MISSISSIPPI CIVIL PRACTICE AND PROCEDURE

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INTRODUCTION TO THE COURT SYSTEM

A. Statutory Provisions

§ 1-1-13. When Code of 1972 to take effect.

The Mississippi Code of 1972, except as expressly provided, shall take effect on the first day of November, one thousand nine hundred and seventy-three, and from that day it shall be received in use, and shall supersede all prior statutes and clauses therein revised, and hereby repealed.

Sources: Codes, 1857, ch. 1, art. 2; 1871, § 8; 1880, § 2; 1892, § 2; Laws, 1906, § 2; Laws, 1930, § 2; Laws, 1942, § 13.

§ 1-1-19. Repeal of former statutes - Effect of Code of 1972 upon laws enacted at same session or before Code takes effect.

From and after the effective date of the Mississippi Code of 1972, subject to any express provisions relating thereto which may be found in the Mississippi Code of 1972, all acts or parts of acts, all sections or parts of sections of the Mississippi Code of 1930, and all sections or parts of sections of the Mississippi Code of 1942, Recompiled, the subjects whereof are revised, consolidated and re-enacted in the Mississippi Code of 1972, or repugnant to the provisions contained therein, shall be, and the same are hereby, repealed, but with respect to statutes brought forward in the Mississippi Code of 1972, that code shall be deemed to be a continuation and not a new enactment. It is especially provided, however, that no curative or validation statute, of any nature or kind whatsoever, shall be affected by the adoption of the Mississippi Code of 1972, in so far as the curative or validation provisions or portions of any such statute are concerned.

Notwithstanding the provisions of the first paragraph of this section, no section or provision of the Mississippi Code of 1972 shall supersede or repeal by implication any law passed at the same session of the legislature at which the Mississippi Code of 1972 is adopted, or passed after the adoption of the Mississippi Code of 1972 but before it shall have taken effect; and an amendatory law passed at such session or at any subsequent session before the Mississippi Code of 1972 takes effect shall not be deemed repealed, unless the contrary intent clearly appears.

Any amendment to any section or sections of the Mississippi Code of 1942, Recompiled, or to any part or parts of acts, the subjects of which are revised, consolidated and enacted in the Mississippi Code of 1972, passed at the same session at which the Mississippi Code of 1972 is adopted, or passed after the adoption of the Mississippi Code of 1972 but before it shall take effect, shall be deemed to amend the corresponding section or sections of the Mississippi Code of 1972.

Sources: Codes, 1857, ch. 1, art. 3; 1871, § 9; 1880, § 3; 1892, § 3; Laws, 1906, § 3; Laws, 1930, § 3; Laws, 1942, § 14.

§ 1-1-21. Effect of repeals by Code of 1972 upon former rights.

The repeal of any statutory provisions by the Mississippi Code of 1972 shall not affect any act done, or any cause of action, or any right accruing or accrued or established, or any suit or proceeding had or commenced in any civil case, or any plea or defense or bar thereto, previous to the time when such repeal shall take place; but the proceedings in every such case shall be conformed, as far as practicable, to the provisions of the Mississippi Code of 1972.

Sources: Codes, 1857, ch. 1, art. 5; 1871, § 13; 1880, § 4; 1892, § 4; Laws, 1906, § 4; Laws, 1930, § 4; Laws, 1942, § 15.

§ 1-1-23. Effect of adoption of Code of 1972 upon offenses committed prior to effective date of Code.

An offense committed, and a penalty or forfeiture incurred, previous to the time when the Mississippi Code of 1972 shall take effect, and an indictment or prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time when the Mississippi Code of 1972 shall take effect, shall not be affected by its adoption; but all such offenses, penalties, and forfeitures shall remain subject to the laws in force before the Mississippi Code of 1972 shall take effect, except that all the proceedings had thereafter shall be conducted according to the provisions thereof, and except that when any punishment, penalty, or forfeiture shall have been mitigated by the provisions of the Mississippi Code of 1972, such provisions may be applied to any judgment to be pronounced after the Mississippi Code of 1972 shall take effect.

Sources: Codes, 1857, ch. 1, art. 6; 1871, § 14; 1880, § 5; 1892, § 5; Laws, 1906, § 5; Laws, 1930, § 5; Laws, 1942, § 16.

§ 1-1-25. No revival of repealed laws.

All statutes and parts of statutes which are repealed or abrogated by, or are repugnant to any law repealed by the Mississippi Code of 1972, and which have not been re-enacted or consolidated therein, shall continue to be so repealed, and shall remain abrogated.

Sources: Codes, 1857, ch. 1, art. 7; 1871, § 15; 1880, § 6; 1892, § 6; Laws, 1906, § 6; Laws, 1930, § 6; Laws, 1942, § 17.

B. Constitutional Provisions

Section 144. Judicial power of state.

The judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this constitution.

Sources: 1817 art V § 1; 1832 art IV § 1; 1869 art VI § 1.

Section 152. Circuit and chancery court districts.

The Legislature shall divide the state into an appropriate number of circuit court districts and chancery court districts.

The Legislature shall, by statute, establish certain criteria by which the number of judges in each district shall be determined, such criteria to be based on population, the number of cases filed and other appropriate data.

Following the 1980 Federal Decennial Census and following each federal decennial census thereafter, the Legislature shall redistrict the circuit and chancery court districts. Should the Legislature fail to redistrict the circuit or chancery court districts by December 31 of the fifth year following the 1980 Federal Decennial Census or by December 31 of the fifth year following any federal decennial census thereafter, the Supreme Court shall, by order, redistrict such circuit or chancery court districts. Any order by the Supreme Court which redistricts the circuit or chancery court districts shall become effective at a date to be set therein and shall, without alteration of the composition of the districts established in such order, be enacted by the next succeeding session of the Legislature.

The circuit and chancery court districts established by the Legislature prior to the approval of this amendment shall remain in force and effect until such time as they are redistricted under the provisions of this amendment.

Sources: 1832 art IV § 13; 1869 art VI § 13; Laws, 1981, ch. 708; Laws, 1992, ch. 720, eff December 8, 1992.

Section 153. Election and terms of circuit and chancery court judges.

The judges of the circuit and chancery courts shall be elected by the people in a manner and at a time to be provided by the legislature and the judges shall hold their office for a term of four years.

Sources: 1869 art VI § 11; Laws, 1912, ch 415.

Section 154. Qualifications for circuit or chancery court judges.

No person shall be eligible to the office of judge of the circuit court or of the chancery court who shall not have been a practicing lawyer for five years and who shall not have attained the age of twenty-six years, and who shall not have been five years a citizen of this state.

Sources: 1832 art IV § 12; 1869 art VI § 12.

Section 158. Holding of circuit court.

A circuit court shall be held in each county at least twice in each year, and the judges of said courts may interchange circuits with each other in such manner as may be provided by law.

Sources: 1832 art IV § 15; 1869 art VI § 15.

Section 164. Holding of chancery court.

A chancery court shall be held in each county at least twice in each year.

Sources: 1869 art VI § 17 and third amendment.

Section 165. Disqualification of judges.

No judge of any court shall preside on the trial of any cause, where the parties or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties. Whenever any judge of the Supreme Court or the judge or chancellor of any district in this state shall, for any reason, be unable or disqualified to preside at any term of court, or in any case where the attorneys engaged therein shall not agree upon a member of the bar to preside in his place, the governor may commission another, or others, of law knowledge, to preside at such term or during such disability or disqualification in the place of the judge or judges so disqualified.

Sources: 1832 art IV § 9; Laws, 1916, ch 155.

Section 171. Justice court judges; jurisdiction.

A competent number of justice court judges and constables shall be chosen in each county in the manner provided by law, but not less than two (2) such judges in any county, who shall hold their office for the term of four (4) years. Each justice court judge shall have resided two (2) years in the county next preceding his selection and shall be high school graduate or have a general equivalency diploma unless he shall have served as a justice of the peace or been elected to the office of justice of the peace prior to January 1, 1976. All persons elected to the office of justice of the peace in November, 1975, shall take office in January, 1976, as justice court judges.

The maximum civil jurisdiction of the justice court shall extend to causes in which the principal amount in controversy is Five Hundred Dollars ($500.00) or such higher amount as may be prescribed by law. The justice court shall have jurisdiction concurrent with the circuit court over all crimes whereof the punishment prescribed does not extend beyond a fine and imprisonment in the county jail; but the Legislature may confer on the justice court exclusive jurisdiction in such petty misdemeanors as the Legislature shall see proper.

In all causes tried in justice court, the right of appeal shall be secured under such rules and regulations as shall be prescribed by law, and no justice court judge shall preside at the trial of any cause where he may be interested, or the parties or either of them shall be connected with him by affinity or consanguinity, except by the consent of the justice court judge and of the parties.

All reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Sources: 1817 art V § 8; 1832 art IV § 23; 1869 art VI § 23; Laws, 1975, ch. 518, eff December 8, 1975.

Section 172. Establishment and abolishment of inferior courts.

The legislature shall, from time to time, establish such other inferior courts as may be necessary, and abolish the same whenever deemed expedient.

Sources: 1832 art IV § 24; 1869 art VI § 24.

Section 159. Jurisdiction of chancery court.

The chancery court shall have full jurisdiction in the following matters and cases, viz.:
(a) All matters in equity;
(b) Divorce and alimony;
(c) Matters testamentary and of administration;
(d) Minor's business;
(e) Cases of idiocy, lunacy, and persons of unsound mind;
(f) All cases of which the said court had jurisdiction under the laws in force when this Constitution is put in operation.

Sources: 1832 third amendment; 1869 art VI § 16.

Section 160. Additional jurisdiction of chancery court.

And in addition to the jurisdiction heretofore exercised by the chancery court in suits to try title and to cancel deeds and other clouds upon title to real estate, it shall have jurisdiction in such cases to decree possession, and to displace possession; to decree rents and compensation for improvements and taxes; and in all cases where said court heretofore exercised jurisdiction, auxiliary to courts of common law, it may exercise such jurisdiction to grant the relief sought, although the legal remedy may not have been exhausted or the legal title established by a suit at law.

Section 161. Concurrent jurisdiction of chancery and circuit court.

And the chancery court shall have jurisdiction, concurrent with the circuit court, of suits on bonds of fiduciaries and public officers for failure to account for money or property received, or wasted or lost by neglect or failure to collect, and of suits involving inquiry into matters of mutual accounts; but if the plaintiff brings his suit in the circuit court, that court may, on application of the defendant, transfer the cause to the chancery court, if it appear that the accounts to be investigated are mutual and complicated.

Section 156. Jurisdiction of circuit court.

The circuit court shall have original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law.

Sources: 1832 art IV § 14; 1869 art VI § 14.

Section 146. Jurisdiction of Supreme Court.

The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals and shall exercise no jurisdiction on matters other than those specifically provided by this Constitution or by general law. The Legislature may by general law provide for the Supreme Court to have original and appellate jurisdiction as to any appeal directly from an administrative agency charged by law with the responsibility for approval or disapproval of rates sought to be charged the public by any public utility. The Supreme Court shall consider cases and proceedings for modification of public utility rates in an expeditious manner regardless of their position on the court docket.

Sources: 1832 art IV § 4; 1869 art VI § 4; Laws, 1983, ch. 682, eff January 3, 1984.

VARIOUS COURT DOCKETS

MRCP 45 Subpoena
(a) Form; Issuance.
(1) Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony, or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified. The clerk shall issue a subpoena signed and sealed, but otherwise in blank, to a party requesting it, who shall fill it in before service. A command to produce or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

MRCP 79. Books and Records Kept By the Clerk and Entries Therein
(a) General Docket. The clerk shall keep a book known as the "general docket" of such form and style as is required by law and shall enter therein each civil action to which these rules are made applicable. The file number of each action shall be noted on each page of the docket whereon an entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted in this general docket on the page assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. In the event a formal order is entered, the clerk shall insert the order in the file of the case.

§ 9-7-171. General docket.

(1) The clerk shall keep a general docket, in which he shall enter the names of the parties in each case, the time of filing the declaration, indictment, record from inferior courts on appeal or certiorari, petition, plea, or demurrer, and all other papers in the cause, the issuance and return of process, and a note of all judgments rendered therein, by reference to the minute book and page. He shall mark on the papers in every cause the style and number of the suit, and the time when, and the party by whom filed; and he shall not suffer any paper so filed to be withdrawn but by leave of the court, and then only by retaining a copy, to be made at the cost of the party obtaining the leave. All the papers and pleadings filed in a cause shall be kept in the same file, and all the files kept in numerical order. Entries in criminal cases shall not be made on the docket so as to disclose the names of the defendants until their arrest. And the docket shall be duly indexed, both directly and indirectly, in the alphabetical order of the names of each of the parties.

(2) The general docket required to be kept by this section and all other dockets or records required by law to be kept by the circuit clerk may be kept on computer in lieu of any other physical docket, record or well-bound book if all such dockets and records are kept by computer in accordance with regulations prescribed by the Administrative Office of Courts.

Sources: Codes, 1892, § 634; Laws, 1906, § 691; Hemingway's 1917, § 470; Laws, 1930, § 479; Laws, 1942, § 1417; Laws, 1994, ch. 521, § 22; Laws, 1994, ch. 458, § 1, eff from and after July 1, 1994.

§ 9-7-175. Criminal docket.

The clerk shall make out for each term a separate docket of cases begun by indictment, presentment, information, or other proceedings of a criminal nature, in the name or on behalf of the state or any municipal corporation. Such docket may be kept on computer as provided in Section 9-7-171.

Sources: Codes, Hutchinson's 1848, ch. 53, art. 5; 1857, ch. 61, art. 21; 1871, § 559; 1880, § 1486; 1892, § 636; Laws, 1906, § 693; Hemingway's 1917, § 472; Laws, 1930, § 481; Laws, 1942, § 1419; Laws, 1994, ch. 521, § 23; Laws, 1994, ch. 458, § 2, eff from and after July 1, 1994.

§ 9-7-177. Appearance docket.

The clerk shall keep an appearance docket, in which he shall enter all civil cases not triable at the first term after they are begun, in the order in which they are commenced, with the date of such commencement. Such docket may be kept on computer as provided in Section 9-7-171.

Sources: Codes, 1857, ch. 61, art. 22; 1871, § 558; 1880, § 1487; 1892, § 637; Laws, 1906, § 694; Hemingway's 1917, § 473; Laws, 1930, § 482; Laws, 1942, § 1420; Laws, 1994, ch. 521, § 24; Laws, 1994, ch. 458, § 3, eff from and after July 1, 1994.

§ 9-7-179. Subpoena docket.

The clerk shall keep a subpoena docket, in which he shall enter the style and number of each case in which a subpoena for a witness is issued, the name of the party for whom the witness is subpoenaed, to whom the subpoena is directed, the date of its issuance, when returnable, whether or not executed. He shall therein keep an account of all witnesses who may be absent when the case in which they have been subpoenaed is called for trial, or who may disqualify themselves from giving testimony by being intoxicated when such case is tried; and he shall not issue any certificate to such witnesses. The docket shall be kept duly indexed. Such docket may be kept on computer as provided in Section 9-7-171.

Sources: Codes, 1857, ch. 61, art. 22; 1871, § 561; 1880, § 1488; 1892, § 638; Laws, 1906, § 695; Hemingway's 1917, § 474; Laws, 1930, § 483; Laws, 1942, § 1421; Laws, 1994, ch. 521, § 25; Laws, 1994, ch. 458, § 4, eff from and after July 1, 1994.

§ 9-7-181. Execution docket.

The clerk shall keep a docket, in which he shall enter every capias pro finem and all executions issued by him, specifying the names of the parties, the date, the amount of the judgment or decree and of costs, the name of the officer to whom it is delivered, to what county directed, the date when issued, and the return-day thereof; and, when the same is returned, shall, without delay, record the return at large on the same page of the docket. And the execution docket shall be kept duly indexed, both directly and indirectly, in the alphabetical order of the names of each of the parties. Such docket may be kept on computer as provided in Section 9-7-171.

Sources: Codes, 1857, ch. 61, art. 268; 1871, § 565; 1880, § 1489; 1892, § 639; Laws, 1906, § 696; Hemingway's 1917, § 475; Laws, 1930, § 484; Laws, 1942, § 1422; Laws, 1994, ch. 521, § 26; Laws, 1994, ch. 458, § 5, eff from and after July 1, 1994.

Chapter Three: Construction of Statutes

§ 1-3-1. Application of chapter.

This chapter is applicable to every statute unless its general object, or the context of language construed, or other provisions of law indicate that a different meaning or application was intended from that required by this chapter.

§ 1-3-3. Bond.

The term "bond," when used in any statute, shall embrace every written undertaking for the payment of money or acknowledgment of being bound for money, conditioned to be void on the performance of any duty or the occurrence of any thing therein expressed and subscribed, and delivered by the party making it, to take effect as his obligation, whether it be sealed or unsealed.

Sources: Codes, 1880, § 19; 1892, § 1501; Laws, 1906, § 1575; Hemingway's 1917, § 1342; Laws, 1930, § 1365; Laws, 1942, § 673.

§ 1-3-5. Crime.

The term "crime," when used in any statute, shall mean any violation of law liable to punishment by criminal prosecution.

Sources: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 8 (26); 1857, ch. 64, art. 349; 1871, § 2856; 1880, § 3105; 1892, § 1502; Laws, 1906, § 1576; Hemingway's 1917, § 1343; Laws, 1930, § 1366; Laws, 1942, § 674.

§ 1-3-11. Felony.

The term "felony," when used in any statute, shall mean any violation of law punished with death or confinement in the penitentiary.

Sources: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 8 (24); 1857, ch. 64, art. 348; 1871, § 2855; 1880, § 3104; 1892, § 1503; Laws, 1906, § 1578; Hemingway's 1917, § 1345; Laws, 1930, § 1369; Laws, 1942, § 677.

§ 1-3-17. Gender, masculine to embrace the feminine.

Words in the masculine gender shall embrace a female as well as a male, unless a contrary intention may be manifest.

Sources: Codes, 1857, ch. 66, art. 7; 1871, § 2936; 1880, § 16; 1892, § 1524; Laws, 1906, § 1605; Hemingway's 1917, § 1372; Laws, 1930, § 1396; Laws, 1942, § 704.

§ 1-3-19. Infamous crime.

The term "infamous crime," when used in any statute, shall mean offenses punished with death or confinement in the penitentiary.

Sources: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 8 (25); 1857, ch. 64, art. 348; 1871, § 2855; 1880, § 3104; 1892, § 1504; Laws, 1906, § 1581; Hemingway's 1917, § 1348; Laws, 1930, § 1372; Laws, 1942, § 680.

§ 1-3-21. Infant.

The term "infant," when used in any statute, shall include any person, male or female, under twenty-one years of age.

Sources: Codes, 1892, § 1505; Laws, 1906, § 1582; Hemingway's 1917, § 1349; Laws, 1930, § 1373; Laws, 1942, § 681.

§ 1-3-27. Minor.

The term "minor," when used in any statute, shall include any person, male or female, under twenty-one years of age.

Sources: Codes, 1892, § 1508; Laws, 1906, § 1585; Hemingway's 1917, § 1352; Laws, 1930, § 1376; Laws, 1942, § 684.

§ 1-3-29. Month.

The term "month," when used in any statute, means a calendar month, unless a contrary intention be expressed.

Sources: Codes, 1857, ch. 66, art. 3; 1871, § 2932; 1880, § 12; 1892, § 1509; Laws, 1906, § 1586; Hemingway's 1917, § 1353; Laws, 1930, § 1377; Laws, 1942, § 685.

§ 1-3-33. Number, singular and plural.

Words used in the singular number only, either as descriptive of persons or things, shall extend to and embrace the plural number; and words used in the plural number shall extend to and embrace the singular number, except where a contrary intention is manifest.

Sources: Codes, 1857, ch. 66, art. 2; 1871, § 2931; 1880, § 11; 1892, § 1523; Laws, 1906, § 1604; Hemingway's 1917, § 1371; Laws, 1930, § 1395; Laws, 1942, § 703.

§ 1-3-37. Offense.

The term "offense," when used in any statute, shall mean any violation of law liable to punishment by criminal prosecution.

Sources: Codes, 1892, § 1511; Laws, 1906, § 1589; Hemingway's 1917, § 1356; Laws, 1930, § 1380; Laws, 1942, § 688.

§ 1-3-39. Person.

The term "person," when used in any statute, shall apply to artificial as well as natural persons; and when used to designate the party whose property may be the subject of offense, shall include the United States, this state, or any other state, territory, or country, and any county, city, town or village which may lawfully own property in this state; also all public and private corporations, as well as individuals.

Sources: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 8 (29); 1857, ch. 64, art. 350, ch. 66, art. 4; 1871, §§ 2857, 2933; 1880, §§ 13, 3106; 1892, § 1512; Laws, 1906, § 1590; Hemingway's 1917, § 1357; Laws, 1930, § 1381; Laws, 1942, § 689.

§ 1-3-57. Unsound mind.

The term "unsound mind," when used in any statute in reference to persons, shall include idiots, lunatics, and persons non compos mentis.

Sources: Codes, 1892, § 1518; Laws, 1906, § 1599; Hemingway's 1917, § 1366; Laws, 1930, § 1390; Laws, 1942, § 698.

§ 1-3-63. Year.

The term "year," when used in any statute, means a calendar year, unless a contrary intention be expressed.

Sources: Codes, 1857, ch. 66, art. 3; 1871, § 2932; 1880, § 12; 1892, § 1521; Laws, 1906, § 1602; Hemingway's 1917, § 1369; Laws, 1930, § 1393; Laws, 1942, § 701.

§ 1-3-65. Construction of terms generally.

All words and phrases contained in the statutes are used according to their common and ordinary acceptation and meaning; but technical words and phrases according to their technical meaning.

Sources: Codes, 1857, ch. 66, art. 1; 1871, § 2930; 1880, § 10; 1892, § 1522; Laws, 1906, § 1603; Hemingway's 1917, § 1370; Laws, 1930, § 1394; Laws, 1942, § 702.

§ 1-3-67. How time computed when a number of days is prescribed.

When process shall be required to be served or notice given any number of days, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday, or any other day when the courthouse or the clerk's office is in fact closed, whether with or without legal authority, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or any other day when the courthouse or the clerk's office is closed. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

Sources: Codes, 1857, ch. 66, art. 8; 1871, § 2931; 1880, § 17; 1892, § 1525; Laws, 1906, § 1606; Hemingway's 1917, § 1373; Laws, 1930, § 1397; Laws, 1942, § 705; Laws, 1991, ch. 573, § 1, eff from and after July 1, 1991.

§ 1-3-69. When a number of weeks is prescribed.

When publication shall be required to be made in some newspaper "for three (3) weeks," such publication shall be made once each week for three (3) successive weeks, and the time within which the noticed party is required to act or within which the noticing party may proceed shall be computed from the first date of publication. This rule shall furnish a guide for any similar case, whether the time required be more or less than three (3) weeks.

Sources: Codes, 1880, § 18; 1892, § 1526; Laws, 1906, § 1607; Hemingway's 1917, § 1374; Laws, 1930, § 1398; Laws, 1942, § 706; Laws, 1991, ch. 573, § 2, eff from and after July 1, 1991.

C. Justice Courts

Brown v. Vance, 637 F.2d 272 (5th Cir. 1981)

Consolidated class actions challenged statutory fee system for compensating justice court judges, i.e., justices of the peace, in the state of Mississippi. The United States District Court for the Southern District of Mississippi at Jackson, Walter L. Nixon, Jr., J., entered judgment from which plaintiffs appealed, save that the District Court determined that the Mississippi statute permitting an additional fee for further proceedings involving levy of execution on judgments and attachment and garnishment proceedings was unconstitutional. The Court of Appeals, Wisdom, Circuit Judge, held that: (1) statutory fee system for compensating justices of the peace in Mississippi, is unconstitutional as applied, in that, under fee system, judge might minimize burden of proof required to convict defendant or might be less than diligent in protecting defendant's constitutional rights, and (2) civil side of Mississippi justice court fee system was also violative of due process in view of, inter alia, record supporting inference that creditors would file more frequently in courts of judges who tended to favor plaintiffs and that judges knew and understood this to be the case.

Affirmed in part and reversed in part.

§ 9-11-9. Civil jurisdiction; pecuniary interest in outcome of action.

Justice court judges shall have jurisdiction of all actions for the recovery of debts or damages or personal property, where the principal of the debt, the amount of the demand, or the value of the property sought to be recovered shall not exceed Two Thousand Five Hundred Dollars ($2,500.00).

The justice court judges shall have no pecuniary interest in the outcome of any action once suit has been filed.

Sources: Codes, Hutchinson's 1848, ch. 50, art 2 (9); 1857, ch 58, art. 7; 1871, § 1302; 1880, § 2190; 1892, § 2394; Laws, 1906, § 2723; Hemingway's 1917, § 2222; Laws, 1930, § 2071; Laws, 1942, § 1805; Laws, 1964, ch. 333; Laws, 1977, ch. 308; Laws, 1981, ch. 471, § 4; Laws, 1985, ch. 478, § 1; Laws, 1986, ch. 365; Laws, 1995, ch. 573, § 1, eff from and after July 1, 1995.

Uniform Rules of Procedure for Justice Court were adopted effective May 1, 1995. The current version is published annually in West's Mississippi Rules of Court.

§ 9-11-5. Office - Where trials to be held - collectibility of compensation

(1) Every justice court judge shall have an office and all trials shall be held therein and whenever possible, said office shall be in the county courthouse, county office building or municipal office building if approved by the appropriate governing authorities notwithstanding such courthouse or office building may be outside of the district of such justice court judge, unless all of the parties to any proceeding before the justice court judge agree otherwise.

(2) The fees provided for in section 25-7-25, Mississippi Code of 1972, shall not be collected by a justice court judge who does not maintain a listed telephone and an appropriate office space which is reasonably accessible to the public for conducting judicial proceedings, filing actions and pleadings and issuing summons.

§ 9-11-5. Courtrooms; offices; insurance.

(1) The justice court judges shall be provided courtrooms by the county and all trials shall be held therein. Such courtrooms shall be in the county courthouse, county office building or any other building within the county deemed appropriate by the board of supervisors.

(2) The county shall provide office space and furnish each justice court office and provide necessary office supplies.

(3) The board of supervisors of each county may secure insurance coverage to protect the office of the justice court clerk against losses due to theft or robbery.

Sources: Codes, 1942, § 1803.3; Laws, 1964, ch. 332; Laws, 1979, ch. 476, § 2; Laws, 1981, ch. 471, § 9; Laws, 1982, ch. 423, § 28; Laws, 1986, ch. 367, eff from and after July 1, 1986.

§ 9-11-15. Regular terms of court; nonresident defendant; trial at reasonable time; court of record; power to punish for contempt.

Justice court judges shall hold regular terms of their courts, at such times as they may appoint, not exceeding two (2) and not less than one (1) in every month, at the appropriate justice court courtroom established by the board of supervisors; and they may continue to hold their courts from day to day so long as business may require; and all process shall be returnable, and all trials shall take place at such regular terms, except where it is otherwise provided; but where the defendant is a nonresident or transient person, and it shall be shown by the oath of either party that a delay of the trial until the regular term will be of material injury to him, it shall be lawful for the judge to have the parties brought before him at any reasonable time and hear the evidence and give judgment or where the defendant is a nonresident or transient person and the judge and all parties agree, it shall be lawful for the judge to have the parties brought before him on the day a citation is made and hear the evidence and give judgment. Such court shall be a court of record, with all the power incident to a court of record, including power to fine in the amount of fine and length of imprisonment as is authorized for a municipal court in Section 21-23-7(11) for contempt of court.

Sources: Codes, Hutchinson's 1848, ch. 50, art. 10 (5); 1857, ch. 58, art. 9; 1871, § 1309; 1880, § 2194; 1892, § 2399; Laws, 1906, § 2728; Hemingway's 1917, § 2227; Laws, 1930, § 2076; Laws, 1942, § 1810; Laws, 1981, ch. 471, § 10; Laws, 1982, ch. 423, § 28; Laws, 1990, ch. 349, § 1; Laws, 1993, ch. 344, § 1, eff from and after July 1, 1993.

§ 11-9-115. Witnesses to be subpoenaed.

The justice court judge before whom any cause is pending shall direct the clerk of the justice court to issue all subpoenas for witnesses which either of the parties may require, and such subpoenas shall be returnable on a day certain, giving reasonable time for attendance. If any witness, duly subpoenaed, shall fail to appear in pursuance of the subpoena, he shall forfeit the sum of ten dollars ($10,00), for the use of the party in whose behalf he was subpoenaed, for which the justice court judge may enter judgment nisi, which shall be made final in case the witness, on being duly subpoenaed to appear and show cause, shall fail to appear and show cause for such default. The justice court may issue an attachment for such witness, as a circuit court may do in like case.

Sources: Codes, Hutchinson's 1848, ch. 50, art. 2 (13); 1857, ch. 58, art. 16; 1871, § 1313; 1880, § 2202; 1892, § 2406; Laws, 1906, § 2735; Hemingway's 1917, § 2234; Laws, 1930, § 2083; Laws, 1942, § 1817; Laws, 1981, ch. 471, § 29; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

§ 9-11-21. Receipt itemizing costs, fees and other payments made to clerk of justice court.

The clerk of the justice court is required in all cases to give to any person paying him any fees, costs or other money a uniform receipt, the form of which is to be prepared by the attorney general. Such receipt shall contain the particulars of such fees, costs or other money, the amount of such fees, costs or other money and such other information as the attorney general shall deem necessary. The county shall have printed such receipts at county expense and distribute them to the clerk of the justice court of the county. Provided, however, that where the party filing the complaint is an entity of government, the clerk shall not be required to receive a prepayment of costs nor issue a receipt, but the clerk shall enter a notation on the docket wherein said complaint is recorded indicating that the party is exempt from payment of costs.

Sources: Codes, 1942, § 1841.5; Laws, 1964, ch. 334; Laws, 1984, ch. 502, § 4, eff from and after passage (approved May 15, 1984).

§ 11-9-125. Setoff filed on return day before trial.

The defendant in any action shall, on or before the return day of the summons, and before the trial of the case, file with the justice court judge to whom the case is assigned the evidence of debt, statement of account, or other written statement of the claim, if any, which he may desire to and which lawfully may be set off against the demand of the plaintiff, and, in default thereof, he shall not be permitted to use it on the trial.

Sources: Codes, 1871, § 1306; 1880, § 2204; 1892, § 2411; Laws, 1906, § 2740; Hemingway's 1917, § 2239; Laws, 1930, § 2088; Laws, 1942, § 1822; Laws, 1981, ch. 471, § 30; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

§ 11-9-143. Trial by jury.

On or before the return day of the process either party may demand a trial by jury, and thereupon the justice of the peace shall order the proper officer to summon six persons, competent to serve as jurors in the circuit court, to appear immediately, or at such early day as he may appoint, whether at a regular term or not, who shall be sworn to try the case; but each party shall be entitled to challenge peremptorily two jurors, and as many more as he can show sufficient cause for. If a sufficient number of jurors shall not appear, others may be summoned until a jury is made up, to consist of six, against whom legal objections shall not exist. If the jury fail to agree, it may be discharged and another jury summoned, and so on until a verdict is obtained, and judgment shall be entered by the justice on the verdict.

Sources: Codes, Hutchinson's 1848, ch. 50, art. 10 (5); 1857, ch. 58, art. 26; 1871, § 1326; 1880, § 2222; 1892, § 2425; Laws, 1906, § 2754; Hemingway's 1917, §§ 2253; Laws, 1930, § 2102; Laws, 1942, § 1836.

§ 11-9-127. Trial and judgment; execution.

On the return day of the summons, unless continued, the justice court judge shall hear and determine the cause if both parties appear; give judgment by default if the defendant fails to appear and contest plaintiff's demand, or judgment of nonsuit against the plaintiff if he fails to appear and prosecute his claim; enter judgment in favor of the defendant where, in case of setoff, it shall appear that there is a balance due him, for the amount of such balance, and, when requested, issue execution against the goods and chattels, lands and tenements, of the party against whom judgment is rendered, for the amount of the judgment and costs, or costs alone, as the case may require, returnable to a day more than twenty (20) days after the rendition of the judgment, and not more than six (6) months after the issuance of the execution; and the execution may be directed to the proper officer of any county in this state.

Sources: Codes, Hutchinson's 1848, ch. 50, art. 2 (9); 1857, ch. 58, art. 7; 1871, § 1307; 1880, § 2205; 1892, § 2412; Laws, 1906, § 2741; Hemingway's 1917, § 2240; Laws, 1930, § 2089; Laws, 1942, § 1823; Laws, 1991, ch. 453, § 1, eff from and after July 1, 1991.

§ 11-9-129. Judgment operates as a lien if enrolled.

Judgments rendered by justices of the peace shall operate as a lien upon the property, real or personal, of the defendant or defendants therein, found or situated in the county where rendered, or in any other county where the same may be, which is not exempt by law from execution, if an abstract of the judgment be filed with the clerk of the circuit court of the county wherein the property is situated, and entered upon the judgment roll, as in other cases of enrolled judgments. The lien shall commence from the date of enrollment, and the judgment may be enrolled and have the force and effect of a lien in all cases where an appeal is taken, as well as in other cases. And in the event of a reversal of the judgment of the justice's court, the clerk of the circuit court shall enter a memorandum to that effect on the judgment roll.

Sources: Codes, Hutchinson's 1848, ch. 50, art. 10 (13); 1857, ch. 58, art. 20; 1871, § 1318; 1880, § 2206; 1892, § 2413; Laws, 1906, § 2742; Hemingway's 1917, § 2241; Laws, 1930, § 2090; Laws, 1942, § 1824.

§ 11-9-137. Judgment on merits res adjudicata.

When any suit brought before a justice of the peace shall be finally decided on its merits by the justice, it shall be a bar to a recovery for the same cause of action or setoff in any other suit.

Sources: Codes, Hutchinson's 1848, ch. 50, art. 2 (15); 1857, ch. 58, art. 19; 1871, § 1316; 1880, § 2213; 1892, § 2417; Laws, 1906, § 2746; Hemingway's 1917, § 2245; Laws, 1930, § 2094; Laws, 1942, § 1828.

§ 11-9-131. Execution not to be issued within ten days.

An execution shall not issue on any judgment of a justice of the peace until ten days after its rendition, unless the party recovering therein shall make and file an affidavit that he believes he will be in danger of losing his debt or demand by such delay, in which case execution shall issue immediately; but the opposite party shall not be deprived of his right of appeal within the time prescribed.

Sources: Codes, Hutchinson's 1848, ch. 50, art. 2 (17); 1857, ch. 58, art. 21; 1871, § 1317; 1880, § 2207; 1892, § 2414; Laws, 1906, § 2743; Hemingway's 1917, § 2242; Laws, 1930, § 2091; Laws, 1942, § 1825.

§ 11-9-133. Form of an execution.

An execution may be in the following form, viz.:

"The State of Mississippi.

"To any lawful officer of _____ county:

"We command you that of the real and personal estate of _____ you cause to be made _____ dollars, adjudged by the undersigned, justice of the peace of the county of _____ in said state, on the _____ day of _____ A. D. _____ , to _____ , also interest at _____ per centum on said sum until you shall make said money, and costs to amount of _____ dollars, as taxed, and costs to accrue under this execution, to be taxed by you; and have said money before me on the _____ day of _____ , A. D. _____ , and have there then this writ.

"Witness my hand the _____ day of _____ A. D. _____ J. P."

Detailed statement of costs, giving each item separately and specifying the law for it, the section and paragraph thereof, viz.; "Issuing summons, $_____ , serving summons $_____ ," etc.

Sources: Codes, 1880, § 2253; 1892, § 2415; Laws, 1906, § 2744; Hemingway's 1917, § 2243; Laws, 1930, § 2092; Laws, 1942, § 1826.

MRCP 69. Execution

(a) Enforcement of Judgment. Process to enforce a judgment for the payment of money shall be by such procedures as are provided by statute. The procedure on execution, in proceedings supplementary to and in aid of judgment, and in proceedings on and in aid of execution, shall be as provided by statute.

§ 11-9-139. Execution of judgment may be stayed.

If the party against whom judgment is given, shall, within ten days thereafter, procure some responsible person to appear before the justice, and in writing, to be entered on the docket of the justice and signed by such person, consent to become surety therefor, the justice shall grant a stay of execution for thirty days from the date of the judgment on all sums not exceeding fifty dollars and for sixty days on all sums over fifty dollars. In case the money be not paid at the expiration of such stay, execution shall issue against the principal and sureties, or either of them, for the principal, interest, and costs.

Sources: Codes, Hutchinson's 1848, ch. 50, art. 2 (16); 1857, ch. 58, art. 22; 1871, § 1343; 1880, § 2214; 1892, § 2418; Laws, 1906, § 2747; Hemingway's 1917, § 2246; Laws, 1930, § 2095; Laws, 1942, § 1829.

§ 11-9-141. Effect of stay.

A party obtaining a stay of execution shall thereby waive all errors in the judgment and abandon the right of appeal and certiorari.

Sources: Codes, 1871, § 1344; 1880, § 2215; 1892, § 2419; Laws, 1906, § 2748; Hemingway's 1917, § 2247; Laws, 1930, § 2096; Laws, 1942, § 1830.

§ 11-51-81. Appeals to the county court.

All appeals from courts of justices of the peace, special and general, and from all municipal courts shall be to the county court under the same rules and regulations as are provided on appeals to the circuit court, but appeals from orders of the board of supervisors, municipal boards, and other tribunals other than courts of justice of the peace and municipal courts, shall be direct to the circuit court as heretofore. And from the final judgment of the county court in a case appealed to it under this section, a further appeal may be taken to the circuit court on the same terms and in the same manner as other appeals from the county court to the circuit court are taken: Provided that where the judgment or record of the justice of the peace, municipal or police court is not properly certified, or is not certified at all, that question must be raised in the county court in the absence of which the defect shall be deemed as waived and by such waiver cured and may not thereafter be raised for the first time in the circuit court on the appeal thereto; and provided further that there shall be no appeal from the circuit court to the supreme court of any case civil or criminal which originated in a justice of the peace, municipal or police court and was thence appealed to the county court and thence to the circuit court unless in the determination of the case a constitutional question be necessarily involved and then only upon the allowance of the appeal by the circuit judge or by a judge of the supreme court.

Sources: Codes, 1930, § 705; Laws, 1942, § 1617; Laws, 1926, ch. 131.

§ 11-51-85. Appeals from judgment of justice court judge in civil cases.

Either party may appeal to the circuit court of the county from the judgment of any justice court judge if appeal be demanded and bond given within (10) days after the rendition of the judgment. The party taking the appeal shall give bond with a sufficient surety, to be approved by the clerk of the justice court payable to the opposite party, in the penalty of double the amount of the judgment, or double the value of the property involved, and all costs accrued and likely to accrue in the case, and in no case to be less than one hundred dollars ($100.00), conditioned for the payment of such judgment as the circuit court may render against him; and the appeal, when demanded and bond given, shall operate as a supersedeas of execution on such judgment. Any defendant against whom a civil judgment may have been entered by a justice court judge who, by reason of his poverty, is not able to give bond may nevertheless appeal from such judgment on his making an affidavit that, by reason of his poverty, he is unable to give bond or other security to obtain such appeal, but the appeal in such case shall not operate as a supersedeas of the judgment. The clerk of the justice court shall at once make up a transcript of the record and properly transmit the same to the clerk of the circuit court, within fifteen (15) days after the bond has been filed. In counties where there is a county court, appeals from justice courts shall be to the county court.

Sources: Codes, Hutchinson's 1848, ch. 50, art. 17; 1857, ch. 58, art. 23; 1871, § 1332; 1880, § 2353; 1892, § 82; Laws, 1906, § 83; Hemingway's 1917, § 63; Laws, 1930, § 64; Laws, 1942, § 1198; Laws, 1912, ch. 203; Laws, 1973, ch. 374, § 1; Laws, 1981, ch. 471, § 40; Laws, 1982, ch. 423, § 24, eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

URCCC Rule 5.04. Notice of Appeal

The party desiring to appeal a decision from a lower court must file a written notice of appeal with the circuit court clerk. A copy of that notice must be provided to all parties or their attorneys of record and the lower court or lower authority whose order or judgment is being appealed. A certificate of service must accompany the written notice of appeal. The court clerk may not accept a notice of appeal without a certificate of service, unless so directed by the court in writing. In all appeals, whether on the record or by trial de novo, the notice of appeal and payment of costs must be simultaneously filed and paid with the circuit court clerk within thirty (30) days of the entry of the order or judgment being appealed. The timely filing of this written notice and payment of costs will perfect the appeal. The appellant may proceed in forma pauperis upon written approval of the court acting as the appellate court. The written notice of appeal must specify the party or parties taking the appeal; must designate the judgment or order from which the appeal is taken; must state if it is on the record or an appeal de novo; and must be addressed to the appropriate court.

§ 11-51-87. Copy of record to be transmitted.

The justice court judge may prepare and certify his record to the following effect, viz.:

"Copy of the record of the proceedings before _____, a justice court judge of _____ county, in the case therein set forth, to wit: (here copy the entries on the docket and certify as follows, viz.:)

"State of Mississippi, _____ County:

"I, _____, a justice court judge of the said county, certify that the foregoing is a copy of the record of the proceedings before me in the case stated therein, as appears on my docket.

"Given under my hand, this the _____ day of _____, A.D. _____.

_____

Justice Court Judge"

Sources: Codes, 1880, § 2241; 1892, § 83; Laws, 1906, § 84; Hemingway's 1917, § 64; Laws, 1930, § 65; Laws, 1942, § 1199; Laws, 1981, ch. 471, § 41; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

§ 11-51-89. Justice, mayor, or police justice to deliver papers to circuit clerk.

The justice of the peace, mayor or police justice of any city, town or village from whose decision an appeal shall be taken, shall at once transmit to the clerk of that court a certified copy of the record of the proceedings, with all the original papers and process in the case, and the original appeal bond given by the appellant, and the clerk shall docket the same, and shall be entitled to the same fees, upon such appeals, as for similar services in suits originating in said court. The justice, mayor, or police justice of any city, town or village shall, at all times, be allowed to amend his return according to the facts.

Sources: Codes, Hutchinson's 1848, ch. 50, art. 3; 1857, ch. 58, art. 24; 1871, § 1333; 1880, § 2353; 1892, § 84; Laws, 1906, § 85; Hemingway's 1917, § 65; Laws, 1930, § 66; Laws, 1942, § 1200.

§ 11-51-91. Trial of cases on appeal from justice of the peace.

On appeal from a justice of the peace court to the circuit court the case shall be tried anew, in a summary way, without pleadings in writing, at the first term, unless cause be shown for a continuance; provided, however, that the circuit court shall have the authority and power of its own motion or on motion of any party to require that defenses to the action shall be set up by way of answer in like manner as is required by Section 11-7-59, Mississippi Code of 1972.

If it appear on the trial that the suit was brought before a justice of the peace not having jurisdiction thereof, the circuit court shall reverse the judgment of the justice and dismiss the case. If the defendant be the appellant and judgment be rendered for the plaintiff in the original suit for a sum equal to or greater than he recovered before the justice of the peace, ten per cent (10%) damages upon the amount thereof shall be included in such judgment; and similarly, when there has been an appeal from a justice of the peace court to a county court, and any judgment against an appellant shall be rendered against the principal and his sureties jointly and when there shall be an appeal from the county court to the circuit court and the same shall be affirmed, then, there shall be added five per cent (5%) damages, and judgment shall be rendered against the principal and the sureties on the appeal bond jointly. In all such cases where the amount in controversy exceeds the sum of fifty dollars ($50.00), either party shall be entitled to an appeal to the supreme court as in cases originating in the circuit court, and the plaintiff may also appeal to the supreme court in cases where the difference between his demand and the judgment in his favor shall exceed said sum.

Sources: Codes, Hutchinson's 1848, ch. 50, art. 2 (19); 1857, ch. 58, art. 25; 1871, § 1334; 1880, § 2354; 1892, § 85; Laws, 1906, § 86; Hemingway's 1917, § 66; Laws, 1930, § 67; Laws, 1942, § 1201; Laws, 1964, ch. 301, § 1.

§ 11-51-93. Certiorari proceedings in circuit court.

All cases decided by a justice of the peace, whether exercising general or special jurisdiction, may, within six months thereafter, on good cause shown by petition, supported by affidavit, be removed to the circuit court of the county, by writ of certiorari, which shall operate as a supersedeas, the party, in all cases, giving bond, with security, to be approved by the judge or clerk of the circuit court, as in cases of appeal from justices of the peace; and in any cause so removed by certiorari, the court shall be confined to the examination of questions of law arising or appearing on the face of the record and proceedings. In case of an affirmance of the judgment of the justice, the same judgment shall be given as on appeals. In case of a reversal, the circuit court shall enter up such judgment as the justice ought to have entered, if the same be apparent, or may then try the cause anew on its merits, and may in proper cases enter judgment on the certiorari or appeal bond, and shall, when justice requires it, award restitution. The clerk of the circuit court, on the issuance of a certiorari, shall issue a summons for the party to be affected thereby; and, in case of nonresidents, he may make publication for them as in other cases.

Sources: Codes, Hutchinson's 1848, ch. 50, art. 9; 1857, ch. 58, art. 28; 1871, § 1336; 1880, § 2358; 1892, § 89; Laws, 1906, § 90; Hemingway's 1917, § 72; Laws, 1930, § 72; Laws, 1942, § 1206.

§ 11-51-95. Certiorari to all other inferior tribunals.

Like proceedings as provided in Section 11-51-93 may be had to review the judgments of all tribunals inferior to the circuit court, whether an appeal be provided by law from the judgment sought to be reviewed or not. However, petitions for a writ of certiorari to the circuit court for review of a decision of a municipal civil service commission created under Section 21-31-1 et seq. or Section 21-31-51 et seq. shall be filed within thirty (30) days after the entry of the judgment or order of the commission.

Sources: Codes, 1892, § 90; Laws, 1906, § 91; Hemingway's 1917, § 73; Laws, 1930, § 73; Laws, 1942, § 1207; Laws, 1984, ch. 521, § 5, eff from and after July 1, 1984.

§ 11-51-97. New appeal bond.

In all appeals and in proceedings of certiorari to the circuit court, the said court, on motion of the appellee or obligee, may inquire into the sufficiency of the amount of the bond, and of the security thereon, and may at any time require a new bond, or additional security, on pain of dismissal; and if any bond be defective, the principal therein may give a new one, which shall have the same effect as if given originally.

Sources: Codes, Hutchinson's 1848, ch. 56, art. 16 (7); 1857, ch. 42, art. 20; 1871, § 1596; 1880, § 2658; 1892, § 91; Laws, 1906, § 92; Hemingway's 1917, § 74; Laws, 1930, § 74; Laws, 1942, § 1208.

D. County Courts

§ 9-9-21. Jurisdiction.

(1) The jurisdiction of the county court shall be as follows: It shall have jurisdiction concurrent with the justice court in all matters, civil and criminal of which the justice court has jurisdiction; and it shall have jurisdiction concurrent with the circuit and chancery courts in all matters of law and equity wherein the amount of value of the thing in controversy shall not exceed, exclusive of costs and interest, the sum of Two Hundred Thousand Dollars ($200,000.00), and the jurisdiction of the county court shall not be affected by any setoff, counterclaim or cross-bill in such actions where the amount sought to be recovered in such setoff, counterclaim or cross-bill exceeds Two Hundred Thousand Dollars ($200,000.00). Provided, however, the party filing such setoff, counterclaim or cross-bill which exceeds Two Hundred Thousand Dollars ($200,000.00) shall give notice to the opposite party or parties as provided in Section 13-3-83, and on motion of all parties filed within twenty (20) days after the filing of such setoff, counterclaim or cross-bill, the county court shall transfer the case to the circuit or chancery court wherein the county court is situated and which would otherwise have jurisdiction. It shall have exclusively the jurisdiction heretofore exercised by the justice court in the following matters and causes: namely, eminent domain, the partition of personal property, and actions of unlawful entry and detainer, provided that the actions of eminent domain and unlawful entry and detainer may be returnable and triable before the judge of said court in vacation.

(2) In the event of the establishment of a county court by an agreement between two (2) or more counties as provided in Section 9-9-3, it shall be lawful for such court sitting in one (1) county to act upon any and all matters of which it has jurisdiction as provided by law arising in the other county under the jurisdiction of said court.

Sources: Codes, 1930, § 693; Laws, 1942, § 1604; Laws, 1926, ch. 131; Laws, 1934, ch. 236; Laws, 1936, ch. 247; Laws, 1948, ch. 236; Laws, 1950, ch. 321; Laws, 1962, ch. 300; Laws, 1964, ch. 322; Laws, 1966, ch. 344, § 1; Laws, 1968, ch. 311, § 1; Laws, 1970, ch. 335, § 1; Laws, 1974, ch. 477, § 2; Laws, 1984, ch. 348; Laws, 1991, ch. 311, § 1; Laws, 1998, ch. 427, § 1; Laws, 2003, ch. 429, § 1, eff from and after July 1, 2003.

§ 11-51-79. Appeals from the county court.

No appeals or certiorari shall be taken from any interlocutory order of the county court, but if any matter or cause be unreasonably delayed of final judgment therein, it shall be good cause for an order of transfer to the circuit or chancery court upon application therefor to the circuit judge or chancellor. Appeals from the law side of the county court shall be made to the circuit court, and those from the equity side to the chancery court on application made therefor and bond given according to law, except as hereinafter provided. Such appeal shall operate as a supersedeas only when such would be applicable in the case of appeals to the Supreme Court. Appeals should be considered solely upon the record as made in the county court and may be heard by the appellate court in termtime or in vacation. If no prejudicial error be found, the matter shall be affirmed and judgment or decree entered in the same manner and against the like parties and with like penalties a s is provided in affirmances in the Supreme Court. If prejudicial error be found, the court shall reverse and shall enter judgment or decree in the manner and against like parties and with like penalties as is provided in reversals in the Supreme Court; provided, that if a new trial is granted the cause shall be remanded to the docket of such circuit or chancery court and a new trial be had therein de novo. Appeals from the county court shall be taken and bond given within thirty (30) days from the date of the entry of the final judgment or decree on the minutes of the court; provided, however, that the county judge may within said thirty (30) days, for good cause shown by affidavit, extend the time, but in no case exceeding sixty (60) days from the date of the said final judgment or decree. Judgments or decrees of affirmance, except as otherwise hereinafter provided, may be appealed to the Supreme Court under the same rules and regulations and under the same penalties, in case of affirmance, as appertain to appeals from other final judgments or decrees of said courts, but when on appeal from the county court a case has been reversed by the circuit or chancery court there shall be no appeal to the Supreme Court until final judgment or decree in the court to which it has been appealed. When the result of an appeal in the Supreme Court shall be a reversal of the lower court and in all material particulars in effect an affirmance of the judgment or decree of the county court, the mandate may go directly to the county court, otherwise to the proper lower court. Provided, however, that when appeals are taken in felony cases which have been transferred from the circuit court to the county court for trial, and have been there tried, such appeals from the judgment of the county court shall be taken directly to the Supreme Court.

Sources: Codes, 1930, § 704; Laws, 1942, § 1616; Laws, 1926, ch. 131; Laws, 1932, chs. 140, 256; Laws, 1940, ch. 229; Laws, 1966, ch. 348, § 1; Laws, 2001, ch. 423, § 1, eff from and after July 1, 2001.

§ 9-9-23. Powers of county judge.

The county judge shall have power to issue writs, and to try matters, of habeas corpus on application to him therefor, or when made returnable before him by a superior judge. He shall also have the power to order the issuance of writs of certiorari, supersedeas, attachments, and other remedial writs in all cases pending in, or within the jurisdiction of, his court. He shall have the authority to issue search warrants in his county returnable to his own court or to any court of a justice of the peace within his county in the same manner as is provided by law for the issuance of search warrants by justices of the peace. In all cases pending in, or within the jurisdiction of, his court, he shall have, in term time, and in vacation, the power to order, do or determine to the same extent and in the same manner as a justice of the peace or a circuit judge or a chancellor could do in term time or in vacation in such cases. But he shall not have original power to issue writs of injunction, or other remedial writs in equity or in law except in those cases hereinabove specified as being within his jurisdiction: Provided, however, that when any judge or chancellor authorized to issue such writs of injunction, or any other equitable or legal remedial writs hereinabove reserved, shall so direct in writing the hearing of application therefor may be by him referred to the county judge, in which event the said direction of the superior judge shall vest in the said county judge all authority to take such action on said application as the said superior judge could have taken under the right and the law, had the said application been at all times before the said superior judge. The jurisdiction authorized under the foregoing proviso shall cease upon the denying or granting of the application.

Sources: Codes, 1930, § 698; Laws, 1942, § 1609; Laws, 1926, ch. 131.

§ 9-9-27. Transfer of cases; prosecution by affidavit.

In any civil case instituted in the circuit court, wherein all parties file a motion to transfer said case to the county court for trial, or wherein all parties file an instrument of writing consenting to such a transfer, the circuit court may, in its discretion, transfer the case to the county court for trial; and the said county court shall have full jurisdiction of and shall proceed to try any case so transferred, provided, however, that such order of transfer be rendered prior to the empaneling of the jury in such cases.

In misdemeanor cases and in felony cases not capital, wherein indictments have been returned by the grand jury, the circuit court may transfer with full jurisdiction all or any of the same, in its discretion, to the county court for trial; and the said county court shall have jurisdiction of and shall proceed to try all charges of misdemeanor which may be preferred by the district attorney or by the county prosecuting attorney or by the sheriff on affidavit sworn to before the circuit clerk of the county; and prosecutions by affidavit are hereby authorized in misdemeanor cases under the same procedure as if indictments had been returned in the circuit court and same had been transferred to the county court.

And, provided further, any reputable citizen may make an affidavit charging crime before the judge of the county court, and such affidavit shall be filed with the clerk of the county court, and if the crime charged is a misdemeanor, the county court shall have jurisdiction to try and dispose of said charge and, if the crime charged be a felony, the county judge shall have jurisdiction to hear and determine said cause, the same as now provided by law to be done by justices of the peace, and to commit the person so charged, with or without bail as the evidence may warrant, or to discharge the defendant.

Sources: Codes, 1930, § 694; Laws, 1942, § 1605; Laws, 1926, ch. 131; Laws, 1944, ch. 191; Laws, 1952, ch. 255.

§ 9-9-35. Circuit judges authorized to assign cases and other court duties to county judges where dockets overcrowded.

In any county in cases where an overcrowded docket justifies the same, any circuit judge may assign to a county judge in said county only, for hearing and final disposition, any case, cause, hearing or motion, or any proceedings involved in the trial and final disposition thereof.

All orders in said cause, trial or hearing may be signed as follows: "_____ County Judge and Acting Circuit Judge by assignment." No special order evidencing said assignment shall be entered on the minutes, except in cases where a county judge is assigned the duty of opening and organizing a court where a grand jury is to be impaneled, in which case an order so assigning the said county judge to act shall be signed and entered on the minutes of the court on the opening day thereof.

No compensation for said services shall be allowed said county judge, neither shall said county judge be compelled to accept any assignment except at his will. Furthermore, no assignment of any cause or hearing shall be made where counsel on both sides object thereto.

Sources: Codes, 1942, § 1605.5; Laws, 1962, ch. 303; Laws, 1982, ch. 476, § 3; Laws, 1989, ch. 378, § 4; Laws, 1989, ch. 486, § 2, eff from and after July 1, 1989.

§ 9-9-36. Chancellors authorized to assign cases and other court duties to county judges where dockets overcrowded.

In any county in cases where an overcrowded docket justifies the same, any chancellor may assign to a county judge in that county only, for hearing and final disposition, any case, cause, hearing or motion, or any proceedings involved in the trial and final disposition thereof.

All orders in the cause, trial or hearing may be signed as follows: "_____ County Judge and Acting Chancellor by assignment." No special order evidencing the assignment shall be entered on the minutes.

No compensation for those services shall be allowed the county judge, neither shall the county judge be compelled to accept any assignment except at his will. Furthermore, no assignment of any cause or hearing shall be made where counsel on both sides object to the assignment.

Sources: Laws, 1989, ch. 378, § 3; Laws, 1989, ch. 486, § 1, eff from and after July 1, 1989.

§ 9-9-19. Term of court fixed.

(1) A term of court shall be held in the county courthouse of the county, beginning on the second Monday of each month and continuing so long as may be necessary; but in counties where there are two (2) circuit court districts the county court shall meet alternately in the two (2) districts in the county courthouse in the same month and in the same district as the board of supervisors of said county holds its meetings. Provided that in the County of Jones, a county having two (2) judicial districts, that a term shall be held in the second judicial district of said county on the second Monday of each month; and provided that in the first judicial district a term shall be held on the fourth Monday of January, the fourth Monday of March, the fourth Monday of April, the fourth Monday of June and the fourth Monday of October. Provided that in the County of Hinds, a county having two (2) judicial districts, a term shall be held in the first judicial district on the second Monday of each month and in the second judicial district on the second Monday of March, June, September and December, and provided further that, when such terms are held concurrently, either of the county judges of Hinds County may be assigned to hold all or any part of such terms in either of the two (2) judicial districts. Provided, further, that in the County of Bolivar, a county having two (2) judicial districts, a term shall be held in the first judicial district on the second Monday of April, August and December, and in the second judicial district on the second Monday of January, February, March, May, June, July, September, October and November. Provided, however, that in the County of Harrison, a county having two (2) county judges and two (2) judicial districts, that a term shall be held in each judicial district concurrently each month. Provided, however, that the judge of the county court for good cause shown may, by order spread on the minutes of the county court, designate some place other than the county courthouse for the holding of such term of the county court as may be designated in said order. The county judge may call a special term of the county court upon giving ten (10) days' notice, and such notice shall be given by posting the same at the front door of the courthouse in said county and by the publication of said notice for one insertion in some newspaper of general circulation in the county.

(2) If a county court is established pursuant to an agreement between two or more counties as provided in Section 9-9-3, the terms thereof shall remain continuously open and shall not be closed and the judge of such court shall sit in rotation in the county seat of each county, beginning on Monday of each week for at least a week in each county in each month.

Sources: Codes, 1930, §§ 693, 702; Laws, 1942, §§ 1604, 1613; Laws, 1926, ch. 131; Laws, 1934, ch. 236; Laws, 1936, chs. 234, 247; Laws, 1948, ch. 236; Laws, 1950, chs. 319, 321; Laws, 1958, ch. 231, § 5; Laws, 1962, chs. 300, 301, 302; Laws, 1964, ch. 322; Laws, 1966, ch. 344, § 1; Laws, 1968, ch. 311, § 1; Laws, 1970, chs. 335, § 1, 336, § 1; Laws, 1971, ch. 397, § 1; Laws, 1972, ch. 348, § 2, eff from and after October 1, 1972.

§ 11-9-1. Writs returnable to other courts may be made returnable to county court; acts of justice court judge, clerk, judge, chancellor, or other officer may be done in behalf of county court.

Whenever under any statute a writ is made returnable to, or the institution of any suit or proceeding is required to be in, a justice court, general or special, or a circuit or chancery court, or when in respect to such matters any justice court judge, or clerk, or judge or chancellor, or other officer, is empowered to do any act in or about any of said courts, the said writs may be made returnable to the county court in any cause or matter there pending or which, within its jurisdiction, is there to be instituted, and all the said acts of the officers aforesaid may be done in behalf of or in respect to the county court in all such matters and causes to the same extent as had the county court been expressly included in each and every of such statutes first aforementioned.

Sources: Codes, 1930, § 696; Laws, 1942, § 1607; Laws, 1926, ch. 131; Laws, 1991, ch. 573, § 22, eff from and after July 1, 1991.

§ 11-9-3. Venue of actions, suits and proceedings.

The venue of actions, suits and proceedings in the county court shall be the same as that now generally provided, or which may hereafter be provided with respect to the particular action, suit or proceedings. Provided, however, that all suits and matters filed in the county court which, if there were no county court, would be triable in the justice court, shall be tried at the courthouse of the county or courthouse of the proper judicial district in counties having two (2) circuit and chancery court districts therein.

Sources: Codes, 1930, § 695; Laws, 1942, § 1606; Laws, 1926, ch. 131; Laws, 1981, ch. 471, § 23; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

E. Court of Appeals

§ 9-4-1. Establishment of Court of Appeals.

(1) There is hereby established a court to be known as the "Court of Appeals of the State of Mississippi," which shall be a court of record.

(2) The Court of Appeals shall be comprised of ten (10) appellate judges, two (2) from each Court of Appeals District, selected in accordance with Section 9-4-5.

Sources: Laws, 1993, ch. 518, § 1; Laws, 1994, ch 564, § 97; Laws, 2001, ch. 574, § 1, eff July 30, 2001 (the date the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, to the amendment of this section.)

§ 9-4-3. Jurisdiction of court; issuance of decisions.

(1) The Court of Appeals shall have the power to determine or otherwise dispose of any appeal or other proceeding assigned to it by the Supreme Court.

The jurisdiction of the Court of Appeals is limited to those matters which have been assigned to it by the Supreme Court.

The Supreme Court shall prescribe rules for the assignment of matters to the Court of Appeals. These rules may provide for the selective assignment of individual cases and may provide for the assignment of cases according to subject matter or other general criteria. However, the Supreme Court shall retain appeals in cases imposing the death penalty, or cases involving utility rates, annexations, bond issues, election contests, or a statute held unconstitutional by the lower court.

(2) Decisions of the Court of Appeals are final and are not subject to review by the Supreme Court, except by writ of certiorari. The Supreme Court may grant certiorari review only by the affirmative vote of four (4) of its members. At any time before final decision by the Court of Appeals, the Supreme Court may, by order, transfer to the Supreme Court any case pending before the Court of Appeals.

(3) The Court of Appeals shall have jurisdiction to issue writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition or any other process when this may be necessary in any case assigned to it by the Supreme Court.

(4) The Court of Appeals shall issue a decision in every case heard before the Court of Appeals within two hundred seventy (270) days after the final briefs have been filed with the court.

(5) The Supreme Court shall issue a decision in every case within its original jurisdiction, including all direct and post-conviction collateral relief appeals or applications in cases imposing the death penalty, within two hundred seventy (270) days after the final briefs have been filed with the court. The Supreme Court shall issue a decision in every case received on certiorari from the Court of Appeals within one hundred eighty (180) days after the final briefs have been filed with the court.

Sources: Laws, 1993, ch. 518, § 2, eff July 13, 1993 (the date the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, to the enactment of this section); Laws, 1996, ch. 492, § 1; Laws, 1998, ch. 588, § 2, eff from and after July 1, 1998.

§ 9-4-5. Selection of judges of court; qualifications; terms of office; Court of Appeals Districts.

(1) The term of office of judges of the Court of Appeals shall be eight (8) years. An election shall be held on the first Tuesday after the first Monday in November 1994, to elect the ten (10) judges of the Court of Appeals, two (2) from each congressional district; provided, however, judges of the Court of Appeals who are elected to take office after the first Monday of January 2002, shall be elected from the Court of Appeals Districts described in subsection (5) of this section. The judges of the Court of Appeals shall begin service on the first Monday of January 1995.

(2) (a) In order to provide that the offices of not more than a majority of the judges of said court shall become vacant at any one (1) time, the terms of office of six (6) of the judges first to be elected shall expire in less than eight (8) years. For the purpose of all elections of members of the court, each of the ten (10) judges of the Court of Appeals shall be considered a separate office. The two (2) offices in each of the five (5) districts shall be designated Position Number 1 and Position Number 2, and in qualifying for office as a candidate for any office of judge of the Court of Appeals each candidate shall state the position number of the office to which he aspires and the election ballots shall so indicate.

§ 9-4-5(2)(a)i-v have been omitted. The omitted provisions list the Congressional Districts by number and dictate what date the corresponding term ends.

(b) The laws regulating the general elections shall apply to and govern the elections of judges of the Court of Appeals except as otherwise provided in Sections 23-15-974 through 23-15-985.

(c) In the year prior to the expiration of the term of an incumbent, and likewise each eighth year thereafter, an election shall be held in the manner provided in this section in the district from which the incumbent Court of Appeals judge was elected at which there shall be elected a successor to the incumbent, whose term of office shall thereafter begin on the first Monday of January of the year in which the term of the incumbent he succeeds expires.

(3) No person shall be eligible for the office of judge of the Court of Appeals who has not attained the age of thirty (30) years at the time of his election and who has not been a practicing attorney and citizen of the state for five (5) years immediately preceding such election.

(4) Any vacancy on the Court of Appeals shall be filled by appointment of the Governor for that portion of the unexpired term prior to the election to fill the remainder of said term according to provisions of Section 23-15-849, Mississippi Code of 1972.

§ 9-4-5(5) has been omitted. The omitted provisions describes the boundaries of the five Court of Appeals Districts.

Sources: Laws, 1993, ch. 518, § 3; Laws, 1994, ch. 340, § 1; Laws, 1994, ch 564, § 98; Laws, 2001, ch. 574, § 2, eff July 30, 2001 (the date the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, to the amendment of this section.)

§ 9-4-7. Structure and personnel of court.

(1) The Court of Appeals shall be subject to the administrative policies and procedures as may be established by the Supreme Court, including docket control of the Court of Appeals cases. Whenever feasible, and subject to approval of the Supreme Court, the administrative structure of the Supreme Court shall also support the Court of Appeals.

(2) The Clerk of the Supreme Court shall be the Clerk of the Court of Appeals and appointment of employees by the Court of Appeals shall be governed by personnel policies adopted and approved by the Administrative Office of the Courts. Whenever feasible and approved by the Supreme Court, employees of the Supreme Court shall also serve the Court of Appeals. The records of the Court of Appeals shall be kept by the Supreme Court Clerk or a deputy of the clerk.

(3) The Chief Justice of the Supreme Court shall appoint a Chief Judge of the Court of Appeals for a term of four (4) years, and the person so named shall be eligible for reappointment, subject to the discretion of the Chief Justice.

(4) The Chief Justice may assign one or more Court of Appeals Judges to serve as lower court trial judges to provide docket relief as he deems necessary.

Sources: Laws, 1993, ch. 518, § 4, eff July 13, 1993 (the date the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, to the enactment of this section).

§ 9-4-11. Location of court.

The Court of Appeals shall be located in the City of Jackson and shall have offices as convenient to the State Law Library and the Supreme Court as can be arranged; but the court en banc, or any panel thereof, may sit at such other locations within the state as the Supreme Court may determine by rule.

Sources: Laws, 1993, ch. 518, § 6, eff July 13, 1993 (the date the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, to the enactment of this section).

§ 9-4-15. Time for holding elections for office of judge of Court of Appeals.

General elections for the office of judge of the Court of Appeals shall be held at the same times as general elections for congressional offices.

Sources: Laws, 1993, ch. 518, § 31, eff July 13, 1993 (the date the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, to the enactment of this section); Laws, 1994, ch 564, § 99, eff from and after September 6, 1994 (the date the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965 to the amendment of this section).

Newell v. State, 308 So.2d 71 (Miss. 1975)
PATTERSON, Justice:

Cecil Newell, Jr., was indicted with others for assault and battery with intent to kill and murder Currie Davis. He was tried separately and upon conviction was sentenced to seven and one-half years in the state penitentiary. From this action of the Circuit Court of Jones County, Second Judicial District, he appeals.

*73 Currie Davis was beaten and stabbed by several assailants on the evening of March 25, 1973. The state's evidence is that the beating and stabbing were inflicted by Eugene Wallace and Jessie Carpenter, Jr., the appellant's co-indictees. The primary issue in the trial was whether the appellant had supported this assault by holding a rifle on the victim while the battery was being inflicted.

Newell contends that he was prejudiced and thereby deprived of a fair trial because the court (1) unduly restricted his cross-examination, (2) erroneous instructions were granted to the state and (3) a proper instruction of the defendant was refused.

* * * *

[6] We think Instruction Number 4 for the defendant was properly refused by the trial court. This instruction advises the jury that the state has the burden of proving to a moral certainty and beyond all reasonable doubt every material allegation lain in the indictment. However, this instruction did not advise, nor are there others advising, the jury of the essential elements of the crime charged by the indictment. Therefore, the jury, being uninformed of the elements of the crime, could not be reasonably expected to ascertain the constituents necessary to constitute the 'material allegations' of the indictment. Northcutt v. State, 206 So.2d 824 (Miss.1967); White v. State, 202 So.2d 633 (Miss.1967) and Mabry v. State, 248 Miss. 149, 158 So.2d 688 (1963), wherein we stated:

> We hold that it is essential that an instruction shall charge the nature and elements of the offense, instead of referring the jury to the pleadings to ascertain what crime the defendant is alleged to have committed. 248 Miss. at 151, 158 So.2d at 689.

We conclude the court did not err in refusing this instruction.

*74 [7] The net result of the last instruction being refused is that the jury was left uninstructed as to the burden of proof in this criminal case. This fact, augmented by the state's instructions previously commented on, substantially prejudiced the appellant, in our opinion, and requires the cause to be reversed for a new trial. In deference to the trial judge, we note that he offered indulgence of time to the attorneys for corrections or other instructions for proper jury guidance, but neither was forthcoming.

The record portrays a discrepancy in our state's legal procedure that has literally cost thousands of dollars in new trials, untold expenditure of time, docket congestion and prolonged litigation. It points out the inability of a trial judge to instruct a jury as to the applicable law of a case due to legislative enactment and the decisions of this Court. More importantly, and aside from the practical considerations mentioned, this prohibition has been in the past, and now is, an impediment to the administration of justice that can no longer be indulged in courts of constitutional origin and which should not be tolerated in courts otherwise ordained since all share a common purpose-the fair and efficient administration of justice.

* * * *

[8] [9] We are keenly aware of, and measure with great respect, legislative suggestions concerning procedural rules and they will be followed unless determined to be an impediment to justice or an impingement upon the constitution. The inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept of the separation of powers and the vesting of judicial powers in the courts. Matthews v. State, 288 So.2d 714 (Miss.1974); Gulf Coast Drilling & Exploration Co. v. Permenter, 214 So.2d 601 (Miss.1968); and Southern Pacific Lbr. Co. v. Reynolds, 206 So.2d 334 (Miss.1968), wherein the following is stated:

> . . . The phrase 'judicial power' in section 144 of the Constitution includes the power to make rules of practice and procedure, not inconsistent with the Constitution, for the efficient disposition of judicial business. 206 So.2d at 335.

Consider Franck, Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform, 43 Miss.L.J. 287 (1972).

While it would seem that no logical person could doubt the wisdom of the past and that precedent is the most direct route to legal wisdom, the fact nevertheless remains that judges to a degree are prisoners of their own era. Each is influenced, buffeted and troubled by the circumstance in which his time is served. The lingering prospect of a return to the tyranny of the King's Court or the blighting of pure democracy by permitting a judge's voice in jury instructions probably motivating the legislation in 1857, is presently mere obsolescence. The vantage point afforded by 118 years of legal history characterizes the limiting terms of the legislation directing that instructions emanate only from the parties to have been a mistake of such magnitude that we now consider it of our own motion.

All courts recognize the benefit of stability through the law, but acknowledge that it should be permitted growth without stagnation when justice requires, hopefully without grievous error. The procedural changes needed to meet the needs of a particular era and to maintain the judiciary's constitutional purpose would be better served, we believe, if promulgated by those conversant with the law through years of legal study, observation and actual trials in accord with their oaths rather than by well-intentioned, but over-burdened, legislators of other pursuits and professions. We are cognizant of the fact that inertia is the easier route for judges, but presently respond to that which was stated by Justice *77 Griffith in Shoemake v. Federal Credit Co., 188 Miss. 683, 192 So. 561 (1940), in dissenting:

> It is easier, of course, to decide cases and to write opinions by floating down stream, in a course of least resistance, upon the restful support of a literal interpretation. But our books are full of cases where the Court has looked beyond the mere letter of statutes and has administered them according to the justice of their purpose . . .. 188 Miss. at 692, 192 So. at 563.

Are Mississippi Code Annotated sections 11-7-155 and 99-17-35 (1972), made separate sections by the annotator but both derivative from Mississippi Code Annotated section 1530 (1942), valid in whole or in part when considered from the viewpoint of our constitution?

> Mississippi Constitution, Article 1 (1890), Distribution of Powers, Section 1, provides:
> The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.

There immediately follows the directive of Section 2:

> No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. . . .

Without additional words it would seem there is no more reason to support legislative control of court procedures than there would be to uphold court supervision of the procedures by which the legislative and executive departments discharge their constitutional duties. However, the constitutional directives do not rest with the pronouncement of these general principles. The division of authority is specifically implemented by Section 144 of the Constitution:

> The judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this constitution.

This leaves no room for a division of authority between the judiciary and the legislature as to the power to promulgate rules necessary to accomplish the judiciary's constitutional purpose.

This Court's role is made clear by the jurisdiction conferred upon it and the oath of the justices elected to administer its functions. Mississippi Constitution, Section 146 (1890) provides:

> The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals.

And, Section 155 directs the judges of the several courts to make oath that they will administer justice without respect to persons agreeably to the constitution and laws of the state before executing the duties of their offices.

[10] The above brings into focus the heart of the issue, and that is-what course the court shall follow in the event the laws enacted by the legislative department are not agreeable with the directives of the constitution. We believe no citation of authority is needed for the universally accepted principle that if there be a clash between the edicts of the constitution and the legislative enactment, the latter must yield.

[11] We conclude that Mississippi Code Annotated sections 11-7-155 and 99-17-35 (1972) [FN1] contravene the constitutional mandates imposed upon the judiciary for the fair administration of justice since such administration is thwarted by the terms of the statute, 'at the request of either party' which prohibits a judge from instructing a jury as to the applicable law of the case when he has the sworn duty to administer *78 justice and uphold the law. We are of the opinion that the framers of our constitution never intended that a judge be so shackled by legislative statute that he become totally dependent upon the requests of litigants so that he might perform his constitutional duty.

The statute, Section 99-17-35, with the unconstitutional words deleted, follows: (Only one of the statutes is quoted for brevity.)

> The judge in any criminal cause, shall not sum up or comment on the testimony, or charge the jury as to the weight of evidence; but . . . he shall instruct the jury upon the principles of law applicable to the case. All instructions asked by either party must be in writing, and all alterations or modifications of instructions given by the court or refused shall be in writing, and those given may be taken out by the jury on its retirement. The clerk, before they are read or given to the jury, shall mark all instructions asked by either party, or given by the court, as being 'given' or 'refused,' as the case may be, and all instructions so marked shall be a part of the record, on appeal, without a bill of exceptions.

[12] As the statute remains, we think it must be implemented for retrial of this case and for the future guidance of the bench and bar. This requires the Court to draw upon its inherent power to prescribe rules of procedure to facilitate the administration of justice in the courts throughout the state. In doing so, we hasten to say that as long as rules of judicial procedure enacted by the legislature coincide with fair and efficient administration of justice, the Court will consider them in a cooperative spirit to further the state's best interest, but when, as here, the decades have evidenced a constitutional impingement, impairing justice, it remains our duty to correct it.

[13] In order, therefore, that the jury may be fully instructed as to the law in each case, we hold that in addition to the written instructions presented for approval by the attorneys for the litigants, heretofore permitted by Mississippi Code Annotated sections 99-17-35 and 11-7-155 (1972), the trial judge may initiate and give appropriate written instructions in addition to the approved instructions submitted by the litigants if, in his discretion, he deems the ends of justice so require. The trial judge may also modify the instructions submitted by the litigants for his approval if, in his discretion, he concludes such to be necessary.

These instructions bearing the court's approval will be read to the jury by the judge before the argument of the attorneys as the instructions of the court and will be taken out by the jury when considering its verdict. Additional instructions may also be granted by the trial judge, again in his discretion, if requested by the jury subsequent to its retirement to consider the verdict.

[14] Further, the trial judge shall not be put in error for his failure to instruct on any point of law unless specifically requested in writing to do so.

[15] We recognize this opinion and the implemented rules will require a change in procedure to which the bench and bar have long been accustomed and that the period of transition may be troublesome, which we regret, but to promote the adoption of these new procedures in an orderly manner, the implemented rules are prospective and shall become effective not later than sixty (60) days from the publication of this opinion.

Reversed and remanded for a new trial.

All Justices concur.

FN1. The judge in any criminal cause, shall not sum up or comment on the testimony, or charge the jury as to the weight of evidence; but at the request of either party he shall instruct the jury upon the principles of law applicable to the case. All instructions asked by either party must be in writing, and all alterations or modifications of instructions given by the court or refused shall be in writing, and those given may be taken out by the jury on its retirement. The clerk, before they are read or given to the jury, shall mark all instructions asked by either party, or given by the court, as being 'given' or 'refused,' as the case may be, and all instructions so marked shall be a part of the record, on appeal, without a bill of exceptions. (For brevity, other section, civil, not copied.)

G. A Brief History of the Mississippi Rule of Civil Procedure

In 1975 the Mississippi Legislature created an Advisory Committee on the Rules of Civil Practice and Procedure to undertake "a comprehensive and continuing study . . . of civil practice and procedure in the trial courts of this state" and to "draft such rules pertaining thereunto as it concludes will simplify, improve and expedite the administration of justice." The Advisory Committee completed a preliminary draft of the proposed Mississippi Rules of Civil Procedure in July, 1977. The proposed rules were then distributed to the state's judges, clerks of courts, bar officers and others associated with the legal profession in order to make the work available to the attorneys in the state. The Advisory Committee conducted open meetings during July and August of 1977 to discuss the proposed Rules and receive suggestions for their improvement. A significant result of the discussions at the open meetings was the change in the wordings of the rules concerning discovery. One year later the Advisory Committee formally submitted the proposed Rules to the Mississippi Supreme Court. Pursuant to the statutory procedure the Supreme Court submitted the proposed Rules to the legislature in 1979 and again in 1980. The legislature through its judiciary committees setting *en banc* disapproved the Rules in toto.

Acting pursuant to its constitutional authority, the Supreme Court adopted the proposed Rules on May 26, 1981, for use in civil actions in all circuit, chancery, and county courts filed on and after January 1, 1982. During the 1982 session, the Mississippi legislature passed Senate Bill No. 2714, which purports to give the legislature the power to disapprove any rules promulgated by the Supreme Court. On March 5, 1982, the Supreme Court deleted Rule 14 entirely and amended Rule 4 by deleting the text as originally adopted and substituting the prior statutory procedure for service of process. The changes pursuant to the March 5 order became effective May 1, 1982.

By this same order the Supreme Court submitted the remainder of the Rules to the Mississippi legislature for "advice and comments"; but the Supreme Court in its order specifically stated that the Court reserves ruling on the constitutionality of Senate Bill No. 2714. In the closing days of the 1982 session, the legislature by Concurrent Resolution No. 617 disapproved rules 3, 12, 13, 41, 47, 49, 55, 56, and 83. If Senate Bill No. 2714 were held to be constitutional, then under the provisions of said bill and concurrent resolution, the nine rules listed above would not be effective after May 1, 1982. As mentioned above, however, the Supreme Court in its March 5 order expressly reserved ruling as to the constitutionality of Senate Bill No. 2714.

The Mississippi Supreme Court made no formal order or opinion to the legislature's attempt to disapprove the aforementioned rules, but on April 6, 1982, Chief Justice Neville Patterson sent the following letter to the trial judges throughout the State of Mississippi.

SUPREME COURT OF MISSISSIPPI

JACKSON 39205

TELEPHONE 354-6021
POST OFFICE BOX 117

NEVILLE PATTERSON
CHIEF JUSTICE

L. A. SMITH, JR.
R. P. SUGG
PRESIDING JUSTICES

HARRY G. WALKER
VERNON H. BROOM
ROY NOBLE LEE
FRANCIS S. BOWLING
ARMIS E. HAWKINS
DAN M. LEE
JUSTICES

MARTIN R. McLENDON
EXECUTIVE ASSISTANT

April 6, 1982

Re: Rules of Civil Procedure

Dear Judge:

In response to inquiries by several trial judges, I advise that the Rules of Civil Procedure adopted on May 26, 1981, remain in effect with the exception of Rules #4 and #14, which become ineffective on May 1, 1982. I trust this information will remove whatever doubt there is concerning the rules so that stability and orderly procedure might be preserved.

The uncertainty emanated from legislative reaction to the court's adoption of the rules. A statute, Senate Bill #2714, was enacted during the recent session of the legislature which went into effect without the Governor's signature. It provided the rules previously adopted by the court be submitted to the legislature for their approval or disapproval. In a spirit of cooperation between the legislative and judicial branches of government, the court responded by submitting the rules for the advice and comment of the legislature so their recommendations could be given judicial consideration.

Thereafter Senate Concurrent Resolution #617 was enacted and reached this Court on yesterday. Instead of advice and comment sought by the court, a number of the rules were expressly disapproved. This leaves the rules in effect as mentioned. The response of the Court to Senate Bill #2714 concluded with the following, "In making our judgment, we will give great weight to the resolution of the Legislature and consider it in the light of whether it accords with the orderly administration of justice. The Mississippi Rules of Civil Procedure, as amended, shall remain in full force and effect until further order of this Court."

Yours sincerely,

Neville Patterson

Neville Patterson, Chief Justice

JURISDICTION OVER THE PERSON: THE LONG-ARM STATUTE

A. Statutory Provisions

§ 13-3-57. Service on nonresident business not qualified to do business in state; survival of cause of action in case of death or inability to act; service on nonresident executor, administrator, etc.

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state. Service of summons and process upon the defendant shall be had or made as is provided by the Mississippi Rules of Civil Procedure.

Any such cause of action against any such nonresident, in the event of death or inability to act for itself or himself, shall survive against the executor, administrator, receiver, trustee, or any other selected or appointed representative of such nonresident. Service of process or summons may be had or made upon such nonresident executor, administrator, receiver, trustee or any other selected or appointed representative of such nonresident as is provided by the Mississippi Rules of Civil Procedure, and when such process or summons is served, made or had against the nonresident executor, administrator, receiver, trustee or other selected or appointed representative of such nonresident it shall be deemed sufficient service of such summons or process to give any court in this state in which such action may be filed, in accordance with the provisions of the statutes of the State of Mississippi or the Mississippi Rules of Civil Procedure, jurisdiction over the cause of action and over such nonresident executor, administrator, receiver, trustee or other selected or appointed representative of such nonresident insofar as such cause of action is involved.

The provisions of this section shall likewise apply to any person who is a nonresident at the time any action or proceeding is commenced against him even though said person was a resident at the time any action or proceeding accrued against him.

Sources: Codes, 1942, §§ 1437, 1438; Laws, 1940, ch. 246; Laws, 1958, ch. 245, § 1; Laws, 1964, ch. 320, § 1; Laws, 1968, ch. 330, § 1; Laws, 1971, ch. 431, § 1; Laws, 1978, ch. 378, § 1; Laws, 1980, ch. 437; Laws, 1991, ch. 573, § 98, eff from and after July 1, 1991.

§ 13-3-63. Service when defendant is nonresident motorist; appointment of secretary of state as agent.

The acceptance by a nonresident of the rights and privileges conferred by the provisions of this section, as evidenced by his operating, either in person or by agent or employee, a motor vehicle upon any public street, road or highway of this state, or elsewhere in this state, or the operation by a nonresident of a motor vehicle on any public street, road or highway of this state, or elsewhere in this state, other than under this section, shall be deemed equivalent to an appointment by such nonresident of the Secretary of State of the State of Mississippi to be his true and lawful attorney, upon whom may be served all lawful processes or summonses in any action or proceeding against him, growing out of any accident or collision in which said nonresident may be involved while operating a motor vehicle on such street, road or highway, or elsewhere in this state, and said acceptance or operation shall be a signification of his agreement that any such process or summons against him which is so served shall be of the same legal force and validity as if served on him personally. Service of such process or summons shall be made by the sheriff of Hinds County, upon prepayment of the fees to which he is entitled by law, by serving two (2) copies of the process or summons for each nonresident defendant, with a fee of Fifteen Dollars ($15.00) for each such defendant on the Secretary of State or by leaving two (2) copies of said process or summons with the fee in the office of the Secretary of State, and such service shall be service upon said nonresident defendant with the same force and effect as if such nonresident had been personally served with such process or summons within the State of Mississippi. One (1) of the copies of such process or summons shall be preserved by the Secretary of State as a record of his office. Notice of such service, together with a copy of the process or summons, shall be mailed forthwith as certified or registered mail, restricted for delivery to addressee only and with postage prepaid, by the Secretary of State to each such nonresident defendant at his last known address, which address shall be written on the process or summons upon the issuance thereof by the clerk of the court wherein the action is pending, or notice of such service and copy of process or summons actually shall be delivered to the said defendant. The defendant's return receipt or evidence of defendant's refusal to accept delivery of such certified or registered mail, in case

such notice and copy of process or summons are sent by certified or registered mail, or affidavit of the person delivering such notice and copy of process or summons, in case such notice and copy of process or summons actually are delivered, shall be filed in the court wherein such action is pending before judgment can be entered against such nonresident defendant. The Secretary of State, upon receipt of such return receipt or evidence of the refusal of such defendant to accept delivery of such certified or registered mail, shall promptly return same to the clerk of the court wherein such action is pending, and the said clerk of the court shall promptly file and preserve same among the records of such action or proceeding. The court in which the action is pending may order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action.

Any cause of action arising out of such accident or collision against any such nonresident, in case of the death of such nonresident, shall survive against his administrator, executor or other personal representative of his estate, and service of all necessary and lawful process or summons, when had or obtained upon any such nonresident owner, nonresident operator or agent or employee, or upon the executor, administrator or other legal representative of the estate of such nonresident owner or nonresident operator, in the manner as hereinbefore provided, for the service of all lawful processes or summonses, herein, shall be deemed sufficient service of process or summons to give any court of this state, in which such action may be filed in accordance with the statutes of the State of Mississippi, jurisdiction over the cause of action and over the nonresident owner, nonresident operator or agent or employee, or the nonresident executor, or administrator of such nonresident owner or nonresident operator, defendant or defendants, and shall warrant and authorize personal judgment against such nonresident owner, nonresident operator, agent, employee, executor or administrator or other legal representative of the estate of such nonresident owner or nonresident operator, defendant or defendants, in the event the plaintiff in such cause of action shall prevail.

The agency or relationship created under the provisions of this section by and between the nonresident owner or nonresident operator of a motor vehicle operating upon the public road, street or highway of this state, or elsewhere in this state, as hereinbefore set forth, in the event of the death of such nonresident owner or nonresident operator of such motor vehicle, shall survive and continue and extend to his executor, administrator or other legal representative of his estate, and the Secretary of State of the State of Mississippi shall be in the same position and relationship with respect to the executor, administrator or other legal representative of the estate of such nonresident owner or nonresident operator of such motor vehicle, as he was in or would have been in with the nonresident owner or nonresident operator of said motor vehicle, had such nonresident owner or nonresident operator survived, and in any action arising or growing out of such accident or collision in which such nonresident owner or nonresident operator of a motor vehicle may be involved while operating a motor vehicle on such street, road or highway or elsewhere in this state, where the nonresident owner or nonresident operator of such motor vehicle has died prior to the commencement of an action against him because of or growing out of such accident or collision, service of process or summons may be had or made upon the nonresident executor, administrator or other legal representative of the estate of such nonresident owner or operator of the motor vehicle involved in such accident or collision, in the same manner and upon the same notice as hereinbefore provided in the case of process or summons upon the nonresident owner or nonresident operator of such motor vehicle. When such process or summons is served, made or had against the nonresident executor or administrator or such nonresident owner or such nonresident operator of such motor vehicle involved in such accident or collision, it shall be deemed sufficient service of such summons or process to give any court in this state in which such action may be filed, in accordance with the provisions of the statutes of the State of Mississippi, jurisdiction over the cause of action and over such nonresident executor or administrator of such nonresident owner or operator of such motor vehicle insofar as such cause of action is involved.

The provisions of this section shall likewise apply to any person who is a nonresident at the time any action or proceeding is commenced against him, even though said person was a resident at the time any action or proceeding accrued against him.

Sources: Codes, 1942, § 9352-61; Laws, 1938, chs. 148, 345; Laws, 1946, ch. 266, § 61; Laws, 1952, ch. 265, § 1; Laws, 1954, ch. 299, §§ 1, 2; Laws, 1958, ch. 262; Laws, 1964, ch. 376, §§ 1-4; Laws, 1978, ch. 378, § 2; Laws, 1991, ch. 443, § 1, eff from and after July 1, 1991.

Uniform Enforcement of Foreign Judgment Act

§ 11-7-301. Definition.

In this act "foreign judgment" means any judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.

Sources: Laws, 1984, ch. 403, § 1, eff from and after July 1, 1984.

§ 11-7-303. Filing copy of foreign judgment; enforcement.

A copy of any foreign judgment authenticated in accordance with the act of Congress or the statutes of this state or any rule promulgated and adopted by the Mississippi Supreme Court may be filed in the office of the clerk of the circuit court of any county in this state. Said clerk shall treat the foreign judgment in the same manner as a judgment of the circuit court of any county in this state. A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying as a judgment of a circuit court of any county in this state and may be enforced or satisfied in like manner, subject to the provisions of Section 15-1-45. Any foreign judgment for the purpose described in Section 85-3-52 shall not be a lien on any property in this state, real, personal or mixed, that is owned by a resident of this state, and shall not be enforced or satisfied against any such property.

Sources: Laws, 1984, ch. 403, § 2; Laws, 1991, ch. 371, § 1; Laws, 1995, ch. 565, § 5, eff from and after July 1, 1995.

§ 11-7-305. Affidavit of filing; notice; execution.

(1) At the time of the filing of the foreign judgment, the judgment creditor or his lawyer shall make and file with the clerk of the circuit court, as the case may be, an affidavit setting forth the name and last known post office address of the judgment debtor and the judgment creditor.

(2) Promptly upon the filing of the foreign judgment and the affidavit, the clerk shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and post office address of the judgment creditor and the judgment creditor's lawyer, if any, in this state. In addition, the judgment creditor may mail a notice of the filing of the judgment to the judgment debtor and may file proof of mailing with the clerk. Lack of mailing notice of filing by the clerk shall not affect the enforcement proceedings if proof of mailing by the judgment creditor has been filed.

(3) No execution or other process for enforcement of a foreign judgment filed hereunder shall issue until twenty (20) days after the date the judgment is filed.

Sources: Laws, 1984, ch. 403, § 3, eff from and after July 1, 1984.

§ 11-7-307. Appeal; stay of execution; security.

(1) If the judgment debtor shows the circuit court of any county that an appeal from the foreign judgment is pending or will be taken, or that a stay of execution has been granted, the court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated, upon proof that the judgment debtor has furnished the security for the satisfaction of the judgment required by the state in which it was rendered.

(2) If the judgment debtor shows the circuit court of any county any ground upon which enforcement of a judgment of any court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction of the judgment which is required in this state.

Sources: Laws, 1984, ch. 403, § 4, eff from and after July 1, 1984.

§ 11-7-309. Alternative rights of judgment creditor.

The right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under this act remains unimpaired.

Sources: Laws, 1984, ch. 403, § 5, eff from and after July 1, 1984.

B. Minimum Contacts: Evolution in Mississippi - Torts

Dawkins v. White Products Corp. of Middleville, Mich., 443 F.2d 589 (5th Cir. 1971)
[Note: This Federal Court opinion has been cited with approval and adopted by the Missisippi Supreme Court in the case of Smith v. Temco, 252 So. 2d 212 (June 28, 1971).]

TUTTLE, Circuit Judge:

We have, once again, to determine just how long Mississippi's 'long-arm statute' for service on non-residents is intended by the courts of Mississippi to reach. The Trial Court, 317 F.Supp. 53, determined that the statute had been construed by the state courts in a manner that would leave to Mississippi residents considerably less than the maximum reach permitted under the federal constitution. We conclude that the trial court misconceived the thrust of the decisions by the Supreme Court of Mississippi since the state legislature amended the statute in 1964 and reverse.

This was an action resulting from damage done to plaintiffs' building from the explosion of a heater that had been made by the two defendants (as to several parts) in foreign states and permitted by them to go into the stream of interstate commerce that finally delivered it to the plaintiffs without either of them ever having 'done business' in Mississippi.

The facts are not now in dispute, for the trial court dismissed the complaint for lack of legal service under the Mississippi 'long-arm' statute. We take as true, for the purpose of this appeal, the allegations of the complaint. A brief statement suffices:

> 'This is a products liability case founded on the explosion of an electric hot water heater manufactured by the White Products Corporation of Middleville, Michigan, hereinafter referred to as 'White.' Attached to the water heater as an integral component was a thermostat manufactured by Therm-O-Disc, Inc., hereinafter referred to as Therm-O-Disc. The water heater was manufactured and assembled in Michigan, the thermostat in Ohio, and was placed in the stream of Interstate Commerce where it travelled until it reached a local hardware store in Louisville, Mississippi. The local hardware store sold it to the plaintiffs who had it installed in their cafe building at Louisville, Mississippi. Some fifteen (15) months after it was installed, the water heater exploded, totally demolishing Dawkins' building and its contents.
>
> Dawkins brought suit in the Circuit Court of Winston County, Mississippi, alleging that White and Therm-O-Disc were doing business in the State of Mississippi and were both amenable to process and the jurisdiction of said Court under Section 1437 of the Mississippi Code of 1942, as amended. White and Therm-O-Disc removed the cause to the United States District Court for the Northern District of Mississippi based on Diversity of Citizenship. Both White and Therm-O-Disc appeared specially and filed Motions to dismiss attacking the territorial jurisdiction of a Mississippi Court over them on the grounds that neither corporation had any agent, place of business, contract or any other contact with the State of Mississippi and that neither had committed a tort in whole or in part within the State of Mississippi. Affidavits in support of the motions were filed by both. Certificates of searches by the Secretary of State of the State of Mississippi indicate that neither of the corporations or their successors had ever qualified to do business in the State of Mississippi.
>
> The Dawkins then filed a motion to amend their Declaration to include the allegation that both White and Therm-O-Disc had committed a tort in whole or in part within the State of Mississippi. The District Court entered an order allowing the amendment.
>
> The District Court entered an order dismissing the suit because of lack of jurisdiction on September 8, 1970.'

It is not difficult to understand why the trial court concluded that the statute authorizing service on the secretary of state was not broad enough in its scope to permit the service here to stand. This is so because no Mississippi case has been decided which would permit a contrary result. The statute with which we are concerned follows:

> 'Any nonresident person * * * who shall make a contract with a resident of this State to be performed in whole or in part by any party in this State, or who shall commit a tort in whole or in part in this State against a resident of this State, or who shall do any business or perform any character of work or service in this State, shall by such act or acts be deemed to be doing business in Mississippi. Such act or acts shall be deemed

equivalent to the appointment by such nonresident of the Secretary of State of the State of Mississippi * * * to be the true and lawful attorney or agent of such nonresident upon whom all lawful process may be served in any actions or proceedings accrued or accruing from such act or acts, or arising from or growing out of such contract or tort, or as an incident thereto, by any such nonresident * * *.' Miss. Code Ann. Sec. 1437(a) (Supp.1968)

Prior to July 1, 1964 the statute in effect was identical with that quoted above except for the emphasized language. Prior to that date the statute authorized service on the secretary of state only in circumstances whereunder the non-resident 'shall do any business or perform any character of work or service in this state.' The amendment of 1964 added two categories of non-residents who might be served, in addition to those 'doing business.' These categories are (1) those 'who shall make a contract with a resident of this State to be performed in whole or in part by any party in this state,' and (2) 'who shall commit a tort in whole or in part in this state against a resident of this state.'

It is apparent that we are not here concerned with the non-resident who may make a contract, but it is equally plain that the complaint as amended clearly alleges that the defendants were persons 'who (committed) a tort in whole or in part in this state against a resident of (Mississippi).'

We, of course, apply state law to this diversity case. (Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1933).) More expressly, we apply state law because the service on these defendants can be effected only by the terms of this state law. (Walker v. Savell and Associated Press (5 Cir., 1964), 335 F.2d 536.) It is, of course, much preferable for the federal court to apply state law as precisely articulated by a state court of highest jurisdiction. However, if no state court decision precisely in point is available to guide the federal court, we are compelled to decide to the best of our ability what the state court would hold if this case were now before it.

Unfortunately, we find no Mississippi case, decided after passage of the amendment that discusses the amendment relating to a local tort except Mladinich v. Kohn, 250 Miss. 138, 164 So.2d 785. Although decided after passage of the amendment that case was decided a few weeks before the effective date of the amendment, July 1, 1964. Of course, it dealt with attempted service on a non-resident before the passage of the amendments.

* * * *

[Note: Omitted is a lengthy discussion of pre-amendment cases]

In view of the fact that this latest case makes clear that all of the earlier cases, as well as the one before it, treated only of the 'doing business' basis for long-arm service, and in view of the very apparent intent of the legislature to add the contract basis and the local tort basis to the already existing basis of doing business within the state, we are inclined to follow the clear language of the statute in the absence of any Mississippi decision that states that these additional bases added nothing to the statute. There is no such decision. We are convinced, Erie-bound as we are, to conclude that the Mississippi Supreme Court, given the facts and presented with the issue, would hold that the complaint as here amended alleged facts which, in spite of the affidavits of non-presence in the state, would permit service on the non-residents under the amended long-arm statute. For somewhat similar cases in other states see Eyerly Aircraft Co. v. Killian, 5 Cir. 414 F.2d 591, and Coulter v. Sears Roebuck and Co., 5 Cir. 426 F.2d 1315, and see Note Vol. XXXVIII Mississippi Law Journal p. 177.

The judgment of dismissal is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

Smith v. Temco, Inc., 252 So.2d 212 (Miss. 1971)

SMITH, Justice:

Appellants, Melton Smith and Virginia Brady Smith, his wife, were plaintiffs, and appellee, Temco, Incorporated, a Tennessee corporation, domiciled in Nashville, Tennessee, was defendant, in an action for damages in a 'products liability' case brought in the Circuit Court of Pearl River County. The case was voluntarily nonsuited as to defendant A. E. Sanders, doing business as Sanders Plumbing and Electric Supply, and he is no longer involved in this litigation.

Defendant Temco, Incorporated, appeared in the trial court specially for the single purpose of challenging its jurisdiction. Temco's motion to dismiss was heard upon the facts alleged in appellants' declaration, which were accepted as true for the purpose of the hearing, and a stipulation as to certain additional facts. The court sustained Temco's motion to dismiss and held that it was without jurisdiction. From the judgment entered dismissing the action, Melton Smith and Virginia Brady Smith have appealed.

The record shows that appellants were residents of Pearl River County, that they owned a home there, to which an addition had been made in 1964. The house was supplied with electricity and liquified petroleum gas for the usual domestic purposes.

On October 25, 1966, appellants purchased from Sanders Plumbing and Electric Supply Company, a local retailer, a wall or space heater which had been manufactured by Temco. This heater was regulated by a thermostat manufactured by Honeywell, Incorporated, of Minneapolis, Minnesota, (not a party to this litigation) which was packaged with the heater at the factory.

The declaration alleged that 'the proper installation of said wall heater was completed on October 28, 1966.' It was charged that the heater 'continuously and intermittently came off and on and could not be controlled by its thermostat,' and that it 'was not equipped with a high limit control device to prevent over-heating inside the combustion chamber.' It was alleged further that on November 2, 1966, a defect within the heater and thermostat and 'lack of high temperature control device permitted the combustion chamber of said heater to over-heat to the extent that the entire house was kindled and destroyed by fire, together with all its contents.'

The plaintiff's charged that the fire and the insuing loss proximately resulted from inherent defects in the heater which made it 'unreasonably hazardous, dangerous and unsafe,' not reasonably safe for its intended use, and that Temco, as manufacturer and distributor, was liable to them in damages for the loss.
Service of the summons issued for Temco was made upon the Secretary of State of Mississippi as its agent for process under the provisions of Mississippi Code 1942 Annotated section 1437(a) (Supp.1970), known as the 'long arm' statute.

The following additional facts were stipulated. Temco, Incorporated, is a Tennessee corporation, foreign to Mississippi, domiciled in Nashville, Tennessee. It is not qualified to do business in Mississippi nor has it named any person, firm, official or corporation to act as its process agent in Mississippi.

Temco is in the business of manufacturing for sale in interstate commerce, among other things, wall or space heaters. Its products are distributed throughout the United States and are sold in Mississippi. Sales of its products are made to wholesalers through manufacturer's representatives, who also sell the products of several other companies, and these, as well as those of Temco, are sold on commission. The heater in question was manufactured by Temco, sold and shipped in interstate commerce to Modern Appliance & Supply Company at New Orleans, Louisiana, which, in turn, sold and shipped it to Sanders Plumbing and Electric Supply, a retailer at Picayune, in Pearl River County, Mississippi. There Sanders sold it to plaintiffs. The thermostat, manufactured by Honeywell, Incorporated of Minneapolis, was packaged with the heater before shipment and Temco played no part in its manufacture or adjustment. Temco had granted no exclusive franchises in Mississippi to any wholesaler, none of its sales people resided in Mississippi, no member of its board of directors lived in Mississippi, it maintained no bank account in Mississippi, its sales manager had been in Mississippi only one time in five years, and neither its service manager nor repairman had ever been to Mississippi.

Thus the narrow question presented for determination on this appeal is squarely posed. Does the Mississippi 'long arm' statute, under the amendment which became effective July 1, 1964, the amended statute now appearing as

Mississippi Code 1942 Annotated section 1437(a) (Supp.1970), confer jurisdiction upon the Circuit Court of Pearl River County?

Mississippi Code 1942 Annotated section 1437(a) (Supp.1970), containing the July 1, 1964 amendment, provides in part:

> (a) Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this State as to doing business herein, who shall make a contract with a resident of this State to be performed in whole or in part by any party in this State, or who shall commit a tort in whole or in part in this State against a resident of this State, or who shall do any business or perform any character of work or service in this State, shall be such act or acts be deemed to be doing business in Mississippi. Such act or acts shall be deemed equivalent to the appointment by such nonresident of the Secretary of State of the State of Mississippi, or his successor or successors in office, to be the true and lawful attorney or agent of such nonresident upon whom all lawful process may be served in any actions or proceedings accrued or accruing from such act or acts, or arising from or growing out of such contract or tort, or as an incident thereto, by any such nonresident or his, their, or its agent, servant or employee.
> (Emphasis added).

Our present concern is limited to an interpretation of this new language, which was inserted by the 1964 amendment: '* * * who shall commit a tort in whole or in part in this State against a resident of this State. * * *'

In State Stove Manufacturing Company v. Hodges, 189 So.2d 113 (Miss.1966), a landmark case in Mississippi jurisprudence this Court adopted the doctrine known as 'products liability' or 'strict liability,' saying:

After careful consideration of the precedents in this and other States, the history of these issues, and the many considerations pertinent to them, which are discussed subsequently, we conclude that the appropriate standards of responsibility are well stated in Section 402A of the American Law Institute's Restatement of Torts (Second), which we adopt insofar as it applies to a manufacturer of a product and to a contractor who builds and sells a house with the product in it. It states:

> Special Liability of Seller of Product for Physical Harm to User or Consumer-
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule stated in Subsection (1) applies although.
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.
>
> The foregoing rule is not exclusive. It does not preclude liability based upon the alternative ground of negligence of the manufacturer or seller, where such negligence can be proved. Restatement (Second), Torts at 348
>
> (189 So.2d 113, 118)

In enacting the 1964 amendment, it will be assumed that the Legislature acted in the light of the decisions of this Court which dealt with the extent of the personam jurisdiction of Mississippi courts in cases brought in this State against nonresidents under the statute as formerly written.

In the cases decided under the statute before the 1964 amendment, this Court held, in effect, that Mississippi courts personam jurisdiction of the nonresident defendant was dependent upon whether such defendant had, or had not been 'doing business' in Mississippi, or whether it had or had not 'sufficient significant contacts in Mississippi' to subject it to the jurisdiction of the Mississippi courts. This test was further restricted to those cases in which 'traditional notions of fair play and of substantial justice' were not offended. Collins v. Truck Equipment Sales, Inc., 231 So.2d 187 (Miss.1970); Hilbun v. California-Western States Life Ins. Co., 210 So.2d 307 (Miss.1968); Mladinich v. Kohn, 186 So.2d

481 (Miss.1966); Breckenridge v. Time, Inc., 253 Miss. 835, 179 So.2d 781 (1965); Republic-Transcon Industries, Inc. v. Templeton, 253 Miss. 132, 175 So.2d 185 (1965); Mladinich v. Kohn, 250 Miss. 138, 164 So.2d 785 (1964).

By the insertion of the new matter, there can be no doubt that the intention of the Legislature was to broaden the scope of the statute and to enlarge the jurisdiction of the Mississippi courts so as to reach nonresident defendants in two new and distinct categories: (1) The nonresident defendant who shall make a contract with a resident to be fulfilled in the State in whole or in part, and the (2) nonresident defendant who shall commit a tort, in whole or in part, in this State against a resident of the State.

The statute, as amended in 1964, has not been construed previously by this Court. In Dawkins v. White Products Corporation, 443 F.2d 589, decided by the United States Court of Appeals for the Fifth Circuit on May 20, 1971, the Court of Appeals was confronted with the necessity of construing the amended statute under a factual situation closely analogous to that in the present case. After reviewing the cases decided by this Court under the former 'long arm' statute, the court correctly concluded that this Court had never passed upon the effect of the 1964 amendments. In the absence of any pronouncement by this Court upon the subject the Court of Appeals stated:

> (W)e are inclined to follow the clear language of the statute in the absence of any Mississippi decision that states that these additional bases added nothing to the statute. There is no such decision. We are convinced, Erie-bound as we are, to conclude that the Mississippi Supreme Court, Given the facts and presented with the issue, would hold that the complaint as here amended alleged facts which, in spite of the affidavits of non-presence in the state, would permit service on the non-residents under the amended long-arm statute. For somewhat similar cases in other states see Eyerly Aircraft Co. v. Killian, 5 Cir. 414 F.2d 591 and Coulter, v. Sears, Roebuck & Co., 5 Cir. 426 F.2d 1315 and see Note Vol. XXXVIII Mississippi Law Journal p. 177.
>
> In 86 C.J.S. Torts s 21 (1954), it is stated:
>
> Damage resulting from a breach of a duty and invasion of a right is a necessary element of tort.
>
> In addition to the elements of tort heretofore discussed, a third element requisite thereto is damage resulting from the breach of duty and invasion of right.

The tort is not complete until the injury occurs, and if the injury occurs in this State, then, under the amended statute, the tort is committed, at least in part, in this State, and personam jurisdiction of the nonresident tort feasor is conferred upon the Mississippi court.

