

of proposed rates. The shipper who feels that a rate charged by a given motor carrier is unreasonable can, in most instances, simply transfer his business to another trucker. Another trucker will usually be available because the trucking industry is relatively competitive. Competition is assured by the relatively low costs of entry in the trucking business. Even the smallest prospective trucker can usually afford the cost of a truck. Highways are paid for by taxes not only on trucks, but also on automobiles, resulting in a virtual subsidy for the motor carrier.⁴⁷

The rail shipper, on the other hand, unless he is located in one rail center and is shipping to another, is limited in his choice of carriers. In the many locations which are served by only one carrier, moreover, there will be no choice. This situation is caused by the high entry costs in the railroad industry: expensive rolling stock; expensive, privately financed roadbeds; and no subsidies. The rail shipper is thus probably in greater need of a remedy for unreasonable past rates as a means of pressuring the rail carrier into maintaining a reasonable rate level.

⁴⁷ See TAFF, *op. cit. supra* note 36, at 548-9, and LOCKLIN, *ECONOMICS OF TRANSPORTATION* (4th ed. 1954) 679-80, 682-83, 700-02, 704. Locklin argues (p. 704) that rate regulation is justified in the motor carrier industry even though competitive conditions are more likely to prevail among motor carriers than among railroads because the number of motor carriers available to some shippers on a given route may be limited and because small shippers who cannot get contract carriers and are unable to do their own carrying are at the mercy of common carriers. (Contract carriers haul under individual contracts with shippers. Their rates are not regulated by the ICC). To say that rate regulation as such is justified by these conditions, however, is not to say that a shipper's action for unreasonable past rates is necessary. It would appear that in most instances the shippers who are on routes where the number of available common motor carriers is limited will hire contract carriers or will haul their own goods unless they are small. These same small shippers will be the ones who are at the mercy of the common carriers in any case. But it is the small shipper who is likely to find an action for unreasonable past rates too expensive to be worthwhile.

LIMITATIONS UPON STATE USE OF FORUM NON CONVENIENS IN FELA ACTIONS

In *Cotton v. Louisville & Nashville R.R.*¹ the Supreme Court of Illinois indicated that although the doctrine of forum non conveniens² is available to state courts in FELA³ cases, its application to such cases is limited⁴ by plaintiff's federal right to his choice of forum.⁵ Justice Schaefer, dissenting, contended that

¹ 14 Ill. 2d 144, 152 N.E. 2d 385 (1958).

² Forum non conveniens refers to the exercise of "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 COLUM. L. REV. 1 (1929).

³ 35 Stat. 65 (1908), 45 U.S.C. §§ 51-59 (1958), as amended, 36 Stat. 291 (1910), 45 U.S.C. §§ 56, 59 (1958).

⁴ "[O]nly where it is shown that plaintiff is motivated purely by vexation and harassment will an F.E.L.A. case be dismissed." 14 Ill. 2d 144, 152 N.E. 2d 385, 400 (1958).

⁵ If the venue provision of FELA is interpreted to be a special privilege created by a federal statute that confers a right to its contents to litigants under the FELA, the supremacy clause

forum non conveniens in FELA actions "should be governed by the same standards that apply to other [actions]."⁶ The *Cotton* case—the first state decision indicating a federal limitation on state forum non conveniens dismissal of FELA actions⁷ since the Supreme Court held forum non conveniens available in FELA suits⁸—may rest on a questionable reading of Supreme Court interpretations of section 6,⁹ the venue provision of FELA.

Although it is clear that state courts may not use forum non conveniens to discriminate between citizens of their state and citizens of other states¹⁰ or against federally-created causes of action,¹¹ there appear to be two other possible grounds for limiting the use of forum non conveniens by state courts in

would preclude state courts from interfering with or derogating from the federal rights. *Central Vermont Ry. v. White*, 238 U.S. 507 (1915). This appears to be the rationale of the *Cotton* case. 14 Ill. 2d at 174, 152 N.E. 2d at 400.

⁶ 14 Ill. 2d at 178, 152 N.E.2d at 402 (1958).

