Finally, of course, the Legislature could just sit tight and hope that the problems will work out themselves. Legislative inaction in reference to this matter during the past twenty years leads one to wonder whether the reason is indifference or whether opposing interests have created an impasse from which neither side will yield.[82] It is possible, too, that the Indiana Supreme Court may reconsider the matter policy-wise and relax its somewhat technical and legalistic attitude should another case arise. Meanwhile, though, no one can be absolutely certain what the ultimate extension of the principal cases will be or what action can be taken by taxpayers in reliance upon the potential development of the doctrine of constructive receipts.

FELA VENUE ABUSE: NECESSITY FOR CONGRESSIONAL AMENDMENT

Recurring discussion in the cases, law reviews, and professional journals concerns the propriety of the Federal Employers Liability Act[1] as a means of redressing injuries sustained by railway workers through the negligence of a railroad or its agents.[2] Not the least of the grounds for criticism of FELA is the breadth of the workman's choice of venue[3] and the consequent tendency to use it to harass the defendant railroad.[4]

revenue." The Commission studied other types of taxes. *Id.* at 154, for an appraisal of retail sales, net income, and net worth taxes for Indiana.

"I think that the gross income tax was intended to be an emergency measure with a short life. But since it proved to be a fountain of finance exceeding the most fantastic expectations the politicians began to magnify its 'good' points and defend it. It is a revenue-raiser deluxe. . . ." Communication to the INDIANA LAW JOURNAL from the General Counsel, Indiana Department of State Revenue.

82. It is significant that no remedial legislation was introduced or adopted during the 1953 Session of the Indiana General Assembly, particularly since the *Colpaert* and *Crown Development* decisions had been reported but a few days prior to the opening of the Legislature and should have been fresh in the minds of those present.

1. 35 STAT. 65 (1908), 45 U.S.C. § 51 *et seq.* (1946). Hereinafter referred to as FELA.

2. The most recent analysis of FELA as a method of redressing railroad employee injuries is Parker, *FELA or Uniform Compensation for All Workers?*, 18 LAW & CONTEMP. PROB. 208 (1953).

3. 36 STAT. 291 (1910), 45 U.S.C. § 56 (1946), as amended, 62 STAT. 989 (1948), 45 U.S.C. § 56 (Supp. 1952). "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

"A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45, may not be removed to any district court of the United States." 28 U.S.C. 1445(a) (Supp. 1950).

4. The broad venue enables the employee to bring suit a large distance from

Ineffective judicial attempts to prevent vexatious suits have lent force to this argument[5] and have also provoked discussion concerning amend-

where the cause of action arose. In general, the railroads claim that such distant suits present a great inconvenience and expense in defending and are brought to harass and vex the railroad. The emphasized factors of inconvenience and expense are the cost of transporting, and maintaining, witnesses to the distant court; the lack of compulsory process to obtain the attendance of witnesses; prejudice through failure to have the actual presence of witnesses; the cost of obtaining depositions; the inability to view the scene of the accident when appropriate; and the damage to business due to the absence of employee witnesses. Miles v. Illinois Central R.R., 315 U.S. 698 (1942); Baltimore & Ohio R.R. v. Kepner, 314 U.S. 44 (1941); Cleveland, C., C. & St. L. Ry. v. Shelly, 96 Ind. App. 273, 170 N.E. 328 (1930); Reed's Adm'x v. Illinois Central R.R., 182 Ky. 455, 206 S.W. 794 (1918); Boston & M. R.R. v. Whitehead, 307 Mass. 106, 29 N.E.2d 916 (1940); New York, C. & St. L. R.R. v. Matzinger, 136 Ohio St. 271, 25 N.E.2d 349 (1940) (not FELA suit); Union Pacific R.R. v. Utterback, 173 Oregon 572, 146 P.2d 769 (1944), *cert. denied*, 323 U.S. 710, 711 (1944); Chicago, M. & St. P. Ry. v. McGinley, 175 Wis. 565, 185 N.W. 218 (1921). The allegation was sometimes made that these factors caused an unreasonable burden on interstate commerce. But such a claim has been generally discredited. Baltimore & Ohio R.R. v. Kepner, 314 U.S. 44, 50, 51 (1941); Jablonski v. Southern Pacific Co., 76 F. Supp. 1022, 1023 (S.D. N.Y. 1948).

For an excellent discussion of the extent of FELA venue abuse including some dramatic statistics see Winters, *Interstate Commerce in Damage Suits*, 29 J. Am. Jud. Soc'y 135 (1946). In Atchison, T. & S. F. Ry. v. Andrews, 338 Ill. App. 552, 88 N.E.2d 364 (1949), an attorney was enjoined from continuance of a solicitation organization located in Chicago under which he was litigating there ninety-two FELA actions with claims of approximately five million dollars. See General Orders No. 18 and 18a of the Director General of Railroads issued in 1918 to limit venue in tort actions against railroads to prevent "remote" suits which seriously interfere with the physical operation of the railroads. The Orders are set out in a footnote to a sustaining decision in Alabama & Vicksburg Ry. v. Journey, 257 U.S. 111 (1921).

