

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-00473 COA**

MATTYE WHIPPET

APPELLANT

v.

BENNIE C. ALLEN

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	3/20/95
TRIAL JUDGE:	HON. ISADORE W. PATRICK JR.
COURT FROM WHICH APPEALED:	SHARKEY COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	SARAH HODNETT BROOKS
ATTORNEY FOR APPELLEE:	WALTERINE LANGFORD
NATURE OF THE CASE:	CIVIL - CIVIL PROCEDURE
TRIAL COURT DISPOSITION:	CIRCUIT COURT EVICTED APPELLANT FROM HOME SHE UNLAWFULLY OCCUPIED.
DISPOSITION:	REVERSED AND DISMISSED WITHOUT PREJUDICE - 1/27/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/27/98

BEFORE THOMAS, P.J., HERRING, AND HINKEBEIN, JJ.

HINKEBEIN, J., FOR THE COURT:

Mattye Whippet [hereinafter Mrs. Whippet] appeals from the Sharkey County Circuit Court's affirmance of the Sharkey County Justice Court's judgment of ejection, whereby she was ordered to remove herself and her personal property from the real property in which Bennie C. Allen [hereinafter Mrs. Allen] held a life estate. Aggrieved by the judgment of the circuit court Mrs. Whippet makes the following assignments of error:

**I. WHETHER THE LOWER COURT ERRED IN ITS FINDINGS EJECTING
MATTYE WHIPPET FROM HER HOME?**

II. WHETHER APPELLANT MATTYE WHIPPET PROVED ADVERSE POSSESSION AS A VALID DEFENSE TO THE EJECTMENT ACTION FILED AGAINST HER?

III. WHETHER APPELLANT MATTYE WHIPPET PROVED BEYOND A REASONABLE DOUBT THAT SHE GAVE ACTUAL NOTICE TO APPELLEE BENNIE C. ALLEN'S LATE HUSBAND, BENNIE LEE ALLEN, OF CLAIM OF OWNERSHIP TO THE HOUSE AND HOUSE SITE WHICH IS PART OF THE PARCEL MRS. WHIPPET DEEDED TO MR. ALLEN ON SEPTEMBER 23, 1980?

IV. WHETHER THE LOWER COURT ERRED PROCEDURALLY IN MAKING AN AGREEMENT OF AN OUTSIDER, NOT A PARTY TO THE ACTION, PART OF ITS RULING AND ORDER WITHOUT PROOF NOR NOTIFICATION TO THE APPELLANT AND ERRED FURTHER IN ITS FINDING AND RULING AFTER A RULE 52 AND 59 MOTION AND HEARING?

Mrs. Allen makes the following assignments of error on cross-appeal:

V. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO DISMISS THE APPEAL FILED BY MATTYE WHIPPET ON FEBRUARY 8, 1993?

VI. WHETHER THE COURT SHOULD HAVE ASSESSED COSTS OF IMPROVEMENTS AGAINST APPELLEE WHEN SHE WAS NEITHER CONSULTED NOR REQUESTED SAID IMPROVEMENTS?

Because the circuit court was without subject matter jurisdiction to address this matter, we reverse its judgment and dismiss this proceeding without prejudice.

FACTS

To effectuate a division of her parent's farm among herself and five other siblings, in 1980 Mrs. Whippet conveyed her interest in certain real property located in Sharkey County, Mississippi to her brother, Bennie Lee Allen [hereinafter Mr. Allen]. Mrs. Whippet had occupied the family home located on this property continuously since 1953. Mrs. Whippet continued to live in the home after her 1980 conveyance of the property. In exchange for conveying her interest in this property to Mr. Allen, Mrs. Whippet's siblings (including Mr. Allen) deeded her a different portion of the family farm. After the 1980 conveyance Mr. Allen and his wife also lived on the property at issue in a house trailer located immediately behind the home in which Mrs. Whippet continued to reside.

