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THE RATIONALE OF THE ELECTION OF REMEDIES UNDER WORKMEN'S COMPENSATION ACTS

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I

NONE can recover compensation twice in respect of the same injury. But what a party recovers under a policy of insurance is not compensation for damages. Beyond dispute is the right of an injured man to retain the benefits from an insurance policy in addition to damages paid to him by the one whose guilt has caused the mishap.

Different is the position of a workman under compensation law. There, more parties are involved, and their relationship, because of the public character of the act, has become more complex. Frequently the triangular connection between employee, employer, and insurer is extended into a four-cornered relation by adding a third-party wrongdoer. In all compensation legislation, therefore, the problem has arisen whether to make the right to compensation under the act and the right to damages in a suit at law mutually exclusive.

Shall an injured man be entitled only to compensation though his injury has been caused by another's negligence? Shall he be permitted or compelled to choose between compensation and damages? Or shall he receive compensation in addition to damages, like the beneficiary under a private insurance policy? And, where the injury is due to a party other than the employer, are the employer and the insurer still liable for compensation, and, if so, how can they get indemnity from the wrongdoer?

It was in response to these questions that the drafters of the acts fell back on an ancient legal artifice, the doctrine of election of remedies. In two places has the doctrine crept into the compensation laws. The workman's choice in either place is between a suit at common law and the ac-

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ceptance of compensation. In one place the choice involves the relation between the employee and the employer; in the other it relates to the rights of the employee against the third party.

If the wrongdoer is the employer the election is severely restricted in the American compensation acts, though it still exists without qualification under the British Act.¹ In this country the remedy against the employer is ordinarily exclusive under the act. It is for compensation solely. Even a negligent employer cannot be sued. An alternative right to damages, a right of election, is left in respect to the employer only under certain specific conditions, in particular where the employer has failed to carry insurance for the payment of compensation.²

If the injury is due to negligence of a third party, that is, a person other than the employer, the employee can avail himself of either remedy. This means in some of the states that he can proceed on both remedies simultaneously or successively. The right, or more properly the necessity, to choose between compensation and damages has been abolished there. But almost one half of the acts still require an election.³ The employee has only the one or the other remedy, not both.

It is this election of remedies, as it exists in cases of injury due to the negligence of a third party, which has become a prolific source of both litigation and literary discussion. Though this is an election of remedies just as much as the one relating to the employer, it seems that its *raison d'être* stands on different ground. An attempt is made in this article to demarcate this distinction and to view election provisions and third-party rules in their economic and historical setting.

At first sight the problem seems to defy a general approach. The varying language of the acts makes each authority dependent upon the wording of the particular statute. Though the methods and means by which the compensation is granted vary on many points, as evidenced, for instance, by the division between state agencies and private insurers, and by

¹ Act of 1925, Section 29 (1).—All statutory references in this article are to workmen's compensation acts and are given in an abridged form if such is customary in that jurisdiction.

² For an American act with an election provision so broadly phrased that it is similar to that of the British Act see N.H. § 2, 10-12, *Roberts v. Hillsborough Mills*, 85 N.H. 517, 161 Atl. 29 (1932).

³ Longshoremen's Act § 33 (a); Ala. § 311 (if third party is within the act); Ariz. § 56-949; Colo. § 87; Del. § 38; D.C. (Longshoremen's Act applicable); Fla. § 39; Idaho § 43-1004; Me. § 24; Mass. § 15; Mich. § 8454; Minn. § 176.06 (if third party is within the act, etc.); N.D. § 20; Okla. § 44-13368; Ore. § 102-1729, 102-1752 (if the third party is not within the act, etc.); Tex. Part II § 6a; Utah § 42-1-58; Vt. § 6511; Wash. § 7675. The right to elect between acceptance or rejection of the act, which exists under many statutes, is not properly an election of remedies, and is outside the scope of this article.

the choice between raising of funds by general taxation and direct contributions, there is hardly a problem where we find more divergence than in the field of third-party rules. Only a refined piece of cataloguing the cases, a classification of the acts into various groups, seems possible.⁴

Nevertheless the common history and purpose of the acts point to a definite number of underlying principles which can be worked out from the infinite variety of statutory provisions and judicial interpretations. The margin of departure from these principles will vary. Yet, though in each case the statute must be consulted for a definition of the rights of the parties, the courts, in seeking that definition, have always considered the legal and social philosophy and the ultimate objectives of the compensation acts in general.

The Longshoremen's Act⁵ has been singled out as the prototype of those acts still containing express election provisions in respect to third parties, in order to demonstrate the trend of the legislation and to show the application of the principles to a specific condition, where, because of the interrelation between the ship's crew and stevedores and between steamship and dock companies, fault of a third party appears surprisingly often as the cause of the workman's injury.

II

The rise of the workmen's compensation acts is inextricably bound up with the industrial development of the nineteenth century. This is true though most of the statutes were enacted only at the end of the period and the compensation acts of the various states of this country did not get through the legislatures until a good part of the next century had passed. This indicates only the usual lag of the law behind economic development.

The approach of the law during the period which preceded the enactment of the workmen's compensation legislation followed entirely the traditional pattern of liability for a wrong. A right of the employee could arise only where there had been an omission or a commission on the part of the employer. This was the situation in all countries, no matter whether their system was the common law or the civil law. The employee, in order to recover, had to prove negligence on the part of the employer. This often

⁴ For classifications of third-party rules see *Moseley v. Lily Ice Cream Co.*, 38 Ariz. 417, 422, 300 Pac. 958, 959 (1931); *McKenzie v. Missouri Stables Inc.*, 225 Mo. App. 64, 69, 34 S.W. 2d 136, 138 (1930). A comparative index may be found in 4 Schneider, *Workmen's Compensation Statutes* 4401.

⁵ 44 Stat. 1424 (1927), 48 Stat. 806 (1934), 52 Stat. 1164 (1938), 33 U.S.C.A. § 901 et seq. (Supp. 1943). The Longshoremen's Act has been adopted in the Defense Base Act, 55 Stat. 622 (1941), 42 U.S.C.A. § 1651 et seq. (1943).

proved a hopeless undertaking in a highly industrialized society where the daily employment of dangerous machinery and powerful agencies of steel and electricity often obscured the causes of an accident.

In common-law countries, the harshness of the rule that the employee must prove the employer's negligence was emphasized by the fact that there were engrafted on it in the courts the three so-called common-law defenses, the fellow-servant rule and the doctrines of assumption of risk and contributory negligence. They had been developed at the beginning of the period in order not to subject the employer to responsibilities which at that time were considered "unreasonable and often ruinous" and in order to insulate him as much as possible from bearing the human overhead and to give maximum freedom to expanding industry.⁶

The moderate degree of liability which otherwise existed had thus been further impaired. The protection which the law provided seemed to wane as the need for it grew.⁷ The workmen's compensation laws, therefore, aimed at two evils: to end the denial of the right to damages through the archaic three defenses, and to shift the liability of the employer away from mere liability for violation of a duty to a liability based on the position of the employer and his enterprise in the line of causation, a change from the fault of the employer as the proximate cause of the accident to the employment as the primary, though more remote, cause.⁸

The compensation acts, therefore, were not merely substitutes for common-law remedies like the federal Employers' Liability Act, which restricted the common-law defenses but retained negligence as foundation of liability.⁹ To some extent, compensation statutes were properly called antipodes of liability statutes. But while their purpose was two-fold, resistance against them doubled. "The opponents were alert, potent, and securely entrenched."¹⁰ While the creation of a new remedy for a wrong, with its ensuing removal of the three judge-made defenses, was conceded

⁶ *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 58 (1943); *Tuttle v. Detroit, G.H. & M. Ry.*, 122 U.S. 189, 196 (1887).

⁷ See Mr. Justice Brandeis, dissenting, in *New York Central R.R. v. Winfield*, 244 U.S. 147, 154, 160 (1917).

⁸ *New York Central R.R. v. White*, 243 U.S. 188 (1917); *Lewis and Clark County v. Ind. Acc. Board*, 52 Mont. 6, 155 Pac. 268 (1916); *State v. Creamer*, 85 Ohio St. 349, 97 N.E. 602 (1912); *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685 (1913).

⁹ *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54 (1943). It is said there by Mr. Justice Frankfurter (at 71, concurring opinion) that the British act had nearly fifty years ago recognized that the common-law concept of liability for negligence was archaic and unjust.

¹⁰ Mr. Justice Brandeis, dissenting, in *New York Central R.R. v. Winfield*, 244 U.S. 147, 154, 160 (1917).

to be within the range of legislative power, the right "to give a remedy for no wrong" was definitely challenged. The new law was called radical and revolutionary, and one distinguished court intimated that it reversed not only the common-law doctrines but the laws of nature.¹¹

When the doubts were finally resolved in favor of the constitutionality of the acts, it was so because the acts envisaged a loss on both sides, and did not merely, as it had at first been put by the New York court, take the property of the employer and give it to the employee. Though the employer was left without defense respecting the question of fault, he, at the same time, was assured that the recovery was limited. The employee had to take a graduated scale of compensation, making good only his loss of earning power, or part of it. While entitled to these standardized benefits in all cases of injury, he was no longer able to recover the full damages in case of negligence. He alone had to bear the physical suffering. The statutes made no effort to afford an equivalent in compensation. In case of death the benefits were arbitrarily terminated at the end of a given number of weeks.

