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Improper Venue Under The Federal Employers' Liability Act

NOTES

IMPROPER VENUE UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT

It has become a familiar federal legislative custom to confer concurrent jurisdiction upon the state and federal courts with regard to newly created causes of action. This practice has produced a problem, however, in the matter of the extent of the control of these courts of purported "equal dignity," one over the other.[1] The principal perplexity has concerned the power of one of these courts, state or federal, to enjoin a party within its jurisdiction from prosecuting an action in a foreign court, state or federal. Under the Federal Employers' Liability Act,[2] in particular, has this question arisen with disturbing frequency, and jurists have been struggling with the resulting complications for many years. The illumination emanating from Supreme Court decisions has been far from adequate; the light cast upon the subject by that body has been a rather flickering and non-too-steady beam. Bit by bit, however, the law on the subject has been taking shape, and late in 1941 a decision of the Supreme Court apparently had settled the issue.[3] Those familiar with the field, and hopeful for further clarification of the issues, however, suffered dismay and disappointment during the early months of 1942, when that Court executed a *volte* face, mutilated long settled principles connected with the subject, and opened the matter again to doubt and confusion.[4]

The difficulties attending the determination of questions of venue under the F. E. L. A. arise from the uncertainty with which the section of that act conferring venue has been interpreted. Before 1910, such venue was determined only by the general venue provisions of the Judicial Code,[5] which allowed suit solely in the district of the defendant's residence; or suit might be brought in the court of any

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[1]See Warren, Federal and State Interference (1930) 43 Harv. L. Rev. 345.

[2]Federal Employers' Liability Act, 45 U. S. A. 51 et seq. (1928). The portions of this act bearing upon the present discussion are: April 5, 1910, c. 143, § 1, 36 Stat. 291 as amended March 3, 1911, c. 231, § 291, 36 Stat. 1167, 45 U. S. C. A. § 56.

[3]Baltimore and Ohio R. Co. v. Kepner, 314 U. S. 44, 62 S. Ct. 6, 86 L. ed. 37 (1941).

[4]Miles v. Illinois Central R. Co., 62 S. Ct. 827 (1942).

[5]Judicial Code § 51, 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. . . "

state which could gain jurisdiction over the person of the employer-carrier.[6]The hardship thereby imposed upon the injured employee of journeying to distant districts, including the transporting of witnesses thereto, and the like, provoked Congress into the passage of an ameliorating amendment to the act in that year. This new venue clause provided that:

> "... an action may be brought in a district 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. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."[7]

It becomes instantly obvious that the inconvenience and expense removed from the shoulders of the employee might now be visited with manifold intensity upon the employer—this, in that the employee, by being allowed to select any district in which the carrier did business, might now force the employer to travel and to move witnesses and employees to great distances; and the employee might often act with no other motive than to vex or harass the employer.

Suppose for instance, that D, a railroad, incorporated in Ohio, employs P, a workman, also an Ohio resident; and while working within Ohio, P sustains injuries that he claims entitle him to damages under the F. E. L. A. Then P learns that D runs a modest ticket agency in California so that the railroad may be held to be "doing business" within that state. P thereupon, at random, or perhaps spitefully, or perhaps merely because he had always wanted to see the ocean, brings his action, under authority of the F. E. L. A. venue provision, in the appropriate federal district court in California. D is outraged, as the company believes it has a valid defense to the claim, but in order to establish this defense several witnesses, including some of its employees, would have to testify. The expense of transporting these witnesses and the cost of substituting others to the positions the employee-witnesses leave temporarily vacant, amounts to several thous-

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[6]Mondou v. New York, N. H. & H. R. R. Co., 223 U. S. 1, 32 S Ct. 169, 56 L. ed. 327 (1911).

[7]April 5, 1910, c. 143, § 1, 36 Stat. 291 as amended March 3, 1911, c. 231, § 291, 36 Stat. 1167, 45 U. S. C. A. 56 (1928).

and dollars.[8] Similarly, under an appropriate state statute, P might gain jurisdiction of D in a California state court. In either case, how, if at all, is D to obtain relief? The answer depends upon the quantum of the power or right given P under the F. E. L. A. venue provision amendment of 1910. (1) Is an absolute right created in the employee to sue in these forums—a right secure against the operation of established equitable practices, applicable in analagous litigation, of restraining vexatious, harassing, and fraudulent law-suits? (2) Is it an absolute right that is independent of the exercise of the familiar doctrine of forum non conveniens, which is the discretionary power of a court to decline to exercise a jurisdiction which it possesses, whenever it is of the opinion that the case before it would be more appropriately and justly tried elsewhere?[9] It is precisely upon these two suggested modifications to the alleged absolute venue privilege that the controversy has centered since 1910.

A dichotomic treatment produces six problems, all of which have confronted the courts many times:

I. May a state court refuse jurisdiction of a suit under the F. E. L. A.?

II. May a federal district court refuse jurisdiction of a suit under the F. E. L. A.?

III. May a federal district court enjoin a person within its jurisdiction from prosecuting an action under the F. E. L. A. in another federal district court.

IV. May a federal district court enjoin a person within its jurisdiction from prosecuting an action under the F. E. L. A. in a distant state court?

V. May a state court enjoin a person within its jurisdiction from prosecuting an action under the F. E. L. A. in another state court?

VI. May a state court enjoin a person within its jurisdiction from prosecuting an action under the F. E. L. A in a distant federal district court?

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[8]This, though a fictitious set of facts, presents a typical situation under which cases involving the venue provision have arisen. Miles v. Illinois Central R. Co., 62 S. Ct. 827 (1942); Baltimore and Ohio R. Co. v. Kepner, 314 U. S. 44, 62 S. Ct. 6, 86 L. ed. 37 (1941); Bryant v. Atlantic Coast Line R. Co., 92 F. (2d) 569 (C. C. A. 2d, 1937); Schendel v. McGee, 300 Fed. 273 (C. C. A. 8th, 1924).

[9]See Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law (1929) 29 Col. L. Rev. 1.

I. The Obligation of a State Court to Entertain an F. E. L. A. Suit

It was early determined in the *Second Employers' Liability Cases*[10] that the rights under the act were enforceable as of right in the courts of a state when their jurisdiction, as prescribed by local laws, was adequate to the occasion. Thus, a state would not be allowed to decline jurisdiction because it felt the act was contrary to its policy. To presume that the act could run contrary to state policy was held to presuppose what in legal contemplation could not exist, since Congress in adopting the act spoke for the whole people. Thus, the act was to be considered as much the policy of a state as if it had "emanated from its own legislature."

