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Recent Cases

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RECENT CASES

FORUM NON CONVENIENS—1404(a)

Does section 1404(a) of the United States Code permit a district court to transfer a cause of action, on motion of the plaintiff, to a district where the defendant is not amenable to process? This question was raised in the case of *Troy v. Poorvu.*[1] In that case the plaintiff, a resident of Connecticut, brought an action for personal injuries against the defendants, residents of Massachusetts, in the federal district court of Massachusetts. The plaintiff then made a motion to transfer the case to the federal district court of Connecticut under section 1404(a). The motion to transfer was based on the facts that the cause of action arose in Connecticut, the witnesses were all there, and the plaintiff was so seriously disabled that it would be difficult for him to travel to Massachusetts. The defendants objected saying that the court does not have the power to transfer the case under section 1404(a). The basis for the objection was that 1404(a) allows a case to be transferred to any district "where it might have been brought", and that it could not be brought in Connecticut because there could be no jurisdiction over the person of the defendants in that state. The plaintiff's motion was allowed. The courts rationale is that section 1332(a) gave the district court of Connecticut jurisdiction of the subject matter and that venue was proper under section 1391(a).

Section 1404(a) provides that,[2] "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". The difficulty arises in the legislative meaning of the phrase "where it might have been brought". All courts agree that a case might have been brought wherever there is jurisdiction and proper venue. The courts also agree that section 1391(a) is the statute setting forth the venue requirements. This section states,[3] "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside". But, this is as far as the courts are in agreement. They are divided as to what constitutes jurisdiction.

Those courts which refuse to transfer a case to a district where the defendant is not amenable to process declare that personal jurisdiction is the requirement under section 1404(a) and that federal rule of civil procedure 4(f) is applicable. This rule states that,[4] "All process . . . may be served anywhere within the territorial limits of the state in which the district court is held . . . ." This rationale is in conformity with the common law doctrine

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[1] 132 F. Supp. 864 (1955).
[2] 62 Stat. 937 (1948), 28 U. S. C. § 1404 (1950).
[3] 62 Stat. 935 (1948), 28 U. S. C. § 1391 (1950).
[4] FED. R. CIV. P. 4(f).

of forum non conveniens. This is important because the revisor's notes state that subsection (a) was drafted in accordance with the doctrine of forum non conveniens and these notes carry great weight in the construction of that section.[5] Since the doctrine of forum non conveniens does not apply if there is an absence of jurisdiction, it would follow that 1404(a), which is in accord, does not apply either.

Those courts which will transfer a case to a district where the defendant is not amenable to process declare that the jurisdiction required under section 1404(a) is that found under section 1332(a) of the Judiciary Act. As is stated in this section,[6] "The district courts shall have original jurisdiction of all civil actions where the matter in controversy . . . is between citizens of different states." Why is there this variance in interpretation? It is because these latter courts feel that the notion that section 1404(a) was a mere codification of existing law relating to forum non conveniens is erroneous, and the purpose of that section was to grant broadly the power of transfer.[7] Even those courts refusing a transfer use such terms as "in conformity with", "in essence" and "in accordance with," but will not state that it is a codification. This hedging is necessitated by the fact that the courts are permitted to transfer rather than dismiss a case. What then could the revisors' intent be when they say that the statute is in accordance with forum non conveniens? It is submitted that they meant in accordance with the purpose of the doctrine which was to change venue to another court. They sought to simplify the process. Such simplification can be obtained by permitting a court which has personal jurisdiction to transfer the proceedings of a case including its jurisdiction to a more convenient district. This was recognized when the court said that, ". . . when an action is transferred, it remains what it was, and all further proceedings in it are merely referred to another tribunal, leaving untouched whatever has been already done".[8] Any order transferring a case to another district preserves it as against the running of the statute of limitations and for all other purposes.[9] Even personal jurisdiction over the defendants is transferred by the effect of the transfer order.[10] Requiring that the defendants be amenable to process in the transferee state would make section 1404(a) almost meaningless. If the defendants are amenable to process, the plaintiff could get into another district without 1404 because he could dismiss and initiate a new action in the more favorable district.[11] This would seem to limit the section's usefulness to cases where the statute of limitations had run. But, if that was the legislative purpose, why did the legislature attack the problem so indirectly? It should

