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Recent Cases

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RECENT CASES

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—VALIDITY OF CARRIER REGULATION REQUIRING RACIAL SEGREGATION

Plaintiff, a Negro school teacher traveling south from Philadelphia on defendant's train, was allowed to ride in a coach normally reserved for white passengers, until the train reached Richmond. At Richmond the trainmen, in attempting to enforce defendant's regulations calling for racial segregation, ordered plaintiff to move to another car. He refused and was later ejected. In a suit for wrongful ejection plaintiff appeals the judgment of the lower court, which found the regulation to be valid. *Held,* reversed; the regulation imposes an undue burden on interstate commerce and is therefore unconstitutional. *Chance v. Lambeth,* 186 F.2d 879 (4th Cir. 1951).

In *Plessy v. Ferguson*[1] the Supreme Court held that a law which requires the separation of white and colored races in public conveyances of interstate character is a reasonable exercise of state police power and does not deprive a colored person of any rights under the Fourteenth Amendment, provided there is substantial equality of treatment and accommodations.[2] The Supreme Court took an entirely different approach to the problem in *Morgan v. Virginia,*[3] however, and found a state statute compelling racial segregation and requiring shifting of interstate passengers in vehicles crossing state lines to be an unconstitutional interference with the national power over interstate commerce.[4] The Court reached this result by relying on *Hall v.*

1. 163 U.S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256 (1896).

2. Recent cases have strictly construed this "separate but equal" doctrine, and it has been held that the requirements are not met when certain tables in a dining car are partitioned off for Negroes [Henderson v. United States, 339 U.S. 816, 70 Sup. Ct. 843, 94 L. Ed. 1302 (1950) (decision actually based on Interstate Commerce Act)], or when a Negro is denied access to a Pullman car. Mitchell v. United States, 313 U.S. 80, 61 Sup. Ct. 873, 85 L. Ed. 1201 (1941). Either "separate but equal" cars must be provided or else the races must be allowed to mix without discrimination. It has been held that before a plaintiff can maintain a federal court damage suit for violation of the Interstate Commerce Act he must first pursue his remedy before the Interstate Commerce Commission. Greene v. Atlantic Coast Line R.R., 19 U.S.L. WEEK 2344 (U.S.D.C., E.D.N.Y., Jan. 17, 1951). This problem, however, did not arise in the instant case since the carrier regulation was contested on the basis of its constitutionality and not as a violation of the Act.

3. 328 U.S. 373, 66 Sup. Ct. 1050, 90 L. Ed. 1317 (1946). For law review comments on this case see, *e.g.,* Richardson, *Segregation of Passengers on Common Carriers on Basis of Race,* 37 KY. L.J. 140, 142 (1949); 46 COL. L. REV. 853 (1946); 19 TENN. L. REV. 794 (1947); 32 VA. L. REV. 1064 (1946).

4. U.S. CONST. Art. I, § 8. "Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation." Morgan v. Virginia, 328 U.S. 373, 377, 66 Sup. Ct. 1050, 90 L. Ed. 1317 (1946). In New v. Atlantic Greyhound Corp., 186 Va. 726, 43 S.E.2d 872 (1947), the statute providing for separation of white and colored passengers in motor-buses was held to be severable as to its subject matter, and thus valid as to intrastate passengers notwithstanding its invalidity as applied to interstate passengers as being an undue burden on interstate commerce. See also REPPY, CIVIL RIGHTS IN THE UNITED STATES 127-34 (1951).

DeCuir,[5] where a state statute which forbade segregation on public carriers was held unconstitutional as an attempt to regulate interstate commerce.

The instant case differs from the *Morgan* case in that it involves a regulation voluntarily adopted and enforced by the carrier.[6] The court holds that the regulation, like a statute, constitutes a burden on interstate commerce when its enforcement interferes with the uniformity which should characterize interstate carriage from one end of the route to the other. Thus, either a local statute which imposes additional duties on a carrier[7] or a statute or carrier rule which creates an unreasonable inconvenience to passengers[8] will be treated as placing an undue burden on interstate commerce.

In the principal case the passenger had entered the carrier in a non-segregation state, and the subsequent enforcement of the segregation rule required movement from one car to another while in transit. Should the same position be taken when the passenger entered the carrier in a segregation state and was not required to move en route? The position of the court on this point is equivocal. On the one hand it sought to distinguish its previous decision in *Day v. Atlantic Greyhound Corp.*,[9] in which it had held, in line with other recent decisions,[10] that a carrier may establish rules which require white and colored passengers to occupy separate accommodations,[11] and that enforcement of such rules does not burden interstate commerce when a passenger may take a seat and retain it to the end of his journey.[12] On the other hand there is language in the opinion which indicates that segregation of some passengers together with the nonsegregation of other interstate passengers would create such confusion and inconvenience as to amount to an unconstitutional burden on commerce.[13]

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5. 95 U.S. 485, 24 L. Ed. 547 (1878).

6. The regulation was enforced at the convenience of the carrier and not as to passengers on Pullman and dining cars. Nor was the regulation enforced in Virginia between Washington, D. C., and Richmond. Some emphasis was placed on the resulting confusion, but this was not the turning point of the case.

7. Morgan v. Virginia, 328 U.S. 373, 66 Sup. Ct. 1050, 90 L. Ed. 1317 (1946).

8. In addition to the instant case, see Whiteside v. Southern Bus Lines, 177 F.2d 949 (6th Cir. 1949).

9. 171 F.2d 59 (4th Cir. 1948).

10. Simmons v. Atlantic Greyhound Corp., 75 F. Supp. 166 (W.D. Va. 1947); Pridgen v. Carolina Coach Co., 229 N.C. 46, 47 S.E.2d 609 (1948); *cf.* Nash v. Air Terminal Services, 85 F. Supp. 545 (E.D. Va. 1949).

11. There must be no discrimination in the arrangement. Chiles v. Chesapeake & Ohio Ry., 218 U.S. 71, 30 Sup. Ct. 667, 54 L. Ed. 936 (1910); Hall v. DeCuir, 95 U.S. 485, 24 L. Ed. 547 (1878).

12. In Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28, 68 Sup. Ct. 358, 92 L. Ed. 455 (1948), the Supreme Court held that enforcement of the Michigan Civil Rights Act which prohibited discrimination did not impose a burden on foreign commerce, which was of such peculiarly local concern that it could be regulated by a state. See Abel, *The Commerce Power: An Instrument of Federalism*, 25 IND. L.J. 498 (1950); Notes, 58 YALE L.J. 329 (1949), 48 COL. L. REV. 733 (1948).

13. "Not only does . . . enforcement [of the regulation] interfere with the uniformity which should characterize interstate carriage from one end of the route to the other, but its irregular enforcement for the convenience of the carrier, dependent upon the number of passengers and the character of accommodations which they purchase, adds to the burden upon the traffic by increasing the confusion and discomfort of the passengers.

The question also remains as to whether segregation of intrastate passengers on an interstate carrier will be declared unconstitutional. One view might be that the resultant confusion in attempting to enforce segregation in one case and not in another would impose a burden on interstate commerce,[14] while another view might be that no burden is created because no rearrangement of passengers in transit is required.[15]

It is conceivable that segregation in strictly intrastate commerce will be held unconstitutional where such commerce "affects" interstate commerce, placing a burden on it. This seems unlikely, however. There is perhaps somewhat more likelihood that the Supreme Court will utilize the equal protection clause of the Fourteenth Amendment to declare unconstitutional the segregation of the races in all public transportation.[16]

CONSTITUTIONAL LAW—POLITICAL QUESTIONS—GEORGIA COUNTY UNIT VOTE SYSTEM

Plaintiffs brought suit in the United States District Court against the Chairman of the Georgia State Democratic Executive Committee and others to restrain adherence to the Georgia county unit system[1] in the primary elections for United States Senator, Governor and other state offices. By this system each county is allotted unit votes, varying from two to six, depending upon the population. The candidate who receives the largest popular vote in each county is said to have carried that county and is given the appropriate unit votes. Plaintiffs, residents of the most populous county, contended that the law violates the Fourteenth and Seventeenth Amendments, since their votes average but one-tenth of the weight of the votes in other counties. The District Court dismissed the suit, and the plaintiffs appealed. *Held* (7-2), affirmed. Federal courts will not exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral

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When white and colored passengers are permitted to ride together for part of their journey through the State of Virginia, and then are compelled to separate and change cars, and when passengers in coaches are segregated on account of race while passengers in Pullman and dining cars are permitted to ride together irrespective of race, the burden upon interstate commerce is . . . clearly manifest. . . ." 183 F.2d at 882-83.

14. "It seems clear to us that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel." Morgan v. Virginia, 328 U.S. 373, 386, 66 Sup. Ct. 1050, 90 L. Ed. 1317 (1946). Does this suggest that the same rule must be applied to both interstate and intrastate passengers on an interstate carrier or merely that all interstate passengers must be treated the same way?

15. See State v. Johnson, 229 N.C. 701, 51 S.E.2d 186 (1949); New v. Atlantic Greyhound Corp., 186 Va. 726, 43 S.E.2d 872 (1947).

16. And thereby overrule Plessy v. Ferguson, 163 U.S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256 (1896) See Note, 49 COL. L. REV. 629 (1949). Compare, Hyman, *Segregation and the Fourteenth Amendment, supra* p. 555.

1. GA. CODE ANN. § 34-3212 (1933).

strength. *South v. Peters,* 339 U.S. 276, 70 Sup. Ct. 641, 94 L. Ed. 834 (1950).

A "political" question is generally recognized as one which the judiciary will not decide, since the ultimate decision must rest with the other departments of the government or with the people.[2] Although there is no specific limitation in the Constitution, this accepted principle is presumed to be based on the theories of the separation and distribution of powers.[3] Other reasons suggested are that the courts would be incompetent to handle such matters because of a lack of legal principles,[4] that the court in a given case may feel that the question is too delicate and pass the burden to another department,[5] or that judicial control might result in an even less desirable situation.[6] Classification of these cases according to subject matter[7] or character of the parties and interests[8] has been attempted, but all admit that no true test has yet evolved for this self-imposed judicial limitation.

Some questions are obviously political in their nature; in these cases, the federal courts,[9] as well as the state courts,[10] appear to be in complete accord. As to other matters the nature of the question is not as readily apparent, and the instant case falls within this group. The Supreme Court has in

2. See ROTTSCHAEFER, AMERICAN CONSTITUTIONAL LAW 68 (1939); 3 WILLOUGHBY, CONSTITUTION OF THE UNITED STATES 1326 (2d ed. 1929); 16 C.J.S., *Constitutional Law* § 145 (1939); Weston, *Political Questions,* 38 HARV. L. REV. 296 (1925).

3. "This distinction results from the organization of the government into the three great departments, executive, legislative and judicial. . . ." Georgia v. Stanton, 6 Wall. 50, 71, 18 L. Ed. 721 (1867). See also Massachusetts v. Mellon, 262 U.S. 447, 43 Sup. Ct. 597, 67 L. Ed. 1078 (1923); Renck v. Superior Court, 66 Ariz. 320, 187 P.2d 656 (1947); Field, *The Doctrine of Political Questions in the Federal Courts,* 8 MINN. L. REV. 485 (1924); Rutledge, *When Is a Political Question Justiciable?* 9 GA. B.J. 394 (1947). A further distinction should be noticed between this doctrine and the power of the courts over purely ministerial duties of officials. Massachusets v. Mellon, *supra.*

4. Field, *The Doctrine of Politicial Questions in the Federal Courts,* 8 MINN. L. REV. 485 (1924).

5. See Finkelstein, *Judicial Self-Limitation,* 37 HARV. L. REV. 338 (1924), where it is suggested that his is a wholesome influence on the part of the judiciary.

6. "And the cure sought may be worse than the disease." Colegrove v. Green, 328 U.S. 549, 566, 66 Sup. Ct. 1198, 90 L. Ed. 1432 (1946) (concurring opinion of Justice Rutledge).

