CHAPTER VIII

Specific Problems in Multiple Contact Cases

SECTION 42

LIABILITIES OF CARRIERS AND TELEGRAPH COMPANIES:
LIMITATION OF LIABILITY

At the present day the liabilities of interstate carriers and telegraph companies in the United States are regulated to a great extent by federal legislation. But before the federal government entered the field, actions against these bodies were decided by the application of state laws selected according to ordinary conflict of laws principles. Many interesting problems in the applications of these principles were raised and decided. Most of these are now of diminished practical significance. But they illustrate admirably the technique of handling choice-of-law principles and may still provide suggestive analogies for the solution of more modern problems.

A buys a ticket in state X for a railway journey into state Y. He receives some injury while the train is in state Y. It seems to have been well settled that he could recover compensation from the railway company in an action of tort governed by the law of state Y.\(^1\) Could he, by framing his action as one for breach of contract, obtain the benefit of a reference to the law of state X? In *Pittsburgh etc., R. Co. v. Grom*\(^2\) a Kentucky court ruled that the carrier's liability to passengers could not be classified as contractual so as to permit

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\(^2\) Pittsburgh, etc., R. Co. v. Grom, (1911) 142 Ky. 51, 133 S. W. 977.
such a reference. But this theory is opposed to the decision of the New York Court of Appeals in *Dyke v. Erie Railroad Co.* The plaintiff, who had obtained a verdict for thirty-five thousand dollars, had been injured in Pennsylvania after buying his ticket in New York. Since the damages recoverable in such cases were limited to three thousand dollars by Pennsylvania law, the defendants sought to make the plaintiff’s claim depend upon Pennsylvania law alone. But the court decided that he might maintain a suit in contract which would be governed by the laws of New York. In *Sawyer v. El Paso, etc., R. Co.* the plaintiff, an injured railway passenger, was met with the defence that notice of her claim had not been delivered to the defendants as required by a statute of New Mexico, the place of wrong. The court held that this was a good defence to a count in tort. But since the plaintiff had bought her ticket in Pennsylvania she was allowed to recover under a second count for breach of contract governed by the laws of that state and unaffected by the New Mexico statute.

Suits against railroad companies for personal injuries sometimes produced another interesting multiple contact problem. Suppose that one of the railroad company’s employees is charged with the task of inspecting trains and their equipment in state X. Due to his failure to perform this duty properly a train becomes involved in an accident in state Y, and A who is riding on the train is injured. Should the question of the company’s liability be referred to the law of state X or to the law of state Y? A considerable body of case-law supports the view that under such circumstances state Y, where the injury occurred, should be regarded as the place

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of wrong and the case should be decided according to its rules of law. 5

The failure of a telegraph company to deliver a message promptly and accurately entailed consequences which varied considerably in different states. 6 In some, the telegraph company was forced to pay a fixed penalty for errors or might find itself at the mercy of a jury empowered to award damages for mental anguish. The possibility of numerous multiple contact cases in this field is obvious. Very frequently a contract for the carriage of a message was made in one state, the message to be delivered in another. If the message was delayed or altered in the transmission and an action brought against the telegraph company it would become necessary to decide which law ought to control.

Before we come to grips with this problem it should be noticed that there are two parties who might bring action against the telegraph company, the sender and the addressee. Let us consider the rights of the sender first. The sender of the message could always frame his claim as one for breach of contract. As such, it was held in some courts to be governed by the law of the place of contracting, 7 in others by the law

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5 El Paso, etc., R. Co. v. McComas, (1903 Tex. Civ. App.) 72 S. W. 629; Cincinnati, etc., R. Co. v. McMullen, (1889) 117 Ind. 439, 20 N. E. 287; Kansas City, etc., R. Co. v. Becker, (1899) 67 Ark. 1, 53 S. W. 406; Chicago, etc., R. Co. v. Doyle, (1883) 60 Miss. 977; Alabama, etc., R. Co. v. Carroll, (1892) 97 Ala. 126, 11 So. 803; Nashville, etc., R. Co. v. Foster, (1882) 78 Tenn. 351.

6 The application of state statutes to impose liability upon telegraph companies in respect of interstate transactions was held, under certain circumstances, to be an unconstitutional interference with interstate commerce. See Western Union Tel. Co. v. Pendleton, (1887) 122 U. S. 347, 7 Sup. Ct. 1126; Western Union Tel. Co. v. James, (1896) 162 U. S. 650, 16 Sup. Ct. 934; Western Union Tel. Co. v. Brown, (1914) 234 U. S. 542, 34 Sup. Ct. 955.

of the place where the message ought to have been delivered. In *Gray v. Telegraph Co.*, a Tennessee court allowed the sender to claim the advantages of the law of the place of delivery on the theory that it gave him a right of action in tort, alternative to any claim arising out of the contract.

Let us now consider the case of the addressee. Most of the suits against telegraph companies seem to have been brought by the addressees of delayed or garbled messages. Although the addressee was rarely a party to the contract for delivery of the message, he was treated in some jurisdictions as a third party beneficiary with an enforceable interest in its performance. By many courts, however, his right to recover was held to sound in tort for a breach of a duty imposed upon the company in the interest of the general public. Both these ideas influenced the courts when they came to decide what law should govern the addressee's claim in a multiple contact case. In some cases he was permitted to rely upon the provisions of the law of the place of contracting. In others he was allowed the benefit of the law in force where the message ought to have been delivered on the theory that the contract was to have been performed there.

Some of those courts which had invoked the law of the place of contracting to permit a recovery by the addressee went further and declined to classify his claim as other than

8 Western Union Tel. Co. v. Fuel, (1910) 165 Ala. 391, 51 So. 571.
contractual. He must succeed under the law of the place of contracting or fail entirely. In other states, however, the tortious nature of his suit was recognized to the extent that he was permitted an alternative reference to the law of the place of wrong. In Schmitt v. Postal Telegraph Cable Co. the court said:

"Counsel for appellant argue that inasmuch as the telegram was delivered for transmission in Illinois, the measure of recovery would be governed by the laws of that state, and, as thereunder damages are not allowed for mental anguish disconnected from physical injury, the verdict should have been for defendant. Were this an action ex contractu, little difficulty would be experienced in determining the point, but, as the action is one sounding in tort, it would seem that the law where the breach of duty occurred would determine the measure of damages; though authorities are not wanting which hold that, as the wrong grew out of and is based on a breach of contract, the lex loci contractus should prevail. This, however, is too narrow a view for it overlooks the fact that the breach is of a public duty owing by the telegraph company as a common carrier of intelligence. . . . This court is committed to the doctrine that either an action ex delictu or ex contractu may be maintained for a breach of the company's duty to transmit promptly."

Among those courts which adopted this tort doctrine there arose a difference of opinion as to whether the place where the


15 Schmitt v. Postal Telegraph Cable Co., (1914) 164 Iowa 654, 656, 146 N. W. 467.
blunder in transmission occurred or the place where the message ought to have been delivered should be considered the locus of the tort. Suppose A makes a contract with a telegraph company in state X for the delivery of a message to B in state Z. The message is to be sent from point to point, starting in state X, passing through state Y, and reaching B in state Z. At some point in state Y a mistake is made by the telegraph company’s employees; the message is lost, delayed or altered. B, the addressee, sues the telegraph company. If we assume that he can frame a claim in tort, based upon the law of the place of wrong, which state should we regard as the “place of wrong?” We might choose state Y, where the negligent acts of the telegraph company’s servants were done, or state Z, where the ultimate failure of delivery occurred.

In *Balderston v. Western Union Tel. Co.*\(^{16}\) the Supreme Court of South Carolina was confronted by a problem of this type. The court adopted the law of the state where the message ought to have been delivered promptly and correctly (state Z in our illustration), saying:

> “The plaintiff cannot be expected to determine the point on defendant’s line where the failure of duty occurred, nor do we think it consonant with public policy to permit the defendant to show that the message was delayed or failed at some specific point on its line and thus make plaintiff’s right to recovery to depend upon the laws of that place. Such a holding would, in nearly every case, lead to much uncertainty, to say nothing of the broad field that would thus be opened to fraud.”

If we may say so with respect, these remarks suggest a sound and practical basis of decision.

Other courts appear, however, to have proceeded upon the

\(^{16}\)Balderston v. Western Union Tel. Co. (1908) 79 S. C. 160, 163, 60 S. E. 435. In other cases it seems to have been assumed rather than decided that the place where the failure of delivery occurred should be regarded as the place of wrong. See Western Union Tel. Co. v. Favish, (1916) 196 Ala. 4, 71 So. 183; Gray v. Telegraph Co., (1901) 108 Tenn. 39, 64 S. W. 1063.
theory that the place where the negligent acts were done should be regarded as the "place of wrong." 17 An Arkansas statute which imposed liability upon telegraph companies for "mental anguish caused by negligence in receiving, transmitting, or delivering messages" was applied by the Arkansas courts to all cases in which the actual negligent acts occurred there, irrespective of the place of delivery. 18 If, on the other hand, the message should have been delivered in Arkansas but no negligence in that state was proved, the plaintiff did not get the benefit of the statute. 19

In the Texas case, Thomas v. Western Union Tel. Co., 20 an ingenious attempt was made to capitalize on one contact of the fact pattern. A telegram was sent from one point to another, both of them within the state of Arkansas. Because of delay in delivering it, the addressee was unable to see his daughter before she died or to attend her funeral. His counsel argued that because he suffered much mental anguish on this account while physically present in Texas, the liberal rule of that state should be applied in estimating damages. They also pointed out that he was a citizen of Texas. But the court did not consider these connections sufficiently significant and applied Arkansas law. The decision seems very sound. It is quite true that the plaintiff suffered the injury of mental pain in Texas. And that mental pain was doubtless a direct consequence of the telegraph company's neglect of duty. But there


18 Western Union Tel. Co. v. Ford, (1906) 77 Ark. 531, 92 S. W. 528; Arkansas, etc., R. Co. v. Lee, (1906) 79 Ark. 448, 96 S. W. 148; Western Union Tel. Co. v. Chilton, (1911) 100 Ark. 296, 140 S. W. 26.


is very little causal connection between the negligent acts of the telegraph company’s operators and the fact that the plaintiff suffered his mental pain in the state of Texas. There would be an element of unfairness in making the telegraph company’s liability depend upon the plaintiff’s presence in Texas when the company was not responsible in any way for his presence there. The telegraph company’s liability ought not to be increased because the plaintiff carried his grief into a particular state.

