Recent Decisions

Criminal Law — Admissibility of Confession — Delay In Arraignment

Defendant was arrested in his New York office for the violation of a presidential proclamation prohibiting the export of lard to Italy. The arrest occurred at 1:45 p. m. and questioning began at 3:30 p. m. in the customs office. Defendant willingly directed the officers to the files in his office containing important evidence in the case. The officers left to examine that evidence and did not return until 6:30 p. m. Questioning was resumed at 9:20 p. m. and continued until shortly after midnight, when it was completed. Defendant was then taken to a place of detention and was finally arraigned at 7:00 p. m. the following day. At the trial the defendant objected to the introduction of the incriminatory written statement on the ground that it was obtained during illegal detention and violated the rule of *McNabb v. United States,* 318 U. S. 332 (1943). The trial court refused to so rule. On appeal, *held,* affirmed. The delay was the result of defendant's readiness to aid the officers and was reasonable under the circumstances. *United States v. Leviton,* 193 F. 2d 848 (2d Cir. 1951), *cert. denied,* 343 U. S. 946 (1952).

Prior to the *McNabb* decision it was a well settled rule of evidence that the important test of admissibility of a confession was whether or not it was given voluntarily. *Ward v. Texas,* 316 U. S. 547 (1942). Delay in arraignment was only a factor to be considered in deciding voluntariness. *Chambers v. Florida,* 309 U. S. 227 (1940). The *McNabb* case, however, laid down the doctrine that confessions obtained during illegal detention due to failure promptly to arraign the prisoner in accordance with Fed. Rules Crim. Proc. rule 5 (a), 18 U. S. C. (1946), were inadmissible in evidence. The *McNabb* doctrine excited a great deal of adverse comment, chiefly on the grounds that it would unduly hamper effective law enforcement. See Comments, 42 Mich. L. Rev. 909 (1944), 43 Ill. L. Rev. 422 (1948). State courts generally declined to follow the doctrine and instead retained the test of voluntariness. *Gallegos v. Nebraska,* 342 U. S. 55 (1951); *Ohio v. Lowder,* 79 Ohio App. 237, 72 N. E. 2d 785, *appeal denied,* 147 Ohio St. 340, 70 N. E. 2d 905 (1946).

In *United States v. Mitchell,* 322 U. S. 65 (1944), the Supreme Court attempted to clarify the application of the *McNabb* rule. The decision itself was limited to the ruling that a subsequent unreasonable delay does not have the affect of rendering inadmissible a voluntary

statement made immediately following arrest. The broad dicta of the case seemed to intimate, however, that the ultimate test of admissibility was still voluntariness and that the effect of the *McNabb* decision was only to extend the traditional test to include certain psychological as well as all methods of physical coercion. The lower courts were quick to interpret this as a qualification of the *McNabb* decision and as authority for rulings to the effect that in the absence of coercive measures the *McNabb* rule would not apply. *United States v. Heitner,* 149 F. 2d 105 (2d Cir. 1945); and *United States v. Corn,* 54 F. Supp. 307 (E.D. Wisc. 1944).

The Supreme Court apparently intended to curtail this relaxation of the original *McNabb* ruling with its decision in *Upshaw v. United States,* 355 U.S. 410 (1948). In that case the court made it quite clear that it was basing its exclusion of a confession on the fact that the defendant was illegally detained prior to arraignment for approximately thirty hours. There was no indication that coercion, psychological or otherwise, was necessarily involved in the interrogation methods there employed by the police.

The latest Supreme Court interpretation of the rule came in *United States v. Carignan,* 342 U.S. 36 (1952). There the court held that a confession of murder obtained from the defendant while in custody after arraignment on a wholly distinct charge was not violative of the rule. Mr. Justice Douglas, dissenting in opinion but concurring in the decision, of reversal on other grounds, argued that the majority holding would be interpreted as widely permissive of arrests on minor or "trumped up" charges for the purpose of further interrogation of the prisoner concerning a major crime, "A Time-Honored Police Method for Obtaining Confessions."

