UNITED STATES OF AMERICA
FIFTH CIRCUIT COURT OF APPEALS

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

MEMORANDUM OF AUTHORITIES AND STATEMENT OF THE STATE OF MISSISSIPPI, IN SUPPORT OF MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND STAY OR DISMISS CONTEMPT PROCEEDINGS

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10-5-62

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JAMES H. MEREDITH, Appellant, v. CHARLES DICKSON FAIR, et al., Appellees.	NO. 19475
UNITED STATES OF AMERICA, As Amicus Curiae and Petitioner, v. STATE OF MISSISSIPPI, et al., Defendants.	

10-5-62

MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO MOTION BY THE STATE OF MISSISSIPPI TO DISSOLVE TEMPORARY RESTRAINING ORDER

The State of Mississippi has filed motions to dissolve the temporary restraining order issued by this Court upon application of the United States on September 25, 1962, and to dismiss the contempt proceedings now pending against Ross R. Barnett and Paul B. Johnson, Jr.

The issues which the State seeks to raise regarding the pending contempt proceedings will not be dealt with in this Memorandum. This Court has heretofore held that the State of Mississippi has no standing to appear upon behalf of the individual contemnors. Neither Governor Barnett nor Lt. Governor Johnson has filed in his own behalf a motion to stay or dismiss.

The issues raised by the State in its Motion to Dissolve the Temporary Restraining Order relate to

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the basic jurisdiction of this Court and to the nature of the claim asserted in the petition filed by the United States. There is no claim that the temporary restraining order, if the Court has jurisdiction of the subject matter and the parties and if the United States has standing to sue, was improvidently granted.

The basic contentions of the State may be stated as follows:

(1) This Court lacks jurisdiction of the subject matter of the claim stated in the petition.

(2) This Court has no jurisdiction and cannot acquire jurisdiction of the persons of the defendants named in the petition.

(3) The United States has no standing to assert the claim stated in its petition.

Each of these assertions will be considered separately. Certain other matters of claimed legal defense will be discussed at the conclusion of the discussion of the above three contentions.

I

This Court Has Jurisdiction of the Subject Matter of the Claim

The State does not urge that the petition fails to state a claim upon which the United States is entitled to relief. In light of the precedents such assertion could hardly be made. Faubus v. United States, 254 F.2d 797 (C.A. 8, 1957), cert. den. 358 U.S. 829; Bush v. Orleans Parish School Board, 191 F.2d 871 (E.D. La., 1961), aff'd. 367 U.S. 908. The State's contention is that this Court cannot grant the relief to which the petition entitles the United States and that such relief should be sought from the District Court. This contention is without merit.

Before considering the legal authorities bearing upon this Court's jurisdiction, certain of the State's misconceptions regarding the nature of the claim set forth in the petition should be corrected.

A. Nature of the Claim

In its petition the United States alleges that the legal issues between the plaintiff, James H. Meredith and the defendant University officials and Board of Trustees have been finally adjudicated. The present proceeding does not involve any claim of right of the United States to participate in that adjudication. Nor does the United States seek to affect the result of that proceeding. The facts alleged in the petition of the United States are separate and distinct from those involved in the basic law suit, which this Court decided in its judgment of reversal on June 25, 1962.

The petition alleges that while the Meredith case was pending in the District Court, while it was pending on appeal to this Court, and since the case has been returned to the District Court pursuant to this Court's mandate of July 28, 1962, the various defendants named in the petition have actively engaged in a program to frustrate the implementation of this Court's judgment of June 25, 1962, and any order of the District Court which has been or might be entered pursuant to that judgment. This program of obstruction has been part of an official and announced policy of the State of Mississippi. The petition alleges that the policy has been announced by both the Chief Executive of the State (paragraph 25) and by the State legislature (paragraphs 17 and 18). The policy has been implemented by calling upon all officials of the State to ignore the orders of this Court and of other federal courts with respect to the subject matter of the Meredith litigation and to

actively obstruct the implementation of those orders (paragraphs 17, 25 and 32). The defendants are alleged to have taken concrete steps to obstruct the federal courts in accordance with the state policy. They have done so by means of invalid injunctive suits in state courts (paragraphs 28 and 29), by criminal prosecution of Meredith (paragraphs 21, 26 and 29), and by legislation which is clearly directed against Meredith personally (paragraph 30).

The petition alleges that both the purpose and effect of the conduct of the defendants is to prevent and discourage James H. Meredith from attending the University of Mississippi pursuant to the judgment and orders of this Court and of the District Court.

In short, the petition alleges that the defendants have unlawfully prevented and are seeking to prevent the judgment, mandate and orders of this Court from being carried into effect.

B. Significance of District Court Precedents

The State points out in its Memorandum that prior to the instant case, obstruction of school desegregation decrees has been dealt with by the district courts. From this circumstance, the state draws the conclusion that only the district courts have power to deal with such obstruction. In considering this contention it is important to consider the bases upon which the district courts have acted.

An original suit to enforce rights under the Fourteenth Amendment to attend public schools without racial discrimination can be initiated only in a district court. The district court has original jurisdiction by virtue of Sections 1331 and 1343 of Title 28 U.S.C. It is this jurisdiction which the district courts have exercised in the many school desegregation suits across the country.

