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CONFLICT OF LAWS IN LABOR MATTERS IN THE UNITED STATES*

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> The problems in Conflict of Laws concern, in part, the questions of how far a state may through its legislative and executive departments govern the legal consequences of acts done in that state or elsewhere and questions concerning over what persons a state may exercise authority; or problems may concern the question of what law is to be chosen by the courts to settle a disputed matter where certain foreign elements have come into the case.[1]

In line with this definition, a sampling of the ways in which the subject of conflict of laws has been treated in the United States in labor matters will be undertaken. However, the term "labor matters" may be regarded as embracing a multitude of topics, and this presentation by no means purports to be encyclopedic.[2] Indeed, questions concerning conflicts between laws of the federal and state governments have been purposely excluded, though admittedly they loom large in domestic law and jurisprudence. On the other hand, the subjects considered are deemed illustrative of the domestic approach to the problems involved.

It may be said in general that the courts are reluctant to give extra-territorial effect to statutes in the absence of a specific legislative direction to do so. This seems to be true even in the field of workmen's compensation statutes, which perhaps involve the most distinctive

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1. GOODRICH, CONFLICT OF LAWS 3 (3d ed. 1949).

2. While employment is based on contract, conflict of law rules do not appear to have played a significant part in reported judicial considerations of alleged breaches of employment contracts. This may be attributed to at least four factors. A large percentage of employment contracts are made and performed in the same state. Controversies over alleged breaches which might involve conflict of law questions may be settled by private agreement or arbitration. Others may be resolved by the application of federal legislation which would not involve conflict problems, and those cases which may be litigated in courts apparently have not reached appellate levels where definitive decisions might be rendered. However, there seems to be no reason to suppose that courts would not follow the general rules of conflict of laws in contract matters in cases involving employment contracts. See Cary v. U. S. Hoffman Mach. Corp., 148 F. Supp. 748 (D.D.C. 1957). For a presentation of these conflict of law rules in contract matters, see, *e.g.*, 2 BEALE, THE CONFLICT OF LAWS 1042-284 (1935); GOODRICH, CONFLICT OF LAWS 304-47 (3d ed. 1949).

development of conflict of laws rules. Such an approach is necessitated by traditional concepts of the comity of nations, *i.e.*, a reciprocal respect for the right of each sovereign to determine the legal effect of acts within those areas under the sovereign's control.

The judicial treatment accorded two federal labor statutes is illustrative of this approach. For example, the Eight-Hour Law[3] requires that "every contract" for construction to which the United States is a party must contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract shall be required or permitted to work more than eight hours per day unless he is paid one and one-half times the basic rate of pay for hours worked each day in excess of eight. An American construction company with a government contract for construction work abroad employed an American citizen in the United States to work at the construction site, and an action was brought to determine the applicability of the Eight-Hour Law to the contract. The United States Supreme Court held that "every contract" did not mean contracts for construction abroad and the statute therefore imposed no obligation on the contractor to comply with its terms in connection with this construction project in a foreign country.[4] The Court refused to give extra-territorial effect to the statute in the absence of a clear congressional directive to do so.

But Congress was found to have given such a directive in the Fair Labor Standards Act,[5] which provides for the payment of minimum wages and overtime pay to certain employees engaged in interstate or foreign commerce or in the production of goods for such commerce. The act, for present purposes, may be said to cover employees within the continental United States, its territories and possessions; and the Supreme Court has held[6] that Congress intended the term "possessions" to include the Government's leasehold interests in foreign countries, thereby bringing employees on these leaseholds within the coverage of the act, even though the United States Government concededly had no sovereign authority over the leaseholds.[7]

Further illustrations of legislative and judicial treatment of conflict of laws problems are found in connection with employees' work-connected injuries, the rights of seamen, and labor-management relations.

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3. 27 Stat. 340 (1892), as amended, 40 U.S.C. §§ 321-26 (1952).
4. Foley Bros. v. Filardo, 336 U.S. 281 (1949).
5. 52 Stat. 1060 (1938), as amended, 29 U.S.C. § 201 (1952).
6. Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948).
7. Pub. L. No. 85-231, 85th Cong., 1st Sess., 71 Stat. 514 (1957), 29 U.S.C. § 213 (Supp. V, 1958) restricted the effect of this decision by eliminating the application of the act to territories and leaseholds of the United States in foreign countries.

I. State Workmen's Compensation Acts

Workmen's compensation acts make an employer responsible for bodily injury to an employee arising out of and in the course of his employment, and liability is imposed without regard to fault on the part of the employer or the employee. Each state of the United States has such a statute, but there is a wide variance in the methods utilized in their administration and the theories underlying their coverage provisions, including provisions giving a majority of these statutes extra-territorial effect.

Characterization has been the traditional approach to conflict of law questions, and once a characterization has been made, such as tort, contract, or property, reasonably well-established rules and principles are available for determining the applicable law. However, in the field of workmen's compensation, no less than three characterizations have been employed: tort, resulting in application of the law of the place of injury; contract, resulting in application of the law of the place of contracting, performance or place intended by the parties; and a new category, the employer-employee relationship or status, resulting in the potential applicability of the law of any jurisdiction having a sufficient connection with this relationship or status. Though characterization is largely a matter of state law, the restraints and limitations imposed by the due process and full faith and credit[8] clauses of the United States Constitution are factors to be considered in a state's choice of law.

There are fundamental inconsistencies between the concepts underlying workmen's compensation and the theories on which the tort and contract characterizations rest. Consequently, the employer-employee relationship or status has been increasingly popular for the development of conflict of law principles in this area because it comports more nearly with the concept of workmen's compensation. However, conflict of law problems in the field of workmen's compensation entail the consideration of a number of subjects.