Prior to the principal case, the Second Circuit Court of Appeals had laid down further qualifications of the *McNabb* rule. Without reliance on the alleged limitation of the rule in *United States v. Mitchell, supra,* the court had reasoned, in *Keegan v. United States,* 141 F. 2d 248 (2d Cir. 1944), *rev'd on other grounds,* 325 U.S. 478 (1944), that the rule only required that arraignment be as prompt as possible. In that case the difficulty of locating a magistrate over a double holiday was held to be sufficient reason for a two day delay in arraignment and the confession was admitted. *United States v. Walker,* 176 F. 2d 564 (2d Cir. 1949), *cert. denied,* 338 U.S. 891 (1949), was to the same effect and the court further provided that the defendant must carry the burden of showing that arraignment prior to the Labor Day week-end was feasible before the rule would apply. In *United States v. Heitner, supra,* the court followed the rule of *United States v. Mitchell, supra,* and said that a confession given immediately and spontaneously upon arrest did not fall within the rule.

But even these prior decisions of the Second Circuit had not gone

nearly so far toward a neutralization of the *McNabb* doctrine as does the principal case. The holdings of the Second Circuit in the *Keegan* and *Walker* cases, *supra,* that the rule must be applied in a reasonable, not technical, manner is supported by several decisions in other circuits. *Garner v. United States,* 174 F. 2d 499 (D.C. Cir. 1949), *cert. denied,* 337 U.S. 945 (1949); *Symonds v. United States,* 178 F. 2d 615 (9th Cir. 1949), *cert. denied,* 339 U.S. 985 (1949); and *Patterson v. United States,* 192 F. 2d 631 (5th Cir. 1951), *cert. denied,* 343 U.S. 951 (1952). The principal case, on the other hand, represents a substantial exception to the rule. There is nothing in the *McNabb* decision, or the Federal rules, to indicate that the actions of the defendant are to determine the application of the rule, although it may be assumed that if the defendant requested or purposely caused a delay in arraignment, and it was to his advantage, he would not later be allowed to complain. There is one other case, *Haines v. United States,* 188 F. 2d 546 (9th Cir. 1951), *cert. denied,* 342 U.S. 888 (1951), in which it was held that an arraignment could be delayed, without violation of the rule, while officers gathered evidence pointed out to them by the defendant. There the Ninth Circuit Court of Appeals said that it was often to the advantage of defendants to have arraignment, with its resulting publicity, delayed while it was determined if sufficient evidence existed. Reasoning such as that seems to beg the question and, carried to its ultimate end, could destroy the rule altogether. The aim of the *McNabb* rule is to protect persons from police "third degree" methods and the mode of enforcement is by this procedural check on the misconduct of Federal officers. As Judge Frank pointed out in his dissent in the principal case, it is impossible to justify this holding by analogy to the "necessary delay" in cases like *Keegan v. United States, supra.* "Reasonableness of the delay will probably depend upon the time required to carry the suspect to the commissioner, not on the time desired to keep him away from the commissioner." Officers can comply with the rule by acquiring adequate evidence before arrest and then promptly arraigning the prisoner. There is no good reason why additional evidence voluntarily pointed out by the defendant could not be investigated *after* arraignment.

The Supreme Court decisions indicate that the court is not yet ready to abandon the *McNabb* rule, or even to qualify it to any appreciable extent. The *Upshaw* case, *supra,* clearly refutes the alleged intent of the dicta in the *Mitchell* case, *supra,* and the *Carignan* case, *supra,* seems to be little more than a rule of reason applied to rather exceptional circumstances. The *McNabb* rule was intended as a means of preventing any opportunity for improper pressure by the police and the reasons for it are just as strong today as they were when the case was tried. There is a great deal that can be said, both pro and con, as to the resulting decisions, but the argument is but a continuation of

the age-old conflict of individual and public security. Although the new Justices on the Court may feel inclined to overthrow, or dilute, the rule, the law at this juncture calls for a straight-forward application of the rule. The principal case cannot be reconciled with this standard.

William R. Hapner Jr.

PLEADING—JOINDER OF CONCURRENT TORTFEASORS

Plaintiff, a passenger on a streetcar of the Cincinnati Street Railway Co., was injured in a collision between the streetcar and a truck operated by Walker. The plaintiff joined the Railway Co. and Walker as defendants on the theory that the injuries sustained were caused by the joint and concurrent acts of negligence of both parties. A demurrer to the petition for misjoinder of defendants was sustained by the trial court. On appeal, *held,* reversed. Joinder of defendants is proper where an injury is proximately caused by the independent but concurrent wrongful acts of two or more persons, even though the parties were not acting in concert in the execution of a common purpose and the want of care of the defendants may not have been of the same character. *Meyer v. The Cincinnati Street Ry. Co.,* 157 Ohio St. 38, 104 N.E. 2d 173 (1952).

