

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 19,475

JAMES HOWARD MEREDITH, et al.,

Appellants,

v.

CHARLES DICKSON FAIR, et al.,

Appellees.

UNITED STATES OF AMERICA, as
Amicus Curiae and Petitioner,

Petitioner,

v.

CHARLES DICKSON FAIR, et al.,

Respondents.

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

Preliminary Statement

For the convenience of the Court the appellant has attached to this Brief a chronology of the relevant orders entered by this Court and the District Court.

I

This Court Had Jurisdiction To Restrain The Governor And Other State Officials From Obstructing Enforcement Of It's Orders And To Cite Them For Contempt Of Such Orders.

The State contends that this Court lacked jurisdiction to issue an injunction securing appellant's admission to the University and, consequently, jurisdiction to proceed in contempt against the Governor, the Lieutenant Governor, and other state officials. This claim is based on the fact that on July 27, 1962, this Court rendered an opinion and entered an order recalling the original mandate to the District Court of July 17, 1962, vacated Judge Cameron's stay of the original mandate, and issued a new mandate forthwith.

The July 27th mandate contained an injunctive order of this Court securing appellant's admission to the University until such time as the District Court had issued and enforced the orders therein required, and until such time as there had been full and actual compliance, in good faith, with each and all of this Court's orders by the actual admission of appellant to, and his continued attendance at the University.

Thereafter, on July 28th, the July 27th mandate was amended by this Court. Simultaneously therewith, another broader preliminary injunction was issued by this Court securing the admission of appellant to the University as set forth above, but additionally enjoining Paul Alexander, Hinds County attorney, from proceeding with a criminal prosecution of appellant, and requiring appellees to promptly evaluate appellant's credits as a transfer student. The mandate, as amended on July 28th, was sent by the Clerk of this Court on that date to the Clerk of the District Court with a letter advising the latter to substitute the July 28th order for the one issued on July 27th. The July 28th mandate was filed in the District Court on July 31st. Consequently the July 28th injunction order of this Court was issued simultaneously with the sending down of the mandate of July 28th. Thus, the State's claim that this Court lost whatever jurisdiction it had to issue an injunction on July 28th because the mandate went down on July 27th, is without basis in fact.

Assuming, however, that the mandate had gone down before the injunction of July 28th was issued, this Court still would have had jurisdiction to issue the injunction. Courts of Appeals, although their function is primarily appellate in nature, have broad power to issue injunctions. For example, the Courts of Appeals enforce the orders of regulatory commissions through injunctions. When injunctive relief is sought in the District Courts, as it was in this case, the Courts of Appeals are not confined to directing the issuance of an injunction by the District Court, but may themselves grant the requested injunctive relief. Rule 62(g) of the Federal Rules of Civil Procedure further illustrates the broad powers which the Courts of Appeals have to issue an injunction. That rule states that Rule 62(c), providing for an injunction pending appeal issued by a District Court, in no way limits the power of an appellate court to "stay proceedings during the pendency of an appeal or to suspend, modify, restore or grant an injunction during the pendency of an appeal" See Public Utilities Comm'n v. Capital Transit Co., 214 F.2d 242 (D.C. Cir. 1954).

Finally, and perhaps most important, Courts of Appeals have the power under §1651, Title 28, United States Code, to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usage and principles of law." Among those writs, of course, is the injunction.

In the unprecedented circumstances of this case, this Court had no alternative but to invoke the provisions of §1651, not only in aid of its jurisdiction, but to preserve the effectiveness of its mandate to the District Court.

The first unusual circumstance requiring an exercise of this Court's power under the All Writs Statute was the fact that prior to July 28th when this Court issued its preliminary injunction, an attempt had been made by Paul Alexander, County Attorney of Hinds County, to defeat the effectiveness of this Court's judgment by prosecuting appellant for allegedly securing his registration as a voter in Hinds County when he was in fact a resident of Attala County, a question decided in appellant's favor by this Court on the appeal of this case.

(Paul Alexander had commenced his criminal prosecution in the state court in May 1962 and was enjoined by this Court from proceeding with that prosecution pending the decision of this Court on appeal.) At this juncture, appellees had made clear their intention to seek certiorari in the United States Supreme Court and to seek a stay of this Court's mandate pending such review. It was, therefore, necessary, in order to preserve the effectiveness of this Court's judgment, to enjoin Paul Alexander further pending certiorari, as was done on July 28th.

