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Case Digests

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DIVERSITY OF CITIZENSHIP: Third Party Practice

Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co., 38 F.R.D. 486 (D. Neb. 1965).

Olson v. United States, 38 F.R.D. 489 (D. Neb. 1965).

These two cases are concerned with the jurisdictional requirements of counterclaims arising between third party defendants and an original plaintiff in an impleader action pursuant to FED. R. CIV. P. 14. In the *Union Bank* case the third party defendant, a resident and citizen of Nebraska, filed a counterclaim against the plaintiff, a Nebraska corporation, for 7,890 dollars. Since the counterclaim did not meet the jurisdictional requirements of diversity and amount, plaintiff's motion to strike specifically raised the issue of whether independent jurisdiction is needed for a third party defendant to assert a claim against the original plaintiff. After noting that there existed "a definite and irreconcible split of authority on the issue," Judge Van Pelt denied the motion to strike on the ground that independent jurisdiction was not necessary since the claim was properly within the concept of ancillary jurisdiction.

Basically the same situation was presented in *Olson v. United States, supra*, except that in that case, the original plaintiff sought leave to amend his complaint so as to assert against the third party defendant a claim which was clearly connected with the subject matter set forth in the original complaint. After acknowledging the weight of authority to the contrary, Judge Van Pelt granted plaintiff's motion for leave to amend, holding that independent jurisdiction was not necessary.

In analyzing the legal issues presented by these two cases, the court was obviously influenced by the compelling policy of the impleader device, *i.e.*, the "settlement in a single lawsuit of as many aspects of a controversy as possible." See JAMES, CIVIL PROCEDURE, §10.20 at 505 (1965). This purpose is enhanced by employing the concept of ancillary jurisdiction since under Rule 14, the only third party claims permitted are those arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the original defendant. In other words, the only claims permitted are those which are conducive to settlement in a single lawsuit. Thus, before third party claims are relegated by the requirement of independent jurisdiction to individual settlement with the inevitable result of additional expense and time that naturally characterize multiple lawsuits, substantial and compelling reasons should be found for not invoking the concept of ancillary

jurisdiction. The fact that the plaintiff or third party defendant could not have litigated their claims in a federal court if independent jurisdiction were required is not a sufficient reason standing alone to abdicate the application of the ancillary doctrine. The only support for such a contention is contained in FED. R. CIV. P. 82, which states that the courts should refrain from construing the rules so as to enlarge federal jurisdiction. However, the function and operation of the ancillary concept is well entrenched in federal procedure and should be extended to the present situations unless some underlying reason can be found for dislodging its application.

The problem facing the court in both decisions was the discovery and evaluation of the reasons which tend to militate against the application of ancillary jurisdiction. The chief logical reason in support of independent jurisdiction was thought to exist in the potentiality for collusion that would naturally stem from the number and relative status of the parties. In most situations where it had previously been applied, *i.e.*, compulsive counterclaims under Rule 13 and intervention under Rule 24, ancillary jurisdiction afforded little encouragement for collusion. However, in the impleader situation, the application of the ancillary doctrine was considered by some authority to be conducive to collusive attempts to circumvent jurisdictional limitations. Such attempts could manifest themselves in either of the following two forms:

The first situation arises where the third party defendant is desirous of asserting a claim against the original plaintiff, as illustrated by the *Union Bank* case. The danger alleged in this situation is that the third party defendant might effectuate his real purpose by finding a friendly defendant to implead him. However, there are several fallacies inherent in such speculation. First, the likelihood of cooperation between the original defendant and the third party defendant is considerably reduced by the fact that the plaintiff selects the original defendant. This limits the initiative powers of the third party defendant. Second, even where the third party defendant succeeds in finding a cooperative defendant, the court may always exercise its discretionary power so as to deny impleader where no substantial grounds are exhibited for recovery over. See 3 MOORE, FEDERAL PRACTICE ¶ 14.27(2), at 724-26 (2d ed. 1964). These two limitations substantially reduce the third party defendant's chances of creating a fictitious situation for exploiting ancillary jurisdiction. Thus, in actual operation the third party defendant's claim against the original plaintiff appears ideally suited to the ancillary doctrine.

