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# CIVIL AVIATION—PROBLEMS ARISING IN WORKMEN'S COMPENSATION CASES

By Mildred Meyers Binzer\*

## I.

### INTRODUCTION

The field of Workmen's Compensation has not as yet been "occupied" by any of the federal legislation enacted for Civil Aviation. Several attempts to so do have been made and a consideration of the question seems to be timely, because of the various and widely differing bills on civil aviation that have been proposed.

Because of the mobility of the air transport industry and the number of different states in which a given air line operates, the matter of the choice of law with respect to workmen's compensation is of considerable importance. The industry has already had some experiences which have been unfortunate. It has happened, for example, that although an airline had qualified under the workmen's compensation law of one state, it was later held that it should likewise have qualified under the law of another state, and in default of doing so, it lost all protection in an accident occurring in the other state.

As in any litigation for relief under the claim of Workmen's Compensation, the plaintiff's rights depend upon the wording of the applicable statute, but in the cases arising from the aviation industry the question that is becoming more and more important, is what statute is applicable, that is, who (what state) has jurisdiction. Which state law prevails in this instance?

Under the laws of X state plaintiff might have a clear right to recovery, but in state Y plaintiff might have no claim at all. Or again in state A plaintiff may have only a fraction of the amount he could recover in state B. In one state plaintiff may

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be an employee, in another he may be considered as an independent contractor.

### QUESTIONS PRESENTED

In order to prevent such uncertainty and confusion it has been proposed at different times to enact federal legislation on this question which thereafter would govern. From the outset of such proposals two questions arose. First, whether there is need for the enactment of such statutes, that is, whether there is, at present, in conflict of laws principles in the field of workmen's compensation "uncertainty and confusion" to an extent which warrants clarifying federal legislation. Second, assuming that there is an urgent need for such clarification, it is essential to consider whether Congress under the Constitution may resolve the uncertainties in this field by authorizing regulations governing the choice of state law.

## II.

### IS THERE CONFLICT?

#### 1. *Statements from Authorities.*

In a statement made by David L. Behncke, the President of the Air Line Pilots Association, it is said

"Relating to injury and disability compensation for the airline pilots, they are now governed in a piece-meal fashion by the various state compensation laws—an arrangement that is highly unsatisfactory. Injury and disability compensation for airline pilots and other airline employees should be federalized and made uniform."<sup>1</sup>

"All branches of control of air transportation and long distance flying generally should lean decidedly toward Federal control and the basis of everything that is related to this question is, we believe, based on who has jurisdiction of the air spaces over the United States—the Federal Government or the States. It is inherently a Federal control problem, and the sooner legislation is created to establish such control, the better it will be for all concerned."<sup>2</sup>

<sup>1</sup> Hearing before the House Committee on Interstate and Foreign Affairs (1943).

<sup>2</sup> Excerpts from Report on Committee on Aeronautical Law of the American Bar Association, 64 A. B. A. Rep. 170 (1939)

The American Bar Association<sup>3</sup> has been making a study of civil aviation and its regulation for over twenty years and at one of its recent annual meetings adopted the following resolution.

“ That the American Bar Association endorse the principle that: (a) maximum development of the air commerce of the nation is in the public interest; (b) uniformity of law and regulation of such air commerce including its economic and safety regulation, control and the certification of air-craft and airman, is necessary to bring about its maximum development; (c) such uniform regulation and control can only be accomplished through federal legislation ”

The need for federal regulation of all commercial transportation for hire by air is especially important. The regulation of this branch of aviation is extremely technical and safety demands the highest standards.

Likewise the essential characteristics of air transport are altogether different from those of land carriers. Air transportation knows no road bed. Navigating the air is even more free of defined pathways than navigating the ocean.

The Aeronautical Chamber of Commerce has stated<sup>4</sup>

“While the airplane and the automobile both date from the beginning of this century the two industries are fundamentally different. The automobile has had wide private use. The airplane on the other hand has been used principally in public service, and therefore the industry is almost dependent upon government policy

“ It should be administered with broad regard for the public interest.”

In the hearings held for the Lea Bill<sup>5</sup> on Civil Aviation, it was said.

“We do not assume that H. R. 3420 meets all of civil aviation's legislative needs. Many matters not dealt with in this Bill require study. Liability salvage, workmens' compensation, relations with surface carriers and development of new safety devices—and numerous other problems may still require attention.”

## 2. *Three Leading Modern Workmen's Compensation Cases.*

Herein we shall analyze the prevailing trends in Workmen's Compensation cases generally and the corresponding problems

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<sup>3</sup>64 A. B. A. Rep. 11-13 (1939)

<sup>4</sup>“Air Power” (1946)

<sup>5</sup>Hearings before Committee on Interstate and Foreign Commerce, House of Representatives, 78th Congress, 1943 (statement by Hon. Clarence F. Lea)

and decisions in Workmen's Compensation cases in civil aviation.

The three leading Workmen's Compensation cases today are *Bradford Electric Co. v Clapper*,<sup>6</sup> *Alaska Packers Ass'n v Commission*,<sup>7</sup> *Pacific Ins. Co. v Commission*.<sup>8</sup>

In the *Bradford* case, Clapper had been employed by the defendant electric company in Vermont. Defendant company was a citizen and a resident of Vermont, but had lines extending into New Hampshire. Clapper also was a resident of Vermont, and was there employed to work both in Vermont and New Hampshire. While performing his duties in New Hampshire he was killed.

