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Clyde W. Wellen

University of Houston

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WORKMEN'S COMPENSATION, CONFLICT OF LAWS
AND THE CONSTITUTION

CLYDE W. WELLEN*

The choice of law problems encountered in workmen's compensation cases resulting from injuries incurred in the course of an employment extending over state lines and the extraterritorial applicability of workmen's compensation statutes was considered in a previous installment of this article.** The purpose of this installment is to discuss the influence of the United States Constitution on the choice of the proper law in workmen's compensation cases and to demonstrate how the Constitution might be further utilized by Congress and the Courts to establish some degree of uniformity in this unsettled field.

B. THE UNITED STATES CONSTITUTION AND CHOICE OF WORKMEN'S COMPENSATION LAW.

1: Full Faith and Credit:

Art. IV, Sec. 1 of the United States Constitution provides, "Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof."

In its present form, the statute enacted by Congress under this power, after dealing with methods of authentication and proof, reads, "Such Acts, records and judicial proceedings, or copies thereof so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."62

In the early days, cases involving the full faith and credit clause were confined almost wholly to enforcement of judgments of a sister state. In more recent years the inquiry has also included the extent to which the clause applies to state law.63 The question of the extent to which the workmen's compensation act of a state must be given full faith and credit in a sister state was first considered by the Supreme Court in Bradford Electric Light Co. v.

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* Associate Professor of Law, University of Houston, Houston, Texas.
63 Moore and Oglebay, The Supreme Court and Full Faith and Credit, 29 Va. L. Rev. 557 (1943); Cheatham, Res Adjudicata and the Full Faith and Credit Clause, 44 Col. L. Rev. 330 (1944).
Clapper. Clapper, an employee of a Vermont company was killed while working temporarily in New Hampshire. He was a domiciliary of Vermont, and had been hired and regularly employed there, but his administratrix brought an action for wrongful death under the New Hampshire law, which permitted an election of remedies after injury. The defense of the company was that Clapper had come within the coverage of the Vermont Compensation Act, and that that act had provided compensation thereunder should be the exclusive remedy of an employee coming within its terms. The lower federal courts found death was due to the employer's negligence, and that New Hampshire law should govern, since it was the state where the injury occurred. On certiorari to the Supreme Court, it was held that refusal to allow the company's defense was a denial of full faith and credit under the Federal Constitution. Both the exclusive nature of the Vermont act and New Hampshire's lack of governmental interest in the case were emphasised by the Court. It was said:

"Obviously the power of Vermont to effect legal consequences by legislation is not limited strictly to occurrences within its own boundaries. It has power through its own tribunals to grant compensation to local employees, locally employed, for injuries received outside its borders, and likewise has power to exclude from its own court, proceedings for any other form of relief for such injuries."

"The interest of New Hampshire was only casual. Clapper was not a resident there. So far as appears, he had no dependents there. It is difficult to see how the state's interest would be subserved under such circumstances, by burdening its courts with this legislation."

Mr. Justice Stone concurred in the result, stating that in the absence of a controlling decision of the New Hampshire court, the federal district court should have recognized the Vermont statute on principles of comity. In the face of the principle that a decision should not be rested upon constitutional grounds, unless such a course is essential to the result, the majority opinion is all the more forceful as a constitutional precedent. The Supreme Court's choice of a single law to control rights and liabilities incident to the employment relation marked the first step in securing uniformity of remedy for industrial accidents through constitutional

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66 Bradford Electric Light Co. v. Clapper, 51 F.2d 992 (1st Cir. 1931).
interpretation. It was thought at the time that this decision was destined to overhaul radically the previous theories concerning the applicability of workmen’s compensation acts.\textsuperscript{68} Limitations of its implications were soon to appear.

The first such limitation appeared in \textit{Ohio v. Chattanooga Boiler & Tank Co.},\textsuperscript{69} the next case to reach the Supreme Court involving this problem. The decedent, a resident of Tennessee, was employed there by a Tennessee corporation. A condition of the employment was that he should serve also in other states. While working for the defendant in Ohio, the decedent was fatally injured. Both the employer and decedent had accepted the Tennessee compensation act, but the company had taken no steps to come within the coverage of the Ohio statute. The Tennessee act by its terms applied to injuries elsewhere than in the state if the contract of employment were made in Tennessee, “unless otherwise expressly provided by contract”, and also made the rights and remedies under the act exclusive of all other rights and remedies. The decedent’s widow, nevertheless, filed an application for compensation in Ohio, and received an award of nearly five thousand dollars. The amount of compensation in Tennessee would have been twenty two hundred dollars. The state of Ohio, thereupon, sought to recover from the defendant, the decedent’s employer, the amount paid the widow by the Ohio commission. The defendant resisted, claiming that any award should have been made under the Tennessee compensation act, and that to award compensation under the Ohio act was to deny such full faith and credit to the laws of Tennessee as was required by the \textit{Clapper} case. The Supreme Court held for the state of Ohio, and said that the \textit{Clapper} case did not require that a state statute be given full faith and credit in a sister state, unless such statute either on its face or by court interpretation, seeks to provide exclusively for the employee’s injuries. It was determined that the Tennessee act, under these facts, did not provide an exclusive remedy, so full faith and credit was not required. To justify this conclusion the Court relied on a decision by the Tennessee supreme court,\textsuperscript{70} that the widow could not seek compensation under the Tennessee law after having applied for compensation in Ohio, this being tantamount to an election not to come within the Tennessee compensation act.


\textsuperscript{69} 289 U.S. 439 (1933).

