



2-1-1949

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Recommended Citation

Katherine S. Wright, *Courts -- Venue -- Attempts to Limit Venue Provisions of the Federal Employers' Liability Act*, 27 N.C. L. REV. 248 (1949).

Available at: <http://scholarship.law.unc.edu/nclr/vol27/iss2/12>

person should be heard to complain that he was tried by the wrong court.²¹

ELIZABETH O. ROLLINS.

Courts—Venue—Attempts to Limit Venue Provisions of the Federal Employers' Liability Act

Congress has provided a special venue statute for cases arising under the Federal Employers' Liability Act which permits the employee to sue (1) at the residence of the defendant, (2) where the cause of action arose, or (3) where the railroad is doing business.¹ Many employees have used the third provision as a means of "shopping" for an advantageous forum, or as a means of forcing railroads to compromise suits rather than defend in a forum which, although technically proper, is highly inconvenient to the railroad. The railroads have attempted to avoid the burdens of such suits by various means, the most recent of which has been a contract with the injured employee limiting the venue. There had been a conflict in the district courts² as to the validity of this type of contract, but recently the Sixth Circuit Court of Appeals decided that such an agreement is void under Section 5 of the FELA as an attempt by the railroad to exempt itself from liability under the Act.³ The court looked to the history of the special venue provisions and concluded that they are an inherent part of the employer's liability. Thus, the latest device to narrow these troublesome provisions has failed.

It is important to note at the outset the purpose of the special venue statute of the FELA. Originally the venue of actions under that Act was governed by the general provisions applicable to federal courts. In

²¹ There was a peculiarity in the Sutton case which has not been mentioned, *viz.*, the petition for habeas corpus was brought within the time allowed for appeal. It would be rare that counsel would make such an error, but where, as here, it occurs, it seems to penalize the petitioner unduly for his attorney's error in choice of remedies to refuse to consider the jurisdictional objection because of the guise in which it was introduced. See Circuit Judge Frank, dissenting in *United States ex rel. Sutton v. Mulcahy*, 169 F. 2d 94 (1948) ("I see no reason why irrational procedural formalism, judicial red-tape-ism, yielding injustice, should not be repudiated in the appellate process, when no statute stands in the way.").

¹ 36 STAT. 291 §6 (1910), 45 U. S. C. §56 (1946).

² Holding such contracts valid on the theory that venue is merely the place of enforcing liability are: *Roland v. Atchison, T. & S. F. Ry.*, 65 F. Supp. 630 (N. D. Ill. 1946); *Herrington v. Thompson*, 61 F. Supp. 903 (W. D. Mo. 1945); *Clark v. Lowden*, 48 F. Supp. 261 (D. Minn. 1942); *Detwiler v. Lowden*, 198 Minn. 185, 269 N. W. 367 (1936). Holding such contracts invalid are: *Krenger v. Pennsylvania R. R.*, 8 F. R. D. 65 (E. D. N. Y. 1947); *Fleming v. Husted*, 68 F. Supp. 900 (S. D. Iowa 1946); *Sherman v. Pere Marquette Ry.*, 62 F. Supp. 590 (N. D. Ill. 1945) ("The beneficial effects of the statute should not be whittled away by the courts by distinguishing between adjective and substantive rights. . . ."); *Peterson v. Ogden U. Ry.*, 110 Utah 573, 175 P. 2d 744 (1946). Compare *Porter v. Fleming*, 74 F. Supp. 378 (D. Minn. 1947).

³ *Akerly v. New York C. R. R.*, 68 F. 2d 812 (C. C. A. 6th 1948).

order to relieve the employees of the inconvenience and expense of travelling to the residence of the defendant to bring suit, Congress added to the Act the broader provisions for venue. When the employees used these liberal provisions to bring suits in forums distant from the scene of the accident or the residence of the parties, the courts sought, at the instance of the railroads, to use their power to avoid such vexatious litigation by compelling the plaintiff to select a more convenient forum. The problem the courts faced was whether or not they had the power to defeat the plaintiff's choice of forum when Congress had conferred a special right upon the employee to sue there. Put more simply, had Congress intended that the venue privilege under the FELA should be an absolute right given the employee with which the courts could not interfere?

