 (1948) (censorship of magazines).

5. Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230, 240 (1915). See cases collected in Note, 64 A. L. R. 505 (1929).

6. Joseph Burstyn, Inc. v. Wilson, *supra* note 3. The Supreme Court in 1925 had held that liberty of speech and of the press was to be protected from state infringement through the Due Process Clause of the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652 (1925).

7. Joseph Burstyn, Inc. v. Wilson, *supra* note 3 at 505-06.

Although the *Burstyn* decision has been cited as authority for the proposition that there remains a field of allowable prior restraint, since that decision the Supreme Court has repeatedly reversed state court decisions upholding prior restraints on motion pictures.[8] Statutes and ordinances found lacking in sufficiently precise standards contained such language as (1) "prejudicial to the best interests of the people of said city,"[9] (2) "only such films as are in the judgment and discretion of the department of education, of a moral, educational, or amusing and harmless character shall be passed and approved,"[10] (3) "immoral or tending to corrupt morals."[11] The court in the instant case conceded that the term "obscene" remains to a certain extent "elusive,"[12] but found that it has achieved a sufficiently precise meaning to describe a class of films which the state may validly suppress.[13]

Assuming that a statute presents a clear and definite standard, do states yet have the power to control the showing of motion pictures by prior restraints? The doctrine that there be no prior restraint on expression through speech and press is based on the notion that ready communication of thoughts, whereby the merits and duties of public men as well as public issues are made known, is essential in dealing with official misconduct. It is readily seen that the factors requiring the doctrine of "no prior restraint" do not extend to the majority of motion pictures. The protection has never been considered absolute;[14] the Supreme Court has said that ". . . the primary requirements of decency may be enforced against obscene publications."[15] Where there is a "clear and present danger" to the public morals, there is no reason to invalidate an unambiguous statute based on principle, not whim, simply as a prior restraint.[16] Punishment by criminal prosecution after the fact is doubtless less offensive to our traditional concepts of liberty, but because of the great potential for moral degradation and corruption through visual and audible dissemination, it is suggested that only by a system of prior restraint may the public be protected

8. See 41 KY. L.J. 257, 261 (1953).
9. Gelling v. Texas, 343 U.S. 960 (1952).
10. Superior Films, Inc. v. Department of Education, 346 U.S. 587 (1954) (Justices Douglas and Black concurring on the ground that all censorship of films is forbidden by the First Amendment).
11. Commercial Pictures Corp. v. Board of Regents, 346 U.S. 587 (1954).
12. Instant Case at 590.
13. "[A] motion picture is obscene within the meaning of the ordinance if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever artistic or other merits the film may possess." Instant Case at 592. See Desmond, *Censoring the Movies,* 29 NOTRE DAME LAW. 27, 31 (1954). See also 41 KY. L.J. 257, 262 (1953).
14. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942); Lovell v. Griffin, 303 U.S. 444, 451 (1938); Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697, 716 (1931); Adams Theatre Co. v. Keenan, 12 N.J. 267, 96 A.2d 519, 521 (1953).
15. Near v. Minnesota *ex rel.* Olsen, *supra* note 14, at 716.
16. *See* Niemotko v. Maryland, 340 U.S. 268, 285 (1951) (concurring opinion of Justice Frankfurter).

from the degenerating influences inherent in motion pictures.[17]

CORPORATIONS—UNIFORM STOCK TRANSFER ACT—EFFECT OF NOTICE OF RESTRICTION ON TRANSFER

A by-law of defendant corporation prohibited any stockholder from holding more than five shares of stock of the corporation. The Michigan Uniform Stock Transfer Act provides that no by-law shall be effective to restrict the transfer of shares unless the restriction is stated upon the certificate.[1] Defendant omitted this by-law from the stock certificates. Plaintiff, while an officer and director of defendant, became the owner of 25 shares and, having custody and control of the corporation books, registered them in his name. Subsequent to his resignation plaintiff purchased an additional share. When requested to transfer ownership of the share on the corporate books, defendant refused on the ground that plaintiff had knowledge of the restriction. Plaintiff commenced this action to compel such transfer, asserting that defendant's noncompliance with the statute rendered the restriction ineffective. From judgment for defendant, plaintiff appeals. *Held,* reversed. The statutory prohibition against any restriction on the transfer of shares not stated upon the certificate includes transfers to all purchasers, irrespective of notice. *Sorrick v. Consolidated Telephone Company of Springport,* 65 N.W.2d 713 (Mich. 1954).

Generally, the owner of corporate stock, as in the case of other personal property, has as an incident of ownership, the right to transfer his stock, except insofar as such right is restricted by the charter or articles of incorporation, statute, by-law, or agreement.[2] The common-law rule made the effectiveness of such restrictions depend upon notice to the purchaser. If the restriction was in a statute,[3] or in the articles of incorporation,[4] the purchaser was held to have notice of it. If the restriction was in the by-laws of the corporation, before it could be successfully invoked, it had to be shown that the purchaser

17. *See* Joseph Burstyn, Inc. v. Wilson, *supra* note 3 at 502; R.K.O. Pictures, Inc. v. Department of Education, 162 Ohio St. 263, 122 N.E.2d 769, 772 (1954) (dissenting opinion).

1. MICH. STAT. ANN. § 19.345 (1937).
2. CHRISTY & MCLEAN, THE TRANSFER OF STOCK § 36 (2d ed. 1940); 12 FLETCHER'S CYCLOPEDIA CORPORATIONS § 5452 (Perm. ed. 1932).
3. Healey v. Steele Center Creamery Ass'n, 115 Minn. 451, 133 N.W. 69 (1911); *see* O'Brien v. Cummings, 13 Mo. App. 197, 198 (1883); *accord, In re* Thornton, 7 F. Supp. 613 (D. Colo. 1934).
4. Lawson v. Household Finance Corp., 17 Del. Ch. 1, 147 Atl. 312 (1929), *aff'd* 17 Del. Ch. 343, 152 Atl. 723 (1930); Mason v. Mallard Telephone Co., 213 Iowa 1076, 240 N.W. 671 (1932); *See* State *ex rel.* Normile v. Cooney, 100 Mont. 391, 47 P.2d 637, 648 (1935).

had actual[5] or constructive[6] notice thereof. A purchaser without notice was not bound; that is, the restriction was not operative against him, as a by-law restriction is not notice.[7]

Section 15 of the Uniform Stock Transfer Act—the section involved in the instant case—states that there shall be no restriction upon the transfer of shares by virtue of any by-law unless it is stated upon the certificate.[8] The act has been adopted in every state, Alaska and Hawaii.[9] The fundamental purpose of the act is to create a negotiable certificate, so far as possible, and to make it the sole representative of the shares represented thereby.[10] It is to implement this policy that the act provides that all by-law restrictions on the transfer of stock must be stated on the certificate.[11] The applicability of this section to purchasers with notice of the restriction has caused a split of authority.

