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## Development of the Doctrine of Forum Non Conveniens

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## COMMENTS

### DEVELOPMENT OF THE DOCTRINE OF FORUM NON CONVENIENS

A recent Illinois Supreme Court decision, *Cotton v. Louisville and Nashville R.R.*,<sup>1</sup> again brings up the problem of allowing the importation of transitory tort actions into the courts of distant forums. This problem, and its resulting history of varied judicial and statutory interpretation and solution leaves in the minds of many a confusion and need for a basic understanding of both the reason and purpose of the problem and solution. The purpose of the writer, by an historical analysis of the doctrine of *forum non conveniens* and discussion of the leading cases in the area of major confusion, Federal Employer's Liability Act cases,<sup>2</sup> is to show the reader the full import of the Illinois Supreme Court decision mentioned above.

Illinois, being the apex of a wheel with railroads branching out as spokes, is in the special circumstance of having to deal with this problem almost daily. Therefore the need for clarification.

#### THE PROBLEM

The Federal Employer's Liability Act (designated herein as F.E.L.A.) is the core of the problem. Section 6 of the F.E.L.A.<sup>3</sup> gives the plaintiff in any action a broad base on which to place venue. Section 6 states in part:

[A]n 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.<sup>4</sup>

A further complication is a clause at the end of the section: "The jurisdiction of the courts of the United States . . . shall be concurrent with that of the courts of the several States."<sup>5</sup> Justice Learned Hand, in his concurring opinion in *Krenger v. Pennsylvania R.R.*,<sup>6</sup> interpreted this section as an attempt to deal with the great disparity of the employee's bargaining power with vast corporate employers, in cases arising out of some injury to the employee in the course of his employment. The section gives the employee a small lever in these negotiations. This thinking led the courts to hold that the venue allowed by Congress could not be defeated,<sup>7</sup> and that

<sup>1</sup> 14 Ill.2d 144, 152 N.E.2d 385 (1958).

<sup>2</sup> 45 U.S.C.A. § 51 et seq. (1950).

<sup>4</sup> *Ibid.*, paragraph 2.

<sup>3</sup> 45 U.S.C.A. § 56 (1950).

<sup>5</sup> *Ibid.*

<sup>6</sup> 174 F.2d 556 (C.A.2d, 1949), cert. den. 338 U.S. 866 (1949).

<sup>7</sup> See: *Baltimore and Ohio R. v. Kepner*, 314 U.S. 44 (1941); *Miles v. Illinois Central R.*, 315 U.S. 698 (1942).

the section giving concurrent jurisdiction to the states imposed a duty upon the states to accept such cases.<sup>8</sup>

Pitted against this rationale is the doctrine of *forum non conveniens*.<sup>9</sup> The court, in *Hayes v. Chicago, R.I. & P.R.*,<sup>10</sup> explained the doctrine in the following terms:

The doctrine of *forum non conveniens* is bottomed upon the right of the Court in the exercise of its equitable power to refuse the imposition upon its jurisdiction of the trial of cases, even though the venue is properly laid, if it appears that, for the convenience of the litigants and witnesses, in the interest of justice, the action should be instituted in another forum where the action might have been brought.<sup>11</sup>

The term *forum non conveniens* originated in Scotland, where it did not mean merely an inconvenient forum, but rather was a term used by Scottish trial courts in applying a settled rule of refusal to hear cases when the ends of justice would be better served by the trial of the action in another forum.<sup>12</sup>

As can be readily seen, these two conflicting theories would naturally oppose each other and this clash is the problem faced. Can the doctrine of *forum non conveniens* be applied in F.E.L.A. cases with its broad venue provisions? The doctrine, when applied, calls for the dismissal of the action which brings the Statute of Limitations immediately into paramount importance.<sup>13</sup>

#### HISTORY OF THE DOCTRINE

The case of *Corfield v. Coryell*<sup>14</sup> was the first case to announce that one of the main privileges and immunities granted by the Constitution<sup>15</sup> was the right "to institute and maintain actions of any kind in the courts of the state."<sup>16</sup> This constitutional provision was one of the underlying reasons for the decision in *Mondou v. New York, N.H. & H.R.*,<sup>17</sup> which held that a state court must entertain suits under the F.E.L.A., if it would entertain similar suits where the action was not brought under the federal

<sup>8</sup> *Mondou v. New York, N.H. & H. R. (Second Employer's Liability Cases)*, 223 U.S. 1 (1912); *Bright v. Wheelock*, 323 Mo. 840, 20 S.W.2d 684 (1929); *Boright v. Chicago, R.I. & P.R.*, 180 Minn. 52, 230 N.W. 457 (1930).

<sup>9</sup> For a general discussion see, 35 Calif. L. R. 380 (1947), *Forum Non Conveniens*.

<sup>10</sup> 79 F.Supp. 821 (D. Minn., 1948).

<sup>11</sup> *Ibid.*, at 824.

<sup>12</sup> *Loftus v. Lee*, 308 S.W.2d 654 (Mo., 1958).

<sup>13</sup> 45 U.S.C.A. § 56 (1950) reads, "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."

<sup>14</sup> Fed. Cas. #3230, 6 Fed. Cas. 546 (E.D. Pa., 1823).

