IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

HAROLD C. GORDON, JR. — APPELLANT

VS. — CASE NO. 2006-CA-01367

MAGGIE MCGEE, ET AL — APPELLEES

APPEAL FROM THE CHANCERY COURT OF OKTIBBEHA COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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VS. — CASE NO. 2006-CA-01367

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The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

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WITNESS counsel's signature, this the 22nd day of December, 2006.

Taylor Tucker

Taylor Tucker

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II. THE TRIAL COURT ERRED IN AUTHORIZING THE REIMBURSEMENT OF TAXES TO MAGGIE MCGEE IN THE SUM OF FIVE THOUSAND FIVE HUNDRED SIXTY-TWO AND 43/100 DOLLARS ($5,562.43)

STATEMENT OF THE CASE

On July 12, 2002, Harold C. Gordon, Jr., filed a Petition For Determination Of Heirship And For Partition Of Real Property in the Chancery Court of Oktibbeha County, Mississippi. (R-1)

On February 11, 2003, Maggie McGee, Katie Young and Patrick Bibbs filed an Answer. (R-28)

A trial of this matter was held in the Chancery Court of Oktibbeha County, Mississippi, on June 21, 2004.

The Chancery Court of Oktibbeha County, Mississippi, on August 4, 2004, found that Harold C. Gordon, Jr., owned an undivided one-eighth ($1/8^{th}$) interest in the real property and that it should be partited in kind. (R-31)

On April 21, 2006, the Chancery Court of Oktibbeha County, Mississippi, entered a Decree Determining Heirship And Partitioning Real Property setting forth that Harold C. Gordon, Jr., owned an undivided one-eighth ($1/8^{th}$) interest in the real property and that the subject property was incapable of an equitable division in kind. The Court ordered a sale of all merchantable timber in the first instance and a partition of the real property in kind once the timber is sold, which would better promote the interest of all parties. (R-35)

A trial was held in the Chancery Court of Oktibbeha County, Mississippi, on June 21, 2006, (the trial was actually held at the Clay County Courthouse, West Point,

Mississippi) on a Motion To Approve Special Commissioner's Sale Of Timber, Payment Of Fees And Expenses And Disbursement Of Proceeds.

On July 12, 2006, the Chancery Court of Oktibbeha County, Mississippi, entered an Amended Decree Confirming Special Commissioner's Sale Of Timber. (R-53)

On August 7, 2006, Harold C. Gordon, Jr., filed his Notice Of Appeal to the Supreme Court of the State of Mississippi. (R-58)

STATEMENT OF THE FACTS

On December 2, 1933, Ed Bibbs obtained ownership of the entire interest in the real property described as:

> The East ½ of the Northeast ¼ of Section 25, Township 17 North, Range 14 East, Oktibbeha County, Mississippi.

which is the subject of the Partition action. (R-33) On March 25, 1950, seven of the nine heirs at law of Ed Bibbs quitclaimed their interest to Minnie Bibbs, one of the other heirs at law of Ed Bibbs. (R-33)(R-36)

Ed Bibbs had nine (9) heirs, which consisted of his widow and eight (8) children. (R-31) (R-36) Therefore, upon the death of Ed Bibbs, his real property passed to his heirs in equal shares. Each heir owned an undivided one-ninth ($1/9^{th}$) interest prior to the conveyance to Minnie Bibbs. Subsequent to the conveyance to Minnie Bibbs, Minnie Bibbs owned an undivided eight-ninths (8/9ths) interest, and Ezell Bibbs owned an undivided one-ninth ($1/9^{th}$) interest in the real property.

