1967

Shirlee M. Housley and Reese C. Housley v. The Anaconda Company, A Corporation, and Dennis P. Cox and The Travelers Insurance Comp Any, A Corporation : Appellants' Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

SHIRLEE M. HOUSLEY and
REESE C. HOUSLEY,
Plaintiffs-APPELLANTS,

vs.

THE ANACONDA COMPANY, a
corporation, and DENNIS P. COX,
Defendants,

and

THE TRAVELERS INSURANCE
COMPANY, a corporation,
Garnishee,
RESPONDENTS.

No.
10612

APPELLANTS' BRIEF

**Appeal from the Orders of the District Court
of Salt Lake County, State of Utah
Hon. Joseph G. Jeppson, Judge
Hon. Aldon J. Anderson, Judge
Hon. Merrill C. Faux, Judge**

**GLEN E. FULLER and
WILFORD A. BEESLEY
15 East 4th South
Salt Lake City, Utah
Attorneys for Plaintiffs-
Appellants**

**RAY, QUINNEY & NEBEKER
300 Deseret Building
Salt Lake City, Utah
Attorneys for Defendant-Respondent**

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TABLE OF CONTENTS

CASES CITED

Page

AUTHORITIES CITED

STATUTES CITED

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STATEMENT OF THE CASE

This is an action for personal injuries and automobile damages arising out of a two-vehicle collision wherein plaintiffs have jointly sued The Anaconda Company and Dennis P. Cox, an employee of Ana-

conda, who was driving a company vehicle at the time it struck the vehicle of plaintiffs; and to proceed against Cox, who left the State of Utah shortly after the accident, by garnishment proceedings against an insurance policy with The Travelers Insurance Company as the liability insurer of both Anaconda and Cox.

DISPOSITION IN LOWER COURT

Four different judges of the Third District Court in and for Salt Lake County have made and entered various Orders in this matter involving—

(a) A ruling that defendant Cox, who left the State of Utah shortly after the accident, had not made a general appearance in certain proceedings relating to plaintiffs' Motion to Amend their Complaint;

(b) The quashing of service of summons in an in rem proceeding brought by serving defendant Cox in the State of Maryland, and the joining of The Travelers Insurance Company, as garnishee therein;

(c) The granting of summary judgment in favor of defendant Anaconda Company.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek a reversal of the applicable Orders entered in this action establishing, in the alternative

as to Cox, either that defendant Cox made a general appearance in this matter or that the liability policy of insurance issued by The Travelers Insurance Company insuring both The Anaconda Company and Dennis P. Cox can be reached as a chose in action so that the lower court can proceed with the trial of this case in an in rem proceeding notwithstanding the absence of Cox from the State of Utah. As to The Anaconda Company, plaintiffs seek a reversal and setting aside of the Order granting summary judgment in favor of that defendant, and that the matter be sent back to the lower court for a trial on the merits of the action as to The Anaconda Company.

STATEMENT OF FACTS

On January 5, 1959, in Salt Lake City, defendant Cox, while driving a motor vehicle owned by The Anaconda Company, and with its express permission (R. 133), drove into the rear of an automobile being driven by plaintiff Shirlee M. Housley, and owned by plaintiff Reese C. Housley (R. 1).

Plaintiff Shirlee M. Housley suffered severe back and neck injuries. Ruptured discs of the lower back have required fusion of that area of the spine and a further fusion is contemplated in the cervical spine. A female operation to prevent future childbirth has been performed as necessary treatment to prevent further aggravation of her spinal injuries (R. 18).

Her expenditures to date for hospitalization and medical expenses, therapeutic devices, drugs and medicines, and nursing care, are in excess of $6,000.00. She is faced with partial permanent disability and continuing pain and suffering.

Within a few weeks after the accident defendant Cox departed the State of Utah and went to Brazil. Subsequently, he returned to the States, and now resides in Maryland.

Within eight months after the collision (R. 3) plaintiffs caused a Complaint to be filed, and service of summons was made upon The Anaconda Company. However, inasmuch as defendant Cox had left the State of Utah approximately six weeks after the accident (Exh. 2-P-#24), personal service could not be made upon Cox. On November 6, 1963, pursuant to a motion made by plaintiffs to file an Amended Complaint setting forth allegations justifying a proceeding against defendant Cox in an in rem count (R. 16-19), counsel for Cox appeared at the hearing (R. 165-168) and informed the court that he was appearing as Cox's attorney " . . . for the purpose of this amendment . . . ", and further informed the court that he wished to argue that plaintiffs " . . . cannot state a cause of action against Mr. Cox." Thereupon, after several hearings and the submission of briefs, Judge Joseph G. Jeppson ruled on May 19, 1964 that in rem jurisdiction could be had in Utah to try the matter against Cox by reaching the liability insurance policy insuring Cox, and that

the appearance in the matter by Cox, through his attorney, was not a general appearance " . . . since the aforesaid ruling of the court that in rem jurisdiction can be had herein is considered by the Court to be a special appearance." (R. 61).

Notwithstandnig the Order of Judge Jeppson, when personal service was actually made upon Cox in the State of Maryland reciting the in rem nature of the proceeding and other incidents of the relief sought, counsel for Cox again appeared, and after one unsuccessful attempt before Judge Aldon J. Anderson (R. 62-63), finally induced the latter, upon a re-hearing, to issue an Order quashing summons (R. 82) on July 7, 1964. The last Order was apparently based upon what counsel for Cox asserted to be constitutional objections under Section 7 of Article I of the Utah Constitution and the Fourteenth Amendment to the United States Constitution in that Cox was being deprived " . . . of his property without due process of law . . . ".

On December 13, 1965, a pre-trial hearing was had before Judge Stewart M. Hanson and a pre-trial Order was prepared setting the matter for trial as to defendant Anaconda Company (R. 131-133). Thereafter, and prior to trial date, defendant Anaconda Company, appearing through the same counsel who represented Cox, moved for Summary Judgment, supported by the Affidavit (R. 134) of defendant Cox, wherein the issue was raised as to whether Cox was

within the scope of employment of Anaconda Company at the time of the accident. The affidavit of Cox recited that at the time of the accident " . . . I was on my way home to have lunch with my wife." He further stated that "I cannot now recall whether I was going to pick up equipment after lunch on the day of the accident."

Based upon the record before the Court at the time, together with the Affidavit of Cox, Judge Merrill C. Faux entered an Order granting Summary Judgment in favor of Anaconda Company on March 16, 1966 (R. 160).

ARGUMENT

This Appeal is taken and based upon the following points:

I. IN REM JURISDICTION CAN BE HAD IN UTAH BY GARNISHMENT OF AN INSURANCE POLICY AS A CHOSE IN ACTION SO AS TO GIVE UTAH COURTS JURISDICTION TO PROCEED IN A PERSONAL INJURY ACTION WHERE THE DEFENDANT HAS DEPARTED THE STATE OF UTAH AFTER THE CAUSE OF ACTION AROSE.

