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and the bench by rules and regulations enacted by administrative agencies and political subdivisions that carry criminal penalties for violation. Vast areas of the law are virtually inaccessible because of inadequate procedures for publication, recording, and codification.

The Florida Constitution provides that "the legislature shall provide for the speedy publication and distribution of all laws it may enact."[54] This policy should be followed for all laws affecting substantive rights. A statute providing for a mandatory uniform system of publication and official periodic codification of administrative rules would be an important reform. In addition, a statute, or perhaps a constitutional amendment, is needed to acknowledge officially the practical fact that rules and regulations enacted by administrative agencies and political subdivisions are criminal laws and to clarify restrictions limiting the delegation of legislative powers to agencies and subdivisions. As the law now stands, uncertainty as to notice and delegation of powers invites litigation.

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FORUM SHOPPING IN FELA ACTIONS

The Federal Employers' Liability Act[1] provides that every railroad company engaged in interstate commerce shall be liable in damages for the injuries sustained by its employees resulting from the negligence of any of its officers or agents or by reason of any defect in the railroad's equipment. The statute abolishes the fellow servant rule, provides that if an employee is contributorily negligent his damages will be proportionately diminished, and modifies the assumption of risk rule. Recovery under the act requires proof of negligence in a court action brought by the employee against the employer.

The plaintiff has been provided with the choice of placing venue (1) where the defendant resides, (2) where the cause of action arose, or (3) where the defendant was doing business at the time the action was commenced.

The last two choices were added to the FELA in 1910.[2] Until that time venue was governed by the general federal venue statute,[3]

54. FLA. CONST. art. XVI, §6.

1. 34 STAT. 232 (1906), held unconstitutional in The Employers' Liability Cases, 207 U.S. 463 (1908); 35 STAT. 65 (1908), 45 U.S.C. §§51-60 (1958), held constitutional in The Second Employers' Liability Cases, 223 U.S. 1 (1911).

2. 36 STAT. 291 (1910), 45 U.S.C. §56 (1958).

3. 25 STAT. 433 (1888).

which requires that any suit against a railroad should be brought in the district in which the railroad was incorporated. Since railroading is not a localized business, this venue requirement placed a hardship upon both parties. The suit often had to be tried in places far removed from the scene of the accident, the residences of witnesses, and the offices of examining physicians. The 1910 amendment was designed to permit the parties to try their cases "at home" and to prevent the necessity of long-range exportation of lawsuits.[4] However, relaxation of the venue requirements made it possible for a plaintiff to bring suit wherever the defendant was doing business and resulted in a large scale migration of personal injury suits to the "plaintiff's courts" of a few large cities.[5]

The railroads were unsuccessful in fighting these abuses, largely because of the attitude of the courts. Mr. Justice Jackson, in *Miles v. Illinois Central R.R.*,[6] said that there is nothing in the FELA to require a plaintiff to exercise his choice of venue in a self-denying or big-hearted manner — that it is his privilege to get away from juries that are inclined toward small verdicts.

Forum shopping under the liberal venue provision reached such proportions that in 1948 Congress enacted a federal change of venue statute.[7] Section 1404(a) of the Judiciary Act now provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." This section, in providing federal judges with discretion to transfer suits to more convenient districts, would have gone far toward curbing forum shopping

4. 45 CONG. REC. 2253 (1910); S. REP. No. 432, 61st Cong., 2d Sess. 1 (1910). See also Gibson, *The Venue Clause and Transportation of Lawsuits*, 18 LAW & CONTEMP. PROB. 366, 369 (1953).

