PROPOSED JUDGMENT AND ORDER OF CIVIL CONTEMPT SUBMITTED ON BEHALF OF THE UNITED STATES

This Court having on September 28, 1962 adjudged Ross R. Barnett to be in contempt of its temporary restraining order entered on September 25, 1962 upon application of the United States, amicus curiae, and having provided that Ross R. Barnett should pay a fine of $10,000 per day and should be committed to and remain in the custody of the Attorney General unless on or before October 2, 1962 at 11:00 a.m. he showed the Court that he was fully complying with the terms of the restraining order and that he had notified all law enforcement officers and all other officers under his jurisdiction or command:

(a) To cease forthwith all resistance to and interference with the orders of this Court and the District Court for the Southern District of Mississippi;

(b) To maintain law and order at and around the University and to cooperate with the officers and agents of this Court and of the United States in the execution of the orders of this Court and of the District Court for the Southern District of Mississippi, to the end that James H. Meredith shall be permitted to register and remain as a student at the University of Mississippi under the same conditions as apply to all other students; and

Ross R. Barnett on October 2, 1962 having

represented to this Court through his counsel that he was, so far as he could do so, fully complying with the orders of this Court, and that he would to the best of his ability maintain law and order and comply in the future with the orders of the Court; and the Court having in reliance upon that representation withheld imposing any sanction for contempt, and having put the matter over to October 12, 1962 for a further showing by Ross R. Barnett of his compliance with the order of this Court; and

This Court having regularly convened on October 12, 1962 to hear such further showing as Ross R. Barnett might have regarding his compliance with the prior order of this Court; and it appearing from statements of counsel for Ross R. Barnett and for the United States that Ross R. Barnett had in fact ceased his affirmative obstruction and interference with the orders of this Court with respect to the admission and attendance of James H. Meredith at the University of Mississippi; but Ross R. Barnett having made no showing that he had notified all law enforcement officers and all other officers under his jurisdiction and command that they should do the things set forth in subparagraphs (a) and (b) of this Court's order of September 28, 1962; and Ross R. Barnett through his counsel having represented to this Court, contrary to the representations made on October 2, 1962, that he would comply with the orders of this Court only when such compliance was in his judgment consistent with his duties as Governor of the State of Mississippi pursuant to the Constitution and laws of the State of Mississippi; and

The Court having this day entered a preliminary injunction which requires Ross R. Barnett to take the same action and refrain from the same action as required and forbidden in this Court's temporary restraining order of September 25, 1962:

NOW THEREFORE THE COURT FINDS that Ross R. Barnett has not purged himself of his contempt of this Court's order of September 25, 1962, as required by the order of September 28, 1962; and that Ross R. Barnett still is in contempt of the Court's order of September 25, 1962; and

IT IS ORDERED that Ross R. Barnett forthwith pay to the Clerk of this Court $10,000 per day on account of his contempt during the period October 2, 1962 to October 12, 1962, being a total amount of $100,000, and that he hereafter pay a fine of $10,000 per day until such time as he shall (1) issue to all law enforcement officers and all other officers under his jurisdiction or command the instructions required by subparagraphs (a) and (b) of this Court's order of September 28, 1962; and (2) submit to the Court a signed statement showing in detail in what manner he is complying and intends to comply with the orders of this Court of September 25, 1962, September 28, 1962, and this date.

Done this _____ day of October, 1962.

Shirley - Put in our brief for CCA 19475 (Brief)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 19,475

JAMES H. MEREDITH,

Appellant

vs.

CHARLES DICKSON FAIR, et al.,

Appellees.

UNITED STATES OF AMERICA,
Amicus Curiae and Petitioner,

vs.

STATE OF MISSISSIPPI, et al.,

Defendants.

FURTHER STATEMENT AND MEMORANDUM ON BEHALF OF THE UNITED STATES IN RESPONSE TO THE MEMORANDUM FILED ON BEHALF OF GOVERNOR ROSS R. BARNETT ON OCTOBER 18, 1962

In their response filed October 18, 1962 counsel for Governor Ross R. Barnett assert that the United States has made incorrect statements of fact to the Court (page 1), has been "wholly inaccurate" in describing an arrangement with the Government for the entrance of James Meredith upon the campus of the University of Mississippi on September 30

(page 3), and has done so "for purposes which are necessarily beyond this case and have nothing to do with proper judicial proceedings or proper pleadings" (page 3).

The United States has a responsibility as amicus curiae to inform the Court of material facts bearing upon the question what sanctions should be imposed now or in the future upon Governor Barnett because of his contempt of the order of this Court of September 25. This further memorandum and statement by the United States is filed pursuant to that responsibility.

1. The denial of any arrangement between the Governor and the United States for the entrance of Mr. Meredith on the campus of the University of Mississippi on Sunday, September 30, is without foundation. We reaffirm that the arrangement described in our previous memorandum was in fact made. To the extent that the counter-assertions of fact made in the response filed by the Governor are inconsistent with the existence of that arrangement, they are misleading.

In view of the importance of the issues in this case, and the gravity of the events that have occurred, the United States has under these circumstances a responsibility to advise the Court that if it deems the issue relevant to disposition of this matter, the United States stands ready to prove the details of the arrangement made and its context, and respectfully advises the Court that it should not, in the absence of such evidence, rely upon either the denial or counter-assertions of fact made on behalf of the Governor in the memorandum filed on October 18.

