THE UNITED STATES OF AMERICA IS ENTITLED TO NO RELIEF FOR ANY VIOLATION BY THESE APPELLEES OF ANY RIGHTS TO EDUCATION SECURED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

RESPONSE TO POINT III OF UNITED STATES THAT IT HAS STANDING TO ASSERT THE CLAIM SET FORTH IN ITS PETITION

Both the appellant, James H. Meredith, and the "Amicus Curiae", United States, have sought to justify the restraining orders and have sought a preliminary injunction on the ground of violation by the original defendants and by the new defendants (the State of Mississippi and its officers) of a right to education secured by the Fourteenth Amendment of the Constitution of the United States.

Notwithstanding its designation as "amicus curiae", the United States is now claiming that it is a party; we have not conceded its right to be a party (compare our Brief, p. 36, with U. S. Brief, p. 28) but have argued that the United States might not become a party and seek the relief sought without unlawfully changing this into criminal contempt proceedings.

The United States is now claiming the right as a party, intervening at the appellate level, to join the State of Mississippi as a party defendant and is directing the main thrust of its attack against the acts of the other defendants as "state action," (Brief of United States pp. 26, 27, footnote 5: "***That suit essentially sought relief against state action, and the interference alleged in our petition, although involving other officials, is also state action."

The United States goes further and talks about "privity" (U.S. Brief, pp. 26, 27, fn. 5: ***at least until most recently, the original defendants were acting for the state, and, in a sense, for the state officials who were added on September 25. ***" The United States thus charges that all the defendants' actions were "state action" and, necessarily, that they were in privity with the state.

Two questions are squarely presented: (1) may the United States enforce the alleged right to education of the Complainant, James H. Meredith, under the Fourteenth Amendment of the Constitution of the United States, and (2) does this Court have jurisdiction of such a suit against "state action" of the State of Mississippi, either directly or through its officers.

1. The United States does not have any rights, power or authority to enforce the alleged right to education of the Complainant, James H. Meredith, under the Fourteenth Amendment to the Constitution of the United States.

The Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." (Emphasis is ours unless otherwise noted)

It has often been held that the United States is not a "person" under such a Constitutional provision, and it certainly is not a "person" subject to the jurisdiction of the State.

In U.S. v. Nedo Oil Co., D. C., La., 90 Fed. Supp. 73, aff. C. A. 5, 190 F. 2d 1003, a State statute making mineral rights imprescriptible for nonuser as against the United States was held not to violate the equal protection clause of the Federal Constitution because the United States was not a "person" within the meaning of the Constitution, and also was not within the jurisdiction of the State within the meaning of the Fourteenth Amendment of the Constitution. In so holding, this Court said:

> "An examination of the terms of the Fourteenth Amendment establishes that it is not applicable, first, because the United States is not a 'person' within the meaning of that term as used in that Amendment, and second, the United States is not 'within the jurisdiction' of Louisiana as that phrase is used in the Fourteenth Amendment.
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> "It has repeatedly been held that a sovereign is not a 'person' within the meaning of the Fourteenth

Amendment. Scott v. Frazier, D. C., 258 F. 699; Riley v. Stack, 128 Cal. App. 480, 18 P. 2d 110; Los Angeles County v. Superior Court in and for Alameda County, 128 Cal. App. 522, 18 P. 2d 112; People of New York v. Long Island R. Co., 60 How. Prac., N. Y., 395; Commissioners of State Ins. Fund v. Dinowitz, 179 Misc. 278, 39 N.Y.S. 2d 34.

". . . In United States v. Cooper Corp., 312 U. S. 600, 61 S. Ct. 742, 743, 85 L. Ed. 1071, which held that the United States was not a 'person' within the meaning of Section 7 of the Sherman Act, 15 U.S.C.A. Section 15 note, Roberts, J., said: . . . 'Since, in common usage, the term "person" does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. . .'

"Tested by this standard, the United States is clearly not a 'person' within the meaning of the Fourteenth Amendment. That Amendment was adopted at the close of the Civil War for the specific purpose of guaranteeing Negroes their freedom. . . The term as used in other provisions of the Fourteenth Amendment clearly indicates that the United States is not a 'person' as the word is used in that Amendment. . .

"This interpretation is also supported by the cases which have arisen under Section 1 of the Fourteenth Amendment. That section provides: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.' (Emphasis ours)

"The phrase, 'subject to the jurisdiction thereof', had been held to cover those persons, and only those persons, subject to the power of a state and under allegiance to it. United States v. Wong Kim Ark, 169 U.S. 649, 18 S. Ct. 456, 42 L. Ed. 890; Elk v. Wilkins, 112 U.S. 94, 5 S. Ct. 41, 28 L. Ed. 643. Since the United States is not subject to the power of any other sovereign not under allegiance to any state, the cases decided under Section 1 of the Fourteenth Amendment would seem likewise to indicate that the United States is not 'within the jurisdiction' of Louisiana as that phrase is used in the Fourteenth Amendment."

Or see the language in Scott v. Frazier, 258 Fed. 669, as follows:

". . . This theory presupposes that the state has rights that are protected by the Fourteenth Amendment. . . Has the state, then, any rights under the Fourteenth Amendment? That question must be answered in the negative. The amendment protects only the rights of 'persons'. This term has been enlarged by judicial interpretation so as to cover private corporations. It does not embrace public corporations, much less the state.

The Civil Rights Act, 28 U.S.C.A. 1343, gives the District Court original jurisdiction of a civil action to be commenced "by any person". The Civil Rights Act was enacted in order to enforce rights given persons under the Fourteenth Amendment (Davis v. Foreman, 251 F. 2d 421, cer.

den. 2 L. Ed. (2) 1148). In Mickey v. Kansas City, 43 F. Supp. 739, the Court in holding that a corporation could not bring an action under the Civil Rights Act, used the following language:

> "At the outset it should be noted that Watchtower Bible & Tract Society, a corporation, is made a plaintiff. It has been repeatedly held that the remedy provided under that portion of Paragraph 14 of Section 41, Title 28 U. S. C. A., pertains exclusively to natural persons, and not to corporations."

See the general expressions in Wong Wing v. U. S., 41 L. Ed. 140, quoted with approval in Alexander v. Alexander, 140 F. Supp. 925, to the effect that the language "any person" in a Constitutional provision "is broad enough to include any human being who is a citizen of the United States."

Or "The rights created by the due process and equal protection clauses of the Fourteenth Amendment are guaranteed to the individual and the rights established are personal rights." Shelly v. Kraemer, 92 L. Ed. 1161; McGhee v. Sipes, 92 L. Ed. 1161.

The question was definitely determined in Hague v. Committee for Industrial Organizations, 83 L. Ed, 1423, 307 U. S. 496. An action was brought for alleged tortuous invasion of civil rights by persons acting under color of state authority by the respondents in the Supreme Court. The Court allowed the relief to the individual respondents but denied it to the corporate respondent and the labor organization. The Court stated:

> "The respondents, individual citizens, unincorporated labor organizations composed of such citizens, and a membership corporation, brought suit in the United States District Court against the petitioners, the Mayor, the Director of Public Safety, and the Chief of Police of Jersey City, New Jersey, and the Board of Commissioners, the governing body of the city.
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> . . .
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> "Natural persons, and they alone, are entitled to the privileges and immunities which Sec. 1 of the Fourteenth Amendment secures for 'citizens of the United States.' Only the individual respondents may, therefore, maintain this suit." (Emphasis ours).

In Monroe v. Pape, 365 U. S. 167, 5 L. Ed. 2d 492, there was involved the Civil Rights Act, which gave a cause of action against any "person" depriving plaintiff of his civil rights, i. e., 42 U. S. C. A. 1983. The Court held:

"A municipal corporation is not within the ambit of Rev Stat Sec. 1979 (42 USC Sec. 1983) and is not a 'person' within the meaning of that statute, which gives a right of action against every 'person' who, under color of state law, custom, or usage, subjects another to the deprivation of any rights, privileges, or immunities secured by the Federal Constitution."

