

Washington University Law Review

Volume 20 | Issue 3

January 1935

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Recommended Citation

Edward S. Stimson, *Conflict of Workmen's Compensation Laws*, 20 ST. LOUIS L. REV. 220 (1935).
Available at: https://openscholarship.wustl.edu/law_lawreview/vol20/iss3/2

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CONFLICT OF WORKMEN'S COMPENSATION LAWS

BY EDWARD S. STIMSON

The recent decision of the United States Supreme Court in *Alaska Packers' Association v. Industrial Accident Commission of California*¹ presents again the troublesome problem of what law governs the employer-employee relation.² A corporation doing business in both Alaska and California entered into a contract of employment with one Palma, an alien, who was not a resident of California. The contract was executed in California. The corporation agreed to employ Palma in Alaska during the salmon canning season and to transport him to Alaska and back to San Francisco. The contract provided that as the only labor was to be performed in Alaska and as the corporation had elected to be bound by the provisions of the Alaska Workmen's Compensation Act, the parties agreed to be bound by that act exclusively. Palma was injured in the course of his employment in Alaska. After returning to California he applied to the Industrial Accident Commission of California for an award of compensation under the California law. The California statute as interpreted by the Supreme Court of California gives the Commission jurisdiction over controversies arising out of injuries received outside of the state in cases where the contract of employment was made in the state. It also provided that "No contract, rule or regulation shall exempt the employer from liability for compensation fixed by this act." The corporation defended on the ground that the parties to the employment relation at the time of the injury were subject to the law of Alaska and not to the law of California and that the application of California law would violate the due process clause of the Fourteenth Amendment and deny full faith and credit to the Alaska law. The Commission awarded compensation to Palma; the Supreme Court of California sustained the award and the United States Supreme Court held that California could apply its own law.

In attempting to solve this problem the courts have been confused by apparent analogies to the problem of what law deter-

¹ (March 11, 1935) 55 S. Ct. 518.

² For earlier articles see Dwan, *Workmen's Compensation and the Conflict of Laws* (1926) 11 Minn. L. Rev. 329 and Angell, *Recovery under Workmen's Compensation Acts for Injury Abroad* (1918) 31 Harv. L. Rev. 619.

mines liability for a tort³ and the problem of what law determines the validity of a contract.⁴ When the employer-employee relation was entered into in their own state and the employee was injured outside of it many courts apply their own law.⁵ When the employee was injured in their own state and the contract of employment was entered into elsewhere, many courts again apply their own law.⁶ Thus it is possible for the employee to recover

³ Johnson v. Nelson (1915) 128 Minn. 158, 150 N. W. 620; American Mutual Liability Ins. Co. v. McCaffrey et al. (C. C. A. 5, 1930) 37 Fed. (2d) 870.

⁴ Pettiti v. T. J. Pardy Construction Co. (1925) 103 Conn. 101, 130 Atl. 70. See also most of the cases cited in note 5, post.

⁵ Rounsaville v. Central R. R. Co. (1915) 87 N. J. L. 371, 94 Atl. 392, reversed in (1917) 90 N. J. L. 176, 101 Atl. 182 on other grounds; Kennerston v. Thames Towboat Co. (1915) 89 Conn. 367, 94 Atl. 372; Grinnell v. Wilkinson (1916) 39 R. I. 447, 98 Atl. 103; Gooding v. Ott (1916) 77 W. Va. 487, 87 S. E. 862; Matter of Post v. Burger & Gohlke (1916) 216 N. Y. 544, 111 N. E. 351; Foughty v. Ott (1917) 80 W. Va. 38, 92 S. E. 143; Klein v. Stoller & Cook Co. (1917) 220 N. Y. 670, 116 N. E. 1055, memo. opinion; Fitzpatrick v. Blackall & Baldwin Co. et al. (1917) 220 N. Y. 671, 116 N. E. 1044, memo. opinion; Industrial Com. v. Aetna Life Ins. Co. (1918) 64 Colo. 480, 174 Pac. 589; State ex rel. Chambers et al. v. District Court (1918) 139 Minn. 205, 166 N. W. 185; State ex rel. Maryland Casualty Co. v. District Court (1918) 140 Minn. 427, 168 N. W. 177; Pierce v. Bekins Van & Storage Co. (1919) 185 Ia. 1346, 172 N. W. 191; Anderson v. Miller Scrap Iron Co. (1919) 169 Wis. 106, 170 N. W. 275, 171 N. W. 935; Crane v. Leonard, Crossette & Riley (1921) 214 Mich. 218, 183 N. W. 204; Hospers v. J. Hungerford Smith Co. et al. (1921) 230 N. Y. 616, 130 N. E. 916, memo. opinion; Hulswit v. Escanaba Mfg. Co. (1922) 218 Mich. 331, 188 N. W. 411; McGuire v. Phelan-Shirley Co. (1924) 111 Neb. 609, 197 N. W. 615; Pettiti v. T. J. Pardy Construction Co., *supra*, note 4, overruling Banks v. Howlett Co. (1918) 92 Conn. 368, 102 Atl. 822; Krekelberg v. M. A. Floyd Co. et al. (1926) 166 Minn. 149, 207 N. W. 193; State ex rel. Brewen-Clark Syrup Co. v. Missouri Workmen's Compensation Com. (1928) 320 Mo. 893, 8 S. W. (2d) 897. *Contra* Johnson v. Nelson (1915) 128 Minn. 158, 150 N. W. 620; Smith v. Heine Safety Boiler Co. (1918) 224 N. Y. 9, 119 N. E. 878; Altman v. North Dakota Workmen's Compensation Bureau (1923) 50 N. D. 215, 195 N. W. 287; Floyd v. Vicksburg Coöperage Co. (1930) 156 Miss. 567, 126 So. 395; Cameron v. Ellis Construction Co. (1930) 252 N. Y. 394, 169 N. E. 622, *semble*.

