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Thomas B. Mooney v. The Denver and Rio Grande Western Railroad Company : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

THOMAS B. MOONEY,
Plaintiff and Appellant,

VS.

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY,
Defendant and Respondent.

Case No.
7373

BRIEF OF RESPONDENT

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1919

CLERK, SUPREME COURT, UTAH

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THOMAS B. MOONEY,
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Defendant and Respondent.

} Case No.
7373

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Although the appellant's "statement of case" includes some of the facts, it is argumentative in form, and misstates and omits many important parts of the record. It is necessary, therefore, for respondent to restate to some extent the facts outlined by appellant and also to set forth the omitted references.

The plaintiff, Thomas B. Mooney, a citizen and resident of the City and County of Denver, Colorado, filed a complaint in this case in the Third Judicial District Court of Salt Lake County, State of Utah, on May 31, 1949 (R. 1-6). The complaint named as defendant, The Denver and Rio Grande Western Railroad Company, a foreign corporation authorized to do business in the State of Utah. The plaintiff alleged a cause of action under the Federal Employers' Liability Act, 45 U. S. C. A. Sec. 51, and the Safety Appliance Act, 45 U. S. C. A. Sec. 11, on account of an accident and injuries occurring in the State of Colorado on January 5, 1949 (R. 1-2). In response to this complaint, the defendant filed a Motion to Dismiss upon the basis of *forum non conveniens* (R. 9-15). The Motion to Dismiss was filed June 20, 1949, and set forth the grounds for dismissal in considerable detail, and in addition was supported by an affidavit of counsel covering substantially the same factual allegations (R. 12-15). Thereafter, plaintiff's counsel "noticed" for hearing the Motion to Dismiss before the trial court at 2:00 P. M. on June 27, 1949 (R. 16). During the noon hour (R. 41) on the same day as the scheduled hearing, plaintiff served upon defendant's counsel a document entitled "Answer In Opposition To Motion To Dismiss" (R. 17), which admitted and denied various of the facts set forth in the affidavit supporting the defendant's motion.

At the scheduled hearing at 2:00 P. M. that day, counsel for defendant called to the attention of the trial court the fact that plaintiff had only just served a counter affidavit apparently traversing the facts contained in de-

defendant's affidavit, and the trial court was asked to continue the hearing to a later date in order that the defendant might present witnesses to support its position (R. 41). In the alternative, defense counsel indicated his willingness to proceed at once by testifying himself to the facts contained in the defendant's affidavit upon the basis of information and belief, provided plaintiff's counsel would waive objections to the competency of such proof (R. 41). Mr. B. E. Roberts, one of the attorneys for the plaintiff, immediately replied that he had "no objection to that at all" (R. 41). On the basis of this understanding, Mr. Clifford L. Ashton, one of the attorneys for the defendant, thereupon took the witness-stand and upon the basis of information and belief, testified as follows (R. 41-53) :

That he was one of the attorneys representing the defendant; that he had signed the defendant's affidavit in support of the Motion to Dismiss (R. 41). In order for the defendant to present its position at the trial of the case, it would be necessary to bring to Salt Lake City from Colorado an estimated number of ten witnesses; that these witnesses consisted of the train crew members and three doctors who had examined the plaintiff (R. 42). All ten witnesses resided in Colorado within convenient distance to both federal and district courts located in Denver, Colorado; that both of such courts in Denver had jurisdiction of the cause of action alleged by the plaintiff. Denver was located approximately 570 miles from Salt Lake City. The Colorado witnesses referred to, including the three doctors (and there might be four doctors, depending on the plaintiff's case) could not be compelled to come to Salt Lake City

to testify. No process was available to the defendant to compel the attendance of these witnesses; that their attendance could be obtained only by meeting their own terms of compensation and expense allowances. The cost of procuring the personal attendance of these witnesses in Salt Lake County would be expensive and burdensome to the defendant, and would represent costs which could not be recovered by the defendant even in the event defendant were successful in the defense of the action (R. 43). If the witnesses resided within the jurisdiction of the courts of the Third Judicial District of Salt Lake County, the defendant could subpoena them and the amount which would be paid them as witnesses would be the amount permitted by the state law and would be recoverable in the event the defendant should win the suit, but if the defendant had to bring these witnesses from Colorado on their own terms, they could not be secured for a trial in Salt Lake City except by paying them a reasonable amount per day, plus travel expenses and other costs. The present case could not be adequately or understandingly tried without the presence of the ten witnesses referred to. It would be unsatisfactory substitute for these witnesses to use depositions taken in another state, because the jurors and the court can not see the witnesses or determine their credibility and the weight which should be given to their testimony (R. 44). If this case were tried in Salt Lake City instead of Colorado where the accident occurred, it would be impossible for the jury to view the Safety Appliance equipment allegedly involved in the accident, and it might become very material at the trial for the jury to examine this equipment. Of course, the

equipment located and maintained in Colorado might be brought to Salt Lake City, but it would be an added expense not recoverable by the defendant (R. 44). Of the ten witnesses desired by the defendant, at least three are practicing physicians and doctors who reside in Colorado; that these doctors are not employed by the defendant, but by an association of railroad employees. The defendant has no control over these doctors by reason of their employment relationship. The defendant can not secure the presence of these doctors in Salt Lake City without meeting their professional terms (R. 45). The defendant estimates that the cost of obtaining the attendance of the ten witnesses referred to, of transporting them to Salt Lake City and of paying their travel and maintenance expenses and compensating them for their services would approximate \$1,500; that the witness asked his office to prepare an estimate of this cost for him, and the estimate prepared was slightly larger than the figure of \$1,500, but in order to be within a safe limit, the witness reduced the estimate to \$1,500 (R. 45). In addition, the trial of this case in Salt Lake County would further add to the congestion of the calendar of that court and would delay the trial of cases involving local residents and citizens and local problems of pressing importance (R. 46); that the court was more informed about this congestion than the witness and probably would take judicial notice of it. It was a fact at the present time that the trial courts hearing cases in the District Court of Salt Lake County were unable to handle all the cases set. The taxpayers of this state were required to wait an undue length of time for cases to be tried, because many cases were

brought into this jurisdiction from outside the state, that is, the cases were brought from another state where the alleged accident happened and where all the witnesses resided. The local juries of this state were required to bear the burden of jury service in a controversy which had no relationship to this state or community, and the courts of this state were required to pay the expense of litigation far removed from the point of its origin (R. 47).

Upon cross examination by plaintiff's counsel, the witness Ashton further testified: That the defendant's Claim Department in Colorado had made an investigation of this case and had referred to the attention of the witness' office the names of all witnesses present at the time of the plaintiff's alleged accident, who saw the equipment alleged to be defective, and who talked to the plaintiff immediately before and after his alleged injury (R. 48). The witness was unable to state the names of the ten witnesses at the moment, because the claim file had been returned to Denver, but it would be quite easy to secure the names from Claim Department in Denver. The ten witnesses referred to all were witnesses to things material to the case; that the seven train crew witnesses would testify to the condition of the alleged defective brake and the alleged unsafe condition of the equipment where the brake was located; that all seven witnesses were present and were able so to testify. Whether all seven witnesses will be called to testify would depend a great deal on the testimony produced by the plaintiff; that defendant certainly would have to have the witnesses present at the trial until after the plaintiff had rested his case (R. 49). The witness could not state the names of the

three doctors required as witnesses, but their names were easily obtainable; that the doctors would testify to their examination of the plaintiff. Their testimony might be cumulative, but as a matter of fact the witness thought it would not be (R. 50). The claim file now in Denver had been examined by the witness before he prepared the affidavit in support of the Motion to Dismiss. The three doctors mentioned saw the plaintiff on different occasions; that the defendant would not want to try this case without having all three doctors present in court so that they could be called as witnesses in the event it became necessary (R. 51). It was not true that the only difference between trying the case in Denver instead of Salt Lake, so far as costs were concerned, consisted of the matter of transportation. Whenever railroad employees were brought from Colorado to the State of Utah to testify they were paid not only the amount of money they would have earned if they had worked that day, but also a reasonable amount to compensate them for food and lodging while in Salt Lake; that in every case the wages they would have earned at their regular employment would be larger than the statutory witness fee (R. 51). Of course, the defendant would have to pay the wages of employees called as witnesses even if the case were tried in Denver, but certainly three or four days time would be saved if the case were tried in Denver (R. 52). The doctors would have to be paid their professional fee while absent from Denver, and three or four days consumed in travel and waiting upon a trial can cost a lot of money with doctors. It was the witness' understanding that a doctor called as a witness

received \$50 a day from the time he left Colorado until he returned. The defendant had been able to secure doctors as witnesses in other cases if these terms were met; the same was true of employee witnesses; that depositions of out of state witnesses could be taken (R. 52).

No evidence or testimony of any kind was offered on behalf of the plaintiff at the hearing (R. 53). The denials and allegations contained in the plaintiff's "Answer In Opposition To Motion To Dismiss" were not supported in any manner. The controverted factual and legal questions were then argued to the trial court by counsel for both parties (R. 53). Thereafter, the trial court granted the defendant's Motion to Dismiss (R. 53). Two days later, on June 29, 1949, the court entered its Findings of Fact and Conclusions of Law (R. 21-27). The Findings of Fact found the controverted factual issues in favor of the defendant, substantially as set forth in defendant's supporting affidavit and as testified to at the hearing by defendant's counsel. The trial court's Findings of Fact and Conclusions of Law were as follows (R. 21-26) :

"The above entitled matter coming on regularly to be heard before the above entitled court on the 27th day of June, 1949, upon the defendant's motion to dismiss the complaint of the plaintiff on file herein, and upon the plaintiff's answer in opposition to the said motion to dismiss. The defendant introduced evidence in support of the issues raised by its affidavit in support of its motion and by plaintiff's answer thereto. No evidence was offered or introduced by the plaintiff. The court having fully considered the pleadings, the evidence, and the arguments of counsel for the respective parties, and being fully

advised in the premises, now makes and enters its Findings of Fact and Conclusions of Law as follows:

“FINDINGS OF FACT

“1. Clifford L. Ashton is one of the attorneys for the defendant The Denver and Rio Grande Western Railroad Company, and in such capacity is familiar with the facts and circumstances connected with the above entitled cause of action filed by the plaintiff herein.

“2. The cause of action referred to in the plaintiff's complaint and on account of which damages are claimed by the plaintiff, arose out of an alleged accident and alleged injuries which occurred on January 5, 1949, in the State of Colorado. The plaintiff named in said complaint is now and at the time of the alleged accident and injuries was a citizen and resident of the City and County of Denver, State of Colorado.

“3. The defendant, The Denver and Rio Grande Western Railroad Company, is a citizen of the State of Delaware, but operates a line of railroad in Colorado and Utah. The defendant's general offices and headquarters are located in Denver, Colorado, and the major portion of its business is located in and carried on within the State of Colorado. Defendant does business within the State of Utah only as a foreign corporation.