Other courts have reached like conclusions under similar statutes. In a note appearing in Chapter 3 Judicial Jurisdiction in American Law Institute, Restatement of the Law (Second), Conflict of Laws 2d, at page 160 appears the following:

> Many states have enacted statutes which authorize the exercise of judicial jurisdiction under the circumstances stated in the rule. The prototypical statute is that of Illinois (Ill.Civ.Prac.Act ch. 110 s 17 (1955)) which, although it speaks only of 'commission of a tortious act within this State', has been interpreted to confer jurisdiction on the Illinois courts in situations where a tortious act outside the State causes injury within the State. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961). The Illinois statute is virtually identical to statutes in many other States. See. e.g., N.M.Sstat.Ann., ch. 21 s 21-3- 16(A) (3) (1967); Ore.Rev.Stat. s 14.305(1)(b) (s 14.035(1)(b)) (1963); Tenn.Code Ann. s 20-235(b) (1968). States which adopted the Illinois language subsequent to the decision on Gray v. American Radiator & Standard Sanitary Corp., supra, have generally followed the Illinois interpretation. See, e.g., Doggett v. Electronics Corp. of America, 93 Idaho 26, 454 P.2d 63 (1969).

In our view, one of the fundamental objects of the Legislature in adopting the 1964 amendment was to extend the personam jurisdiction of the courts of this State to the nonresident who may commit a tort in this State, either in whole or in part, to the injury of a resident of the State so as to provide a practical means for the enforcement of rights accruing under the products liability doctrine.

Under the amended statute, a nonresident manufacturer of a dangerously defective or unsafe product who places it in interstate commerce for the purpose of distribution and ultimate sale to consumers in other States, whether

with a specific intent that it be distributed, sold and used in this State, or not, may be subjected to a personam action for damages in courts of this State by such consumer who may be injured in this State as a result of its defective or unsafe condition.

The trial court erred in holding that it was without jurisdiction in the present case and in sustaining Temco's motion to dismiss. The judgment appealed from is reversed and the case is remanded.
Reversed and Remanded.

C. Evolution in Mississippi — Contracts

Miller v. Glendale Equipment & Supply, Inc., 344 So.2d 736 (Miss. 1977)

LEE, Justice, for the Court:

Claude T. Miller filed suit in the Circuit Court of Attala County against Glendale Equipment & Supply, Inc. for damages resulting from a breach of contract. The trial court entered an order dismissing the cause for lack of jurisdiction under Mississippi Code Annotated § 13-3-57 (1972) [Long Arm Statute] and Miller appeals.

The only question presented here is whether or not the statute applies and whether or not the trial court erred in dismissing the suit.

On March 19, 1975, Joseph Diamond, President of Glendale Equipment & Supply, Inc., and Miller entered into a contract by telephone for the sale and purchase of a bulldozer (tractor) at a price of twenty-one thousand dollars ($21,000). Glendale agreed to deliver the machine from Canton, Ohio (its domicile) to Miller in Attala County, Mississippi. Miller sent a check to Glendale in said amount and when it cleared, Glendale delivered the machine to Miller's farm on one of its low-boy trucks. Miller unloaded the bulldozer and found it to be in unsatisfactory condition and in need of extensive repairs. He then insisted that Glendale's driver call Diamond by telephone in Canton, Ohio, which was done. Diamond agreed to send certain new parts to Miller and to pay for installing same. Glendale was not doing business in the State of Mississippi, and had not sold or delivered any other machines or equipment in Mississippi.

The case of Smith v. Temco, Inc., 252 So.2d 212 (Miss.1971) is controlling here. In that case, Temco was not doing business in the State of Mississippi and was domiciled in Nashville, Tennessee. It manufactured heaters and, through a circuitous route in interstate commerce, a defective heater was finally purchased by a resident of Mississippi. As a result of the defect in the heater, Smith's house burned and was destroyed together with its contents. Suit was filed against Temco in tort and process was obtained under that part of the statute which provides: "Any nonresident person, firm, ... who shall commit a tort in whole or in part in this state against a resident of this state, ..." The trial court held that the long arm statute did not apply and dismissed the suit. In reversing and remanding the cause, this Court stated:

* * * *

[There is omitted a lengthy quote from Smith v. Temco, 252 So. 2d at 214-17.]

We make no distinction in that part of the statute which confers jurisdiction where a contract is performed in whole or in part by any party in this state with that which provides jurisdiction against a nonresident who shall commit a tort in whole or in part in this state against a resident of this state.

Other jurisdictions have adopted a similar construction previous to Temco. McGee v. International Life Insurance Company, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), involved construction of the California long arm statute. In 1944 Lowell Franklin, a resident of California, purchased a life insurance policy from the Empire Mutual Insurance Company, an Arizona corporation. In 1948, International Life Insurance Company assumed the insurance obligations of Empire Mutual and mailed a reinsurance certificate to Franklin in California, offering to insure him in accordance with the terms of the Empire Mutual policy. Franklin accepted the offer and from that time until his death in 1950 paid premiums by mail from his California home to International's Texas office. His beneficiary filed proofs of death, but International refused to pay, claiming that Franklin had committed suicide. International did no business in California. Under those facts, the United States Supreme Court held that the California statute was constitutional, that International Life had no vested right not to be sued in California and that the California court had jurisdiction over the cause.

In Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F.2d 365 (8 Cir.1969), a Minnesota corporation negotiated by mail and telephone for the purchase of certain merchandise from Maxwell Electronics Corporation domiciled in the State of Texas. The merchandise was shipped F.O.B. in five (5) shipments between November 2 and November 22, 1965. Electro-Craft sued for fraud, misrepresentation, breach of contract and breach of warranty.

The transaction involved was the only one between the parties and Maxwell never had an officer, employee or agent in Minnesota, never maintained an office or any physical facility in Minnesota, never advertised in Minnesota and was not qualified to do business in Minnesota. The Court held that while the contract was consummated in Texas,

contractual consequences were reasonably anticipated in Minnesota and that the exercise of jurisdiction was consistent with constitutional requirements.

In the present case, the contract was made over the telephone by Glendale, a nonresident corporation, with Miller, a resident of this state. Miller obtained and mailed the $21,000.00 check from Mississippi to Glendale in Ohio. Glendale delivered the machine through its agent to Miller in Mississippi using the roadways of this state. Certainly, the contract was performed in part by Glendale and Miller in the State of Mississippi.

The trial court erred in holding that it did not have jurisdiction under the Mississippi long-arm statute and in sustaining appellee's motion to dismiss. The judgment appealed from is reversed and the case remanded.

REVERSED AND REMANDED.

Shackelford v. Central Bank of Mississippi, 354 So.2d 253 (Miss. 1978)

LEE, Justice, for the Court:

The Circuit Court of Rankin County entered judgment against Hugh W. Shackelford in favor of Central Bank of Mississippi in the amount of two hundred one thousand four hundred forty-eight dollars sixty-five cents ($201,448.65) and Shackelford appeals.

Appellant first contends that the trial court erred in overruling his motion to dismiss and in holding that he was subject to jurisdiction of the court under Mississippi Code Annotated Section 13-3-57 (1972) (Long-Arm Statute).

[1] On December 13, 1973, appellant executed a loan guaranty agreement in favor of appellee wherein he agreed to indemnify appellee to the extent of sixty thousand dollars ($60,000) in the event of default on an indebtedness owed by Pilgrim Properties, Inc. to appellee. The loan guaranty agreement was executed in order to enable Pilgrim Properties, Inc. to obtain credit at intervals from appellee. Appellant signed the agreement in Albany, Georgia, his place of residence. The instrument provided that the guaranty was to be construed according to the laws of the State of Mississippi and was to be performed by appellant in said state. It was accepted by appellee at its office in Brandon, Mississippi.

Thereafter, on January 21, 1975, Pilgrim Properties, Inc. executed a note in the sum of seventy-five thousand dollars ($75,000) to Central Bank of Mississippi, which note (contract) was endorsed and guaranteed by appellant and other individuals. The note provided that it was negotiable and payable at Central Bank of Mississippi in Brandon, Mississippi. Therefore, appellant agreed that, upon default of same, he would pay the amount of the note together with interest in the State of Mississippi.

Appellant made at least one trip to the office of appellee and from 1973 until the date suit was filed, he (1) was engaged in the business of acquiring real estate in and around Jackson, Mississippi, (2) was a partner in the Regency Apartment Developers, Ltd., which did considerable work for Pilgrim Properties, Inc., and (3) executed notes and deeds of trust to various individuals and firms in connection with his business enterprises, which finance arrangements involved in excess of five million dollars ($5,000,000).

> Mississippi Code Annotated Section 13-3-57 (1972) provides the following:
> "Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi. . . ." (Emphasis added)

The case of Miller v. Glendale Equipment and Supply Company, 344 So.2d 736 (Miss.1977), disposes of the question as to whether or not appellant entered into a contract with a resident of the State of Mississippi to be performed in whole or in part by any party in this state. In that case, the contract was made over the telephone by Glendale, a non-resident corporation, with Miller, a resident of this state. Miller obtained and mailed a twenty-one thousand dollar ($21,000) check from Mississippi to Glendale in Ohio for the purchase price of a bulldozer. Glendale delivered the machine through its agent to Miller in Mississippi using the roadways of this state. The Court held that the contract was performed in part by Glendale and Miller in the State of Mississippi. Here, both instruments provided that they be performed (paid) in the State of Mississippi, and they were accepted by appellee in Mississippi. The trial court had jurisdiction under the Long-Arm Statute, and the first assignment of error is without merit.

* * * *

[Note: Remainder of Opinion which discusses attorneys' fees is omitted.]

AFFIRMED.

D. Libel

Edwards v. Associated Press, 512 F.2d 258 (Cir. 5th 1975)

LYNNE, District Judge:

This case raises, once more, the question of the length of Mississippi's long-arm statute. The trial court concluded that the Mississippi courts would not require defendant Associated Press ("AP") to submit to their jurisdiction on the facts presented here. 371 F.Supp. 333 (N.D.Miss.1974). We disagree and hold, furthermore, that the statute as construed does not offend the due process clause of the Fourteenth Amendment. Accordingly, we reverse.

Plaintiff's libel complaint is predicated upon the publication by AP upon its wire services of a false report, characterized by AP as the result of an "inadvertent transposition," that plaintiff's request for a rehearing in a marijuana case had been denied by this Court. The report originated with an AP correspondent in New Orleans, Louisiana, was sent to Atlanta, Georgia, then back to New Orleans. From there it was transmitted into Mississippi, where it was broadcast by an AP member in Lowndes County, Mississippi, where plaintiff resides and where, as duly elected Sheriff, he is in the business of law enforcement and security.

Plaintiff obtained service upon defendant through the provisions of the Mississippi long-arm statute, Miss.Code Ann., s 13-3-57 (1972) (Miss.Code Ann., s 1437 (1972 Cum.Supp.)),[FN1] which reaches "any foreign . . . corporation . . . who shall make a contract with a resident of this state to be performed in whole or in part by any party in (Mississippi), or who shall commit a tort in whole or in part in (Mississippi) against a resident . . . shall by such act or acts be deemed to be doing business in Mississippi." Plaintiff relies solely upon the commission by defendant of a tort in Mississippi to sustain in personam jurisdiction there. He argues that even if the tort was initiated in New Orleans, the damage to him occurred in Lowndes County, Mississippi, so that the tort was committed "in part" there. This, he contends, satisfies the statute.

* * * *

Defendant argues, and the district court agreed, that the statutory language does not reach it, since the tort was committed outside Mississippi. It also argues, and the district court agreed, that the Mississippi Supreme Court would not uphold jurisdiction on these facts. Finally, it argues that the *261 intersection of First Amendment with due process considerations here prohibits assertion of jurisdiction.

* * * *

[3] We must now turn to the question whether the tort was committed "in whole or in part" in Mississippi. Mississippi has adopted the "single publication" rule for purposes of venue in defamation suits. Forman v. Miss. Publishers Corp., 195 Miss. 90, 14 So.2d 344, 148 A.L.R. 469 (1943). Appellee argues that this rule requires a finding that the tort alleged here was complete in New Orleans where AP first published the report. It would follow that the tort occurred neither wholly nor partially in Mississippi, so that the terms of the long-arm statute would not apply to this tort. We disagree.

Forman treats the question of proper venue in a libel action against a foreign corporation qualified to do business in Mississippi and domiciled in Hinds County, Mississippi. The defendant published and first circulated the allegedly libelous article in Hinds County, but the plaintiff filed suit in Sunflower County, where he resided and where the paper was later circulated. Forman holds that, under the applicable statute, which required venue in the county "where the cause of action may occur or accrue," the proper venue for libel by the publication of a newspaper is in the county where the paper is first published or circulated. The court reasons that this "single publication" rule would prevent a new cause of action arising with each new reader. Moreover, the court concludes that, since the gravamen of the offense is not the knowledge of the plaintiff or the injury to his feelings but is rather the damage to his reputation, the right accrues as soon as the article is exhibited to third persons; under this analysis, further publication increases the potential injury, but does not spawn new causes of action.

Whether the Mississippi Supreme Court would incorporate the venue rule of Forman into its amended long-arm statute is doubtful. In Breckenridge, supra, 253 Miss. at 842, 179 So.2d at 783, the court specifically holds the question open:

> *264 (W)hether we should apply the more limited venue rule of the single publication doctrine, stated in Forman v. Mississippi Publishers Corporation, 195 Miss. 90, 14 So.2d 344, 148 A.L.R. 469 (1943), to multistate defamation is a complex issue not appropriate to be decided here, ...

[4] We are inclined to think that the Mississippi Supreme Court, regardless of how it would decide the venue question in a suit such as this, would not incorporate the single publication rule into its amended jurisdictional statute. Forman makes it clear that the cause of action in defamation is "enlarged by an expanding circulation" of the defamatory matter. 195 Miss. at 105, 14 So.2d at 346, 148 A.L.R. at 472. Since the long-arm statute embraces torts committed in whole or in part in Mississippi, its plain language encompasses at least that part of the enlarged tort created by the distribution of the allegedly defamatory matter in Mississippi.

[5] [6] Our unwillingness to cramp the statutory language is buttressed by the Mississippi Supreme Court's decision in Smith v. Temco, Inc., supra, 252 So.2d 212, upon which we again place strong reliance:

> In 86 C.J.S. Torts s 21, p. 937 (1954), it is stated:
>
> > Damage resulting from a breach of a duty and invasion of a right is a necessary element of a tort.
> >
> > In addition to the elements of tort heretofore discussed, a third element requisite thereto is damage resulting from the breach of duty and invasion of right.
> >
> > The tort is not complete until the injury occurs, and if the injury occurs in this State, then, under the amended statute, the tort is committed, at least in part, in this State, and personam (sic) jurisdiction of the nonresident tort feasor is conferred upon the Mississippi court. 252 So.2d at 216.

While in Smith the entire injury accrued in Mississippi, although the allegedly defective machine was manufactured elsewhere, we nevertheless feel that Smith indicates an intention by the Mississippi Supreme Court to read broadly the "in part" language of Mississippi's long-arm statute.

Indeed it would be anomalous to hedge in the sweeping statutory language of s 13-3-57 with the restrictions of the single publication rule, as appellee *265 would have us do and as was done in Insull v. New York World-Telegraph Corp., 172 F.Supp. 615, 632-4 (N.D.Ill.), aff'd, 273 F.2d 166 (7th Cir. 1959), cert. denied, 362 U.S. 942, 80 S.Ct. 807, 4 L.Ed.2d 770 (1960).

Unlike the posture of the case before us, the Seventh Circuit rendered the Insull decision without the benefit of a prior authoritative construction of the Illinois long-arm statute. That statute has since been broadly construed in Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961). The sharp conflict between Insull and Gray has been noted, and the Second Circuit and an Illinois District Court have refused to follow this aspect of Insull. In the absence of any contrary indication from the Mississippi Courts, and instructed by the broad scope of the language of Smith v. Temco, supra, 252 So.2d 212, we are likewise unpersuaded by the Insull reasoning with respect to the single publication rule and decline to engraft a restrictive construction upon the Mississippi long-arm statute.

[7] [8] We therefore conclude that the Mississippi long-arm statute by its terms confers jurisdiction over AP upon the district court below.

Resolution of this issue does not, however, settle the question before us. Appellee contends that applying the Mississippi long-arm statute to confer jurisdiction over it will contravene federal constitutional requirements of due process, and the district court so held. Again, we disagree.

While the scope of a state's power to call foreign entities before its courts has broadened considerably in the past three decades, there are nevertheless constitutional limits to a state's power. In 1945, the Supreme Court traced the general outlines of the due process determination in jurisdictional disputes:

> (D)ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *266 International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (citations omitted).

Twice since rendering its seminal opinion, the Supreme Court has made a significant effort to add content to the flexible standards of International Shoe. In McGee v. International Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), the Court declared that due process did not prohibit California's entertaining a suit against a nonresident based upon the issuance of a single insurance contract in the forum and the receipt of premium payments mailed from the forum. A year later, Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), suggested that due process would not be satisfied unless the defendant had "purposefully avail(ed) itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."

* * * *

[11] AP's activities in Mississippi indicate that AP has engaged in sufficient local activity to justify, under the due process clause, Mississippi's exercise of its jurisdiction. AP maintains five news correspondents in Mississippi as well as a maintenance employee. Moreover, these employees occupy an office in the state, although the office is offered without rent by two AP members and it is not designated as an AP office in the building directory. More significantly, the news report upon which plaintiff's libel action is predicated was aimed exclusively at Mississippi. In our prior cases, the publications were addressed either to a primary market, distant from the locale in which the greatest injury was alleged, or to a national market. Here, however, defendant's transmission was purposefully and specifically aimed at Mississippi, as surely as if the proverbial gunman had stood in Alabama and fired into a crowd in Mississippi.

Having established that the defendant's activities reveal a purposeful connection *268 with Mississippi, we need not delay long over the requirement that the cause of action stem from the defendant's activities in Mississippi. While the activities of the six employees may have had little direct relation to the averred libel, the communication at issue grew out of the defendant's purposeful transmission of the message into Mississippi.

We also conclude that it is reasonable to exercise jurisdiction over AP on these facts. Mississippi has a strong interest in allowing its resident to vindicate his claim in its courts. See von Mehren and Trautman, The Law of Multistate Problems 599-601 (1965); cf. Curtis Publishing Co. v. Birdsong, supra, 360 F.2d at 346-7. Moreover, given the number of permanent employees in Mississippi, its members there, and the continuous stream of transmissions into and out of the state, AP can claim no sense of surprise, of expectations disappointed, in being called into Mississippi's courts. In another and more appropriate case, such expectations might form a legitimate source of unfairness to a nonresident of the forum state.

[12] That AP is a non-profit association does not, under the circumstances here, warrant a finding of unreasonableness. It is an instrumentality established by its constituent members who are engaged in a commercial business for profit.

First Amendment considerations, while important, do not change the course we have charted. We have already demonstrated that AP's contacts with Mississippi in this case are much more significant than those of the New York Times with Louisiana, in Buckley v. New York Times, supra, 338 F.2d 470, and with Alabama, in New York Times v. Connor, supra, 365 F.2d 567. Of primary importance, however, we are of the opinion that whatever burden defense of this suit may place upon AP's exercise of its First Amendment rights, that burden is justified by AP's many contacts with Mississippi, particularly its deliberate choice of the Mississippi market as the place for distributing the controverted message.

In conclusion, we reaffirm the First Amendment protections we have woven into our prior in personam jurisdictional analysis, but we find, upon consideration of the factors involved here, that the fabric of that analysis is neither torn nor stretched by assertion of jurisdiction over AP. Having put on the mantle of Mississippi's benefits and privileges, AP may not in good conscience complain of the needle of litigation.

Reversed and remanded.

E. Doing Business - Tort Outside of State

Arrow Food Distributors, Inc. v. Love, 361 So.2d 324 (Miss. 1978)

ROBERTSON, Presiding Justice, for the Court:

Arrow Food Distributors, Inc., a Delaware corporation with its headquarters in New Orleans, Louisiana, appeals from a decree of the Chancery Court of Adams County, Mississippi, for $248,920, in favor of Lloyd F. Love, Conservator of the Estate of William F. Riley, Jr.

The injuries to Riley resulted from a head-on collision of Riley's Pinto automobile with a large refrigerated tractor-trailer unit owned by Arrow and driven by Henry D. Alexander. About 4:45 A. M., August 1, 1975, William F. Riley, Jr. was driving south on U. S. Highway 61 north of Baton Rouge, Louisiana. Riley was on his way back to work as a roustabout on an oil rig off of the Louisiana coast. It was raining rather heavily and foggy in low places along the highway. Henry Alexander was driving Arrow's refrigerated tractor-trailer unit north on U. S. Highway 61 at a speed of 45 to 50 miles per hour. He was en route to Natchez, Mississippi, to deliver refrigerated foods ordered by Mississippi customers of Arrow. Alexander testified that he thought he saw headlights in his lane. He blinked his lights and, according to Alexander, the headlights, instead of moving west, moved to the east side of the highway. Alexander continued:

> "At this time I applied my brakes lightly, my truck went into a skid, and shortly after I went into a skid there was an impact.
> Q All right. Now, as you approached that vehicle, tell the Court and Jury again what that vehicle did?
> A It moved to the right shoulder.
> Q What did you do at that time?
> A At that time I looked and I saw that the left lane was available, there was no traffic coming, so I tried to move over to my left.
> Q What were the weather conditions that day?
> A It was raining.
> Q Were there any other weather conditions that you took note of?
> A It was slightly foggy in spots."

Louisiana Highway Patrolman Joe White testified that the refrigerated van turned over and the dual rear wheels came to rest on top of the Pinto automobile. Riley's Pinto was completely in the southbound lane. Arrow's truck was partially in the southbound lane, partially on the west shoulder and partially in the northbound lane. Riley remained unconscious in a Baton Rouge hospital for 24 hours. He suffered a brain contusion, basilar skull fracture, sheared teeth, various bruises and cuts on the head requiring 175 stitches, burns to his fingers and hand, and a compression fracture of the sixth cervical vertebra with a narrowing of the disc between the fifth and sixth vertebrae. The force of the impact bent the frame of the defendant's truck and totally demolished Riley's automobile.

Arrow assigned 24 errors but briefed only 6. In its brief, Arrow argues:

> 1. The Chancery Court of Adams County did not have jurisdiction;
> 2. The United States District Court for the Southern District of Mississippi did have jurisdiction even though, after a hearing, that Court had remanded the case to the Adams County Chancery Court;
> 3. The trial court erred in sustaining a motion In limine and entering a protective order covering Riley's medical records at Whitfield;
> 4. The court erred when it excluded the testimony of an expert "accidentologist"; and
> *326 5. The verdict was against the overwhelming weight of the evidence.

Nelson DeSoto, vice president of appellant, testified that Arrow had sold foodstuffs in Mississippi continuously since 1951. Sales in Mississippi averaged $2,000 to $3,000 a week. A salesman would come to Mississippi and solicit orders. The orders would be filled in Louisiana and shipped by truck to Mississippi purchasers. Sales in Mississippi of $104,000 to $156,000 annually, in our opinion, constitute a substantial amount of business. In April, 1976, $9,000 was owed Arrow by Mississippi purchasers. On June 23, 1976, approximately $3,500 was still owed Arrow by Mississippi purchasers, and two delinquent accounts had been placed in the hands of attorneys for collection. Arrow had

used Mississippi's highways for 15 years in delivering foodstuffs sold to Mississippi customers, and now would use Mississippi's courts in collecting debts due it.

Suit was begun as an attachment in chancery. The defendants were Arrow Foods, a non-resident corporation, and four Mississippi debtors of Arrow. Process was served on the Secretary of State of Mississippi for Arrow. All four attachment defendants answered admitting that they owed Arrow. Appellant moved to transfer to the United States District Court for the Southern District of Mississippi on the ground of diversity of citizenship between Arrow and the ward, William F. Riley, Jr., who was a Natchez resident, even though his conservator, Lloyd F. Love, was a Louisiana resident. After a hearing, the United States District Court remanded the case to the Chancery Court of Adams County. The pleadings transferred to the chancery court included Arrow's Answer which asserted thirteen defenses.

Mississippi Code Annotated section 13-3-57 (1972) provides in part:

> "Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident of this state, or Who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi. Such act or acts shall be deemed equivalent to the appointment by such nonresident of the secretary of state of the State of Mississippi, or his successor or successors in office, to be the true and lawful attorney or agent of such nonresident upon whom all lawful process may be served in any actions or proceedings accrued or accruing from such act or acts, or arising from or growing out of such contract or tort, or as an incident thereto, by any such nonresident or his, their, or its agent, servant or employee.
>
> "The doing of such business, or the engaging in any such work or service in this state, or the making of such contract, or the committing of such tort in this state, Shall be deemed to be a signification of such nonresident's agreement that any process against it or its representative which is so served upon the secretary of state shall be of the same legal force and effect as if served on the nonresident at its principal place of business in the state or country where it is incorporated and according to the law of that state or country." (Emphasis added).

Arrow contends that section 13-3-57 does not apply because the collision took place in Louisiana and the cause of action accrued there. The appellee answers that not only does section 13-3-57 apply but that Mississippi Code Annotated section 79-1-27 (1972) also applies. The appellee contends that section 79-1-27 complements 13-3-57 and that these sections must be read together and harmonized. Section 79-1-27 provides:

> "Any corporation claiming existence under the laws of any other state or of any other country foreign to the United States, Found doing business in this state, *327 shall be subject to suit here to the same extent that corporations of this state are, Whether the cause of action accrued in this state or not." (Emphasis added).

In Vicksburg S. & P. R. Co. v. Forcheimer, 113 Miss. 531, 74 So. 418 (1917), in discussing section 79-1-27 (Chapter 123, Laws 1908), this Court said:

> "The policy of our state is to open the door of our courts to all foreign corporations desiring to sue on any proper cause of action, and to subject foreign corporations to suit here the same as individuals. This is the express declaration of our statute, ..." 113 Miss. at 537-38, 74 So. at 419.

[1] In our opinion section 13-3-57 and 79-1-27 must be read together, construed together and harmonized one with the other. When this is done and full meaning is given to the language used in each section, it is clear to us that 13-3-57 complements 79-1-27 in furthering the state's avowed policy as expressed in Vicksburg S. & P. R. Co. v. Forcheimer, supra, to "open the door" of our Mississippi courts to foreign corporations found doing business in this State to sue and be sued here on all bona fide causes of action.

[2] Besides being a bona fide attachment suit, the chancellor found that Arrow over the years had done and was still doing a substantial amount of business in Mississippi at the time this cause of action accrued. We cannot say that the chancellor was wrong in his finding.

[3] We note that Arrow filed an Answer and asserted thirteen defenses in a full trial of this cause. By entering a general appearance, Arrow waived any asserted defect in the jurisdiction. Maupin v. Dennis, 252 Miss. 496, 175 So.2d 130 (1965); Mladinich v. Kohn, 250 Miss. 138, 164 So.2d 785 (1964).

In McMillan v. Tate, 260 So.2d 832 (Miss.1972) this Court said:

> "While an individual or corporation may appear specially for the purpose of objecting to the jurisdiction of the court over his person, He must do so before filing any other pleadings." 260 So.2d at 833. (Emphasis added).

There is no merit in this assignment of error.

* * * *

Finding no reversible error, we are of the opinion that the decree of the chancery court, adopting the jury's verdict as its own, should be and is hereby affirmed.

AFFIRMED.

Aycock v. Louisiana Aircraft, Inc., 617 F.2d 432 (5th Cir. 1980)

VANCE, Circuit Judge:

This appeal presents a single issue: Whether the district court correctly decided that, under Mississippi's long arm statute, section 13-3-57 of the Mississippi Code Annotated (1972), it lacked in personam jurisdiction over Louisiana Aircraft, Inc. We reverse.

On January 19, 1975, a Piper Navajo owned by Faulkner Concrete Products Company of Hattiesburg, Mississippi, crashed in Mobile County, Alabama. The original plaintiffs in this action were the heirs of John Ashley and John Henry Aycock who died in that crash. They initiated this wrongful death action, section 11-7-13 of the Mississippi Code Annotated (1972), to recover damages from Louisiana Aircraft, which allegedly serviced the aircraft in a negligent manner for Faulkner. Plaintiffs reside in Mississippi, Georgia and Florida. Louisiana Aircraft is a Louisiana Corporation with its principal place of business in Baton Rouge, Louisiana. Although it is not qualified to conduct business in Mississippi, Louisiana Aircraft does business of a "systematic nature" in Mississippi. It is an authorized distributor of Piper Aircraft and parts for the southern two-thirds of Mississippi; it sends its salesmen into Mississippi; its salesmen travel to Mississippi to demonstrate and to sell aircraft to Mississippi residents; it has delivered planes to its customers in Mississippi; it services planes from Mississippi; and it contracts with Mississippi residents. Louisiana Aircraft contends, however, that it had no contacts with Mississippi regarding the sale or maintenance of the Faulkner aircraft. Faulkner took delivery of the plane in Pennsylvania, and, when the plane required servicing, Faulkner brought it to Baton Rouge where Louisiana Aircraft performed the necessary maintenance work. The alleged basis of Louisiana Aircraft's liability is its negligence in servicing the Faulkner aircraft shortly before the accident. This alleged negligence occurred in Louisiana.

The district court concluded that Mississippi law did not authorize an exercise of in personam jurisdiction over Louisiana Aircraft. It reached this conclusion on the basis of its analysis of section 13-3-57, which states that personal jurisdiction may be had over three categories of defendants. *434 The court determined that Louisiana Aircraft did not fit into any of these categories. Specifically, the court held that the contract section of the long arm statute was inapplicable because no contract existed between the plaintiffs and Louisiana Aircraft. The tort section of the long arm statute was also found to be inapplicable. The trial court reasoned that under Mississippi law Louisiana Aircraft did not fit into this category because the alleged tort of negligence did not occur either in whole or in part in Mississippi. Finally, the court held that personal jurisdiction could not be had over Louisiana Aircraft under the doing business section of the long arm statute. Citing Mladinich v. Kohn, 250 Miss. 138, 164 So.2d 785, 790 (1964), the court construed this section to require the plaintiffs to demonstrate three things:

> (1) The non-resident defendant must "purposely do some act or consumate (sic) some transaction" in Mississippi; (2) the plaintiff's (sic) cause of action "must arise from, or be connected with, such act or transaction"; and (3) the assumption of jurisdiction by the forum state's court must "not offend jurisdictional notions of fair plan and substantial justice."

The court denied jurisdiction over Louisiana Aircraft because

> the Defendant has not done some purposeful act in this State from which Plaintiffs' cause of action arises. . . . (e)ven though the Defendant does some business in Mississippi . . .. (emphasis in original).

We do not agree with the district court with respect to its construction of the doing business section of the long arm statute. We do not, therefore, comment on the court's conclusions regarding the other sections. It also is not necessary that we decide whether the district court correctly construed Mississippi cases rendered prior to its decision. Rather we hold that Arrow Food Distributors v. Love, 361 So.2d 324, 326-27 (Miss.1978), which was announced after the district court's ruling, requires us to reverse. In Arrow, the Mississippi supreme court emphasized "the state's avowed policy as expressed in Vicksburg S. & P. R. Co. v. Forcheimer, (113 Miss. 531, 74 So. 418, 419 (1917)), to 'open the door' of our Mississippi courts to foreign corporations found doing business in this state to sue and be sued on all bona fide causes of action." Arrow Food Distributors, Inc. v. Love, 361 So.2d at 327 (emphasis added). The Arrow court further held that section 13-3-57 must be read in conjunction with, and harmonized to, section 79-1-27 of the Mississippi Code Annotated (1972). As a result, personal jurisdiction under a doing business theory was allowed over a Louisiana corporation which did business in Mississippi, even though the tort being sued upon had been committed entirely in Louisiana. Washington v. Norton Mfg., Inc., 588 F.2d 441, 446 (5th Cir. 1979). Contrary to the conclusion reached by the district court, therefore, Arrow holds that the cause of action need not arise from some purposeful act done by

Louisiana Aircraft in Mississippi. In other words, the district court erred in treating the second Mladinich requirement *435 as absolute, i. e., insisting upon a direct link between Louisiana Aircraft's business activity in Mississippi and the plane crash. Arrow teaches us that businessmen who do business in Mississippi or with Mississippi residents will be subject to personal jurisdiction in Mississippi courts at least on causes of action incident to such business, note 2 supra, regardless of whether the action directly arose from a purposeful act done in Mississippi. Personal jurisdiction over Louisiana Aircraft exists in this case because (1) as the district court found, Louisiana Aircraft does business of a systematic and ongoing nature in Mississippi, (2) plaintiffs' cause of action is incident to that business activity, and (3) the assertion of jurisdiction over Louisiana Aircraft does not offend notions of fairness or substantial justice.

REVERSED and REMANDED.

Rittenhouse v. Mabry, 832 F.2d 1380 (5th Cir. 1987)

GARWOOD, Circuit Judge:

The issue on appeal is whether the federal district court sitting in Mississippi had personal jurisdiction over four of the defendants in this diversity medical malpractice case. The court below dismissed the four defendants, appellees Dr. Edward H. Mabry, Memphis Radiological Professional Corporation (MRPC), Dr. Lee L. Wardlaw, and Gastroenterology Consultants, P.C., for lack of personal jurisdiction. Fed.R.Civ.P. 12(b)(2). We affirm as to Dr. Mabry and MRPC, but hold that the district court had in personam jurisdiction over Dr. Wardlaw and Gastroenterology Consultants, P.C.

Facts and Proceedings Below

Plaintiff-appellant Zola W. Rittenhouse is an elderly Mississippi resident who suffered from gastrointestinal problems. In 1982, her Mississippi physician referred her to Dr. Wardlaw, who at the time practiced only in Memphis, Tennessee. During her only visit to Dr. Wardlaw, which occurred at his office in Memphis, he referred Rittenhouse to another Memphis doctor--Dr. Mabry--for further tests and told her that in preparation for those tests she should ingest a particular over-the-counter laxative and also increase her fluid intake. So *1382 far as the record shows, this was Dr. Wardlaw's only contact with Rittenhouse. Rittenhouse returned to her Mississippi home and did as Wardlaw directed. She does not claim any injury caused directly by drinking more fluids and taking the laxative. Gastroenterology Consultants, P.C., (Gastroenterology), is a Tennessee professional corporation of which Dr. Wardlaw is the only member.

The next day, March 17, 1982, Rittenhouse returned to Memphis, this time to the office of MRPC--a Tennessee professional corporation with about twenty doctor-members of whom one was Dr. Mabry. Under his supervision, Rittenhouse was given a barium enema at a Memphis hospital of Methodists Hospitals of Memphis. She claims that the procedure tore her colon, thus necessitating emergency surgery. Rittenhouse continued to feel the effects of this alleged negligence when she returned to Mississippi.

In June 1984, Rittenhouse sued the four appellees, as well as Methodist Hospitals of Memphis, in Mississippi state court. Defendants removed the case to the United States District Court for the Northern District of Mississippi in August 1984 and moved for dismissal on grounds that they were not amenable to in personam jurisdiction under the Mississippi long-arm statute, Miss. Code Ann. § 13-3-57 (1972 & Supp. 1986)--the only statute under which Rittenhouse claimed jurisdiction. On August 6, 1985, the district court, Judge Biggers, granted the motion as to all defendants except Methodist Hospitals (which is not a party to the present appeal). Rittenhouse's motion for reconsideration was denied by the district court on August 23, 1985.

Rittenhouse's motion for reconsideration of the district court's August 6, 1985 order included a request to file an amended complaint alleging jurisdiction under Mississippi's attachment statutes, Miss. Code Ann. § 11- 31-1 et seq. (1972 & Supp.1986), a basis not originally asserted. This aspect of the motion to reconsider was not acknowledged or addressed in the district court's August 23, 1985 order overruling the motion to reconsider. On February 24, 1986, Judge Biggers ordered the case transferred to Judge Davidson. In April 1986, a magistrate denied the motion to amend on grounds that the attachment statutes would not permit jurisdiction on the facts of this case. This order was apparently never appealed to the district court.

Rittenhouse thereafter settled with the Methodist Hospitals, and on August 4, 1986, it was dismissed from the suit by an agreed order. Rittenhouse then perfected her appeal to this Court.

Discussion

[1] If the nonresident defendant protests the exercise of personal jurisdiction, the burden falls on plaintiff to make a prima facie showing that personal jurisdiction exists. E.g., Thompson v. Chrysler Motors Corp., 755 F.2d 1162, 1165 (5th Cir.1985). In a federal diversity case, the federal court must apply the law of the state in which it sits. DeMelo v. Toche Marine, Inc., 711 F.2d 1260, 1264 (5th Cir.1983); Breeland v. Hide-A-Way Lake, Inc., 585 F.2d 716, 719 (5th Cir.1978). If state law provides for the exercise of jurisdiction, then the court must determine whether the federal constitution also permits the judicial reach. Smith v. DeWalt Products Corp., 743 F.2d 277, 278 (5th Cir.1984). We will discuss each defendant-appellee in turn.

I. Mabry and MRPC

Because neither Dr. Mabry nor MRPC is a domiciliary or resident of Mississippi, Rittenhouse had to demonstrate the propriety of personal jurisdiction as to these defendants under Mississippi's long-arm jurisprudence.

The Mississippi Code provides three potentially relevant bases for obtaining jurisdiction in this case: the long-arm statute, section 13-3-57, which itself states three bases for obtaining jurisdiction over a nonresident; a corporate law provision, section 79-1-27, subjecting foreign corporations doing business in Mississippi to suit there; and the attachment provisions, sections 11-*1383 31-1 et seq., providing for jurisdiction over defendants with property in Mississippi.

A. Long-Arm Statute

In pertinent part, section 13-3-57 provides:

> "Any nonresident person ... or any foreign or other corporation not qualified under the constitution and laws of this state as to doing business here, [1] who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or [2] who shall commit a tort in whole or in part in this state against a resident of this state, or [3] who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi."

According to the statute, such acts have the effect of appointing the Mississippi Secretary of State as agent for process "in any actions or proceedings accrued or accruing from such act or acts, or arising from or growing out of such contract or tort, or as an incident thereto...."

No Mississippi case has ever held that this statute is coextensive with federal due process, and so our inquiry must focus on the statute itself. See Smith v. DeWalt Products Corp., 743 F.2d 277, 278 (5th Cir.1984) (refusing to consider due process issue because of lack of jurisdiction under Mississippi's long-arm statute).

1. Contract

[2] The first basis for jurisdiction arises if the nonresident makes a contract to be performed in whole or in part in Mississippi. This contract prong does not apply on the present facts. Suits by patients against physicians are customarily brought as tort actions. This is so because the parties rarely enter formal contracts. The responsibilities of doctor to patient are imposed by law and liability results when the physician's level of care falls short of his legal duty. See, e.g., Hall v. Hilbun, 466 So.2d 856, 866-69 (Miss.1985). Nonetheless, we have identified no Mississippi authority to prevent us from also analyzing the relationship as contractual, at least for purposes of the long-arm statute. See 61 Am. Jur.2d Physicians, Surgeons, and Other Healers § 158, at 290-91 (1981) ("The relationship between a physician and patient may result from an express or implied contract.... [T]he voluntary acceptance of the physician-patient relationship by the affected parties creates a prima facie presumption of a contractual relationship between them."); cf. United Companies Mortgage of Mississippi, Inc. v. Jones, 465 So.2d 1083, 1084 (Miss.1985) (stating that an action for legal malpractice may sound in tort or contract); Hutchinson v. Smith, 417 So.2d 926, 927 (Miss.1982) (same).

In some circumstances, a plaintiff in what is essentially a medical malpractice case might be able to make a prima facie showing of jurisdiction under the contract prong. Rittenhouse has not. She has not identified any act that she, Mabry, or MRPC performed or were to perform in Mississippi pursuant to any explicit or implicit contract. As far as the record reflects, any "contract" was entered into, performed, and, for the sake of argument, breached in Tennessee. That is where the unsuccessful procedure began and continued to its unsuccessful conclusion. The statute requires that the contract be one to be performed in whole or in part in Mississippi. "[M]erely contracting with a resident of the forum state is insufficient ... to subject the nonresident to the forum's *1384 jurisdiction." Colwell Realty Investments v. Triple T Inns, 785 F.2d 1330, 1334 (5th Cir.1986). Accordingly, Mabry and MRPC are not amenable to jurisdiction on a contract theory.

2. Tort

[3] Mabry and MRPC are not amenable under the tort prong for the same reason that prevents the exercise of jurisdiction under the contract prong: the act of alleged negligence was committed and completed in Tennessee. Although Mississippi law does not require that all elements of the tort occur in that state, at least some part of the tort must be committed in Mississippi. See, e.g., Smith v. Temco, 252 So.2d 212, 216 (Miss.1971); Western Chain Co. v. Brownlee, 317 So.2d 418, 421 (Miss.1975); Waffenschmidt v. Mackay, 763 F.2d 711, 720 (5th Cir.1985), cert. denied, 474 U.S. 1056, 106 S.Ct. 794, 88 L.Ed.2d 771 (1986); Breedlove v. Beech Aircraft Corp., 334 F.Supp. 1361, 1365 (D.Miss.1971). The tort is complete when the injury itself occurs, see Smith, 252 So.2d at 216, and so Rittenhouse's continuing pain and discomfort, suffered as a result of the injury after she returned to Mississippi, do not qualify as a tortious occurrence in Mississippi. Cf. Estate of Portnoy v. Cessna Aircraft Co., 730 F.2d 286, 290 (5th Cir.1984) (commenting, in case involving Mississippi's long-arm statute, "[A] tort occurs when and where the actual injury or accident takes place, and not at the place of the economic consequences of that injury.").

3. Doing Business

[4] The final means of asserting jurisdiction under the long-arm statute is by showing that the nonresident defendant conducts "any business or perform[s] any character of work or service" in Mississippi. This basis for long-arm jurisdiction dates back at least to the 1942 Code. See Davis-Wood Lumber Co. v. Ladner, 210 Miss. 863, 50 So.2d 615, 620 (1951). By contrast, the contract and tort prongs did not take effect until 1964. See Mladinich v. Kohn, 250 Miss. 138, 164 So.2d 785, 789 (1984). The court in Mladinich was called upon to construe the pre-1964 statute and adopted a tri-partite test from Tyee Construction Co. v. Dulien Steel Products, Inc., 62 Wash.2d 106, 381 P.2d 245, 245 (1963):

> "(1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation." Mladinich, 164 So.2d at 790.

Seven years later, in Smith v. Temco, 252 So.2d 212 (Miss.1971), the state supreme court held that the Mississippi legislature intended to "broaden the scope of the statute" by the 1964 addition of the tort and contract prongs. Id. at 215. *1385 Nevertheless, the limitations of Mladinich 's tri-partite test retain viability, but "only as to the 'doing business' category of Mississippi's existing long-arm statute." Thompson, 755 F.2d at 1167. See Republic-Transcon Industries, Inc. v. Templeton, 253 Miss. 132, 175 So.2d 185, 189 (1965) (applying three-part test in "doing business" case); Collins v. Truck Equipment Sales, Inc., 231 So.2d 187, 188 (Miss.1970) (same; no causal link between defendant's forum activities and alleged negligence); Ga-Pak Lumber Co. v. Nalley, 337 So.2d 1270, 1274 (Miss.1976) (no jurisdiction because elements of Mladinich test were not met). Thus we turn our attention to the Mladinich test.

There is no evidence in the record that MRPC has ever "purposefully do[ne] some act or consummate[d] some transaction" in Mississippi. MRPC is a professional corporation consisting of about twenty doctors. They confine their respective practices to hospitals in Memphis and the corporation does not solicit patients from Mississippi or advertise there. On these facts, Rittenhouse has not shown that MRPC meets even the first element of the tri-partite test.

Although, as noted below, Mabry has "consummate[d] some transaction" in Mississippi by purchasing property there, this lawsuit is not related to that act and so the Mladinich nexus requirement is not satisfied. Smith v. DeWalt Products Corp., 743 F.2d 277, 279 (5th Cir.1984) (same); see Allen v. Jefferson Lines, Inc., 610 F.Supp. 236, 239 (D.Miss.1985) (no jurisdiction because, inter alia, of lack of nexus between injury and defendant's Mississippi activities). Except for this property purchase, Mabry has no other contact with Mississippi. He is not licensed to practice medicine in Mississippi, does not reside there, advertise his services there, or conduct any business whatever in that state. On this record, we must hold that neither Mabry nor MRPC are amenable to personal jurisdiction under the "doing business" prong of section 13-3-57.

* * * *

*1387 In sum, we hold that Mabry and MRPC are not amenable to jurisdiction under the "doing business" prong of Mississippi's long-arm statute because the relevant facts do not satisfy the Mladinich tri-partite test.

* * * *

[Note: Omitted is that portion of the court's opinion in which the court distinguishes cases from other jurisdictions]

II. Dr. Wardlaw

While the parties have focused their attention on whether Dr. Wardlaw was amenable to the court's jurisdiction under Mississippi's long-arm statute, it nevertheless is apparently undisputed that he was served in person within Mississippi. His corporation, Gastroenterology, was served in like manner--by personal service in Mississippi on him, as the corporation's registered agent.

[8] [9] Under common law, a state can exercise in personam jurisdiction over any party found within its borders. International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945); Restatement (Second) Conflict of Laws § 28 comment a; C. Wright & A. Miller, 4 Federal Practice and Procedure (Civil) § 1064 (1969); R. Casad, Jurisdiction in Civil Actions 2-10 to 2-12 (1983). We thoroughly analyzed this "transient presence" basis for personal jurisdiction in *1389 Amusement Equipment, Inc. v. Mordelt, 779 F.2d 264 (5th Cir.1985), and reaffirmed its constitutionality, despite the speculations of many that the Supreme Court had cast a pall across mere presence as a jurisdictional basis in Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). See Holt Oil & Gas Corp. v. Harvey, 801 F.2d 773, 779 n. 4 (5th Cir.1986) (noting that Amusement "reaffirmed the continuing existence of transient jurisdiction in certain cases in which the defendant is served while physically present within the forum"), cert. denied, --- U.S. ----, 107 S.Ct. 1892, 95 L.Ed.2d 499 (1987).

We have not found any Mississippi case or statute challenging this basis for jurisdiction. We do not regard section 13-3-57 as dispositive because it speaks only to when service on or through the Secretary of State is authorized, while here there was direct personal service. Sections 13-3-33 and 13-3-49, respecting service by direct personal delivery on individuals and corporations (through their designated agents or officers), are not expressly restricted to resident defendants. We believe that Mississippi would recognize this jurisdictional basis if called upon to decide the question. Cf. Munford, Inc. v. Peterson, 368 So.2d 213, 215 (Miss.1979) ("[w]here there is no statute pertaining to a subject, the common law prevails"); American Cas. Co. v. Kincade, 219 Miss. 653, 69 So.2d 820, 824 (1954) (quoting with approval from Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1877), including the passage, "every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory," (95 U.S. at 722, 24 L.Ed. at 568)). Therefore, because Wardlaw was served while in Mississippi, the Mississippi federal court had personal jurisdiction over him.

III. Gastroenterology

The mere fact that Wardlaw, the sole member of his Tennessee professional corporation, Gastroenterology, was personally present in Mississippi when served with process, would not necessarily mean that Gastroenterology itself was so present. "The law of Mississippi is clear that a corporation is a creature of law, with a legal identity separate and distinct from that of its owners." In re Grand Jury Proceedings (Doe), 814 F.2d 190, 192 (5th Cir.1987). Simply because a state acquires jurisdiction over all the stockholders, officers or directors of a corporation does not necessarily mean that the corporation is amenable to the state's jurisdiction. See Restatement (Second) Conflict of Laws § 42 comments d & e (1971). See also R. Weintraub, Commentary on the Conflict of Laws § 4.9 at 146, § 4.21 at 192 (3d ed. 1986). Indeed, it may be questionable whether transient jurisdiction, as commonly understood with respect to individuals, of itself constitutes a discrete basis for jurisdiction over corporations. See Weintraub, supra; Restatement, supra, §§ 42-52. We need not decide that issue, however, as section 79-1-27, discussed earlier, provides a Mississippi state law basis of obtaining jurisdiction over Gastroenterology.

[10] We have found no cases interpreting section 79-1-27 in this context, but its literal terms apply because, quite simply, Gastroenterology was "found doing business" in Mississippi. Gastroenterology is the mirror image of Wardlaw. He is the only member of this professional corporation. Gastroenterology does not conduct business unless Wardlaw does, and when he treats a patient, the corporation by that fact alone is conducting business to precisely the same extent. When Wardlaw was served in Mississippi, he was there to treat and diagnose patients. For these reasons, we hold that Gastroenterology was in Mississippi doing business the day it was served through Wardlaw. This satisfies the requirements of section 79-1-27. We emphasize that Wardlaw was the only member of this corporation and that service was effected on Wardlaw as Gastroenterology's agent while he was directly engaged in the corporation's business.

Gastroenterology correctly points out that it did not begin doing business in Mississippi until well after Rittenhouse sustained her injuries. This is not, however, a relevant consideration under section 79-1-27, which does not distinguish between corporations doing business in Mississippi at *1390 the time the cause of action arose and corporations doing business only at the time of suit. Having found a state law basis for reaching Gastroenterology, we must decide whether the federal constitution prohibits the exercise of that jurisdiction.

When, as in this case, the cause of action does not rise out of a nonresident defendant's contacts with the forum state, those contacts must be "systematic and continuous," so as to afford what is commonly called general jurisdiction. Helicopteros, 466 U.S. 408, 104 S.Ct. at 1872-73, 80 L.Ed.2d 404 (1984); Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952); Petroleum Helicopters, Inc. v. Avco Corp., 804 F.2d 1367, 1369-70 (5th Cir.1986); see International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 159, 90 L.Ed. 95 (1945) (citing cases in which "the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action entirely distinct from those activities"). This is a greater level of activity than required for specific jurisdiction, which is appropriate when there is a sufficient nexus between the nonresident defendant's contacts and the action. E.g., Petroleum Helicopters, 804 F.2d at 1370.

Gastroenterology's Mississippi contacts were sufficient to justify an exercise of general jurisdiction. Starting in 1984, Gastroenterology conducted its affairs in Mississippi every fifth business day. This conduct was calculated rather than fortuitous and regular and continuous rather than sporadic or isolated. Moreover, the business conducted in Mississippi was not only essentially local in character but was performed there through the nerve center, heart, and soul of the corporation, namely, Dr. Wardlaw (who was then licensed to practice in Mississippi), and necessarily amounted, at those times, to almost all the business then being done by the corporation. See Perkins. That distinguishes this case from our recent decisions in Petroleum Helicopters, supra, and Bearry v. Beech Aircraft Corp., 818 F.2d 370 (5th Cir.1987). We conclude that Gastroenterology had adequate Mississippi contacts, of a sufficiently systematic and continuous nature, to meet that requirement for Mississippi's exercise of general jurisdiction over it. See Holt Oil & Gas Corp. v. Harvey, 801 F.2d 773, 779 (5th Cir.1986), cert. denied, --- U.S. ----, 107 S.Ct. 1892, 95 L.Ed.2d 499 (1987).

Beyond minimum contacts, however, we must also determine whether the exercise of general jurisdiction in this case would be fair and reasonable, considering the burden on the defendant, the interests of the forum state, the interests of the plaintiff in obtaining relief, and the intents of the several states. Bearry, 818 F.2d at 377. The interests of the plaintiff, a Mississippi resident both when injured and when suit was filed, and of the forum state, Mississippi, whose citizen was injured and seeks recovery, tend to support the fairness and reasonableness of Mississippi's exercising jurisdiction in this instance. Harvey, 801 F.2d at 780; Thompson v. Chrysler Motors Corp., 755 F.2d 1162, 1173 (5th Cir.1985). Also, the interests of the forum are somewhat enhanced, and the burden on the defendant is somewhat mitigated, by the fact that the defendant's present business in Mississippi is of the same kind as that out of which this suit arose. This factor likewise serves to at least slightly mitigate any invasion of Tennessee's interest which Mississippi's exercise of jurisdiction might entail. The burden on the defendant is likewise mitigated by the factor of geographical proximity. We hold that considerations of fairness and reasonableness do not preclude Mississippi's exercise of general jurisdiction over Gastroenterology in this case. Indeed, in these circumstances, it would be a jarring incongruity to hold that due process and federalism concerns permit jurisdiction over Wardlaw, as we have, but prohibit jurisdiction over his mirror image--Gastroenterology.

Conclusion

Dr. Wardlaw and his corporation were served in Mississippi in accordance with Mississippi law while conducting business there. Dr. Wardlaw is amenable to jurisdiction on a "transient presence" theory; Gastroenterology is amenable under section *1391 79-1-27. We reverse the district court's dismissal of Dr. Wardlaw and Gastroenterology and as to those two defendants only the case is remanded for further proceedings; we affirm the dismissal of Dr. Mabry and MRPC.

AFFIRMED in part; REVERSED in part and REMANDED.

F. Full Faith and Credit

Hertz Corp. v. Domergue, 293 So.2d 463 (Miss. 1974)

SMITH, Justice:

The litigation, out of which the present appeal has evolved, was begun in the Eighth Judicial District Court of Clark County, Nevada, by Hertz Corporation, against appellee, C. R. Domergue, Jr., a resident of Forrest County, Mississippi. The original suit in Nevada arose out of a written contract of bailment, involving the hire from Hertz by Domergue of an automobile, and sought recovery of damages alleged to have been sustained by the leased vehicle while so leased to Domergue.

The action in Nevada was brought and proceeded to final judgment under Nevada Revised Statutes 14.065 (1969). This statute, among other things, provides:

(2) Any person who, in person or through an agent or instrumentality, does any of the acts enumerated in this subsection thereby submits himself and, if an individual, his personal representative to the jurisdiction of the courts of this state as to any cause of action which arises from the doing of such acts:

(a) Transacting any business or negotiating any commercial paper within this state;

(b) Committing a tortious act within this state;

(Emphasis added).

*464 In Certain-Teed Products Corporation v. Second Judicial District Court, 87 Nev. 18, 23, 479 P.2d 781, 784 (1971), the District Court for the Second Judicial District said, among other things:

> The broad language used in the statute (the long arm of NRS 14.065) discloses a legislative intention to reach the outer limits of federal constitutional due process. Such phrases as 'transacting any business within this state,' 'negotiating any commercial paper within this state,' 'committing a tortious act within this state,' are almost without restriction or limitation. The constitutional concern is whether the transaction of business in Nevada produced effects here of such significance that it is not unfair to allow this state to resolve resulting litigation. In short, are traditional notions of fair play and substantial justice offended? . . .

The United States Supreme Court decisions of McGee v. International Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), and Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), when read together, seem to set forth the criteria defining the outer limits of in personam jurisdiction over an out-of-state defendant based upon a single act within the forum state. First, the defendant must purposefully avail himself of the privilege of acting in the forum state or of causing important consequences in that state. Second, the cause of action must arise from the consequences in the forum state of the defendant's activities. Finally, the activities of the defendant or the consequences of those activities must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. . . .

Recitals of the Nevada judgment indicate that evidence was taken.

Process in the Nevada case was personally served upon Domergue in Forrest County, Mississippi, in compliance with the Nevada statute, and this is not questioned, but is conceded. Following such service, Domergue sought the advice of counsel. From the testimony of Domergue and his counsel, both of whom testified in the hearing below, the latter advised Domergue to do nothing about the case, because, 'We investigated the cost of going to Nevada-the airplane fare and the hotel rent and the number of days we would have to be there, so we submitted by mail the proposition of this man being a tourist and this being the result of a tort, and the next thing we heard there was a default judgment taken against him.' Nothing further appears in the record concerning the nature of the 'proposition' submitted by mail, either as to what it was or to whom it was sent.

Thereafter, suit was brought by Hertz against Domergue upon the Nevada judgment in the County Court of Forrest County. A copy of the judgment, duly certified as required in such cases by the Act of Congress, was filed with the declaration.

Upon the hearing in Mississippi, Domergue testified: he did not know the person alleged in the Nevada declaration to have been his agent and who was alleged to have been driving the car at the time it had been damaged, denied that she had been his agent, and disclaimed all responsibility. At the conclusion of the hearing, the Mississippi court entered judgment for Hertz against Domergue for the amount sued for. However, on motion for a new trial, this judgment was set aside and judgment was then entered for Domergue. The circuit court affirmed this judgment and Hertz appeals here.

* * * *

The testimony of Domergue and his counsel shows that Domergue intentionally did not avail himself of the opportunity to question the jurisdiction of the Nevada court and did nothing to defend the suit in Nevada upon its merits. It was only after suit was brought against him upon the judgment that he sought to raise such defenses, including the alleged non-agency of the driver and that he had returned the automobile prior to the time it was alleged to have been damaged.

The United States Constitution provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.
> (Art. IV, s I, Constitution of the United States).

We invite attention to what was said in Roberts v. Worthen Bank & Trust Company, 183 So.2d 811 (Miss.1966), where this Court dealt at length with long arm statutes generally and specifically with a situation which had developed under the 'long arm' statute of the State of Arkansas. In Roberts, this Court held that the activities of Roberts in Arkansas had been sufficient to confer jurisdiction upon the Arkansas court of a case which had arisen out of such activities. Roberts was served with process by mail as required by the Arkansas statute. As here, there was a default by the defendant and a final judgment.

> The appellant, having breached his Arkansas contract, which he elected to execute, cannot now, by crossing a state line, gain asylum in this state and escape the just liabilities of his contractual violations. To hold otherwise would offend our notions of fair play and substantial justice. The decrees rendered against appellant are entitled to full faith and credit in the State of Mississippi.
> (183 So.2d at 817)

The Nevada statute requires actual personal service of process upon the defendant in his state of residence outside of Nevada. Process was so served upon Domergue in Forrest County, Mississippi. No question is raised, either as to the manner of service, nor as to its sufficiency.

The question here is then, whether the alleged acts of Domergue in the execution of the lease contract in Nevada, and the use of the automobile upon the streets and highways of that state, under the provisions of the contract, were sufficient to confer jurisdiction upon the Nevada court, of an action for damages to the leased vehicle alleged to have been incurred while it was being so operated by his alleged agent, upon such streets and highways of Nevada, at a time when such vehicle was under lease to him? If so, may defenses going to the merits of the original action filed by Hertz against Domergue in Nevada, be raised for the first time in the suit filed in Mississippi based upon the final judgment recovered against him in the Nevada court?

[1] [2] The wisdom or unwisdom of the 'long arm statutes,' such as the Nevada *466 statute (Mississippi has a similar statute), is not a question now before the Court. Upon the facts disclosed by the present record, it was too late for Domergue to interpose for the first time in the Mississippi suit on the Nevada judgment, defenses which went to the merits of the Nevada action. The execution of the lease contract and the ensuing use of the leased vehicle on the streets and highways of Nevada were not such a 'single and isolated' contact with that state as to prevent jurisdiction of the Nevada court from attaching in a suit based substantially upon, directly connected with, incidental to, and arising out of these acts. Such jurisdiction did not, of course, attach generally, and was restricted to such causes of action as might have been substantially connected with, incidental to, or which arose out of, Domergue's acts in Nevada.

Determination of what constitutes 'fair play' in such a case involves a number of considerations. Inconvenience and expense to the nonresident, who has departed the forum state after the cause of action against him has accrued, must be weighed against difficulties confronting the resident in proceeding successfully against the departed nonresident, as well as the fact that, ordinarily, necessary records and witnesses will be in the forum state. Moreover, in all likelihood, the lex fori will apply in determining the merits of the litigation. We are unable to say that, in this case, traditional notions of fair play have been offended.

Under the provisions of the United States Constitution the Mississippi trial court was correct in entering judgment for Hertz against Domergue, but erred in setting aside that judgment and in entering judgment for Domergue. It was error on the part of the circuit court to affirm that judgment.

The judgment appealed from, therefore, is reversed and the judgment originally entered for Hertz against Domergue by the county court is reinstated.

Judgment appealed from reversed and judgment originally entered by the County Court for Hertz against Domergue is reinstated.

Galbraith & Dickens Aviation Ins. Agency v. Gulf Coast Aircraft Sales, Inc., 396 So.2d 19 (Miss. 1981)

WALKER, Justice, for the Court:

The issue in this appeal is whether or not a judgment obtained in the District Court for Tulsa, Oklahoma, is entitled to full faith and credit in the Mississippi courts. The County Court of Jackson County ruled that it was not so entitled; the Circuit Court of Jackson County affirmed. Hence, this appeal.

The appellant, Galbraith and Dickens Aviation Insurance Agency, Inc. (hereafter G & D) is a corporation organized and doing business under the laws of the State of Oklahoma. The appellee, Gulf Coast Aircraft Sales, Inc. (hereafter Gulf Coast) is a corporation organized and doing business under the laws of the State of Mississippi. On October 16, 1978, G & D brought suit in the District Court for Tulsa, Oklahoma, against Gulf Coast, seeking to recover earned but unpaid insurance premiums alleged to be due and owing. G & D's petition also contained an allegation that Gulf Coast had "solicited from (G & D) in Tulsa, Oklahoma, certain policies of aviation insurance which policies are numbered RTA 716175 and RTO 720561." The petition also alleged that Gulf Coast had wrongfully stopped payment on a check it mailed to G & D in Tulsa and demanded that Gulf Coast pay the check indebtedness.

Thereafter summons was delivered to Gulf Coast by certified mail. Gulf Coast declined to file an answer and did not otherwise make an appearance in the Oklahoma suit. On December 26, 1978 the Oklahoma court rendered a judgment by default in favor of G & D. In rendering its judgment the Oklahoma court found, inter alia, "that on or about November 22, 1976, defendant solicited from plaintiff in Tulsa, Oklahoma, certain policies of aviation insurance...." (Emphasis added).

Seeking to enforce the Oklahoma judgment, G & D filed its declaration in the County Court of Jackson County, Mississippi. Gulf Coast filed an answer and plea in bar. The plea in bar was premised on an assertion that the Oklahoma court lacked jurisdiction over its person. The County Court held a hearing on the plea, at which hearing Ronnie Hogue, President of Gulf Coast, testified that he had not personally gone to Oklahoma to solicit the insurance upon which the Oklahoma suit was based, but that G & D had come to Mississippi for that purpose. Hogue also testified that Gulf Coast had dealt with G & D for a period of several years, that he had sent numerous checks and had made numerous phone calls to G & D, that he had filed claims with G & D and that G & D had sent him checks, based on said claims, from Oklahoma. Hogue also admitted that he sent the check on which payment was stopped to G & D in Oklahoma.

Hogue was the only witness before the County Court. After both sides rested, that court ruled that the default judgment rendered by the Oklahoma court was obtained by a misrepresentation as to Gulf Coast's solicitation of insurance at the office of G & D, and that Gulf Coast was not present, nor did Hogue, its President, solicit the insurance (on property located in Mississippi) at the office of G & D in Tulsa, Oklahoma.

The County Court sustained the plea in bar, declined to grant judgment on the Oklahoma judgment and dismissed G & D's declaration. An appeal was taken to the Circuit Court which affirmed the County Court.

We do not find it necessary to address the question whether G & D obtained jurisdiction by fraudulently misrepresenting jurisdictional facts to the Oklahoma court. The petition filed in Oklahoma is ambiguous in that regard and so is the recital of jurisdictional facts in the Oklahoma judgment. The allegation in the petition filed in Oklahoma as well as the recital of jurisdictional facts in the judgment, that Gulf Coast had "solicited from (G & D) in Tulsa, Oklahoma, certain policies of aviation insurance ...", could be interpreted to mean simply that G & D had offices in Tulsa, Oklahoma, rather *21 than that the defendant Gulf Coast, through its agent, was personally in Tulsa, Oklahoma, soliciting the policies. However, it is undisputed in the record before us that Gulf Coast did not, through Hogue, solicit the insurance in Tulsa but, to the contrary, G & D solicited the insurance from Gulf Coast in Mississippi and came here for that purpose.

On appeal to this Court, G & D contends the Oklahoma judgment is entitled to full faith and credit under Article IV, Section 1 of the United States Constitution.

[1] It is well settled that a judgment rendered by a court of competent jurisdiction in a sister state is entitled to a presumption of validity as to that court's assumption of jurisdiction, and the burden is on the party attacking the judgment to affirmatively show its invalidity. Marsh v. Luther, 373 So.2d 1039 (Miss.1979).

[2] It is also a general rule that judgments entered in courts of a sister state, when sought to be made the judgment of another state, may only be attacked for lack of jurisdiction, otherwise they must be given the same effect as a domestic judgment. See generally 50 C.J.S. Judgments s 889 (1947); 47 Am.Jur.2d Judgments ss 1214 et seq. (1969).

Other general rules are that the full faith and credit clause applies only where the judgment of a foreign state is founded upon adequate jurisdiction of the parties and subject matter, Restatement 2nd, Conflict of Laws, ss 104, 105, pp. 315-316 (1969); extrinsic evidence is admissible in a collateral attack upon a foreign judgment to show that it is void, Restatement, Judgments, s 12, p. 69 (1942); and a judgment which is void is subject to collateral attack both in the state in which it is rendered and in other states. Id. s 11, p. 65.

In Ratner v. Hensley, 303 So.2d 41 (Fla.App.1974), the principle was stated thusly:

> The courts of this State are bound to give full faith and credit to a judgment of a sister state. This rule is subject to the principle that the courts of this State are not required to recognize the judgment of another state where the judgment was rendered by a court without jurisdiction or where it has been obtained by extrinsic fraud. This principle is in turn subject to the limitation that if the court of the state which rendered the judgment has expressly litigated the jurisdictional question or the matter of fraud that the determination becomes res judicata on this point and is, itself, protected by the full faith and credit clause of the Constitution of the United States, Article IV, s 1. Therefore, a jurisdictional question cannot be relitigated a second time in another state. (Citation omitted). (303 So.2d at 44).

In the present case, the Oklahoma court assumed jurisdiction over the defendant pursuant to its long arm statutes, Oklahoma Statutes Title 12, ss 187, 1701.03 (1971). The Oklahoma courts have interpreted these statutes to extend jurisdiction of Oklahoma courts over non-residents to the outer limits permitted by the due process requirements of the Fourteenth Amendment of the United States Constitution. Jem Engineering & Mfg., Inc. v. Toomer Electrical Co., Inc., 413 F.Supp. 481 (D.C.Okl.1976); Hines v. Clendenning, 465 P.2d 460 (Okl.1970).

A test of that limitation is known as the "minimum contacts" rule and was pronounced by the United States Supreme Court in the case of International Shoe Company v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1942) and McGee v. International Life Insurance Company, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957). In International Shoe Company, the Court said:

> Historically the jurisdiction of courts to render judgment in personam is grounded *22 on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. Pennoyer v. Neff, 95 U.S. 714, 733, 24 L.Ed. 565. But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' (326 U.S. at 316, 66 S.Ct. at 158, 90 L.Ed. at 101-102).

Just what amounts to minimum contacts must be decided by the facts of each individual case. One test of what constitutes "minimum contacts" is whether subjecting a person to in personam jurisdiction under a given set of circumstances offends traditional notions of fair play and substantial justice.

As a general rule, one must look to the law of the state which rendered the judgment sought to be enforced to determine its validity. 47 Am.Jur. Judgments s 1236 (1969).

[3] A study of the Oklahoma cases makes it clear to us that the Oklahoma court, if it had been advised of the jurisdictional facts now before us, would not have asserted in personam jurisdiction over Gulf Coast.

In Architectural Bldg. Components Corp. v. Comfort, 528 P.2d 307 (Okl.1974), the Oklahoma court held that a foreign corporation which ordered goods from a domestic corporation by telephone and by mail was not subject to in personam jurisdiction of the Oklahoma court after receiving service of process under s 187 in a suit brought by the domestic corporation demanding payment for a shipment of a quantity of goods substantially less than that ordered.

Further, in CMI Corp. v. Costello Const. Corp., 454 F.Supp. 497 (D.C.Okl.1978), that court noted that while an out-of-state seller is easily made subject to actions brought on behalf of resident purchasers or users, courts generally have been reluctant to assert jurisdiction over non-resident buyers. See also, Henderson v. University Associates, Inc., 454 F.Supp. 493 (D.C.Okl.1978).

In Vacu-Maid, Inc. v. Covington, 530 P.2d 137 (Okl.App.1974), after discussing the due process question in relation to its "long arm statutes," the Court said:

> ... Oklahoma has made it clear that the Oklahoma long arm statutes were intended to extend the jurisdiction of Oklahoma courts over nonresidents to the outer limits permitted by the due process requirements of the Fourteenth Amendment of the United States Constitution. There is no question but that in personam jurisdiction will be upheld in Oklahoma where the nonresident defendant is a seller who has shipped goods into Oklahoma, even if such shipment was an isolated or infrequent occurrence. See Vemco Plating, Inc. v. Denver Fire Clay Co., (496 P.2d 117 (Okl.)) supra. However, Oklahoma has apparently not interpreted the statute under facts similar to the case at bar, that is, where the defendant is a nonresident buyer.
>
> Other jurisdictions, however, have dealt with the problem with varying results, depending on the facts. In general, the courts have expressed a reluctance to assert jurisdiction over a nonresident buyer. See "Automatic" Sprinkler Corp. v. Seneca Foods Corp., (361) Mass. (441), 280 N.E.2d 423 (1972); Geneva Indus., Inc. v. Copeland Constr. Corp., 312 F.Supp. 186 (N.D.Ill.1970); Oswalt Indus., Inc. v. Gilmore, 297 F.Supp. 307 (D.Kan.1969); Chassis-Trak, Inc. v. Federated Purchaser, Inc., 179 F.Supp. 780 (D.N.J.1960). See also Whittaker Corp. v. United Aircraft Corp., 482 F.2d 1079 (1st Cir. 1973). The reason most often given for this buyer-seller distinction is that the seller is the aggressor or initiator in the forum and by selling his product in the state he receives the benefit and protection of the forum state's laws, and hopefully profits from its business therein. Further, allowing *23 jurisdiction over "passive" buyers would tend to extinguish state lines and also to discourage out-of-state purchasers from dealing with resident sellers. See McQuay, Inc. v. Samuel Schlosberg, Inc., 321 F.Supp. 902 (D.Minn.1971).

In the case sub judice, Gulf Coast was a passive purchaser of insurance from G & D receiving coverage over several years and payments for losses under the policies and, it can be assumed, paying the premiums due until now. This is not enough, under Oklahoma law, to subject a citizen of this State to in personam jurisdiction of the courts of that state.

For the above reasons, the plea in bar to G & D's declaration was properly sustained.

AFFIRMED.

Temtex Products, Inc. v. Brock, 433 So.2d 942 (Miss. 1983)

ROY NOBLE LEE, Justice, for the Court:

Temtex Products, Inc. (Temtex) filed suit in the Circuit Court of Rankin County, Mississippi, Honorable Henry Palmer, Special Judge, presiding, against Cleve B. Brock, III and Mrs. Libby Forbes, to enforce a default judgment rendered February 27, 1980, against them and Hearth and Home Furnishings, Inc. (Hearth & Home), a Mississippi corporation, in the sum of $39,126.17 by the Second Circuit Court of Davidson County, Tennessee. The lower court entered judgment in favor of Temtex, against Cleve B. Brock, III, for the judgment amount, and in favor of Mrs. Libby Forbes that the Tennessee judgment was not entitled to full faith and credit as to her. Temtex has appealed and Brock has cross-appealed.

Temtex is a Texas corporation with its principal offices located in Nashville, Tennessee. The corporation manufactures prefabricated fireplaces. Prior to February 27, 1980, Hearth & Home, with offices located in Pearl, Mississippi, and at the Jackson Metrocenter Mall, was engaged in the business of selling and installing fireplaces and stone facings. Brock owned twenty percent (20%) of the corporation stock and served as president and director. His sister, Mrs. Libby Forbes, owned sixty percent (60%) of the stock and served as secretary-treasurer and director, although she did not take an active part in the business. The corporation has been adjudged bankrupt and is no longer in existence.

In the latter part of 1975, a salesman from Temtex began calling upon Brock, who was operating the corporation, and in early 1976, after several contacts by Temtex with Hearth & Home, the latter corporation decided to carry the line of products offered for sale by Temtex, and Brock gave it an order. Those transactions occurred in *944 the Pearl, Mississippi, office of Hearth & Home. Several months later, Temtex invited Brock to visit the Temtex company at Nashville for the purpose of inspecting the factory and meeting other distributors. This was Brock's only visit to Tennessee and while there, no goods were purchased, no contracts or personal guarantees for credit were executed, and no financing was discussed. At that time, the parties operated on a 30-day open account basis.

The suit in Davidson County, Tennessee, after stating the claim of Temtex against Hearth & Home, charged that Brock and Mrs. Forbes, the individual defendants, negotiated with Temtex for services to be rendered to Hearth & Home; that, in order to induce Temtex to render such services, and to extend credit to Hearth & Home, the defendants entered into a general and unlimited guarantee to pay any indebtedness incurred by Hearth & Home; and that the individual defendants were liable for the amount of $31,882.63 owed by Hearth & Home.

I.

[1] Did the evidence establish in personam jurisdiction over Mrs. Libby Forbes in the State of Tennessee under the long-arm statute of that state?

The pertinent parts of the long-arm statute, Tenn.Code Ann. § 20-2-214 (1980), which applies to this case, follow:

> (a) Persons who are nonresidents of Tennessee and residents of Tennessee who are outside the state and cannot be personally served with process within the state are subject to the jurisdiction of the courts of this state as to any action or claim for relief arising from:
>
> * * *
>
> (4) Entering into any contract of insurance, indemnity, or guaranty covering any person, property, or risk located within this state at the time of contracting;
>
> (5) Entering into a contract for services to be rendered or for materials to be furnished in this state; ...

The uncontradicted evidence reflects that Mrs. Forbes never signed the guaranty agreement and had never seen the instrument; that the signature was not hers; that she had never discussed such an agreement with Temtex or its representatives; and that she had never been in the State of Tennessee.

In Galbraith and Dickens Aviation Ins. v. Gulf Coast Aircraft, 396 So.2d 19, 21 (Miss.1981), which involved the Oklahoma long-arm statute, this Court said:

> It is well settled that a judgment rendered by a court of competent jurisdiction in a sister state is entitled to a presumption of validity as to that court's assumption of jurisdiction, and the burden is on the party attacking the judgment to affirmatively show its invalidity. Marsh v. Luther, 373 So.2d 1039 (Miss.1979).
>
> It is also a general rule that judgments entered in courts of a sister state, when sought to be made the judgment of another state, may only be attacked for lack of jurisdiction, otherwise they must be given the same effect as a domestic judgment. See generally 50 C.J.S. Judgments § 889 (1947); 47 Am.Jur.2d Judgments §§ 1214 et seq. (1969).

See also International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and other cases following International Shoe.

The Tennessee judgment was made a part of the record in the present case, but the record before the Tennessee court, together with the default order are not a part of the record here, and we do not have the benefit of the Tennessee court's finding on jurisdiction.

We are of the opinion that the appellant failed to establish that the Tennessee judgment was entitled to full faith and credit as to Mrs. Libby Forbes under the laws of the United States and the State of Mississippi, and the lower court judgment as to her is affirmed.

* * * *

[Note: The remaining opinion as to Brock's liability is omitted.]

AFFIRMED ON DIRECT AND CROSS-APPEALS.

JURISDICTION OVER THE THING

A. Statutory Provisions

§ 11-31-1. Jurisdiction; debtors.

The chancery court shall have jurisdiction of attachment suits based upon demands founded upon any indebtedness, whether the same be legal or equitable, or for the recovery of damages for the breach of any contract, express or implied, or arising ex delicto against any nonresident, absent or absconding debtor, who has lands and tenements within this state, or against any such debtor and persons in this state who have in their hands effects of, or are indebted to, such nonresident, absent or absconding debtor. The court shall give a decree in personam against such nonresident, absent or absconding debtor if summons has been personally served upon him, or if he has entered an appearance.

Sources: Codes, 1880, § 1832; 1892, § 486; Laws, 1906, § 536; Hemingway's 1917, § 293; Laws, 1930, § 173; Laws, 1942, § 2729.

§ 11-31-2. Application for order of attachment; determination.

(1) Upon the filing of the bill of complaint, the complainant may apply for an order of attachment by presenting to the chancellor the bill, and an affidavit which shall include the following:

(a) A statement that the action is one described in Section 11-31-1, and is brought against a defendant described in said Section 11-31-1.

(b) A detailed statement of the facts and grounds which entitle the complainant to an order of attachment including a statement of the specific reasons why the complainant's ability to recover the amount of his claim may be endangered or impeded if the order of attachment is not issued.

(c) A statement of the amount the plaintiff seeks to recover.

(d) A statement that the complainant has no information or belief that the claim is discharged in a proceeding under the Federal Bankruptcy Act (11 U.S.C., Section 1, et seq.), or that the prosecution is stayed in a proceeding under the Federal Bankruptcy Act.

(e) A description of the property to be attached under the writ of attachment and a statement that the complainant is informed and believes that such property is not exempt from attachment or seizure under Section 85-3-1.

(f) A listing of other persons known to the complainant who may have an interest in the property sought to be attached together with a description of such interest.

(2) The chancellor shall examine the affidavit and bill of complaint and may, in term time or in vacation, issue an order of attachment with respect to such property under the following conditions:

(a) The chancellor finds that unless the order of attachment is issued, the complainant's ability to recover the amount of his claim may be significantly impaired or impeded.

(b) The chancellor finds that the affidavit establishes a prima facie case demonstrating the complainant's right to recover on his claim against the defendant.

(c) The complainant gives security in an amount satisfactory to the chancellor to abide further orders of the court and to protect the defendant from injury should the action of attachment be judicially determined to have been wrongfully brought.

(3) (a) If such an order of attachment is issued, the defendant shall, upon request, be entitled to an immediate post-seizure hearing to seek dissolution of the order of attachment. Such post-seizure hearing shall have precedence on the docket of the chancery court over all other matters except similar matters previously filed. At such hearing, the chancellor shall order dissolution of the order of attachment unless the complainant establishes by satisfactory proof the grounds upon which the order was issued, including the existence of a claim as described in Section 11-31-1, and the impairment or impediment which a failure to continue the attachment could bring to the complainant's ability to recover the amount of such debt. An appearance by the defendant at the post-seizure hearing shall be considered a special appearance and not a general appearance for purposes of personal jurisdiction over the defendant.

(b) In the alternative, a debtor may regain immediate possession of the property attached by giving security satisfactory to the chancellor in an amount equal to one hundred twenty-five percent (125%) of the value of the property attached or one hundred twenty-five percent (125%) of the amount of the claim, whichever is less.

(c) If the chancellor should determine that the attachment was not brought in good faith, then the chancellor in his discretion may award actual damages (including reasonable attorney's fees) to the defendant.

Sources: Laws, 1980, ch. 467, § 1, eff from and after July 1, 1980.

§ 11-31-3. Attaching property or indebtedness.

When a bill shall be filed for an attachment of the effects of a nonresident, absent or absconding debtor in the hands of persons in this state, or of the indebtedness of persons in this state to such nonresident, absent or absconding debtor, it shall be sufficient to bind such effects or indebtedness that the order of attachment together with a copy of the bill of complaint and affidavit be served upon the persons possessing such effects or owing such indebtedness.

Sources: Codes, 1880, § 1898; 1892, § 487; Laws, 1906, § 537; Hemingway's 1917, § 294; Laws, 1930, § 174; Laws, 1942, § 2730; Laws, 1980, ch. 467, § 2, eff from and after July 1, 1980.

§ 11-31-5. Levy on land.

If the land of the nonresident, absent or absconding debtor be the subject of such suit, and an order of attachment be issued, the order shall be levied by the sheriff or other officer as such writs of law are required to be levied on land, and shall have like effect.

Sources: Codes, 1880, § 1889; 1892, § 488; Laws, 1906, § 538; Hemingway's 1917, § 295; Laws, 1930, § 175; Laws, 1942, § 2731; Laws, 1980, ch. 467, § 3, eff from and after July 1, 1980.

§ 11-31-9. Publication for appearance of defendant.

The nonresident, absent or absconding debtor shall be made a party to such suit by publication of summons as in other cases, and may appear and plead, demur or answer to the bill without giving security. If such debtor fails to appear, the court shall have power to make any necessary orders to restrain the defendants within this state from paying, conveying away or secreting the debts by them owing, or the effects in their hands belonging to, the nonresident, absent or absconding defendant, and may order such debts to be paid or such effects to be delivered to the complainant on his giving security for the return thereof in such manner as the court may direct.

Sources: Codes, 1857, ch. 62, art. 61; 1880, § 1901; 1892, § 490; Laws, 1906, § 540; Hemingway's 1917, § 297; Laws, 1930, § 177; Laws, 1942, § 2733; Laws, 1980, ch. 467, § 4, eff from and after July 1, 1980.

§ 11-31-11. Complainant to give security after decree rendered.

If a decree be rendered in such case without the appearance of the absent debtor, the court, before any proceedings to satisfy said decree, shall require the complainant to give security for abiding such further orders as may be made, for restoring of the estate or effects to the absent defendant, on his appearing and answering the bill within two years; and if the complainant shall not give such security, the effects shall remain under the direction of the court, in the hands of a receiver, or otherwise, for such time, and shall then be disposed of as the court may direct.

Sources: Codes, 1857, ch. 62, art. 62; 1880, § 1902; 1892, § 491; Laws, 1906, § 541; Hemingway's 1917, § 298; Laws, 1930, § 178; Laws, 1942, § 2734.

Adm'rs **of the Tulane Educational Fund v. Cooley, 462 So.2d 696 (Miss. 1984)**

ROBERTSON, Justice, for the Court:

I.

This interlocutory appeal presents the question whether New Orleans-based Tulane University may, consistent with the Constitution of the United States, be made amenable to valid and enforceable adjudications of its important rights and duties in the courts of the State of Mississippi.

Plaintiff Duane Cooley seeks recovery for the alleged wrongful death of his wife, Judy Billingsly Cooley. He has brought an attachment action in the Chancery Court of Forrest County under Miss. Code Ann. § 11-31-1, et seq. (Supp.1984), a quasi in rem proceeding, if you will. Pursuant thereto, there have been seized and brought within the power of the Court the proceeds of debts owed to Tulane by Mississippi parties having an aggregate value of $147,677.50. Cooley seeks no in personam judgment against Tulane nor any other recovery of and from Tulane beyond the debts attached.

Tulane strenuously argues that the Chancery Court's efforts to subject its property to jurisdiction are inconsistent with Tulane's rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States, upon which there has been recent authoritative elaboration in Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) and Rush v. Savchuk, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980).

For the reasons set forth below, we find Tulane's arguments without merit and affirm.

II

A.

On June 2, 1981, Duane Cooley as personal representative of Judy Billingsley Cooley, deceased, commenced this wrongful death action by filing his complaint in the Chancery Court of Forrest County, Mississippi. Cooley has since amended his complaint. Defendants below were Hattiesburg Clinic, P.A., a professional association doing business in Forrest County, Mississippi, and The Administrators of the Tulane Educational Fund, A Louisiana Corporation (herein "Tulane University" or sometimes "Tulane"). Tulane is the sole Appellant here.

Subject matter jurisdiction has been predicated upon the Chancery Attachment Statute, Miss. Code Ann. §§ 11-31-1, et seq. (Supp.1984), pursuant to which Cooley demanded that the court attach and bring before it certain effects of, or indebtednesses owed to, Tulane University said to be located in Mississippi.

Two such indebtednesses of the nonresident defendant Tulane University have in fact been seized and brought within the control of the court. These are:

(A) The sum of $48,182.00 owed to Tulane University arising out of an intercollegiate athletic contest between the football teams of the University of Southern Mississippi and Tulane University. The record reflects that the game was played in Hattiesburg, Mississippi, and that the sums due and payable to Tulane were in the hands of the University of Southern Mississippi when the attachment process issuing out of the Chancery Court was served and thereby effectively bound such sums to await the outcome of this action.

(B) The sum of $99,495.50 which is owed to Tulane University by virtue of unpaid for medical care, treatment and services rendered to the late Judy Cooley by Tulane Hospital and Medical Center. These sums were seized while in the hands of Gibson's Storeowners Association Employer Benefit Trust, hereinafter "Gibson's Trust". Judy Cooley during her lifetime was an employee of Gibson's Distributors of Hattiesburg, Inc., hereinafter "Gibson's Hattiesburg", a Mississippi corporation. As such, she was covered by a health insurance policy procured by Gibson's Trust. The care and *699 treatment and hospitalization services rendered to Judy Cooley were covered by this health insurance plan. Pursuant to that policy, Gibson's Trust owed $99,495.50 to Tulane and, before said sums were paid, process of attachment issuing out of the Chancery Court of Forrest County was served upon Gibson's Trust subjecting said sums to the jurisdiction of the Court during the pendency of this action.

All attachment defendants, having paid into the registry of the Court the moneys owed Tulane, have been finally dismissed from this action.

B.

The facts relevant to the issues tendered on this interlocutory appeal have to do with Tulane's activities in, and contacts with, the State of Mississippi. Many of these facts we glean from the record. Others are within our judicial knowledge.

[1] [2] This Court, of course, may take judicial notice of adjudicative facts at any stage of the proceedings, whether requested to do so by a party or not. Moore v. Grillis, 205 Miss. 865, 39 So.2d 505 (1949). A judicially noticed fact must be one not subject to reasonable dispute in that it is either (a) generally known within this state or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

To begin with, indebtednesses to the aggregate tune of some $147,677.50 were found and seized in Forrest County. These valuable properties owned by Tulane certainly represent contacts with Mississippi. There is much more.

Tulane University is a private, non-sectarian university comprising 11 academic divisions with close to 10,000 students. The university has been duly organized and exists as an educational corporation under the laws of the State of Louisiana. As all know, Tulane's principal place of business is in New Orleans, Louisiana.

As the crow flies, Tulane is less than a hundred miles from parts of southern and southwestern Mississippi. It is within the actual as well as judicial knowledge of the members of this Court that, although the nerve center of Tulane's educational and service programs is in Louisiana, the university has a variety of contacts with Mississippi and engages in a plethora of activities in and related to Mississippi.

Most basic is the educational function of the university. Tulane recruits Mississippi students. Because of its excellent reputation in all academic areas, Tulane is successful in this endeavor. It offers scholarships to Mississippi citizens incident to their pursuit of the educational opportunities available at Tulane.

Tulane engages in substantial continuing education programs. The different colleges and schools of the university invite citizens of this state to participate in seminars and continuing education programs. Fees are charged those taking part in these programs. Tulane students engage in a variety of intercollegiate competitions with students from Mississippi's colleges and universities. Most familiar are the athletic contests, wherein almost annually Tulane competes with the University of Southern Mississippi, Mississippi State University, the University of Mississippi and other Mississippi schools in football, basketball and other sports. These competitions take place in accordance with contracts often made a year or more in advance and involving guarantees of and entitlements to substantial sums of money. Many of these contests take place within the State of Mississippi.

Tulane is a member of an intercollegiate athletic conference, the Metro Athletic Conference, which also has as one of its members *700 the University of Southern Mississippi.

Beyond athletics, there are any number of other forms of intercollegiate competitions between Tulane and Mississippi schools. There are Tulane faculty members who participate in a variety of educational programs, seminars and conferences within the State of Mississippi. Conversely, Mississippians are invited to and participate in comparable programs at Tulane.

Perhaps most important of all, we take judicial notice that Tulane has substantial numbers of alumni and friends in this state, primarily on the Mississippi Gulf Coast and in south and southwest Mississippi. Tulane regularly solicits and receives financial contributions and other forms of gifts from these Mississippians, and derives great benefit therefrom.

One of the educational and service functions performed by Tulane has been the operation of a School of Medicine, in connection with which Tulane operates the Tulane Hospital and Medical Center.

The Tulane School of Medicine operates a program whereby senior medical students and residents may receive on the job training with Mississippi doctors and hospitals. Some Tulane medical students or residents are trained at the

University of Mississippi Hospital, Jackson, Mississippi, Veterans Administration Medical Center, Biloxi, Mississippi; and Keesler Air Force Base Hospital, Biloxi, Mississippi.

Tulane faculty members provide lectures at Biloxi hospitals on a monthly basis, and ophthalmology residents rotate on a short term basis through the VA Hospital in Biloxi. In addition, the record reflects that Tulane faculty members conduct medical seminars in Meridian, Mississippi.

Tulane conducts continuing medical education programs to which it invites physicians, surgeons and others from all fifty states, including Mississippi. There are some 63 physicians who are members of the staff at Tulane Medical Center who reside in Mississippi.

The Tulane Hospital provides care and treatment for patients who reside in Mississippi. One such patient was Judy Cooley who was treated originally at the Hattiesburg, Mississippi Clinic and on November 12, 1980, was moved to and admitted to the hospital at the Tulane Medical Center where, Plaintiff alleges, she failed to receive the requisite quality of care and consequently died.

In 1976 Tulane opened the Tulane Medical Center Hospital. It represents this 300-bed general hospital to feature the latest in diagnostic and treatment facilities for the patients of the Tulane School of Medicine. Private, semi-private and private with sitting room accommodations are provided.

Plaintiff attempted through discovery to develop the extent to which Tulane receives and accepts patients from the State of Mississippi, but Tulane was successful in concealing this information [FN3].

> FN3. Within our knowledge are the facts of T.C.L., Inc. v. Lacoste, 431 So.2d 918, 920 (Miss.1983) wherein a Mississippi patient died while a patient at Tulane Medical Center in 1979.

C.

On August 4, 1982, Tulane moved to dismiss Cooley's complaint. The motion urged, inter alia, that Tulane had never qualified to do business within this state; had never done business in Mississippi; has never solicited business in nor placed any advertisement in any publication printed in Mississippi; has never maintained any office, bank account, mailing address, telephone listing, or other business facility in Mississippi; and, in general, had insufficient contacts with Mississippi, to render it constitutionally amenable to judicial jurisdiction [FN4].

> FN4. The term "judicial jurisdiction" is an umbrella term that includes the familiar in personam jurisdiction, in rem jurisdiction, and quasi in rem jurisdiction. Penrod Drilling Co. v. Bounds, 433 So.2d 916, 925 fn. 3 (Miss.1983) (Robertson, J., concurring).

On October 7, 1982, the Chancery Court of Forrest County issued an order overruling Tulane's motion to dismiss. The Chancery *701 Court found that Tulane has been engaged in continuous and systematic activity within the State of Mississippi. Specifically the chancellor found these activities to be: (1) That Tulane has an affiliation with Mississippi hospitals where several courses are taught in Mississippi to Tulane students; (2) Tulane advertises that clinical courses are taught in Mississippi; (3) Tulane regularly engages in athletic contests with Mississippi schools from which it derives substantial revenue; (4) Tulane has purposefully availed itself of the privileges of conducting activities within this state; (5) even if Tulane had no contacts, ties or relations with Mississippi, the money attached that was in the hands of Gibson's Trust and Gibson's Hattiesburg was sufficiently related to the cause of action to sustain quasi in rem jurisdiction of this case against Tulane; (6) the State of Mississippi has a substantial interest in providing a forum to its citizens harmed by negligent acts of others; (7) the basic equities of this case dictate that the exercise of jurisdiction by the Forrest County Chancery Court is not unfair or unreasonable; (8) requiring the plaintiff to pursue separate causes of action, one in Louisiana and one in Mississippi, against these two alleged joint tortfeasors would serve neither judicial economy nor basic fairness.

On October 16, 1982, the Chancery Court of Forrest County issued an order granting Tulane an interlocutory appeal to this Court.

III.

[3] Tulane first challenges the Chancery Court's determination that it has subject matter jurisdiction of this civil action. Tulane reasons that its conduct upon which Cooley's claim of liability has been predicated occurred in Louisiana; therefore, Louisiana substantive law in the form of the Louisiana Medical Malpractice Act, La.Rev.Stat. 40:1299.41, et seq. controls the rights and duties of the parties. Therefore, pursuant to the terms of the Louisiana act, this claim does not lie within the subject matter jurisdiction of the Chancery Court of Forrest County, Mississippi until the claim has been submitted to a medical review panel.

Tulane's thesis belies a fundamental misunderstanding of the concept of subject matter jurisdiction. Simply put, Louisiana has no authority to enact legislation which would affect the subject matter jurisdiction of Mississippi courts.

Cooley invoked the subject matter jurisdiction created by our familiar chancery attachment statutes. Miss.Code Ann. §§ 11-31-1, et seq. (Supp.1984). His complaint alleged that Tulane was a non-resident debtor within the meaning of Section 11-31-1. The complaint further alleged that there are persons in this state, to-wit: the University of Southern Mississippi and The Gibson's Trust, which hold effects of or were indebted to Tulane. The fact of the existence in Forrest County, Mississippi, of these effects and indebtednesses has been established and, as previously noted, they have been seized and paid into the registry of the Chancery Court. The subject matter jurisdiction of the Chancery Court has thereby been established. Crescent Plywood Co. v. Lawrence, 305 So.2d 343, 346-347 (Miss.1974); see also, Penrod Drilling Co. v. Bounds, 433 So.2d 916, 925 (Miss.1983).

The point Tulane makes regarding the applicability of the Louisiana Malpractice Act concerns the choice-of-law issue that must ultimately be confronted by the trial court but which we regard as premature at this time.

IV.

A.

The dispositive question presented on this interlocutory appeal concerns the federal constitutional amenability of Tulane University to the adjudication of its important rights in the courts of Mississippi.

In former days the federal constitutional amenability question would have turned solely on the matter of state power over the res. If the non-resident defendant owned property in the forum state and if *702 that property had been seized in compliance with the law of the state, the courts of the state were thought to have full authority to make a valid and enforceable adjudication regarding the non-resident's rights in the res. Harris v. Balk, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1905); Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1878); O.B. Gough v. Mabsco, Inc., 335 So.2d 910 (Miss.1976).

This power theory has now been "undermined", Shaffer v. Heitner, 433 U.S. 186, 211, 97 S.Ct. 2569, 53 L.Ed.2d 683, 702 (1977), so that something more than a seized res must be shown. Established constitutional doctrine now provides that non-residents such as Tulane, owning property in a foreign state, may not be subjected to adjudications of their rights in that property by the courts of the state in which the property is found, unless they have such contacts with the forum state as would satisfy the requirements of International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and progeny. This right--"immunity" might be a more accurate term-- is secured to Tulane by the due process clause of the Fourteenth Amendment to the Constitution of the United States.

[4] The familiar and oft quoted general principle is that a nonresident may not be subjected to a litigation in a foreign jurisdiction unless he has "certain minimum contacts with it such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice". International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95, 102 (1945). This fairness test, in addition to the old power test, must be met and passed before our courts have the authority to enter a valid and binding adjudication with respect to Tulane's rights in the $147,677.50 seized via this quasi in rem proceeding. Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977); Rush v. Savchuck, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980).

There is no set formulation for resolution of this fairness inquiry. Shaffer repeatedly suggests that we must focus our attention upon "the relationship among the defendant, the forum, and the litigation." 433 U.S. at 204, 207, 97 S.Ct. at 2579, 2581, 53 L.Ed.2d at 698, 700. This Shaffer suggestion enables us to dispatch two red herrings--one offered by Cooley, the other by Tulane.

First, notice that the tripartite relationship Shaffer would have us focus upon does not include the plaintiff. Nothing in Shaffer authorizes us to consider Cooley's interest, wholly legitimate in other contexts, in securing a forum, nor are we concerned with any Mississippi interest in providing a forum for its citizens when asserting claims against non-residents. Cooley could sue Tulane in Louisiana, whose courts are no less capable of the fair administration of justice than are ours. Cooley has no interest in securing a convenient forum, nor has this state any interest in providing Cooley a forum, which may overcome Tulane's due process right/immunity articulated in Shaffer [FN5]. This principle was settled in Kulko v. California Superior Court, 436 U.S. 84, 98-100, 98 S.Ct. 1690, 1700-01, 56 L.Ed.2d 132, 145-146 (1978) which made it clear that the points argued, though highly relevant on choice-of-law and venue issues, are irrelevant to our judicial jurisdictional inquiry. See Shaffer v. Heitner, 433 U.S. 186, 215, 97 S.Ct. 2569, 2585, 53 L.Ed.2d 683, 704-705 (1977); Hanson v. Denckla, 357 U.S. 235, 254, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283, 1298 (1958)

> FN5. For the reasons stated above, the Chancellor erred as a matter of law when, in his Order of October 7, 1982, he relied on Mississippi's interest in providing a forum to its citizens harmed by negligent acts of non-residents. As will be explained below, this error is not fatal.

Cooley puts the point another way. He notes that Hattiesburg Clinic, P.A., is also a Defendant and argues that he would be inconvenienced in the extreme if he were prevented from suing the two Defendants together in the same forum. The argument glosses over the fact that we are here *703 concerned with rights vested in Tulane. Those rights may not be cut down because Cooley has joined a Mississippi Defendant [FN6]. The presence of Hattiesburg Clinic, P.A., in the case is relevant only insofar as its relationship with Tulane may supply "contacts" to be considered in passing on Tulane's due process claim. Tulane invokes a right. That we have eschewed any mechanical formulation of that right in no way means we may look to the interests of the plaintiff or the forum in determining its contours and whether it has been offended. See Read v. State, 430 So.2d 832, 840 (Miss.1983).

> FN6. For the reasons stated above, the Chancellor erred as a matter of law when he premised the order appealed from in part on the notion that requiring Cooley to pursue separate actions would serve neither judicial economy nor basic fairness. Because we here adjudicate a claim of right or immunity constitutionally vested in Tulane, these factors--however important they may be in other contexts--simply may not be invoked to subject to jurisdiction one lacking International Shoe-style minimum contacts. This error, too, is not fatal.

Conversely, a significant omission from Shaffer's three part relational inquiry is any requirement of a direct relationship between the res seized and the litigation. Shaffer makes clear that there are some cases where the presence in the forum state of the non-resident's property related to the litigation will in and of itself suffice to satisfy the minimum contacts standard. Shaffer v. Heitner, 433 U.S. at 207-208, 53 L.Ed.2d at 700. The converse, however, does not follow.

[5] That the allegedly tortious conduct of Tulane occurred in New Orleans, Louisiana, and not in Mississippi--a fact heavily relied upon by Tulane--is per se of no constitutional consequence [FN7]. Similarly, the fact that there is no substantial connection between the property owned by Tulane in this state and seized by the process of the court and the operative events giving rise to Cooley's claim of liability on the part of Tulane is per se of no constitutional consequence. Perkins v. Benquet Consolidated Mining Co., 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952); Aycock v. Louisiana Aircraft, Inc., 617 F.2d 432 (5th Cir.1980); Braman v. Mary Hitchcock Memorial Hospital, 631 F.2d 6, 8 (2d Cir.1980). Cf. Arrow Food Distributors, Inc. v. Love, 361 So.2d 324 (Miss.1978); see also Penrod Drilling Co. v. Bounds, 433 So.2d 916 (Miss.1983).

> FN7. The Chancellor erred as a matter of law when he held that the insurance proceeds attached in the hands of Gibson's Trust were sufficiently related to the cause of action to sustain quasi in rem jurisdiction. Rush v. Savchuk, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980). That "property" in no way resulted from activities of Tulane in Mississippi or contacts of Tulane with this state. It was procured by Judy Cooley's employer for her benefit wholly apart from anything Tulane has ever done in this state. See Shaffer v. Heitner, 433 U.S. 186, 207-208, 97 S.Ct. 2569, 2581, 53 L.Ed.2d 683, 700 (1977). Again, the error is not fatal.

Tulane may be subject to an adjudication of its rights in the property seized only if, in addition to the seizure of that property, Tulane has contacts with Mississippi such that maintenance of this suit does not offend traditional notions of fair play and substantial justice. Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977).

In recent years the fairness test of International Shoe has been considerably refined. Although we continue to speak of minimum contacts, we are careful to exclude "fortuitous" contacts and circumstances. If the non-resident defendant's contacts are fortuitous, not deliberate, de minimis, not substantial, they do not give rise to judicial jurisdiction. Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295, 100 S.Ct. 559, 566, 62 L.Ed.2d 490, 500 (1980).

The U.S. Court of Appeals for the Eighth Circuit, in Iowa Electric Light and Power Company v. Atlas Corporation, 603 F.2d 1301 (8th Cir.1979) has aptly added a caveat:

> [T]he minimum contacts relied upon must be between the defendant and the forum state, not simply between the defendant and a resident of the forum state. 603 F.2d at 1303 fn. 3.

*704 Of course, the principal manner in which a non-resident may have contacts with the forum state is via contacts with its citizens. Still, the distinction noted in Iowa Electric is important.

In recent years two descriptions of the fairness test have achieved a currency and usefulness: the purposeful activities test and the forseeability test. In Hansen v. Denckla, supra, the Supreme Court has said that it is fair that a non-resident defendant be subject to an adjudication of his important rights and duties in the forum state where that defendant has "purposefully availed itself of the privilege of conducting activities within the forum state". 357 U.S. at 253. Worldwide Volkswagen Corp. v. Woodson, 444 U.S. at 297, 100 S.Ct. at 567, 62 L.Ed.2d at 501. These "purposeful activities" should be kept distinct and separate from the "unilateral activity of those who claim some relationship with a nonresident defendant [by virtue of which they] cannot satisfy the requirement of contact with the forum state". Hanson v. Denckla, 357 U.S. at 253; 78 S.Ct. at 1239; Benjamin v. Western Boat Building Corporation, 472 F.2d 723, 730 (5th Cir.1973).

The forseeability test derives from Worldwide Volkswagen where the Supreme Court stated that the

> "forseeability that is relevant to due process analysis ... is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there. 444 U.S. at 297, 100 S.Ct. at 567, 60 L.Ed.2d at 501.

[6] In sum, we find it firmly established that no state's court may make valid and enforceable adjudications of the important rights of non-residents if such would be inconsistent with the non-resident defendant's due process rights as articulated in International Shoe and progeny. This is so whether the plaintiff proceeds in personam against the non-resident or, as here, via a quasi in rem attachment action. Since Shaffer the test is the same. Before any court of this state may subject Tulane to any form of judicial jurisdiction--in personam or quasi in rem--the International Shoe originated minimum contacts/purposeful activities/forseeability/basic fairness formulation of due process must be inquired into and Tulane's rights and immunities wholly respected.

B.

We turn now to the facts of this case and the examination of those facts under the legal principles just discussed.

To begin with, Tulane owns funds in Mississippi to the tune of some $147,677.50. Beyond that, we have found that Tulane University is and has been engaged in systematic, continuous and purposeful activities within the State of Mississippi. These activities have been enumerated in some detail in Section II(B) at the outset of this opinion.

By way of summary, Tulane engages in a wide variety of educational functions involving the recruitment and education of students from Mississippi, the encouragement of alumni activities in Mississippi, including the solicitation of and acceptance of funds from alumni and friends in this state, a variety of intercollegiate competitions and activities, formally and informally, with private and public institutions of the State of Mississippi.

More specifically, the medical school and the Tulane Hospital maintain a variety of ongoing connections with hospitals in the State of Mississippi, with medical practitioners within Mississippi, and with the treatment of patients from Mississippi. Even in the instance of activities conducted at the New Orleans facilities, there are reasonably

forseeable effects in Mississippi, ranging from the response of Mississippi patients to treatments following their return home to the billing of Mississippi residents at their addresses in Mississippi for services rendered.

One important attribute of Tulane's activities in and contacts with Mississippi--those related to the hospital and medical school as well as others not so related--is *705 that they are reasonably susceptible to giving rise to litigable disputes. Suffice it to say that Tulane would find the courts of this state open should it have need of such to enforce a claim or right arising out of its Mississippi contacts or activities.

Without further ado, we hold that, on these facts, the Chancellor was imminently correct when he held that Tulane University had engaged in continuous and purposeful activities within the State of Mississippi sufficient to render it constitutionally amenable to an adjudication of its rights in the funds held by the Clerk of the Court.

For many of the same reasons, Tulane has sufficient contacts with the State of Mississippi that it should reasonably forsee being required to defend an action in the courts of Mississippi and so that the maintenance of this action would not offend traditional notions of fair play and substantial justice.

C.

[7] We have considered the argument that, subjecting Tulane to suit in Mississippi may have a chilling effect on Tulane Hospital's continued provision of hospitalization and other health care services to residents of Mississippi. The point is without merit, legally and factually. That a non-resident may threaten to terminate contacts with a given state in no way enhances its due process rights beyond the formulations provided in International Shoe and progeny. Factually, Tulane has no more to fear from the courts of this state than it does from Louisiana courts. Tulane will receive the same evenhanded justice it would receive in Louisiana, the same as a Mississippi university or hospital would receive here.

Further, nothing turns on the fact that Tulane is not a corporation organized for profit. Substantial and purposeful activities in this state make it reasonably forseeable that Tulane may be sued here, whether those activities were intended to, or did, result in profit. Put another way, non-profit corporations enjoy the same protections under International Shoe and progeny as do corporations organized for profit, no greater, no less.

Nothing in Tulane's motion to dismiss or on this interlocutory appeal turns on the merits vel non of Cooley's claim or Tulane's defense. That we may perceive Cooley's claim strong or weak or Tulane's conduct laudatory or egregious is for the moment beside the point. We are concerned here with a preliminary point--whether the Chancery Court of Forrest County has the authority, consistent with Tulane's due process rights, to make a valid and enforceable adjudication of the merits vel non of Cooley's claim and Tulane's defense and ultimately of Tulane's rights in the property seized.

Finally, nothing turns on the fact that the great bulk of Tulane's activities take place in Louisiana, that its nerve center is in New Orleans. To be sure, the extent of activities engaged in by Tulane in Mississippi is relatively small vis-a-vis Louisiana. Tulane's amenability to suit in Mississippi turns on the extent of its activities here without regard to what or how much more it may do in Louisiana or elsewhere.

D.

In making our determination that the Chancery Court of Forrest County, Mississippi, has authority to hear and adjudicate the rights and interests of the parties in the sum of $147,677.50 presently resting in the registry of the Court, we have given careful consideration to the reported cases concerning non-resident medical facilities.

Braman v. Mary Hitchcock Hospital, 631 F.2d 6 (2d Cir.1980) bears similarities to the case at bar. In that case the plaintiff, a citizen of Vermont, brought suit in Vermont against a New Hampshire hospital charging negligent care in New Hampshire. Hitchcock Hospital had more contacts with Vermont than Tulane Hospital has with Mississippi. Approximately one-third of Hitchcock's patients came from Vermont. Tulane has successfully resisted discovery to the extent that we do not know what percentage of its 300 beds have *706 been occupied by Mississippians in recent years. On the facts before it, the Court of Appeals for the Second Circuit correctly held that the New Hampshire hospital was constitutionally amenable to suit in Vermont.

In Soares v. Roberts, 417 F.Supp. 304 (D.R.I., 1976) a non-profit Massachusetts medical facility had been sued in Rhode Island. The evidence reflected that the defendant, largely an abortion clinic, had advertised and solicited patients from Rhode Island for some three years prior to the suit. The non-resident defendant was held constitutionally amenable to suit in Rhode Island.

