

WORKMEN'S COMPENSATION AWARD—COMMONPLACE
OR ANOMALY IN FULL FAITH AND
CREDIT PATTERN?

PAUL A. WOLKIN †

The general theory applied in most conflict of laws cases is that the substantive rights and liabilities of the parties will be governed by reference to the law of the state where the significant operative facts occurred. In most instances the internal law of the forum is not applied in determining these rights and liabilities unless the significant facts transpired there. Moreover, in the ordinary conflict of laws situation, whatever one of several possible rules of reference is deemed appropriate, reference will and can be had to the law of only one state on any substantive issue. To this proposition there are few exceptions. One of them arises in the workmen's compensation conflict of laws situation.

I.

Mr. Smith is hired in state *A* and in the course of his employment is sent to state *B* where he is injured while engaged in his work. His employer's business is located in state *A* and Smith is a resident of that state. Assuming that both state *A* and state *B* have workmen's compensation acts, under which act may Smith seek compensation? If the workmen's compensation acts merely created a statutory tort, then the statute of the place of wrong, the state of injury, would be the only act applicable. Some courts initially considered the analogy persuasive and adopted this view. However, most courts applied the act of the state of hiring. This was regarded as appropriate on the theory that the employee-employer relationship was contractual in nature. Failure to reject the act of the state of hiring was considered equivalent to an agreement between the employee and employer that that act shall control, irrespective of where the injury took place. The difficulties inherent in this view rendered it no more tenable than the tort theory. A third view, resting on neither tort nor contract theory, was necessary to explain the scope of applicability of the compensation acts in the interstate situation. It was forthcoming: workmen's compensation acts came to be regarded as a statutory regulation of the employer-employee relationship whereby the expenses of industrial accidents are charged to industry as an incident of the production

† A. B., 1937, A. M., 1938, LL. B., 1941, University of Pennsylvania. Member of the Philadelphia Bar.

cost. Under this theory, a basis was furnished for either the state of hiring or the state of injury applying its act.¹

Actually, by the weight of state decisions, recovery could be had in the state of hiring or the state of injury on one or another of these theories. However, because of a lack of uniformity among the various acts and the desire of many states to have their acts afford an exclusive remedy, the conflict of laws problem became pregnant with constitutional issues. Could the state of injury or the state of hiring apply its act in disregard of the act of the other state and still fulfill the obligations imposed by the full faith and credit clause? Could either state apply its act consistently with the requirements of due process when all that had taken place within that state was the hiring or injury? These issues ultimately reached the Supreme Court of the United States.

In *Bradford Electric Light Co., Inc. v. Clapper*,² the Supreme Court held that the state of injury could not allow recovery in a modified tort action, as provided by its compensation act, in disregard of the act of another state where the employee resided, the employer had his principal place of business, and the employment was entered into. The Court pointed out that the duties in the state of injury were but temporary in nature and that state had no defined public policy against recognition of the act of the state of hiring, set up as a defense to the action. Full faith and credit had to be given to the act of the state of hiring which contained a provision precluding recovery in tort. Since the state of hiring had legislated with respect to a relationship which had arisen within its borders, it was not purporting to give its laws an extraterritorial effect.

The intimation in the *Bradford* decision that the act of the state of hiring, if that state had a legitimate contactual interest, would govern although the injury occurred without its borders, became the decision of the Supreme Court in *Alaska Packers Association v. Industrial Accident Commission of California*.³ The employee, a non-resident of California, was hired in that state and sent for the salmon canning season to Alaska where he was injured. The acts of both jurisdictions were exclusive. Compensation was sought and allowed in California under its act. Finding that Alaska's interests in the matter were not superior to those of California and that the latter had declared that its public policy favored the application of its act against

1. Extended discussions of the theories of the nature of workmen's compensation and case authorities appear in: 2 BEALE, *THE CONFLICT OF LAWS* (1935) §§ 398.1-401.3; GOODRICH, *CONFLICT OF LAWS* (2d. ed. 1938) § 97; STUMBERG, *CONFLICT OF LAWS* (1937) 189 *et seq.*

2. 286 U. S. 145, 52 Sup. Ct. 118, 76 L. Ed. 1026 (1932).

