IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

RALPH D. ABERNATHY, J. E. LOWERY, S. S. SEAY, SR., AND FRED L. SHUTTLESWORTH,

Plaintiffs,

VS.

JOHN PATTERSON, individually and as Governor of Alabama, EARL JAMES, individually and as Mayor of Montgomery, L. B. SULLIVAN, individually and as Commissioner of Public Safety of Montgomery, FRANK PARKS, individually and as Commissioner of Public Affairs of Montgomery, MAC SIM BUTLER, individually and as Sheriff of Montgomery County, HOLT A. MCDOWELL, individually and as Sheriff of Jefferson County, and WILMER SHIELDS, individually and as Sheriff of Marengo County,

Defendants

Civil Action
File No. 1683-N

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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ATTORNEYS FOR PLAINTIFFS

in clerk file

in State court against plaintiff's operation of ships from Mass. to Nantucket. Brought under the Civil Rights Act, the constitutional rights involved apparently arose under the Commerce Clause. It was therein said that Tit. 42 U.S. C.A. sec. 1983 is not an express exception to 2283. However, Wyzanski's position is not supported by the majority view as expressed in the Federal circuits on 2283. and the effect of the Civil Rights Acts thereof.

The assertion of jurisdiction therein is consistent with the attitude of the Federal Courts in injunction suits based upon Tit. 42 U.S.C.A. 1983. Browder v. City of Montgomery, Alabama 146 F. Supp. 127 (MD Ala. 1956) assumed jurisdiction, though it found no equity. The court in Browder made it clear that the authority vested in the federal district courts is not revoked by actions of state courts in the enforcement of their asserted authorities. Browder v. City of Montgomery, Alabama at 129.

POINT VII

THAT PROCEEDINGS IN PENDING STATE LITIGATION MAY BE ULTIMATELY REVIEWABLE IN U.S.S.CT. DOES NOT WARRANT DENYING PLAINTIFFS INJUNCTIVE RELIEF

A. The Grounds On Which Federal Courts Have Denied Injunctive Relief To Restrain State Judicial Action Are Inapplicable To This Case.

The right to assert a claim under Tit. 42 U.S.C.A. sec. 1983, 1985(3) for deprivation of rights secured by the Constitution is not dependent upon prior pursuit under State law. Cooper v. Hutchinson, supra; see also: Truax v. Raich 239 U.S. 33 (1915); Keegan v. New Jersey 42 F. Supp. 922 (D. N.J. 1941)

It is not necessary for an Act of Congress to specifically mention 2283 in order for its injunctive provisions to be deemed "expressly authorized." "It is sufficient if the act contains an express grant of power to enjoin State Court actions." (emphasis added) Note, Federal Power to Enjoin State Court Proceedings, 74 Harv. L. Rev. 737, See also: Almagamated Clothing Workers v. Richman Bros. Co., 342 U.S. 511, 516 (1955).

The Civil Rights Acts, Tit. 42 U.S.C.A. secs. 1983, 1985(3) are express authorizations by Congress granting to the Federal Courts injunctive power to stay State proceedings initiated by state officials under color of law depriving persons of their constitutional rights. Cooper v. Hutchinson 184 F. 2d 119 (3rd Cir. 1950); Progress Develop. Corp. v. Mitchell, 182 F. Supp. 681 C.N.D. Ill. 1960); Cf. Henderson v. Fleckinger 136 F 2d 381 (5th Cir. 1943); American Optometric Association v. Rotholtz, 101 F 2d 883 (7 Cir. 1939); See also: Jamerson v. Alliance Ins. Co, 87 F. 2d 253; T. Smith & Son, Inc. v. Williams, 275 F 2d 397 (5th Cir. 1960). Barrett, Federal Injunction Against Proceedings in State Courts, 35 Cal. L. Rev. 545, 549-50 (1947) Truax v. Raich, 239 U.S. 33 (1915)

