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In the

Supreme Court of the United States

THOMAS S. GIBSON, ET AL.,
Appellants,
vs.
L. M. BERRYHILL, ET AL.,
Appellees.

No. 71-653

Washington, D. C.
January 9, 1973
January 10, 1973

Pages 1 thru 40

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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Appellants

v. : No. 71-653

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Appellees

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Washington, D. C.

Tuesday, January 9, 1973
Wednesday, January 10, 1973

The above-entitled matter came on for argument at 2:47 o'clock p.m. on Tuesday, January 9 and was continued after recess at 10:10 o'clock January 10, 1973

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM. J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR.,Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

RICHARD A. BILLUPS, JR., ESQ., P. O. Box 1056, Jackson, Mississippi 39205 for the Appellants

HARRY COLE, ESQ., Second Floor, Hill Building, P.O. Box 116, Montgomery, Alabama for the Appellees

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-653, Gibson versus Berryhill.

You may proceed when ready, Mr. Billups.

ORAL ARGUMENT OF RICHARD A. BILLUPS, JR., ESQ.,

ON BEHALF OF THE APPELLANTS

MR. BILLUPS: Mr. Chief Justice and members of this honorable Court:

This is a case where charges were pending against the Plaintiff Optometrists, charging them with having violated certain sections of the Optometry Law.

Q Could you raise your voice a little, Mr. Billups?

MR. BILLUPS: This is a case where charges were pending against the Plaintiff Optometrists for having, before the Alabama State Board of Optometry and after having scheduled them for hearing before this Board of Optemetry and before hearing, this suit was filed to enjoin the Board from hearing the charges and the Board voluntarily agreed to withhold further action until this case has been finally disposed of.

The Plaintiffs in lower complaint allege a violation of the Civil Rights of the optometrists under section 1983 of the Federal Civil Rights Act on the part of the defendant Board members and later filed a second cause of action alleging that sections 192 and 206 of the Alabama Optometry

Law were unconstitutional and requested a hearing before a three-judge court which was granted.

The defendants assert that there was no misconduct on their part and so answered and also filed a motion to dismiss the case.

The issues were joined on a stipulation of facts and briefs presented the Court which granted an injunction against the State Board, its members and successors in office, from hearing the charges and in addition, held section 192 and 206 unconstitutional on the theory that said section 192 -- that Board member must be eligible for appointment, had to be a member in good standing of the Alabama Optometric Association and that section 206 of the Optometry Law, while providing the procedure for handling and hearing any charges filed before it, was unconstitutional because even though it provided for an appeal from an adverse decision, it failed to spell out supercedeas pending an appeal.

The Defendants answered that these two sections of the Optometry Law had been held to be constitutional by the Alabama Supreme Court in a prior case of McCrory versus Wood and was not violated by the Federal Constitution.

The holding of the court -- of the trial court -- if sustained, will destroy virtually every state-created licensing board because in most instances they have the same

general provisions such as section 192, that board members must be members of the association to be eligible for appointment and 206, of the Alabama Law, which provides for the handling of charges and in the Alabama Law, 206, it provides that from an adverse ruling the optometrists can appeal to the circuit court of his home county.

Q This is in the case of an adverse decision?

MR. BILLUPS: Yes, sir. Yes.

Now, it does not go on to say how the supercedeas can be obtained but in Alabama the courts have held that any court, including the Supreme Court, can grant supercedeas.

And, so, this holding of the trial court would, as I say, where it limits the -- those who can serve on the board to members of the association or, as in some states, where they are recommended by the association to the governor for appointment, if permitted to stand, would virtually destroy every regulatory licensing board created by statute.

Q Is the appeal -- the administrative hearing proceeding goes on and if adverse decision, there is appeal to the circuit court, to the state circuit court, right?

MR. BILLUPS: Yes, sir.

Q Is that on the record or is it de novo?

MR. BILLUPS: In Alabama, there is some question as to whether it is on the record or de novo. The only appeal with which I am familiar was one de novo.

Q Well, is there, you know, a time limit set for the appeal?

MR. BILLUPS: No, sir. No, sir. It just says it will be appealed to the circuit court of the residence of the defendant.

Q Well, if you waited two years, you could still appeal it in Alabama?

MR. BILLUPS: There is no limit in the law itself, as I read it and as I remember it.

Q Wouldn't you be barred by Latches at some point?

MR. BILLUPS: Beg pardon?

Q Might you not be barred by Latches at some point?

MR. BILLUPS: That's -- that would be a good question, but there is nothing -- nothing in the Optometry Law that so holds or touches on that point.

