Michigan Law Review

Volume 39 | Issue 3

1941

# JURISDICTION OF EMPLOYEE SUITS UNDER THE FAIR LABOR STANDARDS ACT

George W. Crockett Jr.
*United States Department of Labor*

# JURISDICTION OF EMPLOYEE SUITS UNDER THE FAIR LABOR STANDARDS ACT*

*George W. Crockett, Jr.* †

THE statutory authority for employee suits under the Fair Labor Standards Act of 1938 is found in section 16(b).[1] Suits under this section have been instituted in both state and federal courts. In practically every case the defendant has, by a motion to dismiss, challenged the jurisdiction of the court. The usual ground for the challenge in the state courts is that such suits seek to recover penalties incurred under a statute of the United States, and are, therefore, within the exclusive jurisdiction of the district courts[2] of the United States.[3] The jurisdiction of the federal district courts is generally challenged because of a lack of diversity of citizenship between the parties or because the plaintiff seeks recovery of a sum less than $3,000.

## JURISDICTION OF FEDERAL COURTS

Jurisdiction of the federal district courts seems so clear that the frequency with which the question has been raised is surprising. Such courts have jurisdiction of all suits arising under a law of the United

* Statements of opinion expressed herein are those of the writer only, and not necessarily those of the Department of Labor.

† A.B., Morehouse College; LL.B., Michigan. Associate Attorney, United States Department of Labor.—*Ed.*

[1] 52 Stat. L. 1069 (1938), 29 U. S. C. (Supp. 1939), § 216 (b): "Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

[2] The Judicial Code, 28 U. S. C. (1934), § 41 (9), confers jurisdiction upon the district courts of all suits for the recovery of penalties incurred under federal statutes. The jurisdiction thus conferred was exclusive of the federal circuit courts. Helwig v. United States, 188 U. S. 605, 23 S. Ct. 427 (1903).

[3] The Judicial Code, 28 U. S. C. (1934), § 371 (2), provides that the jurisdiction of the courts of the United States shall be exclusive of state courts where the suit is one to recover a penalty or forfeiture incurred under a statute of the United States.

States regulating interstate commerce,[4] and such jurisdiction attaches regardless of the citizenship of the parties or the sum or value of the matter in controversy.[5] It is evident both from congressional declaration[6] and judicial authority[7] that the Fair Labor Standards Act is a statute regulating interstate commerce. With but one exception the federal district courts have uniformly sustained their jurisdiction even though there was no diversity of citizenship and the sum or value of the matter in controversy did not exceed $3,000.[8]

[4] Judicial Code, 28 U. S. C. (1934), § 41 (8). Therefore it is not necessary, to sustain the jurisdiction of federal district courts, to contend that suits under section 16 (b) of the act are suits for a penalty.

[5] Judicial Code, 28 U. S. C. (1934), § 41 (1); Mulford v. Smith, 307 U. S. 38, 59 S. Ct. 648 (1939).

[6] In 52 Stat. L. 1060 (1938), 29 U. S. C. (Supp. 1939), § 202 (b), the Congress has stated that the act is passed in pursuance of its power to regulate commerce among the several states: "It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

[7] In Opp Cotton Mills, Inc. v. Administrator, (C. C. A. 5th, 1940) 111 F. (2d) 23 at 28, a unanimous court held that, "the enactment of the Fair Labor Standards Act was a valid exercise of the power given to Congress by the commerce clause of the federal constitution. . . ." For other cases upholding the Fair Labor Standards Act as a valid exercise of the congressional power to regulate interstate commerce, see Andrews v. Montgomery Ward & Co., (D. C. Ill. 1939) 30 F. Supp. 380, affd. Fleming v. Montgomery Ward & Co., (C. C. A. 7th, 1940) 114 F. (2d) 384, cert. denied, Montgomery Ward & Co. v. Fleming, (U. S. 1940) 61 S. Ct. 71; Bowie v. Claiborne, (D. C. Puerto Rico, 1939) 2 W. H. R. 444; Quinones v. Central Igualdad, Inc., (D. C. Puerto Rico, 1940) 3 W. H. R. 83; Honore v. Porto Rican Express Co., (D. C. Puerto Rico, April 1, 1940) unreported; United States v. Walters Lumber Co., (D. C. Fla. 1940) 32 F. Supp. 65; Williams v. Atlantic Coast Line R. R., (D. C. N. C. 1940) 3 W. H. R. 82; Morgan v. Atlantic Coast Line R. R., (D. C. Ga. 1940) 32 F. Supp. 617; Campbell v. Superior Decalcominia Co., Inc., (D. C. Tex. 1940) 31 F. Supp. 663; Fishman v. Marcouse, (D. C. Pa. 1940) 32 F. Supp. 460; Lengel v. Newark Newsdealers Supply Co., (D. C. N. J. 1940) 32 F. Supp. 567; United States v. Chicago Macaroni Co., (D. C. Ill. 1939) 2 W. H. R. 520; United States v. Feature Frocks, Inc., (D. C. Ill. 1939) 33 F. Supp. 206; and Jacobs v. Peavy-Wilson Lumber Co., (D. C. La. 1940) 33 F. Supp. 206; Townsend v. Boston & Maine R. R., (D. C. Mass. 1940) 3 W. H. R. 575; Fleming v. Tidewater Optical Co., (D. C. Va. 1940) 3 W. H. R. 469, 494; United States v. Barr & Broomfield Shoe Mfg. Co., (D. C. N. H. 1940) 35 F. Supp. 75.