Can we draw any general conclusions from this maze of cases and theories dealing with the choice-of-law problem in suits against telegraph companies? It is, of course, impossible to reconcile all the decisions. We can say that, in one case or another, almost every state with which it is possible for a telegram case to make a significant contact has been permitted to create a cause of action against a telegraph company or to increase the amount of damages. In producing this result the courts have applied several choice-of-law principles: choose the law of the place of contracting, choose the law of the place of performance of the contract, choose the law of the place of wrong, etc. In applying the principle, “choose the law of the place of wrong,” they have selected different states as the place of wrong, i.e., sometimes they have selected the state of injury, sometimes they have selected the state where the telegraph company’s negligent acts were done. On the other hand, we find numerous cases in which a court has refused to allow the law of a particular state, which was connected with the pattern of facts, to impose liability. Perhaps we may venture the conclusion that, taken as a whole, the cases evince a general tendency of the courts (often checked and qualified in particular instances) to recognize the fact that every state with which a telegraph case makes a significant connection has an interest in the imposition of a liability upon the telegraph company.
Contracts for the carriage of goods or passengers often contain a stipulation limiting the carrier's liability for injuries to the goods or passengers during transit. In the conflict of laws, such stipulations have received a variety of treatments. Their validity has been referred to the law of the place where the contract of carriage was made, to the law of the place where some actual injury was received, and to the law of the destination.21

Even when they were admittedly valid under the law which the court considered to be the proper law of the contract, contracts limiting a carrier's liability have been refused recognition on the ground that they were contrary to the public policy of the forum. In these cases the doctrine of public policy was applied affirmatively to strike down a defence and to give the plaintiff a cause of action which, apart from this special rule of the forum, he would not have had. But these decisions are not quite as unjust or as contrary to basic choice-of-law principles as they might at first sight appear to be. On closer examination it will be found that, in almost all of them, the contract of carriage had been made at the forum or else some part of it was to be performed there. Quite apart from the fact that the action was brought in the forum, the forum had a certain interest in the transaction.22

An exceptional case is Fox v. Postal Telegraph Cable Co.23 decided by the Supreme Court of Wisconsin. The plaintiff claimed damages for the late delivery of a telegram which was to have been sent from New York to Chicago. The de-

For the application of these theories to telegram cases see Jones, Telegraph and Telephone Companies, Ed. 2 (1916) 501.
22 See Annotations, (1928) 57 A. L. R. 175; (1931) 72 A. L. R. 250 for an exhaustive analysis and classification of cases applying these theories to contracts limiting carrier's liability. See also Robinson, Admiralty (1939) 545, 558. The problem goes beyond the scope of the present work.
23 Fox v. Postal Telegraph Cable Co., (1909) 138 Wis. 648, 120 N. W. 399.
fendant company set up as a defence a stipulation printed upon
the back of the telegram blank relieving it from all liability.
According to the law of Illinois and the law of New York
this stipulation would have been a valid defence. But in Wis­
consin such stipulations were not recognized in the courts on
the ground that they were contrary to public policy. Although
the facts of the instant case had no apparent connection with
Wisconsin, the court refused to recognize the contractual de­
fence and gave judgment for the plaintiff. This decision might
be attacked on constitutional grounds. Although Wisconsin
had no apparent interest in the decision of the case, the court
applied Wisconsin law to strike down a contractual defence,
valid under the laws of the states with which the case was con­
nected. There is authority for the view that such a course of
procedure constitutes a denial of due process.24

Suppose a contract of carriage containing a limitation pro­
vision is made in state X. Damage to the goods or passenger
occurs in state Y. By the law of state X the limitation pro­
vision would be valid. The law of state Y expressly forbids
such contracts. This clash of legal policies might be resolved
by regarding state Y, where the injury occurred, as the place
of performance whose law was therefore entitled to govern
the contract. On this view, the limitation provision would not
be recognized. Apart from this theory, however, there is some
authority for the view that a limitation of liability which is
repugnant to the law of the place of wrong, should not be
available as a defence.25

In Canadian Pacific R. Co. v. Parent26 a carrier’s contract
excluding liability produced a nice problem of concurrent

24 See above, section 9.


reference through two choice-of-law principles. The railway company agreed to carry Joseph Chalifour, a stockman in charge of cattle, from Winnipeg to Montreal at a reduced fare. At the beginning of the journey Chalifour signed a contract absolving the company for any "damage, injury or loss to himself." Owing to the negligence of the company's employees, Chalifour was killed at Chapleau, Ontario. An action was begun in Quebec on behalf of his dependents under the Ontario death statute which permits recovery only where the deceased himself, had he survived, could have maintained suit. Counsel for the railroad contended that such a suit by Chalifour would have failed because he had renounced his rights. Hence, according to the law of the place of wrong, the present plaintiffs ought not to succeed. The court arrived at a contrary result. They held that the effect of the contract should be determined by the law of Manitoba, where it was signed. Since that law had not been proved, they presumed it to be the same as the law of Quebec. It was well established in Quebec law that a deceased person's contract could not affect the right of his dependents to recover damages for his death. Hence the present contract, governed by Quebec law, could not possibly prevent the plaintiffs from recovering damages. This reasoning was not impugned in any way by the Supreme Court of Canada or the Privy Council. But since these bodies take judicial notice of the laws of every Canadian province, the presumption which had enabled the Quebec courts to apply their own peculiar rules to the contract ceased to operate. The contract, governed by either Ontario or Manitoba law, was quite effective to bar the deceased's and hence the plaintiffs' recovery.

SECTION 43

ASSIGNMENT OR RELEASE OF A TORT CAUSE OF ACTION

A injures B in state X. The law of state X gives B a cause of action in tort. B assigns this cause of action to C in state Y.
To what extent should the validity and effect of this transaction depend upon the laws of state X and state Y respectively? Authority upon this point is scanty. The Conflict of Laws Restatement, which devotes an entire “topic” to the theme “transfer of contractual rights,” has nothing to say about the transfer of tort claims. Let us suppose that in the problem stated the assignment is void by the law of state X and valid by that of state Y. Generally speaking, an assignable obligation to pay damages is more onerous than one which cannot be transferred. To uphold the assignment would be to impose a greater burden upon B than that sanctioned by the law of the place of wrong. The only justification for this course is the fact that the assignment was made in state Y. But B is not responsible for that event nor for its occurrence there. He has done nothing to subject himself to the law of state Y. His position ought not to be altered by the fact that A and C have gone into state Y and carried out some transaction there. It is submitted therefore that an assignment of a tort cause of action which is invalid by the law of the place of wrong ought not to be recognized.

The converse situation arose in *Vimont v. Chicago, etc.*, R. Co. A claim for injuries suffered in Iowa was transferred in Illinois under whose law it would not be assignable. An Iowa court allowed the assignees to maintain an action upon it because Iowa law upheld the validity of the transfer.

“It seems to us,” said the court, “that the mere carrying of this claim into another state could not have the effect to change its character or take from it any of its qualities, but that it would retain its properties notwithstanding the removal of the person in whose favour it arose to another state or country; and that, as it had properties which rendered it assignable imparted to it by the laws under which it arose, it would retain those properties when taken beyond the jurisdiction of those laws, and would be assignable anywhere.”

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However mechanical this reasoning may sound, the result seems just and reasonable. Although the contract was made in Illinois, that state had a very slight interest in the transaction. And there is a good deal to be said for the view that, when two people make a bargain, it should be enforced if one of the relevant legal systems upholds its validity.\(^2\)

A release of a claim sounding in tort stands upon a different footing from an assignment. Suppose B, having been injured by A in state X, signs an agreement in state Y absolving B from liability. The contract is void by the law of state X but valid by that of state Y. B cannot argue that he was not responsible for the case's connection with state Y. State X has, however, an obvious interest in extending contract-proof protection to persons injured there. *Leach v. Mason Valley Mines*\(^3\) raised this problem. Emphasizing the fact that the plaintiff resided in the state of contracting, the court sustained the contract as a defence.

In *Snashell v. Metropolitan*, etc., R. Co.\(^4\) an action was brought in the District of Columbia by a husband and wife to recover for injuries received there by the wife. The defendants pleaded a sealed discharge of all claims executed by the wife alone. They urged that effect ought to be given to this instrument, because under the law of the plaintiffs' matrimonial domicile the wife was entitled to contract away her claim like a feme sole. But the court took the view that the law of the place of wrong having conferred a cause of action


\(^3\)Leach v. Mason Valley Mines, *(1916)* 40 Nev. 143, 161 Pac. 513. As emphasizing the place of contracting, see also Page v. United Fruit Co., *(C. C. A. 1st, 1925)* 3 F. (2d) 747 where, however, both tort and contract had the same locus.

\(^4\)Snashall v. Metropolitan, etc., R. Co., *(1890)* 8 Mackey (19 D. C.) 399. See also Cowen v. Ray, *(1901)* 47 C. C. A. 352, 108 Fed. 320 where it was held that the law of the place of wrong should determine whether a release by the plaintiff could bar her from maintaining suit in a purely representative capacity.
upon the husband and wife jointly, no other law could authorize one of them to dispose of it alone.

Many death acts provide for the compensation of all the beneficiaries in a single suit to be instituted by the decedent's personal representative. This has usually been interpreted as referring to a duly accredited administrator appointed in any state. Would a release of all claims given by one administrator be a good defence to an action by another? Several cases have held that it would. Such a release might, however, be given without the consent of the beneficiaries, the real parties in interest. It has been held that the effect of this circumstance upon the legal validity of the release ought to be decided by the law of the place of wrong.

SECTION 44

EMPLOYERS' COMMON-LAW LIABILITY FOR INJURIES TO EMPLOYEES

In this section we are concerned with the conflict of laws aspects of employers' liability for injuries to their employees, prior to the enactment of modern workmen's compensation legislation. At this time it was well established that an injured employee might bring an action in tort against his employer which would be governed by the law of the place of wrong. Between master and servant there usually exists a contract of employment. Considerable authority could be mustered to support the view that an injured employee should be permitted an alternative reference to the law of the place:

6 Pisano v. B. M. & J. F. Shanley Co., (1901) 66 N. J. L. 1, 48 Atl. 618. See also McCarron v. New York Cent. R. Co., (1921) 239 Mass. 64, 131 N. E. 478. In Baltimore, etc., R. Co. v. Evans, (1911) 110 C. C. A. (3d) 158, 188 Fed. 6, 8, it was held that only the domiciliary administrator had power to compromise the beneficiaries' claim.
where the employment contract had been made. If that law were different from the law of the place of wrong, the employee could take his choice. The law of the place of wrong might give him a right of action in tort; the law of the place of contracting might give him one for breach of contract. But if the employee was killed in the course of his work, his dependents could not make out a cause of action under the death statute of the state in which he was hired. The coverage of such statutes was limited to cases where the fatal injury was received within the bounds of the enacting state. In other words, the state in which the employment contract was made was not regarded as having a sufficient interest in the transaction to confer a cause of action upon the deceased employee's dependents if he was killed in another state. But in a few cases the state of hiring was allowed to confer a cause of action upon the employee himself if he were injured in another state.

Some "nice points" were taken in connection with the notorious fellow-servant doctrine, which flourished in some states but had been cut down or abolished in others. Suppose a workman had been hired in a state where the doctrine prevailed and injured in a state where it had been abolished. The doctrine was often explained in domestic law by saying that every contract of employment contained an implied term by which the servant accepted the risk of injury by his fellow-servants. In several cases of the type suggested the employer-defendant argued that the fellow-servant rule prevailing at the place of contracting was incorporated into the workman's


contract. Like a limitation of liability, it should prevent him from recovering for an injury by a fellow-servant wherever that injury had been received. This plausible argument was not received with favour by the courts. They held that a fellow-servant rule prevailing in a particular state could not affect the position of workmen who were hired in that state but injured or killed in other states. Whatever formal analogies may be drawn from the domestic law explanations of the fellow-servant doctrine, the law of the state of injury has a paramount interest in extending what protection it pleases to persons injured within its boundaries. This interest the courts recognized.

