Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

LESTER GUNN, et al.

Petitioner;

vs.

UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, et al.,

Respondents.

Docket No. 7

Pt. 2

Place Washington, D. C.

Date April 30, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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The above-entitled matter came on for further argument, pursuant to recess, at 10:06 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

(Same as heretofore noted.)

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume the arguments in No. 7, Gunn against the University Committee.

FURTHER ARGUMENT OF DAVID W. LOUISELL

ON BEHALF OF PETITIONERS

MR. LOUISELL: Your Honors, please, in view of the time limits we must submit the matter of appealability that we were discussing yesterday. On our supplemental brief, we submit that it is covered there. It is not a judgment; we have here under the statute a reviewable order.

I might only say that the appellees themselves who, in their motion to affirm, with great candor acknowledged this, insofar as it is relevant. They pointed out on page 2 of their motion to affirm that under Reynolds against Simms, the reapportionment case, they had no doubt about the appealability of the order here.

It would, of course, be very unfortunate, I think, from a viewpoint of judicial administration if the case ---

Q I thought the question was not the appealability of the order but whether there was any order at all which would be appealable. That is what bothered me about it.

A And, of course, as we point out in our supplemental brief, what there is is in the last paragraph of the court's opinion.

Your Honors, it seems to us that the crux of this

case, the real turning point where it might have gone the right way, was on the motion by the appellants to dismiss made very promptly, only a day or two after all of the criminal complaints in the state court had been dismissed.

At that point, we submit to Your Honors, there was no case of controversy, anything more to be done was a simple matter of advice, an advisory opinion. And from the beginning of this Nation to the present time the teaching of this Court is there was no occasion, no reason, no right to go ahead and render an advisory opinion.

The court insisted on the so-called using this phrase, "We will carry this motion with the case." If it had faced up to the motion explicitly, what happened might not have happened.

Now remember, if I may say, as far as Dombrowski goes -- and I wish there were time for a full review of it, although there has been so much refreshing and rethinking by the Court, in any event, I doubt it would be necessary -- but far from the facts here invoking Dombrowski, where there was a bona fide allegation of deliberate, intentional, non-good faith use of a very complicated statute to effect racial repression -- far from those facts being involved here -- and even assuming every disputed fact or anything that we can imagine was disputed here in favor of the appellees -- this was a one-shot proposition.

This wasn't a continuing, concerted effort to deprive

anybody of his rights. Instead of Dombrowski being controlling, I submit to you there are controlling words in Cameron against Johnson. If the mere possibility of erroneous application of the statute -- the mere possiblity of erroneous application of the statute does not amount to the irreparable injury necessary to justify a disruption of orderly state procedure.

All the good that may be done ---

Q Are you saying there was no case of controversy, or that there was, but the court should not have entered either a declaratory judgment or an injunction or both?

A I am saying that when those criminal cases were dismissed, Mr. Justice White, there was no longer a case of controversy. The state had given up every effort. There was no reason to go ahead with the federal three-judge case.

Q Even if they hadn't dismissed them, I suppose you would still say ---

A I would still say that it wasn't the type of situation. But, with the dismissal any pretense of excuse ---

Q You mean that brings it within Golden?

A Within Golden, of course, and the necessary distinction between the declaratory judgment and injunction thinking -- I invoke all that. But even within Golden, I would say, would confirm, make more explicit, what I have said about the applicability of Cameron against Johnson.

Q What would you say if criminal charges were

dismissed and no criminal charges were pending, but there were allegations that because of the statute and because of past conduct, we are now deterred from following the course that we would otherwise. Would that not be a case of controversy in your view?

A If there were a genuine position to that effect, there might be within the doctrine of Golden, from Dombrowski through Golden, there might have been. But there was nothing here. Far from meeting the strong requirements of the very words of Dombrowski, there wasn't even a serious claim that there was any concerted effort.

Q I understand that. There were no allegations of harassments or non-good faith application of the law, but I suppose the allegation was that we know that this statute might be applied in these circumstances, and we are now not holding any more demonstrations or expressing our views at all because of this statute. And that gives us a case of controversy.

