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A PROCEDURAL REVIEW OF THE FEDERAL EMPLOYER'S LIABILITY ACT

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The 1908 original version[1] of the present Federal Employer's Liability Act contained no special venue provisions; venue was regulated by the general venue provisions of the Judicial Code, which required the plaintiff to bring his action in the place of residence of the defendant.[2] By amendment in 1910 and 1911, the plaintiff was given the choice of three federal districts in which to sue: "... 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."[3] In the same section it was further provided: "The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States...." This expansion of the number of forums in which the action could be brought relieved the plaintiff of the necessity of going to the residence of the defendant railroad to sue, but it frequently placed a corresponding hardship on the defendant, as the plaintiff was often able to sue the railroad at a considerable distance from the point at which the cause of action arose, thus making it necessary for the railroad to transport employee-witnesses great distances to the scene of the trial. To alleviate the hardship placed on defendant railroads by their normal amenability to suit in the many states in which they were doing business, the state courts began enjoining plaintiffs from prosecuting their actions in distant state forums.[4]

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[1]April 22, 1908, c. 149, 35 Stat. 65, 66.

[2]Judicial Code § 51, 36 Stat. 1101 (1911), 28 U. S. C. A. § 112 (1927): "...no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant...."

[3]36 Stat. 291 (1910), as amended 36 Stat. 1167 (1911), 53 Stat. 1404 (1939), 45 U. S. C. A. § 56 (1943). Further amended, 62 Stat. 989 (1948), 45 U. S. C. A. § 56 (Supp. 1951).

[4]Kern v. Cleveland, C., C. & St. L. Ry. Co., 204 Ind. 595, 185 N. E. 446 (1933); Reed's Adm'x v. Illinois Cent. R. Co., 182 Ky. 455, 206 S. W. 794, 798 (1918): "The federal act does not, as we think, take away from the courts the power they possessed before its enactment to restrain the plaintiff in a transitory suit from doing an inequitable and unconscionable thing that would subject the defendant to great and unnecessary cost and inconvenience."

For an example of the confusing results of having a state court enjoin further prosecution of an F. E. L. A. suit in a distant federal court, see Bryant v. Atlantic

Following the Supreme Court decision of *Miles v. Illinois Central Railroad Co.*[5] in 1942, in which it was held that a state court could not enjoin a person under its jurisdiction from prosecuting an F.E.L.A. action in another state court which also had jurisdiction of the cause of action, it appeared that: (1) A state court could refuse to entertain an F.E.L.A. suit under a "valid excuse."[6] (2) A federal district court could not decline jurisdiction of an F.E.L.A. action.[7] (3) A federal district court would not enjoin a plaintiff from suing on an F.E.L.A. cause of action in another federal district court.[8] (4) A federal district court could not enjoin a plaintiff from suing in a state court.[9] (5) A state court could not enjoin a plaintiff from prosecuting an F.E.L.A. action in another state court.[10] (6) A state court could not enjoin a person from prosecuting an F.E.L.A. action in a distant federal district court, under the rule of *Baltimore & Ohio Rd. Co. v. Kepner.*[11] As of 1942, therefore, it is evident that by federal court decisions the 1910 amended version of the Federal Employer's Liability Act had given plaintiffs, excepting in one situation, an absolute choice as to forum of suit, venue requirements being met. The exception had been created by the decision in *Douglas v. New York, New Haven &*

Coast Line R. Co., 92 F. (2d) 569 (C. C. A. 2d , 1937). And for the usual holding that a state court could not enjoin prosecution of an F. E. L. A. suit in a distant federal court, see McConnell v. Thomson, 213 Ind. 16, 8 N. E. (2d) 986 (1937), rehearing denied, 213 Ind. 16, 11 N. E. (2d) 183 (1937).

[5]315 U. S. 698, 62 S. Ct. 827, 86 L. ed. 1129 (1942).

[6]McKnett v. St. Louis & San Francisco Railway Co., 292 U. S. 230, 54 S. Ct. 690, 78 L. ed. 1227 (1934); Douglas v. New York, N. H. & H. R. Co., 279 U. S. 377, 387, 49 S. Ct. 355, 356, 73 L. ed. 747, 752 (1929): "...the Employers' Liability Act... does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so....It may very well be that if the Supreme Court of of New York were given no discretion, being otherwise competent, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse."; Second Employers' Liability Cases, 223 U. S. 1, 32 S. Ct. 169, 56 L. ed. 327 (1911).

[7]Schendel v. McGee, 300 Fed. 273 (C. C. A. 8th, 1924); Trapp v. Baltimore & O. R. Co., 283 Fed. 655 (N. D. Ohio 1922); Connelly v. Central R. Co. of New Jersey, 238 Fed. 932 (S. D. N. Y. 1916).

[8]Chesapeake & Ohio Ry. Co. v. Vigor, 90 F. (2d) 7 (C. C. A. 6th, 1937); Southern Ry. Co. v. Cochran, 56 F. (2d) 1019 (C. C. A. 6th, 1932).

[9]Southern Railway Co. v. Painter, 314 U. S. 155, 62 S. Ct. 154, 86 L. ed. 116 (1941); Judicial Code § 265, 36 Stat. 1162 (1911), 28 U. S. C. A. 379 (1928): "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

[10]Miles v. Illinois Central Railroad Co., 315 U. S. 698, 62 S. Ct. 827, 86 L. ed. 1129 (1942).

[11]314 U. S. 44, 62 S. Ct. 6, 86 L. ed. 28 (1941).