II. THE DEFENDANT'S APPEARANCE BEFORE JUDGE JEPPSON ON NOV. 6, 1963, WAIVED HIS OBJECTION TO PERSONAL JURISDICTION.

III. THE ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

ANACONDA COMPANY IS UNSUPPORTABLE UNDER THE FACTS AND THE RECORD BEFORE THE COURT.

POINT I

IN REM JURISDICTION CAN BE HAD IN UTAH BY GARNISHMENT OF AN INSURANCE POLICY AS A CHOSE IN ACTION SO AS TO GIVE UTAH COURTS JURISDICTION TO PROCEED IN A PERSONAL INJURY ACTION WHERE THE DEFENDANT HAS DEPARTED THE STATE OF UTAH AFTER THE CAUSE OF ACTION AROSE.

The facts of this case concerning jurisdiction create a somewhat unusual situation—but one which undoubtedly will occur more and more frequently with the mobile population which faces the American future. At the time of the accident the defendant, Dennis P. Cox, was apparently a resident of the State of Utah. Shortly after the accident Mr. Cox left Utah for Brazil, making it difficult to obtain in personam jurisdiction.

This has created an anomalous and ironical situation since Utah's long arm statute, U.C.A. 1953, Sec. 41-12-8, has been held in *Teague v. District Court,* 4 Utah 2d 147, 289 P.2d 331, and *Brandon v. Teague*, 5 Utah 2d 214, 299 P. 2d 1113 (1956), to apply only to those persons who were nonresidents at the time of the injury. Thus, by leaving the State of Utah a resident can avoid jurisdiction over his person, whereas a nonresident is subject to substituted service.

Basically, what the plaintiff seeks to do in this case is to obtain in rem jurisdiction by garnishment of a chose in action belonging to the defendant. This action does not contemplate acquiring in personam jurisdiction over the defendant, nor does it contemplate any form of direct action against the liability insurer. The plaintiff merely intends to impose a lien upon a chose in action in the hands of a third party and to use such lien as a basis for in rem jurisdiction. Any recovery by the plaintiff will be limited to the value of the attached chose in action.

This procedure is authorized by U.C.A. 1953, Rule 64 D. Rule 64 D specifically provides for garnishment prior to judgment. Further, an attachment or garnishment with constructive service gives jurisdiction to proceed in the main action against property of the defendant. *Bristol v. Brent,* 35 Utah 213, 99 P. 1000.

The United States Supreme Court has sanctioned this procedure whereby constructive service can be used to obtain in rem jurisdiction, allowing the plaintiff to proceed in the main action against property of the defendant in the hands of a third party. *Chicago R.R. Co. v. Sturm,* 174 U. S. 710, 19 S. Ct. 797 (1899); *Harris v. Balk,* 198 U. S. 215, 25 S. Ct. 625 (1905). This procedure is not prohibited by *Pennoyer v. Neff,* 95 U. S. 714, 24 L. Ed. 565 (1877), since that case merely prohibits the use of constructive service in obtaining *in personam* jurisdiction.

The conflict on this point initially arose when the plaintiff filed a "Notice and Motion for Filing Amended Complaint" (R. 15-23). By this motion the plaintiff sought to amend the complaint to contain an in rem count against a chose in action belonging to the defendant, Cox, and being held by The Travelers Insurance Company. The defendant, Cox, made an appearance to object to this amendment (R. 165-169). Nevertheless, the plaintiffs' motion was granted by Judge Joseph G. Jeppson in the following language (R. 60-61):

> "NOW, THEREFORE, IT IS HEREBY ORDERED that:
>
> 1. Defendant Dennis P. Cox has a chose in action under a liability insurance policy which can be reached by plaintiffs to acquire in rem jurisdiction in these proceedings, and plaintiffs' motion to amend their complaint accordingly is hereby granted and garnishment may issue as requested."

This final Order dated May 19, 1964, followed Judge Jeppson's Minute Entry dated December 5, 1963, which gave initial approval to the amendment and the in rem action (R. 121). In the interim, however, process was constructively served upon the defendant, Cox, in the State of Maryland (R. 27). Thus, in rem jurisdiction had been established prior to Judge Jeppson's final Order (R. 121).

Being unable to obtain a reversal from Judge Jeppson, defendant Cox, through his attorney, pre-

sented the matter to a different judge. In an Order, dated May 25, 1964, (R. 62-63), Judge Anderson denied defendant's motion to dismiss the Amended Complaint and to quash the service of summons, saying that the

> " . . . Order of Judge Jeppson had disposed of the legal and factual issues material to the Motion before the Court, and to grant the Motion to Dismiss to Quash Summons at this time would require a reversal of the prior Order in the matter involving the same matters of law and fact; . . ."

Nevertheless, the persistent defendant obtained an "Order Granting Motion to Quash Summons" (R. 82) by a second appeal to Judge Anderson on July 7, 1964. By Judge Anderson's own language (R. 62-63) he thereby reversed the prior Order issued at the hand of Judge Jeppson.

In resolving this question, which has been framed by the respective judges and also in the interpretation of cited cases, it is crucial that the statutory language be closely consulted. This was made clear in 134 A.L.R. 853, 854 (1941), where the annotation reads:

> "The remedy of garnishment or attachment is in derogation of the common law and exists only by virtue of statute. 4 Am. Jur. 555, Attachment and Garnishment, Sec. 8.
>
> "There appears to be a garnishment act or statute, or an act or statute relating to a similar process, in practically every jurisdiction, though

in some states the statute does not specifically provide that to make an obligation not due or not payable, garnishable, its payment must not depend upon a contingency.

"However, it is laid down as a general rule by text writers that a debt which is contingent, and may never become due and payable, is not subject to garnishment, is stated in *Hanover F. Ins. Co. v. Connor* (1886) 20 Ill. App. 297.

"Sometimes and in some jurisdictions the statute has apparently permitted the garnishment of contingent obligations, and in that case, of course, the question under annotation does not arise."

This same state of the law was expressed in 47 Marq. L. Rev. 221, 222 (1963).

"In the absence of statutes to the contrary, a debt which is uncertain and contingent, in the sense that it may never become due and payable, is not subject to garnishment. *Only a few states* have by statute provided for the garnishment of contingent interests." (Emphasis added).

It is submitted that Utah is one of those states allowing garnishment of contingent interests. Cases not so allowing garnishment of contingent interests can be explained on the basis of the applicable state statute.

134 A.L.R. 853 (1941), discusses *Banionis v. Lake*, 289 Mass. 146, 193 N. E. 731 (1935), where an obligation under a settlement agreement to pay upon release was held contingent and not garnishable "(a) Under a statute making a debt subject to the trustee process

if its payment does not depend upon any contingency . . . "

In *Gray v. Houck,* 68 S. W. 2d 117, 167 Tenn. 233 (1934), the Tennessee Supreme Court held against the plaintiff on facts similar to those in the case at bar. However, that decision was necessitated by the Code of Tennessee, 1932:

> 23-601 (9396)
>
> *Grounds for Attachment* - Any person having a debt or demand due at the commencement of an action, or a plaintiff after action for any cause has been brought, and either before or after judgment, may sue out of an attachment at law or in equity, against the property of a debtor or defendant, in the following cases:
>
> (1) Where the debtor or defendant resides out of the state . . .
>
> 23-603 (9400)
>
> *Debts not due* - An attachment may in like manner, be sued out upon debts or demands not due, in any cases mentioned in 23-601, *except the first; that is, when the debtor resides out of the state.* (Italics added).
> 23-701 (9428)
>
> *Assets subject to garnishment.* - Where property, choses in action, or effects of the debtor are in the hands of third persons, or third persons are indebted to such debtor, the attachment may be by garnishment.