Secondly, by July 28th, in accordance with the opinion of this Court, appellant had been unconstitutionally denied admission to the University of Mississippi since February 1961. Further delay in his admission was unjustifiable; and so this Court sought to preserve the effectiveness of its judgment by securing the immediate admission of appellant to the second summer term, which had already commenced, or his admission to the September 1962 term at appellant's option. Moreover, delay had been such an integral part of the strategy of the defense, that this Court felt compelled to cut off the delay on July 28th by requiring prompt evaluation of appellant's credits earned at institutions previously attended by him.

However, the third circumstance which warranted, perhaps more than any other, an exercise of this Court's power under §1651, was the fact that a member of this Court, who had not participated as a member of the panel hearing or decided any portion of this case, had entered two unprecedented stays of the mandate of this Court, one on July 18th and another on July 27th, pending final disposition by the Supreme Court of an application to be made by appellees for review of this Court's judgment. No application for a stay had been made to the panel. Consequently, that there would be further unprecedented delay in the admission of appellant was clear to this Court on July 28th when it issued an injunction. Moreover, the District Court could not have been expected to know, under the circumstances of this case as then prevailing, whether to follow the mandate of this Court or observe the stay orders entered by Judge Cameron.

For all of the foregoing reasons, the propriety of this Court's

exercise of its power under §1651 cannot be doubted.

Mississippi also contends that this Court acted improperly in issuing an injunction providing essentially the same relief as was requested in the District Court. However, a comparison of the District Court's permanent injunction order of September 13, 1962 and the terms of this Court's July 28th injunction order manifests significant differences between the two and between the purposes which they were designed to serve. The injunction which the District Court was ordered to issue and which it did issue differs from the Court of Appeals' injunction in that the latter enjoins the Hinds County prosecutor as indicated above. It also secured appellant's admission to the second summer session and ordered prompt evaluation and approval of appellant's credits, all pending final action in the Supreme Court on appellee's application for writ of certiorari. Certiorari was not denied until October 8, 1962. These differences reflect the purpose of this Court to preserve the effectiveness of its judgment, to nullify all attempts to thwart that judgment by Judge Cameron, the Hinds County prosecutor and the appellees.

Admittedly, Courts of Appeals have seldom found it necessary to issue injunctions in order to preserve their appellate jurisdiction or the effectiveness of their judgment. But they frequently have resorted to other traditional writs, and a review of the cases demonstrates that the power to protect jurisdiction is exceedingly broad. For example, in the case of LaBuy v. Howes, 352 U.S. 249, the Supreme Court upheld the power of a Court of Appeals to issue a writ of mandamus to a District Judge who erroneously referred several significant issues in a complicated anti-trust case to a master. The Supreme Court ruled that the Court of Appeals had the power to issue the writ and that the situation there involved was so exceptional as to justify issuance of the writ. In the LaBuy case no appeal had been or could have been taken to the Court of Appeals at that point. Neither had the Court of Appeals taken any previous action regarding the case. Nevertheless, because reference to a master, when the District Judge was most competent to handle the litigation, would be so burdensome to the plaintiff, the Supreme Court ruled that mandamus was proper.

to maintain that the State should maintain in this case that the Court of Appeals lost all power to act in the case after its mandate was sent down in view of the fact that the writ of mandamus in the LaBuy case was issued despite the absence of any previous action by the Court of Appeals and despite the fact that an appeal eventually would have been proper in that case.

In U. S. Alkali Export Assn. v. United States, 325 U.S. 196 (1945), defendants moved to dismiss a suit under the Sherman Act on the ground that the Webb-Pomerene Act exempted export associations from prosecution unless an investigation by the Federal Trade Commission had disclosed evidence of antitrust violations. The motion was denied and defendants sought review by certiorari to the Supreme Court even though the denial of their motion to dismiss was not a final judgment. The Supreme Court granted review by certiorari, citing Section 262 of the Judicial Code which was the predecessor to the present All Writs statute. The Supreme Court said: "This Court has power in aid of its appellate jurisdiction to review judgments and orders of the District Courts by resort to the common law writs of certiorari, mandamus, and prohibition." (201-02). Holding that immediate District Court adjudication of the merits in that case would deprive the Federal Trade Commission of an opportunity to exercise its investigative functions according to law, the Supreme Court held that immediate review was proper. The Supreme Court was acting as a Court of Appeals would ordinarily, for an appeal from a final order in that case was appealable directly to the Supreme Court. See also DeBeers Consolidated Mines, Ltd. v. United States, 325 U. S. 212 (certiorari to review granting of preliminary injunction).

