THE FREDERICK DOUGLASS MOOT COURT COMPETITION BRIEFS

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cleveland, ohio 1977

INTRODUCTION

The following are the Briefs submitted by the two teams which competed in the final round of the 1976-77 Frederick Douglass Moot Court Competition. The participants on the winning teams were Sherman L. Anderson, Case Western Reserve College of Law, and Johnathan T. Green, Cleveland State University College of Law; Daphne Taylor and Reuben Daniels represented Marquette University College of Law.

Special thanks to Judges for the competition, the Honorable Judges Theodore R. Newman, Jr.; District of Columbia Superior Court; Robert M. Duncan, Federal District Court for the Southern District of Ohio; and Lloyd O. Brown, Coyuhoga County Court of Common Pleas.

1976-77 Moot Court Committee

IN THE

SUPREME COURT OF THE STATE OF MISSISSIPPI

OCTOBER TERM, 1976

NO. 77-353

NATIONAL ORGANIZATION FOR THE
LIBERATION OF BLACK PEOPLE,

APPELLANT,

-vs-

RHENQUIST HARDWARE COMPANY, ET AL.,

APPELLEES,

BRIEF OF APPELLANT

SHERMAN L. ANDERSON

JONATHAN T. GREEN

Counsel for Appellant

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RHENQUIST HARDWARE COUNTY, ET.AL.,

APPELLEES

BRIEF OF APPELLANTS

OPINION BELOW

The opinion and order of the United States District Court for the Northern District of Mississippi, Lynchem Division, as yet unreported, is set forth in the record.

JURISDICTION

A formal statement of jurisdiction is omitted pursuant to the Rules of the 1977 Frederick Douglass Moot Court Competition.

STATUTES INVOLVED

Constitutional provisions and statutes relevant to the issues in this case are the First and Fourteenth Amendments to the United States Constitution; Title 42 U.S.C. Section 2000 A,B,C,D, D-3, E, E-2; Civil Rights Acts 1964, 1965; NLRA Section 8 (b) (4) and 8 (b) (1) and the Sherman and Clayton antitrust acts. The foregoing are set forth in pertinent part, in the Appendices to this brief.

QUESTIONS PRESENTED

I. Whether the Mississippi Code Annotated Section 97-23-85 can be applied to the case at hand where the intent of Congress is frustrated and where it produces a result which is void on its face?

II. Whether the Constitutional mandate of First Amendment freedoms from unreasonable, capricious and whimsical restraints are so fundamental that the abridgement of those rights require the most rigid form of scrutiny that the Mississippi statute must fall?

III. Whether the Mississippi statute Sections 75-21-1 et. seq. which are in radical contradiction to Congressional intent

and goals reflected and specified in the anti-trust laws can be held valid?

IV. Whether all individuals are guaranteed the right to deny their patronage to those business which contribute to their social, political and economic inequality or whether any entreprenuer possesses an absolute right to the business of all consumers?

V. Whether citizens of a county, whose race constitutes more than three fourths of the population, can be construed as a monopoly where they elect to trade with one business over another?

STATEMENT OF FACTS

On October 31, 1969, a bill of complaint was filed in the Chancery Court of the First Judicial District of Lynchem, Mississippi. Trial in the Chancery Court commenced on June 11, 1973. The trial lasted approximately eight months (Procedural Background (R) 1).

The Court below accorded judicial notice to the Mississippi Statistical Abstract (1971) (R.3.). In the decade commencing in 1960 the State of Mississippi had a total population of 2,178,141 of which 57.7 per cent were white and 42 per cent were black (R.3). However, in Rhenquist County, Mississippi from a total of 10,900 persons, only 2,500 were white (emphasis added). Thus, the ratio was approximately 76 per cent non-white to 24 per cent white (R.4). It follows that the white merchants of Rhenquist

County were highly susceptible to economic collapse when faced with a selective buying campaign against them. Blacks represented over three-fourths of the population of the county (R.4).

Whites had exercised complete control of the government at all levels in the state of Mississippi. Rhenquist County was no exception (R.4).

In the latter part of 1965, a group of black leaders in Port Hudson and other areas of Rhenquist County formed a Human Relations Committee. This group presented a petition containing thirteen demands to the Port Hudson Chamber of Commerce and leaders in business and civic affairs (emphasis added, R.5).

Later in 1966, the National Organization for the Liberation of Black People (herein after N O L B P) began organizing a chapter in Rhenquist County. The petition of the Human Relations Committee was considered by the Rhenquist NOLBP as insufficient. Thus, on March 14, 1966 a new set of immediate needs, in letter form, was addressed to the Mayor and Board of Aldermen, the Rhenquist County Board of Supervisors, the Board of Education, the Sheriff of Rhenquist County, and the public by release to the press, so that everyone could contribute to the solution of difficulties in Jackon and Rhenquist Counties (R.5,6).

Among the thirteen demands, there were six directly related to employment, Numbers 3, 6, 11, 15, 16 and 18 (R.6,7,8). A second letter was written on March 23, 1966, which included items four and five (employment related) which wer not part of the March

17 letter (R.9). Item 4 in part stated, "all stores must employ Negro clerks and cashiers" (R.9).

When no favorable answer was forthcoming from the addressees on April 1, 1966, a unanimous vote by several hundred black people decided voluntarily not to patronize the white merchants of Jackson and Rhenquist Counties (R.10).

In July, 1966, a group of young black men, totally unrelated to the NOLBP, organized a militant unit. This group was a cause of pervasive fear among black citizens of Rhenquist County (emphasis added, R.13).

On September 13, 1966, a group called, "Mississippi Alliance for Progress, Inc." (MAP) was incorporated (R.14). This group on a strictly voluntary basis favored the selective buying activity (R.15).

On or about March 1, 1967, "Our Market, Inc.", a corporation organized for the purpose of engaging in the wholesale, retail of grocery and clothing was organized (R.16).

On April 4, 1967, Dr. Martin Luther King, Jr. was assassinated. Port Hudson and Rhenquist County reacted as did the rest of the country with remorse and chagrin (R.16,17).

The Mississippi Legislature, with the intent to prohibit and control certain activity, enacted the following statutes: 97-23-85; MCA 1972 and 75-21-1 through 75-21-11 (R.25,26). The trial court held that the appellants had violated Mississippi boycott laws set forth above, and awarded damages to the merchants according (R.30).

The NOLBP now appeals to this Court from the District Court affirming the trial court's judgment.

SUMMARY OF ARGUMENT

I.

The Mississippi statute cannot be held valid in that it fails to meet the constitutional requirements set forth in the First and Fourteenth Amendments. The right to picket and boycott are forms of expression within the purview of constitutional protection. Such a statute not only prohibits freedom of speech, but it also infringes on the right of assembly and association.

Furthermore, the statute lacks in clearly defining lawful and unlawful conduct. The phrases "to induce or encourage", "to have direct control and legal authority" are all unconstitutionally overbroad and vague. The loose working of the Mississippi statute leaves one stranded without any guidance as to conform his conduct.

Assuming arguendo that this Court finds that the wording of the statute is constitutional, the requirement that protestors give notice to merchants who are potential targets of a boycott acts as an unreasonable prior restraint. There exist no justification for imposing a notice provision when such authority to permit boycotts are within the whimsical power of the merchants. For these basic reasons, statutes of such wording have consistently been held unconstitutional.

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II.

The merchants of Rhenquist County were intricately involved in the decision making process of the local government. They were united in their efforts to keep minorities in their place. Blacks in Rhenquist County discontinued patronizing those who aided and abetted their inferior status. The right to withhold one's business from another is protected. There exists no absolute right to the business of any individual. Just as there is a right to withhold one's trade from anyone, there is a right to engage in the free enterprise system by establishing a market. Therefore, the establishment of "Our Market" was legal and enhanced the concept of fair competition.

III.

In order to commit a conspiracy, there must be at least two or more persons. A corporation cannot conspire with its officers. Since there is a presumption of innocence, a lack of proof by the preponderance of the evidence is insufficient to establish the same. Appellees in the instant case merely presume a conspiracy based upon hearsay.

ARGUMENT

I. THE MISSISSIPPI CODE ANNOTATED SECTION 97-23-85 VIOLATES THE BASIC TENANATS OF THE FIRST AMENDMENT AND IS FURTHER IN RADICAL CONTRADICTION TO THE UNITED STATES CONSTITUTION.

The first Amendment to the United States Constitution guaran-

tees to everyone the rights of freedom of expression and association. These rights cannot be abridged by the federal government. The Fourteenth Amendment secures these rights against abridgment by the various States. (see Appendix B)

The Supreme Court has consistantly held that the right to protest cannot be abridged by the States merely because there is a fear that the protest will cause disruption. In Tinker v. Des Moines Independant School District, 393 U.S. 503. (1969), The defendants, some high school students, attempted to passively protest the Vietnam War. A school regulation prohibited all forms of protest. The Court held that, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression.

Likewise, in Terminiello v. City of Chicago, 337 U.S. 1, at 4-5 (1949), the Court held that an ordinance that prohibited speech which was defined as that which intended to invite dispute or create a condition o. unrest or create a disturbance was an unwarranted infringement on freedom of speech. Justice Douglas stated as part of the majority's opinion that:

> (A) function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute. . . is nevertheless protected against censorship or punishment. . .There is no room under our Constitution for a more restrictive view.

Terminiello has also been interpreted to mean that a State

cannot abridge one's right to express his grievances merely because the form of one's protest is considered objectionable. Cohen v. California, 403 U.S. 15 (1971).

Th right to picket and boycott are forms of expression within the ambit of First Amendment protection. The court held in Shuttlesworth v. City of Birmingham, 394 U.S. 147, (1969), that although the First and Fourteenth Amendments do not afford the same protection to those who express their grievances by conduct, as it does to "pure speech", picketing and parading are entitled to some First Amendment protection.

Although primary boycotts resulting from labor disputes have generally enjoyed First Amendment protection, National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612 (1967), the court held in Edwards v. South Carolina, 372 U.S. 224 (1963), that the right of picket or boycott in connection with a claimed grievance is not precluded merely because the grievance is not connected with a labor dispute (emphasis added), see Cox v. Louisiana, 397 U.S. 536 (1965), and Kelly v. Page, 335 F.2d 114 (5th Cir. 1964), holding that picketing department stores for the purpose of eliminating discrimination is entitled to First Amendment protection.

In the case at bar, the appellant merely attempted to persuade citizens of Rhenquist County not to trade with those merchants who persistently violaed the civil rights laws. (see Appendix D). Although there are some limitations on freedom of speech, there existed no justifiable reason for imposing the same. The court held in Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969) that as

long as the boycotters do not unreasonably interfere with the right of others to have free access to the business being boycotted, the State cannot prevent them from pursuing their goals.

In Thornhill v. Alabama, 319 U.S. 88 (1940) petitioners were convicted under an Alabama statute making it unlawful for any person without just cause or legal excuse to go near or loiter about any place of lawful business for the purpose of, or with the intention of, influencing or inducing other persons not to buy from, deal with or be employed at such place of business or to picket a place of business for the purpose of impeding, interfering with or injuring such business. The Court in overturning the conviction held that the statute was invalid as it posed an absolute bar on the right to discuss in public all matters of public concern.