The converse situation arose in Dupont v. Quebec Steamship Co., where an employee of the defendant company, hired in Quebec, was killed by a falling derrick on board a British ship. The court treated the ship as the place of wrong. The relatives of the deceased brought an action based upon the British death statute which provided that any defence which would have prevented a recovery by the deceased (had he lived) should bar a recovery by his beneficiaries. The defendant argued that the present action must fail because the death was due to the negligence of deceased’s fellow-employees. The Quebec court, trained in civil law doctrines, pointed out that this bête noir of English common law, the fellow-servant rule, was based, according to leading English texts and decisions, upon an implied undertaking of the deceased to accept the risks of his employment; they therefore classified it as a contractual rule and irrelevant to the tort aspect of the

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case. The deceased having been hired in Quebec, his contract of employment was governed by Quebec law which imposed no such unfavourable restrictions. In other words, the Quebec court's reference to English law, as the law of the place of wrong, completely excluded the fellow-servant rule on the ground that it concerned, not tort liability, but the effect of contracts. By this ingenious chain of reasoning the court was able to avoid the application of the fellow-servant rule, which, as civil lawyers, they probably considered unduly harsh. The chain of reasoning adopted by the Quebec court does not seem to have been suggested in common-law jurisdictions.

SECTION 45

WORKMEN’S COMPENSATION ACTS: COVERAGE OF THE STATUTE OF THE FORUM

Workmen’s compensation acts, like the death and survival statutes of an earlier generation, have raised many interesting conflict of laws questions. Although the number of variations from state to state makes generalization difficult, the common denominator of all these laws seems to be a new and special remedy for injured industrial employees or their dependents, in case of death. The monetary award, usually adjusted by a quasi-judicial administrative board, may be paid by the employer concerned or his insurer or by a special fund to which all employers contribute. Acceptance of the provisions of the act may or may not be optional with the parties.

Courts have frequently been called upon to decide whether or not their own local statute should be construed as extending the new remedy to an employee in some fact situation.

where an important incident, such as the formation of the contract of employment or the injury to the employee, occurred in the forum. Primarily this question is one of statutory construction and interpretation depending upon the wording of the statute, the general implications of its terms, and the purposes which it was meant to fulfil. Decisions of the courts defining the coverage of their local compensation statutes, which are very numerous, depend so intimately upon the form of the particular statute in question that no attempt is made in this study to analyze and classify all of them. But the process of construction and interpretation has been influenced to a considerable extent by pre-existing rules and analogies of the conflict of laws. In many cases the courts have attempted to reconcile their decision to apply or not to apply the forum's statute with established choice-of-law principles. It may be of interest to observe briefly the applications of these principles to the coverage problem.

Let us consider first the possibility of applying the law of the state where the employee is injured. That state has an obvious interest in the protection of persons injured there and there is an established choice-of-law theory referring questions of tort liability to the law of the place of wrong. Under these circumstances, it is not surprising to find that many states apply their local acts to cases in which an employee has been injured at the forum although he was hired in some other state. Sometimes a contract theory is introduced in these cases. The employee has been hired in an outside state and injured at the forum. The court of the forum justifies the application of the statute of the forum on the ground that the forum is the place of performance of the employment contract. Hence its law ought to determine the legal rights of

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the employee arising out of the injury in the course of performance.\(^3\)

However, the fact of injury at the forum has not always been deemed a sufficiently significant contact with that state to justify the application of its compensation laws. The course of an employee’s employment at the forum might be of a very transitory character, such as soliciting orders, or merely travelling through on his employer’s business. A few courts have held that an employee, injured at the forum under some such circumstances, should not be granted an award under the forum’s compensation law.\(^4\)

In discussing the common-law rules of master and servant, we considered the possibility of referring the master’s liability for the servant’s injuries to the law of the place where the employment contract was made. There was some authority for the view that that law might impose a contractual liability upon the master for injuries to the servant in the course of his work.\(^5\) This theory has had great influence in the workmen’s compensation field. Many American courts have interpreted their local compensation statutes as applicable to all contracts of employment made at the forum. The practical result is that the employee gets compensation under the statute of the state in which he was hired for injuries received in another state. This interpretation of the compensation statutes in their conflict of laws aspect has often been explained or justified on the theory that the liability to pay compensation is contractual or quasi-contractual in its nature. The statutory provisions

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\(^5\) See above, section 44.
are said to be directed to the regulation of employment contracts made within the governed area and the determination of their legal consequences. The use of the somewhat ambiguous term "quasi-contractual," even in connection with the so-called elective acts, has been sharply criticized. As Judge Cardozo has pointed out, it really means nothing more than that "the contract creates the relationship to which the law attaches the duty and the same law which imposes the duty defines its orbit and its measure."

The law of the place of contracting has not been invariably applied in workmen's compensation cases. The decisions rejecting its application are of two classes. The first class consists of decisions which were handed down at an early period while the courts were strongly influenced by the analogy between compensation claims and a common-law recovery for tort. These decisions proceed upon the theory that a claim for compensation is merely a novel form of tort liability. Hence the compensation statute of the state of hiring could have no application to injuries received in another state. This limitation upon the scope of the compensation statutes was found unsatisfactory. Courts and legislatures of states which had adopted compensation laws wanted to extend their protection to employees, who, though regularly employed in such a state, suffered an injury while performing some incidental work in another state. This aspiration brought into play the "state of hiring" theory. The second class of decisions reject-

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6 Cases adopting this theory are legion. See, e.g., Matter of Post v. Burger, (1916) 216 N. Y. 544, 111 N. E. 351.

For a long list of citations, see Annotation, (1929) 59 A. L. R. 735; Beale, CONFLICT OF LAWS (1935) vol. 2, p. 1318.


ing the state of hiring theory proceed upon a less sweeping principle. They are simply cases in which the fact of hiring provided the sole significant contact with the state in question. The employment contract was made there but the actual work was performed elsewhere and the injury occurred elsewhere. Under these conditions some courts have refused to apply their local compensation acts. 10

So far we have merely discussed various solutions of the coverage problem in terms of long-established choice-of-law theories. The coverage problem has, however, evoked a new choice-of-law theory based upon the idea of the "place of employment." In various states the courts have held that the scope of their local statute extends to all employment within the state. 11 The employee must, in the course of his employment, perform some service there. If he does so, the place of hiring and place of injury are not important. The position is thus explained by the Supreme Court of Wisconsin:

"Under the express provisions of the act, an employee is one who renders services for another in the state of Wisconsin under a contract of hire, express or implied, oral or written. Where the employer under the act engages a person to perform services in this state under a contract of hire, express or implied, no matter where or when such contract may have been engendered, such employee is under our act and is entitled to its benefits, and this is so even though he is injured while outside of this state, rendering services incidental to his employment within this state. The place where the contract is made is not controlling. Whether the employee be a resident of this


state is not material. The controlling and decisive factor is whether he had a status as an employee within this state.”

Surveying the coverage problem in retrospect we may say that the courts, in determining the ambit of their local compensation statutes, have employed several different theories. As a result, a good deal of overlapping is possible. In certain situations an injured workman may find that the statutes of two or even more states each offer him a right to compensation. He may be able to get relief in the state where he was injured. He may be able to get relief in the state where he was hired. He may be able to get relief in any state where he actually worked for his employer.

SECTION 46

WORKMEN’S COMPENSATION ACTS: A CLAIM AUTHORIZED BY THE LAW OF ONE STATE CAN RARELY BE ENFORCED IN THE COURTS OF ANOTHER STATE

An employee whose injuries are compensable under the statute of a certain state may desire to collect his claim by proceedings in the ordinary courts of another state. Usually he cannot do so. In many cases the special remedies conferred by compensation laws have been held to be unsuitable for extraterritorial enforcement through the common-law process. Their administration in the state of origin is generally confided to a special tribunal invested with unusual powers, great latitude of discretion, and a system of procedure quite different to that employed by courts of law. Awards often take the form of periodical payments to the injured party. Litigation of the rights conferred by those statutes through an ordinary civil action would really defeat their principle purpose, a cheap and speedy settlement of industrial accident

12 McKesson-Fuller-Morrison Co. v. Industrial Commission, (1933) 212 Wis. 507, 512, 250 N. W. 396.
cases. In declining to implement the acts of other states, the courts have not placed any noticeable emphasis upon the danger of oppressing the defendant, although this factor would probably have to be reckoned with. They have taken the broad ground that the effect of such laws in practice depends too intimately upon the powers and personnel of the executing authority. An outside court, lacking such powers and following its own traditional technique, could not hope to produce even a colourable imitation of that authority’s normal administration.

_Mosley v. Empire Gas and Fuel Co._ is the most articulate decision. An action was brought in the Supreme Court of Missouri for damages to be recovered under the Kansas Workmen’s Compensation Law. The Missouri court carefully reviewed its many detailed provisions and the somewhat extraordinary powers conferred upon the local boards and courts authorized to enforce it. In particular, they noted that the Kansas court might, in its own discretion, decree the payment of either a lump sum or a series of sums subject to modification by the court on the application of either party.

“Courts in Missouri,” said the Supreme Court of that state, “can render only such judgments or so modify them after they are rendered as they might be authorized to do by the laws of Missouri. The jurisdiction of the court is determined by the law of its creation. A statute of Kansas cannot confer upon a Missouri court in a suit for money, a jurisdiction and a power wholly unknown to the Missouri code of procedure. . . . By that statute the right and remedy are so united, and the provision for liability is so coupled with a provision for a special remedy to be administered by a designated tribunal with certain specific powers given, that the remedy must be sought in the designated tribunal.”

Other state courts have replied in a similar vein to suggestions that they should set in motion the rights conferred by

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1 _Mosley v. Empire Gas and Fuel Co._, (1926) 313 Mo. 225, 245, 281 S. W. 762.
foreign compensation statutes. But more often they simply assume that such a course is out of the question or justify that assumption with the laconic remark that the sister state “furnishes an exclusive remedy.” Federal courts, too, have declined to take jurisdiction in such cases when the parties have become subject to a state compensation law.

In some of the states the compensation statutes are administered, not by any specially organized commission but by the ordinary state courts. Such acts have received exceptional treatment in a few cases. One of the earliest is *Texas Pipe Line Co. v. Ware* in which the Eighth Circuit Court of Appeals considered the various sections of Louisiana’s act in some detail and decided that effect could, with propriety, be given to it through the medium of federal procedure. “There may be,” the court admitted, “some few provisions of the act which perhaps could be more easily carried out in the courts of Louisiana. Such provisions can properly be held to apply where a suit is brought in the state court. We see no insuperable difficulties, however, to the federal courts enforcing the provisions of this Compensation Law.” Earlier in the opinion it was remarked that the district court appeared to have encountered no serious clashes between the statute in question and the ordinary trial procedure. Statutes operated by administrative tribunals were emphatically distinguished. “The remedy provided to enforce the provisions of the act is a proceeding in a court of justice, viz., a suit.” Other federal and state courts have also under-

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² Logan v. Missouri Valley, etc., Co., (1923) 157 Ark. 528, 249 S. W. 213; Douthwright v. Champlin, (1917) 91 Conn. 524, 100 Atl. 97.

In Harbis v. Cudahy Packing Co., (1921) 211 Mo. App. 188, 241 S. W. 960, the court declined to enforce another state’s statute because its express terms prohibited such a course of action. See also Alaska Packers Ass’n v. Industrial Accident Commission, (1934) 1 Cal. (2d) 250, 34 P. (2d) 716.


⁵ Texas Pipe Line Co. v. Ware, (C. C. A. 8th, 1926) 15 F. (2d) 171.
taken the administration of Louisiana’s Workmen’s Compensation Law. In Johnson v. Employers Liability Corporation a Texas court declared itself incapable of properly administering that act “with full justice to the parties.” This decision also rested upon the ground that the statute’s dissimilarity to corresponding Texas law rendered its enforcement incompatible with Texas public policy. These views do not seem to be shared by the federal courts in Texas.