2. The response filed on October 18 on behalf of the Governor also to some degree raises an issue of fact as to the actions of the state police in the vicinity of the University of Mississippi on the night of September 30. The United States believes that resolution of this issue is not necessary to the determination which the Court is now required to make. The precise issue before the Court is not how the state police in fact acted that night, but what instructions the Governor had then and has since given the state police and other state officials, not only with respect to the maintenance of law and order, but also with reference to the various proclamations, law suits, and criminal proceedings and statutes which have constituted the pattern of attempted interference with the orders of this Court.

In our view Governor Barnett has still made no sufficient showing with respect to this important requirement.

In the event that the Court considers the question of the extent to which the state police did make an effort to enforce law and order at the University during the night of September 30 to be material to its present consideration, the United States is prepared to offer evidence on that point at any time.

Respectfully submitted,

Burke Marshall
BURKE MARSHALL
Assistant Attorney General

St John Barrett
St. John Barrett
Attorney, Department of Justice

I hereby certify that a copy of the foregoing Further Statement and Memorandum on Behalf of the United States attached hereto has been sent by Airmail, postage prepaid, to each of the attorneys listed below, at the address indicated:

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Honorable Joe T. Patterson
Attorney General, State of
Mississippi
Jackson, Mississippi

Constance B. Motley, Esq.
10 Columbus Circle
New York, New York

R. Jess Brown, Esq.
1105-1/2 Washington Street
Vicksburg, Mississippi

Dated this 24th day of October, 1962.

John Doar

John Doar
Attorney, Department of Justice

Shirley
File in Brief file of Meredith v Fair my file

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JAMES H. MEREDITH,

Appellant,

v.

CHARLES DICKSON FAIR, et al.,

Appellees.

UNITED STATES OF AMERICA
Amicus Curiae and Petitioner,

v. NO. 19475

STATE OF MISSISSIPPI; ROSS R. BARNETT, Governor of the State of Mississippi; JOE T. PATTERSON, Attorney General of the State of Mississippi; T. B. BIRDSONG, Commissioner of Public Safety of the State of Mississippi; PAUL G. ALEXANDER, District Attorney of Hinds County, and WILLIAM R. LAMB, District Attorney of Lafayette County; J. ROBERT GILFOY, Sheriff of Hinds County, and J. W. FORD, Sheriff of Lafayette County; WILLIAM D. RAYFIELD, Chief of Police of the City of Jackson, and JAMES D. JONES, Chief of Police of the City of Oxford; WALTON SMITH, Constable of the City of Oxford,

Defendants.

BRIEF OF DEFENDANTS

Thomas H. Watkins
Malcolm B. Montgomery
Charles Clark, Special
Assistant Attorney General

Joe T. Patterson, Attorney General
for the State of Mississippi
Green, Green & Cheney
Satterfield, Shell, Williams & Buford

Attorneys for Defendants.

PREFACE

Because of the time element involved, this brief is being written in separate subdivisions and, in some instances, by separate counsel. Time will not permit the several separate points to be completely correlated. We also respectfully direct the Court's attention to the fact that this brief is intended only to supplement the brief previously filed and both briefs should be considered.

We ask the Court's indulgence in this regard.

EVERY MATTER PRESENTED TO THIS COURT SINCE JULY 27, 1962, SHOULD HAVE BEEN PRESENTED TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

The United States District Court for the Southern District of Mississippi has issued a permanent injunction in this cause. It thus has full and continuing jurisdiction of this cause of action.

The United States is an amicus in that Court. It should have filed any "ancillary" motions or pleadings there. If it had done so the present jurisdictional problems could have been avoided and the continuing supervision of its injunctive process could be carried on without interruption and thus could have avoided the concern of some of the members of this Court as to interruption of "ancillary" writs.

The United States could, under 28 U.S.C.A. 1345, have filed an original suit in the District Court for all of the relief it has sought here, or it could have proceeded in that Court independently or at the request of the Court in a new cause in criminal contempt, whereas independent proceedings in this Court in such a contempt action would still raise grave questions of jurisdiction since such criminal proceedings must be in a separate cause, and only the District Court is vested with jurisdiction thereof.

Appellant could have proceeded in the District Court in civil contempt or for the entire "ancillary" relief here sought. The appellant could also have proceeded in a separate action against those he alleged to be thwarting his judicially established rights. This Court of Appeals has the power at all times to determine if its mandate is being properly executed by the lower court. It possesses the right of mandamus if the District Court fails to properly interpret or execute this Court's mandate. (And under some authorities, the validity of which we question, it could commence civil contempt proceedings in this Court for violations of orders entered by the District Court under this Court's direction.) Thus this Court would not part with authority to supervise the District Court's functions.

The United States District Court for the Southern District of Mississippi is judicially and geographically so situated, and because of its single judge composition so functions, that the Federal judiciary, as well as the parties of this litigation, would have been infinitely less burdened if the proceedings here had properly been brought in the United States District Court for the Southern District of Mississippi. Cf. Phillips v. United States, 312 U.S. 246.