Q If you want a supercedeas or if you want to practice while you appeal, you better move. I take it you better move fast or unless you go into court and get a supercedeas, you are out of business.

MR. BILLUPS: Well, that is true, sir.

Q Well, isn't that true? Isn't the decision of the board final unless he gets it set aside?

MR. BILLUPS: Unless it is appealed. Now, but

during the course of the proceedings -- and I'll get -- the -- and in order to cover that point that you have just raised, the state board adopted a regulation stating that in the event of an adverse decision, the state board would take no action or hold the matter in abeyance until the appeal had been completed and determined, so that, then, would not even require a supercedeas, because a regulation, of course, has the effect of law.

Q Well, they must have contemplated some time limit, then?

They wouldn't say, we won't take any action and then let you not take any action forever?

MR. BILLUPS: No, sir. There was no time limit in the regulation.

Now, this -- these charges grow out of the series of events that have transpired over a number of years and while these dates are set out in the various pleadings, I believe it would be helpful for this honorable Court to know the sequence because among other things, the board is charged with harassment of the defendant optometrist because of the fact that these charges lay dormant for a long number of years.

But for many years, from the adoption of the Optometry Law in 1919, section 210 of the Optometry Law permitted a retail or a store to maintain an optometric

department wherein eyes were examined and glasses fitted, provided there was an optometrist in charge of it.

That is what is sometimes referred to as "corporate practice."

Now, on August the 4th, 1965, section 210 was repealed in its entirety which we contend lets it fall back on the general rule that is well-recognized that in the absence of statutory authority a person cannot practice a profession through the -- a corporation cannot practice a profession through the employment of a licensed professional and we have had optometrists and physicians involved in these cases.

In August of 1965, shortly after this repeal, the state board notified all optometrists to comply and offered their assistance.

Then in October 26, 1965, charges filed by the Alabama Association with the board were filed, which included charges against these plaintiffs below, who were employed at that time by Lee Optical Company.

A short time later, the state board filed an injunction suit against Lee Optical Company and the employed optometrists, including one physician, alleging that the optometrists were aiding and abetting Lee Optical in the unlawful practice of optometry and by so doing they themselves were unlawfully practicing optometry.

Unfortunately, there was no precedent in Alabama for the filing of such an injunction suit in any of the professional appeals, perhaps because of the fact that the section 210 which permitted corporations to function as they did discouraged others in filing any suits in any of the other fields.

Now, when the defendants, all of them, filed a motion to abate and this motion was sustained because, as I say, there was no precedent for the filing of such an injunction suit.

Now, in other states there is statutory authority for filing of such suits.

Then, the defendants filed a motion to abate and the court sustained that motion to abate and an appeal was taken.

Now, then, in September of 1967 the Alabama Legislature passed Act number 509 giving all boards the right to bring an injunction suit against anyone unlawfully practicing in their field and made it retroactive.

MR. CHIEF JUSTICE BURGER: We will resume at that point in the morning, Mr. Billups.

(Thereupon, at 3:00 o'clock p.m., the Court was recessed in this case until 10:10 o'clock a.m. the following day.)

MR. CHIEF JUSTICE BURGER: We will resume argument in Gibson against Berryhill.

Mr. Billups, you may continue.

MR. BILLUPS: Thank you, sir.

Mr. Chief Justice and may it please the Court:

The last question being discussed was one of supercedeas when the time ran out and, not intending to belabor the point, but on the other hand, in the three-judge tribunal or three-judge trial court, under subparagraphs two and three it states, "Supercedeas is within the power of the court without statutory authority thereforeand appeal from a judgment when no statute requires a supercedeas bond to effect a suspension it ordinarily suspends the judgment without such a bond." In addition, to be doubly sure because it was prior to that time of that decision, the board adopted regulation number one which they said that no action would be taken pending an appeal.

Now, I was trying to show an answer to the question of harassment that the six years between the time these charges and suits were filed resulted from no action on the part of the board but it involved one case that went to the Supreme Court on the question of the sustaining of a motion to abate by lower court in the injunction case against Lee, and the Supreme Court held that and overruled the lower court in their motion to abate and directed the court to proceed and it

did proceed and proceeded to trial with a judgment and an injunction granted against Lee Optical from which they appealed.

Now, in the House of $8.50 case, companion case in that it involved the same questions, however in that case, the optometrist remained in the case along with the House of $8.50 eyeglasses when, in the Lee Case, a motion to abate on demur on their part of the optometrists was sustained by the court without assigning reasons therefore and the case proceeded to trial on the case against Lee.