The statutory language has been interpreted by a majority of courts as applying to all purchasers irrespective of notice.[12] They have held that since the manifest intention of Section 15 is to increase the negotiability of the share, it follows that it is not for the protection of bona fide purchasers only, and unless the restriction is stated upon the certificate, it is not binding upon purchasers with or without notice. This is a departure from the common-law rule. A minority

5. Cook Ry. Signal Co. v. Buck, 59 Colo. 368, 149 Pac. 95 (1915); Sterling Loan & Investment Co. v. Litel, 75 Colo. 34, 223 Pac. 753 (1924); Model Clothing House v. Dickinson, 146 Minn. 367, 178 N.W. 957 (1920).

6. Nicholson v. Franklin Brewing Co., 82 Ohio St. 94, 91 N.E. 991 (1910), 137 Am. St. Rep. 764, 19 Ann. Cas. 699 (1911).

7. Mancini v. Patrizi, 110 Cal. App. 42, 293 Pac. 828 (1930); Robertson v. Nicholes Co., 141 Misc. 660, 253 N.Y. Supp. 76 (Munic. Ct. 1931); FLETCHER, *op. cit. supra* note 2, § 5453-58.

8. 6 U.L.A. § 15 (1922).

9. 6 U.L.A. 6 (Supp. 1954). However, a few states have omitted or changed certain sections. Section 15—that part of the Act in contention in this case—has been omitted by Kansas and North Dakota. California has a substitute for Section 15. See CAL. CORP. CODE ANN. § 2479(1953). Hawaii has changed the wording of Section 15 materially. The Idaho section contains an additional explanatory provision. The wording in the Oklahoma statute has been slightly varied.

10. 6 U.L.A. §§ 1, 5, 9, 15 (1922) (Commissioners' Note); BALLANTINE, CORPORATIONS § 332 (rev. ed. 1946). See Section 13 of the Uniform Act which provides that no levy or attachment on shares of stock shall be valid until the certificate is actually seized or its transfer enjoined. This changed the common-law rule which made levy effective by serving notice on the corporation. Elgart v. Mintz, 16 N.J. Misc. 289, 199 Atl. 68 (Cir. Ct. 1938). Section 15, in addition to prohibiting restrictions on transfer unless stated on the certificate, also provides that there shall be no lien in favor of the corporation upon the shares unless stated on the certificate. U.S. Gypsum Co. v. Houston, 239 Mich. 249, 214 N.W. 197 (1927).

11. 6 U.L.A. § 15 (1922) (Commissioners' Note). Costello v. Farrell, 234 Minn. 453, 48 N.W.2d 557, 29 A.L.R. 2d 891 (1951), 36 MINN. L. REV. 269 (1952).

12. Security Life and Acc. Ins. Co. v. Carlovitz, 251 Ala. 508, 38 So.2d 274 (1949); Age Publishing Co. v. Becker, 110 Colo. 319, 134 P.2d 205 (1943); Weber v. Lane, 315 Mich. 678, 24 N.W.2d 418 (1946) (alternative holding); Costello v. Farrell, *supra* note 11; Peets v. Manhasset Civil Engineers, Inc., 68 N.Y.S.2d 338 (Sup. Ct. 1946); *see* Magnetic Mfg. Co. v. Manegold, 201 Wis. 154, 157, 229 N.W. 544, 545 (1930).

of the courts have interpreted Section 15 as designed only for the protection of purchasers without notice, although recognizing that a purpose of the act is to increase the negotiability of the shares. Consequently, courts of this persuasion have said that purchasers with knowledge of the restrictions are not protected by Section 15.[13] These cases are, however, clearly distinguishable on their facts. In each case an officer of the corporation, who not only had knowledge of the by-law restriction, but also stood in a fiduciary position to the other shareholders, sought to violate it.

By the instant decision, the Michigan court clearly aligns itself with the majority view, holding the by-law ineffective because of defendant's noncompliance with the statute, though the purchaser had knowledge of it. This has been the trend in the more recent decisions, and appears to be the proper interpretation of the section as it is now worded. In three sections the protection of the act is expressly limited to bona fide purchasers.[14] If the legislature had intended this section to apply only to purchasers for value without notice, it seems that they would have so provided as in the aforementioned sections.[15] Neither in the wording of Section 15, nor in the Commissioners' Note following it, does it appear that the section is designed only for the benefit of purchasers without notice. However, in support of the minority view, it must be remembered that under the Uniform Negotiable Instruments Law, in order to cut off defenses, infirmities and equities, there must not only be a negotiable instrument, but also a holder in due course—this is, a holder who takes the instrument in good faith and for value, without notice of any infirmity in the instrument.[16] The Michigan court in the instant case realized that the equities in the case were strongly in favor of the defendant corporation, since the plaintiff (purchaser) had knowledge of the restriction, but felt bound by the wording of the statute. It seems that a "good faith" provision in the statute, thereby restoring the common-law rule, would without unduly hampering the negotiability of the share, insure a more equitable result in cases such as the present.

13. Doss v. Yingling, 95 Ind. App. 494, 172 N.E. 801 (1930); Baumohl v. Goldstein, 95 N.J. Eq. 597, 124 Atl. 118 (Ch. 1924). BALLANTINE, *op. cit. supra* note 10, § 332, 338; *See Cataldo, Stock Transfer Restrictions and the Closed Corporation,* 37 VA. L. REV. 229, 232 (1951); 10 ROCKY MT. L. REV. 117, 118 (1937).

14. 6 U.L.A. §§ 4, 7, 8 (1922).

15. Costello v. Farrell, *supra* note 11; *accord,* United States v. Atchison, Topeka & Sante Fe Ry., 220 U.S. 37 (1911); Bradas & Gheens, Inc. v. Brewer, 195 Tenn. 139, 258 S.W.2d 734 (1953).

16. Negotiable Instruments Law, §§ 52, 56, 58 (1943).

CRIMINAL PROCEDURE—CONTEMPT—EXTENT OF POWER OF TRIAL JUDGE TO PUNISH SUMMARILY

At the close of a criminal proceeding in a Federal District Court the trial judge, acting under Rule 42(a) of the Federal Rules of Criminal Procedure, summarily found defense counsel guilty of contumacious and unethical conduct in open court. The Court of Appeals affirmed, but reduced punishment on the ground that counsel's conduct was in part provoked by the trial judge. The Supreme Court granted certiorari. *Held,*[1] reversed. A district court judge who has become personally involved in the misconduct of counsel during a trial should request that another judge be assigned to sit in the contempt proceeding at which counsel's guilt is determined and punished. *Offutt v. United States,* 348 U.S. 11 (1954).

The inherent power of a court to punish for contempt is essential to the preservation of order in judicial proceedings.[2] In the federal courts,[3] contempt committed in the actual presence of the court may be punished summarily,[4] and other instances of contempt may be prosecuted in a hearing upon proper notice.[5]

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1. The majority includes Justices Frankfurter, Black and Douglas, who dissented in Sacher v. United States, 343 U.S. 1 (1952), while the dissenters in the instant case, Justices Reed, Burton and Minton, were of the majority in the *Sacher* decision. While the *Sacher* case and the instant case were very similar on the facts, they reached opposite results. The instant case does not, however, purport to overrule the *Sacher* decision.

2. Myers v. United States, 264 U.S. 95 (1924); *See Ex parte* Robinson, 19 Wall. 505 (U.S. 1873).

3. *Ex parte* Terry, 128 U.S. 289 (1888) and citations therein.