[8] Fishman v. Marcouse, (D. C. Pa. 1940) 32 F. Supp. 460; Quinones v. Central Igualdad, (D. C. P. R. 1940) 3 W. H. R. 83; Campbell v. Superior Decalcominia Co., Inc., (D. C. Tex. 1940) 31 F. Supp. 663; Lengel v. Newark Newsdealers Supply Co., (D. C. N. J. 1940) 32 F. Supp. 567; Duren v. Gilman, (D. C. Ga. March 27, 1940) unreported; Faulkner v. Little Rock Furniture Mfg. Co., (D. C. Ark. Jan. 2, 1940) unreported, and see subsequent decision in same case, (D. C. Ark. 1940) 32 F. Supp. 590; Shelton v. Missouri, etc. R. R., (D. C. Mo. 1940) 3 W. H. R. 367; Rogers v. Glazer, (D. C. Mo. 1940) 32 F. Supp. 990; Townsend v. Cincinnati Union Terminal, (D. C. Ohio, 1940) 3 W. H. R. 339. Jurisdiction was assumed in Pickett v. Union

In *Sconce v. Montgomery Ward & Co., Inc.*[9] and *Robertson v. Argus Hosiery Mills, Inc.*,[10] jurisdiction was invoked under section 41(9) of the Judicial Code, which confers jurisdiction upon the district courts of "all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States."[11] In each case the court held the action was not for the enforcement of penalties and therefore dismissed the complaint because the amount in controversy was less than $3,000. The question of jurisdiction under section 41(8)[12] was not considered. Motions for rehearing were filed in both cases urging that there was federal jurisdiction because the Fair Labor Standards Act is a statute regulating interstate commerce. In the *Sconce* case, Judge Otis withdrew his opinion and order (February 3, 1940) and thereafter, the jurisdictional objection being withdrawn by the defendant, he entertained the action (August 14, 1940). And in the case of *Rogers v. Glazer*[13] Judge Otis, on April 16, 1940, held that there is federal jurisdiction of such a suit under section 41(8) of the Judicial Code.

In the *Robertson* case the court held, upon rehearing, that the action was not one arising under a law regulating commerce because it did not arise "out of a violation of any statutory provision which tends to regulate interstate commerce." This decision is, however, completely out of line with the other federal court decisions sustaining jurisdiction under the Fair Labor Standards Act.[14] An appeal from

Terminal Co., (D. C. Tex. 1940) 33 F. Supp. 244; Wood v. Central Sand & Gravel Co., (D. C. Tenn. 1940) 33 F. Supp. 40; and David v. Boylan's Private Police, (D. C. La. 1940) 34 F. Supp. 555; Williams v. Atlantic Coast Line R. R., (D. C. N. C. 1940) 3 W. H. R. 82; Morgan v. Atlantic Coast Line R. R., (D. C. Ga. 1940) 32 F. Supp. 617; Saxton v. W. J. Adkew Co., (D. C. Ga. 1940) unreported; Lewis v. Nailling, (D. C. Tenn. 1940) 3 W. H. R. 494; Andrus v. Harding, (D. C. Tenn. 1940) 3 W. H. R. 515; Williams v. Jacksonville Terminal Co., (D. C. Fla. 1940) 35 F. Supp. 267.

[9] (D. C. Mo. 1939) 3 W. H. R. 26.