The query of why a distant suit is brought hundreds of miles from the scene of the accident or the employee's residence may be answered by realistic considerations. When an employee is injured it is inconceivable that a distant court is sought for substantive-procedural advantages. Reed's Adm'x v. Illinois Central R.R., 182 Ky. 455, 206 S.W. 794 (1918) (the court assumes that one court would do justice and give a fair trial as well as another). On the other hand, it is very conceivable that a claimant and his attorney are aware that awards of metropolitan juries are higher than those of rural juries, see Winters, *supra*, at 136, or that there is a greater bargaining power for the client if the distant suit will be of such a great expense to the defendant that it is to the railroad's interest to settle, even for an amount greater than the actual injury suffered. "When the chasers solicited cases . . . they pointed out to the injured employees that it would be difficult and expensive for the railroads to bring . . . witnesses to Chicago for the trial and that therefore the railroad companies were more likely to make settlements, and that . . . in Chicago larger verdicts could be obtained there than in the states where the accidents occurred." Atchison, T. & S. F. Ry. v. Andrews, 338 Ill. App. 552, 566, 88 N.E.2d 364, 370, 371 (1949). See Reed's Adm'x v. Illinois Central R.R., *supra*, at 468, 469, 206 S.W. at 800; Chicago, M., St. P. & P. Ry. v. Wolf, 199 Wis. 278, 226 N.W. 297 (1929) (a well organized solicitation business was described).

5. Pope v. Atlantic Coast Line R.R., 73 Sup. Ct. 749 (1953); Mo. *ex rel.* So. Ry. v. Mayfield, 340 U.S. 1 (1950); Miles v. Illinois Central R.R., 315 U.S. 698 (1942); Baltimore & Ohio R.R. v. Kepner, 314 U.S. 44 (1941).

One judicial remedy for the vexatious suit is a restraining order against prosecution of the distant suit issued by the court having jurisdiction over the employee. See Note, *When Courts of Equity Will Enjoin Foreign Suits*, 27 Iowa L. Rev. 76 (1941); Helsell, *Injunctive Relief Against Oppressive Suits in Foreign Jurisdictions*, 12 F.R.D. 502 (1952); McClintock, Equity 462 (2d ed. 1948). The innumerable

ment to the FELA venue section. Review of past decisions sheds some light on the direction future action may take.

Chronologically, the present ineffectiveness of equitable methods for preventing vexatious litigation derives from *Miles v. Ill. Cent. R.R.*,[6] decided in 1942. The Supreme Court struck down an attempt by a Tennessee state court to enjoin prosecution of an FELA suit in a Missouri court; dicta in Mr. Justice Reed's majority opinion created later confusion by declaring that the Missouri court must hear the suit as presented originally.[7] That same year a similar attempt by a state court

fact situations arising make it difficult to formulate precisely what elements constitute a vexatious or harassing suit. *Ex parte* Crandall, 53 F.2d 969 (7th Cir. 1931), *cert. denied,* 285 U.S. 540 (1932) (petition denied for habeas corpus by imprisoned employee for violation of state court decree enjoining prosecution of FELA action in another state court); Alspaugh v. N. Y., S. & 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); Bankers' Life Co. v. Loring, 217 Iowa 534, 250 N.W. 8 (1933) (intent to coerce a settlement is sufficient grounds to enjoin distant suit; not FELA case); Reed's Adm'x v. Illinois Central R.R., 182 Ky. 455, 206 S.W. 794 (1918) (leading case on state court enjoining FELA action in a distant state court); Missouri Pacific Ry. v. Harden, 158 La. 889, 105 So. 2 (1925) (difference between procedure and practice is not sufficient to enjoin); Boston & M. R.R. v. Whitehead, 307 Mass. 106, 108, 29 N.E.2d 916, 917, 918 (1940) (hope for a larger verdict is not alone harassing); Southern Pacific Co. v. Baum, 39 N.M. 22, 38 P.2d 1106 (1934) (mere inconvenience is not grounds for an injunction); Louisville & N. R.R. v. Ragan, 172 Tenn. 593, 113 S.W.2d 743 (1938); see also 56 YALE L. J. 1234, 1236 (1947).

