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CASES NOTED

Florida Puts Federal Removal Jurisdiction and the Thirteenth Amendment in the Doghouse

A Florida Supreme Court decision contradicts prior law by finding that, during an attempted removal to federal court, the state trial court did not lose jurisdiction if the removal was improper. The author suggests that imprisonment under the state court's order, while removal was attempted, was a denial of due process. In addition, it is contended that the order compelling the defendants to comply with a personal services contract or face imprisonment for contempt, contravenes the thirteenth amendment.

The owner of a Florida dog track instituted suit against 23 kennel owners and their association, seeking both a temporary and a permanent mandatory injunction requiring the defendant kennel owners to comply with contracts providing for the furnishing of greyhounds to the race track. On June 30, 1975, the Circuit Court of Dade County issued an order restraining removal of the dogs from the court's jurisdiction and ordered a hearing to be held on July 3, 1975. The kennel owners appeared at the hearing, announced that a petition for removal to federal court had been filed, and requested permission to withdraw from the hearing, which the circuit court granted. At 5:55 p.m. of the same day, the federal court remanded the cause. At 6:10 p.m. the circuit court entered an order granting the temporary mandatory injunction which demanded immediate compliance with the contracts by the filing of racing entries no later than the next day. The order also provided that, upon refusal of the kennel owners to file entries, custody of the dogs would be delivered to a receiver. The kennel owners refused to submit the entries and the receiver took custody. At the receiver's request,[1] custody of the dogs was returned to the kennel owners, who were adjudged guilty of contempt for violating the order to comply with their contracts. Eighteen of the kennel owners were incarcerated as a result. The jailed kennel owners brought a writ of habeas corpus to the Supreme

1. Apparently, the receiver was unable to cope with the dogs, and asked the trial court to return the greyhounds to their owners. 317 So. 2d 732, 735 (Fla. 1975).

Court of Florida.[2] The court *held*, affirmed: Since the attempted removal to federal court was improper, it did not deprive the trial court of jurisdiction. Therefore, the July 3rd order granting the temporary mandatory injunction was proper, even if, as alleged by the kennel owners, the disputed contracts involved personal services.[3] *Wilson v. Sandstrom*, 317 So. 2d 732 (Fla. 1975).

Several aspects of the court's decision present disturbing implications. First, the court's rejection of the kennel owners' contention that the state trial court was without jurisdiction from the time the removal petition was filed until the time it was denied seems to contradict an almost unanimous battery of cases[4] and writers.[5]

The court's action may be best explained as a confusion between the old and new removal statutes. Under the prior statute,[6] the petition for removal was initially filed in the state court, with a copy of the petition then being filed in the federal court. The old statute provided, in pertinent part, that it was "the duty of the State court to accept said petition and bond and proceed no further in such suit."

In *Metropolitan Casualty Insurance Co. v. Stevens*,[7] the United States Supreme Court interpreted the rule to mean "that proceedings in the state court subsequent to the petition for removal are valid if the suit was not in fact removable. . . ."[8] This was "the logical corollary of the proposition that such proceedings are void if the cause was removable."[9] The rule meant that a defendant who sought removal could be deprived of his opportunity to defend in the

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2. The kennel owners had taken an interlocutory appeal from the circuit court's July 3rd order. The interlocutory appeal was consolidated for review with the writ of habeas corpus.

3. The court also held that the interlocutory appeal did not operate as an automatic stay of the injunction and that the kennel owners contracts with the dog track were not void for lack of mutuality. Also, the court held that their opinion was not res judicata to the main proceeding of the cause.