[10] (D. C. Tenn. 1940) 32 F. Supp. 19.

[11] Judicial Code, 28 U. S. C. (1934), § 41 (9).

[12] Supra, note 4.

[13] (D. C. Mo. 1940) 32 F. Supp. 990.

[14] See Fishman v. Marcouse, (D. C. Pa. 1940) 32 F. Supp. 460. The court in the Fishman case, p. 463, held that plaintiffs, in an employee suit under section 16(b), "should be afforded the privilege of examining the defendant's books and records," but that "This right to examine books and records of the opposing party should be limited . . . to an examination of the material records pertaining solely to the parties bringing this suit."

The Robertson case was expressly disapproved by Townsend v. Boston & Me. R. R., (D. C. Mass. 1940) 3 W. H. R. 575.

this decision is now pending in the Circuit Court of Appeals for the Sixth Circuit (No. 8657).

In three cases[15] federal district courts have sustained motions to dismiss where the complaint did not allege facts sufficient to present a cause of action under section 16(b) of the act. In each of these cases the plaintiff's allegations failed to state facts showing they were within the scope of the statute. The complaints contained allegations that the plaintiff's *employer* was engaged in interstate commerce or in the production of goods for interstate commerce. The courts held that such allegations were insufficient to show "a cause of action arising under a law regulating commerce," because coverage under the act applies to the *employees* who are engaged in interstate commerce or in the production of goods for interstate commerce. The allegations of the complaint must show that plaintiff is such an employee,[16] and a complaint that fails to allege coverage in this manner will be dismissed. It should be borne in mind, however, that the decisions in these cases go only to the question of proper pleading and do not bear on the issue of jurisdiction; in each case plaintiff was given leave to amend.

## JURISDICTION OF STATE COURTS

Those state courts that have maintained their jurisdiction[17] have adopted one of three theories. Relying upon the opinion by Justice

[15] Foster v. National Biscuit Co., (D. C. Wash. 1940) 31 F. Supp. 552; Gates v. Graham Ice Cream Co., (D. C. Neb. 1940) 31 F. Supp. 854; and Bagby v. Cleveland Wrecking Co., (D. C. Ky. 1939) 28 F. Supp. 271.

[16] This view is in line with the position of the Wage and Hour Division that the question of coverage is an individual matter, depending on the nature of the employment of the particular employee. Interpretative Bulletin No. 1, Wage and Hour Division, United States Department of Labor, paragraph 3. Accord: Quinones v. Central Igualdad, Inc., (D. C. Puerto Rico, 1940) 3 W. H. R. 83; Wood v. Central Sand & Gravel Co., (D. C. Tenn. 1940) 33 F. Supp. 40. But see Pedersen v. J. F. Fitzgerald Construction Co., 173 Misc. 188, 18 N. Y. S. (2d) 920 (1940).

[17] Moreno v. Picardy Mills, 173 Misc. 528, 17 N. Y. S. (2d) 848 (1939); Gurtov v. Volk, 170 Misc. 322, 11 N. Y. S. (2d) 604 (1939); Emerson v. Mary Lincoln Candies, Inc., 173 Misc. 531, 17 N. Y. S. (2d) 851, 174 Misc. 353, 20 N. Y. S. (2d) 570 (1940), now pending on appeal before the Appellate Division of the Supreme Court of New York; Niehaus v. Greenspon's & Son Pipe Corp., (Cir. Ct., St. Louis, Mo., March 4, 1940) unreported (demurrer to jurisdiction overruled); Tapp v. Price-Bass Co., (Tenn. Ch. 1940) 3 W. H. R. 171, motion to dismiss appeal denied by the Supreme Court of Tennessee, June 8, 1940; Hart v. Gregory, (N. C. 1940) 10 S. E. (2d) 644; Forsyth v. Central Foundry Co., (Ala. 1940) 3 W. H. R. 562; Johnson v. Werbner, (County Court, Bexar County, Texas, 1940) unreported; and House v. McKeown, (Duluth, Minn., Dist. Ct., Sept. 21, 1940). In each of the following cases the question of jurisdiction was not raised and the court assumed that it had jurisdiction:

Cardozo in *Cox v. Lykes Bros.*,[18] the court in *Moreno v. Picardy Mills*[19] held that the additional liability imposed upon the employer under section 16(b) was liquidated damages rather than a penalty, and therefore, that state courts as well as federal courts have jurisdiction. In *Tapp v. Price-Bass Co.*,[20] the court concluded that "the liability imposed as liquidated damages . . . amounts to a penalty," but the Congress, by using the words "in any court of competent jurisdiction," meant to confer concurrent jurisdiction on the state courts. In *Emerson v. Mary Lincoln Candies, Inc.*,[21] the court held that, "regardless of the question of penalty or not, it is clear that Congress conferred on this court jurisdiction to hear this cause." In the one adverse decision in which an opinion was written, *Anderson v. Meacham*,[22] the Georgia court held that an "action for an additional equal amount as liquidated damages is nothing more or less than a penalty fixed and incurred under the laws of the United States."[23] "We think," the court continued, "the

Eichorn v. Kilkenny, (Ct. Com. Pl. Passaic County, N. J., 1939) 1940 WAGE & HOUR MANUAL 354; Pedersen v. J. F. Fitzgerald Construction Co., 173 Misc. 188, 18 N. Y. S. (2d) 920 (1940); Killingbeck v. Garment Center Capitol, Inc., 259 App. Div. 691, 20 N. Y. S. (2d) 521 (1940); Terner v. Glickstein & Terner, 283 N. Y. 299, 28 N. E. (2d) 846, 29 N. E. (2d) 667 (1940); Lamb v. Quality Bakery Co., Inc., (Tenn. App. 1940) 3 W. H. R. 400. Jurisdiction was sustained without opinion in Rushmann v. Central Ry., (Cir. Ct. St. Clair County, Mo., April 15, 1940) unreported.

[18] 237 N. Y. 376, 143 N. E. 236 (1924).

[19] 173 Misc. 528, 17 N. Y. S. (2d) 848 (1939).

[20] (Tenn. Ch. 1940) 3 W. H. R. 171.

[21] 173 Misc. 531 at 532, 17 N. Y. S. (2d) 851, 174 Misc. 353, 20 N. Y. S. (2d) 570 (1940).

[22] 62 Ga. App. (1st Div.) 145 at 146-147, 8 S. E. (2d) 459 (1940), certiorari denied by the Supreme Court of Georgia, without opinion, May 21, 1940. See also Adair v. Traco Division, (Ga. App. 2d Div. Nov. 20, 1940) 3 W. H. R. 563, 575. Jurisdiction was also denied in Jones v. Mid-Continent Petroleum Co., (Dist. Ct. Pontotoc County, Okla., April 3, 1940), and in Jernigan v. Florida Power & Light Co., (Cir. Ct. Escambia County, Fla., Sept. 24, 1940), but there was no written opinion in either case, and the decisions may have been predicated upon any one of the several grounds of demurrer.

[23] No reason whatever is given by the Court for this conclusion, merely the citation of four Supreme Court decisions. Helwig v. United States, 188 U. S. 605, 23 S. Ct. 427 (1903), concerned the "further sum" levied upon importers who undervalue their importation. The statute itself refers to all such sums as "duties, penalties, or forfeitures." Pacific Mail Steamship Co. v. Schmidt, 241 U. S. 245, 36 S. Ct. 581 (1916); and Collie v. Fergusson, 281 U. S. 52, 50 S. Ct. 189 (1929), concerned seamen's claims for additional compensation under 17 Stat. L. 269 (1872), as amended, 46 U. S. C. (1934), § 596. In the first case the late Justice Holmes refers to the sum to be recovered as "a penalty." But see Calvin v. Huntley, 178 Mass. 29, 59 N. E. 435 (1901), where the same judge agreed that such suits were not actions for a penalty

employee . . . having elected to bring his action for a penalty as is provided by the act, is restricted to the United States court for his relief. . . ." The defendant's demurrer was sustained.[24] In *House v. McKeown*,[25] the views of the Georgia court were expressly rejected.

There have been, thus far, two expressions of opinion upon the subject by the highest tribunal of a state. The Supreme Court of North Carolina has ruled in favor of state courts' jurisdiction in *Hart v. Gregory*.[26] And in an extended and well-reasoned opinion by the Supreme Court of Alabama in *Forsyth v. Central Foundry Com-*

