

# ORIGINAL

In the

## Supreme Court of the United States

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WASHINGTON, D. C. 20543

OWEN EQUIPMENT AND ERECTION COMPANY,  
A Nebraska Corporation,

Petitioner,

v.

GERALDINE KROGER, Administratrix of  
the Estate of JAMES D. KROGER,  
Deceased,

Respondent.

No. 77-677

Washington, D.C.  
April 18, 1978

Pages 1 thru 49

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Deceased,	:	
	:	
Respondent.	:	
	:	

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Washington, D. C.

Tuesday, April 18, 1978

The above-entitled matter came on for argument at  
1:22 p.m.

## BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
 WILLIAM J. BRENNAN, JR., Associate Justice  
 POTTER STEWART, Associate Justice  
 BYRON R. WHITE, Associate Justice  
 THURGOOD MARSHALL, Associate Justice  
 HARRY A. BLACKMUN, Associate Justice  
 LEWIS F. POWELL, JR., Associate Justice  
 WILLIAM H. REHNQUIST, Associate Justice  
 JOHN P. STEVENS, Associate Justice

## APPEARANCES:

EMIL F. SODORO, Esq., 200 Century Professional  
 Plaza, 7000 Spring Street, Omaha, Nebraska 68106,  
 for the Petitioner.

WARREN C. SCHREMPP, Esq., Schrempp & McQuade,  
 1600 Woodmen Tower, Omaha, Nebraska 68102, for  
 the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 77-677, Owen Equipment and Erection Company against Kroger.

Mr. Sodoro.

ORAL ARGUMENT OF EMIL F. SODORO ON

BEHALF OF PETITIONER

MR. SODORO: Mr. Chief Justice, and may it please the Court, gentlemen: We stand before this Court today on the case of Owen v. Kroger, which has basically a single issue to present to you, and the issue, generally stated, is: On a State court claim, can the plaintiff in a civil action in a Federal court file a direct claim against a third party defendant with whom the plaintiff shares common citizenship? Or take it as just one step further in this particular case, gentlemen, what we have is a plaintiff who maintains a suit against the defendant who is not in comity with her citizenship, who files a third party complaint, and that's our client in this particular case, against a third party defendant and then the original defendant is excused from the proceedings on a motion for summary judgment.

It is our contention --

QUESTION: When you say excused from the proceedings, you mean the original defendant moved for summary judgment and it was granted?



MR. SODORO: That's right. Moved for a summary judgment, there was a hearing before District Judge Denney. He sustained the motion for a summary judgment, and that motion for a summary judgment was in fact appealed by the plaintiff in this case to the Eighth Circuit Court which affirmed the judgment sustaining the motion for summary judgment.

QUESTION: So at that stage you had what parties?

MR. SODORO: At that stage, after that original defendant was excused -- and I use that word appropriately, I think; dismissed perhaps is a better word, your Honor -- dismissed from the suit, what we had was an administratrix of an estate, who was a citizen of Iowa, who by this time now had filed a direct claim in the original Federal district court proceedings against the third party defendant.

QUESTION: That was an amended complaint?

MR. SODORO: Yes, sir, your Honor. It was on the basis of an amended complaint.

So at this point, at this juncture, the original defendant is no longer a party to this case. And what we have is that the plaintiff at this stage of the proceedings and the defendant for the purposes of diversity of citizenship, which is a demand for jurisdiction in the Federal court, were both residents of the same State.

Originally this accident arises out of a complex

set of facts, and I am sure that you are aware of the facts and I won't belabor them with you. But this is a suit for damages that arises out of a claim for wrongful death that occurred while the plaintiff decedent was in the course of his employment.

Now, one of the issues, or one of the matters, that was also involved in this case that made it additionally complex to keep the parties straight, was the fact that when the plaintiff originally filed this suit, the employer of the plaintiff, which was also an Iowa resident, the Paxton & Vierling Company, was made a party defendant, and Federal District Judge Denney, in order to retain the jurisdiction, realigned the parties. That original employer defendant was made a defendant only for the purpose of subrogation of the Workmen's Compensation claims.

QUESTION: To that extent the employer defendant would have had more in common with the plaintiffs than with the defendant.

MR. SODORO: That's right, your Honor. And it was for that reason, as I say, that the trial judge, Judge Denney, realigned that party and in fact made the Paxton & Vierling Company --

QUESTION: Which was the employer.

MR. SODORO: Yes. -- a party claimant for the purposes of retaining jurisdiction of the case. And as you

say, their interests were in fact aligned.

QUESTION: That's a new lawsuit.

MR. SODORO: Beg pardon?

QUESTION: That's a new lawsuit, then.

MR. SODORO: Well, it was really part of the original lawsuit, as it was treated in this case. What happened was the parties were simply realigned, Mr. Justice Marshall.

QUESTION: You realigned them because you lost the regular party.

MR. SODORO: That is correct. Actually, as the case was originally filed -- and you have got it exactly -- there was no diversity of citizenship that would confer jurisdiction on the Federal district court because there was no Federal question involved, and by the admission of the plaintiff in that original complaint one of the parties was a resident of the same State as was the plaintiff. I'm glad you noticed that.

But in any event, this case finally came to trial and the question as to the jurisdiction of the court, and it's our contention that the Federal district court never had any jurisdiction to hear and decide the case between the petitioner that stands before you today and the respondent for the reason -- and again very simply stated, it's not a complex case, at least as we view it, because there was no diversity of

citizenship between the respective parties that were involved in the litigation.

Now, Judge Denney, the trier of the case -- and his declaration is in the case -- said that he felt this was a case where he had to decide whether it was a matter of pendant or ancillary jurisdiction.

Now, we have searched the authorities, every authority possible, and it seems that there isn't any question that the Federal courts, once they have the original jurisdiction between a plaintiff and a diverse defendant, that that defendant may make a third party defendant who is a resident or a citizen of the same State as the original defendant. No question about that.

QUESTION: Same State as the original plaintiff.

MR. SODORO: As the original plaintiff or the original defendant.

QUESTION: Well, if the original defendant, there is no problem, because presumably the original plaintiff and the original defendant were of diverse citizenship.

MR. SODORO: Right.

QUESTION: If the third party defendant is of the same residence as the original defendant, then there is no problem at all.