Thus, the Mississippi Code Annotated Section 97-23-85, like the statute in Thornhill, imposes an absolute bar on Appellants right to protest. Thelanguage in Section 97-23-85 (see Appendix L) is written in such a manner as to preclude any and all picketing, boycotting or any other attempt by Appellant and other citizens of the State of Mississippi to air their grievances in public. Furthermore, Section 97-23-85 is constructed as to prevent any and all attempts by dissatisfied citizens to exercis their right to persuade others to join their cause. Such a statute not only prohibits freedom of speech but also infringes upon the right of assembly and association. NAACP v. Alabama, 377 U.S. 288 (1964); Bates v. City of Little Rock, 361 U.S. 516 (1960), and Shelton v. Tucker, 364 U.S. 479 (1960).

Therefore, the Mississippi statute cannot stand as it grossly ignores the basic tenants of the Constitution.

A. THE CONSTITUTIONAL REQUIREMENT OF PRECISION IN LEGISLATION AS TO CLEARLY DEFINE LAWFUL AND UNLAWFUL ACTIVITY IS ABSENT IN THE MISSISSIPPI STATUTE.

It is a fundamental principle that laws regulating the conduct of citizens must be framed in such a way as to offer them a clear standard upon which to base their actions, Winters v. New York, 333 U.S. 507 (1948); Lanzetta v. New Jersey, 306 U.S. 451 (1939). The language of Seciton 97-23-85 (see Appendix L) violates this basic principle. This statute is so vague that it offers no guidelines for any citizen to conform his conduct. Furthermore, this statute is so unclear that it works as a bar to any attempt by law abiding citizen to assert therir First Amendment rights. The Court held in Palmer v. City of Euclid, 402 U.S. 544 (1971) that statutes which are so vague as to fail in giving notice to persons as to what type of conduct constitutes a violation are unconstitutional. Se also Bagget v. Bullett, 377 U.S. 360 (1964); Dombrowski v. Pfister, 380 U.S. 479 (1965). The Machesky case supra, is directly analogous to the instant case. In Machesky, the Court found state injunctive order unconstitutional . In both cases there was a boycott of white merchants to show resentment of the general treatment of the black community. And in both cases the State was attempting either by injunction or by legislation to make the activity an actionable tort and to deny all boycotting and picketing. However, just as the injunction was held overly

broad because of its chilling effect on First Amendment rights in Machesky, so, too, is the nearly identical wording of Section 97-23-85 overly broad.

Furthermore, the phrase "induce or encourage" is unconstitutionally overboard. To induce or encourage an individual can be done by speaking, writing, distributing handbills or pamphlets, picketing, peacefully assemblyin or communcating through the press, radio and television. Cox v. Louisiana; 379 U.S. 599 (1964); Cameron v. Johnson, 390 U.S 616 (1968). Each of these actions is a form of speech or of assembly.

If inducement were interpreted to include acts such as coercion, intimidation or threats, then the expression would go beyond the purview of speech and a case could be made for regulating such acts. However, even if the statute is only applied where such intimidation or coercion occurs, it is on its face written to prevent the exercise of protected First Amendment rights.

Contrary to the clear and concise language used in the Civil Rights statutes, Title II—Civil Rights Act of 1964, Title 42 U.S.C. 200 A. (see Appendix D), the loose wording of the Mississippi statute cannot be held valid for it proscribes First Amendment rights.

B. THE REQUIREMENT THAT PROTESTORS GIVE NOTICE TO MERCHANTS WHO ARE POTENTIAL TARGETS OF A BOYCOTT CONFERS UPON THE LATER VIRTUALLY AN ABSOLUTE POWER TO ARBITRARILY PROHIBIT ANY DEMONSTRATION.

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1. THERE EXISTS NO STATE COMPELLING INTEREST FOR REQUIRING NOTIFICATION IN PRIMARY BOYCOTTS.

When a State attempts to regulate or abridge a fundamental right granted by the Constitution, it has the burden of proving that it has a clear and substantial reason to do so. Anything short of this will not be sufficient to maintain the State's claim. Hague v. C.I.O., 307 U.S. 496 (1939); Near v. Minnesota, 28 U.S. 695 (1930). Appellant avers that the State of Mississippi has not shown any overriding interest that is a sufficient basis for limiting the righ of private citizens to conduct primary boycotts.

Chancellor Porter stated in her ruling that the purpose of Section 97-23-85 was to protect "the property right of the person against whom the proposed boycott is aimed (R.27). Such a reason is clearly insufficient to justify prior restraint. In fact, the only time that the Supreme Court has allowed the State to place restraints on boycotts has been in the case of labor unions.

Appellant contends that the rationale in controlling the acts of labor unions is not applicable in the instant case. It has long been recognized that unions exert a strong influence on the activities of both their members and management. The members of a union are not free to ignore a picket line or boycott established by their union. The consequences of doing so are great. The individual union member depends upon his union to find and secure for him employment. Thus, if he chooses to buck the union by ignoring its strike orders he is endangering his ability to make a living. Appellant has no such

control over its members. It has no control over the ability of its members to secure a livelihood.

In conclusion, even if there is a legitimate purpose for the notice provision of Section 97-23-85, the State of Mississippi cannot pursue this purpose by means that would stibfle fundamental rights and liberties. Shelton v. Tucker, 364 U.S. 479 (1960).

2. ASSUMING ARGUENDO THAT THE COURT FINDS THAT THE PHRASES "TO INDUCE OR ENCOURAGE" OR "DIRECT CONTROL OR LEGAL AUTHORITY" ARE NOT VAGUE OR OVERLY BROAD, THE LANGUAGE NEVERTHELESS REMAINS UNCLEAR.

The phrases "direct control" and "legal authority" are constitutionally vague. see Amsterdam, A.G., "The Void for Vagueness Doctrine", 109 U. of Pa. L. Rev. 67 (1960). What is meant by direct? The statute would allow organizing a boycott against a merchant if that merchant could "directly control" or "legally correct" a legitimate grievance. This wording actually leaves one stranded without direction. In essence, before one may exercise his First Amendment rights to wage a valid criticism against a group, he must first seek approval from the State. There is nothing so peculiar or unique about a class of merchants that they should enjoy such immunity.

Thus, the only conclusion to be derived from the Mississippi statutes is that they are unconstitutional. Anything short of this conclusion fails to recognize the inherent shortcomings.

II. THE APPELLANT'S ACTIVITIES IN THE NATURE OF A PRIMARY BOYCOTT ARE CLEARLY WITHIN THE PURVIEW OF CONSTITUTIONAL PROTECTION.

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The right to speak freely and to peacefully assemble are fundamental rights guaranteed by the First Amendment. These rights and others cannot be denied any person without due process of the law. In New Negro Alliance v. Sanitary Grocery Company, 303 U.S. 522 (1938), Negroes there like the Negroes of Rhenquist County participated in a peaceful boycott to induce an employer to engage Negro workers in sales positions. The court's opinion was careful to distinquish defendant's purpose from labor purposes and approved the same on policy grounds. It declared that discrimination against workers based on color is even less excusable than that based on union affiliation.

Whites exercised complete control of the government and business operations at all levels in the State of Mississippi. Rhenquist County was no exception (R.4). This pervasive type of control was not only the rule in Rhenquist County, but it was a pattern throughout the South. Often individuals woud occupy three or four different positions at various levels in the city government. (see Appendix E and J).

The letters of 1965 and 1966 were addressed to all govenment officials, business leaders and to the public by release to the press (R.5,6). The merchants cannot and should not now at this late date be permitted to claim innocence. Nor should they be permitted to claim that they exercised control over only their individual stores and that they possessed no influence or input as to the decision making process of Rhenquist County. To the contrary, they exercised their power completely and pervasively as to touch and

concern numerous community and government entities. (see Appendix K). Therefore, the appellant possessed a legitimate complaint against Rhenquist County and the merchants who perpetrated discriminatory conditions.

Furthermore, if this Court finds that the boycott was non-labor related, it may be guided by the decision in Edwards v. South Carolina, 372 U.S. 229 (1963), where the right to picket or boycott in connection with a claimed grievance was not precluded merely becasue the grivance did not concern labor matters. see also Hughes v. Superior Court of California, 339 U.S. 460 (1950); Green v. Samuelson, 178 A.109 (1935). The court explicitly held in Julia Baking Co. v. Graymond,, 274 N.Y.S 350 (1934) that right of an individual or group of individuals to protest in a peaceable manner against injustice or oppression is one to be cherished and not proscribed in any well-ordered society.

In Machestky v. Bizzell, 414 F.2d 283 (1969) the appellants were members of a civil rights group who engaged in picketing to obtain social, political and economic rights. The appellees in the case at bar, unlike the appellees in that case, have not demonstrated that the alleged violence or intimidation was generated by member so the NOLBP or that they ratified such actions.

A group of black men, totally unrelated to the NOLBP, organized a militant unit. This group was alleged to be a cause of some pervasive fear among black citizens in Rhenquist County (R.13). In addition, on April 14, 1967 Dr. Martin L. King, Jr. was assassinated. Port Hudson and Rhenquist County reacted as did the rest of the

country (R 16, 17). Whatever violence or intimidation may have resulted was neither calculated nor designed by the NOLBP. Only the appellees, without clear proof, raise allegations of violence, which on their face are unrelated to the appellant as to justify their contention of a secondary boycott.

A. SECTIONS 75-21-1 ET. SEQ. OF THE MISSISSIPPI CODE ANNOTATED ARE UNCONSTITUTIONAL AND INAPPLICABLE TO THE INSTANT CASE.

The Constitution offers some protection to boycotters who effect their purposes by inducing, rather than agreeing with others not to patronize. In Thornhill v. Alabama, 310 U.S. 88 (1940) the Supreme Court held that peaceful picketing, a form of inducement not to partronize, is protected by the First Amendment.

The Constitution, however, does not protect speech that creates a clear and present danger of substantive evils that states have a right to prevent, Feiner v. New York, 340 U.S. 315 (1951). However, if loss of trade were such an evil, all boycotts could be outlawed. Significantly, Thorhill did not consider the loss of expected business a substantive evil. also see, Cafeteria Employers Union v. Angelos, 320 U.S. 293 (1943); Bakery Drivers Local v. Whol, 31.S. 769 (1942).

In a series of cases the Supreme Court has apparently concluded that picketing which is unlawful under ordinary boycott law does not qualify for First Amendment protection. Thus, in Giboney v. Empire Storage Co., 336 U.S. 490 (1940) a State was permitted to enjoin picketing that urged its victim to violate state anti-trus

laws; in Hughes v. Superior Court, 339 U.S. 460 (1950) to enjoin picketing seeking to force a businessman to violate anti-discrimination policies; and in Teamsters Union v. Hanke, 339 U.S. 470 (1950) to enjoin picketing that sought a concession which would place self-employees at a disadvantage.