“4. Plaintiff's alleged cause of action is brought under the provisions of the Federal Employers' Liability Act, 45 U. S. C. A. Sec. 51, and the Safety Appliance Act, 45 U. S. C. A. Sec. 11, et seq. Both federal and state courts are located within the City and County of Denver, Colorado, and at other convenient places in the State of Colorado, and said courts are open and have jurisdiction to entertain and adjudicate the plaintiff's alleged present cause of action if said cause of action were filed in the courts of Colo-

rado, and the general law applicable to the determination of plaintiff's alleged cause of action is the same in Colorado as it is in the State of Utah.

"5. In order to try plaintiff's alleged cause of action in the Third Judicial District Court of Salt Lake County at Salt Lake City, Utah, it would be necessary for the plaintiff to travel to Salt Lake City, Utah, from Denver, Colorado, where he now resides. In order for the defendant properly to defend said action and present all the facts at a trial of the case in Salt Lake City, Utah, it would be necessary for the defendant to bring to Salt Lake City, Utah, from the State of Colorado, an estimated number of ten witnesses. Each and all of these ten witnesses now and at all times mentioned in the plaintiff's complaint reside in and are citizens of the State of Colorado and reside within a convenient distance to courts located in the City and County of Denver, Colorado. Denver, Colorado, is located approximately 570 miles from Salt Lake City, Utah.

"6. The aforesaid necessary witnesses for the defendant cannot be compelled by judicial process to come to Salt Lake City, Utah, and to testify in the trial of this case and their attendance at a trial in Salt Lake City can be obtained only by meeting their own terms of compensation and expense allowances. The cost of procuring the personal attendance of such witnesses in the courts of Salt Lake County will be expensive and burdensome to the defendant. The major portion of such costs cannot be recovered by the defendant, even in the event the defendant should be successful in the defense of the plaintiff's action. The testimony of these necessary witnesses residing in the State of Colorado cannot be adequately presented and made intelligible to a jury, except by oral testimony and explanation in the court room at the time of trial. Such testimony cannot be adequately or understandably presented by witnesses testify-

ing by deposition only or through written interrogatories, because of the inability of jurors to determine intelligently the credibility of such unseen witnesses. Under such circumstances, testimony and evidence by deposition is frequently disregarded or given scant consideration by jurors, even though such testimony might be given full weight if presented orally in the presence of the jury. Moreover, trial of this case in Salt Lake City, Utah, instead of in the State of Colorado where the alleged accident occurred, would prevent a view by the jury of the premises, facilities and instrumentalities involved, and thereby would encourage and facilitate confusion, distortion and misrepresentation of the pertinent facts incident to the claims of both the plaintiff and the defendant.

"7. Of the estimated ten necessary witnesses for the defendant, who reside in or near Denver, Colorado, at least three of said witnesses are practicing physicians and doctors. The other seven witnesses are railroad employees. The physicians and doctors mentioned are actively engaged in their practices and it would be difficult for the defendant to persuade them to leave their practices, except upon the promise of substantial fees and remuneration. The estimated cost to the defendant of transporting these ten necessary witnesses to Salt Lake City, Utah, of paying their travel and maintenance expenses, of compensating them for their services while absent from their usual occupations, and of compensating other persons to substitute for them in their customary occupations, would amount to approximately \$1500.-00. The major portion of this expense could not be recovered by the defendant in its cost bill, even in the event the defendant were successful in the defense of this action. The burden of assuming this unnecessary cost and expense, places an undue and unfair hardship and disadvantage upon the defendant.

"8. The trial of this case in this court will further add to the congestion of an already badly congested and crowded calendar in this court, and will interfere with the orderly and efficient administration of justice in this court. The calendar of cases set in the Third Judicial District Court of the State of Utah in and for Salt Lake County for the month of June, 1949, shows that a total of 165 civil cases are at issue and set for trial. Only about half of this total of cases can or will be disposed of by this court during the month of June. The crowded condition of the calendar also has necessitated the assignment of an extra judge to this court from another Judicial District of the state. The court calendar for the single month of June, 1949, also indicates that of the total number of civil cases assigned for trial, 29 cases involve personal injury suits against three different railroad companies operating in the State of Utah. Of this number, 17 cases were brought by non-resident plaintiffs, suing on actions arising outside the State of Utah. In all 17 cases, the non-resident plaintiffs are represented by the same law firm located in Salt Lake City, Utah. The trial of this case in this court will delay the trial of cases involving local residents and citizens and local problems of pressing importance. The trial of this and similar cases arising out of events occurring in a state other than Utah, and between parties who are non-residents of Utah, increases the administrative costs of local courts of Utah to the detriment of the citizens and taxpayers of Utah, without the citizens and taxpayers of Utah securing any commensurate benefits. Also, local juries of Utah are required to bear the burden of service in a controversy which bears no relationship to their State and community. The courts of the State of Utah are required to pay the expense and bear the burden of litigation far removed from its point of origin.

"9. The plaintiff's alleged cause of action can conveniently be tried in the courts of Colorado, where the accident complained of occurred, where the plaintiff now resides, where defendant has its headquarters and general offices, where all the necessary witnesses reside, and where the instrumentalities involved in connection with the alleged accident can be viewed more readily.

"Pursuant to the foregoing Findings of Fact, the court now draws the following

"CONCLUSIONS OF LAW

"1. This court has jurisdiction of the above entitled action, but it is not mandatory upon the court to accept such jurisdiction.

"2. It is within the inherent power of this court in its discretion to decline jurisdiction of litigation on the basis of *forum non conveniens* between two non-residents when its acceptance will and does interfere with its orderly and efficient administration of justice, unnecessarily burdens the court, places an unfair burden upon one or the other of the parties to the litigation, and when such litigation can be conducted in an available forum in the state of plaintiff's residence and where the accident occurred, which is more conveniently located for the parties, and where the elements of undue cost, vexation, frustration and harassment to the parties do not exist.

"3. Defendant is entitled to have made and entered herein an order granting its motion to dismiss the complaint of the plaintiff on file herein, without prejudice to the right of the plaintiff to re-commence or prosecute the same in any suitable or convenient forum other than the above entitled court."

It will be noted that the foregoing Findings of Fact follow the defendant's affidavit in support of defendant's

Motion to Dismiss and the testimony of defendant's counsel at the hearing, except for certain additional findings in paragraph 8 with respect to the congested condition of the calendar in the Third Judicial District Court for Salt Lake County (R. 24-25). At the hearing on the Motion to Dismiss, the trial court was requested to take judicial notice of the condition of the court calendar (R. 46). In compliance with such request, at the time the trial judge ruled on the motion, he specifically stated that he would take judicial notice of the crowded condition of the calendar, adding that that was the reason why he, a judge from another judicial district, was present in Salt Lake for a three-day period (R. 53). The Findings of Fact contained in paragraph 8 are matters of public record, ascertainable from the records in the Clerk's office of the Third Judicial District Court for Salt Lake County.¹

After the trial court had signed its Findings of Fact and Conclusions of Law, it thereafter entered on the same day its formal Order, dismissing the plaintiff's complaint without prejudice (R. 27). The next day, June 30, 1949, the plaintiff served and filed a document entitled "Objections to Findings of Fact and Conclusions of Law" (R. 28-33). At no time did the plaintiff ever "notice" for hearing his so-called "Objections" or request a ruling thereon by the trial court. Instead, on the following day, July 1, 1949, plaintiff served and filed a self-serving affidavit, intimat-

¹Courts of this state will take judicial notice of facts of public record. See *Utah Code Anno.* (1943), 104-46-1 (3), and *Lehi Irr. Co. v. Jones*, ... Utah ..., 202 P. (2d) 892, 895. In *State v. Bates*, 22 Utah 65, 68, 61 P. 905, it was said that "courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction."

ing that the trial judge had signed the Findings of Fact and Conclusions of Law at a different time than had been indicated in some previous conversation which allegedly had taken place between plaintiff's counsel and the court. Of course, the defendant had no knowledge of any such *ex parte* conversations either then or now. At no time did the plaintiff ask for any kind of reconsideration of the trial court's Findings of Fact and Conclusions of Law, nor at any time did the plaintiff request any ruling or disposition of the document entitled "Objections to the Findings of Fact and Conclusions of Law." Instead, at the same time and on the same day as plaintiff's affidavit was served, the plaintiff filed its Notice of Appeal in this case (R. 36).

Throughout his brief the appellant makes many statements of alleged fact which are either entirely outside of or contrary to the record in this case.

On page 5 of his brief, appellant attributes to the witness Ashton the statement that it would cost in excess of \$1,500 to bring the three doctor witnesses from Denver to Salt Lake City. To the contrary, both the affidavit in support of the motion to dismiss which was signed by Ashton (R. 14) and Ashton's oral testimony at the hearing made it clear that the figure of \$1,500 represented the estimated cost of bringing ten witnesses, including the three doctors, to Salt Lake City (R. 45-46). This estimated cost included items of expense consisting of transportation, maintenance and compensation for services (R. 45).

On page 22 of his brief, appellant states that the document entitled "Objections to Findings of Fact and Con-

clusions of Law” was *supported* by an affidavit of counsel, Brigham E. Roberts. The fact, as shown by the record, is that this affidavit was served the day following the day on which the “Objections” were served (R. 33, 35). The affidavit was filed along with the plaintiff’s Notice of Appeal (R. 36). The obvious purpose of this affidavit was not to *support* the “Objections to the Findings of Fact and Conclusions of Law” but rather to make prejudicial and self-serving statements for inclusion in the record on appeal. The affidavit contains factual allegations entirely outside the record, including various innuendos and charges concerning the conduct of the trial judge. This material then was included in the record on appeal, in a manner designed to exclude both the trial judge and defendant from replying thereto.

On pages 58, 110 and 117 of his brief, appellant inserts statements contradicting the fact that Judge Hendricks was holding court in the Third Judicial District because of the congested condition of the trial calendar in Salt Lake County. How and where appellant obtains his intimate knowledge concerning the internal affairs of the Third Judicial District Court is not revealed. The facts of record in this case are certainly entirely to the contrary. The transcript of the testimony at the hearing, indicates that Judge Hendricks was sitting in Salt Lake County “upon written invitation” (R. 40), and at the time of ruling upon the defendant’s Motion to Dismiss, Judge Hendricks stated that he would “take judicial notice of the crowded condition of the Salt Lake calendar” adding, “that’s why I am here today and Saturday and another day” (R. 53).

Again, on pages 58 and 110, the appellant criticizes what he terms the "summary" action of the trial court in ruling "without argument or presentation of authority." But again, the record reveals that both sides were given full opportunity to present any and all testimony desired (R. 53). The record further indicates that counsel for the parties argued the issues to the court, even though the reporter did not transcribe the arguments (R. 53). The trial court thereafter ruled on the pending motion. Appellant's real objection, of course, is not based upon either the adequacy or propriety of the hearing before the trial court, but rather upon the fact that the ruling was contrary to his position.

ARGUMENT

I.

THE FEDERAL EMPLOYERS' LIABILITY ACT DOES NOT REQUIRE STATE COURTS TO ENTERTAIN SUITS ARISING UNDER THE ACT.

The venue provision of the Federal Employers' Liability Act is contained in Section 6 of the Act. It provides as follows:

"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." (As amended June 25, 1948, 45 U. S. C., Sec. 56.)

