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Recent Cases

APPLICATION OF THE RULE *Res Ipsa Loquitur* TO ACTIONS BY EMPLOYEE AGAINST HIS EMPLOYER

*Whitmaker v. Pitcairn*¹

Plaintiff was head brakeman in the employment of defendant. While riding on the locomotive of a freight train a derailment resulted in injuries to him. The cause of the accident was a very heavy rainfall earlier in the night which had washed out the ballast under the ties and a rail of the track. Plaintiff pleaded negligence generally under the *res ipsa loquitur* doctrine. The court upheld a judgment for plaintiff on the grounds that the rule *res ipsa loquitur* applies to personal injuries actions by an employee against his employer under the Federal Employers' Liability Act, and the fact that the injured employee was operating or working with the instrument causing the injury does not of itself forbid the application of the doctrine.

The recognition of the application of the rule *res ipsa loquitur* to cases between an employee and employer is the result of a complete revolution in judicial and legislative thinking which has taken several centuries to occur. Under strict common law principles with defenses of assumption of risk, negligence of fellow servants, and contributory negligence available to the employer, it was almost impossible for an employee to maintain successfully against his employer a suit for injuries sustained in the course of his employment. With the development of mass industry and the subordination of the individual worker to the machinery of production, these rules no longer served the best interest of society and so were modified by statutes of the federal government as applied to workers in interstate commerce. In 1893 and 1908 the Federal Employers' Liability Act and the Federal Safety Appliances Act, respectively, were passed which practically did away with the common law defenses in actions brought under them.²

Prior to these enactments the federal courts did not allow the application of the rule *res ipsa loquitur* to employee cases.³ The courts were often slow to recognize the scope of the changes made by the new acts and continued to apply the strictest rules of evidence and law in actions brought by employees.⁴ Some of the cases are

1. 174 S. W. (2d) 163 (Mo. 1943).

2. *Ridge v. Norfolk Southern Ry.*, 167 N. C. 510, 83 S. E. 762 (1914); 35 AM. JUR., MASTER AND SERVANT § 391; L. R. A. 1917E, 215, 226.

3. (1923) 36 HARV. L. REV. 759.

4. *Patton v. Texas & P. R. R.*, 179 U. S. 638, 21 Sup. Ct. 275; *Cincinnati, N. O. & T. P. Ry. v. South Fork Coal Co.*, 139 F. 528, 536 (C. C. A. 6th, 1905); *Midland Valley R. R. v. Fulgham Adm'r*, 181 Fed. 91 (C. C. A. 8th, 1910); *Lucid v. E. I. DuPont de Nemours Powder Co.*, 199 Fed. 377 (C. C. A. 9th, 1912); *American Car & Foundry Co. v. Schachlewick*, 229 Fed. 559 (C. C. A. 8th, 1916); L. R.

based on a misconception of the doctrine. A few courts maintained strongly that the burden of proof was on the plaintiff worker and therefore he could not have the advantage of the rule.⁵ Others developed a double standard for the application of the rule *res ipsa loquitur*, allowing it in cases between passengers and carriers and denying it in cases between employees and employers.⁶ Many of the decisions which are cited as denying the application of the rule to any suit by an employee against employer are cases in which the facts did not warrant the application of the rule.⁷

Gradually the courts began to examine the precedents, such as the *Patton* and *Looney* cases and to realize the changes which the Federal Employers' Liability Act had made.⁸ The United States Supreme Court in 1914 and 1917 approved cases in which the rule was applied in an action brought by an employee against his employer.⁹ The court held that the former decisions of the court were not controlling in cases involving the Federal Employers' Liability Act and, if the facts warranted, that the rule *res ipsa loquitur* could be applied. But these two decisions of the Supreme Court seem to have been overlooked for the most part and it was not until 1923 that two decisions in the federal courts were handed down which provide the precedents for the more modern decisions.¹⁰ The *Cochran* case pointed out that, under the Employers' Liability law, employees were really in a more favorable position to bring their actions against employers than passengers were in bringing theirs against carriers because contributory negligence would not be a bar to the employee. The court in the *Peluso* case made a rather complete analysis of the *res ipsa loquitur* rule and pointed out the mistakes of some former cases in refusing to apply it to employer-employee cases. The reasoning and holdings of these decisions have been approved and applied in a number of cases.¹¹

A. 1917E, 1, 4; *Id.* at 182, 187; 35 AM. JUR., MASTER AND SERVANT § 391. *Contra*: *Guffin v. Manise*, 166 N. Y. 188, 59 N. E. 925 (1901).