The Vermont workmen's compensation law in effect at the time Clapper was hired provided that a workman hired within the state should be entitled to compensation pursuant to its provisions and to the exclusion of all other remedies under the laws of any other state, regardless of where the injury was suffered.

The New Hampshire employer's liability act provided that it should apply only to employers who had filed a declaration of election to accept the act. However, even if the employer had so elected, the employee subsequent to the injury might himself elect to sue for damages at common law. The defendant company here had filed such a declaration in New Hampshire.

In the present action Clapper's administratrix brought suit against the company in New Hampshire and elected to sue for negligence in accordance with the election allowed by the New Hampshire statute. The defendant company invoked the full faith and credit clause, and set up the defense that the action was barred by the provisions of the Vermont compensation act, since by that act the parties by entering into their contract of employment in Vermont had accepted the Vermont law as exclusively applicable to injuries by the employee regardless of where they might be incurred. The case was transferred to the Federal courts and both the district court and the circuit court had held that the action had been properly brought under the laws of New Hampshire. This holding was reversed by the Supreme Court.

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<sup>6</sup> 286 U.S. 145 (1932).

<sup>7</sup> 294 U.S. 532 (1935).

<sup>8</sup> 306 U.S. 466 (1938).

Justice Brandeis pointed out that the Vermont statute clearly would have precluded the bringing of the action in Vermont to enforce the New Hampshire law, but here the question was whether New Hampshire was free to disregard that provision of the Vermont law declaring that the rights created by the latter should be exclusive even where the injuries were suffered in another state—that on the facts a constitutional question was raised by the full faith and credit clause. There can be no doubt, the Court said, that a state statute is a “public act” within the meaning of that clause.

The Court admitted that under the full faith and credit clause “there is room for some plays of conflicting policies” but countered this argument by denying that the Vermont act was contrary to New Hampshire policy, basing its conclusion apparently on the consideration that recognition of the Vermont law was asked by way of defense.

“A State may on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff’s substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done.”

Then the Court applies the theory that as between these two conflicting laws, that of the State having the paramount or superior “interest” in the situation should govern, and in this case the interest of New Hampshire was only casual.

This case then appears to hold that the workmen’s compensation law in effect at the place of contracting, if by its terms declared to be an exclusive remedy, must by virtue of the full faith and credit clause be recognized as a defense to an action brought under the law of another state in which the employee is injured. In such cases, since the law of the state of contracting is invoked only as a defense, and not as a basis for affirmative relief, the state of the injury cannot be heard to say that the *lex loci contractus* is obnoxious to its policy—if the state of contracting has a superior “interest” in the controversy.

The decision in the *Alaska Packers* case<sup>9</sup> does not appear to be inconsistent in any fundamental respect with the *Bradford* case. There the employee was a citizen of Mexico and a nonresi-

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<sup>9</sup> *Supra*, note 7.

dent of California who executed with his employer in California, a written contract of employment in which the employee agreed to work in Alaska during the salmon canning season. Both parties agreed that compensation for any injuries suffered by the employee in the course of his employment should be subject to the provisions of the Alaska workmen's compensation law.

The California law as construed was applicable where the contract of employment was made in California, to all controversies arising out of injuries suffered without the state, and this regardless of whether the employee was a resident of California at the time the contract was made. California law also provides that "no contract rule or regulation shall exempt the employer from liability for the compensation fixed by this act."

Plaintiff was injured in the course of his employment in Alaska. The Alaska law provided that it should be the exclusive remedy for injuries there suffered. The employee returned to California and brought suit under the California act. The California court held that a conflict existed between the California and the Alaska laws, but decided that neither the federal due process, nor full faith and credit clauses required it to follow the Alaska law.

This decision was affirmed by the United States Supreme Court saying "while under the due process clause the power to control the legal consequences of a tortious act committed elsewhere has been denied, the liability to workmen's compensation is not a tort" but "it is imposed as an incident of the employment relationship."

Apparently objections under the due process clause cannot be made to a court's refusal to enforce the law of another state with respect to parties over whose "status" the forum has "control." Such questions can be raised only where the exercise of this power is "so arbitrary or unreasonable as to amount to a denial of due process." The power of a state to effect legal consequence is not limited to occurrences within the state if it has control over the status which gives rise to those consequences.

The court pointed out the hardship which would be imposed upon the employee if he were forced to return to Alaska to sue, after having come back to California to collect his wages under the contract.

On the full faith and credit point, the Court stated "Prima facie every State is entitled to enforce in its own courts, its own statutes, lawfully enacted" and one who challenges that right under the full faith and credit clause "assumes the burden of showing that of the conflicting interests involved those of the foreign State are superior to those of the forum."

"And so in the present case, the California law is to be applied in the California courts, unless the employer can show that Alaska has a superior interest."

In the third case, *Pacific Insurance Co. v Commission*<sup>19</sup> the injured employee was a resident of Massachusetts and regularly employed there. He was sent by his employer to the latter's branch factory in California to act temporarily as a technical adviser. While in California he remained subject to the general direction and control of the employer's Massachusetts office, from which his compensation was paid. He was injured in California and instituted proceedings for compensation under the California law. Under the Massachusetts law, the employee's right to recover for personal injuries "was restricted to the compensation provided by the Massachusetts act for injuries received in the course of his employment, whether within or without the Commonwealth." The California law by its terms applied where an employee was injured within the State. And, as has been noted in the *Alaska Packers* case (above) it also provided that "no contract, rule or regulation shall exempt the employer from liability for the compensation fixed by this act."