When a district court has entered a final judgment in a school desegregation case in exercise of its jurisdiction under §1331 and 1343, and is thereafter obstructed in effectuating its decree, the jurisdictional situation changes. Further exercise of jurisdiction is not for the purpose of litigating the rights between the original parties, but to effectuate and preserve the jurisdiction of the court previously exercised and to uphold the integrity of the court's decrees. That a different basis of jurisdiction is relied upon is made clear by a careful examination of the cases.

In McSwain v. County Board of Education of Anderson County, 138 F. Supp. 570 (E.D. Tenn., 1956) the District Court entered a final judgment requiring the defendant school officials to admit Negro applicants

to the high school in Clinton, Tennessee, without racial discrimination. Thereafter, the defendant school officials filed a petition with the district court seeking injunctive relief against interference and harassment by John Kasper and others. The injunction was issued and several of the persons who had been added as defendants and who were named in the injunction were later held to be in contempt. On appeal it was urged that the district court had no jurisdiction to entertain the petition against John Kasper and his co-defendants. Concededly, they were not acting under color of the laws of the State of Tennessee and under normal circumstances the disturbances, assaults and breaches of the peace which they had committed would be cognizable only in the courts of the state. Nonetheless, the court of appeals, relying upon and specifically citing the all-writs statute, 28 U.S.C. 1651, concluded that "The District Court had jurisdiction to issue the injunction." Bullock v. United States, 265 F. 2d 683, 691 (C.A. 6, 1959).

The District Court for the Eastern District of Arkansas was faced with a similar situation in the case relating to desegregation of the Little Rock public schools. A plan for desegregation had been approved by the District Court (Aaron v. McKinley, 143 F. Supp. 855) and the Court of Appeals had affirmed (Aaron v. Cooper, 243 F. 2d 361 (C.A. 8, 1957)). Thereafter the Governor of Arkansas prevented the carrying out of the desegregation decree by his use of the Arkansas National Guard. The district court, upon application of both the United States and of the original plaintiffs, enjoined the Governor and the commandant of the Guard. In sustaining this exercise of jurisdiction, the Court of Appeals held that "It was

proper for the court to do all that reasonably and lawfully could be done to protect and effectuate its orders and judgments and to prevent them from being thwarted by force or otherwise." Faubus v. United States, supra, at pages 804-805. Although the Court of Appeals did not state whether this exercise of jurisdiction was based upon the all-writs statute or upon the inherent power of a court to protect and effectuate its judgments, it is clear that the district court's jurisdiction was regarded as ancillary to the main case and not as primary.

In Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La., 1961), affirmed 367 U.S. 908, the court made it equally clear that in bringing in new parties and enjoining interference with its prior orders it was exercising ancillary and not primary jurisdiction The Court emphasized that its exercise of power was not only independent of the issues in the basic law suit, bu was not even dependent upon the initiative of the litigants in the original law suit. In this connection the court quoted from Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246, 64 S. Ct. 997, 1001, 88 L. Ed. 1250:

> Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims. . . . [191 F. Supp. at 878, fn. 16].

In no instance when a district court has exercised jurisdiction to protect its prior orders in a school desegregation case has it purported to exercise primary jurisdiction. In each case it has enjoined obstruction or interference through exercise of its ancillary jurisdiction, whether by virtue of 28 U.S.C. 1651

or its inherent power to effectuate its decrees. Accordingly, it is of no significance that a court of appeals lacks primary jurisdiction of a school desegregation suit. The only question here pertinent is whether the Court of Appeals has ancillary jurisdiction, as does the district court, to protect its judgments, mandates and orders by the injunctive process.

C. The Court of Appeals May Act to Protect Its Jurisdiction.

Ancillary jurisdiction, whether based upon the inherent power of the court to protect and effectuate its jurisdiction or upon the all-writs statute, reposes in all courts, both trial and appellate. The United States clearly called upon this Court to exercise its ancillary jurisdiction; it did not, and it does not now, purport to invoke original jurisdiction of any sort.

"An ancillary suit in equity is one growing out of a prior suit in the same court, dependent upon and instituted for the purpose of obtaining and enforcing the fruits of the judgment in the former suit." Caspers v. Watson, 132 F. 2nd 614, 615 (CA 7, 1942), cert. denied, 319 U.S. 757, 87 L. Ed. 1709, 63 S. Ct. 1176; Local Loan Co. v. Hunt, 292 U.S. 234, 239 (1934), 78 L. Ed. 1230, 54 S. Ct. 695; Root v. Woolworth, 150 U.S. 401 (1893), 37 L. Ed. 1123, 14 S. Ct. 136.

"Special statutory authority is not necessary to authorize a federal court to exercise its ancillary jurisdiction." Carter v. Powell, 104 F. 2nd 428, 430 (C.A.5, 1939), cert. denied, 308 U.S. 611, 84 L. Ed. 511, 60 S. Ct. 179.