This decision was followed by the Supreme Court in Egan v. City of Aurora, 365 U. S. 514, 5 L. Ed. 2d 741.

In United States v. Cooper Corporation, 312 U. S. 598, 85 L. Ed. 1071, involving an interpretation of the Sherman Act, the Court, in holding that the United States was not a "person" entitled to maintain an action for treble damages under the act, stated:

"The United States is a juristic person in the sense that it has capacity to sue upon contracts made with it or in vindication of its property rights. The Sherman Act, however, created new rights and remedies which are available only to those on whom they are conferred by the Act. . .

"Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. . ."

In United States v. United Mine Workers, 330 U.S. 258, 91 L. Ed. 884, involving the Clayton Act and the Norris-La Guardia Act, the Court held that the Acts did not forbid the United States to intervene by injunction in private labor disputes, stating:

". . . The Act does not define 'persons'. In common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so. . ."

This Court had before it the question of who was a "person" under 42 U.S.C.A. 1983, giving any "party injured" by deprivation of civil rights a cause of action at law or equity against any " person" so depriving him. The Court in Charlton v. City of Hialeah, C.A. 5, 188 F. 2d 421, certiorari denied, 96 L. Ed. 631, in holding that a municipality was not a "person" under this Act, stated:

". . . The Civil Rights statute, 8 U.S.C.A. Sec. 43, has been held to extend only to cases where a 'person' acting under color of a statute, ordinance, regulation, custom, or usage, of a state or territory, deprives a citizen or other person of a right, privilege, or immunity secured by the Constitution and laws of the United States. . .

"We are unable to find any indication that the civil-rights statute was intended by Congress to create such a liability on the part of the municipality itself, as

distinguished from the 'person' who committed the acts which deprived the plaintiff of his civil rights. . ."

This decision was followed by this Court in Hewitt v. City of Jacksonville, 188 F. 2d 423. To the same effect see Graves v. City of Bolivar, D. C. Mo., 154 F. Supp. 625.

We deem conclusive the holding of this Court in United States v. Alabama, C. A. 5, 267 F. 2d 808, reversed because of specific amendment to the statute by the Civil Rights Act of 1960 (74 Stat. 86), 363 U.S. 602, 4 L. Ed. 2d 982:

> "Interesting and engaging as these speculations are, we will not indulge in them here, but, confining ourselves to the sole question for determination, whether the statute supports the jurisdiction asserted, we will state simply but categorically that we agree with the district judge that neither on its face nor in its history, taken alone or in connection with civil rights legislation in general, is there any reasonable basis for holding that, in providing 'whenever any person, * * *', the congress intended to, or did, provide for suit against a sovereign state.
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> "Without elaborating upon it, as under the settled law of the cases we could do in extenso, it is sufficient for us to simply say that, under the principle which has been, and still is, controlling upon the federal courts, whatever congress might or could do in providing in a civil rights action for conferring federal court jurisdiction over a state, it has never heretofore done so and it has not in terms done so in the statute invoked here.
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> "Absent such specific conferring of jurisdiction, a federal court would not, indeed could not assume jurisdiction over a sovereign state without a precedent determination that, though the jurisdiction had not been expressly conferred, the language of the invoked statute carried the necessary, the unavoidable implication that the congress upon the gravest considerations and after the utmost thought and deliberation had intended to and did confer it.
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> "Reading the statute as one will, such an implication cannot be found in it. For it cannot be reasonably contended that the congress intended in a situation of this kind, where both the complaint and the Alabama statutes themselves, of which we take judicial knowledge, plainly show, that no exception or objection is, or can be, made on any kind of constitutional grounds to the will of the state there expressed, or that there is any need for, or justice in, finding authority under this statute to sue the state itself for the wrongs upon the statute and upon it perpetrated by its allegedly unfaithful servants."

This Court thus approved that said by the District Judge therein, 171 F. Supp. 720, 729:

> "There is no doubt that such authority would be appropriate—and even in certain circumstances necessary—

if Congress intended to give full and complete authority to the Attorney General of the United States to enforce the constitutional rights here involved. This Court judicially knows that the Civil Rights Act of 1957 was a compromise measure and the compromise reflected an intention on the part of Congress to give limited authority-as opposed to full and complete authority-in this field. A reading of the legislative history of this Act impresses this Court with the fact that if it had then been mentioned that this Act authorized the United States to sue a state for preventive relief, the Act would not yet be passed."

The Supreme Court of the United States, in reversing, was careful to point out that the change in law was its reason; it said in part, 362 U.S. 604, 4 L. Ed. 2d 984:

"We hold that by virtue of the provisions of that section the District Court has jurisdiction to entertain this action against the State. In so holding we do not reach, or intimate any view upon, any of the issues decided below, the merits of the controversy, or any defenses, constitutional or otherwise, that may be asserted by the State."

It is highly significant that Congress has amended the civil rights legislation so as to authorize specifically suits by the United States against the states in voting situations only. See 1961 Supp., 42 U.S.C.A., Section 1971 provides:

"(a) All citizens of the United States who are otherwise qualified by law to vote. . . shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

"(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President. . ...

"(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person. Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a) of this section,

> the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State."

The Congress is presumably satisfied with this Court's interpretation of the Civil Rights Act of 1957, as it existed prior to the 1960 amendment; because this Congress has not further changed the law. It has had ample opportunity to do so, since the final decision in the Alabama Case was by the Supreme Court on May 16, 1960.

So far as we know, the constitutionality of the 1960 amendment as to voting rights has not been tested.

Thus as a general rule where the word "person" is used in a statute it is not construed as including a sovereign entity. Cases can be found where the word in some statutes has been so interpreted. These few instances depend on the special language of the statute involved and in each and every case the sovereign entity is always acting not in its sovereign capacity, but rather is engaging in commercial businesses and transactions such as other "persons" are accustomed to conduct. NO CASE HAS HELD THAT THE UNITED STATES GOVERNMENT ACQUIRED ANY RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION.

The correctness of the above rule is further substantiated by the well established rule that:

2. Only persons directly discriminated against or personally aggrieved by State action can enforce any rights under the Fourteenth Amendment.

The question of discrimination violating the Fourteenth Amendment cannot be raised except by person belonging to the class alleged to be discriminated against, and the complaining party must show discrimination against himself as a person and injury to him therefrom. This rule applies to all cases affecting civil rights of every kind. *

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*Interesting examples are: White persons may not question the constitutionality of a statute on the ground that it discriminates against colored persons. Wheeler v. State, 219 Miss. 517, 63 So. 2d 517, certiorari denied, 346 U.S. 852, 98 L. Ed. 367. Nor may a male question the validity of a statute under the Fourteenth Amendment as discriminating against women by excluding them from jury service. State v. Ja[illegible]

The Supreme Court of the United States has never departed from the rule announced in McCabe v. Atchison, T. & S. F. R. Co., 235 U.S. 151, 59 L. Ed. 169. There, five Negro citizens of Oklahoma began this action against certain railroads to restrain these companies from making any distinction in service on account of race. Under an Oklahoma statute the railroads were providing sleeping cars and dining cars exclusively for White persons and no similar accommodations for Negroes. The Court held that these Negroes could not obtain equitable relief against the railroads because it was not alleged that any one of the complainants had ever traveled on any one of the railroads in question, or had ever requested transportation on any of them in a sleeping car or dining car; i.e., they were not persons actually discriminated against or actually aggrieved by compliance by the railroads with the State statute. The Court in so holding stated:

> "The allegations of the amended bill, so far as they purport to show discriminations in the conduct of these carriers, are these:
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> " 'That . . . the said abovenamed defendants and each of them are making distinctions in the civil rights of your orators and of all other persons of the negro race and persons of the white race in the conduct and operation of its trains and passenger service in the state of Oklahoma. . .'
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> "We agree with the court below that these allegations are altogether too vague and indefinite to warrant the relief sought by these complainants. It is not alleged that any one of the complainants has ever traveled on any one of the five railroads, or has ever requested transportation on any of them; . . . Nor is there anything to show that in case any of these complainants offers himself as a passenger on any of these roads and is refused accommodations equal to those afforded to others on a like journey, he will not have an adequate remedy at law. The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks. The bill is wholly destitute of any sufficient ground for injunction, and unless we are to ignore settled principles governing equitable relief, the decree must be affirmed." (Emphasis ours).