THIS COURT DOES NOT HAVE ORIGINAL OR ANCILLARY JURISDICTION OF THE CLAIM ASSERTED BY THE UNITED STATES AS A PARTY AGAINST THE STATE OF MISSISSIPPI.

A.

THE CLAIM OR CAUSE OF ACTION, IF ANY, ASSERTED BY THE UNITED STATES IS SEPARATE AND DISTINCT FROM THE CLAIM ASSERTED BY THE PLAINTIFF, JAMES MEREDITH.

The United States seeks to intervene as a party plaintiff and to add as a party defendant, the State of Mississippi. It asserts that such action is necessary in order to safeguard the due administration of justice and the integrity of the judicial processes of the United States. The Government's claim is unique and is completely foreign to the facts and law involved in the original action. The facts and law constituting the original action have been settled by this Court, and are no longer being litigated thereby.

The claim of the Government is a separate, distinct and independent claim having no common ground with the original action. The Government is attempting to assert its sovereign interest to safeguard its judicial processes against impairment by obstruction and/or circumvention. If the United States has a claim or cause of action against the State of Mississippi, in this or any other type of suit, the right to maintain that claim or cause of action is not predicated upon the right to intervene as a party plaintiff in a suit instituted by private plaintiffs seeking to secure their constitutional rights. The cause of action or claim of the United States, if any, cannot

be settled by any law or facts as presented in the main action. This main and original action of plaintiff was for the litigation of Fourteenth Amendment rights, which the United States cannot litigate in behalf of the plaintiff or any other individual party. The Government's interest has no connection with the original action. The United States is asserting a general principle as to its national sovereignty in regard to all judicial processes and is not limited to the decree rendered in this cause. It is not bottoming its cause of action upon the Government's right to enforce this particular Court decree, but upon the broad principle that the United States has the duty to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States. It is this interest that the Government is attempting to assert and any benefit, if any, derived by this Court or the plaintiff herein will be merely as third party beneficiaries.

This is squarely and unequivocally a controversy between the executive power of the United States and the executive power of the State of Mississippi. The controlling law and facts in the determination of this controversy are completely new and foreign to the facts and law controlling the original action.

B.

ANY CLAIM OR CAUSE OF ACTION BY THE UNITED STATES AGAINST THE STATE OF MISSISSIPPI MUST ORIGINATE IN THE UNITED STATES SUPREME COURT OR A FEDERAL DISTRICT COURT.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme

Court shall have original jurisdiction." (Emphasis Supplied) Article 3, Sec. 2, Par. 2, The United States Constitution.

"Except as otherwise provided by act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by act of Congress." Title 28, Judiciary and Judicial Procedure, U.S.C.A., Sec. 1345.

C.

THE UNITED STATES HAS NO RIGHT OF INTERVENTION UNDER RULE 24 (a), F.R.C.P.

The United States has radically changed its position in this cause. It now claims that the order of the Court allowing it to intervene as amicus curiae was really an order permitting it to intervene as a Party to this litigation so that it could assert, not the court's rights, but its own rights against non-parties. It does this in the obvious recognition that the 11th Amendment prevents any suit against the State of Mississippi except in an action where it is a party. Its latest change of position leaves it in an equally untenable position. This Court has accepted the Federal Rules of Civil Procedure as valid here by way of analogy, since the Supreme Court has approved their use for the trial of rights in the Federal Judiciary.

There is no statute of the United States granting an unconditional right in behalf of the United States to intervention.

The interest of the United States is a unique interest of a general and indefinite character and is not the interest included in Rule 24 (a)(2), F.R.C.P.

"It is well settled that the only interest which entitles a person to the right of intervention in a case is a legal interest as distinguished from an interest of a general and indefinite character which do not give rise to definite legal rights." Jewell Ridge Coal Corporation v. Local No. 6167, 3 F.R.D. 251. See also Radford Iron Co., Inc. v. Appalachian Electric Power Co., 62 F.2d 940.

"Under Rule 24 (a)(2) allowing intervention when representation of applicant's interest by existing

is or may be bound by the judgment in the action, both conditions must be shown to exist before intervention is authorized. If both are not established there can be no intervention as of right, however great may be the applicant's interest."
Barron and Holtzoff's Federal Practice and Procedure, Sec. 597.

Conceding arguendo that the Government has a legal interest any judgment or decree in the main action would not and could not be binding upon the United States. Said decree already rendered concerns only a personal interest belonging to the plaintiff, James Meredith.

D.

PERMISSIVE INTERVENTION UNDER RULE 24 (b), F.R.C.P. CANNOT BE APPLICABLE HERE AS TO THE UNITED STATES.

No statute of the United States confers a conditional right upon the United States to intervene.

The claim or cause of action, if any, of the United States does not involve an action of law or fact in common with the main action. (We respectfully refer the Court's attention to the discussion developed in Sub-section "A", that this proceeding is in reality a separate, distinct and independent claim.)

E.

THE CIRCUIT COURT OF APPEALS DOES NOT HAVE ANCILLARY JURISDICTION OF THE CLAIM OR CAUSE OF ACTION, IF ANY, ASSERTED BY THE UNITED STATES AGAINST THE STATE OF MISSISSIPPI

"The ancillary process must be 'to aid, enjoin, or regulate the original suit. * * * to prevent the relitigation in other courts of the issues heard and adjudged in the original suit, * * *.'"
O'Brien, et al. v. Richtarsic, 2 F.R.D. 42, p. 44.