Apparently, this decision imported that an absolute obligation had been imposed upon the state to entertain F. E. L. A. suits, but a later case, *Douglas v. New York, N. H. & H. R. Co.*[11] modified this impression. The state of New York had by statute restricted suits against foreign corporations by non-residents.[12] In a suit arising under the F. E. L. A., Douglas sued in New York a railroad corporation foreign to New York. He attained proper service upon the railroad, and, thus, within the implications of the F. E. L. A. venue provision, the state of New York was a proper venue. The state court, however, dismissed the action, assuming that its state statute gave it discretion to do so. The Federal Supreme Court upheld this decision, stating that the F. E. L. A. did not purport to require state courts to receive these cases, but only to empower them so to do, and that nothing in the act could force the state so to do as against an otherwise valid excuse. The Court intimated, however, in line with the *Second Employers' Liability Cases*[13] that if the New York court had not been given this discretion by statute or judicial decision, but was otherwise competent, it would have been under a duty to entertain the action. These two important cases, then, appeared to have settled the question of the duty of state courts and the extent of the use of forum non conveniens therein, and this was the status of this phase of the problem until 1941.[14]

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[10] 223 U. S. 1, 32 S. Ct. 169, 56 L. ed. 327, 38 L. R. A. (N. S.) 44 (1911).

[11] 279 U. S. 377, 49 S. Ct. 355, 73 L. ed. 747 (1929).

[12] Laws of 1913, c. 60, amending, § 1780 of the Code of Civil Procedure.

[13] 223 U. S. 1, 32 S. Ct. 169, 56 L. ed. 327, 38 L. R. A. (N. S.) 44 (1911).

[14] Again in McKnett v. St. Louis & S. F. Ry. Co. 292 U. S. 230, 233, 54 S. Ct. 690, 692, 78 L. ed. 1227 (1934), this rule was reaffirmed: "While Congress has not attempted to compel states to provide courts for the enforcement of the Federal Employers' Liability Act, ... the Federal Constitution prohibits state courts of

II. The Obligation of a Federal Court to Entertain an F. E. L. A. Suit

The obligation of the three prescribed federal district courts as to acceptance of actions under the act, on the other hand, appears to be absolute. The doctrine of forum non conveniens seems to be absent from the picture. It is submitted that this rule is as unfortunate as the course of case reasoning establishing it is doubtful. The conclusion seems to have been reached from two lines of cases. The first line began in 1916 with the federal district court decision of *Connelly v. Central R. Co. of N. J.*,[15] in which a carrier was sued under the F. E. L. A. in a federal district court of New York. The venue was selected solely upon the basis of the carrier's doing business in that state. The carrier claimed that the action should be set aside upon the ground that the court did not have jurisdiction over the person of the defendant, but the court held that such jurisdiction existed. This decision cannot, therefore, stand as a true rejection of the forum non conveniens doctrine; however, the court added words appropriate to such a ruling to the effect that even though inconvenience resulted to the carrier, this question was entirely for the legislative branch and not for the court.[16] Since the defendant-carrier was forced to travel only from New Jersey to New York, it is doubtful if the doctrine could have been successfully pleaded, if attempted.[17] Later, in 1922, however, a federal district court case[18] based solely upon the *Connelly* decision,[19] rejected a forum non conveniens application, and asserted that Congress had given the plaintiff a "privilege" of bringing his action in any of the three prescribed districts, and that the sole remedy for any oppressiveness lay with the legislature.[20] In basing this ruling upon the language in the *Connelly* case, it is believed

general jurisdiction from refusing to do so solely because the suit is brought under a federal law." See also, Mr. Justice Frankfurter, dissenting in Miles v. Illinois Central R. Co., 62 S. Ct. 827, 833 (1942).

[15] 238 Fed. 932 (S. D. N. Y. 1916).

[16] 238 Fed. 932, 934 (S. D. N. Y. 1916).

[17] Plaintiff was a New Jersey resident, defendant was incorporated in New Jersey, and the cause of action arose in New Jersey, but as defendant did business in New York, he was there prosecuted by the plaintiff.

[18] Trapp v. Baltimore & O. R. Co., 283 Fed. 655 (N. D. Ohio, 1922) .

[19] 238 Fed. 932 (S. D. N. Y. 1916).

[20] 283 Fed. 655, 656, 657 (N. D. Ohio, 1922). "It confers upon an injured employee the privilege of bringing his action in any one of the three districts of the United States.... that much inconvenience may arise from permitting an action to be brought here, when the plaintiff and all the witnesses on both sides may reside in Maryland or Indiana, are considerations merely of convenience, and can be given controlling weight by Congress alone, which has power to make or amend the law."

that a questionable, and certainly an unfortunate decision, was reached. However, this line of cases is not greatly responsible for the status of the rule in these actions, as these decisions are comparatively seldom cited.

The real line of authority establishing the independence of the venue section from the doctrine of forum non conveniens seems to have had its origin in the case of *Schendel v. McGee*[21] in which, to support a holding that a state court could not interfere with certain processes of a foreign federal court trying a case under the F. E. L. A., it was observed that it was that federal court's duty, where there was jurisdiction, to retain jurisdiction and try the case. The only authority for this conclusion was a quotation from the *Second Employers' Liability Cases*:[22]

> "The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication."

Mark this quotation well, for few sentences have been more innocently responsible for a long line of doubtful decisions. *The fault lies in the inexcusable practice of taking a detached sentence from another opinion and applying it, without due regard for the limitations of its context or proper comparison for false analogies, as authority for the proposition at hand.* In the *Second Employers' Liability Cases* this sentence that was borrowed in the *Schendel* case[23] was immediately preceded by:

> "We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law."

This recalls to mind the subject matter of the *Second Employers' Liability Cases,* which, as previously mentioned, dealt with the inability of a state, out of deference for arbitrary, fanciful, or other improper policies, to refuse to entertain jurisdiction of a suit under the F. E. L. A. How different for this borrowed sentence to be lifted from this context and applied in another that makes it the apparent original authority for the proposition that the federal courts are under an absolute duty to accept F. E. L. A. actions—the doctrine of

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[21] 300 Fed. 273 (C. C. A. 8th, 1924). This case is associated with the earlier decision of Chicago, M. & St. P. Ry. Co. v. Schendel, 292 Fed. 326 (C. C. A. 8th, 1923).

[22] 223 U. S. 1, 58, 32 S. Ct. 169, 178, 56 L. ed. 327, 38 L. R. A. (N. S.) 44, 57 (1911).