3. 294 U. S. 532, 55 Sup. Ct. 145, 79 L. Ed. 1044 (1935).

that of another state, the Supreme Court held that California could enforce its own statute and need not give faith and credit to the Alaska act. Neither did the Fourteenth Amendment prevent California from applying its act. California was exercising its power over a status, the employer-employee relationship, which had arisen within its jurisdiction and which it could control, provided this power was not exercised arbitrarily or unreasonably.

Whatever implication there was in the *Bradford* opinion that the state of injury could not apply its act was soon negated by the decision of the Court in *Pacific Employers Insurance Co. v. Industrial Accident Comm'n.*⁴ The employee there sought recovery in California, the state of injury. His employment there was temporary. He was a resident of Massachusetts, where the employment was entered into and where his employer, a Massachusetts corporation, has its head office. The acts of both states were in terms exclusive. The defense asserted was that full faith and credit had to be given to the Massachusetts act and this precluded an award under California law. California was permitted to apply its act. Few matters, the Court said, could be deemed more appropriately within a state's concern than an injury to an employee occurring within its borders. The *Bradford* case was differentiated, since California considered the foreign act obnoxious to its policy. "Full faith and credit does not . . . enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it."⁵

As a result of these decisions by the Supreme Court, constitutional sanction was given to the practice of the states allowing compensation either in the state of injury or the state of hiring, provided the particular state preferred the remedy afforded by its act to the one under the foreign act. A majority of the states were, however, a step ahead of these decisions. They permitted recoveries in both the state of injury and the state of hiring, recovery in the second state being limited to the excess of what that state allowed over the first state's award.⁶ The

4. 306 U. S. 493, 59 Sup. Ct. 629, 83 L. Ed. 940 (1939).

5. *Id.* at 504-505, 59 Sup. Ct. at 634, 83 L. Ed. at 946.

6. Mr. Justice Black cites in his dissenting opinion in *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 458, 64 Sup. Ct. 208, 219, 88 L. Ed. 161, 176-177 (1943), the statutes of Florida, FLA. STAT. (1941) § 440.09 (1); Georgia, GA. CODE ANN. (Park *et al.*, 1936) tit 114, § 411; Maryland, MD. ANN. CODE (Flack, 1939) art. 101, § 80 (3); Ohio, OHIO CODE ANN. (Throckmorton, Supp. 1943) § 1465-68; North Carolina, N. C. CODE ANN. (Michie and Sublett, 1939) § 8081 (rr); South Carolina, S. C. CODE (1942) § 7035-39; Virginia, VA. CODE ANN. (1942) § 1887 (37); and decisions in *Gilbert v. Des Lauriers Column Mould Co., Inc.*, 180 App. Div. 59, 167 N. Y. S. 274 (1917); *Interstate Power Co. v. Industrial Commission*, 203 Wis. 466, 234 N. W. 889 (1931); *McLaughlin's Case*, 274 Mass. 217, 174 N. E. 338 (1931); *Migues' Case*, 281 Mass. 373, 183 N. E. 847 (1933). See also, Note (1943) 57 HARV. L. REV. 242, 246-247; 2 BEALE, *op. cit. supra* note 1, at § 403.1; GOODRICH, *op. cit. supra* note 1, at 243;

constitutionality of this practice received the Supreme Court's first attention in *Magnolia Petroleum Company v. Hunt*.⁷

II.

Hunt, a resident of Louisiana, was hired by the Magnolia Petroleum Company in that state. In the course of his employment he went to Texas and was injured there while engaged in his work. Texas awarded him compensation for the injury under its act. Thereafter he sought compensation, for the same injury, in Louisiana, under its act. The Texas award was interposed as a bar to further recovery and the full faith and credit clause invoked. The Louisiana court gave judgment in favor of Hunt, after deducting the Texas payments. Successive appeals in the state courts failed.⁸ Certiorari was granted by the Supreme Court of the United States,⁹ which, by a five to four decision, reversed the judgment of the Louisiana court.¹⁰

The majority opinion¹¹ found that in Texas a final award for compensation under the Texas act has the same effect as a judgment and is *res judicata* as to all matters which were litigated or could have been litigated. Since there was one injury to the employee in the course of employment there was but one cause of action which merged into the judgment.¹² For the purposes of full faith and credit, since the matter is *res judicata* in Texas, it must be given the same effect elsewhere, as in the case of any other judgment for money in a civil action; neither Louisiana's interest in the matter, its laws, nor its policy, affords any basis for allowing it to avoid this requirement of full faith and credit.