A If there were a real showing, a real position, that they were so inhibited by the statute, that would be one thing. But I want to come to that and show that the statute as construed never in Texas had attempted to reach the content of speech. It was only a method of controlling disturbance and the hysterical need of disorderly conduct.

Q Was there an actual allegation here of

deterrence?

A There was an actual allegation of deterrence. But I submit there was absolutely nothing but the narrow, conclusory, mere allegation. Now we all know -- even from the viewpoint of the strongest support of the Dombrowski philosophy -- Dombrowski is strong medicine, strong medicine in a federal-state relationship. And I respectfully submit that unless taken according to prescription, strong medicine is poison.

But giving to the claims of the appellees every possible assumption -- Mr. Justice White, if it is true that they were being kept out of the county by a concerted action between these people, wasn't the remedy to grab an injunction against that sort of an abuse, rather than to reach out and declare unconstitutional a conventional, orthodox disorderly conduct statute?

Q Did they declare the whole statute unconstitutional?

A The whole statute. At one point they seemed to be emphasizing one part of it. But the net conclusion is, and the assumption among the lower courts of Texas, apparently, is that all of 474 is gone.

Q Of course, that is one of the difficulties in this case, there being no injunction. You can't tell just what was ---

A You can't tell the precise notion the court had in mind, but they did say "entitlement to injunctive relief."

I want to reserve a few minutes, so I will just say now that, of course, historically the purpose of this statute, I suppose, was to meet the conventional types of disorder, scenes on the street, disturbances in church, and so forth. Today the need for this kind of a statute is the kind of a situation where a mob may come to a schoolroom, a classroom, and screech and shout so as to disrupt. Your Honors, that has nothing more to do with free speech than the fact that it involves noise from the vocal cords.

Q Did you understand that the district court, in fact, did declare null and void under the Constitution those parts of this statute that have to do with indecent exposure and firearms and so forth?

A Of course, they didn't direct themselves to that, specifically, but in the final conclusion of the court the whole statute went.

Q They didn't care about any exceptions?

A No exceptions to the condemnation.

Q But they did say what the state could pass as legal.

A They did say that. As a matter of fact, the next session of the legislature met and adjourned without taking any action, as we point out in our supplemental brief.

Q That is the difficulty in a case when there is actually no injunction, you can't tell. And that is the reason for the rule and the law that requires an injunction to be very carefully and precisely drafted. And here there is no injunction at all.

A There is the concluding paragraph. Of course, if we did have ---

Q A statement that they are entitled to an injunction.

A If the court had been obedient to the notion that Your Honor has just put, we would have a specific injunction. But you can go to the whole opinion of the court, including the so-called "addendum" opinion, to see the completeness of the condemnation of section 474.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Louisell.

Mr. Clinton.

ARGUMENT OF SAM HOUSTON CLINTON, JR.

ON BEHALF OF RESPONDENTS

MR. CLINTON: Mr. Chief Justice; may it please the Court:

We think the disposition of this case here, for reasons about to be stated, is a rather simple matter and suggest that that disposition is to affirm what the district court has done and remand for further proceedings not inconsistent with whatever action the Court does take.

Q Are you addressing that observation to the limitation of the injunction, so that it would have some rational relationship to the events?

A I am addressing it to remanding it to the court in order that then the court may actually enter and order for injunction if the court now deems it meet and appropriate to do so.

Q We don't have any power at all to review a case where an injunction hasn't either been granted or denied, and your suggestion is we now remand it so that an injunction can be granted. We don't have any jurisdiction in this case, unless an injunction has been granted or denied under section 1253.

A The real problem here is, I suggest, that the court in real deference to the Legislature of the State of Texas stayed any action under its opinion. With that occurring, prevailing counsel -- just as a practical matter -- is not going to try to bother the court below with getting some kind of order. We are still waiting for the legislative action.

Q Well then, as a practical matter, this Court has no jurisdiction to review anything, under section 1253. You know what its words say, don't you? It is very understandable the courtesy and deference that the three-judge court showed to the sovereign State of Texas. I suggest that the result of what it did was quite unfortunate, because it leaves an essentially advisory opinion unreviewable.

A The opinion does, in the last paragraph say that ----

Q Express the view that you are entitled to an injunction.

A --- we are entitled to declaratory ---

Q But there is no order granting an injunction. There is no injunction.

