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## VENUE-THE NEED FOR A CHANGE IN THE VENUE PROVISIONS OF THE FEDERAL EMPLOYERS' LIABILITY ACT

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VENUE—THE NEED FOR A CHANGE IN THE VENUE PROVISIONS OF THE FEDERAL EMPLOYERS' LIABILITY ACT—In response to the need created by a highly dangerous era of railroad employment,<sup>1</sup> and subsequent to the passage of similar legislation in Europe,<sup>2</sup> there was enacted in 1906 a Federal Employers' Liability Act.<sup>3</sup> The attempted

<sup>1</sup> Some indications as to the perilous nature of early railroad employment are suggested by ADAMS, *NOTES ON RAILROAD ACCIDENTS* (1879); Tait, "Railway Employee Safety," 10 *GEO. WASH. L. REV.* 272 (1942); Griffith, "The Vindication of a National Public Policy under the FELA," 18 *LAW AND CONTEMP. PROB.* 160 (1953). It is not suggested that the perilous nature of operative railroad employment began with the driving of the golden spike at Promontary, Utah and ended with the improvement of railroad equipment subsequent to the passage of the original Federal Safety Appliance Act, 27 *Stat. L.* 531 (1893). It is quite to the contrary; there are currently at least one hundred railroad employees injured every day. See the address of Secretary of Labor, Maurice I. Tobin, *BUREAU OF LABOR STANDARDS BUL.* No. 104, p. 1 et seq. (1948). Since 1888 there have been 125,000 operative railroad employees killed and 4,293,326 injured. See *ICC ACCIDENT BUL.* No. 119, appx. A, p. 112 et seq. (1951).

<sup>2</sup> England enacted protective legislation in 1880 and Germany in 1884. See DAUGHERTY, *LABOR PROBLEMS IN AMERICAN INDUSTRY*, 4th ed., 788 et seq. (1938). These and other European and state efforts at solution of the problem were before the Congress that enacted the Federal Employers' Liability Acts. See *Hearings Before a Subcommittee on the Committee Having under Consideration H. 239 and S. 156 and S. 1657, 59th Cong., 1st sess.* (1906); *Hearings before the House Judiciary Committee on H.R. 17036, 60th Cong., 1st sess.* (1908).

<sup>3</sup> 34 *Stat. L.* 232 (1906). The introduction of this act into Congress by President Theodore Roosevelt was due largely to the efforts of Edward A. Mosely. See MORGAN, *THE LIFE WORK OF EDWARD A. MOSELY IN THE SERVICE OF HUMANITY* (1913); Griffith, "The Vindication of a National Public Policy under the FELA," 18 *LAW AND CONTEMP. PROB.* 160 at 166 (1953).

coverage of the first FELA was too broad to withstand the constitutional scrutiny of a five-to-four Supreme Court,<sup>4</sup> and it consequently remained for the Congress of 1908<sup>5</sup> to enact valid legislation for the protection of the railroad employee.<sup>6</sup> Whether or not the FELA is the most efficacious solution to the problem of the injured railroad employee continues to be warmly debated,<sup>7</sup> but for the present the act provides one of the most heavily litigated<sup>8</sup> of all federally created rights capable of enforcement in state as well as federal courts.<sup>9</sup> It is with the venue features of the act that this comment is concerned.<sup>10</sup>

As enacted in 1908 the statute itself contained no special pro-

<sup>4</sup> The [First] Employers' Liability Cases, 207 U.S. 463, 28 S. Ct. 141 (1908). Justices Moody, Harlan, McKenna, and Holmes dissented.

<sup>5</sup> 35 Stat. L. 65 (1908), 45 U.S.C. (1946) §§51-60. This act was passed two and one-half months after the Supreme Court invalidated the 1906 act. It too was pushed through Congress by President Roosevelt. See 42 CONG. REC. 1347 (1908).

<sup>6</sup> Second Employers' Liability Cases, 223 U.S. 1, 32 S. Ct. 169 (1911).

<sup>7</sup> The obvious alternative of comprehensive workmen's compensation coverage has had many staunch advocates, including past and present members of the Supreme Court. Justice Frankfurter, concurring in *Wilkinson v. McCarthy*, 336 U.S. 53 at 65, 69 S. Ct. 413 (1949), observed that a compensation act would correct the "cruel and wasteful mode of dealing with industrial injuries" under the FELA. See also his concurring opinion in *Urie v. Thompson*, 337 U.S. 163 at 196, 69 S. Ct. 1018 (1949). For a similar sentiment of Chief Justice Taft see his address to the Seventh Annual Meeting of the American Law Institute, 15 A.B.A.J. 332 (1929).

For the history of the congressional efforts at a compensation law to replace the FELA, see Miller, "The Quest for a Federal Workmen's Compensation Law for Railroad Employees," 18 LAW AND CONTEMP. PROB. 188 (1953). Arguments on the merits of the question have been frequent. For some of the views and for citations to other writers, see Pollack, "Workmen's Compensation for Railroad Work Injuries and Diseases," 36 CORN. L. Q. 236 (1951) (favoring a compensation law); Richter and Forer, "Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers," 36 CORN. L. Q. 203 (1951) (favoring retention of the FELA). Also see Parker, "FELA or Uniform Compensation for All Workers?" 18 LAW AND CONTEMP. PROB. 208 (1953).

<sup>8</sup> Justice Frankfurter observed in *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54 at 73, 63 S. Ct. 444 (1943): "Perhaps no field of the law comes closer to so many families in this country than does the law of negligence, imbedded as it is in the Federal Employers' Liability Act." During fiscal 1952 there were 1,231 cases commenced under the FELA in the federal courts alone. In addition there were 2,227 personal injury actions commenced under the Jones Act, 38 Stat. L. 1185 (1915), as amended by 41 Stat. L. 1007 (1926), 46 U.S.C. (1946) §688. Negligence questions under the Jones Act are decided in accordance with the decisions under the FELA. See the ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 126-127 (1952).

<sup>9</sup> 36 Stat. L. 291 (1910), as amended, 45 U.S.C. (1946) §56 provides that "an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."

<sup>10</sup> The venue provisions of the FELA have been a constant source of dissatisfaction to railroad employees and employers since the original enactment of the legislation. See Gibson, "The Venue Clause and Transportation of Lawsuits," 18 LAW AND CONTEMP. PROB. 367 (1953); Martin, "Improper Venue under the FELA," 3 WASH. & LEE L. REV. 247 (1942); Braucher, "The Inconvenient Federal Forum," 60 HARV. L. REV. 908 (1947); Richter and Forer, "The Federal Employers' Liability Act," 12 F.R.D. 13 at 60 et seq. (1952); 39 YALE L. J. 388 at 393 et seq. (1930); 44 ILL. L. REV. 75 (1949); 46 ILL. L. REV. 115 at 117 et seq. (1951).

visions for the venue of actions arising thereunder and venue was consequently governed by the narrow provisions of the then existing general federal venue statute.<sup>11</sup> Under this statute venue was restricted to the federal district courts in the district in which the defendant resided. Congressional reaction<sup>12</sup> against this restriction<sup>13</sup> upon what was intended to be humanitarian legislation resulted in the 1910 amendment to the act.<sup>14</sup> Under the amendment venue was provided wherever the defendant did business, or at the plaintiff's residence, or where the cause of action arose. As a result of these broad provisions for the choice of venue there developed the practice of extensive transportation of lawsuits to forums chosen not always for their convenience, nor even for their history of generosity to plaintiffs, but chosen rather to induce large settlements by offering as an alternative the defense of a lawsuit in a distant, inconvenient forum. As the FELA actions gravitated toward the "plaintiffs' courts" there evolved extensive systems of ambulance chasers composed of attorneys familiar with these courts. Not only did these attorneys offer familiarity with the forum, but they also assured the injured plaintiff of a larger recovery or settlement than could have been obtained elsewhere. Indeed, they sometimes even lent the plaintiff money in order to tide him over during the litigation.<sup>15</sup>

<sup>11</sup> 25 Stat. L. 433 (1888).

