Recent Decisions

AGENCY—SCOPE OF EMPLOYMENT —EMPLOYEE RETURNING HOME

Defendant's truck driver, Russell, was permitted to take defendant's truck to his home over the 4th of July weekend. He had on one occasion made a sale to a customer and had obtained permission to solicit another order from this customer one month previously. On the Fourth of July, Russell left in the truck to solicit the order. Discovering he had no cigarettes, Russell went past the intersection leading to the customer's home and bought cigarettes at the village of Goshen. He started back in less than two hours to solicit the order and on approaching the intersection leading to the customer's home, he could see that the customer's car was not in his yard, and knowing of his habit of keeping the car in his yard, concluded he was not at home. Russell proceeded to his own home and was opening the gate to drive the truck into his yard when the collision occurred, injuring the plaintiff, a guest in the other car. *Held,* for plaintiff. The jury found that Russell was negligent in the scope of his employment. *Rhude v. Ed. G. Koehl Inc.,* 55 Ohio L. Abs. 532 (1948).

It is not every turning away from his duties by the servant which constitutes a departure from his scope of employment and consequent suspension of the liability of the master for the acts of the servant. To constitute a departure there must be a complete turning away from the business of the employer. *Fleichmann v. Howe,* 213 Ky. 110, 280 S. W. 496 (1926); *Schultze v. McGuire,* 241 N. Y. 460, 150 N. E. 516 (1926). It is generally agreed that once the servant does turn away completely from his duties the liability of the master for the acts of his servant is suspended from that moment until the servant again takes up the business of the employer. *Adomoitis v. Hopkins,* 95 Conn. 239, 111 Atl. 178 (1920); *Graves v. Utica Candy Co.,* 211 App. Div. 872, 206 N. Y. Supp. 911 (1924).

A more difficult problem is presented in determining when the servant has returned to the scope of his employment so as to make liable the master for any subsequent acts. In a few cases it has been held that the servant returns to the scope of his employment as soon as he starts back to take up his duties. *Mancuso v. Hurwitz-Mintz Furniture Co.,* 183 So. 461 (1938); *Gilbert v. Trotter,* 160 So. 855 (1935). Other courts require the employee to be where he would have been if he had never departed from his employment. *Southwest Dairy Products Co., Inc. v. Defrates,* 132 Tex. 556, 125

S.W. 2d 282 (1939); *Chisos Mining Co. v. Pedro Huerta,* 141 Tex. 289, 171 S.W. 2d 867 (1943). The majority adopting an intermediate view, requires the servant to be reasonably close to the place he would have been if he had never left his employment. *Riley v. Standard Oil of N. Y.,* 231 N. Y. 301, 132 N. E. 97 (1921); *Fiacco v. Carver,* 234 N. Y. 219, 137 N. E. 309 (1922).

In its opinion the court stated that when the acts of the employee, from their nature, may or may not be in the course of his employment, the controlling test is the motive or intent of the employee. While the motive or intent of the employee is always a factor to be considered it is not the decisive test in imputing liability to the employer for the employee's negligence. 1 MECHEM ON AGENCY 1462, § 1882 (2d ed. 1914). The motive or intent of the employee is controlling only when he has committed a wilful tort. The employer cannot be held for the wilful tort of his servant unless it was committed to carry out the instructions of the employer. *Ploof v. Putnam,* 83 Vt. 252,75 Atl. 277 (1910,; *C.&O. Ry. Co. v. Ford,* 158 Ky. 800, 166 S. W. 605 (1914).

It would seem that the court reached the correct decision in the principal case. The defendant was liable under any of the tests noted for resumption of the liability of the employer since Russell had returned to the place he would have been if he had never departed from his employment. However, it would appear that since no wilful tort was involved, the motive or intention test used by the court was inapplicable.

John D. Duffy

DECEDENTS ESTATES—WRIT OF PROHIBITION NO SUBSTITUTE FOR APPEAL IN CASE OF DOUBLE PROBATE

Myra Shane, a resident of Hamilton County, died in Preble County. Her first will was probated in Hamilton County, then her second will was probated in Preble County over the protest of James Clary, the administrator *c.t.a.* appointed in Hamilton County. Clary sought a writ of prohibition. *Held* writ denied. *State* ex rel. *Clary v. Probate Judge of Preble County,* 151 Ohio St. 497, 86 N.E. 2d 765 (1949).