A Certainly, that is true.

May I, however, clear up one thing that arose yesterday as to whether the district court's old suspension of its order later somehow became effective by reason of the legislature meeting and adjourning.

What actually was, the legislature did meet on June 4, 1968 in special session that was scheduled by the normal course of events to adjourn on July 3. In the meanwhile, the state, the appellants here, applied to His Honor Mr. Justice Black, and he on June 12, I believe, entered a stay order, which in effect superceded whatever the district court's stay of mandate meant. And actually, we are still today under that stay order.

I want to discuss what counsel says is the crux of the case; that being the motion to dismiss. I would like to put that in context, if I may-- the events that led up to that. This particular occurrence was on December the 12th. We filed our complaint by the 21st. The single judge granted a

temporary restraining order, holding things in status quo.

We also filed a motion for preliminary injunction and requested the convening of a three-judge court. In January, on January 2, the TRO was extended, as I recall by agreement. On the 19th the defendants filed an answer to the motion for injunction, joining issue on our allegation. On January 23 the TRO was extended to February 23, which was also the date of the hearing set for the three-judge court.

So by January 23 everybody had their pleadings in order, and the three-judge court had been convened, and the application for the preliminary injunction was then pending.

It was February 15th, some 2 or 3 weeks later, that for the first time the motion to dismiss surfaced and was called to the attention of the court, in connection with a contemporaneously filed motion for continuance, seeking to have the court put off the hearing that had already been scheduled on the pleadings and concentrate only on the motion to dismiss.

The court, on February 20, 3 days before the previously scheduled hearing entered an order deferring the motion, or carry it along with case, as we say down there, and denying the motion for continuance. And then on the 23rd the hearing was held -- on which date, incidentally, and for the first time the defendants filed any character of proof, this being in the form of affidavits from some of them and some of the deputies.

I think and submit that the court was entitled, with respect to the motion to dismiss, to be very suspicious of the validity of the good faith, coming not only as a matter of time as it did -- and, in fact, as I recall, the presiding judge, Judge Thornberry, raised that very question during the hearing as to the timing of that motion. He said, "If you thought these events had occurred on federal enclave over which the state had no jurisdiction, why have you waited this long to call it to our attention?"

But, in any event, the motion to dismiss, if the Court please, is directed only to that event. The motion to dismiss is limited to the fact that ---

Q Where does that appear, Mr. Clinton?

A It is page 16 of the brown appendix.

Q Thank you.

A The last two sentences: " The defendants would show the court that no useful purpose could now be served by granting an injunction to prevent the prosecution of these suits because the same no longer exists. Plaintiffs can ask no greater relief in the instant case than that the complaints heretofore filed be dismissed for want of jurisdiction."

Well, of course, we not only can but did ask for more relief. And just to stop the pending prosecution, we had a prayer for declaratory judgment, that the statute be declared unconstitutional. We had a prayer for preliminary injunction,

later, permanent injunction. We had a prayer for general relief that, I submit, is so broad that if leave could be granted, we could still ask for monetary damages for the action visited upon the appellees here.

The court had this kind of evidence before it, too, which I think this Court can easily conclude that the district court not only considered but was impressed by. To justify this kind of evidence -- to justify the sworn testimony in the sense of affidavits we agreed in the stipulation that those affidavits meant that those people giving the affidavit, if called to testify, would testify in the fashion shown in the affidavit. This was all done by agreement for the convenience of the court.

The appellees here, the three young men who were handled in Bell County as they were, and others called as witnesses through their affidavit who were there also as a part of the demonstration, all said that they were limiting their activity in the Committee and in its peaceful protest, that they would not return to Bell County, that they would not engage in any demonstration in Bell County -- and some said elsewhere -- so long as the statute was being used in the fashion that it was.

Q Could that conceivably be a form of protest against the statute as well as bona fide expression of fear? According to the statute, it has got to be a fear, an

apprehension, doesn't it?

A Well, I think it was an expression of fear. Maybe it wasn't stated directly to the statute itself, but it was stated in terms of, if people can be charged for disturbing the peace for what we have done, then we are not going to do it until something is done about the statute.