[23] Schendel v. McGee, 300 Fed. 273 (C. C. A. 8th, 1924).

forum non conveniens and other venerable allied equitable principles to the contrary notwithstanding. The proposition, however, has been echoed and re-echoed from the *Schendel* case, as a foundation decision,[24] in numerous dicta, and the obligation imposed upon the federal district courts seems to be secure.

Upon strict logic, it would seem that, since under the F. E. L. A. the state and federal district courts are given unqualified concurrent jurisdiction, the right to exert the power of forum non conveniens in F. E. L. A. cases would be equal. Upon reflection, however, differences are seen. The only apparent modification upon the absolute obligation of a state court arises where the entertaining of the suit would run counter to some valid established rule of procedure or law. What could occupy a similar place within the federal system so as to qualify the absolute obligation upon those courts? Certainly no conflicting policy could there exist, statutory or otherwise. However, a factual situation might well arise therein, as in the state courts, that would demand the equitable interposition of the doctrine of forum non conveniens. If there be something that forbids the application of the doctrine in these instances, it must lie either in the venue provision itself, or in a fundamental inability of the federal courts to employ the doctrine. A perusal of the venue provision of the F. E. L. A. fails to register any such indication, expressed or implicit, in the act itself.

As to the power of the district courts generally to refuse to entertain suits that in their opinion would be tried more justly elsewhere, although the authority is not abundant, the United States Supreme Court has upheld the exercise of the power by district courts in admiralty cases on the ground that the parties were citizens of a foreign country, declaring:

> "Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litiga-

[24]For example, in Southern Ry. Co. v. Painter, 117 F. (2d) 100, 106 (C. C. A. 8th, 1941); "To sanction the ousting of federal jurisdiction by state courts of domicile conflicts with the obligation the federal courts are under to exercise jurisdiction conferred upon them. It is not a discretionary matter, but an obligation and a duty. They do not proceed under the Employers' Liability Act in their discretion, but by positive requirement." Three cases are cited here: Wood v. Delaware & H. R. Corp., 63 F. (2d) 235 (C. C. A. 2d, 1933) (but the opinion there expressly stated that it did not decide the point); Schendel v. McGee, 300 Fed. 273 (C. C. A. 8th, 1924) (the associate case); Southern Ry. v. Cochran, Judge, 56 F. (2d) 1019 (C. C. A. 6th, 1932) (but this case relied again on the earlier Schendel case).

> tion is between foreigners. Nor is it true of courts administering other systems of law. *Courts of equity and of law also occasionally decline, in the interests of justice, to exercise jurisdiction, when the suit is between aliens or nonresidents, or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal.*"[25]

Further, cases have been refused upon the ground that they concerned the internal affairs of a corporation foreign to the state in which the federal courts sits,[26] and the general power to apply the doctrine of forum non conveniens has been reaffirmed as appropriate whenever considerations of convenience, efficiency, or justice indicate the propriety of litigating in the court of the domicile.[27] It is difficult to believe that Congress intended to create an absolute venue privilege at the expense of this equitable doctrine. Indeed, the passage of this kind of legislation calls for more frequent application of the principle, rather than for its restriction or complete rejection.

III. *The Power of a Federal District Court to Enjoin a Party from Prosecuting an F. E. L. A. Suit in Another Federal District Court*

Returning, in the hypothetical case, to D, the Ohio Railroad, which has found itself hailed before a federal district court in California, it has been discovered that D would have been refused relief had it asked that district court to decline jurisdiction upon the ground of forum non conveniens. How, then, is D to obtain relief? There is only one remaining remedy for the defendant—i.e., it may attempt to secure an injunction against P, forbidding him to prosecute the suit in the foreign jurisdiction on the ground that such a suit would inequitably and unjustly harass and inconvenience D. For this relief, D would apply either to the federal district court in Ohio or to a state court in Ohio; in either case the court must have jurisdiction of the person of P. This equitable relief is an old and established privilege, and the general right of a court to exercise this power cannot be

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[25]Canada Malting Co. v. Paterson Steamships, 285 U. S. 413, 422, 52 S. Ct. 413, 415, 76 L. ed. 837 (1932). (italics supplied).

[26]Rogers v. Guaranty Trust Co., 288 U. S. 123, 53 S. Ct. 295, 77 L. ed. 652, 89 A. L. R. 720 (1932).

[27]Rogers v. Guaranty Trust Co., 288 U. S. 123, 131, 53 S. Ct. 295, 298, 77 L. ed. 652, 89 A. L. R. 720, 725 (1932): "... it safely may be said that jurisdiction will be declined whenever considerations of convenience, efficiency, and justice point to the courts of the state of the domicile as appropriate tribunals for the determination of the particular case."

questioned.[28] Such restraint of a proper party is not considered legally tantamount to the restraint of the foreign court itself, for the decree operates only against the activity of the party-defendant to the injunction proceeding.[29]

In an early Kentucky decision following the 1910 Amendment to the F. E. L. A., a very reasonable, intelligent, and normal construction was put upon that amendment:

> "... act does not ... 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.
>
> Before the passage of the act, the plaintiff had exactly the same legal right to institute her action in any court having jurisdiction, ... as she does now to bring it in the three places specified in the act.... If it was allowable ... before the act to enjoin the plaintiff from bringing suit ..., it must be equally allowable to do so since the act, because the act merely limits instead of enlarging the places where the suit must be brought, and it confers no more right to bring the suit in the places named in the act than the general law before the act conferred the right to bring the suit at any place where the defendant could be brought before a court of justice having jurisdiction."[30]

The federal courts, however, have not favored this interpretation, and have refused to enjoin suits brought under the act in another federal court. Thus, if petitioned, the federal district court in Ohio would have refused to enjoin P from suing in the federal district court in California. The basis of this conclusion, once more, seems to be the sentence borrowed from the *Second Employers' Liability Cases*[31] to the effect that, the court, having determined that

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[28]Cole v. Cunningham, 133 U. S. 107, 10 S. Ct. 269, 33 L. ed. 538 (1890); Pere Marquette R. Co. v. Shutz, 268 Mich. 388, 256 N. W. 458 (1934). And see Davis v. Farmers' Cooperative Market, 262 U. S. 312, 43 S. Ct. 556, 67 L. ed. 996 (1923); Atchison, T. & S. F. Ry. Co. v. Wells, 265 U. S. 101, 44 S. Ct. 469, 68 L. ed. 928 (1924). The right has been recognized as existing in state courts to enjoin suits in other states under the F. E. L. A. New York, C. & St. L. R. Co. v. Matzinger, 136 Ohio St. 271, 25 N. E. (2d) 349 (1940); Kern v. Cleveland, C. C. & St. L. Ry., 204 Ind. 595, 185 N. E. 446 (1933). The dissenting opinion of Mr. Justice Frankfurter, in Miles v. Illinois Central R. Co., 62 S. Ct. 827, 833 (1942) traces the development of the doctrine with cases cited.