But even if Giboney, Hanke and Hughes are interpreted to apply to all forms of inducements not to patronize, the First Amendment still has meaning for boycotters. For those cases only allow a State to prohibit a boycott when its goal is contrary to public policy. In a celebrated case, Brown v. Board of Education, 347 U.S. 483 (1954) the Court held that discrimination was inimical to public policy and in violation of the Fourteenth Amendment. Thus, boycotting against discriminatory hiring practices cannot be held contrary to public policy. Hughes, supra. (see also appendix F).

In construing the Mississippi restraint of trade statute, it is clear that the statute is unconstitutional for it imposes an unwarranted in vasion on protected rights. Brown v. Staple Cotton Co-Op Ass'n, 96 So. 849 (1923). The Court held in Cantwell v. State of Connecticut, 310 U.S. 900 (1940), that the power to regulate must be so exercise as not, in obtaining a permissible end, unduly infringe the protected freedom. see also Scheider v. State, 308 U.S 147 (1939) In the instant case, the Mississippi statute not only invades protected freedom but it does so to obtain an impermissible end.

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The legality of the anti-discrimination boycott is clear, its value unquestioned, in the pursuit of equality. The appellees cannot be permitted to exploit the intent of Congress by claiming that the appellant's activities are in contravention to the federal anti-trust laws (see Appendix M and N).

The appellee has not shown that there was a restraint on trade. If the term restraint of trade is not defined by a state antitrust statute, the statute is presumed to outlaw those retraints which were invalid for lack of reasonableness at common law. Cumberland Tel. and Tel. Co. v. State, 100 Miss. 102, 54 So. 670 (1911). The rule of reasoning applies in construing state anti trust statutes. that is, conduct is forbidden by the statute only when the restraint is unreasonable. Jackson v. Price, 140 Miss 249, 105 So. 538 (1925) An undreasonable restraint of trade is a restraint which is injurious to the public welfare. Jackson, supra. A restriction is reasonable if under all of the circumstances it appears to have been for a just and honest purpose. Stoeber v. Kempf Oil Co., 45 N.W. 2d 316 (1951).

Thus, if this Court finds that the Mississippi statute is constitutional and further that it is applicable to the instant case, this Court must find that the restraint was reasonable. In considering reasonableness, this Court should take judicial notice of the conditions which prevailed in Rhenquist County, Mississippi and conclude with the appellant that the only effective method which Negroes could use to realize equality under the law in a non-violent manner was to deny their patronage.

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B. ASSUMING ARGUENDO THAT THE MISSISSIPPI STATUTES ANNOTATED ARE CONSTITUTIONAL, THERE EXISTED NO CONSPIRACY TO ADVANCE AN UNLAWFUL PURPOSE OR TO EXECUTE A LAWFUL PURPOSE IN AN UNLAWFUL MANNER.

Conspiracy is defined as a combination of persons to accomplish an unlawful purpose or a lawful purpose unlawfully. Mississippi Power and Light Co. v. Town of Coldwater, 106 So. 2d 375 (1958). In a criminal conspiracy there must be a combination of two or more persons formed for the purpose of committing by their joint efforts some lawful act but unlawful when done by concerted action. Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

It is alleged in the instant case that the appellant conspired with its local chapter to perpetrate injury upon the appellees. The Court held in Tobman v. Hagewood Thrift Shop, 194 F.Supp. 83 (S.D.Calif. 1961) that a person or a corporation cannot conspire with its officals or employees acting on behalf of a corporation. See also Maddox v. Ford Motor Co, 202 F.Supp. 103 (1960) May v. Santa Fe Trail Transp. 370 P.2d 390 (1962). A coporate person can only act through its officers. Their activities in relation to the corporation business are the acts of the corporation, and while so acting they cannot conspire with the corporation of which they are a part. Nelson Radio and Supply v. Motorola, 200 F.2d 911 (5th Cir. 1952).

Since there is a presumption of innocence, a lack of proof by the preponderance of the evidenc is insufficient to establish a conspiracy. Bay Petroleum Corp. v. May, 264 P.2d 734 (1953).

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In the case at bar the evidence does not demonstrate that an agreement or conspiracy existed. Yet, because a majority of the Blacks in Rhenquist County decided not to patronize white-owned business, that act in and of itself is insufficient to establish a conspiracy. A conspiracy is normally not peresumed. Harvey v. Lewis, 98 N.W.2d 599 (1959). The burden of proof is on the plaintiff to prove all of the elements necessary to his recovery. Mid-States Ins. Co. v. American Fidelity, 125 F. Supp. 34 (1961), and to establish the liability of defendants and each of them for the damages sustained by him. El Ranco, Inc. v. First National Bank, 406 F.2d 1205 (1969).

The object of the selective buying campaign in the instant case was similar to that in Hughes v. Superior Court, 339 U.S. 460 (1950) where Negroes sought to gain equal employment. The intent and purpose was gain equality under the laws of Mississippi. There existed no malice at the initiation of the campaign nor has the same been proven below or here. Before a lawful act can be held to have become unlawful, the intent which prompted it must not only be malicious but also must be unwarranted, without any purpose and exclusively directed for the injury and damage of another. Routis v. Swanson, 270 N.Y.S 3d 908 (1966), Beadsley v. Kilmer; 140 N.E. 203 (1923): Tennessee Power Co. v. Tennessee Valley, 306 U.S. 118 (1939).

It is well founded that every person has the righ to deal or refuse to deal with whom he chooses. Robitaille v. Marse, 186 N.E. 78 (1933); F.T.C. v. Raymond Bros-Clark Co., 263 U.S. 565 (1924) The Court held in Grult Motor Co. v. Briner, 229 S.W.2d 259 (1950) that persons who of their own free choice refrained from doing

business with one whom a labor union is picketing, are not engaged in a conspiracy. Furthermore, it is not unlawful or actionable to use peaceable argument and persuasion to induce patrons or customers of the person or company against whom the movement is directed to withhold their patronage from him, where the object of the combination is lawful. Green v. Samuelson, 178 A. 109 (1935); Root v. Anderson, 207 S.W. 255 (1918); International Pocketbook v. Ostove, 146 A.826 (1930).

Therefore, any contention that a conspiracy existed to accomplish an unlawful purpsoe or a lawful purpose unlawfully is diametrically opposed to the facts and law applicable to the instant case.

III. THE ESTABLISHMENT OF "OUR MARKET" WAS A CLEAR EXAMPLE—DEMONSTRATING THE FREE ENTERPIRSE SYSTEM AT WORK.

The appellees have no right to the business of any individual. Benton v. Alabama Cotton Co-Op, 7 So.2d 504 (1942); Beasley-Bennett Co. v. Gulf Coast, 134 So. 2d 477 (1961). To the contrary, the court has long held that individuals or groups of individuals may withhold their business from any entrepreeur. City of Montgomery v. Kelly, 38 So. 67 (1905); Alabama Independent Service Station v. McDowell, 6 So.2d 502 (1942). The Court held in Lafayette Dramatic Productions Inc. v. Fereny, 9 N.W. 2d 57 (1943), that the right to conduct a legalized business for profit is, except in time of war, a fundamental concept under the American doctrin of free enterprise. See also Trirax v. Corrigan, 257 U.S. 312 (1921); Dorchy v. Kansas, 272 U.S. 306 (1926).

The facts of this case succinctly reveal that the white merchants

of Rhenquist County refused to relinquish their arrogant position of discrimination (R.10). Negro citizens of Rhenquist County could not be expected to continue contributing to those acts were unlawful. Therefore, the establishment of "Our Market" was a clear example, demonstrating the free enterprise system at work.

The Negro cannot hope to eliminate the insuperable impediment of discrimination to a higher standard of living by individual action any more than the laborer could be expected to raise his wages by individual action. (see appendix C,G,H,I and J). The class must, therefore, be permitted to deny their patronage to business that contribute to their economic, political and social inequality by discrimiantion.

CONCLUSION

For the reasons set forth herein, appellant respectfully requests that the decisions below be reversed.

Respectfully submitted,

SHERMAN L. ANDERSON

JONATHAN T. GREEN

Counsel for Appellant

APPENDIX A

UNITED STATES CONSTITUTION
AND AMENDMENTS

The Constitution of the United States

Amendment I reads as follows:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or a bridging the freedom of sppech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

APPENDIX B

UNITED STATES CONSTITUTION

AND AMENDMENTS

AMENDMENT XIV

Section 1. * * * No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX C

"Voting In Mississippi", A Report of the United States Commission on Civil Rights (1965)

On May 18, 1965, the United States Commission on Civil Rights transmitted the following letter to the President of the United States, the President of the Senate and the Speaker of the House of Representatives, reporting their findings on voting in Mississippi:

> "SIRS: The Commission on Civil Rights presents to you this report pursuant to Public Law 85-315 as amended.
>
> The report presents and analyzes information concerning denials of the right to vote in Mississippi collected by the Commission as a result of extensive investigations in 1964 and a public hearing held in Jackson in February 1965. The Commission has found that Negro citizens of Mississippi have been and are being denied the right to vote in violation of our Constitution. (Emphasis added)
>
> Although the problem presented is both serious and long standing, legislation currently pending in the Congress offers the prospect of substantial improvement.
>
> We urge your consideration of the facts presented and of the recommendations for corrective action.

APPENDIX D

FEDERAL STATUTES

42 U.S.C. Section 2000 A. Right to full and equal enjoyment of public accomodation

A. Equal access—All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantage, and accomodation of any place of public accomodation, as defined in this action, without discrimination or segregation on the ground of race, color, religion or national origin.

* * * *

42 U.S.C. Section B. Desegregation of public facilities.

Whenever. . . he is being deprived of or threatened with the loss of his right to the equal protection of the laws, on account of his race, color, religion, or national origin, by being denied equal utilization of any public utility.

* * * *

42 U.S.C. Section 2000 D. Nondiscrimination in federally assisted program.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits, or be subjected to discrimination under any program or activity receiving federal financial assistance.

APPENDIX D

(Continued)

* * * *

42 U.S.C. Section 2000 D - 3 Employment practices.

* * * *

42 U.S.C. Section 2000 E. Equal Employment Opportunity

It shall be unlawful for any employer to deny, exclude or refuse employment to any person based on race, color, religion, or national origin.

* * * *

42 U.S.C. Seciton 2000 E - 2. Discrimination because of race, color religion, sex, or national origin.

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

APPENDIX E

Brisbane, Robert H., The Black Vanguard, Judson Press, Valley Forge, Pa., 1970.

If the Negro disfranchisement was to be swift and final, it must above all be "legal". For no later than 1890 the Republicans under Henry Cabot Lodge had attempted to pass a Force Bill to protect Sourthern Negroes in the exercise of their civil and plitiical rights. Southern political leaders definitely were in a quandary. For the second time, however, the state of Mississippi was to show the way. The First "Mississippi Plan," which was originated during the Reconstrcution period and followed generally in the South, prescribed brute force as a means of disfranchisement of Negroes. The poll tax, a literacy test, and a property qualification requirement constituted the essentials of the plan. Mississippi incorporated these devices in its constitution in 1890, and by 1910 seven other Southern states had adopted all or some of these methods as a means of taking the Negro out of politics.

