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Three wrongful death actions were brought in a federal district court in New York by United States citizens as survivors of passengers killed in the crash in Turkey of an airplane owned and operated by defendant Middle East Airlines (MEA). MEA is a Lebanese corporation operating in the Middle East, Europe, and Africa, whose United States sales are made by its general sales agent, Pan American World Airways, Inc. The court held that maintaining a New York office and entering into a general sales agency agreement with Pan American to promote travel on MEA of passengers originating in the United States were sufficient minimum contacts to justify the exercise of jurisdiction over MEA in New York for any legitimate consequences of such activity. The court granted a motion for reargument, however, to hear the contention that the assertion of jurisdiction over MEA would constitute an undue burden on commerce with foreign nations in violation of the commerce clause. On reargument, held, affirmed. Although such an action in a state court may unconstitutionally burden commerce, when the action is brought in a federal court the burden cannot be unconstitutional since the commerce clause is a limitation upon state and not federal power.

In *Davis v. Farmers Co-op. Equity Co.*, the United States Supreme Court declared invalid as an unreasonable burden on interstate commerce a state statute providing for service of process on a foreign railroad corporation. In announcing the doctrine that the negative implications of the commerce clause provided a possible defense to the assertion of jurisdiction, the Court stated that the orderly and effective administration of justice does not require a foreign carrier to submit to a suit by a nonresident of the forum state in a jurisdiction which is remote from where the cause of action

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2. U.S. Const. art. I, § 8, cl. 3.
arose and in which the carrier neither owns nor operates any facilities.

Decisions subsequent to Davis indicate that the Court is reluctant to extend that decision beyond its facts. Thus, the commerce clause objection may be raised only against the maintenance of a suit on a cause of action arising outside of the forum state against a foreign corporation not operating in the forum state. Although the rationale of Davis extends to any legal entity in interstate commerce, it is questionable whether the defense is available other than to incorporated common carriers. Moreover, the fact that the plaintiff is a resident of the forum state is often sufficient to dispose of the defense. In addition, courts have had little difficulty in finding that the defendant carries on sufficient activities in the forum state to obviate the commerce clause objection. However, regardless of the concern in Davis about the dilatory effect on commerce caused by the necessity of removing trained employees from their jobs to appear as witnesses in distant forums, later decisions indicate that there has been no incorporation of a requirement of distant witnesses to limit this defense. Although this defense is of limited

3. 262 U.S. at 317.
5. See Farrier, supra note 4, at 393-95; McGowan, supra note 4, at 880-82; Comment, 45 YALE L.J. 1100, 1114-17 (1936).
6. See generally Farrier, supra note 4, at 393-95 (1933); McGowan, supra note 4, at 880-82 (1939); 42 HARV. L. REV. 1062, 1067 (1929).
10. 262 U.S. at 315.
vitality today, it continues to be verbalized and occasionally to be successfully invoked.

While recognizing its limited scope, the federal courts have not agreed on whether the defense of an undue burden on commerce can be asserted in the federal courts in an ordinary diversity action. One view is represented by Overstreet v. Canadian Pacific Airlines, where a district court on the authority of Davis dismissed the suit as an unconstitutional burden on commerce. Another view was expressed in Wadell v. Green Textile Associates, where a district court found the defendant subject to jurisdiction conferred by the general diversity jurisdiction and venue statutes. Since it is clear that Congress has the constitutional power to burden commerce, the court reasoned that congressional action in conferring jurisdiction was an exercise of that power. A third view, expressed in Wahl, is that actions brought originally in federal courts on a diversity basis can never unduly burden commerce since the negative implications of the commerce clause limit state but not federal power.

It would seem difficult to maintain the position of Wadell that, merely because the action is proper under the general venue and jurisdiction provisions, Congress has exercised its power to burden commerce by permitting jurisdiction to be asserted over a foreign corporation having only a general sales agent in the forum state. In Baltimore & Ohio R.R. v. Kepner, the United States Supreme Court did hold that the venue provisions of the Federal Employers' Liability Act compelled the federal courts to adjudicate any action that was proper under those provisions. The Court found, how-


20. 314 U.S. 44 (1941).
ever, that Congress specifically intended those special venue provisions to have that effect. On the contrary, the general diversity power given the federal courts has not been interpreted to compel adjudication. Significantly, in Woods v. Interstate Realty Co., the Court held that the doctrine of Erie R.R. v. Tompkins precludes federal courts from entertaining diversity actions barred in state courts by "door-closing" statutes. Although Congress has the power to permit the federal courts to adjudicate these suits, the grant of general diversity power has not been considered an exercise of this power. In terms of the implied effect of the general diversity provisions to override limitations on federal adjudicatory power, it would seem inconsistent with the approach in Woods, therefore, to limit the Davis doctrine by holding that the general diversity provisions are an exercise of congressional power to burden commerce by permitting suits in federal courts which Davis prohibits in state courts.