It is apparent from the discussion of the claim asserted by the United States that said claim or cause of action does not fall into the category of any claim or cause of action that could in anywise be ancillary to the main action of this case. The Government's contention that it has a claim or

cause of action to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States is not in aid of or to litigate the original suit, which suit has already been terminated as to the controlling facts and law. Said Government claim or cause of action could and should be litigated in a separate proceeding as above discussed.

F.

PERMISSIVE INTERVENTION
AND ANCILLARY ACTION.

Assuming arguendo that the United States has a cause of action or claim founded on facts and law common to the main action, the intervention by the United States would rise, at the most, to the dignity of a permissive intervention and not to an intervention of right. The Government could not intervene in this main action because the Circuit Court of Appeals does not have original jurisdiction as to a controversy between the United States and the State of Mississippi, said original jurisdiction being in the United States Supreme Court or a Federal District Court. Being a permissive intervention, said claim or cause of action must rest upon its own jurisdiction and cannot be sustained upon the jurisdiction of the main claim.

> "Assuming, as intervenor contends, that the claims for infringement against others than the defendants in the main suit are the present subject of permissive joiner * * * and that adjudication of them did not 'unduly delay or prejudice the adjudication of the rights of the original parties' * * * independent grounds of federal jurisdiction must nonetheless be found to exist." (Emphasis Supplied) Hartley Pen Co. v. Lindy Pen Co., 16 F.R.D. 141, p. 155.

"a permissive counter-claim must be supported by independent grounds of federal jurisdiction."
Barron and Holtzoff's Federal Practice and Procedure, Sec. 392, p. 784.

G.

PROCEDURE UNDER
RULE 24 (c) F.R.C.P.

"A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."
Rule 24 (c) F.R.C.P.

Application for leave to intervene should be made on motion and may not be presented ex parte. See In Re Finger Lakes Land Co., Inc. (W.D., N.Y., 1939), 29 F.Supp. 50. It is clear from a reading of this rule and the cited case that the United States must file a motion to intervene, that due and proper notice must be given to the State of Mississippi and that a due and proper hearing on said motion must be held giving the State of Mississippi a right to be heard in this matter.

NO VALID SERVICE OF PROCESS WAS HAD ON THE NON-PARTIES, NOW "DEFENDANTS" IN THIS COURT

We recognize at the outset that the service of process in an original action in the Court of Appeals is a complete novelty and that there is no precedent for it; however, it is the universal rule that the returns of officers must control on the question of their service of process since they can neither bolster nor impeach their written returns. Evidence, even moving pictures, cannot change this basic rule.

As to service of all process in this cause, including the Temporary Restraining Order issued at the motion of the United States to Governor Barnett, Marshal McShane, in his return, states he "tendered" it to him. There is no return whatsoever supporting service of such process on Lieutenant Governor Johnson and no finding of fact is made by the Court in its order of contempt as to service of even the Temporary Restraining Order on him. The Court's judgment of civil contempt does contain a conclusion of law that the Court acquired jurisdiction over his person but this conclusion is unsupported by any fact finding.

The return on the Show Cause Order to Governor Barnett shows that Deputy Marshal Emerton attempted to make service on the Governor without showing in any way that personal notification to the Governor resulted. As to the Lieutenant Governor, Deputy Marshal Rowe's return shows he left a copy of the Show Cause Order with the Lieutenant Governor's wife less than forty-eight hours prior to the hearing set thereon. The attempted

service of the Show Cause Order on Governor Barnett was also made less than forty-eight hours prior to the hearing and in both instances the hearings were scheduled for points outside of the State of Mississippi far from the homes of these officials. Both the Chief of U. S. Marshals and officers of the Department of Justice were in personal contact with Lieutenant Governor Johnson in Oxford, Mississippi, when these attempts at service were being made elsewhere.

Except in limited classes of property actions where in rem procedures permit process to reach across state lines, the boundaries of sovereign states and not the boundaries of United States Districts for its Circuit Courts of Appeal have always controlled the validity of service of process, cf. Hess v. Pawloski, 274 U.S. 355; Wuchter v. Pizzutti, 276 U.S. 24.

Service of process must accord with a rule or statute of the United States or a law of the state in which a suit is filed. Royal Lace Paper Works v. Pestguard Products, 240 F.2d 814. Service here, insofar as the contempt actions against the Governor and Lieutenant Governor are concerned did not accord with such rule, statute or law.

Separate and apart from the question of valid service of process, the hearings in this cause with regard to contempt citations to the Governor and Lieutenant Governor lacked due process under the 5th and 14th Amendments to the Constitution of the United States. Roller v. Holly, 176 U.S. 398. In that case, the Supreme Court of the United States held that five days notice to a non-resident in another state was insufficient to constitute reasonable notice or due process of law, cf. re Green, 8 L.Ed.2d 198.

THE UNITED STATES AS AMICUS CURIAE AND THE APPELLANT CONTINUOUSLY HAD THE BURDEN OF AFFIRMATIVELY SHOWING THAT THIS COURT HAD JURISDICTION TO HEAR AND DETERMINE THEIR PETITIONS FOR ANCILLARY RELIEF.