⁷ The following state supreme courts in addition to Illinois have specifically held that the doctrine of forum non conveniens is available in FELA cases: *Price v. Atchison, T. & S. Ry.*, 42 Cal. 2d 577, 268 P.2d 457 (1954); *Johnson v. Chicago, B. & Q. R.R.*, 243 Minn. 58, 66 N.W. 2d 763 (1954); *Douglas v. New York, N. H. & H. R.R.*, 248 N.Y. 580, 162 N.E. 532 (1928), *aff'd* 279 U.S. 377 (1929); *St. Louis-San Francisco Ry. v. Superior Court*, 276 P.2d 773 (Okla. 1954); *Mooney v. Denver & R.G.W.R.R.*, 118 Utah 307, 221 P.2d. 628 (1950).

⁸ *Missouri ex rel Southern Ry. v. Mayfield*, 340 U.S. 1 (1950). See also *Douglas v. New York, N. H. & H. R.R.*, 279 U.S. 377 (1929).

⁹ "Under this chapter 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. . . ." 36 Stat. 291 (1910), as amended 36 Stat. 1167 (1911), 45 U.S.C. § 56 (1958).

¹⁰ *Douglas v. New York, N. H. & H. R.R.*, 279 U.S. 377 (1929).

¹¹ In the situation where the Congress gives state courts concurrent jurisdiction over the federal action, once a state court agrees to hear the federally created cause of action it seems clear that the federal system has the power, via the supremacy clause, to prescribe the manner in which the state court will handle the case. *Cf. Brown v. Western Ry. of Alabama*, 338 U.S. 294 (1949); *Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359 (1952). Likewise, if a state court ordinarily hears a particular form of action it is clear that the supremacy clause imposes upon state courts the duty to give equal recognition to the federal cause of action. See, *e.g.*, *Testa v. Katt*, 330 U.S. 386 (1947); *McKnett v. St. Louis & S. F. Ry.*, 292 U.S. 230 (1934); *Douglas v. New York, N. H. & H. R.R.*, 279 U.S. 377 (1929).

Whether or not the Congress can compel a state court to hear a federal action of a type not ordinarily heard by the state court is still unanswered. See, Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?*, 17 OHIO ST. L. J. 384, 410 n.159 (1956); Hart, *The Relation Between State and Federal Law*, 54 COLUM. L. REV. 489, 506-08 (1954); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 70-71 (1923).

If the Congress were to require, rather than merely to empower, state courts to hear a federally created cause of action by an explicit statute it would seem that the supremacy clause would force the states to maintain the action. See note 22 *infra*. *Cf. Mr. Justice Frankfurter's dissent in Baltimore & Ohio R.R. v. Kepner*, 314 U.S. 44, 58 (1941). The crucial issue in such situations is whether the Congress has remained within the bounds of the constitutional clause under which it is proceeding, *e.g.* the commerce clause in FELA situations.

FELA actions. First, the venue provision of FELA may impose restrictions upon the use of the doctrine.¹² Second, the use of forum non conveniens under the state's ordinary rules may in some situations contravene the supremacy clause by causing the federal substantive right created by section 1 of FELA to be evaded or diminished.

I

The venue provision has been interpreted in three contexts: state injunction of a suit in a foreign inconvenient forum,¹³ change of venue under section 1404(a)—the federal transfer provision,¹⁴ and state dismissal on the grounds of forum non conveniens.¹⁵ The Supreme Court in *Baltimore & Ohio R.R. v. Kepner*¹⁶ and *Miles v. Illinois Central R.R.*¹⁷ held that state courts cannot enjoin their citizens from prosecuting FELA actions in inequitable or vexatious federal or state forums. In each case, the Court expressed the view that the Congress, in enacting the venue provision, created a right in the plaintiff to his choice of the enumerated forums,¹⁸ which right the supremacy clause protects from state interference. Mr. Justice Frankfurter, dissenting in both cases, contended that section 6, in merely providing general rules for venue created no federal rights.

This position of Mr. Justice Frankfurter appears to have been followed in the subsequent cases of *Ex parte Collett*¹⁹ and *Southern Ry. v. Mayfield*.²⁰ In *Collett* the Court, while expressly stating that "section 1404(a) does not limit or otherwise modify any right granted in [section] 6 of the Liability Act,"²¹ rejected the contention that the rationale of *Miles* and *Kepner* precluded the use of section 1404(a) in FELA actions and held that federal courts, under section 1404(a), can transfer FELA actions on forum non conveniens grounds. Even greater doubt was cast upon the absolute right of an FELA plaintiff to his choice of forum by the Court's decision in the *Mayfield* case.²² The majority in *Mayfield*, by relying

¹² See note 6 *supra*.