On the other hand, Wolf v. Richmond County Hospital Authority, 745 F.2d 904 (4th Cir.1984) arguably supports Tulane's position. The question in Wolf was whether an Augusta, Georgia hospital's contacts with South Carolina were sufficient to render the hospital constitutionally amenable to suit in South Carolina for allegedly negligent care rendered a South Carolina resident while a patient in the hospital in Augusta, Georgia. In the face of proof that the hospital received roughly one-fifth of its gross income from South Carolina patients, the Court of Appeals held it was not subject to suit in South Carolina. To like effect is Walters v. St. Elizabeth Hospital Medical Center, 543 F.Supp. 559 (W.D.Pa.1982).

We distinguish Wolf and Walters from the case at bar. In Wolf and Walters the only contacts being examined were the hospital's. Here the defendant is the corporate entity, Tulane University. We look not only at the Mississippi-oriented contacts and activities of the Tulane Hospital but of the entire university.

The only case we have found in which a university hospital was the defendant is Gelineau v. New York University Hospital, 375 F.Supp. 661 (D.N.J.1974). In Gelineau the District Court held that New York University Hospital was not constitutionally amenable to suit in New Jersey when sued by a New Jersey resident for allegedly negligent care in New York. Inexplicably, the Court seems to consider only the hospital's contacts with New Jersey rather than the totality of New Jersey-oriented contacts and activities of the corporate entity, New York University. In this we regard Gelineau as having been incorrectly analyzed and, accordingly, incorrectly decided.

All things considered, nothing in any of these hospital cases undermines our confidence in the correctness of our adjudication on this interlocutory appeal: that under the totality of the circumstances, Tulane may be held constitutionally amenable to the adjudication in the Chancery Court of Forrest County, Mississippi, of its rights in and to the $147,677.50 now held in the registry of the Court. The Chancellor correctly overruled the motion to dismiss.

V.

Tulane next argues that the doctrine of sovereign immunity precludes this suit. Fleshed out, the theory is that the University of Southern Mississippi and the Board of Trustees of Institutions of Higher Learning, State of Mississippi, enjoyed sovereign immunity at the time the $48,182.00 in football game proceeds were attached [FN8].

FN8. This suit was brought prior to the July 1, 1984, effective date for the abolition of sovereign immunity. Pruett v. City of Rosedale, 421 So.2d 1046 (Miss.1982).

[8] [9] Sovereign immunity is a defense "personal" to the state or its political subdivision. No third party has standing to invoke it. After a few preliminary skirmishes, the record reflects that USM and the Board of Trustees have waived sovereign immunity, have paid into the registry of the court all sums they held due and owing to Tulane, and have been finally dismissed. In this context, Tulane's point is seen wholly without merit.

VI.

No other point presented by Tulane being worthy of mention, the Order of the Chancery Court of Forrest County, Mississippi, *707 entered October 7, 1982, overruling and denying Tulane's motion to dismiss shall be, and the same hereby is, affirmed. This matter is remanded to the active docket of the Chancery Court for such further proceedings as may be appropriate.

AFFIRMED AND REMANDED

JURISDICTION OVER SUBJECT MATTER

A. Statutory Provisions

§ 9-7-81. Jurisdiction; general enumeration of subjects.

The circuit court shall have original jurisdiction in all actions when the principal of the amount in controversy exceeds two hundred dollars, and of all other actions and causes, matters and things arising under the constitution and laws of this state which are not exclusively cognizable in some other court, and such appellate jurisdiction as prescribed by law. Such court shall have power to hear and determine all prosecutions in the name of the state for treason, felonies, crimes, and misdemeanors, except such as may be exclusively cognizable before some other court; and said court shall have all the powers belonging to a court of oyer and terminer and general jail delivery, and may do and perform all other acts properly pertaining to a circuit court of law.

Sources: Codes, Hutchinson's 1848, ch. 61, art. 6 (5); 1857, ch. 61, art. 29; 1871, § 519; 1880, § 1493; 1892, § 645; Laws, 1906, § 702; Hemingway's 1917, § 481; Laws, 1930, § 490; Laws, 1942, § 1428.

§ 9-7-85. Jurisdiction; suit for sum below.

If a suit shall be brought in the circuit court for a sum of less than the court can take cognizance of, or if a greater sum than is due shall be demanded, on purpose to confer jurisdiction, the complaint shall be involuntarily dismissed pursuant to the Mississippi Rules of Civil Procedure; and if the plaintiff, in any case, shall not recover more than the minimal jurisdictional amount, he shall not recover any costs of the defendant unless the judge shall be of the opinion, and so enter on the record, that the plaintiff had reasonable ground to expect to recover more than the minimal jurisdictional amount, or unless the court shall have jurisdiction of the cause, without respect to the amount in controversy.

Sources: Codes, Hutchinson's 1848, ch. 58, art. 1 (11); 1857, ch. 61, art. 33; 1871, § 666; 1880, § 1497; 1892, § 649; Laws, 1906, § 706; Hemingway's 1917, § 485; Laws, 1930, § 494; Laws, 1942, § 1432; Laws, 1991, ch. 573, § 9, eff from and after July 1, 1991.

County Courts

§ 9-9-21. Jurisdiction.

(1) The jurisdiction of the county court shall be as follows: It shall have jurisdiction concurrent with the justice court in all matters, civil and criminal of which the justice court has jurisdiction; and it shall have jurisdiction concurrent with the circuit and chancery courts in all matters of law and equity wherein the amount of value of the thing in controversy shall not exceed, exclusive of costs and interest, the sum of Two Hundred Thousand Dollars ($200,000.00), and the jurisdiction of the county court shall not be affected by any setoff, counterclaim or cross-bill in such actions where the amount sought to be recovered in such setoff, counterclaim or cross-bill exceeds Two Hundred Thousand Dollars ($200,000.00). Provided, however, the party filing such setoff, counterclaim or cross-bill which exceeds Two Hundred Thousand Dollars ($200,000.00) shall give notice to the opposite party or parties as provided in Section 13-3-83, and on motion of all parties filed within twenty (20) days after the filing of such setoff, counterclaim or cross-bill, the county court shall transfer the case to the circuit or chancery court wherein the county court is situated and which would otherwise have jurisdiction. It shall have exclusively the jurisdiction heretofore exercised by the justice court in the following matters and causes: namely, eminent domain, the partition of personal property, and actions of unlawful entry and detainer, provided that the actions of eminent domain and unlawful entry and detainer may be returnable and triable before the judge of said court in vacation.

(2) In the event of the establishment of a county court by an agreement between two (2) or more counties as provided in Section 9-9-3, it shall be lawful for such court sitting in one (1) county to act upon any and all matters of which it has jurisdiction as provided by law arising in the other county under the jurisdiction of said court.

Sources: Codes, 1930, § 693; Laws, 1942, § 1604; Laws, 1926, ch. 131; Laws, 1934, ch. 236; Laws, 1936, ch. 247; Laws, 1948, ch. 236; Laws, 1950, ch. 321; Laws, 1962, ch. 300; Laws, 1964, ch. 322; Laws, 1966, ch. 344, § 1; Laws, 1968, ch. 311, § 1; Laws, 1970, ch. 335, § 1; Laws, 1974, ch. 477, § 2; Laws, 1984, ch. 348; Laws, 1991, ch. 311, § 1; Laws, 1998, ch. 427, § 1; Laws, 2003, ch. 429, § 1, eff from and after July 1, 2003.

B. Concurrent Jurisdiction with the Justice Court

Arant v. Hubbard, 824 So. 2d 611 (Miss. 2002)

By a 6-3 opinion, the Mississippi Supreme Court held that the Justice Court and the Circuit Court share concurrent jurisdiction over matters in which the amount in controversy exceeds $200 but is not over $2500, since neither the constitutional amendments nor the statutes governing the courts state that either court is to have exclusive jurisdiction.

Justice Waller in his dissent stated his reasons why the Justice Court should have exclusive jurisdiction over matters in which the amount in controversy does not exceed $2500. Justice Waller believes that the portion of Miss. Code § 9-7-81 which vested circuit courts with jurisdiction of amounts in controversy greater than $200 was repealed by implication with the enactment of the 1975 amendment to § 171 of the Constitution.

C. Claim for Punitive Damages

Adams-Newell Lumber Co. v. Jones, 139 So. 315 (Miss. 1932)

McGOWEN, J.

The Adams-Newell Lumber Company appeals from a judgment of the circuit court of Neshoba county rendered upon a verdict of a jury awarding the appellee, Jones, damages in the sum of $150 for a milch cow alleged to have been killed by a log train.

The declaration in this case, among other things, alleged that the appellant, while operating a train of cars on a railroad drawn by an engine propelled by steam, negligently killed a milch cow of the value of $150. The declaration also alleged that servants of the company killed the cow under such circumstances as to amount to willful wrong and gross negligence, and sued for the sum of $2,750 punitive and other damages.

By instruction, the court submitted the question of punitive damages to the jury, but such damages were not allowed.

[1] On the facts, two witnesses testified positively and in detail that they saw the cow in controversy killed by the engine of the appellant; that the track was straight and level at the point for a long distance; and that the engineer was looking directly at the cow for a long time before it was struck while grazing, knocked off, and killed.

For the defendant railroad company, it was shown by many witnesses that the train in question did not kill the cow; that the body of the cow was not at that point at the time the train passed; and that no train was operated from that time until the dead cow was found in the ditch the following morning.

The appellee's witnesses testified that there were scars and bruises on the cow, and cow's hair on the track. The appellant's witnesses testified to the contrary.

It will be seen from this statement of facts that there was conflicting testimony which *316 was properly submitted to jury as to whether or not the train of the appellant struck and killed the cow.

[2] The first assignment of error argued and presented here is that the court erred in declining to overrule the appellant's motion to dismiss the cause for want of jurisdiction, it being alleged in the motion that the only sum honestly demanded was $150, less than $200, and not within the original jurisdiction of the circuit court. There is no merit in this assignment, for the reason that the declaration not only sought to recover the value of the cow, but also punitive damages in the sum of $2,750. In addition to this, the appellant's motion was not disposed of by the court, and does not appear by this record to have been presented and ruled upon. There is no order in this record.

* * * *

[The portion of the opinion dealing with statutory presumption is omitted.]

There is no merit in the contention of the appellee that notwithstanding this erroneous instruction, this case should not be reversed because the appellee was entitled to a peremptory instruction.

Reversed and remanded.

D. Effect of Counterclaim

Horton v. White, 254 So.2d 188 (Miss. 1971)

BRADY, Justice:

This is an appeal from the Circuit Court of Hinds County, Mississippi, wherein appellant's suit was dismissed when the circuit court sustained a motion of the appellees predicated on the ground of res adjudicata. From that dismissal appellant perfects this appeal.

It is from the pleadings largely that we are able to reconstruct what happened in the county court of the First Judicial District of Hinds County where suit was filed by the appellees in October 1969. This suit was based on a promissory note made payable to appellees by the appellant with a balance due of $6,224.99. To this suit filed by the appellees, appellant filed a counterclaim asserting a defense of usury under Mississippi Code 1942 Annotated section 36 (1956). The appellant charged in the counterclaim that there were some 572 transactions in which he and the appellees were involved and that the amount due because of usury amounted to the sum of $84,000. This case proceeded to trial in the county court and the jury returned a verdict for the appellant in the amount sued for, which was approximately $84,000. Subsequent to the verdict, the appellees moved for a judgment notwithstanding the verdict. Appellees assert that the county court granted the judgment notwithstanding the verdict for the reason that the county court did not have jurisdiction to entertain a counterclaim in excess of its maximum jurisdictional limit of $10,000. As reflected in the brief of appellant, the county court agreed that it did not have jurisdiction and sustained appellees' motion for judgment notwithstanding the verdict. No appeal was taken from that judgment. However, the appellees had contended that the judgment notwithstanding the verdict was granted by the county court for the reason that the appellant had failed to offer any proof that a single one of the commercial paper notes was not in excess of the limit of $10,000.

On March 11, 1969, the county court rendered its judgment allowing neither the claim of the appellees nor the claim of the cross complainant, the appellant here. Over a year later, on July 2, 1969, appellant filed a declaration in the Circuit Court of the First Judicial District of Hinds County. The declaration of appellant alleged substantially the same matters as heretofore appellant had alleged in his counterclaim in the Circuit Court of Hinds County. To this declaration appellees filed a plea in bar of res adjudicata and also a plea in bar of the statutes of limitation of one and three years.

On November 11, 1970, the circuit court entered its order sustaining the plea in bar of res adjudicata filed by appellees but did not rule on the plea in bar based on the statutes of limitation. The appeal to this Court in predicated solely upon the plea in bar of res adjudicata.

[1] Appellant assigns only one error, which is, the county courts of Mississippi are without jurisdiction to entertain counterclaims in excess of the jurisdictional limit of $10,000 and, therefore, the judgment of the county court could not be res adjudicata of the merits of the controversy and the plea in bar was wrongfully sustained by the court below.

> It should be noted that appellees concede in their brief as follows:
> * * * in truth and in fact the only matter to be decided by this Court is the plea in res judicata, and the action of the Circuit Court of the First Judicial District of Hinds County should be sustained so that the rule formerly announced by this Court in such case shall still prevail.

Actually, before the assertion of appellees that the plea of res adjudicata was properly sustained, it must be shown that the county court had jurisdiction not only of the parties but also the subject matter. The statutes of this state are determinative of the question of jurisdiction and it is to *190 these statutes which we must turn. Mississippi Code 1942 Annotated section 1483.5 (1956) provides in part as follows:

> 1. In all suits at aw there the defendant has a claim or demand against the plaintiff arising out of or connected with the situation, occasion, transaction or contract or subject matter upon which the plaintiff's action is based, whether the claim or demand of the defendant is liquidated or unliquidated, the defendant in his answer may plead his claim or demand against the plaintiff by way of counterclaim, in recoupment, stating the facts upon which such counter-claim is based.

The record in this case fails to include any testimony or other evidence, except ledger sheets relating to the counterclaim and the judgment, and the only available information which we can obtain must be gleaned from the pleadings, and it is apparent 'that the amount or value of the thing in controversy exceeds, exclusive of costs and interest, the county court jurisdictional amount of $10,000.' That portion of Mississippi Code 1942 Annotated section 1604 (Supp.1971) which applies here provides as follows:

> § 1604. County court-jurisdiction.
> * * *The jurisdiction of said court shall be as follows: It shall have jurisdiction concurrent with the courts of justices of the peace in all matters, civil and criminal of which justices of the peace have jurisdiction; and it shall have jurisdiction concurrent with the circuit and chancery courts in all matters of law and equity wherein the amount of value of the thing in controversy shall not exceed, exclusive of costs and interest, the sum of Ten Thousand Dollars ($10,000.00). * * * (Emphasis added.)

The declaration of the appellant filed in the circuit court charged that all of the 572 transactions were made on oral agreements between the parties based upon interest charges as follows:

> That the plaintiff was then and there engaged in the business of inventorying and selling to the general public electric vacuum cleaners, and that the defendants (appellees here) sought to earn interest income by making loans of varying amounts * * * for the purpose of providing plaintiff with operating capital, and that said arrangements amounted to direct personal loans to the plaintiff (appellant here)

The appellant charges in his declaration that he 'is entitled to recover of and from the defendants (appellees), jointly and severally, the sum of $84,317.02' for which amount the appellant demands judgment.

It is apparent that the declaration of the appellant in the circuit court was a suit for the express sum of $84,317.02. The language in appellant's declaration is verbatim with the allegations set forth in appellant's counterclaim filed to the declaration of the appellees in county court. It is obvious that the counterclaim filed by the appellant in the county court was also for the exact sum of $84,317.02. In county court the appellant here 'demanded judgment of and from the cross-defendants (appellees) jointly and severally, in the sum of $84,317.02 plus interest allowed by law and all court costs accrued herein.'

A careful review of the briefs together with a study of the authorities cited therein, particularly those of the appellees, fails to present any case which is authority to support appellees' contention that that which transpired in the county court constitutes res adjudicata under the general interpretation accorded these words. Appellees cite thirty-five cases dealing with what constitutes res adjudicata but no case is cited by the appellees which shows that jurisdiction was vested in the county court in spite of the fact that appellant's counterclaim was for the sum of $84,317.02.

We agree with the assertion made by the appellant, namely, there does not appear to *191 be any Mississippi case directly in point which would authorize a county court to assume jurisdiction over a counterclaim in excess of the amount of $10,000. We do not have a record of the evidence which was presented in the county court other than that which is reflected in the pleadings, including the counterclaim, and the verdict of the county court together with the judgment notwithstanding the verdict. As is frequently the case, we find a sharp conflict in briefs of counsel representing the litigants as to what actually transpired and upon what basis the county court rendered its judgment notwithstanding the verdict. The appellant asserts that 'the court agreed that it did not have jurisdiction and sustained appellees' motion for a judgment notwithstanding the verdict.' Appellant further asserts that 'the citations are literally too numerous to mention that the rule of law is too well founded to brook argument that a court may dispose only of such things as it has jurisdiction over. If the county court had no jurisdiction of a counterclaim it could not dispose of it one way or the other and, in fact, this was the holding of the county court.

To the contrary, appellees urge in their briefs that the order of the county court sustaining the motion of the appellees for a judgment notwithstanding the verdict was not based on the issue of jurisdiction of the county court but upon the failure of the counterclaimant to have made proof of his case and the alleged 572 distinct transactions. Both litigants cite the cases of Barnes v. Rogers, 206 Miss. 887, 41 So.2d 58 (1949); Catchot v. Russell, 160 Miss. 330, 134 So. 140 (1931); and Continental Casualty Company v. Crook, 157 Miss. 518, 128 So. 574 (1930). None of these cases has application to the issue here for the reason that factually they are distinguishable. In the light of the statutes hereinabove noted, we hold that the county court was without jurisdiction (power) to enter any judgment in the controversy beyond the dismissal thereof or the transference of the case to the proper chancery or circuit court. for that reason, regardless of

the form of the judgment actually entered by the county court, it does not affect the respective rights of the parties to litigate the issues in the proper forum.

In Hines Motor Company, Inc. v. Hederman, 201 Miss. 859, 30 So.2d 70 (1947), this Court, speaking through Justice L. A. Smith, Sr., said:

> (T)he forum wherein this action was instituted was not a court of general jurisdiction, but of limited jurisdiction only. Such a court can exercise no authority other than that conferred by the statute, and clearly so. Its powers or jurisdiction cannot be extended by implication. A case on this point is Welch v. Bryant, 157 Miss. 559, 562, 128 So. 734, citing 15 C.J. p. 982. (201 Miss. at 869; 30 So.2d at 73.)

If any inference is to be drawn from the cases hereinabove cited it is that a counterclaim would not be cognizable in a county court which exceeds the jurisdictional amount set by the legislature. We do not conclude that the filing of a counterclaim by the appellant can be merely considered to be subsequent events such as those spoken of in the Barnes case, supra.

[2] [3] We conclude that we are correct in saying that a county court is one of general but limited jurisdiction. It may exercise jurisdiction concurrently with circuit and chancery courts but is in terms of amount in controversy a court of limited or special jurisdiction in that the legislature saw fit to restrict it to amounts not in excess of $10,000. It is undoubtedly true that jurisdiction attaches with the filing of the declaration or complaint when the amount sued for is not in excess of $10,000. Jurisdiction once attached will not be defeated by subsequent events; that is to say, if it is discovered at a later date, the object in controversy is actually worth more than the jurisdictional limit of the court, jurisdiction still will not be affected, provided there was no fraud involved. Also, if several intervenors appear and file claims, each of which is separately within *192 the jurisdictional limit, they can also be determined in the county court but which are in the aggregate beyond that limit jurisdiction still will not be defeated. We must decide whether the county court acquired jurisdiction insofar as the counterclaim is concerned. We hold that the counterclaim, just as is required of the declaration, must comply with the same jurisdictional prerequisites and if those jurisdictional requisites are not met then the counterclaim cannot be adjudicated in the county court. This appears to be the general rule.

Since apparently we do not have any Mississippi case directly in point, this is a case of first impression. We cite secondary authority in support of our holding. A review of Corpus Juris and American Jurisprudence seems to indicate that this is the general rule. 21 C.J.S. Courts s 66; 20 Am.Jur.2d Courts section 169 (1965). We find nothing in the statutes of Mississippi, section 1604 (Supp.1970), section 1483.5 (1957) or in any of the cased decided in this state which in any way conflicts with this general rule. The logic of the rule is apparent and the spirit of the legislative intent to limit the jurisdiction of the county courts to matters in controversy worth an amount not in excess of $10,000 is also consistent with this rule.

We hold, therefore, that the county court did not have jurisdiction of the counterclaim and for the foregoing reasons the judgment of the circuit court in sustaining appellees' plea of res adjudicata is reversed and the cause is remanded to the circuit court for trial on all issues.

Reversed and remanded.
[Note: See § 9-9-21]

E. Concurrent Jurisdiction - State and Federal

Lewis v. Delta Loans, Inc., 300 So.2d 142 (Miss. 1974)

INZER, Justice:

This is an appeal by the Christine Lewis, plaintiff below, from a judgment of the Circuit Court of the First Judicial District of Hinds County which affirmed a judgment of the county court holding that a state court is not the proper forum for the enforcement of rights arising under Section 130 of the Truth in Lending Act, (hereinafter sometimes called the Act), 15 U.S.C.A. s 1640. We reverse and remand.

Appellant Lewis sought money damages under the civil liability provision of the Truth in Lending Act, 15 U.S.C.A. s 1640. The jurisdiction of the court was invoked pursuant to the jurisdictional grant of the civil liability provision, 15 U.S.C.A. s 1640(e). In addition to damages under the Truth in Lending Act appellant also sued for relief under state statutory law, a claim with which we are not concerned on this appeal.

As a responsive pleading to the appellant's declaration, the defendant-appellee filed a motion to strike all portions of the appellant's declaration which sought relief under the Truth in Lending Act. The appellant urged that the Act was not enforceable in the state courts of Mississippi as grounds for his motion. The county court granted appellee's motion and gave the appellant fifteen days to so amend her declaration or the entire suit would be dismissed. Appellant declined to amend and prosecuted an appeal to the circuit court which affirmed the order of the county court. Hence this appeal.

Appellant argues that the state courts, as well as federal district courts, have jurisdiction to hear any suit brought under the civil liability provisions of the Truth in Lending Act. The specific statutory language under which appellant sought to invoke the jurisdiction of the county court constitutes Section 130(e) of the Act and is found at 15 U.S.C.A. s 1640(e) as follows:

Any action under this section (s 1640) may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

*144 It is further argued by appellant that where concurrent jurisdiction exists over rights arising under the constitution and laws of the United States, state courts are mandated to accept such jurisdiction under the Supremacy Clause of the United States Constitution.[FN1]

FN1. U.S.Const. art. VI, cl. 2.

The appellee opposes these views and urges that only federal district courts and courts of United States' possessions come within the description 'any United States District Court or any other court of competent jurisdiction.'

Jurisdiction of actions brought under the Truth in Lending Act has been taken by state courts in many cases, but as far as has been determined there has been no analysis by these courts of the jurisdictional question here considered. See First Nat'l Bank of Commerce v. Eaves, 282 So.2d 741 (La.App.1973); McDonald v. Savoy, 501 S.W.2d 400 (Tex.Civ.App.1973); Browning v. Levy's, 20 Ariz.App. 325, 512 P.2d 857 (1973). The only authority located directly in point on the question here presented takes the position, though somewhat equivocally, that state courts were intended to have concurrent jurisdiction under the civil liability provision of the Act.[FN2]

FN2. In a letter of September 1, 1969, subsequently designated FRB Public Position Letter No. 99, Frederic Soloman, Director of the Federal Reserve Board, gave the following opinion on concurrent jurisdiction under the civil liability provisions of the Truth in Lending Act:

> In answer to your question regarding paragraph (e) of Section 130 of the Act, I believe that State courts do have concurrent jurisdiction with the United States District Courts. The reference to '. . . any other court of competent jurisdiction . . .' simply means that any State court which is competent under the applicable state law could try such a case. 2 R.
> Clontz, Truth in Lending Manual, App. E, p. E-139 (3rd ed. 1973).

The Federal Reserve Board is the agency officially authorized by Congress to interpret the Act. Though the Public Position Letters do not constitute official regulations, they do 'represent the careful analysis by most able counsel on the staff of the Board.' 2 R. Clontz, Truth in Lending Manual, App. E, p. E-3, (3rd ed. 1973).

[1] There is certainly nothing inherently incompatible with the concept that state and federal courts may exercise concurrent jurisdiction over rights created under federal law. To the contrary 'concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule.' Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507, 82 S.Ct. 519, 523, 7 L.Ed.2d 483, 487 (1962). Consistent with this doctrine, this Court has on several occasions held that unless jurisdiction over federally created rights is expressly restricted to the federal courts, the state courts have concurrent jurisdiction. Masonite Corp. v. IWA, 215 So.2d 691 (Miss.1968); Southern Bus Lines, Inc. v. Amalgamated Asso. of St. Elec. Ry. and Motor Coach Employees, 205 Miss. 354, 38 So.2d 765 (1949); cf. Mengle Co. v. Ishee, 192 Miss. 366, 4 So.2d 878 (1941).

[2] Nothing in the wording of the jurisditional grant under 15 U.S.C.A. s 1640(e) indicates an intention to restrict jurisdiction under the Act to federal courts, and nothing in the legislative history of the Act suggests such an intention. 1968 U.S.Code Cong. and Admin.News, p. 1962. Consequently, in the absence of any indication of Congressional intent to restrict jurisdiction and in view of the broad word of the jurisdictional grant, we hold that state courts have concurrent jurisdiction under s 130(e) of the Truth in Lending Act, 15 U.S.C.A. s 1640.

[3] [4] State courts are not free to refuse or ignore jurisdiction over rights of action which arise under the constitution and laws of the United States. If the ordinary jurisdiction of the state court as prescribed by local law is adequate to the case, the court must accept jurisdiction of *145 such federally created rights, U.S.Const. art. VI, cl. 2; Testa v. Katt, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947). The county court being a court of general jurisdiction, we hold that jurisdiction of the appellant's claim under the Truth in Lending Act was improperly refused by the county court.

For the reasons stated the case must be and is reversed and remanded.

Reversed and remanded.

F. Concurrent Jurisdiction - Generally

Hancock v. Farm Bureau Ins. Co., 403 So.2d 877 (Miss., 1981)

ROBERTSON, Presiding Justice, for the Court:

Appellant, John W. Hancock, filed a complaint in the Chancery Court of Lauderdale County against Farm Bureau Insurance Company, State Farm Insurance Company, J. R. Shannon and Walter W. Eppes, Jr., seeking reformation of a written release signed by Hancock and obtained by Farm Bureau Insurance Company, for its insured, Mary Walker Stewart. Hancock also prayed that State Farm Insurance Company and its attorneys, J. R. Shannon and Walter W. Eppes, Jr., be enjoined from interposing and relying on this written release as an affirmative defense in a suit for damages filed by Hancock against Gerald Miles Harrison in the Circuit Court of Lauderdale County.

General demurrers by all defendants were filed in the Chancery Court suit and the chancellor sustained these general demurrers and dismissed Hancock's bill of complaint.

On January 6, 1979, about 7:00 p. m., Hancock ran into a stopped automobile owned and operated by Mary Walker Stewart on U. S. Highway 45 Alternate, approximately one mile north of Artesia, Mississippi.

Shortly thereafter, Gerald Miles Harrison drove his car into Hancock's automobile while it was immobilized due to the collision with the Stewart automobile. Stewart's insurer, Farm Bureau Insurance Company, on February 23, 1979, settled Hancock's claim against Stewart for $1500, and took a general release from Hancock on that date.

When suit was filed in the Circuit Court of Lauderdale County by Hancock against Gerald Miles Harrison, defendant Harrison answered and asserted as an affirmative defense the "Final Release and Settlement of Claim" executed by Hancock to Mary Walker Stewart.

At this stage of the proceedings, Hancock, plaintiff in the Circuit Court suit against Harrison, filed his bill of complaint in the Chancery Court of Lauderdale County, praying reformation of the release executed by Hancock in favor of Stewart. This complaint was filed not against Harrison, the only defendant in the Circuit Court suit, but against Stewart's insurer, Farm Bureau Insurance Company, Harrison's insurer, State Farm Insurance Company, and Harrison's attorneys, J. R. Shannon and Walter W. Eppes, Jr. Hancock also prayed that Harrison's insurer "State Farm Insurance Company, J. R. Shannon and Walter W. Eppes, Jr." be enjoined "from relying on the said Release in the defense of Gerald Miles Harrison in Cause No. 1055-H pending in the Circuit Court of Lauderdale County, Mississippi."

We affirm the decree of the chancery court sustaining the general demurrers of all defendants and dismissing the bill of complaint because there is no equity on the face of the bill and because plaintiff Hancock has a plain, adequate and speedy remedy at law.

In Huffman v. Griffin, 337 So.2d 715 (Miss.1976), this Court said:

> "This motion raises the issue of priority jurisdiction between courts of concurrent jurisdiction. The principal of priority jurisdiction is that where two suits between the same parties over the same controversy are brought in courts of concurrent jurisdiction, the court which first acquires jurisdiction retains jurisdiction over the whole controversy to the exclusion or abatement of the second suit. (Citing Lee v. Lee, 232 So.2d 370, 373, (Miss.1970), and other authorities). (Emphasis added).
>
> "In this state priority of jurisdiction between courts of concurrent jurisdiction is determined by the date the initial pleading is filed, provided process issues *879 in due course. (Citing Euclid-Mississippi v. Western Casualty and Surety Company, Inc., 249 Miss. 547, 559-60, 163 So.2d 676 (1964), and other authorities). 337 So.2d at 719.

[1] [2] Plaintiff, Hancock, chose his forum when he filed his suit for damages against Gerald Miles Harrison in the Circuit Court of Lauderdale County. He is bound by that decision and, as said in Huffman :

> "(T)he court which first acquires jurisdiction retains jurisdiction over the whole controversy to the exclusion or abatement of the second suit." 337 So.2d at 719. (Emphasis added).

* * * *

The decree of the chancery court, sustaining the general demurrers of all defendants and dismissing the bill of complaint, is, therefore, affirmed.

AFFIRMED.

G. Equity Court - Punitive Damages

Tideway Oil Programs, Inc. v. Serio, 431 So.2d 454 (Miss. 1983)

En Banc.

* * * *

S. Barnett Serio, Sr., brought this action in October, 1980, charging that defendants, Tideway Oil Programs, Inc., Tideway Energy Group, Inc., Miller Oil Purchasing Company, Dave Gammill, and Tideway Energy Limited Partnership 1977-2, breached their fiduciary duty owed Serio and the other members of a class he represented. Serio's complaint charged that this fiduciary duty arose out of the relationship between the class members and the defendants as "co-tenants" and "joint venturers" in certain oil and gas leases covering a 480-acre block of land located near Larto Lake, Catahoula Parish, Louisiana. Members of the class were alleged to be Serio, G.G. Cornwell, and all of the persons comprising the Tideway Oil Limited Partnership 1975-1 and the Tideway Oil Limited Partnership 1975-2.

* * * *

Serio's bill sought to compel the defendants to execute certain assignments, and sought other mandatory injunctive relief, accountings, actual and punitive damages, attorneys' fees, etc.

* * * *

PART II
ROBERTSON, Justice, for the Court:

A.

Squarely presented is the question of whether the chancery courts of this state have the power to assess punitive damages. To put the issue another way, does so much of Serio's complaint as asks punitive damages lie within the subject matter jurisdiction of the chancery court? We recognize that thirty years of clear decisions of this Court hold in the negative. On re-examination, we are convinced that neither history nor reason support such an approach. Accordingly, we now hold that the chancery courts of this state have the discretionary power to assess punitive damages according to the same substantive standards as apply in our circuit courts.

* * * *

[Note: Omitted is that portion of the court's opinion which discusses the history of punitive damages in Mississippi, except for the following excerpt and footnote.]

[7] [8] [9] It follows from all of this, of course, that exemplary or punitive damages are awarded to plaintiff and are assessed against defendant only in extreme cases. [FN1]

FN1. The policy underlying our rule on award of punitive damages obviously contemplates rewarding public spirited plaintiffs who will endure the slings and arrows of litigation to bring a wrongdoer to account. As fate would have it, more than one or two plaintiffs demanding punitive damages in recent years have not been actuated by any public spirit. Pursuit of filthy lucre plays its unseemly role. That we believe the power to award punitive damages should be recognized in the chancery courts in no way implies any view that we wish to encourage a wholescale filing of punitive damage actions. If anything, in the present "atmosphere", the standards for award of punitive damages should be restricted--to assure that such damages are given only to those truly public spirited plaintiffs. We would emphasize that punitive damages are not favored in the law and are to be allowed only with caution and within narrow limits. Standard Life Ins. Co. of Indiana v. Veal, 354 So.2d 239, 247 (Miss.1977). Suffice it to say that every attorney filing a complaint demanding punitive damages does so subject to the provisions of Rule 11 of the Mississippi Rules of Civil Procedure, to-wit, his signature constitutes his certificate "that to the best of his knowledge, information, and belief there is good ground to support it [the claim for punitive damages]".

* * * *

A correct resort to history militates in favor of the decision we announce today. In the instant action, plaintiff Serio charges the Defendants with fraud. In this context, it is by no means irrelevant to note that claims of fraud historically were an important subject of the chancellor's jurisdiction.

* * * *

Couple this with more recent legal history wherein fraud has become a principal basis for an award of punitive damages. Fowler Butane Gas Co. v. Varner, 244 Miss. 130, 141 So.2d 226, 233 (Miss.1962); Woodall v. Ross, 317 So.2d 892, 896 (Miss.1975). We have here a case where the core charge made by Plaintiff Serio in his complaint is "collusive, deceitful and fraudulent conduct". Complete relief, Serio charges, requires temporary and permanent injunctive relief, an accounting, actual and punitive damages. Our chancery courts delight to *462 do complete justice and not by halves. Griffith,Mississippi Chancery Practice, § 36 (2d Ed. 1950).

If Plaintiff can prove his charges, there is no sensible reason why all relief to which he may be entitled should not be afforded by a single court--the chancery court. Seen in this light, the case at bar is a proper one to reconsider Mississippi's limitation on the power of its chancery courts in proper cases to assess punitive damages. The power to grant complete relief in fraud cases should be vested in the chancellors within whose jurisdiction such cases historically were heard.

(4)

Other states have recognized there is no reason why courts of equity should be held without the power to award punitive damages in proper cases.

* * * *

For example, the Supreme Court of Iowa * * * recognizes that "The modern trend is for an equity court to award ... (punitive) damages...." [137 N.W.2d at 618.]

* * * *

Turning to the State of Indiana, we find the Hedworth case cited above holding that the view adopted in this opinion, that punitive damages may be recovered in our chancery courts, "more fully carries out the theory of broad powers of the equity court." [192 N.E.2d at 651.]

(5)

The rule in Mississippi that chancery courts have no power to award punitive damages may have been well established. Our recent cases, to be sure, have routinely cited the rule, as though there were no doubt concerning its viability. See, e.g., Carl v. Craft, 258 So.2d at 241; Subscribers Casualty Reciprocal Exchange v. Totaro, supra, 370 So.2d at 1342-1343. But matters have not always been thus.

* * * *

[Omitted is the court's discussion of early MS cases where punitive damages were within a chancellor's discretion. See Hines v. Imperial Naval Stores Co., 101 Miss. 802, 58 So. 650 (1911); Neal v. Newburger Co., 154 Miss. 691, 123 So. 861 (1929).]

The rigidity of the present Mississippi rule seems to be traceable to Monsanto Company v. Cochran, supra. In that case the Court completely miscites Neal and Hines for the proposition that when a party seeks relief in a court of equity, he thereby waives all claim to punitive damages. 254 Miss. at 405, 180 So.2d 624. Even so, there remained a touch of flexibility in the Mississippi approach when the Monsanto court acknowledged that there are a "few exceptions to the general rule that the courts of equity will not assess punitive damages." 254 Miss. at 404, 180 So.2d 624.

In short, the rule that courts of equity have no power to award punitive damages has existed in other states much longer than it has in Mississippi. Ironically, the rule became engraved in stone in this state about the time other states began to abolish it.

* * * *

In summary, we find an absence of logic undergirding the rule we here abandon. We suggest that the rule, when adopted in this state only in 1953, was based on misunderstanding. Whatever logic the rule may ever have had has ceased to exist.

* * * *

Our chancellors are charged with granting that relief which equity and good conscience require. There will be rare cases where the conduct of the defendant is so outrageous that an assessment of punitive damages ought to be made. It would be peculiarly appropriate that a judge charged to act in accordance with equity and good conscience may not hear and adjudicate such claims. This is particularly so in this day when many feel that more than an occasional plaintiff recklessly demands punitive damages at law, hoping that he can move a jury to give him that windfall which in equity and good conscience he ought not to have.

C.

We hold that claims for punitive damages lie within the subject matter jurisdiction of the chancery courts of this state. We rely in no part upon notions of pendent jurisdiction en route. By way of analogy only, we note that today's holding is consistent with much that we have said in the past.

[10] Claims for punitive damages have traditionally been thought of as legal not equitable claims. Yet our chancery courts have long been vested with a pendent jurisdiction to hear and adjudicate claims at law. Once chancery court subject matter jurisdiction otherwise attaches, our chancery courts are fully empowered to grant wholly "legal" relief.

* * * *

These legal claims are heard and adjudicated within the pendent subject matter jurisdiction of the chancery courts.

[11] The rule of the cases just cited may be instructively examined here. For its logic is strongly analogous to the result decreed for here: The empowerment of the chancery courts to assess punitive damages where otherwise proper under the facts and the otherwise applicable positive remedial law. For example, in Shaw v. Owen Gin Co., supra, the Court stated

> "It is settled beyond question in this jurisdiction that where a suit is brought in the chancery court and the court takes jurisdiction on any one ground of equity, it will proceed in the one suit to a complete adjudication and settlement of every one of all the several disputed questions materially involved in the entire transaction, awarding by a single comprehensive decree all appropriate remedies legal as well as equitable, although all the other questions involved would otherwise be purely of legal cognizance; and if the ground of equity fails under the proof the cause may be retained for a complete final decree on the remaining issues, although the latter present legal subjects only and the decree would cover only legal rights and grant none but legal remedies." 229 Miss. at 133, 90 So.2d at 181.

On what rationale might the assessment of punitive damages--purely legal relief--be excluded from this sweeping pronouncement? Nothing in Shaw v. Owen Gin Co., or any of the other cases which are to like effect, suggests in any way that the chancery courts, incident to adjudication of a controversy in part grounded in equity, ought at the same time adjudicate all legal claims except claims for punitive damages. We go the further step, however, and hold that notions of pendent jurisdiction are unnecessary to our decision. We hold that our chancery courts have actual, not just pendent, subject matter jurisdiction over claims for punitive damages.

* * * *

[Note: Omitted is the courts discussion of the effects of changing the rule.]

All before whose eyes these pages may come are enjoined to discern not so much as a whisper of a suggestion that punitive damages in fact ought to be assessed in this case--or for that matter, that any other relief should be granted. Such are for trial on the merits.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED TO CHANCERY COURT OF FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI.

PATTERSON, C.J., WALKER, P.J., and ROY NOBLE LEE, BOWLING, HAWKINS, DAN M. LEE, PRATHER and ROBERTSON, JJ., concur as to Part I.

PATTERSON, C.J., and ROY NOBLE LEE, BOWLING, DAN M. LEE and PRATHER, JJ., concur as to Part II.

BROOM and WALKER, P.JJ., and HAWKINS, J., dissent as to Part II. [Omitted]

COMMON LAW VS. EQUITY JURISDICTION

A. Constitutional and Statutory Provisions

§ 9-7-81. Jurisdiction; general enumeration of subjects.

The circuit court shall have original jurisdiction in all actions when the principal of the amount in controversy exceeds two hundred dollars, and of all other actions and causes, matters and things arising under the constitution and laws of this state which are not exclusively cognizable in some other court, and such appellate jurisdiction as prescribed by law. Such court shall have power to hear and determine all prosecutions in the name of the state for treason, felonies, crimes, and misdemeanors, except such as may be exclusively cognizable before some other court; and said court shall have all the powers belonging to a court of oyer and terminer and general jail delivery, and may do and perform all other acts properly pertaining to a circuit court of law.

Sources: Codes, Hutchinson's 1848, ch. 61, art. 6 (5); 1857, ch. 61, art. 29; 1871, § 519; 1880, § 1493; 1892, § 645; Laws, 1906, § 702; Hemingway's 1917, § 481; Laws, 1930, § 490; Laws, 1942, § 1428.

§ 9-7-83. Jurisdiction of cases transferred or remanded to it.

The circuit court shall have jurisdiction of all cases transferred to it by the chancery court or remanded to it by the supreme court.

Sources: Codes, 1892, § 646; Laws, 1906, § 703; Hemingway's 1917, § 482; Laws, 1930, § 491; Laws, 1942, § 1429.

§ 9-5-81. Jurisdiction of the chancery court, in general.

The chancery court in addition to the full jurisdiction in all the matters and cases expressly conferred upon it by the constitution shall have jurisdiction of all cases transferred to it by the circuit court or remanded to it by the supreme court; and such further jurisdiction, as is, in this chapter or elsewhere, provided by law.

Sources: Codes, Hutchinson's 1848, ch. 54, arts. 2 (1), 10 (4); 1857, ch. 62, art. 2; 1871, § 974; 1880, § 1829; 1892, § 482; Laws, 1906, § 532; Hemingway's 1917, § 289; Laws, 1930, § 351; Laws, 1942, § 1262.

Miss Constitution
Section 157. Exclusive jurisdiction of chancery court; transfer.

All causes that may be brought in the circuit court whereof the chancery court has exclusive jurisdiction shall be transferred to the chancery court.

Section 162. Transfer to circuit court.

All causes that may be brought in the chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court.

Section 163. Certification of transferred causes.

The legislature shall provide by law for the due certification of all causes that may be transferred to or from any chancery court or circuit court, for such reformation of the pleadings therein as may be necessary, and the adjudication of the costs of such transfer.

§ 11-1-37. Certification of transferred causes.

If a cause be transferred by order of the chancery court to the circuit court, or vice versa, the clerk of the court ordering the transfer shall forthwith deposit all the papers in the cause, together with his certificate of the fact of the transfer, in the court to which it was transferred, taking the receipt of the clerk therefor.

Sources: Codes, 1892, § 936; Laws, 1906, § 1012; Hemingway's 1917, § 732; Laws, 1930, § 765; Laws, 1942, § 1680.

§ 11-1-39. Proceedings in transferred causes.

When the papers have been deposited in the court to which the cause was transferred, all the parties to the proceeding shall take notice of the fact of the transfer; and the complainant or plaintiff shall file his declaration or bill in the court to which the cause was transferred within thirty days, unless the court, judge, or chancellor shall restrict the time or grant further time; and the defendant shall plead within thirty days thereafter, unless the time, by like means, be restricted or extended. And the cause shall be proceeded with as if it had been originally begun in that court, as of the date on which the cause was originally instituted.

Sources: Codes, 1892, § 937; Laws, 1906, § 1013; Hemingway's 1917, § 733; Laws, 1930, § 766; Laws, 1942, § 1681.

§ 11-1-41. Costs in transferred causes.

The complainant or plaintiff in the first court shall pay all the costs in such court; but he may recover the same of the defendant, in the court to which the cause was transferred, at the discretion of the court.

Sources: Codes, 1892, § 938; Laws, 1906, § 1014; Hemingway's 1917, § 734; Laws, 1930, § 767; Laws, 1942, § 1682.

U.S. Constitution
7th Amendment: Civil trials

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Miss. Constitution
Section 31. Trial by jury.

The right of trial by jury shall remain inviolate, but the Legislature may, by enactment, provide that in all civil suits tried in the circuit and chancery court, nine or more jurors may agree on the verdict and return it as the verdict of the jury.

Sources: 1817 art I § 28; 1832 art I § 28; 1869 art I § 12; Laws, 1916, ch 158.

Section 147. Reversal of judgment for want of jurisdiction; remand.

No judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction; but if the Supreme Court shall find error in the proceedings other than as to jurisdiction, and it shall be necessary to remand the case, the Supreme Court may remand it to that court which, in its opinion, can best determine the controversy.

§ 11-3-9. No reversal or annulment for want of jurisdiction.

A judgment or decree in any chancery or circuit court rendered in a civil case, shall not be reversed or annulled on account of want of jurisdiction to render the judgment or decree.

Sources: Codes, 1892, § 4354; Laws, 1906, § 4920; Hemingway's 1917, § 3196; Laws, 1930, § 3380; Laws, 1942, § 1964.

B. Limitation to Mistake as between Law and Equity

Board of Levee Com'rs for Yazoo-Mississippi Delta v. Brooks, 25 So. 358 (Miss. 1899)

TERRAL, J.

This is a proceeding under the statute regulating the exercise of the power of eminent domain, commenced in the circuit court of Coahoma county on the 3d day of July, 1896, when said court had no jurisdiction of such proceeding, and which want of jurisdiction rendered the action of the court utterly null and void, and nothing can relieve it of this hopeless infirmity except it be section 147 of the state constitution, which is invoked for that purpose. The constitution provides: "Sec. 147. No judgment or decree in any chancery or circuit court, rendered in a civil cause, shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common law jurisdiction; but if the supreme court shall find error in the proceedings other than as to jurisdiction, and it shall be necessary to remand the case, the supreme court may remand it to that court which, in its opinion, can best determine the controversy." The constitution does not help the proceeding. The cause is not one of equity or of common-law jurisdiction. By the common law the circuit court had no jurisdiction of eminent domain proceedings, nor did the chancery court, by its institution in this state, have such jurisdiction; and the proceedings were entirely void because not in conformity with the power conferred. Railroad Co. v. Drake, 60 Miss. 626; Mills, Em. Dom. § 84; Commissioners v. Allen, 60 Miss. 93; Brown v. Beatty, 34 Miss. 227. If by mistake of the chancellor one of our chancery courts should entertain a suit of unlawful entry and detainer, which is not a common-law suit, but pertains to a special court composed at least of *359 two justices of the peace, and from its decree an appeal should be taken here, could we entertain jurisdiction of it? We think not. Or should a chancery court, by mistake of the learned chancellor, entertain a suit for debt on open account for less than $200, which pertains alone to the jurisdiction of the justice of the peace of the proper district, and its decree is complained of in this court, could we uphold such action? Certainly not. It has been held that, if the circuit court adjudicates an action of debt there brought for less than $200, an appeal here gives this court no jurisdiction. For reasons equally cogent an appeal from a decree of the chancery court in a similar action of debt for less than $200 could not be validated by judgment here. Stephen v. Eiseman, 54 Miss. 535; Fenn v. Harrington, Id. 733; Griffin v. McDaniel, 63 Miss. 121; Delmas v. Morrison, 61 Miss. 314; Andrews v. Wallace, 72 Miss. 291, 16 South. 204. Should a chancellor emulous of larger power try in his court an ordinary action of ejectment, the decree of the court therein, if right upon the principles applied to the case, would, perhaps, be valid under section 147 of the constitution; or if a circuit judge should adjudicate a specific performance of contract for the sale of land, his action, if conformable to equitable principles on that subject, possibly could not be assailed here for want of jurisdiction; but the action of said tribunals in such cases would be valid, because the causes pertained, by the constitution of said courts, to the one or the other of them. But one of these courts may not usurp the statutory power of the other, and have claimed for such usurpation the curative effect of section 147, because they are not covered by the letter or by the spirit of said section. Those instances do not contain mistakes as to whether the cause is of equity or of common-law jurisdiction, so as to be cured by section 147 of the constitution. They are not causes of equity jurisdiction or of common-law jurisdiction pertaining to the circuit court, and the attempted proceedings in those courts, being in a matter over which that individual court had no jurisdiction whatever, cannot be upheld under section 147. They are not mistakes, but are usurpations, and cannot be supported. It is a rule often announced by this court that every special statutory authority must be strictly pursued, and, if not so pursued, the action taken is null and void. 60 Miss. 93; Id. 626; Mills. Em. Dom. § 84; 10 Am. & Eng. Enc. Law (2d Ed.) 1054; Brown v. Beatty, 34 Miss. 227.

Reversed and dismissed.

C. Violability of An Inviolable Right: Trial by Jury

McLean v. Green, 352 So.2d 1312 (Miss. 1977)

IDOM, Commissioner for the Court:

This is a personal injury action brought in the Chancery Court of Adams County, Mississippi by Kenneth Green and Lawrence Rollins, both minors, against Mrs. Joyce B. McLean. Both complainants prayed for damages in the amount of Ten Thousand ($10,000.00) Dollars each, allegedly due as a result of an automobile-motorcycle collision, which occurred on Highway 61 near Natchez, Mississippi. Following a hearing, the court entered two decrees, one awarding Green Ten Thousand ($10,000.00) Dollars and the other awarding Rollins Three Thousand One Hundred Eighty-four ($3,184.00) Dollars. Mrs. McLean appeals from these judgments of the chancery court.

On November 12, 1974, at or about 7:30 P.M., Green and Rollins were riding Green's motorcycle in a westerly direction on Highway 61 just outside of Natchez. The highway was four-lane and ran in an East-West direction. Rollins was driving the motorcycle in the right lane of traffic and Green was seated directly behind him on the passenger's seat. They were traveling at approximately forty miles per hour. The defendant, Mrs. McLean, was driving her automobile in a westerly direction, too, but was in the left lane. She was accompanied in her car by her husband, mother and two children.

Green and Rollins testified that the defendant crossed the center line and collided with their motorcycle in the right lane. Mrs. McLean, on the other hand, stated that she never crossed the center line, but rather had turned on her left blinker with the intention of turning around at an intersection which was located about seventy yards from the point of impact. She contends that she neither saw nor heard the motorcycle until the two vehicles collided. The point of impact was the right rear fender of the defendant's car.

Following the accident, Green and Rollins were taken to Jefferson Davis Hospital in Natchez. Green received lacerations and burns to the face and a fractured knee which later required surgery. Rollins, who was knocked unconscious in the accident, received a laceration to his shoulder, which left a scar. Also, his ear was badly torn and required stitches.

Originally, each complainant filed a separate bill of complaint in the chancery court, but the cases were later consolidated. The defendant's motion to dismiss or in the alternative to transfer to circuit court was overruled and the case was tried in the Chancery Court of Adams County. The *1314 defendant has appealed the order of the lower court, which awarded both complainants damages, and has made three assignments of error:

> 1. The chancellor erred in assuming jurisdiction of and in failing to transfer the cause to the Circuit Court of Adams County;
> 2. The chancellor's findings of fact were against the overwhelming weight of the evidence;
> 3. The amount of the respective judgments were so excessive as to evince bias, passion and prejudice on the part of the chancellor.

[1] [2] [3] [4] The chancellor assumed jurisdiction of this cause pursuant to Mississippi Constitution, Section 159(d) (1890), which provides:

> The chancery court shall have full jurisdiction in the following matters and cases, viz: . . . (d) Minor's business . . .

While it is true that both complainants were minors, this case neither involved nor required any equitable relief. An analysis of the case law concerning Section 159(d), clearly shows that the jurisdiction of the chancery court over minors is limited to matters involving equitable relief. The action at bar arises from a tort claim, and we have made it clear previously that courts of equity should not assume jurisdiction over claims for personal injury. Evans v. Progressive Casualty Insurance Company, 300 So.2d 149 (Miss.1974); 30 C.J.S. Equity s 28 (1965). One reason for such a rule is that historically tort claims have been tried by jury. In chancery court, with some few statutory exceptions, the right to a jury is purely within the discretion of the chancellor, and if one is empaneled, its findings are totally advisory. Our constitution, Mississippi Constitution, s 31 (1890), provides that the right to trial by jury shall remain inviolate, but in this case, the chancellor's assumption of jurisdiction of this common law action has deprived the defendant of this right.

Although we hold that the chancellor was in error, Mississippi Constitution, s 147 (1890) prevents reversal solely on the ground of want of jurisdiction. That section provides:

No judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction, but if the Supreme Court shall find error in the proceedings other than as to jurisdiction, and it shall be necessary to remand the case, the Supreme Court may remand it to that court which, in its opinion, can best determine the controversy.

See also, Mathews v. Thompson, 231 Miss. 258, 95 So.2d 438 (1957); Boyett v. Boyett, 152 Miss. 201, 119 So. 299 (1928); Talbot & Higgins Lbr. Co. v. McLeod Lbr. Co., 147 Miss. 186, 113 So. 433 (1927); Hancock v. Dodge, 85 Miss. 228, 37 So. 711 (1905) and Cazeneuve, et al. v. Curell, 70 Miss. 521, 13 So. 32 (1893).

In Talbot & Higgins Lbr. Co. v. McLeod Lbr. Co., supra, we held that where the chancellor erroneously assumed jurisdiction of a common law action, the right to trial by jury had been taken away. However, we also held that s 147 was just as much a part of our Constitution as s 31, and, therefore, they must be construed together. In doing this, the net result is that trial by jury shall remain inviolate except in cases where the chancellor's erroneous assumption of jurisdiction is the only error in the proceeding.

[5] Despite the mandate of s 147, we look with disfavor upon and consider it an abuse of discretion for a chancellor to assume jurisdiction of a common law action which properly should be tried in a court of law where the right to trial by jury remains inviolate. But absent other error, we cannot reverse.

* * * *

[Note: The section of the opinion discussing adequacy of damages has been omitted.]

Finding no error, other than the erroneous assumption of jurisdiction by the chancellor, the decrees of the lower court must be and are hereby affirmed.

AFFIRMED.

Robertson v. Evans, 400 So.2d 1214 (Miss. 1981)

ON PETITION FOR APPEAL FROM INTERLOCUTORY DECREE

ROBERTSON, Presiding Justice, for the Court:

Joan Marie Evans has petitioned this Court for an appeal from an Interlocutory Decree of the Chancery Court of George County overruling her motion to dismiss for lack of jurisdiction, or alternatively, to transfer to the Circuit Court of George County a tort action for damages filed on behalf of William R. Robertson, a minor, by his Guardian. This suit arises out of an intersectional collision between the motorcycle driven by the 14-year-old minor and the automobile driven by Defendant Evans.

Mississippi Constitution Article 3, Section 31 (1890), provides:

"The right of trial by jury shall remain inviolate...."

In McLean v. Green, 352 So.2d 1312 (Miss.1977), this Court said:

> "The action at bar arises from a tort claim, and we have made it clear previously that courts of equity should not assume jurisdiction over claims for personal injury. Evans v. Progressive Casualty Insurance Company, 300 So.2d 149 (Miss.1974); 30 C.J.S. Equity s 28 (1965). One reason for such a rule is that historically tort claims have been tried by jury. * * * *
>
> Despite the mandate of s 147, we look with disfavor upon and consider it an abuse of discretion for a chancellor to assume jurisdiction of a common law action which properly should be tried in a court of law where the right to trial by jury remains inviolate." (352 So.2d at 1314).

Unlike McLean v. Green, supra, where a tort action proceeded to judgment in chancery court and the defendant was denied a trial by jury vouchsafed to her by the Mississippi Constitution, this question is raised on the threshold in the case at bar.

In view of this fact, even though we are denying the Petition for Interlocutory Appeal, we are of the opinion that the chancellor should transfer this cause of action to the proper circuit court and thus avoid a clear abuse of discretion on his part in proceeding to try a tort action and thus violate the constitutional provision that "the right of trial by jury shall remain inviolate." (Emphasis added). (Miss.Const. Art. 3, s 31 (1890)).

PETITION DENIED BUT CAUSE REMANDED WITH DIRECTIONS.

Tillotson v. Anders, 551 So.2d 212 (Miss. 1989)

En banc.

ROBERTSON, Justice, for the Court:

I.

This is a libel action wherein a former chancery clerk has sued his hometown newspaper and two of its reporters, complaining of articles and editorials about his conduct of his office and demanding actual and punitive damages. The former clerk attempted to disguise his action as one for an accounting and then filed it in the chancery court. The newspaper moved to dismiss for lack of subject matter jurisdiction. When the Court below denied the motion, we accepted the newspaper's interlocutory appeal. We reverse.

II.

The parties to this appeal are as follows:

J. Odell Anders is an adult resident citizen of Adams County, Mississippi. He served as Chancery Clerk of Adams County from November of 1974 until January of 1988. Anders was the plaintiff below and is the appellee here.

Natchez Newspapers, Inc., is a Mississippi corporation and is the publisher of a daily newspaper known as The Natchez Democrat, which at all times relevant has had a general circulation in Adams County, Mississippi, and in surrounding areas.

Randolph C. (Dolph) Tillotson and Susan Willey were at all relevant times employees of Natchez Newspapers, Inc., serving as reporters for The Natchez Democrat. *213 Natchez Newspapers, Inc., Tillotson and Willey were the defendants below and are the appellants here. They are hereafter collectively referred to as "the Newspaper".

Between May 30, 1987, and June 21, 1987, the Newspaper published a series of articles and editorials regarding Anders' conduct of the office of Chancery Clerk. These articles and editorials were critical of Anders for the substantial income his family derived from his service in office, commenting upon the fact that Anders had hired his wife and his two daughters as deputy clerks and had paid them allegedly handsome salaries. The Newspaper was generally critical of the system provided by state law for compensating chancery clerks and their deputies.

On October 19, 1987, Anders commenced this civil action by filing his complaint in the Chancery Court of Adams County, Mississippi. Anders charged that the articles were false, and maliciously so, and then charged that the proof in this case would be "extremely complex and complicated and present issues of accounting that could only be resolved by the Chancery Court because of the complex nature thereof." Anders demanded a declaratory judgment that all receipts and disbursements of funds discussed in the articles were in strict conformity with law and then demanded of the Newspaper actual damages in the amount of $500,000.00 and punitive damages in the amount of $8,000,000.00, plus attorneys fees and court costs.

On November 2, 1987, the Newspaper filed a motion to dismiss or, in the alternative, to transfer the case to the Circuit Court of Adams County. The Newspaper charged that Anders' suit was a garden variety libel action which lay outside Chancery Court subject matter jurisdiction. The Newspaper also invoked its right to trial by jury, Miss. Const. Art. 3, § 31 (1890), and argued that this right would be denied if the matter remained in the Chancery Court.

On June 28, 1988, the Chancery Court denied the motion, holding that the action lay within chancery court subject matter jurisdiction because it is one "which requires a complex accounting and several issues upon which a multiplicity of suits could arise." On July 25, 1988, the Court entered its order denying the motion to dismiss or transfer.

[1] Having found that there are substantial grounds for believing that the Chancery Court erred on the legal question of subject matter jurisdiction and that an interlocutory appeal might materially advance the termination of the litigation and protect the Newspaper from substantial and irreparable loss of its right to trial by jury, we granted the Newspaper's interlocutory appeal. See Rule 5(a), Miss.Sup.Ct.Rules.; American Electric v. Singarayar, 530 So.2d 1319, 1321-24 (Miss.1988).

III.

[2] That this is a libel suit ordinarily cognizable as an action at law does not inexorably preclude its being heard in chancery court. Where there appears from the face of the well-pleaded complaint an independent basis for equity jurisdiction, our chancery courts may hear and adjudge law claims. Penrod Drilling Co. v. Bounds, 433 So.2d 916 (Miss.1983); Tideway Oil Programs, Inc. v. Serio, 431 So.2d 454, 464 (Miss.1983); Burnett v. Bass, 152 Miss. 517, 521, 120 So. 456 (1929). In such circumstances we consider that the legal claims lie within the pendent jurisdiction of the chancery court.

Anders proclaims independent equity grounds threefold. Foremost, he insists that this is an action for an accounting, noting that our chancery courts have historically enjoyed jurisdiction over suits for accounting. See Dunagin v. First National Bank, 118 Miss. 809, 80 So. 276 (1919); Evans v. Hoye, 101 Miss. 244, 252-53, 57 So. 805, 806 (1912); see also Miss. Const. Art. 6, § 159(f) (1890) (jurisdiction over all cases of which the chancery court had jurisdiction under the laws in force when the Constitution was adopted and put into operation); Miss.Code Ann. § 9-5-81 (1972); Griffith, Mississippi Chancery Practice, § 24 (2d ed. 1950); Pomeroy, Equity Jurisprudence, §§ 1420 & 1421 (5th ed. 1941).

*214 One fallacy in Anders' point is that his complaint does not seek an accounting as between himself and the Newspaper. When the question whether an action lay within chancery court subject matter jurisdiction has been raised, our cases have consistently held

> It is the substance of the action that should be controlling on this issue, not its form or label.

Thompson v. First Mississippi National Bank, 427 So.2d 973, 976 (Miss.1983). In Dixie National Life Insurance Co. v. Allison, 372 So.2d 1081 (Miss.1979), we rejected a plaintiff's characterization of his action as one for specific performance, noting that

> it was nothing more than a suit for breach of contract and should have been brought in the circuit court.

Dixie National, 372 So.2d at 1085. We repeated the point in Thompson and urged that our lower courts

> be wary of attempts to camouflage as a complicated accounting what is in essence an action at law for breach of contract.

Thompson, 427 So.2d at 976. More recently, in Blackledge v. Scott, 530 So.2d 1363 (Miss.1988), we rebuffed a plaintiff's effort to bring in chancery court what was clearly a common law tort action.

Love v. Dampeer, 159 Miss. 430, 439, 132 So. 439, 442 (1931) affords Anders no succor, for that case involved liquidation of a bank, a matter within chancery court jurisdiction by statute. Miss.Code Ann. § 3817 (1930). The same may be said of Anders' citation of State of Mississippi ex rel. King v. Harvey, 214 So.2d 817 (Miss.1968), a suit on the bond of a public official. See Miss. Const. Art. 6, § 161 (1890).

Anders next argues that this is a suit to prevent a multiplicity of suits at law, and, indeed, the court below so held. To be sure, this is another of the historical grounds for equity jurisdiction. Griffith, Mississippi Chancery Practice §§ 24, 439 (2d Ed.1950). How the notion applies here escapes us. True, Anders complains of a series of articles and editorials. Perhaps theoretically each could be made the subject of a separate action, but they have not been and we have no doubt of the propriety of their being joined in a single action at law before the circuit court. Conceivably, the state auditor or some public authority might proceed against Anders, but that would involve, at least in part, different legal theories than today's action. There is a marked difference between a multiplicity of suits and a multitude of suits. See Gulf & Ship Island Railroad Co. v. Barnes, 94 Miss. 484, 512, 48 So. 823, 829 (1909).

Finally, Anders suggests, if we understand him correctly, that his prayer for declaratory judgment makes his suit cognizable in chancery. The short answer is that our law's authorization of the declaratory judgment procedure in Rule 57, Miss.R.Civ.P., is jurisdictionally neutral. Rule 57 empowers the trial court to grant a procedural remedy not thought available in our practice prior to January 1, 1982. That new remedy may be sought only in a court of otherwise competent jurisdiction. Indeed, nothing in the Mississippi Rules of Civil Procedure may be construed to extend or limit the subject matter jurisdiction of our trial courts. [FN1] Rule 82(a), Miss.R.Civ.P.

FN1. The Mississippi Rules of Civil Procedure place no new categories or types of civil actions within the subject matter jurisdiction of our several trial courts. The Rules do, however, make clear that more may be done than was allowable before January 1, 1982, with actions already within a given court's jurisdiction.

There is good reason why we ought heed the Newspaper's arguments, and do so interlocutorily. The Newspaper has demanded its right to trial by jury. If this action is allowed to remain in chancery court, there will be no trial by jury, this notwithstanding the command of our constitution that "the right of trial by jury shall remain inviolate." [FN2] Miss. *215 Const. Art. 3, § 31 (1890). See Penrod Drilling Co. v. Bounds, 433 So.2d 916, 931- 32 (Miss.1983) (Robertson, J., concurring); Louisville & Nashville Railroad Co. v. Hasty, 360 So.2d 925 (Miss.1978), McLean v. Green, 352 So.2d 1312 (Miss.1977). And, if the case should proceed to final judgment in chancery and there appear in the record no error other than the point of subject matter jurisdiction, we would be without power to reverse. Miss. Const. Art. 6, § 147 (1890); Talbot and Higgins Lumber Co. v. McLeod Lumber Co., 147 Miss. 186, 113 So. 433 (1927).

FN2. Section 31 is of no effect in chancery. Of course, in a case such as this, the chancery court has discretionary authority to impanel a jury. If one is impaneled, however, our law is clear that "its findings are totally supervisory." Louisville & Nashville Railroad Co. v. Hasty, 360 So.2d 925, 927 (Miss.1978); McLean v. Green, 352 So.2d 1312, 1314 (Miss.1977); Griffin v. Jones, 170 Miss. 230, 233-34, 154 So. 551, 552 (1934); Griffith, Mississippi Chancery Practice § 597 (2d ed. 1950). Indeed, anomaly attends the suggestion that the chancery court here impanel a jury as the raison d'etre of Anders' suing in chancery is his view that his action's complexity places it well beyond a jury's ken.

We hold that this case lies outside the limited subject matter jurisdiction of the chancery court. If that be so, it must perforce be within the subject matter jurisdiction of the circuit court, a court of general jurisdiction. See Hall v. Corbin, 478 So.2d 253, 255 (Miss.1985). Miss. Const. Art. 6, § 156 (1890) provides:

* * * *

IV.

[3] Miss. Const. Art. 6, § 147 (1890) does not compel a contrary result. Section 147, precluding reversal of a "judgment or decree" of a chancery or circuit court, applies primarily (although not necessarily exclusively) to final judgments or decrees.

* * * *

Reading Section 147 to apply only to final judgments, or cases where, by litigation, a party has gained some other substantial advantage, gives maximum life to Sections 31 and 162 in cases of conflict.

Because the point has been questioned, not by Anders but by several Justices of this Court in dissent, discussion is in order.

* * * *

Robertson v. Evans, 400 So.2d 1214 (Miss.1981) is our latest case in this line. Robertson was a tort action arising from an intersectional collision between a motorcycle and an automobile. The injured minor sued in chancery court demanding monetary damages. The chancery court denied defendant's transfer motion and an interlocutory appeal was sought. This Court found "a clear abuse of discretion" and ordered the case transferred "to the proper circuit court." [FN5]

FN5. In an unrelated point, the Court in Robertson inadvertently mis-spoke itself. The opinion reads that the Court is "denying the petition for interlocutory appeal" and then remanding the case to the Circuit Court. Obviously, the Court would have had no authority to do anything other than leave the judgment of the lower court intact if the petition for interlocutory appeal had been denied. The correct reading of Robertson should be that the Court granted the petition for interlocutory appeal and then remanded the case to the Circuit Court.

In sum, this Court's treatment of transfer orders under Sections 157 and 162 of the Constitution is consonant with the reading of Section 147 which restricts the authority of this Court to reverse only in cases where a full hearing on

the merits had already been held, albeit in the incorrect forum, or where by litigation a party has gained some other substantial advantage. The rationale employed to extend the inhibitory nature of the section to interlocutory appeals (the existence of that mechanism only in chancery) has since been obviated by the adoption of various procedural rules which allow interlocutory appeals from both circuit and chancery. The common sense policy reason for there being a Section 147 at all is to protect a person who has tried his case and won it from having his time and expense and trouble and result go down the drain because of a jurisdictional error. The same notion undergirds the Double Jeopardy Clause.

Persons in this posture are deserving of protection from relitigation; hence, Section 147. The opposite result is compelled where, as here, the jurisdictional point is raised at an early pre-trial stage--a mere fourteen days after Anders filed suit--and appealed interlocutorily.

V.

We hold that the Chancery Court substantially abused its discretion when it failed to grant the Newspaper's motion to dismiss or, in the alternative, to transfer to Circuit Court. Rather than here ordering the case dismissed, we reverse and remand *219 the case to the active docket of the Circuit Court of Adams County, Mississippi.

INTERLOCUTORY APPEAL GRANTED; ORDER OF CHANCERY COURT DENYING MOTION TO DISMISS OR TO TRANSFER TO CIRCUIT COURT REVERSED; CASE REMANDED TO CIRCUIT COURT OF ADAMS COUNTY, MISSISSIPPI.

ROY NOBLE LEE, C.J., and PRATHER, ANDERSON and BLASS, JJ., concur. HAWKINS, P.J., dissents by separate written opinion, joined by DAN M. LEE, P.J., and SULLIVAN and PITTMAN, JJ. [Dissenting opinion by Presiding Justice Hawkins omitted.]

D. Reversal Not Prohibited: Wrongful Declination of Jurisdiction

McClendon v. Miss. State Highway Comm'n, 38 So.2d 325 (Miss. 1949)

MONTGOMERY, Justice.

* * * *

[1] The bill in this case invoked two grounds of equitable jurisdiction, viz.: injunctive relief and to prevent a multiplicity of suits. As to the first there can be no doubt. The principle is so well settled as to be axiomatic. As to the second the question was settled in this *77 state by the decision in Stigall et al. v. Sharkey County, 197 Miss. 307, 20 So.2d 664.

While this suit was pending in the Chancery Court of Hinds County, as aforesaid, an agreement was entered into between the complainants and the Highway Commission wherein the Highway Commission agreed to do certain corrective drainage work on the branch and the complainants in this suit agreed to dismiss this suit with prejudice against each of them, upon each and every prayer for relief herein, except as to the sums claimed or demanded as damages shown in the bill and as to which the agreement should be in no way prejudicial to the rights of any of the parties, but recovery, if any, was to be had only to the extent and in the amount specified in the bill.

When the matter came on for hearing in the lower court, the Chancellor held that nothing remained to be tried but a suit at law for damages. He did not hear the **327 respective claims of the parties but offered to either transfer the matter to the Circuit Court or to dismiss the cause without prejudice to the rights of the parties to sue at law. The parties taking no action, the court proceeded to dismiss the suit without prejudice. From this decree there is a direct and cross-appeal.

* * * *

[4] *79 Section 147 of the Constitution of 1890 provides as follows:

> 'No judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction; but if the Supreme Court shall find error in the proceedings other than as to jurisdiction, and it shall be necessary to remand the case, the Supreme Court may remand it to that court which, in its opinion, can best determine the controversy.'

This Section of the Constitution covers only cases where the trial judge assumes jurisdiction. If therefore the Chancellor sustain a demurrer on the ground of no equity and decline jurisdiction, as in the case at bar, when in fact the case was one good in equity his action is as reviewable as if the section did not exist. Griffith's Chancery Practice, Sec. 512, page 513.

* * * *

[5] Here, the Court below had two grounds of equitable jurisdiction, upon which the bill was predicated--the injunctive relief to abate the nuisance and to avoid a multiplicity of suits. After the abatement of the nuisance and the injunctive relief was settled out of the lawsuit, the court nevertheless still had jurisdiction to proceed to a full and complete determination of all of the remaining issues, even though they might cover only legal rights and require the granting of none but legal remedies.

Section 24 of the Constitution of 1890 provides:

> 'All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay.'

These complainants have the right to have their controversy adjudicated in a court of competent jurisdiction. The Chancery Court of Hinds County was such a court and the learned Chancellor erred in denying them that right by dismissing their suit. The decree of the court below will be reversed and remanded.

Reversed and remanded on direct appeal. Affirmed on cross-appeal.

VENUE OF ACTIONS

A. Statutory Provisions

§ 11-11-1. Provisions of this chapter applicable to all courts.

All things contained in this chapter, not restricted by their nature or by express provision to particular courts, shall be the rules of decision and proceeding in all courts whatsoever.

Sources: Codes, Hutchinson's 1848, ch. 53, art. 2 (100); 1857, ch. 61, art. 189; 1871, § 630; 1880, § 1585; 1892, § 629; Laws, 1906, § 687; Hemingway's 1917, § 465; Laws, 1930, § 474; Laws, 1942, § 1412.

§ 11-11-3. County in which to commence civil actions generally; transfer of action to proper county.

Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant or any of them may be found or in the county where the cause of action may occur or accrue and, if the defendant is a domestic corporation, in the county in which said corporation is domiciled or in the county where the cause of action may occur or accrue, except where otherwise provided, and except actions of trespass on land, ejectment and actions for the statutory penalty for cutting and boxing trees and firing woods and actions for the actual value of trees cut which shall be brought in the county where the land or some part thereof is situated. If a civil action is brought in an improper county, such action may be transferred to the proper county pursuant to section 11-11-7.

[§ 11-11-3 was amended effective 1-1-03; and is set forth below]

§ 11-11-3. County in which to commence civil actions generally; transfer of action to proper county.

(1) Civil actions of which the circuit court has original jurisdiction shall be commenced in the county where the defendant resides or in the county where the alleged act or omission occurred or where the event that caused the injury occurred. Civil actions against a nonresident may also be commenced in the county where the plaintiff resides or is domiciled. Civil actions alleging a defective product may also be commenced in the county where the plaintiff obtained the product.

(2) If a civil action is brought in an improper county such action may be transferred to the proper county pursuant to Section 11-11-17.

Sources: Codes, Hutchinson's 1848, ch. 58, art. 1 (19); 1857, ch. 61, art. 32; 1871, § 522; 1880, § 1498; 1892, § 650; Laws, 1906, § 707; Hemingway's 1917, § 486; Laws, 1930, § 495; Laws, 1942, § 1433; Laws, 1908, ch. 166; Laws, 1940, ch. 248; Laws, 1984, ch. 429; Laws, 2002, 3rd Ex Sess, ch. 2, § 1; Laws, 2002, 3rd Ex Sess, ch. 4, § 1, eff from and after Jan. 1, 2003.

[This version of § 11-11-3 was in effect from 1-1-03 until 9-1-04; the Miss. Legislature met in 2004 Extraordinary Session and passed House Bill No. 13 as part of a tort reform package. The newly amended section can be found on the following page.]

§ 11-11-3. County in which to commence civil actions; dismissal of actions more properly heard in another forum; transfer of action to proper county; factors determining grant of motion to dismiss or transfer.

(1) (a) (i) Civil actions of which the circuit court has original jurisdiction shall be commenced in the county where the defendant resides, or, if a corporation, in the county of its principal place of business, or in the county where a substantial alleged act or omission occurred or where a substantial event that caused the injury occurred.
(ii) Civil actions alleging a defective product may also be commenced in the county where the plaintiff obtained the product.

(b) If venue in a civil action against a nonresident defendant cannot be asserted under paragraph (a) of this subsection (1), a civil action against a nonresident may be commenced in the county where the plaintiff resides or is domiciled.

(2) In any civil action where more than one (1) plaintiff is joined, each plaintiff shall independently establish proper venue; it is not sufficient that venue is proper for any other plaintiff joined in the civil action.

(3) Notwithstanding subsection (1) of this section, any action against a licensed physician, osteopath, dentist, nurse, nurse-practitioner, physician assistant, psychologist, pharmacist, podiatrist, optometrist, chiropractor, institution for the aged or infirm, hospital or licensed pharmacy, including any legal entity which may be liable for their acts or omissions, for malpractice, negligence, error, omission, mistake, breach of standard of care or the unauthorized rendering of professional services shall be brought only in the county in which the alleged act or omission occurred.

(4) (a) If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties and witnesses a claim or action would be more properly heard in a forum outside this state or in a different county of proper venue within this state, the court shall decline to adjudicate the matter under the doctrine of forum non conveniens. As to a claim or action that would be more properly heard in a forum outside this state, the court shall dismiss the claim or action. As to a claim or action that would be more properly heard in a different county of proper venue within this state, the venue shall be transferred to the appropriate county. In determining whether to grant a motion to dismiss an action or to transfer venue under the doctrine of forum non conveniens, the court shall give consideration to the following factors:
(i) Relative ease of access to sources of proof;
(ii) Availability and cost of compulsory process for attendance of unwilling witnesses;
(iii) Possibility of viewing of the premises, if viewing would be appropriate to the action;
(iv) Unnecessary expense or trouble to the defendant not necessary to the plaintiff's own right to pursue his remedy;
(v) Administrative difficulties for the forum courts;
(vi) Existence of local interests in deciding the case at home; and
(vii) The traditional deference given to a plaintiff's choice of forum.

(b) A court may not dismiss a claim under this subsection until the defendant files with the court or with the clerk of the court a written stipulation that, with respect to a new action on the claim commenced by the plaintiff, all the defendants waive the right to assert a statute of limitations defense in all other states of the United States in which the claim was not barred by limitations at the time the claim was filed in this state as necessary to effect a tolling of the limitations periods in those states beginning on the date the claim was filed in this state and ending on the date the claim is dismissed.

Sources: Codes, Hutchinson's 1848, ch. 58, art. 1 (19); 1857, ch. 61, art. 32; 1871, § 522; 1880, § 1498; 1892, § 650; Laws, 1906, § 707; Hemingway's 1917, § 486; Laws, 1930, § 495; Laws, 1942, § 1433; Laws, 1908, ch. 166; Laws, 1940, ch. 248; Laws, 1984, ch. 429; Laws, 2002, 3rd Ex Sess, ch. 2, § 1; Laws, 2002, 3rd Ex Sess, ch. 4, § 1; Laws, 2004, 1st Ex Sess, ch. 1, § 1, eff from and after Sept. 1, 2004, and applicable to all causes of action filed on or after Sept. 1, 2004.

§ 11-11-9. Actions against executors.

Executors, administrators or guardians, appointed in this state and residing out of it, may be sued in the county of their appointment and may be made parties to such suit so as to authorize judgment against them by publication of summons made as provided for in the case of absent and nonresident defendants.

Actions against resident executors, administrators or guardians may be brought in the county or judicial district of their appointment.

Sources: Codes, 1880, § 1520; 1892, § 653; Laws, 1906, § 710; Hemingway's 1917, § 489; Laws, 1930, § 498; Laws, 1942, § 1436; Laws, 1971, ch. 486, § 1, eff from and after passage (approved March 31, 1971).

§ 11-11-15. Actions against State Board of Health or State Board of Medical Licensure.

The venue of actions against the Mississippi State Board of Health wherein said board is a defendant, or the State Board of Medical Licensure wherein said board is a defendant, shall be in Hinds County.

Sources: Codes, 1942, § 7096-01; Laws, 1946, ch. 483, § 1; Laws, 1980, ch. 458, § 32, eff from and after July 1, 1980.

§ 11-11-17. Where court has jurisdiction of subject matter but not venue.

Where an action is brought in any justice court of this state, of which the court in which it is brought has jurisdiction of the subject matter, but lacks venue jurisdiction, such action shall not be dismissed because of such lack of proper venue, but on objection on the part of the defendant shall, by the court, be transferred, together with all prepaid costs remaining after the court in which the action was originally brought has deducted the costs incurred in that court, to the venue to which it belongs.

Sources: Codes, 1942, § 1441; Laws, 1940, ch. 233; Laws, 1981, ch. 471, § 3; Laws, 1982, ch. 423, § 3; Laws, 1989, ch. 404, § 1; Laws, 1991, ch. 573, § 23, eff from and after July 1, 1991.

§ 11-11-19. Where brought if judge interested.

If the judge of the court be a party to or interested in any suit about to be commenced, the suit may be instituted in an adjacent district, and the process may be issued to and served in any county where the defendant may be found; or the suit may be brought as if the judge were not a party to or interested in it.

Sources: Codes, Hutchinson's 1848, ch. 58, art. 1 (173); 1857, ch. 61, art. 34; 1871, § 524; 1880, § 1501; 1892, § 654; Laws, 1906, § 711; Hemingway's 1917, § 490; Laws, 1930, § 499; Laws, 1942, § 1442.

§ 11-45-25. Suits by and against municipalities.

A municipality may sue and be sued by its corporate name. Suits against any municipality shall be instituted in the county in which such municipality is situated, where such actions are brought in the circuit or chancery or county courts, and where such municipality is wholly situated in one (1) county. In a case where a county has two (2) judicial districts, such suits shall be brought in the judicial district in which the municipality or its principal office is located. In cases where a municipality is located in two (2) counties, such suits shall be brought in the county in which the principal office of the municipality is located. As to justice court actions, the same shall be brought in the county in which the municipality or its principal office is located.

Sources: Codes, 1892, § 2912; Laws, 1906, § 3300; Hemingway's 1917, § 5796; Laws, 1930, § 2370; Laws, 1942, § 3374-02; Laws, 1938, ch. 335; Laws, 1950, ch. 491, § 2; Laws, 1981, ch. 471, § 39; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Venue of suits in Chancery Court

§ 11-5-1. Venue of suits.

Suits to confirm title to real estate, and suits to cancel clouds or remove doubts therefrom, shall be brought in the county where the land, or some part thereof, is situated; suits against executors, administrators, and guardians, touching the performance of their official duties, and suits for an account and settlement by them, and suits for the distribution of personalty of decedents among the heirs and distributees, and suits for the payment of legacies, shall be brought in the chancery court in which the will was admitted to probate, or letters of administration were granted, or the guardian was appointed; other suits respecting real or personal property may be brought in the chancery court of the county in which the property, or some portion thereof, may be; and all cases not otherwise provided may be brought in the chancery court of any county where the defendant, or any necessary party defendant, may reside or be found; and in all cases process may issue to any county to bring in defendants and to enforce all orders and decrees of the court.

Sources: Codes, 1857, ch. 62, art. 6; 1871, § 977; 1880, § 1847; 1892, § 510; Laws, 1906, § 561; Hemingway's 1917, § 321; Laws, 1930, § 363; Laws, 1942, § 1274.

Change of Venue

§ 11-11-51. Grounds for change of venue, generally.

When either party to any civil action in the circuit court shall desire to change the venue, he shall present to the court, or the judge of the district, a petition setting forth under oath that he has good reason to believe, and does believe that, from the undue influence of the adverse party, prejudice existing in the public mind, or for some other sufficient cause to be stated in the petition, he cannot obtain a fair and impartial trial in the county where the action is pending, and that the application is made as soon as convenient after being advised of such undue influence, prejudice, or other cause, and not to delay the trial or to vex or harass the adverse party. On reasonable notice in writing to the adverse party of the time and place of making the application, if made in vacation, the court, if in term time, or the judge in vacation, shall hear the parties and examine the evidence which either may adduce, and may award a change of venue to some convenient county where an impartial trial may be had, and, if practicable, in which the circuit court may next be held. If made in vacation, the order shall be indorsed on the petition and directed to the clerk, who shall file the same with the papers in the suit.

Sources: Codes, Hutchinson's 1848, ch. 59, art. 2 (1); 1857, ch. 61, art. 122; 1871, § 719; 1880, § 1502; 1892, § 655; Laws, 1906, § 712; Hemingway's 1917, § 491; Laws, 1930, § 500; Laws, 1942, § 1443.

B. Jurisdiction Distinguished

Leake County Coop. (A.A.L.) v. Barrett's Dependents, 226 So.2d 608 (Miss. 1969)

* * * *

GILLESPIE, P.J., and RODGERS, JONES and INZER, JJ., concur.

RODGERS, Justice:

ON PETITION FOR REHEARING

This is a workmen's compensation claim of the dependents of Billy Howard Barrett, deceased, against the Leake County Cooperative and Mutual Liability Company.

The attorney referee found that the deceased did not sustain a compensable injury by reason of his death within the meaning of the Mississippi Compensation Act. The full Commission affirmed the opinion of the attorney referee. The Circuit Court of Leake County, Mississippi, reversed the holding of the Commission and entered a judgment in favor of the claimants. The appellants appealed to this Court and we affirmed the judgment of the Circuit Court. The appellants have filed a petition for rehearing in which they point out, for the first time, that the deceased died in Madison County, Mississippi; that the appeal by the complainants to the Circuit Court of Leake County was null and void because, it is said, the appeal was made to the Leake County Circuit Court and not to the Madison County Circuit Court, the county in which the injury occurred. The appellants assert that the failure to appeal to the Madison County Circuit Court was jurisdictional, and that such an issue may be raised in this Court at any time.

The appellants point out that section 6998-26, Miss.Code 1942 Ann. (1952), says, among other things, that:

> 'Such appeal may be taken by filing notice of appeal with the commission, *615 whereupon the commission shall under its certificate transmit to the circuit court of the county where the injury occurred all documents and papers on file in the matter, together with a transcript of the evidence, the findings, and award, which shall thereupon become the record of the cause. Appeals shall be considered only upon the record as made before the commission.'

It is therefore argued that since the claimants failed to appeal to the Circuit Court of Madison County, where the deceased died, there was no appeal, and since the time allowed by law for an appeal has lapsed, the order of the Workmen's Compensation Commission 'in favor of the appellants must be affirmed by court.'

[4] The fallacy of this argument is found in the assumption that the appeal to the Circuit Court of Leake County from the order of the Workmen's Compensation Commission was jurisdictional. That part of section 6998-26, Miss.Code 1942 Ann. (1952), applicable to the present case is in the following language:

> 'The final award of the commission shall be conclusive and binding unless either party to the controversy shall within thirty (30) days from the date of its filing in the office of the commission and notification to the parties appeal therefrom to the circuit court of the county in which the injury occurred.'

In the case of Grenada Bank v. Petty, 174 Miss. 415, 164 So. 316 (1935), we said: 'There is a difference between jurisdiction and venue. Jurisdiction connotes the power to decide a case on the merits, while venue connotes locality, the place where the suit should be heard.'

It is pointed out in 21 C.J.S. Courts s 15(c) that: 'Jurisdiction is the subject which relates to the power of the court and not to the rights of the parties as between themselves * * *.'

The distinction between 'jurisdiction' and 'venue' has been plainly established and has been frequently recognized. Jurisdiction connotes the power to decide a case on the merits, while venue connotes locality, the place where the suit should be heard. The word 'venue,' unless it is given jurisdictional effect by localizing the action, relates only to the place where, or the territory within which, either party may require the case to be tried, and unless it is a local action, the question of jurisdiction of subject matter is not involved. The mere existence of general rules of venue,

whether at common law or statutory form, does not of itself affect the right of the court to hear and determine foreign causes.

It is clear from the language of the foregoing Code section, 6998-26, Mississippi Code 1942 Annotated (1952), that the Circuit Court of Leake County has jurisdiction to determine workmen's compensation cases on appeal to that court from the Workmen's Compensation Commission, although it lacks venue to hear cases where the injury occurred in another county.

Our legislature has made provision for a change of venue where the court has jurisdiction but lacks venue. See s 1441, Miss.Code 1942 Ann. (1956), which is as follows:

> 'Where an action is brought in any circuit, chancery, county, or justice of the peace court of this state, of which the court in which it is brought has jurisdiction of the subject matter, but lacks venue jurisdiction, such action shall not be dismissed because of such lack of proper venue, but on objection on the part of the defendant shall, by the court, be transferred to the venue to which it belongs.'

Since Section 6998-26, Mississippi Code 1942 Annotated (1952), permits a case to be appealed from an administrative agency to a court, section 1441, Code 1942 Annotated is applicable since it is the court mentioned therein where the action is brought and gives appellee the right to object to the venue when the appeal is taken to a court other than the court in the county in which the injury occurred. 2 Am.Jur.2d Administrative Law s 737 (1962).

*616 [5] It is generally conceded that where a court has jurisdiction it has the power to decide the case. 2 Am.Jur.2d Administrative Law s 731 (1962). The right to have a case heard in the court of the proper jurisdiction may be lost unless seasonably asserted. Industrial Addition Ass'n. v. Commissioner of Internal Revenue, 323 U.S. 310, 65 S.Ct. 289; 89 L.Ed. 260 (1945); compare Ravesies v. Martin, 190 Miss. 92, 199 So.2d 282 (1940).

[6] In the instant case the question was not raised as to the venue of the action until after this Court had affirmed the judgment of the trial court. We hold, therefore, that the objection that the trial court in Leake County did not have jurisdiction to try this case is not well taken. We find no other point raised in the petition for rehearing which merits our consideration.

The petition for rehearing is therefore denied.

Petition for rehearing denied.

C. County Where the Cause of Action May Occur or Accrue

Flight Line, Inc. v. Tanksley, 608 So.2d 1149 (Miss. 1992)

ROBERTSON, Justice, for the Court:

I.

Today's appeal and cross-appeal arise from a less than commonplace occurrence. A Vicksburg-based towing company chartered the aircraft of a commuter service to fly men and equipment to Chicago. During unloading, the craft suddenly sat down on its tail, shifting a heavy pump back onto *1153 Plaintiff, who was injured and sued the charter service in tort.

Thrice the Circuit Court has convened to try the case. Six days into the first such, the Court declared a mistrial. A two-week second trial saw a verdict for Plaintiff, but the Court ordered a substantial additur the Defendant refused. On the third trial on damages only, the jury returned a much larger verdict, and Defendant appeals.

The action has been hotly contested throughout. The issues by their nature, factual and otherwise, resist mightily our knowing the whole truth. We seek justice in the fairness of the process, accepting pragmatically its powers be limited.

II.

A.

Magnolia Marine Transportation Company is a Mississippi corporation operating out of Vicksburg. Magnolia Marine is in the river transportation business and is engaged primarily in moving cargoes of asphalt on the inland waterways system, principally the Mississippi River.

In October of 1984, Howard Tanksley, then thirty-five years of age, was employed by Magnolia Marine as a senior tankerman. Tanksley was the Plaintiff below and is Appellee/Cross-Appellant here. The tankerman's task is largely a manual labor job, requiring from time to time considerable physical strength. He is particularly responsible at the time of receiving and discharging cargo. Prior to October 8, 1984, Tankerman Tanksley was earning approximately $32,000.00 a year, plus fringe benefits. Magnolia Marine personnel say, had Tanksley not been injured, he likely would have been a career employee.

On October 8, 1984, Magnolia Marine's Vicksburg office received word two of its barges had become disabled in the Chicago area. Magnolia Marine determined to fly the needed personnel and equipment to Chicago and do the repair work itself. Flight Line, Inc., is a Mississippi corporation operating a commuter passenger and cargo air service out of the Jackson Municipal Airport in Rankin County, Mississippi. Flight Line was the Defendant below and is Appellant/Cross-Appellee here. Magnolia Marine's port captain, Gene Neal, called Flight Line to charter an airplane to transport two workers, their luggage, and the necessary equipment and tools from Vicksburg to Chicago. Capt. Neal requested an airplane adequate for a 1500 pound load. Flight Line, acting through its dispatcher, Cougar Easley, accepted the engagement and provided the aircraft, a Cessna 402B, and its pilot, Robert Avery. On land the craft rests and runs on three wheels, one under each armpit and a third under the nose, but no tail struts, a point whose import will presently appear.

Avery flew the aircraft to Vicksburg in Warren County and there supervised the loading of Magnolia Marine's equipment--three pumps and one motor--weighing in the aggregate some 1,079 pounds, together with a case of work tools weighing about 20 pounds. The two employees Magnolia Marine provided were Billy Chandler, an engineer, and Tankerman Tanksley. Chandler questioned pilot Avery about weight distribution in the plane and expressed concern of the possibility of the plane tipping over. Avery assured Chandler that the fuel and "stuff" in the wings would balance the plane. Under Avery's directions, the loading was completed.

The plane then took off from the Vicksburg Airport and flew to Chicago without incident. Upon arrival, Avery taxied to a terminal for light aircraft. Pilot Avery, together with Chandler and Tanksley, exited the plane and walked to the terminal where they met Frank Connor and other men who were to fly back to Mississippi. Avery mentioned filing

flight plans for the return trip and told the men to arrange a truck--a full half-ton pickup truck-- to be driven out to the plane to receive the equipment. The truck was backed up almost flush with the airplane door, its tailgate down. Chandler, Tanksley and Connor waited a while. Avery did not return, and they decided they had best get on with the unloading process.

Chandler and Tanksley re-entered the aircraft, Chandler to the front and Tanksley *1154 to the rear, while Connor was standing in the back of the truck. Chandler and Tanksley began to slide a heavy motor back and had moved it but a foot or so when the plane suddenly shifted rearward, its tail striking the ground and sitting there, its nose in the air at a 45 degree angle. When this happened, Tanksley was on the downside of the plane and was on the receiving end of the heavy motor, as Chandler could not hold it and finally let go.

Stunned for a few moments, Tanksley felt "pressure" in his back. Chandler and Tanksley then exited the plane to assess the situation. They waited ten or fifteen minutes. The pumps and motor had to be unloaded and were unlikely to unload themselves. Chandler and Tanksley proceeded anew, and with Connor's assistance, managed to push and shove the several pieces of heavy equipment into the truck. When they unloaded the last piece, a 382 pound pump, the plane righted itself just as suddenly.

Soon thereafter, Tanksley's back began to bother him, a matter verbally reported to port captain Neal either that night or the next day through a phone call. There is evidence Tanksley took medicine for pain that evening. Eight days later, Tanksley, who is illiterate, had his wife, Ann, complete a written accident report which was delivered to Magnolia Marine in Vicksburg on November 16. In that report, Ann Tanksley said Howard had slipped on oil in the back of the pickup truck. All eyewitnesses agree there was no oil in the back of the truck nor did Tanksley slip there, and, in view of the verdict, we regard this an inadvertence of no consequence.

Tanksley was treated by Dr. George Abraham of Vicksburg. Dr. Abraham first found no evidence of a pinched nerve in Tanksley's back and after a period of hospitalization and conservative treatment, released Tanksley to return to light work. Ten days later, Tanksley returned to Dr. Abraham reporting he had re-injured his back lifting a heavy object. Dr. Abraham then referred Tanksley to Dr. Lynn Stringer, a neurosurgeon, who operated on Tanksley for a herniated disk in 1984. After a period of convalescence, Dr. Stringer released Tanksley for light work but readmitted him to the hospital in July of 1985 with renewed back pains. Dr. Stringer performed a second disk operation and subsequently, Dr. Daniel Dare, an orthopedic surgeon, performed a third.

B.

On September 6, 1985, Howard Tanksley commenced the present civil action by filing his complaint against Flight Line, Inc., claiming personal injuries said to have been proximately caused by the negligent arrangement and stowage of the cargo of heavy equipment prior to the flight to Chicago and thereafter by the failure to supervise the unloading of same in Chicago. Ann Tanksley, Howard's wife, joined as a plaintiff with a claim of loss of consortium. Ann Tanksley was killed in an accident on April 21, 1987, and her action was revived in the name of Howard Tanksley, administrator of her estate. National Union Fire Insurance Company, Magnolia Marine's workers' compensation insurance carrier, intervened as a plaintiff by reason of the compensation and medical benefits it had paid Tanksley.

Flight Line denied the essential allegation of the complaint and immediately challenged venue in Warren County. Flight Line's motion to transfer was denied. The Circuit Court first called the case for trial on July 27, 1987, but this accomplished little as matters ended in a mistrial. Eleven months later, the case was tried anew, and the jury returned a verdict for Tanksley in the amount of $100,000.00. Tanksley moved for an additur or, in the alternative, for a new trial on damages, and the Circuit Court granted the motion, ordering an additur of $400,000.00 and failing that, a new trial on damages only. Flight Line rejected the additur.

On January 23, 1989, the Circuit Court of Warren County convened a jury for a third time, this time to hear the issue of damages only. In response to interrogatories, the jury found Tanksley's total damages to be $4,120,400.00, but found further that *1155 Tanksley had knowingly entered a position of open and apparent danger and that this was thirty percent of the total negligence in the case and, further, the jury found twenty-five percent of Tanksley's damages were the proximate result of his failure to take care of himself, post-accident and ultimately post-surgery, a failure to mitigate his damages, if you will. The jury's net verdict was $1,854.180.00. The Circuit Court entered judgment in favor of Tanksley and against Flight Line in this amount. Meanwhile, the Circuit Court dismissed the claim for Ann Tanksley's loss of consortium.

Flight Line moved for judgment notwithstanding the verdict, or, in the alternative, for a trial or, in the alternative, for a new trial on damages only or a remittitur. The Circuit Court denied all motions. Flight Line now appeals, and Tanksley cross-appeals.

III.

Our first issue is venue. Flight Line complains that it was required to submit to trial in Warren County. Flight Line is a domestic corporation with its principal place of business in Rankin County and, as the record reflects, timely objected to venue in Warren County and moved for a transfer to Rankin County. Flight Line pressed the point several times over but to no avail.

[1] [2] Venue is a function of statute. Miss.Code Ann. § 11-11-3 (1991) has at all times relevant hereto provided:

> Civil actions of which the circuit court has original jurisdiction shall be commenced ..., if the defendant is a domestic corporation, in the county in which said corporation is domiciled or in the county where the cause of action may occur or accrue....

Applied here, venue lay in one of "two" places, Rankin County, the county of Flight Line's domicile, [FN1] or the county "where the cause of action may occur or accrue." Flight Line says the cause of action occurred or accrued in Chicago, hence venue in Mississippi was proper only in Rankin County.

> FN1. For venue purposes, the domicile of a corporation is the county of its principal place of business. Plummer-Lewis Co. v. Francher, 111 Miss. 656, 661, 71 So. 907 (1916).

[3] [4] [5] In venue disputes courts begin with the well-pleaded allegations of the complaint. These, of course, may be supplemented--and contested--by affidavits or other evidence in cognizable form. See Long v. Patterson, 198 Miss. 554, 562-64, 22 So.2d 490, 492-93 (1945). What is important is that venue needs to be settled early on. See New Biloxi Hospital, Inc. v. Frazier, 245 Miss. 185, 192, 146 So.2d 882, 885 (1962). This policy premise undergirds our rule that a defendant waives any objection to venue unless he asserts it early on. Rule 12(h)(1), Miss.R.Civ.P.; Atwood v. Hicks, 538 So.2d 404, 407 (Miss.1989). If venue is proper when and where suit is filed, it may not be ousted by later events. See Blackledge v. Scott, 530 So.2d 1363, 1365 (Miss.1988).

[6] [7] [8] [9] Of right, the plaintiff selects among the permissible venues, and his choice must be sustained unless in the end there is no credible evidence supporting the factual basis for the claim of venue. See Mississippi Power Co. v. Luter, 336 So.2d 753, 754 (Miss.1976); Great Southern Box Co. of Miss. v. Barrett, 231 Miss. 101, 109-110, 94 So.2d 912, 914-15 (1957). Put otherwise, the court at trial must give the plaintiff the benefit of the reasonable doubt, and we do so on appeal as well. Still, we regard venue a right as valuable to the defendant as to the plaintiff. Jefferson v. Magee, 205 So.2d 281, 283 (Miss.1967). If in the end venue is improper, the court must honor timely objection and transfer to the correct venue, and, if it does not do so, we must reverse. *1156 Dunn v. Dunn, 577 So.2d 378, 379-80 (Miss.1991); Board of Trustees of State Institutions of Higher Learning v. Van Slyke, 510 So.2d 490, 493 (Miss.1987); Batson & Hatten Lumber Co. v. McDowell, 159 Miss. 322, 131 So. 880 (1931).

Tanksley argues, as he has throughout, that the cause of action at least partially occurred in Warren County. The Circuit Court accepted this view and, en route to denying Flight Line's motion, said:

> I think where an accident results as a result of a series of acts, the fact that it finally culminates in a foreign place does not take it away from where it began to start.

Flight Line tells us all of this is error and that where a cause of action occurs within the meaning of Section 11-11-3, is, in effect, the place where the last event occurs or, more generally, where the injury is, in fact, inflicted. It appears we have adopted this view a while back in Masonite Corp. v. Burnham, 164 Miss. 840, 146 So. 292 (1933). In construing the words "occur or accrue" within the statute, Masonite reasoned, although the cause of the injury may have had, and did have, its origin in one county, the cause was entirely harmless, and on account of which no action could accrue, until the injury took place, and when that injury occurred in another county the cause of action, within the meaning of the venue statute occurred or accrued in the latter county. Masonite, 164 Miss. at 851-52, 146 So. at 293-94.

[10] This reasoning seems flawed. In the first place, "occur" and "accrue" are not synonymous, legally or otherwise, as the disjunctive connector forthrightly suggests. We read accrual in its formalistic sense. A cause of action accrues when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested. Forman v. Mississippi Publishers Corp., 195 Miss. 90, 104, 14 So.2d 344, 346 (1943). This may well mean the moment injury is inflicted, that point in space and time when the last legally significant fact is found. "Occur" is a less formalistic term. It is event oriented to its core. It connotes conduct and phenomena and imports no preference among all of those necessary that a plaintiff may sue. It is certainly true in cases such as this the action--the improper loading in Vicksburg--was harmless when done "and on account of which no action could accrue, until the injury took place." What Masonite misses is that the converse is equally true. The injury could not, as a matter of common sense, take place had it not been for the conduct in the county of origin. The mere fact of injury in Chicago could not be actionable without negligence somewhere, here (at least in part) in Warren County.

Flight Line argues we reaffirmed Masonite in Coca-Cola Bottling Co. v. Cox, 174 Miss. 790, 165 So. 814 (1936). In Coahoma County, Coca-Cola bottled within its soft drinks decomposed bodies of roaches. The plaintiff received the Coke and drank it in Tunica County and suffered injury. The court held venue proper in Tunica County where the injury occurred when the plaintiff drank the coke. This decision, of course, is entirely proper. The words "occur or accrue" within the statute are at least broad enough to include the place where the injury is inflicted, but this does not and cannot exclude the place where substantial parts of the injury-causing conduct occurred, in that case in Coahoma County.

Blackledge v. Scott, 530 So.2d 1363 (Miss.1988), is the other side of the coin. *1157 Plaintiff, a resident of Claiborne County, boarded an automobile in Claiborne County and was injured later in Hinds County. We rejected his claim of venue in Claiborne County. The reason this is correct is that nothing happened in Claiborne County which in law had any causative effect upon the claim plaintiff asserted. Blackledge is quite sharply distinguished from the case at bar. Had Tanksley without more boarded the plane in Warren County for the flight to Chicago, Blackledge would control. What takes this case out of Blackledge is that Tanksley has alleged and presented colorable proofs that in Vicksburg and in Warren County, Flight Line delivered a plane not suited for the task at hand and/or loaded the aircraft overweight and out of balance.

[11] In the final analysis, venue is about convenience. The legislative prescription implies a legislative finding counties meeting certain criteria will generally be more convenient to the parties. The use of "occur" makes sense because important witnesses will often be accessible where the action occurs. Yet, there is nothing in the phrase "where the cause of action may occur...." that limits the judicial search for but a single county. Torts arise from breaches of duties causing injuries, and it is common experience that breach and causation and impact do not all always happen at once. At the very least, the word "occur" connotes each county in which a substantial component of the claim takes place, and this may include, in the present context, the negligent conduct which substantially undergirds Tanksley's claim. Anything to the contrary in Masonite Corp. v. Burnham or following cases stands overruled.

The Circuit Court did not err when it denied Flight Line's motion for a change of venue. That the emphasis at trial centered on the unloading in Chicago does not counsel the contrary. From the outset and at trial, Tanksley alleged and colorably proved part of Flight Line's negligence occurred in Warren County.

* * * *

ON DIRECT APPEAL, AFFIRMED; ON CROSS-APPEAL, AFFIRMED IN PART AND REVERSED IN PART AND REMANDED.

Burgess v. Lucky, 674 So.2d 506 (Miss. 1996)

ROBERTS, Justice, for the Court:

* * * *

In an action brought pursuant to Mississippi's Wrongful Death Statute, Miss. Code Ann. § 11-7-13, for damages allegedly resulting from negligence arising out of medical care and/or treatment rendered to decedent by defendants, is venue proper in the county where defendants reside and the alleged negligence occurred or in the county where decedent died.

FACTS AND PROCEDURAL HISTORY

On June 28, 1989, Edward Lucky, the decedent, was admitted to Forrest General Hospital where he came under the care and supervision of the appellants, Dr. Charles Dewayne Burgess, and Dr. Kurt Frederick Bruckmeier. Both Drs. Burgess and Bruckmeier were residents of Forrest County, Mississippi. After being admitted to the hospital the decedent received a series of Ativan injections and thereafter lapsed into a coma. The decedent was still in a coma when he was discharged from Forrest General Hospital on August 21, 1989. Without ever regaining consciousness, Edward Lucky died in Simpson County, Mississippi, on August 28, 1989.

On June 18, 1991, Wisey S. Lucky (Lucky), the decedent's widow, filed a complaint in the Circuit Court of Simpson County against the appellants. An amended complaint was filed on February 13, 1992. Forrest General Hospital was also originally made a defendant to the suit, but was later dismissed. Lucky's complaint alleged that she was entitled to recover damages pursuant to Miss.Code Ann. § 11-7-13 on behalf of Edward Lucky's wrongful death beneficiaries. The complaint alleged that the decedent died as "a direct and proximate result of the negligence, gross negligence, and deviations from the standard of care" by Drs. Burgess and Bruckmeier.

A motion for change of venue to Forrest County was filed by both Drs. Burgess and Bruckmeier. Appellants argued a lack of venue in the Circuit Court of Simpson County. The lower court denied the motions, holding that pursuant to Miss.Code Ann. § 11-11-3, the wrongful death action accrued in Simpson County since that was the place of decedent's death. Subsequently the lower court, pursuant to Rule 5 of the Mississippi Supreme Court Rules, denied certification "that a substantial basis exists for a difference of opinion on a question of law...." *508 Appellants' petition for interlocutory appeal was granted by this Court on June 3, 1992.

DISCUSSION

The appellants, Drs. Burgess and Bruckmeier, argue that a cause of action for wrongful death, in a medical negligence context, occurs and accrues for venue purposes in the county where the negligence took place. Lucky, on the other hand, maintains that wrongful death is a cause of action separate and distinct from medical negligence and that it accrues only at the time of death and therefore, under Mississippi's general venue statute, the county of death is a proper venue.

Lucky filed suit against Drs. Burgess and Bruckmeier pursuant to Miss.Code Ann. § 11-7-13, Mississippi's wrongful death statute, which reads in part:

* * * *

Mississippi's wrongful death statute does not contain a specific provision regarding venue; therefore, Miss.Code Ann. § 11-11-3 (Supp.1995), the state's general venue statute, must be relied upon in wrongful death cases. Miss.Code Ann. § 11-11-3 provides in pertinent part:

> Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant or any of them may be found or in the county where the cause of action may occur or accrue.... (emphasis added).

In order to determine permissible venues in a wrongful death cause of action, it must first be determined where the cause of action occurred or accrued. There are three possible alternatives to this question in a wrongful death action.

The cause of action occurs and/or accrues: one, in both the county where the death occurred and the county where the alleged negligence took place, if they are different; two, only in the county where the negligence that led to the death occurred; or three, only in the county where the decedent died. There is no consistent treatment of this issue among other jurisdictions in which a general venue statute is used in wrongful death actions.

There are relevant Mississippi cases concerning venue, wrongful death actions and when a cause of action occurs and accrues. The first alternative of venue being proper in both the county where the death took place, as well as the county where the negligence occurred, is the alternative most consistent with this Court's prior holdings.

In Owens-Illinois, Inc. v. Edwards, 573 So.2d 704, 706 (Miss.1990), a statute of limitations case, the Court, quoting Rankin v. Mark, 238 Miss. 858, 120 So.2d 435 (1960), stated that "[a] cause of action accrues only when it comes into existence as an enforceable claim; that is, when the right to sue becomes vested." The Court in Gentry v. Wallace, 606 So.2d 1117 (Miss.1992), was faced with the question of when the statute of limitations begins to run in a wrongful death action stemming from medical negligence. The Gentry Court held that in a wrongful death case "the cause of action does not accrue until the death of the negligently injured person." 606 So.2d at 1119. The Court went on to state:

> Wrongful death is a separate and distinct cause of action, which can be brought only by the survivors of the deceased. Miss.Code Ann. § 11-7-13 (1972 and Supp.1991). Without and until the death of Mary Gentry, there was no cause of action under the wrongful death statute to trigger the two year statute of limitations....
>
> As it stands, the ruling of the trial court erroneously assumes that wrongful death and medical negligence causes of action are synonymous. However, wrongful death has been recognized as a tort separate *509 and distinct from other personal injury actions.
> Gentry, 606 So.2d at 1119-20. (citations omitted).