7. FIELD, *supra* note 4.

8. ROTTSCHAEFER, *op. cit. supra* note 2 at 70.

9. *E.g.,* Coleman v. Miller, 307 U.S. 433, 59 Sup. Ct. 972, 83 L. Ed. 1385 (1939) (ratification of amendment); Terlinden v. Ames, 184 U.S. 270, 22 Sup. Ct. 484, 46 L. Ed. 534 (1902) (determining existence of treaty); *In re* Baiz, 135 U.S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222 (1890) (recognizing foreign ministers); Prize Cases, 2 Black 635, 17 L. Ed. 459 (1862) (determining existence of state of war); Luther v. Borden, 7 How. 1, 12 L. Ed. 581 (1848) (deciding if state has a republican form of government).

10. *E.g.,* Dubuisson v. Simmons, 157 Fla. 473, 26 So.2d 438 (1946) (power to determine existence of state of war); Bullard v. Culpepper, 190 Ga. 848, 11 S.E.2d 19 (1940) (interference by judiciary in primary elections); Zurn v. Chicago, 389 Ill. 114, 59 N.E.2d 18 (1945) (deciding necessity or propriety of exercising right of eminent domain); Stieritz v. Kaufman, 234 S.W.2d 145 (Ky. 1950) (calling of referendum election); State *ex rel.* Porterie v. Smith, 184 La. 263, 166 So. 72 (1935) (guarantee of republican form of government); Anderson v. N.V. Transandine Handelmaatschappij, 289 N.Y. 9, 43 N.E.2d 502 (1942) (recognition of foreign governments); Application of Peterson, 92 Utah 212, 66 P.2d 1195 (1937) (creation of city and establishment of boundaries).

the past vigorously protected the rights of voters when they have been discriminated against because of race, creed or color in primary or general elections.[11] That the principal case involves a primary election, then, would seem to be unimportant in determining the result. The court has also protected voters from enforcement of reapportionment laws invalid because not approved by the governor, as required by state law.[12] On the other hand, it has denied protection from statutes creating congressional districts unequal in population,[13] and from statutes allegedly discriminating against the forming of new political parties.[14] The argument of Justices Douglas and Black, who dissented in the instant case, was that the right to vote involves the right to have the ballot counted at its full value without dilution. Furthermore, they felt that as a practical matter this case would not be open to the objection that action by the Court would amount to judicial supervision of elections.[15] The dissenting opinion further states that the system also produces a disenfranchisement of the Negro population which is heaviest in the urban areas. Actually, the real discrimination appears to be in favor of the rural voters over those in the urban areas.

In the case of gerrymandering or unequal apportionment, the voter still has an effective vote within his district; but under the unit vote system, the weight of the individual's vote is affected within the entire area of representation, in this case the state. However, absolute equality in voting concededly is impossible to achieve; and indeed, the Federal Constitution provides for similar schemes by the electoral college and by providing for two senators from every state regardless of area or population,[16] although the discriminations here may not approach those found under the Georgia system.[17]

11. Smith v. Allwright, 321 U.S. 649, 64 Sup. Ct. 757, 88 L. Ed. 987 (1944); Nixon v. Condon, 286 U.S. 73, 52 Sup. Ct. 484, 76 L. Ed. 984 (1932); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948), 1 VAND. L. REV. 645; *cf.* Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala. 1949), *aff'd mem.*, 336 U.S. 933 (1949), 2 VAND. L. REV. 696; Cushman, *The Texas "White Primary" Case— Smith v. Allwright*, 30 CORNELL L.Q. 66 (1944).

12. Smiley v. Holm, 285 U.S. 355, 52 Sup. Ct. 397, 76 L. Ed. 795 (1932); Carrol v. Becker, 285 U.S. 380, 52 Sup. Ct. 402, 76 L. Ed. 807 (1932). On the general subject of reapportionment, see Chafee, *Congressional Reapportionment*, 42 HARV. L. REV. 1015 (1929); Note, *Reapportionment of Congressional Districts in Illinois*, 41 ILL. L. REV. 578 (1946).

13. Colegrove v. Green, 328 U.S. 549, 66 Sup. Ct. 1198, 90 L. Ed. 1432 (1946); Wood v. Broom, 287 U.S. 1, 53 Sup. Ct. 1, 77 L. Ed. 131 (1932); 81 U. OF PA. L. REV. 343 (1933).

14. MacDougall v. Green, 335 U.S. 281, 69 Sup. Ct. 1, 93 L. Ed. 3 (1948), 47 MICH. L. REV. 406 (1949).

15. 339 U.S. at 277 (dissenting opinion of Justices Douglas and Black). See also United States v. Saylor, 322 U.S. 385, 64 Sup. Ct. 1101, 88 L. Ed. 1341 (1944); United States v. Classic, 313 U.S. 299, 61 Sup. Ct. 1031, 85 L. Ed. 1368 (1941), 20 N.C.L. REV. 93. See also Colegrove v. Green, 328 U.S. 549, 566, 66 Sup. Ct. 1198, 90 L. Ed. 1432 (1946) (dissenting opinion of Justices Black, Murphy and Douglas).

16. See Note, *Georgia County Unit Vote*, 47 COL. L. REV. 284 (1947) for a collection of previous cases attacking this system and comparison of the Georgia system with other methods that have been used. See also Curtis, *A Modern Court in a Modern World*, *supra* p. 427, at 437-38.

17. In one instance under the Georgia unit vote a vote in one county is worth over

During recent years, the Supreme Court has adopted a policy of self-restraint on problems of substantive due process, taking the viewpoint that the Court cannot be concerned with the wisdom of the legislation and that the people should be able, through their representatives, to decide to enact such laws as they see fit. On the other hand, the Court has been alert to overthrow restrictions on such liberties as freedom of speech because these restrictions interfere with the process of determining what legislation the people may decide to adopt. Many of the so-called "political questions" are similar to the first class; they are concerned with matters which the people can control through their elected representatives and which they can eventually change if they desire. The problem in the instant case is more nearly like the second class. The legislation involved here sets up a self-perpetuating condition that can effectively prevent the people of the State of Georgia from being able to express and enforce their desires.[18]

DIVORCE—ALIMONY IN DEFAULT DECREES—POWER OF COURT TO AWARD ALIMONY IN ABSENCE OF PRAYER THEREFOR IN COMPLAINT

In a divorce action filed by his wife, relator was personally served with summons and complaint to which he made no answer. The complaint did not pray for an award of alimony and no notice was given to relator that additional relief would be sought or given by the court, but the trial judge made an award of alimony under a statute conferring upon the court authority to "make all necessary provisions as to alimony" in divorce cases. After contempt proceedings were instituted against relator for failure to pay alimony, relator sought a writ of prohibition from the Supreme Court to prohibit further action in the contempt proceedings. *Held,* writ of prohibition granted. The award of alimony was not authorized; the statute could constitutionally apply only where alimony was prayed for in the complaint. *State* ex rel. *Adams v. Superior Court,* 220 P.2d 1081 (Wash. 1950).

The general rule, produced by either statute or judicial decision, is that "relief granted in a judgment by default must be, not only within the fair scope of the allegations of the complaint, but also within the fair scope of the prayer thereof. Under this rule, a judgment entered by default should not contain an award of damages or grant relief in excess of that demanded in

120 times that of a vote in the most populous county. 339 U.S. at 278 (dissenting opinion of Justices Douglas and Black).

18. See Ragland v. Anderson, 125 Ky. 141, 100 S.W. 865, 128 Am. St. Rep. 242 (1907) (redistricting); Gates v. Long, 172 Tenn. 471, 113 S.W.2d 388 (1938) (county unit vote), for the disposition of cases in other states involving similar problems.

the pleadings of the plaintiff."[1] Many courts have taken the position that since a demand for alimony is not an essential part of the cause of action and is merely incidental thereto, alimony may be awarded even in the absence of a specific request therefor in the original bill or notice.[2] Statutes in many states authorize such practice.[3] The courts of several states have recognized these statutes to be permissible exceptions to a general statute limiting relief to that demanded in the complaint.[4]

Washington, by judicial decision, follows the general rule limiting the relief that may be granted in ordinary actions to that prayed for in the complaint.[5] A Washington statute authorizes courts in divorce proceedings to make all necessary orders as to alimony, custody of children, and property settlements.[6] The court in the instant case construed the statute to apply only to subject matter brought before the court by the complaint; to hold that the statute authorizes the court to grant such relief in addition to that prayed for in the complaint was held to be contrary to the due process clause of the state constitution.[7] In so holding, the court followed an earlier decision[8] on the point which seemingly had been overruled in the meanwhile.[9]

The question of due process of law was not raised in the other states that have considered the question involved here.[10] The court in the instant case, however, failed to consider the peculiar position of the state as an in-

1. 31 AM. JUR., *Judgments* § 516 (1940). The rule in Washington was laid down in State *ex rel.* First National Bank v. Hastings, 120 Wash. 283, 207 Pac. 23 (1922).

2. 2 BISHOP, MARRIAGE AND DIVORCE 417-18 (6th ed. 1881): "In principle, the proceeding for alimony being collateral to the main issue, whereof it is not necessarily a part, and the hearing on this question being practically or permissively subsequent, and a separate allegation of faculties with prayer for the alimony being in practice esteemed requisite, no rule either of law or propriety requires that the same shall be also inserted either in the libel or the answer." See Prescott v. Prescott, 59 Me. 146 (1871); Sprague v. Sprague, 73 Minn. 474, 76 N.W. 268, 42 L.R.A. 419, 72 Am. St. Rep. 636 (1898); Galusha v. Galusha, 138 N.Y. 272, 33 N.E. 1062 (1893).

3. See Note, 152 A.L.R. 445, 449 (1944). But in the absence of such a statute, it has been held that a general statute limiting relief to that demanded in the complaint curtails this practice. Bennett v. Bennett, 50 Cal. App. 48, 194 Pac. 503 (1920); *cf.* Burtnett v. King, 33 Cal.2d 805, 205 P.2d 657 (1949).

4. Hopping v. Hopping, 233 Iowa 993, 10 N.W. 87, 152 A.L.R. 436 (1943); Ecker v. Ecker, 130 Minn. 472, 153 N.W. 864 (1915).

5. See note 1 *supra.*

6. WASH. CODE § 23-15 (Pierce 1943) provides in part: "If, however, the court determines that either party, or both, is entitled to a divorce an interlocutory order must be entered accordingly, declaring that the party in whose favor the court decides is entitled to a decree of divorce as hereinafter provided; which order shall also make all necessary provisions as to alimony, costs, care, custody, support and education of children and custody, management and division of property. . . ."

7. Art. I, § 3. The court did not consider the point that a "judgment is void unless a reasonable method of notification is employed and a reasonable opportunity to be heard afforded to persons affected," [RESTATEMENT, JUDGMENTS § 6 (1942)], and thus might be attacked collaterally as a basis for the issuance of the writ of prohibition. See Mooney v. Holohan, 294 U.S. 103, 55 Sup. Ct. 340, 79 L. Ed. 791, 98 A.L.R. 406 (1935); and Brown v. Mississippi, 297 U.S. 278, 56 Sup. Ct. 461, 80 L. Ed. 682 (1936).

8. Ermey v. Ermey, 18 Wash.2d 544, 139 P.2d 1016 (1943).

9. Ackerman v. Ackerman, 32 Wash.2d 53, 200 P.2d 527, 528 (1948).

10. See note 4 *supra.*

terested party in divorce cases.[11] The constitutional requirements of due process, it seems, might well be less stringent in divorce cases than in ordinary cases.[12] The concept of procedural due process, intended to protect the rights of private litigants, ought here to be defined in the light of this peculiar interest of the state.[13]

EVIDENCE—PROOF OF CORPUS DELICTI—CORROBORATION OF DEFENDANT'S CONFESSION BY HIS OWN SPONTANEOUS STATEMENTS

Defendant was convicted of the crime of illegally transporting liquor into the state. The only evidence introduced by the state in the prosecution was an extrajudicial confession obtained from the defendant by the police and defendant's spontaneous statements. Defendant appeals on the ground that the *corpus delicti* was not adequately proved. *Held* (5-3), there was adequate proof of the *corpus delicti*. Defendant's spontaneous statements were sufficient corroboration in the purview of the statute requiring an extrajudicial confession to be corroborated by other evidence. *State v. Saltzman,* 44 N.W.2d 24 (Iowa 1950).