The other judicial remedy for the harassing suit is dismissal by the initial court trying the cause under the doctrine of *forum non conveniens.* The doctrine has been classically stated as "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). Barrett, *The Doctrine of Forum Non Conveniens,* 35 CALIF. L. REV. 380 (1947). The cases indicate no distinction in the allegations and considerations for ruling on *forum non conveniens* or in granting an injunction. The better view, instead of a mechanical formula for *forum non conveniens* or a restraining order, would be to balance the advantages and disadvantages of the distant suit to the litigants and require a clear showing of real injury which approaches evidence of intent by the plaintiff employee to defraud, harass, and vex the defendant. See Southern Pacific Co. v. Baum, 39 N.M. 22, 38 P.2d 1106 (1934). In denying the railroad an injunction that court said something more substantial than a mere showing of inconvenience and expense was required. The implication is that such a showing of hardship is needed as to draw an inference of intent to secure some inequitable advantage by the employee. In this case the employee presented a good faith purpose in his venue choice; the court appears to grasp the correlation between the function of the courts and the purpose of FELA venue. Although a justification of choice of venue is presumed and should not be required in the first instance, it should be required to rebut a clear showing by the railroad of hardship and harassment in the venue selected.

Since 1404(a), *infra* note 9, the federal courts are adequately equipped to prevent FELA venue abuse. Therefore, the scope of this note will be restricted to FELA venue in the state courts.

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

7. "The Missouri courts here involved must permit this litigation." *Supra* note 6, at 704. The Court continues: "To deny citizens from other states, suitors under F.E.L.A., access to its [Missouri] courts would, if it permitted access to its own citizens, violate the Privileges and Immunities Clause." *Ibid.* These statements could

to enjoin litigation in a federal court was invalidated in *B. & O. R.R. v. Kepner*.[8] Since the vexatious suit could not be foreclosed in a federal court by injunction, Congress, in 1948, enacted Section 1404(a) of the Judicial Code to empower the federal district courts to transfer any civil action in the interest of justice and for the convenience of the parties;[9] thus, the equitable power of *forum non conveniens* was statutorily conferred upon federal courts. It now became of immediate interest whether state courts would also be permitted, in view of the equitable policy of 1404(a) and of the *Miles* dicta, to utilize the doctrine of *forum non conveniens* to dismiss inconvenient suits.

Mr. Justice Frankfurter in *Missouri v. Mayfield*[10] expressly stated that state courts could adopt or reject the doctrine of *forum non conveniens* according to their own procedural rules or policy. Neither the *Miles* case nor federal law prevented the state forum from dismissing an FELA suit if such was the operation of local law with regard to other actions. Nothing prior to 1404(a) purported to force states to entertain FELA actions.[11] Mr. Justice Jackson, concurring, expressed the more reasonable conclusion that 1404(a) evidences congressional

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be interpreted as stating an unquestionable fact as regards Missouri practice and not a general dicta holding that FELA venue is compulsory on state courts, for Missouri courts had interpreted their statute law as compelling jurisdiction over all transitory actions, *see* Bright v. Wheelock, 323 Mo. 840, 873, 20 S.W.2d 684, 699 (1929); thus to refuse this present suit by a citizen of another state would have been a violation of the "privileges and immunities" clause. The dicta when taken in context with the opinion, including a statement that the power of Missouri to regulate its courts was not an issue, should have precluded any reliance upon it.

However, the dicta was relied upon. The *Miles* case was held to be "completely decisive" that a state court must hear an FELA action. Leet v. Union Pacific R.R., 25 Cal.2d 605, 155 P.2d 42 (1944), *cert. denied,* 325 U.S. 866 (1945). *See* also Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 505 (1947).

8. 314 U.S. 44 (1941).

9. 28 U.S.C. 1404(a) (Supp. 1950). "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." See Harris, *Survey of the Federal Judicial Code,* 3 SOUTHWESTERN L. J. 229, 235 (1949); 18 J. B. A. KAN. 242 (1949). Note that this differs from common law *forum non conveniens* which resulted in dismissal of the action. However, this section is generally referred to as a statutory enactment of the doctrine.

The FELA venue section is subject to a motion to transfer under 1404(a) in the federal courts. *Ex parte* Collett, 337 U.S. 55 (1949). The court concluded that the broad language of 1404(a) and the evidences of congressional intent, especially the revisor's notes, *infra* note 16, could lead only to the conclusion that a special venue section as in FELA was subject to 1404(a) in federal courts.

10. 340 U.S. 1 (1950). In an FELA action in a Missouri state court, a motion of *forum non conveniens* was denied. The defendant railroad instituted proceedings in the state supreme court for a writ of mandamus to compel the trial court to entertain the motion; the writ was denied.