The contracts of the type in the instant case were a result of the railroads' attempts to limit venue extra-judicially, inasmuch as they had met with no success in attempting to invoke judicial methods. The judicial method first attempted was the use of the injunction. Courts of a state have the general equitable power to enjoin citizens of the state from prosecuting vexatious suits in a foreign forum. But the federal courts would not exercise such equitable power of injunction where a FELA suit was begun in a federal court, either on the ground of inconvenience to the defendant or that such suit would burden interstate commerce, since Congress has the right to place such incidental burdens by jurisdictional statutes.⁴ Nor may a federal court enjoin the prosecution of an action in a state court because of Section 265 of the Judicial Code.⁵

In *Baltimore & Ohio R. R. v. Kepner*⁶ the Supreme Court decided that a state court may not enjoin a suit under the FELA begun in a federal court. This case followed the settled line of authority which preceded it,⁷ and it is not the actual decision that made legal history,

⁴ *Chesapeake & Ohio Ry. v. Vigor*, 90 F. 2d 7 (C. C. A. 6th 1937); *Baltimore & Ohio R. R. v. Clem*, 36 F. Supp. 703 (N. D. W. Va. 1941).

⁵ Now §2283 of the revised Judicial Code, 28 U. S. C. §2283 (1948) (prohibits federal courts, with certain exceptions, from granting an injunction to stay proceedings in a state court—see note 27 *infra*). *Southern Ry. v. Painter*, 314 U. S. 155 (1941), *reversing* 117 F. 2d 100 (C. C. A. 8th 1941). The Circuit Court of Appeals held that §262 of the Judicial Code [now §1651(a), 28 U. S. C. §1651(a) (1948)] which allows a court to issue any writ necessary to protect its jurisdiction gave the federal court power to enjoin an action in the state court to obtain injunction restraining prosecution of suit in federal court. In *Chicago, M. & St. P. Ry. v. Schendel*, 292 Fed. 326 (C. C. A. 8th 1923) the court issued an injunction on the same facts. The Supreme Court in the *Painter* case did not mention this decision.

⁶ 314 U. S. 44 (1941).

⁷ Before the *Kepner* case the leading case was *Chicago, M. & St. P. Ry. v. Schendel*, 292 Fed. 326 (C. C. A. 8th 1923) which held the state court could not interfere with rights created by federal law by means of an injunction based on the public policy expressed in a statute preventing soliciting injury claims arising

but rather the rationale used to reach it. In the majority opinion Mr. Justice Reed says, "A privilege of venue, granted by the legislative body which created this right of action, cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative. . . ."⁸ This language forecast the conclusion that special venue statutes create an absolute right given by Congress which is not subject to interference, either by injunction or in *any other* manner except by legislation. The cases following the *Kepner* case arrived at this inevitable conclusion.

Before this conclusion was reached, however, there was one situation in which the railroads might obtain an injunction. Although §6 of the FELA provides that the state courts shall have concurrent jurisdiction with the federal courts, the state courts found nothing in the FELA, as did the federal courts, to prevent their exercising the power of injunction. They therefore enjoined their citizen-employees from prosecuting the foreign suit if they found it oppressive, harassing, or an undue hardship on the railroad.⁹ With the advent of *Miles v. Illinois C. R. R.* in 1942 the Supreme Court decided that the FELA provisions superseded this equitable power of the state courts. Since the right to

outside the state. The court expressly put its decision on the ground of public policy as the basis for the injunction and impliedly left open whether or not the state court could enjoin on the grounds of undue hardship or oppression. However, later cases held that state courts could not exercise their equitable power to enjoin for oppression or hardship and based their decision on this case. *Southern Ry. v. Painter*, 117 F. 2d 100 (C. C. A. 8th 1941), *rev'd on other grounds*, 314 U. S. 155 (1941); *Rader v. Baltimore & Ohio R. R.*, 108 F. 2d 980 (C. C. A. 7th 1940); *McConnell v. Thomson*, 213 Ind. 16, 8 N. E. 2d 986, 11 N. E. 2d 183 (1937). *Compare* *Baltimore & Ohio R. R. v. Inlow*, 64 Ohio App. 134, 28 N. E. 2d 373 (1940).

