MISSISSIPPI DELINQUENT TAXES

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Authors' Preface

All Chancery Clerks have encountered difficulty with delinquent taxes. Many have been the subject of litigation, reported decisions of higher courts, or opinions of the Attorney General. In the bright light of hindsight, the path seems clear, but in the fog of everyday work, things are rarely well illuminated. The Mississippi Supreme Court, the Mississippi Court of Appeals, and various statutes and other authorities have imposed exceedingly high standards on Chancery Clerks. This is particularly true with respect to the duty to notify record owners and lien holders of the impending maturity of delinquent taxes.

The standards are rightly high because quite often a citizen's most precious possession – her real property – is at stake. Tax sales represent a taking – if not by the government, then at least with the government's urging and blessing and for its ultimate benefit. Thus, it is rightly the job of government to do everything within its power to provide notice and due opportunity to redeem delinquent taxes and avoid forfeiture of title. The job falls to Chancery Clerks, and they are up to the task. It is a high and sacred responsibility.

Recent changes to MISS. CODE ANN. §§ 25-7-21 and 27-43-3 have provided Clerks with increased financial resources to deal with and improve the mechanics of handling delinquent taxes. The aim of this paper is just that – to help Chancery Clerks improve the performance of their delinquent tax duties by thoroughly reviewing them, isolating those that pose the greatest difficulties, and offering suggestions on carrying them out in conformity with the demands of statute and the rulings of our high courts.

Chapter 1.
Mechanics of the Tax Sale Process and its Nature and Purpose.

Section 1.01 Why Do We Have a Tax Sale? At the county government level, taxes fund a number of services, including hospitals, public schools, law enforcement, parks, and road construction and maintenance. When taxes are not paid, county governments do not have the operating funds needed for these programs. The debt owed to the county in unpaid taxes is collected in the tax sale as a result of the money tendered by the tax purchasers. Thus, the tax sale is the means by which county governments generate lost income from delinquent tax payers. Moreover, it is the force by which county governments are guaranteed the collection of ninety-five percent or more of the revenue projected by their tax rolls.

Section 1.02 What Actually Happens at the Sale? The tax sale takes place at the Courthouse or the place designated as the Courthouse by the Board of Supervisors. On the day of the tax sale – which is either the first Monday in April or the last Monday in August – the Tax Collector offers for sale the land of each delinquent taxpayer for the payment of taxes then remaining due and unpaid, together with all fees, penalties and damages provided by law. MISS. CODE ANN. § 27-41-59. The sale will continue from day to day within the hours of 8:30 a.m. and 4:30 p.m. until completed. After the tax sale, the Tax Collector has no further authority to collect that year's taxes. Such taxes must be paid to the Chancery Clerk by means of redemption. Also, the Tax Collector should not collect current year taxes if delinquent taxes are still owed.

Section 1.03 The Amount of Bids. The minimum bid is the amount owed for taxes and fees. A tax sale purchaser may bid more; however, if the parcel is redeemed, the purchaser will only get the amount owed for taxes and fees at the time of the sale and interest since then. The excess or "overbid" will be retained by the county. According to MISS. CODE ANN. § 27-41-77, if a parcel is sold for more than the amount of taxes due and all costs, the Tax Collector reports the excess to the Chancery Clerk and pays it into the County Treasury where it should be held in escrow because, if the parcel is not redeemed by the maturity date, the "owner of the land" may request payment of the overbid. Such request must be made within two years of the expiration of the maturity date. If no request is made within that time frame, the overbid will be retained by the County.

Section 1.04 When There is a Maturity, to Whom is the Overbid to be Paid – the Owner at the Time of the Tax Sale or the Tax Purchaser? Occasionally, when there is a maturity, the tax purchaser will request a refund of his overbid. MISS. CODE ANN. § 27-41-77 says that when there is no redemption and the redemption period has expired, the excess bid amount "shall, upon request of the owner, be paid to such owner." Elsewhere in that code section the words "owner of the land" are used. What about a situation where the tax purchaser has received and recorded a tax deed to the property? Is he then "the owner" and entitled to the overbid amount he paid at the sale two years prior? This question has yet to be clearly answered. However, the OPINION TO GERALD GEX, Docket No. 1997-0150 (March 21, 1997) appears to indicate that the owner at the time of the tax sale rather than the purchaser who received a tax deed is entitled to the excess bid amount. That is, the land owner who "lost" the property gets the benefit of the purchaser's

overbid. The OPINION TO WILLIE L. BAILEY, Docket No. 1997-0736 (November 14, 1997) also lends support to the notion that the word "owner" does not mean "tax purchaser who received a tax deed" but rather "owner at the time of the tax sale." Therefore, until further clarification is received, the tax purchaser should not be refunded excess bid amounts, unless the sale is declared void by the Board or the Court.

The OPINION TO PIETER TEEUWISSEN, Docket No. 2016-00091 (March 25, 2016) sheds more light on the subject, although it involves a convoluted chain of tax sales and maturities. The conclusion supports the view that the record owner at the time of the tax sale in question is entitled to the overbid amount, whether that owner acquired title by prior tax deed or by fee simple ownership.

Section 1.05 When the Sale is Declared Void, the Tax Purchaser can be Refunded the Amount of the Overbid. In the OPINION TO EDDIE R. MYERS, Docket No. 2000-0410 (July 28, 2000), the Attorney General stated that when a tax sale is declared void by the Board or the Court, the county should refund the amount of the excess bid to the tax purchaser.

Section 1.06 The Certified List and the Lien Created Thereby. The Tax Collector will transmit separate certified lists[1] of the lands struck to the state and those sold to individuals to the Chancery Clerk each year on or before the second Monday of May, in the case of an April sale and on or before the second Monday of October, in the case of an August sale. The certified lists will specify to whom the property is assessed, the date of the sale, the amount of taxes for which the sale was made, and each item of cost incident thereto, and, where sold to individuals, the name of the purchaser. The certified lists will vest in the State or in the individual purchaser perfect title to the land sold for taxes, but without the right of possession for the period of, and subject to, the right of redemption. MISS. CODE ANN. § 27-41-79. If the property is redeemed within the two-year maturity period, the tax purchaser has no other interest in the parcel.

Section 1.07 Lands Sold to Individuals vs. Lands Struck to the State. According to MISS. CODE ANN. § 27-41-59, if no one bids the whole amount of taxes and all costs incident to the sale, the Tax Collector must strike the parcel off to the State. According to the Attorney General, perfect title vests in the State on the date the land is struck off to the State, without the right of possession and subject to the equitable right of redemption in the property owner. See OPINION TO KAY PACE, Docket No. 2010-0036 (February 10, 2010). Therefore, once property is struck to the State, it cannot be offered for sale at a subsequent year's tax sale by the County unless it was redeemed in the meantime. When a parcel is struck to the State (often referred to as "sold to the State") and is thereafter sought to be redeemed, all delinquent taxes and current taxes must be paid by the redeemer at the same time. MISS. CODE ANN. § 27-35-63. Indeed, the Attorney General has opined that one redeeming property which has been struck off to the State is

[1]In OPINION TO JACK ALLEN, Docket No. 2014-00065 (February 21, 2014), the Attorney General noted that "[t]here is no requirement that the list be in a particular form, i.e. printed hard copy or electronic," presumably indicating that either format was acceptable. One thing is certain, though: the list must be certified in some form or fashion.

required to pay all accrued taxes since the tax sale. OPINION TO NORMAN MCLEOD, Docket No. 1999-0276 (June 11, 1999). After the redemption period is over, assuming the property is not redeemed, the Secretary of State "shall have charge. . .of the lands forfeited to the state for nonpayment of taxes." MISS. CODE ANN. § 7-11-11.

Section 1.08 Collecting all Accrued Taxes Upon Redemption of Lands Struck to State. Given that MISS. CODE ANN. § 27-35-63 requires the taxpayer to pay all taxes, including current year taxes, at the time of redemption of lands struck to the state, how should the current year taxes be handled? There is a difference of opinion – and of practice – among the various Chancery Clerks in this regard. Some Chancery Clerks (a minority, it seems) require all taxes including current year taxes to be paid to and collected by the Chancery Clerk, and then the current year amounts are remitted to the Tax Collector. A majority of Chancery Clerks, however, collect only the delinquent amounts, and direct the taxpayer to tender separate funds to the Tax Collector in payment of current year taxes. Either method is probably acceptable.

Section 1.09 Effect of a Foreclosure. Liens created by delinquent taxes survive a foreclosure and run with the land. OPINION TO JOSEPH D. NEYMAN, JR., Docket No. 2010-00178 (April 23, 2010); OPINION TO W. BRUCE LEWIS, Docket No. 2014-00370 (October 3, 2014).

Section 1.10 Public Servants are Prevented from Purchasing at Tax Sale in Home County. The Ethics in Government Act, particularly MISS. CODE ANN. § 25-4-105 (3) states that no public servant may be a purchaser at any sale made by "the governmental entity of which he is an officer or employee." Thus, Chancery Clerks and all other county officials and employees are prohibited from purchasing at a tax sale in the county where they serve. This prohibition would likely extend to prohibit such an official or employee from acting on behalf of another company or an LLC, whether he has an ownership interest in that entity or not. See ETHICS ADVISORY OPINION NO. 13-075-E (August 9, 2013)(holding that a county employee may not buy property on behalf of a company at that county's tax sale). The penalty for violating this statute is set forth in MISS. CODE ANN. § 25-4-109 and will be imposed by the Mississippi Ethics Commission. It could include a $10,000 fine and removal from office.

Section 1.11 However, Public Servants may Purchase at Sales in Another County and at Sales in Home County After Retirement. This prohibition discussed in Section 1.10 above does not apply to tax sales in other counties. That is to say, a county employee or official in one county may purchase at a tax sale in another county where he is not an employee or official. ETHICS ADVISORY OPINION NO. 15-023-E (May 8, 2015). Similarly, a former or retired chancery clerk or former or retired county employee may purchase taxes at a sale in the county where he or she was formerly employed. ETHICS ADVISORY OPINION NO. 13-060-E (July 12, 2013).

Section 1.12 Tax Collector may not Exclude Bidders. In OPINION TO JOHN D. SUTTON, Docket No. 20179-0202 (July 21, 2017), the Attorney General stated that "potential bidders of a tax sale may not be limited or excluded" absent specific statutory authority. The opinion may be construed to prevent Tax Collectors from engaging the long-standing practice of allowing owners or family members of owners – as well as prior purchasers of specific parcels – to have the opportunity to buy parcels at the sale prior to offering those parcels to the bidders at large.

Chapter 2.
The Redemption Process

Section 2.01 Who May Redeem? The question often arises, "who may redeem delinquent taxes?" The short answer is – anyone who asserts that he is interested in the property. The issue is not as easy as it first appears because sometimes parties seeking to redeem taxes think that by doing so, or by paying taxes for so many years, they acquire ownership of the property. That is incorrect. A redemption inures to the benefit of the assessed owner no matter by whom it is made - that is, no matter who pays. *Jamison v. Thompson*, 65 Miss. 516, 5 So. 107 (1888). Consequently, it may behoove a Clerk to ask a few questions to determine why a person is seeking to redeem and to explain that the payment of taxes or the redemption of taxes will not create ownership outright. Nevertheless, just about anyone who wants to redeem taxes should be allowed to do so, and the discussion which follows will render an explanation.

Section 2.02 Mississippi Constitution § 79. We begin with Section 79 of the Mississippi Constitution of 1890, which states that the Legislature (a) must establish laws for the sale of all delinquent lands and (b) shall apply "liberal principles in favor of such titles as in sale by execution." The right of redemption from all sales of real estate for the non-payment of taxes "shall exist . . . in favor of owners **and persons interested in** such real estate." (Emphasis added).

Section 2.03 Mississippi Code § 27-45-3. The laws mandated by Section 79 of the state constitution are set forth in Chapter 45 of Title 27 of the Mississippi Code of 1972. In particular,. MISS. CODE ANN. § 27-45-3 deals specifically with who may redeem:

> The owner, or any persons for him with his consent, **or any person interested in the land sold for taxes**, may redeem the same, . . . at any time within two (2) years after the day of sale . . .

Note that both in the statute and in the Constitution, the wording is:

"any person *interested in,*"
– and **not** –
"any person *with an interest in."*

There is a difference. The latter ("with an interest in") is a legal term of art and connotes a legal interest, such as title to the property, partial title to the property, or a lien on the property. It has a relatively narrow application. The former ("interested in"), however – and the way the Constitution and the law actually read – is not a term of art and has very broad application. The Mississippi Supreme Court and the Mississippi Court of Appeals have expounded upon these provisions of law, so there are a number of court decisions which give us even more guidance on this topic. We will examine some of the more helpful ones.

Section 2.04 Liberal Construction. In *Darrington v. Rose*, 128 Miss. 16, 90 So. 632 (1920), the Mississippi Supreme Court held that although there is some slight variation in the language used in the constitutional provision and statute as to who is given the right to redeem, when both are construed together, the right to redeem is as broad in one as in the other. Thus, any owner of land, or person interested therein, is given the right to redeem.

> Among the reasons given by some of the courts for such a liberal construction of statutes of this character is that the purchaser at a tax sale suffers no loss; he buys with full knowledge that his title cannot be absolute until the time for redemption expires, and that, if his title is defeated by redemption, it reverts to the original owner; and if it is redeemed, he is fully reimbursed for his outlay, with interest.

Perret v. Loflin, 814 So. 2d 137, 139 (2002)(quoting *Darrington*, 90 So. at 634). In *Perret*, the Court held that since redemption must be construed liberally in favor of the right to redeem, then a judgment creditor was "a person interested in the land sold for taxes" within the meaning of MISS. CODE ANN. § 27-45-3. *Perret*, 814 So. 2d at 140.

Section 2.05 Liberal Construction in Action. In *Marathon Asset Management, LLC v. Otto*, 977 So. 2d 1241 (Miss. App. 2008), the Court of Appeals upheld the Chancellor's ruling that the redemption period could be extended by an additional sixty days. The facts in this case differ from the above-referenced cases in that the party attempting to redeem in those cases was either the original owner, had acquired a deed, or otherwise had some claim of ownership during the redemption period. In *Marathon*, the Ottos purchased the subject property through a foreclosure sale held on June 4, 2002. However, because of separate court proceedings involving the original owners and the property, the Ottos did not actually obtain legal title to the property until September 9, 2002, two months after the foreclosure sale and twelve days after the expiration of the redemption period. The Chancellor found that at the time of the foreclosure sale, the Ottos stood ready to redeem the property, but could not due to the delay caused by the actions of the original owners. There is an argument that, as the winning bidders at the foreclosure sale, the Ottos were sufficiently "interested in" the property, but their interest was contingent on the Chancellor confirming the sale. The Ottos did not want to pay the taxes (redeem) and then have the Chancellor rule that they did not have title. In other words, prior to the expiration of the redemption period, the Ottos did not hold record title and could not be certain whether or not the Chancellor would confirm the foreclosure sale. Thus, the Court found that since there is no statute that explicitly prohibits the extension of the redemption period and in light of decisions by the Supreme Court which provide for liberal construction of the statute, there was no error in the Chancellor's decision to extend the redemption period. *Marathon*, 977 So. 2d at 1245.

Section 2.06 Clerks Should Allow Almost Anyone to Redeem. Although it seems clear that Mississippi law requires the redeemer to have some connection to the property in question, that connection can certainly be minimal – and it may even be non-existent. Regardless, it is not the duty of the Chancery Clerk to inquire into the nature or sufficiency of the redeemer's connection to, or interest in, the property. Rather, as the *Darrington* court observed, when there is an offer to redeem, "the officer before whom the redemption is sought to be made is not required to try the title of the alleged owner" and Chancery Clerks should not "stop to see whether [the redeemer]

has good title." *Darrington*, 128 Miss. 16 at 26, 90. So. 132 (1920). The requirement of some legal interest or connection was further eroded in *Perret* when the court held that "the exclusion of anyone not meeting the test of *Darrington* [*i.e.* having some legal connection to the land] is an overly restrictive view." *Perret*, 814 So. 2d 137, 139 (Miss. 2002). Given the liberal construction which is applied to the right to redeem, these two cases taken together inescapably lead to the conclusion that Chancery Clerks should never refuse an offer of redemption and should allow virtually anyone to redeem taxes.

Section 2.07 Prior and Subsequent Years' Tax Purchasers. Individuals who purchase delinquent taxes at a sale prior to or after the sale in question should be allowed to redeem if they so desire. They are sufficiently "interested in" the property. OPINION TO THOMAS J. O'BEIRNE, 1991 WL 577532 (April 3, 1991). The fact that a tax purchaser has not requested a tax deed does not prevent him from redeeming subsequent year's taxes – or paying current year's taxes. OPINION TO PARKER H. STEEL, Docket No. 2009-00172 (May 8, 2009).

