

**IN THE COURT OF APPEALS 08/06/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00531 COA**

**EDMOND ALLEN JENKINS AND DONNA B. JENKINS**

**APPELLANTS**

**v.**

**ELDON THOMAS JENKINS, EARL BURNELL JENKINS, LAVELLE JENKINS McREE,  
ALICE JENKINS THOMPSON, EDMUND BURKE JENKINS, ROBERT EUGENE  
JENKINS, FRANCIS JENKINS SIMMONS, SHIRLEY JENKINS SESSIONS, SARA ANN  
JENKINS WHITE, HENRIETTA JENKINS BUCKLEY AND DILLY JENKINS**

**APPELLEES**

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

TRIAL JUDGE: HON. DONALD B. PATTERSON

COURT FROM WHICH APPEALED: CHANCERY COURT OF COPIAH COUNTY

ATTORNEY FOR APPELLANTS:

MARC BRAND

ATTORNEYS FOR APPELLEES:

JOHN T. ARMSTRONG

DUDLEY F. LAMPTON

NATURE OF THE CASE: PARTITION OF LAND

TRIAL COURT DISPOSITION: LAND PARTITIONED INTO TWO PARTS: ONE-SIXTH  
AND FIVE-SIXTHS

BEFORE THOMAS, P.J., DIAZ, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

This appeal arises from a partition action which sought to partite a one-sixth interest from a 219-acre tract of land. All parties are descendants of a common ancestor from whom they have inherited their respective interests in the land subject to this partition action. Appellees sought the

partition of their collective interest from the one-sixth interest held by Allen and Donna Jenkins (collectively Allen) (hereinafter "Allen") pursuant to section 11-21-3. The chancery court confirmed the report of the commissioners who partitioned the property. Feeling aggrieved that he was not awarded the tract of land he specifically requested, Allen Jenkins appeals arguing the following: (1) the chancellor abused his discretion by confirming the commissioner's partition report because the report was invalid as the result of improper conduct of the commissioners; (2) the chancellor abused his discretion by failing to properly instruct the commissioners about their duty as fact finders, and in particular, their duty to inspect all parts of the land to be partitioned and to account for any improvements; and (3) the Mississippi partition statutes were unconstitutionally applied in this case. Finding no error, we affirm.

#### STATEMENT OF THE FACTS

The 219 acres located in Copiah County were originally acquired by Jesse Allen Jenkins, grandfather of Appellant Allen Jenkins. Jesse Allen Jenkins is also the common ancestor to all the Appellees from whom they inherited their respective interests. Jesse farmed the land and built a house on his property. Cecil W. Jenkins, son of Jesse and father of Allen, was born and raised in the home. Cecil had a pond built on the property. There was testimony that other heirs contributed to the cost of the pond. Cecil raised his family in the house and farmed the land. As a boy, Allen helped his father plant fruit, pecan, black walnut, and chestnut trees around the pond. At the age of eighteen, Allen left the farm to serve in the military. He returned in 1973 to raise his family. In 1979, the house was destroyed by fire.

After Cecil's death in 1979, Allen and Donna moved onto five acres of land which they owned. This property adjoined the southwest corner of Jesse's 219 acres. Allen continued to

maintain the part of Jesse's estate containing the pond, trees, and former house site. Allen placed a small trailer, to be used as a deer camp, on the former home site and provided it with plumbing and electricity. Since 1979, Allen regularly bushhogged the property and cared for the trees. Allen stocked the pond with catfish. Allen desired to keep the northeast corner of Jesse's acreage which contained the pond, fruit and nut trees, the deer camp, and the former home site.

A partition action was brought by the Appellees, the intestate heirs of Jesse. They sought to have their collective five-sixths interests partitioned as one undivided tract from Allen and Donna's one-sixth interest. The parties agreed to withdraw their respective claims for monetary damages, and limiting the issue to partition pursuant to an agreed judgment on May 6, 1993.