The risk of accidental injury was thus shared by employer and employee.¹² The relinquishment of the cause of action in case of negligence, therefore, constitutes, as it were, the consideration furnished by the employee which, to a large extent, served to take from the statutes the odium of taking property without due process.

The economic aspect of this development was clear. The loss was to be distributed as overhead costs. It was to be charged as an operating expense, like the cost of broken machinery. It became an element in the cost of production. It shifted part of the burden of accidental injuries from the injured workmen to the industry, which, in turn, could pass it on to the customer, that is, to society as a whole.¹³

The legal garment in which this movement appeared was the exclusive-

¹¹ See *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 305, 94 N.E. 431, 444 (1911).

¹² *New York Central R.R. v. White*, 243 U.S. 188 (1917); *Western Indemnity Co. v. Pillbury*, 170 Cal. 686, 151 Pac. 398 (1915); *Grand Trunk Western Ry. Co. v. Ind. Comm.*, 291 Ill. 167, 125 N.E. 748 (1919); *Connors v. Semet-Solvay Co.*, 94 Misc. 405, 159 N.Y. Supp. 431 (Sup. Ct., 1916) (no action for pain and suffering or disfigurement after acceptance of compensation). But see *Crowell v. Benson*, 285 U.S. 22, 41 (1932) (compensation should reasonably approximate the probable damages). The legislative history of the Longshoremen's Act demonstrates that the compensation acts did not confer an unqualified boon on the employees. Seamen preferred to remain outside the acts and to retain their remedy under the Jones Act where, although the fellow-servant rule has been abolished and the doctrine of assumption of risk modified, proof of negligence of the employer remains a condition of recovery; see *South Chicago Coal and Dock Co. v. Bassett*, 309 U.S. 251, 257 (1940).

¹³ *Bowen v. Hockley*, 71 F. 2d 781 (C.C.A. 4th, 1934). See *Keeran v. Peoria, Bloomington and Champaign Traction Co.*, 277 Ill. 413, 420, 115 N.E. 636, 639 (1917).

ness of the remedy under the act and, as a safety valve for anomalous cases, the election of remedies doctrine.

While ordinarily insofar as the employer is concerned the remedy under the act is exclusive, the statute gave the employee the right to choose between compensation and damages in those irregular cases where the employer had not complied with the act. In this connection, it must be borne in mind that noncompliance with the act is not always an indication of wilful default. It frequently happens that doubts exist, for instance, whether the injury arose out of the course of the employment, whether it was covered by some other act, whether it consisted in an excluded occupational disease, etc. In all of these cases, and in particular in those where, under the elective type of act, the employer had rejected the act, the employer is denied the benefit of the common-law defenses.¹⁴ It appears, therefore, that even where the employer did not comply with the act, the employee is bound to receive some benefit from the act, as compared with the status of the law before the acts went into effect. It was in return for these benefits that either the right to damages was taken away from the employee or he was forced to choose on which remedy to rely.

In other countries, a similar exchange of rights and values took place, though, due to a different constitutional setup, the controversy there developed less in the courts than in the parliamentary bodies and public debate. In most countries the grant of a new remedy to the employee and the exaction of new duties from the employer was compensated by some kind of limitation on the rights of the employee.¹⁵ The British Act, though

¹⁴ A few jurisdictions go further. Where a damage action is permitted, negligence of the employer is presumed, Cal. § 3708; Iowa § 1379; La. § 4; Nev. § 1(b); Utah § 42-1-54; or the employer is liable without fault, Mass. § 66; *Fahler v. Minot*, 49 N.D. 960, 194 N.W. 695 (1923). Only under these laws does it appear proper to speak of an indirect compulsion to insure. Penalties or fines for failure to insure are imposed in many states; see, e.g., Colo. § 27 (compensation increased by 50 per cent); Ill. § 26; N.Y. § 52; Ohio § 69a. Under the elective type of act, the employer is generally not deprived of his common-law defenses where the employee rejects the act.

¹⁵ E.g., Austria: law of 1935, 1935 Bundesgesetzblatt No. 107, § 74 (intent or gross negligence; liable to insurer only); Belgium: law of Sept. 28, 1931, 1931 Moniteur Belge No. 303, 6253, §§ 9 and 19 (intent or failure to secure compensation); France: law of July 1, 1938, amending Compensation Law of 1898, 1938 Journal Officiel No. 154, p. 7706 § 2 (remedy exclusive); Germany: Reichsversicherungsordnung, as amended Jan. 9, 1926, 1926 Reichsgesetzblatt I, 97 §§ 898 and 903 (liability towards employee: intent, established by criminal court; towards insurance carrier also negligence; liability to employee limited to excess over compensation); Switzerland: law of June 13, 1911, Amtl. Sammlung n.F. xxviii, 353 § 129 (2) (intent or gross negligence). But see Spain: law of Oct. 8, 1932, 1932 Gaceta de Madrid No. 286, p. 218 § 63 (damage claims for negligence not affected); Sweden: law of June 15, 1922, 1922 Svensk Författningssamling No. 320, § 12 (employee retains claims for damages over and above compensation).

All comparisons with the Continent must be accepted with caution since most Continental

it did not go as far as the American acts in adopting the exclusiveness of the remedy and did still permit a suit at common law in case of negligence on the part of the employer, nevertheless required the employee to make an election between compensation and damages at law.¹⁶

III

Contrasting with that development the election of remedies as to a third-party we see at once that the rationale of the election within the employer-employee relationship can apply in this case only to a very limited extent. No additional burden is heaped upon the wrongdoer, as in the case of the employer who is forced to pay for injuries or, at least, to contribute to their compensation, no matter whether they have been caused by his negligence or not. No *quid pro quo* is involved on the part of the third party. The interest of the employer or the insurance carrier is affected only to the extent that the employee after suit against the third party claims compensation.

It is, therefore, an accepted principle in almost all jurisdictions that a third-party wrongdoer does not enjoy the protection of the workmen's compensation act and that the statute does not attempt to regulate the ordinary common-law liability of such third parties.¹⁷ While the modern theory considers the compensation provisions as an integral part of the master-servant relationship,¹⁸ the third party is generally regarded as beyond the pale of the law.

This statement need be qualified only as to those acts which distinguish between third parties under the act and third parties not under the act.

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laws have a general social insurance system. Their problem is often primarily an accounting between several insurance carriers. Denial of compensation there means only that the workman is limited to the general health insurance, not that he receives no benefit at all.

¹⁶ See note 1, *supra*.

¹⁷ *Cupo v. Isthmian S.S. Co.*, 56 F. Supp. 45 (S.D. N.Y. 1941); *Hartquist v. Tamiami Trail Tours*, 139 Fla. 328, 190 So. 533 (1939); *Lebak v. Nelson*, 62 Idaho 96, 107 P. 2 1054, 1064 (1940); *Lester v. Otis Elevator Co.*, 90 Misc. 649, 153 N.Y. Supp. 1058 (1915), *aff.* 169 App. Div. 613, 155 N.Y. Supp. 524 (1915); *McArthur v. Dutee W. Flint Oil Co.*, 50 R.I. 226, 146 Atl. 484 (1929). The inapplicability of the acts to third parties appears in reverse in those unusual cases where the third party, after being made liable for full damages by the employee, claims indemnity from the employer. The exclusiveness of the remedy as it exists in the employer-employee relationship does not save the employer from full liability toward the third party, *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, 278 N.Y. 175, 15 N.E. 2d 567 (1938), noted in 38 Col. L. Rev. 1517 (1938) and 52 Harv. L. Rev. 174 (1938). But indemnity was denied where one of the parties was primarily liable, *Fidelity & Cas. Ins. Co. v. Sears, Roebuck & Co.*, 124 Conn. 227, 199 Atl. 93 (1938). The liability of persons in the same employ (fellow-servants) is not discussed in this article.

¹⁸ 4 Williston, *Contracts* (rev. ed., 1936) § 1028A.

Under these laws, an employer who is under duty to insure or to pay contributions is granted a limited degree of protection against full liability even where the injured man is not his employee, but occupies the position of a perfect stranger. Thus, all employers that can bring themselves under the act form a special group, which finds itself in a better position than an ordinary third-party wrongdoer. These statutes either require an election of remedies or deprive the employee of his right to damages in case the third party comes under the act while they otherwise, with one exception, permit him to pursue both remedies. The whole setup is in the nature of a converse of the fellow-servant rule, though the fellow-principal rule in this case does not work to the detriment of the employer.¹⁹

With this qualification the broad principle of all acts is that the rights of the employee against a third party are neither changed nor impaired. However, this notwithstanding, all but three acts have adopted third-party rules; a large number have incorporated into their rules a provision for election of remedies, and many acts, in addition thereto and independent thereof, provide for subrogation of those who paid the compensation and for the transfer of the entire cause of action to them.