\textsuperscript{70} Tidwell v. Chattanooga Boiler & Tank Co., 163 Tenn. 420, 43 S.W.2d 221 (1931).
In Alaska Packers Ass'n v. Industrial Accident Comm'n, the Supreme Court further restricted the conditions under which a workmen's compensation statute must be given full faith and credit in a sister state. The employee was hired in California to perform work in Alaska, and the parties expressly adopted the Alaska act, which by its terms provided its remedies were to be exclusive. While in Alaska, the workman, who was a nonresident of both Alaska and California, was injured. Upon returning to California, he brought an action for compensation before the California board and under the California act. The court weighed the governmental interests of the two jurisdictions involved, and found that of California great enough to justify the application of its compensation act, despite the fact that the parties had expressly stipulated to be bound by the law of Alaska, and that the injury occurred there. Thus, for the act of a state to be entitled to full faith and credit in another state, the additional condition was imposed that the other state involved (which will sometimes be the state of employment and other times the state of injury) must have only a casual interest in the employment relationship. What the Court meant by casual interest was not made clear. Further light was cast on the question by Pacific Ass'n v. Industrial Accident Board. There an employee of a Massachusetts corporation, who was a resident of that state, and regularly employed there, was injured in the course of his employment while temporarily working in California. The compensation act of each state provided that its remedies were exclusive. The Supreme Court, speaking through Mr. Justice Stone, said:

"The Clapper case cannot be said to have decided more than that a state statute applicable to an employer and employee within the state, which by its terms provides compensation for an employee if he is injured in the course of his employment, while temporarily in another state, will be given full faith and credit in the latter state when not obnoxious to its policy." 

The Massachusetts statute was found to be obnoxious to the public policy of California, as expressed by its courts, and embodied in its act, since it denied California physicians and hospitals the certainty of receiving the pay granted by the California act for helping injured employees, and possibly would require them to go to another state to collect their charges. It was held, therefore,
that California need not give full faith and credit to the Massachusetts act. The facts in the *Pacific* case were substantially identical to those in the *Clapper* case. The difference in the result reached in the instant case was rationalized by pointing out that the applicability of the foreign act in the *Clapper* case was not obnoxious to the New Hampshire public policy, while in the *Pacific* case the public policy of California demanded that only its act be applied. Since either one or both of the two factors of public policy, (a) that the employee might become a public charge to the forum, or (b) that the economic interests of physicians and hospitals of the forum must be protected, are likely to be present in any case that may arise, there will probably be few cases where the Supreme Court will compel a state to recognize the applicability of a foreign statute.

Under the existing state of the law, the forum must recognize a foreign statute as applicable only: (1) when that statute provides that it is the exclusive remedy in case of extraterritorial injury, and (2) when the forum has no governmental interest to preserve in making an award. Applying these tests, it seems clear that either the state of injury, or the state of employment will have power to make an award in nearly every situation. In the event that such an award is made by one of the states having a contact with the employment relation, what will be the effect of the award on further proceedings in a second state? Should the workman's claim be considered indivisible and treated like a common law cause of action? If this is done when an award is made in one state, the whole claim will be merged into the award, as is a cause of action merged into a judgment at common law, thus preventing a second satisfaction for the same injury. If an award is made by a court and is final, it is of course conclusive between the parties with respect to the matters it covers, and entitled to full faith and credit in a second jurisdiction. Workmen's compensation claims, however, are not usually heard by courts of law, but are determined by special administrative tribunals set up for that purpose, so it is questionable whether their awards should be given the same full faith and credit in a second jurisdiction as an ordinary judgment; and, even if these proceedings are judicial, there is the further question whether they could logically affect a claim in

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another state, since they only determine rights to compensation under local law. The courts are not uniform in their answers to these questions. According to one view, workmen's compensation awards are treated as a complete adjudication of the rights of the parties, and entitled to full faith and credit under the Federal Constitution, regardless of whether the proceedings are those of a court of general jurisdiction or those of statutory tribunals set up solely to administer the compensation laws.76 The conclusion, that these awards should be given the same full faith and credit as proceedings of a court of general jurisdiction, was fortified by the decision of the Supreme Court in *Broderick v. Rosner*77 in which it was held that administrative action involving a stockholder assessment was entitled to full faith and credit in a sister state. In many states, while recognizing that these awards are entitled to full faith and credit, it was said that they only determine the right to compensation under the law of the state where rendered, and do not bar the employee's claim in another state with respect to the same injury. In the states permitting a second award, it is provided, however, either by statute,78 or by decision,79 that the amount received in the initial award outside the state shall be deducted from the local award, so that the employee's total compensation would be no greater than the measure he would have received had he pursued only his local claim. The question of whether a final award in one state constitutionally bars a subsequent recovery of compensation for the same injury in a second state, was squarely presented in the United States Supreme Court in *Magnolia Petroleum Co. v. Hunt.*80 Hunt, a resident of Louisiana, was employed there by the defendant company as a laborer in connection with drilling oil wells. In the course of his employment he went from Louisiana to Texas, and while working there was injured. The latter state awarded him compensation, but subsequently he made a claim for the same injury in Louisiana. The

77 294 U.S. 629 (1936).
insurer set up the Texas award as a bar, and invoked the full faith and credit clause. The Louisiana board made an award (its act providing a higher rate of compensation) after deducting the amount of the Texas payment. The Supreme Court vacated the second award on the ground that a final award for compensation under the Texas act had the same effect as a judgment, and was res judicata as to all matters which had been, or could have been litigated; that, since there was but one injury, there was but one cause of action which merged in the award; and, since the matter was res judicata in Texas, it must be given the same effect elsewhere as in the case of any other judgment for money in a civil action. There were four dissents to the Magnolia decision. Separate dissenting opinions were written by Mr. Justice Black and Mr. Justice Douglas. The principal grounds of dissent were: (1) that Texas did not intend the award of compensation by its industrial accident board to bar the rights granted to Hunt in other states, and (2) even if Texas did intend its award to have this effect, the claim of Hunt was not indivisible, so that the Texas award was res judicata only concerning Hunt’s claim in Texas.

In Industrial Comm’n of Wisconsin v. McCartin,81 the next case to reach the Supreme Court involving the extraterritorial effects of workmen’s compensation awards, the effects of the Magnolia decision were virtually negated. McCartin hired one Kopp to work for him as a bricklayer in Wisconsin. Both the employer and employee were residents of Illinois and the contract of employment was made in that state. For an injury suffered while working in Wisconsin, Kopp filed claims against McCartin in both states. The parties made a settlement which, pursuant to Illinois procedure, was entered as an award. The Illinois statute provided: “No common law or statutory right to recover damages . . . . other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this act.”82 Nevertheless, the award reserved the employee’s rights under the Wisconsin law, although the Illinois commissioner expressed doubt as to the effect of the reservation. Subsequently, the Wisconsin commission awarded the employee additional benefits, overruling an objection based on the full faith and credit clause. But the Wisconsin court held that the award should be set aside on the authority of the Magnolia case. On certiorari, the United States Supreme Court reversed the judgment and held that the Illinois award did not

bar additional recovery under the Wisconsin statute since the Illinois law did not expressly foreclose recovery under the law of another state, but was conclusive only as to the rights arising in Illinois.

