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Federal Jurisdiction—Removal of Civil Rights Cases—Fourth Circuit Affirms Limitations

Subsection 1443(1) of the Judicial Code¹ permits removal to the federal district court of a case commenced in a state court when a defendant "cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens. . . ."² This provision has gained new importance because section 901 of the Civil Rights Act of 1964 permits appellate review of a district court order remanding such a case to the state court. Such review was not previously available.

In *Baines v. City of Danville*,³ the United States Court of Appeals for the Fourth Circuit affirmed by a three-to-two decision the remand of 105 civil rights cases, holding that the equal protection clause of the fourteenth amendment was not a "law providing for the equal civil rights of citizens"⁴ and that the inability to enforce the "law" must be shown to result from a state statute or constitutional provision which, on its face, violates the provisions of the federal constitution.⁵ The Fourth Circuit thus put itself in conflict with holdings of the Second, Fifth and Ninth Circuits that the equal protection clause was such a "law providing for the equal civil rights of citizens"⁶ and a further holding of the Fifth Circuit

¹ U.S.C. § 1443(1) (1964). For a more complete discussion of the removal of civil rights cases and the origin, history and recent interpretations of § 1443 see Comment, 44 N.C.L. REV. 380 (1966). See also Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 805 (1965).

² 28 U.S.C. § 1443(1) (1964).

³ 357 F.2d 756 (4th Cir.), *affirmed without opinion*, 34 U.S.L. Week 3425 (June 21, 1966). The United States Supreme Court decision was announced after this note was written. The petitioners alleged that they were being prosecuted for demonstrating in the streets of Danville in protest against customs and practices perpetuating racial segregation, that the injunctive order [which they were charged with violating] is unconstitutional for "making criminal" conduct which is constitutionally protected [by the first and fourteenth amendments] and that the injunction is in violation of their civil rights. *Id.* at 758.

⁴ *Id.* at 764.

⁵ *Id.* at 765.

⁶ *Peacock v. City of Greenwood*, 347 F.2d 679, 682, rev'd, 34 U.S.L. Week 4572 (June 21, 1966); *New York v. Galamison*, 342 F.2d 255, 271 (2d Cir. 1965) (dictum); *Steele v. Superior Court*, 164 F.2d 781 (9th Cir. 1947) (dictum). The dissenting opinion in *Baines* relied upon these cases for authority that the equal protection clause is a "law providing for equal rights" within the meaning of the statute.

that removal was justified in situations other than where the "law" was rendered unenforceable by state statute or constitutional provision.⁷ The conflict is primarily one of statutory construction, and this note will examine the opposing constructions as developed in the majority and dissenting opinions in *Baines*.

I. THE EQUAL PROTECTION CLAUSE

In *Baines* the Fourth Circuit insisted that the petitioners' allegations "that they were acting in aid of fourteenth amendment rights . . ." furnished no basis for removal.⁸ Section 1 of the original civil rights removal act, the Civil Rights Act of 1866,⁹ had enumerated rights which if denied made removal appropriate. This law was re-enacted in 1870, and in the Revision of 1875 the enumeration was taken out of the removal provision and placed elsewhere in the Judicial Code.¹⁰ The court concluded that the replacement of the phrase "those rights enumerated in section 1" with the language "all rights secured to him by any law providing for the equal civil rights of citizens . . ." was not intended to extend coverage in excess of those rights which had been previously enumerated in section 1, but that "the revisers understood that the laws were not static and that the Congress in the future might enact additional legislation . . . with an intention to expand the removal rights."¹¹ The statute was open-ended in that new laws might come within its purview, but the fourteenth amendment was not included for two reasons: it had been passed by Congress and ratified by the states in the period between the passage of the original act and the re-enactment of 1870, and it was not a "law" in the sense in which the word is used in the removal provision.¹² The court maintained the word "law" as used in the section refers only to *statutes* providing for equal civil rights, and since the fourteenth amendment is not a statute its inclusion was not intended.¹³

A contrary conclusion in regard to the equal protection clause was reached by the dissenting opinion. Also relying upon the scope of the original removal act of 1866,¹⁴ it depended upon what it

⁷ *Peacock v. City of Greenwood*, 347 F.2d 679, 682 (5th Cir. 1965).

⁸ 357 F.2d at 764.

⁹ Act of April 9, 1866, ch. 31, 14 Stat. 27.

¹⁰ REV. STAT. § 641 (1875).

¹¹ 357 F.2d at 764.

¹² *Id.* at 763.

¹³ *Id.* at 764.