It is to be noted that the foregoing section contains detailed venue provisions with respect to actions brought in the federal courts. The section contains no such provisions with respect to actions brought in the state courts, but merely presupposes the existence of jurisdiction in the courts of the several states. Since the venue privilege prescribed by Section 6 is limited to federal courts, it necessarily follows that the venue of such actions in state courts is controlled by local state law. *Barton v. Delaware, L. & W. R. Co.*, 218 App. Div. 748, 218 N. Y. S. 171. For this reason, cases dealing with the compulsive duty of federal courts to entertain jurisdiction of actions under the Federal Employers' Liability Act must be distinguished from authorities involving the question whether state courts may for good reason decline to exercise jurisdiction of such actions.

The importance of this distinction is recognized in an annotation in 158 A. L. R. 1022, 1025, 1033, which points out that cases holding state courts have the power to decline jurisdiction of an action under the Federal Employers' Liability Act are not authoritative upon the same question with respect to federal courts, and vice versa. To the same effect is *Southern Ry. Co. v. Cochran*, 56 F. (2d) 1019, 1020 (C. C. A. 6) holding that although a federal court could not refuse to exercise jurisdiction of a case arising under the Act, a contrary rule exists with respect to such an action in a state court, the opinion stating: "Authorities holding that state courts may by reason of local law under like circumstances in their discretion refuse to entertain a suit under the Act are not controlling, for the statute does not impose a duty upon state courts as against a valid excuse,

but rather confers a power." The principle also was affirmed by Mr. Justice Holmes in *Douglas v. New York, N. H. & H. R. Co.*, 279 U. S. 377, 387, 388, 49 S. Ct. 355, 356, in the following language:

"As to the grant of jurisdiction in the Employers' Liability Act that statute does not purport to require State Courts to entertain suits arising under it but only to empower them to do so, so far as the authority of the United States is concerned . . . there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse."

The above quotation was reiterated with approval by the United State Supreme Court in the recent case of *Herb v. Pitcairn*, 324 U. S. 117, 120, 65 S. Ct. 459, 461.

It is now a well settled proposition that Section 6 of the Federal Employers' Liability Act, as amended, was not intended to, and does not, impose a duty upon a state court to exercise jurisdiction under the act, merely because a state court has properly acquired jurisdiction of the person of the defendant:

Murnan v. Wabash Ry. Co., 246 N. Y. 244, 158 N. E. 508, 54 A. L. R. 1522, (reversing 220 App. Div. 218, 221 N. Y. S. 332).

Douglas v. New York, N. H. & H. R. Co., 279 U. S. 377, 49 S. Ct. 355.

Herb v. Pitcairn, 324 U. S. 117, 65 S. Ct. 459.

Ex Parte Crandall, 53 F. (2d) 969, affirming 52 F. (2d) 650, cert. denied 285 U. S. 540, 52 S. Ct. 312.

Loftus v. Pennsylvania R. Co., 107 Ohio St. 325, 140 N. E. 94, writ of error dismissed, 266 U. S. 639, 45 S. Ct. 97.

Walton v. Pryor, 276 Ill. 563, 115 N. E. 2, writ of error dismissed, 245 U. S. 675, 38 S. Ct. 10.

Note (1945) 158 A. L. R. 1022.

44 *Harvard Law Review*, 41.

39 *Yale Law Journal*, 388, 391.

56 *Yale Law Journal*, 1234.

29 *Journal of the Am. Jud. Soc.*, 135, 146.

In *Murnan v. Wabash Ry. Co.*, *supra*, an action was brought under the Federal Employers' Liability Act in a state court of New York by a resident of Connecticut against an Indiana railroad corporation for alleged injuries sustained in Michigan. Even though a state statute conferred discretion upon the state court to refuse to entertain jurisdiction over a cause of action arising out of a tort committed in a sister state where both parties were non-residents, the Appellate Division of the State Supreme Court interpreted the *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*), 223 U. S. 1, 32 S. Ct. 169, as requiring a holding that the Federal Employers' Liability Act made it mandatory upon the state courts of New York to exercise jurisdiction in any case brought under the Act. But upon appeal of the case, the New York Court of Appeals, speaking through Justice Pound with the concurrence of a unanimous court including Chief Justice Cardozo, took exactly the opposite view. The court said:

"That Congress has undertaken to regulate the exercise of jurisdiction by our courts by making compulsory what in other similar cases is discretionary seems an unreasonable conclusion and a resulting invasion of the powers of our tribunals as heretofore

exercised. We conclude that a litigant who brings his action under the federal Employers' Liability Act stands before the court in no different attitude than a litigant who brings his action under the statute of a sister state. He may not be cast out because he is suing under the act of Congress. He may not enforce his rights merely because he is suing under the act."

Justice Pound further pointed out that the *Mondou case* was authority for the bare proposition that state courts may not refuse to exercise jurisdiction merely because the right of action arose under a federal statute. It was emphasized, however, that in all cases state courts should act in conformity with their own general principles of practice and procedure.

The decision in the *Murnan case* was challenged in *Douglas v. New York, N. H. & H. R. Co., supra*, upon the grounds that the discretionary power asserted by the New York courts under state law, violated the privileges and immunities clause of the Federal Constitution and also was repugnant to the jurisdictional provisions of the Federal Employers' Liability Act. The United States Supreme Court through Mr. Justice Holmes rejected both of these arguments, stating:

"Construed as it has been and we believe will be construed the statute applies to citizens of New York as well as to others and puts them on the same footing. There is no discrimination between citizens as such, and none between nonresidents with regard to these foreign causes of action. A distinction of privileges according to residence may be based upon rational considerations and has been upheld by this Court, emphasizing the difference between citizen-

ship and residence. * * * There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned.

"As to the grant of jurisdiction in the Employers' Liability Act that statute does not purport to require State Courts to entertain suits arising under it but only to empower 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."

The proposition that the Federal Employers' Liability Act presents no obstacle so far as state courts are concerned, to proceed in accordance with their own modes of procedure and practice, recently was reaffirmed by the United States Supreme Court in *Herb v. Pitcairn, supra*. That case involved two separate actions under the Federal Employers' Liability Act initially filed in one of the city courts of Illinois. Judgments for the plaintiffs were obtained but in both cases the verdicts were later set aside. Before retrial of the cases, the Illinois Supreme Court handed down a decision holding that city courts of the state were without jurisdiction in any case where the cause of action arose outside of the city where the court was located. Both of the pending cases fell within this prohibition. Thereafter, the plaintiffs moved for a change of venue to the Circuit Court of the State. The city court granted the motions and transferred the cases. Defendants then ap-

peared in the Circuit Court and moved for dismissal on the grounds that the proceedings in the city court were void, that the city court had no power to transfer venue of the cases, and that since no action had been commenced in a court of competent jurisdiction, the statute of limitations of the Federal Act had run against the actions. The Circuit Court granted the defendants' motion to dismiss in both cases. The Supreme Court of Illinois affirmed and the cases then were appealed to the United States Supreme Court. There, the plaintiffs below claimed that the state law as interpreted by the Illinois Supreme Court was discriminatory and unlawfully interfered with rights conferred by the Federal Employers' Liability Act. In rejecting these contentions, Mr. Justice Jackson, speaking for the majority of the Court, said :

"Whether any case is pending in the Illinois courts is a question to be determined by Illinois law, as interpreted by the Illinois Supreme Court. For as we have said of the Federal Employers' Liability Act, 'we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those 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.' *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 56, 57, 32 S. Ct. 169, 178, 56 L. Ed. 327, 38 L. R. A., N. S., 44. 'As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State

Courts to entertain suits arising under it but only to empower them to do so, so far as the authority of the United States is concerned . . . But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse.'

* * *

" . . . It would not be open for us to say that the state in setting up a local court could not limit its jurisdiction to actions arising within the city for which it is established.

* * *

" . . . We think that the Supreme Court [of Illinois] probably has decided that as a matter of Illinois law no action is pending against these defendants in any court and that all of the proceedings have been of no effect whatever.

"The freedom of the state courts so to decide is, of course, subject to the qualification that the cause of action must not be discriminated against because it is a federal one. *McKnett v. St. Louis & S. F. R. Co.*, 292 U. S. 230, 54 S. Ct. 690, 78 L. Ed. 1227. But we cannot say that the court below, in so far as it did hold the city courts without power, construed the state jurisdiction and venue laws in a discriminatory fashion."

The rule of the *Douglas case*, the *Herb case* and of the other authorities above cited is in no way inconsistent with the true import of *Baltimore & O. R. Co. v. Kepner*, 314 U. S. 44, 62 S. Ct. 6, and *Miles v. Illinois Central Railroad Company*, 315 U. S. 698, 62 S. Ct. 827. In the *Kepner case*, it was held that a state court of Ohio had no power to enjoin the prosecution of an action under the Federal Employers' Liability Act in the federal district court for the eastern district of New York. The decision rests upon the venue

privilege with respect to actions brought in federal courts created by Section 6 of the Federal Employers' Liability Act. As heretofore pointed out, that section confers special privileges upon plaintiffs so far as actions in the federal courts are concerned, but leaves venue problems in state courts under the control of the local law, either statutory or judge-made. The opinion in the *Kepner case* in no way involved the discretionary power of a state court to dismiss an F. E. L. A. action upon the grounds of *forum non conveniens*. Moreover, since enactment of 28 U. S. C. Sec. 1404 (a) and the decision of the United States Supreme Court in *Ex Parte Collett*, — U. S. —, 69 S. Ct. 944, the holding of the *Kepner case* has been vitiated with respect to its application to an action brought in a federal court under the Federal Employers' Liability Act.

In *Miles v. Illinois Central R. Co.*, *supra*, the United States Supreme Court reversed the judgment of a Tennessee state court enjoining a resident widow from prosecuting an action for her husband's death in a Missouri state court. The basis of the decision was that even though a state may by reason of its control over its own courts refuse to open them to an action under the Federal Employers' Liability Act, it does not follow that still another state (Tennessee) has the power to close by injunction the courts of the former state (Missouri) to a plaintiff with a cause of action arising under a federal statute. The Supreme Court expressly held that it was not dealing "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* cases." In the course of Mr. Justice Reed's

majority opinion (concurred in by only two other justices) the statement was made that "the Missouri Court here involved must permit this litigation," since "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." But it is manifest that Mr. Justice Reed did not intend by this statement to announce that a state court could not decline jurisdiction of a transitory cause of action under the Federal Employers' Liability Act, when empowered by local law as expressed by judicial decision or legislative enactment. This is made clear by footnote 6 to the opinion, which states:

"Chambers v. Baltimore & O. R. Co., (1907) 207 U. S. 142, 52 L. Ed. 143, 28 S. Ct. 34, or Douglas v. New York, N. H. & H. R. Co., (1929) 279 U. S. 377, 13 L. Ed. 747, 49 S. Ct. 355, do not impinge upon this principle. In the former case, an Ohio statute forbade suits in its courts for wrongful death occurring in another state unless the decedent was a citizen of Ohio. This court saw no discrimination against personal representatives of any decedent since their right to sue did not depend upon their citizenship but upon the citizenship of their decedent. In the latter case a statute of New York, which gave only discretionary jurisdiction to suits by nonresidents but compulsory jurisdiction to suits by residents was held valid because it treated citizens and noncitizens alike and tested their right to maintain an action by their residence or nonresidence."

