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

Utah Supreme Court

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CASE No. 7373

IN THE SUPREME COURT
of the
STATE OF UTAH

THOMAS B. MOONEY,
Plaintiff and Appellant,

VS.

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COM-
PANY, a corporation,
Defendant and Respondent.

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APPELLANT'S REPLY BRIEF

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INDEX TO BRIEF

Subject Index

	Page
PRELIMINARY STATEMENT	1
ARGUMENT	2
POINT I. THE FEDERAL EMPLOYERS' LIABILITY ACT PROHIBITS STATE COURTS FROM DISMISSING ACTIONS ON THE GROUNDS OF FORUM NON CONVENIENS	2
CONCLUSION	9
APPENDIX "A"	10
APPENDIX "B"	24

Cases Cited

Akerly v. New York Cent. R. Co., 168 Fed. 2d 812.....	6
Boyd v. Grand Trunk Western R. Co., U. S., 70 S. Ct. 26	5, 6, 24
Leet v. Union Pac. R. Co., 25 Cal. 2d 605, 155 P. 2d 42 (Cert. den. 65 S. Ct. 1403).....	5
Petersen v. Ogden Union Railway & Depot Co., 110 Utah 514, 175 P. 2d 744.....	6
State ex rel. Atchison, T. & S. F. Ry. Co. v. Murphy, Judge.....	10
State of Missouri, at the Relation of Southern Railway Company, a corporation, v. Waldo C. Mayfield, Judge of the Circuit Court of the City of St. Louis, Missouri, and His Successors, as Presiding Judge of said Court, 224 S. W. 2d 105.....	4, 10
United States v. National City Lines, Inc. et al., 334 U. S. 573, 68 S. Ct. 1169, 92 L. Ed. 1584.....	7

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APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

Since the filing of appellant's original brief, decisions have come down which we believe are decisive of the issues presented on this appeal. Certain statements made by respondent in its brief require answer. For these reasons we have concluded to write a short reply brief.

ARGUMENT

POINT I.

THE FEDERAL EMPLOYERS' LIABILITY ACT PROHIBITS STATE COURTS FROM DISMISSING ACTIONS ON THE GROUNDS OF FORUM NON CONVENIENS.

Under Point I of its brief respondent makes the startling contention that by the very language of Section 6 of the Federal Employers' Liability Act federal courts only are required to accept jurisdiction of actions brought under the Federal Employers' Liability Act. In other words, respondent contends that the provisions of Section 6 that an action may be brought in the District of the residence of 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, are applicable to federal courts only. Respondent thus eliminates from the act the provision that "The Jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states."

We submit that ever since the enactment of this statute it has been uniformly interpreted and construed to mean that actions under the F.E.L.A. may be brought in state courts of jurisdiction whenever and wherever one or more of the three permissive factors for jurisdiction exist. For instance, an action under the Federal Employers' Liability Act may be brought in the District Court of the Third Judicial District in and for

Salt Lake County, State of Utah, a court of general jurisdiction whenever,

- (1) The defendant resides in Salt Lake County;
or
- (2) The cause of action arose in Salt Lake County; or
- (3) The defendant shall be doing business in Salt Lake County at the time of the commencement of such action.

To hold otherwise would require the elimination of the foregoing quoted portion of the F.E.L.A.

At page 25 of its brief respondent contends that since the enactment of 28 U.S.C. Sec. 1404(a) and the decision of the United States Supreme Court in *Ex Parte Collett*, 69 S. Ct. 944, the holding of the United States Supreme Court in *Baltimore & O. R. Co. v. Kepner*, has been vitiated with respect to its application to an action brought in a federal court under the Federal Employers' Liability Act. In the first place, we are not here concerned with an action brought in a Federal District Court, but are concerned with an action brought in a district court of this state. The enactment of Section 1404(a) could not possibly have any application to state courts. That section is applicable only to federal courts and 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.”

The only remedy sought by respondent in the case at bar was dismissal of the action and not a transfer to some other court. Obviously a Utah Court could not effectively transfer this action to a Colorado Court or to a Delaware Court or to a Federal Court. In the very recent Missouri case of *State of Missouri, at the Relation of Southern Railway Company, a corporation, v. Waldo C. Mayfield, Judge of the Circuit Court of the City of St. Louis, Missouri, and His Successors, as Presiding Judge of said Court*, 224 S.W. 2d 105, it was held that the foregoing quoted section of the United States Code has no application to an action brought in a state court. For the convenience of the court we are setting forth in Appendix "A" of this brief the Court's opinion in full.