Then, after these two -- and in the House of $8.50, an injunction was granted against both the House of $8.50 eyeglasses and their employed optometrist from -- enjoining them from the unlawful practice of optometry.

Following that, then, these charges which had been voluntarily held in abeyance by the court, this covered the period of almost six years, and with the counsel for the board stating to counsel for the defendants that they had no desire whatsoever to run the optometrists involved out of Alabama, that they were badly needed in Alabama, so badly is the shortage of optometrists in Alabama that Alabama has now established a school of optometry and legislature made it a part of the multiple complex at Birmingham and in'73 they will graduate their first class of optometrists.

So that, then, brings us up to the injunction suit

filed in federal court which was filed between the time the -- of the decisions, favorable decisions in the lower court granting injunctions which were appealed by Lee and House of $8.50, but following those favorable decisions, then these charges were set for hearing before the board, with due notice.

At one prior time they were continued by agreement, as shown by an exhibit in the record because of the possibility that by participating in the trial by the state board it might cause them to become disqualified to hear the charges as a state board and it was agreed by counsel and reduced to writing and is in the record that that would not be true.

However, no member of the state board did participate in the charges except Dr. Cash who was at that time president and soon went off the board after that and would not have been a member of the board to hear these charges when this injunction suit was filed in federal court.

Now, we have the Geiger case from Georgia which is almost an identical case to the case we have here, involving charges filed against a physician before the board, alleging misconduct on his part. And in that case an injunction suit was filed, just as in this case and was heard.

It was held in that case that the charges were penal in nature and the injunction statute would apply and

the case was dismissed.

It came up to this Court and on March the 29th, 1972, when the action was affirmed by this Court.

Now, in McCrory versus Wood in Mississippi it has been held that these sections of the optometry law involved here are constitutional, even though held unconstitutional by the trial court in the federal injunction suit.

Now, also in Alabama in the case of State versus Keel it has been held that such charges pending before a state board are penal in nature and by virtue of being penal in nature, then would be subject to the anti-injunction statute.

Now, then, that brings us up to the case of Mitchum from Florida which didn't involve a professional case but involved a bookstore and an injunction was filed and in that case the -- oh, charges were filed and in state courts against the bookstore under the obscenity law before they were tried, before they were heard.

Then an injunction suit was filed in federal court as in this case. Then, upon a hearing, the three-judge trial court held that since this was a penal case pending in state court, that the anti-injunction suit, section 2283, would apply and the case was dismissed.

Then, upon appeal here, this honorable Court held that the exception under 1983 or that there was an

exception, to wit, 1983, to such a penal case as that and based on that, this honorable Court held that that exception applied to the case pending in Florida and reversed the lower court and its ruling that had dismissed, saying that the anti-injunction suit was absolute in its application.

This honorable Court reversed but at the same time in a concurrence it was suggested that perhaps the lower court should give consideration to what could be accomplished in the state courts in the disposition of this matter.

Q Was this that is now before us filed under 1983?

Was this complaint in this three-judge court in this case filed under 1983?

MR. BILLUPS: Under both, sir. The first cause of action was under the Civil Rights section. They filed a second cause of action bringing it under the anti-injunction suit.

Q Well, then, all that Mitchum stands for, I suppose, is that the three-judge district court in this case was not absolutely barred from issuing an injuention by 2283. Is that right?

MR. BILLUPS: Well, sir, as I read the three-judge trial court, they held that it was an absolute bar and --

Q Not in the present case.

MR. BILLUPS: Sir?

Q Not in the present case. They issued an injunction, didn't they?

MR. BILLUPS: Yes, sir.

Q Yes. So they couldn't have held it was an absolute bar.

MR. BILLUPS: Well, I thought you were mentioning the Mitchum case.

Q No, I'm talking about the present case.

MR. BILLUPS: Oh, oh, right, right. But it -- they issued an injunction nevertheless in this case, the present case, enjoining the state -- the board from proceeding with a hearing on the charges.

Q And this case, this case that you are now arguing here was decided by the district court before the Mitchum case was decided by this Court, wasn't it?

MR. BILLUPS: Right. Right. Right. Right.

Now, I'd like, in closing, to say that in the case of McCrory versus Wood in Mississippi, as well as in some other states, sections of the Optometry Law such as 192 and 206 that are involved here are constitutional and for what that might be worth in the consideration given this case by this honorable Court, that is the situation.

We sincerely trust that this honorable Court will take cognizance of the extreme importance on all licensing boards of the decision rendered in this case because

throughout the country practically all licensing boards in the professional health care field have similar provisions as to appointment of members of the board and similar provisions as to membership in the association and in general, appeals from charges that are heard before the board.