Section 2.08 Collecting the Proper Amounts, Forms of Payment, and Failure of Payment. It is important that Chancery Clerks collect the proper amount when accepting payment for delinquent taxes. Unlike the Tax Collector, the Chancery Clerk cannot accept partial payments except as a part of a Chapter 13 bankruptcy. (See Section 5.14 below.) Therefore, if payment is not tendered in full, the property cannot be redeemed. Indeed, the Attorney General has opined that when a check for the redemption amount is later dishonored, the redemption is void unless and until the taxpayer redeems the property within the time allowed by law, with sufficient good funds. OPINION TO FRANK EDENS, Docket No. 1993-0837 (November 19, 1993). The tender of a check which is later returned for insufficient funds does not extend the redemption period. The property will mature if the proper amount is not presented prior to the expiration of the redemption period. When insufficient funds are tendered for the payment of delinquent taxes, it may be a good practice for the Clerk to notify the taxpayer immediately and explain that the proper amount must be tendered before the maturity date.

Section 2.09 Tips on Collecting the Proper Amounts. Chancery Clerks can avoid such problems by refusing to accept personal checks as a form of payment. A safer alternative may be to elect to accept cash, certified funds, and credit cards for the payment of delinquent taxes.

Section 2.10 Delinquent Taxes Must be Redeemed Before Current Taxes May be Paid. Under MISS. CODE ANN. § 27-41-31 (2), the Tax Collector is prevented from accepting payments of current year's taxes where delinquent taxes are owed. The only exception to this rule is where a prior or subsequent year's tax purchaser seeks to make payment of current year taxes. He will not be required to redeem off himself – or redeem off any other purchaser – in order to pay current taxes and protect his un-matured interest. OPINION TO BETTY BYRD, 2004 WL 870169 (March 12, 2004).

Section 2.11 The Release – its Contents and Effect. The tax release is a written statement of the amount of the delinquent taxes and all penalties, interests and fees that were paid to redeem the land. Upon payment, the Chancery Clerk is required to execute to the redeeming party a release of all claim or title of the state or tax sale purchaser, by virtue of the tax sale. The release

is the County's certification that the taxes have been paid and the lien has been removed. When the tax release is executed, the necessity for an action to cancel the title of the purchaser at the tax sale no longer exists. *Lee v. Smith*, 189 Miss. 636, 198 So. 296, 298 (1940). The release effectively cancels the title of the state or tax sale purchaser. [See *Appendix A* for an example of a Tax Release.]

Section 2.12 Release Should be Recorded. MISS. CODE ANN. § 27-45-3 contemplates that each release is to be recorded in the land records. The statute says that releases "shall be entitled to be recorded without acknowledgment as deeds are recorded." Further, MISS. CODE ANN. § 89-5-35 provides that "every conveyance . . . by an official . . . shall be indexed by the Clerk;" thus, the each release should be indexed in the general index to deeds, both direct and reverse, as well as in the appropriate sectional or subdivision index.

Section 2.13 A Rare Occurrence – Redemption in Part. According to MISS. CODE ANN. § 27-45-7, a bank, mortgagee, or any person interested in the property, may apply in writing to the Chancery Clerk and request to be allowed to redeem a portion of a tract of land secured by a deed of trust or mortgage. The application must be made prior to the expiration of the maturity date. Once the application is filed, the Chancery Clerk must give ten (10) days' written notice of the application to the owner, the tax sale purchaser, and to all persons holding mortgages or other liens of record on the land. The Chancery Clerk must make notations on the tax sale record indicating the date the notices were mailed, as well as the names and addresses of persons to whom the notices were mailed. The notices must be sent by registered mail, return receipt requested and must designate a time, not less than ten (10) days from the date of the mailing of the notices when the Chancery Clerk will make investigation and ascertain the relative value of that certain portion of the land, as it relates to the value of the entire land sold for taxes, and he will then apportion the taxes on that certain portion of the land accordingly. (On the date appointed, he will conduct a hearing of sorts. This is really more of a job for the Tax Assessor and it is recommended that he or she be consulted as to the best means of assessing a proportionate value to the parcel sought to be carved out and redeemed.)

Once this apportionment is made, the mortgagee or holder of the deed of trust, or any person interested in the property, will be entitled to redeem that part of the land by payment of the sum apportioned by the Chancery Clerk, regardless of the purchaser's bid at the tax sale. The redeemer must pay the sum apportioned to that portion of the property, as well as all costs, damages and interest. The redeemer must also pay all current year taxes that have accrued upon that portion of land since the sale. In other words, the redeemer must pay all delinquent and current year taxes on that certain portion of the parcel, as apportioned by the Chancery Clerk. See MISS. CODE ANN. § 27-45-7. [See *Appendix B* for an example of Notice to Owner of Application To Redeem in Part; See *Appendix C* for an example of Notice to Lienor of Application To Redeem in Part; See *Appendix D* for an example of Notice to Tax Sale Purchaser of Application To Redeem in Part; See *Appendix E* for an example of a Tax Release for a Partial Redemption.]

It is important to note that the need to make a redemption in part rarely occurs. It usually happens when a lien holder who has a mortgage on less than a whole tract of land wants to clear

up the taxes on the part it has a mortgage on – and not on the remainder. It could also arise in the case of heirship property where an heir wants to preserve a portion of the property that he thinks or claims he owns either by devise or by adverse possession.

Section 2.14 Redemption in Part Does not Mean Allowing Partial Payments. A redemption in part should **not** be confused with or mis-interpreted as a partial payment. As stated above, the Chancery Clerk cannot accept partial payments. However, the Chancery Clerk can allow a redemption in part if the steps highlighted above are carefully followed.

Section 2.15 Handling the Settlement in a Redemption in Part. In practice, the settlement of a redemption in part works like this: Following the payment of a redemption in part, the Chancery Clerk will send a redemption check to the tax sale purchaser **for the portion of the property that is redeemed through the redemption in part** including his purchaser's interest prorated based on the proportion. After the redemption in part, the remaining portion of the parcel is left unredeemed. If the remaining portion is redeemed prior to the expiration of the maturity date, the Chancery Clerk will send another redemption check for that remaining portion to the tax sale purchaser. If such portion is not redeemed prior to the expiration of the maturity date, that remaining portion – and the remaining portion only – will mature to the tax sale purchaser.

Chapter 3.
The Settlement Process

Section 3.01 The Settlement Process, Generally. According to MISS. CODE ANN. § 27-45-1, the Chancery Clerk shall make his redemption settlements within twenty (20) days after the end of each month and shall make a complete report thereof to the Board of Supervisors.[2] The Chancery Clerk sends out redemption checks each month to the purchasers of parcels that were redeemed the previous month. The Chancery Clerk must also settle with the County and the Sheriff. When a parcel is redeemed, the Chancery Clerk remits a five percent (5%) damages fee to the County and a $35.00 fee to the Sheriff for each notice served. (An additional $5.00 is payable to the Sheriff for each additional notice served at the same address.) The Chancery Clerk receives a three percent (3%) redemption fee, as well as other fees associated with ascertaining record owner, recording the redemption, and sending notices. Payment of settlement amounts and fees are not to be made until redemption, or, if there is no redemption, upon the recording of a tax deed. OPINION TO JEANNE R. WALKER, 1980 WL 28405 (February 8, 1980).

Section 3.02 The Settlement Process, Continued. The settlement process involves several aspects. First, by reference to all the releases issued by the office for the month, the Chancery Clerk must total all funds received in the redemption of taxes for that month. This aggregation must be done category by category according to how redemption monies are broken out on the releases. Careful records must be kept (usually on computer) reflecting each individual purchaser and how much money each purchaser and other payees are entitled to in the categories set forth

[2]This code section formerly required that the report also be filed with the State Auditor; however, this requirement was deleted from the law during the 2009 legislative session.

in Sections 3.03 – 3.06 below. The aggregate amounts due each purchaser must be sent to each based on the releases issued during the month.

Section 3.03 Money Owed to the Tax Purchaser. Each tax purchaser who has a redemption issued on a parcel he purchased at a tax sale is entitled to the following for each parcel redeemed:

1. The amount of the delinquent tax (Section 27-45-3)
2. The interest from February 1 to date of sale (1%) paid by purchaser (Section 27-41-9)
3. The publisher's fee paid by purchaser (Section 25-7-21(3))
4. The interest at 1.5 % per month from date of sale (Section 27-45-3).

Section 3.04 Money Owed to the County. Then, for each redemption issued during the month, the following amounts must be paid over to the county general fund in the aggregate:

5. Damages at 5% of amount of delinquent tax *without* interest, etc. (Section 27-45-1)
6. Actual postage cost, if redeemed after notice sent to newspaper (Section 27-43-3)
7. Publisher's actual fee per parcel (if paid with county funds) (Section 27-43-3).

Section 3.05 Money Owed to the Sheriff. Next, the following amounts must be paid over to the Sheriff, including, where applicable, the Sheriff of other counties if notices were issued to that Sheriff and actually served by him:

8. Fee for serving first notice (Section 27-43-3)
9. Fee for serving second notice (Section 27-43-3).

Section 3.06 Money Owed to the Chancery Clerk. Finally, the Chancery Clerk must pay himself an aggregate amount representing the totals from the following categories for every redemption issued in the month:

10. Ascertaining record owners (Section 27-43-3)
11. Abstracting the list of lands sold for taxes (Section 25-7-21(4)(a))
12. Issuing first sheriff's notice to owner (Section 27-43-3)
13. Mailing first owner's notice (Section 27-43-3)
14. Issuing second sheriff's notice to owner (Section 27-43-3)
15. Mailing second owner's notice (Section 27-43-3)
16. Issuing each lienor's notice (Section 27-43-11)
17. Publisher's actual fee (if paid by the clerk, not county) (Section 27-43-3)
18. Recording each redemption (Section 27-7-21(4)(d))
19. Abstracting each redemption in section or subdivision index (Section 25-7-21(4)(e))
20. Certifying the amount necessary to redeem (Section 25-7-9(1)(a))
21. Certifying release from sale (Section 25-7-9(1)(a))
22. 3% fee on the total amount necessary to redeem (Section 25-7-21).

Section 3.07 When are the Clerk's Fees to be Collected? The short answer to this question is that the fees listed in Section 3.06 above may be collected when they are earned. It would seem

that the fees set forth in items 11, 18, 19, 20, 21, and 22 should be collected by the Chancery Clerk every time a release is issued – that is, every time a redemption is taken. This is because a Chancery Clerk should always abstract each redemption (11); he should always record each redemption (18); he should always abstract each redemption in the sectional or subdivision index (19); he should always certify the amount necessary to redeem each year's taxes on the face of each release (20); and he should always certify the release from each sale (22). Also, the 3% fee is applicable for every redemption no matter when it is taken. Most of our computer programs and form releases already provide for this.

Section 3.08 Certain Redemption Fees Should be Collected When Issuing a Tax Deed. If the property taxes on a particular piece of property are not redeemed, remember to collect the fees set forth in MISS. CODE ANN. §§ 27-43-3, 27-43-11 **from the purchaser** after maturity when a tax deed is requested. (Many of our computer programs calculate these sums automatically.) These three code sections clearly state that if the taxes are not redeemed, these costs are "to be taxed as part of the cost against the purchaser." In addition, MISS. CODE ANN. § 25-7-21 (4) sets forth the recording fee for a tax deed at $10.00 and carries forward the index entry fee of $1.00. Obviously, some will not be collected if the service for which they are applicable is not performed, e.g., if a 2nd Notice to Owners was not issued, the associated fee would not apply.

Thus, the following fees are to be collected when issuing a tax deed:

(1) Clerk's Fee for Ascertaining Record Owner(s) (**§ 27-43-3**).....$50.00
(2) Clerk's Fee for Issuing 1st Notice to Owners (**§ 27-43-3**).....2.00
(3) Clerk's Fee for Mailing and Notating 1st Notice (**§ 27-43-3**).....1.00
(4) Sheriff's Fee for Serving Notice (**§ 27-43-3**).....35.00
(3) Clerk's Fee for Issuing 2nd Notice to Owners (**§ 27-43-3**).....5.00
(6) Clerk's Fee for Mailing and Notating 2nd Notice (**§ 27-43-3**).....2.50
(7) Sheriff's Fee for Serving 2nd Notice (**§ 27-43-3**).....5.00
(8) Clerk's Fee for Ascertaining Lienors, per lienor identified (**§ 27-43-11**).....7.00
(9) Clerk's Fee for Filing Tax Deed **(§ 25-7-21 (4)(b))**.....10.00
(9) Clerk's Fee for Certifying Tax Deed **(§ 25-7-9 (1)(a))**.....1.00
(10) Clerk's Fee for Indexing Tax Deed **(§ 25-7-21 (4)(c))**.....1.00
(11) Archive Fee for Tax Deed **(§ 25-60-5**).....1.00
(12) Clerk's Fee for Filing 1st Affidavit **(§ 25-7-9 (1)(b)(i))**.....10.00
(14) Clerk's Fee for Certifying 1st Affidavit **(§ 25-7-9 (1)(a))**.....1.00
(15) Clerk's Fee for Indexing 1st Affidavit **(§ 25-7-9 (1)(b)(ii))**.....1.00
(16) Archive Fee for 1st Affidavit **(§ 25-60-5**).....1.00
(17) Clerk's Fee for Filing 2nd Affidavit **(§ 25-7-9 (1)(b)(i))**.....10.00
(18) Clerk's Fee for Certifying 2nd Affidavit **(§ 25-7-9 (1)(a))**.....1.00
(19) Clerk's Fee for Indexing 2nd Affidavit **(§ 25-7-9 (1)(b)(ii))**.....1.00
(20) Archive Fee for 2nd Affidavit **(§ 25-60-5**).....1.00
(21) Actual Cost of Publication (pro rata) (**§ 27-43-3**).....as applicable

Section 3.09 A Special Note About the $50.00 Fee for Ascertaining Record Owner. MISS. CODE ANN. § 27-43-3 establishes the procedure for giving notice to the record owner of property which is about to mature as a result of a tax sale and provides that "[f]or examining the records to ascertain the record owner of the property, the clerk shall be allowed a fee of Fifty Dollars ($50.00)." Importantly, this $50.00 fee "shall be taxed against the owner of said land **if the same is redeemed**, and if not redeemed, then said fees are to be taxed as part of the cost against the purchaser."

In OPINION TO STACEY PICKERING, Docket No. 2012-00135 (July 20, 2012), the Attorney General opined that the Chancery Clerk may perform work required to ascertain record owner **at any time** and "may charge the fee whenever the property is redeemed." The question posed to the Attorney General by the Auditor was whether the $50.00 fee could be applied and collected by Chancery Clerks only during the 180-day period prior to the expiration of the two-year redemption period. The Attorney General made it clear that this was not the case and that there was no time limitation on when the fee can be collected within the redemption period. Indeed, the Attorney General unequivocally stated that

> [t]he clerk's right to charge the $50 fee accrues, according to Section 27-43-3, upon redemption. The statute does not consider when the redemption occurs. The statutory scheme allows for redemption anytime within 2 years of the tax sale . . . Further, the statute does not state when the clerk must perform the work necessary to ascertain who is or will be the record owner . . .

According to the opinion, "the clerk is entitled to the fee whenever the land is redeemed, whether before or after the 180-day period." **However, the Opinion contains one important caveat – "the clerk or his deputy must actually perform the task of examining the records to ascertain the record property owner, in order to earn the fee."**

Section 3.10 Earning the $50.00 Fee for Ascertaining Record Owner. If a Chancery Clerk intends to apply and collect the $50.00 fee for ascertaining record owner prior to 180 days before maturity, then he must be able to demonstrate that he has performed the task of examining the records to determine record owner prior to or contemporaneously with issuing the redemption/ release. One way to demonstrate that such tasks have been performed is to run a quick title update through the general index by owner name and then make a notation on each release as to the results of this examination. Another method would be to check the parcel number in the current year land roll (as opposed to the land roll on which the delinquency arises). This examination necessarily reflects updated records because the land roll is more current. There may be other ways to make this demonstration.

In Madison County, deputy clerks taking redemptions do both. That is, they run the owner's name through the general index and they consult the current year land roll prior to issuing each redemption. The deputy then makes the notation "R/O:" followed by the name of the record owner who is revealed in this examination. Another way to satisfy the requirement of ascertaining record owner before the 180-day period would be to conduct a brief title update in a

similar manner and mail out early notice cards, provided the Chancery Clerk makes a notation of the mailing of the notice on the Tax Sale Record Book. There can be no doubt but that a Chancery Clerk must actually perform the task of ascertaining a current record owner and making a notation of that fact for future reference in order to apply and collect the $50.00 fee.

Section 3.11 A Word About Interest Earned on the Redemption Account. Although there appears to be no specific ruling on the point, the best practice is to treat the interest earned on the Chancery Clerk's redemption account as belonging to the county. Therefore, it should be paid out on a monthly or annual basis to the county treasury. See MISS. CODE ANN. § 27-45-5 and OPINION TO IRL DEAN RHODES, 1980 WL 28408 (March 14, 1980)(both stating that "all such funds are hereby declared to be public funds" and shall be secured "as other public funds are required to be secured by law"). Thus, the interest most likely does **not** belong to the Clerk, nor should it be allowed to simply remain in the account. Rather, the best practice is to make a monthly settlement of interest to the county to coincide with the settlement to purchasers.

Section 3.12 IRS Form 1099 INTs Must be Sent to Purchasers Annually. The IRS requires that interest income over $10.00 paid by a public body to a tax buyer in any given year be reported to the IRS and the tax buyer using Form 1099-INT. Thus, for each tax purchaser to whom interest exceeding $10.00 is paid in any given year, the Chancery Clerk must issue and file a Form 1099-INT.

