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1. Necessity for delegated authority.

It is essential for a federal employee to possess delegated authority to perform any particular act; the absence of delegated authority means that the act in question was beyond the scope of the employee's duties, and therefore unlawful.

The necessity for a public employee to possess delegated authority is shown by a wealth of cases. For example, in *United States v. Spain*, 825 F.2d 1426 (10th Cir. 1987), at issue was the authority of the Drug Enforcement Administration to place certain substances upon the federal controlled substances list and thus make possession thereof a crime. Under former provisions of this law, the Attorney General possessed this power to schedule controlled substances, and he had previously delegated that authority to the DEA. But, in 1984, Congress amended the law and provided a new statutory procedure by which such substances could be placed upon the list through a "bypass" procedure. Without delegated authority to schedule drugs under the amendment, the DEA did so and commenced prosecution of parties possessing the newly scheduled drugs. However, Spain's conviction was reversed when the Court held that the DEA's acts were void due to the lack of delegated authority to schedule the drugs pursuant to the new statutory procedure. Other courts have reached the identical conclusion; see *United States v. Pees*, 645 F. Supp. 697 (D. Col. 1986); *United States v. Hovey*, 674 F. Supp. 161 (D. Del. 1987); *United States v. Emerson*, 846 F. 2d 541 (9th Cir. 1988); *United States v. McLaughlin*, 851 F. 2d 283 (9th Cir. 1988); and *United States v. Widdowson*, 916 F.2d 587, 589 (10th Cir. 1990).

In *United States v. Giordano*, 416 U.S. 505, 94 S.Ct. 1820 (1974), at issue was the validity of a wire-tap application, which under existing law could be approved only by the Attorney General and a specially designated assistant. In this case, a wire-tap was needed and application was submitted to the Attorney General, who was absent from his office as was the designated assistant. Instead, an executive assistant lacking authority to approve the application authorized it on the supposition that the Attorney General would approve. The Court held the executive assistant's act void, declared the wire-tap illegal, and as a consequence evidence was suppressed. See also *Department of Ins. of Indiana v. Church Members Relief Ass'n.*, 217 Ind. 58, 26 N.E.2d 51, 52 (1940)("When the right to do a thing depends upon legislative authority, and the Legislature has failed to authorize it, or has forbidden it, no amount of

acquiescence, or consent, or approval of the doing of it by a ministerial officer, can create a right to do the thing which is unauthorized or forbidden").

In *United States v. Mott*, 37 F.2d 860, 862 (10th Cir. 1930), an incompetent Indian leased some land and received large amounts as royalties, which were held in trust by the Secretary of the Interior. An agreement made to disburse those funds was held to be without authority:

> *"Where an executive officer, under his misconstruction of the law, has acted without or beyond the powers given him, the courts have jurisdiction to restore the status quo ante insofar as that may be done (cites omitted)."*

See also *Continental Casualty Co. v. United States*, 113 F.2d 284, 286 (5th Cir. 1940)("Public officers are merely the agents of the public, whose powers and authority are defined and limited by law. Any act without the scope of the authority so defined does not bind the principal, and all persons dealing with such agents are charged with knowledge of the extent of their authority").

In *United States v. Gemmill*, 535 F.2d 1145, 1152 (9th Cir. 1976), some Indians were engaged in a demonstration within a federal park. As a result of the presence and protest of the Indians, park officials closed the park and thereafter arrested the Indians, who were convicted of trespass. The decision vacating these convictions was premised upon the lack of delegated authority for the officials who closed the park:

> *"Absent an explicit delegation from the Secretary, the boundaries of the Forest Supervisors' authority should not be extended into areas the regulations have clearly reserved for higher officials. "By immediately closing the entire area, the Supervisor went beyond the limits of his authority and exercised a power that had not been granted to him. The closure orders were invalid and the trespass convictions cannot stand."*

