

VALIDITY OF CONTRACTS RESTRICTING
FELA VENUE RIGHTS

Current attempts by railroads to restrict by contract the venue possibilities available to injured employees under Section 6 of the Federal Employers' Liability Act¹ have led to a distinct split of authority in both state and federal courts. Under that act suits may be brought ". . . in a district court of the United States, in the district 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."² A recent decision in the Court of Appeals for the Sixth Circuit illustrates one approach to the validity of such contracts. The plaintiff, a resident of Pennsylvania, was injured in that state while employed by the defendant railroad. In consideration of an advance of fifty dollars, the plaintiff agreed not to institute proceedings on his claim in any court sitting outside the state in which the accident took place or in which he resided when the accident occurred. He subsequently initiated suit in a federal district court in Ohio. In reversing a trial court order sustaining defendant's motion to dismiss on grounds of improper venue, the court of appeals held the contract void because it contravened Section 5 of the FELA which prohibits all agreements ". . . the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter. . . ."³ *Akerly v. New York Central R. Co.*⁴

The railroads have explored a number of devices in seeking to limit the statutory choice of venue. The United States Supreme Court in *Miles v. Illinois Central R. Co.*⁵ and *Baltimore & Ohio R. Co. v. Kepner*⁶ nullified their attempts to obtain injunctions from state courts of state X preventing citizens of state X from suing on claims arising under the Act in state or federal courts of foreign states where the Act gives venue. Federal courts of state X may not enjoin citizens of state X from prosecuting claims in foreign state or federal courts.⁷ In

¹ 35 Stat. 66 (1908), 45 U.S.C.A. § 51 et seq. (1943).

² 36 Stat. 291 (1910), 45 U.S.C.A. § 56 (1943). This section also provides that the jurisdiction of the courts of the United States shall be concurrent with that of the courts of the several states.

³ 35 Stat. 66 (1908), 45 U.S.C.A. § 55 (1943). The statute was held valid in *Phil., Baltimore & Washington R. Co. v. Schubert*, 224 U.S. 603 (1912); *Second Employers' Liability Cases*, 223 U.S. 1 (1912); cf. *Duncan v. Thompson*, 315 U.S. 1 (1942).

⁴ 168 F. 2d 812 (C.C.A. 6th, 1948). Accord: *Fleming v. Husted*, 68 F. Supp. 900 (Iowa, 1946); *Sherman v. Pere Marquette Ry. Co.*, 62 F. Supp. 590 (Ill., 1945); *Krenger v. Penn. Ry. Co.*, 8 F.R.D. 65 (N.Y., 1947); *Petersen v. Ogden Union Ry. & Depot Co.*, 110 Utah 573, 175 P. 2d 744 (1946), noted in 47 Col. L. Rev. 498 (1947); cf. *Detwiler v. Chicago, R.I. & P. Ry. Co.*, 15 F. Supp. 541 (Minn., 1936). Contra: *Roland v. A., T. & S.F. Ry. Co.*, 65 F. Supp. 630 (Ill., 1946); *Herrington v. Thompson*, 61 F. Supp. 903 (Mo., 1945); *Clark v. Lowden*, 48 F. Supp. 261 (Minn., 1942); *Grand Trunk Western Ry. Co. v. Boyd*, 33 N.W. 2d 120 (Mich., 1948); *Detwiler v. Lowden*, 198 Minn. 185, 269 N.W. 367 (1936).

⁵ 315 U.S. 698 (1942).

⁶ 314 U.S. 44 (1941).

⁷ *Chesapeake & Ohio Ry. Co. v. Vigor*, 90 F. 2d 7 (C.C.A. 6th, 1937), cert. den. 302 U.S. 705 (1937).

*Gulf Oil Co. v. Gilbert*⁸ the Supreme Court stated by way of dictum that federal courts may not apply the doctrine of *forum non conveniens* to actions arising under the FELA. On the basis of these three cases, the lower federal courts have refused to apply the doctrine.⁹ Although the *Miles*, *Kepler*, and *Gulf Oil* cases strongly limit courts in the exercise of their general authority to interfere with a plaintiff's choice of forum, they do not support the conclusion that plaintiffs may not make their own choice by contract.