¹³ See *Pope v. Atlantic Coast Line R.R.*, 345 U.S. 379 (1958); *Miles v. Illinois Central R.R.*, 315 U.S. 698 (1942); *Baltimore & Ohio R.R. v. Kepner*, 314 U.S. 44 (1941).

¹⁴ See *Ex parte Collett*, 337 U.S. 55 (1949). The federal transfer provision provides: "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." 28 U.S.C. § 1404(a) (1952).

¹⁵ *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950); *Douglas v. New York, N. H. & H. R.R.*, 279 U.S. 377 (1929).

¹⁶ 314 U.S. 44 (1941)

¹⁹ 337 U.S. 55 (1949).

¹⁷ 315 U.S. 698 (1942)

²⁰ 340 U.S. 1 (1950).

¹⁸ See note 11 *sup. j.*

²¹ 337 U.S. at 60.

²² The case resulted in a 5-4 decision with Mr. Justice Clark, joined by Chief Justice Vinson, Mr. Justice Black, and Mr. Justice Douglas, dissenting on the ground that it is the duty of the Supreme Court to uphold state court decisions where there exists an adequate ground to sustain them. Since the Missouri court declared that they do not distinguish between residents and non-residents when determining the availability of their courts, the dissenters argued that Missouri rightfully declined to dismiss the case.

upon *Douglas v. New York, N.H. & H.R.R.*,²³ which was decided prior to *Kepner* and *Miles*, and without discussing possible conflict with either the dictum of *Gulf Oil v. Gilbert*²⁴ or the rationale of *Kepner* and *Miles*, held that no federal law precludes state courts from making a forum non conveniens dismissal of an FELA action.

The possible conflict in the interpretation of section 6 created by *Miles* and *Kepner* on the one hand and *Collett* and *Mayfield* on the other, was again presented to the Court when, subsequent to the *Mayfield* decision, the issue of the *Miles* case was relitigated in *Pope v. Atlantic Coast Line R.R.*²⁵ In *Pope* it was urged that section 1404(a) as interpreted by the *Collett* decision, dispelled the notion of *Miles* and *Kepner* that section 6 made the plaintiff-chosen forum absolute. The Court, repeating that section 1404(a) did not modify or change the right to venue,²⁶ reaffirmed the *Miles* holding. Dissenting, Mr. Justice Frankfurter maintained that enactment of section 1404(a) confirmed his position as stated in *Miles* and *Kepner* that the Congress intended to enact only a general venue provision. By so dissenting, Mr. Justice Frankfurter indicated that he intended the *Mayfield* holding to overrule sub silentio the *Miles* and *Kepner* decisions.

Although *Mayfield* makes it clear that state courts are free to use forum non conveniens according to their own rules,²⁷ it might appear that the rationale of *Pope* undercuts the validity of the *Mayfield* decision. It could be argued that the *Mayfield* decision rests either on the theory expressed by Mr. Justice Frankfurter dissenting in *Miles* and *Kepner*, or on Mr. Justice Jackson's concurring

²³ 279 U.S. 377 (1929). This was a FELA action in which a discretionary dismissal was made pursuant to a statute of the state of New York which read in part: "An action against a foreign corporation, or by a non-resident, in one of the following cases only; . . . 4. When a foreign corporation is doing business within this state." N.Y. Laws 1913, ch. 60. In discussing the application of the statute to the FELA action the Court said: "[the] statute [section 6] does not purport to require State Courts to entertain suits arising under it but only empowers them to do so, so far as the authority of the United States is concerned. It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse." *Id.*, at 387-88.

²⁴ 330 U.S. 501 (1947). The Court said: "It is true that in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a 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." (Citing *Baltimore & Ohio R.R. v. Kepner*, 314 U.S. 44 (1941) and *Miles v. Illinois Central R.R.*, 315 U.S. 698 (1942).) *Id.*, at 505.

²⁵ 345 U.S. 379 (1953).

²⁶ *Id.*, at 386 where the Court quotes from *Ex parte Collett*: "Section 6 of the Liability Act defines the proper forum; § 1404(a) of the Code deals with the right to transfer an action properly brought. The two sections deal with two separate and distinct problems. Section 1404(a) does not limit or otherwise modify any right granted in § 6 of the Liability Act or elsewhere to bring suit in a particular district . . ." An action may still be brought in any court, state or federal, in which it might have been brought previously.