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11. "When an attempt is made through the courts to undo a marriage, the state becomes in a sense a party to the proceedings. . . ." 17 AM. JUR., *Divorce and Separation* § 13 (1938). "The marriage status is a matter of public interest. . . . In view of this interest of the public, an action for divorce is not a mere controversy between private parties. . . ." MADDEN, DOMESTIC RELATIONS 263 (1931). See Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020 (1915); Allen v. Allen, 73 Conn. 54, 46 Atl. 242, 49 L.R.A. 142, 84 Am. St. Rep. 135 (1900); People v. Case, 241 Ill. 279, 89 N.E. 638, 25 L.R.A. (N.S.) 578 (1909); Franklin v. Franklin, 40 Mont. 348, 106 Pac. 353, 26 L.R.A. (N.S.) 490, 20 Ann. Cas. 339 (1910); Grant v. Grant, 84 N.J.Eq. 81, 92 Atl. 791 (1914); State *ex rel.* Fowler v. Moore, 46 Nev. 65, 207 Pac. 75, 22 A.L.R. 1101 (1922); Schultz v. Schultz, 46 Wyo. 121, 23 P.2d 351 (1933).

12. Furthermore, the constitutional requirements with respect to a court order in default judgment proceedings for a divorce might not be the same for an award of alimony as for an order with respect to division of property. There is a divergence of opinion as to the necessity of making specific allegations as to the property rights of the parties in order to procure a disposition of property in divorce proceedings. See Note, 152 A.L.R. 445, 454 (1944).

13. The use of the writ of prohibition in this case raises an interesting procedural point. Prohibition as a rule does not lie for grievances which may be redressed in the ordinary course of judicial proceedings by other remedies provided by law, 22 R.C.L., *Prohibition* § 3 (1918). The Washington Supreme Court has emphasized that the test for the use of prohibition is the adequacy of remedy by appeal or in the ordinary course of law and not the mere question of jurisdiction or lack thereof. State *ex rel.* Miller v. Superior Court, 40 Wash. 555, 82 Pac. 877, 111 Am. St. Rep. 925 (1905).

A judgment for contempt of court may be appealed in Washington "in a like manner and with like effect as a judgment in an ordinary action," WASH. CODE § 20-27 (Pierce 1943), and proceedings may be stayed pending the appeal. State *ex rel.* Denham v. Superior Court, 28 Wash. 590, 68 Pac. 1051 (1902). There is no suggestion in the instant case that such appeal would not have been a "plain, speedy and adequate remedy." In Washington the writ of prohibition is available in all cases "where there is not a plain, speedy and adequate remedy in the ordinary course of law." WASH. CODE § 17-3 (Pierce 1943). The availability of prohibition in this case may be explained, as the court suggests early in its opinion, by the failure of the respondent to file an answer to the application of the relator for the writ. 200 P.2d at 1083. The Washington rule is that, if the respondent does not answer the application for the writ, "the case must be heard on the papers of the applicant." WASH. CODE § 16-19 (Pierce 1943).

It is an elementary principle of criminal law that a state, to be entitled to a conviction, must prove the *corpus delicti*.[1] This term is generally said to mean, when applied to a particular offense, that the specific crime charged has been committeed by someone.[2] The *corpus delicti* must be proved beyond a reasonable doubt.[3] In the proof either direct or circumstantial evidence may be used.[4]

In the United States, while the *corpus delicti* cannot be established by a confession alone, it may be established by a confession if it is corroborated by other evidence.[5] Although there is slight authority to the contrary,[6] it is almost universally held that this corroborative evidence need not be independently sufficient to prove the *corpus delicti*.[7] There is no detailed rule defining the nature of the evidence required; the sufficiency of the corroboration depends upon the circumstances of each case.[8] It must be borne in mind that confessions may be unfounded, and this rule is designed to prevent a conviction in such a situation.[9] It has been said that the evidence must be material and substantial,[10] but the cases indicate that the slightest evidence is sufficient.[11]

The Iowa statute in the instant case,[12] which requires a confession to be corroborated, is substantially a restatement of the common law on this point.[13] The court in the instant case, in construing this statute, held that defendant's spontaneous statements were sufficient corroboration. Thus the defendant was convicted where the *corpus delicti* was proved entirely by his own statements. There was no other evidence. From a strictly logical point of view, spontaneous statements are "other evidence" which a jury might consider with a confession in order to find the *corpus delicti*. Certainly spontaneous statements by third parties constitute such "other evidence."[14] But from the stand-

1. Reed v. State, 201 Ga. 789, 41 S.E.2d 426 (1947); State v. Sullivan, 34 Idaho 68, 199 Pac. 647, 17 A.L.R. 902 (1921); State v. Marcy, 189 Wash. 620, 66 P.2d 846 (1937).
2. Hawkins v. State, 219 Ind. 116, 37 N.E.2d 79 (1941); 14 AM. JUR., *Criminal Law* § 6 (1938).
3. Williamson v. State, 28 Ala. App. 455, 186 So. 785 (1939); Reed v. State, 201 Ga. 789, 41 S.E.2d 426 (1947).
4. Perovich v. United States, 205 U.S. 86, 27 Sup. Ct. 456, 51 L. Ed. 722 (1907); Williams v. People, 114 Colo. 207, 158 P.2d 447, 159 A.L.R. 509 (1945); State v. Stewart, 231 Iowa 585, 1 N.W.2d 626 (1942).
5. Forte v. United States, 94 F.2d 236, 127 A.L.R. 1120 (D.C. Cir. 1937); State v. Morgan, 157 La. 962, 103 So. 278, 40 A.L.R. 458 (1925); 20 AM. JUR., *Evidence* § 1233 (1939).
6. Williams v. State, 125 Ga. 741, 54 S.E. 661 (1906); Dunn v. State, 34 Tex. Crim. App. 257, 30 S.W. 227, 53 Am. St. Rep. 714 (1895).
7. Forte v. United States, 94 F.2d 236, 127 A.L.R. 1120 (D.C. Cir. 1937); 20 AM. JUR., *Evidence* § 1233 (1939).
8. 2 WHARTON, CRIMINAL EVIDENCE 1072 (11th ed. 1935).
9. Bergen v. People, 17 Ill. 425 (1856).
10. 20 AM. JUR., *Evidence* § 1234 (1939).
11. People v. Bausell, 18 Cal. App.2d 15, 62 P.2d 774 (1936); 32 COL. L. REV. 378 (1932); 29 VA. L. REV. 1070 (1943).
12. IOWA CODE ANN. § 782.7 (1949).
13. State v. Webb, 239 Iowa 693, 31 N.W.2d 337 (1948).
14. 6 WIGMORE, EVIDENCE § 1755 (3d ed. 1940).

point of the theory and policy behind the rule requiring corroboration, defendant's spontaneous statements would not seem to be sufficient corroboration. No cases on the precise point have been found. In one case defendant's self-contradictory testimony was held sufficient corroboration.[15] In another case it was held, with a vigorous dissent, that admissions to a magistrate were sufficient corroboration.[16] But in a widely discussed case, *Gulotta v. United States*,[17] it was held that admissions of the defendant were not sufficient corroboration. And in an arson case it was held that defendant's confession and other admissions were not enough to support a conviction.[18]

The problem raised by the instant case involves two conflicting considerations. On the one hand there is the policy behind the rule itself—to prevent a defendant from being convicted solely on the strength of his own words, for there is a danger that no crime exists.[19] On the other hand, a defendant who admits having committed a crime which seems clearly to have occurred ought not to escape punishment merely because of a technicality.[20] Although Wigmore takes the position that the policy for requiring corroboration is questionable,[21] and there seems to be a trend toward allowing corroborative evidence of the slightest kind,[22] the overwhelming majority of the courts and writers believe that this policy has a sound basis. The rule is so entrenched in American legal thought that immediate change is unlikely.

FEDERAL COURTS—VENUE—USE OF STATE NONRESIDENT MOTORIST STATUTE TO IMPLY WAIVER

Plaintiffs, residents of Texas, were injured in an automobile accident in Tennessee. Defendants were residents of West Virginia. Under the Tennessee nonresident motorist statute,[1] defendants were amenable to service of process in Tennessee. Plaintiffs brought action in the federal district court in Tennessee, basing jurisdiction on diversity of citizenship, and defendants filed a motion for dismissal because of improper venue.[2] *Held*, dismissed for improper venue. The court rejected plaintiffs' contention that a nonresident

15. Commonwealth v. Lettrich, 346 Pa. 497, 31 A.2d 155 (1943), 29 VA. L. REV. 1070.
16. State v. McClain, 208 Minn. 91, 292 N.W. 753 (1940); the dissent brought out that the only evidence of the *corpus delicti* was two confessions, one corroborated by the other.
17. 113 F.2d 683 (8th Cir. 1940), 26 IOWA L. REV. 130.
18. State v. McLarne, 128 Minn. 163, 150 N.W. 787 (1915).
19. Bergen v. People, 17 Ill. 425 (1856); 20 AM. JUR., *Evidence* 1086 (1939); 1 GREENLEAF, EVIDENCE 294 (15th ed., Crosweld, 1892); Note, 21 MICH. L. REV. 339 (1923).
20. 7 WIGMORE, EVIDENCE 395 (3d ed. 1940); 32 COL. L. REV. 378 (1932).
22. See note 11 *supra*.
21. 7 WIGMORE, EVIDENCE 395 (3d ed. 1940).

1. TENN. CODE ANN. § 8671 (Williams Supp. 1950).
2. 28 U.S.C.A. § 1391(a) (1950) limits venue in diversity cases to the district where all plaintiffs or all defendants reside. See note 13 *infra*.

motorist, by using the highways of the state, consents to be sued in the courts of the state, including the federal courts, and thus waives his right to object to the venue. *Waters v. Plyborn,* 93 F. Supp. 651 (E.D. Tenn. 1950).