So, I thank you and I appreciate the attention of the Court.

MR. CHIEF JUSTICE BURGER: Thank you --

Q Mr. Billups, can I ask you a question?

MR. BILLUPS: Yes, sir.

Q Do you feel that Mitchum against Foster is a case up here in your favor?

MR. BILLUPS: Well, it came up here --

Q Do you think it is authority that favors your side of the case?

MR. BILLUPS: Well, in the Mitchum case -- I know the Bay Springs case or the Florida case was in our favor when it came up here and yes, sir, the Mitchum case was in our favor when it came up here. But when it went back, this Court held that the exception of the Civil Rights Act, the general exception to the anti-injunction suit, applied and they reversed the dismissal that had theretofore been made, if I am not mistaken.

Q Well, you state in your brief that you feel that Mitchum against Foster as here decided is persuasive in

the case at bar in favor of the Appellants.

MR. BILLUPS: Yes.

Q I wondered if you really feel this way.

Could I ask whether you rely primarily on the abstention doctrine of Younger against Harris? Or on the anti-injunction statute?

MR. BILLUPS: Well, sir, there have been so many things happen to this law suit and so many decisions rendered between now and then and all, Younger being the first one, that I would just hesitate to say, sir, except that we treated it in our brief as sincerely as we possibly could, with the cases that were decided up until that time.

Q Well, I didn't remember that you cited Younger against Harris and I was curious.

Q You cited Samuels against MacKell, an accompanying case for the proposition that the court shouldn't have issued an injunction in this case.

MR. BILLUPS: Right. But in our briefs making up the pleadings we did cite Younger, which had just come out.

Q But you did cite Samuels against MacKell in your main brief in this case.

MR. BILLUPS: Thank you, sir.

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

Mr. Cole.

ORAL ARGUMENT OF HARRY COLE, ESQ.,

ON BEHALF OF THE APPELLEES

MR. COLE: Mr. Chief Justice and may it please the Court:

The position of the Appellees in this case is, and I think that possibly to focus on the issues which we will present here, I might make this statement at the outset and that is, that in our view and in the study of the district court's opinion, the three-judge district court held nothing unconstitutional and no statute was held unconstitutional. The only effect of the court's decision and opinion being to enjoin the enforcement of the statute holding that it was unconstitutional as applied to the Plaintiff Appellees in this case. The --

Q What is the point of youre saying that?

MR. COLE: The point of my saying it is, your Honor, I think that we are going to get back to a regular 1983 case and that the only question before this Court is whether or not the Federal District Court should have exercised equity jurisdiction to enjoin.

Q And the anti-injunction statute wouldn't apply under Mitchum, I suppose you argue, right?

MR. COLE: Right.

Q And so you are left with Younger against Harris and Samuels against MacKell.

MR. COLE: Well, yes. Yes.

Q And you have a pending -- at the time the injunction was issued, you had a pending administrative proceeding in a state court?

MR. COLE: Yes. No, sir. No, sir, before an administrative board to revoke the Appellee's licenses.

Q Well, I said "a pending administrative proceeding in --" the state.

MR. COLE: Yes, sir.

Q Which was subject to judicial review.

MR. COLE: Yes, sir, inadequate, as we contended in the court below.

Q Do you know whether that review would be de novo on the record?

MR. COLE: De novo.

Q And there was an absolute right to it with the right to -- would there have been an interim right to an injunction against revocation of the license?

MR. COLE: In our opinion of judgment there was no absolute right to supercedeas. The Alabama case would hold that supercedeas was not a matter of right and unless granted by statute must be directed to one of the circuit judges and the circuit judge has authority to issue a writ of supercedeas at law.

Q Well, has the Alabama court characterized

this kind of a proceeding as a penal proceeding or as a criminal proceeding?

MR. COLE: No, sir, the case of State versus Keel cited by the Appellant involved a fact situation where the Department of Conservation had issued some regulations prohibiting trotline fishing in a river in Alabama and the defendant was was arrested for trotline fishing and they held that they could issue a warrant on that.

Q So the question here is whether or not a federal court should withhold an injunction when there is pending a state administrative proceeding subject to judicial review?

MR. COLE: Yes, sir, but the facts here additionally, we contend and we think that the record is replete with examples of bias, prejudice and disqualification on the part of the tribunal who were -- which was to try these defendants and that was the basis we asked for the injunction in the first place.

Q That adds up to something like Dombrowski.

MR. COLE: Dombrowski versus Pfister.

Q Yes.

Q Tell me, what about the administrative supercedeas, if that is the right term.