Although the above-cited cases do not contain venue issues, they seem to indicate that a wrongful death action does not accrue until the death of the negligently injured person. This being the case, Simpson County, the county where the decedent died, would be a county of appropriate venue. However, there is nothing to suggest that venue may be proper in but one county.

The Mississippi case most relevant to the issue at bar is Flight Line, Inc. v. Tanksley, 608 So.2d 1149 (Miss.1992). In that case, this Court held that a cause of action does not necessarily "occur" and "accrue" at the same time or place.

* * * *

If the reasoning used in Flight Line is applied to the case at bar, Simpson County and Forrest County would each be permissible venues. Simpson County is a permissible venue because it is the place of death, or rather, the place where the right to sue for wrongful death became vested. Forrest County would also be an appropriate venue since it is the county where the alleged negligent conduct which led to the death of decedent took place. Accepting this reasoning, the circuit court's ruling must be affirmed. This is so since "[o]f right, the plaintiff selects among the permissible venues, and his choice must be sustained unless in the end there is no credible evidence supporting the factual basis for the claim of venue." Flight Line, 608 So.2d at 1155. (citations omitted) (footnote omitted).

Other states have taken different approaches in deciding venue in wrongful death cases. It should be noted, however, that although there are other jurisdictions which apply general venue statutes to wrongful death cases, Mississippi is the only one to use the phrase "occur or accrue."

* * * *

The theory that a cause of action for wrongful death accrues for venue purposes where the negligence occurred or where the injuries causing death were inflicted and not in the county where the death occurred, if different, can be reconciled with prior Mississippi case law. Although this Court held in Gentry, 606 So.2d at 1119, that a cause of action for wrongful death "does not accrue until the death of the negligently injured person," the issue in that case was when the cause of action accrued for statute of limitations purposes, not venue. Applying the rationale of the Missouri court in Dzur, Lucky's cause of action did not accrue for statute of limitations purposes until Mr. Lucky's death in Simpson

County, but it accrued for venue purposes in Forrest County, the place where the underlying negligence and injuries occurred.

This rationale makes sense if wrongful death is considered a derivative action. In Wickline v. U.S. Fidelity & Guaranty Co., 530 So.2d 708, 715 (Miss.1988), the Court stated that "[t]he wrongful death statute provides a derivative action by the beneficiaries, and those beneficiaries stand in the position of their decedent." (emphasis added). Miss.Code Ann. § 11-7-13, Mississippi's wrongful death statute substantiates, this. It reads in part:

> Whenever the death of any person shall be caused by any real, wrongful or negligent act or omission ... as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof ... the person or corporation, or both that would have been liable of death had not ensued, and the representatives of such person shall be liable for damages, notwithstanding the death....

[1] "[V]enue [is] a right as valuable to the defendant as to the plaintiff." Flight Line, 608 So.2d at 1155; Jefferson v. Magee, 205 So.2d 281, 283 (Miss.1967). Finding that the cause of action accrues for venue purposes at the place where the negligence occurred is the alternative most fair to the defendant. Otherwise, a defendant might find himself having to defend an action in a county where none of the negligence occurred, there are no witnesses, and he has no contacts, just because the negligently-injured party happened to be in another county when he died, whether that be the county of decedent's residence or a county he happened to be passing through at the time.

* * * *

Of the three alternatives discussed, the first, that a cause of action in a wrongful death case may occur and/or accrue in both the county where the death occurred and the county where the alleged negligence took place, is the alternative most consistent with our prior case law and the legislature's intent.

CONCLUSION

[3] In light of our decision in Flight Line and the legislature's use of "or" which indicates that the words "occur" and "accrue" are not synonymous, we find that in answering the question of where a wrongful death cause of action may occur or accrue for venue purposes, the answer is that it may "occur" where the negligence happened and "accrue" in the county of death, making either county, if they are different, a permissible venue. The statute's use of the disjunctive "or", as well as, this Court's holding in Flight Line makes this alternative the most reconcilable with Mississippi law. Therefore, since suit was brought in Simpson County, the county of decedent's death and therefore, the county in which the cause of action accrued, we affirm the lower court's denial of Burgess and Bruckmeier's motion for change of venue.

AFFIRMED.

Forrest County Gen. Hosp. v. Conway, 700 So.2d 324 (Miss. 1997)

Mills, Justice, for the Court:

STATEMENT OF THE CASE

¶ 1. Ronnie Conway and Christy Conway, individually and on behalf of their minor daughter, Megan Conway (hereinafter "Appellees"), filed a complaint in the Circuit Court of the First Judicial District of Hinds *325 County, Mississippi on February 22, 1993. The complaint alleged medical malpractice against Charmaine McCleave, M.D., and Forrest County General Hospital.

¶ 2. Forrest County General Hospital and Charmaine McCleave, M.D., (hereinafter "Appellants") answered the complaint and objected to the improper venue of Hinds County. The Appellants moved the court to transfer venue to Forrest County, Mississippi, the domicile of Forrest County General Hospital ("Forrest General"), or Lamar County, the domicile of Charmaine McCleave, M.D.

¶ 3. By order dated May 24, 1993, the Circuit Court of Hinds County denied Appellants' motion for change of venue finding that although the cause of action first accrued in Forrest County, the Appellees' damages continued to occur in Hinds County making venue proper in Hinds County pursuant to Miss.Code Ann. § 11-11-3.

¶ 4. South Mississippi Emergency Physicians (hereinafter "SMEP"), along with Darrell Ellzey, Dorothy Denham and Miriam Jarrell, all nurses at Forrest General (hereinafter collectively referred to as "Appellants"), were named in Appellees' amended complaint filed on November 23, 1993. The three employees filed a separate answer, which incorporated a motion to dismiss for lack of venue, or alternatively, to transfer the cause to Forrest County. On December 23, 1993, SMEP moved separately to transfer venue, and on February 3, 1994, the Hinds County Circuit Court denied this motion. Aggrieved by the lower court's ruling, Appellants filed a petition for interlocutory appeal on June 7, 1993. This Court granted the petition on March 14, 1994.

¶ 5. The Appellants raise four issues on appeal. However, we find the following issue to be dispositive of this appeal and will not address the remaining issues:

> WHETHER PLAINTIFFS, ALL OF WHOM ARE RESIDENTS OF FORREST COUNTY, CAN MAINTAIN AN ACTION PURSUANT TO MISS. CODE ANN. § 11-11-3 (SUPP.1993) IN HINDS COUNTY, MISSISSIPPI, FOR ALLEGED MEDICAL NEGLIGENCE THAT IS SAID TO HAVE OCCURRED IN FULL IN FORREST COUNTY, MISSISSIPPI, AGAINST SIX DEFENDANTS, NONE OF WHOM RESIDE IN HINDS COUNTY, BASED SOLELY UPON PLAINTIFFS' ALLEGATIONS THAT THE MINOR CHILD'S "INJURIES AND RESULTING DAMAGES SUFFERED BY HER AND HER PARENTS OCCURRED FOR THE MOST PART IN ... HINDS COUNTY."

STATEMENT OF THE FACTS

¶ 6. On February 20, 1992, at approximately 2:50 a.m., Ronnie Conway and Christy Conway brought their seven-month-old infant daughter, Megan Conway, into the emergency room at Forrest County General Hospital. She was seen by various nursing personnel. According to the complaint, Megan had a temperature in excess of 104 degrees and "blue spots." The charge nurse had refused to call a pediatrician and sent Megan to the general emergency room physician, Dr. McCleave who diagnosed Megan with a virus and prescribed an antibiotic. Megan was discharged at approximately 4:30 a.m. with a 102 degree temperature.

¶ 7. Later that day at 1:30 p.m., Megan's condition worsened. Her parents took her to the office of Dr. Frank Dement, a pediatrician. Megan was then taken back to Forrest General, where she was diagnosed with meningitis at approximately 2:00 p.m. After the staff determined that the infant's condition had substantially worsened and had reached the critical stage, a decision was made to transport her to the University Medical Center Hospital (hereinafter "UMC") in Jackson, Mississippi.

¶ 8. After arriving in Jackson, Megan remained in the intensive care unit for several weeks and was hospitalized for a total of sixty-nine days at UMC. During the course of the infant's treatment and care at UMC, and in order to save her life, Megan's arms and legs were amputated.

¶ 9. The facts relevant to the issues concerning venue are largely taken from the pleadings and are summarized herein.

1. The Appellees, at the time of the operative events and the filing of the complaint, *326 were and continue to be residents of Forrest County, Mississippi.

2. Forrest County General Hospital is a community hospital organized under and operating pursuant to Title 41, Chapter 13 of Mississippi Code Annotated. The Hospital is owned by and is a political subdivision of Forrest County.

3. Charmaine McCleave, M.D., was a resident of Lamar County, Mississippi, at the time the complaint was filed.

4. South Mississippi Emergency Physicians, P.A. is a professional association domiciled in Forrest County, Mississippi.

5. Darrell Ellzey, Dorothy Denham and Miriam Jarrell are residents of Covington, Jones and Pearl River counties, respectively; thus, none are residents of Hinds County.

DISCUSSION OF THE LAW

[1] ¶ 10. This interlocutory appeal concerns our venue scheme in Mississippi as set forth in § 11-11-3 of the Mississippi Code of 1972 Annotated. We may properly consider issues pertaining to venue via an interlocutory appeal. See Tideway Oil Programs, Inc. v. Serio, 431 So.2d 454 (Miss.1983) (ruling on venue issue proper as it avoids unnecessary expense and delay).

¶ 11. Appellants assert the following arguments for reversing the lower court's denial of their venue motion. First, they point to the fact that not one of the named Appellees is a resident of Hinds County. Second, they assert that the Appellants are residents of Forrest County. Third, they contend that all acts of alleged negligence "occurred" or "accrued" in Forrest County.

[2] [3] ¶ 12. Appellees contend that the lower court, in interpreting § 11-11-3, correctly determined that venue was proper in Hinds County. They further state that the damages first occurred and the cause of action first accrued in Hinds County. Venue is a valuable right possessed by both plaintiff and defendant. See Jefferson v. Magee, 205 So.2d 281, 283 (Miss.1967); Great Southern Box Co. v. Barrett, 231 Miss. 101, 94 So.2d 912, 915 (1957). "Of right, the plaintiff selects among the permissible venues, and his choice must be sustained [footnote omitted] unless in the end there is no factual basis for the claim of venue." Flight Line, Inc. v. Tanksley, 608 So.2d 1149, 1155 (Miss.1992).

¶ 13. Section 11-11-3 of the Mississippi Code of 1972 Annotated provides in part: "Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant or any of them may be found or in the county where the cause of action may occur or accrue." Miss.Code Ann. § 11-11-3 (1972) (emphasis added). The Appellants contend that Hinds County lacks venue because Forrest General is domiciled in Forrest County, and Dr. McCleave is a resident of Lamar County. SMEP also points out that none of its physicians are residents of Hinds County. Likewise, the Conways are residents of Forrest County. The Conways agree that none of the defendants are residents of Hinds County. Instead, they base their claim of venue on the "occur or accrue" language of the statute.

¶ 14. Appellants also argue that since no defendant may be found in Hinds County, venue cannot prevail in Hinds County unless it can be established that the cause of action asserted by the Appellees occurred or accrued in Hinds County. They argue for a strict construction of the venue statute, stating that the true sense in which words are used in a statute is to be ascertained, generally, by taking them in their ordinary and obvious significance in order to effect the plain intent of the Legislature. Furthermore, they rely on our cases holding that "the right to be sued in the county of one's residence is a valuable right, not a mere technicality." Board of Trustees of State Institutions of Higher Learning v. Van Slyke, 510 So.2d 490, 492 (Miss.1987).

[4] ¶ 15. The Appellants urge us to rely upon our holding in Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So.2d 344 (1943), that a cause of action occurred or accrued when "it came into existence as an enforceable claim, that is, when the right to sue becomes vested." Forman, 195 Miss. at 105, 14 So.2d at 346. We find that the initial *327 damage in the case sub judice occurred and accrued in Forrest County when the doctors allegedly failed to properly diagnose the disease. At that point, the initial damages occurred. The actions at the University Medical Center simply manifested the injury which had already occurred in Forrest County.

¶ 16. In 1996, this Court decided the two analogous cases of McMillan v. Puckett, 678 So.2d 652 (Miss.1996) and Burgess v. Lucky, 674 So.2d 506 (Miss.1996), where we held that venue is proper in both the county of the alleged negligence and the county of the decedent's death in wrongful death actions. Both cases involved alleged medical malpractice claims resulting in death. Wrongful death actions were filed in the counties of the actual deaths, rather than the counties of the alleged negligence. We found this to be proper since wrongful death actions create a new cause of action. McMillan, 678 So.2d at 656; Burgess, 674 So.2d at 512. However, the death required to initiate a wrongful death action is not analogous to the injury sustained by the Appellees, and therefore, McMillan and Burgess are readily distinguishable from the case sub judice.

¶ 17. We have also examined our decision in Flight Line, Inc. v. Tanksley, 608 So.2d 1149, 1156 (Miss.1992). In Flight Line, an airplane was improperly loaded in Vicksburg, Mississippi. The plane then flew to Chicago, Illinois, where Tanksley was injured while unloading the plane. Tanksley's injury occurred due to the negligent loading of the plane in Vicksburg. This Court found venue proper in Warren County since the injury could not have occurred without that negligent action. Flight Line, 608 So.2d at 1156.

¶ 18. Flight Line is consistent with the case sub judice. In Flight Line, the original negligence occurred in Warren County. In the present case, the Appellee's injuries occurred in Forrest County when the doctors allegedly failed to properly diagnose the Appellee's illness.

¶ 19. Our present analysis is also consistent with our holding in Blackledge v. Scott, 530 So.2d 1363 (Miss.1988), since no causative events in this case occurred in Hinds County. The only action occurring in Hinds County was the treatment of the already injured child.

CONCLUSION

¶ 20. The Conways brought suit in an improper county for purposes of venue under § 11-11-3. Since the cause of action accrued and the injury occurred in Forrest County, proper venue lies according to Rule 82 of the Mississippi Rules of Civil Procedure. Therefore, the ruling of the trial court on the change of venue motion must be reversed and the case remanded.

¶ 21. REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. DAN LEE, C.J., PRATHER, P.J., and BANKS, JAMES L. ROBERTS, Jr., and SMITH, JJ., concur. McRAE, J., dissents with separate written opinion joined by SULLIVAN, P.J., and PITTMAN, J.

McRAE, Justice, dissenting:

¶ 22. In finding that Forrest County is the only proper venue for the Conway's action against the Appellants, the majority fails to have perceived the subtle nuances between the accrual and occurrence of an act of negligence and the damages stemming therefrom. Further, it improperly focuses on the point where the "initial damages" occurred or accrued, neglecting the fact that ongoing damages continued to accrue after the child was moved to Hinds County for further treatment. To so find misses the point of our holding in Flight Line, Inc. v. Tanksley, 608 So.2d 1149, 1157 (Miss.1992). Accordingly, I dissent.

¶ 23. As we explained in Flight Line, "accrual" connotes that moment when a cause of action "comes into action as an enforceable claim, that is, when the right to sue becomes vested." Flight Line, 608 So.2d at 1156. "It may well mean the moment the injury is inflicted, that point in space and time when the last legally significant fact is found." Id. Occur, we further explained, is a less formalistic term, "event oriented to its core. It connotes conduct and phenomena and imports *328 no preference among all of those necessary that a plaintiff may sue." Id. The situation is analogous to a products liability case where a negligent act happens at the point of manufacture but the injury does not occur until after the product is in the stream of commerce. Flight Line 's analysis of Coca-Cola Bottling Co. v. Cox, 174 Miss. 790, 165 So. 814 (1936) is instructive.

In Coahoma County, Coca-Cola bottled within its soft drinks decomposed bodies of roaches. The plaintiff received the Coke and drank it in Tunica County and suffered injury. The court held venue proper in Tunica County where the injury occurred when the plaintiff drank the coke. This decision, of course, is entirely proper. The words "occur or accrue" within the statute are at least broad enough to include the place where the injury is inflicted, but this does not and cannot exclude the place where substantial parts of the injury-causing conduct occurred, in that case in Coahoma County. Flight Line, 608 So.2d at 1156. Venue, therefore, in Cox was proper both where the injury occurred and where the conduct causing the injury occurred. See also Smith v. Temco, Inc., 252 So.2d 212, 216 (Miss.1971)(personal jurisdiction over non-resident tortfeasor when the tort is committed, at least in part, in Mississippi). By the same token, in the case sub judice, venue is proper in Forrest County, where the act of negligence occurred, that is, the doctors' failure properly diagnose the severity of young Megan's illness, and in Hinds County, where the ultimate injury arising from that negligence occurred--the amputation of her arms and legs. The tort was not complete until that final injury took place. Further, it should not be necessary to reiterate that neither an act of negligence nor an injury alone constitutes the entire tort. Again, Flight Line is instructive:

In the final analysis, venue is about convenience. The legislative prescription implies a legislative finding counties meeting certain criteria will generally be more convenient to the parties. The use of "occur" makes sense because important witnesses will often be accessible where the action occurs. Yet, there is nothing in the phrase "where the cause of action may occur ...." that limits the judicial search for but a single county. Torts arise from breaches of duties causing injuries, and it is common experience that breach and causation and impact do not all always happen at once. At the very least, the word "occur" connotes each county in which a substantial component of the claim takes

place, and this may include, in the present context, the negligent conduct which substantially undergirds Tanksley's claim. Flight Line, 608 So.2d at 1157 (emphasis added). Thus, under Flight Line, as well as pursuant to Cox, venue is proper either in Forrest County, where doctors failed to diagnose Megan, or in Hinds County, where she received further treatment and where the ultimate injury, the amputation of her limbs, occurred.

¶ 24. By analogy, we must look also to the provisions for venue in wrongful death actions. In those cases, venue is proper both where the death occurred and where the alleged act(s) of negligence that led to the death took place. McMillan v. Puckett, 678 So.2d 652, 655 (Miss.1996). In that case, we looked to " 'the point in space and time when the last legally significant fact is found.' " McMillan, 678 So.2d at 655, quoting Flight Line, 608 So.2d at 1156. In the case sub judice, the last legally significant fact was the amputation of Megan's arms and legs in Hinds County.

¶ 25. Because venue in this case is proper in Hinds County as well as in Forrest County, I respectfully dissent.

D. Resident Individual Defendants

Belk v. State Dept. of Pub. Welfare, 473 So.2d 447 (Miss. 1985)

SULLIVAN, Justice, for the Court:

This case presents an issue of the interpretation of our statutes and the Mississippi *448 Rules of Civil Procedure as they apply to the sometimes troublesome issue of venue.

The State Department of Public Welfare, under the authority of Mississippi Code Annotated § 43-19-31 (Supp.1984) (child support unit procedure), and Mississippi Code Annotated § 93-9-9 (1972) (bastardy procedure), filed an action in the Chancery Court of Lowndes County against Otis Lee Belk alleged to be a Lowndes County resident. The suit sought to declare Belk the father of an illegitimate child and to order him to support that child. Subsequent events were to show that Belk was and always had been a resident of Clay County.

On September 15, 1982, service of process was had upon Belk by the sheriff of Clay County, Mississippi. Belk made no response, and on January 3, 1983, an entry of default was made against him by the Lowndes County Chancery Clerk. On February 1, 1983, the chancellor granted a default judgment declaring Belk the natural father of the child and ordering him to pay child support of $100.00 per month.

On May 30, 1983, the department moved to cite Belk for contempt as no support had ever been paid.

On July 28, 1983, Belk filed a motion to dismiss the contempt and the underlying default judgment of paternity and support on the theory that venue under the paternity statute, Mississippi Code Annotated § 93-9-17 (1972) was in Clay County and therefore the Lowndes County judgment was void.

The department sought a summary judgment that Belk had waived venue (his right to be sued in Clay County) when he neither responded to the action nor objected to the venue in Lowndes County.

After a hearing, the chancellor overruled Belk's motion to dismiss and granted the motion of the Department of Public Welfare for a summary judgment that Belk had waived venue by his failure to timely object.

In his opinion, the chancellor found that under § 93-9-17 Belk had a right to be sued only in Clay County. The chancellor then found that this case was controlled by the Mississippi Rules of Civil Procedure and that Rule 82(d) Miss.R.Civ.P. adopted the dissent in Gillard v. Great Southern Mortgage and Loan Association, 354 So.2d 794 (Miss.1978). Therefore, based upon Rule 82(d), Belk's proper remedy, in vindication of his venue right, was to timely object to the improper venue and move to transfer to Clay County at the cost of the Welfare Department.

Treating the motion to dismiss as an objection to venue, the chancellor then found that it was not timely filed and that venue had been waived.

On appeal, Belk contends that the chancellor has overruled Gillard and repealed Mississippi Code Annotated § 93-9-17, which provides in pertinent part:

> An action under § 93-9-1--§ 93-9-49 may be brought in the county where the alleged father is present or has property; or in the county where the mother resides; or in the county where the child resides. However, if the father resides or is domiciled in this state, the action must be brought in the county where the father resides.

Belk argues that Rule 82(d) merely replaces Mississippi Code Annotated § 11-11-17 (Supp.1984), and adds to it that the plaintiff will bear the burden of transfer expenses in the event the plaintiff brought an action that might properly have been filed in more than one county in the wrong county. Furthermore, Rule 82(d) does not take effect until the defendant objects to the improper venue. Belk then argues that Mississippi Code Annotated § 93- 9-17 is not listed in Appendix B of the Miss.R.Civ.P. as having been supplanted by those rules. He contends that § 93-9-17 specifically provides mandatory procedures governing venue in illegitimacy proceedings. If this reasoning be correct, then the ruling of the chancellor is in error and must be reversed.

Belk relies upon Gillard, in which this Court held that venue was not waived and reversed a default judgment where the defendants were sued in a county not of their *449 residence by a plaintiff for the plaintiff's own convenience. Plaintiff knew that neither defendant resided there and the cause of action did not accrue there. In Gillard, we interpreted Mississippi Code Annotated § 11-11-17 (Supp.1984) to hold that where a plaintiff failed to make a bona fide reasonable effort to file suit in the county where the defendant resided venue was not waived.

Belk also places great reliance in another pre-Rules case, Metts v. State Department of Public Welfare, 430 So.2d 401 (Miss.1983), in which this Court, speaking through Justice Prather, addressed the question of venue in a paternity proceedings similar to the case sub judice. In Metts, the alleged father, a resident of Winston County, was sued in the Chancery Court of Hinds County in exactly the same type proceeding as in this case. Default was entered against the defendant and he appealed and raised as one issue on appeal the failure of the plaintiff to sue the defendant in the county of his residence. We gave the following interpretation of Mississippi Code Annotated § 93-9-17:

> The venue of a bastardy proceeding under § 93-9-9 is as follows:
> An action brought under § 93-9-1--§ 93-9-49 may be brought in the county where the alleged father is present or has property; or in the county where the mother resides; or in the county where the child resides. However, if the father resides or is domiciled in this state, the action must be brought in the county where the father resides. (Miss.Code Ann. § 93-9-17 (1972) ... Thus, when a party filed a law suit based on these two statutes, compliance with § 93-9-17 is required.

The thrust of the argument of Belk is that venue in a paternity action is jurisdictional and as such it cannot be waived. If this is true, Rule 82(d) of the Miss.R.Civ.P. is inapplicable.

It is true that in certain instances we have recognized a concept of geographical jurisdiction. In Ross v. Ross, 208 So.2d 194 (Miss.1968), this Court held such notion applicable in divorce actions. In Green v. Winona Elevator Co., 319 So.2d 224 (Miss.1975), a suit to set aside a fraudulent conveyance of soybeans, we held that Mississippi Code Annotated § 11-5-1 (1972), required that the suit be brought in the county where the real or personal property was located. Geographical jurisdiction, therefore, was based on the location of the property, not the parties. By statute, there are many other actions which may be brought only in the chancery or circuit court of Hinds County, Mississippi.

Venue, however, has always been a personal privilege which can be waived when the action is "in personam". The only exception to this rule is when, by statute, the place where the action is to be heard is deemed jurisdictional, the primary examples of which are divorce actions, and actions dealing with property.

To determine proper venue in this case, three statutes must be interpreted. The general chancery venue statute, Mississippi Code Annotated § 11-5-1 (1972), provides:

> Suits to confirm title to real estate, and suits to cancel clouds or remove doubts therefrom, shall be brought in the county where the land, or some part thereof, is situated; suits against executors, administrators, and guardians, touching the performance of their official duties, and suits for an account and settlement by them, and suits for the distribution of personalty of decedents among the heirs and distributees, and suits for the payment of legacies, shall be brought in the chancery court where the will was admitted to probate, or letters of administration were granted, or the guardian was appointed; other suits respecting real or personal property may be brought in the chancery court of the county in which the property, or some portion thereof, may be; and all cases not otherwise provided may be brought in the chancery court of any county where the defendant, or any necessary party defendant, may reside or be found; and in all cases process may issue to any county to bring in defendants*450 and to enforce all orders and decrees of the court.

This is the most general of chancery venue statutes in its relation to the individual defendant in an in personam action. It provides that an action may be brought in any county where a defendant may reside or be found. There is no mandatory requirement that it be brought in a particular county.

We must next consider Mississippi Code Annotated § 93-9-17 (1972), the paternity venue statute. It states:

> An action under § 93-9-1--§ 93-9-49 may be brought in the county where the alleged father is present or has property; or in the county where the mother resides; or in the county where the child resides. However, if the father resides or is domiciled in this state, the action must be brought in the county where the father resides.

This provides three possible venues for paternity proceeding but mandates that a resident putative father is entitled to be sued in the county where he resides.

The third statute we must consider is Mississippi Code Annotated § 43-19- 31 (Supp.1984). This is the statute that created the child support unit within the State Department of Public Welfare. This statute allows the institution of proceedings in the name of the State Department of Public Welfare or in the name of the recipient "in any court of competent jurisdiction in any county where the mother of the child resides or is found, in the county where the father resides or is found, or in the county where the child resides or is found; ..." In our opinion, the conflict between these three statutes has been authoritatively settled by the opinion of Justice Prather in Metts v. Department of Public Welfare. In that case, Metts properly objected to the improper venue and we remanded the case to the county of his domicile for a determination of paternity. We did not hold that the paternity venue statute, however, was mandatory. The effect of our ruling in Metts was that the defendant in a paternity action has the right to be sued in the county in which he resides. We did not hold that he could not waive that right and we readily foresee circumstances in which a defendant in an action for paternity would prefer to waive his right to be sued in the county of his home in such an action in favor of defending himself from such charges in some county far removed from his home where the mother or the child might reside.

Of great importance in this case is the fact that this entire action was brought after the effective date of the Mississippi Rules of Civil Procedure. This importance is apparent when the rules regarding venue are examined. Rule 82(d) deals with improper venue. The thrust of the rule is that when an action is filed laying venue in the wrong county, the action shall not be dismissed, but the court, on timely motion, shall transfer the action to the court in which it might properly have been filed and the case shall proceed as though originally filed therein. The expenses of the transfer shall be borne by the plaintiff. The plaintiff shall have the right to select the court to which the action shall be transferred in the event the action might properly have been filed in more than one county. The last sentence of Rule 82 does not apply to our situation, but instead applies to those cases in which improper venue was laid and there are two or more counties in which the suit could properly have been filed.

Rule 12 Miss.R.Civ.P. provides the method by which the question of improper venue may be raised. Rule 12(b) states that every defense, in law or fact, to a claim for relief in any pleading whether a claim, counterclaim, crossclaim or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (3) improper venue. Further, Rule 12(h) concerning waiver or preservation of certain defenses, sets forth in 12(h)(1) that a defense of lack of jurisdiction over the person, improper venue, ... is waived (A) if omitted from a motion and the circumstance is described in (g) or (B) if it is *451 neither made by a motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course. It is to be noted that the Chancery Court of Lowndes County did not lack jurisdiction over the subject matter nor did it lack jurisdiction over the person of the defendant Belk. The only issue that could have been raised was improper venue. If we assume that Belk's motion to dismiss was in fact a 12(b)(3) motion, then the question becomes, was it timely and was it a proper vehicle?

Stated simply, the conflict is whether Belk must apply for a change of venue or whether the Welfare Department is required to bring the paternity action in the county of Belk's residence.

[1] We begin with the basic premise that venue may be waived. See Leake County Coop. (A.A.L.) v. Dependents of Barrett, 226 So.2d 608, 616 (Miss.1969); King v. Ainsworth, 225 Miss. 248, 83 So.2d 97 (1955). There are exceptions to this rule. The language of Metts would appear to hold that in a paternity action against a resident of the state of Mississippi it is mandatory that the action be brought in the county where the father resides. This is not actually the case.

It is important to note that in Metts the default judgment was set aside on other grounds. Our discussion of venue was not essential to the determination of that case. Because we remanded Metts for a trial, and the issue of venue would be before the trial court on the remand, this Court took the opportunity to point the trial court in the way it should go.

In attempting to harmonize the conflicting statutes and our case law, and recognizing that our Rules of Civil Procedure control within their scope and ambit, the most reasonable interpretation that we may give is that when a defendant is sued in both a paternity proceeding and a support proceeding, under §§ 93-9-17 and 43-19-33, the putative

father has a right to have the case heard in the county in which he resides, if he is a resident of the state of Mississippi. The defendant must timely assert that right via a Rule 12(b)(3) motion, and his failure to do so amounts to a waiver. This is consistent with our pre-Rules case of Wofford v. Cities Service Oil Co., 236 So.2d 743 (Miss.1970). Foreshadowing the approach taken by our Rules of Civil Procedure, Wofford announced the principle that venue is waived where a defendant does not timely apply for a transfer. Here, as in Wofford, there is no suggestion that the action was filed in Lowndes County to invoke the jurisdiction of its Court to the detriment of the Clay County defendant. In fact, the same chancellor presides in Clay County that presided over this trial in Lowndes County.

[2] For the reasons stated the chancellor was correct in his finding that venue was waived because Belk did not timely object to the improper venue. Rules 12(b)(3) and 12(h)(1), Miss.R.Civ.P. The decision of the chancery court is, therefore, affirmed.

AFFIRMED.

Dunn v. Dunn, 577 So.2d 378 (Miss. 1991)

SULLIVAN, Justice, for the Court:

The Dunns were married on May 13, 1965. They purchased a home in Brandon, Rankin County, Mississippi, at 204 Harbor View Road and resided there until November 20, 1987, when Dr. Dunn left the home. Dr. Dunn lived in a motel for a brief period in Jackson, Hinds County, Mississippi, then moved in as a guest with a Mr. and Mrs. Hardwick at 3817 Meadowlane, Jackson, Hinds County, Mississippi.

On January 22, 1988, Mrs. Dunn filed a complaint for separate maintenance, and on January 25, 1988, Dr. Dunn was served a summons at the Hardwick residence in Hinds County, Mississippi. Dr. Dunn responded by filing a cross-bill for divorce in which he timely objected to venue. Dr. Dunn also filed a motion for a change of venue. In Dr. Dunn's motion he stated by affidavit that he had lived at 204 Harbor View Road, Brandon, Rankin County, Mississippi, since the summer of 1986 until November 20, 1987; that he had and continued to practice medicine in Brandon, Rankin County, Mississippi; that his homestead exemption was filed in Rankin County, Mississippi; and that he was a registered voter in Rankin County, Mississippi. Although he stayed as a guest with the Hardwicks in their home in Hinds County, Dr. Dunn considered himself a guest there. He maintained that he was a resident domiciled in Rankin County, Mississippi. The Chancery Court of Hinds County, Mississippi, overruled the motion for change of venue.

The case came on for trial and at the conclusion of the plaintiff's case, Dr. Dunn moved to dismiss for failure of the plaintiff to prove venue, contending that the house in Rankin County was his official residence and was still owned by him, and he was still registered to vote and did vote in Rankin County, Mississippi.

The chancellor allowed Mrs. Dunn to reopen her case in chief to show venue, and although Dr. Dunn objects to this procedure by the chancellor, this Court has said ... "the opportunity to reopen should be granted when the opposing party would not be surprised and when a refusal would deprive a litigant of the opportunity to introduce material evidence." Reagan Equipment Co. v. Vaughn Gin Co., 425 So.2d 1045, 1047 (Miss.1983). After hearing the testimony of Mrs. Dunn on venue, the chancellor noted he had previously decided the venue issue on February 2, 1988. He saw no reason to change his prior ruling at trial. The chancellor then proceeded to grant Mrs. Dunn's petition for separate maintenance making numerous orders touching her support and maintenance, all of which are appealed by Dr. Dunn.

Because we find that the chancellor was manifestly wrong in finding that venue lay in the Chancery Court of Hinds County, Mississippi, we will not discuss the other issues raised by Dr. Dunn in this appeal.

Venue for a separate maintenance suit is controlled by our general venue statute which reads in pertinent part:

> [A]nd all cases not otherwise provided may be brought in the chancery court of any county where the defendant, or any necessary party defendant, may reside or be found....

Miss.Code Ann. § 11-5-1 (1972), as Amended.

[1] Under both our statutory law and Rules of Civil Procedure, if venue is improper, the court on timely motion shall transfer the action to the court in which it might properly have been filed. See Miss.R.Civ.P. 82; Miss.Code Ann. § 11-11-17 (Supp.1990). We previously have reversed *380 and remanded actions for transfer to the proper county when the trial court erred in declining to transfer a cause to a county of proper venue. Blackledge v. Scott, 530 So.2d 1363, 1366 (Miss.1988); Gillard v. Great Southern Mtg. & Loan Corp., 354 So.2d 794, 796 (Miss.1978); Trainum v. Trainum, 234 Miss. 448, 452, 105 So.2d 628, 630 (1958).

[2] Never to be overlooked when such issues are raised in the trial courts is our policy that a defendant sued alone in personam shall be sued in the county of his residence. Ross v. Ross, 208 So.2d 194, 195 (Miss.1968). The defendant having timely objected to venue and moved to transfer, the trial court was bound to transfer this cause to the defendant's and plaintiff's residence.

We are loath to declare a chancellor manifestly wrong and therefore we closely examine the evidence in this record as it touches upon venue in this suit for separate maintenance. If the defendant be a resident of this state, by

statute the action should have been brought in the county in which Dr. Dunn resides or may be found at the time. See Miss.Code Ann. § 11-5-1 (1972), as Amended.

Clearly, Dr. Dunn was found in Hinds County at the time the suit was filed and clearly he was a resident of the State of Mississippi. Therefore, it appears to us that the first issue to be determined is what does the statutory language "[o]r may be found at the time...." mean?

[3] We have defined "may be found" as a reference only to non-residents of the state, and to those who have no fixed place of residence within the state. In re Estate of Erwin, 317 So.2d 55, 57 (Miss.1975); Ross v. Ross, 208 So.2d at 196. We have recognized that "[t]he statute holds no such intent that a resident may be caught on the wing and sued in any county where he may be temporarily found." Ross v. Ross, 208 So.2d 194, 195 (Miss.1968); Griffith, Miss. Chancery Prac. (2d ed.) § 155 at 339 (1950). Therefore, we find that Dr. Dunn was not found within the meaning of the general venue statute in Hinds County.

[4] [5] Next we must then determine where Dr. Dunn resided at the time Mrs. Dunn initiated this action. As early as 1938, this Court has held that the word "residence" as used in divorce statutes is synonymous with "domicile," and that temporary absence by reasons of position did not change the residence of the party. Bilbo v. Bilbo, 180 Miss. 536, 549, 177 So. 772, 775 (1938). We find this reasoning persuasive and applicable to determine Dr. Dunn's residence within the meaning of the general venue statute. The mere fact that Dr. Dunn was not actually present in his home does not mean that this was not his residence.

[6] In light of the fact that Dr. Dunn still owned a home in Rankin County, Mississippi, still considered it his residence, was registered to vote and did vote in Rankin County, and had homestead exemption on a home in Rankin County, we find that the chancellor was manifestly wrong when he found that because Dr. Dunn was temporarily residing in Hinds County, Mississippi, where he was found for the service of process, the Hinds County Chancery Court had jurisdiction and venue of this cause. The chancellor should have declined to hear this matter and transferred it to the Chancery Court of Rankin County.

For the reasons set forth above, we therefore reverse this cause and remand it to the Chancery Court of Hinds County, with instructions that it promptly transfer the action to the Rankin County Chancery Court under Miss.R.Civ.P. 82.

REVERSED AND REMANDED.

E. Change of Venue for Inconvenience

Ill. Cent. Gulf R.R. v. Stedman, 344 So.2d 468 (Miss. 1977)

INZER, Presiding Justice, for the Court:

This is an appeal by Illinois Central Gulf Railroad and L. J. Madison from a judgment of the Circuit Court of Smith County awarding appellee Mrs. Lula B. Stedman, administratrix of the estate of her deceased husband, Henry Clay Stedman, damages in the amount of $181,316 as a result of a truck-train collision.

Mrs. Stedman brought this suit in the Circuit Court of Smith County seeking to recover damages for the alleged wrongful death of her husband, Henry Clay Stedman. The accident resulting in the injury and death two days later of Mr. Stedman occurred on March 11, 1974, at about 4 p.m. at the southernmost railroad crossing in the Town of Sledge, Quitman County. The truck, owned by Ouitman County and driven by Stedman, was struck by a locomotive operated by L. J. Madison. The declaration charged three principal grounds of negligence: (1) The train was traveling at a high, dangerous and unlawful rate of speed in excess of thirty miles per hour in violation of Mississippi Code 1972 Annotated, Section 77-9-237. (2) The train crew failed to properly sound the bell and whistle for the distance, time and place as required by Section 77-9- 225, and (3) The failure to erect flashing signals or warnings or to give special warning at the intersection where the accident occurred since the intersection was highly hazardous because of obstruction to vision.

The railroad and its engineer answered and denied the charges of negligence and alleged that the sole proximate cause of the collision was the negligence of Mr. Stedman in failing to stop, look and listen as required by statute.

* * * *

[Note: The portion of the opinion regarding the negligence claim is omitted.]

[6] Appellants also urge that the trial court was in error in failing to sustain their motion to dismiss this cause under the doctrine of the forum non conveniens, or in the alternative grant a change of venue. The trial court after hearing testimony on the motion overruled it, although none of the parties or witnesses were residents of Smith County. Although we cannot say that the trial court abused its discretion in this regard, however, on remand the trial court should again consider the motion in light of the testimony given and the circumstances now existing, and if it finds that it is proper to do so, transfer the cause to a more convenient forum.

Appellants also raise the question relative to the amount of the judgment, but since the case must be tried by another jury, we need not comment on the amount of the judgment.

For the reasons stated, this cause must be and is reversed and remanded.

REVERSED AND REMANDED.

Clark v. Luvel Dairy Prods., Inc., 731 So.2d 1098 (Miss. 1998)

SULLIVAN, Presiding Justice, for the Court:

¶ 1. Henry Clark, the appellant, sued Luvel Dairy Products, Inc., and its president, James H. Briscoe, the appellees, in Hinds County Circuit Court for actionable words, false imprisonment, and defamation. That court ordered venue transferred to Attala County upon the motion of the appellees based on the doctrine of forum non conveniens. This Court granted interlocutory appeal.

* * * *

[A lengthy discussion of forum non conveniens and venue has been omitted.]

IV.

CONCLUSION

¶ 28. Our research on the doctrine of forum non conveniens, the common law, and the development of venue conclusively establishes the following:

1) The history of the doctrine of forum non conveniens reveals no support for intrastate forum non conveniens.

2) Venue is a function of statute, and reference to common law can only be had where the venue statutes are silent.

3) By enacting a general venue statute which limited venue to the residence of the defendant or the place where the defendant could be found, the legislature effectively repealed the common law with regard to changing venue for the sake of convenience.

4) Venue is a matter of convenience, and the legislative directive with regard to convenience in this state is that counties meeting certain criteria will generally be more convenient to the parties.

5) The issue is one of legislative prerogative, and the Court today does not invade that prerogative.

[4] ¶ 29. To the extent that any of our previous decisions indicated that the doctrine of intrastate forum non conveniens would apply in this state, they are hereby overruled. Giving respect to the plaintiff's choice of forum, we hold the doctrine of forum non conveniens to be inapplicable when the trial court is faced with a choice of venue between two Mississippi counties. As a result, this case must be reversed and remanded to the Hinds County Circuit Court for further proceedings consistent with this opinion.

¶ 30. REVERSED AND REMANDED.

PITTMAN, P.J., and BANKS, McRAE and JAMES L. ROBERTS, Jr., JJ., concur.

McRAE, J., specially concurs with separate written opinion. [Omitted]

SMITH, J., dissents with separate written opinion joined by PRATHER, C.J., and MILLS and WALLER, JJ. [Omitted]*

*However, one must now see MRCP 82(e) promulgated in 2004 and Miss. Code Ann. § 11-11-3(4), effective Sept. 1, 2004. Intrastate *forum non conveniens* has been implemented in Mississippi.

F. Domesticated Foreign Corporation

Sandford v. Dixie Const. Co., 128 So. 887 (Miss. 1930)

Foreign corporation designating resident agent could be sued in circuit court of county where transitory cause of action accrued (Laws 1928, c. 90, § 11; Hemingway's Code 1927, § 500).

The foreign corporation referred to was doing business in state and under Laws 1928, c. 90, § 11, had designated resident agent within state who resided in H. county. Plaintiff sued the corporation in circuit court of F. county upon transitory *888 cause of action which accrued in F. county and served summons on resident agent in H. county. Laws 1926, c. 155; Hemingway's Code 1927, § 500, provides that civil action shall be commenced in county in which defendants may be found or county where cause of action accrued, except where otherwise provided.

Statute must be construed, if possible, as being intended to come fairly within constitutional rights and limitations.

Foreign corporation designating resident agent is placed, as regards venue in transitory action, in same position as domestic corporation (Laws 1928, c. 90, § 11, Hemingway's Code 1927, §§ 500, 4506).

Laws 1908, c. 123; Hemingway's Code 1927, § 4506, declares that all foreign corporations doing business in state shall be subject to suit here to same extent that corporations of state are, whether cause of action accrued in state or not, and this statute indicates general policy of equality and similarity of treatment as between foreign and domestic corporations.

G. Nonresident as Co-Defendant

Capital City Ins. Co. v. G.B. "Boots" Smith Corp., No. 2002-CA-01896-SCT, 2004 WL 2403939 (Miss. Oct 28, 2004)

Background: General contractor brought action against subcontractor for damages arising out of the cost of repairs to ditches, subcontractor counterclaimed for services rendered, and general contractor brought cross-claim against subcontractor's insurer, seeking coverage under the general liability policy. The Jones County Circuit Court, Billy Joe Landrum, directed a verdict in favor of contractor regarding liability of subcontractor and insurer and entered a judgment on a jury verdict for damages. Subcontractor and insurer appealed.

Holdings: The Supreme Court, Easley, J., held that:
(1) trial court was required to bifurcate trial between liability issues and insurance coverage, and
(2) venue in the county of plaintiff's residence was not proper.

Reversed and remanded.

EN BANC.

EASLEY, Justice, for the Court.

* * * *

[Overruling Senatobia Community Hospital v. Orr]

¶ 29. In the case sub judice, Capital City is a foreign insurance company from South Carolina. Boots Smith Corporation is domiciled in Jones County, Mississippi. The complaint against Capital City was served upon the insurance commissioner of the State of Mississippi. Thus, according to the insurance statute venue against the insurance company lies either in the county where the loss occurred or in the county where the plaintiff resides. Miss.Code Ann. § 11-11-7. See also Blackledge, 530 So.2d at 1364-65.

¶ 30. Because this case involves both an insurance company and a Mississippi resident defendant, we must look further than the insurance statute alone. We must also look to the general venue statute, Miss.Code Ann. § 11-11-3, and to the specific language used in each statute.

¶ 31. The main issue here centers on the mandatory "shall" language in § 11-11-3 versus the permissive "may" language in § 11-11-7. The venue statutes have been revised since this case was commenced, and more recently the venue statutes have been revised further effective September 1, 2004. While the former version of § 11-11-3 and the now repealed § 11-11-7 were in effect, neither statute referenced the other. Therefore, the statutes were competing in a sense, yet statutory construction gives preference to one statute over the other. Had the Legislature intended for each statute to have equal footing or equal force then both statutes should have had the mandatory "shall" language or § 11-11-7 would have explicitly stated that § 11-11-7 was controlling in suits involving insurance companies, foreign or domestic, either as sole defendants or as co-defendants with other resident defendants.

[3] ¶ 32. The venue statutes which were in effect for this case were never designed to remove a resident defendant's right to be sued in his or her own county of residence. Moreover, the Legislature never intended an interpretation of the venue statutes that would allow a resident defendant to be sued in the plaintiff's county of residence simply because a non-resident defendant, be it an individual, a corporation, or an insurance company, is joined in the same suit. Again, if the Legislature had intended to carve out an exception for foreign insurance companies in an action that involved both resident defendants and one or more foreign insurance companies, the language of the insurance statute, § 11-11-7, would have explicitly stated the exception and made it a mandatory requirement to achieve proper venue. It was only after our decision in Senatobia Community Hospital v. Orr, 607 So.2d 1224 (Miss.1992), that the practice of joining non-residents in suits against residents, then commencing the suit in the plaintiff's county of residence, began in Mississippi. Granted Orr dealt with Miss.Code Ann. § 11-11-11, whereas this case concerns § 11-11-7, nevertheless, the reasoning and logic is analogous to the case sub judice.

¶ 33. In Orr, plaintiffs who lived in Tunica County sued a hospital and doctors in a wrongful death malpractice case. The cause of action accrued in Tate County, and all defendants resided in Tate County at that time. The suit was

brought in Tunica County Circuit Court. At the time that the suit was filed, one of the doctors had moved to Louisiana and was therefore a non-resident of Mississippi. The circuit court denied the defendants' motion for change in venue to Tate County.

*11 ¶ 34. Whether venue was proper in Tunica County rather than Tate County was an issue of first impression for this Court in Orr. At the core of the issue were two statutes: the general venue statute, Miss.Code Ann. § 11-11- 3 (1999), and the non-resident venue statute, Miss.Code Ann. § 11-11-11 (repealed 2003), and they were described in Orr as competing rather than complementary laws:

For their position that the venue in this action is Tate County rather than Tunica County, the appellants rely upon Miss.Code Ann. § 11-11-3 (Supp.1992) which provides:

> Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant or any of them may be found or in the county where the cause of action may occur or accrue ... If a civil action is brought in an improper county, such action may be transferred to the proper county pursuant to section 11-11-17.

On the contrary, the appellees rely upon Miss.Code Ann. § 11-11-11 (1972) which provides:

> All civil actions for the recovery of damages brought against a nonresident or the representative of the nonresident in the state of Mississippi may be commenced in the county in which the action accrued or where the plaintiff then resides or is domiciled, except as otherwise provided by law.

(emphasis added). The appellees also cite M.R.C.P. Rule 82(c). In Blackledge v. Scott, 530 So.2d 1363 (Miss.1988), the Court held that "[i]n suits involving multiple defendants, where venue is good as to one defendant, it is good as to all defendants." Id. at 1365.

Orr, 607 So.2d at 1226. Without further discussion, the Court then stated:

> The question is elementary that where there are multiple defendants and they live in different counties, venue is proper in the county where one of the defendants resides. Likewise, if one of the defendants is a nonresident of the State, the plaintiff may bring suit against the nonresident in the county of plaintiff's residence. Jurisdiction and venue of that nonresident defendant makes the county of plaintiff's residence the proper venue against all resident defendants, even though they may live in different counties. Mississippi cases on this question are few, evidently because of the clarity of the statutes and the simplicity of the question.

Id. (emphasis added). There were no Mississippi cases cited, and there was no discussion of the right of a defendant to be sued in his (or a co-defendant's) county of residence, a right that had been enjoyed until that time. Interestingly, a Westlaw search shows that no subsequent case has ever cited Orr as authority on a venue question. However the concept that M.R.C.P. 82(c) allows a plaintiff to establish venue in his own county of residence when resident and non-resident defendants are joined in the same suit has been cited on numerous occasions. See Boston v. Hartford Acc. & Indem. Co., 822 So.2d 239 (Miss.2002); Ill. Cent. R.R. v. Travis, 808 So.2d 928 (Miss.2002); American Bankers Ins. Co. of Florida v. Alexander, 818 So.2d 1073 (Miss.2001); McDonald v. Holmes, 595 So.2d 434 (Miss.1992).

*12 ¶ 35. We find that the statutes have been wrongly interpreted under rules of statutory construction to allow this situation. The general venue statute, section 11-11-3 is mandatory: "Civil actions of which the circuit court has original jurisdiction shall be commenced in the county where the defendant or any of them may be found or in the county where the cause of action may occur or accrue ...." Miss.Code Ann. § 11-11-3. By contrast, the insurance company venue statute is permissive: "Actions against insurance companies ... may be brought in any county in which a loss may occur...." Miss.Code Ann. § 11-11-7. Thus, where there is a resident defendant, the general venue statute "shall" apply; and where there is no resident defendant, the insurance company venue statute offers the plaintiff other options.

¶ 36. The additional option of suing in the plaintiff's home county is not available to a plaintiff when a resident defendant is sued. This logical conclusion has the effect of ranking the general venue statute above the other venue statutes in circumstances where more than one may apply. Cf. Missouri Pac. R.R. v. Tircuit, 554 So.2d 878, 881 (Miss.1989) ("But because the railroad venue statute [Miss.Code Ann. § 11-11-5] employs the permissive 'may' and because the general venue statute provides that, 'except where otherwise provided,' actions 'shall' be commenced in one

of the counties authorized, we have no authority to ignore the latter."). In Orr this Court incorrectly presumed that there was no ranking of the statutes and thus did not discuss the possibility. We find today that the reasoning in Orr is flawed; and therefore, it is overruled.

¶ 37. The argument that Rule 82(c) was never intended to allow this situation is even more convincing. The Comment to Rule 82(c), prior to the recent changes, stated that the rule "tracks prior Mississippi law" in situations where several defendants are involved, providing that the action may be brought in any court where any one of the claims could have been brought and that venue would be good as to all defendants. The comment then referenced supporting law for this contention, which included Miss.Code Ann. § 11-11-3 and two cases: Gillard v. Great Southern Mortgage & Loan Corp., 354 So.2d 794 (Miss.1978) and Wofford v. Cities Service Oil Co., 236 So.2d 743 (Miss.1970). Each of these supporting authorities concerns the situation in which multiple resident defendants are joined in a single suit. None concerns the situation where a resident and a non-resident defendant (individual, corporation, or insurance company) are joined in the same trial. Thus, Rule 82(c) does not support a plaintiff establishing venue in his own county of residence when a resident defendant is a party to the suit. We, thus, overrule any contrary language in McDonald, American Bankers, Travis, and Boston, which are in conflict with this opinion.

*13 ¶ 38. Here, plaintiff Boots Smith is a Jones County, Mississippi resident, corporation. Defendant Wicker Logging is a Newton County resident, and Defendant Capital City is a foreign insurance company. Because there is a resident defendant, Wicker Logging, venue is proper only in a county where the defendant or any of them may be found or in the county where the cause of action may occur or accrue ...." In this case venue is proper in Newton County where the resident defendant lives, or Scott County where the cause of action occurred. Thus, the circuit court abused its discretion in denying a change of venue.

CONCLUSION

¶ 39. For the foregoing reasons, we reverse the judgment in favor of Boots Smith, and we remand this case to the Jones County Circuit Court with directions that it transfer venue in this case to the circuit court of either Newton County or Scott County where a new bifurcated trial on the issues of liability and insurance coverage under the policy will be held consistent with this opinion.

¶ 40. REVERSED AND REMANDED.

SMITH, C.J., COBB, P.J., CARLSON AND DICKINSON, JJ., CONCUR. WALLER, P.J., CONCURS IN RESULT ONLY. DIAZ, GRAVES AND RANDOLPH, JJ., NOT PARTICIPATING.

FN1. This issue is not before this Court on appeal.
FN2. Boots Smith was represented in trial court by Harold Melvin. However, on appeal Boots Smith is represented by Brett W. Robinson and Christopher B. McDaniel.
FN3. The court papers indicate that the motion for declaratory judgment only was filed approximately two weeks before trial on April 3, 2002.
FN4. This same lawsuit filed today would, of course, yield a different venue result as Miss.Code Ann. § 11-11-7 is now repealed and Miss.Code Ann. § 11-11-3 has been modified.

H. Domestic Corporations: Venue in Libel Actions

Forman v. Mississippi Publishers Corporation, 14 So.2d 344 (Miss. 1943)

ALEXANDER, Justice.

Appellant brought suit against the appellee to recover damages arising from an alleged libel published editorially in its newspaper. The paper is published in the first judicial district of Hinds County, and the plaintiff resides in Sunflower County where it is alleged the paper was circulated. There was joined as a defendant a resident of the local county, who, under a contract with defendant, purchased and sold the paper as a news dealer and whose duties required her to augment its circulation locally by procuring new subscribers. She purchased a limited number of copies and was free to dispose of them as she saw fit, without the right to refund for unsold copies.

A plea in abatement was filed setting up that the local dealer was not an agent or servant of appellee; that she had no knowledge of the contents of the paper; and, for further reasons therein set forth, she was joined as a defendant not for the purpose of seeking a judgment against her but in order to fix venue in Sunflower County. She filed no plea or defense but no judgment in default was taken against her.

[1] We do not detail the evidence by which it was sought to show that no judgment was sought against the local defendant and that her joinder was solely to establish venue locally. We find no reason to overturn the finding of the trial judge that under the evidence this joinder was not of itself effective to fix venue in Sunflower County.

[2] Such proceeding in cases of frivolous or fraudulent joinder is proper where jurisdiction over the remaining defendant is dependent upon the issue raised by the plea. Gasquet v. Fisher, 7 Smedes & M. 313, 15 Miss. 313; Trolio v. Nichols, 160 Miss. 611, 612, 132 So. 750, 133 So. 207; McRae v. Ashland Plantation Co., 187 Miss. 350, 192 So. 847.

That this procedure must be limited to such circumstances should not be left to inference. Accordingly, we take occasion to guard against its abuse by denying its propriety in cases where it is sought to thresh out the merits of plaintiff's case by piecemeal. Between those cases where, on the one hand, a defendant is admittedly or obviously joined to confer jurisdiction and where, on the other hand, judgment is confidently and in good faith sought against all defendants upon grounds of prima facie liability, there may hover doubtful cases against which an adverse presumption as *346 to the propriety of this procedure should be indulged.

In view of the fact that the sole remaining defendant is a corporation having its place of business in the first judicial district of Hinds County, the court held that it must be sued, if at all, in that district, and the cause was dismissed without prejudice.

[3] The venue is to be determined from a construction of Code 1930, Section 495, Amended by Chapter 248, Laws 1940: "Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant or any of them may be found, and if the defendant is a domestic corporation, in the county in which said corporation is domiciled, or in the county where the cause of action may occur or accrue * * *". The defendant, although a foreign corporation, has appointed a resident agent and is subject to the same rights and disabilities as to venue as are domestic corporations. Sandford v. Dixie Construction Co., 157 Miss. 626, 128 So. 887. The newspaper here involved is edited, composed and issued in Hinds County. It is also, in both a popular and technical sense, there published. The question therefore further narrows to a construction of the quoted statute which requires venue in the county "where the cause of action may occur or accrue."

The range of our examination must be circumscribed by principles involving libel by newspaper. We thus avoid complexities inherent in communications by telegraph, sealed letters, radio and cinema, some of which have built up a separate body of law, while others are confused with the chaos which always obscures questions which are in a formative state. See E. H. Bohlen, 50 Harvard Law Rev. 725, 728; Restatement, Torts, Vol. 3, Section 577 and caveat, p. 196. Principles indigenous to these activities are unsuitable material for analogy. Nor are principles of common law applicable in view of our statute, to which we now return for construction.

[4] Citation from neither judicial decision nor lexicon is needed to support the view that a cause of action "accrues" when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested. The copies of the newspaper containing the alleged libel were published and first circulated about noon in the City of

Jackson in Hinds County, the domicile of the publisher. Copies were distributed by conveyance and otherwise to other parts of the state, reaching the home of plaintiff in the late afternoon.

[5] Did the cause of action "accrue" in Hinds County? A negative answer is impossible. If but one copy of the paper had been issued, or if all copies had been restricted to Hinds County, the cause of action would not only have there accrued, but the extent of damage would have been limited largely to its local effect. If plaintiff were a resident of the county of publication, he would no doubt vigorously assert and be not gainsaid that a cause of action had occurred and accrued there. If, therefore, it accrued where first published, the circulation in Sunflower County may not alter this simple fact, and the only theory upon which the statute may be turned to plaintiff's use is to hold that a new and separate cause of action accrued in Sunflower County. The logical conclusion of this reasoning is that a cause of action, although set in motion in Jackson, multiplies as the widening circles of its distribution expand, creating new causes of action throughout the land and to the uttermost parts of the earth. To argue upon some theory of a reaccrual is to presuppose its original accrual in Hinds County. It is not helpful to consider merely that plaintiff suffered his greatest damage in the county of his residence. He may not ignore the origin of the injury and arbitrarily fix its genesis at that moment when it first invaded his own county. The matter must not be studied with an eye to the advantages or disadvantages to either party in the application of a sound rule. Otherwise, a plaintiff may be left free to choose his own forum, subject to guidance by considerations of local prejudice for and against himself or the defendant. We must assume that the Legislature ignored these irrelevancies or devitalized them by establishing a venue which works for an orderly procedure, thereby requiring the courts to hew to this line, indifferent to the fall of its administrative chips on one side or the other.

[6] We do not mean that the cause of action is not enlarged by an expanding circulation. Such fact is always relevant upon the issue of quantum of damages. The situs of plaintiff's damage may be proven to be chiefly in the county of his home where the mutilation of repute would reach its maximum. But we are dealing, not with *347 the centrifugal forces which operate to multiply injury by dissemination, but with the centripetal forces which fix venue at its axis or center of origin.

We must trace our path carefully past those decisions dealing with republication in a legal sense, which is a repetition or republishing by third persons, or a second and distinct writing by the same person. We must distinguish between multiplied damage and multiplied venue. A victim of assault may be injured by repeated blows upon different parts of his body, inflicted by both tooth and nail of his assailant. Yet, it is but one assault, and one composite injury which may not be dissected into as many incidents as there were violent fangs or fingers.

In defamation, the assault is not directly upon the plaintiff but upon his public esteem. The impact is upon those who are custodians of his reputation. Such reputation, which is the sum total of popular regard, is injured as soon as a destructive fire of criticism ignites the edifices in which such prestige is housed. The searing power of such contact may spread rapidly from accumulating sparks and become progressively destructive. Indeed, the analogy to arson is not inapt, and our analysis of the tort here ought to be as free from unnecessary subdivision. Like arson, it consists not in the successive burning of each separate support in the structure, but the blackening and burning by a fire which, although continually reproducing itself, remains nevertheless the same fire. There are not as many fires as there are successive planks, each of which borrows flame from its fellow. Nor may one withhold its characterization as arson until the conflagration reaches the room which he occupies.

A newspaper's power for good or evil is undoubtedly large, but its responsibility for libel is thereby made intensive and not extensive. The principle is implicit in the distinction between the power of, let us say, forty separate horses and forty horsepower. Its arm has a long reach, with power both to write and to broadcast the writing in a thousand identical sheets. It has but one voice, and here spoke but once, even though its echoes reverberated throughout the land. One set of type may reproduce its message in countless facsimiles, but we can not assent to a principle which would multiply the causes of action by the number of its readers. Plaintiff contends that when the paper reached his home county, it was published there and created a new cause of action. Yet, it is not as relevant that it was delivered to a new geographical area as that it reached other readers. So that the contention, after all, is that a new cause of action arises with each reader. Such view leads to many impracticable conclusions, not the least untenable of which is that, even if the circulation were restricted to a single county, a plaintiff could enlarge his declaration so as to include as many counts as there were subscribers.

[7][8][9][10] We reach these conclusions not under the questionable guidance of mere a priori reasoning. We find that there is ample support in the decisions of our courts. There seems to be no doubt that the statute of limitations begins to run from the date of the first publication. Means v. MacFadden Publications, Inc., D.C., 25 F.Supp. 993;

Cannon v. Time, Inc., D.C., 39 F.Supp. 660. It is evident that had this newspaper been published on one evening and had reached the county of plaintiff after midnight, the cause of action would accrue on the preceding day and the statute of limitations would date therefrom. Since the gravamen of the offense is not the knowledge by the plaintiff nor the injury to his feelings but the degrading of reputation, the right accrued as soon as the paper was exhibited to third persons in whom alone such repute is resident. Cf. McCarlie v. Atkinson, 77 Miss. 594, 27 So. 641, 78 Am.St.Rep. 540. The tort is then complete even though the damage may continue or even accumulate. Wallace v. Southern Express Co., 7 Ga.App. 565, 67 S.E. 694; Galligan v. Sun Printing & Pub. Ass'n, 25 Misc. 355, 54 N.Y.S. 471; Odgers, Libel & Slander, 5th Ed., p. 375; Gatley, Libel & Slander, 5th Ed., p. 623. There is here but one publication and that is where the paper is published. Wolfson v. Syracuse Newspapers, Inc., 254 App.Div. 211, 4 N.Y.S.2d 640; Fried, Mendelson & Co. v. Edmund Halstead Ltd., 203 App.Div. 113, 196 N.Y.S. 285. The cause of action accrues where the paper is first published. Houston v. Pulitzer Pub. Company, 249 Mo. 332, 155 S.W. 1068. In Missouri Pac. Transportation Company v. Beard, 179 Miss. 764, 176 So. 156, an auditor for appellant had made a report containing libelous matter against appellee. The superintendent of the company predicating a letter upon this report wrote a letter *348 recommending the discharge of appellee upon the ground set out in the report. We held that plaintiff should have declared not upon the letter but upon the original report.

The infection by which a trivial harm may become gangrenous or even fatal is not an occurrence or accrual but a consequence. There should be no doubt that if the offending article had been brought to attention in Sunflower County more than a year after its initial publication, suit thereafter would be barred by our statute of limitations.

In Grenada Bank v. Petty, 174 Miss. 415, 164 So. 316, the question presented was where the cause of action accrues in a suit for malicious prosecution. It was held that such cause accrued as soon as the last requisite element, the acquittal of plaintiff, came into existence. The other and preliminary factors, the affidavit, arrest and prosecution furnish analogies to the preparation of the editorial, its setting up in type and its impression upon paper.

In O'Malley v. Statesman Printing Co., 60 Idaho 326, 91 P.2d 357, the facts were similar to those here present, and the contentions identical with those of appellant. The court held that in actions of libel by newspaper, the cause of action arose in the county of the domicile of the newspaper and that as regards venue, the publication was made in such county and the venue thereby fixed. So also in Galligan v. Sun Printing & Pub. Ass'n, supra; Murray v. Galbraith, 86 Ark. 50, 109 S.W. 1011, 126 Am.St.Rep. 1078; Houston v. Pulitzer Pub. Company, supra. The last cited case presented the issue squarely and overruled former decisions which were in accord with appellant's contentions.

Age-Herald Pub. Company v. Huddleston, 207 Ala. 40, 92 So. 193, 197, 37 A.L.R. 898, is directly in point and supports the views herein expressed. The contentions of appellant are there fully answered. The court stated: "With respect to the basis of venue here under consideration, it (the statute) reads, more restrictively, 'in the county where the injury occurred'-not in any county where the injury occurred, nor in any county where the injury was repeated or duplicated merely. This is significant-highly significant we think-of a legislative conception of a single venue to be determined by the locus of a primary wrongful act; and not of a multitude of venues to be created by mere repetitions or secondary extensions of the primary act. * * * We do not see how there can be any conflict of opinion as to the unfairness, injustice, or impolicy of permitting aggrieved persons, in this class of cases only, to select at their pleasure any judicial forum within the state where the political, religious, industrial, moral, or personal predilections of the local citizenship may readily furnish a jury whose biased views will probably be reflected, however sincerely, in a verdict favorable to them."

We do not find adequate support for a contrary view in the authorities cited by appellant. Each must be appraised in the light of the particular venue statutes involved. We need only construe the term "where the cause of action may occur or accrue." The case most strongly relied upon by appellant is Tingley v. Times-Mirror, 144 Cal. 205, 77 P. 918. But the court was applying a statute which fixed venue (1) where the liability arises, or (2) at the principal place of business of the corporation, or (3) subject to the power of the court to change the place of trial as in other cases. The last named alternative deprives the case of its value as authority, for, as pointed out in O'Malley v. Statesman Printing Co., supra, it is apparent that the court justified its acceptance of venue at the county of plaintiff's residence by this omnibus provision. In the Tingley case [144 Cal. 205, 77 P. 919], the court placed much emphasis upon the fact that the greatest injury was suffered where plaintiff resided, using the following language: "The liability arises where the injury occurs, and the injury in the case of libel is peculiarly at the county in which the plaintiff resides, if, as is alleged, the defendant has published and circulated the libelous article there; and there it is that plaintiff is most injured by the publication."

It would seem futile to try to justify venue here by a consideration of the area of greatest disparagement. Certainly, if the occurrence of injury is the criterion, venue would be as extensive as circulation. Nor is any decision helpful which merely holds that a cause of action arises "where the paper is circulated" unless it mean one of the two opposites, to wit, wherever the paper is circulated, or where the paper is first circulated. Our statute is concerned not with where the damage occurs but where the cause of action arises or "accrues." It is true that, except in sealed communications, they may be and often are *349 identical, but damage may occur progressively or in fortunate cases be ameliorated, whereas causes of action accrue where the effective cause of the damage occurs. Venue takes no account of either the subsequent mitigation or enlargement of its effect.

* * * *

Affirmed.

[Dissenting Opinion by Chief Justice Smith Omitted]

I. Joinder of Defendants

Blackledge v. Scott, 530 So.2d 1363 (Miss. 1988)

ROY NOBLE LEE, Chief Justice, for the Court:

* * * *

[2] In suits involving multiple defendants, where venue is good as to one defendant, it is good as to all defendants. This is true where the defendant upon whom venue is based is subsequently dismissed from the suit. In such situations, venue as to the remaining defendants continues despite the fact that venue would have been improper, if the original action had named them only. Jefferson v. Magee, 205 So.2d 281 (Miss.1967).

In New Biloxi Hospital, Inc. v. Frazier, 245 Miss. 185, 146 So.2d 882 (1962), a standard was set for requiring the plaintiff to follow in order to prohibit abuse of the rule: (1) the action must be initiated in good faith in the bona fide belief that the plaintiff has a cause of action against the defendant upon whom venue is based; (2) the claim against the defendant upon whom venue is based must be neither fraudulent nor frivolous nor made with the intention of depriving the other defendants of their right to be sued in their own counties; and (3) there must be reasonable claim of liability asserted against the defendant upon whom venue is based. New Biloxi Hospital, supra; see also Rule 11, Miss.R.Civ.P.

* * * *

REVERSED AND REMANDED.

J. Venue for Chancery Actions Respecting Personal Property

Mathews v. Thompson, 95 So.2d 438 (Miss. 1957)

LEE, Justice.

*265 This litigation grew out of the collision of two automobiles on State Highway No. 12 in the corporate limits of the City of Kosciusko, in Attala County, in the early evening of March 19, 1955. William H. Leslie, Sr., with one guest, his brother-in-law S. E. Brunt, was driving east in a Plymouth. Wilbur Y. Kerr, with his wife, Mrs. Lillie D. Thompson Kerr, and two children, and K. B. Fowler, Jr., and his wife, Mrs. Mary Lucy Fowler, and his son, Jan Davis Fowler, and another child, in a Chevrolet sedan, was driving west. Both occupants of the Plymouth were killed. In the other car, Wilbur Y. Kerr and Jan Davis Fowler were killed, and Mrs. Kerr, Mrs. Fowler and K. B. Fowler, Jr., were seriously injured.

**440 All of these people lived in Attala County, and thereafter letters of administration on the Estate of Leslie, Kerr, and Jan Davis Fowler were issued by the chancery court of that county.

Five separate suits, numbered 10,799, 10,800, 10,801, 10,865 and 10,866, with D. M. Thompson, Administrator of the Estate of Wilbur Y. Kerr, Deceased, K. B. Fowler, Jr., Administrator of the Estate of Jan Davis Fowler, Deceased, Mrs. Lillie D. Thompson Kerr, Mrs. Mary Lucy Fowler, and K. B. Fowler, Jr., as complainants, were filed in the Chancery Court of Attala County to recover damages for these deaths and personal injuries. The named defendants were Mrs. Lila Maude Leslie, Administratrix of the Estate of William H. Leslie, Sr., Deceased, W. C. Matthews and H. M. Whitfield, partners, doing business as M & W Construction Company, residents of Lee County, and Walter S. Ables, their foreman, a resident of Attala County, Colonial Life and Accident Insurance Company, a foreign corporation domiciled in Columbia, S. C., but doing business in this State, and Homer A. Moore, a resident of Attala County.

* * * *

It was further charged, on information and belief, that Leslie, at the time, was an agent of defendant Colonial Life and Accident Insurance Company, and was acting within the scope of his duties and employment and in furtherance of the business of his employer, and that Leslie's negligence was both his own and that of his employer; that defendant Homer A. Moore had in his hands money of the Insurance **441 Company, and it was charged, on information and belief, that he had other moneys and effects of the Company, and was indebted to it. There was a prayer for an attachment, under Section 2729, Code of 1942, and for discovery from him as to the amount thereof and of other money and effects coming into his hands, and for discovery from Colonial Life & Accident Insurance Company as to the true relationship between it and Leslie, of which it had exclusive information, and which the complainant had requested, and which the Insurance Company had refused.

By separate motions all defendants, except Homer A. Moore, set up that there was no equity jurisdiction involved, but that the suit was grounded in tort, and they asked for transfer of the cause to the Circuit Court of Attala County, as they were entitled to a jury trial under Section 31 of the Constitution, where the questions of negligence and contributory negligence could be submitted to a jury. In addition, Colonial Life & Accident Insurance Company said that, although it is a nonresident, it has been domesticated; that Homer A. Moore was not its agent and had none of its moneys or effects; that it *268 had furnished complainant all information which he sought; and that the suit in chancery was an effort to deprive it of the right of a jury trial. By his separate answer, Homer A. Moore denied that he had $10 of the Insurance Company's money, or any other property at the time of the service of the writ; but admitted that he had $23 which he had collected from W. C. Blackwelder, who had submitted an application for insurance to the company, but that the application was subsequently rejected.

Issue was taken on the motion of the Insurance Company and Moore's answer. The complainant offered evidence, and at the conclusion thereof, the same were overruled. The court also overruled all motions to transfer to the circuit court.

* * * *

The causes were then consolidated and tried together. At the conclusion of the evidence for the complainants, their attorneys and the attorneys for Mrs. Lila Maude Leslie, Administratrix, and the attorneys for Colonial Life and

Accident Insurance Company announced to the court that they had agreed upon a settlement whereby these defendants would pay to the complainants for covenants not to sue the following amounts: D. M. Thompson, Administrator, $4,000; K. B. Fowler, Jr., Administrator, $3,000; and Mrs. Lillie D. Thompson Kerr $2,000; Mrs. Mary Lucy Fowler $2,000; and K. B. Fowler, Jr., $2,000. *271 At the conclusion of the evidence for the defendant and cross-complainant Mrs. Lila Maude Leslie, Administratrix, her attorneys and the attorneys for D. M. Thompson, Administrator, announced to the court that the Estate of Wilbur Y. Kerr had paid to the Administratrix of the Estate of William H. Leslie, Sr., the sum of $3,000 for a covenant not to sue. In all instances the parties preserved their rights and causes of action against M & W Construction Company and Ables. At the conclusion of all of the evidence, the court prepared and filed in writing detailed and elaborate findings of law and fact to the following effect.

* * * *

[holding M&W Construction Co. responsible for creating the condition that caused the accident.]

The collision would not have occurred if these defendants had discharged their duty with reference to the highway in a lawful and prudent manner.

* * * *

[Note: The Chancery Court found for the plaintiffs and awarded substantial damages.]

Final decrees were entered accordingly, and M & W Construction Company and Ables have appealed.

The appellants assign and argue that there was no substantial evidence upon which to predicate liability against them; that the decrees of the court, in sustaining both the complaints and the cross-complaint were against the great and overwhelming weight of the evidence and were contrary to law, equity and good conscience, and the court erred in failing to dismiss them; that the court erred in exercising jurisdiction, in refusing to transfer the cases to the circuit court, and in finally refusing to grant a trial by jury in the chancery court.

* * * *

The appellants also contend that the scheme whereby the complainants sought to attach the small sum of $23, alleged to be owing to Colonial Life & Accident Insurance Company by Homer A. Moore in order to satisfy their large demands for damages, was a mere device to confer jurisdiction on the court; and that the court should not have assumed jurisdiction by reason of such a trivial amount. They rely strongly on Nicholson v. Gulf, M. & N. R. Co., 177 Miss. 844, 172 So. 306.

[3] The Court has found no reversible error in this record. Consequently, whether the court was in error in taking jurisdiction of these cases is wholly immaterial since Section 147 of the Constitution forbids *291 this Court to reverse or annul the decree 'on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction'. Talbot & Higgins Lbr. Co. v. McLeod Lbr. Co., supra, cited 16 early cases, beginning with Cazeneuve v. Curell, 70 Miss. 521, 13 So. 32, and ending with Engleburg v. Tonkel, 140 Miss. 513, 106 So. 447, to show this Court's interpretation of, and adherence to the plain language of Section 147, supra. Some of the later cases are Taylor v. Hines, 221 Miss. 759, 74 So.2d 834, and Myers v. Giroir, Miss., 84 So.2d 525. Conceding but not deciding that there is merit in this contention, the case could not be reversed on that ground.

In passing, not by way of decision but as negativing the contention that the action of the learned chancellor, in taking jurisdiction of these cases, was arbitrary and capricious, **453 these facts should be pointed out: Section 2729, Code of 1942, does not specify the minimum amount of the indebtedness necessary to be owing by the resident to the nonresident defendant. The collision, with its consequent injuries and deaths, occurred in Attala County. It is not contended that suits could not have been brought in the circuit court. The appellants were not deprived of their right to be sued in a fixed venue, as was the case of Nicholson v. Gulf, M. & N. R. Co., supra. There was no collusion between the complainants and Homer A. Moore, the resident defendant, alleged to have been indebted to the insurance company. There was no fraud whatsoever.

Thorough consideration and study have been given to all alleged errors which were assigned and argued. Since no reversible error appears in the record, it follows that the decrees of the lower court must be and they are, in each instance, affirmed.

Affirmed.

Guice v. Mississippi Life Ins. Co., 836 So.2d 756 (Miss. 2003)

SMITH, P.J., for the Court.

¶ 1. On March 21, 2000, Mississippi Life Insurance Company ("MS Life") filed suit in the Chancery Court of Madison County against Dudley Guice, Sr. ("Guice"), alleging that he fraudulently induced MS Life to enter into two disability credit insurance policies covering promissory notes on vehicles that he had purchased and that he had filed fraudulent claims thereunder. The complaint sought, among under things, a declaratory judgment regarding the legal existence of certain of the certificates and proceeds allegedly due thereunder. Guice's motion to transfer venue to Jefferson County was denied by the trial court. At Guice's request, the chancellor entered an order certifying the matter for an interlocutory appeal. Guice petitioned this Court for an interlocutory appeal, which was thereafter granted. See M.R.A.P. 5. This Court holds that MS Life's choice of venue should not be disturbed.

FACTS

¶ 2. MS Life's claims are based on Guice's applications for credit disability insurance when he purchased four vehicles from four different dealerships during an eleven-day period. The automobiles were purchased from the following dealers: (1) Blackwell Imports in Jackson, August 13, 1999; (2) Infiniti of Jackson, August 16, 1999; (3) Mark Escude Nissan North, August 18, 1999; and (4) Rivertown Lincoln-Mercury Toyota in Vicksburg, August 24, 1999.

¶ 3. The dealers each had group credit life and disability insurance policies with MS Life. At the time of each purchase, Guice applied for coverage under these policies. It appears that MS Life concedes that two certificates were issued for credit disability insurance under Blackwell and Rivertown Lincoln-Mercury's group policies. As to the vehicles purchased at Infiniti of Jackson and Mark Escude Nissan North, MS Life rejected coverage because the amount of the coverage applied for, when combined with the coverage already in force, exceeded the maximum benefit limit underwritten by MS Life. Notice of this rejection was given to Guice by letter dated September 21, 1999. MS Life refunded the premium to the creditors, Trustmark National Bank and Deposit Guaranty National Bank, to be applied to his note. Guice claims that he never received the denial notices.

*758 ¶ 4. Guice was injured on October 12, 1999, in a four-wheeler accident in Jefferson County. The various claim forms and hospital records reveal that Guice broke his leg, sprained an ankle, and strained his back. Guice was ultimately admitted to Natchez Community Hospital. He filed claims under the policies he applied for at the time he purchased the vehicles.

¶ 5. Guice made his first claim for disability benefits under the MS Life credit disability certificates approximately three months after purchasing the vehicles, during the last week of November 1999. MS Life paid benefits under the Blackwell and Rivertown certificates, paying Trustmark National Bank on behalf of Guice $2025.48 and paying Deposit Guaranty National Bank on behalf of Guice $2000.00, for a total of $4025.45.

¶ 6. MS Life filed this suit in the Madison County Chancery Court to have the Blackwell and Rivertown certificates declared null and void ab initio and for a declaratory judgment that the Infiniti and Mark Escude certificates never came into existence. In short, MS Life asserts that Guice committed insurance fraud. Additionally, MS Life seeks to be reimbursed for the amounts paid to Trustmark National Bank and Deposit Guaranty National Bank on behalf of Guice, plus costs and attorney's fees. Further, MS Life seeks an award of punitive damages in an amount sufficient to punish Guice and deter such conduct.

¶ 7. In finding venue appropriate in Madison County, the chancellor found that the suit was one respecting MS Life's personal property in Madison County:

> MS Life will perform its contractual obligations, if any, in Madison County, and such obligations include preparing checks and paying moneys due under the contracts, if any ... MS Life's money constitutes personal property that is located and maintained in Madison County. The certificates issued by MS Life to Guice also constitute personal property and the original certificates are located and maintained at MS Life's principal offices in Madison County.

¶ 8. Agreeing with the chancellor, MS Life contends that venue was proper in Madison County pursuant to Miss.Code Ann. § 11-5-1 (Rev.2002) because this action is clearly one "respecting ... personal property," and the items of personal property at issue in this case, the four insurance certificates and MS Life's money, are located in Madison County. Guice, however, argues that the chancellor has confused an action in rem with a personal action against Guice alleging fraud. He contends that this is an in personam action, and the case should be transferred to the Chancery Court of Jefferson County, the county where Guice resides.

DISCUSSION

¶ 9. The sole issue before us is whether Madison County is appropriate venue for this action regarding insurance certificates and whether Guice is entitled to the insurance proceeds. Guice requested that this matter be transferred to Jefferson County based on his status as a defendant and his residence in Jefferson County pursuant to Miss.Code Ann. § 11-5-1. The chancellor denied the motion to transfer, but did grant Guice's request for certification of an interlocutory appeal.

[1] ¶ 10. An application for a change of venue is addressed to the discretion of the trial judge, and his ruling thereon will not be disturbed on appeal unless it clearly appears that there has been an abuse of discretion or that the discretion has not been justly and properly exercised under the circumstances of the case. *759 Donald v. Amoco Prod. Co., 735 So.2d 161, 181 (Miss. 1999) (citing Estate of Jones v. Quinn, 716 So.2d 624, 626 (Miss.1998); Beech v. Leaf River Forest Prods., Inc., 691 So.2d 446 (Miss.1997); Miss. State Highway Comm'n v. Rogers, 240 Miss. 529, 128 So.2d 353, 358 (1961)).

[2] ¶ 11. The venue of a suit in equity in our state is governed entirely by statute. Green v. Winona Elevator Co., 319 So.2d 224, 226 (Miss.1975)(quoting Griffith, Mississippi Chancery Practice, § 151 (2d ed.1950)). This necessitates consideration of the general statute on venue appertaining to chancery courts. Miss.Code Ann. § 11-5-1 in part provides: "[s]uits respecting real or personal property may be brought in the chancery court of the county in which the property or some portion thereof, may be...."

¶ 12. This Court has repeatedly stated that "[w]here a statute is clear and unambiguous, no further statutory construction is necessary and the statute should be given its plain meaning." Miller v. Meeks, 762 So.2d 302, 305 (Miss.2000); OXY USA, Inc. v. Miss. State Tax Comm'n, 757 So.2d 271, 274 (Miss.2000); City of Natchez v. Sullivan, 612 So.2d 1087, 1089 (Miss.1992). The chancery court venue statute is not ambiguous, and Guice does not contend otherwise.

[3] ¶ 13. The items of personal property, the certificates and money held by MS Life, are the subject of this lawsuit and, therefore, establish venue in Madison County. Similar to the case before us, Green v. Winona Elevator Co., 319 So.2d 224 (Miss.1975), concerned an action to set aside an allegedly fraudulent conveyance of personal property, soybeans. Id. at 225. This Court established that venue was in the county where the property was located since the specific terms of Miss.Code Ann. § 11-5-1 prevail over the general terms of § 11-11-3. Id. at 226. Miss.Code Ann. § 1-3-41 (1998) defines personal property when used in any statute to "include goods, chattels, evidences of rights of action, and all written instruments by which any pecuniary obligation, or any right, title, or interest in any real or personal estate, shall be created, acknowledged, transferred, incurred, defeated, discharged, or diminished." Moreover, this Court has clarified the term "personal property" and held that said term includes anything which is or can be the subject of ownership, including money. Watson v. Caffery, 236 Miss. 223, 233, 109 So.2d 862, 866 (1959). The term "respecting" has been defined as "to have regard to; to have reference to; to relate to ..." Webster's Revised Unabridged Dictionary 1934 (1996). Since this case concerns personal property, it is one of the categories otherwise provided for in Miss.Code Ann. § 11-5-1 and was properly brought in Madison County. Additionally, since the property was purchased in Hinds and Warren counties, the plaintiff had the option to sue in those counties. Ultimately, the controlling principle here is that it is the plaintiff's choice to decide where to sue the defendant among the permissible venues, and MS Life selected Madison County as its choice of venue. Stubbs v. Miss. Farm Bureau Cas. Ins. Co., 825 So.2d 8, 14 (Miss.2002).

¶ 14. MS Life will perform its contractual obligations such as preparing checks and paying money due under the contracts in Madison County. MS Life's money is located and maintained in Madison County. The original certificates issued by MS Life to Guice are located and maintained at MS Life's principal offices in Madison County. Moreover, MS Life processed and paid Guice's allegedly fraudulent credit disability claims from its offices in Madison County.

¶ 15. The allegations and the evidence reveal that the personal property, the subject *760 of this lawsuit, is located in Madison County. Using the language of this Court in Green, it follows that:

> [V]enue was in that county since the specific terms of Mississippi Code Annotated section 11-5-1(1972), supra, prevail over the general terms of Mississippi Code Annotated section 11-11-3 (1972) which places venue generally in the county of the defendant's residence "except where otherwise provided," this suit being in one of the categories otherwise provided for.

Green, 319 So.2d at 226 (emphasis added). Additionally, the language of the chancery court venue statute, is unambiguous: "and all cases not otherwise provided may be brought in the chancery court of any county where the defendant, or any necessary party defendant, may reside or be found ..." Miss.Code Ann. § 11-5-1 (emphasis added). Since this suit concerns personal property, it is one of the categories otherwise provided for.

¶ 16. Guice alleges that MS Life's complaint is entirely in personam in nature; and therefore, venue is inappropriate in Madison County. However, in rem versus in personam is not the standard imposed by the chancery court venue statute. Because venue in Mississippi courts is "governed entirely by statute," an in rem versus in personam distinction is irrelevant to the Court's application of § 11-5-1. See Green, 319 So.2d at 226. The central issue is whether the suit is one "respecting ... personal property." This matter concerns whether there was a fraudulent conveyance of certificates and whether MS life must pay Guice. Such a suit concerns personal property; and therefore, venue is appropriate where the personal property is located, Madison County.

* * * *

Madison County is an appropriate venue for this matter. The chancellor did not abuse his discretion in determining that this suit is one respecting personal property and that MS Life's choice of venue should not be disturbed. The order denying Guice's motion to transfer venue is affirmed, and this case is remanded to the Madison County Chancery Court for further proceedings.

¶ 18. AFFIRMED AND REMANDED.

[Concurring and dissenting opinion has been omitted]

Justice McRae in his dissent stated that fraud and submission of false claims are in personam proceedings; therefore, venue is proper in Jefferson County since cases not involving real or personal property "may be brought in the chancery court of any county where the defendant . . . may reside or be found . . . ." (quoting Miss. Code Ann. § 11-5-1).

K. Mississippi Tort Claims Act

Estate of Jones v. Quinn, 716 So.2d 624 (Miss. 1998)

SULLIVAN, Presiding Justice, for the Court:

¶ 1. On August 20, 1993, Esther Jones Quinn and Alonzo Jones (Plaintiffs) filed their complaint in the Circuit Court of Hinds County against the defendants in this case, alleging that their son's death was a result of the intentional and malicious, or grossly negligent, behavior of the defendants in the deficient upkeep of the Simpson County Jail and the treatment of prisoners at the jail. Their son, Andre Jones, was found dead, hanging by a shoestring in a shower stall at the jail, while being held on charges of possession of a stolen tag, altering a vehicle identification number, violating a city beer ordinance, and carrying a concealed weapon. Andre had been arrested at a road block set up by the Brandon Police Department, and was transported to the Simpson County Jail due to overcrowding in the Brandon City Jail. Dr. Steven Hayne, who performed the autopsy, found that the manner of death was suicide. However, Plaintiffs maintained that their son was murdered. Plaintiffs named as defendants: Lloyd Jones, Sheriff of Simpson County; John Abernathy, Deputy Sheriff of Simpson County; Simpson County; Walter Tucker, Chief of the Brandon Police Department; John Henley, Sergeant at the Brandon Police Department; the City of Brandon; Willie Brown, Inspector for the Department of Institutional Sanitation of the Health Department for the State of Mississippi; Ed Thompson, State Health Officer; Jerry Oakes, Acting Director/Assistant Director/Chief Architect for the Bureau of Buildings, Grounds and Real Property; Millard Mackey, State Chief Deputy Fire Marshal; and Eddie Lucas, Commissioner of the Department of Corrections for the State of Mississippi. Plaintiffs later amended their complaint to include Commissioner of Public Safety James Ingram as a defendant. Upon the death of Lloyd Jones, Plaintiffs filed a motion to substitute the new Sheriff of Simpson County, Doyle King, and the administratrix of Lloyd Jones's estate, Lucy Jones, in Lloyd Jones's official and individual capacities, respectively. They also amended their complaint to include a count for simple negligence and one for wrongful death. Plaintiffs accomplished their amendments to the complaint both by motion to amend and by filing a new complaint which was later consolidated into the original complaint.

¶ 2. In addition to their tort lawsuit filed in state court, Plaintiffs filed a complaint in the United States District Court for the Southern District of Mississippi on August 24, 1993. The complaint in federal court was *626 based upon the same set of facts and circumstances surrounding the death of Andre Jones, and named the same defendants as the complaint filed in circuit court with the exception of Defendants Brown, Thompson, Oakes, Mackey, Lucas, and Ingram (State Defendants). Plaintiffs alleged constitutional and federal statutory violations amounting to deliberate indifference, wrongful death, and conspiracy.

¶ 3. In an order dated January 11, 1996, the federal court granted summary judgment for Chief Tucker, Sergeant Henley, the City of Brandon, and Deputy Sheriff John Abernathy. However, the court denied summary judgment for Lloyd Jones and Simpson County. On June 12, 1996, the federal court entered summary judgment for the remaining defendants. The court entered a final judgment dismissing the case with prejudice on the same day.

¶ 4. On October 31, 1995, Hinds County Circuit Court Judge James E. Graves, Jr. granted the defendants' motion to hold discovery in abeyance until the issue of immunity was decided. On November 28, 1995, Judge Graves issued a detailed opinion ruling on all of the defendants' motions to dismiss and for summary judgment. He found that the motions to dismiss filed by the State Defendants should be granted. The judge also granted the motions to dismiss filed by Deputy Sheriff Abernathy and Sergeant Henley. However, Judge Graves denied the motions to dismiss and for summary judgment filed by Simpson County and Sheriff Jones (Simpson County Defendants), and the City of Brandon and Chief Tucker (Brandon Defendants).

¶ 5. On January 3, 1996, the Simpson County Defendants and Brandon Defendants filed a joint motion, requesting that the claims against them be dismissed due to improper venue or, in the alternative, severed and venue transferred to their respective home counties. Judge Graves denied this motion in an order dated March 21, 1996, and reaffirmed the March 21 order on April 10, 1996. On April 24, 1996, the Simpson County Defendants and Brandon Defendants filed their Motion for Certification of Interlocutory Appeal, requesting that the circuit court enter an order granting them certification to appeal to this Court on the issue of venue. Judge Graves entered an order denying the motion on May 30, 1996. However, by an order dated August 5, 1996, this Court granted the remaining defendants' petition for interlocutory appeal and ordered that the trial court proceedings be stayed pending review of this appeal. Although the Brandon Defendants and Simpson County Defendants have raised the issue of res judicata regarding the dismissal of the federal lawsuit in their answers to the amended complaint and in separate motions for summary

judgment, the circuit court had not yet reached any decision on the issue of res judicata when this Court granted interlocutory appeal and stayed the lower court proceedings.

* * * *

[2] [3] ¶ 12. Since the State Defendants were properly included in the suit, Section 11-46-13(2) controls determination of proper venue in this case:

> The venue for any suit filed under the provisions of this chapter against the state or its employees shall be in the county in which the act, omission or event on which the liability phase of the action is based, occurred or took place. The venue for all other suits filed under the provisions of this chapter shall be in the county or judicial district thereof in which the principal offices of the governing body of the political subdivision are located. The venue specified in this subsection shall control in all actions filed against governmental entities, notwithstanding that other defendants which are not governmental entities may be joined in the suit, and notwithstanding the provisions of any other venue statute that otherwise would apply.

Miss.Code Ann. § 11-46-13(2) (Supp.1997). The second sentence regarding venue for suits against other political subdivisions does not apply here, because it controls only in "all other suits filed under the provisions of this chapter," meaning all suits other than those filed against state employees. Id. This is a suit filed against state employees, so proper venue is in the county in which the negligence took place. Here, that would be Simpson County, where Andre Jones died and the alleged negligent upkeep of the Simpson County Jail occurred. Section 11-46-13(2) specifically states that no other venue statutes that otherwise would apply will be controlling in a lawsuit against the state or its employees. As a result, the Simpson County Defendants and Brandon Defendants are incorrect in asserting that the individual statutes governing venue for actions against counties and municipalities apply. As previously discussed, it is of no consequence that the State Defendants were eventually dismissed from the suit, because proper venue is determined at the time the lawsuit is originally filed, and subsequent dismissal of the defendant upon whom venue is based does not destroy proper venue. Blackledge, 530 So.2d at 1365. Venue in this case was only proper in Simpson County based upon Section 11-46-13(2). Judge Graves should have transferred venue to Simpson County under *629 Rule 82(d) of the Mississippi Rules of Civil Procedure. Miss. R. Civ. P. 82(d) (improper venue).

CONCLUSION

¶ 15. Based upon the dictates of Section 11-46-13(2), this case was improperly filed in Hinds County, and Judge Graves should have transferred venue to Simpson County. We must reverse the trial court's denial of the motion for transfer of venue. However, based upon the rules governing proper venue in this case, and in the interest of judicial economy, we affirm Judge Graves's decision to deny the remaining defendants' request for severance. Since the issue of res judicata is not raised in the interlocutory appeal to this Court, we remand the case to the Hinds County Circuit Court for further proceedings consistent with this opinion.

¶ 16. REVERSED AND REMANDED.

PRATHER, C.J., and BANKS and JAMES L. ROBERTS, Jr., JJ., concur. McRAE, J., concurs in result only. WALLER, J., dissents with separate written opinion joined by PITTMAN, P.J., and SMITH and MILLS, JJ. [Concurring and Dissenting opinions have been omitted.]

PARTIES TO THE ACTION

A. Statutory Provisions

The 1988 Model Business Corporation Act drastically alters the earlier version of the "Corporation Door Closing Statute" which is the first statute set forth below. You should compare the provisions of the 1963 Act below to the provisions of the 1988 Act which follows, especially since a reasonable argument can be made that the 1963 "door closing statute" should apply to all appropriate claims arising before January 1, 1988. Keep in mind that the following cases which discuss "door closing" interpret the 1963 version of the door closing statute.

§ 79-3-247. Transacting business without certificate of authority [Repealed as of 1/1/1988]

No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state. Nor shall any action, suit or proceeding be maintained in any court of this state by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this state.

The failure of a foreign corporation to obtain a certificate of authority to transact business in this state shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action, suit or proceeding in any court of this state.

A foreign corporation which transacts business in this state without a certificate of authority shall be liable to this state, for the years or parts thereof during which it transacted business in this state without a certificate of authority, in an amount equal to all fees which would have been imposed by this chapter upon such corporation had it duly applied for and received a certificate of authority to transact business in this state as required by this chapter and thereafter filed all reports required by this chapter, plus all penalties imposed by this chapter for failure to pay such fees. The attorney general shall bring proceedings to recover all amounts due this state under the provisions of this section.

SOURCES: Codes, 1942, § 5309-239; Laws, 1962, ch. 235, § 124, eff. from and after January 1, 1963.

§ 79-4-15.01. Authority to transact business required.

(a) A foreign corporation may not transact business in this state until it obtains a certificate of authority from the Secretary of State.

(b) The following activities, among others, do not constitute transacting business within the meaning of subsection (a):

(1) Maintaining, defending or settling any proceeding;
(2) Holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs;
(3) Maintaining bank accounts;
(4) Maintaining offices or agencies for the transfer, exchange and registration of the corporation's own securities or maintaining trustees or depositories with respect to those securities;
(5) Selling through independent contractors;
(6) Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this state before they become contracts;
(7) Creating or acquiring indebtedness, mortgages and security interests in real or personal property;
(8) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts;
(9) Owning, without more, real or personal property;
(10) Conducting an isolated transaction that is completed within thirty (30) days and that is not one in the course of repeated transactions of a like nature;
(11) Transacting business in interstate commerce.

(c) The list of activities in subsection (b) is not exhaustive.

(d) A foreign corporation which is a partner or member of any general partnership, limited partnership (other than a limited partner), joint venture, syndicate, pool or other association of any kind, whether or not such foreign corporation

shares with or delegates to others control of such entity, which entity is transacting business in this state, is hereby declared to be transacting business in this state.

Sources: Laws, 1987, ch. 486, § 15.01; Laws, 1990, ch. 538, § 9, eff from and after July 1, 1990.

§ 79-4-15.02. Consequences of transacting business without authority.

(a) A foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority.

(b) The successor to a foreign corporation that transacted business in this state without a certificate of authority and the assignee of a cause of action arising out of that business may not maintain a proceeding based on that cause of action in any court in this state until the foreign corporation or its successor obtains a certificate of authority.

(c) A court may stay a proceeding commenced by a foreign corporation, its successor or assignee until it determines whether the foreign corporation or its successor requires a certificate of authority. If it so determines, the court may further stay the proceeding until the foreign corporation or its successor obtains the certificate.

(d) A foreign corporation is liable for a civil penalty of Ten Dollars ($10.00) for each day, but not to exceed a total of One Thousand Dollars ($1,000.00) for each year, it transacts business in this state without a certificate of authority. The Attorney General may collect all penalties due under this subsection.

(e) Notwithstanding subsections (a) and (b), the failure of a foreign corporation to obtain a certificate of authority does not impair the validity of its corporate acts or prevent it from defending any proceeding in this state.

Sources: Laws, 1987, ch. 486, § 15.02, eff from and after January 1, 1988.

§ 85-5-5. Contribution between joint tort feasors.

In any action for damages where judgment is rendered against two (2) or more defendants, jointly and severally, as joint tort feasors, the defendants against whom such a judgment is rendered shall share eqally the obligation imposed by such judgment, and if one (1) of such defendants pays an amount greater than the total sum of the judgment divided by the number of defendants against whom the judgment was rendered, then the other defendants shall be jointly and severally liable to him for the amount so paid in excess of his proportionate part; provided that no defendant shall be liable to any other defendant for more than his proportionate share of the original judgment.

Provided further, that in determining, for the purpose of the above contribution, the number of defendants against whom the judgment has been rendered, an employer and his employee, or a principal and his agent, shall be considered as one (1) defendant when the liability of such employer or principal has been caused by the wrongful or negligent act or commission of his employee or agent.

Provided further, that the liability of such defendants against whom such a judgment has been rendered shall be joint and several as to the plaintiff in whose favor such judgment has been rendered.

SOURCES: Codes, 1942, § 335.5; Laws, 1952, ch. 259.

[Note: Miss. Code Ann. § 85-5-5 was repealed effective July 1st, 1989 but still applies to claims arising before July 1st, 1989.]

§ 85-5-7. Limitation of joint and several liability for damages caused by two or more persons; contribution between joint tortfeasors; determination of percentage of fault.

(1) As used in this section "fault" means an act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including, but not limited to, negligence, malpractice, strict liability, absolute liability or failure to warn. "Fault" shall not include any tort which results from an act or omission committed with a specific wrongful intent.

(2) Except as may be otherwise provided in subsections (6) of this section, in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be joint and several only to the extent necessary for the person suffering injury, death or loss to recover fifty percent (50%) of his recoverable damages.

(3) Except as otherwise provided in subsections (2) and (6) of this section, in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be several only, and not joint and several and a joint tort-feasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault. In assessing percentages of fault an employer and the employer's employee or a principal and the principal's agent shall be considered as one (1) defendant when the liability of such employer or principal has been caused by the wrongful or negligent act or omission of the employee or agent.

(4) Any defendant held jointly liable under this section shall have a right of contribution against fellow joint tort-feasors. A defendant shall be held responsible for contribution to other joint tort-feasors only for the percentage of fault assessed to such defendant.

(5) Nothing in this section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly noted herein.

(6) Joint and several liability shall be imposed on all who consciously and deliberately pursue a common plan or design to commit a tortious act, or actively take part in it. Any person held jointly and severally liable under this section shall have a right of contribution from his fellow defendants acting in concert.

(7) In actions involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault.

(8) Nothing in this section shall be construed to create a cause of action. Nothing in this section shall be construed, in any way, to alter the immunity of any person.

SOURCES: Laws, 1989, ch. 311, § 1, eff. from and after July 1, 1989.

[Note: This version of § 85-5-7 was amended effective January 1, 2003, as shown below]

§ 85-5-7. Limitation of joint and several liability for damages caused by two or more persons; contribution between joint tortfeasors; determination of percentage of fault; liability of medical defendants for economic and noneconomic damages.

(1) As used in this section "fault" means an act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including, but not limited to, negligence, malpractice, strict liability, absolute liability or failure to warn. "Fault" shall not include any tort which results from an act or omission committed with a specific wrongful intent.

(2) Except as may be otherwise provided in subsections (6) and (8) of this section, in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be joint and several only to the extent necessary for the person suffering injury, death or loss to recover fifty percent (50%) of his recoverable damages.

(3) Except as otherwise provided in subsections (2), (6) and (8) of this section, in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be several only, and not joint and several and a joint tort-feasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault. In assessing percentages of fault an employer and the employer's employee or a principal and the principal's agent shall be considered as one (1) defendant when the liability of such employer or principal has been caused by the wrongful or negligent act or omission of the employee or agent.

(4) Any defendant held jointly liable under this section shall have a right of contribution against fellow joint tort-feasors. A defendant shall be held responsible for contribution to other joint tort-feasors only for the percentage of fault assessed to such defendant.

(5) Nothing in this section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly noted herein.

(6) Joint and several liability shall be imposed on all who consciously and deliberately pursue a common plan or design to commit a tortious act, or actively take part in it. Any person held jointly and severally liable under this section shall have a right of contribution from his fellow defendants acting in concert.

(7) In actions involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault.

(8) Except as provided in subsection (6) of this section, in any action involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each joint tort-feasor, including named parties and absent tort-feasors, without regard to whether the joint tort-feasor is immune from damages. For noneconomic damages, a defendant's liability shall be several only. For economic damages, for any defendant whose fault is determined to be less than thirty percent (30%), liability shall be several only and for any defendant whose fault is determined to be thirty percent (30%) or more, liability shall be joint and several only to the extent necessary for the person suffering injury, death or loss to recover fifty percent (50%) of his recoverable damages. Fault allocated under this subsection to an immune tort-feasor or a tort-feasor whose liability is limited by law shall not be reallocated to any other tort-feasor.

(9) Nothing in this section shall be construed to create a cause of action. Nothing in this section shall be construed, in any way, to alter the immunity of any person.

SOURCES: Laws, 1989, ch. 311, § 1, eff. from and after July 1, 1989; Laws, 2002, 3rd Ex. Sess., ch. 2, § 4, eff. from and after January 1, 2003; Laws 2002, 3rd Ex. Sess., ch. 4, § 3, effective from and after January 1, 2003.

[Note: This version of § 85-5-7 was in effect from 1-1-03 until 9-1-04. As part of the Miss. Legislature's Tort Reform Package passed in the 2004 Extraordinary Session, § 85-5-7 was amended as set forth below]

§ 85-5-7. Limitation of joint and several liability for damages caused by two or more persons; contribution between joint tortfeasors; determination of percentage of fault; liability of medical defendants for economic and noneconomic damages.

(1) As used in this section, "fault" means an act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including, but not limited to, negligence, malpractice, strict liability, absolute liability or failure to warn. "Fault" shall not include any tort which results from an act or omission committed with a specific wrongful intent.

(2) Except as otherwise provided in subsection (4) of this section, in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be several only, and not joint and several and a joint tort-feasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault. In assessing percentages of fault an employer and the employer's employee or a principal and the principal's agent shall be considered as one (1) defendant when the liability of such employer or principal has been caused by the wrongful or negligent act or omission of the employee or agent.

(3) Nothing in this section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly noted herein.

(4) Joint and several liability shall be imposed on all who consciously and deliberately pursue a common plan or design to commit a tortious act, or actively take part in it. Any person held jointly and severally liable under this section shall have a right of contribution from his fellow defendants acting in concert.

(5) In actions involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault without regard to whether the joint tort-feasor is immune from damages. Fault allocated under this subsection to an immune tort-feasor or a tort-feasor whose liability is limited by law shall not be reallocated to any other tort-feasor.

(6) Nothing in this section shall be construed to create a cause of action. Nothing in this section shall be construed, in any way, to alter the immunity of any person.

Sources: Laws, 1989, ch. 311, § 1; Laws, 2002, 3rd Ex Sess, ch. 2, § 4; Laws, 2002, 3rd Ex Sess, ch. 4, § 3; Laws, 2004, 1st Ex Sess, ch. 1, § 6, eff from and after September 1, 2004, and applicable to all causes of action filed on or after September 1, 2004.

[Note: This is the current version of § 85-5-7; this version is effective as to all causes of action filed on or after 9-1-04]

B. Real Parties in Interest

Alexander v. Elzie, 621 So.2d 909 (Miss. 1992)

BANKS, Justice, for the Court:

Here, we are presented with the issue of whether a plaintiff is barred from pursuing a claim for personal injuries by virtue of a prior adverse judgment on the issue of the defendant's liability in a claim for property damage. The property damage claim was brought by the subrogated insurance carrier and the plaintiff, who retained an interest in the property damage claim by virtue of the deductible amount not paid by the insurer. We conclude that the trial court correctly determined that the plaintiff was a real party in interest, as opposed to a nominal party in the property damage suit, and is therefore barred from pursuing a subsequent action under the doctrines of res judicata and collateral estoppel. We affirm.

I.

This is an appeal from the Circuit Court of Lee County where a motion to dismiss was granted in favor of Nollen Elzie on June 15, 1989, on the basis of res judicata and collateral estoppel. Roy Alexander had filed a complaint against Elzie alleging that on November 11, 1984, he and Elzie were involved in an automobile collision at the intersections of Cliff Gookin Boulevard and South Thomas Street in Tupelo, Mississippi. Alexander alleged that Elzie was negligent in failing to yield the right of way, causing Alexander to be forced off the street and into a utility pole. As a result of the alleged collision, Alexander claimed that he suffered severe injuries *910 amounting to damages in the sum of $200,000.

Subsequently, Elzie filed his Motion to Dismiss pursuant to Miss.R.Civ.P. 12(b)(6) asserting that Alexander failed to state a cause of action for which relief could be granted. In his motion, Elzie submitted, inter alia, that an action had been previously prosecuted in the Circuit Court of Lee County by Alexander and Empire Fire and Marine Insurance Company (Empire) against Elzie on March 21, 1985.

The initial action was brought by Empire and Alexander to recover from Elzie the amount of property damages suffered by Alexander in the accident. Empire had paid Alexander the sum of $5,536.87 for his property loss in the accident, and thus subrogated Alexander's property damage claim to that extent. Alexander retained a $250 interest in the property damage claim, the amount of his deductible. Empire and Alexander filed suit against Elzie to recover the property damages. Alexander did not have separate counsel, but he was a named party, and he sat at the counsel table during the trial in addition to participating as a witness. The court entered a judgment against Alexander and Empire in accordance with a jury verdict favoring Elzie. Alexander appealed that judgment to this Court, which affirmed.

II.

[1] [2] Where a claim has been previously litigated, all grounds for, or defenses to recovery that were available to the parties in the first action, regardless of whether they were asserted or determined in the prior proceeding, are barred from re-litigation in a subsequent suit under the doctrine of res judicata. Dunaway v. W.H. Hopper & Assoc., 422 So.2d 749 (Miss.1982) Res Judicata and the issue of splitting a cause of action are closely related. Rosenthal v. Scott, 150 So.2d 433, 436 (Fla.1963) (citing 1 Fla.Jur., Actions, Sec. 42). Mississippi is among the majority of states which does not allow splitting a cause of action. Kimball v. Louisville and National Railroad Co., 48 So. 230 (Miss.1909).