The clearest expression of the purpose of this second Mississippi Plan came from Carter Glass in a debate during the Virginia Constitutional Convention of 1901-1902:

> Discrimination! Why, that is precisely what we propose; that, exactly, is what this convention was elected for. . . the elimination of every Negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate. . . . It is a fine discrimination, indeed, that we have practiced in the fabrication of this plan. (Emphasis added)

APPENDIX F

Ferman, Louis A., The Negro and Equal Employment Opportunities, Praeger, Publishers, Washington, D.C., 1968.

In the 1960's the initial thrust in equalizing employment opportunities was in Presidential executive orders. Executive orders 10925 and 11114 provided for the pormotion and insurance of equal employment opportunity on government contracts. State legislatures—twenty-three in all—established state fair employment practices commissions, and, in many cases, this development was supplemented by municipal legislation. On July 1, 1965, Title VI of the Civil Rights Act became operative, banning discrimination in employment in any economic activity. In contrast to earlier periods of our history, equal employment policy in the 1960's was more pervasive, provided for greater implementation by inspection and reporting systems, and emphasized organized, systematic attempts to move minority group members into a key role in the national manpower scene. (Emphasis added)

APPENDIX G

Bailey, Harry A. Jr., Negro Politics In America, Merrill Books, Inc., Ohio, 1967.

Selective buying campaigns, boycotts and picketing; mass protest demonstrations; riots in large urban centers—all of these events have highlighted the dissatisfaction of the Negro with American society. The basic fact is that the Negro is excluded from the mainstream of American life through economic, social and residential segregation. The list of exclusions is numerous, but more and more attention is being focused on the exclusion of the Negro from the world of work. The work role is a primary form of social involvement in our society, determining both the life styles and life chances of individuals. Thus, the quality of the work role and access to decent employment are key data to the understanding of any gorup's position in and dissatisfactions with the society. (Emphasis added)

APPENDIX H

Barron, Milton, L., Minorities In A Changing World, Knopf, New York, 1967.

In the present decade, civil rights demands have brought a new awareness of the problems of integrating the Negro into American industry. Although unusual public interest today gives the impression that the origins of equal employment policy are recent, it has had a long history. The fair employment principle was embodied in the legislation of the Great Depression of the 1930's, in which the policy of equal employment opportunity for persons paid from the public treasury was an integral part of the appropriation and enabling statutes dealing with emergency relief. This principle was also affimred in the work of the President's Committee on Fair Employment Practices during the 1940's and in the establishment of the President's Committee on Government Contracts in 1953.

APPENDIX I

Holloway, Harry, The Politics of the Southern Negro, Random House, New York, 1969.

Most Negroes did not challenge the system and a good many actually cooperated with it. By the early 1960's a traditionalism powerfully reinforced by the white community still held most Mississippi Negroes "in their place."

The persistence of traditional attitudes among the mass of Mississippi whites was striking. James Silver, for many years an historian at the Univeristy of Mississippi, described the state as a "closed society." Louis Harris provided further verification of the Mississippi climate of opinion with a 1964 post-election poll comparing the state with the South and the United States. For instance, when asked to describe their own philosophy 68 percent of Mississippi voters chose conservatism, compared with 35 percent of the United States and 40 percent of the South. Only 24 percent of Mississippians described themselves as middle of the road, compared with 44 percent of the United States and 43 percent of the South. On civil rights specifically, 54 percent of the South opposed the Civil Rights Act of 1964; in Mississippi. (Emphasis added)

APPENDIX J

Bailey, Harry A. Jr., Negro Politics in America, Merrill Books, Inc., Ohio, 1967.

With the evolution of the system completed by about 1900, the Negro found that a kind of feudalism had replaced slavery. Especially in the Black Belt areas the system was heavily rural and dependant economically on cotton production. Population was relatively stable and inbred, so that people in a given locality knew one another and even their ancestors. The proportion of Negro population was high, although the great migration to the city and to the North following World War I steadily siphoned off Negroes. With the fluidity of the one-party system and the prevailing conservative notions of government, much power devolved upon county officials. Local government relfected the dominance of planters, merchants, and local professional people. (Emphasis added)

Law enforcement within the system tended to be highly personal and flexible. The sheriff and other county officials were potent figures who reflected the interests of local economic dominants. And of course local folkways and interests influenced the application of the law: it could be benign to the favored.

Storekeepers could overcharge and otherwise exploit the Negro. Perhaps the double standard clearly implied by white sumpremancy did not initially mean exploitation of black by white; but neither doctrine nor practice included much in the way of checks

APPENDIX J

(Continued)

by which the Negro might restrain the white and protect himself. (Emphasis added)

Whites could use these "Negro spokesmen" to keep tabs on affairs in the Negro community and to trasmit white desires to Negroes. Ultimately there was the threat of lynching. This last was not simply a means of punishing the wrongdoer. The chase, the turmoil, the crowds, and the public spectacle of a gruesome death all helped spread fear among the Negro population and to reinforce thereby "the system" that held the Negro in his place.

APPENDIX K

Myrdal, Gunnar, An American Dilemma, Harper & Bros., New York, 1944.

In the South the Negro's person and property are practically subject to the whim of any white person who wishes to take advantage of him or to punish him for any real or fancied wrong-doing or 'insult'. A white man can steal from or maltreat a Negro in almost any way without fear of reprisal, because the Negro cannot claim the protection of the police or courts, and personal vengeance on the part of the offended Negro usually results in organized retaliation in the form of bodily injury (including lynching), home burning or banishment. . . . Physical violence and threats against personal security do not, of course, occur to every Negro every day . . . . But violence may occur at any time, and it is the fear of it as much as violence itself which creates the injustice and the insecurity. (Emphasis added)

APPENDIX L

MISSISSIPPI CODE ANNOTATED

PART I

Section 97-23-85. If two (2) or more persons conspire to prevent another person or other persons from trading or doing business with any merchant or other business and as a result of said conspiracy said persons induce or encourage any individual or individuals to cease doing business with any merchang or other person, and when such conspiracy is formed and effectuated because of a reasonable grievance of the conspirators over which the said merchant or place of business boycotted or against which a boycott is attempted has no direct control or no legal authority to correct, or when the conspiracy results from such alleged grievance agains the merchant or other person boycotted when no notice of such grievance has been given the merchant or party boycotted and no reasonable opportunity to correct such alleged grievance has been given such merchant or other person against whom the conspiracy was formed, then each of such persons shall be guilty of the crime of unlawful restraint of trade and shall be fined not more than one thousand dollars ($1,000.00) or imprisoned for not more than two (2) years and in addition each such person shall be liable in civil action for any damages suffered by said merchan or place of business so wrongfully boy-

APPENDIX L

(Continued)

cotted and also for attorney fees incurred by said merchant or person boycotted in a civil action to recover damages. (Emphasis added)

PART II

Section 97-23-85 also takes into its purview the illegality of a primary boycott under the following circumstances:

". . . or when the conspiracy results from such alleged grievance agains the merchant or other person boycotted when no notice of such grievance has been given the merchant or party boycotted and no reasonable opportunity to correct such alleged grievance has been given such merchant or other person against whom the conspiracy was formed. . . " (Emphasis added)

PART III

Section 75-21-1, et seq., MCA 1972, declares that combinations or agreements between two or more persons, corporations or associations, the effect of which is to create or attempt to create monopolies or restraints of trade and commerce in the State, are inimical to the public welfare and unlawful.

APPENDIX M

Relevant Antitrust Statutes

(1) Sherman Act (Act of July 2, 1890, e. 647, 26 Stat. 209; 15 U.S.C.A. Section 1-7)

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, it any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

APPENDIX N

The debates on the Sherman Act[7] evidence primarily a desire to regulate large-scale trusts;[8] there was apparently no mention of concerted refusals to deal. In fact, it appears that the only specific legislative proposal concerning boycotts was made in a rejected version[9] of the Clayton Act.[10] Further, the common-law policy against conspiracies in restraint of trade in general[11] and concerted refusals to deal in particular was not well defined. State courts, however, in applying statutory and common-law prohibitions, have impliedly adopted a rule of reason in cases of concerted refusals, to deal, and have frequently been liberal in upholding boycotts furthering alleged social and mora purposes.[12] (Emphasis added)

7 26 Stat. 209 (1890), as amended, 15 U.S.C. Sections 1-7 (1952), as amended, 15 U.S.C. Sections 1-3 (Supp. Iv, 1957).

8 See, e.g., 21 CONG. REC. 4098-99 (1890)

9 H.R. 15657, 63rd Cong., 2d Sess. Section 3 (1914); see S. REF. No. 698, 63rd Cong., 2d Sess. 44 (1914)

10 38 Stat. 730 (1914), as amended, 15 U.S.C. Sections 12-27 (1952), as amended, 15 U.S.C. Sections 15-16 (Supp. IV, 1957).

11 Omitted

12 See, e.g., Kuryer Publishing Co. v. Messmer, 162 Wis. 565, 156 N.W. 948 (1916)

NO. 77,353

IN THE

SUPREME COURT OF THE STATE OF MISSISSIPPI

The National Organization For The
Liberation of Black People, et al.

Defendants - Appellants

vs.

Rhenquist Hardware Company,
et al.

Complainants - Respondents

On appeal from the Chancery Court of the First Judicial District
of Lynchem County, Mississippi

BRIEF FOR RESPONDENTS

DAPHNE TAYLOR
REUBEN DANIELS

Counsel for the Respondents

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The Chancery Court of the First Judicial District of Lynchem County granted injunctive relief and awarded damages to the complainants. The cross-bills of all defendants were dismissed. (R. 30).

QUESTIONS PRESENTED

I.

Whether the Chancery Court correctly held that Section 97-23-85 Mississippi Code Annotated is constitutional as written and as applied in this case?

II.

Whether the Chancery Court correctly found Appellants guilty of violating Section 97-23-85 M.C.A. 1972 (conspiracy and secondary boycott) and Sections 75-21-1 through 75-21-11 M.C.A. 1972 (unlawful restraint of trade)?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First and Fourteenth Amendments to the United States Constitution, in pertinent parts, are set forth in Appendix A. Mississippi Code Annotated, in pertinent part, is set out in Appendix B.

STATEMENT OF FACTS

Respondents stipulate the facts to be as they appear in the record.

SUMMARY OF ARGUMENT

I.

In determining constitutionality of M.C.A. 97-23-85, the correlating statutes that define and specify the conduct prohibited must be read in conjunction. Respondent

will show that the Chancery Court correctly held that the Mississippi statutes in question are constitutional as written and as applied in this case. The statutes are sufficiently definite and limited to overcome any challenge to constitutionality based on the concept of vagueness or overbreadth.

Further, the lawless acts for which the Appellants were convicted were beyond the protection of the Constitution and Sec. 97-23-85 was properly applied to their conduct. Such conduct may be prohibited by the state, legislatively, as a proper exercise of its police power. Since there was no direct affront on freedom of speech, in the instant case, Respondents contend that the proper test to be used for determining if such regulation is justified is the rational connection standard. In compliance with this standard, Respondents will show that the statute in question is clearly rationally and reasonably connected to the ends that it was designed to further. Alternatively, Respondents will argue that even if the more rigid compelling state interest standard is used the statute is well within the areas the state has a compelling interest in protecting. The law is well settled that a state has a compelling interest in protecting its citizens from violence and economic abuse. Thus Respondent urges this Court to uphold the Chancery Court's finding of the Constitutionality of M.C.A. 97-23-85 as enacted and as applied.