<sup>15</sup> U.S. Const. Art. IV, § 2, Clause 1.

<sup>16</sup> Authority cited note 14, *supra*, at 552.

<sup>17</sup> 223 U.S. 1 (1912); cf. *Testa v. Katt*, 330 U.S. 386 (1946).

statute. State courts could not refuse to hear cases merely on the basis of local policy or inconvenience. The meaning was clear. *Forum non conveniens* did not apply to F.E.L.A. cases, or for that matter, impliedly, to any other actions brought under Federal statutes with similar venue provisions. *Murnan v. Wabash Ry.*,<sup>18</sup> decided 15 years after the *Mondou* case, applied *forum non conveniens* in an F.E.L.A. case and the controversy raged again. Judge Pound reasoned that, since New York had always had discretionary power to refuse jurisdiction in tort cases which arose out of state between non-residents, and that since neither the F.E.L.A. or *Mondou* case stated positively that the state *had* to entertain F.E.L.A. cases; therefore, New York courts, under their discretionary powers, could refuse to entertain the case at hand, not because it was brought under the Federal act, but because it was like any other suit in tort brought under a foreign statute by non-residents for a tort committed outside of the state. Two years later in another New York case, *Douglas v. New York, N.H. & H.R.*,<sup>19</sup> the United States Supreme Court held that since the doctrine of *forum non conveniens* was part of the local law of New York, and F.E.L.A. was silent on its application, it could be applied to F.E.L.A. cases.<sup>20</sup> Justice Oliver Wendell Holmes stated: "But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse."<sup>21</sup> In quick succession the courts of Missouri<sup>22</sup> and Minnesota<sup>23</sup> held that since the doctrine was not part of their local law, their courts had no discretion and could not refuse F.E.L.A. cases.<sup>24</sup>

Here the issue remained, until eleven years later two cases decided in the United States Supreme Court led to significant repercussions. *Baltimore and Ohio v. Kepner*<sup>25</sup> and *Miles v. Illinois Central R.R.*<sup>26</sup> decided the immediate issue, whether a state court could enjoin the prosecution of F.E.L.A. cases in another forum, in the negative; but by way of dicta, set down the rule that F.E.L.A. §6, which gave broad venue powers to plaintiff, is fortified by the privileges and immunity clause of the Constitution,<sup>27</sup>

<sup>18</sup> 246 N.Y. 244, 158 N.E. 508 (1927).

<sup>19</sup> 279 U.S. 377 (1929).

<sup>20</sup> Further in the *Douglas* case, the court said that the Privileges and Immunities clause only applied when the discrimination was based upon citizenship; but New York's discretionary power to refuse to allow nonresidents use of their courts was based not on citizenship, but upon residency; consult annotation in 158 A.L.R. 1034, for a full discussion of the issues involving the Privileges and Immunities clause.

<sup>21</sup> Authority cited note 19, *supra*, at 388.

<sup>22</sup> *Bright v. Wheelock*, 323 Mo. 840, 20 S.W.2d 684 (1929).

<sup>23</sup> *Boright v. Chicago, R.I. & P.R.*, 180 Minn. 52, 230 N.W. 457 (1930).

<sup>24</sup> In the *Boright* case, the court held that Minnesota courts are open to all without discrimination and are therefore, open to citizens of sister states when bringing transitory actions under laws of the sister state or even under Federal statutes.

<sup>25</sup> 314 U.S. 44 (1941).

<sup>26</sup> 315 U.S. 698 (1942).

<sup>27</sup> U.S. Const. Art. IV, § 2, Clause 1.

and therefore the doctrine of *forum non conveniens* is precluded in such actions. Both cases were narrowly decided, and in the *Miles* case Justice Jackson, in his concurring opinion said:

I do not, however, agree . . . 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 non-resident plaintiff and a foreign corporation to fight out issues imported from another state where the cause of action arose.<sup>28</sup>

Justice Frankfurter dissented in both cases on the same grounds. From the *Kepner* case is found:

Nor does it [majority opinion] question the familiar doctrine of *forum non conveniens* under which a court having statutory jurisdiction may decline its facilities to a suit that in justice should be tried elsewhere.<sup>29</sup>

Frankfurter went on to say:

The declaration by Congress that a court has jurisdiction and venue is not a command that it must exercise its authority in such a case to the unnecessary injury of a defendant and the public.<sup>30</sup>

Federal and State courts then applied the dicta in the *Miles* and *Kepner* cases. The District Court of New York held the venue conferred by §6 of the F.E.L.A. is absolute and precluded the use of the doctrine of *forum non conveniens*.<sup>31</sup> The State of California held, in *Leet v. Union Pacific Railroad*,<sup>32</sup> that by virtue of the *Miles* and *Kepner* cases, state courts had to entertain F.E.L.A. cases and the doctrine did not apply.<sup>33</sup>

A series of cases involving the doctrine of *forum non conveniens* in non-F.E.L.A. cases reached the Supreme Court next; first, hinting that the doctrine could be used in appropriate cases,<sup>34</sup> and then giving the various criteria for applying the doctrine in specific cases.<sup>35</sup> In *Gulf Oil v. Gil-*

<sup>28</sup> Authority cited note 26, *supra*, at 708.