What, then, is the policy behind these statutes; what are the rationes decidendi of the courts interpreting them? From a survey of the statutes and cases these main points emerge:

1. *No double recovery*.—This is often stated as an ultimate objective. Appeal is made to it as a basic rule of the common law. It is invoked as if

¹⁹ Four states have statutes of this kind: Alabama, Illinois, Minnesota, and Oregon. Two of these acts afford protection to the third-party wrongdoer only if he and the employer are engaged in the furtherance of a common enterprise or the accomplishment of the same or related purposes on the premises where the accident occurs; Minn. § 176.06 (1943), 27 Minn. L. Rev. 585; Ore. § 102-1729, § 102-1752. Oregon, in addition, requires that the employer and the third party have joint supervision and control over the premises. No such restrictions appear in the acts of Alabama (§ 311) and Illinois (§ 29). In Illinois it has been held that even third-party employees are included among the persons bound by the act and, hence, exempt from full liability; *Thornton v. Herman*, 380 Ill. 341, 43 N.E. 2d 934 (1942), 21 Chi-Kent L. Rev. 271 (1943), 9 U. of Chi. L. Rev. 362 (1942) (commenting on the lower courts decision). The Wisconsin act, although extending the duty to pay compensation to subcontractors of the employer, does not belong in this group. Compare *City of Taylorville v. Central Ill. Publ. Serv. Co.*, 301 Ill. 157, 133 N.E. 720 (1921) (though action against third party is for negligence, recovery is limited to amount of compensation) with *Culbertson v. Kieckhefer Container Co.*, 197 Wis. 349, 222 N.W. 249 (1928) (secondary liability for compensation does not save subcontractors from full liability for damages). Only the Washington act, at one time, went so far as to abolish outright all rights of action of the employee, whether against the employer or against a third person, *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685 (1913); however the act has subsequently been changed (§ 7675). An interesting continental variant of these statutes is the Swedish act which cuts off the insurance carrier's right to indemnity against the third party, if the third-party wrongdoer has himself been injured in the accident and is himself entitled to compensation, § 12 (for complete source see note 15, supra).

it had the inevitableness of a logical conclusion. Its foundations are said to be laid in history.²⁰

But the problem here is not the liability of two joint tortfeasors where payment by one releases the other. The employer and the third party might be, but they need not be, joint tortfeasors.²¹ A situation of that kind is the exception rather than the rule. Nor, as was mentioned before, is the compensation designed to give the employee full indemnification so that everything gained in an action against the third party would of necessity be a second coverage of the same damage.

The distinction has been made between benefits under an insurance contract promised in exchange for the payment of premium and receipt of workmen's compensation by reason of the injury alone.²² But contributions are also paid under the workmen's compensation scheme. Whether they are paid by the employee or by another party in his favor should make little difference. In many respects the relation between the employee and the insurance carrier bears close resemblance to a commercial insurance and is no less independent from the tort claim against the third party than the contract-bond with a private insurance company.²³

Before reference is had to basic common-law principles, it should be noted that the three states which have no third-party rules in their laws and could, therefore, apply general principles to the problem permit what in other states is called double recovery. The Ohio court characterized the compensation law of that state as in the nature of an occupational insurance.²⁴ The Supreme Court of West Virginia has said that compensation

²⁰ *Godfrey v. Brooklyn Edison Co.*, 115 Misc. 21, 187 N.Y. Supp. 263 (Sup. Ct., 1921); *Miller v. New York Ry's Co.*, 171 App. Div. 316, 157 N.Y. Supp. 200 (1916). See *Keeran v. Peoria, Bloomington & Champaign Traction Co.*, 277 Ill. 413, 423, 115 N.E. 636, 640 (1917).

²¹ If they are joint tortfeasors the employer's right to indemnity from the third party might be lost; *McCullough v. John B. Varick Co.*, 90 N.H. 409, 10 A. 2d 245 (1939) (alternative holding); *Cory & Son v. France, Fenwick & Co.*, [1911] 1 K.B. 114 (C.A.).

²² See *Miller v. New York Ry's Co.*, 171 App. Div. 316, 319, 157 N.Y. Supp. 200, 202 (1916).

²³ *McCullough v. John B. Varick Co.*, 90 N.H. 409, 10 A. 2d 245 (1939). For a comprehensive analysis of the insurance angle see Lenhoff, *Insurance Features of Workmen's Compensation Laws*, 29 Corn. L. Q. 176, 353 (1943).

²⁴ *Truscon Steel Co. v. Trumbull Cliffs Furnace Co.*, 120 Ohio St. 394, 166 N.E. 368 (1929), overruling *Ohio Pub. Serv. Co. v. Sharkey*, 117 Ohio St. 586, 160 N.E. 687 (1927) which had held that an employee after recovery of compensation could sue the third party only for the deficiency. Accord, *Hotel Equipment Co. v. Liddell*, 32 Ga. App. 590, 124 S.E. 92 (1924) (decided when the Georgia act contained no provision for subrogation). Cf. *O'Brien v. Chicago City Ry. Co.*, 305 Ill. 244, 262, 137 N.E. 214, 221 (1922) (if third party is not under the act).

was not indemnity but rather in the nature of a pension.²⁵ The New Hampshire court permitted a compensation claim after full recovery from the third party on the ground that the employer is not called upon to discharge the wrongdoer's liability but only to make good some of its consequences.²⁶

Outside these three jurisdictions public policy rather than logic or basic principle has precluded a double recovery for the simple reason that it would necessarily have resulted in an increase in the cost of the insurance.²⁷

If, therefore, one objective of the provision requiring a workman to choose between compensation and damages seems to be the preclusion of a recovery on both remedies, it must, on the other hand, be noted that a large number of states bar a double recovery without foreclosing the employee's right to pursue both remedies.²⁸ This makes apparent the distinction between the right to proceed twice, that is for compensation and for damages, and the right to recover twice. It further proves that the connection between election of remedy provisions and preclusion of double recovery is by no means indispensable or unbreakable.

2. *Right to indemnity*.—Where the employer or, in his stead, the insurer has paid compensation the problem arises how to secure his right to get indemnity from the third-party wrongdoer. The courts are not in accord on the question whether the person who paid compensation is subrogated to the employee's rights against the third parties under general rules of law. Under the statutes without third-party rules it was decided that there could be no subrogation since the act contained no provision to that effect.²⁹ In other jurisdictions subrogation was permitted by analogy to the

²⁵ *Mercer v. Ott*, 78 W.Va. 629, 89 S.E. 952 (1916). Accord, *Crab Orchard Imp. Co. v. Chesapeake & O. Ry.*, 115 F. 2d 277 (C.C.A. 4th, 1940), cert. den. 312 U.S. 702 (1940), 40 Col. L. Rev. 1452 (1940), 47 W.Va. L.Q. 351 (1941).

²⁶ *Holland v. Morley Button Co.*, 83 N.H. 482, 145 Atl. 142 (1929).

²⁷ See *Aetna Life Ins. Co. v. Moses*, 287 U.S. 530, 542 (1933) (Longshoremen's Act). For decisions permitting double recovery see also 7 U. of Chi. L. Rev. 569 (1940) and note, 46 Yale L. J. 695 (1937).

²⁸ E.g., Cal. § 3852; Conn. § 5231; Ind. § 13; Kan. § 4; Ky. § 4890(9); La. § 7; Md. § 72; N.J. § 34:15-40; N.Y. § 29 (1, 2); Pa. § 319; R.I. Art. III § 20; Wis. § 102.29.

²⁹ See cases notes 24-26, *supra*. Accord, *Fidelity & Cas. Co. of New York v. Huse & Carleton*, 272 Mass. 448, 172 N.E. 590 (1930) (right of insurer does not rest upon subrogation or depend upon reimbursement; wholly creature of statute); *New York, S. & W. Ry. v. Huebschmann*, 111 N.J. Eq. 547, 162 Atl. 767 (1932) (decided when New Jersey had not yet adopted statutory right to indemnity). But see *Campbell, Subrogation under Workmen's Compensation*, 18 Chi-Kent L. Rev. 225 (1940); *Hardman, The Common-Law Right of Subrogation under Workmen's Compensation Acts*, 26 W.Va. L. Q. 183 (1920).

equitable principle that subrogation takes place where a party has been subjected to liability for the negligence of another.³⁰

Many acts contain express subrogation provisions. Subrogation, as the term is used in compensation acts, is not necessarily identical with a transfer of the cause of action to the subrogee. To be sure, in other fields courts of law have dealt with subrogation as they would with assignments, and when the right of action to which subrogation took place was a legal right, the courts have often treated the subrogee as an assignee and allowed him to maintain an action.³¹ A number of acts, however, make a distinction between the assignment by operation of law which effects a transfer of the cause of action and subrogation which merely gives a right to the proceeds. The Longshoremen's Act, for instance, provides for an "assignment" to the employer, in section 33(b), and for "subrogation" to the insurer, in section 33(i).

The election provisions of the third-party rules have generally been interpreted as at least giving a right to get indemnity. It was held in a case where the employee chose to sue the third party that the election provision was an implicit recognition of the employer's right to reimbursement for his outlay, no matter whether he had become an assignee of the employee's right of action or not.³² The employer is not a volunteer within the meaning of the equity term since he is bound to pay irrespective of an award, unless he wishes to controvert his liability.³³

On the other hand, it again appears that the same result can be accomplished without forcing an election upon the employee. A large number of statutes permit subrogation, though they provide that the right of the employee to bring an action against the third party shall not be affected by a claim for or acceptance of compensation.³⁴ Indemnity under these stat-

³⁰ *Stinchcomb v. Dodson*, 190 Okla. 643, 126 P. 2d 257 (1942) (statutory assignment in Oklahoma not self-executing; but insurance carrier in the absence of an assignment can rely on equitable subrogation). Accord, *Aetna Life Ins. Co. v. Moses*, 287 U.S. 530, 541 (1933) (interpreting Longshoremen's Act at a time when § 33 (i) regarding subrogation of insurer had not yet been added; subrogation declared necessary in order to avoid double recovery); *The Etna*, 138 F. 2d 37 (C.C.A. 3d, 1943).