Furthermore, a majority of the justices (Mr. Justice Jackson in a concurring opinion and Mr. Justice Frankfurter in a dissenting opinion joined in by the Chief Justice and by Justices Roberts and Byrnes), specifically disagreed with

the statement in Mr. Justice Reed's opinion that "the Missouri Court here involved must permit this litigation." Mr. Justice Jackson said: "I do not, however, agree with the statement in Mr. Justice Reed's opinion that the 'Missouri Court here involved must permit this litigation.' It is very doubtful if any requirement can be spelled out of the Federal Constitution that a state must furnish a forum for a nonresident plaintiff and a foreign corporation to fight out issues imported from another state where the cause of action arose." The concurring opinion also criticized the system whereby a plaintiff is allowed to go "shopping for a forum," adding that the judiciary has never favored the practice of seeking out "soft spots" in the judicial system in which to bring particular kinds of litigation. Mr. Justice Frankfurter went even further, saying: "Moreover, the Constitution would not prevent Missouri from declining to entertain a suit to vindicate a Federal right, such as was brought here, if an action to enforce a similar non-Federal right would also not lie in her courts. The availability of state courts for the enforcement of Federal rights has not resulted in putting Federal rights on any different footing from state rights. 'A state may not discriminate against rights arising under Federal law,' *McKnett v. St. Louis & S. F. R. Co.*, (1934) 292 U. S. 234, 78 L ed 1229, 54 S. Ct. 690, but neither the Constitution nor Congress has compelled the states to discriminate in favor of Federal rights. And this court has expressly held that the rights created by the Federal Employers' Liability Act are not different in this respect, from other Federal rights."

Much of appellant's brief is devoted to an argument that for a state court to decline jurisdiction of an F. E. L. A.

action would violate the privileges and immunities provision of the Federal Constitution. It is respectfully submitted that this argument definitely was laid at rest by the decision of the United States Supreme Court in *Douglas v. New York, N. H. & H. R. Co.*, *supra*, and the subsequent cases herein cited. The various cases referred to in appellant's brief are fully reconcilable with respondents' position that state courts are not required to entertain such suits "as against an otherwise valid excuse." For example, the appellant places great reliance upon the *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 32 S. Ct. 169, but the doctrine of that case was fully reviewed and interpreted in *Murnan v. Wabash R. Co.*, *supra*, and the interpretation there made was expressly approved by the United States Supreme Court in the *Douglas case*. The *Mondou case*, of course, antedates the *Douglas case* by some 18 years. *McKnett v. St. Louis & S. F. Ry. Co.*, 292 U. S. 230, 54 S. Ct. 690, as heretofore pointed out, was a case in which an Alabama state court refused jurisdiction of an F. E. L. A. case solely upon the ground that suit was brought under the federal law. It was held that a state could not thus discriminate against a right arising under the federal law, but the opinion also makes clear that Congress has not attempted to compel states to provide courts for the enforcement of suits under the Federal Employers' Liability Act. *Hoffman v. State of Missouri ex. rel. Foraker*, 274 U. S. 21, 47 S. Ct. 485, involved an F. E. L. A. suit brought in the state of incorporation of the defendant and where it also was doing business. Under these circumstances, it was held that the suit could not be dismissed on

the grounds it constituted a burden on interstate commerce. The doctrine of *forum non conveniens* and its application to a suit between non-residents of the forum was in no way involved. *Denver & R. G. W. R. Co. v. Terte*, 248 U. S. 284, 52 S. Ct. 152, is a similar type of case in which the railroad company was sued in the state courts of Missouri. The Court held that under the facts shown the railroad company was not doing sufficient business in that state to make it amenable to process there, and that to allow suit to proceed would constitute a burden on interstate commerce. The case involved none of the questions presented in the instant case. *Gulf Oil Corporation v. Gilbert*, 330 U. S. 501, 67 S. Ct. 839, is hereinafter cited by respondent in support of its position that a court has the inherent power to dismiss an action on the basis of *forum non conveniens*. It is true that in the course of the opinion Mr. Justice Jackson made the gratuitous remark based on the *Kepner* and *Miles* decisions "that in cases under the Federal Employers' Liability Act, we have held a plaintiff's choice of a forum can not be denied on the basis of *forum non conveniens*." This dictum clearly is confined, however, to the special privilege of bringing F. E. L. A. actions in the federal courts. It is obvious from both the majority and concurring opinion in the *Miles* case that the quoted statement has no application to the discretionary power of a state court to decline jurisdiction for reasons of *forum non conveniens*. *Akerly v. New York Central R. R. Co.*, 168 F. (2d) 812, and *Peterson v. Ogden Union Railway and Depot Co.*, 110 Utah 514, 175 P. (2d) 744, are beside the point, in that they involve the validity of contracts attempting to ex-

empt the railroad companies from liability to suit in certain courts. In both cases the contracts were held invalid under the prohibition imposed against such type contracts by Section 5 of the Federal Employers' Liability Act. In considering the effect of those cases, the distinction heretofore pointed out should be kept in mind, namely, that the venue privilege created by Section 6 of the Act is limited by its terms to federal courts, whereas the venue in state courts is controlled by local law. See 158 A. L. R. 1033. In *Schendel v. McGee*, 300 F. 273 (C. C. A. 8) and *Sacco v. Baltimore & O. R. Co.*, 56 F. Supp. 959, it was held that a federal district court could not decline jurisdiction of an F. E. L. A. suit upon the grounds of a burden on interstate commerce. The right of a state court to decline jurisdiction upon the ground of *forum non conveniens* was not involved. *Kilpatrick v. Texas & P. Ry. Co.*, 166 F. (2d) 788 (C. C. A. 2) stands for nothing more than that the continuous solicitation of business in New York constitutes sufficient "doing business" so as to subject a railroad company to service of process in that state, and that with respect to the issue of validity of process *forum non conveniens* is irrelevant. *Leet v. Union Pac. R. Co.*, 25 Cal. (2d) 605, 155 P. (2d) 42, 158 A. L. R. 1008, is apparent authority for appellant's position that a state court will not dismiss an F. E. L. A. action on the basis of *forum non conveniens*. The decision is bottomed, however, upon an erroneous interpretation of the opinions of the United States Supreme Court in the *Kepner* and *Miles* cases. As stated by the annotation in 158 A. L. R. 1033, "neither" of these two cases "supports the conclusion of the California court."

II.

THE STATE COURTS OF UTAH POSSESS THE INHERENT POWER TO DISMISS AN ACTION UPON THE BASIS OF *FORUM NON CONVENIENS*.

In state courts, generally, there exists the power to decline jurisdiction of a cause of action on the basis of *forum non conveniens*. The doctrine had its inception in the early common law courts of Great Britain. Since early times both the English and Scottish courts freely have recognized and entertained a plea of *forum non conveniens*. See: Foster, "Place of Trial — Interstate Application of Intrastate Methods of Adjustment" 44 *Harvard Law Review*, 41, 44, (which traces the development of the doctrine of *forum non conveniens* from the English common law to the state courts of this country); also *Logan v. Bank of Scotland*, 1 K. B. 141; *Longsworth v. Hope*, 3 Macph. 1049, 3 Sc. Sess. 3rd Series, 1049, 37 Scot. Juris. 552. In the latter case, Lord Deas, after holding that the court had jurisdiction of the case before him, then stated:

"The only debatable point is whether, as a matter of expediency, this is the court in which the action (for a libel printed in defendant's London Newspaper, all the parties to which were domiciliary residents of England, plaintiff, however, residing temporarily in Scotland) ought to be tried. It is a valuable discretion, which is vested in every court, not to exercise its jurisdiction if there are grounds for holding that, by the exercise of that jurisdiction, the defendant, who objects to it, will be put to an unfair disadvantage which he would not be subjected to in another accessible and competent court."

In *Gulf Oil Corporation v. Gilbert*, 330 U. S. 501, 67 S. Ct. 839, it was pointed out that though federal courts possessed the "inherent power" to dismiss an action on the basis of *forum non conveniens*, the doctrine actually had its origin in the state courts. In the cited case, the plaintiff below was a resident of Virginia where he operated a large public warehouse. The defendant was a Pennsylvania corporation, qualified to do business in both Virginia and New York, with a process agent in both states. Plaintiff brought a tort action in the federal court for the southern district of New York, alleging damages from a fire which burned his warehouse in Virginia. When sued in New York, the defendant filed a motion to dismiss upon the grounds of *forum non conveniens*, claiming that the appropriate place for trial was in Virginia, where the plaintiff resided and did business, where all the events in the litigation took place, where most of the witnesses lived, and where both state and federal courts were available. The Supreme Court affirmed the ruling of the lower district court in granting the motion to dismiss, holding that the court possessed the inherent power to thus dismiss. In the course of its opinion, the Supreme Court stated:

"We later expressly said that a state court 'may in appropriate cases apply the doctrine of *forum non conveniens*.' *Broderick v. Rosner*, 294 U. S. 629, 643, 55 S. Ct. 589, 592, 79 L. Ed. 1100, 100 A. L. R. 1133; *Williams v. State of North Carolina*, 317 U. S. 287, 294, n. 5, 63 S. Ct. 207, 87 L. Ed. 279, 143 A. L. R. 1273. Even where federal rights binding on state courts under the Constitution are sought to be adjudged, this Court has sustained state courts in a refusal to entertain a litigation between a nonresi-

dent and a foreign corporation or between two foreign corporations. *Douglas v. New York N. H. & H. R. Co.*, 279 U. S. 377, 49 S. Ct. 355, 73 L. Ed. 747; *Anglo-American Provision Co. v. Davis Provision Co.* No. 1, 191 U. S. 373, 24 S. Ct. 92, 48 L. Ed. 225.

"... The defendant's consent to be sued [in a foreign jurisdiction] extends only to give the court jurisdiction of the person; it assumes that the court, having the parties before it, will apply all the applicable law, including, in those cases where it is appropriate, its discretionary judgment as to whether the suit should be entertained. In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."

And in a footnote, to the above statement, the Court added that "The doctrine [of *forum non conveniens*] did not originate in federal but in state courts." See also *Koster v. Lumbermen's Mut. Casualty Co.*, 330 U. S. 518, 67 S. Ct. 828. And to the same effect is *St. Louis & Iron Mountain Ry. v. Taylor*, 210 U. S. 281, 285, a case arising under the provisions of the Federal Safety Appliance Act, in which the Court said:

"... Each state may, subject to the restrictions of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and specifically how far it will, having jurisdiction of the parties, entertain in its courts transitory actions where the cause of action has arisen outside its borders."