The dissenters¹³ did not believe that the Texas award was intended by Texas to be *res judicata* of anything but a recovery under

RESTATEMENT, CONFLICT OF LAWS (1934) § 403, followed by the New Jersey court in *Miller v. National Chair Co.*, 127 N. J. L. 414, 22 A. (2d) 804 (1941), affirmed by the Court of Errors and Appeals, 129 N. J. L. 98, 28 A. (2d) 125, (1942), on the opinion of the lower court. *Contra*: *Hughey v. Ware*, 34 N. M. 29, 276 P. 27 (1929); *Minto v. Hitchings & Co.*, 204 App. Div. 661, 198 N. Y. Supp. 610 (1923); see also *Tidwell v. Chattanooga Boiler & T. Co.*, 163 Tenn. 420, 43 S. W. (2d) 221 (1931), *rehearing denied*, 163 Tenn. 648, 45 S. W. (2d) 528 (1932); *De Gray v. Miller Bros. Const. Co., Inc.*, 106 Vt. 259, 173 Atl. 556 (1934).

7. 320 U. S. 430, 64 Sup. Ct. 208, 88 L. Ed. 161 (1943).

8. The Louisiana Court of Appeals affirmed the judgment of the court below, 10 S. (2d) 109 (1943), and the Louisiana Supreme Court refused writs of certiorari and review.

9. 319 U. S. 734, 63 Sup. Ct. 1031, 87 L. Ed. 1695 (1943).

10. 320 U. S. 430, 64 Sup. Ct. 208, 88 L. Ed. 161 (1943).

11. Chief Justice Stone wrote the majority opinion, and Justices Roberts, Reed, Frankfurter and Jackson voted with him.

12. *But see* RESTATEMENT, JUDGMENTS (1942) c. 3, Introductory Note. The conclusiveness of a judgment as to facts litigated is but one aspect of *res judicata*.

13. There were two dissenting opinions: one by Mr. Justice Douglas, in which Mr. Justice Murphy joined; the other by Mr. Justice Black, in which Justices Douglas, Murphy and Rutledge concurred.

Texas law. Hence, even if full faith and credit were required to be given to the Texas award, it was not *res judicata*, in Texas, to the extent that it would bar a recovery under the Louisiana act. However, further than this, they did not think that any constitutional question was involved, but that the matter was so much a question of state interest, state policy, that a given state's policy should be decided by its legislature and its courts. "The argument of state interest is hardly less compelling when Louisiana chooses to reject as decisive of the issues of the case a foreign judgment than when it rejects a foreign statute."¹⁴

Were the Court concerned with an ordinary judgment in a civil action for money, little criticism, if any, could be levelled at the majority's opinion. The state in which enforcement of the judgment was sought or in which it was set up as a bar to further recovery, would, under the compulsion of full faith and credit, have to give to the judgment the same effect that it had in the state of rendition. Local public policy,¹⁵ laws,¹⁶ and procedural handicaps,¹⁷ are unavailing to escape this obligation. These propositions, so firmly established by precedent, unless they are now to be discarded, smash to smithereens the broad blade wielded by Mr. Justice Black in the second part of his dissent. State interest and policy, no matter how vital, do not enable a state to deny to a valid judgment on the merits, as distinguished from a claim which has not so ripened,¹⁸ the same effect that it has in the state of rendition.¹⁹ Perhaps the most vivid example of the numerous instances cited by the majority as illustrations of this is *Fauntleroy v. Lum*²⁰

14. 320 U. S. 430, 456, 64 Sup. Ct. 208, 221, 88 L. Ed. 161, 175 (1943).

15. *Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039 (1908); *Milwaukee County v. M. E. White Co.*, 296 U. S. 268, 56 Sup. Ct. 229, 80 L. Ed. 220 (1935); *RESTATEMENT, CONFLICT OF LAWS* (1934) § 446.

16. *Titus v. Wallick*, 306 U. S. 282, 291, 59 Sup. Ct. 557, 562, 83 L. Ed. 653, 659 (1939); *Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039 (1908). See also cases cited in next footnote.

17. *Kenney, Administrator of Kenney v. Supreme Lodge of the World, Loyal Order of Moose*, 252 U. S. 411, 40 Sup. Ct. 371, 64 L. Ed. 638 (1920); *Roche v. McDonald*, 275 U. S. 449, 48 Sup. Ct. 142, 72 L. Ed. 142 (1928).