The second situation wherein the risk of collusion is alleged to be present arises when the original plaintiff seeks to assert a

claim against the third party defendant. In this situation, which is exemplified by the *Olson* case, most authorities consider the risk of collusion high since the plaintiff need only select an original defendant who would cooperate in impleading the defendant whom the plaintiff really wanted. The collusive element present in such a case is also somewhat more despicable since the initiating power is lodged in the plaintiff. However, the risk of collusion does not go completely unchecked. The plaintiff must first establish genuine grounds for recovery against his chosen defendant because if the court should dismiss the complaint against the original defendant, it is doubtful if the counterclaim could survive in the absence of supporting jurisdiction. Second, the plaintiff is further limited in his selection of original defendants because he must select one which can successfully implead the third party defendant. This means that there must be genuine grounds for recovery over. Irrespective of these limitations, it is not disputed that a situation may arise where a plaintiff can sue a third party defendant in federal court on a claim which otherwise could have been litigated only in a state court. However, even where such a situation exists, it is difficult to visualize how such an occurrence could prejudice the third party defendant since under the *Erie* doctrine the federal court will apply the applicable state law. Admittedly, the impleaded defendant may be required to journey to a distant federal court if independent jurisdiction is not required. However, through the operation of a long arm statute, the chances are that such defendant would be required to make this journey if the action was brought in a state court. The only other possibility of prejudice against an impleaded defendant arises from the distinction between procedural and substantive rules as applied by the federal courts. In rare cases state procedural devices might give rise to a defense or immunity which would not exist under federal law. However, with the current emphasis on the merits of a case, it is doubtful if any real prejudice is created particularly in light of the generally considered fairness of the federal rules.

DISCOVERY OF DOCUMENTS: Good Cause

Haarhues v. Gordon, 180 Neb. 189, — N.W.2d— (1966).

Plaintiff was the owner of a truck struck by defendant resulting in an action and counterclaim by the defendant alleging negligence. Plaintiff's driver gave a statement on the day of the accident to a representative of a claim adjustment service which at the time of trial was in the possession of the defendant. A second statement was given to the plaintiff three days later, and the driver was available for questioning at all times. Plaintiff moved to

have the defendant produce the first statement contending their lack of a full statement of the facts, absence of counsel when the statement was made, the fact that the driver's admissions may be used against the plaintiff, and the lapse of five years constituted the requisite good cause under Nebraska's discovery of documents statute, NEB. REV. STAT. § 25-1267.39 (Reissue 1964) which is identical to FED. R. CIV. P. 34. On appeal, *held*, good cause is shown only when there are special circumstances such that production of the facts is essential to the establishment of the case. It is not shown by relevancy, absence of counsel, a need for preparation to examine witnesses, counsel's desire to double check his case, a lapse of three days after the accident before the plaintiff could obtain a statement, or the fact that the statements could render the plaintiff liable. The majority emphasized that the discovery technique harmed the adversary system and so must be restricted to cases where special circumstances compel its use.

The federal courts' definitions of "good cause" were supposedly given "great weight" since it has never been defined by the Nebraska court. However, the court departed from the majority and trend of federal decisions. "Good cause" has been found where the party or witness making the statement was under drugs as in *Irvine v. Safeway Trails, Inc.*, 10 F.R.D. 586 (E.D. Pa. 1953); was still in the hospital as in *Parla v. Matson Navigation Co.*, 28 F.R.D. 348 (S.D. N.Y. 1961); or was an invalid as in *New York Central Ry. v. Carr*, 251 F.2d 433 (4th Cir. 1957). The most common factors establishing good cause are the absence of counsel and the failure to provide a copy to the plaintiff. *New York Central Ry. v. Carr, supra*; *Novick v. Pennsylvania Ry.*, 18 F.R.D. 296 (W.D. Pa. 1955); *Miehle v. United States*, 11 F.R.D. 583 (S.D. N.Y. 1961). In *Parla v. Matson Navigation Co., supra*, the court noted that even though there is a danger that pre-trial inspection will afford an opportunity to tailor testimony in accordance with a prior explanation, the better course is to allow disclosure since there is a greater danger in that the party taking the statement may have unfairly extracted damaging admissions. A minority of federal cases are contrary.