<sup>12</sup> See S. Rep. No. 432, 61st Cong., 2d sess. (1910); H. Rep. No. 17263, 61st Cong., 2d sess. (1910); 45 CONG. REC. 2253-2260, 3993-3998, 4034-4051, 4091-4100, 4120-4124 (1910).

<sup>13</sup> The restriction was made even greater than necessary by the refusal of state courts to entertain jurisdiction on the grounds that it would be contrary to the congressional intent. *Hoxie v. New York, N.H. & H. R. Co.*, 82 Conn. 352, 73 A. 754 (1909). Although this was clearly erroneous [see 25 Stat. L. 433 (1888) and the Second Employers' Liability Cases, 223 U.S. 1 at 56, 32 S. Ct. 169 (1911)], the 1910 amendment specifically provided for concurrent jurisdiction. See Gibson, "The Venue Clause and Transportation of Lawsuits," 18 LAW AND CONTEMP. PROB. 367 at 369 (1953).

<sup>14</sup> 36 Stat. L. 291 (1910), 45 U.S.C. (1946) §56.

<sup>15</sup> The states most favorable to plaintiffs for negligence actions are generally thought to be Minnesota, Illinois, New York, Missouri, and California. See hearings before Subcommittee No. 4 of the House Committee on the Judiciary on H.R. 1639, 80th Cong., 1st sess. (1947); Hearings before a Subcommittee of the Committee on the Judiciary United States Senate on H.R. 1639 and S. 1567, 80th Cong., 2d sess. (1948). In a five year period ending in 1946, of all the suits begun in federal district courts other than those of the place where the injury occurred, ninety-two percent were commenced in the above five named states. H. Rep. No. 613, 80th Cong., 1st sess. (1947).

In a note to Justice Brandeis' majority opinion in *Davis v. Farmers Co-operative Equity Co.*, 262 U.S. 312 at 316, 43 S. Ct. 556 (1923), it is stated: "A message, dated February 2, 1923 of the Governor of Minnesota to its Legislature, recites that a recent examination of the calendars of the district courts in 67 of the 87 counties of the State disclosed that in those counties there were then pending 1,028 personal injury cases in which nonresident plaintiffs seek damages aggregating nearly \$26,000,000 from foreign railroad corporations which do not operate any line within Minnesota." The Minnesota situation has received additional unfavorable comment. See *Chicago, M. St. P. & P. R. Co. v. Wolf*, 199 Wis.

In an effort to diminish the effects of the wide venue choice of their employees, the railroads have utilized, with varying degrees of success, at least three devices. The one which has in recent times been most vigorously employed and which currently maintains the greatest vitality is the doctrine of *forum non conveniens*. But in order to appreciate better the use of this device it may be well to examine briefly the use, and the reasons for the current disuse, of the other devices.

### I. *Contracts Restricting Choice of Venue*

Prior to the 1949 decision of the Supreme Court in *Boyd v. Grand Trunk Western R. Co.*,<sup>16</sup> several state and lower federal courts had sustained the validity of contracts between railroads and employees, whereby the latter, for a consideration, agreed to pursue their rights under the FELA in some particular forum. Venue-restricting coven-

278, 226 N.W. 297 (1929); *Chunes v. Duluth, W. & P. Ry. Co.*, (D.C. Minn. 1924) 298 F. 964. Illinois, especially Chicago, has also been a favored forum for injured plaintiffs—or perhaps more accurately for their attorneys. In *Atchison, T. & S. F. Ry. Co. v. Andrews*, 338 Ill. App. 552, 88 N.E. (2d) 346 (1949), the court enjoined an attorney from maintaining an extensive solicitation operation headquartered in Chicago. This industrious attorney was litigating ninety-two FELA cases in Chicago, in which the claims approached \$5,000,000. It has not been unknown for these Minnesota and Chicago importation organizations to make advances to plaintiffs pending judgment in their cause, to provide entertainment for the plaintiffs, and to maintain standing groups of expert witnesses.

The abuse of venue privileges was thought to so interfere with the war effort that in World War I, W. G. McAdoo, Director General of the Railroads, issued General Orders Nos. 18 and 18a (1918), which restricted venue to the place of the plaintiff's residence or the place where the cause of action arose. Although originally held unconstitutional by state and lower federal courts as applied to FELA cases, the orders were sustained by the Supreme Court in *Alabama & Vicksburg Ry. Co. v. Journey*, 257 U.S. 111, 42 S. Ct. 6 (1921). During World War II, without the promulgation of any executive order, it was held that the interference with the war effort did not affect the statutory venue privileges of plaintiffs. See *Union Pacific R. Co. v. Utterback*, 173 Ore. 572, 146 P. (2d) 76 (1944), cert. den. 323 U.S. 711, 65 S. Ct. 36 (1944). Also see "Actions Against Railroads under the Federal Control," 23 LAW NOTES 46 (1919).

The unsavory practices encouraged by the FELA venue provisions has received considerable attention. See especially Gibson, "The Venue Clause and Transportation of Lawsuits," 18 LAW AND CONTEMP. PROB. 367 (1953); Henderson, "The 'Exportation' of Personal Injury and Death Claims," 13 DETROIT B. Q. 11 (1945); Winters, "Interstate Commerce in Damage Suits," 29 J. AM. JUD. SOC. 135 (1946); Barrett, "The Doctrine of *Forum Non Conveniens*," 35 CALIF. L. REV. 380 (1947); Gay, "Venue of Actions: Bill to Curb Shopping for Forums Is Urged," 33 A.B.A.J. 659 (1947); 29 IND. L. J. 97 (1953). Also see Remmers, "Recent Legislation Affecting the Place of Trial: *Forum Non Conveniens*," CURRENT TRENDS IN STATE LEGISLATION 355-356 (1952); 39 YALE L. J. 388 at 399 et seq. (1930); 15 MINN. L. REV. 83 at 94 (1930); 46 W. VA. L. Q. 344 at 346 (1940); 15 UNIV. CHI. L. REV. 332 at 340 (1948); 44 ILL. L. REV. 75 at 77 et seq. (1949); 27 TEX. L. REV. 698 at 703 (1949); 34 MINN. L. REV. 145 (1950); 30 N.C.L. REV. 168 (1952).

<sup>16</sup> 338 U.S. 263, 70 S. Ct. 26 (1949).

ants were thought not to violate the specific language of section 5<sup>17</sup> of the act, on the theory that choice of venue is a privilege and hence may be waived, or that reasonable contracts which prevent "forum shopping" are not violative of public policy.<sup>18</sup> On the other hand, a substantial number of courts held that these venue-restricting covenants were invalid, either on the ground that they were contrary to the expressed congressional intent or, by appeal to Hohfeldian analysis, on the ground that Congress in prohibiting contracts limiting the employer's liability under the FELA thereby also prohibited contracts restricting the employee's venue choice, since such contracts may operate to limit the employer's liability.<sup>19</sup> The Supreme Court in holding that the "right to bring suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of §5"<sup>20</sup> was apparently relying upon the argument from the Hohfeldian analysis of liability.