A. Enforcement in One State of a Compensation Claim under the Workmen's Compensation Act of Another State.

The vast majority of the workmen's compensation acts are administered by special administrative tribunals expressly created for that purpose, though a few are administered in state courts. Because of substantive or procedural variations in these state acts, including the powers of the administering agency, the prescribed procedure, and

8. See Restatement, Conflict of Laws, Introductory Note 485-86 (1934); Note, *Enforcement in One Jurisdiction of Right to Compensation under Workmen's Compensation Act of Another Jurisdiction,* 6 Vand. L. Rev. 744 (1953).

the relation of the remedy to the method of obtaining it, in the majority of the cases it has been impossible for an injured workman to receive a compensation award in one state under the act of another state. As succinctly put by the *Restatement:*

> A Workmen's Compensation Act usually calls for the award of compensation by a particular administrative tribunal provided by the Act. Frequently, the provisions of the Act are such that, until the award is made, there is no right in the injured workman which is capable of being the subject of suit in an ordinary court. Even if under a particular Act the injured workman has a claim against the employer rather than a right to make application for an award to a local tribunal, the difficulties of procedure may make it impracticable for a court in another state to attempt to administer the Act. Therefore, no award is ordinarily made under the provisions of the Workmen's Compensation Act of a foreign state. If an award has been made in a state under the local statute, a suit may be brought in another state on the award.[9]

This statement apparently is equally applicable to enforcement of a claim in one state under the court-administered act of another.[10]

B. Successive Recoveries of Compensation Awards under the Acts of More than One State

Although a compensation award may not ordinarily be obtained in one state under the statute of a foreign state, it does not follow that an award can be obtained in a single state only.[11] An award under the act of one state will not necessarily bar a subsequent award under the applicable act of another state. In this connection, it should be noted that a state's insistence on applying its own act or none at all, as well as the possibility of obtaining multiple awards, violates one of the cardinal principles of conflict of laws rules, *i.e.*, the choice of a forum should be as insignificant as possible in the outcome of a case.

It is possible that by express provision or judicial interpretation a state act or an award under it may be the exclusive remedy, or award for an employee's injury. In this event, the full faith and credit clause of the United States Constitution has been held to preclude another state from granting an award under its own act.[12] But this basic rule has given rise to, and given way in, a staggering amount of litigation. Courts usually find that an award in one state is not

9. RESTATEMENT, CONFLICT OF LAWS, Introductory Note 485-86 (1934).

10. See Note, *Enforcement in One Jurisdiction of Right to Compensation under Workmen's Compensation Act of Another Jurisdiction*, 6 VAND. L. REV. 744 (1953), where most of the cases are gathered and discussed. Although the statutes of some states authorize the administrative agency to provide benefits under the act of another state, this does not appear to have had any particular importance. *Id.* at 749 n. 15.

11. 2 LARSON, WORKMEN'S COMPENSATION LAW § 85 (1952).

12. Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943); Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932).

intended to be the exclusive award for the injury or that the foreign state's act is "obnoxious" in view of the act of the forum state,[13] and this enables more than one state to grant an award because of a particular interest in the employer-employee relationship concerned.[14] Thus it becomes necessary to determine the bases for the application of one state's act to a work-connected injury which is compensable under the act of another state.

C. Bases for Application of the Act of the Forum

Whether a state's act is to apply to work-connected injuries occurring inside or outside its borders is primarily a question for the state legislatures and courts to determine. However, when foreign contacts are involved, this freedom of determination is bounded by the due process and full faith and credit clauses of the Constitution. Though the Supreme Court has attempted to delineate these bounds in a series of cases since 1932, the Court's efforts seem not to have been entirely successful. From a highly legalistic initial approach,[15] the Court has moved to the view that the "governmental interests" of a state must be weighed in determining whether that state may apply its act in a compensation case with foreign contacts.[16] Its interest must be more than casual, and states in which the employment contract was entered, where the injury occurred, and where there was a substantial relationship with the employment relationship have been found to have such an interest. It has also been suggested that a state would have an interest sufficient to support the application of its act if it were the place where the industry was localized, the employee's residence, or the state whose statute the parties adopted by contract.[17] Therefore, it becomes extremely difficult to determine whether the interest of a state with a contact with a work-connected injury is merely casual, thereby prohibiting it from making the remedies provided by its act available to the injured employee or his survivors.

An employee who enters a contract of employment in one state may

13. It is, of course, largely a fiction to say that one state regards another state's workmen's compensation act as obnoxious since all these statutes, no matter how varied their terms, are designed to accomplish the same basic purpose. However, the doctrine has been useful in cases involving the full faith and credit clause of the Constitution as a method of enabling a state having a legitimate interest in a work-connected injury to apply its statute even though the statute of another state might also be applicable. See Pacific Employers Ins. Co. v. Industrial Acc. Comm'n, 306 U.S. 493 (1939); and Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532 (1935).

14. Industrial Comm'n v. McCartin, 330 U.S. 622 (1947).

15. See Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932).

16. Carroll v. Lanza, 349 U.S. 408 (1955); Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469 (1947).

17. 2 LARSON, *op. cit. supra* note 11, § 86.10.

recover a compensation award under the act of that state for a work-connected injury in another state[18] unless the act applies, by express provision or interpretation, only to injuries occurring within the state.[19] Such awards may be granted on either of two theories. First, by making the employment contract in the state, the parties are regarded as having agreed to accept coverage under the act.[20] Second, the act may be viewed as establishing a mandatory regulation of an incident of the employer-employee relationship, thereby bringing the parties within its coverage by virtue of their having entered the employment contract in the state.[21] If such an act purports to provide exclusive coverage for employment-connected injuries, domestic as well as foreign, coverage under it may even be used as a defense to a tort action in a second state if that latter state does not find its provisions obnoxious and has no more than a casual interest in the employment relationship.[22]

A workman may also recover a compensation award in the state where his injury occurred under the act of that state[23] unless that act, by specific provision or interpretation, applies only when the employment contract was made in the state and he did not enter his employment contract there.[24] Thus it is possible for an injured workman to be unable to recover a compensation award at all if the act of the state where he made his employment contract applies only to injuries occurring within that state and the act of the state where the injury occurred applies only if the employment contract was made there.[25] But this is not to say that the employee would be entirely without a remedy since presumably an action in negligence would still be available to him under the law of the state where the injury occurred. As a practical matter, however, such a remedy is more apparent than real since in order to recover the employee would have to surmount the "unholy trinity" of defenses, the doctrines of contributory negligence and assumption of risk and the fellow-servant rule.