5. *Patton v. Texas & P. R. R.*, 179 U. S. 658, 663, 21 Sup. Ct. 275, 277 (1901); *Looney v. Metropolitan R. R.*, 200 U. S. 480, 26 Sup. Ct. 303, 306 (1906); *New Orleans & N. E. R. R. v. Harris*, 247 U. S. 367, 371, 38 Sup. Ct. 535, 536 (1918).

6. *Byers v. Carnegie Steel Co.*, 159 Fed. 347, 350 (C. C. A. 6th, 1908); *Southern R. R. v. Deir*, 240 Fed. 73, 76 (C. C. A. 6th, 1917); exhaustive note in L. R. A. 1917E 4.

7. (1907) 20 HARV. L. REV. 228, 229; L. R. A. 1917E, 1, 4; *Id.* at 68.

8. *Cochran v. Pittsburg & Lake Erie R. R.*, 31 F. (2d) 769 (App. D. C. 1923); *Neary v. Georgia Pub. Serv. Co.*, 27 Ga. App. 238, 107 S. E. 893 (1921); *Decahn v. Edy*, 186 Ind. 205, 115 N. E. 577 (1907).

9. *Minneapolis & St. Louis R. R. v. Golshall*, 244 U. S. 66, 37 Sup. Ct. 598 (1917); *Southern Ry.—Carolina Division v. Bennett*, 233 U. S. 80, 34 Sup. Ct. 566 (1914).

10. *Cochran v. Pittsburg & Lake Erie R. R.*, 31 F. (2d) 769 (App. D. C. 1923); *Central Railroad of N. J. v. Peluso*, 286 Fed. 661 (C. C. A. 2d, 1923).

11. *Pitcairn v. Perry*, 122 F. (2d) 881 (C. C. A. 8th, 1941); *Carpenter v. Baltimore & O. R. R.*, 109 F. (2d) 375 (C. C. A. 6th, 1940); *Eker v. Pettibone*, 110 F. (2d) 451 (C. C. A. 7th, 1940); *Terminal R. R. Ass'n of St. Louis v. Staengel*, 122 F. (2d) 271 (C. C. A. 8th, 1941); *Lowery v. Hocking Valley Ry.*, 60 F. (2d) 78 (C. C. A. 6th, 1932); *Chesapeake & Co. Ry. v. Smith*, 42 F. (2d) 111 (C. C. A. 6th, 1930); *Baltimore & O. R. R. v. Kast*, 299 Fed. 419 (C. C. A. 6th, 1924).

The preceding cases showing the development of the application of the rule *res ipsa loquitur* to actions between employees and employers and the principal case all arose under federal acts. The rule seems settled now in such cases that the rule may be applied.¹² The principal case is representative of the more recent decisions in favor of workmen.

Many state courts independent of similar statutes have applied the rule in this class of litigation. The Missouri courts have been rather liberal in allowing the application of the rule to cases between employer and employees not controlled by federal law. As early as 1892 the Supreme Court of Missouri approved a case¹³ decided on the basis of the rule where the plaintiff was an employee of the defendant. The injury there resulted from the automatic starting of the machine which plaintiff was operating. Following this case is a long line of decisions allowing the rule where the injury results from the automatic starting of machinery.¹⁴ These cases were all decided without reference to federal law.

Aside from cases where the injury results from the automatic starting of machinery, the decisions by the Missouri courts are more hesitant in allowing the application of *res ipsa loquitur*,¹⁵ the courts seemingly considering that the precedents of the automatic starting are to be strictly limited to that type of situation. However, the general rule as stated in these situations is broad enough to cover other types of cases.¹⁶ Where the legislature has placed some extra duty on the employer, the Missouri courts have considered the rule applicable.¹⁷ Under the influence of the recent cases decided by state courts under federal law,¹⁸ the decisions in the automatic starting cases, and the general tendency of legislation to give more and more protection to the employee, making the business bear the loss, further extensions may be anticipated in the application of the rule to other situations in this field. The widespread application of workmen's compensation acts to injured em-

12. (1936) 21 ST. LOUIS L. REV. 166.