But see Island Steamship Lines, Inc. v. Glennon, 178 FS 292 (D.C. Mass. 1959) per Wyzanski, J. wherein an action brought to enjoin the enforcement of an injunction issued

Arfons v. E.I. Du Pont de Nemours & Co. (C.A. 2d, 1958) 261 Fed. 2d 434; Carss v. Outboard Marine Corp. 252 F. 2d 690 (C.A. 5th 1958)

See also: MacDonald v. Winfield Corp. (E.D. Pa. 1948) 82 F. Supp. 929 where a motion to dismiss was denied because it did not appear to a certainty that plaintiff would not be entitled to relief under any state of facts which could be proved.

POINT II

SUMMARY OF ALLEGATIONS CONTAINED IN PLAINTIFFS' COMPLAINT.

The plaintiffs, RALPH D. ABERNATHY, J. E. LOWERY, S. S. SEAY, SR., AND FRED L. SHUTTLESWORTH, are all citizens of the United States and are over the age of 21, and reside in the State of Alabama. Each of the plaintiffs herein belongs to that class of persons commonly referred to and designated as Negroes.

The plaintiffs individually and through their association with the organizations mentioned in paragraphs 1 through 5 of the Complaint and in association with other persons throughout the State of Alabama and the United States, under the spiritual leadership of the Revernd Martin Luther King, Jr., sought to advance the equality of treatment of members of the Negro race through Christian and non-violent constitutional means.

In pursuance of the foregoing objectives, plaintiffs,

their supporters and others with whom they have been associated, sought to rely on the utilization of educational processes, the various media of press and speech, and other forms of communication guaranteed to them by the Constitution of the United States.

In or about February 1960, several of the defendants and divers other co-conspirators, the names of whom are to the plaintiffs presently unknown, entered into a conspiracy, individually and under the authority of their offices, to prevent the plaintiffs and others from exercising their constitutional rights. Pursuant to the aforesaid conspiracy defendants, as more particularly set forth in paragraphs 18, 19, 20, 21, 22, 23, 24, 25, 26, and 31 of the Complaint, thereafter repeatedly conspired , under color of law and the authority of their office, for the purpose of depriving, either directly or indirectly, plaintiffs of the equal protection of the law, or of equal privileges and immunities under the laws.

POINT III

THIS COURT HAS JURISDICTION OVER THE SUBJECT MATTER OF THE ACTION BROUGHT HEREIN BY PLAINTIFFS.

A. <u>The Federal Courts Have Plenary Power To Enjoin Violations Or Threatened Violation Of Rights Protected By The U.S. Constitution.</u>

> "...(I)t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by

> the Constitution...Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773 (1946).

See also: Hower v. Weiss Malting Elevator Co., N.Y. 1893, 55 F. 356, 359, 5 C.C.A. 129; Philadelphia Co. v. Stimson, 223 U.S. 605 (1912); Penhoyer v. McConnaughy, 140 U.S. 1; City Railway Co. v. Citizens St. Railroad Co., 166 U.S. 557; City of Mitchell v. Dakota Central Telephone Co., 246 U.S. 396, 407; Chicago B. & O. Railroad Co. v. City of Chicago, 166 U.S. 226; American Surety Co. v. Baldwin, 287 U.S. 156, 53 S.C. 98.

Where Constitutional rights have been invaded, and where a federal statute provides for a general right to sue for such invasion, federal courts in exercise of their plenary power to protect rights safeguarded by the U.S. Constitution may use any available remedy to redress the injury incurred. Bell v. Hood, supra, at 684; See e.g. Dooley v. U.S., 182 U.S. 222, 21 S.Ct. 762, 45 L.ed. 1074 and cases cited and discussed at pages 228-230 of 182 U.S., at pp. 764--765 of 21 S.Ct.; Bd. of Commissioners of Jackson County v. U.S., 308 U.S. 343, 349, 350, 60 S.Ct. 285, 287, 288, 84 L.ed. 313.

