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No. 22,008

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

LEE F. DILWORTH, ET AL., APPELLANTS

v.

T. N. RINER, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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I N D E X

CASES

Cases -- continued Page

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional and Statutory Provisions -- continued

Constitutional and Statutory Provisions -- continued

MISCELLANEOUS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22008

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT OF THE CASE

1. Pleadings and Procedure

On September 22, 1964, a complaint was filed by 18 Negro citizens (the appellants here) in the United States District Court for the Northern District of Mississippi. The complaint alleged that appellants

and others similarily situated[1] were refused service by an employee of Tom's Restaurant and were arrested and prosecuted by Dan Adams, Chief of Police, of Aberdeen, James Harmon, Sheriff and Jessee Lackey, Deputy Sheriff of Monroe County, Richard Booth, City Attorney of Aberdeen, and George Howell, Judge of the Municipal Court of Aberdeen (the appellees here) when they failed to leave the restaurant.[2] Appellants further alleged that the acts of appellees in refusing to serve, arresting, and prosecuting them were violative of, inter alia, Title II of the Civil Rights Act of 1964. A temporary restraining order was sought to enjoin appellees from proceeding further with the trial of appellants in the Municipal Court of Aberdeen, which trial had been set for hearing on October 7, 1964.[3] Appellants also sought to enjoin appellees from continuing or maintaining any policy or practice of denying or interferring with appellants' use and enjoyment

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[1] The complaint was brought as a class action pursuant to Rule 23(a)(3), Fed. Rules Civ. Proc.

[2] T. N. Riner, owner of Tom's Restaurant, is also an appellee.

[3] The United States understands that, by informal agreement of the parties, trial of appellants in the municipal court proceeding has been postponed pending the outcome of the instant proceeding.

of Tom's Restaurant and other public accommodations in Aberdeen or the punishment of appellants for the use of such facilities, because of their race or color.

A hearing was held in the District Court on October 2, 1964, and numerous witnesses were called. At the conclusion of the hearing the court stated that the demand for a temporary restraining order would be denied. An order to this effect was filed on October 5, 1964. This appeal followed.

2. The Evidence

At the hearing on October 2, five of the appellants testified that they had occasion to visit Tom's Restaurant[4] on September 5, 1964 (R. 8, 15, 23, 34, 43, 51). They further testified that upon requesting service, they were told they would have to go around to the back of the restaurant to obtain service[5] (R. 9, 16, 26, 34, 45).

4/ Counsel for appellants sought in the court below to examine Mrs. Riner, who is part owner of Tom's Restaurant, for the purpose of showing sufficient involving of the restaurant in commerce to bring it within the terms of Title II of the Civil Rights Act of 1964. The court, however, excused Mrs. Riner from testifying, ruling that, for the purposes of the application for the temporary restraining order, it would assume that the restaurant was covered by the Civil Rights Act (R. 73-74).

5/ The restaurant served Negroes in a special area reached by passing through a separate door in the back of the establishment (R. 9, 18, 26, 34, 44).

While the Negroes remained seated, the waitress and a middle-aged lady[6] made several telephone calls (R. 11, 25, 27, 35). The police arrived and one officer told the waitress to request appellants to leave (R. 11, 17, 27, 36, 45). She made the request but appellants refused to comply and they were placed under arrest by Officer Newman (R. 11, 17, 28, 36, 46, 53). When asked to specify the charges, an officer replied that they were arrested for trespassing and disturbing the peace (R. 11, 17, 28, 36, 46). Appellants were then taken to the police station (R. 12, 28, 37, 47).

Mr. Dan Adams, Chief of Police of Aberdeen, testified that he entered the restaurant and informed appellant Galloway that the Negroes were under arrest for trespassing and disturbing the peace (R. 53).[7] The Mayor of Aberdeen, who is also presiding judge of the Justice of the Peace Court, testified that the Negroes

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6 / The lady was apparently Mrs. T. N. Riner (R. 27, 36).

7 / When asked what were the acts that constituted disturbing the peace, the Chief of Police stated: "Well, they were pulling the napkins out of the holders on the table and pouring salt and pepper into the napkins, and Mr. Riner said he wanted them out." (R. 54, 55). We do not regard this testimony as having any bearing on the case. Even assuming that the incident, if true, is evidence of a true breach of the peace, a suggestion we find difficult to believe, the affidavit of arrest makes no mention of the incident or in any way suggests that such an incident was a basis for the arrests.

who entered the restaurant were charged with refusing to leave the premises of Tom's Restaurant after being requested to do so (R. 60). He stated that they were not charged with disturbing the peace (R. 60).