As a general rule in Ohio prohibition is an extraordinary remedy and not a substitute for appeal, and will be granted only when a court is obviously exceeding its jurisdiction. When the determination of jurisdiction depends on the facts of the case it is the court that must decide whether the facts necessary for jurisdiction are present. That is, " A writ of prohibition will not issue against a court having jurisdiction of the subject matter of an action pending before it or to deprive such court of the authority vested in it by the laws of

the state of Ohio to determine its own jurisdiction." 31 O. JUR. 581. And the laws of Ohio do grant the probate courts power to determine the facts of their jurisdiction. *Schroyer v. Richmond,* 16 Ohio St. 455 (1865).

The problem facing the supreme court was: did the provision of Ohio General Code Section 10501-55 that "The jurisdiction acquired by a probate court over a matter or proceeding is exclusive of that of any other probate court, except where otherwise provided by law," deprive the Preble County Probate Court of jurisdiction of the subject matter in this case? The supreme court opined that "it is otherwise provided by law" that a will shall be probated in the county in which the testator was domiciled, if at the time of his death he was domiciled in the state. OHIO GEN. CODE § 10504-15.

In a situation involving administrators rather than executors, appointed by different probate courts, the supreme court reached a result opposite from that in the principal case. *State* ex. rel *Taylor v. Gregory,* 122 Ohio St. 512, 172 N.E. 365 (1930). The only other case in which the situation of the principal case was present was a nisi prius case in which the judge of the first probate court in order to assume jurisdiction refused to surrender control of the case to the Lucas County personal representative. In re *Estate of Henry Worthington,* 4 Ohio Dec. 381 (Probate Ct. Hamilton County 1896). The statutes involved in that case are the same as those in the principal case.

Ohio General Code Section 10501-55 was originally enacted in 1853 and its wording has remained unchanged. It has been held to establish that the jurisdiction of a probate court, once acquired over an estate, is exclusive of that of every other probate court. *State* ex. rel. *Black v. White,* 132 Ohio St. 58, 63, 5 N.E. 2d 84 (1936). This position was first attacked in the case of *State* ex rel. *Overlander v. Brewer,* 147 Ohio St. 386, 72 N.E. 2d 84 (1947). In that case the decedent had died a resident of Mahoning County and intestate administration had been granted there, when a will was sought to be probated in Cuyahoga County. The court held that since a will is to be probated in the county in which decedent was domiciled and intestate administration is granted in the county in which the decedent was resident. OHIO GEN. CODE §§ 10504-14 and 10509-1. This is under the exception "where otherwise provided by law" included in Ohio General Code Section 10501-55 which prevents the intent of the statute from operating. By this construction the supreme court manages to reach the same result as in *State* ex rel. *Barbee v. Allen,* 96 Ohio St. 10, 117 N.E. 13 (1917). The *Barbee* case is distinguishable on the facts since the relator was the executor appointed by the second probate court, and the statutes construed in

the principal case were not relied on by the court although both were in effect at the time.

The result of this case is the re-affirming of the old rule that a judgment of a probate court could be collaterally attacked by another probate court for lack of jurisdiction, a condition that Ohio General Code Section 10501-55 was intended to correct. This condition prevails in Kentucky where it causes much confusion. Evans, *The Venue of Probate Proceedings in Kentucky,* 6 KY. ST. B. J. 13 (1941).

Most states have avoided this problem by changing the fact of residence from a jurisdictional matter to one of venue, thus avoiding collateral attack on probate proceedings. It was believed that this problem had been avoided in Ohio by the provision in Ohio General Code Sections 10504-15 and 10501-56 allowing appeal from contest of jurisdiction in probate court. Basye, *The Venue of Probate and Administration Proceedings,* 43 MICH. L. REV. 471 (1944).