B. This Action By Plaintiffs Is A Case Arising Under The Constitution Of The United States.

See Jordine v. Walling, 185 F. 2d 662, 668, 3rd Cir. (1950); Osborn v. Bank of U.S. 9 Whet. 738, 6 L.ed. 204

(1824); Amendments 13, 14, and 15 of the U.S. Constitution; Tit. 28, Sec. 1331(a) U.S.C.A.; Hague v. Committee for Industrial Organizations, 307 U.S. 496, 59 S.Ct. 954, 81 L.ed. 1423 (1939), Opinion per Roberts, Jr. Cf Little York Gold Washing & Water Co. v. Keyes, Cal. 1877 96 U.S. 199, 24 L.ed. L.ed. 656; U.S. v. Old Settlers, 1893 13 S.Ct. 650, 148 U.S. 427, 37 L.ed. 509; Cound v. Atchison, T. & S.F. Ry. Co., C.C. Tex. 1909, 173 F. 527; Anthony v. Burrow, C.C. Kan. 1904, 129 F. 783; King v. Lawson, C.C.S.D. 1897, 84 F. 209; Van Allen v. Atchison C. & P.R. Co., C.C. Kan., 1880, 3 F. 545; City of Toledo v. Rys. & Light Co., 259 F. 450, C.C.A. Ohio (1919). See also: Walter P. Villere Co. v. Blinn, C.C.A. La. 1946, 156 F. 2d (1914); Cohen V. Virginia, 6 Wheat. 264.

C. This Is A Cause Arising Under The Laws Of The United States And This Court Has Jurisdiction Thereof Pursuant To Title 28, Sec. 1331(a).

Cf Shapiro v. Goldberg, 192 U.S. 232, 24 S.Ct. 259, 48 L.ed. 419; Ziegler v. Hopkins, 117 U.S. 683, 6 S.Ct., 919 29 L.ed. 1019; Gage v. Pumpelly, 108 U.S. 164, 2 S.Ct. 390, 27 L.ed. 668; Risty v. Chicago, R.I. & P. R. Co., 270 U.S. 378, 46 S.Ct. 236, 70 L.ed. 641; Put-in Bay Waterworks, Light and R. Co. v. Ryan, 181 U.S. 409, 21 S.Ct. 709, 45 L.ed. 927. See also: Montana-Dakota Utilties Co. v. Northwestern Public Service Co., 341 U.S. 246, 71 S.Ct. 692.

D. This Action Arises Under The Laws Of The United States And This Court Has Jurisdiction To Restrain Violations Of The Federal Civil Rights Statute.

Title 28, 1343(3), U.S.C.A. provides that the federal courts have original jurisdiction of any civil action authorized by law to be commenced by any person.

> "To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

Cf Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877 (1943) where the Court said:

> "Allegations of fact sufficient to show deprivations of the right of free speech under the first amendment are sufficient to establish deprivation of a constitutional right guaranteed by the Fourteenth, and to state cause of action under the Civil Rights Act." Douglas at 162 of 319, U.S., 880 of 63 S.Ct.

See also: Raich v. Truax (D.C.) 219 F. 273; Giles v. Harris, 189 U.S. 475, 23 S.Ct. 639, 47 L.ed. 909; Nixon v. Herndon, 273 U.S. 356, 47 S.Ct. 446, 71 L.ed. 759; Hope v. Indiana Manufacturing Co., 176 U.S. 68, 20 S.Ct. 272, 44 L.ed. 374.