5. The states most favorable to plaintiffs for negligence actions are generally thought to be California, Illinois, Minnesota, Missouri, and New York. See H.R. REP. No. 1639, S. REP. No. 1567, 80th Cong., 1st Sess. (1947). In the 5-year period ending in 1946, of all the suits begun in federal district courts other than those of the place where the injury occurred, 92% were commenced in the aforementioned states. See H.R. REP. No. 613, 80th Cong., 1st Sess. (1947). See also Davis v. Farmers Coop. Equity Co., 262 U.S. 312, 316, n.2 (1923); Cotton v. Louisville & N.R.R., 14 Ill. 2d 144, 175, 152 N.E.2d 385, 400 (1958) (dissenting opinion). Intrastate abuses in Florida are illustrated by figures from a survey made by the Association of American Railroads. See letter, Jan. 16, 1961, from Frank G. Kurka, Ass't Gen. Solicitor, Atlantic Coast Line R.R., to Hon. John E. Rawls, Chairman, Continuing Law Reform Committee of the Florida legislature. During 1959-60 at least 80 cases were "exported" to Dade County from distances ranging from 70 to over 500 miles. These cases did not include any instance in which the cause of action occurred or the plaintiff resided in a county immediately contiguous to Dade County.

6. 315 U.S. 698, 707 (1942).

7. 28 U.S.C. §1404(a) (1958).

practices under the FELA were it not for three factors:

(1) Section 1404 (a) is of necessity limited in its operation to the federal judiciary.[8]

(2) The FELA provides that the jurisdiction of state courts shall be concurrent with that of federal courts. In other words, if the defendant is doing business in the locale of the plaintiff's choice, the plaintiff can commence his case in the local state court and escape the operation of section 1404 (a).

(3) The FELA provides that a suit commenced in a state court of competent jurisdiction cannot be transferred to a federal court. This bar is in effect whether the ground alleged for the removal is diversity of citizenship,[9] a federal question,[10] or local prejudice.[11]

It therefore appears that a plaintiff can avoid the effect of section 1404 (a) simply by commencing his suit in a state court. It is the purpose of this note to review briefly the treatment of this problem by other states and to compare their results with the situation in Florida.

NON-STATUTORY PROVISIONS

Employer-Employee Agreements Restricting Venue

Long before the enactment of section 1404 (a) the railroads attempted to limit the plaintiff's choice of venue by means of a contract with their employees restricting the choices permitted under the FELA. In *Boyd v. Grand Trunk Western R.R.*[12] the United States Supreme Court held that such covenants are unconstitutional. The Court said that the "right to bring the suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of [the FELA] . . . ."[13]

The Defense of Undue Burden on Interstate Commerce

A principal argument used by railroad companies was that long-range transportation of claims constituted an unreasonable burden on interstate commerce. In a series of cases originating in state courts, the Supreme Court of the United States held that interstate com-

8. Pope v. Atlantic Coast Line R.R., 345 U.S. 379 (1953).
9. Southern Ry. v. Lloyd, 239 U.S. 496 (1916).
10. Strauser v. Chicago, B. & Q.R.R., 193 Fed. 293 (D. Neb. 1912).
11. Lombardo v. Boston & M.R.R., 223 Fed. 427 (N.D.N.Y. 1915).
12. 338 U.S. 263 (1949).
13. *Id.* at 265.

merce was unreasonably burdened only when suit was brought in courts of states in which the defendant was merely soliciting traffic.[14] But when the defendant owned and operated a railroad line in the county and state of forum, the suit was not considered an undue burden on interstate commerce.[15]

Equitable Relief

Until 1941, railroads were often able to avoid unfavorable selections of venue in FELA cases by invoking the power of a court of equity to enjoin a party within its jurisdiction from bringing a vexatious or oppressive lawsuit in a court of another jurisdiction. The weight of authority favored the use of this injunctive power to restrain the maintenance of a FELA action in a court of another state,[16] but frowned upon its use to restrain a plaintiff from maintaining such a suit in a federal court.[17]

The 1941 Supreme Court decision in *Baltimore and Ohio R.R. v. Kepner*[18] held that interference by a state court with a plaintiff's choice of a federal forum in a FELA case would no longer be permitted. In the following year the Court in *Miles v. Illinois Central R.R.*[19] held that a state court cannot grant injunctive relief to restrain the bringing of a FELA action in the courts of other states.