Hartford Railroad Company,[12] which allowed a state "by judicial decision or legislative enactment to regulate the use of its courts generally . . .,"[13] and accordingly to accept or refuse jurisdiction of the case by means of a nondiscriminatory forum non conveniens doctrine.[14]

Plaintiff's Choice of Forum construed To Be Absolute

In *Union Pac. R. Co. v. Utterback*,[15] the Supreme Court of Oregon, on the basis of the *Miles* case, properly refused to enjoin plaintiffs from prosecuting an F.E.L.A. action in a California state court for damages for an accident which occurred in Oregon. The railroad then resumed its fight in California by requesting the California court in *Leet v. Union Pac. R. Co.*[16] to refuse jurisdiction because of forum non conveniens. The California court refused to do so saying: "Whatever may have been the rule on the subject from time to time it is now settled that the state court having jurisdiction may not refuse to exercise it."[17] The decision ignored the *Douglas* case, and also expressions in the *Miles* case that the F.E.L.A. did not impose any absolute duty on a state court to accept an F.E.L.A. case.[18] The reasoning of the California court was that since the injunction could no longer be used to thwart a plaintiff from suing in a distant federal or state court on an F.E.L.A. cause of action and because forum non conveniens was not applied to an F.E.L.A. action brought in a federal court, therefore, the state court where the same cause of action was being prosecuted could not refuse jurisdiction because of forum non conveniens.

By denying certiorari, the United States Supreme Court refused

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[12]279 U. S. 377, 49 S. Ct. 355, 73 L. ed. 747 (1929).

[13]Miles v. Illinois Central Railroad Co., 315 U. S. 698, 704, 62 S. Ct. 827, 831, 86 L. ed. 1129, 1134 (1942).

[14]For a more complete and exhaustive coverage of the problems discussed in the foregoing section, see Note (1942) 3 Wash. & Lee L. Rev. 247.

[15]173 Ore. 572, 146 P. (2d) 76 (1944).

[16]25 Cal. (2d) 605, 155 P. (2d) 42 (1944).

[17]Leet v. Union Pac. R. Co., 25 Cal. (2d) 605, 155 P. (2d) 42, 44 (1944); Notes (1945) 58 Harv. L. Rev. 877, (1945) 18 So. Cal. L. Rev. 281.

For cases holding a state court had to accept jurisdiction of an imported F. E. L. A. cause of action, but which were decided before the Supreme Court decision in the Douglas case, see Holmberg v. Lake Shore & M. S. Ry. Co., 188 Mich. 605, 155 N. W. 504 (1915); State ex rel. Schendel v. District Court of Lyon County, 156 Minn. 380, 194 N. W. 780 (1923); Davis v. Minneapolis St. P. & S. S. M. Ry. Co., 134 Minn. 455, 159 N. W. 1084 (1916).

[18]Miles v. Illinois Central Railroad Co., 315 U. S. 698 at 704 and 708, 62 S. Ct. 827 at 831 and 832, 86 L. ed. 1129 at 1134 and 1136 (1942).

to overthrow the decision.[19] The one remnant of restraint was thereby removed, and a plaintiff now appeared to have an unqualified right to bring his F.E.L.A. action and to have it tried in any court, state or federal, where the venue provisions were complied with.

Forum Non Conveniens Made Applicable to F.E.L.A. Actions

Section 1404 (a) of Title 28, United States Code[20] which became effective on September 1, 1948, codified the doctrine of forum non conveniens for the federal courts. While no statute was necessary to give federal courts power to apply the doctrine, because it is a common law doctrine and may always be used in a proper case unless explicitly denied a court by statute or decision,[21] Section 1404 (a) specifically gave the federal courts the authority to use forum non conveniens. One significant difference exists between the common law version of forum non conveniens and this codified version; the common law would require dismissal of the case, whereas the federal act authorized transfer "to any other district or division where it might have been brought."[22]

A split developed in the federal courts as to whether 1404 (a) could be applied to F.E.L.A. actions. While most of those courts faced with the problem held that it was applicable,[23] at least one court decided that the special venue provision of the F.E.L.A. was superior to 1404 (a), and plaintiff's choice of forum would not be subordinated to a forum non conveniens doctrine.[24] The United States Supreme Court settled the issue in regard to the federal courts by its decision in

[19]Union Pacific Railroad Co. v. Leet, 325 U. S. 866, 65 S. Ct. 1403, 89 L. ed. 1986 (1945).

[20]"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." 62 Stat. 937 (1948), 28 U. S. C. A. § 1404 (a) (1950).

[21]Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law (1929) 29 Col. L. Rev. 1: "...new legislation is not needed...for the doctrine in question involves nothing more than an appeal to the inherent powers possessed by every court of justice—powers, that is to say, which are incontestably necessary to the effective performance of judicial functions."

[22]This has generally been held to mean that in a diversity suit the transfer has to be to a district where jurisdiction could originally have been obtained over defendant. Rogers v. Halford, 107 F. Supp. 295 (E. D. Wis. 1952).

[23]Scott v. New York Cent. R. Co., 81 F. Supp 815 (N. D. Ill. 1948); Nunn v. Chicago, Milwaukee, St. P. & P. R. Co., 80 F. Supp. 745 (S. D. N. Y. 1948); Hayes v. Chicago, R. I. & P. R. Co., 79 F. Supp. 821 (D. C. Minn. 1948).

[24]Pascarella v. New York Cent. R. Co., 81 F. Supp. 95 (E. D. N. Y. 1948).