[29]Steelman v. All Continent Corp., 301 U. S. 278, 57 S. Ct. 705, 81 L. ed. 1085 (1937).

[30]Reed's Adm'x v. Illinois Central R. Co., 182 Ky. 455, 206 S. W. 794, 798 (1918).

[31]262 U. S. 312, 43 S. Ct. 556, 67 L. ed. 996 (1923).

jurisdiction existed, was under a duty to exercise it.[32] A corollary attached to this proposition is that there being an absolute duty upon the court to take jurisdiction, an absolute right exists in the employee-plaintiff to sue there. But again, this borrowed sentence, the basis of the proposition, had reference only to the power of state court for arbitrary reasons to refuse to entertain an F. E. L. A. action. To place the sentence in a different context and thus to alter its import to sustain an otherwise unsupported conclusion seriously detracts from the persuasiveness of the latter. Again, here, as it was upon the question of the applicability of the doctrine of forum non conveniens, it is a matter of inquiring into the intention of Congress under the venue provision; and again, it seems unlikely that Congress intended to create an absolute venue privilege at the expense of this venerable equitable practice of restraining oppressive litigation of this type, particularly when the very nature of the legislation makes such relief more frequently necessary.

IV. *The Power of a Federal District Court to Enjoin a Party from Prosecuting an F. E. L. A. Suit in the Court of a Distant State*

If P, suing in California, had employed a state court, rather than a federal court, an entirely different problem would have arisen upon D's application to the federal district court in Ohio. As far as the equitable power to restrain oppressive litigation alone is concerned, the situation is the same as when P was suing in a federal district court in California. But now the controversial question of state and federal court interference, one with the other, is introduced. The phase of the general problem under discussion, however, is relatively simple, and consequently the rights of D are more certain here than in any other of the six situations being presented.

A controlling federal statute, Section 265 of the Judicial Code, provides:

> "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."[33]

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[32]Chesapeake & O. Ry. v. Vigor, 90 F. (2d) 7 (C. C. A. 6th, 1937); Southern Ry. v. Cochran, Judge, 56 F. (2d) 1019 (C. C. A. 6th, 1932). These cases were founded upon the authority of the Connelly and Schendel cases and those which followed them.

[33]Judicial Code § 265, 36 Stat. 1162 (1911), 28 U. S. C. A. 379 (1928).

This statute clearly prohibits the federal court from enjoining the pursuance of P's action in the California court. Although the rule is clear today, it did not become so until 1941; before that it was the subject of much controversy.

An established case upon the general problem of federal and state court interference is *Kline v. Burke Construction Co.*[34] There, two suits involving the same parties and issues were being litigated simultaneously in the state and federal courts in Arkansas. The plaintiff filed in the federal court a bill to enjoin the defendant from further prosecuting the suit in the state court. In affirming the denial of this injunction, the Supreme Court of the United States held that Section 265 of the Judicial Code was to be construed in connection with Section 262 which authorized federal courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdiction." The Court ruled, therefore, that in one class of cases, the court, state or federal, first gaining jurisdiction of the action might enjoin either of the parties from proceeding in another court, state or federal, *where the effect of the new action would be to impair or defeat the jurisdiction of the first court.*[35] In another class of cases, as in the *Kline* case, it is of no matter that one of the courts acquired jurisdiction first; both courts were entitled to proceed to judgment, and neither could interfere with the processes of the other. The distinction was made upon whether the action was purely a personal controversy in which it was unnecessary that any *res* or subject matter remain in the custody of the court for the proper handling of the case. If so, then both courts had the right to proceed simultaneously. If however, such a *res* existed, then the first court to gain control thereof could proceed to judgment and enjoin either of the parties from suing elsewhere.[36]

Applying this rule to the F. E. L. A. cases, it is seen that, since no such *res* in the custody of the first court is to be disturbed in these simple personal injury actions, state and federal court should be allowed to proceed simultaneously. Consequently, neither court should prevent the parties before it from proceeding in the other *upon the*

[34] 260 U. S. 226, 43 S. Ct. 79, 67 L. ed. 226 (1922).

[35] 260 U. S. 226, 229, 43 S. Ct. 79, 81, 67 L. ed. 226 (1922).

[36] Of course, the judgment of the first court to render a decision may be the basis of a plea of *res judicata*, Kline v. Burke Construction Co., 260 U. S. 226, 43 S. Ct. 79, 67 L. ed. 226 (1922). The mere fact that there is a *res* before the court is not enough to enjoin a party suing later in another court. The second action must disturb the first court's possession of the property involved.

ground that to so proceed would be exerting unwarranted interference with its own processes of justice, as in legal contemplation such interference does not exist. Preventing the parties before it from prosecuting in the other court, however, *upon the ground that so to prosecute would unconscionably vex and oppress the complainant,* is quite another thing and must be kept distinct in the general problem. In the instance of a federal court enjoining the prosecution of the suit in a state court, it may well be that Section 265 of the Judicial Code is conclusive, and that Congress has put a fundamental bar upon the exercise of this equitable practice by express prohibitions. In the instance of a state court enjoining a suit in a federal court or other state courts, or of a federal court enjoining a suit in another federal court, however, this statutory prohibition does not apply. To deny the exercise of the equitable practice in these cases, as will be shown, the courts have had to rely upon more intangible, illusive, and, consequently more doubtful support.

Subsequent to the *Kline* case,[37] however, federal court decisions, in the face of Section 265 of the Judicial Code and the doctrine of the *Kline* case, allowed federal court injunctions to restrain the prosecution of F. E. L. A. actions in distant state courts. The following year, the case of *Chicago, M. & St. P. Ry. Co. v. Schendel*[38] was decided. An Iowa state statute allowed Iowa courts to grant an injunction against an Iowa citizen to prevent his prosecuting in a jurisdiction outside of Iowa, a cause of action for personal injuries sustained in Iowa. Plaintiff, who came within the purview of this statute, nevertheless instituted an F. E. L. A. action in a state court in Minnesota. Defendant applied to an Iowa state court and had all the prospective witnesses to the Minnesota trial enjoined from testifying in the cause in any but the appropriate state and federal courts within Iowa as prescribed by the statute. Plaintiff thereupon dismissed the state action in Minnesota and instituted the same action in a federal court in the latter state. Plaintiff then applied to that same federal court for an injunction restraining the defendant from exercising his Iowa state injunction or in any way interfering with the processes of the federal court in Minnesota. The injunction was granted. It was held that the Iowa statute was unconstitutional in that it destroyed a right (in the employee) created

[37]Kline v. Burke Construction Co., 260 U. S. 226, 43 S. Ct. 79, 67 L. ed. 226 (1922).