so as to deprive state courts of jurisdiction; and see the opinion of Justice Stone in the Collie case and also in McCrea v. United States, 294 U. S. 23, 55 S. Ct. 291 (1935), where the Court studiously refrains from denominating such recovery a penalty. In the Collie case, Justice Stone cites with approval Buckley v. Oceanic S. S. Co., (C. C. A. 9th, 1925) 5 F. (2d) 545; Covert v. British Brig Wexford, (D. C. N. Y. 1880) 3 F. 577; and Cox v. Lykes Bros., 237 N. Y. 376, 143 N. E. 236 (1924), each of which holds such recovery not a penalty from a jurisdictional standpoint, and the last expressly sustains the jurisdiction of state courts. O'Sullivan v. Felix, 233 U. S. 318, 34 S. Ct. 596 (1914), also cited by the Georgia court as favorable to its view, really supports an opposite view. Suit was brought under U. S. Rev. Stat. (1878), §§ 1979-1981, to recover for deprivation of the right to vote. The question was whether the statute of limitations applicable to penal actions should be applied. The Court, in holding that the action was not one for a penalty, said, 233 U. S. at 325: "It is very clear that the public wrong is punished by the fines and punishment prescribed, that the private injuries inflicted are to be redressed by civil suit, and the amount of recovery is determined by the extent of the injury received and the elements constituting it."

[24] This decision would seem to indicate that the employee may elect to sue for his unpaid compensation only and relinquish his right to "liquidated damages," in which case the state court would be a proper forum. Compare the opinion in Forsyth v. Central Foundry Co., (Ala. 1940) 3 W. H. R. 562, stating: "If the [state] court has jurisdiction of one item sued for, the state court has power to proceed." The opposite question arose in the case of Abroe v. Lindsay Bros. Co., (Mun. Ct. Minneapolis, Minn., Nov. 26, 1940), where the employer had made voluntary restitution to the plaintiff and the plaintiff sought to recover an equal amount as liquidated damages. The court directed a verdict in favor of plaintiff. In Thomassin v. Max Kopp, (Mun. Ct., City and County of Los Angeles, Cal., Nov. 29, 1939), unreported, the court, while rendering judgment in favor of the plaintiff for the amount of his unpaid compensation under the act, refused to allow recovery of an equal additional amount as liquidated damages. In Reeves v. Howard County Refining Co., (D. C. Tex. 1940) 33 F. Supp. 90, the court refers to the liquidated damages provision of the act as a "penalty," and concludes that the awarding of the same to the successful plaintiff is mandatory. See also Emerson v. Mary Lincoln Candies, Inc., 174 Misc. 353, 20 N. Y. S. (2d) 570 (1940).

[25] Memorandum opinion of Duluth, Minn., District Court, Sept. 21, 1940.

[26] (N. C. 1940) 10 S. E. (2d) 644, quoting in support thereof 14 AM. JUR. 440-441 (1938).

*pany*,[27] it was held that state and federal courts generally have concurrent jurisdiction to enforce private rights arising under state or national laws, "unless excepted by express constitutional limitation or by valid legislation to that effect"; that by denominating the additional recovery under section 16 (b) as liquidated damages,

> "Congress manifests an unmistakable purpose to exclude it from the operation of a statute which applies to penalties and not to a claim for liquidated damages"

and that this interpretation

> "is further emphasized when it is provided that the recovery may be had in any court of competent jurisdiction."

From the legislative history of section 16 (b) it is apparent that the original sponsors of the bill in both Houses of the Congress intended that state courts should exercise concurrent jurisdiction with federal courts. Section 21 of the bill as originally introduced in both the House[28] and the Senate[29] gave to the employee a cause of action for his unpaid compensation under the act and refers to such as "reparations." No provision is made for double recovery. Section 26 of the same bill gave to state and territorial courts concurrent jurisdiction with the district courts of the United States over all suits instituted under the act. These provisions were a part of the bill as passed by the Senate on July 31, 1937. All provisions of the bill relative to employee suits and state court jurisdiction were eliminated from the House bill prior to its passage on May 24, 1938. Jurisdiction of injunction proceedings under the act, as passed by the House, was confined to "the district courts of the United States and the United States courts of the Territories."