⁸ 314 U. S. 44, 54 (1941).

⁹ *Alspaugh v. New York C. & St. L. R. R.*, 98 Ind. App. 280, 188 N. E. 869 (1934); *Kern v. Cleveland, C. C. & St. L. R. R.*, 204 Ind. 595, 185 N. E. 446 (1933); *Cleveland, C. C. & St. L. R. R. v. Shelly*, 96 Ind. App. 273, 170 N. E. 328 (1930); *Reed's Admx. v. Illinois C. R. R.*, 182 Ky. 455, 206 S. W. 794 (1918); *State ex rel. New York, C. & St. L. R. R. v. Nortoni*, 331 Mo. 764, 55 S. W. 2d 272 (1932); *Chicago, M. & St. P. Ry. v. McGinley*, 175 Wis. 565, 185 N. W. 218 (1921); *accord, Mobile & Ohio R. R. v. Parrent*, 260 Ill. App. 284 (1931); *Lancaster v. Dunn*, 153 La. 15, 95 So. 385 (1922); *Chicago, M., St. P. & P. Ry. v. Wolf*, 199 Wis. 278, 226 N. W. 297 (1929). The last three cases recognized the right to enjoin but denied on the merits. *Compare* *Missouri-Kansas-Texas R. R. v. Ball*, 126 Kan. 745, 271 Pac. 313 (1928); *Southern Pacific Co. v. Baum*, 39 N. M. 22, 38 P. 2d 1106 (1934) (would not enjoin on the ground of burden of interstate commerce, and denied injunction because not sufficient hardship for interference of equity); *Payne v. Knapp*, 197 Iowa 737, 198 N. W. 62 (1924) note inconsistency in discussing venue as a federal right under FELA in connection with state statute, but does not recognize such right as superior to the equitable power of injunction).

Such an injunction might also enjoin the employee's witnesses from testifying, the notary from taking their depositions, or any other person from furthering the suit. *New York, C. & St. L. R. R. v. Perdue*, 97 Ind. App. 517, 187 N. E. 349 (1933); *accord, Ex parte Crandall*, 53 F. 2d 969 (C. C. A. 7th 1931) (federal court denied habeas corpus where petitioner cited for contempt for disobeying such an injunction).

sue under the FELA springs from federal law, the right to sue in the state courts is of the same quality as such right in the federal courts and "is no more subject to interference by state action than was the federal venue in the *Kepner* case."¹⁰ Hence a state court may not now enjoin proceedings in another state court under FELA on the ground of inconvenience and expense, and the language is broad enough to include the ground of burden on interstate commerce.¹¹

Related to the injunction cases have been those involving the duty of courts to take jurisdiction; that is, whether or not they may apply the doctrine of *forum non conveniens* either on the ground of inconvenience or undue burden on interstate commerce. That the federal courts cannot refuse to take jurisdiction on either ground is well-settled.¹²

In the *Second Employers' Liability Cases*¹³ it was held that a state court may not refuse to entertain jurisdiction of a FELA suit on the ground that the Act is against public policy. From the Court's language¹⁴ it seemed that the state had no discretion to refuse to hear such a suit and many cases so held.¹⁵ But in *Douglas v. New York, N. Y. & H. R. R.*,¹⁶ seventeen years later, the Supreme Court decided that since New York had a statute restricting actions arising out of the state between non-residents, the New York court had discretion in refusing to entertain a suit under FELA. Congress did not require the state courts to take jurisdiction but only empowered them to do so, and there is nothing in the Act that purports to force a duty upon such courts as against an otherwise "valid excuse." This case is often cited as holding that a state court may apply *forum non conveniens* in a FELA suit, but in other cases where the courts have refused to take jurisdiction similar statutes of the states regulating venue have been involved.¹⁷ On the other hand, in cases not involving a state statute,

¹⁰ 315 U. S. 698, 704 (1942).