MR. COLE: The administrative supercedeas, your Honor, was nothing more than administrative grace in this

instance. There had been no right to supercedeas. After this action was filed, after the board members had refused to requse themselves at our request, we filed this suit and asked that they be enjoined. After the suit was filed and while it was pending, then they passed regulation number one which was the first regulation the Alabama State Board of Optometry had passed in some 40 years.

Q Well, even if you had not got the injunction you did get from the three-judge court, would that regulation have been operative to permit you to carry on business?

MR. COLE: No, sir, because I don't think an administrative board can pass a statute allowing supercedeas.

Q I see. Well, that is a question, I gather, of state law.

Q No, but its own regulations said that they would not bother you pending judicial review.

MR. COLE: Yes, sir, but the regulation could be revoked as easily as it was passed.

Q But they wouldn't pursue you if their own regulations said they wouldn't pending review.

MR. COLE: Your Honor, they said they wouldn't after the suit was filed.

Q Well, is there any reason we should disbelieve them?

MR. COLE: No, sir, except that if I may recite the

history of this litigation and the background which we claim shows the disqualification on the part of the board --

Q Would you mind tying that in when you do, Mr. Cole, to the harassment concept?

MR. COLE: Yes, sir. Yes, sir.

Q Mr. Cole?

MR. COLE: Yes, sir.

Q One other question in connection with procedure. Was mandamus on the state side available to you?

MR. COLE: Mandamus was available on the state side to require the board members to requse themselves, yes.

Q But you didn't pursue it?

MR. COLE: No, sir.

Q Is there a reason why you didn't?

MR. COLE: Yes, sir, because we thought we had concurrent federal jurisdiction under 1983.

Q That means you preferred to go into a federal court?

MR. COLE: Yes, sir.

Q And then sometime in your argument, will you discuss the Geiger case which is cited by your opponent and not cited in your brief?

MR. COLE: Yes, sir, I'll just mention the Geiger case to get it behind us right now. This was a proceeding to revoke the license of a doctor in the State of Georgia

and -- I've forgotten whether it was this Court or the district court -- refused to issue an injunction because there was no allegation that he would be denied due process in the first instance or that he could not avail himself of a constitutional defense and the defense of the single criminal action.

In this case, we allege that they could not get due process in the first instance and that we have been subjected to harassment and would be deprived of 14th Amendment rights and for that reason we invoked the equity jurisdiction of the federal courts under 1983.

Q Let's assume we accept your proposition that the composition of the board was such that there was a denial of due process in the administrative proceeding.

MR. COLE: Yes, sir.

Q Now, you have already told us, if I heard you correctly, that the judicial proceedings following the administrative action, would be de novo.

MR. COLE: Yes, sir.

Q Would -- are we to understand that you are claiming it would be a denial of due process in that de novo proceedings?

MR. COLE: Your Honor, the denial of due process, we feel, would be number one in either making us go before a board which we think this Court will recognize is just

obviously disqualified or pursuing a mandamus remedy in the state court to try to require them to requse themselves and also having some question about supercedeas during which these people are deprived of the right to practice their profession with the attendant embarassment and trouble that they may face by having had their license revoked.

Q Would not the state court -- the state court that would be involved in/de novo review have the right to stay the administrative action?

MR. COLE: By injunction probably, yes, sir.

Q But you didn't try that?

MR. COLE: No, sir and I might add the state court which -- to which we would have had to apply was the same one that had just enjoined the same optometrists, or enjoined Lee Optical from employing these same optometrists, the decision in which was later reversed and rendered by the Alabama Supreme Court.

Q Well, all of this adds up to that Alabama was quite capably taking of this problem, wasn't it?

MR. COLE: Well, if the state courts were in Dombrowski versus Pfister, yes, sir. I mean, that's where we were. We were in the same position, we think, as the defendants were in Dombrowski versus Pfister. Whether or not we could have defended this in a single action, of course, we think is the question before the Court.

If I may review the history and what the record will show, and the record is voluminous and it is up here without Appendix, there are some 400 or 500 pages of testimony in here from the state board members. Depositions were taken from each of them.

The history of this litigation goes back to, oh, 1956 at first, the two Alabama state statutes giving the board the authority to regulate the practice of optometry are sections 206 and then, additionally, there are some other sections. One of the sections says that nothing in this chapter shall be deemed to deny the right of a department store or some other business to operate an optometrical department, assuming that it is under the control of a licensed optometrist and that his name appears in any advertisement.

There had been prosecution of several -- or one or two at least -- optometrists under this act hoping that they were guilty of unprofessional conduct because their name had appeared in advertising.

The board prosecuted these people because they said that they violated the code of ethics of the Alabama Optometric Association.