The United States has seen the affidavits of arrest (each of which is identical except for the name of defendant) and has reprinted the text of one of them as an appendix to this brief. The affidavits charge the Negroes with violating Mississippi Code, Section 2087.5,[8] which punishes breach of the peace.[9]

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[8] Another statutory provision recited in the affidavit, House Bill 960 of the 1964 Legislature provides, inter alia, that minors charged with violating section 2087.5 shall not be tried in the Youth Court.

[9] Although the affidavit talks of breach of the peace, it describes conduct which is more akin to trespass. But whether the charge be phrased in "trespass" or "breach of the peace" terms, it is clear that the acts for which the Negroes were arrested were entering a restaurant, requesting service, and remaining seated when asked to leave. As we demonstrate, infra, pp. 16-19 , this conduct is protected by the Civil Rights Act of 1964 and the name attached to it is of no legal significance.

INTEREST OF THE UNITED STATES

Title II of the Civil Rights Act of 1964 guarantees all citizens equal access to places of public accommodation. In the instant case this Court is called upon to determine whether section 203(c) of that Title authorizes a federal district court to enjoin state court proceedings brought for the purpose of punishing persons seeking to enjoy use of public accommodations. Obviously, the 1964 Act will be vitiated if persons exercising rights under that Act are subject to arrest and harassment. Thus, the decision in this case raises basic questions as to the effectiveness of the new law.

The interest of the United States in the implementation of the 1964 Act is clear. Title II expressly authorizes the United States to bring suit to enforce that Title. Heart of Atlanta Motel, Inc. v. United States, U.S. (Dec. 14, 1964); Katzenbach v. McClung, U.S. (Dec. 14, 1964); see also United States v. Raines, 362 U.S. 17 (1960). In light of this plain and direct interest, and the great public importance of this case, we believe that it is incumbent upon the United States to express its views.

ARGUMENT

1. A preliminary issue before this Court is whether the order of the district court denying the application for a temporary restraining order is appealable. Appellants argue in their brief that the order is appealable under the test announced in United States v. Wood, 295 F. 2d 772 (C.A. 5, 1961). For that reason, we will concentrate here on the alternative argument that the District Court's order should be treated as one denying an application for a preliminary injunction and that it is for that reason appealable under 28 U.S.C. 1292(a)(1).

2. The central issue in this case is whether the Civil Rights Act of 1964 authorizes a federal court to enjoin a state court from proceeding with a criminal trial brought to punish persons who were arrested for requesting service in a restaurant covered by that Act.

Two possible obstacles to the issuance of such an injunction have been suggested.

The first is the statutory rule, embodied in 28 U.S.C. 2283, which prohibits a court of the United States from granting an injunction to state state court proceedings except (1) as expressly authorized by Act of Congress, (2) where necessary in aid of its jurisdiction, or (3) to protect its judgments. We will demonstrate, by an examination of the language and legislative

history of Title II, one of the recent Supreme Court decisions construing Title II, and the decisions interpreting the "expressly authorized" language of Section 2283, that Title II of the Civil Rights Act of 1964 is an express authorization within the meaning of the first exception to section 2283, to enjoin criminal proceedings for acts protected by that Title.

The second is the judicially created rule of non-interference with state criminal proceedings which applies even where 28 U.S.C. 2283 does not. We will show that the language of Title II expressly exempts this proceeding from the usual rule of non-interference.

I

This Court Has Jurisdiction to Review the Denial of Interlocutory Relief Below

1. The issue necessarily preliminary to all other questions is whether the order here complained of is appealable. Appellants framed their request for preliminary relief in a prayer for a temporary restraining order to enjoin their further prosecution in the Aberdeen Municipal Court. Thereafter, the action below was referred to as one for a temporary restraining order by the parties and the court.[10/]

Certain interlocutory orders such as those granting or denying preliminary injunctions may be reviewed under 28 U.S.C. 1292(a)(1).[11/] Deckert v. Independence Share Corp., 311 U.S. 282 (1941); Peters

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10/ The order of October 5, 1964, specifically denied appellants' prayer for a "temporary restraining order."

11/ 28 U.S.C. 1292 provides in part:

> (a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of United States * * * granting continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

v. Standard Oil Co., 174 F. 2d 162 (C.A. 5, 1949). On the other hand, the denial of a temporary restraining order is not appealable under that section. The appealability of an order does not, however, depend upon the terminology used by the parties or the court but upon substantive factors bearing upon the real nature of the proceeding below. Western Union Telegraph Co. v. United States & Mexican Trust Co., 221 Fed. 545, 553 (C.A. 8, 1915); Connell v. Dulien Steel Products, 240 F. 2d 414, 418 (C.A. 5, 1957).

