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WORKMEN'S COMPENSATION, CONFLICT OF LAWS AND THE CONSTITUTION

Clyde W. Wellen

I. HISTORICAL BACKGROUND OF WORKMEN'S COMPENSATION

A. Personal Injury at Common Law

At common law an employee could maintain an action for injuries incident to his employment only if he could establish that his employer had been negligent. His action could then be defeated by the employer, if the employer could show contributory negligence, assumption of risk by the workman, or that a fellow servant had contributed to the injury. Under workmen's compensation acts these defenses are not available to the employer.¹ An employer is charged with injuries arising out of his business without regard to any question of his negligence, or that of the injured employee.² Workmen's compensation is thus a form of strict liability. A source of much litigation has thereby been removed, but many new problems have been created by these statutes. One of the most difficult of these problems relates to the conflict of laws.

Under the common law system the employee's remedy for injuries connected with the employment was in tort. In such actions it was the well established rule of conflict of laws that reference should be made to the lex loci delicti to determine the rights of the parties. If the law of the place of tort gave a cause of action it could be maintained in the courts of any state, unless against the public policy of the forum. This was true even though a cause of action would not arise from the same facts under the laws of the forum. It was equally true that if the lex loci delicti gave the plaintiff no cause of action, he had no enforceable claim in a second state.

B. Employer's Liability Acts

The enactment, by the states, of employer's liability acts widened materially the scope of the employee's possible recovery through the abolition of the common law fellow servant and as-

¹ For a collection of the statutes in the United States accompanied by brief annotations see DIGEST OF WORKMEN'S COMPENSATION LAWS (16th ed. 1939).
² 1 Schneider, WORKMEN'S COMPENSATION TEXT § 3 (3d perm. ed. 1941).
WORKMEN'S COMPENSATION

1: Tort theory:

The early workmen's compensation statutes usually contained no provisions concerning their application to extraterritorial accidents, so the duty of determining the conditions under which the local act should be applied to injury in another state devolved upon the courts. A few of the early cases construing the compensation acts held that workmen's compensation was merely a substitute for tort liability and that the law of the place of injury should determine the rights of the parties. Such a narrow construction, limiting the coverage of the local statute to injuries occurring within the borders of the state, did not seem consonant with the purpose of the compensation law, and since the concept of fault or wrongful injury was entirely absent from the acts, it was held that liability under the acts was not delictual.

2: Contract theory:

The courts, desiring to give the statutes a broader effect, turned to the alternative common law theory of contract. Rights to compensation benefits were considered contractual rights involving conflict of law principles derived from the subject of contracts generally. In accordance with these principles, the rights of the employee in the event of injury is determined by the lex loci contractus, which in workmen's compensation cases is the place where the parties enter into the contract of employment. If the contract

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4 Statutes have changed the rule in the states which held rights under the acts to be in tort: CAL. STATS. 381 (1917); ILL. ANN. STAT. c. 48, § 142 (Smith-Hurd, 1929); MASS. GEN. STAT. c. 152, § 26 (Supp. 1939).


of employment is made in a state providing for workmen's compensation as an incident of such contract, it is said that incident should follow the employee wherever he goes within the scope of his employment, whether the contract is to be performed within the state in whole or in part or actually outside its bounds. This principle affords a facile means for justifying the extraterritorial application of compensation acts. Conversely, it tends in some cases to carry compensation acts far beyond the sphere in which the state has a legitimate interest to conserve in applying them.

In addition to these practical considerations, there are many theoretical difficulties inherent in the application of ordinary contract principles to workmen's compensation. Where a compensation act specifically refers to the right to compensation benefits as a statutory annexation to the contract of employment, it is more or less natural for the courts to regard this right as a right of contract and to settle questions of conflict of laws on that basis. Compensation acts, however, are of two types. They are either elective or compulsory. When the act is compulsory in character, there is no element of contract in coming within its terms. The incidence of workmen's compensation is appurtenant to the employment whether the parties wish it or not. Even where the acts are elective courts have found it difficult to interpret them as ordinary contracts. If the obligation to pay compensation is contractual, its terms will necessarily be governed by requirements in force at the time when the employment began, and the law could not be amended as against existing contracts in a way which would impair the contract within the meaning of the term as used in the Constitution. No case has been found which so limits the effect of the statutes. Likewise the claim for compensation has been held not to be contractual within the statute of limitations. Once under the act, it is the law and not the contract which governs, hence the parties may not freely modify its terms.