³¹ See *Aetna Life Ins. Co. v. Moses*, 287 U.S. 530, 542 n. 3 (1933); *Dunlop v. James*, 174 N.Y. 411, 415, 67 N.E. 60, 61 (1903); 2 *Moore's Federal Practice* § 17.08, p. 2055 (1938).

³² *The Etna*, 138 F. 2d 37 (C.C.A. 3d, 1943) (employer allowed to intervene under admiralty rules); *Grasso v. Lorentzen*, 56 F. Supp. 51 (S.D. N.Y. 1943).

³³ E.g., Longshoremen's Act § 14(a); N.Y. § 25.

³⁴ E.g., Ga. § 114-403; Iowa § 1382; Mont. § 2839 (subrogation to extent of one half of compensation paid); Neb. § 48-118; Nev. § 7; N.M. § 57-925; S.D. § 64.0301; Tenn. § 6865; and statutes cited in note 28, *supra*.

utes is effected by a lien on the proceeds³⁵ or by a right to bring a separate suit for the amount paid.³⁶

3. *One trial.*—The provision regarding an election of remedies is in many statutes dovetailed with a clause providing for the transfer of the right to sue to the employer or insurer who paid the compensation. Under these acts, what is to be accomplished is not only that the employee shall no longer retain both compensation and recovery from a third party, but that the action shall be disposed of in a single trial with a single plaintiff.³⁷

There is, of course, another way to accomplish this. The employee can be left in control of the suit with the duty only to notify the employer or insurer. However, such an arrangement is liable to endanger the right to indemnity. Where there is an election provision, it is, therefore, usually assumed or expressly provided that the cause of action is transferred. Several statutes, e.g., Illinois, provide for a transfer of the cause of action without even a right to elect.

This transfer comprises the entire cause of action irrespective of the amount which the employer or the insurer has paid as compensation or for which he has become liable. It strips the employee of any further right against the third party, and gives the transferee the right to bring the action in his own name, making him the only real party in interest.³⁸ It is a legal tour de force which, as could not otherwise be expected, has led to unending controversies, and has not infrequently become the source of grave injustice.

Before this is illustrated by samples taken from the vast number of cases, a few words may be said about the root of these transfer provisions. It seems that they owe their existence primarily to two procedural obstacles.

The first obstacle is the rule against splitting a cause of action. The third-party wrongdoer is not to be subjected to the embarrassment of multiple suits. Therefore, where because of statutory or equitable subrogation the subrogee becomes entitled to a share of the proceeds which is less than the whole, he shall not bring an action for that portion of its

³⁵ E.g., Ill. § 29(3); Kan. § 4; Mont. § 2839; N.Y. § 29(1); Wis. § 102.29. Cf. N.J. § 34:15-40(d).

³⁶ See statutes note 89, *infra*.

³⁷ See *Aetna Life Ins. Co. v. Moses*, 287 U.S. 530, 539 (1933); *Kandelin v. Lee Moor Contracting Co.*, 37 N.M. 479, 491, 24 P. 2d 731, 737 (1933).

³⁸ *Aetna Life Ins. Co. v. Moses*, 287 U.S. 530 (1933), see note 30, *supra*; *Moore v. Hechinger*, 127 F. 2d 746 (App. D.C., 1942) (Longshoremen's Act no legal impediment to bring the action to the use of the employee); *Friebel v. Chicago City Ry. Co.*, 280 Ill. 76, 117 N.E. 467 (1917) (if third party is within the act); *Miller v. Richards*, 305 Mass. 424, 26 N.E. 2d 380 (1940); *Paxos v. Jarka Corp.*, 314 Pa. 148, 171 Atl. 468 (1934) (Longshoremen's Act).

share only. A division of the cause of action and the bringing of two separate suits against the third party is considered improper.³⁹

Of less importance seems to be the restriction on joinder though there can be little doubt that apprehension of improper joinder has had a part in shaping the third-party rules of the compensation acts.⁴⁰ True, the common-law practice that a partial assignee could not sue, no matter whether he brought the action in his own name, the name of the assignor, or jointly with the assignor, is no longer in full effect under the codes. Yet the question is far from being settled in all jurisdictions. In addition, a federal act, like the Longshoremen's Act, which is enforced by action in the state courts must give consideration also to the problems arising in jurisdictions operating under common-law pleading systems.⁴¹

It seems, therefore, beyond doubt that either still prevailing rules or simply the force of gravity inherent in an ancient procedural tradition has worked in favor of a provision for enforcement of the third-party action by a single plaintiff.

Of the host of difficulties which have cropped up under these provisions the following instances may serve as illustrations.

a) Where there are several dependants as beneficiaries, election of one beneficiary only does not operate as an assignment, since otherwise a splitting of the cause of action would result. The election by one of several beneficiaries, therefore, gives the employer or the insurer only the right to compel the executor or administrator to sue.⁴²

For the same reason, the insurer, unless the statute makes him the transferee of the entire cause of action, cannot sue even though he has paid the full compensation. For, if the statute gives the proceeds of the suit so far as they exceed the compensation to the employee, the insurer is not entitled to the full damages.⁴³ Were he to ask for part of them, a division of the cause would be inescapable.

³⁹ See cases notes 42 and 43, *infra*.

⁴⁰ It has been suggested, though without reference to compensation acts, that the restrictions on the joinder of causes of action and parties are perhaps the basic reason for the continued presence of the election doctrine in American laws; note, 38 Col. L. Rev. 292 (1938).

⁴¹ In actions against third parties state law applies except on questions regulated by the federal act, *Travelers' Ins. Co. v. Lee & Simmons Inc.*, 241 App. Div. 835, 271 N.Y. Supp. 239 (1934); *Paxos v. Jarka Corp.*, 314 Pa. 148, 171 Atl. 468 (1934).

⁴² *Doleman v. Levine*, 295 U.S. 221 (1935) (Longshoremen's Act); *Reidy v. Old Colony Gas Co.*, 315 Mass. 631, 53 N.E. 2d 707 (1944); *United States Fidelity & Guaranty Co. v. Graham & Norton Co.*, 254 N.Y. 50, 171 N.E. 903 (1930); *Zirpola v. Casselman Inc.*, 237 N.Y. 367, 143 N.E. 222 (1924). But cf. *State v. Vinther*, 183 Wash. 350, 48 P. 2d 915 (1935).

⁴³ *Aetna Life Ins. Co. v. Moses*, 287 U.S. 530 (1933); *Globe Indemnity Co. v. Atl. Lighterage Corp.*, 271 N.Y. 234, 2 N.E. 2d 640 (1936). Though these two cases, which both arose

b) Where the employee has been killed, the right to recover does not arise in his person. It is given by the wrongful death statutes to the personal representative. However, the employee is the person from whom the employer or insurance carrier takes his right. The question, therefore, arose whether in such case anything could pass by assignment to the employer. In deciding under the Longshoremen's Act that the employer can bring the action in his own name, the Supreme Court put emphasis on the fact that it was the general purpose of the act to give the employer complete control of the institution of the action, the compromise and settlement of the claim, and the distribution of the proceeds, in case of death as well as where the injury results in disability.⁴⁴

c) A particularly thorny problem is the right, resulting from the control over the suit, to settle the case by a compromise with the third party.

Some statutes have furnished a just solution by requiring official approval of the settlement.⁴⁵ Others have made a compromise by the person in control of the suit dependent on consent from the other interested party. Where the employer sues, the employee has to give his consent, and vice versa.⁴⁶

The Longshoremen's Act has made what appears to be an unwarranted discrimination between the employee and the employer. The employee can settle the claim for less than the compensation only with written approval of the employer; otherwise his right to get compensation for the deficiency is lost, in section 33(g).⁴⁷ The employer, on the other hand, where he has become assignee of the right of action, can compromise at will with

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under the Longshoremen's Act, were decided before § 33(i), providing for subrogation of the insurer, was added it would seem that the principles stated in the text still apply. Accord, *Michigan Employers' Casualty Co. v. Doucette*, 218 Mich. 363, 188 N.W. 507 (1922). But cf. *Baker & Conrad v. Chicago Heights Constr. Co.*, 364 Ill. 386, 399, 4 N.E. 2d 953, 959 (1936); *Travelers' Ins. Co. v. Lee & Simmons Inc.*, 241 App. Div. 835, 271 N.Y. Supp. 239 (1934). Many statutes provide for subrogation of the insurer, e.g., Mass. § 15; others, still broader, of the person paying compensation, e.g., N.Y. § 29(1). Statutes under which the employer is the person to bring suit and to distribute the proceeds are, e.g., Longshoremen's Act § 33(b) and (d), Ill. § 29(1), Mich. § 8454.

⁴⁴ *Aetna Life Ins. Co. v. Moses*, 287 U.S. 530, 539 (1933).

⁴⁵ E.g., Fla. § 39; Mass. § 15; Me. § 24; Okla. § 44-13368; Ore. § 102-1729; Tex. Part II, § 6a.

⁴⁶ E.g., Cal. § 3859; Conn. § 5231; Ill. § 29(4); La. § 7; 7 U. of Chi. L. Rev. 569, 572 (1940).