13. *Blanton v. Dold*, 109 Mo. 74, 18 S. W. 1149 (1892).

14. *Gordon v. Muchling Packing Co.*, 328 Mo. 123, 131, 40 S. W. (2d) 693, 696 (1931) (sausage grinding machine. This case reviews the former holdings and sets out the rule applicable to such cases); *Kitchen v. Schlueter Mfg. Co.*, 323 Mo. 1179, 20 S. W. (2d) 676 (1929) (punch press); *Nelson v. C. Heinz Stove Co.*, 320 Mo. 655, 8 S. W. (2d) 918 (1928) (power press); *Lowe v. Fox Laundry, Cleaning & Dying Co.*, 274 S. W. 857 (Mo. App. 1925) (pressing machine); *Taul v. Askeew Saddlery Co.*, 229 S. W. 420 (Mo. App. 1921) (power press); *Ash v. Woodward & Turnan Printing Co.*, 199 S. W. 994, 997 (Mo. 1917) (paper cutting machine).

15. *Removich v. Bambrick Bros. Const. Co.*, 264 Mo. 43, 173 S. W. 686 (1915); *Beebe v. Transit Co.*, 206 Mo. 441, 103 S. W. 1019 (1907), note (1908) 12 L. R. A. (N.S.) 760; *Fuchs v. City of St. Louis*, 167 Mo. 620, 67 S. W. 610, 617 (1902). *Contra*: *Ferguson v. Fulton Iron Works*, 220 Mo. App. 525, 259 S. W. 811, 814 (1924) (indicating the more modern approach to the problem).

16. *Gordon v. Muehling Packing Co.*, 328 Mo. 123, 40 S. W. (2d) 693 (1931).

17. *Propulonis v. Goebel Const. Co.*, 279 Mo. 358, 213 S. W. 792 (1919); *Burt v. Nichols*, 264 Mo. 18, 173 S. W. 681 (1915), note, L. R. A. 1917E, 250.

18. *Sibert v. Litchfield & M. Ry.*, 159 S. W. (2d) 612 (Mo. 1942); *Benner v. Terminal R. R. Ass'n of St. Louis*, 348 Mo. 928, 156 S. W. (2d) 657.

ployees has removed many situations which otherwise may have pressed the courts on the immediate problem.

In applying the rule to cases between employee and employer, the further problem arose, which is considered in the principal case, as to how much control the injured employee could have over the instrumentality that injures him and still recover under this rule. The rule *res ipsa loquitur* is ordinarily applied only where sole control and management of the injuring instrumentality is in the defendant.¹⁹ By the very nature of the employment the employee in using the appliance tests the concept of sole management of the defendant. But the courts have for the most part been liberal in construing "sole control and management."²⁰ It has been made easier by federal statutes which make the employer liable for the actions of fellow employees. This attitude reflects the social interest in giving proper protection to the employee in modern mass-production industry. "Because of the extreme division of labor in modern industry, the servant may know nothing of the construction of the machine with which he works, so that when an injury occurs, the master or the person whom he has delegated to take charge of inspection and repair of the machine, is the only one in a position to determine the cause of the injury."²¹

The division of labor characteristic of modern industry not only reduces the possibility of the workman's knowing the cause of the injury, but also greatly reduces his control over the machine he operates. For this reason, cases which at first appear to be a relaxation of the traditional rule, on closer scrutiny are often found to carry it out completely. Where²² an engineer is killed while in control of the engine by its derailment which was caused by a defect of the pony track—a part of the engine—the court said, "The decedent, as engineer, had control of the speed of the engine, but he had no more control and was no more responsible for the proper functioning of the pony track which caused the accident than was the fireman, brakeman, or conductor."

But in determining the application of the rule *res ipsa loquitur* in employer-employee cases the courts have usually rephrased the rule to state the limitations on the control which the employee can have over the injuring instrumentality and still recover. It is generally stated, where the plaintiff employee is injured in an accident by some device or machine, the management, inspection and repair of which is entrusted to other servants exclusively, that *res ipsa loquitur* applies.²³ However, if

19. Terminal R. R. Ass'n of St. Louis v. Staengel, 122 F. (2d) 271 (C. C. A. 8th, 1941); Ridge v. Norfolk Southern Ry., 167 N. C. 510, 83 S. E. 762 (1914), L. R. A. 1917E, 215, 226; 35 AM. JUR., MASTER AND SERVANT § 498; 39 C. J., MASTER AND SERVANT § 976; 18 R. C. L., MASTER AND SERVANT § 124 (Supp. 6, 1929).

