IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
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EDWARD W. WADSWORTH
CLERK

JAMES H. MEREDITH,

Appellant,

v.

CHARLES DICKSON FAIR, et al.,

Appellees

No. 19475

UNITED STATES OF AMERICA,

Amicus Curiae and Petitioner,

v.

STATE OF MISSISSIPPI, et al.,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION OF THE UNITED STATES, AS AMICUS CURIAE, FOR TEMPORARY RESTRAINING ORDER

I.

The courts of the United States have inherent power to enjoin interference with and obstruction to the carrying out of their orders.

Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La.), affirmed 367 U.S. 908.

Bush v. Orleans Parish School Board, 194 F. Supp. 182 (E.D. La.), affirmed 368 U.S. 11.

Bush v. Orleans Parish School Board, 190 F. Supp. 861 (E.D. La.), affirmed 365 U.S. 569, and affirmed sub nom New Orleans v. Bush, 366 U.S. 861.

Bush v. Orleans Parish School Board, 188 F. Supp. 916 (E.D. La.), affirmed 365 U.S. 569.

Faubus v. United States, 254 F. 2d 797 (C.A. 8), cert. denied 358 U.S. 829.

United States v. Louisiana, 180 F. Supp. 915 (E.D. La), stay denied 364 U.S. 500.

II.

Relief can properly be granted on the application of the United States.

Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La.), affirmed 367 U.S. 908.

Faubus v. United States, 254 F. 2d 797 (C.A. 8), cert. denied 358 U.S. 829.

III.

The arrest of persons on account of their exercise of their right to attend schools free from racial discrimination and pursuant to court order constitutes an obstruction to the court order.

Bush v. Orleans Parish School Board, 194 F. Supp. 182 (E.D. La.), affirmed 368 U.S. 11.

IV.

State court injunctions which interfere with federal rights exercised pursuant to a federal court decree are void.

Thomason v. Cooper, 254 F. 2d 808 (C.A. 8).

V.

The doctrine of "interposition" is of no legal effect and can provide no justification for obstruction of or defiance of orders of courts of the United States.

Aaron v. Cooper, 358 U.S. 1.

Bush v. Orleans Parish School Board, 188 F. Supp. 916 (E.D. La.).

Respectfully submitted,

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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.

INTRODUCTION

One factor in this case which affects the use of injunctive procedures is that this suit is an original proceeding filed in the District Court solely for the purpose of obtaining an injunction. It is not a case involving title to property, payment of damages, or enforcement of a contract as to which there may arise the use of injunctive process ancillary to the main relief sought. The sole object of this original suit is an injunction. The Plaintiff had the choice of who should be joined as original parties and chose to join only members of the Board of Trustees of State Institutions of Higher Learning of the State of Mississippi and certain officers of that Institution. The Plaintiff chose not to join the Governor, Lieutenant Governor, Attorney General of the State of Mississippi or any other persons nor was there an attempt to join the State of Mississippi as a sovereign entity.

It is quite interesting to take a "long look" at the procedure followed in this case. The District Court heard the case fully and entered a judgment adverse to the Plaintiff. This was appealed to this Court and

reversed and the mandate sent down on July 27, 1962, followed by an additional mandate on July 28. This particular element will be discussed later in this brief. On September 13, 1962, the District Court issued a permanent injunction in accordance with the mandate. The Court is familiar with the other proceedings herein.

The Plaintiff decided, in cooperation with the Attorney General of the United States, that he would not join the Governor, Lieutenant Governor, Attorney General or other officials of the State of Mississippi and numerous other persons as parties in the District Court where the matter was pending on the permanent injunction. The Plaintiff and "amicus curiae" chose to attempt to join these new parties in the Court of Appeals from which the mandate had been issued and in which final judgment had been entered. The relief sought against these parties was actually and in effect the identical relief sought in the original bill of complaint upon which due process had been served on the original parties and they had been afforded an opportunity to be heard. They also have attempted to join the State of Mississippi as a new party to this suit at the appellate level.

By this procedure, which we will not designate as legal maneuvering, an attempt is being made to add new parties, to obtain the full substantive relief prayed in the original bill and the only relief prayed therein, at a level where there is no right to have an original hearing, where rules of procedure have not been set up for the service of process upon parties or for the filing of pleadings, the giving of notices and the taking of testimony and all those things which constitute the attributes of a court of original jurisdiction. Every act and thing done, every pleading filed and every procedure now pending in this case at the appellate level before this appellate court could and should have been had and done in the court of original jurisdiction, being the district court below. Why there was an attempt by the Plaintiff, in cooperation with the Attorney General of the United States, to prevent the court of original jurisdiction from carrying on in due, regular and proper

course of procedure is somewhat obscure. In fact, the jurisdiction of the district court was invoked on a citation for contempt of several of the original defendants. The action of the district court upon such citation, while not appealed to this court, has been vindicated by the order entered by this court finding such persons not to be in contempt.

Since all of the original parties have complied with the orders of this court and have been discharged by order entered by this court itself, we have the anomaly of a proceeding being carried on by the Plaintiff, joined by the United States as "amicus curiae", against new parties attempted to be brought in by new process against whom the identical relief prayed in the original complaint is sought under the guise of a temporary restraining order sought to be converted into a preliminary injunction, and thereafter to a permanent injunction. Thus the identical relief sought in the court of original jurisdiction by original and appropriate proceedings is now being sought in the Court of Appeals as if it were a court of original jurisdiction by new parties-plaintiff, against new parties-defendant.

As is shown by the record, the Plaintiff in this cause was and has been during the pendency thereof a student in one of the colleges of the State of Mississippi maintained at the expense of the State for its citizens, i.e. Jackson College. That education has been and was continuing during the pendency of this case and the only issue is whether he should be transferred to another educational institution, i.e. the University of Mississippi. Any due and proper time consumed in reaching a judicial determination in this case does not in any manner affect the education of this Mississippi student. The only question is, shall the State give this student his education in one institution or another? If we assume that the judgment of this court is affirmed, the only question as to time is how many semesters of his education is received at each of these state institutions.

The court is familiar with the number of hours and days which have elapsed since the Plaintiff and the "amicus curiae" have instituted a

proceeding against the State of Mississippi, the Governor, Lieutenant-Governor, Attorney General and other officials of the State and of the counties of Mississippi. This original proceeding has been filed at the appellate level in this Court seeking in fact and in effect the same relief sought by the Plaintiff in the court of original jurisdiction. It cannot be denied that this proceeding in all of its phases could have been filed in the court of original jurisdiction under the rules of civil procedure adopted for its use and in due and proper course, without any greater delay in any phase of the matter than is required in this appellate court.

POINT I.

NEITHER THE STATE OF MISSISSIPPI, THE GOVERNOR OF THE STATE OF MISSISSIPPI, ITS LIEUTENANT GOVERNOR, ATTORNEY GENERAL NOR OTHER OFFICERS OR OTHER PERSONS NOW ATTEMPTED TO BE JOINED AS DEFENDANTS IN THIS APPELLATE COURT WERE PARTIES TO OR BOUND BY THE INJUNCTIONS OR INJUNCTIVE ORDERS GRANTED PRIOR TO SEPTEMBER 25, 1962.

Assuming the validity of the "injunctive order" entered by this Court on July 28, we direct the Court's attention to the portion thereof now relied upon by the Plaintiff and "amicus curiae":

> "Now therefore, the following injunctive order is issued:
>
> "O R D E R
>
> "Pending such time as the District Court has issued and enforced the orders herein required and until such time as there has been full and actual compliance in good faith with each and all of said orders by the actual admission of plaintiff-appellant to, and the continued attendance thereafter at the University of Mississippi on the same basis as other students who attend the University, the defendants, their servants, agents, employees, successors and assigns, and all persons acting in concert with them, as well as any and all persons having knowledge of the decree are expressly:"

On September 13, 1962, a permanent injunction was entered by the

District Court in accordance with a mandate of this Court entered on July 27 which contained the following language:

> "It is further ordered that the defendants, their servants, agents, employees, successors and assigns, and all persons acting in concert with them, are enjoined to admit the plaintiff, James Howard Meredith to the University of Mississippi upon his applications heretofore filed and they are enjoined from excluding the same James Howard Meredith from admission to continued attendance at the University of Mississippi or discriminating against him in any way whatsoever because of his race."

It seems to be the position of the Plaintiff and the "amicus curiae" that these provisions were sufficient to constitute due process of law to bind the Governor and the Lieutenant Governor as well as all the other new parties-defendant which have been attempted to be joined at the Appellate Court level. This position has long since been determined adversely to the plaintiff and the "amicus curiae" by the Supreme Court of the United States.

