Wyoming Law Journal

Volume 3 | Number 4 Article 4

December 2019

Venue and the Federal Employers' Liability Act

E. J. Herschler

VENUE AND THE FEDERAL EMPLOYERS' LIABILITY ACT*

Endless litigation has arisen concerning venue with respect to accident cases under the Federal Employers' Liability Act.[1] The necessity of defending suits for personal injuries brought by employees in states far removed from the place of injury has cast a tremendous burden on the railroads.[2] Under the original statute[3] it was held[4] that the place of trial of such actions was left to the general venue statute,[5] which provides that no civil suit shall be brought in any federal court "against any person, by an original process or proceeding in any other district than that whereof he is an inhabitant". Recognizing the need for appropriate legislation in the field, Congress added Section 6 to the act.[6] This Section was introduced in H. R. Rep. No. 17263, 61st Cong., 2nd Sess., and it provided that an action could be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing the action. The legislative intent was expressly declared when Senator Borah, speaking for the amendment as finally adopted, declared: ". . . the law will be remedied in that respect, in enabling the plaintiff to bring his action where the cause of action arose or where the defendant may be doing business. The bill enables the plaintiff to find the corporation at any point or place or State where it is actually carrying on business and there lodge his action if he chooses to do so".[7]

A typical situation in which Section 6 of the Act could be applied was exemplified in the case of *Baltimore & O. R. R. v. Kepner.*[8] In that case the plaintiff railroad brought suit in an Ohio State Court to restrain the defendant's continued prosecution of a suit in New York. The accident occurred in Ohio and the defendant resided in Ohio. It was necessary for the plaintiff to transport approximately 25 witness a distance of 700 miles at a cost that would exceed $4,000. In denying plaintiff's request for injunction, the court said that since the carrier was "doing business" in New York as contemplated by Section 6, the plaintiff's contention that the suit creates a burden on interstate commerce need not be given consideration.[9] It was held, however, in *Michigan Central R. R. v. Mix*[10] that

---

* Since this paper was written, the Supreme Court of the United States, in Ex parte Collett, 69 Sup. Ct. 944 (1949), has held that 28 U. S. C. A. sec. 1404, is applicable to actions under Federal Employer's Liability Act.

1. 35 Stat. 65 (1908), 45 U. S. C. A. secs. 51-59.
2. 35 Calif. L. Rev. 380 (1947).
3. Note 1 supra.
4. Macon Grocery Co. v. Atlantic Coast Line R. R., 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300 (1910); Cound v. Atchison, T. & S. F. Ry., 173 Fed. 527 (C. C. W. D. Texas 1909).
5. 18 Stat. 470 (1875) as amended by 24 Stat. 552 (1887) and 25 Stat. 433 (1888), 28 U. S. C. A. sec. 41.
6. c. 143, sec. 1, 36 Stat. 291 (1910) as amended by c. 231, sec. 291, 36 Stat. 1167 (1911), 45 U. S. C. A. sec. 56.
7. 45 Cong. Rec. 4034 (1910).
8. 314 U. S. 44, 62 Sup. Ct. 6, 86 L. Ed. 28 (1941).
9. Accord: Miles v. Illinois Central R. R., 315 U. S . 698, 62 Sup. Ct. 827, 86 L. Ed. 1129 (1942); Chesapeake & Ohio Ry. v. Vigor, 90 F. (2d) 7 (C. C. A. 6th 1937); Wood v. Delaware & H. R. Corp., 63 F. (2d) 235 (C. C. A. 2nd 1933); Baltimore & Ohio R. R. v. Clem, 36 F. Supp. 703 (N. D., W. Va. 1941); Sacco v. Baltimore & Ohio R. R., 56 F. Supp. 959 (E. D., N. Y. 1944); Leet v. Union Pac. R. R., 25 Cal. (2d) 664, 155 P. (2d3 42 (1944); Taylor v. So. Ry., 350 Ill. 139, 182 N. E. 805 (1932); Mobile &

where the carrier did no business in the state except to maintain an office for soliciting freight and transportation in interstate commerce, to allow the employee to maintain a suit in that state would be a burden on interstate commerce.*11*

It was also contended in the *Kepner* case that a state court might enjoin a citizen from doing inequity by bringing a suit in another forum. An injunction to prevent such practice has been frequently granted when the citizen of one state brought the action in another state court.*12* To illustrate, the courts have said that an injunction would be granted "to prevent a company from being subjected to great and unnecessary expense",*13* or "to prevent needless and irreparable damage to the company",*14* or "to avoid laws of the state or for other unjust and unreasonable purposes".*15* The granting of an injunction has been denied where substantial hardship was not shown if the suit were to continue.*16* But, as the *Kepner* case pointed out, a state court has no power to enjoin a citizen from prosecuting an action in federal court of another state since such an injunction would destroy the federal right of a litigant and obstruct the federal court in performance of its duties.*17* Finally in the case of *Miles v. Illinois Central R. R.*,*18* the Supreme Court reversed a decision of the Court of Appeals of Tennesee which had enjoined a citizen of Tennessee from bringing an action against the railroad in the State Court of Missouri when the accident had occurred in Tennessee. Speaking for the Court, Mr. Justice Reed pointed out that "Since the existence of the cause of action and the privilege of vindicating rights under the Federal Employers' Liability Act in state courts spring from federal law, the right to sue in state courts of proper venue where their jurisdiction is adequate is of the same quality as the right to sue in federal courts. It is no more subject to interference by state action than was the federal venue in the *Kepner* case."