The question here, therefore, is not what the proceeding below was labelled, but whether, under the circumstances of the case, the denial of the "temporary restraining order" was in reality the denial of a preliminary injunction.

2. A temporary restraining order is generally issued without notice to the adverse party, or, where notice is given, after a hearing which has a most summary character. See Connell v. Dulien Steel Products, 240 F. 2d 414, 418 (C.A. 5, 1957); Pennsylvania R.R. v. Transport Workers Union, 278 F. 2d 693 (C.A. 3, 1960); 7 Moore, Federal Practice p. 1642-1643. The practical reason for not allowing an appeal from such an order, other than the fact that it is usually effective for only a brief period of time (less than the time normally required for an appeal), is that

the trial judge has not had the advantage of a full presentation of the facts and law before entering an order. Connell v. Dulien Steel Products, supra. At this stage of the case questions of a legal and a factual nature bearing on whether the lower court would grant a preliminary injunction are usually unanswered. Orderly procedure requires that -- at least in most circumstances -- the trial judge be permitted to pass on these questions at the time of the more complete hearing for a preliminary injunction before his decision is reviewed by a higher court. See Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546 (1949); Connell v. Dulien Steel Products, supra;[12/] Pan American World Airlines v. Flight Engineers Int'l Ass'n, 306 F. 2d 840, 842-843 (C.A. 2, 1962).

12/ In Connell this Court found that (240 F. 2d at 418):

> It is not at all clear that the court below would actually have granted a preliminary injunction, for there are several legal questions that might well have been passed on at such a hearing. Orderly procedure requires that the trial court be given the opportunity of passing on these legal matters at the time of the hearing of the motion for preliminary injunction. Also, the plaintiff below should be required at the hearing on preliminary injunction to make out a prima facie case on the merits in order to obtain injunctive relief.

It is apparent that these reasons do not apply where, as we show infra, there has been adequate notice and a full hearing on the question of whether an injunction shall be issued.

a. In Western Union Telegraph Co. v. United States & Mexican Trust Co., 221 Fed. 545 (C.A. 8, 1915), the telegraph company and all other creditors of a railroad line were restrained, after a hearing on petition of the trust company, from commencing or prosecuting any action against the railroad. On appeal, the trust company contended that the orders below were mere restraining orders and not appealable. The Court of Appeals recognized that a restraining order granted without a hearing is not ordinarily appealable, but it concluded that (221 Fed. at 553):

> . . . a restraining order which is granted, or sustained, or denied after a hearing of the parties, and which is in effect and in everything but name, is a temporary injunction, falls within the evident meaning of the statute [Judicial Code §129, now 28 U.S.C. 1292(a)(1) as amended] and is reviewable by appeal * * *.

In this Circuit, in Connell v. Dulien Steel Products, supra, the District Court had granted an order temporarily restraining appellants from enforcing a judgment in the Louisiana state courts. While this Court held that the order was not appealable, it reached this result for factual reasons. Indeed, the Court explicitly recognized that "the question of appealability should not depend on mere terminology but on whether the order is one within the purview of §1292" (240 F. 2d at 418). The order in Connell was issued on the same day as the motion for a "temporary restraining order" was filed and after only a most summary hearing.[13/]

13/ Similarly, in Woods v. Wright, 334 F. 2d 369 (C.A. 5, 1964), where it was urged that the denial of a temporary restraining order was in fact a refusal to grant a preliminary injunction, this Court implied that because of the summary nature of the proceeding, what was involved was the denial of a temporary restraining order. The Court ultimately found it unnecessary specifically to rule on this point since the order was a final and appealable decision under United States v. Wood, 295 F. 2d 772 (C.A. 5, 1961). It is to be noted that in Woods v. Wright, the notice itself was inadequate to support a preliminary injunction since the hearing was held on the same day as the action was filed. Moreover, the hearing at which both parties were represented by counsel was summary in nature, and not a full evidentiary hearing as in this case.

Here the request for a temporary restraining order was filed on September 22, 1964, and on September 24, 1964, a summons was served on each of the appellees. The hearing before the District Court was not held until eight days later. At the hearing all the appellees except T. N. Riner[14/] were represented by counsel. Eight witnesses, three of whom were appellees, testified concerning the attempts of the Negroes to receive service at the restaurants and the subsequent arrests by the police. Appellees' counsels were given full opportunity to cross-examine all witnesses.