11. Mr. Justice Frankfurter apparently continued the view he held in dissenting in the *Miles* case. The venue section of FELA does not remove state courts' powers to subject it to equitable considerations whether by injunction or *forum non conveniens.*

intent to subject FELA venue to equitable considerations and to remove the compulsion of the *Miles* dicta on state courts.[12]

Although state utilization of *forum non conveniens* was not grounded upon the passage of 1404(a), the question remained unanswered as to whether the states could, upon the theory that 1404(a) abolished the rule of the *Miles* case, employ the injunction to prevent harassing FELA suits in other jurisdictions. Since very few state courts had, nor have, adopted *forum non conveniens* as local policy, the issue was acute.[13] It was against this background that, in the 1952-53 term, the Supreme Court decided *Pope v. Atlantic Coast Line R.R.*[14]

The respondent railroad sought an injunction in a Georgia court to restrain a Georgia citizen from bringing his FELA suit in an Alabama court. The cause of action arose in Georgia. The trial court refused to grant the injunction but the Supreme Court of Georgia reversed, holding that state courts could, after the adoption of 1404(a), enjoin the continuance of an FELA suit in another state court. The Supreme Court of the United States reversed, finding that the *Miles* case still controlled. Mr. Chief Justice Vinson, for the majority, construed 1404(a) literally; it conferred *forum non conveniens* upon federal courts alone. "Nor does 1404(a) contemplate the collateral attack on venue . . .; it contains no suggestion that the venue question may be raised and settled by the initiation of a second lawsuit in a court in a foreign jurisdiction. . . ."[15]

Mr. Justice Frankfurter, dissenting, broadly interpreted 1404(a) as a declaration of congressional policy to subject FELA venue to equitable considerations and thus to state restraining orders.[16] The *Miles* decision was no longer controlling because he thought it unreasonably narrow to believe that Congress intended merely to prevent abuse of

12. 340 U.S. 1, 5, 6 (1950).

13. Barely half a dozen states have accepted the doctrine. Barrett, *supra* note 5, at 388, 389.

14. 73 Sup. Ct. 749 (1953). The state supreme court opinion is reported in 209 Ga. 187, 71 S.E.2d 243 (1952). See 26 So. CALIF. L. REV. 210 (1953). In Atlantic Coast Line R.R. v. Wood, 58 So.2d 549 (Fla. 1952), the Florida Supreme Court in a similar fact situation held that *Miles* still controlled despite 1404(a). The court utilized reasoning similar to that of the majority opinion in the United States Supreme Court.

15. 73 Sup. Ct. 749, 752 (1953).

16. 73 Sup. Ct. 749, 753-757 (1953).

See revisor's notes to 28 U.S.C.A. 1404(a) (1948). H. R. REP. 308, 80th Cong., 1st Sess. (1947). "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. As an example of the need of such a provision, see Baltimore & Ohio R.R. v. Kepner which was prosecuted under the F.E.L.A. in New York, although the accident occurred and the employee resided in Ohio." See the Supreme Court's interpretation of congressional intent in *Ex parte* Collett, 337 U.S. 55 (1949).

FELA venue in federal courts while ignoring the same considerations in state courts. Admittedly the case illustrated the effect of a literal interpretation of 1404(a), because Alabama, where the employee initiated his action, did not recognize the doctrine of *forum non conveniens*, so that the railroad's sole remedy against the alleged vexatious choice of forum was an injunction.[17] It follows that adherence to the rule of the *Miles* case creates a haven for employee suits in those state courts which do not recognize the inconvenient forum doctrine. Moreover, Mr. Justice Frankfurter asserts, denial of the injunctive process destroys between state and federal courts and between different state courts the uniformity of treatment generally accorded FELA litigants. Underlying these views appears to be the conviction that *forum non conveniens* and enjoining an FELA litigant are indistinguishable as equitable powers of state courts which in the first instance were not destroyed by the FELA venue section: "It is beside the point to urge that 1404(a) speaks only of *forum non conveniens* in federal courts and not of state court injunctions against out of state suits."[18]

In recognition that the harassing suit presents a distinct problem in FELA litigation, little assistance could be expected from the *Pope* case no matter what decision was reached. Manifestly, to relegate the railroad to the sole use of the inconvenient forum doctrine as the chief attack upon the vexatious suit is an insignificant aid in resolving the problem. Very few states have adopted the use of the doctrine and the breadth of the venue section permits easy access to other states' courts.

On the other hand, the alternative decision in the *Pope* case, affirming the use of the injunction, is also subject to serious objection. To impress FELA litigants of the equitable limitation upon their choice of venue, the railroads quite conceivably might seek restraining orders when any suit was brought in a distant court not completely satisfactory to the railroad. An appeal in case the injunction were denied would have rested on the belief that it should be public knowledge that the restraining order would be used to full avail and no unsatisfactory venue tolerated. The employee would then be burdened not only with the expense of contesting the appeal but also with a great delay in time. Obviously, the typical FELA litigant is financially incapable of bearing the cost and delay of prolonged proceedings before final adjudication of his claim on the merits.[19] As a result of this strengthening factor

17. *See* Pope v. Atlantic Coast Line R.R., 73 Sup. Ct. 749, 756 (1953). *See* Atlantic Coast Line R.R. v. Pope, 209 Ga. 187, ___, 71 S.E.2d 243, 248 (1952).

18. 73 Sup. Ct. 749, 755 (1953).