<sup>29</sup> Authority cited note 25, *supra*, at 55.      <sup>30</sup> *Ibid.*, at 58.

<sup>31</sup> *Sacco v. Baltimore & O. R.*, 56 F.Supp. 959, 960 (E.D. N.Y., 1944), "It has repeatedly been held by authorities which preclude a contrary determination by this Court that the privilege of venue conferred by Section 6 of the Federal Employer's Liability Act is absolute and that the plaintiff's right to bring his action in the federal court in a district where the defendant is doing business is not subject to discretionary denial by the court, whether on considerations of convenience, expense, alleged burden on interstate commerce, or crowding of court calendars with out-of-district cases."

<sup>32</sup> 25 Cal.2d 605, 155 P.2d 42 (1945); cf. *Petersen v. Ogden Union Ry.*, 110 Utah 573, 175 P.2d 744 (1946); *Porter v. Fleming*, 74 F.Supp. 378 (D.C. Minn., 1947).

<sup>33</sup> The statutory right of the plaintiff under the venue provisions of F.E.L.A. to choose among the various jurisdictions in which an action may be brought, being absolute, a court having jurisdiction may not decline to exercise it solely because some other forum would be more convenient.

<sup>34</sup> *William v. North Carolina*, 317 U.S. 287, 294n (1942).

<sup>35</sup> *Williams v. Green Bay & W.R.*, 326 U.S. 549 (1946); *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947); *Koster v. Lumbermans Mutual Casualty*, 330 U.S. 518 (1947); *Cox v. Pennsylvania R.*, 72 F.Supp. 278 (S.D. N.Y., 1947).

bert,<sup>36</sup> it was held that the doctrine of *forum non conveniens* could be applied to cases under the general venue statute.<sup>37</sup> The District Court of Pennsylvania extended the *Gulf Oil* doctrine by saying that where a special venue section is concerned, the plaintiff's choice of forum could not be defeated by the use of the doctrine.<sup>38</sup> Several district courts allowed the doctrine and held that *forum non conveniens* was an inherent power of the courts.<sup>39</sup>

The repercussions mentioned above in connection with the *Miles* and *Kepner* cases occurred on June 25, 1948, when Congress passed an amendment to the Judiciary Act.<sup>40</sup> It read as follows:

(A) 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.<sup>41</sup>

The revisers' notes, found on page 416 of the annotated code, indicate the reason behind this section: "Subsection (A) . . . was drafted . . . in accordance with [the] doctrine of *forum non conveniens*. . . ."<sup>42</sup>

This section, dealing with change of venue, had a profound effect upon the courts. Two Supreme Court cases held that the doctrine was now applicable to F.E.L.A. cases,<sup>43</sup> and in *United States v. National City Lines*,<sup>44</sup> the Supreme Court said that section 1404 (A) was applicable, not only to the general venue sections of Title 28, but to all special venue sections as well. The purpose of section 1404 (A) was to make the doctrine applicable to F.E.L.A. cases.<sup>45</sup> The district courts, following the lead of the Supreme Court, gave the real basis upon which the above decisions were made. They stated that since the section 1404 (A) embraced within its scope "any civil action," this included F.E.L.A. cases, even though

<sup>36</sup> 330 U.S. 501 (1947).

<sup>37</sup> 28 U.S.C.A. § 1391 (1950).

<sup>38</sup> *O'Connor v. Yardley Golf Club*, 79 F.Supp. 264 (E.D. Pa., 1947); cf. *Securities and Exchange Comm. v. Wimer*, 75 F.Supp. 955 (W.D. Pa., 1948).

<sup>39</sup> *Murray v. Union P.R.*, 77 F.Supp. 219 (N.D. Ill., 1948); *Ferguson v. Ford Motor Co.*, 77 F.Supp. 425 (S.D. N.Y., 1948).

<sup>40</sup> 28 U.S.C.A. § 1, et seq. (1950).

<sup>41</sup> 28 U.S.C.A. § 1404 (A) (1950).

<sup>42</sup> *Ibid.*, at 416, and further, ". . . permitting transfer to a more convenient forum, even though the venue is proper . . . the new subsection requires the court to determine that the transfer is necessary for the convenience of the parties and witnesses, and further, that it is in the interest of justice to so do."

<sup>43</sup> *Ex Parte Collett*, 337 U.S. 55 (1949); *Kilpatrick v. Texas and Pacific Ry.*, 337 U.S. 75 (1949).

<sup>44</sup> 337 U.S. 78 (1949).

<sup>45</sup> *Healy v. New York, N.H. & H.R.*, 89 F. Supp. 614 (S.D. N.Y., 1949); *Maloney v. New York, N.H. & H.R.*, 88 F.Supp. 568 (S.D. N.Y., 1949); *Levenson v. Little*, 81 F.Supp. 513 (S.D. N.Y., 1949).

venue is properly laid.<sup>46</sup> In *Schoen v. Mountain Producers*,<sup>47</sup> the court laid out the procedural process under section 1404 (A). The motion called for is a motion to transfer, not a motion to dismiss as under *forum non conveniens*; and by the use of the statute, Congress has aided an inconvenienced defendant without the consequent possible loss of the plaintiffs' action by a subsequent plea of the running of the Statute of Limitations.