That the power conferred by the All Writs statute on all statutory courts, including the Courts of Appeals, includes the power to issue injunctions is stated in the case of In re Nine North Church Street, Inc., 82 F.2d 186 (2nd Cir. 1936), at p. 188: "An indefinite power to enjoin in aid of the Court's jurisdiction is granted by Section 262 of the Judicial Code." See also United States v. Western Pa. Sand & Gravel Ass'n, 114 F.Supp. 158 (W.D. Pa. 1953). Nonetheless, the State contends, citing Dowagiac Manufacturing Co. v. Minnesota Moline

is for the Court of Appeals to direct the District Court to issue an injunction so that contempt proceedings for violation of the injunction will be maintained exclusively in the District Court. The error in this view is demonstrated by the subsequent Supreme Court case of Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399 (1923). In that case defendants objected to a Circuit Court of Appeals' order directing the District Court to enjoin the Toledo Company from maintaining an equity bill in Ohio seeking to frustrate the orders of the Federal Courts. In addition to upholding the Circuit Court of Appeals' power to issue such an order, the Supreme Court stated that the Circuit Court of Appeals:

"had the right to issue all writs not specifically provided for by statute which might be necessary for the exercise of its appellate jurisdiction. It could therefore itself have enjoined the Toledo Company from interfering with the execution of its own decree...or it could direct the District Court to do so, as it did.... Moreover, when the character of the proceeding initiated by the Toledo Company, a party before it, to stop the execution of its decree was disclosed on a full hearing on the petition for a ruling against the Toledo Company, it had jurisdiction to determine whether the filing and maintenance of the bill was in contempt of its jurisdiction;...or to remand it to the District Court to do so," (Emphasis supplied.) 261 U.S. at 426.

Those are the words of Chief Justice Taft speaking for a unanimous Court.

It is thus clear that a Court of Appeals has the power to grant an injunction to preserve its appellate jurisdiction. It is equally clear that having done so, it can hear and determine contempt proceedings growing out of a violation of such injunctive orders. For example, in the case of Sawyer v. Dollar, 190 F.2d 623 (D.C. Cir. 1951) the Court of Appeals issued an order directing the District Court to issue an injunction against the defendants. Upon violation by the defendants of the order issued by the District Court in conformity with the Court of Appeals' order, the Court of Appeals cited defendants for contempt of court. The State in this case would have the court believe that only the District Court had the power to hear the contempt proceedings.

authority because that judgment was vacated by the Supreme Court (344 U S. 806)), is without merit. Vacation for mootness in no way undermines the Court of Appeals' reasoning and decision when the merits of the case were before it.

The power of this Court to entertain this contempt proceeding need not even be predicated on a violation of its own injunctive order. In the case of Merrimac River Savings Bank v. Clay Center, 219 U.S. 527 (1911), the Supreme Court, which has the same powers to issue extraordinary writs as do the Courts of Appeals, entertained a contempt proceeding, not because of any violation of any particular injunctive order, but simply because the defendants had destroyed the subject matter of the litigation still pending before that Court. In that case plaintiffs sought an injunction to restrain city official from dismantling a utility company's equipment. Although the Circuit Court dismissed the bill, it granted an injunction pending appeal to the Supreme Court. The Supreme Court dismissed the appeal and the city, believing that the matter had been finally adjudicated, proceeded to dismantle the equipment. The Supreme Court held the defendants to be in contempt because their acts were committed before the Supreme Court mandate had gone down and while a petition for rehearing was still possible. The contempt was not grounded on any injunctive order.