In short, the proceedings below had all the substantive characteristics of a hearing on a motion for a preliminary injunction.

b. The legal issues in this case were decided by the District Court in such a way that, of necessity, the resolution of those issues also disposes of any formal application that might be made for a preliminary or permanent injunction. Judge Clayton held that he was without authority to issue any injunctive relief against the state court proceedings because of 28 U.S.C. 2283. He stated that (R. 84):

14/ Mrs. T. N. Riner, wife of one of the appellees, stated that she and her husband decided that they did not want counsel (R. 69, 70). Mr. Riner did not testify.

> There is no part of the Civil Rights Act of 1964 . . . [which empowers] this Court to . . . enjoin proceedings in State Court contrary to the provisions of 28 U.S.C. 2283. . . .
>
> With the Civil Rights Act of 1964 making no provision by any of its parts for this Court to enjoin proceedings in State Court, it is my view that this Court is wholly without authority to grant the restraining order. . . .

The rationale of that decision requires, of course, the denial of all relief, whether temporary or permanent. It follows that any further hearing in the District Court would be futile.[15/] Thus the principal reason advanced by this Court in the Connell case for not allowing an appeal from the order therein has no application here. See note 12, supra, p. 11.

In short, under any test which considers substance rather than semantics, the proceeding below was one for a preliminary injunction, and its denial therefore was appealable as such.

15/ It is, of course, well settled that courts of equity will not require the doing of a futile act. Montana Nat'l Bank v. Yellowstone County, 276 U.S. 499, 505 (1928); Orleans Parish School Board v. Bush, 138 F. Supp. 327 (E.D. La. 1955), aff'd, 242 F. 2d 156 (C.A. 5, 1957), cert. denied, 354 U.S. 921.

II

28 U.S.C. 2283 Does Not Bar the District Court From Enjoining the Proceedings in the Justice of the Peace Court in Aberdeen.

1. 28 U.S.C. 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments [emphasis supplied].

(a) We submit that Title II of the Civil Rights Act of 1964 is an express authorization within the meaning of 28 U.S.C. 2283. Sections 201, 203, and 204 16/ of Title II provide in pertinent part as follows:

> Sec. 201(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations effect commerce . . .
>
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises. . .

16/ Section 202, which provides "All persons shall be entitled to be free, at any establishment or place,

(continued on following page)

> Section 203. No person shall . . . (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.
>
> Section 204. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 203, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. . . .

In our view, these provisions make clear the statutory purpose to provide for injunctive relief against anyone who attempts to punish another for attempting to exercise his right to equal enjoyment of the facilities of an included place of public accommodation, such as a restaurant.[17]

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[16] (continued from preceding page)

from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof," is not relevant to this issue.

[17] Appellees contend that the acts for which appellants were arrested by state authorities were entirely unrelated to their right to the equal enjoyment of the facilities of Tom's Restaurant. They assert that appellants, having been

(continued on following page)

(b) One of the forms of punishment, and no doubt the principal form contemplated by the drafters of section 203 (c), was the arrest and prosecution of persons seeking access to places of public accommodation solely because of their race.

It is difficult to understand what section 203(c) would mean if it did not mean to prohibit arrests and prosecutions for using a place or public accommodation. Acts of private "punishment" would as well be covered by section 203(b) which prohibits intimidating, threatening, or coercing a person for the purpose of interfering with rights secured by section 201 or 202.

17/ (Continued from preceding page)

denied service, had laid the predicate for having their rights declared by the courts and were required to leave the premises of the restaurant. Their arrest in their view, was not for attempting to exercise their right to service, but for the physical occupancy of another's premises. This contention was authoritatively disposed of by the Supreme Court decision in Hamm v. City of RockHill, ___ U.S. ___ (Dec. 14, 1964) where it was argued that the victims of discrimination are restricted to the statutory mechanisms for the redress of any infringement of the right to access to a place of public accommodation. In squarely rejecting this contention, the Court declared (Slip Opinion, p. 5):

> Although we agree that the law generally condemns self-help, the language of §203(c) supports a conclusion that non-forcible attempts to gain admittance to or remain in establishments covered by the Act, are immunized from prosecution, for the statute speaks of exercising or attempting to exercise a "right or privilege" secured by its earlier provisions.

(c) The legislative history of section 203(c) fully supports this conclusion. Senator Humphrey, Floor Manager of the Act in the Senate, stated that

> [S]ection 203(c) . . . prohibits the imposition of punishment upon any person "for exercising or attempting to exercise any right or privilege" secured by section 201 or 202. This plainly means that a defendant in a criminal trespass, breach of the peace, or other similar case can assert the rights created by 201 and 202 and that State courts must entertain defenses grounded upon these provisions. (110 Cong. Rec. 9463, daily ed; May 1, 1964)

The opponents of the measure had a similar understanding. Congressman Harris of Arkansas opposes section 203(c) on the ground that it "would interfere with the enforcement of trespass laws in every State in the Union." (110 Cong. Rec. 1843 (daily ed. February 4, 1964)). Likewise, Senator Stennis of Mississippi said:

> As to State judges and State law enforcement officers, Section 203(c) provides that "no person shall (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by Section 201 or 202." This is patently an attempt to make enforcement by State judges and State law enforcement officers of State laws which may later be held to conflict with the act a violation of a federal law and to subject them to punitive Federal action. (110 Cong. Rec. 6871 (daily ed. April 7, 1964)).