Another thing to be observed is that the decision in the *Kepner* case is based squarely upon a construction of Section 6 of the F.E.L.A., and the *Collett* case states that Section 1404(a) does not repeal that section. 1404(a) does not purport to give the kind of relief which defendant here seeks, to wit: the right to a dismissal of the case.

The two cases cited and relied upon extensively by defendant, *Douglas v. New York, N. H. & H. R. Co.*, 279 U.S. 377, 49 S. Ct. 355 and *Herb v. Pitcairn*, 324 U.S. 117, 65 S. Ct. 459, do not relate to a consideration of the doctrine of forum non conveniens or its application to the F.E.L.A., cases.

In the *Douglas* case a New York statute was involved. There is no similar statute in the State of Utah.

The case set forth in Appendix "A" of this brief, and *Leet v. Union Pac. R. Co.*, 25 Cal. 2d 605, 155 P. 2d 42 (cert. den. 65 S. Ct. 1403), distinguish the *Douglas* case and hold it inapplicable. It is to be noted that the *Douglas* case was decided in 1929 and the cases relied upon by plaintiff herein were decided at a much later date. The *Kepner* case was decided in 1941; the *Miles* case in 1942 and the *Gulf Oil Company* case in 1947.

Defendant's discussion of the *Miles*, *Kepner* and *Gulf Oil Company* cases amounts merely to an assertion by it that the United States Supreme Court did not mean what it said in those cases. There is no basis for defendant's statement that the language quoted from the *Gulf Oil Company* case at page 46 of appellant's brief relates only to actions in the federal courts. The language is not so limited and the *Miles* case there cited does not concern in any way an action in the federal courts.

A reading of the *Miles* and *Kepner* cases discloses that the equitable doctrine therein asserted by the railroads seeking an injunction is the same in principle as the doctrine of forum non conveniens, it being based on vexation and harrassment.

In the case of *Boyd v. Grand Trunk Western R. Co.*, U. S., 70 S. Ct. 26, 27, 28, the United States Supreme Court on November 7, 1949, concluded that the choice of forum given by Section 6 of the F.E.L.A., was a substantive right extended employees who came within the provisions of the F.E.L.A. That case confirmed the

holdings in the cases heretofore cited by appellant. See *Akerly v. New York Cent. R. Co.*, 168 Fed. 2d 812; *Petersen v. Ogden Union Railway & Depot Co.*, 110 Utah 514, 175 P. 2d 744.

In the *Boyd* case the petitioner was injured in the course of his duties as an employee of the railroad. On two occasions he had signed an agreement stipulating that if his claim could not be settled and he elected to sue, such suit would be commenced within the county or district where he resided at the time of his injuries, or in the county or district where his injuries were sustained and not elsewhere. The Supreme Court held that this agreement was void. The court stated:

“ * * * We hold that petitioner’s right to bring the suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of Section 5 of the Liability Act: ‘Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void * * *.’ The contract before us is therefore void.”

The court further stated:

“The right to select the forum granted in Section 6 is a substantial right. It would thwart the express purpose of the Federal Employers’ Liability Act to sanction defeat of that right by the device at bar.”

For the convenience of the Court we are setting forth in Appendix "B" of this brief the opinion of the United States Supreme Court in full.

The force of this language and holding can readily be recognized when we consider the statement made by the United States Supreme Court in the case of *United States v. National City Lines, Inc. et al.*, 334 U. S. 573, 68 S. Ct. 1169, 1181, 92 L. Ed. 1584, wherein it was said:

"Finally, both appellees and the District Court have placed much emphasis upon this Court's recent decisions applying the doctrine of forum non conveniens and in some instances extending the scope of its application. Whatever may be the scope of its previous application or of its appropriate extension, the doctrine is not a principle of universal applicability, as those decisions uniformly recognize. *At least one invariable, limiting principle may be stated. It is that whenever Congress has vested courts with jurisdiction to hear and determine causes and has invested complaining litigants with a right of choice among them which is inconsistent with the exercise by those courts of discretionary power to defeat the choice so made, the doctrine can have no effect. Baltimore & O. R. Co. v. Kepner*, 314 U.S. 44, 62 S. Ct. 6, 86 L. Ed. 28, 136 A.L.R. 1222; *Miles v. Illinois Central R. Co.*, 315 U.S. 698, 62 S. Ct. 827, 86 L. Ed. 1129, 146 A.L.R. 1104. The question whether such a right has been given is usually the crux of the problem. It is one not to be an-

swered by such indecisive inquiries as whether the venue or jurisdictional statute is labeled a 'special' or a 'general' one. Nor is it to be determined merely by the court's view that applicability of the doctrine would serve the ends of justice in the particular case. It is rather to be decided, upon consideration of all the relevant materials, by whether the legislative purpose and the effect of the language used to achieve it were to vest the power of choice in the plaintiff or to confer power upon the courts to qualify his selection.'

At page 42 of its brief defendant contends that the Supreme Court of the State of Utah in its order in cases Nos. 7326, 7327 and 7328, entitled *The Denver and Rio Grande Western Railroad Company, a corporation, v. The Third Judicial District Court of Salt Lake County, State of Utah, and Joseph G. Jeppson*, one of the Judges thereof, held that the doctrine of *forum non conveniens* was an inherent power in the trial courts of this state.

The Supreme Court knows the reasoning back of its order, but as it was understood by us, the sole ruling of the court in those cases was that the extraordinary writs sought by the railroad company were not proper remedies in the case and ruled solely upon that basis.

The defendant cites cases from Massachusetts and Illinois contending that the rule of *forum non conveniens*

applied in those states should also be applied in Utah. Those states apparently do not have constitutional provisions and statutes similar to those in the State of Utah and hence those decisions are not applicable here. Appellant in his brief has already cited cases from states having provisions of constitutions and statutes similar to the State of Utah and have held that in view of such provisions the doctrine of forum non conveniens was not applicable to their courts.

CONCLUSION

It is respectfully submitted that the judgment appealed from should be reversed and the Court's order dismissing plaintiff's action vacated, set aside and held for naught and the matter referred to the Third Judicial District Court for trial in accordance with the laws and statutes of the State of Utah and the United States of America.

Respectfully submitted,

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APPENDIX "A"

STATE ex rel. SOUTHERN RY. CO. v.
MAYFIELD, Judge.

STATE ex rel. ATCHISON, T. & S. F. RY. CO. v.
MURPHY, Judge.

Nos. 41461, 41558.

Supreme Court of Missouri, en Banc.
Oct. 10, 1949.

Rehearing Denied Nov. 14, 1949.

224 S.W. 2d 105.

Original proceedings in mandamus by the State of Missouri on the relation of the Southern Railway Company against Waldo C. Mayfield, Judge of the Circuit Court of the City of St. Louis, and his successors, as Presiding Judge of the court, and a like proceeding by the State on the relation of the Atchison, Topeka & Santa Fe Railway Company against the Honorable David J. Murphy, Judge of the Circuit Court of the City of St. Louis, and his successors, as Presiding Judge of the court, to compel the use of discretion in passing on motions by the relators to dismiss actions by nonresidents against relators under the Federal Employers' Liability Act. The motions were grounded solely on the doctrine of forum non conveniens.

Writs were quashed by the Supreme Court, Tipton, J., on the ground that the trial judge of a circuit court could not in the exercise of judicial discretion dismiss such an action on the sole ground of forum non conveniens.

These two cases involve identical issues and for that reason they were consolidated for argument before

this court. They are original proceedings in mandamus to compel the trial court to use discretion in passing on relators' motions to dismiss these actions brought under the Federal Employers' Liability Act. The trial court (William L. Mason, deceased) denied the motions on the sole ground that in his opinion the court had no jurisdiction or discretion to entertain or grant them.