This Honorable Court, being an Appellate Court, can exercise only appellate and not original jurisdiction. Title 28, U.S.C.A. 1291. The petitions of the amicus and the appellant for new relief against new parties could not be maintained by this Court unless they were properly ancillary to this Court's appellate jurisdiction. Neither petition alleges any independent jurisdictional grounds.

This Court reversed and remanded this case with directions to the District Court for the Southern District of Mississippi on July 27, 1962. Appellees contended that these proceedings were without authority and that the judgment and mandate of this Court issued July 17, 1962, directing the District Court to retain jurisdiction, properly concluded this Court's appellate function. Assuming, arguendo, that the Court had some residual appellate jurisdiction that did permit it on July 28, 1962 to enter an order of injunction against the parties to this litigation, then this injunctive order and it alone would form the only element of appellate jurisdiction which could now be vested in this Court. This order provides by its own terms that it is effective only:

> "Pending such time as the District Court has issued and enforced the orders herein required and until such time as there has been full and actual compliance in good faith with each and all of said orders by the actual admission of plaintiff-appellant to, and the continued attendance thereafter at the University of Mississippi on the same basis as other students who attend the [illegible]

During the course of oral argument Judge Brown opined that the parties against whom the preliminary injunctive relief was sought had failed to meet the burden of proving that this injunction had not expired of its own terms. Some of the members of the Court stated that they had read or heard via news media of events which caused them to feel that the injunction might not have expired by its terms.

We respectfully submit that this was not the burden of the "defendants." With deference we submit this was improper since the entire jurisdiction for the Court to entertain these admittedly ancillary petitions, and to issue its ancillary injunctive orders against nonparties, was based upon the continuing validity vel non of the injunction of July 28, 1962. These moving parties had the continuous, self-asserted burden of proving to the Court that such jurisdiction did exist.

Judge Tuttle speaking for the Court in the case of Birmingham Post Co. v. Brown, 127 F.2d 127, pointed out:

> "No matter how the issue is raised, whether by motion, by answer, or upon the court's own initiative, the burden of proving all jurisdictional facts rests upon the plaintiff or persons asserting that the court has jurisdiction."

He also pointed out that every court of the United States was presumed to be without jurisdiction unless the contrary affirmatively appeared from the record. The question of jurisdiction is self-asserted and arises though the litigants themselves are silent. The question of jurisdiction can never become an affirmative defense.

See also Town of Lantana v. Hopper, 102 F.2d 118.

The "defendants" have asserted continuously that ne Court is without jurisdiction in this proceeding. As nis Court pointed out in the case of Williams v. Employers ntual Liability Insurance Co., 131 F.2d 601, which was verse at the instance of then Attorney, and now Judge, ives, if jurisdiction is challenged then the party sserting jurisdiction must support the existence of such risdiction by competent proof.

For all the foregoing reasons, it is submitted that ne Court lacks jurisdiction to hear, determine or proceed rther with any matter related to the former appeal in redith v. Fair, whether such proceedings be called "ancillary" r by any other name. Despite the foregoing, defendants are illing to furnish the Court with such additional information s the Court may require to show that, in fact, full good aith compliance has been had by all persons to whom the ourt's Order of July 28, 1962, was directed, and that verything sought to be accomplished by that Order has been ccomplished.

Such additional information will, of course, be rnished without waiving the complete failure on the part of ne moving parties to meet the burden of proving jurisdictional cts, which burden they wholly failed to meet.

THE ACTS OF GOVERNOR ROSS R. BARNETT, CHARGED TO BE IN VIOLATION OF THE ORDERS OF THIS COURT, WERE DONE SOLELY IN HIS OFFICIAL CAPACITY AND THE SOLE DESIGN OF THE RESTRAINING ORDER AND TEMPORARY INJUNCTION IS TO FORCE HIM TO EXERCISE HIS OFFICIAL POWERS AND CONSTITUTES A SUIT AGAINST THE STATE

The action of the Supreme Court in accepting jurisdiction of a suit against a State by a citizen of another state in Chisholm vs. Georgia, 2 Dall. 419, provoked such angry reactions in Georgia and such anxieties in other states that at the first meeting of Congress after this decision what became known as the Eleventh Amendment was proposed and ratified with "vehement speed".

In Osborn vs. Bank of United States, Wheat.264,411-412, the Court laid down two rules, one of which has survived and the other of which was soon abandoned. The latter was the holding that a suit is not one against a state unless the state is a party to the record. This rule the Court was forced to repudiate seven years later in Governor of Georgia vs. Madrazo, 1 Pet. (26 U.S.) 110, in which it was conceded that the suit had been brought against the Governor solely in his official capacity and with the design of forcing him to exercise his official powers. In its opinion the Court said:

> "The claim upon the governor, is as governor; he is sued not by his name, but by his title. The demand made upon him, is not made personally, but officially. The decree is pronounced not against the person, but the officer, and appeared to

have been pronounced against the successor of the original defendant; as the appeal bond was executed by a different governor from him who filed the information. In such a case, where the Chief Magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the Court as defendant. This not being a proceeding against the thing, but against the person, a person capable of appearing as defendant, against whom a decree can be pronounced, must be a party to the cause before a decree can be regularly pronounced.

But were it to be admitted, that the governor could be considered as defendant in his personal character, no case is made which justifies a decree against him personally."