<sup>17</sup> Sec. 5 essentially provides that "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void. . . ." 35 Stat. L. 66 (1908), 45 U.S.C. (1946) §55.

<sup>18</sup> The argument for venue choice as a privilege stems from dictum in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 164, 60 S. Ct. 153 (1939). See *Clark v. Lowden*, (D.C. Minn. 1942) 48 F. Supp. 261; *Roland v. A. T. & S. F. Ry. Co.*, (D.C. Ill. 1946) 65 F. Supp. 630; 44 LL. L. REV. 75 at 84 et seq. (1949).

<sup>19</sup> In general, restricting covenants have been looked upon with suspicion as against public policy. See 6 WILLISTON, *CONTRACTS*, rev. ed., §1725 (1938); 2 *CONTRACTS RESTATEMENT* §558 (1932); *Insurance Co. v. Morse*, 30 Wall. (87 U.S.) 445 (1874); *Judge Hand* concurring in *Krenger v. Pennsylvania R. Co.*, (2d Cir. 1949) 174 F. (2d) 556 at 561. But when, as is the case with regard to the FELA, there is a special venue provision and the legislation itself reveals an intent to favor the injured employee, e.g., by removing the common law defenses of the fellow servant rule, 35 Stat. L. 65 (1908), as amended, 45 U.S.C. (1946) §51, contributory negligence, 35 Stat. L. 66 (1908), as amended, 45 U.S.C. (1946) §53, and assumption of risk, 35 Stat. L. 66 (1908), as amended, 45 U.S.C. (1946) §54, it becomes even more apparent, some courts have argued, that the congressional policy was to prevent any interference with any of the plaintiff's rights under the statute which may result in recovery for the injury. Actually, this argument is not too persuasive, except against the background of the fact that the railroads are generally able to secure favorable venue covenants from prospective plaintiffs because of the financial plight in which the employees or the employees' survivors frequently find themselves immediately after the injury. See *Porter v. Fleming*, (D.C. Minn. 1947) 74 F. Supp. 378; *Pryor v. Union Pacific R. Co.*, (Cal. App. 1949) 205 P. (2d) 471, revd. 34 Cal. (2d) 724, 214 P. (2d) 377 (1950); 38 CALIF. L. REV. 524 at 526 (1950); 23 *TEMPLE L. Q.* 428 at 429 (1950). Because of such policy arguments, rather than because of the grounds actually relied upon by the court, the *Boyd* decision has found support. See, e.g., 48 *MICH. L. REV.* 527 (1950); 23 *TEMPLE L. Q.* 428 (1950). There have also been those who were impressed by the Hohfeldian argument that "any contract" affecting "liability," as that term is used in §5, is wide enough to include venue covenants. See *Judge Clark* in *Krenger v. Pennsylvania R. Co.*, *supra*; 23 *So. CAL. L. REV.* 388 (1950). Also see 29 *NEB. L. REV.* 129 (1949).

<sup>20</sup> *Boyd v. Grand Trunk Western R. Co.*, 338 U.S. 263 at 265, 70 S.Ct. 26 (1949). See HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 8, 50, 58-60 (1923). Also see *Corbin*, "Legal Analysis and Terminology," 29 *YALE L. J.* 163 at 170 (1919); 3 *VANDERBILT L. REV.* 160 (1949).

It is important to note that the *Boyd* decision specifically avoided impairing the force of *Callen v. Pennsylvania R. Co.*<sup>21</sup> which sustained the validity of a full compromise agreement between the plaintiff employee and the defendant railroad. Such contracts avoid all litigation, whereas the venue restriction contract operates to obstruct maximum recovery should the employee elect to proceed to trial.<sup>22</sup> One further limitation upon what might have been thought to be an effect of the *Boyd* case was settled in *South Buffalo Ry. Co. v. Ahern*,<sup>23</sup> where it was held that the voluntary submission to a permissive state workmen's compensation statute estopped the later dissatisfied railroad from resisting the award by claiming that the employee should have pursued his rights under the FELA. Although the *Ahern* case does not decide the question, it does suggest that an employee would likewise be estopped from pursuing his rights under the FELA after once submitting his personal injury claim, pursuant to agreement, to some permissive machinery established by state law—provided he does so voluntarily and with knowledge as to the legal effects of his acts.

Thus, although a covenant limiting the employee's choice of venue is per se illegal, the employer railroad may avoid defending an action in a distant, inconvenient forum, if a full release can be negotiated, or if the employee elects, under proper safeguards, to submit to the administrative procedure of a state agency. For fairly obvious reasons, neither alternative will prove of practical value in preventing abuse of the FELA venue provisions.

There is one further aspect of the negotiated release situation which merits attention, since under certain circumstances the release may be an effective way to limit the employee's venue choice should he elect to pursue rights under the FELA despite the release. Although there is as yet a paucity of case law on the point, the problem may become more acute as wider use is made of the declaratory judgment procedure. Illustrative of what is here involved is *Zayatz v.*

<sup>21</sup> 332 U.S. 625; 68 S. Ct. 296 (1948).

<sup>22</sup> See *Duncan v. Thompson*, 315 U.S. 1, 62 S. Ct. 422 (1942). It has been argued with some cogency that if a complete release in all forums may be valid, then why not a release in some forums? See 62 HARV. L. REV. 134 at 135 (1948). Also see 34 MINN. L. REV. 342 (1950).

<sup>23</sup> 344 U.S. 367, 73 S. Ct. 340 (1953). The permissive character of the New York statute was of integral importance in enabling the Court to say that the state statute did not conflict with the congressional enactment in the field, despite the strong presumption to the contrary. See GAVYR, *THE COMMERCE CLAUSE* §118 (1932); 86 UNIV. PA. L. REV. 532 at 538 et seq. (1938). Criticizing the *Ahern* decision is 5 STAN. L. REV. 338 (1953). Also see 29 N. Y. UNIV. L. REV. 228 (1954).

*Southern Ry. Co.*<sup>24</sup> where an employee, after executing a release, contemplated pursuing his rights under the FELA in a foreign forum and the employer railroad, upon learning this fact, asked for a declaratory judgment construing the release and an injunction to prevent the foreign proceeding. Stating that the FELA was not involved, the Supreme Court of Alabama granted both of the remedies sought by the railroad, and certiorari was denied by the United States Supreme Court. Since a declaratory judgment is generally available to test a written instrument,<sup>25</sup> and since a decision construing the validity of the release in such a proceeding may be res judicata on the issue, the employer would have an effective means for limiting the employee's foreign FELA proceeding should the release be judged valid.<sup>26</sup> There are at least two reasons why there are so few instances of such cases: (1) the employer must secure a valid release, and (2) even more important, the employer will be unable to secure a declaratory judgment construing the release once the employee has actually instituted a foreign proceeding in which the issue would be resolved.<sup>27</sup>

## II. *Injunctions against Foreign Suits*

Successful avoidance of venue abuses requires the intervention of either the legislature or the judiciary for, so long as the employee alone is able to control the choice of venue, defense of a suit in an inconvenient, distant forum continues to impede settlements based solely on the merits of the case. One device has been appeal to the long recognized power of equity courts, acting as they do in personam, to enjoin a litigant subject to the court's jurisdiction from bringing or continuing an action in a foreign forum.<sup>28</sup> Invoking this power generally requires that both parties be residents of the state of the enjoining forum, that the state of the forum be the situs of the injury,

<sup>24</sup> 248 Ala. 137, 26 S. (2d) 545 (1946), cert. den. 329 U.S. 789, 67 S.Ct. 353 (1946). See 42 ILL. L. REV. 112 (1947); 44 ILL. L. REV. 75 at 85 (1949). Also see 45 YALE L. J. 1235 at 1242 (1936).