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7 Restatement, Conflict of Laws § 398 (1934). See Dwan, supra note 5, at 337.
8 For a comparative table of the various state acts and the extent to which they are elective, see Digest of Workmen's Compensation Laws 10, Introduction (16th ed. 1989).
3: Other theories of extraterritoriality developed by the courts:

It may be seen from these observations that workmen's compensation problems cannot be solved by the application of orthodox conflicts principles. The obligation to pay compensation is neither a substitute for older tort liability, nor is it purely contractual, but it is a statutory regulation of the relation of employer and employee based upon the interest of the state in the protection of the health and lives of its citizens. Recognizing this the courts in several states, even in the absence of statutory provisions, have developed conflict of laws principles more adapted to workmen's compensation problems. The common factor in these theories is the attempt to find some act, relation, or situation within the jurisdiction to which the local act will attach legal consequences. Probably the best known of these theories has been the "business localization test" developed by the Minnesota court.\(^\text{12}\) The basic thought underlying this theory is expressed as follows:

> "When a business is localized in a state there is nothing inconsistent with the principles of the compensation act in requiring the employer to compensate for injuries incurred in a service incident to his business sustained beyond the border of the state. What the employer did, if done in Minnesota, was a contribution to the business involving an expense and presumably resulting in a profit. It was not different because done across the border in North Dakota."\(^\text{13}\)

In an increasing number of states, the business localization theory is being regarded as an important factor in determining whether the local act will be applied.\(^\text{14}\) A closely analogous test, and one also receiving widespread approval, has been developed in New York. This test places the emphasis upon the location of the employment, however, rather than upon the location of the employer's business.\(^\text{15}\) The distinction between the two theories

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\(^\text{12}\) See State ex rel. Chambers v. District Court of Hennepin County, 139 Minn. 205, 166 N.W. 185 (1918); cf. De Rosier v. Jay W. Craig Co., 217 Minn. 296, 14 N.W.2d 286, 28 Minn. L. Rev. 335 (1944); Ginsburg v. Byers, 117 Minn. 366, 214 N.W. 55 (1927).

\(^\text{13}\) Chambers v. Hennepin County, 139 Minn. 205, 209, 166 N.W. 185, 187 (1918).


may be illustrated by considering the New York case of Cameron v. Ellis Construction Co. There the employer was constructing a road in New York. The employee was employed only for work in Canada, where the injury occurred in a sand pit operated solely to provide sand and gravel for the New York road. Compensation under the New York Act was denied since the regular place of employment was in Canada. In Minnesota a different result would probably have been reached under these facts, since the employer's business was localized within the state in which compensation was being sought.

The New York rule has much to commend it. The state's direct concern is a regulation of employment within its borders. It is not the fact that the employee or employer resides within the state, or that the employee was hired there, but the fact that the two are within the state in a relation which the state may have an interest in regulating. That relation may entail work outside the state, and if that work be properly incidental to the relation existing within the state, the state has a sound reason for extending its regulation to such work. But when the employer and employee carry on work in another state which may fairly be said to be localized there, the state's interest diminishes, and the other state's interest is superior. There is, to be sure, a no-man's land between outside operations clearly transitory and incidental, and outside operations fixed in time and location. As compared with the pitfalls inherent in the contract theory, however, this defect is negligible, and a way to avert even this difficulty has been pointed out by the Wisconsin court in Wandersee v. Meskowitz. In that case it was held that a constructive status as employee was created under the Wisconsin Act until the workman acquired an actual status as an employee in some other state. While admitting this constructive status may be fictional, it was said to be justified in that it assured the employee of coverage under the act of at least one state.