Ohio R. R. v. Parrent, 260 Ill. App. 284 (4th District 1931); Boston & M. R. R. v. Whitehead, 307 Mass. 106, 29 N. E. (2d) 916 (1940); Wolf v. Chicago, M., St. P. & Pac. R. R., 180 Minn. 310, 230 N. W. 826 (1930).

10. 278 U. S. 492, 49 Sup. Ct. 207, 73 L. Ed. 470 (1929).
11. Accord: Livingston v. Chesapeake & Ohio Ry., 18 F. Supp. 863 (N. D., Okla. 1937); Bohn v. Norfolk & W. Ry., 22 F. Supp. 481 (S. D., N. Y. 1937).
12. Alspaugh v. New York, C. & St. L. R. R., 98 Ind. App. 280, 188 N. E. 869 (1934); Cleveland C. C. & St. L. Ry. v. Shelly, 96 Ind. App. 273, 170 N. E. 328 (1930); Kern v. Cleveland C. C. & St. L. Ry., 204 Ind. 595, 185 N. E. 446 (1933); Reeds' Adm'x v. Illinois Central R. R., 182 Ky. 455, 206 S. W. 794 (1918); New Orleans & N. E. R. R. v. Bernich, 178 La. 153, 150 So. 860 (1933); Pere Marquette Ry. v. Slutz, 268 Mich. 388, 256 N. W. 458 (1934); Alford v. Wabash Ry., 229 Mo. App. 102, 73 S. W. (2d) 277 (Kan. City Ct. App. 1934); State ex rel N. Y. C. & St. L. R. R. v. Nortoni, 331 Mo. 764, 55 S. W. (2d) 272 (1932); Louisville & N. R. Co. v. Ragan, 172 Tenn. 593, 113 S. W. (2d) 743 (1938).
13. Reeds' Adm'x v. Illinois Central R. R., 182 Ky. 455, 206 S. W. 794 (1918).
14. Cleveland C. C. & St. L. Ry. v. Shelly, 96 Ind. App. 273, 170 N. E. 328 (1930).
15. Pere Marquette Ry. v. Slutz, 268 Mich. 388, 256 N. W. 458 (1934).
16. Baltimore & Ohio R. R. v. Inlow, 64 Ohio App. 134, 28 N. E. (2d) 373 (1940); Lancaster v. Dunn, 153 La. 15, 95 So. 385 (1922); Chicago, M. & St. P. Ry. v. McGinley, 175 Wis. 565, 185 N. W. 218 (1921); Payne v. Knapp, 197 Iowa 737, 198 N. W. 62 (1924); Missouri-Kansas-Texas R. R. v. Ball, 126 Kan. 745, 271 P. 313 (1928).
17. Accord: So. Ry. v. Painter, 314 U. S. 155, 62 Sup. Ct. 154, 86 L. Ed. 116 (1941); Rader v. Baltimore & Ohio R. R. 108 F. (2d) 980 (C. C. A. 7th 1940), cert. denied, 309 U. S. 682 (1940); Chicago, M. St. P. Ry. v. Schendel, 292 Fed. 326 (C. C. A. 8th 1923); Marks v. Penn. R. Co., 8 F. R. D. 242 (S. D., N. Y. 1948); McConnell v. Thomson, 213 Ind. 16, 8 N. E. (2d) 986 (1937).
18. 315 U. S. 698, 62 Sup. Ct. 827, 86 L. Ed. 1129 (1942).

In the case of *Akerly v. New York Central R. R.*[19] the court would not enforce an agreement in which the injured employee was advanced $50 for living expenses pending adjustment of his claim against the railroad in exchange for a promise not to bring suit in any other courts except those sitting within the State where the injury was sustained. In refusing to give force and effect to the agreement, the court decided that venue is an inherent part of the employer's liability, and any attempt to limit it by contract is an attempt to exempt the railroad from liability and is therefore void.