In reaching this conclusion, the Court referenced the applicable delegation orders published in the CFR. See also *Sittler v. Board of Control of Michigan College of Mining and Technology*, 333 Mich. 681, 53 N.W.2d 681, 684 (1952)("The extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and

assumption of authority"); *Phillips v. Fidalgo Island Packing Co.*, 238 F.2d 234 (9th Cir. 1956); *Flavell v. Dept. of Welfare, City and County of Denver*, 355 P.2d 941, 943 (Colo. 1960); *Tulsa Exposition and Fair Corp. v. Board of County Commissioners*, 468 P.2d 501, 507 (Ok. 1970)("Public officers possess only such authority as is conferred upon them by law and such authority must be exercised in the manner provided by law"); *In re Benny*, 29 B.R. 754, 762 (N.D. Cal. 1983) ("an unlawful or unauthorized exercise of power does not become legitimated or authorized by reason of habitude"); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1523 (D.C. Cir. 1984) ("when an officer acts wholly outside the scope of the powers granted to him by statute or constitutional provision, the official's actions have been considered to be unauthorized"); *Outboard Marine Corp. v. Thomas*, 610 F.Supp. 1234, 1242 (N.D. Ill. 1985)("Acting without statutory power at all, or misapplying one's statutory power, will result in a finding that such action was ultra vires").

In *Lopez-Telles v. I.N.S.*, 564 F.2d 1302, 1303 (9th Cir. 1977), a deportee alleged that an administrative law judge could refuse to deport him for humanitarian reasons, a reason not permitted by statute. In rejecting this argument, it was stated:

> *"Immigration judges, or special inquiry officers, are creatures of statute, receiving some of their powers and duties directly from Congress... and some of them by subdelegation from the Attorney General... These statutes and the regulations implementing them... contain a detailed and elaborate description of the authority of immigration judges. Nowhere is there any mention of the power of an immigration judge to award the type of discretionary relief that was sought here."*

These rules regarding the necessity for a government employee to have delegated authority to act apply with equal force in the field of tax law. For example, in *Botany Worsted Mills v. United States*, 278 U.S. 282, 288, 289, 49 S.Ct. 129, 131, 132 (1929), the mills and a subordinate revenue agent entered into an informal compromise agreement regarding the tax liability of the mills. That agreement was held invalid on the ground that the agent lacked delegated authority to make the agreement:

> *"We think that Congress intended by the statute to prescribe the exclusive method by which tax cases could be compromised, requiring therefor the*

> *concurrence of the Commissioner and the Secretary, and prescribing the formality with which, as a matter of public concern, it should be attested in the files of the Commissioner's office; and did not intend to intrust the final settlement of such matters to the informal action of subordinate officials of the Bureau. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.*
>
> *"It is plain that no compromise is authorized by this statute which is not assented to by the Secretary of the Treasury... For this reason, if for no other, the informal agreement made in this case did not constitute a settlement which in itself was binding upon the Government or the Mills."*

See also *Brubaker v. United States*, 342 F.2d 655 (7th Cir. 1965); and *Royal Indemnity Co. v. United States*, 313 U.S. 289, 61 S.Ct. 995 (1941).

In *Country Gas Service, Inc. v. United States*, 405 F.2d 147, 149, 150 (1st Cir. 1969), the taxpayer entered into a compromise with a revenue agent to settle a tax liability in a beneficial manner, but the agent had no delegated authority to do so. To decide this case, the Court noted the absence of any delegated authority for the agent and concluded the agreement was void:

> *"The narrow issue presented by this case is whether the revenue agent had authority to make a binding agreement ... The exclusive procedure for compromising tax liabilities is set forth in Int. Rev. Code of 1954 § 7122. This section explicitly reposes such authority in 'the Secretary or his delegate', and such delegation stops at the district level. Since the exclusive means of compromise established by §7122 was not utilized in this case, any arrangement taxpayer made with agent McInnis had no legal standing."*

And in *Brooks v. United States*, 833 F.2d 1136, 1146 (4th Cir. 1987), there was a dispute concerning competing claims to and liens upon some property and one party claimed that such a compromise agreement concerning taxes should be accepted as valid in the case. The court rejected the validity of the

agreement because it would have been consummated by agents lacking delegated authority:

> *"[T]he authority to settle disputes involving unpaid liability over $100,000 is granted only to IRS Regional Commissioners and Regional Counsel. Delegation Order 11 (Rev. 13), 1982-1 Cum. Bull. 333. Thus, even if the District Director had signed the letter and intended to accept Frank's offer of compromise, the acceptance would have been ineffective."*

See also *Boulez v. C.I.R.*, 810 F.2d 209, 217, 218 (D.C. Cir. 1987) ("Acting in contravention of a regulation governing execution of compromise agreements, the Director was as much without authority to join in the oral agreement with Boulez's counsel as he would have been had power to compromise never been delegated to him"); and *Thornton v. United States*, 73-1 U.S.T.C. ¶ 9232 (E.D.Pa. 1973), holding that a jeopardy assessment approved by a group chief rather than the district director was void.

