DOUGLAS *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

CERTIORARI TO THE SUPREME COURT OF NEW YORK, NINTH DISTRICT.

No. 312. Argued January 16, 1929. Reargued April 15, 16, 1929.—Decided May 13, 1929.

1. In determining whether the privileges and immunities clause of the Constitution, or an Act of Congress, is contravened by a state statute, the purport established for the state statute by the highest court of the State is accepted here. P. 385.
2. Where a state law is susceptible of two constructions, one of which might put it in conflict with the Federal Constitution, it is to be presumed that the other construction, rendering it valid, would be adopted by the state courts. P. 386.
3. In § 1780 of the New York Code of Civil Procedure, under which as locally construed actions by non-residents against foreign corporations doing business in the State are subject to dismissal at the discretion of the court, the term "non-resident" should be interpreted as embracing citizens of the State who do not actually live in the State at the time of bringing such actions. P. 386.
4. A state law under which citizens of the State who actually reside there have the right to maintain actions in the state courts against foreign corporations doing business there on causes of action arising from foreign torts, but under which such actions when brought by non-residents, whether citizens of that State or of other States, are subject to dismissal at the discretion of the court, makes a distinction based on rational considerations and does not violate the privileges and immunities clause, Art. IV, § 2, of the Constitution. P. 387.
5. The Federal Employers' Liability Act does not purport to require state courts to entertain actions under it as against an otherwise valid excuse under the state law. P. 387.

248 N. Y. 580, affirmed.

CERTIORARI, 278 U. S. 590, to review a judgment of the Supreme Court of New York, entered on a rescript from the Court of Appeals affirming the dismissal of an action

brought under the Federal Employers' Liability Act. See also 223 App. Div. (N. Y.) 782. The Attorney General of New York was given leave to file a brief and take part in the reargument, because of the importance of the case.

Messrs. Thomas J. O'Neill and *Charles D. Lewis,* with whom *Messrs. John Ambrose Goodwin, Leonard F. Fish,* and *L. Daniel Danziger* were on the brief, for petitioner.

The state statute, as it now reads, is neither in conflict with natural justice nor the Federal Constitution. The difficulty is, that New York courts have interpreted it to mean what the judges privately seem to believe the law should be, based on principles of state comity, *Murnan* v. *Wabash R. Co.,* 246 N. Y. 244, and not according to the intent of Art. VI of the Federal Constitution in view of Art. IV, § 2, of that instrument and the rights of residents of New York to resort to state courts.

It is this conflict that we ask this Court to overrule, since in the exercise of its appellate jurisdiction it is not bound by the decision of a final state court establishing state law when that decision makes that which is constitutional unconstitutional within the plain intent of the Federal Constitution. *Ward & Gow* v. *Krinsky,* 259 U. S. 503; *Fiske* v. *Kansas,* 274 U. S. 385; *Southwestern Telephone Co.* v. *Danaher,* 238 U. S. 482; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292.

Great stress has been placed by the New York courts on the words "may be maintained" as used in § 47. They have been construed to vest a discretion in the court to entertain or decline an action. The same words, however, are used in § 46 of the same statute enacted at the same time, and as to their use in the latter section they have always been held mandatory. *Gregonis* v. *P. & R. Coal Co.,* 204 N. Y. 478. By what legal principle, we ask, do the same words command obligatory jurisdiction as matter of right in the case of a resident and give discretionary

jurisdiction in the case of a non-resident in the same kind of an action in tort?

The principle of comity, perhaps, justifies certain classes of discrimination. But this principle has no application to the present action under our constitutional form of government, *Murray* v. *C. & N. W. R. Co.,* 62 Fed. 24, since the present action involves the enforcement of the Federal Constitution and an Act of Congress, and not the applicability of a statute of a sister State.

This Court has dealt with the use of the word "residents" in *LaTourette* v. *McMaster,* 248 U. S. 465.