Moreover, in the exercise of ancillary jurisdiction, courts may proceed without regard to the statutory limits of jurisdiction which would restrict the court were the proceedings original. Local Loan Co. v. Hunt, 292 U.S. 234, 239 (1934), 78 L. Ed. 1230, 54 S. Ct. 695; Krippendorf v. Hyde, 110 U.S. 276,(1884), 28 L. Ed. 145, 4 S. Ct. 27; Dewey v. West Fairmont Gas Coal Co., 123 U.S. 329, 333 (1887), 31 L. Ed. 179, 8 S. Ct. 148; Caspers v. Watson, 132 F. 2nd 614 (C.A.7, 1942), cert. denied, 319 U.S. 757; Glens Falls Indemnity

Co. v. United States, 229 F. 2nd 370 (C.A.9, 1955); Walmac Co. v. Isaacs, 220 F. 2nd 108, 113-114 (C.A.1, 1954).

And ancillary jurisdiction may be exercised by an appellate court in aid of its appellate jurisdiction just as it may be exercised by a trial court in aid of its jurisdiction. National Brake Co. v. Christensen, 254 U.S. 425 (1921), 65 L. Ed. 341, 41 S. Ct. 154; Toledo Scale Co. v. Computing Scale Co., 281 Fed. 488 (C.A.7, 1922), affirmed, 261 U.S. 399 (1923), 67 L. Ed. 719, 43 S. Ct. 458.

D. Issuance of the Mandate Does Not Exhaust the Power of the Court of Appeals.

The State argues, however, that the "enforcement of a final decree remanded to a District Court lies in the hands of that Court." (Memorandum, p. 20). Presumably it follows that the issuance of the mandate exhausts the power of the Court of Appeals to act with respect to the case.

We agree that the jurisdiction of courts of appeals is appellate rather than original. We agree also that the appellate function is exercised by a review of the record made in the district court, followed by a mandate to that court, and that normally the appellate function does not involve the taking of evidence or the addition of parties at the appellate level. But the question here concerns not generalities about the usual functions of an appellate tribunal; what is involved is the power of a federal court of appeals to protect and make effective its appellate jurisdiction in appropriate cases by ancillary proceedings.

It is clear that proceedings [illegible]

court of appeals which involve something other than review of the record made in the district court. LaBuy v. Howes Leather Co., 352 U.S. 249 (1957), 1 L. Ed. 290, 77 S. Ct. 309. Such proceedings may be had either prior to the attachment of appellate jurisdiction -- as in the LaBuy case -- or they may occur after the mandate has issued to the district court. See discussion, infra. The test in each case is whether the proceeding involved can properly be said to be ancillary to the appellate function of the court and to a case to which the jurisdiction of the court has attached or may attach in the future.

In Toledo Scale Co. v. Computing Scale Company, 261 U.S. 399 (1923), 67 L. Ed. 719, 43 S. Ct. 458, the Supreme Court upheld an order of the Court of Appeals for the Seventh Circuit directing the District Court to issue an injunction the purpose of which was to protect a judgment of the Court of Appeals. Previously, the Court of Appeals had upheld the validity of a patent held by the Computing Scale Company and the case was sent back to the District Court for an accounting. The accounting resulted in a decree for profits of more than $400,000 in favor of the Computing Scale Company. The Court of Appeals affirmed the decree but stayed its mandate to permit an application to the Supreme Court for writ of certiorari. On the day the Court of Appeals took this action, the Toledo Scale Company brought suit in the United States District Court for the Northern District of Ohio and again challenged the validity of the Computing Scale Company's patent. The Computing Scale Company then directly petitioned the Court of Appeals for the Seventh Circuit requesting

Toledo Scale Company from continuing with its suit in the Ohio District Court. A response was filed in the Court of Appeals by the Toledo Scale Company. The Court of Appeals, on the basis of the pleadings filed and argument heard, which raised issues never presented to the District Court, concluded that the petition of the Computing Scale Company was "ancillary to the original jurisdiction invoked" and ordered the issuance of the injunction prayed for. 281 Fed. 488 (C.A. 7, 1922). The Supreme Court affirmed, holding that the injunction was "within the power of the Circuit Court of Appeals" (261 U.S. 399, at 426, 67 L. Ed. 719, 43 S. Ct. 458), relying upon the all-writs-statute (now 28 U.S.C. 1651).

To be sure, in Toledo Scale, as the State correctly points out, the mandate of the Court of Appeals to the District Court had not yet gone down at the time the appellate court acted to protect its judgment. But that this is irrelevant is shown by subsequent decisions. In United States v. United States District Court, 334 U.S. 258 (1948), 92 L. Ed. 1351, 68 S. Ct. 1035, the very question at issue was whether the Court of Appeals could take action to compel compliance with a mandate which had already issued. Said the Supreme Court (334 U.S. 258, at 264, 92 L. Ed. 1351, 68 S. Ct. 1035):

> It is, indeed, a high function of mandamus to keep a lower tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court [citing case]. That function may be as important in protecting a past exercise of jurisdiction

as in safeguarding a present or future one (emphasis added).[1/]

See also, United States v. Smith, 331 U.S. 469 (1947), 91 L. Ed. 1610, 67 S. Ct. 1330, where the Supreme Court held that the Court of Appeals had power to issue mandamus