⁶ American Radiator Co. v. Rogge (1914) 86 N. J. L. 436, 92 Atl. 85, 94 Atl. 85, affirmed 87 N. J. L. 314, 93 Atl. 1083, writ of error dismissed for want of jurisdiction 245 U. S. 630, 38 S. Ct. 63, 62 L. ed. 520; Davidheiser v. Hay Foundry & Iron Works (1915) 87 N. J. L. 688, 94 Atl. 309; West Jersey Trust Co. v. Philadelphia & R. Ry. Co. (1915) 88 N. J. L. 102, 95 Atl. 753, reversed 90 N. J. L. 730, 101 Atl. 1055 on another ground; Douthwright v. Champlin (1917) 91 Conn. 524, 100 Atl. 97; Banks v. Howlett Co. (1918) 92 Conn. 368, 102 Atl. 822, overruled in Pettiti v. T. J. Pardy Construction Co., *supra*, note 4; Smith v. Heine Safety Boiler Co. (1921) 119 Me. 552, 112 Atl. 516; Farr v. Lumber Co. (1921) 182 N. C. 725, 109 S. E. 833; American Mutual Liability Ins. Co. v. McCaffrey et al., *supra*, note 3. *Contra*, Barnhart v. American Concrete Steel Co. (1920) 227 N. Y. 531, 125 N. E. 675; Hopkins v. Matchless Metal Polish Co. (1923) 99 Conn. 457, 121 Atl. 821; Hall v. Industrial Com. (1925) 77 Colo. 338, 235 Pac. 1073; Scott v. White Eagle Oil & Refining Co. (D. C. Kan. 1930) 47 Fed. (2d) 615.

in both states.⁷ In *Smith v. Heine Safety Boiler Co.*,⁸ New York repudiated the contract theory. Justice Cardozo said that the law which determined the employee's right to compensation and the employer's duty to pay it was the law governing the employer-employee relation.⁹ While this represents the farthest advance in judicial reasoning on this problem it still leaves us in the dark as to how to ascertain what law governs the employer-employee relation. Attempting to apply this test in a later case¹⁰ in the same jurisdiction, Judge Lehman said that it meant the law of the state in which the employee did most of his work.

For the purpose of analysis let us take a hypothetical case. Suppose the employer is an individual who is at all times in California and the employee's work is entirely in Alaska.¹¹ Obviously the employer is subject to California law and the employee to Alaska law. Alaska cannot apply its laws extraterritorially to