MR. SODORO: There is no problem at all.

QUESTION: But you are talking about a third third



party practice bringing in a defendant who is of the same citizenship as the original plaintiff.

MR. SODORO: Yes. And I see no problem with that.

QUESTION: That's permissible; that's established.

MR. SODORO: I see no problem with that.

But the problem that arises here, Mr. Justice Stewart, is in that the plaintiff in this case was permitted to file a direct claim, don't you see, against that third party defendant.

QUESTION: Right.

MR. SODORO: Now, we can find no cases in any jurisdictions in the Federal court that permits such practice, let alone find any case particularly where the original defendant is removed or excused or dismissed from the case that permits any such practice.

Gentlemen, it would be really, I think, a waste of your time for me to reiterate to you the portions of our brief. I am sure you are acquainted with them. But it was our feeling and it's our contention today that Judge Denney was mistaken, that this is not a case for determination as to whether or not it is a matter of pendant or ancillary jurisdiction.

QUESTION: Mr. Sodoro, let me just get one thing straight. Does your position depend at all on the fact that the original defendant was dismissed out of the case?

MR. SODORO: In part, but not necessarily. Our

principal argument is that the plaintiff could not do what she did here because she was not entitled to do it under Federal practice. There was no jurisdiction that would inure to the Federal court.

It's true that that has some bearing and some effect. But here is what it is, your Honor: The plaintiff ends up suing in the Federal court a person who is a citizen of the same State as the plaintiff. And we submit there is no authority for that type of jurisdiction.

QUESTION: How is that any different in practical effect between A suing B and B having a cross-claim against C, and then after everything is all done, C pays B and B pays A? Isn't it the same as C paying A?

MR. SODORO: Yes, it has a substantial effect. You have to assume it this way, Your Honor: Let's say the plaintiff instead of filing only her lawsuit against the defendant, would file her lawsuit against both the defendant and the third party defendant.

QUESTION: Then there would be no jurisdiction.

MR. SODORO: There would be no jurisdiction in the Federal court. And all of the cases have that as their holding. Well, you cannot do in the record, you see, what you are not permitted to do by way of jurisdiction in the record.

QUESTION: On the pleadings, though, initially, this appeared to be a suit by a resident of Iowa against a

Nebraska corporation, your client. That's right, isn't it?

MR. SODORO: Yes, sir.

QUESTION: It wasn't until the trial was almost over that was introduced the fact that actually the Nebraska corporation had its principal place of business in Iowa.

MR. SODORO: On the record that is generally the exact statement.

QUESTION: That's what happened, isn't it?

MR. SODORO: Not exactly. That generally is what happened.

QUESTION: When did the fact that the Nebraska corporation had its principal place of business in Iowa, when was that revealed to the court?

MR. SODORO: That was revealed at the -- when you say "to the court" --

QUESTION: To the parties, for that matter.

MR. SODORO: To the parties. Please let me answer that one, your Honor.

On the 23rd -- no, I take that back.

On the 3rd day of June 1974 --

QUESTION: When did the trial start?

MR. SODORO: The trial commenced, your Honor, on the 12th day of January 1976.

Now, here is how it came about, so that the parties had knowledge of the location of the principal place of

business of this third party defendant, our client, the petitioner here. The deposition was being taken pursuant to request by the plaintiff, not pursuant to notice, but pursuant to production of the witnesses. The attorney for the plaintiff said, "I want to see the books and records of the Owen Equipment and Construction Company, and I want to take the depositions of the officers," and by agreement that was done at the headquarters of this petitioner, sir, on the 3rd day of June 1974, and the headquarters are located in Carter Lake, Iowa.

QUESTION: Right there, Mr. Sodoro, Carter Lake, Iowa, is on the west side of the Missouri River, isn't it?

MR. SODORO: Yes, it is, your Honor.

QUESTION: And isn't it a kind of nubbin sticking into the city of Omaha?

MR. SODORO: Your description generally is accurate, except that it is not a nubbin that is part of the city of Omaha; it is out of the city of Omaha.

QUESTION: Near the airport.

MR. SODORO: Out near the airport, exactly. And what you have there is when the States were originally divided by the Missouri River, there was a bend in the river and that bend in the river somehow avulsed to the east, and there is a piece of land, despite the fact that it is located on the west side of the Missouri River, that is really a part of



Iowa. And that is a very well-known fact in our community because the city of Omaha is always complaining that they have to render certain services to the city of Carter Lake, Iowa, and the real estate taxes and the State income taxes and the State sales taxes have to go over to Des Moines, over to Iowa.

QUESTION: This is why I was asking whether everybody really didn't know what the situation was at all times.

MR. SODORO: I think that's pretty general knowledge, because there is a community, there is a city, that is known as the city of Carter Lake, Iowa.

QUESTION: And you have a city hall there.

MR. SODORO: And they have a city hall and they have a mayor and they have city councilmen.

QUESTION: But I take it, apart from this aspect in the background, the fact it's on the west side of the Missouri doesn't cut any ice in this litigation.

MR. SODORO: Not in the least. Not in the least, particularly with respect to the question of jurisdiction.

QUESTION: When was it that you raised this question that there was no jurisdiction? Was that at the trial the first time?

MR. SODORO: Our original answer that was filed to the amended complaint as filed by the respondent --

QUESTION: And that was filed when?

MR. SODORO: That was filed, your Honor -- well, the plaintiff's amended complaint was filed against, directly against Owen, on November 9, 1973. And thereafter, on November 27, 1973, we filed an answer on behalf of Owen, and in that answer admitted that the Owen Erection and Equipment Company was a corporation existing under the laws of the State of Nebraska, because that is a fact, and then went on to deny generally all of the other allegations of the plaintiff's amended complaint against Owen.

One of the allegations --

QUESTION: Did you expressly raise the question that we have our principal office in Iowa and therefore there is no jurisdiction?

MR. SODORO: No, we did not at that time.

QUESTION: When did you?

MR. SODORO: That was raised on the record. First of all, as I told you, on the 3rd of June 1974, when that deposition was taken, counsel for those questions -- and those answers were given in response to interrogation made by the attorney for the plaintiff. But the formal request, or the formal filing of the motion to dismiss was not filed, and the reason it wasn't filed is, very honestly, we didn't give it the adequate consideration that this issue deserved. I submit that to you and tell you that --

QUESTION: Meanwhile, the statute of limitations

may have run in the State court?