If New York allows its "residents" the absolute right to resort to its courts, it must also allow its "citizens" the same privilege, for "residents" must of necessity, under our constitutional form of government at least include "citizens." Section 1, Fourteenth Amendment. To refuse a like absolute right to non-residents, when the non-resident is a citizen of the United States, of necessity must violate § 2 of Art. IV of the Federal Constitution. *Chambers* v. *B. & O. R. Co.,* 207 U. S. 142; *Missouri Pacific R. Co.* v. *Clarendon Boat Oar Co.,* 247 U. S. 533; *Cole* v. *Cunningham,* 133 U. S. 107; *State ex rel. Watkins* v. *North American Lumber Co.,* 106 La. 621; *State ex rel. Prall* v. *District Court,* 126 Minn. 501; *Corfrila* v. *Coryell,* 4 W. C. C. 380.

Distinguishing *Walton* v. *Pryor,* 276 Ill. 563, 245 U. S. 675; *Loftus* v. *Pennsylvania R. Co.,* 107 Oh. St. 352; *Chambers* v. *B. & O. R. Co.,* 207 U. S. 142; *Missouri Pacific R. Co.* v. *Clarendon,* 257 U. S. 533.

Congress emphasized its intent to provide that an injured employee of a common carrier railroad might sue under the Federal Employers' Liability Act either in the District Court of the United States, or in any state court of competent jurisdiction in the district of the residence of the defendant, or in which the cause of action arose,

or in which the defendant does business at the time of the commencement of the action. Congress had the right to confer this jurisdiction upon the state courts, and the provisions of its Act are supreme. *Matter of Taylor,* 232 U. S. 263; *Toledo, St. L. & W. R. Co.* v. *Allen,* 276 U. S. 165; *Mondou* v. *N. Y., N. H. & H. R. Co.,* 223 U. S. 1; *Missouri* v. *Taylor,* 266 U. S. 200.

That Congress, when regulating interstate commerce, may compel the several state courts to take jurisdiction of civil actions authorized by such legislation, whenever said "state courts' ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws," is too well settled to dispute. Cases *supra;* U. S. Constitution, Art. I, § 8, Art. VI; *Robb* v. *Conley,* 111 U. S. 637; *Tennessee* v. *Davis,* 100 U. S. 257; *Taylor* v. *Carryl,* 20 How. 595; *Covell* v. *Heyman,* 111 U. S. 182; *Teal* v. *Fulton,* 22 How. 292; *Defiance Water Co.* v. *Defiance,* 191 U. S. 194. If the court exists and has jurisdiction, Congress may enforce the exercise of its jurisdiction. Art. VI; Art. I, § 8, U. S. Constitution.

Mr. Edward R. Brumley, with whom *Messrs. John M. Gibbons, Frederick J. Rock,* and *J. Howland Gardner, Jr.,* were on the brief, for respondent.

The order and judgment do not violate § 2 of Article IV of the Constitution of the United States.

Both § 46 and § 47 of the General Corporation Law of New York contain the word "may," but the opinion in *Gregonis* v. *P. & R. Coal Co.,* 235 N. Y. 152, says that the courts have never refused to entertain jurisdiction over a foreign corporation in behalf of a resident for a transitory cause of action such as contract and tort cases arising outside of the State. This is somewhat negatived by *Pietraroia* v. *N. J. & H. R. R. & F. Co.,* 197 N. Y. 434, but is in

line with *Palmer* v. *Phoenix Ins. Co.,* 84 N. Y. 63; *Grant* v. *Cananea Copper Co.,* 189 N. Y. 241; and *McCauley* v. *Georgia Bank,* 239 N. Y. 514.

While there is no statutory or constitutional reason, we submit, why this should be so, this is the situation as it obtains in New York State at the present time. The opinion in *Gregonis* v. *P. & R. Coal Co., supra,* admits rejection of litigation even by residents where it is futile and useless to assume jurisdiction. There is some indication that if plaintiff had been a citizen, jurisdiction would be compulsory, but this is *dictum,* and throughout emphasis is laid upon residence. A further limitation of the broad ruling of *Gregonis* v. *P. & R. Coal Co., supra,* is made in *Swift & Co.* v. *Obcanska Zalozna V. Karline,* 245 N. Y. 570.

See *Adams* v. *Penn Bank,* 35 Hun. 393; *Robinson* v. *Navigation Co.,* 112 N. Y. 315; *Klotz* v. *Angle,* 220 N. Y. 347. See *Canadian Northern R. Co.* v. *Eggen,* 252 U. S. 553; *Barrow Steamship Co.* v. *Kane,* 170 U. S. 100; *Duquesne Club* v. *Penn Bank,* 35 Hun. 390; *Frost* v. *Brisbin,* 19 Wend. 11.

