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Conflict of Laws—Recovery under N.Y. Compensation Act Does Not Bar Suit against Co-Employee in Ohio

Erratum

Page 322, line 9. For "wether" read "whether."

of the magnitude and complexity of organization of the union it may be that the employee is becoming aware of a need to find a more satisfactory means of gaining recognition.

Labor organizations have become an integral part of our business life. Their members constitute a large percentage of our citizenship to the extent that the fate of the union is vital to the public interest. Where public and individual rights have been in opposition, policy considerations have demanded that the greater public interest prevail, thus the interests of the individual are often overridden by dominant interest groups.¹⁵ Here the interest of the larger group is being subordinated to the rights of an individual though the public interest may be adversely affected.

Clearly the individual needs more adequate and certain protection in this area. It is doubtful, however, that a means which may destroy the uniformity of substantive and procedural law essential to matters having impact on a national labor regulation, and which could so weaken, as to make ineffectual, the employee's only protector, provides a solution.

MARGARET RAY

CONFLICT OF LAWS — RECOVERY UNDER N. Y. COMPENSATION ACT DOES NOT BAR SUIT AGAINST CO-EMPLOYEE IN OHIO

Plaintiff's decedent and the defendant, New York residents and co-employees of a New York corporation, were involved in an automobile accident in Ohio while in the course of employment. Following her husband's death, plaintiff filed an application for death benefits under the Workmen's Compensation Law of New York¹ on behalf of herself and the decedent's children. An award was made under the New York law.

Subsequently, the plaintiff instituted the present action in Ohio under Ohio's wrongful death statute.² Defendant pleaded as an affirmative defense the plaintiff's acceptance of benefits under the New York law, which provides that such benefits shall be the exclusive remedy, barring actions against both the employer and co-employees. Plaintiff's demurrer to this defense was overruled and, as she declined to plead further, the action was dismissed. On appeal, the court of appeals reversed the judgment and remanded the cause for further proceedings.³

The defendant appealed from this decision. The Supreme Court affirmed the decision of the court of appeals that the New York Work-

15. *Garner v. Teamster's Union*, 346 U.S. 485, 501 (1953). ". . . To the extent that a private right may conflict with a public one, the former is superseded. To the extent that the public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded. . . ."

men's Compensation Law, with the benefits and immunities thereunder conferred, did *not* bar this tort action in Ohio.⁴

The supreme court based its decision upon the rule that the *lex loci*⁵ governs as to the substantive rights of the parties and the *lex fori*⁶ governs the procedural rights. Thus, the Ohio law was held to be controlling because the Ohio law, under the decision in *Morrow v. Hume, Admx.*,⁷ does not bar a civil action against a co-employee because an award has been made under the Workmen's Compensation Act. Further, Section 4123.54 of the Ohio Revised Code, while specifically barring a civil action against an employer when a non-resident temporarily in Ohio is injured and is covered by the Workmen's Compensation Law of a sister state, does not mention immunity from suit for a co-employee.

Most of the opinion was concerned with establishing the rule that suits by an injured person or a decedent's dependents against a co-employee are not barred by Ohio law. Assuming that this is correct, it does not decide the central issue; whether the right conferred by Ohio or the immunity conferred by New York should prevail. As this was an important case of first impression in the complex area of Workmen's Compensation-Conflict of Laws, the mechanical adoption of the rule of *lex loci*, with no real consideration of the underlying problems raised, seems unwarranted.

The supreme court made no ruling as to the applicability of the full faith and credit clause of the United States Constitution because the appellant did not argue the point at this level after an unfavorable ruling in the court of appeals.⁸ The court of appeals followed the holding of the United States Supreme Court in the case of *Carroll v. Lanza*, that

... in these personal injury cases the State where the injury occurs need not be a vassal to the home state and allow only that remedy which the home state has marked as the exclusive one.⁹

This decision, following a line of confusing (and at times contradictory) decisions,¹⁰ gives weight to the conclusion:

1. N.Y. WORKMEN'S COMP. LAW § 29(6).
2. OHIO REV. CODE § 2125.01.
3. Brief for Appellee, p. 27, *Ellis, Admx. v. Garwood*, No. 24104, Ct. App. Ohio, 8th Dist., August 13, 1957.
4. 168 Ohio St. 241 (1958).
5. The law of the place where the injury occurred.
6. The law of the jurisdiction where the litigation takes place.
7. 131 Ohio St. 319, 3 N.E.2d 39 (1936).
8. Brief for Appellee, pp. 32-33, *Ellis, Admx. v. Garwood*, No. 24104, Ct. App. Ohio, 8th Dist., August 13, 1957.
9. 349 U.S. 408, 412 (1955).
10. *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932), held that where

Any state having a more-than-casual interest in a compensable injury may apply its compensation act to that injury without violating its constitutional duty to give full faith and credit to the compensation statutes of other states also having an interest in the injury.¹¹

However, it must be noted that while *Carroll v. Lanza* does not forbid a state from applying its own compensation law so long as the forum state has some interest in the matter, the case does not purport to formulate the proper or better rule as to the choice of laws.¹² Furthermore, while not required to do so by the full faith and credit clause of the Constitution, the immunities granted by the foreign state have been recognized and upheld by the forum state on the basis of comity in cases similar to the case at bar.¹³

The Ohio Supreme Court found that "the broad uncontroverted rule is that the *lex loci* . . . governs as to the substantive rights of the parties."¹⁴ While this is a quick, easy conflicts rule to apply in tort law, there is a distinction between regular tort actions and these tort actions which are connected with the area of Workmen's Compensation¹⁵ which went unnoticed by the supreme court.