⁴⁷ Even where the employer has not been damaged by the settlement the employee loses his right to compensation, in view of the express provision in § 33(g); *Marlin v. Cardillo*, 95 F. 2d 112 (App. D.C. 1938). The holding was different where the employee merely discontinued his suit against the third party without entering into a settlement, *Chapman v. Hoage*, 296 U.S. 526 (1936); *American Lumbermen's Mut. Cas. Co. v. Lowe*, 70 F. 2d 616 (C.C.A. 2d, 1934). Cf. Mass. § 15 (discontinuance of employee's suit before trial does not bar right to compensation, if insurer notified and not prejudiced).

or without instituting suit (section 33d). The reason behind this arrangement was said to be the appreciation that an injured employee, especially once he has received compensation, may have neither the incentive nor the desire to press his right of action against the third party. The probability that the employer would settle the employee's claim for an amount not commensurate with the injury was considered less likely if the compensation accepted and paid was adequate.⁴⁸

It would seem that this does little justice to the real situation. The employee is always interested in a full recovery because he can retain the money. Damages awarded by a jury are frequently higher than the compensation, which covers only the loss of earning power. On the other hand the employer must turn over the recovery to the employee in so far as it exceeds the compensation paid; see section 33(e) No. 2. Actually, though not nominally, the insurance company has control of the suit by virtue of the contract of insurance. It will be little interested in fighting for more than it has paid out. Therefore, if the profit motive, *auri sacra fames*, dominates these, as other human relations, there should be more incentive for the employee to carry the fight for damages to a successful end, and, therefore, more reason to put a check on the employer's right to settle the action.

d) The discontinuance of the suit or omission to bring an action is another bothersome problem.

Again, the Longshoremen's Act and many similar statutes, in consequence of the full transfer of the cause of action, put the question up to the employer's discretion.⁴⁹ This has led to awkward results where the action was not brought because the insurance carrier of the employer was also the insurance company of the third party. Even in an extreme situation of that kind, groundless refusal to bring the action was considered not sufficient to transfer the cause of action back to the employee, since the statute manifested the intention of the legislature that the employee after the assignment should have no further rights or interests in the cause of action, unless the employer recovered more than the amount of compensation, costs, and expenses. The transferee of the right of action was held to be under no trust duty to the employee to sue the third party regardless of his duty to pay over an excess recovery to the employee.⁵⁰

⁴⁸ See *The Etna*, 138 F. 2d 37, 40 (C.C.A. 3d, 1943).

⁴⁹ Longshoremen's Act § 33(d). As to discontinuance of suit by the employee see note 47, *supra*.

⁵⁰ *Hunt v. Bank Line Ltd.*, 35 F. 2d 136 (C.C.A. 4th, 1929). This case was questioned in *The Kokusai Kisen Kabushiki Kaisha*, 44 F. 2d 659 (S.D. Tex., 1930), but approved in *Johnsen v. American-Hawaiian S.S. Co.*, 98 F. 2d 847 (C.C.A. 9th, 1938) (dictum: employee was per-

One court arrived at what seems a more just result by applying the broad equitable principle that, where by operation of the statute the person having the mere legal title by assignment fails or refuses to sue, the real beneficiary can sue for protection or enforcement of his rights.⁵¹ That the employee is the real beneficiary was considered as unmistakably shown by the provisions giving him the right to the excess recovery. By force of this rule it has been held that, though the insurer is subrogated to the rights against the third party and can sue the third party, this right to sue reverts in the employee where the insurer fails to bring suit.

Thus one court has achieved what in other jurisdictions has been provided by express statutory rules, i.e., that failure to sue by the employer results in a reversion of the cause of action in the employee.⁵² The converse of that rule can be found in provisions which divest the employee of the right to bring the action otherwise left to him, if he does not bring it within a certain time.⁵³

Time limits of that kind may serve to prevent the running of the statute of limitations before the employer or insurer gets an opportunity to bring an action. Such a contingency is another undesirable result of the full transfer of the right of action. This is due to the fact that no matter whether the employee or the employer sues, it is the employee's right which is asserted by the plaintiff, since the acts do not create a new cause of action against the third party but merely transfer the employee's right to the employer.⁵⁴

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mitted to rescind his election). *Accord*, *Whalen v. Athol Mfg. Co.*, 242 Mass. 547, 136 N.E. 600 (1922). In *Globe Ind. Co. v. Atl. Lighterage Corp.*, 271 N.Y. 234, 238, 2 N.E. 2d 640, 642 (1936) it was said that the insurer, unlike the employee, could compel the employer to sue in order to protect his right to subrogation.

⁵¹ *Houston Gas & Fuel Co. v. Perry*, 127 Tex. 102, 91 S.W. 2d 1052 (1936) (employee after reversion of right for damages limited to excess over compensation), 16 Tex. L. Rev. 437 (1938); *Lancaster v. Hunter*, 217 S.W. 765 (Tex. Civ. App., 1919); 18 Tex. L. Rev. 532 (1940).

⁵² E.g., Mass. § 15 (nine months after injury); Me. § 24 (thirty days after demand); Md. § 72 (two months after award); N.C. § 11 (six months after injury).

⁵³ E.g., Ill. § 29(5) (three months before statute of limitation has run); Kan. § 4 (twelve, in case of death eighteen months from the accident); Mont. § 2839 (six months after accident); N.J. § 34:15-40f (one year after accident); N.Y. § 29(2) (six months after award, one year after injury); Ore. § 102-1729 (twenty days after demand by commission).

⁵⁴ *Walsh v. Central Cold Storage Co.*, 58 N.E. 2d 325 (App. Ct. Ill., 1944); *Schlitz Brewing Co. v. Chicago Ry.'s Co.*, 307 Ill. 322, 138 N.E. 658 (1923) (completely disagreeing, in effect, from *Star Brewing Co. v. Cleveland, C.C. & St. L. Ry.*, 275 Fed. 330 [C.C.A. 7th 1921]); *Fidelity & Cas. Co. of N.Y. v. Miller*, 111 Ind. App. 308, 38 N.E. 2d 279 (1941) (considerations of hardship cannot lead a court to broaden the statute beyond its legitimate limits), 26 Minn. L. Rev. 768 (1942); *Exchange Mut. Ind. Ins. Co. v. Central Hudson Gas & El. Co.*, 243 N.Y. 75, 152 N.E. 470 (1926); *United States Fidelity & Guaranty Co. v. Blue Diamond Coal Co.*, 161 Va. 373, 170 S.E. 728 (1933). *Contra*, *Foster & Glassell Co. v. Knight Bros.*, 152 La. 596, 93 So. 913 (1922) (separate cause of action arising from payment in addi-

In these cases it is the employer or the insured whose rights are often inadequately protected. Where the assignment, because of its sweeping nature, is made conditional upon an award, the insurer who pays compensation in accordance with the mandate of the statute without an award has almost no means to secure his right to indemnity. As a rule he cannot compel the employee to bring an action against the third party.

e) The complete control over the lawsuit makes it necessary to surround the provisions for transfer of the cause of action with specific safeguards as to the distribution of the recovery. Unmerited benefits for the third-party wrongdoer should be prevented. Further, neither the employer nor the insurance company should be allowed to speculate with the claim for damages. Such speculation is well within the range of probability, since the damages will often exceed the compensation, the latter being only an equivalent of the loss of earning power.

Most statutes, therefore, provide that the recovery in excess of compensation, costs, and expenses shall go to the employee.⁵⁵

However, there is all manner of variation in these statutes. Some say that the employee shall under any circumstances get part of the proceeds, which, in a particular case, might result in an impairment of the right to indemnity.⁵⁶ Others give the employee only a part of the excess recovery, so that there will be an incentive for the employer to prosecute the action.⁵⁷

In some jurisdictions which have no provisions for excess recovery, the transfer of the entire cause of action has resulted in a situation where only the amount of compensation could be recovered from the third party, while nobody could make a claim for damages in excess of that amount.⁵⁸

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tion to employee's tort cause of action). Limitation on the separate quasi-contract cause runs from the time of the payment, not from the time of the accident. This ruling was based on principles of the common law, though it looks as if it was influenced by the broader concept of a quasi-contract in the civil law (*negotiorum gestio* of the Roman law). However, the same result was reached in England, *Tuckwood v. Mayor of Rotherham*, [1921] 1 K.B. 526 (C.A.), though it must be noted that the British act, § 30(2), gives the employer a right to indemnity against the third party without using the terms "subrogation" or "assignment." See also *Attorney General v. Arthur Ryan Automobiles, Ltd.*, [1938] 2 K.B. 16, 21 (C.A.). Contra, also, *State v. Vinther*, 176 Wash. 391, 29 P. 2d 693 (1934), on the ground that where the state is suing as statutory subrogee it acts in its sovereign capacity, and, therefore, is not barred by the statute of limitations. The state has an inchoate right from the time of the accident so that the limitation can never become operative.

⁵⁵ Note, 38 Harv. L. Rev. 971, 974 (1925).

⁵⁶ Wis. § 102.29 exempts one-third of the proceeds for the employee. Cf. Mont. § 2839 (subrogation only to the amount of one-half of the compensation paid).

⁵⁷ Mass. § 15 gives the employee four-fifths (if the insurer sues), N.Y. § 29(2), two-thirds.