The early common law limited joinder of defendants to situations where concert of action and mutual agency were present. This concert requirement was developed before the law recognized negligent torts, but was later carried over to apply to joinder of negligent as well as to joinder of intentional tortfeasors. PROSSER, TORTS 1098 (1941), and cases cited.

The enactment of the codes, with the aim of settling all questions connected with a transaction in a single suit, would seem to dispel the view that concert of action was still a necessary element for joinder of defendants. Section 11255 of the Ohio General Code, a typical code provision, states:

> Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved therein.

Notwithstanding the intent of the new codes, courts were at first reluctant to dispense with the common law requirement. Few of the opinions even mentioned the code in deciding the issue of whether the joinder was proper. In recent years, the vast majority of the courts no longer require concert of action as a prerequisite for proper joinder

of defendants when their independent acts combine to produce a single injury. *Glazener v. Safety Transit Lines,* 196 N.C. 504, 146 S.E. 134 (1929); *McDonald v. Robinson,* 207 Iowa 1293, 224 N.W. 820 (1929); *Wery v. Seff,* 136 Ohio St. 307, 25 N.E. 2d 692 (1940), noted 7 OHIO ST. L.J. 278 (1941); RESTATEMENT, TORTS §879 (1934).

Although the rule that concert of action is not required is well settled in most jurisdictions, there had been conflict in the cases when the duty of care owed to the plaintiff by the defendants is of a different character. The majority of courts have ruled that it should make no difference that one defendant may have the duty of exercising ordinary care and the other defendant the duty of exercising the highest degree of care toward the plaintiff, inasmuch as the jury can be instructed as to the duty of each. *Matthews v. Delaware L. & W. R. Co.,* 56 N.J.L. 34, 27 Atl. 919 (1893); *Carlton v. Boudar,* 118 Va. 521, 88 S.E. 174, 4 A.L.R. 1480 (1916); *Floyd v. Williams,* 54 Ga. App. 557, 188 S.E. 467 (1936).

Confusion in the Ohio law resulted from the third paragraph of the syllabus of *Stark County Agricultural Society v. Brenner,* 122 Ohio St. 560, 172 N.E. 659 (1930), which states:

> Joint liability for torts only lies where wrongdoers have acted in concert in the execution of a common purpose and where the want of care of each is of the same character as the want of care of the other.

Later Ohio Supreme Court cases have permitted the joinder of concurrent tortfeasors without requiring a common purpose or the same want of care, but these cases did not directly overrule the *Brenner* case. *Wery v. Seff, supra; Larson v. The Cleveland Railway,* 142 Ohio St. 20, 50 N.E. 2d 163 (1943); *Maloney v. Callahan,* 127 Ohio St. 387, 188 N.E. 656 (1933). As a result, the Appellate Court for the Second District held joinder improper on the authority of the *Brenner* case. *Seabold v. City of Dayton,* 56 Ohio L. Abs. 417, 92 N.E. 2d 701 (1949).

The principal case shows unequivocally that Ohio has adopted the position of the majority of the courts by specifically overruling the *Brenner* case. This view is in conformity with OHIO GEN. CODE § 11255 and is the more realistic approach to the joinder problem, in that it will avoid multiplicity of suits and eliminate inconsistent verdicts that may result if the defendants are sued in separate actions. Although the principal case has taken a step forward in clarifying and liberalizing the Ohio law pertaining to permissive joinder of concurrent tortfeasors whose actions inflict an indivisible injury to the plaintiff; yet, it does not disturb the distinction between primary and secondary liability in determining whether joinder is proper. Ohio has consistently ruled that a party whose liability is entirely secondary cannot

be joined with a primary tortfeasor if on the face of the petition the fact of primary and secondary liability appears. *Bello v. City of Cleveland,* 106 Ohio St. 94, 138 N.E. 526 (1922); *Canton Provision Co. v. Gauder,* 130 Ohio St. 43, 196 N.E. 634 (1935).