4. The word "summary," as used in Rule 42(a), does not refer to the timing of the action with reference to the offense, but refers to a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint, and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial. Sacher v. United States, 343 U.S. 1 (1952).

5. FED. R. CRIM. P. 42.

Sec.(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

Sec.(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

No one would question that the power of summary disposition is necessary to prevent the "demoralization of the court's authority"[6] when contempt committed in the presence of the court interferes with court procedure.[7] This power can be exercised by the trial judge during the trial,[8] at close of trial,[9] or after the trial.[10] But unless there is an impelling necessity for immediate action,[11] it would seem that the procedure involving notice and hearing should be preferred over summary disposition, as the latter deprives the defendant, in a criminal proceeding, of the right to be informed of the crime charged, to be represented by counsel, to cross-examine adverse witnesses, and to testify.[12]

The effectiveness and fairness of a summary disposition of contempt will necessarily be determined by the trial judge. When the power is wielded by a judge who, in the face of contempt directed at him personally, forgot his duty to remain calm and impartial[13] and allowed himself to become embroiled in a personal exchange with the offending attorney,[14] the right to due process[15] guaranteed to an accused by the Fifth Amendment may be impaired.[16]

Where lack of impartial judicial demeanor toward the misconduct of a defendant is indicated,[17] justice will be better served[18] by requiring that another judge sit in the contempt proceeding.[19] Special

6. *In re* Oliver, 333 U.S. 257 (1948); *Ex parte* Terry, 128 U.S. 289 (1888).
7. *Ex parte* Terry, 128 U.S. 289 (1888).
8. *Ibid.*
9. Sacher v. United States, 343 U.S. 1 (1952). This prevents delay in the trial proceedings or hardship to a party because of unavailability of an attorney.
10. Connell v. State, 80 Neb. 296, 114 N.W. 294 (1907). Jurisdiction of a judge to punish criminal contempt summarily will not be lost by delay in bringing charges. MacInnis v. United States, 191 F.2d 157 (9th Cir. 1951), *cert. denied,* 342 U.S. 953 (1952); Hallinan v. United States, 182 F.2d 880 (9th Cir. 1950), *cert. denied,* 341 U.S. 952 (1951); *In re* Maury, 205 Fed. 626 (9th Cir. 1913). See also Brown v. State, 178 Okla. 506, 62 P.2d 1208 (1936).
11. Cooke v. United States, 267 U.S. 517 (1925); Cornish v. United States, 299 Fed. 283 (6th Cir. 1924); Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).
12. *In re* Oliver, 333 U.S. 257 (1948). *See* Cooke v. United States, 267 U.S. 517 (1925); *Ex parte* Robinson, 19 Wall. 505 (U.S. 1873). *Contra*: Fisher v. Pace, 336 U.S. 155 (1949). *But see Ex parte* Hudgings, 249 U.S. 378, 383 (1918). *See* Myers v. United States, 264 U.S. 95, 104, 105 (1924), stating that contempt proceedings are *sui generis* and are neither civil actions nor criminal prosecutions as ordinarily understood.
13. Ponder v. Davis, 233 N.C. 699, 65 S.E.2d 356 (1951).
14. Instant Case.
15. Cooke v. United States, 267 U.S. 517 (1925).
16. Haslam v. Morrison, 113 Utah 14, 190 P.2d 520, 523 (1948). See also Whitaker v. McLean, 118 F.2d 596 (D. C. Cir. 1941).
17. Who is to determine whether the judge is prejudiced? Ponder v. Davis, 233 N.C. 699, 65 S.E.2d 356 (1951); U'Ren v. Bagley, 118 Ore. 77, 245 Pac. 1074 (1926); Haslam v. Morrison, 113 Utah 14, 190 P.2d 520 (1948).
18. Lack of impartiality may cause reversal. Peckham v. United States, 210 F.2d 693 (D.C. Cir. 1953); Whitaker v. McLean, 118 F.2d 596 (D.C. Cir. 1941).
19. Whitaker v. McLean, 118 F.2d 596 (D.C. Cir. 1941); Ponder v. Davis, 233 N.C. 699, 65 S.E.2d 356 (1951). *See* dissent of Justice Black in Sacher v. United States, 343 U.S. 1, 14 (1952).

provision for such action is made in the federal system.[20] No judge has a vested right to sit in a particular case,[21] and the power to punish for contempt is for the protection of the public rather than the judge.[22] Notwithstanding that certain facts within the personal knowledge of the trial judge, such as "expression, manner of speaking, bearing and attitude of defendant,"[23] will not be known to the judge replacing him,[24] real injustice may result if the trial judge is allowed to remain on the bench to conduct the contempt proceeding.[25]

EVIDENCE—POST-ACCIDENT STATEMENTS—THEORIES OF ADMISSIBILITY

Plaintiff sued for the death of his decedent in an automobile accident occasioned by the negligence of defendant's truck driver. A statement regarding his speed through an intersection, made by the employee at the scene of the collision to an investigating police officer, was admitted in evidence over defendant's objection. Defendant sought to attack a verdict for the plaintiff on the ground that this evidence was erroneously received. *Held,* no error. An employee's statement made immediately after an accident to an investigating officer is within his scope of employment and admissible against the employer regardless of whether it is considered a part of the *res gestae. Martin v. Savage Truck Line,* 121 F. Supp. 417 (D.D.C. 1954).

The law governing admissibility of post-accident statements by employees or agents affecting the tort liability of their employers is in considerable confusion.[1] The admissibility of such statements depends upon whether they fall within any of the following hearsay exceptions: 1) declarations constituting part of *res gestae;* 2) declarations against interest; 3) vicarious admissions. There is some recent tendency to find these statements admissible under one or another of the enumerated exceptions.[2] This is particularly true under the *res*

20. Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).
21. U'Ren v. Bagley, 118 Ore. 77, 245 Pac. 1074 (1926).
22. *Ex parte* Terry, 128 U.S. 289 (1888); U'Ren v. Bagley, 118 Ore. 77, 245 Pac. 1074 (1926).
23. MacInnis v. United States, 191 F.2d 157, 160 (9th Cir. 1951), *cert. denied,* 342 U.S. 953 (1952). *See* Fisher v. Pace, 336 U.S. 155, 161 (1949); Hallinan v. United States, 182 F.2d 880, 888 (9th Cir. 1950), *cert. denied,* 341 U.S. 952 (1951); Connell v. State, 80 Neb. 296, 114 N.W. 294, 296 (1907).
24. Appellate courts recognize this fact by tending to leave untouched the amount of punishment imposed by trial courts, provided the contempt conviction is upheld. MacInnis v. United States, 191 F.2d 157 (9th Cir. 1951), *cert. denied,* 342 U.S. 953 (1952); *In re* Maury, 205 Fed. 626 (9th Cir. 1913).
25. See Berger v. United States, 255 U.S. 22 (1920).