⁷ *DeGray v. Miller Bros. Construction Co.* (Vt. 1934) 173 Atl. 556, holding, however, that recovery in Connecticut when the contract of employment was entered into estopped the employee from recovering again in Vermont. The employee's prior recovery in Connecticut was held to bar the employer from recovering from the insurance carrier which had insured it against liability under the Vermont act. *Minto v. Hitchings & Co. et al.* (1923) 204 App. Div. 661, 198 N. Y. Sup. 610, also holding employee estopped by prior recovery under the New Jersey Act. In the following cases the amount recovered in the first state was allowed as a credit on the award obtained in the second. *Jenkins v. T. Hogan & Sons Inc.* (1917) 177 App. Div. 36, 163 N. Y. Sup. 707; *Gilbert v. DesLauriers Column Mould Co. Inc. et al.* (1917) 180 App. Div. 59, 167 N. Y. Sup. 274; *Anderson v. Jarrett Chambers Co.* (1924) 210 App. Div. 543, 206 N. Y. Sup. 458, repudiating the estoppel theory. In *Hughey v. Ware et al.* (1929) 34 N. M. 29, 276 Pac. 27, the petition was dismissed apparently because the recovery under the New Mexico law would be less than what had already been recovered under the Texas law and therefore finding it unnecessary to decide between the estoppel theory and the credit theory.

⁸ *Supra*, note 5. See also note 19 post.

⁹ "The duty to insure does not outlast the existence within our borders of the business or relation which calls it into life." 224 N. Y. 9, 12.

¹⁰ *Cameron v. Ellis Construction Co.*, *supra*, note 5.

¹¹ Five cases have been found presenting this fact situation except that in none of them does it appear where the employer was *at the time* the employee received his injury. Three apply the law of the state in whose territory the employment relation was entered into. *Grinnel v. Wilkinson*, *supra*, note 5; *State ex rel, Maryland Casualty Co. v. District Court*, *supra*, note 5; *Hughey v. Ware et al.*, *supra*, note 7. One proceeds upon a tort theory and applies the law of the place of injury. *Johnson v. Nelson*, *supra*, note 3. Another applies the law of the place of injury because the state in which the contract was entered into interpreted its statute as not applying to injuries received outside of the state and thus the employee would otherwise be left to the inadequate common law remedies. *Douthwright v. Champlin*, *supra*, note 6.

compel the employer to pay or insure. The only law to which the employer is subject is California law and as long as he remains there it is the only law which can compel him to pay. Obviously, then, if the employee is to have any right to compensation for an injury received in the course of his employment, it must be conferred by the California law.

At this point there may be a doubt as to whether or not the California legislature intended to confer rights upon employees in other states. Where the statute did not expressly confer rights on employees injured outside of the state, a few courts have held that the legislature did not intend to confer such rights.¹² In most of these states the legislature promptly amended the act to make it apply to out of state employees.¹³ Since no other law can confer rights upon out of state employees of local individual employers the statute should be construed to apply to them in the absence of an express provision. Most state courts have so interpreted their statutes.¹⁴ Many statutes expressly so provide.¹⁵

If we vary the facts and assume that the employer is a corporation incorporated or doing business in California and therefore subject to its jurisdiction but also doing business in and subject to the jurisdiction of Alaska where the employee is at work, what law is the employer-employee relation subject to? Surely in this situation the relation cannot be thought of as existing between an employer in California and an employee in Alaska. Both employer and employee are at the time the employee is injured subject to Alaska law. Alaska having jurisdiction over the corporation can compel it to pay. True, California

¹² Tomalin v. S. Pearson & Son, Ltd. (1909) 2 K. B. 61, 100 L. T. R. 685; In re Gould (1913) 215 Mass. 480, 102 N. E. 693; North Alaska Salmon Co. v. Pillsbury (1916) 174 Cal. 1, 162 Pac. 93; Union Bridge Co. v. Industrial Com. (1919) 287 Ill. 396, 122 N. E. 609.

¹³ General Laws of Mass. 1932, Vol. II, c. 152, sec. 26; Smith-Hurd Ill. Rev. St. 1931, c. 48, sec. 142; General Laws of California, 1931, Vol. II, Act 4749, sec. 58.

¹⁴ Kennerson v. Thames Towboat Co., *supra*, note 5; Matter of Post v. Burger & Gohlke, *supra*, note 5; State ex. rel. Chambers et al. v. District Court, *supra*, note 5; Industrial Com. v. Aetna Life Ins. Co., *supra*, note 5; Pierce v. Bekins Van & Storage Co., *supra*, note 5; Anderson v. Miller Scrap Iron Co., *supra*, note 5; Crane v. Leonard, Crossette & Riley, *supra*, note 5.

¹⁵ Revised Statutes of Missouri 1929, sec. 3310; Compiled Laws of Michigan 1929, Vol. II, sec. 8458; Code of Tennessee 1932, Sec. 6870. The Missouri statute applies not only to injuries received outside of the state under contract of employment made in the state but also to all injuries received in the state regardless of where the contract of employment was entered into. See also the statutes referred to in note 13 *supra*.

also has jurisdiction over the corporation but it should not be permitted to impose duties upon the corporation because of relations which exist between it in other states and its employees there.¹⁶ It is submitted that in this case the employer-employee relation is governed by the law of Alaska.