MR. SODORO: Sir, the statute of limitations is two years in Iowa, and the statute of limitations in this case had run on the 18th day of January 1974. Yes, sir.

QUESTION: Also, I gather from the majority and dissenting views in the court of appeals that there may be some difference on this point of view. What position do you take? Do you take the view that it's your obligation to call to the attention of the district court by motion at some stage its lack of jurisdiction, or that that's something that may be raised by any party or by the court on its own motion at any time as long as there has been no act of concealment?

MR. SODORO: Absolutely. I agree with the last portion of your statement. It's my understanding, and I have been a lawyer for 27 years, that the allegations and the claims that are made by a plaintiff against any party in a proceeding must be proven by that plaintiff. That's the law, I think, in almost any jurisdiction. The burden of proving the claims that are made by the plaintiff must be made by the plaintiff.

QUESTION: Unless they are admitted.

MR. SODORO: Unless they are admitted in the pleadings, you bet. And in this case we filed a general denial as to every claim made by the plaintiff in a petition against us, amended complaint against us, except the fact that

the corporation Owen Equipment and Erection Company was in fact incorporated under the laws of the State of Nebraska.

QUESTION: So you admitted everything except jurisdiction?

MR. SODORO: In effect that's our position exactly, your Honor.

QUESTION: You don't feel that you as a lawyer had any responsibility to tell the court that it did not have jurisdiction?

MR. SODORO: Let me say this, your Honor: At the time the answer was filed --

QUESTION: Go ahead.

MR. SODORO: -- and I have told you already and I am more than happy to tell you again, this issue did not deserve in our office the type of consideration that it did. It was called to our attention, as you will see, in the affidavit that's filed as part of the appendix in this case.

Let me for a second just back up and explain this matter to you. Our office is not the corporate office or the corporate attorneys for the Owen Equipment Company, and on the morning that this case was to commence for trial, we were satisfied with our pleading at that time, our answer. We were suspect of the fact that this was an Iowa corporation but had not developed that theory, had not worked it out. The corporate counsel --



QUESTION: You didn't know that they had their main office -- you didn't know where their main office was?

MR. SODORO: Except for the fact --

QUESTION: Let me ask you, did you know where the main office of your client was?

MR. SODORO: Yes, sir, we did. We knew that on the 3rd day of June 1974, because we were present, your Honor, at the same time the attorneys --

QUESTION: Did you know it when you filed your answer on October 15, 1973?

MR. SODORO: Not really.

QUESTION: You didn't really intend to deny the allegation, then.

MR. SODORO: Well, we denied it.

QUESTION: You denied it without investigating the facts?

MR. SODORO: Let me say this to you: The facts -- we were suspect of that fact.

QUESTION: But you didn't make any check --

MR. SODORO: We were not satisfied completely one way or the other, your Honor.

QUESTION: Where did your check come from?

QUESTION: You are asking us to construe the answer as a denial when you say you didn't really intend it as a denial.

MR. SODORO: We intended it as a denial because it says that, don't you see? Those are the words spelled out on the answer. Yes, sir, by all means.

QUESTION: An interpretation of rules of civil procedure doesn't ordinarily take into contemplation intention with respect to the allegations of a pleading, does it?

MR. SODORO: Well, it provides, I think, generally, your Honor, to the effect that --

QUESTION: The thing speaks for itself.

MR. SODORO: The thing speaks for itself, and you are entitled to admit portions of averments and entitled to generally deny the rest of them. That's what we did in this case.

But I submit to you along these lines, sir, and gentlemen, that the question of jurisdiction of a court is something that can be raised at any time. I don't believe that the conduct of the parties, all the authorities indicate and indicate substantially that you can't be estopped, that the jurisdiction cannot be created when it didn't otherwise exist. And it's our position that the jurisdiction did not exist when the plaintiff, the respondent here, filed her claim against us. It's our position that this is not a matter of pendant or ancillary jurisdiction, that the facts and circumstances presented here create an exact problem of original jurisdiction between two parties who are residents of the same State.

QUESTION: How come the defendant can implead, file a claim against a third party defendant from the same State he is?

MR. SODORO: I am sorry, sir, I didn't catch your question.

QUESTION: The defendant in a case may file a third party claim against a third party defendant from the same State as he is.

MR. SODORO: Right.

QUESTION: And that party may file a counterclaim.

MR. SODORO: Yes, absolutely.

QUESTION: And he may also file a claim against the plaintiff.

MR. SODORO: Yes, sir.

QUESTION: But you are suggesting the plaintiff cannot counterclaim against that claim.

MR. SODORO: That the plaintiff can never claim against a third party defendant. And I think that the authorities --

QUESTION: What is your justification for that? I mean, the defendant could never have sued the third party defendant in the Federal court.

MR. SODORO: Well, the theory is that the plaintiff selects the forum for the trial and disposition of the plaintiff's claim. All right. Now, the theory that permits

ancillary proceedings by a defendant where you have the original diversity of citizenship between the original two parties, the theory is that this now is an ancillary proceeding between the original defendant, who becomes the third party plaintiff, and the third party defendant. That is the ancillary portion of the proceedings. And the courts have indicated that that's perfectly OK, that that falls within the purview of the jurisdictions of the Federal courts.

QUESTION: I know you are saying that is what the cases say, but I still don't understand why you think the Federal court is more qualified jurisdictionwise to try that claim than a claim by the plaintiff against a third party defendant.

MR. SODORO: Because the plaintiff did not, unless there is diversity of citizenship between that plaintiff and the third party defendant --

QUESTION: Well, there is diversity between the plaintiff and the third party defendant.

MR. SODORO: But the reason for that is, your Honor, that it is in conformity with rule 14 of the Federal Rules of Procedure.

Now, I would like to retain, if I might, gentlemen, just a few minutes left of my argument.

QUESTION: Mr. Sodoro, before you sit down, there was mention a few moments ago about the statute of limitations.