²⁷ The Court said: "It should be freed to decide the availability of the principle of *forum non conveniens* in these suits according to its own local law." 340 U.S. 1, 5 (1950).

opinion in *Mayfield* that section 1404(a) as interpreted by *Collett* changed the interpretation of section 6 found in *Miles* and *Kepner*.²⁸ Since the *Pope* case reaffirmed the *Miles* position, rejected Mr. Justice Frankfurter's interpretation of section 6, and held that section 1404(a) did not alter the interpretation of section 6 as far as state interference with plaintiff's choice of forum is concerned, it could be said that section 6, under the *Pope* rationale, creates a right with which state courts cannot interfere. Thus the *Mayfield* holding that an FELA action may be dismissed on forum non conveniens grounds would conflict with the *Pope* interpretation of both section 6 and section 1404(a).²⁹ A difficulty with this interpretation is that it ignores the fact that in the *Pope* case the Court explicitly refused to overrule the *Mayfield* decision, and restricted its prohibition to state interference by way of injunction.

Alternatively, it might be argued that since Mr. Justice Frankfurter's interpretation of section 6 was clearly rejected in the *Pope* case, the *Mayfield* holding could be said to rest only on the theory of Mr. Justice Jackson that enactment of section 1404(a) manifested an intention on the part of Congress to change the *Miles* and *Kepner* interpretations of section 6.³⁰

Under this view a dismissal by a state court under section 6 would be permitted only in those situations where a federal court would transfer under section 1404(a). It is arguable that there is no reason to interpret section 1404(a) as an implicit grant to state courts of more power than is explicitly granted to federal courts.³¹ State forum non conveniens dismissals of FELA actions would thus be limited by the standard employed by the federal courts when transferring under section 1404(a).

²⁸ Cf. Mr. Justice Rutledge concurring in *Ex parte Collett*, 337 U.S. 55, 72-73 (1949). Several state courts have relied upon this interpretation of the *Mayfield* decision in overruling earlier holdings that forum non conveniens was not available in FELA actions. See, e.g., *Price v. Atchison T. & S. F. Ry.* 42 Cal. 2d 577, 268 P.2d 457 (1954), overruling *Schultz v. Union Pacific R.R.*, 118 Cal. App. 2d 169, 257 P.2d 1003 (1953); *Johnson v. Chicago, B. & Q. R.R.*, 243 Minn. 58, 66 N.W.2d 763 (1954), overruling *Boright v. Chicago, R. I. & P. Ry.*, 180 Minn. 52, 230 N.W. 457 (1930).

²⁹ For a state court maintaining this position, see *Schultz v. Union Pacific R.R.*, 118 Cal. App. 2d 169, 257 P.2d 1003 (1953) which was overruled by *Price v. Atchison, T. & S. F. Ry.*, 42 Cal. 2d 577, 268 P.2d 457 (1954). Cf. also dissent in *Price v. Atchison T. & S. F. Ry.*, 42 Cal. 2d 577, 268 P.2d 457 (1954).

³⁰ 340 U.S. 1, 5 (1950).

³¹ By maintaining that section 1404(a) "removed the compulsion which determined the *Miles* case," Mr. Justice Jackson could be contending, in the alternative, that section 1404(a) indicated a Congressional intent to remove *all* compulsions, thereby permitting the forum where the suit was filed to determine, completely according to its own discretion, whether to hear the action. This position is supported by the fact that Mr. Justice Jackson concurred in the "decision and opinion of the Court," *Southern R.R. v. Mayfield*, 340 U.S. 1, 6 (1950), thereby accepting the Court's position that state courts should "decide the availability of the principle of forum non conveniens in these suits according to its own local law." *Id.* at 5.

Since Mr. Justice Jackson joined the majority in *Pope v. Atlantic Coast Line R.R.*, 345 U.S. 379 (1953), it would seem that Mr. Justice Jackson distinguishes between dismissal and injunction situations. As such, the argument here presented would be consistent with the suggested theory of Congressional intent presented in the text *infra*.

The argument, however, presents difficulties, as does the argument that the *Pope* rationale undercuts the validity of the *Mayfield* holding. Under either approach, it must be assumed that state courts could not use forum non conveniens, absent section 1404(a). It would thus follow that the *Douglas* case was incorrectly decided. This conclusion appears a questionable interpretation of the Congressional intent in enacting section 6, since the Congress has never overruled the *Douglas* decision, although the issue of section 6 was before it. Moreover, in *Miles* the Supreme Court explicitly approved the *Douglas* decision.³²

To accept Mr. Justice Jackson's theory as the rationale of *Mayfield* and to interpret his approach as limiting state dismissals to those instances in which federal courts would transfer, limiting the *Pope* case to the injunction situation, ignores the fact that Mr. Justice Jackson expressly concurred in the *holding and opinion* of the majority. It seems indisputable that Mr. Justice Jackson thus subscribed to the majority's statement that a state court "should be freed to determine the availability of forum non conveniens according to its own local law." It accordingly seems most questionable that Mr. Justice Jackson felt that state dismissals were to be governed by the section 1404(a) standard.