It would be supposed that with the clear legislative declaration of policy of section 1404 (a), relief from abuses of venue would again be afforded. This expectation has not materialized. In *Atlantic Coast Line R.R. v. Wood*[20] the Florida Supreme Court held that a state court was powerless to restrain the prosecution of a FELA case in the courts of another state and that section 1404 (a) had not changed the rule laid down in the *Miles* case. The Court stated that to sanction injunctive relief would resurrect an outmoded principle. When the Supreme Court of Georgia reached the opposite conclusion in *Atlantic Coast Line R.R. v. Pope*,[21] the Supreme Court of the United States granted certiorari.[22] The Court reversed the Georgia court, thereby tacitly approving the position taken in Florida. The operation of section 1404 (a), said Chief Justice Vinson, is to be confined to the

14. Denver & R.G.W.R.R. v. Terte, 284 U.S. 284 (1932); Michigan Cent. R.R. v. Mix, 278 U.S. 492 (1929); Atchison, T. & S.F. Ry. v. Wells, 265 U.S. 101 (1924).
15. Denver & R.G.W.R.R. v. Terte, *supra* note 14; Hoffman v. Foraker, 274 U.S. 21 (1927).
16. See Annot., 113 A.L.R. 1444 (1938).
17. See Annot., 136 A.L.R. 1232 (1942).
18. 314 U.S. 44 (1941).
19. 315 U.S. 698 (1942).
20. 58 So. 2d 549 (Fla. 1952).
21. 209 Ga. App. 187, 71 S.E.2d 243 (1952).
22. Pope v. Atlantic Coast Line R.R., 345 U.S. 379 (1953).

type of action for which it provides — transfer of cases between federal courts. Prevention of abuses under the venue clause of the FELA by resort to injunctive relief was forbidden by *Kepner* and *Miles*. Congress in revising the Judicial Code has not expressly revived this form of action. Consequently the *Miles* case still stands.

Forum Non Conveniens

The doctrine of forum non conveniens is based in part upon the inherent right of a court in the exercise of its equitable power to refuse the imposition of an action upon its jurisdiction, even though the requirements of venue are fulfilled, if it appears that for the convenience of the litigants and witnesses and in the interest of justice the action should have been instituted in another forum in which the action might have been brought.[23]

The rejection by *Kepner* and *Miles* of injunctive relief against forum shopping did not necessarily eliminate forum non conveniens as an argument favorable to FELA defendants. However, at least one state[24] and one federal[25] court, adopting the policy pronouncements of *Kepner* and *Miles*, have held that forum non conveniens did not relieve the courts of the duty imposed by the FELA to hear a case.

It was intended that section 1404(a) would make the doctrine of forum non conveniens applicable to cases arising under the FELA.[26] After it was held that section 1404(a) applied only to the federal courts,[27] the question arose whether state courts had thereby been denied the use of forum non conveniens to refuse jurisdiction over FELA cases. The Supreme Court answered this question in *Missouri ex rel. Southern Ry. v. Mayfield*[28] by holding that if forum non conveniens is part of the local law of the state, the doctrine may be applied in FELA cases if there is no discrimination between non-resident citizens and non-resident non-citizens.

Statutory Provisions to Curb Intrastate Abuses of Venue

Although state legislatures are powerless to regulate interstate traffic in lawsuits, they can control forum shopping among localities

23. Hayes v. Chicago, R.I. & P.R.R., 79 F. Supp. 821, 824 (D. Minn. 1948).

24. Leet v. Union Pac. R.R., 25 Cal. 2d 605, 155 P.2d 42 (1944).

25. Sacco v. Baltimore & O.R.R., 56 F. Supp. 959 (E.D.N.Y. 1944).

26. Reviser's Note, 28 U.S.C. §1404(a) (1958), states: "Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper." See also Moore, Moore's Judicial Code 201-03 (1949). This intention was recognized by the Supreme Court in *Ex parte* Collett, 337 U.S. 55 (1948); Kilpatrick v. Texas & Pac. Ry., 337 U.S. 75 (1948).

27. Pope v. Atlantic Coast Line R.R., 345 U.S. 379 (1953).

28. 340 U.S. 1 (1950).

within the state. At least five states have approached the problem by limiting the plaintiff's choice of venue.[29] The Georgia statute,[30] for example, provides that any suit against a railroad must be brought in the county in which the cause of action arises.

