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## WORKMEN'S COMPENSATION AND THE PLACE OF CONTRACT

The California workmen's compensation system, as presently applied, provides unequal protection for California residents employed inside and outside the state. For example, under the present law if two California residents were to suffer the same injury while performing similar duties for the same employer, it is possible that one could qualify for workmen's compensation in California while the other could not. The latter individual may be able to claim benefits in another state that may or may not be as remunerative as those to which he would have been entitled in California, or he may go uncompensated altogether.

This inequality is made more acute by the fact that while numerous residents are denied coverage, some nonresidents *may* qualify even though they have never entered California.<sup>1</sup> Moreover, it is possible for a resident and a nonresident to suffer the same injury under the same conditions, and only the nonresident be able to claim compensation in California. These anomalous situations are made possible by provisions<sup>2</sup> in the California workmen's compensation laws giving *anyone* who qualifies for employee status and who has entered into a contract of hire within the state the right to file a claim for benefits under the California laws. There is no provision, however, that insures coverage for *resident* employees unless they can establish that (a) they entered into a contract of hire in California,<sup>3</sup> (b) they are regularly employed here,<sup>4</sup> or (c) they were injured here under circumstances other than those provided for in Labor Code section 3600.5(b).<sup>5</sup> This is the

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1. See notes 63-65 & accompanying text *infra*.

2. See CAL. LABOR CODE §§ 3600.5, 5305. For the language of these sections see notes 3 & 5 and text accompanying note 71 *infra*.

3. CAL. LABOR CODE § 3600.5(a) provides: "If an employee who has been hired or is regularly employed in the state receives personal injury by accident arising out of and in course of such employment outside of this state, he, or his dependents in the case of his death, shall be entitled to compensation according to the law of this state."

4. *Id.*

5. In *Pacific Emps. Ins. Co. v. Industrial Acc. Comm'n*, 10 Cal. 2d 567, 75 P.2d 1058, *aff'd*, 306 U.S. 493 (1938), compensation was awarded a claimant whose only contact with this state was that his injury occurred here. Coverage on the basis of injury alone was limited in 1955 by the enactment of CAL. LABOR CODE § 3600.5(b) which provides:

"Any employee who has been hired outside of this state and his employer shall be exempted from the provisions of this division while such employee is temporarily within this state doing work for his employer if such employer has furnished workmen's compensation insurance coverage under the workmen's compensation insurance laws or similar laws of a state other than California, so as to cover such employee's

result of an unfortunate perpetuation of an inappropriate fiction used by early 20th century lawmakers to explicate a novel system in terms of long-established common law principles. As presently applied, the California act impairs the basic principles of a workmen's compensation system by allowing the safety and well-being of those with whom a state should be most concerned, its residents, to turn on the fortuitous circumstance of their place of work or injury, or the place where the contract of employment was consummated. This Note will attempt to expose the misbegotten heritage of the place-of-contract theory as well as the disadvantages of applying such an ill-suited standard in the present system.

### Origin of the Contract Theory

The first states to enact workmen's compensation laws did so hesitantly, fearing the constitutional objections that would inevitably follow such revolutionary legislation. To minimize the effect of objections to the concept of employer liability without fault for an employee's injuries, some acts were made elective, at the option of the employer.<sup>6</sup> If the employer elected to come within the act, it was said that a new contractual relationship was created between the employer and the employee.<sup>7</sup> The provisions of the statute were "read into" the contract of employment,<sup>8</sup> and the right to compensation was based upon

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employment while in this state; provided, the extraterritorial provisions of this division are recognized in such other state and provided employers and employees who are covered in this state are likewise exempted from the application of the workmen's compensation insurance or similar laws of such other state. The benefits under the Workmen's Compensation Insurance Act or similar laws of such other state, or other remedies under such act or such laws, shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this state.

"A certificate from the duly authorized officer of the appeals board or similar department of another state certifying that the employer of such other state is insured therein and has provided extraterritorial coverage insuring his employees while working within this state shall be prima facie evidence that such employer carries such workmen's compensation insurance."

For a discussion of this subsection see text accompanying note 69 *infra*. See generally REVIEW OF SELECTED 1955 CODE LEGISLATION § 98 (Cal. Cont. Educ. Bar ed. 1955); 44 CALIF. L. REV. 387 (1955).