18. See footnotes 25 and 26 *infra*. Nor need the forum always recognize a claim predicated on a foreign statute. "The full faith and credit clause and the Act of Congress implementing it have, for most purposes, placed a judgment on a different footing from a statute of one state, judicial recognition of which is sought in another." *Stone, C. J.*, in *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 437, 64 Sup. Ct. 208, 213, 88 L. Ed. 161, 165 (1943). See *Hilpert and Cooley, The Federal Constitution and The Choice of Law* (1939) 25 WASH. U. L. Q. 27, 31 *et seq.*; *Moore and Oglebay, The Supreme Court and Full Faith and Credit* (1943) 29 VA. L. REV. 557, 605-613.

19. For possible exceptions, see cases cited in footnote 4 of the majority opinion, 320 U. S. 430, 438, 64 Sup. Ct. 208, 213, 88 L. Ed. 161, 166 (1943), and dissenting opinion of Chief Justice Stone in *Yarborough v. Yarborough*, 290 U. S. 202, 213, 216-218, 54 Sup. Ct. 181, 185, 186-187, 78 L. Ed. 269, 276, 278-279 (1933); *Moore and Oglebay, loc. cit. supra* note 18, at 571, 577-605. But note the reservation of approval in the language used in the *Magnolia* decision: "Even though we assume for present purposes . . . that there may be exceptional cases in which the judgment of one state may not override the laws and policy of another, . . ." *Cf. dissent in Yarborough v. Yarborough*, 290 U. S. 202, 213, 54 Sup. Ct. 181, 185, 78 L. Ed. 269, 276 (1933).

20. 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039.

where full faith and credit had to be given to a judgment of a sister state upon a gambling debt, even though the debt was incurred in the state where enforcement of the judgment was sought and was not a valid, legally enforceable obligation under its law. Were the rule otherwise, the mere fact of state interest in the operative facts would enable a state to disregard the consequences of a valid judgment of a sister state and thus destroy the very purpose of the full faith and credit clause as a "unifying force"²¹ among the forty-eight states.²² Certainly, Louisiana's interests in the *Magnolia* case, are, as such, no more vital than the interests of Mississippi in *Fauntelroy v. Lum* or of the other states in the instances cited. The bare fact of that interest affords, alone, no basis for distinguishing an award in compensation from any other ordinary judgment for the purposes of full faith and credit.

However, a salient point of difference between a final award in compensation and an ordinary judgment may be found in the choice of law approach to the two underlying claims as they occur in the conflict of laws situation. In the ordinary civil action, as in tort or contract, where some of the operative facts occur in the state of the forum and some elsewhere, the forum may have a choice of several possible rules of reference. Thus, in determining the validity of a contract, the forum might decide that the law of the place of making the contract or the law of the place of performance or the law intended by the parties to the contract governs.²³ But, in the final analysis, only one of these rules will be applied; choice of one rule automatically precludes application of any other rule of reference.²⁴ Whatever rule of reference is deemed appropriate, reference will and can be had only to the law of one state to determine the substantive rights and liabilities of the parties on any one issue. If that state is one other than the forum, then what the result would be under the internal law of the forum becomes immaterial. Of course, under certain circumstances, the forum may deny recovery although under the law of the state indicated by the rule of reference there may be a clear case of liability. The forum's procedural limitations,²⁵ public policy and interest in the subject-matter²⁶ are instances. But, although these considerations afford a basis for the

21. 320 U. S. 430, 439, 64 Sup. Ct. 208, 213-214, 88 L. Ed. 161, 166 (1943).

22. See *Milwaukee County v. M. E. White Co.*, 296 U. S. 268, 276, 277 (1935).

23. GOODRICH, *op. cit. supra* note 1, at § 107.

24. *But cf.*, the choice of law problems arising in cases of multiple incorporation. See *Steckler v. Pennroad Corporation*, 136 F. (2d) 197 (C. C. A. 3d, 1943), *cert. denied*, 320 U. S. 757 (1943).

25. *E. g.*, *Slater v. Mexican National Railroad Company*, 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900 (1901); RESTATEMENT, CONFLICT OF LAWS (1934) §§ 603, 608. If, to obtain an award for compensation under an act of a state resort to specially provided administrative procedure is necessary, an action for compensation cannot be maintained except in that state. STUMBERG, *loc. cit. supra* note 1, at 197.