Although the forms vary somewhat, nonresident motorist statutes have been adopted in each of the 48 states and the District of Columbia.[3] Basically these statutes provide that the use of state highways by a nonresident owner or operator of an automobile shall be deemed the equivalent of an appointment of a designated state official as agent of the nonresident to accept service of process in any action growing out of such use of the highways.[4] The validity of these statutes now seems beyond question.[5] Of course, the extent of their application depends upon the specific terms of each statute, but it has been held that they may operate for the benefit not only of resident plaintiffs but of nonresident plaintiffs as well,[6] and may apply equally to defendants who are residents of other states and those who are residents of other countries.[7] Furthermore, they subject the nonresident defendant to the jurisdiction of

3. ALA. CODE ANN. tit. 7, § 199 (1940); ARIZ. CODE ANN. § 66-226 (1939); ARK. STAT. ANN. tit. 27, § 341 (1947); CAL. VEHICLE CODE § 404 (Supp. 1945); COLO. STAT. ANN. c.16, § 48(1) (Supp. 1950); CONN. REV. GEN. STAT. § 7779 (1949); DEL. REV. CODE § 4590 (1935); D.C. CODE § 40-403 (1940); FLA. STAT. ANN. § 47.29 (Supp. 1950); GA. CODE ANN. § 68-801 (Supp. 1947); IDAHO CODE ANN. tit. 49, § 1202 (1947); ILL. ANN. STAT. c.95½, § 23 (1950); IND. ANN. STAT. § 47-1043 (Burns Supp. 1949); IOWA CODE ANN. § 321.498 (1949); KAN. GEN. STAT. ANN. § 8-401 (1935); KY. REV. STAT. ANN. § 188.020 (Baldwin 1943); LA. GEN. STAT. ANN. § 5296 (1939); ME. REV. STAT. c.19, § 59 (1944); MD. ANN. CODE GEN. LAWS art. 56, § 188 (1939); MASS. ANN. LAWS c.90, § 3A (1946); MICH. STAT. ANN. § 9.1701 (Supp. 1947); MINN. STAT. ANN. § 170.55 (Supp. 1950); MISS. CODE ANN. § 9363 (Supp. 1950); MO. REV. STAT. ANN. § 8410.1 (West 1943); MONT. REV. CODES ANN. § 53-202 (1947); NEB. REV. STAT. § 25-530 (Cum. Supp. 1949); NEV. COMP. LAWS ANN. § 4441.01 (Supp. 1941); N.H. REV. LAWS c.116, § 42 (1942); N.J. STAT. ANN. § 39:7-2 (Supp. 1950); N.M. STAT. ANN. § 68-1003 (1941); N. Y. VEHICLE & TRAFFIC LAW § 52 (Supp. 1950); N.C. GEN. STAT. ANN. § 1-105 (1943); N.D. REV. CODE § 28-0611 (1943); OHIO GEN. CODE ANN. § 6308-1 (1945); OKLA. STAT. tit. 47, § 391 (1941); ORE. COMP. LAWS ANN. § 115-128b (Supp. 1947); PA. STAT. ANN. tit. 75, § 1201 (1939); R.I. GEN. LAWS c.103 § 1 (1938); S.C. CODE ANN. § 437 (1942); S.D. CODE § 33.0809 (1939); TENN. CODE ANN. § 8671 (Williams Supp. 1950); TEX. REV. CIV. STAT. ANN. art. 2039a (1950); UTAH CODE ANN. § 57-13-12 (1943); VT. REV. STAT. § 10,062 (1947); VA. CODE ANN. § 8-67.1 (Supp. 1950); WASH. CODE § 295-111 (Pierce 1943); W. VA. CODE ANN. § 5555(1) (1949); WIS. STAT. § 85.05(3) (1949); WYO. COMP. STAT. ANN. § 60-1101 (1945).

4. See Culp, *Process in Actions against Non-Resident Motorists,* 32 MICH. L. REV. 325 (1934); Culp, *Recent Developments in Actions against Nonresident Motorists,* 37 MICH. L. REV. 58 (1938); Scott, *Hess and Pawloski Carry On,* 64 HARV. L. REV. 98 (1950); Scott, *Jurisdiction over Nonresident Motorists,* 39 HARV. L. REV. 563 (1926); Tapley, *Jurisdiction and the Non-Resident Motorist,* 13 ST. JOHN'S L. REV. 278 (1939); Notes, 138 A.L.R. 1464 (1942), 125 A.L.R. 457 (1940), 96 A.L.R. 594 (1935), 82 A.L.R. 768 (1933), 42 ILL. L. REV. 780, 789-90 (1948), 20 IOWA L. REV. 654 (1935).

5. The leading case, upholding the constitutionality of the Massachusetts nonresident motorist statute, is Hess v. Pawloski, 274 U.S. 352, 47 Sup. Ct. 632, 71 L. Ed. 1091 (1927). *Cf.* Kane v. New Jersey, 242 U.S. 160, 37 Sup. Ct. 30, 61 L. Ed. 222 (1916); Wuchter v. Pizzutti, 276 U.S. 13, 48 Sup. Ct. 259, 72 L. Ed. 446 (1928). See 9 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW § 5913 (Perm. ed. 1941); 15-16 HUDDY, CYCLOPEDIA OF AUTOMOBILE LAW § 82 (9th ed. 1931); Notes, 99 A.L.R. 130 (1935), 57 A.L.R. 1239 (1928), 35 A.L.R. 951 (1925).

6. Neff v. Hindman, 77 F. Supp. 4 (W.D. Pa. 1948) (Pennsylvania nonresident motorist statute).

7. Lulevitch v. Hill, 82 F. Supp. 612 (E.D. Pa. 1949) (defendant a resident of Canada).

both the state courts and the federal courts located in the state where the accident occurred.[8]

But to say that a particular court has acquired jurisdiction over the defendant does not therewith solve the separate problem of venue,[9] which involves a personal privilege of the defendant that the case be tried only in certain localities.[10] It is well settled that a defendant may waive this privilege.[11] In cases originally brought in a state court and removed by the defendant to the federal court, venue is properly laid in the district where that state court is located, even though such venue would have been improper if the plaintiff had brought the action originally in that federal court.[12] On the other hand, the venue of actions originally brought in a federal court is governed by section 1391 of the Judicial Code,[13] which, roughly speaking, restricts venue to the districts in which the parties reside. Under an earlier statute,[14] a corporate defendant was given the same venue privilege as was an individual defendant, until the famous *Neirbo* rule was announced by the Supreme Court in 1939.[15] In the *Neirbo* case it was held that a foreign corporation

8. See, *e.g.*, Zavis v. Warren, 35 F. Supp. 689 (E.D. Wis. 1940); Carby v. Greco, 31 F. Supp. 251 (W.D. Ky. 1940); Devier v. George Cole Motor Co., 27 F. Supp. 978 (W.D. Va. 1939); Clancy v. Balacier, 27 F. Supp. 867 (S.D.N.Y. 1939); O'Donnell v. Slade, 5 F. Supp. 265 (M.D. Pa. 1933). 9 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW § 5821 (Perm. ed. 1941). *Cf.* Angel v. Bullington, 330 U.S. 183, 187, 67 Sup. Ct. 657, 91 L. Ed. 832 (1947): "For purposes of diversity jurisdiction a federal court is, 'in effect, only another court of the State.'"

9. "It is only after the question of the jurisdiction of this court is answered in the affirmative that the question of venue ever arises." DOBIE, FEDERAL JURISDICTION AND PROCEDURE 477 (1928). See also 9 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW § 5811 (Perm. ed. 1941).

10. DOBIE, FEDERAL JURISDICTION AND PROCEDURE § 116 (1928).

11. Commercial Casualty Ins. Co. v. Consolidated Stone Co., 278 U.S. 177, 179, 49 Sup. Ct. 98, 73 L. Ed. 252 (1929); Panama R.R. v. Johnson, 264 U.S. 375, 385, 44 Sup. Ct. 391, 68 L. Ed. 748 (1924). "Unless the litigant himself specially raises the question [of venue], it is not before the court, for the judge cannot, of his own motion, either raise or decide the question, even though the venue is manifestly improper." DOBIE, FEDERAL JURISDICTION AND PROCEDURE 478 (1928). See also MONTGOMERY, MANUAL OF FEDERAL JURISDICTION AND PROCEDURE § 136 (4th ed. 1942).

12. The leading case is Lee v. Chesapeake & O. Ry., 260 U.S. 653, 43 Sup. Ct. 230, 67 L. Ed. 443 (1923). See DOBIE, FEDERAL JURISDICTION AND PROCEDURE § 124 (1928). The rule applies to actions brought under a nonresident motorist statute. Peeples v. Ramspacher, 29 F. Supp. 632 (E.D.S.C. 1939).

13. "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

"(d) An alien may be sued in any district." 28 U.S.C.A. § 1391 (1950).

14. 28 U.S.C. § 112 (1946).

15. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 60 Sup. Ct. 153, 84 L. Ed. 167 (1939); *cf. Ex parte* Schollenberger, 96 U.S. 369, 24 L. Ed. 853 (1878). For discussions of the *Neirbo* case, see Levin, *Federal Venue in Actions Against Corporations*, 15 TEMP. L.Q. 92 (1940); Notes, 53 HARV. L. REV. 660 (1940), 42 ILL. L. REV. 780 (1948), 38 MICH. L. REV. 1047 (1940); 25 CORNELL L.Q. 291 (1940); 18 N.C.L. REV. 232 (1940); 2 VAND. L. REV. 481 (1949).

which, under state law as a requirement for the privilege of doing business in the state, appoints an agent within the state to accept service of process, thereby consents to be sued in the courts of the state, including the federal courts, and thus waives its right to raise the objection of improper venue. Subsequently, the rule was extended to apply to all manner of cases involving foreign corporations,[16] until the new venue provisions of section 1391 (c)[17] eliminated the necessity of invoking the *Neirbo* rule by greatly restricting the privilege accorded to corporate defendants.

The theory of the *Neirbo* decision, however, is broad enough to extend beyond its mere application to foreign corporations. It has been applied to individual defendants who, under state law as a requirement for doing business under a fictitious name, have appointed an agent to accept service of process;[18] and on repeated occasions it has been applied to nonresident motorists.[19] In these latter cases, the consent and waiver are found not in the actual appointment of a resident agent which the state law requires, but in the use of state highways by the nonresident—which use the state law makes operate as an appointment of a resident agent. The results have sometimes been startling. For example, in *Steele v. Dennis,*[20] even though the court's jurisdiction over the defendant had been acquired by personal service upon him within the state, it was held that his act of using the highways had constituted a consent by him to be sued in the state and consequently a waiver of his right to object so to be sued.[21] Thus it would seem that quite independently of establishing a machinery for obtaining service of process on a nonresident motorist, these statutes create a situation whereby the mere act of using the highways becomes a consent and waiver.[22] On the other

16. *E.g.,* Roger v. A. H. Bull & Co., 170 F.2d 664 (2d Cir. 1948), 2 VAND. L. REV. 481 (1949) (Fair Labor Standards Act); Knott Corp. v. Furman, 163 F.2d 199 (4th Cir. 1947), 61 HARV. L. REV. 723 (1948), 33 VA. L. REV. 812 (1947); Shapiro v. Southeastern Greyhound Lines, 155 F.2d 135 (6th Cir. 1946) (Federal Motor Carriers Act); Dean v. Bituminous Casualty Corp., 72 F. Supp. 801 (W.D. La. 1947); Vogel v. Crown Cork & Seal Co., 36 F. Supp. 74 (D. Md. 1940) (patent case); Bennett v. Standard Oil Co. of New Jersey, 33 F. Supp. 871 (D. Md. 1940) (Jones Act); International Union v. Tennessee Copper Co., 31 F. Supp. 1015 (E.D. Tenn. 1940) (federal question case). See Note, *The Aftermath of the Neirbo Case,* 42 ILL. L. REV. 780 (1948).

17. See note 13 *supra.*

18. Surclo Mfg. Co. v. Dunlap, 76 F. Supp. 552 (E.D. Pa. 1948).

19. Kostamo v. Brorby, 19 U.S.L. WEEK 2409 (U.S.D.C., D. Neb. 1951); Burnett v. Swenson, 19 U.S.L. WEEK 2312 (U.S.D.C., W.D. Okla., 1951); Urso v. Scales, 90 F. Supp. 653 (E.D. Pa. 1950); Morris v. Sun Oil Co., 88 F. Supp. 529 (D. Md. 1950); Steele v. Dennis, 62 F. Supp. 73 (D. Md. 1945); Krueger v. Hider, 48 F. Supp. 708 (E.D.S.C. 1943); Andrews v. Joseph Cohen & Sons, Inc., 45 F. Supp. 732 (S.D. Texas 1941); Malkin v. Arundel Corp., 36 F. Supp. 948 (D. Md. 1941); *cf.* Williams v. James, 34 F. Supp. 61 (W.D. La. 1940). *Contra:* Martin v. Fischbach Trucking Co., 183 F.2d 53 (1st Cir. 1950).

20. 62 F. Supp. 73 (D. Md. 1945).

21. Five years later, in considering hypothetically an identical situation, Professor Scott seems to have had no difficulty in concluding that "the action could not be maintained in the federal court if the defendant had been served personally in the state." Scott, *Hess and Pawloski Carry On,* 64 HARV. L. REV. 98, 102 (1950). Professor Scott failed to appreciate the extent to which a fiction may be carried.