One of the leading cases is that of Chase National Bank v. City of Norwalk, Ohio, 291 U.S. 431, 78 L.ed. 895 (1933), in which the United States Supreme Court clearly pointed out that where a city was made defendant it was error to enjoin all persons to whom notice of the order should come. The Court said, p. 897, 898, 899:

> "* * * The decree enjoined the City, its officers, agents and employees, 'and all persons whomsoever to whom notice of this order shall come,' from destroying, or interfering with the continued operation by the Power Company of, the plant and distribution system; 'from taking any steps or action of any kind whatsoever to cause the enforcement or carrying out by the Sheriff of Huron County,

Ohio, . . . of the judgment of ouster;' and 'from applying to any of the courts of the State of Ohio for any writ, process or order of any kind whatever for the purpose of enforcing and carrying out said judgment of ouster.' * * *.

"Independently of the prohibition of Judicial Code, '265, the decree entered by the District Court was clearly erroneous in so far as it enjoined 'all persons to whom notice of the order of injunction 'should come from taking any steps or action of any kind to cause the enforcement of the ouster in the state court.' The City alone was named as defendant. No person other than the City was served with process. None came otherwise before the court. The prayer of the bill sought relief solely against the City and 'its officers, officials, agents, employees and representatives.' It is true that persons not technically agents or employees may be specifically enjoined from knowingly aiding a defendant in performing a prohibited act if their relation is that of associate or confederate. Since such persons are legally identified with the defendant and privy to his contempt, the provision merely makes explicit as to them that which the law already implies. See Re Lennon, 166 U.S. 548, 41 L.ed. 1110, 17 S.Ct. 658. But by extending the injunction to 'all persons to whom notice of the injunction should come,' the District Court assumed to make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law. See Alemite Mfg. Corp. v. Staff (CCA 2d) 42 F. (2d) 832. Under the clause inserted in the decree, officials of the State of Ohio might be proceaded against for contempt, if they should apply to the state court to enforce its judgment, although acting solely in the perform-

ance of their official duty. To subject them to such peril violates established principles of equity jurisdiction and procedure. Scott v. Donald, 165 U.S. 107, 117, 41 L. ed. 648, 654, 17 S.Ct. 262; Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 299, 62 L.ed. 260, 269, 38 S.Ct. 65, L.R.A. 1918C, 497, Ann.Cas. 1918B, 461. Those principles require that the clause be limited to confederates or associates of the defendant."

As stated above, the Plaintiff had chosen to limit his suit to the members of the Board of Trustees of Institutions of Higher Learning and certain officials of the University of Mississippi. Because of the above provisions of the "injunctive order" and the permanent injunction, he now says that every official in the State of Mississippi and apparently every person therein is bound by the decree and will be guilty of contempt if he does not conform thereto. This position is wholly untenable.

Rule 65(d), of the Federal Rules of Civil Procedure, Title 28 U.S.C.A. is as follows:

"Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; shall be binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

It is clear from this rule that only those persons "in active concert and participation with" the parties are bound by actual notice through "personal service or otherwise." This question has been before the Supreme

Court and the Court of Appeals many times. The record here not only fails to demonstrate that the Governor and Lieutenant Governor were in "active concert and participation with" the members of the Board of Trustees but that the opposite was true. The record in this cause shows a lack of concert and participation and actually adverse action on both sides has been fully demonstrated.

This Court by order entered on its minutes has found that all of the original defendants are not in contempt of this Court. Hence no concert of action has existed or could be found to exist between the original defendants and the new defendants.

In Regal Knitwear Co. v. National Labor Relations Board, 324 U.S. 9, 89 L. ed. 661, 666 (1944), the Supreme Court of the United States said:

> " * * * The courts, nevertheless, may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law. Chase Nat. Bank v. Norwalk, 291 U.S. 431, 436, 437, 78 L. Ed. 894, 898, 54 S.CT. 475; Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 299, 234, 62 L. ed. 260, 269, 38 S.Ct. 65, LRA 1918C 497, Ann. Cas. 1918B 461; Scott v. Donald, 165 U.S. 107, 117, 41 L. ed. 648, 655, 17 S.Ct. 262;Alemite Mfg. Corp. v. Staff (CCA2d) 42 F (2d) 832."

The Court further said at p. 667:

> "No one can be punished for contempt because of these words (successors or assigns) until after a judicial hearing, in which their operation could be determined on a concrete set of facts . . ."

One of the most complete discussions of the law rendering such broad provisions wholly ineffective is that by the Eighth Circuit Court of Appeals in the case of Kean v. Hurley, 179 F. 2d 888:

"A judgment or decree for injunction is usually in personam and as such binding upon the parties to the litigation and those who are represented by such parties or are in privity with them. Stated conversely, persons who are not parties to the injunction or in privity with them, and whose rights have not been adjudicated therein, are not bound by the decree and cannot be held liable for acts done contrary thereto even though the decree assumes to bind them. Chase National Bank v. City of Norwalk, 291 U.S. 431, 54 S.Ct. 475, 78 L.Ed. 894; Alemite Mfg. Corp. v. Staff, 2 Cir., 42 F. 2d 832; Regal Knitwear Co. v. N.L.R.B., 324 U.S. 9, 65 S.Ct. 478, 89 L.Ed. 661; Scott v. Donald, 165 US 107, 17 S.Ct. 262, 41 L.Ed. 648; LeTourneau Co. v. N.L.R.B., 5 Cir., 150 F. 2d 1012. The suit here had for its object a judgment against the person as distinguished from a judgment against the property. * * *

* * * *

"In Chase National Bank v. City of Norwalk, supra, the Supreme Court held that the decree from which the appeal was taken 'was clearly erroneous in so far as it enjoined "all persons to whom notice of the order of injunction should come from taking any steps or action of any kind to cause the enforcement of the ouster in the state court."'"

In Hitchman Coal & Coke Company v. Mitchell, 245 U.S. 229, 62 L.Ed. 260 (1917), at p. 269 the United States Supreme Court said:

"The final decree of the district court included an award of injunction against John Mitchell, W. B. Wilson, and Thomas Hughes, who, while named as defendants in the bill, were not served with process and entered no appearance except to object to the jurisdiction of the court over

them. Under the Federal practice the appearance to object did not bind these parties to submit to the jurisdiction on the overruling of the objection (Harkness v. Hyde, 98 U.S. 476, 479, 25 L.Ed. 237, 238; Southern P. Co. v. Denton, 146 U.S. 202, 206, 36 L.Ed. 942, 945, 13 Sup. Ct. Rep. 44; Mexican C. R. Co. v. Pinkney, 149 U.S. 194, 209, 37 L.Ed. 699, 705, 13 Sup. Ct. Rep. 859; Goldey v. Morning News, 156 U.S. 518, 39 L. Ed. 517, 15 Sup. Ct. Rep. 559; Davis v. Cleveland, C. C. & St. L. R. Co., 217 U.S. 157, 174, 54 L. Ed. 708, 718, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907), and since the injunction operates only in personam, it was erroneous to include them as defendants. * * *"

In Keen v. Hurley, supra, the Eighth Circuit Court of Appeals said further:

"In Alemite Mfg. Corp. v. Staff, supra, an injunction against infringement of a patent was issued against John Staff. At the time of the issuance of the injunction Joseph Staff was in the employ of his brother John. He thereafter quit the employment of his brother and proceeded to infringe the patent. He was adjudged in contempt. On appeal the court, speaking through Judge Learned Hand, said inter alia, 'On the other hand no court can make a decree which will bind anyone but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court.'

"The injunctional decree in the instant case in effect purports to enjoin the world at large."

The Supreme Court of the United States disposed of an identical proposition in the case of Scott v. Donald, 165 U.S. 107, 41 L.Ed. 648, in which the Court held as follows:

"The plaintiff prayed for a preliminary and a final injunction, restraining the defendants named, and all other persons claiming to act as constables, and all sheriffs, policemen, and other officers, acting or claiming to act under said dispensary act, from seizing and carrying away wines or spirituous liquors imported or brought into the state of South Carolina for his own use or consumption, and from forcibly entering or attempting to search the dwelling house of the plaintiff for any such articles, and from hindering and preventing the plaintiff or any other person from importing, holding, possessing, and using the said liquors so imported.

"After argument a preliminary injunction was issued on May 9, 1895. The plaintiff had leave to amend his bill by adding the averment that the other said persons on behalf of whom he sues, to wit, importers for their own use and consumers in the State of South Carolina of such ales, wines, and spirituous liquors as aforesaid, are too numerous to make parties complainant to the bill, and that some of them are unknown.

* * * * *

"But while we think the complainant was entitled to an injunction against those defendants who had despoiled him of his property, and who were threatening to continue so to do, we are unable to wholly approve the decree entered in

this case.

"The theory of the decree is that the plaintiff is one of a class of persons whose rights are infringed and threatened, and that he so represents such class that he may pray an injunction on behalf of all persons that constitute it. It is, indeed, possible that there may be others in like case with the plaintiff, and that such persons may be numerous, but such a state of facts is too conjectural to furnish a safe basis upon which a court of equity ought to grant an injunction. * * *

* * * * *

"The decree is also objectionable because it enjoins persons not parties to the suit. This is not a case where the defendants named represent those not named. Nor is there alleged any conspiracy between the parties defendant and other unknown parties. The acts complained of are tortious, and do not grow out of any common action or agreement between constables and sheriffs of the state of South Carolina. We have, indeed, a right to presume that such officers, though not named in this suit, will, when advised that certain provisions of the act in question have been pronounced unconstitutional by the court to which the Constitution of the United States refers such questions, voluntarily refrain from enforcing such provisions; but we do not think it comports with well-settled principles of equity procedure to include them in an injunction in a suit in which they were not heard or represented, or to subject them to penalties for contempt in disregarding such an injunction. Fellows v. Fellows, 4 Johns. Ch. 25, citing Iveson v. Harris, 7 Ves. Jr. 257.