Further, prohibition or limitation of the use of forum non conveniens in FELA cases would appear doubtful, since either would require a relatively few states to bear the burden of a disproportionately large percentage of state FELA actions. It seems clear that FELA cases tend to be concentrated in a few states which may have no real relation to the accident involved.³³ If states are not free to consider their own interest in avoiding unfair imposition on their judicial systems, this undue centralization would be likely to continue. And it may be questioned whether the Congress in providing concurrent state jurisdiction over FELA cases intended a few states to carry the burden of state FELA litigation.

It does not appear necessary, however, to accept either of the two arguments presented. An apparent fallacy in each is that the interpretation of section 6 in one context, the injunction cases, is deemed conclusive in another, the dismissal situation. The holding in the *Collett* case, on the other hand, makes it clear that

³² In *Miles v. Illinois Central R.R.*, 315 U.S. 698, 704 (1942) the Court said: "This is not to say that states cannot control their courts. We do not deal here with the power of Missouri by judicial decision or legislative enactment to regulate the use of its courts generally, as was approved in the *Douglas* or the *Chambers* [207 U.S. 142 (1907)] cases . . ." Since *Pope v. Atlantic Coast Line R.R.*, 345 U.S. 379 (1953) expressly reaffirmed the *Miles* case, it appears unlikely that *Douglas* was invalid.

³³ In a recent statistical survey it was found that in a five year period ending in 1946, 92% of the 2,512 FELA suits filed outside the federal district where either the cause of action arose or the plaintiff resided at the time of the accident were concentrated in the five states of Illinois, New York, California, Minnesota and Missouri. H.R. REP. NO. 613, 80th Cong., 1st Sess. 3 (1947); statement of John W. Freels, representing the Law Committee of the Association of American Railroads, *Hearing Before Subcommittee No. 4 of the House Committee on the Judiciary* 80th Cong., 1st Sess., ser. 4 at 31 (1947).

For collection of material discussing abuses of venue of FELA cases see Barrett, *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380, 382 n.13-15 (1947). See also Winters, *Interstate Commerce in Damage Suits*, 29 J. AM. JUD. Soc'y. 135 (1946).

the language of the injunction cases, indicating an absolute right to plaintiff's choice of forum, does not determine the effect of section 6 in a different context and thus should not be taken literally. On this basis it seems possible to reconcile the *Miles*, *Kepner*, and *Pope* cases with the holdings of the *Douglas* and *Mayfield* cases.

There appears to be a significant difference between the injunction of an inconvenient suit in a foreign forum and a dismissal on forum non conveniens, with respect to the interest of the state involved. When a state court enjoins one of its citizens from prosecuting an action in a foreign tribunal, the only interest the enjoining state has in so acting is the desire to protect the defendant. On the other hand, when a court dismisses on forum non conveniens, the court has an interest of its own, the prevention of an imposition on its judicial system.³⁴

Since the Court, in interpreting the venue provision, has consistently recognized the right of states to regulate their own judicial systems,³⁵ it does not seem unreasonable to interpret the plaintiff's right to his choice of forum, referred to in the injunction cases, solely as a right to be free from interference by a state with no interest of its own in the choice of forum. So understood, the "right" would not be affected by a dismissal on forum non conveniens grounds, since here the state would be protecting its own interest³⁶ rather than simply weighing questions of fairness as between plaintiff and defendant.

Under this interpretation, the ruling in the *Mayfield* case, that states may use forum non conveniens according to their own local rules, would not be in conflict with the *Miles*, *Kepner* and *Pope* decisions. And since it is unlikely that the full effect of *Mayfield* has been undercut,³⁷ it seems that state courts are free to use forum non conveniens in FELA actions according to their own local rules³⁸ without being limited by the language of section 6, the venue provision.