On July 11, 1974, Minnie Bibbs quitclaimed unto Patrick Henry Bibbs, Scott Bibbs, Eddie James Bibbs, Katie Dell Bibbs Young, Annie Bell Bibbs Smith, Maggie T. Bibbs McGee, Rosie Dell Bibbs Harris and Ezell Bibbs

> "my eight children, all of my right, title and interest in and to the following described land and property as tenants in common with equal parts"

the real property subject to the partition suit. Minnie Bibbs reserved a life estate in the property. (R-33 & 37)

On March 9, 1998, Ezil Bibbs, Jr., conveyed all of his undivided interest in the real property to Harold C. Gordon, Jr. (R-33) Ezil Bibbs, Jr., constituted the sole and only heir at law of Ezell Bibbs. (R-32)

A trial of this matter was held in the Chancery Court of Oktibbeha County, Mississippi, on June 21, 2004. (R-32) The Court ruled that Harold C. Gordon, Jr., only owned an undivided one-eighth ($1/8^{th}$) interest in the real property. (R-34 & 39) The Court found that Ezell Bibbs only acquired a one-seventy-second interest in the deed from Minnie Bibbs to Ezell Bibbs and his siblings. (R-33)

The Court appointed Lynn Prine as Special Commissioner to make a sale of all merchantable timber. (R-43)

A trial was held in the Chancery Court of Oktibbeha County, Mississippi, on June 21, 2006, on a Motion To Approve Special Commissioner's Sale Of Timber, Payment Of Fees And Expenses And Disbursement Of Proceeds.

On July 12, 2006, the Court confirmed the Special Commissioner's Sale Of Timber, (R-54) authorized certain amounts to be paid including $5,562.43 to Maggie McGee for reimbursement of taxes, (R-55) and distributed the balance of the proceeds to the owners including Harold C. Gordon, Jr., an undivided one-eighth ($1/8^{th}$) interest. (R-56)

This Judgment is being appealed to the Supreme Court of the State of Mississippi.

SUMMARY OF THE AGRUMENT

There are actually two (2) issues before the Court. The first is a determination of the ownership of Harold C. Gordon, Jr., in the real property subject to the partition action.

On December 4, 1928, Ed Bibbs and Scott Logan acquired the property which is subject to this suit. On December 2, 1933, Scott Logan conveyed his interest in the property to Ed Bibbs. Ed Bibbs died leaving a widow and eight (8) children. (R-33) Upon the death of Ed Bibbs, each of his heirs owned an undivided one-ninth ($1/9^{th}$) interest in the real property.

On March 25, 1950, seven (7) of Ed Bibbs' children quitclaimed their interest to the real property to their mother, also an heir. (R-17 & 33) The quitclaim deed stated that the grantors and grantee constitute all the heirs of Ed Bibbs with the exception of Ezelle Bibbs. (R-17) Upon the execution of this quitclaim deed, Minnie Bibbs owned an undivided eight-ninths ($8/9^{ths}$) interest and Ezell Bibbs owned an undivided one-ninth ($1/9^{th}$) interest.

On July 11, 1974, Minnie Bibbs quitclaimed to all of her eight (8) children (including Ezell Bibbs) the real property in question. This quitclaim deed provided:

> "all my right, title and interest in and to the following described land and property as tenants in common with equal parts..." (R-19)

According to the deed itself, Minnie Bibbs conveyed her undivided eight-ninths (8/9ths) interest equally to her eight (8) children. Therefore, each of the eight (8) children obtained an undivided eight-seventy-second ($8/72^{nd}$) interest. This would give each of the eight children a one-ninth ($1/9^{th}$) interest from their mother. Since Ezell Bibbs already owned an undivided one-ninth ($1/9^{th}$) interest, which he inherited from his father, he then owned an undivided two-ninths (2/9ths) interest in the real property.

On March 9, 1998, Ezil Bibbs, Jr., the sole and only heir at law of Ezell Bibbs conveyed all his undivided interest in the real property to Harold C. Gordon, Jr. (R-21 & 33) Therefore, Harold C. Gordon, Jr., owned an undivided two-ninths (2/9ths) interest in the real property and should receive that interest both from the proceeds of the timber sale and from the partition of the land in kind.