In Walpole v. Canadian Northern R. Co. and McMillan v. Canadian Northern R. Co. the Privy Council was called upon to determine what effect should be attributed in one Canadian province to the compensation statutes of another. In the final result, their lordships reached the same result as the majority of American courts by giving an additional twist to the meaning of that pliable symbol “justifiable.” The Anglo-Dominion choice-of-law theory is that an action cannot be brought upon a foreign tort if the acts complained of are “justifiable” under the law of the place of wrong. The Privy Council decided that the compensation act of one province could not be enforced in the ordinary courts of another prov-


See above, section 2.
ince because acts which, under the law of the place where they were done, merely gave rise to a claim for compensation, were, in a highly technical sense, "justifiable." In rationalizing their inclusion in that category of acts giving rise to a claim for compensation, their lordships laid some stress upon two characteristics of the factual situations there presented: (a) that the acts were not shown to form a possible basis for a criminal action against the defendants; (b) that, in McMillan's case, the defendant would not have been subject to a civil action prior to the enactment of the compensation statute. Hence the question is patently left open whether or not the absence of these somewhat fortuitous circumstances would really produce a different result, a matter not left in any doubt at all by the more simple and comprehensive solution of the American courts. It is interesting to note that that solution was adopted in Walpole's case by the Saskatchewan Court of Appeal notwithstanding the lack of any suggestive discussion in either the English precedents or textbooks. 12

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SECTION 47
WORKMEN'S COMPENSATION ACTS: STATUTORY PROVISIONS BARRING ALTERNATIVE CLAIMS OR REMEDIES

Workmen's compensation laws are characteristically exclusive. The power to obtain compensation is usually given in lieu of the employee's common-law power to sue for damages, which is expressly abolished. In some compensation acts the clauses barring alternative remedies are phrased in language broad enough to include not merely common-law rights but also such claims as might be available under the compensation

statutes of other states. Such a provision contained in the
statute of the state of injury or in that of the state of hiring
may be pleaded by an employer as a defence to either (a)
a common-law suit or (b) compensation proceedings, at the
forum. Should the court of the forum obey the command of
the foreign statute and dismiss the suit for damages or the
claim for compensation? As might be expected, the answer to
this question will depend upon the nature of the contacts
which the facts make with the states involved and upon con­
siderations of policy. Let us consider in order the various
problems of this kind which may arise.

Suppose A, a workman, is hired and injured in state X.
The statute of that state would allow him compensation but
no common-law remedy. He cannot bring a common-law ac­
tion in state X. If he attempts to do so in some outside juris­
diction, a reference to the law of the place of wrong will
show that it denies him a right of action in common-law
courts. That law gives him only a special claim which the
foreign court could not conveniently assist him to enforce.¹
An alternative reference to the law of the place of contracting
would reach the same result.²

Johnson v. Carolina, etc., R. Co.³ is a peculiar decision.
Plaintiff employee was hired and injured in Tennessee. He
brought a common-law action for damages against his em­

¹ At least, this is the normal situation. See above, section 46.
Wasilewski v. Warner Sugar Refining Co., (1914) 87 Misc. 156, 149 N. Y.
Supp. 1035; Magnolia Petroleum Co. v. Turner, (1933) 188 Ark. 177, 65
S. W. (2d) 1 (semble).
³ It has been expressly decided that the mere fact of the forum having adopted
workmen's compensation legislation does not render obnoxious to its policy a
common-law suit by an employee based on injuries received in another state
and not compensable at the forum. Reynolds v. Day, (1914) 79 Wash. 499, 140
Pac. 681.
A similar decision was given by a Quebec court in Johansdotter v. Canadian
Pac. R. Co., (1914) 47 Queb. S. Ct. 76.
employer in North Carolina. The employer argued that this common-law action was forbidden by the Tennessee Workmen’s Compensation Act. The court refused to recognize the Tennessee law and dealt with the case according to the common law of North Carolina. The decision would appear to be open to attack upon constitutional grounds.  

More difficult problems arise when the contract of employment is made in one state and the injury occurs in another. Suppose A is hired in state X and injured in state Y. The law of state Y would allow him compensation but purports to exclude all other remedies. State X has no workmen’s compensation statute; the common law is in force there. As we have seen, there is some authority for the view that the employee could bring an action for breach of contract based upon the common law of state X, which would be alternative to any claim he might have under the law of state Y. An attempt to enforce this common-law contractual right of action would bring the laws of the two states into conflict with one another. If the suit were brought in state Y, it would probably be dismissed. If brought in state X, its fate would be more dubious. There is some authority supporting the view that the courts of the state of hiring (state X) ought to waive its interest in favour of the state of injury’s aspiration to provide an exclusive remedy of a more modern character.  

The situation would be different if the state of hiring had established a compensation law under which the employee was entitled to an award. It is very unlikely that the courts of the state of hiring would stay compensation proceedings there in deference to the law of the state of injury. And the Supreme Court has indicated that the Constitution does not compel them to do so. In Alaska Packers Association v. In-

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4 See the ensuing discussion regarding the effect of the “full faith and credit” clause.
5 See section 44, above.
Industrial Accident Commission of California\(^7\) the claimant employee was hired in California for services wholly to be performed in Alaska. His contract stipulated that the parties should be subject to, and bound by, the Alaska compensation statute. Having suffered injuries in Alaska, he filed a claim for compensation under the California act. Both statutes purported to exclude all other remedies. But the California courts granted an award and the Supreme Court upheld them in doing so:

"Prima facie," said the court, "every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum. It follows that not every statute of another state will override a conflicting statute of the forum by virtue of the full faith and credit clause; that the statute of a state may sometimes override the conflicting statute of another, both at home and abroad; and, again, that the two conflicting statutes may each prevail over the other at home, although given no extraterritorial effect in the state of the other."

Having reviewed the facts, the court decided that the interest of Alaska was not superior to that of California. In reaching this conclusion they laid stress upon two circumstances: (1) the formation of the contract in California, (2) the possibility of the injured workman's becoming a public charge to the state of California.

To produce another variation on our original problem, let us suppose that state X (the state of hiring) has enacted compensation legislation which covers A's injury in

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\(^7\)Alaska Packers Association v. Industrial Accident Commission of California, (1934) 1 Cal. (2d) 250, 34 Pac. (2d) 716, aff'd (1935) 294 U. S. 532, 547, 55 Sup. Ct. 518. See also Daggett v. Kansas City Structural Steel Co., (1933) 334 Mo. 207, 65 S. W. (2d) 1036; Sims v. Truscon Steel Co., (1939) 343 Mo. 1216, 126 S. W. (2d) 204.
state Y and denies him any alternative form of relief. State Y (the state of injury) has no compensation act; the common law is in force there. Here again the policies of the two states may clash. Although the law of the state of injury gives the workman a common-law right to damages, the law of the state of contracting forbids its enforcement. Some compensation acts govern the parties' relations only in the absence of an express disaffirmance. If the state of hiring has one of these acts, its provisions may be compared to an ordinary contract limiting the employer's liability. But this analogy is at best a thin one and, in the case of a compulsory act, it vanishes entirely. The real issue is between the desires of the two states to protect the workman and his family in whatever manner they may see fit. If he were to bring an ordinary suit in state X, the courts there would probably prefer their own law and dismiss the action. And there are cases in which courts other than that of the state of hiring have recognized the law of that state as an effective bar to a common-law action based upon the law of the place of wrong.

8 Where the employee is killed and an action brought for his death under the death statute of the state of injury, it might be argued that the compensation act of the place of contracting should not be allowed to affect the rights of the beneficiaries. They are not parties to the employment contract; why should they be subjected to the law of the place where it was made? But if the death statute of the law of the place of wrong gives a right of action to the beneficiaries only in the event that the deceased, had he lived, would have had one, a compensation statute of the place of contracting which would bar him, will bar them also. See Barnhart v. American Concrete Steel Co., (1920) 227 N. Y. 531, 125 N. E. 675.


The Supreme Court has discussed the bearing of the “full faith and credit” clause upon the solution of this problem. In *Bradford Electric Light Co. v. Clapper* the facts were as follows: Leon Clapper was engaged by the defendant company in Vermont to serve as a linesman in Vermont and New Hampshire. His duties required him to go into New Hampshire only for temporary and specific purposes. Both parties resided in Vermont, where the company had its principal place of business. They elected to be bound by the Vermont Workmen’s Compensation Act. While replacing some fuses in Vermont, Clapper was killed. To an action by his administrator in a federal court, the company pleaded the exclusionary sections of the Vermont act. The court held that this section was opposed to the public policy of New Hampshire and gave judgment for the plaintiff. This decision was reversed by the Supreme Court on the ground that there was no basis for the assumption that a New Hampshire state court would not give effect to the Vermont statute. The Supreme Court also held that, irrespective of New Hampshire policy, full faith and credit to the Vermont act would require the action to be dismissed. In the subsequent case of *Pacific Employers Ins. Co. v. Industrial Accident Commission of California* the court appears to have withdrawn from this position. The opinion in the latter case clearly suggests that a New Hampshire court would have been free to disregard the Vermont statute if it were deemed obnoxious to New Hampshire policy.

We have still to consider the situation where an exclusionary section in the compensation law of the state of hiring is pleaded as a defence to compensation proceedings in the


12 Pacific Employers Ins. Co. v. Industrial Accident Commission of California, (1939) 306 U. S. 493, 59 Sup. Ct. 629, aff’g (1938) 10 Cal. (2d) 567, 75 Pac. (2d) 1058.
state of injury. If the courts of the state of injury felt that their statute was designed to cover the case in hand, they would be most reluctant to allow this defence. But prior to the decision in Pacific Employers Ins. Co. v. Industrial Accident Commission of California\(^{13}\) it was necessary to consider the effect of the Clapper case. The crucial facts in the Clapper case were: (1) the contract of hiring was made in Vermont; (2) both parties resided in Vermont; (3) the employee was required to make only occasional and temporary excursions out of Vermont. The Supreme Court held that, in view of these facts, the Vermont statute barring alternative remedies was entitled to absolute recognition everywhere. In other cases where the same factors connected the circumstantial pattern to a single state, the courts of the state of injury enjoined their local boards from proceeding.\(^{14}\) Where one of the parties did not reside in the state of hiring, the Clapper case has been distinguished.\(^{15}\)

In Pacific Employers Ins. Company v. Industrial Accident Commission of California\(^{16}\) both employer and employee resided in Massachusetts, the state of hiring. The employee was injured while working temporarily in California. The Supreme Court of California upheld an award of compensation made by the California Industrial Commission. Taking their keynote from the Alaska Packers' case, the court argued that California had a sufficient interest in the affair to justify

\(^{13}\) Pacific Employers Ins. Co. v. Industrial Accident Commission of California, (1939) 306 U. S. 493, 59 Sup. Ct. 629, aff'd (1938) 10 Cal. (2d) 567, 75 Pac. (2d) 1058.


the application of California law because an injured employee might easily become a public charge there.\footnote{Stress was laid upon this fact in United States Casualty Co. v. Hoage, (1935) 64 App. D. C. 284, 77 F. (2d) 542.} They also pointed out that if the local commission could not dispose of the case, the hospitals and doctors who had supplied the employee with medical services might have to go to Massachusetts to collect their claim. The decision of the California court was affirmed by the Supreme Court of the United States. As a decision upon the obligatory effect of the full faith and credit clause, the Clapper case would appear to have been overruled.