I note that the dissenting judge in the court of appeals in note 42 of his dissenting opinion, appearing on appendix page 32 of the petition for certiorari, indicates that it is his belief that this action would not be barred by the Iowa statute of limitations if the judgment of the court of appeals were reversed.

Now, I appreciate that you don't want to take the position here that --

MR. SODORO: Mr. Justice Stewart, I know it's there and I certainly wish to make no comment about it at this time.

QUESTION: But there certainly does seem to be a difference of opinion, and therefore perhaps the question is not -- there is no clear-cut answer to it, at least that's fair to say.

MR. SODORO: And let me say fairly and honestly I don't know if there is a clear-cut answer.

I would like to reserve the remainder of my time.  
Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Schrempp.

ORAL ARGUMENT OF WARREN C. SCHREMPP ON  
BEHALF OF RESPONDENT

MR. SCHREMPP: Mr. Chief Justice, and may it please the Court: Our position in this matter is generally simple, we hope, and that is that we simply contend that the

United States district court had the power to retain and dispose of this case in its waning moments when for the first time the jurisdiction was attacked and that it was within the discretion of the district court to retain and dispose of this cause under its ancillary powers and under the unique facts of this case, as may be readily apparent from a reading of the timetable of events in this case. Therefore, the United States district court to have failed to retain and dispose of this litigation which had been pending for four long years in Federal court would have indeed been an abuse of his discretion in rejecting a final disposition of this claim one day before it was to go to the jury.

QUESTION: At some point in your discussion would you enlighten us about the Iowa savings statute? Do it in your own time.

MR. SCHREMPP: The Iowa savings statute, your Honor, Mr. Chief Justice, is a statute that, from my knowledge of Iowa law, is as vague and nebulous and its boundaries are as murky as Mr. Justice Blackmun mentioned about the boundaries of Iowa and Nebraska on the west side of the Missouri River. I do not know.

QUESTION: Counsel, if on this day before the case was to go to the jury the pleadings had been called to Judge Denney's attention and he had construed the petitioner's answer to the allegation as to diversity as a denial of your

allegation as to diversity, and he said, "We simply don't have diversity here," would you say that if he had construed it in that way, he should have been reversed by the Court of Appeals for the Eighth Circuit if he had said, "I am going to dismiss this case right now for want of jurisdiction"?

MR. SCHREMPP: Yes, your Honor. Under the facts and circumstances of this particular case after the four years of litigation, I think it would have been an abuse of his discretion at that point even.

QUESTION: Then you really don't regard Federal courts as courts of limited jurisdiction. You treat this very much as the court of original jurisdiction in Iowa and Nebraska, as general jurisdiction unless someone comes in and moves to dismiss.

MR. SCHREMPP: No, your Honor. Of course, Federal courts are courts of limited jurisdiction. I think that limited jurisdiction, though, derives in the power of the United States district court, the United States district judge, if you will, Mr. Justice Rehnquist, provides in general that this court may in appropriate circumstances retain a jurisdiction of a case --

QUESTION: What rule are you referring to?

MR. SCHREMPP: Rule 14. Rule 14 does not in and of itself--and I would rather quote words from Dery v. Wyer in the Second Circuit on that -- Rule 14 does not extend jurisdiction.

It merely sanctions an impleading procedure which rests upon the broad conception of a claim as comprising a set of facts giving rise to rights flowing both to and from a defendant. For solution of the incidental jurisdictional problems which often attend utilization of the procedure, the concept of ancillary jurisdiction which long antedated the Federal Rules may often be drawn upon.

I do espouse that view, your Honor.

I would like to comment on what this case does not concern. From the standpoint of equity and fairness, this case does not concern a forum-shopping situation. The plaintiff in this case was not an in-state plaintiff seeking to gain some advantage over an out-of-state plaintiff. The plaintiff in this case was an out-of-state plaintiff coming to the court of Nebraska. There was no forum shopping, which I think with respect to the discretion exercise of the court is worthy of comment.

Secondly, there was no advantage gained, and I am calling particularly attention to Aldinger, your Honor, we did not implead a new party. We started out, as has been slightly delineated by counsel, with a suit against the Omaha Public Power District. The Omaha Public Power District is a political subdivision. This was the first delay in the case because there is a six-months waiting period, and without going into the ramifications of that, we started out against the Omaha

Public Power District with complete diversity, of course.

Ultimately, then, the Omaha Public Power District impleaded Owen Erection and Equipment Company, the defendant in this case. This was not a choice of ours. We did not implead a new party. We did not make co-defendants of two parties. We took the parties as we found them, the party that had been impleaded by the original defendant, the third party plaintiff. There is no suggestion of anything other than that in this case.

And I might say further that with respect to one of the traditional lines of reasoning, and that is that this gives rise to collusion, I join B so I can really get at C, there is not, I submit to this Court, one hint or suggestion of any such collusion. To the contrary, our battle against the Omaha Public Power District perdured and went all the way to the United States Court of Appeals. By the time it had come out of the United States Court of Appeals, the statute of limitations, of course, had run in Iowa. At the time the statute of limitations ran in Iowa, which was January of 1974, all three parties were very properly, I think everyone will agree, in the jurisdiction of the Federal court: Kroger, Owen; Kroger, OPPD, Owen. There would be no reason for any filing or dismissal without prejudice. Certainly we couldn't dismiss without prejudice. There are all three parties in there. And they were all three parties very properly in Federal court for 18 months after the statute of limitations



ran, until there was a final affirmance by the United States Court of Appeals of the summary judgment which the Omaha Public Power District had gained against Kroger.

QUESTION: If Owen had chosen in its answer to flatly deny that it was a resident and citizen, as you allege it to be, so that there was no way of interpreting its pleading other than a denial of diversity jurisdiction, that it had done nothing more, would you still say that it was estopped?

MR. SCHREMPP: Certainly for the 18 months after the statute ran there would have been no impropriety about going ahead because the Omaha Public Power District certainly wouldn't have let Owen out. They joined them in the first place. They were after them, and we were both after them.

QUESTION: Isn't jurisdiction something that can be raised at any time?