Ex Parte Collett,[25] which held that an F.E.L.A. action was subject to 1404 (a) in spite of the special venue provision contained in the Act. Under this decision, forum non conveniens could now be used in a federal court, but under the *Leet* case,[26] forum non conveniens could not be used in an F.E.L.A. action brought in a state court. Thus, by 1949 the situation had become just the reverse of what it had been in 1942.

Although plaintiffs who sued in a federal forum at a very inconvenient location could be remitted under 1404 (a) to a more convenient federal forum to prosecute the suit, inasmuch as state courts were now powerless to apply forum non conveniens and an F.E.L.A. action brought in a state court could not be removed to a federal court,[27] plaintiffs could still not be disputed in their choice of forum as long as they sued in a distant state court. By this obvious discrepancy the bulk of F.E.L.A. litigation was thrown upon state courts of large cities where the benefits of larger verdicts were thought to accrue. In *State ex rel. Southern Ry. Co. v. Mayfield*,[28] a Missouri court in 1949 felt bound to accept jurisdiction of an F.E.L.A. action even though the cause of action had arisen in Tennessee. On review of this case the United States Supreme Court[29] held that a state court could also apply its local doctrine of forum non conveniens to F.E.L.A. actions, thereby reestablishing the holding of *Douglas v. New York, New Haven & Hartford Railroad Company*,[30] which was cited in the case. However, in subsequent proceedings, the Missouri Supreme Court held that the courts of that state must try the case, because Missouri had no forum non conveniens doctrine.[31] As a result of the *Mayfield* decision, the only place where plaintiff could not have his case subjected to the forum non conveniens doctrine was in a state court not using the doctrine. Such a situation was presented in *Ex Parte State ex rel. Southern Ry. Co.*,[32] in which the defendant railroad asked for a writ

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[25]337 U. S. 55, 69 S. Ct. 944, 93 L. ed. 1207 (1949).

[26]Leet v. Union Pac. R. Co., 25 Cal. (2d) 605, 155 P. (2d) 42 (1944).

[27]36 Stat. 291 (1910), as amended 36 Stat. 1167 (1911), 53 Stat. 1404 (1939), 45 U. S. C. A. § 56 (1943). Further amended, 62 Stat. 989 (1948), 45 U. S. C. A. § 56 (Supp. 1951).

[28]359 Mo. 827, 224 S. W. (2d) 105 (1949).

[29]Missouri ex rel. Southern Railway Co. v. Mayfield, 340 U. S. 1, 71 S. Ct. 1, 95 L. ed. 3 (1950).

[30]279 U. S. 377, 49 S. Ct. 355, 73 L. ed. 747 (1929).

[31]State ex rel. Southern Ry. Co. v. Mayfield, 240 S. W. (2d) 106 (Mo. 1951).

[32]254 Ala. 10, 47 S. (2d) 249 (1950).

of mandamus requiring the Judge of the Tenth Judicial Circuit in Alabama to decline jurisdiction and dismiss, on the grounds of forum non conveniens, an F. E. L. A. action there pending against it. The plaintiff in the Alabama suit was a resident of Georgia and the cause of action arose in Georgia. The Alabama Supreme Court refused to issue the writ, deeming all Alabama courts to be bound by a state statute to take jurisdiction of all transitory actions brought in the state courts.[33] The statute was regarded as allowing no room for discretion to refuse to accept jurisdiction of the cause of action, because "The wording [of the statute] is that the 'cause of action *shall* be enforceable in the courts of this state,' and to read into the statute the vesting of judicial discretion to accept or decline jurisdiction would do violence to the language employed."[34]

The Injunction Applied to F.E.L.A. Actions

There is very little difference between the effect of the application of the forum non conveniens doctrine, and the issuance of the injunction against prosecuting the action—both devices are used to deter the plaintiff from suing in locations which are inequitably inconvenient to the defendant. In the injunction case, the court having jurisdiction of the plaintiff will enjoin him, on defendant's petition, from prosecuting his action in another court. Under forum non conveniens, the court where the cause of action is brought, if a state court, will dismiss the suit, and if a federal court, will transfer to another federal court. Although the two devices have similar deterrent effects, the problem remains whether they are interchangeable, so that a court, not the court of the forum and hence without jurisdiction

[33]"Whenever, either by common law or the statutes of another state, a cause of action, either upon contract, or in tort, has arisen in such other state against any person or corporation, such cause of action shall be enforcible in the courts of this state, in any county in which jurisdiction of the defendant can be legally obtained in the same manner in which jurisdiction could have been obtained if the cause of action had arisen in this state." Ala. Code (1940) Tit. 7, § 97.

In First National Bank of Chicago v. United Air Lines, Inc., 342 U. S. 396, 72 S. Ct. 421, 96 L. ed. 360 (1952), a statutory version of forum non conveniens applicable to out-of-state wrongful death actions, prosecuted in Illinois, was held invalid under the Full Faith and Credit Clause. Except for the fact that an out-of-state statute was in issue, it would seem to follow from this decision that the Alabama statute would be the ultimate requirement needed and probably preferred by the United States Supreme Court to fulfill the requirements of the Full Faith and Credit Clause of the Federal Constitution.

[34]Ex Parte State ex rel. Southern Ry. Co., 254 Ala. 10, 47 S. (2d) 249, 250 (1950).

to apply forum non conveniens, may nevertheless reach the same result by use of the injunction.