The documents as presented to the Court clearly show that Harold C. Gordon, Jr., owns an undivided two-ninths (2/9ths) interest in the real property and the Court erred in ruling that he only owned an undivided one-eighth ($1/8^{th}$) interest. (R-33 & 39)

The other issue deals with the Court authorizing Maggie McGee to be reimbursed for taxes. The Court in its ruling stated:

> "Ms. McGee has asked in her motion for reimbursement of taxes and interest, and the Court is going to overrule the motion that requests interest but authorize the payment of $5,562.43 in taxes..." (T-61)

The record is void of any such motion, and even if there was a motion, there is no documentation of any taxes being paid. Harold C. Gordon, Jr., admits that Honorable Gary Street Goodwin, Attorney for Maggie McGee, Katie Young, and Patrick Bibbs mailed a Motion For Reimbursement Of Payment Of Ad Valorem Property Taxes on June 19, 2006. This motion had tax receipts dating back to 1979 attached. However, the Motion For Reimbursement Of Payment Of Ad Valorem Property Taxes was never properly filed in the cause and was improperly considered by the Chancellor.

Even if the Chancellor could properly consider the Motion For Reimbursement Of Payment Of Ad Valorem Property Taxes, no evidence was ever presented as to the amount of taxes paid or by whom any of the taxes were paid. The attorney for Harold C. Gordon, Jr., objected to the reimbursement for payment of taxes which was acknowledged by the Chancellor. (T-61)

The record clearly shows that the Chancellor improperly considered a Motion For Reimbursement Of Payment Of Ad Valorem Property Taxes, which was not filed and before the Court for consideration. Even if the Court could consider the unfiled Motion, it was improper for the Court to consider evidence not properly presented, either in the way of testimony or documents, to prove the amount to be reimbursed.

ARGUMENT

I. THE TRIAL COURT ERRED IN DETERMINING HAROLD C. GORDON, JR., THE PLAINTIFF, ONLY OWNED AN UNDIVIDED ONE-EIGHTH (1/8TH) INTEREST IN THE REAL PROPERTY RATHER THAN AN UNDIVIDED TWO-NINTHS (2/9THS) INTEREST

This matter was heard and considered by the Chancery Court of Oktibbeha County, Mississippi, on a Petition For Determination Of Heirship And For Partition Of Real Property. (R-4) One of the issues on appeal is the determination of the actual undivided interest in the real property Harold C. Gordon, Jr., obtained in the deed from the sole and only heirs of one of the children of Ed Bibbs. Therefore, the Court had to determine what interest the one child (Ezell Bibbs) owned in the property.

On December 4, 1928, Ed Bibbs and Scott Logan acquired the property, which is subject to this action. On December 2, 1933, Scott Logan conveyed his interest in the property to Ed Bibbs. On March 25, 1950, all the heirs at law of Ed Bibbs with the exception of Ezell Bibbs, conveyed the property to Ed Bibbs' wife, Minnie Bibbs. (R-33 & 36) Ed Bibbs' heirs consisted of a widow and eight (8) children. (R-36) Therefore, upon the death of Ed Bibbs, his real property passed to his heirs in equal shares. Each of the heirs owned an undivided one-ninth (1/9th) interest prior to the conveyance to Minnie Bibbs.

Subsequent to the conveyance to Minnie Bibbs, Minnie Bibbs owned an undivided eight-ninths (8/9ths) interest and

Ezell Bibbs owned an undivided one-ninth (1/9th) interest. I do not believe that there is any dispute as to ownership after this conveyance.

The dispute in ownership arises as the result of Minnie Bibbs conveying her interest in the real property to her eight (8) children, including Ezell Bibbs, in July 11, 1974. In this deed Minnie Bibbs quitclaimed to all eight (8) of her children being Patrick Henry Bibbs, Scott Bibbs, Eddie James Bibbs, Katie Dell Bibbs Young, Annie Bell Bibbs Smith, Maggie T. Bibbs McGee, Rosie Dell Bibbs Harris and Ezell Bibbs the property in question. The quitclaim deed provided:

> "...all of my right, title and interest in and to the following described land and property as tenants in common with equal parts..." (R-19)

The quitclaim is not ambiguous and conveys Minnie Bibbs' undivided eight-ninths (8/9th) interest equally to her eight (8) children. Therefore, Ezell Bibbs owned an undivided two-ninths (2/9ths) interest. This being the one-ninth (1/9th) interest he already owned plus one-eighth (1/8th) of the eight-ninths (8/9ths) conveyed to him by Minnie Bibbs. The other seven (7) heirs owned an undivided one-ninth (1/9th) interest each.