22. Limited, of course, to actions arising from such use of the highways.

hand, in *Blunda v. Craig*,[23] involving the Missouri nonresident motorist statute, which contains a provision that any action under the statute must be brought in the county where the accident occurred,[24] it was held that this provision was not controlling on federal courts, and the action could be maintained in a federal district other than that including the county where the accident occurred. It would seem to follow that if state venue provisions do not limit the consent, and if federal venue provisions are waived by the consent, then state venue provisions must also be waived by the consent. Yet such an argument apparently has never been credited by state courts.[25] Its absurdity is particularly emphasized by nonresident motorist statutes which themselves contain venue provisions.[26]

The federal venue privilege is given by Congress, and ought not to be taken away by act of a state legislature.[27] The court in the instant case, and the court in the recent case of *Martin v. Fischbach Trucking Co.*,[28] recognized this principle in refusing to apply the *Neirbo* rule to nonresident motorists.[29] The distinction which justifies such refusal is that the consent found in the *Neirbo* case in an actual appointment by a corporation of an agent for service of process cannot be found in any act of the motorist as such, but only in the significance which state law attaches to an act of the motorist—that is, his use of state highways.[30] That the distinction was appreciated by Mr. Justice

23. 74 F. Supp. 9 (E.D. Mo. 1947).

24. Mo. REV. STAT. ANN. § 8410.11 (West Supp. 1950).

25. *E.g.*, Carroll v. Matthews, 172 Tenn. 590, 113 S.W.2d 742 (1938); *cf.* Carter v. Schackne, 173 Tenn. 44, 114 S.W.2d 787 (1938); *see* Turner v. Manos, 291 Ky. 431, 164 S.W.2d 962, 963-64 (1942) ("It should also be remembered that if we should hold that the service in this case was in strict accord with the statute and reverse the judgment, then upon the filing of the mandate and setting the judgment aside defendant could raise in the proper manner the question of proper venue, and when done the action would have to be dismissed; so that, after all, no beneficial result to plaintiff would be accomplished by the reversal"). See 9 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW § 5817 (Perm. ed. 1941); Note, 115 A.L.R. 893 (1938).

26. GA. CODE ANN. § 65-803 (Supp. 1947); IND. ANN. STAT. § 47-1043 (Burns Supp. 1949); IOWA CODE ANN. § 321.507 (1949); MISS. CODE ANN. § 9363 (Supp. 1950); MO. REV. STAT. ANN. § 8410.11 (West Supp. 1950); OKLA. STAT. tit. 47, § 400 (1941); WYO. COMP. STAT. ANN. § 60-1101 (1945).

27. *Cf.* Mr. Justice Holmes' statement, "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Davis v. Wechsler, 263 U.S. 22, 24, 44 Sup. Ct. 13, 68 L. Ed. 143 (1923).

28. 183 F.2d 53 (1st Cir. 1950).

29. Any hope that these two cases herald a new, more logical trend would seem to be dispelled by two very recent district court decisions which apply the *Neirbo* rule to nonresident motorists, specifically rejecting the logic of the *Fischbach* decision. Kostamo v. Brorby, 19 U.S.L. WEEK 2409 (U.S.D.C., D. Neb., Feb. 21, 1951); Burnett v. Swenson, 19 U.S.L. WEEK 2312 (U.S.D.C., W.D. Okla., Jan. 8, 1951).

30. Prior to the enactment of the new venue provision as to corporations, there was at least one case applying the *Neirbo* rule in the case of a foreign corporation to an agent designated by statute. Knott Corp. v. Furman, 163 F.2d 199 (4th Cir. 1947), *cert. denied*, 332 U.S. 809 (1947), 61 HARV. L. REV. 723 (1948), 33 VA. L. REV. 812 (1947). But the holding relied strongly on the application of the rule in nonresident motorist cases. The usual holding as to foreign corporations was that no waiver would be implied unless the agent had actually been appointed by the corporation. See, *e.g.*, Moss v. Atlantic Coast Line R.R., 149 F.2d 701 (2d Cir. 1945), *cert. denied*, 330 U.S. 839 (1947);

Frankfurter in writing the majority opinion in the *Neirbo* case is indicated by his statement that "In finding an actual consent by Bethlehem to be sued in the courts of New York, federal as well as state, we are not subjecting federal procedure to the requirements of New York law."[31]

GIFT TAXES—TRANSFER MADE UNDER DIVORCE DECREE INCORPORATING PREDIVORCE PROPERTY SETTLEMENT—EFFECT OF PROVISION IN SETTLEMENT THAT IT WOULD BE BINDING REGARDLESS OF TERMS OF DIVORCE DECREE

In contemplation of divorce the taxpayer and her husband entered into a property settlement which was contingent upon the entry of a decree of absolute divorce. The terms of the agreement, however, were to be effective regardless of the settlement imposed upon the parties by the decree. The decree as entered incorporated the contract without change. Pursuant thereto the taxpayer transferred property exceeding in value by $107,000 that received by her; the Commissioner assessed a deficiency against the taxpayer for gift taxes on the excess. The Tax Court expunged the deficiency, and the Court of Appeals reversed on the ground that the transfer was not based solely on the divorce decree. *Held* (5-4),[1] reversed. The transfer was not voluntary but was based on an obligation imposed by law. *Harris v. Commissioner,* 340 U.S. 106, 71 Sup. Ct. 181 (1950).[2]

The federal estate tax and the federal gift tax are to be construed *in pari materia* since the purpose of the gift tax is to prevent the tax-free depletion of one's estate during his life.[3] The estate tax provides that claims against the estate may be deducted from the gross estate; but the deductions for such claims, when founded upon a promise or agreement, are limited to the extent that they were contracted for an adequate and full consideration in money or money's worth.[4] The statute expressly provides that a relinquishment of marital rights is not to any extent a consideration in money or money's worth. The gift tax provides that when property is transferred for less than an adequate and full consideration in money or money's worth, the amount by which the value of the property exceeds the consideration con-

cf. Note, 48 ILL. L. REV. 780, 784-85 (1948); 2 VAND. L. REV. 481, 482 (1949). However, these cases usually involved statutes requiring a separate act of appointment.

31. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 175, 60 Sup. Ct. 153, 84 L. Ed. 167 (1939).

1. Majority opinion by Douglas, J. (Clark, Jackson and Reed, JJ., and Vinson, C.J., concurring); dissenting opinion by Frankfurter, J. (Black, Burton and Minton, JJ., concurring).

2. For proceedings in the lower courts see 10 T.C. 741 (1948) and 178 F.2d 861 (2d Cir. 1949).

3. Merrill v. Fahs, 324 U.S. 308, 65 Sup. Ct. 655, 89 L. Ed. 963 (1945); Comm'r v. Wemyss, 324 U.S. 303, 65 Sup. Ct. 652, 89 L. Ed. 958 (1945).

4. INT. REV. CODE § 812 (b).

stitutes a gift.[5] By a process of judicial interpretation the estate tax provision regarding release of marital rights has been read into the gift tax statute, with the result that the relinquishment of marital rights in property is not considered adequate and full consideration under the gift tax statute.[6]

In the past, in cases involving transfers arising out of divorce proceedings, the discussion has centered around the question of consideration. There was disagreement between the Tax Court and the Treasury with regard to whether the release of marital rights arising out of predivorce agreements later incorporated into the decree constitutes consideration.[7] The Treasury insisted that it did not; the Tax Court consistently took the view that the proximity to the divorce proceedings gave the transfers the characteristics of arm's length business transactions made without any donative intent,[8] and thus under the Treasury Regulations such transfers were not subject to the gift tax.[9] In 1946 the Treasury made a partial concession in recognizing the release of support rights, even when founded upon an agreement, as adequate consideration, but reaffirmed its position that the release of other marital rights would not constitute consideration.[10] This was consistent with the *Wemyss* case,[11] which settled the matter as to antenuptial agreements.

Since only voluntary transfers come within the purview of the gift tax statute,[12] it is conceded that a transfer based solely upon a divorce decree, being in satisfaction of an obligation imposed by law, is not a taxable gift.[13] The primary question, then, in cases involving a predivorce agreement later

5. *Id.* § 1002.
6. Merrill v. Fahs, 324 U.S. 308, 65 Sup. Ct. 655, 89 L. Ed. 963 (1945).
7. See Note, 1 MIAMI L.Q. 40 (1947).
8. See, *e.g.*, Josephine S. Barnard, 9 T.C. 61 (1947), *rev'd*, 176 F.2d 233 (2d Cir. 1949); Clarence B. Mitchell, 6 T.C. 159 (1946); Matthew Lahti, 6 T.C. 7 (1946); Edmund C. Converse, 5 T.C. 1014 (1945), *aff'd*, 163 F.2d 131, 174 A.L.R. 199 (2d Cir. 1947); Herbert Jones, 1 T.C. 1207 (1943). *But cf.* Clarissa H. Thomson, 16 P-H 1947 TC MEM. DEC. ¶ 47,194 (1947). The instant case somewhat refutes this view. "This transaction is not 'in the ordinary course of business' in any conventional sense. Few transactions between husband and wife ever would be; and those under the aegis of a divorce court are not. But if two partners on dissolution of the firm entered into a transaction of this character . . . there would seem to be no doubt that the unscrambling of the business interests would satisfy the spirit of the Regulations. No reason is apparent why husband and wife should be under a heavier handicap absent a statute which brings all marital property settlements under the gift tax." 340 U.S. at 112.
9. 340 U.S. at 112, n.8, citing U.S. Treas. Reg. 108, § 86.8: "However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth."
10. E.T. 19, 1946-2 CUM. BULL. 166. This E.T. applied to both the estate tax and the gift tax.
11. Comm'r v. Wemyss, 324 U.S. 303, 65 Sup. Ct. 652, 89 L. Ed. 958 (1945).
12. Comm'r v. Converse, 163 F.2d 131, 174 A.L.R. 199 (2d Cir. 1947), *affirming* 5 T.C. 1014 (1945); Edward B. McLean, 11 T.C. 543 (1948); Albert V. Moore, 10 T.C. 393 (1948); Junius R. Judson, 16 P-H 1947 TC MEM. DEC. ¶ 47,050 (1947); Long, *What Is New in Handling The Tax Phases of Marriage; Divorce; Alimony; Minor's Income; Decedent's Income* in SIXTH ANN. INST. ON FED. TAXATION 1061, 1070 (N.Y.U. 1948). *See* Herbert Jones, 1 T.C. 1207 (1943).
13. "Even the Commissioner concedes that that result would be correct in case the property settlement was litigated in the divorce action." 340 U.S. at 110.

incorporated into a divorce decree emerges not as one of consideration but whether the transfer is based upon the divorce decree or upon the predivorce agreement.

Commissioner v. Maresi,[14] an estate tax case, held that a claim by a divorced wife was deductible from the gross estate of the decedent because the claim was based upon the decree of divorce which adopted a previous agreement made by the parties. The theory of the holding was that the decree transformed the obligation from a contractual duty to a judicially imposed duty; hence the claim ceased to be based upon a promise or agreement.[15] *Commissioner v. Converse,*[16] a gift tax case, relying heavily upon the *Maresi* case, held that a transfer made pursuant to a divorce decree was not taxable as a gift even though there was a prior agreement. The nub of the holding was that if the taxpayer had died, the claim would have been deductible from his gross estate under the holding of the *Maresi* case.