We have considered the situation in which the statutory provision barring all claims (other than a claim for compensation at the forum) forms part of the law of the state in which the employee was injured. We have also considered the problems which arise when the statutory provision barring all claims (other than a claim for compensation at the forum) forms a part of the law of the state of hiring. A third situation (unusual but possible) suggests itself. A statutory provision of the type under consideration forms a part of the law of a state in which the employee has been employed. Part, at least, of his work has been performed there; that state (we may call it state \(Z\)) is a "state of employment." Yet neither the contract of hiring nor the actual injury to the employee have occurred in that state. The employee has been hired in state \(X\), injured in state \(Y\). But under the coverage theory entertained by the court of state \(Z\) (the state of employment) his injuries are compensable there.

The problem presents itself in the usual variant forms. We first assume that state \(X\) (the state of hiring) and state \(Y\) (the state of injury) each give the employee a common-law claim for damages. If he brings an action in state \(Z\) (the state of employment) to enforce either of these claims, he is not
very likely to succeed. The courts there will tell him that his remedy is before the state Z compensation tribunal; his common-law action is barred by the local statute. If he brings his action in state X or state Y, his chances of success are dubious. As we have seen, there are several cases in which courts have dismissed a common-law suit on the ground that the law of a foreign state (which was the state of hiring or the state of injury) barred the action. The same recognition might be given to a statutory prohibition contained in the law of a state of employment.

The problem would be different if state X or state Y gave the employee a claim for compensation and proceedings were taken in either state to secure an award. The statutory bar of state Z would probably be disregarded. The court of the forum (state X or state Y) would probably carry on with the compensation proceedings. Would the full faith and credit clause permit it to do so? According to the excerpt quoted above from the Supreme Court's opinion in *Alaska Packers Association v. Industrial Accident Commission of California*, the answer would depend upon the extent of the forum's interest in the problem. If state X (the state of hiring) was the forum, this case would lend considerable support to the argument that the forum had a sufficient interest to justify the application of its law. If state Y (the state of hiring) was the forum, *Pacific Employers Ins. Co. v. Industrial Accident Commission of California* would go a long way to justify the application of state Y's law.

Let us attempt to summarize the principal trends in the

19 Alaska Packers Ass'n v. Industrial Accident Commission of California, (1935) 294 U. S. 532, 55 Sup. Ct. 518, aff'd (1934) 1 Cal. (2d) 250, 34 Pac. (2d) 716.
judicial treatment of our problem. We start with the fact that most workmen's compensation statutes purport to give an exclusive remedy and to bar alternative proceedings. So far as such a prohibition affects common-law suits, it will probably be recognized and enforced by the courts of other jurisdictions. But so far as it attempts to stop compensation proceedings in other states it will probably be disregarded. Pronouncements of the Supreme Court indicate that the court of a state which has a sufficient interest in the protection of an injured employee may award compensation to him although the laws of another state purport to prohibit such an award. But the Clapper case, though overruled, still signifies the power of the Supreme Court to prevent a state from extending its law to cases in which it has not a sufficient interest.

SECTION 48

WORKMEN'S COMPENSATION ACTS: CONTRACTS LIMITING THE EMPLOYER'S LIABILITY, RELEASES, AND PRIOR JUDGMENTS

Bargains between employer and employee limiting the employer's liability for injuries are deprived of legal validity by most compensation acts. Such a contract might be made in a state whose laws upheld it and then pleaded as a defence to compensation proceedings in a forum whose laws avoided it. If the court of the forum believed that the forum had a sufficient interest in the case to entertain compensation proceedings, it would probably reject the contractual defence as contrary to local public policy.¹ A similar problem has frequently arisen in suits against carriers who have attempted to limit their liability. In such cases some courts declined to

¹ See Carl Hagenbeck, etc., Show Co. v. Ball, (1920) 75 Ind. App. 454, 126 N. E. 504.
recognize the limitation if the factual pattern was significantly connected to the forum.²

Contracts made after the event releasing the employer from liability for injuries are also invalid under most compensation acts. In a few states they are permitted to take effect when their terms comply with certain statutory requirements. Cases have arisen in which employers tried to defend themselves against compensation proceedings at the forum by pleading a release signed in some outside state, valid under its laws but void under the statute of the forum. The courts have given scanty consideration to the parties’ desire to arrange a binding settlement of their dispute. Stressing instead the policy of the forum which disapproved such releases, the courts have uniformly treated such foreign releases as void.³ But if the employer or his insurer has paid sums of money to the employee under the terms of the release, these sums are usually credited to them in the compensation proceedings at the forum.⁴

Questions are sometimes raised in the course of compensation proceedings regarding the effect of a prior judgment rendered in some other state. The “double recovery” problem has been the subject of several judicial decisions. Suppose that an employee’s injuries are compensable under the statute of state X. He takes appropriate proceedings in state X and receives an award. Then he discovers that the same injuries are compensable under the statute of state Y. Being dissatisfied with the award obtained in state X, he

² See above, p. 200.
initiates proceedings in state Y to obtain an award under its statute. In these latter proceedings the employer pleads that the matter has already been conclusively settled by the compensation tribunal of state X. That body has investigated the merits of the employee's claim and made an award. Its disposition of the case ought to be regarded as final.

The court of state Y is now called upon to decide whether or not it will make a second award in respect of the same injuries. It is very desirable, of course, that the litigation in respect of these injuries should be brought to an end, once and for all, and not protracted unnecessarily. The prime object of all workmen's compensation is to provide a cheap, speedy, and effective means of handling industrial accident cases. Consecutive proceedings in two different states respecting the same accident are scarcely consistent with this objective. In many states the compensation statutes provide that an award shall be given in lieu of all other alternative claims or remedies. We may assume that state X has the same rule; thus the employee may be said to have received his award there on condition that he accept it as complete satisfaction and that he refrain from taking further proceedings. These various factors in the problem have led some courts to forbid compensation proceedings based upon injuries for which compensation has already been awarded in another state. 5

*Minto v. Hitchings & Co., (1923) 204 App. Div. 661, 198 N. Y. Supp. 610; De Gray v. Miller Bros. Const. Co., (1934) 106 Vt. 259, 173 Atl. 556; Di Carvallo v. Di Napoli, (1935 N. J. Dept. of Labor) 180 Atl. 488; Hughey v. Ware, (1929) 34 N. M. 29, 276 Pac. 27; Tidwell v. Chattanooga Boiler & Tank Co., (1931) 163 Tenn. 420, 43 S. W. (2d) 221, rehearing denied 163 Tenn. 648, 45 S. W. (2d) 528. This last decision proceeds upon the theory that the acceptance of compensation in Ohio constituted a breach of the statutory terms of the contract imposed by the law of Tennessee where the contract of employment was made. This breach excused the employer from his duty to pay compensation under the Tennessee statute.

In Texas an employee who has collected compensation in another state is barred by statute from making a claim in the local tribunals. See Vernon's Ann. Civ. St. (1925) 1940 Supp., art. 8306, § 19c.
On the other hand, it is always possible to argue that, notwithstanding the previous award in another state, the policy of the forum requires that the case be disposed of according to its laws. The statute of the forum might allow greater compensation to the injured employee. Taking this view of the matter, several courts have held that the court of the forum ought to make a second award according to its own laws.6

In those states where a foreign award does not prevent the employee from making a further claim, the courts usually credit the employer or his insurer with all sums paid under the prior judgment.7 But the employee still retains the advantage of being able to try for a larger sum in the second proceeding.

It has been suggested that the full faith and credit clause may have some bearing upon the solution of the double-recovery problem. If the court of a sister state has obtained proper jurisdiction of the parties, and has given a judgment in favour of the plaintiff, that judgment will be recognized in other states as a conclusive adjudication upon all issues of law or fact which it purports to dispose of. Should a question be raised in another state as to whether a particular issue of law or fact has been dealt with by such a judgment, it will be referred to the law of the state in which the judgment was rendered. This general choice-of-law rule is supposed to be reinforced by the constitutional obligation of the full faith and credit clause.8 But it does not dispose of our problem concern-


8 See FREEMAN, JUDGMENTS, Ed. 5 (1925) Vol. 3, § 1394; CONFLICT OF LAWS RESTATEMENT (1934) § 450 and comment f.
ing two awards in the workmen's compensation field. The first judgment, given by the compensation tribunal in state X, may be said to have conclusively determined the rights of the employee under the statute of state X. But it does not touch the question of what rights are conferred upon him under the statute of state Y. In the normal case it could not do so because, as we have seen, the rights conferred by compensation statutes can rarely be enforced except in their state of origin. If the court of state Y where the second claim is put forward orders a second award, that award will be based upon an application of legal rules which the first court could not have made. In other words, the employee, when injured, had two causes of action, one created by the law of state X, the other created by the law of state Y. Either state could render an award according to its own rules of law. This state of affairs is quite compatible with the obligation of the full faith and credit clause. When the court of state X gives the first judgment, it finally disposes of the cause of action created by the law of state X. The cause of action, the claim to compensation, is merged in the judgment. But the cause of action created by the law of state Y remains unaffected by that judgment. Hence the cause of action created by the law of state Y may properly form the subject of a second adjudication by the court of that state.

The double award problem arose in Interstate Power Co. v. Industrial Commission of Wisconsin. The first award was made under the Iowa statute by an Iowa court; proceedings were then taken in Wisconsin to obtain a second award under the Wisconsin statute. The court approved a second award saying:

"It is contended by the appellant [employer] that the disposition of this case in Iowa has the force and effect of a

9 See section 46, above.
10 See Freeman, Judgments, Ed. 5 (1925) Vol. 3, §1395.
judgment, to which this court must give full faith and credit. This might be a valid argument provided the Iowa court had any jurisdiction to effect proceedings under the Wisconsin act. We think it has not such jurisdiction. We concede the jurisdiction of the Iowa Commission to determine the rights of the parties under the Iowa act, and we claim the jurisdiction of the Wisconsin Commission to determine their rights under the Wisconsin act."

Like other species of adjudications, a judgment which terminates workmen's compensation proceedings may be introduced in the course of subsequent litigation to show that, as between the parties, a particular issue of fact or law has been conclusively determined by a competent tribunal. In Chicago etc., R. Co. v. Schendel an action was brought in Minnesota under the Federal Employer's Liability Act to recover damages for the death of an employee. Such a suit necessarily proceeded upon the theory that the employee was engaged in interstate commerce. The employer defendant set up the prior judgment of an Iowa court affirming an award of compensation under the Iowa compensation statute upon the ground that the deceased was engaged in intrastate commerce only. The parties to the Minnesota suit had all been parties to the prior proceedings in Iowa. The employer contended that as between himself and the plaintiff beneficiaries the question of the character of the deceased employee's employment had been conclusively determined. This contention was upheld by the Supreme Court of the United States. That court held that by virtue of the full faith and credit clause, the decision of the Iowa court that the deceased employee was engaged in intrastate commerce must be recognized in Minnesota. Hence the proceedings there, which were based upon a

12 Chicago, etc., R. Co. v. Schendel, (1926) 270 U. S. 611, 46 Sup. Ct. 420. In the Schendel case the Iowa compensation proceedings had terminated in a final judgment by an ordinary court. But it has also been held that a finding of fact by an administrative board, which is not open to review, is res judicata. Williams v. Southern Pac. Co., (1921) 54 Cal. App. 571, 202 Pac. 356.
contrary theory, could not be maintained. The Supreme Court's opinion clearly indicated that, in the converse situation, a determination by a court that the deceased was engaged in interstate commerce would preclude further proceedings under a state compensation act.