<sup>25</sup> BORCHARD, *DECLARATORY JUDGMENTS*, 2d ed., 499 (1941).

<sup>26</sup> *Callen v. Pennsylvania R. Co.*, 332 U.S. 625, 68 S. Ct. 296 (1948).

<sup>27</sup> See *Pacific Electric Ry. Co. v. Dewey*, 95 Cal. App. (2d) 69, 212 P. (2d) 255 (1949); *Union Pacific R. Co. v. Zimmer*, 87 Cal. App. (2d) 524, 197 P. (2d) 363 (1948).

<sup>28</sup> *Cole v. Cunningham*, 133 U.S. 107, 10 S. Ct. 269 (1890); 2 STORY, *EQUITY JURISPRUDENCE*, 14th ed., §§1224, 1225 (1918); 2 ROBERTS, *FEDERAL LIABILITIES OF CARRIERS* §962 (1929). Also see *Ex parte Crandall*, (7th Cir. 1931) 53 F. (2d) 969, cert. den. 285 U.S. 540, 52 S. Ct. 312 (1932); Helsell, "Injunctive Relief Against Oppressive Suits in Foreign Jurisdictions," 12 F.R.D. 502 (1952); Messner, "The Jurisdiction of a Court of Equity over Persons to Compel the Doing of Acts Outside the Territorial Limits of the States," 14 MINN. L. REV. 494 (1930).

and that permitting the foreign action would be inequitable and unjust, rather than merely inconvenient.<sup>29</sup>

When there was compliance with these requirements, the majority of the state courts asked to enjoin an FELA action in a sister state granted the injunction, and some, though not a majority, would also enjoin FELA actions in foreign federal courts.<sup>30</sup> However, in the *Kepner* case<sup>31</sup> the Supreme Court decided that actions in foreign federal courts may not be enjoined, and in the *Miles* case<sup>32</sup> the same reasoning operated to conclude that actions in foreign state courts could not be enjoined. These decisions were based not upon notions of comity, nor essentially upon equal protection considerations, but rather upon the fact that Congress had spoken and indicated that the employee's choice of venue is not to be frustrated by reasons of convenience or expense to the employer railroad. With this as the basis for the decisions, and with Justice Jackson's pronouncement in the

<sup>29</sup> See *Bigelow v. Old Dominion Copper & C. Co.*, 74 N.J. Eq. 457, 71 A. 153 (1908); *Cole v. Cunningham*, 133 U.S. 107, 10 S.Ct. 269 (1890). A leading case involving an FELA action is *Reed's Admx. v. Illinois Central R. Co.*, 182 Ky. 455, 206 S.W. 794 (1918). Also see 46 ILL. L. REV. 115 at 119 et seq. (1951); 31 MICH. L. REV. 88 (1932). Annotations on the power to enjoin foreign FELA actions are found in 85 A.L.R. 1351 (1933); 113 A.L.R. 1444 (1938); 136 A.L.R. 1232 (1942); 146 A.L.R. 1118 (1943). That mere inconvenience was insufficient grounds to enjoin the foreign proceeding seems to have been the general rule. See, e.g., *Illinois Life Ins. Co. v. Prentiss*, 277 Ill. 383, 115 N.E. 554 (1917); *Southern Pacific Co. v. Baum*, 39 N.M. 22, 38 P. (2d) 1106 (1934). Also see Pound, "The Progress of the Law—Equity," 33 HARV. L. REV. 420 at 425 et seq. (1920); 45 YALE L. J. 1235 at 1240 (1936); 27 IOWA L. REV. 76 (1941); 56 YALE L. J. 1234 at 1236 (1947).

<sup>30</sup> The important cases and the development up to the time of the Supreme Court decisions in the area are considered in Gibson, "The Venue Clause and Transportation of Lawsuits," 18 LAW AND CONTEMP. PROB. 367 at 407 et seq. (1953); 3 WASH. & LEE L. REV. 247 (1942). Also see 27 N.C.L. REV. 248 (1949); 46 ILL. L. REV. 115 at 119 et seq. (1951); Warren, "Federal and State Court Interference," 43 HARV. L. REV. 345 (1930).

<sup>31</sup> *Baltimore & O. R. Co. v. Kepner*, 314 U.S. 44, 62 S.Ct. 6 (1941). Interestingly, almost all the comment elicited by the decision was unfavorable, either because the reasoning of the Court was considered unpersuasive or because the implications of the language used in the decision indicated that venue abuses were to be tolerated. See 8 UNIV. CHI. L. REV. 789 (1941) (which even suggested that upon reconsideration of the question *Kepner* would be overruled); 8 OHIO ST. L. J. 115 (1941); 27 CORN. L. Q. 273 (1942); 20 N.C.L. REV. 210 (1942); 16 TULANE L. REV. 290 (1942); 14 ROCKY MOUNT. L. REV. 126 (1942). Some writers thought the decision commendable, because, among other reasons, it would avoid the type of confusion considered in *Southern Ry. Co. v. Painter*, (8th Cir. 1941) 117 F. (2d) 100, a confusion which resulted from enjoining a proceeding already begun. See 51 YALE L. J. 343 (1941); 90 UNIV. PA. L. REV. 489 (1942); 26 MINN. L. REV. 404 (1942).

<sup>32</sup> *Miles v. Illinois Central R. Co.*, 315 U.S. 698, 62 S.Ct. 827 (1942). This decision also met with almost uniformly unfavorable reception, either because it permitted an excess burden on the wartime railroads, 41 MICH. L. REV. 537 (1942), or because the Court should not have presumed that Congress intended to sanction vexatious litigation without more specific language in the statute, 90 UNIV. PA. L. REV. 964 (1942). Also see 3 WASH. & LEE L. REV. 247 at 267 et seq. (1942).

*Mayfield* case that "by amendment, 28 U.S.C. §1404(a), as interpreted in *Ex parte Collett*, . . . Congress has removed the compulsion which determined the *Miles* case, and the Missouri Court should no longer regard it as controlling,"<sup>33</sup> it is not difficult to appreciate why the Georgia Supreme Court decided that the enactment of section 1404(a) of the Judicial Code<sup>34</sup> permitted the enjoining of FELA actions in foreign state courts.<sup>35</sup> Section 1404(a), which in *Ex parte Collett*<sup>36</sup> the Supreme Court held applied to FELA actions, permits federal courts to *transfer* an action to a more convenient federal forum. Despite the attractiveness of the argument that enactment of section 1404(a) altered the congressional attitude toward the problem as decided in the *Kepner* and *Miles* cases, and although the reviser's notes to section 1404(a) specifically mentioned the *Kepner* case as illustrative of the need for the recommended change, the Court decided in *Pope v. Atlantic Coast Line R. Co.*<sup>37</sup> that state courts were unable to enjoin FELA actions in foreign, inconvenient state forums.<sup>38</sup> Chief Justice Vinson spoke for eight members of the Court, saying that the *Kepner* and *Miles* cases were deliberately left intact in the congressional enactment of section 1404(a), since in that section Congress spoke only to the federal courts and made no provision for permitting the venue question to be "raised and settled by the initiation of a

<sup>33</sup> Missouri ex rel. Southern Ry. Co. v. *Mayfield*, 340 U.S. 1 at 5, 71 S.Ct. 1 (1950).