In the latter field, the general rule in regard to third-party actions brought in the state of injury after an award in a foreign state, is that "the substantive rights of the employee, the subrogated insurance company and the employer are governed by the law of the foreign state."¹⁶ The reasoning behind this is that if, before an award has been made, the forum state decides to confer the *benefits* of its own statute, no harm ensues to any of the parties, but after an award, "if the defenses created

a state was merely the locus of the injury, it did not have a sufficient interest to justify the application of its own Workmen's Compensation law; *Alaska Packers v. Industrial Accident Comm'n.*, 294 U.S. 532 (1935), allowed the home state to apply its compensation law on the basis that otherwise the victim might become a public charge; *Pacific Employers Ins. Co. v. Industrial Accident Comm'n.*, 306 U.S. 493 (1939), held that the state of injury could apply its own compensation law since the law of the foreign state was "obnoxious" to the public policy of the forum; *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947), said the true test was not the place of work or injury, but the existence of some substantial connection between the particular employee-employer relationship and the forum state.

11. 2 LARSON, WORKMEN'S COMP. LAW § 86.00, at 367 (1952).

12. *Ohlhaber v. Narron*, 195 F.2d 676 (4th Cir. 1952); *Wilson v. Faull*, 27 N.J. 105, 120, 141 A.2d 768, 776 (1958).

13. *Stacy v. Greenberg*, 9 N.J. 390, 88 A.2d 619 (1952), *reaffirmed* 14 N.J. 262, 102 A.2d 48 (1954).

14. 168 Ohio St. 241, 246 (1958).

15. RESTATEMENT, CONFLICT OF LAWS, Topic 3 (1934); 2 LARSON, *op cit. supra* note 11, § 88.10.

16. 2 LARSON, *op. cit. supra* note 11, § 88.00 at 402.

by the foreign state are not enforced, irremediable harm . . . is the result."¹⁷

The reason for this is to be found in the nature of Workmen's Compensation theory. Under this compromise scheme, an expeditious and certain remedy is provided the employee by the statutory imposition of absolute but limited and determinate liability upon the employer. A balance is struck in that the employee surrenders his right to damages at law against the employer in return for swift recovery, independent of fault. The employer gives up his right of common law defenses in return for immunity from common law negligence suits.¹⁸

When a state, such as New York, extends immunity to co-employees, the worker gives up the right to common law verdicts against co-employees in return for immunity from common law negligence suits resulting from his on-the-job negligence — thereby maintaining the balance.¹⁹

In Workmen's Compensation theory, third-party suits are justified on the basis that a stranger to the system — one who has parted with nothing — should not be absolved of liability because of the system.²⁰ However, the efficacy of this type of action turns upon the state having a subrogation statute enabling the employer to recover his outlay, thereby avoiding an unjustifiable double recovery on the part of the claimant.

The Ohio Supreme Court, by its present decision, has treated the defendant as a third-party — one who has given up nothing. In fact, the co-employee *has* already given up something — his right to sue a fellow employee for injuries caused by his negligence. Thus, the balance struck by the New York law in regulating the employment relationship coming within their jurisdiction has been destroyed.

Even though Ohio allows suits against co-employees, and allows double recovery in third party suits,²¹ it seems grossly unfair to apply the eccentricities of Ohio Law in a suit where Ohio has only a casual interest. The result reached by the Ohio Supreme Court cannot be justified upon the basis of the New York law being obnoxious to the public policy of Ohio because of the above differences. The basic purpose in each state remains the same — swift, assured compensation for the employee and absolute but limited liability on the part of the employer.²²

17. *Wilson v. Faull*, 27 N.J. 105, 119, 141 A.2d 768, 775 (1958).

18. *Id.* at 116, 141 A.2d at 774.

19. 2 LARSON, *op. cit. supra* note 11, § 72.20.

20. *Id.* § 71.20.

21. *Trumbull Cliffs Furnace Co. v. Shakovsky*, 111 Ohio St. 791, 146 N.E. 306 (1924), and *Trucson Steel Co. v. Trumbull Cliffs Furnace Co.*, 120 Ohio St. 394, 166 N.E. 368 (1929).

22. *Stacy v. Greenberg*, 9 N.J. 390, 398, 88 A.2d 619, 623 (1954).