[38] 292 Fed. 326 (C. C. A. 8th, 1923). This case is not to be confused with Schendel v. McGee, 300 Fed. 273 (C. C. A. 8th, 1924).

by a federal act (F. E. L. A. venue provision) and deprived a federal court of jurisdiction.

The court distinguished the case upon its facts from the *Kline* case in that here no state court had acquired jurisdiction of the cause of action. The fact that the injunction was obtained in the state court before the institution of the action in the federal court was not considered the equivalent of the action being instituted first in the state court. It was thereupon held that to allow the securing of such a sweeping injunction, and to consider it as the equivalent of having acquired jurisdiction of the cause of action, would impair or defeat the jurisdiction of the federal court, as much as if the injunction order were obtained after the federal case had started.[39] In concluding, the court expressly specified the grounds upon which it placed its decision by stating that the cases allowing the enjoinder of oppressive litigation in a foreign forum did *not* apply in this case. The court declared that it was satisfied that the Iowa injunction was not issued upon the equitable grounds of hardship or oppression, but solely upon the ground that the public policy of Iowa was being violated.[40]

This highly interesting case deserves a closer examination. The Iowa court did not enjoin prosecution of the suit in the federal court upon the ground that it was a later suit that would interfere with a suit being tried before the Iowa court. If this had been the reason, the injunction would have been improper under the *Kline* case. Again, the Iowa injunction was not based upon the ground that the foreign suit was oppressive. It was based solely upon the authority of a liberal construction[41] of its peculiar state statute. This statute, however, was unconstitutional, and thus the state injunction was improperly issued. Granting the injunction's impropriety, questions arise as to how to obviate its effect, and as to whether the injunction of the federal court

[39]Chicago, M. & St. P. Ry. Co. v. Schendel, 292 Fed. 326, 333 (C. C. A. 8th, 1923).

[40] 292 Fed. 326, 334 (C. C. A. 8th, 1923): "We do not feel called upon to discuss the cases cited where the courts have held that equity may enjoin citizens of one state from bringing action in other jurisdictions. They do not apply to this situation. We are satisfied that the order was not issued on equitable grounds of oppression or hardship, but on the ground that the public policy of the state was being violated." Although the Schendel case was not explicitly rejected by Southern Ry. Co. v. Painter, 314, U. S. 155, 62 S. Ct. 154, 86 L. ed. 123 (1941) discussed infra, note 45, clearly a contrary conclusion in the Schendel case would have been required by the construction which the Supreme Court placed upon Section 265 of the Judicial Code in the Painter case.

[41]The Iowa statute did not purport to prevent witnesses from testifying in the foreign tribunal, but only to prohibit parties from pursuing actions there.

for this purpose was itself a proper injunction. It is apparent that this latter injunction does not fall within the rule of the *Kline* case as it was not an order directing the defendant to discontinue the same action in the Iowa court, but merely a direction to dismiss an equity suit based upon another but related matter. Section 265 of the Judicial Code, however, expressly forbids such enjoinder of the proceedings of state courts. The only reliance for the holding in the case, then, must be that of Section 262, as announced in the *Kline* case—i.e., that the issuance of the injunction was necessary for the exercise of the court's jurisdiction. By just what reasonable interpretation of the interworking of these two provisions of the Judicial Code this conclusion was reached, it is hard to see. When interpreting two clauses of equal dignity in an act, an "all things necessary and proper" clause cannot be held to negative a positive prohibition. If this were so, by analogy, the power to tax for the general welfare would override the prescription that all direct taxes must be apportioned, and an income tax would have been possible under the general welfare clause without the passage of the Sixteenth Amendment.

In a later Circuit Court of Appeals case, *Bryant v. Atlantic Coast Line R. Co.*,[42] involving the same situation as the case of *Chicago, M. & St. P. Ry. Co. v. Schendel,* except that here the state injunction was given upon the grounds that the suit in the foreign federal court was oppressive, the reverse result was reached. The process of reasoning to this correct result, however, was doubtful. In holding that the federal court could not issue the injunction, the court indicated that the state injunction had been improperly issued, but held that, nevertheless, a federal injunction was not the way to remedy it. In reaching this conclusion, the court relied upon the doctrine of the *Kline* case—i.e., that being *in personam,* the two suits had a right to proceed simultaneously—rather than upon the prohibition of Section 265 of the Judicial Code. In following the *Kline* case, it was of course necessary for the court to consider the injunction proceeding in the state court as the equivalent of a litigation of the principal cause of action in progress in the federal court. Whether or not an injunction could

[42] 92 F. (2d) 569 (C. C. A. 2d, 1937). Plaintiff-employee of defendant-railroad sued under the F. E. L. A. in a federal district court in New York. Defendant filed an equity bill in a Virginia state court to enjoin plaintiff from prosecuting the action, upon the grounds of oppression, etc., and the injunction was granted. Plaintiff then moved for an order in the New York federal court to enjoin defendant from enforcing his state court injunction.

be so classed, the court ignored a clear and most appropriate supporting authority for its decision when it failed to rely upon Section 265.

It was not until 1941 that the Supreme Court intervened and straightened the matter out, thereby revitalizing this provision of the Judicial Code. *In Southern Ry Co. v. Painter*[43] the same facts existed as in the *Bryant* case,[44] but the Circuit Court of Appeals granted the injunction against the exercise of the state injunction, again upon the strength of Section 262 of the Judicial Code, considering the latter to outweigh the prohibitions of Section 265. Upon appeal to the Supreme Court, however, this ruling was reversed. The high court held that even though the federal court had first acquired the suit, it could not issue such an injunction to keep a state court from interfering with its process. Section 265 was held to be unqualified by Section 262. Congress was held to have endowed the federal courts with no such means of protecting their jurisdiction either generally, or specifically in F. E. L. A. cases. Rather, it was held, precisely the opposite had been provided, and any vindication of federal rights would have to come from the Supreme Court itself upon direct appeal from the highest state court. Section 265 was finally given a literal construction.[45]

V. *The Power of a State Court to Enjoin a Person within Its Jurisdiction from Prosecuting an F. E. L. A. Claim in Another State Court*

Returning again to the situation where P in California has instituted suit in a state court, suppose that D, to enjoin this oppressive litigation, applies, not to a federal court in Ohio, but to an Ohio state court. May an Ohio court enjoin P from so proceeding in the California court? It has already been pointed out that, in general, the right to such equitable relief to prevent unconscionable hardship is a

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[43] 314 U. S. 155, 62 S. Ct. 154, 86 L. ed. 123 (1941).

