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Federal Employers' Liability Act in Inconvenient State Courts

William C. Morris Jr.

FEDERAL EMPLOYERS' LIABILITY ACT IN INCONVENIENT STATE COURTS

The venue section of the Federal Employers' Liability Act[1] gives a plaintiff a wide choice in the selection of a forum,[2] but this privilege has been abused[3] to the extent that a huge interstate commerce in actions brought under the F.E.L.A. has developed through the efforts of certain law firms in several metropolitan centers.[4]

Since 1910[5] the F.E.L.A. has expressly provided that a suit may be brought in a state court, or in a United States district court, (1) in the district of the residence of the defendant, or (2) in the district where the cause of action arose, or (3) in any district in which the defendant shall be doing business at the time.[6]

Efforts by some railroads to avoid being sued in forums inconvenient to them, by the use of injunctions, were unsuccessful. The United States Supreme Court, in *Baltimore & Ohio R.R. v. Kepner*,[7] held that a state court could not restrain a resident from continuing the prosecution of a suit under the F.E.L.A. in a distant federal dis-

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[1]35 STAT. 65 (1908), as amended, 45 U.S.C. §§51-59 (1946).

[2]35 STAT. 66 (1908), as amended, 45 U.S.C. §56 (1946).

[3]"The open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

[4]Winters, *Interstate Commerce in Damage Suits*, 29 J. AM. JUD. SOC'Y 135 (1946). The chief centers are New York, Chicago, Baltimore, St. Louis, Minneapolis and Los Angeles. Many of these cases are brought from great distances, some from California to Chicago. See Winters, *supra* at 137, and Note, 25 N.C.L. REV. 379 (1947).

[5]The original F.E.L.A., adopted in 1908, made no provision for venue. Following Mondou v. New York, N.H. & H.R.R., 82 Conn. 373, 73 Atl. 762 (1909), holding that courts of Connecticut did not have jurisdiction to entertain an action based on the F.E.L.A., Congress amended the Act in 1910 to provide 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 . . . ." 36 STAT. 291 (1910), as amended, 45 U.S.C. §56 (1946). The United States Supreme Court later commented that "the amendment, as appears by its language, instead of granting jurisdiction to the state courts, presupposes that they already possessed it." Mondou v. New York, N.H. & H.R.R., 223 U.S. 1, 56 (1912).

[6]See note 2 *supra*.

[7]314 U.S. 44 (1941).

trict court, or interfere with the privileges of federal venue.[8] The following year, the same court, in *Miles v. Illinois Central R.R.*,[9] held that a state court could not restrain the prosecution of an action under the F.E.L.A. in another state court on account of inconvenience or harassment to the defendant.[10]

In 1948 Congress, with knowledge of the *Kepner* and *Miles* decisions, enacted Section 1404 (a) of the Judicial Code.[11] This section 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," which in effect gives the federal courts the power to use the doctrine of *forum non conveniens*.[12] In 1949, the United States Supreme Court held that Section 1404 (a) not only applied to the general venue provisions applicable to the federal courts, but also to the special venue provisions of the F.E.L.A.[13]

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[8]The injunction could not be used "for the benefit of the carrier or the national transportation system, on the ground of cost, inconvenience or harassment." Baltimore & Ohio R.R. v. Kepner, 314 U.S. 44, 54 (1941). Inequity based on cost, inconvenience or harassment is the argument most often presented in favor of granting dismissal under the doctrine of *forum non conveniens*.

[9]315 U.S. 698 (1942).

[10]However, it had been held in Cole v. Cunningham, 133 U.S. 107 (1890), that the right of a state court to prevent unjust resort to the courts of another state was well established. The decision in the *Miles* case seems to be limited to the situation where a federal right is sought to be litigated in the other state court, inasmuch as ". . . 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. . . . 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." Miles v. Illinois Cent. R.R., 315 U.S. 698, 703 (1942).

[11]62 STAT. 937 (1948), 28 U.S.C. §1404(a) (Supp. 1950); Note, 29 N.C.L. REV. 61 (1950) (concerned chiefly with the interpretation to be given Section 1404(a)).

[12]The doctrine of *forum non conveniens* "deals with the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere." Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COL. L. REV. 1 (1929). See Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947).