The necessity for a federal employee to have delegated authority to act not only is shown in the above cases, it also manifests itself in cases under the Federal Torts Claims Act (herein "FTCA"), 28 U.S.C. §1346(b). Under this law, the United States is liable for torts committed by its employees if so committed within the scope of their employment. If the act in question was not committed in the scope of employment, the employee is liable and the United States is not.

A variety of cases deciding FTCA claims show instances where the United States is held not liable for its employees torts. In *Paly v. United States*, 125 F.Supp. 798 (D.Md. 1954), a soldier detailed as a military funeral escort was driving his own car to a funeral and was involved in an accident. Since the soldier lacked express orders to do so, his tort was held to be outside the scope of his employment and the United States was not liable. In *Jones v. F.B.I.*, 139 F.Supp. 38, 42 (D.Md. 1956), it was alleged that certain FBI agents had stolen or converted property belonging to the plaintiff. The court held that if such were true, the agents "were not 'acting within the scope of [their] office or employment'," and the United States could not be liable in tort. In *James v. United States*, 467 F.2d 832 (4th Cir. 1972), a reservist was involved in a car accident on his return from an annual field training exercise; since this travel was not within the scope of his employment, the government was held not liable for damages. In another accident case involving an Army truck, *White v.*

Hardy, 678 F.2d 485, 487 (4th Cir. 1982), the driver was found to have no authority to drive the truck when the accident happened, thus his acts were beyond the scope of his employment and the United States was not liable ("There was substantial evidence that Sergeant Hardy was not given the requisite express authority to use the government vehicle involved in the collision"). In *Hughes v. United States*, 662 F.2d 219 (4th Cir. 1981), the United States was held not liable for child molestation committed by one of its employees, a postal worker. In *Trerice v. Summons*, 755 F.2d 1081 (4th Cir. 1985), the United States was held not liable for the wrongful death of one serviceman committed by another. And in *Thigpen v. United States*, 800 F.2d 393 (4th Cir. 1986), the court held the government not liable under the FTCA for the sexual assault of some girls by one of its employees.

Cases from other jurisdictions also demonstrate that for an act to be within the government employee's scope of employment, it must have been authorized by a regulation or some other written document. For example, in *Mider v. United States*, 322 F.2d 193 (6th Cir. 1963), a FTCA claim was being asserted against the United States for damages arising from an accident involving a drunken Air Force serviceman. To define the serviceman's authority, written regulations were consulted to determine whether the act of driving the government's car was authorized. Finding that the regulations did not permit use of the vehicle on this occasion, the serviceman was found not to be acting within the scope of his employment. In *Bettis v. United States*, 635 F.2d 1144 (5th Cir. 1981), a soldier drove a truck off a military base without authority and was involved in an accident; his act was held to be beyond his authority and thus the United States was not liable in tort. In *Turner v. United States*, 595 F.Supp. 708 (W.D.La. 1984), a recruiter conducted an unclothed physical examination of some potential females enlistees, which caused them to sue under the FTCA. In finding that there were no regulations either permitting or requiring such examinations, the United States was found not liable. See also *Doggett v. United States*, 858 F.2d 555 (9th Cir. 1988), and *Lutz v. United States*, 685 F.2d 1178 (9th Cir. 1982).

Thus the above cases adequately demonstrate that a government employee must have some specific delegated authority, based upon statutes, regulations or delegation orders, in order to be authorized to act in the premises. The absence of such authority, when challenged, therefore requires a holding that the employee's acts were unauthorized and thus beyond the scope of his employment.

