

4-1-1951

Forum Non Conveniens and the Federal Employers Liability Act

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Recommended Citation

Louis A. Del Cotto, *Forum Non Conveniens and the Federal Employers Liability Act*, 1 Buff. L. Rev. 21 (1951).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol1/iss1/7>

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of the United States by the individual defendant. However, if plaintiff then amended his complaint to assert a claim against the United States, a waiver of his right to a jury trial as against the individual defendant might be provided for.³⁶

Further legislation would have been necessary to avoid injustices regardless of how the Supreme Court decided the issues in the *Yellow Cab* case. But the alternative evils were not equal, and it is submitted that the approach of Mr. Justice Burton for the Court is sound and the result has the greater justness to commend it.

The questions of contribution and impleader for that purpose having now been decided, the difficulties arising therefrom cannot long escape more definite consideration by the courts, in view of the ever increasing volume of litigation arising under the Federal Tort Claims Act.³⁷ Pending further action by the Congress, private parties to such litigation must themselves examine with care the problems suggested herein in order to avoid possible pitfalls and to aid the courts in making judicial adjustments.

Henry Rose

FORUM NON CONVENIENS AND THE FEDERAL EMPLOYERS LIABILITY ACT

In recent years there has been much speculation as to the power of a state court to invoke the doctrine of forum non conveniens¹ in order to dismiss suits based on foreign operative facts when the suit is brought under the Federal Employers Liability Act.² The problem has been greatly clarified by the recent decision of the United States Supreme Court in *Missouri ex rel. Southern Ry. v. Mayfield*.³ In order to understand the import and effect of the *Mayfield* decision, it is important to review the problem prior to that case.

It is not within the scope of this comment to discuss the doctrine of forum non conveniens as such, or the reasons for its application, but only to treat the restrictions of the Federal Constitution and statutes on state courts in applying the doctrine in actions properly brought under the FELA.

36. And in the joinder situation: Joinder of the United States with an individual as defendants might be deemed a waiver of trial by jury on the part of the plaintiff who joined them. Assertion of a cross-claim for contribution by an individual defendant against the United States, where they were joined by the plaintiff, could be given the same effect.

37. See Collet, *Federal Tort Claims Act*, 8 F. R. D. 2 (1948).

1. The doctrine of forum non conveniens deals "with the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere." Blair, *The Doctrine of Forum Non Conveniens In Anglo-American Law*, 29 COL. L. REV. 1 (1929).

2. 45 U. S. C. § 56 (1908).

3. 339 U. S. 918, 71 S. Ct. 1 (1950).

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It has long been settled that a state court cannot invoke forum non conveniens so as to violate the Privileges and Immunities Clause of the Constitution⁴ or to discriminate against suits brought under a federal statute.⁵ A question was present prior to the *Mayfield* case as to the existence of a third restriction, i.e., could a state be prevented from dismissing an imported suit, properly brought under the FELA on the ground of forum non conveniens although this doctrine is applied indiscriminately? Herein lies the import of the *Mayfield* decision.

Prior to a recent amendment,⁶ § 6 of the FELA provided that an action under the act "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 comencing such action. The jurisdiction of the courts of the United States under this Chapter shall be concurrent with that of the courts of 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

The above section gives no original jurisdiction to state courts but only to federal courts. The language shows that Congress assumed that jurisdiction over FELA suits was already possessed by state courts of general jurisdiction.⁸

There can be little doubt that Congress intended state courts to enforce the federal right by the same rules of practice and procedure used before the Act was passed.⁹ This is illustrated by the statement in *Ex parte Collett*: ". . . the words selected by Congress for section 6 denote nothing, one way or the other, respecting forum non conveniens . . ."¹⁰

In spite of the clear wording of the statute, a great deal of doubt arose as to the intent of Congress. In the *Second Employers Liability Act Cases*¹¹ a Connecticut court dismissed a suit properly brought under the FELA declaring the act against its public policy because of the abolition of certain common law defenses. The United States Supreme Court reversed, and in referring

4. *Chambers v. Baltimore & Ohio R. R.*, 207 U. S. 142 (1907); *Douglas v. N. Y., N. H. & H. R. R.* 279 U. S. 377 (1929).