The point I am trying to get to is to suggest to the Court that when the district court accepted those statements, not only by the appellees but by their witnesses who were there in the demonstration, they had very good reason for accepting them and believing them and granting relief based on that or indicating that we were entitled to relief based on that.

Q Professor Louisell, I think, argued yesterday, Mr. Clinton, that the 1871 statute was not aimed at isolated, or sporadic, enforcement of a particular statute in a particular way but systematic, or patterned, use of the local statutes to inhibit constitutional rights. Do you think -- going back to your original pleading -- do you think you have a case of systematic conduct, or a pattern of conduct, to deprive people of their constitutional rights here?

A We did not allege that the defendants, the appellants here, had previously used this statute.

Q Let me try a hypothetical case that might illustrate it. I think someone said Texas had 365 or 367

counties.

A Actually, 254.

Q Two hundred and fifty four? Well, that is still quite a few. Suppose you have a prosecutor in each county, and you have one prosecutor in one of those counties who has some aberrations about a Texas statute and enforces it in a certain way. Is that the kind of state action which the 1871 act contemplated where it is one prosecutor in one of 254 counties, or must it be something farther than that?

A I think it is, especially in this case, where the state attorney general appears in the case for the State of Texas.

Q That is after the event.

A But he is in effect saying, as he did in the pleadings, that the statute was valid, that the events that occurred there were the disturbance of the peace, and he is alleging really that that local event in Bell County was proper, and is, in effect, the State of Texas adopting that position. I think the court was entitled to consider that.

Q But that is an argument over the factual issue, whether this was a disorderly conduct case or whether it was a repression of First Amendment rights, isn't it?

A Yes.

Q He is defending on a quite different ground than your attack.

A We contended and we alleged that what was happening in Bell County -- which is a focal point for such demonstrations for the reason that counsel pointed out -- was deterring the exercise of free speech of people that wanted to go to Bell County to demonstrate. We did not contend that the same thing was happening in other parts of the state, because we weren't really trying that. All this is very true.

Q But did you allege anything in your complaint that indicated that there was something you wanted to do that you had not done?

A Actually wanted to do?

Q That you had not done. I mean, specifically, other than just generalities?

A We alleged what the University Committee did, in terms of its activities: demonstrtions, distribution of literature ---

Q Did you allege you had ceased it?

A Various individuals handled it in different ways. Some individuals said, "We have ceased all activities." Others said, "We have ceased any activity in Bell County. We will not go back to Killeen and Bell County and the Fort Hood area."

Q This was in your complaint or in the affidavits or what?

A I believe it is in both. We allege in our complaint ---

Q But you say "will" ---

A --- that the sole purpose of these activities by the defendants were to deter, intimidate, hinder, and prevent plaintiffs and the members of the University Committee, as friends and supporters, from exercising the rights guaranteed. We say unless the court restrains the operation and enforcement of a void, invalid, nonconstitutional statute, plaintiffs and members of the committee will suffer immediate and irreparable injury.

Q I know, but that is a long way from saying that you had actually been deterred from a course of conduct.

A Well, we say that as along as the charges are pending, we will be fearful of exercising the rights, the federal rights guaranteed. And then the affidavits come along and say that they have, indeed, ceased activities, either statewide in the event of some of the affiants or just in Bell County.

Q The details are in the affidavits?

A The details are in the affidavits, and what I want to try to point out at this time is to show why the court below was justified in accepting those statements against the background of the other evidence that was before the court.

What counsel labeled yesterday as unfortunate events. Some of those unfortunate events include the following, based on the evidence that was before the court. Sheriff Gunn

himself said to two of the demonstrators -- who were not actually handled, who were not arrested, who were not jailed, Sue Granville and Phillip Juvenville -- "Get out of my county and don't come back. Don't ever want to see your faces in Bell County again."

Sheriff Gunn -- contrary to counsel's suggestion yesterday -- does not deny having made those statements. He denies having said other things to the specific appellees here in and out of the jail, but he does not deny, in his affidavit, making those statements to Sue Granville and Phillip Juvenville.

Q Mr. Clinton, my problem is, assuming that the officials in this county did exactly everything that you allege they did, why is that sufficient ground to knock out a state-side statute? Do you allege that any other county is going to enforce it?