"The decree of the court below should therefore be amended by being restricted to the parties named as plaintiff and defendants in the bill, and this is directed to be done, and it is otherwise affirmed."

Hence, Governor Ross Barnett and Lieutenant Governor Paul Johnson and the other new defendants cannot be in contempt of the injunctive order of July 28 or the permanent injunction entered by the District Court on September 13. The Plaintiff and "amicus curiae" are necessarily relegated to the restraining orders entered by this Court. Such restraining orders cannot be effective for the reasons hereinafter set forth.

II

THIS COURT HAS NO JURISDICTION TO ADD, AT THE APPELATE LEVEL, NEW PARTIES DEFENDANT-APPELLEES AND THEREBY SUBJECT THEM TO AN INJUNCTION PRECEDENTLY GRANTED IN THE ORIGINAL ACTION.

It is submitted that this Court erred in exercising original jurisdiction when, after the District Court had granted the Appellant the relief prayed for and enjoined the parties defendant before the Court, this Court brought in new parties defendant and enjoined them. This action was taken peremptorily, without any trial and without giving these new defendants any opportunity to raise such defenses as they may have personally had - especially with reference to the intervening statutes passed by the Legislature of the State of Mississippi.

As stated in the 1961 Supplement, Moore's Federal Practice, Vol. 1, Section 15.15, p. 108:

"An amendment which substitutes one party defendant for another or adds an additional party defendant will not relate back."

In Hoffman v. Halden, C.A. 9, 268 F. 2d 280, 304, it is said:

"The general rule is that an amendment of a complaint dates back to the filing of the original complaint, Rule 15(c),

F.R.Civ.P., 28 U.S.C.A. Where the same defendant named in an amended complaint was named in the original complaint, no problem is ordinarily presented. . . .

"But where new defendants are brought into the action, without previous notice or service of process, a different situation exists. This is like the institution of a new action against the new parties."

See also Davis v. L. L. Cohen & Co., 268 U.S. 638, 69 L. Ed. 1129.

This Court has no jurisdiction to add either parties plaintiff or defendant at the appellate level.

Although the United States was added as amicus curiae, nevertheless it has acted as a regular party plaintiff or appellant and, in fact, the restraining order and citation for contempt in connection therewith which has been the actual basis of the hearing was issued upon petition of the "amicus curiae."

Also the plaintiff appellant and the new amicus curiae appellant both attempted to join new parties defendant at the appellate level including sixteen named parties, many of whom are alleged to be representatives of various classes. Such action is beyond the jurisdiction of this Court and the attempt to join either parties plaintiff or appellant as such or parties defendant-appellee as such is void.

The leading case directly in point was decided by the Circuit Court of Appeals for the Ninth Circuit in 1943, being the case of Smith v. American Asiatic Underwriters, 134 F.2d 233. It is significant that in this case there is an attempted joinder of a plaintiff appellant and that the actual appellant and appellee and the new plaintiff appellant all consented to the joinder. It was a direct and simple question of the jurisdictional power on the part of a Court of Appeals. The Ninth Circuit held as follows, p. 235:

"Following our decision (9 Cir., 127 F.2d 754), appellant and appellee filed petitions for rehearing, and the

Secretary of Commerce filed a motion for leave to file an appearance in this court. A rehearing was granted and has been had, and the Secretary's motion has been submitted. Appellant and appellee have consented to and joined in the motion, each expressing the view that, if the motion were granted, the controversy between appellee and the Secretary could be determined on this appeal. Recognizing as we do that such a determination should be had if possible, we now consider whether it is possible, or would be possible if the motion were granted.

* * * * *

"The Secretary's motion is for leave to file an appearance 'as a party defendant-appellant.' He apparently assumes that we could, by granting his motion, make him a defendant in the suit and an appellant from the judgment therein. The assumption is unwarranted. The Secretary was not made a defendant by appellee or by the China court. No one else could, or can, make him a defendant. And even if he were a defendant, we could not make him an appellant. To become an appellant, he would have to appeal. He has not appealed and could not now do so, the time for appeal having long since expired.

"Even if the Secretary were an appellant, we could not on this appeal, determine the controversy between him and appellee, for that controversy has not yet been determined by any court of original jurisdiction. We have no original jurisdiction in cases of this character. Our jurisdiction in such cases is appellate only. It follows that to grant the Secretary's motion would be a futile gesture.

"We have not been asked to bring the Secretary in as a party appellee by issuing notice to him, as of course we

could do if he were a proper party appellee. Miller v. Hatfield, 309 U.S. 1, 60 S.Ct. 374, 84 L.Ed. 535; In re Knox-Powell-Stockton Co., 9 Cir., 97 F.2d 61; Browning v. Boswell, 4 Cir., 209 F. 788. See, also, Stepp v. McAdams, 9 Cir., 88 F.2d 925. In the case at bar, such a request, if made, would be denied; for, not being a party to the suit or to the judgment, the Secretary is not a proper party to the appeal, either as appellee or as appellant.

"The Secretary's motion is not a motion for leave to intervene in this court. If it were, it would be denied upon the authority of United States v. Patterson, 15 How. 10, 12, 14 L.Ed. 578; Thomson Houston Electric Co. v. Western Electric Co., 2 Cir., 158 F. 813; Wenborne-Karpen Dryer Co. v. Cutler Dry Kiln Co., 2 Cir., 292 F. 861; Morin v. Stuart, 5 Cir., 112 F. 2d 585. * * *"

In the Wenborne-Karpen case, supra, the Circuit Court of Appeals of the Second Circuit stated: " . . . it is not the practice to permit one to intervene in an appellate court of the United States who was not a party in the court below. United States v. Patterson, 15 How. 10, 14 L.Ed. 578."

In Holland v. Board of Public Instruction, 258 F.2d 730, the Court of Appeals for the Fifth Circuit recognized the impropriety of adding parties at the appellate level when it denied a petition to intervene as follows:

" * * * In addition, some fifty parents of some 189 Negro children who claim that they are entitled to or attending the public schools of Palm Beach County, Florida, have moved to intervene as appellants, and the appellees have vigorously objected to and opposed such motions to intervene. Intervention in this Court of appeals should, we think, be denied. Morin v. City of Stuart, 5 Cir., 1939, 112 F.2d 585; Stallings v. Conn, 5 Cir., 1934, 74 F.2d 189, 191; 4 Moore's Federal

Practice, 2d ed., page 99; 39 Am. Jur. p. 943. Our denial of leave to intervene here, however, is without prejudice to the movants becoming additional parties plaintiff in the District Court after remand.

* * * * *

"The primary responsibility rests on the County Board of Public Instruction to make 'a prompt and reasonable start,' and then proceed to 'a good faith compliance at the earliest practicable date' with the Constitution as construed by the Supreme Court. 'During this period of transition,' the district court must retain jurisdiction to ascertain and to require good faith compliance."

It is the practice to allow new parties at the district court level. In Faubus v. United States, (8th Cir., 1958), 254 F.2d 797, cert. den., 358 U.S. 829, the United States District Court added Governor Faubus and other persons as parties defendant to the action before it because of the fact that Faubus et al were allegedly obstructing the enforcement of a decree previously entered by the Court. The adding of Faubus et al as parties defendant was done on the petition of, and at the instance of, the United States as amicus curiae. This action was affirmed by the Court of Appeals and the United States Supreme Court.

In the cases of Bush vs. Orleans Parish School Board and related cases, chief among which are found at 187 F. Supp. 42, 188F. Supp. 916, aff., 365 U.S. 569; 190 F. Supp. 861; and 191 F. Supp. 871, aff., 367 U.S. 908, a three-judge district court in Louisiana added new parties defendant at the district level.

We know of no precedent for bringing in new parties and having a trial anew at the appellate level. The reason for this is simply due process of law. As stated in 16A C.J.S., "Constitutional Law", Section 622, p. 822:

"Due process of law requires an orderly proceeding

adapted to the nature of the case, in which proceeding the citizen has a right and an opportunity to be heard and to defend, protect, and enforce his rights, by establishing any facts which, under the law, would be a protection to him or to his property, and resultant action in conformity with the facts developed.

"The right of a hearing or an opportunity to be heard within the requirement of the due process clause ordinarily includes the right of a party to be present, during the taking of testimony or evidence, and to appear or be represented by counsel. Such right also includes the opportunity to know the claims of his opponent, hear evidence introduced against him, cross-examine witnesses, introduce evidence in his own behalf, and present proper argument as to law and fact.