The defendant insurance carrier insisted that the Massachusetts act must be given effect and held to be the employees' exclusive remedy under the *Bradford Electric Co.* case (see above), and that the employee, therefore, was not entitled to relief under the California law. The Court said.

" the very nature of the Federal union of States precludes resort to the full faith and credit clause as a means for compelling a state to substitute the statutes of other states for its own statutes in the case of statutes, the extra state effect of which Congress has not prescribed the full faith and credit clause does not require one state to substitute for its own statute applicable to persons and events within it, the conflicting statute of another state."

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<sup>19</sup> *Supra*, note 8.



The Court then distinguished the *Bradford Electric* case and intimated that if the Vermont statute was shown to be obnoxious to New Hampshire policy, the Bradford decision would have gone the other way

In the present case, it was said the Massachusetts law was obnoxious to the policy of California, not only because there was a conflict between the two, "but the California law, in addition provides that no contract, rule or regulation shall exempt the employer from liability for the compensation fixed by this act."

These three decisions really bring up the question as to what conflict of law principles in the workmen's compensation field are dictated by the Federal Constitution. The law in effect where the contract was made is not determinative; it was applied in the *Bradford* and *Alaska Packers'* cases, but the *lex fori* was applied in the *Pacific Insurance* case. Domicile and residence may be considered as factors in some cases, but not in others. And so with the other points of argument.

Therefore it seems pertinent to consider whether there is any doctrine or test which is consistently applied in these cases. There seem to be three such concepts (1) That State which "controls the status" of the parties, (2) That State having "a superior interest" in the controversy, and (3) "a public policy" existing at the forum to which the foreign law is obnoxious. Basically, however, these are mere "tags" and give little aid in determining, in advance, what a court will decide. To extract any definite principle, as evidenced by these three leading cases, seems to be a baffling task, and, therefore, it seems to be apparent that there is "uncertainty and confusion" in Workmen's Compensation cases generally

### 3. *Modern Civil Aviation Cases on Workmen's Compensation Issues.*

Following we shall survey the recent decisions rendered in the aviation cases.

#### JURISDICTION AND OTHER PROBLEMS

In determining which of two or more Workmen's Compensation Acts is applicable, the trend of decisions in the cur

rent aviation cases seems to show that the courts have decided on the basis of the location of the industry, rather than the place where the accident occurs, or the place where the employee's contract was made.<sup>11</sup>

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<sup>11</sup> 1. Colonial Air Transport v. Tallman, 234 App. Div 809 (N.Y. 1932). Compensation was allowed in New York under the Workmen's Compensation Act where the contract was made in New York and decedent was not employed to work in a fixed place outside the state.

2. Severson v. Hanford Tri-State Airlines, Inc., 309 U.S. 660, 60 Sup Ct. 514 (1939). A Delaware corporation whose business is localized in Minnesota, employed plaintiff by oral contract in Iowa to fly between St. Paul, Minneapolis and Chicago. Plaintiff was injured in Wisconsin. The Court held that the Minnesota law was applicable, the place where the business was located.

3. United Airlines Transport Co. and Hartford Accident & Indemnity Co. v Industrial Commission of State of Utah, et al., 175 P 2d 752, 2 Avi. 14268 (Utah, 1944) on the question of an employee killed while temporarily in the state.

4. Lorna Livermore as Administratrix v. Northwest Airlines, Inc., 6 Wash. 2d 1, 106 P 2d 578, 1 Avi. 814 (1939). Workmen's Compensation law held to be applicable to a non-resident employer with respect to any of its workers living and working in Washington regardless of where the contract of employment was entered into.

See also:

5. Bisson, Adm. v Winnepesaukee Air Service, Inc., et al., 91 N.H. 73, 13 A. 2d 821 (1940) on construing "employment outside of the state."  
and

6. Alexander v Movietone News, Inc., 273 N.Y. 511, 6 N.E. 2d 604, 1937 U.S. Av R. 167 (1937), cert. den. 301 U.S. 702.

7. Spelar, Administratrix v American Overseas Airlines, Inc., 75 F Supp. 967 (S.D.N.Y. 1947), 2 Avi. 14,479 and 14,567. The plaintiff's intestate, an employee of the defendant air carrier, was killed in a crash in Newfoundland, during the course of his regular employment as flight engineer. Defendant is a Delaware corporation with its principal office located in New York City and decedent had been a resident of New York City, and under the New York statutes, plaintiff was allowed workmen's compensation.

8. Duskin, Executrix v Pennsylvania Central Airlines Corp., 71 F Supp. 867 (W.D. Tenn. 1947) 2 Avi. 14,427 and 14,594. Plaintiff's decedent, a resident of New York, was employed by Pennsylvania Central Airlines, a Delaware corporation with principal offices in Pittsburgh, Pa. The contract of employment provided that all the rights and obligations of the parties should be governed by the laws of the State of Pennsylvania. The decedent, whose base of operations was LaGuardia Field, New York, was killed in the course of his employment in Alabama. Here the court held that decedent was a Pennsylvania employee of the defendant corporation, and held that the Pennsylvania Workmen's Compensation should govern. Contra to theory of "superior interest." Since reversed and remanded for new trial, April 14, 1948, 2 Avi. 14,594.