> "Title 28 U.S.C.A., sec. 1343 expressly grants jurisdiction to the district court in civil actions for violations of civil rights." Hoffman v. Halden, 268 F 2d 280, 289 (9th Cir. 1959)

E. This Court Has A

E. This Court Has Equitable Jurisdiction To Grant The Relief Sought Herein.

Title 28, 1343(4) U.S.C.A. makes it unmistakeably clear that the federal courts have original jurisdiction, "...to secure equitable or other relief under any act of Congress providing for the protection of Civil Rights..." (emphasis added). Thus, in instances where Congress has expressly provided for the protection of civil rights, federal courts have original jurisdiction to "secure equitable or other relief" appropriate to safeguard federally protected civil rights.

It is submitted that the subject matter of this action clearly comes within the provisions of Congressionally authorized Civil Rights Action. Title 42 U.S.C.A. Secs. 1983, 1985(3); Hague v. Committee for Industrial Organizations, supra; Ghadiali v. Delaware State Medical Society, (D.C. Del.) 28 F. Supp. 841 (1939). See also: Westminster School District of Orange County v. Mendez, 161 F. 2d 774, C.C.A. Cal. (1947); A.F.L. v. Watson, 327 U.S. 582.

Tit. 28 U.S.C.A. 1343(3) and Tit. 42 U.S.C.A. 1983, 1985(3) are derived from "An Act To Enforce The Provision Of The Fourteenth Amendment To The Constitution Of The U.S. And For Other Purposes," approved April 20, 1871. The legislative history and historical setting of Sai d Act, (more commonly known as the Civil Rights Act) make it

unequivocably clear that the underlying rationale of the Civil Rights Act was to open the federal courts to the enforcement of rights distinctively civil in matters that fall within the scope of the Fourteenth amendment.

Sections 1983 and 1985(3) of Tit. 42 U.S.C.A. creates a cause of action in equity or at law and specifically authorizes the use of a federal forum for its enforcement in instances where rights distinctively civil in character, and protected by the Fourteenth amendment are alleged to be infringed by actions of officers or persons acting under State authority or under color of State authority.

Thus, a conspiracy aimed at depriving any person or class of persons of the equal protection of the laws or of equal privilege or immunities under the law subjects the conspirators to a civil action under Tit. 42 U.S.C.A. sec 1983, 1985(3) Cf Penn. R. System v. Penn. R. Co., 296 Fed 220 (1924), aff'd 1 F 2d 171 (3rd Cir 1924), aff'd 267 U.S. 203 (1925)*

POINT IV

THIS COURT HAS JURISDICTION OVER THE PERSONS OF DEFENDANTS.

*Though complaint was dismissed Federal jurisdiction to grant equitable relief to persons injured by the continuance of conspiracy designed to deprive them of rights secured by Federal law was sustained.

A. All Requisites Of Jurisdiction Consistent With Constitutional Due Process Have Been Satisfied.

An exercise of jurisdiction consistent with due process under the Fourteenth amendment to the U.S. Constitution requires that the person of the defendant have some "minimum connection" with the jurisdiction issuing service and that said defendant have been given notice and an opportunity to be heard. The defendants named in the Complaint heretofore filed were properly served. There is little question that the method of service was one "reasonably calculated" to bring to the attention of the defendants therein named notice of the action that has been instituted against them.

All the defendants are residents and citizens of the State of Alabama and all are therefore subject to the jurisdiction of this court.

B. That Some Of The Defendants Named In The Complaint May Have Participated In The Conspiracies Aforesaid Later Than Others Does Not Preclude Their Being Subject To This Action.

It is an established principle of the law of conspiracy, judicially developed in federal cases, that all persons who participate in a conspiracy are vicariously liable for the acts committed by other members. This is so, though some members of a conspiracy joined in at a later date than others.

All of the defendants named in plaintiffs' complaint at one time or another took part, participated and performed acts under color of law and the authority of their office, which directly and indirectly sought to deprive plaintiffs of their constitutional rights of freedom of speech, press, assembly and due process and equal protection under laws as guaranteed by the Constitution of the United States.