* * * * *

"A hearing or an opportunity to be heard before judgment, with full opportunity to present all the evidence and arguments which the party deems important, is all that can be adjudged vital under the guaranty of due process of law. However, there may be circumstances under which a hearing before judgment is not requisite, as where rights are preserved for appeal. * * * "

In the instant case, the new parties defendant were held to be bound by the trial in the District Court, in which they had not participated - the evidence in that trial was the sole predicate for this Court's exercise of jurisdiction. That evidence had to be the predicate for the exercise of this Court's appellate jurisdiction, and, therefore, necessarily the predicate for the alleged exercise of its ancillary jurisdiction. Yet these new defendants were not served with process before that trial, were not parties therein, and were not represented therein.

In 67 C.J.S., "Parties", Section 81(2), p. 1066, it is said:

"Where a person having or claiming an interest in the subject matter is brought in as a party defendant, he has a substantial right to be heard on all matters which materially affect his interest, and ordinarily he may defend on the merits as though he were an original party defendant, unrestricted by any of the prior proceedings.

" * * * It has been held * * * that a decision, as to him, cannot be based on evidence in the case in which he took no part."

In addition to whatever defenses the new defendants had as of the time the action was originally tried, they also had the recent legislation passed by the Legislature of Mississippi. On September 20, 1962, Senate Bill No. 1501, Laws of Mississippi, 1962 Extraordinary Session was enacted, prohibiting persons who have criminal charges of moral turpitude pending against them from registering or enrolling in any state institution of higher learning and making it a crime to knowingly aid or abet another person in so doing. On September 28, 1962, House Bill No. 2, Laws of Mississippi, 1962 Extraordinary Session, was enacted, providing that all acts, words and conduct performed or attempted to be performed by any state officer and in anywise connected with keeping the institutions of higher learning segregated are adopted as the acts of the State of Mississippi in its sovereign capacity and not the individual acts of such persons.

It is, therefore, submitted, with deference, that this Court exceeded its jurisdiction when it allowed the new parties defendant to be brought in and enjoined.

POINT III.

THE RIGHT OF A COURT OF APPEALS TO ISSUE WRITS IN AID OF ITS APPELLATE JURISDICTION DOES NOT INCLUDE THE RIGHT TO RETAIN A CASE AS A PENDING MATTER EITHER IN WHOLE OR IN PART AFTER ISSUANCE OF MANDATE REMANDING TO THE DISTRICT COURT ENFORCEMENT OF THE FINAL JUDGMENT.

The Court is thoroughly familiar with the entry of the mandate to the District Court on July 27, 1962, and the issuance thereof on the same date. This was followed by an additional mandate and injunctive order on July 28th. We will later refer to the sequence of events and the fact that an unconditional remand was entered on the minutes prior to the order and mandate of July 28th. Regardless of this sequence that portion of the order and mandate of July 28th which embodies the "injunctive order" is clearly beyond the jurisdiction of this Court. The status of litigation cannot be both "fish and fowl". With deference, the plaintiff cannot ask this Court to "eat its cake and have it, too". This case is now pending in the District Court for the Southern District of Mississippi upon the permanent injunction issued by such Court on September 13, 1962. It cannot also be pending in this Court on the attempted "injunctive order" of July 28th.

The enforcement of a final judgment or decree which has been remanded to the Court of original jurisdiction is a function of that Court. The function of the Court of Appeals is simply that of an appellate court. The "All Writ Statute" and the statutes governing the jurisdiction of this appellate court only permit issuance of writs in exceptional cases in actual aid of appellate jurisdiction. When the case is no longer before this Court that right ends.

It is the position of all of the defendants newly joined that this Court is without jurisdiction to issue the restraining orders here and does not have the right by statute or otherwise to divest the District Court of its functions, nor, with deference, does this Court have the power to vest itself with the powers of a District Court. The enforcement of a final decree remanded to a District Court lies in the hands of that Court. This is subject to supervision and direction by mandamus or mandatory injunction directed to that Court and to a correction of errors committed by that Court through appeal to this Court.

That the District Court in this case continues to retain the actual and proper powers of a District Court was recognized by the plaintiff and "amicus Curiae" when they moved the District Court to cite several of the original parties for contempt.

It was never intended that we would have the spectacle of two courts, one of original jurisdiction and another appellate, contending for the right of enforcing a final decree by issuance of writs of execution, writs of injunction, writs of prohibition, etc. The danger of such a spectacle has long since been removed by the repeated holdings of the Supreme Court of the United States and the Courts of Appeal that the issuance of writs by the appellate court is limited to extraordinary cases and can only be in actual and factual aid of appellate jurisdiction, as distinguished from ultimate recovery upon and enforcement of a judgment or decree. It is most significant that the sole and whole relief sought in the original suit was an injunction. Nothing more. Nothing less. Yet this Court would retain jurisdiction to obtain that relief, while remanding the case to the District Court so that such relief may be obtained.

No relief against the newly joined defendants has been sought in the United States District Court for the Southern District of Mississippi by either party to these restraining orders. As to each of them the action is a proceeding initiated in the Court of Appeals. As the temporary restraining order and the injunction sought, in the absence of compliance, could only result in contempt proceedings and have thus resulted as to the Governor and the Lieutenant Governor of the State of Mississippi, the case of Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 124 F. 735, decided by Eighth Circuit, is directly in point and under it this proceeding can only be brought in the District Court. The opinion in that case is as follows:

"An examination of the affidavits discloses the fact that the contempt charged in this case occurred subsequent to the filing of the mandate of this court in the United States Circuit Court. The proposition to which Mr. Howard has addressed himself, to the effect that every party in a proceeding is bound to take notice of the order of the court, and obey it, is undoubtedly sound; and, if there had been a violation of the

injunction which was practically ordered by this court during the time antecedent to the remission of the mandate, the court would proceed to the remission of the mandate, the court would proceed to punish for contempt, if it thought proper to do so. But when the mandate of this Court was remitted to the Circuit Court, the decree of that court was, in effect, modified, as declared by the opinion of this court; or, of not modified simply by the filing of that mandate, it was in the power of that court, upon motion of the successful party, to so change its decree that it would read in accordance with the opinion then handed to it by this court. If that application has not been made, it may still be made; and if there has been a violation of that decree since the mandate was remitted, we are unanimously of the opinion that the jurisdiction to punish for that violation is not in this court, but in the Circuit Court. For this reason, the demurrer will be sustained, and the petition dismissed."

The United States Court of Appeals for the Eighth Circuit in 1957 followed the Dowagiac case, supra, in the case of Meredith v. John Deere Plow Co., 244 Fed. 2nd 9, 10, (cert. den. 355 U. S. 831, 2 L.ed. 2nd 43) as follows:

"In an effort to put an end to appellant's repetitive suits against it on the alleged contract, appellee has moved for leave to file in this Court a petition for a writ of injunction. No injunctive relief was sought by way of counterclaim in the District Court, nor has appellee otherwise undertaken to obtain from that Court any such protection. No controlling reason is apparent why, as against the normal prerogative and function of the District Court, we should be asked to entertain such a petition in original jurisdiction.

"In addition, the elements of hearing that might be involved in relation to the issuing of a writ, and the incidents of enforcement that could become necessary from any granting of it are matters which a single-judge court manifestly would be in a position to deal with, from the standpoint of both parties, more routinely, expeditiously, conveniently and economically than we.

"The motion for leave to file the petition for injunction is accordingly denied."

The status of this case (regardless of an attempt of this Court to assume the jurisdiction of the District Court) is clearly delineated by the Eighth Circuit in the case of Omaha Electric Light & Power Co. v. City of Omaha, 216 F. 848, 855, as follows:

"It is a universal rule that the perfecting of an appeal transfers the cause to the appellate court, and that it remains there until it is remitted to the trial court by the sending down of the mandate. Credit Co. v. Ark. Cen. Ry. Co., 128 U. S. 258, 9 Sup.Ct. 107, 32 L.Ed. 448; Lockman v. Lang, 132 Fed. 1, 65 C.C.A. 621; Thomas v. Thomas, 27 Okl. 784, 113 Pac. 1058, 35 L.R.A.(N.S.) 124, 133, Ann.Cas. 1912C, 713; Aspen Smelting Co. v. Billings, 150 U.S. 31, 36, 14 Sup.Ct. 4, 37 L.Ed. 986; Ott v. Boring, 131 Wis. 472, 111 N.W. 833, 11 Ann.Cas. 857; In re Jessup's Estate, 81 Cal. 408, 22 Pac. 1028, 1031, 6 L.R.A. 591. . . .

"The jurisdiction of an appellate court differs radically from that of a trial court. It exists solely for the purpose of review. As soon as that is finished the suit is remitted to the trial court. ...."

In 1959, the Court of Appeals for the Sixth Circuit held in the case of Wooten v. Bomar, 266 F. 2nd 27, 28, as follows:

"Appellant, who is a prisoner in the State Penitentiary at Nashville, Tennessee, has tendered to an individual member of this Court his motion for a restraining order directing the Commissioner of Institutions of the State of Tennessee and the Warden of the Tennessee State Penitentiary to cease interfering with the exercise by the appellant of his 'civil and legal rights guaranteed him under the provisions of the 14th Amendment of the United States Constitution.' ...