II.

The Chancellor was correct in finding Appellants liable for engaging in an unlawful civil conspiracy to destroy Respondents' businesses and restrain trade. In a civil action, the crux of the charge is the damage to complainant. The act of any conspirator is the act of all engaged in effecting the common design and the use of force in effecting that design is a usurption of the governmental function.

The tactics employed by Appellants were neither lawful in themselves nor employed for a lawful purpose. The record and testimony clearly shows the use of force and intimidation to prevent patronization of Respondents in order to coerce respondent merchants to bring pressure upon municipal and county officials. Such conduct is beyond the realm of protected speech and a proper area for regulation.

Boycotts furthered by violence, threats and intimidation are always illegal, even when only some of the means are violent. Combinations to exercise coercive pressure upon the customers of complainant whereby they are caused to withhold their patronage out of fear of loss or damage to themselves is an unlawful secondary boycott. A boycott meeting the perfunctory requirements of a primary dispute but which is shown to have an unlawful secondary object

is not saved where that desired object is accomplished. It is an entrenched policy of the law to protect innocent parties from being involuntarily drawn into controversies they are without authority to resolve.

Combinations or agreements having the effect of creating monopolies or restraints of trade and commerce within the state are inimical to the public welfare and unlawful. Proof of harm to the public or court deductions that it is so inimical is not necessary once the conduct is shown to be violative of any section of the pertinent statute. Intent and/or motive inducing such action is likewise irrelevant. Where intimidation and acts of violence are used in furtherance of a plan to work economic havoc upon a heretofore competitor and thereby eliminate such competitor all participants in the scheme are liable for damages suffered by the effectuation of such plan.

ARGUMENT

I. THE CHANCERY COURT CORRECTLY HELD THAT SECTION 97-23-85 MISSISSIPPI CODE ANNOTATED IS CONSTITUTIONAL AS WRITTEN AND AS APPLIED IN THIS CASE.

A. Miss. Code Ann. 97-23-85 Clearly Does Not Abridge Free Speech On Its Face.

The substance of the prohibition entailed in Section 97-23-85 is a conspiracy in restraint of trade.

Section 97-1-1 Miss. Code 1972 Annotated states with particularity the type of conduct that constitutes an unlawful conspiracy. (Set forth in pertinent part in Appendix B).

Mississippi Constitution, Art. 7, section 198, empowers the state legislature to "enact laws to prevent all trusts, combinations, contracts and agreements inimical to the public welfare;" Revised Mississippi Code Annotated section 75-21-1 defines "trust or combine" as any combination between any two entities which is inimical to the public welfare and which has the effect of restraining trade or hindering competition with regard to the commodity, or is contrary to the spirit of the laws on trusts and combines.

Revised Mississippi Code Annotated section 75-21-3 condemns certain actions as a trust or combine if done intentionally, or even if done unintentionally, provided the same results are accomplished "to a degree inimical to public welfare". One of the acts specifically enumerated

is:

(a) Restrain or attempt to restrain the freedom of trade or production.

The phrase "inimical to public welfare" - which appears in both sections 75-21-1 and 75-21-3 sets forth per se violations in the Mississippi antitrust statutes. If proof is made of one of the acts listed in those sections, "... such act is intrinsically inimical to the public welfare without further or special proof of a result beyond the definitions of the statute, or deduction by the courts that proven violations are or are not inimical to public welfare. The legislature has pre-empted the question."

Thus sections 75-21-1, 75-21-3 and 97-1-1 must be read in conjunction with 97-23-85 to determine constitutionality.

1. The statutes in question clearly proscribe specific conduct and accord fair warning of the sanction the law places on such conduct.

In order for a statute to be constitutional on its face the following standards must be met: (1) the statute must have established standards of guilt sufficiently ascertainable that men of common intelligence need not guess at its meaning, Connolly v. General Construction Co., 269 U.S. 385 (1926); and (2) the language of the statute must sufficiently limited to avoid infringement on the exercise of constitutionally protected activity, State v. Driscoll,

53 Wis.2d 699 (1972).

The distinction between a challenge of vagueness and a challenge of overbreadth is well stated in Landry v. Daley, 280 Fed. Supp. 938, 951 (1968).

> The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise judge and jury of standards for the determination of guilt. If the statute is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional.
>
> The concept of overbreadth, on the other hand, rests on the principles of substantive due process which forbid the prohibition of certain individual freedoms. The primary issue is not reasonable notice or adequate standards, although these issues may be involved. Rather the issue is whether the language of the statute, given its normal meaning, is so broad that its sanctions may apply to conduct protected by the Constitution ....

A recent decision by the court on the issue of statutory vagueness was undertaken in Butala v. State, 71 Wis.2d 569 (1976). It was stated at pages 573, 574 that:

> An allegation that a statute is vague is based on the procedural due process requirement of fair notice. The primary issue raised by such challenge is whether the statute taken as a whole is sufficiently definite to give reasonable notice of the prohibited conduct to

> those who wish to avoid its penalties and to apprise the judge and jury of standards for the determination of guilt.

Further explaining the void for vagueness doctrine, the court in United States v. National Diary Products Corp., 372 U.S. 29 (1963) stated: "Void for vagueness simply means criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed". Quoting the Connelly test, supra, the court upheld a statute making it a crime to sell goods at unreasonably low prices for the purpose of destroying competition as not unconstitutionally vague or indefinite. Consideration was given not only to the statute in terms of the constitutionality "on its face" but also in light of the conduct to which it was applied.

The record (p. 13) indicates that the Appellants were found guilty of physical assaults, abusive telephone calls, destruction of personal property and intimidation by various violent acts. Indeed, the shooting that erupted at the church (R. p. 17) was clearly an extension of the original conspiracy.

Section 97-1-1 prohibits an unlawful conspiracy and specifies the types of conduct proscribed, including both lawful and unlawful acts by "threats, force or intimidation". M.C.A. 97-23-85 imposes civil and criminal liability on conspirators (as specifically defined in 75-21-1) who unlawfully restrain trade. Thus the statutes suf-

ficiently identify the types of conduct which the legislature intended to be contrary to law. The Appellant's vagueness argument must fail because the statutes in question give notice of the precise conduct that is within the statutory prohibitions.

2. The pertinent statutes are sufficiently limited to avoid infringement on the exercise of constitutionally protected activity.

In State v. Driscoll, supra, pages 701, 703-04, the test for overbreadth was stated in the following terms:

> ... the test of overbreadth is whether the language of the section is so broad as to discourage conduct expressly protected by the Constitution, i.e, conduct that the state has no right to prohibit...
> ... the normal and reasonable meaning of the language must be found to be so broad that its sanctions apply to constitutionally protected conduct which the state is not entitled to regulate before a statute can be faulted for overbreadth. State v. Starks, 51 Wis.2d 256 (1971).

Under this test sec. 97-23-85 is not overly broad and must be upheld. It is the duty of the state not only to maintain order but to promote the well-being of its citizens. This includes not only relief from violence and oppressive deprivation of property, but also preventative methods. M.C.A. 97-23-85 has a direct relationship to the welfare of the public and is an appropriate means to achieve that appropriate end. The statute deals with conduct having no connection with speech, but rather

connotes conduct which is abhorrent to the sensitivities of the general public. The acts prohibited are not primarily those engaged in for the purpose of expressing views, but rather acts involving deprivation of property without notice, violence to persons and property, and the oppression of the basic right of the consumer to freely choose the business he will patronize as well as the proprietor's right to conduct his business free from wrongful interference.

These acts do not embrace conduct that reasonable persons would consider appropriate methods of protest. Sections 97-1-1 and 97-23-85 provide appropriate safeguards.

The Mississippi policy against restraint of trade is of long standing and is in most respects the same as that which the Federal Government has followed for more than half a century. It is clearly drawn in an attempt to afford all persons an equal opportunity to buy goods. Giboney v. Empire Storage & Ice Co., 336 U.S. 409 (1949) held the state's power to govern in this field to be paramount, and that nothing in the constitutional guarantees of free speech compels a state to apply or not to apply its anti-trade restraint law to any particular group. Thus the Mississippi statutes in question are clearly constitutional as construed and must be upheld.

B. The Statutes In Question Are Constitutional As Applied.

1. The acts for which the Appellants were convicted were beyond the protection of the Constitution and Sec. 97-23-85 was properly applied to their conduct.

The right of freedom of speech is not absolute but rather is limited by the rights of others. Perhaps the most classic example of the court's position regarding this limitation was expressed in Schenck v. U.S., 249 U.S. 47 (1919). "Even the most stringent protection of free speech would not protect a man in falsely shouting 'FIRE' in a crowded theatre ..." Neither the First nor the Fourteenth Amendments constitute an absolute bar to government regulation of areas which may incidentally touch on free expression and association. This Court has repeatedly held that certain forms of speech are outside the scope of the protection of these amendments. Schenek, supra. In accord, the court in Younger v. Harris, 401 U.S. 37 (1971) held:

> ... Where a statute does not directly abridge free speech, but while regulating a subject within the state's power -- tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effects on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so.

Perhaps the best indication of the Court's attitude toward the constitutional limits placed upon the action of demonstrators is found in Cox v. Louisiana, 379 U.S. 536

(1965). There Justice Goldberg answered the contention that demonstrators could insist on the right to cordon off a street or the entry to a public or private building prohibiting the passage of those who refused to listen to them by stating:

> We emphatically reject the notion ... that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech. Id.at 555.

While Goldberg was not saying that all conduct could be protected under the First Amendment, he seemed to be indicating that orderly conduct as an adjunct to protest could be.

The fact that the abusive speech and violent conduct of the Appellants took place in furtherance of a boycott, whether primary or secondary, does not give their actions any special standing under the First Amendment.

> It has rarely been suggested that the Constitutional freedom of speech ... extends its immunity to speech ... used as an integral part of conduct in violation of a valid criminal statute .... Giboney v. Empire Storage Co., supra, p. 490, 498.

Conduct which involves substantial disorder or invasion of the rights of others is not immunized by the constitutional guarantee of freedom of speech. Tinker v. Des Moines

School Dist., 393 U.S. 503 (1969).

Extending the same principle, Mr. Chief Justice Warren expressed the court's unwillingness to accept the notion that all conduct is protected under the First Amendment.

> We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. When speech and nonspeech elements are combined in the same course of conduct a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. United States v. OBrien, 391 U.S. 376 (1968).

Since the lower court properly held that secondary boycotts are unlawful under both U.S. and Mississippi law, the provisions of Section 97-23-85 making activities of parties in furtherance of such boycotts illegal will not be invalid because freedom of speech is thereby restricted. N.L.R.B. v. Wine L. & D. Union, 178 F.2d 584 (1949).

The lower court properly held that protest does not exonerate lawlessness. Unlawful conduct is not protected by the First Amendment.

There was therefore no basis for the Appellant's contention that their lawless conduct was protected by the First Amendment.