Mr. Allen died on March 15, 1992. Mr. Allen's will, accepted by the Sharkey County Chancery Court as a muniment of title, devised a life estate in the property to Mrs. Allen with the remainder interest passing to Mrs. Allen's son, Charlie Lee Scott. At some point after Mr. Allen's will was probated relations between Mrs. Whippet and Mrs. Allen became strained. Mrs. Allen subsequently instituted an ejectment action in the Sharkey County Justice Court to compel Mrs. Whippet to vacate the property at issue. Mrs. Whippet raised adverse possession as an affirmative defense to the ejectment action. The justice court, however, rejected Mrs. Whippet's claim of adverse possession and issued a judgment of ejection giving her sixty days to vacate the property. Mrs. Whippet appealed this

decision to the Sharkey County Circuit Court, which also rejected her claim of adverse possession and affirmed the justice court's decision. It is from the circuit court's judgment that the instant appeal is taken.

ANALYSIS

I. THE CIRCUIT COURT'S LACK OF SUBJECT MATTER JURISDICTION TO ENTERTAIN THIS MATTER ON APPEAL FROM THE JUSTICE COURT.

Whether raised by the parties or not, this Court is required to note its own lack of jurisdiction. *Michael v. Michael*, 650 So. 2d 469, 471 (Miss. 1995). Under Mississippi's system of courts, "the jurisdiction to make a conclusive and final adjudication of title to land rests alone with the circuit and chancery courts, and now to a limited extent with the county courts." *McCoy v. McRae*, 37 So. 2d 353, 356 (Miss. 1948) (citing *Vansant v. Dodds*, 145 So. 613, 614 (Miss. 1933)). Furthermore, Section 9-11-9 of the Mississippi Code (which details the jurisdiction of justice courts) states only that justice courts have jurisdiction for "the recovery of debts or damages or personal property" *Miss. Code Ann. § 9-11-9 (Rev. 1991)*. Neither this nor any other section of the Mississippi Code gives justice courts subject matter jurisdiction over ejectment actions. Because the justice court had no subject matter jurisdiction to entertain the ejectment action, the circuit court was likewise without jurisdiction. *See Standard Fin. Corp. v. Breland*, 163 So. 2d 232, 236 (Miss. 1964) (holding that where justice court had no jurisdiction over matter circuit court had no jurisdiction on appeal); *Jordan v. City of West Point*, 75 So. 2d 465,465 (Miss. 1954) (stating that "[i]f justice of the peace has no jurisdiction, the circuit court acquires none on appeal."). Accordingly, we must reverse and dismiss this case without prejudice.

Regarding actions for the possession of real property, the Mississippi Supreme Court has held that:when the right to possession is dependent upon title or ownership and title or ownership is the issue upon which the right to possession has actually turned, then the judgment for the landlord is as fully conclusive upon the issue of title or ownership as would be the same determination in any other court of competent jurisdiction.

Vansant v. Dodds, 145 So. at 356 (citing *Fair v. Dickerson*, 144 So. 238, 239 (Miss. 1932)). In *McCoy v. McRae*, 37 So. 2d 353, 355 (Miss. 1948) our supreme court reiterated its decisions in *Vansant* and *Fair*, again holding that only circuit, chancery, and county courts have the power to adjudicate title to land, and then only when exercising original jurisdiction over such matters. *McCoy*, 37 So. 2d at 356. In *McCoy* the court reversed and dismissed without prejudice a possessory action in which the justice court had attempted to adjudicate title to real property. *Id.* at 357. The court concluded that the circuit court was without jurisdiction to hear such an appeal because it "would have only such jurisdiction as was vested in the . . . court from which the appeal was taken." *Id.* at 356. Because the justice court was without subject matter jurisdiction to make a conclusive and final adjudication of title to land, the circuit court was also without jurisdiction to rule upon this issue. *See Standard Fin. Corp. v. Breland*, 163 So. 2d 232, 236 (Miss. 1964)(holding that where justice court had no jurisdiction over matter circuit court had no jurisdiction on appeal); *Jordan v. City of West Point*, 75 So. 2d 465,465 (Miss. 1954) (stating that "[i]f justice of the peace has no jurisdiction, the circuit court acquires none on appeal.").