(d) Any remaining doubt as to the meaning of section 203(c) has been removed by the decision of the Supreme Court in Hamm v. City of Rock Hill, supra.[18/] After stating that "The Civil Rights Act of 1964 forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities," the Court continued (slip opinion p. 5):

> On its face, this language prohibits prosecution of any person for seeking service in a covered establishment because of his race or color, * * * [T]he language of §203(c) supports a conclusion that nonforcible attempts to gain admittance to or remain in establishments covered by the Act, are immunized from prosecution, for the statute speaks of exercising or attempting to exercise a "right or privilege" secured by its earlier provisions. * * * In effect the Act prohibits the application of state laws in a way that would deprive any person of the rights granted under the Act. * * * there can be no question that this was the intended result here in light of §203(c).

18/ Although the court split 5-4 on these decisions, the split was over the question whether the Civil Rights Act of 1964 abated convictions of persons who had been sentenced on charges of trespass for "sitting in" at restaurants prior to passage of the 1964 Act. The Court was not divided on the question of the meaning of "punishment" in 203(c).

(e) The Supreme Court in Hamm stated that the language of section 203(c) on its face prohibits the prosecution of anyone for seeking service in a covered establishment because of his race or color. Plainly, too, section 204 provides, on its face, that:

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 203, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved . . .

In light of this explicit language, there can be no doubt but that Title II expressly authorizes United States courts to enjoin state court proceedings within the terms of 28 U.S.C. 2283. Congress could have made its express authorization even more specific only by (1) specifically referring to section 2283 or (2) specifically referring to the enjoining of state courts. But neither of these references is necessary to meet the "expressly authorized" requirements of section 2283.

2. a. In Amalgamated Clothing Workers of America v. Richmond Brothers, 348 U.S. 511 (1955), the Supreme Court considered for the first time the language of 28 U.S.C. 2283 which had been enacted in 1948 as part of the revised Title 28 of the United States Code.[19] In holding that the Taft-Hartley Act created no express exceptions to section 2283 that would permit petitioner to enjoin state proceedings, the Court noted pointedly that an authorization to provide an exemption from the generality of section 2283 "need not expressly refer to §2283."[20]

19/ For a discussion of the history of the predecessor of section 2283 and the reasons for its modification, see, in addition to the Amalgamated case, Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941); Jacksonville Blow Pipe Co. v. Reconstruction Finance Corp., 244 F. 2d 394 (C.A. 5, 1957); and T. Smith & Son, Inc. v. Williams, 275 F. 2d 397 (C.A. 5, 1960).

20/ In the Amalgamated case itself, the Court was unable to find an express authorization for an exemption "within even the most attenuated meaning of the term." The provisions of the Taft-Hartley Act, the Court emphasized, gave jurisdiction to the district courts to grant injunctive relief only on behalf of the National Labor Relations Board on petition by it or one of its regional attorneys: "To hold that the Taft-Hartley Act also authorizes a private litigant to secure interim relief would be to ignore the closely circumscribed jurisdiction given to the District Court and to generalize where Congress has chosen to specify." 348 U.S. at 517. In contrast to the statutory scheme in Amalgamated case, Congress, by enacting Title II of the Civil Rights Act, specifically authorized private persons to secure injunctive relief.

b. Similarily, the authorizing statute need not refer specifically to the possibility that state court proceedings might have to be enjoined. This Court recently held in Beal v. Waltz, 309 F. 2d 721 (C.A. 5, 1962), that 46 U.S.C. 185 expressly authorizes a federal court to enjoin state court proceedings and that, hence, 28 U.S.C. 2283, does not bar the injunction. Yet 46 U.S.C. 185 makes no reference whatever to enjoining state proceedings.[21] In Providence & New York Steamship Co. v. Hill Manufacturing Co., 109 U.S. 528 (1883), the Supreme Court pointed out that Section 185 did not refer to enjoining state proceedings but nevertheless concluded: "Surely [Section 185] applies as well to 'claims and proceedings' in state courts as to those in the federal courts; . . ." The Court added that any further proceedings by the state courts "would be against the express words" of section 185.