Although the McCartin case does not purport to affect the technical doctrine of the Magnolia case, it strictly limits its practical effects. Under the present decision only an express declaration, statutory or judicial, that an award bars further recovery under the laws of other states, will bring the Magnolia rule into operation; and it seems unlikely that any statute will be interpreted to come within such a narrow scope. 83

The result in the Magnolia case has been criticised since the time of its decision. It has been argued that there should be a relaxation of the full faith and credit clause in relation to workmen's compensation awards. 84 Since workmen are often members of a necessitous class, it is said the state has a special interest in seeing that its workmen are provided with compensation according to its own standards. 85 This special interest cannot be passed upon by another state, since the machinery for enforcing claims in each state is adapted to enforcing rights and liabilities arising under its own laws. The tribunals set up to administer compensation cannot apply the statutes of another state, as can a court of law apply the tort law of another state in a negligence case where there is an extrastate element. There is thus a distinction between a transitory tort action and workmen's compensation proceedings so far as choice of law is concerned. Because of this distinction, it has been suggested that a compensation award should not be con-

83 For a collection of statutes see 1 Schneider, Workmen's Compensation Text §§ 156 (e), 163-218 (3d ed. 1941).

Measured by the rule of the McCartin case, it would seem that even the Texas law pertinent in the Magnolia case did not make a sufficiently explicit declaration. The Illinois and Texas statutes are strikingly similar.

The applicable provision of the Illinois statute reads: "No common law or statutory right to recover damages for injury or death sustained by an employee while engaged in the line of his duty as an employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this act..." ILL. ANN. STATS. c. 48, § 143 (Smith-Hurd, 1935).

The similar section of the Texas act provides: "The employees of a subscriber shall have no right of action against their employer or against any agent, servant, or employee of said employer for damages for personal injuries but such employees...shall look for compensation solely to the association." TEX. REV. CIV. STATS. art. 8305, § 3 (Vernon, 1941).


85 Id. at 844 (where this special interest is compared to the interest a state has in the support of a minor child). See Mr. Justice Stone's dissenting opinion in Yarborough v. Yarborough, 290 U.S. 202, 213 (1939).
sidered res judicata and as constituting a bar to further proceedings in a second state having a governmental interest in awarding additional compensation to the injured workman.86

A further criticism of the Magnolia decision is that the employer is given an opportunity to take advantage of the injured employee with regard to choice of forums. The employer is likely to be better informed than the employee concerning the various state statutes, and may urge an early award in the state which would grant the lowest amount of compensation. Once granted, this award would conclusively determine the rights and liabilities of the parties.

The result in the McCartin case reflects the Court's tendency to recognize the unique status of workmen's compensation, and to relax the rigidity of the requirement of full faith and credit in that field. The cases dealing with workmen's compensation awards in relation to the full faith and credit clause seem to be following along a pattern set by the Court in dealing with workmen's compensation statutes. The McCartin case is distinctly parallel to the Chattanooga Boiler & Tank Company case. There a non-exclusive statute could not be asserted as a bar to an award in a foreign jurisdiction, and the doctrine of the Clapper case did not apply; in the McCartin case a statute construed as not providing an exclusive remedy similarly did not bar additional compensation under the laws of another state, and the Magnolia case was found inapplicable. Whether the Alaska Packers and Pacific cases point the way for the Supreme Court in cases involving previous awards remains to be seen. The Magnolia and McCartin cases apparently stand for the proposition that a state can determine for itself the extent of the extraterritorial application of its own statute, without weighing the interests of the second state in the matter. That a state should be allowed to preclude another from applying its own act to provide a maximum recovery for one of its injured citizens, who may become a permanent public charge, seems grossly unfair, as well as unjustified under the full faith and credit clause. Certainly the rule, as thus laid down by the Court, does not square with the policy previously announced in the Alaska Packers and Pacific cases that the governmental interests of each state connected with the employment relation should be considered, and that an award should be sustained if the forum has any governmental interest to preserve in granting it. An application of this policy

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to the previous award cases would require the Court to sustain the grant of additional compensation in a second state if this state has more than a casual interest in the employment relation. Such a result would be desirable both from the standpoint of the state and the injured employee, and it would remove from the first state granting an award the questionable power of deciding whether its award should be conclusive of the rights of the parties in a second state.

2 (a): The Commerce Clause—in the absence of federal legislation:

As has been seen, there are several choice of law theories applied by the states to determine which law should govern when an employee is injured while engaged in an interstate transaction. A great many of the states make some application of the rules of conflict of law derived from the contract theory. These rules have been found inadequate and have been extensively modified by statute and decision.87 While these modifications were much needed, their adoption by the different states was not uniform, and the result has been a most undesirable variation in state policy. A few states have in effect closed their borders to the compensation laws of other states. Others have written limitations into their extraterritorial provisions, or have by judicial decision educed limitations unknown to the principles of choice of law applicable to contract. Still others have discarded the contract theory entirely. When this choice of law question was taken to the Supreme Court under the full faith and credit clause, it failed to provide a rule by which the law of one state would automatically be applied to the exclusion of others. While it is believed that this was a wise decision, still it contributed little to the solution of the problem.

This uncertainty, connected with workmen's compensation, is probably felt most by businesses engaged in interstate commerce. The rapid growth of businesses in this country extending over state lines, accompanied by a like development in our transportation and communication facilities, has resulted in the employment of a large number of workmen in interstate activity. An analysis of their status under current compensation acts points out serious deficiencies in existing legislation.

Art. 1. Sec. 8 (3) of the United States Constitution provides: “The Congress shall have power to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.”