There still seems to be some confusion as to whether an amphibian plane is a water craft or an aircraft.<sup>12</sup>

In *Charleton v Schwartz*<sup>13</sup> which involved the question of the death of an airline pilot on a foreign mission, the next of kin was denied compensation under the Longshoremen and Harbor Worker's Act.

In intrastate flying it has been definitely held that the application of Workmen's Compensation is wholly within the jurisdiction of the State courts.

In a Wisconsin case,<sup>14</sup> it was urged that the Federal government had sole jurisdiction because the jurisdiction of aircraft navigation is vested solely in the Federal government. The court held that it was true that although the pilot was engaged in intrastate flying, the Federal Air Commerce Act and the air traffic rules of the Department of Commerce were applicable under the Wisconsin statutes, but that it was in no wise apparent that either Congress or the Department of Commerce has adopted any rule as to the compensation of injured employees.

Later in *Parker v Granger*,<sup>15</sup> it was again stated that intrastate flight is not regulated by the Federal government and it is a question to be decided by the proof as to whether the regulation of intrastate flying is necessary to protect interstate flying.<sup>16</sup>

The state statutes and decisions have shown a great variance as to persons covered. In Minnesota a pilot employed by the state on a glider soaring program was considered covered by Workmen's Compensation as a state employee.<sup>17</sup>

<sup>12</sup> 1. *Reinhardt v. Newport Flying Service*, 232 N.Y. 115, 133 N.E. 371 (1921) A hydroplane was determined to be a vessel within Admiralty laws under certain conditions. Here the craft was moored and so considered to be a vessel.

2. *Sue Dollins, Adm. v Pan-American Grace*, 27 F Supp. 487, 1 Av. 334 (1939). Here, an aircraft of amphibian type was considered not to be a vessel within the meaning of Sections 4283-4289 Revised Statutes "operation of aircraft on water is merely an auxiliary function. Congress could not have had such a craft in mind when enacting the statutes."

<sup>13</sup> 65 F Supp. 378 (S.D.N.Y. 1946).

<sup>14</sup> *Sheboygan Airways, Inc. v Industrial Commission*, 209 Wis. 352, 245 N.W. 178, 1 Av. 413 (1932)

<sup>15</sup> *Parker, et al. v Granger, Inc. et al.*, 4 Cal. 2d 668, 52 P 2d 226, 298 U.S. 664, 1 Av. 590 (1935)

<sup>16</sup> See also *Neiswanger v. Goodyear, et al.* 55 Fed. 761, 1 Av. 157 (1929).

<sup>17</sup> *Goss v. McJunkin*, 157 Kan. 684, 143 P 2d 659, 1944 U.S. Av. R. 55, 1 Av. 1118 (1943).

In an Oklahoma case, the occupation of an airline pilot and instructor who was injured while performing mechanical duties was held to be a hazardous occupation within the Oklahoma Workmen's Compensation Act.<sup>18</sup>

In Texas,<sup>19</sup> a garage mechanic was allowed compensation for injuries sustained while working on an airplane even though the policy did not expressly mention airplanes.

In the State of Washington,<sup>20</sup> in a suit to compel the Washington Department of Labor to recognize that certain employees come within the scope of the Workmen's Compensation Act, it was held that the intent of the legislature was to bring the business of airplane manufacturing under the act but not to include "airplane pilots, instructors or other employees of air transportation companies engaged in actual flying" Whether other non-flying employees of an air transport company are covered was left undecided.

The Utah statutes grant the Industrial Commission power to allow a flight instructor reasonable workmen's compensation.<sup>21</sup>

In Oklahoma it has been held that an airport is a factory and a workshop within the terms of the Workmen's Compensation Act.<sup>22</sup>

In Iowa a pilot who, to increase his own experience, was flying an airplane to a purchaser was held to be covered by workmen's compensation.<sup>23</sup>

In Texas, a theater manager who was killed while flying on an advertising trip was held to be furthering the theater's

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<sup>18</sup> Fort Smith Aircraft Co. v State Industrial Com., 151 Okla. 67, 1 P 2d 682, 1931 U.S. Av R. 216, 1 Avi. 279 (1931). See also: Sowinski v. State Industrial Com., 169 P 2d 752 (Okla. 1945).

<sup>19</sup> Standard Accident Insurance Co. v Arnold, 1 S.W 2d 434 (Tex. Civ App.), 1928 U.S. Av R. 301, 1 Avi. 101 (1927)

<sup>20</sup> Washington ex rel. Northwest Airlines, Inc. v. Hoover, 200 Wash. 277, 93 P 2d 346, 1941 U.S. Av. R. 209, 1 Avi. 848 (1939). See also: Rhodenbaugh Adm. v Preferred Accident Ins. Co. of N.Y., 67 F Supp. 379, 2 Avi. 14,210 (1946) in regard to ground crew members.

<sup>21</sup> Anderson v Industrial Com. of Utah, 108 Utah 52, 157 P 2d 253, 1 Avi. 1262 (1945)

<sup>22</sup> Ft. Smith Aircraft Co. v. State Industrial Com., *supra*, note 18.