Compensation has also been awarded an injured employee under

18. Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532 (1935); Haverly v. Union Constr. Co., 236 Iowa 278, 18 N.W.2d 629 (1945); Sweet v. Austin Co., 12 N.J. Misc. 381, 171 Atl. 684 (1934).
19. *In re* Gould, 215 Mass. 480, 102 N.E. 693 (1913).
20. Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 Atl. 372 (1915).
21. GOODRICH, CONFLICT OF LAWS 284 (3d ed. 1949).
22. See Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932). Indeed, this appears to be the only possible present interpretation of *Bradford Elec. Light* if that case is not to be regarded as having been overruled sub silentio by Carroll v. Lanza, 349 U.S. 408 (1955).
23. Pacific Employers Ins. Co. v. Industrial Acc. Comm'n, 306 U.S. 493 (1939).
24. House v. State Industrial Acc. Comm'n, 167 Ore. 257, 117 P.2d 611 (1941).
25. *Ibid.*

the act of a state which was neither the place where the employment contract was made nor the place where the injury occurred. This award was bottomed on the interest of the state in the employment relationship and was made because of the existence of the employment relationship in the state.[26] Too, the localization of an employer's business in a state has been held to be a sufficient basis for making the act of that state applicable to an employee's injury incurred outside that state even though the employment contract was made in still another state.[27] And in a leading case,[28] the Supreme Court of the United States upheld a compensation award under the District of Columbia's act for an injury sustained outside the District because of the substantial connection between the District and the employment relationship. The employee resided in the District, and the employer's place of business was located there. The fact that the employment contract had been made in the District was simply disregarded.

D. Tort Actions Against the Employer

If an action in tort or for wrongful death against an employer has been abolished by the act of the state where the injury occurred, the general rule is that no action for such tort or wrongful death will be entertained anywhere.[29] And under the traditional doctrine of *lex loci delicti commissi,* this would certainly appear to be the better view.

But it seems that such actions may also be precluded in certain circumstances by virtue of the act of the state where the employment contract was entered even if such actions would ordinarily be permitted under the act of the state where the injury occurred.[30] This might result if the state where the contract was made purported to provide the exclusive remedy for the injury, whether it occurred within or without the territorial jurisdiction of the state, and the state where the suit was brought had not declared such an act obnoxious to its own policy of allowing tort actions and its connection with the employment relationship was casual.[31] In this connection, it has

26. McKesson-Fuller-Morrison Co. v. Industrial Comm'n, 212 Wis. 507, 250 N.W. 396 (1933).
27. Severson v. Hanford Tri-State Airlines, 105 F.2d 622 (8th Cir. 1939).
28. Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469 (1947).
29. RESTATEMENT, CONFLICT OF LAWS § 401 (Supp. 1948).
30. Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932).
31. Compare Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932), with Carroll v. Lanza, 349 U.S. 408 (1955); Industrial Comm'n v. McCartin, 330 U.S. 622 (1947); Pacific Employers Ins. Co. v. Industrial Acc. Comm'n, 306 U.S. 493 (1939); Ohio v. Chattanooga Boiler & Tank Co., 289 U.S. 439 (1933). Whether this result is required by the full faith and credit clause is open to question. The Supreme Court's opinion in *Carroll v. Lanza, supra,* would seem to lead to the conclusion that the state where the injury occurred could use its discretion in the matter since its interest in the injury, but not necessarily in the em-

been said that "it is generally held that, if a damage suit is brought in the state of injury by the employee against the employer, the state of injury will enforce the bar created by the exclusive-remedy statute of the state of contract or employment relation."[32]

If a work-connected injury occurred in a foreign nation and a workmen's compensation award was paid in a state which barred tort actions for such injuries, it has been held that it would be against the public policy of the state, as evidenced by its acts, to entertain a suit based on the foreign cause of action.[33]

E. Rights Against Third Parties

Employees at times receive work-connected injuries through the fault of a third person, who may be liable for damages in a tort or wrongful death action. Those denominated third persons differ from state to state, and this is particularly true with respect to fellow employees and general and subcontractors, though for present purposes the term may be regarded as embracing the latter. An employer or his insurer will ordinarily be subrogated to the rights of an employee against a third person, but the extent of the subrogation and the time it arises also vary from state to state. It is therefore important that employers, employees and third persons be able to determine their rights or obligations if more than one state has a legitimate interest in the employment relationship of an employee who has sustained a compensable injury. The questions involved may be approached by considering the situation before compensation has been awarded and that after an award has been made.

1. Before a Compensation Award.—When more than one state has a legitimate interest in a work-connected injury and a compensation award has not been made, it would be expected that the act of the state where the injury occurred would be determinative of an employee's rights against a third person and the subrogation rights of the employer and his insurer.[34] However, even though the state where the injury occurred might permit an action in tort or for wrongful death against a person under its own act, it might refuse

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ployment relationship, is regarded as more than casual. Hence, the holding in *Bradford Elec. Light Co. v. Clapper, supra,* must be viewed as being susceptible of this interpretation or else overruled sub silentio in *Carroll v. Lanza, supra.*

32. 2 LARSON, *op. cit. supra* note 11, § 88.10.