26. *Union Trust Company v. Grosman*, 245 U. S. 412, 38 Sup. Ct. 147, 62 L. Ed. 368 (1918); *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198 (1918).

forum not permitting recovery on a foreign cause of action, it is important to note for present purposes that recovery will be denied in these instances, not because the significant operative facts occurred in the forum and under the forum's law no cause of action arose, but merely because suit was brought, in the first instance, in the forum.

If a claim for workmen's compensation were merely a tort or contract claim, the choice of law problem would be the same as that in a tort or contract conflict of laws case. Whether there was an enforceable right to compensation could be determined by reference to the law of only one state, irrespective of where suit was brought. But, as has been indicated, such notions have been refuted by the practice of the courts in allowing compensation in either the state of injury or hiring, by the many authorities which have critically examined these theories, and by the Supreme Court of the United States. The decisions in the *Alaska Packers* and *Pacific Employers* cases, conclusively establish that the workmen's compensation conflict of laws situation is one of the instances²⁷ in the conflict of laws where more than one state is constitutionally empowered to determine the legal consequences of a single event by the application of its internal law, as distinguished from its conflict of laws rule, governing the subject. The legal justification for this result is the power of each state to determine the consequences of events which transpire within its borders and in which it has a governmental interest.²⁸ The factual justification is two sets of operative facts, one in each state. Common to both states is the relationship of employer and employee. Peculiar to each is the governmental interest in that relationship as determined by local industrial, social and economic conditions. In one state the relationship was created. In the other state the employee was injured.²⁹ When, following an injury, the employee seeks compensation, in each state a different coterie of facts superimposed on a common base renders each act applicable. It would thus seem that each state is adjudicating something distinct and that the process of allowing an award in one state is not a determination which precludes an award, predicated on different facts which have not been litigated, in another state.

The majority opinion in the *Magnolia* case, however, does not proceed on the theory that the Texas award purported to adjudicate the rights and duties of the parties under the Louisiana law or to con-

27. For other possible situations see instances cited in the dissenting opinion of *Yarborough v. Yarborough*, 290 U. S. 202, 213, 216-218, 54 Sup. Ct. 181, 185-186, 186-188, 78 L. Ed. 269, 276-277, 278-279 (1933); Moore and Oglebay, *loc. cit. supra* note 18, at 577-605.

28. See Hilpert and Cooley, *loc. cit. supra* note 18.

29. There may be additional contactual facts, such as residence of the employer and employee and duration of employment, which are of varying significance.

trol persons or the courts in Louisiana by the application of the Texas act. In fact it dismissed this as irrelevant because Texas was without power to give extra-territorial effect to its laws.³⁰ Rather, it regarded the employee as having but one cause of action for which there were two remedies. Resort to one of the remedies precluded the other. There was but one cause of action because "The grounds of recovery are the same in one state as in the other—the injury to the employee in the course of his employment." There were not two causes of action "merely because Louisiana law authorizes compensation, and in a different measure than does Texas, or because the jurisdiction of the court of one state depends on the place of injury and that of the other on the place of the employment contract, . . ." ³¹

These conclusions raise some serious doubts. The decisions in the *Alaska Packers* and *Pacific Employers* cases appear to be incompatible with the thesis that the grounds of recovery in the state of hiring and the state of employment are identical. Of course, an injury in the course of employment gives rise to a right to compensation. But, if that were all that were shown and required there could be recovery only under the act of the state of injury, which, of course, is not the case. The cornerstone of the two decisions allowing either the state of injury or the state of hiring to apply its act is that each state may legislate as to events occurring within its borders and apply those laws to such events in disregard of the laws of another state. Each decision carefully points to the facts in each state which made its act applicable. And, as already indicated, the factual grounds for recovery in each state are not the same.³² Nor do those differences in fact merely determine the jurisdiction of the *court* of each state. The fact differences are the determinants of the substantive law applicable for deciding the rights and liabilities of the litigants; they determine the choice of law required under the federal constitution just as the significant operative facts in a tort or contract conflict of laws problem are used to fashion the appropriate rule of reference. The majority points out that the extent to which a forum shall apply in its own courts a rule of law of another state is itself a question of local law of the forum and that merely because a compensation or tort action is transitory

30. Citing *New York Life Insurance Company v. Head*, 234 U. S. 149, 58 L. Ed. 1259 (1914); *Home Insurance Company v. Dick*, 281 U. S. 397, 50 Sup. Ct. 338, 74 L. Ed. 926 (1930).