As in the *McCoy* case, under the facts at bar the circuit court should have dismissed the appeal from

justice court due to a lack of subject matter jurisdiction. While it is true that the justice court had subject matter jurisdiction to adjudicate which party was entitled to immediate possession of the disputed property (i.e. an unlawful entry and detainer claim), this was not the issue pled to or considered by the justice court. Rather than merely determining who was entitled to immediate possession of the property, we interpret the justice court's consideration and ultimate disposition of Mrs. Whippet's adverse possession claim to be an attempt at a final adjudication of title to real property - - an undertaking which it had no subject matter jurisdiction to entertain. Despite our agreement with the circuit court's disposition of the merits of Mrs. Whippet's claim of adverse possession, because the circuit court lacked subject matter jurisdiction to address this matter we must reverse its judgment and dismiss without prejudice.

THE JUDGMENT OF THE SHARKEY COUNTY CIRCUIT COURT IS REVERSED AND DISMISSED WITHOUT PREJUDICE. COSTS OF THIS APPEAL ARE ASSESSED EQUALLY AGAINST THE APPELLANT AND THE APPELLEE.

THOMAS, P.J., COLEMAN, DIAZ, HERRING, AND KING, JJ., CONCUR. HERRING, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY THOMAS, P.J., HINKEBEIN, AND PAYNE, JJ. McMILLIN, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY BRIDGES, C.J., AND SOUTHWICK, J.

HERRING, J., CONCURRING:

With due respect given to my colleague who authored the dissenting opinion, I feel compelled give my views on why the majority opinion reaches the appropriate result in this case.

ORIGINAL JURISDICTION

The dissent looks to the body of the complaint filed by Bennie C. Allen and determines that the complaint, while styled a "Declaration of Ejectment," is actually a lawsuit which invokes Mississippi's unlawful entry and detainer law found in sections 11-25-1 through 11-25-119 of the Mississippi Code, as amended. I disagree with the dissent's position that a fair reading of the "Declaration of Ejectment" shows that the action filed by Ms. Allen was actually an unlawful entry and detainer proceeding. The "Declaration of Ejectment" filed by Ms. Allen states in part:

Comes now Bennie C. Allen, owner . . . , and demands of Mattie [sic] Whippet, the possession of a lot or parcel of land . . . [legal description]. And the Plaintiff states that her right to the possession of the same accrued on the 15th day of March, 1992, and that the defendant *wrongfully deprived her of the possession thereof*. Wherefore, plaintiff demands that the defendant be turned out of possession of said real property

(emphasis added). The complaint was accompanied by a document entitled "Justice Summons." The summons was executed and delivered to Mattye Whippet. The summons put Ms. Whippet on notice that Ms. Allen had filed an action for ejectment against her seeking to "evict" Ms. Whippet from the

property on which she lived. The summons informed Ms. Whippet the date and time on which to appear before the Justice Court Judge of Sharkey County.

Ejectment was originally a common law action. **28A C.J.S. Ejectment § 3 (1996)**. However, the old common law ejectment action has been supplanted in most states by a special statutory action of ejectment. **Id. at § 4**. Section 11-19-23 of the Mississippi Code, as amended, gives the form of the declaration or complaint to be used in an action for ejectment in Mississippi and provides the following form and language:

"The State of Mississippi In the circuit court ____ term,

A.D. ____.

County of _____

"AB, plaintiff, claims the right to possession of a tract of land, situated in _____ County, containing _____ acres, more or less, and being more particularly described as follows: (here insert legal description of premises); and that the defendant *wrongfully deprives him of the possession* thereof, for which damage in the amount of _____ Dollars are here demanded.

EF, Attorney for the Plaintiff.

(emphasis added). Additionally, section 11-19-27 in the statutes on ejectment sets out the form of the summons to be used in gaining process of a defendant in an ejectment action:

"State of Mississippi,

"To the sheriff of _____ county, greeting:

"We command you to summon C D to appear before the circuit court of the county of _____, to be held at the courthouse thereof on the _____ Monday of _____ next, to answer the complaint of A B, who demands of him the possession of [describe the land as in the declaration]; and in default of his appearing and defending this action, judgment will be entered against him and he will be turned out of possession of said land; and you have you there then this writ.