In *Ohio v. Chattanooga Boiler & Tank Co.*¹⁷ a corporation incorporated in Tennessee and one Tidwell entered into a contract of employment in Tennessee by the terms of which the employee agreed to work for the company in Tennessee and other states. Tidwell was killed while erecting a tank in Ohio. His widow applied to the Industrial Commission of Ohio for compensation under the Ohio Workmen's Compensation Law. The corporation appeared specially and objected to the jurisdiction of the Commission. The Commission ruled against the corporation and awarded the widow \$4910.64, which was paid to her out of the state insurance fund. The corporation had complied with the Tennessee Workmen's Compensation Act under which the compensation would have been \$2200.00, but not with the Ohio law. Under the Ohio law the state was given a right of action over against the employer for reimbursement. Ohio invoked the original jurisdiction of the Supreme Court of the United States and brought its action for reimbursement there against the corporation. Judgment was for the plaintiff.

In this case the Supreme Court reaches just the opposite conclusion from that arrived at in the instant case and in *Bradford Electric Light Co. v. Clapper*¹⁸ which it followed. It held that the law governing the employer-employee relation was Ohio law distinguishing *Bradford Electric Light Co. v. Clapper* on the ground that the Tennessee law as interpreted by the Supreme Court of Tennessee did not bar recovery in other states as the Vermont statute in that case had. The distinction is untenable because it assumes that a state by statute can prevent another state from applying its own law to a relation between parties over whom it has jurisdiction.

¹⁶ Cf. *St. Louis Cotton Compress Co. v. Arkansas* (1922) 260 U. S. 346, 43 S. Ct. 125 67 L. ed. 297, where Justice Holmes said: "It is true that the state may regulate the activities of foreign corporations within the state but it cannot regulate or interfere with what they do outside."; and *Western Union Tel. Co. v. Brown* (1914) 234 U. S. 542, 34 S. Ct. 955 58 L. ed. 1457. By a parity of reasoning it cannot interfere with their relations outside.

¹⁷ (1933) 289 U. S. 439, 53 S. Ct. 663 77 L. ed. 1307.

¹⁸ (1932) 286 U. S. 145, 52 S. Ct. 571; 76 L. ed. 1026.

If at the time the employee was injured the parties, and therefore the employer-employee relation, were subject to the law of Alaska, it is a denial of full faith and credit not to recognize it and unfair and a denial of due process of law to apply any other law.

The decision, as was that in *Bradford Electric Light Co. v. Clapper*, is based on the fallacy that the law of the state in which the contract is completed enters into and becomes a part of the contract. This is not true.¹⁹ The contract merely creates the employer-employee relation to which the law of a particular state may or may not apply and the question is to what law was it subject at the time the employee was injured.²⁰ If the statute in the state in which the contract of employment was entered into was repealed after the contract of employment had been entered into but prior to the time when the employee was injured, no one would suppose that the right to compensation and the duty to pay it regardless of fault would remain a term of the contract.²¹ The statute is clearly not a part of the contract where it is entered into prior to the enactment of the statute.²² The place where the relation was formed cannot determine the law to which it is subject at a later time when it exists elsewhere.²³ It cannot matter that the statute is of the so-called elective type. All of these statutes are compulsory and the election given to the employer is a choice between a limited liability for all injuries regardless of fault and the more onerous unlimited liability for negligence without benefit of the common law defenses.²⁴ The contract theory will not work in the large number of cases where

¹⁹ Ala. Great So. Rd. Co. v. Carroll (1892) 97 Ala. 126, 135; North Alaska Salmon Co. v. Pillsbury, *supra*, note 12; Smith v. Heine Safety Boiler Co., *supra*, note 5; Smith v. Heine Safety Boiler Co., *supra*, note 6; Altman v. North Dakota Workmen's Compensation Bureau, *supra*, note 5; Cameron v. Ellis Construction Co., *supra*, note 5; Angell, *Recovery under Workmen's Compensation Acts for Injury Abroad*, 31 Harv. L. Rev. 619, 630-636. See also Anderson v. Miller Scrap Iron Co., *supra*, note 5, where Judge Rosenberry refutes this argument, but nevertheless falls into the error of holding that the law of the place where the contract was made governs.

²⁰ See the Alabama case in note 19 *supra*.