<sup>23</sup> Knipe v Skelgas Co., 229 Iowa 740, 294 N.W 880, 141 U.S. Av. R. 16, 1 Avi. 934 (1940). See also: Schonberg v. Zinmaster Baking Co., 173 Minn. 414, 217 N.W 481, 1 Avi. 111 (1929) and Hammer v. General Electric X-Ray Corp., et al., Dec. 23, 1931. Minn. Industrial Commission. 1932 U.S. Av. Rep. 242.

business and so allowed workmen's compensation;<sup>24</sup> while in Pennsylvania,<sup>25</sup> a salesman killed in a flying accident while calling on prospective customers on the theory that the flight was not "or constructively in the furtherance of the business or affairs of his employer"

In Ohio,<sup>26</sup> a ground mechanic who also had the duty to taxi planes from the hangars to the starting liner, followed his foreman who was not a licensed pilot into the plane and they took off, and crashed shortly after. The court held that the question of whether he so acted in obedience to orders connected with his employment was for the jury to decide and in this instance it was so held, although the court said that the foreman who piloted the plane was definitely outside the scope of his own employment, and his estate was not entitled to workmen's compensation.

In *Owens v Bennett Air Service, et al.*,<sup>27</sup> the New Jersey Supreme Court held that the claimant who was injured in a crash of an airplane was entitled to compensation even though his main employment was that of a mechanic, as his flying was tolerated by his employer and was beneficial to both the employer and the employee.<sup>28</sup>

There has also been some variance in the state decisions on the question as to whether or not the claimant (or his administrator) was an employee at the time of the accident out of which the claim arose.

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<sup>24</sup> *Constitution Indemnity Co. v. Shybles et al.*, 47 F. 2d 441, 1 Av. 263 (1931) and see—*Shults v. Colonial Flying Service*, 262 N.Y. 667, 188 N.E. 113 (1933) See also—*Knupe v. Skelgas Co.*, 229 Iowa 740, 294 N.W. 880, 1 Av. 934 (1948).

<sup>25</sup> *Fulwiler v. Mack International Motor Truck Corp. & Zurich General Accident & Liability Insurance Co.*, 137 Pa. Sup. 421, 9 A. 2d 173, 1 Av. 866 (1939).

<sup>26</sup> *Smith v. The Industrial Com. of Ohio*, 7 O. Ops. 183, 32 N.E. 2d 215, 1 Av. 608 (1936).

<sup>27</sup> 45 A. 2d 32, 2 Av. 14,112 (N.J. Sup. 1946)

<sup>28</sup> *Shults, et al. v. Colonial Flying Service, Inc.*, 262 N.Y. 667, 188 N.E. 113, (1933). In California, in a very recent decision, in *Phoenix Indemnity Co. v. Industrial Accident Com.*, 2 Av. 14,665 (May 25, 1948), the court awarded a workmen's compensation award to decedent's widow when deceased flight instructor was killed in an accident while taking his twelve year old daughter up for a ride, even though this child had never been listed as a student, and would not be eligible to apply for a license for several years. The court held that this death arose out of and in the course of decedent's scope of employment.

In 1928, a Washington Supreme Court<sup>29</sup> decision held that a pilot was an employee even though he received a portion of the income from the flights he made as an instructor and from sight-seeing trips, and received no other salary or income. The court held that he was an employee and not a partner.

There have been several cases on the question of whether the claimant was an employee or an independent contractor, and whether claimant was under the employ of his general employer or the specific employer at the time when the injury or death occurred.

In the *Montijo* case,<sup>30</sup> a pilot was employed to perform stunt flying by a motion picture company in conjunction with other employees of the company. The court held him to be not an employee but an independent contractor saying that a pilot who engages with his airplane in dangerous "stunt" flying for motion pictures assumes the risk of injury to himself and to his plane.

Again, in the *Famous Players-Lasky Corp.* case,<sup>31</sup> the court held that an airplane pilot who is rented for the day with his plane by an aircraft corporation to a motion picture producer from whom he takes his orders, in the making of the picture, is in the general employment of the aircraft company, and in the special employ of the producer, and in case of injury may look to either or both for compensation under California law.

In Illinois, in *Brd v Louer*<sup>32</sup> in an action for the death of a passenger killed in a mid air collision, while the plane was being piloted by a pilot in the general employ of the owner of the plane, the court said that although at this time the pilot was flying under the orders of the passenger, and even though there was a general custom between the passenger and the owner of the plane for this passenger to pay the owner for the use of the plane, the pilot was held to be an employee of the owner of the plane.

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<sup>29</sup> *Hinds v. Department of Labor and Industries*, 150 Wash. 230, 272 Pac. 734, 1 Avi. 143 (1928)

<sup>30</sup> *Montijo v. Samuel Goldwyn*, 133 Cal. App. 57, 297 Pac. 949, 1. Av. 268 (1931). See also contra—*Stiles v Universal Film Mfg. Co.* (1928) U.S. Av. R. 312.

<sup>31</sup> *Famous Players-Lasky Corp. et al. v. Industrial Accident Com. et al.*, 194 Cal. 134, 228 Pac. 5, 1 Avi. 65 (1924)

<sup>32</sup> 272 Ill. App. 522, 1 Avi. 486, 1934 U.S. Av. R. 188 (1934)

In Texas, <sup>33</sup> a pilot employed by the president of a manufacturing company to pilot him on company business in a plane owned by the president individually was held to be covered by the company's workmen's compensation insurance on the grounds that the pilot's pay was paid by the company under the expenses of the president, although his name was not included in the payroll. He was not considered to be an independent contractor because he was in many ways subject to orders.

From the foregoing, it is clearly evident that there is an abundance of confusion, in the state statutes themselves, and great variations in the intent of the legislatures, and in the interpretations of the courts.

The amount of variance, no doubt, seems greater in this particular field, because of the nature of the business and the wide ramifications within it.