5. *McKnett v. St. Louis*, S. F. R. R. 292 U. S. 230 (1934).

6. The section preventing state courts from removing a cause to a federal court was transferred to § 1445 (a) of the Judicial Code in 1948.

7. 45 U. S. C. § 56 (1908).

8. *Second Employers Liability Act Cases*, 223 U. S. 1, 56-57 (1912); *Herb v. Pitcairn*, 324 U. S. 117 (1945).

9. *Second Employers Liability Act Cases*, *supra* at 56-57.

10. *Ex parte Collett*, 337 U. S. 55, 61 (1949).

11. *Supra* n. 9.

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to § 6 of the FELA declared: “. . . there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of the state courts or to control or affect their modes of procedure, but only a question of the duty of such court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with such laws, to take cognizance of an action to enforce a right of civil recovery arising under the Act of Congress and susceptible of adjudication according to the prevailing rules of procedure.”¹² The foregoing is not inconsistent with the application of forum non conveniens by a state court where the application is allowed by the local rules of procedure even though the court has jurisdiction of the cause. There would seem to be support for this view in *Douglas v. New York, N. H. & H. R. R.*,¹³ where the Court sustained the power of the New York court to refuse to entertain an action by a non-resident against a foreign corporation under the FELA. A New York statute¹⁴ had been interpreted to give the court discretion to dismiss when the plaintiff was a non-resident but not when he was a resident. Forum non conveniens was mentioned in neither the statute nor the case and it would appear that the New York court was upheld solely on the ground that there was no violation of the Privileges and Immunities Clause of the Federal Constitution. However, the Court strongly implied that the New York statute was being interpreted as based on forum non conveniens when it said: “There are manifest reasons for preferring residents in access to often over crowded courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the courts concerned.”¹⁵

Later cases, however, cast grave doubts on the conclusion that the *Douglas* case turned on forum non conveniens. *Baltimore & Ohio R. R. v. Kepner*¹⁶ denied the power of an Ohio state court to enjoin the prosecution of an FELA action in a federal court in New York. Although the issue was not before the court, the power of a federal court to dismiss as forum non conveniens was denied. “A privilege of venue, granted by the legislative body which created the right of action, cannot be frustrated by reasons of convenience or expense. If it is deemed unjust, the remedy is legislative . . .”¹⁷ In *Miles v. Illinois*

12. Emphasis supplied. However, the federal right cannot be defeated by unreasonable local procedure. The Supreme Court will make its own inquiry as to how burdensome local practice is. *Brown v. Western R.*, 338 U. S. 294 (1949), commented on in 28 TEXAS L. REV. 972 (1950).

13. *Supra* n. 4.

14. N. Y. Gen. Corp. Law § 225.

15. *Supra* n. 4 at 387. Emphasis supplied. See also *Mooney v. D. & R. G. W. R. R.—Utah—*, 221 P. 2d 628, 640-641 (1950) and dissenting opinion in *Miles v. Illinois Central R. R.*, 315 U. S. 698, 710 (1942), to the effect that the *Douglas* case was based on forum non conveniens.

16. 314 U. S. 44, 54 (1941).

17. The Congress followed through on the Court's suggestion in 1948 by enacting § 1404 (a) of 28 U. S. C., allowing federal district courts to transfer causes for reasons of convenience.

*Central R. R.*¹⁸ the Court went a step further by denying the power of a Tennessee state court to enjoin the prosecution of an FELA action in a Missouri state court, which injunction had been based on the ground of inconvenience and expense to the railroad. The Court said: "Since the existence of the cause of action and the privilege of vindicating rights under the FELA in state courts spring from federal law, the right to sue in state courts of proper venue where their jurisdiction is adequate *is of the same quality as the right to sue in federal courts*. It is no more subject to state interference by state action than was the federal venue in the *Kepner* case."¹⁹ This dictum seemed to indicate that the state court could not deny jurisdiction since the duty of the state courts was made the same as that of the federal courts as to the federal right. The *Miles* case led to the popularization of the view that where a state court has jurisdiction of the cause it cannot dismiss it as *forum non conveniens*, although it would do so as a matter of practice were the FELA not involved. For example, in *Gulf Oil Corporation v. Gilbert*,²⁰ which was not an FELA suit, the Court remarked that in suits under that statute the plaintiff's choice of forum could not be defeated on the basis of *forum non conveniens* because of the special venue act. The *Kepner* and *Miles* cases were cited as authority.