The so-called discrimination is not between citizens and non-citizens, but between residents and non-residents. *Robinson* v. *Oceanic Steam Navigation Co., supra; Johnson* v. *Victoria Copper Co.,* 150 App. Div. 653.

It has been the unanimous opinion of the Court of Appeals that § 1780 of the Code did not conflict with any provision of the Federal Constitution or with the federal authorities upon the subject. *Grant* v. *Cananea Copper Co.,* 189 N. Y. 241. See also *Fairclough* v. *Southern Pacific Co.,* 171 App. Div. 496, affirmed, 219 N. Y. 657.

Residence and citizenship are wholly different things within the meaning of the Constitution. *Steigleder* v. *McQuesten,* 198 U. S. 141; *LaTourette* v. *McMaster,* 248 U. S. 465; *Maxwell* v. *Bugbee,* 250 U. S. 525; *Travis* v.

Y. & T. Mfg. Co., 252 U. S. 60; *Canadian N. R. Co.* v. *Eggen*, 252 U. S. 553; *Union Hotel Co.* v. *Hersee*, 79 N. Y. 454; *Cummings* v. *Wingo*, 31 S. C. 427; *Central R. Co.* v. *Georgia Co.*, 32 S. C. 319; *Loftus* v. *Pennsylvania R. Co.*, 107 Oh. St. 352; distinguishing *Blake* v. *McClung*, 172 U. S. 239. See Paxton Blair, Doctrine of *Forum Non Conveniens* in Anglo-American Law, Columbia L. R., Vol. XXIX, p. 18.

The Fourteenth Amendment does not make a resident in a State a citizen of such State unless he intends by residence therein to become a citizen. *Sharon* v. *Hill*, 26 Fed. 337; *Penfield* v. *C. & O. R. Co.*, 134 U. S. 351.

A discrimination is not unconstitutional, even as between citizens of different States, if there is a reasonable ground for the diversity of treatment. The constitutional question does not arise in this case because of the circumstances.

The cause of action did not arise in New York out of business done by the defendant therein. The immaterial fact that the defendant was doing some business in New York can hardly serve as the basis for the invocation by petitioner of a constitutional privilege. The discrimination is not directed against plaintiff because he is a non-resident. Non-residents are capable of separate identification from residents by facts and circumstances other than that they are non-residents. This goes further than is required for permissive classification. *Central Loan & Trust Co.* v. *Campbell*, 173 U. S. 84.

LaTourette v. *McMaster*, 248 U. S. 465, is authority for the proposition that the discrimination under the New York statute is not between citizens and non-citizens, but between residents and non-residents. But the case is also authority for the proposition that discrimination may be made if we have "practical justifications." Cf. *Minor* v. *Happersett*, 21 Wall. 162; *Chemung Canal Bank* v. *Lowery*, 93 U. S. 72; *McCready* v. *Virginia*, 94 U. S. 391;

Central Loan & Trust Co. v. *Campbell,* 173 U. S. 84; *Travellers' Ins. Co.* v. *Connecticut,* 185 U. S. 364; *Ballard* v. *Hunter,* 204 U. S. 241; *Heim* v. *McCall,* 239 U. S. 175; *Canadian N. R. Co.* v. *Eggen,* 252 U. S. 553; *Ferry* v. *Spokane, P. & S. R. Co.,* 258 U. S. 315; *Kentucky* v. *Paramount Exchange,* 262 U. S. 544, at p. 551.

"Literal and precise equality in respect of this matter is not attainable; it is not required." *Hess* v. *Pawlowski,* 274 U. S. 352, at p. 356.

New York's judicial policy in the treatment of non-residents is reasonable.

To exercise discretionary jurisdiction has become a matter of public policy. *Payne* v. *N. Y., S. & W. R. Co.,* 157 App. Div. 302; *Colorado State Bank* v. *Gallagher,* 76 Hun. 310; *Collard* v. *Beach,* 81 App. Div. 582.

Only in tort cases, arising outside of New York, between non-residents, do New York courts make it a rule to exercise a reasonable discretion, based upon all the circumstances. Mere non-residence is never controlling. Because of non-residence, other circumstances may come in making reasonable the refusal of jurisdiction.