6. *E.g.*, *Berry v. M.F. Donovan & Sons*, 120 Me. 457, 115 A. 250 (1921); *Barnhart v. American Concrete Steel Co.*, 227 N.Y. 531, 125 N.E. 675 (1920); *West v. Kozler*, 104 Ore. 94, 206 P. 542 (1922); *Gooding v. Ott*, 77 W. Va. 487, 87 S.E. 862 (1916). For a list of additional states and accompanying cases see 71 C.J. *Workmen's Compensation* § 2 n.30(a) (1935).

7. *Preveslin v. Derby & Ansonia Developing Co.*, 112 Conn. 129, 142, 151 A. 518, 522 (1930); *Baker v. St. Louis Smelting & Ref. Co.*, 145 Kan. 273, 280, 65 P.2d 284, 288 (1937); *Smith v. Van Noy Interstate Co.*, 150 Tenn. 25, 31, 262 S.W. 1048, 1049 (1924).

8. *Sneeden v. Industrial Comm'n*, 366 Ill. 552, 558, 10 N.E.2d 327, 330 (1937);

“an agreement implied by the law.”<sup>9</sup> Thus, the contract of employment became the source of liability, and actions or proceedings to secure compensation were, in some jurisdictions, declared to be suits upon contract<sup>10</sup> or for breach of contract.<sup>11</sup> When it became necessary to determine to what extent the local act applied to persons injured outside of the state, conventional conflict of laws principles for contracts were applied, for it was well-settled that the legislature had the power to enforce a contract between an employer and employee that was extra-territorial in effect.<sup>12</sup>

Those states that enacted compulsory statutes<sup>13</sup> met with immediate difficulty in trying to explain this new liability as one arising out of contract.<sup>14</sup> It is obvious that if an act is compulsory and thus not open to rejection by the parties,<sup>15</sup> an essential element of contract, mutual assent, is lacking.<sup>16</sup> Also, if the right to compensation rested upon contract, it would seem to follow that such right would exist only in cases of employment contracts made *after* the passage of the statute. However, it has never been supposed that any such limitation could be upheld,<sup>17</sup> and the statute applies even though the contract of employment was made before the statute went into effect.<sup>18</sup> Also, if the act is said

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Post v. Burger & Gohlke, 216 N.Y. 544, 555, 111 N.E. 351, 354 (1916).

9. American Radiator Co. v. Rogge, 86 N.J.L. 436, 437, 92 A.2d, 85, 86 (Sup. Ct. 1914).

10. Woods v. City of La Follette, 185 Tenn. 655, 207 S.W.2d 572 (1947); Cornett v. City of Chattanooga, 165 Tenn. 563, 56 S.W.2d 742 (1933); Southern Sur. Co. v. Morris, 22 S.W.2d 1098 (Tex. Civ. App. 1929).

11. Beckoff v. Dan Creek Mining Co., 6 Alas. 218 (1920).

12. See, e.g., Kennerson v. Thames Towboat Co., 89 Conn. 367, 376, 94 A. 372, 376 (1915); Beall Bros. Supply Co. v. Industrial Comm'n, 341 Ill. 193, 197, 173 N.E. 64, 66 (1930); Rounsaville v. Central Ry., 87 N.J.L. 371, 374, 94 A. 392, 393 (Sup. Ct. 1915); Post v. Burger & Gohlke, 216 N.Y. 544, 549, 111 N.E. 351, 352 (1916).

13. While in elective acts either the employer, the employee, or both may have the option to accept or reject the act, no such options are conferred in the case of compulsory acts. Under compulsory acts, strict penalties may be provided for noncompliance by the employer. See CAL. LABOR CODE §§ 3706, 3710-3710.2, 3712, 3715, 4554.

14. See, e.g., Ocean Acc. & Guar. Corp. v. Industrial Comm'n, 32 Ariz. 275, 257 P. 644 (1927); North Alas. Salmon Co. v. Pillsbury, 174 Cal. 1, 162 P. 93 (1916); Note, *Contractual Extraterritoriality of Workmen's Compensation Statutes*, 80 U. PA. L. REV. 1139, 1139-40 (1932). See generally Dwan, *Workmen's Compensation and the Conflict of Laws*, 11 MINN. L. REV. 329, 332-41 (1927).

15. Besides not being able to reject the act in toto, the parties are unable to alter or eliminate any particular provision of the act. See Smith v. Heine Safety Boiler Co., 224 N.Y. 9, 11, 119 N.E. 878, 881 (1918).

16. H. GOODRICH & E. SCOLES, *CONFLICT OF LAWS* 186 (4th ed. 1964); 21 MICH. L. REV. 449, 450 (1923); see Davidson v. Payne, 281 F. 544 (D.C. Kan. 1922) (dealing with an elective act); 37 HARV. L. REV. 375, 376 (1924).