Subsequent to the *Gulf Oil Corporation case*, Congress enacted 28 U. S. C. Sec. 1404 (a), specifically authorizing

federal courts to apply the doctrine of *forum non conveniens*. But the decision in the *Gulf Oil Corporation case* and the other cases herein cited anticipated the federal statute. Section 1404 (a) is merely declaratory of the principle of "inherent power" which previously had been announced by the United States Supreme Court. Interestingly enough, the House Report on the Bill to enact Sec. 1404 (a), cited the holding of the Supreme Court in *Baltimore & O. R. Co. v. Kepner, supra*, "as an example of the need of such a provision." See reviser's notes in House Report 308, 80th Congress. Since enactment of Section 1404 (a), the Supreme Court has approved application of the doctrine of *forum non conveniens* to actions in federal courts arising under the Federal Employers' Liability Act. *Ex Parte Collett*, — U. S. —, 69 S. Ct. 944.

It is to be noted that the *Gulf Oil Corporation case* inferentially disposes of another of appellant's arguments, i. e., that because the respondent, a foreign corporation doing business in Utah, has appointed a process agent in Utah, it voluntarily has subjected itself to the jurisdiction of Utah Courts for the purpose of suit and cannot thereafter invoke the principle of *forum non conveniens*, citing *Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd.*, 308 U. S. 165, 60 S. Ct. 153. But as pointed out by Mr. Justice Jackson, the defendant in the *Gulf Oil Corporation case* likewise was sued as a foreign corporation in a jurisdiction in which it maintained a process agent. There was no question but that the court where suit was brought had the jurisdiction to entertain the litigation. However, as stated by the Supreme Court "that does not settle the question

whether it [the court where the action was initially brought] must do so. Indeed the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue." It is clear, therefore, that the ruling of the *Neirbo Co. case* in no way qualifies application of *forum non conveniens*, since the doctrine "presupposes at least two forums in which the defendant is amenable to process" and "furnishes criteria for choice between them."

Although some states have relied upon specific statutes as conferring the discretionary power to decline jurisdiction upon the grounds of *forum non conveniens* (*Loftus v. Penn. R. Co.*, *supra*, and *Douglas v. New York, N. H. & H. R. Co.*, *supra*,) many state courts have asserted the power as an inherent common law prerogative. Typical examples of the exercise of such power on an inherent basis and without benefit of statute are:

Universal Adjustment Corp. v. Midland Bank,
281 Mass. 303, 184 N. E. 152, 158;
Whitney v. Madden, 400 Ill. 185, 79 N. E. (2d)
593, cert. den. 69 S. Ct. 55;
Thistle v. Halstead, 95 N. H. 87, 58 A. (2d) 503;
Sielcken v. Sorenson, 111 N. J. E. 44, 161 A. 47.
See also: Blair, "The Doctrine of Forum Non
Conveniens in Anglo-American Law" 29
Col. L. Rev. 1.

In *Universal Adjustment Corp. v. Midland Bank*, *supra*, Chief Justice Rugg stated the doctrine in that state to be as follows:

"The governing principle in such circumstances is that the parties have standing in the courts of this Commonwealth, not as a matter of strict right but

only as a matter of comity. Where it appears that complete justice cannot be done here, that the defendant will be subjected to great and unnecessary inconvenience and expense, and that the trial will be attended, if conducted here, with many if not insuperable difficulties which all would be avoided without special hardship to the plaintiff if proceedings are brought in the jurisdiction where the defendant is domiciled, where service can be had, where the cause of action arose and where justice can be done, our courts decline to take jurisdiction on the general ground that the litigation may more appropriately be conducted in a foreign tribunal. Stated succinctly, the principle is that where in a broad sense the ends of justice strongly indicate that the controversy may be more suitably tried elsewhere, then jurisdiction should be declined and the parties relegated to relief to be sought in another forum. *This is the doctrine of our own decisions. It prevails generally.* [Italics added.]

Likewise, in *Whitney v. Madden, supra*, the Illinois Supreme Court stated its rule of decision as follows:

“ . . . the privilege of free access to the courts must be tempered with reasonable limitations . . .

“Many jurisdictions have added the limitation that if it is apparent that an appropriate forum is available and the relief is sought in the local courts by a nonresident against a nonresident for a transaction which occurred outside the territorial boundaries of the State, for the purpose of frustrating the defendant, or if the bringing of the action unduly burdens the defendant or causes him great and unnecessary inconvenience, or unnecessarily burdens the court, the trial court may, in its discretion, decline the jurisdiction of the case, even though it may have proper jurisdiction over all parties and the subject matter involved. This is the doctrine of forum non

conveniens. The Federal courts have recognized the application of this doctrine and have found it not repugnant to section 2 of article IV, and section 1 of the fourteenth amendment of the constitution of the United States."

In at least two recent cases, a state court on the basis of its inherent common law power has applied the doctrine of *forum non conveniens* in dismissing actions brought under the Federal Employers' Liability Act. These are:

Hart v. Southern Pacific Company, (Superior Ct. of Cook County, Ill. No. 47 S. 96 23,—the opinion is set forth in the Appendix to this brief and a certified copy thereof has been filed with the Clerk of the Court.)

Kelly v. Trustee, Missouri Pacific Company, et al., (10 cases—Circuit Court, St. Clair County, Ill.—the written order is set forth in the Appendix to this brief and a certified copy thereof has been filed with the Clerk of the Court.)

The opinion in *Hart v. Southern Pacific Company*, *supra*, contains a well reasoned discussion of the applicable cases, including the *Douglas*, *Kepner*, *Miles* and *Gulf Oil cases*. It fully sustains the respondent's position in the present case.

The cited state decisions all focus upon the point that in applying their inherent discretionary power to dismiss actions brought in an inconvenient forum, state courts should refuse to entertain jurisdiction when undue hardship will be imposed upon one of the parties to the suit, and when it affirmatively appears that the convenience of

all concerned will be better served by trial in the forum where the alleged grievance occurred and most of the witnesses reside. The principle becomes especially appropriate in suits between non-residents where a "shopping plaintiff" comes looking for the most suitable bargain counter. The manifest injustice of suits by plaintiffs looking for "soft spots" in the judicial system, and the unfair burden such suits impose upon defendants who are required to transport witnesses from other states to answer complaints brought in distant forums, to the detriment of the taxpayers and overcrowded courts of the place chosen for such litigation, has been the subject of considerable comment by reviewers and students of our judicial system. The cited article in 44 *Harvard Law Review* 41 is an interesting example. The article contains the following pertinent comment with respect to the impact of the opinion of the United States Supreme Court in the *Douglas case* and its application to the decision in *Boright v. Chicago, R. I. & Pac. R. R.*, 230 N. W. 457, a case cited as authority by the appellant:

"The most interesting question suggested by the *Douglas case* is what will happen in the states which have thus far felt a constitutional compulsion to entertain vexatious suits by plaintiffs who are citizens of other states. Will they now feel free to treat questions as to the state of trial as sensibly as they do questions as to the county of trial, and will they regard citizens of sister states as no more entitled to abuse their processes than aliens and foreign corporations? This question was raised recently in Minnesota in the case of *Boright v. Chicago, R. I. & Pac. R. R.* The case was recognized as of great importance. Numerous counsel filed briefs as *amici curiae*—representatives of railroads and, on the plaintiff's side,

counsel for labor unions and counsel whose interest is not stated of record. These last, one may infer, were interested as frequently appearing for non-resident plaintiffs in personal injury cases. The victory was for the personal injury racket—not, however, without a vigorous dissent. Thriving under a highly organized and thus far judicially tolerated system of ambulance chasing, and the old beliefs as to the effect of the privileges and immunities clause, the spectacle of vexatiously imported litigation has long been familiar in Minnesota. The majority opinion in the *Boright* case suggests that judges are perhaps becoming callous to it. It seemed that the common law power to adapt procedure to prevent its abuse had atrophied from disuse, and the court found on non-constitutional grounds that it was powerless to dismiss such suits. Instead of regretting this situation, it glorified the Minnesota law for its hospitality to strangers, thus indicating that it was still thinking in terms of a philosophy which assimilates a would-be litigant to a laborer or business man entitled to a free opportunity to try his luck in whatever state he chooses. Compelled by the United States Supreme Court to abandon any constitutional sanction for this theory, the majority of the Court still stubbornly adheres to it as determining at least the domestic policy of the state. The decision is hardly one to commend itself for general acceptance.”

So far as the state courts of Utah are concerned, they are in the same position as the courts of Massachusetts and Illinois, in that no state statute expressly confers the power to decline jurisdiction of an action on the basis of the doctrine of *forum non conveniens*. But this, of course, is immaterial if the discretionary authority is vested in the state courts as part of their inherent power under common law

precedent. In his article in 44 *Harvard Law Review* 41, 52, Foster points out that it is far more desirable for state courts to assert their inherent common law powers in this respect than to wait for possibly unwieldy legislation on the subject. The article continues:

“The best hope is that courts will feel free to take appropriate action without specific legislation authorizing them to do so. It is submitted that authority for such action is implicit in well-established common law principles. The closest analogy is to change of venue on terms for the convenience of witnesses . . .”

Again, in 29 *Columbia Law Review* 1, Mr. Paxton Blair stated the common law power of state courts in this respect, as follows:

“At the outset it is to be noted that new legislation is not needed before any benefit can be expected to flow from the remedies we propose; for the doctrine in question [*forum non conveniens*] involves nothing more than an appeal to the inherent power possessed by any court of justice—powers, that is to say, which are incontestibly necessary to the effective performance of judicial functions.”

Though no Utah statute in specific terms confers the power to dismiss an action upon the basis of *forum non conveniens*, the State Code (88-2-1) does contain the following reference to the inherent common law powers of the state courts:

“The common law of England so far as it is not repugnant to, or in conflict with, the constitution or laws of the United States, or the constitution or the

laws of this state, and so far only as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, is hereby adopted, and shall be the rule of decision in all courts of this state."

As heretofore pointed out, the doctrine of *forum non conveniens* was and is a firmly established principle of the common law of England. By virtue of the foregoing statute, this common law principle is incorporated in and made a part of the local law of this state. As heirs of the English common law, the state courts of Utah not only have the inherent power to invoke the principle, but also the general statutory authorization. This necessarily follows, unless it can be said that the principle of *forum non conveniens* is repugnant to the state laws or inconsistent with the natural and physical conditions of the state. But far from being repugnant to or inconsistent with state law, the principle is practically identical with the announced statutory policy of the Utah courts to order a change of venue within the state "when the convenience of witnesses and the ends of justice would be promoted by the change." *Utah Code Anno.* (1943), 104-4-9 (3). Certainly, there is nothing in the State Constitution or statutes of Utah, which in a way impinges upon this common law principle. Provisions to the effect that state "courts shall be open" and that transitory actions "shall be brought and tried" in certain counties, contain no suggestion that a state court may not in an appropriate case decline to exercise jurisdiction in order to facilitate justice and prevent undue hardship. Moreover, the state courts of Utah have original and plenary authority, Art.

VIII, Sec. 7, Constitution of Utah, and by statute are given broad discretion to adopt appropriate procedures to carry their power into effect. *Utah Code Anno.* (1943), 20-7-3 (8), (9). The doctrine of *forum non conveniens* "assumes that the court, having the parties before it, will apply *all the applicable law*, including in those cases where it is appropriate its discretionary judgment as to whether the suit should be entertained." 330 U. S. 506, 67 S. Ct. 842.