On the basis of the *Kepner*, *Miles* and *Gilbert* cases an argument could well be made that the *Douglas* case was overruled; yet it was cited in both *Miles*²¹ and *Gilbert*²² with apparent approval. If the *Douglas* case was not overruled, we must come to one of two conclusions: either that the *Douglas* case was not based on *forum non conveniens* or that the quoted language of the *Miles* and *Gilbert* cases is without force.

If the view is taken that the *Douglas* case was not based on *forum non conveniens*, it can be reconciled only by saying that a state court is considered to lack jurisdiction where it is declined under a statute giving the court discretion to do so. This view is a weak one at best. It is submitted that the source of the power to dismiss should not be determinative as to whether the court is deprived of jurisdiction or merely refuses to exercise jurisdiction admittedly possessed. The effect of procedure ought to be the same whether derived from common law or statute.

The more reasonable conclusion is that the quoted language of the *Miles* and *Gilbert* cases is of no effect. The *Gilbert* case was not an FELA suit and so did not decide the question under consideration. The *Miles* case can be authority only for the narrow proposition that one state cannot enjoin the

18. 315 U. S. 698 (1942).

19. *Ibid.* at 704. Emphasis supplied.

20. 330 U. S. 501 (1946).

21. 315 U. S. at 704.

22. 330 U. S. at 504.

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prosecution of an FELA suit in another since that was the only issue. Thus the language quoted from the *Miles* case is mere dictum since it does not follow from the holding in that case that the forum itself is denied the right to close its courts to imported suits.²³

Because of the doubt and uncertainty raised by these decisions, state courts differed as to their power to invoke forum non conveniens in an FELA suit. Many states felt a duty to exercise their jurisdiction, not merely as a matter of local policy, but because they believed that the federal act so required. Minnesota's belief was based on the *Second Employers Liability Act Cases*;²⁴ California's on the *Miles* case;²⁵ and Missouri (in the *Mayfield* case) on the *Miles* and *Kepner* cases. New York²⁶ and Utah²⁷ held that there is no federal prohibition against dismissing a case under the FELA for reasons of inconvenience. Other states have avoided the difficulty by venue provisions which deprive their courts of power to hear certain imported suits.²⁸

In this setting the United States Supreme Court granted certiorari in the *Mayfield* case. The Missouri Supreme Court had quashed writs of mandamus brought to compel the trial court to exercise discretion in passing on the motion of the defendants to dismiss the combined causes of action as forum non conveniens.²⁹ There can be little question that the decision of the Missouri Court was based entirely on a federal ground. The court said: "Thus it is clear that under the *Kepner* and *Miles* cases, *supra*, a state court cannot dismiss a Federal Employers Liability case solely under the forum non conveniens doctrine . . .

"Respondents also contend that under our Constitution and statutes the doctrine of forum non conveniens cannot be recognized in Missouri. Since we have already ruled the trial court had no discretion in Federal Employers Liability Act cases, *it is not necessary to discuss the Missouri law upon the subject.*"³⁰

23. *Mooney v. D. & R. G. W. R. R.*, *supra*, 221 P. 2d at 640. See also the concurring opinion of Justice Jackson in the *Miles* case, 315 U. S. 698, 708.

24. *Boright v. Chicago & R. I. R. R.*, 180 Minn. 52, 230 N. W. 457 (1930).

25. *Leet v. Union Pacific R. R.*, 25 Cal. 2d 605, 155 P. 2d 42 (1944).

26. *Murnan v. Wabash Ry.* 246 N. Y. 244, 158 N. E. 508 (1927).

27. *Mooney v. D. & R. G. W. R. R.*, *supra* n. 15.