87 See supra page 235.
The grant of power over interstate commerce in the Constitution, of its own force, established the essential immunity of interstate commercial intercourse from direct control of the states with respect to those subjects embraced within the grant, which are of such a nature as to demand that if regulated at all their regulation should be prescribed by a single authority. In such a case the federal power is exclusive, and the states may not act even though Congress has not exerted its legislative authority, the silence of Congress being equivalent of a declaration that the particular commerce shall be free from regulation. In matters admitting of diverse treatment, according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act, and when Congress does act, the exercise of its authority overrides all conflicting state legislation. From the start many employers tried to avoid liability under state compensation statutes on the ground that injuries to employees, while they were engaged in interstate commerce, were not compensable. It was argued that this was exclusively a matter for Congress, and that, under the Constitution, state industrial commissions had no power to make awards for interstate injury. It was held by the Supreme Court, however, that in the absence of congressional action, the states may, without infringing the jurisdiction of the Federal Government with respect to interstate commerce, legislate concerning relative rights and duties of employers and employees while within their borders, although engaged in such commerce. But to the extent that the subject is covered by federal legislation, state compensation laws are excluded.

Congress, by the enactment of the Federal Employer's Liability Act, has legislated concerning the liability of railroad companies to their employees injured while engaged in interstate commerce. The Employer's Liability Act, however, permits an injured workman to recover damages, only when it is made to appear that the

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90 Sanitary District v. United States, 266 U.S. 405 (1925); In re Rahner, 140 U.S. 545 (1891).
93 Valley Steamship Co. v. Wattaqu, 244 U.S. 202 (1917).
employer railroad was guilty of negligence, whereas the state workmen's compensation acts authorize compensation for all injuries, which are incident to the employment. A large number of injuries to railway employees are thus excluded from the operation of the Federal enactment, but will fall within the purview of the state statutes. The courts in several states formerly held that compensation for injuries of this class might be made under the local act. The United States Supreme Court did not accept this view but held that railway employees cannot recover under a state act for injuries or death arising out of the acts connected with their employment in interstate commerce, even in those cases where, by reason of the absence of the employer's negligence, there is no remedy under the federal act. The Federal Employer's Liability Act is construed as establishing a rule of regulation which is intended to operate uniformly in all states as respects interstate commerce, and as being in that field both paramount and exclusive. The coverage of this statute, however, is limited to interstate railway employees, and, with the possible exception of injuries to employees as a result of violations of the Federal Safety Act by the railway employer, the state acts are always applied if the employee was engaged in intrastate activity when injured. The Federal Safety Act was enacted to designate the safety devices to be used on interstate railways, and provides certain rights and liabilities for their violations. The first cases construing the act indicated that these rights and liabilities operated to the exclusion of the state workmen's compensation acts, but later cases have held that since the act does not create, prescribe the measure, or govern the enforcement of the liability arising from its breach, it

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100 Tipton v. Atchison, T. & S.F. Ry., 298 U.S. 141, 104 A.L.R. 831 (1936). The problem of distinguishing between interstate and intrastate employment was involved in forty-three cases out of one hundred seventy-two in the first twenty-five years under the Federal Employer's Liability Act. For discussion of this question see Schroene and Watson, Workmen's Compensation and Interstate Railways, 47 HARV. L. REV. 889 (1934).
does not extend to the field occupied by the state compensation acts.\textsuperscript{102}

With the exception of the laws applicable to railway employees and to employees coming within federal admiralty jurisdiction,\textsuperscript{103} there is no federal legislation dealing with injuries to interstate employees, occupying the field to the exclusion of state statutes.\textsuperscript{104} Hence, the compensation acts of the states are applicable to interstate workers, unless the acts themselves expressly deny such applicability. While some of the state statutes make no mention of interstate employments,\textsuperscript{105} most of the acts have provisions denying their applicability to interstate employments in some instances. The statute of Alabama expressly excludes employees of all interstate carriers from its operation.\textsuperscript{106} The remaining statutes may be divided into four basic groups: (1) that group which provides that the acts shall apply to employees engaged in interstate commerce, but where Congress has established a rule of liability, the acts shall apply only to the extent that the interstate and intrastate work may and shall be clearly separable;\textsuperscript{107} (2) that group which provides that the acts shall not apply to businesses or employments which according to law, are so engaged in interstate commerce as to be not subject to the legislative power of the states;\textsuperscript{108} (3) that group which provides that the acts shall not apply to employers and employees engaged in interstate commerce in case the laws of the United States provide for compensation or for liability for injuries or death in such employments, and which laws are exclusive;\textsuperscript{109} and (4) that group which provides that the acts shall not apply to common carriers by rail. State statutes can,


\textsuperscript{103} For a discussion of the problems of workmen's compensation connected with federal admiralty jurisdiction, see Horowitz, Injury and Death under Workmen's Compensation Laws 16 (1944).

\textsuperscript{104} In Bradley v. Public Utilities Comm'n 289 U.S. 92 (1933), it was held that the Federal Motor Carrier Act, 49 Stat. 543, 49 U.S.C. §§ 301 et seq. (1935), does not render a state act inapplicable with regard to interstate motor carrier employees. The same result has been reached under the Air Commerce Act, 44 Stat. 569, 49 U.S.C. §§ 171 et seq. (1926), with respect to the interstate employees of air carriers: Sheboygan Airways v. Industrial Comm'n, 209 Wis. 352, 254 N.W. 178 (1932).

\textsuperscript{105} For a collection of statutes see Digest Workmen's Compensation Laws (16th ed. 1939 with cum. supp.).


\textsuperscript{107} Alaska Packers Ass'n v. Industrial Comm'n, 294 U.S. 532 (1935).