In the case of *Atlantic Coast Line R. Co. v. Pope*,[35] the Georgia court was recently asked by petitioner railroad to enjoin Pope from prosecuting his F.E.L.A. action in an Alabama state court. From even a cursory examination of the facts of the case, it would seem that the whole issue was foreclosed by *Miles v. Illinois Central Railroad Co.*,[36] which prohibited the courts of a state having jurisdiction of the plaintiff in an F.E.L.A. action from issuing an injunction against prosecution of the action in a state court of another state. Yet the Georgia court issued the injunction. On an identical set of facts, however, the Florida Supreme Court, in *Atlantic Coast Line R. Co. v. Wood* has recently held that it could not issue the injunction.[37]

The confusion existing is aptly illustrated by the fact that in the Florida case both appellant and appellee relied on 1404 (a), *Ex Parte Collett*,[38] and *Missouri ex rel. Southern Railway Co. v. Mayfield*.[39] Moreover, in both the Florida and Georgia cases the two courts considered exactly the same cases together with 1404 (a), and arrived at differing conclusions. The critical point of difference between them is whether 1404 (a) has or has not diminished plaintiff's initial choice of venue given to him by 45 U.S.C. Section 56, and made absolute in him by the *Kepner, Miles,* and *Leet* cases.

After discussing 1404 (a), and its applicability to F.E.L.A. actions by reason of *Ex Parte Collett,* the Georgia court relied for its authority to enjoin the plaintiff, on a statement in the concurring opinion of Justice Jackson in the *Mayfield* case:

> "The Missouri Court appears to have acted under the supposed compulsion of *Miles v. Illinois Central R. Co.*, 315 U. S. 698, among other of this Court's decisions. The deciding vote in that case rested, in turn, only on what seemed to be compulsion of statutory provisions as to venue. By amendment, 28 U. S. C. Section 1404 (a), as interpreted in *Ex Parte Collett*, 337 U. S. 55,

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[35]209 Ga. 187, 71 S. E. (2d) 243 (1952).

[36]315 U. S. 698, 62 S. Ct. 827, 86 L. ed. 1129 (1942).

[37]58 S. (2d) 549, 551 (Fla. 1952): "The effort here is not only to resurrect and apply an outmoded principle but to deprive the courts of a sovereign sister state of the right under its own statute to entertain a suit rightfully begun and which it may or may not retain in its discretion. Futhermore, to so hold would, though indirectly, violate the rule of comity between the states."

[38]337 U. S. 55, 69 S. Ct. 944, 93 L. ed. 1207 (1949).

[39]340 U. S. 1, 71 S. Ct. 1, 95 L. ed. 3 (1950).

> Congress has removed the compulsion which determined the *Miles* case, and the Missouri Court should no longer regard it as controlling."[40]

An almost identical statement is made by Justice Frankfurter in the opinion of the Court: "Therefore, if the Supreme Court of Missouri held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion."[41] In both instances the sentences following the quoted ones resurrect the view of the *Douglas* case by stating that Missouri should now be free to apply its own local law on forum non conveniens to an F.E.L.A. action brought by a non resident in its courts. Two questions are thereby raised by the *Mayfield* case: (1) What was the compulsion that existed under the *Miles* case? (2) Was that compulsion removed for all purposes, or only in relation to the forum court being able to apply forum non conveniens to an F.E.L.A. action?

Mayfield Case Clarified Miles Case

The compulsion referred to in the *Mayfield* case as existing under the *Miles* case was that plaintiff, by special statute given his choice of forum in which to commence his action, could not be denied that choice by an *injunction* issued against him by a state court having jurisdiction over him. As the cause of action in an F.E.L.A. suit is predicated on a federal statute, and concurrent jurisdiction is given to state and federal courts to determine the issue, the United States Supreme Court reasoned in the *Miles* case that because a plaintiff, when bringing his F.E.L.A. action in a federal court, could not under the *Kepner* case[42] be enjoined from prosecuting it there, neither could a plaintiff when bringing the same cause of action in a foreign state court, be enjoined by the state court having jurisdiction over him. In other words, the injunction could not be used to keep plaintiff in an F.E.L.A. suit from initially bring his cause of action where he chose to do so, venue provisions being met.

Taken out of its context, one sentence from the *Miles* case, which was a suit for an injunction, might be taken to mean that a state court also could not apply forum non conveniens to an F.E.L.A. action.

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[40]See concurring opinion, Missouri ex rel. Southern Railway Co. v. Mayfield, 340 U. S. 1, 5, 71 S. Ct. 1, 3, 95 L. ed. 3, 9 (1950).

[41]Missouri ex rel. Southern Railway Co. v. Mayfield, 340 U. S. 1, 5, 71 S. Ct. 1, 3, 95 L. ed. 3, 8 (1950).

[42]Baltimore & Ohio Railroad Co. v. Kepner, 314 U. S. 44, 62 S. Ct. 6, 86 L. ed. 28 (1941).

That sentence is:"The Missouri court here involved [where the suit was brought] must permit this litigation."[43] Taken to mean that the court having jurisdiction of the cause of action could not apply forum non conveniens to the case, this assertion would be pure dicta. But this sentence is qualified by a succeeding observation that Missouri, if it were "To deny citizens from other states, suitors under F.E.L.A., access to its courts would, if it permitted access to its own citizens, violate the Privileges and Immunities Clause."[44] It seems evident, therefore, that the first-quoted sentence was meant to refer to a violation of the Privileges and Immunities Clause,[45] and not to forum non conveniens. This interpretation is further substantiated by a direct denial in the opinion of the Court that forum non conveniens was being considered.[46] Therefore, the removal by the *Mayfield* case of the compulsion of the *Miles* case merely made it clear that the forum court was now able to apply forum non conveniens to an F.E.L.A. action, but did not withdraw from plaintiff the initial right to bring his action where he could and where he chose to bring it.