The only time the rules of construction of a deed come into question is where there is an ambiguity. Holifield v Perkins, 103 So 2d 433, 233 Ms 876(1958). When the language of a deed is clear, definite, explicit, harmonious in all its provisions, and free from ambiguity throughout, the

Court looks solely to the language used in the instrument itself. Sumter Lumber Co. v Skipper, 184 So 296, 183 Ms 595(1938). The Courts have consistently held that an ambiguity may not be created in order to make available the rules of construction of a deed nor may courts seek out an intent in order to judge what was said, but rather must judge what was meant by what was not said. Gaston v Mitchell, 4 So 2d 892, 192 Ms 452(1942). The intent of the deed in question is clear and unambiguous. The deed clearly states that Minnie Bibbs wanted her eight (8) children to share in her undivided eight-ninths (8/9ths) interest with equal parts. The quitclaim deed states:

> "...unto...my eight children, and all of my...interest...as tenants in common in equal parts..."

This clearly shows the true intent of the grantor.

However, even if it is held that the deed is ambiguous, it must look and determine the intent of the conveyance. This is subject to certain rules of construction. One of these rules is that in constructing instruments of conveyance, it must be considered as a whole and the intent of the parties be gathered from the plain and unambiguous language contained in the conveyance. Whittington v Whittington, 608 So 2d 1274(Ms 1992). Crum v Butler, 601 So 2d 834(Ms 1992). Gilich v Mississippi State Highway Commission, 547 (74) So 2d 8(Ms 1990). Manson v Magee, 534 So 2d 545(Ms 1988). Welborn v Henry, 252 So 2d 779 (Ms 1971). Rogers v Morgan, 164 So 2d 480, 250 Ms 9(1964).

Another rule of construction is that deeds of conveyance are construed most strongly against the grantor. Baker v Columbia Gulf Transmission Co., 218 So 2d 39(Ms 1969). Ouber v Campbell, 202 So 2d 638(Ms 1967). Fatherree v McCormich, 24 So 2d 724, 199 Ms 248 (1946). Soria v Harrison, 50 So 443, 96 Ms 109 (1909). This is further iterated in other cases, which consistently held that the court should adopt the construction most favorable to the grantee. Salmen Brick & Lumber Co. v Williams, 50 So 2d 130, 210 Ms 560(1951). Allen v Boykin, 24 So 2d 748, 199 Ms 417(Ms 1976). Therefore, any construction made by the court should be most strongly against the grantor and most favorable to the grantee.

The court must also determine which clause prevails where there are two (2) in a deed which are in conflict. If there is a conflict between the granting clause and the recital clause in a deed, the granting clause controls. Mississippi Central Railroad Co. v Ratcliff, 59 So 2d 311, 214 Ms 647(1952). Dunbar v Aldrich, 31 So 341, 79 Ms 698(1902). As a matter of fact, the Mississippi Supreme Court in Alabama & Vicksburg Railway Company v Mashburn, 109 So 2d 533, 235 Ms 346(1959), held that the conveying and granting clause of the deed prevails over a subsequent provision in the deed which tends to cut down the estate previously conveyed.

In any event, a grantor cannot convey an interest that he did not own, and the court in construing a deed would not

assume that the grantor would undertake to convey an interest he did not own. Fatherree v McCormick, 24 So 2d 724, 199 Ms 248(1946). The deed can only convey title in land that grantor actually possesses or owns. Williamson v DeBruce, 57 So 2d 167, 213 Ms 530(1952). In Rosenbaum v McCaskey, 386 So 2d 387(Ms 1980), the Court was faced with determining what interest passed by a quitclaim deed. The Court held that you must look to chain of title prior to deed to determine what interest the grantor had to convey. The Court held that if the grantor had a smaller interest than the deed purports to convey, the grantee may not complain.

Deeds are deemed to express the real intentions of the parties unless the contrary is established by convincing proof. Jones v Jones, 84 So 2d 414, 226 Ms 378(1956).