Not only has the above case never been overruled, but it was very recently re-affirmed by the Supreme Court of the United States in Bailey v Patterson, 368 U.S. 346, 7 L. Ed. 2d 332; 369 U.S. 31, 7 L. Ed. 2d 512, where certain Negroes living in Mississippi sought injunctions to enforce

their alleged constitutional rights. The Court in a Per Curiam opinion in December, 1961, 7 L. Ed. 2d 332, held:

> "This is a motion for an injunction to stay the prosecution of a number of criminal cases in the courts of Mississippi pending an appeal to this Court from the judgment of a three-judge Federal Court . . . In addition to the considerations normally attending an application for such relief, a serious question of standing is presented on this motion, in that it appears that the movants themselves are not being prosecuted in the Mississippi courts. On the record before us the motion for a stay injunction pending appeal is denied." (Emphasis ours).

In the final opinion, 7 L. Ed. 2d 512, the Court used the following language:

> "Appellants lack standing to enjoin criminal prosecutions under Mississippi's breach of peace statutes, since they do not allege that they have been prosecuted or threatened with prosecution under them. They cannot represent a class of whom they are not a part. McCabe v. Atchison, T. & S. F. R. Co., 235 US 151, 162, 163, 59 L ed 169, 174, 175, 35 S Ct 69. . ."(Emphasis ours.)

Rule 23, Federal Rules of Civil Procedure, only authorizes or permits a class suit by one or more of the persons making up the class. The person suing in behalf of the members of a class must be a member of the class which he is supposed to represent. Hickey v. Illinois Central Railroad, C. A. 7, 278 F. 2d 529; Rock Drilling, Blasting, Etc. v. Mason & Hanger Co., C. A. 2, 217 F. 2d 687; Augustus v. Board of Public Instr., D. C. Fla., 185 F. Supp. 450.

The law on this issue is set out in Brown v. Ramsey, C. A. 8, 185 F. 2d 225, where the Court used the following language:

> "At the very threshold of this case, we are met with the question of the capacity of the appellants to maintain this action for either declaratory or injunctive relief. 'It is the individual who is entitled to the equal protection of the laws* * *. It is the fact, clearly established, of injury to the complainant–not to others–which justifies judicial intervention' to protect rights under the 14th Amendment to the Constitution of the United States. McCabe v. A., T. & S. F. Ry. Co., 235 U. S. 151, 161-162, 35 S. Ct. 69, 59 L. Ed. 169. 'It is fundamental that these cases concern rights which are personal and present.' . . .
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> "It is obvious that the seven appellants enrolled in the elementary schools are not qualified to maintain an action to redress discrimination against students of high school or junior college age. Nor are students of high school age competent plaintiffs in suits charging discrimination against students of junior college age and qualifications. . . ." (Emphasis ours).

Therefore, The United States is not a "person" being deprived of "life, liberty or property," nor is it a "person within. . . (a state's) jurisdiction" being denied "the equal protection of the law", within the meaning of the Fourteenth Amendment to the Constitution of the United States of America. The United States does not complain of discrimination against itself; it could not.

The United States seeks to justify (U.S. Brief, pp. 28 and 29) its strange status as "amicus curiae" by citation of Bush v. Orleans Parish School Board, 191 F. Supp. 871, (affirmed, 368 U.S. 11, 7 L. Ed. 2d 75 wherein the Court stated, 191 F. Supp. 876: ". . . It should also be stressed that the government appeared at the court's request. The Justice Department was not intervening to protect a special interest of its own. Nor was it to champion the rights of the plaintiffs or defend the harassed School Board. It came in, by invitation, to aid the Court in the effectuation of its judgment, to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States'." (Double emphasis by the Court).

It is submitted that the United States may act either as the arm of the Court "in vindicating the authority of the federal courts" (Bush v. Orleans Parish School Board, 190 F. Supp. 861, 866 (E.D. La. 1960) or as a litigant enforcing its rights either in its sovereign capacity or in its proprietary capacity. But the right of the United States to act as an arm of the court in some special cases does not give the United States the right to act as an arm of the court without complying with lawful requirements for such action.

We submit that the United States has not answered and cannot answer the logic in McNeil v. U.S., C.A. 1, 236 F. 2d 149, 153, 61 A.L.R. 2d 1075, discussed in our Brief, p. 38, and re-quoted in part here:

> "Although there does not appear to be much express authority on the point, we believe that logic, and to some extent precedent as well, supports the proposition that civil contempt proceedings may be instituted only by the parties primarily in interest.
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> "It would appear from these authorities, and indeed from the very nature of the judicial function, that the trial

initiated by the court of its own motion must be regarded as criminal in nature for the vindication of the court's authority and the punishment of the public wrong. 'A civil contempt proceeding is wholly remedial, to serve only the purposes of the complainant, not to deter offenses against the public or to vindicate the authority of the court.' United States v. International Union, etc., 1951, 88 U.S. App. D.C. 341, 190 F. 2d 865, 873."

The United States is trying to attain the same public purpose the trial court did in the McNeil Case, justifying its action as an arm of the Court; but, if the Court itself could not proceed in criminal contempt under the guise of civil contempt, without complying with the requirements for criminal contempt, surely the arm of the Court could not.

We direct the Court's attention to its comprehensive discussion of contempt in Parker v. United States, C.A. 5, 1953, 153 F.2d 66, 69, 70, 71:

"The Supreme Court has had many occasions to emphasize the importance of the distinction between a proceeding in civil contempt and one in criminal contempt. . . .

"Proceedings in civil contempt are between the original parties and are instituted and tried as a part of the main cause. Though such proceedings are 'nominally those of contempt' (Worden v. Searls, 1887, 121 U.S. 14, 26, 7 S. Ct. 814, 820, 30 L. Ed. 853), the real purpose of the court order is purely remedial-to coerce obedience to a decree passed in complainant's favor, or to compensate complainant for loss caused by respondent's disobedience of such a decree. If imprisonment is imposed in civil contempt proceedings, it cannot be for a definite term. Gompers v. Bucks Stove & Range Co., supra, 221 U.S. at pages 442-444, 31 S. Ct. 492, 55 L. Ed. 797, 34 L. R. A., N. S., 874; In re Kahn, 2 Cir., 1913, 204 F. 581. The respondent can only be imprisoned to compel his obedience to a decree. If he complies, or shows that compliance is impossible, he must be released, for his confinement is not as punishment for an offense of a public nature. If a compensatory fine is imposed, the purpose again is remedial, to make reparation to a complainant injured by respondent's disobedience of a court decree. . . . If complainant makes a showing that respondent has disobeyed a decree in complainant's favor and that damages have resulted to complainant thereby, complainant is entitled as of right to an order in civil contempt imposing a compensatory fine. Union Tool Co. v. Wilson, 1922, 259 U.S. 107, 42 S. Ct. 427, 66 L.Ed. 848; Enoch Morgan's Sons Co. v. Gibson, 8 Cir., 1903, 122 F. 420, 423; L. E. Waterman Co. v. Standard Drug Co., 6 Cir., 1913, 202 F. 167. The court has no discretion to withhold the appropriate remedial order. In this respect the situation is unlike that of criminal contempt where the court in its discretion may withhold punishment for the past act of disobedience. An order imposing a compensatory fine in a civil contempt proceeding is thus somewhat analogous to a tort judgment for damages caused by wrongful conduct.