1. See generally the following annotations: 23 A.L.R.2d 1360 (1952); 163 A.L.R. 15 (1946); 141 A.L.R. 704 (1942); 118 A.L.R. 1230 (1939); 101 A.L.R. 1197 (1936); Note 15 OHIO ST. L.J. 187 (1954). *But cf.,* Morgan, *A Suggested Classification of Utterance Admissible as Res Gestae,* 31 YALE L.J. 229 (1922).
2. See 4 WIGMORE, EVIDENCE, § 1078 (3d ed. 1940); MCCORMICK, LAW OF

gestae exception involving narratives that are nearly contemporaneous with the event described or statements that are spontaneous rather than reflective.[3] It is also true where statements by servants at the scene of the accident are offered against the master,[4] or where the fact stated would subject the speaker to civil liability,[5] though it seems difficult to believe the servant in such a situation realizes the likelihood of a suit against him. The admissibility of a declaration against interest does not depend upon any relation between the speaker and a party to the action, and a few courts have intimated that a driver's post-accident statement would be admissible if he were not available as a witness.[6] In the third category the A.L.I. Model Code and the Uniform Rules of Evidence extend admissibility to any statement concerning any action which was within the scope of the agency or employment made by an agent or servant during the existence of the relationship.[7]

The orthodox rule as to vicarious admissions excludes post-accident statements unless the alleged agent had authority to speak about the subject matter in question.[8] By distinguishing between the authority to do an act or to deal with a specified matter and the authority to speak about it, most courts refuse evidence of narratives concerning a matter

EVIDENCE, § 244 (1954); MORGAN, BASIC PROBLEMS IN EVIDENCE, 235 (1954); A.L.I. MODEL CODE OF EVIDENCE; UNIFORM RULES OF EVIDENCE; Moscowitz, *Trends in Federal Law and Procedure*, 5 F.R.D. 361, 367-68 (1946).

3. Navajo Freight Lines, Inc. v. Mahaffy, 174 F.2d 305 (10th Cir. 1949) (statement immediately after the accident); MacDonald v. Appleyard, 94 N.H. 362, 53 A.2d 434 (1947) (statement immediately after the accident); Ambrose v. Young, 100 W. Va. 452, 130 S.E. 810 (1926) (twenty minutes later). *Contra*, Adams & Co., Inc. v. Homeyer, 87 Ga. App. 301, 73 S.E.2d 581 (1952) (twenty minutes later); Mattan v. Hoover Co., 350 Mo. 506, 166 S.W.2d 557 (1942) (shortly after accident); Citizens St. R. Co. v. Howard, 102 Tenn. 474, 52 S.W. 864 (1899) (fifteen minutes later); Tennessee Cent. Ry. Co. v. Gleaves, 2 Tenn. App. 549 (1926) (time enough to walk from engine to mail car); Hamilton v. Reinemann, 233 Wis. 572, 290 N.W. 194 (1940).

4. See note 3 *supra*.

5. Square Deal Cartage Co. v. Smith's Adm'r, 307 Ky. 135, 210 S.W.2d 340 (1948); MacDonald v. Appleyard, *supra* note 3. See also cases involving declarations against interest: Windorski v. Doyle, 219 Minn. 402, 18 N.W.2d 142 (1945). Admitting a bartender's statement against interest in a suit against the tavern owner, the court said: "[Relevant] declarations . . . by a deceased person as to facts presumably within his knowledge, if relevant to the matter of inquiry, are admissible . . . between third parties. . . ." Carlton v. Bernhardt-Seagle Co., 210 N.C. 655, 188 S.E. 77 (1936) (admitting a manager's report of an injury, notwithstanding some of the statements of fact are not within his personal knowledge).

6. *Cf.* Navajo Freight Lines, Inc. v. Mahaffy, *supra* note 3; Hamilton v. Reinemann, *supra* note 3. In the instant case it is noteworthy how closely the truckdriver's statements meet the requirements for a declaration against interest: 1) the declarant is dead, 2) the declaration was against his pecuniary interest (i.e. possible subjection to civil liability), 3) he had competent knowledge of the fact declared, 4) there was no probable motive to falsify the fact declared. Queries for the court: did the driver know the speed limit? Did he think of personal liability for the tort?

7. A.L.I. MODEL CODE OF EVIDENCE, c. 6, rule 508 (a).

8. RESTATEMENT, AGENCY, § 286 (1933): "Statements of an agent to a third person are admissible in evidence to prove the truth of facts asserted in them as though made by the principal, if the agent was authorized to make the statement or was authorized to make, on the principal's behalf, true statements concerning the subject matter."

within the scope of the agency or employment.[9] Other courts have thought it good policy to disregard the distinction.[10] This view, advocated by the Model Code, is amply supported by leading commentators.[11] It seems apparent that the guaranty of trustworthiness, the theoretical basis for admissibility, would be stronger when the statement is made on the scene of the accident, subject to verification by the parties present, the injured, the witnesses and any fresh physical evidence.[12] Immediate investigation by a police officer would afford a further stimulus for truthfulness.[13] Realistically speaking, the possibility of admonition by the employer or suggestions by his attorney would tend to make later statements less reliable.[14]

In accident cases, the subsequent statements are usually made by servants rather than agents.[15] It is well settled that a master is responsible for acts of a servant done within the scope of his employment, even though the servant may have been disobeying specific instructions.[16] A servant-driver of a truck is not authorized generally to speak for his employer concerning his work or his past conduct. Nevertheless, today he is almost always expected to answer questions of the investigating police at the scene of the accident.[17] His obedience to these regulations stands on the same basis as the duty to drive carefully.

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9. Vicksburg & Meridian Ry. Co. v. O'Brien, 119 U.S. 99 (1886); Niles v. Steiden Stores, Inc., 301 Ky. 80, 190 S.W.2d 876 (1945); Shelton v. Wolf Cheese Co., 338 Mo. 1129, 93 S.W.2d 947 (1936); Beaule v. Weeks, 95 N.H. 453, 66 A.2d 148 (1949); Van Allen v. Lobel, 123 N.J.L. 273, 8 A.2d 608 (1939); San Antonio Public Service Co. v. Jackson, 103 S.W.2d 251 (Tex.Civ.App.1937); Roadway Express, Inc. v. Gaston, 91 S.W.2d 883 (Tex.Civ.App.1936); Jones v. Gay's Express, 110 Vt. 531, 9 A.2d 121 (1939); Spence v. Browning Motor Freight Lines, Inc., 77 S.E.2d 806 (W.Va. 1953); Hamilton v. Reinemann, note 3 *supra*. *Contra,* Myrick v. Lloyd, 158 Fla. 47, 27 So.2d 615 (1946); Thornton v. Budge, 74 Idaho 103, 257 P.2d 238 (1953); Pinnix v. Griffin, 219 N.C. 35, 12 S.E.2d 667 (1941); MacDonald v. Appleyard, note 3 *supra*. It is important to notice that if agent and principal are both parties to the suit, the agent's admission is admitted against him, though not admissible against the principal. Square Deal Cartage Co. v. Smith's Adm'r., *supra* note 5.