_____, Clerk.

Mississippi's special statutory action of unlawful entry and detainer was created and is found in sections 11-25-1 through 11-25-119 of the Mississippi Code, as amended. Like the sections of the Mississippi Code pertaining to statutory ejectment actions, the Mississippi Legislature provided our citizens with a form to follow when filing an unlawful entry and detainer action. The language of the form codified in section 11-25-5 is as follows:

The party turned out of possession, or held out of possession, may exhibit his complaint before the clerk of the justice court of the county within which the lands, or some part thereof, may lie, to the following effect:

"County of _____, to wit;

"AB, of said county, complains that CD hath unlawfully turned him out of possession (or unlawfully withholds from him the possession) of certain land (here describe it), lying and being in the said county, whereof he prays the possession. AB, Plaintiff."

The complaint shall be verified by the oath or affirmation of the plaintiff, certified at the foot thereof, after the following manner;

"County of _____, to wit:

"This day the above-named AB made oath (or affirmed) before me, the clerk of the justice court for said county, that the allegations of the above complaint are correct and true.

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

_____EF, Clerk of the Justice Court.

The statutes authorizing actions for unlawful entry and detainer must be strictly construed. *Sistrunck v. Majure*, 186 Miss. 814, 823, 192 So. 5, 6 (1939) ("The action of unlawful entry and detainer is statutory, and the statutes authorizing the remedy are strictly construed, because they are in derogation of the common law."); *see also McKay v. Shaffer*, 202 Miss. 558, 564, 32 So. 2d 746, 748 (1947). This ruling by our supreme court is consistent with the general rule in matters of this type. According to the textwriter:

[T] he action of forcible entry and detainer is a special statutory proceeding, summary in its nature, and in derogation of the common law, it follows that the statute conferring jurisdiction must be strictly pursued in the method of procedure prescribed by it, or the jurisdiction will failed to attach, and the proceeding will be . . . void, unless the defects in procedure may be, and are, waived.

36A C.J.S. § 31 *Forcible Entry & Detainer* (1961).⁽¹⁾

Because both ejectment and unlawful entry and detainer are special statutory actions which must be strictly construed and procedurally strictly complied with without regard to equitable considerations, I am of the opinion that this court has no authority, as contended by the dissent, to transform this proceeding into an unlawful entry and detainer action. To do so would ignore that the action involved was initiated by a "Declaration in Ejectment" which closely follows the statutory language required for a statutory ejectment action found in section 11-19-23 of the Mississippi Code, as amended. Thus, since a justice court undisputedly has no jurisdiction to try an ejectment action, the majority is correct that the case *sub judice* should be dismissed without prejudice for lack of jurisdiction. This result is all the more compelling since Mattye Whippet originally appeared *pro se* before the Sharkey County Justice Court, at which time it is alleged that she submitted herself to the jurisdiction of the court. It is also noteworthy that when the circuit court finally ruled in favor of Ms. Allen, it entitled its final judgment of a "Judgment of Ejection." The judgment shows on its face that it was prepared by the attorney for Ms. Allen. Thus, the record is clear that the parties, as well as both the circuit and justice courts below, considered this proceeding to be an ejectment action and not an unlawful entry

and detainer action.

PROCESS

There are two other previously unmentioned reasons why the justice court had no jurisdiction to hear this case. Both have to do with the absence of adequate service of process on Ms. Whippet. Even if we assume that the present proceeding is an unlawful entry and detainer action, the special statutory requirements of sections 11-25-7 and 11-25-11 of the Mississippi Code, as amended, in regard to process must be strictly complied with, unless waived, in order for the justice court to have jurisdiction. See **36A C.J.S. *Forcible Entry and Detainer* § 35 (1961)**, where the textwriter states:

To give the court jurisdiction, a valid and sufficient summons or other process must, . . . be issued and served in the manner provided by statute.