<sup>34</sup> 62 Stat. L. 937 (1948), 28 U.S.C. (Supp. V, 1952) §1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." See 27 TEX. L. REV. 698 (1949); 44 ILL. L. REV. 75 (1949); 37 CALIF. L. REV. 697 (1949). These notes were concerned with whether §1404(a) would apply to the special venue statutes, e.g., the FELA and the Sherman Act. Also see Harris, "Survey of the Federal Judicial Code," 3 SOUTHWESTERN L. J. 229 at 235 (1949); 18 J.B.A. KAN. 242 (1949); "New Judicial Code and *Forum Non Conveniens*," 1 STAN. L. REV. 497 (1949).

<sup>35</sup> *Atlantic Coast Line R. Co. v. Pope*, 209 Ga. 187, 71 S.E. (2d) 243 (1952). But the Florida court held that despite §1404(a) the *Miles* case was decisive of the question. *Atlantic Coast Line R. Co. v. Wood*, (Fla. 1952) 58 S. (2d) 549. See 26 So. CAL. L. REV. 210 (1953) (commenting on the two cases); 29 IND. L. J. 97 at 101 (1953).

<sup>36</sup> 337 U.S. 55, 69 S.Ct. 944 (1949). This decision has not evoked the unfavorable reception which followed the *Kepner* and *Miles* cases. See 48 MICH. L. REV. 366 (1950); 34 MINN. L. REV. 145 (1950); 24 TULANE L. REV. 247 at 248 et seq. (1949).

<sup>37</sup> 345 U.S. 379, 73 S.Ct. 749 (1953). See 52 MICH. L. REV. 447 (1954); "The Supreme Court, 1952 Term," 67 HARV. L. REV. 91 at 149 (1953); 6 UNIV. FLA. L. REV. 262 (1953). In these discussions it was recognized that the *Pope* decision in effect sanctioned the continuance of the unwholesome practices which had been occurring under the FELA venue provisions.

<sup>38</sup> Although the strong language in the opinion fairly conclusively suggests the answer, there does remain the question of whether a state court may enjoin a FELA action brought in a foreign *federal* forum. Prior to the *Miles* and *Kepner* cases some state courts, clearly not a majority, had enjoined such actions, and it may be argued that since §1404(a) recognizes the inequity of a suit in an inconvenient federal forum, state courts may enjoin such proceedings and, in effect, transfer them to the enjoining jurisdiction. See 16 Mo. L. REV. 174 at 178 (1951).

second law suit in a court in a foreign jurisdiction."<sup>39</sup> Section 1404(a) provides for the *transfer* of the action to a different, more convenient federal forum, whereas enjoining a foreign action requires the plaintiff to institute a new proceeding. Justice Frankfurter dissented in the *Pope* case, as he had in *Kepner* and *Miles*.

Thus, once again, the railroads need look elsewhere if they are to find relief from the defense of a suit in an inconvenient, distant forum.<sup>40</sup> Injunction, as inefficacious as it may be,<sup>41</sup> is not available.

### III. *Forum Non Conveniens*

Although the historical origins of the doctrine of *forum non conveniens*<sup>42</sup> are uncertain, it appears that the practice was well known in Scotland by at least the late nineteenth century,<sup>43</sup> and that some very early American courts, without designating the practice by name,

<sup>39</sup> *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379 at 384, 73 S.Ct. 749 (1953).

<sup>40</sup> "When the bars were let down in the *Kepner* and *Miles* cases the length of haul began to grow. Previously for the most part claims had been imported from adjoining or adjacent states. In the *Kepner* case it was 700 miles from Ohio to New York. In the *Utterback* case it was 1150 miles from Portland, Oregon to Los Angeles. Eventually it reached almost from ocean to ocean. The Southern Pacific Company with eastern termini at Ogden and New Orleans was held to be doing business in New York and therefore subject to suit under the Act by an administrator for the death of an employee living and working in Arizona where he maintained his residence at the time of his death." Gibson, "The Venue Clause and Transportation of Lawsuits," 18 *LAW AND CONTEMP. PROB.* 367 at 418 (1953).

<sup>41</sup> Even were injunction available to defendant railroads, it would not provide a very satisfactory remedy. The enjoined party can avoid compliance with the decree by continued absence from the enjoining jurisdiction. See *Kempson v. Kempson*, 63 N.J. Eq. 783, 52 A. 360 (1902). Recognizing that the injured plaintiff may thus avoid the injunction, one court also enjoined his attorney and witnesses. See *New York, C. & St. L. R. Co. v. Perdiue*, 97 Ind. App. 517, 187 N.E. 349 (1933). But an even greater infirmity of the injunction remedy is the fact that the decree may not be entitled to full faith in the state where the plaintiff has brought his action or where he afterward proceeds to bring his action. See Foster, "Place of Trial in Civil Actions," 43 *HARV. L. REV.* 1217 at 1245 et seq. (1930); *Frye v. Chicago, R.I. & P. Ry. Co.*, 157 Minn. 52, 195 N.W. 629 (1923), cert. den. 263 U.S. 723, 44 S.Ct. 231 (1924); 72 *UNIV. PA. L. REV.* 429 (1924); 39 *YALE L. J.* 719 (1930); 45 *YALE L. J.* 1235 at 1241 (1936); 56 *YALE L. J.* 1234 at 1236 et seq. (1947); 29 *IND. L. J.* 97 at 103 (1953).

<sup>42</sup> For general discussions of the doctrine, see Blair, "The Doctrine of *Forum Non Conveniens* in Anglo-American Law," 29 *COL. L. REV.* 1 (1929); Dainow, "The Inappropriate Forum," 29 *ILL. L. REV.* 867 (1935); Foster, "Place of Trial in Civil Actions," 43 *HARV. L. REV.* 1217 (1930); Braucher, "The Inconvenient Federal Forum," 60 *HARV. L. REV.* 908 (1947); Barrett, "The Doctrine of *Forum Non Conveniens*," 35 *CALIF. L. REV.* 380 (1947).

<sup>43</sup> For the historical background and development of the doctrine, see in addition to the articles cited in the previous footnote 56 *YALE L. J.* 1234 at 1235 et seq. (1947). On the Scottish practice see GIBB, *THE INTERNATIONAL LAW OF JURISDICTION IN ENGLAND AND SCOTLAND* 212 et seq. (1926); GLOAG AND HENDERSON, *INTRODUCTION TO THE LAW OF SCOTLAND*, 5th ed., 24 (1952).

were refusing jurisdiction in certain cases.<sup>44</sup> The phrase "forum non conveniens" may actually have been used in court opinions prior to Blair's classic article,<sup>45</sup> but it was not until after that article was published that American courts began to recognize the doctrine by name. Justice Jackson has suggested that it was probably Justice Cardozo who first referred to the doctrine by name in a Supreme Court opinion in 1932.<sup>46</sup> However, the Court had recognized the doctrine as early as 1903,<sup>47</sup> and in 1929, in *Douglas v. New York, N.H. & H. R. Co.*,<sup>48</sup> the Court expressly held that a New York state court might refuse to hear a FELA cause even though the court had jurisdiction.