The rule against splitting a cause of action and the reasons for it, is stated in Restatement, Judgments, § 62:

§ 62 SPLITTING CAUSE OF ACTION--JUDGMENT FOR PLAINTIFF OR DEFENDANT.
"Where a judgment is rendered, whether in favor of the plaintiff or of the defendant, which precludes the plaintiff from thereafter maintaining an action upon the original cause of action, he cannot maintain an action upon any part of the original cause of action, although that part of the cause of action was not litigated in the original action, except * * * .

"(c) where the defendant consented to the splitting of the plaintiff's cause of action.

"Comment:

> a. Rationale: The rule stated in this Section is based on the idea that where a person has a single cause of action, in the interests of convenience and economy to the public and to the defendant he should be entitled to but one right of action and hence should be required to unite in one proceeding all matters which are part of it.

In Kimball, supra, at 231, this Court quoted with approval, language from the case of King v. Chicago, M. & St. P.R. Co., 80 Minn. 83, 82 N.W. 1113, 50 L.R.A. 161, 81 Am.St.Rep. 238, which stated: "[a] rule of construction should be adopted which will most speedily and economically bring litigation to an end, if at the same time it conserves the ends of justice. There is nothing to be gained in splitting up the rights of an injured party ... and much may be saved if one action is made to cover the subject."

Alexander urges this Court to extend an exception to the general rule against splitting that was recognized in the case of Underwriters at Lloyds Insurance Co. v. Vicksburg Traction Co., 106 Miss. 244, 63 So. 455 (1913); Thornton v. Insurance Co. of North America, 287 So.2d 262 (Miss.1973) and Rosenthal v. Scott, 150 So.2d 433 (Fla.1963).

*911 In Kimball, Mr. Kimball was injured by a train while attempting to cross a railway track with his mule and wagon. He initially brought suit and recovered a judgment for damages to his horse and wagon. Subsequently, he brought suit to recover for personal injuries sustained. We held that where a person received injuries to both person and property by the same tortious act, only one single cause of action arose.

In Vicksburg Traction, this Court distinguished Kimball, where a plaintiff assigns all of his rights and interests in his property to an insurance company and then later brings suit against the defendant for personal injuries.

> We see a difference between this case and the Kimball case. Mr. Kimball brought both suits against the railroad company. The entire cause of action was in him when he filed his first suit for damages done to his personal property and when he sued to recover for injuries to his person. He himself split his cause of action, which all along was wholly in him. This is not so in the case now before us. Mr. O'Neil had assigned all of his rights and interest against the traction company for damages to his automobile before he filed suit for personal injuries. When the suit was entered by him he had no cause of action against the company for damages to the automobile. This disposition by him of his right to damages to the automobile was in pursuance of a policy of insurance written for him by appellant company. It was in accordance with an agreement executed by him to make such transfer, whereby appellant would be subrogated to all of his rights to recover.
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> * * * * * *
>
> Appellant had an equitable interest in the automobile at the time of the collision by reason of having written the policy of insurance. When it was damaged, then, by virtue of the contract of insurance and the article of subrogation, appellant had such an interest in the claim for damages. This interest became a right to sue at law when appellant paid to Mr. O'Neil the amount owing him for loss under the policy and received from him assignment of his claim and was subrogated to his right to recover for damages. Therefore, when the suit was filed by ... O'Neil, ... against appellee, the cause of action for recovery for injuries sustained to his person was in O'Neil and the cause of action to recover for damages to the automobile was in appellant. There were then two distinct causes of action, two separate rights to recover, in two different persons. 63 So. at 456.

The Court asserted that its intent was not to disturb the rule in Kimball. Id., at 457.

In Thornton, a husband was killed when his car struck a tractor and cotton wagon. The insurance company (INA) paid the widow for damages to the automobile and received the right of subrogation to all of the insured's right of recovery. Subsequently, the widow settled their wrongful death claim with the owners of the tractor and signed a release with them. Additionally, she signed a partial release with the defendants for the consideration of $45,000 paid Mrs. Thornton as guardian of a minor child. The insurance company filed suit alleging that Mrs. Thornton breached the subrogation provisions of the policy when she consented to a judgment against the Youngbloods, thus precluding them from collecting the subrogated claims. This Court held that she was not liable to INA for the $1500 paid to her for damage to her husband's vehicle. "Since INA's policy provided for subrogation, under Lloyds Ins. Co., it, rather than Mrs. Thornton had a cause of action for the amount paid for damage to the automobile." 287 So.2d at 268.

In the case of Rosenthal v. Scott, 150 So.2d 433 (Fla.1963), the Florida Supreme Court also recognized an exception to the rule against splitting a cause of action in similar circumstances. The court reasoned:

> If a so-called subrogated insurer must wait for perhaps several years to recover the money which it has advanced for the property damage or by filing its claim can force the injured person to bring a *912 personal injury action prematurely, before the total extent of his injuries are known, then, and in that event, there is something wrong with the law. We can not be persuaded that we should create a truism out of the hackneyed saw: 'It's all law and no justice'.

150 So.2d at 438-439.

III.

[3] We find the cases cited by Alexander inapposite and his contention that he was but a nominal party meritless. While it is true that a separate cause of action can be maintained in those cases where an insured has subrogated 'all' of his rights to an insurance company as was evinced in the cases relied on by Alexander, the same is not true where the insured retains a portion of his interest.

Miss.R.Civ.P. 17(b) provides:

> In subrogation cases, regardless of whether subrogation has occurred by operation of law, assignment, loan receipt, or otherwise, if the subrogor no longer has a pecuniary interest in the claim the action shall be brought in the name of the subrogee. If the subrogor still has a pecuniary interest in the claim the action shall be brought in the names of the subrogor and the subrogee. (Emphasis added)

As the rule is interpreted in Federal courts, if an insurer has paid the entire claim, it is the real party in interest who must sue in its own name. 6 Wright and Miller, Federal Practice and Procedure, Civil § 1546 (1971) An insurer who merely pays a part of the loss is deemed partially subrogated to the right of the insured. This can occur in situations such as here where the insurance policy contains a deductible which must be paid by the insured. In these instances, the rights of the parties parallel that of a partial assignment. See gen. U.S. v. Aetna Cas. & Surety Co., 338 U.S. 366, 380- 81, 70 S.Ct. 207, 215-16, 94 L.Ed. 171, 185 (1949) "Either the insured or the insurer may sue in his own name. Thus, if the insured brings suit, the insurer who is partially subrogated may intervene in the action to protect his pro rata share of the potential recovery. If either sues and the other is not voluntarily joined or intervened, defendant may protect himself from multiple law suits by having the absent party joined." Id., at 381-382, 70 S.Ct. at 215-216.

Alexander maintains that in the property damages suit against Elzie, he was merely a nominal party seeking recovery of his deductible. Moreover, that he had no control over the suit and that he only became a party because he was persuaded by the insurance company. The fact is, however, that Alexander was not a nominal party but instead, a real party in interest to the property damages suit by virtue of his live claim for $250.

A case involving similar facts has been decided by a New York appellate court. In Kisielewicz v. Mullins, 28 A.D.2d 680, 280 N.Y.S.2d 715 (1967), the New York Supreme Court Appellate Division, found that a judgment in a prior action against a defendant was res judicata with respect to issues of negligence, inter alia, where the earlier action litigated both the subrogation claim of the plaintiff's insurance carrier as well as the plaintiff's claim for damages which were not reimbursed by the insurer because of a deductible damage clause. The Court held that the plaintiff was a real party in interest as a result of his involvement in the initial suit.

Alexander relies on the case of Palmer v. Clarksdale Hospital, 213 Miss. 611, 57 So.2d 476 (1952) to assert that his case is not barred by res judicata. In Palmer, we allowed a husband to bring a second suit against a hospital for loss of consortium arising out injuries his wife sustained due to the hospital's negligence. The wife had initially brought suit for injuries sustained. The Court held that the two actions were different and could be maintained because the husband did not have a pecuniary interest in the outcome of the prior litigation notwithstanding that he sat at the counselor's table during trial, conferred with his wife's attorney's during jury selection, appeared as a witness and paid incurred expenses. 57 So.2d at 491.

*913 The Palmer rule has been abrogated by the case of McCoy v. Colonial Baking Co. Inc., 572 So.2d 850 (Miss.1990). In McCoy, a husband brought a second suit against Colonial for loss of consortium after his wife was injured in an automobile accident with an employee of Colonial. The lower court held that the husband was collaterally estopped from relitigating the negligence issue in his action. 572 So.2d at 851. Citing from the case of Choctaw v.

Wichner, this Court affirmed in part and reversed and remanded in part the decision of the lower court. This Court adopted the majority approach by moving away from the out dated Palmer decision: "[O]ur neighbor Arkansas ... reasoned that the husband's right to such damages for loss of consortium was derivative, and that it was only logical that since the husband's cause of action was derivative he could have no better standing in court than his wife had." 521 So.2d 878, 881 (Miss.1988) (emphasis added).

The four factors necessary to apply res judicata are present in this case. See gen. Dunaway v. W.H. Hopper & Assoc., Inc., 422 So.2d at 751. Moreover, collateral estoppel precludes parties "from relitigating a specific issue actually litigated, determined by, and essential to the judgment in a former action, even though a different cause of action is the subject of the subsequent action." Id. Alexander's claim is, therefore, barred by the doctrine of collateral estoppel in that the liability issue has already been determined by a jury.

For the foregoing reasons the judgment of the circuit court is affirmed.

AFFIRMED.

[Dissenting opinion omitted]

C. Joint Parties and Contribution

Moore v. Foster, 180 So. 73 (Miss. 1938)

ETHRIDGE, Presiding Justice.

Arthur Moore, appellant, brought an action against John Foster, one of the appellees, a constable of Itawamba county, for wrongfully and negligently shooting appellant on or about July 15, 1934. On said date appellant and some other young men were parked in an automobile on a public road near Kirkville, in Itawamba county, and had some beer which, at that time, was not legal in that county. It seems that appellee Foster and Jack Grissom, another constable, having received information that there might be trouble, had secreted themselves near the place where the shooting occurred, while a deputy sheriff was farther down the road in his car; that seeing the unloading of the contraband beer, they ran from their place of hiding, and upon the approach of the officers, the appellant, and some of the other young men, ran from the scene, and as they ran Foster and Grissom started after appellant and others firing their pistols concertedly in seeking their arrest. As appellant did not stop, these officers in firing at him hit his arm, breaking it. These officers testified that their purpose was to arrest appellant, and that they shot at an elevation not intending to hit him, but only to frighten him into stopping.

According to the testimony for the appellant, Foster fired and Grissom had turned back to the car for the purpose of arresting the others, while the testimony of Foster and Grissom showed that they were firing at the same time, and that Foster did not continue shooting after Grissom turned back to the car.

[1] It is not shown that these officers had warrants for these parties, but that is immaterial, as officers are not permitted to shoot fleeing misdemeanants for the purpose of arrest, either upon warrants, or for crimes committed in their presence. Brown v. Weaver, 76 Miss. 7, 23 So. 388, 42 L.R.A. 423, 71 Am.St.Rep. 512; State, to Use of Johnson v. Cunningham, 107 Miss. 140, 65 So. 115, 51 L.R.A.,N.S., 1179.

It was contended by the appellees that there could be no recovery unless it was shown by a preponderance of the evidence *74 that the shot fired by Foster inflicted the wound on appellant. Foster was sued alone, and Grissom and the deputy sheriff were not joined in the suit.

[2][3] It will be seen from the statement that Foster and Grissom were acting in a common purpose in seeking the arrest of the appellant, and each negligently and wrongfully fired at the fleeing appellant. It has long been settled in this state that joint tort-feasors may be sued jointly or individually, and that liability may be joint or several. Westerfield v. Shell Petroleum Corporation et al., 161 Miss. 833, 138 So. 561; Sawmill Const. Co. v. Bright, 116 Miss. 491, 77 So. 316; Waterman-Fouke Lumber Co. et al. v. Miles, 135 Miss. 146, 99 So. 759; Oliver v. Miles, 144 Miss. 852, 110 So. 666, 50 A.L.R. 357, and Illinois C. R. R. Co. v. Clarke, 85 Miss. 691, 38 So. 97. In the case of Oliver v. Miles, supra, the facts are very much in point here. There Oliver and one Shamburger were hunting birds and a covey flew across the public road. Both fired at this covey across the highway, and Miles, who was traveling on the highway, was wounded. He was unable to tell which one shot him, and the court there held that Oliver and Shamburger were jointly and severally liable, and that Miles was entitled to recover against either or both.

Under the authorities above cited, Foster and Grissom were each liable, regardless of which one of the pistols used hit appellant.

Instruction No. 1, complained of by the appellant, told the jury that before they could return a verdict against the defendants they should be convinced by a preponderance of the evidence that John Foster shot and thereby inflicted the injury, and if not so convinced, it was their sworn duty to return a verdict for defendants.

Instruction No. 2 charged the jury for the defendants that: "John Foster, one of the defendants in this case, is not liable for the acts of any other man, and unless the proof convinces you by the preponderance thereof, that he and not some other, fired the shot that inflicted the injury, then it is your sworn duty to return a verdict in favor of the defendants."

Instruction No. 3 charged the jury for the defendants that if "you should return a verdict against the defendants, it should be for only such sum that you have been convinced by a preponderance of the evidence will compensate for the injury, but the Court says to you, in this connection, that you can not find against the defendants for

any sum unless you are convinced by a preponderance of the evidence that John Foster fired the shot that inflicted the damage."

These instructions are erroneous, as the parties, according to their own testimony, were engaged in a common enterprise, and each committed the negligent and wrongful acts in carrying out their common enterprise. It was not necessary to prove which one inflicted the wound.

The judgment of the court below will therefore be reversed, and the cause remanded for a new trial in accordance with the principles above announced.

Reversed and remanded.

Granquist v. Crystal Springs Lumber Co., 1 So.2d 216 (Miss. 1941)

GRIFFITH, Justice.

The determinative issue, and a sufficient statement of the facts to disclose it fully, is presented by the fourth special plea of the defendant, appellee here. The demurrer to that plea was overruled by the court; appellant declined to plead further, and the action was dismissed. The plea is as follows:

"Now comes the defendant, Crystal Springs Lumber Company, by its attorneys, and for fourth special plea to the declaration herein says that this action ought not to be maintained against it, for that this is an action by the plaintiff against the defendant for and on account of personal injuries alleged to have been sustained by the plaintiff, resulting from an automobile collision which occurred in Copiah County, Mississippi, on or about December 27, 1938, and said plaintiff did on or about the *217 15th day of August, 1939, file her suit against Thorpe A. Huntington and others in the District Court of the United States for the Jackson Division of the Southern District of Mississippi, a court of competent jurisdiction, said suit being No. 91 on the law docket of said court, wherein and whereby said plaintiff sought to recover damages for said personal injuries alleged to have been sustained by her in said automobile collision. A copy of said declaration in said suit so filed in the District Court of the United States for the Jackson Division of the Southern District of Mississippi is attached hereto as Exhibit 1 and as a part hereof, and a copy of defendant's answer in said suit is attached hereto as Exhibit 2 and as a part hereof. This defendant has been at all times since said collision found within the jurisdiction of said United States Court.

Issue was joined in said suit and the same came on for trial in said United States District Court and a trial thereof was had on the merits of said cause and resulted in a jury verdict in favor of said plaintiff and against said defendant, Thorpe A. Huntington, in the sum and amount of $500.00, and thereupon judgment was entered in said cause on the 22 day of August, 1940, and appears of record in Minute Book 2, at page 27 of the Minutes of said United States District Court. A copy of said judgment so entered is hereto attached as Exhibit 3 and as a part hereof.

The cause of action in the present suit is identical with the cause of action involved in said suit in the United States District Court and the subject matter and things sued for are likewise identical. Said judgment so rendered in said suit has not been appealed from, remains unreversed and has never been in any way vacated or annulled, but the same is and remains a final judgment in said cause.

That the said Thorpe A. Huntington, the defendant in said suit in the United States District Court, is one and the same party as T. A. Huntington described in the declaration herein, and the liability, if any, of this defendant in this action is based solely upon the acts of the said Huntington, and is solely by reason of the existence of the relation of master and servant between this defendant and the said Huntington at the time of the automobile collision in question and is solely and alone by virtue of the doctrine of respondeat superior.

That the said plaintiff at the time said suit in the District Court of the United States was filed either knew, or, by the exercise of reasonable diligence could and should have known that at the time of said automobile collision the relation existing between this defendant and the said Huntington was that of master and servant, and that the said Huntington in the operation of the automobile involved in said collision was acting within the scope of his authority and in furtherance of the business of this defendant, and said plaintiff at all times prior to the trial of said cause in the United States District Court either had such knowledge, or, by the exercise of reasonable diligence, could and should have had such knowledge, and said plaintiff did prior to the trial of said cause in the District Court of the United States have actual knowledge of such fact and did prior to the submission of said cause to the jury in said District Court and prior to the verdict of the jury therein and prior to judgment therein have actual knowledge of such fact.

That the judgment so rendered in said United States District Court against the said Thorpe A. Huntington has not been satisfied, but the same has at all times since the rendition thereof been collectible, and the said Huntington is and has been at all times since the rendition of said judgment fully solvent and ready, able and willing to pay and discharge said judgment and has repeatedly since the date of the rendition of said judgment and long prior to the filing of the suit herein offered to pay said judgment, but the plaintiff has at all times declined and refused to accept the satisfaction of said judgment, and said Huntington prior to the filing of the suit herein did offer to make tender of the full amount of said judgment to the plaintiff, but was advised by the plaintiff that such tender would be refused, if made, and that it was wholly unnecessary and useless to make tender thereof.

And plaintiff, with full knowledge of the facts, and that the said Huntington was acting as the servant of this defendant at the time of said automobile collision, having proceeded to trial and to judgment against the said Huntington, the servant, in said suit in the District Court of the United States, is now estopped by said judgment to prosecute this action against this defendant, the master, based upon the act of the servant and solely upon the doctrine of respondeat superior, and the plaintiff *218 is now barred by said judgment; and having so proceeded has elected to prosecute her suit and proceed to judgment against the said Huntington, the servant, has thus elected her remedy, and this action against this defendant, the master, based upon the act of the servant and solely upon the doctrine of respondeat superior cannot now be maintained; and the liability of this defendant being wholly derivative and depending entirely upon the doctrine of respondeat superior said judgment is res adjudicata as to the maximum of the liability of this defendant, and said judgment being a collectible judgment the same is res adjudicata here, and this suit cannot be maintained; and this the defendant is ready to verify."

The issue has been well summarized by one of counsel in this brief statement: "The sole and one question here presented is whether the recovery of a valid, collectible judgment against a servant, with full knowledge of all the facts, is a bar to a subsequent action against the master whose liability arises solely and alone by virtue of the doctrine of respondeat superior, and without fault on his own part, the latter action being for the identical act of negligence."

[1] [2] The term "joint tort feasors" means that two or more persons are the joint participants or joint actors, either by omission or commission, in the wrongful production of an injury to a third person. There the act or omission of each is his own act or omission, but the acts or omissions are concurrent in, or contribute to, the production of the wrongful injury, so that each actor is, on his own account, liable for the resulting damages. But when the liability of a principal for the tort of an agent, or that of the master for the wrong of a servant, has grown out of a tort in which the agent or servant is the sole actor, whence the liability of the principal or master is an imputed or constructive liability and has its sole basis in the doctrine of respondeat superior and in nothing else, the liability is joint and several, but they are not joint tort feasors.

[3] [4] And if any elaborations be necessary to fortify the correctness of the statement contained in the foregoing paragraph, a sufficient demonstration may be found in this: The rule is universal, except where modified by statute, that joint tort feasors are not entitled to contribution between themselves or to any recovery over, one against the other; while it is equally well and long settled that an agent or employe, through whose sole wrong the principal or master has been obliged to make compensation to a third person, is liable to the principal or master for such compulsory outlays. 39 C.J. pp. 1313, 1314; 14 R.C.L. 52, 18 R.C.L. 502; A.L.I. Rest. Restitution, Sec. 96; notes 40 L.R.A.,N.S., 1147 and 1153, 1154; Cooley on Torts, 4th Ed., pp. 292, 293 and cases cited under note 88; 7 Labatt Mast. & Serv., 2d Ed., p. 8011.

[5] [6] It further follows as a logical legal consequence of what has been said that when the third person, with the full knowledge alleged in the quoted plea, has by suit or action had a recovery against the agent or employe for the wrong committed by the agent or employe as the sole actor in the commission of the wrong, the liability of the principal or master which was solely a derivative of, or a dependency from, and identical with the tort of the agent or servant, becomes merged into the judgment recovered against the agent or servant if that judgment be collectible, for that the wrong has then been legally satisfied and no subsequent or separate action against the principal or master will be allowed.

* * * *

Appellant relies also to some extent on Illinois Cent. R. Co. v. Clarke, 85 Miss. 691, 38 So. 97 and St. Louis, etc., R. Co. v. Sanderson, 99 Miss. 148, 54 So. 885, 46 L.R.A.,N.S., 352, and some of the several cases which have cited those cases. In the two cases mentioned, it was held that the exoneration by the jury of the servant who was joined as a defendant in the action cannot be availed of on appeal by the master; and it will be noted that final refuge for the maintenance of that view was taken in what is now Section 3404, Code 1930*-a procedural section which is not involved in or applicable to the case now before us. Those cases are not directly in point, and if it may be said that they are persuasively so, or if some of the cases have inadvertently spoken of the liability to third persons of principal and agent or master and servant, which is joint and several, as if making them joint tort feasors, when the wrong was committed solely by the agent or servant and when the liability of the principal or master was solely a derivative of, or a dependency from, the tort of the agent or servant, and rests upon no other foundation, then we say now that such cases, if they are to stand at all, must be henceforth construed within and as not going beyond the principles which we now affirm in the

present case-principles which are so deeply, and have been so long, imbedded in the common law that a distinct departure therefrom should belong to the legislative department and not to the courts.

Affirmed.

*Note: Now, Miss. Code Ann. § 11-3-37 (1972)

D. Minors as Parties

Ruiz v. Ruiz, 101 So.2d 533 (Miss. 1958)

McGEHEE, Chief Justice.

* * * *

[2] The appellant also assigns as error the failure of the trial court to dismiss the bill for divorce on the *196 ground that the complainant Sally Bradford Ruiz was only 20 years and 9 months of age at the time she filed the bill of complaint in her own name, instead of by a guardian ad litem or a next friend. This point was not raised by the proceedings in the trial court, and it is contended by the appellee, and not disputed by the appellant in the briefs that the point was raised for the first time during the oral argument on the plea to the jurisdiction of the court.

[Note: Miss. Code Ann. § 93-19-11 now removes disability of married minors for purpose of litigation involving marital rights.]

[3] There is no rule of law or pleading that requires a complainant to allege that he or she is an adult. If the defense of infancy at the time of the bringing of the suit is raised by the defendant, then the complaint should be amended so as to show that the complainant is suing by a guardian ad litem or next friend, where the defense of infancy is well taken. But it is well settled that it is not an absolute prerequisite to jurisdiction of an action by an infant that he or she should sue by a guardian ad litem or next friend, and the suit or action is not void on that ground alone, it merely affects the regularity of the proceeding and the defect is amendable and the judgment or decree taken therein is not void. 43 C.J.S. Infants § 108, p. 281. At page 282 of the same text, under the heading 'Ratification', it is said: 'If the judgment is considered merely voidable but not void, it may be affirmed by the infant, and it will be considered as affirmed by him if he takes any action in reference thereto after he becomes of age, which is consistent only with assuming its validity.' And see subsections (c) and (d) thereof as to the manner of raising objection and the waiver or loss or right to object, respectively.

In Griffith's Miss. Chancery Practice, 2d Ed., page 122, it is said: '* * * although an infant may have sued without a next friend, and the fact of the infancy is made to appear by plea or otherwise during the progress of the suit the bill will not be for that reason dismissed, but the court will allow a next friend to become *197 a party and will thereupon proceed with the case.' Citing Gully v. Dunlap, 24 Miss. 410, 413-414; Sam v. Allen, 152 Miss. 572, 120 So. 568.

* * * *

Affirmed and remanded.

[Note: Affirmed in absence of transcript.]

E. Foreign Corporations

C. H. Leavell & Co. v. Doster, 211 So.2d 813 (Miss. 1968)

GILLESPIE, Presiding Justice:

C. H. Leavell & Company and Peter Kiewit Sons' Company, both non-resident corporations, sued J. V. Doster, an individual doing business as Central Gulf Construction Company, in the Circuit Court of Hinds County to recover damages alleged to have arisen out of a contract between the plaintiffs and the defendant. Defendant filed a motion to dismiss the case for want of jurisdiction and this motion was sustained and final judgment entered dismissing the case. From this judgment plaintiffs appeal.

The question involves a construction of Mississippi Code 1942 Annotated, section 1437 (Supp.1966), the so-called 'long arm' statute.

The corporate plaintiffs are both non-residents of Mississippi and both have qualified to do business in this state. The individual defendant, Doster, is a non-resident of the State of Mississippi and a resident of the State of Texas. The declaration alleges that the corporate plaintiffs, as joint venturers, were prime contractors in a construction contract at the NASA Test *814 Facility near Bay St. Louis, Mississippi, and entered into a contract with the defendant, Doster, to perform a part of the work called for under the prime contract; that, in the performance of said contract the defendant, Doster, was doing business in the State of Mississippi and that the contract between the corporate plaintiffs and the defendant, Doster, was to be performed entirely within the State of Mississippi. It is not necessary to refer in further detail to the declaration except to state that the suit was based upon matters which arose out of the performance of the aforementioned contract.

* * * *

The first sentence of subsection (a) of section 1437 provides for three categories of nonresident persons, firms, partnerships or foreign corporations not qualified to do business in Mississippi who are reached by the terms of the statute and subjected to suit in this state. They are: (1) any nonresident person, etc., who shall make a contract with a resident of this state to be performed in whole or in part by any party, in this state; (2) any nonresident person, etc., who shall commit a tort in whole or in part in this state against a resident of this state; and (3) any nonresident person, etc., who shall do any business or perform any character of work or service in this state.

[1] [2] [3] The first question is whether a foreign corporation who has qualified to do business in this state is a resident within the meaning of category (1) so that such party may bring a suit under the terms of this statute. We are of the opinion that it is. A foreign corporation qualified to do business in this state may not be sued under the terms of section 1437 because a foreign corporation, to be reached by the statute, must not be one qualified as doing business in this state. Mississippi Code 1942 Annotated section 5309-222 (Supp.1966) provides that a foreign corporation qualified to do business in this state shall, until qualification is revoked or withdrawn as provided in the Act, enjoy the same, but no greater, rights and privileges as a domestic corporation. Moreover, a foreign corporation qualified to do business under the corporate laws of this state should have the same privileges and advantages of invoking the aid of the courts of this state under section 1437 as resident corporations if they are to have equal protection of the laws. Cf. Sandford v. Dixie Construction Company, 157 Miss. 626, 128 So. 887 (1930). We are therefore of the opinion that the nonresident plaintiffs in the present case are residents within the meaning of category (1) under the first sentence of section 1437 mentioned above. State ex rel. Northwestern Mutual Fire Ass'n v. Cook, 349 Mo. 225, 160 S.W.2d 687 (1942).

*815 [4] The defendant in this case is also subject to the jurisdiction of the courts of Mississippi under category (3) of the first sentence of section 1437. . . .

We are, therefore, of the opinion that the trial court erred in dismissing the suit. The case is reversed and remanded for trial on the merits.

Reversed and remanded.

Parker v. Lin-Co Producing Co., 197 So.2d 228 (Miss. 1967)

INZER, Justice.

This is an appeal from a judgment of the Circuit Court of Lincoln County which held appellants liable for damage to appellee's oil well. The judgment must be reversed because appellee was doing business in this state as an undomesticated foreign corporation, and as such was not entitled to use the courts of this state to enforce its claim.

Lin-Co Producing Company, a Louisiana corporation, was owner of an oil, gas and mineral lease in Warren County. Lin-Co discovered a sand bridge in its oil well and hired appellants to attempt to remove the sand by sand bailing. During the sand bailing operation a wire line attached to the sand bailer broke, leaving the bailer and part of the line in the well.

Suit was brought charging appellants with negligence. In its defense appellants offered as a plea in abatement Lin-Co's lack of standing to sue, contending that Lin-Co was a foreign corporation doing business in the state without having qualified to do business and as such did not have a right to sue under Mississippi Code Annotated section 5309-239 (Supp.1964). This section is, in part, as follows:

> No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state.

The circuit court properly found that at the time this cause of action arose and at the time suit was filed, Lin-Co was a foreign corporation doing business in this state *229 without having qualified to do so as required by statute. Although the court held that the suit should be abated, it was not dismissed. The court held that if Lin-Co desired to qualify to do business in this state it could proceed with its suit, and after this ruling Lin-Co did qualify to do business in this state and proceeded with the suit.

This ruling was based on the theory that the statute prohibited only the maintaining of the suit and not the bringing of it, and accordingly, since the corporation complied with Mississippi statutes by qualifying to do business, the prohibition would be removed and Lin-Co could prosecute the suit already brought.

In his construction of the statute the circuit judge sought to distinguish the word 'maintain' from the word 'begin,' since the latter word did not appear in section 5309-239 (Supp.1964). In doing so he followed the reasoning found in 23 Am.Jur. Foreign Corporations s 351 (1939), at 328, where it is said:

> * * * it is generally held that a compliance with the requirements after a contract has been entered into and after an action has been begun thereon is sufficient to enable the corporation to maintain the action. The words 'maintain' and 'prosecute' as used in such statutes are construed by the courts in these jurisdictions as being different in meaning from the words 'institute,' 'commence,' or 'begin,' and as implying that the action must be begun before it can be maintained.

However, the same section, at 328, states:

> In some jurisdictions it is held, however, that although contracts made by a foreign corporation before complying with the local statutory requirements are not for that reason invalid, nevertheless the corporation has no standing at all in a court before such compliance; and a compliance after the commencement of a suit is not sufficient.

The courts of this country in defining the word 'maintain' as applied to actions have given it several different meanings. In 54 C.J.S. at 902 particular applications of 'maintain' are discussed as follows:

> It has been held that the word 'maintain,' when applied to actions, has three meanings. One meaning of the term is to commence; to begin; to bring; to institute. However, it has been said with reference to actions that 'maintain' means something more than to commence, and carries a different meaning from 'begin' or 'institute.' Thus the second meaning of the word is to continue; to carry on; to support, as contradistinguished from to institute, the action that has already been brought; to persevere in or with; to commence and prosecute to a conclusion. In accordance with this view, it has frequently been said that to maintain a suit is to uphold,

> continue on foot, and keep from collapse a suit already begun. Where the word is employed to signify either the first or second meaning, it may comprehend the institution as well as the support of the action, including the commencement of or right to institute an action, and in this sense it implies that an action must be begun before it can be maintained. The third meaning of the term is to commence and prosecute to a conclusion that which has already been begun. In addition, the term is often used to signify an action yet to be instituted. A prohibition against the maintaining of an action or suit may or may not indicate a prohibition against beginning or commencing it.

Appellant urges that the purpose of this statute is to insure that foreign corporations comply with our state law, and that the construction placed on the statute (5309-239) by the circuit judge would defeat the purpose of the Legislature, and as a result only those foreign corporations which had litigation develop would have reason to comply with the statute.

*230 Prior to the adoption of the Mississippi Business Corporation Act of 1962, the law of this state was clearly to the effect that a corporation which failed to qualify to do business in this state could not subsequently qualify and bring or maintain a suit based upon transactions which occurred while it was doing business without having qualified. See Mississippi Code Annotated section 5319 (1957), before amended, and Peterman Construction & Supply Co. v. Blumenfeld, 156 Miss. 55, 125 So. 548 (1930).

Corporation statutes enacted in 1962 are based generally on the Model Business Corporation Act. Mississippi Code Annotated section 5309-239 (Supp.1964) is based on section 117, Model Business Corporation Act Annotated (1960), which reads in part as follows:

> No foreign corporation transacting business in this State without a certificate of authority shall be permitted to maintain any action, suit or proceedings in any court of this state . . . . until such corporation shall have obtained a certificate of authority. Nor shall any action, suit or proceeding be maintained in any court of this State by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this state, ... until a certificate of authority shall have been obtained by such corporation or by a corporation which has acquired all or substantially all of its assets.

The words italicized were part of a bill introduced as Senate Bill 1712 in the 1962 Regular Session of the Legislature. The bill was amended in committee to eliminate the italicized words. This is an indication that the Legislature desired to adhere to the established law of this state relative to foreign corporations doing business in this state without first qualifying. Furthermore, the Corporation Act, as enacted by the Legislature, expressly prohibited a foreign corporation from transacting business in this state until it had procured a certificate of authority to do so. Miss.Code Ann. s 5309- 221 (Supp.1964).

[1] [2] It is the opinion of this Court that the Legislature prohibited a foreign business corporation from doing business in this state without first qualifying as required by the act, and in the event such corporation violated this prohibition, it could not use the courts of this state to enforce any right of action that accrued prior to the time it qualified to do business in this state. To allow a corporation that has violated the express terms of the statute to avoid the effect of the statute by qualifying only in the event it found it necessary to enforce a cause of action, would defeat the purpose of the Legislature. We hold that a foreign corporation doing business in Mississippi without having qualified as required by statute cannot use the courts of this state to enforce any cause of action that accrued as a result of doing such business. In order to avail itself of the state courts to enforce a cause of action, a foreign corporation doing business in this state must have qualified to do business when the cause of action accrued.

The circuit judge correctly held that Lin-Co was doing business in this state without having qualified as required by statute, and that as a result thereof its suit should be abated. However, he was in error in refusing to dismiss the suit. For this reason the case is reversed, and judgment will be entered here dismissing the suit.

In view of this holding we do not reach the other matters assigned as error.

Reversed and judgment here for appellant.

Trane Co. v. Taylor, 295 So.2d 746 (Miss. 1974)

GILLESPIE, Chief Justice:

The Trane Company, a Wisconsin corporation, sued H. L. Taylor and the surety on his performance bond, the United States Fidelity & Guaranty Company, in the Circuit Court of Tallahatchie County for recovery of the purchase price of air conditioning equipment. Taylor included in his answer an affirmative defense based on the contention that the Trane Company is a foreign corporation doing business in the State of Mississippi without having qualified to do business in this state, and, therefore, has no right to sue in the courts of Mississippi. This affirmative defense was set down for separate hearing, and the court found that Trane was doing business in Mississippi and was not qualified to do so and dismissed the case. Trane appealed.

* * * *

The facts bearing on the issue whether Trane was doing business in the State of Mississippi in violation of section 79-3-247, Mississippi Code Annotated (1972), are as follows: Trane is a Wisconsin corporation. It has not qualified to do business in the State of Mississippi but sells about one million dollars worth of its manufactured equipment in the State of Mississippi annually. Its business in Mississippi is conducted from three franchised sales offices, described by Trane in its answer to interrogatories as 'Trane Sales Offices.' The northern counties os Mississippi are assigned to the Memphis office; a few counties in the southern part of the state are assigned to the New Orleans office; and the balance of the State of Mississippi is served from the Trane Sales Office in Jackson. The Memphis sales office operates as a corporation, Wilson Trane Service Agency, Inc.

*748 The testimony showed that the other franchised offices operate substantially the same as the Memphis office, and it may be inferred from this statement that the Jackson and New Orleans offices are also operated as separate corporations. The ownership of the stock of these corporations is not shown in the record, but there is nothing to show that Trane owns any of their corporate stock. Each of these franchised offices operates under a contract designated as 'Trane Territorial Franchise Agreement.'

* * * *

Franchise holder sells Trane equipment exclusively. All air conditioning equipment is warranted by Trane for parts and labor for one year, and the compressor is warranted for parts only for five years. It is customary for the installing contractor to be responsible for the labor repairs during the first year. Franchise holder maintains service personnel to provide such service, and Trane furnishes the parts through franchise holder. Franchise holder maintains from $20,000 to $30,000 worth of parts and compressors. If a compressor goes bad and franchise holder knows that it is in warranty, it will deliver a compressor and then order another one from Trane. Jones testified that in this type of business, 'We've got to have service after the sale, and our most important aspect is to have a happy customer and owner, and if the man does have a problem and has a piece of equipment that is a lemon, then we will do everything we can to make him happy and provide the parts he needs to get him back in operation.' It is not unusual for something to go wrong with equipment, and part of the service provided by franchise holder is to provide engineers and professional people to make such corrections.

1. Did the trial court err in finding that Trane was transacting business in this state?

The statute is the starting point of the inquiry. Section 79-3-247, Mississippi Code Annotated (1972), provides in part as follows:

> No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state.

[1] The statute denying access to the courts is penal in nature and must be strictly construed. S. & A. Realty Company v. Hilburn, 249 So.2d 379 (Miss.1971). Three categories of cases require construing the phrase 'transacting business': (1) taxing, (2) amenability to suit and service of process under the 'long-arm' statute, and (3) barring foreign corporations from state courts for failure to meet the state's qualification requirements. These three categories have been recognized in Mississippi. See Century Brick Corporation of America v. Carroll, 247 Miss. 514, 153 So.2d 683 (1963).

[2] [3] The marketing within a state of the products of a foreign corporation through a local business or dealer does not in itself constitute transacting business in the state by the foreign corporation. If, however, the local dealer is not in fact an independent business but is so far under the control of the foreign company that it is a mere conduit for the passage of products from the manufacturer to the consumer, then the foreign corporation may be regarded as

transacting business in the state. The degree of control over the local business and whether the contract in substance establishes the relationship of seller and purchaser or principal and agent are important factors. If the contract establishes a principal and agent relationship, the foreign corporation is regarded as doing business in the state, but if its effect is to establish the relationship of buyer and seller, it is not so regarded. 36 Am.Jur.2d, Foreign Corporations s 363 (1968).

In Century Brick Corporation of America v. Carroll, 247 Miss. 514, 153 So.2d 683 (1963), the question was the amenability of the foreign corporation to suit in Mississippi, and the Court held that the foreign*750 corporation's operation through a franchise license constituted transacting business in this state.

[4] We hold that Trane was transacting business in Mississippi. The franchise agreement and the oral testimony clearly reveal that the local franchise agents are not independent businesses and are merely tightly controlled agencies of Trane for the distribution of Trane's products. The arrangements and activities do not result in establishing the relationship of seller and purchaser. The franchised holder does not pretend to purchase anything except parts. The relationship is for all practical purposes that of principal and agent, or more accurately, the establishment of a branch office of Trane for the sale and service of its products. Every significant aspect of the franchise holder's business is either controlled or subject to control by Trane.

Applying the rule of strict construction of a penal statute, we hold the trial court correctly held that Trane was doing business in Mississippi.

2. Were the activities of Trane in this state such as to bring them within the statutory exceptions?

Section 79-3-211(d) and (e), Mississippi Code Annotated (1972), provides:

> Without excluding other activities which may not constitute transacting business in this state, a foreign corporation shall not be considered to be transacting business is this state, for the purposes of this chapter, by reason of carrying on in this state any one or more of the following activities: . .
> (d) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this state before becoming binding contracts.
> (e) Transacting any business in interstate commerce.

[5] We hold that if Trane is transacting business within the state by maintaining therein, as at Jackson, an active branch sales and service business for conducting sales of its products and servicing its equipment under its warranty, after sale, then it is immaterial whether the business is 'in interstate commerce,' unless it is shown that an undue burden was placed on the interstate business. If a foreign corporation engages in business in the state, it must bear its share of responsibilities as a corporate citizen the same as domestic corporations.

[6] As to subsection (d) of the quoted statute, if the only activity of Trane in the State of Mississippi consisted of soliciting orders requiring acceptance in Wisconsin, then it would be exempt from the penalties of the statute. But Trane's activity in the state is far more than the mere solicitation of orders. As shown in the statement of facts, Trane, operating through a franchise holder totally dominated by Trane, conducts at Jackson a sales and service office for the promotion of Trane's business by furnishing engineering service to prospective customers, conducting sales, extending credit to its customers, servicing its equipment upon its warranty, and maintaining a stock of parts and compressors We hold the exception does not apply.

Affirmed.

Environmental Coatings, Inc. v. Baltimore Paint & Chemical Co., 617 F.2d 110 (5th Cir. 1980)

PER CURIAM:

Appellant Baltimore Paint and Chemical Company challenges the district court's dismissal of its counterclaim and third-party complaint in a diversity action initiated by appellee Environmental Coatings, Inc. The trial court dismissed Baltimore Paint's claim because it had not qualified to do business in Mississippi as a foreign corporation. Under Miss.Code Ann. s 79-3-247 (1972),[FN1] a foreign corporation which has not obtained from Mississippi's secretary of state a certificate of authority to transact business in the state may not maintain an action in any courts in Mississippi. We find that this door-closing statute, however, does not deprive a defendant of the right to present compulsory counterclaims and third-party complaints. Accordingly, we reverse the dismissal of appellant's claims and remand for trial.

FN1. Miss.Code Ann. s 79-3-247 provides in pertinent part:

> No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state. Nor shall any action, suit or proceeding be maintained in any court of this state by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this state.
>
> The failure of a foreign corporation to obtain a certificate of authority to transact business in this state shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action, suit or proceeding in any court of this state.

Appellee Environmental Coatings, Inc., was a distributor for appellant Baltimore Paint, a division of Dutch Boy, Inc. Environmental Coatings brought a diversity suit against Baltimore Paint for breach of their paint distributorship contract, and Baltimore Paint sought to counterclaim for contract breach damages and to implead the personal guarantors of Environmental Coatings. Finding that Baltimore Paint engaged in intrastate commerce within Mississippi and had failed to qualify to do so, the trial court held that Miss.Code Ann. s 79-3-247 (1972) barred Baltimore Paint's counterclaim and its third-party complaint.

Baltimore Paint appeals that dismissal, asserting that Miss.Code Ann. s 79- 3-247 (1972) deprives such nonqualifying corporations of any right to initiate a lawsuit, but not of the right to defend, to bring compulsory counterclaims, and to implead third parties.

The parties do not contest the applicability of section 79-3-247 to federal courts in Mississippi. The United States Supreme Court in Woods v. Interstate Realty Co., 337 U.S. 535, 69 S.Ct. 1235, 93 L.Ed. 1524 (1948), concluded that an earlier Mississippi disqualification statute did bar an action in federal court brought by a nonqualifying foreign corporation. Under the Woods rationale, the current disqualification statute is likewise applicable to federal courts sitting in Mississippi. See id. at 538. See also Fred Hale Machinery, Inc. v. Laurel Hill Lumber Co., 483 F.2d 58, 60 (5th Cir. 1973).

Neither this court nor the Mississippi Supreme Court has ever decided precisely whether the current Mississippi disqualification statute permits a nonqualifying defendant corporation to bring counterclaims or third party complaints. Decisions by both courts under the current statute's *112 predecessor, however, compel the conclusion that even a nonqualifying corporation may bring such claims.

In Smith v. Kincade, 232 F.2d 306 (5th Cir. 1956), this court upheld a district court order permitting a nonqualifying defendant corporation to bring a compulsory counterclaim. The purpose and import of the state statute then in effect, Miss.Code Ann. s 5319 (1942) (amended 1962),[FN2] bear sufficient resemblance to those of the current disqualification statute to compel a parallel result in the present case. Moreover, the decision of the Supreme Court of Mississippi in Parker v. Lin-Co Producing Company, 197 So.2d 228 (Miss.1967), suggests that decisions under the former statute apply with equal force to the current statute. The Parker Court perceived in the adoption of the new disqualification statute a legislative desire "to adhere to the established law of this state relative to foreign corporations doing business in this state without first qualifying." Id. at 230.

FN2. Miss.Code Ann. s 5319 (1942) provided in part:

Any foreign corporation failing to (qualify) shall not be permitted to bring or maintain any action or suit in any of the courts of this state.

In 1962, Miss.Code Ann. s 5309-239 was adopted, replacing section 5319 as it dealt with foreign corporations. Section 5309-239 was substantially the same as the current version now codified as Miss.Code Ann. s 79-3-247 (1972).

Lending additional support to this result is the express provision in the current law that the failure of a foreign corporation to qualify ". . . shall not prevent such corporation from defending any action, suit or proceeding in any court of this state." Miss.Code Ann. s 79-3-247 (1972). Moreover, Miss.Code Ann. s 11-7-69 (1972) [FN3] expressly preserves the right of foreign corporations to defend against suits, actions or proceedings brought in courts in Mississippi. Presumably, the Mississippi legislature would not have expressly permitted defense by nonqualifying corporate defendants but impliedly circumscribed the scope of that defense by denying the right to bring compulsory counterclaims or third-party complaints.

FN3. As pertinent here, Miss.Code Ann. s 11-7-69 (1972) provides:

(1) In all suits at law where the defendant has a claim or demand against the plaintiff arising out of or connected with the situation, occasion, transaction or contract or subject matter upon which the plaintiff's action is based, whether the claim or demand of the defendant is liquidated or unliquidated, the defendant in his answer may plead his claim or demand against the plaintiff by way of counterclaim, in recoupment, stating the facts upon which such counterclaim is based.

Accordingly, the district court's order dismissing Baltimore Paint's claims is REVERSED and REMANDED.

Pittman v. Allenberg Cotton Co., 276 So.2d 678 (Miss. 1973)

SMITH, Justice:

Allenberg Cotton Company, a Tennessee corporation, brought suit in the Chancery Court of Quitman County against Ben E. Pittman for injunctive enforcement of a contract for the purchase by it of cotton produced by Pittman in the year 1971 on 700 acres of his land in Quitman County, Mississippi. Under the terms of the contract, Pittman was required to plant, cultivate and harvest a crop of cotton on the land, employing methods provided in the contract, then to deliver it to Valley Gin Company in Marks, Mississippi for ginning. Under the contract, Allenberg retained certain control as to methods to be employed in the production of the cotton, and, after ginning, Pittman was obligated to deliver the bales for the account of Allenberg at the warehouse of Federal Compress and Warehouse Company at Marks, Mississippi. The contract also provided a formula for determining amounts to be paid for the cotton. The bill of complaint alleged a refusal on the part of Pittman to deliver the cotton, and in addition to injunctive relief, demanded damages for breach of contract.

Allenberg Cotton Company, a Tennessee corporation, had never qualified to do business in the State of Mississippi. Its charter, granted by the State of Tennessee, among other things, authorized it:

> Section A: To carry on the business of cotton merchants including the buying and selling of spot cotton, the dealing in cotton futures, the storing, warehousing, insuring, and hedging of the cotton and cotton sales or puchases; (sic) the borronwin (sic) or lending of money, unsecured, or secured by cotton warehouse receipts or otherwise, and in general, any other business that may be allied therewith, *680 or ancillary thereto, or useful in the advancement of the general purposes of the business of cotton merchants, and any other business that can be conducted along with said business, or that might advance the purposes, including the right to deal in any commodity by the actual sale or purchase of same by private negotiations or on any organized market, and also including the purchases or sales of future contracts or hedges for any such other commodity.

Pittman set up several defenses in his answer, and pleaded that Allenberg Cotton Company was a foreign corporation, doing business in Mississippi, but it had never qualified to do so by securing a certificate of authority as required by Mississippi Code 1942 Annotated section 5309-221 (Supp.1972). Pittman alleged that, as a consequence of this failure to qualify, Allenberg was not entitled to maintain its suit under the provisions of Mississippi Code 1942 Annotated section 5309-239 (Supp.1972), which is (in part) as follows:

> No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state. Nor shall any action, suit or proceeding be maintained in any court of this state by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this state.

The proof showed that Allenberg had arranged with one Covington, a local cotton buyer, with his office in Marks, Mississippi, to act for them (although it is denied that this made him its agent) 'to contract cotton' from cotton farmers to be produced in Quitman County, Mississippi. Although Covington had performed this service for another company in 1967, in 1970 and in 1971 he acted exclusively for Allenberg. Under his arrangement with Allenberb, Covington would contact Quitman County farmers and, if they agreed to produce and sell their cotton crop to Allenberg, he would obtain all information necessary to the preparation of a purchase contract, telephone this information to Allenberg's Memphis office where a contract would be prepared and signed by an official of Allenberg. This document would then be forwarded to Covington at his office in Marks. On its receipt, Covington would get in touch with the farmer who would then come into Covington's office in Marks and there execute the contract. One copy would be retained by Covington in his Marks office, one copy would be given to the farmer and the third copy sent to Allenberg Cotton Company. For these services Covington received a commission on each bale of cotton delivered to Allenberg's account at the warehouse. Covington kept a record of these contracts in his Marks office, including a record of whether the farmers were delivering as required by their contracts. Farmers were paid for cotton delivered under the Allenberg contracts by Covington who drew upon Allenberg for the money.

Covington testified that the Pittman contract, here involved, had been brought personally to his office in Marks by the official of Allenberg who was in charge of the 'Memphis Territory' which included Mississippi. He recalled that seven or eight other similar Quitman County contracts had also been brought down at the same time. He stated that usually, but not always, the contracts were mailed to him by Allenberg and that actually it was not necessary for an

official of the company to come to Marks, saying 'I could tend to it. I reckon I was supposed to do something.' He stated that he kept up with whether deliveries of cotton were being made by the farmers as required by the contracts and that some contracts were 'adjusted' by an official of Allenberg who would come down to Quitman County for that purpose.

It appears that Allenberg, through its representative, Covington, by whatever name called, in the year 1971 alone, the second year of its Mississippi operation, made 20 to 25 similar contracts covering *681 9,000 acres of cotton land in Quitman County, Mississippi.

It is apparent that these transactions of Allenberg in each case, including that with Pittman, took place wholly in Mississippi. The contract was negotiated in Mississippi, executed in Mississippi, the cotton was produced in Mississippi, delivered to Allenberg at the warehouse in Mississippi, and payment was made to the producer in Mississippi. All interest of the producer in the cotton terminated finally upon delivery to Allenberg at the warehouse in Marks. The fact that afterward Allenberg might or might not sell the cotton in interstate commerce is irrelevant to the issue here, as the Mississippi transaction had been completed and the cotton then belonged exclusively to Allenberg, to be disposed of as it saw fit, at its sole election and discretion.

The facts stated were developed upon the hearing of the plea and are without substantial dispute. The chancellor held, however, that Allenberg was not doing business in Mississippi within the meaning of the statute. It having been stipulated that no further defense would be offered, the court entered a decree awarding Allenberg judgment against Pittman for $18,156.00 as damages sustained because of his breach of the contract. This appeal has been prosecuted by Pittman from that decree.

[1] It is argued on behalf of Allenberg that its Mississippi activities fall within the following statutory exceptions.

> Without excluding other activities which may not constitute transacting business in this state, a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this Act, by reason of carrying on in this state any one or more of the following activities:
> (d) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this state before becoming binding contracts.
> (e) Transacting any business in interstate commerce.

[2] We cannot agree. The entire transactions with respect to Mississippi cotton contracts took place in Mississippi. The contracts were not 'orders', within the commonly accepted meaning of that word, 'requiring acceptance without this state before becoming binding contracts.' Aside from the fact that they were not 'orders', they became contracts only when executed by the producer at Marks, Mississippi.

The affixation of Allenberg's signature in Memphis to a contract form before it was sent or brought to Marks for execution by the producer in nowise made it a contract prior to its acceptance and execution by the producer at Marks. Nor is the transaction converted into interstate commerce because, after the cotton had been delivered to Allenberg at the warehouse in Marks and title thereto had become vested in Allenberg in Mississippi, Allenberg, at its own election and for its own purposes, might afterward sell it in interstate commerce.

In order to maintain an action in a court of this State, a foreign corporation doing business in this State must qualify as required by the statute at the time the cause of action accrued. Parker v. Lin-Co Producing Company, 197 So.2d 228 (Miss.1967).

[3] Nor may a foreign corporation, doing business in Mississippi without having qualified as required by statute, maintain an action in a court of this State to enforce a cause of action which accrued as the result of doing such business. Bunge Corporation v. St. Louis Terminal Field Warehouse Company, 295 F.Supp. 1231 (N.D.Miss.1969).

Where the charter of a foreign corporation provided that it was formed to sell, lease and exchange real estate of all kinds, and such corporation obtained a lease upon Mississippi real property for a ten year term, and thereafter renewed it for an additional ten years, and paid rentals under *682 the provisions of such renewal and initial leases and sought an option to purchase the real estate, the corporation was held to have been 'transacting business' in Mississippi within the meaning of the statute. S & A Realty Company v. Hilburn, 249 So.2d 379 (Miss.1971).

The plea should have been sustained and Allenberg's suit should have been dismissed. The judgment appealed from is, therefore, reversed and judgment is entered here sustaining the plea interposed by Pittman against the right of Allenberg to maintain its suit against him in the Mississippi Court, and the suit is dismissed.

Reversed and judgment entered for appellant.

[Note: Cochran argued this case before the U.S. Supreme Court. See Allenberg Cotton Co., Inc. v. Pittman, 419 U.S. 20 (1974). This case was reversed by the U.S. Supreme Court on the sole grounds that the cotton industry is so involved in interstate commerce as to be beyond all state control.]

Barbee v. United Dollar Stores, Inc., 337 So.2d 1277 (Miss. 1976)

GILLESPIE, Chief Justice, for the Court:

United Dollar Stores, Inc. (United), an Arkansas Corporation, sued James G. Barbee in the Circuit Court of Harrison County to recover for merchandise sold and a two and one-half percent royalty payment on the gross receipts of a franchised retail store operated by Barbee. From an adverse judgment entered against Barbee, he appealed.

United sued to recover $12,117.49 on a sworn open account for goods sold Barbee. This figure included $719.71 in interest of service charges which during the course of the trial United relinquished its demand. *1278 It also sought recovery of a two and one-half percent franchise fee alleged to be due under a franchise agreement between the parties based on the gross sales of Barbee in a retail store. Barbee answered and filed a counterclaim in which he sought damages allegedly resulting from the sale by United to Barbee of defective and inferior merchandise, plus $1500 Barbee had paid United as a franchise fee for the privilege of operating a United Dollar Store in Gulfport, Mississippi.

At the termination of the trial, the court ruled as a matter of law that (1) United was entitled to recover on its open account, (2) United failed to prove its case as to the two and one-half percent royalty, (3) United had breached the franchise agreement but specific damages were not proven by Barbee, and that (4) Barbee was entitled to recover the $1500 franchise fee. The net result was a judgment in favor of United against Barbee for $9,897.78. The court also found that United was a foreign corporation not qualified to do business in this State and that it was doing business in this State in violation of Mississippi Code Annotated section 79-3-211 (1972), but declined to dismiss United's suit because Barbee had waived his right to invoke the penal effects of Mississippi Code Annotated section 79-3-247 (1972) by filing a counterclaim. United cross-appealed and urges that the trial court erred in holding that United was doing business in this State.

In our view of the case, the answer to two questions disposes of the case.

I.

[1] Was United doing business in this State in violation of Mississippi Code Annotated section 79-3-211 (1972)?

United is an Arkansas corporation. It has not qualified to do business in this State. Code section 79-3-211 provides that a foreign corporation shall not have the right to transact business in this State until it shall have procured a certificate of authority from the Secretary of State. Code section 79-3-247 bars such foreign corporation from transacting business in this State without a certificate and from maintaining any action in the courts of this State.

United has a chain of franchised retail stores. Barbee and United entered into a retail dealer agreement on November 25, 1970, wherein United granted Barbee a franchise to operate in Gulfport, Mississippi, a franchised retail store in accordance with the terms of the agreement. This is a lengthy contract, giving United a large measure of control over the operation of the store to be operated by Barbee and provides for service fees and the payment to United of a continuing royalty of two and one-half taxes on the total volume of sales. taxes on the total volume of sales. Barbee was required to give monthly written reports of business transacted each month by the 10th day of the following month. United retained the sole right to set all specifications relating to design, decor, furnishings, fixtures, signs and identifying materials, uniform record keeping practices, and other matters as may be required in the operating policies of United. All merchandise sold in the store shall be purchased from United, or from sources approved by United. Barbee agreed to advertise and promote the United program of merchandising. United agreed to provide all training service, information, techniques, and guidance sufficient to enable Barbee to operate the store. United agreed to stimulate the business through state and regional advertising and public relations campaigns. Barbee was required to carry comprehensive public liability insurance and products liability for certain limits and to add the name of United as an additional insured, failing which, United had the right to obtain and pay for such insurance and charge it to Barbee. There are many other provisions of the contract.

United has other stores in Mississippi, including one at Vicksburg, three in Jackson, and one each in Prentiss, Greenville, Clarksdale, Grenada, Rolling Fork, Greenwood, and McComb. In connection with the opening of Barbee's store at Gulfport, United made a design layout of the store, United's representative sketched what fixtures *1279 they wanted and where they wanted the fixtures built. United delivered the merchandise to the store, interviewed prospective

employees, ran ads in the newspaper for employees, took applications, and selected eight employees. Two representatives of United instructed Barbee's employees how to arrange and price the merchandise. In this manner, United's employees stocked the store with merchandise. United also furnished some of the fixtures and all of the merchandise and charged them to Barbee. After Barbee's store began operating, United worked out an arrangement for the exchange of good between other Dollar Stores and Barbee's store. United furnished and mailed out catalogues.

In view of United's contract rights to control virtually the entire operation of the store, its actual stocking of the store, the hiring and training of employees, arranging the layout of the fixtures and of the goods, the control of advertising, and the right to sell to Barbee all of the merchandise to be sold in the store, or approve its purchase elsewhere, and the fact that United was receiving two and one-half percent of the gross of the entire business, less taxes, clearly indicates that United was doing business in the State of Mississippi in violation of the statute.

On the authority of Trane Company v. Taylor, 295 So.2d 746 (Miss.1974), and Century Brick Corporation of America v. Carroll, 247 Miss. 514, 153 So.2d 683 (1963), we hold that the trial judge was correct in ruling that United was doing business in the State of Mississippi within the meaning of Code section 79-3-211.

[2] Because United was doing business within the meaning of the statute, it is not exempt from the penalty of the statute because of the interstate aspects of its business. It is well settled that a state cannot require a foreign corporation to obtain a certificate to do business if that corporation is engaged solely in interstate sales. Such a limitation is based on the Commerce Clause of the United States Constitution, and is reflected in our qualification statute. Section 79-3-211 provides that '. . . a foreign corporation shall not be considered transacting business in this state . . .' if it is engaged in interstate commerce. United contends that its activities were in the nature of interstate commerce, and, therefore, it is exempt from the penal effects of Code section 79-3-247. United's contention is without merit as there is no question that a state can require a foreign corporation to obtain a certificate if it is engaged in intrastate activities as well as interstate activities. Eli Lilly & Co. v. Sav-On-Drugs, 366 U.S. 276, 81 S.Ct. 1316, 6 L.Ed.2d 288 (1961).

United urges that the holding in Allenberg Cotton Co., Inc. v. Pittman, 419 U.S. 20, 95 S.Ct. 260, 42 L.Ed.2d 195 (1974), should control the instant case. In Allenberg, the United States Supreme Court held that where the degree of a foreign corporation's business activity is limited to contracts, arranged through independent brokers, to purchase cotton from local farmers, and where the cotton is temporarily stored in local warehouses for classification purposes, then the foreign corporation's activities are not sufficiently intrastate as would require qualification. The Court stated that these local ties were nothing more than '. . . fleeting events (of an) . . . intergral first step in a vast system of distribution of cotton in interstate commerce.' 419 U.S. at 26, 95 S.Ct. at 264, 42 L.Ed.2d at 201.

United's previously described business activities within this State are far greater than the 'fleeting events' found in Allenberg.

II.

[3] Did the trial court err in finding that Barbee was estopped from raising the bar of the statute because he filed a counterclaim against United?

Waiver is defined in 28 Am.Jur.2d, Estoppel and Waiver section 154, at 836 (1966), as '. . . the voluntary and intentional relinquishment of a known right . . .' United filed its suit and alleged that it was 'a foreign corporation, licensed and qualified *1280 to carry on and conduct business in the State of Mississippi.' This was an incorrect statement-United was not qualified and licensed to do business in the State of Mississippi. In response to this pleading, the truth of which Barbee had a right to rely on, Barbee filed his responsive pleadings, including a counterclaim. After Barbee learned that United was not qualified to do business in the State, he moved for leave to amend in order to invoke the provisions of the statute barring United from maintaining an action in the courts of this State. No case is cited and United does not argue on this appeal that Barbee waived the right to invoke the statute. This question is discussed in 36 Am.Jur.2d, Foreign Corporations section 588, at 585 (1968), as follows:

> In jurisdictions in which an allegation of compliance with the laws is required on the part of the plaintiff corporation, its complaint or petition is demurrable if it fails to allege that fact. And even in a jurisdiction where such an allegation is not required, if its complaint or other pleading shows that it has been doing business in violation of a statute requiring it to qualify therefor, and if such violation is, in the particular jurisdiction, a bar to the maintenance of an action, a demurrer to such pleading may be properly sustained. In any case, such

> objection, unless raised by a timely and proper pleading, is to be deemed waived; it cannot be raised for the first time on appeal. It has been held, however, that the fact that the defendant has set up a counterclaim in the answer, asking for the damages resulting from the breach of the contract by the plaintiff, does not operate as a waiver of his right to ask for an abatement of the action on the ground that the plaintiff had failed to comply with the conditions of doing business in the state.

We hold that Barbee had a right to rely upon the truth of United's pleadings and by relying thereon did not waive his right to invoke the statute.

For the reasons stated, on direct appeal the action of the trial court is reversed insofar as it held that Barbee had waived the right to invoke the statute barring United from maintaining an action in the courts of this State. It follows the judgment against Barbee is reversed.

On cross-appeal, that part of the judgment holding that United was doing business in Mississippi is affirmed. The second assignment of error on the cross-appeal is disposed of as a result of the reversal of the trial court as already stated.

Because United could not maintain an action in the courts of this State, the court should have dismissed the suit at United's cost. Therefore, we enter an order here dismissing United's suit and vacating the judgment entered in the court below and dismissing Barbee's counterclaim.

REVERSED ON DIRECT APPEAL AND RENDERED; AFFIRMED ON CROSS-APPEAL.

Diversacon Industries, Inc. v. Nat'l Bank of Commerce of Mississippi, 629 F.2d 1030 (5th Cir. 1980)

JOHN R. BROWN, Circuit Judge:

A Florida corporation, Diversacon Industries, Inc., (Diversacon) commenced a diversity action in the Federal District Court for the Northern District of Mississippi, seeking to recover a construction contract debt from the surety, National Bank of Commerce of Mississippi (Bank). The District Court granted the Bank's motion for dismissal on the grounds that Diversacon had engaged in intrastate commerce without qualifying to do so as required by Mississippi law, and thus, was precluded from maintaining an action in any Mississippi State or Federal Court. We find the Court erred in its characterization of Diversacon's activities as substantially intrastate in nature. Diversacon's Mississippi activities were, in fact, in furtherance of a unitary interstate transaction- the construction of a Louisiana highway system. To affirm the District Court's finding by enforcing the Mississippi door-closing statute would impermissibly burden interstate commerce and wholly deny Diversacon a forum in which to litigate its cause. Accordingly, we reverse.

The Corporate Components

The basic facts on appeal are uncontroverted. Diversacon, a Florida Corporation with its principal place of business in that state is one of many wholly owned subsidiaries of United States Industries, Inc. (USI), a Delaware Corporation. USI maintains an administrative office in Jackson, Mississippi at the headquarters of Con-Plex, one of its subdivisions. In 1972, USI administrative employees in Jackson traveled to Baton Rouge, Louisiana to bid on the construction of a portion of interstate highway system to be built there. The bid was submitted in the name of Diversacon, listing Con-Plex's post office address and telephone in Jackson. Diversacon was awarded the contract. Subsequently, all administrative support necessary to the Louisiana construction project was handled out of the Con-Plex office in Jackson by USI personnel including the negotiation of a sub-contract with Central Builders, Inc. in Mississippi. As a part of this contract, Diversacon obtained a surety agreement with the First National Bank of Monroe County, Mississippi, Bank's predecessor, by which Bank was to reimburse it for funds *1032 expended on the sub-contractor's behalf. When the sub-contractor defaulted and abandoned the Louisiana project in 1975, the Bank refused to honor its obligation for over $600,000 which Diversacon spent to complete the construction. Diversacon's suit and the Federal District Court's door-slamming dismissal followed.

Is the Door Closed?

The Mississippi Federal District Court found Diversacon's activities to constitute "doing business" in that state, which required it to qualify as a foreign corporation under Mississippi law in order to have access to its courts. In reaching this conclusion, the Court considered all of the evidence before it, including pleadings, depositions and affidavits. Appropriately, therefore, we proceed to review the Court's dismissal under the "clearly erroneous" standard of F.R.Civ.P. 52(a). The door-closing statute at issue here provides:

> No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court in this state.

Miss. Code Ann. s 79-3-247 (1972).

The Court rejected the application of a companion statute s 79-3-211 (1972) which exempts a foreign corporation from qualifying if they are transacting any business in interstate commerce. The Court reasoned that Diversacon did not fall within the exemption because the sub-contract work around which the controversy arose, was to be performed wholly within the State of Louisiana-thus lacking an "interstate" nature.

Although we disagree with the District Court's final determination, we consider the Court's interpretation of the applicable rules to be sound. First, the Court recognized the need for a strict construction of the statute because of its penal nature. Val-U-King Homes, Inc. v. Taylor, 301 So.2d 857, 859 (Miss.1974); Davis-Wood Lumber Co. v. Ladner, 50 So.2d 615, 620-21 (Miss.1951). Then, it adopted the test set out in Newell Contracting Co. v. State Highway Commission, 15 So.2d 700 (Miss.1943) for "doing business" within the meaning of the statutes as ". . . whether or not it is doing such acts as are within the function of its corporate powers, and whether the business so performed is substantial in scope." Id., at 703. Because the test escapes uniform application, the Court with ample precedent made its final determination *1033 upon an ad hoc basis. S&A Realty Co. v. Hilburn, 249 So.2d 379, 381 (Miss.1971). See, e.g.,

Republic-Transcon, Inc. v. Templeton, 253 Miss. 132, 175 So.2d 185 (1965); Davis-Wood Lumber Co. v. Ladner, 50 So.2d 615 (Miss.1951); Wiley Electric Co. v. Electric Storage Battery Co., 167 Miss. 842, 147 So. 773 (1933).

Both the District Court and the Bank have relied on certain facts to demonstrate Diversacon's "intrastate" status. USI administrative offices housed at the Con-Plex offices in Jackson, performed book-keeping services for Diversacon. For purposes of the Louisiana project, Diversacon used both Con-Plex's mailing address and phone number. In particular, receipts of Diversacon's payment of Central Builder's weekly payroll expenses mailed to the Bank for reimbursement carried Con-Plex's return address. In, essence, the Court concluded that Diversacon's activity was geographically confined to Jackson, Mississippi.

Finding the Key-Intrastate or Interstate?

A determination of whether or not the District Court correctly applied its door-closing statutes to the facts of this case hinges on whether Diversacon's activities were intrastate or substantially interstate. In construing the same statute now before us, the United States Supreme Court in Allenburg Cotton Co. v. Pittman, 419 U.S. 20, 95 S.Ct. 260, 42 L.Ed.2d 195 (1974), distinguished between a situation where a corporation has "localized" its business and one where a corporation enters the state "to contribute to or to conclude a unitary interstate transaction." 419 U.S. at 32-33, 95 S.Ct. at 267, 42 L.Ed.2d at 205. In Allenburg, the Court found that where the degree of a foreign corporation's business activity is limited to contracts, arranged through independent brokers, to purchase cotton from local farmers, and where the cotton is temporarily stored in local warehouses for classification purposes, then the foreign corporation's activities are not sufficiently intrastate to require a foreign corporation to qualify to do business.

Essentially, the Court included in a federal definition of interstate commerce any activity of an intrastate nature which was an integral part of an overall interstate pattern or transaction. See e.g., Union Brokerage v. Jensen, 322 U.S. 202, 64 S.Ct. 967, 88 L.Ed.2d 1227 (1944); Ralli-Coney, Inc. v. Gates, 528 F.2d 572 (5th Cir.1976).

The Bank erroneously relies on cases which involve foreign corporations conducting thriving intrastate businesses in the forum state. Eli Lilly & Co. v. Sav-On-Drugs, 366 U.S. 276, 81 S.Ct. 1316, 6 L.Ed.2d 288 (1969) (intrastate drug sales); Barbee v. United Dollar Stores, Inc., 337 So.2d 1277 (Miss.1976) (intrastate sales through local franchise dealers). The holdings of Eli Lilly and Barbee, while sound, provide little or no support for the Bank's position in view of the particular facts and circumstances underlying the present controversy.

Clearly, Eli Lilly is manifestly distinguishable from the present case not only in the nature and quantity of activity by the *1034 foreign corporation, but also by the fact that the suit here involved a contract which was "entirely separable from any particular interstate sale." 366 U.S. at 287, 81 S.Ct. at 1320, 6 L.Ed.2d at 294. Here, the agreement upon which Diversacon is suing the Bank is clearly the single business transaction to which all of Diversacon's activities related-the construction of the Louisiana highway. Furthermore, unlike Diversacon, the foreign corporations in Eli Lilly and Barbee had established a "continuing presence" in the state for the purpose of "doing business" within the state. 366 U.S. at 284 n.1, 81 S.Ct. at 1321 n.1; 377 So.2d at 1279. There is nothing in the record before this Court which suggests that Diversacon undertook any activity whatsoever in Mississippi except activities which related to the Louisiana project.

[1] In determining whether Diversacon could maintain its action under s 79-3-211, the District Court failed to consider the Allenburg standard. We agree with the view expressed in Cone Mills Corp. v. Hurdle, 369 F.Supp. 426 (N.D.Miss.1974) that it would be unrealistic to conclude that the ". . . interstate commerce exception was enacted as a voluntary exercise of legislative grace." 369 F.Supp. at 432. Rather, the enactment of the exemption was obviously a recognition of a constraint imposed upon state power by the Commerce Clause. "Therefore, a Mississippi Court, when determining what activities constitute interstate commerce within the contemplation of the exemption statute, would consider itself bound by the express language of s 79-3-289 of the Mississippi Code to apply the federal standard . . . ." Id. If the District Court had applied state decisions in light of this federal standard, undoubtedly, it would have been compelled to find, as we do, that as a matter of law, Diversacon would not be barred from litigating its claim despite its failure to qualify to do business at the time of the transaction.

Unlocking the Door-A Burden on Interstate Commerce

[2] Where a foreign corporation has established a continuing presence in a state for the purpose of "doing business" within that state, it is fair that it be required to comply with qualification statutes. In this case, however, where the scope of Diversacon's activities extended beyond the Mississippi border for the consummation of a definite

interstate project, we hold it would be an impermissible burden on interstate commerce to give effect to denial of access through this qualification statute. As Allenburg stated so well ". . . Mississippi's refusal to honor and enforce contracts made for interstate or foreign commerce is repugnant to the commerce clause." 419 U.S. at 34, 95 S.Ct. at 267, 42 L.Ed.2d at 206. This Circuit has applied this constitutional principal. Fred Hale Machinery, Inc. v. Laural Hill Lumber Co., 483 F.2d 58 (5th Cir.1973). There, negotiations were conducted in Louisiana and Mississippi for the *1035 purpose of component parts manufactured in Mississippi and Georgia by a Louisiana company and to be supplied and installed in a Mississippi sawmill by the company's Louisiana employees. The Court held that these factors gave the transaction an "interstate character" and that such statutes as s 5309-239 (See n. 3, supra) cannot be enforced ". . . if their application would unreasonably burden interstate commerce by prohibiting suits growing out of transactions in interstate commerce." 483 F.2d at 60. See, e.g., York Manufacturing Co. v. Colley, 247 U.S. 21, 38 S.Ct. 430, 62 L.Ed. 963 (1918).

The burden on interstate commerce is obvious in the present controversy. The Court's decision leaves Diversacon, a Florida plaintiff, without an available forum in which to litigate its claim against Bank, a Mississippi defendant, arising out of a Louisiana construction project. The National Bank Act, 12 U.S.C.A. ss 24, 94, has perhaps preempted s 79-3-247 with respect to national banks. Mercantile National Bank v. Langdeau, 371 U.S. 555, 83 S.Ct. 520, 9 L.Ed.2d 523 (1963). In construing the venue provision of the act, 12 U.S.C.A. s 94, the Court specifically held in Citizens National Bank v. Bougas, 434 U.S. 35, 98 S.Ct. 88, 54 L.Ed.2d 218 (1977), that despite the appearance of permissive language in the statute, "... national banks may be sued only in those state courts in the county where the banks are located ...", the language is clear. 434 U.S. at 38, 98 S.Ct. at 90, 54 L.Ed. at 222; See National Bank v. Associates of Obstetrics, 425 U.S. 460, 96 S.Ct. 1632, 48 L.Ed.2d 92 (1976) (quoting Mercantile National Bank v. Langdeau, 371 U.S. at 561, 83 S.Ct. at 523, 9 L.Ed.2d 523 (1963)).

Because case law and the National Bank Act mandate that Bank in the instant case be sued in the county (Federal District including the county) where it is located, we hold that it would be an impermissible burden on interstate commerce to permit Mississippi courtroom doors to remain closed to Diversacon on events and contracts substantially related to interstate activities.

REVERSED and REMANDED.

F. Joint Ventures and Partnerships

Scott Co. of Cal. v. Enco Const. Co., 264 So.2d 409 (Miss. 1972)

GILLESPIE, Chief Justice:

[1] Suit was filed in the Circuit Court of the First Judicial District of Hinds County, *410 Mississippi, by Scott Company of California, a California corporation (Scott), Sam P. Wallace Company, Inc., a Texas corporation (Wallace), and Eckco Mechanical Contractors, Inc., a Louisiana corporation (Eckco), doing business as a joint venture under the name of Scott-Wallace-Eckco, against Enco Construction Company, Inc., and Earl W. Nunneley (defendants). Scott-Wallace-Eckco, as plaintiffs, alleged that in performing some contractual obligations for the United States at the Mississippi Test Facility in Hancock and Pearl River Counties, the plaintiffs were damaged by the negligent acts of defendants. Defendants' motion to dismiss the suit was sustained because Eckco, one of the corporate plaintiffs, was a nonresident corporation and had failed to qualify to do business in the State of Mississippi.[FN1] Plaintiffs appeal. We affirm.

FN1. Scott and Wallace had qualified to do business in Mississippi.

The three corporate plaintiffs, all nonresidents of the State of Mississippi, were successful bidders for certain construction work in Mississippi. Before undertaking the performance of the contract, a joint venture agreement was entered into by the three corporations. Under this agreement, the parties agreed to operate under the name of Scott-Wallace-Eckco, and the obligations under the construction contract were to be joint and several; Scott was designated as the sponsoring joint venturer to perform the contract on behalf of the joint venture; the interest of the parties to any profits derived from the contract was to be as follows: Wallace, 45%; Scott, 45%; and Eckco, 10%; all parties agreed to execute indemnity agreements to secure the necessary performance bonds, and all financial obligations and liabilities were to be shared in the proportion above stated; all working capital when and as required was to be furnished proportionately in accordance with their respective interests; and all funds advanced by the joint venturers were to be deposited in a joint venture account to be established by Scott. The lengthy contract also provided for various other matters, including audits, sharing of profits and losses, and disposition of assets acquired in the performance of the contract.

The only testimony offered was that of the president of Eckco, who in effect testified that Eckco's connection with the transaction was limited to furnishing its share of the capital needed to carry out the contract, which it did by sending a check to Scott whenever that company requested such. During the performance of the contract Eckco did not have any of its corporate officers or employees in Mississippi. All of the actual performance of the contract was accomplished by Scott.

Mississippi Code 1942 Annotated section 5309-239 (1971) provides in part as follows:

> No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state. Nor shall any action, suit or proceeding be maintained in any court of this state by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this state. . . .

[2] We hold that every member of a joint venture is transacting business in this State when one of the joint venturers is transacting in this State the business for which the joint venture was created. 17 Fletcher, Cyclopedia of the Law of Private Corporations, s 8500, p. 669 (1960). Scott, as the sponsoring joint adventurer, was physically present in this State, and was acting for all three corporate joint adventurers. Each of said corporations, therefore, is deemed to have been 'transacting business' in this State within the meaning *411 of Mississippi Code 1942 Annotated section 5309-239 (1971).

[3] [4] [5] In Blackwell v. John Reid & Co., 41 Miss. 102 (1866), this Court held that partners cannot sue in the name of the partnership, but only in the names of the individual members who compose the partnership. Furthermore, all the partners ordinarily are necessary parties plaintiff where the subject matter of inquiry is injury to the partnership property or partnership business. 60 Am.Jur.2d, Partnership s 325, p. 215 (1972). This is because a partnership is not regarded as a legal entity. This restriction to the right to sue applies likewise to joint venturers. The rights, duties, and liabilities of joint venturers are similar to those of partners. Tansil v. Horlock, 204 So.2d 457 (1967). In fact, there is no

real difference between joint venture and a partnership except that the former is limited to a single transaction or a series of similar transactions and the latter usually relates to a general and continuing business of a particular kind. Sample v. Romine, 193 Miss. 706, 8 So.2d 257, 9 So.2d 643, 10 So.2d 346 (1942).

[6] All members of the joint venture were required to be parties to this suit and were in fact parties. It follows that since Eckco was disqualified under the statute, the suit is not maintainable. If this were not so, a nonresident corporation could associate itself in a joint venture or partnership and through other members transact business in this State in disregard of the laws of this State, and then invoke the protection of the laws in the courts of this State. Mandel Bros., Inc. v. Henry A. O'Neil, Inc., 69 F.2d 452 (C.A.8, 1934); Ashland Lbr. Co. v. Detroit Salt Co., 114 Wis. 66, 89 N.W. 904 (1902); Harris v. Columbia Water & Light Co., 108 Tenn. 245, 67 S.W. 811 (1901).

Affirmed.

§ 13-3-55. Suits by or against partnerships; service on one of several partners.

A partnership may sue or be sued in the partnership name, or in the names of the individuals composing the partnership, or both and service of process on any partner shall be sufficient to maintain the suit against all the partners so as to bind the assets of the partnership and of the individual summoned.

Sources: Codes, 1880, § 1519; 1892, § 3436; Laws, 1906, § 3935; Hemingway's 1917, § 2942; Laws, 1930, § 2988; Laws, 1942, § 1869; Laws, 1977, ch. 405, eff from and after April 1, 1977.

G. Joinder of Plaintiffs under MRCP 20

Am. Bankers Ins. Co. of Fl. v. Alexander, 818 So. 2d 1073 (Miss. 2001)

This opinion deals with how Mississippi courts should administer the growing number of "mass actions" that are being brought in this state.

Facts: 1371 individual plaintiffs joined in circuit court actions in four counties (Jones, Jasper, Claiborne and Jefferson) alleging that American Bankers and Fidelity Financial Services conspired to defraud customers by placing insurance premiums at inordinately high rates - substantially higher than they could have obtained from a neutral source. The plaintiffs contended that they were placed into a collateral protection insurance policy underwritten by American Bankers. The plaintiffs allege breach of duty of good faith and fair dealing implied in every contract and breach of fiduciary duties owed by American Bank and Fidelity. American Bankers filed motions for summary judgment and motions to dismiss claiming that the plaintiffs were improperly joined under Rule 20 and were barred from brining causes of action by the "filed rate doctrine." Three circuit judges in four counties ruled that the plaintiffs could proceed together under MRCP 20 (permissive joinder) and Rule 42(a) (consolidation) and that under Rule 82, if venue is proper for one party, then venue is proper for all. American Banker took an interloctory appeal from the orders denying its motions to dismiss for improper joinder of these plaintiffs.

Holding: A five justice majority speaking through Justice McRae affirmed the joinder of the plaintiffs' suits. Justice Waller dissented for four justices and would have remanded for development of more facts regarding the similarities, or lack thereof, of the claims being consolidated. The following is a summary of the court's opinion.

Issue I. Whether the joinder of the appellees pursuant to MRCP 20 is improper and violates the American Bankers' constitutional right to a fair trial

A. The Court first determined whether plaintiffs' claims arose out of the same transaction or series of transactions. Both the majority and the dissent acknowledged the need to develop a method to manage state court litigation with large numbers of plaintiffs with related types of claims.

The majority noted that Mississippi does not have a Rule 23 for state class actions, so even though the opinions cite federal authority, Mississippi's approach to joinder will be more liberal since state courts are limited in procedures to deal with such numerous claims. The court looked Fed. R. Civ. P. Rule 20 for the two requirements for joinder, i.e., the transaction or occurrence test and the common question of law or fact test. The court noted that under the federal rule, if the transaction and occurrence test cannot be met, "there is always the possibility that the cases can be consolidated solely on the existence of common issues." Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2nd* § 1653 (1986). The court held that when reviewing common questions of law or fact, the existence of only a single common issue of law, or a single common issue of fact will support joinder. In addition, the court held that the plaintiffs claims arose out of the same "pattern of conduct," the same type of insurance, and the same master policy. The court found that even under a "rigid" application of Rule 20 it would be difficult for the court to find that the plaintiffs should not be joined.

B. The court then determined whether the complaints alleged a common question of law or fact within the meaning of Rule 20. American Bankers argued that similar conduct alone was insufficient to satisfy the commonality requirement of Rule 20. Plaintiffs argued that individual treatment did not take place but that the same fraudulent scheme was involved. The court held that American Bankers admitted through its actions that the common question requirement has been met. The court held that American Bankers' assertion of the filed rate doctrine as a defense to all of plaintiffs' claims was "strong proof" that in that in the interest of judicial economy all claims should remain intact.

C. The court then determined whether the misjoinder of multiple plaintiffs in these cases threatened American Bankers' constitutional right to a fair and impartial trial. American Bankers argued that considerations of convenience and economy must yield to the paramount concern for a fair and impartial trial. The court found that the overriding theme of American Bankers was its disagreement with the venue of the case in Jefferson County. The court reiterated its opinion that where Rule 20 joinder is involved, venue is proper for all claims wherever it is proper for one such claim. In this case, the court held, venue was proper in Jefferson County.

A large part of the opinion, which contains a lengthy discussion of the court's rejection of the defendants' "filed rate doctrine" defense, is not discussed here.

H. Recent Developments Regarding Mass Actions in Mississippi

In your materials, you have excerpts from the American Bankers Ins. Co. of Florida v. Alexander case. That decision was the first major case in which the Mississippi Supreme Court gave guidance as to how actions with a large number of plaintiffs should be handled. In American Bankers, the Court espoused a very liberal view slanted toward allowing joinder of many plaintiffs when applying the joinder tests of MRCP 20 & 42(a).

In February, 2004, the Supreme Court signaled that the trial court should take a much stricter view of joinder in future cases. In Janssen Pharmaceutica, Inc., v. Armond, 866 So. 2d 1092 (Miss. 2004), the Supreme Court granted an Interlocutory Appeal in order to determine whether fifty-six Mississippi plaintiffs should be allowed to proceed against Janssen Pharmaceutica and forty-two Mississippi physicians in one law suit in the Circuit Court of Jones County. Defendants filed a motion to sever and transfer venue for separate trials. Only one of the fifty-six plaintiffs resides in Jones County and none of the forty-two physician defendants reside there. The Supreme reversed the Circuit Court with the following language:

> "We hold today that the prescribing of the drug Propulsid by forty-two different physicians to fifty-six different patients did not arise out of the same transaction, or occurrence, or series of transactions or occurrences, and that joinder in this case unfairly prejudices the defendants. We hold that this joinder was improper and that the trial court abused its discretion in denying the motion to sever and to transfer. We reverse the trial court's order and remand the case for severance for all claims against defendants who have no connection with Armond (The Jones County Plaintiff). This would include all physicians who have not prescribed Propulsid to Armond. We also instruct the trial court to transfer the severed cases to those jurisdictions in which each plaintiff could have brought his or her claims without reliance on another of the improperly joined plaintiffs."

The Janssen Court pointed to the different medical histories of each plaintiff and the different advice received from forty-two different doctors who, in turn, received different information about the risks associated with the medication via six different warning labels utilized during the time covered by the law suit. The Court then concluded that there was no single transaction or occurrence or series of transactions or occurrences connecting all fifty-six plaintiffs and the forty-two physician defendants.

On February 20, 2004, the Supreme Court promulgated amendments to the comments to MRCP 20 and 42 and added a new subsection to MRCP 82. The thrust of the Amendments was to ask trial courts to require a much closer connection between the parties and claims before joinder is allowed than has been required in the past.

MRCP 82 was amended to add subsection (e) **Forum Non-Conveniens**. The New Subsection states:

> "With respect to actions filed in an appropriate venue where venue is not otherwise designated or limited by statute, the Court may, for the convenience of the parties and witness or in the interest of justice, transfer any action or any claim in any civil action to any court in which the action might have been properly filed and the case shall proceed as though originally filed therein."

Following Janssen Pharmaceutica v. Armond, supra, decided February 19, 2004, the Mississippi Supreme Court published several additional opinions dealing with joinder of plaintiffs: See Harold's Auto Parts, Inc., v. Mangialardi, 2004 WL 2092963 (Miss. Aug. 26, 2004) (Plaintiffs required to provide certain core information in complaint); and see Culbert v. Johnson & Johnson, 2004 WL 2110580 (Miss. Sept. 23, 2004) (claims of 18 out-of-state plaintiffs were dismissed without prejudice).

Further "Mass Action" recent developments have come from the legislature. Effective September 1, 2004, MCA §11-11-3 was amended to add in section 2:

> In any civil action where more than one (1) plaintiff is joined, each plaintiff shall independently establish proper venue. . . .

However, note that MRCP 82(c) can be construed as a conflicting view on that issue.

MCA §11-11-3(4) (as amended 9/1/04) provides for interstate and intrastate Forum Non Conveniens and lists 7 factors for the court to consider when making such decisions.

I. Bills of Peace

Prestage Farms, Inc. v. Norman, 813 So.2d 732 (Miss. 2002)

DIAZ, J., for the Court.

¶ 1. The plaintiffs filed their joint complaint and request for a bill of peace in the Chancery Court of Montgomery County, Mississippi, on January 4, 2000, against Prestage Farms, Inc. (Prestage), and seven of its contract hog growers (the defendant farmers) alleging (1) the creation, establishment, and maintenance of public nuisances consisting of nine large commercial hog confinement facilities containing hundreds of hogs for the purpose of feeding, growing, and raising hogs belonging to Prestage for sale by Prestage, (2) the creation of private nuisances, and (3) the intentional infliction of emotional distress. Plaintiffs seek damages and injunctive relief.

¶ 2. Each of the defendants filed separate answers to the complaint, all of which are substantially the same and all of which assert identical affirmative defenses incorporating common issues of fact and law.

¶ 3. On March 2, 2000, defendants filed a joint motion to sever parties under M.R.C.P. 21 raising the issue of joinder of plaintiffs and defendants under M.R.C.P. 20(a). After a hearing, the chancellor entered an order on June 27, 2000, denying the defendants' motion to sever.

¶ 4. On July 13, 2000, the defendants filed a motion for certification and interlocutory appeal and stay of trial court proceedings. The chancellor denied that motion on July 28, 2000. The defendants then filed their petition for interlocutory appeal and petition to stay proceedings with the clerk of this Court, which was granted on December 13, 2000.

¶ 5. The defendants raise the following issues on appeal:

I. WHETHER THE CHANCELLOR ABUSED HIS DISCRETION BY DENYING THE M.R.C.P. RULE 21 MOTION TO SEVER.

II. WHETHER USE OF AN EQUITABLE BILL OF PEACE FOR THE JOINDER OF PARTIES IS PROPER IN THIS CASE.

* * * *

[Facts and Plaintiffs' Cross Appeals were omitted.]

LEGAL ANALYSIS

I. WHETHER THE CHANCELLOR ABUSED HIS DISCRETION BY DENYING THE M.R.C.P. RULE 21 MOTION TO SEVER.

¶ 10. The defendant farmers argue that plaintiffs in this case are improperly joined and that the trial court abused its discretion in denying defendants' motion to sever. Plaintiffs argue that the trial court did not err and that its ruling falls under the exercise of sound discretion.

[1] [2] [3] [4] ¶ 11. The standard of review applicable to a trial court's ruling based on the exercise of sound discretion is abuse of discretion. American Bankers Ins. Co. v. Alexander, 2001 WL 83952, at *4, 818 So.2d 1073, ---- (Miss.2001); Bobby Kitchens Inc., v. Mississippi Ins. Guar. Ass'n, 560 So.2d 129, 135 (Miss.1989). When the standard of review is abuse of discretion, this Court must first determine if the court applied the correct legal standard and, if so, the trial court's determination will be affirmed unless it committed a clear error of judgment. Wood v. Biloxi Pub. Sch. Dist., 757 So.2d 190, 192 (Miss.2000). When the question of abuse of discretion arises, this Court will not reverse the trial court unless it is shown that prejudice resulted to the complaining party by the ruling. Lamar Hardwood Co. v. Case, 143 Miss. 277, 107 So. 868, 871 (1926). Courts are given "broad discretion" to determine when and how claims are tried under M.R.C.P. 20 and 42. First Investors Corp. v. Rayner, 738 So.2d 228, 238 (Miss.1999). An appellate court cannot substitute its own view for the findings of a trial court regarding joinder. American Bankers, 2001 WL 83952, at *4 (citing Bobby Kitchens, Inc., 560 So.2d 129).

¶ 12. M.R.C.P. 20 provides that "[a]ll persons may join in one action as plaintiffs if they assert any right to relief .... arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or

fact common to all these persons will arise in the action...." As pointed out in American Bankers, 2001 WL 83952, at *2 the official comment to Rule 20 defines its intent as:

> The general philosophy of the joinder provisions of these Rules is to allow virtually unlimited joinder at the pleading stage but to give the Court discretion to shape the trial to the necessities of the particular case.

M.R.C.P. 20 cmt.

[5] [6] ¶ 13. Here, the plaintiffs' claims arise out of an alleged private nuisance. A private nuisance is an interference with the use and enjoyment of land. *736 Leaf River Forest Prods., Inc. v. Ferguson, 662 So.2d 648, 662 (Miss.1995). The defendant farmers argue that Lambert v. Matthews, 757 So.2d 1066 (Miss.Ct.App.2000), is dispositive of this issue. Lambert quotes Alfred Jacobshagen Co. v. Dockery, 243 Miss. 511, 517, 139 So.2d 632, 634 (1962) as follows: "Each [nuisance] case must be decided upon its own peculiar facts, taking into consideration the location and the surrounding circumstances." Lambert, 757 So.2d at 1069. Joinder was not the issue before the Court in either Lambert or Jacobshagen and is not considered by this Court to be precedent as to the issue of joinder. We must next discuss whether the requirements of Rule 20 have been met in this case.

A. Same transaction or occurrence.

¶ 14. The defendants cite Demboski v. CSX Transp. Inc., 157 F.R.D. 28 (S.D.Miss.1994) in support of their assertion that plaintiffs' claims do not arise from the same transaction or occurrence. In Demboski, the court held that three wrongful death claims and one personal injury claim arising out of four separate crossing accidents could not be joined. However, the court opined as follows, "[i]n ascertaining whether a particular factual situation constitutes a single transaction or occurrence for purposes of Rule 20, a case by case approach is generally pursued." Id. at 28 citing Mosley v. General Motors Corp., 497 F.2d 1330, 1333 (8th Cir.1974).

* * * *

¶ 15. Relying upon Demboski, we must review this case on its own facts. In doing so, we find that there is a common pattern of behavior among the various defendants which satisfies the requirements of Rule 20.

¶ 16. Our finding is strengthened by American Bankers, 2001 WL 83952. In that case, approximately 1371 borrowers brought action against a secured lender and collateral protection insurer to recover for overcharging premiums in connection with a scheme to defraud the borrowers. This Court held that joinder was proper under Rule 20, finding that the plaintiffs' claims arose "out of the same pattern of conduct, the same type of insurance, and involve interpretation of the same master policy." Id. at *5.

¶ 17. Plaintiffs in this case allege that Prestage Farms, acting in concert with each of its contract growers, established and operated identical public and private nuisances which caused harm to each plaintiff and their property. We find that this case involves essentially the same situation as the American Bankers case and that the plaintiffs' claims arise out of the same series of transactions or occurrences.

B. Common questions of law or fact.

¶ 18. Due to the fact that Fed.R.Civ.P. 20 also requires plaintiffs' claims to arise out of the same transaction or occurrence or series of transactions or occurrences and contains common questions of law or fact, American Bankers analyzed the liberal approach the federal courts use to determine if joinder is proper.

> *737 .... under the federal rule, if the transaction and occurrence test cannot be met, there is always a possibility that the cases can be consolidated solely on the existence of common issues. When reviewing common questions of law or fact, the existence of only a single common issue of law, or a single common issue of fact will support joinder.

American Bankers, 2001 WL 83952, at *4 (Citing 7 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2nd § 1653 (1986)).

¶ 19. In American Bankers, the defendants argued that because the plaintiffs' claims related to more than 1,371 independent loan transactions, each claim involved facts and circumstances unique to each plaintiff. But this Court noted that the cases contained at least twenty-two common issues of fact and law which applied to "each and every plaintiff." Id. at *5. Here, the defendants assert nineteen of the same defenses and the plaintiffs all present the same issues of fact. There is no question that common questions of law and fact are present in this case.

¶ 20. Lastly, the defendants argue that they will be prejudiced by the joinder of the various plaintiffs and rely on Grayson v. K-Mart Corp., 849 F.Supp. 785, 791 (N.D.Ga.1994) and Greene v. Mobil Oil Corp., 188 F.R.D. 430 (E.D.Tex.1999) (holding that joinder of many plaintiffs with differing types and amounts of damages would prejudice the defendants in the eyes of the jury). The defendants in American Bankers also relied on Grayson. In rejecting defendants' arguments, this Court stated,

> In Grayson, eleven plaintiffs filed an age discrimination suit against their employer. Grayson v. K-Mart Corp., 849 F.Supp. 785, 791 (N.D.Ga.1994). A joint trial of plaintiffs' claims would have involved eleven different factual situations, eleven sets of work histories, eleven sets of witnesses and testimony, and the laws of four different states. Id. at 791. The case at bar stands in stark contrast to the factual situations in Grayson. Here, each plaintiff has alleged the very same claims involving the same insurance policies. As such, the prejudice and confusion contemplated by the defendant is not sufficient to warrant separate trials. At the very least, any prejudice or confusion can be remedied by a carefully drafted jury instruction.

American Bankers, 2001 WL 83952, at *4. Plaintiffs in this case have also alleged the same claims involving the same pattern of conduct of Prestage and its contract growers. As this Court found in American Bankers, we again hold that joinder under Rule 20 is proper.

¶ 21. In sum, we find that the chancellor did not abuse his discretion or make a clear error of judgment in denying the defendants motion to sever because plaintiffs' claims involve many common questions of law and fact and arise out of the same series of occurrences or transactions. Furthermore, whether or not we think the better choice would be to sever the trials is irrelevant because we cannot substitute our own findings for that of the trial court absent an abuse of discretion.

> II. WHETHER USE OF AN EQUITABLE BILL OF PEACE FOR THE JOINDER OF PARTIES IS PROPER IN THIS CASE.

[7] ¶ 22. On direct appeal, the defendants argue that the use of a bill of peace is improper in this case. Plaintiffs defend the use of a bill of peace by arguing that it is necessary to prevent a multiplicity of suits citing Leaf River Forest Prods., Inc., v. Deakle, 661 So.2d 188, 192-93 (Miss.1995) in support of their argument.

*738 ¶ 23. In Deakle, several defendants sought a bill of peace to consolidate all of the cases filed against them for the purposes of case management and injunction of further prosecution. The defendants had been sued by 7,000 plaintiffs in separate suits claiming damages arising from pollution of the Leaf River.

¶ 24. The defendants argue that a bill of peace cannot be used where there are both multiple defendants and multiple plaintiffs. Deakle clearly contradicts this argument, "The object of a bill of peace is to obtain protection of equity against the necessity for maintaining or defending numerous actions at common law in order to protect the interests of the parties, where claims of more than one party on at least one side were involved." Id. at 192 citing Henry J. McClintock, McClintock on Equity § 176, at 480 (2d ed.1948).

¶ 25. This Court, in Deakle, found that a bill of peace was not proper for procedural reasons, but opined that a bill of peace may be proper in a suit involving a "community of interest" between the parties or common questions of law or fact, the decision of which would, in large part, determine many of the actions. Id at 193. Deakle further stated that "Where codes or rules of practice, such as the Mississippi Rules of Civil Procedure, provide an adequate remedy, a bill of peace to allow an injunction against numerous actions should be denied." Id. at 193. The Court then found that the Mississippi Rules of Civil Procedure did not provide a remedy for defendant's "dilemma" because Mississippi does not provide for class actions, so the bill of peace would have been proper. Id. at 193.

¶ 26. We are facing a very similar situation in this case. As stated by the chancellor in his ruling on the motion to sever:

> [T]his is a contractual arrangement, in effect, one person or one entity owning it, determining--the word "dictating" may be a little harsh, but, really, it's more appropriate--dictating what's done, and, even, handling it; and what's not handled by them is under their supervision and control; it's, in effect, as if everybody is one, and that one is Prestage.

¶ 27. As we essentially hold under the previous issue, we now hold that a bill of peace is proper in this case because a "community of interest" is present in this case.

* * * *

CONCLUSION

¶ 37. Plaintiffs' claims are properly joined under Rule 20, and, for the same reasons, a bill of peace is also proper in this case. Interlocutory appeal was not improvidently granted, and the issue of whether venue would be proper if the motion to sever were granted is moot. Therefore, the order of the Montgomery County Chancery Court denying the defendants' Motion to Sever is affirmed, and this case is remanded to that court for further proceedings consistent with this opinion.

¶ 38. AFFIRMED AND REMANDED.

PITTMAN, C.J., McRAE, P.J., EASLEY AND GRAVES, JJ., CONCUR. SMITH, P.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY WALLER AND COBB, JJ. CARLSON, J., NOT PARTICIPATING.

[Justice Smith's concurrence and dissent were omitted. Justice Smith agreed that the interlocutory appeal was properly granted; however, he disagreed with the denial of the motion to sever and the utilization of the equitable bill of peace. With respect to the equitable bill of peace, Justice Smith stated that the plaintiffs "improperly lumped together separate and distinct claims[;]" therefore, an equitable bill of peace was an improper vehicle for the joinder of the parties in this case.]

COMMENCING THE ACTION

A. Statutory Provisions

§ 1-3-69. When a number of weeks is prescribed.

When publication shall be required to be made in some newspaper "for three (3) weeks," such publication shall be made once each week for three (3) successive weeks, and the time within which the noticed party is required to act or within which the noticing party may proceed shall be computed from the first date of publication. This rule shall furnish a guide for any similar case, whether the time required be more or less than three (3) weeks.

Sources: Codes, 1880, § 18; 1892, § 1526; Laws, 1906, § 1607; Hemingway's 1917, § 1374; Laws, 1930, § 1398; Laws, 1942, § 706; Laws, 1991, ch. 573, § 2, eff from and after July 1, 1991.

§ 11-1-16. Proceedings in vacation; jurisdiction and authority of judge.

(1) Notwithstanding the provisions of any other law to the contrary, the judge of any circuit, chancery, county, youth or family court or any other court of record shall, in vacation, and in the same manner as at a regular term, have jurisdiction to hear and determine and make and enter judgments, orders and decrees in all cases, civil or criminal, which are pending in the court and which were triable at the preceding term. Parties and witnesses duly summoned, subpoenaed or bound by recognizance at the preceding term shall be bound to attend without the necessity of additional process. Petit juries may be impaneled in such cases in the same manner as in termtime. All judgments, orders and decrees which the judge may render or make in such cases tried shall be signed by him and thereupon be entered and recorded on the minute book of the court in which the case or matter is pending, and shall have the same force and effect as if made, entered and recorded in termtime. Appeals may be had and taken therefrom when so entered and recorded, as in other cases, in like manner as is provided by law when cases are tried in termtime.

(2) The provisions of this section shall be supplemental and in addition to all other jurisdiction and authority which the judge of any such court may lawfully exercise in vacation or at a special term.

Sources: Laws, 1983, ch. 388, eff from and after passage (approved March 23, 1983).

§ 13-3-15. Separate or additional summons; attachment against estate of defendant.

Upon the request of the plaintiff, separate or additional summons shall issue against any defendants. When the defendant shall not be found, the plaintiff may have an attachment against the estate of the defendant. If, upon such attachment, the sheriff shall seize or attach any property of the defendant, the same proceedings shall thereafter be had as if the suit had been originally commenced by attachment.

Sources: Codes, Hutchinson's 1848, ch. 58, art. 1 (40); 1857, ch. 61, art. 67; 1871, § 718; 1880, §§ 1534, 1851; 1892, § 3419; Laws, 1906, § 3918; Hemingway's 1917, § 2925; Laws, 1930, § 2970; Laws, 1942, § 1850; Laws, 1991, ch. 573, § 94, eff from and after July 1, 1991.

§ 13-3-69. Process not void for certain defects.

If any matter required to be inserted in or indorsed on any process be omitted, such process shall not on that account be void, but it may be set aside as irregular, or amended on such terms as the court shall deem proper. The amendment may be made upon an application to set aside or quash the writ.

Sources: Codes, 1857, ch. 61, art. 70; 1871, § 712; 1880, § 2286; 1892, § 3439; Laws, 1906, § 3938; Hemingway's 1917, § 2945; Laws, 1930, § 2991; Laws, 1942, § 1873.

§ 13-3-73. Plaintiff's options when sheriff kept off by force.

When the sheriff shall return, on any process, that he has been kept off by force, the plaintiff may issue an alias or pluries, as the case may be, or he may proceed in the action against the defendant as if the process had been returned executed.

Sources: Codes, Hutchinson's 1848, ch. 58, art. 1 (41); 1857, ch. 61, art. 71; 1871, § 713; 1880, § 2287; 1892, § 3440; Laws, 1906, § 3939; Hemingway's 1917, § 2946; Laws, 1930, § 2992; Laws, 1942, § 1874.

§ 13-3-87. Return of officer may be questioned by parties.

The return of the officer serving any process may, in the same action, be shown to be untrue by either of the parties, but the officer himself shall not be permitted to question its truth.

Sources: Codes, 1857, ch. 61, art. 65; 1871, § 707; 1880, § 1533; 1892, § 3446; Laws, 1906, § 3945; Hemingway's 1917, § 2952; Laws, 1930, § 2998; Laws, 1942, § 1880.

§ 13-3-91. Reversal, on appeal by defendant, for want of service or defective service as an appearance.

Where a judgment or decree is reversed on appeal taken by defendant for the want of service, or because of defective service of process, a new summons or citation need not be issued or served, but the defendant shall, without such process or service, be presumed to have entered his appearance to the cause in the court from which the appeal was taken when the mandate shall be filed therein.

Sources: Codes, 1892, § 3448; Laws, 1906, § 3947; Hemingway's 1917, § 2954; Laws, 1930, § 3000; Laws, 1942, § 1882.

§ 13-3-75. Return of alias where first writ served.

If any process be executed, and for want of a return thereof other process be issued, the sheriff or other officer shall not execute the subsequent process, but shall return the first process by him executed, if it be in his possession, and, if it be not in his possession, he shall return the subsequent process, with an indorsement of the execution of the first process, and how it was executed, on which there shall be the same proceedings as if the said first process had been duly returned.

Sources: Codes, Hutchinson's 1848, ch. 58, art. 1 (42); 1857, ch. 61, art. 72; 1871, § 714; 1880, § 2288; 1892, § 3441; Laws, 1906, § 3940; Hemingway's 1917, § 2947; Laws, 1930, § 2993; Laws, 1942, § 1875.

§ 13-3-77. Process may be executed by an officer out of his county.

The sheriff or other proper officer of a county may execute process out of his county, in case the person to be served or property to be seized was in the officer's county when the writ was received, but had removed or been carried into another county before its execution. In such case the officer shall state the facts in his return, and the writ and return shall have the same effect as if the process had been returned not executed and a testatum or duplicate writ had been issued to and executed and returned by an officer of the county where served.

Sources: Codes, 1892, § 3500; Laws, 1906, § 3998; Hemingway's 1917, § 3005; Laws, 1930, § 3051; Laws, 1942, § 1939.

§ 13-3-25. Summons by publication for unknown heirs and unknown defendants.

When unknown heirs are made parties defendant in any proceeding in the chancery court, upon affidavit that the names of such heirs are unknown, the complainant may have publication of summons for them and such proceedings shall be had thereupon in all respects as are authorized in the case of a nonresident defendant. When the parties in interest are unknown, and affidavit of that fact be filed, they may be made parties by publication to them as unknown parties in interest.

Sources: Codes, 1857, ch. 62, art. 35; 1871, § 1069; 1880, § 1858; 1892, § 3424; Laws, 1906, § 3923; Hemingway's 1917, § 2930; Laws, 1930, § 2975; Laws, 1942, § 1855.

§ 13-3-31. Publication; requirements and procedures.

(1) Whenever it is required by law that any summons, order, citation, advertisement or other legal notice shall be published in a newspaper in this state, it shall mean, in addition to any other requirements imposed by law, publication in some newspaper which:

(a) Maintains a general circulation predominantly to bona fide paying subscribers within the political subdivision within which publication of such legal notice is required. The term "general circulation" means numerically substantial, geographically widespread, demographically diversified circulation to bona fide paying subscribers. In no event shall the term "general circulation" be interpreted to require that legal notices be published in a newspaper having the greatest circulation. The term "bona fide paying subscribers" means persons who have subscribed at a subscription rate which is not nominal, whether by mail subscriptions, purchases through dealers and carriers, street vendors and counter sellers, or any combination thereof, but shall not include free circulation, sales at a token or nominal subscription price and sales in bulk for purposes other than for resale for individual subscribers.

(b) Maintains a legitimate list of its bona fide paying subscribers by the following categories where applicable:

(i) Mail subscribers;

(ii) Dealers and carriers; and

(iii) Street vendors and counter sellers.

(c) Is not published primarily for advertising purposes and has not contained more than seventy-five percent (75%) advertising in more than one-half (1/2) of its issues during the period of twelve (12) months next prior to the first publication of any legal notice therein, excluding separate advertising supplements inserted into but separately identifiable from any regular issue or issues.

(d) Has been established and published continuously for at least twelve (12) months next prior to the first publication of such matter to be published, is regularly issued at stated intervals no less frequently than once a week, bears a date of issue, and is numbered consecutively; provided, however, that publication on legal holidays of this state or of the United States and on Saturdays and Sundays shall not be required, and failure to publish not more than two (2) regular issues in any calendar year shall not disqualify a paper otherwise qualified.

(e) Is issued from a known office of publication, which shall be the principal public business office of the newspaper and need not be the place at which the newspaper's printing presses are physically located. A newspaper shall be deemed to be "published" at the place where its known office of publication is located.

(f) Is formed of printed sheets. However, the word "printed" does not include reproduction by the stencil, mimeograph or hectograph process.

(g) Is originated and published for the dissemination of current news and intelligence of varied, broad and general public interest, announcements and notices, opinions as editorials on a regular or irregular basis, and advertising and miscellaneous reading matter.