The holding of this Court in Beal v. Waltz applies with even greater force to Title II of the Civil Rights Act. Unlike 46 U.S.C. 185, which merely provides that "claims and proceedings . . . shall cease," Title II specifically privides in section 204(a) for the granting of injunctions.

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[21] The pertinent portion of this section provides: "Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease."

c. There are additional reasons for this result here. Unlike 46 U.S.C. 185 and other statutory provisions which come within the terms of the "expressly authorized" language of section 2283,[22] the central objective of section 203(c) (in conjunction with section 204(a)) of the Civil Rights Act is to halt court proceedings brought to punish persons who seek to utilize public facilities and are barred from them solely because of their race. And, as we show, supra, not only does the legislative history of section 203(c) prove beyond doubt that Congress had such proceedings particularly in mind when it enacted this section, but to hold otherwise would be to render section 203(c) of the 1964 Act largely meaningless. Compare Great Northern Railway v. United States, 208 U.S. 452, 465 (1908); Hertz v. Woodman, 218 U.S. 205, 218 (1910).

It is noteworthy in this connection that the Supreme Court in Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957), the Court ruled that section 2283 had no application where the United States was a party. Invoking the rule of construction that a statute which divests rights that would exist apart

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22/ See, e.g., 28 U.S.C. 1335, 2361 (the interpleader statutes).

from the statute "will not be applied to the sovereign without express words to that effect," United States v. United Mine Workers, 330 U.S. 258 (1947), the Court stated: "the frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. 2283 alone." 352 U.S. at 226 (emphasis supplied). The doctrine of Leiter Minerals may support the proposition that Title II of the 1964 Act is an exception to the general section 2283 rule.

In addition to providing for private suits, section 204(a) of the Civil Rights Act of 1964 allows the Attorney General to intervene in such suits upon obtaining the court's permission and certifying they are of general public importance. Clearly section 2283 would have no application if the Attorney General intervened. By authorizing the Attorney General to intervene, Congress has recognized in Title II actions that "superior federal interest" which provides for the section 2283 exception.

3. a. In support of its conclusion that section 2283 barred any relief, the court below cited Baines v. City of Danville, 337 F. 2d 579 (C.A.4, 1964).

As the District Court read that decision, it "held that the Civil Rights Act of 1964 and the other Sections to which you referred, did not provide exceptions to the anti-injunction statute [§2283] that we have been talking about." (R.85). The Baines case had nothing to do with Title II of the Civil Rights Act of 1964. That case was brought under 42 U.S.C. 1981-1983. The question before the court was whether the provision of 42 U.S. C. 1983 authorizing a "suit in equity, or other proper proceeding for redress," falls within the statutory exception to 28 U.S.C. 2283. This question, which has elicited conflicting views from the courts[23/]

23/ Holding that the authority to seek injunctive relief under 1983 is not an express authorization within the terms of section 2283 are Goss v. Illinois, 312 F. 2d 257 (C.A. 7, 1963); Smith v. Village of Lansing, 241 D. 2d 856 (C.A. 7, 1957); Sexton v. Barry, 233 F. 2d 220 (C.A. 6, 1956); Alesna v. Rice, 172 F. 2d 176 (C.A. 9, 1949) (dictum); Aultman & Taylor Co. v. Brumfield, 102 Fed. 7 (C.C.N.D. Ohio, 1900); Hemsley v. Myers, 45 Fed. 283 (C.A. Kan., 1891); Chafee v. Johnson, 229 F. Supp. 445 (S.D. Miss., 1964); Island Steamship Lines, Inc. v. Glennon, 178 F. Supp. 292 (D. Mass., 1959)(alternate holding). Taking the opposite position are Cooper v. Hutchison, 184 F. 2d 119 (C.A. 3, 1950); Tuchman v. Welch, 42 Fed. 548 (C.C.D. Kan. 1890); Tribune Review Publishing Co. v. Thomas, 153 F. Supp. 486 (W.D. Pa., 1957).

and the writers[24], troubled the court which was sitting en banc. The majority ruled[25] that section 1983 did not expressly authorize an injunction. The language of the Court's opinion however, clearly demonstrates why the result pertains only to section 1983:

> The substantive right, in many situations, may call for equitable relief, and equitable remedies are authorized, but only by a general jurisdictional grant. * * * [T]here is no incompatibility between a generally created equity jurisdiction, and particularized limitations which restrict a chancellor's power to define the limits of his discretion. * * * If every grant of general equity jurisdiction created an exception to the anti-injunction statute, the statute would be meaningless. [337 F. 2d at 589]

Unlike 42 U.S.C. 1983, which concededly is a broad grant of general equity jurisdiction, section 203(c) of the Civil Rights Act of 1964 is a very narrow grant of equity jurisdiction which has specific application only where a person is punished for seeking to utilize places of public accommodation. The court in Baines in no way suggested that it would arrive at the same conclusion should it consider a statute expressly authorizing preventive relief against courts which seek to punish persons exercising the right to enjoy the facilities of public

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24/ See e.g., Moore, Federal Practice, Vol. 1A, §0.213[2], p. 2417, Wright Federal Courts, §47, p. 156.