Distinction Between Forum Non Conveniens and Injunction Overlooked

In evaluating the decisions in this field, the courts have failed to keep in mind whether the issues dealt with forum non conveniens or with the injunctive remedy. From Justice Jackson's assertion in the *Mayfield* case that "By amendment, 28 U. S. C. Section 1404 (a), as interpreted in *Ex Parte Collett* . . . Congress has removed the compulsion which determined the *Miles case* . . . ,"[47] the Georgia court in *Atlantic Coast Line R. Co. v. Pope*,[48] infers that a state court may now again enjoin a person within its jurisdiction from prosecuting an F.E.L.A. action in a state court of another state. This seems to be an unwarranted assumption. It disregards the concluding portion of the sentence which states: ". . . and the Missouri Court should no longer

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[43]Miles v. Illinois Central Railroad Co., 315 U. S. 698, 704, 62 S. Ct. 827, 830, 86 L. ed. 1129, 1134 (1942).

[44]Miles v. Illinois Central Railroad Co., 315 U. S. 698, 704, 62 S. Ct. 827, 830, 86 L. ed. 1129, 1134 (1942).

[45]"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U. S. Const. Art. IV, § 2.

[46]Miles v. Illinois Central Railroad Co., 315 U. S. 698 at 704, 62 S. Ct. 827 at 831, 86 L. ed. 1129 at 1134 (1942).

[47]See concurring opinion, Missouri ex rel. Southern Railway Co. v. Mayfield, 340 U. S. 1, 5, 71 S. Ct. 1, 3, 95 L. ed. 3, 9 (1950).

[48]209 Ga. 187, 71 S. E. (2d) 243 (1952).

regard it as controlling."[49] The Georgia court overlooks the fact that the Missouri court was not regarding the *Miles* case as controlling on the use of the *injunction,* but was erroneously regarding it as controlling on the use of forum non conveniens. To have been explicit Justice Jackson should simply have said: "The Missouri Court should *not* regard the *Miles* case as controlling." The *Miles* case, a suit concerning an injunction, never was controlling on the Missouri court where forum non conveniens was the issue, but is still controlling on the Georgia court where the injunction is again in issue.

Apparently not yet completely convinced that it may again use the injunction, the Georgia court also reasoned along another line: That because the plaintiff no longer has an unqualified right to have his case tried where he brings it, he no longer has an inviolable right to bring it where he chooses.[50] The injunction and forum non conveniens issues are again not distinguished, but are made component and necessary parts of the special venue privilege. If Justice Jackson meant, as the Georgia court here concluded he did, that the plaintiff in an F.E.L.A. action no longer has an inviolate initial right to bring his action in any court where venue requirements are met, merely because once he has brought it he may have it dismissed or transferred by virtue of forum non conveniens, then Justice Jackson should not have limited the effect of 1404 (a) by saying "Section 1404 (a), as interpreted in *Ex Parte Collett. . . .*"[51] He should rather have said that because 1404 (a) punctured plaintiff's special choice of venue privilege by denying him an absolute right to have his case tried where he brought it, the special venue privilege is entirely deflated and he no longer has an initial right to bring it where he chooses, venue provisions being complied with. This is exactly what *Ex Parte Collett* interprets 1404 (a) as *not* having done. Either inadvertently or pur-

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[49]See note 47, Supra.

[50]Atlantic Coast Line R. Co. v. Pope, 209 Ga. 187, 71 S. E. (2d) 243, 247 (1952): "It being clear from the decisions in the Collett and Mayfield cases... that the courts in the State where transitory causes of action are pending have a right to apply the doctrine of forum non conveniens, no sound reason exists why a court of equity, where the employee resides and where the cause of action arose, having jurisdiction of the parties, cannot, in a proper case, on equitable principles, restrain the employee from prosecuting his action under the Federal Employers' Liability Act in a court of a foreign State."

It is interesting to note that the California court in the Leet case had reasoned that because the injunction could not be used, it could not use forum non conveniens.

[51]See concurring opinion, Missouri ex rel. Southern Railway Co. v. Mayfield, 340 U. S. 1, 5, 71 S. Ct. 1, 3, 95 L. ed. 3, 9 (1950).

posely, the Georgia court did not recognize the distinction made in the *Miles* and *Collett* cases.

In *Ex Parte Collett* it was held that 28 U. S. C. Section 1404 (a) applied to F.E.L.A. actions even though they were brought under a special venue statute. But it is specifically stated that plaintiff's initial right to bring his action where he can and chooses to do so is not affected thereby.[52] When Justice Jackson gave 1404 (a) the effect it was interpreted to have under *Ex Parte Collett,* he recognized the distinction made that the plaintiff in an F.E.L.A. action may still bring his case where he chooses, venue requirements being fulfilled, but has no inviolable right to have it tried there. The effect seems clearly stated by Justice Rutledge in the concurring opinion, where he observed that "the changes made in them [special venue causes of action] by 1404 (a) were in the nature of repeals to the extent that the plaintiffs were deprived of their rights under the pre-existing statutes to have their causes of action tried in the forums where they were properly brought."[53] The Georgia court unjustifiably interpreted Justice Jackson as saying much more.