### III.

#### THE DEVELOPMENT OF WORKMEN'S COMPENSATION SINCE 1917

Since 1917 the United States Supreme Court has upheld all types and features of Workmen's Compensation acts with minor exceptions,<sup>34</sup> upon the justification of the police powers of the governing bodies, the right of the State and Federal governments to protect the health and welfare of the workmen.

Those provisions that have been held unconstitutional include a feature that attempted to reopen a previously closed case;<sup>35</sup> to take jurisdiction of exclusively maritime injuries;<sup>36</sup> to apply a state act to the already preempted field of interstate railroad injuries;<sup>37</sup> and the 1927 Longshoremen and Harbor

<sup>33</sup> *Texas Employer's Insurance Ass'n. v Kelly*, 56 S.W. 2d 1108, (Tex. Civ. App.), 1 Av. 416 (1932).

<sup>34</sup> Question of due process, *State ex rel. Williams v Industrial Commission*, 116 Ohio 45, 156 N.E. 486 (1927)

Question of no liability without fault, *Western Indemnity Co. v Pillsbury*, 151 Pac. 398 (Cal. 1915).

Loss of jury trial, *State v. Clausen*, 65 Wash. 156, 210, 117 Pac. 1101 (1911).

Unequal treatment before the law, *Jeffrey Manufacturing Co. v. Blogg*, 235 U.S. 571 (1915).

Loss of employer's right to contract, *Clevenger v. Burgess*, 31 S.W. 2d 675 (Tex. Civ. App. 1930).

<sup>35</sup> *Casieri's case*, 286 Mass. 50, 190 N.E. 118 (1934).

The remainder of the statute abolishing *res adjudicata* for future cases was upheld.

<sup>36</sup> *Southern Pacific v. Jensen*, 244 U.S. 205 (1917).

<sup>37</sup> *New York Central Ry. Co. v. Winfield*, 244 U.S. 147 (1947)

Workers Act was sustained with a provision for trials de novo over questions of jurisdiction.<sup>38</sup>

In admiralty cases there is a recognized penumbra, a twilight zone, where only magicians can draw the line between Federal and State Workmen's Compensation Acts.<sup>39</sup> Under the "twilight zone doctrine" the recovery is allowed under a state statute where the employer has failed to obtain federal coverage. The doctrine also upholds the state coverage wherever the plaintiff's duties are not primarily in navigation.

Many employers tried to avoid liability under state compensation acts on the grounds that injuries sustained by an employee while he was engaged in interstate commerce were not compensable, that when the Constitution gave Congress the right to regulate interstate commerce, it *ipso facto*, made it impossible for State Industrial Commissions to make any awards, that injuries sustained on interstate busses, trains and airplanes were beyond state jurisdiction. So it has been held until the Federal Employees Liability Act which applies to railway employees.<sup>40</sup>

Until Congress preempts the field by a Federal Interstate injury law for trucks, airplanes, etc., the states may continue to extend their compensation protection.<sup>41</sup>

Or a state can deliberately cut down its jurisdictional rights and prerogatives, as has been done in Tennessee, West Virginia and Colorado.

Where no limitation exists in the state act, all interstate and intrastate injuries by truck, bus, plane, sleeping cars, street

<sup>38</sup> Thornton v. Duffy, 254 U.S. 361 (1930).

<sup>39</sup> Where the matter was held to be of mere "local concern"—a state matter until a ship is sent into service. Grant Smith Porter Ship Co. v. Rohde, 257 U.S. 469 (1922)

<sup>40</sup> Lighthouses—even 12 miles out.

U.S. Casualty Co. v. Taylor, 64 F. 2d 251 (1933).

New Amsterdam Casualty Co. v. McMangel, 87 F. 2d 332 (1937).

U.S. Employees Compensation Act applies to:

- (1) Civil employees of U.S.
- (2) Employees of Panama and Alaskan Railways
- (3) Employees of District of Columbia except policemen and firemen
- (4) Those employed in timber and logging on Menominee Indian reservation
- (5) Employees of Federal Civil Works Adm.
- (6) Members of Officers Reserve, and enlisted reserve in times of peace, coast guard, etc.

<sup>41</sup> Hall v. Industrial Commission, 131 Ohio St. 416 (1936).



cars, etc., except interstate rail carriers, come exclusively under the state Workmen's Compensation acts.

Prior to the 1939 Amendments to the Federal Employees Liability Act (1908) the following questions had to be considered first:

Was the employee at the time of the injury engaged in interstate commerce or in work so closely related to it as to be a part of it.<sup>42</sup>

A worker also had to prove negligence to come under the Federal Act, otherwise the state act was his only recourse.

The 1939 Amendment states "any employee of a carrier, any part of whose duties shall be the furtherance of interstate or foreign commerce, or shall in any way directly or closely or substantially affect such commerce be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of Sections 51 to 59 of this title."

This amendment supersedes part of the old rule of the *Shanks* case,<sup>43</sup> which stated specific work at the time of the injury and not the workman's general duties was the sole test.

The remainder of the *Shanks* case rule, "It is transportation, not commerce that counts." is still the law.<sup>44</sup>

Thus uniformity is obtained for the transportation workers, but excludes those who have nothing directly or closely to do with interstate transportation, such as the clerical workers, back

<sup>42</sup> 1. New York Central Ry. Co. v. Carr, 238 U.S. 260 (1915) Tram on interstate run.