⁵⁸ *Industrial Comm. v. Nevelle*, 58 Ariz. 325, 119 P. 2d 934 (1941); *City of Taylorville v. Central Ill. Publ. Serv. Co.*, 301 Ill. 157, 133 N.E. 720 (1921) (if third party is within the

This is certainly at variance with the principle that the third-party wrongdoer shall not benefit from the compensation act.

In another jurisdiction the third party has been held liable to the insurer for the full amount of the damages, but the excess recovery above compensation was not paid over to the employee but was permitted to remain in the hands of the insurer.⁵⁹

These two instances again illustrate the danger of election and absolute transfer provisions.

4. *Time and definiteness of election and transfer.*—Attempts to determine what constitutes an election of remedies and what results in a transfer of the cause of action lead into a morass of doubts and uncertainty wherever the statute has failed to define which specific acts and facts shall conclusively be regarded as an election and shall effectuate the transfer of the right to sue.

The main problems which arise may be tabulated thus: Does (a) acceptance of money from the employer or insurer, (b) unsuccessful pursuit of one remedy, (c) pursuit of one remedy in ignorance of the other or of the alternative character of the two remedies divest the employee of his right to bring an action?

The first problem has been regulated by legislative fiat in most jurisdictions. Provisions on this point seem, indeed, one of the pivotal points of the third-party rules. Unfortunately, those statutes which make the acceptance of compensation the effective act are not of great help in clarifying the problem.⁶⁰ They still leave open the question whether the money paid was compensation or not and whether its acceptance constituted acceptance of compensation. Less problematical are statutes which expressly provide that the determinative act shall be the filing of a claim or notice with the commission,⁶¹ the granting of an award,⁶² or the receipt of compensation under an award.⁶³

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act); *Albrecht A. Albrecht Co. v. Whitehead & Kales Iron Works*, 200 Mich. 109, 166 N.W. 855 (1918) (if excess were held in trust for employee this would give employee two remedies though the statute says he shall have but one); *Ridley v. United Sash & Door Co.*, 98 Okla. 80, 224 Pac. 351 (1924) (even the employee himself, after taking back an assignment from the subrogee, could not recover damages in excess of compensation).

⁵⁹ *Traveler's Ins. Co. v. Brass Goods Mfg. Co.*, 239 N.Y. 273, 146 N.E. 377 (1925) (decided before the law was changed in 1935 by adopting an excess provision).

⁶⁰ Ala. § 311; Ariz. § 56-949; Mass. § 15; Mich. § 8454; Minn. § 176.06; N.M. § 57-925; Okla. § 44-13368; Wash. § 7675.

⁶¹ E.g., Fla. § 39; Tex. Part II § 6(a); Va. § 12.

⁶² E.g., Colo. § 87; Del. § 38; Idaho § 43-1004; N.D. § 20; Utah § 42-1-58; Vt. § 6511.

⁶³ E.g., Longshoremen's Act § 33(b).

The second problem is partly covered in a few statutes which permit the employee to claim compensation for the deficiency in case of an insufficient recovery from the third party.⁶⁴

The third problem is entirely left to judicial interpretation.

The courts have applied widely differing tests to these problems. However, in spite of the multitude of reasons which often are predicated upon a peculiar wording of the statute, there shine through two fairly discernible and distinct schools of thought.⁶⁵

Even within the first question, where the legislators' mandate goes farthest, room is left for an expression of these judicial individualities. Under a statute which provides for subrogation in case of payment of compensation but does not mention the necessity of an award, it has been held that acceptance of payment from the insurer, though called compensation, does not divest the employee's right to bring the action, unless the payment has been approved by the agency in charge of the administration of the act.⁶⁶ Through the court's interpretation the requirement of an award is thus supplied.

On the other hand, under a statute which expressly makes the transfer of the cause of action dependent upon an official award, it has been held that an election which precludes an action by the employee against the third party is made as soon as compensation, though paid without an award, has been received.⁶⁷

The same parting of the ways appears as to the second question. In some jurisdictions it has been held that the doctrine of election applies only where the claimant has two valid and available remedies; that choice of an unsound remedy and the futile pursuit of it are simply a mistake; that a party is not obliged to select his remedy at his peril; that considering a man to have waived a valid remedy for a nonenforceable one would be to reflect on his sanity.⁶⁸

⁶⁴ E.g., Longshoremen's Act § 33(f); N.Y. § 29(4); Okla. § 44-13368.

⁶⁵ The same distinction appears as to the election of remedies in other fields of the law, 5 Williston, Contracts § 1528 (rev. ed., 1937).

⁶⁶ Quick v. Western Mich. Transp. Co., 294 Mich. 402, 293 N.W. 696 (1940).

⁶⁷ See cases note 80, *infra*.

⁶⁸ American Lumbermen's Mut. Cas. Co. v. Lowe, 70 F. 2d 616 (C.C.A. 2d, 1934). Cf. (employer-employee relationship) Carter v. Uhrich, 122 Kan. 408, 252 Pac. 240 (1927); Jellico Coal Co. v. Adkins, 197 Ky. 684, 247 S.W. 972 (1923); Conrad v. Youghioghney and Ohio Coal Co., 107 Ohio St. 387, 140 N.E. 482 (1923); Hudgins v. Nashville Bridge Co., 172 Tenn. 580, 113 S.W. 2d 738 (1938); Poe v. Continental Oil & Cotton Co., 231 S.W. 717 (Tex. Comm. of App., 1921); Griffith v. Raven Red Ash Coal Co., 179 Va. 790, 20 S.E. 2d 530 (1942); Adams v. Ky. & W.Va. Power Co., 102 W.Va. 66, 135 S.E. 662 (1926). Cf. also the following holdings to the effect that unsuccessful claim of compensation under one act does not bar a similar claim under another act: Troxell v. Del., L. & W. Ry. Co., 227 U.S. 434 (1913);

Elsewhere, notably in Massachusetts, the view has been taken that the statutory election under the compensation act follows rules other than those of the ordinary common-law election between inconsistent remedies. If only the latter were involved, an employee who prosecuted one remedy to the end, only to find that it did not exist, might then resort to the other. Yet where the statute says that the employee shall seek compensation or proceed against the third party, it is said that compensation cannot be claimed after an action has been brought against the third party, though such action established only that there was no legal liability on the part of the third party.⁶⁹ This rule was clothed with the sanctity of an absolute command. Thus an agreement between employee and insurer reserving the employee's rights in case he should lose in his action against the third party has been declared illegal and unenforceable, as attempting to accomplish indirectly what the statute had expressly prohibited.⁷⁰

The same principles are applied to an election the other way. The mere institution of a compensation proceeding, though it may prove unsuccessful, e.g., because the injury is not compensable under the act, is held to be a bar to a tort action against the third party.⁷¹ It is said that an employee's gambling with the remedy that promises the greater return, in order to resort to the other less fruitful remedy if the first one proves unavailable, cannot be tolerated.⁷²

A similar difference of opinion flares up where the question is whether the employee must be conscious of his choice when making it. The liberal interpretation reasons that a man cannot be said to have elected between two inconsistent remedies, when he does not know of both. This applies in all those cases where the employee takes compensation without being

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Corbett v. Boston & M.R.R., 219 Mass. 351, 107 N.E. 60 (1914); Maxwell v. Kurn, 180 S.W. 2d 249 (C.A. Mo., 1944); Utah Idaho Cent. R.R. v. Ind. Comm. of Utah, 84 Utah 364 35 P., 2d 842 (1934).

⁶⁹ Tocci's Case, 269 Mass. 221, 168 N.E. 744 (1929).

⁷⁰ Coughlin v. Royal Ind. Co., 244 Mass. 317, 138 N.E. 395 (1923). Accord, Tews v. C. F. Hanks Coal Co., 267 Mich. 466, 255 N.W. 227 (1934). But cf. The Owen, 43 F. Supp. 897 (E.D. Pa., 1942) (right of action had vested in employer; subsequent agreement to reassign it to employee valid); The Kokusai Kisen Kabushiki Kaisha, 44 F. 2d 659 (S.D. Tex., 1930) (assignment from employer to insurer.)

⁷¹ Miller v. Richards, 305 Mass. 424, 26 N.E. 2d 380 (1940); McDonald v. Employers' Liab. Assn., Corp., 288 Mass. 170, 192 N.E. 608 (1934); Barry v. Bay State St. Ry. Co., 222 Mass. 366, 110 N.E. 1031 (1916); Ott v. St. Paul Union Stockyards, 178 Minn. 313, 227 N.W. 47 (1929). But cf. Walsh v. Central Cold Storage Co., 58 N.E. 2d 325 (App. Ct. Ill. 1944) (Illinois has no election provision.)

⁷² See Industrial Comm. v. Schaefer Realty Co., 98 Colo. 445, 448, 56 P. 2d 51, 52 (1936) (employer-employee relationship).

aware that he could sue the third party for damages. Where he has thus acted in misapprehension of his rights, the employee is given the right to rescind his election. It is said that in order to bind him he must know the inconsistency of the rights and the necessity of choosing between them.⁷³

Others proceed on the rule that everyone is presumed to know the law, a presumptuous if time-honored principle. Rescission is not permitted where the workman was sufficiently literate to know that he was getting compensation.⁷⁴ "Be ignorance thy choice where knowledge leads to woe." There is also a fine-spun distinction between ignorance of the existence of the two remedies and failure only to know that a choice between them has to be made, which latter variety is definitely called a mistake of law not justifying equitable relief.⁷⁵

In setting out these underlying principles we are conscious that the decision often turns upon the precise language of the statute. However, not little depends upon the manner of approach. Cases applying divergent principles in the same jurisdiction may illustrate this.