10. Instant Case, 121 F. Supp. 417 (1954); Whitaker v. Keogh, 144 Neb. 790, 14 N.W.2d 596 (1944); 4 WIGMORE, EVIDENCE, § 1078, p. 119 (1940): "He who sets another person to do an act in his stead as *agent* is chargeable in substantive law by such acts as are done under that authority; so too, properly enough, admissions made by the agent in the course of exercising that authority have the same testimonial value to discredit the party's present claim as if stated by the party himself."

11. See note 2, *supra*.

12. Note, 163 A.L.R. 15, at 148 (1946).

13. *Id.* at 167.

14. See MCCORMICK, EVIDENCE, § 244 (1954).

15. Manual operation of a motor vehicle, train, streetcar, or airplane is done by a servant-driver more so than an agent. Such acts are referred to as nonjuristic. See FERSON, PRINCIPLES OF AGENCY (1954).

16. 35 AM. JUR., *Master and Servant* § 532 (1941); 57 C.J.S., *Master and Servant* § 555 (1948); FERSON, *op. cit. supra* note 16, § 62.

17. It is a matter of common knowledge that states have motor vehicle statutes requiring drivers to report accidents resulting in injury. "Police authorities have special units for the immediate investigation of the numerous injuries which are of daily occurrence." Instant Case at 419.

The basic question involved is one of employment—not authorization. The truckdriver's statement was clearly not authorized.[18] As an employer, however, today can be reasonably certain that any accident in which his employee is involved will be investigated by police, the scope of a driver's employment should realistically include the answering of the investigating officers' questions. Imposing responsibility in this type of case for an employee's statements just as for his non-verbal conduct seems at most a minimal extension of the orthodox doctrine. The next logical step for the courts is the adoption of the provision of the Model Code and the Uniform Rules. In the instant case, the court may not have been exactly accurate in speaking in terms of principal and agent, rather than master and servant, but the result seems both theoretically sound and practically desirable.

INSURANCE—AUTOMOBILE THEFT POLICY—MEANING OF "POSSESSION" IN EXCLUSIONARY CLAUSE OF POLICY

An automobile was stolen from the plaintiff car dealer, by a sales prospect who was allowed to test the car by driving around the block. The dealer sued defendant insurer on an automobile theft policy which specifically excepted from coverage loss resulting from the voluntary delivery of possession of an automobile.[1] Notwithstanding a jury finding that plaintiff had permitted the prospect to test-drive the car, the court entered judgment for the plaintiff, and the defendant appealed. *Held,* reversed. By giving a prospect control of a car in order to test it, a dealer voluntarily parts with possession within the meaning of the contract. *Dinkin v. American Insurance Company,* 268 Wis. 138, 66 N.W.2d 681 (1954).

Exclusionary clauses similar to that in the instant case are fairly common in car-dealer theft policies.[2] As a general rule the owner is allowed to recover despite the clause where he has parted with the automobile for the purpose of some service such as garage storage or

18. The agency to do an act and the legal consequences of the act are separate questions for the court. Utterances may have legal consequence, regardless of whether an agency exists. This has been explained by the theory that representations are non-juristic acts and they do not need authorization to make the employer liable. FERSON, *op. cit. supra* note 16, §§ 77 and 79. It is most important to notice that altercations following a traffic accident have been held to be within servant-driver's general scope of employment. Fields v. Sanders, 29 Cal.2d 834, 180 P.2d 684 (1947), 172 A.L.R. 525 (1948); Felder v. Houston Transit Co., 203 S.W.2d 831 (Tex. Civ. App. 1947), *aff'd* 146 Tex. 428, 208 S.W.2d 880 (1948).

1. The policy provided that the insurer should not be liable in the event of "loss suffered by the insured in case he voluntarily parts with title to or possession of an automobile at risk hereunder, whether or not induced so to do by any fradulent scheme, trick, device or false pretence or otherwise." Instant Case at 682.

2. Galloway v. Marathon Ins. Co., 220 Ark. 548, 248 S.W.2d 699, 700 (1952).

repair;[3] he is said to part with custody—not possession.[4] But disagreement arises among the different jurisdictions when, as here, the car is stolen after delivery to a prospective buyer.[5] Here, the courts find much more difficulty in determining whether the car owner has voluntarily parted with possession within the meaning of the exclusionary clause. Several courts follow the rule of the present case and hold that the prospective buyer was given possession.[6] Various methods of reasoning have been used in arriving at this result. One court ascribes to "possession" its common dictionary meaning[7] and holds that physical control of an object is possession.[8] Another states that possession is an exercise of control over the car for the sales prospect's own purposes.[9] A Texas court said that the policy was drawn to exclude just such temporary possession,[10] perhaps meaning that an intended temporary parting is a transfer of possession. Finally, the instant case defines possession as a physical control, plus an intent by the owner to entrust the car to the prospect for the latter's own purposes and benefit. There are still other decisions, some relied upon by the court in the instant case, which upon superficial analysis might seemingly be authority for the result reached herein.[11] However,

3. Bennett Chevrolet Co. v. Bankers & Shippers Ins. Co., 58 R.I. 16, 190 Atl. 863, 109 A.L.R. 1077 (1937); Gibson v. St. Paul Fire & Marine Ins. Co., 117 W. Va. 156, 184 S.E. 562 (1936)' (theft from a public garage).

4. Gibson v. St. Paul Fire & Marine Ins. Co., 117 W. Va. 156, 184 S.E. 562 (1936).

5. Instant Case. Contra: Tripp v. United States Fire Ins. Co., 141 Kan. 897, 44 P.2d 236 (1935). Concerning this general problem see 5 APPLEMAN, INSURANCE LAW § 3212 nn. 10, 12, 21 (Supp. 1955); 6 BLASHFIELD, AUTOMOBILE LAW § 3723 nn. 78, 79 (Cumm. Supp. 1954).

6. Nelson v. Pennsylvania Fire Ins. Co., 155 Neb. 237, 47 N.W2d 432 (1951) (plaintiff's employee allowed prospect to drive truck off lot for demonstration); Boyd v. Travelers Fire Ins. Co., 147 Neb. 237, 22 N.W.2d 700 (1946) (prospect allowed to take car to wife for inspection after leaving a five dollar deposit); McDowell Motor Co. v. New York Underwriters Ins. Co., 233 N.C. 251, 63 S.E.2d 538, 3 MERCER L. REV. 217 (1951) (prospect allowed to take car out of city to show his wife); Stuart Motor Co. v. General Exchange Ins. Corp., 43 S.W.2d 647 (Tex. Civ. App. 1931)' (prospect permitted to drive truck five miles to next town to show person who was to assist in buying).

7. "Act, fact, or condition of person's having such control of property that he may legally enjoy it to the exclusion of all others having no better right than himself. . . . [Recognizing] as having possession him (as a thief) who has actual physical control of a thing and holds it for himself. . . ." Webster's New International Dictionary (2d ed. 1955).

8. Boyd v. Travelers Fire Ins. Co., 147 Neb. 237, 22 N.W.2d 700 (1946); Nelson v. Pennsylvania Fire Ins. Co., 155 Neb. 199, 47 N.W.2d 432 (1951) (following the earlier Nebraska case without any citation or reasoning by simply stating that if the employee had allowed a sales prospect to try out the car, possession had been given voluntarily by the car owner—opinion concerned mainly with the question of agency).