The American Bar Association's Statement of Principles with Respect to the Practice of Law, Insurance Adjustors, # 5(b) deals with the question and has been approved by a large number of insurance companies and claims adjustor companies. To be applied to all witnesses with no time limit placed upon the request for the statement, it is as follows: "If any witness making a signed statement so requests, he shall be given a copy thereof." "Witness" is to be construed to include "parties," but the construction is not to authorize an interview of a party after he is represented by an at-

torney. It would seem that as a principle of estoppel the refusal of a request for a copy of the statement in light of these principles would constitute "good cause".

The dissent argued that the statute grants broad discretion to the trial court and that the trial judge can exercise that discretion better than an appellate court. Moreover, the purpose of the statute is to help the movant to guard against statements by the witness made while under the effects of an accident and without counsel. It would seem the court's narrow interpretation of "good cause" does not effectuate this purpose.

TORTS: Charitable Immunity

Myers v. Drozda, 180 Neb. 183, — N.W.2d— (1966).

Plaintiff was negligently anesthetized when a patient in the defendant non-profit charitable hospital. Recovery of damages was barred in the lower court by the doctrine of charitable immunity last reaffirmed by the court in 1955. On appeal, *held*, tort liability extends to non-profit charitable hospitals as to causes of action arising in the future. Torts committed before the date of the opinion give rise to liability only to the extent of insurance carried by the hospital. The decision brings Nebraska in accord with the great weight of authority.

Cases which upheld immunity relied on fictional theories or assumed that the financial resources of the hospitals would be unduly burdened by tort liability. The court rejected the latter in view of the availability of insurance and lack of empirical data to support immunity.

Myers is noteworthy in its candid break with precedent. The court properly examined the reasons for the previous rule, found them non-existent, and then proceeded to change the rule. A majority of the court now seems to view stare decisis as a guide rather than a rigid rule. This attitude should lead to a re-examination of several cases examples of which are the following: *Tober v. Hampton*, 178 Neb. 858, 136 N.W.2d 194 (1965) (no contribution between joint tort-feasors without a statute); *Weston v. Gold & Co.*, 167 Neb. 692, 94 N.W.2d 380 (1959) (plaintiff must elect either res ipsa loquitor or allege particular acts of negligence); and *Brunson v. Rank's Army Store*, 161 Neb. 519, 73 N.W.2d 803 (1955) (no right of privacy because of no precedent to support it).

The dissent's complaint of judicial legislation is answered by the majority opinion in noting that the original immunity rule was court made. Moreover, the judiciary can and should "make law" when the legislature demonstrates no willingness to do so.

CONFLICT OF LAWS: *Lex Loci Delicti* Choice of Laws Rule

Lorenzen v. Continental Baking Co., 180 Neb. 23, 141 N.W.2d 163 (1966).

A Continental Baking Company truck driven by an employee of that company was in collision with a Peter Pan Bakers, Inc., truck driven by appellee's deceased, an employee of Peter Pan. Both drivers were killed. Although the accident occurred in Iowa, both drivers were residents of Nebraska, as was the appellee, and both were employed in this state. Appellee, administratrix of the estate and widow of the driver of the Peter Pan truck, brought an action for wrongful death under the Iowa rule for damages. The jury returned a verdict for the appellee for 85,368 dollars and Continental appealed. *Held*: Affirmed in part, and in part reversed and remanded to the district court for retrial as to damages only. The finding of the jury as to the negligence of Continental was affirmed but the verdict for damages was set aside as excessive. As to the question of what law of damages applied to this action, the court held that "[t]he accident occurred in Iowa and the rule of damages is therefore determined from the law of Iowa." *Id.* at 31, 141 N.W.2d at 168.

In support of this choice of laws rule, the Nebraska Supreme Court cited RESTATEMENT, CONFLICT OF LAWS § 391, comment *d* at 480 (1934) and *id.* at § 412. Thus, Nebraska has continued to adhere to the older rule of *lex loci delicti,* which states that the law of the place of the wrong governs the right of action for death. See *Whitney v. Penrod,* 149 Neb. 636, 32 N.W.2d 131 (1948), and *Missouri Pac. Ry. v. Lewis,* 24 Neb. 848, 40 N.W. 401 (1888).