The aid given to defendants in the federal courts by the use of section 1404 (A) did not immediately help defendants in state actions, but in *Mooney v. Denver and Rio Grande Railroad*,<sup>48</sup> the Utah court said: "This court, in one form of words or another, has repeatedly recognized the existence of the power to decline jurisdiction in exceptional cases."<sup>49</sup> It further held that since the venue section of the F.E.L.A.<sup>50</sup> and section 1404 (A) did not remodel a state court's judicial process, where the circumstances are exceptional Utah would allow dismissal of an F.E.L.A. case on the basis of the doctrine of *forum non conveniens*. The Missouri Supreme Court, in *State v. Mayfield*,<sup>51</sup> returned to the thinking of the *Miles* and *Kepner* cases and refused to grant dismissal for the reason given in those cases. The United States Supreme Court granted certiorari, and remanded the case<sup>52</sup> to the Missouri Supreme Court with these instructions:

It [Supreme Court of Missouri] should be freed to decide the availability of the principle of *forum non conveniens* in these suits according to its own local laws.<sup>53</sup>

The Supreme Court of the United States subsequently held that section 1404 (A) was applicable only to the Federal Courts;<sup>54</sup> but the *Mayfield* decision had opened the flood gates to the states. California overruled the *Leet*<sup>55</sup> case on the holding in *Mayfield* and held: "The rule of *forum non conveniens* is an equitable one embracing the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause

<sup>46</sup> *Nunn v. Chicago, Milw. St. P.&P.R.*, 80 F.Supp. 745 (S.D. N.Y., 1948); *Hayes v. Chicago, R.I. & P.R.*, 79 F.Supp. 821 (D.C. Minn., 1948); contra, *Pascarella v. New York Cent. R.*, 81 F.Supp. 95 (E.D. N.Y., 1948).

<sup>47</sup> 170 F.2d 707 (C.A. 3d, 1948).

<sup>49</sup> *Ibid.*, at 636.

<sup>48</sup> 118 Utah 307, 221 P.2d 628 (1950).

<sup>50</sup> 45 U.S.C.A. § 56 (1950).

<sup>51</sup> 359 Mo. 827, 224 S.W.2d 105 (1949).

<sup>52</sup> *Missouri v. Mayfield*, 340 U.S. 1, (1950).

<sup>53</sup> *Ibid.*, at 5; when remanded, the Missouri Supreme Court in 362 Mo. 101, 240 S.W.2d 106 (1951), rejected the doctrine because it violated the Missouri constitutional provision similar to § 19, Art. II, of the Illinois Constitution, "Every person ought to find a remedy in the laws for all injuries and wrongs which he may receive in his person or property."

<sup>54</sup> *Pope v. Atlantic Coast Line R.*, 345 U.S. 379 (1953).

<sup>55</sup> *Leet v. Union Pacific R.*, 25 Cal. 2d 605, 155 P.2d 42 (1945).

of action when it believes that the action before it may be more appropriately and justly tried elsewhere."<sup>56</sup> In *Johnson v. Chicago, Burlington & Quincy R.R.*,<sup>57</sup> the Minnesota court, in overruling *Boright v. C.R.I.&P.R.*,<sup>58</sup> stated:

Whatever may have been the former rule, since the decision by the United States Supreme Court in *State of Missouri ex rel. Southern Ry. Co. v. Mayfield*. . . , there can no longer be any doubt that the states are left free to adopt or reject the doctrine of *forum non conveniens* as far as federal law is concerned as long as they treat citizens of their own state who are nonresidents on the same basis as they treat noncitizens who are nonresidents.<sup>59</sup>

Other states<sup>60</sup> followed suit, and dismissed F.E.L.A. cases on the basis of the *Mayfield* holding. In Illinois, two cases, *People v. Clark*,<sup>61</sup> and *Cotton v. Louisville and Nashville R.R.*,<sup>62</sup> took cognizance of the doctrine and applied it to the facts in those cases.

The rule now seems to be thus: If a state decides to use the doctrine of *forum non conveniens* in F.E.L.A. cases, it may do so, if in the application of the doctrine, there is no discrimination between nonresident citizens and noncitizen non-residents.

One further word came from the United States Supreme Court in *Norwood v. Kirkpatrick*,<sup>63</sup> where Justice Minton, quoting Justice Goodrich in *All States Freight v. Modarelli*,<sup>64</sup> said:

The *forum non conveniens* doctrine is quite different from Section 1404 (A). That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate. Section 1404 (A) avoids this latter danger. Its words should be considered for what they say, not with preconceived limitations derived from the *forum non conveniens* doctrine.<sup>65</sup>

<sup>56</sup> *Price v. Atchison, Topeka & Santa Fe Ry.*, 42 Cal. 2d 577, 43 A.L.R.2d 756, 759 (1954), and further on 760, "The [Supreme] court further expressly recognized the power of each State, 'According to its own motion of procedural policy . . . [to] reject, as it may accept, the doctrine [of *forum non conveniens*] for all causes of action begun in its courts,' including those arising under FELA, so long as it discriminates against neither citizens of sister States nor FELA actions."

<sup>57</sup> 243 Minn. 58, 66 N.W.2d 763 (1954).

<sup>58</sup> 180 Minn. 52, 230 N.W. 457 (1930).