[13]*Ex parte* Collett, 337 U.S. 55 (1949). Section 1404(a) was also held to apply to the special venue provisions in the Sherman Anti-Trust Law, 26 STAT. 209 (1890), as amended, 15 U.S.C. §§4, 5 (1946), United States v. National City Lines, 337 U.S. 78 (1949). Justices Black and Douglas dissented in this case and in *Ex parte* Collett, *supra*, on the ground that Congress has not made it sufficiently clear

This development in the federal courts caused plaintiffs to resort to the state courts — inasmuch as these courts were not subject to the provisions of Section 1414 (a) of the Judicial Code. Attempts made by railroads to apply the doctrine of *forum non conveniens* to these suits in state courts have had some interesting consequences.

The case of *Missouri* ex rel. *Southern Ry. v. Mayfield*[14] was an original proceeding in mandamus to compel a trial judge in Missouri to use his discretion in passing on a motion, grounded solely on *forum non conveniens,* to dismiss an action brought by a nonresident under the F.E.L.A.[15] The Missouri Supreme Court held that the judge could not in the exercise of discretion grant a dismissal. The case involved one accident which occurred in Tennessee, 700 miles distant from the forum, and another which occurred in Oklahoma, 647 miles distant.[16] This decision seems to be grounded on two principles: (1) that "under the *Kepner* and *Miles* cases . . . a state court cannot dismiss a Federal Employers' Liability case solely under the *forum non conveniens* doctrine,"[17] and (2) that a dismissal would violate the Privileges and Immunities Clause of the United States Constitution.[18] Upon certiorari, the United States Supreme Court reversed this decision, saying:[19]

> ". . . if the Supreme Court of Missouri held as it did because it felt under compulsion of federal law as enunciated by this Court[20] so to hold, it should be relieved of that compulsion.

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that "any civil action" as used in Section 1404 (a) extended to special venue statutes not found in the Judicial Code, Tit. 28 U.S.C.

[14]359 Mo. 827, 224 S.W.2d 105 (1949).

[15]Undoubtedly, the only thing the railroad had to gain in compelling the use of discretion in passing on the motion to dismiss on the theory of *forum non conveniens* was the bare chance that the court would have decided that the motion should have been granted due to the hardship on the defendant in defending in that forum.

[16]State *ex rel.* Atchison, T. & S.F. Ry. v. Murphy, 359 Mo. 827, 224 S.W.2d 105 (1949), was a case on precisely the same question and was consolidated with the *Mayfield* case.

[17]*Id.* at 837, 224 S.W.2d at 107.

[18]"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." U.S. CONST. Art. IV, §2.

[19]Missouri *ex rel.* Southern Ry. v. Mayfield, 340 U.S. 1, 5 (1950).

[20]The Court here was referring to the *Kepner* and *Miles* decisions. Justice Jackson in a concurring opinion, *ibid.,* stated: "The Missouri Court appears to have acted under the supposed compulsion of Miles v. Illinois Cent. R.R., 315 U.S. 698 . . . ."

> It should be freed to decide the availability of the principle of *forum non conveniens* in these suits *according to its own local law.*"[21]

The United States Supreme Court further stated in the *Mayfield* case that a state court decision to the effect that the doctrine of *forum non conveniens* cannot bar an action brought under the F.E.L.A. might be based on one of three possible theories: (1) that according to its own notions of procedural policy, the doctrine is not part of its law (where no federal issue is involved), or (2) that by reason of the Privileges and Immunities Clause, a state may not discriminate against citizens of sister states, or (3) that previously announced federal law compelled such a decision (which compulsion the Court held not to exist).

In relation to theory (2), the Court stated:[22]

> "Therefore Missouri cannot allow suits by non-resident Missourians for liability under the Federal Employers' Liability Act arising out of conduct outside that state and *discriminatorily deny access* to its courts to a non-resident who is a citizen of another state."

This raises an important constitutional question. The Court has held that the Privileges and Immunities Clause secures to citizens of one state the right to resort to the courts of another state.[23] Although this guarantee has certain qualifications, the Clause does not require a state to supply its courts with such jurisdiction that citizens of

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[21]Italics added.

[22]Missouri *ex rel.* Southern Ry. v. Mayfield, 340 U.S. 1, 3 (1950). Italics added. There is some feeling that Justice Frankfurter here might have been thinking of the availability of the courts rather than the availability of *forum non conveniens,* since the Privileges and Immunities Clause could not prevent the use of *forum non conveniens* except in a situation where the state had a policy of applying the doctrine to one class of citizens and not to another.