Section 3.13 The Importance of Balancing the Settlement. The settlement must balance. That is, there must always be enough money in the redemption account to pay out to all purchasers the entirety of what they are owed each month. Most purchasers are sophisticated and keep careful track of their redemptions – and the money to which they are entitled. Any discrepancy will result in a check to a purchaser drawn on the redemption account being returned for insufficient funds, and that development will lead to other, more serious problems – including a visit from the State Auditor.

Section 3.14 Always Reconcile the Redemption Account Bank Statement Each Month. The Chancery Clerk should never write checks totaling more than he or she has in his or her redemption account at the end of the month. The Attorney General has stated that the Chancery Clerk must reconcile his redemption account regularly and keep all actual bank statements and cancelled checks – and he must keep these in his office. OPINION TO H. H. "HERKY" HARDEE, Docket No. 94-0376 (July 13, 1994). Reconciliation means that the aggregate total of all checks issued each month must match exactly to the total of all deposits made during the month plus interest paid by the bank.

Section 3.15 Reconcile the Releases to the Settlement and the Checks Issued Each Month. The totals on the releases issued during the month should also reconcile to the settlement totals and to the total amount of the checks to be issued each month. Accomplishing this task is best illustrated by way of an example. In Madison County, the releases are linked both to the settlement and to the checks issued by the use of a number of reports which are discussed below. These reports are not mandatory but are illustrative of one method for insuring that the redemption account is balanced and reconciled regularly.

A. The Daily Register Report. First off, our office bookkeeper maintains a spreadsheet in Microsoft Excel which is updated daily and which contains columns reflecting the following information for each redemption taken each day:

- the year of the sale
- the release number
- the receipt number
- the tax parcel number
- the amount due to the purchaser (amount he paid at the sale plus his interest)
- the amount of the sheriff's notices if applicable
- the amount of the damages and fees accruing to the county
- the amount of total fees due to the chancery clerk
- the total amount of the release
- the total amount of the redemption deposit for each day.

[See *Appendix F* for the Daily Register Report for the month of September, 2011.] he purpose of this spreadsheet is to account for each release (using the release number) and the funds received for each redemption.

B. The Monthly Computer Summary Report. Shortly after the first of a new month (and always before the 20th of the month), our office bookkeeper will run the monthly computer summary report from our AS400 computer system. Based on the total releases issued, this report shows the exact total amount of money that should have been collected during the month and shows exactly how much money each purchaser should be receiving as a part of the month's settlement. [See *Appendix G* for the Monthly Computer Summary Report for the month of September, 2011.] Our bookkeeper then compares the totals on the Daily Register Report [*Appendix F*] with the totals on the Monthly Computer Summary Report [*Appendix G*], taking into account strike-offs to the state and refunds for any overpayments. The totals should equal.

C. The Settlement and Reconciliation Report. Once the totals are verified as equal, our bookkeeper then performs a formal reconciliation [See *Appendix H* for the Settlement and Reconciliation Report for the month of September, 2011.] This report forces our office to account for even the slightest difference between the total amount of checks to be written and what the Monthly Computer Summary Report [*Appendix G*] indicates should be paid based on the actual releases issued in the computer system. Explanations for any difference must be reflected on this report and may include: interest earned on the account, current year taxes paid to the Tax Collector due to redemptions of strike-offs, any overpayments that may be due to redeemers, and any other variances or anomalies. Once the reconciliation is performed and all discrepancies accounted for, checks are issued:

- to each of the purchasers for the funds discussed in Section 3.03 above;
- to Madison County for the funds discussed in Section 3.04 above
- to Sheriffs of counties serving notices for the funds discussed in Section 3.05 above;

- to the Chancery Clerk for the funds discussed in Section 3.06 above;
- to the redeemers who are due refunds for any overpayments; and
- to Madison County again for the interest earned on the account.

Checks are issued using Quickbooks, and reference is made to each individual release for thorough verification.

D. The Checks Issued Report. Quickbooks then generates a report which reflects the date of each release, the release number, and the amount due to each purchaser for each release. [See *Appendix I* for an example of this Quickbooks report, known as the Checks Issued Report, for the month of September, 2011.] The total on this report should equal the totals on the computerized report.

The Chancery Clerk himself then reviews all of the above-referenced reports, and signs each check personally after satisfying himself that the checks are reconciled to the releases and all discrepancies are accounted for.

Section 3.16 A Helpful Note About an Audit Test. One audit test which is routinely performed on the Chancery Clerk's redemption account is a test to determine whether there are sufficient funds in the account to enable the Clerk to settle with all purchasers and all other parties who are entitled to a fee at any given point in time. A good practice may be to have your accountant or someone else in your office perform this test on a regular, yet random basis in your office just to insure you remain in compliance. Have him or her total up all the redemption amounts due to be paid out for the month to date and have your bank run a monthly statement snapshot showing the bank balance to date. The funds in the bank should be sufficient to cover the total redemption amounts to be paid out.

Section 3.17 A Strong Word of Caution. Without a doubt, issues arising out of the co-mingling of, mis-use of, or outright theft of, delinquent tax monies is the most common act of malfeasance committed by Chancery Clerks. See, e.g., CROCKETT, JAMES R. HANDS IN THE TILL: EMBEZZLEMENT OF PUBLIC MONIES IN MISSISSIPPI (University Press of Mississippi, 2007), pp. 15 – 22 and 39– 50. It cannot be over-emphasized that these funds do not belong to the Chancery Clerk (except for the specific fees noted above and payable only after a correct and proper settlement is done each month). **If you take, borrow from, or co-mingle the money in this account – or if you fail to collect this money in full from a redeemer/taxpayer – or if you pay yourself or your employees or your office expenses out of this account – you will be caught, you will be prosecuted, and you will go to jail.** The funds a Chancery Clerk receives in the redemption of delinquent taxes are funds to be held in trust for the benefit of the purchaser and the county. They do not belong to the Clerk except for the fees as specifically noted above.

Section 3.18 Payment by County When There is a Shortage in the Redemption Account. If the redemption account is short to the extent that monies in the account are insufficient to cover the amounts owed to purchasers, then payments to the purchasers who are due their money "must be made from any available county funds after first being lawfully transferred into the land redemption fund by the board of supervisors." However, in this event, "**the county must seek**

restitution from the . . . clerk on his official bond." OPINION TO WAYNE THOMPSON, Docket No. 2009-00638 (October 28, 2009).

Section 3.19 Some Important Tips. Here are some important tips about how to handle these funds correctly:

- Do not co-mingle these funds with any other funds in the office.
- Always deposit all redemption amounts into a separate account.
- Do not use these funds to cover any shortage in any other account, not even to make payroll!
- Do not "borrow" from these funds – for any reason!
- Do not pay yourself or your employees or pay any expenses out of this account.
- Even the bank charges associated with the costs of checks printed on this account should be paid for out of the General Fee Clearing Account and not from funds in this account.
- Do not take a redemption and fail to **collect and deposit** the entire amount shown on the release.
- Do not take partial payments on a redemption.
- Personally sign all checks drawn on this account. Do not allow deputy clerks to do so except in exigent circumstances – and even then carefully review the checks which were signed by the deputy.
- Tend to this account daily and have others looking over your shoulder.
- Make deposits in this account every day that you take a redemption. Here's the rule – if you take a redemption, you make a deposit.
- Balance and reconcile this account every month.
- Have someone, preferably a trained accountant, perform the audit test for this account at least once a month.

Chapter 4.
The Notification Process

Section 4.01 Identifying and Notifying Record Owners. MISS. CODE ANN. § 27-43-3 requires that when property is sold for unpaid taxes, the property owner must be given notice of his right to redeem the property within 180 days of, but no less than 60 days prior to, the expiration of the redemption period. *Deweese Nelson Realty, Inc. v. Equity Services Co.,* 502 So. 2d 310, 311 (Miss. 1986). This creates a 120- day window of time in which the Chancery Clerk must act. A search must be conducted to determine the physical address of the owner. In the event that a physical address cannot be found, the notice should be sent to a post office address. It is imperative that Chancery Clerks employ effective search methods in order to identify and notify record owners. **The goal is to get actual notice to the record owner and document this for your records.** This means that often, the search is as much about figuring out good contact information on someone connected with the property who is likely to see that the taxes are paid, as it is discovering who owns or has a lien on a parcel. [See *Appendix J* for an example of a Notice to Owners.]

Section 4.01A Owner Noticed Must be Current Owner. In its OPINION TO JOHN HEDGLIN, Docket No. 2015-00422 (February 12, 2016) the Attorney General made it clear that the notice

to owner must be directed to the current owner at the time the notice is issued. This could be different than the owner at the time the taxes in question were assessed. Hence, where a change in ownership is determined, the notice must reflect the name(s) of the new owner(s).

Section 4.02 Identifying and Notifying Lien Holders.[3] MISS. CODE ANN. § 27-43-5 requires Chancery Clerks to examine the records of deeds, mortgages and deeds of trust in the office to determine the names and addresses of all mortgagees, beneficiaries and holders of vendors' liens of each parcel of land sold for taxes. The Chancery Clerk is further required to send notice by certified mail, return receipt requested to all lien holders of record. Section 27-43-5 once required only a six (6) year search, but this limitation was removed by the legislature in 1995. The Attorney General has opined that the Chancery Clerk need not give notice of the maturity of a tax sale to any lien holder whose lien appears to be barred. OPINION TO JOHN MCADAMS, Docket No. 2000-0055 (February 18, 2000). [See *Appendix K* for an example of a Notice to Lienors.]

Section 4.03 Importance of Identifying the Correct Address of Lien Holders. MISS. CODE ANN. § 27-43-7 provides that notice shall be mailed to lienors of record, if any, to the post-office address of the lienors, if such address is set forth in the instrument creating the lien, otherwise to the post-office address of said lienors, if actually known to the Clerk, and if unknown to the Clerk then addressed to "the county site of the said county," which probably means the lienor's local office address. See *Gober v. Chase Manhattan*, 918 So. 2d 840, 845 (Miss. App. 2005) (referencing the words "county site" and alluding to the county seat but otherwise shedding no light on the meaning of the phrase); see also *Curtis v. Carter*, 906 So. 2d 758 (Miss. 2005).

In *Rebuild America, Inc. v. Milner*, 7 So. 3d 972 (Miss. App. 2009), the tax sale was set aside, in part, because of the Chancery Clerk's failure to send the lien holder's notice to the address shown on the recorded instrument. The original deed of trust executed by the Milners in favor of Jim Walter Homes was subsequently assigned seven different times with most of the assignments being to various branches or offices of First Union National Bank. The Clerk mailed the notice to the address for First Union National Bank in Charlotte, North Carolina, which was found in the third assignment. However, at the time the notice was sent, the deed of trust had been assigned for a **seventh** time to First Union with an address in Tampa, Florida. MISS. CODE ANN. § 7-43-7 requires the notice to be mailed to the address set forth in the instrument evidencing the lien.

Thus, the *Milner* court concluded that the notices to lien holders **should have been mailed to the current lien holder at its current address as determined by reference to the most recent assignment or modification of record**. *Milner*, 7 So. 3d at 976. In instances where there are multiple lien holders, notice should be sent to each. A tax sale in which a lien holder fails to receive notice is void as to that lien holder. *Gober v. Chase Manhattan*, 918 So. 2d 840, 843 (Miss. 2005) (quoting *Lamar Life Ins. Co. v. Billups*, 169 So. 32, 35-36 (1936)).

[3]The words "lien holders," "lienors," "mortgagees," and "lenders" are used interchangeably in this paper to describe persons or entities having an encumbrance on a parcel of real property.

Section 4.04 Practical Tips for Complying with Lienor Notice Requirements. On notices to lien holders, Chancery Clerks should be sure the name of the record owner is the name of the borrower. In other words, the notice sent to the lien holder must not simply reference the record owner as it appears on the record of land sold for taxes. Rather, the notice must give the lien holder the correct name of its borrower if different from the record owner. If the parcel has changed hands since the record of lands sold for taxes was created, the lienor's notice must reference the new owner, which is most likely its borrower. It is equally important to send the lienor's notice to the proper address. In the event that the lien has been assigned, be sure to send the notice to the address noted on the last recorded assignment. If no address is listed on the instrument, the notice should be sent to the last address of record for the lienor and to any local address for the lienor. This is probably what the statute means by reference to "the county site of the said county."

Section 4.05 Mechanics of Giving Notice to Owners. Chancery Clerks must give notice to owners through personal service, certified mail, and newspaper publication. MISS. CODE ANN. § 27-43-3. In *Viking Investments, LLC v. Addison Body Shop, Inc.*, 931 So. 2d 679, 681 (Miss. App. 2006), the Chancery Clerk met two of these three statutory notice requirements by mailing a copy of the notice to the owner via certified mail and by publishing the notice in the newspaper within the statutorily-mandated time frame. However, the personal service that the owner received did not meet statutory requirements, since the Sheriff simply posted the notice to the property. The three methods of providing notice are not alternatives. Rather, all three requirements must be met in order for our notification duties to be complete. *Viking Investments*, 931 So. 2d at 681. "Any deviation from the statutorily-mandated procedure renders the sale void." *Id.* Thus, the Court held the tax deed was void because the owner was not given adequate notice of the expiration of the redemption period. The Supreme Court held in *Alexander v. Womack*, 857 So. 2d 59 (Miss. 2003), that both the tax sale and tax deed were void when there was no record that the Chancery Clerk and Sheriff actually served the statutorily-required notice in person. Note, however, that personal service by the Sheriff is not required when the property owner is not a Mississippi resident. See MISS. CODE ANN. § 27-43-3. Nor is personal service required on lien holders.

Section 4.06 All Three Methods of Notice are not Absolute in All Cases. In *Rebuild America v. Norris*, 64 So. 3d 480 (Miss. 2011), the Mississippi Supreme Court granted certiorari from a Court of Appeals decision[4] for the specific purpose of noting that MISS. CODE ANN. § 27-43-3 contemplates cases in which the lack of personal service will not necessarily render the tax sale void. The Court observed that "the requirement of all three methods of notice is not absolute in all cases." *Norris*, 64 So. 3d at 481. When the sheriff and clerk have complied with their duties, the tax deed may be confirmed "even though the owner never received actual notice of the tax sale."

[4] *Rebuild America v. Norris*, 64 So. 3d 499 (Miss. App. 2010).

The holding in *Norris* was relied on by the U. S. Bankruptcy Court for the Northern District of Mississippi in the case of *In re Holyfield*, 2012 WL 1579335 (N. D. Miss. Bnkr. May 4, 2012) rev'd on other grounds, 2014 WL 7739345 (N. D. Miss. September 5, 2014) in which the court found that a notice to owner sent to that owner's residence by certified mail and signed for by the owner's son was sufficient compliance with the requirement of notice by certified mail. The court also complimented Panola County Chancery Clerk Jim Pitcock for his diligent notification efforts.[5]

Section 4.07 Personal Service and the Return. According to MISS. CODE ANN. § 27-43-3, Chancery Clerks must issue notice to the Sheriff, who in turn is required to serve such notice according to RULE 4[6] of the Mississippi Rules of Civil Procedure (MRCP), and make his return. RULE 4 requires **PERSONAL** service[7]. Service of process under this code section is not effective if it is made by a private process server, a city police officer, or even a Constable. Only the Sheriff or his deputy may effectively serve the notice to owners. OPINION TO MARVIN WILLIAMS, 1983 WL 179394 (November 18, 1983); OPINION TO RYAN EVERETT, Docket No. 2016-00338 (July 29, 2016).

Section 4.08 Posting on Property is not Sufficient. Often, if the Sheriff cannot find the owner at the home, he will post the notice to the door of the property. However, our courts have made it clear that this practice is not effective to satisfy the personal service requirement. In the *Viking* case cited above, the Court of Appeals ruled that the Sheriff's posting of notice at the defendant's

[5]On appeal, the District Court reversed and remanded the case on other grounds, finding that a creditor whose lien appeared only in the UCC records (which are not the type of records Chancery Clerks must search) was not entitled to receive a lienor's notice, thus overturning the bankruptcy court's finding that the lack of notice to that creditor caused the tax sale to be invalid. *Holyfield v. Whitehead*, 2014 WL 7739345 (N. D. Miss. September 5, 2014).

[6]RULE 4 of the MISSISSIPPI RULES OF CIVIL PROCEDURE says: "The summons and complaint shall be served together. Service by sheriff or process server shall be made as follows: (1) Upon an individual other than an unmarried infant or a mentally incompetent person, (A) by delivering a copy of the summons to him personally or to an agent authorized by appointment or by law to receive service of process; or (B) if service under subparagraph (1)(A) of this subdivision cannot be made with reasonable diligence, by leaving a copy of the summons and complaint at the defendant's usual place of abode with the defendant's spouse or some other person of the defendant's family above the age of 16 who is willing to receive service, and thereafter mailing a copy of the summons and complaint (by first class mail, postage prepaid) to the person to be served at the place where a copy of the summons and complaint were left. Service of a summons in this manner is deemed complete on the 10th day after such mailing."