<sup>59</sup> Authority cited note 57, *supra*, at 767.

<sup>60</sup> *St. Louis-San Francisco Ry. v. Superior Court of Creek County*, 290 P.2d 118 (Okla., 1955); *Bruner v. Seaboard Air Line R.*, 226 S.C. 177, 84 S.E.2d 557 (1954).

<sup>61</sup> 12 Ill. 2d 515, 147 N.E.2d 89 (1958).

<sup>63</sup> 349 U.S. 29 (1955).

<sup>62</sup> 14 Ill. 2d 144, 152 N.E.2d 385 (1958).

<sup>64</sup> 196 F.2d 1010, 1011 (C.A.3d, 1952).

<sup>65</sup> Authority cited note 63, *supra*, at 31; Justice Clark dissented, holding that *Ex Parte Collett*, 337 U.S. 55 (1949), and the revisers notes said § 1404 (A) was ". . . to adopt for federal courts the principles of *forum non conveniens*."



The district courts have in two instances<sup>66</sup> reiterated these sentiments, and it will be of interest to see what effect the *Norwood* decision will have on future litigants. This decision tends to broaden the right to transfer under section 1404 (A), to a much greater extent than is possible by the doctrine of *forum non conveniens*.

#### HISTORY OF DOCTRINE IN ILLINOIS

In 1919, the Illinois Supreme Court refused to accept an F.E.L.A. case on the same basis as found later in *Douglas v. N.Y., N.H.&H.R.*<sup>67</sup> This case, *Walton v. Pryor*,<sup>68</sup> said that since Illinois did not provide for a recovery in death cases occurring outside of Illinois, they would refuse an F.E.L.A. case based on a death outside of Illinois. From a similar holding in New York, the doctrine of *forum non conveniens* grew to full flower in that state; but in Illinois this was not the case. In 1935, in *Wintersteen v. National Cooperage*,<sup>69</sup> the court stated:

The action here is in tort for injuries to the person of the plaintiff. Such action is not prohibited by any statute of this state, nor is the maintainance of the action against public morals, natural justice, or the general interest of the citizens of the state. . . . There is no statute in this state denying redress of grievances by reason of nonresidence. The policy of our state has always been to permit persons, regardless of residence, to bring suits in our courts. Citizenship has never been a condition precedent to the right of an individual to sue in our courts.<sup>70</sup>

Some writers have cited the *Wintersteen* case as authority for the proposition that the doctrine of *forum non conveniens* was not applicable in Illinois; but no mention of the doctrine was made in the case.

In *Whitney v. Madden*,<sup>71</sup> the court in specific terms allowed the dismissal of a libel action on the grounds of *forum non conveniens* and laid down the rules for applying the doctrine. This was the first Illinois case which unambiguously used *forum non conveniens*.<sup>72</sup> *Nelson v. Miller*<sup>73</sup>

<sup>66</sup> *Hohler v. Pennsylvania R.*, 140 F.Supp. 487 (W.D. Pa., 1956); *Buchanan v. New York Cent. R.*, 148 F.Supp. 732 (E.D. Pa., 1957).

<sup>67</sup> 279 U.S. 377 (1929).

<sup>68</sup> 276 Ill. 563, 115 N.E. 2 (1919).

<sup>69</sup> 361 Ill. 95, 197 N.E. 578 (1935).

<sup>70</sup> *Ibid.*, at 582; cf. *Miller v. Yellow Cab*, 308 Ill. App. 217 (1941).

<sup>71</sup> 400 Ill. 185, 79 N.E.2d 593 (1948).

<sup>72</sup> *Ibid.*, at 595, "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 inconveniences, . . . in its discretion, decline the jurisdiction of the case, even though it may have proper jurisdiction over all parties and the subject mater involved. This is the doctrine of *forum non conveniens*. The Federal courts have recognized the

<sup>73</sup> 11 Ill.2d 378, 143 N.E.2d 673 (1957).

in 1957 further entrenched the doctrine in Illinois. Justice Schaefer, who wrote the opinion of the court, said:

If, in a particular case, trial in an Illinois court will be unduly burdensome to the non-resident defendant, the doctrine of *forum non conveniens* is available.<sup>74</sup>

Thus, with this background of acceptance of the doctrine of *forum non conveniens*, and the earlier *Mayfield*<sup>75</sup> decision of the United States Supreme Court, the rulings in *People v. Clark*,<sup>76</sup> and *Cotton v. L.&N.R.R.*,<sup>77</sup> which apply the doctrine to F.E.L.A. cases, bring the problem up to date.