There seems to be no available record of the debates of the conference committee of the two Houses, but the confidential committee print of June 12, 1938, contains section 16(b) substantially in the same form as it now appears in the act; and in the final conference report section 16(b) is identical with the present section 16(b).[30] This section appears therein, together with section 16(a) (the penal provision) and the heading is changed from "Reparations" to "Penalties." However, in the presentation of this report, the House conferees continued to refer to the amount to be recovered under section 16(b) as "repara-

[27] (Ala. 1940) not yet reported.
[28] H. R. 7200, 75th Cong., 1st sess. (1937).
[29] S. 2475, 75th Cong., 1st sess. (1937).
[30] 83 CONG. REC. 9158, 9246 (1938).

tions" just as it was called in the Senate version of the bill; and Representative Keller, one of the conferees, in explaining the views of the committee regarding suits under section 16(b), stated that, "the employees can . . . maintain an action in any court. . . ."[31]

It would appear to be a reasonable conclusion, based upon this legislative history, that section 16(b) adopts the jurisdictional provision found in the Senate version of the bill regarding suits by employees under the act, and that the phrase "any court of competent jurisdiction" was intended to embrace every court upon which the Congress had authority to confer jurisdiction. It should be noted that wherever in the act the Congress intended to restrict jurisdiction, that has been accomplished in no uncertain or equivocal manner. Nothing is said regarding the jurisdiction of courts of criminal proceedings under section 16(a), because exclusive jurisdiction in such cases is conferred upon the courts of the United States under section 256 of the Judicial Code.[32] Injunction proceedings under section 17 of the Fair Labor Standards Act can be instituted only by the administrator,[33] a federal officer, and the Congress has therefore limited jurisdiction in such cases to "the district courts of the United States and the United States courts of the Territories and possessions."[34] If the Congress intended to exclude state courts from the exercise of jurisdiction under section 16(b), it is probable it would have used the same language adopted in section 17.

If the term "any court of competent jurisdiction" is not given this broad and customary interpretation,[35] then not only are state courts without jurisdiction, but the United States courts of the territories and possessions are likewise without jurisdiction, since jurisdiction must be expressly conferred upon those courts.[36] Furthermore, in cases arising

[31] 83 CONG. REC 9264 (1938).

[32] 28 U. S. C. (1934), § 371. Note that under this section, when read in conjunction with section 41 (9), the jurisdiction of the United States district courts over suits to recover penalties incurred under a statute of the United States, is also exclusive of the jurisdiction of all other courts—both state and federal circuit courts—unless the Congress has excepted such cases. See note 46, post.

[33] 52 Stat. L. 1066 (1938), 29 U. S. C. (Supp. 1939), §§ 211 (a), 212 (b). Cf. Harper v. Southern Coal & Coke Co., (C. C. A. 5th, 1934) 73 F. (2d) 792.

[34] 52 Stat. L. 1069 (1938), 29 U. S. C. (Supp. 1939), § 217. Section 17 of the act appears as section 15 in the version of the bill passed by the House, and the words "and possessions" are not found in the House bill.

[35] Ex parte Justus, 3 Okla. Cr. 111, 104 P. 933; (1909); Burke v. McDonald, 2 Idaho 339, 13 P. 351 (1887); National Sash & Door Co. v. Continental Casualty Co., (C. C. A. 5th, 1930) 37 F. (2d) 342 .

[36] See Munoz v. Puerto Rico Ry. Light & Power Co., (C. C. A. 1st, 1936) 83 F. (2d) 262 at 266, cert. denied, 298 U. S. 689, 56 S. Ct. 955 (1936); Mookini v.

under new legislation, the courts have indicated that in the absence of an express restriction by the Congress, state courts have concurrent jurisdiction,[37] and in the absence of express authorization the United States courts of the Territories and possessions are without jurisdiction.

## SUMMARY

The limits of this discussion do not permit an extended examination of the basic legal arguments and decisions supporting the jurisdiction of state courts over employee suits under the act. The principal arguments may be summarized as follows:

(1) Prior to the passage of the act the courts had ascribed to the words, "any court of competent jurisdiction," a definite meaning.[38] The Congress, by using the same phraseology in a later statute, will be presumed to have adopted this meaning.[39]

(2) State courts generally have concurrent jurisdiction with the federal courts in suits arising under statutes regulating interstate commerce. This has been true of actions arising under the Interstate Commerce Act and amendments thereto,[40] actions arising under the Federal

United States, (C. C. A. 9th, 1937) 92 F. (2d) 126, reversed on other grounds 303 U. S. 201, 58 S. Ct. 543 (1938). See also, § 17 of the act, 52 Stat. L. 1069 (1938), 29 U. S. C. (Supp. 1939), § 217.

[37] Mondou v. New York, N. H. & H. R. R. (Second Employers' Liability Cases), 223 U. S. 1, 32 S. Ct. 169 (1911); Grubb v. Ohio Public Utilities Comm., 281 U. S. 470, 50 S. Ct. 374 (1929).