Probably the most familiar case is that of joining the master and the servant, where the only wrong charged to the master is vicarious liability based on the employer-employee relationship. Joinder is disallowed in this and other situations where primary and secondary liability are involved, on the theory that there is no joint liability. *Losito v. Kruse,* 136 Ohio St. 183, 24 N.E. 2d 705 (1940); *Kniess v. Armour and Co.,* 134 Ohio St. 432, 17 N.E. 2d 734 (1938); *Cowley v. Bolander,* 120 Ohio St. 553, 166 N.E. 677 (1929).

Thomas E. Cavendish

TAXATION — 5351 GENERAL CODE — PROPERTY EXEMPTION

A portion of a municipally owned public airport was leased to a federal agency for storing grain. The city of Dayton, the lessor, claimed exemption from taxation of the leased premises under Section 5351, General Code, which provides in part that *public property used for a public purpose* shall be exempt from taxation. Article XII, Section 2, of the Constitution of Ohio states: "General laws may be passed to exempt public property used exclusively for *any public purpose*" (emphasis supplied). Both parties conceded that the use was for a public purpose. The court denied exemption, holding that for property to qualify for tax exemption, as public property used for a public purpose, the user of the property and the ownership thereof must coincide, that is, the use must be by the one whose ownership constitutes the property public property. *City of Dayton v. Haines, Aud.,* 156 Ohio St. 366, 102 N.E. 2d 290 (1951).

The majority of the court in the principal case does not divulge the secret as to why use for a public purpose must involve use by the one whose ownership constitutes the property public property. Reading Section 5351 in the light of Article XII, Section 2, one does not easily arrive at this conclusion. The court gave no precedent for this unique interpretation, satisfying itself in merely differentiating this case from *City of Toledo v. Jenkins et al., Board of Tax Appeals,* 143 Ohio St. 141, 54 N.E. 2d. 656 (1944). In the *Toledo* case, *supra,* portions of the buildings and hangars of a municipal airport were rented, and the acreage not occupied by runways was sowed to alfalfa which was cut and sold. Here it was held that these incidental uses did not prevent exemption from taxation.

Perhaps the previous decision of *City of Cincinnati v. Lewis, Aud.,*

66 Ohio St. 49, 63 N.E. 588 (1902), may shed some light on how the court came to this interpretation. The city of Cincinnati acquired land for a water works but because the plant was not erected, rented the land to a farmer. While the result under Article XII, Section 2, seemed obvious, the court was determined to define the meaning of the provisions explicitly. Taking the general rule at that time, that *property owned by a municipality* and not used in the actual exercise of its *municipal function* is subject to taxation, and reading this rule in the light of Article XII, Section 2, Judge Shauck, writing the opinion, concluded that public ownership of property was not alone sufficient to exempt it from taxation. The Judge stated that this was made obvious by the requirement that an exclusive use for a public purpose shall coincide with public ownership.

There has been no deviation from the conclusion, in Ohio, that a municipality in the operation of a public utility, whether it be a light and power plant, a waterworks, a railroad, a bus line, or an airport, is engaged in a proprietary and not a governmental function. *Frederick, Admx., v. City of Columbus,* 58 Ohio St. 538, 51 N.E. 531 (1898); *City of Wooster v. Arbenz,* 116 Ohio St. 281, 156 N.E. 210 (1927); 52 A.L.R. 518, and *City of Portsmouth v. Mitchell Mfg. Co.,* 113 Ohio St. 250, 148 N.E. 846 (1925), 43 A.L.R. 961. Yet waterworks, airports, and light and power plants, when municipally owned and operated, have been held exempt from taxation. *City of Toledo v. Hosler, Treas.,* 54 Ohio St. 418, 43 N.E. 583, (1896); *Toledo v. Jenkins, supra.* Therein lies the conflict between the general rule at the time of the *Cincinnati* case, *supra,* and the rule today.

Judge Shauck's conclusion can be interpreted in one of two ways, (1) that two factors are necessary for tax exemption, which is apparent from reading the constitutional provision, or (2) that the two necessary factors must be associated with the same governmental entity. The court in the principal case has taken the second position using virtually the same language as in the *Cincinnati* case, *supra,* that the use must coincide with the public ownership. If we assume that the first interpretation of the *Cincinnati* case, *supra,* is valid, then the minority opinion in the principal case, which declares that this surprising interpretation constituted judicial legislation, deserves a great deal of consideration. If we assume that Judge Shauck really intended the latter interpretation, we find that the general rule used by him to get to this interpretation is no longer valid in Ohio today. By using the general rule at that time, it would have been easy for the court to come to this surprising interpretation.