Commissioners were appointed and the chancery court of Copiah County ordered the commissioners to divide the property into two tracts. The chancellor authorized the parties to make recommendations to the commissioners in writing. Appellees requested that Allen receive his share on the southwest corner of the acreage which adjoined the five acres Allen already owned, and on which he lived. The attorney for the Appellees sent a letter to the commissioners which included their request, referred to Allen's preference, and instructed the commissioners to divide the 219 acres into three tracts.

The commissioners filed their report with the court on October 4, 1994. However, their report partitioned the property into three tracts. The chancellor held, after a hearing on October 21, 1993, that the commissioners acted beyond the scope of their authority in dividing the tract into three tracts. The chancellor also held that Allen and Donna had failed to show that the commissioners

were so prejudiced by the letter from the Appellees' attorney that they could not act impartially. The judge denied Allen and Donna's request to disqualify the commissioners and ordered the commissioners to re-divide the property into two tracts. The court also instructed the attorneys to send the commissioners a joint document which expressed their respective recommendations. The attorneys for both parties sent a letter dated October 25, 1993, to the commissioners containing their requests and providing the commissioners with instructions.

On December 6, 1993, the commissioners filed their second report with the court. This second report appeared the same as the first except that the term "three" was changed to "two" where it denoted the number of tracts. The plat appeared the same except that the third tract's allocation had been removed and was now included in the larger undivided interest, thus leaving Allen and Donna with the same allocation.

On January 3, 1994, Allen filed his suggestion for partition requesting the northeast corner containing the pond, fruit and nut trees, the deer camp, and the former home site.

Allen and Donna objected to the commissioners' second report alleging that they failed to meet their statutory duties by failing to inspect the property to determine whether the partition was feasible and equitable. After a hearing on February 2, 1994, the chancellor confirmed the report of the commissioners.

## ARGUMENT AND DISCUSSION OF THE LAW

I. THE CHANCELLOR ABUSED HIS DISCRETION BY CONFIRMING THE COMMISSIONER'S PARTITION REPORT BECAUSE THE REPORT WAS INVALID AS THE RESULT OF IMPROPER CONDUCT OF THE COMMISSIONERS: (A) THE COMMISSIONERS FAILED TO GIVE ANY CONSIDERATION TO THE IMPROVEMENTS ALLEN JENKINS MADE UPON THE LAND AS REQUIRED OF THEM UNDER MISSISSIPPI LAW; (B) ASSUMING ALLEN JENKINS' DESIRED PARTITION WAS INFEASIBLE, HAVING DEPRIVED ALLEN OF THE IMPROVEMENTS HE MADE ON THE LAND, THE COMMISSIONERS SHOULD HAVE CONDUCTED AN ACCOUNTING.

## II. THE CHANCELLOR ABUSED HIS DISCRETION BY FAILING TO PROPERLY INSTRUCT THE COMMISSIONERS ABOUT THEIR DUTY AS FACT FINDERS, AND IN PARTICULAR, THEIR DUTY TO INSPECT ALL PARTS OF THE LAND TO BE PARTITIONED AND TO ACCOUNT FOR ANY IMPROVEMENTS.

Allen's first two arguments concern essentially the same issue, the commissioners, and ultimately the chancellor, failed to account for his improvements on the tract of land he requested. Consequently, we will consider these arguments together.

Allen attacks the partition process because of the commissioners' failure to inspect all of the property subject to this partition action. Specifically, Allen argues that the commissioners failed to inspect the northeast tract to assess the improvements, and he claims he is entitled to be awarded the benefit of his work on the property. This argument, upon first glance, appears to have merit. Clearly, the commissioners charged to partite 219 acres should be informed as to the condition and configuration of the land subject to partition. Section 11-21-19 requires that the land be partitioned into equal shares. Miss. Code Ann. § 11-21-19 (1972). However, Allen's argument fails because he has been unable to demonstrate any prejudice by the commissioners' failure to inspect the entire acreage. Upon examination of the record, we note that Allen testified that the value of the tract he was awarded equaled that of the tract he wanted. In other words, Allen suffered no detriment because, according to his own testimony, the two tracts were of the same value acre for acre. Moreover, Allen's attorney twice argued to the chancellor that the tracts were of equal value. We can find no basis for reversal when Allen admits that the value of the two tracts is the same and to

require the commissioners to go back and inspect the entire acreage would serve no purpose.