In recent years, the more flexible choice of laws rule of "most significant contacts," stated in *Babcock v. Jackson,* 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), and expressed in RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1964), has gained considerable favor in many jurisdictions. According to this newer rule, the court looks to each specific issue to determine which of the states involved with the occurrence has the greater governmental interest in applying its law to the resolution of the issue. In doing so, the court considers which state has the "most significant contacts" with the parties and issues. Important contacts to be considered include: (a) the place where the injury occurred; (b) the place where the conduct occurred; (c) the domicil, nationality, place of incorporation and place of business of the parties; (d) the place where the relationship, if any between the parties is centered; and (e) any other contact which can reasonably be said to be of significance in connecting the occurrence and the par-

ties with a given state.

According to the RESTATEMENT (SECOND), CONFLICT OF LAWS § 390, comment *b* at 118 (Tent. Draft No. 9, 1964), "[i]f the plaintiff and the defendant are domiciled in a single state, it would seem that, ordinarily at least, this state would have the greatest interest in the issue of survival and that its law should control." It seems strange indeed that the Nebraska Supreme Court would resolve the issue of which state's law of damages applys without mention of either the "most significant contacts" rule of the *Babcock* decision or the rule of the proposed Restatement. Among recent decisions adopting the "most significant contacts" rule are *Fabricus v. Horgen*, — Iowa —, 132 N.W.2d 410 (1965), digested in 44 NEB. L. REV. 874 (1965), and *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965), digested in 45 NEB. L. REV. 192 (1966).

WATER LAW: Reciprocal Rights of Upstream Riparian Owners

Kiwanis Club Foundation, Inc v. Yost, 179 Neb. 598, 139 N.W.2d 359 (1966).

Plaintiff, an upper riparian owner, brought an action for an injunction to restrain the defendants from destroying a dam and to require them to replace and repair a portion of the dam already destroyed. The dam, originally built in 1887, was located on the Big Blue River approximately one mile downstream from the property of the plaintiff. In reliance upon the existence of the dam and the favorable water level created by it, the plaintiff had acquired the property, improved it at great expense, and operated it for over forty years as a camp and recreation area for Camp Fire Girls. The action was brought on the theory that by prescription the plaintiff had acquired rights in the existence of the dam and the water level maintained by it, and therefore, the defendants were barred by acquiescence and were estopped from damaging or interfering with such rights. The district court sustained a demurrer and a later motion to dismiss, and appeal was taken. *Held*: Judgment affirmed. Where a dam is originally built for the benefit of the owner, he is not obligated to maintain it for the benefit of an upper riparian owner who receives advantages from its existence, and he may return the river to its natural state by destroying the dam. A departure from the "rules of property" was not justified since other riparian owners, who may have had an interest in the action, were not before the court, and the plaintiff failed to disclose the extent of damages that would be encountered if the dam were destroyed. Although the dam was originally constructed in 1887, the court found that the fact that the dam was man-made "is

sufficient to charge them with notice that the water level above the dam is artificial as distinguished from natural, and that its level may be lowered or returned to the natural state at any time." *Id.* at 601, 139 N.W.2d at 361. In so holding, the court followed the reasoning of *Mitchell Drainage Dist. v. Farmers Irr. Dist.*, 127 Neb. 484, 256 N.W. 15 (1934), where it was held that a dam, being a temporary obstruction, does not give rise to prescriptive rights which would result from a permanent diversion.

In finding for the defendants, the court rejected the reasoning of *Kray v. Muggli*, 84 Minn. 90, 86 N.W. 882 (1901), where, under similar facts, injunctive relief was granted to an upstream riparian owner upon three theories: (1) The originally artificial condition had become the natural permanent condition which could not be altered to the damage of other riparian owners; (2) after a period of time, the upper riparian owners acquired a reciprocal prescriptive right to enjoy the benefit of the dam; (3) the person who built the dam, and those claiming through him, were estopped by principles of equity from removing the dam to the injury of other riparian owners who had improved their property in reliance on the continued existence of the dam. See also, *Harris v. Brooks*, 225 Ark. 436, 283 S.W.2d 129 (1955); *Taylor v. Tampa Coal Co.*, 46 So.2d 392 (Fla. 1950).

Likewise, riparian owners were found not to have a sufficient interest in the use of water to prevent the drilling of wells for public water supply in *In re Metropolitan Util. Dist. of Omaha*, 179 Neb. 783, 140 N.W.2d 626 (1966). The objectors failed to show any damage, beyond mere speculation, resulting from the diversion of their water rights, and consequently, the action failed.