2. Immunity depends upon delegated authority.

When a citizen challenges the acts of a federal or state official as being illegal, that official cannot just simply avoid liability based upon the fact that he is a public official. In *United States v. Lee*, 106 U.S. 196, 220, 221, 1 S.Ct. 240, 261 (1882), the United States claimed title to Arlington, Lee's estate, via a tax sale some years earlier, held to be void by the Court. In so voiding the title of the United States, the Court declared:

> *"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.*
>
> *"Shall it be said... that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without any lawful authority, without any process of law, and without any compensation, because the president has ordered it and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights."*

See also *Pierce v. United States ("The Floyd Acceptances")*, 7 Wall. (74 U.S.) 666, 677 (1869)("We have no officers in this government from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority"); *Cunningham v. Macon*, 109 U.S. 446, 452, 456, 3 S.Ct. 292, 297 (1883)("In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him... It is no answer for the defendant to say I am an officer of the government and acted under its authority unless he shows the sufficiency of

that authority"); and *Poindexter v. Greenhow*, 114 U.S. 270, 287, 5 S.Ct. 903, 912 (1885).

In *Reagan v. Farmers Loan & Trust Co.*, 154 U.S. 362, 390, 14 S.Ct. 1047, 1051, 1052 (1894), the Court declared:

> *"A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge; and yet the officers charged with the administration of that valid tax law may so act under it, in the matter of assessment or collection, as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts."*

In *Cooper v. O'Connor*, 99 F.2d 135, 137, 138 (D.C. Cir. 1938), a banker was indicted, acquitted and then brought suit for malicious prosecution against the agents who caused his indictment. Regarding the rule that agents acting outside the scope of their authority are personally liable for their torts, the court stated:

> *"There is also a general rule that if any officer- ministerial of otherwise- acts outside the scope of his jurisdiction and without authorization of law, he is liable in an action for damages for injuries suffered by a citizen as a result thereof."*

See also *Estrada v. Hills*, 401 F.Supp. 429, 434 (N.D.Ill. 1975).

This rule that agents are personally liable for their acts outside the scope of their authority has not been modified or changed in any way over the years. In *Barr v. Matteo*, 360 U.S. 564, 572, 79 S.Ct. 1335, 1340 (1959), the Court stated that the immunity rules have always been subject to the "limitation upon that immunity that the official's act must have been within the scope of his powers." In *Doe v. McMillan*, 412 U.S. 306, 320, 93 S.Ct. 2018, 2028 (1973), it was held that the "scope of immunity has always been tied to the scope of... authority."

Simply put, for a government agent to have some type of absolute or qualified immunity from suit for conduct arising from the performance of his duties, he must first have the valid authority to perform the acts in question; if

he lacks such delegated authority, his immunity vanishes. In *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894 (1978), this rule was clearly acknowledged by the Court:

> *"As these cases demonstrate, a federal official was protected for action tortious under state law only if his acts were authorized by controlling federal law," 438 U.S., at 490.*
>
> *"Beyond that, however, neither case purported to abolish the liability of federal officers for actions manifestly beyond their line of duty; and if they are accountable when they stray beyond the plain limits of their statutory authority, it would be incongruous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability," 438 U.S., at 495.*

See also *Westfall v. Erwin*, 484 U.S. 292, 297, 298, 108 S.Ct. 580, 584 (1988)(" As *Doe's* analysis makes clear, absolute immunity from state law tort actions should be available only when the conduct of federal officials is within the scope of their official duties and the conduct is discretionary in nature"); *Benford v. American Broadcasting Co., Inc.*, 554 F.Supp. 145, 148 (D.Md. 1982); and *Pleasant v. Lovell*, 876 F.2d 787 (10th Cir. 1989). See also *Rutherford v. United States*, 702 F.2d 580 (5th Cir. 1983).

It was established long ago that whenever any officer exceeds his authority and wrongfully seizes or levies upon property, he is personally liable in tort for that act. For example, in *Buck v. Colbath*, 70 U.S. 334, 344 (1866), a marshall levied upon property of one party to satisfy a judgment entered against another. In holding that the Marshall was liable for this wrongful levy, the Court declared:

> *"In all these particulars he is bound to exercise his own judgment, and is legally responsible to any person for the consequences of an error or mistake in its exercise to his prejudice. He is so liable to plaintiff, to defendant, or to any third person whom his erroneous action in the premises may injure."*

The lack of statutory authority for a government employee or agent to levy or seize the property of another party was the subject of *Bates v. Clark*, 95 U.S.