An analysis of the three quoted statutory provisions shows that garnishment proceedings are tied to

attachment proceedings, and that a limitation prohibited attachment or garnishment upon *"debts or demands not due . . . when the debtor or defendant resides out of the state."*

60 A.L.R. 884, 885 (1929), discusses the garnishability of notes or accounts in the possession of a third party for collection. On this issue the courts split, but in referring to a decision holding that a note was not garnishable from a custodian the annotator said:

> "The reason for the decision was that a mere custodian of choses in action who has received no money upon them is not liable to an attachment in execution, as he is in no sense a debtor to the defendant in the execution."

It is obvious that the applicable statute in that case did not allow attachment or garnishment of a chose in action.

However, the applicable Utah statute, U.C.A. 1953, Rule 64 D, *does* provide for the garnishment of a chose in action.

> (a) *When plaintiff entitled to writ; affidavit*— The plaintiff, at any time after the filing of the complaint, may have a writ of garnishment issue, and attach the credits, effects, debts, *choses in action,* money, and other personal property of the defendant in the possession or in the control of any third person, as garnishee, *whether the same are due at the time of the service of the writ or are to become due thereafter, . . .* " (Italics added).

The exact scope of this statute has not been delineated by this Court, but a comparison of the statutes of sister states will soon show that the Utah statute is indeed broad. The Utah statute expressly allows garnishment of a chose in action to become due after service of the writ.

That an insurance policy is a species of property in the nature of a chose in action, susceptible of ownership like any other chose in action, there can be no doubt. 29 Am. Jur., Insurance, Sec. 186; Black, Law Dictionary (3rd ed. 1933); *Thompson Heating Corp. v. Hardware Indemnity Ins. Co. of Minn.,* 72 Ohio App. 55, 50 N.E. 2d 671, 673; *Sheldon v. Sill,* 49 U.S. 441, 447, 12 L. Ed. 1147. The defendant has even so much as admitted this in his pleadings (R. 64, 71), where he erroneously cited *Pennoyer v. Neff* for the proposition "that a denial of his motion to dismiss and quash summons will deprive him of *his property* without due process of law." It was upon that motion that Judge Anderson acted in the quashing of summons (R. 82).

The case of *Acheson-Harder Co. v. Western Wholesale Notions Co.,* 72 Utah 323, 269 P. 1032, 60 A.L.R. 881 (1928), is appropriate to point out the significance of the allowance of garnishment of a *chose in action to become due after service of the writ.* In that case this Court held that accounts placed in the hands of the garnishee for collection, but not collected, could not be reached by the service of a writ of garnishment

upon the person having such accounts in his hands for collecton. This Court held that the liability of the garnishee to account to the defendant for property or indebtedness must be absolute, in order that such property or indebtedness be garnishable. The then existing statute, Laws of Utah 1925, C. 106, required that the garnishee have

> "property, money, goods, chattels, credits or effects in his, or its hands or under his or its control belonging to the defendant or defendants, or any or either of them, or that such person or persons, firm or corporation is indebted to the defendant; that the defendant is indebted to him or it on such contract, judgment or decree, *sued* upon, . . . " (Emphasis added).

The present statute has obviously liberalized garnishment proceedings by adding *chose in action,* by including language to the effect that the asset need not be due, and by deleting the reference to such contract, judgment or decree *sued upon.* By definition alone, a chose in action does not mean absolute indebtedness. *Sheldon v. Sill, supra; United States v. J. T. Hubbell,* 323 F. 2d 197 (5th Cir. 1963).

Furthermore, the *Acheson Case* can be distinguished on the basis that the obligation was contingent *qua* contingent since the *garnishee himself* had an act to perform to determine his liability. In other words the garnishee could have effectively blocked the garnishment by not making the collection. In the case at bar all *facts* which would make the garnishee liable

have occurred; the garnishee himself cannot, by action or inaction, prevent his liability to the defendant.

At this point it should be made clear that the plaintiff is not engaged in a direct action against The Travelers Insurance Company. Such a procedure has not been permitted by Utah law. Rule 64 D merely permits the imposition of a garnishment lien as a basis for in rem jurisdiction whereby the plaintiff can proceed in the main action against property of the defendant.

This proceeding, in contrast to a direct action (personal), is not prohibited by the insurance contract between defendant and garnishee. The contract does contain a "no action" clause in the following words:

CONDITIONS

13. Action Against Company—

> No action shall lie *against the company* unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company. (Emphasis added).

This action is not *"against the company"* but rather against Cox, by reaching a liability insurance contract between him and the insurance company. This distinction was made clear by a prominent Utah defense attorney, Ray R. Christensen, *Direct Rights and Reme-*

dies Against Liability Insurers, 28 Utah Bar Bull. 155 (1958), where he said:

> "Under the provisions of Rule 64 D, the writ of garnishment apparently will lie before judgment is obtained against the insured. However, it would serve a useful purpose only in rare cases such as suggested under paragraph A. above."

The distinction between a tort claim and a contract claim is necessitated under Utah law. Plaintiffs are not attaching an unliquidated tort claim, which is the nature of the chose in action which *they* have; rather, they are proceeding against a contractural right which defendant Cox has against The Travelers Insurance Company to have the latter pay damages on his behalf arising out of the use of a motor vehicle.

That an unliquidated tort claim could not be garnished under Rule 64 D was held by this Court in *Paul v. Kirkendall,* 6 Utah 2d 256, 311 P.2d 376, 380 (1957). In that case the plaintiff obtained a $20,000.00 personal judgment against the defendant. The insurance company, garnishee, paid to its maximum liability of $10,000.00. The plaintiff claimed that the garnishee was negligent in not making a settlement, and that therefore the garnishee was liable to the defendant in tort. The plaintiff attempted to label this tort claim as a chose in action under Rule 64 D, and garnished same.

This court held that an *unliquidated tort claim* was not a chose in action within Rule 64 D. In this respect this Court specifically referred to the claim of

defendant against garnishee and not the claim of plaintiff against defendant. This Court's determination was necessitated by the language of Rule 64 D (m) where it indicates that the garnishee may set off any debt owed him against defendant, but is liable for the balance *"not including unliquidated damages for wrongs and injuries."*

By way of dicta this Court went one step further and assumed that an unliquidated tort claim was a chose in action.