#### CRITERIA

Throughout this discussion it has been the purpose of the writer to omit the criteria which the courts use in applying the doctrine to various fact situations. It is felt that a concentrated approach is preferred to a piecemeal exposure of these tests. A fact to be kept in mind is that the application of the doctrine is up to the discretion of the trial court, as in the *Clark*<sup>78</sup> case, where the railroad sought by mandamus proceedings to compel Judge Clark to issue a dismissal on the basis of *forum non conveniens*, the court refused to order the mandamus to issue, since the trial judge has a wide latitude of discretion.<sup>79</sup>

In *Koster v. Lumbermans Mutual Casualty*,<sup>80</sup> the Supreme Court broke down the criteria into two groups: a) Vexation to the defendant, and b) Inconvenience to the court. In *Murray v. Union Pacific R.R.*,<sup>81</sup> the court held that the doctrine is applicable when there is mere inconvenience to the defendant, the courts in the forum upon which suit would be imposed are crowded or when the defendant is put to trouble and expense. *Naughton v. Pennsylvania R.R.*<sup>82</sup> laid down the rule that the plaintiff's action must be in the nature of vexation or of harassment to the defend-

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application of this doctrine and have found it not repugnant to section 2 of article IV, and section 1 of the fourteenth amendment. . . ." See also, *Peterie v. Thompson*, 10 Ill. App.2d 100, 134 N.E.2d 534 (1956); *Bagarozzy v. Meneghini*, 8 Ill. App.2d 285, 131 N.E.2d 792 (1955).

<sup>74</sup> *Ibid.*, at 391, 680.

<sup>76</sup> 12 Ill.2d 515, 147 N.E.2d 89 (1957).

<sup>75</sup> *Missouri v. Mayfield*, 340 U.S. 1 (1950). <sup>77</sup> 14 Ill.2d 144, 152 N.E.2d 385 (1958).

<sup>78</sup> *People v. Clark*, 12 Ill.2d 515, 147 N.E.2d 89 (1957).

<sup>79</sup> Justice Schaefer dissented saying that the mandamus should issue because 45 U.S.C.A. § 56 does not preclude *forum non conveniens* and, therefore, the trial judge should have looked to the issues involved. Compare, *St. Louis-San Francisco Ry. v. Superior Ct. of Creek Cty.*, 290 P.2d 118 (Okla., 1955) which ordered mandamus to issue in a similar circumstance.

<sup>80</sup> 330 U.S. 518 (1947); cf. *Cullinan v. New York Cent. R.*, 83 F.Supp. 870 (S.D. N.Y., 1948).

<sup>81</sup> 77 F.Supp. 219 (N.D. Ill., 1948).

<sup>82</sup> 85 F.Supp. 761 (E.D. Pa., 1949).

ant.<sup>83</sup> *Belair v. New York N.H.&H.R.*<sup>84</sup> held that one criterion is inconvenience to the witnesses.<sup>85</sup> Utah courts have held that one of the main considerations is the ability of the plaintiff to employ adequate counsel, and therefore one must look to the condition of the calendars in the dismissing forum and in the forum to which the suit will be sent.<sup>86</sup> About the most adequate and comprehensive discussion of the criteria is found in 43-39 *Chanango Street Corp. v. Metropolitan Life Ins.*<sup>87</sup> All the various factors for which the courts look are stated: a) Ease of access to sources of proof, b) Availability of compulsory process for attendance of unwilling witnesses, c) Cost of obtaining attendance of willing witnesses, d) Possibility of a view of the premises by the jury if necessary, e) Enforceability of a judgment by the court, f) Possibility of a fair trial, g) Local interest in having localized controversies decided at home, h) Congestion of the court and ability to implead, and i) Court to which plaintiff is relegated by exercise of the doctrine. The Oklahoma court stated that employment of expert witnesses in the forum will not convert an otherwise inappropriate forum into an appropriate forum.<sup>88</sup> Another very important consideration, not mentioned in the opinions to any great extent, but of infinite importance to the plaintiff, would be the possibility of the running of the Statute of Limitations before suit can be re-instituted in the proper forum. This problem is discussed in *Norwood v. Kirkpatrick*.<sup>89</sup>

The criteria, as can be seen, are varied and subject to different stress and importance by the various judges hearing the motion. Each case is decided individually, and as usual in discretionary cases, similar facts may produce divergent opinions.

There does appear to be a definite split of authority on the question of the extent of inconvenience to be suffered by the defendant before the

<sup>83</sup> In *Loftus v. Lee*, 308 S.W.2d 654, 661 (Mo., 1958), the court said, "[Plaintiff] should be denied the right to sue on a transitory cause of action in a court with jurisdiction over the parties only on a clear showing that he is abusing those rules for the purpose of vexing and harassing the defendant. Caution must be exercised in every case if the plea of forum non conveniens is not to become a powerful weapon in the hands of the defendant who is seeking to avoid his obligations."

<sup>84</sup> 88 F.Supp. 572 (S.D. N.Y., 1950).

<sup>85</sup> But see, *Chicago, R.I.&P.R., v. Breeding*, 232 F.2d 584 (C.A. 10th, 1956), (motion denied because allegation of inconvenience to witnesses too general, without a showing of the materiality of the evidence to be presented by the witnesses).

<sup>86</sup> *Mooney v. Denver & R.G.W.R.*, 118 Utah 307, 221 P.2d 628 (1950).

<sup>87</sup> 162 N.Y.Supp.2d 802 (1957).

<sup>88</sup> *St. Louis-San Francisco Ry. v. Superior Ct. of Creek Cty.*, 290 P.2d 118 (Okla., 1955); for criteria in Illinois see, *Peterie v. Thompson*, 10 Ill.App.2d 100, 134 N.E.2d 534 (1956); *Bagarozny v. Meneghini*, 8 Ill.App.2d 285, 131 N.E.2d 792 (1955); *Whitney v. Madden*, 400 Ill. 185, 79 N.E.2d 593 (1948).