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1/ That there may be circumstances in which jurisdiction remains in the court of appeals for certain purposes even after issuance of the mandate is reflected also in cases such as Individual Drinking Cup Co. v. Public Service Cup Co., 262 Fed. 410 (C.A. 2, 1919); S. S. Kresge Co. v. Winget Kickernick Co., 102 F. 2nd 740, 742 (C.A. 8, 1939), and Epstein v. Goldstein, 110 F. 2nd 747 (C.A. 2, 1940), where appellate courts construed or clarified their mandates without recalling them. See also In re Gamewell Fire-Alarm Tel. Co., 73 Fed. Rep. 908 (C.A. 1, 1896), where a petition was filed with the Court of Appeals requesting leave to reopen a case in the District Court because of newly discovered evidence. The petition was filed with the Court of Appeals after that court had affirmed the decree of the lower court and had issued its mandate. Nevertheless, the Court of Appeals entertained the petition and held (73 Fed. Rep. at 911):

> We have no doubt that an application may be made, as in this case, after the judgment, after the issue of the mandate, and after the close of the term at which the judgment was entered, subject to certain limitations as to time arising out of the equitable doctrine of laches, and other possible exceptional limitations.

Subsequently, the decision in the Gamewell case was approved by the Supreme Court. In National Brake Co. v. Christensen, 254 U.S. 425, 431 (1921), 65 L. Ed. 341, 41 S. Ct. 154, that Court stated:

> That leave to file a supplemental petition in the nature of a bill of review may be granted after the judgment of the appellate court, and after the going down of the mandate at the close of the term at which judgment was rendered, was held in In re Gamewell Co., 73 Fed. Rep. 908, in a carefully considered opinion rendered by the Circuit Court of Appeals for the First Circuit, reciting the previous consideration of the question in cases in this Court. We think these cases settle the proper practice in applications of this nature.

Accord: Brown v. Brake-Testing Equipment Corporation, 50 F. 2nd 380 (C.A. 9, 1931). See also Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575 (1946), 90 L. Ed. 1447, 66 S. Ct. 1176, where the Court of

and prohibition to compel vacation of a District Court order granting a new trial after affirmance of the conviction by the Court of Appeals. And see, In re Chicago R.I. & P.R. Co., 162 F. 2nd 257 (C.A. 7, 1947), cert. denied, 332 U.S. 793 (1947), 92 L. Ed. 374, 68 S. Ct. 21.

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1 / (Cont.)

Appeals for the Third Circuit permitted inquiry into the validity of a judgment that had been rendered many years previously. There, a decree was entered sustaining a patent of the Universal Oil Products Company (6 F. Supp. 763). That decree was affirmed by the court of appeals (78 F. 2nd 991) and certiorari was denied by the Supreme Court (296 U.S. 626 (1935), 80 L. Ed. 445, 56 S. Ct. 149), but its validity was challenged before the Court of Appeals in subsequent proceedings in related cases. The Court of Appeals thereupon caused an investigation to be conducted of the earlier decree and, at the conclusion of the investigation and following a report of a master, vacated the earlier decree and ordered the cause reargued. The Supreme Court affirmed the power of the Court of Appeals to act as it did, noting that (328 U.S. 575, at 580, 90 L. Ed. 1447, 66 S. Ct. 1176): "the inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question."

B. The Court Of Appeals May Act By Order Directly Upon Litigants

The State would further argue, however, that the decisions discussed above show merely that an appellate court may direct the District Court to take steps to protect the past, present, or future jurisdiction of the Court of Appeals, but that the appellate tribunal may not act to protect its jurisdiction by proceeding directly against litigants. To issue direct orders, as distinguished from orders operating through the District Court -- the argument goes -- is an exercise of original jurisdiction not vested in a court of appeals.

There is no good reason for assuming that, in the protection of its own orders and its own jurisdiction, a court of appeals is as limited as the State would have it. It is "fundamental that a court of equity has the inherent power to issue such orders and injunctions as may be necessary to prevent the defeat or impairment of its jurisdiction." In re Quick Charge Inc., 69 F. Supp. 961, 969, (W.D. Okl. 1947). The power to render a judgment includes the power to enforce that judgment by appropriate process. United States v. King, 74 F. Rep. 493 (C.C. E.D. Mo., 1896)

In Sawyer v. Dollar, 190 F. 2d 623 (C.A.D.C. 1951), vacated as moot, 344 U.S. 806, 73 S. Ct. 7, 97 L.Ed. 628 (1952), the Court of Appeals held that it had power to enforce, by its own processes, and by way of a civil contempt proceeding, a District Court order entered by its direction in haec verba. The Court said (190 F. 2d at 634, 642):

This court, having directed the United States District Court for the District of Columbia to enter a judgment on mandate in terms prescribed by it, has the power to punish for contempt those who disobey or resist the order or mandate so entered by the District Court. Merrimack River Sav. Bank v. City of Clay Center, 1911, 219 U.S. 527, 31 S. Ct. 295, 55 L. Ed. 320; Toledo Scale Co. v. Computing Scale Co., 1923, 261 U.S. 399, 43 S. Ct. 458, 67 L. Ed. 719.