All of the states have enacted statutes permitting a change of venue "for prejudice" when the judge or the jury of the forum of the plaintiff's choice is unduly biased.[31] Many states go further and provide for a change of venue "for cause" or for the convenience of the witnesses and in the interest of justice.[32] The few cases that have considered the effect of these statutes on actions brought under the FELA have held them to be applicable.[33] The trial judge has a duty to change the venue when it is shown that the convenience of witnesses and the ends of justice will be promoted.

THE SITUATION IN FLORIDA

Florida lacks a statute limiting a plaintiff's choice of venue in actions against railroads. Florida's change-of-venue statute[34] applies only when the applicant can show that his opponent has undue influence over those living within the court's jurisdiction, or when the applicant is so odious to the inhabitants that he cannot receive a fair trial. A bill authorizing courts to transfer suits to the county in which the cause of action arises if justice demands[35] was introduced in the 1961 Legislature but failed to pass. This bill would have given Florida courts the discretion enjoyed by federal judges under section 1404 (a).

Although Florida recognizes forum non conveniens, the doctrine apparently has little practical significance as a barrier to forum shopping in FELA cases tried in state courts.[36] In *Atlantic Coast Line*

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29. GA. CODE ANN. §94-1101 (1935); KY. REV. STAT. §452.455 (1953); N.C. GEN. STAT. ANN. §1-83 (1943); OHIO CODE ANN. §11273 (Page 1938); TEX. REV. CIV. STAT. ANN. art. 1995-25 (1925).

30. GA. CODE ANN. §94-1101 (1935).

31. See 56 AM. JUR. *Venue* §§55, 56 (1947).

32. See Annot., 74 A.L.R.2d 16 (1960). See also Foster, *Place of Trial*, 44 HARV. L. REV. 41, 62-64 (1930).

33. Doll v. Chicago G.W.R.R., 159 Minn. 323, 198 N.W. 1006 (1924); State *ex rel.* Warner v. District Ct., 156 Minn. 394, 194 N.W. 876 (1923); Smith v. Atlantic Coast Line R.R., 218 S.C. 481, 63 S.E.2d 311 (1951).

34. FLA. STAT. §53.03 (1959).

35. S. BILL No. 274, S. JOUR. 126 (1961).

36. Hagen v. Viney, 124 Fla. 747, 169 So. 391 (1936); Southern Ry. v. Bowling, 129 So. 2d 433 (3d D.C.A. Fla. 1961); Atlantic Coast Line R.R. v. Ganey, *infra* note 37; Greyhound Corp. v. Rosart, 124 So. 2d 708 (3d D.C.A. Fla. 1960). See also Odell, *Venue: Forum Non Conveniens — The Florida View*, 15 U. MIAMI L. REV. 420 (1961).

R.R. v. Ganey[37] the plaintiff suffered the loss of his left leg as a result of an accident in the defendant's freight yard at Jacksonville. The City of Jacksonville is located in Duval County, but the plaintiff instituted his suit in Dade County. The defendant moved to dismiss, contending that the Circuit Court of Dade County should have refused to accept jurisdiction under the equitable doctrine of forum non conveniens. The trial judge denied the motion, indicating that he was without authority to entertain it. The appellate court affirmed. The doctrine of forum non conveniens, said the court, may be applied by Florida courts in cases in which (1) the plaintiff is a non-resident of Florida, (2) the defendant is a non-resident of Florida, (3) the cause of action arose in a foreign state, and (4) the parties seek to litigate their action in a Florida court. When these conditions are not fulfilled, a motion to dismiss or to transfer to another court or jurisdiction for purposes of trial convenience is unauthorized and the judge has no authority to consider it in the absence of legislative authority. Therefore forum non conveniens cannot be relied upon to effect a transfer of venue *intrastate*.[38]

Not long after the *Ganey* decision another case afforded a test of Florida's forum non conveniens doctrine in an interstate setting. In *Southern Railway Co. v. Bowling*[39] the plaintiff, a resident of Rome, Georgia, was injured while employed by the Southern Railway Company. The accident occurred in Rome, and the defendant com-

37. 125 So. 2d 576 (3d D.C.A. Fla. 1961).