20. (1933) 11 N. Y. U. L. Q. REV. 297 points out that the courts in other *res ipsa* cases, besides employer-employee, are liberal in construction of "sole control and management."

21. (1925) 25 COL. L. REV. 109.

22. Eker v. Pettibon, 110 F. (2d) 451 (C. C. A. 7th, 1940).

23. Pitcairn v. Perry, 122 F. (2d) 881, 885 (C. C. A. 8th, 1941); Benner v. Terminal R. R. Ass'n of St. Louis, 348 Mo. 928, 938, 156 S. W. (2d) 657, 661 (1941); Gordon v. Muchling Packing Co., 328 Mo. 123, 140, 40 S. W. (2d) 693, 701 (1931).

plaintiff is charged with the inspection and direction of the repairing of the machine causing the injury, the rule will not apply.²⁴ If the injured employee is supervising an operation which causes his injury, as the re-railing of a freight car, he cannot plead under *res ipsa loquitur*.²⁵ In cases such as the principal one, where the injury is caused by a defect in the road bed or rails,²⁶ it is clear that a member of a train crew had no control of the instrument causing the injury. Likewise the rule has been held applicable where the injury resulted from defects in appliances not under plaintiff's charge, such as couplers,²⁷ brakes,²⁸ electric shock from telephone set;²⁹ where substances were thrown off by passing trains;³⁰ where an elevator³¹ or scaffold³² fell; where a boiler exploded.³³

Perhaps the time has come to change the entire approach to whether the rule *res ipsa loquitur* is applicable to the employee-employer cases, to discard the older decisions based upon an obsolete theory of the relation, and to apply the rule as in other types of situations with special considerations in instances where the injured employee must work with the thing causing the harm yet is not in complete control of it.

M. MARING

WORKMEN'S COMPENSATION—CONFLICT OF LAWS—FULL FAITH AND CREDIT

*Magnolia Petroleum Co. v. Hunt*¹

Plaintiff, a resident of Louisiana, in that state entered into a contract of employment with defendant, a corporation licensed to do business in Louisiana and Texas. He was sent by the defendant into the state of Texas, where, in the course of his employment, he suffered an injury for which he claimed compensation under

24. *Lynch v. N. Y., N. H. & H. R. R.*, 200 N. E. 877 (Mass. 1936).

25. *Dryden v. Western Pacific Ry.*, 1 Cal. App. (2d) 49, 36 P. (2d) 394 (1934).

26. *Sibert v. Litchfield & M. Ry.*, 159 S. W. (2d) 612 (Mo. 1942); *Terminal R. R. Ass'n of St. Louis v. Staengel*, 122 F. (2d) 271 (C. C. A. 8th, 1941); *Williams v. St. Louis-San Francisco Ry.*, 337 Mo. 667, 85 S. W. (2d) 624 (1935); *Lowery v. Hocking Valley Ry.*, 60 F. (2d) 78 (C. C. A. 6th, 1932).

27. *Minneapolis & St. Louis Ry. v. Gotschall*, 244 U. S. 66, 37 Sup. Ct. 598 (1917); *Gable v. Central of Georgia Ry.*, 39 Ga. App. 350, 147 S. E. 135 (1929).

28. *Chesapeake & O. Ry. v. Smith*, 42 F. (2d) 111 (C. C. A. 6th, 1930); *McGrew v. Southern Ry.*, 206 N. C. 873, 175 S. E. 286 (1934).

29. *Benner v. Terminal R. R. Ass'n of St. Louis*, 348 Mo. 928, 156 S. W. (2d) 657 (1941).

30. *Noce v. St. Louis-San Francisco Ry.*, 337 Mo. 689, 85 S. W. (2d) 637 (1935); *Howard v. Chicago & A. R. R.*, 179 Ill. App. 380 (1913); *Pittsburgh, C., C., & St. L. Ry. v. Hoffman*, 57 Ind. App. 431, 107 N. E. 315 (1914).

31. *Artificial Ice & Cold Storage Co. v. Waltz*, 86 Ind. App. 534, 156 N. E. 534 (1927).