2. New York Central Ry. Co. v. Porter, 249 U.S. 168 (1919). Direct work on interstate tracks and bridges in actual use.

3. Sullivan v. Booth, 202 N.Y.S. 807 (1924). Construction of things later to be used by interstate railways; held to be under State compensation acts until the things are actually put in service. See also: Raymond v. Chicago Ry. Co., 243 U.S. 43 (1917), and Moser v. Union Pacific Ry. Co., 65 Idaho 479, 147 P. 2d 336 (1944).

4. As to interstate material that has been abandoned: New York, New Haven and Hartford Ry. Co. v. Bezue, 284 U.S. 415 (1932), and Industrial Accident Com. of California v. Davis, 259 U.S. 182 (1922). . . .

<sup>43</sup> *Shanks v. Delaware, L. and W. Ry. Co.*, 239 U.S. 556 (1916). See also: *Ermin v. Pennsylvania Ry. Co.*, 36 F. Supp. 936 (1941). *Southern Pacific Co. v. Industrial Accident Com.*, 113 P. 2d 763 (Cal. 1941) aff. (1942) 120 P. 2d 880.

<sup>44</sup> Senate Report No. 661, 76 Congress, 1st session p. 3. Contract with: cases based on Fair Labor Standards Act. *U.S. v. Darby*, 312 U.S. 100 (1941) and: on A.A.A. *Wickard v. Filburn*, 317 U.S. 111 (1942).

shopmen, restaurant help, etc. These employees are still under the State acts, until or unless the United States Supreme Court interprets this amendment to be all-inclusive.

#### IV

#### POWERS OF CONGRESS

The next inquiry then is, whether it is within the power of Congress to enact a statute clarifying conflict of law principles as applied to workmen's compensation laws in their application to employees engaged in civil aviation. There seems to be little doubt that such power exists and can be based on two provisions of the Constitution (1) the commerce clause,<sup>45</sup> and (2) the full faith and credit clause.<sup>46</sup>

##### 1. *Power under the Commerce Clause.*

In order to discuss the power of Congress to enact such legislation under the Commerce Clause, it is essential to consider the Second Employes' Liability Act cases.<sup>47</sup> This decision upheld the constitutionality of the Second Federal Employees' Liability Act,<sup>48</sup> the act fixing the liability for employees engaged in transportation by railroad in interstate commerce for injuries incurred by their employees while engaged in such commerce.

Justice Van Devanter in his decision paraphrased Marshall's famous statement in *Gibbons v. Ogden*<sup>49</sup> and stated. "This power over commerce among the states, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution."

"It does not admit of doubt that Congress, in the execution of its power over interstate commerce, may regulate

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<sup>45</sup> Art. I, Sec. 8.

<sup>46</sup> Art. 4, Sec. 1.

<sup>47</sup> *Mondow v. N.Y. New Haven & Hartford Ry. Co., Northern Pac. Ry. Co. v. Babcock; N.Y., New Haven & Hartford Ry. Co. v. Walsh; Walsh v. N.Y., New Haven & Hartford Ry. Co.*, 223 U.S. 1 (1912).

<sup>48</sup> 35 Stat. 65, as amended 36 Stat. 291.

<sup>49</sup> 9 Wheat. 1 (1824)

the relations of common carriers by railroad and their employees.”

The Court also rejected the argument of the railroads that Congress had exceeded its powers because of its abrogation of the fellow servant rule, and the defenses of contributory negligence and assumption of risk.

The fact that a substantial measure of relief may have been available under a variety of state laws could not affect the power of Congress to supplant them by uniform national legislation. As the Court said.

“We are not unmindful that that end was measurably attained through the remedial legislation of the several states, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the states upon all carriers by railroads engaged in interstate commerce would better serve the needs of that commerce.”

The doctrines expressed in this old case, of course, had even at the time of the decision long been commonplaces, but are restated here because these principles are sufficient in themselves to establish the power of Congress to enact the legislation in question, quite aside from a consideration of the full faith and credit clause.

Congress unquestionably has plenary power under the commerce clause to exclude the states entirely from the application of their workmen's compensation laws to interstate air carriers and their employees. At Congress' choice, it may exclude the states from the field entirely, or only partially, it may permit state action only on conditions—any conditions that Congress may see fit to impose for the protection of commerce. That is, Congress may authorize the making of regulations by which will be determined the conflict of law principles to be followed by the States with respect to workmen's compensation laws. The States would be unable to object that such Federal regulations, enacted under the commerce clause, were obnoxious to their local policies, just as was decided when the State of Connecticut objected to the Federal Employers Liability Act.

## 2. *Full Faith and Credit Clause.*

When the force of the full faith and credit clause is added to the commerce clause, there seems to be little doubt that there is ample constitutional power to enact the proposed legislation.

Article IV, Section 1, of the Constitution provides

“Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof.”

Congress heretofore has apparently never exercised the power thus conferred to alleviate the confusion in the field of conflict of laws by regulations prescribing which of two or more conflicting state statutes is to prevail. But there can be little doubt that this power exists.

The history of this clause in the Constitutional Convention offers substantial evidence that the clause was intended to empower Congress to legislate in this manner. Valuable accounts of the history of this clause appear in articles by Professor Edward S. Corwin<sup>50</sup> and Professor Walter Wheeler Cook.<sup>51</sup>

Quoting from Corwin's article in which he states

“The protest was raised against this clause, it will be recalled, that in vesting Congress with power to declare the effect State laws should have outside the enacting state, it enabled the new Government to usurp the powers of the States, but the objection went unheeded

“ Indeed there are few clauses of the Constitution, the merely literal possibilities of which have been so little developed

Congress has the power under the clause to decree the effects that the statutes of one State shall have in other States. Or to speak in more general terms, Congress has, under the clause, power to enact standards whereby uniformity of State legislation may be secured as to almost any matter in connection with which interstate recognition of private rights would be useful and valuable.