[44] Bryant v. Atlantic Coast Line R. Co., 92 F. (2d) 569 (C. C. A. 2d, 1937).

[45] Southern Ry. Co. v. Painter followed of necessity from a case decided the same day and just before, Torcey v. New York Life Ins. Co., 314 U. S. 118, 62 S. Ct. 139, 147, 86 L. ed. 107 (1941). The case concerned the power of the federal courts to use an injunction in the so-called "relitigation cases." It was held that after a federal court had proceeded to judgment, it could not enjoin the losing party from prosecuting the claim elsewhere in a state court. It was recognized under the doctrine of the Kline case, that when the federal courts first acquire control of the *res* an injunction would lie to prevent another proceeding in a state court. But it was held that "... apart from Congressional authorization, only one 'exception' has been imbedded in § 265 by judicial construction, to wit, the res cases. The fact that one exception has found its way in § 265 is no justification for making another."

well recognized subject of equity jurisdiction.[46] An imposing array of state cases has held that there was nothing in the F. E. L. A. as amended in 1910 which indicated any intention of Congress to prohibit a court of equity from so regulating its own citizens, and this relief has been granted whenever the situation has called for it.[47] Opinions in lower federal court decisions have been to the same effect.[48] In the federal case of *Ex Parte Crandall*[49] it was expressly held that no federal right was denied by a state thus enjoining an F. E. L. A. suit in another state court upon proper grounds. *The right of a resident or nonresident to institute a tort action in the courts of a state existed before and independently of the F. E. L. A. and therefore the right to institute an F. E. L. A. action in a state court was held to spring not from the F. E. L. A. or from any other federal statute or constitutional provision, but from the constitution and statutes of the state which established the court and defined its powers.* It was determined, therefore, that for a state court so to restrain oppressive F. E. L. A. litigation in the courts of a sister state did not subject such action to review by the federal courts upon the ground that a federal right had been denied—although the F. E. L. A. cause of action thus excluded from a court of competent jurisdiction was one based upon a federal statute.

This is certainly persuasive reasoning and unless an intention of Congress contained in the terms of the 1910 amendment can show that Congress intended thereby to overthrow the practice of this equitable means of relief, the operation of the rule must be considered as unchanged.

In a Supreme Court decision involving state court interference with federal court jurisdiction of F. E. L. A. actions, *Baltimore & Ohio R. Co. v. Kepner*,[50] decided late in 1941, it was noticed by the Court that state tribunals had on numerous occasions so enjoined F. E. L. A. actions in other state courts, but this practice received no comment in the opinion.

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[46]See note 28, supra.

[47]Kern v. Cleveland, C. C. & St. L. R. Co., 204 Ind. 595, 185 N. E. 446 (1933); Reed's Adm'x v. Illinois Central R. Co., 182 Ky. 455, 206 S. W. 794 (1918); New York, C. &. St. L. R. Co. v. Matzinger, 136 Ohio St. 271, 25 N. E. (2d) 349 (1940). In Missouri-Kansas-Texas R. Co. v. Ball, 126 Kan. 745, 271 Pac. 313 and Lancaster v. Dunn, 153 La. 15, 95 So. 385 (1922), the injunctions were denied upon inadequacy in the factual situation demanding the relief, but the general right was recognized.

[48]Ex parte Crandall, 52 F. (2d) 650 (S. D. Ind. 1930); 53 F. (2d) 969 (C. C. A. 7th, 1931).

[49] 53 F. (2d) 969 (C. C. A. 7th, 1931).

[50] 314 U. S. 44, 62 S. Ct. 6, 86 L. ed. 37 (1941).

At the close of 1941, therefore, while no direct Supreme Court decision had ever involved the question, every reasonable deduction from a normal construction of the 1910 amendment, reinforced by numerous state and lower federal court decisions, made it seem that the rule was settled and that the right of a state court so to proceed was unquestioned.

VI. *The Power of a State Court to Enjoin a Person within Its Jurisdiction from Prosecuting an F. E. L. A. Claim in a Federal District Court*

Had D sought an injunction from an Ohio state court to prevent P from suing in a federal district court in California, it would seem to a logician, upon analysis, that D should be as successful as he would have been had P brought his action in a California state court. This would seem a natural deduction from the proposition that the two courts, state and federal, were by statute made concurrent for the purpose of trying claims arising under the F. E. L. A. If the two systems of courts are concurrent, and one state court can enjoin a proceeding in another state court in this manner, then it would seem to follow that a state court could also enjoin a proceeding in a federal court for this purpose.[51] There is something about the idea of state courts enjoining proceedings in the federal courts, however, that the latter find objectional. There seems to be some sub-conscious concept, always in the back of the minds of the judges, that the "Supremacy Clause" of the Federal Constitution ought to make the federal courts superior in all instances, even if in fact it does not.

Certainly, the general right of a state court to enjoin proceedings in a federal court cannot be denied. In *Princess Lida v. Thompson*,[52] a trust case, the state court of Pennsylvania and a federal district court within that state had each issued an injunction to opposing parties, forbidding them from further prosecuting proceedings in the other court. To Supreme Court of the United States held that the federal court, in which suit had been brought on the same cause of action subsequent to the institution of suit in the state court, was without jurisdiction, and that the petitioners were properly enjoined from further proceeding in that court. This recalls the doc-

[51] It will be recalled that the prohibitions of Judicial Code § 265 prevent the federal courts from so restraining state courts, and that there is nothing in the F. E. L. A. itself that so limits the power of the federal courts.

[52] 305 U. S. 456, 59 S. Ct. 275, 83 L. ed. 285 (1939). See also (1938) 14 Ind. L. J. 366.

trine announced in the *Kline* case that in the "*res* cases" the state court, when it had acquired first jurisdiction, could enjoin the parties from proceeding in a federal court upon the same cause of action.

