A lawyer who wants to raise the problem, hoping to come within the "affirmative sanction" caveat of the *Wolf* case, must exercise care in preserving the question. The practice required in the federal courts is the making of a timely pre-trial motion to suppress or recover the evidence.[25] That this would be wise, at least, in making an Iowa record is indicated by *State v. Gillam*,[26] holding that a motion to quash evidence not made until a second trial of the case, more than a year after the return of the indictment, was not timely; the delay had waived any right that might have existed.

A post-conviction method of obtaining federal review exists. After all state remedies are exhausted[27] the prisoner may apply to the federal district court in the district of confinement for a writ of habeas corpus on the ground that he has been deprived of his liberty in violation of the Fourteenth Amendment.[28] But this does not increase his rights; it is merely another procedure by which he may attack the state proceeding.[29]

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[25] Fed. R. Crim. P. 41(e).
[26] 230 Iowa 1287, 300 N.W. 567 (1941).
[27] 28 U.S.C. § 2254 (1948); Note, 34 MINN. L. REV. 653 (1950). A petition for certiorari is a state remedy which ordinarily must be exhausted. Darr v. Burford, 339 U.S. 200 (1950).
[28] 28 U.S.C. § 2241(c)(3) (1948); Note, 61 HARV. L. REV. 657 (1948).
[29] Note, 61 HARV. L. REV. 657, 667 (1948).

THE CONSENT STATUTE: DRIVER'S DECLARATIONS AND OWNER'S LIABILITY

> "In all cases where damage is done by any car by reason of negligence of the driver, and driven with the consent of the owner, the owner of the car shall be liable for such damage."[1]

Liability of the owner under this statute depends upon (1) liability for negligence on the part of the driver and (2) the consent of the owner to the use of the car.[2]

A problem has appeared in the case where evidence of negligence of the driver consists of admissions and declarations of the driver as to his conduct or condition, made at or after the time of the accident.[3] For example: plaintiff collides with an automobile then being operated by a driver who has the owner's consent. Immediately upon alighting from the car the driver says, "I know I was driving fast.[4] I lost my head and stepped on the accelerator instead of the brakes."[5]

In an action by the plaintiff against the driver alone, plaintiff may introduce in evidence these statements to prove the driver's negligence because they fall within the admission-of-a-party-opponent exception to the hearsay rule.[6]

In an action by plaintiff against the owner alone, the plaintiff must prove negligence of the driver as a part of his cause of action. These same statements of the driver would not then be admissions of a party opponent; to be admissible at all they must fall within some other exception. The one most frequently employed is called spontaneous or excited utterances, or, as it is generally described by the Iowa Court, res gestae.[7] This distinction depends upon the proposition that an admission of a party opponent is available only as against that party,[8] while the area generally described as res gestae depends not upon the status of the declarant but upon his condition at the time the statements were made.[9]

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[1] IOWA CODE § 321.493 (1950).

[2] Robinson v. Bruce Rent-A-Ford Co., 205 Iowa 261, 215 N.W. 724 (1927); Note, 61 A.L.R. 866 (1929).

[3] Skalla v. Daeges, 234 Iowa 1260, 15 N.W.2d 638 (1944); Broderick v. Barry, 212 Iowa 672, 237 N.W. 481, 75 A.L.R. 1530 (1931); Duncan v. Rhomberg, 212 Iowa 389, 236 N.W. 638 (1931); Ege v. Born, 212 Iowa 1138, 236 N.W. 75 (1931); Wieneke v. Steinke, 211 Iowa 477, 233 N.W. 535 (1930); Looney v. Parker, 210 Iowa 85, 230 N.W. 570 (1930); Cooley v. Killingsworth, 209 Iowa 646, 228 N.W. 88 (1930); Wilkinson v. Queal Lumber Co., 208 Iowa 933, 226 N.W. 43 (1929).

[4] See Duncan v. Rhomberg, 212 Iowa 389, 236 N.W. 638 (1931).

[5] See Looney v. Parker, 210 Iowa 85, 230 N.W. 570 (1930).

[6] *E.g.*, Tuthill v. Alden, 239 Iowa 181, 30 N.W.2d 726 (1948).

[7] *E.g.*, Skalla v. Daeges, 234 Iowa 1260, 15 N.W.2d 638 (1944); Duncan v. Rhomberg, 212 Iowa 389, 236 N.W. 638 (1931).

[8] 4 WIGMORE, EVIDENCE § 1076 (3d ed. 1940).

[9] 3 JONES, EVIDENCE § 1196 (2d ed. 1926).