[7]One could argue that the language in MISS. CODE ANN. § 27-43-3 could not possibly mean service of process under RULE 4 since this code section was written into law long before the Rules of Civil Procedure were adopted. However, the words of Section 27-43-3 plainly state that "the Sheriff shall be required to serve personal notice as summons issued from the courts are served." And, RULE 4 is the current means for serving summonses in civil court in Mississippi.

business, when the intended recipient could not be located, was clearly not one of the methods for perfecting personal service under RULE 4 and, therefore, the tax sale was held void. *Viking Investments*, 931 So. 2d at 682 (Miss. App. 2006). That is not to say posting should not be done; rather, it is just not sufficient. [See *Appendix L* for an example of a Sheriff's Notice and Return.] However, it may be helpful as a part of a Clerk's acts of further search and inquiry. (See Section 4.20 below.)

Section 4.09 Difficulty Meeting the Personal Service Requirement. Adherence to the personal service requirement is the most difficult means of providing notice to the delinquent taxpayer and is one of the most troublesome aspects of our notification duties. It may be advisable for Chancery Clerks to simplify the process for the Sheriff in order to ensure that service is effective. One way to do this is to copy the return on the back of each notice and submit two copies to the Sheriff. Explain to the deputies serving process that service of the redemption notice is the same as with service of civil process. Also, be sure to review the completed returns immediately after receiving them and check for notices that were served on family members. In the case of *Brown v. Riley*, 580 So. 2d 1234 (Miss.1991), the deputy served the notice on the son of the property owner but failed to mail a copy of the served notice to the owner. The Supreme Court affirmed the Chancellor's dismissal of the tax sale purchaser's complaint to confirm the tax deed because, among other things, there was noncompliance with RULE 4. *Brown*, 580 So. 2d at 1237. Under RULE 4, substituted service is allowed. However, when service is made on a member of the owner's family, the service cannot be effective until a copy of the served notice is sent to the owner, at the place where the notice was left, by first class mail, postage prepaid. Service is then deemed complete after ten (10) days of such mailing.

Section 4.10 More Tips for Personal Service Compliance. What happened to the certified mail notice is a good indicator of whether or not someone is available to be served by the Sheriff. If the owner signed the certified mail notice to owner, but the Sheriff's notice to owner is returned "unable to serve/not found," the Chancery Clerk should reissue the notice and inform the Sheriff that someone signed for the certified mail notice at that same address. This is paramount because before an affidavit can be employed to satisfy the statutory notice requirements, there must be a failure of personal service **AND** a return of the notice by mail as undelivered. *Rebuild America, Inc. v. Estate of Wright*, 27 So. 3d 1202 (Miss. App. 2010) offers an example. In this case, the Chancery Clerk properly served the owner by certified mail and by publication. However, the Sheriff's return stated that the Deputy Sheriff serving process had been unable to locate the owner, and that the deputy had left a copy of the notice attached to a door of a structure on the property. Rebuild America argued that the Sheriff's failure to personally serve the owner was cured by an affidavit executed by a deputy Chancery Clerk. The Court disagreed and affirmed the Chancellor's decision to set aside the tax deed, specifically holding that the Chancery Clerk's affidavit cannot be a substitute for personal service where notice by mail was completed. However, in light of the holdings in *Rebuild America v. Norris* and *In re Holyfield*, discussed above, such an absolute rule might not be upheld in the future.

Section 4.11 Certified Mail Notice Must Be Sent to Each Owner. The notice to owner must be mailed to the record owner's street address or, in absence of a street address, her post office address, and such action should be noted on the tax sale record. MISS. CODE ANN. § 27-43-3. The notice should be sent by registered or certified mail. The Supreme Court has held that

Section 27-43-3 "contemplates that *each owner* shall receive the notice required by statute." *Brown v. Riley*, 580 So. 2d 1234, 1237 (Miss. 1991). Therefore, notices should be sent to each owner individually, even in the case of married couples. They must also be signed for separately.

Section 4.12 Example. In *Rebuild America v. Milner*, the Chancery Clerk sent notice to Robert Milner, but not to his wife, Patricia. The notice was sent by certified mail to "Milner, Robert K ETUX." Although the "et ux" following Mr. Milner's name translates to "and wife," Robert Milner was the only owner to sign for the letter and, therefore, was the only owner to receive notice. *Milner*, 7 So. 3d 972, 975 (Miss. App. 2009). A single notice, attempting to serve multiple owners is fatally defective. If the notice was addressed to Patricia Milner but signed by Robert Milner, as was the case in *Rebuild America, Inc. v. McGee*, 49 So. 3d 499 (Miss. App. 2010, a strict reading of the statute would still render the notice improper. In *McGee*, the Chancery Clerk sent notices by certified mail, addressed individually to Robert McGee and Mattie McGee. Robert McGee signed for each of the notices that were sent to Mattie McGee. The Court held that the notice by mail to Mattie was ineffective because the notices were signed by Robert. The Court of Appeals affirmed the Chancellor's ruling and the tax sale and tax deed were set aside.

Section 4.13 Tips for Certified Mail Compliance. Mailing the notice to the owners and receiving a signed return receipt is not enough. Chancery Clerks should review those return receipts and note whether or not they were signed by the proper party. If the signature of the owner/addressee does not appear on the return receipt card, the Chancery Clerk should re-send the certified mail notice. Chancery Clerks should also compare such receipts with the corresponding Sheriff's returns, as discussed above.

Section 4.14 Publication. Notice should be published in the newspaper of the county or, if no such newspaper, a newspaper having general circulation within the county. The publication should contain the name, address, and legal description of the parcels which are about to mature. The publication must occur at least 45 days prior to the expiration of the redemption period. MISS. CODE ANN. § 27-43-3. In *Brown v. Riley,* referred to above, the Chancery Clerk's published notice which occurred 43 days before the expiration of the maturity period was deemed insufficient to comply with the statutory notice requirements and the tax deed was set aside. *Brown*, 580 So. 2d at 1237 (Miss. 1991).

Section 4.15 Further Search and Inquiry, Part 1. Our notification efforts quite often do not stop at notice by mail, personal service, and publication. What happens when notice by mail is returned undelivered and personal service by the Sheriff is **not** achieved? In that event, MISS. CODE ANN. § 27-43-3 says that the Chancery Clerk "shall make further search and inquiry to ascertain the reputed owner's street and post office address." If, as a result of such efforts, the address – or a better or an additional address(es) – is found, then we should re-issue notice and follow the procedures outlined above for both notice by mail and notice by personal service as to the new address. If this additional notice is again unsuccessful, then the Chancery Clerk "shall file an affidavit to that effect" and set forth in that affidavit all that he did in his effort to find the street and post office address for the property's owner. If the Chancery Clerk is still unable to

ascertain a good address, he must re-double his efforts and then file a **second** affidavit explaining what actions he took in **further** effort to find a good address for the owner. All of this should be noted on the tax sale record, preferably on the certified list of lands sold for taxes itself – but at least in work papers or other documents kept as a permanent record in the Chancery Clerk's office. In the sections that follow, we will briefly explore what the courts have said "further search and inquiry" means.

Section 4.16 Further Search and Inquiry, Part 2. In *O.C. Rush v. Wallace Rentals, LLC,* 837 So. 2d 191 (Miss. 2003), the Mississippi Supreme Court explained what should be considered "further search and inquiry." It is important to note the facts in *Rush.* In *Rush*, the assessed owner did not provide any financial assistance in the purchase of the property and testified that she was not concerned with the assessment of taxes on the property and did not feel accountable for those assessed taxes.

The Court's decision was largely based on the fact that the assessed owner's actions and lack of actions caused the confusion. She allowed a relative to purchase property in her name and made no attempt to correct the confusion caused by an improper address being placed on the quitclaim deed and stated that she did not consider the property at issue to belong to her. The Chancery Clerk filed a form affidavit reciting the nature of the further search and inquiry performed. One item on the list was a search of telephone directories. Although a search of telephone directories was not conducted, a search of several other resources was performed. The affidavit, though, erroneously reflected that the directories were searched. If the telephone directories had been searched, deputy Chancery Clerks would have discovered a current address. The *Rush* court ruled that strict adherence to the checklist was not required, so long as efforts reflected a diligent search and inquiry. Based on what the Court determined was diligent search and inquiry by the Chancery Clerk, and based on the well-reasoned opinion of the Chancellor, the tax sale was confirmed. This is one of the few reported decisions upholding the validity of a tax sale in Mississippi.

Section 4.17 Similar Issue – Different Result. It is important to note that the decision in *Rush* was fact-driven and that cases involving a similar issue would likely yield a different result. *Alexander v. Gross*, 996 So. 2d 822 (Miss. 2008) offers an example. In this case, the Chancery Clerk made phone calls, mailed an additional notice to an alternate address, and even left a message at a nearby convenience store, all as a part of his efforts to serve notice to the record owners. However, an examination of the record owner's 2003 tax receipt would have led the Clerk to the owner's correct post office address. Somehow the Tax Assessor did not pick up the correct address during a reappraisal. The Court held that the Chancery Clerk failed to conduct a diligent search as required by statute, and because of this error it upheld the Chancellor's ruling which set aside the tax sale.

Section 4.18 Clerks Must Be Diligent in Their Search and Inquiry Efforts. *Roach v. Goebel,* 856 So. 2d 711 (Miss. 2003), offers another example of a Chancery Clerk failing to meet the statutory requirement of "further search and inquiry." In this case, a deputy Chancery Clerk testified that even though she executed an affidavit detailing the office's efforts of further search

and inquiry, she had no personal knowledge of any efforts to locate the owner, because such efforts were undertaken by another deputy clerk who was no longer employed with the office. In such affidavit, the deputy clerk claimed that phone directories and land and tax records had been searched for the property owner's most recent address. However, the Court held that the deputy Clerk's repudiation of the affidavit is indicative of the Chancery Clerk's failure to conduct further search and inquiry. The Court further held that a diligent search would have revealed that the owner had filed an application for homestead exemption for the subject property prior to it being sold in the tax sale. A review of that application would have revealed the owner's true address. Based on the foregoing, it is important that Chancery Clerks be diligent in their search and inquiry efforts. It is not enough to perform a cursory search of the land and tax records. Chancery Clerks must strategically and thoughtfully search for the owners of property which has sold in the tax sale. For additional guidance, see OPINION TO JOE MOORE, 1988 WL 249944 (September 12, 1988)(listing a number of suggestions for clerks in carrying out further search and inquiry).

Section 4.19 Suggestion From the Mississippi Supreme Court. The Supreme Court made a suggestion to Chancery Clerks: although not a requirement, "The Chancery Clerks could perhaps consider a 'check list' form affidavit containing a general list of the description of actions normally taken in a search and inquiry, and then merely 'check off' on the list the action actually taken in any particular search and inquiry." *Rush,* 837 So. 2d at 200. In *Reed v. Florimonte,* 987 So. 2d 967 (Miss. 2008), the deputy Clerk did not check any blanks on the face of the affidavit and did not note any sources of her search. Thus, the tax deed was set aside due to the Chancery Clerk's failure to properly document his efforts to locate the property owner. A deputy Clerk testified that she believed that further search and inquiry had been conducted by another deputy Clerk; however, since no such efforts were noted on the form affidavit, the tax sale was held void. [See *Appendix M* for a sample checklist which may be helpful in performing a diligent search and inquiry.]

Section 4.20 Further Search and Inquiry is Required by the U. S. Constitution. In the case of *Jones v. Flowers*, 547 U. S. 220 (2006), the United States Supreme Court weighed in on the matter of further search and inquiry. In striking down the Arkansas delinquent tax notification statute (ARK. CODE ANN. § 26-37-301 (1997)), the Court held that the Due Process Clause of the 14th Amendment requires that when a government agent (such as Chancery Clerks) receive notice from the U. S. Postal Service that a certified mail piece sent in an effort to notify a land owner of the impending loss of his property due to the failure to pay taxes is returned "unclaimed," the government agent "must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Jones*, 547 U. S. 220, at 225. Importantly, in footnote 2 of the opinion, the Court cited with approval MISS. CODE ANN. § 27-43-3, noting that Mississippi's law properly required Chancery Clerks to make "a diligent inquiry to find a property owner's correct address when mailed notice is returned." 547 U. S. 226, at 228, n. 2.

Several facts associated with the *Jones* case are important:

(1) Under the Arkansas statute,

(a) A state government official known as the Commissioner of State Lands, rather than a local official such as a Chancery Clerk, is charged with notifying delinquent property owners of their delinquency and right to redeem.

(b) No acts of further search and inquiry were required after certified mail was sent. In other words, there was no requirement for follow-up notification.

(c) The sale did not occur until two years after the taxes were certified as delinquent, and the redemption period thereafter was just thirty (30) days.

(2) The taxpayer, Gary Jones, went through a divorce in 1993 and paid off his mortgage in 1997. Being accustomed to the mortgage company paying his taxes, and having lost possession but not ownership of the house in the divorce, he did not pay his taxes for the next several years.

The Supreme Court cited the well-known case of *Mullane v. Central Hanover Bank & Trust Co*., 339 U. S. 306 (1950) for the proposition that the level of notice required under the Due Process Clause must be the same as if the government agent was a person truly desiring to get actual notice to the delinquent landowner. Based on the facts before the *Jones* Court, and writing for a five (5) to three (3) majority of the Court, Chief Justice John Roberts concluded:

> We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed. If the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again. No one "desirous of actually informing" the owners would simply shrug his shoulders as the letters disappeared and say "I tried." Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman.

Jones, 547 U. S. 220, at 229. The case thus keenly turned on the fact that the government was informed that its efforts at providing notice to the landowner had failed – that is, it got a response from the Post Office that its certified mail piece was returned "unclaimed."

Responding to a refrain often uttered by Mississippi Chancery Clerks, the Court observed that

> Jones should have been more diligent with respect to his property, no question. People must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property. But before forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking. U. S. CONST., AMDT. 14.

Id. at 234. Although the Court stated that it was not its responsibility to set forth the steps the government should take upon being informed that its certified mail notice did not reach its intended recipient, the Court did offer some suggestions. In its view, the government should:

> (1) "resend the notice by regular mail" since a new owner or occupant "might scrawl the owner's new address on the notice . . ." or might notify the owner directly.
> (2) "post notice on the front door . . ."
> (3) "address otherwise undeliverable mail to 'occupant.'"

Id. at 36. But, the Court concluded that the Constitution does not necessarily require the government to look up new addresses in phone books, search other governmental records, or conduct "an open-ended search for a new address." *Id.* at 37. However, Mississippi's law regarding acts of further search and inquiry does contain such requirements. The bottom line is that when certified mail notice fails and the government (i.e., the Chancery Clerk) becomes aware that the notice has failed, the government "cannot simply ignore that information in proceeding to take and sell [convey via a tax deed in Mississippi's case] the owner's property. . ." *Id.*

Section 4.21 Document, Document, Document. The holdings in each of the aforementioned cases highlight one very important point for Chancery Clerks to remember in their search and inquiry efforts: **DOCUMENTATION** is very important. Chancery Clerks should always remember to document their search efforts. It is not enough to simply provide a checklist. The checklist must reflect the Clerk's actual efforts undertaken to get actual notice to the proper owner and lienor. Clerks must not ignore the obvious, and should always consult the land roll, homestead roll, tax receipts, court records, and land and tax records when attempting to locate owners.

Section 4.22 The Internet and Social Media. In today's world, many people have traded home phone service for cell phones. As a consequence, Chancery Clerks must employ non-traditional methods to locate owners. To this end, the internet is an effective search tool. Google and social media websites, such as Facebook, are also very helpful when searching for those hard-to-find property owners. Many of the internet phone book sites, such as yellowpages.com and whitepages.com, offer the option to search by address. Thus, you can enter the address of the property and possibly discover the phone number to the property, even if the listing is under someone else's name. Subscription services are also available.

Section 4.23 Leave No Stone Unturned. When notices to the owner are continually returned to the Chancery Clerk, the Clerk should search for relatives, neighbors, or others who may know how to contact the owner. If such individuals are located, send them a copy of the notice to owner and a letter requesting their help in locating the owner of the subject property. Be sure that the letter is clear and concise so as not to cause confusion. Each redemption period will bring different challenges in locating certain property owners. [See *Appendix N* for an example of a letter to a family member.]

Section 4.24 Affidavits. MISS. CODE ANN. § 27-43-3 imposes additional requirements upon the Chancery Clerk when further search and inquiry does not reveal the owner's street and post office addresses. The Clerk must "file an affidavit specifying therein the acts of search and inquiry made by him." The Clerk "shall retain" the affidavit "as a permanent record in the office of the clerk and such action shall be noted on the tax sale record." MISS. CODE ANN. § 27-43-3.

Section 4.25 Contents of Affidavits. The Clerk's affidavits should be detailed and narrowly-tailored to the efforts associated with the parcel in question. In the recent case of *High Sierra Tax Sale Properties, LLC v. Daley et al,*188 So.3d 1224 (Miss. App. 2015), the Mississippi Court of Appeals noted that affidavits should contain, among other things, a confirmation of the dates of mailing and serving, and should have a copy of the notices issued to the owners attached.