<sup>50</sup> *The Full Faith and Credit Clause*, 81 U. of PA. L. REV. 371 (1933).

<sup>51</sup> *The Power of Congress Under the Full Faith and Credit Clause*. 28 YALE L. J. 421 (1919)

“Nor should the limited initiative taken by the Court in this matter in recent years deter Congress from acting. The little that can be accomplished by the judicial process of inclusion and exclusion will go neither far nor fail toward meeting present day necessities. Besides, it is to Congress that the Constitution reserves the initiative in the application of the full faith and credit clause, not to the Court.”

Cook comes to the same conclusion.

“(4) Compulsory recognition by the States of rights created by legislative acts of other States. Here we enter upon an unexplored field.

“ it is well worthwhile to inquire into the powers of Congress with reference to the enactment of legislation to make compulsory this interstate enforcement of vested rights instead of leaving it, as how to depend upon the whim of the State legislature or the notions of the State Court as to the conflict of laws. A careful study of the evolution in the Constitutional Convention of the wording of the full faith and credit clause, will it is believed convince the impartial student that the final shaping of the clause so as to give Congress power to prescribe the effect, not only of judgments but also of such public acts, was intended by the more nationally minded members of the Convention to confer upon Congress some such power. True, we do not know exactly what the members of the Convention expected Congress to enact in the way of legislation, but it seems obvious that they were conscious that they were conferring in somewhat general language power on Congress to deal with the matter.

“ It is conceived that in place of the present chaotic conditions which obtains in the field of the conflict of laws as applied to interstate relations, Congress could by enacting such a statute substitute, at least to a large extent, a code of uniform national law.”

While it is true that, at most, we can say the views of these scholars are interesting, and it is the views of the Supreme Court which must be our ultimate concern, we can answer that, too, as the Court has stated unequivocally that Congress has the power contended for by Cook and Corwin.

In the dissent of Mr. Justice Stone in the case of *Yarborough v. Yarborough*,<sup>52</sup> the Justice cites with approval the

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<sup>52</sup> 290 U.S. 212 (1933)

articles quoted above. This case involved the question of whether South Carolina was required to accord full faith and credit to a Georgia law which operated to relieve a husband, from whom his wife had obtained a divorce in Georgia, from all obligation to provide for the education and maintenance of their minor child. Under its own law, South Carolina had directed the husband to make provision for the child. The majority of the Court held that the Georgia law, as a legal incident of the Georgia divorce decree, was entitled to full faith and credit and, therefore, South Carolina was without power to enforce a decree for maintenance of the child.

Justice Stone in his dissent said:

“The mandatory force of the full faith and credit clause as defined by this Court may in some degree not fully defined, be expanded or contracted by Congress. Much of the confusion and procedural deficiencies which the constitutional provision alone has not avoided may be remedied by legislation. The constitutional provision giving Congress power to prescribe the effect to be given to acts, records and proceedings would have been quite unnecessary had it not been intended that Congress should have a latitude broader than that given the courts. The play which has been afforded for the recognition of local public policy in cases where there is called in question only a statute of another State, as to the effect of which Congress has not legislated, compared with the more restricted scope for local policy where there is a judicial proceeding, as to which Congress has legislated, suggests the Congressional power.”

In the *Alaska Packers* case,<sup>53</sup> discussed *supra*, the Court states in the case of statutes, the extra territoriality of which Congress has not prescribed, where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is still more important.

While the Court's indication of the power of Congress may be termed only parenthetical, the meaning of the phrase is unmistakable.

In the *Pacific Insurance* case,<sup>54</sup> the court states in the case of statutes, the extra state effect of which Congress has not pre-

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<sup>53</sup> 294 U.S. 532 (1934).

<sup>54</sup> 306 U.S. 466 (1938).

scribed as it may under the constitution provision the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it. the conflicting statute of another state.

It would be hardly possible for the Court to declare in clearer terms that Congress has power under the full faith and credit clause to determine the principles of the conflict of laws by which the states shall be governed. It is true that the above statements are dicta, but no opinions given by the Court can be other than dicta until Congress enacts legislation pertinent to the subject.

## V

### CONCLUSION

Thus it has been shown that the two preliminary questions have been answered, first, that there is at present "uncertainty and confusion" in the field of Workmen's Compensation in Civil Aviation, to an extent which warrants clarifying federal legislation, and secondly, that within the framework of the United States Constitution, Congress has ample power to enact legislation.

While it is true that the matter of State's rights versus Federal jurisdiction has always been a delicate subject, it is a reasonable and common-sense deduction that there should be no conflict on this question relative to these rights respecting air commerce generally

It is quite true that State's rights must, insofar as is consistent with good government, be protected, but when as in this case, the problem involves the fastest mode of travel in the world, a mode of travel that has an effect, either directly or indirectly, on all the people of all the states.

Just as it has seemed sensible and logical and to the best interests of the United States, to enact the federal legislation that has been enacted in the Air Commerce Acts of 1926 and 1938, so it seems to be only a furtherance of those interests to clarify the situation in the field of Workmen's Compensation.