It is clear, however, that state courts may refuse to entertain suits under the Act so long as there is no discrimination between citizens and non-citizens.¹⁰ This is true only where as a matter of local law state courts have discretion to refuse ordinary transitory actions.¹¹ Thus, the Supreme Court upheld a New York court's refusal to entertain jurisdiction of a suit based upon injuries sustained in Connecticut filed by a Connecticut resident against a railroad incorporated in Connecticut.¹² Although there are cases to the contrary,¹³ the better view indicates that states which have incorporated the doctrine of *forum non conveniens* into their common law¹⁴ may apply it to cases arising under the Act.¹⁵ State courts may not, of course, refuse to exercise general jurisdiction solely because the action is brought under a federal law.¹⁶

The alternative venue provisions in the Act were motivated in part by congressional desire to protect the plaintiff against the inconvenience and expense of bringing suit only in the jurisdiction in which the defendant was incorporated.¹⁷ Recognizing the disparity in bargaining power between a claims agent

⁸ 330 U.S. 501, 505 (1947).

⁹ *Nunn v. Chicago, M., St. P. & P. R. Co.*, 71 F. Supp. 541 (N.Y., 1947); *Butts v. Southern P. R. Co.*, 69 F. Supp. 895 (N.Y., 1947). Accord: *Kilpatrick v. T. & P. Ry. Co.*, 166 F. 2d 788 (C.C.A. 2d, 1948), cert. den. 69 S. Ct. 32 (1948). The same rule was applied before the *Gulf Oil* case in *Sacco v. B. & O. Ry. Co.*, 56 F. Supp. 959 (N.Y., 1944), and even before the *Miles* and *Kepler* cases, in *Connelly v. Central R. Co. of N.J.*, 238 Fed. 932 (D.C. N.Y., 1916).

¹⁰ *Douglas v. N.Y., N.H. & H. R. Co.*, 279 U.S. 377 (1929); *Murnan v. Wabash Ry. Co.*, 246 N.Y. 244, 158 N.E. 508 (1927); *Loftus v. Penn. R. Co.*, 107 Ohio St. 352, 140 N.E. 94 (1923).

¹¹ It is not clear from the cases whether such discretion must be conferred by statute or whether it may also arise from judicial decisions. In *Douglas v. N.Y., N.H. & H. R. Co.*, 279 U.S. 377 (1929) a statute was involved but the discretion seems to have been added by broad judicial interpretation.

¹² *Douglas v. N.Y., N.H. & H. R. Co.*, 279 U.S. 377 (1929).

¹³ *Leet v. Union Pacific R. Co.*, 25 Cal. 2d 605, 155 P. 2d 42 (1944), cert. den. 325 U.S. 866 (1945); *Boright v. Chicago, R.I. & P. R. Co.*, 180 Minn. 52, 230 N.W. 457 (1930).

¹⁴ See Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Col. L. Rev. 1 (1929).

¹⁵ See *Miles v. Ill. Cent. R. Co.*, 315 U.S. 698, 704 (1942) where the court said, "We do not deal here with the power of Missouri by judicial decision or legislative enactment to regulate the use of its courts generally." Justice Jackson, concurring in this same case, distinguished between the right to enjoin foreign suits and *forum non conveniens*. *Ibid.*, at 708.

¹⁶ *McKnett v. St. L. & S.F. Ry. Co.*, 292 U.S. 230 (1934); *Second Employers' Liability Cases*, 223 U.S. 1 (1912).

¹⁷ See *Cound v. A., T. & S.F. Ry. Co.*, 173 Fed. 527 (C.C. Tex., 1909); S. Rep. 432, 61st Cong. 2d Sess., at 4 (1910).

and an injured employee, Congress intended to give "the disadvantaged workman some leverage."¹⁸ Thus, to some courts, contracts restricting venue smack of attempts by private parties to restore the imbalance which Congress sought to eliminate.

On the other hand, Section 6 of the Act has given rise to forum-shopping¹⁹ with its attendant evils which these contracts seek to mitigate. And where a statute provides a choice of venue there would seem to be no reason for not allowing the parties to make that choice by contract. Finally, in the *Akerly* opinion the court appears to have confused "liability" with "venue." The intent of Congress in enacting Section 5, the principal basis for the court's decision, was the prevention of contracts discharging employers from liability for personal injuries suffered by employees.²⁰ But a contract restricting venue, which has reference to the place where judicial authority may be invoked,²¹ would not "enable any common carrier to exempt itself" from liability created by the Act.²²

If this type of contract were held valid it is possible that railroads might attempt to obtain agreements restricting venue more narrowly. If such contracts deprived the plaintiff of a convenient forum they could be declared void because contrary to the purpose of the Act to provide a convenient forum to injured employees. It is true, however, that a rule of thumb whereby all contracts restricting venue are declared void, could be more easily administered than the "rule of reason" proposed herein.