33. Urda v. Pan American World Airways, Inc., 211 F.2d 713 (5th Cir. 1954).

34. See Carroll v. Lanza, 349 U.S. 408 (1955); Jonathan Woodner Co. v. Mather, 210 F.2d 868 (D.C. Cir.), *cert. denied,* 348 U.S. 824 (1954); Bagnel v. Springfield Sand & Tile Co., 144 F.2d 65 (1st Cir.), *cert. denied,* 323 U.S. 735 (1944); 2 LARSON, *op. cit. supra* note 11, § 88.23.

to entertain such an action if the act of the state where the contract was made was applicable and would bar the suit.[35]

2. After a Compensation Award.—If the state where the injury occurred had abolished an action in tort or for wrongful death against a third party and compensation had been awarded under the law of that state, the general rule, again following the doctrine of *lex loci delicti commissi,* is that no such action against a third party could be maintained in any state.[36] Consequently, there would be no question of the right of an employer or his insurer to subrogation under the usual rule.

If the state where the employment contract was made barred an action against a third party and a compensation award had been paid in that state, the state where the injury occurred will ordinarily dismiss an action against the third party.[37] However, if both states

35. Stacy v. Greenberg, 9 N.J. 390, 88 A.2d 619 (1952).

36. Williamson v. Weyerhaeuser Timber Co., 221 F.2d 5 (9th Cir. 1955); RESTATEMENT, CONFLICT OF LAWS § 401 (Supp. 1948). In Wilson v. Faull, 27 N.J. 105, 141 A.2d 768 (1958), the plaintiff was employed by a New Jersey subcontractor to work on a project in Pennsylvania, where he was injured through the general contractor's alleged negligence. The Pennsylvania statute made general contractors liable to the employees of subcontractors for workmen's compensation and abolished their tort liability. The employee collected workmen's compensation in New Jersey from his immediate employer, the subcontractor, and brought an action there against the general contractor for negligence, which was permitted under the New Jersey statute. The New Jersey Supreme Court held that the Pennsylvania statute would have given the general contractor a defense to such a suit in Pennsylvania and that the defense should be recognized in New Jersey since the Pennsylvania law was not obnoxious, though contrary, to the law of New Jersey. The court also stated that this rule should be followed whether the forum state is the place of the contract, injury, or employment relationship.

37. 2 Larson, *op. cit. supra* note 11, § 88.22. *But see* Sheerin v. Steele, 240 F.2d 797 (6th Cir.), *cert. denied,* 353 U.S. 938 (1957), in which an employee's administratrix brought a wrongful death action in Michigan against a fellow employee of deceased for alleged negligence in causing the employee's injury and death in Michigan. The contract of employment had been made in Ohio and stipulated that the New York Workmen's Compensation Act would be applicable to a work-connected injury, which was permissible under Ohio law. The employee lived in New York. The widow, who was also the administratrix, collected workmen's compensation under the New York compensation statute, which barred a suit against a fellow-employee for negligence in causing a work-connected injury or death. Then she brought this action in Michigan, whose workmen's compensation act barred an action against a fellow employee if compensation were "payable" under that act. The court of appeals interpreted the act as meaning that the benefits of the act had to be retained before such an action would be barred. They had not been, and so the court held that the action could be maintained and that Michigan was not bound under the full faith and credit clause to recognize a defense to the suit based on the New York act. Apparently only the full faith and credit clause question was before the court of appeals. Having determined that the full faith and credit clause did not require Michigan to recognize the New York law as a bar to the action, it did not overtly consider whether the Michigan state courts *would* recognize a defense based on the New York statute. Rather, it merely reversed the trial court's determination of the constitutional question and remanded the cause for further proceedings not inconsistent with its opinion.

would permit the action and compensation had been paid in one state, then any right to subrogation would ordinarily be determined under the act of that state if any action were brought in the other state.[38] Thus, if the act of the state where compensation was awarded would assign the employee's cause of action to the employer or his insurer, the state where the injury occurred would probably recognize the effect of the assignment. This would have the beneficent effect of preventing the third person from being liable both to the employee in the state where the injury occurred and to the statutory assignee of the employee's right of action in the state where compensation was awarded.

II. FEDERAL EMPLOYERS' LIABILITY ACT

The Federal Employers' Liability Act,[39] hereinafter referred to as FELA, is a federal statute providing an action in negligence for work-connected injuries of employees of interstate rail carriers. The act covers a carrier's employee if any part of his duties as such an employee are in the furtherance of interstate or foreign commerce or in any way directly or closely and substantially affect such commerce. Whereas workmen's compensation statutes provide compensation for work-connected injuries on a liability without fault basis, this act is not a compensation act. It provides a remedy by way of a suit in state or federal courts for damages based on negligence. The employer may not defend the suit by resort to the assumption of risk and fellow servant defenses, and a concept of comparative negligence is substituted for the common law concept of contributory negligence. As a result, while the employee's negligence contributing to his injury may be considered so as to reduce the amount of damages he may recover, it will not necessarily preclude recovery of all damages.

As one commentator has said:

> Since the Act is an expression of the pre-eminent federal power over interstate commerce, it is exclusive of state action in respect to work injuries insofar as it has by its terms covered the field. Exactly how much of the field it has covered has been an extremely prolific source of litigation ever since its enactment in 1908.[40]

The problem of the exclusion of state workmen's compensation remedies by FELA coverage, a problem of federal pre-emption, is beyond the scope of this discussion. However, it is relevant to consider the applicability of the act both to injuries sustained in a foreign jurisdiction by employees of a domestic carrier and to injuries sustained within the territory of the United States by employees of foreign rail carriers.

38. 2 LARSON, *op. cit. supra* note 11, § 88.22.
39. 53 Stat. 1404 (1939), 45 U.S.C. § 51 (1952).
40. 2 LARSON, *op. cit. supra* note 11, § 91.10.