Even though to the Georgia court no sound reason exists for not being able to use an injunction where forum non conveniens can be used, some reason for distinguishing the two situations must have been apparent to the United States Supreme Court. The Georgia court apparently forgot that a federally created cause of action was in issue, and that the state court is bound to follow interpretations already made by the United States Supreme Court, and not to make its own. Perhaps the soundest reason why plaintiff in an F.E.L.A. action has an inviolable right to bring his action wherever he chooses, venue requirements being complied with, is that given by Justice Jackson when he called the F.E.L.A. a medieval system of recompense for in-

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[52]Ex parte Collett, 337 U. S. 55, 60, 69 S. Ct. 944, 947, 93 L. ed. 1207, 1211 (1949): "Section 6 of the Liability Act defines the proper forum; § 1404 (a) of the Code deals with the right to transfer an action properly brought. The two sections deal with two separate and distinct problems. Section 1404 (a) does not limit or otherwise modify any right granted in § 6 of the Liability Act or elsewhere to bring suit in a particular district. An action may still be brought in any court, state or federal, in which it might have been brought previously. The Code, therefore, does not repeal § 6 of the Federal Employers' Liability Act.... We cannot agree that the order before us [to transfer an F. E. L. A. case to another federal court because of forum non conveniens] effectuates an implied repeal.... Discussion of the law of implied repeals is, therefore, irrelevant."

[53]See concurring opinion, Ex Parte Collett, 337 U. S. 55, 73, 69 S. Ct. 944, 959, 93 L. ed. 1207, 1218 (1949).

juries received, allowing a lawsuit instead of a remedy, burdening interstate commerce with two dollars of judgment for every dollar the injured person receives, and concluded:

> "I see no reason to believe that Congress could not have intended the relatively minor additional burden to interstate commerce from loading the dice a little in the favor of the workman in the matter of venue. It seems more probable that Congress intended to give the disadvantaged workman some leverage in the choice of venue, than that it intended to leave him in a position where the railroad could force him to try one lawsuit at home to find out whether he could be allowed to try his principal lawsuit elsewhere."[54]

Forum Non Conveniens a Prerogative of the Forum Court

The doctrine of forum non conveniens involves determinations which can only be made by the court of the forum.[55] And it is immaterial in this connection whether the forum empowers its courts to employ the doctrine. It does not follow as the Georgia court in the *Pope* case supposed that because the Alabama courts do not apply forum non conveniens, a Georgia court may enjoin a plaintiff subject to its jurisdiction from prosecuting the action in an Alabama court. This point is even more significant where a federally created right is in issue as in the *Pope* case, than where a state created right is being litigated.

In *Miles v. Illinois Central Railroad Co.* it was stated:

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[54]See concurring opinion, Miles v. Illinois Central Railroad Co., 315 U. S. 698, 707, 62 S. Ct. 827, 832, 86 L. ed. 1129, 1136 (1942).

[55]Tivoli Realty, Inc. v. Interstate Circuit, Inc., 167 F. (2d) 155, 156 (C.A.A. 5th, 1948): "Under the doctrine of forum non conveniens a court having *jurisdiction* may decline to exercise it in a suit that in justice should be tried elsewhere. This doctrine involves the use of discretion on the part of the *court in which the suit is brought.*" Note (1945) 158 A. L. R. 1022, 1031: "The doctrine of forum non conveniens deals with the discretionary power of a court to decline to exercise a possessed jurisdiction whenever, because of the foreign elements involved in the cause of action before the court, it appears that the controversy may be more suitably tried elsewhere."

The Georgia court also draws attention to the fact that counsel for plaintiff had instituted ten suits against defendant railroad in twenty-four months in Alabama, nine of which arose outside that state. However, this is a matter for correction by the Alabama legislature or courts. In Atchison, T. & S. F. Ry. Co. v. Andrews, 338 Ill. App. 552, 88 N. E. (2d) 364 (1949), defendant attorney was enjoined from futher prosecuting F. E. L. A. cases in the Superior Court of Cook County, Illinois. He secured these cases by means of a regular agency, and the cause of action often occurred far distant from Illinois.

> "Even if Missouri, by reason of its control of its own courts might refuse to open them to such a case [F.E.L.A. action, cause of action occurring outside the state], it does not follow that another state may close Missouri's courts to one with a federal cause of action. If Missouri elects to entertain the case, the courts of no other state can obstruct or prevent its exercise of jurisdiction as conferred by the federal statute. . . ."[56]

The Georgia court is in effect making all F.E.L.A. actions arising in Georgia and sued on where it is deemed to be inconvenient to the defendant, local Georgia actions. This result is in conflict with the reasoning of *Tennessee Coal, Iron & Railroad Company v. George*.[57] In that case a suit based on an Alabama statute was instituted in Georgia. The defense was that Alabama had by another statute decreed that all actions based on the statute had to be tried in Alabama, and litigating the action in Georgia would violate the Full Faith and Credit Clause of the Constitution.[58] The United States Supreme Court held:

> ". . . a State cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction. That jurisdiction is to be determined by the law of the court's creation and cannot be defeated by the extra-territorial operation of a statute of another State, even though it created the right of action."[59]

If a state may not make its own statutory cause of action a local action it would seem impossible for a state court to make a federally created cause of action a local action, and the Georgia court could not by the use of the injunction keep plaintiff from prosecuting his action in Alabama.

Power To Use, Plus a Proper Case, a Necessity for the Use of the Injunction

The Georgia court in the *Pope* case based the power of the outside state court to enjoin the plaintiff in an F.E.L.A. action from proceeding in the inconvenient state forum largely upon the power of a forum court to decline jurisdiction on the basis of forum non conveniens. This would seem to be erroneous reasoning, yet the Georgia court

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[56]See concurring opinion, Miles v. Illinois Central Railroad Co., 315 U. S. 698, 708, 62 S. Ct. 827, 832, 86 L. ed. 1129, 1136 (1942).

[57]233 U. S. 354, 34 S. Ct. 587, 58 L. ed. 997 (1914).