A We do not allege experience in any other county.

Q Do you allege that any other person, police official, is going to use it the way it was used here?

A This case arises solely from what happened in Bell County.

Q Could you get the same relief by enjoining those officials from acting, without knocking the statute out?

A It appears to me that if the statute is -- of course, if it is invalid in Bell County, it is invalid

statewide.

Q Why?

A It just happens that this situation arose from Bell County.

Q Well, I respectfully submit the situation would not arise again in Bell County, unless the President of the United States came down there.

A No, sir, that is exactly another point that is made throughout these affidavits.

Q Well, I can't leave that out.

A May I comment about that?

Q First I want to know, can you get your relief without knocking the statute out?

A I don't see how we could. We have to allege, as I understand it, under Dombrowski that the statute is unconstitutional.

Q Dombrowski said the statute was being used, systematically, over and over and over again. You say the statute was used once by one group of officers.

A We say it was used on this occasion and that they were threatening us with, in effect, using it again and again and ain if we came back.

Q Where do you get that from?

A I infer that from all of these events that happened: the sheriff saying, "Don't come back, we don't

want to see your face here again." The other things that I have to call to the Court's attention are these other evidentiary events that happened that portend what would happen in the future.

Q Did you ever apply for an injunction after the judgment in this case?

A I am sorry, I don't get your timing there. After the court handed down its opinion? We did not apply, because the court said, "We are deferring any further action until the legislature acts."

Q And then the legislature closed?

A The legislature met. While the legislature was in session, Mr. Justice Black entered a stay order, which is still in effect.

Q Still in effect?

A Yes, sir.

Q But if this case is decided and sent back, then you will apply for an injunction; you will get it or not. Will you get the injunction?

A As we point out in our brief, we will appear before the court and make application for whatever relief then appears to be appropriate.

Q Well, what other relief is appropriate, other than an injunction?

A We think, frankly, that the declaration that

the statute is unconstitutional is sufficient to preclude any other bona fide prosecution under the statute. We believe the state local, district and county attorneys will follow the law. If it is declared unconstitutional ---

Q So you wouldn't ask for an injunction?

A We may not, in view of the problems ---

Q Well, if you are not interested in an injunction, where do we get our jurisdiction?

A I don't suggest that we are not interested; I say we may not.

I must again emphasize this point that I am trying to make; that the court below acted very properly in seeing that there was a case and there was a controversy; that it was continuing; that it was very live, because of what the appellees said as to restricting their activities; and that they were justified in accepting that by reason of what had happened to them in Bell County and what was threatened would reoccur, in the event they went back to Bell County.

I have indicated what the sheriff himself said. When they were taken before the Justice of the Peace, he greeted them -- under the evidence in this case -- he greeted them with the statement, "We don't like traitors around here." He said, "You can plead guilty and be fined $200, or you can plead not guilty and I will put you in jail until you can make a $500 bond."

One of the appellees here said, "Isn't that a little high?" And he said, "Why sure it's high, but I want to make sure you're back, because I want to see that this case is tried."

After that happened, an officer of the law is there in the J.P.'s office, and he confronts one of the appellees, and he is toying with live bullets in his hand, and he says, "You know, sonny, I've shot a lot of mad dogs in my day, and I could shoot a traitor and never give it a thought. It would be just like shooting a mad dog."

When they finally got moved from the Killeen City Jail to be taken over to Belton, a community, or town, some 15-20 miles away, to be put in that jail, the Killeen police chief tells them, "Don't come back here. We don't like your kind around here, and tell your University of Texas friends the same thing, because we've got all the education we need right here at the junior college."

All of these activities, all of this evidence -- the whole point of bringing it up is to justify what the court below found was a live controversy, a genuine, good faith, solid based statement by each of the appellees and their associates that they were no longer going to engage in demonstrations, because this is what happened to them, or would happen to them.

Q Let's assume they could have demonstrated, with solid evidence that all of those allegations are true -- those are just allegations now -- do you think those allegations, if

true, would bring it within the systematic pattern of conduct the Dombrowski Case was talking about?

A Obviously, not statewide.