The last point may be disposed of first. Although no case in point has been found, there appears to be no reason to suppose that the FELA would not be applicable in the event of an injury within United States territory to an employee of a foreign rail carrier if the employee's duties within the territory were in the furtherance of or affected interstate or foreign commerce.

Unlike many state workmen's compensation laws, the FELA has no extra-territorial effect. In the case in which this was determined,[41] a rail carrier's employee was killed in Canada while engaged in foreign commerce. Both the carrier and the employee were citizens of the United States, and suit was brought in this country under the FELA to recover damages for the death. The United States Supreme Court held that the act was based on tort and provided no cause of action for an injury occurring outside the territory of the United States. There was nothing in the act indicating an intention to give it extra-territorial effect. Accordingly, the Court followed its usual rule of construction that: " 'Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction' *Sandberg v. McDonald,* 248 U.S. 185, 195."[42] In this connection, the Court quoted from the leading case on the point:

> The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done . . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent . . . . The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. All legislation is *prima facie* territorial. *American Banana Co. v. United Fruit Co.,* 213 U.S. 347, 356, 357.[43]

Consequently, the Court held that the availability of a remedy would have to be determined by the laws and statutes of the country where the alleged act of negligence occurred, which in this case was Canada.

One other case is worthy of mention. In *Grand Trunk Ry. v. Wright*[44] it was held that a recovery could not be had under the FELA for the death of an employee of a Canadian railroad in the operation of a railroad car ferry on territorial waters of the United States.

41. New York Cent. R.R. v. Chisholm, 268 U.S. 29 (1925).
42. *Id.* at 31.
43. *Id.* at 31-32.
44. 21 F.2d 814 (6th Cir. 1927), *aff'd per curiam,* 278 U.S. 577 (1929). Because of the authority cited by the United States Supreme Court for its per curiam affirmance, the opinion of the court of appeals is reduced to the status of mere dicta.

The court found that by treaty the territorial waters of the United States and Canada are absolutely free to citizens of each country. This ferry, though registered in the United States, was chartered to the Canadian railroad and was not shown to be operated by it in a way which would make the operation incidental to the railroad's status as a rail carrier within the United States. If the facts had been otherwise, the FELA would presumably have been applicable. The court followed the general rule that the boats of one country in the territorial waters of another are subject to the laws of their own country in all matters of "internal discipline and management," and that domestic laws displace the vessels' home laws only as to navigation rules and matters distinctly pertaining to police powers. Hence, Canadian rather than domestic law was determinative of any remedy for the employee's death.

III. THE RIGHTS OF SEAMEN

Full consideration of the domestic impact of conflict of law rules on the rights of seamen would be impracticable in a brief paper. Therefore, consideration will be limited primarily to the application of domestic law in cases involving seamen's injuries and the collection of wages.

The domestic approach to questions of conflict of laws in maritime cases may be gleaned from an excerpt from Mr. Justice Jackson's opinion reviewing the application of domestic law to seamen's injuries:

> But the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea. Hence, courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality. It has the force of law, not from extra-territorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations.
>
> International or maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory. However, it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own. Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping trans-

> action regulated and the national interest served by the assertion of authority. It would not be candid to claim that our courts have arrived at satisfactory standards or apply those that they profess with perfect consistency. But in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.[45]

A. Seamen's Injuries

In general, the *lex loci delicti commissi* applies to torts against seamen while serving on a ship.[46] If, however, only the internal economy or discipline of the ship is affected, the law of the flag will ordinarily be used to determine liability for such torts.[47] But perhaps the principal problem with which domestic courts have been confronted is the applicability of the Jones Act[48] to seamen's injuries.

The Jones Act makes the remedies provided in the Federal Employers' Liability Act, discussed above, applicable, with the right to trial by jury, to injuries sustained by seamen in the course of their employment. But the Jones Act does not alter the ancient and traditional rights of seamen to maintenance and cure and to wages so long as the voyage continues. In the domestic view, these rights are contractual in nature,[49] whereas a suit under the Jones Act is in tort.[50]

The act covers seamen injured on an American vessel regardless of the place of injury or the nationality of the seamen, and it has been applied when an American seaman was injured on a foreign vessel in the territorial waters of the United States.[51] If, however, an American seaman is injured on a foreign vessel outside the United States' territorial waters, the law of the flag of the vessel is used to determine the nature of his right to relief, if any.[52] But it is interesting to note that in a case in which an American seaman was injured on the high seas on a vessel of foreign registry owned by one American citizen and operated by another, the seaman was permitted a recovery against the owner under the Jones Act.[53]

45. Lauritzen v. Larsen, 345 U.S. 571, 581-82 (1953).
46. The Hanna Nielsen, 273 Fed. 171 (2d Cir.), *cert. denied*, 257 U.S. 653 (1921). RESTATEMENT, CONFLICT OF LAWS § 404 (1934).
47. RESTATEMENT, CONFLICT OF LAWS § 405 (1934).
48. 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).
49. Aguilar v. Standard Oil Co., 318 U.S. 724 (1943); The Montezuma, 19 F.2d 355 (2d Cir. 1927). See also The Osceola, 189 U.S. 158 (1903).
50. Lauritzen v. Larsen, 345 U.S. 571 (1953).
51. Shorter v. Bermuda & West Indies S.S. Co., 57 F.2d 313 (D.C.S.D. N.Y. 1932).
52. The Oriskany, 3 F. Supp. 805 (D. Md. 1933).
53. Gerradin v. United Fruit Co., 60 F.2d 927 (2d Cir.), *cert. denied*, 287 U.S. 642 (1932).