31. 320 U. S. 430, 444, 64 Sup. Ct. 208, 216, 88 L. Ed. 161, 169 (1943).

32. See Clark, *The Code Cause of Action* (1924) 33 YALE L. J. 817; I MOORE AND FRIEDMAN, *MOORE'S FEDERAL PRACTICE* (1938) 145 *et seq.* "The term 'cause of action' is used in many different situations, . . . The meaning of the term is not necessarily the same in all these situations. This Chapter deals with the extent of the application of the principle that a controversy which has been determined by a judgment shall not be relitigated. This Title deals with the question what constitutes a claim or cause of action in the application of this principle." RESTATEMENT, JUDGMENTS (1942) 239.

does not mean that there is a different cause of action in every forum in which suit may be brought. However, there is this significant difference: in the workmen's compensation conflict of laws problem, if suit were in a forum other than the state of injury or employment, the rights of the employee would be governed by the law of two states, since there are two rules of reference, simultaneously applicable.

Do the decisions in *Williams v. North Carolina*³³ or *Chicago, R. I. & P. R. Co. v. Schendel*³⁴ necessitate the conclusion reached by the majority?³⁵ In a way, the *Williams* case presents an analogous problem: a conflict of laws situation where the rights and liabilities of the litigants are subject to the control of two states. However, as Mr. Justice Douglas points out, "Such questions of status, i. e., marital capacity, involve conflicts between the policies of two States which are quite irreconcilable as compared with the present situation."³⁶ A divorce granted by the state of domicile of one of the spouses terminates the marriage and this cannot be reconciled with another state's regarding the marriage as still existing through a prosecution for bigamy. The two policies cannot be accommodated. An award for compensation supplementing a previous award does not negate the latter. That the second recovery is only for the difference is an express recognition of the first award. And, because of this device there cannot be a double recovery. When the employee's total compensation equals the maximum amount permissible under either act he has been fully compensated and that is all to which he is entitled.³⁷ The two dissenting opinions also distinguish the *Schendel* case. There, actions were instituted under the Federal Employers' Liability Act and the state compensation statute. Recovery under the former could only be had if the employee was engaged in interstate commerce. The action on the state statute was the first to proceed to judgment. In that suit the issue of whether the deceased was engaged in intrastate or interstate commerce was litigated and the court found that the deceased had been engaged in intrastate commerce. This finding became *res judicata* of the issue of interstate commerce and precluded recovery

33. 317 U. S. 287, 63 Sup. Ct. 207, 87 L. Ed. 279 (1942). Mr. Justice Jackson concurred in the majority opinion, 320 U. S. 430, 446, 64 Sup. Ct. 208, 217, 88 L. Ed. 161, 170 (1943), regarding himself bound by the majority decision in the *Williams* case, where he dissented. 317 U. S. 287, 311, 63 Sup. Ct. 207, 219, 87 L. Ed. 279, 293 (1942).

34. 270 U. S. 611, 46 Sup. Ct. 420, 70 L. Ed. 757 (1926).

35. *Certiorari* in the *Magnolia* case was granted to resolve an apparent conflict with these two cases.

36. 320 U. S. 430, 447, 64 Sup. Ct. 208, 218, 88 L. Ed. 161, 171 (1943).

37. *But cf.* *Rounsaville v. Central R. Co.*, 87 N. J. L. 371, 374, 94 Atl. 392, 393 (1915). ". . . recovery of compensation in two states is no more illegal, and is not necessarily more unjust, than recovery upon two policies of accident or life insurance." See also dissenting opinion in *Salvation Army v. Industrial Commission*, 219 Wis. 343, 263 N. W. 349 (1935).

under the Federal Act. The theory of the *Schendel* case would have been applicable in the *Magnolia* case if in the Texas proceedings the issue of whether Hunt was injured or was an employee of the Magnolia Petroleum Corporation had been litigated and a finding made adverse to the employee.³⁸ However, that was not the case.³⁹ Nothing adjudicated in Texas precluded a further action under the Louisiana act. The Texas act barred recovery in Texas if there had been a prior award elsewhere. The Louisiana act did not. But Texas neither said an award in Texas barred an award elsewhere nor could it do so. This the Supreme Court has now held results from the impact of the full faith and credit clause; the two remedies provided by the two acts are mutually exclusive.