MR. SCHREMPP: Your Honor, I believe a jurisdictional question, if you say it can be raised at any time, my answer is no, it cannot be raised at any time. It can be raised normally at any time unless the inequities, the unfairness, the absolute lack of justice of raising it as was done in this case --

QUESTION: You have got two cases from this Court, Finn v. American Fire and Casualty Company and a General Electric case that I wrote about six or seven years ago, that say quite apart from inequities or unfairness, a question of

jurisdiction of the Federal court can be raised at any time.

MR. SCHREMPP: Your Honor, I was going to discuss -- I felt, and this is very difficult to stand before a court who wrote the opinion and stand before the author of that opinion and tell him what I think he meant.

QUESTION: No. This is your opportunity to do it.

MR. SCHREMPP: I thought that your very discerning and wonderfully --

(Laughter.)

MR. SCHREMPP: -- wonderfully narrowly limited decision in Aldinger would be an indication to attorneys that this is not an absolutely inflexible rule.

QUESTION: I wasn't talking about Aldinger. I was talking about the General Electric case.

MR. SCHREMPP: I know.

QUESTION: Well, you gave him one on the Second Circuit where during the argument it was found out that they only had \$10,000 involved and it was thrown out because the statute says "in excess of \$10,000."

MR. SCHREMPP: Yes, that would be on the monetary jurisdiction, your Honor.

QUESTION: It was jurisdiction, the word we are talking about, the same thing, jurisdiction. So jurisdiction can be raised at any time.

MR. SCHREMPP: Your Honor --

QUESTION: I agree is isn't fair to raise jurisdiction after the man has been hung.

(Laughter.)

MR. SCHREMPP: I would like to compare this to the justice that this situation would -- let us assume, if I may --

QUESTION: Let's take this case, this case here. You were wrong in your allegations, weren't you, in saying that this was a resident of one State when it really was a resident of another State. You were wrong.

MR. SCHREMPP: As a matter of truth and fact, Mr. Justice Marshall, we were not, but that was raised in counter to an affidavit --

QUESTION: Anyway, your allegation was that Owen was a corporation of Nebraska. That was your allegation, wasn't it?

MR. SCHREMPP: Yes, and in one way --

QUESTION: Yes. And on the face of the pleadings, that suggested a resident of Iowa suing a resident of Nebraska, didn't it?

MR. SCHREMPP: Of course, your Honor.

QUESTION: Of course it did.

QUESTION: And that was admitted, was it not, in the answer?

MR. SCHREMPP: Yes, your Honor.

QUESTION: You don't suggest that in itself makes

jurisdiction, though, do you, standing alone?

MR. SCHREMPP: Not completely.

QUESTION: You were about to approach the question of ancillary or pendant type jurisdiction. Would you care to pursue that?

MR. SCHREMPP: I feel, of course, there is a parallel between ancillary and pendant jurisdiction, and I would like to think of this with respect to both your question, Mr. Chief Justice, and your question, Mr. Justice Marshall, with respect to what would have happened had this issue never been raised. What would have happened, let's say, had we not had summary judgment granted against us by the trial court and ultimately affirmed by the court of appeals? What would have happened had the trial commenced with Owen, OPPD, and Kroger all properly before the court? The case goes to the jury, now, against all three, no impropriety. The jury then returns a verdict letting OPPD out and a verdict solely against Owen. What happens now if this be a rule of justice? Is Owen then out after verdict, after the jury has rendered a verdict having let OPPD out? I think it is a parallel situation and it points up the injustice of an inflexible rule.

QUESTION: Mr. Schrempp, don't you have to differentiate between a verdict against Owen on the third party complaint brought by the Power District and the verdict against Owen on the amended complaint brought directly by Kroger

against Owen? Wouldn't both issues be submitted to the jury?

MR. SCHREMPP: Yes, Mr. Justice Stevens. In my hypothetical situation here, the jury is submitted the case with respect to our claim against OPPD. Now, that does not arise out of the same elements of negligence. Our claim against OPPD was based on the fact that we claimed that they had strung their high-tension wires which --

QUESTION: Improperly.

MR. SCHREMPP: Pardon?

QUESTION: Improperly, I suppose.

MR. SCHREMPP: Improperly. They came in on a summary judgment, so that that may be clear, and said, "We sold that whole system to Paxton-Vierling Company. We sold the whole system to them." We felt there was enough control left and we felt that stringing their high-tension wires, they are insulated by air and space, which means that they are bare wires, we felt that we had a case against them, and then during the discovery we developed the case also against Owen Equipment Company on the grounds that their cranes were improperly --

QUESTION: In other words, there were two quite separate claims against Owen, one directly by your client and, secondly, by Omaha Power District against them indirectly, isn't that right?

MR. SCHREMPP: Yes, based on --

QUESTION: Once Omaha Power was out of the case,



then the third party complaint necessarily fell, too, didn't it?

MR. SCHREMPP: Not under these circumstances, we feel, no, your Honor.

QUESTION: How could they be liable by way of a third party complaint if the third party plaintiff had prevailed, had been found not liable at all?

MR. SCHREMPP: You mean in my hypothetical case here?

QUESTION: Yes.

MR. SCHREMPP: All right. The jury could have found that the Omaha Public Power District was not negligent in the construction and maintenance of the wires. The jury could have found that the Owen Erection and Equipment Company was negligent in the operation of its crane.

QUESTION: But that would not justify a recovery on the third party complaint, because the third party complaint is brought by Omaha Power against Owen, and if Omaha Power had no liability, it had no injury and nothing to recover over in the third party complaint.

MR. SCHREMPP: Omaha Public Power District might have failed on its third party complaint, but I feel that we were --

QUESTION: You recover only directly against Owen just as though you had never sued Omaha Power at all.

MR. SCHREMPP: No, because we couldn't have sued Owen directly originally, but it was a proper impleader under

Rule 14 by Omaha Public Power District and then Owen --

QUESTION: Only so far as it related to Omaha Power's claim over against Owen. The impleader didn't justify it, unless I misunderstand you, didn't justify your asserting an independent claim of negligence on behalf of Kroger against Owen, did it?

MR. SCHREMPP: Basically, the Omaha Public Power District alleged that Owen was negligent and therefore made them a third party defendant.

QUESTION: And then you filed a separate pleading in which you made such allegation.

MR. SCHREMPP: Yes.

QUESTION: And the question is whether that pleading is one that the Federal court can entertain.