The problem of the instant case involves not a mere predivorce agreement but an agreement providing that its terms were to survive the decree, which agreement was incorporated into the decree. The court of appeals and the minority in the instant case took the position that since both the agreement and the decree provided that the agreement was to survive the decree, the transfer was not made solely pursuant to the decree and hence should be taxable. The view of the majority, however, in holding the transfer nontaxable even though not made solely pursuant to the decree, does not discourage compromise agreements. The essence of the holding is that if there is a predivorce agreement conditional upon an absolute divorce and providing for submission of the agreement to the court for inclusion in the decree if the court so orders, then to the extent that the court incorporates it in the decree, transfers made pursuant to the decree will not be subject to the gift tax; to the extent, however, that the court does not approve the agreement, it seems that any transfers required by the agreement will be subject to the terms of the gift tax. To be perfectly safe from the gift tax, the predivorce agreement should be contingent not only upon an absolute divorce but also upon approval of its terms by the court.[17]

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14. 156 F.2d 929 (2d Cir. 1946), *affirming* 6 T.C. 582 (1946). *Accord,* Comm'r v. State Street Trust Co., 128 F.2d 618, 142 A.L.R. 943 (1st Cir. 1942); Fleming v. Yoke, 53 F. Supp. 552 (N.D. W. Va. 1944), *aff'd per curiam,* 145 F.2d 472 (4th Cir. 1944).

15. Rudick, *Marriage, Divorce and Taxes,* 2 TAX L. REV. 123, 160 (1947); 48 COL. L. REV. 152 (1948).

16. 163 F.2d 131, 174 A.L.R. 199 (2d Cir. 1947), *affirming* 5 T.C. 1014 (1945).

17. In George C. McMurtry, 4 PH 1951 FED. TAX SERV. ¶ 74.258 (T.C. 1951), the Tax Court distinguished the instant case on the grounds that in the *McMurtry* case the predivorce agreement was not contingent upon the divorce and that it did not provide for submission of the agreement to the divorce court for ratification.

INSURANCE—NOTICE TO AGENT REPRESENTING TWO INSURERS—ESTOPPEL PREVENTING COMPANY SECONDARILY LIABLE FROM CLAIMING AGAINST COMPANY PRIMARILY LIABLE

A single agent, who represented both plaintiff and defendant insurance companies, sold to the insured a general liability policy issued by defendant company and one for "excess insurance over any other valid and collectible insurance available to the insured" issued by plaintiff company. The insured reported an accident within the coverage of both policies to the agent, who notified only the plaintiff company. In ignorance of other insurance, plaintiff company assumed the liability and retained attorneys to defend the suit brought against the insured. Plaintiff learned of the other insurance shortly before trial and agreed with defendant insurer that plaintiff should continue defense of the suit and pay any judgment, without prejudice to the existing rights of either company. Plaintiff paid a judgment rendered against the insured and sued to recover from defendant company. Defendant denied liability on the grounds that (1) the insured had not given it proper notice, and (2) plaintiff was estopped to deny its own liability. *Held* (3-2), judgment for defendant affirmed. Plaintiff is estopped to deny the liability it had assumed and cannot recover from the other insurer, even though the latter conceded that the liability in question fell within the coverage of its policy. *Maryland Casualty Co. v. Aetna Casualty & Surety Co.*, 60 S.E.2d 876 (Va. 1950).

In the absence of a controlling statute, the parties to an insurance contract may make any reasonable provision for notice and proof of loss.[1] If the policy carries a provision regarding notice and proof of loss, compliance therewith is determined upon the facts in each case.[2] If the policy does not provide to whom notice should be given, notification to an agent of the com-

1. 29 AM. JUR., *Insurance* § 1100 (1940); Note, 76 A.L.R. 23, 28 (1932); McClendon, *Public Liability Insurance: The Injured Person's Right of Recovery When the Policy Holder Fails to Give Immediate Notice to the Insurer*, 10 TULANE L. REV. 69 (1935); Note, 17 KAN. CITY L. REV. 63 (1949).

2. *E.g.*, Georgia Life Ins. Co v. Otter Creek Coal Co., 67 Ind. App. 277, 119 N.E. 151 (1918) (notice to agent sufficient where insured had no knowledge of revocation of agency); Mandell v. Fidelity & Cas. Co., 170 Mass. 173, 49 N.E. 110, 64 Am. St. Rep. 291 (1898) (written notice made where letter addressed to agent came to home office of insurer); Vandervliet v. Standard Acc. Ins. Co., 209 Mich. 146, 176 N.W. 574 (1920) (general agent and one with authority to countersign has authority to receive notice); C.S. Brackett & Co. v. General Acc., Fire & Life Assur. Corp., 140 Minn. 271, 167 N.W. 798 (1918); Rogers v. Western Indemnity Co., 189 Mo. App. 82, 173 S.W. 1087 (1915) (notice to general agent not sufficient where required to give notice to agent countersigning); Pringle v. Aetna Life Ins. Co., 123 Mo. App. 710, 101 S.W. 130 (1907) (notice to broker not sufficient); Lehrhoff v. Continental Cas. Ins. Co., 101 N.J.L. 375, 128 Atl. 245 (1925) (oral notification to employee at home office not sufficient unless employee was an agent); State Automobile Mut. Ins. Ass'n v. Friedman, 122 Ohio St. 334, 171 N.E. 591 (1930) (giving notice to former agent not enough but notice to cashier is); Keyes v. Continental Cas. Co., 121 Pa. Super. 359, 183 Atl. 672 (1936) (not proper notice where additional insurer notifies primary insurer); 6 LA. L. REV. 729 (1946).

pany has been held sufficient.[3] A mistake by the insured as to which of his several policies covers the loss is not a sufficient excuse for his failure to notify the proper insurer as required by the terms of his policy.[4] On the other hand, even where the agent mistakenly forwards the notice to a stranger insurance company,[5] notice given to the proper agent is generally imputed to the insurer.[6] Where the agent receiving notice is also the agent of other insurance companies, a single notice to such agent has been held sufficient to impute knowledge to the other companies which are separately liable.[7]

In an action upon a policy, the insurer may be estopped to deny liability if, under the terms of the policy, it has defended a suit brought against its insured.[8] To be estopped the insurer must either have made no reservation of its rights, or such reservation must have been inadequate.[9] An essential element of the estoppel is that the insured must have been injured as a result of the action of the insurer,[10] although some jurisdictions have held that defense of the suit by the insurer creates a presumption that the insured's position has been prejudiced.[11] It seems that the theory of estoppel should

3. American Cas. Co. v. Purcella, 163 Md. 434, 163 Atl. 870 (1933).

4. Jefferson Realty Co. v. Employers' Liability Assurance Corp., 149 Ky. 741, 149 S.W. 1011 (1912); Reina v. United States Cas. Co., 228 App. Div. 108, 239 N.Y. Supp. 196 (1st Dep't 1930); Sherwood Ice Co. v. United States Cas. Co., 40 R.I. 268, 100 Atl. 572 (1917); 29 AM. JUR., *Insurance* § 1114 (1940).

5. Toub v. Home Indemnity Co., 116 N.J.L. 287, 183 Atl. 827 (Sup. Ct. 1936).

6. 16 APPLEMAN, INSURANCE LAW AND PRACTICE § 9101 (1944); 2 COUCH, CYCLOPEDIA OF INSURANCE LAW §§ 547, 547(a) (1929). See Merrill, *Unforgettable Knowledge*, 34 MICH. L. REV. 474 (1936); Merrill, *The Anatomy of Notice*, 3 U. OF CHI. L. REV. 417 (1936); Seavey, *Notice Through an Agent*, 65 U. OF PA. L. REV. 1 (1916).

7. Mechanic Ins. Co. v. Claunch, 158 Ark. 191, 249 S.W. 588 (1923); Benero v. Insurance Companies, 65 Cal. 386, 4 Pac. 382 (1884); Kelley v. United Benefit Life Ins. Co., 275 Ill. App. 112 (1934).

8. See Note, 81 A.L.R. 1326 (1932); 16 B.U.L. REV. 236 (1936); 13 FORD. L. REV. 248 (1944); 29 ILL. L. REV. 115 (1934); 26 ILL. L. REV. 90 (1931); 24 TEX. L. REV. 504 (1946); 65 U.S.L. REV. 238 (1931).

9. *E.g.*, Meyers v. Continental Cas. Co., 12 F.2d. 52 (8th Cir. 1926); Employers' Liability Assurance Corp. v. Chicago & B.M. Coal & Coke Co., 141 Fed. 962 (7th Cir. 1905); Columbian Three Color Co. v. Aetna Life Ins. Co., 183 Ill. App. 384 (1913); Fidelity & Cas. Co. v. Stewart Dry Goods Co., 208 Ky. 429, 271 S.W. 444, 43 A.L.R. 318 (1925); Sargent Mfg. Co. v. Travelers' Ins. Co., 165 Mich. 87, 130 N.W. 211, 34 L.R.A. (N.S.) 491 (1911); Cowell v. Employers' Indemnity Corp., 326 Mo. 1103, 34 S.W.2d 705 (1930); Ford Hospital v. Fidelity & Cas. Co., 106 Neb. 311, 183 N.W. 656 (1921); 29 ILL. L. REV. 115 (1934). For a complete discussion of waiver or estoppel see Note, 81 A.L.R. 1326 (1932).

10. *E.g.*, Lunt v. Aetna Life Ins. Co., 261 Mass. 469, 159 N.E. 461 (1928); Kitsap County Transp. Co. v. Pacific Coast Cas. Co., 67 Wash. 297, 121 Pac. 457 (1912); J. S. Stearns Lumber Co. v. Travelers' Ins. Co., 159 Wis. 627, 150 N.W. 991 (1915). The elements of a complete estoppel are: "(1) A position of authority assumed by [insurer] under color of right; (2) submission to and reliance upon that assumption by [insured]; and (3) injury suffered by [insured] as a proximate consequence of such submission and reliance." Belt Automobile Indemnity Ass'n v. Ensley Transfer & Supply Co., 211 Ala. 84, 99 So. 787, 790 (1924). "[T]here is no estoppel unless [insured] has been misled and injured." American Cereal Co. v. London Guarantee & Acc. Co., 211 Fed. 96, 99 (7th Cir. 1914).

11. *E.g.*, Tozer v. Ocean Acc. & Guaranty Corp., 99 Minn. 290, 109 N.W. 410 (1906); Royle Mining Co. v. Fidelity & Cas. Co., 126 Mo. App. 104, 103 S.W. 1098 (1907); Malley v. American Indemnity Corp., 297 Pa. 216, 146 Atl. 571, 81 A.L.R. 1322 (1929). However, the motive of the insurer in defending the suit is immaterial. Empire

be inappropriate as between insurers primarily and secondarily liable. If a party secondarily liable pays a judgment, it may be subrogated to the rights of the judgment creditor and may recover from the party primarily liable;[12] and by analogy this principle would seem to apply where the parties are insurers.

If the court in the instant case had determined the liability of the defendant company to the insured under the above rules, it would probably have found that the defendant was liable to the insured for the judgment rendered against it. Though notice of the accident was required, the notice given to the agent generally should be sufficient. If the mistake had been on the part of the insured alone, the defendant could have escaped liability; but where the company's agent also erred, his knowledge would normally be imputed to the company, and the company's liability would follow unless it could escape for other reasons.

The plaintiff in the instant case would probably have been estopped from denying liability in a suit brought by the insured on the policy; but when the judgment was rendered against the insured and was paid by the plaintiff, the latter should be subrogated to the rights of the insured. The plaintiff would thus step into the shoes of the insured and, since there was no estoppel of the insured in relation to the defendant insurer, no estoppel should exist as between the two insurers. Furthermore, the rights of the defendant were not prejudiced; and the plaintiff had made an adequate reservation of its rights prior to defending the suit against the insured.

JURISDICTION—ATTACHMENT OF PROPERTY BELONGING TO NONRESIDENT—APPEARANCE BY OWNER AS BASIS FOR POWER TO GRANT INJUNCTION AGAINST HIM

Sutherland, defendant in the present suit, a nonresident of Tennessee, originally brought an action at law in the Tennessee circuit court to recover funds allegedly converted by the bank, the present plaintiff. The bank then attached the funds and brought this suit in chancery court to recover on a note signed by Sutherland, as a member of a dissolved partnership, and to enjoin him from continuing his action at law. Sutherland appeared specially and filed a plea in abatement, asserting that the statute of limitations barred the action on the note. The chancery court upheld his plea and entered judgment in his favor, from which the bank appealed. *Held* (2-1), reversed; the statute of limitations was tolled by the absence of Sutherland from the state. The bank is entitled to recover the amount of the note to the extent of the property

State Surety Co. v. Pacific Nat. Lumber Co., 200 Fed. 224 (9th Cir. 1912); Oehme v. Johnson, 181 Minn. 138, 231 N.W. 817, 81 A.L.R. 1308 (1930).