Apart from legal theory, the majority opinion presents another serious difficulty. If the employee were certain always to seek recovery under the act which permits the larger award, then as a practical matter the decision of the majority would not make much difference. However, the facts of the *Magnolia* case itself demonstrate that the injured employee is not always in a position to so act. He may well be jockeyed into a position, either through ignorance on his part and the superior knowledge of the insurer,⁴⁰ as in the *Magnolia* case, or through a procedural device which allows the employer to initiate proceedings, as in the *Schendel* case,⁴¹ where he will be compelled to take the lesser of the two recoveries possible. In a country of forty-eight states with widely varying economic and social standards, the difference which the employee is thus precluded from recovering may well frustrate the very purpose of workmen's compensation. Perhaps under the dissenters' view the employer will be put to two lawsuits. The chances are, however, that a different insurer will defend in each case. Be that as it may, the conclusive answer to this is that one who con-

38. RESTATEMENT, JUDGMENTS (1942) § 68.

39. See *Hoffman v. New York, N. H. & H. R. R. Co.*, 74 F. (2d) 227 (C. C. A. 2d, 1934), where a plea of *res judicata* based on a Connecticut award was held inadmissible in a suit under the Federal act because an express adjudication in the Connecticut proceeding that the accident occurred in intrastate commerce was lacking.

40. "Confined to a hospital he [Hunt] was told that he could not recover compensation unless he signed two forms presented to him. . . . there was printed on each of the forms 'in small type' the designation 'Industrial Accident Board, Austin, Texas.' To get his compensation Hunt signed the forms. . . . Returning to his home in Louisiana, Hunt apparently discovered that his interests would be more fully protected under Louisiana law and notified the insurer of an intention to claim under the statute of that state." After that the insurer stopped payment and notified the Board in Texas which proceeded to make an award in the absence of Hunt, although with due notice to him. 320 U. S. 430, 450, 451, 64 Sup. Ct. 208, 219, 88 L. Ed. 161, 172-173 (1943).

41. In the latter case the surviving widow started suit under the Federal act. Thereafter the railway company instituted a proceeding before the Iowa Industrial Commission and the widow was made a party. Later she appeared and contested the applicability of the state act.

ducts business in more than one state must comply with the multi-state legal consequences which attach.

III.

Can the effect of the decision be avoided by state legislation or judicial decision? One possibility is that a state say that an employee may recover under its laws even though there has been a previous recovery for the same injury in another state. The Court expressly left open this question in the *Magnolia* case. It is at best difficult to see what bearing this has on the issue. The full faith and credit provisions of the statute⁴² require such faith and credit to be given to judgments as they have by law or usage in the courts of the state from which they are taken. They do not require that such faith and credit be given a judgment that the state of rendition gives to a judgment of another state. Nevertheless, the question expressly having been left open, it offers at least a temporary avenue of escape. Of course a state could say an award is not *res judicata*, but obviously no state would find it to its interest to say that once an award is recovered it is not final but may be relitigated. A third, and perhaps more feasible suggestion, is that legislation be enacted declaring that upon application by an employee who desires to avail himself of the benefits of another act, pending proceedings shall be stayed; or, if an award has already been granted, it may be revoked and vacated,⁴³ subject to repayment of compensation already paid and to reinstatement if compensation elsewhere is denied. Thus, if the employee finds it to his advantage to sue in another state, the prior award could be removed as a barrier to a second proceeding.

Finally, there is one more possibility. Congress, by excepting workmen's compensation awards from the provisions of the statute implementing the full faith and credit clause, could leave the matter to each state to decide for itself.

42. 28 U. S. C. A. § 687 (1928).

43. Cf. *Lynde v. Lynde*, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810 (1901); *Sistare v. Sistare*, 218 U. S. 1, 30 Sup. Ct. 682, 54 L. Ed. 905 (1910); RESTATEMENT, CONFLICT OF LAWS (1934) §§ 434, 435, 446, 464. Cf. *Yarborough v. Yarborough*, 290 U. S. 202, 54 Sup. Ct. 181, 78 L. Ed. 269, 90 A. L. R. 924 (1933).