4. *E.g.*, United States *ex rel.* Echevarria v. Silberglitt, 441 F.2d 225 (2d Cir. 1971); Adair Pipelines Co. v. Pipeliners Local 798, 325 F.2d 206 (5th Cir. 1963); Hopson v. North Am. Ins. Co., 71 Idaho 461, 233 P.2d 799 (1951); Schuchman v. State, 250 Ind. 408, 236 N.E.2d 830 (1968); State *ex rel.* Gremillion v. NAACP, 90 So. 2d 884 (La. Ct. App. 1956); Bean v. Clark, 226 Miss. 892, 85 So. 2d 588 (1956); State v. Price, 15 N.C. App. 599, 190 S.E.2d 403 (1972). *Contra*, F & L Drug Corp. v. American Cent. Ins. Co., 200 F. Supp. 718 (D. Conn. 1961).

5. 1 W. Barron & A. Holtzoff, Federal Practice and Procedure § 107, at 526 (C. Wright ed. 1960); 1A J. Moore, Federal Practice ¶ 0.168[3.-8], at 511 (2d ed. 1974).

6. Act of Mar. 3, 1911, ch. 231, § 29, 36 Stat. 1095, *formerly codified as* 28 U.S.C. § 72 (1946).

7. 312 U.S. 563 (1941).

8. *Id.* at 566.

9. *Id.*

state court during the time between attempted removal and remand. While the defendant was in the federal court asking for removal, the plaintiff could proceed in state court in a proceeding that was ex parte unless the defendant had legal representation in both places.[10]

The current statute specifying the procedure for removal (enacted in 1948) changes the old statute considerably. One important change is that the petition for removal is now filed in the federal, rather than state, court. Section 1446(e) of Title 28, United States Code (1970) provides:

> Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, *which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.* (emphasis added)

Cases have interpreted section 1446(e) to mean that the state court is divested of all jurisdiction while removal is attempted, even if the federal court later remands the cause.[11] In 1971, the United States Court of Appeals for the Fourth Circuit in *South Carolina v. Moore*,[12] presented a thoughtful discussion of the difference between the two removal statutes. "Since the adoption of § 1446," stated the court, "it has been uniformly held that the state court loses all jurisdiction to proceed immediately upon the filing of the petition in the federal court and a copy in the state court."[13] The court took cognizance of what it described as the "Rives-Metropolitan" rule,[14] which, as the court stated, provided "that if the facts stated in the removal petition were insufficient for removal, the state court could ignore the petition, and proceedings conducted in the state court in

10. *See* Hopson v. North Am. Ins. Co., 71 Idaho 461, 465, 233 P.2d 799, 801 (1951):

> The import of the decisions under 28 U.S.C.A. § 72 is clear to the effect that the defendant when petitioning for removal must assume the consequences if the case is remanded and he does not preserve his rights in the State court, because as the Act has been construed by the courts if the case was remanded for want of jurisdiction, the Federal Court is regarded as never having acquired jurisdiction.

11. *See* cases cited in note 4 *supra*.

12. 447 F.2d 1067 (4th Cir. 1971).

13. *Id.* at 1073.

14. The *Moore* court's "Rives-Metropolitan" rule was actually a synthesis of three cases: Metropolitan Casualty Ins. Co. v. Stevens, 312 U.S. 563 (1941), was the latest distillation of two earlier cases interpreting this facet of the old removal rule, Virginia v. Rives, 100 U.S. 313 (1879), and Removal Cases, 100 U.S. 457 (1879).

the interval between the filing of the petition and a subsequent federal remand order were not invalid."[15] However, the *Moore* court was unpersuaded:

> It is clear, however, that § 1446, in providing for the filing of the petition in the district court while promptly thereafter filing a copy in the state court and giving notice to adverse parties was designed to make removal effective by the performance of those acts. The removal was no longer dependent upon any judicial act in any state or federal court. The new procedure effectively reversed the premise underlying the *Rives-Metropolitan* rule.[16]

Not all cases, however, have interpreted section 1446(e) to mean that a state court is divested of all jurisdiction when removal is attempted. In *F & L Drug Corp. v. American Central Insurance Co.*,[17] cited by the Supreme Court of Florida in *Wilson v. Sandstrom*, the United States District Court for the District of Connecticut, in construing section 1446(e), held:

> It is well settled that, if, upon the face of the record, including the petition for removal, a suit does not appear to be a removable one, then the state court is not bound to surrender its jurisdiction.[18]

This statement, however, was supported by citation to five cases, all of which were decided on the basis of the pre-1948 statute rather than section 1446(e). Thus, in light of later cases and the express wording of the statute itself, this apparently unique holding appears to be erroneous.