Relator Southern Railway Company was sued by Lelia M. Blevins, Administratrix, in the circuit court of the city of St. Louis for \$100,000 for the death of her husband, based on the Federal Employers' Liability Act. This relator filed a motion to dismiss this action on the ground of inappropriate forum within the doctrine of *forum non conveniens*. This motion alleged that the plaintiff was a resident of Tennessee and was appointed administratrix of the estate of her husband by a Tennessee probate court, and that her husband was also a resident of that state at the time of his death. The motion further stated that this relator was a Virginia corporation and that the alleged acts of negligence took place near the boundary line between the states of Virginia and Tennessee, some 700 miles from St. Louis. It further emphasized the added expense of trying the case in St. Louis rather than at or near the place the alleged cause of action arose and where the parties and witnesses resided.

Floyd P. Seachris filed suit in the circuit court of St. Louis against the relator, the Atchison, Topeka and Santa Fe Railroad Company, under the Federal Employers' Liability Act, for alleged injuries he received

at Waynoka, Oklahoma. This relator also filed a motion to dismiss that action under the doctrine of *forum non conveniens*. The facts alleged in this motion are similar to the facts alleged by the relator, the Southern Railway Corporation, except in this instance it is alleged that Waynoka is 647 miles from St. Louis.

As previously stated, the trial court denied these motions. The ground for the denial of each of these motions was that the "Court has no jurisdiction or discretion to entertain or grant such a motion."

The sole question before us is: May a trial judge of a circuit court of this state exercise his judicial discretion in determining whether to retain or relinquish jurisdiction of a case brought under the Federal Employers' Liability Act when a motion to dismiss on the sole ground of *forum non conveniens* is presented before him for a ruling?

In the case of *Gulf Oil Corporation v. Gilbert*, 330 U. S. 501, 91 L. Ed. 1055, 67 S. Ct. 839, 1.c. 841-842, the Supreme Court of the United States said:

"It is true that in cases under the Federal Employers' Liability Act, 45 U.S.C.A. §51 et seq., we have held that plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens*. But this was because the special venue act under which those cases are brought was believed to require it. *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44, 62 S. Ct. 6, 86 L. Ed. 28, 136 A.L.R. 1222; *Miles v. Illinois Central R. Co.*, 315 U. S. 698, 62 S. Ct. 827, 86 L. Ed. 1129, 146 A.L.R. 1104. Those

decisions do not purport to modify the doctrine as to other cases governed by the general venue statutes.”

That court upheld the Federal District Court of New York, 62 F. Supp. 219, when it dismissed the plaintiff’s suit on the ground that the doctrine of *forum non conveniens* applied. But that action was brought under the general venue statute. It was not a Federal Employers’ Liability case.

In the case of *Ex Parte Collett*, 337 U. S. 55, 69 S. Ct. 944, 945, 93 L. Ed. 901, l.c. 903 and 904-905, the Supreme Court of the United States said:

“Prior to the current revision of title 28 of the United States Code, *forum non conveniens* was not available in Federal Employers’ Liability Act suits. *Baltimore & O. R. Co. v. Kepner*, 314 U. S. 44, 86 L. Ed. 28, 62 S. Ct. 6, 136 A.L.R. 1222 (1941); *Miles v. Illinois C. R. Co.*, 315 U. S. 698, 86 L. Ed. 1129, 62 S. Ct. 827, 146 A.L.R. 1104 (1942); see *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 505, 91 L. Ed. 1055, 1060, 67 S. Ct. 839 (1947). The new Code, however, provides that ‘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.’ This is § 1404 (a).”

“Section 6 of the Liability Act defines the proper forum; § 1404 (a) of the Code deals with the right to transfer an action properly brought. The two sections deal with two separate and distinct problems. Section 1404 (a) does not limit or otherwise modify any right

granted in § 6 of the Liability Act or elsewhere to bring suit in a particular district. An action may still be brought in any court, state or federal, in which it might have been brought previously.

“The Code, therefore, does not repeal § 6 of the Federal Employers’ Liability Act.”

Section 1404 (a), *supra*, became effective September 1, 1948, and applies only to civil suits brought in the federal courts. It has no application to Federal Employers’ Liability suits brought in state courts. We have no machinery to transfer these two cases, one to the state or federal courts of Tennessee and the other to the courts of Oklahoma. Relators do not contend that this section applies to the problem before us. They do not ask that the two suits in question be transferred but they rely upon the common law doctrine of *forum non conveniens* which calls for a dismissal of the action.