> "Let it be assumed that the facts alleged in plaintiffs' second reply to defendant's answer show the existence of a chose in action in favor of Kirkendall and against garnishee which would support a judgment against garnishee which we do not here decide, nevertheless we are of the opinion that that chose in action must be processed by defendants' instituting an action in court against the garnishee where all rights and issues may be determined in the garnishment proceedings."

The Court would here appear to be reading into the statute a requirement that the chose in action or claim of defendant against garnishee be absolute, liquidated and not contingent. It is respectfully submitted that no language of Rule 64 D so infers and that a chose in action, by definition, is unliquidated and uncertain. In *Sheldon v. Sill,* 49 U. S. 411, 447, 12 L. Ed. 1147,

> "A chose in action is a thing in action, a right of action, a thing recoverable in action, a debt, a demand, a promissory note, a right to recover

> damages. A chose in action was originally a right of action not assignable at law. It was a cause of suit for a debt due or a wrong done."

Surely a *demand* implies no certainty, nor does *a right of action.* In *First Nat. Bank v. Holland,* 39 S. E. 126, 129, 99 Va. 495, 55 L.R.A. 155, 86 Am. St. Rep. 898, Kent's definition of a chose in action is quoted.

> "A 'chose in action' is defined by Kent (2 Kent's Comm. pt. 5, p. 351) as a personal right not reduced to possession, but recoverable by a suit at law. Money due on bond, note or other contract, damages due for the breach of contract for the detention of chattels, or for torts, as included under this general head or title of things in action. A chose in action is a mere right of action due, a personal chattel not in actual possession."

Again, it is submitted that Utah is one of the states referred to in Annot., 134 A.L.R. 853 (1941), and 47 Marq. L. Rev. 221 (1963), which allows garnishment of contingent obligations. Nevertheless, it is also submitted that the chose in action which the plaintiffs seek to attach is not contingent.

In *Knudson v. Anderson,* 199 Minn. 479, 272 N. W. 379 (1937), a judgment was obtained against the defendant in a suit arising out of an automobile accident. The insurance company denied liability upon the basis that ownership of the offending car was in another. The injured plaintiff then garnished the insurance company. The Minnesota statute, Mason's Minn. Stat.

1927, Sec. 9361, being *much more strict* than Utah's Rule 64 D, provided:

> "No person or corporation shall be adjudged a garnishee in any of the following cases:
>
> (1) By reason of any money or other thing due to the defendant, unless at the time of the service of the sumons the same is due absolutely, and without depending on any contingency."

In answering the question as to whether the establishment of the fact of ownership created a contingency within the meaning of Sec. 9361, the Court said:

> "It is not contemplated that the garnishee shall interest himself for the protection of his creditor, who is the defendant in the original action; nor should the statute be so construed as to enable the garnishee to assist his creditor.
>
> * * *
>
> "The contingency must affect the actual liability of the garnishee and be such as may prevent defendant from having any claim whatever against the garnishee or right to call him to an accounting, and not merely the title to the property in possession of the garnishee, or his liability, the force and effect of which may be in dispute between defendant and garnishee.
>
> "Litigation is often, if not always, uncertain as to ultimate result. But that uncertainty after all is dependent upon establishment of the facts. When these are established, the uncertainty no longer exists. We think the uncertainty or 'contingency' referred to in the statute is such as is

inherent in the obligation itself, not the uncertainty of what litigation may establish as facts."

In the case at bar all *facts* which would establish liability of the garnishee to the defendant have occurred; hence, there is no contingency in the legal sense. The only uncertainty is the establishment of these facts in a court of law; the plaintiffs merely seek that opportunity.

The nature of the insurance contract and the Utah Safety Responsibility Act both contribute toward making the liability of The Travelers Insurance Company to defendant, Cox, more certain. In this respect the insurance contract in force between defendant and garnishee is one of liability insurance, rather than of indemnity insurance. Thus, payment need not be made by the defendant before the insurance company's liability becomes certain. The only uncertainty remaining is the uncertainty which the plaintiffs seek to resolve in this case.

The Utah Safety Responsibility Act also contributes toward making the liability of The Travelers Insurance Company to defendant, Cox, more certain. U.C.A. 1953, Sec. 41-12-21 (f) (1) and (2) provide:

> "(f) Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:
>
> (1) The liability of the insurance carrier with respect to the insurance required by this act shall become absolute whenever injury or

damage covered by said motor vehicle liability policy occurs; said policy may not be canceled or annulled as to such liability by any agreement between the insurance carrier and insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy.

(2) The satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the insurance carrier to make payment on account of such injury or damages; . . ."

As indicated by the defendant (R. 96), "The language "the liability of the insurance carrier with respect to the insurance required by this act shall become absolue" means that the Insurance Company cannot cancel the policy or attempt to escape its obligation under the policy." Thus the insurance company can bring up no side defenses to disclaim liability to the defendant. Upon the occurrence of the accident all facts needed to establish liability have occurred; no contingency exists.

Additional authority for this point is *United States v. J. T. Hubbell,* 323 F. 2d 197, 200 (5th Cir. 1963). In that case a United States tax lien was held to attach to an unliquidated tort claim pursuant to 26 U.S.C.A., Sec. 3670, which imposed "A lien in favor of the United States upon all property and rights to property, whether real or personal . . . " Suit had not been commenced upon the tort claim at the time the lien attached. The Fifth Circuit Court of Appeals said:

> "Lewis' claim against Housing Authority was not contingent merely because it would take a lawsuit to reduce it to judgment or to collect it. It was, perhaps uncertain, but not subject to any infirmity which would prevent the attachment of a lien. The real issue in this case, the unprecedented one, is whether the lien attaches to an unliquidated claim sounding in tort. Neither party cites us to a case directly in point, and we have found none. We see no reason, however, why a tort claim is not 'property' or 'rights to property', just as, e.g., any unliquidated contract claim is so considered."

If a federal tax lien can attach to an unliquidated tort claim pursuant to a statute in terms of "property and rights to property" then, *a fortiori,* a garnishment lien can attach to an unliquidated contract claim pursuant to a statute in terms of "personal property" and "choses in action".

The case of *Ackerman v. Tobin,* 22 F. 2d 541, 543 (8th Cir. 1927), *cert. denied,* 276 U. S. 628, 72 L. Ed. 739, 48 S. Ct. 321 (1928), *is conclusive authority in favor of the plaintiffs on the issue before this Court.* In that case, the garnishee, Fidelity and Casualty Company, insured defendant, Singer, against interior office robbery. Singer submitted a claim on February 4, 1924. The Fidelity and Casualty Company disputed Singer's claim, and while the matter was in dispute, on March 10, 1924, creditors of the defendant filed an attachment suit in New York and a warrant of attachment was issued thereon. On March 11, 1924, service of garnishment was had on the Fidelity and Casualty

Company of New York. On April 1, 1924, constructive service was had by Singer in St. Louis. On April 7, 1924, Singer began action against Fidelity & Casualty Company; this suit was subsequently removed to a federal district court. The last judgment obtained by any creditor was August 23, 1924, while the consent judgment of Singer against Fidelity and Casualty Company was not rendered until December 17, 1924.