³⁴ Some state courts have adopted forum non conveniens in FELA cases specifically to prevent imposition upon their own judicial systems. See, e.g., *St. Louis-San Francisco Ry. v. Superior Court*, 276 P.2d 773 (Okla. 1954); *Mooney v. Denver & R. G. W. R.R.*, 18 Utah 307, 221 P.2d 628 (1950). Cf. Mr. Justice Jackson's concurrence in *Miles v. Illinois Central R.R.*, 315 U.S. 698, 705 (1942).

³⁵ See, e.g., *Herb v. Pitcairn*, 325 U.S. 77 (1945) (permitting transfer of FELA action from state court without jurisdiction to another state forum having jurisdiction); *Smith v. Atlantic Coast Line R.R.*, 218 S.C. 481, 63 S.E.2d 311 (1951) (permitting transfer of FELA suit from one court to another within a state); *Ledbetter v. Sanford*, 212 Ark. 277, 205 S.W.2d 464 (1947) (holding state venue rules controlling in FELA actions). Cf. note 32 *supra*.

³⁶ The Utah Supreme Court appears to have applied forum non conveniens in FELA actions expressly for that purpose. *Mooney v. Denver & R. G. W. R.R.*, 18 Utah 307, 221 P.2d 628 (1950). The court said: "Only when the factors which establish there is a real imposition on our jurisdiction weigh strongly in favor of the defendant should the trial court deny to the plaintiff his choice of forum." *Id.* at 340, 647. Cf. *St. Louis-San Francisco Ry. v. Superior Court*, 290 P.2d 118 (Okla. 1956).

³⁷ See note 34 *supra*.

³⁸ The Supreme Court in *Gulf Oil v. Gilbert*, 330 U.S. 501, 508 (1947), has listed several criteria that courts may consider in determining whether a particular case should be dismissed. They are: "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility

II

Even though the position of the court in the *Cotton* case that section 6 limits state dismissals on forum non conveniens grounds appears ill-founded, one limitation may still be imposed upon a state court's usage of forum non conveniens. If forum non conveniens diminishes the federal substantive right created by section 1 of the FELA its use may be curtailed as a contravention of the sanctions of the supremacy clause.³⁹

In recent cases the Supreme Court has resolved questions of whether state procedures interfere with federal substantive rights by requiring adherence to a policy of "uniform application of the act."⁴⁰ The cases of *Brown v. Western Ry.*⁴¹

of view of premises, if view would be appropriate to the action; . . . relation [of the forum] to the litigation . . . interest in having localized controversies decided at home." The state courts in establishing their standard must be careful to comply with the holding of *Douglas v. New York, N. H. & H. R.R.*, 279 U.S. 377 (1929) that state courts may discriminate between residents and non-residents but not between citizens and non-citizens to avoid violation of the privileges and immunities clause of the Constitution.

Commentators have severely criticized the resident-citizen distinction as being "merely verbal." See, e.g., Meyers, *The Privileges and Immunities of Citizens of the Several States*, 1 MICH. L. REV. 286 and 364, 382 (1903); Barrett, *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380, 389 (1947); Comment, 18 CAL. L. REV. 159 (1930). It has been suggested that a sounder basis for the *Douglas* holding would be to interpret the privileges and immunities clause as forbidding only those discriminations that are unreasonable. *Ibid.* Cf. Barrett, *supra*, at 392-93. It has been further argued that if a state court invokes the forum non conveniens doctrine to prevent an imposition upon its judicial system that this would be a reasonable discrimination and not, therefore, a violation of the privileges and immunities clause. Comment, *supra*, at 164.

³⁹ The question of when state procedural rules infringe upon federal substantive rights has been the subject of much litigation. Examples of state rules that have been held to violate the federal substantive right are: *Davis v. Wechsler*, 263 U.S. 22 (1923) (local rule determining proper venue); *Chesapeake & O. R.R. v. Kelly*, 241 U.S. 485 (1916) (rules determining proper amount of damages); *Central Vt. Ry. v. White*, 238 U.S. 507 (1915) (rules allocating the burden of proof as to contributory negligence). Examples of state rules whose use has been permitted in federally created causes of action are: *Lee v. Central of Georgia Ry.*, 252 U.S. 109 (1920) (state rules as to joinder of parties); *Nevada-California-Oregon Ry. v. Burrus*, 244 U.S. 103 (1917) (amendment of answer); *Atlantic Coast Line R.R. v. Mims*, 242 U.S. 532 (1917) (assertion of a federal right must be done in accordance with state rules of practice and pleadings); *Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211 (1916) (less than unanimous jury verdicts).