In the present case, the summons was neither in the form nor was it served in the manner provided by our unlawful entry and detainer statute.

Section 11-25-7 requires that a "warrant" be issued to a defendant in an unlawful entry and detainer case and states:

The clerk of the justice court before whom the complaint is made shall thereupon issue a warrant to the following effect:

"The State of Mississippi

"To the Sheriff of _____ County:

"WHEREAS, AB hath made complaint on oath (or affirmation), before me, the clerk of the justice court for the said county, that CD hath unlawfully turned him out of possession (or unlawfully withholds from him the possession) of certain land (here describe it), lying and being in the said county, and hath prayed the possession thereof, this is therefore to command you to summon the said CD to appear at _____ (which shall be at the usual place of holding the justice court of the justice court judge to whom the case is assigned), on the ____ day of _____, before said justice court judge, to answer to the complaint, and have then there this warrant.

"Witness my hand, this _____ day of _____.

EF. Clerk of the Justice Court.

Section 11-25-11 provides the manner in which the warrant is to be served:

The warrant shall be directed to the sheriff or any constable of the proper county, as the case may require, and shall be made returnable on a day certain, *not less than five (5) days no more than twenty (20) days after its date*, and shall be forthwith executed by the proper officer on the defendant, in the same manner as a summons is required to be served, by delivering a copy, and he shall make due return to the justice court judge to whom the case is assigned, at the time and

place herein mentioned, of the manner in which he shall have executed the same.

(emphasis added). In the case *sub judice*, the "summons" was undisputedly served only three days prior to the hearing date, in violation of the five day requirement. Thus, the justice court had no authority or jurisdiction to proceed with an unlawful entry and detainer action against a *pro sedefendant* unless we can conclude that Mattye Whippet waived process. This jurisdictional issue never came up when this action was later tried on its merits because all parties and the court considered it to be an ejectment action. A review of the "summons" which was issued to Ms. Whippet by the justice court clearly shows that it was more akin to the summons required in an ejectment action than to the "warrant" required by section 11-25-7 in an unlawful entry and detainer action. [\(2\)](#)

In summary, applying the appropriate ejectment and unlawful entry and detainer statutes to Ms. Allen's complaint and summons, I cannot agree with the dissent that the action filed by Ms. Allen was one based upon our unlawful entry and detainer statutes. Her complaint was clearly entitled "Declaration of Ejectment," and it substantially conformed to the requirements of the form for ejectment complaints set out in section 11-19-23. Specifically, the form of the declaration in an action for ejectment requires language that the plaintiff has been "wrongfully deprived" of possession of the property in question. Ms. Allen's complaint includes this language. Additionally, according to statute, a summons as opposed to a warrant, must accompany a complaint for ejectment. Ms. Allen's complaint was accompanied by such a summons.

The statutes in regard to unlawful entry and detainer include specific requirements for the issuance of a warrant in connection with an unlawful entry and detainer complaint. These requirements were not met by Ms. Allen. Because our statutes on unlawful entry and detainer must be strictly construed, I cannot agree that Ms. Allen's complaint was essentially an action based upon unlawful entry and detainer rather than what she declared it to be, a "Declaration of Ejectment." Even when looking to the substance of Ms. Allen's complaint, I find that her action was one for ejectment rather than an action based upon unlawful entry and detainer. Thus, I agree with the majority opinion that the justice court was without jurisdiction to adjudicate this action. In absence of such authority, the judgment rendered by the justice court is void, making the circuit court's subsequent judgment null and void as well.

THOMAS, P.J., HINKEBEIN, AND PAYNE, JJ., JOIN THIS SEPARATE WRITTEN OPINION.

McMILLIN, P.J., DISSENTING:

I respectfully disagree with the majority when it makes a *sua sponte* determination that the justice court lacked subject matter jurisdiction of this action--a position taken by neither of the parties before any of the three courts that have now considered the case.

A.