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5 United States v. Scott & Williams, Inc., 88 F. Supp. 531 (1950).
6 62 Stat. 930 (1948), 28 U. S. C. § 1332 (1950).
7 Aircraft Marine Products, Inc. v. Brundy Engineering Co., 96 F. Supp. 588 (1951).
8 Magnetic Engineering & Manufacturing Co. v. Dings Manufacturing Co., 178 F. 2d 866 (1950).
9 Jiffy Lubricator Co. v. Stewart-Warner Corp., 177 F. 2d 360 (1949).
10 In the Matter of Josephson, 218 F. 2d 174 (1954).
11 *Curtailing The Scope of 1404(a)—Round Two,* 60 YALE L. R. 183 (1951).

also be noted that section 1391, which both sides agree must necessarily be read along with 1404(a), goes to the basic power of the court. Would it not also be reasonable to apply section 1332, since it too goes to the court's basic power, rather than to look to the procedural rules of court?

The inequity of the first argument may be seen in a recent case where the plaintiff was unable to obtain personal jurisdiction and venue as the court, following the first view, required. This resulted in his action being dismissed.[12] Under the rationale of the second view, such an unfair result would not arise.

WILLIAM MCBRIDE

12 Drapkin v. Keene, 128 F. Supp. 182 (1955).

FOURTEENTH AMENDMENT—STATE ENFORCEMENT—DETERMINABLE FEE

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Thus reads the first section of the Fourteenth Amendment to the Constitution of the United States. In furtherance of the purpose of this Amendment, Title 42 U. S. C. A. § 1981 was enacted. It states that:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The action inhibited by the first section of the Fourteenth Amendment is action of the states only.[1] The amendment does not afford protection against merely private conduct, whether it be discriminatory or not.[2]

The first problem which is met in regard to the application of the Fourteenth Amendment and the supplemental legislation, is the meaning of "state action."

In the *Shelley* case[3] it was stated that "state action," as that phrase is understood in light of the purpose of the Fourteenth Amendment, refers to exertions of state power in all forms. In this case private agreements between property owners of one district sought to restrict the use of their property to persons of the Caucasian race. Land was sold to negroes by one of the parties and the other parties subject to the terms of the restrictive covenant brought suit in a Missouri state court to restrain the negroes from taking possession of the property, divest title from them and revest title in such person as the court should direct. The trial court denied relief on the ground that the restrictive agreement never became final and complete as it was never signed by all the property owners in the district. The Supreme Court of Missouri reversed, and directed the trial court to grant the relief for which was prayed. The Supreme Court of the United States reversed the Missouri Supreme Court on the ground that the enforcement of the restrictions was state participation and in granting judicial enforcement the state had denied the petitioners the equal protection of the laws.

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1 Shelley v. Kraemer, 334 U. S. 1 (1947).
2 United States v. Harris, 106 U. S. 629 (1883).
3 See n. 1, *supra*.
4 Title 42 U. S. C. A. §§ 1981, 1983 (Supp. 1954).

The Supreme Court, in rendering this decision, reviewed the operation of the Fourteenth Amendment and related legislation[4] from the *Civil Rights Cases*[5] to the present time. In the course of the opinion, Chief Justice Vinson stated that the power of a state to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment, and that judicial action is not immunized from the operation of this amendment simply because it is taken pursuant to the state's common law policy. In reference to the interpretation of state action within the meaning of the amendment it was felt that this term includes the action of state courts and judicial officers in their official capacities, and, as has been pointed out, it refers to the executions of state power in all forms.

The recent North Carolina case of *Charlotte Park and Recreation Commission v. Barringer*[6] should be considered with the above brief background in mind. The action involved in this case was for a declaratory judgment in order to determine the validity of restrictions and reverter clauses in certain deeds. These deeds involved the conveyance of lands to the Charlotte Park and Recreation Commission and each contained similar provisions and restrictions. The subject of this discussion will be the deed from Osmond L. Barringer and his wife to the commission, in which was conveyed certain land to the commission for use as a park, playground and recreational system to be known as Revolution Park. This deed in the granting clause conveys the land to the commission ". . . upon the terms and conditions, and for the uses and purposes, as hereinafter fully set forth." The habendum clause is to have and to hold the land "upon the following uses and purposes, and none other." One of the purposes being that this land together with the lands conveyed in the other aforementioned deeds, be used for the operation of Revolution Park, and the other purpose being that the park is "for the use of, and to be used and enjoyed by persons of the white race only." The deed also contained language to the effect that if Revolution Park should not be used and maintained as a park, playground and/or recreational area, for use by the white race, the lands hereby conveyed shall revert in fee simple to Osmond L. Barringer, his heirs or assigns.