\textsuperscript{109} See notes 12 and 15 supra.
and do to varying degrees apply to interstate employees without violating the burden on interstate commerce.\footnote{110 \textit{Cf.} Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938); Freeman v. Hewit, 329 U.S. 249 (1947).}

The problem may be outlined by considering two Ohio decisions. In the first, \textit{Spohn v. Industrial Comm'n},\footnote{111 \textit{Spohn v. Industrial Comm'n}, 130 Ohio St. 322, 28 N.E.2d 493 (1941).} the plaintiff, an Ohio citizen, was employed in Michigan to drive a truck for an interstate trucking firm incorporated in Michigan. The company confined its operations exclusively to interstate commerce. It contributed to the Ohio and Pennsylvania workmen's compensation funds on the basis of wages paid its terminal employees in those respective states. To the State Accident Commission of Michigan, it contributed on the basis of its employees in that state and of all its interstate drivers. The plaintiff was injured in Ohio while within the course of his employment and sought compensation under the Ohio statute,\footnote{112 \textit{Ohio Gen. Code} c. 237, § 1455-37 (Page, 1938).} which provided that none of the terms of the Ohio workmen's compensation act shall apply to interstate commerce, unless the same shall be permitted by the Constitution of the United States and the Acts of Congress. The Ohio court held that, except for the above provisions, the coverage of the Ohio act extended to interstate employees injured within the state, but, that if so construed, the statute would place an unconstitutional burden on interstate commerce. In accordance with the section in the Ohio act, prohibiting regulation violating the United States Constitution, it was held the Ohio act should not be applicable.\footnote{113 \textit{Cf.} Hall \textit{v. Industrial Comm'n}, 131 Ohio St. 416, 3 N.E.2d 367 (1936).}

A second decision by the Ohio court, however, has limited the doctrine of the \textit{Spohn} case to employers engaged exclusively in interstate commerce,\footnote{114 \textit{Holly v. Industrial Comm'n of Ohio}, 142 Ohio St. 79, 50 N.E.2d 152 (1945).} so that now the Ohio act will be applied to injuries within the state even though the injured employee resides in, and was hired in another state, if part of his duties are in intrastate commerce.

While the doctrine of these cases is somewhat limited, they do indicate the possibility of using the commerce clause as an instrument for forcing more uniformity in the application of state compensation laws. Only one case involving the relation of the commerce clause to state workmen's compensation statutes has arisen in the United States Supreme Court. This was \textit{Wattawa v. Valley
Steamship Co.115 Wattawa, an employee of an interstate shipping company, was injured within the scope of his employment in Ohio. The Ohio workmen's compensation act116 provided that all employers of more than five men should contribute to the state insurance fund. If the employer did not elect to so contribute, it was provided that he should be deprived of the common law defenses of contributory negligence, assumption of risk, and the fellow servant rule, if sued by an employee for negligent injury. The company had not complied with the Ohio statute, so an action based on negligence was brought by Wattawa. The company denied negligence and claimed assumption of risk by the plaintiff. The company admitted it employed more than five men, and thus came within the wording of the Ohio act, but it was claimed the act contravened the commerce clause when applied to a company engaged in interstate transportation and hence could not be enforced. The United States Court held that, in the absence of congressional legislation occupying the field, the commerce clause does not forbid a state to legislate concerning the relative rights and duties of employers and employees within her borders, although engaged in interstate commerce.

It is important to note that the employer was a resident of Ohio, and that the injury, and contract of employment all took place within the state. No other state had attempted to bring the employer within the scope of its act with respect to this employee. If the incidents of the contract of the employment, *viz.*, the contract of employment, the place of regular employment, the residence of the parties, and the place of injury had been located in different states, so that the employer would have been burdened with qualifying under several state statutes for the same employee, the result might have been different.

As business expands and the number of interstate employees increases, the problem will become more acute. It may be argued that such burden on the employer might be obviated by the employer paying a premium on the proportion of the workmen's wages measured by the time spent in each of the several states. This argument was met in the Spohn case as follows:

"While such arrangement might be reasonable in some cases, it can readily be seen that such a procedure would at once become a burden in and of itself in a majority of cases. Before an employer engaged solely in interstate commerce might send a workman into or through a state, it would be

115 244 U.S. 202 (1917).
necessary for the employer to qualify within the state and pay a premium, which premium would, in the great majority of cases, be speculative in amount. It would be somewhat analogous to securing a visa for foreign travel and paying a premium on a bond to insure that the workman would not become a public charge. It would Balkanize the states, the avoidance of which, and the assurance of free intercourse among the states, are the purposes of the commerce clause."

Even if the Supreme Court should declare that one, or some, of the present theories by which states give their workmen's compensation statutes extraterritorial application are unconstitutional as applied to interstate commerce, many perplexing problems would remain. Definition of the difficult term "interstate employee" would be necessary. Also remaining would be the necessity of specifying the precise amount of contact a state must have with the incidents of employment before its law would become applicable, and of determining the relevance of the laws of the state in which the injury occurred. Uniformity would certainly be desirable in this respect since the problem is necessarily of concern to more than one state. But if the Supreme Court should exercise jurisdiction and turn this question of conflicts into a constitutional problem, it may be unduly burdened with litigation as a practical matter. These disadvantages would appear to outweigh any advantage to be gained in freeing limited phases of interstate employment from state regulation, so it seems doubtful that the Supreme Court will resort to the commerce clause for this purpose.

2 (b): Federal legislation under the Commerce Clause:

The lack of uniformity among the state statutes, and decisions, would seem to suggest the passage of a federal workmen's compensation act. An examination of federal experience in this field, however, reveals many formidable obstacles to such legislation. Under the authority conferred by the commerce clause, Congress has the power to legislate concerning the redress of personal in-

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117 Spohn v. Industrial Comm'n, 158 Ohio St. 42, 50, 32 N.E.2d 554, 557.
118 For a discussion of the difficulties in defining this term in connection with the Federal Employer's Liability Act, see Schroene and Watson, "Workmen's Compensation and Interstate Railways," 47 Harv. L. Rev. 389 (1934).
119 If a constitutional question is determined to be involved appeal may be taken directly to the United States Supreme Court from the highest court within the state where the action was brought. Rev. Stats. § 690 (1875), as amended 45 Stat. 54 (1928), 28 U.S.C. § 344 (1941). See Dodd, The Power of The Supreme Court to Review State Decisions in the Field of Conflict of Laws, 39 Harv. L. Rev. 533 (1926).
juries occurring in the course of interstate and foreign commerce.\textsuperscript{120} The first effort to create such liability was in the First Federal Employer's Liability Act, passed in 1906, and declared unconstitutional by the Supreme Court in 1907, on the ground that Congress had exceeded its authority in endeavoring to make the law applicable to all employees of interstate carriers without regard to whether they were engaged in interstate commerce when injured.\textsuperscript{121} The act was re-enacted by Congress in 1908, with the provision that it should apply only to employees of interstate or foreign carriers, while employed in such interstate or foreign commerce.\textsuperscript{122} With this restriction, the act has been held to be within the authority of Congress.\textsuperscript{123} This act is an employer's liability act, and not a workmen's compensation statute, that is, liability is based upon negligence of the employer, with the customary statutory modifications of the employer's common law defenses. Under its admiralty jurisdiction, conferred by Art. III, Sec. 1 of the Constitution, Congress has passed a workmen's compensation statute covering injuries to longshoremen and harbor workers occurring upon the navigable waters of the United States.\textsuperscript{124} At present, however, there is no federal compensation act covering other private employees engaged in interstate and foreign commerce. Several attempts have been made in Congress to provide such legislation, but none of these bills have become law.