The Fidelity and Casualty Company filed a bill of interpleader in which the trustee in bankruptcy attacked the attachment liens on the ground that the New York court did not have jurisdiction of the res, *because the insurance claim was an unliquidated cause of action upon a contract,* and, being such, was not garnishable under the New York statute; that it was not garnishable because the claim was unliquidated, and that there was a genuine dispute as to the liability of the Fidelity & Casualty Company to Singer.

In holding the garnishment of the unliquidate contract clai mto be valid the Court said:

> "The fact that the attachment is issued before the debt is conclusively established on which it is founded, and it may subsequently be shown by the defendant in the attachment that there was no such debt, is not a sufficient reason for holding that the attaching creditor cannot show that the property attached is in fact the debtor's.
>
> * * *
>
> "The contingency which will prevent garnishment is not presented by the mere fact of denial

by the garnishee of the obligation. The uncertainty contemplated by the law is one that conditions the obligation, rendering it uncertain in the sense that it may never become due or owing, the determination of that being contingent upon the happening of some future event.

"The court may take evidence and determine what the truth is as to whether or not the event determining the liability has or has not happened, and the mere denial of the indebtedness by the garnishee does not prevent garnishment."

The only distinction between *Ackerman v. Tobin* and the case at bar is that in the former there was uncertainty as to the liability of defendant to plaintiff and also of the liability of garnishee to defendant; whereas, in the latter the only uncertainty concerns the liability of defendant to plaintiff. It is this uncertainty which the plaintiffs seek to resolve by establishing in rem jurisdiction allowing them to proceed in the main action against property of the defendant within the jurisdiction of the court.

Since Judge Jeppson ruled that in rem jurisdiction could be had by reaching a chose in action under the liability insurance policy and *"that garnishment may issue as requested"*, it is submitted that the Order quashing service of summons was improperly entered and should be set aside so that proceedings can coutinue in rem.

POINT TWO

THE DEFENDANT'S APPEARANCE BEFORE JUDGE JEPPSON ON NOV. 6, 1963, WAIVED HIS OBJECTION TO PERSONAL JURISDICTION.

On October 22, 1963, the plaintiffs filed a "Notice and Motion for filing Amended Complaint" (R. 15-23). This amendment sought to add an in rem count to the complaint so as to garnish an insurance policy as a chose in action. Prior to this time, and prior to the hearing, no personal jurisdiction had been acquired over defendant, Dennis P. Cox, since no summons could be served under the applicable statutes. This motion was heard on November 6, 1963 (R. 165-169).

At the hearing, and before any jurisdiction had been acquired, the defendant, represented by his attorney, made an appearance. That the attorney, Mr. Nebeker, represented the defendant, Cox, is subject to no doubt, as evidenced by the Reporter's Transcript (R. 165-169). Judge Jeppson, realizing that Cox could well be making a general appearance, closely questioned Mr. Nebeker (R. 166):

> THE COURT: Do you not represent Mr. Cox?
>
> MR. NEBEKER: We are appearing especially for that purpose, Your Honor.
>
> THE COURT: You do not represent Mr. Cox?

MR. NEBEKER: For the purpose of resisting this amendment, Yes. No jurisdiction over Mr. Cox, that is the problem.

THE COURT: Are you Mr. Cox's attorney? You did not so state.

MR. NEBEKER: Yes, I would represent here we are representing him for the purpose of this amendment.

The same transcript also sheds light upon the reason for the appearance by defendant, Cox (R. 165):

THE COURT: This motion is to amend as to Mr. Cox, is it not?

MR. FULLER: Essentially as to Mr. Cox, Your Honor.

THE COURT: Do you have any objection to that?

MR. NEBEKER: We would object to that —appearing especially for that purpose, yes.

Here Mr. Nebeker expressly said that he was appearing especially to object to the motion to amend as to Mr. Cox. The defendant further stipulates (R. 100): "It is undisputed that the only motion before Judge Jeppson was plaintiffs' motion to amend their complaint."

In objecting to the motion to amend the complaint, the defendant argued that the plaintiffs could not state a cause of action against Mr. Cox (R. 166):

THE COURT: Do you want to argue he cannot state a cause of action against Mr. Cox?

MR. NEBEKER: Yes, Your Honor.

On December 5, 1963, Judge Jeppson made a minute entry (R. 121), which was finalized by Order of May 19, 1964 (R. 60-61). As applicable to this issue, that Order read (R. 61):

> 2. Defendant Dennis P. Cox has made a special appearance herein challenging personal jurisdiction over his person, and that such appearance did not constitute a general appearance since the aforesaid ruling of the Court that in rem jurisdiction can be had therein is considered by the Court to be a special appearance.

From the foregoing Order it can be seen that Judge Jeppson's ruling as to the nature of the appearance was tied to the question of in rem jurisdiction. If the objection went to jurisdiction over the matter in an in rem action, then the appearance would be considered as special under the majority rule. 129 A.L.R. 1240. This is apparently the way Judge Jeppson so considered the case. However, if it is considered that in rem jurisdiction cannot be obtained or that the matter before the Court, being merely a motion for filing an amended complaint in a personal action, had no indicia of an in rem action, then the appearance would be one which would waive any objection to personal jurisdiction.

The plaintiffs here contend that the defendant made an appearance, without objecting to jurisdiction over his person, at a hearing wherein the complaint was personal and the hearing had no indicia of an in

rem action, and by so doing waived his objection to personal jurisdiction.

The determination of this issue involves an interpretation of U.C.A. 1953, Rule 12. This rule is substantially identical to the federal rule. The federal rule was interpreted in *Orange Theatre Corporation v. Rayherstz Amusement Corporation,* 139 F. 2d 871, 874 (3rd Cir. 1944), *cert. denied,* 322 U. S. 740, 88 L. Ed. 1573, 64 S. Ct. 1057, in the following words:

> "It necessarily follows that Rule 12 has abolished for the federal courts the age-old distinction between general and special appearances. A defendant need no longer appear specially to attack the court's jurisdiction over him. He is no longer required at the door of the federal courthouse to intone that ancient abracadabra of the law, de bene esse, in order by its magic power to enable himself to remain outside even while he steps within. He may now enter openly in full confidence that he will not thereby be giving up any keys to the courthouse door which he possessed before he came in. This, of course, is not to say that such keys must not be used promptly. If the defense of lack of jurisdiction of the person is not raised by motion before answer or in the answer itself it is by the express terms of pargaraph (h) of Civil Procedure Rule 12 to be treated as waived, not because of the defendant's voluntary appearance but because of his failure to assert the defense within the time prescribed by the rules."