¹¹ *Id.* at 701, 702 and 705; *id.* at 707 (concurring opinion). See note 22 *infra*.

¹² *Wood v. Delaware & H. R. R.*, 63 F. 2d 235 (C. C. A. 2d 1933); *Southern Ry. v. Cochran*, 56 F. 2d 1019 (C. C. A. 6th 1932); *Schendel v. McGee*, 300 Fed. 273 (C. C. A. 8th 1924); *Norris v. Illinois C. R. R.*, 18 F. 2d 584 (D. Minn. 1925); *Trapp v. Baltimore & Ohio R. R.*, 283 Fed. 655 (N. D. Ohio 1922); *Connelly v. Central R. R.*, 238 Fed. 932 (S. D. N. Y. 1916); see *Schilling v. Delaware & H. R. R.*, 114 F. 2d 69, 72 (C. C. A. 2d 1940). For a critical discussion of these decisions see Note, 3 WASH. & LEE L. REV. 251 (1942).

¹³ 223 U. S. 1 (1912).

¹⁴ *Id.* at 58 ("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.")

¹⁵ *Taylor v. Atchison, T. & S. F. Ry.*, 292 Ill. App. 457, 11 N. E. 2d 610 (1937); *Holmberg v. Lake Shore & M. S. Ry.*, 188 Mich. 605, 155 N. W. 504 (1915); *Witort v. Chicago & N. W. Ry.*, 178 Minn. 261, 226 N. W. 934 (1929); *State ex rel. Schendel v. District Court of Lyon County*, 156 Minn. 380, 194 N. W. 780 (1923).

¹⁶ 279 U. S. 377 (1929).

¹⁷ *Taylor v. Southern Ry.*, 350 Ill. 139, 182 N. E. 805 (1932); *Walton v. Pryor*, 276 Ill. 563, 115 N. E. 2d (1917); *Murnan v. Wabash Ry.*, 246 N. Y. 244, 158 N. E. 508 (1927); *Loftus v. Pennsylvania R. R.*, 107 Ohio St. 352, 140 N. E. 94 (1923).

the courts have found a duty to exercise jurisdiction in spite of a claim of burden on interstate commerce or inconvenience.¹⁸ These courts cite the *Douglas* case but distinguish it on the ground that they have no statute giving them discretion to refuse jurisdiction as did the New York court.

While a statute regulating venue is a "valid excuse" for refusing jurisdiction, a state court has apparently never found *forum non conveniens* or a claim of burden on interstate commerce¹⁹ a "valid excuse." Furthermore, the *Miles* case has been held to embrace the proposition that a state court cannot apply the doctrine²⁰ (unless statutory—the *Miles* decision did not overrule the *Douglas* case). In spite of Mr. Justice Jackson's concurring opinion in the *Miles* case,²¹ the courts have felt that the same reasoning used in the injunction cases applies in cases involving a refusal to take jurisdiction. If the venue right is absolute, it is no more subject to interference by the latter than by the former. With this same idea of an absolute right in mind, later cases construed the *Miles* and *Kepler* cases as prohibiting interference on the ground of burdening interstate commerce,²² as well as on the ground of

¹⁸ *Beem v. Illinois C. R. R.*, 55 F. 2d 708 (D. Minn. 1930); *Hoch v. Byram*, 180 Minn. 298, 230 N. W. 823 (1930); *Boright v. Chicago, R. I. & P. R. R.*, 180 Minn. 52, 230 N. W. 457 (1930); *Winders v. Illinois C. R. R.*, 177 Minn. 1, 223 N. W. 291, 226 N. W. 213 (1929); *Bright v. Wheelock*, 323 Mo. 840, 20 S. W. 2d 684 (1929).

¹⁹ *Cf. McKnett v. St. Louis & S. F. Ry.*, 292 U. S. 230 (1934). *But cf. Michigan C. R. R. v. Mix*, 278 U. S. 492 (1929) (see note 22 *infra*).