19. Mr. Justice Jackson concurring in the *Miles* case, 315 U.S. 698, 705, makes an often stated observation that: "He [the employee] is not given a remedy, but only

in its bargaining position, the railroads would then be in a position to coerce an unreasonable settlement. Moreover, even though an employee may have a bona fide reason for bringing suit where the defendant is merely doing business, though the cause of action may have arisen elsewhere, the threat of a time-consuming, expensive series of legal proceedings might very possibly induce him to sue in a forum more acceptable to the defendant. The plaintiff's election of a forum could be effectively restricted through eliminating the effect of the "doing business" choice, but as a consequence, the essence of the venue section[20] would be undermined.

In addition, the efficacy of the injunction is conditional. The party enjoined could refuse to comply with the order but escape contempt proceedings by leaving the jurisdiction of the enjoining court.[21] Yet a more important determinative of the injunction's ineffectiveness is the recognition given to it by the court where the suit was initiated. No substantial authority exists to require recognition under the full faith and credit clause.[22] The strongest argument advanced by those state courts which refuse recognition of the decree is that recognition and consequent dismissal of the suit would be such a denial of its courts to citizens of other states as to constitute discrimination which violates the privileges and immunities clause of the United States Constitution.[23] In view of *Douglas v. New York, N. H. & H. R.R.*,[24] where dismissal

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a lawsuit. . . . [I]n most cases he will be unable to pursue that except by splitting his speculative prospects with a lawyer. The functioning of this backward system of dealing with industrial accidents . . . [results in] two dollars of judgment for every dollar that actually reaches those who have been damaged. . . . It seems more probable that Congress intended to give the disadvantaged workman some leverage in the choice of venue than that it intended . . . [that] the railroad could force him to try one lawsuit at home to find out whether he would be allowed to try his principal lawsuit elsewhere." *Id.* at 707, 708.

20. The Court discussed the history and purpose of the present FELA venue section in Baltimore & Ohio R.R. v. Kepner, 314 U.S. 44, 49, 50 (1941).

21. One state court, recognizing the FELA claimant's attempt to circumvent its injunction against the distant suit, enjoined within its jurisdiction the notary, the claimant's attorney, and the witnesses from taking testimony and certifying to any deposition in any manner representing the restrained party in the distant suit. New York, C. & St. L. R.R. v. Perdiue, 97 Ind. App. 517, 187 N.E. 349 (1933).

22. McCLINTOCK, EQUITY 477 (2d ed. 1948); STUMBERG, CONFLICT OF LAWS 123 (1950); Foster, *Place of Trial in Civil Actions*, 43 HARV. L. REV. 1217, 1245 (1930); 21 NEB. L. REV. 160 (1942); 39 YALE L. J. 719 (1930).

23. Although there are few cases on this specific issue, the leading case appears to be State *ex rel.* Bossung v. District Ct., 140 Minn. 494, 498, 168 N.W. 589, 591 (1918).

24. 279 U.S. 377 (1929). A state statute conferred discretionary power on state courts to dismiss transitory actions. Although the opinion made no specific mention of *forum non conveniens*, the case has been generally accepted as authority for state court exercise of the doctrine. The test laid down, dismissal on basis of "residence" does not violate the "privileges and immunities" clause, has been used by state courts

was permitted under a statute based upon plaintiff's residence rather than his citizenship, and the decision in the *Mayfield* case,[25] such an interpretation is unnecessarily restricted. For example, if a citizen of state X sued in the courts of X but resided in state Y where the injunction issued, state X could deny use of its courts in recognition of the injunction; since the state could refuse access to its courts in the interest of justice to its own citizens, no discrimination would result from according similar treatment to citizens of other states. Despite the fact that the privileges and immunities contention is weak, the present law with respect to recognition of foreign decrees is vague and depends upon perennial issues of comity between the states.[26]

Since permitting use of the injunction could potentially have caused more harm than good,[27] and because of nonrecognition by a majority of state courts of the *forum non conveniens* doctrine, it is manifest that the *Pope* case neither furnished, nor could it have furnished, any substantial assistance in this problem area. Although the *Pope* case permits this obvious conclusion, it does not so patently indicate the next step in the legal battle over abuse of FELA venue.

If the judiciary is to provide relief from inequitable use of the venue section, clearly the inconvenient forum doctrine must provide the means.[28] In light of the states' inertia, only a more decisive position

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to determine the limit of their dismissal powers in FELA cases. Perhaps more emphasis upon dismissal in the interest of justice could have been noted. This decision formed the basis for the unnecessary confusion after the *Miles* case dicta.

