UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 21,795.

COUNSEL OF FEDERATED ORGANIZATIONS, ET AL, APPELLANTS

vs.

L. A. RAINEY, ET AL, APPELLEES

COUNCIL OF FEDERATED ORGANIZATIONS, ET AL, PETITIONERS

vs.

HONORABLE SIDNEY C. MIZE, RESPONDENT

Appeal from the United States District Court,
Southern District of Mississippi, Eastern Division

BRIEF OF RESPONDENTS – APPELLEES

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BRIEF OF RESPONDENTS - APPELLEES

The action of the District Court in dismissing Appellants' Complaint is an appealable order and, thus, must be reached in this Court by appeal and not by writ of mandamus. The Supreme Court of the United States in Roche v. Evaporated Milk Association, 319 U.S. 21-32, 87 L. Ed. 1185, in reversing the United States Court of Appeals for the Ninth Circuit, used the following language:

> In determining what is appropriate we look to those principles which should guide judicial discretion in the use of an extraordinary remedy rather than to formal rules rigorously controlling judicial action. Considerations of importance to our answer here are that the trial court, in striking the pleas in abatement, acted within its jurisdiction as a district court; that no action or omission on its part has thwarted or tends to thwart appellate review of the ruling; and that while a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute.

To the same effect is the case of Leimer v. Reeves, District Judge, 180 F.2d 891, Cert. Denied, 95 L.Ed. 627. The same principle is applied in Ex parte v. Fahey, 91 L.Ed. 2041, Coakley v. U. S. District Court, 291 F.2d 927, approved 7 L.Ed.2d 69.

We earnestly submit that this Petition for a Writ of Mandamus should be dismissed.

THE DISTRICT COURT WAS EMINENTLY CORRECT IN DISMISSING APPELLANTS' COMPLAINT

When a hearing on this matter at Meridian, Mississippi, on July 23 was recessed until Thursday, July 30 at Hattiesburg, Mississippi,

the District Court ordered that the three plaintiffs, who swore to the Complaint, namely, R. Hunter Morey, Dorie Ladner and Ruth Schein, be present in Hattiesburg on July 30, at 9:00 A. M. Then and there counsel for Plaintiffs noted an objection in the record to that directive. There could not possibly have been any misunderstanding on the part of Plaintiffs' counsel in connection with that order. When Court convened at 9:00 A. M. in Hattiesburg on July 30, the District Judge inquired as to whether or not those parties were present, to which Mr. Kunstler, attorney for Plaintiffs, who had objected to the Court's order in Meridian, announced to the Court, "No, I have them waiting in Jackson." It, therefore, became quite apparent to the Court that Mr. Kunstler had evidently, by deliberate design, instructed these Plaintiffs not to be present in Hattiesburg at 9:00 A. M. but to await his advice, in Jackson. This was a deliberate violation of the orders of the District Court and the Court was justified in dismissing this suit under Rule 41-b. But the Court did not base its order on this alone, but for the more substantial reason that the Complaint failed to state a claim upon which relief can be granted on the motions made by Defendants, which go to the jurisdiction of the Court.

It will be noted that in deciding this matter the Court first made its pronouncement that it did not think the Complaint states a cause of action upon which any relief could be given and described the Complaint as being "a scatter load, the worst I have ever seen."

The Complaint in this cause is based entirely on a charge of conspiracy. Such a charge, as all of the courts have held, like a charge of

fraud, must be pled with that particularity controlled by Rule 9-b of the Federal Rules of Civil Procedure. It cannot be pled by conclusionary allegations or by the general assertion that Defendants conspired for the purpose of depriving Plaintiffs of equal protection of the laws or of rights and privileges and immunities secured by the Constitution and laws of the United States.

When the Complaint is examined, it will be noted that Paragraphs 15, 16, 17, 18 and 19 are all couched in general conclusionary language and set out no particular act by any particular defendant. Paragraph 20 attempts to set out an overt act, but in so doing, fails to identify any defendant or any person and even fails to charge all defendants with the act complained of. The significant language in Paragraph 20 is as follows: "The defendants, or some of them, (underscoring ours) together with persons presently to the plaintiffs unknown", conspired and committed certain criminal acts. That these acts were for the purpose of intimidating and deterring certain people from exercising any of their fundamental rights under the Constitution of the United States. What rights are not particularized or described except in general terms. The Court should bear in mind that the Defendants in this action are L. C. Rainey, Cecil Price, T. B. Birdsong, Association of Citizens Councils of Mississippi, Ku Klux Klan, Americans for the Preservation of the White Race, John Doe and Richard Roe, John Smith and Paul Jones, Members of State and Local Law Enforcement Agencies in Mississippi and private white citizens of the State of Mississippi. The only Defendants upon whom process was served and who are presently involved in this suit are

the Defendants, Rainey, Price, Birdsong and Association of Citizens Councils of Mississippi. When Plaintiffs, as they did in Paragraph 20, say that "the Defendants or some of them," did certain things, how could the Court possibly determine which Defendants are charged with such acts? How could any one of the Defendants know whether or not he was charged with such act? When Plaintiffs charge that such acts were done by some undesignated person or persons for the purpose of intimidating and deterring some unnamed negro citizens from exercising their fundamental rights under the Constitution of the United States, how is any one to know what rights are involved? The charge in Paragraph 20 alleges that serious injuries were inflicted upon several negro citizens of Neshoba County. They are not named or identified.