Plaintiff usually, however, elects to join both the driver and the owner in a single action. The jury in the joint action hears the statements as admissions of the driver. The question at this point is whether such statements are competent to support a verdict against the owner. Does the fact that they are joined make the character of proof necessary to establish liability of the owner different from what it would be in an action against the owner alone?[10]

The owner's liability for injuries and damages sustained by reason of the driver's negligence is not regarded as purely statutory in origin; the prevailing view in the Iowa cases is that it is an extension of the doctrine of respondeat superior.[11] A strong dissent in an early case indicated that the consent statute is not properly so viewed, and that a showing of liability on the driver's part, by evidence competent against him, together with evidence showing consent on the owner's part, is sufficient to support a verdict against the owner.[12] This viewpoint has been rejected by the majority; it is not all evidence of negligence of the driver that is admissible as against the owner. The negligence of the driver for which the owner may be liable must be established against him by the usual and ordinary rules of evidence.[13] The consistent view of the Iowa Court has been that if the statements are admissions only of the driver they are admissible against him alone, and the court must instruct the jury to disregard them in considering the liability of the owner.[14] If these statements fall within what the court calls the "res gestae" rule, however, they are substantive evidence of the matters stated against both defendants.[15]

It is submitted that the view of the dissent is untenable. The statutory scheme is, indeed, broader than respondent superior, whether it be called an extension of that doctrine or not, but the element of negligence is in no way changed. The cause of action against the owner now consists of liability of the driver plus consent of the owner, instead of liability of the driver plus agency. The liability of the driver is the same whether the liability of the

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[10] See, *e.g.*, Cooley v. Killingsworth, 209 Iowa 646, 228 N.W. 88 (1930); Wilkinson v. Queal Lumber Co., 208 Iowa 933, 226 N.W. 43 (1929).

[11] *Ibid.;* Maine v. Maine & Sons Co., 198 Iowa 1278, 201 N.W. 20, 37 A.L.R. 161 (1924). *But cf.* Krausnick v. Haegg Roofing Co., 236 Iowa 985, 20 N.W.2d 432, 163 A.L.R. 1413 (1945); Lind v. Eddy, 232 Iowa 1328, 6 N.W.2d 427 (1943).

[12] *See* Broderick v. Barry, 212 Iowa 672, 675, 237 N.W. 481, 482, 75 A.L.R. 1533 (1931) "Our statutory law is being overlooked in this line of cases." The same judges dissented in Wilkinson v. Queal Lumber Co., 208 Iowa 933, 939, 226 N.W. 43, 46 (1929).

[13] Cases cited note 10 *supra.*

[14] Ege v. Born, 212 Iowa 1138, 236 N.W. 75 (1931); Cooley v. Killingsworth, 209 Iowa 646, 228 N.W. 88 (1930). A fact sometimes overlooked is that under the National Standard Automobile Policy the "insured" includes ". . . any person while using the automobile . . . , provided the actual use . . . is by the named insured or with his permission." Recourse may be had to the owner's insurer without getting a judgment against the owner.

[15] Cases cited note 7 *supra.*

owner rests upon an extension of respondeat superior or upon a new statutory responsibility, and must be established in the same way. The dissenters were evidently disturbed by the fact that in a single proceeding the evidence is both sufficient to support a finding of negligence for one verdict and insufficient to support it for another, and that inconsistent verdicts may be reached. But this arises from defects in evidence rules rather than in the foundations of liability.

The wisdom of using the term "res gestae" for this class of testimony has been subjected to constant criticism as being inaccurate and ambiguous[16] but the Iowa Court has persisted in its use. The Court applies the term to spontaneous exclamations made contemporaneously with the act done.[17] This is a misclassification; in accident cases the collision itself is the res gestae. The words uttered so close in time to the collision and before the declarant has opportunity to calculate a false answer are an exception to the hearsay rule not because they are a part of the transaction or occurrence but because they have such a sufficient safeguard for the truth that the possibility of falsehood is negligible, the spontaneity of the utterances being their guaranty of trustworthiness.[18] They are not narrative of past happenings since they are uttered while the mind is under the influence of the activity of the surroundings. In determining whether these declarations are spontaneous, the following elements are to be considered: the time lapse, the circumstances of the accident, the mental and physical condition of the declarant, the shock produced, the nature of the utterance, and other material facts tending to show spontaneity and an absence of opportunity for contrivance and misrepresentation.[19] The element of time is no longer considered to be the decisive factor by the Iowa Court; it merely goes to show spontaneity.[20]

It is a possible justification of the Iowa cases that when the court uses the term "res gestae" it is as a shorthand way of saying that the declarations were so close in point of time to the occurrence that they satisfy all the tests for the spontaneous exclamation exception. The latest Iowa cases place their emphasis on the proper elements in determining admissibility,[21] even though they mislabel the doctrine.

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[16] See 3 JONES, EVIDENCE § 1193 (2d ed. 1926); MCKELVEY, EVIDENCE § 276 (5th ed. 1944); 6 WIGMORE, EVIDENCE § 1756a (3d ed. 1940); Note, 14 IOWA L. REV. 87 (1928).

[17] Cases cited note 7 *supra*.

[18] See State v. Berry, 241 Iowa 211, 215, 40 N.W.2d 480, 483 (1950); State v. Stafford, 237 Iowa 780, 785-787, 23 N.W.2d 832, 835-836 (1946).

[19] *Ibid.*; Stukas v. Warfield-Pratt-Howell Co., 188 Iowa 878, 175 N.W. 81 (1919).

[20] Cases cited note 18 *supra*. In State v. Berry, 241 Iowa 211, 40 N.W.2d 480 (1950), the statements were made about fourteen hours after the event.

[21] Cases cited note 18 *supra*.