9. McDowell Motor Co. v. New York Underwriters Ins. Co., 233 N.C. 251, 63 S.E.2d 538 (1951).

10. Stuart Motor Co. v. General Exchange Ins. Corp., 43 S.W.2d 647 (Tex. Civ. App. 1931).

11. Galloway v. Marathon Ins. Co., 220 Ark. 548, 248 S.W.2d 699 (1952) cited by the instant case as supporting its position although the car dealer sold the car for a bad check, rather than permitting it to be driven as a demonstration); Aetna Casualty & Surety Co. v. Salyers, 172 S.W.2d 635 (Ky. App. 1943) (thief paid ten dollars to owner and kept car four weeks

in these cases, the period of time is generally so long[12] and the right of control by the prospective buyer so obvious[13] as to come within almost any definition of possession. They are, therefore, of little weight as authority for cases, such as the present, in which the prospective buyer is given a very limited time and definite directions (drive around the block). At least two courts[14] hold the car owner (dealer) has not given up possession on facts very similar to the instant case; in both cases the prospect was held to have obtained custody only.[15]

The disagreement among these different courts seems to prove an earlier statement of the United States Supreme Court concerning the ambiguity of the word "possession."[16] Although several of the courts supporting the present case talk quite feelingly about the intent of the insurance company,[17] they appear to overlook the intent of the car dealer in regard to the insurance policy. It is quite likely that the insured intended to be covered [18] just as much as the insurer intended to avoid that coverage.[19] The dispute is over an interpretation of the ambiguous term "possession." When called upon to resolve that ambiguity, it would seem that courts, by an elementary maxim of insurance law, should construe the policy strictly against the insurer, whose draftsmen occasioned the ambiguity.[20]

In the final analysis, it is the intent of the contracting parties which is the object of the court's search. Here the court determined that the insurer had not contracted to assume the risk of loss resulting from

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before absconding with it); Jacobson v. Aetna Casualty & Surety Co., 233 Minn. 383, 46 N.W.2d 868 (1951) (relied upon by instant case, though distinguishable in that prospect gave a check for the car and was allowed to keep the car over a weekend while verifying the check).

12. Aetna Casualty & Surety Co. v. Salyers, 172 S.W.2d 635 (Ky. App. 1943) (four weeks).

13. Jacobson v. Aetna Casualty & Surety Co., 233 Minn. 383, 46 N.W.2d 868 (1951) (buyer allowed to use car over a weekend).

14. McConnell v. Fireman's Fund Ins. Co., 178 F.2d 76 (5th Cir. 1950), *aff'd*, Fireman's Fund Ins. Co. v. McConnell, 198 F.2d 401 (5th Cir. 1952) (prospect allowed to take car out for a drive at an auction); Tripp v. United States Fire Ins. Co., 141 Kan. 897, 44 P.2d 236 (1935) (sales prospect allowed to try out car); *cf.* Allen v. Berkshire Mut. Fire Ins. Co., 105 Vt. 471, 168 Atl. 698 (1933), 89 A.L.R. 465 (1934) (owner allowed prospect to take car on trial fourteen days, then demanded the car back; thief promised to bring it back after weekend, but did not. *Held*, owner had constructive possession and the thief was only a bailee).

15. See note 14 *supra*.

16. "[B]oth in common speech and in legal termmology, there is no word more ambiguous in its meaning than Possession." National Safe Deposit Co. v. Stead, 232 U.S. 58, 67 (1914).

17. McDowell Motor Co. v. New York Underwriters Ins. Co., 233 N.C. 251, 63 S.E.2d 538, 541 (1951); Stuart Motor Co. v. General Exchange Ins. Corp., 43 S.W.2d 647 (Tex. Civ. App. 1931).

18. McConnell v. Fireman's Fund Ins. Co., 178 F.2d 76, (5th Cir. 1950).

19. See note 17 *supra*.

20. Tripp v. United States Fire Ins. Co., 141 Kan. 897, 44 P.2d 236 (1935) (some term less equivocal than "possession" held essential if the insurer would have its exclusionary clause cover situations such as the present). Perhaps, in light of the instant case, "physical control" would be a proper term.

the surrender of physical control by the insured for the primary purpose and use of a prospective buyer. Assuming this determination to represent the intent of the parties (or what they would have intended had they foreseen the problem), the soundness of the result reached would seem not measurably less questionable. If the question of "possession" is to turn upon the purpose for which control of the car was relinquished, a realistic interpretation of the transaction would appear to be that the insured was acting directly and primarily in furtherance of his own purpose—to sell the car.

MALICIOUS PROSECUTION—NO RECOVERY FOR BASELESS CIVIL ACTION—NECESSITY OF "SPECIAL INJURY"

Plaintiff sued for the malicious prosecution of an action in which the defendant, charging plaintiff with fraud and misrepresentation, had sought rescission of a contract. The defendant had dismissed the prior action before trial. Plaintiff claimed damages for injury to reputation, mental pain and suffering, loss of credit, and deprivation of the free use of his company's assets. From a judgment of dismissal, plaintiff appealed. *Held* (5-2), affirmed. No action will lie for malicious prosecution of a civil action unless there has been an arrest of the person, seizure of property, or special injury sustained which would not necessarily result in all suits for like causes of action. *Aalfs v. Aalfs,* 66 N.W.2d 121 (Iowa 1954).

The gist of the action for malicious prosecution of a civil suit is the initiation of legal process for the purpose of vexation or injury.[1] The plaintiff must prove that: (1) suit has been instituted or continued without any probable cause therefor; (2) the motive in the proceeding was malicious; and (3) the proceeding terminated in favor of the defendant.[2]

The courts are divided as to whether recovery can be had if there has been no arrest of the person, seizure of property, or other special damage. One line of authority, following the English doctrine,[3] holds that without such special circumstances the defendant had no redress, despite the fact that his antagonist proceeded against him maliciously and without probable cause.[4] Several contentions are advanced by

1. *See* Schott v. Indiana Nat. Life Ins. Co., 160 Ky. 533, 169 S.W. 1023, 1025 (1914), [1916A] Ann. Cas. 337, 340; 34 AM. JUR., *Malicious Prosecution* § 2 (1941).

2. *See* Staunton v. Goshorn, 94 Fed. 52, 56 (4th Cir. 1899); Sawyer v. Shick, 30 Okla. 353, 120 Pac. 581, 582 (1911); COOLEY, TORTS § 115 (1932); RESTATEMENT, TORTS § 674 (1938).