12. New York Cas. Co. v. Sinclair Refining Co., 108 F.2d 65 (10th Cir. 1939).

attached, and the defendant will be enjoined from enforcing the judgment which had been confessed in his action at law after the present action had been started. *Farmers State Bank v. Jones,* 232 S.W.2d 658 (Tenn. App. E.S. 1949).

Courts have generally exercised their power over a *res* to enforce the obligations of an absent owner; and, although the jurisdiction is over the *res* alone, and the judgment is effective only to the extent of the *res,* the suit is in form against the person and the jurisdiction is described as *quasi in rem.*[1] The normal method of acquiring jurisdiction in this manner is by attachment or garnishment.[2]

Once a court has acquired jurisdiction *quasi in rem,* the defendant is faced with the alternatives of: (1) not appearing, (2) appearing generally and pleading to the merits, or (3) appearing specially to challenge the jurisdiction of the court.[3] If the defendant does not appear, he loses by default;[4] and if he appears generally and pleads to the merits or asks for relief which presupposes jurisdiction, the court acquires jurisdiction *in personam.*[5] However, a special appearance to test the jurisdiction of the court will not generally extend the power of the court beyond the limits of an action *quasi in rem.*[6] An appearance to contest the validity of the attachment is usually held to be a special appearance,[7] although some courts hold otherwise.[8] An appearance to protect the defendant's rights in the property attached, or to challenge the merit of the claim to the extent of the property attached, has also been

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1. 1 BEALE, CONFLICT OF LAWS § 106.1 (1935); GOODRICH, CONFLICT OF LAWS § 70 (3d ed. 1949).

2. GOODRICH, CONFLICT OF LAWS § 71 (3d ed. 1949).

3. See Frumer, *Jurisdiction and Limited Appearance in New York: Dilemma of the Nonresident Defendant,* 18 FORD. L. REV. 73 (1949).

4. As to the problem of judgment by default and res adjudicata, see GOODRICH, CONFLICT OF LAWS § 71 (3d ed. 1949).

5. Campbell v. Murdock, 90 F. Supp. 297 (W.D. Ohio 1950), 51 COL. L. REV. 242 (1951) (motion to make more specific); Stecker v. Snyder, 118 Colo. 153, 193 P.2d 881 (1948); Wolf v. Timmons, 192 Ill. App. 121 (1915); Stringfellow v. Nowlin Bros., 157 La. 683, 102 So. 869 (1925); Service Printing Co. v. Wallace, 179 Okla. 58, 64 P.2d 863 (1937); Notes, 129 A.L.R. 1240 (1940), 25 IOWA L. REV. 329 (1940); 42 MICH. L. REV. 714 (1944).

6. GOODRICH, CONFLICT OF LAWS 197 (3d ed. 1949); RESTATEMENT, JUDGMENTS § 82 (1942). In some states a special appearance is sufficient to give the court jurisdiction *in personam.* York v. Texas, 137 U.S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604 (1890). See 97 U. OF PA. L. REV. 403 (1949).

7. *E.g.,* Thompson v. Terminal Shares Inc., 89 F.2d 652 (8th Cir. 1937), *cert. denied sub nom.* Guaranty Trust Co. v. Thompson, 302 U.S. 735 (1937); Dudley v. Peterson, 42 Ariz. 282, 25 P.2d 276 (1933); Alabama Power Co. v. Jackson, 181 Miss. 691, 179 So. 571 (1938); Hurst-Boillin Co. v. Kelly, 146 Tenn. 251, 240 S.W. 771 (1922); *see* Smyth v. Moffett, 6 Tenn. App. 381 (E.S. 1927).

8. Roach v. Henry, 186 Ark. 884, 56 S.W.2d 577 (1933); Johnson v. Holt's Adm'r, 235 Ky. 518, 31 S.W.2d 895 (1930); Gale v. Consolidated Bus & Equipment Co., 251 Wis. 642, 30 N.W.2d 84 (1948).

considered a special appearance only;[9] but there is substantial authority to the contrary.[10]

The issue of the jurisdiction of either the chancery or the appellate court to enter a personal judgment against the defendant was not raised in the instant case, and the court gave no theory upon which it acted to enjoin the defendant. To the contrary, the court said: "The result is that the complainant is entitled to recover the amount due on the note to the extent of the fund attached herein. There can be no personal judgment in that Sutherland entered his appearance specially to test the sufficiency of the attachment."[11] This language indicates that the court did not intend to hold that the defendant had pleaded to the merits, but rather to the contrary. If the court thus intends to hold that the jurisdiction is *quasi in rem* only, then the injunction is inconsistent with this language.

There are two possible bases on which the court might have achieved the same result. It could have held that it had jurisdiction *in rem*, with the judgment of the circuit court as the *res*,[12] in which case the decree should have been that the judgment at law was void. Or, the court could have acquired jurisdiction *in personam* if it had held that the equity proceeding was a continuation of the action at law.[13] This position would be somewhat difficult to sustain, since the suit in equity was a new proceeding, not in the nature of an appeal, and in Tennessee, chancery and circuit courts are separate and distinct.[14] However, if it were possible to consider the equity proceeding as a continuation of the action at law, then the present court could have issued the injunction as a valid exercise of its personal jurisdiction over the defendant.

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9. Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., 285 Fed. 214 (6th Cir. 1922); Cheshire National Bank v. Jaynes, 224 Mass. 14, 112 N.E. 500 (1916); RESTATEMENT, JUDGMENTS §§ 38-40 (1942).

10. Najdowski v. Ransford, 248 Mich. 465, 227 N.W. 769 (1929); Industrial Trust Co. v. Rabinowitz, 65 R.I. 20, 13 A.2d 259 (1940); *see* Jos. Riedel Glass Works Inc. v. Keegan, 43 F. Supp. 153 (S.D. Maine 1942).

11. 232 S.W.2d at 665.

12. Britton v. Bryson, 216 Cal. 362, 14 P.2d 502 (1932); Sparrenberger v. District Court, 66 Mont. 496, 214 Pac. 85 (1923); Parker v. Board, 187 Okla. 308, 102 P.2d 880 (1940). *But cf.* Indemnity Ins. Co. v. Smott, 152 F.2d 667, 163 A.L.R. 498 (1945), *cert. denied*, 328 U.S. 835 (1946); Des Moines Union Ry. Co. v. District Court, 170 Iowa 568, 153 N.W. 217 (1915); Fisher v. Evans, 25 Mo. App. 582 (1887); Moyer v. Koontz, 103 Wis. 22, 79 N.W. 50 (1899); *see* Bickerdike v. Allen, 157 Ill. 95, 41 N.E. 740, 741, 29 L.R.A. 782 (1895).

13. Michigan Trust Co. v. Ferry, 228 U.S. 346, 33 Sup. Ct. 550, 57 L. Ed. 867 (1913); Hanna v. Brictson Mfg. Co., 62 F.2d 139, 149 (8th Cir. 1932); Dickey v. Turner, 49 F.2d 998 (6th Cir. 1931); O'Connor v. O'Connor, 146 Fed. 994 (W.D. Texas 1906); The Cortes Co. v. Thannhauser, 9 Fed. 226 (S.D.N.Y. 1881); Reybine v. Kruse, 128 Fla. 278, 174 So. 720 (1937); Beck v. Koester, 79 Ind. 135 (1881); Ohlquist v. Nordstrom, 143 Misc. 502, 257 N.Y. Supp. 711 (Sup. Ct. 1932), *aff'd*, 188 N.E. 125 (1933); Carey v. Carey, 121 Pa. Super. 251, 183 Atl. 371 (1936).

14. TENN. CODE ANN. §§ 10318, 10349 (Williams 1934).

MASTER AND SERVANT—SCOPE OF EMPLOYMENT—LIABILITY FOR OMISSION TO ACT WHEN AFFIRMATIVE CONDUCT IS BEYOND SCOPE OF EMPLOYMENT

Defendant telephone company occupied the second floor of a building, immediately above plaintiff's store. The landlord, in order to repair the plumbing in his living quarters at the rear of the second floor, directed defendant's operator to open a water faucet so that the air and water might escape when he shut off the common water line. The operator, after receiving notice that the faucet should be closed, negligently opened it further, and plaintiff's storeroom was flooded when the water was later turned on. From a directed verdict for plaintiff, defendant appeals. *Held,* affirmed. Regardless of whether or not the operator was acting within the scope of her employment in opening the faucet, by so doing she created a situation requiring further action by defendant to protect others; and her failure to close the faucet after she became aware of the risk of leaving it open was conduct within the scope of her employment. *Southern Bell Tel. & Tel. Co. v. Yates,* 232 S.W.2d 796 (Tenn. App. W.S. 1950).

A master is liable for injuries resulting from the negligent conduct of a servant within the scope of his employment;[1] but before a negligent omission to act, as in the instant case, will be such conduct, there first must be a duty to act.[2] Thus the master may be held for the failure of a servant to act where the master owes a duty to third persons and the servant is expressly employed to perform this duty,[3] or where the general nature of the work to be performed gives rise to the servant's duty to protect others.[4]

May a servant's act outside the scope of his employment give rise to a duty to act within the scope of his employment? The American Law Institute suggests an affirmative answer,[5] and most of the few cases directly in point are in agreement.[6] For example, a carrier was held liable when a train con-

1. 2 MECHEM, AGENCY § 1874 (2d ed. 1914); RESTATEMENT, AGENCY § 219 (1933).
2. Peter Piper Tailoring Co. v. Dobbin, 195 Mo. App. 435, 192 S.W. 1044 (1917); 2 MECHEM, AGENCY § 1874 (2d ed. 1914); RESTATEMENT, AGENCY 232, comment *a* (1933).
3. Kissenger v. New York & H.R.R., 56 N.Y. 538 (1874).
4. Simonton v. Loring, 68 Me. 164, 28 Am. Rep. 29 (1878) (occupant of upper tenement liable for damage done when his servant accidentally left open a faucet, flooding lower tenement); Strong v. Woodrow Investing Co., 158 N.Y. Supp. 513 (1st Dep't 1916) (landlord liable for damage to plaintiff's furniture when the building superintendent failed to comply with instructions and inspect plaintiff's apartment before turning on steam).
5. RESTATEMENT, AGENCY § 232 (1933). See FERSON, BASIS OF CONTRACTS 280 (1949).
6. Linam v. Murphy, 232 S.W.2d 937 (Mo. 1950); Wheeler v. Grand Trunk Ry., 70 N.H. 607, 50 Atl. 103 (1901); Chapman v. New York Central R.R., 33 N.Y. 369, 88 Am. Dec. 392 (1865); Cincinnati, H. & D. Ry. v. Kassen, 49 Ohio St. 230, 31 N.E. 282 (1892); Craker v. Chicago & N.W. Ry., 36 Wis. 657, 17 Am. Rep. 504 (1875). *Contra:* Loyd v. Herrington, 143 Tex. 135, 182 S.W.2d 1003 (1944), *reversing* 178 S.W.2d 694 (Tex. Civ. App. 1944).

ductor kissed a female passenger, there being a duty to protect her from the whole world against such indignities.[7] So also, a railroad was held liable when a laborer took down a set of bars along the right-of-way to let his own team through and negligently failed to replace them, the laborer being under a continuous duty to replace them.[8] And when a flying instructor took over the controls of a training plane from a student pilot and proceeded to "buzz" various objects, his employers, under the duty of a carrier, were held liable for injuries to the student sustained in the crash of the plane.[9] In each of these cases, although the opinions do not clearly state the doctrine, the various acts involved gave rise to the situation calling for affirmative action within the scope of employment; and when the servant failed to take such action, liability attached.[10]

Even more clearly in the instant case did the operator's independent act[11] give rise to a duty to act within the scope of her employment. In opening the faucet, defendant's operator created the duty to close it when necessary, since defendant through its servant was bound to use ordinary care at all times to prevent leakage.[12] Damage resulted from the operator's omission to act within the scope of her employment,[13] and her master became liable.[14]

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7. Craker v. Chicago & N.W. Ry., 36 Wis. 657, 17 Am. Rep. 504 (1875). *But cf.* Castorina v. Rosen, 290 N.Y. 445, 49 N.E.2d 521 (1943).