Subject Matter Jurisdiction in Justice Court

Bennie Allen's justice court suit, though unfortunately styled "Declaration of Ejectment," was, on a fair reading of her complaint, an action to try the right to *present possession of*--not title to--the contested property. This is a proceeding over which the justice court has jurisdiction under the provisions of this state's Unlawful Entry and Detainer laws. **Miss. Code Ann. §§ 11-25-1-11-25-31 (1972 & Supp. 1997)**. This long-established justice court remedy is a summary proceeding and can be a very valuable one. It permits a dispossessed property owner such as Allen to try her right to possession in as little as five days as opposed to the inevitably lengthy time required to file suit and obtain a trial date in circuit or chancery court. It seems to me to be unduly harsh, and in fact legal error, to deny Allen the right to pursue this summary possessory remedy in the justice court based solely on her misstatement of the name of her action in the caption of her pleading. I would look to the well-pled facts and prayer for relief, rather than the caption, to determine any dispute over jurisdiction. In my opinion, such an inquiry would support a finding of jurisdiction in this case. The inevitable similarity of an unlawful entry and detainer proceeding to a circuit court ejectment action demonstrates only that the remedies are essentially identical in terms of the relief sought. The scope of inquiry may be greater in a circuit court ejectment action and the relief may have more lasting effect, but, at their core, both actions involve one claiming to be wrongfully out of possession of his lands. Noting the similarities of the actions does nothing to suggest that Allen was improperly pursuing the "wrong" remedy. She claimed in her pleading a right to possession, alleged that Whippet was wrongly keeping her out of possession, and asked the court's assistance in getting back into possession. That is a quintessential claim based on unlawful entry and detainer.

In *Ragan v. Harrell*, **52 Miss. 818 (1876)**, the defense to an unlawful entry and detainer action was "that ejectment is the proper remedy." *Ragan*, **52 Miss. at 822**. This was, in essence, an attack on the justice of the peace's jurisdiction. The supreme court, in finding the justice of the peace had jurisdiction of the case said:

It is not supposed the legislature intended, or did in fact, by the statute involved, confer upon justices of the peace power to adjudicate title to real estate, yet this statute does plainly confer upon them jurisdiction of cases where the right to possession is deduced from an exhibition of title.

***Id.* at 823.**

The majority also errs, it seems to me, when it looks to the defense that Mattye Whippet attempted to raise in the circuit court--adverse possession--rather than the relief sought by Allen in the justice court to determine the jurisdiction question. A defendant cannot defeat the jurisdiction of the court, once it has properly attached, by pleading matters in defense that are beyond the jurisdiction of that court to try. "Jurisdiction is to be determined, as regards the nature of the thing in controversy, by the character of the suit. The defence which may exist has no influence in settling the question of jurisdiction." *Boone v. Poindexter*, **20 Miss. (12 S. & M.) 640, 647 (1849)**.

Neither does the fact that the circuit court exceeded its jurisdiction by trying Whippet's adverse possession claim on appeal give cause to defeat the justice court's previously-existing right to try *possession*. Possession is all the justice court purported to try, and that was an issue it had the absolute authority to try.

B.

Lack of Jurisdiction in the Circuit Court

Having concluded that the justice court had jurisdiction to try the case, I would agree with Allen when she says that the circuit court lacked jurisdiction to consider Whippet's appeal because it was untimely filed. The justice court rendered judgment in favor of Allen on November 30, 1992. Whippet took no action until January 6, 1993, when she filed what amounted to a motion to reconsider. The justice court denied relief on the motion and Whippet filed an appeal with the circuit court. Allen moved to dismiss the appeal as untimely and the circuit court denied the motion without explanation. It would be my opinion that the November 30 judgment became final when Whippet failed to perfect an appeal within ten days of its entry as required by section 11-51-85 of the Mississippi Code of 1972. There is no recognized post-trial motion practice in the justice court. The Mississippi Rules of Civil Procedure governing such matters do not apply to justice court proceedings. *See M.R.C.P. 1*. Thus, I would hold that Whippet's post-judgment motion was a nullity, as was the justice court's order disposing of that motion. The judgment had, by that time, become final. Since timely perfection of an appeal is jurisdictional, the circuit court had no authority to consider the case on the merits. *See In re Estate of Ware v. Capers, 573 So. 2d 773, 774 (Miss. 1990); Duncan v. St. Romain, 569 So. 2d 687, 688 (Miss. 1990)*.