32. *Propulonoris v. Goeble Const. Co.*, 279 Mo. 358, 213 S. W. 792 (1919); *Talge Mahogany Co. v. Hockett*, 55 Ind. App. 303, 103 N. E. 815 (1914).

33. *Harris v. Mangum*, 183 N. C. 235, 111 S. E. 177 (1922).

1. 64 Sup. Ct. 208 (U. S. 1943).

the Workmen's Compensation Act of that state. Defendant's insurer paid the statutory benefits pending the award of the Texas commission. In the meantime plaintiff returned to Louisiana and notified the insurer of his intention to claim the benefits of the Louisiana law. He took no further steps to prosecute his claim under the Texas act, disregarded the notice of hearing sent him by the commission of that state and was not represented at the hearing, which resulted in an award in his favor. The award became final and the insurer tendered him the amount required, which plaintiff rejected. Under Texas law, the final award of the commission has the force of a judgment by a court of competent jurisdiction. Plaintiff then brought the instant action against the defendant employer in the Louisiana courts for benefits provided by the Louisiana act. Defendant pleaded the Texas award and contended that it was *res judicata* of the rights of the parties. Judgment was entered for the plaintiff, with the provision that the amounts received from the insurer should be deducted from the benefits permitted under the Louisiana law. The Louisiana court of appeals affirmed and the Louisiana Supreme Court denied *certiorari*. The United States Supreme Court then granted its writ of *certiorari*, directed to the court of appeals, and reversed the judgment, five justices to four.

The decision was indeed about as close as it could have been, for one of the majority, who felt that the case was governed by the recent decision in *Williams v. North Carolina*,² a decision to which he had vigorously dissented, stated that he would have joined the dissenters had they favored overruling that precedent. Instead, they preferred to distinguish it.

The several very able opinions so completely state the conflicting theory and examine the authorities that a commentator can add little to the argument. The decision of the court, although opposed to the weight of previous authority on the precise question,³ seems more nearly in harmony with fairly analagous precedent.

2. 317 U. S. 287, 63 Sup. Ct. 207 (1942), 143 A. L. R. 1273, 1294 (1943), discussed by Evans, *Jurisdiction to Divorce—A Study in Stare Decisis*, (1943) 8 Mo. LAW REV. 177.

3. RESTATEMENT, CONFLICT OF LAWS § 403; DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION (1936) 819; SCHNEIDER, WORKMEN'S COMPENSATION (3d ed. 1941) § 160; GOODRICH, HANDBOOK ON CONFLICT OF LAWS (2d ed. 1938) § 97. *Interstate Power Co. v. Industrial Commission*, 203 Wis. 466, 234 N. W. 889 (1931); *Salvation Army v. Industrial Commission*, 219 Wis. 343, 263 N. W. 349 (1935); *Constanti Migue's Case*, 281 Mass. 373, 183 N. E. 847 (1933); *Gilbert v. Des Lauriers Column Mould Co.*, 180 App. Div. 59, 167 N. Y. Supp. 274 (3d Dep't 1917); *Anderson v. Jarrett Chambers Co.*, 210 App. Div. 543, 206 N. Y. Supp. 458 (3d Dep't 1924); *see Rousanville v. Central R. R.*, 87 N. J. L. 371, 94 Atl. 392 (1915). *Guy McLaughlin's Case*, 274 Mass. 217, 174 N. E. 338 (1931) *semble*. *Contra*: *Hughey v. Ware*, 34 N. M. 29, 276 Pac. 27 (1929); *De Gray v. Miller Bros. Const. Co.*, 106 Vt. 259, 173 Atl. 556 (1934). *Tidwell v. Chattanooga Boiler and T. Co.*, 163 Tenn. 420, 43 S. W. (2d) 221 (1931) *semble*.

