

COMMENTS

CONFLICT OF LAWS—FORUM NON CONVENIENS—STATE DISCRETION UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT. The Supreme Court of the United States has held that in cases brought under the Federal Employers' Liability Act the law of a state may permit its courts to exercise discretion as to a motion to dismiss made on the sole ground of *forum non conveniens*.¹ The case arose from two suits brought in a circuit court of St. Louis, Missouri.² In both, the plaintiff was not a citizen of Missouri, and the defendant carrier was a foreign corporation. The claims were based on negligent injuries which took place outside the state.

The trial courts in Missouri had denied the motion to dismiss. They felt that it was beyond the jurisdiction of the court to sustain the motion of *forum non conveniens* because by the F.E.L.A., a state court was compelled to entertain all suits arising thereunder. The carriers then originated proceedings in mandamus to the Supreme Court of Missouri. That court quashed the writs by a single judgment holding that a trial judge of a circuit court could not dismiss a suit instigated under the F.E.L.A. solely on *forum non conveniens* as a matter of discretion. The case was brought before the Supreme Court of the United States on writ of certiorari.

Venue statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some court in which to pursue his remedy. The principle of *forum non conveniens* allows a court to resist imposition upon its jurisdiction even when that jurisdiction is authorized by a venue statute.

Important considerations in refusing a case by discretionary application of the principle include convenience of witnesses, ends of justice, the relative ease elsewhere of access to sources of proof, availability of compulsory process for attendance of the unwilling, low cost of obtaining attendance of those who are willing, possibility of a view of premises in question, or in fact

1. *Missouri v. Mayfield*, 340 U.S. 1 (1950).

2. *State v. Mayfield*, 359 Mo. 827, 224 S.W.2d 105 (1949).

anything that can make litigation easy, expeditious and inexpensive.³

The origin of the doctrine of *forum non conveniens* is somewhat obscure.⁴ Following an article by Blair written in 1929 there has been a more general awareness among lawyers and courts of the doctrine of *forum non conveniens*.⁵ He wrote that some American cases had referred to the doctrine by name, that its principles are not foreign but are inherently within the powers of all courts.⁶ One of the important considerations in the article is the proposition that the application of the doctrine by a state court in otherwise proper circumstances does not constitute a violation of the Privileges and Immunities clause of the federal Constitution. The term became general enough by 1941 for Justice Frankfurter to refer to the "familiar doctrine of *forum non conveniens* as a manifestation of a civilized judicial system which is firmly imbedded in our law."⁷ Yet few states have actually accepted the doctrine. The number where it may be said to be in operation is barely half a dozen states.⁸ Regardless of the use of the term by Justice Frankfurter, the Supreme Court of the United States did not give full recognition to the power of the federal courts to apply *forum non conveniens* until 1947.⁹ The principal case is the third in which the Supreme Court has given recognition and approval to the doctrine.

The majority opinion in the principal case recognized two bases which a state court may use to deny the doctrine of *forum non conveniens* in actions based on the F.E.L.A.: (1) because its statutes or the general local practice of its courts reject the principle of the doctrine; (2) a state may not discriminate against citizens of a sister state by reason of the Privileges and Immunities clause of the Constitution.¹⁰ However, the majority refused to accept an additional theory, advanced by the Missouri

3. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COL. L. REV. 1 (1929).

4. For general discussion see Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 386 (1947).

5. Blair, *supra* note 3.

6. Blair found only four cases in which the American courts had used the term *forum non conveniens*.

7. *Baltimore & Ohio Railroad Co. v. Kepner*, 314 U.S. 44, 47 (1941).

8. Barrett, *supra* note 4, at 389; Florida, Louisiana, Massachusetts, New Hampshire, New Jersey, and New York. (Limited to tort actions).

9. *Kester v. Lumbermens Mutual Co.*, 330 U.S. 518 (1947); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

10. U.S. CONSTITUTION, ART. IV, § 2.

court, that under the F.E.L.A. a state court is compelled by federal law to reject the doctrine. The majority said that no restriction is imposed upon the states merely because the F.E.-L.A. empowers the state courts to entertain suits arising under it, and that there has never been any compulsion upon state courts to entertain F.E.L.A. litigation "against an otherwise valid excuse."¹¹

The dissenting judges in the principal case on reviewing the authorities found that the Supreme Court on other occasions had stated that

To deny citizens from other states, suitors under the F.E.-L.A. access to its courts would, if it permitted access to its own citizens, violate the Privileges and Immunities Clause.¹²

The dissent cites that part of the decision of the Missouri court stating that Missouri does allow its citizen to maintain F.E.L.A. actions in its courts, and therefore, it follows that if Missouri denied this to citizens of other states, Missouri would violate the Privileges and Immunities Clause of the United States Constitution.¹³ The dissenting Justices in the principal case, Justice Clark writing, with the Chief Justice, Justice Black and Justice Douglas concurring, felt that when the Missouri court used the term "citizen" it was intended in the usual sense, meaning to include Missourians regardless of residence. This interpretation distinguished the case from *Douglas v. New Haven Railroad*.¹⁴ There under a state statute,¹⁵ resident was interpreted by the New York court as meaning "resident" in the strict primary sense of one actually living in the place for the time, irrespective even of domicile in New York. The Supreme Court of the United States upheld this as not violating the Privileges and Immunities clause since the discrimination was based on residence and not citizenship. Missouri has no such statute.