17. North Alas. Salmon Co. v. Pillsbury, 174 Cal. 1, 2-3, 162 P. 93 (1916).

18. Drtina v. Charles Tea Co., 281 Ill. 259, 118 N.E. 69 (1917).

to be "read into" the contract of employment at the time and place of its inception, subsequent amendments to the act would, under ordinary contract principles, have no effect on the original obligation. Yet it has been generally held that the law in force at the time of injury governs the right to, or liability for, compensation.<sup>19</sup>

The California Supreme Court was quick to discern the contradictions that arose when the contract theory was applied to a compulsory system.<sup>20</sup> In a case involving an employee who was hired in San Francisco and injured while working in Alaska, the court first upheld the jurisdiction of the California Industrial Accident Commission on the grounds that the workmen's compensation law entered into and became a part of the employment contract. On rehearing, the court recanted:

Upon further study, we are satisfied that this view [expressed at the first hearing] is not tenable. The liability of the employer to pay compensation arises from the law itself, rather than from any agreement of the parties. The law operates upon a status, *i.e.*, that of employer and employee, and affixes certain rights and obligations to that status. True, the relationship of employer and employee has its inception in a contract, but, once the relation is created, its incidents depend, not upon the agreement of the parties, but upon the provisions of the law. . . . It may well be said that the rights declared by an elective statute have their origin and sanction in the agreement of the parties to be bound by the statute. *Under a compulsory statute, however, the correlative rights and obligations are not founded upon contract.*<sup>21</sup>

Even more significant is the renunciation of the contract theory by the United States Supreme Court when it stated that "workmen's compensation legislation rests upon the idea of status, not upon that of implied contract . . . ."<sup>22</sup> It is unfortunate that some state courts persisted in branding the new obligations placed on the employer as a form of liability arising out of the employment contract.<sup>23</sup> The better view, as espoused by the Supreme Court, was to explain the new legislation as having its essence in "the relationship which the employee

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19. *E.g.*, *Hopkins v. Matchless Metal Polish Co.*, 99 Conn. 307, 121 A. 828 (1923) (holding that the employer's election incorporates the act plus subsequent amendments); *Lyon v. Wilson*, 201 Kan. 768, 443 P.2d 314 (1968); *Rosell v. State Indus. Acc. Comm'n.*, 164 Ore. 173, 95 P.2d 726 (1939); *Bodine v. Department of Labor and Indus.*, 29 Wash. 2d 879, 190 P.2d 89 (1948); *Anderson v. Miller Scrap Iron Co.*, 169 Wis. 106, 170 N.W. 275 (1919). *See also* GOODRICH & SCOLES, *supra* note 14, at 186.

20. *See* *North Alas. Salmon Co. v. Pillsbury*, 174 Cal. 1, 162 P. 93 (1916).

21. *Id.* at 2, 162 P. at 93 (emphasis added). The Wisconsin Supreme Court came to a similar conclusion in *Anderson v. Miller Scrap Iron Co.*, 169 Wis. 106, 113, 170 N.W. 275, 277 (1919).

22. *Cudahy v. Parramore*, 263 U.S. 418, 423 (1923).

23. *See* cases cited notes 7, 8 & 10 *supra*.

bears to his employment”:

Workmen's compensation legislation rests upon the idea of status . . . that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry. . . . The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment . . . .<sup>24</sup>

The authority of the state to regulate this relationship has overwhelmingly been attributed to its police power rather than its power to enforce contracts made within its boundaries.<sup>25</sup> In support of the constitutionality of Washington's compulsory system, the Supreme Court said:

We are clearly of the opinion that a state, *in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people*, may regulate the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability . . . and may require that these human losses shall be charged against the industry . . . .<sup>26</sup>

### The Contract Theory Today

Despite the Supreme Court's rejection of the contract theory, it has survived to the extent that presently the most common standard for determining workmen's compensation coverage is where the contract of employment was made.<sup>27</sup> In fact, many states have incorporated into their act a provision that an employee is covered if he has been hired within the state.<sup>28</sup> The contractual foundation for this test is not entirely without merit since the application of almost all workmen's compensation systems requires that there be a contract of employment.<sup>29</sup> A

24. *Cudahy v. Parramore*, 263 U.S. 418, 423 (1923). See also Note, *Nature of Employer's Liability Under Workmen's Compensation Acts*, 84 U. PA. L. REV. 85 (1935).