Cf. *American Ry. Express Co. v. Levee*, 263 U.S. 19 (1923) (burden of proof); *Louisville & Nashville R.R. v. Holloway*, 246 U.S. 525 (1918) (rules for measuring damages); *Brinkmeier v. Missouri Pacific Ry.*, 224 U.S. 268 (1912) (amending of complaints).

See generally Hill, *Substance and Procedure in State FELA Actions—the Converse of the Erie Problem?*, 17 OHIO ST. L. J. 384 (1956); Note, *Railroads—F.E.L.A.—State Procedure in Derogation of Federal Right*, 25 TENN. L. REV. 301 (1958); Note, *State Pleading Rule Defeats Federal Right*, 2 STAN. L. REV. 594 (1950).

⁴⁰ *Brown v. Western Ry.*, 338 U.S. 294, 295 (1949). The notion of uniformity appears to have originated, for purposes of FELA actions, in *Brady v. Southern R.R.*, 320 U.S. 476 (1943). See Mr. Justice Frankfurter's opinion in *Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359, 369 (1952). Compare *Wilkerson v. McCarthy*, 336 U.S. 53 (1949) with *Brady v. Southern R.R.*, 320 U.S. 476 (1943), dealing with the problem of sufficiency of evidence to send a FELA case to a state jury. Cf. *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500 (1957); *Arnold v. Panhandle & Santa Fe Ry.*, 353 U.S. 360 (1957); Comment, 27 U. CHI. L. REV. 141 (1959).

⁴¹ 338 U.S. 294 (1949).

and *Dice v. Akron C. & Y. R.R.*⁴² indicate that the members of the Supreme Court have taken two divergent views of the meaning of "uniformity." Mr. Justice Frankfurter, dissenting in both *Brown* and *Dice*, maintained that since rules concerning adequacy of pleadings⁴³ and rules allocating judge-jury functions⁴⁴ would not cause a "substantially different result in the outcome of the litigation,"⁴⁵ state courts should be free in FELA actions to apply the local rule even though it does not conform to its federal counterpart. The majority, however, without disclosing their test of "uniformity" held that the state rules sufficiently diminished the federal right to require reversal. Since the majority requires state and federal rules to conform, even where the state rule does not produce a substantially different result, it seems undeniable that the majority would agree to the necessity for conformity of those rules that fall within the Frankfurter test because such local rules more clearly affect the federal substantive right.

Certainly a forum non conveniens dismissal will cause a substantially different result where the FELA statute of limitations⁴⁶ has run. Without an alternate open forum a dismissal would eliminate the plaintiff's right to bring his FELA action.⁴⁷ As a consequence, it is submitted that a forum non conveniens dismissal in this situation would be prohibited under the view of both the majority and Mr. Justice Frankfurter.⁴⁸ Since the doctrine of forum non conveniens "pre-

⁴² 342 U.S. 359 (1952).

⁴³ *Brown v. Western Ry.*, 338 U.S. 294 (1949).

⁴⁴ *Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359 (1952).

⁴⁵ *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). Mr. Justice Frankfurter, in his dissent in *Brown v. Western Ry.*, 338 U.S. 294, 299 (1949), seems to express the view that the problem of when state procedural rules infringe upon federal substantive rights is precisely the converse of the problem faced by federal courts in *Erie*—diversity situations. He strongly intimates that the *Guaranty Trust* test should be used to determine if state courts must conform their procedures to give full effect to federal rights. *Id.* at 301.

⁴⁶ "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." 35 Stat. 66 (1910), as amended, 53 Stat. 1404 (1939), 45 U.S.C. § 56 (1958).

⁴⁷ When the Supreme Court said that the doctrine of forum non conveniens "presupposes at least two forums in which the defendant is amenable to process" [*Gulf Oil v. Gilbert*, 330 U.S. 501, 506-7 (1947)], it could be argued that a dismissal when the statute of limitations had run in the alternate forums would be possible under the doctrine. It would seem, however, that the general trend of authority is to the contrary. Since the Court in *Gulf Oil v. Gilbert* did not know whether the statute of limitations had run at the time of dismissal, *id.* at 516-17, it would seem that the Court considered it irrelevant in a determination of the appropriateness of a forum non conveniens dismissal. There are at least two cases where a court has made a forum non conveniens dismissal when the statute of limitations had run in the alternate forums. *Running v. Southwest Freight Lines*, 227 Ark. 839, 303 S.W.2d 578 (1957). See Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405 (1955); Kaufman, *Transfer under the New Judicial Code*, 10 F.R.D. 595 (1951); Note, 56 MICH. L. REV. 439 (1958).