In summary, this Court properly assumed jurisdiction of this case and reversed the decree of the District Court. Simultaneously with the sending down of its mandate, it issued an injunction of its own while it still had jurisdiction of the case. There can be no doubt that this Court, having issued such an order while it had jurisdiction, had the power to issue all appropriate orders relating to the merits, the preservation of its jurisdiction, or the effectiveness of its judgment as it did by restraining the Governor on September 25th and the Lieutenant Governor on September 26th. In fact all the orders here complained of were issued primarily to preserve the integrity of this Court's process. Nonetheless, an analysis of the authorities presented by the State may be useful.

the first case relied on by the State, Dowagiac Manufacturing Co. v. Minnesota Moline Plow Co., *supra*, has been discussed above. The case of Meredith v. John Deere Plow Co., 244 F.2d 9 (8th Cir. 1957), cert. denied, 335 U.S. 831, is a simple case, with no particularly unusual circumstances in which the Court of Appeals refused to do that which is normally done by the District Court. The case of Omaha Electric Light and Power Co. v. City of Omaha, 216 Fed. 848 (8th Cir. 1914), is quoted at length for the proposition that the sending down of a mandate divests an appellate court of all jurisdiction. However, it is interesting that in that case the Circuit Court of Appeals actually changed its decree after the mandate had gone down and after a stay had ceased to be effective. In Wooten v. Bomar, 266 F.2d 27 (6th Cir. 1959), the Court of Appeals refused to enjoin a state prison official from interfering with a prisoner's use of law books. While the opinion in that case contains language stating that the Court of Appeals lacked authority to issue such an order, it would seem not unreasonable that the Court could have issued the requested order in aid of its appellate jurisdiction if the deprivation of the prisoner's law books would have eliminated his chances of obtaining the writ of habeas corpus for which he had previously filed. A number of cases heavily relied on by the State, including O'Malley v. Cover, 221 F.2d 156 (8th Cir. 1955), Ralston Purina Co. v. Novak, 111 F.2d 631 (8th Cir. 1940), and Dictograph Products Co. v. Sonotone Corp., 231 F.2d 861 (2d Cir. 1956), state no more than the settled proposition that one who appeals to an appellate court must clearly raise his objections to the decision below.

Mutual Life Insurance Co. of New York v. Holly, 135 F.2d 675 (7th Cir. 1943), merely illustrates that the All Writs statute confers no power on a Court of Appeals when there is no possibility that the Court of Appeals could have any appellate jurisdiction to protect. In that case a statute clearly provided that no appeal could lie from a District Court's remand back to the state court of a case previously removed from the state court. There being no possible appeal, there could be no invocation of the All Writs statute.

The State cites Ex parte Peru, 318 U.S. 578, as authority that appellate courts, including the Supreme Court, lack original jurisdiction to issue extraordinary writs. However, that case is but another illustration of the broad power of appellate courts to preserve their appellate jurisdiction and confine inferior courts to their proper jurisdiction, for in that case the Supreme Court issued mandamus to a District Court which denied the defendant nation's claim of the sovereign immunity. This was a particularly strong holding for the claim of sovereign immunity was appealable eventually and appeal lay, not to the Supreme Court, but to the Court of Appeals.

The State places heavy reliance on In re Philadelphia & Reading Coal & Iron Co., 103 F.2d 901 (3rd Cir. 1939). While an appeal in that case was pending from the refusal of the District Court to appoint a trustee to take possession of a bankrupt's assets, a motion was made in the Circuit Court of Appeals to restrain certain unrelated proceedings ordered by the District Court. The Court of Appeals denied the relief on the ground that "our jurisdiction of the substance of the pending appeal will be in no wise imperiled by the contemplated hearings before the master." Thus the Court of Appeals simply refused to act on a matter that was properly before the District Court where relief under the All Writs act was not asked and would not have been necessary.

CONCLUSION

For all of the foregoing reasons, the motion of the State of Mississippi to dismiss or to stay should be denied.

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CHRONOLOGY
**Of Relevant Orders Of this
Court and District Court.**

1962

JUNE 25

Opinion reversing judgment below.

JULY 8

Appellant's motion for immediate issuance of mandate denied.

JULY 17

Mandate mailed to District Court.

JULY 18

- 1) Mandate received in District Court.**
- 2) First stay order of Judge Cameron staying execution and enforcement of mandate.**

JULY 27

Opinion and Order vacating stay, recalling mandate, issuing new mandate forthwith.