[58]"Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." U. S. Const. Art. IV, § 1.

[59]Tennessee Coal, Iron & Railroad Company v. George, 233 U. S. 354, 360, 34 S. Ct. 587, 589, 58 L. ed. 997, 1000 (1914).

assumed it has the power, and concluded: "At least for the present, the views of the minority in the Miles and Kepner cases are the views of the majority in Ex Parte Collett and Southern Railway Co. v. Mayfield... We are bound by controlling decisions of the United States Supreme Court as of today. Sufficient unto the day is the decision thereof."[60] It is submitted that by allowing forum non conveniens to be applied to F.E.L.A. cases, the United States Supreme Court did not overrule the *Miles* and *Kepner* cases pertaining to injunctions, and that all four cases in their own proper spheres are still authoritative. The Georgia court is bound by the decisions of the United States Supreme Court on this federally created cause of action, and the *Miles* case is authority for an opposite conclusion than that at which the Georgia court arrived.

Having concluded that it had the power to use the injunction, the Georgia court then studied the facts and found from them that there was also a proper case for issuing the injunction. It was determined that plaintiff had secured an "inequitable and unconscionable" advantage over the defendant by bringing the suit 313 miles distant from where the cause of action accrued, thereby causing defendant great expense and inconvenience in transporting the necessary witnesses to the trial. Another reason given for why there was a proper case for invoking the injunction was that: "In selecting a State court of Alabama, the employee [plaintiff] has... denied to the employer [defendant railroad] the equitable right of invoking the doctrine of forum non conveniens, which it would have had if the action had been brought in a Federal court of that State."[61] This reasoning could only be upheld if it were shown that Alabama, because of its statute which denied any Alabama court the right to reject jurisdiction of a transitory cause of action because of forum non conveniens, had forced defendant to defend in the Alabama courts, and had thereby given him an inadequate remedy at law. Such has not been shown, nor can it be assumed that any state will not give a citizen of another state a just and fair trial in its courts. Furthermore, if forum non conveniens is regarded as substantive law, and a denial of it is viewed as an inadequate remedy at law, then the Alabama statute would be substantive, and the injunction of the Georgia court would be invalid under the Full Faith and Credit Clause. If there was a proper case for issuing the injunction, it would have to rest on the distance of

[60]Atlantic Coast Line R. Co. v. Pope, 209 Ga. 187, 71 S. E. (2d) 243, 247 (1952).
[61]Atlantic Coast Line R. Co. v. Pope, 209 Ga. 187, 71 S. E. (2d) 243, 248 (1952).

travel, expense, and inconvenience forced on defendant by having to defend in Alabama. No rules can be set as to when there is, or when there is not a just case for invoking the injunction. Each case must rest on its own facts and the trial court by the exercise of a sound discretion must determine if there is sufficient justification for the injunction.[62]

Supreme Court Reaffirms the Miles Case

The United States Supreme Court granted certiorari in the *Pope* case, because the Georgia court interpreted a federal statute, and did so in a manner seemingly repugnant to prior interpretation by the Supreme Court.[63] In holding, in its decision announced on April 27, 1953,[64] that the Georgia court could not issue the injunction, the Supreme Court reaffirmed the *Miles* case, which had previously held that a state court could not enjoin a person within its jurisdiction from prosecuting an F.E.L.A. action in a distant state court where venue requirements were also fulfilled. In the opinion of the majority, Chief Justice Vinson declared:

> "Congress has deliberately chosen to give petitioner a transitory cause of action; and we have held before, in a case indistinguishable from this one, that Section 6 displaced the traditional 'power of a state court to enjoin its citizens, on the ground of oppressiveness... from suing... in the courts of another state....' *Miles v. Illinois Central R. Co.*,... 315 U. S. at 699."[65]

It was denied that there was any implied repeal of the *Miles* case in 28 U. S. C. A. Section 1404 (a), which gave federal courts permission to use forum non conveniens, and which by the *Collett* case was made

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[62]Note (1933) 85 A. L. R. 1351: "No general rule can be laid down as to when the court ought to enjoin a party from prosecuting a suit in a foreign jurisdiction. Each case must be governed by its own facts. If they show that it is necessary and equitable to exercise the power in the orderly administration of justice, the injunction will issue; otherwise not."

[63]62 Stat. 929 (1948), 28 U. S. C. A. § 1257 (1949): "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari,... where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Some time was spent to determine whether the decision by the Georgia Supreme Court was such a final decision as 28 U. S. C. A. § 1257 requires before the United States Supreme Court has jurisdiction to review a state court decision. This was determined in the affirmative.

[64]Pope v. Atlantic Coast Line Rd. Co., 73 S. Ct. 749, 97 L. ed. 719 (1953).

[65]Pope v. Atlantic Coast Line Rd. Co., 73 S. Ct. 749, 751, 97 L. ed. 719, 722 (1953).

applicable to F.E.L.A. actions brought in federal courts. It is asserted that 1404 (a) applies only to federal courts, and then only to federal courts where the suit is being prosecuted; that 1404 (a) has no effect on any state court, and contains no provision concerning an injunction.[66]

Justice Frankfurter, dissenting, reasoned that by the passage of 1404 (a) "... Congress has cut the ground from under ..."[67] the *Miles* and *Kepner* cases. However, he apparently relied too heavily on the reviser's notes to Section 1404[68] as support for his view, and overlooked the portions of the *Collett* case which specifically stated that the *Miles* and *Kepner* cases were undisturbed by 1404 (a).[69]

The F.E.L.A. in Retrospect

Had the contention of Justice Frankfurter and the Georgia court prevailed, the injured railroad employee would have been in the most disadvantageous position since amendments to the F.E.L.A. in 1910 and 1911 gave him the choice of three forums in which to sue. Even though in the early years of the Act plaintiff could be enjoined by the state court of his residence, and though a distant state court could reject jurisdiction, a distant federal court could be made the forum court, and it would accept the case. The plaintiff's position gradually became stronger, and after the *Kepner, Miles* and *Utterback*

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[66]73 S. Ct. 749 at 752, 97 L. ed. 719 at 722 (1953).