The language in the *Orange Theatre Case,* which indicates that the distinction between general and spe-

cial appearances has been completely abolished, cannot be taken literally. It is true, however, that the emphasis has been changed. Where formerly a defendant could not object to jurisdiction over his person, and being overruled, plead to the merits without waiving his objection to personal jurisdiction, a defendant can now *join* his defense to personal jurisdiction with other defenses without affecting a waiver. Hence, the distinction between a general appearance, one where the defendant appears without having first objected to jurisdiction over his person, and a special appearance, one where the defendant objects to, *inter alia,* jurisdiction over his person, is still a viable one. *United States v. Onan,* 190 F. 2d 1 (8th Cir. 1951) *cert. denied,* 72 S. Ct. 112, 342 U. S. 869; *Savas v. Maria Trading Corp.,* 285 F. 2d 336 (4th Cir. 1960); *Graff v. Nieberg,* 233 F. 2d 860 (7th Cir. 1956); *Barreiro v. McGrath,* 108 F. Supp. 685 (N.D. Calif. 1952), *modified, Barreiro v. Brownell,* 215 F. 2d 585 (9th Cir.), *cert. denied,* 75 S. Ct. 207, 348 U. S. 887; *United States v. Balanovski,* 230 F. 2d 298 (2nd Cir. 1956); *Hasse v. American Photograph Corp.,* 299 F. 2d 666 (10th Cir. 1962).

Because of this change in emphasis many courts speak in terms of waiver by nonjoinder instead of waiver by joinder or by general appearance. This position is stated very clearly in the following quotation from 16 Cal. State Bar Journal 152, which is incorporated under the Notes of Advisory Committee on Rules to Rule 12 of the Federal Rules of Civil Procedure:

"The new federal Rules do not in terms abolish the "special appearance", but have this effect. . . . If a party so desires, he can make a preliminary motion solely on the grounds of jurisdiction of the subject matter or person, venue, or process Rule 12 (g); but he need not do so, and waives nothing by making such objections to the answer. . . . On the other hand, if the objecting party does not raise all of these dilatory defenses (except, of course, jurisdiction of the subject matter) in any motion he may make, or in the answer if he has made no motion, he does waive Rule 12 (g) and (h). So while the form of the old "special appearance" is preserved in the preliminary motion under Rule 12 (g), in substance the preliminary motion is a matter of convenience, not of necessity, and the formula has been reversed. *Where formerly joinder might mean waiver non-joinder is likely to create a waiver.*" (Emphasis added).

Similar explanations can be found in *Allen B. DuMont Laboratories, Inc. v. Marcolus Manufacturing Co., Inc.*, 30 N. J. 290, 152 A. 2d 841, 847 (1959), and in 15 U. Miami L. Rev. 269, 272.

The applicable statute, U.C.A. 1953, Subdiv. 12 (g), reads:

"(g) *Consolidation of Defenses.* A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of

the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

Subdivision (h) makes no exception for objections to jurisdiction over the person.

In applying this statute to the case at bar it should be kept in mind that the defendant, Cox, appeared from nowhere to object to a motion for filing an amended complaint. No process had been served upon him. In making his objection or counter-motion he did not "include therein all defenses and objections then available to him" *i.e.*, the objection to jurisdiction over his person.

Under the new procedural rules the timeliness of any motion is crucial. The jurisdictional objection must be made in the first instance or on the first appearance to prevent a waiver by nonjoinder. This point has been made clear in a multitude of cases. *The Aquia,* 72 F. Supp. 201 (E.D.S.C. 1947); *McLaughlin v. Chicago, Milwaukee, St. Paul and Pacific Ry. Co.,* 23 Wis. 2d 592, 127 N. W. 2d 813 (1964); *In re Industrial Associates, Inc.,* 155 F. Supp. 866 (E. D. Pa. 1957); *Yentzer v. Taylor Wine Company, Inc.,* 409 Pa. 338, 186 A. 2d 396, 398 (1962).

In the latter case the court held that the defendant had made a "general" appearance even though he had previously filed a motion to quash the service of process and to dismiss the action, but had not appealed the adverse ruling or subsequently joined the jurisdictional objection. The Court said:

> "When the defendant filed the original preliminary objections to this case, which objected only to the substance and form of the complaint, and none of which raised a jurisdictional question, this constituted a general appearance in the action."

The question next arising is what constitutes an appearance sufficient to affect a waiver. The cases and authorities are in clear agreement that an uncompelled appearance whereby the defendant resists the cause of action without objecting to personal jurisdiction is sufficient to affect a waiver. *Hadden v. Rumsey Products,* 96 F. Supp. 988 (W. D. N. Y. 1951); *Anderson v. Taylorcraft, Inc.,* 197 F. Supp. 872 (W.D. Pa. 1961); 5 Am. Jur. 2d; Appearance, Sec. 16; *U. S. v. Hoerner,* 157 F. Supp. 563 (D. Mont. 1957).

In the latter case the court said on page 567:

> "In fact, any act which resognizes the case as in court constitutes a general appearance, and even in the face of a declared contrary intention, a general appearance may arise by implication from the defendant seeking, taking, or agreeing to some step or proceeding in the cause beneficial to himself or detrimental to the plaintiff, other than one contesting only the jurisdiction of the court, . . . "

The last quotation also refers to the insignificance of the label which the defendant attaches to his appearance. Thus, it is of no legal significance that the defendant labels his appearance as being "special" or "especial". It is the substance of the appearance which

prevails over the form. *U. S. v. Hoerner, supra; Hadden v. Rumsey Products, supra.*

It must be made clear that the waiver contemplated by Rule 12 is sufficient to confer personal jurisdiction where none otherwise existed. Personal jurisdiction being merely a privilege, it can be waived. Thus, personal jurisdiction can be obtained by waiver albeit no summons was ever issued. *Drinkwater v. Drinkwater,* 111 F. Supp. 559 (D. Colo. 1953); *Emerson v. National Cylinder Gas Co.,* 131 F. Supp. 299 (D. Mass. 1955).

The unfairness of the defendant's position is pointed out in *Savas v. Maria Trading Corp.,* 285 F. 2d 336 (4th Cir. 1960), where the defendant sought the court's help on his own behalf and yet resisted the court's jurisdiction on behalf of his adversary. This position where the defendant seeks to have his cake and eat it too is clearly untenable. In calling for mutuality the court, on page 341, said:

> "We think that under these circumstances it submitted itself to the jurisdiction of the court and cannot escape liability through its subsequent jurisdictional exceptions to the cross-libel of Associated Bulk and to the amended libel of Savas. Even if it was not validly served with process it should not be heard to say that the court had the power to decide in its favor but no power to render a decree against it. It subjected itself to the general rule that a litigant who seeks action by the court without objecting to the jurisdiction thereby makes a general appearance and subjects itself to the court's power."

POINT THREE

THE ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT ANACONDA COMPANY IS UNSUPPORTABLE UNDER THE FACTS AND THE RECORD BEFORE THE COURT.