Q In Dombrowski it was sustained over a period of time. The Dombrowski opinion describes the series of events which has this inhibiting effect -- drying up contributions, acts that took place over a period of many months, if not years. Here you have one event on one day, don't you?

A One event on one day, with the threat of what would happen if they came back to have any other event on any other day. It occurs to me that we should not be required to keep testing the statements that these officers had made, in order to have standing to complain and say, "We are being put upon, and we are being mistreated, and we can't get a fair trial up there," and come into federal court for relief.

Q That is again what was suggested about the 1871 act. It was aimed only at sustained, systematic, organized patterns of harassment of a particular group of people or of a particular kind of conduct. Is that not true of the 1871 statute?

A I will accept the Professor's statement on that.

Q I think the Dombrowski opinion reflects that.

A I am suggesting to the Court that we have definitely shown in his case the chilling effect by reason of the acts and conduct that happened there and that are threatened

to reoccur every time any of these people, or their associates, or their friends and supporters ever again enter Bell County, in order to engage in any peaceful demonstration. In order to do -- what counsel himself said to the Court yesterday -- there was nothing improper about their protest.

May I hark right back to the business about the President of the United States to show that -- Not only does this evidence show that any other time they went up there for any other purpose the same was likely to occur, but also to suggest that to protect the President on this occasion all that was necessary was to -- once, whoever the officers were that seized them and detained them and walked them out to the edge of the crowd, was then to suggest that they leave. There was no necessity in protecting the esident for these deputy sheriffs then to seize them and handcuff them and frisk them and put them in cars and take them down to the Killeen Jail, choking them all the way down there, and engaging in this further activity that really gave rise to the complaint.

Q Since you have pushed that point so far, do you think the sheriff, or any of his people, had the slightest idea that they were going to use this statute? Weren't they just working them over, period?

A Oh, no.

Q And then later they found the statute?

A No. The sheriff -- and the evidence shows --

the sheriff, while still at the scene, told his deputy -- who was Deputy Strange, I believe his name is, and Deputy Strange confirmed this -- that while he was taking the appellees into the Killeen Jail, he was in communication with the sheriff, who told him to file disturbing of the peace complaints.

Q That was after, wasn't it?

A Just a matter of minutes.

Q But it was after. All I am trying to say is that your complaint is against the police officials of that county, not against the statute. Suppose there had been a Texas statute, a disorderly conduct statute, that was satisfactory to you and the 9 of us, and they did the same thing -- and there is no doubt they would -- you wouldn't have been able to get to the statute, would you? The statute was just an excuse, wasn't it?

A You are suggesting that if the statute were constitutional?

Q Yes.

A Well, no, we would have to complain about the abuse of the statute, but here we are complaining about both: that it is unconstitutional, and we also allege the other branch of Dombrowski, too, below.

Q I know, but the court took the one prong, that the statute was unconstitutional.

A That is correct, yes, sir. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Clinton.

Mr. Louisell, you have 2 minutes left.

REBUTTAL ARGUMENT OF DAVID W. LOUISELL

ON BEHALF OF PETITIONERS

MR. LOUISELL: If the Court please:

Before I forget, I just wanted to point out all that this Court has done to make freedom of speech really viable when it has an orderly procedure before it -- as contrasted with what went on here. I simply refer to your own recent decision in the Batchelor Case for Maryland and, if I may add, two California cases -- certainly, a court trying to be obedient to your teaching on free speech -- they were too late to get into the brief. These cases show how you don't reach out to strike down the California Disorderly Conduct Statute because you have got to grant some kind of relief: In re Kay, 1 California 3rd 930, In re Bushman, 1 California 3rd 767.

The one thing that Mr. Justice Stewart directed himself to is all I will have time to comment upon, but I would like to call Your Honors attention to the fact that we are not dealing here with rule 65 that uses the phraselogy, "preliminary injunction, temporary restraining order and permanent injunction." We are dealing with section 1253.

Fortunately, I need not take a lot of -- even if I had time on this. Your Honors had occasion to carefully rethink this problem in the Goldstein Case. In the Cole against

Richardson proposition that was referred to from the bench yesterday that -- as I understand it from the concurring opinions (there was only a very brief per curiam order) and the dissenting opinion -- in that case the matter was one of mootness. There is no possible claim of mootness here, Your Honors.