Section 4.26 Importance of Affidavits. Several Court of Appeals decisions illustrate the importance of preparing and filing the appropriate affidavits. In *Moore v. Marathon Asset Mgmt., LLC.*, 973 So. 2d 1017 (Miss. 2008), the Court overruled a Chancellor and declared a tax sale void, at least in part, because the Chancery Clerk did not file the affidavits required by MISS. CODE ANN. § 27-43-3. Nothing in the record indicated that the Chancery Clerk took any steps beyond mailing the notice and sending the Sheriff to the property to deliver the notice. The Court stated, "the Clerk was required to conduct additional diligent search and inquiry **and** file two affidavits detailing her efforts to locate the owner." *Moore,* 973 So. 2d 1017, 1021. Because there were no affidavits in evidence or noted in the tax sale record, the Court found that it was erroneous for the Chancellor to conclude that the Clerk complied with the statutory notice requirements.

Section 4.27 Affidavits Must Be Filed. In *Lawrence v. Rankin*, 870 So. 2d 673 (Miss. 2004), the Chancery Clerk searched telephone directories, records in the office of the Tax Collector, school index and tax rolls, Tax Assessor records, and court department records, all in an effort to locate the owner after the initial certified mail notice was returned unclaimed. The Clerk sent notice by certified mail on two separate occasions and the notices were returned both times. The Chancery Clerk properly issued notice to the Sheriff with the result being a notation on the back of the notice stating that the owner had relocated. A deputy clerk prepared an affidavit setting forth her efforts. At first glance, it appears that the Chancery Clerk properly carried out his duties as outlined by the statute. However, the Clerk failed to **file** the affidavit. The Court of Appeals held that the failure to file the supporting affidavits rendered the tax deed void.

It is important to note that in *Lawrence*, the Court did not require the Clerk to **record** the affidavit, but simply required that the affidavit be **filed** in the Clerk's office. The Attorney General has opined that the Clerk is not required to **record** the affidavits in the land records. However, any purchaser or interested party, may at their expense, have the affidavit(s) – or certified copies thereof – recorded in the land records upon payment of the appropriate recording fee. OPINION TO JIMMY JONES, Docket No. 1997-0664 (October 17, 1997). In the Madison County Chancery Clerk's office, affidavits are stamped "filed" soon after the Clerk affixes his signature. The affidavits are then placed in a file which consists of the search notes, certified mail receipts, Sheriff's returns, and any returned mail associated with that specific parcel. The

file is kept as a permanent record in the Clerk's office. This would appear to be sufficient to meet the requirements of the *Lawrence* case.[8]

Section 4.28 Making Affidavits Count. According to the Court of Appeals, for affidavits to satisfy the statutory requirements, the Clerk's first affidavit should detail his efforts in the initial search and inquiry; while the second affidavit should detail the Clerk's efforts from any subsequent search and inquiry. The following example may be instructive: If notice is sent by certified mail and returned undeliverable and the sheriff's return is returned not found, the Chancery Clerk is obligated to search and inquire further in an effort to locate an accurate address. That further search should be documented in the Clerk's First Affidavit, specifying the particular acts of search and inquiry. If after that initial search and inquiry, the Clerk is still unable to determine an appropriate address for the record owner, the Clerk's efforts should be documented in the Clerk's Second Affidavit. (See *Roach v. Goebel*, 856 So. 2d at 715.)

Section 4.29 One Affidavit or Two? Although the statute is not entirely clear about requiring two affidavits, the Court of Appeals says that two affidavits are required in most all cases. See *Norwood v. Moore*, 932 So. 2d 63, 66 (Miss. App. 2006) (holding that "failure of the Chancery Clerk to file **the second** affidavit renders a tax deed void" (emphasis added)). What if nothing more can be or is done to get notice to the proper owner? The answer is probably to file a second affidavit anyway, indicating that the Chancery Clerk has redoubled his efforts. All affidavits must be sworn to and properly filed. [See *Appendix O* for an example of a Clerk's First Affidavit & *Appendix P* for an example of a Clerk's Second Affidavit.]

Section 4.30 Documentation for the Record – Notations On the Tax Sale Book. It is important to note all notices sent by mail or served by the Sheriff in the tax sale book. A simple way to do this is to print an additional label when preparing notices for mail. That label can then be affixed in the tax sale book. This should be done when notices are sent to owners and lien holders. In *Pace v. Wedgeworth,* where the Chancery Clerk's notation on record did not show that notice had been sent by registered mail, the tax sale was held void. *Pace v. Wedgeworth*, 20 So. 2d 842 (1945). [See *Appendix Q* for an example of Notations On the Tax Sale Book.]

Section 4.31 Documentation for the Record – Redemption/Maturity Files. The maintenance of redemption files requires strategic organization at the outset of the notification process. The easiest way to do so is to reference each parcel by the page and line number noted in the tax sale book. These numbers can then be noted on each notice and Sheriff's return sent from the Chancery Clerk's office. When a notice is returned, the disposition of the notice should be noted on the corresponding work papers. All of these documents (return receipts, returned mail, Sheriff's returns) must be kept together and maintained so as to allow for easy review, since these documents can be used as reference tools in subsequent redemption periods and may also

[8]In Madison County, the affidavits are recorded in the land records when a tax deed is issued. The recording fee for each affidavit is included in the fee quoted to and collected from the tax purchaser when she requests a tax deed. This seems to be a safe practice – if a tax deed is recorded, so are the affidavits.

be important evidence in a subsequent suit to quiet title or confirm a tax deed. [See *Appendix R* for an example of a Redemption File and *Appendix S* for an example of a Maturity File.]

Section 4.32 In Summary: A Chronicle of Notification Errors. By reference to case law, here are the things that have caused a tax deed to be set aside:

(1) Not notifying a lienor, an owner, or a part owner.

(2) Sending lien holder's notice to an address which is not the most current for that lienor.

(3) Sending lien holder's notice to an address on the original deed of trust where there is an assignment or multiple assignments on record.

(4) Posting notice to owner on property without getting personal service under RULE 4.

(5) Constable, police officer, or private process server serving notice to owner, rather than a deputy sheriff.

(6) Getting substituted service under RULE 4 but failing to mail, by first class mail, the notice to owner to the place where the notice was left.

(7) Sheriff failing to execute a return on the notice to owner.

(8) In the case of joint owners, serving one notice addressed to both.

(9) In the case of joint owners, serving only one owner.

(10) In the case of joint owners, both return receipts signed by only one of the owners.

(11) Publishing notice in the newspaper after the 45th day prior to the expiration of the period of redemption.

(12) Failing to check prior years' tax receipts and homestead exemption applications as a part of the Clerk's further search and inquiry efforts.

(13) Clerk having no personal knowledge of the facts set forth in an Affidavit of Further Search and Inquiry.

(14) Failing to file a First Affidavit of Further Search and Inquiry.

(15) Failing to file a Second Affidavit of Further Search and Inquiry.

(16) Filing an Affidavit which does not properly and correctly document the Clerk's efforts at further search and inquiry.

(17) Failing to list the book and page number of the lienor's deed of trust on the Notice to Lienor.

(18) Failing to list the correct name of the lienor's borrower on the Notice to Lienor.

(19) Failing to list a legal description of the property on the Notice to Lienor.

(20) Failing to give notice to the holder of a future interest where a reversionary event had occurred (even though the Clerk had no way of knowing such).

(21) Filing an undated and unsworn "tax search form" instead of a true Affidavit of Further Search and Inquiry.

(22) Sending a mere duplicate of the Notice to Owners to the lienholder instead of the a separate Notice to Lienors containing the statutorily-required language.

Chapter 5.
Bankruptcy[9]

Section 5.01 In General. Federal law trumps state law, as a general rule. So, where the two are in conflict, the federal law will control. Nowhere in jurisprudence is this fact more evident than in bankruptcy. Indeed, federal law overriding state and other laws (not to mention overriding private contracts) is an essential aspect of bankruptcy and is the only effective way for our nation and our society to have the protections and benefits that federal bankruptcy law affords.

Section 5.02 The Automatic Stay. The bankruptcy code provides for a number of mechanisms to achieve its purposes (which are, namely, to allow for an orderly resolution of a debtor's debts and give the debtor a fresh start). One of the chief mechanisms is the Automatic Stay. This provision of law, codified at 11 U. S. C. § 362, basically says that all actions seeking to enforce liens against a debtor's property are stayed and must not go forward after the date the bankruptcy petition is filed. A willful violation of the Automatic Stay is punishable by fines and sanctions and will result in the violator being held in contempt of court. The potential for violations of the Automatic Stay arises in the context of real property taxation by counties, and in particular, the tax sale of delinquent real property by a county. Thus, it is important that Chancery Clerks have a basic understanding of how bankruptcy law – and the Automatic Stay in particular – impact our actions in the delinquent tax process.

[9]The authors acknowledge the excellent work of Trey Bobinger, Esq., General Counsel to the Mississippi Chancery Clerks' Association, in researching and preparing the material from which Chapter 5 is taken. Most of Section 5.15 below is re-stated verbatim from his work. In addition, Rachel Lenoir, Esq., law clerk to Chief United States Bankruptcy Judge Neal Olack, edited this chapter and offered valuable insight into its important concepts. We thank them both.

Section 5.03 Pre-Petition Tax Sales, Generally. When property is sold for taxes **before** the debtor files his petition in bankruptcy, the tax sale is valid and is not impacted by the bankruptcy. Notices may be issued and a tax deed may be granted to the purchaser if the sale matures. The debtor, a lienor, the bankruptcy trustee, or anyone else "interested in" the property may redeem. The case of *In re Isom*, 342 B.R. 743 (Bkrtcy. N.D. Miss. 2006) made this clear. In that case, the U.S. Bankruptcy Court for the Northern District of Mississippi held that the filing of the bankruptcy petition does not interrupt the tax sale redemption period and that county tax sales that take place before the debtor files for bankruptcy are not prohibited. If the debtor or trustee redeems the property under MISS. CODE ANN. § 27-45-3, then the property becomes property of the bankruptcy estate under 11 U. S. C. § 541, and is thereafter protected by the Automatic Stay. If the debtor or trustee does not redeem the property, then the statutory right of redemption lapses as a matter of state law, and the property does not become part of the debtor's bankruptcy estate. Thus, at maturity, title to the property will vest in the tax sale purchaser and the Chancery Clerk may issue a tax deed as if there were no bankruptcy involved. In other words, if property is sold in a tax sale prior to the filing of the bankruptcy petition, the redemption period is the same as with a normal sale, with one exception which is discussed in the next section.

Section 5.04 60-Day Extension Granted Under § 108(b). The exception referred to in Section 5.03 above involves an extension of the redemption period under certain circumstances. Under another provision of the bankruptcy code, 11 U. S. C. § 108(b)[10], if the petition is filed during the sixty (60) day period right before maturity, the debtor or the trustee receives an extension. This extension is for a period of sixty (60) days from the date of filing the petition. Thus, taking into account the extension created by Section 108(b), the debtor or the trustee may redeem property sold at a pre-petition tax sale either before the end of the two-year redemption period created by MISS. CODE ANN § 27-45-3, or if less than sixty (60) days remains on the statutory redemption period on the date of filing, then before the end of the sixty (60) day extension granted under Section 108(b).

Section 5.05 Post-Petition Tax Sales, Generally. When property is sold for taxes **after** the debtor files his petition in bankruptcy, the situation is different. Here, the tax sale is void as a matter of federal law, and the sale is technically in violation of the Automatic Stay. Said another way, unless the county receives specific relief by the bankruptcy court from the Automatic Stay, once the taxpayer files a petition for relief in bankruptcy, 11 U. S. C. § 362(a) stays all actions to collect a pre-petition debt, all actions to obtain property of the estate or otherwise exercise control over property of the estate, and all actions to enforce liens against property of the estate or the debtor, including the "lien" imposed by a tax sale. Thus, a sale of the debtor's property at a tax sale after the filing of the bankruptcy petition is a violation of the Automatic Stay. See *In re Pierce*, 91 Fed. Appx. 927, 928-30 (5th Cir. 2004) (sale of property at tax sale 30 minutes after bankruptcy filing violated automatic stay).

[10]Section 108(b) says that if state law fixes a period of time within which a debtor must do a certain thing to cure a default and that period has not expired before the date of the filing of the petition, the debtor or trustee may have an additional sixty (60) days to cure the default.

Section 5.06 What to do if a Post-Petition Tax Sale Occurs. Quite often, the Tax Collector will not receive notice of a debtor's bankruptcy filing prior to the tax sale. If this occurs and a sale takes place which is technically in violation of the Automatic Stay, the Chancery Clerk should spring into action. First, inquiry should be made of the Clerk of the local U. S. Bankruptcy Court as to the date of filing and the exact name or names of the filer. This way, a Clerk can confirm that the bankruptcy filing occurred **before** the tax sale and occurred as to property owned by the debtor (and not some other entity or person). If the Chancery Clerk confirms that a post-petition tax sale has occurred, then it is clear that the sale is invalid. If this fact is discovered prior to maturity, the matter should be brought before the Board of Supervisors and the sale declared invalid in light of the bankruptcy. A notation to that effect should be made on the tax sale record. This action should avoid a contempt citation or any other adverse consequence by the bankruptcy court being visited upon the Chancery Clerk or the county. Note that in bringing the matter to the Board, the Board is not taking some action to void the sale; rather, the sale is invalid anyway as a matter of federal law. Bringing the matter to the Board of Supervisors is simply as a means of formally acknowledging and giving notice to the world that the bankruptcy trumped the tax sale and the sale is invalid.

Section 5.07 A Word About Notice. The Automatic Stay is effective whether or not the county actually receives written notice from the bankruptcy court or the debtor concerning the filing of the bankruptcy petition. However, the Automatic Stay does not prevent Chancery Clerks from mailing, serving or publishing notices to owners or lienors regardless of when the bankruptcy petition is filed.

Section 5.08 Beware: Prior Attorney General's Opinions on this Subject are Erroneous. Without reference to the *Isom* case cited above, the Mississippi Attorney General issued several opinions addressing the effects of bankruptcy on a tax sale. In those opinions, the Attorney General stated that if the petition for bankruptcy was filed after the property was sold for taxes, the statutory redemption period was automatically put on hold and was extended for the amount of time that the property owner was in bankruptcy. See OPINION TO LISA YOUNGER NEASE, Docket No. 2006-00258 (June 26, 2006) and OPINION TO WILLIAM H. AUSTIN, JR., 1993 WL 669092 (February 3, 1993). However, the *Isom* court held these views to be incorrect and ruled that the Automatic Stay did not toll the redemption period. As a result, the Attorney General issued his OPINION TO CONRAD MORD, Docket No. 2008-00015 (January 28, 2008) and effectively rescinded the two prior opinions. The Attorney General has recognized that in light of the ruling in *Isom*, a bankruptcy petition filed by a property owner after a tax sale does **not** interrupt the two-year statutory redemption period. Thus, the Automatic Stay in bankruptcy does not toll or otherwise affect the running of the two-year period during which the debtor can redeem the property sold at a pre-petition tax sale. *In re Isom*, 342 B.R. at 745-46.

Section 5.09 Specific Scenarios. Under the following scenarios, may the Chancery Clerk issue a tax deed to a purchaser if the property is not redeemed, without violating the Automatic Stay?

Example 1

02/01/04 - last day to pay 2003 taxes without penalty.
08/26/04 - debtor's property sold at tax sale for nonpayment of 2003 taxes.
09/26/04 - bankruptcy petition is filed.
08/26/06 - sale matures without redemption.

Answer 1

Yes, the Chancery Clerk may issue a tax deed. In this scenario, the property was sold for taxes before the bankruptcy filing, so there was no violation of the Automatic Stay by virtue of the tax sale itself. Also, because the sale was prior to the bankruptcy filing, only the debtor's statutory right of redemption, and not the property itself, becomes property of the bankruptcy estate. See *In re Isom*, 342 B.R. at 745. The Clerk may send the statutory notice to the debtor of the tax delinquency under Section 362(b)(9) of the bankruptcy code.

Regarding the issuance of a tax deed, in this example, as of the date of the bankruptcy filing, twenty-three (23) months remained on the debtor's statutory right of redemption created by MISS. CODE ANN § 27-45-3. Thus, the sixty (60) day extension of the redemption period created by Section 108(b) of the bankruptcy code would **not** be applicable. If neither the debtor nor the trustee exercised the right to redeem the property prior to the expiration of the redemption period, title to the property would vest with the tax sale purchaser, and the Chancery Clerk may issue a tax deed. Note: If this example were different and the bankruptcy petition was filed on a date between July 28, 2006 and August 25, 2006, Section 108(b) of the bankruptcy code would grant the debtor or trustee an additional sixty (60) days from the date the bankruptcy petition was filed to redeem the property.

Example 2

02/01/04 - last day to pay 2003 taxes without penalty.
02/28/04 - bankruptcy petition is filed.
08/26/04 - debtor's property sold at tax sale for nonpayment of 2003 taxes.
08/26/06 - sale matures.

