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Agency

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Such a construction of the amended statute was challenged in the Supreme Court. In reversing the court of appeals in the *Rufo* and a companion case, the court stated that the statute now provides for something more than a review on merely issues of law as proclaimed in the *Farrand* case. The Ohio Administrative Procedure Act, however, now provides for an appeal which still falls short of a trial de novo. The common pleas court is limited to an examination of the record of the hearing before the administrative agency and such additional evidence as the court in its discretion may allow to be presented upon the theory that it is newly discovered:

> The court must read and consider all the evidence offered by both sides and must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence and the weight thereof. In other words, the court may reverse, vacate or modify the order of the agency, unless it finds that it is supported by reliable, probative and substantial evidence and is in accordance with law.[27]

Thus if the common pleas court cannot make a finding that the agency's order is supported by reliable, probative and substantial evidence and is in accordance with law, it is authorized to reverse, vacate or modify the order of the agency.

Where there is a finding that the order of an agency subject to review under these provisions is supported by reliable, probative and substantial evidence, the common pleas court, in practice, must affirm the order if it is otherwise in accordance with law, according to numerous court of appeals decisions.[28]

MAURICE S. CULP

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The Problem of the Borrowed Servant

A problem of frequent occurrence and considerable difficulty arises where a servant is, at the time of the accident, acting in some sense as a servant of two masters. The typical case involves a general employer who

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[27] Andrews v. Board of Liquor Control, 164 Ohio St. 275, 280, 131 N.E.2d 390, 393, 394 (1955)

[28] Quinn v. State Board of Real Estate Examiners, 137 N.E.2d 777 (Ohio App. 1956); Burgerr v. Board of Liquor Control, 135 N.E.2d 786 (Ohio App. 1955); Abdoney v. Board of Liquor Control, 101 Ohio App. 57, 135 N.E.2d 775 (1955); DiMatteo v. State, 130 N.E.2d 351 (Ohio App. 1955); Ross v. Board of Liquor Control, 135 N.E.2d 629 (Ohio App. 1954); Shranko v. Board of Liquor Control, 134 N.E.2d 173 (Ohio App. 1953); Miecznikewski v. State, 135 N.E.2d 641 (Ohio C.P. 1952)

loans an employee to an independent contractor who is working for the general employer. In a very real sense, the work of the employee benefits both employers. Since one of the reasons for the rule of *respondeat superior* is to encourage safety discipline on the part of an employer, the normal rule is that the employer which has control over the servant's work is liable for his torts. The rule is difficult to apply in most cases, because in fact both employers exercise some control. In spite of the practice of divided control, the courts adopt the theory that control is unitary and liability is fastened on one employer or the other, but not both.[1]

The classic case illustrating the application of the above principles is *Standard Oil Co. v. Anderson*,[2] where the general employer loaned a winch and operator to a stevedore engaged in unloading a ship which belonged to the general employer. In spite of the fact that the winchman took his signals from the special employer, the general employer was held liable. A very similar fact situation was before an Ohio court of appeals in *Redmond v. Republic Steel*.[3] The general employer was held liable. Although the courts do not talk in terms of presumptions in this area, the results clearly indicate that in these cases of divided control the presumption is that the general employer is liable.

Course of Employment

As a general rule, if a servant is ostensibly acting for his master and within the indicated limits of space and time, the servant is in the course of his employment, although he has an intent to deviate from his route. Thus in *Clawson v. Pierce-Arrow Co.*,[4] the servant was told to deliver the employer's car to a repair garage. The accident happened on the way to the garage and the employer was held liable, even though the servant testified he did not intend to stop at the garage, but intended to continue beyond it on a "frolic and detour" of his own. As a policy matter, the *Clawson* case was correctly decided by the New York court, because the only evidence of the deviation was subjective evidence of the servant himself, who was under some economic pressure from the employer. A recent Ohio case points out that in the same situation, if there is sufficient objective evidence of the intent to deviate, the result should be otherwise. In *Thornberry v. Oyler Bros. Inc.*,[5] the servant was told to drive an empty

[1] The exception is Pennsylvania where both masters are held. See MECHEM, OUTLINES OF AGENCY 311 (4th ed. 1952).

[2] 212 U.S. 215 (1909).

[3] 131 N.E.2d 593 (Ohio App. 1956).

[4] 231 N.Y. 273, 131 N.E. 914 (1921).

[5] 164 OHIO ST. 395, 131 N.E.2d 383 (1955).