<sup>89</sup> 349 U.S. 29 (1955); cf. *Peterie v. Thompson*, 10 Ill.App.2d 100, 134 N.E.2d 534 (1956).

motion to dismiss on the grounds of *forum non conveniens* will be allowed. A line of cases, beginning with *Gulf Oil v. Gilbert*,<sup>90</sup> follow Justice Jackson's words:

But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.<sup>91</sup>

The court in *Naughton v. Pennsylvania R.R.*<sup>92</sup> stated:

The doctrine *forum non conveniens* requires the moving party to show a great deal more than merely that it would be more convenient to try the case in a different jurisdiction. . . .<sup>93</sup>

The court went on to say that the defendant must show such hardship as would amount to oppression or vexatiousness if the court persisted in exercising its jurisdiction.<sup>94</sup> Illinois seems to follow the greater weight of the cases. In *Cotton v. L&N Ry.*,<sup>95</sup> the majority opinion read:

[Only time *forum non conveniens* will be used is when plaintiff's choice of forum is] purely vexatious or whether there is a relevant connection between the litigation and forum chosen.<sup>96</sup>

This requirement of vexatiousness was strengthened in the dicta of a later case in Illinois, *James v. Grand Trunk Western Ry.*<sup>97</sup>

Another line of thinking, beginning with Justice Frankfurter's dissent in *Baltimore and Ohio R. v. Kepner*,<sup>98</sup> maintains that the balance between defendant's inconvenience and inconvenience to the forum must be in favor

<sup>90</sup> 330 U.S. 501 (1947).

<sup>91</sup> *Ibid.*, at 508; *U.S. v. National City Lines*, 337 U.S. 78 (1949); *Koster v. Lumbermans Mutual Casualty*, 330 U.S. 518 (1947); *Williams v. Green Bay W.R.*, 326 U.S. 549 (1946); *Chicago, R.I.&P.R. v. Breeding*, 232 F.2d 584 (C.A. 10th, 1956); *General Portland Cement v. Perry*, 204 F.2d 316 (C.A. 7th, 1953); *Ford Motor Co. v. Ryan*, 182 F.2d 329 (C.A.2d, 1950); *Hohler v. Pennsylvania R.*, 140 F. Supp. 487 (W.D. Pa., 1956); *Skultety v. Pennsylvania R.*, 91 F.Supp. 118 (S.D. N.Y., 1950); *Maloney v. New York, N.H.&H.R.*, 88 F.Supp. 568 (S.D. N.Y., 1949); *Naughton v. Pennsylvania R.*, 85 F.Supp. 761 (E.D. Pa., 1949); *Cullinan v. New York Cent. R.*, 83 F.Supp. 870 (S.D. N.Y., 1948); *Ferguson v. Ford Motor Co.*, 77 F.Supp. 425 (S.D. N.Y., 1948); *Securities and Exchange Comm. v. Wimer*, 75 F.Supp. 955 (W.D. Pa., 1948); *Cox v. Pennsylvania R.*, 72 F.Supp. 273 (S.D. N.Y., 1947); *James v. Grand Trunk Western R.*, 14 Ill. 2d 356, 152 N.E.2d 858 (1958); *Cotton v. Louisville & Nashville R.*, 14 Ill.2d 144, 152 N.E.2d 385 (1958); *People v. Clark*, 12 Ill.2d 515, 147 N.E.2d 89 (1957); *Loftus v. Lee*, 308 S.W.2d 654 (Mo., 1958); *43-39 Chanango Street Corp. v. Metropolitan Life Ins.*, 162 N.Y.Supp.2d 802 (1957).

<sup>92</sup> 85 F.Supp.2d 761 (E.D. Pa., 1949).

<sup>93</sup> *Ibid.*, at 763.

<sup>94</sup> In *Ford Motor Co. v. Ryan*, 182 F.2d 329 (C.A.2d, 1950), Justice Learned Hand in his concurring opinion said on page 332, ". . . § 15 of Title 15 U.S.C.A., gives to a plaintiff a privilege which a defendant must overcome by more than a bare balance of convenience between the two forums." *Skultety v. Pennsylvania R.*, 91 F.Supp. 118 (S.D. N.Y., 1950).

<sup>95</sup> 14 Ill.2d 144, 152 N.E.2d 385 (1958).

<sup>97</sup> 14 Ill.2d 356, 152 N.E.2d 858 (1958).

<sup>96</sup> *Ibid.*, at 397.

<sup>98</sup> 314 U.S. 44 (1941).

of the defendant, without the need for showing vexation.<sup>99</sup> In *Bruner v. Seaboard Air Line R.*,<sup>100</sup> a quote is found which hits the heart of this reasoning:

On a motion of this character the burden in the first instance is upon the moving party to make a *prima facie* showing not only that the convenience of the witnesses would be served, but also that the ends of justice would be promoted by the change. If this is done, the burden shifts to the other side to show that at least one of these requirements has not been sufficiently satisfied.<sup>101</sup>

In *Price v. A.T.&S.F. Ry.*,<sup>102</sup> the first major state decision after the *Mayfield* case, the court did not look for any showing of spite or vexatiousness, but only an inconvenience to the defendant and the court, which the plaintiff's right to the forum failed to balance. Justice Schaefer, in his dissent to the *Cotton*<sup>103</sup> case, held that the doctrine of *forum non conveniens* should be used where the burdens of plaintiff and defendant do not balance, not solely because of vexatious intent. Justice Schaefer reasoned that the plaintiff's choice of forum is usually based on the "doing business in the forum" concept of jurisdiction, which concept is declining in importance since the case of *International Shoe Co. v. State of Washington*,<sup>104</sup> which announced the concept of procedural due process. Therefore, the doctrine of *forum non conveniens* is of increased importance and will be of greater use if the base of the doctrine is broadened, and yet it will still satisfy procedural due process.