25. *E.g.*, *Madera Sugar Pine Co. v. Industrial Acc. Comm'n*, 262 U.S. 499, 502 (1923); *Western Indem. Co. v. Pillsbury*, 170 Cal. 686, 694, 151 P. 398, 401 (1915); *Grasse v. Dealer's Transp. Co.*, 412 Ill. 179, 190, 106 N.E.2d 124, 130 (1952); *Breimhorst v. Beckman*, 227 Minn. 409, 430, 35 N.W.2d 719, 732 (1949); *Mandle v. Kelly*, 229 Miss. 327, 343, 90 So. 2d 645, 649 (1956); *Cataldo v. Admiral Inn, Inc.*, 227 A.2d 199, 203 (R.I. 1967).

26. *Mountain Timber Co. v. Washington*, 243 U.S. 219, 243 (1917) (emphasis added).

27. 3 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION*, §§ 87.11, 87.31 (1968) [hereinafter cited as LARSON]. See generally 3 LARSON, app. A, table 6.

28. *E.g.*, ARIZ. REV. STAT. ANN. § 23-904A (1956); OKLA. STAT. ANN. tit. 85, § 4 (Supp. 1969); TEX. REV. CIV. STAT. ANN. art. 8306, § 19 (1967); UTAH CODE ANN. § 35-1-54 (1953); VT. STAT. ANN. tit. 21, § 619 (1967).

29. 1A LARSON § 47. But see CAL. LABOR CODE § 3351. This section recognizes persons in service under appointment or apprenticeship as employees as well as those under a contract of hire.

friendly volunteering of services will not suffice.

Probably the greatest advantage of the contract theory was that it enabled the application of well-established legal principles to determine jurisdiction in situations where the employee had contacts with more than one state. For jurisdictional purposes, the law has always entertained the fiction that every contract has a determinable time and place of inception.<sup>30</sup> In the workmen's compensation field, this fiction was preferred to the nebulous characteristics suggested by the terms "status" or "employment relationship."<sup>31</sup> Even California, which had rejected the contract theory as the basis of liability,<sup>32</sup> retained it as a practical device to be used in determining whether its act applied.<sup>33</sup> Evidently, it was thought that such a device would provide the basis for jurisdiction and also facilitate the rapid disposition of disputed claims. The fallacy of this latter conclusion is very adequately illustrated in two recent California cases.

In the first,<sup>34</sup> a California resident accepted a position by telephone to work for a corporation whose headquarters were located in Denver, Colorado. The job had been offered to him through a Denver employment agency. He was told to report to a location in Wyoming where he filled out and signed several documents, including a contract to work as a "mud logger" in Utah. Sometime later, he was injured in Utah, and in 1965 he filed a claim for workmen's compensation in California where he had been receiving medical treatment. The only disputed issue was whether, within the meaning of sections 5305<sup>35</sup> and 3600.5<sup>36</sup> of the California Labor Code, the applicant, at the time of his injury, was working pursuant to an employment contract made in California. The referee found that the telephone calls between the Denver agency and the California applicant constituted a contract made in California, but that this contract was rescinded in Wyoming when the applicant executed the written documents. Since the written con-

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30. See H. GOODRICH & E. SCOLES, *CONFLICT OF LAWS* 201 (4th ed. 1964).

31. Earlier cases basing compensation legislation on the idea of status were *Cudahy v. Parramore*, 263 U.S. 418, 423 (1923); *Lane v. Industrial Comm'r*, 54 F.2d 338, 341 (2d Cir. 1931); *Alaska Packers' Ass'n v. Industrial Acc. Comm'n*, 200 Cal. 579, 584, 253 P. 926, 928 (1927); *Val Blatz Brewing Co. v. Gerard*, 201 Wis. 474, 477, 230 N.W. 622, 624 (1930).

More recent cases employing the idea of status are *Argonaut Ins. Co. v. Industrial Acc. Comm'n*, 104 Cal. App. 2d 27, 29, 230 P.2d 637, 638 (1951); *Crilly v. Ballou*, 353 Mich. 303, 307, 91 N.W.2d 493, 496 (1958); *Grenier v. Alta Crest Farms*, 115 Vt. 324, 329, 58 A.2d 884, 887 (1948).

32. See note 21 *supra*.

33. See CAL. LABOR CODE § 3600.5(a).

34. *Travelers Ins. Co. v. Workmen's Comp. App. Bd.*, 68 Cal. 2d 7, 434 P.2d 992, 64 Cal. Rptr. 440 (1967).