In 1912, a congressional committee, after two years' exhaustive investigation, reported voluminously in favor of a federal workmen's compensation bill for employees injured in interstate commerce. Such bills were passed by both Houses of Congress,\textsuperscript{125} but because of differing provisions which were never adjusted, failed to become law. Another attempt was made in 1932 when Senator Wagner of New York introduced in Congress a compensation bill,\textsuperscript{126} which in its terms and scale of benefits followed very closely the provisions of the Longshoremen's and Harbor Workers' Compensation Act. It proposed to provide compensation for disability

\textsuperscript{121} First Federal Employer's Liability Cases, 207 U.S. 468 (1908).
\textsuperscript{123} Second Federal Employer's Liability Cases, 223 U.S. 1 (1911).
\textsuperscript{125} These bills were S.B. 5382, and H.R. 20487 passed by the 62d Cong. 2d Sess.
\textsuperscript{126} S.B. 4927, introduced June 15, 1932, 72d Cong., 1st Sess.
or death resulting to employees, if the injury was sustained by the employee while engaged in work of an interstate character. Despite the inadequacy of the state legislation and of the Federal Employer's Liability Act to cover workmen engaged in interstate employment, this bill did not receive favorable action. A similar bill, but restricted in application to employees of air carriers, was introduced in the Seventy-ninth Congress, but it too failed to secure the necessary backing for passage.

Many objections have been urged against this proposed legislation. Some of these seem well founded. One important objection is that these bills, like the Federal Employer’s Liability Act, apply only to injuries sustained in work of an interstate character. One of the most fruitful sources of litigation under the Federal Employer’s Liability Act has been the determination of the exact boundary between state and federal jurisdiction, that is, between service in interstate and foreign commerce on the one hand, and service intrastate, or local, on the other. At best, then it could be expected that this drawback of the Federal Employer's Liability Act would be carried over into the proposed compensation acts. The question would not be important if the coverage and schedule of benefits of the state and proposed federal acts were similar, for then the employee would be equally protected, whether it be determined he was engaged in intrastate or interstate activity when injured. The rate of compensation proposed by the federal acts, however, has been much higher than that allowed by the states, so that a worker injured in interstate commerce would receive a much greater compensation than an intrastate worker would receive for the same injury. This would tend to create ill feeling, and much litigation on the part of workers in an attempt to qualify under the federal act.

In connection with this litigation, a serious administrative defect in the proposed acts would be revealed. The Supreme Court has held that there is a right under the Longshoremen's and Harbor Workers' Compensation Act, to a judicial trial de novo to re-determine the issue of whether the workman comes within the federal admiralty jurisdiction and hence under the coverage of the act. Since the question of the character of the employee's activity, that is, whether intrastate or interstate, would be jurisdictional under the proposed federal legislation, the employee, by analogy to the rule adopted under the Longshoremen's Act, would

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probably have a right to a hearing *de novo* in the federal courts after an adverse determination by the compensation commission. This would place a tremendous burden on the courts and would make administration of the act slow and difficult. Because of these inherent difficulties, it seems doubtful that future proposals for a federal compensation act will receive favorable action.

C. EFFECT OF STIPULATIONS ON THE CHOICE OF LAW

In an attempt to avoid choice of law problems under existing legislation, some employers, contemplating that their employees may perform services in more than one state, have expressly incorporated in the employment contract a stipulation that the law of a specified jurisdiction shall apply in case of injury. As more businesses expand over state lines, it is probable that the use of this type of stipulation will increase, so an examination should be made of its possible validity and effects.

The problem of stipulation in relation to choice of law has arisen mostly in connection with contracts. Whether such stipulation should be permitted has been the subject of much discussion both *pro* and *con*. There has been a paucity of cases dealing with stipulation in relation to choice of workmen's compensation law, so an analysis of its treatment in the contract field should be useful, especially since workmen's compensation is believed, by many courts, to be based on contract principles.

According to one view, the intent of the parties can have no effect in determining the law applicable to their transactions. The law of the place of contracting, it is said, must in all cases be applied to ascertain the validity of contracts, while matters connected with performance of contracts must be governed by the law of the place where the contract is to be performed. Hence only the acts of the parties are important in determining the applicable law, and their intent with reference thereto becomes irrelevant. Where intent of the parties will not be permitted to govern choice of law relating to ordinary contracts, it would seem most doubtful

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121 See 55 W. Va. L. Rev. 182, and n. 6.
123 Ibid.
that such intent would be enforced with respect to workmen's compensation, since a state's interest with respect to compensation of injured workmen is much greater than its interest in ordinary contractual obligations.

There has been much criticism of the view that the intent of the parties, especially their expressed intent, should be disregarded in choosing the law applicable to their contracts. An examination of this criticism reveals that it is well founded. In every case, in which the express intent of the parties concerning the law applicable to their transactions is considered by a court, the initial question is whether it will be given effect under the choice of law rules of the forum. It is then the law of the forum which is applied. The effect is not to permit the law of a foreign state, as such, to control the legal consequences of an agreement. The case is precisely like one in which the parties, without mentioning laws or state, stipulate that the contract shall be determined in accordance with certain specified rules. The "rules of law" of the foreign state take effect, not as the law of the state, but merely as terms of the agreement of the parties, and those supporting this view argue that the foreign law should be given at least as much effect by the forum, as it would give the applicable provisions of such law if they were expressly written into the contract by the parties without reference to the law from which they were taken. This view seems well justified in logic and authority since many examples may be cited in our law where parties to a contract have been able, by stipulation, to alter what would otherwise be the legal consequences of their agreements.