Pursuant to the pre-trial Order plaintiffs proceeded to prepare their case for trial against The Anaconda Company, and the case was set for trial. Thereupon defendant Anaconda Company made a motion for summary judgment and claimed that defendant Cox was not acting within the scope of his employment at the time of the accident so as to impose liability upon The Anaconda Company. In support of its position it secured an Affidavit from Cox in Maryland (R. 134), and submitted it to the local court. The pertinent statements in the Affidavit are as follows:

> "At the time of the accident I was on my way home to have lunch with my wife. . . . On a number of occasions I used the car to pick up laboratory equipment on my way back to my office. . . . I cannot now recall whether I was going to pick up equipment after lunch on the day of the accident . . . "

It will be the purpose of plaintiffs to point out to this Court that the Affidavit, considered with the entire record in this matter, is insufficient to support a summary judgment in favor of defendant Anaconda. Much of the information referred to is contained in the Exhibit packet attached to the record, which contains

"Statement Regarding Use of Company Cars", Interrogatories to The Anaconda Company, Answers to Interrogatories, and the published deposition of Roland Mulchay, assistant chief geologist for The Anaconda Company.

On the day of the accident defendant Cox was driving a vehicle owned by defendant Anaconda Company with its *express permission* (R. 18, 25). The vehicle being driven by Cox was not an ordinary automobile: rather, it was a 1958 GMC panel truck, similar to the large vehicles used by survey crews on road projects and similar activities. At the precise time of the accident, according to Mr. Cox's Affidavit, he was going home to lunch.

Without admitting that Cox was on his way home to lunch, it would seem that the Affidavit, in the absence of a controverting affidavit or other substantial evidence, would support the defendant to that extent. However, an examination of the statement in the Affidavit serves no further purpose other than to point out that Cox on a number of occasions was called upon to pick up laboratory equipment on his way back to the office, that he could not recall what he was going to do with the vehicle on the day of the accident after getting his lunch other than it was *his intent* to return to the office where he was working. With the meager help furnished by the Affidavit submitted by Cox, we must now look to the pertinent portions of the record, namely: Defendant's Answer to the Amended Com-

plaint, Defendant's Answer to the Interrogatories which have been admitted in evidence, the Deposition of Roland Mulchay, chief geologist for defendant Anaconda Company in charge of geological work in the west, and other available pleadings and exhibits.

As is so often the situation in cases involving agency, evidence relating to agency and the scope of employment is solely within the control and knowledge of the defendant company and outside the knowledge of plaintiff injured by the negligence of an employee-driver. Plaintiffs submit that in this case a presumption of agency has been created sufficient to present a question of fact for determination by a jury and that the Affidavit of Cox falls far short of rebutting this presumption. Plaintiffs will now establish that defendant Anaconda Company benefitted by giving Cox express permission to use the vehicle at the time the accident occurred.

At the time of the accident, Cox was a salaried employee working for Anaconda Company as a geologist (Mulchay Deposition 3-25). He worked directly under Malcolm Kildale, who was in charge of the Salt Lake office (Mulchay Deposition 4-11). Cox spent time both in the field and in the office, and was driving a "field" vehicle furnished to geologists for work on field examinations (Mulchay Deposition 8-11). The geologists did not follow a regular work schedule, and might be called on a field trip at any unscheduled time (Mulchay Deposition 12-28), including a call for an

immediate field trip at noon or afternoon (Mulchay Deposition 15-25). Therefore, it was for the *convenience of the company* to permit the geologists to take these vehicles to and from their homes so that the geologists would have access to a field vehicle upon instant notice to move to a different project (Mulchay Deposition 13-26). Anaconda would pay all the gas and oil and expenses for the operation of the field car at all times (Mulchay Deposition 14-4) irrespective of where the men might take the car (Mulchay Deposition 14-13)—and Anaconda obviously secured all income tax benefits from expensing such operations against its earnings. Since the company had numerous interests in the Salt Lake area and in the Park City district, Bingham Canyon, and other places around the general perimeter of Salt Lake, it was frequently desirable for geologists to make short field trips upon instant notice to see particular developments (Mulchay Deposition 16-3). It is particularly significant to observe that Anaconda Company did not permit its employees to use company vehicles for their personal use (Answer to Interrogatory No. 27), nor did they permit employees, and specifically Dennis P. Cox, to have the use of company vehicles for their own personal use during lunch time breaks within the regular working day (Answer to Interrogatory No. 31), unless it would facilitate company work (Mulchay Deposition 12-283:

> "#31. As of January 5, 1959, was it the policy of the company to permit Dennis Cox, or other employees having similar duties, to have the use

of company vehicles for their own personal use during lunch tim breaks within the regular working day?

Answer: No."

From Mr. Mulchay's Deposition:

Pages 10 and 11:

Q. All right. Assuming that Mr. Cox was actually working in Salt Lake City in the office at the time of the collision, would Anaconda, as to Cox and men similarly situated, permit them to use vehicles to go to and from their work each day where they were stationed here in Salt Lake City. If you do not understand, I will back up and take it slower.

A. The use of vehicles in that regard is *strictly in connection with field work, and they were not supposed to use it on personal business.*

* * *

Page 12:

A. Well, I believe that my former statement tells exactly what the policy is. Possibly an example would serve to illustrate it better. One of the fellows, John Tombs, a geologist in the Salt Lake office, left early this morning to go to Bingham to map corps. To facilitate this work, the car was at his house, and he left early, directly from his house, rather than coming to the office and then going to the field.

* * *

Pages 12 and 13:

A. Because the nature of the work is not subject to an accurate schedule, he would be able to

do this to facilitate his work in case that he must make a field trip at some particular time, which could not be scheduled.

Page 13:

Q. Under those circumstances, would a man such as Cox, even though he was working here in the office in the Kearns Building, be permitted to use this car, then, in going to and from his home subject perhaps to call that he may go somewhere else the next day? Would that be a good illustration or not?

A. Well, I believe it would, yes. But not necessarily for personal convenience.

* * *

Page 13:

Page14:

Q. Did you feel in any way it served the convenience of the company to have men like this one you mentioned this morning, or anyone else to have access to these cars so that if they would be subject to a call to move to a different project for something of that sort?

A. That arrangement is made.

Q. And while men would have access to these cars at times when they might take them, say, home at night and then go from there whenever directed, would Anaconda pay the gas and oil and expenses on the operation of the car?

A. Yes.

* * *

Q. Were these particular cars, from your knowledge, and I am speaking of 1959, right up until the present, are there ever occasions when Anaconda furnishes cars to say—geologists and have them, the geologists, pay for the gas and oil and any upkeep for operational costs?

A. No.

* * *

Page 17:

Q. I see. Do you know whether Mr. Cox was a salaried employee?

A. I believe Mr. Cox was a salaried employee.

* * *

As previously pointed out in the answer of defendant Anaconda Company to plaintiffs' Amended Complaint, it was admitted that Cox had *express permission* of Anaconda Company to use the field car at the time the collision occurred. Consequently, considering Mulchay's statements that the vehicles were used solely for company purposes and not for personal use, the *express permission* certainly would not have been given for the use of the vehicle unless in some manner there was a benefit to Anaconda Company. The benefit might have been that Cox was to pick up supplies as was suggested in his Affidavit, or he might have been called upon immediate notice to proceed to some location outside the city for company work, or he might have been called upon for any number of duties involving his movement with the vehicle which he had in his possession. In any event, the device of a

summary judgment in this situation is extremely harsh and improper.