In the present case the quitclaim deed is clear as to the intent. The deed specifically states that Minnie Bibbs' undivided interest be shared by her eight (8) children in equal parts. (R-33, RE-30) This thereby created a larger interest in one of the children being Ezell Bibbs. However, this larger interest was created because Minnie Bibbs never acquired the interest of Ezell Bibbs, which he inherited from his father. This does not change the fact that Minnie Bibbs clearly stated that she wanted all of her children to share equally in the undivided interest owned by her. The fact that the other seven (7) children or their heirs are

dissatisfied with what their mother did, does not create an ambiguity in the quitclaim deed.

Even if the court finds that there is an ambiguity in the deed, all of the rules of construction which include:

1. The intent must be determined according to the language in the quitclaim deed;

2. The intent is construed most strongly against the grantor;

3. The intent is construed most favorably to the grantee;

4. The granting clause prevails over subsequent provisions; and

5. The grantor cannot convey more interest than he actually owns

must be applied by the Court to determine the intent of the conveyance.

Therefore, in accordance with the established law of the State of Mississippi, the trial court erred in finding that Ezell Bibbs only owned an undivided one-eighth ($1/8^{th}$) interest in the real property. The proper ruling should have been that Ezell Bibbs inherited an undivided one-ninth ($1/9^{th}$) interest from his father plus an undivided one-eighth ($1/8^{th}$) interest of his mother's eight-ninths (8/9ths) interest. Ezell Bibbs owned a total of an undivided two-ninths (2/9ths) interest in the real property, which was subsequently conveyed to Harold C. Gordon, Jr.

The dissatisfaction of the other brothers and sisters is not sufficient legal grounds to substitute their wishes over the obvious intent of their mother.

The trial court erred in finding that Harold C. Gordon, Jr., only owned an undivided one-eighth ($1/8^{th}$) interest in the real property rather than an undivided two-ninths (2/9ths) interest.

II. THE TRIAL COURT ERRED IN AUTHORIZING THE REIMBURSEMENT OF TAXES TO MAGGIE MCGEE IN THE SUM OF FIVE THOUSAND FIVE HUNDRED SIXTY-TWO AND 43/100 DOLLARS ($5,562.43)

At the beginning of the hearing on the confirmation of the special commissioner's sale of timber on June 21, 2006, the Court stated:

> "Ms. McGee has asked in her motion for reimbursement of taxes and interest, and the Court is going to overrule the motion that request interest but authorize the payment of $5,562.43 in taxes..." (T-61)

This ruling by the Court was prior to any hearing on the matter.

Honorable Gary Street Goodwin, attorney for Maggie McGee, Katie Young and Patrick Bibbs, mailed a Motion For Reimbursement Of Payment Of Ad Valorem Property Taxes on June 19, 2006. This motion had tax receipts dating back to 1979 attached. By some means, the Honorable Chancellor had to have obtained a copy of the Motion and upon considering the Motion reached the above stated decision. However, the Motion For Reimbursement Of Payment Of Ad Valorem Property Taxes was never filed with the Chancery Clerk of Oktibbeha County, Mississippi. Since the Motion was not filed, the Chancellor improperly considered said Motion.

Rule 2.02 of the Uniform Chancery Court Rules states:

> "All pleadings...in any action shall be filed with the Clerk of the proper court before being presented to the Chancellor, if to do so would inflict undue hardship on the attorney, or in emergency matters, the papers may be presented to the Chancellor and marked filed by him as provided in MRCP 5(e). Therefore, the said papers shall be forthwith transmitted to the proper Clerk."

Rule 5(e) of the Rules of Civil Procedure provides:

> "The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk."

Both of these rules clearly show that any pleading including a Motion must be filed prior to consideration by the Court. The rules even make provisions in the event of emergency matters. However, in the present case the Motion For Reimbursement Of Payment Of Ad Valorem Property Taxes was never filed either with the Clerk or with the Chancellor. The Court erred in ruling on the Motion, which was not properly before the court.

Even if this Honorable Court determines that the Chancellor could consider the Motion, there was insufficient evidence to justify the ruling by the Court.

Rule 43(e) of the Rules of Civil Procedure entitled "Evidence On Motions" sets forth:

> "When a motion is based on facts, not appearing of record the Court may hear the matter on affidavit presented by the respective parties, but the Court may direct that the matter be heard wholly or partly on oral testimony or depositions."