The intimation in Wahl that the Davis doctrine is inapplicable in the federal courts because the commerce clause limits only state power is interesting, but unsupported. It is true that the Supreme Court has never considered a defense based on Davis in a case arising in the federal courts. However, the rationale of the Court in Davis


24. This was explicitly recognized in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 505 (1947), a forum non conveniens case, in which the Court, discussing the Kepner line of cases, said that: "Those decisions do not purport to modify the doctrine as to other cases governed by the general venue statutes." Another example of the absence of compulsion under the general diversity provisions is the abstention doctrine, which prevents federal courts from hearing certain diversity cases in which the controlling state law is not clear. See, e.g., Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); Burford v. Sun Oil Co., 319 U.S. 315 (1943).


26. 304 U.S. 64 (1938).


30. 227 F. Supp. at 841. If the court is correct that the commerce clause limits only state power, an argument that the federal courts would still have to follow state law under Erie is possible. If, in addition to the constitutional limitation, the state has an affirmative policy in its refusal to assert jurisdiction, for example the encouragement of limited activities in the state by foreign corporations, Erie would seem applicable. Certainly, there is no absolute due process right to sue in an American court. See Comment, 103 U. PA. L. REV. 830 (1955). In the absence of an affirmative state policy, however, it is clear that Erie would not preclude the federal courts from adjudicating the suit. Cf. Hill, supra note 29, at 570-71; Weintraub, supra note 29, at 249-51.

31. In Atchison, T. & S.F. Ry. v. Wells, 265 U.S. 101 (1924), the Court held that the enforcement of a judgment obtained in a state court against a foreign railroad corporation in violation of the Davis doctrine could be enjoined by a federal court.
that the general submission of common carriers to suit will unreasonably obstruct commerce applies as well to the federal courts, and the language of the Court broadly encompasses suits in both court systems. Moreover, since the power to regulate commerce is vested in the legislative branch of the federal government, it would seem that the federal courts have no power to burden commerce. This question seems analogous to that question of executive power presented in Youngstown Sheet & Tube Co. v. Sawyer, where there were at least four different views among the Justices of the Supreme Court as to whether the President could exercise any powers which fell within the legislative powers of Congress. Nevertheless, each member of that Court considered all powers of the President to regulate commerce to be delegated powers. It would seem clear by analogy, therefore, that the federal courts could not burden commerce in the absence of congressional delegation of that power to them. The inability to find a specific intent in the general diversity provisions to burden commerce, as existed in Kepner, would seem to preclude finding such a delegation. Although its range of application has been narrowed, the commerce clause still remains a possible defense to jurisdiction, particularly appropriate to common carriers in foreign commerce. As a constitutional method of adjusting place of trial, analogous to the doctrine of forum non conveniens, its value has diminished with the expanded use of that doctrine. Nevertheless, as long as the Supreme Court does not view the Davis doctrine as discretionary,

32. See Davis v. Farmers Co-op. Equity Co., 262 U.S. 312, 315 (1923), where the Court took notice “that litigation in States and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations.” (Emphasis added.)
33. Id. at 315-17.
34. U.S. CONST. art. I, § 8, cl. 3.
35. 343 U.S. 579 (1952).
36. See Kauper, The Steel Seizure Case—Congress, the President and the Supreme Court, 51 Mich. L. Rev. 141, 177 (1952). Justices Black and Douglas considered the President powerless to act in the sphere of legislative powers of Congress without express authorization. See ibid.
37. Id. at 175. See also United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), aff’d on other grounds, 348 U.S. 296 (1955).
38. See In re Debs, 158 U.S. 564 (1895), where the argument was made that the federal courts could not enjoin conduct interfering with interstate commerce unless authorized to do so by Congress. The Court sustained the injunction on the basis of a finding of congressional policy. See Kauper, supra note 36, at 148.
39. See notes 4-14 supra and accompanying text.
40. See Farrier, supra note 4, at 392.
42. Mr. Justice Jackson viewed Davis as really a forum non conveniens case. Jackson, Full Faith and Credit—The Lawyer’s Clause of the Constitution, 45 Colum. L. Rev. 1, 51 (1945). See also Bickel, supra note 23, at 17 n.28. This view has been criticized. See Braucher, The Inconvenient Federal Forum, 60 Harv. L. Rev. 309, 313 (1947).
as is forum non conveniens, and as long as there is no specific congres­sional authorization to burden commerce by permitting suits in the federal courts in these situations, the defense to the assertion of jurisdiction of an undue burden on commerce must be considered applicable in the federal courts.