B. Express Statutory Provisions for Extraterritoriality

As workmen's compensation statutes have been developed and their coverage made more complete, there has been an attempt to

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17 198 Wis. 345, 233 N.W. 837 (1929).
18 In Val Blatz Brewing Co. v. Gerard, 201 Wis. 474, 230 N.W. 622 (1930), the application of this doctrine was limited to employees who were residents of the state.
make them more explicit concerning their extraterritorial application. The provisions in the statutes, however, show the same diversity as did the decisions of the courts in the absence of statutory provisions. In thirty-seven states, the District of Columbia, and Hawaii, the statutes expressly provide for extraterritorial application.¹⁹ In seven of these states and the District of Columbia it is merely provided that the statutes shall apply to extrastate injury if the injured employee comes within the coverage of the statute.²⁰ Because of this indefiniteness, the courts in these jurisdictions have been forced to create and apply their own conditions for extraterritoriality. Connecticut and Massachusetts regard the place where the contract of employment is made as decisive for this purpose,²¹ while Indiana, Ohio and the District of Columbia hold that the law of the place where the contract of employment is to be performed should control.²² In the other states having statutes dealing with this problem, the statutes contain more specific requirements for extrastate application, viz., that the contract of hire must have been made within the state²³ or that the status of employee must be maintained and localized within the state,²⁴ or that

¹⁹ These states are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Mississippi, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia and Wyoming. For a collection of these provisions see DIGEST OF WOMEN'S COMPENSATION LAWS. (16th ed. 1939 with cum. supp.).

²⁰ The states having such provisions are Arkansas, Connecticut, Indiana, Iowa, Massachusetts, Ohio and South Dakota.


²³ This is a condition for extraterritorial application in Alabama, California, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Maine, New Hampshire, Missouri, Michigan, North Carolina, South Carolina, Tennessee, Texas, Vermont, and Virginia.

²⁴ These states are: Maryland, Oregon, Pennsylvania and West Virginia. In Maryland and West Virginia the statutes apply extraterritorially only if the employee's absence from the state is temporary and incidental to his employment within the state. Md. Ann. Code art. 101, § 80 (2) (Flack, 1939); W. Va. Code § 2511 (Michie, 1949). Pennsylvania limits the application of its statute to employees not absent from the state for more than ninety days. Pa. Stat. Ann. tit. 77 § 1 (Purdon Perm. ed.). As a further restriction, the Oregon act extends its coverage to out of state injuries only of the act of another state is not applicable. Ore. Comp. Laws Ann. § 102-1731 (1940).
either, or both, of these conditions must coexist at the time of injury. Delaware alone expressly limits the applicability of its statute to injuries occurring within the state. Eleven states, Alaska, and Puerto Rico have no express provisions in their statutes concerning extraterritoriality. Most of these statutes, however, provide that every person under the service of another under contract of hire within the state shall come within the coverage of the act. Construction of this provision has produced results basically the same as in those states with express provision for extraterritoriality.

III. APPLICATION OF THE LAW OF THE STATE OF INJURY

A. Compensation Statutes

The converse of the question just considered is whether the local compensation act, or possibly the local common law governs an injury within the state when the employment is located in another state. This will involve first a determination of whether the employee comes within the provisions of the compensation statute of the state where the injury occurred. If it be decided that he is

26 The states providing for extraterritorial coverage in case either the contract of employment, or the regular employment is within the state are: Arizona, Colorado, Mississippi, Utah, and Wyoming.
20 Nevada is the only state having this strict requirement. Nev. Comp. Laws § 2723 (Hilyer, 1929). The parties may elect to come within the Nevada statute, however, where the employment is wholly or partially without the state, even though the contract of hire is made outside the state.
27 Del. Rev. Code c. 175, art. 6.071 (1935).
28 Louisiana, Minnesota, Montana, Nebraska, New Jersey, New Mexico, New York, Oklahoma, Rhode Island, Washington, and Wisconsin.
29 For a collection of these provisions see Digest Workmen's Compensation Laws (16th ed. 1959 with cum. supp.).
31 The Oklahoma act has been held not to apply to any out of state injuries. 197 Okla. 618, 173 P.2d 922 (1946); Continental Oil Co. v. Pitts, 158 Okla. 200, 13 P.2d 180 (1932).
not so covered, then the question arises whether the local common law or employer's liability act is applicable. The applicability of the local compensation act will first be considered.