The problem has been attacked in a host of ways. Wisconsin provides that when a court has found the jurisdictional fact of residence present, its judgments or proceedings may not be collaterally attacked on those grounds. WIS. STATUTES 253.03 (1943). In Minnesota it is required in case of conflict as to venue that the second court shall stay all proceedings until the first court has ruled as to its venue. MINN. STATUTES § 525.82 (1945). Many states hold that the first court acquiring jurisdiction has exclusive and exhaustive jurisdiction. Basye, *The Venue of Probate and Administration Proceedings* 43 MICH. L. REV. 471 (1944).

With due respect for the judgment and wisdom of the supreme court it seems that the decision in this case could have been as well, if not more excusably decided the other way. Jurisdiction is by its nature either exclusive or concurrent, it can not be both. If the jurisdiction is exclusive "except where otherwise provided by law," it must be concurrent when so otherwise provided. Yet in will probate proceedings of the resident decedent, jurisdiction is only in the county of domicile. OHIO GEN. CODE § 10504-15. Surely, however, the court does not mean to say that a decedent had two domiciles; and if so the rule propounded in *Merril v. Lake* would hold, "where there are two courts of equal or concurrent jurisdiction, that the court possesses the case in which jurisdiction first attaches." 16 Ohio 374, 405 (1847). And since Ohio law provides that a probate court is competent to determine the facts of its own jurisdiction and appeal from such determination is provided for, it would seem that comity would require more respect for the determinations of other probate courts as to their jurisdiction. If the present trend, as exemplified by the principal case, is followed to its logical result we may well find the probate courts of the various counties actively

competing with one another to supervise the estates of decedents in order that the inheritance tax revenue will be paid over to their county.

James D. Hapner.

PLEADING—CLASS SUIT

Plaintiff, in his amended petition, purported to represent himself and approximately 700,000 other gas consumers who purchased gas from defendants, gas and electric corporations, between the years 1929 to 1937. The gravamen of the complaint was the alleged secret dilution of natural gas by means of inert gas. Plaintiff's prayer was for an injunction prohibiting the billing of consumers for diluted gas until proper charges had been determined and prohibiting dilution in the future; for a finding of the aggregate amount of damages suffered by plaintiff and those he represents and that a master be appointed who would require each defendant to account for and turn into the custody of the court all the funds which it received at any time by reason of said secret dilution. A general demurrer to the original petition was sustained by the trial court on the ground that the action was not maintainable as a class suit and judgment was entered for the defendants. The court of appeals reversed, directing that plaintiff be permitted to amend his petition with instructions that if a general demurrer should be filed thereto to overrule the same. *Davies v. Columbia Gas & Electric Corp.*, 51 Ohio L. Abs. 372, 79 N.E. 2d 327 (1948), 9 OHIO ST. L.J. 704. *Held*, reversing the appellate court, that the amended petition was insufficient to support a class suit. 151 Ohio St. 417, 86 N.E. 2d 603 (1949).

Ohio General Code Section 11257 provides, "When the question is one of common or general interest of many persons, or the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." The standard code provisions for class actions or representative suits are not sufficiently explicit and the confusion in Ohio concerning their proper interpretation is typical. There is no outstanding weight of authority, at the present time, to aid the courts in this matter. Federal Rule 23 is much more specific in that it classifies representative suits into true, hybrid and spurious. Perhaps as a result of this classification the principles involved in class actions have been developed significantly by the federal courts since 1938. A few of the states have copied this rule.

The court first pointed out that under the statutes quoted, in the principal case, "there must be a community of interest plus a right of recovery based upon the same essential facts, and all those

on whose behalf the suit is filed must have an interest in common or identical with that of the person in whose name the suit is brought." In support of this the court cited *Trustees of Jackson Twp. v. Thoman,* 51 Ohio St. 285, 37 N.E. 523 (1894); *Duncan v. Willis,* 51 Ohio St. 433, 38 N.E. 13 (1894); *Stevens v. Cincinnati Times-Star Co.,* 72 Ohio St. 112, 73 N.E. 1058 (1905); *Haggerty v. Squire, Supt. of Banks,* 137 Ohio St. 207, 28 N. E. 2d 554 (1940); *Wheatley, Trustee, v. A. I. Root Co.,* 147 Ohio St. 127, 69 N.E. 2d 187 (1946).