Although it is now clear that in some circumstances the refusal of a court to hear a case over which it has properly acquired jurisdiction is not violative of the Federal Constitution, the early application of forum non conveniens was thought to raise serious problems of due process, privileges and immunities, full faith and credit, and equal protection. At first blush it may appear that a plaintiff is deprived of "property" without due process if a court with proper jurisdiction refuses to enforce his rights.<sup>49</sup> However, the objection has very seldom been raised, and even if it were urged it is unlikely to be successful, since, among other reasons, the proposition requires the assumption that the plaintiff does have a right everywhere enforceable. Similarly unavailing in resisting the application of forum non conveniens is appeal to the equal protection clause of the Fourteenth Amendment. This is so since the clause does not prohibit reasonable

<sup>44</sup> See 32 A.L.R. 6 (1924); Barrett, "The Doctrine of *Forum Non Conveniens*," 35 CALIF. L. REV. 380 at 387, n. 36 (1947). In admiralty courts especially the doctrine received early application. The explanation for this lies in the fact that forum non conveniens was readily applied in the type of case which frequently arose in an admiralty court, i.e., one involving foreigners and the application of law other than that of the forum. See the dictum by Justice Marshall in *Mason v. Ship Blaireau*, 2 Cranch (6 U.S.) 240 at 246 (1804). Also see *The Maggie Hammond*, 9 Wall. (76 U.S.) 435 (1869); 15 UNIV. CHI. L. REV. 332 (1948).

<sup>45</sup> Blair, "The Doctrine of Forum Non Conveniens in Anglo-American Law," 29 COL. L. REV. 1 (1929). It is this article which is generally thought to have led to the development of the current doctrine of forum non conveniens.

<sup>46</sup> The opinion was *Rogers v. Guaranty Trust Co.*, 288 U.S. 123 at 151, 53 S.Ct. 295 (1933). Jackson, "Full Faith and Credit—The Lawyer's Clause of the Constitution," 45 COL. L. REV. 1 at 30 et seq. (1945).

<sup>47</sup> *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U.S. 373, 24 S.Ct. 92 (1903).

<sup>48</sup> 279 U.S. 377, 49 S.Ct. 355 (1929).

<sup>49</sup> See *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 28 S.Ct. 337 (1908). Also see Hansell, "The Proper Forum For Suits Against Foreign Corporations," 27 COL. L. REV. 12 at 19 et seq. (1927), where it is suggested that the due process argument is somewhat circular, since for plaintiff to assert a deprivation of property without due process means that it has already been decided that the plaintiff has a cause of action (property) everywhere enforceable.

classifications of litigants, but rather prohibits unequal treatment of litigants in the same class. Consequently a state statute or court rule which resulted in dismissal of all actions between nonresidents on a foreign cause of action would be unlikely to offend the equal protection clause.<sup>50</sup> The constitutional full faith and credit requirement is not relevant to FELA actions dismissed in response to a plea of inconvenient forum, but may be relevant in other types of cases where the defendant's plea is complied with because the forum does not wish to apply a foreign state law. But even in such cases full faith may not be violated unless the sole grounds for finding inconvenience was the presence of the foreign state law.<sup>51</sup> The most vigorous constitutional objection to forum non conveniens is the charge that the privileges and immunities clause is violated by the doctrine. This view is largely attributable to the frequently quoted and approved dictum of Justice Washington in *Corfield v. Coryell*,<sup>52</sup> in which he indicated that only those privileges and immunities which were in their nature fundamental were protected by the Constitution, and that included among these fundamental privileges was the "right to institute and maintain actions of any kind" in the state courts. However, by positing a distinction between citizenship and residence, artificial as such a distinction may be,<sup>53</sup> and by basing the refusal to hear certain causes

<sup>50</sup> Reasonable procedural discriminations against nonresidents have long been permitted. See *Chemung Canal Bank v. Lowery*, 93 U.S. 72 (1876); *Canadian Northern Ry. Co. v. Eggen*, 252 U.S. 553, 40 S.Ct. 402 (1920); *Douglas v. New York, N.H. and H. R. Co.*, 279 U.S. 377, 49 S.Ct. 355 (1929); 18 CALIF. L. REV. 159 (1930).

<sup>51</sup> See *Hughes v. Fetter*, 341 U.S. 609, 71 S.Ct. 980 (1951). But see *Broderick v. Rosner*, 294 U.S. 629 at 643, 55 S.Ct. 589 (1935); *Williams v. North Carolina*, 317 U.S. 287 at 294, 63 S.Ct. 207 (1942). Actually the full faith type problem which arose in the prior cases involving full faith and forum non conveniens, *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U.S. 373, 24 S.Ct. 92 (1903), and *Kenney v. Supreme Lodge*, 252 U.S. 411, 40 S.Ct. 371 (1920), are not very important in regard to FELA actions. In those cases after securing a judgment elsewhere plaintiff sought to enforce the judgment in a forum which would not have been willing to hear the original action. However, in FELA cases it is unlikely that any judgment recovered against the defendant will be uncollectible within the state of the forum. On the relation between forum non conveniens and full faith, see Blair, "The Doctrine of Forum Non Conveniens in Anglo-American Law," 29 COL. L. REV. 1 at 4 et seq. (1929); Jackson, "Full Faith and Credit—The Lawyer's Clause of the Constitution," 45 COL. L. REV. 1 (1945); Remmers, "Recent Legislation Affecting Place of Trial; Forum Non Conveniens," CURRENT TRENDS IN STATE LEGISLATION 355 at 364 et seq. (1952).

<sup>52</sup> (C. C. Pa. 1823) 6 Fed. Cas. 546, No. 3230. That the right to bring suit is constitutionally protected, see *Chambers v. Baltimore & O. R. Co.*, 207 U.S. 142, 28 S.Ct. 34 (1907).

<sup>53</sup> The artificiality of the distinction has long been recognized. See Meyers, "The Privileges and Immunities of Citizens in the Several States," 1 MICH. L. REV. 364 at 382 (1903). Also see the note on *Collard v. Beach*, 81 App. Div. 582, 81 N.Y.S. 619 (1903) (where an early New York decision did recognize the distinction) in 17 HARV. L. REV. 54 (1903). An even earlier New York case averring to the distinction is *Robinson v. Oceanic*

upon the nonresidence of the litigants, rather than upon their non-citizenship, state courts have been able to make applications of the doctrine of *forum non conveniens* which have withstood Supreme Court examination as to constitutionality.<sup>54</sup> Regardless of the Supreme Court approval, a very substantial number of states still refuse to make *forum non conveniens* a part of their procedure, either because state statutes are said to deprive the courts of discretion to refuse jurisdiction or because the doctrine is said to be in violation of the privileges and immunities clause even though the Supreme Court has held to the contrary where criteria other than citizenship determine the issue.<sup>55</sup>

Despite the early decision in the *Douglas* case upholding the refusal of a New York court to hear a FELA action properly before the court, the constitutionality of dismissing a FELA case in response to a plea of inconvenient forum has been fraught with uncertainty. The *Kepler* and *Miles* cases were thought to have so impaired the *Douglas* holding that in *Leet v. Union Pacific R. Co.*<sup>56</sup> the California Supreme Court decided that the special venue provisions of the FELA could not be avoided by a plea of *forum non conveniens*. When the Su-

Steam Navigation Co., 112 N.Y. 315, 19 N.E. 625 (1889). Defending the distinction between residence and citizenship is Hansell, "The Proper Forum for Suits Against Foreign Corporations," 27 COL. L. REV. 12 at 16-18 (1927). Also see 41 HARV. L. REV. 387 (1928); 28 COL. L. REV. 347 (1928).