38. Some jurisdictions do not limit forum non conveniens to actions involving only non-residents. The Supreme Court of Massachusetts, in Universal Adjust. Corp. v. Midland Bank, 281 Mass. 303, 315, 184 N.E. 152, 159 (1933), stated: "[D]omestic residence of parties is not decisive in requiring courts to assume jurisdiction of a cause, but . . . the basis of inquiry will be whether justice can be as well done here as in another jurisdiction to which the parties may have access." In Gore v. United States Steel Corp., 15 N.J. 301, 311, 104 A.2d 670, 675, *cert. denied*, 348 U.S. 861 (1954), the court said: "[T]he doctrine, as we construe it, is non-discriminatory and does not turn on considerations of domestic residence or citizenship as against foreign residence or citizenship. It turns, rather, on considerations of convenience and justice and it may, therefore, be applied for and against domestic residents and citizens as well as for and against foreign residents and citizens." See also Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947); Foster, *Place of Trial*, 44 HARV. L. REV. 41 (1930). Furthermore, nothing in the doctrine of forum non conveniens requires that the cause of action arise outside the territory covered by the judicial system of which the court considering the motion for a change of venue is a part. The federal courts apply forum non conveniens (see note 26 *supra*) in transferring cases to any other district within the federal judicial system in which the action might have been brought, including transfers from and to districts within the same state. Mazula v. Delaware & H. R.R., 90 F. Supp. 966 (1950), was transferred from the Southern District of New York to the Northern District of New York, where the cause of action arose.

39. 129 So. 2d 433 (3d D.C.A. Fla. 1961).

pany had its home office in Norfolk, Virginia. The plaintiff brought suit under the FELA in the Circuit Court of Dade County, Florida. The defendant moved to dismiss under the doctrine of forum non conveniens. The circuit court denied the motion, and the defendant filed an interlocutory appeal. The Third District Court of Appeal affirmed, finding no abuse of the trial judge's discretion. Said Judge Milledge for the majority:[40]

> "It seems to me that in a F.E.L.A. case, since the plaintiff is given by the Congress a right to inconvenience the defendant, the proper application of the doctrine of *forum non conveniens* is limited to situations in which the railroad makes a strong showing that the inconvenient forum was not chosen for the purpose of trying a law suit but for the purpose of adding to the nuisance value of an unfounded claim. A court should not decline to exercise its jurisdiction merely because the forum is inconvenient to the defendant when the plaintiff is given a specific statutory right to impose the inconvenience."

CONCLUSION

With the enactment of section 1404(a), Congress provided the federal trial judge with the discretion to transfer cases, including those arising under the FELA, to a more convenient federal forum if the interest of justice and the convenience of the parties and witnesses so require. Since the FELA provides for concurrent jurisdiction in the state courts, and since a FELA action commenced in a state court of competent jurisdiction cannot be transferred to the federal courts, the forum shopper can evade section 1404(a) simply by initiating his suit in a state court.

Some states have stopped the intrastate abuse of venue by limiting the plaintiff's choice. Most other states have provided the trial judge with the discretion to transfer cases intrastate in the interest of justice and the convenience of the parties and the witnesses. Florida lacks both kinds of statutes.

It is submitted that in order to prevent the Dade County courts from being deluged with a state-wide influx of FELA cases, Florida judges should be armed with the same legislative authority that is available to federal judges under section 1404(a).

In addition, the Third District Court of Appeal should re-

40. *Id.* at 438. The court here apparently returns to the philosophy pronounced by *Kepner* and *Miles*. The U. S. Supreme Court, in *Ex parte* Collett, 337 U.S. 55 (1948), expressly held that the enactment of §1404(a) swept away the judicial gloss put upon the FELA by these cases.

examine its restrictive interpretation of the doctrine of forum non conveniens with a view toward permitting trial courts in that district to exercise some degree of discretion in discouraging FELA plaintiffs who have obviously selected an inconvenient but lucrative forum.

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