3. See Quartz Hill Mining Co. v. Eyre, 11 Q.B.D. 674 (1883).

4. Schwartz v. Schwartz, 366 Ill. 247, 8 N.E.2d 668 (1937); Supreme Lodge v. Muverzagt, 76 Md. 104, 24 Atl. 323 (1892); Paul v. Fargo, 84 App. Div. 9, 82 N.Y. Supp. 369 (4th Dep't 1903); Cincinnati Daily Tribune v. Bruck, 61 Ohio

the courts to support this strict view. One contention is that costs in law are generally sufficient reimbursement to the successful defendant for damages resulting from the malicious prosecution of an ordinary civil action.[5] Another argument is that litigants should be encouraged to use the courts without being amenable to suit for calling on the courts to determine their rights.[6] A third contention rests upon the perennial "flood of litigation" theory—that every successful defendant would be tempted to bring the action, alleging malice in the prior suit.[7]

A great number of jurisdictions, however, allow the action even though in the prior suit the defendant was not arrested, nor were his property rights violated.[8] These courts generally proceed on the basic theory that for every legal wrong there is a remedy, especially where the infliction is malicious.[9] The arguments of these courts purport to refute the contentions of the opposing jurisdictions. The reason for the English rule would not seem to apply in the United States where the costs recoverable are confined to much narrower limits.[10] Likewise, the policy of keeping the courts open to litigants offers little support to the plaintiff who maliciously seeks to harass or damage another.[11] Moreover, it is said that where the remedy is allowed there is really no overcrowding of the courts with such complaints.[12] The requisites of lack of probable cause and malicious intent tend to dis-

St. 489, 56 N.E. 198 (1900), 76 Am. St. Rep. 433 (1901); Abbott v. Thorne, 34 Wash. 692, 76 Pac. 302 (1904).

5. *See* Bitz v. Meyer, 40 N.J.L. 252, 254, (Sup. Ct. 1878), 29 Am. Rep. 233, 236 (1912); Norcross v. Otis Bros. & Co., 152 Pa. 481, 25 Atl. 575, 576 (1893), 34 Am. St. Rep. 669, 671 (1894).

6. Schwartz v. Schwartz, 366 Ill. 247, 8 N.E.2d 668 (1937); Smith v. Michigan Buggy Co., 175 Ill. 619, 51 N.E. 569 (1898); Abbott v. Thorne, 34 Wash. 692, 76 Pac. 302 (1904).

7. Schwartz v. Schwartz, 366 Ill. 247, 8 N.E.2d 668 (1937); Smith v. Michigan Buggy Co., 175 Ill. 619, 51 N.E. 569 (1898); Supreme Lodge v. Muverzagt, 76 Md. 104, 24 Atl. 323 (1892); Paul v. Fargo, 84 App. Div. 9, 82 N.Y. Supp. 369 (4th Dep't 1903); Abbott v. Thorne, 34 Wash. 692, 76 Pac. 302 (1904).

8. Peerson v. Ashcraft Cotton Mills, 201 Ala. 348, 78 So. 204 (1917); Ackerman v. Kaufman, 41 Ariz. 110, 15 P.2d 966 (1932); Slee v. Simpson, 91 Colo. 461, 15 P.2d 1084 (1932), 85 A.L.R. 412 (1933); Antcliff v. June, 81 Mich. 447, 45 N.W. 1019 (1890), 10 L.R.A. 621 (1891); Kolka v. Jones, 6 N.D. 461, 71 N.W. 558 (1897), 66 Am. St. Rep. 615 (1899); Lipscomb v. Shofner, 96 Tenn. 112, 33 S.W. 818 (1896). *See* Turner v. J. Black & Sons, 242 Ala. 127, 5 So.2d 93, 94 (1941); Eastin v. Bank of Stockton, 66 Cal. 123, 4 Pac. 1106, 1109-10 (1884); Levy v. Adams, 140 Fla. 515, 192 So. 177, 178 (1939). See Note, 150 A.L.R. 897 (1944).

9. *See* Peerson v. Ashcraft, 201 Ala. 348, 349, 78 So. 204, 205 (1917); Antcliff v. June, 81 Mich. 447, 45 N.W. 1019, 1022 (1890), 10 L.R.A. 621, 626 (1891); Lipscomb v. Shofner, 96 Tenn. 112, 33 S.W. 818, 819 (1896).

10. Peerson v. Ashcraft, 201 Ala. 348, 78 So. 204 (1917); Ackerman v. Kaufman, 41 Ariz. 110, 15 P.2d 966 (1932). *See* Eastin v. Bank of Stockton, 66 Cal. 123, 4 Pac. 1106, 1109 (1884).

11. Peerson v. Ashcraft, 201 Ala. 348, 78 So. 204 (1917); Ackerman v. Kaufman, 41 Ariz. 110, 15 P.2d 966 (1932); Kolka v. Jones, 6 N.D. 461, 71 N.W. 558 (1897), 66 Am. St. Rep. 615 (1899). *See* Chatham Estates v. American Nat. Bank, 171 N.C. 579, 88 S.E. 783, 785 (1916).

12. *See* Peerson v. Ashcraft, 201 Ala. 348, 349, 78 So. 204, 205 (1917); Kolka v. Jones, 6 N.D. 461, 71 N.W. 558, 561 (1897), 66 Am. St. Rep. 615, 620-21 (1899).

courage actions for malicious prosecution except in clear cases.[13]

It would seem that the liberal view toward allowing the action is more reasonable than the strict view; but, since the court in the instant case chose not to follow it, it appears worthwhile to examine the question of what does constitute sufficient "special injury," there being seizure of person or property.

It has been said that, in jurisdictions where the strict rule is followed, there is a tendency readily to construe actions as interfering with property or causing special injury in order to avoid denial of a remedy to the victimized defendant.[14] Yet other authority indicates that mere expense and annoyance of defending a civil action is not sufficient special damage to sustain an action for malicious prosecution,[15] even where the prior suit operated to cast discredit upon the plaintiff.[16] In an Ohio case[17] the court held that no cause of action was stated when a malicious prosecution resulted in injury to the credit of a corporation and otherwise embarrassed it in the conduct of its business.

It would appear that even though the Iowa court in the instant case prefers to follow the strict rule, the damages complained of here are close to the borderline separating actionable "special injury" from the ordinary non-compensable "burdens of litigation."

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13. *See* Kolka v. Jones, 6 N.D. 461, 71 N.W. 558, 561 (1897), 66 Am. St. Rep. 615, 620 (1899).

14. *See* Peterson v. Peregoy & Moore Co., 180 Iowa 325, 163 N.W. 224, 225 (1917). In some jurisdictions requiring special injury in the absence of seizure of person or property varying results have occurred. Shedd v. Patterson, 302 Ill. 355, 134 N.E. 705 (1922), 26 A.L.R. 1004 (1923) (strict rule inapplicable where successive actions were brought by the antagonist on like causes of action after having had his day in court); Luby v. Bennett, 111 Wis. 613, 87 N.W. 804 (1901), 87 Am. St. Rep. 897 (1902), 56 L.R.A. 261 (1902) (action allowed where defendant had suffered loss through depreciation of his firm's assets and injury to his good name); Slater v. Kimbro, 91 Ga. 217, 18 S.E. 296 (1892), 44 Am. St. Rep. 19 (1895) (malicious and unfounded ejectment action which caused the plaintiff to lose her old boarders and deterred new ones from giving her their business constituted special damage sufficient to support the action); Payne v. Donegan, 9 Ill. App. 566 (1881) (successive suits before a justice of the peace, thereby subjecting the plaintiff to great trouble and expense in defending the same, held actionable).