In states where the parties' expressed intent has been allowed to govern, their choice of law has been limited by the requirement


\[136\] Mutual Reserve Fund Life Ass'n v. Minehandt, 72 Ark. 690, 83 S.W. 923 (1904); Louis Dreyfus v. Paterson Steamships, 43 F.2d 824 (2d Cir. 1930).


\[138\] Id. at 903. Some of the examples listed by Cook are limitations in bailment contracts; limitations of liability of common carriers; normally assignable contractual rights made nonassignable by the parties; time limitation in insurance policies for notice of loss; the insurance company being absolved from liability of notice not given within a fixed time, despite a longer period allowed by the statute of limitations; elective workmen's compensation acts; arbitration agreements and award; and in some states, limitations on the alienability of property.
that it be in good faith,\textsuperscript{130} and that it not violate the public policy of the forum.\textsuperscript{140} In the United States, the cases, without exception, have required that the state, whose law is stipulated, have some substantial contact with the contract.\textsuperscript{141} The theoretical reasons for this latter limitation are obscure,\textsuperscript{142} but as a practical matter there is much justification. To allow a wider choice would place a possible inconvenient burden on the courts of the forum in discovering and applying the law of some remote jurisdiction, and perhaps, too often, lead to a clash with the public policy of the states concerned.

Even if a conflicts rule were accepted, permitting the parties to designate the law applicable to an ordinary contract, there would be many objections to extending it to workmen's compensation. At the outset it may be asked if this is a situation where the parties should be allowed to change the legal consequences of their acts. Many courts hold that the obligation of the employer to compensate his employees for injuries occurring within the course of the employment is more than a mere contractual obligation. Once the employment relationship is established, it is said, the law imposes certain obligations on the employer with respect to his employees.\textsuperscript{143} These obligations are imposed by the state under its police power because of its governmental interest in seeing that workmen within its jurisdiction are compensated for their industrial injuries.\textsuperscript{144} Any effort by the parties to change their rights and duties under compensation acts of this nature will likely be closely limited.

In those states where workmen's compensation is treated as contractual, and the parties are permitted to elect by contract to


\textsuperscript{143}Val Blatz Brewing Co. v. Industrial Comm'n of Wisconsin, 201 Wis. 474, 230 N.W. 622 (1930).

\textsuperscript{144}The rights of the state legislatures to impair the right to contract and to impair obligations of existing contracts under a proper exercise of the police power in connection with workmen's compensation is uniformly recognized. See cases collected in 71 C.J. 287 (1935).
come under either workmen's compensation or the common law. There is much greater reason for giving effect to the intent of the parties. If these acts may be wholly rejected by the parties, they should be free to look to the law of another state to determine their rights and liabilities. Even in this instance, however, it is arguable that the choice was meant to extend only to the various laws of the state, and not that the parties might choose the law of a foreign state.

Many arguments can be made for enforcing the choice of the parties concerning the workmen's compensation law to cover their employment. When the employee is engaged in interstate activities he can never be sure he will qualify for compensation in a state with adequate coverage, and the extent, or existence of the employer's liability will be equally uncertain. When the incidents of employment touch several states there may be several statutes covering the injury, and the scale of benefits will vary according to the law elected. An additional burden of the employer would be the necessity of complying with the statutes of the several states to avoid possible common law liability, which might in certain cases be much greater than the amount provided by the compensation statutes for such injury.

If the parties could designate the provisions of a single state statute to determine their rights and liabilities, many of these problems would be averted. The principal objection to this is that the employee often would not have equal bargaining power with the employer. If the employer were permitted to impose the terms of the employment contract, he could select the law of the state which imposes the least onerous burden from among all the states which have a substantial contact with the employment. To permit this would violate the primary purpose of workmen's compensation, which is to provide adequate benefits for industrial injuries. Where, however, the purpose of the parties is merely to provide for definite rights and liabilities in case of injury, there would seem to be no sound reason for rejecting their attempt. If, on the other hand, the purpose of the stipulation is to minimize the effect of workmen's compensation laws, and there is a large discrepancy between the rates provided by the parties, and the

145 See I. Schneider, Workmen's Compensation Text, c. 3 (3d ed. 1941).
146 In six states it is provided by statute that the expressed intent of the parties shall be controlling. Those states are Alabama: Ala. Code Ann. tit. 26, § 259 (1940); Kentucky: Ky. Rev. Stats. § 342-045 (1948); Maine: Me. Rev. Stats. c. 26, § 2-II-A (1944); Missouri: Mo. Rev. Stats. c. 29, § 3700 (6) (1939); Nevada: Nev. Comp. Laws § 2723 (Hillyer, 1929); Tennessee: Tenn. Code Ann. § 6870 (Williams, 1934).
rates provided by otherwise applicable statutes, the intent of the parties should be given no effect on the ground that it is against the public policy of the forum.

In the event that it is desired to incorporate a provision in the employment contract concerning choice of law, great care must be taken to express the exact provisions of foreign law desired to be applicable. Some of the problems, which may arise if the contract is loosely drawn, were revealed in a recent federal case. In that case, the plaintiff's decedent, a resident of New York, was hired by an interstate airline company, a Delaware corporation, as a copilot. The contract of employment, made in Washington, D.C., provided that "the Pennsylvania laws, including workmen's compensation" should govern. In discharging his duties, the decedent made round-trip flights from New York to Pittsburgh, where the defendant maintained a large operating base, and then frequently flew on to Chicago, or Birmingham. More of the decedent's flying service was over the state of Pennsylvania than any other state, but his duties did not require him to be in any one state the majority of his working time. The decedent was killed when his plane crashed in Birmingham, Alabama. At the time of his death, he was engaged in a flight from New York to Birmingham, which included a stop-over at Pittsburgh, Pennsylvania. The plaintiff, the decedent's widow, alleging negligence on the part of the defendant, brought this action, under the Alabama wrongful death statute, in a federal court in Tennessee. The defense was that such action was barred by the stipulation in the employment contract, that Pennsylvania law should govern in case of the employee's injury or death. The federal district court sustained the intent of the parties and held the Pennsylvania compensation act applicable. Since this act barred damage actions against employers, the plaintiff's action was dismissed. On appeal, the Court of Appeals for the Sixth Circuit sustained the decision of the district court, giving effect to the intent of the parties, but reversed on the ground that the Pennsylvania act was not applicable. It was held that the decedent could not qualify under the Pennsylvania act since he was not a "Pennsylvania employee" within the meaning of the act. Reference was then made to the general laws of Pennsylvania, and it was determined that the Pennsylvania con-

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flicts of law rule dealing with tort problems was applicable. Since this rule referred the parties to the place of tort, Alabama, the case was remanded to be tried on the merits according to the Alabama rule.