There can be no question, therefore, of the general right of a state court, for proper cause, to enjoin the proceedings in a federal court.[53] The fact that the federal courts do not enjoy a reciprocal privilege in this regard is due entirely to a special Congressional restriction,[54] and so this does not militate in the least against the right of the state court. Lack of mutuality does not destroy the power.

If the general right in the state court exists, then it must extend to the F. E. L. A. cases unless something expressed within the act or something implicit therein from Congressional intention excludes its exercise. Both of these possible sources of justifiable exclusion are investigated in vain. The Supreme Court of the United States, however, when the question was first presented to it for decision in 1941 in *Baltimore & Ohio R. Co. v. Kepner*,[55] ruled that such an injunction was not procurable. There an action, in which the locus of the injuries and the residence of the parties was Ohio, was nevertheless brought in a federal court in New York, jurisdiction being based upon the ground that the defendant-carrier did business there. Defendant complained to the Ohio state court setting forth an appealing array of hardship factors which would be suffered if this oppressive litigation were to go unrestrained. The Ohio court refused the injunction, however, upon the ground that the F. E. L. A. venue section created an absolute privilege in the employer to sue in the federal court in New York.[56] The Supreme Court upheld this decision and the reasoning upon which it was reached.

In arriving at the conclusion that the venue provision created an absolute privilege, the Court relied upon three reasons. First, it was held that the federal courts have felt that they could not restrain suits in other federal courts upon this ground. The comparison is proper, but the weakness of the rule, with regard to the federal courts, lies in the fact that it was based mainly upon the sentence borrowed from the context of the *Second Employers' Liability Cases*, as has already been discussed.[57]

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[53]See also, Karcher v. Burbank, 303 Mass. 303, 21 N. E. (2d) 542 (1939); Reagan v. Dick, 76 Colo. 544, 233 Pac. 159 (1925).

[54]Judicial Code § 265, 36 Stat. 1162 (1911), 28 U. S. C. A. 379 (1928).

[55]314 U. S. 44, 62 S. Ct. 6, 86 L. ed. 37 (1941).

[56]137 Ohio St. 409, 30 N. E. (2d) 982 (1940).

[57]See note 32, supra.

Further support for the *Kepner* decision was found in the case of *Chicago, M. & St. P. Ry. Co. v. Schendel,*[58] the Court holding that if no state statute could vary the venue, then no state court could interfere with the privilege upon the grounds of oppression. This second reason is not altogether persuasive, as it will be remembered that the *Schendel* case was expressly *not* decided upon the ground that the Iowa injuction was issued because the foreign suit was oppressive; rather, the injunction had been granted only in the furtherance of a state policy which was not founded upon the oppressive character of these foreign suits.

The third support for the conclusion was based upon a line of cases which have held that F. E. L. A. suits, brought in the federal district where the defendant does business, are not objectionable upon the grounds that they burden interstate commerce,[59] as Congress has the power to burden interstate commerce, if it so wishes. The Court then reasoned that the importance of unhampered commerce was at least equal to that of the carrier's freedom from harassing incidents of litigation. And therefore, Congress has the right to impose on the defendant-carrier the inconveniences involved in a distant suit. Again, however, it is not a question of which is the most important—the freedom of defendant, or the freedom of interstate commerce; rather, it is a question of which Congress intended to and did restrict. The mere fact that Congress may have intended to restrict interstate commerce by the F. E. L. A. does not mean that it also intended to restrict the freedom of defendant from oppressive suits in distant jurisdictions.

As doubtful and unfortunate as it may be,[60] however, the decision of the Court in the *Kepner* case[61] is undeniably the logical product of the federal cases that preceded it. The point of departure seems traceable again to the two *Schendel* cases[62] and the familiar passage:

> The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be *onerous* does not militate against that implication."

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[58] 292 Fed. 326 (C. C. A. 8th, 1923).

[59] Huffman v. Missouri ex rel. Foraker, 274 U. S. 21, 47 S. Ct. 485, 71 L. ed. 905 (1927).

[60] See excellent dissenting opinion of Mr. Justice Frankfurter, in Baltimore & Ohio R. Co. v. Kepner, 314 U. S. 44, 62 S. Ct. 6, 11, 86 L. ed. 37 (1941).

[61] Baltimore & Ohio v. Kepner, 314 U. S. 44, 62 S. Ct. 6, 86 L. ed. 37 (1941).

[62] Chicago, M. & St. P. Ry. Co. v. Schendel, 292 Fed. 326 (C. C. A. 8th, 1923); Schendel v. McGee, 300 Fed. 273 (C. C. A. 8th, 1924).

Once more, however, it must be recalled that this detached statement had to do with the incapacity of a state court to refuse, for arbitrary considerations, the entertainment of an F. E. L. A. claim. In the *Second Employers' Liability Cases,* the quality of being *"onerous"* had reference to its being so to the state court. The quality of such suits being "onerous" to an individual, who was hailed before that state court from a distant jurisdiction, is quite another matter, and was not within the purview of this quoted passage or the opinion of the case. Nevertheless, apparently largely from this concept, the courts have reached the conclusion that a declaration by Congress that a court has jurisdiction and venue is a *command* and a *demand,* so that the court must exercise its powers in a case, although such action operates to the unnecessary injury of a defendant so situated.[63] This was considered to be the intention of Congress in the venue provision, and thus, this was the situation at the close of 1941.

The Principles Upset in 1942

There is something about this rule forbidding state courts to enjoin federal courts in these actions which seems inconsistent when it is viewed with the rule allowing a state court to enjoin another state court in the same situation. Since the jurisdiction of the courts are concurrent, it would seem that the rule would be either that the state court could enjoin both or that it could not enjoin either. The distinction upon which the cases had been decided until 1942, however, was that the jurisdiction of the state courts rested upon their own legislative and constitutional grants, and that they were merely empowered by the F. E. L. A. to entertain claims arising under it. Entertain these claims they must, unless some valid state policy excused them from so doing. The jurisdiction of the federal courts, upon the other hand, was viewed as arising under a positive demand of Congress from a peculiar construction placed upon the venue provision, that such was the manifest intention of that body. Thus, while a state court could either refuse to entertain an F. E. L. A. suit or could have its proceedings enjoined by another court as being oppressive litigation, the federal courts neither enjoy the privilege on the one hand nor bear the liability on the other.

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[63]Southern Ry. Co. v. Cochran, Judge, 56 F. (2d) 1019 (C. C. A. 6th, 1932); Roder v. Baltimore & Ohio R. Co., 108 F. (2d) 980 (C. C. A. 7th, 1940). These cases, and others, seem to have been based primarily upon the Schendel cases and those which followed them.