Because the exercise of jurisdiction would be a burden on interestate commerce, the refusal to exercise jurisdiction is at least reasonable, and, therefore, not a violation of § 2 of Art. IV of the Constitution.

For general treatment of this subject matter see Yale L. J., V. XXXVII, p. 983; Harvard L. R., V. XLI, p. 387; Columbia L. R., V. XXIX, p. 1.

The courts of New York are invested with discretion to decline jurisdiction of an action under the Federal Employers' Liability Act such as this one. *Douglas* v. *N. Y., N. H. & H. R. Co.,* 246 N. Y. 422.

Congress has not attempted to enlarge state jurisdiction by the Federal Employers' Liability Act. In the first place, this is indicated by the wording of the statute itself.

In the second place, the effect of the use of the word "concurrent" is analogous to its use in the Eighteenth Amendment of the Constitution. It does not mean joint jurisdiction any more than "concurrent power" in the Eighteenth Amendment means joint power. *National Prohibition Cases,* 253 U. S. 350. Furthermore, neither the statute nor the Amendment is the "source of the power of the States." *United States* v. *Lanza,* 260 U. S. 377; *Hebert* v. *Louisiana,* 272 U. S. 312.

In the third place, in the Act we find the words " competent jurisdiction," referring to the state courts. Manifestly Congress intended not to enlarge state jurisdiction, for otherwise the phrasing would be totally unnecessary. The decisions of this and of other courts bear out this statutory interpretation. *Chambers* v. *B. & O. R. Co.,* 207 U. S. 142; *Second Employers' Liability Cases,* 223 U. S. 1; *Walton* v. *Pryor,* 276 Ill. 563, s. c. 245 U. S. 675; *Loftus* v. *Pennsylvania R. Co.,* 107 Oh. St. 352, s. c. 266 U. S. 639.

Congress can not enlarge state jurisdiction. *Martin* v. *Hunter,* 1 Wheat. 304; *Houston* v. *Moore,* 5 Wheat. 1; *Rushworth* v. *Judge,* 58 N. J. L. 97; *Murnan* v. *Wabash R. Co.,* 246 N. Y. 244.

But this Act does not impose jurisdiction except upon the federal courts. The laws of the State must determine whether "the State has cognizance of the cause of action and may acquire jurisdiction of the parties." *Trapp* v. *B. & O. R. Co.,* 283 Fed. 655. Each State decides for itself the jurisdictional limitations of its courts.

A State may refuse to entertain jurisdiction, notwithstanding the effect is to exclude an action under a federal statute. *Walton* v. *Pryor, supra; Anglo-American Co.* v. *Davis Provision Co.,* 191 U. S. 373. New York, having concurrent jurisdiction, is " free to adopt such remedies, and to attach to them such incidents as it sees fit." *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109. See also

Engel v. *Davenport,* 271 U. S. 33; *St. Louis & I. M. R. Co.* v. *Taylor,* 210 U. S. 281; Harvard L. R., V. 38, pp. 545, 546.

Mr. Hamilton Ward, Attorney General of New York, participated in the oral argument, and with *Mr. Wendell P. Brown,* Assistant Attorney General, filed a brief, as *amicus curiae,* by special leave of Court.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit under the Employers' Liability Act for personal injuries. The injuries were inflicted in Connecticut, the plaintiff, the petitioner, is a citizen and resident of Connecticut, and the defendant, the respondent, is a Connecticut corporation, although doing business in New York where the suit was brought. Upon motion the trial Court dismissed the action, assuming that the statutes of the State gave it a discretion in the matter, and its action was affirmed by the Appellate Division, 223 App. Div. 782, and by the Court of Appeals, 248 N. Y. 580. Thus it is established that the statute purports to give to the Court the power that it exercised. But the plaintiff says that the Act as construed is void under Article IV, Section 2, of the Constitution of the United States: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." A subordinate argument is added that the jurisdiction is imposed by the Employers' Liability Act when as here the Court has authority to entertain the suit. C., Title 45, § 56. Acts of April 22, 1908, c. 149, § 6, 35 Stat. 66, April 5, 1910, c. 143, § 1, 36 Stat. 291. That section gives concurrent jurisdiction to the Courts of the United States and the States and forbids removal if the suit is brought in a State court.