See also Commonwealth of Kentucky vs. William Dennison Governor of Ohio, 24 Howard (65 U. S.) page 66, 97, to same effect and citing Governor of Georgia vs. Madrazo.

In Hagood vs. Southern, 117 U. S. 52,67, the Court stated:

"The bill was in substance a bill for the specific performance of a contract between the complainants and the State of South Carolina, and, although the state was not in name made a party to the alleged contract, the performance of which was sought and the only party by whom it could be performed, the State was, in effect, a party to the suit and it could not be maintained for that reason."

The suit at bar, seeks nothing at the hands of Ross R. Barnett, an individual person. The demand made upon him, is not made personally, but officially. The decree sought against him is: to compel him to perform the order of the Court, is

not sought against him personally but officially. The demand is that the Governor be required to do this and that in his official capacity as Governor. Under the three above cited decisions by the Supreme Court of the United States such demand is a demand against the State and the suit is a suit against the State and not the individual.

The State has immunity, under the Eleventh Amendment, to a suit against it by its own citizens, Hans Vs. Louisiana, 134 U. S. 1; Fitts vs. McGehee 172 U. S. 516; Duhne vs. New Jersey, 251 U. S. 311, 313; Ex Parte New York 256 U. S. 49. Meredith is admittedly a citizen of Mississippi.

With reference to the appearance of the United States as amicus curiae it is said in 2 Am. Jur., page 680, Section 4, that:-

> "He has no control over the suit and no right to institute any proceedings therein. It seems clear that an amicus curiae cannot assume the function of a party in an action or proceeding pending before the Court and that ordinarily, he cannot file a pleading in a cause."

In 3 C.J.S., p. 1050, Sec. 3 (5), the statement is found that:

> "The amicus curiae cannot file a pleading and hence a demurrer cannot be filed by an amicus curiae."

As to the status of an amicus curiae appointed by the Court it is said in 3 C.J.S., p. 1048, that:

> "The fact that the Court assumes to appoint one as amicus curiae does not

enlarge the authority of the amicus curiae."

The United States has not filed any original suit against the Governor or Lieutenant Governor in a Court of original proper jurisdiction and it is beyond its power to petition in its own right as amicus curiae for an injunction.

Am. Jur. 2d, p. 110, Sec. 3, says:-

> "An amicus curiae is heard only for the purpose of assisting the court in a case already before it, and the function of an amicus curiae is to call the court's attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration. His principal or usual function is to aid the court on questions of law, but whatever the matter with reference to which an amicus curiae undertakes to inform the court, he should act in good faith, make full disclosure on the point, and suppress nothing with intent to deceive the court.
>
> An amicus curiae is not a party and cannot assume the functions of a party, an attorney for a party, or even a partisan. He has no control over the litigation and no right to institute any proceedings therein; he must accept the case before the court with the issues made by the parties. Thus, an amicus curiae may not raise issues as to the constitutionality of a statutory provision where such issue is not raised by the parties to the action; and it has also been held that an amicus curiae may not raise a constitutional question which does not relate to the jurisdiction of the court.
>
> Ordinarily, an amicus curiae cannot file a pleading in the cause but is restricted to suggestions relative to matters apparent on the record or to matters of practice."

This Honorable Court has held that an amicus curiae has no standing or status except to advise and are not parties to a suit.

In City of Winterhaven vs. Gillespie, 84 Fed. 2d, 287, certiorari denied 299 U. S. 606, 91 L. Ed. 447, 51 S. Ct. 232, rehearing denied 301 U. S. 714, 81 L. Ed. 1365, 57 S. Ct. 927, this Court of Appeals for the Fifth Circuit held that a suit for a mandatory injunction is in its nature the same as a suit for mandamus and that they are not parties to the suit and have no standing except to advise the Court. In so holding the Court speaking through Judge Hutcheson said:-

> "We held in Normandy Beach Dev. Co. v. United States ex rel. Brown-Crummer Inv. Co., 69 F.(2d) 105, that the only proper parties to a mandamus suit are the relators who seek to compel performance of a duty, and those on whom the duty is imposed by law, and that intervening taxpayers, like these here, have no standing to appeal. Though this is a suit for injunction, it is for a mandatory one, and in its nature it is a suit for mandamus to direct officials of a city to proceed as they ought to do, and it may be questioned whether intervening taxpayers could any more appeal from a judgment in this suit than they could in that. We do not decide that question, however, for these appellants did not come into the cause of interveners. They came in by a pleading and order specifically fixing their status as and limiting it to, that of "friends of the court." They thus have no status except to advise, or, as they themselves put it, to "suggest." They are not named in, they are not parties to, and they are not bound by, the decree. They are without standing here to appeal. Hughes Federal Practice, vol. 1, § 37, p. 37; American Jurisprudence, vol. 2, p. 679, § § 4-6 and 7."

We respectfully submit that the United States, as amicus curiae, is not a party to this suit and consequently this suit cannot be construed to be a suit by the United States against the State of Mississippi. It is purely a suit by

THE STATE OF MISSISSIPPI AND ITS RIGHTS

When James H. Meredith filed his suit, the State of Mississippi was not named as a party; and the State was not brought into this Court until the suit was fait accompli. Having not had its day in court and not being bound by previous evidence (our Brief, p. 13, see also Stone v. Interstate Natural Gas Co., C.A. 5, 103 F. 2d 544), the State of Mississippi with deference, makes this further statement of its rights, still reserving its objections to the jurisdiction of this Court.