The Alabama Optometric Association is given the authority by the legislature to admit members of the practice and govern the practice of the professionals in Alabama in

accordance with the state code.

The Alabama Optometric Association also nominates the members of the Alabama State Board and board members must come from the association. Also in the record or in the rules of the Alabama Optometric Association is a provision which says that any optometrist who is employed by anybody other than a licensed optometrist cannot join the association so that optometrists who are employed by corporations or optical dispensaries are excluded from membership in the organization governing the practice of their profession.

Now, the association and the state board and, admittedly, this is stipulated and Mr. Billups stated it in his statement, have been engaged for many years and been interested in eliminating what they refer to as "corporate practice of optometry in the State of Alabama and other states." That is, the practice by which an optometrist may be employed by an optical dispensary.

In Alabama I think the record shows that there are 100 members of the Alabama State Board of Optometry. There are 92 members of these non-corporation-employed optometrists or non-members of the state board. There has been litigation --

Q Do you mean state board or state association?

MR. COLE: Sir?

Q Do you mean state board or state association?

MR. COLE: Well, Alabama State Optometrical Association and then the state board comes from the association.

Q Maybe I misunderstood you. You didn't say the membership of a board was 100?

MR. COLE: Oh, no, excuse me. I'm sorry. I meant the association, yes. The membership of the board is five members.

The litigation first began in 1956 in the case of Alabama State Board versus Busch Jewelry. They attempted to entertain some license revocation action of an optometrist because he had violated the association code of ethics. The Alabama Supreme Court said you can't take his license away from that because you can't impose your association's code of ethics on a nonmember of the association when he is actually pursuing a right given to him by statute.

Later, the next case of the Alabama State Board versus Dr. McCrory, who was one of the plaintiff appellees in this case, was begun in 1961. They started a license revocation proceeding against McCrory alleging that he was guilty of unprofessional conduct because he had allowed his license to be used and had advertised the practice of his profession.

Q I noticed that you used the term "doctor." Does an optometrist have --

MR. COLE: They refer to themselves as "doctor."

Q Well, is that just a euphemism, a colloquialism or is he allowed to do so by statute?

MR. COLE: There is nothing in the statute to allow them to do it. It's just -- in fact, the Alabama Supreme Court, the last case, the lead case, the deciding point was whether or not it was a learned profession and the court said that it was not, that it was a limited statutory profession.

But at any rate, McCrory, who was one of the plaintiff appellees in this case, was -- there was an attempt at prosecution and the Alabama Supreme Court said that the state board didn't have the authority to prosecute him or to revoke his license.

That occurred in 1965. The basis of that holding was a provision of the Alabama code which guaranteed them the right to advertise and also said that a department store could have an optometrical department.

At that point, the bias of this board, the present members of this board, begins to become more evident. We think that their depositions and their testimony show it very clearly.

This state board, Dr. Thomas S. Gibson who was chairman of the Alabama State Board of Optometry, who was also legislative chairman of the Alabama State Optometric Association; members of the association were either asked to contribute or assist even though Dr. Gibson himself contributed $500 and so did other members of the state board to what they

referred to as a legislative fund to secure the repeal of section 210 of the optometry act. This was the section which gave corporations the specific right to employ optometrists. The section was appealed in August, I believe, of 1965.

Then in October of 1965 Dr. Thomas S. Gibson filed a sworn complaint in the circuit court of Montgomery County in behalf of the state board of optometry. All of the members of the state board were parties to this complain.

They alleged that all of these plaintiff appellees in this case were guilty of improper and unethical practice and that they were employed by a corporation contrary to the provisions of the law and asked that the court enjoin these optometrists from working for the corporation and the corporation from employing them.

Later, as Mr. Billups said, the court let the individual optometrists out of the case on a technicality.

At the same time this other proceeding was filed, the Alabama State Optometric Association initiated charges before the state boards so at this point you have the state board maintaining a civil action claiming that these people are guilty of something and at the same time they are fixing to try them to revoke their licenses in a proceedings by their parent organization, the Alabama State Board of Optometrists.

The license revocation charges were held in

abeyance over a period of six to seven years. During this time, the state court enjoined Lee from employing optometrists, saying that it was a learned profession and all sorts of things. The Alabama Supreme Court reversed them summarily and rendered the case and that was the end of that, said that there was nothing wrong with them employing optometrists.

While this was pending and just a few weeks before the Alabama Supreme Court rendered its opinion, these appellees were again notified that license revocation charges were going to be brought and that they were going to be prosecuted for practicing optometry illegally because they were working for a corporation, corporate practice.