In speaking of the allegiance of a shipowner as a basis for imposing Jones Act liability on American owners of foreign vessels, Justice Jackson said:

> Until recent times this factor was not a frequent occasion of conflict, for the nationality of the ship was that of its owners. But it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries. Confronted with such operations, our courts on occasion have pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law places upon them.[54]

In line with this, the Jones Act has been held applicable to a foreign seaman's injury occurring in domestic waters on a vessel of foreign registry owned by a corporation in the country of registry which was in turn owned and controlled by a company incorporated in a second country, the latter being owned and controlled by American citizens.[55] The foreign corporations were treated as if they were American companies for purposes of the application of the act. The court also intimated that ownership alone of the foreign corporations was a sufficient contact for the application of the act and shed doubt on lower court cases requiring both ownership and control before the act could be applied.[56]

A foreign seaman may not maintain an action under the Jones Act against the foreign owner of a foreign vessel for an injury sustained outside the territorial waters of the United States even if the seaman had been hired in and was returned to the United States after the voyage. By saying "we do not think the place of contract is a substantial influence in the choice between competing laws to govern a maritime tort,"[57] the Supreme Court rejected a contention that the Jones Act should be applied in such a case because the United States was the place of contract. However, the Court did indicate that considerable weight might be given to a contractual provision stipulating the law applicable to a tort to a seaman:

> Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply. We are aware of no public policy that would prevent the parties to this contract, which contemplates performance in a multitude of territorial jurisdictions and on the high seas, from so settling upon the law of the

54. Lauritzen v. Larsen, 345 U.S. 571, 587 (1953).
55. Bartholomew v. Universe Tankships, Inc., 263 F.2d 437 (2d Cir. 1959). The court found sufficiently substantial contacts with the United States for application of the Jones Act. Aside from the corporate ownership structure, the seaman signed on in the United States where the voyage began and was to end, and he was regarded as being a resident of the United States.
56. 263 F.2d 437, 443 n.4.
57. Lauritzen v. Larsen, 345 U.S. 571, 589 (1953).

> flag-state as their governing code. This arrangement is so natural and compatible with the policy of the law that even in the absence of an express provision it would probably have been implied. . . . We think a quite different result would follow if the contract attempted to avoid applicable law, for example, so as to apply foreign law to an American ship.[58]

The Jones Act, however, is not applicable to an injury sustained in domestic waters by a foreign seaman on a foreign vessel in the absence of other contacts with the United States.[59] Though until recently the Supreme Court had expressly left this question open,[60] the Court's expression of a strong preference for a single law applicable to shipboard torts, *i.e.*, the law of the flag,[61] made this result readily predictable. And if the Jones Act is inapplicable to a shipboard tort, a suit in admiralty between foreigners may be dismissed in the exercise of a court's discretion.[62]

B. Collection of Wages by Foreign Seamen on Foreign Ships in Domestic Ports

In a recent case,[63] the Supreme Court of the United States presented a review of domestic law regarding the right of foreign seamen on foreign ships in domestic ports to collect the wages owed them. An attempt to surpass the Court's presentation would be useless, and it is therefore quoted in toto:

> In the Seamen's Act of March 4, 1915, 38 Stat. 1164, the Congress declared it unlawful to pay a seaman wages in advance and specifically declared the prohibition applicable to foreign vessels "while in waters of the United States." *Id.*, at 1169, as amended, 46 U.S.C. § 599(e). In *Sandberg* v. *McDonald*, 248 U.S. 185 (1918), this Court construed the Act as not covering advancements "when the contract and payment were made in a foreign country where the law sanctioned such contract and payment. . . . Had Congress intended to make void such contracts and payments a few words would have stated that intention, not leaving such an important regulation to be gathered from implication." *Id.*, at 195. The Court added that "such sweeping and important requirement is not found specifically made in the statute." *Ibid.* See also *Neilson* v. *Rhine Shipping Co.*, 248 U.S. 205 (1918). In 1920 Congress amended § 4 of the Seamen's Act of 1915, and granted to every seaman on a vessel of the United States the right to demand one-half of his then earned wages at every port the vessel entered during a voyage. 41 Stat. 1006, 46 U.S.C. § 597. The section was made applicable to "seamen on foreign vessels

58. *Id.* at 588-89.

59. Romero v. International Terminal Operating Co., 79 Sup. Ct. 468 (1959).

60. Plamals v. Pinar Del Rio, 277 U.S. 151 (1928).

61. Lauritzen v. Larsen, 345 U.S. 571, 584-86 (1953).

62. Romero v. International Terminal Operating Co., 79 Sup. Ct. 468 (1959); Canada Malting Co. v. Paterson Steamships, Ltd., 285 U.S. 413 (1932).

63. Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957).

while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

This Court in *Stratheam Steamship Co.* v. *Dillon*, 252 U.S. 348 (1920), upheld the applicability of the section to a British seaman on a British vessel under British articles. The Court pointed out:

"taking the provisions of the act as the same are written, we think it plain that it manifests the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned, with equal opportunity to resort to the courts of the United States for the enforcement of the act. Before the amendment . . . the right to recover one-half the wages could not be enforced in face of a contractual obligation to the contrary. Congress, for reasons which it deemed sufficient, amended the act so as to permit the recovery upon the conditions named in the statute." *Id.*, at 355.

In 1928, *Jackson* v. *S. S. Archimedes*, 275 U.S. 463, was decided by this Court. It involved advance payments made by a British vessel to foreign seamen before leaving Manchester on her voyage to New York and return. It was contended that the advances made in Manchester were illegal and void. That there was "no intention to extend the provisions of the statute," the Court said, "to advance payments made by foreign vessels while in foreign ports, is plain. This Court had pointed out in the *Sandberg* case [*supra*] that such a sweeping provision was not specifically made in the statute. . . ." *Id.*, at 470. Soon thereafter several proposals were made in Congress designed to extend the coverage of the Seamen's Act so as to prohibit advancements made by foreign vessels in foreign ports. A storm of diplomatic protest resulted. Great Britain, Italy, Sweden, Norway, Denmark, the Netherlands, Germany, and Canada all joined in vigorously denouncing the proposals. In each instance the bills died in Congress.[64]

IV. LABOR MANAGEMENT RELATIONS

The National Labor Relations Act,[65] the principal federal statute regulating labor-management relations affecting interstate and foreign commerce, enunciates the rights, duties, privileges, and obligations of employers and employees and their representatives, usually unions, in the area of collective bargaining. Among other things, the act authorizes the National Labor Relations Board to certify the selected representative of the employees in an appropriate unit as the exclusive representative of those employees for purposes of collective bargaining. It also empowers the Board to prevent or restrain certain unfair labor practices on the part of employers and employee representatives.[66]

64. *Id.* at 144-46.