Where some of the incidents of the employment, in addition to mere transitory employment, are present within the state where the injury occurred, its laws may be applied under one of the theories discussed above. If, however, the employee's work within the state, at the time of injury, was merely transitory and incidental to his employment elsewhere, justification for the application of the local law must be found on other grounds. With respect to this question, three state statutes have provisions expressly providing for their applicability to all injuries occurring within the state, without regard to the place of hiring, or of regular employment.\(^{31}\) Conversely, in four states it is expressly provided that an employee hired in another state shall be entitled to compensation under the laws of the state where the contract arose and not under the domestic law.\(^{32}\) But in two of these states, the provision has been construed as applying only to cases where injury occurred outside the state.\(^{33}\) In the remainder of the states, \(i.e.,\) those having no, or only partial statutory provisions, various tests have been used to determine whether the local law applies to an injury occurring within the state. Consistency in applying the contract theory of extraterritoriality would prevent the application of the law of the state of injury where the contract of employment was without the state, since this theory requires that the parties look only to the law of the place of hiring to determine their rights and liabilities.\(^{34}\) In accordance with this principle, a few courts have held that the rules governing injury within the state shall be the precise complement of rules concerning recovery for an injury without,\(^{35}\) but most courts have not restricted the application of their statutes so narrowly. The extraterritorial effect of the laws of other states, having

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\(^{33}\) Ocean Accident & Guarantee Corp. v. Industrial Comm'n, 32 Ariz. 775, 257 Pac. 644 (1927); Fay v. Industrial Comm'n, 100 Utah 542, 114 P.2d 503 (1941).

\(^{34}\) Dunlap, supra note 5, at 388.

contact with the incidents of the employment relation, has been an important factor in determining whether the *lex loci fori* should be applied to an injury within the state. Accordingly, it has been held that relief should be denied if the forum has no contact with the employment other than its contact as the place of injury, and it seems clear that another state having a greater interest would grant compensation.\(^{36}\) The local act usually has been held applicable, however, where denial of relief in the forum might leave the worker without a remedy.\(^{37}\) It has been suggested that another reason influencing the courts to apply the law of the forum is the difficulty of establishing a claim in a remote jurisdiction because of the unavailability of witnesses.\(^{38}\) If, in determining the applicability of the local act, the workers' rights under the law of another state are ignored, it may result in great hardship. This can be well illustrated by a recent Oregon case.\(^{39}\) Oregon denied recovery under its law to an employee of an Oregon corporation, although the injury occurred within the state and the contract of hire was there. The basis for the decision was that the employee was a resident of California, whose presence in Oregon at the time of injury was temporary, the principal place of business being in California. California law would not permit a recovery because the contract of employment was made in Oregon, hence there could be no recovery for the accident under the law of either state. In Colorado, Ohio, and Rhode Island this problem is specifically covered by statutory provisions making their law inapplicable to employees hired in another jurisdiction temporarily working within the state, if, and only if, the employer has furnished insurance for extraterritorial employment under the law of another state.\(^{40}\) Other states having laws partially addressed to this problem are Maryland and North Dakota.\(^ {41}\) Maryland adds to the prerequisites

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\(^{37}\) United States Casualty Co. v. Hoage, 77 F.2d 542 (App. D.C. 1935); Ocean Accident & Guarantee Corp. v. Industrial Comm'n, 82 Ariz. 275, 257 Pac. 644 (1927); Weaver v. Missouri Compensation Comm'n, 339 Mo. 150, 95 S.W.2d 641 (1936).

\(^{38}\) Goodrich, Handbook of the Conflict of Laws § 100 (3d ed. 1949).