SECTION 49

WORKMEN'S COMPENSATION ACTS: A STATUTORY ASSIGNMENT OF THE EMPLOYEE'S RIGHTS AGAINST A THIRD PARTY TORTFEASOR TO THE EMPLOYER

So broad is the scope of some workmen's compensation statutes that an employer may find himself compelled to compensate an employee in respect of injuries caused by the negligence of some third party but received by the employee in the course of his employment. Some statutes provide that where an award is made under these circumstances the employer shall be subrogated to the rights of the employee against the third party tortfeasor. The acceptance of compensation is made to constitute an assignment by the employee to the employer of his claim against the tortfeasor. Usually the statutory assignment is limited to the amount of the compensation award which the employer has paid to the employee. The employee is then entitled to any damages in excess of that sum for which the tortfeasor is liable.

Provisions of this kind give rise to an interesting modern instance of concurrent reference to two legal systems. Any tort cause of action which an injured employee may have against someone other than his employer will be defined and governed by the law of the place of wrong. If the employee accepts compensation in some other state whose laws in that event assign his cause of action to his employer, the effect of those laws upon the employee's original cause of action will have to be determined. We have seen that where a claim for
damages in tort accrues in one state and is assigned in another state the spheres of influence appropriate to the respective laws of these two states are by no means clearly defined. In dealing with these statutory assignments by acceptance of compensation, the courts have generally given very full play to the law of the state where the award was accepted. Several opinions indicate, however, that the modification of the employee's right of action by that law must not run counter to any settled rule or policy of the state where the tort was committed.

Thus the law of the state where the employee had accepted an award has been permitted to determine the following points:

(1) That the employee might, notwithstanding his acceptance of an award, maintain an action against the third party tortfeasor to recover his interest in the partially assigned cause of action.

(2) That the employer might intervene in a suit brought by the employee or his dependents in order to recover his interest in the partially assigned cause of action.

(3) That an employee who had already collected damages at the forum from the third party should be forced to share them with his employer.

1 See section 43, above.
5 Hartford Accident & Indemnity Co. v. Chartrand, (1924) 239 N. Y. 36, 145 N. E. 274; General Accident, etc., Co. v. Zerbe Const. Co., (1935) 269 N. Y. 227, 199 N. E. 89; Re Hertell's Estate, (1929) 135 Misc. 36, 237 N. Y. Supp. 655 (here the employee's administrator had collected a sum of money as damages in another state but it had come under the control of the court in administration proceedings.)
Where the injury to the employee has resulted in death, the award of compensation to persons who would be entitled to damages under the law of the place of wrong has been recognized as effecting an assignment of their rights to the employer. But it has been held that the acceptance of an award by one beneficiary should not be permitted to affect the rights of others who have not received compensation. The law of the place of wrong gives them a common-law cause of action for damages against the third party tortfeasor. This common-law cause of action they are entitled to enforce unless and until they accept compensation on terms which require them to assign their cause of action. The acceptance of compensation upon these terms by one of the beneficiaries should not affect the position of the others.

In *Foster v. Denny Motor Transfer Co.* the court had to deal with a rather peculiar statutory assignment provision contained in the Illinois compensation act. The provision in question was directed to a situation in which both the employer and the third party tortfeasor were operating under the Illinois compensation act and the employee’s injuries were compensable under that act. It purported, in these circumstances, to assign the employee’s entire claim against the third party tortfeasor to the employer, whether the employee obtained an award under the act or not. In *Foster v. Denny Motor Transfer Co.* the plaintiff employee was injured in Indiana. He apparently made no attempt to obtain compensation in Illinois but brought a common-law action against the defendant third party tortfeasor in an Illinois federal court. The defendant third party tortfeasor argued that since both it and

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the plaintiff's employer were operating under the Illinois compensation act, and the plaintiff's injuries were compensable under that act, the plaintiff's claim had been assigned to his employer. Hence the plaintiff could not maintain the present action. The court rejected this argument and allowed the action to proceed. Although the reasoning of the opinion is somewhat obscure, the decision seems sound. The law of the place of wrong, Indiana, gave the plaintiff a cause of action against the defendant third party tortfeasor. Illinois law gave him a claim for compensation against his employer. Since he made no attempt to collect this latter claim, it is difficult to see why Illinois law should be allowed to interfere with his Indiana cause of action.

SECTION 50

ACTIONS BETWEEN SPOUSES

The ancient common-law rule that a husband and wife may not bring suit against one another has come up for classification in several recent cases. In *Buckeye v. Buckeye*¹ the plaintiff was injured in Illinois while riding as a passenger in defendant's automobile. After the commencement of proceedings the parties were married, Wisconsin, the forum, becoming their matrimonial domicile. Under its internal law such an action was maintainable, under that of Illinois it was not. The Wisconsin court admitted the general proposition that "with respect to the legal consequences of marriage both as to the status of the parties and as to all their property interests, except interests in land, the law of the matrimonial domicile governs." But they refused to accede to the plaintiff's contention that the question whether the marriage extinguished her power to sue her husband should be determined by Wisconsin law. Instead, they permitted the law of Illinois to supply a

¹ *Buckeye v. Buckeye*, (1931) 203 Wis. 248, 234 N. W. 342.
conclusion upon this issue, thereby barring the plaintiff’s action.

It is submitted that such an all-inclusive reference to Illinois law was unnecessary. The Illinois theory of legal identity to spouses might well have been classified as a rule relating to the marital status or property rights of the parties. The purposes of the common-law incapacity are no doubt obscure and antiquated, but if it can be regarded as a means to the preservation of domestic harmony, that is clearly a matter of little concern to Illinois when the spouses reside in Wisconsin. The same result has been reached in several other cases where the facts were similar except that the marriage preceded the injury. Thus there may now be said to exist an established jurisprudence upon the point, which, although not immune to criticism, probably ought to be followed for the sake of consistency and predictability.

In *Mertz v. Mertz* the New York Court of Appeals appears to have taken the view that the common-law prohibition of actions between spouses in force in that state should be assigned to the department of procedure. They refused to permit a wife to sue her husband in New York for injuries received in Connecticut. Such a holding is quite inconsistent with the modern view that the category of procedure ought to be restricted as much as possible. The court also maintained that the New York rule in question embodies the public policy of that state.

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4 (1936) 271 N. Y. 466, 3 N. E. (2d) 597. Some slight stress is laid upon the fact of the plaintiff wife’s residence in New York.
6 Actions between spouses upon foreign judgments were dismissed as contrary to the law of the forum in Metzler v. Metzler, (1930) 8 N. J. Misc. 821, 151 Atl. 847; Weidman v. Weidman, (1931) 274 Mass. 118, 174 N. E. 206.
At the present day there are important variations between the laws of different states governing the liability of automobile owners for damage occasioned by the use of their automobiles. This state of affairs has produced some interesting conflict of laws problems. For example, A entrusts his car to B in state X. B drives the car into state Y and, while driving it there, injures C. The law of state Y makes an automobile owner responsible for all injuries caused by persons using his car with his consent. The law of state X where the car was lent is not so strict. Which law should govern A’s liability to C? State Y ought to have the right to regulate the use of automobiles within its boundaries. But A did not bring his car to state Y. A may not have authorized B to take the car to state Y. Under these circumstances there might seem to be some hardship to A in charging him with liability under the law of state Y. The decided cases appear to indicate that before A can be so charged, it must be shown that he gave an express or tacit consent to the use of his car in state Y.¹

In Young v. Masci² the Supreme Court of the United States considered the constitutional aspects of this problem. In New Jersey Young gave possession of his car to a friend who injured Masci while driving the car in New York. New York imposes the strict liability upon automobile owners. A New Jersey court applied New York law. Young appealed to the Supreme Court on the ground that a reference to New York law under these circumstances was so unfair to him as to


amount to a denial of due process of law. Emphasizing the fact that Young permitted his car to be used in New York, the Supreme Court held that the New Jersey court's choice of law was perfectly proper.

To vary the problem, let us suppose that state X, in which the car is lent, imposes strict liability upon the owner. The law of state Y, where the injury occurs, is more lenient. An alternative reference to the law of state X has been suggested. The government of state X may desire to make owners who lend their cars there responsible for harm caused by the operation of those cars in other states. The application of the law of state X might be explained in terms of the tort choice-of-law theory. This would mean that state X was regarded as the "place of wrong." But a state, in order to qualify as a "place of wrong," is usually expected to be the scene of actual harm to the defendant. No harm has occurred in state X. Hence a second theory has been brought forward. The bailment of the car has taken place in state X. The law of state X might be regarded as imposing a semi-contractual, relational duty upon A to insure the public against injury by B. It would be adopted as the law of the place where the contract or relationship of bailment was entered into.

This theory was adopted by the court in Levy v. Daniels' U-Drive Auto Renting Co.\(^8\) The defendant company rented a car in Connecticut to Sack, whose negligent driving in Massachusetts occasioned the plaintiff's injury. A Connecticut statute provided that "any person renting or leasing to another any motor vehicle owned by him shall be liable for any damage to any person or property caused by the operation of such motor vehicle while so rented or leased." The action was brought in Connecticut and the court there applied the statute in question. "The statute," said the court, "made the liability

\(^8\) Levy v. Daniels U-Drive Auto Renting Co., (1928) 108 Conn. 333, 143 Atl. 163.
of the person renting motor vehicles a part of every contract of hiring of a motor vehicle in Connecticut. The statute did not create the liability, it imposed it in case the defendant voluntarily rented the automobile. Whether the defendant entered into this contract of hiring was its own voluntary act; if it did, it must accept the condition upon which the law permitted the making of the contract." Following out the contract analogy, the court described the plaintiff as a third-party beneficiary for whose benefit the contract was made.4

The question has been raised whether the choice-of-law principle of Levy v. Daniels' U-Drive Co. might be extended to cases in which the automobile owner did not rent his car for hire but merely lent it to the bailee. In Cherwien v. Geiter5 the defendant owner lent his car to a friend in New York who drove it into New Jersey and injured the plaintiff. A New York court declined to refer the owner's liability to New York law.6

SECTION 52
LIABILITY OF TORTFEASOR'S INSURER TO INJURED PARTY

A number of American states have passed legislation giving an injured person direct recourse against the wrongdoer's insurer. Under an ordinary contract of public liability auto-

4 If analogies be wanted, the owner's liability to the injured third party is not unlike that of a telegraph company to an addressee who has suffered a loss by reason of the company's failure to deliver a telegram. See section 42, above.


6 The case of Burkett v. Globe Indemnity Co., (1938) 182 Miss. 423, 181 So. 316, raises a problem similar to that canvassed in this section. A, an automobile repairman, was commissioned by B to repair his automobile in New Orleans. A left the car in such a dangerous condition that it ran off the road in Alabama and injured C. The court appears to have referred the question whether C could recover from A to the law of Louisiana. The case might be explained by saying that the effect of the contract for repairs made between A and B was governed by Louisiana law. That law imposed a contractual liability upon the repairman in favour of third parties who suffered injury by reason of his neglect to perform the contract properly.
mobile insurance, the insurer undertakes to discharge any liabil­
ity incurred by the insured in the use of his automobile. Legisla­tion of the type in question provides that, under certain cir­
cumstances, a person damaged by the insured may bring an action directly against the insurer, who shall be liable to him for any loss within the coverage of the policy. The statute gives the injured person an enforceable third-party interest in the performance of the insurance contract.