In several recent cases the court has stated that the use must coincide with public ownership and these decisions cite the *Cincinnati* case, *supra,* as authority. *Columbus Metropolitan Housing Authority v. Thatcher,* 140 Ohio St. 38, 42 N.E. 2d 537 (1942); *Division of*

Conservation and Natural Resources of Ohio v. Board of Tax Appeals, 149 Ohio St. 33, 77 N.E. 2d 242 (1948). But the principal case is actually the first one where it was necessary to decide whether the use for a public purpose and the public ownership had to coincide in the same entity. The general rule used in *Cincinnati v. Lewis, supra,* was that property owned by a municipality and not used in the actual exercise of its municipal function is taxable. Proprietary functions would under the general rule be taxable. Assuming that Judge Shauck used the general rule in order to come to a unique coincidental interpretation of Article XII, Section 2, it would seem that since the supreme court has held proprietary functions tax exempt the general rule would no longer be applicable in Ohio and there would therefore be no foundation for this unique interpretation. But there is no doubt that the principal case entrenches the coincidental doctrine after some fifty years of questionable standing.

Stanley Jurus, Jr.

TORTS — GUEST STATUTE — BAILOR'S LIABILITY TO GUEST OF BAILEE

Defendant, in permitting his fifteen year old son to use his defective automobile, violated Kansas statute, G.S. 1949, 8-222, which reads "Every owner of a motor vehicle . . . knowingly permitting a minor under sixteen years to drive . . . shall be jointly and severally liable with the minor for the damages caused by the negligence of such minor. . . ." The son negligently wrecked the car, injuring plaintiff, a guest. The plaintiff alleged liability, either under statute or common law, for the negligent bailment of a defective automobile to a minor. Defendant's demurrer, on the basis that the guest statute applies to a negligent bailment, was sustained. *Held,* reversed. *Bisconi v. Carlson,* 171 Kan. 631, 237 P. 2d 404 (1951).

At common law a bailor was not liable for the negligence of the bailee, *Elliott v. Harding,* 107 Ohio St. 501, 140 N.E. 338 (1923); see 5 AM. JUR. 694; see note 36 A.L.R. 1128 (1925), but he was held liable for his own negligence if he knew the bailee was incompetent, or knew the automobile to be defective. *Williamson v. Eclipse Motor Lines,* 145 Ohio St. 367, 62 N.E. 2d 339 (1945); *Elliott v. Harding, supra; Priestly v. Skourap,* 142 Kan. 127, 45 P. 2d 851 (1935), 100 A.L.R. 916 (1936).

The Kansas and Ohio statutes codify the common law view, although Kansas, as indicated in the principal case, holds violation of their statute to be negligence *per se* while Ohio holds violation of their

statute to be merely evidence of negligence. OHIO GEN. CODE §6292-28 (1938); *Mt. Nebo Baptist Church v. Cleveland Crafts Co.,* 154 Ohio St. 185, 93 N.E. 2d 668 (1950).

Both states have guest statutes, OHIO GEN. CODE §6308-6 (1938); G.S. 1949, 8-122b (Kan.); however, guest statutes, being in derogation of the common law, must be strictly construed. *Kitchens v. Duffield,* 50 Ohio L. Abs. 161, 76 N.E. 101 (1948).

In jurisdictions which have guest statutes, there is a conflict of decisions concerning their effect on an owner's negligent bailment. Cases *contra* to the principal case base their decision on the plain meaning of the guest statute, "the owner or operator is not liable. . . ." *Thereault v. Pierce,* 307 Mass. 532, 30 N.E. 682 (1940); *White v. Center,* 218 Iowa 1027, 254 N.W. 90 (1934); *Benton et al. v. Sloss,* 234 P. 2d 749 (Cal. App. 1951). The argument is advanced that the legislature if they desired could have made an express exception for negligent bailments. *Koger v. Hollahan,* 144 Fla. 779, 198 So. 685 (1940), 131 A.L.R. 886 (1941).

Jurisdictions which support the principal case usually distinguish between negligent operation and negligent bailment, holding the guest statute applicable only to negligent operation. *William v. Hustead,* 39 Ohio L. Abs. 589, 54 N.E. 2d 165 (1943).