C. The Public Official Capacity Of The Defendant/ State Officials Does Not Make Them Immune To This Action.

A State official, acting in an unconstitutional manner for the pruposes of depriving citizens of the State of Alabama and of the United States of their constitutional rights is not precluded from the exercise of jurisdiction by this honorable court.

In Georgia R.R. & Banking Co. v. Redwine 342 U.S. 299, 72 S.Ct. 321, 96 L.ed. 335 (1952) Chief Justice Vinson, for the court held that:

> "a suit to restrain unconstitutional actions threatened by an individual who is a state officer is not a suit against the State." (citing, Gunter v. Atlantic Coast Line R. Co., 1906, 200 U.S. 273; and other cases) These decisions were reexamined and reaffirmed in Ex parte Young, 1908, 209, U.S. 123 and have been consistently followed to the present day. (citing Alabama P.S. C. v. Southern R. Co., 1951, 341 344; Sterling v. Constantin, 1932, 287 U.S. 378, 393; Greene v. Louisville & Interurban R. Co. , 1917, 244 U.S. 499, 507.)

As indicated supra the very purpose of the Civil Rights Act of 1871 and of Congressional legislation subsequently

enacted thereupon was to provide private citizens with a civil remedy in the federal courts for redress of injuries incurred to their constitutional, personal, and property rights. This of course includes the utilization of the injunctive power of the federal courts in instances where constitutional rights have been and are threatened with immediate, imminent and irreparable harm.

POINT V

THE COMPLAINT FILED HERETOFORE STATES A CLAIM UPON WHICH RELIEF MAY BE GRANTED

A. Plaintiffs Have Sufficiently Alledged That Federally Protected Constitutional Rights Are Being Interfered With And Threatened With Imminent Danger.

Hague v. C.I.O., supra. Cf. Geach v. Moynahahn, 207 F. 2d 714 (1953); Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, Rehearing denied, 319 U.S. 782, 63 S.Ct. 1170; Cobb v. City of Malden, 202 F. 2d 701 (1953); Picking v. Pennsylvania Railroad Co., 151 F. 2d 240 (1945), Rehearing denied, 152 F. 2d 753; Hoffman v. Halden, 268 F. 2d 280, C.A. Oregon (1959). See also: Agnew v. City of Compton, 239 F 2d 226, 230 (9th Cir. 1956).

It is a firmly established principle in the federal courts that in determining whether a complaint for alleged deprivation of constitutional rights states a claim upon which relief can be granted allegations made therein should be given a liberal construction. Eaton v. Bibb, 217

F 2d 446; Rule 8(f) Fed. Rules Civ. Proced.

> "Under 1985(3) Title 42, U.S.C.A. the elements of a cause of action are; (1) that defendants conspired, (2) that the purpose of the conspiracy was to deprive plaintiff of equal protection of the laws or equal privileges and immunities under the law, (3) a purposeful intent to discriminate (Snowden v. Huges 321 U.S. 1, 64 S.Ct. 397 (1943) that defendant acted under color of state law or authority (citing Collins v. Hardyman, 341 U.S. 651, 71 S.Ct. 937 (1951))...that by acts in furtherance of the cnnspiracy plaintiff was injured in his person or property or was deprived of having and exercising a right or privilege of a citizen of the United States." Hoffman v. Halden, supra, at 293.

1. Under the classic requirements of the Doctrine of Conspiracy plaintiffs have sufficiently stated a claim upon which relief may be granted.

The sine qua non of a conspiracy is an agreement between the parties to perform the act or acts complained of. It is accepted law in the federal courts that such an agreement can be expressed or inferred from conduct. Cf. Greenleaf, Evidence (1st Ed. Vol. 3, Ch. X, Sec. 93).

Thus if

> "...sufficient allegations appear of the acts of one defendant among the conspirators, causing damage to plaintiff, and the act of the particular defendant was done pursuant to the conspiracy during its course in furtherance of the objects of the conspiracy with the requisite purpose and intent under color of state law, then all defendants are liable for the acts of the particular defendant under the general principle of agency on which conspiracy is based." Hoffman v. Halden, supra, at 296.