At this point, we had asked the board to reqse itself. It had refused and we filed this action invoking the provisions of 1983 to protect 14th Amendment rights. The allegations were, and the evidence showed that there had been, between the State Board of Optometry and the Alabama Optometric Association a common defense fund whereby they had shared legal expense for the prosecution of these people.

They had conferred at length between themselves as to the course of the litigation, how it should be handled and how corporate practice should be eliminated. There had been, as I said, contribution to legislative funds by members of the civil suit. The board chairman himself testified in his deposition that the state board of

optometry felt compelled to follow the mandates and dictates of the Alabama Optometric Society in determining what to do and how to handle these things.

We feel that basically the case presents a perfect illustration of bias, prejudice and disqualification upon the trial of fact who are ultimately to sit in judgment upon these optometrists as to whether they should be able to practice their profession.

As to the rights of supercedeas and irreparable injury, we think that it goes without saying, to quote from what one of the district judges said in the -- sorry, it was a Florida case, I forget what it is -- they had absolutely nothing to lose except their livelihood and the right to practice their profession.

Q What did the district court say or do about Younger against Harris or Samuels against MacKell?

MR. COLE: the district court considered Younger versus Harris and said that it recognized the doctrine of abstention but said that in cases of harassment and where there was obvious bias and disqualification that a person could not receive due process in the first instance, that federal equity jurisdiction should be invoked and enjoined this board from prosecuting these appellees.

Q So I gather when the district court equated the bias --

MR. COLE: Yes, sir.

Q -- he found that you had --

MR. COLE: Yes, sir, the district --

Q -- approved. He found that that was to be equated with harassment.

MR. COLE: That is the only thing that --

Q Now, tell me, Mr. Cole, are you familiar with our recent decision last November in Ward versus Monroeville?

MR. COLE: No, sir, I don't believe I am.

Q Well, that was a case that involved allegations of bias by a local magistrate in which it was contended that there was no constitutional deprivation since there was a trial de novo in the Ohio Court of Common Pleas and we held in that case that "nor in any event may the state's trial court procedure be deemed constitutionally acceptable simply because the state eventually offers a defendant an impartial adjudication. Petitioner is entitled to a nutral and detatched judge in the first instance."

Well, does that support you?

MR. COLE: Yes, sir, that supports me and that is exactly the position that we feel we are here with.

Q Well, that goes to your underlying constitutional claim.

MR. COLE: Yes, sir.

Q It doesn't go, really, to the question of whether or not the district court had -- should have enjoined the state proceedings, does it?

MR. COLE: Yes, sir, I think it does.

Q If the -- because if you ride on the constitutional claim, you can make that claim in the state proceedings, as was done in Ward against Monroeville, as I remember. That came right up here directly from the Supreme Court of Ohio.

MR. COLE: Yes. Yes, sir. You see, I am not familiar with the Ward case, your Honor, but it is my understanding from this Court's previous holdings that if the defendant could not be afforded due process in the first instance that that was sufficient to -- for the court --

Q Well, now, what holdings are you talking about?

MR. COLE: Sir?

Q What --?

MR. COLE: Dombrowski.

Q Of course, there was no pending proceeding in Dombrowski, was there?

MR. COLE: Well, it was to enjoin the, I think, that the --

Q There was no pending proceeding? That is made clear in Dombrowski.

MR. COLE: All right.

Q Did the district court, in the present case, rest any part of its willingness to go ahead and enjoin these state proceedings on the ground that they were not criminal proceedings but rather were civil administrative proceedings?

MR. COLE: They mentioned the fact that in Younger that it was not made clear whether or not that it would apply to civil proceedings, but --

Q That's all?

MR. COLE: That's all.

Q They went no further than that.

MR. COLE: That's right, yes,sir. In fact, the only real finding made by the district court in this case was that we couldn't get due process and that there was bias and irreparable injury threatened and that the injunction should issue and the decision had to be based upon the unconstitutional application of the statute as to these defendants as opposed to the finding of unconstitutionality.

Q Let's assume that the administrative proceeding had been completed and there had been an adverse decision to your clients and you had appealed?

MR. COLE: Yes, sir.

Q You would have started a judicial proceeding in the state courts.

MR. COLE: Yes, sir.

Q And then you went to the federal court.

MR. COLE: I don't know how I could have gone to federal court, your Honor.

Q Well, you just go file a complaint and ask that the --

MR. COLE: Oh, I see, moving from administrative to judicial injunction. You mean a pending state action?

Q Well, there was a pending state action and then you go to the federal court and you are tired of the state proceedings. You think you can get better justice in the federal court so you go to the federal court and ask for an injunction against the enforcement of the administrative judgment.