Since the supreme court relied on what appears to be an incorrect decision, their holding concerning the removal issue is thus also arguably erroneous. Had the Supreme Court of Florida given effect to the seemingly unambiguous wording of section 1446(e), the July 3rd order of the trial court should have been held void since that order was based upon testimony and evidence taken after removal and prior to remand.[19] Moreover, at no time were the defendants present after removal,[20] yet evidence was heard ex parte and a deci-

15. 447 F.2d at 1072-73.
16. *Id.* at 1073.
17. 200 F. Supp. 718 (D. Conn. 1961).
18. *Id.* at 723.
19. Record at 3, Wilson v. Sandstrom, 317 So. 2d 732 (Fla. 1975).
20. *Id.*

sion was handed down 15 minutes after remand. The July 3rd decision was the basis for all of the subsequent orders, including the contempt citations, for which the defendants were later incarcerated. It would thus appear that the imprisonment of the defendants for disobeying a void order was a denial of their right to due process of law, since it is axiomatic in Florida, as elsewhere, that a court cannot hold anyone in contempt of a void order.[21]

Apart from the removal question, a second troublesome issue raised by *Wilson v. Sandstrom* involves the Supreme Court of Florida's approval of the use of a mandatory injunction to compel performance of the kennel owners' contracts. The court held a mandatory injunction proper if "irreparable harm will otherwise result, the party has a clear legal right thereto, and such party has no adequate remedy at law."[22] Additionally, the Supreme Court of Florida found it necessary to consider the public interest.

Traditionally, American courts have been reluctant to grant mandatory injunctions to enforce personal services contracts. This reluctance stems both from familiar equity principles and the constitutional proscription of the thirteenth amendment.

Many courts have indicated that neither specific performance nor injunction against threatened breach will be granted as a remedy if the subject matter of the proceeding is a personal services contract.[23] Professor Corbin and others[24] have inveighed against granting equitable remedies to force the fulfillment of personal services contracts. The primary reasons appear to be the difficulty of enforcing the decree and of gauging the quality of the performance rendered,[25] as well as the "strong prejudice against any kind of invol-

21. State *ex rel.* Everett v. Petteway, 131 Fla. 516, 179 So. 666 (1938). In other words, "a state court is without power to hold one in contempt for violating an injunction that the state court had no power to enter by reason of federal pre-emption." *In re* Green, 369 U.S. 689, 692 (1962).

22. 317 So. 2d at 736.

23. *E.g.*, Robinson v. Sax, 115 So. 2d 438, 440 (Fla. 3d Dist. 1959).

24. 5A A. CORBIN, CONTRACTS § 1203 (1964); RESTATEMENT OF CONTRACTS §§ 307, 308 (1932).

25. It seems that this contention is especially valid in the instant case, when the public is encouraged to wager their money on greyhounds trained by men who are compelled by court order to work. In Marble Co. v. Ripley, 77 U.S. (10 Wall.) 339 (1870), the United States Supreme Court refused to order specific performance of a contract to deliver marble because "the court is incapable of determining whether [the sellers] accord with the contract or not. The agreement being for a perpetual supply of marble, no decree the court can make will end the controversy."

untary personal servitude."[26]

This strong prejudice against involuntary personal servitude stems from the thirteenth amendment's dictate that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." *Arthur v. Oakes*[27] is the leading case which extends this principle to personal services contract situations. That case involved a strike of railroad employees. In denying the validity of an order restraining the employees from leaving the employ of the railroad, the United States Court of Appeals for the Seventh Circuit said:

> It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude,—a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction.[28]

A series of United States Supreme Court cases[29] have invalidated statutes providing for punishment when work contracted for had not been performed. The most recent, *Pollack v. Williams*,[30] involved a Florida statute which made the inducement and acceptance of money under a contract, coupled with nonperformance of the contract, a misdeameanor. In holding that a state cannot "make criminal sanctions available for holding unwilling persons to labor,"[31] the Supreme Court reasoned:

> [I]n general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overloardship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every

26. 5A A. CORBIN, CONTRACTS § 1204 (1964).

27. 63 F. 310 (7th Cir. 1894).

28. *Id.* at 317-18.

19. Pollock v. Williams, 322 U.S. 4 (1944); Bailey v. Alabama, 219 U.S. 219 (1911); Clyatt v. United States, 197 U.S. 207 (1905). These cases are familiarly referred to as the peonage cases.

30. 322 U.S. 4 (1944).

31. *Id.* at 18.

> other with whom his labor comes in competition. Whatever of social value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service.[32]

Despite both the equitable principles and the thirteenth amendment, the Supreme Court of Florida in *Wilson v. Sandstrom* approved the trial court's injunction compelling the kennel owners to provide dogs.[33] The kennel owners' contention that their incarceration for failure to comply with their contracts constituted involuntary servitude in violation of the thirteenth amendment was dismissed on the rather disingenuous grounds that a "greyhound is not a 'party' as provided in the United States Constitution, Amendment Thirteen, § 1."[34] The court concluded that "[e]ven if we assume that some personal service is involved in the requirement that the kennel owners produce their unique product, temporary relief should nevertheless be granted."[35]

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32. *Id.*

33. Although the court vacillates as to whether or not these contracts were of a personal service nature, the evidence clearly indicates that in ordering the injunction, the trial court judge assumed that they were. *See* Record at 161, Wilson v. Sandstrom, 317 So. 2d 732 (Fla. 1975).

34. 317 So. 2d at 738.

35. *Id.* As authority, the court quoted 17 FLA. JUR. *Injunctions* § 37 (1958):

> Many of the cases in which equity has been asked to enjoin a breach of contract arise from disputes concerning contracts for personal services. Underlying the exercise of the injunctive power in such cases is the difficulty of replacing such service, and the inadequacy of damages as compensation for such loss. Injunctive relief, therefore, is often invoked to prevent violation of contracts calling for personal services or acts of a special character, or for such services by persons of eminence in their calling, possessing special qualifications. It follows clearly that reasons for equitable intervention are wholly lacking in cases of ordinary employment, where no personal contract or peculiar influence of the employee over the customers of his employer exists, and where the services are without special merit and are such as can be readily supplied or obtained from others without much difficulty or expense. In such cases injunctive relief will be denied.

The only authority cited for this proposition, which is almost unanimously rejected by American courts, is American Jurisprudence. Whether the first edition of American Jurisprudence supports the Florida Jurisprudence doctrine is at least questionable; it is a certainty that the second edition does not:

> Equity will not, by decreeing specific performance or by issuing a mandatory injunction, compel one person against his will to employ or serve another although he has contracted to do so. Speaking generally, it may be said that it is the right of an employer to discharge his employee and of the employer's service subject to no other penalty than a judgement for damages for breach of the contract. Neither will a court of equity, indirectly or negatively, by means of an injunction restrain-

It seems apparent that the supreme court's approval[36] of the trial court's injunction and ensuing contempt orders runs contrary to the spirit and letter of the thirteenth amendment. The fact that the court saw its action as a necessity because of the "great public interest" involved in keeping racing tracks open is probably of little comfort to the kennel owners who were incarcerated. Equally distrubing are the procedural irregularities inherent in the hearing of evidence in the trial court during attempted removal to a federal court, which the supreme court also approved.