MR. SCHREMPP: Yes. And it's the old A against B, B against C. Is there a question can C counterclaim against A. One of the comments of Mr. Justice White, I believe, pointed that out. And A cannot proceed against C. We don't think that's so.

QUESTION: Are there cases holding that A can proceed directly against C?

MR. SCHREMPP: Yes, your Honor.

QUESTION: What are those cases?

QUESTION: What are those cases? This case is the court of appeals. Prior to this case.

MR. SCHREMPF: Your Honor, when I say cases, I felt that perhaps the word "law," and when I say "law" I felt perhaps I was referring to all of the legal writers, Moore, Wright & Miller, everyone. Cases holding that, yes, your Honor. Cases that were persuasive in Nebraska. The opinion of the Honorable Robert Van Pelt in two cases -- it's in the brief. Robert Van Pelt in Nebraska had held that exact thing in two district court cases. Robert Van Pelt, his Honor in Nebraska, is a highly regarded judge. They are district court opinions.

I think we have a difficulty in connection with case law in this in that in most cases the statute of limitations has not run, and if a district court rules against the existence of the third party claim, rather than go through the, let's say expense, let's say uncertainty, of an appeal, that many district court cases are allowed to remain one way or the other, because the State court remedy is still available. In other words, rather than take the chance of simply filing in State court. And I think that even in Kenrose, which is the case that is urged most vigorously by the petitioner, even in Kenrose, there is some possible interpretation of the perhaps reluctance to abide by a hard and fast prohibitory rule. And in that particular instance, in Kenrose, the court did say -- excuse me.

Kenrose was in 1971. In September of 1975 the Fourth Circuit again had the situation where they approached

this particular problem. They said this: They said in Kenrose v. Fred Whitaker we broadly held that there must be an independent basis of jurisdiction of a claim by a plaintiff against a third-party defendant. And then in footnoting, they said, "After Kenrose was decided," and they cited another section of a case previously decided. Then they say this, "Were we inclined" -- and they are talking about the harsh prohibitory rule -- "Were we inclined under any other context to reconsider the absolute rule of Kenrose, we would not find it appropriate to do so here."

In other words, what we are contending basically and simply is this, that the presence of a rule without exception, of an absolute, prohibitory rule, under the circumstances of this particular case, of this particular case, would be unjust and inequitable.

QUESTION: Judge Sobeloff's opinion in Kenrose was absolute and prohibitory only in the sense that it said, If you are going to go into the Federal court, which is a court of limited jurisdiction, you are going to have to bear the burdens as well as the benefits. You have available to you your State court of general jurisdiction in which you won't suffer those, and that is your alternative.

MR. SCHREMPF: In that particular case, I believe the facts were slightly dissimilar, your Honor, slightly dissimilar.

QUESTION: Didn't Judge Sobeloff say in Kenrose that the plaintiffs could have gone into the State court without having all of the problems that were now raised because of pendant and ancillary jurisdiction?

MR. SCHREMPP: Yes, and he said the State court remedy was then available to the plaintiff, and the plaintiff's State court remedy in Kenrose, I assume, was available and no statute had run upon it.

QUESTION: Your State court remedy was available the day you filed in Federal court, was it not?

MR. SCHREMPP: The day we filed in Federal court?

QUESTION: Yes.

MR. SCHREMPP: I believe in our situation with Owen being in there as a party --

QUESTION: I don't think --

MR. SCHREMPP: -- we could have filed. In other words, if we had filed in State court after Owen, after OPPD impleaded Owen and then we filed an action in State court against Owen, I feel that Owen -- we were all properly in Federal court, all properly in Federal court, under not only our local rule --

QUESTION: But you still haven't said could you have filed as of the date you filed your original lawsuit in State court against Owen, or could you have filed as of the date you filed your amended complaint against Owen?



MR. SCHREMPP: I believe we could have filed as of the date we filed our amended complaint --

QUESTION: Certainly you could have filed as of the date --

MR. SCHREMPP: The timetable is fairly complicated. I think it makes it clear. In other words, in January 1974 the Iowa statute of limitations ran. On that particular date, all three parties were properly in Federal court. No one would quarrel with that. All three parties were properly in Federal court.

QUESTION: They were properly in Federal court, but was it proper in that case for A to be suing C?

MR. SCHREMPP: Yes, your Honor, we contend it was, for the same reason that Mr. Justice White mentioned, C could have sued A, and it would be highly unjust if A couldn't sue C. We feel that that remedy, and our position is espoused, we --

QUESTION: I know the brief explains this, but why didn't you sue C in the first place?

MR. SCHREMPP: Why didn't we sue C in the first place?

QUESTION: Yes.

MR. SCHREMPP: Because we didn't even know about C in the first place.

QUESTION: They were a lessee of the employer, is that it?

MR. SCHREMPP: No. The situation was this, Mr.

Justice Stevens: We sued because we felt that the power lines had killed our client's husband.

QUESTION: You couldn't have sued them either.

MR. SCHREMPP: Pardon?

QUESTION: There was no jurisdiction in the first place, was there?

MR. SCHREMPP: Oh, yes.

QUESTION: I thought --

MR. SCHREMPP: I am talking about A against B now.

QUESTION: Yes.

MR. SCHREMPP: Our client against Power District, our client Iowa, Power District Nebraska.

QUESTION: Yes.

MR. SCHREMPP: So we brought our action properly there.

QUESTION: Yes.

MR. SCHREMPP: Does that answer your question or did your question --

QUESTION: Why didn't you sue Owen in the first place?

MR. SCHREMPP: Why didn't we sue Owen in the first place?

QUESTION: In the State court. Why didn't you sue them right away?

MR. SCHREMPP: Because the evidence against Owen, in other words, the defectiveness of their crane and things

like that, was developed later. We felt that the primary, the first serious suit that we had was that those wires should not have been allowed there in the presence of moving cranes. The crane was owned by Owen Erection and Equipment Company. It was operated, however, by an employee of Paxton-Vierling. Paxton-Vierling was also the employer of our client.

QUESTION: Oh, the Workmen's Compensation problem.

MR. SCHREMPP: Of course.

QUESTION: Sure. That's the answer.

MR. SCHREMPP: And it turned out that that situation was not true at all, because under the borrowed servant rule of Iowa, it was not under Workmen's Compensation. That explains it as well as I could.