25/ Chief Judge Sobeloff and Judge Bell dissented on this issue.

accommodations. In fact, the court's stress on the general equity jurisdiction created by section 1983 strongly suggests that it would reach the opposite conclusion in the instant case. Plainly, then, the district court's reliance on the Baines opinion was totally unwarranted.

b. The court below also cited three decisions by this Court which, according to Judge Clayton, "indicate very strongly" that this Court would reach here the Baines result (R. 85-86).

None of the cases cited has any bearing on the issues involved in the instant case.

Poole v. Barnett, 336 F. 2d 267 (C.A. 5, 1964), involved a request for an injunction against officers of the State of Mississippi and the City of Jackson to restrain them from making further arrests for violations of the malicious trespass[26/] and the disturbance of worship[27/] laws of the State of Mississippi. This Court pointed out that the Supreme Court had not ruled that "state action" within the meaning of the Fourteenth Amendment was involved when the police arrest trespassers at the request of an owner of property which he holds open to the

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26/ Miss. Code, §2406

27/ Miss. Code, §2090

public for some purposes but otherwise maintains on a segregated basis. The Court ruled that in "this state of the law, we cannot hold that the trial court erred in denying the preliminary injunction." The question of the applicability of 28 U.S.C. 2283 never entered the case.

The other two decisions cited, Brown v. Rayfield, 320 F. 2d 96 (C.A. 5, 1963) and In Re Wykoff, 6 Race Relations Law Reporter 793 (unreported), are habeas corpus cases. The Court there held that persons who concededly had failed to exhaust their state remedies as required by 28 U.S.C. 2254 did not make a sufficient showing of an absence of an available state remedy or the existence of circumstances rendering such remedy ineffective to protect their rights. Hence the exception to 28 U.S.C. 2254 was not applicable and this Court dismissed the appeals. Again, there was no reference to section 2283.

III

The Injunction Requested in This Case is Not Barred by Rules of Comity

The general rule of non-interference by federal courts with state criminal proceedings was set forth by the Supreme Court in Douglas v. City of Jeannette, 319 U.S. 157 (1943), as follows:

> Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent28/ ...

Underlying the principle of comity between state and federal courts is the notion that, since the decision of the state court is subject to ultimate review by the Supreme Court, the state judicial system should be permitted to complete its function undisturbed by premature interference by the federal courts. Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 95-96 (1935); Fenner v. Boykin, 271 U.S. 240, 244 (1926).

28/ C. F. Cleary v. Boyler, 371 U.S. 397 (1963); Wilson v. Schnettler, 365 U.S. 381 (1961); Stefanelli v. Minard, 342 U.S. 117 (1951); Ponzi v. Fessenden, 258 U.S. 254 (1922).

But, as this Court stated in United States v. Wood, 295 F. 2d 772, 779 (C.A. 5, 1961), "the policy against interference with state criminal proceedings . . . is not one of statutory derivation." It is simply a rule of comity, "not a rule distributing power as between the State and federal courts," Fay v. Noia, 372 U.S. 391, 425 (1963), and may at any time be abrogated by Congress. This is precisely what was done when Congress enacted Title II of the Civil Rights Act. Section 207(a) of the 1964 Act provides:

> The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative of other remedies that may be provided by law.

This provision plainly and unambiguously removes Title II cases from the ambit of the comity rule (for obvious reasons similar to those discussed in the preceding portion of this brief, supra at pp. 16-19).

Any doubt that section 207(a) creates an exception to the rule of non-interference discussed in Jeannette was removed by the decision of this Court in United States v. Wood, 295 F.2d 772 (C.A. 5, 1961). That case involved a suit which, like the instant one, was brought to enjoin

a pending criminal prosecution. The Wood opinion construed section 131(c) of the Civil Rights Act of 1957 (42 U.S.C. 1971(d) which is virtually identical to section 207(a) of the Civil Rights Act of 1964, as follows:[29/]

> The court in this action is not operating under common-law equitable and discretionary doctrines, but under a mandatory jurisdictional statute. As already pointed out, the district court considered that it had jurisdiction over this action but that such jurisdiction should not be exercised to the extent of issuing the temporary restraining order. Under the applicable jurisdictional section, we do not believe the court had that choice.