MR. COLE: Are you asking me do I think we could have?

Q Yes.

MR. COLE: Well, yes, sir, I think we could have. I think --

Q You wholly aside from Younger?

MR. COLE: I think we could have asked for it as I understand it.

Q Well, you could ask for anything, I guess, but --

MR. COLE: I don't think it would have been very well-advised for a lawyer to start a proceeding in one court and then decide to switch horses and go to the other.

Q Well, that's certainly what Younger seems to indicate.

MR. COLE: Yes, sir. My idea and my theory is that the courts have concurrent equity jurisdiction, as you said in Ex Parte Young in one of these cases that where you have a federal right where the Congress has said, "Let's give them protection," that you ought to give them protection. The only thing that keeps you from it is the doctrine of abstention or just considering our federalism as you mentioned in the Younger case and if the facts override the measures which normally would indicate to you to restrain something, then, of course, you go forward. That is our theory.

Q Mr. Cole, supposing following Justice White's example further that you had taken a judicial review in the Alabama courts of an adverse administrative decisision and pursued that through the Alabama courts and then lost on that so that the administrative finding against you was the same, do you think you then could have gone into the federal district court and sought an injunction?

MR. COLE: No, sir. I think that it would have been res judicata.

Q You couldn't have saved your federal constitutional claim for a federal court?

MR. COLE: Possibly for this Court, I think.

Q Well, maybe for this Court but not for independent action?

MR. COLE: I don't believe we could, no, sir.

Q Tell me, Mr. Cole, is there an express finding equating this bias of the board with harassment in Judge Warner's opinion?

MR. COLE: Well --

Q The closest I come to it is at A5 of the jurisdictional statement. "On the other hand, federal courts will enjoin state proceedings even in criminal cases to protect federal rights where irreparable injury is threatened to prevent continued harassment." That is at A5 and then follows a recital, I gather, of fact findings. Is that it?

MR. COLE: That is basically the only reference.

Q A5 and 6, that's it?

MR. COLE: Yes. Yes.

Are there any other questions, your Honors?

I might add that our theory was irreparable injury as far as damage to these people. That is the basis for the injunctive relief of course and I think --

Q So I gather your idea is, even if Younger is to be applicable to pending civil or pending administrative state proceedings, this comes within the exception, anyway, for harassment?

MR. COLE: Yes, sir. I mean, our theory is just purely and simply, whether it is a criminal or a civil proceeding, that we are entitled to 1983 protection for violation of 14th Amendment rights and that you have all of the elements to support equitable jurisdiction and the federal courts to protect them.

Thank you.

Q Would it be appropriate to infer from your statement about the other case that was decided by the Supreme Court of Alabama after an injunction was entered against some of these optometrists, that you could have gotten the relief that you are now seeking in the Alabama Supreme Court?

MR. COLE: Yes, sir --

Q I am going to the scope of that holding. I am not familiar with it, of course.

MR. COLE: That holding would not have been per se applicable in this instance. I mean, to these defendants in this case other than establishing --

Q No, no, but established rules of law that would have given you the relief that you are here for.

MR. COLE: Yes. Yes, sir, it establishes rules of law that says that these appellees are not guilty of what they have been charged with in these proceedings.

Q Well, as a practical matter then, laying

aside whether it has any relevance here, as a practical matter, you might have got your relief a lot sooner than 1973 if you had stayed in the Alabama courts. Is that true?

MR. COLE: No, sir. It took us two years to get that, so -- I mean --

Q You started this in 1956.

MR. COLE: Sir?

Q You started in 1956, you said.

MR. COLE: No, sir, we didn't start. Now, that was another prosecution back in 1956. That -- I cited those cases just to show the evidence of harassment that we alleged in our brief.

And I might mention one other thing. I think that the trial court found evidence that pecuniary interest in this thing by the board members, the evidence that came out in the hearings was that there was some 75,000 pairs of eyeglasses sold by the employer of these appellees alone in the State of Alabama in one year. Aside from the price differentials charged between the two parties, I mean, the employees of these people at one time examined eyes free and sold glasses for $20 a pair.

The members of the state association and the board members at the same time were charging $20 to examine eyes and $40 for glasses so if you take it right down to the dollar marks in the thing you have a proposition where you

have got $30,000 per year per man as far as the sale of eye-glasses and this is what the whole thing is about. It is a competitive proposition and has been for 20 years.

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

MR. COLE: Thank you.

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

The case is submitted.

(Whereupon, at 10:52 o'clock a.m., the case was submitted.)