35. See text accompanying note 71 *infra*.

36. See note 3 *supra*.

tract gave California no jurisdiction of the Utah injury, the application was dismissed.<sup>37</sup> Upon petition for reconsideration, the Workmen's Compensation Appeals Board held that the oral agreement was made in California, where the offer of employment was accepted, and that the written contract did not extinguish it; therefore, California had jurisdiction and could award compensation.<sup>38</sup>

On appeal, the court of appeal found that the employment agency was acting as agent for the applicant and therefore the contract was not made until the agency transmitted the employee's offer to the employer, who accepted in Denver. Therefore, the contract was made in Colorado and California lacked jurisdiction.<sup>39</sup> In 1967, more than two years after the filing date, the California Supreme Court reversed the court of appeal and reinstated the findings of the Workmen's Compensation Appeals Board giving California jurisdiction to award compensation to its injured resident.<sup>40</sup>

A similar incident occurred in *Reynolds Electric and Engineering Co. v. Workmen's Compensation Appeals Board*.<sup>41</sup> The employer, Reynolds, had an agreement with the International Association of Bridge, Structural and Ornamental Iron Workers whereby one of the union's locals was to refer workers to the employer. Pursuant to this agreement the claimant, a resident of California, was dispatched to a jobsite in Nevada. Upon reporting, he was instructed to fill out forms that were to be used in obtaining a security clearance and then told to report on the following Monday. A little over a month later while in the scope of his employment in Nevada, he sustained an injury from which his claim for California compensation resulted.

At a hearing before the referee, an order dismissing the application was entered on grounds that the appeals board had no jurisdiction since the contract of employment had been consummated in Nevada.<sup>42</sup> Upon reconsideration, the appeals board annulled the order of dismissal and awarded the claimant benefits.<sup>43</sup> On appeal it was held by the court of appeal that under the contract between the union and the employer, the employer was not obligated to hire the applicant and that the claimant upon arriving at the jobsite offered himself for employment, which offer Reynolds accepted. The acceptance having occurred

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37. *Travelers Ins. Co. v. Workmen's Comp. App. Bd.*, 59 Cal. Rptr. 262, 264 (Ct. App.), *rev'd*, 68 Cal. 2d 7, 434 P.2d 992, 64 Cal. Rptr. 440 (1967).

38. *Id.*

39. *Id.* at 265.

40. See note 34 *supra*.

41. 65 Cal. 2d 429, 421 P.2d 96, 55 Cal. Rptr. 248 (1966).

42. 50 Cal. Rptr. 333, 335 (Ct. App.), *rev'd*, 65 Cal. 2d 429, 421 P.2d 96, 55 Cal. Rptr. 248 (1966).

43. 50 Cal. Rptr. at 335.

in Nevada, California was without jurisdiction to apply its act.<sup>44</sup>

The California Supreme Court held that the applicant was a third party beneficiary to the collective bargaining agreement.<sup>45</sup> Under that agreement the union was made an agent of Reynolds for purposes of transmitting an offer of employment,<sup>46</sup> and the offer in this case was accepted when the applicant obtained his dispatch slip.<sup>47</sup> Since the requirement for a security clearance was a condition subsequent to employment, the contract was consummated in Los Angeles and the appeals board was justified in making the award.<sup>48</sup>

When cases of this nature arise, it is easy to lose sight of the fundamental purpose of a workmen's compensation system. As stated by a California court:

The primary purpose of industrial compensation is to insure to the injured employee and those dependent upon him adequate means of subsistence while he is unable to work and also to bring about his recovery *as soon as possible* in order that he may be returned to the ranks of productive labor.<sup>49</sup>

The system is remedial in nature and its purpose is to do justice to workmen without expensive litigation and unnecessary delay.<sup>50</sup> For this purpose the California Constitution ordained

an administrative body . . . to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character . . . .<sup>51</sup>

Once it has been determined that an injury is of a compensable nature and the claimant is a resident, any controversy over such a fortuitous event as where the contract of hire was consummated seems to be an unnecessary threat to the basic principles for which the system was enacted.

Even more disconcerting than the expenditure by the employee of time and funds in unnecessary litigation, is the possibility that a resident or his dependents may be denied compensation solely on the technical ground that his contract of employment was made outside the state. Such an unfortunate incident has already occurred at least once in California.<sup>52</sup>

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44. *Id.* at 336.

45. 65 Cal. 2d at 433, 421 P.2d at 99, 55 Cal. Rptr. at 251 (1966).

46. *Id.*

47. *Id.*

48. See note 41 *supra*.

49. *Union Iron Works v. Industrial Acc. Comm'n*, 190 Cal. 33, 39, 210 P. 410, 413 (1922) (emphasis added).