“While the substantial factors to be weighed in determining a motion under Section 1404 (a) may be similar to those involved in a consideration of *forum non conveniens*, yet it seems clear that transfer under Section 1404 (a) is something more than and somewhat different from dismissal under *forum non conveniens*. In the first place, the procedure to be followed in affirmatively invoking the two remedies is drastically different. Under Section 1404 (a) a case is not dismissed but merely transferred to the more convenient forum; under *forum non conveniens* a case is dismissed and must be instituted anew in the more convenient forum, carrying

with it the inherent and jeopardous hazard of being barred therein by the statute of limitations. The danger of having the action barred in such a manner was one of the principal reasons for Mr. Justice Black's dissent in *Gulf Oil Corp. v. Gilbert*, 1947, 330 U.S. 501, 516, 67 S. Ct. 839, 91 L. Ed. 1055.

"The doctrine of forum non conveniens has been held inapplicable to cases instituted under 'special venue' statutes, such as actions arising under the Federal Employers' Liability Act and the anti-trust laws. Such types of cases may be transferred under Section 1404 (a), however. *Ex parte Collett*, 1949, 337 U.S. 55, 69 S. Ct. 944 (1959); *United States v. National City Lines*, 1949, 337 U.S. 78, 69 S. Ct. 955 (1959). In this respect, then, the two remedies are also different." U.S.D.C., Del. (Rodney, J.); *Cinema Amusements, Inc. v. Loew's, Inc.*, June 10, 1949, 85 F. Supp. 319, 322.

Thus, with reference to Federal Employers' Liability actions brought in state courts the law is the same now as it was before Section 1404 (a) was enacted.

The case of *Baltimore and Ohio R. Co. v. Kepner*, 314 U.S. 44, 86 L. Ed. 28, 62 S. Ct. 6, l.c. 9-10, was a suit brought in a state court of Ohio against an injured resident employe of the Baltimore and Ohio Railroad to enjoin him from prosecuting a suit he instituted in the United States District Court of New York under the Federal Employers' Liability Act for an injury he received in the State of Ohio. The Supreme Court of Ohio denied the injunction. Upon application of the

railroad, the Supreme Court of the United States issued its writ of certiorari to review the Ohio decision. In affirming the decision of the Supreme Court of Ohio, that court said:

“That real contention of petitioner is that despite the admitted venue respondent is acting in a vexatious and inequitable manner in maintaining the federal court suit in a distant jurisdiction when a convenient and suitable forum is at respondent’s doorstep.”

We read the opinion of the Supreme Court of Ohio to express the view that if it were not for Section 6 of the Employers’ Liability Act the requested injunction would be granted on the undisputed facts of the petition. Section 6 establishes venue for an action in the federal courts. As such venue is a privilege created by federal statute and claimed by respondent the Supreme Court of Ohio felt constrained by the Supremacy Clause to treat Section 6 as decisive of the issue. It is clear that the allowance or denial of this federal privilege is a matter of federal law, not a matter of state law under *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 72, 58 S. Ct. 817, 819, 82 L. Ed. 1188, 114 A.L.R. 1487. Its correct decision depends upon a construction of a federal act. Consequently the action of a state court must be in accord with the federal statute and the federal rule as to its application rather than state statute, rule or policy.

“Petitioner presses upon us the argument that the action of Congress gave an injured railway employee the privilege of extended venue, subject to the usual

powers of the state to enjoin what in the judgment of the state courts would be considered an improper use of that privilege. This results, says petitioner, because the Act does not in terms exclude this state power. As courts of equity admittedly possessed this power before the enactment of Section 6, the argument continues, it is not to be lightly inferred that the venue privilege was in disregard of this policy. But the federal courts have felt they could not interfere with suits in far federal districts where the inequity alleged was based only on inconvenience. There is no occasion to distinguish between the power and the propriety of its exercise in this instance since the limits of the two are here co-extensive. The privilege was granted because the general venue provisions worked injustices to employees. It is obvious that no state statute could vary the venue and we think equally true that no state court may interfere with the privilege, for the benefit of the carrier or the national transportation system, on the ground of inequity based on cost, inconvenience or harrassment. When the section was enacted it filled the entire field of venue in federal courts. A privilege of venue granted by the legislative body which created this right of action cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative, a court followed in securing the amendment of April 5, 1910, for the benefit of employees."