²⁰ *Butts v. Southern Pac. Co.*, 69 F. Supp. 895 (S. D. N. Y. 1947); *Sacco v. Baltimore & Ohio R. R.*, 56 F. Supp. 959 (E. D. N. Y. 1944); see *United States v. National City Lines*, 68 Sup. Ct. 1169, 1181 (1948) ("... whenever Congress has vested courts with jurisdiction to hear and determine causes and has invested complaining litigants with a right of choice among them which is inconsistent with the exercise by those courts of discretionary power to defeat the choice so made, the doctrine [*forum non conveniens*] can have no effect," citing *Kepler* and *Miles* cases); *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 504 (1947) ("It is true that in cases under the FELA we have held plaintiff's choice of forum cannot be defeated on the basis of *forum non conveniens*. But this was because the special venue act under which those cases are brought was believed to require it." For a discussion of *forum non conveniens* and other types of special venue statutes, see Note, *The Doctrine of Forum Non Conveniens*, 34 VA. L. REV. 819; *Porter v. Fleming*, 74 F. Supp. 378, 379 (D. Minn. 1947).

And the same result has been reached in the state courts. *Leet v. Union Pac. R. R.*, 25 Cal. 2d 605, 155 P. 2d 42 (1944), *cert. denied*, 325 U. S. 866 (1945) ("The doctrine of *forum non conveniens*, claim of burden on interstate commerce or war conditions constitute no justification for a refusal to exercise jurisdiction. . . . While some of the foregoing authorities involved an injunction . . . as distinguished from a motion in the forum to refuse jurisdiction, the principle is the same."). Compare this language with the concurring opinion in the *Miles* case in note 21 *infra*.

²¹ 315 U. S. 698, 708 (1942) (Mr. Justice Jackson would limit the decision to injunctions only. He agrees that one state court may not close the doors of the courts of another state to a plaintiff with a federal cause of action, but he is not willing to admit that the courts of the states can be told by Congress that they must entertain jurisdiction of these suits).

²² *Butts v. Southern Pac. Co.*, 69 F. Supp. 895 (S. D. N. Y. 1947); *Union Pacific R. R. v. Utterback*, 173 Ore. 572, 146 P. 2d 76 (1944); *Leet v. Union Pac. R. R.*, 25 Cal. 2d 605, 155 P. 2d 42 (1944), *cert. denied*, 325 U. S. 866 (1945)

inconvenience. With the cases following these two, the forecast of the *Kepner* case became a reality; the railroads were deprived of every judicial means attempted thus far to limit this right. Assuming that the instant case (which was the first circuit court of appeals decision on the matter) was indicative of the future attitude of the courts as to venue contracts, then the picture was complete. The only remedy lay with Congress.

The Jennings Bill²³ sought to amend the FELA venue section and practically eliminate the provision authorizing suits where the railroad is doing business. This bill passed the House in the 80th Congress, but at the close of the second session was still in the Senate Judiciary Committee. Whether or not the pressure for such an amendment will cease remains to be determined by the effect on the problem of the new Title 28 of the United States Code. In the revision of the Code which was effective September 1, 1948, Congress incorporated a provision giving express statutory power to the federal courts to apply the doctrine of *forum non conveniens*.²⁴ Apparently it was the intent of Congress that this provision should apply to FELA suits, as the revisory committee expressly stated that the purpose of the statute is to relieve the situation under the decision of the *Kepner* case.²⁵ The Supreme Court has held that the test of whether or not an absolute right in the venue exists is "not to be answered by such indecisive inquiries as whether the venue or jurisdictional statute is labelled a 'special' or 'general' one. . . . It is rather to be decided, upon consideration of all the relevant materials, by whether the legislative purpose and the effect of the language used