JULY 28

- 1) July 27th mandate amended, sent to District Court with letter requesting return of July 27th mandate.**
- 2) Injunction order securing admission of appellant to University of Mississippi pending such time as appellant's admission and continued attendance at the University of Mississippi is secured, enjoining Paul Alexander, county attorney for Hinds County, and requiring prompt evaluation of appellant's credits.**
- 3) Second Cameron stay order staying mandate of July 27.**

JULY 31

Third Cameron stay order.

AUGUST 4

Order of this Court vacating all of the stays entered by Judge Cameron.

AUGUST 6

Fourth stay order of Judge Cameron.

AUGUST 12

Appellant applied to Justice Black for order vacating Judge Cameron's stays.

SEPTEMBER 10

Order of Justice Black vacating all stay orders of Judge Cameron and enjoining appellees from taking any further action to prevent enforcement of this Court's judgment and mandate pending final action on petition for writ of certiorari.

SEPTEMBER 13

District Court's permanent injunction order.

SEPTEMBER 18

Order of this Court designating United States as Amicus Curiae.

SEPTEMBER 20

- 1) District Court's order enjoining Paul Alexander and others from proceeding with prosecution and arrest of appellant.
- 2) A. L. Meadors, Sr., et al., v. James H. Meredith, et al., removed to District Court on petition of United States.
- 3) District Court orders deferring consideration of appellant's and United States' injunction enjoining enforcement of Senate Bill 1501 (moral turpitude statute) and setting same for hearing September 24.

- 4) District Court order deferring consideration of appellant's motion to enjoin A. L. Meadors, et al., from proceeding with state court injunction action against appellant in Jones County Chancery Court and setting same for September 24.
- 5) Order of this Court enjoining Paul Alexander, Senate Bill 1501 and A. L. Meadors, et al.
- 6) District Court contempt show cause order to Registrar, Dean and Chancellor on application of United States.

SEPTEMBER 21

- 1) Hearing on District Court's show cause order re contempt - 3 University officials.
- 2) Contempt show cause order of this Court on application of United States to Board of Trustees.

SEPTEMBER 22

- 1) Contempt show cause order to all original appellees on application of appellant.
- 2) District Court Order clearing 3 University officials of contempt.

SEPTEMBER 24

Hearing on contempt order and order advising that Trustees had wilfully violated this Court's order and directing appellees to rescind authority to Governor to act as registrar, etc.

District Court Order continuing hearing on motions set for September 24.

SEPTEMBER 25

Petition of United States Re preservation of due administration of justice.

Temporary restraining order on application of United States enjoining State of Mississippi, Governor and other officials.

Temporary restraining order on application of appellant restraining Governor and Sheriff of Hinds County.

This Court's order to Governor on application of United States to show cause re contempt.

SEPTEMBER 26

- 1) Order of this Court to Governor to show cause on application of appellant re contempt.
- 2) Order of this Court to Lt. Governor to show cause on application of United States re contempt.

SEPTEMBER 28

Order adjudging Governor in contempt of restraining orders of September 25.

SEPTEMBER 29

Order adjudging Lt. Governor in contempt of orders of September 25.

OCTOBER 2

- 1) Governor and Lt. Governor appeared by counsel.
- 2) Order of this Court clearing Board of Trustees and University officials of contempt.
- 3) Argument on motion of Mississippi to dismiss or to stay restraining orders of September 25.

CERTIFICATE OF SERVICE

This is to certify that on the 10th day of October, 1962, I mailed three copies of Appellant's Brief to the Honorable Joe L. Patterson, Attorney General of the State of Mississippi; two copies to the Honorable John C. Satterfield, Special Assistant Attorney General of the State of Mississippi, both being served in care of the Clerk of the United States Court of Appeals for the Fifth Circuit in New Orleans, Louisiana, and two copies of said brief to the Honorable Burke Marshall, Assistant Attorney General, United States Department of Justice, Washington 25, D. C., via United States mail, postage prepaid and that on October 11, 1962 I called the offices of Mr. Patterson and Mr. Satterfield advising them that they could pick up copies of the brief at the Clerk's office.

Attorney for Appellant