[38] In Burke v. McDonald, 2 Idaho 339, 13 P. 351 at 361 (1887), the Supreme Court for the Territory of Idaho held that "a court of competent jurisdiction" as used in U. S. Rev. Stat. (1878), § 2326, providing that it shall be the duty of the adverse claimant of a mineral patent, within 30 days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession means "a court of general jurisdiction, whether federal, state or territorial." See also 420 Mining Co. v. Bullion Mining Co., 9 Nev. 240 (1874); National Sash & Door Co. v. Continental Casualty Co., (C. C. A. 5th, 1930) 37 F. (2d) 342; Emerson v. Mary Lincoln Candies, Inc., 173 Misc. 531, 17 N. Y. S. (2d) 851, 174 Misc. 353, 20 N. Y. S. (2d) 570 (1940).

[39] Virginian Ry. v. System Federation No. 40, 300 U. S. 515, 57 S. Ct. 592 (1937).

[40] 24 Stat. L. 379 (1887), 49 U. S. C. (1934), § 1 et seq.; State of Missouri ex rel. St. Louis, Brownsville & Mexico R. R. v. Taylor, 266 U. S. 200, 45 S. Ct. 47 (1924); Grubb v. Ohio Public Utilities Comm., 281 U. S. 470, 50 S. Ct. 374 (1929). Jurisdiction in similar cases was assumed by the state courts in Pittsburgh, C. C. & St. L. Ry. v. Mitchell, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996 (1910), and Central of Georgia Ry. v. Sims, 169 Ala. 295, 53 So. 826 (1910). See also 15 C. J. 1157, note 13 (1918).

Employers' Liability Act,[41] and actions arising under the Federal Safety Appliance Act.[42]

(3) The Congress did not intend that suits under section 16(b) of the act should be considered suits to recover a penalty.

(a) An action under 16(b) is not a suit for a penalty within the meaning of the phrase "penalty and forfeiture" as defined by the Supreme Court.[43]

(b) Where the question is one of jurisdiction, the designation of the nature of the action as made by the Congress is to be accepted.[44]

(c) The term "penalties" as used in sections 24 and 256 of the Judicial Code refers to penalties in the international sense.[45]

(4) Even if the recovery provided for in section 16(b) be con-

[41] 35 Stat. L. 65 (1908), 45 U. S. C. (1934), § 51 et seq. Before the amendment of April 5, 1910, Nelson v. Southern Ry., (C. C. Ga. 1909) 172 F. 478; after the amendment, Mondou v. New York, N. H. & H. R. R., 223 U. S. 1, 32 S. Ct. 169 (1911).

[42] 27 Stat. L. 531 (1893), 45 U. S. C. (1934), § 1 et seq. Atchison, T. & S. F. Ry. v. Superior Court, (Cal. App. 1938) 79 P. (2d) 740, and connected cases, Scarlett v. Atchison, T. & S. F. Ry., (Cal. 1936) 54 P. (2d) 465, 7 Cal. (2d) 181, 60 P. (2d) 462 (1936), 300 U. S. 471, 57 S. Ct. 541 (1937).

[43] In Meeker v. Lehigh Valley R. R., 236 U. S. 412 at 423, 35 S. Ct. 328 (1915), the Court said: "The words 'penalty or forfeiture' . . . refer to something imposed in a punitive way for an infraction of a public law and do not include a liability imposed for the purpose of redressing a private injury, even though the wrongful act be a public offense and punishable as such." See also United States v. Bethlehem Steel Co., 205 U. S. 105 at 120, 27 S. Ct. 450 (1907), and Life & Casualty Ins. Co. v. McCray, 291 U. S. 566 at 574, 54 S. Ct. 482 (1934); Sullivan v. Associated Billposters, (C. C. A. 2d, 1925) 6 F. (2d) 1000 at 1009.

[44] Where Congress has intended a penalty or forfeiture it has used that designation. First Nat. Bank v. Morgan, 132 U. S. 141 at 144, 10 S. Ct. 37 (1889); Helwig v. United States, 188 U. S. 605 at 613, 23 S. Ct. 427 (1903); see also, Foreign Contract Labor Act, 39 Stat. L. 879 (1917), 8 U. S. C. (1934), § 139, and the Federal Safety Appliance Act, 27 Stat. L. 531 (1893), 45 U. S. C. (1934), § 1 et seq. Where Congress has not intended a penalty or forfeiture, other designations have been used. McCrea v. United States, (D. C. N. Y. 1932) 3 F. Supp. 184 at 187, (C. C. A. 2d, 1934) 70 F. (2d) 632, 294 U. S. 23, 55 S. Ct. 291 (1935); Cox v. Lykes Bros., 237 N. Y. 376, 143 N. E. 236 (1924). But see also Pacific Mail Steamship Co. v. Schmidt, 241 U. S. 245, 36 S. Ct. 581 (1916).