None of the Supreme Court decisions cited seem very directly in point, except for the general principles which have evolved out of the construction of the "full faith and credit" clause of the Constitution. Thus, *Troxell v. Delaware, L. & W.*

It has never been supposed that a successful, any more than an unsuccessful, plaintiff could relitigate in another state a civil claim on which final judgment had been rendered by a court of competent jurisdiction of a sister state,⁴ in the hope of a higher verdict.⁵ And the circumstance that the "internal" law of the second state would have required a different judgment, and that the conflict of laws rule of the second state would have required the application of its own "internal" law (as distinguished from the situation at the trial in the first state, where the forum, by its conflicts rule had applied its "internal" law) has not been thought to create a separate claim or right which had not been adjudicated. Although the United States Constitution has not, with rare exceptions,⁶ been held to dictate the choice of law to be applied by the first forum to hear the controversy, it has consistently been used to compel recognition of the conclusiveness of the judgment when rendered. Neither the legitimate concern of the second state with the parties and facts of the case, which would justify the imposition of its own internal law if the case were being tried before its courts originally, nor a strong public policy

R. R., 227 U. S. 434, 33 Sup. Ct. 274 (1913), relied on by Justice Douglas, merely held that a judgment for defendant in an action under state law brought by plaintiff in her individual capacity did not bar a subsequent action under the Federal Employers' Liability Act brought by plaintiff in representative capacity, where, because the injury was incurred in interstate commerce, the federal act was the exclusive remedy and under it, the action could only be brought by the administratrix. It seems clear the case does not recognize the possibility of two separate claims, arising from the laws of two jurisdictions, for the single injury. *Wabash R. R. v. Hayes*, 234 U. S. 86, 34 Sup. Ct. 729 (1914), thought by Chief Justice Stone to have overruled parts of the *Troxell* opinion, simply held that a recovery was possible under state law upon a pleading which stated a good cause of action under state law, had not it averred that the injury took place in interstate commerce, where the proof failed to establish the interstate character of the activity. The opinion did state there was but one cause of action upon the true facts, and whether or not recovery was under state law or the Federal Employers' Liability Act depended upon the character of the commerce. In *Chicago, R. I. & P. Ry. v. Schendel*, 270 U. S. 611, 46 Sup. Ct. 420 (1926), debated by all opinions, the final state court decision that defendant was engaged in intrastate commerce, so that the state act was applicable, was held *res judicata* of that issue to prevent a subsequent suit under the federal act, which applied only to interstate commerce.

4. A distinction is made between judgments of sister states and of foreign jurisdictions. In the latter case, the cause of action is said not to be merged in the judgment, and a successful claimant may, if he chooses, sue again on the original claim, to establish which the judgment may be used as evidence. *Eastern Town-ship Bank v. H. S. Beebe Co.*, 53 Vt. 177 (1880). *Cf. Alaska Commercial Co. v. Debney*, 144 Fed. 1 (C. C. A. 9th, 1906).

5. STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* (1937) 107, n. 3.

6. At one time it appeared that Workmen's Compensation might be one of the exceptions. *See Bradford Electric Light Co. v. Clapper*, 286 U. S. 145, 52 Sup. Ct. 571 (1932). More recently, there seems to have been considerable recession from that position. *Alaska Packers' Ass'n v. Industrial Comm'n*, 294 U. S. 532, 55 Sup. Ct. 518 (1935) (permitting application of the Act of the place on contract and employee's residence); *Pacific Employers Insurance Co. v. Industrial Accident Comm'n*, 306 U. S. 493, 59 Sup. Ct. 629 (1939) (permitting application of the Act of the place of injury). Attempts at reconciliation of the first opinion with the latter two have not been wholly satisfactory.

(whatever that may mean) against the conclusion reached by the court of the first state, as evidenced by a marked difference in the internal laws of the two states, will justify refusal to accord the first judgment its full effect as *res judicata*,⁷ although the courts of the second state may possibly be permitted to deny affirmative assistance in enforcing that judgment.⁸ If we suppose that *A*, a domiciliary of state 2 who in that state has no capacity to contract, enters into a contract with *B* in state 1, by whose law he is competent, and a suit upon that contract is brought in state 1 by the prevailing conflicts rule of this country the law of state 1 will be applied⁹ and judgment rendered for *B*. If this judgment were introduced in court in state 2, a Supreme Court decision that it was not conclusive of the rights and liabilities of the parties to that contract would certainly come as a great surprise to the profession. Yet it cannot be denied that state 2 had a real concern for the welfare of its domiciliaries and might have been justified as an original matter in applying its own tests of capacity to the contract entered into in another state. In fact, a considerable number of courts have done so.¹⁰