[23]Missouri Pac. R.R. v. Clarendon Boat Oar Co., 257 U.S. 533 (1922). "The right of a citizen of one state to pass through, or to reside in any other state, for the purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of habeas corpus; to institute actions of any kind in the courts of the state; . . . may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental . . . ." Corfield v. Coryell, 6 Fed. Cas. No. 3,230, at 552 (E.D. Pa. 1823). Under a state statute which provided that a foreign corporation

other states may litigate certain classes of cases, unless it afford jurisdiction to the same classes of cases brought by its own citizens,[24] even when rights under the Constitution are sought to be adjudged. The Clause only "requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens."[25] The right to resort to the courts of another state is conditioned upon that court's jurisdiction as determined by local law[26] and its own notions of procedural rules.[27] One of these rules is the doctrine of *forum non conveniens*,[28] but like other procedural rules, it must apply alike to citizens of the state as well as to citizens of sister states.[29] Since the decisions in the *Kepner* and *Miles* cases have been clarified by the *Mayfield* decision,[30] there seems to be nothing in the F.E.L.A. to compel state courts to entertain cases

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could be sued by a nonresident in the state courts only when the foreign corporation was doing business in that state, no violation of the Privileges and Immunities Clause occurred, since the discrimination was made on the basis of residence and not citizenship, Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929). A statute which prohibited the bringing of an action for wrongful death in the state unless the deceased was a citizen of that state was held valid, because the discrimination was not based on the citizenship of the person bringing the suit, Chambers v. Baltimore & Ohio R.R., 207 U.S. 142 (1907).

[24]Anglo-American Provision Co. v. Davis Provision Co., 191 U.S. 373 (1903).

[25]McKnett v. St. Louis & S.F.R.R., 292 U.S. 230, 233 (1934).

[26]"But, subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them. The State policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions." Chambers v. Baltimore & Ohio R.R., 207 U.S. 142, 148 (1907).

[27]"It [venue section of the F.E.L.A.] does not preclude any procedural requirement of the forum which plaintiff selects for the trial of the case. Plaintiff's attempt to stretch the decisions to preclude the power to enforce local rules, or local methods of procedure, or any of the usual practice regulations, other than those relating to venue, seems contrary to the very terms of the section itself . . . ." Grant v. Pennsylvania R.R., 8 F.R.D. 40, 41 (1948).

[28]Koster v. (American) Lumbermen's Mut. Cas. Co., 330 U.S. 518 (1947); Williams v. Green Bay & W.R.R., 326 U.S. 549 (1946).

[29]"But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other." Chambers v. Baltimore & Ohio R.R., 207 U.S. 142, 148 (1907).

[30]"But neither of these cases limited the power of a State to deny access to its courts to persons seeking recovery under the Federal Employers' Liability Act if in similar cases the State for reasons of local policy denies resort to its courts and

brought under it, and this has been frequently stated.[31] It follows that an action brought in a state court under the F.E.L.A would be subject to the doctrine of *forum non conveniens,* if the state court permitted the doctrine to be used when an action under the F.E.L.A. is brought by a citizen of the forum. Conversely, if the forum did not allow the doctrine in F.E.L.A. suits by its own citizens, a policy allowing it when the action is by a nonresident citizen[32] of a sister state would violate the Privileges and Immunities Clause.[33] Thus, if state *A* does not allow the doctrine to be used by defendant *X,* citizen of state *Y,* when *X* is sued by citizens of state *A,* then to allow the doctrine to be used by *X* when sued by citizens of state *B* would result in unconstitutional discrimination against citizens of state *B.*

Faced with the mandate of the United States Supreme Court, the Missouri Supreme Court, dealing with the case for the second time,[34] merely reiterated that since it was the policy of that state to allow citizens of Missouri (resident and nonresident) to bring and maintain suits under the F.E.L.A. in Missouri courts, to bar citizens of other states from doing likewise violates the Privileges and Immunities Clause. This leaves something to be desired, in that it seems to con-

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enforces its policy impartially . . . so as not to involve a discrimination against Employers' Liability Act suits and not to offend against the Privileges-and-Immunities Clause of the Constitution. No such restriction is imposed upon the States merely because the Employers' Liability Act empowers their courts to entertain suits arising under it." 340 U.S. 1, 4 (1950).

[31]Mondou v. New York, N.H. & H.R.R., 223 U.S. 1, 56 (1912). "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 duty upon such Courts as against an otherwise valid excuse." Douglas v. New York, N.H. & H.R.R., 279 U.S. 377, 387 (1929). See Herb v. Pitcairn, 324 U.S. 117, 120 (1945).

[32]It seems that few, if any, situations would arise where a court would dismiss an action brought by a resident citizen of a sister state, since in that situation, it would be imposing an obvious hardship on the plaintiff to force him to bring his action in a court outside the state of his residence.