\(^{40}\) Colo. Stat. Ann. c. 97, § 430 (Michie, 1941); Ohio Code Ann. § 1465-68 (Page, 1946) (provision not applicable to residents of Ohio); R.I. Laws c. 1052, § 7 (1938). These provisions in the Colorado and Rhode Islands statutes also require that the state of hiring must guarantee reciprocity.

\(^{41}\) Md. Code Ann. art. 101, § 80(3) (Flack, 1939); N.D. Laws c. 252, § 1 (1939).
for applicability the requirement that the employer and employee be residents of the state. The North Dakota provision is the same except that hiring outside the state is not required.

Two other factors must always be considered in determining the applicability of the local act. The first is that the employer have enough workmen employed within the state to come within its terms. The minimum number of workmen required to be employed within the state before its act is applicable varies from a requirement of fifteen in South Carolina to a minimum of one, which is the requirement in a number of states. If this minimum number of employees is not present within the state, the injured employee will not qualify for benefits under the local act. Another important consideration is that of jurisdiction of the parties. If the only interest of the employer, within the state in which his employee is injured, is transitory and incidental to his business localized elsewhere, it may be impossible for the employee to secure service of process on his employer to prosecute his claim within the state though he might otherwise qualify under the local act. The acts contain no special provisions for securing service of process upon out-of-state employers, so, to obtain jurisdiction it would be necessary to serve the employer, or one of his agents upon whom service of process might be made, within the state.

B. Common Law

If it be determined, for one or another of the above reasons, that the local compensation act is inapplicable, then the employee's only method of securing relief will be either under the compensation act in the state of regular employment, or under the common law of the state of injury. The compensation statutes are uniform in providing that, where both the employer and employee are under their coverage, the rights of the injured employee and liabilities of the employer are determined by their provisions and an action under the common law for damages is not permitted.42 Many of the statutes are expressly made compulsory for employers and employees coming within their provisions.43 Most of these acts impose a fine or other penalty on employers who fail to comply with their compulsory provisions. The usual provision is that

42 1 Schneider, Workmen's Compensation Text § 90.
43 For a list of the compulsory statutes see Digest of Workmen's Compensation Laws 9, Introduction (16th ed. 1939 with cum. supp.).
an employer who fails to insure his liability, or fails to make the
necessary accident or payroll reports to the commission, shall be
liable to the injured employee either under the act, or at common
law, and in such cases he is foreclosed from interposing any of the
usual common law defenses. The remainder of the acts are design-
nated as elective, but most of these are drafted in such a way as
to make the term misleading. Under many of the so-called
elective acts, neither the employer nor employee is actually put to
an election, for acceptance of the act is presumed unless notice is
received to the contrary. In other words, the effect of the elective
features is to give those concerned a right to reject the act. Rejec-
tion of the acts, however, is often discouraged by other modifica-
tions in the common law complementing the passage of the compen-
sation statutes. For instance, if the employer rejects the act, he
is usually deprived of his common law defenses in an action by the
injured employee. If, on the other hand, rejection is by the em-
ployee, he is subject to these defenses by the employer and must
prove negligence on the part of the employer to recover. Because
of these compulsions, direct and indirect, the employee usually
comes within the coverage of the compensation statute in the
state of regular employment, and actions at common law for
injuries to the employee are thereby precluded. Where the em-
ployee leaves the state of regular employment, however, and is
temporarily working in another state when injured, the problem
is more difficult. If this temporary work is the only occurrence
within the state incident to the employment relation, the local act,
as has been seen, will frequently not be applicable, and will be no
bar to a common law action in tort by the workman against his
employer.