²¹ See the same Alabama case in note 19 *supra*. The entire analysis of this problem will be found in Judge McClellan's opinion, the force and clarity of which has never been equalled.

²² Smith v. Heine Safety Boiler Co., *supra*, note 5.

²³ See again the Alabama case in note 19 *supra*.

²⁴ Note 37 Harv. L. Rev. 375, 376.

the employment is at will,²⁵ i. e. where the employee does agree to work for any fixed period of time and the employer does not agree to employ the worker for any specified term. In these cases there is no contract²⁶ yet the employer-employee relation exists.

In the instant case Justice Stone remarks upon the hardship on the claimant of compelling him to return to Alaska to prosecute his claim especially when the witnesses had probably been returned to California too. This assumes what is not true. The Alaska law provides for suit in a court, the action is transitory and could be brought in a court in California.²⁷ The Supreme Court has held provisions like the one in the Alaska law, limiting actions under the act to the courts of Alaska except where service in Alaska is impossible, contrary to the due process clause of the Fourteenth Amendment and void.²⁸ It is submitted that rights arising under the laws of the commission type are also transitory. The only case in which the point has arisen is *Logan v. Missouri Valley Bridge & Iron Co.*²⁹ The Arkansas Supreme

²⁹ (1923) 157 Ark. 528, 249 S. W. 21.

Court said the action was transitory but that the Oklahoma law had provided no machinery by which it could be enforced in Arkansas. This reason for refusing to enforce the foreign right is absurd. The Oklahoma legislature could not set up law enforcement machinery in Arkansas. It is submitted that a court of equity can administer periodic payments, retain the cause for subsequent adjustments where that is necessary and make any

²⁵ For cases in which the employment was at will, see *Johnson v. Nelson*, *supra*, note 3; *Krekelberg v. M. A. Floyd Co. et al.*, *supra*, note 5.

²⁶ 1 *Mechem on Agency*, 2d ed., sec. 592.

²⁷ *Texas Pipe Line Co. v. Ware* (C. C. A. 8, 1926, Kenyon, J.) 15 Fed. (2d) 171, cert. den. 273 U. S. 742, 71 L. ed. 869, 47 S. Ct. 335; *United Dredging Co. et al. v. Lindberg et al.* (C. C. A. 5, 1927) 18 Fed. (2d) 453, cert. den. 274 U. S. 759, 71 L. ed. 1337, 47 S. Ct. 769; *Floyd v. Vicksburg Cooperaage Co.*, *supra*, note 5. In all of these cases the foreign law enforced was the Louisiana statute which provided for recovery by suit in a court. *Contra*, *Lehman v. Ramo Films Inc.* (1915) 92 Misc. 418, 155 N. Y. Sup. 1032; *Verdicchio v. McNab & Harlin Mfg. Co.* (1917) 178 App. Div. 48, 164 N. Y. Sup. 290; *Mosely v. Empire Gas & Fuel Co.* (1925) 313 Mo. 225, 281 S. W. 762; *Johnson v. Carolina C. & O. Ry. Co.* (1926) 191 N. C. 75 131 S. E. 390; *Lee v. Chemical Constr. Co.* (1931) 200 N. C. 319, 156 S. E. 848.

²⁸ *Atchison, Topeka & Santa Fe Ry Co. v. Sowers* (1909) 213 U. S. 55, 29 S. Ct. 397, 53 L. ed. 695; *Tennessee Coal, Iron & R. Co. v. George* (1914) 233 U. S. 354, 34 S. Ct. 587, 58 L. ed. 997.

award that the foreign commission could.³⁰ All that was said in *Slater v. Mexican National Railroad Co.*³¹ was that a court of

In conclusion it is submitted that the law governing the employer-employee relation is, in the case of individual employers, the law of the state in which the employer is at the time the employee is injured and, in the case of corporate employers, the law of the state in which the employee is at the time he receives his injury. In the latter class of cases, the Supreme Court should follow its decision in *Ohio v. Chattanooga Boiler & Tank Co.*³² and overrule its decisions in *Bradford Electric Light Co. v. Clapper*³³ and the instant case.

³³ *Supra* note 18. Professor Beale also thinks this case should be overruled, 48 Harv. L. Rev. 620.

³⁰ *Floyd v. Vicksburg Cooperage Co.*, *supra*, note 5.

³¹ (1904) 194 U. S. 120, 24 S. Ct. 281, 48 L. ed. 900.
law could not do so.

³² *Supra* note 17.