65. 61 Stat. 136 (1947), 29 U.S.C. § 151 (1952).

66. Though controversy has raged about the question of the extent to which this federal legislation has pre-empted the jurisdiction of the states to deal with problems in the field of labor-management relations, that subject is beyond the scope of this paper. On this subject, see, *e.g.*, Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 655 (1954); Pub. L. No. 86-257 § 701(a), 86th Cong., 1st Sess, 73 Stat. 519, 541 (1959).

The Board has exercised jurisdiction over foreign corporations if those corporations are engaged in regular business operations in the United States or its territories.[67] However, there appears to be some doubt both about the scope of the Board's jurisdiction over labor relations matters involving foreign contacts and the extent to which it will exercise any such jurisdiction.

In 1937, the Board was petitioned to hold an election to determine the collective bargaining representative for certain seamen on the ships of a number of companies, including at least one foreign company.[68] The Board ordered the election held but refused to include the seamen of two of the companies. One of the companies was a British company operating vessels under British registry only. The nationality of the other company was not mentioned, but it was not operating any vessels under American registry. No mention was made of nationalities of the companies and the vessels whose seamen were to participate in the certification election, though presumably they were American, and the Board did not discuss the question of its jurisdiction over the foreign vessels.

Pennsylvania Greyhound Lines[69] was also decided in 1937 and involved the certification of a collective bargaining agent. Of the three employers concerned in one part of the decision, one was a Canadian company wholly owned by a domestic corporation.[70] The Canadian company employed fifteen bus drivers, three of whom were employed entirely within Canada. The Board found that the drivers of the Canadian company constituted an appropriate bargaining unit and certified a union as the exclusive representative of *all* the company's drivers,[71] including the three drivers employed entirely within Canada. Again the jurisdictional question was not discussed.

Two years later, however, this same Canadian bus company challenged an assertion of the Board's jurisdiction in an unfair labor practice case.[72] The company was accused of discharging two drivers because of their union activities. The trial examiner found that one employee had been discharged because of "an inexcusable and an 'at-fault' accident" and that the other employee had been discharged through operation of Canadian law. He recommended dismissal of the

67. See Royal Bank of Canada, 67 N.L.R.B. 403 (1946) (Canadian Corporation doing a branch bank business in Puerto Rico); Pennsylvania Greyhound Lines, 3 N.L.R.B. 622, 660-62 (1937) (Canadian bus company with lines in the United States). *Cf.* Delta Match Corp., 102 N.L.R.B. 1400 (1953) (wholly owned subsidiary of a Swedish corporation doing business in the United States).

68. American France Line, 3 N.L.R.B. 64 (1937).

69. 3 N.L.R.B. 622 (1937).

70. *Id.* at 660.

71. *Id.* at 662.

72. Pennsylvania Greyhound Lines, 13 N.L.R.B. 28 (1939).

charges based on these discharges. Though he found that other acts of the company constituted an unfair labor practice, the acts were not located geographically. The company contested the Board's jurisdiction. The Board did not discuss the question other than to state the citizenship of the company (Canadian) and its owner (American) and mention the company's three bus routes. Two of these routes were exclusively within Canada and only ten percent of the third lay within domestic territory. The Board added that by Canadian law all the company's drivers were required to be Canadian citizens. The case was dismissed with this statement: "Under all the circumstances of this case, we are of the opinion that it will not effectuate the policies of the Act to assert jurisdiction over the matters alleged in this complaint. . . ."[73]

These latter two cases should be compared with *Detroit & Canada Tunnel Corp.*[74] There an American company owned a Canadian subsidiary which owned the buses the American company operated between Canada and the United States. In considering a petition for a certification election, the Board treated both companies as a single unit. It found that all of one occupational group of both companies constituted an appropriate bargaining unit, but it excluded from the unit those employees who worked exclusively within Canada.[75] The Board remarked,

> A generally accepted principle in international law is that one government will not exercise official, including administrative, functions within the territory of another government. "[W]ithin the national domain the will of the territorial sovereign is supreme. That will must, therefore, be exclusive, opposing the assertion of any other, and excluding the lawfulness of obedience to the commands of such other. There can be no conflict of right in this matter."[76]

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73. *Id.* at 32.
74. 83 N.L.R.B. 727 (1949).
75. This would seem to be in accord with the established practice of the National Mediation Board which has authority under the Railway Labor Act, 44 Stat. 577 (1926), as amended, 54 Stat. 785-86 (1940), 45 U.S.C. § 151 (1952) to certify the collective bargaining representatives of employees of carriers by rail and air in the United States. The Mediation Board has regularly excluded such carriers' employees from voting in representation elections if they are based in foreign countries. See Detroit & Canada Tunnel Corp., 83 N.L.R.B. 727, 732 n.10 (1949). Further, it has been held that the Mediation Board has no authority under the Railway Labor Act to certify a bargaining representative for foreign-based employees of a domestic airline. Air Line Dispatchers Ass'n v. National Mediation Bd., 189 F.2d 685 (D.C. Cir.), *cert. denied,* 342 U.S. 849 (1951). On the other hand, the Mediation Board has asserted jurisdiction over employees of foreign rail and air carriers if the employees are based in domestic territory even though part of their duties are performed abroad. But the Railway Labor Act has been held inapplicable to airline employees who are hired and perform services entirely outside the United States. Air Line Stewards v. Northwest Airlines, Inc., 267 F.2d 170 (8th Cir. 1959).
76. 83 N.L.R.B. 727, 732 n.10 (1949).