25. The *Mayfield* case enumerates grounds upon which access to a state court may be denied. The state court opinion was ambiguous as to just what grounds the decision was based upon. The majority of the Supreme Court deemed it necessary, on the probability that the state court felt bound by federal case law, to enunciate clearly the status of *forum non conveniens* in state courts as regards FELA. The opinion established the grounds upon which a state could dismiss an FELA action without involving a federal question—local procedural policy applicable to all actions including those of nonresident citizens of the state. The constitutional test of the *Douglas* case was utilized by the Court. "[N]o substantial question as to the constitutional validity of the court's action would appear since the application of the doctrine [*forum non conveniens*] would depend on other factors than the mere residence or citizenship of the parties." Barrett, *supra* note 5, at 393.

26. See note 22 *supra*.

27. Adoption of the injunctive device would also have been in conflict with the principle of uniformity and created even more confusion as to the rights of the litigants under FELA venue. *E.g.*, federal courts use *forum non conveniens*, some state courts use *forum non conveniens*, and in the remaining state courts the injunctive device would have been used.

28. "The difficulty both in obtaining and enforcing the injunction makes it appear a rather inadequate makeshift, of some use in correcting certain of the more extreme [venue] abuses. . . . The chief significance [of restraining decrees against distant suits] . . . is to indicate the need of meeting the issue directly by staying or dismissing pending actions whenever another forum is more appropriate." Foster, *supra* note 22, at 1248.

by the Supreme Court would seemingly resolve the problem. A plausible legal argument may be proposed which supports a requirement that state courts entertaining FELA suits must hear a motion of *forum non conveniens*. Uniform treatment of litigants in federal and state courts has long been a strong influence upon the development of FELA law.[29] Arguably, if 1404(a) permits transfer of inconvenient FELA suits in federal courts, then uniformity requires that state courts also assert the power to dismiss on the grounds of *forum non conveniens*. Certainly it is true, as Mr. Justice Frankfurter emphasized, that refusal to permit use of the injunction achieves the opposite of uniform treatment since venue is thereby absolute in all state courts except those recognizing the *forum non conveniens* doctrine.[30] Obviously, requiring state courts to consider a motion for *forum non conveniens* would be an alteration in procedure for most states, but this has not been an insurmountable objection in the past development of FELA law.[31] Moreover, compulsory adoption of the doctrine would place much less burden on state courts than have other changes wrought by FELA, for *forum non conveniens* would permit states to refuse to exercise jurisdiction.[32] This is no small consideration since it is estimated that two-thirds of all FELA suits are brought in state courts.[33] Other than the assertion

29. Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952) (Ohio state courts must submit all factual issues under FELA to the jury regardless of state procedure to the contrary). That Court said: ". . . [O]nly if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Id.* at 361. Brown v. Western Ry. of Ala., 338 U.S. 294 (1949) (a state court could not invoke local rules of pleading burdening rights under FELA); Davis v. Wechsler, 263 U.S. 22 (1923); C. & O. Ry. v. Kelly, 241 U.S. 485 (1916) (state court's instructions on measure of damages invalid as in conflict with federal court principles under FELA). See for a general discussion and the suggested standard to determine when state procedural rules must give way to federal rules in FELA, 27 IND. L. J. 536 (1952).

30. This deduction must be premised on the assumption that *forum non conveniens* and the injunction subject venue to uniform equitable considerations. But this is not a sound assumption, for the devices are two distinct remedies with inherent differences requiring separate considerations even though the same end result may be speciously reached. Use of the remedies interchangeably would not, when broadly considered, achieve true uniformity in FELA venue. There is a considerable difference in expense and convenience between deciding the propriety of venue in the same court litigating the merits of the cause of action and a separate court in another state. The injunction could be litigated again in substance by the distant court on the question of recognition; if in addition, the injunction had been appealed in the enjoining court several suits would be required before litigation on the merits. A decision on *forum non conveniens* would be finally decided, even after review, in the courts of one state with unconditioned effect. It cannot be reasonably denied that a large distinction with substantial effects exists between *forum non conveniens* and an injunction.

31. See note 29 *supra*.

32. See 46 ILL. L. REV. 115, 126 n.51 (1951). While such a result would force state courts to entertain dual procedures, the concurrent jurisdiction area is familiar with such duality. See for a brief illustration with cases cited, *id.* at 127 n.54.

33. See 46 ILL. L. REV. 115, 128 n.58 (1951).

of a doctrinaire states' rights position, therefore, little objection could be made by defenders of local law.

Despite the superficial appeal of that argument, serious doubt arises whether the question could be presented to the Court at all. If the defendant in the *Pope* case had moved for dismissal by the Alabama court on the basis of *forum non conveniens,* the motion would no doubt have been denied and this result affirmed by the Alabama Supreme Court in reliance upon local law.[34] Presumably the *Mayfield* case is substantial authority for this position since Mr. Justice Frankfurter there stated that a state court may refuse to accept a motion for *forum non conveniens* on the grounds of local procedural rules or local policy.[35] The complete absence of any suggestion in *Mayfield* that a state must accept the doctrine does not auger well for such a future contention. It does not even appear that petitioner's counsel advanced this proposition. The dissenters in the *Mayfield* case thought a federal question was involved but only on the basis that the Missouri Supreme Court correctly concluded that for the trial court to entertain the motion for *forum non conveniens* would violate the privileges and immunities clause.[36] This is, indeed, a far cry from a belief that the Missouri courts must entertain the motion because federal law required it. Therefore, had the Alabama court denied *forum non conveniens* expressly and solely on considerations of state law, it is highly doubtful that the desiderata of uniformity in the adjudication of FELA cases would be sufficient to elevate the denial to the status of a federal question so that Supreme Court review could be obtained.