2. The state, in the exercise of its police power, may enact legislation for the protection of its citizens.

The maintenance of order and liberty is a basic objective of our constitutional form of government. Order and liberty are both to be protected; neither may be extinguished in favor of the other. Order without liberty is tyranny. Liberty without order is anarchy. The constitutional mandate is that both excesses be avoided. Cox v. Louisiana, supra.

The legislature has the right to reasonably regulate the conduct of its citizens for the protection of society as a whole, even when that conduct is intertwined with expression ... Cameron v. Johnson, 390 U.S. 611 (1968). The Mississippi statutes in question are proper legislative responses to the balance between the maintenance of public order and protection of personal freedoms.

The test set forth in Obrien, supra, for determining if a governmental regulation is justified is:

1. Whether the regulation is within the constitutional power of the government;
2. Whether it furthers an important or substantial governmental interest;
3. Whether the governmental interest is unrelated to suppression of free expression; and
4. Whether the incidental restriction on the alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

Encompassing these same requirements, the Alabama Federal Court in Lewis v. Baxley, 368 F.Supp. 768 (1973) set forth a two-pronged balancing test:

1) Whether the asserted state interest is compelling or paramount; and

2) Whether the state's action has the requisite nexus with the state's asserted goal.

Respondents submit that the Mississippi statutes in question meet these requirements. Consequently, the Appellants conviction for violating them is constitutional and must be upheld.

The Respondents have demonstrated that the Mississippi statutes at issue are justified for the following reasons: First, the Mississippi Constitution empowers the state legislature to enact laws to prevent all trusts, combinations, contracts and agreements inimical to the public welfare. Further, the courts have consistently recognized the power of the state legislatures to exert the police powers of the state by determining what measures are appropriate or necessary for the protection of the public. Second, either of two broad standards may be applied to determine the validity of the state interest in that which is prohibitied: (1) the rational connection standard - which requires a state's asserted goals have a valid connection to the conduct which is prohibited or 2) the compelling state interest standard - which requires the statute be in furtherance of a paramount interest that the state has a right to protect.

Respondents contend that the standard to be applied in this case is the rational connection standard. There is no direct affront on the freedom of speech in the statutes at issue in the instant case.

> Certain activities are outside the protection of the First and Fourteenth Amendments and general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfrettered exercise are permissible when they have been found justified by subordinating valid government interest. Konigsbery v. State Bar of California, 366 U.S. 36 (1961).

Mississippi restraint on trade statute is an economic regulation, well within the traditional regulation powers of the state. Further, the statutes in question were designed to prevent a restraint on trade which the legislature has specifically enumerated as an act that is inimical to public welfare. Additionally, M.C.A. 97-1-1(c) prohibits such acts when attempted by violence. Thus the statutes are rationally and reasonably connected to the ends that they were designed to further.

Even if the compelling state interest standard is applied, the statutes come well within the sphere of validity. The law is well settled that a state has a compelling interest in protecting its citizens from violent acts. Black citizens were threatened, intimidated, abused and ridiculed. Such action drastically departs from speech alone and plunges into the sphere of unlawful conduct. Thus the area of legitimate and compelling state interest is evident. The state has a compelling interest in protecting a proprietor's right to conduct

his business free from wrongful interference as well as an interest in protecting the consumer's right to choose freely the business he will patronize. There is nothing inherently illegal in injuring a business by persuading customers to boycott, provided customers do so not out of coercion or fear of bodily harm, but rather out of personal desire to aid the boycott.

The freedom guaranteed by the U.S. Constitution and the civil rights accorded by the statutes of the United States are freedoms and rights guaranteed to all people and not only to a particular group. The state's right to protect the rights guaranteed to all of its citizens is compelling and must be upheld.

Third, such interest could be protected no more reasonably than to prohibit the specific acts which constitute a wrongful interference with the proprietor. There appears to be no perceivable alternative means than would protect these interests more adequately. Both the state interest and the operation of the statutes in question are limited to the non-communicative aspect of the Appellants' conduct. The state interest and the scope of the statutes are limited to preventing physical and economical harm to persons unable to correct grievances primarily caused by public officials and perhaps more importantly, to protect persons physically prevented from exercising their freedom of choice by fear, force and abuse.

Considerable argument would be required to demonstrate a constitutionally acceptable justification to warrant the prohibition of peaceful picketing and boycotting specifically

directed at eliminating racially discriminatory employment or other practices toward those who could correct these grievances. However, no such exhaustive justification is necessary concerning the case at bar. The boycott was neither peaceful nor direct. (R. pp. 13, 19, 20, 21, 24).

The state of Mississippi has not endeavored to prohibit peaceful civil rights picketing but rather has restricted the use of violence, threats and intimidation in the furtherance of perhaps even just ends. The validity of the state interest justifying this prohibition can easily be discerned in the instant case: the protection of citizens to shop with whom they wish free from violence or threats of violence and the preservation of public peace and safety.

In accord see Southern Christian Leadership Conference, Inc. v. A.G. Corp., 241 So.2d 619 (1970). The Mississippi Supreme Court held that defendants had unlawfully conspired to ruin plaintiff's business through intimidation and secondary boycott, illegal means that placed the demonstration clearly outside the guarantees of the First Amendment. In State ex rel. Fair Share Organization, Inc. v. Newton Circuit Court, 244 Ind. 112 (1963), an Indiana Supreme Court decision, the plaintiff recovered damages where threats of violence had been used to obtain jobs for Black workers. The Supreme Court held that where picketing has an untimely illegal purpose, it is also not protected by the First Amendment. In Hughes v. Superior Court, 339 U.S. 460 (1950) a citizen's organization demanded that a branch of a California grocery chain hire

Black clerks in proportion to the number of Black customers. The state court enjoined peaceful picketing to enforce this demand, on the ground that such selective hiring would be oppose to public policy although there was no statute specifically on the subject. The United States Supreme Court sustained the injunction without dissent.

The Appellants' unlawful conduct, although directed toward perhaps justifiable ends, conducted in an unlawful manner and for an unlawful purpose, will not find sanction or protection under the First or Fourteenth Amendments of the Constitution. The statutes must be upheld as constitutional as written and as applied in this case.

II. THE CHANCERY COURT WAS CORRECT IN FINDING APPELLANTS GUILTY OF CONSPIRACY, SECONDARY BOYCOTT AND UNLAWFUL RESTRAINT OF TRADE.

A. The Chancellor Was Correct In Finding Appellants Liable For Conspiracy In Violation Of Sec. 97-23-85 As Defined In 97-1-1, MCA 1972.

1. Every agreement between two or more persons to accomplish a criminal or unlawful object, or a lawful object by criminal or unlawful means is an unlawful conspiracy wherein the acts of any conspirator inure to all engaged therein .

Conspiracy is defined as a combination between two or more persons by concerted action to accomplish a criminal or unlawful purpose or some purpose not in itself criminal or unlawful by criminal or unlawful means. Pettibone v. United States, 148 U.S. 197 (1893). This definition excludes only confederations to accomplish lawful objects by lawful means.

In a civil action, the crux of the charge is the damage resulting to a complainant from any overt act done pursuant to the common design. Jessup v. Reynolds, (Miss.), 43 So.2d 753, 755 (1949). The elements essential to establishing a civil conspiracy are: (1) two or more persons; (2) an object to

be accomplished; (3) a meeting of minds on the object or cause of action; (4) one or more unlawful "overt" acts and (5) damages flowing proximately therefrom. This test was stated with approval in NAACP v. Overstreet, 221 Ga. 16, 142 SE2d 816, cert. dis. as improvidently granted at 384 U.S. 118 (1966). There the Georgia Supreme Court in finding the NAACP, a New York corporation, liable for damages to plaintiff-respondent for engaging in an unlawful conspiracy to destroy plaintiff's lawful business said:

> Every agreement between two or more persons to accomplish a criminal or unlawful object, or a lawful object by criminal or unlawful means, is an unlawful conspiracy, and any persons whose rights are injured by acts done in furtherance of such conspiracy has his action at law for redress in damages.

The act of any conspirator is the act of all engaged in the conspiracy. Where a cause of action for damages in tort is set out, allegations showing a conspiracy make any actionable deed by one of the conspirators chargeable to all with the liability being joint and several. NAACP v. Overstreet, supra at 823, 825.

The Mississippi Supreme Court in Southern Christian Leadership Conference,et al. v. A.G. Corp. (Miss. 1970), 241 So.2d 619, while approving a Chancery Court decision finding liability in a businessman's suit for damages caused by a conspiracy and secondary boycott, said:

> The law permits great latitude in the admission of circumstantial evidence tending to establish a conspiracy and to connect those advising, encouraging, aiding, abetting and ratifying the

> overt acts committed for the purpose of carrying into effect the objects of the conspiracy. 241 So.2d 619 at 625.

The facts in that case were almost identical to those of the case at hand in that in both cases the demands made were of a governmental and public nature totally beyond the powers of the merchants to effect and arose out of a background of public rather than private inequities.

In the cited case, Southern Christian Leadership Conference (SCLC) along with the Grenada County Freedom Movement (GCFM) made certain demands upon Grenada County officials among which were extended and expanded voting rights, improvement of conditions in the Negro community with particular attention to political education and use of public accomodations covered by the 1964 Civil Rights Act. These demands closely parallel those of Appellants in the case at hand wherein, inter alia, by letter of March 14, 1966, public officials were warned of the urgent necessity that the Black citizen be "allowed free exercise of their rights to public accomodations, public facilities, public services and entry into hospitals, schools, recreational facilities ... protection of the law, particularly in the election machinery, service as jurors and other rights which are ours by law, logic and American ethic." (R. p. 6). Catalogued as immediate needs were: desegregation of public schools, employment of Black policemen, improved public services in the Black community, and use of Blacks as election officials and on official and semi-official boards and commissions. (See R. p. 6 through 8 for complete list).

It is readily apparent that the demands in both cases were of a public nature and could only be addressed by those appropriate officials. The boycott was imposed on the merchants in both cases, despite the fact no claim was made the merchants in any way participated in, urged, or were responsible for the conduct (or misconduct as the case may be) of those officials. Complainant in the SCLC case asserted, without contradiction, that at no time material had it had any dispute, disagreement or controversy with any of the defendants. Appellants, by their own testimony, established the same to be true in the case at hand. (R. pp. 12, 21). It was against the aforestated factual background that the Mississippi Supreme Court affirmed the finding of liability to the merchants for having engaged in an unlawful conspiracy and secondary boycott.

There, as here, the merchant was, in effect, an innocent bystander who ultimately became the helpless victim in a struggle for political and social change beyond his authority to grant. The vulnerability of the merchants to economic ruination from such action was readily apparent to all from the clientele they served. The Mississippi Supreme Court in Southern Bus Lines v. Amalgamated Ass'n. of Street, Electric Railway & Motor Coach Employees of America, et al, 205 Miss. 354, 38 So.2d 765 (1949) at page 769 said private persons could not conspire to illegally destroy the business of another, and when any individual or organization under whatever name attempts to use force to gain his or her ends, they are usurping

a governmental function. The facts and testimony set forth in the Chancellor's opinion (R. pp. 11-13) clearly show the existence of a conspiracy to coerce the white merchants of Port Hudson to put pressure on elected governmental officials to grant demands of a public nature, action which, if the merchants had pursued, held no assurance of the desired results and further, held grave possibilities of criminal liability.