The dissent in the principal case cites *Tighe v. Diamond,* 149 Ohio St. 520, 80 N.E. 2d 122 (1948), in support of the proposition that the immunity of the guest statute should have been imputed to the owner. In the Ohio case, however, the defendant's liability was not based on his own negligence, either in operation or bailment, but was vicarious in that he had assumed liability for the minor by signing his driver's license. In the principal case liability is not vicarious, but is based on the owner's negligent bailment. Actually Ohio agrees with the majority in the principal case in holding that the immunity of the guest statute is not imputed to an owner who has made a negligent bailment. *William v. Hustead, supra.*

Therefore, if the facts stated in the plaintiff's petition were pleaded in Ohio, the guest statute would be inapplicable to the bailment and the owner would be liable.

Earl E. Mayer, Jr.

WORKMAN'S COMPENSATION — ARISING OUT OF — RIGHT OF AGGRESSOR IN WORK DISPUTE

Hull, an oiler working on road construction, became incensed when his foreman relayed an order through another employee to him to help load a caterpillar. Words were exchanged between the foreman

and Hull. Hull swung at the foreman, but missed, and in the ensuing fight, Hull was injured. The Industrial Accident Board awarded compensation upon rehearing. Since Hull was the aggressor, the employer and his insurance carrier seek to have the award annuled as contrary to previous decisions of the board to dicta of the supreme court. Respondents admit this, but assert that the modern trend of authority allows aggressors to recover in work disputes. *Held,* award affirmed. An aggressor injured in a work dispute is entitled to compensation since his injury occurred "in the course of, and arising out of his employment." Three judges dissented. *State Compensation Ins. Fund et al. v. Industrial Acc. Comm. of Calif. et al.,* 38 Cal. 2d 659, 242 P.2d 311 (1952).

Past decisions and dicta reveal that Ohio courts agree with the dissent in the principal case and would deny recovery to an aggressor in a work dispute. Clearly, when the dispute is personal in nature and not concerning the work, the aggressor may not recover. *Seaton v. Ind. Comm.,* 13 Ohio Supp. 78, 29 Ohio Op. 199 (1942). Where an aggressor claimant is injured in the hall outside the place of employment, he is not entitled to compensation notwithstanding it is a work dispute. *Williams v. Ind. Comm.,* 63 Ohio App. 66, 25 N.E. 2d 313 (1939). A dictum in *Ind. Comm. v. Pora,* 100 Ohio St. 218, 222, 125 N.E. 662, 663 (1919), also indicates hostility to aggressor claimants. The court pointed out that "the employee who assaulted him was acting wholly outside the course of his employment."

In cases where the claimant is the victim of the aggression, the rule is that the claimant may recover when the dispute concerns the work regardless of whether or not he participated. *Ind. Comm. v. Pora, supra; Interstate Foundry v. Ponder,* 16 Ohio App. 319 (1922). This is in contrast with the "horseplay" or "skylarking" cases where the victim recovers only when he is not participating. *Ind. Comm. v. Weigant,* 102 Ohio St. 1, 130 N.E. 38 (1921); *Toma v. Ind. Comm.,* 32 Ohio L. Abs. 95 (1940). *Contra: East Ohio Gas Co. v. Coe,* 42 Ohio App. 334, 182 N.E. 123 (1932). Clearly, if the claimant is the instigator of the sportive acts which result in his injury, he is denied compensation. *Ind. Comm. v. Bankes,* 127 Ohio St. 517, 189 N.E. 437 (1934).

Thus, if the principal case had occurred in Ohio, Hull would not be allowed compensation in view of the *Williams* case, *supra,* and the dictum in the *Pora* case, *supra.* The hesitancy of Ohio courts to allow compensation to participating claimants in horseplay cases also points to this result. The foreman, however, if injured by Hull's aggression, would be allowed compensation in Ohio.