[33]If the discrimination is based on the residence of the litigant rather than on his citizenship, the discrimination is valid under the Privileges and Immunities Clause. "But if a state chooses to [prefer] residents in access to often overcrowded courts and to deny such access to all non-residents, whether its own citizens or those of other States, it is a choice within its own control." Missouri *ex rel.* Southern Ry. v. Mayfield, 340 U.S. 1, 4 (1950).

[34]State *ex rel.* Southern Ry. v. Mayfield, 240 S.W.2d 106 (Mo. 1951), *certiorari denied,* 72 Sup. Ct. 107 (1951).

template mere jurisdiction, for the court nowhere said that it had a policy rejecting *forum non conveniens* in F.E.L.A. suits brought by its own citizens. Before a motion to dismiss based on the doctrine can be entertained, the court must have jurisdiction,[35] and then consideration of the motion is in the discretion of the court. Since Missouri accepts jurisdiction, in order to discriminatorily deny access to its courts to citizens of sister states, it would have to formulate a policy whereby the doctrine of *forum non conveniens* was available to defendants sued by citizens of sister states, but not to defendants sued by citizens of Missouri. The only Missouri case cited by the Missouri court[36] in the last decision to substantiate its position was a case dealing with the jurisdiction of the court and not the availability of *forum non conveniens*. However, there is some indication that this doctrine is not part of the law of Missouri, for in at least one previous case[37] involving a motion to dismiss an F.E.L.A. suit, on the ground that the cause of action arose in the state of Illinois, that all parties were residents and citizens of Illinois, and that the plaintiff could have brought his suit in Illinois, the court held that the interpretation given its statutes did not give it discretion to decline jurisdiction.

New York and Utah have held that an action brought under the F.E.L.A. may be dismissed without the benefit of a controlling statute.[38] Illinois and Ohio have held that because of certain venue statutes, an F.E.L.A. suit may not be maintained there as a matter of right;[39] while Missouri and California have held that their courts are not invested with the discretion to deny jurisdiction when the action is brought in the inconvenient forum.[40] Florida, Louisiana,

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[35]"Indeed, the doctrine of *forum non conveniens* can never apply if there is an absence of jurisdiction or mistake of venue." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947).

[36]State *ex rel.* Pacific Mut. Life Ins. Co. v. Grimm, 239 Mo. 135, 143 S.W. 483 (1911).

[37]Bright v. Wheelock, 323 Mo. 840, 20 S.W.2d 684 (1929).

[38]Murnan v. Wabash Ry., 246 N.Y. 244, 158 N.E. 508 (1927); Mooney v. Denver & R.G.W.R.R., 221 P.2d 628 (Utah 1950) (motion for dismissal denied on other grounds).

[39]Walton v. Pryor, 276 Ill. 563, 115 N.E. 2 (1917) (wrongful death action under F.E.L.A.; statute prohibited wrongful death action for death occurring in another state); Loftus v. Pennsylvania R.R., 107 Ohio St. 352, 140 N.E. 94 (1923) (state statute excluded from jurisdiction of state courts all actions for wrongful death occurring without the state unless the claimant is a resident of the state).

[40]See note 33 *supra;* Leet v. Union Pac. R.R., 25 Cal.2d 605, 155 P.2d 42 (1944). In this case, the *Kepner* and *Miles* decisions were cited as controlling authority

Massachusetts, New Hampshire and New Jersey have indicated that their courts have the discretion to deny jurisdiction of a transitory cause of action between two nonresidents.[41] Other jurisdictions have either failed to decide the question or have indicated that their courts do not have the discretion to decline jurisdiction.[42]

Looking at the effect of the *Mayfield* decision upon the overall problem faced by the railroads in coping with the inconvenient F.E.L.A. suit, little if anything has been achieved. The most that can be said is that the compulsion previously thought to exist under the *Kepner* and *Miles* decisions is now removed, as well as any compulsion thought to exist in the Act itself. Only the litigant's rights under the Privileges and Immunities Clause remain mandatory upon the state court. Accordingly, some additional remedy is necessary to eliminate the unethical practices of "ambulance chasing" firms, and the consequent inevitable burden placed upon the railroads in defending the inconvenient suit.

In 1947, the House of Representatives passed the Jennings Bill,[43]

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that California had to grant jurisdiction. Query: Would California so hold after the *Mayfield* decision?