Thus the practice of an employee suing in distant forums was almost unlimited and became so widespread that the railroads found it necessary to petition Congress for relief.[20] In an attempt to alleviate the inconveience and burden on interstate carriers, H. R. Rep. No. 1639, 80th Cong. 1st Sess., known as the Jennings Bill, was introduced and passed by the House of Representatives on July 17, 1947.[21] This bill provided that any civil action for damages for wrongful death or personal injuries arising against a carrier could only be brought where the cause of action arose or where the claimant resided at the time the accident occurred. The bill provided further, however, that if the defendant could not be served with process in any of the afore-mentioned courts, then the action could be maintained in any jurisdiction where the defendant was doing business at the time of the institution of the action. This bill, however, was not acted upon by the Senate.

As part of the new Judicial Code, Congress enacted legislation,[22] which 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". As James William Moore, Professor of Law at Yale University and author of Moore's Federal Practice pointed out, Section 1404 introduces an element of convenience which gives the court the power to transfer a case for the convenience of parties and witnesses to another jurisdiction.[23]

Apparently it was the intent of Congress to include actions brought under the Federal Employers' Liability Act within this section because the Revisor's Notes[24] refer to the *Kepner* case in connection with the drafing of the change of venue section. In a treatise[25] on the new Federal Judicial Code, Judge Clarence G. Galston, a member of the Judicial Conference Committee on Revision of the Judicial Code, also referred to the *Kepner* case and went on to say: "This subsection was drafted in accordance with the doctrine of forum non conveniens".

Since the adoption of the new venue statute, courts have been almost unanimous in granting a change of venue under the doctrine of forum non conveniens

19. 168 F. (2d) 812 (C. A. 6th 1948).
20. 35 Calif. L. Rev. 380, 383 (1947).
21. 80th Congress, 1st Session (1947).
22. 28 U. S. C. A. sec. 1404(a).
23. Hearing before Subcommittee No. 1, Congressional Service, 80th Congress, 2nd Sess., p. 1969.
24. Congressional Service, 80th Congress, 2nd Sess., p. 1853.
25. An Introduction to the New Federal Judicial Code, 8 F. R. D. 201, 206.

in Federal Employers' Liability Act cases.[26] To illustrate; in the case of *Nunn v. Chicago, Milwaukee, St. P. & P. R. R.*[27] the employee, a resident of Iowa, was injured in Iowa, but brought an action for damages in the Federal District Court of New York where the company maintained a fiscal office for the solicitation of business. The company pointed out that to defend the case properly it would be necessary to transport a number of witness a distance of 1200 miles at a cost of $4,000 to $5,000. The court held that Section 1404(a) applied to just such a case, and relief would be granted to remove the case to a court that would be convenient for the parties and witnesses.

However, in the case of *Pascarella v. New York Central R. R.*[28] the court would not apply Section 1404(a) since it said that there were special venue provisions that apply to suits brought under the Federal Employers' Liability Act.[29] The court pointed out that it was not the intent of Congress to negative a long line of Supreme Court holdings by allowing a court to apply Section 1404(a) in such a situation. It was also decided in *Brainard v. Atchison, T. & S. F. Ry.*[30] that the defendant's motion for transfer to another district would be denied when the case had been on trial call for a considerable length of time and where it was contemplated that the case would go to trial in approximately one week.

As pointed out by Thomas B. Gay, Chairman of the American Bar Association Committee on Jurisprudence and Law Reform, Section 6 permitted widespread transportation of claims to foreign jurisdictions by unscrupulous lawyers, resulting in the violation of accepted ethical concepts, undue burden upon the courts of such jurisdictions, and great hardship to the railroads.[31] It is hoped that in the furtherance of justice this new venue statute will cure those evils.

E. J. HERSCHLER

THE CHANGING OLEOMARGARINE PICTURE AND WYOMING

The butter-oleomargine battle has taken on a new character as a result of a change in tactics by the dairy industry announced late in 1948. The American Butter Institute, with the National Creameries Association and the National Milk Producers Federation, has decided to consent to the repeal of the various special and occupational taxes which the national and state governments now collect on oleomargarine, but these groups plan to urge more vigorously that laws

26. Ex parte Collett, 69 Sup. Ct. 944 (1949); Scott v. New York Central R. R., 81 F. Supp. 815 (N. D., Ill., 1948); White v. Thompson, 80 F. Supp. 411 (N. D., Ill. 1948); Hayes v. Chicago, R. I. & P. R. R., 79 F. Supp. 821 (Minn. 1948); Chaffin v. Chesapeake & Ohio Ry., 80 F. Supp. 957 (E. D., N. Y. 1948); Nunn v. Chicago, Milwaukee, St. P. & P. R. R., 80 F. Supp. 745 (S. D., N. Y. 1948).
27. Note 26 supra.
28. 81 F. Supp. 95 (E. D., N. Y. 1948).
29. See footnote 6 supra.
30. 81 F. Supp. 211 (N. D., Ill. 1948).
31. 33 Am. Bar Ass'n. Jour. 659 (1947).