The case of *Miles v. Illinois Central R. Co.*, 315 U.S. 698, 86 L. Ed. 1129, 62 S. Ct. 827, l.c. 830-831, 146 A.L.R. 1104, was a suit to review the action of the

Tennessee Court of Appeals which had enjoined the plaintiff, a resident of Tennessee, from prosecuting a suit under the Federal Employers' Liability Act in the circuit court of St. Louis, Missouri, for the death of her husband which occurred in Tennessee while working for the railroad. In ruling the case the court said:

“In the legislative history of section 6, the provision that removal may not be had from a ‘State court of competent jurisdiction’ was added to the House bill on the floor of the Senate and later accepted by the House, in order to assure a hearing to the employee in a state court. Words were simultaneously adopted recognizing the jurisdiction of the state courts by providing that the federal jurisdiction should be concurrent. The venue of state court suits was left to the practice of the forum. The opportunity to present causes of action arising under the F.E.L.A. in the state courts came; however, not from the state law but from the federal. By virtue of the Constitution, the courts of the several states must remain open to such litigants on the same basis that they are open to litigants with causes of action springing from a different source. This is so because the Federal Constitution makes the laws of the United States the supreme law of the land, binding on every citizen and every court and enforceable wherever jurisdiction is adequate for the purpose * * *

“Since the existence of the cause of action and the privilege of vindicating rights under the F.E.L.A. in state courts spring from federal law, the right to sue in state courts of proper venue where their jurisdiction

is adequate is of the same quality as the right to sue in federal courts. It is no more subject to interference by state action than was the federal venue in the *Kepner* case * * *.

“The permission granted by Congress to sue in state courts may be exercised only where the carrier is found doing business. If suits in federal district courts at those points do not unduly burden interstate commerce, suits in similarly located state courts cannot be burdensome. As Congress has permitted both the state and federal suits, its determination that the carriers must bear the incidental burden is a determination that the state courts may not treat the normal expense and inconvenience of trial in permitted places, such as the one selected here, as inequitable and unconscionable.”

Thus, it is clear that under the *Kepner* and *Miles* cases, *supra*, a state court cannot dismiss a Federal Employers' Liability case solely under the *forum non conveniens* doctrine.

“*The Federal Employers' Liability Act, as interpreted by Kepner, increases the number of places where the defendant may be sued and makes him accept the plaintiff's choice*” (Italics ours). *Gulf Oil Corporation v. Gilbert, supra*, 67 S. Ct. 839, *l.c.* 842.

Relators rely mainly upon the case of *Douglas v. New York, N. H. & H. R. Co.*, 279 U. S. 377, 73 L. Ed.

747, 49 S. Ct. 355. In that case a resident of Connecticut brought a suit in a state court of New York under the Federal Employers' Liability Act against the defendant, a Connecticut corporation, for personal injuries inflicted in Connecticut. The trial court dismissed the action under a statute which it held gave it discretion in suits brought by non-resident plaintiffs. The trial court action was affirmed by the New York Court of Appeals, 248 N.Y. 580, 162 N.E. 532. This was the statute in question: "An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only: * * * 4.

Where a foreign corporation is doing business within this State." Code Civ. Proc., Sec. 1780.

The Supreme Court of the United States held that this statute was not in violation of Article 4, Section 2, of the Constitution of the United States, as discriminating between citizens of New York and citizens of other states when construed as using the word "resident" in the strict primary sense of one actually living in the place for a time, irrespective of domicile. Such was the construction placed upon this statute by the New York Court of Appeals. It also held that state courts are not required to entertain suits under the Federal Employers' Liability Act but are empowered to do so.

We do not think this case sustains the relator. The common law doctrine of *forum non conveniens* is not even mentioned in the opinion. In the first place, Missouri does not have a statute similar to the New York statute which the courts of that state have held to give them discretionary power to dismiss an action brought by a non-resident as distinguished from a citizen of another state. Also, Missouri permits citizens of this state to file Federal Employers' Liability cases in its courts. To deny the same privilege to citizens of another state would violate Article 4, Section 2, of the Constitution of the United States.