Answer 2

No, the Chancery Clerk should not issue a tax deed. In this example, the bankruptcy petition is filed before the debtor's property is sold for delinquent taxes. Thus, the debtor's property constitutes property of the bankruptcy estate under Section 541 of the bankruptcy code. Since the Automatic Stay is in force on August 26, 2004 (as outlined above), the debtor's property should not be sold. Sale of the property at a tax sale after the bankruptcy case has been filed, and during a time when the Automatic Stay is in effect, is a violation of Section 362(a) of the bankruptcy code. The sale is void unless the bankruptcy court granted the County relief from the Automatic Stay. See *In re Pierce*, 91 Fed. Appx. 927, 928-30 (5th Cir. 2004). No tax deed should issue from the Chancery Clerk.

Example 3

12/01/03 - bankruptcy petition is filed.
02/01/04 - last day to pay 2003 taxes without penalty.
08/26/04 - debtor's property sold at tax sale for nonpayment of 2003 taxes.
08/26/06 - sale matures.

Answer 3

No, the Chancery Clerk should not issue a tax deed. In this example, the taxes for 2003 were due, and the tax lien attached on January 1, 2003. MISS. CODE ANN § 27-35-1. Thus, the taxes would constitute a pre-petition secured claim against the debtor, secured by a tax lien on the property. Assuming the debtor's bankruptcy case is still active and the Automatic Stay is still in force on August 26, 2004, a sale of the debtor's property for nonpayment of the 2003 taxes would violate the Automatic Stay. Any such sale would be void unless the bankruptcy court granted relief from the Automatic Stay. See *In re Pierce*, 91 Fed. Appx. 927, 928-30 (5th Cir. 2004). Because the parcel was sold in violation of the Automatic Stay, and because the underlying sale would be void, the Clerk could not issue a tax deed to the purchaser on August 26, 2006.

Section 5.10 Follow-up Question – Validity of Sale. In which, if any, of the above three examples should the Tax Collector **not** have sold the property at the tax sale? ***Answer:*** Because in examples 2 and 3 the bankruptcy petition was filed prior to the sale of the property for taxes, the property should not have been sold at the tax sale. In those instances, the sale would violate the Automatic Stay and, therefore, would be void. In addition, if the County was on notice of the bankruptcy filing at the time the sale occurred, penalties could be imposed for willful violation of the Automatic Stay.

Section 5.11 Follow-up Question – Notice to the County. Does the Automatic Stay apply even if the debtor fails to give the county notice of the filing of the bankruptcy and/or if county real estate taxes and any delinquent real estate taxes are not listed on the schedule of debts? ***Answer:*** Yes. Section 362 of the U. S. Bankruptcy Code applies in all bankruptcy cases immediately upon the filing of the petition. There is no requirement that any creditor receive notice of the Automatic Stay for it to be applicable. Thus, if a tax sale is conducted after the Petition is filed, which would violate the Automatic Stay, the absence of notice would not in itself validate the tax sale, and the sale would be void. See *In re Pierce*, 91 Fed. Appx. 927, 928-30 (5th Cir. 2004) (tax sale conducted 30 minutes after bankruptcy filing, without notice of the bankruptcy filing, held void). In that same light, the fact that delinquent real estate taxes may not be listed on the debtor's schedules does not in itself prevent the applicability of the Automatic Stay.

Section 5.12 Follow-up Question – Notice to the Tax Collector. Is notice to the Tax Collector sufficient as notice to the Chancery Clerk's office for delinquent tax purposes? ***Answer:*** Yes. Notice to the county Tax Collector likely would suffice as notice to the Chancery Clerk of the bankruptcy filing. However, Section 342(c)(2) of the revised bankruptcy code (effective for cases filed after October 17, 2005) creates specific rules for the debtors to follow in providing notices required under the code. Included among these are rules for where notices must be sent.

Creditors may direct where notices are to be sent by notifying the debtor in at least two communications, within 90 days prior to the date of filing, of the address where all communications should be sent. Thus, if the Chancery Clerk wishes to receive notice of the bankruptcy filing along with the Tax Collector, the Clerk may notify the delinquent taxpayer of the notice address under Section 342(c)(2). In addition, Section 342(f)(1), which was added by the 2005 amendments to the bankruptcy code, gives creditors the right to file a notice in any bankruptcy court designating an address to be used for all chapter 7 and chapter 13 cases in all courts or in particularly designated courts. Beginning no later than 30 days after such a notice is filed, all notices to the creditor that are required to be provided by the designated courts in such cases must be provided at the address in the notice filed under section 342(f), unless a notice has been filed under section 342(e) requesting a different address to be used in a particular case. Thus, the county may, if it desires, designate one individual to receive all notices in bankruptcy cases affecting the county as a creditor, and file that designation with the Court. Thereafter, the court will provide all notices in cases where the county is listed as a creditor to that address.

Section 5.13 Follow-up Question – Penalties, Interest, and Fees. If the Tax Collector has submitted a notice of claim for the then-current taxes which have now become delinquent, must the Chancery Clerk submit a separate notice to cover the interest, penalties and fees associated with the delinquency? ***Answer:*** Probably. If the Tax Collector has filed a Proof of Claim in the bankruptcy case that identifies the amount of taxes, but does not include the additional statutory interest, penalties, fees and the like, the Clerk should file an Amended Proof of Claim on behalf of the county asserting these amounts before the deadline set by the bankruptcy court to file Proofs of Claim. Clerks should secure the services of the bankruptcy attorney. As a general rule, a creditor can amend an earlier-filed Proof of Claim so long as the amendment does not change the nature of the claim. The Tax Collector would be well advised in this scenario when the original Proof of Claim is filed to include language putting the debtor and trustee on notice that additional interest, fees and/or penalties may accrue on the claim if the taxes are not paid as required by law, and reserve the right to amend the Proof of Claim to state any such amounts that may arise in the future.

Section 5.14 Follow-up Question – Partial Payments. Must the Chancery Clerk accept partial payments of delinquent taxes during the bankruptcy? This is precluded under state law. Does the bankruptcy law require the Clerk to do so? ***Answer:*** Yes. Under 11 U. S. C. § 1322 of the bankruptcy code, an individual debtor who files a Chapter 13 bankruptcy must file a Chapter 13 Plan that provides for the payment of debts over a period of time ranging from 3 years to 5 years. Section 1322(b)(3) permits the debtor to cure defaults as part of the Plan. Section 1125 of the code includes similar provisions as it relates to Chapter 11 debtors. Once the Plan is filed, it is submitted to all creditors to review and, if appropriate, to file objections related to the treatment of claims under the Plan. If the Plan provides for partial payments over time to cure the default, the county will be bound by the Plan once it is confirmed. If the Plan does not provide for payment of the full amount of the county's claim, the county should object to the Plan. The Mississippi Attorney General concurred in the view that in Chapter 13 cases, Chancery Clerks must accept partial payments as a part of a bankruptcy workout or re-organization. See OPINION TO WILLIAM WESSLER, Docket No. 2010-00625 (November 15, 2010)

Section 5.15 In Summary – Bankruptcy-at-a-Glance. In bullet-point form, here are the salient points about bankruptcy for Chancery Clerks:

(a) **Tax Rolls.** The annual assessment of taxes does not violate the Automatic Stay, no matter when the bankruptcy petition is filed and no matter when the taxes are assessed.

(b) **Notices to Owners.** Mailing, serving and/or publishing a notice to owners and a notice to creditors does not violate the Automatic Stay.

(c) **Pre-petition Taxes.** Taxes which were assessed before the filing of the bankruptcy petition are valid and are not discharge-able in bankruptcy.

(d) **Pre-petition Tax Sales.** Tax sales which take place **before** the filing of the bankruptcy petition are valid and the debtor or the Trustee may redeem the taxes during the redemption period.

(e) **Post-petition Tax Sales.** However, tax sales which take place **after** the filing of the bankruptcy petition are in violation of the Automatic Stay and are void as a matter of federal law.

(f) **Tax Deeds – OK.** A Chancery Clerk **should** issue a tax deed to a tax purchaser at maturity if the tax sale occurred **before** a bankruptcy petition is filed.

(g) **Tax Deeds – NOT OK.** However, a Chancery Clerk **should not** issue a tax deed to a tax purchaser at maturity if the tax sale occurred **after** a bankruptcy petition was filed.

(h) **Extension.** If the bankruptcy petition is filed within the sixty (60) day period prior to maturity, bankruptcy law gives the debtor or trustee an extension of time to redeem calculated on the basis of an additional sixty (60) days from the date of the petition.

(i) **Lack of Notice.** The Automatic Stay is effective even if the county or the Chancery Clerk's office did not receive notice of the filing of a bankruptcy petition.

(j) **Notice of the Petition.** Notice to the Tax Collector is effective as notice to the County and the Chancery Clerk. Effective communication by the Chancery Clerk with the Tax Collector is imperative.

(k) **Partial Payments.** A debtor in a Chapter 11 or 13 bankruptcy may be allowed to make partial payments of his or her delinquent taxes over a long period of time; so, Chancery Clerks must be prepared to accept such partial payments and note the tax sale record accordingly.

Chapter 6.
Void Tax Sales

Section 6.01 Through the Board of Supervisors. During the redemption period, the Board of Supervisors may, by resolution spread on the minutes, declare a tax sale void if facts are presented that show that the sale should have never taken place. There appears to be conflicting opinions on whether the Board of Supervisors has the authority to void or set aside the tax deed after maturity and after the period for redemption has expired. (Compare OPINION TO PAULA S. YANCEY, Docket No. 2000-310 (July 14, 2000)(saying Board may void sales after maturity and even after a tax deed) with OPINION TO H. H. "HERKY" HARDEE, Docket No. 1995-236 (June 28, 1995)(saying only a court of competent jurisdiction may set aside a tax deed). The answer may be that the Board of Supervisors can **declare the underlying sale void**, but **setting aside the tax deed** is reserved for the courts.

In OPINION TO DAVID B. MILLER, Docket No. 2015-00231 (August 7, 2015), the Attorney General clarified the apparent conflict in the YANCEY and HARDEE opinions, noting that –

- "a board of supervisors may not void a tax sale after the redemption period has run;" and
- "supervisors cannot void tax deeds."

The OPINION TO SCOTT F. SLOVER, Docket No. 2015-00384 (November 13, 2015) is to the same effect regarding the inability of the board of supervisors to void a tax sale after maturity.

Section 6.02 Through the Chancery Court. The Chancery Court of the county where the tax sale was held is the proper venue for parties seeking to confirm title in property acquired through such tax sale. Whether or not the Chancery Clerk and Sheriff adhered to the statutory notice requirements is a determining factor for Chancellors when deciding whether to confirm or set aside a tax deed. The Chancery Clerk's records will play an important role in the Chancellor's decision. Thus, Chancery Clerks should remember that their work product may be put on display in Chancery Court and should prepare their files accordingly. A Chancellor's decision will not be disturbed unless the decision was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *Bell v. Parker*, 563 So. 2d 594, 596-597 (Miss. 1990).

Section 6.03 The Chancery Clerk has NO Power to Void a Tax Sale. The power to declare a tax sale void is reserved only for the Chancery Court and to the Board of Supervisors as noted above. See OPINION TO KENT E. SMITH, Docket No. 2010-00390 (July 23, 2010)(noting that even where the failure to give notice is obvious and clear to the Clerk, she may not wipe the sale away).

Section 6.04 16th Section Leasehold Interests. Contrary to popular belief, 16th section lands are subject to tax sales as to the leasehold interest only. MISS. CODE ANN. § 29-3-71 states that once under lease, "Sixteenth section lands . . . shall be liable . . . to be taxed as other lands are taxed during the continuance of the lease, but in case of sale thereof for taxes, only the title of the lessee . . . shall pass by the sale." See also, MISS. CODE ANN. § 27-35-71. The OPINION TO DAVID B. MILLER cited in Section 6.01 above made clear that sales of 16th section lands for taxes are not

void simply because they are 16th section lands; rather, there must be some other defect in the sale to render it void. Even provisions in leases that automatically terminate the leasehold if the lessee fails to pay the taxes do not, alone, render the tax sales of such leaseholds void. At maturity, the tax purchaser gains the leasehold, that is the right of possession of the land for the duration of the lease. In other words, he obtains the remainder of the lease. According to the MILLER opinion, if the lease has been terminated by the school board prior to maturity, there may remain nothing for the tax purchaser to obtain. Thus, the doctrine of *caveat emptor* applies to the tax purchaser such that he may not receive anything at all.

Section 6.05 Specific Examples of Void Sales. There are many instances when a tax sale is void. A few examples have come to light, and the following is a good list, but probably not exhaustive:

(1) Taxes which have previously matured to the State of Mississippi are void. OPINION TO JIM WILKINSON, Docket No. 1995-0541 (August 23, 1995).

(2) Taxes which have sold in a tax sale after a bankruptcy is filed, such sale is void. *In re Pierce*, 91 Fed. Appx. 927, 928-30 (5th Cir. 2004).

(3) Taxes which sold on property which is later acquired by a public body are void. OPINION TO ROBERT W. LAWRENCE, Docket No. 2009-0712 (January 20, 2010). This would include properties acquired by counties; cities; the State of Mississippi and its agencies such as MDOT; the United States of America and its agencies; a public water district; a school district; etc. The sale is void even though the public body acquired title well after the taxes were assessed and well after the sale, but likely not after maturity.

(4) Taxes assessed on un-leased 16th section property are likely void, as are such taxes sold on 16th section property where the lease has expired or been terminated by the school district prior to the sale. OPINION TO BENJAMIN E. GRIFFITH, 1991 WL 578105 (November 27, 1991).

(5) Taxes which have been erroneously assessed to an exempt entity are void. OPINION TO PAULA S. YANCEY, Docket No. 2000-0388 (August 4, 2000).

(6) A number of authorities reflect that the clear failure of the Chancery Clerk to give notice to an owner or lienor of record will render the sale void. See, e.g., OPINION TO JIM BECKETT, Docket No. 2008-0658 (December 30, 2008).

(7) Taxes which have been assessed at full tax rate and sold at tax sales when the land owner was entitled to a 100% Disabled American Veteran's tax exemption and the exemption was erroneously not applied by the Tax Assessor. OPINION TO SCOTT F. SLOVER, Docket No. 20015-00139 (May 29, 2015).

Section 6.06 Void Tax Sales: What Should be Done? When a tax sale is declared void by the Board of Supervisors, the tax purchaser is entitled to a refund of the amount he paid at the sale inclusive of interest up to the date of sale but not interest since the date of sale. OPINION TO RONNY SMITH, Docket No. 97-0319 (June 20, 1997). The Board should make a finding that the sale is void and spread the same upon its minutes. A notation and reference to the Book and Page of the Board Minutes where the finding is made or the order is entered should be made on the tax sale book and possibly elsewhere in the land records. When requested by the tax purchaser, the refund should be issued by the Tax Collector pursuant to MISS. CODE ANN. § 27-73-7 and her next month's settlement shorted such that the school district and other special funds can bear their proportionate share of the refund burden. At least one Attorney General's Opinion has determined that the amount of any overbid should also be refunded to the purchaser when a sale is declared void. OPINION TO EDDIE MYERS, Docket No. 2000-0410 (August 4, 2000).

Section 6.07 Void Tax Sales: Lands Struck to the State. Where it appears that the validity of a sale or strike off to the state is in question, MISS. CODE ANN § 29-1-29 states that the Chancery Clerk should report the same to the Attorney General. The Attorney General will investigate, and, if he determines that the strike off/sale to the state is void, "he shall so notify the chancery clerk in writing, and the said clerk shall strike such land from the list of lands sold to the state . . ." The Chancery Clerk must then report the land to the Board of Supervisors for a new assessment or for a resale. The Secretary of State may also declare sales to the state void and notify the Chancery Clerk who shall mark the tax sale record book accordingly. MISS CODE ANN. § 29-1-31.

Section 6.08 A Word About Actions by the Chancery Court. When a tax deed is set aside or declared void by a Chancery Court, the Chancellor may award the tax purchaser damages as discussed in Sections 9.07and 9.13, below.

Section 6.09 A Note About Refunds. In the case of void sales, any refund should be made only upon demand made by the tax purchaser. OPINION TO LATAH P. HOLLOWAY, Docket No. 1996-0649 (September 20, 1996); and OPINION TO MARTHA MARTIN, 1992 WL 614571 (February 27, 1992). Although it may be a good practice to notify the purchaser anytime the Board declares a sale void, given the strong application of the doctrine of *caveat emptor* in connection with tax purchases, the burden is on the purchaser to check the records for any void sales. There seems to be no duty on the Chancery Clerk to advise the purchaser of the Board's finding. Moreover, the refund request must be made "within the three year [general] statute of limitations" or it will not be payable, citing MISS. CODE ANN. § 15-1-49. OPINION TO PAULA S. YANCEY, Docket No. 2000-0310 (July 14, 2000). This probably means three years from the date the sale matured, although if the sale is declared void prior to maturity, it may mean three years from the date the Board of Supervisors declared it so publicly on its minutes.