* * * * *

Toledo Scale Co. v. Computing Scale Co. held that when a District Court enters an order by direction of a Circuit Court of Appeals, and that order is disobeyed, the Circuit Court of Appeals has power to punish summarily for the disobedience. In that case the order of the District Court was in the words of the Circuit Court of Appeals, as in the case now before us. And the punishment there was in civil contempt, as in the order now being entered in the present case. We are of the opinion that the decision in Toledo Scale Co. v. Computing Scale Co. is not only "good law" but is a binding authority upon the point. If it is not the law, Courts of Appeals are impotent

in respect to decrees which they formulate and direct a District Court to enter.[2]

In addition to pointing out correctly that the decision in Sawyer was vacated by the Supreme Court because it had become mooted,[3] the State objects to the Sawyer case on two grounds: (1) the Court of Appeals there enforced its previous orders not by an injunction but by a contempt proceeding, and (2) no additional parties were involved. We submit that these distinctions are of no significance.

2/ And see Merrimack River Savings Bank v. Clay Center, 219 U.S. 527, 31 S.Ct. 295, 55 L. Ed. 320 (1911) where the Supreme Court held that, irrespective of the issuance of an injunction by a lower federal court, the wilful removal beyond the reach of the lower court of the subject matter of the litigation or its destruction, pending an appeal, is a contempt of the appellate jurisdiction of the Supreme Court. A fortiori, if the lower court has issued an injunction at the direction of an appellate court, violation of that injunction would vest in the appellate court jurisdiction to take whatever action necessary to protect its judgment.

3/ Whatever may be the effect of a vacation on the ground of mootness insofar as the lower courts in the District of Columbia are concerned, the opinion in the case is as persuasive here as this Court deems it to be.

F. A Court of Appeals May Issue Injunctions in Aid of its Jurisdiction

Courts of Appeals traditionally issue injunctions in the nature of stays to preserve the status quo pending appeal. Beyond that, however, like district courts, they can issue injunctions which are ancillary to the main proceeding and necessary to preserve and effectuate the jurisdiction of the court.

As the Supreme Court explicitly stated in Toledo Scales, supra (261 U.S. at 426, 43 S. Ct., at 465, 67 L. Ed., at 730):

> Under §262 of the Judicial Code, [the 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 * * *.

In National Labor Relations Board v. Underwood Machinery Co., 198 F.2d 93 (C.A. 1, 1952), the Court of Appeals for the First Circuit had entered a decree enforcing an order of the National Labor Relations Board requiring the payment of back pay by an employer to an employee. The Board then petitioned the Court of Appeals to restrain a creditor of the employee from instituting a state court proceeding to carry into effect attachments of part of the back pay, which would have delayed compliance with the Court of Appeals decree. Although the Court of Appeals, in the exercise of its discretion, decided not to grant the relief requested, it concluded that (198 F.2d at 95):

> We have no doubt of the ancillary jurisdiction of this court, under 28 USC §1651, to entertain the present petition of the Board for a restraining order in effectuation of our decree entered in the main proceeding * * *.

Chief Judge Magruder, dissenting, would have granted the relief requested by the Board in the exercise of the court's ancillary jurisdiction under 28 U.S.C. 1651 (198 F.2d at 96).

Judge Magruder relied upon National Labor Relations Board v. Sunshine Mining Co., 125 F.2d 757 (C.A. 9, 1942). There the Court of Appeals had entered a decree enforcing a back pay order against an employee. Subsequently, on petition of the Board, the Court of Appeals granted an injunction restraining estranged wives and creditors of the employees from maintaining state court actions seeking to attach the back pay.

These decisions indicate that appellate courts no more than district courts are limited in their choice of means of protecting their orders. Injunction, just like mandamus or contempt, is merely a means by which the court exercises its ancillary power to protect its general jurisdiction. As we have demonstrated, the courts of appeals possess the power in an ancillary proceeding to effectuate their appellate jurisdiction. The choice of means obviously depends upon the circumstances.

Nor is it an objection to an ancillary injunctive proceeding before the court of appeals that the proceeding involves the filing of pleadings, the appearance of witnesses, the introduction of evidence and the determination of factual matters not raised in the court below. Although the requirement for such proceedings is less common in an appellate court than in a court of first instance, as we have shown, there is every reason why the two types of courts are parallel in their need for ancillary jurisdiction to protect

their orders and parallel in their power to entertain such proceedings.

In Toledo Scales, supra, the petition filed in the Court of Appeals raised factual issues. Consequently, an answer was filed and a hearing had. See Toledo Scale Co. v. Computing Scale Co., 281 Fed. 488 (C.A. 7, 1922). As noted, the Supreme Court affirmed the judgment rendered by the Court of Appeals as a result of its hearing. Similarly, in In re Door, 195 F. 2d 766 (C.A.D.C., 1952), testimony was offered and cross-examination conducted in a contempt proceeding before the Court of Appeals for the District of Columbia. See also, United States v. Lynd, No. 19576 (C.A. 5, 1962). Cf. United States v. Shipp, 214 U.S. 386, 29 S.Ct. 637, 53 L. Ed. 1041 (1909), and Universal Oil Products Company v. Root Refining Company, 328 U.S. 575, 66 S. Ct. 1176, 90 L. Ed. 1447 (1946), where appellate courts appointed masters to take evidence which the courts then considered and evaluated.

In short, it is clear that, even though a court of appeals would have no jurisdiction to entertain an application for an injunction as an original matter, it is not so limited when it acts in an ancillary proceeding to protect its appellate jurisdiction.