Relators also rely upon the case of *Chambers v. Baltimore & Ohio Railroad Co.*, 207 U. S. 142, 28 S. Ct. 34, 1 c. 36, 52 L. Ed. 143. In that case the wife of an employe brought suit in a state court of Ohio for injuries received by her husband in Pennsylvania which caused his death. Both the husband and wife were residents of the latter state. The court held that an Ohio statute which permits suits in Ohio state courts for wrongful death occurring in another state only when the decedent was a citizen of Ohio did not violate the Privileges and Immunity Clause of the Federal Constitution (Article 4, Section 2). In ruling the case, that court said:

“The courts were open in such cases to plaintiffs who were citizens of other states if the deceased was

a citizen of Ohio; they were closed to plaintiffs who were citizens of Ohio if the deceased was a citizen of another state. So far as the parties to the litigation are concerned, the state, by its laws, made no discrimination based on citizenship, and offered precisely the same privileges to citizens of other states which it allowed to its own. There is, therefore, at lease a literal conformity with the requirements of the Constitution.”

The opinion in the *Chambers* case deals only with the constitutionality of a state statute; it does not mention the Federal Employers’ Liability Act nor the doctrine of forum non conveniens. This state does not have any such statute. We fail to see its applicability to the issue before us.

The Federal Employers’ Liability Act does not compel the courts of this state to hear cases arising under that act, but it empowers our courts to do so.

Since Missouri does allow its citizens to maintain Federal Employers’ Liability actions in its courts (see the many such cases listed in the Missouri Digest, Master and Servant, 85), it follows that not to allow citizens of other states the right to file Federal Employers’ Liability suits in our state courts would violate Article 4, Section 2, of the Constitution of the United States.

The relators do not contend that the circuit court of St. Louis does not have jurisdiction of the parties or of the subject matter of these two suits, or that there is any state statute that would prohibit maintaining these suits in our state courts, but their sole contention is that the common law doctrine of forum non conveniens should be open to them in these cases. Under the *Kepner* and *Miles* cases, supra, the doctrine of forum non conveniens is not open to relators in the two Federal Employers' Liability cases in question.

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

From what we have said, it follows that our writ should be quashed. It is so ordered.

ERNEST M. TIPTON, *Judge*

All concur.

APPENDIX "B"

BOYD vs. GRAND TRUNK WESTERN R. CO.,

70 S. Ct. 26

No. 17.

Argued Oct. 11, 1949.

Decided Nov. 7, 1949.

PER CURIAM.

In issue here is the validity of a contract restricting the choice of venue for an action based upon the Federal Employers' Liability Act.¹ Petitioner was injured in the course of his duties as an employee of respondent railroad in November, 1946. Twice during the following month petitioner was advanced fifty dollars by respondent. On each of these occasions petitioner signed an agreement stipulating that if his claim could not be settled and he elected to sue, "such suit shall be commenced within the county or district where I resided at the time my injuries were sustained, or in the county or district where my injuries were sustained

¹ 35 Stat. 65, as amended, 45 U.S.C. Sec. 51, 45 U.S.C.A. Sec. 51.

and not elsewhere.”² Although this provision defined the available forum as either the Circuit Court of Calhoun County, Michigan, or the United States District Court for the Eastern District of Michigan, petitioner brought an action in the Superior Court of Cook County, Illinois. To enjoin petitioner’s prosecution of the Illinois case, respondent instituted this suit. The Michigan Circuit Court held that the contract restricting the choice of venue was void and dismissed the suit. The Michigan Supreme Court reversed, 1948, 321 Mich. 693, 33 N.W. 2d 120.

Certiorari was granted, 1949, 337 U. S. 923, 69 S. Ct. 1166, because the federal and state courts which have considered the issue have reached conflicting results.³ We agree with those courts which have held

² The agreement also provided that the sums advanced would be deducted from whatever settlement or recovery petitioner finally achieved. As to this, the proviso in Sec. 5 of the Liability Act specifies “That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.” Referring to this provision, and interpreting a contract similar to the one here involved, at least one federal court has held that “The contract to waive the venue provisions is of no effect * * * because there was no consideration for it.” *Akerly v. New York Cent. R. Co.*, 6 Cir., 1948, 168 F. 2d 812, 815.