"On the other hand, a proceeding in criminal con-

with the public on one side and the respondent on the other. The purpose of sentence in such a proceeding 'is punitive in the public interest to vindicate the authority of the Court and to deter other like derelictions.' Ex parte Grossman, 1925, 267 U.S. 87, 111, 45 S.Ct. 332, 334, 69 L.Ed. 527, 38 A.L.R. 131. Therefore, in such a proceeding imprisonment may be imposed for a definite term. Stewart v. United States, 8 Cir., 1916, 236 F. 838. Or respondent may be subjected to a punitive fine. Such a fine is usually payable to the United States. But without derogating from the punitive character of the proceeding, the court may have power to order the fine to be paid in whole or in part to some person injured by the contumacious act. Michaelson v. United States, 1924, 266 U.S. 42, 65, 45 S.Ct. 18, 69 L.Ed. 162, 35 A.L.R. 451.

"The respondent is entitled to due notice of the nature of the proceeding against him—whether of criminal or civil contempt. In re Guzzardi, 2 Cir., 1935, 74 F.2d 671; McCann v. New York Stock Exchange, 2 Cir., 1935, 80 F.2d 211, 214; Federal Trade Commission v. A. McLean & Son, 7 Cir., 1938, 94 F.2d 802. If respondent is answer- a charge of criminal contempt, he 'is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself.' Gompers v. Bucks Stove & Range Co., supra, 221 U.S. at page 444, 31 S.Ct. at page 499, 55 L.Ed. 797, 34 L.R.A., N.S., 874. If he is called to answer a civil contempt proceeding, a punitive fine cannot be imposed upon him. Where a fine is imposed in such a proceeding, it must not exceed the actual loss to the complainant caused by respondent's violation of the decree in the main cause plus complainant's reasonable expenses in the proceedings necessitated in presenting the contempt for the judgment of the court. Christensen Engineering Co. v. Westinghouse Air Brake Co., 2 Cir., 1905, 135 F. 774, 782; Eustace v. Lynch, 9 Cir., 1935, 80 F.2d 652, 656.

"Since the complainant in the main cause is the real party in interest with respect to a compensatory fine or other remedial order in a civil contempt proceeding, if for any reason complainant becomes disentitled to the further benefit of such order, the civil contempt proceeding must be terminated. Worden v. Searls, 1887, 121 U.S. 14, 7 S.Ct. 814, 30 L.Ed. 853; Gompers v. Bucks Stove and Range Co., 1911, 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797, 34 L.R.A., N.S., 874. Such proceeding not having been instituted to punish for a contumacious act in vindication of the court's authority, the court has no such independent interest in maintaining in force its order imposing a compensatory fine as would justify it in transmuting the proceeding into one for criminal contempt, with the fine now regarded as punitive. But the required vacation of the remedial order, in the event supposed, does not trench upon the power of the court, in a proper case, to vindicate its own authority by punishment of an offender for a criminal contempt. Criminal and civil proceedings for contempt are not mutually exclusive. In both Worden v. Searls, supra, and Gompers v. Bucks Stove & Range Co., supra, the court made clear that the termination of the civil contempt proceedings was without prejudice to the power of the court to institute a separate and independent proceeding for criminal contempt. And see Parker v. United States, 1 Cir., 1942, 126 F.2d 370, 382. Such a proceeding would of course require a

new citation and would have to be tried in accordance with the procedures and limitations applicable to criminal contempt.

"There is no doubt that the contempt proceeding in the case at bar was instituted and maintained throughout as one of civil contempt. This is true, despite the fact that the petition for attachment for contempt was filed by the United States. McCrone v. United States, 1939, 307 U.S. 61, 59 S.Ct. 685, 83 L. Ed. 1108. The United States was acting in its capacity as complainant in the original equity suit brought to compel Green Valley Creamery, Inc., to comply with the milk marketing order of the Secretary of Agriculture and to make the required payments into the equalization pool operated by the Market Administrator; and the purpose of the contempt petition was to obtain for the Market Administrator as agent of the United States the benefit of the decree in the equity suit. The compensatory fine was measured by the loss to the Market Administrator occasioned by Parker's disobedience of the interlocutory and final decrees in such suit."

This Court, in the Parker Case, thus specifically stated that "the court has no such independent interest in maintaining in force its order imposing a compensatory fine as would justify it in transmuting the proceeding into one for criminal contempt . . ."; with deference, we repeat that, if the Court has no such interest in this proceeding, the United States has none either.

The Parker Case is conclusive on the question of contempt. It clearly sets forth the earmarks of criminal contempt set forth in our Brief, pp. 37-41, all of which, with deference, are present in this proceeding:

(1) The fines are not compensatory to the complainant and are not based on proof of actual loss by the complainant; (2) the contempt proceeding is to vindicate the authority of the court and "*** to vindicate that (restraining) order ***" (U. S. Brief, p. 29; (3) the proceedings "are between the public and the defendant, and are not a part of the original cause." (Gompers v. Bucks Stove & Range Co., 212 U.S. 418, 444, 445, 55 L. Ed. 797, 808); and (4) the proceedings are sought to be tried after the original complainant has secured the relief sought.

On the third earmark, note that said on page 3 of the Brief for the United States:

"In its petition the United States alleges that the legal issues between the plaintiff, James H. Meredith, and the defendant University officials and Board of Trustees have been finally adjudicated. The present proceeding does not involve any claim of right of the United States to participate in that adjudication. Nor does the United States seek to affect the result of that proceeding. The facts alleged in the petition of the United States are separate and distinct from those involved in the basic law suit, which this Court decided in its judgment of reversal on June 25, 1962." (Emphasis ours)

The United States is, in effect, admitting that its action is separate from the main suit already "finally adjudicated."

If the United States wishes to bring criminal contempt proceedings, it may do so in the proper court and in accordance with law; but, with deference, this is neither the court nor the proceeding for such a trial.

We submit, with deference, that the United States was not entitled to file its Petition herein and is not entitled to enforce any rights James H. Meredith may have to an education under the Fourteenth Amendment to the Constitution of the United States.

3. This Court does not have Jurisdiction in this Action To Enjoin "State Action" of the State of Mississippi, either directly or indirectly.

The United States admits that this Court does not have original jurisdiction and seeks to invoke ancillary jurisdiction under the all writs statute (U.S. Brief, p. 9). But ancillary jurisdiction presupposes original jurisdiction as a predicate and justification for the ancillary relief.

In the case at bar, learned counsel for the United States state, U.S. Brief, p. 26, that: "***That (Meredith) suit essentially sought relief against state action.***" But learned counsel apparently ignore our citation of Louisiana Land and Exploration Company v. State Mineral Board, C.A. 5, 229 F. 2d 5, and Stone v. Interstate Natural Gas Co., C.A. 5, 103 F. 2d 544, affirmed, 308 U.S. 530 (our Brief, p. 42).

We agree with counsel that this suit has always been one against "state action." It was against a board which, under the law of Mississippi, is a mere agency or arm of its principal, the State. Although the Board of Trustees of State Institutions of Higher Learning has the management

and control of state colleges, with "general supervision of the affairs of all the institutions" (Section 6724(b), 1960 Supp., Recompiled Mississippi Code of 1942), it does not have the statutory authority to sue and be sued. See Mississippi Constitution, Section 213-A and section 6719 et seq., Recompiled Mississippi Code of 1942. Whether the Board is a separate corporate entity is a question of state law (Louisiana Land & Exploration Board v. State Mineral Board, C.A. 5, 229 F. 2d 5) and certainly there has as yet been no determination of this question binding upon the State of Mississippi, which has not been heard.