QUESTION: It's in your brief, and I am sorry.

MR. SCHREMPP: It's a natural question, why didn't we --

QUESTION: You stumbled into it through discovery really, is what it amounts to.

MR. SCHREMPP: Yes.

QUESTION: When did you first learn that Owen indeed had its principal office in Iowa?

MR. SCHREMPP: On the third day of trial, your Honor.

QUESTION: And that was '76?

MR. SCHREMPP: That was 1976.

QUESTION: Your adversary suggests that you had taken some depositions which had acquainted you a couple of years earlier with the fact that Owen indeed had its chief office in Iowa.

MR. SCHREMPP: What my adversary refers to is the fact that a deposition was taken in the offices of the Paxton-Vierling Company in which they say, You should have known. Now, they themselves say --

QUESTION: Should have known what?

MR. SCHREMPP: Should have known that this was an Iowa resident.

QUESTION: Which? Owen was?

MR. SCHREMPP: Owen, yes. Then they filed an affidavit after the court of appeals' opinion in which they say that for the first time they knew on the third day of trial when the local counsel, in other words, the corporate counsel for the company, called their attention to it.

QUESTION: "They" being your adversary?

MR. SCHREMPP: Pardon?

QUESTION: Your adversary filed an affidavit?

MR. SCHREMPP: Yes.

QUESTION: After the court of appeals judgment?---

MR. SCHREMPP: Yes.

QUESTION: Stating what?

MR. SCHREMPP: Stating that they became aware of

the fact that they were an Iowa principal place of business only on the third day of the trial. And we in our brief objected to that, and I object to it here, because of the fact that it was an ex parte affidavit filed after the court of appeals opinion in this case, and it was not subject to cross-examination. If it had been subject to cross-examination, it would certainly have fallen because the charter of the company names its principal place of business as being in the State of Nebraska, which I attach as an appendix, in the same manner that they attach their affidavit as an appendix. Their affidavit was an affidavit of one attorney for the defendant in favor of another attorney for the defendant. My affidavit was from the Secretary of State of the State of Nebraska.

QUESTION: Are you telling us that everything you knew or had reason to know indicated that its principal place of business as well as its corporate office was in the State of Nebraska?

MR. SCHREMPP: Yes, both in the records of the State of Nebraska and the records of the State of Iowa. And had this matter been raised earlier, this would have been produceable for the record at that time. Even with respect to the records of the State of Iowa where they applied for permission to do business in the State of Iowa, their principal place of business, if counsel urges this, this is a certificate from the State of Iowa, from the Secretary of State of the State of



Iowa in which they apply to do business in the State of Iowa in the germane times to this case and say, in effect, their principal place of business is in the State of Nebraska and they are applying for permission and authority from the State of Iowa to do business in that State.

QUESTION: Are you saying we don't know yet where it is?

MR. SCHREMPP: I know where the principal place of business is, your Honor.

QUESTION: In the record now, where are we going to find it?

MR. SCHREMPP: Pardon?

QUESTION: In the record all I saw was that affidavit.

MR. SCHREMPP: In the record? Everyone at trial time because it was a sudden thing --I will say that this case was given birth to in a spirit of judicial economy. I personally, and I am a small office, I have two other attorneys, both young attorneys, one law student, I was personally engaged in a State trial. At that particular time the word came from the United States district court, "We are going to start the Owen case because it is one of the oldest cases on the docket." It was because it had been up to the court of appeals and back. And I said, "I can't walk out of the State court case; I will call the judge." I called the judge, his bailiff said, "No,

It's the oldest case on the docket, send somebody else down."  
I did. I had to. You may look on Federal judges from here,  
but we look on them as god-like where we are from, and when  
they say, "Come down and try the case, and if you can't do it,  
send somebody from your office," I had one choice. I sent my  
young lawyer down. Perhaps in the heat of battle --

QUESTION: Either that or --

MR. SCHREMPP: I am certainly not disparaging in any  
way, shape, or form from his efforts. In the heat of battle  
perhaps --

QUESTION: I don't see anything wrong when you take  
the certificate of the Nebraska government which shows the  
office as being in Nebraska. I don't see where you have to go  
further.

MR. SCHREMPP: I don't either.

QUESTION: You rely on a State document.

MR. SCHREMPP: They were at the time of trial, they  
were under the record of Nebraska, they were under the records  
of Iowa.

QUESTION: That certificate that you were just  
holding in your hand --

MR. SCHREMPP: I know it's not an original.

QUESTION: That's what I was asking. It's not from  
the original files?

MR. SCHREMPP: Pardon?

QUESTION: Not in the files in the record in this case?

MR. SCHREMPP: No. After, very frankly just on June 10 -- I am sorry, on April 7, 1978, I thought to myself --

QUESTION: I take it it's a public document, isn't it?

MR. SCHREMPP: Yes, it's a public document.

QUESTION: Could we judicially notice it, do you think?

MR. SCHREMPP: Pardon?

QUESTION: Could we notice it judicially?

MR. SCHREMPP: It's a public document. I don't know. It's a public document of the State of Iowa through the Secretary of State.

QUESTION: When was the contrary affidavit filed? After the court of appeals' opinion you said.

MR. SCHREMPP: The contrary affidavit, after the court of appeals' opinion, was filed, it was subscribed to about the 29th of June. The date of the court of appeals' opinion preceded that by a substantial length of time, and our affidavit of the Secretary of State of the State of Nebraska was filed as a counter affidavit to that. The date of the opinion was June 21, 1977. The date of the opinion of the court of appeals of the Eighth Circuit was June 21, 1977. The date of the affidavit was, as I mentioned, after that time.

QUESTION: June 29th, I think you said.

MR. SCHREMPP: Yes. And then we included in our brief a copy of the affidavit from the Secretary of State of the State of Nebraska that says the principle place of business is in Nebraska and also available would have been the Secretary of State's certification of the State of Iowa that they applied to do business in the State of Iowa naming their principal place of business as Omaha, Nebraska, 30-something Farm Street.

QUESTION: Mr. Schrempp, did you rely on that document at any time prior to the end of the trial?

MR. SCHREMPP: No, your Honor.

QUESTION: You didn't know about it, did you?