The Utah Supreme Court has repeatedly held it fundamental that where pleadings filed and representations made to the trial court at a hearing for summary judgment dispute a moving parties' claim sufficiently to raise an issue of fact *or an inference from those facts* such a motion for summary judgment should be denied. (*Calder v. Siddoway,* 330 P.2d 494, 8 Utah 2d 174). The trial courts should be reluctant to employ such a drastic remedy as a summary judgment and deprive litigants of an opportunity to fully present their contentions upon trial. (*Welchman v. Wood,* 337 P. 2d 410, 9 Utah 2d 25; *Richards v. Anderson,* 337 P. 2d 59, 9 Utah 2d 17). All doubts should be resolved in favor of permitting trial and summary judgment should be granted with reluctance. (*Henry v. Washiki, Inc.,* 355 P. 2d 973, 11 Utah 2d 138). *Normally plaintiff must prove agency by inference or implication rather than by direct evidence since the facts of agency are entirely at the command of the defendant company.* Plaintiff submits that such inference has been created by the pleadings and the deposition of Mr. Mulchay and that this issue should be resolved by a jury.

In the case of *Wright v. Intermountain Car Company,* 53 Utah 176, 177 P. 237, involving a somewhat similar case but substantially different on its facts because on the day involved there was no business transaction of any kind being conducted by the employee

for his employer and there being no other purpose for using the car involved except for the social purpose of dating a young lady, the Utah Supreme Court observed that a moving plaintiff should not be held to a standard of direct proof of agency:

> "Where it appears, as in this case, that the instrumentality which causes an accident and injury was, at the time of such accident in the custody and control of the servant or agent of the owner of such instrumentality, and the plaintiff is unable to show by direct evidence that the instrumentality was at the time being used by the agent or servant within the scope of his employment and in the master's business, *Courts are usually quite liberal in permitting the plaintiff to prove facts and circumstances from which the master's liability may be inferred.*"

The court further held that where the evidence is inferential, conflicting or doubtful, it is clearly for the jury to pass on.

> "If the evidence in this case had been inferential or doubtful respecting the purpose for which the car was being used at the time of the accident, the plaintiff's circumstantial evidence would have been proper and would have presented a questionable effect for the jury."

In the case of *Larkins v. Utah Copper Company,* 127 P.2d 354, an employee of defendant company had the duty to inspect lumber purchased by the company. He was subject to a call at any time and could be sent any place the company wanted to send him. On the day in question the employee traveled to Bukoda,

Washington, completed his work, and was on his way returning to his own home when an accident occurred. The Court held that the company benefitted from having the employee return home after having completed his inspection in order to be available for call to do other like work. The Court further held that while the general rule is that one is not within the course of his employment when going to or from work unless engaged in the furtherance of his master's business, the instant case is to be distinguished in that the use of the automobile was impliedly authorized, that such method of transport ation was reasonably necessary for the efficient prosecution of the company's business, *and that the employee was subject to call at any time.*

Disregarding the pleadings and deposition of Mulchay, Cox's affidavit is ambiguous and uncertain concerning his business activity in returning to the office. In 52 A.L.R. 2d 391, the writer of that annotation speaks upon the subject as follows:

> "Where there is evidence that the driver is combining a business trip or business duties with a trip after a meal, it has been held that he might be found to have been acting in the scope of his employment."

Thereafter, the annatator cites the case of ***Barz v. Fleischmann Yeast Company,*** 308 Mo. 288, 271 S.W. 361, holding that the question of scope of employment should have been submitted to the jury, and a directed verdict for the defendant was reversed where defendant's shipping clerk took one of its trucks in

order to go to his noon meal. Defendant's testimony showed that the driver acted *without authority* and was not authorized to drive the truck, but there was evidence for plaintiff that immediatley after the accident, when the driver offered to take plaintiff home, he had said that he had first some deliveries to make. The Court held this evidence was sufficient to submit to a jury and the directed verdict was reversed.

Also, where there is evidence justifying the conclusion that the employer received some special business benefit from the employee's use of the automobile in going to and from his meals, it has been held that he might be found to be within the scope of his employment (52 A.L.R. 2d 397). The fact that Cox was subject to call at any time in going to and from his meals indicates a convenience to the company in permitting the use of the field car.

In 8 Am. Jur 2d, Sec. 629, page 182, the annotator enunciates the folowing rule:

> " * * * where an employee is involved in an accident while proceeding to get a meal in the course of a business errand undertaken in the course of his employment, it is generally held that he has not left the scope of his employment for the reason that this use of the vehicle is a normal incident of the business errand, or that the employer derives some special business benefit from this use of his vehicle;"

In summary, the uncontroverted facts reveal that defendant Anaconda Company was the owner of the

vehicle involved in the collision; that Cox was defendant Anaconda's employee on a salary and subject to calls at all hours; that the defendant company furnished to Cox a field vehicle and permitted him to take the field vehicle to his home for the convenience of the company in order to be available for instant calls to go to area projects; that it was the company policy not to give permission for use of vehicles for private use but only when accompanied by a business use or convenience of the company; that express permission was given for the particular trip during which the accident occurred. The Affidavit of Cox does not deny the possiblity of a call by the company directing him to another work project. Also, he could not recall whether he would pick up equipment after lunch on his way back to the office. The pleadings and Mulchay deposition, coupled with the admission by defendant Anaconda Company that Cox had permission to use the car at the time of the accident, create an inference of benefit to the company and control of the employee sufficient to submit this issue to a jury. In ***Fox v. Lavender,*** 56 P.2d, 1049, 109 A.L.R. 109, the Court held:

> "When there is a paucity of facts from which any inference as to agency or the lack of it can be had, *solution may depend entirely upon presumptions.* And these presumption may, in many cases, not only serve to relieve the plaintiff on the duty of presenting evidence tending to show agency, but may have the effect of substantive law."

In *Higgans v. Deskins,* 263 S.W. 108, 52 A.L.R. 2d 346, the Court held that proof of ownership coupled with evidence of employment create a presumption of responsible agency which requires the defendant to take up the burden of evidence and rebut the presumption. The Court stated:

> "This rule of practice rests on the view that the ownership of an automobile implies the right of possession and control, and the evidence essential to the determination of the question is peculiarly within the owner's knowledge. He knows whether the machine is being operated by his employee or agent so as to render the owner liable under the doctrine of respondeat superior, while a person injured by the negligence of the driver ordinarily cannot know and may find it impossible to prove that he was acting for the owner within the range of the employee's duty or authority."

CONCLUSION

It is respectfully submitted that defendant Cox has made a personal appearance in this action submitting him to the Court's jurisdiction, and, in any event, that in rem jurisdiction as to his liability can be had through garnishment proceedings in accordance with the ruling of Judge Jeppson heretofore made in this matter and that the Order quashing summons should be set aside and nullified. Further, as to defendant

Anaconda Company, this matter should be returned to the Third District Court for a trial on the merits.

GLEN E. FULLER
WILFORD A. BEESLEY

Attorneys for Appellants

15 East 4th South Street
Salt Lake City, Utah