Such statutes have important conflict of laws aspects. Sup­pose B makes a contract of insurance with the A company in state X. The company undertakes to discharge any liability incurred by B in using his automobile. B, driving his auto­mobile in state Y, injures C. There is a statute in force in state X (where the insurance contract was made) making insur­ers directly responsible to injured third parties. Can C, who has been injured in state Y, bring action directly against the A company relying upon the terms of this statute? Since the statute is primarily designed to protect injured persons by enabling them to recoup themselves more effectually, it might be thought that state X should have little or no interest in the application of its statute to cases of injury in state Y. The statute can be regarded, however, as imposing a semi­contractual liability in respect of all insurance contracts made in state X. It governs the contract between B and the A com­pany which was concluded in state X and gives C an enforce­able interest in the performance of that contract. Taking this view of the matter, some courts have under such circumstances allowed the injured party to bring action directly against the insurer.¹

When a court deals with insurance legislation in this way, it may have to make concurrent references to two bodies of

The law of the state where the insurance contract was made will determine whether the injured party can bring suit directly against the insurer. If such a suit is permitted, the injured party is entitled to recovery against the insurer only in the event that he could have recovered against the insured tortfeasor. To ascertain the liability of the tortfeasor, the court must refer to the law of the place of wrong.

To produce a different problem, let us suppose that no special legislation has been enacted in state X where B and the A company have made their contract. State Y, the scene of the injury to C, has the special legislation. Can C bring suit against the company, relying on the law of state Y? No doubt state Y has an interest in extending the protection of its law to C. But such an extension might be unjust to the A company. They have done nothing in state X and are not responsible for the occurrence of the accident there. On the other hand, it might be argued that, by promising to indemnify B against liability, the company has encouraged him to use his car in state Y and elsewhere. They have given him a confidence and assurance which he might not otherwise have had. Perhaps the analogy of the owner who lends his car for use in another state is not too remote. However, there is some authority for the proposition that, in the situation stated, to subject the company to the law of state Y would be wrong. On the other hand we have the case of Kertson v. Johnson. Here the injury occurred in Wisconsin, whose law authorized direct recourse against insurers. A Minnesota court allowed the injured person to bring suit directly against the tortfeasor's insurer, say-

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In Coderre v. Travelers' Ins. Co., (1927) 48 R. I. 152, 136 Atl. 305, the court refused to apply the statute of the forum when neither the contract of insurance nor the injury were located in the forum.

ing that the Wisconsin law ought to be enforced "as part of every contract in force in that state." The court emphasized the fact of injury in Wisconsin exclusively; the opinion does not even mention the place of contracting. It therefore affords a basis for suggesting that the law of the state of injury should be allowed to fix an obligation upon a tortfeasor's insurer in favour of injured third parties.

In McArthur v. Maryland Casualty Co. a Mississippi court offered a peculiarly undesirable solution for the instant choice-of-law problem. The injury occurred in Louisiana, which has a statute imposing direct liability upon insurers. The injured person brought an action against the tortfeasor's insurer in Mississippi. The Mississippi court refused to enforce the Louisiana statute upon the ground that it was a law of a remedial character, affecting only a matter of procedure. The court did not say where the insurance contract was made. If it was not made in Louisiana, the propriety of applying the Louisiana statute to the case in hand might be considered debatable as a question of choice-of-law policy. But it is impossible to see how the Louisiana statute could be classified as a rule of procedure for conflict of laws purposes. Such a classification should only be made where the rule in question cannot be conveniently implemented by the court of the forum. If this element of inconvenience is not present, there is no sufficient justification for disregarding the choice-of-law policies which require that rights vested under a proper law should be enforced, so far as is possible, in all other jurisdictions. The Mississippi court did not suggest that the Louisiana law would be hard to enforce; it had already been enforced in a previous Mississippi decision. The Mississippi court argued that the Louisiana statute was remedial because

4 McArthur v. Maryland Casualty Co., (1939) 184 Miss. 663, 186 So. 305.
5 See above, section 13.
the Louisiana courts had held it to be remedial for constitutional law purposes. The connection between the constitutional law problem and the conflict of laws problem is not explained. Obviously there is none; the word "remedial," like many other words, has different meanings in different contexts. By a process of mechanical reasoning, the Mississippi court reached a speedy solution of the case before it which cannot be commended.

Statutes giving direct recourse against insurers sometimes provide that the injured party must obtain a judgment against the tortfeasor and attempt to execute it before seeking his remedy against the insurer. To a student of conflict of laws, such a provision will suggest the possibility of obtaining a judgment against the tortfeasor in one state and bringing suit against the insurer in another. In *Continental Auto Insurance Underwriters v. Menuskin* the plaintiff who had been injured obtained a judgment against the tortfeasor in Tennessee. Being unable to obtain satisfaction of it, he brought suit against the tortfeasor's insurer in Alabama, relying upon an Alabama statute which authorized direct recourse against insurers upon the conditions which we have outlined. The contract of insurance had been made in Alabama. The Alabama court held that in order to comply with the statutory requirement of a prior unsatisfied judgment against the tortfeasor, the injured party must obtain such a judgment in the courts of Alabama. A Tennessee judgment against the tortfeasor would not be sufficient. Nevertheless the Alabama court was able to allow the injured party to recover against the tortfeasor by virtue of the express terms of the insurance contract. A further question suggests itself: Would the result be different if the suit against the insurer were brought in some other state? Since the cause of action against the insurer would be based upon

Alabama law, the courts of other states ought to adopt the
conditions laid down by the Alabama courts. To do otherwise
would be to impose a burden upon the insurer which the proper
law of his obligation did not authorize.

SECTION 53
LEGAL EFFECT OF A PARTY'S DEATH

Vestiges of the maxim, actio personalis moritur cum persona,
still survive in many common-law jurisdictions. What law
should determine the extent to which the rights and duties
of the parties are affected by the death of (1) the plaintiff and
(2) the defendant?

Let us consider the problem of the defendant's death first.
Employing a purely theoretical technique we might work out
four possible solutions. (1) Survivability could be regarded
as an attribute of the obligations created by the law of the
place of wrong. If that law did not give the plaintiff a surviv­ing
cause of action, no suit would be permitted after defend­
ant's death. (2) We might say that the question to be decided
is whether or not the plaintiff's claim survived as a liability
of the defendant's estate. Such a matter ought to be referred to
the law of the defendant's domicile. (3) We could also say
that, since one result of our deliberations might be to order the
deceased's personal representative to pay damages over to
the plaintiff, the question was one of administration, to be gov­
erned by the law of the forum. (4) Rules denying or allowing
recovery against a decedent's estate might be classified as pro­
cedural. In that case they would likewise be adopted only from
the law of the forum.¹

Both the third and fourth theories lead us to the internal

¹See per Redfield, J., in Burgess v. Gates, (1848) 20 Vt. 326 at 330: "I
think the demise of the action with the person may be treated as of the remedy
perhaps, and so not affect a mere transitory cause of action."
law of the forum. If either of them is followed, the plaintiff's success will depend upon the law of the place where he is able to bring his action. Each of the first two theories indicates a single proper law which will produce a uniform result no matter where the action is brought. They would appear to be preferable for this reason. If, for this reason, we eliminate the last two theories from consideration we are left with the first two theories from which to make a selection. We can choose either the law of the place of wrong or the law of the defendant's domicile. There is, however, a serious objection to making the validity of the plaintiff's claim depend upon the law of the defendant's domicile. The plaintiff has no control over the defendant's conduct in selecting a domicile. There would be an element of unfairness in allowing the defendant's selection of a domicile, after the harm had been inflicted, to alter the plaintiff's rights. It would be strange if the defendant could protect his estate from liability in this way. Hence it is submitted that the most satisfactory rule would be to refer the effect of the defendant's death to the law of the place of wrong.

The first theory, applying the law of the place of wrong, has been most generally adopted by the courts. In Ormsby v. Chase the plaintiff, who had been injured on an elevator in a New York office building owned by the defendant, sued his estate in a Pennsylvania federal court. Since New York retained the common-law rule that a right of action for personal injuries abates upon the death of the wrongdoer, the Supreme Court on appeal gave judgment for the estate. “Assuming Ormsby's negligence as alleged,” said the court, “the New York law upon the happening of the accident gave plaintiff a right of action. But the same law limited the right and made it to end upon the death of the tortfeasor.” Other courts have reached the same result when the law of the place of wrong

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\*Ormsby v. Chase, (1933) 290 U. S. 387, 54 Sup. Ct. 211.\*
made no provision for survival of liability. Conversely it has been held that, when the law of the place of wrong has abrogated the common-law rule and created a surviving claim, the defendant cannot rely upon a contrary rule prevailing at the forum.

The third theory, referring to the law of the defendant's domicile, has not gone entirely unrecognized. In Whitten v. Bennett the defendant executor's deceased was charged with malicious prosecution and false imprisonment in Massachusetts where such claims survived. But the plaintiff's suit was dismissed by a Connecticut federal court on the ground that the law of Connecticut, where deceased died domiciled, caused his liability to terminate with his death.

Herzog v. Stern, a decision of the New York Court of Appeals, appears to favor a reference to the law of the forum where the deceased wrongdoer's estate is being administered. The action arose out of an automobile accident in Virginia. By the laws of that state the defendant's liability survived his death; the Decedent Estate Law of New York restates the common-law rule. The Court of Appeals, by a majority, gave judgment in the defendant's favor, saying:

"This State has undoubted power to determine the devolution of the property of a deceased resident and how such prop-


property shall be administered. It determines upon what claims a suit may be brought against the representatives of the decedent, and payment be enforced out of the assets of the estate. . . . The rights and obligations of executors and administrators appointed by our courts are defined by our law and our courts are without jurisdiction to grant a judgment binding on the executors or administrators appointed here unless our law makes provision for such actions against executors and administrators."

The judgment does not dispute the propriety of a reference to the law of the place of wrong but insists that the law of the state of administration should also be consulted. In effect, it imposes upon the plaintiff the burden of concurrent reference to both laws. As an alternative ground, the court also held that a recovery by the plaintiff would offend New York’s public policy.

Let us now consider what law determines whether the claim of the party wronged continues after his death. To find an answer for this question we might apply, mutatis mutandis, each of the four theories outlined above for the problem of a deceased defendant.7 But for the same reasons, the theory which refers the question of survivability to the law of the place of wrong is the most satisfactory. Generally speaking, the courts have leaned toward the law of the place of wrong as the best source for a controlling principle. Where that law decrees that the plaintiff’s claim is extinguished at his death, a series of cases supports the principle that it cannot be collected anywhere.8 The converse proposition, that a claim sur-

7 Where the deceased party is the one on whose behalf the action is brought, the state of administration will not always coincide with the forum. The action might be brought by an administrator appointed in some other state.
viving by the law of the place of wrong can be enforced anywhere, has been accepted, apparently without dispute, in a number of decisions.9

The idea that the law of the dead plaintiff's domicile should in some respects control the transmission of a tort chose in action to his personal representative has found expression in two decisions of a federal judge.10 He did not deny that the law of the place of wrong should be recognized as authoritative to settle the issue of survivability. But where that law failed to specify the administrator to which the claim should go, he argued that it could only pass to the domiciliary administrator. Decisions upon the question of the proper administrator to enforce death statutes were distinguished because they did not purport to transmit an accrued right but conferred a new one. There do not appear to be any other decisions discussing the incidence of surviving delictual rights of action as among a number of administrators. This state of affairs contrasts strangely with the mass of case-law which has clustered about the question of the proper administrator to enforce death statutes.11

One of the most important types of surviving claims in tort is that which arises out of the wrongful death of the deceased. Such claims differ from those based upon ordinary death statutes with respect to the basic theory employed in estimating damages. A death statute aims to compensate the deceased's dependents for their loss; survival statutes simply transmit the same cause of action which the deceased would

Fed. 708 (here the law of the place of wrong was applied to determine whether the claim of a beneficiary under a death statute would, upon his death, pass to his estate).