Accepting as true the proposition that the will of the territorial sovereign is supreme within the domain, it goes without saying that it is sometimes difficult to determine what that will is. This problem figured prominently in three cases involving employment aboard vessels of foreign registry in domestic ports. In *Compania Maritima Samsoc Limitada,*[77] the National Labor Relations Board dismissed a union's petition to represent employees on a Panamanian vessel owned by a Panamanian corporation, the majority of whose stockholders were not citizens of the United States. The vessel was in drydock in this country, where the company employed a crew of foreign seamen to man it. After their employment but before the ship left the drydock, a domestic union picketed the premises of the drydock for the purpose of compelling the owners of the vessel to bargain collectively with the union for the benefit of the seamen. The Board dismissed a certification petition on the ground that the internal economy of a foreign vessel was involved. When the drydock owner, a domestic employer, subsequently charged the union with an unfair labor practice because of the picketing, the Board assumed jurisdiction of the case but, on grounds having nothing to do with the nationality of the vessel, found that no unfair labor practice was involved.[78]

In the second case, *Benz v. Compania Naviera Hidalgo,*[79] a foreign vessel with a foreign crew docked at a domestic port. The voyage had begun at Bremen, Germany, where a British form of articles of agreement had been opened. The conditions, including wages and hours of employment, prescribed by the British Maritime Board were incorporated in it. While the ship was in the domestic port, the seamen instituted a strike to obtain better wages and working conditions and picketed the ship, whereupon they were discharged. Then several American unions successively picketed the ship for the purpose of forcing the re-employment of the discharged seamen. The vessel-owner obtained an injunction against the picketing and sued both the American unions and their representatives for damages. Because the picketing was for an unlawful purpose under the law of the state where it occurred, damages were awarded against the union representatives. The United States Supreme Court held that Congress had not intended that the principal federal statute regulating labor management relations be applied to labor disputes between a foreign ship and its foreign crew. Therefore, the lawfulness of the Americans' conduct was properly determinable under the state law. Though this

77. Case No. 20-RC-809, May 1, 1950, CCH N.L.R.B. Decisions, 1950-51, ¶ 10,081.
78. Moore Dry Dock Co., 92 N.L.R.B. 547 (1950).
79. 353 U.S. 138 (1957).

case essentially involved a question of federal supremacy and the applicability, if any, of state law, the teaching of both cases is that federal labor relations law is not intended to be applied to the labor disputes of foreign seamen employed on foreign vessels which happen to be in American ports.

But the question of what a "foreign" vessel is was before the Board in the third case[80] in which a domestic corporation had sold two of its vessels to foreign corporations which it had established and wholly owned. The ships were then registered in the foreign country and leased to a third foreign corporation which the domestic company created and owned. This latter corporation leased the vessels to the domestic company but was obliged to furnish their officers and crews, though the domestic company could dismiss any of the employees and otherwise controlled the operation of the vessels. The crews were composed in part of domestic seamen, but the majority were nonresident aliens.

Upon a request for a representation election for the crews of these vessels, the Board examined the facts and asserted its jurisdiction. The *Benz* case was distmgnished on its facts since in that case the vessel was owned by foreigners and operated under a foreign registry. In the instant case, the corporate structure which had been established was disregarded masmuch as the Board regarded the foreign corporations as mere instruments of the domestic company and under its complete control. The ships were not regarded as foreign vessels since they were based in and operated out of domestic ports in the same way they had been prior to their transfer to foreign registry. Accordingly, the Board held that it had jurisdiction over the operator of the vessels and their crews and ordered a representation election held.

The case is significant for at least two reasons. First, it demonstrates the Board's approach to a situation intermediate between one with almost completely domestic contacts and one in which virtually all the contacts are foreign. The Board assumed jurisdiction over what it regarded as essentially a domestic vessel. Second, the case may be regarded as the beginnmg of what could become a series of cases delineating the Board's jurisdiction over "foreign" vessels[81] operated under the so-called "fiags of convenience."

80. Peninsular and Occidental S.S. Co., 120 N.L.R.B. 1097 (1958).

81. In a case awaiting decision by the Board, a complaint alleging violations of §§ 8 (a) (1), (3) of the National Labor Relations Act in the transfer of employees was issued on April 23, 1959, against a domestic corporation which operated ships, under Liberian registry, between Cuba and the United States. The vessels were repaired annually in a domestic port and crew members, all of whom were non-resident aliens, executed their articles of employment in the United States. It appears that although some of the conduct alleged to

The act has also been applied to the picketing of a domestic employer by a domestic union to force him to cease doing business with a foreign concern which does not maintain labor standards regarded by the union as "fair."[82] In such a case, the Board has said,[83] "although the Board does not have jurisdiction over foreign manufacturers as such, it does have jurisdiction over unfair labor practices occuring in this country and affecting foreign commerce." This statement relates to jurisdiction over domestic activities resulting from conditions abroad. A case is now before the Board in which a domestic employer has been charged in a complaint issued April 23, 1959, with the commission of unfair labor practices because of activities which occurred in part in a foreign country.[84]

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violate the National Labor Relations Act occurred in the United States, some did not. West India Fruit & Steamship Co., Inc., 15-CA-1454, NLRB, 1959.

82. Sound Shingle Co., 101 N.L.R.B. 1159 (1952); Hammermill Paper Co., 100 N.L.R.B. 1176 (1952). *Cf.* Norris Grain Co. v. Nordaas, 232 Minn. 91, 46 N. W.2d 94 (1951).

83. Sound Shingle Co., 101 N.L.R.B. 1159, 1161 (1952).

84. See note 81, *supra.*