<sup>54</sup> In *Blake v. McClung*, 172 U.S. 239, 19 S.Ct. 165 (1898), the Court rejected the discriminations based on a distinction between "residents" and "citizens," Justice Brewer dissenting. This view again prevailed two years later in *Sully v. American National Bank*, 178 U.S. 289, 20 S.Ct. 935 (1900). However, in *La Tourette v. McMaster*, 248 U.S. 465, 39 S.Ct. 160 (1919), the Court accepted the position of Justice Brewer, and this view has since prevailed. *Maxwell v. Bugbee*, 250 U.S. 525, 40 S.Ct. 2 (1919); *Canadian Northern Ry. Co. v. Eggen*, 252 U.S. 553, 40 S.Ct. 402 (1920); *Douglas v. New York, N.H. & H. R. Co.*, 279 U.S. 377, 49 S.Ct. 355 (1929); *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 71 S.Ct. 1 (1950). See 30 MICH. L. REV. 610 (1932); 18 CALIF. L. REV. 159 (1930); 24 ILL. L. REV. 826 (1930); 39 YALE L. J. 388 (1930).

<sup>55</sup> Barrett, writing in 1947, pointed out that barely a half-dozen states had made *forum non conveniens* a part of their procedure; in seven states there were indications that in a proper case the doctrine might be applied; and in twelve states, where the doctrine had been considered, it was rejected. Among the rejecting states are Illinois, Minnesota, and Missouri, three of the states to which plaintiffs frequently transport tort actions. See Barrett, "The Doctrine of *Forum Non Conveniens*," 35 CALIF. L. REV. 380 at 388 et seq. (1947). Upon remand of the *Mayfield* case, the Supreme Court of Missouri decided that its constitution and statutes required that Missouri courts be open for all Missouri citizens, whether or not residents, and hence it was not within the discretion of the court to deny jurisdiction in response to a plea of inconvenient forum because one or both of the parties was a nonresident. *State ex rel. Southern Ry. Co. v. Mayfield*, 362 Mo. 101, 240 S.W. (2d) 106 (1951). Minnesota has similarly rejected the *Douglas* case by saying that its statutes prevented the court from denying jurisdiction. *Boright v. Chicago, R. I. & P. Ry. Co.*, 180 Minn. 52, 230 N.W. 457 (1930).

<sup>56</sup> 25 Cal. (2d) 605, 155 P. (2d) 42 (1944), cert. den. 325 U.S. 866, 65 S.Ct. 1403 (1945). See 18 So. CAL. L. REV. 281 (1945); 58 HARV. L. REV. 877 (1945).

preme Court denied certiorari, the continuing vitality of the *Douglas* holding was made most questionable despite the fact that only a year prior to the *Leet* case the Supreme Court had, in another connection, quoted approvingly from a critical portion of the *Douglas* opinion.<sup>57</sup> The likelihood of reversal for the *Douglas* decision increased, or at least the probability that it would be closely limited to its facts increased, when Justice Jackson spoke for a five-to-four Court in *Gulf Oil Corp. v. Gilbert* and said, citing the *Kepler* and *Miles* cases: "It is true that in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a forum cannot be defeated on the basis of forum non conveniens. But this was because the special venue act under which those cases are brought was believed to require it. . . . Those decisions do not purport to modify the doctrine as to other cases governed by the general venue statutes."<sup>58</sup> In other words, the absence or presence of a special venue provision would determine whether forum non conveniens was constitutional. Two factors mitigated against concluding from the *Gulf Oil* decision that when next presented with the opportunity the Court would decide that forum non conveniens was inapplicable to FELA cases: (1) Justice Jackson was clearly incorrect in finding that the Court had held in the *Kepler* and *Miles* cases that forum non conveniens was inapplicable to FELA actions; and (2) in the *Gulf Oil* case the Court reversed the court of appeals for too narrowly construing the doctrine of forum non conveniens.

The enactment of section 1404(a),<sup>59</sup> the "federal equivalent of forum non conveniens," and the decisions holding that the section applied as well to statutes containing special venue provisions as to those having only general venue provisions,<sup>60</sup> indicated that at least the federal courts would not be available for abusive litigation under the broad venue provisions of the FELA. But the decision in *Ex parte*

<sup>57</sup> See *Herb v. Pitcairn*, 324 U.S. 117 at 120, 65 S.Ct. 459 (1945). The *Douglas* decision had also received favorable attention in earlier dictum in *McKnett v. St. Louis & S. F. Ry. Co.*, 292 U.S. 230 at 233, 54 S.Ct. 690 (1934).

<sup>58</sup> 330 U.S. 501 at 505, 67 S.Ct. 839 (1947).

<sup>59</sup> See Braucher, "The Inconvenient Federal Forum," 60 HARV. L. REV. 908 at 930 et seq. (1947); Harris, "Survey of the Federal Judicial Code," 3 SOUTHWESTERN L. J. 229 at 235 et seq. (1949); 27 TEX. L. REV. 698 (1949) (dealing with the relationship between §1404(a) and forum non conveniens); 41 CALIF. L. REV. 507 (1953); 29 N. C. L. REV. 61 (1950); 64 HARV. L. REV. 1347 at 1352 et seq. (1951); 18 J.B.A. KAN. 242 (1949); 5 A.L.R. (2d) 1239 (1949); 10 A.L.R. (2d) 932 (1950).

<sup>60</sup> *Ex parte Collett*, 337 U.S. 55, 69 S.Ct. 944 (1949) (FELA); *United States v. National City Lines*, 337 U.S. 78, 60 S.Ct. 955 (1949) (Sherman Act). See 35 CORN. L. Q. 459 (1950); 48 MICH. L. REV. 366 (1950); 34 MINN. L. REV. 145 (1950); 24 TULANE L. REV. 247 (1949); 27 TEX. L. REV. 698 at 704 (1949).

*Collett*, holding that section 1404(a) is applicable to FELA actions, was also suggestive of a possible departure from the Court's thinking in the *Gulf Oil* case, where it was concluded that the difference between a special and general venue provision determined whether forum non conveniens was available. The problem was laid to rest in the *Mayfield* case,<sup>61</sup> for even though the Court split five to four, the dissent did not appear to object to the conclusion of the majority that the *Douglas* case was still good law. Justice Frankfurter, for the Court, declared that a state court should be freed from thinking that the *Kepler* and *Miles* cases prevented the application of forum non conveniens to FELA actions and that the state court was free to decide for itself whether the doctrine was to be available in the forum.

#### IV. *Conclusion: The Need for a Change*

Today, unless the employer railroad succeeds in effecting a full compromise agreement, it is unlikely that an employee can be prevented from bringing his FELA action in a distant, inconvenient state forum. Nor is there a much greater likelihood that the railroad can succeed in getting the inconvenient state forum to dismiss the action in response to a plea of forum non conveniens. This is so since not all states have made forum non conveniens a part of their procedure, and even where the doctrine is available, its use is restricted. But even more frustrating for the railroad is the fact that if it should convince the court to dismiss the plaintiff's action because of the inconvenience of the forum selected, this does not prevent the plaintiff from then selecting another equally inconvenient state forum. So long as there continue to be a large number of states unwilling to refuse jurisdiction over an FELA case, regardless of the inconvenience of the forum, the abusive tactics permissible under the FELA, with its system of interstate ambulance chasing, will prosper—and unfortunately the prosperity is enjoyed not so much by the injured worker as by his counsel.<sup>62</sup>

The need for a remedy is clear; the source of the possible remedies is likewise clear—congressional solution for the problem is required.