The consumers represented are scattered throughout Ohio. They paid different rates and purchased under different franchises, contracts and ordinances. From this the court concluded that there was no community of interest plus a right of recovery based upon the same essential facts between plaintiff and those he purports to represent; stating that it could not be said that plaintiff is acting pursuant to the wishes and desires of all such persons, because some might not wish to sue at all and others might wish to sue for breach of contract or for restitution, in which event the parties defendant would not be the same. The objection that some might not wish to sue at all might be made in most class actions, but this objection by itself has not generally been thought to preclude this type of action. However, the court no doubt had in mind and is hereby approving the action of the parties themselves in the *Wheatley* case, *supra.* In that case the record shows that the parties themselves, by stipulation in the court of common pleas, divided the preferred shareholders into classes in accordance with the attitude of each as to consent, acquiescence or opposition in connection with the recapitalization of the A. I. Root Co.

Although both the *Wheatley* and *Haggerty* cases, *supra,* would permit a class suit when the causes of action arise from a common source and represent a like interest or when parties were very numerous, the court apparently did not consider the rule applicable to the instant factual situation, emphasizing the lack of factual similarity between the parties represented. Less rigid requirements as to factual similarity have been indicated. *Smith v. Kroeger,* 138 Ohio St. 508, 37 N.E. 2d 45 (1941); *McKenzie v. L'Amoureux,* 11 BARB. 516 (N.Y. 1851); *Hilton Bridge Const. Co. v. Foster,* 26 Misc. 338, 57 N.Y. Supp. 1106 (3d Dep't 1899); POMERY, EQUITY JURISPRUDENCE 510 (5th ed. 1941). But see *Garfein v. Steglitz,* 260 Ky. 430, 86 S.W. 2d 155 (1935); Wheaton, *Representative Suits Involving Numerous Litigants,* 19 CORN. L.Q. 434 (1933); Lesar, *Class Suits and the Federal Rules,* 22 MINN. L. REV. 36 (1937).

In the principal case the court pronounced the recovery of damages for all those who were allegedly defrauded as the primary object of the action and the relief of an equitable character merely ancillary. To this extent the court hinted that the statute applies

only to equitable causes. It is generally held, however, that the statute applies to legal and equitable causes. *Platt v. Colvin,* 50 Ohio St. 703, 36 N.E. 735 (1893); *Cherry v. Howell,* 4 F.Supp. 597 (E.D. N.Y. 1933) (but not fraud or deceit); *Colt v. Hicks,* 97 Ind. App. 177, 179 N.E. 335 (1932); *Walker v. Village of Dillonvale,* 82 Ohio St. 137, 92 N.E. 220 (1910). One such view is that the statute is a codification of the equitable bill of peace. POMEROY, EQUITY JURISPRUDENCE, *supra* at p. 463.

Although stressing the above reasons for reversal the court was also of the opinion that in view "of the orders issued, adjustments made and rates determined by the Public Utilities Commission affecting gas consumers in Columbus and covering the years mentioned in the amended petition, some of them pursuant to the judgments of this court, it is extremely doubtful whether the plaintiff has sustained any loss or damage which would support his action." In addition, the court held that since the total claim of the plaintiff is less than $100, it would not be sufficient to confer original jurisdiction on the court of common pleas. Ohio General Code Section 11215. And, being an action of this type, the total claims of the class may not be aggregated to supply the necessary jurisdictional amount. *Hackner v. Guaranty Trust Co. of New York,* 2 Cir., 117 F. 2d 95, *cert. denied,* 313 U. S. 559 (1941); *Quinlan, Aud., v. Myers,* 29 Ohio St. 500 (1876). On this point the court once again is in conflict with the view expressed above concerning the equitable bill of peace which gives a court of equity jurisdiction to prevent a multiplicity of suits regardless of the amount of the claim.

The court did not mention the prodigious accounting task that would be involved in distributing the damages to the various consumers if the case had been decided in favor of the plaintiff, although this administrative problem could properly be considered by a court of equity in exercising its discretion to grant or withhold relief.

Jack V. Danaher.