In Stone v. Interstate Natural Gas Co., C.A. 5, 1939, 103 F. 2d 544, 547, affirmed, 308 U. S. 522, 84 L. Ed. 530, this court declared:

> "We conclude also that the judgment in the three-judge case of Dec. 4, 1931, is no estoppel. It does not appear to be between the same parties. The Gas Company is plaintiff in both suits but Stone, the present defendant who is sought to be bound by the former judgment, was not a party to it. This suit against him is a personal suit and the judgment rendered is a personal judgment. Execution on it would run against him. The reference to him as Commissioner is descriptio personae. Smietanka, Collector, v. Indiana Steel Co., 257 U.S. 1, 42 S. Ct. 1, 66 L. Ed. 99. The Three-judge suit was against other individuals, who though officers were enjoined from what they were about to do on the ground that the law of their office did not justify them. The State of Mississippi for whom they tried to act was not a party, though her Attorney General was among those sued. She could not under the Eleventh Amendment, U.S.C.A. Const. have been sued. How officers who act for their government under an unconstitutional authority may be sued, and yet their governments not be bound by the judgment, is fully explained in United States v. Lee, 106 U.S. 196, 222, 1 S. Ct. 240, 27 L. Ed. 171. See also Sage v. United States, 250 U.S. 33, 39 S. Ct. 415, 63 L. Ed. 828; Hussey v. Crane, 222 U.S. 88, 93, 32 S. Ct. 33, 56 L. Ed. 106; Carr v. United States, 98 U.S. 433, 25 L. Ed. 209; Stanley v. Schwalby, 162 U.S. 255, 16 S. Ct. 754, 40 L. Ed. 960. Stone can now justify his collection of these taxes as fully as the State of Mississippi could do if she were now sued; and as she is not bound by the former judgment against her officers, he is not."

This decision raises another point: James H. Meredith could could not have sued the State of Mississippi, either directly or indirectly through its agents, in the District Court of the United States without violating the Eleventh Amendment to the Constitution of the United States. There was no original jurisdiction in this case for such a suit as a predicate for ancillary jurisdiction. Almost directly in point is the decision of this Court in The Louisiana Land and Exploration Co. v. State Mineral

Board, C.A. 5, 229 F. 2d 5, 7, 8, wherein this Court held:

> "The narrow question presented on this appeal is whether the within action is, in effect, a suit against the State. Appellant contends that this question must be answered in the negative. First, it is argued that the State Mineral Board is a separate and distinct corporate entity, possessing all of the usual powers incident to corporations, and that this was sufficient to vest the District Court with jurisdiction based upon diversity of citizenship. Whether or not appellant is right in this contention must be determined by the law of the State. *** Thus, the fact that the legislature chose to call it a corporation does not alter the Board's characteristics so as to make it something other than what it actually is, a mere agent of the State. Accordingly, it is clear that when the Board sues or is sued, it appears in Court as an agent of its principal, the State. We, therefore, are of the opinion that this suit against the State Mineral Board, a mere agency or arm of the State, is in effect, a suit against the State which may not be sued by a citizen of another State under the Eleventh Amendment to the Constitution of the United States. Cf. State Highway Commission of Wyoming v. Utah Const. Co., 278 U.S. 194, 49 S. Ct. 104, 73 L. Ed. 262.
>
> "This brings us to a consideration of appellant's second point which is that the Eleventh Amendment is inapplicable and does not bar the present suit against a State agency which wrongfully has exceeded its statutory authority. This contention is likewise without merit for the reason that the complaint is directed against the State Mineral Board in its official capacity, not against its members individually, and because the acts complained of are not without, but clearly within the Board's statutory power. It is true that the complaint did allege that the Board's action was 'ultra vires' and cast 'illegal' clouds upon plaintiff's title, but these allegations were not and could not be based upon any lack of statutory power on the part of the Board to advertise ***for lease bids upon 'all lands owned by the State.' The Larson case makes it clear that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law. This does not mean, as was pointed out in the Larson decision, that a government officer is thereby necessarily immunized from liability, if his action is such that liability would be imposed by the general law of torts, but only that in this situation the action itself cannot be enjoined, since it is also the action of the sovereign. It is therefore plain that the State Mineral Board cannot be enjoined in this suit since the compulsion which the court is asked to impose would be compulsion against the sovereign; and for that reason the suit is barred by the Eleventh Amendment, not because it is a suit against the Board, but because it is, in effect, a suit against the State."

In Great Northern Life Insurance Co. v. Read, 322 U.S. 51, 88 L. Ed. 1124, the United States Supreme Court held that suit could not be brought against the Insurance Commission of Oklahoma to recover taxes because of the Eleventh Amendment, saying:

"This ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. ***(Citations). Efforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution. * * * (Citations). A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment. The inherent nature of sovereignty prevents action against a state by its own citizens without its consent. Hans v. Louisiana, 134 U.S. 1, 10, 33 L. Ed. 842, 845, 847, 10 S. Ct. 504."

In Petty v. Tennessee-Missouri Bridge Commission, C. A. 8, 254 F. 2d 857, 861, the court held:

"In Ford Motor Co. v. Department of Treasury of Indiana, supra., the Supreme Court states (323 U.S. at page 467, 65 S. Ct. at page 352):

"'***The Eleventh Amendment declares a policy and sets forth an explicit limitation on Federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court.'

"***

"It has uniformly been held that Federal judicial power does not extend to any suit in law or equity against a state by citizens of another state even in cases arising under the Constitution or laws of the United States. * * *

"* * *The Amendment does not by its terms bar a citizen from suing his own state. However, the Supreme Court has squarely held that a state cannot be sued without its consent in a Federal Court by one of its own citizens. Hans v. State of Louisiana, 134 U.S. 1 * * *."

It is respectfully submitted, first, that this action as originally brought was beyond the original jurisdiction of the District Court as a suit against the State of Mississippi in violation of the Eleventh Amendment to the Constitution of the United States, so that this Court never had appellate jurisdiction herein; and second, that, this action as amended in this Court to sue the State of Mississippi, directly, was beyond the appellate, ancillary jurisdiction of this Court.

For this second point, we rely especially on Missouri v. Fiske, 290 U.S. 18, 78 L. Ed 145.

Therein, the will of Ehrhardt D. Franz had been probated, leaving his estate to Sophie Franz, his wife, for life, with remainder to his ten children. The wife transferred certain securities, in part belonging to

her husband's estate, to a trustee to hold for her life; but the contents of the trust were complicated by stock dividends and transfers. Protracted litigation arose as to this trust and, in 1924, this suit was brought in the U. S. District Court by one of the sons to determine his interest and for an accounting and security for his protection. The bill was dismissed for want of parties and an amended bill was filed. The Court thus stated the facts in part, 78 L. Ed. 148:

> "* * *On an ancillary bill, it appearing that the Federal Court had first acquired jurisdiction over the subject matter in an action quasi in rem, defendants Sophie Franz and her trustees were enjoined from prosecuting a suit in the circuit court of the City of St. Louis for the determination of the same issues. Franz v. Franz (C. C. A. 8th) 15 F. (2d) 797. The present suit in the Federal Court then proceeded to decree, in 1927, which, * * * was affirmed by the Circuit Court of Appeals in the following year. Buder v. Franz (C. C. A. 8th) 27 F. (2d) 101.
>
> "* * *This decree, as stated by the Circuit Court of Appeals in the decision under review (62 F. (2d) pp. 151, 153, 154), determined the rights of the present respondents by virtue of the remainders under the will of Ehrhardt D. Franz. The decree, as thus construed, determined that certain shares, with their increase through stock dividends, were corpus of the estate of Ehrhardt D. Franz, and not income, and hence that Sophie Franz had only a life interest. * * *
>
> "Later, in 1930, Sophie Franz died and her estate is in the course of administration in the Probate Court of the City of St. Louis. Her executor, in view of the decree of the Federal Court, did not include the shares above mentioned in his inventory of her estate. Thereupon, in 1931, the State of Missouri procured the issue, on behalf of the State, of a citation in the Probate Court to compel the executor to inventory these shares as assets of the estate of Sophie Franz. The State of Missouri then moved in the Federal Court for leave to intervene * * * to protect the State's right to inheritance taxes * * *. The application for intervention was granted.
>
> "* * * The present respondents (with others) answered the petition in intervention denying that the decree of the Federal Court had been limited as alleged and setting up their rights under the decree as res judicata. They asked that the petition be dismissed and that their motions for distribution be sustained.
>
> "Shortly before filing this answer the present respondents brought their ancillary and supplemental bill of complaint to enjoin the State of Missouri from 'prosecuting further the said citation in the Probate Court' and 'from seeking or obtaining any order, decree, or judgment therein' until the further direction of the District Court. The Circuit Court of Appeals, in sustaining the jurisdiction of the District Court to entertain the bill for this purpose, stated that the extent to which that jurisdiction should be exercised was 'the protection of the jurisdiction and decrees of the trial court;'

"that it did not extend to matters not involved in the main litigation. 62 F. (2d) p. 157."

This situation was, therefore almost the same as that at bar except, if anything, it was stronger for the United States since the proceeding was by ancillary bill in the District Court as to a matter quasi in rem.

The Court, in part, stated the law as follows, 78 L. Ed. 147, 149, 150, 151, and 152:

> "By an ancillary and supplemental bill of complaint in the District Court of the United States, respondents sought an injunction against the State of Missouri restraining the State from prosecuting certain proceedings in the Probate Court of the City of St. Louis * * *. The Circuit Court of Appeals reversed the order of dismissal, holding that the Eleventh Amendment was inapplicable, in the view that the ancillary and supplemental bill had been brought to prevent an interference with the jurisdiction of the Federal Court. 62 F. (2d) 150 * * *.
>
> "* * *
>
> "* * * The Eleventh Amendment is an explicit limitation of the judicial power of the United States. * * * However important that power, it cannot extend into the forbidden sphere. Considerations of convenience open no avenue of escape from the restriction. The 'entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given.' Re New York, 256 U.S. 490, 497 * * *. Such a suit cannot be entertained upon the ground that the controversy arises under the Constitution of laws of the United States. * * *
>
> "The ancillary and supplemental bill is brought by the respondents directly against the State of Missouri. It is not a proceeding within the principle that suit may be brought against state officers to restrain an attempt to enforce an unconstitutional enactment * * *. Here, respondents are proceeding against the State itself to prevent the exercise of its authority to maintain a suit in its own court.
>
> "The proceeding by ancillary and supplemental bill to restrain the State from this exercise of authority is unquestionably a 'suit'. * * * Expressly applying to suits in equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a state. This conception of the Amendment has had abundant illustration. * * * (Citations).
>
> "* * *This is not less a suit against the State because the bill is ancillary and supplemental. The State had not been a party to the litigation which resulted in the decree upon which respondents rely. The State has not come into the suit for the purpose of litigating the rights asserted. Respondents are attempting to subject the State, without its consent, to the court's process.

"The question, then, is whether the purpose to protect the jurisdiction of the Federal Court, and to maintain its decree against the proceeding of the State in the State Court, removes the suit from the application of the Eleventh Amendment. The exercise of the judicial power cannot be protected by judicial action which the Constitution specifically provides is beyond the judicial power. Thus, when it appears that a State is an indispensable party to enable a Federal court to grant relief sought by private parties, and the State has not consented to be sued, the court will refuse to take jurisdiction. * * * And if a State, unless it consents, cannot be brought into a suit by original bill, to enable a Federal court to acquire jurisdiction, no basis appears for the contention that a State in the absence of consent may be sued by means of an ancillary and supplemental bill in order to enforce a decree.

"The fact that a suit in a federal court is in rem, or quasi in rem, furnishes no ground for the issue of process against a non-consenting state. * * *.

"* * *

"* * *The contention that the question of ownership of the shares has been finally determined by the Federal Court affords no ground for the conclusion that the Federal Court may entertain a suit against the State, without its consent, to prevent the State from seeking to litigate that question in the State Court.

"The decree of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court with directions to dismiss the ancillary and supplemental bill.

"Reversed."

This case has not been departed from and is controlling on the point that this Court does not have ancillary jurisdiction to award James H. Meredith relief. The Circuit Court of Appeals therein enjoined the State for "the protection of the jurisdiction and decrees of the trial court." (62 F 2d 157) and was reversed for doing so. Since the ancillary jurisdiction of this Court is only in aid of its appellate jurisdiction, which is bounded by and predicated upon the original jurisdiction of the District Court, necessarily this holding applies equally to ancillary decrees for the protection of decrees of this Court.

That prohibited was "the enforcement of equitable rights and the prosecution of equitable remedies * * * by an individual against a State. * * *" 78 L. Ed. 150. An injunction has been sought herein by a petition and process has been served upon the State of Mississippi as a party defendant; no one can deny that this is an equitable suit being commenced and prosecuted within the prohibition of the Eleventh Amendment, this

being in an action wherein James H. Meredith is still the complainant and wherein the only appellate jurisdiction rests upon the original jurisdiction of his suit. This demonstrates conclusively, with deference, that this Court has no ancillary jurisdiction herein to award James H. Meredith any further relief. The reason is simply that this Court has only appellate jurisdiction to exercise herein and it necessarily is based upon and circumscribed by the original jurisdiction possessed by the trial court. 2 Am. Jur., "Appeal and Error," Section 11, p. 851; 4 C.J.S., "Appeal and Error," Section 39, p. 152, fn. 78-81; see also, "Appeal and Error," Section 1453 p. 576, in Vol. 5, C.J.S. "* * *The United States clearly called upon this Court to exercise its ancillary jurisdiction; it did not, and it does not now purport to invoke original jurisdiction of any sort." (U.S. Brief, p. 9).

The Eleventh Amendment to the U. S. Constitution prohibited James H. Meredith from directly suing the State of Mississippi in an action in the original jurisdiction of the District Court; and the Fiske Case prohibited him from invoking the ancillary jurisdiction of that Court and, necessarily, this Court for such a suit.

Therefore, whatever may be the interest of the United States in vindicating the orders of this Court, no ancillary jurisdiction can exist in this Court to help James H. Meredith sue the State of Mississippi, without its consent.

We have already demonstrated that the United States of America has no possible right to any form of relief herein on its own behalf and the United States candidly admits that "* * *The present proceeding does not involve any claim of right of the United States to participate in that adjudication (between the plaintiff, James H. Meredith, and the defendant University officials and Board). Nor does the United States seek to affect the result of that proceeding. * * *" (U. S. Brief, p. 3). In short, the United States claims to assert its own right and not James H. Meredith's, not realizing that this is James H. Meredith's suit and cannot be brought against the State of Mississippi, in any event. The United States overlooks the Fiske Case, with deference, and its express holding that

ancillary jurisdiction may not exist to protect the Court's decrees or vindicate the Court as against the State.

It is, therefore, respectfully submitted that this Court lacks jurisdiction of this cause and should dismiss the same.

THE "JUDGMENT OF CIVIL CONTEMPT" ENTERED BY THIS COURT IS NOT VALID AS A JUDGMENT OF CIVIL CONTEMPT.