MR. SCHREMPP: No, we did not. That was one of the unfairness and the disadvantage of having the thing blasted at my young associate in the middle of a trial that concerned not only one issue, but several very complicated issues. We took the word of the Secretary of the Owen Corporation.

QUESTION: Rather than the official record. But you didn't check the official record?

MR. SCHREMPP: No, it came up that fast.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Sodoro?

REBUTTAL ARGUMENT OF EMIL F. SODORO ON  
BEHALF OF PETITIONER

MR. SODORO: I do, indeed, your Honor.

QUESTION: Do you think we could not take judicial notice of the certificate that we have been discussing, the official records of the State of Nebraska?

MR. SODORO: Of course not. It's not in the record in this case. Not at all.

QUESTION: If it were in the record, we wouldn't be talking about judicial notice.

MR. SODORO: I realize that.

QUESTION: We judicially notice what is not in the record.

MR. SODORO: I don't think that's possible, sir.

But after you hear me in this regard, you will find that there is no reason for that.

First of all, let me say this: There is a judicial finding by Judge Denney in the record in this case which is to the effect that this petitioner before this Court today is in fact an Iowa resident. Bear in mind, gentlemen, that there are two places that a corporation can exist for purposes of jurisdiction under the law which grants jurisdiction to the Federal court. One place, of course, is the place that it is domiciled where the articles of incorporation are filed, no question about that. But the Congress of the United States has declared by law that an additional place of corporate existence is where that corporation has its principal place of business.

In order to clear the record absolutely complete for



you, Mr. Justice Brennan, particularly in regard to your question to Mr. Schrempp, I don't believe that the answer to that question was accurate with respect to the record, and I would like to straighten the record out for you.

In that regard, the allegation made by the respondent here against the petitioner was this --

QUESTION: Where are you reading from?

MR. SODORO: I know it by heart, but I don't know if I can find it.

QUESTION: We don't.

MR. SODORO: Would you please look at the appendix, page No. 23, amended complaint, at the bottom of the page, gentlemen, under paragraph II.

The recitation made by this plaintiff in her direct claim now against the defendant is, "That the defendant Omaha Public Power District, a public corporation, is a public corporation organized and existing under the laws of the State of Nebraska and having its principal place of business in Omaha, Douglas County, Nebraska; that the defendant, Owen Equipment and Erection Co. is a Nebraska corporation with its principal place of business in Nebraska."

Now, our answer demanded strict proof, you see, of this allegation, strict proof that in order for the Federal court to have jurisdiction over the defendant, then it became necessary upon this plaintiff to prove in the case where we

end up being the direct defendant, to prove that we were in fact a Nebraska corporation and that our principal place of business was in Nebraska.

QUESTION: Turn to page 28 of the appendix, in paragraph 1 of your answer. You say you admit that Owen Equipment and Erection Company is a corporation organized and existing under the laws of the State of Nebraska.

MR. SODORO: Right. That's all. We do not admit in that answer that they have as their principal place of business, you see, Omaha, Nebraska.

QUESTION: Right.

MR. SODORO: And therefore our demand comes now for the strict proof. The only proof presented at the trial in connection with the citizenship of the defendant Owen, the only proof was the proof from the officers of the Owen Equipment Company which was that their principal place of business was in Iowa. And Judge Denney therefore made a judicial finding that --

QUESTION: Where is that?

MR. SODORO: Beg your pardon, sir?

QUESTION: Where is Judge Denney's finding?

MR. SODORO: Oh, I don't know if I can find it. It's also recited in the opinion of the Eighth Circuit.

As a matter of fact, we have cited in our reply brief some of the words from the record as recited by Judge

Denney. On page 6 he says this: "I don't think they ever admitted anything" -- and he is referring now to the defendant Owens -- "I don't think they ever admitted anything. The proof here before this Court today by the Secretary of the Owen Equipment and Erection Company, their principal place of business was in Carter Lake, Iowa." That was the only proof in the trial of the case, gentlemen.

The trial court in its memorandum as filed, which is also part of the record, found this: "Plaintiff, an Iowa citizen, alleged that jurisdiction was based upon 28 U.S.C. 1332, that the defendant is incorporated in the State of Nebraska and has his principal place of business there. It is now uncontroverted, however, that defendant's principal place of business is in the State of Iowa. Hence, an independent basis of jurisdiction does not exist."

QUESTION: It is not sufficient under these Federal statutes then if the plaintiff is a resident of Iowa, the defendant corporation is incorporated in Nebraska but has its principal place of business in Iowa.

MR. SODORO: Then for the purposes of the Federal jurisdiction statute, both those parties are residents of the same State.

QUESTION: So there is no diversity.

MR. SODORO: So there is no diversity of citizenship, and all of the decisions are to that effect.

And in answer to one of your earlier questions, Mr. Justice White, you asked me why isn't it then that a plaintiff could sue a third-party defendant if a third-party defendant under the decisions could sue the original plaintiff.

QUESTION: And if the third-party defendant is from the same State as the plaintiff.

MR. SODORO: Yes. The reason for that is that careful reading of the Kenrose v. Fred Whitaker case and what we consider to be a very astute opinion by the circuit judge sets that out exactly and precisely as being a violation of the jurisdictional requirements set forth by Congress on Federal courts.

QUESTION: You are saying again he can't, but why?

MR. SODORO: I am telling you that's that decision, and as a lawyer I would like to think that we follow those decisions. When you say why, it is because the Federal court, your Honor, is a court of very limited jurisdiction. And that was such an important matter that the framers and writers of our Constitution in Article III make that recitation. And I think that the history of the decisions by the Federal courts --

QUESTION: Why may the third-party defendant, however, sue the plaintiff even though he is from the same State as the plaintiff?

MR. SODORO: It appears that the rationale, or at least the rationale I get from the examination of the cases,

is the plaintiff has selected the forum, and although it has not made a direct claim against the third-party defendant, that the third-party defendant, because he is brought into the case in which he had no participation concerning the institution, has that right as a matter of defense of this claim against the original defendant to counterclaim against the plaintiff.

Gentlemen, I think I am out of time. I wish to thank you very much for your courtesy.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:25 p.m., the oral arguments in the above-entitled matter were concluded.)



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