"This Court is given jurisdiction by statute to review final decisions and certain interlocutory orders of the District Court. Sections 1291, 1292, Title 28 U. S. Code. The present motion does not seek a review of any order of the District Court. We do not have original jurisdiction to issue an injunction or restraining order against a state official even though he may be exceeding his statutory authority Stone v. Wyoming Supreme Court, 10 Cir., 236 F. 2d 275, 276; United States v. Otley, 9 Cir., 116 F. 2d 958. As stated in Lewis V. United

Gas Pipe Line Co., 5 Cir., 194 F. 2d 1005, 1006, 'We have no general superintendence over district courts and cases in them, but may interfere only when and to the extent that the laws provide.'

After the issuance of the mandates of this Court to the District Court, the parties to this cause had no further right of appeal to this Court. That appeal had been heard and disposed of finally, subject only to the petition for writ of certiorari which has not yet been considered by the Supreme Court. A similar question was before the Seventh Citcuit in the case of Mutual Life Insurance Co. of New York v. Holly, 135 F. 2nd 675, 676, in which it held as follows:

"We think for another reason we have no jurisdiction to issue a writ of mandamus or injunction in this cause. It is admitted by counsel for the insurance company that it is without remedy by way of appeal to this Court. That is an admission that this Court has no jurisdiction. Our jurisdiction is wholly appellate, and if there is no appeal pending here and can be no appeal, we are wholly without authority to issue a writ of mandamus or injunction, as we have no such original jurisdiction. Our jurisdiction to issue such writs is only incidental to and in aid of our appellate jurisdiction. 28 U.S. C.A. Sec. 377; United States v. Mayer, 235 US 55, 35 S.Ct. 16, 59 L.Ed. 129; United States v. Avis, 3 Cir., 108 F. 2d 457. Since there is no proceeding of any kind which invokes or may invoke our appellate jurisdiction in aid of which the writs herein prayed for are sought, we are wholly without jurisdiction to issue them" .

In United States v. Mayer, 235 US 55, 59 L.Ed. 129, 134, it is said:

". . . The argument is that an application to a circuit court of appeals for a writ of prohibition is an original proceeding. But the jurisdiction of the circuit courts of appeal is exclusively appellate (act of March 3, 1891, Secs. 2, 6 [26 Stat. at L. 826, 828, chap. 517, U. S. Comp. Stat. 1901, pp. 547, 549;] Judicial Code, Secs. 117, 128; Whitney v. Dick, 202 U. S. 132, 137, 138, 50 L.Ed. 963, 965, 26 Sup. Ct. Rep. 584); and their authority to issue writs is only that which may properly be deemed to be auxiliary to their appellate power (Judicial Code, Sec. 262; Rev. Stat. Sec. 716, U.S. Comp. Stat. 1901, p. 580; act of March 3, 1891, Chap. 517, Sec. 12, 26 Stat. at L.826, 829, U.S. Comp. Stat. 1901, pp. 488, 553; Whitney v. Dick, supra;

McClellan v. Carland, 217 U.S. 286, 279, 280, 54 L. ed 762, 766, 767, 30 Sup. Ct. Rep. 501). Section 128 defines the class of cases in which the circuit court of appeals may exercise appellate jurisdiction, and where a case falls within this class, a proceeding to procure the issue of a writ in aid of the exercise of that jurisdiction must be regarded as incidental thereto, and hence as being embraced within the purview of Sec. 239, authorizing the court to certify questions of law."

See also Whitney v. Dick, 202 U.S. 132, 50 L. Ed. 963, Syllabus 3.

Sections 1291-1294 of Title 28 U.S.C.A., make it clear that the Congress, which fixes the entire jurisdiction of all inferior courts in the Federal Judiciary under Article I, Section 8, Clause 9 of the Constitution of the United States, has granted only appellate and not original jurisdiction to this Honorable Court.

Courts of appeal have frequently ruled that their jurisdiction is limited to appellate functions and not to the exercise of original jurisdiction. Ralston Purina v. Novak, C.A. 8, 111 F.2d 631, 634:

"This is a court of appellate jurisdiction and our function is limited to a review of alleged specific erroneous rulings of the lower court."

Pictograph Products Co. v. The Sonotone Corp., et al, C. A. 2, 231 F. 2d 867:

"On this appeal we may not consider any depositions or other evidence that were not filed in the district court where Judge Ryan decided the motion. It is true that under Rule 75(h) of the Rules of Civil Procedure, 28 U.S.C.A., we may on our 'own initiative' direct that 'a supplemental record shall be certified and transmitted by the clerk of the district court'; but obviously that should comprise only such 'records' as were before the district court itself, for this court has no jurisdiction save to correct errors, and it cannot be an error to ignore evidence never presented to the court."

O'Malley v. Cover, C.A. 8, 221 F.2d 156, 159:

" * * * * We have frequently pointed out that this Court has power to review only questions of law which are properly preserved

for review, and that it does not have power to try or retry cases."

In this case, this Court's judgment was remanded to the District Court on the 27th day of July, 1962, and we respectfully submit that it has never been legally or validly recalled so as to revest jurisdiction in this Court. The attempt to enlarge this Court's jurisdiction on July 28th was ineffective.

In the case of Ohio Oil Co., et al. v. Thompson, C.A. 8, 120 F.2d 831, the Court, in a very closely parallel situation to that at hand, ruled that actions of district courts with regard to mandates could be controlled by mandamus or by a new appeal, citing City National Bank v. Hunter, 152 U.S. 512, 38 L.Ed. 53[illegible], and other cases; and that it was proper, if new parties were joined, for such action to be taken by the trial court after the remand, citing inter alia Ex Parte Union Steamboat Co., 178 U.S. 317, 44 L.Ed. 1084. In concluding, the Court stated: "It is for the district court to which the mandate is directed to construe and execute such mandate; and if that court misconstrues or refuses to enforce it or attempts to 'vary it' or 'to intermeddle with it', it is for the Supreme Court alone to construe and enforce its own mandate. We hold only that we are without jurisdiction to interfere in this instance."

The position of opposing counsel, as understood by us, is that the actions of this Court lie within the ancillary jurisdiction of this Court under the All Writs Statute, 28 U.S.C.A. Sec. 1651. They do not, and could not, contend that the All Writs Statute is applicable to proceedings in this Court in the exercise of original jurisdiction. That statute is available only in the exercise of appellate jurisdiction. Whitney v. Dick (1906), 202 U.S. 132, 50 L.Ed. 963; McClellan v. Carland (1910) 217 U.S. 268, 54 L.Ed. 762; United States v. Meyer (1914), 235 U.S. 55, 59 L.Ed. 129. See also Ex Parte Republic of Peru, 318 U.S. 578, 87 L.Ed. 1014.

The rule is clearly stated in 36 C.J.S. Federal Courts, 784 et seq., as follows:

> "Although the Federal Rules of Civil Procedure do not apply of their own force to the courts of appeals, such courts have general power, under the provisions of 28 U.S.C.A. § 1651, usually referred to as the 'All Writs' statute, to issue all writs which are necessary

or appropriate for the exercise of their appellate or potential appellate jurisdiction, such as writs of supersedeas, scire facias, habeas corpus, injunction, or prohibition, ...

"The extraordinary power to issue writs is only that which may properly be deemed to be auxiliary to its appellate power, and is reserved for use in those rare instances when the appellate jurisdiction would be adversely affected unless action is taken by the appellate court. ...

* * * * * * * * * * * *

"A court of appeals is without any power to issue writs as original process, and accordingly it has no original jurisdiction to issue writs of prohibition, injunction, or habeas corpus."

The same is true of the Supreme Court of the U. S. Ex Parte Peru, 318 U.S. 578, 87 L.Ed. 1014.

28 U.S.C.A. 1651 provides:

"The supreme court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

In the case of State of California v. U. S. District Court, 213 F. 2d 818, C.A. 9, the Court held:

"The power of mandamus or prohibition is an extraordinary power which is reserved for use in those rare instances when the appellate jurisdiction of a Court of Appeals would be adversely affected unless action is taken, and may not be used to supervise all district court activity."

Such writs of the Circuit Court of Appeals are usually, if not always, necessarily addressed to the lower court.

The proper procedure was followed in Federal Home Loan Bank v. Hall, 215 F. 2d 349, where the Court of Appeals issued a mandamus writ to the district court and ordered it to dismiss a cause and to itself issue a writ of injunction to restrain litigants from prosecuting such litigation. This was a case where the judges of the Federal district court and litigants miscon-

strued and erroneously interpreted the opinions and mandates of the court of appeals and continued to litigate and relitigate issues previously disposed of by the court of appeals. In note 12 on page 385 of said opinion the Court listed the cases justifying issuance of the writ of mandamus by the court of appeals and all of said authorities dealt with writs directed to the lower court.