(h) Is not designed primarily for free circulation or for circulation at nominal rates.

(2) "Newspaper," as used in this section, shall not include a newspaper, publication, or periodical which is published, sponsored by, is directly supported financially by, or is published to further the interests of, or is directed to, or has a circulation restricted in whole or in part to any particular sect, denomination, labor or fraternal organization or other special group or class of citizens, or which primarily contains information of a specialized nature rather than information of varied, broad and general interest to the general public, or which is directed to any particular geographical portion of any given political subdivision within which publication of such legal notice is required, rather than to such political subdivision as a whole. No newspaper otherwise qualified under this section shall be disqualified from publishing legal

notices for the sole reason that such newspaper does not have as great a circulation as some other newspaper publishing in the same political subdivision.

(3) In the event of the discontinuance of the publication of all newspapers in any county qualified under this section to publish legal notices, any other such newspaper published in the same county, regardless of the length of time it has been published, shall be deemed qualified to publish such legal notices, provided such newspaper meets all requirements of this section other than the requirements of subsection (1) (d) of this section.

(4) A newspaper otherwise qualified under this section which is published in a municipality whose corporate limits encompass territory in more than one (1) county shall be qualified to publish legal notices, including foreclosure sale notices as described in Section 89-1-55, for any county a portion of whose territory is included within the municipality, irrespective of the actual physical location within the municipality of the principal public business office of the newspaper.

Sources: Codes, 1942, § 1858; Laws, 1936, ch. 313; Laws, 1948, ch. 427, eff 60 days after passage, approved April 14, 1948; Laws, 1976, ch. 479, § 1; Laws, 1984, ch. 400; Laws, 2004, ch. 453, § 1, eff from and after passage (approved Apr. 28, 2004.)

§ 13-3-32. Publication - in what newspaper - presumption of continued qualification.

All newspapers which were qualified to publish legal notices and which were publishing legal notices prior to July 1, 1976, shall be presumed to qualify under Section 13-3-31 unless and until a determination has been made by competent authority that such newspaper fails to meet the requirements and provisions of Section 13-3-31.

Sources: Laws, 1976, ch. 479, § 2, eff from and after July 1, 1976.

§ 13-3-55. Suits by or against partnerships; service on one of several partners.

A partnership may sue or be sued in the partnership name, or in the names of the individuals composing the partnership, or both and service of process on any partner shall be sufficient to maintain the suit against all the partners so as to bind the assets of the partnership and of the individual summoned.

Sources: Codes, 1880, § 1519; 1892, § 3436; Laws, 1906, § 3935; Hemingway's 1917, § 2942; Laws, 1930, § 2988; Laws, 1942, § 1869; Laws, 1977, ch. 405, eff from and after April 1, 1977.

Chapter 45
Suits by and against the State or its Political Subdivisions

§ 11-45-1. When the state may be sued.

Any person having a claim against the State of Mississippi, after demand made of the auditor of public accounts therefor, and his refusal to issue a warrant on the treasurer in payment of such claim, may, where it is not otherwise provided, bring suit therefor against the state, in the court having jurisdiction of the subject matter which holds its sessions at the seat of government; and, if there be no such court at the seat of government, such suit may be instituted in such court in the county in which the seat of government may be.

Sources: Codes, 1871, § 1573; 1880, § 2641; 1892, § 4248; Laws, 1906, § 4800; Hemingway's 1917, § 3164; Laws, 1930, § 5997; Laws, 1942, § 4387.

§ 11-45-3. Service of summons and conduct of case.

The summons in such suit shall be served on the attorney general in the mode prescribed by law for the service of a summons in other cases; and he shall appear for the state. The suit shall be proceeded with as if it were between private persons; but a bill shall not be taken as confessed nor a judgment by default be rendered against the state. The answer of the state to any bill need not be under oath or under the great seal, but may be made by the attorney general for the state.

Sources: Codes, 1871, §§ 1577, 1578; 1880, § 2642; 1892, § 4249; Laws, 1906, § 4801; Hemingway's 1917, § 3165; Laws, 1930, § 5998; Laws, 1942, § 4388.

§ 11-45-5. Payment of judgment or decree against the state.

A judgment or decree against the state shall not be satisfied except by an appropriation therefor by the legislature, and an execution shall not be issued against the state.

Sources: Codes, 1871, § 1580; 1880, § 2644; 1892, § 4250; Laws, 1906, § 4802; Hemingway's 1917, § 3166; Laws, 1930, § 5999; Laws, 1942, § 4389.

§ 11-45-11. The state entitled to all actions - unlawful detainer for its lands.

The state shall be entitled to bring all actions and all remedies to which individuals are entitled in a given state of case. It may maintain the action of unlawful entry and detainer in all cases, at its option, for the recovery of land.

Sources: Codes, 1880, § 897; 1892, § 4253; Laws, 1906, § 4805; Hemingway's 1917, § 3169; Laws, 1930, § 6002; Laws, 1942, § 4392.

§ 11-45-15. County to have like remedies.

Any county may have like remedies given to recover any property belonging to it, or damages for injury thereto; and action may be brought in behalf of the county by the county prosecuting attorney or by someone employed therefor by the board of supervisors.

Sources: Codes, 1880, § 896; 1892, § 4254; Laws, 1906, § 4806; Hemingway's 1917, § 3170; Laws, 1930, § 6004; Laws, 1942, § 4394; Laws, 1978, ch. 509, § 2, eff from and after January 1, 1980.

§ 11-45-17. County may sue and be sued.

Any county may sue and be sued by its name, and suits against the county shall be instituted in any court having jurisdiction of the amount sitting at the county site; but suit shall not be brought by the county without the authority of the board of supervisors, except as otherwise provided by law.

Sources: Codes, 1857, ch. 59, art. 34; 1871, § 1384; 1880, § 2175; 1892, § 290; Laws, 1906 § 309; Hemingway's 1917, § 3682; Laws, 1930, § 270; Laws, 1942, § 2955.

§ 11-45-19. Suit where part only of county is interested.

Suit may be brought, in the name of the county, where only a part of the county or of its inhabitants are concerned, and where there is a public right of such part to be vindicated.

Sources: Codes, 1892, § 291; Laws, 1906, § 310; Hemingway's 1917, § 3683; Laws, 1930, § 271; Laws, 1942, § 2956.

§ 11-45-21. Bond not to be required.

Neither the state nor any county shall be required to give bond in any suit.

Sources: Codes, 1880, § 897; 1892, § 4255; Laws, 1906, § 4807; Hemingway's 1917, § 3171; Laws, 1930, § 6005; Laws, 1942, § 4395.

Hours and Holidays

§ 25-1-99. County office hours.

The clerks of the circuit and chancery courts, the county superintendents of education, the county tax assessors, and the sheriffs shall keep their offices at the courthouses of their respective counties if offices shall be there provided for them. If offices shall not be there provided for them, they shall keep their offices within one-half (1/2) mile of the courthouses of their respective counties; except that the office of the county superintendent of education may be placed in the county in any other place determined by the county board of education to be most feasible, regardless of the distance from the courthouse. The offices of all circuit and chancery clerks and sheriffs shall be open for business on all business days from 8:00 a.m. to 5:00 p.m., except that within the discretion of the board of supervisors of said county, the above county offices may be closed at 12:00 noon one (1) business day of each week, or may be closed all day Saturday of each week, or may be closed at 12:00 noon on Saturday and at 12:00 noon on one (1) additional business day of each week. Such courthouse hours decided upon within the discretion of the board of supervisors must be duly entered at large on the minutes of said board, and such action by the board shall be published in a newspaper having general circulation in the county once each week for four (4) consecutive weeks.

Provided, however, the courthouse shall be closed on all state holidays as set forth in Section 3-3-7, and when any state holiday set forth in Section 3-3-7 falls on a Saturday, the courthouse may be closed on the Friday immediately preceding such Saturday and when such holiday falls on a Sunday, the courthouse may be closed on the Monday immediately succeeding such Sunday. The board of supervisors, in its discretion, may close the county offices on those holidays created by executive order of the Governor.

Sources: Codes, Hutchinson's 1848, ch. 33, art 10 (1); 1857, ch. 6, art 190; 1871, § 313; 1880, § 419; 1892, § 3074; Laws, 1906, § 3482; Hemingway's 1917, § 2820; Laws, 1930, § 2916; Laws, 1942, § 4062; Laws, 1926, ch. 143; Laws, 1942, ch. 209; Laws, 1950, ch. 285; Laws, 1958, ch. 215, § 3; Laws, 1960, ch. 198; Laws, 1962, ch. 252; Laws, 1964, ch. 284; Laws, 1966, ch. 299, § 1; Laws, 1968, ch. 286, § 1; Laws, 1972, ch. 428, § 1; Laws, 1974, ch. 345; Laws, 1976, ch. 304; Laws, 1988, ch 350, § 6; Laws, 1988, ch. 386, eff from and after July 1, 1988.

§ 3-3-7. Legal holidays.

(1) Except as otherwise provided in subsection (2) of this section, the following are declared to be legal holidays, viz: the first day of January (New Year's Day); the third Monday of January (Robert E. Lee's birthday and Dr. Martin Luther

King, Jr.'s birthday); the third Monday of February (Washington's birthday); the last Monday of April (Confederate Memorial Day); the last Monday of May (National Memorial Day and Jefferson Davis' birthday); the fourth day of July (Independence Day); the first Monday of September (Labor Day); the eleventh day of November (Armistice or Veterans' Day); the day fixed by proclamation by the Governor of Mississippi as a day of Thanksgiving, which shall be fixed to correspond to the date proclaimed by the President of the United States (Thanksgiving Day); and the twenty-fifth day of December (Christmas Day). In the event any holiday hereinbefore declared legal shall fall on Sunday, then the next following day shall be a legal holiday.

(2) In lieu of any one (1) legal holiday provided for in subsection (1) of this section, with the exception of the third Monday in January (Robert E. Lee's and Martin Luther King, Jr.'s, birthday), the governing authorities of any municipality or county may declare, by order spread upon its minutes, Mardi Gras Day or any one (1) other day during the year, to be a legal holiday.

(3) August 16 is declared to be Elvis Aron Presley Day in recognition and appreciation of Elvis Aron Presley's many contributions, international recognition and the rich legacy left to us by Elvis Aron Presley. This day shall be a day of recognition and observation and shall not be recognized as a legal holiday.

(4) May 8 is declared to be Hernando de Soto Day in recognition, observation and commemoration of Hernando de Soto, who led the first and most imposing expedition ever made by Europeans into the wilds of North America and the State of Mississippi, and in further recognition of the Spanish explorer's 187-day journey from the Tombigbee River basin on our state's eastern boundary, westward to the place of discovery of the Mississippi River on May 8, 1541. This day shall be a day of commemoration, recognition and observation of Hernando de Soto and European exploration and shall not be recognized as a legal holiday.

(5) Insofar as possible, Armistice Day shall be observed by appropriate exercises in all the public schools in the State of Mississippi at the eleventh hour in the morning of the eleventh day of the eleventh month of the year.

Sources: Codes, 1880, § 1132; 1892, § 3514; Laws, 1906, § 4011; Hemingway's 1917, § 2045; Laws, 1930, § 5024; Laws, 1942, § 5946; Laws, 1924, ch. 343; Laws, 1940, ch. 138; Laws, 1948, ch. 365; Laws, 1966, ch. 563, § 1; Laws, 1970, ch. 460, § 1; Laws, 1987, ch. 301; Laws, 1987, ch. 398; Laws, 1988, ch. 566; Laws, 1993, ch. 301, § 1; Laws, 1997, ch. 339, § 1, eff from and after July 1, 1997.

B. MRCP 81(d) Summons

Powell v. Powell, 644 So.2d 269 (Miss. 1994)

JAMES L. ROBERTS, Jr., Justice, for the Court:

The original opinions are withdrawn and these opinions are substituted therefor.

This appeal arises from an order of the Hinds County Chancery Court, First Judicial District, transferring custody of sixteen-year-old Tracee Reschell Powell from her father Marvin to her mother Christine, awarding Christine child support and attorney's fees, and providing for the garnishment of Marvin's wages. The order had been entered after a hearing unattended by Marvin or counsel on his behalf. We find insufficient evidence that Marvin received notice of the hearing, and hold that he was denied due process by the adjudication of custody and support matters in his absence. We reverse and remand for a new hearing.

A.

FACTS AND PROCEDURAL HISTORY

Marvin and Christine Powell were married in 1972 and had two daughters. Sherrie Mischelle was born in 1973, and Tracee Reschell in 1976.

On October 4, 1985, the Chancery Court of the First Judicial District in Hinds County entered a judgment of divorce. Christine was awarded custody of the girls, then ages 12 and 9, and Marvin was ordered to pay child support in the amount of $300.00 per month until June 1, 1986, at which point the amount would increase to $400.00 per month.

On September 5, 1989, Marvin and Christine agreed to a modification of the divorce judgment, and the Hinds Chancery Court entered an order transferring custody of both daughters to Marvin. Support payments were terminated.

On November 21, 1991, Christine filed a motion for modification of the judgment, seeking custody of Tracee. She alleged that Tracee had expressed a desire to be with her, and that while Marvin was not averse to this, he refused to pay child support absent a court order. Christine requested child support and attorney's fees.

On December 19, 1991, an alias summons was filed in the Hinds Chancery Court, stating that it had been served on Marvin Powell the previous day, apparently at his place of employment. [FN1] The summons stated that a complaint was attached (Christine's motion for modification), and that Marvin was "required to mail or hand-deliver a copy of a written response" to Christine's lawyer within 30 days. The summons did not set a date or time for a hearing or other procedure.

FN1. The record contains copies of two other summons for Marvin, dated November 21, 1991, directed to his home address of 147 Powell Road in Jackson. These summons were apparently not served.

On March 2, 1992, Christine filed a Notice of Hearing in the Hinds Chancery Court, stating that she would bring her motion before the Court on March 9, 1992 at 9:00 a.m. A certificate of service stated that Christine's lawyer had sent a copy of the notice to Marvin at his home address of 147 Powell Road, Jackson. Marvin contends that he never received this notice.

The hearing was held before the Hinds Chancery Court on March 9, 1992. Present were Christine and her lawyer, Roy Perilloux. At the hearing, Perilloux stated that after filing the motion for modification, he had received a telephone call from Marvin's last attorney of record, Hal Dockins. [FN2] Perilloux also stated that he had spoken with Dockins "last week to advise him of the hearing," and that Dockins had told him that while he was not representing Marvin, he did not think Marvin was opposed to the motion, except for the child support provision. The Chancellor requested that Perilloux take a quick look around the courthouse for Marvin. Marvin was not found, and the hearing was held.

FN2. Dockins had not represented Marvin in the original divorce proceedings, but had represented him in a modification of the decree.

In an order dated March 12, 1992, the chancellor transferred custody of Tracee from Marvin to Christine. He awarded $250.00 per month child support, as well as Christine's $550.00 attorney's fees. The judgment provided that an order be served on Marvin's employer, commanding Texas Eastern Transmission Corporation to withhold $250.00 per month for Tracee's support. The withholding order was to take effect immediately. Additionally, a writ of garnishment was served on Texas Eastern Transmission in the amount of $550.00.

Marvin filed a motion for relief from the March 12th judgment and to stay the garnishment proceedings. He claimed that although he had been served the alias summons in December 1991, he had never received notice of the hearing held March 9, 1992, and that the alias summons failed to comply with the notice requirements of M.R.C.P. 81. He asked the Court to set aside its judgment as void, to stay or vacate all garnishments, and to assess attorney's fees and court costs.

A hearing on this motion was held on April 23, 1992. It was attended by Christine, Marvin, *272 and their lawyers. Marvin's lawyer Hal Dockins made the following statement concerning his client's alleged lack of notice of the March 9th hearing:

> My client never received any notice of the hearing. When he received the alias summons, Your Honor, he came to my office. I called Mr. Perilloux on the phone. I asked Mr. Perilloux, I said, "I notice that your summons does not yet have a hearing date." He said, "I haven't set it yet." I never heard from Mr. Powell or Mr. Perilloux again. I saw Mr. Perilloux in the hallway one day when I was here on another matter, and he asked me a question about Mr. Powell's case. And I advised him that I had advised Mr. Powell that he should take some sort of action on the case. I was on another matter. I never received any notice of the hearing date. Mr. Powell never received notice of a hearing date. The next thing we knew about the case Mr. Powell was being garnished.

Perilloux had a somewhat different recollection of the conversation in the hallway:

> (M)r. Dockins and (Carol English) [FN3] were having a conversation at the counter on Friday, March the 6th, prior to this hearing, when I happened by. And Carol asked me was the hearing before you that Monday still on. And I said, "You couldn't have asked me at a more appropriate time," because Mr. Dockins had made a telephone call on this case. And I turned to Hal and asked him, "Are you representing Mr. Powell?" And his response was, "Definitely not." And I said somewhat in a joking manner, Judge, "Speak now or forever hold your peace," to which Hal said, "I am definitely not representing him. He's fair game." Judge, I think there's a waiver problem here.
>
> FN3. Apparently a court employee, never specifically identified in the record.

Dockins denied that he had ever told Perilloux that he was no longer representing Marvin Powell.

The chancellor was unsympathetic to Marvin's claim that he had not received notice of the March 9th hearing. He stated that he had an affidavit from Perilloux, swearing that he had sent notice of the hearing by first class U.S. mail to Marvin at his Powell Road address in Jackson. However, no such affidavit appears in the record. The chancellor held that notice of the hearing had been given, and denied Marvin's motion to set aside the judgment.

The chancellor then permitted Dockins to call Marvin to make an offer of proof. Marvin testified that he had been employed at Texas Eastern for sixteen years, and that it was there he had been served the alias summons. He stated that the summons had given no indication of when or where he was to appear to defend his rights, and that had he received notice of the hearing, he would have appeared. Upon questioning by the judge, Marvin stated that he had no objection to Tracee going to live with Christine, and that he had no objection to paying child support.

The chancellor denied Marvin's motion in an order dated April 28, 1992. On May 18, 1992, Marvin appealed the judgment to this Court.

B.

NOTICE

I. WHETHER A RULE 4 ALIAS SUMMONS, WHICH FAILED TO GIVE NOTICE OF THE DATE, TIME AND PLACE OF A MODIFICATION OF CHILD CUSTODY HEARING, COMPLIES WITH THE NOTICE REQUIREMENTS OF M.C.R.P. 81(d)(5).

II. WHETHER A LETTER CONTAINING THE DATE AND TIME OF A HEARING ALLEGEDLY MAILED TO THE RESPONDENT TWO MONTHS AFTER SERVICE OF THE RULE 4 ALIAS SUMMONS IS SUFFICIENT NOTICE OF HEARING OF RULE 81(d) MATTERS WHERE THE RULE 4 ALIAS SUMMONS DID NOT CONTAIN THE REQUIRED NOTICE OF THE DATE, TIME AND PLACE OF THE HEARING.

III. WHETHER RESPONDENT'S RIGHT OF DUE PROCESS OF *273 LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND THE CORRELATING SECTION OF THE MISSISSIPPI CONSTITUTION WAS VIOLATED WHERE THE NOTICE OF THE TIME, PLACE AND DATE DID NOT COMPLY WITH M.R.C.P. 81(d)(5).

Marvin argues that the summons with which he was served on December 18, 1991, was of the wrong variety, and did not comply with the notice requirements of M.R.C.P. 81(d)(5). He notes that he was served with a Rule 4 or "alias" summons, which requires a written response to be delivered to the plaintiff's attorney within thirty days. Marvin contends that he should have been served with a Rule 81 summons, which does not require a response, but sets a time and place for a hearing in court concerning the matters set out in the complaint. Marvin also contends that he was not notified of the March 9, 1992, hearing on Christine's motion; in particular, he denies having received the notice Roy Perilloux certifies he mailed to Marvin on February 19, 1992.

Christine argues that Marvin was properly apprised of her motion for modification by service of the summons and complaint, and that the notice requirements of Rule 81 were met by the notice of hearing she claims was sent to Marvin on February 19, 1992.

M.R.C.P. 81

[1] M.R.C.P. 81 governs procedure in twelve categories of civil actions, including child custody actions. The comment to the Rule states:

Rule 81(a) lists 12 categories of civil actions which are not governed entirely by the M.R.C.P. In each of those actions there are statutory provisions detailing certain procedures to be utilized ... (h)owever in any instance in the twelve listed categories in which the controlling statutes are silent as to a procedure, such as security for costs, form of summons and methods of service of process and notices, service and filing of pleadings, computation of time, pleadings and motions, discovery, subpoenas, judgments and the like, the M.R.C.P. govern. Comment, Rule 81. The statute pertaining to child custody (including modification of a custody order) is Miss.Code Ann. (1972) § 93-5- 23 (Supp.1992). It is silent concerning the procedures for summons and service of process; therefore, the M.R.C.P. govern. See Covington v. Covington, 459 So.2d 780 (Miss.1984) (where statute addressing chancery court's contempt power is silent as to methods of service of notices, M.R.C.P. govern).

Rule 81(d)(1) provides that child support actions are "triable 30 days after completion of service of process in any manner other than publication." Rule 81(d)(4) provides:

No answer shall be required in any action or matter enumerated in subparagraphs (1) and (2) above but any defendant or respondent may file an answer or other pleading or the court may require an answer if it deems it necessary to properly develop the issues ... (emphasis added).

Finally, Rule 81(d)(5) provides:

Upon the filing of any action or matter listed in subparagraphs (1) and (2) above, summons shall issue commanding the defendant or respondent to appear and defend at a time and place, either in term time or vacation, at which the same shall be heard. Said time and place shall be set by special order, general order or rule of the court. If such action or matter is not heard on the day set for hearing, it may by order entered on

that day be continued to a later day for hearing without additional summons on the defendant or respondent ... (emphasis added).

The Comment to Rule 81 states that section (d)(5) "recognizes that since no answer is required of a defendant/respondent, then the summons issued shall inform him of the time and place where he is to appear and defend." Form 1D in the Appendix to the Rules is entitled "Rule 81 Summons." It notices the defendant that a complaint is attached, and provides blanks for the date, time and courthouse where the defendant should appear. It also states that *274 the defendant may, but is not required to file an answer. A Form IA summons (an "alias summons"), on the other hand, notifies the defendant that he must deliver a response to the attached complaint to the plaintiff's lawyer within 30 days.

The summons with which Marvin was served on December 18, 1991, was an alias summons. It stated that Marvin was required to respond within 30 days to Roy Perilloux; it did not set a time, date and place for a hearing on the complaint. In short, it did not comply with the requirements of Rule 81.

In Saddler v. Saddler, 556 So.2d 344 (Miss.1990), this Court considered whether a Rule 4 summons, served with a motion for modification of a divorce decree, was proper, where the custodial mother sought increased child support from the father. Lear, the mother, who alleged that Walter's income had substantially increased, had Walter served with the Rule 4 summons, pleadings, requests for admissions, and interrogatories. Walter did not answer any of the above. Several months later, Lear filed an application for a default judgment with an affidavit concerning Walter's finances. She also requested an evidentiary hearing to establish the precise amounts of increased child support and attorney's fees. Ten days later, a default judgment was entered, finding that Lear was entitled to an increase in child support and attorney's fees, and setting a date for a hearing three weeks later. At the hearing, the chancellor denied Walter's motion to set aside the default judgment, and ordered him to pay increased child support and attorney's fees. We reversed, holding that the entry of default was improper:

It is patent and obvious that the Chancellor erred in granting the default judgment. Rule 81(d)(5) requires the issuance of summons commanding the defendant to appear and defend at a time and place at which the action is to be heard and precludes a default judgment. That kind of summons was not issued in this case. Saddler v. Saddler, 556 So.2d at 346 (Miss.1990).

[2] The proper procedure under Rule 81 would have been to serve Marvin with the motion for modification and a Rule 81 summons, setting a time and date for a hearing at the Hinds Chancery Court, First Judicial District, and informing him that he was not required to respond in writing. It appears from the record that at the time Marvin was served with the motion and Rule 4 summons, no date was set for a hearing. It is clear that under Rule 81, even had Marvin been served with the correct form of summons, he would not have been required to respond in writing to the motion. The effect of the Rule 4 summons was merely to inform Marvin that a motion for modification had been filed. Such "notice" does not comply with Rule 81, which requires that a date and time be set for a hearing. Therefore, the Court finds that when proceeding under matters enumerated in Rule 81, a proper 81 summons must be served. [FN4]

FN4. This Court's finding in Covington v. Covington, 459 So.2d 780 (Miss.1984), was correct at the time it was decided based upon Rule 81 at that time. However, since Covington Rule 81 was changed. In Hunt v. Hunt, 629 So.2d 548 (Miss.1993) and Cooley v. Cooley, 574 So.2d 694 (Miss.1991), the Court decided those cases without applying amended Rule 81. Therefore, to the extent that those cases are in conflict with today's holding they are overruled. Although a Rule 81 summons must be served, we do not find that personal jurisdiction is lost once a court had personal jurisdiction over the defendant at the time of the divorce, but hold that Rule 81 matters, because of their nature, require special notice.

* * * *

REVERSED AND REMANDED.

HAWKINS, C.J., DAN M. LEE, P.J., and SULLIVAN, PITTMAN, BANKS and McRAE, JJ., concur. SMITH, J., dissents with separate written opinion joined by PRATHER, P.J. [Omitted]

C. Failure to Have Summons Served

Erby v. Cox, 654 So.2d 503 (Miss. 1995)

McRAE, Justice, for the Court:

Linder Erby appeals the Lee County Circuit Court's January 29, 1992, grant of summary judgment in favor of Drs. John Cox, Thomas Wooldridge, James Cooper and Jimmy Hamilton. Her claim against these parties arose from her father's death in the hospital several days later after undergoing kidney surgery. Erby raises the following issue on appeal:

> Whether the filing of a medical malpractice complaint commences the civil action and tolls the two year statute of limitation pursuant to Miss.Code Ann. § 15-1-36 where service of process was within 120 days after the complaint was filed?

Finding that the trial court erred in applying the statute of limitations to this cause of action, we reverse for trial on the merits.

FACTS

On August 26, 1987, Erby's father, J.C. Cannon, who had a history of insulin dependent diabetes, was admitted by Dr. Cox to the hospital for evaluation of chronic renal failure. Insulin for Cannon was discontinued on August 28, 1987, prior to surgery. The next day, after surgery, Cannon was unresponsive and became comatose. It appeared that he had slipped into a diabetic coma. He died on September 3, 1987. The cause of death was listed as cerebral vascular accident due to or as a consequence of diabetes.

On August 25, 1989, Erby filed a medical negligence claim against North Mississippi Medical Center as well as various doctors and nurses based on the failure to check Cannon's blood sugar level during his stay in the hospital, and to monitor his glucose levels prior to, during and after surgery. Summons were mailed by the plaintiff's attorney at this time for all the defendants, approximately 105 days after the complaint was filed. Process was not served until December 8, 1989, for all the doctors.

On September 3, 1991, approximately one year and seven months later, Doctors Cox, Wooldridge, Cooper and Hamilton filed Motions for Summary Judgment alleging that this action and process were untimely pursuant to Miss.Code Ann. § 15-1-36.

Erby responded on December 3, 1991, asserting that there were factual issues in dispute and that summary judgment was inappropriate. After a hearing, the lower court rendered its final judgment on January 29, 1992, granting summary judgment to the doctors solely on the issue of the statute of limitations. The court stated that the defendants were served on December 8, 1989, and that the cause of action accrued on September 3, 1987. Further, the court found that the plaintiffs offered no justification for the delay of 105 days to serve the defendants after the filing of the complaint on August 25, 1989. Thereafter, Erby timely perfected this appeal.

LAW

> Whether the filing of a medical malpractice action commences the suit under Miss.Code Ann. § 15-1-36 when service of process was had some months later, but still within the 120-day window under M.R.C.P. 4(h)?

We are confronted today with Mississippi Rules of Civil Procedure Rules 3(a) and 4(h). Rule 4(h) allows 120 days to obtain service of process on a defendant after the filing of the lawsuit pursuant to Rule 3(a). Specifically, Rule 4(h) provides as follows:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was *505 required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Civil actions are commenced by the filing of a complaint with the court pursuant to Rule 3(a). In this case, the suit was filed on August 25, 1989, clearly within the limits of the two-year statute of limitations, provided for in Miss.Code Ann. § 15-1-36, and after the September 3, 1987, date on which the trial judge said the cause of action had accrued. Since process was not issued or obtained on the defendants until December 8, 1989, approximately 105 days later, does the simple filing of the complaint without process being issued toll the statute of limitations? We answer in the affirmative.

Erby's service of process falls squarely within the allowable time frame in which to serve a summons. Rule 4(h) provides that service of process should be made upon a defendant within 120 days after the filing of the complaint. Clearly the defendant doctors were served within 105 days, well within the range of the 120 days required by the rule. It does not matter under our rule whether the defendant is served within the first week or within 120 days as the rule does not specify except to say that the case shall be dismissed if the plaintiff cannot show good cause why service was not obtained.

* * * *

In conclusion, the decedent's daughter filed suit well within the prescribed limitations under Miss.Code Ann. § 15-1-36, and process was timely served pursuant to M.R.C.P. 4(h). Thus, the trial court erred in dismissing the complaint against the defendant doctors, Cox, Wooldridge, Cooper and Hamilton. Accordingly, we reverse and remand for trial on the merits.

REVERSED AND REMANDED.

Watters v. Stripling, 675 So.2d 1242 (Miss. 1996)

In this matter, we consider whether an action is properly dismissed if service is not effectuated within 120 days after filing, absent good cause. We conclude that Rule 4(h) requires a dismissal without prejudice. We also conclude that filing a complaint tolls the statute of limitations, but that, if service is not made upon the defendant within the 120-day service period of Rule 4(h), the clock begins to run again at the end of the 120 days. We affirm the judgment of the trial court dismissing this cause without prejudice.

D. Computation of Time (See MRCP 6)

Robb v. Ward, 266 So.2d 133 (Miss. 1972)

SMITH, Justice:

Charles Robb appeals from an order of the Circuit Court of Madison County declining to set aside a default judgment recovered against him by appellee, Jerry B. Ward, at a former term.

Ward sued Robb on January 15, 1971, alleging that Robb had willfully shot and killed his dog. A summons was issued and served upon Robb on January 24, 1971, as shown by the sheriff's return endorsed upon it. At the ensuing term, Robb having failed to answer and having failed to enter his appearance, the default judgment from which Robb appeals was entered. The court term ended and court adjourned finally. At the next term, Robb filed a motion to set aside the judgment, his motion reciting that he had received the summons through the mail and that no writ of inquiry had been issued for determination of the amount of damages. This motion was overruled on April 12, 1971, Robb again having failed to appear. On April 23, 1971, Robb filed another motion to set aside and vacate the action of the court in overruling his preceding motion. In his April 23, 1971 motion, Robb asserted that neither he nor his counsel knew that the court would take up his former motion and that they should have been notified before it was acted upon. On July 15, 1971, a motion to reinstate was overruled because Robb did not appear. On the same day, however, Robb, acting through a new attorney, filed yet another motion to vacate the judgment, again stating that no writ of inquiry had issued and this time alleging that the original summons had been served upon him on Sunday and that this invalidated the judgment.

Of the three errors assigned for reversal, only one requires notice. That is, appellant's contention that the service of the summons on Sunday rendered the judgment void.

[1] Before reaching that question, however, it is well to note that the judgment does recite that damages were awarded *134 upon writ of inquiry and, since the judgment imports verity and there is nothing to the contrary in the record, it must be assumed that the statement is correct. It is true that the amount of the award appears a large one for the shooting of a dog, but the circumstances of the shooting alleged in the declaration are such as to justify the award of punitive damages and such damages comprise a major portion of the judgment.

[2] Nor is there anything in the record to support Robb's original claim that the summons was mailed to him. Moreover, that assertion is in conflict with his later (and present) contention that the summons was served upon him on Sunday. The sheriff's unimpeached return, endorsed upon the summons, shows personal service upon Robb and is conclusive under the circumstances.

The sheriff's return, however, does reflect that the summons was served on Sunday and appellant urges that this rendered the judgment void. On this question, it appears that there is some conflict of authority in the United States. An interesting discussion of the historical background of the matter appears in the Court's opinion in the case of Pedersen v. Logan Square State and Savings Bank, 377 Ill. 408, 36 N.E.2d 732 (1941).

In support of his position that service of the summons on Sunday was utterly void, appellant points out that in Mississippi certain remedial writs are expressly authorized by statute to be 'issued, executed and served' on Sunday, and therefore, a fortiori, civil process, other than those writs expressly enumerated by statute, may not be served on Sunday.

On page 870, 83 C.J.S. Sunday s 42 (1953) appears the following statement dealing with issuance of process on Sunday.

> There is some authority holding that, although the award of judicial writs is a judicial act, void if done on Sunday, the issuing of original process is merely ministerial and valid in the absence of a statutory provision forbidding it, but there is more numerous authority holding the issuance of process to be a judicial act, and, hence, of such a character that its being done on Sunday is void at common law. Where the rule forbidding and avoiding issuance of process on Sunday has been affirmed or adopted by statute, process within the terms of the prohibitions when issued on that day is a nullity. Express exceptions in statutes forbidding service of process on Sunday have been held not alone applicable to service of process but are equally exceptions to the common-law rule forbidding issuance of process on Sunday. Since as a general rule, courts may not sit on

Sunday, a process or notice returnable on that day is void, and no proceedings may be had thereon. (Emphasis added).

And further, at page 871 of the same work:

> b. Service
> Generally the service of process on Sunday is valid in the absence of statutes forbidding such service.
> The service of process has been held to be a merely ministerial act, being thus of such a character that Sunday service is not affected by the common-law status of Sunday as a nonjudicial day. Under the statutes of many jurisdictions, however, the service of process or Sunday is specially forbibben; and such service as is within the scope of their provisions is of course illegal and void. Moreover, in other jurisdictions, the provisions of the general Sunday laws, relative to acts and transactions generally without specific reference to the service of process, have been held extensive enough to include such service within their prohibitions so as to avoid it; but elsewhere statutes of a similar character have been held not to include it within the scope of their provisions, so that the time of service does not impair its legality and validity; and, *135 of course, where statutes adopt and reaffirm the rule of the common law, Sunday service of process or summons is legal. Some of the statutes forbidding the service of process on Sunday, either directly or as included in the general Sunday regulations, make exceptions to permit service in certain cases of urgent necessity; and service of process in the cases specified is valid, although made on Sunday; . . . (Emphasis added.)

However, in Mississippi, since it is not expressly forbidden by statute, even process issued on Sunday is valid. In Armstrong v. State, 195 Miss. 300, 15 So.2d 438 (1943) this Court stated:

> 'The fact that a search warrant is issued on Sunday does not render it invalid, unless expressly prohibited by statutory enactment. 47 Am.Jur. p. 520, par. 30. There is no such prohibition in any of our statutes. The question was considered in State v. Conwell, 96 Me. 172, 51 A. 873, 90 Am.St.Rep. 333, and we are in accord with what was said in the first four paragraphs of that opinion as furnishing a sufficient basis for the announced conclusion.

Nor are we able to ascribe to the legislature an intention to forbid service of process on Sunday through the enactment of the statutes which prohibit or limit the engaging in such activities as fishing, boxing, games, plays, farces and the like.

Armstrong, surpa, decided in 1943, established that, the proposition in Mississippi, even the Issuing of process on Sunday, generally considered a judicial act, since it was not expressly prohibited by statute, is valid. The Ministerial act of service is also valid since no statute prohibits it. Prompt service of process in civil suits and actions is a matter of imperative importance to the administration of justice. Today, more than ever, many people work at considerable distances from their homes and often Sunday is the only day in which they can be found and served. This presents a very considerable problem for the process server, particularly in border counties near large cities in other states. Failure to find the defendant on a secular day, or even a delay in finding him on such a day, could be a circumstance operating to deny justice by preventing the speedy and efficient disposition of cases.

* * * *

[3] We hold that the process was not void because served on Sunday in the absence of a statute prohibiting such service. It therefore follows that the trial court was without jurisdiction to set aside the judgment in this case after the final adjournment of the term. Consequently, the order of the circuit court, declining to reopen or set aside the judgment must be affirmed.

Affirmed.

E. Effect of Irregularities

Rich By and Through Brown v. Nevels, 578 So.2d 609 (Miss. 1991)

PRATHER, Justice, for the Court:

I. INTRODUCTION

A.

This negligence case involves primarily the issue of whether the trial judge abused his discretion in denying a motion to set aside a default judgment. This Court affirms--with the exception of the damages award of $180,000. The award is vacated and the issue remanded because the record is devoid of evidentiary support.

B.

On October 16, 1984, an individual burglarized a boarding house [FN1] in Jackson and violently attacked one of the elderly residents, *611 Bobbie Nevels. On July 16, 1987, Nevels filed a complaint in the Hinds County Circuit Court against the owner of the house, Wilma Rich, for her alleged negligence in failing "to provide appropriate and necessary security to assure the reasonable protection of the ... residents." Nevels claimed that she sustained "grievous physical injuries, pain and emotional distress, all of which required and continues to require medical and psychiatric care." Nevels "demanded" $250,000 in actual damages and $250,000 in punitive damages.

FN1. Basically the boarding house was a group home for former mental patients of Whitfield State Hospital.

Rich subsequently received a summons from Nevels on July 27, 1987; however, she wholly failed to respond. Thus, on December 9, 1987, Nevels moved for and secured an entry of default. Six months later, on June 6, 1988, Nevels filed a motion for default judgment. On August 12, 1988, Judge Charles Barber held a hearing, granted the motion, and awarded Nevels $180,000. Judge Barber entered the final judgment on August 15.

On June 20, 1989, Nevels filed a "Motion for Examination of Judgment Debtor"; the next day, Judge Barber granted the motion. Finally, on July 14, 1989-- over two years after Nevels filed her complaint and nearly one year after Barber granted the motion for a default judgment--Rich responded. Actually, Betty L. Brown and Jean Jennings filed a motion on Rich's behalf asking that the service of process be quashed or that the default judgment be set aside. (Brown and Jennings are relatives of Rich and were appointed her conservators only two days prior to their filing of the motion.)

Specifically, the conservators contended that the summons contained a misnomer--i.e., it incorrectly identified Wilma Rich as "Wilma Ritchie." The conservators nonetheless conceded that the sheriff "in fact served" Rich. The conservators added that, although Rich was served, she "was thoroughly incompetent to have any meaningful understanding of the process that had been served upon her."

Alternatively, the conservators contended that "reasonable and valid grounds" exist for "setting aside the default judgment." They based this contention on Rich's "medical condition, age, thorough ignorance of the summons, and thorough ignorance to notify other family members of [the] summons served upon her." And they explained that a "defense to the merits of [Nevels'] claim" exists and that "no prejudice [would] be suffered by [Nevels] if the default judgment is set aside."

The trial judge held a hearing and denied the conservators' request. (The judge also ordered that all instances of "Wilma Ritchie" found in the dockets and minutes of the court be amended to reflect her correct name, "Wilma Rich.")

The conservators appealed and presented two issues:
(1) Whether the service of process should have been quashed and default judgment set aside because Nevels incorrectly identified Rich on the summons as "Ritchie?"

(2) Whether the default judgment should have been set aside?

II. ANALYSIS

A. Whether Service of Process Should Have Been Quashed?

 The Parties' Contentions

The conservators' one-page argument regarding this issue is simple. They contend that Rich has no recollection of being served; therefore, she may have been misled by the misnomer.

Nevels counters that, indisputably, Rich received a summons and that her alleged lack of "recollection" due to alleged incompetency is unproven. Nevels adds that case law is supportive of the trial judge's refusal to quash the service of process and his order to amend all instances of "Wilma Ritchie."

2. Dispositive Law

Southern Trucking Serv., Inc. v. Mississippi Sand & Gravel, Inc., 483 So.2d 321 (Miss.1986) is dispositive of the issue. In Southern Trucking, the issue was one of first impression, so this Court considered the various views espoused by other jurisdictions.

*612 In sum, this Court decided to reject the admittedly harsh minority view which holds that a misnomer should mean the death-knell of a case. Id. At 323 (citing case law from other jurisdictions). This Court instead adopted the "general view" which holds that a misnomer is not fatal so long as the incorrectly-identified party knew what was meant. Id. (citing Bank of America v. Superior Court for Los Angeles County, 35 Cal.App.3d 555, 110 Cal.Rptr. 709, 710 (1973) (bank "knew at all times the case it had to meet" despite the misnomer). Thus, "an amendment correcting a misnomer is permissible at any time or any stage in the proceedings." Id. At 324 (citing 67A C.J.S. Parties § 172); see also Donald v. Luckie Strike Loans, Inc., 148 Ga.App. 318, 251 S.E.2d 168, 169-70 (1978). "When a judgment is amended, it is as though the entire action had been conducted in the correct name of the [party]." Southern Trucking Serv., Inc., 483 So.2d at 324.

[1] In sum, under Mississippi law, an amendment is permitted so long as the evidence does not suggest that the misnomer "misled the parties into thinking that another [party] was meant." Id. (quoting Cigan v. St. Regis House Hotel, 72 Ill.App.3d 884, 29 Ill.Dec. 38, 41, 391 N.E.2d 197, 200 (1979).

3. The Law Applied to the Facts

[2] In the case sub judice, no one disputes that Rich received a summons. The conservators simply explain that Rich didn't "remember anything about it" and that she was possibly misled by the misnomer or was not sufficiently competent to appreciate the consequences of her failure to respond. Record Vol. II, at 83. This explanation proved unpersuasive with the trial judge:

> There are several things that are requested, and I'm going to take them one by one as they were requested. The first thing that the Movant [the conservators] requested on behalf of Mrs. Rich was that the original process be quashed, and in determining whether or not the original process should be quashed I looked at two things: First is the summons itself in regards to the misnomer. Second, I looked at your argument as to the service. Now, in looking at the summons itself which, of course, is part of the court record, I basically was attempting to determine whether or not a person would have known they were being sued even though the name did not properly appear on the summons.
>
> The name which appears on the summons is Wilma Ritchie, R-I-T-C-H-I-E. In this case the actual name of the ward is Wilma Rich. The address is correct. The return is made by Deputy Gray, as he testified, and in accordance to his testimony he asked whether or not the person that answered the door was, in fact, Wilma Ritchie, and he certifies that he did hand deliver a copy to a Wilma Ritchie at this address. Then after looking at the summons in reviewing the complaint allegations set forth dealing with the same address, the same dates that everyone discussed, and I do find that although there is a misnomer in regards to the complaint and the summons, the same was sufficient to notify a reasonable person that they were being sued.

> In regards to the service I have a lot of problems with placing a burden on the Plaintiff to determine whether or not a Defendant is competent prior to the service of a process when there is no prior finding that a Defendant was in fact incompetent. So I am going to find that the service of process in this case was proper.
>
> The next thing that is requested by [the] conservators for Mrs. Rich is that the execution of process issued and served on the ward be quashed; this being the same, however, it is set out, Wilma Ritchie a/k/a Wilma Rich. I'm going to deny this request for the same reasons as set forth above in regards to the request that the other process be quashed, the original process be quashed.
> Id. At 162-64.

4. Disposition

This Court concurs in this decision; the misnomer should not be deemed fatal. The *613 record and appellant's brief are devoid of any evidence proving that the misnomer misled Rich. Most notable is Nevels' failure to claim during her testimony that the misnomer actually misled her; instead, she merely conceded that "she don't remember anything about [being served]." Rich admitted that she knows Nevels and remembers the attack; thus, it seems more likely than not that she understood the summons since it correctly identified Nevels as the "complainant." The process server, Deputy Ralph Gray, testified that Rich acknowledged she was indeed the individual named on the summons. According to Deputy Gray, Rich "acted normal" when he served her. And although several of Rich's family members testified that she was probably incompetent at the time, they did not seek to establish a conservatorship until 1989--years after Rich received her summons. Id. At 45.

In sum, the evidence does not support the conservators' claim that the slight misnomer misled Rich. The judge's decision does not reflect an abuse of discretion and, therefore, this Court affirms.

* * * *

F. Process by Publication

Rice v. McMullen, 43 So.2d 195 (Miss. 1949)

MONTGOMERY, Justice.

The appellee, Nathan J. McMullen, a residuary legatee under the will of P. H. McCalep, brought this suit in the Chancery Court of the Second Judicial District of Tallahatchie County to recover from the estate of Mrs. Carrie McCalep Armstrong, a sister of P. H. McCalep, deceased, his alleged rightful share of the residuum of the trust estate created by the last will and testament of P. H. McCalep, the corpus of which trust estate, it is alleged, *718 had been wrongfully appropriated by Mrs. Armstrong, as the sole heir at law of P. H. McCalep, deceased, on the strength of a void decree rendered by the trial court theretofore on April 23, 1939, whereby it was decreed that the alleged will was not the true last will and testament of P. H. McCalep, deceased, and adjudging Mrs. Armstrong to be his sole heir at law and as such entitled to receive the estate. There was a decree in the lower court for appellee for the sum of $3,984.33 and from this decree the executors appeal and the appellee cross-appeals.

* * * *

It is first assigned as error, here on the direct appeal, that the decree of the lower court is contrary to the law and the evidence and that the lower court erred in holding that the decree of April 23rd, 1939, setting aside the will of P. H. McCalep was null and void insofar as it affected the rights of Nathan McMullen. We are of the opinion the lower court was correct in so holding.

Section 1852, Code of 1942, reads as follows:

> 'If the defendant in any proceeding in a chancery court be shown by sworn bill or petition, or by affidavit filed, to be a non-resident of this state, or not to be found therein on diligent inquiry and the post office of such defendant be stated in the bill, petition or affidavit, or if it be therein stated that it is not known to the complainant *724 or petitioner after diligent inquiry, or if the affidavit be made by another for him, that such post office is unknown to affiant after diligent inquiry and he believes it is unknown to complainant or petitioner after diligent inquiry by complainant or petitioner, the clerk, upon the filing of the bill or petition, account or other commencement of a proceeding, shall promptly prepare and publish a summons to such party to appear and defend the suit, on a rule day in vacation sufficiently distant in time to admit of the due publication thereof, or on the first day of the next regular term if thereby the answer of the defendant would be the earlier required. The summons shall be substantially in the following form, to-wit:
>
> "'The State of Mississippi.
> "To ..... (inserting name of defendant). You are summoned to appear before the chancery court of the county of ..... in said state, on the ..... Monday of ..... A.D. ..... to defend the suit No. ..... in said court of ..... (et al.) wherein you are a defendant.
> "This ... day of ..... A.D. ...
> "..... Clerk.'
>
> 'The publication of said summons shall be made once in each week during three successive weeks in a public newspaper of the county in which the court is held if there be one, and where there is no newspaper in the county the notice shall be posted at the courthouse door of the county and published as above provided in a public newspaper in an adjoining county or at the seat of government of the state, and the period of said publication shall be deemed completed at the end of twenty-one days from the date of the first publication, provided there have been three publications made as hereinabove required; and upon proof of the prescribed publication of such summons and of the mailing of a copy of the summons to the defendant at his post office where that is stated, *725 the defendant may be thereupon proceeded against as if he had been served personally for five days, previously to the date of the completion of **200 said publication, with a summons in the case in this state. Where the post office address of a defendant is given the street address, if any, shall also be stated unless the bill, petition, or affidavit above mentioned, aver that after diligent search and inquiry said street address cannot be ascertained.'

It will be noted that under this statute it is expressly made a condition precedent to the issuance of process by publication that 'the defendant * * * be shown * * * to be a non-resident of this state, or not to be found therein on diligent inquiry * * *.' Mrs. Armstrong did not fulfill this condition. She simply named as defendant: 'Nathan McMullen,

whose place of residence and post office address is Sherman, Texas, but whose street address is unknown to respondent and could not be ascertained after diligent inquiry * * *'. She did not state in her pleading that Nathan McMullen was a non-resident of this state, or not to be found therein on diligent inquiry.

[1] [2] There is no ambiguity as to how a non-resident shall be brought into court. In substance the statute simply provides that, in order to bring in a non-resident defendant, the complainant as his first step must either in his sworn bill or petition or separate affidavit make oath that the defendant is a non-resident of this state or not to be found therein on diligent inquiry, and the post office address of such defendant if known, and, if not known after diligent search and inquiry, so stating; and if the post office address is known then by giving the street address if known and if not known, after diligent search and inquiry, so stating. This statute is jurisdictional. It is one of the methods provided by law to meet the requirements of the due process clause of the Constitution. Burns v. Burns, 133 Miss. 485, 97 So. 814. This Court has repeatedly held that constructive service *726 of process under this statute by publication is insufficient to support a decree, unless the requirements of the statute are strictly pursued. Burns v. Burns, supra; Ponder v. Martin, 119 Miss. 156, 80 So. 388; Id., Miss., 78 So. 929; Moore v. Summerville, 80 Miss. 232, 31 So. 793, 32 So. 294; Diggs v. Ingersoll, Miss., 28 So. 825; McCray v. McCray, 137 Miss. 160, 102 So. 174; Mays Food Products, Inc., v. Gloster Lumber Co., 137 Miss. 691, 102 So. 735; Hume v. Inglis, 154 Miss. 481, 122 So. 535; Mercantile Acceptance Corp. v. Hedgepeth, 147 Miss. 717, 112 So. 872; Sellers v. Powell, 168 Miss. 682, 152 So. 492; Cratin v. Cratin, 178 Miss. 881, 173 So. 415, 174 So. 255.

[3] It is argued that to state in the bill that the place of residence and post office address of the defendant is Sherman, Texas, is to state the inescapable inference that the defendant is a non-resident of Mississippi but inferences are not sufficient to uphold a process by publication and nothing short of a positive averment of the facts will suffice. Hume v. Inglis, 154 Miss. 481, 122 So. 535. The sworn bill in the case before us was defective in that it did not state that Nathan J. McMullen was a non-resident of the State of Mississippi, and the attempted service of process upon him by publication was null and void. Paepcke-Leicht Lumber Co. v. Savage, 137 Miss. 11, 101 So. 709; Sellers v. Powell, 168 Miss. 682, 152 So. 492; McCoy et al. v. Watson, 154 Miss. 307, 122 So. 368, and many other cases.

It is further assigned as error and argued by appellant that even though the process by publication for Nathan J. McMullen was void still he is estopped from attacking the validity of the decree of April 23, 1939, because he knew of the death of P. H. McCalep and that he left a will in which he, Nathan J. McMullen, had been named as one of the residuary legatees; he had seen a copy of the will; he knew that Mrs. Armstrong had filed a contest of the will and was endeavoring to set it aside; he knew *727 that his co-defendants had employed lawyers to uphold the will; and he knew that they were endeavoring to get him to join them in the defense of the suit. Did these acts estop the appellee from attacking the validity of the decree setting aside the P. H. McCalep will? We think not.

[4] [5] Griffith's Mississippi Chancery Practice, Section 223, page 221, states the rule as follows:

> **201 'It is a cardinal principle in the administration of justice that no man can be condemned, or divested of his rights, until he has had an opportunity of being heard. He must, by service of process, by publication of notice or in some equivalent way, be brought into court, and if judgment be rendered against him before that is done, the proceedings will be as utterly void as though the court had undertaken to act where the subject matter was not within its cognizance. The principle is universal that no judgment, order or decree is valid or binding upon a party who has had no notice of the proceeding against him. The court must not only have jurisdiction of the subject matter, but also of the persons of the parties to give validity to its final judgments, orders and decrees, and it is not in the power of the legislature, under our constitution, to dispense with this notice, actual or constructive.'

> 21 C. J. S., Courts, § 83, page 124, announces the rule as follows:
> '* * * it is held that a person's knowledge of the existence of an action does not supply the want of compliance with the statutory or legal requirements as to service, and that a person's mere presence in court does not give jurisdiction to enter a judgment against him when he was not brought there by any legal means.'

This contention by appellant has been forever set at rest in this state by the decision in McCoy et al. v. Watson, 154 Miss. 307, 122 So. 368, 370, wherein it was said:

> *728 'Finally, it is argued that since the filing of the petition to remove shows conclusively that the nonresident defendant knows all about the suit, and has all the actual knowledge that could be conferred by a legal

summons, we should not require the ceremony of a legal notification; that it would be an idle thing to do. Upon the same reasoning it could be maintained that the affidavit of the sheriff and witnesses could be received to show that, although the sheriff had not served the defendant with a formal legal summons, he had told the defendant orally in the presence of these witnesses all about the suit and warned him to appear and when to appear, and that the defendant had gone to the courthouse and read all the papers in the case and had obtained certified copies of the case papers and knew everything about the case that he could have learned from a legal summons. It is now so thoroughly well settled as to make it too late to urge that knowledge by a defendant of a suit, however definite and full, or however obtained, or whatever may have been the defendant's action under that knowledge, is of any avail or advances the case a step, unless there has been a legal summons or a legal appearance. McPike v. Wells, 54 Miss. 136; 8jacks v. Bridewell, 51 Miss. 881; Burns v. Burns, 133 Miss. 485, 97 So. 814.'

* * * *

Affirmed.

ROBERDS, Justice (concurring).

Except that the decided cases appear to hold otherwise, and I am bound by them unless and until they are overruled, I would be compelled to conclude that the affidavit in this case states that McMullen, at the time of the former contest of the will, was a non-resident of Mississippi. It borders on the absurd, in my judgment, to say an affidavit does not say a party is a non-resident of this State when it does state the party is a resident of Sherman, Texas, and that Sherman is his post office address. That is the same as concluding that an affidavit fails to state the party is a non-resident of Mississippi, although it said he is a resident of London, England, and his post office address is No. 10 Downing Street. He could not be a resident of both places at one and the same time for the purpose of service of process.

High v. High, 186 So.2d 196 (Miss. 1966)

RODGERS, Justice.

This is an appeal from a decree granting appellee, Sidney H. High, a divorce from *197 appellant, Joan Elaine High, and granting him custody of their four-year-old daughter, Sean M. High.

The appellee filed his bill for divorce in the Chancery Court of Lamar County, Mississippi, on April 23, 1965, in which he alleged that 'the complainant is a bona fide resident citizen of Lamar County, Mississippi, and has been such continuously for more than one year prior to the date on which the original bill of complaint was filed herein; that the defendant is a nonresident of the State of Mississippi, residing at this time at 811 Vera Court, Madison, Wisconsin, and upon whom service of process may be had by publication.' The facts of the original bill were duly verified by oath.

After the bill had been filed, the chancery clerk prepared a nonresident summons and delivered it to the Lamar County News for publication. A copy of the original bill of complaint and the summons were mailed to the defendant, Joan Elaine High. The return receipt from the United States Post Office Department indicated that she received the bill and summons on May 1, 1965. The summons required the appearance of the defendant on the Fourth Monday of June, which was June 28, 1965. The Editor of the Lamar County News filed proof of publication showing publication of the summons for three successive weeks.

On the return date, the chancery clerk received a telegram from a Mississippi attorney who was then in California, advising the clerk that he was filing a motion to dismiss the original bill of complaint on behalf of defendant. The chancellor, however, disregarded the telegram and proceeded to trial upon final decree, the original bill, and summons of the defendant by publication. The final decree was dated June 29, 1965. Thereafter, on July 3, 1965, a letter from the Mississippi attorney was received by the Chancery Clerk of Lamar County, Mississippi. Enclosed in the letter was a motion to dismiss the original bill. On July 19, 1965, another attorney (the attorney who now represents the defendant on appeal) appeared on behalf of defendant, and filed a motion to set aside the final decree granting appellee a divorce, and custody of their minor daughter. This motion was overruled and an appeal was granted to this Court.

[1] The appellant contends that the final decree was void because the defendant (appellant here) was not summoned to appear before the chancery court as required by law. After a careful consideration of the authorities cited, and the facts stated in this case, we have reached the conclusion that the contention of the appellant is correct for the reasons hereafter discussed.

The original bill charges that the defendant is 'residing at this time at 811 Vera Court, Madison, Wisconsin.' There was no separate affidavit filed with the original bill setting out the post office and street address other than the general verification of the original bill.

The pertinent parts of Mississippi Code Annotated section 1852 (1956) are as follows:

> 'If the defendant in any proceeding in a chancery court be shown by sworn bill or petition, or by affidavit filed, to be a non-resident of this state * * * and the post office of such defendant be stated in the bill * * * the clerk * * * shall promptly prepare and publish a summons to such party to appear and defend the suit, on a rule day in vacation * * * or on the first day of the next regular term * * *
>
> '* * * Where the post office address of the defendant is given the street address, if any, shall also be stated unless the bill, petition, or affidavit above mentioned, aver that after diligent search and inquiry said street address cannot be ascertained.'

[2] This Court has often pointed out that summons by publication is jurisdictional, *198 Rice v. McMullen, 207 Miss. 706, 43 So.2d 195 (1949), and that compliance with the statutory method of obtaining process must be strictly followed. McDuff v. McDuff, 252 Miss. 459, 173 So.2d 419 (1965); McCray v. McCray, 137 Miss. 160, 102 So. 174 (1924); Belt v. Adams, 124 Miss. 194, 86 So. 584 (1920).

[3] We have repeatedly held that the residence and post office address of a nonresident defendant must be given in the petition or affidavit, or it must be shown that it cannot be learned after diligent inquiry, before publication

of a nonresident's process is valid. Mercantile Acceptance Corp. v. Hedgepeth, 147 Miss. 717, 112 So. 872 (1927); Burns v. Burns, 133 Miss. 485, 97 So. 814 (1923); Ponder v. Martin, 119 Miss. 156, 80 So. 388, 78 So. 929 (1918).

Griffith, Mississippi Chancery Practice (2d ed. 1950), section 236 points out:

> 'For instance, it is not enough according to a very recent case, to allege that the defendant is a resident of another state, naming it, with the requisite averment as to his post office address in the other state but the averment must be in express terms that the defendant is a nonresident of this state without the aid of inferences, although the latter are inescapable, and it is not enough merely to give the residence of defendant, it must give his post office address, if known, and if not known it must be stated that it is not known after diligent inquiry.'

Bunkley and Morse's Amis Divorce and Separation in Mississippi section 15.01(4) page 285 (1957) points out:

> 'If, after diligent inquiry first made, the complainant learns that the defendant is a non-resident of this state and what his post office address is, but is unable to learn his street address, the form of the averment should be, 'that the defendant is a non-resident of this state and that his post office address is (stating it) but that his street address is unknown to complainant after having made diligent inquiry to ascertain the same' or if the post office be a town or village not having free delivery of mail, as shown by the United States postal guide, then the averment should be 'that the defendant is a non-resident of this state and that his post office address is, (stating it); but that he has no street address served by such post office."

[4] We are therefore of the opinion that Mississippi Code Annotated section 1852 (1956) not only requires that the bill, petition or separate affidavit allege that the defendant is a nonresident of Mississippi, but it must also allege the post office address of defendant, if known, and where the post office address is given, the street address, if any, shall also be stated unless the bill, petition or affidavit aver that after diligent search and inquiry, the street address cannot be ascertained. For example: The sworn bill or affidavit should state positively if known 'whose post office address is (name post office) and whose street address is (name street address).'

The decree of the chancery court in the case at bar is reversed and remanded so defendant may have her day in court, and may plead, answer or demur to the original bill. New process is not necessary. Miss. Code Ann. s 1882 (1956).

Reversed and remanded.

G. Effect of Service on Secretary of State

Ellis v. Milner, 194 So.2d 232 (Miss. 1967)

ETHRIDGE, Chief Justice:

Appellant, Lewis Ellis, Attacks a default judgment rendered against him by the Circuit Court of Lowndes County in a suit brought by Mrs. Mary R. Milner, appellee, under the Nonresident Motorist Statute. Miss.Code Ann. s 9352-61 (Supp.1964). Ellis contends that it was rendered at the return term when the cause was not triable under the general statute. Mississippi Code Annotated section 1519 (Supp.1964) prohibits a default judgment at the return term, unless 'process has been served personally' on the defendant. The question is whether process on the Secretary of State and notice thereof mailed to defendant under the Nonresident Motorist Act was personal service under code section 1519, which would authorize a default judgment at the return term. We think it was.

Mrs. Milner's declaration, filed on November 16, 1965, averred that she received personal injuries while riding in her automobile, from the negligence of Ellis, who was driving a truck for Varco Steel Company, an Arkansas corporation. Ellis is an adult nonresident of Mississippi, residing in Clarendon, Arkansas. Varco is not involved in this appeal.

On November 18 summons was served on Heber Ladner, Secretary of State of Mississippi. On November 18 the Secretary of State mailed to Lewis Ellis, P.O. Box 307, Clarendon, Arkansas, a copy of the process served on him as the agent of Ellis, under the Nonresident Motorist Statute. On November 30 Ellis signed a return receipt for a copy of the process mailed to him by the Secretary of State by registered mail. The process was returnable to the December term, convening the first Monday of December 1965, which was December 6. The next regular term of the Circuit Court of Lowndes County, Mississippi, convened on that date.

On December 21 plaintiff filed a motion for an interlocutory default judgment and a writ of inquiry of damages. On the same date the writ was issued and a final default judgment was rendered for plaintiff against Ellis in the amount of $9,500. The December term of court ended without Ellis filing any motion to set aside the default judgment

At the March 1966 term, Ellis and Varco filed an answer to the declaration, which alleged, among other things, that the default judgment against Ellis was void for defective process, and an appeal to the Supreme Court had been perfected. Within the proper time, Ellis filed an appeal bond from the default judgment.

The Nonresident Motorist Statute was first enacted in this State in 1938. Miss.Laws 1938, Ch. 148, 345. Mississippi Code Annotated section 9352-61 (Supp.1964) is in the traditional form. The acceptance by a nonresident of the rights and privileges of this State by operating a motor vehicle upon its streets and highways is deemed equivalent to the appointment by such nonresident of the Secretary of State as his agent upon whom may be served all lawful process or summons, in any action growing out of an accident or collision in which a nonresident was involved while operating a motor vehicle on state highways. Such operation shall signify the nonresident's agreement that any process for any accident 'shall be of the same legal force and validity as if served on him personally.' Process is served on the Secretary of State as the nonresident's agent, 'and such service shall be service upon said nonresident defendant with the same force and effect as if such nonresident had been personally served with process or summons within the State of Mississippi.' The Secretary of State shall send by certified or registered mail a copy of the process to defendant at his last known address, with return receipt to be obtained. The statute then provides: 'The court in which the action is pending may order such continuance as may be necessary *235 to afford the defendant reasonable opportunity to defend the action.'

[1] The basic purposes of the act are to provide a remedy for citizens of this State against nonresidents who operate automobiles within the State, and to afford a nonresident adequate notice of a pending suit with reasonable opportunity to defend the action. Nationwide Mut. Ins. Co. v. Tillman, 249 Miss. 141, 161 So.2d 604 (1964).

[2] The general rule is that substituted service of process is complete when made upon the designated state official, and therefore receipt by the nonresident defendant of the specified notice of such service is not the determinative date for completion of process. Simmons v. Broomfield, 163 F.Supp. 268 (W.D.Ark.1958); Allen v. Campbell, 141 So. 827 (La.App.1932); Bessan v. Public Service Co-ordinated Transport, 135 Misc. 368, 237 N.Y.S. 689 (1929); Noseworthy v. Robinson, 203 Tenn. 683, 315 S.W.2d 259 (1958); 8 Am.Jur.2d Automobiles and Highway Traffic s 871 (1963); 61 C.J.S. Motor Vehicles s 502e(1) (1949).

[3] In the instant case, process was served on the Secretary of State on November 18, 1965, returnable the first Monday of December. Ellis received the process on November 30. Although the term of court began on December 6, plaintiff did not move for a default judgment until December 21, 1965, on which date the default judgment was rendered. Over a month transpired between the date of service on the Secretary of State and rendition of the default judgment. Despite this, Ellis had no one file any pleadings for him in the court, or make any other representation to the court of any type. Under the circumstances, the trial court did not abuse its discretion in entering the default judgment when it did, provided the statutes permit it.

Appellant contends that these was no personal service of process on him, and therefore under section 1519 a default judgment could not be entered at the return term. Mississippi Code Annotated section 1519 (Supp.1964) states:

> The defendant shall plead on or before the first day of the term to which the process is returnable, or within thirty (30) days after service of process, whichever would cause the pleading to be filed earlier, or within such other time as the court, by rule or otherwise, may allow; and, for want of plea, judgment may be entered by default. * * * Judgment by default shall not be entered at the return term, unless it appear that the process has been served personally on the defendant.

[4] [5] [6] The controlling question is whether service of process pursuant to the Nonresident Motorist Act is personal service within the meaning of the last sentence of Code section 1519, so as to authorize judgment by default at the return term based on personal process. Generally, personal service means the actual delivery of the process to the defendant in person, or someone who is authorized to receive it in his behalf. 42 Am.Jur., Process s 48 (1942). Service of process upon one whom a nonresident has appointed, either expressly or by implication of law, as his resident agent or lawful attorney upon whom legal process may be served may be effective as personal process upon a nonresident. 42 Am.Jur., Process ss 51 (1942). Section 9352-61 reflects the legislature's intent to create a service of process tantamount for all purposes to personal service.

[7] [8] [9] Although the act relates primarily to jurisdiction, it has the purpose of placing a nonresident motorist summoned under it on a parity with a resident in all respects. It requires the nonresident using state highways to consent to service of process upon the Secretary of State, but the Secretary of State is also required to send to him by certified or registered mail a copy of the process, and the court may order *236 such continuances as may be necessary to afford him a reasonable opportunity to defend the action. The statute puts nonresidents on the same footing as residents in the litigation of accidents growing out of the use of the highways in this State. They have equal procedural rights once the prescribed service of process has been effected. For these reasons, section 9352-61 ascribes to the required service on the nonresident's agent, the Secretary of State, all of the attributes of personal service within the State.

Nonresident motorist statutes in the various states are substantially alike. The above interpretation of the Mississippi act is in accord with the accepted application. For example, Solot v. Linch, 46 Cal.2d 99, 292 P.2d 887 (1956), with strikingly similar facts and statutes, held that service pursuant to the California Nonresident Motorist Act was personal service, for the purposes of another code section permitting vacation of the default judgment more than six months after its entry only if defendant was not personally served. It was held that the legislature intended to create a service of process tantamount for all purposes to personal service. The default judgment was valid and should not have been set aside after the six months. See Ehrenzweig, Conflict of Laws 96-98 (1962).

Cases holding that a judgment rendered at the return term against a nonresident on publication only is invalid, because not based on personal service, are not pertinent. Copiah Hardware Co. v. Meteor Motor Car Co., 136 Miss. 274, 101 So. 375 (1924); J. P. Colt Co. v. Ward, 135 Miss. 202, 99 So. 676 (1924). Process by publication is entirely different from personal process on the resident agent of a nonresident motorist.

[10] In summary, personal process was had upon defendant through the Secretary of State of November 18, 1965, returnable to the December term of court. It was properly executed for that return term. Miss.Code Ann. s 1848 (1956). Defendant failed to answer at the return term, although the process had been 'served personally' on him, in accord with the last sentence of Code Section 1519. Thus the trial court was authorized, on motion of plaintiff, enter the default judgment. Cf. Miss.Code Ann. s 1547 (1956); Id. s 1519 (Supp.1964).

Affirmed.

PLEADINGS, MOTIONS AND DEFAULT JUDGMENTS

A. Statutory Provisions

§ 11-1-55. Authority to impose condition of additur or remittitur.

The supreme court or any other court of record in a case in which money damages were awarded may overrule a motion for new trial or affirm on direct or cross appeal, upon condition of an additur or remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence. If such additur or remittitur be not accepted then the court may direct a new trial on damages only. If the additur or remittitur is accepted and the other party perfects a direct appeal, then the party accepting the additur or remittitur shall have the right to cross appeal for the purpose of reversing the action of the court in regard to the additur or remittitur.

Sources: Codes, 1942, § 1686.5; Laws, 1971, ch. 396, § 1; Laws, 1972, ch. 411, § 1, eff from and after passage (approved April 27, 1972).

§ 11-1-59. Damages in medical malpractice actions.

In any action at law against a licensed physician, osteopath, dentist, hospital, nurse, pharmacist, podiatrist, optometrist or chiropractor to recover damages based upon a professional negligence theory, the complaint or counterclaim shall not specify the amount of damages claimed, but shall only state that the damages claimed are within the jurisdictional limits of the court to which the pleadings are addressed and whether or not the amount of such damages is ten thousand dollars ($10,000.00) or more, or such other minimum amount as shall be necessary to invoke federal jurisdiction if the action is brought in federal court.

Sources: Laws, 1983, ch. 425, eff from and after July 1, 1983.

Rankin v. Brokman, 502 So.2d 644 (Miss. 1987)

ANDERSON, Justice, for the Court:

This is an appeal from a decree of the Chancery Court of Yazoo County rendered on August 16, 1985, holding that two instruments, one purporting to be a warranty deed and the other purporting to be a bill of sale, executed by Katie Mae Brokman and Fannie Mae Johnson in favor of Johnny L. Rankin and Dorothy Mae Rankin were actually mortgages, whose only effect was to vest the Rankins with a security interest in the property described.

Katie Mae Brokman is a 66-year-old widow with a fourth grade education who lives in Yazoo City. She owned the lot on which her home is situated in Yazoo City; she also owned a mobile home in which she allowed her niece, Eddie Mae Johnson, to live for $100 per month. Citizens Bank and Trust Co. of Yazoo City holds a deed of trust on Mrs. Brokman's lot as security for debts in the amount of $17,467.80; the mobile home was also purchased with a loan from Citizens. Mrs. Brokman found herself in financial difficulty; in 1982 she filed for bankruptcy, but her case was dismissed. Shortly afterwards, she began a course of conduct with Johnnie Rankin and Citizens Bank which led to this litigation.

On April 12, 1984, Mrs. Brokman filed a bill in the Chancery Court of Yazoo County. She alleged that having had trust and confidence in the friendship of Johnny "Catfish" Rankin, whom she had known for years, she had asked Rankin to mediate between her and Citizens Bank in order to avert foreclosure on her property for non-payment on her loans. The complaint alleges that Rankin undertook to do this, but that one day, after a meeting with the bank official, he came by Mrs. Brokman's house and told her he had some papers for her to sign. The plaintiff contends that Mrs. Brokman signed these papers under the assumption that they were necessary to provide some relief for her indebtedness, when in fact, the papers were a warranty deed and a bill of sale conveying both her lot and the mobile home to the Rankins. Mrs. Brokman insists she had no knowledge of the actual contents of the papers she signed. Shortly after this transaction, but before Mrs. Brokman claims to have discovered the true nature of the documents she signed, Rankin came to Mrs. *646 Brokman and obtained $225. According to Mrs. Brokman, this was to be given to the bank in payment on her own indebtedness; according to Rankin it was a rental fee.

Mrs. Brokman's petition asked the chancellor to cancel the deed and bill of sale, alleging that they were obtained by fraudulent misrepresentations.

The chancellor refused to grant a motion to dismiss for Rankin on the issue of fraud, finding that a prima facie case (albeit a weak one) had been made out.

[1] During the trial, the plaintiff adduced certain testimony tending to show that the instruments in question were de facto mortgages. The theory seems to have been that the bank officials told Rankin that he could avert foreclosure on Mrs. Brokman's property only by becoming a guarantor of her debt, and that once Rankin understood this, he executed these instruments in order to give him a security interest in the property.

The complaint did not contain any allegation that the instruments were de facto mortgages. Nevertheless, the chancellor, hoping to reach an equitable result, announced that Rule 15(b), Mississippi Rules of Civil Procedure, empowered him to consider the matter as one actually tried during the proceeding. Accordingly, he found that the instruments were indeed mortgages, operating only to give Rankin a security interest in the property.

While we fully sympathize with the chancellor's aim, we believe that he misinterpreted Rule 15(b). The relevant part of the rule states that "when issues not raised by the pleadings are tried by express or implied consent of the parties, they should be treated in all respects as if they had been raised in the pleadings."

The record in the present case presents one insuperable obstacle to the application of Rule 15(b). Although the mortgage issues were indeed tried, they were not tried by consent of the parties, as the rule requires. On the contrary, counsel for the defense strongly objected to these issues being raised. The cases are firm that Rule 15(b) has no application if issues are brought in over the objection of a party. E.g., Johnson v. Franklin, 481 So.2d 812, 815, (Miss.1985); Domar Ocean Transports, Ltd. v. Independent Refining Co., 783 F.2d 1185, 1188-89 (5th Cir.1986); Hay v. Nance, 119 F.Supp. 763, 770 (D.Alaska 1954). Therefore, the chancellor erred in allowing such testimony without timely amendment of the pleadings as well as in considering such evidence in framing his decree.

[2] We are also of the opinion that he erred in not granting a motion to dismiss for Rankin on the issue of fraud. The elements of a prima facie case of fraud in Mississippi were set forth by this Court in Franklin v. Lovitt Equipment Co., Inc., 420 So.2d 1370 (Miss.1982), which said:

> In order to establish fraud, the plaintiff must prove (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury.

420 So.2d at 1373.

There was no evidence that Johnny Rankin made any representation to Mrs. Brokman about the contents of the paper she signed. In fact, Mrs. Brokman flatly admitted the contrary. This does not end the inquiry. The omission or concealment of material facts can constitute a misrepresentation. But in such a case, this Court has held that:

> [I]n order to recover damages for fraudulent concealment [the plaintiff] must demonstrate [that the defendant] took some action, affirmative in nature, which was designed or intended to prevent and which did prevent the discovery of the facts giving rise to the fraud claim. Davidson v. Rogers, 431 So.2d 483, 485 (Miss.1983).

In the present case, Rankin took no such steps, or if he did, there was no evidence of them. On the contrary, the faces of the *647 instruments declared them to be a warranty deed and a bill of sale, and Mrs. Brokman admitted on the stand that she could read.

In view of the total failure of proof as to the existence of a representation (a necessary element of fraud), it is clear that the plaintiff failed to make out a prima facie case of fraud--even a "weak" one. Therefore, the chancellor should have granted a motion to dismiss for Rankin.

The chancellor's decree must therefore be reversed, and judgment rendered for Rankin on the original complaint.

REVERSED AND RENDERED.

C. Bill of Exceptions

Shaw v. State, 195 So. 581 (Miss. 1940

McGEHEE, Justice.

The appellant was convicted in the Circuit Court of Montgomery county on an indictment charging him with assault and battery with intent to kill and murder, and sentenced to serve a term of five years in the state penitentiary. No complaint is made that the proof fails to sustain the verdict and judgment appealed from, but a reversal is sought on the ground of improper argument made to the jury by the district attorney.

[1][2] The alleged improper argument is shown by means of a motion dictated into the record by appellant's counsel, instead of the remark being taken down by the Court Reporter and incorporated in a general bill of exceptions, or shown by a special bill of exceptions taken in some of the ways authorized by law. The argument complained of is not therefore before us for review. Powers v. State, 83 Miss. 691, 36 So. 6; Keeton v. State, 102 Miss. 747, 59 So. 884; Huggins v. State, 103 Miss. 227, 60 So. 209; and Brumfield v. State, 102 Miss. 610, 59 So. 849, 921. We set forth the remarks alleged to have been made only in order that we may make the observation again that trial courts should never permit counsel in any case to make an argument calculated to dispute the correctness of the instructions given as to the law by which a jury is to be guided in its deliberations.

The motion above referred to alleges that the district attorney stated in closing his argument that: "These instructions are sugar coated; they were prepared to mislead the jury; they are telling you one thing when the law is another; and it is always evidence of a defendant's weak case when he procures from the court a lot of instructions." These alleged remarks were objected to, the objection sustained, and the jury was told by the court that the instructions given for the defendant were the law as given by the court. We do not have the benefit of the trial judge's version of what language was actually employed by the district attorney on the occasion in question, nor the said officer's own version of the incident. A special bill of exceptions, duly approved and signed by the judge, where the language complained of was not taken down by the reporter and made the basis of a general exception, would serve to reflect his assent to the correctness of the statements set forth therein as grounds for exception, after giving due consideration to the respective contentions in regard thereto.

[3][4] Since a motion is at issue without further pleading, the averments thereof do not amount to any proof of the facts stated therein, Reed v. State, 143 Miss. 686, 109 So. 715; Young v. State, 150 Miss. 787, 117 So. 119. Therefore, we cannot predicate reversible error on the complaint here *582 made as to the alleged argument, even though we should deem it prejudicial error if embodied in a bill of exceptions, so as to be reviewable. Therefore, we think it sufficient to say that the remarks attributed by the motion to the prosecuting officer, if made as stated therein, were highly improper and should not be indulged in under any circumstances. However, in view of the fact that this record discloses that the trial judge promptly took issue with whatever argument was then being made in regard to the instructions, by telling the jury that they correctly stated the law, it was equivalent to an instruction for the jury to disregard the argument; and hence no error was committed in overruling the motion for a mistrial.

Affirmed.

[Note: Making such matters a part of the record for purposes of appeal is now handled under MRAP 10(c)(e).]

D. Sanctions

Vicksburg Refining, Inc. v. Energy Resources, Ltd., 512 So.2d 901 (Miss. 1987)

ROY NOBLE LEE, Presiding Justice, for the Court:

[1] Vicksburg Refining, Inc. (VRI) appeals from an order of the Circuit Court of Warren County imposing two hundred twenty-one dollars ($221.00) in sanctions upon its attorney for abuse of court processes. We affirm.

On March 24, 1986, a judgment was entered against VRI in favor of appellees in the Court of Common Pleas of Portage County, Ohio. That judgment was enrolled in the Circuit Court of Warren County on April 8, 1986. On May 7, 1986, appellees successfully moved for examination of judgment debtor, and the examination was scheduled in Vicksburg for May 23. Sometime before May 19 (the date does not appear in the record), the appellants moved in Ohio for a new trial or for judgment notwithstanding the verdict on the ground of fraud or misrepresentation. On May 19, appellant filed with the Warren County Circuit Clerk a motion to abate the examination of judgment debtor, noticing the motion to be heard at the same time and on the same date as the scheduled examination of judgment debtor.

Unfortunately, appellant's attorney failed to contact the court to ascertain that the judge could hear the motion at the noticed time, assuming that the judge would be present for the examination of judgment debtor. When the attorneys arrived at the courthouse for the motion, appellant's attorney discovered that the circuit judge would not be present and that the examination would be conducted like a deposition.

By telephone the judge continued the examination and scheduled a hearing on the motion to abate for a later date. On motion of appellees, the judge sanctioned appellant's attorney two hundred dollars ($200.00) in attorney fees and twenty-one dollars ($21.00) in travel expense due to his failure to notice and schedule the motion properly.

Appellant argues that sanctions are inappropriate because counsel did not act in bad faith, was not dilatory, did not disobey a court order or otherwise abuse the discovery process. Miss.R.Civ.P. 37.

[2] Not only may willful and intentional conduct be sanctioned, but courts have the inherent power to impose sanctions "to protect the integrity of their processes." Ladner v. Ladner, 436 So.2d 1366, 1370 (Miss.1983). When counsel's carelessness causes his opponent to expend time and money needlessly, it is not an abuse of discretion for the court to require offending counsel to pay for his mistake, especially where, as here, out-of-town travel was involved.

Therefore, the sanctions imposed below are affirmed.

AFFIRMED.

E. Motion for Mistrial

Selleck v. S.F. Cockrell Trucking, Inc., 517 So.2d 558 (Miss. 1987)

ZUCCARO, Justice, for the Court:

On July 12, 1983, Ruth Selleck, on behalf of two (2) surviving children of Walter Henry Selleck, deceased, filed suit against S.F. Cockrell Trucking, Inc. (Cockrell) in the Circuit Court of Jefferson Davis County. After the jury returned a verdict for Cockrell, the trial court granted Selleck's motion for a new trial. Thereafter, Charles Selleck replaced Ruth Selleck as the named plaintiff representing the children of the deceased, and a third child of *559 the deceased was added as a survivor. At the conclusion of the second trial on the merits, the jury returned a verdict in favor of Cockrell. From judgment entered pursuant to that verdict, Selleck appeals.

FACTS

Ize Collins was a truck driver for S.F. Cockrell Trucking, Inc. On June 9, 1983, Collins was hauling saw dust and bark from Silver Creek, Mississippi, to Bogalusa, Louisiana. Collins, whose pay was based on the number of loads hauled, had already made two (2) trips to Bogalusa that day and was returning to Silver Creek to pick up a third load. At approximately 12:30 p.m., Collins was driving his eighteen-wheel tractor-trailer north on Highway 13 between Columbia, Mississippi, and Prentiss, Mississippi. A Volkswagen "bug" driven by Walter Selleck was in front of Collins on the two-lane road. According to Collins, the Volkswagen was traveling between 40 and 45 miles per hour. Collins moved into the left lane to pass the Volkswagen. According to Collins' testimony, just as he was moving into the left lane, the Volkswagen moved over into the left lane without giving any turn signal. Collins skidded and then the right (passenger side) front of his truck struck the driver's door of the Volkswagen. After the collision, the truck was partly off the left shoulder of the road and partly in the left lane. The Volkswagen was straddling the center line. Walter Selleck died from injuries received in the collision.

The evidence is conflicting as to 1) the speed at which Collins was driving, and 2) the manner in which Selleck's Volkswagen moved into the left lane. Immediately after the collision, Collins told Mississippi State Trooper Jerry Kilpatrick that his speedometer read 57 miles per hour at the moment he hit his brakes and began skidding. The speed limit on Highway 13 at that time was 55 miles per hour. At trial, however, Collins admitted on cross-examination that his speedometer was "off some," although he did not know how much. There is no indication in Collins' testimony or elsewhere in the record as to whether the speedometer was "off" high or "off" low. Selleck's expert witness was William Eugene Hughes, Ph.D. physicist. Based on his tests and measurements of the skid marks, the gouges in the pavement, the length of the truck, the grade of the highway's slope, and the coefficient of friction, Hughes testified that in his opinion the minimum speed of Collins' truck at the time it began leaving skid marks was 72 miles per hour.

As to the manner in which the Volkswagen moved into the left lane, Collins claimed that the car moved without giving a signal and that he did not know whether the car was turning left. Selleck's expert Hughes testified that, in his opinion, the Volkswagen was making a left turn as it was struck. There was, at the point of the collision, a store on the left side of the highway, although testimony indicated that it was closed and was overgrown with weeds.

Ruth Selleck Dyess, ex-wife of the deceased, filed a wrongful death suit on behalf of two (2) of Walter Selleck's surviving children. She alleged, inter alia, that Collins had been speeding and had failed to keep a proper lookout, and that Cockrell had negligently entrusted the truck to Collins. At the conclusion of the first trial, the jury returned a verdict for Cockrell, but the trial court granted Selleck's motion for a new trial.

Between the first and second trials, Walter Selleck's brother Charles replaced Ruth as the plaintiff representing the children. Also, a third child of the deceased was named as a survivor.

The second jury also returned a verdict in favor of Cockrell. From that verdict Selleck appeals assigning six (6) errors. Because one (1) is dispositive, we need not address the others.

DID THE TRIAL COURT ERR IN NOT DECLARING A MISTRIAL BECAUSE OF MISCONDUCT ON THE PART OF COCKRELL?

[1] On the third day of the trial, S.F. Cockrell, owner of the defendant/appellee S.F. Cockrell Trucking, Inc., went into the jury room and conversed with jurors for *560 ten or 15 minutes. With other jurors present he spoke with Mrs. Jones, a juror, about church, her uncle, and biscuits. Then Cockrell told Hall, a juror who was by profession a concrete finisher, that he (Cockrell) needed some work done on his driveway and that he would like Hall to do the work. When this conversation was brought to the attention of the trial court, the judge offered to grant plaintiff Selleck a mistrial. After consulting with his client regarding the trial court's offer, plaintiff's counsel stated the following:

> It's just economically impossible to pay all these expenses again. We're just going to have to take the position that, even though three little children are involved, there's just not any money here to finance a third trial, and if we can't recover some of our expenses,--I've got approximately--with Dr. Hughes's second day here, I've probably got in the range of $2500 in actual expenses in this trial. I'd have to go calculate it, and just under the-- under the economics of the thing, we've got to go ahead for a conclusion, if we possibly can.

Seldom has this Court encountered such a blatant attempt to influence a juror. We find it difficult to believe that Cockrell did not know the impropriety of offering employment to a juror during the trial. We would be remiss in our duty to administer justice if we allowed such misconduct to go unsanctioned. In Great American Surplus Lines, Inc. v. Dawson, 468 So.2d 87 (Miss.1985), we reversed because material witnesses had talked and laughed with jurors during the trial. There we stated that "whatever tends to threaten public confidence in the fairness of jury trials, tends to threaten one of our sacred legal institutions." Id. at 90.

Cockrell argues that Selleck waived this issue when, through counsel, he affirmatively stated that he did not want the circuit court to declare a mistrial. We note, however, that Selleck's counsel stated that his client could not afford a third trial unless he could "recover some of [his] expenses" for the second trial, which he estimated to be $2,500.00. What occurred in the case at bar was an attempt to influence a juror by offering him employment. The only relief which the trial court offered Selleck was a mistrial with a $2,500.00 price tag attached. Thus, Cockrell's intentional, inexcusable conduct put Selleck between a rock and a hard place: he could let his case go to a tainted jury, or he could lose the $2,500.00 expended so far and still have no verdict. The trial court should not, nor should we, stand by and allow a wrong-doer like Cockrell to force such a choice.

[2] In Ladner v. Ladner, 436 So.2d 1366, 1370 (Miss.1983), we held that even where there is no specific statutory authority for imposing sanctions, courts have an inherent power to protect the integrity of their processes, and may impose sanctions in order to do so. More recently, in Vicksburg Refining, Inc. v. Energy Resources Ltd., 512 So.2d 901 (Miss.1987), we held that "[w]hen counsel's carelessness causes his opponent to expend time and money needlessly, it is not an abuse of discretion for the court to require offending counsel to pay for his mistake, especially where ... out-of-town travel was involved." Id. at 902. In the case at bar, we conclude that where a party's intentional misconduct causes the opposing party to expend time and money needlessly, then attorney's fees and expenses should be awarded to the wronged party. Although not all misconduct would warrant such an award, Aeroglide Corporation v. Whitehead, 433 So.2d 952 (Miss.1983), Cockrell's blatant attempt to influence a juror requires this sanction. Therefore, the judgment is reversed and the cause remanded for the trial court to 1) conduct a new trial and 2) award Selleck attorney's fees and reasonable expenses for the second trial, including the expense resulting from the presence of the expert witnesses.

REVERSED AND REMANDED.

F. Motion for Continuance

Viverett v. State, 269 So.2d 862 (Miss. 1972)

*863 BRADY, Justice:

This is an appeal from the Circuit Court of Scott County, Mississippi, wherein the appellant was found guilty of breaking and entering with felonious intent to rape or ravish a young girl. From a verdict of guilty and a judgment based thereon sentencing the appellant to fifteen years in the state penitentiary at Parchman, Mississippi, this appeal is prosecuted.

* * * *

Affirmed.

GILLESPIE, Chief Justice:

ON PETITION FOR REHEARING

On petition for rehearing the appellant again argues that the court erred in overruling his motion for a continuance. We have carefully reviewed this issue because the court will use all reasonable efforts to see that one accused of a crime has the benefit of all available witnesses, especially if the witness is the defendant's wife.

[4] [5] In this case, counsel for the defendant was appointed on the 8th day of October 1971. No motion for a continuance was filed until ten days later, the day the case came on for trial. Counsel then filed an affidavit that the defendant intended to call his wife as a witness, and while she was not under subpoena, she was hospitalized at the University Hospital in Jackson, and would not be released during the October term, and that counsel had been unable to obtain a statement or affidavit from her because of her physical condition. The affidavit further stated that if she were in court she would contradict the State's main witness in a material manner as set out in the affidavit. Although counsel stated in his affidavit that he could not obtain a statement or affidavit from defendant's wife, he did not reveal *865 the basis of his statement as to what her testimony would be. During the course of the trial, defendant's counsel again renewed his motion without adding any additional information. After the defendant was convicted a motion for a new trial was filed, one of the grounds of which was that the court erred in not granting a continuance. No testimony was offered in support of his motion for a new trial. No explanation was made why an affidavit could not be obtained from defendant's wife. No doctor's certificate was offered that she could not communicate. The Court feels that in view of the frequency with which the question of denying a continuance is raised that attention should be called to the following statement from King v. State, 251 Miss. 161, 168 So.2d 637 (1964):

> If the court declines to grant the continuance he should sue out the proper process for them, and when the case is called from trial should renew his application, make such changes in his affidavit as the conditions then existing require. If the continuance is still refused, he should with unremitting diligence seek to secure their attendance pending the trial by the continued use of the process of the court; if tried and convicted he should still persist in his efforts to enforce their attendance before the expiration of the term, and on his motion for a new trial present them to the court for examination; if, will all of his efforts, he is unable to have the witnesses personally present, he should, if practicable, secure their ex parte affidavits, which should be presented for the consideration of the court, which, on the motion for a new trial, will review the whole case and correct any error prejudicial to the defendant which may appear in any part of the proceeding. (251 Miss. at 171, 168 So.2d at 641).

There is no compliance with the foregoing rule in the present case and no reason given excusing such compliance. We cannot under these circumstances say that the trial court abused its discretion in refusing to grant the continuance.

Petition for rehearing overruled.

G. Summary Judgment

Brown v. Credit Center, Inc., 444 So.2d 358 (Miss. 1983)

Creditor brought action against consumer debtor for repayment of balance due on loan, and the debtor asserted a series of affirmative matters, the essence of which was that creditor had committed various truth in lending disclosure violations. The Circuit Court, Rankin County, Alfred G. Nicols, Jr., J., granted creditor's motion for summary judgment and dismissed debtor's cross motion, and the debtor appealed. The Supreme Court, Robertson, J., held that: (1) undisputed affidavit from creditor's manager that account was due and was unpaid accompanied by account or ledger sheet which was obviously business record entitled creditor to summary judgment; (2) creditor's affidavit in support of summary judgment was not deficient, but even if it was, debtor waived objection to it by failing to raise issue before circuit court; (3) genuine issue of material fact existed as to whether creditor accurately disclosed cost and term of credit life and disability insurance as required by the Truth in Lending Act, precluding summary judgment for creditor on debtor's claim for setoff.

Affirmed in part, reversed in part, and remanded.

ROBERTSON, Justice, for the Court:

* * * *

[1] At no point in the proceedings in the Circuit Court did either party urge that the summary judgment procedure was unavailable *362 because this action was commenced prior to the effective date of the Mississippi Rules of Civil Procedure. Neither party has assigned the point as error on this appeal. Each party has effectively waived any objection it may have had to the Circuit Court's utilization of Rule 56 in the determination of this action.

B.

The heart of our summary judgment procedure is found in Rule 56(c), Miss.R.Civ.P., which provides as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

We need keep clearly in mind what is intended by this rule. The Advisory Committee which assisted in the drafting of our civil rules offers in its Comment several helpful views:

> The motion for a summary judgment challenges the very existence of legal sufficiency of the claim or defense to which it is addressed; in effect, the moving party takes the position that he is entitled to prevail as a matter of law because his opponent has no valid claim for relief or defense to the action, as the case may be.
>
> Rule 56 provides the means by which a party may pierce the allegations in the pleadings and obtain relief by introducing outside evidence showing that there are no fact issues that need to be tried. The rule should operate to prevent the system of extremely simple pleadings from shielding claimants without real claims or defendants without real defenses....
>
> A motion for summary judgment lies only where there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried. [Emphasis added]

[2] The argument that there exists no genuine triable issue of material fact is the functional equivalent of a request for a peremptory instruction. It merely occurs at an earlier stage in the life of a civil action. The trial court must review carefully all of the evidentiary matters before it-- admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If in this view the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be

entered in his favor. Otherwise the motion should be denied. Compare generally, Paymaster Oil Mill Co. v. Mitchell, 319 So.2d 652, 657 (Miss.1975); City of Jackson v. Locklar, 431 So.2d 475, 478-479 (Miss.1983).

[3] Trial judges must be sensitive to the notion that summary judgment may never be granted in derogation of a party's constitutional right to trial by jury. Miss. Const. art. 3, § 31 (1890). On the other hand, there is no violation of the right of trial by jury when judgment is entered summarily in cases where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. There is no right of trial by jury in such cases.

[4] Federal cases suggest that the burden is on the moving party to establish that there is no genuine issue of fact, although this burden is one of persuasion, not of proof. When doubt exists whether there is a fact issue, the non-moving party gets its benefit. Indeed, the party against whom the summary judgment has been sought should be given the benefit of every reasonable doubt. Liberty Leasing Co. v. Hillsum Sales Corporation, 380 F.2d 1013, 1015 (5th Cir.1967); Heyward v. Public Housing Administration, 238 F.2d 689, 696 (5th Cir.1956).

We recognize that reasonable minds may often differ on the question of whether *363 there is a genuine issue of material fact. In this context we find appropriate the admonition in a leading commentary on Federal Rule 56:

> If there is to be error at the trial level it should be in denying summary judgment and in favor of a full live trial. And the problem of overcrowded calendars is not to be solved by summary disposition of issues of fact fairly presented in an action. 6 Moore's Federal Practice § 56.15[1.-2] p. 56-435 (1982).

Because of the disposition we make of this case, we note that partial summary judgments are available under our procedure. Rule 56(d), Miss.R.Civ.P., provides:

> (d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered on the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

The various parameters of this aspect of our summary judgment procedure have been fleshed out in discussions of the comparable federal procedure. 10A Wright & Miller, Federal Practice and Procedure §§ 2736-2737 (1983); Moore's Federal Practice §§ 56.20 et seq. (1982). Partial summary judgments when granted have the effect of removing from trial issues that ought not be there. The courts and the litigants are thus freed to concentrate on the real to the exclusion of the pretended.

[5] Summary judgments, in whole or in part, should be granted with great caution. Notwithstanding, as every lawyer knows, there are many cases reaching the dockets of our courts where there are no genuine fact issues. Rule 56 provides a viable and just vehicle for the adjudication of such cases.

Another word of caution. We have held that each party by filing a motion for summary judgment has consented to the enforceability of Rule 56 in this case. The fact that cross-motions for summary judgment have been filed, however, does not without more empower the court to dispense with trial and enter judgment summarily. Construing comparable Federal Rule 56, the United States Court of Appeals for the Third Circuit in Rains v. Cascade Industries, Inc., 402 F.2d 241 (3d Cir.1968), explained:

> Cross-motions are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of material fact exist. If any such issue exists it must be disposed of by a plenary trial and not on summary judgment. 402 F.2d at 245.

See also, 10A Wright & Miller, Federal Practice and Procedure § 2720 (1983). The same may be said of our summary judgment procedure.

IV.

A.

In this case the merits of Credit Center's claim on its underlying debt as well as Brown's Truth In Lending defense were both adjudged via summary judgment. We will consider first the claim on the debt.

On this appeal, Brown urges that summary judgment was improper for two reasons. First, Brown argues that there were indeed genuine issues of material fact with respect to the underlying debt. Second, Brown urges that the affidavits filed by *364 Credit Center fail to comply with the procedural requisites of Rule 56(e).

1.

Brown insists that, with respect to Credit Center's claim on the February 22, 1978, note for the outstanding balance of $268.60, there are genuine issues of material fact. What those issues are, however, we know not. Those issues have certainly not been disclosed by Brown. In pleadings she has admitted signing the note. At no point has she intimated payment in full.

[6] [7] Our search of the record reflects only a denial by Brown that the debt is due. She has effectively stonewalled for over four years, during which time she has offered no affidavit or other evidentiary material explaining why the debt is not owing. Except for her Truth In Lending argument, she offers no reason in law why the debt is not due and why judgment ought not be entered against her thereon. She is merely putting off the evil day of payment as long as possible.

Rule 56(e) provides that:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Brown's response to Credit Center's motion is woefully inadequate. It amounts to a simple denial. The unmistakable language of the rule provides that mere denial is insufficient to create an issue of fact. See Union Planters National Leasing, Inc. v. Woods, 687 F.2d 117, 119 (5th Cir.1982); Ferguson v. National Broadcasting Co., Inc., 584 F.2d 111, 114 (5th Cir.1978); Liberty Leasing Co. v. Hillsum Sales Corp., 380 F.2d 1013 (5th Cir.1967). [FN1] This is true whether the denial be in pleadings, briefs or arguments. Only sworn denials providing a credible basis therefor in evidentiary fact will suffice.

> FN1. We observe here in relevant part the wording of our Rule 56 is identical to the wording of Rule 56 of the Federal Rules of Civil Procedure. Accordingly, we regard authoritative constructions of Federal Rule 56 as persuasive of what our construction of our rule ought to be. As the author of this opinion has urged in another rules context there is much to be said for uniformity in interpreting the identical language of the federal and Mississippi versions [of Rules of Civil Procedure]. A disparity in interpretation would inevitably lead to forum shopping, which has been a perceived evil for at least half a century. Robertson, Joinder of Claims and Parties--Rule 13, 14, 17 and 18, 53 Miss.L.J. 37, 63 (1982).

[8] [9] Our Rule 56 mandates that the party opposing the motion be diligent. "Mere general allegations which do not reveal detailed and precise facts will not prevent the award of summary judgment." Liberty Leasing Co. v. Hillsum Sales Corporation, 380 F.2d 1013, 1015 (5th Cir.1967). The party opposing the motion is required to bring forward significant probative evidence demonstrating the existence of the triable issue of fact. Union Planters National Leasing, Inc. v. Woods, 687 F.2d 117, 119 (5th Cir.1982). This Carolyn L. Brown has wholly failed to do.

2.

Credit Center is not permitted to rest exclusively on the weakness of Brown's response. To be sure, Brown has failed to create a genuine issue of material fact. [FN2] Before we can affirm the summary judgment, however, we must ascertain that the strength of Credit Center's showing is such that it is entitled to judgment as a matter of law.

> FN2. In Brown's cross motion for summary judgment, Brown stated, "Defendant (Brown) would show unto the court that there is no genuine issue as to any material fact based upon the affidavits of the Plaintiff [Credit Center] and the Plaintiff's motion for summary judgment...."

In support of its motion, Credit Center filed the affidavit of William Edward Scott, Manager of Credit Center in Pearl, Mississippi. This affidavit traced the history of *365 the Brown loan and then stated in pertinent part:

> Two hundred sixty-eight and sixty one hundredths dollars ($268.60) of Brown's loan is still outstanding. A true and correct copy of Brown's ledger sheet is attached hereto as Exhibit "3".

The attached ledger sheet then reflects Brown's payment record. It reflects that Brown fell repeatedly in arrears, so that the installment payment due March 5, 1979, was not in fact paid until August 24, 1979, at which time there was an outstanding balance of $268.60.

[10] We hold that in an open account or collection suit where the creditor has filed a motion for summary judgment, an undisputed affidavit from the creditor's manager that the account is due and is unpaid where accompanied by the account or ledger sheet which is obviously a business record, entitles the creditor to summary judgment. [FN3]

> FN3. This is essentially the practice we have followed in Mississippi for years under our open account statute entitling a creditor to judgment where he files an affidavit as to the correctness of an account. Miss.Code § 13-1-141 (Supp.1982). See also, Olympic Insurance Company v. Harrison, Inc., 418 F.2d 669 (5th Cir.1969).

[11] The affidavit of William Edward Scott establishes the amount of the debt, that it is unpaid, and that it is now due and payable--in fact, payment is well overdue. The attached account ledger adds great credibility to Credit Center's claim. In view of Brown's feeble denials, we hold the Scott affidavit and attached ledger adequate to undergird a valid summary judgment.

B.

[12] Its contents aside, Brown charges that there are fatal formal deficiencies in the Scott affidavit. She seems to be fussing about the fact that Scott has no personal knowledge of the inception of the disputed loan. True, the loan was made on February 22, 1978. Scott became Credit Center's Pearl Manager some nine months later in November of 1978 and has served there continuously since that time. We have no doubt of Scott's power, sufficient unto this day, to make an affidavit describing the account and attaching his company's ledger sheet, surely a business record.

[13] We regard it as important that this issue was not tendered to the Circuit Court. Where the party against whom a motion for summary judgment is made wishes to attack one or more of the affidavits upon which the motion is based, he must file in the trial court a motion to strike the affidavit. This point is made clear by Wright and Miller in their discussion of identical Federal Rule 56(e):

> A party must move to strike an affidavit that violates Rule 56(e); if he fails to do so, he will waive his objection and, in the absence of "a gross miscarriage of justice," the court may consider the defective affidavit. 10 Wright & Miller, Federal Practice and Procedure § 2738 pp. 507-509 (1973).

[14] We in no way suggest that the Scott affidavit was deficient. Even if it was, Brown filed no motion to strike in the Circuit Court. Before the Circuit Court Brown in no way suggested any unhappiness with the form of the Scott affidavit.

The point is made in Auto Drive-Away Company of Hialeah, Inc. v. Interstate Commerce Commission, 360 F.2d 446 (5th Cir.1966). There the Court of Appeals held that an objection to the use of an affidavit and exhibits thereto could not be raised for the first time on appeal. The court held:

An affidavit that does not measure up to the standards of Rule 56(e) is subject to a timely motion or other objection, formal defects in the affidavit ordinarily are waived. 360 F.2d at 448-449.

Under the circumstances, we hold that Scott's affidavit was sufficient to undergird Credit Center's motion for summary judgment and to establish that, on the underlying claim of debt, Credit Center is entitled to judgment as a matter of law.

V.

A.

We turn now to Brown's affirmative defense in the nature of a set-off. Brown claims that Credit Center failed to disclose the cost and term of credit and disability insurance as required by the Truth In Lending Act, 15 U.S.C. § 1605(c) and by Federal Reserve Regulation Z, 12 C.F.R. §§ 226.4(b)(7), 226.4(c)(8), and 226.18(n). If she can establish this proposition on the merits, Brown is entitled to recover from Credit Center an amount equal to at least twice the finance charge. 15 U.S.C. § 1640(a)(2)(A)(i).

[15] Our immediate question, however, concerns the propriety of the Circuit Judge's dismissal of Brown's Truth In Lending set-off via summary judgment. For the reasons explained below, we regard this as an issue which, in the context of the record we have before us, ought not to have been decided summarily. In our view there is a genuine issue of material fact whether Credit Center accurately disclosed the cost and term of credit life and disability insurance as required by the Truth In Lending Act and by Regulation Z.

B.

[16] [17] The Truth In Lending Act is an enactment of the Congress of the United States. Pub.L. 96-221, 94 Stat. 170. The courts of this state exercise concurrent jurisdiction with federal courts in the enforcement of federally created rights. In the absence of the federal statute expressly providing for exclusive jurisdiction in the federal courts, e.g., International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, Local Union 710 v. Howard L. Byrd Building Service, Inc., 284 So.2d 301, 303 (Miss.1973), our courts are not free to refuse jurisdiction over claims based on rights created by the Constitution and laws of the United States. Such is the command of the Supremacy Clause of our Federal Constitution. Art. VI, § 2. If the ordinary jurisdiction of a court of this state is adequate to the case, that court must accept jurisdiction and proceed to enforce federally created rights. Lewis v. Delta Loans, Inc., 300 So.2d 142, 144-145 (Miss.1974).

The Truth In Lending Act was first enacted in 1968. It is one of those federal enactments which is subject to the regime of concurrent federal and state jurisdiction. This Court has on several occasions recognized that Truth In Lending claims and defenses are well within the competence of our courts. See, e.g., Lewis v. Delta Loans, Inc., 300 So.2d 142 (Miss.1974); Ray v. Acme Finance Corp., 367 So.2d 186, 188 (Miss.1979).

C.

[18] The Truth In Lending Act allows a creditor to exclude the cost of insurance from the finance charge if the cost of insurance is disclosed. 15 U.S.C. § 1605(c); 12 C.F.R. § 226.18(n). Credit Center apparently so elected in the case at bar. When the term of the insurance coverage is less than the term of the loan, however, in addition to the disclosure of the cost of the insurance, Regulation Z has been interpreted to require disclosure of the term of the insurance. Reneau v. Mossy Motors, 622 F.2d 192, 194-195 (5th Cir.1980); Philbeck v. Timmers Chevrolet, Inc., 499 F.2d 971, 978 (5th Cir.1974). [FN4]

FN4. In the construction of a statutory enactment of the Congress of the United States, we give great weight and deference to the interpretations of the United States Court of Appeals for the Fifth Circuit, just as that Court respects our interpretations of enactments of the Legislature of the State of Mississippi. See Jordan v. Watkins, 681 F.2d 1067, 1077-1078 (5th Cir.1982); Bell v. Watkins, 692 F.2d 999, 1010 (5th Cir.1982).

The uncontroverted facts of this case reflect that incident to her loan Brown elected to purchase through Credit Center credit life and disability insurance. The premiums for Brown's insurance are listed on the Disclosure

Statement presented to her and signed by her. Those premiums, as we understand the matter, were not included in the finance charge. The Disclosure Statement advises her that the insurance *367 coverage lasts for the term of the loan.

The problem is that from the record before us, we cannot ascertain with confidence the termination date of the insurance policy. The record before us is inconclusive as to whether the policy of credit life and disability insurance issued by Old Colony Life Insurance Company terminated on April 5, 1978, or September 5, 1978. The best evidence of all--the insurance policy itself--is not before us, nor was it before the Circuit Court. We are therefore unable to look into the horse's mouth and see exactly how many teeth he has, though surely the horse is available and ought to have been produced for such inspection.

Brown points to the insurance application which was prepared by Credit Center. It reflects an insurance termination date of April 5, 1978. It seems likely that the actual policy contains the same termination date as the application. That possibility has not been excluded by anything Credit Center has filed. If in fact the termination date of the insurance was April 5, 1978, then the term of insurance was less than the loan and it is likely that there has been a violation of the disclosure requirements of the Truth In Lending Act. See Reneau v. Mossy Motors, 622 F.2d 192, 194-195 (5th Cir.1980); Philbeck v. Timmers Chevrolet, Inc., 499 F.2d 971, 978 (5th Cir.1974).

Credit Center supported its motion for summary judgment on this point with an affidavit from John E. Gough, Vice President of Old Colony Life Insurance Company. The Gough affidavit explains that, in Gough's opinion, the premiums charged as reflected on the company's records match those that would have been charged if the insurance coverage had been designed to remain effective through the full term of the loan. Gough further offers his conclusory opinion that "Brown's insurance coverage was effective for the full term of her loan, from February 22, 1978, through September 5, 1979".

Applying the considerations outlined in Section II(B) above, we cannot say with confidence that there is here no issue requiring trial. We repeat and emphasize that we do not have before us the actual policy. Based upon a careful consideration of the affidavits and documents in evidence before us, we consider it entirely possible that at trial Brown might be able to marshall credible evidence that would carry the day before the trier of the fact. Certainly nothing in the record before us excludes that possibility.