204, 209 (1877). Here, an Army captain had statutory authority to seize whiskey within "Indian country," and pursuant to this authority, he seized such from a merchant not within Indian country. The Court held this to be an illegal seizure which subjected the officer to personal liability:

> *"But the objection fatal to all this class of defenses is that in that locality they were utterly without any authority in the premises; and their honest belief that they had is no defense in their case more than in any other, where a party mistaking his rights commits a trespass by forcibly seizing and taking away another man's property."*

This is an extremely old rule. In *Gaillard v. Cantini*, 76 F. 699 (4th Cir. 1896), a state constable executed a search warrant of a business premises and home looking for illegal alcoholic beverages. But, state law required such warrants to be executed by the county sheriff, and the constable had no authority under the statute to execute the warrant. He was sued and suffered judgment. This court affirmed that judgment by noting that the constable lacked authority to search under state law and he was liable as a consequence. At the opposite end of the country, this rule is also followed as shown by *McKnight v. United States*, 130 F. 659 (9th Cir. 1904). Here, a state sheriff was executing a warrant to levy upon property of a husband, but instead levied upon cattle belonging to his Indian wife, a ward of the government. Noting that the sheriff possessed only authority to levy upon the cattle of the husband and not the wife, the court held the sheriff personally liable for conversion.

This rule obtains in Maryland. An illegal levy was the subject of *State, to use of German v. Timmons*, 90 Md. 10, 44 A. 1003 (1899), which involved a constable making a levy via a null and void warrant. In holding that the proper remedy here was a suit personally against the constable, the Court held:

> *"There can be no doubt that a constable acting under a void warrant is a trespasser, and is not protected by reason of such a warrant being issued to him, if he enforces it; for, although the law does not hold an officer responsible, as a trespasser, for acting under a warrant that is merely defective or irregular, yet, when it is void on its face, it is as if no warrant had been issued to him."*

At the other end of this country in California, if a public official such as a sheriff wrongfully levies upon property he is personally liable in tort for conversion. For example, in *Irwin v. McDowell*, 91 Cal. 119, 27 P. 601, 602 (1891), an officer seized some mortgaged grain contrary to state law which required him to pay any prior claims. Since the levy was wrongful, he was held personally liable; see also *Black v. Clasby*, 97 Cal. 482, 32 P. 564 (1893); and *Curtner v. Lyndon*, 128 Cal. 35, 60 P. 462 (1900). In *Brinkley-Douglas Fruit Co. v. Silman*, 33 Cal.App. 643, 166 P. 371 (1917), the sheriff seized some potatoes owned by a third party, who sued him for illegal levy; it was determined that the sheriff was personally liable for this wrongful act. See also *Phillips v. Byers*, 189 Cal. 665, 209 P. 557, 560 (1922).

This rule applies in other states between Maryland and California. An illegal levy was the subject of *Duff & Repp Furn. Co. v. Read*, 74 Kan. 730, 88 P. 263, 264 (1907), where it was declared that, "where levy is made by an officer under a process which is irregular, unauthorized, or void, the party suing out the process is a trespasser, and in such case the former becomes the agent of the latter." See also *Adamson v. Noble*, 137 Ala. 668, 35 So. 139 (1903); *Stowers Furn. Co. v. Brake*, 158 Ala. 639, 48 So. 89, 93 (1908); and *Tregre & Shexnayder v. Carter*, 132 La. 293, 61 So. 379 (1913). In *Texas Liquor Control Board v. Whitefield*, 127 S.W.2d 339, 340 (Tex.Civ.App. 1939), this rule was stated as follows:

> *"Nowhere is it alleged or proved that the seizure was made by virtue of a lawfully issued search warrant or under circumstances rendering such a warrant unnecessary. It is alleged by appellee that the seizure was unlawfully made. If the seizure were made without lawful authority, the act was not that of the Board or the Administrator, as such, the officers making the seizure were trespassers and the suit was against them as individuals."*