1. The State qua State has been sought herein to be mandated. With deference, we deny the jurisdiction of the Court over her insofar as the rights assumed for James H. Meredith are concerned, there being as to education no specific Congressional legislation. Compare United States v. Alabama, 362 U.S. 602, 4 L. ed. 2nd 982, 267 Fed. 2nd 808, 171 F. Supp. 720, quoted and discussed elsewhere in this brief.

2. The State was not assumed to be brought in until September 25, 1962 after the cause in the District Court had been tried on the merits, appealed to this court and the mandate remitted: and so being, if a coercible party, it must be vouchsafed full right to be heard as res nova, but beware of the Eleventh Amendment. Morgan v. United States, 298 U.S. 468, 80 L. ed. 1288.

3. On the merits, District Judge Mize specifically said:

> "The Registrar, on cross examination by attorney for Plaintiff, testified that if the application filed by the Plaintiff for admission were considered as still a pending application for admission that he would not accept the application of the Plaintiff, but that his rejection of the application for admission would be based not in the slightest on his race, but that the same rule would be applied if the applicant had been a white person; that the race of the Plaintiff did not enter into his judgment. ***."

In short, this was not a denial of Brown v. Board of Education, 349 U.S. 294, 99 L. ed. 1083, but an application of Waugh v. University of Mississippi, 237 U.S. 589, 59 L ed. 1131, 1137, wherein the Supreme Court declared:

> "This being our view of the power of the legislature, we do not enter upon a consideration of the elements of complainant's contention. It is very trite to say that the

> right to pursue happiness and exercise rights and liberty are subject to some degree to the limitations of the laws, and the condition upon which the State of Mississippi offers the complainant free instruction in its University, that while a student there he renounce affiliation with a society which the state considers inimical to discipline, finds no prohibition in the 14th Amendment."

Hamilton v. Board of Regents, 293 U.S. 245, 79 L.ed. 343.

4. The Legislature of Mississippi, vested with plenary power under Section 33 of the Mississippi Constitution, has spoken in divers statutes, but in this particular instance by (a) an Act of September 27, 1962, Senate Bill No. 1502; (b) an Act of September 20, 1962, Senate Bill No. 1501; and (c) an Act of September 28, 1962, House Bill No. 2, seeking to validate, as a sovereign, that precedently done by its officers, especially the Registrar at the University. These statutes evidenced their subservience to the Constitution as interpreted by the Supreme Court, but as to James H. Meredith forbade registration by reason of personal characteristics. The State affirmed her right thus to do and these statutes stand out as expressions entitled to constitutional protection under the Tenth Amendment. Whether that protection shall be termed "interposition" or by another name is substantially a question of semantics and not of constitutional authority. Thereunder, as its own, the State, subject to the Federal constitutional limitations, has declared that those similarly circumstanced to James H. Meredith may not enter because its Registrar had determined under State law, that he was not entitled thereto, irrespective of the Brown Case, supra. The Registrar and University officials were skilled in their profession and, with deference, vested with a modicum of State authority when they acted. The Courts initially must regard that administratively done and legislatively approved as valid until vacated in accordance with the Federal Constitution and statutes. With deference, the Governor was not privileged to disregard these Mississippi laws until appropriately construed.

5. Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639, 3 L.ed. 2nd 562, makes State adjudication as to validity and construction of these statutes a condition precedent to Federal action. Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 3 L.ed. 2nd 1058; Harrison v. NAACP, 360 U.S. 167, 3 L.ed. 2nd 1152.

6. We shall substitute in place of James H. Meredith, a Negro, as Complainant, "James H. Eredith", Caucasian, possessed of precisely the same character and qualifications as James H. Meredith, save that one is black and the other is white. These statutes are, under Mississippi law, the precise equivalent of this act:

"BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

"SECTION 1. That 'James H. Eredith' (not James H. Meredith) is not entitled to register at the University of Mississippi and his previous exclusion by the Registrar is ratified, approved and confirmed.

"SECTION 2. That this act shall take effect from and after its passage."

7. As to constitutional construction, stare decisis is not strictly regarded. Glidden v. Zdanok, ____U.S.____, 8 L.ed. 2nd 671, 683.

8. The State is the owner and operator of the University. Thereasto, there are constitutional and statutory provisions presumptively valid and applicable; and to deprive it of that which is its own, it must be in personam a party. Compare Stone v. Interstate Natural Gas Co., CA 5, 103 Fed. 2nd 544, affirmed, 308 U.S. 522, 84 L.ed. 530. The laws of Mississippi are not to be overruled until determined under due form of law to contravene the U.S. Constitution.

9. The Supreme Court of Mississippi may alone under the State Constitution prescribe what the Governor and Lieutenant Governor may do or leave undone. When acting under her mandates, they are, with deference, not contemptuous. Henry v. State, 87 Miss. 1, 39 So. 856; Kennington-Saenger Theatres v. State, 196 Miss. 841, 18 So. 2nd 483.