[19] There is another reason why summary judgment is peculiarly inappropriate on this issue. All of the proof regarding the term and termination date of the policy is within the exclusive possession and control of Credit Center, Inc. and Old Colony Life Insurance Company. Insofar as we have been advised, no credit insurance policy was ever delivered to Brown. Where this type summary judgment issue is before the court, even greater caution should be exercised, lest a viable issue be precluded from trial. By way of contrast, on the claim of Credit Center on the underlying debt, it is within our common sense that any defense Brown may have would likely be within her own personal knowledge or easily accessible to her. When she has failed to come forth with any credible defense, we do not hesitate to affirm summary judgment. Here, however, Brown's practical access to information is considerably less.

In the final analysis, we view this issue as we did that regarding the underlying debt. See Section IV(A) above. When Brown points to the policy application, she places before us what is some evidence that the policy termination date was April 5, 1979. That suggests a fact issue. Contrast Section IV(A)(1) above. Even though Brown had tendered nothing intimating a fact issue, we would have to consider the strength of Credit Center's showing. When we look for such strength, we find weakness. Credit Center has failed to produce the policy. The Gough affidavit is conclusory only on the termination date issue. Beyond that, it is obviously based on information and belief. Contrast Section *368 IV(A)(2) above. The summary judgment on this issue should have been denied.

D.

In reversing the summary judgment granted on the Truth In Lending issue, we need to make clear what we are not holding. First, we are not holding that Credit Center has committed a violation of the Truth In Lending Act. This is an issue for plenary trial in the Circuit Court.

Second, we do not hold that, at trial Credit Center will not be entitled, first, to a directed verdict, or, ultimately, the granting of a peremptory instruction. Credit Center here insists strenuously that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law on the Truth In Lending set-off claim. If at the close of Brown's

evidence, the proof is in that posture, Credit Center has available to it the directed verdict procedure as in other cases. See Rule 50(a), Miss.R.Civ.P.

Finally, we note that Credit Center has asserted an alternative position. Credit Center argues that, even if there has been a technical violation of the disclosure requirements of the Truth In Lending Act, such was a mere typographical error within the bona fide error exception to Truth In Lending liability found in 15 U.S.C. § 1640(c). As indicated, in no way do we pass upon the question of whether there was an error in disclosure in the first place. Accordingly, we leave open for trial whether the disclosure error, if any, falls within the bona fide error exception to liability under the Act.

VI.

In conclusion, on the authority of Rule 56(d), Miss.R.Civ.P., we affirm so much of the summary judgment entered below as adjudges that Carolyn L. Brown is liable to Credit Center, Inc. in the amount of $268.60, plus interest and attorney's fees. All issues regarding Credit Center's claim on the underlying debt have now been finally decided and are foreclosed.

We remand for a plenary trial on the Truth In Lending issue tendered by Brown by way of set-off.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED FOR TRIAL.

K. Motion to Reopen

Nelson v. Home Ins. Co., 353 So.2d 763 (Miss. 1977)

ROBERTSON, Justice for the Court.

Robert Nelson brought suit on a contract of insurance against the Home Insurance Company in the County Court of the First Judicial District of Hinds County, Mississippi, to recover the value of two guns allegedly stolen from him.

After Nelson rested, Home moved for a directed verdict, which motion was sustained by the county court. The court based its decision on Nelson's failure to prove the actual value of the two guns at the time of the theft. Before the court ruled on the motion, Nelson moved to reopen for the purpose of proving the actual value of the two guns stolen.

The county court overruled plaintiff's motion to reopen. Nelson appealed to the circuit court, which affirmed the judgment of the county court.

Nelson appeals, assigning as error:

(1) The trial court erred in denying the Appellant's motion to reopen for the limited purpose of establishing the value of the chattels in question as of the date of their theft.

(2) The trial court erred in sustaining the Appellee's motion for a directed verdict.

Accompanied by Frank Schlosser Jr. and Paschal Townsend, Nelson flew to Chicago on March 21, 1975, on a business-pleasure trip. He rented a two-door Ford Granada. On March 23rd, after participating in a gun-shooting contest and eating supper thereafter, the three of them returned to their motel room about 11:00 p.m. The testimony of Nelson, Schlosser and Townsend was that the two doors of the car were locked. Nelson left his two-gun case containing a Winchester Model 21, Custom Grade, Double Barrel Shotgun, and an Aproxy (Perazzi) MX8 over-under Trap Gun, made in Italy, on the floorboard of the car between the front and back seats.

About 8:30 the next morning, when they went out to the car, Schlosser noticed that the right door was unlocked and the guns were missing. While the right door was unlocked the left door was still locked.

The police were called and one policeman came out to investigate. The investigating officer commented that he could find no evidence of forcible entry.

The only evidence of forcible entry discovered by Nelson, Schlosser and Townsend was a scratch on the rubber trim around the window of the door. One witness testified that this scratch was on the trim around the left door, another that it was on the trim around the right door.

*765 When Nelson returned to Jackson, he notified Home Insurance Company of his loss. Home denied liability because the police report listed no visible evidence of forcible entry as required by the following provision of the insurance policy:

> "3. THIS POLICY DOES NOT INSURE AGAINST:
> (d) Loss or damage caused by theft or pilferage of the insured property while left unattended in or on any automobile unless such automobile is equipped with a fully enclosed body or compartment, and the loss be a direct result of violence or forcible entry (of which there shall be visible evidence) from a fully enclosed body, the doors and windows of which shall have been securely locked, or from a compartment which shall have been securely locked;" (Emphasis added).

At the trial on March 16, 1976, Nelson testified that he had paid $2600 for the Winchester Model 21, but that the list price today was around $3750. He testified that he paid $1400 for the Italian gun, but that the replacement cost today was $1995.

As to value of the property lost or stolen, the policy provided:

> "4. Valuation. The Company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs and the loss or damage shall be ascertained or estimated according to such actual cash value with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost to repair or replace the same with material of like kind and quality." (Emphasis added).

There was no testimony as to "the actual cash value" of these two guns "at the time" they were stolen.
Home's motion for a directed verdict was based on these two grounds:
(1) That there was no visible evidence of forcible or violent entry, and
(2) That there was no evidence of the actual cash value of the guns at the time of the loss.

The court, in ruling on the motion for a directed verdict, stated that he was not concerned with the lack of evidence of forcible entry because "they (thieves) are so professional they can just barely touch an automobile and get in it". We are inclined to agree with this observation of the lower court.

The court further commented: "My only concern right now is whether or not counsel may reopen". The court then overruled plaintiff's motion to reopen for the limited purpose of establishing the value of the guns at the time of the theft and sustained the motion for a directed verdict on the ground that the actual cash value at the time of the loss had not been proved.

We think the county court was in error in overruling the plaintiff's motion to reopen his case for the limited purpose of proving the actual cash value of the guns at the time of the theft.

In Marshall v. Oliver Electric Manufacturing Company, 235 So.2d 244 (Miss.1970), this Court said: "As a general rule, even in formal hearings in a regular trial court, the reopening of a case for the
purpose of showing facts vital to the issue involved, is liberally allowed by the trial judge and a
failure to do so may be considered an abuse of judicial discretion. (Emphasis added).

"In the case of Moreland v. Newberger Cotton Co., 94 Miss. 572, 48 So. 187, this Court said: 'In this state of the record we are forced to conclude that the learned judge should have permitted plaintiff, even after argument, to reopen his case and prove, if he could, the non-existence of the custom as to payment, upon the existence of which defendant's whole case rested. The peremptory instruction can be justified only upon the idea that there was no conflict in the testimony, and the plaintiff ought to have been permitted, we think, though the application was out of time, to go before the court and jury upon all the facts of his case. The right *766 of the cause demanded it in this particular case, and we think that the discretion of the court in this particular was not properly exercised.'

"In the case of F. W. Woolworth Company v. Freeman, 193 Miss. 838, 11 So.2d 447, this Court said: 'One other contention of the appellant is that the court below erred in permitting the appellee to testify further after she had rested her case and after a motion to exclude her evidence had been made. No error here appears; on the contrary, the court below would have abused its discretion had it not permitted the introduction of this evidence.'

"The right to reopen proceedings for the purpose of introducing testimony inadvertently omitted has been liberally allowed, even in criminal trials on formal hearing. See Lee v. State, 201 Miss. 423, 29 So.2d 211, 30 So.2d 74; Summerville v. State, 207 Miss. 54, 41 So.2d 377." 235 So.2d at 246.

We are of the opinion that the county court should have allowed the plaintiff to reopen his case to prove the actual cash value of the two guns at the time of the loss.

The judgment of the circuit court, affirming the judgment of the county court, is, therefore, reversed and this cause remanded for a new trial.

REVERSED AND REMANDED.

L. Motion for JNOV

New Hampshire Ins. Co. v. Sid Smith & Associates, Inc., 610 So.2d 340 (Miss. 1992)

PITTMAN, Justice, for the court:

New Hampshire Insurance Company filed suit in Hinds County Circuit Court against Sidney Smith and his insurance agency, alleging that Smith had failed to timely pay $31,031.42, represented by a promissory note executed by Smith in favor of New Hampshire Insurance Company. Smith counterclaimed, alleging that when credits properly due him were considered, New Hampshire was in debt to him in the approximate amount of $11,000.00. A jury trial resulted in a verdict in favor of Smith in the amount of $11,000.00. New Hampshire Insurance Company appeals from the lower court judgment. Finding reversible error committed below, we reverse and remand this cause for a new trial.

I.

* * * *

[Note: Facts omitted.]

New Hampshire did not request a directed verdict at the end of all the evidence, or a peremptory instruction. The jury found in favor of Sid Smith on the matter of New *344 Hampshire's claim against him. It further found in favor of Smith on his counterclaim against New Hampshire, awarding damages of $11,000.00. New Hampshire subsequently moved for judgment notwithstanding the verdict (j.n.o.v.), or in the alternative a new trial. The motion was denied.

II.

[1] New Hampshire argues first on appeal that the trial court erred in not granting its post-trial motion for j.n.o.v. Rule 50(b) of the Mississippi Rules of Civil Procedure states:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict....

(emphasis added). Rule 50(b) makes it clear that a motion for directed verdict is a procedural prerequisite for a motion for j.n.o.v.

This Court, in Maxwell v. Illinois Central Gulf R.R., 513 So.2d 901 (Miss.1987), followed the federal lead in liberally construing what could qualify as a motion for directed verdict. This Court found that a peremptory instruction was the functional equivalent of a motion for directed verdict and could satisfy the prerequisite requirements of Rule 50(b). It appears that nothing has heretofore been done to weaken the requirement that some kind of directed verdict motion, or its equivalent, be made before a j.n.o.v. motion could be considered.

In the case at bar New Hampshire made no motion at any time that could be considered as a motion for directed verdict as to the counterclaim asserted against it. According to Rule 50(b) and the case law of this State, the lower court would be precluded from granting New Hampshire's motion for j.n.o.v. Such a holding, however, is nonsensical and is made only because we have held it before. In many situations for reasons of judicial economy, a judge will reserve his ruling on a motion for a directed verdict made at the close of all the evidence until the jury returns its verdict. As long as a party makes its motion for j.n.o.v. within the allotted time after the jury verdict, the lower court should not be precluded from granting such motion if the evidence is insufficient to support such verdict simply because the party failed to make a motion for a directed verdict prior to the jury's deliberation. Any cases holding otherwise are hereby overruled and Rule 50(b) is hereby amended to comply with this holding.

M. Default Judgments (See MRCP 54, 55, and 60)

Burkett v. Burkett, 537 So.2d 443 (Miss. 1989)

ROBERTSON, Justice, for the Court:

I.

This case asks that we consider the time limitations within which a defendant must act in order to obtain relief from a judgment or order under Rule 60(b), Miss.R.Civ.P. In the context of a judgment by default, Earl Burkett made his application for relief seven months and eight days following entry of the judgment against him. Rule 60(b)(6) authorizes relief from judgment on grounds of "any other reason justifying relief" upon motion "made within a reasonable time." The Chancery Court held that the present motion was made within a reasonable time. We affirm.

II.

Lyndia Burkett and Earl D. Burkett, Jr., were married on October 7, 1961, and divorced on June 10, 1976. Three children were born of the marriage. Pursuant to the court-approved separation agreement Earl was required to pay Lyndia $305.60 per month in child support, maintain medical insurance for the children and make the mortgage payments on the house. Soon after the parties divorced, however, Earl moved back into the house and the couple again began cohabitation as man and wife. During this time both Earl and Lyndia were employed and contributed to the support of the family unit in general and the three children in particular.

In February of 1984, Lyndia moved out of the couple's home. At that time the Burketts' oldest child, Earl Burkett III, was 22 years old and self-supporting. The couple's second child, Gwendolyn Mavis Burkett, was married and living in Louisiana. The youngest child, Terri Burkett, was a college student at Southern Mississippi.

On July 25, 1985, Lyndia filed in the Chancery Court of Rankin County a complaint for a citation of contempt. She charged Earl with failure to pay any of the child support obligations pursuant to the 1976 divorce decree. Although Earl was served with process, he did not respond or appear. On September 13, 1985, the Court entered a judgment by default. The total amount of this judgment was $31,737.04, consisting of past due child support, medical insurance and mortgage payments for the nine-year period.

Armed with this judgment Lyndia began to garnish Earl's wages and in this manner collected some $3,915.47 before Earl quit his job in March, 1986. Immediately, Lyndia filed another "Complaint for Citation of Contempt". This time Earl hired a lawyer and on April 21, 1986, filed an answer. In his answer Earl prayed that the September 13, 1985, default judgment be set aside on the grounds that the judgment was "onerous, burdensome, oppressive, unjust and inequitable". Earl further alleged that the judgment was obtained through fraud and perjured testimony.

On August 20, 1986, the Chancery Court called the matter for hearing and was informed for the first time of the couple's post-divorce cohabitation and of the extent of Earl's contributions toward the support of the children. In this setting the Court ruled that Earl had substantially satisfied his child support obligations for that period of time. Because of these new facts, the Court set aside the default judgment of September 9, 1985, reforming the judgment to take into account the contributions of the husband during the previous nine years. In net effect, the Court reduced Earl's judgment debt to an effective total *445 of $18,407.17. After then giving credit for the $3,915.47 which had been withheld from his salary via garnishment, the Court entered judgment in favor of Lyndia and against Earl in the amount of $14,491.70.

Lyndia now appeals claiming that by reason of Earl's tardy application, the Court had no authority to vacate the default judgment.

III.

Our concern is whether the Chancery Court acted within the discretionary authority granted to it by Rule 60(b), Miss.R.Civ.P. That rule, in pertinent part, reads as follows:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) fraud, misrepresentation, or other misconduct of an adverse party; * * *
> (4) the judgment is void;* * *
> (6) any other reason justifying relief from the judgment.
>
> The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order, or proceeding was entered or taken....

Lyndia argues that Earl's motion was one made under Rule 60(b)(1) and, accordingly, that it was subject to the six-month time limitation found in the rule. Without doubt, the Court had no authority to grant relief from the judgment if the grounds therefor were "fraud, misrepresentation or other misconduct of an adverse party." But these are not the grounds upon which the Court acted. Indeed, in the Order of September 16, 1986, vacating the prior judgment--an order, we might add, prepared by counsel in accordance with custom and practice--the Court deleted two typed-in statements that indicated that relief would be granted under Rule 60(b)(1). We can imagine no clearer expression that the Court was not acting on any of the grounds contained in Rule 60(b)(1).

After the enumerated grounds of subsections 1 through 5, Rule 60(b)(6) provides that the court may relieve a party from a final judgment or order for "any other reason justifying relief from the judgment," and the motion "shall be made within a reasonable time." Most assuredly this is not grounds from the escape of the six-month time limitation upon motions made under Rule 60(b)(1), (2) and (3). Where the grounds of those three subsections are the basis for action, the court is without authority if the motion is not made within the six-month time period.

[1] Rule 60(b)(6), which is taken from an analogous federal rule, is designed for cases of extreme hardship not covered under any of the other subsections. See, e.g., United States v. Karahalias, 205 F.2d 331 (2d Cir.1953). We have referred to this catch-all as a "grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses, or when it is uncertain that one or more of the preceding clauses afford relief." Bryant, Inc. v. Walters, 493 So.2d 933, 939 (Miss.1986). See also Accredited Surety and Casualty Company, Inc. v. Bolles, 535 So.2d 56, 60 (Miss. 1988).

Acknowledging the broad equitable powers Rule 60(b) vests in our trial courts, this Court has adopted a balancing test approach respecting relief from a judgment which has been entered by default.

> Specifically, the Circuit Court is directed to consider (1) the nature and legitimacy of defendant's reasons for his default, i.e., whether the defendant has good cause for default,(2) whether defendant in fact has a colorable defense to the merits of the claim, and (3) the nature and extent of prejudice which may be suffered by the plaintiff if the default judgment is set aside. * * *
>
> Necessarily, the Circuit Court in its administration of this balancing test has a certain amount of leeway. Rule 60(b) *446 provides that the court "may relieve a party" of the burden of a final judgment for one of the six reasons thereafter enumerated. When we are reviewing such a matter, we consider that the Circuit Court has not inconsiderable discretion, though not unfettered discretion. We will not reverse unless convinced that the Circuit Court has abused its discretion in the premises. See Pointer v. Huffman, 509 So.2d [870], at 875 [(Miss.1987)]; Guaranty National Insurance Co. v. Pittman, 501 So.2d [377], at 388-89 [(Miss.1987)]; Bryant, Inc. v. Walters, 493 So.2d at 937-39.

H & W Transfer & Cartage Service v. Griffin, 511 So.2d 895, 898 99 (Miss.1987).

Applying the above-enumerated factors to the situation before the Court today, with due regard for this Court's standard of review, one is led to conclude that the Chancery Court did not abuse its discretion in setting aside its prior order.

Lyndia cites Donaldson v. Pontotoc County Welfare Department, 445 So.2d 1377 (Miss.1984) wherein this Court refused to set aside a judgment under Rule 60(b)(6) where the defendant had argued that he was illiterate, could

not read and write and did not know the significance of the process served upon him. Counsel fails to perceive the limited value of such precedents where our appellate review is of the exercise of trial court discretion. In Donaldson, we affirmed the refusal to set aside the judgment. Like as not, we would also have affirmed in Donaldson if the court below had set aside the judgment, although the point is not before us.

[2] When we say that the trial court has discretion in a matter, we imply that there is a limited right to be wrong. [FN1] At the very least the statement imports a view that there are at least two different decisions that the trial court could have made each of which on appeal must be affirmed. [FN2] Indeed, if there are not at least two possible affirmable decisions, by definition the trial court is without discretion. When we review on appeal the decision of a trial court within the discretion vested in it, we ask first if the court below applied the correct legal standard. See Detroit Marine Engineering v. McRee, 510 So.2d 462, 467 (Miss.1987); Croenne v. Irby, 492 So.2d 1291, 1293 (Miss.1986). If so, we then consider whether the decision was one of those several reasonable ones which could have been made.

FN1. See Rosenberg, Appellate Review Of Trial Court Discretion, 79 F.R.D. 173, 176 (1975); Rosenberg, Judicial Discretion Of The Trial Court, Viewed From Above, 22 Syracuse L.Rev. 635, 653 (1971).

FN2. See Friendly, Indiscretion About Discretion, 31 Emory L.J. 747, 754 (1982).

[3] These thoughts in mind, we return to the H & W Transfer balancing test cited above--a balancing test, we might emphasize, that is to be applied at the trial court level, and not by this Court on appeal.

First, Earl has no excuse for his default. The record does reflect that at the time he was actively negotiating with his wife's attorney regarding alimony, child support and partition of the couple's jointly-held property before and after the order was entered. Earl did not realize the gravity or import of his wife reducing the past-due obligation to judgment--an obligation which had lain dormant since it was fixed nine years previous. The circumstances ameliorate Earl's lack of excuse.

Second, Earl has a colorable (partial) defense to his wife's claim for past- due child support payments--he had in significant part satisfied that obligation. In Alexander v. Alexander, 494 So.2d 365 (Miss.1986), this Court held that a non-custodial parent effectively discharges his child support obligations by directly supporting the child. That is, he is entitled to credit for the amount of support directly given to the child when the custodial parent sues for any arrearage.

Third, Lyndia sustained no cognizable prejudice. There is no evidence that she was without evidence that would have been available to her had Earl not defaulted. She had no witnesses whose lapse of memory put her at a disadvantage when the matter was finally litigated. What turned *447 this case below was the revelation of the parties' post-divorce cohabitation and Earl's proof that his child support obligation was in fact discharged during the period of claimed arrearage. The facts of the continued cohabitation and the emancipation of two of the three children were not before the Court when the September 1985 judgment was entered, Lyndia claiming that "it wasn't asked." "Indeed, upon a showing by the defendant that he has a meritorious defense, we would encourage trial judges to set aside default judgments in a case where, as here, no prejudice would result to the plaintiff." Bryant, Inc. v. Walters, 493 So.2d 933, 937 n. 3 (Miss.1986); see also Guaranty National Insurance Co. v. Pittman, 501 So.2d 377, 388 (Miss.1987).

The Chancery Court acted with the discretionary authority conferred by Rule 60(b)(6) when it held that Earl's motion, filed as it was some seven months and eight days after entry of the default judgment, was filed "within a reasonable time." Equally within the Court's discretion was its order modifying Earl's past due support obligations to give credit for the support he in fact provided the children and to account for the emancipation of two of the three.

AFFIRMED

ROY NOBLE LEE, C.J., HAWKINS and DAN M. LEE, P.JJ., and SULLIVAN, ANDERSON and ZUCCARO, JJ., concur. HAWKINS, P.J., and ZUCCARO, J., specially concur. PRATHER, J., not participating.

HAWKINS, Presiding Justice, specially concurring:

I concur. The majority opinion fails to recall, however, that the dissent in Hooten v. State, 492 So.2d 948 at 950 (Miss.1986), addresses the meaning of discretion as well.

THE COUNTERCLAIM

A. Satisfaction of Judgment: Claim and Counterclaim

Pham v. Welter, 542 So.2d 884 (Miss. 1989)

ZUCCARO, Justice, for the Court:

Andrew Welter (Welter) filed suit against Thua Van Tran and Tan Minh Pham (Pham) for his damages in connection with an automobile accident between his vehicle and a vehicle which Pham was driving owned by Thua Van Tran. Pham counter-claimed for his damages and Thua Van Tran counter-claimed for the damages to his automobile.

In the court below, the jury returned the following verdict:

> We, the jury, find plaintiff/driver Welter negligent by 40% and the defendant/driver Pham negligent by 60%; we find that the total damage suffered by Welter to be $40,000, the total damages suffered by defendant/driver Pham to be $30,000 and the total damages suffered by the defendant/owner Tran to be $0.

Upon entry of the judgment, Thu Van Tran and Pham each filed a motion for additur, or in the alternative, a new trial on the issue of their respective damages. Tran based his motion on the uncontradicted testimony as to the value of his destroyed car, while Pham asserted his undisputed damages including pain and suffering. Pham also moved for a remittitur or in the alternative a new trial as to the $40,000 in damages awarded to Welter and asserted as his grounds therefor that the jury verdict was against the overwhelming weight of the evidence and was so grossly excessive as to evidence bias and prejudice on the part of the jury. Upon hearing the motions, the trial court ordered an additur of $2,500 for Thu Van Tran for damages to his vehicle reduced by 60% for Pham's contributory negligence, but overruled both Pham's motions (remittitur as to Welter's damages and additur as to his damages). From that ruling Pham appeals and Welter cross-appeals and the following assignments of error are alleged:

* * * *

[Note: The following has been omitted: a detailed discussion of the facts; Sec. I which is a discussion of Appellant's motion for additur; Sec. II which is a discussion of a comparative negligence instruction.]

III.

Proposition Number VI-A

Did the Trial Judge err in overruling the Motion to Correct Judgment?

Proposition Number VI-B

Did the Trial Judge Correctly Overrule the Motion to Correct Judgment?

* * * *

[3] Counsel for Welter's Insurance Company cites Miss.Code Ann. § 11-7- 69 [repealed in 1991] which provides in pertinent part:

> If it appears that the plaintiff's demand is valid and exceeds that of the defendant, the plaintiff shall have judgment for only that portion of his demand which exceeds the valid demand of the defendant's, with costs of court, but if it appears that the demand of the defendant is valid, and exceeds the demand of the plaintiff, the defendant shall have judgment for the amount by which his claim exceeds the claim of the plaintiff, with costs of court.

Considering this Code section, counsel for the insurance company not a party argues,

> [t]he jury returned a verdict in favor of Welter for $40,000 in favor of Pham on his counter-claim in the sum of $30,000. After reduction of the damages based on the comparative fault of each party, the trial court filed its

> judgment June 18, 1986, allowing Welter to recover $24,000 and allowing Pham to recover $12,000 in his counter-claim. According to the mandatory language of Miss.Code Ann. § 11-7-69, there should be but one judgment. Accordingly, the lower court should have entered a net judgment in favor of Welter in the amount of $12,000. See also, Richmond v. Van's Moving & Storage Co., 197 So.2d 235 (Miss.1967).
>
> We discuss Assignment VI-B.

Welter agrees that § 11-7-69 provides that a plaintiff's verdict should be offset by defendant's verdict, or vice versa. However, this was not done by the trial judge, even though State Farm's attorney (supposedly representing Welter) raised the issue. According to Welter, to reach a similar result in this case would be manifestly unjust, and contrary to the public policy of the state. Welter questions:

> [w]hy is there a financial responsibility law in this state? Why should State Farm, Welter's liability carrier, enjoy a windfall and pay nothing while Andrew Welter pays for Pham's damages (assuming they stand) by a reduction of Welter's $24,000 verdict to $12,000? Does a law that pre-dates the Code of 1942 have blind application to parties who are both insured? These questions, among others, need answers in this appeal.

The questions raised by Welter are valid ones and should be answered by this Court. The question is posed: Why should State Farm, Welter's liability carrier, enjoy a windfall and pay nothing for Pham's damages by a reduction of Welter's damages? The question also is applicable to the liability carrier of Pham. We answer this question by holding that this procedure is manifestly unjust.

To support our position we turn to a holding from our sister southern state of Florida. In Stuyvesant Ins. Co. v. Bournazian, 342 So.2d 471 (Fla.1976), the Supreme Court of Florida was faced with a question very similar to the one we address today. The Florida court had to determine whether the concept of "set-off" could be read into a standard automobile liability insurance contract and require a partially-negligent but fully-insured person to absorb a portion of the cost of his negligence. Similarly, if State Farm Mutual were allowed to apply Miss.Code Ann. § 11-7-69 to the facts at hand, the insurer could escape his contract liability to Welter due to the fact that Pham's damages would be absorbed by the amount of money Welter would collect from Pham. In Bournazian, the Florida Supreme Court found:

> The concept of "set-off" ... applies only between uninsured parties to a negligence action, or to insured parties to the extent that insurance does not cover their mutual liabilities. The doctrine has *892 no effect on the contractual obligations of liability insurance carriers. Id. at 474.

In arriving at this holding, the Florida court explained that "the notion of 'set-off' should have no effect on the contractual obligation of liability insurance carriers to pay the amounts for which their insureds are legally responsible." Id. at473. This explanation is in rebuttal to Stuyvesant Insurance Company's argument that "the amount legally owed by each party to the other is the net amount receivable after set-off has been applied rather than the total amount awarded to each by a jury after comparing relative fault and damages." The Florida court, finding Stuyvesant's argument a restrictive view of liability, writes:

> [this] view of "liability" is defective in a case tried under comparative negligence, however. The effect of set-off as an antecedent to payment by each insurer is to abrogate the parties respective insurance contracts by providing an unwarranted second level of comparative recovery reductions--the jury's award being first. Id. at 473.

The facts of the instant case illustrate the same problem faced by the Florida court. If both Welter and Pham carry adequate automobile insurance, in the absence of a mandatory "set-off" rule, Welter would recover $24,000 ($40,000 reduced by 40% of his negligence) from Pham's insurer to compensate him for the serious injuries caused by Pham, and Pham would receive $12,000 ($30,000 reduced by his 60% negligence) from Welter's insurer to compensate him for the serious injuries caused by Welter. However, under the set-off rule or the application of § 11-7-69, Welter's recovery from Pham's insurance company is reduced to $12,000 and Pham is denied any recovery whatsoever from State Farm Mutual. [FN3] Such a mandatory set-off diminishes both Welter's and Pham's recovery and accords both their insurance companies a corresponding windfall at their insureds' expense.

> FN3. For all of this, of course, must be modified in light of our decision above on the question of Pham's additur.

[4] Based on this analysis, this Court is in full agreement with the Florida court in Bournazian where the Florida court held:

> Nothing in Hoffman [v. Jones, 280 So.2d 431 (Fla.1973)] the insurance laws, or the public policy of this state justifies our reading into a standard automobile liability insurance contract a requirement that a partially-negligent but fully-insured person should absorb a portion of the cost of his negligence. The purpose of the contract is precisely to the contrary, being designed and paid for to relieve the insured of all such obligations (within policy limits and over agreed deductibles, of course). Id. at 474.

California has followed the Bournazian case in Jess v. Herrmann, 26 Cal.3d 131, 161 Cal.Rptr. 87, 604 P.2d 208 (1979), where the Supreme Court of California held in a case similar to the case sub judice:

> Although the insurer in Stuyvesant, like the numerous amici in the instant case, argued that its obligation under its insurance policy should be viewed only as an obligation to pay sums owed by its insured after the setoff of any debts which the injured party owed its insured, the Florida court emphatically rejected that suggestion. The court recognized that in securing insurance coverage an insured does not thereby authorize its insurance company to reduce its own liability by, in effect, appropriating to its own benefit a separate asset of the insured, i.e., the insured's right to recover for his own injuries. * * * * * *
>
> At least in cases in which both parties to a lawsuit carry adequate insurance to cover the damages found to be payable to an injured party, both the public policy of California's financial responsibility law and considerations of fairness clearly support a rule barring a setoff of one party's recovery against the other. * * * * * *
>
> *893 Under these circumstances, we conclude that the current setoff statutes cannot properly be interpreted to require setoff in cases in which such a setoff will defeat the principal purpose of California's financial responsibility law and will provide an inequitable windfall to an insurance carrier at the expense of the carrier's insured.

Accordingly, we find that § 11-7-69 is not applicable in diminishing the responsibility of an insurer in performing its contractual duty.

[5] Before closing, we address the actions of the attorneys representing the interest of State Farm Mutual. Having accepted the responsibility of representing Welter, these attorneys, contrary to representing Welter's interest, attempted to penalize its client by urging the setting-off of the separate verdicts. To this end, we sternly recommend that the attorneys with an absolute obligation to represent Welter but instead representing the interest of State Farm Mutual, review Rule 1.7 Conflict of Interest: General Rule, Miss.Code of Professional Conduct as well as our holding in Hartford Acc. & Indem. Co. v. Foster, 528 So.2d 255 (Miss.1988) where we stated:

> Although a lawyer may ethically in some circumstances, and with his client's consent, limit the objectives of his representation, Rule 1.2 Scope of Representation, par. (c), this can never authorize the attorney to engage in dual legal representation entailing professional decisions on his part which stand to benefit one client at the expense of the other. Rule 1.7, supra.
>
> Any lawyer who attempts to represent two adverse masters places himself in a precarious, perilous position.
>
> These Professional Code statements are distilled principles of ancient, time-honored, and judicially-enforced conduct on the part of lawyers in representing clients. Without them our system of justice would be doomed.
>
> A liability insurance policy undertakes to insure a person up to a specified sum of money caused by his negligence. The policy requires the company to defend any lawsuit charging negligence, and also authorizes the company to select the attorney and conduct the defense of the action. The insured is required to fully cooperate with the company in undertaking the defense. Because the company is footing the bill for the defense, and will be obligated to pay any judgment rendered (if it does not settle the case), it is clearly entitled to select the attorney and conduct the defense. This does not, and indeed could not, authorize the company to undertake or pursue any defense prejudicial to the monetary interest of the insured. It hardly needs to be added that no insurance policy can validly diminish a lawyer's duty to his insured client. Id. at 269.

The law firm assigned by State Farm to represent Welter abandoned him at a crucial part of the litigation and not only did not represent Welter, but represented another client (State Farm) to the detriment of Welter. Welter had paid for representation when he paid his State Farm premium.

CONCLUSION

Considering the conflicting testimony as to liability, this Court finds that the trial *894 court correctly instructed the jury as to the possibility of contributory negligence of each party, thereby leaving to its discretion the issue of negligence of both drivers. As to the question of damages, this Court is persuaded by Pham's evidence supporting his claim of past and future pain and suffering and permanent partial disability. The jury verdict for Pham was "so grossly inadequate as to shock the conscience;" therefore, we order an additur of $30,000 to Pham's jury finding or in the event Welter declines to accept it, a new trial on the question of damages only.

Additionally, we find that the concept of "set-off" as argued by State Farm Mutual is not applicable in a situation such as the one at bar in order to diminish the recovery of the insured while providing a corresponding windfall to the insurer. We caution all attorneys representing both the insurer and the insured in the future to refrain from any action which conflicts with our holding in Foster v. Hartford, supra, and the Mississippi Code of Professional Conduct.

Accordingly, the final judgment of the Circuit Court of Harrison County as to the jury's findings of damages are affirmed with the exception that this Court makes a $30,000 additur to the finding of damages to Tan Minh Pham or in the alternative a new trial at Welter's option. We affirm the jury's finding of Welter's damages.

AFFIRMED, WITH ADDITUR TO TAN MINH PHAM, OR IN THE ALTERNATIVE A NEW TRIAL AT HIS OPTION.

HAWKINS P.J., and PRATHER, ROBERTSON, SULLIVAN, ANDERSON and PITTMAN, JJ., concur. ROY NOBLE LEE, C.J., dissents without opinion. DAN M. LEE, P.J., dissents as to part I and concurs as to parts II and III. [Omitted]

JURIES

A. Excerpt from Prosecutor's Training Manual Concerning Jury Instructions Published by Miss. Prosecutors' College

I. Scope

The purpose of this chapter is to list and outline the various objections that may be raised about jury instructions, to set forth the mechanics of jury instructions, and to provide the prosecutor with some general rules to follow when drafting instructions that will be proper in the various kinds of factual situations you will encounter. This chapter should not be used as an instruction form book.

II. General Requirements and Considerations

A. Definition: A jury instruction is a statement of the pertinent law as it applies to the case or an aspect of the case.

B. Mechanics of Jury Instructions:

1. Instructions Must be Written: All instructions must be written. Miss. Code. Ann. § 99-17-35 (1972). If a trial court orally answers a jury question on a point of law, it may be reversed for giving an oral instruction. Carrol v. State, 391 So. 2d 1000 (Miss. 1980).

2. Who Reads: All instructions granted by the court are given by the judge. Attorneys and others are not to instruct the jury. Pearson v. State, 245 Miss. 275, 179 So. 2d 729 (1965); Roney v. State, 167 Miss. 532, 142 So. 475 (1932).

NOTE: In the "old days" each party read its own instructions to the jury during the closing argument. This is no longer done. However, counsel may have and refer to instructions during argument pursuant to Uniform Criminal Rules of Circuit Court Practice, Rule 5.03

3. Available to Jury: The jury takes the instructions, which have been read by the court, with it when it retires to consider the case. Miss. Code Ann. § 99-17-35 (1972); Unif. Crim. R. of Cir. Ct. Pract., R. 5.03.

4. Not to be Identifiable as to Party: Instructions are not be designated as coming from any particular party to the trial, except that standard, or "court's", instructions are designated by the letter "C", the State's instructions by the letter "S", and Defense instructions by the letter "D", which letters precede the number given each instruction. Language such as "The Court instructs the jury for the State that . . . ." is no longer proper. Gray v. State, 351 So. 2d 1342 (Miss. 1977); Unif. Crim. R. of Cir. Ct. Pract., R. 5.03.

5. Must be Numbered: All instructions must have a number. If, for example, the State requests three instructions, the prosecutor would designate each instruction separately as either S-1, S-2, or S-3. Unif. Crim. R. of Cir. Ct. Pract., R. 5.03.

6. Time of Filing: Instructions must be filed at least twenty-four hours prior to the time set for trial; the opposing counsel must be served with copies. Unif. Crim. R. of Cir. Ct. Pract., R. 5.03. The rule requiring the filing of instructions twenty-four hours in advances "may be and often is, out of necessity, waived." Newell v. State, 308 So. 2d 68, 69 (Miss. 1975). Unif. Crim. R. of Cir. Ct. Pract., R. 5.03 requires a showing of good cause before the court will permit the late filing of instructions. Failure to serve copies on opposing counsel will be error. Failure to serve copies on opposing counsel will be error, if prejudice is shown, and a specific objection made at trial. Gray v. State, 387 So. 2d 101 (Miss. 1980); see Knight v. State, 360 So. 2d 674 (Miss. 1978).

7. Unrequested Instructions: The trial court may instruct the jury sua sponte. If it does, the instructions must be written and submitted to the attorneys for their objections. The trial

court may also give additional written instructions if after retiring, the jury requests clarification or further instruction. Newell v. State, 308 So. 71 (Miss. 1975); Unif. Crim. R. of Cir. Ct. Pract., R. 5.03.

8. Modification by Court: The trial court may make necessary modifications to instructions submitted to it for approval. Newell v. State, 308 So. 71 (Miss. 1975).

9. How many instructions: Each side is limited to six instructions on the substantive law. There is no limit on the number of definitional instructions a side may request. A definitional instruction defines the legal terms used in substantive instructions. Unif. Crim. R. of Cir. Ct. Pract., R. 5.03; Miss. Mod. Jury Inst. Civ. & Crim. P. ix (1977)(Hereinafter cited M.J.I.). As a general rule of practice, file only necessary instructions, and refrain from over-instructing the jury.

10. When Given: In Mississippi practice, jury instructions are read at the conclusion of all testimony, after each side has rested, and prior to closing arguments. No instructions will be given after closing argument has begun except where the failure to give such additional instructions would work an extreme injustice. If an instruction is granted after argument is begun, the other side will be given opportunity to submit other instructions as well. Unif. Crim. R. of Cir. Ct. Pract., R. 5.03; see cases collected under 5 Miss. Digest, Criminal Law Key number 801, (1963 and Supp. 1981).

11. Amendment by Counsel: Most trial courts will permit counsel to amend previously filed instructions before they are read to the jury. Instructions may be amended after they have been read to the jury if the opposing side is given adequate opportunity to respond. Rose v. State, 170 Miss. 550, 155 So. 341 (1934); see also Depriest v. State, 377 So. 2d 615 (Miss. 1979).

12. Withdrawal: Instructions previously given may be withdrawn, provided the jury understands that the instruction have been changed. "[I]t will be presumed on appeal that the jury accepted the instructions as granted." Deaton v. State, 242 So. 2d 452 (Miss. 1970). Counsel may "withdraw" previously filed instructions when they are taken up for consideration.

13. Objections to Instructions: Objections must be specifically stated and must state the particular grounds for the objections. Depriest v. State, 377 So. 2d 615 (Miss. 1979). It is insufficient to object on grounds that an instruction "does not properly state the law." Bright v. State, 347 So. 2d 503 (Miss. 1977). See Rules of the Supreme Court, R. 42.

C. Model Jury Instructions: The Mississippi Circuit Judges' Association and the Mississippi Judicial College have published Mississippi Model Jury Instructions, Civil and Criminal (West Publishing Co. 1977). There are many other instruction form books available. M.J.I. is periodically supplemented. The introduction to the M.J.I. states, "Model Jury Instructions by their very nature are abstract. Pattern instructions are abstract statements of law drawn from statutes and case law and drafted so that they may be adapted to fit differing case situations. When using such instructions counsel must be sure to tailor the instructions so that they apply to the specific facts of the case under consideration." See Boring v. State, 365 So. 2d 960 (Miss. 1978).

B. Excerpt from Circuit Judge Benchbook Concerning Jury Instructions by Miss. Judicial College

1. The judge in any civil case shall not sum up or comment on the testimony, or charge the jury as to the weight of the evidence.
Reference:
Miss. Code Ann. § 11-7-155 (1972)

2. However, the trial judge may initiate and give appropriate written instructions in addition to the approved instructions submitted by the litigants if he deems the ends of justice so require, but the trial judge shall not be put in error for his failure to instruct on any point of law unless specifically requested in writing to do so.
Reference:
Newell v. State, 308 So. 2d 71 (Miss 1975)

3. Language of Instructions

   The words in an instruction must be accorded their customary and usual significance. They will not be deemed erroneous if when considered as a whole they furnish a correct guide for the jury.
Reference:
Council v. Duprel, 250 Miss. 269, 165 So. 2d 134 (1964)
Stoner v. Colvin, 236 Miss. 736, 110 So. 2d 920 (1959)

4. Forms of Instruction

   Instructions must be requested in writing; provided, however that if the record indicates that consent has been given to oral instructions, the parties cannot complain about that to which they have agreed. Furthermore, the trial judge may strike certain evidence and verbally advise the jury not to consider the evidence that was introduced.
Reference:
Henry v. State, 253 Miss. 263, 174 So. 2d 348 (1963)
Lindsey Wagon Co. v. Nix, 108 Miss. 814, 67 So. 459 (1915)

5. Modification or Withdrawal

   Incorrect instruction may be modified to conform to law.
Reference:
Masonite Corp. v. Lochridge, 163 Miss. 364, 141 So. 758

6. It is the duty of the court to see that the jury gives due attention to instructions on law submitted by the judge.
Reference:
Gulf & S.I.R. Co. v. Bond, et al, 181 Miss. 254, 179 So. 355 (1938)

7. Number of Instructions

   In a civil suit, each side will normally be limited to six instructions, although the court may allow more as justice requires.
Reference:
Proposed Rules of Civil Procedure

8. A court may initiate and give appropriate written instructions to a jury after it has retired to consider its verdict in response to a question from the jury.
Reference:
Newell v. State, 308 So. 2d 71 (Miss 1975)

SPECIAL PROCEEDINGS

A. Attachment in Chancery

§ 11-31-1. Jurisdiction; debtors.

The chancery court shall have jurisdiction of attachment suits based upon demands founded upon any indebtedness, whether the same be legal or equitable, or for the recovery of damages for the breach of any contract, express or implied, or arising ex delicto against any nonresident, absent or absconding debtor, who has lands and tenements within this state, or against any such debtor and persons in this state who have in their hands effects of, or are indebted to, such nonresident, absent or absconding debtor. The court shall give a decree in personam against such nonresident, absent or absconding debtor if summons has been personally served upon him, or if he has entered an appearance.

Sources: Codes, 1880, § 1832; 1892, § 486; Laws, 1906, § 536; Hemingway's 1917, § 293; Laws, 1930, § 173; Laws, 1942, § 2729

§ 11-31-2. Application for order of attachment; determination.

(1) Upon the filing of the bill of complaint, the complainant may apply for an order of attachment by presenting to the chancellor the bill, and an affidavit which shall include the following:

(a) A statement that the action is one described in Section 11-31-1, and is brought against a defendant described in said Section 11-31-1.

(b) A detailed statement of the facts and grounds which entitle the complainant to an order of attachment including a statement of the specific reasons why the complainant's ability to recover the amount of his claim may be endangered or impeded if the order of attachment is not issued.

(c) A statement of the amount the plaintiff seeks to recover.

(d) A statement that the complainant has no information or belief that the claim is discharged in a proceeding under the Federal Bankruptcy Act (11 U.S.C., Section 1, et seq.), or that the prosecution is stayed in a proceeding under the Federal Bankruptcy Act.

(e) A description of the property to be attached under the writ of attachment and a statement that the complainant is informed and believes that such property is not exempt from attachment or seizure under Section 85-3-1.

(f) A listing of other persons known to the complainant who may have an interest in the property sought to be attached together with a description of such interest.

(2) The chancellor shall examine the affidavit and bill of complaint and may, in term time or in vacation, issue an order of attachment with respect to such property under the following conditions:

(a) The chancellor finds that unless the order of attachment is issued, the complainant's ability to recover the amount of his claim may be significantly impaired or impeded.

(b) The chancellor finds that the affidavit establishes a prima facie case demonstrating the complainant's right to recover on his claim against the defendant.

(c) The complainant gives security in an amount satisfactory to the chancellor to abide further orders of the court and to protect the defendant from injury should the action of attachment be judicially determined to have been wrongfully brought.

(3) (a) If such an order of attachment is issued, the defendant shall, upon request, be entitled to an immediate post-seizure hearing to seek dissolution of the order of attachment. Such post-seizure hearing shall have precedence on the docket of the chancery court over all other matters except similar matters previously filed. At such hearing, the chancellor shall order dissolution of the order of attachment unless the complainant establishes by satisfactory proof the grounds upon which the order was issued, including the existence of a claim as described in Section 11-31-1, and the impairment or impediment which a failure to continue the attachment could bring to the complainant's ability to recover the amount of such debt. An appearance by the defendant at the post-seizure hearing shall be considered a special appearance and not a general appearance for purposes of personal jurisdiction over the defendant.

(b) In the alternative, a debtor may regain immediate possession of the property attached by giving security satisfactory to the chancellor in an amount equal to one hundred twenty-five percent (125%) of the value of the property attached or one hundred twenty-five percent (125%) of the amount of the claim, whichever is less.

(c) If the chancellor should determine that the attachment was not brought in good faith, then the chancellor in his discretion may award actual damages (including reasonable attorney's fees) to the defendant.

Sources: Laws, 1980, ch. 467, § 1, eff from and after July 1, 1980.

§ 11-31-3. Attaching property or indebtedness.

When a bill shall be filed for an attachment of the effects of a nonresident, absent or absconding debtor in the hands of persons in this state, or of the indebtedness of persons in this state to such nonresident, absent or absconding debtor, it shall be sufficient to bind such effects or indebtedness that the order of attachment together with a copy of the bill of complaint and affidavit be served upon the persons possessing such effects or owing such indebtedness.

Sources: Codes, 1880, § 1898; 1892, § 487; Laws, 1906, § 537; Hemingway's 1917, § 294; Laws, 1930, § 174; Laws, 1942, § 2730; Laws, 1980, ch. 467, § 2, eff from and after July 1, 1980.

§ 11-31-5. Levy on land.

If the land of the nonresident, absent or absconding debtor be the subject of such suit, and an order of attachment be issued, the order shall be levied by the sheriff or other officer as such writs of law are required to be levied on land, and shall have like effect.

Sources: Codes, 1880, § 1889; 1892, § 488; Laws, 1906, § 538; Hemingway's 1917, § 295; Laws, 1930, § 175; Laws, 1942, § 2731; Laws, 1980, ch. 467, § 3, eff from and after July 1, 1980.

§ 11-31-9. Publication for appearance of defendant.

The nonresident, absent or absconding debtor shall be made a party to such suit by publication of summons as in other cases, and may appear and plead, demur or answer to the bill without giving security. If such debtor fails to appear, the court shall have power to make any necessary orders to restrain the defendants within this state from paying, conveying away or secreting the debts by them owing, or the effects in their hands belonging to, the nonresident, absent or absconding defendant, and may order such debts to be paid or such effects to be delivered to the complainant on his giving security for the return thereof in such manner as the court may direct.

Sources: Codes, 1857, ch. 62, art. 61; 1880, § 1901; 1892, § 490; Laws, 1906, § 540; Hemingway's 1917, § 297; Laws, 1930, § 177; Laws, 1942, § 2733; Laws, 1980, ch. 467, § 4, eff from and after July 1, 1980.

§ 11-31-11. Complainant to give security after decree rendered.

If a decree be rendered in such case without the appearance of the absent debtor, the court, before any proceedings to satisfy said decree, shall require the complainant to give security for abiding such further orders as may be made, for restoring of the estate or effects to the absent defendant, on his appearing and answering the bill within two years; and if the complainant shall not give such security, the effects shall remain under the direction of the court, in the hands of a receiver, or otherwise, for such time, and shall then be disposed of as the court may direct.

Sources: Codes, 1857, ch. 62, art. 62; 1880, § 1902; 1892, § 491; Laws, 1906, § 541; Hemingway's 1917, § 298; Laws, 1930, § 178; Laws, 1942, § 2734.

B. Replevin

§ 11-37-101. How replevin commenced; immediate seizure of property sought.

If any person, his agent or attorney, shall file a complaint under oath setting forth:

(a) A description of any personal property;

(b) The value thereof, giving the value of each separate article and the value of the total of all articles;

(c) The plaintiff is entitled to the immediate possession thereof, setting forth all facts and circumstances upon which the plaintiff relies for his claim, and exhibiting all contracts and documents evidencing his claim;

(d) That the property is in the possession of the defendant; and

(e) That the defendant wrongfully took and detains or wrongfully detains the same; and shall present such pleadings to a justice of the Supreme Court, a judge of the circuit court, a chancellor, a county judge, a justice court judge or other duly elected judge, such justice or judge may issue an order directing the clerk of such court to issue a writ of replevin for the seizure of the property described in said complaint, upon the plaintiff posting a good and valid replevin bond in favor of the defendant, for double the value of the property as alleged in the complaint, conditioned to pay any damages which may arise from the wrongful seizure of said property by the plaintiff. The said writ shall be directed to the sheriff or other lawful officer, returnable as a summons before the proper circuit or county court where the value of the property, as alleged in the complaint, exceeds the jurisdictional amount of the justice court, or to the circuit or county court or the proper justice court if the value shall not exceed such amount. The complaint along with the order of the court, the writ of replevin with the officer's return thereon, and the bond of the plaintiff shall be filed in the proper court at once. Writs of replevin may be made returnable to the proper court of another county where the property may be found.

Sources: Laws, 1975, ch. 508, § 1; Laws, 1990, ch. 344, § 1, eff from and after July 1, 1990.

§ 11-37-107. Venue.

The action of replevin may be instituted in the circuit or county court of a county or in the justice court of a county in which the defendant, or one (1) of several defendants, or property, or some of the property, may be found, and all proper process may be issued to other counties.

Sources: Laws, 1975, ch. 508, § 4; Laws, 1981, ch. 471, § 37; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

§ 11-37-109. The writ.

The writ of replevin shall command the sheriff, or other lawful officer, to immediately seize and take possession of the property described in the writ and deliver it to the plaintiff after two (2) days, unless bonded by the defendant, and summon the defendant to appear before the court shown in the writ, in termtime or in vacation, and to answer to the action of the plaintiff.

Sources: Laws, 1975, ch. 508, § 5, eff from and after passage (approved April 8, 1975).

§ 11-37-113. How writ may be executed.

The writ may be executed by seizing the property described therein and summoning the defendant as in other civil actions, with a copy of the declaration and exhibits attached thereto to be attached to said writ, so as to fully inform the defendant as to the claim being made against him.

Sources: Laws, 1975, ch. 508, § 7, eff from and after passage (approved April 8, 1975).

§ 11-37-123. Duplicate, alias, and pluries writs or process, and publication.

The plaintiff shall be entitled to duplicate writs or process to other counties, and alias and pluries writs or process to take the property or to summon the defendant, as in other actions. When property shall be taken under the writ, but the defendant cannot be found, the defendant shall be notified by publication, as provided in case of attachment under like circumstances, as provided in Section 11-33-37, Mississippi Code of 1972, except that said cause may be triable five (5) days after completion of publication.

Sources: Laws, 1975, ch. 508, § 12, eff from and after passage (approved April 8, 1975).

§ 11-37-125. Trial of replevin actions.

All replevin actions, whether followed by writ of replevin as herein provided or by summons, as hereinafter provided, shall be triable in termtime or in vacation, and the court or judge having jurisdiction shall proceed at such hearing to a final determination of the rights of the parties to possession, provided at least five (5) days process has been had upon the defendant.

Sources: Laws, 1975, ch. 508, § 13, eff from and after passage (approved April 8, 1975).

§ 11-37-127. Judgment for plaintiff.

If, upon a trial, the judgment shall be for the plaintiff, he shall retain possession of the property delivered to him under the writ of replevin, or if said property has not been found, then the plaintiff shall have a judgment for its value as determined by such hearing, or the value of the plaintiff's interest therein. Upon the entry of a judgment for the plaintiff in such replevin action, the plaintiff and the sureties on his bond shall be fully and finally discharged and said bond cancelled. If the defendant shall have bonded the property after seizure and the judgment shall be for the plaintiff, then such judgment shall be that the defendant shall immediately deliver up said property to the plaintiff, with the defendant and the sureties on his bond to be liable to the plaintiff for any damage to or depreciation in the value of such property from the date of its surrender to the defendant under his bond until the date of its surrender by the defendant in obedience to the judgment of the court, in addition to any other damage the plaintiff may have sustained by reason of the wrongful taking or detention of such property by the defendant, all as determined upon writ of inquiry; or that the plaintiff recover from the defendant and his sureties the value of said property at the date of its return to the defendant under bond.

Sources: Laws, 1975, ch. 508, § 14, eff from and after passage (approved April 8, 1975).

§ 11-37-129. Judgment for defendant; default; writ of inquiry.

If the judgment be for the defendant, the plaintiff and the sureties on the plaintiff's bond shall restore to the defendant the property, if to be had, or pay to him the value thereof and any damages for the wrongful suing out of the writ, as assessed upon writ of inquiry. If the defendant shall have made bond for such property, he and his sureties shall be fully discharged and he may recover any damages from the plaintiff and his sureties for the wrongful suing out of said writ. In case the plaintiff make default in prosecuting the replevin action, or be nonsuited, after seizure under writ of replevin, the defendant may have a writ of inquiry to assess the value of the property, or the damages sustained by the wrongful suing out of the writ, or both, as the case may be; and like judgment shall be rendered upon the finding as upon an issue found for him.

Sources: Laws, 1975, ch. 508, § 15, eff from and after passage (approved April 8, 1975).

§ 11-37-145. Replevin actions to be treated as preference cases.

All replevin actions shall be treated by the court as preference cases and shall be heard on the merits at the earliest possible date, with the view of reaching an early determination as to the rights of the parties to the property in question.

Sources: Laws, 1975, ch. 508, § 23, eff from and after passage (approved April 8, 1975).

§ 11-37-147. Jury trial.

All replevin actions shall be tried by the court without a jury, unless one (1) of the parties thereto shall file a written request for a jury trial.

Sources: Laws, 1975, ch. 508, § 24, eff from and after passage (approved April 8, 1975).

§ 11-37-131. How replevin commenced - immediate seizure of property not sought.

If any person, his agent or attorney, shall desire to institute an action of replevin without the necessity of posting bond, and without requesting the immediate seizure of the property in question, he shall file a declaration under oath setting forth those matters shown in subparagraphs (a) through (e) of Section 11-37-101 and shall present such pleadings to a judge of the supreme court, a judge of the circuit court, a chancellor, a county judge, a justice of the peace or other duly elected judge, and such judge shall issue a fiat directing the clerk of such court, or a deputy clerk, to issue a summons to the defendant, to appear before a court or judge having jurisdiction, as determined by the value of the property as alleged in the declaration, and as outlined in section 11-37-101, with said process being returnable in termtime or in vacation, upon at least five (5) days' notice, summoning the defendant to appear for a final hearing to determine the rights of the parties as to possession, and upon such final hearing the court shall enter judgment accordingly.

Sources: Laws, 1975, ch. 508, § 16, eff from and after passage (approved April 8, 1975).

C. Claim and Delivery

Magee v. Griffin, 345 So.2d 1027 (Miss. 1977)

[In omitted portion, facts show lienholder GMAC filed a claim and delivery action and in due course received a default judgment allowing repossession of a vehicle which had been financed by plaintiff here, E.B. Magee.

In this action, Magee has sued GMAC and its agent, Griffin, alleging mental anguish and seeking attorneys' fees and other costs in connection with the loss of possession of the vehicle.

The court below barred the present action after GMAC showed Magee had been served, but failed to appear in response to the earlier claim and delivery action.]

SMITH, Justice, for the Court:

* * * *

[6] It should be borne in mind that the suit by GMAC against Magee was one for 'claim and delivery,' an entirely new and more comprehensive form of action than replevin, authorized by Mississippi Code Annotated sections 11-37-1 et seq. (1972), adopted March 28, 1973.

Mississippi Code Annotated section 11-38-7 (Supp.1976) (of the Claim and Delivery Act) provides:

> The defendant, or any interested person, may contest the demand of the plaintiff on or before the return day of the writ by filing an answer in writing, under oath, of his claim or defense, itemizing his account, if any, and the case shall be then at issue between the parties, and shall be tried as other cases in the court. The judgment or judgments of the court shall adjudicate and adjust the rights of the several parties as to the subject matter of the suit, and cost may be adjudged accordingly.

[7] It is apparent that an important purpose of the enactment of the legislation was to provide a new form of action whereby the entire controversy would be settled in one suit, thereby preventing the necessity *1031 of multiple suits and appeals arising out of the same subject matter which often resulted under the old replevin statutes. It should be noted that section 11-38-7, supra, provides that the defendant may contest the demand of the plaintiff by filing an answer, under oath, setting up his 'claim or defense.' It also provides that the case be tried as other cases are and that the Court 'shall adjudicate and adjust the rights of the several parties as to the subject matter of the suit.' Mississippi Code Annotated section 11-38-3 (Supp.1976) contains this provision: 'The judge shall have jurisdiction to hear the cause, or any matter pertaining thereto . . . and to enter such orders and judgment thereon as to adjust the rights of the parties in the subject matter.'

In the suit for claim and delivery brought by GMAC against Magee under the new statutes, the Court found that Magee had defaulted, and then, 'the court having had a hearing', proceeded to find for GMAC, and to enter final judgment accordingly.

The subsequent suit by Magee against GMAC and Griffin was, in effect at least, an effort on Magee's part to make a collateral attack upon the final judgment in the prior suit for claim and delivery by treating it as a nullity. This is not permissible.

* * * *

[Separate majorities of the court concluded Magee's present action was barred by res judicata as to GMAC, but not as to Griffin. The action against Griffin was also deemed not to be a collateral attack and remanded.]

D. *Ne Exeat*

Johnson v. Johnson, 198 So. 308 (Miss. 1940)

GRIFFITH, Justice.

Appellee filed her bill in the chancery court for divorce, alimony, and custody of children. The sworn bill alleged that the wife owned no property of her own and that the husband had none except some live stock of no considerable value, and that the husband had declared his purpose to sell this, pocket the proceeds and forthwith depart from the state. A writ of ne exeat was prayed, and the writ was ordered by the chancellor. The ne exeat bond was given by the defendant with appellants as sureties, the conditions of the bond being in accord with the order and reciting as follows: "The condition of this bond is that the said defendant Bankston Johnson, will appear before the Chancery Court of DeSoto County, Mississippi, at its regular September term 1939, and from term to term during the pendency of said cause, and shall remain within the jurisdiction of said Court, and make himself amenable to all orders and process of said Court during the pendency of said suit," etc.

At the next September, 1939, term a decree of divorce was granted to the wife with custody of the children; and it was decreed that the defendant husband pay to the wife for the support and maintenance of the children the sum of $12.50 per month, beginning October 15, 1939, and continuing until the further order of the Court. Nothing was said in the decree about the ne exeat bond.

The defendant failed to make payment, as required by the decree, and on November 10, 1939, the complainant filed her petition praying that the defendant be compelled by process in contempt. Citation was ordered on this petition, and the defendant appeared and answered at the time and place designated in the citation, when and where a hearing was had, at the conclusion of which the chancellor made an order adjudging the defendant in contempt but gave therein a period of thirty days thereafter within which the defendant might purge himself by paying the alimony installments due up to and within that period. The defendant continued in default, and about thirty days after the expiration of the period last aforesaid, complainant filed her second petition reciting the default aforesaid and praying that the contempt order be enforced. On this petition a further citation was ordered issued to the defendant returnable at a later day, but when the sheriff undertook to serve the process on the defendant he could not be found; and it is admitted that the defendant had gone to another state, where he remained for about four weeks.

Thereafter complainant filed her third petition, reciting the facts as above outlined, and prayed a summons returnable to the regular March 1940 term of the court against the defendant and also against the sureties on his ne exeat bond. This summons was served, and at the term the sureties appeared, surrendered the defendant, and were relieved of their bond, save that because of the aforesaid breach thereof a decree was entered upon the bond and against the sureties, not in the full sum of the bond but for $74.20, the amount of the arrearage up to the date of that decree; and from this the sureties appeal.

The writ of ne exeat and its appropriate enforcement were well established features of the processes in chancery when that court was instituted in this state, and none of its effectiveness has ever been attempted to be modified by statute in this jurisdiction.

[1][2] The office and object of the writ is to detain the person of the defendant within the state in order that he may remain amenable to the processes of the court during the pendency of the cause and may be compelled personally to perform the orders and decrees of the court, either interlocutory or final, where a personal performance thereof by him is essential to the effectual preservation and enforcement of the rights of the complainant in the cause. It is issuable, but only, in a case where the right of the complainant against the defendant is coupled with a positive personal duty on the part of the defendant, and which duty no other person can be compelled effectually to perform.

*310 [3] The above statement of its offices discloses its applicability and essential usefulness in alimony cases where neither the husband nor the wife has any property and the alimony must be paid by the husband out of his earnings from employment, and when it is definitely averred and shown that the husband is about to depart beyond the jurisdiction of the state to avoid compliance with his positive personal duty. And its availability in such cases has been put beyond the reach of further question by the rulings of this Court in Edmonson v. Ramsey, 122 Miss. 450, 465, 84 So. 455, 10 A. L. R. 380; Rhinehart v. Rhinehart, 126 Miss. 488, 89 So. 152, and Muckelrath v. Chezem, 184 Miss. 511, 186 So. 621.

[4] And all the authorities upon the direct question are to the effect that no notice of the application or of the purpose to serve the writ is necessary, for the obvious reason that such a notice would enable the defendant to depart before the writ could be served, and thereby defeat the very object of the writ. And it can no more be said that in this there is an infringement upon due process than to say that a sheriff must first give advance notice to a defendant in an indictment that he expects to arrest him at a certain time, or to the respondent under a search warrant that the search will be made at a stated time and place.

[5][6] There is no hard and fast form of the writ, or of the bond to be given thereunder. The bond may be so ordered and so worded as to secure the real objects and offices of the writ as hereinabove stated. The quoted bond required and given in the case at hand was such a bond and its terms were authorized and valid. And, as expressly held in the Muckelrath case, such a bond is more than a mere bail bond. It is not discharged when the principal appears and the final decree is entered. As said in that case quoting from the Edmonson case [122 Miss. 450, 84 So. 458, 10 A. L. R. 380]: "the object of the writ of ne exeat is to detain the person of the defendant in order to compel him to perform the decree of the court in those cases where his departure would endanger the rights of the complainant or prevent the effectual enforcement of the order of the court."

The language of our Court in the cited cases is, therefore, in accord with the rule as stated in the text books on the subject that such a writ and the bond thereunder is not a mere provisional or interlocutory remedy expiring at the entry of final decree, but that its object is to secure the presence of the party in order that the decree may be executed or enforced. The leading case on this point is Lewis v. Shainwald, C.C., 48 F. 492, 499. In fact, the writ in actual practice is more often issued after decree and for its enforcement. The few cases in other jurisdictions holding that the writ and bond expire on the rendition of the final decree are based on statutory provisions and are of no persuasiveness in this state.

[7][8][9] Immediately upon the service of the writ or at any time thereafter in term time or in vacation, the defendant, if not in contempt, may move to discharge or modify the writ or the bond upon showing: (1) That there was no allegation of sufficient facts, or, if alleged, that such facts did not exist at the time the writ was issued which would justify the issuance; or (2) that the basic facts have ceased to exist, or (3) that other facts have arisen which make the discharge or modification just or proper. The sureties may be released at any time upon proper petition and the surrender of the principal. But until the appropriate step is taken to discharge or modify the writ or bond, the failure so to do must be treated as a confession that the facts existed and still exist which authorized the writ and bond, and both will remain in force until there is performed all that the defendant is required under the decree to do as a positive personal duty and which no other person can be compelled effectually to perform; and, therefore, there is no sound basis for the complaint that there is anything unreasonable or arbitrary in the rule or that there is a deprivation of the personal liberty of the defendant, a term which must be understood as liberty under the law, not a liberty which demands the right to disregard and go free of the character of personal obligation with which we are here dealing.

[10] The argument is made that there was no power to proceed in vacation in the enforcement of the alimony decree--that this could be done only in term time. This defendant was ordered in the decree to pay the alimony in monthly installments. He contemptuously failed to do so, and in vacation there was the stated proceeding to punish for contempt. The power to do so in vacation is expressly conferred by *311 Section 367, Code 1930, and this power is not confined to injunction cases, as contended, but expressly includes "any other order, decree, or process of the court."

[11][12] The facts of the present case are that in the progress of the effort to enforce the decree by way of process in contempt, the defendant had admittedly gone beyond the limits of the state, so that citation could not be served upon him, he did not remain amenable to the processes of the court, with the result that his bond was thereupon breached. The sureties were thence properly cited to show cause why they should not stand in judgment for the penalty of the bond. They showed no valid cause for avoidance, and they are not in a position to complain that the court adjudged against them a less sum than the penalty of the bond.

Affirmed.

STATUTE OF LIMITATIONS AND LACHES

A. Statutory Provisions

§ 15-1-1. Application of chapter.

The provisions of this chapter shall not apply to any suit which is or shall be limited by any statute to be brought within a shorter time than is prescribed in this chapter, and such suit shall be brought within the time that may be limited by such statute.

Sources: Codes, 1857, ch. 57, art. 24; 1871, § 2168; 1880, § 2689; 1892, § 2763a; Laws, 1906, § 3126; Hemingway's 1917, § 2490; Laws, 1930, § 2293; Laws, 1942, § 723.

§ 15-1-3. Completion of limitation extinguishes right.

The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy. However, the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon.

Sources: Codes, 1880, § 2685; 1892, § 2755; Laws, 1906, § 3115; Hemingway's 1917, § 2479; Laws, 1930, § 2313; Laws, 1942, § 743.

§ 15-1-5. Period of limitations shall not be changed by contract.

The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contracts stipulation whatsoever shall be absolutely null and void, the object of this section being to make the period of limitations for the various causes of action the same for all litigants.

Sources: Codes, 1906, § 3127; Hemingway's 1917, § 2491; Laws, 1930, § 2294; Laws, 1942, § 724.

§ 15-1-7. Limitations applicable to actions to recover land.

A person may not make an entry or commence an action to recover land except within ten years next after the time at which the right to make the entry or to bring the action shall have first accrued to some person through whom he claims, or, if the right shall not have accrued to any person through whom he claims, then except within ten years next after the time at which the right to make the entry or bring the action shall have first accrued to the person making or bringing the same. However, if, at the time at which the right of any person to make an entry or to bring an action to recover land shall have first accrued, such person shall have been under the disability of infancy or unsoundness of mind, then such person or the person claiming through him may, notwithstanding that the period of ten years hereinbefore limited shall have expired, make an entry or bring an action to recover the land at any time within ten years next after the time at which the person to whom the right shall have first accrued shall have ceased to be under either disability, or shall have died, whichever shall have first happened. However, when any person who shall be under either of the disabilities mentioned, at the time at which his right shall have first accrued, shall depart this life without having ceased to be under such disability, no time shall be allowed, by reason of the disability of any other person, to make an entry or to bring an action to recover the land beyond the period of ten years next after the time at which such person shall have died.

Sources: Codes, Hutchinson's 1848, ch. 57, arts. 1 (1), 6 (1); 1857, ch. 57, art. 1; 1871, § 2147; 1880, § 2664; 1892, § 2730; Laws, 1906, § 3090; Hemingway's 1917, § 2454; Laws, 1930, § 2285; Laws, 1942, § 709.

§ 15-1-13. Ten years' adverse possession gives title; exceptions.

(1) Ten (10) years' actual adverse possession by any person claiming to be the owner for that time of any land, uninterruptedly continued for ten (10) years by occupancy, descent, conveyance, or otherwise, in whatever way such occupancy may have commenced or continued, shall vest in every actual occupant or possessor of such land a full and complete title, saving to persons under the disability of minority or unsoundness of mind the right to sue within ten (10) years after the removal of such disability, as provided in Section 15-1-7. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one (31) years.

(2) For claims of adverse possession not matured as of July 1, 1998, the provisions of subsection (1) shall not apply to a landowner upon whose property a fence or driveway has been built who files with the chancery clerk within the ten (10) years required by this section a written notice that such fence or driveway is built without the permission of the landowner. Failure to file such notice shall not create any inference that property has been adversely possessed. The notice shall be filed in the land records by the chancery clerk and shall describe the property where said fence or driveway is constructed.

Sources: Codes, Hutchinson's 1848, ch. 57, art. 6 (3); 1857, ch. 57, art. 3; 1871, § 2149; 1880, § 2668; 1892, § 2734; Laws, 1906, § 3094; Hemingway's 1917, § 2458; Laws, 1930, § 2287; Laws, 1942, § 711; Laws, 1998, ch. 504, § 1, eff from and after July 1, 1998, and shall apply to claims arising on or after July 1, 1998.

§ 15-1-15. Three years' actual occupation under a tax title bars suit.

Actual occupation for three years, after two years from the day of sale of land held under a conveyance by a tax collector in pursuance of a sale for taxes, shall bar any suit to recover such land or assail such title because of any defect in the sale of the land for taxes, or in any precedent step to the sale, saving to minors and persons of unsound mind the right to bring suit within such time, after the removal of their disabilities, and upon the same terms as is provided for the redemption of land by such persons.

Sources: Codes, 1871, § 1709; 1880, § 539; 1892, § 2735; Laws, 1906, § 3095; Hemingway's 1917, § 2459; Laws, 1930, § 2288; Laws, 1942, § 716; Laws, 1912, ch. 233.

§ 15-1-21. Actions on mortgages, deeds of trust, and statutory liens to be brought within time allowed for action upon writing in which debt is specified.

When a mortgage or deed of trust shall be given on real or personal estate, or when a lien shall be given by law, to secure the payment of a sum of money specified in any writing, an action or suit or other proceedings shall not be brought or had upon such lien, mortgage, or deed of trust to recover the sum of money so secured except within the time that may be allowed for the commencement of an action at law upon the writing in which the sum of money secured by such lien, mortgage, or deed of trust may be specified. In all cases where the remedy at law to recover the debt shall be barred, the remedy in equity on the mortgage shall be barred.

Sources: Codes, 1857, ch. 57, art. 4; 1871, § 2150; 1880, § 2667; 1892, § 2733; Laws, 1906, § 3093; Hemingway's 1917, § 2457; Laws, 1930, § 2290; Laws, 1942, § 719.

§ 15-1-23. Limitations applicable to suits or actions on installment notes following foreclosure or sale of property pledged as security therefor.

In all cases, no suit or action shall hereafter be commenced or brought upon any installment note, or series of notes of three or more, whether due or not, where said note or notes are secured by mortgage, deed of trust, or otherwise, upon any property, real or personal, unless the same is commenced or brought within one year from the date of the foreclosure or sale of the property pledged as security for said note or notes.

Sources: Codes, 1942, § 720; Laws, 1934, ch. 251.

§ 15-1-25. Limitations applicable to action or scire facias against executor or administrator.

An action or scire facias may not be brought against any executor or administrator upon any judgment or other cause of action against his testator or intestate, except within four years after the qualification of such executor or administrator.

Sources: Codes, Hutchinson's 1848, ch. 57, art 6 (12); 1857, ch. 57, art. 11; 1871, § 2155; 1880, § 2676; 1892, § 2745; Laws, 1906, § 3105; Hemingway's 1917, § 2469; Laws, 1930, § 2295; Laws, 1942, § 725.

§ 15-1-27. Limitations applicable to action by ward against guardian or surety.

All actions against a guardian and the sureties on his bond, or either of them, by the ward, shall be commenced within five years next after the ward shall have arrived at the age of twenty-one years, and not after.

Sources: Codes, 1892, § 2738; Laws, 1906, § 3098; Hemingway's 1917, § 2462; Laws, 1930, § 2296; Laws, 1942, § 726.

§ 15-1-29. Limitations applicable to actions on accounts and unwritten contracts.

Except as otherwise provided in the Uniform Commercial Code, actions on an open account or account stated not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three (3) years next after the cause of such action accrued, and not after, except that an action based on an unwritten contract of employment shall be commenced within one (1) year next after the cause of such action accrued, and not after.

Sources: Codes, Hutchinson's 1848, ch. 57, art 6 (10); 1857, ch. 57, art. 5; 1871, § 2151; 1880, § 2670; 1892 § 2739; Laws, 1906, § 3099; Hemingway's 1917, § 2463; Laws, 1930, § 2299; Laws, 1942, § 729; Laws, 1964, ch. 299; Laws, 1966, ch. 316, § 10-105; Laws, 1976, ch. 488, § 1, eff from and after July 1, 1976.

§ 15-1-31. When statute commences to run on open accounts.

In all actions brought to recover the balance due upon a mutual and open current account, where both parties are merchants or traders, the cause of action shall be deemed to have accrued at the time of the true date of the last item proved in such account. In all other actions upon open accounts, the period of limitation shall commence to run against the several items thereof from the dates at which the same respectively became due and payable.

Sources: Codes, Hutchinson's 1848, ch. 57, art. 6 (10); 1857, ch. 57, art. 20; 1871, § 2164; 1880, § 2671; 1892, § 2740; Laws, 1906, § 3100; Hemingway's 1917, § 2464; Laws, 1930, § 2300; Laws, 1942, § 730.

§ 15-1-33. Limitations applicable to actions and suits for penalty or forfeiture.

All actions and suits for any penalty or forfeiture on any penal statute, brought by any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense was committed, and not after.

Sources: Codes, 1857, ch. 57, art. 23; 1871, § 2167; 1880, § 2672; 1892, § 2741; Laws, 1906, § 3101; Hemingway's 1917, § 2465; Laws, 1930, § 2301; Laws, 1942, § 731.

§ 15-1-35. Limitations applicable to actions for certain torts.

All actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, for failure to employ, and for libels, shall be commenced within one (1) year next after the cause of such action accrued, and not after.

Sources: Codes, Hutchinson's 1848, ch. 57, art. 6 (6); 1857, ch. 57, art. 7; 1871, § 2152; 1880, § 2673; 1892, § 2742; Laws, 1906, § 3102; Hemingway's 1917, § 2466; Laws, 1930, § 2302; Laws, 1942, § 732; Laws, 1983, ch. 394, eff from and after July 1, 1983.

§ 15-1-36. Limitations applicable to malpractice action arising from medical, surgical or other professional services.

(1) For any claim accruing on or before June 30, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered.

(2) For any claim accruing on or after July 1, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered, and, except as described in paragraphs (a) and (b) of this subsection, in no event more than seven (7) years after the alleged act, omission or neglect occurred:

(a) In the event a foreign object introduced during a surgical or medical procedure has been left in a patient's body, the cause of action shall be deemed to have first accrued at, and not before, the time at which the foreign object is, or with reasonable diligence should have been, first known or discovered to be in the patient's body.

(b) In the event the cause of action shall have been fraudulently concealed from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence should have been, first known or discovered.

(3) Except as otherwise provided in subsection (4) of this section, if at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be six (6) years of age or younger, then such minor or the person claiming through such minor may, notwithstanding that the period of time limited pursuant to subsections (1) and (2) of this section shall have expired, commence action on such claim at any time within two (2) years next after the time at which the minor shall have reached his sixth birthday, or shall have died, whichever shall have first occurred.

(4) If at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be a minor without a parent or legal guardian, then such minor or the person claiming through such minor may, notwithstanding that the period of time limited pursuant to subsections (1) and (2) of this section shall have expired, commence action on such claim at any time within two (2) years next after the time at which the minor shall have a parent or legal guardian or shall have died, whichever shall have first occurred; provided, however, that in no event shall the period of limitation begin to run prior to such minor's sixth birthday unless such minor shall have died.

(5) If at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be under the disability of unsoundness of mind, then such person or the person claiming through him may, notwithstanding that the period of time hereinbefore limited shall have expired, commence action on such claim at any time within two (2) years next after the time at which the person to whom the right shall have first accrued shall have ceased to be under the disability, or shall have died, whichever shall have first occurred.

(6) When any person who shall be under the disabilities mentioned in subsections (3), (4) and (5) of this section at the time at which his right shall have first accrued, shall depart this life without having ceased to be under such disability, no time shall be allowed by reason of the disability of such person to commence action on the claim of such person beyond the period prescribed under Section 15-1-55, Mississippi Code of 1972.

(7) For the purposes of subsection (3) of this section, and only for the purposes of such subsection, the disability of infancy or minority shall be removed from and after a person has reached his sixth birthday.

(8) For the purposes of subsection (4) of this section, and only for the purposes of such subsection, the disability of infancy or minority shall be removed from and after a person has reached his sixth birthday or from and after such person shall have a parent or legal guardian, whichever occurs later, unless such disability is otherwise removed by law.

(9) The limitation established by this section as to a licensed physician, osteopath, dentist, hospital or nurse shall apply only to actions the cause of which accrued on or after July 1, 1976.

(10) The limitation established by this section as to pharmacists shall apply only to actions the cause of which accrued on or after July 1, 1978.

(11) The limitation established by this section as to podiatrists shall apply only to actions the cause of which accrued on or after July 1, 1979.

(12) The limitation established by this section as to optometrists and chiropractors shall apply only to actions the cause of which accrued on or after July 1, 1983.

(13) The limitation established by this section as to actions commenced on behalf of minors shall apply only to actions the cause of which accrued on or after July 1, 1989.

(14) The limitation established by this section as to institutions for the aged or infirm shall apply only to actions the cause of which occurred on or after January 1, 2003.

(15) No action based upon the health care provider's professional negligence may be begun unless the defendant has been given at least sixty (60) days' prior written notice of the intention to begin the action. No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered. If the notice is served within sixty (60) days prior to the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended sixty (60) days from the service of the notice for said health care providers and others. This subsection shall not be applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name.

Sources: Laws, 1976, ch. 473; Laws, 1978, ch. 464, § 1; Laws, 1979, ch. 347; Laws, 1983, ch. 482, § 1; Laws, 1989, ch. 311, § 2; Laws, 1998, ch. 573, § 1; Laws, 2002, 3rd Ex Sess, ch. 2, § 5, eff from and after Jan. 1, 2003.

§ 15-1-41. Limitations applicable to actions arising from deficiencies in constructions, or improvements to real property.

No action may be brought to recover damages for injury to property, real or personal, or for an injury to the person, arising out of any deficiency in the design, planning, supervision or observation of construction, or construction of an improvement to real property, and no action may be brought for contribution or indemnity for damages sustained on account of such injury except by prior written agreement providing for such contribution or indemnity, against any person, firm or corporation performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than six (6) years after the written acceptance or actual occupancy or use, whichever occurs first, of such improvement by the owner thereof. This limitation shall apply to actions against persons, firms and corporations performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property for the State of Mississippi or any agency, department, institution or political subdivision thereof as well as for any private or nongovernmental entity.

This limitation shall not apply to any person, firm or corporation in actual possession and control as owner, tenant or otherwise of the improvement at the time the defective and unsafe condition of such improvement causes injury.

This limitation shall not apply to actions for wrongful death.

The provisions of this section shall only apply to causes of action accruing from and after January 1, 1986; and any cause of action accruing prior to January 1, 1986, shall be governed by Chapter 350, Laws of 1972.

Sources: Codes, 1942, § 720.5; Laws, 1966, ch. 397, § 1; Laws, 1972, ch. 350, §§ 1, 2; Laws, 1985, ch. 332; Laws, 1985, ch. 505, § 5; Laws, 1994, ch. 626, § 3, eff from and after July 1, 1994.

§ 15-1-43. Limitations applicable to actions founded on domestic judgments or decrees.

All actions founded on any judgment or decree rendered by any court of record in this state, shall be brought within seven years next after the rendition of such judgment or decree, and not after, and an execution shall not issue on any judgment or decree after seven years from the date of the judgment or decree.

Sources: Codes, Hutchinson's 1848, ch. 57, art. 6 (13); 1857, ch. 57, art. 8; 1871, § 2153; 1880, § 2674; 1892, § 2743; Laws, 1906, § 3103; Hemingway's 1917, § 2467; Laws, 1930, § 2303; Laws, 1942, § 733.

§ 15-1-45. Limitations applicable to actions founded on foreign judgments or decrees.

All actions founded on any judgment or decree rendered by any court of record without this state shall be brought within seven years after the rendition of such judgment or decree, and not after. However, if the person against whom such judgment or decree was or shall be rendered, was, or shall be at the time of the institution of the action, a resident of this state, such action, founded on such judgment or decree, shall be commenced within three years next after the rendition thereof, and not after.

Sources: Codes, Hutchinson's 1848, ch. 57, art. 6 (14); 1857, ch. 57, art. 9; 1871, § 2154; 1880, § 2675; 1892, § 2744; Laws, 1906, § 3104; Hemingway's 1917, § 2468; Laws, 1930, § 2304; Laws, 1942, § 734.

§ 15-1-47. Lien of judgments limited.

A judgment or decree rendered in any court held in this state shall not be a lien on the property of the defendant therein for a longer period than seven years from the rendition thereof, unless an action be brought thereon before the expiration of such time. However, the time during which the execution of a judgment or decree shall be stayed or enjoined by supersedeas, injunction or other process, shall not be computed as any part of the period of seven years.

Sources: Codes, Hutchinson's 1848, ch. 57, art. 6 (13); 1857, ch. 57, art. 15; 1871, § 2159; 1880, § 2680; 1892, § 2750; Laws, 1906, § 3110; Hemingway's 1917, § 2474; Laws, 1930, § 2305; Laws, 1942, § 735.

§ 15-1-49. Limitations applicable to actions not otherwise specifically provided for.

(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.

(2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

(3) The provisions of subsection (2) of this section shall apply to all pending and subsequently filed actions.

Sources: Codes, 1880, § 2669; 1892, § 2737; Laws, 1906, § 3097; Hemingway's 1917, § 2461; Laws, 1930, § 2292; Laws, 1942, § 722; Laws, 1989, ch. 311, § 3; Laws, 1990, ch. 348, § 1, eff from and after passage (approved March 12, 1990).

§ 15-1-51. Limitations of suits by and against the state, counties and municipal corporations.

Statutes of limitation in civil cases shall not run against the state, or any subdivision or municipal corporation thereof, except that any judgment or decree rendered in favor of the state, or any subdivision or municipal corporation thereof, shall not be a lien on the property of the defendant therein for a longer period than seven (7) years from the date of filing notice of the lien, unless an action is brought before the expiration of such time or unless the state or such subdivision or municipal corporation refiles notice of the lien. There shall be no limit upon the number of times that the state, or any subdivision or municipal corporation thereof, may refile such notices of lien.

The statutes of limitation shall run in favor of the state, the counties, and municipal corporations beginning at the time when the plaintiff first had the right to demand payment of the officer or board authorized to allow or disallow the claim sued upon. The provisions of this section shall apply to all pending and subsequently filed notices of liens.

Sources: Codes, 1892, § 2736; Laws, 1906, § 3096; Hemingway's 1917, § 2460; Laws, 1930, § 2291; Laws, 1942, § 721; Laws, 1991, ch. 503, § 1, eff from and after passage (approved April 3, 1991).

§ 15-1-53. Effect of running of statute of limitations against executor, administrator, guardian, or other trustee, as against beneficiary.

When the legal title to property or a right in action is in an executor, administrator, guardian, or other trustee, the time during which any statute of limitations runs against such trustee shall be computed against the person beneficially interested in such property or right in action, although such person may be under disability and within the saving of any statute of limitations; and may be availed of in any suit or actions by such person.

Sources: Codes, 1880, § 2694; 1892, § 2761; Laws, 1906, § 3123; Hemingway's 1917, § 2487; Laws, 1930, § 2297; Laws, 1942, § 727.

§ 15-1-55. Effect of death of party before bar is complete.

If a person entitled to bring any of the personal actions herein mentioned, or liable to any such action, shall die before the expiration of the time herein limited therefor, such action may be commenced by or against the executor or administrator of the deceased person, after the expiration of said time, and within one year after the death of such person.

Sources: Codes, 1857, ch. 57, art. 18; 1871, § 2162; 1880, § 2683; 1892, § 2753; Laws, 1906, § 3113; Hemingway's 1917, § 2477; Laws, 1930, § 2298; Laws, 1942, § 728.

§ 15-1-57. Statute of limitations not to run when person prohibited to sue.

When any person shall be prohibited by law, or restrained or enjoined by the order, decree, or process of any court in this state from commencing or prosecuting any action or remedy, the time during which such person shall be so prohibited, enjoined or restrained, shall not be computed as any part of the period of time limited by this chapter for the commencement of such action.

Sources: Codes, 1857, ch. 57, art. 26; 1871, § 2170; 1880, § 2691; 1892, § 2758a; Laws, 1906, § 3120; Hemingway's 1917, § 2484; Laws, 1930, § 2307; Laws, 1942, § 737.

§ 15-1-59. Saving in favor of persons under disabilities.

If any person entitled to bring any of the personal actions mentioned shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the actions within the times in this chapter respectively limited, after his disability shall be removed as provided by law. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

Sources: Codes, Hutchinson's 1848, ch. 57, art. 1 (7); 1857, ch. 57, art. 12; 1871, § 2156; 1880, § 2677; 1892, § 2746; Laws, 1906, § 3106; Hemingway's 1917, § 2470; Laws, 1930, § 2308; Laws, 1942, § 738; Laws, 1983, ch. 482, § 2, eff from and after July 1, 1983.

§ 15-1-65. Action barred in another jurisdiction barred here.

When a cause of action has accrued outside of this state, and by the laws of the place outside this state where such cause of action accrued, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state; provided, however, that where such a cause of action has accrued in favor of a resident of this state, this state's law on the period of limitation shall apply.

Sources: Codes, 1880, § 2684; 1892, § 2754; Laws, 1906, § 3114; Hemingway's 1917, § 2478; Laws, 1930, § 2311; Laws, 1942, § 741; Laws, 1989, ch. 311, § 4, eff from and after July 1, 1989.

§ 15-1-67. Effect of fraudulent concealment of cause of action.

If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

Sources: Codes, 1857, ch. 57, art. 14; 1871, § 2158; 1880, § 2679; 1892, § 2749; Laws, 1906, § 3109; Hemingway's 1917, § 2473; Laws, 1930, § 2312; Laws, 1942, § 742.

§ 15-1-69. Commencement of new action subsequent to abatement or defeat of original action.

If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein, and his executor or administrator may, in case of the plaintiff's death, commence such new action, within the said one year.

Sources: Codes, Hutchinson's 1848, ch. 57, art. 1 (16); 1857, ch. 57, art. 19; 1871, § 2163; 1880, § 2686; 1892, § 2756; Laws, 1906, § 3116; Hemingway's 1917, § 2480; Laws, 1930, § 2314; Laws, 1942, § 744.

§ 15-1-71. Limitation of setoff.

All the provisions of this chapter shall apply to the case of any debt or demand on the contract, alleged by way of setoff on the part of a defendant.The time of limitation of such debt or demand shall be computed in like manner as if an action had been commenced therefor at the time when the plaintiff's action was commenced. The fact that a setoff is barred shall not preclude the defendant from using it as such if he held it against the debt sued on before it was barred.

Sources: Codes, 1857, ch. 57, art. 22; 1871, § 2166; 1880, § 2687; 1892, § 2756a; Laws, 1906, § 3117; Hemingway's 1917, § 2481; Laws, 1930, § 2317; Laws, 1942, § 747.

§ 15-1-73. New promise to be in writing; effect of new promise by one or more joint contractors as against non-promisors.

In actions founded upon any contract, an acknowledgment or promise shall not be evidence of a new or continuing contract whereby to take any case out of the operation of the provisions of this chapter or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing signed by the party chargeable thereby. Where there shall be two or more joint contractors, one or more of them shall not lose the benefit of the provisions of this chapter so as to be chargeable, by reason only of an acknowledgment or promise made or signed by any other or others of them. In actions against joint contractors, if the plaintiff be barred as to one or more of the defendants but be entitled to recover against any other or others of them, by virtue of a new acknowledgment or promise, or otherwise, judgment shall be given for the plaintiff as to any of the defendants against whom he is entitled to recover, and for the other defendants against the plaintiff.

Sources: Codes, Hutchinson's 1848, ch. 57, art. 6 (16); 1857, ch. 57, art. 21; 1871, § 2165; 1880, § 2688; 1892, § 2757; Laws, 1906, § 3118; Hemingway's 1917, § 2482; Laws, 1930, § 2318; Laws, 1942, § 748.

§ 15-1-75. Bar of statute of limitations against one does not affect another jointly interested.

In all cases where the interests are joint, one shall not be barred because another jointly interested is, and the statute of limitations provided in this chapter shall be severally applied, and not jointly, to the right of actions, in whatever cause, pertaining to each of all the parties, though jointly interested.

Sources: Codes, 1906, § 3128; Hemingway's 1917, § 2492; Laws, 1930, § 2320; Laws, 1942, § 750.

§ 15-1-77. Effect upon limitations of concurrent jurisdiction in courts of common law and of equity.

Whenever there be a concurrent jurisdiction in the courts of common law and in the courts of equity of any cause of action, the provisions of this chapter limiting a time for the commencement of a suit for such cause of action in a court of common law, shall apply to all suits to be brought for the same cause in a court of chancery.

Sources: Codes, 1857, ch. 57, art. 30; 1871, § 2174; 1880, § 2695; 1892, § 2762; Laws, 1906, § 3124; Hemingway's 1917, § 2488; Laws, 1930, § 2321; Laws, 1942, § 751.

§ 15-1-79. Limitations inapplicable to suits on certain obligations of banks and moneyed corporations.

None of the provisions of this chapter shall apply to suits brought to enforce payment of notes, bills, or evidences of debt issued by any bank or moneyed corporation.

Sources: Codes, 1857, ch. 57, art. 27; 1871, § 2171; 1880, § 2690; 1892, § 2758; Laws, 1906, § 3119; Hemingway's 1917, § 2483; Laws, 1930, § 2319; Laws, 1942, § 749.

§ 15-3-1. Certain contracts to be in writing.

An action shall not be brought whereby to charge a defendant or other party:

(a) upon any special promise to answer for the debt or default or miscarriage of another person;
(b) upon any agreement made upon consideration of marriage, mutual promises to marry excepted;
(c) upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one year;
(d) upon any agreement which is not to be performed within the space of fifteen months from the making thereof; or
(e) upon any special promise by an executor or administrator to answer any debt or damage out of his own estate;

unless, in each of said cases, the promise or agreement upon which such action may be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or signed by some person by him or her thereunto lawfully authorized in writing.

Sources: Codes, Hutchinson's 1848, ch. 47, art. 1 (1); 1857, ch. 44, art. 1; 1871, § 2892; 1880, § 1292; 1892, § 4225; Laws, 1906, § 4775; Hemingway's 1917, § 3119; Laws, 1930, § 3343; Laws, 1942, § 264; Laws, 1926, ch. 152.

§ 15-3-3. Fraudulent conveyances, judgments, loans and the like.

Every gift, grant, or conveyance of lands, tenements, or hereditaments, goods or chattels, or of any rent, common or other profit or charge out of the same, by writing or otherwise, and every bond, suit, judgment, or execution had or made and contrived of malice, fraud, covin, collusion, or guile, to the intent or purpose to delay, hinder, or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties, or forfeitures, or to defraud or deceive those who shall purchase the same lands, tenements, or hereditaments, or any rent, profit, or commodity out of them, shall be deemed and taken only as against the person or persons, his, her, or their heirs, successors, executors, administrators, or assigns, and every of them whose debts, suits, demands, estates, or interests by such guileful and covinous devices and practices shall or might be in any wise disturbed, hindered, delayed, or defrauded, to be clearly and utterly void; any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

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Moreover, if any conveyance be of goods or chattels, and be not on consideration deemed valuable in law, it shall be taken to be fraudulent within this section, unless the same be by will duly proved and recorded, or by writing acknowledged or proved, and such writing, if the same be for real estate, shall be acknowledged or proved and filed for record in the county where the land conveyed is situated, and, if for personal property, then in the county where the donee shall reside or the property shall be. The proof or acknowledgment in either case shall be taken or made and

certified in the same manner as conveyances of lands and tenements are by law directed to be acknowledged or proved, unless, in the case of personal property, possession shall really and bona fide remain with the donee.

And in like manner, where any loan of goods or chattels shall be pretended to have been made to any person, the possession thereof having remained with said person or with those claiming under him for the space of three years without demand made and pursued by due course of law on the part of the pretended lender, or where any reservation or limitation shall be pretended to have been made of a use of property by way of condition, reversion, remainder, or otherwise in goods or chattels, the possession thereof having remained in another or those claiming under him for a space of three years without demand made and pursued by due course of law on the part of the one making such pretended reservation or limitation, the same shall be taken to be fraudulent within this statute as to the creditors and purchasers of the persons so remaining in possession, and the absolute property shall be deemed to be with the possession, unless such loan, reservation, or limitation were declared by will or by writing, proved or acknowledged, and filed for record.

Sources: Codes, Hutchinson's 1848, ch. 47, art. 1 (2); 1857, ch. 44, art. 2; 1871, § 2893; 1880, § 1293; 1892, §§ 4226, 4227; Laws, 1906, §§ 4776, 4777; Hemingway's 1917, §§ 3120, 3121; Laws, 1930, §§ 3344, 3345; Laws, 1942, §§ 265, 266.

§ 15-3-5. Fraudulent conveyances, judgments, loans and the like; exceptions.

Section 15-3-3 shall not extend to any estate or interest in any lands, goods or chattels, or any rents, common, or profit out of the same, which shall be upon good consideration and bona fide lawfully conveyed or assured to any person or persons, bodies-politic or corporate, nor shall it in any case extend to creditors whose debts were contracted after such fraudulent act, unless made with intent to defraud them, and though a conveyance or contract be decreed void as to prior creditors, it shall not, on that account, be void as to subsequent creditors or purchasers.

Sources: Codes, Hutchinson's 1848, ch. 47, art. 1 (3); 1857, ch. 44, art. 3; 1871, § 2894; 1880, § 1294; 1892, § 4228; Laws, 1906, § 4778; Hemingway's 1917, § 3122; Laws, 1930, § 3346; Laws, 1942, § 267.

§ 15-3-7. Property of improperly disclosed principal or partner to be treated as property of one ostensibly transacting business.

If a person shall transact business as a trader or otherwise, with the addition of the words "agent," "factor," "and company," or " & Co.," or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if a person shall transact business in his own name without any such addition, all the property, stock, money and choses in action used or acquired in such business shall, as to the creditors of such person, be liable for his debts, and be in all respects treated in favor of his creditors as his property. However, the provisions of this section shall not apply to a refrigerated box, vending machine or other container when placed by a person, firm, or corporation in a store, mercantile establishment, or other place of business to be used therein, where said refrigerated box, vending machine, or other container is plainly marked with a sign, painted on or attached to and prominently displayed on such property, showing said property to be the property of the person, firm, or corporation, placing the same therein.

Sources: Codes, 1880, § 1300; 1892, § 4234; Laws, 1906, § 4784; Hemingway's 1917, § 3128; Laws, 1930, § 3352; Laws, 1942, § 273; Laws, 1956, ch. 208.

§ 15-3-9. Creditors to be notified of destruction of insured stock of merchandise by fire.

In case of the destruction of a stock of merchandise by fire upon which there is insurance against such loss, the holder of such insurance policies shall within five days after such loss notify his creditors to whom he is indebted for merchandise, of his loss and the amount of insurance carried, and no such policy or policies of insurance shall be transferred or assigned for ten days after such notice, and no such insurance shall be paid for fifteen days next after the occurrence of any such fire.

Sources: Codes, Hemingway's 1917, § 3130; Laws, 1930, § 3354; Laws, 1942, § 276; Laws, 1908, ch. 100.

§ 15-3-11. Actions on contracts made during infancy.

An action shall not be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or contract made during infancy, unless such promise or ratification shall be made by some writing, signed by the person to be charged therewith.

Sources: Codes, 1857, ch. 44, art. 8; 1871, § 2898; 1880, § 1298; 1892, § 4232; Laws, 1906, § 4782; Hemingway's 1917, § 3126; Laws, 1930, § 3350; Laws, 1942, § 271.

§ 15-3-13. Chapter is not applicable to official sales.

Nothing in this chapter shall apply to official sales by sheriffs, constables, executors, administrators, guardians, receivers, commissioners, trustees in bankruptcy, or any public officer.

Sources: Codes, Hemingway's 1917, § 3131; Laws, 1930, § 3355; Laws, 1942, § 277; Laws, 1908, ch. 100.

§ 15-3-15. Effect of chapter on rules of evidence or presumptions of law.

Except as especially provided, nothing contained in this chapter, nor any act thereunder, shall change or affect the present rules of evidence or the present presumptions of law.

Sources: Codes, Hemingway's 1917, § 3132; Laws, 1930, § 3356; Laws, 1942, § 278; Laws, 1908, ch. 100.

B. Laches

Stepanek v. Roth, 418 So.2d 74 (Miss. 1982)

ROY NOBLE LEE, Justice, for the Court:

Earl H. Roth, Jr., et al., filed a bill of complaint in the Chancery Court of Hancock County, Honorable John S. Morris, presiding, seeking a mandatory injunction against Dennis Stepanek, et al., requiring them to remove mobile homes or trailers placed on lots in Bayou Phillips Estates Subdivision No. 2. After a trial on the merits, the chancellor directed issuance of the injunction and ordered the defendants to remove the trailers within ninety (90) days, and they have appealed here.

The plat for the Bayou Phillips Estates No. 2 was filed and recorded in the Record of Plats, Chancery Clerk's Office, Hancock County, Mississippi, on July 13, 1956. The subdivision, consisting of several hundred lots, was originally platted, filed and dedicated by Bayou Phillips Estates, Inc. Thereafter, lots were sold to the public. The plat contained certain restrictive covenants, among which was the following:

> (2) Property in this subdivision shall be used only for residential purposes, with the exception of necessary outbuildings used in connection therewith and for public utility facilities on lots reserved for same. All buildings erected thereon shall be of substantial construction (no trailers, tents, hutments, hotels, apartment houses or temporary dwellings) and conform to the high class of development of said subdivision. No dwelling houses shall be erected thereon that shall cost less than Four Thousand Dollars ($4,000.00).

The appellants contend that appellees waived enforcement of the restrictive covenant and are estopped by the doctrine of laches. We agree and reverse the judgment of the lower court.

The appellants acquired lots in the Bayou Phillips Estates Subdivision No. 2 and placed home trailers on them. They improved the properties, some by elevating the trailers several feet above ground, as required by ordinance and the Planning Commission of Hancock County. All the appellants improved their property by work upon the grounds and by connecting with utilities. They had owned and placed trailers on the lots for periods from three (3) years to ten (10) years, with the knowledge of appellees.

* * * *

No better statement of the rule or summary as applicable to restrictive covenants has been made than that by Rugg, J., in Stewart v. Finklestone, 206 Mass. 28, 92 N.E. 37, 39, 28 L.R.A. (N.S.), 634, 646, 138 Am.St.Rep. 370, from which we quote:

"There is no hard and fast rule as to what constitutes laches. If there has been unreasonable delay in asserting claims or if, knowing his rights, a party does not seasonably avail himself of means at hand for their enforcement, but suffers his adversary to incur expense or enter into obligations or otherwise change his position, or in any way by inaction lulls suspicion of his demands to the harm of the other, or if there has been actual or passive acquiescence in the performance of the act complained of, then equity will ordinarily refuse her aid for the establishment of an admitted right, especially if an injunction is asked. It would be contrary to equity and good conscience to enforce such rights when a defendant has been led to suppose by the word [or silence, or conduct] of the plaintiff that there was no objection to his operations. Diligence is an essential prerequisite to equitable relief of this nature. Quiescence will be a bar when good faith requires vigilance...."

Looking to the stated rules and to the facts as sustained by the evidence, we think it was too late, after waiting more than six years and until appellee had invested her money in the purchase of the property, for appellant to complain, so far as any relief in equity is concerned. Considerably less time than this has been deemed sufficient as a bar in several cases in point, some of which may be found in the reporter's abstracts of the briefs, and to these we add Bigham v. Winnick, 288 Mich. 620, 286 N.W. 102, and see 2 High on Injunctions, 4th Ed., Sec. 1159. [199 Miss. at 553-554; 26 So.2d at 357-358].

We are of the opinion that the principle stated in Twin States Realty Company applies to the facts of the case sub judice and that the appellees here are estopped from enforcing the restrictive covenant against appellants. We hasten

to add and emphasize that this case is decided upon the peculiar facts here and is not a bar and does not apply to other property owners who may be differently situated and affected.

The judgment of the lower court is reversed and judgment is entered here in favor of appellants. In view of this decision, the other questions are not addressed.

REVERSED AND RENDERED.

C. Miss. Tort Claims Act

Univ. of Miss. Medical Center v. Robinson, 876 So.2d 337 (2004)

RANDOLPH, JUSTICE, FOR THE COURT:

A suit was filed in 2002 regarding injuries suffered by a child during a medical procedure in July of 1995. The University of Mississippi Medical Center (UMC) argues that at the time of the injury the controlling version of the Mississippi Tort Claims Act (MTCA) provided a strict one year statute of limitations and that the failure to file the claim prior to the running of such rendered the claim barred. Debra Jenkins Robinson, the mother of the child, contends that a subsequent amendment to the MTCA tolled the running of the statute of limitations. UMC counters arguing that any subsequent amendment to the MTCA which revives a barred claim is unconstitutional.

Per Article 4, § 97 of the Mississippi Constitution, we hold that the March 2002 amendment to § 11-46-11(4) is unconstitutional. We reverse and render.

FACTS

In July of 1995 Debra Robinson took her six-week-old son Kenny to the University of Mississippi Medical Center in Jackson, Mississippi, because she suspected he had a bowel obstruction. He did, and an emergency colostomy was performed. While the procedure went well, Kenny suffered chemical burns on his left arm from where he was intravenously administered a large dosage of calcium chloride. Two separate doctors recorded in his medical chart the presence of burns on his arm. One remarked that the damaged skin was actually "sloughing" off the arm. The burns have resulted in scars and an alleged reduction of use in the arm.

In 1993 the Legislature enacted the Mississippi Tort Claims Act, which codifies the immunity of the state and state employees in certain situations. See Miss. Code Ann. § 11-46-1 ("The term 'employee' shall also include any physician . or other health care practitioner employed by the University of Mississippi Medical Center"). The MTCA has a one-year statute of limitations. Miss. Code Ann. § 11-46-11 (Rev. 2002).

Counsel for Robinson requested medical records from UMC in January of 1996 and again in both April and May of 1996. Nevertheless, no suit was filed until January of 2002. At that point the one-year statute of limitations had clearly run, and the claim was barred. However, in March of 2002, the Legislature amended § 11-46-11(4) of the MTCA. As will be discussed, Robinson contends that the amended MTCA cleared any confusion regarding the applicability of the minors savings clause. Miss. Code Ann. § 11-46-11(4). Relying on Article 4, § 97 of the Mississippi Constitution, UMC contends that the 2002 amendment to § 11-46-11 is unconstitutional.

The trial court denied UMC's motion for summary judgment. This Court granted UMC permission to bring this interlocutory appeal on the issue of the constitutionality of the § 11-46-11. See M.R.A.P. 5. As required by M.R.A.P. 44(a) and M.R.C.P. 24(d), counsel for UMC certified that he served a copy of UMC's brief on the Attorney General. No response was filed on behalf of the State.

ANALYSIS

I. The Constitutionality of the Several Amendments to § 11-46-11.

At the outset, we recount the relevant amendments to the MTCA. The MTCA was enacted in 1993 to create a limited waiver of sovereign immunity of the state and its political subdivisions. Marcum v. Hancock County Sch. Dist., 741 So. 2d 234, 236 (Miss. 1999). As first enacted, the MTCA provided a strict one-year statute of limitations. Id. In Marcum, this Court considered whether the general savings clause applies to the MTCA and held "that § 11-46-11's one (1) year statute of limitations is not tolled by [the general] minor savings clause." Id. at 236-38 (emphasis added). "The MTCA clearly mandates that a one (1) year statute of limitations be applied to any actions brought under the Act." Id. See also Stockstill v. State, 854 So. 2d 1017, 1021 (Miss. 2003); Hays v. Lafayette County Sch. Dist., 759 So. 2d 1144, 1147-48 (Miss. 1999).

Robinson contends that as a result of the holding in Marcum, the Legislature amended § 11-46-11 to include a savings clause. In April of 2000, subsection (4) was added to § 11-46-11. Subsection (4) provided:

From and after May 15, 2000, if any person entitled to bring any action under this chapter shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the action within the time allowed in this section after his disability shall be removed as provided by law. The savings in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

S.B. 2974, 2000 Miss. Laws ch. 315. The practical result of this amendment is that as of May 15, 2000, any injured party under disability of infancy or unsoundness of mind whose remedy is not yet barred by the statute of limitations may avail themselves of the savings clause. Because it was prospective in nature, this amendment created no constitutional issues. Indeed, this amendment only enhanced or extended the rights of actions still existing. It did not include any retroactive language nor did the language indicate that the Legislature sought to revive any barred claims.

In 2002, the Legislature again amended § 11-46-11 by changing the effective date of subsection (4). This final version, and that which is presently before the Court, provides:

(4) From and after April 1, 1993, if any person entitled to bring any action under this chapter shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the action within the time allowed in this section after his disability shall be removed as provided by law. The savings in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

Miss. Code Ann. § 11-46-11 (Rev. 2002). It is this second amendment which today we find unconstitutional under Miss. Const. § 97.

Statutory interpretation is a matter of law which we review in its entirety. Wallace v. Town of Raleigh, 815 So. 2d 1203, 1206 (Miss. 2002). We presume a statute is constitutional unless the challenging party is able to prove unconstitutionality beyond a reasonable doubt. Id. See also Miss. Power Co. v. Goudy, 459 So. 2d 257, 263 (Miss. 1984). All doubt must be resolved in favor of the validity of a statute. Loden v. Miss. Pub. Serv. Comm'n, 279 So. 2d 636, 640 (Miss. 1973). It is our duty to adopt a construction of the statutes which purges the legislative purpose of any constitutional invalidity, absurdity, or unjust inequality. Fortune v. Lee County Bd. of Sup'rs, 725 So. 2d 747, 752 (Miss. 1998); Cole v. Nat'l Life Ins. Co., 549 So. 2d 1301, 1305 (Miss. 1989). Our primary objective when construing statutes is to adopt that interpretation which will meet the true meaning of the Legislature. Stockstill, 854 So. 2d at 1023.

As originally enacted, § 11-46-11 required that Robinson's claim be filed within one year of the date of the tortious conduct. Unfortunately, because no claim was filed by the end of July 1996, Robinson's claim was time barred. HN3Go to the description of this Headnote."The effect of the attachment of the bar of the statute of limitations appears well-established in Mississippi." Cole, 549 So. 2d at 1305. This bar is a vested right which cannot be revived. Id. (citations omitted); see also Miss. Code Ann. § 15-1-3 (Rev. 2003) ("The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy."). The running of the statute of limitations is the point where one's right to pursue a remedy is extinguished and another's vested right in the bar rises.