The solution might be thought to lie in amending the venue provision of the FELA to permit actions only at the plaintiff's residence or at the place of injury. Such a proposed amendment has already

<sup>61</sup> *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1 at 5, 71 S.Ct. 1 (1950). See 49 *MICH. L. REV.* 1061 (1951).

<sup>62</sup> See 15 *UNIV. CHI. L. REV.* 332 at 340 et seq. (1948).

been before Congress, but as its critics rightly point out, it is too restrictive, since, for example, it may prevent an injured plaintiff from suing in the state where he is hospitalized and where his medical witnesses reside.<sup>63</sup> One recent suggestion urges the incorporation of *forum non conveniens* as a substantive part of the FELA by conditioning "the grant of state court jurisdiction upon cognizance of a timely motion for *forum non conveniens*. . . ."<sup>64</sup> There are at least three objections to such a proposal: (1) it would permit state courts to refuse to hear FELA actions; (2) it raises a serious constitutional question of how far Congress may go in requiring a particular procedure in a state court hearing cases which arise under federal statutes; and (3) it does not prevent the plaintiff from again instituting his action in a different inconvenient forum.

The most recent proposal for amending section 6 has been advanced by two writers who on previous occasions indicated their belief in the superiority of FELA over workmen's compensation type coverage for railroad injuries and who apparently share Justice Jackson's sentiment that it is "a rather fantastic fiction that a widow [can be] harassing the . . . Railroad."<sup>65</sup> Mr. Richter and Mrs. Forer argue that the applicability of section 1404(a) to FELA actions "has caused expensive and time-consuming litigation. . . . The burden upon the courts in determining so vague a concept as inconvenience, when an action was brought within the bounds of legal choice of districts, has

<sup>63</sup> United States Congress House Bill, H.R. 1639, 80th Cong., 1st sess. (1947) (the so-called Jennings Bill). The bill aroused considerable attention; it was endorsed in principle by the American Bar Association House of Delegates, 32 A.B.A.J. 493 (1946), and was further urged in Gay, "Venue of Actions: Bill To Curb 'Shopping' for Forums Is Urged," 33 A.B.A.J. 659 (1947). It received unfavorable comment in Devitt, "Venue of Actions: Substitute for Jennings Bill (H.R. 1639) Is Urged," 34 A.B.A.J. 454 (1948). Also see 93 CONG. REC. 9178-9193 (1947); Hearings before Subcommittee No. 4 of the House Committee on the Judiciary on H.R. 1639, 80th Cong., 1st sess. (1947); Hearings before a Subcommittee on the Judiciary United States Senate on S. 1567 and H.R. 1639, 80th Cong., 2d sess. (1948).

<sup>64</sup> 29 IND. L. J. 97 at 108 (1953). Also see Richter and Forer, "Federal Employers' Liability Act," 12 F.R.D. 13 at 62 et seq. (1952).

<sup>65</sup> Justice Jackson concurring in *Miles v. Illinois Central R. Co.*, 315 U.S. 698 at 706, 62 S.Ct. 827 (1942). For the views of writers Richter and Forer see "Federal Employers' Liability Act—A Real Compensatory Law For Railroad Workers," 36 CORN. L. Q. 203 (1951); "Federal Employers' Liability Act," 12 F.R.D. 13 (1952). In the latter article, at page 63, Mr. Richter and Mrs. Forer do recognize that "there has been unfair advantage taken by plaintiffs in many cases . . .," and would apparently permit the application of *forum non conveniens* to FELA cases either where the defendant railroad does not operate in the venue selected by the plaintiff or where the venue selected is not within a reasonable geographical distance from the site of the occurrence. It seems that this position has now been abandoned by these writers. It is interesting to note that the authors would reject inconvenience of the selected forum as a test because of its vagueness, while "reasonable geographical distance" is seemingly thought to be free of that difficulty.

been great and unwarranted."<sup>66</sup> Consequently the authors propose amending section 6 to provide, among other things, that "no action brought under this Act shall be transferred to any other district court of the United States under 28 U.S.C. §1404(a), or otherwise, without the consent of all parties thereto."<sup>67</sup>

It is submitted that there are at least five important objections to this specific proposal and the attitude from whence it stems: (1) although widows and injured employees may be unable to take advantage of railroad corporations, it has already been revealed that their counsel frequently do not suffer the same infirmities; (2) if it is true that inconvenience is a vague test, it is surely no more vague than other standards utilized in determining the legal relations among individuals, and clearly it will become less vague as there develops a body of case law from which the criteria of inconvenience may be extracted; (3) it is either circular or immaterial to argue that there is an undue burden on courts in requiring them first to decide the issue of inconvenience when the action is "brought within the bounds of legal choice of districts," because the issue is not whether the action is legally brought but whether the best interests of justice are promoted by its maintenance in the particular court where it is admitted the action is legally brought; (4) it is question-begging to assert that a prior determination on the issue of convenience is "unwarranted," since without presenting either evidence or argument the authors thereby dismiss the very point in issue; and (5) even if it were thought desirable that forum non conveniens be declared inapplicable to FELA actions the proposed amendment is inadequate, since it will affect only federal courts unless the language of the proposed amendment is ambiguous in that the words "or otherwise" are somehow intended to affect the state court use of forum non conveniens. Should it be intended that state courts are to be affected by the amendment, there is then raised the question already mentioned as to whether Congress may so regulate state court procedure.

Would not the evils be avoided and the plaintiff's interests still protected if, as has been suggested,<sup>68</sup> the FELA were amended to make actions arising thereunder subject to the present general venue statutes with concurrent jurisdiction in the state courts? Indeed, it

<sup>66</sup> Richter and Forer, "Proposed Changes in the Laws Governing Injuries in Interstate Transportation," 67 HARV. L. REV. 1003 at 1013 (1954).

<sup>67</sup> Ibid. Emphasis supplied.

<sup>68</sup> Devitt, "Venue of Actions: Substitute for Jennings Bill (H.R. 1639) Is Urged," 34 A.B.A.J. 454 (1948).

has been argued with some persuasiveness that Congress never intended section 6 to operate as anything other than a general venue provision. On this view the purpose of section 6 was to ensure that the ordinary venue provisions applicable in state courts would also be applied to FELA actions. That is, state courts would not be permitted to discriminate against FELA actions.<sup>69</sup> If Congress should now decide that FELA actions should be subject to the general venue provisions, the *Kepner* and *Miles* cases would no longer be applicable and the conscience of equity courts could be appealed to in order to enjoin a truly vexatious choice of forum.<sup>70</sup> Since the present general venue provision (28 U.S.C. §1391) permits a civil action to be brought in the district of the defendant's residence or where the defendant corporation is incorporated, licensed to do business, or doing business, the only important diminution from the plaintiff's present choice of forum would occur where the situs of the accident was in a district other than one where the railroad corporation was incorporated, licensed to do business, or doing business. However, it is difficult to understand how there could be many such cases, and should any arise it would not be improper for a court to find that for purposes of venue the railroad corporation was doing business in the district where the accident occurs.

S. I. Shuman, S.Ed.

<sup>69</sup> See Gibson, "The Venue Clause and Transportation of Lawsuits," 18 LAW AND CONTEMP. PROB. 367 at 380, 405, 414 et seq. (1953).

<sup>70</sup> See Justice Frankfurter dissenting in both *Baltimore & O. R. Co. v. Kepner*, 314 U.S. 44 at 56 et seq., 62 S.Ct. 6 (1941), and *Miles v. Illinois Central R. Co.*, 315 U.S. 698 at 715 et seq., 62 S.Ct. 827 (1942).