10. It may be contended that these statutes enacted lawfully by the Legislature may be disregarded by this Court and treated as nullities because palpably a fraud on James H. Eredith; but note that this Court on appeal divided, District Judge DeVane declaring:

> "The one defense that leads me to dissent is the fear expressed by the appellees that Meredith would be a trouble-maker if permitted to enter the University of Mississippi. ***."

And the prevailing opinion specifically declared:

> "* * * The most damaging bit is a psychiatry report dated April 29, 1960:
>
> " 'This is a 26 year old negro S Sgt who complains of tension, nervousness and occasional nervous stomach. Patient is extremely concerned with the 'racial problem' and his symptoms are intensified whenever there is a heightened tempo in the racial problems in the U S and Africa. Patient feels he has a strong need to fight and defy authority and this he does in usually a passive procrastinating way. At times he starts a crusade to get existing rules and regulations changed. He loses his temper at times over minor incidents both at home and elsewhere. * * *."

And therein two Circuit Judges joined; but the other seven have not spoken so as to bind the State and prescribe a future course of conduct when the United States had moved in approximately twenty thousand men and, with deference, usurped power.

11. When the Registrar at the University acted, essentially, if there was to be judicial review, precisely that done should have been carefully preserved. California Co. v. State Oil & Gas Board, 200 Miss. 824, 27 So. 2nd 542. The Constitution and statutes, as questions of law, could be reviewed; and if there were no competent proof, reversal might be, but an administrative action should not be disregarded by the Court because thereasto its action is episodic. Public Service Commission v. United States, 356 U.S. 421, 2 L. ed. 2nd 886, 897. But the fundamental error, with deference, available to the State is that this question of trouble-maker or not is not to be decided upon by two members of the appellate Court composed of nine judges upon a preponderance of the evidence, when the Legislature, vested with fact finding powers and law-making authority, declared James H. Meredith to have been not entitled to registration.

12. With these statutes thus enacted, Congress has provided that invalidity must be declared by a District Court, Section 2281, Title 28 U.S.C.A.; and thereover this appellate Court is without jurisdiction since the exclusion was for personal characteristics other than race.

13. With "James H. Eredith" thus circumstanced, but withal a pacificist, he was taken up by the pressure group as an instrumentality whereby, under the guise of the Brown Case, supra, notwithstanding his

disqualification, the police power of Mississippi could be overthrown in the Federal Court. That deprivation of police power is that which in this aspect makes this case so serious and, with deference, justified all that the State officials in that behalf did.

14. There is, therefore, herein basically a modicum of State sovereignty which need not be herein precisely defined until the merits are reached, as thereasto there is no jurisdiction; but this valid modicum may not be impaired or suspended because so thus to do would violate Texas v. White, 74 U.S. 564, 19 L.ed. 227, 237. And the supreme question here is, may the United States destroy this relationship by blasting the modicum of State sovereignty remaining? This line of State sovereignty and Federal sovereignty has to be meticulously regarded, otherwise the Constitution fails. Compare South Carolina v. United States, 199 U.S. 437, 50 L.ed. 261; New York v. United States, 326 U.S. 572, 90 L.ed. 326; Detroit v. Murray Corporation, 355 U.S. 489, 2 L.ed. 2nd 441, 460.

15. James H. Meredith (here the assumption to conform to facts) malingered at Jackson College so as to not disqualify himself from entering the University. This action was deliberate and intentional. He became, under the pressure group, a crusader, vindicating alleged rights, not seeking an education. Appropriate qualification thereasto was requisite in accordance with State law. Had he not attempted to crusade -- making time of the essence and quintessence -- no such catastrophe would have occurred.

16. Let this Court, with deference, be mindful of its jurisdiction. The State, qua State, is not before the Court validly; and when the State officers do that of them specifically required by the Constitution and express statutes of Mississippi as will be interpreted by its own Supreme Court, as was the case here, it is not a case of contempt; for had they not done that which was in accordance with their judgment, as approved by the legislative acts and by Mississippi decisions as we contend, they would have been subject to impeachment. Obeying State sovereignty

cannot be punished when in good faith, in accordance with state statutes and decisions, and, with deference, in fundamental compliance with the Tenth Amendment of the U.S. Constitution, which as to this case stands as the law of the land.

17. That whereasto adjudication may herein be had does not involve the Fourteenth Amendment. The police power of the State, legislatively enacted, exists in the form of the statute hereinabove quoted. If the matter were again referred to the Legislature, we respectfully submit they would reaffirm and ratify, and make specific and precise that which precedently they made general so as to show that there was not an intention to in any way transgress under Brown v. Board of Education, supra. Frankly, as has been pointed out, the Brown Case sought to change fundamental customs. At the moment, it stands as the law. Whether it will continue so to do rests with the Supreme Court and the Congress; and when formally there declared, irrespective of the State's opinion, she has never deviated in any case one iota therefrom, and under an injunction should not be deprived of her rightful sovereignty. With deference, remember the Eleventh Amendment.

The State of Mississippi was brought into this action against its will and, with deference, continuously denies the jurisdiction of this Court over it under the Eleventh Amendment to the U.S. Constitution. Nothing herein heretofore done should be considered a waiver of its rights under the Eleventh Amendment but rather the statements and Motions herein made, must all be considered, with deference, as protestations against the jurisdiction of this Court over the State in this cause.