This Court Has Jurisdiction of the Defendants Named in the Petition

By its very nature an ancillary proceeding will often raise factual issues not embraced within the original litigation. Whether the ancillary proceeding is in a district court or a court of appeals, its disposition may require the subpoenaing of witnesses, the receipt of evidence, findings of fact and affirmative relief. In its Memorandum the State seemingly concedes that a district court may, in such ancillary proceeding, avail itself of all process and procedures available in the primary litigation. The State urges, however, that a court of appeals, in exercising its ancillary jurisdiction, is limited in certain regards to the procedures ordinarily attendant upon the appellate process itself. The court of appeals, while it can subpoena witnesses, hear testimony, and receive exhibits, cannot, says the State, summon new parties to appear before the court even though such parties may be necessary for full and effective relief in connection with the court's ancillary jurisdiction.

The general rule that new parties may not be added to a lawsuit at the appellate level is distinguishable from the present situation. The distinction is that between the appellate process itself and proceedings ancillary to that process. An appellate court is by its very nature a court of "review." It reviews what the district court has done and corrects errors. In properly performing this function it must necessarily limit its consideration

to the record upon which the district court based its decision. It must also, of necessity, limit its judgment to the parties who were before the district court. The issues, the evidence, and the parties are the same. In contrast, an ancillary proceeding cannot be so limited. An ancillary proceeding by its very nature involves issues, evidence, and very often parties, which are extrinsic to the primary proceeding. To inhibit the addition of parties would defeat the very purpose of the proceeding and would ignore its "ancillary" nature. The State in its Memorandum merely points out the obvious when it notes that process and procedures appropriate for ancillary proceedings are more akin to the customary procedures in a district court than they are to the procedures followed in appellate courts. To deduce from this a general rule of law accords neither with reason nor decided cases.

Abundant authority may be found for the proposition that new parties may be added in connection with an ancillary proceeding. The rule has been well stated by the Court of Appeals for the Seventh Circuit in Natural Gas Pipeline Co. v. Federal Power Commission, 128 F.2d 481, 484 (C.A. 7, 1942) as follows:

> "Where a court has jurisdiction of a cause of action and the parties, it has jurisdiction also of supplemental proceedings which are a continuation of or incidental to and ancillary to the former suit even though the court as a federal tribunal might not have had jurisdiction of the parties involved in the ancillary proceeding if it were an original action. In other words, inasmuch as such jurisdiction is ancillary, a federal court is not precluded from exercising it over persons not

> parties to the judgment sought to be enforced. 25 C.J. 696 and 697; 21 C.J.S., Courts, §88, page 136. [Emphasis added.]

In the Natural Gas Pipeline Company case, supra, the court relied on Labette County Commissioners v. Moulton, 112 U.S. 217, 5 S.Ct. 108, 28 L.E. 698 (1884). In that case, a court had entered judgment against a township upon bonds issued by the county commissioners in behalf of the township. Subsequently, the plaintiff sought a writ of mandamus to compel the commissioners to assess and collect a tax to satisfy the judgment. It was contended that the court, if it should act upon such a petition, would be exercising original jurisdiction which, under the particular facts, it did not have. But the Supreme Court declined to accept this reasoning, saying (112 U.S. at 221):

> It is quite true, as it is familiar, that there is no original jurisdiction in the circuit courts in mandamus, and that the writ issues out of them only in aid of a jurisdiction previously acquired, and is justified in such cases as the present as the only means of executing their judgments. But it does not follow because the jurisdiction in mandamus is ancillary merely that it cannot be exercised over persons not parties to the judgment sought to be enforced. [Emphasis added.]

See also Lewis v. United Air Lines Transport Corporation, 29 F. Supp. 112, 115 (D. Conn., 1939) where Judge Hincks wrote:

> It must be noted that the scope of ancillary jurisdiction depends only upon the subject-matter of supplemental proceeding. The number, identity or relationship of the parties affected by the supplemental proceedings have nothing to do with the existence of ancillary jurisdiction over the subject-matter. Thus it has long been established that ancillary

> jurisdiction over the subject-matter may obtain even though the supplemental proceeding brings in new parties.

And Judge Hincks also said (29 F. Supp. at 116):

> ... the existence of ancillary jurisdiction depends wholly upon a relationship of subject-matter as distinguished from the relationship of the parties. * * * If, then, the test is the need of relief to the party bringing the supplemental proceeding, it is immaterial whether the relief sought is directed against a party or against a stranger to the principal action.

Ancillary jurisdiction extends to additional parties, even though the court would lack jurisdiction over such parties were the ancillary proceeding original in nature. McComb v. McCormack, 159 F.2d 219, 226 (C.A. 5, 1947) (cross-claim); United Artists Corp. v. Masterpiece Productions, 221 F.2d 213 (C.A. 2, 1955) (compulsory counterclaim); Vaughn v. Terminal Transport Co., 162 F. Supp. 647 (E.D. Tenn., 1957) (third-party action).

In the exercise of their ancillary jurisdiction to prevent obstruction to the carrying out of school desegregation decrees, the district courts have regularly added as parties defendant persons having no legal relationship to the original litigants. Thus in Faubus v. United States, supra, the commander of the Arkansas National Guard was added as a defendant and was enjoined. At various stages in the New Orleans desegregation case the State, the governor, the secretary of state, various legislators, the sheriffs and district attorneys of all parishes in the state, the mayors and chiefs of police of all cities, and several commercial banking houses were added as parties in the exercise of the court's ancillary jurisdiction.