Also see the holding of the Circuit Court of Appeals of the Third Circuit in In Re Philadelphia & Reading Coal & Iron Co., 103 Fed. 2nd 901.

The fact situation in this case closely parallels that in the case at bar. Therein, a petition for reorganization was filed by the iron company and it was ordered to continue in possession. The Securities and Exchange Commission intervened pursuant to 11 U.S.C.A. Section 608, almost as the United States has become a "Petitioner" herein except at the trial court level and pursuant to statutory authority; certain creditors proposed a plan dated April 1, 1939, and it was referred to a Master on April 5th. No appeal was taken from this referral and the first hearing thereon was set for April 18th.

The Commission petitioned on April 8th in the District Court for an examiner to be appointed and then for a hearing thereon; this was set for April 17th.

Previously, on March 7th, two creditors had petitioned for compliance with Chapter X of the Chandler Act and for immediate appointment of a Trustee. After answer, argument and opinion, the District Judge denied this petition by decree dated March 30, 1962, just as the District Court denied relief herein.

Appeal was then taken to determine the retrospective applicability of the Chandler Act --- as appeal was taken in this case.

On April 14th the two creditors filed a motion in the Appellate Court for early hearing, for filing the record, and " *** to restrain the debtor, the committees and their attorneys, and other parties in interest from proceeding with *** the plan of reorganization dated April 1, 1939 or holding any hearings thereon until a determination of this appeal." 103 F. 2d 903.

The Securities and Exchange Commission filed a similar motion in the Appellate Court, just as in this case (except that the mandate had not been sent down in that case).

The court denied the motions for injunctive relief, even though the mandate therein had not been sent down, saying:

"The character of the motions in this court indicates a misconception of the powers of an appellate court. The injunctive relief sought is without connection with the appeal pending before us. The pending appeal is simply from the decree of the District Court of March 30, 1939, refusing to appoint a trustee to take possession of the assets of the debtor. The relief now sought from this court by the movants is in fact the equivalent of that which might be sought by an application for supersedeas from the order of the District Court filed April 5, 1939, referring the plan of April 1, 1939 to the master for consideration. The movants in substance seek to effect a stay of the order referred to by indirect means.

"The jurisdiction of this court is purely statutory and unless an appeal be taken from the refusal or neglect of a lower tribunal to grant an injunction, our authority to grant injunctive relief must proceed from the so-called 'All Writs' Section of the Judicial Code, Section 262, 28 U.S.C.A. §377, and may be exercised by us only as auxiliary to and strictly in aid of our appellate jurisdiction. In re Eastman Kodak Co., 3 Cir., 1931, 48 F. 2d 125. See also cases cited in note 14 to Section 377, 28 U.S.C.A.

"We think that thoughtful consideration of the appellate process will demonstrate to the movants the correctness of our conclusions. It is obvious that our jurisdiction of the substance of the pending appeal will be in no wise imperilled by the contemplated hearings before the master. If the movants anticipate harm resulting to them from the hearings, they should have applied to the District Court for their postponement or should have appealed from the order prescribing them. In this manner only can the respective and appropriate functions of the trial and appellate courts be preserved. Accordingly the injunctive relief sought by the movants is denied."

A careful examination of the authorities presented by opposing counsel at the oral argument reveals that none of them are in point as supporting the procedure taken here and most of them support our position. Great reliance was placed by the Plaintiff and the "amicuscuriae" upon the case of Toledo Scale Co., 261 U. S. 399, 67 L. ed. 719 (1923). That case cannot possibly be authority for the position of the Plaintiff and "amicus curiae" here for the following reasons:

(1) In that case the mandate of the Circuit Court of Appeals of the Seventh Circuit included a direction to the District Court to enjoin the Toledo Company from maintaining a bill in Ohio. The injunction involved was not issued by the Court of Appeals but rather the mandate directed the District Court to issue the injunction. This is the procedure which we submit, with deference, should have been followed in the case now before the Court.

(2) The Plaintiff and "amicus curiae" rely upon the following statement contained in the opinion:

> "It is objected that the circuit court of appeals had no power to direct the district court to enjoin the Toledo Company from further maintaining its Ohio bill, or from filing elsewhere any similar bill. ... We think these orders were within the power of the circuit court of appeals. This Ohio proceeding was instituted to halt and defeat the decree of the circuit court of appeals, while that decree was still in that court to be enforced by mandate to the lower court. Under §262 of the Judicial Code, that court 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 (Merrimack River Sav. Bank v. Clay Center, 219 U.S. 527, 535, 55 L. ed. 320, 325, 31 Sup. Ct. Rep. 295, Ann. Cas. 1912A,513), or it could direct the district court to do so, as it did. (Citing authorities)"

At the time to which the Supreme Court referred a mandate had not been issued. The case had not been sent back to the lower court of original jurisdiction for the entry of an order or judgment in accordance with the mandate.

The mandate was actually stayed by the Court so that the cause was pending without issue of mandate in the Court of Appeals and, under those circumstances, the dicta by the Supreme Court of the United States simply affirmed the right of a court of appeals, while a case is actually pending on its docket and prior to the issuance of a mandate, to act in support of its jurisdiction.

(3) The parties involved were the original parties to the suit, having been duly served by process in the original proceeding, there was no attempt to add new parties either plaintiff, defendant or amicus curiae in the Court of Appeals and not only had proper process been had but the party enjoined had actively participated in the trial of the cause by pleadings, introduction of evidence, etc.

The words of the Supreme Court quoted above were based upon the Merrimack River Savings Bank Case, supra. The words should be read in the light of that case upon which they are based. It is unnecessary to discuss the facts and law in the Merrimack Case except to present to the Court the following extracts, (219 U. S. 527, 55 L. ed. 320, 324, 325, 326):

> "The present petition alleges that after this court had made an order dismissing said appeal, but before any mandate had issued or could issue under the rules of this court, and pending the right of petitioners to file an application for a rehearing, since filed and now pending, certain of the defendants to said appeal, namely, George W. Hanna, O. L. Slade, W. D. Vincent, S. D. Tripp, and G. P. Randall, had, by force and violence, cut down many of the poles and destroyed much of the cable and wires stretched thereon, and had put the light and power company out of business and disabled it so that it could not exercise its franchise or carry on its operations.
> * * *.
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> * * * *
>
> "The defendants have severally answered, and have denied under oath that they meant any contempt of this court. They say that when they were advised that the decree of the court dismissing the bill of complaint had been affirmed and an order of affirmance entered,

that they honestly believed the case to be finally concluded, and that there was no reason why the order of the city council requiring the removal of the lines of poles and wires should not be carried out. This is an excuse, but does not acquit them of a technical contempt, since the appeal must be regarded as pending and undisposed of until a mandate issues. * * *"

The Supreme Court of the United States clearly set forth the law applicable to this case when it said in the Merrimack Case, "since the appeal must be regarded as pending and undisposed of until a mandate issues". Under the authorities we have presented, which are consistent with both of these cases, it is clear that the issuance of a mandate ends the appellate jurisdiction of the Court of Appeals, unless necessity arises for a mandamus to be issued to the court of original jurisdiction.

The case of Sholtz v. United States, 82 F. 2d 780, from the Fifth Circuit, cited by counsel, is simply a case in which the District Court entered a writ of mandamus to carry out and effectuate a judgment rendered by such court. It can have no possible bearing upon the question of the right of this Court of Appeals to oust the District Court of jurisdiction or to retain in part and remand in part a proceeding which is wholly for injunctive relief and has no other substantive relief or adjudication involved therein. For the convenience of the Court, we quote from the Sholtz Case as follows (82 F. 2d 781, 783):

"This is an appeal from a judgment ordering the issuance of a peremptory writ of mandamus directed to the individuals constituting the board of administration of the state of Florida, and W. V. Knott, as treasurer of said state, and ex officio treasurer of county of Monroe, Fla., commanding said individuals constituting said board of administration to pay a described judgment recovered in the court below * * *."

" * * *

"* * * The power of the court below to enforce its judgment in the Northern District of Florida was similar to that possessed by Florida state courts to enforce their judgments throughout the

state. Virginia-Carolina Chemical Corporation v. Smith, 164 So. 717, 721."