Appellants are not before the Court today because they sought to speak out or address grievances before the governing officials of Port Hudson. They are here because of the illegal conspiracy and attendant actions in which they engaged. Acts of violence, intimidation and destruction of personal property were universally proscribed at common law as malum in se. Most states as well as the Federal government today statutorily proscribe these various acts as public wrongs. The statute with which we are here concerned merely collectively proscribes these acts as public wrongs. The tactics employed by Appellants were neither lawful in themselves nor employed for a lawful purpose. Hughes v. Superior Court, 339 U.S. 460, 464, 465 (1950); International Brotherhood of Teamsters v. Vogt, 354 U.S. 284 (1957); Giboney, supra; SCLC, supra.

The allegations of the complaint in SCLC v. A.G. Corp. (supra at 620,621) covers each of the substantive and procedural elements of 97-23-85 MCA (1972), the statute under which Appellants here were charged and found guilty in the Chancery Court. This statute was first enacted in 1968 as

Chapter 344, General Laws of the State of Mississippi, and is little more than a codification of the common law in regards to unlawful conspiracy and secondary boycotts with a provision allowing merchants to recover damages in a civil action. See Restatement of Torts §762 through 766 (1939).

2. Appellants engaged in a conspiracy to coerce the white merchants of Port Hudson to pressure elected officials to grant demands of a public nature with the tactics employed being neither lawful in themselves nor employed for a lawful purpose.

The Chancellor found here as did the court in A.G. Corp. supra at 626, and rightfully so, that the boycott was not conducted within peaceful and legal limits. The "agreement" among Appellants, the means to the end of the boycotts, amounted to a conspiracy and one of their goals was to injure Respondents business unless the public officials, who by virtue of sheer electoral numbers were more responsible to Appellants than Respondents, granted their demands. The record is clear here that the activity of Appellants caused fear in the Black community. This was done intentionally under threat of physical harm to their persons (P. 12) and social ostracism (p. 13). Thus it is plain there was coercion and intimidation to prevent Blacks patronizing the merchants of their choice. The statements of Appellants show conclusively the purpose of the boycotts was to coerce the merchants to bring pressure to bear on the municipal and county governments. (R. p. 11). Such action is not within the realm of protected speech.

This conspiracy pervaded the testimony of Respondents at trial and can only serve to discredit any reliance now claimed

upon the otherwise lawful complaints. The principle objective of the boycott controls. AFL-CIO v. NLRB (D.C.C.), 413 F. 2d 1085 (1969). Several appellants stated it to be other than resolving complaint against Respondents. In fact, the record is uncontroverted in that at trial no Appellant claimed a personal dispute with any white merchant or that he or she had ever sought a job from any white merchant, nor did they claim to represent any person seeking a job. Members of the Committee drafting the demands testified the purpose to be to force white merchants to bring pressure to bear on the public officials. This is precisely the conspiracy and attendant activity codified as unlawful in 97-23-85 for which Appellants have been held liable to Respondents in property damage. The Chancellor's finding of liability for conspiracy in violation of 97-23-85 MCA, 1972, should accordingly be affirmed.

B. The Chancery Court Did Not Err In Finding Appellants Liable For Engaging In An Unlawful Secondary Boycott As To Respondents In Violation Of 97-23-85, MCA 1972.

1. Interference without just cause with another's reasonable expectation of business is tortious and a boycott only perfunctorily meeting the requirements of a primary dispute but which is shown to have an unlawful secondary object is not saved where the desired secondary object is effectuated .

The use of boycotts as economic coercion on businessmen by private individuals seeking redress of public grievances raises the difficult question of the place of self help in a government of laws. This problem is especially compounded where these businessmen are being deprived of the right to

pursue a lawful profession and the property rights attendant thereto despite the fact they are without power to grant the relief sought by those boycotting to protest governmental inequities. Somewhere in limbo lies the recognized and protected property rights of the merchant to seek and have the patronage and goodwill of his customers. NAACP v. Overstreet, supra at 827; Segal v. Wood, 42 App. Div.2d 548, 345 N.Y.2d 27 (1973).

At common law, interference without "just cause" with another's reasonable expectations of business was tortious. Vegelahen v. Gunter, 167 Mass. 72, 105, 44 N.E. 1077, 1080 (1896)(dissenting opinion of Justice Holmes); Restatement of Torts §765. Because of the great injuries likely to be inflicted by group action, inducements of others not to deal was prohibited. A.S. Beck Shoe Corp. v. Johnsons, 153 Misc. 363, 274 N.Y. Supp. 946 (1934); Restatement of Torts §766 (1939). Although the term "just cause" has never been precisely defined, there is substantial agreement as to the indicia of illegality or lack of just cause in boycotts.

Boycotts furthered by violence, threats and intimidation are always illegal, even when only some of the means are violent. Local 122 v. Wisconsin, 315 U.S. 437 (1942); Restatement of Torts §§765, 766. Some courts have found violence or coercion to be prerequisite to restricting civil rights picketing and boycotting. NAACP v. Thompson (5th Cir.), 357 F.2d 831 (1966); NAACP v. Webb City (Fla.), 152 So.2d 179 (1963).

This rule is but a tacit recognition of the long standing distinction between protected "speech" and "speech-plus" with which we are here concerned.

Respondents contend the record amply supports the Chancellor's finding of an unlawful secondary boycott. The U.S. Supreme Court in Duplex Printing Press co. v. Deering, 254 U.S. 443 at 466 said:

> ... a combination not merely to refrain from dealing with complainant or to advise or by peaceful means persuade complainants customers to refrain (primary boycott) but to exercise coercive pressure upon such customers, actual or prospective in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with [him] is an unlawful secondary boycott.

Trevers and the Rheinquist County NOLBP made it clear early in the boycott that no Black trade with white merchants would be tolerated. "Store watchers" or "enforcers" were placed in the vicinity of the merchants business houses as deterrants to those merchants expected Black patronage. (R. pp. 12). Blacks who did trade were subjected to threats of physical violence, threatening and abusive telephone calls, destruction and/or deprivation of personal property bought from the merchants, (R. pp. 12 and 20), social ostracism, and even having their homes shot into (R. pp. 13 and 20). Sheriff Thomas, who incidentally was re-elected by an overwhelmingly Black electorate, testified to at least 100 Blacks complaining to him of interference while attempting to trade with white merchants. There were almost certainly many times that number who feared to even complain lest they be branded

traitors and subjected to intensified harassment and intimidation.

A boycott meeting the perfunctory requirements of a primary dispute but which is shown to have an unlawful secondary object is not saved by the claims of a primary dispute where the desired effect is accomplished. International Brotherhood of Electrical Workers, Local 480 v. National Labor Relations Board (U.S. CA D.C. Cir.) 413 F.2d 1085 (1969). The Chancellor heard testimony from Appellants and its witnesses and accordingly found (R. p. 19) the thrust of the boycott to be directed at the governing officials of Port Hudson and not the merchants. Testimony of Appellants, on its face, dictated this result. For example, Jones Nathaniel, who was a member and signitary of the drafting committee for the demand letters of March 14 and 23, 1966, and later a member of the "enforcer" group called "Beacons" or "Black Hats" as well as manager of Our Mart, Inc., testified Appellants "... expected white business people to put pressure on the Board of Aldermen and the Board of Supervisors to grant the demands." (R. p. 11). Testimony of others corroborated this to be the reason for the boycott and not any expectation that the merchants could themselves grant the demands or correct any purported grievance against them.

The perfunctory treatment Appellants accorded the one direct demand made upon the merchants (employment of Blacks) raises obvious questions as to the merits of that demand in regard to Respondents. This is further obviated in that on

April 19, 1969 the boycott was reimposed on all white merchants without regard for employment or non-employment of Blacks when certain demands were again refused by the governing officials.

MAP's conscious participation in the boycott makes it liable along with the other Appellants for the damage suffered by Respondents. By voluntarily supporting the demands of Trevers and NOLBP, MAP became as much a prime mover in the boycott as though it had actually committed the acts attendant thereto. Southern Bus Lines, supra; NAACP v. Overstreet, 384 U.S. 118, reh. den. 384 U.S. 981.

2. The Constitutional guarantees of free speech and press do not confer immunity when used as an integral part of conduct violative of a valid criminal statute .

Protecting parties from being involuntarily drawn into a controversy not involving them and which they are without authority to resolve has been an entrenched policy of the law. Duplex Printing Co. v. Deering et al, 254 U.S. 443, 446 (1921); Loewe v. Taylor, 208 U.S. 274, 294-95 (1908); SCLC v. A. G. Corp. (supra) at 624. Such economic pressure on innocent third parties - known as secondary boycott - was outlawed at common law long before being attacked by statute. Hopkins v. Oxley Stave Co. (8th Cir.), 83 Fed. 912 (1897). In speaking to the use of coercion and secondary boycott the court in Giboney, supra at 498, said even laudable and praiseworthy objectives should not be viewed in isolation of the activities engaged in in furtherance of that aim. The Consti-

tutional guarantees of free speech and press does not confer immunity when used as an integral part of conduct in violation of a valid criminal statute. The right to picket is not absolute and the manner in which it is conducted may be regulated. Amalgamated Food Employees, Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968); Giboney, supra; see also, "Non Labor Picketing or Boycott", 93 ALR2d 1284 at 1288. It is not only proper but necessary that the state regulate collective actions such as engaged in here. Protection of the welfare of all its citizens takes precedence over actions such as here described, irregardless of intent or motive. The conduct engaged in by Appellants was defined as criminal under various state statutes, and collectively as both a criminal and civil offense under 97-23-85 MCA. The statute under consideration here is no more than a compendium of those wrongs, normally actionable by the state as criminal offenses, so as to allow innocent businessmen to recover civil damages where the statute is not complied with. The demands of the statute are simple and easily complied with. It merely requires if a party has a grievance with a businessman, he, before engaging in activity likely to cause such person economic ruin, notify him of such grievance and allow a reasonable opportunity for correction. If there is no lawful grievance to be aimed against said merchant, then he should not be boycotted. The Chancellor's findings should be affirmed.

C. The Chancellor Did Not Err In Finding Appellants Liable For Violating Sections 75-21-1 Through 75-21-11 MCA 1972.

1. This chapter is to be liberally construed and the Mississippi Supreme Court has declared the forbidden acts listed in the statute to be intrinsically inimical to the public welfare without further proof or deduction by the court once shown to exist .

Sections 75-21-1 et seq., MCA 1972, make combinations or agreements between two or more persons, corporations, or associations, the effect of which is to create or attempt to create monopolies or restraints of trade and commerce in the state inimical to the public welfare and unlawful. Although the statute closely parallels the Sherman Act, 15 USCA §§ 1-7, it is more detailed than that Act and less controlled by general considerations of public policy and the "effects" of those prohibited actions. The legislature at §75-21-39 MCA, 1972, declared its intent that this chapter be "... liberally construed in all courts to the end that trusts and combines may be suppressed, and the benefits arising from competition in business preserved to the people of this state."