The supreme court's holding on the removal issue, however, may not be wholly without merit. It appears that section 1446(e), if construed as written, would allow attempted removal to be used as a dilatory tactic. The defendant may well desire to delay trial and could accomplish this by a specious attempted removal. It is doubtful whether this prospect is any more attractive than subjecting the defendant to the possibility of having the state court proceed while he is attempting to remove to federal court, as in *Wilson v. Sandstrom*. It is suggested that if the removal procedure is found to be abused, the solution of the problem is properly in the Congressional domain, perhaps as an amendment to section 1446(e) prohibiting specious removals.

As to the thirteenth amendment issue, the supreme court's holding suggests unresolved issues. Intended primarily as a device to assure the Black man total emancipation, the amendment has never been given a wide latitude outside that area and has been limited in some instances.[37] The thirteenth amendment has never

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> ing the violation of the contract, compel the affirmative performance from day to day or the affirmative acceptance of merely personal services. It has been said that this refusal is based in part upon the difficulty or impossibility of enforcement and of passing judgment upon the quality of performance, and in part upon the undesirability of compelling the continuance of personal association after disputes have arisen and confidence and loyalty are gone. In some cases it has been observed that an award of that character against an employee would seem like the enforcement of involuntary servitude, and to award it against an employer would constitute an attempt by the courts to run the business of the country, which would be dangerous.

42 AM. JUR. 2d *Injunctions* § 101 (1969).

36. Four of the five justices approved the entire opinion. Justice Boyd dissented as to the authorization of specific performance compelling the owners to race their greyhounds because "this constitutes involuntary servitude in conflict with the Thirteenth Amendment. . . ." 317 So. 2d at 742.

37. *See, e.g.*, Aver v. United States, 245 U.S. 366 (1918) (conscription for military services does not violate the thirteenth amendment); Butler v. Perry, 240 U.S. 328 (1916) (Florida

been construed by the United States Supreme Court to allow an unrestricted right to strike, although one federal district court has so held.[38] It should be noted that *Wilson v. Sandstrom* itself does not present the problem of the outer limits of the thirteenth amendment in this area since the kennel owners themselves were incarcertated for not working, rather than the more ordinary problem of union officials who are jailed for calling illegal strikes. However, *Wilson v. Sandstrom* may presage an increasing tension between an individual's thirteenth amendment rights and society's dependence on that individual's services.

HARLEY S. TROPIN

Contribution Act Construed—Should Joint And Several Liability Have Been Considered First?

This article examines the various issues and legal concepts regarding apportionment of damages between parties presented in a recent Supreme Court of Florida decision. The relationship between comparative negligence, joint and several liability, and contribution among joint tortfeasors is discussed. The author is critical of the court's focusing its analysis on the collateral issue of contribution among tortfeasors rather than on the central issue of the case—joint and several liability. In addition, the potential inconsistencies between the Uniform Contribution Among Tortfeasors Act and the underlying principles of Hoffman v. Jones *are noted, and the author urges resolution of those conflicts.*

Two automobiles collided at an intersection resulting in injury to a passenger in one of the automobiles. Issen, the injured passenger, brought suit against Lincenberg, the driver-owner of the car in

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could, because of "ancient usage," constitutionally require able-bodied men to work on public roads); Robertson v. Baldwin, 165 U.S. 275 (1897) (proscription of involuntary servitude was not intended to apply to sailors' contracts, because of the "exceptional nature" of the sailors' duties). It is doubtful, however, that the occupation of racing greyhounds falls into any of the "historical exceptions."

38. United States v. Petrillo, 68 F. Supp. 845, 849 (N.D. Ill. 1946), *rev'd on other grounds*, 332 U.S. 1 (1947); *see* Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUSTON L. REV. 593, 604: "A constitutional right to strike may well be derived from the proscription of involuntary servitude contained in the thirteenth amendment, as reenforced by the first amendment guarantees of free speech and peaceful assembly."