(cites *Miles* case that Congress has exercised its authority over interstate commerce and permits such suits despite the incidental burden on a defendant, where process may be obtained on a defendant not merely soliciting business but actually carrying on railroading by operating trains and maintaining traffic offices within the territory of the court's jurisdiction). *Butts v. Southern Pac. Co.*, *supra* at 896 distinguishes *Davis v. Farmers Co-operative Equity Co.*, 262 U. S. 312 (1923) on the ground that a state may not burden interstate commerce, but Congress may. In note 11 at page 51 of the *Kepner* case, it is stated: "Michigan Central v. Mix . . . turn[s] on the absence of inconsequential character of business done within the states where the railroads were sued." It seems that the *Mix* case is not authority that the courts may refrain from exercising jurisdiction on the ground of burden on interstate commerce where the forum is otherwise proper, but rather that there was not sufficient business done in the state to constitute proper venue within §6, and to so find on the facts would be a burdening of interstate commerce by the state court. Cf. *Hoffman v. Missouri ex rel. Foraker*, 274 U. S. 21 (1927) (where Court on the facts finds sufficient doing of business to take jurisdiction under FELA).

²³ H. R. 1639. This bill provided the plaintiff could sue only where the cause of action arose or where plaintiff resided at the time of injury, unless could not serve defendant with process issuing out of any of the courts mentioned, in which case could sue where the defendant does business. For a criticism of the provisions of the bill see 34 A. B. A. J. 454 (1948).

²⁴ 28 U. S. C. C. S. §1404(a) (1948) ("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.").

²⁵ See Reviser's Notes to §1404(a) in 28 U. S. C. C. S. at p. 1853.

to achieve it were to vest the power of choice in the plaintiff or to confer power upon the courts to qualify his selection."²⁶ In the past, courts have considered this particular venue statute as conferring a special right because of its legislative history. Now Congress has manifested an intent to confer power upon the courts to qualify the selection of forum. Therefore, applying the test laid down by the Supreme Court, it is submitted that this is no longer an absolute right. Without this idea of an absolute right, the obstacle to using injunctions in the federal courts no longer exists; interference by injunction should be allowed if it is allowed by applying *forum non conveniens*. The rule that a federal court may not enjoin the proceeding in a state court will, of course, remain unchanged.²⁷ As for the state courts, the *Miles* case pointed out that the right to sue in state courts under the Act is of the same quality as such right in the federal courts. It would seem to follow that if venue is subject to interference in the federal courts, it may also be interfered with in the state courts. The state courts would again say that nothing in the FELA prevents their applying *forum non conveniens* or granting injunctions.

It is hoped that the courts will not hold the new provision of the Judicial Code applicable only in cases arising under the general venue provisions of the federal courts.^{27a} If, instead, the courts do carry out the apparent intent of Congress and apply the doctrine of *forum non conveniens* in suits brought under the FELA, they would provide a solution fair to both employee and railroad in that the injured employee would still have a wide choice of forums but where this right was abused the courts could protect the defendant by refusing to exercise jurisdiction.

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Criminal Procedure—Method of Raising Constitutional Issues— Writ of Coram Nobis

The federal courts have become increasingly zealous of protecting the rights of those whose convictions have been obtained without due

²⁶ United States v. National City Lines, 68 Sup. Ct. 1169, 1182 (1948).

²⁷ Section 2283 of the revised Judicial Code incorporates some general exceptions which the old §265 did not have. One of these exceptions was put in to overrule *Toucey v. New York Life Ins. Co.*, 314 U. S. 118 (1941), which decision was followed by *Southern Ry. v. Painter*, 314 U. S. 155 (1941) (see note 5 *supra*). The exception will not apply in the *Painter* case, however, because in that case there was no federal decree to protect as in the *Toucey* case. See *Southern Ry. v. Painter*, *supra* at 160 (concurring opinion); Reviser's Notes to §2283, 28 U. S. C. S. at page 1910.

^{27a} Since the preparation of this note three federal district courts have decided that §1404(a) of the revised Judicial Code applies to suits under the FELA. *Hayes v. Chicago, R. I. & P. R. R.*, 79 F. Supp. 821 (D. Minn. 1948); *White v. Thompson*, 80 F. Supp. 411 (N. D. Ill. 1948); *Nunn v. Chicago, M., St. P. & P. R. R.*, 80 F. Supp. 745 (S. D. N. Y. 1948).