See also *Bishop v. Vandercook*, 228 Mich 299, 200 N.W. 278 (1924); *Kelly v. Baird*, 64 N.D. 346, 252 N.W. 70, 76 (1934); *Bowler v. Vannoy*, 215 P.2d 248, 258 (Nev. 1950); *Reese v. Bice*, 87 Ga.App. 519, 74 S.E.2d 476 (1953); *Mica Industries, Inc. v. Penland*, 249 N.C. 602, 107 S.E.2d 120 (1959); *Bowman v. Waldt*, 9 Wash.App. 562, 513 P.2d 559, 564 (1973); and *Kemp's Wrecker Service v. Grassland Sod Co., Inc.*, 404 So.2d 348 (Ala.App. 1981).

END OF BRIEF

An interesting issue:

Back in the early 80s, I was researching ways to raise legal issues to challenge the Federal Reserve and one of the arguments I developed asserted that Congress had unlawfully delegated its legislative authority to issue obligations of the United States to the Fed, a complicated issue. While doing this research, I also cataloged some of the state cases regarding this point, and these cases holds that a state legislature cannot connect state laws to another jurisdiction because to do so constitutes an unlawful delegation of legislative authority to that other jurisdiction. Some of the cases on this point appear below:

Alabama: *Clark & Murrell v. Port of Mobile*, 67 Ala. 217 (1880); *State v. Firemen's Fund Ins. Co.*, 223 Ala. 153, 134 So. 858 (1931); *State v. Proetorians*, 226 Ala. 259, 146 So. 411 (1933).

Arkansas: *Crowley v. Thornbrough*, 226 Ark. 768, 294 S.W.2d 62 (1956); *Cheney v. St. Louis Southwestern Ry. Co.*, 394 S.W.2d 731 (Ark. 1965). The opposite was held in *Curry v. State*, 279 Ark. 153, 649 S.W.2d 833 (1983)(can connect with existing federal laws).

Florida: *Hutchins v. Mayo*, 143 Fla. 707, 197 So. 495 (1940).

Idaho: *Idaho Sav. & Loan Assoc. v. Roden*, 82 Idaho 128, 350 P.2d 225 (1960). But compare *State v. Kellogg*, 98 Idaho 514, 568 P.2d 514 (1977).

Kentucky: *Western & Southern Life Ins. Co. v. Commonwealth*, 133 Ky. 292, 117 S.W. 376 (1909); *Young v. Willis*, 305 Ky. 200, 203 SW 2d 5, 7-8 (1947); *Dawson v. Hamilton*, 314 S.W. 2d 532, 535-36 (Ky.App. 1958); *Legislative Research Comm. V. Brown*, 664 S.W.2d 907 (Ky. 1984).

Louisiana: *State v. Rodriguez*, 379 So.2d 1084, 1087 (La. 1980)("The Louisiana legislature is not authorized to delegate its legislative power to a federal agency, nor to Congress)".

Maine: *State v. Intoxicating Liquors*, 121 Me. 438, 117 A. 588 (1922).

Massachusetts: *Opinion of Justices*, 239 Mass. 606, 133 N.E. 453 (1921).

Minnesota: *Wallace v. Comm. of Taxation*, 184 N.W.2d 588 (Minn. 1971).

Nebraska: *Smithberger v. Banning*, 129 Neb. 651, 262 N.W. 492 (1935).

New York: *Darweger v. Staats*, 267 N.Y. 290, 196 N.E. 61 (1935).

Ohio: *State v. Emery*, 55 Ohio St. 364, 45 N.E. 319 (1896); *State v. Perrico*, 66 Ohio Misc. 7, 419 N.E.2d 895 (1980).

Pennsylvania: *Holgate Bros. Co. v. Bashore*, 331 Pa. 255, 200 A. 672 (1938).

Utah: *Utah League of Insured Savings Assoc's. v. State of Utah*, 555 F.Supp. 664, 673-74 (D.Utah 1983): court indicated that Utah courts would follow this rule.

See also the interesting ALR annotation at 133 ALR 401. This is not an exhaustive list.