The Mississippi Supreme Court in construing this statute in the case of Wagley v. Colonial Baking Co. et al, 208 Miss. 815, 45 So.2d 717 (1950) said at p. 720, 721, an offense is complete under the statute when shown to come within the terms of any section. In other words, the legislature had declared the forbidden things listed in the statute to be intrinsically inimical to the public welfare without further proof of a result beyond the definitions of the statutes or deductions by the court that the proven acts were or were not inimical to the public welfare.

The U.S. Supreme Court in Grenada Lumber Company, supra, agreed with the Mississippi Supreme Court that:

> ... an act, harmless when done by one, may become a public wrong when done by many acting in concert, and when it becomes the object of a conspiracy and operates in restraint of trade the police power may prohibit it without impairing the liberty of contract protected by the Fourteenth Amendment.

The court further noted that a combination that is "actually" a restraint of trade under a valid statute is illegal without regard for motive or necessity inducing such action. See also Wagley, supra at 721.

In Klor's, Inc. v. Broadway Hale Stores, Inc. et al, 359 U.S. 207 (1959) a Ninth Circuit decision (255 F.2d 214 (1958) holding a restraint, in order to be violative of the law, must operate to substantially restrict commercial competition and consist of conduct by which the public is or may be ultimately injured, was reversed. The Court pointed out under the Sherman Act any combination or conspiracy in restraint of trade is illegal and group boycotts or concerted refusals by traders to deal with other traders have long been held to be in the forbidden category.

Respondents contend the conduct of Appellants here merits no treatment different from that accorded other business enterprises under the law. MAP, NOLBP, Our Mart, Inc. and the individual defendents acted in concert to deprive Respondents of their lawful right to freely engage in business competition. There is no reason why acts condemned under federal laws should be found protected and beyond the reach of the Mississippi legislature.

2. Intent to cause the harm is not a necessary element nor will liability be mitigated in view of motives or necessity.

As herein stated before, Appellants did conspire to and in fact did engage in an unlawful secondary boycott of Respondent's businesses. In direct violation of the plain language of 75-21-1(a)(D) MCA 1972, Blacks were forced against their will to withhold their trade from white merchants despite an expressed desire to so trade. In pertinent part a trust or combine is there defined as a combination, understanding or agreement between two or more persons, corporations or associations of persons "... when inimical to [the] public welfare and the effect of which would be:

(a) to restrain trade;

(b) to hinder competition in the ... sale or purchase of a commodity.

The facts in the record are overwhelmingly supportive of the Chancellor's finding Appellant's actions "... hindered the sale and purchase of commodities in Rheinquist County." (R. 22). To this end Appellants in combination unreasonably limited competition between Black and white merchants of Rheinquist County so far as to compel Blacks to leave the county to purchase items not stocked by Black merchants there.

It is hardly arquable that the actions of NOLBP, MAP, Jones Nathaniel, Our Mart, Inc. and others did work to create a monopoly and unlawfully restrain trade within the purview of the statute.

The facts in the record clearly show Our Mart, Inc. and Jones Nathaniel, its manager, to have engaged in an unlawful restraint on trade whereby it sought to secure, and did secure, economic success at the expense of Respondents by

virtue of a controlled lack of competition. Jones Nathaniel prior to being manager had served on the Committee drafting the original 21 demands of March 14, 1966, as well as the subsequent demands of March 23, 1966, and was a signatary of both. More importantly, he was a member of the "Beacons" or "Black Hats" a militant group described as "... a cause of pervasive fear among Black citizens of Rheinquist County, at least to the extent of preventing trade with white businessmen." (See Record at p. 13). The intimidation and acts of violence set forth hereinabove certainly furthered the plan to work economic havoc upon Respondent merchants if the public officials failed to cooperate with the profitable effect of restraining trade and hindering (more accurately, eliminating) competition in the sale of like commodities in Rheinquist County. MAP being unable to reach an agreement with Trevers whereupon purchases could be made from Respondent on a revolving plan asceded to his demands and ceased all trade with Respondents. By virtue of its understanding with Trevers that in order to operate in Rheinquist County Respondents should be boycotted Appellant MAP placed itself squarely within the purview of 75-21-1(a) and/or 75-21-3(a)(R.p. 15). Intent to cause the harm to which MAP was party is not necessary under 75-21-3(a) nor can its liability be mitigaged in view of the services it sought to provide where other alternatives were available. Wagley, supra, 721. There is no indication from the Record that MAP could not have gotten persons to comply with the more equitable revolving purchase plan it initially proposed. Nor is there evidence that aid in

implementing the program would not have been forthcoming from local or federal law enforcement officials had such been requested. Instead, MAP knuckled under to the demands of Trevers and so became party to his actions. Southern Bus Lines, supra; NAACP v. Overstreet, supra. It thereby precluded itself from claiming the status of a mere innocent bystander. The judgment of the Chancery Court finding Appellants liable for engaging in an unlawful restraint of trade should accordingly be affirmed.

CONCLUSION

The Defendants unlawful secondary boycott and restraint on trade accomplished through a conspiracy were within the express prohibition of the Mississippi statutes herein noted. None of the acts or conduct was protected by the Constitution of the United States or the Constitution of the State of Mississippi. Appellants should not be allowed to escape liability by attempting to manipulate lawless conduct under the shield of First Amendment freedoms. For the reasons set forth herein, Respondents respectfully urge this Court to affirm the decision of the Chancery Court.

RESPECTFULLY SUBMITTED,

Daphne Taylor

Reuben Daniels

COUNSELS FOR RESPONDENTS

APPENDIX A

The United States Constitution provides in relevant part:

AMENDMENT 1

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 of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Mississippi Code Ann. (1972)

Chapter 21

§75-21-1. Trust and combine - defined

A trust or combine is a combination, contract, understanding or agreement, expressed or implied, between two or more persons, corporations or firms or associations of persons or between any one or more of either with one or more of the others, when inimical to public welfare and the effect of which would be:

(a) To restrain trade;

(d) To hinder competition in the production, importation, manufacture, transportation, sale or purchase of a commodity;

(e) To engross or forestall a commodity;

(i) To unite or pool interest in the importation, manufacture, production, transportation, or price of a commodity, contrary to the spirit and meaning of this chapter.

Any corporation, domestic or foreign, or any partnership or individual, or other association, or person whatsoever, who are now, or shall hereafter create, enter into, become a member of, or a party to any trust or combine as hereinabove defined shall be deemed and adjudged guilty of a conspiracy to defraud and shall be subject to the penalties hereinafter provided. Any person, association of persons, corporation, or corporations, domestic or foreign, who shall be a party or belong to a trust and combine shall be guilty of crime and upon conviction thereof shall, for a first offense be fined in any sum not less than one hundred dollars ($100.00) nor more than five thousand dollars ($5,000.00) and for a second or subsequent offense not less than two hundred dollars ($200.00) nor more than ten thousand dollars ($10,000.00), and may be enjoined by a final decree of the chancery court, in a suit by the state on the relation of the attorney general, from the further prosecution of or doing of the acts constituting the trust and combine as defined in this chapter.

§75-21-3. Additional contracts or combinations not allowed by law.

Any corporation, domestic or foreign, or individual, partnership, or association of persons whatsoever, who, with intent to accomplish the results herein prohibited or without such intent, shall accomplish such results to a degree inimicable to public welfare, and shall thus:

(a) Restrain or attempt to restrain the freedom of trade or production;

(b) Or shall monopolize or attempt to monopolize the production, control or sale of any commodity, or the prosecution, management or control of any kind, class or description of business;

§75-21-39. Application of chapter.

No right, liability, pain, penalty, forfeiture, prosecution or suit under laws existing prior to the adoption of this chapter shall be in any wise affected thereby, but the same may be asserted, prosecuted, declared, inflicted and imposed under the laws in force prior to the adoption of this chapter. This chapter shall be liberally construed in all courts to the end that trusts and combines may be suppressed, and the benefits arising from competition in business preserved to the people of this state.

Chapter 1

§97-1-1. Conspiracy

If two (2) or more persons conspire either:

(a) To commit a crime; or

(e) To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof; or

(f) To commit any act injurious to the public health, to public morals, trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws; or

(g) To overthrow or violate the laws of this state through force, violence, threats, intimidation, or otherwise; or

(h) To accomplish any unlawful purpose or a lawful purpose by any unlawful means; such persons, and each of them, shall be guilty of a felony and upon conviction shall be fined not less than five hundred dollars ($500.00) nor more than five thousand dollars ($5,000.00), or shall be imprisoned not less than one (1) year nor more than (5) years or both.

Chapter 23

§97-23-85. Unlawful restraint of trade - boycott - civil liability.

If two (2) or more persons conspire to prevent another person or other persons from trading or doing business with any merchant or other business and as a result of said conspiracy said persons induce or encourage any individual or individuals to cease doing business with any merchant or other person, and when such conspiracy is formed and effectuated because of a reasonable grievance of the conspirators over which the said merchant or place of business boycotted or against which a boycott is attempted has no direct control or no legal authority to correct, or when the conspiracy results from such alleged grievance against the merchant or other person boycotted when no notice of such grievance has been given the merchant or party boycotted and no reasonable opportunity to correct such alleged grievance has been given such merchant or other party against whom the conspiracy was formed, then each of said persons shall be guilty of the crime of unlawful restraint of trade and shall be fined not more than one thousand dollars ($1,000.00) or imprisoned for not more than two (2) years and in addition each such person shall be liable in civil action for any damages suffered by said merchant or place of business so wrongfully boycotted and also for attorney fees incurred by said merchant or person boycotted in a civil action to recover damages.

APPENDIX C

Restatement of Torts 2d (in pertinent parts)

§762. PRIVILEGE OF SELECTING PERSONS FOR BUSINESS RELATIONS.

One who causes intended or unintended harm to another merely by refusing to enter into a business relation with the other or to continue a business relation terminable at his will is not liable for that harm if the refusal is not

(b) a means of accomplishing an illegal effect on competition, or

(c) part of a concerted refusal by a combination of persons of which he is a member.

§765. CONCERTED REFUSAL TO DEAL

(1) Persons who cause harm to another by a concerted refusal in their business to enter into or to continue business relations with him are liable to him for that harm, even though they would not be liable for similar conduct without concert, if their concerted refusal is not justified under the circumstances.

(2) In the issue of justification under the rule stated in Subsection (1), the following are important factors:

(a) the objects sought to be accomplished and the interests sought to be advanced by the actor's conduct;

(b) the extent of the hardship caused to the person against whom the actors' conduct is directed and his opportunities for mitigating the hardship;

(c) the appropriateness of the actor's conduct as a means of advancing their interests and the availability of less harmful means to that end;

(d) the relations between the actors and the person against whom the conduct is directed and their relative economic power;

(e) the effects of the actors' conduct and of its objects on the social interest in business enterprise and competition.

§766. GENERAL PRINCIPLE.

Except as stated in Section 698, one who, without a privilege to do so, induces or otherwise purposely causes a third person not to

(b) enter into or continue a business relation with another

is liable to the other for the harm caused thereby.