[41]Hagen v. Viney, 124 Fla. 247, 169 So. 391 (1936) (suit for specific performance of separations agreement where both parties were nonresidents of the forum); Union City Transfer v. Fields, 199 So. 206 (La. App. 1940) (action on a promissory note made and payable in Texas, both parties being residents of Texas); Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N.E. 152 (1933) (action by domestic corporation, as assignee of bank deposit by Russian bank, brought against English bank of deposit not doing business in United States; refusal to retain jurisdiction under rules of comity and under doctrine of *forum non conveniens*); Jackson & Sons v. Lumbermen's Mut. Cas. Co., 86 N.H. 341, 168 Atl. 895 (1933) (action by insured against its liability insurer for negligently conducting the defense of a suit against the insured where both parties were residents of other states); Anderson v. Delaware, L. & W.R.R., 18 N.J. Misc. 153, 11 A.2d 607 (1940) (action by residents of Pennsylvania against a Pennsylvania corporation for wrongful death occurring in Pennsylvania).

[42]North Carolina is typical of these states. See McDonald v. MacArthur Bros. Co., 154 N.C. 122, 69 S.E. 832 (1910). The majority of the states which have denied their courts this discretion have so held because they have felt that the Privileges and Immunities Clause of the Constitution prohibited it.

[43]"A civil suit for damages for wrongful death or personal injuries against any interstate common carrier by railroad may be brought only in a district court of the United States or in a State court of competent jurisdiction, in the district or county (parish), respectively, in which the cause of action arose, or [where] the person suffering death or injury resided at the time it arose: Provided; That if the defendant cannot be served with process issuing out of any of the courts afore-mentioned, then and only then, the action may be brought in a district

which would have amended Section 6 of the F.E.L.A. to authorize the bringing of an action under the Act only in the district or state where the accident occurred or where the injured party resided, and only when the railroad could not be served in either place could an action be brought wherever the railroad was doing business.[44] It seems clear that by so narrowing the venue, the solicitation of suits[45] would be greatly reduced. The bill died in a Senate committee.

Another possible solution would be the creation of a workmen's compensation act applicable to employees of interstate railroads.[46] A reasonable compensation for all injuries sustained, regardless of negligence, might prove to be more desirable than a few cases of very large recoveries where the injury is a major one and where the railroad is clearly negligent. However, the adoption of a federal act in this field seems unlikely.[47]

The evils surrounding the misuse of the venue privileges given by the Act could be greatly diminished by each state adopting the doctrine of *forum non conveniens* as part of its law, but at best this result would be slow and decidedly uncertain. Due to the inability of Congress or the federal courts, as displayed by the *Mayfield* case, to make the doctrine of *forum non conveniens* available as a pro-

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court of the United States, or in a State court of competent jurisdiction, at any place where the defendant shall be doing business at the time of the institution of said action." H.R. 1639, 80th Cong., 1st Sess. (1947).

[44]The opponents of the Bill argued that the solution to the problem was in the prevention of solicitation rather than in curbing the wide venue privileges, Pascarella v. New York Cent. R.R., 81 F. Supp. 95 (E.D.N.Y. 1948). Labor argues that these F.E.L.A. suits should be brought in industrial centers where juries are more capable of assessing damages, due to their own peculiar knowledge of the needs of the working class. But this seems to amount to little more than an argument that plaintiffs under the F.E.L.A. should be allowed to go "shopping" for a favorable court and jury. On the other side the argument exists that something must be done to curb the unethical practices of the handful of "ambulance chasing" lawyers. It is apparent that state laws and local bar associations are not effectively controlling this matter. A balancing of these arguments seems to weigh in favor of curbing the venue privileges.

[45]An example of a state statute authorizing injunction against solicitation in this field is N.C. GEN. STAT. §84-38 (Supp. 1950). This statute is discussed in 25 N.C.L. REV. 379 (1947).

[46]Winters, *Interstate Commerce in Damage Suits,* 29 J. AM. JUD. SOC'Y 135, 144 (1946).

[47]*Ibid.* Labor generally regards the maximum benefits obtainable under existing state acts as far too small.

cedural rule in the state courts,[48] serious reconsideration should be given to the Jennings Bill as offering the better solution to a proper administration of the federal act. Certainly, such flaunting of legal ethics and principles of justice[49] demands immediate and well-considered attention.

WILLIAM C. MORRIS, JR.
University of North Carolina

[48]Due to the fact that Congress cannot make procedural rules for the courts which it does not create, it is generally conceded that Congress may not make the *forum non conveniens* doctrine available as a procedural rule in state courts. This seems to be borne our by the fact that Congress, in enacting Section 1404 (a) of the Judicial Code (28 U.S.C.), made no attempt to apply that section to state courts in which actions under the F.E.L.A. might be brought.

[49]*E.g.*, Chicago, M., St. P. & P.R.R. v. Wolf, 199 Wis. 278, 226 N.W. 297 (1929).