Perhaps the dissenting justices intended to carry their argument to its logical conclusion and reconsider the whole body of precedent under the full faith and credit provisions of the Constitution. Mr. Justice Douglas, in reply to the contention that *Williams v. North Carolina* was controlling, observed that the question was whether the two conflicting policies (of the two states) could somehow be accommodated, and pointed out that while that might be impossible where the issue was the marital status of two spouses (*sic*) domiciled in different states, it was not beyond possibility in the instant situation to give each state opportunity to enforce its Workmen's Compensation policy. Mr. Justice Black argued that even if the Texas decision were intended to foreclose rights under the Louisiana act, which he did not believe to be the case, it should not be permitted to deny to Louisiana the power to grant the larger measure of compensation which it felt its residents needed, for injuries incurred in the course of employment entered into in Louisiana.¹¹

7. The leading case is *Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641 (1907).

8. The exact boundary of this privilege has not been marked out. *Cf.* *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U. S. 373, 24 Sup. Ct. 92 (1903) with *Kenney v. Supreme Lodge*, 252 U. S. 411, 40 Sup. Ct. 371 (1920) 10 A. L. R. 716, 719 (1921).

9. 2 BEALE, *CONFLICT OF LAWS* (1935) 1177. See notes (1922) 18 A. L. R. 1518, (1931) 71 A. L. R. 744.

10. This is particularly true as to the capacity of married women. In general, see the authorities cited *supra*, note 9.

11. Mr. Justice Black was even more specific, in that he contended it was a drastic innovation to read into the Constitution that "two recoveries shall never be allowed by separate states for losses from a single personal injury." It is submitted that this has long been the accepted interpretation of the "full faith and credit" clause except as applied to Workmen's Compensation. If, as was held in *Kenney v. Supreme Lodge*, 252 U. S. 411, 40 Sup. Ct. 371 (1920), the state of Illinois could not effectuate its statutory policy not to enforce a judgment of a sister state rendered under the latter's wrongful death statute, it is hard to understand how it could effectuate a policy of allowing a recovery for allegedly wrongful death

Of course, that is just what is done whenever full faith and credit is given a foreign judgment rendered according to a domestic policy repugnant to the policy of the later forum. And so far as the Texas award having been intended to dispose only of rights accruing under the Texas act is concerned, it must be remembered that no judgment is based upon or enforces foreign law.¹² The only law which any court can administer is the law of the same jurisdiction and the existence of a given foreign law is but a fact which may be of primary significance, as the conflicts law of the jurisdiction may will.

To some extent, it is true, problems of Workmen's Compensation have been regarded as *sui generis*. Because the acts usually provide their own exclusive mode of administration, courts have rarely been confronted with the question of whether they should enforce the remedies provided by the act of another state which had some connection with the injury or parties. Rather, the courts have had to decide whether the act of their own state was or was not intended to cover the situation.¹³ Many opinions have suggested that the matter was more than a controversy between employer and employee and that the state was an interested party, concerned in providing benefits for persons who might otherwise be public charges. It could hardly be denied that several states might provide relief benefits for the same person if they chose. Can they do so at the expense of the same employer, singled out from the other taxpayers by reason of employment of the injured person? As long as the employer bears the cost, it is hard to see in what way the interest of the state is greater than in more conventional forms of tort litigation.

O. B. E.

when a recovery had been denied in a court of competent jurisdiction, or a different assessment of damages made.

12. This really goes to the essence of Mr. Justice Black's argument. He would apparently agree that if the judgment were enforceable where rendered, it must be enforceable everywhere as a determination of the law of the state in which it was rendered. He would not make it conclusive of the law of the other states and of the rights given under the latter laws. As he gives no reason for distinguishing between statute and common law, under that reasoning a plaintiff might retry any case in as many jurisdictions as he could serve the defendant, for as stated in the text, no judgment is upon any other rights than those created by the law of the forum. The doctrine of merger in judgment has never been so limited and whatever the literal meaning of the full faith and credit provisions, to so circumscribe their effect would indeed diminish its integrating effect upon the forty-eight states.

13. For the Missouri decisions, see Bour, *Recent Missouri Decisions and the Restatement of Conflict of Laws* (1938) 3 MO. L. REV. 143. For a summary of the treatment of other courts, see note (1939) 4 MO. L. REV. 203. For a summary of statutory provisions, see note (1944) 57 HARV. L. REV. 242.