The majority in the principal case stated that Missouri could not permit suits by non-resident Missourians under the F.E.L.A. and deny access to its courts to non-residents who were citizens of other states, but added that

... if a state chooses to 'prefer residents in access to often overcrowded courts,' and to deny such access to all non-

11. *Missouri v. Mayfield*, 340 U.S. 1 (1950).

12. *Miles v. Illinois Central R.R.*, 315 U.S. 698, 704 (1942).

13. *State v. Mayfield*, 359 Mo. 827, 838, 224 S.W.2d 105, 110 (1949).

14. 279 U.S. 377 (1929).

15. N.Y. Laws 1920, c. 916, § 47. See note 17 *infra*.

residents, whether its own citizens or those of other states it is a choice within its control.¹⁶

Thus, the majority presumes that "citizens" as used by the Missouri court means only resident citizens.

Actually there were two vexing problems which divided the Court in the principal cases: (1) the effect of the venue provision (§6)¹⁷ of the F.E.L.A. on the states as to the application of the doctrine of *forum non conveniens*, and (2) the interpretation of the term "citizen" as used in the opinion of the Missouri court. In regard to the venue provision, the Court in *Mondou v. New York, N.H. & H.R.* (Second Employers' Liability Case)¹⁸ held that the state and federal courts shall have concurrent jurisdiction in relation to the F.E.L.A. but this provision of the Act shall not be interpreted as an attempt to enlarge, regulate or control the jurisdiction of the state courts or affect their modes of procedure. Further, an action under the F.E.L.A. might now be brought in a United States court in the district of the defendant's residence, or where the cause of action arose, or where the defendant shall be doing business at the time of commencing such action and no case shall be removed to any court of the United States. The *Mondou* case emphasized that this amendment to the F.E.L.A. was not a regulation of state courts, or an attempt to control or effect their method of procedure.

Later the Supreme Court examined a state statute providing by whom and under what circumstances actions under the F.E.L.A. could be brought in the state:

. . . an action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only: . . . (4) where a foreign corporation is doing business within the state.¹⁹

Here a Connecticut citizen and resident brought suit against a Connecticut corporation in the state courts of New York under the F.E.L.A. to recover damages for personal injuries suffered in Connecticut. The trial court exercised its discretion under

16. *Missouri v. Mayfield*, 340 U.S. 1, 4 (1950).

17. 45 U.S.C. § 56 (1908): State and Federal courts shall have concurrent jurisdiction and a suit instigated in a state court shall not be transferred to a federal district court.

18. 223 U.S. 1 (1912).

19. *Douglas v. New Haven R.R.*, 279 U.S. 377, 379 (1929); N.Y. Laws 1920, c. 916, § 47.

the state statute to refuse jurisdiction. The Supreme Court of the United States held the statute constitutional. Justice Holmes stated that the F.E.L.A. statute only empowered the state courts to entertain suits and there was nothing in the Act which purports to force a suit upon such courts against an otherwise valid excuse. The Supreme Court held that since the New York court had interpreted "resident" as including only persons actually living in New York state, the state statute did not violate the Privileges and Immunities clause of the Constitution.

It would appear that as a result of the *Douglas* case the Supreme Court has left a wide zone of permissible extension of the application of the doctrine of *forum non conveniens*. The Privileges and Immunities clause has appeared to be the limitation most emphasized. Commentators have stated that a satisfactory interpretation of the *Douglas* case would seem to be that the Privileges and Immunities Clause is limited to the protection of those privileges and immunities which are "in their nature fundamental." Even as to those only reasonable discrimination is forbidden.²⁰ As indicated above, Blair has said that the Privileges and Immunities clause does not apply to *forum non conveniens*. Each state thus has a right to refuse jurisdiction, no question of unconstitutionality being involved.²¹

A clarification of the doctrine was made in *Baltimore & Ohio Railroad Co. v. Kepner*.²² The case involved the right of an Ohio court to enjoin a resident from further prosecution of an action under the F.E.L.A. in a New York federal court. The Supreme Court held that a state court could not by injunction deny a party his choice of a federal forum and that §6 of the Law established venue for an action in the federal courts. This privilege is created by federal statute and it is clear that any allow-