50. *Gill v. Hrupek*, 184 Neb. 436, 439, 168 N.W.2d 377, 379 (1969).

51. CAL. CONST. art. 20, § 21.

52. *House v. State Indus. Acc. Comm'n*, 167 Ore. 257, 117 P.2d 611 (1941).

Mr. House, a resident of California, lived near the Oregon border and entered into a contract of employment in Oregon where he assumed the duties of a used car salesman. He was subsequently made manager at a branch location in California. While on his way from California back to Oregon to attend a dealers meeting, House was fatally injured in Oregon when the automobile in which he was a passenger was involved in an accident. For his dependents to be eligible for a workmen's compensation award, California Labor Code section 5305 required that the place of contract be in California,<sup>53</sup> while the Oregon statute required that the *place of regular employment* be in that state.<sup>54</sup> Since the decedent met the converse of these qualifications, neither state's requirements were satisfied and his dependents were unable to recover.<sup>55</sup>

After the *House* case, the California Legislature broadened the coverage of workmen's compensation by enacting Labor Code section 3600.5.<sup>56</sup> In addition to codifying the existing law, which enabled those hired in the state to qualify for California benefits even though injured outside the state, subsection (a) extended this same protection to those *regularly* employed in the state. This addition would presumably have been sufficient to cover House at the time of his fatal injury in Oregon since he was at that time regularly employed in California as a branch manager. Notice, however, that had he remained a salesman in Oregon while residing in California, he would have been dependent on the Oregon statute since he was neither hired nor regularly employed in California. In some situations this will be entirely satisfactory, but in others it will not. For example, in the 24 states still maintaining an elective system, an employee may not be eligible for compensation because his employer has elected not to come within the act.<sup>57</sup> Also, while various state acts are similar in many respects, they often vary in the types of injuries made compensable<sup>58</sup> and the amount of benefits awarded.<sup>59</sup>

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53. See note 71 & accompanying text *infra*.

54. 167 Ore. at 265, 117 P.2d at 615.

55. *Id.* at 257, 117 P.2d at 611.

56. Cal. Stats. 1955, ch. 1813, § 1, at 3352 (now CAL. LABOR CODE § 3600.5); see notes 3 & 5 *supra*.

57. For a list of these 24 states see 3 LARSON, app. A, table 7. In those states having an elective system, a rejection of the act by the employer results in the loss by him of the customary common law defenses of assumption of risk, negligence of a fellow servant and contributory negligence in actions brought by his injured employees. *Id.*

58. See generally Sagall, *Compensable Heart Disease*, 5 TRIAL 29 (1969); 19 STAN. L. REV. 878 (1967).

59. Larson points out that the maximum available benefits may vary from a total permanent disability award limited to \$6000 to a payment of \$35 a week for life, the cumulative value of which in the case of a person totally disabled in his youth and

One California resident, while working in Nevada, suffered a heart attack during the course of his employment. In Nevada, heart injuries are not considered to be of an industrial character and are therefore not made compensable.<sup>60</sup> In California, a heart attack brought on by strain and over-exertion incident to employment is compensable.<sup>61</sup> Fortunately, the offer of employment and acceptance by the employee were made by telephone at a time when the employee was in California. This was sufficient evidence for the court to conclude that the contract was consummated in California, thus placing the injured employee within the jurisdiction of the California Industrial Accident Commission.<sup>62</sup> Had he been forced to rely on his Nevada remedy, he would have gone uncompensated. Needless to say, it seems rather arbitrary to allow a matter of such import to hinge on something as slight as where a party to a telephone conversation was located.

As was suggested in the introduction, the contract theory has also been carried to the opposite extreme. For example, in *Commercial Casualty Insurance Co. v. Industrial Accident Commission*,<sup>63</sup> the claimant, a Georgia resident, responding to an advertisement for construction workers overseas, corresponded with a San Francisco firm which forwarded to him, among other things, a memorandum of agreement which had been drafted in the form of an offer made by the applicant. This document, when signed by the claimant and accepted by the firm in San Francisco, resulted in a valid contract of employment. The formalities having been completed, the claimant was sent to Saudi Arabia where he suffered a temporary total disability. Without ever entering California, the claimant filed a claim with the California commission, and with the aid of an attorney, submitted evidence at a hearing in Georgia. This evidence was forwarded in the form of a deposition to the California commission, which also held a hearing. The commission resolved, and the court of appeals affirmed, that the claimant was entitled to workmen's compensation benefits under the California act since the contract of employment was made in California.<sup>64</sup> Although the situation at first may seem rather unique, the court reached the same result in a similar fact situation one year later.<sup>65</sup>

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living to a ripe old age could conceivably exceed \$100,000. 3 LARSON § 84.10. See generally *id.* app. B, tables 8-11 (1968).