This Court has recognized by its prior ruling that the state courts of Utah do possess the inherent power to dismiss an action upon the basis of *forum non conveniens*. Essentially the same propositions involved in the present case were argued at some length to the Court on petitions for alternative writ of prohibition in cases No. 7326, No. 7327, and No. 7328 entitled *The Denver and Rio Grande Western Railroad Company, a corporation*, Plaintiff, v. *The Third Judicial District Court of Salt Lake County, State of Utah, and Joseph G. Jeppson, one of the Judges thereof*, Defendants. In the cited cases, this Court by written order denied alternative writs of prohibition for the stated reason that it was "not made to appear that there was a clear duty on the part of the District Court to grant the motion to dismiss." The order further stated that "denial of this writ is not intended to suggest what the court might hold in a proceeding seeking to set aside or review an order of the District Court dismissing a cause of action for reasons of *forum non conveniens*." It is apparent from the terms of the foregoing order that although the Court recognized the existence of the inherent power of dismissal in the trial court, it declined to interfere with the exercise of that

power upon the plea that there had been an arbitrary abuse of discretion on the facts of the particular case. But in order to reach the issue of discretion, the Court necessarily held that the trial court had the inherent power in a proper case to dismiss for reasons of *forum non conveniens*.

It is respectfully submitted, therefore, that the doctrine of *forum non conveniens* is a part of the law of this state, both on the basis of inheritance from the English common law and on the basis of the previous ruling of this Court. It is as much a part of the law of this state as any state statute. It is a necessary part of the inherent right and power of the state courts in order to control their own procedure, effect the orderly administration of their affairs, and "promote the ends of justice."

III.

THE TRIAL COURT EXERCISED A PROPER DISCRETION IN DISMISSING, WITHOUT PREJUDICE, THE PRESENT ACTION.

The various factors to be given consideration by a trial court in connection with a motion to dismiss on the grounds of *forum non conveniens* were stated by Mr. Justice Jackson in *Gulf Oil Corporation v. Gilbert*, *supra*, as follows:

"If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the 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 of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. * * *

"Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home."

Again in *Loftus v. Pennsylvania R. Co.*, 107 Ohio St. 325, 140 N. E. 94, 99, in discussing the reasons why an F. E. L. A. action arising in Pennsylvania and brought in Ohio against a Pennsylvania corporation was dismissed on the basis of *forum non conveniens*, the Court said:

". . . It has not been made to appear that this plaintiff has been denied access to the courts of Pennsylvania, or that in any manner substantial prejudice results to him by the Ohio courts having sus-

tained the motion to quash. Again it is difficult to see how he can be prejudiced by being required to litigate his cause at the place of his residence, or at the place of his injury, in the State of Pennsylvania, where no doubt his witnesses reside, and where his litigation can be prosecuted at much less expense than in the distant jurisdiction of the State of Ohio.

* * * [It] might very pertinently be remarked at this point that the courts of our state are maintained at considerable expense, and only a small fraction of such expense is charged to litigants, the major portion being met by taxes and levied upon the property of the state. The constitutional mandate that all courts shall be open does not require that the burdens of taxation in a single state shall be further increased to provide remedies by judicial process for those who for reasons of their own prefer to reside in other states."

The foregoing quotations make clear the criteria for application of the principle of *forum non conveniens*. All of these factors affirmatively were shown to exist in the case at bar. The alleged cause of action arose in another state, some distance from the forum. Both parties to the suit were non-residents, the plaintiff being a resident of Denver, Colorado, and the defendant being a foreign corporation with its general offices and headquarters located in Denver, Colorado. As shown at the hearing on the defendant's motion in the court below, all of the witnesses necessary for a fair trial of the case resided within convenient distance to Denver, Colorado, including the plaintiff, himself. The relative superiority of Denver as compared to Salt Lake City, with respect to ease of access to sources of proof can not be questioned. Moreover, it was

shown that if trial took place in Salt Lake City, the defendant would be seriously handicapped by the lack of compulsory process to secure the attendance of necessary witnesses, and that the cost of obtaining the attendance of witnesses in any event would be excessive and burdensome. Moreover, many factors of public interest in the present case tended to make trial in Salt Lake City inconvenient and vexatious. The trial court took notice of the congested condition of the court calendar in Salt Lake County, and the delay that this and similar type cases imposed upon local litigation. Other factors which the trial court weighed consisted of the burden of jury duty on local citizens in cases imported from another state, and the expense of maintaining local courts in order to provide a forum for foreign controversies. Also, it was made to appear without contradiction, that trial of the present case in the courts of Colorado could be had without prejudice to the rights of the plaintiff and with much greater convenience to all concerned.

In view of all these considerations, the trial court's exercise of discretionary authority in declining to assume jurisdiction of this case cannot be seriously questioned. For the trial court to have acted otherwise would have constituted an abuse of its discretion. The record demonstrates that the trial court's ruling was based upon considered judgment and unrefuted facts. The discretion exercised clearly was dictated by considerations of fair play and even-handed justice.

CONCLUSION

It is respectfully submitted that the venue privilege as contained in Section 6 of the Federal Employers' Liability Act does not require state courts to entertain actions under the Act. The venue of such actions in state courts is left to the local state law. For the Act "does not impose a duty upon state courts as against a valid excuse, but rather confers a power." Moreover, the decisions of the United States Supreme Court have established that a state court may exercise its discretionary authority to dismiss an action brought by a non-resident against a foreign corporation doing business within the forum, without violating any provision of the Federal Constitution.

By virtue of its heritage of the principles of the common law of England, the state courts of Utah have the inherent power to dismiss an action upon the basis of *forum non conveniens*. The assertion of this discretion by the state courts is fully sustained by authority and precedent. It is a necessary power of the state courts in order to control their own procedure and "to promote the ends of justice." In the present action between a non-resident plaintiff and a foreign corporation on a cause of action arising in another state, there was an affirmative showing in the trial court of serious inconvenience and hardship to the defendant if trial were permitted in the courts of Salt Lake County instead of the courts of Colorado, where the plaintiff and all the necessary witnesses resided. It further was shown that the costs of trial in Salt Lake County would be vexatious and burdensome to the defendant, and that trial

of the case in Salt Lake County would add to the congestion of a badly crowded court calendar. In consideration of all these factors, the trial court exercised a proper discretion in dismissing, without prejudice, the plaintiff's complaint, in order that the action might be initiated in a more convenient forum.

Respectfully submitted,

VAN COTT, BAGLEY,
CORNWALL & McCARTHY,
CLIFFORD L. ASHTON,

Attorneys for Respondent.

Thompson, Trustee, etc., No. 13751; Cloyd Pottorff vs. Thompson, Trustee, Missouri Pacific Railroad Co., No. 12317; Leroy C. Bair vs. Thompson, Trustee, etc., No. 10848; Harry Carter v. Thompson, Trustee, etc., No. 11003, the defendant's joint and several motions to dismiss, etc., are and the same are hereby denied.

(b) That in the cases of Sherman Garrison vs. Thompson, Trustee, etc., No. 14343; Preston Garrison vs. Thompson, Trustee, etc., No. 14342; James A. Jones vs. Thompson, Trustee, etc., No. 13383; Arnie C. Green v. Thompson, Trustee, etc., No. 13521; defendant is hereby given leave to withdraw his answer, and the Court, on consideration of his several motions to dismiss, does order that plaintiffs' several complaints be, and the same are, hereby dismissed without prejudice to each plaintiff to rebring his action elsewhere.

Enter:

/s/ RALPH L. MAXWELL,
Circuit Judge.

APPENDIX

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

IN THE SUPERIOR COURT OF COOK COUNTY

W. J. HART,	} <i>Plaintiff,</i>	} No. 47 S 9623
vs.		
SOUTHERN PACIFIC COMPANY, a corporation,		

OPINION OF THE COURT UPON THE MOTION OF
THE DEFENDANT TO DISMISS THE PLAIN-
TIF'S CAUSE OF ACTION.

PRELIMINARY STATEMENT

This action is brought under the Federal Employers Liability Act to recover damages for personal injuries alleged to have been sustained by the plaintiff on July 2, 1946, at Albany, Oregon, while in defendant's employ as a switchman. The plaintiff resides at Albany, Oregon. The defendant is incorporated under the laws of Kentucky. It

operates railroad lines as a common carrier in the states of Texas, New Mexico, Utah, Arizona, California, Nevada and Oregon and not elsewhere. Defendant does not operate any railroad nor own or maintain any tracks within 1000 miles of Illinois. It does, however, maintain an office in Chicago for soliciting freight and passenger business and is, for purposes of venue, doing business in the State of Illinois.

The defendant filed a written motion to dismiss the case under the principle of *forum non conveniens*. In support of this motion, affidavits were filed by the defendant alleging substantially the following: That the defendant is not an Illinois corporation; does not operate a railroad line into Illinois; does not own or maintain any tracks within Illinois; is not licensed to do business in Illinois; that the injuries complained of by the plaintiff occurred in Albany, Oregon, the place of residence of the plaintiff.

The affidavits further set forth that 14 witnesses necessary for the defense of the cause of action reside in Albany, Oregon, or substantially in that vicinity, a distance from Chicago by rail of approximately 2300 miles; that two physicians residing at or near Albany, Oregon, will be required to attend the trial in Chicago; that at least five (5) days of actual trial will be required to complete the testimony in this case, that all of the defendant's witnesses will have to be transported to Chicago and housed and fed here at the defendant's expense; that traveling time for each of these witnesses by rail will require additional three days in each direction; that the witnesses are employed by the railroad and that their absence for a period of approximately eleven

days would impede the railroad service; that the defendant would be required to pay for the time of these witnesses during their absence; that its expenditure for such purposes would approximate the sum of Thirty Seven Hundred Dollars (\$3700.00).

The affidavits further recite that there is functioning in the State of Oregon regularly constituted state and federal courts available to the plaintiff for the adjudication of his claim. That a case now filed in the local courts of Oregon could be reached for trial within five months.

The affidavits further set forth that during the period from July 2, 1945 to April 12, 1946, a single attorney filed thirty-four cases under the Federal Employers Liability Act in the Superior Court of Cook County against the same defendant, arising out of accidents which occurred in California, Arizona, New Mexico and Oregon. That in the five-year period from July 1, 1941 to June 30, 1946, more than 669 of such cases were commenced in the courts of Cook County, Illinois, and notices of 546 additional claims were filed under the Federal Employers Liability Act by plaintiffs, none of them residents of Illinois; that one of the attorneys for the plaintiff (now deceased) participated in 114 of these cases; that the aggregate of such cases filed and claims which might result into actions in this county imported into Chicago between 1941 and 1946 total 1215, an average rate of 308 cases and 316 claims per year, and that the percentage of increase is constantly mounting.

The affidavits further set forth that these transitory cases clog the jury calendars of our courts and constitute a

financial burden on this county and state, and that the jury calendar of common law cases is now three years behind.

A counter affidavit was filed in behalf of the plaintiff to the effect that the above case was filed in the Superior Court of Cook County not for the purpose of harassing the defendant, but because it was the plaintiff's belief that he could secure a larger and more substantial verdict against the defendant in this jurisdiction than in his own immediate locality; that Illinois citizens from time to time filed cases on transitory torts in other states, and that the application of the doctrine of *forum non conveniens* would warrant other courts from excluding cases of Illinois residents.