⁴⁸ The same statute has by incorporation become the statute of limitations under the Jones Act. See GILMORE & BLACK, *ADMIRALTY* 296 (1957). It appears that a similar development has been made under the Jones Act statute of limitations. *McAllister v. Magnolia Petroleum Company*, 357 U.S. 221 (1958).

supposes at least two forums in which the defendant is amenable to process,"⁴⁹ each of which must conform to the federal law to the same extent, a dismissal where the statute of limitations has not run would not cause a "substantially different result."⁵⁰

Even under the broad requirements of "uniformity" apparently required by the majority in *Brown* and *Dice*, state use of forum non conveniens would not appear limited when the statute of limitations has not run. In the *Dice* case the trial court by applying the peculiar state rule caused the plaintiff to lose a case he would otherwise have won.⁵¹ Although it cannot be said that the plaintiff would have won in the *Brown* case under the federal rule, it is clear that prior to the use of the local rule plaintiff had a reasonable chance of success. Application of the local rule, however, causing a decision on the merits, deprived plaintiff of this chance. Since theoretically plaintiff would have the same chance of success in one forum as another, it seems clear that a forum non conveniens dismissal would not have the effect of the rules in issue in the *Dice* and *Brown* cases.⁵²

But for the situation where the statute of limitations has run, the *Brown-Dice* "uniformity" requirements would appear to place no restrictions on state use of forum non conveniens. Assuming the FELA statute of limitations waivable,⁵³ it is submitted that even this restriction may be circumvented by granting defendant a conditional dismissal subject to defendant waiving statute of limitations objections in the alternate forum.⁵⁴

⁴⁹ *Gulf Oil v. Gilbert*, 330 U.S. 501, 506-7 (1947).

⁵⁰ Since the state courts must give full effect to the federal substantive right, an FELA plaintiff will get the same "bundle-of-rights" regardless of the state in which his action is brought.

⁵¹ At the trial level the judge initially sent the issue of fraud in the release to the jury. The jury returned a verdict for plaintiff. The judge then invoked the Ohio rule which provided that the judge determine issues of fraud in releases. By use of this rule the judge entered judgment for defendant notwithstanding the verdict.

⁵² Professor Hart, in analyzing *Brown v. Western Ry.*, 338 U.S. 294 (1949) and *Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359 (1952) suggests that the Supreme Court is distinguishing procedural from substantive rules by reasoning "backwards from the result of litigation to the basic premises of decision." Hart, *The Relations between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954). Professor Hart appears to be in concord with Mr. Justice Frankfurter when he suggest that the proper way to distinguish between substantive and procedural rules is to see if application of a particular rule will "affect advance calculations of outcome." *Ibid.* See Note, *Characterization of Forum Non Conveniens as Substantive or Procedural*, 32 MINN. L. REV. 633 (1948); Note, *Effect of State Rules of Forum Non Conveniens under Erie v. Tompkins*, 14 U. CHI. L. REV. 97 (1946).

⁵³ This question does not seem to have been litigated. At least one authority states the view that the FELA statute of limitations is jurisdictional and as a consequence cannot be waived GILMORE & BLACK, ADMIRALTY 299 (1957).

⁵⁴ The following are cases in which a forum non conveniens dismissal has been granted conditioned upon waiver of statute of limitations objections in the alternate forum: *Buekley, Dunton Paper Co. v. The Rio Salado*, 67 F. Supp. 115 (S.D.N.Y. 1946); *Wendel v. Hoffman*, 258 App. Div. 1084, 18 N.Y.S.2d 96 (2d Dept. 1940); *Vargas v. A. H. Bull S.S. Co.*, 44 N.J. Super. 536, 552, 131 A.2d 39, 48 (L. 1957); *Rodriguez v. A. H. Bull S.S. Co.*, 143 N.Y.S.2d 618 (App. Div. 1955) (memorandum decision). Compare *Libby, McNiell & Libby v. Bristol City Line*, 41 F. Supp. 386 (S.D.N.Y. 1941) (dismissal conditioned upon defendant waiving defense of delay). See also Note, 60 HARV. L. REV. 908, 931-32; Note, 43 MINN. L. REV. 1199, 1201 (1959).