60. NEV. REV. STATS. § 616.110 (1967).

61. *Lumberman's Mut. Cas. Co. v. Industrial Acc. Comm'n*, 29 Cal. 2d 492, 175 P.2d 823 (1946).

62. *Reynolds Elec. & Eng'r Co. v. Workmen's Comp. App. Bd.*, 65 Cal. 2d 438, 441, 421 P.2d 102, 104, 55 Cal. Rptr. 254, 256 (1966).

63. 110 Cal. App. 2d 83, 242 P.2d 13 (1952).

64. *Id.* at 88, 242 P.2d at 16.

65. *Commercial Cas. Ins. Co. v. Industrial Acc. Comm'n*, 116 Cal. App. 2d 901, 254 P.2d 954 (1953). See also *Benguet v. Industrial Acc. Comm'n*, 36 Cal. App. 2d 158, 97 P.2d 267 (1939).

Several states have recognized that they have only a slight interest in contracts to be performed entirely outside the state. Some states even have statutes declaring, *inter alia*, that the act shall not apply to an employee who is employed wholly without the state or whose departure from the state is caused by a permanent assignment.<sup>66</sup> Other states have reached the same result by judicial decision.<sup>67</sup>

The California Legislature has recognized that there are occasions when a state having a lesser interest in the injured employee may want to cede jurisdiction to a state having a more dominant interest.<sup>68</sup> Basically, subsection (b) of section 3600.5 exempts an employer from the provisions of the California workmen's compensation system if he has provided compensation in another state for an employee who is working within California only temporarily.<sup>69</sup> Thus, if all the conditions in subsection (b) are met, an employee who has been injured while working in California may be denied California compensation. If it is conceded that California has a lesser interest in such an employee than does the state where he is regularly employed, how much less of an interest does California have in injured workmen who have never entered the state? No doubt subsection (b) achieves a desirable result in so far as it minimizes the obligations of the employer to satisfy various states' insurance and compensation requirements, while at the same time insuring the injured employee of coverage in at least one state.<sup>70</sup> It does, however, point out the irrationality of extending coverage to those connected with the state solely by reason of the place-of-contract fiction.

### A Possible Solution

In a compensation system instituted by the state to diminish the likelihood that injured workmen or their dependents will become public charges, some reference to residency would seem appropriate.

If it is the intention of the state to exclude those whom it deems

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66. *E.g.*, GA. CODE ANN. § 114-411 (1956); MD. ANN. CODE art. 101, § 67(3) (1957); MISS. CODE ANN. § 6998-55(b) (1952); N.M. STAT. ANN. § 59-10-33 (1953); N.C. GEN. STAT. § 97-36 (1965); S.C. CODE ANN. § 72-169 (1962).

67. *E.g.*, Graver Tank & Mfg. Co. v. Maher, 129 Ind. App. 218, 151 N.E.2d 163 (1958); Kutt v. Beaumont Birch Co., 177 Pa. Super. 352, 110 A.2d 816 (1955); Sherk v. Department of Labor & Indus., 189 Wash. 460, 65 P.2d 1269 (1937).

A unique approach was taken in Texas and Utah by construing the phrase "hired in this state" as having no reference to the place where the contract of hiring took place. Jordan v. Standard Acc. Ins. Co., 339 S.W.2d 267 (Tex. Civ. App. 1960); Buhler v. Maddison, 105 Utah 39, 140 P.2d 933 (1943).

68. *See* CAL. LABOR CODE § 3600.5(b).

69. *Id.*

70. *See generally* Storke & Sears, *Reciprocal Exemption Provisions of Workmen's Compensation Acts*, 67 YALE L.J. 982 (1958).

too remotely connected with the state to be afforded protection under the local workmen's compensation provisions, residency may be used as a sword and made a requirement. Such was the law in California before 1920. As enacted, section 5305 of the Labor Code read:

The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases *where the injured employee is a resident of this state at the time of the injury* and the contract of hire was made in this state, and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act.<sup>71</sup>