Article 4, § 97 of the Mississippi Constitution provides: HN4Go to the description of this Headnote."The legislature shall have no power to revive any remedy which may have become barred by lapse of time, or by any statute of limitations of this state." The principle espoused in § 97 of the 1890 constitution is firmly grounded under Mississippi law. See Woodman v. Fulton, 47 Miss. 682, 684 (1873) ("that the bar created by the statute of limitations . . . once vested, cannot be taken away by legislative action."). In Davis v. Minor, 2 Miss. 183 (1835), Chief Justice Sharkey declared for the Court that "it is clear that the moment the remedy was gone, by the running of the statute, the right was gone also . . . and [a party] could not be deprived of the privilege . . . by subsequent legislation." Id. at 189. There are compelling reasons for our constitution to forbid resurrecting a barred claim:

It is reasonable and just, and, indeed, altogether important, that some period of time by legislative enactment should be fixed, beyond which debts and property cannot be recovered; otherwise the debtors or owners would never be free from liability to useless litigation, and courts of justice would be thronged with suitors, seeking, either ignorantly or fraudulently, to possess themselves of that which in justice they should not claim to recover.

Id. at 190.

This Court recognized the adoption of the MTCA's savings clause in dicta. See Stockstill, 854 So. 2d at 1022. However, this question of unconstitutionality was not brought before us then. HN5Go to the description of this Headnote."Where an amended statute remedially lengthens a statute of limitations, [we] will apply the amendment to existing causes." Hollingsworth v. City of Laurel, 808 So. 2d 950, 954 (Miss. 2002) (citations omitted). Of course to do so requires that the amendment or statute be constitutional. Fortune, 725 So. 2d at 752-53.

In the case sub judice, by the time the Legislature first amended § 11-46-11 to include a minor savings clause, Robinson's claim was barred, and thus could not be revived. Though the Legislature enjoys a great deal of authority under the Mississippi Constitution, its second attempt to amend § 11-46-11(4) is specifically prohibited by § 97.

Moreover, the facts of the instant case do not support creating an exception to Miss. Const. § 97 as Robinson now requests. The compelling argument to create a policy exception to protect minors is handicapped by the fact that no suit was filed until January of 2002. Robinson began pursuing a claim several months before the running of the statute of limitations, but failed to give notice of claim or file a timely suit. Her argument on appeal is not persuasive because her claim could have been timely prosecuted.

Further, the injury was obvious, and Robinson had retained counsel by January 1996. At that time, and again in both April and May of 1996, counsel for Robinson requested medical records on behalf of the child. Thus, Robinson knew that a putative cause of action existed.

Certainly public policy dictates that where possible this Court should apply the law in a way that favors protecting minors. Likewise, in this instance, it clear that the Legislature realized that the MTCA lacked a minor savings clause and intended to remedy this. Nevertheless, public policy and legislative intent must give way to specific constitutional principles. HN6Go to the description of this Headnote.This Court "will enforce a statute whose retroactivity is expressed with the "clearest and most positive expression" so long as the statute is not unconstitutional." Fortune, 725 So. 2d at 753 (dictum).

CONCLUSION

Robinson's claim was barred by the applicable statute of limitations prior to the codification of a minors savings clause in the MTCA.

The March 2002 amendment to § 11-46-11(4) is unconstitutional to the extent that it makes the savings clause applicable to all claims since April 1, 1993. However, the savings clause as first enacted in April of 2000 is valid and enforceable. Those claims in existence on May 15, 2000, are subject to the savings clause.

The Legislature is invited to amend § 11-46-11 in accordance with this opinion. Until such is done, the application of the savings clause will differ from that which is provided in the code.

Accordingly, the circuit court erred in denying UMC's motion for summary judgment. We reverse the circuit court's judgment, and we render judgment here for UMC finally dismissing Robinson's complaint and this action with prejudice as barred by the applicable statute of limitations.

REVERSED AND RENDERED.

SMITH, C.J., WALLER AND COBB, P. JJ., CARLSON AND DICKINSON, JJ., CONCUR. EASLEY AND GRAVES, JJ., DISSENT WITHOUT SEPARATE WRITTEN OPINION. DIAZ, J., NOT PARTICIPATING.

D. Med Mal Limitation

Pope v. Brock, 912 So.2d 935 (2005).

EN BANC.

DICKINSON, JUSTICE, FOR THE COURT:

This appeal involves a claim that several health care providers' negligence led to a wrongful death. The question presented is whether the claim is barred by the statute of limitations.

BACKGROUND FACTS AND PROCEEDINGS

Nancy Springer died on June 2, 2001. Ginger M. Pope, Administratrix of the Estate of Nancy Springer, served written notice on Dr. Charles F. Brock, Dr. Steven G. Clark, Dr. James Wise, Bolivar Medical Center (BMC), and University of Mississippi Medical Center on May 30, 2003, advising them of the estate's [*2] claim of professional negligence. In what she believed was compliance with a statutorily required sixty-day notice period, Pope waited until July 30, 2003, and then filed a wrongful death suit in Hinds County Circuit Court n1 against the five health care providers, alleging that their negligence caused Springer's death. n2 Dr. Brock, Dr. Clark, and BMC filed motions to dismiss, claiming the suit was barred by the statute of limitations. The trial court granted the motions to dismiss on March 25, 2004. It is from this dismissal that Pope now appeals.

n1 Venue was subsequently transferred to Bolivar County by agreement of the parties.

n2 Pope later consented to the dismissal of defendants Dr. James Wise and University of Mississippi Medical Center.

ANALYSIS

The question before us requires only that we interpret certain statutes which provide for the expiration of time for filing suit in this case. Our decision is not dependent on resolution of any factual dispute which should be submitted to a [*3] finder of fact. Therefore, the question before us is one of law, which we review de novo. *Sarris v. Smith, 782 So. 2d 721, 723 (Miss. 2001).*

Miss. Code Ann. § 15-1-36(15)

The parties agree that this case is controlled by *Miss. Code Ann. § 15-1-36(15)* (Rev. 2003) (the "Statute"), which provides:

> No action based upon the health care provider's professional negligence may be begun unless the defendant has been given at least sixty (60) days' prior written notice of the intention to begin the action. No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered. If the notice is served within sixty (60) days prior to the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended sixty (60) days from the service of the notice for said health care providers and others.

The issue presented is a difficult one. Where the required notice of claim is given within sixty days of the running of the two-year [*4] statute of limitations, n3 the Statute, in isolation, may fairly be read to provide for a new statute of limitations which expires "sixty (60) days from the service of the notice." However, the Statute's language, "shall be extended," may be fairly read to provide a sixty-day tolling of the two-year statute. If the former interpretation prevails, Pope filed suit too late. But if the latter prevails, the suit was timely filed. Stated differently, *Section 15-1-36(15)* is ambiguous.

n3 *Miss. Code Ann. § 15-1-36(2).*

The doctors argue that the trial court was correct in its finding that the literal language of this Statute set the expiration of the statute of limitations sixty days from the date of notice. Under this interpretation, since notice was

served on May 30, 2003, the statute of limitations expired on July 29, 2003. Because the suit was not filed until July 30, 2003, the trial court held that the statute ran and the suit was time-barred.

Pope, on the other hand, argues that [*5] a literal application of all of the provisions of *§ 15-1-36(15)* "leads to unreasonable and absurd results." She has concluded that any plaintiff serving the required notice "within 60 days prior to the expiration of the applicable statute of limitations" is forced into a statutory dilemma because, by her calculation, the required sixty-day notice period ends at the same moment the sixty-day statute of limitations expires. Thus, she argues, compliance with one requires violation of the other. This "absurd result" causes Pope to argue that we should apply the rules of statutory construction which, according to Pope, lead to the conclusion that the Legislature intended the statute of limitations be tolled during the sixty-day notice period.

The phrase "intent of the Legislature," is often used when what is really meant is "intent of the statute." Our duty is to carefully review statutory language and apply its most reasonable interpretation and meaning to the facts of a particular case. Whether the Legislature intended that interpretation, we can only hope, but we will never know.

Where a statute is ambiguous, as it is here, we are required to interpret it in light of various [*6] rules of statutory construction. *Kerr-McGee Chem. Corp. v. Buelow, 670 So. 2d 12, 17 (Miss. 1995).* Interpreting using the rule of statutory construction simply means we look for clues in certain time-honored rules as well as other places in order to apply the most reasonable interpretation of the statute's language and intent.

The words selected by the Legislature for inclusion in the Statute do not say that the statute of limitations is tolled. In fact, the words selected are "the time for the commencement of the action shall be extended sixty (60) days from the service of the notice." Certainly this is not clear tolling language. Clear and unambiguous language would provide either (1) "the statute of limitations is *tolled* for sixty days; or (2) the time for commencement of the action shall be extended for sixty (60) days from the *original expiration* of period of limitation."

P11. The word "tolled" is readily used and understood in statutory language. For instance, the Mississippi Tort Claims Act includes a similar notice requirement prior to suit. *Miss. Code Ann. 11-46-11(1).* In subsection 3, this statute provides: [*7]

> All actions brought under the provisions of this chapter shall be commenced within one (1) year next ... provided, however, that the filing of a notice of claim as required by subsection (1) of this section *shall serve to toll* the statute of limitations for a period of ninety-five (95) days from the date the chief executive officer of the state agency receives notice of the claim, or for one hundred twenty (120) days from the date the chief executive officer or other statutorily designated official of a municipality, county, or other political subdivision receives the notice of the claim...

Miss. Code Ann. 11-46-11(3) (emphasis added). This tolling provision is not ambiguous. Therefore, because the word "tolled" is absent from *Section 15-1-36(15)* a persuasive argument exists that if the Statute intended for the time period to be tolled, such wording would have been used. Instead, the Statute uses the language "the time for the commencement of the action shall be extended sixty (60) days from the service of the notice." Thus, the interpretation and conclusion that the language of the Statute specifically sets the last day suit may be filed [*8] - is reasonable.

However, just as reasonable is the argument that the Statute's language, "shall be extended sixty (60) days," tolls the statute of limitations for sixty days. Pope already had two years (until June 2, 2003) to file suit by virtue of the provision of *Section 15-1-36(2).* If the time for commencement of the action is "extended (60) sixty days," then two years, plus the sixty-day extension, results in the expiration of the statute of limitations on August 1, 2003.

Reasonable meaning of the Statute

We find two significant clues regarding the meaning of the Statute. The first is in a statute cited by neither party. The second is argued by Pope.

Miss. Code Ann. § 15-1-57

Although neither party cited the following statute, we find it compelling:

> When any person shall be prohibited by law . . . from commencing or prosecuting any action or remedy, the time during which such person shall be so prohibited . . . shall not be computed as any part of the period of time limited by this chapter for the commencement of such action.

Miss. Code Ann. § 15-1-57 (Rev. 2003).

Since Pope was [*9] prohibited by law from filing suit during the sixty-day notice period, this statute clearly and unambiguously prohibits use of any of the sixty-day notice period in computing the running of the statute of limitations. Since Pope originally had two years to file suit under *Section 15-1-36(2)*, and since Pope was "prohibited by law" from filing suit for the sixty-day period, a literal application of the wording of the statute results in a statute of limitations period of two years and sixty days, which expired on August 1, 2003. We find no statute which explicitly renders *Section 15-1-57* inapposite to this case, although a reasonable argument can be made that it is in conflict with *Section 15-1-36(15)*.

The "Borrowed Statute" doctrine

While statutory interpretation by another state's supreme court is not binding upon this Court, Pope correctly points out that, under the "Borrowed Statute" doctrine, we may consider a sister state's interpretation of its statutes where there is clear evidence that our Legislature consciously borrowed statutory language from that state's enactment. *Crosby v. Alton Ochsner Med. Found., 276 So. 2d 661, 664-65 (Miss. 1973)*. [*10]

California law also includes statutory provisions which require a notice period before claims may be filed against medical professionals. Though we have no memorandum from our Legislature informing us that the language of the Mississippi statute was modeled after the California law, the following comparison of Mississippi's statutory provisions to those of California is dispositive of the issue:

Mississippi: Miss. Code Ann. § 15-1-36(15)	California: Cal. Civ. Proc. Code § 364 (West 1982)
No action based upon the health care provider's professional negligence may be begun unless the defendant has been given at least sixty (60) days' prior written notice of the intention to begin the action.	(a) No action based upon the health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days' prior notice of the intention to commence the action.
No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered.	(b) No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered.
If the notice is served within sixty (60) days prior to the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended sixty (60) days from the service of the notice for said health care providers and others.	*** (d) If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended 90 days from the service of the notice.

[*11]

In interpreting the California statute, the Supreme Court of California has held that the statute of limitations is tolled during the ninety day notice period. *See Russell v. Stanford Univ. Hosp., 15 Cal. 4th 783, 64 Cal. Rptr. 2d 97, 937 P.2d 640 (Cal. 1997)*; *Woods v. Young, 53 Cal. 3d 315, 807 P.2d 455, 279 Cal. Rptr. 613 (Cal. 1991)*. Both the California statute and the California Supreme Court cases interpreting it predate our Statute by two decades. Thus, the Borrowed Statute doctrine may be applied, not as controlling, but as helpful authority. We also point out that the California statute and cases were readily available to our Legislature when it drafted and adopted *Section 15-1-36(15)*.

Pope and the doctors make persuasive arguments. However, after applying the rules of statutory construction, we conclude the interpretation most faithful to the language of the Statute requires a sixty-day tolling of the two-year statute of limitations provided by *Section 15-1-36(2)*. This finding requires that we reverse the trial court's dismissal for failure to file the suit within the statute of limitations.

We reach our conclusion today based [*12] not solely on any one argument, but rather based on the combination of a careful reading and analysis of the Statute's language, the rules of statutory interpretation including the reasonable meaning of the Statute, the Borrowed Statute doctrine, as well as reference to *Section 15-1-57*. Since the suit was filed on July 30, 2003, it was timely filed within the statute of limitations which did not expire until August 1, 2003.

CONCLUSION

Although this case presents a close question, we are persuaded that the most reasonable interpretation of *Miss. Code Ann. § 15-1-36(15)* and *§ 15-1-57* tolls the two-year statute of limitations for sixty days. Thus, we reverse the judgment of the Circuit Court for the Second Judicial District of Bolivar County and remand this case for proceedings consistent with this opinion.

REVERSED AND REMANDED.

SMITH, C.J., WALLER AND COBB, P.JJ., EASLEY AND CARLSON JJ., CONCUR. RANDOLPH, J., CONCURS IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. GRAVES, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION. DIAZ, J., NOT PARTICIPATING.

CONCURBY: GRAVES

CONCUR:

GRAVES, JUSTICE, SPECIALLY CONCURRING: [*13]

I agree with the result reached by the majority; however, I limit my concurrence to the majority's reliance on *Miss. Code Ann. § 15-1-57* (Rev. 2003). A literal reading of this controlling statute mandates that the statute of limitations in *Section 15-1-36(15)* be tolled during the sixty-day notice period that Pope is barred by law from filing her complaint. The majority clouds the issue, and ultimately its decision, with an unnecessary discussion of statutory construction, the Mississippi Tort Claims Act, and the "Borrowed Statute" doctrine. Because I believe that discussion of these non-dispositive issues diminishes the clarity of our decision, I specially concur.

ENFORCING JUDGMENTS

A. Statutory Provisions

§ 11-7-169. Judgment - remedial orders.

In all actions in which the right to real or personal estate is in controversy, the court or the judge thereof shall make an order for the protection of the property in controversy from waste or destruction, and to prevent the removal of personal property beyond the jurisdiction of the court, upon satisfactory proof being made of the necessity for such order, and may enforce such order by an attachment for contempt and other proper process; but in all such cases the court or judge may require a bond of the party applying for the order, in an adequate penalty, payable to the opposite party, with sufficient sureties, to be approved by the court or judge, conditioned to pay all such damages as may be suffered by reason of such order in case the principal obligor be cast in the suit.

Sources: Codes, 1857, ch. 61, art. 179; 1871, § 661; 1880, § 1729; 1892, § 748; Laws, 1906, § 810; Hemingway's 1917, § 598; Laws, 1930, § 602; Laws, 1942, § 1546.

§ 11-7-189. Enrollment of judgments; satisfaction.

(1) The clerk of the circuit court shall procure and keep in his office one or more books to be styled "The Judgment Roll," which book or books shall be appropriately divided under the several letters of the alphabet, and on each page shall be placed the following captions:

Defendant's Name and Name of Defendant's Attorney and Post Office Address of Each	Amount of Judgment or Decree	Date of Rendition	County and Court in Which Rendered	Social Security or Tax Identification Number

Date, Hour and Minute of Enrollment	Plaintiff's Name, Plaintiff's Attorney, and Post Office Address of Each	When and How Satisfied	Remarks

The clerk shall, within twenty (20) days after the adjournment of each term of court, enroll all final judgments rendered at that term in the order in which they were entered on the minutes by entering on The Judgment Roll, under the proper letter or letters of the alphabet, the name of each and every defendant to such judgment, the post office address of each defendant, and the social security or tax identification number of each defendant if such information is known or readily ascertainable, and if such defendant or defendants have an attorney at law in such case the name and post office address of such attorney or firm of attorneys if such post office address is known or readily ascertainable; the amount of such judgment; date of rendition; county and court in which rendered; the date, hour and minute of enrollment; and the name of the plaintiff or plaintiffs and the post office address of each plaintiff if readily ascertainable, and if represented by an attorney at law or a firm of attorneys then the name and post office address of such attorney or firm of attorneys if the post office address is known or readily ascertainable. The name of the attorney or firm of attorneys and post office addresses of the parties may be subsequently inserted by the clerk at any time.

Notwithstanding the foregoing, the failure to list a social security number on a judgment shall not invalidate said judgment nor shall it make the party failing to list said judgment liable for such failure to list or the recording official liable for such failure.

(2) Any attorney of record representing a plaintiff or plaintiffs in the case may, for and on behalf of his client or clients, satisfy in whole or in part a judgment on such Judgment Roll by endorsing thereon the extent of such satisfaction and signing an entry so showing, and when so satisfied the clerk shall attest and subscribe such endorsement under the proper heading therein. When any judgment shall otherwise be satisfied, the clerk shall so enter under proper heading and subscribe the entry.

(3) The Judgment Roll may be kept on computer as provided in Section 9-7-171. In such case the plaintiff or attorney representing such plaintiff shall present to the clerk a sworn affidavit directing the clerk to cancel or otherwise show as satisfied the judgment recorded under this section.

Sources: Codes, Hutchinson's 1848, ch. 61, art. 16 (12); 1857, ch. 61, art. 260; 1871, § 829; 1880, § 1736; 1892, § 756; Laws, 1906, § 818; Hemingway's 1917, § 606; Laws, 1930, § 610; Laws, 1942, § 1554; Laws, 1946, ch. 437; Laws, 1960, ch. 233, §§ 1, 2; Laws, 1994, ch. 521, § 27; Laws, 1994, ch. 458, § 8; Laws, 1997, ch. 342, § 1, eff from and after July 1, 1997.

§ 11-7-193. How priority of lien forfeited.

A junior judgment creditor may give written notice to any senior judgment creditor requiring him to execute his judgment; and if the senior judgment creditor, being so notified, shall fail, neglect or refuse to have execution issued, and levied within ten days from said notice for the satisfaction of his judgment, he shall lose his priority, and the junior judgment creditor may cause execution to issue on his judgment and to be levied on any of the property of the defendant, and the proceeds of a sale thereof shall be applied to the junior judgments so levied.

Sources: Codes, 1857, ch. 61, art. 261; 1871, § 830; 1880, § 1737; 1892, § 758; Laws, 1906, § 820; Hemingway's 1917, § 608; Laws, 1930, § 612; Laws, 1942, § 1556.

B. Exempt Property

§ 11-7-195. Judgment not a lien out of county unless enrolled.

A judgment or decree rendered in any court of the United States or of this state shall not be a lien upon or bind any property of the defendant situated out of the county in which the judgment or decree was rendered until the plaintiff shall file in the office of the clerk of the circuit court of the county in which such property is situated an abstract of such judgment or decree which has been certified by the clerk of the court in which the same was rendered containing the names of all the parties to such judgment or decree, its amount, the social security or tax identification number of the defendant if such information is known or readily ascertainable, the date of the rendition, and the amount appearing to have been paid thereon, if any. It shall be the duty of the clerk of the circuit court on receiving such abstract and on payment of the fees allowed by law for filing and enrolling the same, to file and forthwith enroll the same on The Judgment Roll, as in other cases. Such judgment or decree shall, from the date of its enrollment, be a lien upon and bind the property of the defendant within the county where it shall be so enrolled. If a foreign judgment has been filed in any county of this state pursuant to Sections 11-7-301 through 11-7-309 and such judgment may be enforced in such county, then, for purposes of this section, such judgment shall be treated as if it had been rendered in such county and may be enrolled on The Judgment Roll in other counties pursuant to the provisions of this section. Any judgment for the purpose described in Section 85-3-52 shall not be a lien on any property in this state, real, personal or mixed, that is owned by a resident of this state and shall not be enforced or satisfied against any such property.

Sources: Codes, Hutchinson's 1848, ch. 61, art. 14 (3); 1857, ch. 61, art. 262; 1871, § 833; 1880, § 1738; 1892, § 759; Laws, 1906, § 821; Hemingway's 1917, § 609; Laws, 1930, § 613; Laws, 1942, § 1557; Laws, 1991, ch. 416, § 1; Laws, 1995, ch. 565, § 4; Laws, 1997, ch. 342, § 2, eff from and after July 1, 1997.

§ 11-7-197. Judgment not a lien in county until enrolled.

Judgments and decrees, at law or in equity, rendered in any court of the United States held within this state, or in the Supreme Court or the court of chancery of this state, shall not be a lien upon or bind the property of the defendant within the county in which such judgments or decrees may be rendered, until an abstract thereof shall be filed in the office of the clerk of the circuit court of the county and enrolled on the judgment roll, in the manner and on the terms hereinbefore provided in Section 11-7-195. Such judgments and decrees shall bind the property of the defendants from the date of such enrollment, in like manner as judgments and decrees rendered in a different county and so enrolled.

Sources: Codes, 1857, ch. 61, art. 263; 1871, § 834, 1880, § 1739; 1892, § 760; Laws, 1906, § 822; Hemingway's 1917, § 610; Laws, 1930, § 614; Laws, 1942, § 1558.

§ 11-7-199. Growing crop not subject to judgment lien.

A growing crop shall not be subject to the lien of a judgment.

Sources: Codes, 1880, § 1764; 1892, § 761; Laws, 1906, § 823; Hemingway's 1917, § 611; Laws, 1930, § 615; Laws, 1942, § 1559.

§ 11-7-191. Enrolled judgment as lien.

A judgment so enrolled shall be a lien upon and bind all the property of the defendant within the county where so enrolled, from the rendition thereof, and shall have priority according to the order of such enrollment, in favor of the judgment creditor, his representatives or assigns, against the judgment debtor and all persons claiming the property under him after the rendition of the judgment. A judgment shall not be a lien on any property of the defendant thereto unless the same be enrolled. In counties having two (2) judicial districts, a judgment shall operate as a lien only in the district or districts in which it is enrolled. Any judgment for the purpose described in Section 85-3-52 shall not be a lien on any property in this state, real, personal or mixed, that is owned by a resident of this state, and shall not be enforced or satisfied against any such property.

Sources: Codes, Hutchinson's 1848, ch. 61, art. 14 (1); 1857, ch. 61, art. 261; 1871, § 830; 1880, § 1737; 1892, § 757; Laws, 1906, § 819; Hemingway's 1917, § 607; Laws, 1930, § 611; Laws, 1942, § 1555; Laws, 1995, ch. 565, § 3, eff from and after July 1, 1995.

C. Execution

§ 85-3-1. Property exempt from seizure under execution or attachment.

There shall be exempt from seizure under execution or attachment:

(a) Tangible personal property of the following kinds selected by the debtor, not exceeding Ten Thousand Dollars ($10,000.00) in cumulative value:

(i) Household goods, wearing apparel, books, animals or crops;
(ii) Motor vehicles;
(iii) Implements, professional books or tools of the trade;
(iv) Cash on hand;
(v) Professionally prescribed health aids;
(vi) Any item of tangible personal property worth less than Two Hundred Dollars ($200.00).

Household goods, as used in this paragraph (a) means clothing, furniture, appliances, one (1) radio and one (1) television, one (1) firearm, one (1) lawn mower, linens, china, crockery, kitchenware, and personal effects (including wedding rings) of the debtor and his dependents; however, works of art, electronic entertainment equipment (except one (1) television and one (1) radio), jewelry (other than wedding rings), and items acquired as antiques are not included within the scope of the term "household goods." This paragraph (a) shall not apply to distress warrants issued for collection of taxes due the state or to wages described in Section 85-3-4.

(b) (i) The proceeds of insurance on property, real and personal, exempt from execution or attachment, and the proceeds of the sale of such property.

(ii) Income from disability insurance.

(c) All property, real, personal and mixed, for the collection or enforcement of any order or judgment, in whole or in part, issued by any court for civil or criminal contempt of said court; expressly excepted herefrom are such orders or judgments for the payment of alimony, separate maintenance and child support actions.

(d) All property in this state, real, personal and mixed, for the satisfaction of a judgment or claim in favor of another state or political subdivision of another state for failure to pay that state's or that political subdivision's income tax on benefits received from a pension or other retirement plan. As used in this paragraph (d), "pension or other retirement plan" includes:

(i) An annuity, pension, or profit-sharing or stock bonus or similar plan established to provide retirement benefits for an officer or employee of a public or private employer or for a self-employed individual;
(ii) An annuity, pension, or military retirement pay plan or other retirement plan administered by the United States; and
(iii) An individual retirement account.

(e) One (1) mobile home, trailer, manufactured housing, or similar type dwelling owned and occupied as the primary residence by the debtor, not exceeding a value of Twenty Thousand Dollars ($20,000.00); in determining this value, existing encumbrances on said dwelling, including taxes and all other liens, shall first be deducted from the actual value of said dwelling. A debtor is not entitled to the exemption of a mobile home as personal property who claims a homestead exemption under Section 85-3-21, and the exemption shall not apply to collection of delinquent taxes under Sections 27-41-101 through 27-41-109.

(f) Assets held in, or monies payable to the participant or beneficiary from, whether vested or not, (i) a pension, profit-sharing, stock bonus or similar plan or contract established to provide retirement benefits for the participant or beneficiary and qualified under Section 401(a), 403(a), or 403(b) of the Internal Revenue Code (or corresponding provisions of any successor law), including a retirement plan for self-employed individuals qualified under one of such enumerated sections, (ii) an eligible deferred compensation plan described in Section 457(b) of the Internal Revenue Code (or corresponding provisions of any successor law) or (iii) an individual retirement account or an individual retirement annuity within the meaning of Section 408 of the Internal Revenue Code (or corresponding provisions of any successor law), including a simplified employee pension plan.

(g) Nothing in this section shall in any way affect the rights or remedies of the holder or owner of a statutory lien or voluntary security interest.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 1 (23); 1857, ch. 61, art. 280; 1871, § 2131; 1880, § 1244; 1892, § 1963; Laws, 1906, § 2139; Hemingway's 1917, § 1812; Laws, 1930, § 1755; Laws, 1942, § 307; Laws, 1932, ch. 138; Laws, 1948, ch. 232, § 1; Laws, 1962, 1st Ex Sess. ch. 7; Laws, 1966, ch. 318, § 1; Laws, 1980, ch. 540, § 1; Laws, 1981, ch. 469, § 3; Laws, 1987, ch. 473; Laws, 1991, ch. 479, § 7; Laws, 1995, ch. 565, § 1; Laws, 2002, ch. 594, § 1, eff from and after July 1, 2002.

§ 85-3-4. Execution or attachment of wages, salaries or other compensation; limitations.

(1) The wages, salaries or other compensation of laborers or employees, residents of this state, shall be exempt from seizure under attachment, execution or garnishment for a period of thirty (30) days from the date of service of any writ of attachment, execution or garnishment.

(2) After the passage of the period of thirty (30) days described in subsection (1) of this section, the maximum part of the aggregate disposable earnings (as defined by Section 1672(b) of Title 15, United States Code Annotated) of an individual that may be levied by attachment, execution or garnishment shall be:

(a) In the case of earnings for any workweek, the lesser amount of either,

(i) Twenty-five percent (25%) of his disposable earnings for that week, or
(ii) The amount by which his disposable earnings for that week exceed thirty (30) times the federal minimum hourly wage (prescribed by section 206 (a)(1) of Title 29, United States Code Annotated) in effect at the time the earnings are payable; or

(b) In the case of earnings for any period other than a week, the amount by which his disposable earnings exceed the following "multiple" of the federal minimum hourly wage which is equivalent in effect to that set forth in subparagraph (a)(ii) of this subsection (2): The number of workweeks, or fractions thereof multiplied by thirty (30) multiplied by the applicable federal minimum wage.

(3) (a) The restrictions of subsection (1) and (2) of this section do not apply in the case of:

(i) Any order for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure, which is established by state law, which affords substantial due process, and which is subject to judicial review.
(ii) Any debt due for any state or local tax.

(b) Except as provided in subparagraph (b)(iii) of this subsection (3), the maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed:

(i) Where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), fifty percent (50%) of such individual's disposable earnings for that week; and
(ii) Where such individual is not supporting such a spouse or dependent child described in subparagraph (b)(i) of this subsection (3), sixty percent (60%) of such individual's disposable earnings for that week;
(iii) With respect to the disposable earnings of any individual for that workweek, the fifty percent (50%) specified in subparagraph (b)(i) of this subsection (3) shall be deemed to be fifty-five percent (55%) and the sixty percent (60%) specified in subparagraph (b)(ii) of this subsection (3) shall be deemed to be sixty-five percent (65%), if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the period of twelve (12) weeks which ends with the beginning of such workweek.

Sources: Laws, 1980, ch. 540, § 2; Laws, 1981, ch. 469, § 4, eff from and after passage (approved April 7, 1981).

§ 85-3-21. Homestead exemption; land and buildings.

Every citizen of this state, male or female, being a householder shall be entitled to hold exempt from seizure or sale, under execution or attachment, the land and buildings owned and occupied as a residence by him, or her, but the quantity of land shall not exceed one hundred sixty (160) acres, nor the value thereof, inclusive of improvements, save as hereinafter provided, the sum of Seventy-five Thousand Dollars ($75,000.00); provided, however, that in determining this value, existing encumbrances on such land and buildings, including taxes and all other liens, shall first be deducted from the actual value of such land and buildings. But husband or wife, widower or widow, over sixty (60) years of age, who has been an exemptionist under this section, shall not be deprived of such exemption because of not residing therein.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 17(1); 1857, ch. 61, art. 281; 1871, § 2135; 1880, § 1248; 1892, § 1970; Laws, 1906, § 2146; Hemingway's 1917, § 1821; Laws, 1930, § 1765; Laws, 1942, § 317; Laws, 1938, ch. 125; Laws, 1950, ch. 360; Laws, 1970, ch. 323, § 1; Laws, 1979, ch. 447, § 1; Laws, 1991, ch. 479, § 1, eff from and after July 1, 1991.

§ 85-3-23. Homestead exemption; land and buildings; insurance proceeds; personal property.

Every citizen of this state, male or female, being a householder shall be entitled to hold exempt from seizure or sale under execution or attachment the land and buildings owned and occupied as a residence by such person, also the proceeds of any insurance, fire or otherwise, on any such buildings destroyed or damaged by fire, tornado or otherwise, not to exceed in value, save as hereinafter provided, Seventy-five Thousand Dollars ($75,000.00), and personal property to be selected by him or her not to exceed in value Two Hundred Fifty Dollars ($250.00) or the articles specified as exempt to the head of a family; provided, however, that no sum or amount due, or to become due such person, nor any part thereof, for or on account of wages, salaries or commissions, shall in any proceedings be selected or claimed as exempt under this section. But husband or wife, widower or widow, over sixty (60) years of age, who has been an exemptionist under this section, shall not be deprived of such exemption because of not residing therein.

Sources: Codes, 1871, § 2140; 1880, § 1249; 1892, § 1971; Laws, 1906, § 2147; Hemingway's 1917, § 1822; Laws, 1930, § 1766; Laws, 1942, § 318, Laws, 1926, ch. 159; Laws, 1931, ch. 18; Laws, 1970, ch. 323, § 2; Laws, 1979, ch. 447, § 2; Laws, 1991, ch. 479, § 2, eff from and after July 1, 1991.

§ 13-3-111. Time when executions shall be issued.

The clerks of all courts of law or equity, after the adjournment of the court for the term shall, at the request and cost of the owner of the judgment or decree or his attorney, issue executions on all judgments and decrees rendered therein, and place the same in the hands of the sheriff of the county. The sheriff shall effectuate any execution on a judgment. If requested by such owner, they shall issue executions directed to the sheriff of any other county, and shall deliver the same to the owner or his attorney.

Sources: Codes, Hutchinson's 1848, ch. 59, art. 9 (4); 1857, ch. 61, art. 265; 1871, § 837; 1880, § 1742; 1892, § 3459; Laws, 1906, § 3958; Hemingway's 1917, § 2965; Laws, 1930, § 3011; Laws, 1942, § 1899; Laws, 1976, ch. 331; Laws, 1990, ch. 408, § 1, eff from and after July 1, 1990.

§ 13-3-113. Issuance, execution, and return of executions.

Writs of execution shall bear date and be issued in the same manner as original process, and shall be made returnable on the first day of the next term of the court in which the judgment or decree was rendered, if there be fifteen days between the issuance and return thereof, and, if not, on the first day of the term next thereafter. Such execution may be directed to the sheriff or other proper officer of any county, who shall serve and execute the same, and make return thereof to the court in which the judgment or decree was rendered.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 1 (7); 1857, ch. 61, art. 267; 1871, § 839; 1880, § 1743; 1892, § 3460; Laws, 1906, § 3959; Hemingway's 1917, § 2966; Laws, 1930, § 3012; Laws, 1942, § 1900.

§ 13-3-115. Issuance of subsequent execution.

If a first writ of execution shall not have been returned and shall not have been executed, the clerk may issue another execution at the cost of any party in whose favor the execution was issued, if such party shall desire to take out another execution.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 1 (3); 1857, ch. 61, art. 269; 1871, § 840; 1880, § 1774; 1892, § 3461; Laws, 1906, § 3960; Hemingway's 1917, § 2967; Laws, 1930, § 3013; Laws, 1942, § 1901.

§ 13-3-117. Issuance of execution against several defendants.

When one judgment has been recovered against several defendants, execution shall issue thereon against all the defendants, and not otherwise.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 1(3); 1857, ch. 61, art. 269; 1871, § 840; 1880, § 1774; 1892, § 3461; Laws, 1906, § 3960; Hemingway's 1917, § 2967; Laws, 1930, § 3013; Laws, 1942, § 1901.

§ 13-3-119. Effect of death of one or more of several defendants before issuance of execution.

If one or more of several defendants have died before the issuance of a writ of execution, and a revivor shall not have been had, the fact of the death shall be noted on the writ, and the property of the survivors only shall be liable to the execution in such case.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 1 (3); 1857, ch. 61, art. 269; 1871, § 840; 1880, § 1774; 1892, § 3461; Laws, 1906, § 3960; Hemingway's 1917, § 2967; Laws, 1930, § 3013; Laws, 1942, § 1901.

§ 13-3-121. Execution for costs of supreme court.

In cases decided in the supreme court, or dismissed or otherwise disposed of, the clerk of the court may issue executions for costs accrued in the supreme court, in excess of the filing fee, in the same manner that the clerks of the circuit courts are authorized to issue executions against any party liable therefor. Such executions may be directed to the sheriff of any county, and shall be returned in the same manner and under like penalties as in case of executions returnable to the circuit court.

Sources: Codes, 1857, ch. 63, art. 31; 1871, § 433; 1880, § 1449; 1892, § 3462; Laws, 1906, § 3961; Hemingway's 1917, § 2968; Laws, 1930, § 3014; Laws, 1942, § 1902; Laws, 1978, ch. 335, § 34, eff from and after July 1, 1978.

§ 13-3-123. Levy of writs of execution and attachments - on land.

In case of a levy of an attachment on real estate in the occupancy of any person, the officer shall go to the house or upon the land of the defendant, and there declare that he attaches the same at the suit of the plaintiff, but if the land be unoccupied, or if the process be an execution, he may attach or levy upon the same by returning that he has attached or levied upon the land, describing it by numbers or otherwise properly, and, if the process be an attachment, stating that the land is unoccupied; and in all cases the return of the officer shall be conclusive of the facts stated therein, except on timely motion to quash.

Sources: Codes, 1892, § 3464; Laws, 1906, § 3963; Hemingway's 1917, § 2970; Laws, 1930, § 3016; Laws, 1942, § 1904.

§ 13-3-125. Levy of writs of execution and attachments - on personalty.

If the levy be upon personal property the officer shall take the same into his possession and dispose of it according to law.

Sources: Codes, 1892, § 3465; Laws, 1906, § 3964; Hemingway's 1917, § 2971; Laws, 1930, § 3017; Laws, 1942, § 1905.

§ 13-3-127. Levy of writs of execution and attachments - on choses in action.

In case an attachment be levied on rights, credits, and choses in action, the officer shall take into his possession the books of accounts and other evidences of debt belonging to the defendant, and if the plaintiff so direct, he shall summon all persons appearing to be indebted to the defendant, or to have effects of his in their hands, as garnishees, in the manner prescribed by law.

Sources: Codes, 1892, § 3466; Laws, 1906, § 3965; Hemingway's 1917, § 2972; Laws, 1930, § 3018; Laws, 1942, § 1906.

§ 13-3-129. Levy of writs of execution and attachments - on corporate stock and the like.

In case of the levy of an execution or attachment on the stock, shares, or interest of the defendant in any corporation or joint stock company, the officer shall go to the office or principal place of business of the corporation or company, and there declare that he attaches or levies upon the stock, shares, or interest of the defendant therein at the suit of the plaintiff. The officer shall demand of any officer, agent, or clerk of such corporation or company there present, and who is not the defendant, a statement in writing, under oath, of the amount of the defendant's stock, the number of his shares, or extent of his interest in such corporation or company, and shall leave with the officer, agent, or clerk, a copy of the writ. If no such officer, agent, or clerk be present, the officer shall post conspicuously at such office or place of business a copy of the writ, with a statement therewith that he has attached or levied upon the stock, shares, or interest of the defendant at the suit of the plaintiff, and that he demands of the corporation or company the statement, under oath, of the defendant's stock, share, or interest therein. The stock, shares, and interest of the defendant in the corporation or company, including all dividends that may accrue after such levy, shall be bound by the lien of the execution or attachment. The corporation or company shall, within a reasonable time, not longer than ten days after the levy, deliver to the officer a statement in writing, under oath, of the particulars demanded by the officer, and of the value of the defendant's stock, shares, or interest, and in case the corporation or company shall neglect or refuse to do so, or shall wilfully make any false statement thereof, such corporation or company shall be liable to the plaintiff for the full amount of the judgment or decree, or of such judgment as the plaintiff shall recover if the process be an attachment. The failure of the corporation or company to make such statement shall not affect the right of the officer to sell the stock, shares, or interest of the defendant.

Sources: Codes, 1892, § 3467; Laws, 1906, § 3966; Hemingway's 1917, § 2973; Laws, 1930, § 3019; Laws, 1942, § 1907.

§ 13-3-131. Levy of writs of execution and attachments - on interest of partners or co-owners.

When a defendant in execution shall own or be entitled to an undivided interest in any property not exclusively in his own possession, such interest may be levied on and sold by the sheriff without taking the property into actual possession, and such sale shall vest in the purchaser all the interest of the defendant in such property.

Sources: Codes, 1892, § 3468; Laws, 1906, § 3967; Hemingway's 1917, § 2974; Laws, 1930, § 3020; Laws, 1942, § 1908.

§ 13-3-133. Money, banknotes, judgments and the like may be levied on.

Money, banknotes, bills, evidences of debt circulating as money, and any judgment or decree belonging to the defendant, may be taken under an execution or attachment and sold or disposed of according to law, or applied to the payment of the execution or in satisfaction of the judgment in attachment.

Sources: Codes, 1857, ch. 61, art. 285; 1871, § 849; 1880, § 1765; 1892, § 3470; Laws, 1906, § 3968; Hemingway's 1917, § 2975; Laws, 1930, § 3021; Laws, 1942, § 1909.

§ 13-3-135. Purchaser's title to certain interests of defendant sold under execution or attachment.

The purchaser of any chose in action, stock, share, interest, judgment, or decree of the defendant, sold under execution or attachment, shall become the owner thereof, in the same manner as if it had been regularly assigned to him by the defendant.

Sources: Codes, 1857, ch. 61, art. 285; 1880, § 1765; 1892, § 3471; Laws, 1906, § 3969; Hemingway's 1917, § 2976; Laws, 1930, § 3022; Laws, 1942, § 1910.

§ 13-3-137. Growing crop shall not be levied upon.

An execution shall nor be levied upon a growing crop, nor shall the same be seized under an attachment.

Sources: Codes, 1880, § 1764; 1892, § 3472; Laws, 1906, § 3970; Hemingway's 1917, § 2977; Laws, 1930, § 3023; Laws, 1942, § 1911.

§ 13-3-139. Lien of executions, and priority thereof.

Writs of executions, where there is no judgment lien, shall bind the property of defendant only from the time of the levy thereof. If two or more writs shall be delivered to the officer for execution against the same person, that which was first delivered shall be the first levied and satisfied. It shall be the duty of the sheriff or other officer, on receipt of an execution, to indorse thereon the day of the month and the year and the hour when he received the same. For a failure to make such indorsement, the sheriff or other officer shall be liable to a penalty of one hundred dollars, to the use of the plaintiff, recoverable by motion before the court from which the execution issued, and the sheriff or other officer shall, moreover, be liable for all damages sustained by any party aggrieved.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 1 (8); 1857, ch. 61, art. 270; 1871, § 841; 1892, § 3473; Laws, 1906, § 3971; Hemingway's 1917, § 2978; Laws, 1930, § 3024; Laws, 1942, § 1912.

§ 13-3-141. Officer to care for property and allowed expenses.

When a sheriff or other officer shall levy an execution on livestock, he shall provide for its sustenance until sold or otherwise legally discharged from the execution. Upon the return of the execution, the court, in cases where the compensation is not fixed by law, shall settle and adjust what the officer shall be allowed for his expenses incurred by providing for the stock, and also reasonable expenses of keeping personal property levied on by him, and the same shall be taxed as costs. The officer may retain the same out of the money arising from the sale of the property.

Sources: Codes, 1857, ch. 61, art. 274; 1871, § 843; 1880, § 1746; 1892, § 3474; Laws, 1906, § 3972; Hemingway's 1917, § 2979; Laws, 1930, § 3025; Laws, 1942, § 1913.

§ 13-3-143. Manner by which personal representative or successor thereof of plaintiff may have execution.

When the executor or administrator of a plaintiff who dies before satisfaction of his judgment shall file with the clerk a copy of his letters testamentary or of administration, duly certified, execution may be issued on the judgment as if such death had not occurred, and the clerk shall indorse on the execution the fact of the death of the plaintiff, and that the execution is at the instance of his executor or administrator, stating the name of the executor or administrator. When an administrator, guardian, trustee, or other person acting in a fiduciary or official capacity, who recovered a judgment, shall die, resign, or be removed without having obtained satisfaction thereof, his successor may have execution of the judgment in the same manner, without revival of the judgment by scire facias.

Sources: Codes, 1880, § 1747; 1892, § 3475; Laws, 1906, § 3973; Hemingway's 1917, § 2980; Laws, 1930, § 3026; Laws, 1942, § 1914.

§ 13-3-145. Effect of death of one or more of several plaintiffs before issuance of execution.

The death of one or more of several plaintiffs in a judgment shall not prevent the issuance of execution in favor of the survivors.

Sources: Codes, 1880, § 1748; 1892, § 3476; Laws, 1906, § 3974; Hemingway's 1917, § 2981; Laws, 1930, § 3027; Laws, 1942, § 1915.

§ 13-3-147. Assignee of a judgment may have execution.

The assignee of a judgment, where the plaintiff has died, may have execution thereof for his use as if such death had not occurred, upon filing with the clerk his affidavit of the death of the plaintiff and the assignment, and, where the plaintiff has not died, the assignee of a judgment may have an execution for his use in the same manner.

Sources: Codes, 1880, § 1749; 1892, § 3477; Laws, 1906, § 3975; Hemingway's 1917, § 2982; Laws, 1930, § 3028; Laws, 1942, § 1916.

§ 13-3-149. Effect of death of party after execution issued.

The death of any plaintiff or defendant after the issuance or the levy of an execution on personal or real estate, shall not affect the duty of the officer making the levy to proceed and sell as if such death had not occurred.

Sources: Codes, 1880, § 1750; 1892, § 3478; Laws, 1906, § 3976; Hemingway's 1917, § 2983; Laws, 1930, § 3029; Laws, 1942, § 1917.

§ 13-3-151. Execution issued against dead defendant.

After one year from the death of any defendant in a judgment for money, execution thereof may be had by leave of the court rendering the judgment, or of the judge thereof in vacation, upon cause shown, against any property on which such judgment was a lien at the time of the death of the defendant, and a sale of such property may be made in the same manner and with the same effect as if the defendant were living. In case of the death of the defendant in a judgment for the recovery of real or personal property, execution may be had without revival, in the same manner as if the defendant had not died.

Sources: Codes, 1880, § 1751; 1892, § 3479; Laws, 1906, § 3977; Hemingway's 1917, § 2984; Laws, 1930, § 3030; Laws, 1942, § 1918.

§ 13-3-153. Motion to revive judgment.

Those provisions of the Mississippi Code of 1972 relating to the execution of judgments without revival shall not prevent a revival in any case by a motion to revive judgment.

Sources: Codes, 1880, § 1752; 1892, § 3480; Laws, 1906, § 3978; Hemingway's 1917, § 2985; Laws, 1930, § 3031; Laws, 1942, § 1919; Laws, 1991, ch. 573, § 102, eff from and after July 1, 1991.

D. Garnishment

§ 13-3-155. Execution and garnishment on certain judgments and decrees of other courts may be issued by clerk.

The clerk of the circuit court in whose office any judgment or decree shall be enrolled, may issue execution and writs of garnishment thereon, directed to the sheriff of his county, returnable before the court which rendered the judgment or decree.

Sources: Codes, 1880, § 1738; 1892, § 3481; Laws, 1906, § 3979; Hemingway's 1917, § 2986; Laws, 1930, § 3032; Laws, 1942, § 1920; Laws, 1890, p. 66; Laws, 1990, ch. 408, § 2, eff from and after July 1, 1990.

§ 13-3-157. When a bond of indemnity shall be required.

If the sheriff shall levy an execution, attachment, or writ of seizure for the purchase-money on any personal property, and a doubt shall arise whether the right to the property be in the defendant or not, the sheriff may demand of the plaintiff a bond with sufficient sureties, payable to the officer, in a penalty equal to double the value of the property, conditioned that the obligors therein will indemnify and save harmless the officer against all damages which he may sustain in consequence of the seizure or sale of the property, and will pay to and satisfy any person claiming title to the property all damages which such person may sustain in consequence of the seizure or sale. If such bond be not given on or before the day of the sale or the return day of the attachment, the sheriff shall be justified in releasing the levy and delivering the property to the party from whose possession it was taken; but the plaintiff or his agent or attorney shall have reasonable notice, in writing, before the day of sale or return day of the writ, that the bond is required.

However, in instances where a warrant is issued by the Chairman of the State Tax Commission, as the commissioner, under the authority of any statute by which such commissioner is authorized to issue such warrants, and where the officer to whom such warrant is directed shall demand of the commissioner an indemnifying bond under the circumstances and conditions hereinbefore provided, the commissioner is hereby authorized to execute such indemnifying bond demanded and pay all obligations which may accrue by reason of the execution of such bond out of the funds appropriated by the Legislature to defray the expenses of the State Tax Commission.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 1 (12); 1857, ch. 61, art. 275; 1871, § 844; 1880, § 1754; 1892, § 3482; Laws, 1906, § 3980; Hemingway's 1917, § 2987; Laws, 1930, § 3033; Laws, 1942, § 1921; Laws, 1952, ch. 404; Laws, 1956, ch. 409; Laws, 1990, ch. 408, § 3, eff from and after July 1, 1990.

§ 13-3-159. Remedy on bond of indemnity.

If the bond and security required under Section 13-3-157 be given, it shall be returned with the writ, and the person claiming the property levied on may prosecute a suit upon the bond, with the name of the payee or his representatives, for the use of the claimant, and recover such damages as he may sustain by the seizure or sale of the property or levy of process; and the claimant shall, after the due execution of the bond, be barred of any action against the officer levying the process, unless the obligors in the bond shall be or become insolvent, or the bond be otherwise invalid.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 1 (12); 1857, ch. 61, art. 276; 1871, § 845; 1880, § 1755; 1892, § 3483; Laws, 1906, § 3981; Hemingway's 1917, § 2988; Laws, 1930, § 3034; Laws, 1942, § 1922.

§ 13-3-161. Where sales under execution or other process are to be made.

All sales by any sheriff by virtue of an execution or other process, when not issued by a justice court, shall be made at the courthouse of the county. The sheriff shall effectuate any execution on a judgment. However, personal property too cumbersome to be removed, may be sold at the place where the same may be, or at any convenient place. Cattle, sheep, or stock, other than horses and mules, may be sold at any public place in the neighborhood of the defendant's residence.

Sales of personal property under execution or other process from a justice court may be made at any convenient point in the county where it is found, or at the courthouse of the county. The sheriff shall effectuate any execution on a

judgment. The sale of lands under executions or other process from such courts shall be made as under execution from the circuit courts.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 1 (21); 1857, ch. 61, art. 277; 1871, §§ 846, 1345; 1880, §§ 1757, 2208; 1892, §§ 3484, 3485; Laws, 1906, §§ 3982, 3983; Hemingway's 1917, §§ 2989, 2990; Laws, 1930, §§ 3035, 3036; Laws, 1942, §§ 1923, 1924; Laws, 1981, ch. 471, § 42; Laws, 1982, ch. 423, § 28; Laws, 1990, ch. 408, § 4, eff from and after July 1, 1990.

§ 13-3-163. When sales of land may be made; advertising of sale.

(1) Sales of land may be made on any day except Sunday and any legal holiday as defined by Section 3-3-7, Mississippi Code of 1972, and shall be advertised by the plaintiff in a newspaper published in the county, once in each week for three (3) successive weeks, or, if no newspaper is so published, in some newspaper having a general circulation therein once in each week for three (3) successive weeks.

(2) In addition to effectuating the advertisement, any expense or cost incurred by advertising and providing notice for the sale of land pursuant to subsection (1) of this section in justice court shall be paid by the plaintiff, and said expenses shall be taxed as costs.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 1 (21); 1857, ch. 61, art. 277; 1871, § 846; 1880, § 1759; 1892, § 3486; Laws, 1906, § 3984; Hemingway's 1917, § 2991; Laws, 1930, § 3037; Laws, 1942, § 1925; Laws, 1960, ch. 239; Laws, 1978, ch. 398, § 1; Laws, 1989, ch. 405, § 1, eff from and after July 1, 1989.

§ 13-3-165. When sales of personalty may be made; advertising of sale.

(1) Sales of personalty may be made on any day except Sunday and any legal holiday as defined by Section 3-3-7, Mississippi Code of 1972, and shall be advertised by the plaintiff ten (10) days before the day of sale by posting notices of the time, terms and place of sale in three (3) public places in the county, one (1) of which shall be at the courthouse.

(2) In addition to effectuating the advertisement, any expense or cost incurred by advertising and providing notice for the sale of personalty pursuant to subsection (1) of this section in justice court shall be paid by the plaintiff, and said expenses shall be taxed as costs.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 1 (21); 1857, ch. 61, art. 277; 1871, § 846; 1880, § 1759; 1892, § 3487; Laws, 1906, § 3984; Hemingway's 1917, § 2992; Laws, 1930, § 3038; Laws, 1942, § 1926; Laws, 1978, ch. 398, § 2; Laws, 1989, ch. 405, § 2, eff from and after July 1, 1989.

§ 13-3-167. Sale of perishable goods.

When goods and chattels are levied on, which by their nature are perishable and in danger of immediate waste or decay, the officer levying shall sell them at such time, and on such notice, and at such place as a sound discretion may warrant.

Sources: Codes, 1871, §§ 1466-1469; 1880, § 1758; 1892, § 3488; Laws, 1906, § 3986; Hemingway's 1917, § 2993; Laws, 1930, § 3039; Laws, 1942, § 1927.

§ 13-3-169. Hours and mode of sale.

Sales under execution shall not commence sooner than eleven o'clock in the forenoon, nor continue later than four o'clock in the afternoon. All such sales shall be by auction, to the highest bidder for cash, and only so much of the property levied on shall be sold as will satisfy the execution and costs.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 1 (21); 1857, ch. 61, art. 277; 1871, § 846; 1880, § 1759; 1892, § 3489; Laws, 1906, § 3987; Hemingway's 1917, § 2994; Laws, 1930, § 3040; Laws, 1942, § 1928.

§ 13-3-171. Lands to be sold to be offered in subdivisions and as an entirety.

All lands comprising a single tract, sold under execution, shall be first offered in subdivisions not exceeding one hundred and sixty acres, or one-quarter section, and then offered as an entirety, and the price bid for the latter shall control only when it shall exceed the aggregate of the bids for the same in subdivisions.

Sources: Codes, 1892, § 3491; Laws, 1906, § 3989; Hemingway's 1917, § 2996; Laws, 1930, § 3042; Laws, 1942, § 1930.

§ 13-3-173. Sale may be adjourned or continued from day to day.

Whenever, from a defect of bidders, caused by inclement weather or otherwise, the property shall not be likely to command a reasonable price, the officer may adjourn the sale and re-advertise the same for a subsequent day. Whenever a sale advertised for a particular day shall not be completed on that day, the same may be continued from day to day.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 1 (21); 1857, ch. 61, art. 278; 1871, § 847; 1880, § 1760; 1892, § 3490; Laws, 1906, § 3988; Hemingway's 1917, § 2995; Laws, 1930, § 3041; Laws, 1942, § 1929.

§ 13-3-175. Venditioni exponas.

If any property taken in execution shall remain in the hands of the officer unsold, he shall so return on the execution, and thereupon a writ of venditioni exponas shall issue, directed to the officer, upon which the like proceedings shall be had as might and ought to have been had on the first execution. And if property sold on a venditioni exponas shall not bring enough to satisfy the judgment, the officer shall forthwith return the same, and thereupon another proper execution for the balance remaining unpaid may be issued.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 1 (18); 1857, ch. 61, art. 279; 1871, § 848; 1880, § 1761; 1892, § 3492; Laws, 1906, § 3990; Hemingway's 1917, § 2997; Laws, 1930, § 3043; Laws, 1942, § 1931.

§ 13-3-177. Venditioni exponas to issue when officer taking property dies.

When the officer taking property under execution shall die before the sale thereof, a writ of venditioni exponas shall issue, directed to the proper officer of the county in which the property was taken, and such officer shall, under the writ of venditioni exponas, receive the property from the representatives of the former sheriff, or other officer, who are required to deliver the same to the officer having the venditioni exponas, on his producing the same and executing a receipt for the property, and the officer shall proceed to sell the same as in other cases.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 1 (52); 1847, ch. 61, art. 292; 1871, § 856; 1880, § 1771; 1892, § 3493; Laws, 1906, § 3991; Hemingway's 1917, § 2998; Laws, 1930, § 3044; Laws, 1942, § 1932.

§ 13-3-179. Procedure to be followed where property is not delivered by representatives of deceased officer taking property.

If the representatives of the deceased officer shall refuse or neglect to deliver the property on demand, or if there shall not be an executor or administrator of his estate, the officer having the writ of venditioni exponas may seize the property taken by the former officer wherever it may be found, and sell the same as in other cases, or the plaintiff may move in the court from which the execution issued against the representatives of the deceased officer and his sureties, and thereupon a judgment shall be entered against the representatives of the deceased officer and his sureties for the amount of the execution which came to the hands of such deceased officer, with interest and costs.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 1 (52); 1857, ch. 61, art. 293; 1871, § 857; 1880, § 1772; 1892, § 3494; Laws, 1906, § 3992; Hemingway's 1917, § 2999; Laws, 1930, § 3045; Laws, 1942, § 1933.

§ 13-3-181. Duty of officer to examine judgment-roll; priority of liens.

After the sale of any property by the sheriff or other officer on execution, before the money is paid over by him, he shall examine the judgment-roll to ascertain if there by any elder judgment or judgments, decree or decrees, enrolled against the defendant or defendants in execution, having a priority of lien. If there be, he shall apply the proceeds of the sale to the judgment or decree having the priority of lien, and return such application upon the execution. Should there by any dispute as to which judgment or decree has the priority of lien, the officer shall make a statement of the fact of the dispute, and return the same, with the execution and the money raised thereon, into the court to which the same is returnable, and the court shall, on motion and examination of the facts, determine to whom the money so raised on execution shall be paid.

Sources: Codes, 1880, § 1762; 1892, § 3495; Laws, 1906, § 3993; Hemingway's 1917, § 3000; Laws, 1930, § 3046; Laws, 1942, § 1934.

§ 13-3-183. Officer to restore money on injunction of execution.

When an officer shall receive under execution the whole or any part of the money for which the same was issued, and the defendant, before payment thereof to the plaintiff, obtain an injunction against the execution, the officer shall pay over to the defendant the money received, or such part thereof as may be enjoined. If an officer shall, when required, fail to pay over the money so received and enjoined to the person having a right to demand the same, such officer and his sureties shall be liable to the same remedies as are given by law to the plaintiff for the nonpayment of money levied on execution.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 1 (16); 1857, ch. 61, art. 286; 1871, § 850; 1880, § 1766; 1892, § 3496; Laws, 1906, § 3994; Hemingway's 1917, § 3001; Laws, 1930, § 3047; Laws, 1942, § 1935.

§ 13-3-185. How purchaser takes property sold at execution sale.

The purchaser of any property sold at execution sale by the sheriff or other officer shall take the same discharge of all liens of judgments and decrees, whether the same be sold under an execution issued upon the elder or junior judgment or decree.

Sources: Codes, 1880, § 1763, 1892, § 3497; Laws, 1906, § 3995; Hemingway's 1917, § 3002; Laws, 1930, § 3048; Laws, 1942, § 1936.

§ 13-3-187. Conveyance of land sold under execution or other process.

When lands are sold by virtue of any writ of execution or other process, the officer making the sale shall, on payment of the purchase-money, execute to the purchaser a conveyance which shall vest in the purchaser all the right, title and interest which the defendant had in and to such lands, and which, by law, could be sold under such execution or other process.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 1 (55); 1857, ch. 61, art. 290; 1871, § 854; 1880, § 1769; 1892, § 3498; Laws, 1906, § 3996; Hemingway's 1917, § 3003; Laws, 1930, § 3049; Laws, 1942, § 1937.

§ 13-3-189. Completion of title under justice's execution.

The title to land sold under execution issued by a justice of the peace shall not be complete in the purchaser until he shall have obtained from the justice a certified transcript of the proceedings had before him in the suit, including a copy of the execution and the officer's return on it, which shall be filed with the conveyance made by the officer in the chancery clerk's office and recorded with the conveyance. Upon filing such transcript and conveyance for record in the chancery clerk's office of the county where the land lies, the title of the purchaser shall be as full and complete as if the sale had been under a judgment and execution from a circuit court.

Sources: Codes, 1880, § 2211; 1892, § 3499; Laws, 1906, § 3997; Hemingway's 1917, § 3004; Laws, 1930, § 3050; Laws, 1942, § 1938.

§ 11-35-1. When issued on judgment or decree.

On the suggestion in writing by the plaintiff in a judgment or decree in any court upon which an execution may be issued, that any person, either natural or artificial, including the state, any county, municipality, school district, board or other political subdivision thereof, is indebted to the defendant therein, or has effects or property of the defendant in his, her or its possession, or knows of some other person who is indebted to the defendant, or who has effects or property of the defendant in his, her or its possession, it shall be the duty of the clerk of such court to issue a writ of garnishment, directed to the sheriff or proper officer, commanding him to summon such person, the state, county, municipality, school district, board or other political subdivision thereof, as the case may be, as garnishee to appear at the term of court to which the writs of garnishment may be returnable, to answer accordingly.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 7 (1); 1857, ch. 61, art. 313; 1871, § 874; 1880, § 1738; 1892, § 2130; Laws, 1906, § 2337; Hemingway's 1917, § 1932; Laws, 1930, § 1838; Laws, 1942, § 2783; Laws, 1936, ch. 321; Laws, 1990, ch. 378, § 1, eff from and after July 1, 1990.

§ 11-35-3. When issued on suing out attachment.

If, at the time of issuing a writ of attachment, or thereafter before the attachment issue has been tried, the attaching creditor shall suggest that any person is indebted to the debtor, or has property of the debtor in his hands, or knows of any other person so indebted or who has effects or property of the debtor in his hands, the officer issuing the writ of attachment shall insert therein a command to summon such person to appear on the return day of the attachment, to answer accordingly.

Sources: Codes, Hutchinson's 1848, ch. 56, art. 4 (6); 1857, ch. 52, art. 4; 1871, § 1430; 1880, § 2422; 1892, § 2131; Laws, 1906, § 2338; Hemingway's 1917, § 1933; Laws, 1930, § 1839; Laws, 1942, § 2784.

§ 11-35-9. Service.

A writ of garnishment, whether issued in a case of attachment or on a judgment or decree, shall be served as a summons is required by law to be executed; but if the garnishee be not personally served, and make default, judgment nisi shall be rendered against him, and a scire facias awarded, returnable to the next term, unless the court be satisfied that the garnishee can be personally served at once, in which case it may be returnable instanter.

Sources: Codes, 1892, § 2134; Laws, 1906, § 2341; Hemingway's 1917, § 1936; Laws, 1930, § 1842; Laws, 1942, § 2787.

§ 11-35-11. Service of writs of garnishment on government employees.

Service of writs of garnishment upon judgments against any officer or employee of the state, a county, a municipality, any state institution, board, commission or authority shall be effected as follows:

(1) In a case of garnishment against any employee of a state department, agency, board, commission, institution or other authority, the writ shall be served upon the department head, president of the institution or chairman or other presiding officer thereof. In case of a garnishment against a state officer, departmental head, president of an institution, director of

a board or other head of any other agency or commission of the state government, the writ shall be served upon the state auditor. In case of a garnishment against the state auditor, the writ shall be served upon the state treasurer, this being the only case in which the state treasurer is served with a writ of garnishment except where a garnishment is against an employee of the state treasurer.

(2) In case of a garnishment against any person who is now or may hereafter be a salaried officer or employee of a county, the writ shall be served upon the clerk of the chancery court of the county, except that in case of garnishment upon a judgment against such clerk the writ shall be served upon the sheriff of the county.

(3) In case of a garnishment against any person who is now or may hereafter be a salaried officer or employee of a county school district or a municipal separate school district, the writ shall be served upon the superintendent of the respective school district, except in the event the garnishment be against such superintendent the writ shall be served upon the president of the board of education or the board of trustees.

(4) In case of a garnishment against an officer or employee of a municipality, the writ shall be served upon the city, town or village clerk.

Sources: Codes, 1942, § 2789; Laws, 1936, ch. 321; Laws, 1952, ch. 264; Laws, 1973, ch. 422, § 1, eff from and after passage (approved March 29, 1973).

§ 11-35-23. Nature and effects of garnishment; property affected.

(1) Except for wages, salary or other compensation, all property in the hands of the garnishee belonging to the defendant at the time of the service of the writ of garnishment shall be bound by and subject to the lien of the judgment, decree or attachment on which the writ shall have been issued. If the garnishee shall surrender such property to the sheriff or other officer serving the writ, the officer shall receive the same and, in case the garnishment issued on a judgment or decree, shall make sale thereof as if levied on by virtue of an execution, and return the money arising therefrom to satisfy the judgment; and if the garnishment issued on an attachment, the officer shall dispose of the property as if it were levied upon by a writ of attachment. And any indebtedness of the garnishee to the defendant, except for wages, salary or other compensation, shall be bound from the time of the service of the writ of garnishment, and be appropriable to the satisfaction of the judgment or decree, or liable to be condemned in the attachment.

(2) The court issuing any writ of garnishment shall show thereon the amount of the claim of the plaintiff and the court costs in the proceedings and should at any time during the pendency of said proceedings in the court a judgment be rendered for a different amount, then the court shall notify the garnishee of the correct amount due by the defendant under said writ.

(3) (a) Except for judgments, liens, attachments, fees or charges owed to the state or its political subdivisions; wages, salary or other compensation in the hands of the garnishee belonging to the defendant at the time of the service of the writ of garnishment shall not be bound by nor subject to the lien of the judgment, decree or attachment on which the writ shall have been issued when the writ of garnishment is issued on a judgment based upon a claim or debt that is less than One Hundred Dollars ($100.00), excluding court costs.

(b) If the garnishee be indebted or shall become indebted to the defendant for wages, salary or other compensation during the first thirty (30) days after service of a proper writ of garnishment, the garnishee shall pay over to the employee all of such indebtedness, and thereafter, the garnishee shall retain and the writ shall bind the nonexempt percentage of disposable earnings, as provided by Section 85-3-4, for such period of time as is necessary to accumulate a sum equal to the amount shown on the writ as due the court, even if such period of time extends beyond the return day of the writ. Unless the court otherwise authorizes the garnishee to make earlier payments or releases, the garnishee shall retain all sums collected pursuant to the writ and make only one (1) payment into court at such time as the total amount shown due on the writ has been accumulated, provided that, at least one (1) payment per year shall be made to the court of the amount that has been withheld during the preceding year. Should the employment of the defendant for any reason be terminated with the garnishee, then the garnishee shall not later than fifteen (15) days after the termination of such employment, report such termination to the court and pay into the court all sums as have been withheld from the defendant's disposable earnings. If the plaintiff in garnishment contest the answer of the garnishee, as now provided by law in such cases, and proves to the court the deficiency or untruth of the garnishee's answer, then the court shall render judgment against the garnishee for such amount as would have been subject to the writ had the said sum not been

released to the defendant; provided, however, any garnishee who files a timely and complete answer shall not be liable for any error made in good faith in determining or withholding the amount of wages, salary or other compensation of a defendant which are subject to the writ.

(4) Wages, salaries or other compensation as used in this section shall mean wages, salaries, commissions, bonuses or other compensation paid for employment purposes only.

(5) The circuit clerk may, in his or her discretion, spread on the minutes of the county or circuit court, as the case may be, an instruction that all garnishment defendants shall send all garnishment monies to the attorney of record or in the case where there is more than one (1) attorney of record, then to the first-named attorney of record, and not to the clerk. The payment schedule shall be the same as subsection (3)(b) of this section.

(6) All payments made pursuant to a garnishment issued out of the justice court shall be made directly to the plaintiff or to the plaintiff's attorney as indicated by the plaintiff in his or her suggestion for writ of garnishment. The employer shall notify the court and the plaintiff or the plaintiff's attorney when a judgment is satisfied or when the employee is no longer employed by the employer.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 7 (8); 1857, ch. 61, art. 314; 1871, § 875; 1880, § 1784; 1892, § 2136; Laws, 1906, § 2343; Hemingway's 1917, § 1938; Laws, 1930, § 1844; Laws, 1942, § 2796; Laws, 1981, ch. 469, § 1; Laws, 1997, ch. 533, § 1; Laws, 2000, ch. 497, § 1; Laws, 2004, ch. 475, § 1, eff from and after July 1, 2004.

§ 11-35-24. Multiple garnishments.

(1) Where more than one garnishment has been issued against an employee of a garnishee, such garnishee shall comply with the garnishment with which he was first served. In the event more than one (1) garnishment on an employee is received on the same day, the writ of garnishment which is the smallest amount shall be satisfied first. However, in every case, garnishments issued pursuant to court ordered child support shall have first priority, even if previous garnishments are in effect or pending.

(2) Any such conflicting or subsequent garnishments on an employee of the garnishee shall be returned to the court issuing such writ of garnishment with a statement by the garnishee that a previous garnishment is in effect. Such statement shall operate as a stay of the subsequent garnishment until satisfaction of any prior garnishments has been made.

(3) Upon satisfaction of the writ of garnishment in progress, the garnishee shall immediately begin collection of such writ of garnishment with next priority.

(4) Good faith compliance with this section shall release the garnishee from any liability for failure of compliance with this section.

Sources: Laws, 1981, ch. 469, § 5, eff from and after passage (approved April 7, 1981).

§ 11-35-25. Answer of the garnishee.

(1) Every person duly summoned as a garnishee shall answer on oath as to the following particulars, viz.:

(a) Whether he be indebted to the defendant or were so indebted at the time of the service of the writ on him, or have at any time since been so indebted; and, if so indebted, in what sum, whether due or not, and when due or to become due, and how the debt is evidenced, and what interest it bears;

(b) What effects of the defendant he has or had at the time of the service of the writ on him, or has had since, in his possession or under his control;

(c) Whether he knows or believes that any other person is indebted to the defendant; and, if so, whom, and in what amount, and where he resides; and
(d) Whether he knows or believes that any other person has effects of the defendant in his possession or under his control; and, if so, whom, and where he resides.

(2) In addition to answering as to the particulars in subsection (1) of this section, each person duly summoned as a garnishee in any case in which he be indebted to the defendant for wages, salary or other compensation shall answer on oath as to whether the defendant is an employee of the garnishee and, if so, the time interval between pay periods of the defendant including any specific day of a week or month on which such defendant is regularly paid.

Sources: Codes, Hutchinson's 1848, ch. 56, art. 4 (6), ch. 62, art. 7 (1); 1857, ch. 52, art. 4, ch. 61, art. 313; 1871, §§ 874, 1430; 1880, §§ 1783, 2422; 1892, § 2135; Laws, 1906, § 2342; Hemingway's 1917, § 1937; Laws, 1930, § 1843; Laws, 1942, § 2788; Laws, 1981, ch. 469, § 2, eff from and after passage (approved April 7, 1981).

§ 11-35-27. Garnishee's answer; time.

Garnishees shall, in all cases in the circuit or chancery court, answer on the first day of the return term, and, in the courts of justices of the peace, they shall answer by noon on the return day of the writ, unless the court, for cause shown, shall grant further time; and, if upon the answer of any garnishee, it appear that there is any estate of the defendant in the hands of any person not summoned, an alias writ may at once be issued, to be levied on the property in the hands of such person, or he may be summoned as garnishee.

Sources: Codes, 1857, ch. 52, art. 26; 1871, § 1443; 1880, § 2444; 1892, § 2140; Laws, 1906, § 2347; Hemingway's 1917, § 1942; Laws, 1930, § 1848; Laws, 1942, § 2800.

§ 11-35-29. Judgment on answer.

If the garnishee admits indebtedness to or the possession of effects of the defendant, and he have not paid or delivered the same to the sheriff, judgment may be rendered against him in favor of the plaintiff for the amount of the debt admitted, or for the property, or the value thereof (to be assessed if necessary), admitted to be in his possession; but the judgment shall not be for a greater sum than the plaintiff's demand.

Sources: Codes, 1892, § 2137; Laws, 1906, § 2344; Hemingway's 1917, § 1939; Laws, 1930, § 1845; Laws, 1942, § 2797.

§ 11-35-31. Garnishee's failure to answer.

If a garnishee, personally summoned, shall fail to answer as required by law, or if a scire facias on a judgment nisi be executed on him, and he fail to show cause for vacating it, the court shall enter a judgment against him for the amount of plaintiff's demand; and execution shall issue thereon, provided, however, that the garnishee may suspend the execution by filing a sworn declaration in said court showing the property and effects in his possession belonging to the debtor, and his indebtedness to the debtor, if any, or showing that there be none, if that be true; and by such act and upon a hearing thereon, the garnishee shall limit his liability to the extent of such property and effects in his hands, and such indebtedness due by him to the debtor, plus court costs and reasonable attorney's fees of the judgment creditor in said garnishment action.

Sources: Codes, Hutchinson's 1848, ch. 56, art. 4 (19), ch. 62, art. 7 (2); 1857, ch. 52, art. 25; 1871, § 1442; 1880, § 2446; 1892, § 2138; Laws, 1906, § 2345; Hemingway's 1917, § 1940; Laws, 1930, § 1846; Laws, 1942, § 2798; Laws, 1966, ch. 364, § 1, eff from and after passage (approved May 20, 1966).

§ 11-35-33. Garnishee may claim exemptions.

Any garnishee who answers admitting an indebtedness, or the possession of property due or belonging to the defendant, may show by his answer that he is advised and believes that the defendant does or will claim the debt or property, or some part thereof, as exempt from garnishment, levy, or sale. Upon the filing of such answer, the clerk or justice of the peace shall issue a summons or make publication, if defendant be shown by oath to be absent from the state, for the defendant, notifying him of the garnishment and the answer, and requiring him to assert his right to the exemption. Proceedings against the garnishee shall be stayed until the question of the debtor's right to the exemption be determined. If the defendant fail to appear, judgment by default may be taken against him, adjudging that he is not entitled to the property or debt as exempt; but if he appear, the court shall, on his motion, cause an issue to be made up and tried between him and the plaintiff.

Sources: Codes, 1892, § 2139; Laws, 1906, § 2346; Hemingway's 1917, § 1941; Laws, 1930, § 1847; Laws, 1942, § 2799.

§ 11-35-35. Stay if debt not yet due; delivery of goods or chattels to sheriff.

If a garnishee admit an indebtedness not then due, execution shall be stayed until its maturity; and if he admit the possession of goods or chattels of the defendant, such goods or chattels shall be delivered to the sheriff; but, in attachment cases, the garnishee may replevy the property by giving a bond for the same, as the defendant in attachment may do, and subject to the same proceedings and liabilities.

Sources: Codes, 1857, ch. 52, art. 27; 1871, § 1444; 1880, § 2445; 1892, § 2141; Laws, 1906, § 2348; Hemingway's 1917, § 1943; Laws, 1930, § 1849; Laws, 1942, § 2801.

§ 11-35-37. Garnishee protected in certain cases.

If a garnishee shall pay over or deliver, in pursuance of the judgment or process of the court, any money or property belonging to the defendant, before notice of sale, assignment, or transfer thereof by the defendant to any other person, such garnishee shall not thereafter be liable for the debt or property to the vendee or assignee thereof.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 7 (5); 1857, ch. 52, art. 36; 1871, § 1453; 1880, § 2447; 1892, § 2142; Laws, 1906, § 2349; Hemingway's 1917, § 1944; Laws, 1930, § 1850; Laws, 1942, § 2802.

§ 11-35-39. Garnishee may plead that judgment is void.

The garnishee may plead that the judgment under which the writ of garnishment was issued is void, and if his plea be sustained, no judgment shall be rendered against him.

Sources: Codes, 1906, § 2350; Hemingway's 1917, § 1945; Laws, 1930, § 1851; Laws, 1942, § 2803.

§ 11-35-41. Garnishee may compel interpleader.

When a garnishee, by his answer or by affidavit at any time before final judgment against him, or after such judgment if he had no such notice before the judgment was rendered, shall show that he has been notified that another person claims title to or an interest in the debt or property, which has been admitted by him, or found on a trial to be due or to be in his possession, the court shall suspend all further proceedings, and cause a summons to issue or publication to be made for the person so claiming to appear and contest with the plaintiff the right to such money, debt, or property. In such case, if the answer admit an indebtedness, and the garnishee pay the money into court, he shall thereupon be discharged from liability to either party for the sum so paid. And whenever such garnishee shall by said answer or affidavit show that he has been notified that another person claims title to or interest in such debt or property, it shall be lawful for such third person of his own motion to come in and claim the debt or property, and the claim shall be tried as other claimant's issues are tried whether summons or publication has been made to bring him in or not.

Sources: Codes, 1857, ch. 52, art. 34; 1871, § 1451; 1880, § 2449; 1892, § 2143; Laws, 1906, § 2351; Hemingway's 1917, § 1946; Laws, 1930, § 1852; Laws, 1942, § 2804.

§ 11-35-43. Claim of third person tried.

If the claimant, being duly summoned, fail to appear, the court shall adjudge the money, debt, or property to the plaintiff. If he appear, he shall propound his claim to the money, debt, or property in writing under oath; and the plaintiff may take issue thereon, and the same shall be tried and determined as other issues. If the issue be found in favor of the plaintiff, judgment shall be rendered for him against the garnishee, and also for the costs of the interpleader against the claimant; but if the issue be found for the claimant, judgment shall be rendered in his favor against the garnishee, and against the plaintiff for the costs. Where the garnishee has paid money into court, the judgment shall direct its payment to the party entitled thereto, and a judgment therefor shall not go against the garnishee.

Sources: Codes, 1857, ch. 52, art. 35; 1871, § 1452; 1880, § 2450; 1892, § 2144; Laws, 1906, § 2352; Hemingway's 1917, § 1947; Laws, 1930, § 1853; Laws, 1942, § 2805.

§ 11-35-45. Contest of garnishee's answer by plaintiff.

If the plaintiff believe that the answer of the garnishee is untrue, or that it is not a full discovery as to the debt due by the garnishee, or as to the property in his possession belonging to the defendant, he shall, at the term when the answer is filed, unless the court grant further time, contest the same, in writing, specifying in what particular he believes the answer to be incorrect. Thereupon, the court shall try the issue at once, unless cause be shown for a continuance, as to the truth of the answer, and shall render judgment upon the facts found, when in plaintiff's favor, as if they had been admitted by the answer, but if the answer be found correct, the garnishee shall have judgment for costs against the plaintiff.

Sources: Codes, Hutchinson's 1848, ch. 56, art. 4 (21), ch. 62, art. 7 (4); 1857, ch. 52, art. 28; 1871, § 1445; 1880, § 2451; 1892, § 2145; Laws, 1906, § 2353; Hemingway's 1917, § 1948; Laws, 1930, § 1854; Laws, 1942, § 2806.

§ 11-35-47. Contest of garnishee's answer by defendant.

The defendant may contest, in writing, the answer of the garnishee, and may allege that the garnishee is indebted to him in a larger sum than he has admitted, or that he holds property of his not admitted by the answer, and shall specify in what particular the answer is untrue or defective. Thereupon an issue shall be made up and tried; but the plaintiff may take judgment for the sum admitted by the garnishee, or for the condemnation of the property admitted to be in his hands, notwithstanding the contest.

Sources: Codes, 1857, ch. 52, art. 32; 1871, § 1449; 1880, § 2452; 1892, § 2146; Laws, 1906, § 2354; Hemingway's 1917, § 1949; Laws, 1930, § 1855; Laws, 1942, § 2807.

§ 11-35-49. Transfer to other county; change of venue.

Writs of garnishment, in all cases, may be issued to any county; but if the garnishee whose answer is contested, shall not be a resident of the county, then, upon an issue being made upon his answer, the venue of the trial of the issue may be changed, on his application, to the county of his residence. The court in which the issue is tried shall cause the facts found to be certified and returned with the issue to the court from which the writ issued, and judgment shall be entered thereupon as if the issue had there been tried.

Sources: Codes, Hutchinson's 1848, ch. 56, art. 4 (27), art. 13 (4); 1857, ch. 52, art. 29; 1871, § 1446; 1880, § 2453; 1892, § 2147; Laws, 1906, § 2355; Hemingway's 1917, § 1950; Laws, 1930, § 1856; Laws, 1942, § 2808.

§ 11-35-51. Judgment on issue against garnishee.

If the issue in any case be found against the garnishee, judgment shall be rendered against him for the amount of the debt or money or property in his hands, which judgment shall be in favor of the plaintiff, if necessary to satisfy his judgment or claim against the defendant, or in favor of the defendant, if the judgment of the plaintiff have been satisfied, or for so much thereof as may remain after satisfying said judgment.

Sources: Codes, 1857, ch. 52, art. 33; 1871, § 1450; 1880, § 2454; 1892, § 2148; Laws, 1906, § 2356; Hemingway's 1917, § 1951; Laws, 1930, § 1857; Laws, 1942, § 2809.

§ 11-35-53. Valuation and discharge of judgment.

If the personal property levied on under an attachment, or any part thereof, shall have been left in the hands of the garnishee on his giving bond as prescribed, the court or jury trying the issue between the plaintiff and garnishee, if it find for the plaintiff, shall assess the value of the property left in the hands of the garnishee. If the value of the property equal or exceed the amount due the plaintiff, judgment shall be entered against the garnishee and his sureties on his replevin bond for the sum due the plaintiff. If the value of the property be less than the amount due the plaintiff, judgment shall be entered against the garnishee and his sureties for the value of the property so replevied or left in his hands. If judgment by default shall be rendered against the garnishee, the value of the property so replevied or left in his hands shall be assessed, and judgment shall be entered as above provided. In all cases the judgment against the garnishee and his sureties shall be satisfied and discharged by the delivery to the sheriff of the property replevied or left in his hands within ten days after execution on the judgment shall have come to the hands of the sheriff, and he shall sell the property so delivered to him, and apply the proceeds to the payment of the execution.

Sources: Codes, 1857, ch. 52, art. 9; 1871, § 1448; 1880, § 2455; 1892, § 2149; Laws, 1906, § 2357; Hemingway's 1917, § 1952; Laws, 1930, § 1858; Laws, 1942, § 2810.

§ 11-35-55. No final judgment in certain cases.

Final judgment upon a garnishment shall not go against a surety or accommodation indorser until judgment be rendered against the principal and the cosureties or prior indorsers who may be liable to judgment, if they be residents of the state.

Sources: Codes, Hutchinson's 1848, ch. 56, art. 13 (1); 1857, ch. 52, art. 30; 1871, § 1447; 1880, § 2456; 1892, § 2150; Laws, 1906, § 2358; Hemingway's 1917, § 1953; Laws, 1930, § 1859; Laws, 1942, § 2811.

§ 11-35-57. Executors and administrators may be garnished.

Executors and administrators may be garnished for a debt due by their testator or intestate to the defendant; but judgment shall not be entered in such case against an executor or administrator until the lapse of six months after the grant of letters; and they may be garnished as having effects due to legatees or distributees; but judgment shall not be rendered against them in such case, except with their consent, until after a final settlement of the estate.

Sources: Codes, 1857, ch. 52, art. 24; 1871, § 1485; 1880, § 2457; 1892, § 2151; Laws, 1906, § 2359; Hemingway's 1917, § 1954; Laws, 1930, § 1860; Laws, 1942, § 2812.

§ 11-35-59. Proceedings if garnishee dies.

If the garnishee dies, like proceedings may be had as provided for in case of the death of a party to an action.

Sources: Codes, 1880, § 2458; 1892, § 2152; Laws, 1906, § 2360; Hemingway's 1917, § 1955; Laws, 1930, § 1861; Laws, 1942, § 2813.

§ 11-35-61. Garnishee compensation; conditions.

The garnishee shall be allowed for his attendance, out of the debts or effects in his possession, or against the plaintiff in attachment, judgment, or decree in case there be no debts or effects in his possession, provided he shall put in his answer within the time prescribed by law, the pay and mileage of a juror, and, in exceptional cases rendering it proper, the court may allow the garnishee reasonable compensation additional to the foregoing and to be obtained in the same way.

Sources: Codes, Hutchinson's 1848, ch. 62, art. 7 (6); 1857, ch. 52, art. 37; 1871, § 1454; 1880, § 2448; 1892, § 2153; Laws, 1906, § 2361; Hemingway's 1917, § 1956; Laws, 1930, § 1862; Laws, 1942, § 2814.

First Miss. Nat'l Bank v. KLH Indus., Inc., 457 So.2d 1333 (Miss. 1984)

ROBERTSON, Justice, for the Court:

ON PETITION FOR REHEARING

I.

We today inquire generally whether the Mississippi Rules of Civil Procedure, effective January 1, 1982, regulate the procedural aspects of the form of action known as garnishment. A garnishment action is in the nature of a civil action and is certainly subject to the rule-making power of this Court and the Mississippi Rules of Civil Procedure the same as any other civil action. By operation of Rule 69(a), Miss.R.Civ.P., process supplementary to, and for the enforcement of, a judgment for the payment of money is expressly declared to be governed by heretofore existing statutes. Accordingly, by virtue of an express provision in the Rules the procedural rules whereby a party seeks to secure and enforce the remedy of garnishment are those provided by our garnishment statutes, Miss.Code Ann. §§ 11-35-1 to -61 (1972), supplemented by so much of the Mississippi Rules of Civil Procedure as may be found not inconsistent with the procedures prescribed in such statutes.

More specifically, the instant appeal asks that we consider just how long a garnishee served with a writ of garnishment may ignore the process of the court without being stuck for the entire original judgment debt. The question is controlled by procedural aspects of our garnishment statutes. We today hold that such a garnishee, even though the subject of an otherwise valid default judgment following service of the writ of garnishment and failure to answer, may nevertheless suspend execution and enforcement of that judgment at any time before completion of the execution of enforcement process thereon. Miss.Code Ann. § 11-35-31 (1972).

When all is said and done, we find that KLH Industries, Inc., the garnishee below and the Appellee here, filed its sworn declaration prior to the response of a third party upon whom execution of process by way of a supplemental garnishment had been levied. Accordingly, the trial judge correctly held KLH entitled to limit its liability to the extent of indebtedness held by it owing to the original judgment debtor, plus court costs and reasonable attorneys fees of First Mississippi National Bank, the original judgment creditor and the Appellant here. We affirm.

II.

On May 19, 1982, First Mississippi National Bank (FMNB) filed in the Circuit Court of Jefferson Davis County its suggestion for writ of garnishment against KLH Industries, Inc. (KLH).

FMNB alleged that it held an unsatisfied judgment against Cordelia Clark in the sum of $10,182.60. The judgment was said to have been entered on January 11, 1978, and to bear interest at the rate of 8% from that date.

The suggestion then charged

> "that KLH Industries, Inc., a Mississippi Corporation, of Jackson, Hinds County, Mississippi, is indebted unto said Defendant [Clark] or has property of said Defendant in its possession or under its control, or knows of some other person who is so indebted, or who has effects or property of the said Defendant in his hands."

The record reflects that, on May 24, 1982, process--denominated "writ of garnishment"--was formally executed upon KLH Industries, Inc. via Kenneth G. Humer, an agent for KLH. The process advised KLH that it should answer on or before August 16, 1982. The process also advised KLH of FMNB's claim that it held a judgment against Cordelia Clark.

For reasons unknown KLH filed no answer--not within thirty days nor by August 16, 1982.

On September 1, 1982, FMNB filed a motion for default judgment against KLH. A copy of the motion was served upon KLH. This motion charged that KLH had failed to answer

> "thereby rendering itself in default and making itself liable to the Plaintiff and subject to default judgment;".

On September 28, 1982, FMNB filed a request for entry of default, purportedly in accordance with Rule 55(a), Miss.R.Civ.P., accompanied by an affidavit setting forth the facts of KLH's default. Insofar as the record reflects, these papers were not served upon KLH.

On September 28, 1982, KLH's default was entered by the Circuit Clerk of Jefferson Davis County. On the following day, September 29, 1982, the Circuit Court entered judgment by default in favor of FMNB and against KLH in the amount of $9,782.60 plus interest and costs as allowed by law.

Thereafter, FMNB discovered that KLH had funds on deposit with Deposit Guaranty National Bank of Jackson (DGNB). On November 8, 1982, FMNB filed a second suggestion for writ of garnishment, this time against DGNB. FMNB there alleged that it held an unsatisfied judgment against KLH entered September 29, 1978, and that DGNB was indebted to KLH. The writ of garnishment appears to have been formally served on DGNB on November 9, 1982.

KLH's first appearance insofar as the record reflects was made on January 6, 1983, when it filed a "sworn declaration", invoking a procedure set forth in our garnishment statutes: Miss.Code Ann. § 11-35-31 (1972). Significantly, DGNB as garnishee had not, prior to this point in time, either answered or paid into court the funds caught by the garnishment. In its sworn declaration, KLH acknowledged that Cordelia Clark was in its employ and stated that it had been withholding from Clark's wages the appropriate sum continuously since May 29, 1982, and that an aggregate amount of $1,110.95 had been so withheld. KLH denied that it was in any other way indebted to or in possession of the effects of Clark, thus suggesting that the execution on FMNB's judgment against KLH should be suspended with respect to all amounts in excess of the amount that KLH had withheld to date.

On January 11, 1983, FMNB responded, insisting that the judgment of September 29, 1982, had become final and that no timely motion to vacate said judgment had been filed nor had any appeal been perfected.

Following a hearing thereon, the Circuit Court on February 4, 1983, entered its order in effect suspending enforcement of so much of the judgment as required KLH to pay to FMNB an amount in excess of the sums theretofore lawfully withheld from Clark's wages, directing KLH to pay to FMNB all wages so withheld, and further directing that KLH continue to withhold from Clark's wages the maximum amount allowable by law until such time as (a) the judgment held by FMNB against Clark be satisfied or (b) Clark should leave the employment of KLH, whichever first occurred. KLH was further ordered to pay to FMNB the sum of $500 as attorneys' fees, plus court costs.

On March 21, 1983, FMNB filed a motion asking the Court to reconsider its order of February 4, 1983, and to reinstate the original judgment. On the same day the Circuit Court entered its order overruling that motion. Immediately thereafter FMNB perfected its appeal to this Court.

III.

A.

The substantive remedy of garnishment has been created by legislative enactment codified as Miss.Code Ann. §§ 11-35-1 to -61 (1972). The procedure for enforcement of that remedy has heretofore been provided in the same code chapter. A question arises, however, whether that procedure has in any way been supplanted by the Mississippi Rules of Civil Procedure which became effective January 1, 1982.

Rule 1, Miss.R.Civ.P., provides that the Rules shall

> "govern procedure in circuit courts ... in all suits of a civil nature, subject to certain limitations enumerated in Rule 81."

This garnishment action, aside from its picturesque nomenclature, has all of the appearances of a "suit of a civil nature". It has been brought in the Circuit Court of Jefferson Davis County. A careful perusal of Rule 81, Miss.R.Civ.P., discloses no express indication that garnishment proceedings are exempt from procedural regulation by the Mississippi Rules of Civil Procedure.

On the other hand, there is in Rule 81 an implied indication to that effect. Rule 81(h) relates to statutes affected by the Rules:

> (h) Statutes Affected. To the extent that the statutes listed in Appendix B of these rules prescribe rules of civil practice or procedure, such statutory rules shall be supplanted by these Mississippi Rules of Civil Procedure in all courts subject to these rules in all actions not excepted by these rules.
>
> Appendix B is entitled: "Statutes Affected." The introductory paragraph of Appendix B provides:
>
> To the extent that the statutes listed in this Appendix prescribe rules of practice and procedure, such statutory rules shall be supplanted by the provisions of the Mississippi Rules of Civil Procedure, which shall govern any civil action authorized or contemplated thereby (see, M.R.C.P. 81).

The garnishment statutes [Section 11-35-1 et seq. of the Code] are not listed as statutes affected by the Rules. The fact that the garnishment statutes were not among those listed in Appendix B suggests that the Rules may not have altered the statutory garnishment procedure.

B.

Two other Rules are much closer to the mark. First, Rule 64, Miss.R.Civ.P., provides that "at the commencement of and during the course of an action" provisional remedies "are available under the circumstances and in the manner provided by law". The unofficial Comment to Rule 64 expressly though erroneously mentions garnishment as one of those so-called provisional remedies available.

The reason Rule 64 has no application is that it refers to "provisional remedies" available "at the commencement of and during the course of an action". The action by FMNB against Cordelia Clark was commenced August 22, 1977. That action ended on January 11, 1978, with the entry of a final judgment in favor of FMNB and against Clark. This action was not a procedure employed by FMNB at the commencement of or during the course of the original action against Cordelia Clark. Rather it was a separate albeit successor action in which FMNB sought to enforce its judgment against Clark.

[1] Beyond that, the substantive remedy of garnishment has never been available in this state "at the commencement of and during the course of an action". Mississippi law allows a creditor to proceed against another said to be indebted to the creditor's debtor only after the creditor has obtained a judgment against such debtor. Miss.Code Ann. § 11-35-1 (1972). Of course, the substantive aspects of the garnishment remedy he may receive have in no way been altered by the advent of our Civil Rules, nor could they be.

C.

Rule 69(a), Miss.R.Civ.P., is the applicable and governing rule. This Rule pertains to enforcement of judgments, and provides:

> (a) Enforcement of Judgments. Process to enforce a judgment for the payment of money shall be by such procedures as are provided by statute. The procedure on execution, in proceedings supplementary to and in aid of judgment, and in proceedings on and in aid of execution, shall be as provided by statute.

[2] [3] Garnishment is not a pure, independent action but instead is more in the nature of "an ancillary or auxiliary proceeding, growing out of, and dependent on, another original or primary action or proceeding, ..." 38 C.J.S. Garnishment § 2(4) at 206. Garnishment is a process which may be "resorted to in aid of an execution for the enforcement of a judgment recovered in the principal action or proceeding, ..." Id.

[4] This Court observed in First National Bank of Hattiesburg v. Ellison, 135 Miss. 42, 99 So. 573 (1924), that garnishment was "the process by which money and goods due a judgment ... debtor by third persons were attached." 99 So. at 574. Garnishment is a process to enforce a judgment, as well as being supplementary to and in aid of judgment and a proceeding on and in aid of execution as contemplated by Rule 69(a).

[5] According to Rule 69(a), the procedure required by the Rules themselves by which the holder of a judgment seeks to enforce that right and to secure that remedy, "shall be as provided by statute [the garnishment statutes]." [Emphasis added]. The Rules, therefore, defer to the garnishment statutes with regard to procedures to be followed in a garnishment action.

The official comment to Rule 69(a) reiterates the point:

> "Rule 69(a) provides that the traditional Mississippi legal devices continue to be available for the enforcement of judgments, and that the statutory procedures governing their use still prevail; there is no departure from prior law." [Emphasis added].

Accordingly, the procedural rules whereby a party seeks to enforce, or resist the enforcement of, the remedy of garnishment is that provided by our garnishment statutes, Miss.Code Ann. §§ 11-35-1 to -61 (1972) supplemented only by so much of the Mississippi Rules of Civil Procedure as may be found not inconsistent with those statutes.

IV.

Turning to the merits of this appeal, we find FMNB arguing strenuously that KLH has waited too late to file its sworn declaration, that its judgment of September 29, 1982, against KLH for $9,782.60 plus interest and costs had become irretrievably final, subject to enforcement by execution or other similar process as any other final judgment. In support FMNB relies heavily upon Mississippi Action for Community Education, Inc. v. Montgomery, 404 So.2d 320 (Miss.1982) (hereinafter "MACE"). The rule of that case ultimately proves FMNB's undoing.

In MACE, C.M.I. recovered a judgment against Montgomery, an employee of MACE. C.M.I. then commenced garnishment proceedings against MACE to enforce that judgment. MACE failed to answer and final judgment was entered against it by default. Subsequently, C.M.I. sought to enforce the MACE judgment and to that end issued process in the form of a writ of garnishment against the First National Bank of Greenville, suggesting that the Bank held property of or was indebted to MACE. On July 11, 1980, the Bank answered that it held funds on deposit for the account of MACE sufficient to cover the judgment and paid into the registry of the court the amount sought in the garnishment process. The circuit clerk dispersed the funds, and the judgment against MACE was marked satisfied.

On August 28, 1980--some six weeks later--MACE filed a sworn declaration in which it invoked the limitation of liability provisions of Section 11-35- 31. MACE asked that the court enter an order suspending the execution of the judgment C.M.I. held against MACE and that its liability be limited to the total amount of funds (wages) held by MACE and owed to the original judgment debtor, Montgomery. This Court held that the sworn declaration was filed six weeks too late.

> "MACE, in order to suspend the execution of the writ of garnishment, ... [had to have filed] a sworn declaration in the court before the garnishee (FNB) had answered and paid into Court the funds caught by the garnishment. In other words, MACE ... [could] not wait to file a declaration to suspend the execution until the execution ... [had] been completed, the answer filed, the funds paid into Court and dispersed by the clerk to the judgment creditor."
> --404 So.2d at 322. [Emphasis added]

The controlling distinction between MACE and the case at bar is that, KLH's sworn declaration, however tardy it may have been, was filed on January 6, 1983--before the garnishee (DGNB) had either answered or paid into Court the funds caught by the garnishment, while in MACE the declaration was filed after.

We are ultimately concerned with Miss.Code Ann. § 11-35-31 (1972), which provides:

> If a garnishee, personally summoned, shall fail to answer as required by law, or if a scire facias on a judgment nisi be executed on him, and he fail to show cause for vacating it, the court shall enter a judgment against him for the amount of plaintiff's demand; and execution shall issue thereon, provided, however, that the garnishee may suspend the execution by filing a sworn declaration in said court showing the property and effects in his possession belonging to the debtor, and his indebtedness to the debtor, if any, or showing that there be none, if that be true; and by such act and upon a hearing thereon, the garnishee shall limit his liability to the extent of such property and effects in his hands, and such reasonable attorney's fees of the judgment creditor in said garnishment action.

This statute has been authoritatively construed in MACE.

[6] The statute itself places no time limit on the filing of a sworn declaration such as that filed KLH on January 6, 1983. Indeed, that statute does not appear to invalidate the judgment, only to suspend enforcement via execution or other similar process. Upon proper proof the garnishee may limit its liability

> "to the extent of ... such indebtedness due by him to the debtor, plus court costs and reasonable attorney's fees of the judgment creditor in said garnishment action." Miss.Code § 11-35-31

MACE construes the statute and holds that, so long as the garnishment defendant files its sworn declaration before completion of the enforcement process, i.e., before the party levied upon has answered or paid monies into the Court, the limitation of liability protections of the statute remain available. By virtue of Rule 69(a), Miss.R.Civ.P., the statute Section 11-35-31, as construed in MACE, furnishes the rule of decision for today's case.

On February 4, 1983, the Circuit Court of Jefferson Davis County entered its final order upholding KLH's claim of the protections of the limitation of liabilities features of Section 11-35-31. That order provided that KLH should pay into the registry of the court all sums withheld from the wages of the original judgment debtor, Cordelia Clark, since the date of the original garnishment caused by FMNB to have been served upon KLH (which sum appears to have been at the time a minimum of $1,110.95); that KLH should pay FMNB the sum of $500.00 as reasonable attorney's fees allowed under Section 11-35-31 and that KLH should continue to withhold from the salary or wages of Cordelia Clark the amounts required by law until such time as the original debt is satisfied or Clark should leave the employment of KLH. Finally, KLH was required to pay all costs.

The Circuit Court was asked to reconsider this ruling and on March 21, 1983, entered its order overruling the motion to reconsider, in effect reaffirming the order of February 24, 1983. For the reasons set forth hereinabove, we affirm.

PETITION FOR REHEARING DENIED; FORMER OPINION WITHDRAWN AND MODIFIED; FINAL JUDGMENT OF THE CIRCUIT COURT OF JEFFERSON DAVIS COUNTY AFFIRMED.

APPEALS TO SUPREME COURT

A. Outline of *Miss. Rules of Appellate Procedure* (Effective 1-1-95)

The Mississippi Supreme Court has promulgated the Mississippi Rules of Appellate Procedure (hereinafter referred to as MRAP) which became effective on January 1, 1995, and govern all civil and criminal appeals to the Supreme Court and the Court of Appeals of Mississippi. See MRAP 1: Scope of Rules. The MRAP provides the only methods by which cases may be taken to the Mississippi Supreme Court, and the basic mode of appellate review is direct appeal.

1. Basic Steps in the Appeal Process

   a. File Notice of Appeal [Form 1] with clerk of trial court [MRAP 3(a)] within 30 days after the date of entry of the judgment or order appealed from. MRAP 4(a)

   b. Upon a showing of "excusable neglect", the trial court may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the ordinary 30 day appeal period. No such extension shall exceed 30 days past the ordinary appeal period or ten days from the entry of the order granting the motion, whichever occurs later. MRAP 4(g).

   c. Post-Trial Motions in Civil Cases may delay the start of the 30 day time in which to appeal until a ruling on the motion . Motion for a JNOV under MRCP 50(b) for a new trial or to alter or amend the judgment under MRCP 59 and to amend or make additional findings or fact under MRCP 52(b) are the examples found in MRAP 4(d) of motions which abate the beginning of the appeal period.

   d. Appellant shall estimate the cost of appeal and deposit that sum with the clerk of the trial court within 7 days after filing the notice of appeal. MRAP 11(b)(1).

   e. Simultaneously with making the deposit for costs, the appellant shall file a CERTIFICATE OF COMPLIANCE with the clerk of the trial court and shall serve a copy of the certificate upon all other parties and upon the court reporter. MRAP 11(b)(1).

   f. The only absolute requirement for perfecting an appeal is the filing on the Notice of Appeal, but failure to take other steps such as the deposit of estimated costs may result in sanctions by the Supreme Court which can include dismissal of the appeal. MRAP 3(a).

   g. Cross Appeals. MRAP 4(c) states:

      Notice by Another Party. If a timely notice of appeal is filed by a party any other party may file a notice of appeal with 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires.

   h. Supersedas. Appellant shall be entitled to a stay of execution in appropriate cases upon the giving of a supersedes bond on a penalty of 125 percent of the amount of judgment appealed from. MRAP 8(a). All motions regarding whether a stay should exist or the amount of the bond must ordinarily be made in the first instance to the trial court, and for good cause shown, the trial court may set supersedeas bond for less than 125 percent. However, a bond based on punitive damages shall, as to the punitive damages portion of the judgment only, be the lower of 125 percent of the total amount of punitive damages or ten percent of the net worth of the defendant seeking appeal. Absent unusual circumstances, the total amount of the bond for any case as to punitive damages shall not exceed $100,000,000. MRAP 8(b). All such rulings may be reviewed by the Supreme Court. MRAP 8(c).

   i. The Record on Appeal. MRAP 10 details the basic content of the record and the mechanics of designating the record.

   j. Briefs. MRAP 28. Briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, and briefs shall contain a certificate of interested persons.

k. Filing and Service of Briefs (MRAP 31) is triggered by the filing of the record in the office of the Supreme Court clerk. Upon filing of the record, briefs must be served as follows:

(1) Appellant's brief within 40 days after record is filed.
(2) Appellee's brief within 30 days after being served the brief of appellant.
(3) Appellant's reply brief within 14 days after service of the brief of appellee.
(4) In cross-appeals, appellant/cross appellee may serve and file a combined brief of the appellee/cross appellant. Cross appellant's reply may then be served within 14 days after service of appellant's combined responsive brief.

l. Record excerpts. Under MRAP 30 Mississippi follows the federal appellate practice with record excerpts. MRAP 30(a) lists mandatory record excerpts and MRAP 30(b) permits optional record excerpts which any party feels are essential to the understanding of the issues.

2. Damages for Unsuccessful Appeal or for Frivolous Appeal. MRAP 38 allows the Supreme Court in civil cases to award just damages and single or double costs to the appellee when the appeal is determined to be frivolous.

3. Forcing a Decision on Cases Taken Under Advisement. After a trial judge has had under advisement for sixty (60) days a motion or request for relief which would be dispositive of any substantive issues, any party has fourteen (14)days to submit a proposed order or judgment to the trial judge. If a subsequent order or judgment is entered, both parties shall, in writing, notify the Administrative Office of Courts and the opposing parties of the date of entry of the decision. If the Administrative Office of Courts does not receive written notice of a decision within six (6) months form the date the case was taken under advisement, it shall notify the Supreme Court and forward copies of its notification to the trial judge and parties which will be advised that they are to respond to the notice within a specified period. The Supreme Court shall treat this notification as the filing of an application for a writ of mandamus by all the parties to the action and shall proceed accordingly. Not later than thirty (30) days prior to the expiration of the six (6) months from the date the case was taken under advisement, the trial judge, for just cause shown, may apply in writing to the Supreme Court for additional time beyond the six (6) months to enter a decision. MRAP 15.

4. Certified Questions from Federal Appellate Courts. MRAP 20. The United States Supreme Court and any of the United States Courts of Appeal (but not United States District Courts) may certify questions of Mississippi law to the Mississippi Supreme Court, which the Mississippi Supreme Court may answer or decline.

5. Amicus Curiae. MRAP 29 sets forth the grounds for filing amicus briefs and how and when such briefs are filed. A party requesting to file an amicus brief must file the proposed brief together with a motion stating why such should be allowed. Even if the amicus brief is allowed, oral argument by amicus curiae will be granted only for extraordinary reasons.

C. Court of Appeals of the State of Mississippi (Miss. Code Ann. §§9-4-1, et. seq.)

The Court of Appeals began service in January 1995, and it is comprised of ten appellate judges (two elected from the districts as described in Miss. Code Ann. § 9-4-5(5) to serve eight year terms).

1. The Court of Appeals shall have the power to determine or otherwise dispose of any appeal or other proceeding assigned to it by the Supreme Court . . . . However, the Supreme Court shall retain appeals in cases imposing death penalty, or cases involving utility rates, annexations, bond issues, election contests, or a statute held unconstitutional by the lower court. Miss. Code Ann. § 9-4-3(1).

2. Decisions of the Court of Appeals are final and are not subject to review by the Supreme Court, except by writ of certiorari. The Supreme Court may grant certiorari review only by the affirmative vote of four (4) of its members. . . . Miss. Code Ann. § 9-4-3(2) and MRAP 17.

3. MRAP 16 gives a detailed description of the jurisdiction of the Court of Appeals and provides the procedure for the Court of Appeals and provides the procedure for transfer of cases from the Supreme Court to the Court of Appeals. Rule 16 describes the jurisdiction of the Supreme Court and Court of Appeals as follows:

   a. Jurisdiction of the Supreme Court. The Supreme Court shall have such jurisdiction as is provided by Constitution and statute. All appeals from final orders of trial courts shall be filed in the Supreme Court and the Supreme Court shall assign cases, as appropriate, to the Court of Appeals.

   b. Jurisdiction of the Court of Appeals. Pursuant to Miss. Code Ann. § 9-4-3 (Supp. 1994), the Court of Appeals shall have only such jurisdiction as is conferred upon it by assignment of appeals and other proceedings by the Supreme Court. The Supreme Court may, by statute, assign any appeal to the Court of Appeals except appeals in cases involving:

      (1) the imposition of the death penalty;
      (2) utility rates;
      (3) annexations;
      (4) bond issues;
      (5) election contests; or
      (6) a trial court's holding a statute unconstitutional.

   c. Cases usually kept by Supreme Court. Although any case, other than those which the Supreme Court is statutorily required to retain, may be assigned to the Court of Appeals, the Supreme Court will retain all cases involving attorney discipline, judicial performance, and certified questions from a federal court. The Court will also ordinarily retain cases involving:

      (1) a major question of first impression;
      (2) fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court;
      (3) substantial constitutional questions as to the validity of a statute, ordinance, court rule, or administrative rule or regulation;
      (4) issues upon which there is an inconsistency in the decisions of the Court of Appeals or of the Supreme Court or conflict between the decisions of the two courts.

[End of *Mississippi Civil Practice and Procedure*]
7 January 2006