Allen's assertion that he is entitled to the tract he requested because of the improvements on that tract, fails for several reasons. As a co-tenant in possession who paid no rent for the use of the land, Allen bore the responsibility of maintenance and repair. *Cheeks v. Herrington*, 523 So. 2d 1033, 1037 (Miss. 1988). However, "[a] tenant in common who has improved the land is entitled to have such land allotted to him or her if there is a partition in kind." *Carter v. Brewton*, 396 So. 2d 617, 618 (Miss. 1981) (citing *Bennett v. Bennett*, 84 Miss. 493, 36 So. 452, 453 (1904)). If allowing the improver to be in possession of the land he has improved becomes infeasible, then an accounting is appropriate. *Id.* However, if the improver is awarded his improved land, then no accounting is necessary. *Id.* (citing *Butler v. Furr*, 168 Miss. 884, 891-92, 152 So. 277, 279 (1934)).

The problem that we have in the present case is that Allen waived his right to claim any improvements in the agreed judgment of May 6, 1993. Furthermore, the chancellor found that Allen failed to prove that he in fact had made improvements on the Jenkins tract. Allen was ordered to remove his trailer from the property. The learned chancellor also made a finding that, assuming arguendo, improvements had been made, that there was insufficient proof that the improvements should be credited to Allen. We agree. Simply put, Allen failed to satisfy his burden in establishing entitlement to the allegedly improved land. Thus, these issues are without merit.

III. THE MISSISSIPPI PARTITION STATUTES WERE UNCONSTITUTIONALLY APPLIED IN THIS CASE: (A) ALLEN AND DONNA JENKINS WERE NOT ACCORDED THE MINIMAL PROCEDURE REQUIRED UNDER THE PARTITION STATUTES AND MISSISSIPPI CASE LAW; (B) THE COMMISSIONERS FAILED TO PROVIDE THE JENKINS WITH NOTICE OF FACT-FINDING MEETINGS AND OTHER CONDUCT.

Allen argues "the statutes and case law interpreting them set out the relevant procedure which is due a litigant [in a partition suit]. The statutes and case law are the yardstick by which one

measures whether the requirements of due process are met." He then argues that he was not accorded the procedure required by Mississippi law. However, Allen fails to point to any example of how he was denied minimal procedure in violation of statutory law or case law. We cannot address a general argument which is not supported by the record.

We are unpersuaded that a party to a partition suit is entitled to meet and discuss the partition with the commissioners appointed to partite the property. Allen has been unable to provide this Court with any Mississippi case law on this point, and we decline to create such precedent. In the present case, the chancellor furnished a means by which each of the parties could notify the commissioners of their respective preferences as to the division of the Jenkins tract. The parties, under the chancellor's order, were permitted to contact the commissioners in writing to indicate any preferences. We find that the chancellor provided ample means by which to allow the parties to indicate their respective wishes without substantially harassing the commissioners or interfering with their tasks. Thus, this issue is without merit.

CONCLUSION

As an appellate court, we are limited by the record on appeal, and we are bound to apply the case law of Mississippi. While we may not have made the same apportionment as did the commissioners and may understand Allen's desire for a particular tract, we are nevertheless bound to uphold the chancellor's confirmation of the commissioner's report absent an abuse of discretion, manifest error, or misapplication of the law. *Bracken v. Means*, 631 So. 2d 178, 181 (Miss. 1994) (citations omitted). After a careful review of the record, it becomes evident that Allen has failed to adequately challenge the validity of the commissioner's report, nor has he established that the result deprived him of value or his right to any alleged improvements. We can find no basis for reversal simply because Allen did not get the tract he wanted. We cannot say that the chancellor erred in confirming the commissioners' partition of the Jenkins tract. Thus, we are compelled to affirm the chancery court.

**THE JUDGMENT OF THE CHANCERY COURT OF COPIAH COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR.**