The case of La Buy v. Howes Leather Co., 352 U.S. 249, 1 L. ed. 290, 77 S. Ct. 309, is another case whose holding is directly in accordance with and supports the position of the State of Mississippi and its Governor, Lieutenant Governor and other officers. It simply involves the right of a Court of Appeals to issue writs of mandamus to compel a District Court to take action. No more is needed to demonstrate this than to quote the following preliminary statement of the Supreme Courtof the United States in its opinion, 1 L. ed 2d 294:

"These two consolidated cases present a question of the power of the Courts of Appeals to issue writs of mandamus to compel a District Judge to vacate his orders entered under Rule 53(b) of the Federal Rules of Civil Procedure referring antitrust cases for trial before a master. The petitioner, a United States District Judge sitting in the Northern District of Illinois, contends that the Courts of Appeals have no such power and that, even if they did, these cases were not appropriate ones for its exercise. The Court of Appeals for the Seventh Circuit has decided unanimously that it has such power and, by a divided court, that the circumstances surrounding the references by the petitioner required it to issue the mandamus about which he complains. 226 F 2d 703. * * * "

P. 298:

"It is claimed that recent opinions of this Court are to the contrary. Petitioner cites Bankers Life & Casualty Co. v. Holland, 346 US 379, 98 L. ed. 106, 74 S. Ct. 145 (1953), and Parr v. United States, 351 US 513, 100 L. ed. 1377, 76 S. Ct. 912 (1956). The former case did not concern rules promulgated by this Court but, rather, an Act of Congress, the venue statute. Furthermore, there we pointed out that the ' . . . All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or "usurpation of judicial power" . . . . ' 346 US, at 383. * * *"

Counsel also cited the case of Kasper v. Brittain, 245 F. 2d 92, from the Sixth Circuit. This procedure was had exactly in accordance with the position which we take before this Court and is authority supporting our position that this Court had no jurisdiction to take over the jurisdiction and rights of the District Court. Two very short quotations from the Kasper Case are sufficient to demonstrate this fact, 245 F. 2d 93, 95:

> " * * * On appeal to this court, judgment was reversed and the case remanded to the district court for further proceedings, in conformity with the decision of the Supreme Court in Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L.Ed. 873. In compliance, the district court issued an injunctional order, requiring the appellees to desegregate the High Schools of Anderson County by the fall term of 1956. * * *
>
> "* * *
>
> "(1) The question whether the district court had jurisdiction of the controversy and the power to enforce its order by the injunctive process need give us little trouble. * * * "

The case of Faubus v. United States, 254 F. 2d 797, is also in direct support of our position. All that is needed to demonstrate this fact is to give for the convenience of the Court two short quotations from that opinion as follows, pp. 799, 808:

> "This is an appeal from an order of the District Court made September 20, 1957 (filed September 21, 1957), in the action of Aaron v. Cooper, 143 F. Supp. 855, to which the appellants on September 10, 1957, had been made additional parties defendant. The order enjoined the appellants, and other under their control or in privity with them, from using the Arkansas National Guard to prevent eligible Negro children from attending the Little Rock Central High School, and otherwise obstructing or interfering with the constitutional right of such children to attend the school. * * *
>
> "* * *

"Our conclusion is that nothing advanced by the appellants in the instant case would justify the reversal by this Court of the order appealed from."

The several Bush Cases cited by counsel also support our position in the case at bar. In each case the injunction was issued by the District Court. We will cite only one of these cases in order not to prolong this brief, being the case of Bush v. Orleans Parish School Board, 191 F. Supp. 871, in which the determination of the District Court was as follows: (p. 879):

"(5) On these findings temporary injunctions will issue restraining the enforcement of Act 5 of the Second Extraordinary Session of the Louisiana Legislature for 1960 and Act 4 and Senate Concurrent Resolution 7 of the Third Extraordinary Session. ***"

In the oral argument opposing counsel relied heavily upon the case of Sawyer v. Dollar, 190 F. 2d 623 (Ct. of Ap., D. of C. 1951). They evidently overlooked the fact that this judgment was vacated by the Supreme Court, 344 U. S. 806, 97 L. Ed. 628 (1952). The cases were remanded to the Court of Appeals with directions to dismiss the proceedings upon the ground that the case was moot.

Although this case was vacated and hence is not authority, nevertheless these distinguishing features should be noted:

(1) This case did not involve an injunction or restraining order issued by the Court of Appeals. The injunction involved was issued by the District Court. Hence it would be no authority for the granting of the restraining orders by this Court, but supports our position that the District Court and not the Court of Appeals should grant restraining orders or injunctions.

(2) The parties involved were the original parties to the suit. No new parties were brought in at the appellate level and there was no question of notice or process.

(3) If the parties now before the Court were the members of the Board of Trustees or the named officials of the University, the holding might be applicable. The finding of the Court that it had authority to punish for contempt of the District Court order is not applicable to the new parties

defendant-appellees who were not parties to or bound by either the "injunctive order" of this Court dated July 28th or the final injunction issued by the District Court on September 13th.

(4) Had this judgment not been vacated, the narrow holding that the Court of Appeals may punish for contempt of a judgment entered by a District Court upon its mandate would simply have been contrary to the holdings of the other Circuits and the Supreme Court which we have cited.

IV

EITHER THIS COURT HAS ERRED IN CONVERTING THIS INTO A CRIMINAL CONTEMPT PROCEEDING OR THE INJUNCTION AND CONTEMPT PROCEEDINGS ARE TERMINATED

Analysis of the actions of the United States herein shows that as one of this Court observed during the oral argument, the United States has acted as "much more than an amicus curiae."

The order of September 18, 1962 by this Court admitted the United States to appear before this Court and the District Court for the Southern District of Mississippi, " . . . 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."

This is equivalent in substance to allowing an intervention as a party because "an amicus curiae is not a party and cannot assume the functions of a party, an attorney for a party, or even a partisan. He has no control over the litigation and no right to institute any proceedings therein; he must accept the case before the court with the issues made by the parties." 4 Am. Jur. 2d, "Amicus Curiae", Section 3, p. 110. Cf. Kretch v. United States, 364 U.S. 261, 5 L.ed 2d 128, 134; Winter Haven v. Gillespie, CA5, 84 F.2d 285.

Concededly, the United States has duties affecting the public interest, but has its intervention converted this proceeding wrongfully into one in criminal contempt? We submit that it has, with deference. In 5 Moore's Federal Practice, Sec. 38.33, p. 256, the following distinction appears:

" * * * * Contempts are usually divided into two classes, civil and criminal. As to operative facts the classes are neither mutually exclusive nor inclusive, and the contemptuous act may partake of the characteristics of both civil and criminal contempt. The violation of a single order, mandate, decree, judgment, or process of court may be the basis for both civil and criminal contempt proceedings. A 'contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public.' The criminal contempt power, on the other hand, is punitive in nature and used to vindicate the authority of the court and to prevent like-minded individuals from emulating the conduct of the contemnor. * * *"

The Court's attention is respectfully called to the following earmarks of criminal contempt in the proceeding at bar:

(1) In a civil contempt proceeding, the only permissible fine is a compensatory fine and "must not exceed the actual loss to the complainant caused by * * * violation of the decree * * *" Parker v. U. S., C.A. 1, 1946, 153 F.2d 66, 71, 163 A.L.R. 379; Boylan v. Detrio, C.A. 5, 187 F.2d 375, 379; Christensen Engineering Co. v. Westinghouse Air Brake Co., C.A. 2, 1905, 135 F. 774, 782. "The imposition of a fine which bore no relation to the injury suffered * * * was unauthorized," Eustace v. Lynch, C.A. 9, 1935, 80 F.2d, 652, 656; especially since it was not " * * * based upon evidence of complainant's actual loss * * *" U. S. v. United Mine Workers of America, 330 U.S. 258, 304, 91 L.Ed. 884; Boylan v. Detrio, C.A. 5, 187 F. 2d at page 379. "Unless it is based upon evidence showing the amount of loss and expenses, the amount must necessarily be arrived by conjecture, and in this sense it would be merely an arbitrary decision." Christensen Engineering Co. v. Westinghouse Air Brake Co., C.A. 2, 135 F. 774, 782. In Norstrom v. Wahl, C.A. 7, 1930, 41 F.2d 910,

914, it is said, however, that even in the absence of proof, the court should "in the very nature of things * * * be able to reach a fair conclusion as to the amount of ordinarily necessary costs and attorneys' fees to be awarded in such a case." Note, however, that even if this were criminal contempt, "* * * in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000 * * *" 18 U.S.C.A. Sec. 402.

(2) A civil contempt proceeding " * * * serves only the purposes of the complainant * * *." 5 Moore's Federal Practice, Section 38.33, p. 25; herein the United States, as the moving "petitioner," is certainly seeking to serve its own purposes. These purposes must be public purposes since the United States sought "to represent the public interest in the administration of justice and the preservation of the integrity of the processes of this Court." (Paragraph 36, p. 13, Petition of the United States, Amicus Curiae, For an Injunction). It was given the power as an amicus curiae "to initiate further proceedings for injunctive relief * * * in order to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States." Surely, this is a public purpose, not a private one, no matter what its label; and it is exactly the same purpose had by the trial court in McNeil v. U. S., C.A. 1, 236 F.2d 149, 153, 154, 61 A.L.R.-2d 1075:

> "Although there does not appear to be much express authority on the point, we believe that logic, and to some extent precedent as well, supports the proposition that civil contempt proceedings may be instituted only by the parties primarily in interest.
>
> * * * * *
>
> "It would appear from these authorities, and indeed from the very nature of the judicial function, that the trial court can have only a public as distinguished from a private interest in the enforcement of its own decrees. It seems to

us, therefore, that regardless of what label may be appended to the proceedings by the court, any action of contempt initiated by the court of its own motion must be regarded as criminal in nature for the vindication of the court's authority and the punishment of the public wrong. 'A civil contempt proceeding is wholly remedial, to serve only the purposes of the complainant, not to deter offenses against the public or to vindicate the authority of the court.' United States v, International Union, etc., 1951, 88 U.S.App.D.C. 341, 190 F.2d 865, 873.