Bush v. Orleans Parish School Board, supra. As already noted, the district court in the Clinton, Tennessee, school case added John Kasper and a number of local townspeople as defendants. Bullock v. United States, supra.

A commonly exercised type of ancillary jurisdiction is that of the contempt power. The case of Sawyer v. Dollar, supra, involving contempt proceedings in a court of appeals for violation of a district court order after the mandate on appeal had gone down, has already been discussed. It is interesting to note at this point, however, that the respondents in the contempt proceeding included persons who had not been parties in either the district court or, on the appeal, in the court of appeals. Charles Sawyer, the Secretary of Commerce, had been the sole defendant in the district court. The order entered by the district court on remand was directed against Mr. Sawyer personally. Nonetheless, when other persons, including several attorneys connected with the Department of Justice, acted with Sawyer in violating the court's order, they were all cited for contempt by the Court of Appeals. Clearly, the Court of Appeals could not have added them as parties appellant or appellee while the appeal was pending. They could have been added as litigants to the primary litigation, if they could have been added at all, only at the district court level. Nonetheless, the court of appeals in the ancillary proceeding assumed jurisdiction of their persons for the purpose of compelling compliance with the district court order.

Smith v. American Asiatic Underwriters, 134 F.2d 233 (C.A. 9, 1943); Wenborne-Karpen Dryer Co. v. Cutler Dry Kiln Co., 292 Fed. 861 (C.A. 2, 1923); and Holland v. Board of Public Instruction, 258 F.2d 730 (C.A. 5, 1958), which the State cites, are inapposite, for they deal solely with the propriety of joining additional parties in appellate courts to litigate the merits of the controversy decided in the district court.[4] The situation is obviously different where, as here, the merits of the controversy (i.e., Meredith's right to admission to the University of Mississippi) have been foreclosed ever since this Court's decree of June 25, 1962, and the proceedings in this Court are ancillary only, i.e., they are concerned solely with enforcement of this Court's adjudication of the merits.[5]

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[4] With respect to the Smith and Wenborne-Karpen cases, supra, see also the earlier opinions dealing with the merits, 127 F.2d 754 (C.A. 9, 1942), and 290 Fed. 625 (C.A. 2, 1923), respectively.

[5] The State argues (Memorandum, pp. 4-13) that since it and the state officers (other than the original defendants) were not parties prior to September 25, 1962, they are not bound by any antecedent orders. As we show supra, the power of the court to conduct ancillary proceedings necessarily includes the power to add parties. In any event, the State's argument deals only with the question of whether contempt proceedings can be had against persons not parties to the injunction claimed to be violated; it does not deal with what is here involved: the power of the court to entertain an injunction action against additional persons in the exercise of ancillary jurisdiction. Finally, on this point, it may well be that the defendants added on September 25 are in privity with the previous defendants and thus properly added even under the narrowest possible view. The Meredith suit has been against officials who were represented by the state attorney general. That suit essentially sought relief against state action, and the interference

(Footnote continued on next page)

5 / (Footnote continued from preceding page) alleged in our petition, although involving other officials, is also state action. At least until most recently, the original defendants were acting for the state, and, in a sense, for the state officials who were added on September 25. In that posture, it is reasonable to hold that the new defendants and the old defendants are sufficiently in privity even for contempt purposes -- certainly for additional relief purposes.

III

The United States Has Standing to Assert the Claim Set Forth in its Petition

The State of Mississippi contends further (Memorandum, pp. 36-41) that the United States had no standing to seek from this Court the issuance of the Temporary Restraining Order which prohibited the Governor, Lieutenant Governor, other state officials, and the State itself, from interfering with its orders and mandate of July 27-28, 1962. The United States has sought and obtained just such orders as the one here questioned in a number of similar cases.

This Court on September 18, 1962, granted the United States authority to appear as amicus curiae "in all proceedings in this action before this Court * * * [and the District Court] with the right to submit pleadings, evidence, arguments and briefs and to initiate such further proceedings, including proceedings for injunctive relief and proceedings for contempt of court, as may be appropriate in order to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States."

As the State points out in its Memorandum, pp. 36, this order was something more than the ordinary authorization to appear as amicus curiae. It was, in effect, as the State concedes, permission for the Government to appear in the case in the status of a party to the proceedings. There is no doubt that this Court's order is valid.

In Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La. 1961), affirmed, 368 U.S. 11 (1961), 7 L.Ed.2d 75, 82 S.Ct. 119, and Hall v. St. Helena Parish School Board, 197 F.Supp. 649 (E.D.