2. The rights herein claimed are privileges inherent in citizenship of the United States secured against state abridgement by the Fourteenth Amendment to the U.S. Constitution.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,and to petition the Government for a redress of grievances."
Amendment 1, Constitution of the United States.

See Hague v. C.I.O., supra; Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736 (1940); Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249, 1255 (1947).

"Abridgement of freedom of speech and of the press impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the process of popular government..." Thornhill v. Alabama, supra, (at 741).

"The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all the matters of public concern without previous restraint or fear of subsequent punishment...Freedom of discussion, if it would fulfill its historical function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." Thornhill v. Alabama, supra, (at 744).

See also; Roth v. U.S. 77 S.Ct. 1304 (1957) where the Court said:

"The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. This objective was made explicit as early as 1774 in a letter of the Continental Congress to the inhabitants of Quebec:
'The last right we shall mention regards freedom of the press. The importance of this consists, besides the advancement of truth,.../in/ its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or

intimidated into more honourable and just modes of conducting affairs.' I. Journals of the Continental Congress 108 (1774)." (At 1308-09).

Even in the Slaughter House Cases, 16 Wall 36, where the court restricted the operation of the Fourteenth Amendment, the court acknowledged that the;

> "The right to peaceable assembly and petition for redress of grievances are rights of the citizen guaranteed by the federal Constitution."

The actions of the defendants pursuant to the conspiracies described in plaintiffs' complaint directly and indirectly served to deter and prohibit the plaintiffs from exercising their rights guaranteed to them by the First Amendment to the Constitution as incorporated into the Fourteenth Amendment. N.A.A.C.P. v. Alabama U.S.

See also; Hague v. C.I.O., supra, where it was said:

> "Freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment." (at 512)

3. A cause of action for equitable relief has been adequately alleged in that plaintiff has shown irreparable injury.

Cf. Hitchman Coal and Coke Co. v. Mitchell, 245 U.S. 229, 38 S.Ct. 65; Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.ed. 2d 988; Hague v. C.I.O., supra; A.F.L. v. Watson, 327 U.S. 582.

4. Plaintiff has alleged inadequacy of his remedy at law.

Cf. Franklin Telegraph Co. v. Harrison, 145 U.S. 459,

12 S.Ct. 900; Beacon Theatres, Inc. v. Westover, supra, where the Court said in an action under the Declaratory Judgment Act in a controversy under the Anti-Trust Laws;

> "On proper showing, harassment by threats of other suits or other suits actually brought, involving the issues being tried in this case could temporarily be enjoined pending the outcome of this litigation." (emphasis added) (at 568)

See also: Pennsylvania v. Wheeling & B. Bridge Co. (U.S.) 13 How. 518, 561; 14 L.ed. 249, 267; Parker v. Winnipiseogee Lake Cotton & Woolen Co. (U.S.) 2 Black 545, 551, 17 L.ed. 333, 337; Enelow v. New York L. Ins. Co., 293 U.S. 379, 79 L.ed. 440, 55 S.Ct. 310.

5. The complaint hertofore filed has shown the necessity for restraining the multiplicity of actions, to which plaintiff has been subjected and will be subjected to unless this court provides the requisite protection.

Phoenix Mutual Ins. Co. v. Bailey, 13 Wall 616 20 L.ed. 501; See also: Root v. Woolworth, 150 U.S. 401, 14 S.Ct. 136, 37 L.ed. 1123; Lieter Minerals, Inc. v. U.S. 352 U.S. 220, 77 S.Ct. 287, 1 L.ed. 2d 265.

POINT VI

THERE IS NO STATUTORY IMPEDIMENT TO GRANTING PLAINTIFFS THE RELIEF PRAYED FOR

28 U.S.C.A. sec. 2283 provides:

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