Section 6.10 Circumstances in Which Sales Appear to be Void but are Not. Many taxpayers erroneously believe that the tax sale of their property is void because they never received a tax "bill" from the Tax Collector. This is usually the case when property is conveyed from one owner to another and the closing is late in the year. At closing, the taxes are pro-rated between the

buyer and seller on the HUD-1 which gives the impression that the taxes were taken care of. However, due to the time of year, those taxes were not capable of being paid because they had not been finally assessed by the Board of Supervisors. The tax "bill" is mailed to the previous owner who may or may not forward the "bill" to the new owner. The new owner may believe that the taxes have been paid because of the pro-ration at closing and may have no idea that the property sold in the tax sale until he receives a notice from the Chancery Clerk months or years later. In some cases, the owner is well aware that the property has sold in the tax sale, but believes that a failure by the Tax Collector to send a tax "bill" voids the sale. Another misconception is that if there is an error in the assessment, the tax sale is automatically void. This is simply untrue. Taxpayers may question the assessment of their property at the time of equalization. If the taxpayer cannot come to a satisfactory conclusion with the Tax Assessor and the Board of Supervisors, the taxpayer may present his argument to the appropriate Court. However, the taxpayer cannot simply claim that the alleged valuation or assessment error automatically voids the sale.

Chapter 7.
Homestead Chargebacks

Section 7.01 Homestead Chargebacks, Generally. MISS. CODE ANN. § 27-33-37(l) provides that when an application for homestead exemption has been finally rejected by the Mississippi State Tax Commission, the Board of Supervisors **shall** order the Tax Collector "to reassess, and list as subject to all taxes" the property described in the homestead exemption application. The additional taxes due as a result of this reassessment are due and payable by February 1 **of the following year**. If the additional taxes are not paid, the Tax Collector is directed to sell the property for the additional taxes at the next delinquent tax sale. If, however, a bona fide purchaser for value without notice of such reassessment has purchased the property or a bona fide encumbrancer for value without notice of the reassessment has encumbered the property, then the reassessment does not take affect and does not become a lien on the property unless, prior to such purchase or encumbrancing, a notice of rejection of the application of homestead exemption is recorded in the land records. The recording of the notice of rejection gives constructive notice of the reassessment to future purchasers and encumbrancers.

The Attorney General has issued an opinion that is instructive on this matter. In OPINION TO KENNETH D. HARMON, Docket No. 2006-480 (September 29, 2006), the Attorney General explained that the lien for additional taxes due to a rejection of the homestead exemption application will not attach to the property or impose liability on the new owner, as long as the new owner is a bona fide purchaser for value and without notice of the rejection. The Attorney General further opined that the protection of the new owner, who is a bona fide purchaser for value and without notice of the lien, extends to all subsequent purchasers, even if such purchasers have notice of the rejection. (See *Appendix T* for an example of a recorded Notice of Rejection.)

Section 7.02 Example. Matthew's homestead application is rejected. Matthew conveys the property to Mark before the notice of rejection is filed. Therefore, Mark is a bona fide purchaser for value without notice of the rejection. After the filing of the notice of rejection, Mark conveys

the property to Luke. Based on the Attorney General's Opinion and the statute, Luke stands in the shoes of Mark and qualifies as a bona fide purchaser for value and without notice. The homestead chargeback would not be applicable to either Mark or Luke. If Luke conveys the property to John, the chargeback would not apply to him, either, even if the notice of the chargeback was recorded before either Luke or John acquired title Because it was not recorded before the first change of ownership, the chargeback does not run with the land. It is merely a personal liability of Matthew's. OPINION TO KENNETH D. HARMON, Docket No. 2006-480 (September 29, 2006).

Section 7.03 The Attorney General's View On Homestead Chargebacks. Indeed, the Attorney General has issued an opinion stating that once an application by the State Tax Commission has been rejected, "the board shall order the tax collector to reassess the subject property and to proceed with collection efforts including if necessary, proceeding to sell the property for nonpayment of the additional taxes in the same manner and in the same time other property is sold for the current year's taxes." OPINION TO BILLY COOPER, Docket No. 1987-582 (October 5, 1987). Further, the Attorney General stated, "[i]f then the homestead application is finally disallowed, and the reassessment for additional taxes completed, the property would be subject to sale for nonpayment of the additional tax at the tax sale immediately following February 1 of the year following that in which notice to make the reassessment is issued."

Section 7.04 No Difference in the Collection of Homestead Chargebacks. Finally, MISS. CODE ANN. § 27-33-51(d) states that the Tax Collector "shall collect all taxes due to the extent required by this article; and it shall be his duty to collect said taxes, including additional taxes as provided by [the homestead disallowance], by sale of the property in the manner provided by law in the case of other real property, and by any other method [allowed] by law for the collection of taxes levied against real property." Based on a plain reading of the foregoing statutes and the Attorney General's opinion, for delinquent tax purposes, the Tax Collector should treat the chargeback from a disallowed homestead exemption in the same manner as regular ad valorem taxes. Thus, after the two-year statutory period of redemption expires, the Chancery Clerk shall, on demand, execute tax deeds to individuals who purchased such chargebacks at the tax sale.

Chapter 8.
Maturity

Section 8.01 What is Maturity and Why do we Have it? When property is sold for unpaid taxes, the property owner has a right to redeem it **within two years after the day of the sale.** MISS. CODE ANN. §27-45-3. Thus, the maturity date signals the expiration of the period of redemption. Parcels may be redeemed until the close of business on the day of maturity.

Section 8.02 Two Years From When? The redemption period ends – or forecloses – at 5:01 pm on the precise, two-year anniversary date of the tax sale. Thus, property which sold at the August 26, 1998 tax sale matured at 5:01 pm on August 26, 2000, regardless of whether the latter date is the last Monday of August or not. OPINION TO JIMMY JONES, Docket No. 97-0664 (October 17, 1997).

Section 8.03 Redemption After Maturity? The Saga of the Postmark. The postmark is a determining factor in deciding whether or not to allow redemption after maturity. As discussed above, long-standing case law indicates that when it is doubtful whether one should be allowed to redeem, the doubt should be resolved in favor of allowing the redemption. *Darrington v. Rose*, 128 Miss. 16, 25 (Miss. 1922); *Perret v. Loflin*, 814 So. 2d 137, 140 (Miss. 2002). It follows, then, that when a payment is mailed for the proper amount and in an envelope bearing a postmark dated on or before the maturity date, the taxpayer should be allowed to redeem. OPINION TO SHEILA CRAWFORD, Docket No. 97-0584 (September 19, 1997). Thus, it is a good practice to check the mail carefully for several days after the maturity date and save the envelope for any late-received redemption payments. If the postmark reflects the date of maturity or a date prior thereto, redeem the taxes.

Section 8.04 Tax Deeds. If there is no redemption, MISS. CODE ANN § 27-45-23 provides that upon demand, the Chancery Clerk shall execute a tax deed. *Brown v. Riley*, 580 So. 2d at 1235 (Miss. 1991). The tax deed evidences that the period of redemption has expired and that the land was not redeemed. The purchaser may request a tax deed at any time after a tax sale has matured. It is manifest from the statute that it was not the legislative intent to permit a mere formal error in the execution of a tax deed to frustrate the entire process. Those grounds specifically enumerated in the statute for invalidation of a tax deed must be considered exclusive, and therefore, negate any suggestion that a defect or informality in the mode of execution renders the instrument void. *Stark v. Stark*, 244 So. 2d 13 (Miss. 1971).

In the case of *Merritt v. Magnolia Federal Bank for Sav.*, 573 So. 2d 746 (Miss. 1990), the Court held that the Chancery Clerk did not have the legal authority to execute a tax deed on property where the creditor, who was responsible for paying the taxes and was ready and willing to pay the cost of redemption, would have paid such if the Clerk had not erroneously informed the creditor that the taxes had already been redeemed. [See *Appendix U* for a Tax Deed example.]

Section 8.05 Effect of Tax Deeds on Existing Deeds of Trusts and Other Liens. Some encumbrances may survive a tax deed. Easements do. *Hearn v. Autumn Woods Office Park Property Owners Association*, 757 So. 2d 155 (Miss. 1999). But mortgages and deeds of trust likely do not, assuming the bank/mortgagee has adequate notice of the running of the redemption period. OPINION TO TOMMY D. CADLE, Docket No. 2010-0305 (June 11, 2010). Further, as noted in Section 1.09 above, the lien created by the delinquent taxes survives a foreclosure of a deed of trust and "runs with the land" again assuming adequate notice was given to the lien holder of record. OPINION TO JOSEPH D. NEYMAN, JR., Docket No. 2010-00178 (April 23, 2010); OPINION TO W. BRUCE LEWIS, Docket No. 2014-00370 (October 3, 2014).

Section 8.06 Nature and Effect of Garbage Fee Liens. MISS. CODE ANN § 19-5-22 states that the amount of a delinquent garbage fee "shall be a lien upon the real property" of the person to whom it is assessed. However, it also states that no real property shall be sold to satisfy this lien. Thus, garbage fee liens should not be put through the tax sale – and if they are, the sale is likely void. This lien does not run with the land; therefore, the sale of the *ad valorem* taxes of a parcel on which a garbage lien has been placed by a governmental entity does not result in the garbage lien "flow[ing] through the tax sale to the tax purchaser." Rather, a garbage lien is a personal liability of the previous owner and is enforceable elsewhere in the statute whereby the Tax

Collector is prevented from issuing a car tag to anyone with a delinquent garbage assessment. OPINION TO JOSEPH M. SHEPARD, Docket No. 2017-00098 (April 21, 2017)

Section 8.07 Myth #1 – Tax Purchaser Must Buy the Taxes Two or Three Years in a Row Before he may Receive a Tax Deed. This is false. Some tax purchasers and others involved in the delinquent tax process mistakenly believe that in order for a purchaser to secure a tax deed, the purchaser must have purchased delinquent taxes on the same parcel two or three years in a row. Although a tax purchaser may in fact be able to purchase the same property at the tax sale two or three years in a row, this is not a requirement for the issuance of a tax deed.[11] All that must occur for a Chancery Clerk to issue a tax deed is a maturity in the tax purchaser for one year's taxes.

Section 8.08 Myth #2 – A Tax Purchaser Who Buys Taxes on the Same Property at a Tax Sale Three Years in a Row is Entitled to a Tax Deed Even if There has been a Redemption. This, too, is false. A redemption always clears the lien for that year's taxes and prevents maturity, even if the same tax purchaser buys the same property year after year.

Section 8.09 Myth #3 – Tax Purchaser Must Redeem Prior or Subsequent Delinquencies and Pay Current Year Taxes Before he may Receive a Tax Deed. This, too, is false. Nothing in law requires a tax purchaser to pay other years' taxes – whether delinquent or not – as a condition of receiving a tax deed. OPINION TO STEVE AMOS, Docket No. 2001-0472 (August 31, 2001). He is, however, liable for real estate taxes from and after the date he records the tax deed, but he is not required to redeem before then, or pay current taxes. A Chancery Clerk should, however, collect from the tax purchaser all the fees referenced in MISS. CODE ANN. §§ 27-43-3 and 27-43-11 at the time the tax purchaser requests and files a tax deed.

Section 8.10 Myth #4 – A Chancery Clerk Cannot Issue More Than One Tax Deed for the Same Property. This, too, is false. The trigger for issuance of a tax deed is *maturity* of a tax sale – that is, the running of the two-year redemption period without there being a redemption. Thus, for every year that a maturity occurs for the non-payment of taxes, the Chancery Clerk may issue a tax deed if demanded by the tax purchaser(s). More than one tax deed **for any given year's taxes** should not be issued, however. Obviously, where a redemption of that year's taxes has occurred, no tax deed can be issued.

Section 8.11 Tax Patents. When a parcel which has been struck off to the State matures, that is when the two (2) year period of time for redemption has expired, the parcel is certified by the Chancery Clerk to the Secretary of State. The parcel is then added to the state's portfolio of public lands available for sale. The Secretary of State must collect the delinquent taxes represented by the maturity as well as all other current outstanding taxes. Whoever tenders such

[11]Note, however, that when the same tax purchaser buys the same property at the next two sales, he is not required to "redeem off himself" for those other two years. The tax deed for the first year's taxes is sufficient. He will not lose title to subsequent purchasers since he is the subsequent purchaser. OPINION TO STEVE AMOS, Docket No. 2001-0472 (August 31, 2001).

payments to the Secretary of State will be issued a Tax Patent, which is at least the equivalent of a Tax Deed. The Tax Patent has the effect of extinguishing prior sales and the next subsequent sale pursuant to MISS. CODE ANN § 29-1-83 and the Attorney General's OPINION TO EDWARD PEACOCK, III, Docket No. 04-0299 (September 3, 2004). [See *Appendix V* for an example of a Tax Patent.]

Section 8.12 Tax Patents – Procedure and Preferences. The Secretary of State administers the application procedure for tax patents, and the process is governed by MISS. CODE ANN. § 29-1-37. Counties and other governmental entities may make application and receive a patent to lands in the Secretary's portfolio. Applications by non-governmental entities or individuals must remain on file for thirty (30) days before they can be approved; however, applications made by counties, municipalities, a state agency or other political subdivisions of the state are exempt from the thirty-day requirement and "may be acted upon immediately after filing." MISS. CODE ANN § 29-1-37.

Chapter 9.
Post-Maturity Matters

Section 9.01 Suits to Quiet or Confirm Title – Some Lessons Learned. The purpose of a suit to confirm a tax title is not only to settle contentions between main parties claiming ownership of the land but also to make tax title good against the world, so that there may be no further litigation concerning the validity of the title. *Lamar Life Ins. Co. v. Billups*, 169 So. 32 (Miss. 1936). The tax sale purchaser who seeks to have a tax title quieted and confirmed has the burden of proving valid assessment of land for taxes and that taxes for which land was offered for sale had not been paid. *Walker v. Polk*, 44 So. 2d 477, 479 (Miss. 1950). The tax deed is *prima facie* evidence of a legal assessment and sale. In all suits to quiet or confirm a tax title, the plaintiff must state in some manner that all procedures were accomplished according to the rules. As noted at length above, all of the steps in the notification process must be performed with reasonable care and accuracy. In Mississippi, it is public policy to favor and protect landowners from loss by a sale for taxes. *Carmadelle v. Custin*, 208 So. 2d 51, 55 (Miss. 1968). Thus, it is important that Chancery Clerks strictly adhere to the statutory notice requirements.

Section 9.02 Liability of the Clerk. In *Alexander v. Taylor*, 928 So. 2d 992 (Miss. 2006), the tax sale purchasers sued the Chancery Clerk individually and in his official capacity for refusal to issue tax deeds. The Chancery Clerk refused to issue tax deeds on the grounds that the properties in question were subsequently redeemed. The plaintiff, James Alexander, brought a number of claims against the Clerk, including federal claims for denial of civil rights, equal protection, and due process. After over ten years of threats, claims, and litigation in a number of courts, the Mississippi Court of Appeals ruled that all of the plaintiffs' claims were barred by applicable statutes of limitations. The Court never actually addressed the substantive issues raised, but did shed some light on potential liability of Chancery Clerks through an explanation of the Mississippi Tort Claims Act (MTCA), which is discussed below.

Section 9.03 Mississippi Tort Claims Act. Chancery Clerks are officials of political subdivisions of the State and, when acting within the course and scope of their employment, are

entitled to the protections of the MTCA. A failure to make required payments or similar failures to comply with statutory duties constitute "misfeasance in office" and may give rise to claims against the Clerk on his official bond outside the protection of the MCTA. *Alexander v. Taylor,* 928 So. 2d at 998. The remedy of mandamus is the proper remedy when a Clerk improperly withholds a tax deed. However, if a Clerk has a reasonable basis for refusing to take some action or otherwise acting impermissibly, the Clerk's actions will likely be protected from personal lawsuits. See *Vinson v. Benson,* 805 So. 2d 571 (Miss. App. 2001).

Section 9.04 If the Statute Does Not Create a Remedy, No Remedy Exists. In the case of *Rebuild America v. Johnson*, 99 So. 3d 1154 (Miss. App. 2010) the Court of Appeals agreed with the trial court and held that whether or not the alleged conduct was inadvertent is irrelevant to whether or not Rebuild America's claims were precluded by the doctrine of *caveat emptor*. The relevant question was whether there is a statutory remedy against the Chancery Clerk and Sheriff. The Court held that since MISS. CODE ANN. § 27-43-3 does not create one, no remedy exists to the purchaser. The tax sale purchaser is charged with knowledge of the statutory requirements necessary for a valid sale and the statutory conditions upon which a valid deed may be acquired. Such purchaser must be held to have purchased subject to those statutory provisions. *Rebuild America v. Johnson,* 99 So. 3d 1154 at 1158-1159.

Section 9.05 Damages to the Purchaser When the Tax Deed is Set Aside? After the tax deed was set aside in *Rebuild America v. Milner*, discussed above in Sections 4.03 and 4.12, Rebuild America filed a subsequent suit against the Chancery Clerk and the Sheriff, alleging that it was entitled to damages sustained as a result of the tax deed being set aside. In this case, styled *Rebuild America v. Johnson,* the purchaser, Rebuild America, claimed that the statutory notice requirements constituted an "official duty" on the part of the Chancery Clerk and that the Clerk's failures amounted to a breach of that duty, giving rise to a claim for damages. Rebuild America also made a similar argument regarding the Sheriff. *Rebuild America v. Johnson*, 99 So.3d at 1157. Rebuild America argued that the trial court erred in its application of MISS. CODE ANN §27-43-3 because the Chancery Clerk's failure was not inadvertent, but intentional or effectively intentional, claiming that the Clerk and Sheriff repeatedly and systematically failed to comply with the statute's notice requirements. The trial court dismissed Rebuild America's complaint for failure to state a claim and found that recovery was precluded under the doctrine of *caveat emptor* ("buyer beware"). The trial court also found the suit barred by the statute of limitations and by Rebuild America's failure to provide notice prior to filing suit under the MTCA.