CONTENTION OF THE PARTIES

There is no doubt that this court has jurisdiction of the subject matter and of the parties. It is conceded that generally the principle of *forum non conveniens* is recognized in the State of Illinois. The sole issue is whether or not the Illinois courts may invoke this principle to appropriate cases brought under the Federal Employers Liability Act. The principle of *forum non conveniens* is simply that a court may, because of considerations of convenience to the parties or to the court, refuse to hear a case even though it is otherwise properly before the court.

Section 6 of the Federal Employers Liability Act (45 U. S. C. A. Section 56) contains the following relevant provision:

“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, 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.”

The plaintiff maintains that the above provision which conferred concurrent jurisdiction upon the State courts made it mandatory upon a state court to exercise its jurisdiction in all cases brought under this Act. He maintains that the principle of *forum non conveniens* is not applicable to cases under Federal Employers Liability Act and cites authorities to support this view.

The defendant contends that the grant of jurisdiction to state courts under the Employers Liability Act only imposes on state courts a duty to act in conformity with local laws and general principles of practice and procedure prevailing in that court; that Congress did not attempt to compel the exercise of jurisdiction by a state court if such jurisdiction in other similar cases is discretionary.

CONSIDERATION OF AUTHORITIES

The general principle of *forum non conveniens* has been approved by the Supreme Court of Illinois in the most recent case of *Whitney v. Madden*, 400 Ill. 185, in which the court says :

“* * * if it is apparent that an appropriate forum is available and the relief is sought in the local courts by a non-resident against a non-resident for a transaction which occurred outside the territorial boundaries of the State, for the purpose of frustrating the defendant, or if the bringing of the action unduly burdens the defendant or cause him great and unnecessary inconvenience, or unnecessarily burdens the court, the trial court may, in its discretion, decline the jurisdiction of the case, even though it may have proper jurisdiction over all parties and the subject matter involved. This is the doctrine of *forum non conveniens*. The Federal courts have recognized the application of this doctrine and have found it not repugnant to section 2 of article IV, and section 1 of the fourteenth amendment of the Constitution of the United States.”

Although the above case does not involve an action under the Federal Employers Liability Act, it does establish the principle that local courts may refuse to entertain jurisdiction of a case because of inconvenience to the parties or the court. The Federal courts have also consistently recognized and applied the principle of *forum non conveniens*. *Kostner v. Lumbermen's Mutual Co.*, 330 U. S. 518; *Gulf Oil Corporation v. Gilbert*, 330 U. S. 501.

The sole question presented by the motion to dismiss, is whether or not the principle of *forum non conveniens* is applicable to cases arising under the Federal Employers Liability Act.

The plaintiff relies principally upon the language of the following cases of the United States Supreme Court: *B. & O. R. Co. v. Kepner*, 314 U. S. 44; *Miles v. Illinois Central*

Railroad Co., 315 U. S. 698; *Gulf Oil Corporation v. Gilbert*, 330 U. S. 501. In each of the above cases the majority opinion stated categorically that the principle of *forum non conveniens* is not applicable to cases arising under the Federal Employers Liability Act. An analysis of these cases, however, will demonstrate that these categorical statements were merely dicta and that the principle of *forum non conveniens* was not directly involved.

The Kepner case involved an attempt by a state court of Ohio to enjoin the prosecution of a case under the Federal Employers Liability Act which had been filed in the Federal District Court of New York. The United States Supreme Court was at first evenly divided, but upon rehearing rendered a decision by a divided court to the effect that a state court could not enjoin its citizens from seeking access to a foreign forum of their choice. The right of the federal district court of New York to refuse to take jurisdiction of this case because of inconvenience either to the parties or to the court was not in issue. Hence, the broad statement in the majority opinion that the principle of *forum non conveniens* is not applicable to cases under the Federal Employers Liability Act is mere dictum.

The *Miles* case involved the power of one state to enjoin its citizens from seeking access to a forum in another state. A suit was filed in a Tennessee court for injunction to restrain a Tennessee citizen from prosecuting an action brought in Missouri under the Federal Employers Liability Act. The holding of the United States Supreme Court by a vote of 5 to 4, was that the Tennessee court could not en-

join its citizens from seeking access to the Missouri court on the ground of inconvenience to the defendant. The *Miles* case did not involve the right of the Missouri court to decline to hear this case because of inconvenience to the parties or to the court. In fact, the opinion in the *Miles* case recognized the power of a state to regulate by judicial decision the use of its courts by applying the principle of *forum non conveniens* (315 U. S. 704) :

“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 cases, *supra*, note 6. We are considering another state’s power to so control its own citizens that they cannot exercise the federal privilege of litigating a federal right in the court of another state.”

Obviously the *Miles* case is no authority for the proposition that the principle of *forum non conveniens* is not applicable to cases arising under the Federal Employers Liability Act.

The *Gulf Oil* case did not involve an action under the Federal Employers Liability Act. The issue in that case was whether or not a United States District Court had the inherent power to apply the principle of *forum non conveniens* to dismiss a case based on an ordinary tort brought in a District Court of New York against a foreign corporation to recover damages sustained in Virginia. In a 5 to 4 decision, Justice Jackson, speaking for the majority of the court did say gratuitously, “It is true that in cases under

the Federal Employers Liability Act, we have held a plaintiff's choice of a forum cannot be denied on the basis of *forum non conveniens*." (Citing the *Miles* and the *Kepner* cases.) The discretionary power of a state court to apply the principle of *forum non conveniens* to Federal Employers Liability Act cases was obviously not involved.

The other cases cited by the plaintiff in his brief are similarly distinguishable. The only case which appears to support plaintiff's position is *Leet v. Union Pacific*, 155 Pac. (2d) 42 (California). In that case the plaintiff, as administrator appointed by the California court and a resident of California, sued in a California state court for damages arising out of an accident in Oregon. The California court held that *forum non conveniens* is not applicable to cases arising under the Federal Employers Liability Act, citing the *Miles* and *Kepner* cases. However, the plaintiff, a resident of the State of California, was appointed administrator by the Probate Court of California and could not sue in that capacity in any other state. As the court pointed out in its opinion, it would be anomalous to appoint Leet as administrator for the purpose of suing in California and then deny him the right to sue by reasons of inconvenience.

On the other hand, many of the decisions cited by plaintiff contain language to the effect that the jurisdiction of state courts in cases under the Federal Employers Liability Act are subject to local laws and procedure.

The phrase "as prescribed by local laws is adequate for the occasion" or "according to the rules of procedure

prevailing in that court" seems to be a uniform limitation in the cases cited by the plaintiff.

The United States Supreme Court as well as state courts have recognized these limitations.

In the Second Employers Liability Cases, 223 U. S. 1, the court said (page 56-57) :

"* * * we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of State courts *or to control or affect their modes of procedure*, but only a question of the duty of such a court, when its ordinary jurisdiction *as prescribed by local laws is appropriate to the occasion* and is invoked in conformity with those 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*." (Emphasis mine.)

To the same effect see *McKnett vs. St. L. & S. F. Ry. Co.*, 292 U. S. 230; *Minn. & St. L. R. R. vs. Bombolis*, 241 U. S. 211, 218.

The case of *Douglas v. New York, N. H. & H. R. Co.*, 279 U. S. 385, involved a suit in New York under the Federal Employers Liability Act by a resident of Connecticut for injuries sustained in Connecticut against the defendant railroad, a Connecticut corporation doing business in New York. A New York statute limited actions against foreign corporations by non-residents to foreign corporations doing business within the State. It was contended that the jurisdiction upon state courts is imposed by the Employers Liabil-

ity Act. Justice Holmes, speaking for a majority of the court, said:

“As to the grant of jurisdiction in the Employers’ Liability Act, that statute does not purport to require state courts to entertain suits arising under it, but only to empower 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.*”

Murnan v. Wabash Railroad, 246 New York 244, involved an action begun in New York state court by a resident of Connecticut under the Federal Employers Liability Act for an accident which occurred in Michigan on the defendant’s railroad. The trial court dismissed the case under the principle of *forum non conveniens*. The New York Court of Appeals said:

“There is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of State courts or to control or affect the modes of procedure, but only a question of the duty of such a court, *when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion* and is invoked in conformity with those 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
* * *

“That Congress has undertaken to regulate the exercise of jurisdiction by our courts by making compulsory what in similar cases is discretionary seems

an unreasonable conclusion and a resulting invasion of the powers of our tribunals as heretofore exercised. We conclude that a litigant who brings his action under the Federal Employers' Liability Act stands before the court in no different attitude than a litigant who brings his action under the statute of a sister state. He may not be cast out because he is suing under the Act of Congress. He may not enforce his rights merely because he is suing under the act." (Emphasis mine.)

The Illinois Supreme Court has ruled that the Federal Employers Liability Act did not compel state courts to handle all cases falling under the provisions of that Act.

In *Walton v. Pryor*, 276 Ill. 563, our own Supreme Court said:

"In view of the powers of the Federal government and the States and in the light of the uniform decisions relating to the subject, this provision (Sec. 6 of the Federal Act) can only mean that when the jurisdiction of the courts of a State *as fixed by local laws* empowers them to hear and determine a certain class of actions, an action of that class arising under Federal law may be enforced as of right in the State court." (Emphasis mine.)

In a more recent case under the Federal Employers Liability Act (*Taylor v. Southern Railway Company*, 350 Ill. 139) our Supreme Court said:

"If he elects to bring his suit in a State court the act having made no regulation of the practice and procedure in those actions, the practice and procedure are regulated by the law of the forum. The act contemplated suits in State courts and accepted State procedure in advance. (*Minneapolis and St.*

local litigants and witnesses are interested. That such a trial costs the taxpayers of St. Clair County in jury fees, court's and court attache's time approximately \$600.00 to \$900.00.

10. That while Section 6 of the Federal Employers' Liability Act confers jurisdiction upon this court to try these cases, it is not mandatory upon the Court to accept that jurisdiction. That it is within the inherent power of this Court in its discretion to decline jurisdiction of litigation between two non-residents when its acceptance will and does interfere with its own orderly and efficient administration of justice, unnecessarily burdens the Court, and when such litigation can be conducted in an available forum in the State of plaintiff's residence or in a State where the accident occurred, which is more conveniently located for the parties, and where the elements of undue cost, vexation, frustration and harassment to the parties do not exist.

11. That each case here sought to be dismissed, as well as any other case similarly brought in which a dismissal on similar grounds is prayed, must be considered on its own particular merits. In several of the cases embraced by this motion, the defendant has taken plaintiff's deposition, while in others, the Statute of Limitations has either run or about to expire. In such cases the allowance of the motion would materially prejudice the plaintiff's rights.

IT IS, THEREFORE, ORDERED:

(a) That in the cases of Alee Richardson vs. Thompson, Trustee, etc., No. 12283; Raymond E. Lipscomb vs.

cently passed and became effective September 1, 1948. It provides as follows:

“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.” (Title 28, U. S. Code, Section 1404(a).)