A further distinction was made that the venue of the federal courts is expressly set out in the statute, but no mention was made therein of state court venue. It is believed, however, that there was no need of so expressing the state court venue—to do so would have been redundant. The venue provision could have been augmented with a clause creating venue "in the court of any state wherein jurisdiction may be properly gained over the person of the defendant" and it would not have affected in the slightest the meaning or effect of that statute.[64]

In 1942, however, the Supreme Court decided the case of *Miles v. Illinois Central R. Co.*,[65] and the distinction and the alleged inconsistency are no longer existent. In the *Miles* case, a Tennessee state court, in accordance with its recognized principles of equity, had enjoined one of its residents from pursuing an F. E. L. A. action in a Missouri state court upon the ground that such a suit would be inconvenient, unnecessarily expensive, and oppressive to the defendant. The Supreme Court of the United States in reversing this decision and holding that there existed no right in the Tennessee court to enjoin an F. E. L. A. action in another state, relied on the Privileges and Immunities Clause[66] and the case of *Baltimore & Ohio R. Co. v. Kepner*. From the former it was deduced that a Missouri court could not exclude a foreign F. E. L. A. claimant. The Court then went on to conclude that a state court falls within the rule of the *Kepner* case, and thus that an F. E. L. A. suit in its courts, like those in the federal courts, could not be enjoined by a foreign state court. The reasoning of the Court in the first step was that Missouri had a right to exclude the foreign F. E. L. A. action, if it had by "judicial decision or legislative enactment," a policy such as existed in *Douglas v. New York, N. H. & H. R. Co.*,[67] provided such policy did not violate the Privileges and Immunities Clause. The *Douglas* case had withstood such an attack.[68] The Court reasoned that since Missouri had no such judicial decision or statute upon the matter, it was obligated to open its courts to its own citizens for F. E. L. A. actions. Then, to give its own citizens access to its courts, but to deny the

[64]See dissent of Mr. Justice Frankfurter in Miles v. Illinois Central R. Co., 62 St. 827, 833 (1942).

[65] 62 S. Ct. 827 (1942).

[66]U. S. Const., Art. IV, § 2.

[67] 279 U. S. 377, 49 S. Ct. 355, 73 L. ed. 747 (1929).

[68]"Non-residents" was interpreted to include citizens of New York temporarily absent as well as actual foreigners.

use of those courts to non-residents suing under the F. E. L. A. would be a discrimination against the latter and a violation of the Privileges and Immunities Clause. The conclusion, therefore, was that Missouri was bound to accept a foreign F. E. L. A. claim.

Before examining the final deductive step of the Court, an analysis of its reasoning process up to this point is in order. This reasoning to the conclusion that the Missouri court is obligated to entertain F. E. L. A. actions may be put in syllogistic form:

(a) Missouri courts cannot discriminate between Missouri plaintiffs and Tennessee plaintiffs.
(b) Missouri courts must accept F. E. L. A. suits by Missouri plaintiffs.
(c) Therefore, Missouri courts must accept F. E. L. A. suits by Tennessee plaintiffs.

There is no denying the general validity of the major premise (a). The minor premise (b), however, is one which cannot be supported. If (b) be accepted, then the rule of the *Douglas* case must have been overlooked, overthrown or materially restricted. It was neither overlooked nor overthrown, for it was mentioned in the same breath and expressly upheld. Moreover, it was stated to be in no way modified or limited, but was expressly held to be unaltered. Under the *Douglas* case, a state was assured the power to refuse the facilities of its courts to an F. E. L. A. claim whenever by judicial decision or legislative enactment a state policy existed upon which to base such a rejection. In saying that Missouri had no such judicial decision upon which to predicate a policy for refusal of certain suits under the F. E. L. A. by its own citizens, the court either overlooked or implicitly denied the right which exists in the courts of every state[69] to exercise the doctrine of forum non conveniens. It is difficult to see why such a venerable and established judicial practice is not the basis for a policy equally as valid as, indeed more valid than, the policy of New York which was upheld in the *Douglas* case, and which enabled New York courts to refuse certain claims brought under the F. E. L. A.

Moreover, the Privileges and Immunities Clause can have no connection with the doctrine of forum non conveniens. The very nature of that doctrine would seem to make it applicable independently of any consideration as to whether the plaintiff in the case is a resident or non-resident. The criterion is rather the hardship upon

[69]See notes 25, 26, 27, supra.

the defendant who is to be summoned to the local court. The hardship to this defendant, and therefore the need for applying the doctrine, should be the same whether the plaintiff happens to be a resident of the state in which he is suing or not.

It is believed, therefore, that Missouri, in its exercise of the doctrine of forum non conveniens, should be considered as operating within the rule of the *Douglas* case, and should be allowed to refuse an F. E. L. A. claim brought by any plaintiff (whether resident or non-resident being entirely beside the point) upon this basis.

It is difficult to see, therefore, how Missouri's declining jurisdiction upon the grounds of forum non conveniens can be interpreted as a violation of the Privileges and Immunities Clause. Nevertheless, the Supreme Court has exercised its unquestionable authority, and, properly or not, has decided that this constitutional protection would be so violated. This ruling was the stepping stone needed, and from it the Court went on to reach its startling decision. It was concluded that since the right to an F. E. L. A. action in a state court springs from a federal law, then the right to sue in a state court where the jurisdiction is adequate is of the same quality as the right to sue in the federal courts. Therefore, a state court, like that of Missouri, with no policy similar to the New York law in the *Douglas* case, is to be considered the same as a federal court, as far as the obligation to receive an F. E. L. A. action is concerned, and is thus no more subject to interference by the action of another state court than is a federal court, under the rule of the *Kepner* case.

The decision reached in the *Miles* case is a most disturbing one. The Court with a cheerful casualness has threatened or overthrown principles that were considered settled. The decision must be taken to import that simply by using the courts of the states to facilitate the disposition of litigation under the act, Congress must be considered to have intended that the settled equitable jurisprudence of the states be altered so as to operate in the furtherance of federal rights more than in the furtherance of similar rights created by the state itself.[70] The natural presumption is that such settled practices would

[70]See dissent of Mr. Justice Frankfurter, in Miles v. Illinois Central R. Co., 62 S. Ct. 827, 833 (1942). In view of the decision in the Kepner case, if the Miles case had been decided otherwise F. E. L. A. plaintiffs would have generally preferred federal courts, and thus the manifest policy of Congress in conferring concurrent jurisdiction upon federal and state courts would have been defeated. For this reason the Miles decision follows consistently from the Kepner decision, but it is