In 1920, however, the California Supreme Court ruled unconstitutional the residency requirement contained in this section on the ground that it denied nonresidents the "privileges and immunities" allowed residents in violation of article 4, section 2 of the Federal Constitution.<sup>72</sup> Upon the first hearing by the supreme court, the compensation award made by the Industrial Accident Commission was annulled on the theory that the section was unconstitutional and therefore the Industrial Accident Commission was without jurisdiction.<sup>73</sup> On rehearing, however, the court, in a rather unusual move, allowed the section to remain in effect. It ruled that the Federal Constitution did not render the section invalid but rather "automatically, and without regard to the intent of the state legislature, extend[ed] the benefits created by the act to non-residents."<sup>74</sup> In another section of the opinion, the court stated:

[W]hen a privilege is granted to a citizen and withheld from a noncitizen, the latter finds relief in the provision of the Federal Constitution which, by operation of law, so to speak, extends the privilege to him.<sup>75</sup>

This decision met with almost immediate criticism<sup>76</sup> and has not been followed in other states having a similar requirement.<sup>77</sup> Despite this decision, the legislature has never removed the residency requirement from the wording of the section, possibly in the hopes that a reconsideration will restore it to its full force.

In addition to being used as a sword, residency may be used as a shield to protect those who, if forced to go uncompensated, could eventually become a direct burden on the state. In this sense, residency,

71. Cal. Stats. 1917, ch. 586, § 58, at 870 (emphasis added).

72. *Quong Ham Wah Co. v. Industrial Acc. Comm'n*, 184 Cal. 26, 192 P. 1021 (1920), *writ of error dismissed*, 255 U.S. 445 (1921).

73. *Quong Ham Wah Co. v. Industrial Acc. Comm'n*, 6 I.A.C. 248 (1919), *rev'd on rehearing*, 184 Cal. 26, 192 P. 1021 (1920).

74. 184 Cal. 26, 39, 192 P. 1021, 1027 (1920).

75. *Id.* at 41, 192 P. at 1027.

76. *See* Annot., 12 A.L.R. 1207 (1920).

77. Residency requirements were upheld in *Liggett & Myers Tobacco Co. v. Goslin*, 163 Md. 74, 80, 160 A. 804, 807 (1932); *Tedars v. Savannah River Veneer Co.*, 202 S.C. 363, 384, 25 S.E.2d 235, 243 (1943).

rather than being a requirement, would serve as a qualification which, when met, would entitle the one qualified to share in the full benefits offered by the system. In this way the state can assure *all* of its residents the protection to which they are entitled by virtue of their residency status alone.

By providing all California residents with the maximum protection afforded under the California compensation system, the state also protects itself by eliminating welfare claims that have their source in industrial accidents. If, for example, a California resident becomes disabled by an industrial accident to the extent that he is unable to provide for himself and his dependents, the state, in the absence of compensation coverage, may be called upon to provide welfare assistance.<sup>78</sup> If compensation coverage were extended to all such residents, however, the burden of providing for such disabilities would fall on the industry, rather than on the state, in accordance with the basic intent of workmen's compensation legislation. The workmen's compensation system is designed to accommodate these very circumstances and is certainly better equipped to provide a more adequate remedy than is any general welfare program.

A workmen's compensation system keyed to residency rather than place of contract would also be open to less abuse. As the situation now stands, it is possible for large employers to select a state where the compensation benefits are small or unavailable to employees of the class in their employ, and by making their contracts of employment in that state, reduce or eliminate the benefits which the public policy of the employee's home state has declared should accrue to injured workmen.<sup>79</sup> It would be highly unlikely that an employee, on the other hand, would choose to reside in a state solely for the purpose of qualifying for compensation benefits if and when they should become necessary. At the same time residency would provide a standard as easily determinable as that of where the contract was made.

## Conclusion

For these reasons, it is believed that California's interests will be best served by (1) repealing Labor Code section 5305, which has been rendered ineffective as a device to exclude remote claimants, and (2) amending Labor Code section 3600.5 to the extent that the contract qualification would be replaced by one of residency. By taking these steps, protection under the California system would be available to (a)

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78. Some situations in which compensation coverage may be denied a California resident have already been suggested. *See, e.g.*, text accompanying notes 1-5, 39, 44, 52 & 62 *supra*.

79. *See Ocean Acc. & Guar. Corp. v. Industrial Comm'n*, 32 Ariz. 275, 283, 257 P. 644, 647 (1927). *See also* 3 LARSON § 87.34.

those regularly employed in the state, and (b) those permanently residing here *regardless of where the injury occurred*. Coverage would also be extended to (c) those employees injured in this state except when they are here only temporarily and are insured under the laws of another state as now provided in subsection (b) of section 3600.5. Only by such legislative action will the California workmen's compensation system cover those most in need of its protection, while excluding those only casually connected with the state.

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