If the *lex loci delicti* gives the employee a cause of action in
tort, then the question is whether the compensation act of the
state of regular employment can be pleaded as a bar to such action.
Where it appears that the injured employee is subject to the com-
pensation act of the state where the regular employment is located,
and that act extends its coverage to extrastate injuries and is by its
terms made the exclusive remedy, the cases hold that no action
at law should be maintained, even though the injury constitutes
an actionable wrong under the *lex loci delicti*. Indeed, Art. IV,

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44 E.g., Barnhart v. American Concrete Steel Co., 227 N.Y. 531, 125 N.E. 675
(1920); The Linseed King, 48 F.2d 311 (S.D.N.Y. 1930); In re Spencer Kellogg
Sec. 1; of the United States Constitution might require that full faith and credit be given a compensation statute in such a case.\(^4^5\)

Closely analogous to this question is that of the extent to which the elimination of the employer's common law defenses, as a result of noncompliance with the compensation statute of the state where the regular employment is located, should be given effect beyond the state. It is generally held that the provisions of the compensation statutes, creating special rights of action in tort and removing the employer's common law defenses, are effective only as to torts committed within the state.\(^4^6\) Creation of special causes of action, and the elimination of defenses, it is said, are matters touching delictual rights and liabilities, and, as such, are governed by the law of the place where the tort occurred.\(^4^7\) In Armburg v. Boston & Maine R. R.,\(^4^8\) however, the Massachusetts court adopted a contrary view. This case involved an injury to the employee of a railroad, employed in Massachusetts, and injured in intrastate commerce outside of Massachusetts. The railroad had not complied with the Massachusetts compensation act, and was therefore liable to an action at law. The action was brought in Massachusetts, and the court held that the provisions of the Massachusetts act, abolishing common law defenses, was applicable; and this position was sustained by the Supreme Court.\(^4^9\) This decision is apparently on the ground that abolition of common law defenses is so annexed to the employment as to operate extraterritorially, as would have the compensation provisions, had the employer accepted the act.

IV. ENFORCEMENT OF CLAIM IN A STATE NOT THE PLACE OF INJURY AND HAVING NO CONTACT WITH THE EMPLOYMENT RELATION

Where neither the injury, nor any incidents of the employment are within the state, in which the claim is sought to be enforced,

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\(^4^7\) Ibid.
\(^4^8\) 276 Mass. 418, 177 N.E. 665 (1932).
the compensation act of the forum will not be applied. If the injury, under the laws of the state where it occurs, creates rights under the compensation act of that state, to the exclusion of an action of tort, that should be a conclusive defense to an action of tort brought in the forum. If, however, the employee would have a cause of action in tort under the lex loci delicti, and this would not be barred by the exclusive provisions of the compensation act of another state, then the employee's cause of action should be enforced by the forum as it would enforce other transitory tort claims. When it is determined that the compensation act of another state is applicable to the exclusion of a tort claim, the employee's action will be dismissed, and jurisdiction will usually not be exercised to hear his claim under the foreign compensation act.

The reasons for this rule are well stated in Mosely v. Empire Gas & Fuel Co., where it was said:

"A transitory cause of action can be maintained in another state even though the statute creating the cause of action provides that the action must be brought in the local domestic courts; the venue is no part of the right to recover damages for personal injuries inflicted by common law negligence, and a state cannot, under the full faith and credit clause of the United States Constitution, create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any state having jurisdiction. But those rules are not controlling where the right to recover compensation arises out of contract and the remedies, afforded by the statute creating the cause of action, are exclusive, and both the employer and employee have accepted the statute as part

50 Liggett & Myers Tobacco Co. v. Goslin, 163 Md. 74, 160 Atl. 804 (1932); Bement Oil Co. v. Cubbison, 84 Ind. App. 22, 149 N.E. 919 (1925); Freeman v. Higgins, 123 Neb. 73, 242 N.W. 271 (1932); Hamm v. Rockwood Sprinkler Co., 85 N.J.L. 564, 97 Atl. 730 (1916); RESTATEMENT, CONFLICT OF LAWS § 400 (1934).
53 In spite of the difficulties inherent in the situation, five jurisdictions have changed this rule by statute, and expressly provide that an employee, hired outside the state, might enforce the rights acquired under the law of the state of hire before their commissions or courts. ARIZ. CODE ANN. § 56-943 (1939); IDAHO CODE § 72-615 (1949); UTAH REV. STAT. ANN. § 42-1-52 (1943); VT. STAT. tit. 40, c. 353, § 8074 (1947); HAWAII REV. LAWS § 7523 (1935). In all these states but Utah, however, the rights must be capable of being reasonably determined and dealt with by the local bodies.
54 313 Mo. 225, 281 S.W. 762 (1925).
of their contract, and the statute prescribes a procedure for adjusting the compensation, and tribunals for enforcing the right, entirely different from the proceedings of courts proceeding according to the course of the common law, and the statute itself says that no action or proceeding under it can be brought outside of the state. . . . Where the statute creating the right provides an exclusive remedy to be enforced in a particular way, or before a particular tribunal, the aggrieved party will be left to the remedy given by the statute which creates the right."