The record is totally void of any evidence whatsoever on the amount of taxes paid, who paid the taxes, or even the years for which Ms. McGee was seeking reimbursement. The Court in its ruling recognized that Harold C. Gordon, Jr.,

objected to the reimbursement of taxes. (T-61) The Chancellor in his ruling stated:

> "...which I understand that while you may not agree to the reimbursement of the taxes, but that is the way it ought to be handled..." (T-61)

There was no basis for the determination of reimbursement of taxes in the amount of $5,562.43.

The attorney for Ms. McGee failed to submit any evidence either in the way of testimony or admission of documentary evidence to the Court.

The trial court erred in authorizing the reimbursement of taxes to Maggie McGee in the sum of Five Thousand Five Hundred Sixty-Two and 43/100 Dollars ($5,562.43).

CONCLUSION

Harold C. Gordon, Jr., requests the Court to Reverse the Judgment of the Trial Court that Harold C. Gordon, Jr., only owned an undivided one-eighth ($1/8^{th}$) interest in the real property and authorize the reimbursement of ad valorem taxes to Maggie McGee in the sum of Five Thousand Five Hundred Sixty-Two and 43/100 Dollars ($5,562.43).

Harold C. Gordon, Jr., further requests that the Court render that Harold C. Gordon, Jr., owns an undivided two-ninths (2/9ths) interest in the real property, that the distribution should be adjusted accordingly, and that Maggie McGee is to remit the sum of Five Thousand Five Hundred Sixty-Two and 43/100 Dollars ($5,562.43) plus interest to the Chancery Clerk of Oktibbeha County, Mississippi.

Respectfully submitted,

HAROLD C. GORDON, JR.

BY: Taylor Tucker
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CERTIFICATE OF SERVICE

I, Taylor Tucker, Attorney At Law, do hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to:

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Chancellor
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Honorable Gary Street Goodwin
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Angela Buress Stewart
Appellee
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THIS the 22nd day of December, 2006.

Taylor Tucker

Taylor Tucker

REPRODUCTION OF STATUTES, ETC.

copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter but, unless ordered by the court, discovery papers need not be filed until used with respect to any proceeding. Proof of service of any paper shall be upon certificate of the person executing same.

(e) Filing With the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk. Filing may be accomplished by delivering the pleadings or other papers to the clerk of the court or to the judge, or by transmitting them by electronic means.

[Amended effective March 1, 1989.]

Advisory Committee Historical Note

Effective March 1, 1989, Rule 5(b) and Rule 5(e) were amended by authorizing the service and filing of pleadings and documents by electronic means. 536–538 So.2d XXI (West Miss.Cas.1989).

Comment

The purpose of Rule 5 is to provide both an expedient method of exchanging written communications between parties and an efficient system of filing papers with the clerk. This rule presupposes that the court has already gained jurisdiction over the parties. A "pleading subsequent to the original complaint" which asserts a claim for relief against a person over whom the court has not at the time acquired jurisdiction must be served upon such person not a party along with a copy of a summons in the same manner as the copy of the summons and complaint is required to be served upon the original defendants. See Miss.Code Ann. § 11–5–37 (1972) (answer may be made a cross-bill). However, where a plaintiff has settled his case, the service on him of a notice and motion to intervene is ineffectual to bring him back into court. This is consistent with Mississippi practice although past procedure did not recognize intervention. See Hyman v. Cameron, 46 Miss. 725 (1872).

A motion which may be heard ex parte is not required to be served, but should be filed; see also MRCP 81(b). The enumeration of papers in Rule 5(a) which are required to be served is not exhaustive; also included are affidavits in support of or in opposition to a motion, Rule 6(d), and a motion for substitution of parties, Rule 25.

Discovery papers, referred to in Rule 5(a), embrace interrogatories, Rule 33, requests for admission, Rule 36, and requests for production, Rule 34. Responses served under the provisions of any of these rules must also be served on all parties.

A secondary purpose of Rule 5(c) is to permit the court to alleviate some of the difficulties in actions where there are unusually large numbers of defendants. Rule 5(c) is the only instance in which the provisions of Rule 7(a) (pleadings allowed) are permitted to be relaxed. This relaxation extends only to replies to counterclaims and answers to cross-claims; other pleadings and all motions must still be served in the usual manner.