There has been a trend in other states to allow workman's compensation to a worker injured in a work dispute even though he was the aggressor. See 41 ILL. L. REV. 311 (1946). During the 1930's, the rule was almost unanimous that an injury received by an aggressor did

not "arise out of the employment" and therefore the worker could not receive compensation. *Triangle Auto P. & T. Co. v. Ind. Comm.*, 346 Ill. 609, 178 N.E. 886 (1931); *Fulton Bag and Cotton Mills v. Haynie*, 43 Ga. App. 579, 159 S.E. 781 (1931); *Merkel v. T.A. Gillespie Co.*, 10 N.J.Misc. 1081, 162 Atl. 250 (1932); *Davis v. Robinson*, 94 Ind. App. 104, 179 N.E. 797, 112 A.L.R. 1270n (1932); *Lignori v. Bankers Trust Co.*, 251 App. Div. 765, 295 N.Y. Supp. 520 (1937); *Texas Indemnity Ins. Co. v. Dunlap* (Tex. Civ. App.), 68 S.W.2d 664 (1934); *Woodley v. Minneapolis Equipt. Co.*, 157 Minn. 428, 196 N.W. 477 (1923); *Kimbro v. Black & White Cab Co.*, 50 Ga. App. 143, 177 S.E. 274 (1934). In 1940, however, Judge Rutledge in *Hartford Acc. & Ind. Co. v. Cardillo*, 112 F.2d 11 (D.C. Cir. 1940) said that the old rule did not take sight of the fact that "the work brings the claimant within the range of peril" and noted that courts had difficulty in elmininating the defense of fault improperly carried over from tort law. He held that a worker who was assaulted and injured because of the vile language that he used could recover when the dispute arises from the work. Many courts have fallen in line with this decision and have repudiated the old rule and allowed recovery to an aggressor in such cases. *Newell v. Moreau*, 94 N.H. 439, 55 A.2d 476 (1947); *Dillon's Case*, 324 Mass. 102, 85 N.E.2d 69 (1949); *Hass v. Brotherhood of Transportation Workers*, 158 Pa. Super. 291, 44 A.2d 776 (1945); *Comm. of Tax. & Fin. (in re Callahan) v. Bronx Hospital*, 276 App. Div. 708, 97 N.Y. Supp.2d 120, *Motion for leave to appeal denied*, 277 App. Div. 911, 98 N.Y. Supp.2d 591 (1951). This is the view of the principal case. Recently, three courts have repudiated the old rule by dicta though denying the claim involved on the ground that it was not a work dispute but was personal in nature. *Willis v. Taylor & Fenn Co. et al.*, 137 Conn. 626, 79 A.2d 821 (1951); *Jackson v. State Com'r*, 127 W. Va. 59, 31 S.E.2d 848 (1944); *Rothfarb v. Camp Awanee*, 116 Vt. 172, 71 A.2d 569 (1950). A minority of courts has nevertheless reaffirmed the old rule. *Vollmer v. City of Milwaukee*, 254 Wis. 162, 35 N.W.2d 304 (1948); *Fischer v. Ind. Comm.*, 408 Ill. 115, 96 N.E.2d 478 (1951); *Staten v. Long-Turner Constr. Co.*, (Mo. App.) 185 S.W.2d 375 (1945); *Brown v. Philmac Sportswear Co.*, 23 N.J.Misc. 378, 44 A. 2d 805 (1945); *Lindsay v. Hoffman Beverage Co.*, 19 N.J.Misc. 356, 19 A.2d 824 (1941); *Florida Forest & Park Service et al. v. Strickland*, 154 Fla. 472, 18 So.2d 251 (1944). Other courts have taken a middle of the road attitude and allowed compensation to an aggressor foreman, but denied an aggressor subordinate employee compensation. See 58 AM. JUR., 767 (Cum. Supp. 1952).

It would seem that the "modern" trend of cases may have some influence upon the Ohio court as it is quite possible to infer that the intent of the legislature was to include both parties to a work dispute. The abolition of assumption of risk, the fellow servant rule, and

contributory negligence as defenses, indicates that the legislature wished to allow compensation irrespective of fault. Furthermore, the Ohio act states that the worker may receive compensation provided only that the injury is not purposely self-inflicted, OHIO GEN. CODE §1465-68, and by invoking the rule *expressio unius est exclusio alterius,* it may be reasoned that the legislature did not intend to exclude aggressors in work disputes. Moreover, modern insight into working conditions indicates that the working environment plays a large role in contributing to disputes and conflicts among workers. Therefore, in a very real sense, the consequential injuries "arise out of the injured employee's employment." A ruling that an aggressor can recover would seem to be in accord with the required liberal construction in favor of the employee.

John M. Adams