There is no question under these circumstances of denial of full faith and credit to the public acts of sister states in violation of the United States Constitution, since the Supreme Court has held, where a provision for liability is coupled with a provision for a special remedy to be administered by a designated tribunal with certain specified power, the Federal Constitution does not require the forum to exercise jurisdiction.

V. THIRD PARTY LIABILITY

Another interesting problem, involving the extent to which common law rights and liabilities have survived, is that concerning third party liability. Injuries, not infrequently, occur for which the employer would normally be liable to pay compensation, and with respect to which a suit for negligence may also lie against some person other than the employer. In all but three states (New Hampshire, Ohio, and West Virginia) the compensation laws contain provisions regarding third party liability, and in these three the courts recognize the right of the injured party to sue the negligent person for damages. The statutes regulating third party liability expressly authorize the bringing of actions by employees entitled to compensation, and provide for subrogation to the employee's rights in favor of the employer or insurer paying compensation. When the injury occurs in a state, other than the state of regular employment, the question arises concerning the extent to which these provisions will receive extraterritorial enforcement. The problems that may be presented in this connection are many and difficult. Since this paper is primarily concerned with problems involving the rights and liabilities existing

55 Id. at 226, 281 S.W. at 763.
56 Art. IV, § 1.
between the parties to the employment contract, no more than this brief reference to the conflicts issues involved in subrogation will be made.\textsuperscript{58}

VI. \textbf{Choice of Workmen's Compensation Laws'}

\textit{A. In the Absence of Constitutional or Statutory Requirements}

The principles of conflict of laws as applied to workmen's compensation will be seen from the foregoing to be in no very orderly condition. The injured workman may find that he is eligible to secure compensation for the same injury under more than one act; utilization of one statute being based upon control of the employment relationship in its inception and performance; of the other, upon control at the time of injury. Apart from statutory or constitutional prohibitions, it has generally been recognized that the workman may seek recovery under either act,\textsuperscript{59} and in some jurisdictions under both,\textsuperscript{60} with a deduction being made for the first award.\textsuperscript{61} If the compensation acts of all the states were uniform, it would make little difference which act was determined to apply. The acts differ widely, however, with respect to the type of injury included, the defenses allowed, and the amounts recoverable, so that the election of laws becomes very important.

To this point the choice of law problem in workmen's compensation has been considered almost entirely on pure conflict of laws principles, without giving much attention to the relevant provisions of the United States Constitution. In recent years several cases have been decided by the Supreme Court in this field. The influence of these decisions on the choice of workmen's compensation law will be discussed separately in a subsequent installment of this article.

\textsuperscript{58} For an excellent and comprehensive discussion of third party liability and subrogation under workmen's compensation see Campbell, \textit{Subrogation Under Workmen's Compensation Too Much or Too Little}, 18 Chi-Kent L. Rev. 223 (1940).

\textsuperscript{59} Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939); American Mutual Liability Ins. Co. v. McCaffrey, 37 F.2d 870 (5th Cir. 1939), \textit{cert. denied}, 281 U.S. 751 (1930); Restatement, Conflict of Laws § 402 (1934).

\textsuperscript{60} McLaughlin's Case, 274 Mass. 217, 174 N.E. 398 (1931); McKesson-Fuller-Morrison Co. v. Industrial Comm'n, 212 Wis. 507, 250 N.W. 396 (1933); \textit{Restatement, Conflict of Laws} § 403 (1934).

\textsuperscript{61} Industrial Accident Comm'n of Wisconsin v. McCartin, 330 U.S. 622 (1947).