¹⁴ 357 F.2d at 774.

asserted was the "general understanding" of both the supporters and opponents of the measure that the rights in section 1 were to be given the broadest possible interpretation.¹⁵ After the passage of the original civil rights act, the dissenters observed, there was some concern over its constitutionality, and the fourteenth amendment, they concluded, was passed to insure the act's legality.

The enactment of the Equal Protection Clause, in language closely paralleling section 1 of the 1866 statute, legitimated beyond question Congress' attempt to protect the type of rights granted in the statute, and there is no reason to think that the rights contemplated by section 1 are of less breadth than those contemplated by the Equal Protection Clause.¹⁶

The dissenters thought that the adoption of the language " 'law[s] providing for equal civil rights' in the 1875 recodification . . . evidences the revisor's understanding of the broad view taken by the 1866 Congress of the rights protected by removal"¹⁷ and that the section is thus not limited to "statutory" rights as the majority contended.¹⁸

The Supreme Court may decide whether the equal protection clause is a "law providing for equal civil rights" when examining the conflict between the circuit courts.¹⁹ This determination is not likely to increase or decrease removal litigation to any great extent. Should it be decided that the clause is not such a law, a petitioner can, without too much trouble, draft the removal petition so as to base the claim upon a federal statute guaranteeing substantially the same substantive right.

II. WHAT PETITIONER MUST SHOW TO DEMONSTRATE THAT HE CANNOT ENFORCE THE RIGHT

The early United States Supreme Court cases of *Virginia v. Rives*²⁰ and *Kentucky v. Powers*²¹ did not allow removal because

¹⁵ *Ibid.*

¹⁶ *Id.* at 775.

¹⁷ *Id.* at 777.

¹⁸ *Ibid.*

¹⁹ After this note was written the United States Supreme Court reversed *Peacock v. City of Greenwood*, 34 U.S.L. Week 4572 (June 21, 1966), and affirmed *Rachel v. Georgia*, 34 U.S.L. Week 4563 (June 21, 1966).

²⁰ 100 U.S. 313 (1880).

²¹ 201 U.S. 1 (1906). In both *Rives* and *Powers* the petitioners based their right to remove on the allegation that a group to which they belonged would be excluded from the jury that would try them in the state court. The alleged exclusion, in each case, would not result from a state statute but from a practice within the community.

the petitioner could not satisfy the court that the protected right would be denied in the state court.²² The *Baines* majority read these cases as establishing the rule that a right must be denied by a state statute or constitutional provision that is unconstitutional on its face in order to remove to the federal court. It concluded, furthermore, that the right to remove must be apparent before trial and cannot be based "upon the supposition that during the course of the trial or the sentencing, a protected right would be denied or the defendant would find himself unable to enforce it."²³ On the other hand, the dissenting opinion maintained that the *Rives-Powers* line of decisions has no application when removal is sought "on assertions . . . relating not to some future stage of the proceedings, but to the very arrests and prosecutions which give rise to these proceedings."²⁴ In this situation the Fifth Circuit had allowed removal in *Peacock v. City of Greenwood*²⁵ where the allegation was that the arrests and prosecutions denied the petitioners "equal civil rights,"²⁶ that is, the right to demonstrate against the segregation policies of the community.

The original act, the Civil Rights Act of 1866, contained a provision for post-judgment removal which was deleted by the Revision of 1875.²⁷ The majority in *Baines* maintained that this rendered the act virtually unenforceable.²⁸ "[T]he judiciary cannot restore what the Congress struck from the statute or construe what remains to approximate the congressional intention before it struck the most important part of its earlier scheme."²⁹ The dissenting opinion did not agree. It maintained that the purpose of the original act was to provide for removal other than post-judgment removal and that the excision of the post-judgment removal provision did not amount to "major surgery" as the majority maintains.³⁰

Another argument adopted by the majority opinion in *Baines* is that there must be "vertical unenforceability,"³¹ that is, the petitioner must show that the right would also be denied in the state

²² 100 U.S. at 320; 201 U.S. at 31.

²³ 357 F.2d at 765.

²⁴ *Id.* at 784.

²⁵ 347 F.2d 679 (5th Cir. 1965) (removal allowed on facts almost identical to *Baines*).

²⁶ *Id.* at 681.

²⁷ REV. STAT. § 641 (1875).

²⁸ 357 F.2d at 768.

²⁹ *Ibid.*

³⁰ *Id.* at 778.