Section 9.06 Effect of the Case of Booneville Collision Repair, Inc. v. City of Booneville. The MTCA provides that governmental officials and agencies have immunity for claims "arising out of the collection of any tax or fee." MISS. CODE ANN § 11-46-9(1)(i). One would think that all actions undertaken by the Chancery Clerk to give notice to owners and lienholders pertaining to the existence of delinquent taxes would logically fall within the protection of this immunity. However, in the December 4, 2014 case of *Booneville Collision Repair, Inc. v. City of Booneville,*152 So.3d 265 (Miss. 2014), the Mississippi Supreme Court held that acts of negligence associated with issuing and serving notices under the delinquent tax statutes in Mississippi were not acts "arising out of the assessment or collection of any tax or fee" since the purpose of such statutes was to give notice and not to assess or collect taxes. *Booneville*

Collision, 152 So.3d at 275. The case involved a lawsuit against Booneville and its city tax collector for damages caused when a buyer of property did not learn of the existence of delinquent municipal taxes because the list of lands sold for city taxes was not certified by the city collector to the Chancery Clerk. The court concluded that because the statute requiring the city collector to certify the list and file it with the Chancery Clerk did provide a remedy (unlike the situation with the statute under which chancery clerks must issue and serve notices), and because the immunity provided under the MTCA did not apply, the city and the tax collector were potentially liable to the buyer.

Section 9.07 Statutory Damages Should be Ordered by Chancellor When Tax Deed is Set Aside. Although no right of action will lie against the Clerk or the Sheriff, the tax purchaser who has his deed set aside is not without a remedy. The recent case of *Rebuild America v. McGee*, discussed in Section 4.12 above, made clear that when a tax deed is set aside, the Chancellor should award statutory damages to the tax purchaser and order the delinquent tax payer/owner to pay such damages calculated on the basis of MISS. CODE ANN § 27-45-3. *McGee*, 49 So. 3d at 160; see also, *Lawrence v. Rankin*, 870 So. 2d 673, 676 (Miss. App. 2004). Importantly, these damages are payable by the owner to the tax purchaser **and do not involve the county or the Clerk.**

In addition, in *Rebuild America v. Norris*, cited in Section 4.06 above, holds that the question of whether a litigant who is unsuccessful in confirming his tax title is entitled to a reimbursement of taxes paid for previous years, together with statutory interest and penalty "must be decided by a separate claim made pursuant to Section 27-45-27(1)." *Norris*, 64 So. 3d at 482. This code section provides that the purchaser has a lien on the land even though the sale may be held void – and provides an enforcement mechanism. Under it, the purchaser

> may enforce the lien by bill in chancery, and may obtain a decree for the sale of the land in default of payment of the amount within some short time to be fixed by the decree. In all suits for the possession of land, the defendant holding by descent or purchase, mediately or immediately, from the purchaser at tax sale of the land in controversy, may set off against the complainant the above-described claim, which shall have the same effect and be dealt with in all respects as provided for improvements in a suit for the possession of land. But the term "suits for the possession of land," as herein used, does not include an action of unlawful entry and detainer.

Section 9.08 Orcutt v. Chambliss – To Own, or not to Own, That is the Question. In a 5-4 decision, the Mississippi Court of Appeals in the case of *Orcutt v. Chambliss*, 2018 WL 444899, No. 2016-CA-00902 (Miss. App. January 16, 2018)[12] affirmed a trial court's order declaring a tax sale void due to the clerk's failure to give the owner (Chambliss, appearing *pro se*) proper notice more than two decades ago. *Orcutt*, ¶¶ 12 -14. However, it reversed the lower court's decision to award statutory damages *for only a portion* of the period of time the tax purchaser

[12]A motion for rehearing is pending in the Mississippi Court of Appeals.

owned the property and held that the purchaser (Orcutt) was entitled to damages based on *all* the year's taxes which the tax purchaser paid since the date of the tax sale in which he acquired the property. *Id.*, ¶ 35. Oddly, when it came time for the trial court to assess damages in favor of the purchaser, this same "owner" (Chambliss) suddenly claimed that "he had no interest in the disputed property" and should not be held liable to the purchaser for such damages. *Id.*, ¶ 9.

This case highlights several significant but perhaps under-appreciated aspects of the law of tax sales in Mississippi.

Section 9.09 Proof and the Necessary Records are Often Stale or Incomplete. The *Orcutt* case was filed in 2014 by the tax purchaser (Orcutt) seeking to confirm title in himself following his purchase at the 1993 Jefferson County tax sale, which matured to him in August of 1995. From the outset, the case turns on facts and evidence which are more than twenty (20) years old. The opinion notes that "no one from the [clerk's office] testified in an attempt to prove that proper notice was actually made to anyone related to this property." *Orcutt*, ¶ 13. The lack of testimony is not surprising given that, by law, the Chancery Clerk's notification efforts took place in the spring and summer of 1995, some twenty-one (21) years before the lawsuit was tried. Thus, *Orcutt* highlights for clerks the practical importance of the First and Second Affidavits. Had those been prepared, signed, notarized, and filed of record shortly after the 1993 sale matured in 1995, there likely would have been proof available to offer in evidence. However, even in cases which do not involve such a lengthy timetable, the record is often devoid of any testimony by the Chancery Clerk, her deputies, or other officials of government who could bring important, but often omitted, facts to bear.

Section 9.10 Courts Regularly Find Inapplicable the Three-year Statute of Limitations Which is Supposed to Govern Tax Title Challenges. Not surprisingly, the Court of Appeals gave short shrift to MISS. CODE ANN § 15-1-15 which states that actual occupation of a parcel of land by the tax purchaser for three years after maturity "shall bar any suit to recover such land *or assail such title* because of any defect in the sale of the land for taxes . . ." [emphasis added]. The Court held that the Chancellor was correct in determining that this statute of limitations was inapplicable because the parcel of land in question was "wild lands" and "not in occupation by anyone." *Orcutt*, ¶ 18. However, elsewhere in its opinion, the Court of Appeals credited the trial court's findings that, after the property matured to him, Orcutt sufficiently "[flew] his flag over the property" to meet many, but not all, of the elements of adverse possession.[13] In fact, the lower court found that Orcutt (a) paid the taxes on the property for twenty-one (21) years, (b) regularly hunted on the property since 1996 and planted food plots and erected deer stands, (c) ran off trespassers, (d) repaired roads on the parcel, and (e) allowed friends and family to hunt on it. *Orcutt*, ¶s 21 and 24. Even more significantly, the trial court also found that Orcutt proved "continuous and uninterrupted possession" of the property for at least ten (10) years. *Id.*, ¶ 27. Yet, despite these facts, the Chancery Court and the Court of Appeals found that the land in question was not "actually occupied by anyone" and thus the limitations provision did not bar the

[13] *Orcutt v. Chambliss*, 2018 WL 444899, Docket No. 2016-CA-00902 (Miss. App. January 16, 2018), ¶ 20. Orcutt claimed, alternatively, that he acquired the property under the doctrine of adverse possession, MISS. CODE ANN. § 15-1-13(1)(Rev. 2012).

counter-claim by the owner Chambliss in opposition to Orcutt's confirmation suit. *Id.*, ¶ 18 (citing *Bowser v. Tootle*, 556 So. 2d 1373, 1375 (Miss. 1990) and *Waldrop v. Whittington*, 213 Miss. 567, 573, 57 So. 2d 298, 300 (1952)).

Section 9.11 Record Owners Who do not Pay Their Taxes and Then Fight Confirmation Suits by Tax Purchasers Want to Have Their Cake and Eat it, too. This case is a classic example of what Chancery Clerks regularly experience: quite often, the problem is not the lack of notice to the owner, but the owner's unwillingness (or inability) to pay county land taxes. When forced to address the question of the amount of damages owed to the tax purchaser – and when faced with the prospect of having to repay Orcutt the twenty-three (23) years' taxes he paid on the property together with significant interest[14] – the owner Chambliss suddenly claimed he did not own the property and that someone else really owed the taxes. Yet, in this case, the Court still decreed that the tax purchaser did not have title to the property because the sale – occurring almost twenty-five (25) years before the Court of Appeals' ruling – was void for lack of notice to this same individual.

Section 9.12 Courts Tend to Over-think Tax Sale Law. The four-judge dissent argued that the majority applied the wrong standard of review which over-complicated the case and led to an errant result.[15] It also asserted that the Chancellor's rulings were "internally inconsistent" in that on the one hand he found the sale void because Chambliss was the owner and did not get notice, yet on the other hand, he appeared to have conceded that Chambliss may not be the owner and concluded that whoever the true owner of the land is owes Orcutt damages. *Orcutt*, ¶ 55. Applying the correct standard, the dissent argues, one cannot help but reach the succinct conclusion that "[o]nce Chambliss disavowed ownership of the property, he no longer had standing to contest Orcutt's ownership." *Id.*, ¶ 56. Going a bit further, the dissent squarely posits:

> If Chambliss was the owner of the property and was entitled to notice of the tax sale, then he owes Orcutt the amount of statutory damages. If Chambliss does not own the property, he has no standing to challenge Orcutt's petition, and Orcutt would be entitled to an order that quieted and confirmed his title to the property.

Id., ¶ 59.

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[14]The testimony apparently reflected that Orcutt paid county *ad valorem* taxes on the 20-acre parcel in question *every year* since the tax sale in 1993. *Id.*, ¶ 20.

[15]Because the trial court's judgment was based on an involuntary dismissal under Rule 41(b) of the Mississippi Rules of Civil Procedure rather than a final judgment on the merits, the dissent contends the trial judge should not have taken the matter under advisement and permitted the defendant's case-in-chief to proceed. Moreover, the Chancellor also erred when he granted a Rule 41(b) dismissal *in favor of the defendant but then awarded damages to the plaintiff. Id.*, ¶ 47.

Section 9.13 The Measure of Statutory Damages Owed to the Purchaser When a Sale is Declared Void is Better Defined. The *Orcutt* case brings clarity to one important issue – the measure of damages due to the purchaser when a tax sale is declared void. On this point, the Court of Appeals held that the purchaser is entitled to recover from the record owner:

> (a) all years' taxes he paid on the property since the tax sale where he acquired the parcel; and
>
> (b) simple, not compound, interest on those amounts at the statutory rate of 1.5% per month.

Id., ¶ 35. The dissent concurs in this analysis, apparently rendering that aspect of the decision unanimous. *Id.*, ¶¶ 66, 68. It also seems likely that had Orcutt offered proof on the matter, he would have been entitled to an amount of money representing improvements he made to the property during his time of possession. *Id.*, ¶ 36.

Section 9.14 Tax Purchasers Can Elect Remedies When Notice to Leinor is Defective. In cases in which a tax deed is not confirmed as to a lienholder because notice to that leinholder was defective or deficient, the tax purchaser may elect his remedies – he may either take his title subject to the lien of the lienholder who did not get good notice or he may "relinquish his rights to the property and file a claim [with the county] for a refund." *Wachovia Bank v. Rebuild America, Inc.*, 56 So. 3d 586 (Miss. App. 2011). See also, *SKL Investments, Inc. v. American General Finance*, 22 So. 3d 1247 (Miss. App. 2009). Regardless of which election is made, in such circumstance, the remedy allowed MISS. CODE ANN. § 27-45-27(1) would not be applicable since if he chose one or the other and later recovered on a claim under MISS. CODE ANN. § 27-45-27(1) he would receive "an inequitable windfall." *SKL*, 22 So. 3d at 1251.

Section 9.15 Tax Purchasers Have Standing to Sue to Set Aside a Tax Sale and May Seek a Refund From the County. In the case of *SASS Muni-V, LLC v. DeSoto County*, 170 So.3d 441 (Miss. 2015), the Mississippi Supreme Court held that a tax purchaser may bring suit against a county to set aside a tax sale and receive a refund of the amount the purchaser paid for the property at the sale when the Chancery Clerk has failed to provide notice in conformity with statute. SASS Muni-V paid more than $530,000.00 for a certain parcel of real estate in DeSoto County at the 2008 tax sale. When the parcel was not redeemed prior to maturity, SASS Muni-V sued the county, asking that the court set aside the sale and issue it a refund, claiming that the Chancery Clerk did not provide notice to several of the corporate owners/lienors of the property in question. The Chancery Court of DeSoto County granted the county's motion to dismiss, saying SASS Muni-V, as the tax buyer, lacked standing to sue for errors in the notification process. Seven (7) years after the sale, the Mississippi Supreme Court reversed and remanded the case to the Chancery Court for further proceedings, specifically holding that tax purchasers may challenge the validity of a tax sale. The significance of this case is apparent: the door is now open for any tax purchaser who finds himself with a matured interest in a property he does not want (or is otherwise undesirable) to bring suit to set aside the sale as void – and thereby recover the amount he paid at the sale from the county, provided he can prove some defect in the Chancery Clerk's notification process. (See Section 4.32 above for an assortment of defects which regularly occur.)

The impact on county treasuries may prove substantial: refunding over $530,000 some seven (7) or more years after receiving it at as a part of the tax collector's tax sale settlement will cause a significant budgetary constraint, even for a fiscally sound county like DeSoto. Hence, the notification duties of the Chancery Clerk have become even more important.

Section 9.16 People or Companies Acquiring Title After Maturity From the Original Owner Also Have Standing to Sue. In *High Sierra Tax Sale Properties, LLC v. Daley et al,* 188 So.3d 1224 (Miss. App. 2015), the Mississippi Court of Appeals held that persons or entities who acquire title after maturity from the owner who lost the property at a tax sale more than two years prior also had standing to bring suit to set aside the tax sale.

Section 9.17 What Statute of Limitations Governs Requests for Refunds? In light of the *SASS Muni-V* and *High Sierra* cases, and in light of the Attorney General OPINIONS TO DAVID B. MILLER AND SCOTT F. SLOVER discussed in section 6.01 supra, it would appear that courts should expect an increase in suits to declare tax sales void. One defense likely to be raised by counties and other governmental entities in opposition to such suits will be the applicability of the proper statute of limitations. In this regard, and as noted in section 6.09 supra, the Attorney General has consistently opined that the general, catch-all three year statute of limitations set forth in MISS. CODE ANN. § 15-1-49(1) likely applies. Moreover, it would stand to reason that the limitations period would begin to run on the date of maturity at the very latest, and possibly earlier if the sale was declared void by the Board of Supervisors for some defect in the sale other than the Chancery Clerk's alleged failure to properly carry out his notification duties which arises only in the 180-day period prior to maturity.

Section 9.18 In Summary – Liability of the Clerk-at-a-Glance.

(a) Chancery Clerks, as officials of political subdivisions of the State, are entitled to the protections of the MTCA, when acting within the course and scope of their employment.

(b) A Chancery Clerk's failure to comply with statutory duties constitutes "misfeasance in office."

(c) Mandamus is the proper remedy when a Chancery Clerk improperly withholds a tax deed.

(d) Chancery Clerks are immune from liability when performing official acts but not when totally failing to perform ministerial acts.

(e) Tax purchasers buy property at a tax sale with full knowledge of the difficulties of the statutory notice provisions. Thus, under the doctrine of *caveat emptor,* no liability will attach to the Chancery Clerk in his failure to notify properly.

(g) The absence of liability, however, does not mean that we may ignore our duties or fail to carry them out properly.

(h) Tax purchasers have standing to ask the court to declare a sale invalid based on some defect in the Chancery Clerk's notification process. The impact on the county treasury may ultimately be significant and substantial.

(i) People or companies who get title from the original owner after maturity of a tax sale also have standing to sue to set aside the sale.

Chapter 10.
Conclusion – Ten Maxims of Land Redemption

Section 10.01 There are Ten (10) Basic Precepts that Govern Land Redemptions. Known as "Maxims," the following simple statements sum up many of the principles discussed above.

(1) There can be no maturity if there's been a redemption of that year's taxes.

(2) There can be no redemption if there's been a maturity of that year's taxes.

(3) There can be only one tax deed on any given parcel for any given year's taxes (except where there is a separate sale of a homestead chargeback, or a separate municipal tax sale).

(4) But, there can be multiple tax deeds on the same parcel for multiple year's taxes which have matured.

(5) There can be no partial payments of redemption amounts (except in bankruptcies).

(6) When a parcel is struck to the state in any given year and not redeemed, it must be struck to the state in the next year.

(7) A board of supervisors may not void a tax sale after maturity, nor may it void a tax deed.

(8) Where delinquent taxes are owed on a parcel, they must be redeemed before current year taxes may be paid on that parcel.

(9) Payment of succeeding year's taxes by a tax sale buyer does not shorten the redemption period, nor does it entitle the buyer to a tax deed before maturity.

(10) There is no time limit on a Clerk's ability to issue a tax deed, provided there was a maturity and there was no prior tax deed issued for that year's taxes.