The contention of the plaintiff that this statute is not applicable to cases under Federal Employers Liability Act does not lend itself to reason in view of the reference of the statute to “any civil action.” This statute is an express recognition of the principle of *forum non conveniens* in the Federal courts. It is difficult to perceive any sound reason why the Federal courts should enjoy the prerogative of refusing to hear cases because of inconvenience while the same privilege is denied to state courts. It is true that in the Federal courts only a transfer to another district is required while in the state courts a dismissal and the refileing in another jurisdiction is necessary. Yet, that distinction is more perfunctory than real. In the light of this new statute, it would appear that the concurrent jurisdiction of state courts should also be subject to the privilege of refusing jurisdiction because of inconvenience.

CONCLUSION

The principle of *forum non conveniens* lies in the sound discretion of the court. It should be applied with great caution and reserve. Serious consideration should be given to the intent of Congress to provide a forum for cases under the Federal Employers Liability Act beyond the locale of

the accident if desired. Persons injured in employment should have the opportunity of seeking a forum away from local influences and other disadvantages. Only in extreme cases of inconvenience should a court refuse to take jurisdiction.

Such an extreme situation is presented by this case. The unusual factual situation in this case justifies this court to invoke the principle of *forum non conveniens*. The defendant has no railroad line into Illinois, but only maintains an office for solicitation of business. It is neither incorporated in Illinois nor authorized to do business under our statutes. The witnesses for both plaintiff and defendant reside at a distance of about 2300 miles from this jurisdiction. Plaintiff lives in Oregon. The accident occurred in Oregon, in a locale not familiar to our local courts and juries. Fourteen witnesses, including two physicians, will have to be transported, housed and fed by the defendants for about two weeks at an expense of about \$3700.00, not recoverable as costs in the event of a victory by the defendant. These witnesses will be separated from their customary jobs and professions.

This case is not an occasional instance of a migratory suit coming into our jurisdiction. The affidavits on file in this cause set forth that cases of this migratory character now pending in this jurisdiction represent a large percentage of all cases pending in the local courts; that the number is constantly increasing. The influx of these cases into this jurisdiction is not a mere accident. It commenced in 1941 when an enterprising group of lawyers saw the possibility

of personal profits from the importation of these cases to this jurisdiction. These cases have been clogging our court calendars and materially interfere and delay the progress of other cases in our courts. Citizens of Illinois, many of them working people, who sustained serious injuries are obliged to wait as much as three and four years to have their rights adjudicated. The influx of these migratory cases in such large numbers is a grave injustice to these people.

This court will take judicial notice that the trial of each of these migratory cases involves a cost to our taxpayers of over \$1,000 per case, based on an average of a five-day jury trial; the salary of a presiding judge for such period is approximately \$350.00; the jury fees approximately \$300.00; and, in addition thereto, the salaries of clerks, bailiffs, cost of heat, light and other services certainly aggregate an amount in excess of \$1,000 per case. Upon that basis the taxpayers of Illinois will be burdened by an expense of about one and a half million dollars in connection with these cases, whereas the filing fee is only \$23.00 per case. It does not appear to be reasonable that Congress intended unqualifiedly to impose such a burden on these defendants and on state courts.

It is inconceivable that under such extreme circumstances a state court is powerless to protect itself against the flagrant abuse of comity. This case must be considered in the light of its own particular circumstance and in light of the general situation prevailing in this jurisdiction. All these factors lead me to the conclusion that the principle of

forum non conveniens should be applied to this case. Accordingly, on the basis of the principle of *forum non conveniens*, the motion to dismiss this case will be allowed, and the cause is hereby dismissed.

(Signed) SAMUEL B. EPSTEIN,
Judge.

IN THE CIRCUIT COURT OF
ST. CLAIR COUNTY, ILLINOIS

WILLIAM J. KELLY,

Plaintiff,

vs.

GUY A. THOMPSON, TRUSTEE,
MISSOURI PACIFIC RAILROAD
COMPANY, a Corporation,

Defendant.

CIVIL ACTION
AT LAW
NO. 13578

ALEE RICHARDSON,

Plaintiff,

vs.

GUY A. THOMPSON, TRUSTEE,
MISSOURI PACIFIC RAILROAD
COMPANY, a Corporation,

Defendant.

CIVIL ACTION
AT LAW
NO. 12263

SHERMAN GARRISON,

Plaintiff,

vs.

GUY A. THOMPSON, TRUSTEE,
MISSOURI PACIFIC RAILROAD
COMPANY, a Corporation,

Defendant.

CIVIL ACTION
AT LAW
NO. 14343

PRESTON GARRISON,	<i>Plaintiff,</i>	CIVIL ACTION AT LAW NO. 14342
vs.		
GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, a Corporation,	<i>Defendant.</i>	
JAMES A. JONES,	<i>Plaintiff,</i>	CIVIL ACTION AT LAW NO. 13383
vs.		
GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, a Corporation,	<i>Defendant.</i>	
RAYMOND E. LIPSCOMB,	<i>Plaintiff,</i>	CIVIL ACTION AT LAW NO. 13751
vs.		
GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, a Corporation,	<i>Defendant.</i>	
ARNIE C. GREEN,	<i>Plaintiff,</i>	CIVIL ACTION AT LAW NO. 13521
vs.		
GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, a Corporation,	<i>Defendant.</i>	
CLOYD POTTORFF,	<i>Plaintiff,</i>	CIVIL ACTION AT LAW NO. 12317
vs.		
GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, a Corporation,	<i>Defendant.</i>	

Louis Railroad Co. v. Bombolis, 241 U. S. 211; *Louisville and Nashville Railroad Co. v. Stewart*, 241 id. 261.) But the act of Congress does not attempt to enlarge or regulate the jurisdiction of State courts or to control or affect their modes of procedure, but only imposes on such a court the duty, when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act and susceptible of adjudication according to the prevailing rules of procedure. *Minneapolis and St. Louis Railroad Co. v. Bombolis*, supra.”

Plaintiff admits that this court would have the right to deny jurisdiction of this case if the Illinois statute gave it such right. He distinguishes the case of *Walton v. Pryor*, supra, on the ground that an Illinois statute prohibited actions in this state for wrongful death occurring outside of the State of Illinois. He also attempts to distinguish the case of *Murnan v. Wabash Railway Company* as well as the *Douglas v. N. Y. N. H. & H. R. Co.* on the ground of existing statutes. If the jurisdiction of a state court in cases arising under the Federal Liability Act can be limited by statute, there seems to be no logical reason why limitations under common law may not also be enforced. If the principle of *forum non conveniens* is an established rule of administration of justice in a state, it is immaterial whether it has been established by judicial decision or legislative enactment.

As further proof that the convenience of the parties and of the court is gaining favor, a Federal statute was re-

HARRY L. CARTER,	} <i>Plaintiff,</i>	CIVIL ACTION AT LAW NO. 11003
vs.		
GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, a Corporation,		
<i>Defendant.</i>		

LEROY C. BAIRD,	} <i>Plaintiff,</i>	CIVIL ACTION AT LAW NO. 10848
vs.		
GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, a Corporation,		
<i>Defendant.</i>		

O R D E R

A joint and several verified motion to dismiss was here filed by the same defendant to apply in each of the above styled cases. Leave to withdraw each of the defendants' answers was sought and alternative relief to dismissal such as a general continuance or a transfer of venue in each case to adjoining counties of the State where trials could be had without undue interference with the administration of justice was also requested in such motion.

The said joint and several motion was argued by counsel for both parties on September 24, 1948, and briefs requested.

(1) However, on the 5th day of October, 1948, because the parties had taken depositions in the case of Kelly

v. Thompson, etc., No. 13578, and the same had previously been set for trial, this Court denied the motion as to said cause, and ordered that it be tried, but in said order did save and reserve its decision on said motion as to the remaining cases.

(2) Now on this 27th day of January, 1949, all briefs having been furnished, and the Court, after having been properly advised in the premises, and after having made personal investigation and observations as to the condition of the law, chancery and criminal dockets and the administration of the judicial business of the St. Clair County Circuit Court, finds:

1. That in each of the cases sought to be dismissed, the plaintiff brought his suit for damages under the provisions of the Federal Employers' Liability Act for injuries sustained while in the employ of the defendant.

2. That the defendant in each case is Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, a citizen and resident of Missouri, and in his capacity as Trustee operates a railroad in Illinois and Missouri, and other states in the South and Southwest.

3. That each plaintiff is represented by a lawyer with offices in Chicago, Illinois, but that in each case he associates with him a St. Clair County, Illinois lawyer on a per diem basis.

4. That the residence and place of accident of each plaintiff and the distance from the County Seat of St. Clair County, Illinois, is as follows:

No. of Case	Pl. Residence	Place of Accident	Mileage from Belleville, Ill.
12263	Little Rock, Ark.	Same	300
14343	Kansas City, Mo.	Same	300
14342	Little Rock, Ark.	Same	300
13751	Little Rock, Ark.	Same	300
11003	Kansas City, Mo.	Same	300
13383	Fort Smith, Ark.	Same	375
13521	Hope, Ark.	Same	470
12317	Osawatomie, Kans.	Same	450
13751	Little Rock, Ark.	Same	300

5. That there are no witnesses, parties, citizens, residents or taxpayers residing in St. Clair County, Illinois, who have a real or material interest or who are involved in any of the suits sought to be dismissed.

6. That in each case the additional cost to the defendant to try a case of this character in St. Clair County, Illinois, over a County in the State where the accident occurred or where the plaintiff resides will approximate Five Hundred Dollars; that defendant, as well as the plaintiff, is at a disadvantage in trying a case in a foreign jurisdiction because of the inability to compel unwilling witnesses to attend trial and the unsatisfactory use of depositions at a trial. That the additional cost to the plaintiff, and the difficulties which sometimes beset him in a foreign jurisdiction often times exceed any alleged advantages he purportedly receives in choosing a forum so far from home, making the supposed alluring advantage to him more illusory than real.

7. That the St. Clair County Circuit Court is believed to have the heaviest criminal, civil and chancery docket of any County of the State, save Cook County. That the docket has increased by sixty per cent over a comparable period prior to the war. That a single presiding judge (the three Circuit Judges of this district alternating) did, during 1947 and 1948, dispose of cases as follows: 858 Law (jury and non-jury), 982 chancery, 506 criminal, 170 habeas corpus, 360 motions, decree modifications, citations, etc., and 210 probation hearings. That from January 1, 1948, to September 21, 1948, 1025 new law chancery and criminal cases were filed. That on the last mentioned date there were on file and undisposed of 1334 cases, some of which cases where jury trials were requested were on file more than eighteen months. That in a large majority of said pending cases St. Clair County was and is the only county of venue and the witnesses and parties are residents and taxpayers of the County.

8. That for the past year St. Clair County has been in a critical financial plight. That jurors are now being paid by vouchers due, but not necessarily payable, in December, 1949.

9. That many cases similar to those here sought to be dismissed have in the past three years been brought in the St. Clair County Circuit Court by the present counsel for the respective plaintiffs. That the usual time required for trial of such a case is two to four court days. That such trial results in no benefit to any resident or taxpayer of St. Clair County, but instead, because of the congestion of the docket, prevents the trial of two or more cases where purely