20. Barrett, *supra* note 4, at 392: "The results may be broadly summarized: Rights guaranteed under Article IV, Section 2 are not protected absolutely, but only to the extent that a state cannot unreasonably nor arbitrarily discriminate against non-citizens or non-residents; the distinction between resident and citizen is valuable only as a factor entering into the determination of the reasonableness of the legislation and not as an independent element withdrawing the legislation from the provisions of Article IV, Section 2." Note, 18 CALIF. L. REV. 159, 163 (1930). Cf. *Canadian Northern Ry. Co. v. Eggen*, 252 U.S. 553, 560 (1920); *Duehay v. Acacia Mut. Life Ins. Co.*, 105 F.2d 768 (D.C. Cir. 1939).

21. Blair, *supra* note 3, at 19.

22. 314 U.S. 44 (1941).

ance or denial of this privilege when sought in a federal court is not within the purview of state jurisdiction.

Later in *Miles v. Illinois Central R.R.*²³ the question was whether one state court could enjoin a citizen from suing a non-resident carrier on an F.E.L.A. claim in a court of general jurisdiction in another state. The Supreme Court of the United States held that the right to bring action under the F.E.L.A. in a state court came not from state law but from federal law. Justice Reed in the majority opinion of the *Miles* case stated that the Missouri court must accept the suit, for the latter's denial of access by citizens from other states while permitting access by its own citizens would violate the Privileges and Immunities clause. However, Justice Jackson in a concurring opinion said that the statement by Justice Reed, "Missouri must permit this litigation," was erroneous and that it was extremely doubtful if any requirement could be found in the Constitution to the effect that a state must furnish a forum for a non-resident plaintiff and a foreign corporation to litigate issues exported from another state where the cause of action arose.

According to Justice Frankfurter, dissenting in the *Miles* case, the essence of §6 is merely that the state courts are open to a plaintiff suing under the Act and if one chose to bring suit in a state court, the defendant may not remove the cause of a federal court—the fact that a federal right is the basis of a suit cannot deprive the state courts of the power to use their customary procedure. Justice Frankfurter contended that Congress could not be deemed to have enlarged the settled jurisdiction of the state courts to operate more for federal rights than for similar rights created by the states themselves. Further, he contended everytime the question has arisen the Supreme Court has recognized that §6 of the F.E.L.A. did not modify any already established powers of the state courts.

It would appear that federal courts may not refuse jurisdiction of any case under the Act simply because another forum might prove more convenient. There was no provision or authority by which a federal court even could transfer a case to another district because of inconvenience, prior to the F.E.L.A. amendment 1404(a).²⁴ Of course, no such privilege inures to

23. 315 U.S. 698 (1942).

24. 28 U.S.C. § 1404 (a) (1948): "For the convenience of parties and

the state courts permitting transfer of cases to another state. Further, there are certain limitations on a state court in enjoining its citizens from bringing suits in another state under the F.E.L.A. One state may not enjoin its citizens from suit in the federal courts of a sister state, nor may a state court enjoin its citizens from suit in the courts of another state if the latter assumes jurisdiction of the case and is willing to try it. In the *Miles* case it was suggested that a state court was not required to permit F.E.L.A. litigation under all causes and circumstances.²⁵ The limitation on a state court to enjoin its citizens from bringing suit in another state under the F.E.L.A. is different from the right of a state to attach some condition to the use of its courts by a non-resident. Therefore, a state court in a situation similar to that in the principal case may impose conditions upon the use of its courts by a non-resident and invoke the doctrine of *forum non conveniens* in suits arising out of the F.E.L.A. The state, if the application of the doctrine does not violate the Privileges and Immunities Clause, may direct the plaintiff to try his cause elsewhere. The majority opinion in the principal case affirming that discretion may be given by state law to dismiss a suit under the F.E.L.A. on the sole ground of *forum non conveniens* certainly established something new. However, the Supreme Court has made a special point in many of these decisions to the effect that the venue provisions of the F.E.L.A. empower state courts to entertain employer liability suits but that they need not accept all of them.

As to the remaining problem of what the Missouri Supreme Court meant by the word "citizen," the Supreme Court of the United States has remanded the case to that court for a determination. Under the holding in the principal case the Missouri Supreme Court will be allowed to look to its own law to determine the presence or absence of judicial discretion under these circumstances. That court will decide by its own law whether discretion will be given to a trial judge to dismiss a suit on the sole grounds of *forum non conveniens*.

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witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might be brought."

25. 315 U.S. 698, 705 (1942). See note 12 *supra*.