The same fatal defects can be found in Paragraph 21 of the Complaint.

The entire Complaint falls far short of stating a claim upon which relief could be granted as required by Rule 9-B of the Federal Rules of Civil Procedure.

In the case of Dunn v. Gazzola, 216 F.2d 709, an action was brought for damages under two provisions of the Civil Rights Act, 42 U.S.C.A. 1983 and 1985(3). This suit was brought against a group of officials of the Commonwealth of Massachusetts and the City of Attleboro. This was a conspiracy case. The complaint was dismissed for failure of Plaintiff to state a claim upon which relief could be granted. The First Circuit, in sustaining the action of the District Court, used the following language:

> * * * the bare conclusionary allegation that "the defendants jointly conspired for the purpose of depriving the plaintiff of the equal protection of the laws and of her rights and privileges and immunities secured to the plaintiff by the Constitution and laws of the United States", without any support in the facts alleged, could not protect the complaint from the motion to dismiss; only material facts and not the unsupported conclusions of the pleader are considered in the light most favorable to the plaintiff.

To the same effect are the cases of McCampbell v. Warrick Corp., 109 F.2d 115, Cert. Denied, 84 L.Ed. 1401, Parmelee Transp. Co. v. Keeskin, 186 F.Supp. 533, Aff'd. 292 F.2d 794, Cert. Denied, 7 L.Ed.2d 340.

In C.J.S., under the general heading "Conspiracy", Section 25, at page 1039, we find this statement, "the facts and circumstances which constitute the conspiracy, or from which it might be inferred, should be set out clearly, concisely and with sufficient particularity", citing Morse v. Lewis, 54 F.2d 1027, Cert. Denied, 286 U.S. 557, 76 L.Ed. 1291.

Counsel, in their Brief, go to great lengths in tracing the legislative history of the Civil Rights Acts and to great lengths in tracing the history providing for the appointment of commissioners. They call attention to many affidavits, which have been injected into this case and take the particular pains to condemn the entire State of Mississippi and its citizenry. No attempt has been made to engage in a verbal battle with counsel in their scurrilous attack for the reason that the issue before this Court is confined to the narrow limits of whether or not the Complaint states a claim upon which relief can be granted under Rule

9-b of the Federal Rules of Civil Procedure coupled with a deliberate refusal to comply with an order of the Court about which there could be no uncertainty. If the District Judge had dismissed this Complaint under Rule 41-b alone, there might be some concern in the minds of this Court as to whether or not the District Judge acted providentially. On the other hand, considering that the District Judge had carefully examined the Complaint and the Motions to Dismiss prior to the hearing date in Hattiesburg on July 30, if this Court concludes that the Complaint in this action fails to meet the standards of particularity which is required under the Federal Rules of Civil Procedure in a case such as this, the District Judge was thoroughly warranted in his order of dismissal and this Court should say so. Due process is a two-pronged right and Defendants are to be advised of charges made against them with sufficient clarity as will enable them to properly defend. Plaintiff should not be permitted to bring a scatter-gun charge of widespread conspiracy in such general terms as we have here. This Court may recall or may have seen statements in the press during the early part of 1964 in which leaders of some of the organizations, which are members of CCFC, openly boasted that during the summer of 1964 their organizations intended to march, en masse, on Mississippi to bring about a situation that would require the Federal Government to move in and take over the State. It would seem that this suit was brought with that object in mind.

We earnestly submit that the District Court correctly and properly dismissed the Complaint in this action for failure to state a claim as is required by Rule 9-b of the Federal Rules of Civil Procedure and

that his action in so doing, should be sustained.

Respectfully submitted,

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BY: _____
Will S. Wells, of Counsel.

CERTIFICATE CF SERVICE

This is to certify that a true copy of the foregoing Brief has this day been mailed via United States Mail, postage prepaid, to L. H. Rosenthal, 406 Medical Building, Jackson, Mississippi, and Kunstler, Kunstler & Kinoy, 511 Fifth Avenue, New York, New York 10017, attorneys for Petitioners -- Appellants.

DCNE this the 3rd day of November, 1964.

_____
Cf Counsel for Respondents--Appellees.