Should such a case reach the Supreme Court the probability of a compulsory inconvenient forum doctrine is also slight in view of the restricted interpretation of 1404(a) enunciated by the Supreme Court in the *Pope* case. Moreover, a judicial pronouncement imposing the doctrine on state courts encounters serious policy objections. The majority of state courts would suddenly be vested with an unfamiliar power the use of which would be guided only by federal decisions on 1404(a) and by foreign state decisions on *forum non conveniens* and injunctions. The relevant criteria by which to judge a vexatious suit are dis-

34. See note 17 *supra.*

35. The Supreme Court reviewed on the grounds that the state supreme court felt bound by federal case law to deny *forum non conveniens* in FELA suits. The majority decided, upon this basis, that the federal cases did not deny this power to state courts and within constitutional limits as first enunciated in the *Douglas* case, 279 U.S. 377, *forum non conveniens* could be invoked.

For a brief discussion of the granting of certiorari in this case, see 46 ILL. L. REV. 115, 116 n.5, 6.

36. 340 U.S. 1, 6 (1950).

persed with little uniformity among innumerably divergent fact situations.[37] The opportunity for the railroads to take advantage of the new problem presented to state courts should not be underestimated. If a parallel may be drawn from other FELA problem areas, several years would elapse before sufficient *forum non conveniens* cases were presented to the Court to enable it to elaborate a clear cut expression of policy and of uniform considerations for trial courts to apply in ruling on a motion to dismiss.[38] In the meantime the railroads could well afford to appeal a refusal to dismiss as a warning to future litigants who may choose an inconvenient forum. The result would be that the actual delay and increased costs, or threat thereof, in defending an appeal of a refusal to dismiss coupled with a lack of uniformity and specificity in enumerating grounds for finding the forum inconvenient, could lead the more cautious attorney and litigant to refrain from choosing a forum which possibly would be thought unsuitable to the railroad. Thus the indecisiveness of a Supreme Court decision compelling states to use *forum non conveniens* in FELA cases could conceivably be employed as a weapon by defendant railroads.[39]

In light of these considerations the sole significant result of the *Pope* case is the emphatic notice it gives to Congress to amend Section 6 of FELA. Obviously, a satisfactory solution to the problem will not be forthcoming from the courts. But, Congressional endeavors to limit the scope of venue in an FELA suit must take cognizance of limitations inherent in the basic purpose underlying the Act. The employee must continue to be permitted easy access to state courts, yet Congress must also prevent the possibility of an unjustified and inequitable burden upon

37. In Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 516 (1947), the dissent of Mr. Justice Black expresses concern over the uncertainty which *forum non conveniens* would place upon selecting a court: "The broad and indefinite discretion left to federal courts to decide the question of convenience from the welter of factors which are relevant to such a judgment, will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible." See Barrett, *supra* note 5, at 402.

38. See for example Alderman, *What the New Supreme Court Has Done to the Old Law of Negligence,* 18 LAW & CONTEMP. PROB. 110 (1953). A chronological study is made of Supreme Court decisions upon negligence principles in FELA litigation; the decisions have resulted in considerable confusion in lower courts.

39. "[C]ourts must take care to see that the effort to minimize hardship to the defendant does not result in imposing new and unreasonable burdens on the plaintiff. Delay, particularly in personal injury actions, favors the defendant." Barrett, *supra* note 5, at 420, 421.

The dissenting opinion in the *Mayfield* case, 340 U.S. 1, 6, 7, takes cognizance of the unfortunate delay of review of *forum non conveniens:* "The cases out of which this proceeding arises are now in their third year in the courts without coming to trial, and remand by this Court will unnecessarily cause further delay and expense in bringing them to final adjudication." *Id.* at 7.

the employer. This suggests that a rigid, narrowly defined choice of venue which neither permits easy access to the courts nor recognizes the divergent individual needs would not be satisfactory. Illustrative of this was a proposed amendment limiting venue in any tort action for personal injuries or death against railroads to the place where the cause of action arose or where the plaintiff resides.[40] If process could not be acquired against the railroad, then suit could be initiated where the defendant was doing business. Such a narrow provision would, for example, prevent an employee from suing in a state in which he was hospitalized and in which his medical witnesses resided if he lived, and the accident occurred, in another state.[41] A plaintiff would be similarly inhibited if available forums' dockets were so relatively crowded as to cause unreasonable delay in litigating his claim—suit in another forum would be impossible even though of great advantage to the employee and not an inequitable and vexatious burden upon the defendant.[42] An appropriate venue section should be characterized by a flexibility which does not so limit the employee's election of forums.