11 See above, p. 126.
have had, had he lived to enforce it. Where it is transmitted by the terms of the law of the place of wrong to designated individuals, they are, of course, entitled to share the proceeds of the action. Where it passes to the deceased person's estate, the proceeds are divided, like other personalty, according to the terms of his will or the intestacy laws of his domicile.

The foregoing principles for deciding the effect, in conflicts cases, of the death of either party have been held, in a series of decisions inspired by the Supreme Court, to have no application to the situation where the action was commenced before death occurred. These decisions hold that the law of the forum, rather than the law of the place of wrong, should determine the effect of the party's death upon the continuation of a lawsuit. In the case of *Martin's Adm'r v. Baltimore & O. R. Co.* the Supreme Court had to deal with an action brought in a West Virginia federal court for personal injuries received in Maryland. During the prosecution of the suit the plaintiff died. It was held that the action could not be continued by his administrator because, by the law of West Virginia, his action died with him. Speaking for the majority, Mr. Justice Gray said:

"The question whether a particular cause of action is of a kind that survives for or against the personal representative of a deceased person is a question not of procedure but of right. But in the case at bar, the question whether the administrator has a right of action depends upon the law of West Virginia, where the action was brought and the administrator appointed."

Despite the directness of this language, it may be doubted whether the learned judge meant to decide the conflict of laws question. Nowhere does it appear from the report that

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anyone argued or even suggested the relevance of Maryland law as that of the place of wrong. Moreover, at a later point in the opinion, decisions of the Maryland Court of Appeals are quoted to show that there too, as in West Virginia, a right to compensation for personal injuries died with its owner. Hence even assuming that the conflict of laws problem was present to the learned judge's mind, his opinion was, on his own showing, clearly unnecessary to the decision of the case.

A somewhat brief but much more articulate decision upon the point was given by the same court in *Baltimore & O. R. Co. v. Joy*, where, however, the effect of the law of the forum (Ohio) was to preserve the plaintiff's cause of action, that of the law of the place of wrong (Indiana) to extinguish it. Mr. Justice Harlan, speaking for the court, resolved the conflict in the following words:

"It is scarcely necessary to say that the determination of the question of the right to revive this action in the name of Hervey's personal representative is not affected in any degree by the fact that the deceased received his injuries in the State of Indiana. The action for such injuries was transitory in its nature, and the jurisdiction of the Ohio court to take cognizance of it upon personal service or on the appearance of the defendant to the action cannot be doubted. Still less can it be doubted that the question of the revivor of actions brought in the courts of Ohio for personal injuries is governed by the laws of that State, rather than by the law of the State in which the injuries occurred."

Hence the plaintiff's administrator was permitted to revive the action begun by his deceased, contrary to the law in force at the place of wrong. Upon similar facts, the same conclusion has been reached by other tribunals.

The theory that revivor of actions is governed by the law of the forum has also been invoked in the case of the defendant’s death. In *Clough v. Gardiner* the defendant died while the suit was pending. The law of the place of wrong would have allowed it to be continued against his estate; the law of the forum would not. The court followed the rule of the forum.

The *Joy* case seems to sound a note of discord in modern conflicts doctrine. Where the law of the forum, in contrast with the law of the place of wrong, favours a survival the plaintiff gains an advantage over the defendant due solely to his selection of a forum. Where the law of the forum, in contrast with the law of the place of wrong, extinguishes the cause of action, a most peculiar result ensues. The mere fact that the action was begun before the death of one of the parties puts the plaintiff in a worse position than he would have occupied if the action had been commenced later. The doctrine has been explained as a particular instance illustrating the general principle that matters of procedure are governed by the law of the forum. It may be doubted, however, whether the application of an outside law in this connection would entail sufficient inconvenience to justify such a classification. With reference to the question of convenience, there does not appear to be any sound reason for distinguishing between the revival of an existing action and the prosecution of a new one.

**SECTION 54**

**MISCELLANEOUS MULTIPLE CONTACT PROBLEMS**

In this section are collected together a number of miscellaneous multiple contact problems, none of which are suf-
ficiently important to deserve a separate section. Most of them have been solved in terms of a single choice-of-law theory.

Suppose A in state X sets in motion some physical force which injures B in state Y. The law of state Y is usually adopted. In *Connecticut Valley Lumber Co. v. Maine Cent. R. Co.* an employee of the defendant company, operating one of its engines in Quebec, set fire to a bridge owned by the plaintiffs. The bridge, which extended into New Hampshire, was completely burned. The plaintiffs brought action in New Hampshire. The court held that the defendant's liability should be governed by New Hampshire law with respect to the part of the bridge burned in that state, and by Quebec law with respect to the part burned there. A New Hampshire statute imposed strict liability upon railroad companies for damage by fire. But the court decided that this statute of the forum was not intended to cover damage caused by the operation of trains in another jurisdiction.

The general problem of interstate libel or slander has received very little judicial discussion. A few cases have been litigated in which the defendant wrote a libel in one state and sent it into another where it was read. These cases support the view that the law of the state where the libel was read ought to control.

In *Connecticut Valley Lumber Co. v. Maine Cent. R. Co.* the court carried the place of injury theory so far as to hold

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that when injury occurs in two states, each state's law should govern with respect to the harm done there. Suppose A, in state X, broadcasts slanderous remarks by radio which are heard in states X, Y, and Z. It might be very difficult to determine how much harm to A's reputation was inflicted in each state and to apply the law of each state with respect to the harm done there. For the sake of convenience it might be better to apply the law of state X to the entire transaction.

In *Le Forest v. Tolman* a dog, kept by the defendant in Massachusetts, wandered into New Hampshire and bit the plaintiff there. Under the common law in force in New Hampshire the plaintiff had to prove scienter; he therefore argued for a reference to a Massachusetts statute which apparently abolished this defence. The court did not reject his plea upon any general principle but considered the aims and effect of the Massachusetts statute in question.

"It does not declare the owning or keeping of a dog to be unlawful, but that if the dog injures another person, the owner or keeper shall be liable, without regard to the question whether he had or had not a license to keep the dog. The wrong done to the person injured consists not in the act of the master in owning or keeping, or neglecting to restrain, the dog, but in the act of the dog for which the master is responsible."

Since the "act of the dog" was executed in New Hampshire, the statute was held to be inapplicable; but it seems to be clearly implied in the opinion that, had the statute by its terms been directed against the negligent control of animals, the plaintiff might well have succeeded.

The line of the A railroad company runs from state X into state Y. At a point in state X, one of the company's trains is negligently inspected by the company's employees so that B, who is riding on the train, is injured in state Y. By a number

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of courts the company's liability has been referred to the law of Y. In *Mike v. Lian* an automobile accident in Ohio resulted from failure properly to inspect the tires at the commencement of the trip in Pennsylvania. Only the law of Ohio was applied.

In *Burkett v. Globe Indemnity Co.* an automobile repairman in New Orleans left a car in such a dangerous condition that it ran off the road in Alabama and injured the plaintiff. The plaintiff was a guest of the owner riding in the car at the time of the accident. He brought suit against the repairman. The court appears to have determined the liability of the repairman according to the laws of Louisiana. This case might be explained upon the theory that Louisiana was the "place of wrong." It could also be explained upon the theory that Louisiana law governed the contract for repairing, and was therefore allowed to impose a contractual liability upon the repairman in favour of third parties who suffered injury by reason of his neglect.

In *Reed & Barton v. Maas*, a coffee urn, which had been defectively constructed in Massachusetts by the defendant was sold by him to a caterer in Wisconsin. The urn, while in use by the caterer, spilled hot coffee upon the plaintiff in Wisconsin. Wisconsin law was allowed to define the legal position of the manufacturer-defendant.

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6 El Paso, etc., R. Co. v. McComas, (1903 Tex. Civ. App.) 72 S. W. 629; Cincinnati, etc., R. Co. v. McMullen, (1889) 117 Ind. 439, 20 N. E. 287; Kansas City, etc., R. Co. v. Becker, (1899) 67 Ark. 1, 53 S. W. 406; Chicago, etc., R. Co. v. Doyle, (1883) 60 Miss. 977; Alabama, etc., R. Co. v. Carroll, (1892) 97 Ala. 126, 11 So. 803; Nashville, etc., R. Co. v. Foster, (1882) 78 Tenn. 351. See also Hoodmacher v. Lehigh Valley R. Co., (1907) 218 Pa. 21, 66 Atl. 975 (law of state where negligence and death but not actual injury occurred, applied).


9 See section 51, above.

A injures B in state X so that he dies in state Y. An action is brought against B on behalf of A’s estate or A’s dependents. State X’s interest in the affair is obvious; it has been held that the law of the place of injury may confer a cause of action notwithstanding the circumstance of death having occurred elsewhere. State Y’s interest, on the other hand appears rather small. Since A was not responsible for B’s presence in state Y at the time he died, it might not be fair to judge A’s conduct by the laws in force there. Under such circumstances a number of courts have refused to make any reference to the law of the place of death.

A curious case, apparently sui generis, is Buckles v. Ellers, an action for seduction in which the defendant was proved to have had sexual intercourse with the plaintiff, first in Illinois and then in Indiana. An Indiana court held that his liability should be governed by Illinois law, saying: “The illicit intercourse testified to as having occurred in this state did not constitute a new and independent case of seduction as contended for by the appellee, but was merely consequential to the alleged seduction which had previously taken place.”

A multiple contact problem involving a husband’s vicarious liability for his wife’s torts arose in Siegmann v. Meyer. The defendant’s wife assaulted the plaintiff in Florida. The plaintiff argued that under Florida law the defendant was liable for his wife’s torts. It might be questioned whether a rule of this kind ought to be adopted from the law of the place where negligence and death but not actual injury occurred, applied.


13 Buckles v. Ellers, (1880) 72 Ind. 220.

of wrong. Perhaps the vicarious liability of a husband for his wife's torts ought to be regarded as an incident of the marital relationship and referred to his domiciliary law. But the court did not take up this point. It ruled out the law of Florida upon another ground. The husband was not in Florida and was not responsible in any way for his wife's presence there. There was no causal relation between any act of his and the fact that the assault occurred in Florida. Hence the court held that it would be unfair to subject the husband to liability under Florida law.

Legal rules governing marital property and delictual liability were distinguished for conflicts purposes in *Williams v. Pope Manufacturing Co.* The plaintiff, a married woman, being domiciled and resident in Mississippi, was wrongfully imprisoned by the defendant's agents in Louisiana. She instituted an action in her own name in the Louisiana courts. It was contended for the defendant that any claim which the plaintiff might have must be litigated by her husband, because under Louisiana law a husband and wife held their property rights in common, under the control of the husband. The Supreme Court of Louisiana held that the provisions of Louisiana law referred to did not affect a right of action for tort belonging to a married woman domiciled outside Louisiana. Although the cause of action for the tort arose under Louisiana law, the wife was allowed to sue upon it alone.