³¹ *Id.* at 770.

appellate courts. This argument was rejected by the dissenting opinion, which insisted that even if this were true, when rights are denied prior to trial by the arrests and prosecutions "vertical unenforceability" has no application and the question is mooted.³²

The dissent also relied upon the mood of the Thirty-ninth Congress, which enacted the original Civil Rights Removal Act in 1866, and the Eighty-ninth Congress, which enacted the provision for appellate review in 1964. It maintained that the Eighty-ninth Congress in providing for appellate review intended that federal courts re-examine the restrictions on removal established by *Rives* and *Powers*.³³ But the majority disagreed, saying indications of this were "minority expressions of an expectation of judicial reconsideration of congressional intent . . . not the equivalent of congressional redefinition of its intention."³⁴

President Andrew Johnson, after once vetoing the original Civil Rights Act of 1866, expressed concern over what he termed the broad effect of the bill. In contrast, Senator Trumbell, the bill's manager, in a speech to the Senate insisted that "there would be no pretrial removal even in the face of a discriminatory state statute."³⁵ The majority took Trumbell's remark to mean that Con-

³² *Id.* at 787. The dissenting opinion points out that after their removal petitions had been filed in the federal district court, two of the present petitioners were tried in the Corporation Court of Danville, fined, and sentenced to 45 to 90 days for their participation in the demonstrations. The conduct of these two trials affords a striking illustration of the treatment to be expected by these petitioners in the state courts. Policemen were stationed at every corner of the room; lawyers were searched on entering and leaving the courtroom; and petitioners were required to appear in court from day to day for roll call, although the prosecutor could have had no expectation of trying more than a few of them on any one day. Thus any organized protests were effectively silenced and the defendants' ability to earn a living impaired. Then, all the cases were transferred to various courts throughout the state, some as far as 250 miles away.

The assumption that these Negroes' rights could be vindicated in the state courts was dramatically undermined by a ruling that flatly barred constitutional defenses to the charges against the demonstrators. The presiding judge announced from the bench, prior to taking of any evidence, that he would not permit any such defense to be raised. By stripping appellants of any opportunity to show in the record that their conduct was protected from state interference, this prohibition shows a clear inability to enforce their rights in the local tribunals.

Id. at 773-74.

³³ *Id.* at 788.

³⁴ *Id.* at 762.

³⁵ CONG. GLOBE, 39th Cong., 1st Sess. 1759 (1866) [covering 1833-1873].

gress never contemplated pretrial removal,³⁶ but the dissent maintained that the President was concerned only about the criminal liability of the state court judges under the act³⁷ and that Senator Trumbull was replying to Johnson in reference only to this aspect of the statute. "The Senator did not say, as the majority would infer, that these sections could not be brought into play by the action of . . . sheriffs and policemen . . . *prior* to the court proceedings."³⁸

Dissenting Judges Bell and Sobeloff would hold these cases removable under subsection 1443(1) if "they have been denied these rights by state officials prior to trial. . . ."³⁹

Part of the reason for the wide divergence in the opinions can be traced to the long period of time in which the problems remained dormant because of the lack of appellate review and the futility of attempting to reach conclusions about century-old congressional mood or intent. There seems to be some merit to the argument of the dissenters that the Eighty-ninth Congress meant for the federal courts to re-examine their position in regard to removal when it passed the proviso for appellate review of an order to remand. Whether or not this be the case, the conflict in the circuit courts necessitates clear explanation of the *Rives* and *Powers* opinions by a modern Court.

BILLY R. BARR

Securities Regulations—Civil Liability Under Section 17(a) of the Securities Act and Rule 15c1-7 of the Exchange Act

In the expanding area of securities regulations, the Securities Act of 1933¹ and the Securities Exchange Act of 1934,² together with the rules promulgated thereunder, have been used increasingly as bases for finding civil liability for violations thereof. While sections 11, 12(1), and 12(2)³ of the Securities Act and sections

³⁶ 357 F.2d at 767.

³⁷ Section 2 of the original act of 1866, now 18 U.S.C. § 242 (1964), provided that any state official who "shall subject or cause to be subjected any inhabitant . . . to the deprivation of any right secured or protected by this act . . . shall be guilty of a misdemeanor."

³⁸ 357 F.2d at 783.

³⁹ *Id.* at 773.

¹ 48 Stat. 74 (1933), as amended, 15 U.S.C. §§ 77a-77bb (1964).

² 48 Stat. 881 (1934), as amended, 15 U.S.C. §§ 78a-78jj (1964).

³ 48 Stat. 82, 84 (1933), as amended, 15 U.S.C. §§ 77k, 77l (1964).