#### CONCLUSION

Throughout the vagaries of decision and comment on the doctrine of *forum non conveniens* in its most important field of application, F.E.L.A. cases, one is impressed by the inherent vigor and resilience of the doctrine. From each adverse decision, it bounds back to assert its basically equitable appeal. Now that the doctrine is being applied by the states with the lessening of the Supreme Court of the United States, and the Federal Courts have a similar tool at their disposal, section 1404 (A),<sup>105</sup> the big issue in the future will involve the circumstances under which the doctrine will be applied. The Federal Courts need only balance the conveniences, and

<sup>99</sup> Accord, *Buchanan v. New York Cent. R.*, 148 F.Supp. 732 (E.D. Pa., 1957); *Healy v. New York, H.N.&H.R.*, 89 F.Supp. 614 (S.D. N.Y., 1949); *Bruner v. Seaboard Air Line R.*, 226 S.C. 177, 84 S.E.2d 557 (1954); *Price v. Atchison, Topeka & Santa Fe Ry.*, 42 Cal.2d 577, 268 P.2d 457 (1954); and Justice Schaefer's dissent in *Cotton v. Louisville & Nashville R.*, 14 Ill.2d 144, 152 N.E.2d 385 (1958).

<sup>100</sup> 226 S.C. 177, 84 S.E.2d 557 (1954).      <sup>101</sup> *Ibid.*, at 558.

<sup>102</sup> 42 Cal.2d 577, 268 P.2d 457 (1954).

<sup>103</sup> *Cotton v. Louisville & Nashville R.*, 14 Ill.2d 144, 152 N.E.2d 385 (1958).

<sup>104</sup> 326 U.S. 310 (1945); *Nelson v. Miller*, 11 Ill.2d 378, 143 N.E.2d 673 (1957).

<sup>105</sup> 28 U.S.C.A. § 1404 (A) (1950).

Justice Schaefer calls for the same reasoning to be used in the states. This writer's purpose as stated initially was to bring the entire problem of *forum non conveniens* into clear focus. Prognostication as to the future use of the doctrine is left to the reader.

### APPLICATIONS OF THE FEDERAL GAMBLING STAMP TAX LAW

Spurred by the Kefauver Crime Investigating Committee, Congress, in the Revenue Act of 1951, enacted two tax laws on gambling. The first tax, aimed at the bookmaker and lottery operator, is a ten per cent excise on all wagers concerning sporting events or lotteries. The second law imposes a special \$50 per year occupational stamp tax on such persons.

When purchasing the occupational gambling tax stamp the person must register with the Director of Internal Revenue and give certain information including: (1) name and place of business (2) each place of business where his gambling activity is carried on, and the names and places of residence of persons engaged in receiving wagers for him or on his behalf and (3) the name and place of residence of each for whom he is receiving wagers. The required information is made available for public inspection,<sup>1</sup> which means available for the state police or the FBI. But the payment of the tax does not exempt any person from criminal prosecution for violations of federal or state laws prohibiting such gambling activities.<sup>2</sup> A fine of \$1000 to \$5000 is provided for failure to pay either the wagering tax or failure to purchase the \$50 tax stamp.<sup>3</sup> In addition, wilful violations are punishable by a fine up to \$10,000 and imprisonment up to five years.<sup>4</sup>

Even though Congressional committees defended the tax as a revenue producing measure<sup>5</sup> there is little dispute as to the real purpose of these taxes—to discourage gambling and to facilitate the enforcement of state criminal laws against gambling. It is obvious that from a practical standpoint a tax which is designed to end the activity with respect to which it is imposed cannot be said to be for the purpose of collecting revenue. However, in a somewhat similar situation in 1919, the Supreme Court upheld a one dollar per year tax upon narcotic dealers though there were elaborate ancillary provisions as to registration requirements and records.<sup>6</sup>

#### CONSTITUTIONALITY OF THE TAX

The federal gambling tax law places the professional gambler in a dilemma. If he buys the tax stamp and provides the information required he will

<sup>1</sup> Internal Revenue Code §§ 3292, 3275.

<sup>3</sup> Internal Revenue Code § 3294(a).

<sup>2</sup> Internal Revenue Code § 3297.

<sup>4</sup> Internal Revenue Code § 3294(c).

<sup>5</sup> H.R. Rep. No. 586 82d Cong. 1st Sess. 54-55 (1951); Sen. Rep. No. 781, 82d Cong. 1st Sess. 112-113 (1951). At that time annual revenue from the tax was estimated at \$400,000,000, but has only run about 1% of this figure.

<sup>6</sup> *United States v. Doremus*, 249 U.S. 86 (1919).