Allen prevailed on the merits in the circuit court after her motion to dismiss was improperly denied. Therefore, but for the majority's *sua sponte* dismissal of the entire proceeding, the circuit court's error in retaining jurisdiction of the case would be harmless. Allen, despite her victory on the merits at the circuit court level, very astutely preserved the jurisdictional ruling as error by raising it in a cross-appeal to this Court. Since our jurisdiction can be no greater than that of the circuit court, it logically follows that Allen's cross-appeal has merit.

C.

Perceived Defects in the Justice Court Summons Issued to Whippet

I respectfully disagree with Judge Herring's concurrence insofar as it states that the deficient form of the process was enough to deprive the justice court of jurisdiction. Process was issued to Whippet and served on her on October 9, 1992. Though the form of the summons may have been improper and the return date two days too soon under the statute, the record is clear that Whippet was not defaulted for failure to appear. Rather, the record shows that a trial on the merits was held in the justice court on November 30--over a month after the return date on the summons. There is no indication that Whippet, during that intervening period (or at any time since, for that matter), raised the issue of the court's jurisdiction over her person because of defects in the form of the process. The justice court's judgment recites that Whippet appeared in person at the trial, and that "[a]fter having considered the testimony and evidence produced in this matter, the Court does hereby rule in favor of the Plaintiff, Bennie C. Allen." We must accept these adjudications as conclusive, since they have not been challenged at any stage of this case. By any standard, this must be seen as a general appearance by Whippet, which constitutes a waiver of alleged defects in the form of the process. In *Beck v. Kersh, 208 Miss. 879, 45 So. 2d 730 (1950)*, the defendant lost a justice court action. The case eventually came before the supreme court, and the court said:

An appeal was taken to the circuit court where appellant [the defendant in justice court] filed a motion to quash the process served upon him prior to the trial in the justice court. The action of the circuit court in overruling that motion is assigned as error. The judgment entered by the justice of the peace shows that both parties appeared, both offered evidence, and both argued the case before entry of judgment. In *Helmer Bros. v. Hastings*, 142 Miss. 403, 107 So. 551, it was held that *where a party appeared in the justice court and defended on the merits he could not on appeal to the circuit court challenge the jurisdiction of the justice of the peace over his person because of any defect in the summons*. We therefore find no merit in the first assignment.

Beck, 45 So. 2d at 731 (emphasis supplied). The fact that Whippet was proceeding *pro se*, though it may inspire sympathy for her, does nothing to lessen the legal effect of her general appearance.

Conclusion

This appeal should be dismissed for lack of jurisdiction because a timely appeal from the justice court was not perfected. The effect of dismissing the appeal would be to leave the justice court judgment undisturbed. That is the proper result since its validity lies beyond the reach of this Court in this proceeding.

BRIDGES, C.J., AND SOUTHWICK, J., JOIN THIS SEPARATE WRITTEN OPINION.

1. "Forcible entry and detainer" is a slightly different action from "unlawful entry and detainer," requiring that a plaintiff have possession of the subject property and thereafter be ousted from the property in question. Pursuant to our statutes in regard to the statutory action of unlawful entry and detainer, it is not required for a plaintiff to have actual possession of the property prior to bringing the action. It is only required that the plaintiff be entitled to possession.

2. The summons issued by the justice court to Mattye Whippet reads as follows:

JUSTICE SUMMONS

STATE OF MISSISSIPPI

TO ANY LAWFUL OFFICER OF SHARKEY COUNTY:

This is to command you to summon Mattie [sic] Whippet to appear before a Justice Court Judge of said County, at the Sharkey County Courthouse, Rolling Fork, Mississippip, [sic] on the 12 day of Oct., 1992, at 3:30 P.M., to answer to the Suite [sic] of Eviction, filed by Bennie C. Allen and have there this writ.