Q I had in mind section 1253, and I point out in your own words in a motion for a new trial in the district court. I am quoting from your motion; you said that the court had given, "not a declaratory judgment, but an advisory opinion." So according to your submission to that court -- with which I agree -- the court has not even given a declaratory judgment, much less entered, or refused to enter, an injunction.

A But wouldn't it be a very serious commentary on judicial administration if an opinion that is so effective, but for Mr. Justice Black's stay of mandate, that is so effective, as a practical matter -- and remember there is no other review, except to this Court ---

Q An outrageous situation.

A An outrageous situation, and also, I invite the attention of Your Honor to the fact that you can't blame counsel, or the appellees for that matter, because the very last sentence of rule 58 provides, "Attorneys shall not submit forums of judgment except upon direction of the court, and these directions shall not be given as a matter of course."

So I have to leave it to the Court to find a way of avoiding the continuation of a reprehensible order that is operating de facto as an advisory opinion and arrest the processes of enforcing the law. Something has to be done, or the situation will become impossible.

Q Just to pursue the point that, I think, Mr. Justice Stewart raised earlier: Isn't the very function of the judgment, which ordinarily follows the opinion, the expression of the court as to what it is going to do -- isn't the very function of that judgment to define precisely, narrowly and specifically the general thrust which the court's memorandum opinion has articulated?

A Yes.

Q And wouldn't it be very likely that an injunction of this stringent nature would have been very precise and very specific as against the broad and sweeping language of the court's opinion?

A Hopefully, certainly it would.

Q Where do you find the judgment in this appendix?

A In the appendix, Your Honor, and I again call your attention to the fact that in the docket entries it is referred to as a judgment.

Q Yes; but where can you find the judgment? Any judgment?

A You must turn to the last paragraph of the

opinion. You don't find, as I said yesterday, you do not find any separately entered document ---

Q There is not even a judgment here, is there?

A But, Your Honors ---

Q Just a paragraph of an opinion.

A You will remember in how many instances -- in fact the very rules provide -- that if findings of fact and conclusions are embraced within an opinion, the opinion is adequate for that purpose. If in substance a judgment is embraced within a form of words concluding an opinion, even though it isn't entered as the rule requires on a separate piece of paper, we respectfully submit it can constitute -- at least, I submit, that this Court should strain ---

Q Did you go back to the court at any time asking them to ---

A No, and I think -- of course, I had nothing to do with the case at that stage, but the attorney general ---

Q I am talking about the last year. You had something to do with it in the last year, didn't you?

A Yes. In fact, I argued the first appeal.

Q My question was, did any of the parties ask the court, since the last argument; this question was raised last time.

A To my knowledge, no; but Your Honors, will note again the last sentence of rule 58. This is a matter that is

left to the court, and the court has never entered what is should have done under rule 58. But that isn't the question. That isn't the question as we respectfully submit the question is, Mr. Justice. The question is, is there any kind of an order under 1253 of the Judicial Code. The language in 1253 is not in terms of a preliminary injunction; it is a interlocutory order, granting or denying relief.

Q Well, is this anything more than a judgment of a court that we will hold this case and retain jurisdiction over it? Is there anything else in that last paragraph?

A There is the explicit provision that the court's stay expires upon the termination of the next session of the state legislature.

Q Stay of what?

A The stay of what the court conceived of as its injunction, because it specifically ---

Q When are we going to agree there is no injunction?

A Your Honor, words are words. "Oh to distinguish the reality of things."

Q I haven't implied any criticism of you, at all, sir.

Q May I ask you one thing, Professor, how can anybody give them contempt for that piece of paper?

A The whole problem of the establishment of a contempt, of course, would be a very difficult thing, but with

the clear intention that is deducible from the words of the opinion, I would say it is conceivable. In any event, being subject to a contempt order is not the definition of section 1253, Mr. Justice.

Q But it has something closely ressembling an order?

A Yes.

Q But you don't have an order here, do you?

A We have what the judge intended to embrace within his opinion as an order, however ineptly such a thing was done.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Louisell. Thank you, Mr. Clinton. The case is submitted.

(Whereupon, at 10:55 a.m. the argument in the above-entitled matter was concluded.)