It may be urged therefore, that a proposed amendment to Section 6 of the FELA be adopted.²³ That amendment would limit actions to state or federal courts of the county or district in which the accident occurred or in which the employee resided at the time of his injury, with the exception that if the defendant cannot be served with process in any of those jurisdictions the action could be brought in any federal district or state court of competent jurisdiction wherever the defendant is doing business.²⁴ Such an amendment, coupled with

¹⁸ Justice Jackson, concurring in *Miles v. Ill. Cent. R. Co.*, 315 U.S. 698, 707 (1942); see also Cong. Rec., 61st Cong. 2d Sess., vol. 45, pt. 4, at 4031 (1910).

¹⁹ See *New Limitations of Choice of Federal Forum*, 15 Univ. Chi. L. Rev. 332, 340-41 (1948).

²⁰ H.R. Rep. No. 1386, 60th Cong. 1st Sess., at 6 (1908).

²¹ See *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167-68 (1939).

²² The cases are split in the same way as those cited supra note 4. See H.R. Rep., supra note 20: "Some of the railroads of the country insist on a contract with their employees discharging the company from liability for personal injuries." The contracts in question here do not defeat that liability. But see *Petersen v. Ogden Union Ry. Co.*, 110 Utah 573, 579, 175 P. 2d 744, 747 (1946) (dictum to the effect that the practical result of the contract is probably to decrease the likelihood of defendants having to pay damages).

²³ H.R. 1639, 80th Cong. 1st Sess. (1947). See *Pascarella v. New York Cent. R. Co.*, 81 F. Supp. 95 (N.Y., 1948).

²⁴ During the first World War, an order of the Director General of Railroads made a somewhat similar limitation of venue choice to escape the burden of defending suits far from the scene of the accident. The validity of the order was sustained in *Alabama & Vicksburg Ry. Co. v. Journey*, 257 U.S. 111 (1921).

another provision making void any contracts limiting venue, would guarantee employees their convenient, effective remedy and would at the same time serve the purposes of limiting venue now fulfilled by these contracts. The same purpose may be judicially attained if federal district courts are upheld in their application of the doctrine of *forum non conveniens* to cases arising under this act.²⁵

²⁵ Compare *Nunn v. Chicago, M., St.P. & P. R. Co.*, 80 F. Supp. 745 (N.Y., 1948); *Hayes v. Chicago, R.I. & P. R. Co.*, 79 F. Supp. 821 (Minn., 1948); *Collett v. Louisville & Nashville R. Co.*, 17 U.S.L. Week 2223 (D.C. Ill., 1948), all applying 28 U.S.C. Cong. Service § 1404(a) (1948) which makes the doctrine of *forum non conveniens* applicable to all civil actions in federal district courts. Contra: *Pascarella v. New York Cent. R. Co.*, 81 F. Supp. 95 (N.Y., 1948). Until the passage of this provision, judicial interpretation of § 6 of the FELA in conjunction with the Supreme Court's decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), had modified the rules developed in *Denver & Rio Grande Western R. Co. v. Terte*, 284 U.S. 284 (1932); *Michigan Central R. Co. v. Mix*, 278 U.S. 492 (1929); *A., T. & S.F. Ry. Co. v. Wells*, 265 U.S. 101 (1924); *Davis v. Farmers' Co-op. Equity Co.*, 262 U.S. 312 (1923); *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U.S. 264 (1917); *Green v. Chicago, B. & Q. Ry. Co.*, 205 U.S. 530 (1907). This line of cases set forth the principle that a foreign corporation which owned no lines within a state, although it owned property and solicited traffic, was not subject to the jurisdiction of a court of that state in a suit under the Act. The rationale was the prevention of an undue burden on interstate commerce and the fact that the corporations involved were not "doing business" within the state. The doctrine of the *International Shoe* case modified the "doing business" objection, and the *Kepner* and *Miles* cases removed that of the undue burden on interstate commerce. *Kilpatrick v. T. & P. Ry. Co.*, 166 F. 2d 788 (C.C.A. 2d, 1948), cert. den. 69 S. Ct. 32 (1948). The passage of § 1404(a), *supra*, may change the situation by allowing the interstate commerce problem to be considered as part of the doctrine of *forum non conveniens*.