La. 1961), affirmed 368 U.S. 515, 7 L.Ed.2d 521, 82 S.Ct. 529, the United States was granted the authority to, and did, file pleadings and seek injunctions on its own motion. See also, Allen v. State Bd. of Educ., No. 2106 (E.D. La.); Angel v. State Bd. of Educ., No. 1658 (E.D. La.); Davis v. East Baton Rouge Parish School Bd., No. 1662 (E.D. La.), in all of which the United States entered as amicus on March 17, 1961, and sought injunctions on its own motion. Similarly, the United States, joined by the original plaintiffs, filed pleadings against new defendants in Faubus v. United States, 254 F.2d 787 (C.A. 8, 1957), cert. denied, 358 U.S. 829 (1958), 79 S.Ct. 49; Bush v. Orleans Parish School Bd., 188 F. Supp. 916 (E.D. La. 1960), affirmed, 365 U.S. 569, 5 L.Ed.2d 806, 81 S Ct. 754 (1961); and Bush v. Orleans Parish School Bd., 190 F.Supp. 861 (E.D. La. 1960), affirmed sub nom. New Orleans v. Bush, 366 U.S. 212, 6 L.Ed.2d 239, 81 S.Ct. 1091 (1961).

There can be, at this late date, no doubt of this Court's power to authorize the United States to institute injunctive proceedings, as it has done here. The State's objection, then, is wholly unsubstantial. Furthermore, the United States having standing to obtain the temporary restraining order, it necessarily has standing to vindicate that order by proceedings in civil contempt.

IV

The Governor, Lieutenant Governor and Other Officials of the State of Mississippi Are Proper Defendants

The State contends that it is the only real party in interest in this proceeding and that the Governor, Lieutenant Governor and the other officials

of Mississippi were improperly joined as defendants. In effect, the State is arguing that the Mississippi officials who have been made parties to this action are without responsibility for any of the acts they are alleged to have performed. This contention is totally erroneous, both procedurally and substantively.

A. Procedurally.

Rule 17 of the Federal Rules of Civil Procedure is the source of the "real party in interest" requirement of federal court litigation. The Rule, however, applies only to the capacity of the plaintiff, and not the defendant. It specifically provides that "every action shall be prosecuted in the name of the real party in interest" (emphasis added). Nothing in the Rule requires that the person sued be the real party in interest. Other provisions of the federal rules are designed to protect improperly joined defendants or persons with interests opposed to the plaintiff who have not been made parties to the litigation. Thus, Rule 24 permits persons to intervene in law suits under certain circumstances. This Rule, however, does not permit the intervenor to displace another party to the action merely by purporting to accept responsibility. Rather, where a party alleges that he has been improperly joined as a defendant, he must test this contention by moving to dismiss the suit as against himself. Here the State officials who have been joined as defendants have not moved to dismiss, and this Court has already held that these officials must personally make such a motion in order to challenge their joinder as defendants. It is clear, therefore, that the State of Mississippi has no basis for contesting the joinder

of the defendant state officials on the ground that they are not the real parties in interest.

B. Substantively.

More fundamentally, however, the State is in error when it contends that the defendant officials are not responsible for the acts they are alleged to have performed since they acted either pursuant to state law or under directions from a superior official. That individual governmental officials are responsible for their unconstitutional acts notwithstanding the fact that they are carrying out what state law commands of them is now too well settled to be questioned. Thus, in In re Ayers, 123 U.S. 443, 507 (1887), 31 L.Ed. 216, 8 S.Ct. 164, the Supreme Court made clear the nature of a state official's responsibility. The Court said:

> The Government of the United States, in the enforcement of its laws, deals with all persons within its territorial jurisdiction, as individuals owing obedience to its authority. The penalties of disobedience may be visited upon them, without regard to the character in which they assume to act, or the nature of the exemption they may plead in justification. Nothing can be interposed between the individual and the obligation he owes to the Constitution and laws of the United States which can shield or defend him from their just authority, and the extent and limits of that authority the Government of the United States, by means of its judicial power, interprets and applies for itself. If, therefore, an individual, acting under the assumed authority of a State, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. (emphasis added.)

While the quoted statement in Ayers was dictum it has since been accepted by the Supreme Court and by

See Ex parte Young, 209 U.S. 123, 159-160 (1908) 52 L.Ed. 714, 28 S.Ct. 441; Sterling v. Constantin, 287 U.S. 378, 393 (1932), 77 L.Ed. 375, 53 S.Ct. 190; United States v. Alabama, 267 F.2d 808, 811 (C.A. 5, 1959).

Nor can governmental officials excuse their disobedience of the law by claiming that they acted pursuant to the directives of a superior. Nelson v. Steiner, 279 F.2d 944 (C.A. 7, 1960), involved civil contempt proceedings against Justice Department and Internal Revenue officers. In rejecting a defense that the defendants had acted under instructions from a superior officer, the Court said (279 F.2d at 948):

> That the action of defendants was taken pursuant to instructions of superior authority is no defense. The executive branch of government has no right to treat with impunity the valid orders of the judicial branch. * * * And the "greater the power that defies law the less tolerant can this Court be of defiance" . . . .

See also Sawyer v. Dollar, 190 F.2d 623, 640, supra, where the Court said:

> [T]he directives of superior executive officials cannot nullify the court decree. . . .

Cf. United States v. Mine Workers, 330 U.S. 258, 306 91 L.Ed. 884, 67 S.Ct. 677 (1947).

CONCLUSION

Wherefore, it is respectfully requested that the motion of the State to dissolve the temporary restraining order be denied.

Respectfully submitted,

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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.

ARGUMENT

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. Consequentl 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.

It is curious 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 dimsiss 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, 355 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 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 T. 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