28. *Taylor v. Southern Ry.*, 350 Ill. 139, 182 N. E. 805 (1932); *Walton v. Pryor*, 276 Ill. 563, 115 N. E. 2 (1916); *Loftus v. Pennsylvania R. R.*, 107 Ohio 352, 140 N. E. 94 (1923).

29. Petitioners were of the opinion that the Missouri court purposely rested its decision on the federal ground alone in order to have the United States Supreme Court pass on the federal question. See p. 5 of petitioner's reply brief in the United States Supreme Court.

30. — Mo. —, 224 S. W. 2d 109, 111 (1949); emphasis supplied. See pages 4 and 5 of petitioner's reply brief in the United States Supreme Court for cases showing that the local law of Missouri did not prevent dismissal of suits as forum non conveniens.

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In deciding the federal question the United States Supreme Court vacated the judgment of the Missouri court and said of the *Miles* and *Kepner* cases: "But neither of these cases limited the power of a State to deny access to its courts to persons seeking recovery under the Federal Employers Liability Act if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially . . . so as not to involve a discrimination against Employers Liability Act suits and not to offend against the Privileges and Immunities Clause of the Constitution . . . There was nothing in that Act even prior to section 1404(a) . . . which purported to 'force a duty' upon the State Courts to entertain or retain Federal Employers Liability litigation 'against an otherwise valid excuse.' *Douglas v. New Haven R. Co.* . . .

"Therefore, if the Supreme Court of Missouri held as it did because it felt under compulsion of federal law as enunciated by this court so to hold, it should be relieved of that compulsion. It should be freed to decide the availability of the principle of forum non conveniens in these suits according to its own local law."³¹

There can be little doubt that the *Mayfield* decision relieves the states of the "compulsion" of the *Miles* case. The *Miles* dictum is given no effect and the conclusion that the *Douglas* case turns on forum non conveniens is reinforced. A state court is permitted to require a plaintiff to try his cause in a more convenient forum unless denial to hear the cause is discriminatory either as to plaintiff's citizenship or because he is suing under a federal statute. Thus the supposed third restriction that forum non conveniens cannot be applied—even indiscriminately—in an FELA suit does not exist.

Justice Jackson in his concurring opinion attributes this result only to the fact that Congress removed the "compulsion" of the *Miles* case by amendment. Section 1404(a) of 28 U. S. C. (1948) in part removed the effect of the *Kepner* case by allowing federal district courts to transfer FELA suits on grounds of inconvenience.³² Justice Jackson feels that if the federal court in the state is freed from "compulsion" the state court should be also.³³

This view is not accepted by the rest of the majority, as the opinion states explicitly that there was no "compulsion" on the states "even prior to section 1404(a) . . ."³⁴ Moreover, the soundness of Justice Jackson's contention is questionable since, under § 1404(a), a federal court does not dismiss an action but merely transfers it to a more convenient forum. A state court must dismiss the suit, requiring that it be instituted de novo; in many cases, the statute of limitations would bar the action.³⁵

31. 71 S. Ct. 1, 3.

32. *Ex parte Collett*, *supra* n. 10.

33. 71 S. Ct. 3-4.

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CONCLUSION

In any event, the troublesome dictum in the *Miles* case is no longer to be given effect and it can be concluded that the present law is as follows:

1. A state court, so far as its local law allows it, is free to dismiss *any* suit as forum non conveniens if the doctrine is applied indiscriminately.

2. Under a strict view of the holding in the *Mayfield* case, it is reconcilable with the *Miles* and *Kepner* cases. It is therefore proper to conclude that a state court cannot enjoin the prosecution of an FELA suit in a state or federal court of another jurisdiction.

Nonetheless, the tenor of the *Mayfield* opinion leads one to speculate as to whether the *Miles* doctrine will survive. The overturning of this doctrine, however, cannot be forecast from the present decisions.

3. A federal district court can transfer an FELA suit to the district court in a more convenient forum under 28 U. S. C. § 1404(a) (1948).

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34. *Ibid.* at 3.

35. *Cinema Amusements v. Leow's, Inc.*, 85 F. Supp. 319 (D. Del. 1949); see also the dissenting opinion of Justice Black in the *Gilbert* case, *supra* n. 10.