After quoting 42 U.S.C. 1971(d) the court continued

> For several reasons, we hold that this theory [of non-interference with state criminal proceedings set forth in Jeanette] is not applicable to the present case.
>
> First, section 1971 creates a cause of action in the United States for "preventive relief" where a person has intimidated or has attempted to intimidate another in the exercise of his right to vote. Where a federal statute has specifically created a **cause of action for preventive relief for intimidation**, it may no longer be said that this intimidation will not be judicially recognized for the purpose of establishing an equitable cause of action.

29/ The statutes differ in two respects: (1) the 1957 Act states: "pursuant to this section" while the 1964 Act states: "pursuant to this title";(2) where the 1957 Act speaks of the "party aggrieved," the 1964 statute speaks of the "aggrieved party."

> Second, we believe that the affirmative defense of adequate state remedies has been specifically removed by statute, for subsection (d) expressly states that the district court is to exercise jurisdiction without regard to whether the aggrieved party shall have exhausted other remedies provided by law. With this defense removed, there are no longer any grounds for judicially ignoring that intimidation may exist in fact or that irreparable injury is not present.

The Wood opinion concluded by pointing out that its interpretation of section 1971(c) was "in line with the doctrine in other federal cases in this Circuit dealing with the deprivation of constitutional rights on the basis of race or color." The Court noted that in Morrison v. Davis, 252 F. 2d 102 (C.A. 5, 1958),[30] an injunctive action

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30/ In Morrison, this Court stated:

> Whatever may be the rule as to other threatened prosecutions, the Supreme Court in a case presenting an identical factual issue affirmed the judgment of the trial court in the Browder case [Browder v. Gayle, D.C.M.D. Ala., 142 F. Supp. 707, affirmed 1956, 352 U.S. 903] in which the same contention was advanced. To the extent that this is inconsistent with Douglas v. City of Jeannett, Pa., 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324, we must consider the earlier case modified.

See also Aelony v. Pace, No. 530 (M.D. Ga., Nov. 1, 1963) (unreported) where Chief Judge Tuttle, writing for a three-judge court, granted an injunction forbidding prosecution of plaintiffs under Georgia insurrection and unlawful assembly statutes: Anderson v. City of Albany, 321 F. 2d 649 (C.A. 5, 1963); Bailey v. Patterson, 323 F. 2d 201 (C.A. 5, 1963), cert. denied, 376 U.S. 910 (1964).

brought pursuant to 42 U.S.C. 1983, Douglas v. Jeannette was held to be inapplicable.[31]

In short, Wood plainly holds that Jeannette is inapplicable to injunctive proceedings brought under a mandatory jurisdictional statute such as 42 U.S.C. 1971 or Title II of the Civil Rights Act of 1964.[32]

31/ It may also be said that, at least, in this Circuit, it is the rule that the Jeannette case is to be given "a narrow reading in civil rights cases," Dombrowski v. Pfister, 227 F. Supp. 556, 583 (dissenting opinion of Judge Wisdom), jurisd. noted, 377 U.S. 976 (1964).

32/ In cases analogous to the instant proceeding the equity powers of federal courts have also been invoked to entertain a bill of peace to enjoin proceedings brought in state courts solely for purposes of harassment. See American Optometric Ass'n v. Ritholz, 101 F 2d 883 (C.A. 7, 1939); Jamerson v. Alliance Ins. Co. of Philadelphia, 87 F. 2d 253 (C.A. 7, 1937) which affirmed district court proceedings and held that the predecessor of 28 U.S.C. 2283 did not bar such relief. See also Woodmen of the World v. O'Neil, 266 U.S. 292 (1924). Professor Moore, in his "Commentary on the U.S. Judicial Code," states that 28 U.S.C. 2283 permits such injunctive proceedings.

CONCLUSION

For the foregoing reasons, it is suggested that the order of the District Court be reversed.

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JANUARY 1965

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief for the United States as amicus curiae has been served by official United States mail in accordance with the rules of this Court to the attorneys for the appellants and appellees as follows:

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Dated this 7th day of January, 1965.

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APPENDIX

Text of affidavit of arrest (see p. 5 , supra).

"One Galloway willfully and unlawfully refused to leave the premises of another, to wit, T. N. Riner, when requested so to do by the owner of said premises, to wit, T. N. Riner, under such circumstances that a breach of peace might be occasioned thereby in violation of Code Section 2087.5 of Mississippi Code of 1942 as amended and as provided by House Bill 960 of the 1964 Mississippi Legislature."