The Massachusetts act provides that the insurer may enforce the liability of the third party, if he paid compensation. In *Furlong v. Cronan*⁷⁶ the beneficiary filed his claim shortly before the statute had run. The insurer

⁷³ *Johnsen v. American-Hawaiian S.S. Co.*, 98 F. 2d 847 (C.C.A. 9th, 1938) (Longshoremen's Act; oddly, this case relies on a Massachusetts case where a liberal rule was applied, this, however, to the election of remedies under a will); *Ellich v. Hamburg Am. Packetfahrt A. G.*, 226 App. Div. 32, 234 N.Y. Supp. 171 (1929), aff. 252 N.Y. 541 (jury question); *Barton v. Okla., K. & M. Ry.*, 96 Okla. 119, 220 Pac. 929 (1923); *Walter v. Turtle*, 146 Ore. 1, 29 P. 2d 517 (1934); *Hicks v. Peninsula Lumber Co.*, 109 Ore. 305, 220 Pac. 133 (1923); *Harvey v. Chas. R. McCormick Lumber Co.*, 149 Wash. 358, 271 Pac. 65 (1928). Cf. (employer-employee relationship): *Miles v. Lavender*, 10 F. 2d 450 (C.C.A. 9th, 1926) (Arizona act); *Lassell v. Mellon*, 219 App. Div. 589, 220 N.Y. Supp. 235 (1927); *Cleveland Akron Bag Co. v. Rodatt*, 26 Ohio App. 233, 159 N.E. 105 (1926).

⁷⁴ *Toomey v. Waterman S.S. Corp.*, 123 F. 2d 718 (C.C.A. 2d, 1941); *The Owen*, 43 F. Supp. 897 (E.D. Pa., 1942); *Barry v. Bay State St. Ry. Co.*, 222 Mass. 366, 110 N.E. 1031 (1916) (applies principles of executed contract and equitable estoppel). Cf. (involving employer-employee relationship): *Talge Mahogany Co. v. Burrows*, 191 Ind. 167, 130 N.E. 865 (1921); *Schofield v. E. R. Bates & Co.*, 90 N.H. 31, 3 A. 2d 818 (1939) (executed contract of release); *Barbee v. Baker Car Co.*, 154 Tenn. 130, 289 S.W. 525 (1926) (irrelevant that employee did not know that employer had not complied with the act). British cases have similarly restricted the benefit of a rescission as against the employer: *Unsworth v. Elder Dempster Lines, Ltd.*, [1940] 1 K.B. 658 (C.A.); *Selwood v. Townley Coal and Fireclay Co., Ltd.*, [1940], 1 K.B. 180 (C.A.) (binding election though only fraction of compensation accepted). Compare *Perkins v. Hugh Stevenson & Sons, Ltd.*, [1940] 1 K.B. 56 (C.A.) (ignorance of right to election cannot avail, since otherwise employer would be doubly liable; no machinery to have the previous compensation payment deducted in a subsequent action for damages) with *Huckle v. London County Council*, 27 T.L.R. 112 (C.A., 1910) (even repayment of compensation does not help). These cases have been subjected to severe criticism: 93 L.J. 332 (1943); 91 L.J. 324 (1941); 191 L.T. 241 (1941). Cf. 56 L.Q. Rev. 287 (1940).

⁷⁵ *Ott v. St. Paul Union Stockyards*, 178 Minn. 313, 227 N.W. 47 (1929).

⁷⁶ 305 Mass. 464, 26 N.E. 2d 382 (1940).

could not secure a determination of its liability before that date. It, therefore, brought an action before it had paid compensation. The lower court held that under the statute it had no right to sue, since it had not paid compensation. The Supreme Judicial Court reversed upon the ground that in a case of this kind the insurer's right to enforce the liability of the third party should be construed as including "by implication" the incidental right to bring the action before compensation was actually paid. This was placed on the broad principle that the act should be liberally construed to accomplish the purposes for which it was enacted.

In another class of cases, however, the Massachusetts court, as was pointed out before, subjected the language of the act to a most narrow interpretation. The statute there provided—like many similar laws—that the employee should either proceed against the third party or against the insurer but "not against both." The question suggests itself: Should not this provision likewise be construed liberally as including "by implication" that the first proceeding, in order to preclude another step, must be a valid one, not merely an abortive attempt, so that the purpose of the act, relief for the injured workman—be it compensation or damages—be accomplished?

It is submitted that the answer to all these questions should be subordinate to two sets of principles. One is that the compensation acts are for the benefit of the employee and his dependents; that the election doctrine should not depend on technical rules but on principles of equity and justice and actual intention. It would seem that this last statement should apply with more, and not, as held in Massachusetts and Minnesota,⁷⁷ with less, force to the compensation acts. If one theory is as plausible as the other the courts should find in favor of the theory which enables an injured party to be fully compensated. *Leges vigilantibus scriptae sunt*; yet, compensation laws certainly are written also for those on the sickbed and in the hospital room, for the ignorant and the uneducated.

The second principle is the one which has been stressed throughout this article, viz., that the election of remedies in respect to a third party should follow rules of its own. This principle, though, is of more restricted application. It cannot be invoked where the issue is whether compensation can still be claimed. But, where the concern is the right to sue the third party, the following argument can be made: the third party is an outsider who does not share the burdens of the act. He is not the favorite of the law. He is not entitled to its benefits. He deserves no special consideration at the hands of the court. The election provision should serve to adjust the

⁷⁷ *Supra*, notes 69-71.

rights between the employee and the employer and is not meant to relieve a third-party wrongdoer from the consequences of his acts.

IV

The development under the Longshoremen's Act furnishes an instructive illustration of how the intentions of the legislature can be jeopardized by the strait-jacket of the election concept.

The Longshoremen's Act originally provided for an assignment of the right to bring an action upon acceptance of compensation. In 1938 the law was changed so that only acceptance of compensation under an award effected a transfer of the cause of action. Congress, following the suggestions of the United States Employees' Compensation Commission which has responsibility for the administration of the act, wished to remove possible cause of complaint regarding the automatic operation of the acceptance of compensation as an assignment to the employer of all rights of action against the third-party tortfeasor.⁷⁸ Apprehension was voiced that "acceptance of compensation without knowledge of the effect upon such rights may work grave injustice." The injured party should be given a better opportunity to consider the acceptance of compensation with the resulting loss of right to bring suit. It was thought that this opportunity would be best afforded when the transfer was made contingent upon the acceptance of compensation under an award by the commissioner. The injured man would then have the benefit of an instruction and a caution from the commissioner.

However, though the transfer provision of the act was thus amended, there remained virtually unchanged the provision which required an election between receipt of compensation and recovery of damages against the third party. In other words, there remained a general provision for election of remedies along with the separate transfer provision.⁷⁹

Under this language of the statute, it has been decided that acceptance of compensation paid voluntarily, that is in accordance with the law but without an award, divests the employee of his right to bring suit, though

⁷⁸ H.R. Rep. No. 1945, 75th Cong., 3d Sess. (1938) 2 and 9; Sen. Rep. No. 1988, 75th Cong., 3d Sess. (1938) 2 and 9.

⁷⁹ § 33(a) of the act states that the election be made in such a manner as the commission may provide. The commission has issued a "notice of election to sue" (form US-213). This form refers to § 33(f) of the act. If the election goes the other way, that is not to sue but to take compensation, there is only the ordinary blank regarding a claim for compensation (form US-203). Filing of a claim has been treated by the commission as meeting the requirements of notice of election according § 33(a), *Brusich v. Grace Line Inc.*, 56 F. Supp. 48 (S.D. N.Y., 1944).

it does not vest such right in the employer, since the acceptance has not occurred under an award.⁸⁰

The upshot of such ruling is that we have a cause of action without a plaintiff to enforce it. Lest the third party go scot-free, and in order to secure the employer's right to indemnity, the employer must proceed for an award though he has no ground to controvert the compensation liability.

The same situation is met under all statutes where the election and transfer provisions have not properly been synchronized, where it may occur that the employee has made an election, but that the transfer of the right of action depends upon some further contingency such as an award or payment of compensation.

Other courts in not viewing the election of remedy as an isolated concept have interpreted differently similar but not identical language in other statutes. These statutes do not use the expression "election"; they say only that the employee shall either accept compensation or sue the third party, but not both. At the same time, like the Longshoremen's Act, they provide for an assignment in case of an award. Under statutes of that kind it has been held that the employee's election of remedies has merely the effect of giving the employer a right to share in the recovery from the third party but not to take away from the employee the right to institute and prosecute the action.⁸¹

⁸⁰ *Jakuboski v. Matson Navigation Co.*, 264 App. Div. 735, 34 N.Y.S. 2d 352 (1942). This was a real test case. There was no award but merely a voluntary payment. Separate defenses were at issue. The court held that the defense which pled securing and payment of compensation by the employer was sufficient in law as allegation of an election by the employees, since the mere acceptance of compensation precluded the employee from proceeding against the third party for damages. But the employee was held not to be divested of his cause of action, since the payment was not made under an award. The defense to that effect was stricken. *Accord, Cocasso v. Erie R.R.*, 44 N.Y.S. 2d 373 (Sup. Ct., 1943) (the dictum that acceptance of compensation without an award may even effect an assignment seems untenable); *Toomey v. Waterman S.S. Corp.*, 123 F. 2d 718 (C.C.A. 2d, 1941) *semble. Contra*, (under old form of the act) *Brusich v. Grace Line Inc.*, 56 F. Supp. 48 (S.D. N.Y., 1944); *Tartaglio v. Cunard White Star*, 56 F. Supp. 55 (S.D. N.Y., 1944) (indicates that the employee would have lost his right, had there been a claim notice to the commission, not only acceptance of payment); *Cupo v. Isthmian S.S. Co.*, 56 F. Supp. 45 (S.D. N.Y., 1941). But cf. the following holdings under a statute without election provision: *Rehula v. Bessert*, 322 Ill. App. 146, 54 N.E. 2d 71 (1944); *Anderson v. Chicago, B. & Q. R.R.*, 250 Ill. App. 92 (1928); *Kelly-Atkinson Construction Co. v. Foreman Bros. Bk. Co.*, 218 Ill. App. 345 (1920).