³ In accord with the decision below are: *Roland v. Atchison, T. & S. F. R. Co.*, D.C.N.D. Ill. 1946, 65 F. Supp. 630; *Herrington v. Thompson*, D.C.W.D. Mo. 1945, 61 F. Supp. 903; *Clark v. Lowden*, D.C.D. Minn. 1942, 48 F. Supp. 261; *Detwiler v. Chicago, R. I. & P. R. Co.*, D.C.D. Minn. 1936, 15 F. Supp. 541; *Detwiler v. Lowden*, 1936, 198 Minn. 185, 188, 269 N.W. 367, 369, 838, 107 A.L.R. 1054, 1059. In conflict with the ruling before us are: *Krenger v. Pennsylvania R. Co.*, 2 Cir., 1949, 174 F. 2d 556, petition for certiorari denied 70 S. Ct. ___, *infra*; *Akerly v. New York Cent. R. Co.*, 6 Cir., 1948, 168 F. 2d 812; *Fleming v. Husted*, D.C.D. Iowa 1946, 68 F. Supp. 900; *Sherman v. Pere Marquette R. Co.*, D.C.N.D. Ill. 1945, 62 F. Supp. 590; *Peterson v. Ogden Union Railway & Depot Co.*, 1946, 110 Utah 573, 175 P. 2d 744; *cf. Porter v. Fleming*, D.C.D. Minn. 1947, 74 F. Supp. 378.

that contracts limiting the choice of venue are void as conflicting with the Liability Act.

(1) Section 6 of the Liability Act provides that “Under this Act 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 Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any State court of competent jurisdiction shall be removed to any court of the United States.” It is not disputed that respondent is liable to suit in Cook County, Illinois, in accordance with this provision. We hold that petitioner’s right to bring the suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of Section 5 of the Liability Act: “Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void * * *” The contract before us is therefore void.

(2) Any other result would be inconsistent with *Duncan v. Thompson*, 1942, 315 U. S. 1, 62 S. Ct. 422, 86 L. Ed. 575. That opinion reviewed the legislative history and concluded that “Congress wanted Section 5 to have the full effect that its comprehensive phraseology implies.” 315 U. S. at page 6, 62 S. Ct. at page 424.

In that case as in this, the contract before the Court was signed after the injury occurred. The court below, in holding that an agreement delimiting venue should be enforced if it was reached after the accident, disregarded Duncan.

(3) The vigor and validity of the Duncan decision was not impaired by *Callen v. Pennsylvania R. Co.*, 1948, 332 U. S. 625, 68 S. Ct. 296, 92 L. Ed. 242. We there distinguished a full compromise enabling the parties to settle their dispute without litigation, which we held did not contravene the Act, from a device which obstructs the right of the Liability Act plaintiff to secure the maximum recovery if he should elect judicial trial of his cause.⁴ And nothing in *Ex parte Collett*, 1949, 337 U. S. 55, 69 S. Ct. 944, affects the initial choice of venue afforded Liability Act plaintiffs. We stated expressly that the section of the Judicial Code there involved, 28 U.S.C. Sec. 1404 (a), 28 U.S.C.A. Sec. 1404 (a), "does not limit or otherwise modify any right granted in Section 6 of the Liability Act or elsewhere to bring suit in a particular district. An action may still be brought in any court, state or federal, in which it might have been brought previously." 337 U. S. at page 60, 69 S. Ct. at page 947.

The right to select the forum granted in Section 6 is a substantial right. It would thwart the express pur-

⁴ See Krenger, *supra* note 3, 174 F. 2d at page 558; 174 F. 2d at page 561 (concurring opinion of L. Hand, C. J.); Akerly, *supra* note 3, 168 F. 2d at page 815; Peterson, *supra* note 3, 110 Utah at page 579, 175 P. 2d at page 747.

pose of the Federal Employers' Liability Act to sanction defeat of that right by the device at bar.

Reversed.

Mr. Justice FRANKFURTER and Mr. Justice JACKSON concur in the result but upon the grounds stated by Chief Judge Hand in *Krenger v. Pennsylvania R. Co.*, 2 Cir., 1949, 174 F. 2d 556, at page 560.

Mr. Justice DOUGLAS and Mr. Justice MINTON took no part in the consideration or decision of this case.

Received.....copies of Appellant's Reply

Brief this.....day of....., A.D. 19.....

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Attorneys for Defendant and Respondent.