It seems quite obvious that the parties did not intend a result such as this when they expressed an intent in their employment contract, "that it be governed by the Pennsylvania law, including workmen's compensation." As in all such cases, however, where the wording of the contract is not clear, the court must substitute its own idea of what the parties would have meant had they thought of the contingency. Since here the reference to the Pennsylvania compensation act was expressed in general terms, and was not directed to any specific provisions of that act, the court seemed justified in applying the act as a whole or not at all. Where an employee is engaged in interstate activity, and there is a possibility that he would not come within the coverage of the act, which the parties wish to govern their relationship, the parties should not make reference to the whole of such act in their contract. Since the compensatory provisions of these acts are closely tied with their administrative and procedural provisions, the acts will be of no use to the parties when they refer to the whole act, unless the latter requirements are met. Each state has set up its own machinery, and prescribes its own method of administering workmen's compensation claims. Since this machinery varies greatly from state to state, the right to compensation can generally be enforced only before the tribunal designated by the particular statute covering the injury. It is very doubtful, then, that a foreign court, much less a foreign commission, could, or would apply the law of the state stipulated by the parties to govern the award of compensation. As a result, it would be necessary for the employee to enforce his claim within the jurisdiction of the state whose laws were designated to cover the injury, which in some cases might be distant from the place of injury and domicil of the parties. Not only might this be inconvenient, but in addition, the workman, once there, would run the further risk of not qualifying as an employee within the coverage of that act. To avoid this possible inapplicability, the parties must provide by appropriate language, that the act shall simply be a quantitative guide for determining liability. If the act designated by the parties were to regulate no more than the amount of the claim, there would seem to be no procedural objection to presenting the claim in any forum which would have taken jurisdiction in the absence of stipulation.
D. Uniformity by State Legislation

It has been seen that existing workmen's compensation laws are not nearly adequate to provide compensation for employees injured while engaged in work extending over state lines. There is not sufficient uniformity among the acts to assure employees that they are protected in case of injury or death occurring in the course of their employment, and neither is there sufficient uniformity, where the laws of more than one state are involved to assure the employer that liability is limited. While a carefully drafted stipulation by the parties, designating a particular act to measure the amount of their claims may, and it is believed should, avoid much of this difficulty, such stipulation will be ineffective in those jurisdictions where the legal consequences of an act or relationship cannot be altered, even by the parties' expressed intent. Federal legislation under the commerce clause has been proposed as a cure for certain of these ills, but it has been seen that the disadvantages flowing from such legislation would balance or possibly outweigh any advantages to be gained. The only remaining course of action to eliminate the confusion and uncertainty under existing laws, is for the states themselves to pass additional legislation to provide more uniform benefits and choice of law rules. A few uniform amendments to state laws should eliminate much of the existing confusion. One such amendment should be a provision expressly permitting the parties to designate the workmen's compensation law of any state having a contact with the employment as the exclusive measure of the benefits to be paid the employee in case of injury. This modification could be easily made and would do much to eliminate the uncertainty now attending interstate employment. Additional legislation should expressly provide the conditions under which the state's law will be given extraterritorial application. These provisions should enumerate the incidents of the employment which must exist within the state before its law will be applied to outside injuries. In this particular, workmen's compensation should be treated as sui generis. It should be required that a state's contact with the employment be substantial before its laws are applied to extraterritorial injuries, and conflict of laws principles governing tort and contract liability should be borrowed only when useful. It will not be attempted to define what the specific conditions for extraterritorial application of a state act should be. Many of the present state statutes as well as the standard developed by the courts in Minnesota and New York seem satisfactory in this regard, but the difficulty is their lack of
uniformity. The primary object of new legislation should be standardization, so that the conditions under which all the acts will be applied extraterritorially will be the same. To complement the revisions concerning extraterritoriality, should be a provision that the local act will not be applicable to injury within the state when that injury comes within the extraterritorial coverage of a statute of another state. Such a rule would abolish a frequent source of conflict, but still an employee would be protected, since the local act would be applicable whenever he failed to qualify under the extrastate law.

Until the compensation acts are more uniform, and all provide a scale of benefits adequate to compensate an injured worker, there is much argument for permitting an employee to seek a recovery under the law of both states. The amount recovered in the first award in such cases should, of course, be deducted from the second award. It is somewhat difficult to justify such a deduction on theoretical grounds, however, since to permit a recovery at all is to admit that the employee has two causes of action, or at least a divisible cause of action, with respect to the same injury. In states where such deductions are made, they are justified on principles of estoppel where there are no applicable statutory provisions. To prevent possible misunderstanding, it would perhaps be wise to provide for these deductions by express legislation. Another desirable reform in existing legislation would be the inclusion of interstate, as well as intrastate employees within the coverage of the state acts. While most state statutes apply to interstate employees, to the extent permissible under the commerce clause of the United States Constitution, the laws of many states are not nearly adequate in this respect and should be made more inclusive.

If the states could be induced, or possibly forced by federal legislation under the full faith and credit or due process clause of the Constitution, to accept these revisions uniformly, it would be the happy solution for most of the current choice of law problems connected with workmen's compensation. The state machinery is already established and working, so that creation of a new system of compensation would not be necessary as it would under the proposed federal legislation. Uniformity would insure work-

\[\text{249 For a discussion of the possibilities of federal legislation under these clauses of the Constitution see Yarborough v. Yarborough, 290 U.S. 202, 215 (1933) (dissenting opinion); Corwin, The "Full Faith and Credit" Clause, 81 U. of P. A. L. REV. 371 (1938); Cook, The Powers of Congress under the Full Faith and Credit Clause, 28 YALE L.J. 421 (1919).}\]
men protection regardless of the place of injury; employers could arrange their insurance with certainty; and much needless litigation over jurisdiction would be prevented.