8. Chapman v. New York Central R.R., 33 N.Y. 369, 88 Am. Dec. 392 (1865).

9. Linam v. Murphy, 232 S.W.2d 937 (Mo. 1950). See RESTATEMENT, AGENCY § 232, comment *c* (1933).

10. In Loyd v. Herrington, 178 S.W.2d 694 (Tex. Civ. App. 1944), an employee of defendant's independent contractor, as a prank, attached a dynamite percussion cap to the motor of his foreman's automobile. The cap failed to explode when the foreman started the car, but plaintiff was injured by its explosion when he was checking the motor. In holding defendant liable the court pointed out that placing the cap in the motor was not within the scope of employment, but once the prank failed the employee was under a duty to remove it. The supreme court refused to follow this reasoning and reversed, holding that "the failure of the employees to recover the explosive from the motor prior to the injury . . . was but a continuation of the original prank. . . ." 143 Tex. 135, 182 S.W.2d 1003, 1006 (1944).

11. The court indicates that this act might have been within the scope of the operator's employment but bases its decision on the assumption that it was not. 232 S.W.2d at 799.

12. Weinstein v. Barrasso, 139 Tenn. 593, 202 S.W. 920 (1918); 4 SHEARMAN AND REDFIELD, NEGLIGENCE § 803 (Rev. ed., Zipp, 1941). Being chargeable with the knowledge of the dangerous condition acquired by its operator, "it was the duty of the defendant to see that the water did not escape to the lower floor, even though the condition making this possible was due to a fault not attributable to it." 232 S.W.2d at 799.

13. "Whatever may be true with respect to the authority of the operator to open the faucet . . . , it cannot be said that her failure to close it after she became aware of the risk of leaving it open was not within the scope of the duties imposed upon her by the defendant." 232 S.W.2d at 800.

14. See RESTATEMENT, AGENCY § 232, comment *d* (1933).

MASTER AND SERVANT—TORT ACTION WITH COMMON LAW DEFENSES ABROGATED BY STATUTE—LIABILITY OF EMPLOYER TO VICE PRINCIPAL FOR NEGLIGENCE OF SUBORDINATE EMPLOYEE

Plaintiff, employed as a foreman by defendant mining company, sought to recover for injuries received when defendant's bus, used to carry employees to and from work, was negligently wrecked by the driver, another employee. The evidence showed plaintiff was placed in charge of the bus with authority to control the driver. The action was at common law since the employer had elected not to operate under the Workmen's Compensation Act, but the common law defenses had been abrogated by a provision of this act.[1] *Held,* no recovery because the plaintiff was a vice principal. *Pikeville Fuel Co. v. Marsh,* 232 S.W.2d 789 (Tenn. App. E.S. 1948).

Common law tort actions by a servant against a master were subject to the defenses of assumption of risk, the fellow servant rule and contributory negligence. Under the so-called fellow servant rule, a master was not liable to a servant for injuries caused by the negligence of another servant in common employment.[2] In order to escape the harshness of this rule, the courts gradually developed a series of exceptions. Thus, recovery was allowed if the master had failed to hire a competent fellow servant,[3] if the negligent fellow servant was exercising a nondelegable duty,[4] if the negligent employee was hired in a different department,[5] or if the negligent employee was a vice principal.[6]

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1. The Tennessee act, coercive and not compulsory in nature, provides that where both the employer and employee elect not to proceed under the act, the action is the same as at common law. TENN. CODE ANN. § 6864 (Williams 1934). Where the employer elects to proceed under the act, but the employee does not, the action is still the same as at common law. *Id.* § 6863. But where the employee elects to proceed under the act, while the employer does not, the defenses of the fellow servant rule, assumption of risk and contributory negligence are abrogated. *Id.* § 6862.

2. The rule originated in Priestly v. Fowler, 3 M. & W. 1, 150 Eng. Rep. 1030 (Ex. 1837). One of the first cases setting up the fellow servant rule in this country was Farwell v. Boston & W.R.R., 45 Mass. (4 Metc.) 49 (1842). This decision was based upon public policy and also upon the theory that the negligence of a fellow servant was one of the ordinary risks assumed when one enters employment. For the history and rationale of the rule, see MCKINNEY, FELLOW SERVANTS 1-23 (1890).

3. *E.g.,* Cecil Lumber Co. v. McLeod, 122 Miss. 767, 85 So. 78, 11 A.L.R. 776 (1920) (employer held liable for knowingly hiring a deaf employee whose incompetence caused injury to plaintiff, a fellow servant). Also see 3 LABATT, MASTER AND SERVANT §§ 1079-80 (2d ed. 1913).

4. *E.g.,* Coffeyville Vitrified Brick & Tile Co. v. Shanks, 69 Kan. 306, 76 Pac. 856 (1904) (employer held liable for negligence of employee who failed to give warning to men in shale pit, a duty which could not be satisfied by mere delegation).

5. *E.g.,* Louisville & N.R.R. v. Jackson, 106 Tenn. 438, 61 S.W. 771 (1901) (conductor and negligent station master not fellow servants, each being employed in separate and distinct departments). For an exhaustive discussion of the "departmental doctrine," see 4 LABBATT, MASTER AND SERVANT §§ 1425 *et seq.* (2d ed. 1913).

6. *E.g.,* Chattanooga Electric Ry. v. Lawson, 101 Tenn. 406, 47 S.W. 489 (1898) (employer held liable for negligence of track foreman in ordering a track hand to board moving car). For a collection of cases, see 4 LABATT, MASTER AND SERVANT § 1478 (2d ed. 1913).

Although under the vice principal exception to the fellow servant rule, sometimes called the superior servant rule, a subordinate employee generally was permitted to recover,[7] it was well settled that a vice principal could not recover from the employer for the negligence of an employee under his control.[8] Denial of recovery was usually based on the theory that the vice principal assumed the risks of injury when he assumed control of subordinate employees,[9] but it was also said that the subordinates were fellow servants as far as the vice principal was concerned,[10] so that to this extent the fellow servant rule survived.

In addition to the numerous judicial qualifications of the fellow servant rule, statutory enactments have further restricted the use of the rule so that it now applies to relatively few cases. The Federal Employers' Liability Act abolished the rule as a defense to actions arising under that legislation,[11] and modified the defenses of assumption of risk[12] and contributory negligence.[13] Workmen's Compensation Acts, now adopted by all of the states,[14] being based on an entirely different theory than fault of the defendant, have eliminated these defenses in instances within the scope of the acts.[15] They

7. Massachusetts expressly rejected the superior servant rule, considering all employees to be fellow servants, regardless of grade. Moody v. Hamilton Mfg. Co., 159 Mass. 70, 34 N.E. 185 (1893). A majority of the courts recognizing the superior servant rule have allowed recovery only for those negligent acts of the vice principal which are done in an official capacity and have not allowed recovery if the negligent act of the vice principal was done on the same level or in common labor with the injured employee. *E.g.*, Crispin v. Babbitt, 81 N.Y. 516 (1880); Dwyer v. American Express Co., 82 Wis. 307, 52 N.W. 304 (1892). The following Tennessee cases clearly set forth this doctrine of dual capacity. Gann v. Nashville, C. & St. L.R.R., 101 Tenn. 380, 47 S.W. 493 (1898); Illinois Central R.R. v. Bolton, 99 Tenn. 273, 41 S.W. 442 (1897). Under this majority view, the character of the act is, in many cases, the equivalent of the performance of a nondelegable duty for which, if done negligently, the employer would be liable under another exception to the fellow servant rule. See note 4 *supra*. Thus the vice principal doctrine would not really be needed in deciding these cases. See Note, 1 IOWA L. BULL. 83 (1915). A minority of courts have held, however, that the liability of the master depends merely upon the rank of the vice principal without regard to the character of the act involved. *E.g.*, Russ v. Wabash Western Ry., 112 Mo. 45, 20 S.W. 472 (1892). See Note, 14 B.U.L. REV. 845 (1934) (criticizing the doctrine of dual capacity followed by the majority).

8. McGrory v. Ultima Thule, A. & M. Ry., 90 Ark. 210, 118 S.W. 710, 23 L.R.A. (N.S.) 301 (1909); *accord,* Linemueller v. Arthur, 127 La. 500, 53 So. 732 (1910); McCarty v. Rood Hotel Co., 144 Mo. 397, 46 S.W. 172 (1898).

9. McGrory v. Ultima Thule, A. & M. Ry., 90 Ark. 210, 118 S.W. 710, 23 L.R.A. (N.S.) 301 (1909); Linemueller v. Arthur, 127 La. 500, 53 So. 732 (1910).

10. *Ibid.*

11. 35 STAT. 66 (1908), *as amended,* 53 STAT. 1404 (1939), 45 U.S.C.A. § 54 (1943). See Second Employers' Liability Cases, 232 U.S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327 (1912), upholding constitutionality of the act.

12. Assumption of risk is abolished as a defense in so far as the "negligence of any of the officers, agents, or employees of such carrier" is concerned. 35 STAT. 66 (1908), *as amended,* 53 STAT. 1404 (1939), 45 U.S.C.A. § 54 (1943).

13. Contributory negligence does not bar recovery, but only mitigates damages. 35 STAT. 66 (1908), 45 U.S.C.A. § 53 (1943).

14. Mississippi was the last state to enact such a law, becoming effective January 1, 1949. MISS. CODE ANN. §§ 6998-01 *et seq.* (Supp. 1950).

15. Abolition of the defenses by this type statute has also been upheld. New York Central R.R. v. White, 243 U.S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667 (1917).

frequently abrogate the defenses when tort actions by servant against master are permitted.

After the statutory modifications of the employer's common law defenses, several cases have held that a vice principal may recover from his employer for the negligence of a subordinate.[16] The court in the instant case, however, refused to allow recovery by a vice principal, on the theory that the master-vice principal relationship was not contemplated in the abolition of the defenses by the Workmen's Compensation Act.[17]

It might seem that the present decision undermines the effect of excluding common law defenses by statute. But, as the court said in the instant case, "it is not contributory negligence or assumption of risk with which we are here dealing. It is rather the failure on the part of the plaintiff to exercise a primary responsibility."[18] Here the vice principal was primarily negligent in failing to control the driver. In such cases it is well recognized that an employee is liable directly to his employer for any injury or loss sustained by the employer because of the employee's failure to exercise reasonable care in the performance of his duties,[19] as when he fails to supervise properly an employee under his control where proper supervision might have prevented the loss.[20] Certainly it would avail nothing to allow recovery by the vice principal for a servant's act when the employer could in turn hold the vice principal for his failure to prevent the act.

16. St. Louis, I. M. & S. Ry. v. Cobb, 126 Ark. 225, 190 S.W. 107 (1916) (under the Employers' Liability Act, the effect of which was to exclude defenses of assumption of risk, contributory negligence and the fellow servant rule); Bloxam v. Stave & Timber Corp., 172 N.C. 37, 89 S.E. 1013 (1916) (under the "Fellow Servant Act," abrogating assumption of risk and fellow servant rule as defenses).

17. 232 S.W.2d at 795.

18. *Ibid.*

19. See 2 SHERMAN AND REDFIELD, NEGLIGENCE § 260 (Rev. ed. 1941); Note, 110 A.L.R. 831 (1937).

20. RESTATEMENT, AGENCY § 405 (1933).