"We find support for this position in the language of Title 18 U.S.C. § 401:

* * * * *

"It is clear that in a criminal contempt proceeding both a fine and imprisonment may not be imposed for a single act of contempt. Carter v. United States, 5 Cir., 1943, 135 F.2d 858. It is equally clear that both may be imposed where the same act constitutes civil and criminal contempt. So long as civil contempts are restricted to those initiated by the parties primarily in interest we see nothing objectionable in the double sentence - one remedial, the other punitive. We believe, however, that such a double sentence is not proper where the parties primarily in interest have not complained and where the trial judge, in effect, seeks to turn the remedial sentence for civil contempt into additional punishment for an offense to the public interest. If the court may accomplish this by merely adding the word 'civil' to his charge of criminal contempt then the provisions of § 401 become meaningless.

"Perhaps it should be noted that the language in

United States v. United Mine Workers, 1947, 330 U.S. 258, 301, 302, 67 S.Ct. 677, 700, 91 L.Ed. 884, lends inferential support to our position:

* * * * *

"We think this language implies that if the United States were denied the civil remedies enjoyed by other litigants there could be no civil aspect to that case - in other words the language seems to exclude any possibility that the court could initiate civil proceedings on its own motion.

"The judgment of the district court finding that MacNeil is in violation of Title 18 U.S.C. § 401(2) and (3) is affirmed and that part of the judgment finding MacNeil to be in civil contempt is reversed.

We concede that there is authority that the United States as a litigant may have sufficient interest to bring civil contempt. (See Annotation, 61 A.L.R. 2d 1104.) Note, however, that most of the cases cited either fall under the general rule requiring some real or pecuniary interest (Annotation, 61 A.L.R.2d 1086), such as U.S. v. United Mine Workers, 330 U.S. 258, 91 L.Ed. 884, when the United States as operator of the mines was litigating with its employees; or under some regulatory statutes, where the regulatory body was the original complainant.

(3) "Proceedings for civil contempt are between the original parties and are instituted and tried as a part of the main cause. But, on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause." Gompers v. Bucks Stove & Range Co., 212 U.S. 418, 444, 445, 55 L.Ed. 797, 808; Parker v. United States, C.A. 5, 1953, 153 F.2d 66, 70-71. The United States was the principal moving party both here and in the District Court. Unless this is a proceeding in criminal contempt, it is necessarily ended by the settlement of the main case by the acquittal of the original defendants and the admission

of James Meredith into the University of Mississippi. In Leman v. Krentler-Arnold Hinge Last Company, 284 U.S. 448, 76 L.Ed. 389, 394, it is held:

> " * * * If this had been a separate and independent proceeding at law for criminal contempt, to vindicate the authority of the court, with the public on one side and the defendants on the other, it could not, in any way, have been affected by any settlement which the parties to the equity case made in their private litigation. But, as we have shown, this was a proceeding in equity for civil contempt where the only remedial relief possible was a fine payable to the complainant. The company prayed 'for such relief as the nature of its case may require' and when the main cause was terminated by a settlement of all differences between the parties, the complainant did not require and was not entitled to any compensation or relief of any other character. The present proceeding necessarily ended with the settlement of the main cause of which it is a part.' See Michaelson v. United States, 266 U.S. 42, 64, 65, 69 L.ed. 162, 166, 167, 35 A.L.R. 451, 45 S. Ct. 18, Oriel v. Russell, 278 U.S. 358, 363, 73 L.ed. 419, 424, 49 S. Ct. 173."

It is, therefore, respectfully submitted, with deference, that either this Court has erred in allowing the United States to convert this into a punitive criminal contempt proceedings (without the procedural due process requisite therefor); or the injunctions herein and the contempt proceedings based thereon were ended by the settlement of the main case. In either case, with deference, this Court has exceeded its jurisdiction in enforcing its restraining order and adjudicating the Governor and the Lieutenant Governor of Mississippi to be in contempt.

V

THE SOVEREIGN STATE OF MISSISSIPPI IS THE ONLY REAL PARTY IN INTEREST IN THE NEW PROCEEDINGS ORIGINALLY COMMENCED IN THIS COURT AND ENGRAFTED UPON CAUSE NO. 19,475.

The entire basis for the assertion of the United States as amicus curiae of a right to file and institute pleadings and proceedings is alleged by the amicus to grow out of the acts, actions and activities of the officials through whom the State of Mississippi acted. All acts, actions and activities of said officials which are alleged to give rise to any right to proceed in this matter have been exclusively done and taken for and on behalf of and in the name of the sovereign State of Mississippi alone and not pursuant to or in furtherance of any individual or personal interest of any such actor or participant.

It is a question of Mississippi law whether the Board of Trustees of Institutions of Higher Learning is a separate corporate entity or so much a mere arm of the State as to constitute suit against the Board one against the State, within the prohibition of the Eleventh Amendment of the United States Constitution. Louisiana Land and Exploration Company v. State Mineral Board, C.A. 5, 229 F.2d 5. Compare Stone v. Interstate Natural Gas Co., 5 C.A., 103 F.2d 544, affirmed, 308 U.S. 530.

The acts and things done and performed by the Governor have been taken and done under and pursuant to the provisions and requirements of our State Constitution and Statutes.

Section 116 of Article 5 of the Mississippi Constitution provides the chief executive power of this States shall be vested in the governor.

Section 119 of the same Article provides that the governor shall be the commander in chief of the army and navy of the state and the militia, except when they shall be called into the service of the United States.

Section 123 of the same Article provides the governor shall see that the laws are faithfully executed.

Rule 17(a) of the Federal Rules of Civil Procedure demonstrates that the Supreme Court recognized the desirability for all actions to be prosecuted

in the name of the real party in interest.

Although "the real party in interest rule in terms applies only to parties plaintiff, * * * the concept has been referred in connection with parties defendant." 3 Moore's Federal Practice, Section 17.07, p. 1331.

In Lumbermen's Mutual Casualty Co. v. Elbert, 348 U.S. 48, 99 L.Ed. 59, 63, as to a liability insuror it is said: "Petitioner is therefore not merely a nominal defendant but is the real party in interest here."

See also International Brotherhood of Teamsters, etc. v. Keystone Freight Lines, C.A. 10, 123 F.2d 326, Syllabus 3.

Technically, the Federal Rules of Civil Procedure govern the procedure in the district courts of the United States (F.R.C.P. 1) and, as stated in F.R.C.P. 81(a), paragraph 2:

> "In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States.* * * "

The appellant is apparently now in doubt as to the applicability of those rules; he formerly moved "pursuant to Rule 21 of the Federal Rules of Civil Procedure" to add Governor Ross R. Barnett as a party.

It is submitted that this very doubt as to the applicable rules to be used points up the originality of the jurisdiction being exercised in this Court. The rules of this Court are all aimed at appellate proceedings. In appeals in civil actions, the only Federal Rules of Civil Procedure adopted by this Court are in Rule 10 of this Court, 28 U.S.C.A., United States Courts of Appeals Rules, adopting Federal Rules of Civil Procedure Nos. 46, 50, 51, 73, 74, 75 and 76. F.R.C.P. No. 65 as to Injunctions was not adopted. We call

particular attention to the absence of any rule in this Court for the filing of complaints and petitions and for responsive pleadings thereto, and for injunctive relief. Your Rule 21 applies to "Motions" only. Although your Rule 9 provides for process, you have no rule for making new parties, nor any for amending pleadings to do so (such as F.R.C.P. 15).

It is respectfully submitted that in this case the real party in interest is the State of Mississippi. The United States recognized this by making the State of Mississippi the first named party to its alleged new suit in this Court.

CONCLUSION

For the reasons set forth both in this Brief and in its Motions to Dissolve Temporary Restraining Order and Stay or Dismiss Contempt Proceedings, the State of Mississippi respectfully moves that said motions be sustained.

RESPECTFULLY SUBMITTED,

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CERTIFICATE

I, Garner W. Green, Sr., one of the attorneys for the State of Mississippi herein, hereby certify that on the date shown below, I served the foregoing Brief on James H. Meredith, appellant, by mailing true copies thereof to Constance B. Motley, Esq., 10 Columbus Circle, New York, New York, air-mail, postage prepaid, and to R. Jess Brown, Esq., 1105-1/2 Washington Street, Vicksburg, Mississippi, by first class mail, postage prepaid (the distance being less than 500 miles), the Attorneys of Record for said Appellant; and on the United States, Amicus Curiae and Petitioner, by mailing a true copy thereof upon John Doar, Esq., U. S. Department of Justice, Room 1143, Washington 25, D. C., air mail, postage prepaid.

Dated this 5th day of October, 1962.

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