The "Judgment of Civil Contempt" entered by this Court against Governor Ross R. Barnett and Lieutenant Governor Paul B. Johnson, Jr. is not valid as a judgment of civil contempt for the following reasons:

(1) Title 18, U.S.C.A., Sec. 401, which provides in part that a Court of the United States "shall have power to punish by fine or imprisonment" (Emphasis Added) contempts of its authority applies to civil as well as criminal contempts; (2) No fine other than a compensatory fine to be paid to the complaining party can be assessed as a punishment for civil contempt, and the "Judgment of Civil Contempt" entered by this Court provides that the fines to be levied be paid to the United States; (3) No showing of damages or injuries sustained by Appellant, James H. Meredith, as a result of the alleged violation of this Court's orders by Governor Ross R. Barnett and Lieutenant Governor Paul B. Johnson, Jr., has been shown and absent such showing, no fine can be imposed for civil contempt; (4) The "Judgment of Civil Contempt" entered by this Court did not provide for a remittitur of the punishment to be imposed upon compliance with this Court's orders, thus making the imposition of such punishment one for criminal, not civil contempt.

Firstly, it must be taken to be the law that the provisions of Title 18, U.S.C.A., Sec. 401, that a Court of the United States "shall have power to punish by fine or imprisonment" (Emphasis Added) contempts of its authority apply to civil as well as criminal contempts.

Estes vs. Potter (5th Cir. 1950), 183 F.2d 865, cert. den. 340 U.S. 920, 95 L.Ed. 664, was a purely civil contempt for failure to answer questions propounded by immigration inspectors pursuant to federal statutes. The defendant asserted his Fifth Amendment rights against self-incrimination as a defense to his refusal to answer. In discussing the punishment that could be levied for civil contempt, this Court said at 183 F.2d 866:

> "The proceeding is one of civil contempt, which is not punishable by both fine and imprisonment for the same offense; but that does not preclude the court from imposing a fine as a punitive measure and imprisonment as a remedial measure, or vice versa. Sec. 401 of the New Criminal Code, 18 U.S.C.A. Sec. 401; Penfield Co., etc., v. Securities and Exchange Comm., 330 U.S. 585, 67 S.Ct. 918, 91 L.Ed. 1117, 1124." (Emphasis added).

And, United States vs. Montgomery (U.S.D.C. Montana 1957) 155 F.Supp. 633, was also a purely civil contempt case. At 155 F. Supp. 637, the Court said:

> "A court of the United States has power to punish by fine or imprisonment, at its discretion, such contempt of its authority as 'disobedience or resistance to its lawful writ, process, order, rule, decree, or command.' Title 18 U.S.C.A. Sec. 401. This applies to civil as well as criminal contempt proceedings. When a fine is imposed in civil contempt proceedings, it is punishment for past contemptuous conduct. Imprisonment in civil contempt cases is ordered where the defendant refuses to do an affirmative act required by an order mandatory in its nature. Gompers v. Bucks Stove & Range Co., supra; Penfield Co. v. S.E.C., 330 U.S. 585, 594, 67 S.Ct. 918, 91 L.Ed. 1117." (Emphasis Added)

Thus, as a preliminary matter, it is clear that the United States Court of Appeals for the Fifth Circuit does not have the power to impose a punishment of fine and imprisonment upon the respondents Barnett and Johnson in this purely civil

The other three contentions of respondents will not be discussed separately, because the cases involving these points contain a discussion of two or more of them, and for the sake of convenience, we will deal with the other three contentions on a case-by-case basis.

Cliett v. Hammonds, (5 Cir. 1962) 305 F.2d 565, was a civil contempt case in which the district court entered an order that unless the defendant, Mrs. Cliett, purged herself of contempt within 30 days, she was to be confined in jail for a period of 90 days.

On appeal, this Court affirmed in part and reversed in part the order of the district court, on the grounds that the automatic imposition of the unconditional 90-day jail sentence after failure of defendant to purge herself constituted punitive, not coercive punishment, and was thus in the nature of criminal, not civil contempt.

This Court, speaking through Judge Brown, at 305 F.2d 569, used the following pertinent language which we think is controlling in this case:

> "Thus, with respect to the very element of the jail sentence itself, a specific time (30 days) was allowed in which she could purge herself. Had she done so within that period, the confinement was expressly remitted entirely. Thus far the objective of the judgment was to coerce the recalcitrant party into compliance with the Court's decrees. That is the mark of civil contempt. Coca-Cola Co. v. Feulner, S.D.Tex., 1934, 7 F.Supp. 364. The sanction imposed by the judgment is commonly referred to as remedial. But after the expiration of that 30-day period without compliance, the 90-day jail sentence automatically became unconditional in execution and duration. No provision was made for release from imprisonment once the 90-day confinement commenced. This was unrelated to contemporary compliance with the Court's decree." (Emphasis Added)

The judgments of civil contempt entered in this cause by this Court have the same flaw as the penalty imposed by the district court in Cliett v. Hammonds, supra. In this case, as in Cliett, Respondents were given a specific time to purge themselves of civil contempt. Here, as in Cliett, after the expiration of said specific time, the punishment to be imposed automatically became unconditional in execution and enforcement. In each case there was no provision for the remission of the penalties imposed after the expiration of the specific time within which the parties could purge themselves. In this case, the judgment of civil contempt entered against Governor Barnett does not provide for a remission of the imprisonment or fine upon his compliance with the orders of this Court, and the same is true as to the fine imposed upon Lieutenant Governor Johnson. We submit that if this Honorable Court follows its holding recently made in Cliett v. Hammonds, supra, that it will hold in this case that the punishments for civil contempt imposed upon Governor Barnett and Lieutenant Governor Johnson are for criminal, not civil contempt, and should be set aside or modified so as to make the punishment imposed solely for civil contempt.

Boylan v. Detrio (5th Cir. 1951) 187 F.2d 375, was a civil contempt case where the district court imposed a fine without any showing that the complainants had been injured by defendant's failure to obey the injunctive order. In discussing the judgment that may be meted out for civil contempt, this Court said (187 F.2d 379):

> "In these cases the requisites and conditions of civil contempt and of the remedial orders appropriate thereto were all present.

> These requisites are that a civil contempt exists only where there is a disobedience of court orders to the damage of the other party and the punishment is by imprisonment to coerce the performance of an affirmative act or by the imposition of a fine to compensate the injured party for actual loss or damage suffered because of the disobedience of an order or decree of the court made for his benefit.
>
> "In Parker v. U. S., 1 Circ., 153 F.2d 66, 163 A.L.R. 379, one of the cases mainly relied on by appellees, it is said: 'In civil contempt proceeding a punitive fine cannot be imposed upon respondent, and where a fine is imposed it must not exceed the actual loss to the complainant caused by respondent's violation of the decree in the main cause plus complainant's reasonable expenses in the proceedings necessitated in presenting the contempt for the judgment of court.'
>
> "In U. S. v. United Main Workers of America, 330 U.S. 258, 67 S.Ct. 677, 680, 91 L.Ed. 884, it was declared: 'Where compensation is intended in civil contempt proceeding, a fine is imposed payable to complainant but fine must be based on evidence of complainant's actual loss (from the contempt), and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.'" (Emphasis Added)

It is settled by the Boylan case and other authorities that the punishment to be imposed for civil contempt may be coercive or remedial; if coercive, the penalty to be imposed is imprisonment until compliance, and if remedial, the punishment to be imposed is a fine payable to the complaining party to compensate him for past violations of the court's order. See Gompers v. Bucks Stove & Range Co. (1911), 221 U.S. 418, and United States v. United Mine Workers of America (1947), 330 U.S. 258. In Gompers, supra, the Court said (221 U.S. 451):

> "But, as we have been shown, this was a proceeding in equity for civil contempt, where the only remedial relief possible was a fine, payable to the complainant."

And in the case of Champion Spark Plug Co. v. Reich (U.S.D.C., W.D. Mo. 1951) 98 F.Supp. 242, the Court said at Page 244:

> "The present proceeding is one for alleged civil contempt. As said by the Supreme Court, in McComb v. Jacksonville Paper Co., 336 U.S. 187, 69 S.Ct. 497, 499, 93 L.Ed. 599: 'Civil * * * contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance.' The plaintiff seeks a compensatory order in this case. Such order could not be made in the absence of a showing that the plaintiff has actually sustained damages.