The language of the New York statute, Laws of 1913, c. 60, amending § 1780 of the Code of Civil Procedure is: "An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only; . . . 4. When a foreign corporation is doing business within this State." Laws of 1920, c. 916, § 47. The argument for the petitioner is that, construed as it is, it makes a discrimination between citizens of New York and citizens of other States, because it authorizes the Court in its discretion to dismiss an action by a citizen of another State but not an action brought by a citizen of New York, which last it cannot do. *Gregonis* v. *Philadelphia & Reading Coal & Iron Co.* 235 N. Y. 152. It is said that a citizen of New York is a resident of New York wherever he may be living in fact, and thus that all citizens of New York can bring these actions, whereas citizens of other States can not unless they are actually living in the State. But however often the word resident may have been used as equivalent to citizen, and for whatever purposes residence may have been assumed to follow citizenship, there is nothing to prohibit the legislature from using 'resident' in the strict primary sense of one actually living in the place for the time, irrespective even of domicile. If that word in this statute must be so construed in order to uphold the act or even to avoid serious doubts of its constitutionality, we presume that the Courts of New York would construe it in that way; as indeed the Supreme Court has done already in so many words. *Adams* v. *Penn Bank of Pittsburgh,* 35 Hun. 393 *Duquesne Club* v. *Penn Bank of Pittsburgh,* 35 Hun. 390. *Robinson* v. *Oceanic Steam Navigation Co.,* 112 N. Y. 315, 324. *Klotz* v. *Angle,* 220 N. Y. 347, 358. See *Canadian Northern Ry. Co.* v. *Eggen,* 252 U. S. 553, 562, 563. The same meaning seems to be assumed in *Gregonis*

v. *Philadelphia & Reading Coal & Iron Co.,* 235 N. Y. 152. We cannot presume, against this evidence and in order to overthrow a statute, that the Courts of New York would adopt a different rule from that which is well settled here. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375, 390.

Construed as it has been, and we believe will be construed, the statute applies to citizens of New York as well as to others and puts them on the same footing. There is no discrimination between citizens as such, and none between non-residents with regard to these foreign causes of action. A distinction of privileges according to residence may be based upon rational considerations and has been upheld by this Court, emphasizing the difference between citizenship and residence, in *La Tourette* v. *McMaster,* 248 U. S. 465. Followed in *Maxwell* v. *Bugbee,* 250 U. S. 525, 539. It is true that in *Blake* v. *McClung,* 172 U. S. 239, 247, 'residents' was taken to mean citizens in a Tennessee statute of a wholly different scope, but whatever else may be said of the argument in that opinion (compare p. 262, *ibid.*) it cannot prevail over the later decision in *La Tourette* v. *McMaster,* and the plain intimations of the New York cases to which we have referred. There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned.

As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned. It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a

duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse. *Second Employers' Liability Cases*, 223 U. S. 1, 56, 57.

Judgment affirmed.

THE CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER and MR. JUSTICE BUTLER dissent.

BECHER *v.* CONTOURE LABORATORIES, INCORPORATED, ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 559. Argued April 24, 1929.—Decided May 13, 1929.

1. An undisclosed invention does not need a patent to protect it from disclosure by breach of trust. P. 391.
2. O, being the inventor of a machine, employed B as a machinist to construct it, B agreeing to keep secret the information concerning the invention imparted to him by O and not to make use of it for the benefit of himself or any other than O. B, in breach of his trust, surreptitiously obtained a patent for the invention as his own, and O, in a suit in a state court, obtained a decree holding B a trustee *ex maleficio* of the invention and patent, commanding him to assign the patent to O and forbidding him to use, make or sell, etc., such machines or to transfer any rights under the patent. *Held:*

   (1) That the suit was not one arising under the patent laws and was within the jurisdiction of the state court. P. 390.

   (2) That the decree of the state court was an estoppel against B in a suit brought by him in the federal court to enjoin O from infringing the patent. P. 391.

29 F. (2d) 31, affirmed.

CERTIORARI, 278 U. S. 597, to review a decree of the Circuit Court of Appeals, which affirmed a decree of the District Court refusing a preliminary injunction in a suit for infringement of a patent, and dismissed the bill.