15. Swain v. American Surety Co., 47 Ga. App. 501, 171 S.E. 217 (1933); Schwartz v. Schwartz, 366 Ill. 247, 8 N.E.2d 668 (1937); Doane v. Hescock, 155 N.Y. Supp. 210 (Sup. Ct. 1915).

16. Soffos v. Eaton, 39 A.2d 865 (D.C. Mun. App. 1944), *rev'd on other grounds*, 152 F.2d 682 (D.C. Cir. 1945); Johnson v. Walker-Smith Co., 47 N.M. 310, 142 P.2d 546 (1943). In Soffos v. Eaton, *supra* at 866, the court said: "Practically every defendant to a law suit suffers some damage to his reputation. The damage will vary . . . but . . . only a matter of degree."

17. Cincinnati Daily Tribune v. Bruck, 61 Ohio St. 689, 56 N.E. 198 (1900), 76 Am. St. Rep. 433 (1901).

MALPRACTICE—NEGLIGENT PRESCRIPTION OF HABIT-FORMING DRUGS—PATIENT'S SIMULATION OF PAIN AS CONTRIBUTORY NEGLIGENCE

Drugs were administered to plaintiff while she was a patient in the hospital following a major operation. Later, while she was convalescing at home, defendant physician, without first examining her, prescribed drugs to ease her pain. The drugs were administered by the patient herself or her family. The hospital sued on the account for its services and patient filed a cross-complaint against the hospital and physician alleging malpractice in the administration of drugs which resulted in her becoming a drug addict and caused her great pain and suffering in withdrawal treatment. Verdict and judgment were for patient in the trial court. *Held,* affirmed. The evidence supported the verdict, and, despite the fact that patient called the physician and complained of pain when no pain was present, the patient was not as a matter of law guilty of contributory negligence. *Los Alamos Medical Center v. Coe,* 275 P.2d 175 (N.M. 1954).

Malpractice is negligent treatment by a physician or surgeon in a manner contrary to accepted rules and with injurious results to the patient.[1] The general rules of contributory negligence apply in actions against physicians for malpractice;[2] recovery cannot be had if the patient's own action was an active and contributing cause of the injury.[3] Perhaps because of the likelihood that the patient has been contributorily negligent in becoming a drug addict, malpractice actions involving the prescription of habit-forming drugs are very uncommon. The decision in the instant case, however, that simulation of nonexistent pain to get the drugs does not make the patient contributorily negligent as a matter of law, is not without precedent. The court relied upon a Massachusetts case in which recovery was allowed a patient who had become an addict from injections by a doctor who had made no adequate attempt to ascertain the cause of her pain.[4] The court there held that the patient could not be ruled contributorily negligent as a matter of law even though she lied about her condition.

A loose analogy to the instant situation may be drawn from cases involving the liability of sellers of intoxicating liquors for injury re-

1. *See* Napier v. Greenzweig, 256 Fed. 196, 197 (2d Cir. 1919); Williams v. Elias, 140 Neb. 656, 1 N.W.2d 121, 124 (1941); 70 C.J.S., *Physicians and Surgeons* § 40 (1951).
2. *See* Wemmett v. Mount, 134 Ore. 305, 292 Pac. 93, 97 (1930); REGAN, DOCTOR AND PATIENT AND THE LAW § 33 (2d ed. 1949); 41 AM. JUR., *Physicians and Surgeons* § 80 (1942).
3. *See* Leadingham v. Hillman, 224 Ky. 177, 5 S.W.2d 1044, 1045 (1928); Halverson v. Zimmerman, 60 N.D. 113, 232 N.W. 754, 757 (1930); Wemmett v. Mount, 134 Ore. 305, 292 Pac. 93, 97 (1930).
4. King v. Solomon, 323 Mass. 326, 81 N.E.2d 838 (1948).

sulting from such intoxication. At common law no redress existed against a person selling, giving or furnishing intoxicating liquors.[5] Civil damage statutes, or "Dram Shop" acts, however, have provided for actions by innocent third parties for injuries received through the intoxication of the buyer.[6] Yet most courts hold that a person who becomes voluntarily intoxicated and receives injury thereby is not one of the persons for whose benefit the statutes were passed.[7] The policy manifest in the instant case would seem to be to protect the patient against himself, a policy not evident in the intoxicating liquor cases. It should be noted that a more personal and inherently dangerous relationship exists between doctor and patient than between liquor seller and buyer. Although a physician may personally administer any narcotics at such times and under such circumstances as he, in good faith, believes to be necessary for the alleviation of pain and suffering,[8] he enters a dangerous area when he prescribes narcotics without adequate medical examination of the patient.

In a Vermont case,[9] an instruction to the effect that a sick man is not expected to exercise the same discretion and judgment as a well man was held not to be error. On the other hand, the habit-forming qualities of drugs such as morphine and codeine, and the effects therefrom, are matters of common knowledge. In a wrongful death action[10] against a druggist for frequently selling to the deceased barbiturates which resulted in his addiction and ultimate suicide, the court indicated by dictum that, had the deceased survived and brought the suit himself, his own contributory negligence would have barred the suit. It has been said that it would not be contributory negligence for the patient to disregard instructions of a physician which would subject him to needless danger of health or life.[11] It is submitted that under certain circumstances, where the natural result of the abuse of some treatment is a matter of common knowledge, a failure to disregard the instructions of the physician may constitute contributory negligence. This is especially so where the patient has the peculiar

5. *See* Coy v. Cutting, 138 Kan. 109, 23 P.2d 458, 461 (1933); Sworski v. Colman, 204 Minn. 474, 283 N.W. 778, 780 (1939); Demge v. Feierstein, 222 Wis. 199, 203, 268 N.W. 210, 212 (1936).

6. *See* Lester v. Bugni, 316 Ill. App. 19, 44 N.E.2d 68 (1942); Lang v. Casey, 326 Pa. 193, 191 Atl. 586 (1937); Healey v. Cady, 104 Vt. 463, 161 Atl. 151 (1932).

7. Holmes v. Rolando, 320 Ill. App. 475, 51 N.E.2d 786 (1943); Malone v. Lambrecht, 305 Mich. 58, 8 N.W.2d 910 (1943); Sworski v. Colman, 204 Minn. 474, 283 N.W. 778 (1939). *Contra:* Kraus v. Schroeder, 105 Neb. 809, 182 N.W. 364 (1921).

8. HAYT, HAYT, AND GROESCHIEL, LAW OF HOSPITAL, PHYSICIAN AND PATIENT 302 (2d ed. 1952).

9. Williams v. Marini, 105 Vt. 11, 162 Atl. 796 (1932).

10. *See* Scott v. Greenville Pharmacy, 212 S.C. 485, 48 S.E.2d 324, 326 (1948), 2 VAND. L. REV. 330 (1949).

11. *See* DuBois v. Decker, 130 N.Y. 325, 330, 29 N.E. 313, 314 (1891); Halverson v. Zimmerman, 60 N.D. 113, 232 N.W. 754, 758 (1930); 41 AM. JUR., *Physicians and Surgeons* § 80 (1942).

knowledge that a drug is not actually needed for its legitimate purpose of relief of pain, as in the instant case. But the question of contributory negligence is usually one for the jury, and cases holding the patient guilty as a matter of law would be very rare.