It is clear that in order for the complaining party, in this case James H. Meredith, to be awarded any compensatory damages by way of fine as a punishment for civil contempt, said complaining party must show by competent proof the extent of the injuries or damages sustained by him because of the failure to obey a court order.

Babee-Tenda Corporation v. Scharco Manufacturing Co., (U.S.D.C., S.D., N.Y. 1957) 156 F.Supp. 582, was a case involving purely civil contempt. Plaintiff asked the court for the following fines to be imposed on defendant for its benefit: (1) $5,987.23 for counsel fees and disbursements in preparing for and prosecuting the contempt proceeding; (2) $19,681.20 because of lost sales caused by the defendant's violation of the injunction.

The court allowed the $5,987.23 fine for counsel fees and other expenses of the litigation, but disallowed the $19,681.20 for lost sales because plaintiff did not make competent proof as to its damages or injuries as to this item, the figure being arrived at by guess and speculation. The Court said (156 F.Supp. 588):

Yanish v. Barber (9th Cir. 1956) 232 F.2d 939, was a civil contempt case. In discussing the fine that may be imposed in a civil contempt case, the Ninth Circuit said (232 F.2d 944):

> "A fine imposed 'must not exceed the actual loss to the complainant caused by * * * violation of the decree * * *' Parker v. United States, 1 Cir., 1946, 153 F.2d 66, 71, 163 A.L.R. 379; Boylan v. Detrio, 5 Circ., 1951, 187 F.2d 375, 379; Christensen Engineering Co. v. Westinghouse Air Brake Co., 2 Cir., 1905, 135 F. 774, 782, and 'the imposition of a fine which bore no relation to the injury suffered * * * was unauthorized', Eustace v. Lynch, 9 Cir., 1935, 80 F.2d 652, 656, 'Such fine must of course be based upon evidence of complainant's actual loss * * *', United States v. United Mine Workers of America, 330 U.S. 258, at page 304, 67 S.Ct. 677, at page 701, 91 L.Ed. 884; Christensen Engineering Co. v. Westinghouse Air Brake Co., supra, 135 F. at page 782; Boylan v. Detrio, supra, 187 F.2d at page 379. 'Unless it is based upon evidence showing the amount of the loss and expenses, the amount must necessarily be arrived at by conjecture, and in this sense it would be merely an arbitrary decision.' Christensen Engineering Co. v. Westinghouse Air Brake Co., supra, 135 F. at page 782; Norstrom v. Wahl, 7 Cir., 1930, 41 F.2d 910, 914."

United States v. Green (2d Cir., 1957) 241 F.2d 631, aff. 356 U.S. 165, 2 L.Ed.2d 672, involved purely criminal contempt, the offense being "jumping bail", and the court sentenced defendants to three years imprisonment for this contempt. In affirming the judgment of the district court, the Second Circuit said (241 F.2d 633):

> "In a civil action ordinarily the proceeding is only remedial and imprisonment is imposed only to coerce compliance; but it may also be punitive, provided its penal character be clearly enough disclosed from the outset."

> "Plaintiff's claim of actual damages must be established by competent evidence and the amount must not be arrived at by mere speculation or conjecture."

It is also the law that if all or any part of a fine assessed as a punishment for contempt is payable to the United States where the United States is not the complainant that the imposition of such a fine is for criminal and not civil contempt.

In Norstrom v. Wahl (7th Cir. 1930) 41 F.2d 910, the defendant was found in contempt and the Court imposed a fine of $1,000.00 upon him, with $500.00 thereof to be paid to the United States and $500.00 to the complaining party. At 41 F.2d 912 the Court said:

> "It is important to classify the proceeding here--whether for civil or criminal contempt, or both--since the order for payment to the United States of part of the fine imposed can be supported only in a proceeding for criminal contempt, and for payment of part to the plaintiff only in one for a civil contempt." (Emphasis Added)

In Nye v. United States (1941), 313 U.S. 33, 85 L.Ed. 1172, the Supreme Court, in discussing whether a contempt order entered by the district court was civil or criminal, said (313 U.S. 43, 85 L.Ed. 1177):

> "The order imposes unconditional fines payable to the United States. It awards no relief to a private suitor." (Emphasis Added)

The Supreme Court there held the punishment imposed to be for criminal contempt.

In McCrone vs. United States (1939) 307 U.S. 61, 83 L.Ed. 1108, the petitioner refused to give testimony to an internal revenue agent pursuant to a federal statute. After his refusal

to testify, the district court ordered petitioner to give testimony, but he remained adamant. Petitioner was then found in contempt for his failure to obey the court's previous order to testify before the agent and was ordered held in jail until he purged himself of contempt by obeying the order to testify.

In deciding that the contempt was civil, not criminal, in nature, the Supreme Court said (307 U.S. 64, 83 L.Ed. 1110):

> "While particular acts do not always readily lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public." (Emphasis Added)

United States v. Onan (8th Cir., 1951) 190 F.2d 1, cert. den. 342 U.S. 869, 96 L.Ed. 654, dealt only with civil contempt. There, the opposing party moved for an order for the informer-plaintiffs to show cause why they should not be held in contempt of a prior order of the court. The district court found the informer-plaintiffs in contempt, and ordered them to pay a fine of $2,500.00 to be paid to the moving parties to compensate them for damages sustained by the contemptuous acts. The Court of Appeals affirmed the judgment, holding that the punishment sought and meted out was wholly remedial, and pointed out that the proceeding was instituted by counsel for appellees and not by the United States attorney, and that the order adjudging appellants in contempt awarded damages to appellees, which clearly marked the proceeding as civil, not criminal.

For the reasons above stated, Respondents submit that the "Judgment of Civil Contempt" entered by this Court against them in this cause is not valid as a judgment of civil contempt.

In any event, it is well settled that as to the confinement aspect of the punishment imposed for civil contempt, confinement can only be imposed in order to compel the doing of an affirmative act required by the terms of a valid injunction or restraining order. See United States v. Montgomery, 155 S.Supp. 633, 637 and Gompers v. Bucks Stove and Range Co., 221 U.S. 418.

The restraining orders issued by this Court against Governor Barnett and Lieutenant Governor Johnson were prohibitory, and did not require the performance of an affirmative act. The only requirements of affirmative acts imposed upon these persons by this Court are contained in the purge requirements, and of course, the purge requirements cannot and should not go beyond the scope of the original restraining order.

Thus, it follows that Governor Barnett and Lieutenant Governor Johnson cannot be imprisoned for civil contempt in this case, because the conditions precedent for such imprisonment punishment do not exist.

To the extent that this Court's "Order of Civil Contempt" was based upon the petition for citation for civil contempt filed by the United States, we respectfully submit it was clearly erroneous. As pointed out previously, only the opposing party in the main lawsuit can institute proceedings for civil contempt, which are for its benefit.

Much reliance has been placed upon the case of Bush v. Orleans Parish School Board, 191 F.Supp. 871 (1961), but that case only strengthens our position here. In Bush, the United States was brought in as amicus curiae only for the purpose of vindicating the court's authority. Under the universal rule, the only proceedings for contempt that could have been instituted

criminal, not civil, contempt. The following language used by the court in Bush is pertinent here, and clearly shows that the government there came in as amicus solely for the purpose of vindicating the authority of the court. At 191 F. Supp. 876, the court said:

> "The Justice Department was not intervening to protect a special interest of its own. Nor was it to champion the rights of the plaintiffs or defend the harassed School Board. It came in, by invitation, to aid the court in the effectuation of its judgment, 'to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States.'
>
> . . . As we have said, the government entered the case only to vindicate the authority of the court."

It follows that the only contempt proceedings that could be initiated by the United States here are those in criminal contempt.