Careful consideration of these factors indicates that amending the present venue section to condition the grant of state court jurisdiction upon cognizance of a timely motion for *forum non conveniens* would adequately alleviate the problem. Incorporating the doctrine as a substantive part of the FELA would assure the employee his choice of forum but would provide a discretionary check on the propriety of suit in a particular state court.[43] In order to adequately inform state courts of the criteria by which *forum non conveniens* is to be measured, these should be enumerated in the amended section.[44] Much of the objection

40. H. R. 1639, 80th Cong., 1st Sess. (1947).

41. See Devitt, *Venue of Actions,* 34 A. B. A. J. 454 (1948). The article criticizes limitation of FELA venue as suggested in H. R. 1639. It is pointed out that many southern transcontinental railroads maintain hospitals as a service to injured employees. These hospitals may be hundreds of miles from the scene of the accident or where the injured employee resides. Since the employee's medical witnesses would be in the district of the hospital, it would be an unjustified burden to require the suit to be brought in the district of his residence or where the cause of action arose. An FELA suit arose on substantially the same facts in Southern Pacific Co. v. Baum, 39 N.M. 22, 38 P.2d 1106 (1934). An injunction against the suit was denied.

42. See Devitt, *supra* note 41, at 530.

43. See 46 ILL. L. REV. 115, 127 (1951).

44. In Kaufman, *Observations on Transfers under Section 1404(a),* 10 F.R.D. 595 (1951), the suggestion is made that specific criteria applicable in a ruling on 1404(a) should be codified in the statute. This would make for uniformity in federal practice in applying the section and in reviewability of rulings pursuant to 1404(a). If the section or its equivalent *forum non conveniens* should be invoked in an FELA action in state courts, the same desire for uniformity and clarity should necessitate an enumeration of criteria for invoking the doctrine.

to judicially imposed *forum non conveniens* would then be avoided, and both employers and employees would be assured of fairness in the operation of this particular phase of FELA.

CONSERVATION OF DWELLINGS: THE PREVENTION OF BLIGHT

Nearly everyone is cognizant of firetrap tenements,[1] overcrowded and unsanitary boarding houses, and single-family dilapidated dwellings with broken windows and crumbling foundations. Furthermore, most people appreciate the efforts being made to rid our communities of these malignant blotches.[2] Unfortunately, few persons are sufficiently aware that the process of gradual deterioration creates such conditions, and consequently a paucity of efforts are directed toward its prevention.[3]

This deterioration process, which is labelled blight,[4] is induced by

1. Occasionally, these conditions are brought vividly to the attention of the citizen by the happening of a terrible disaster. This is exemplified by the recent Chicago tenement fire which took 18 lives. See Chicago Daily Tribune, Sept. 12, 1953, § 1, p. 1, col. 9.

2. See footnote 20 and accompanying text *infra.*

3. Any program which is aimed entirely at the elimination of slums through an attack upon the established slum area will only serve to force the slum into another area.

"Like a migratory flock of black birds resting and feeding temporarily, so groups of immigrants as well as individual families and isolated individuals stop in this transitional area on their way up or down the social scale. Each of these waves of people leaves a residue of poverty-stricken, socially unadjusted, maladjusted defectives and delinquents which gradually accumulates into a slum population." WALKER, URBAN BLIGHT AND SLUMS 31 (1938).

4. Many persons have attempted to define blight. See WALKER, *op. cit. supra* note 3. In her discussion of blight, Dr. Walker cites the following definitions by other writers: "A blighted residential area is one on the down grade, which has not reached the slum stage." Wood, *Slums and Blighted Areas in the United States,* 1935 HOUSING DIV. BULL. No. 1 at 3. "A blighted area is an area that economically is not self-supporting." *Analysis of a Slum Area in Cleveland 2,* prepared for Cleveland Housing Authority. Blight exists in ". . . any area in which economic development has been considerably retarded, as compared with the development in the larger area, of which the area under consideration is a part." Knight, *Blighted Areas and Their Effect Upon Land Utilization,* ANNALS OF THE AMERICAN ACADEMY 134 (1930). Dr. Walker comes to the following conclusion: "At any rate the term 'blight' is used in an economic sense, while the designation 'slum' is essentially of social significance. . . . A blighted area is generally unprofitable, but the opposite may be true of certain slums. . . . For the purposes of this study we shall define blighted areas as those sections of a community where, as a result of social, economic, or other conditions, there is a marked discrepancy between the value placed upon the property by the owner and its value for any uses to which it can be put, appropriate to public welfare, under existing circumstances. This discrepancy prevents or handicaps the improvement of the area. Old buildings are neglected and new ones are not erected and the