[67]See Pope v. Atlantic Coast Line Rd. Co., 73 S. Ct. 749, 754, 97 L. ed. 719, 724 (1953).

[68]In the reviser's note to 1404 this statement is made: "Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner...." H. R. Rep. No. 308, 80th Cong. 1st Sess. A. 132 (1947).

In the opinion of the Court, this reviser's note was interpreted to mean that the inequity of the result of the ruling in the Kepner case would be alleviated by 1404 (a), but that the decision itself is undisturbed; that the power of the federal court to transfer was the reference, and not of a state court to enjoin. Pope v. Atlantic Coast Line Rd. Co., 73 S. Ct. 749 at 752, 97 L. ed. 719 at 723 (1953).

Justice Frankfurter, on the other hand, interpreted the note to mean that by 1404 (a) Congress has changed the ruling of the Kepner case, and that henceforth the plaintiff in an F. E. L. A. action could again be enjoined by a state court of his residence from prosecuting his F. E. L. A. action in a distant state court. See Pope v. Atlantic Coast Line Rd. Co., 73 S. Ct. 749 at 754, 755, 97 L. ed. 719 at 725 (1953).

The differences in interpretation seem to be academic, and after all it is the statute not the reviser's note that is in issue, and the statute concerns forum non conveniens, not the injunction. Justice Frankfurter, as others have done, has made forum non conveniens and the injunction correlatives, which they are not.

[69]See note 52, supra.

cases he enjoyed a temporary absolute right to bring his case and to have it tried in the forum of his choice, state or federal, wherever venue requirements were met.

A retrogression was made when, by the *Collett* case, 1404 (a) was made applicable to F.E.L.A. actions brought in a federal court. Plaintiff's choice of federal forum was no longer absolute. Another backward step was made by the *Mayfield* case. By it forum non conveniens could be applied by a state court when the state court was made the forum for an F.E.L.A. action. Plaintiff's choice of forum was then secure only when a state court that was not able to apply forum non conveniens to any cases by its local law, was made the forum court. If the injunction could now be used when the action was being prosecuted in the distant state court where forum non conveniens was not in practice, then plaintiff would have no courts other than the state or federal court in his immediate vicinity in which he could bring his action and not have to prove his right outside the statute to prosecute it there—this, in spite of the fact that the basic statute gave an injured railroad employee three places in which to sue, and never qualified his right to sue in any one of them.[70]

As the cases now stand, an injured railroad employee may bring his suit in a distant state or federal court, and the state court of his residence cannot enjoin him from doing so. Both the federal and state court may view the case in the light of forum non conveniens, and are not required to hear the case. But if the state court, which is the

[70]Attempts and suggestions have been made to alter the effect of the venue provision of the F. E. L. A. Railroad employers have attempted by contractual arrangement with the employee to delimit the place of suing in case a suit should arise. While earlier decisions have varied, by Boyd v. Grand Trunk Western Rd. Co., 338 U. S. 263, 70 S. Ct. 26, 94 L. ed. 55 (1949), the Supreme Court seems to have now determined that such contracts are invalid under 35 Stat. 66 (1908), 45 U. S. C. A. § 55 (1943) voiding any contract by which the carrier attempts to exempt itself from liability under the Act. In 1947 the Jennings Bill, H. R. 1639, 80 Cong., 1st Sess. (1947), was discussed in Congress, but was never enacted. By it venue would have been limited to plaintiff's place of residence or where the injury occurred, and only if defendant could not there be served, could suit be had in any other place where defendant railroad could be served. New legislation has been urged repeatedly. What has retarded it, and will continue to do so, is lack of any consensus as to what it should embody. It has been suggested that the suits be heard only in federal courts, or that transfer from the state court to the federal court be allowed generally, or at least when the case is an imposition on the defendant, and is brought in a distant state court. Note (1950) 3 Ala. L. Rev. 192 at 200. Another suggestion is to abolish the F. E. L. A. entirely, and to set up a workmen's compensation for injured railroad employees. Note (1952) 30 N. C. L. Rev. 168.

forum court, does not have the principle of forum non conveniens available for its use, then it must try the case.[71]

[71]Justice Frankfurter points out what might seem to be an anomolous situation as the decisions now stand, in that the F. E. L. A. is a federal cause of action, yet federal courts are able to transfer by 1404 (a), but state courts cannot. The result is not as illogical as Justice Frankfurter seems to view it. A federal court only transfers to another federal court, while a state court can dismiss because of forum non conveniens. Of course, a state court not allowed to use forum non conveniens, is currently required to try the case. Yet a non-discriminatory forum non conveniens statute may be passed by those states not now using it. While Justice Frankfurter states that it is the exceptional state court which does not use forum non conveniens [See 73 S. Ct. 749, 756, 97 L. ed. 719, 727 (1953)], it seems that the exception is the other way. Few states have it. Barrett, The Doctrine of Forum non Conveniens (1947) 35 Calif. L. Rev. 380, 388; Goodrich, Conflict of Laws (3d ed. 1949) 22.