[45] Huntington v. Attrill, 146 U. S. 657 at 668, 13 S. Ct. 224 (1892), followed by the Court in Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U. S. 390 at 397, 27 S. Ct. 65 (1906); and Claflin v. Houseman, 93 U. S. 130 at 136-137 (1876). See also, Covert v. British Brig Wexford, (D. C. N. Y. 1880) 3 F. 577; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 S. Ct. 1370 (1888), and Younts v. Southwestern T. & T. Co., (C. C. Ark. 1911) 192 F. 200. It should be noted that the one element characteristic of the instances of exclusive federal jurisdiction, as listed in 28 U. S. C. (1934), § 371, is sovereignty in the international sense, and as given to the federal government by the Constitution.

sidered a penalty, it is evident that Congress, by using the words "any court of competent jurisdiction," intended to make an exception to the exclusive jurisdiction of federal courts and confer jurisdiction upon state and territorial courts as well.[46]

Finally, the close proximity of, and the moderate cost in, the state courts; the modesty of the claims that are and will be prosecuted under section 16(b); the evident desire on the part of Congress to facilitate the prosecution of such claims; the unusually wide applicability of the statute; [47] the comparative poverty of the typical plaintiff and the expeditious relief usually afforded by state tribunals; [48] and the difficulty of measuring the damage to the health, efficiency and general well-being of the worker who has not been paid in accordance with the act,[49] all lead to the conclusion that the Congress intended that the courts of the United States and all other courts within the territorial sovereignty of the United States should be open to litigants under section 16(b), so long as such courts have jurisdiction of the person and of the general subject matter.[50]

[46] Forsyth v. Central Foundry Company, (Alabama Sup. Ct., Nov. 22, 1940) 3 W. H. R. 562; Tapp v. Price-Bass Co., (Tenn. Ch. 1940) 3 W. H. R. 171; Emerson v. Mary Lincoln Candies, 173 Misc. 531, 17 N. Y. S. (2d) 851, 174 Misc. 353, 20 N. Y. S. (2d) 570 (1940). Exceptions have been made by the Congress in other statutes. Regarding suits to recover usurious interest paid to national banks, see First Nat. Bank v. Morgan, 132 U. S. 141, 10 S. Ct. 37 (1889). See also, 2 Stat. L. 354 (1806), 489 (1808), and 3 Stat. L. 244 (1815), where jurisdiction was given to the county courts along our northern frontier to entertain suits for fines, penalties and forfeitures under the revenue laws of the United States.

[47] Note that §§ 3(b) and 3(c) of the act, when read together with § 17, extend the operation of the act to "any Territory or possession of the United States." It would be a strange conclusion to hold that employees in the territories and possessions are covered but are not permitted to enter suit under § 16(b) in their local, federal or territorial courts. See note 36, supra. District courts in the territories and possessions are not "district courts of the United States" within the meaning of § 24 of the Judicial Code, 28 U. S. C. (1934), § 41. McAllister v. United States, 141 U. S. 174 at 179, 11 S. Ct. 949 (1891); Mookini v. United States, (C. C. A. 9th, 1937) 92 F. (2d) 126; Dorr v. United States, 195 U. S. 138, 24 S. Ct. 808 (1904).

[48] The Wage and Hour Division, United States Department of Labor, reports that in several instances suits under § 16(b) have been instituted in justice of the peace courts.

[49] See § 2 (a) of the act.

[50] In Ricciardi v. Lazzera Baking Corp., (D. C. N. J., 1940) 32 F. Supp. 956, the court held that an action under § 16(b) commenced in a state court may be removed to the federal district court since both courts have concurrent jurisdiction, a federal question is involved, and Congress has not indicated an intention to qualify the Removal Act, 18 Stat. L. 470 (1875), as amended, 28 U. S. C. (1934), § 72. The petition, however, must be filed within the time provided by the latter act. But see Nelson v. Southern Ry., (C. C. Ga. 1909) 172 F. 478.