⁸¹ *Canadian Pacific Ry. v. Morin*, 54 F. 2d 246 (C.C.A. 2d, 1931) (Vt. act); *Riss & Co. v. Anderson*, 108 Colo. 78, 114 P. 2d 278 (1941); *King v. O. P. Baur Confectionery Co.*, 100 Colo. 528, 68 P. 2d 909 (1937); *Lowe v. Morgan's La. & T. Ry. & S.S. Co.*, 150 La. 29, 90 So. 429 (1922) (subsequent to this case Louisiana abolished the election requirement, § 7). Cf. *Lebak v. Nelson*, 62 Idaho 96, 113, 107 P. 2d 1054, 1061 (1940) (employee does not lose the right to sue where employer does not insist on subrogation); *Quick v. Western Michigan Transp. Co.*, 294 Mich. 402, 293 N.W. 696 (1940) (statute silent on award); *Fox v. Detroit United Ry.*, 218 Mich. 5, 187 N.W. 321 (1922); 12 So. Calif. L. Rev. 506 (1939). The New York act be-

V

The Longshoremen's Act, with its shift from informal acceptance of compensation to acceptance of compensation under an award, is only one instance of the trend of the legislation. The same tendency can be found in other acts. Either the law does away with acceptance of compensation as the operative fact and predicates the election of remedies and the transfer of the cause of action on some official act like an award, or, going the full length, the statute scraps completely both election of remedy and assignment of the entire cause of action.

The Longshoremen's Act exemplifies only the first of these two alternatives. A picture of both alternatives in succession is reflected in the history of the New York act.

The New York law, which has been called the pioneer in the field of American workmen's compensation acts,⁸² originally required an election before a suit could be brought or before compensation could be claimed. If compensation was taken, the cause of action against the third party was assigned to the state or the person liable for the payment. In 1917 the law was changed so that only an award of compensation operated as an assignment, although the separate provision requiring an election of remedies was not eliminated. The election provision was finally abolished in 1937.⁸³

The New York law now is that the injured man need not elect, and that he may take compensation and, at the same time, sue the third party, provided only that he brings such action within a specified time. Only if he takes compensation and fails to sue within the time limit, does an assignment to the state fund or to the person liable for compensation take place.

The Longshoremen's Act in its present form appears, in the light of this development, as a peculiar posthumous child of an extinct form of the New York law.

The 1938 amendment to the Longshoremen's Act was first submitted by the United States Employees' Compensation Commission on February 24, 1937. It was introduced in the 74th Congress. Hearings were had and

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tween 1917 and 1937 was almost identical with the present Longshoremen's Act. It required in general an election of remedies, while it provided for a transfer of the right to sue only in case of an award. The sole distinction from the Longshoremen's Act was that the transfer was not conditional on payment of the award. Under this language of the law it was held that the divesting of the title was postponed until an award was made: *Godfrey v. Brooklyn Edison Co.*, 115 Misc. 21, 187 N.Y. Supp. 263 (Sup. Ct., 1921), aff. 188 N.Y. Supp. 923.

⁸² See *Branham v. Terminal Shipping Co.*, 136 F. 2d 655, 657 (C.C.A. 4th, 1943).

⁸³ N.Y. Laws 1914, c. 41 § 29; id. 1917, c. 705 § 29; id. 1937, c. 684 § 29(1); note, 15 St. John's L. Rev. 283 (1941).

the bill was favorably reported, but not passed. It was then reintroduced in the 75th Congress and finally enacted, effective from June 6, 1938. The Congressional reports expressly state that "the amendment follows the New York Workmen's Compensation Law."⁸⁴ However, the New York law had meanwhile been changed, effective from September 1, 1937. Thus it happened that the election and transfer provisions of the Longshoremen's Act were patterned after the law of a state where the election provision had already been swept into discard by a statute permitting the workman to pursue both remedies.

Significant also is the development under the British act. The first British Compensation Act compelled the employee to make his choice between acceptance of compensation or an action for damages against the third party. In 1906, however, the act was changed so that the employee now could seek both compensation and damages against the third party though he could not recover in both proceedings.⁸⁵

The Continental law, where the idea of workmen's compensation originated, does not employ the device of an election of remedies. Under many Continental laws the employer or the insurance carrier who has paid the compensation is subrogated pro tanto to the rights of the employee without otherwise impairing them.⁸⁶ Jury trial in civil cases, misjoinder, and rules against a division of the cause of action being all but unknown under the civil-law system, the transfer pro tanto presents little practical difficulty.

The usefulness of the doctrine of election of remedies has been questioned. Is it necessary that the workman by accepting money from the employer or insurer, be it under an award or without it, forfeits the right to sue the third party for damages? He might be in urgent need of money. He might still be suffering from the accident. The needs of his family, which has been deprived of the breadwinner, might weigh heavily on his mind. He might be unable to pay for hospital and medical help. Does he lose his right when he accepts money at a time when he is in no financial condition to await the results of protracted litigation? It has been asked why a workman could not receive certain payments as compensation to keep him alive until his action comes to trial; why he could not be allowed to proceed with his more lucrative remedy, though in his folly or in his destitution he

⁸⁴ Note 78, *supra*.

⁸⁵ Compare act of 1897 § 6 with act of 1906 § 6(1). In the subsequent recodification of the law no change was made in this provision, act of 1925 § 30(1).

⁸⁶ E.g., Austria § 75(2); Germany § 1542; Sweden § 12; Switzerland § 100. Cf. Belgium § 19(7); France: law of Oct. 28, 1935 (modifying the administration of the social insurance), 1935 Journal officiel No. 256, p. 11588 Part I § 7. For complete sources see note 15, *supra*.

has accepted compensation, provided he is prepared to account for the money or to return it.⁸⁷

Even from the viewpoint of expediency it is difficult to suppress doubts as to the usefulness of the election and absolute transfer provisions. Their stringency, cumbersomeness, and lack of resiliency have, it would seem, to some extent offset the avowed intention of the acts to provide for simplicity of procedure and to eliminate wasteful litigation and costly lawsuits.⁸⁸

In a large number of jurisdictions these considerations have led to an abolishment of both devices. Under the most progressive acts the rule now is that the person paying compensation, no matter whether the employer, a private insurer, or the state fund, gets a right to sue, but only to the extent of such payment. This assignment pro tanto can be enforced in the courts without thereby depriving the employee of his right to sue likewise for his share. Joinder between both is expressly permitted in some statutes; if only one sues, notice to the other is required.⁸⁹

However, many acts still employ both devices, election of remedies and transfer of the full cause of action. In weighing and construing third-party rules under these statutes, the great importance of the distinction between the two election provisions of the act should not be overlooked. The economic thought crystalized into the election provision within the employer-employee relationship must be distinguished from the narrow purpose of the other election provision as an instrument of legal technique.

While there is, or was at the time of the enactment of the laws, difficulty in allocating interests to employer or employee, there should be no such difficulty within the ambit of third-party rules. A narrow and forced construction of the third-party rules should, therefore, be studiously avoided, and the rules should receive the broad and liberal construction which is given other provisions of the compensation acts.

⁸⁷ A British court posed these questions even with respect to the election of remedies as against the employer: *Selwood v. Townley Coal and Fireclay Co., Ltd.*, [1940] 1 K.B. 180, 187 (C.A.); 93 L.J. 332 (1943); 191 L.T. 241 (1941). Cf. *Toomey v. Waterman S.S. Corp.*, 123 F. 2d 718, 721 (C.C.A. 2d, 1941).

⁸⁸ See Mr. Justice Stone in *Doleman v. Levine*, 295 U.S. 221, 229 (1935): "While it seems beyond the resources of judicial ingenuity to construe the statute [the election provision of the Longshoreman's Act] so as to give it a wholly consistent and harmonious operation . . ."; Lord Stirling in *Field v. Longden & Sons*, [1902] 1 K.B. 47, 56 (C.A.): "The Workmen's Compensation Act was intended for the benefit of workmen, not for that of the legal profession."

⁸⁹ E.g., Cal. § 3852; Conn. § 5231; Ill. § 29(9) (if third party elects not to be bound by the act); Wis. § 102.29. Cf. also the statutes, note 28, supra, and *Kandelin v. Lee Moor Contracting Co.*, 37 N.M. 479, 24 P. 2d 731 (1933) (rules regarding assignability and splitting of a cause of action yield to provisions of Workmen's Compensation Act).