The commission has a swimming pool, tennis courts and golf course in Revolution Park, which it operates and maintains as part of the recreational system of Charlotte. This golf course is the only one operated and maintained by the commission, and it and the other recreational features of Revolution Park are operated for the exclusive use of members of the white race. The golf course is situated on the lands conveyed to the commission by two grantors other than the petitioner Barringer. In December, 1951, certain defendants presented a petition to the commission stating that they were negroes, and for this reason they have been denied the right to use this golf course, in viola-

[5] 109 U. S. 3 (1883).
[6] 88 S. E. 2d 114 (1955).

tion of their constitutional rights. A declaratory judgment action was then brought to determine the validity of the restrictions and reverter clauses in the deeds.

The Supreme Court of North Carolina sustained the validity of the Barringer deed as found by the lower court. In reference to this deed the court quoted language from *Tiffany on Real Property*[7] to the effect that no set formula is necessary for the creation of a limitation, and any words expressive of the grantor's intent that the estate shall terminate on the occurrence of the event is sufficient. The court also pointed out that North Carolina recognizes the validity of determinable fees, and that it is a distinct characteristic of a fee determinable upon limitation that the estate automatically reverts at once on the occurrence of the event by which it is limited, by virtue of the limitation in the written instrument creating such fee. The court declared:

> "The operation of this reversion provision is not by any judicial enforcement by the State Courts of North Carolina, and Shelley v. Kraemer, has no application. We do not see how any rights of appellants under the Fourteenth Amendment to the United States Constitution, Section 1, or any rights secured to them by Title 42 U. S. C. A. §§ 1981, 1983, are violated."

The North Carolina Supreme Court affirmatively declares that the operation of a reversion provision of a determinable fee is automatic and not by any judicial enforcement, thereby attempting to distinguish this case from the *Shelley* case and its forerunners. If it be conceded that a valid determinable fee is present from the standpoint of construction, is there a distinguishing feature in this case which causes an evasion of the application of the Fourteenth Amendment? We have noted that the amendment does not pertain to private agreements between individuals, no matter how discriminatory. But, the intervention of state enforcement, in whatever form, causes the application of this amendment.

It is this writer's contention that the discriminatory provision in the Barringer deed is violative of the Fourteenth Amendment for two reasons: (1) indirect state enforcement through judicial action, and (2) direct state enforcement by the Charlotte Park and Recreation Commission.

(1) The judicial enforcement is present due to the fact that the courts of North Carolina entertained the action for a declaratory judgment. The North Carolina Supreme Court has attempted to distinguish the instant case, which involves a determinable fee, from other cases involving restrictive agreements and covenants, on the ground that the operation of the reverter provision is not by any judicial enforcement. It is true that a reverter clause does terminate the limited estate automatically upon the occurrance of the stated event by op-

[7] TIFFANY REAL PROPERTY § 220 (3rd ed. 1939).

eration of law, and that no judicial enforcement is necessary to accomplish this result. But this is also true of other private agreements and restrictions entered into by individuals. Difficulty ensues, however, when agreements, restrictions, etc. are brought into court for some reason. When the court takes jurisdiction of the case and enforces, whether by declaratory judgment or some other form of judicial proceeding, the discriminatory provisions, whether they be in the form of reverter clauses or restrictive covenants, it is then that state action is in contravention to the Fourteenth Amendment. No distinction, therefore, can be made between the type of enforcement when the state court takes jurisdiction to determine the validity of a discriminatory determinable fee, and when it takes jurisdiction to enforce or restrain restrictive covenants.

(2) Direct state enforcement is present due to the fact that the Charlotte Park and Recreation Commission is an agency created by the City of Charlotte, and it has enforced the discriminatory feature of the deed in regard to the operation of Revolution Park. It has been held that local ordinances, discriminatory in nature, are violative of equal protection under the laws and the Fourteenth Amendment. Recognition and enforcement by the City of Charlotte, likewise being enforcement by a state agency, is invalid.

The North Carolina Supreme Court, by its decision, has opened the door to state enforcement of discriminatory provisions. This kind of decision clearly side-steps the language of Chief Justice Vinson when he said:[8]

> "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee."

ALFRED M. ISAACS

[8] See n. 1, *supra*.