Rule 5(d) recognizes both the expense of making additional transcripts of recordings and duplicating exhibits or attachments to discovery papers, and the fact that the routine filing of such items can engulf the space in a clerk's office. Accordingly, papers produced in the course of discovery need not be filed with the court unless they are relevant to some proceeding or the court so directs, nor must all discovery papers be filed if only some of them are required for the disposition of some motion or proceeding. MRCP 5(d) differs from Federal Rule 5(d) in the preceding respect but accords with the recommendations of the American Bar Association for correcting abuses in the discovery procedures. See Special Committee for the Study of Discovery Abuse, Section of Litigation, A.B.A., Report, at 1, 2 (1977).

Of further significance in Rule 5(d) is that although service must be made within the times prescribed, filing is permitted to be made within a reasonable time thereafter. See Blank v. Bitker, 135 F.2d 962 (7th Cir. 1943). Instances requiring the pleading to be filed before it is served include Rule 8 (complaint) and any other pleading stating a claim for relief which it is necessary to serve with a summons. Pursuant to Rule 5(c) (numerous defendants) the filing of a pleading coupled with service on the plaintiff is notice to the parties. Rule 65(b) requires temporary restraining orders to be filed forthwith in the clerk's office.

To obtain immediate court action under Rule 5(e), a party may file his papers with the judge, if the latter permits, and obtain such order as the judge deems proper. Rule 5(e) should be read in conjunction with Rules 77(a) (courts always open), 77(b) (trials and hearings; orders in chambers), and 77(c) (clerk's office and orders by clerk).

Rule 5(b) has no application to service of summons; that subject is completely covered by Rule 4.

For general discussions of the federal rule analogous to MRCP 5, see 1 Wright & Miller, Federal Practice and Procedure, Civil §§ 71–82 (1969), and 2 Moore's Federal Practice ¶¶ 5.01–5.11 (1975).

RULE 6. TIME

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, as defined by statute, or any other day when the courthouse or the clerk's office is in fact closed, whether with or without legal authority, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or any other day when the courthouse or the clerk's office is closed. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. In the event any legal holiday falls on a Sunday, the next following day shall be a legal holiday.

(b) Enlargement. When by these rules or by notice given thereunder or by order of court an act is

Co. v. Mississippi Clinic, 152 Miss. 869, 871, 120 So.2d 187, 188 (1929) (consolidation in court of law, of two separate actions on appeal from justice of the peace court, where interests of expediency and economy would be served, merges several actions into one action with but one judgment); but see Stoner v. Colvin, supra (in court of law separate instructions were rendered in two actions which had been consolidated for trial); and Elliott v. Harrigill, 241 Miss. 877, 882, 133 So.2d 612, 614 (1961) (consolidation of causes in equity does not make parties to one cause parties to the other, and separate decrees are entered, unless the nature of matters be such that it is clearly proper to include them in one decree); V. Griffith, supra § 506 (equity cases preserve identity of the causes, pleadings are carried on as if no consolidation had arisen, and separate decrees are issued); Wilborn v. Wilborn, 258 So.2d 804, 806 (Miss. 1972) (refusal to consolidate divorced wife's citation for contempt and husband's petition to modify child support decree was within court's discretion). The granting or denying of an order of consolidation is not a final judgment and thus is not appealable. See Miss.Code Ann. § 11-51-3 (1972) (final judgments or decrees appealable).

Rule 42(b) allows the courts to order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims or issues. The court may do so in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy. The procedure authorized by Rule 42(b) may be distinguished from severance under Rule 21 as follows: Separate trials will usually result in one judgment; but severed claims become entirely independent actions to be tried and judgment will be entered thereon independently.

The provision for separate trials in Rule 42(b) is intended to further convenience, avoid delay and prejudice, and serve the ends of justice. It is the interest of efficient judicial administration that is to be controlling, rather than the wishes of the parties. The piecemeal trial of separate issues in a single suit is not to be the usual course. It should be resorted to only in the exercise of informed discretion when the court believes that separation will achieve the purposes of the rule.

If a single issue could be dispositive of the case, and resolution of it might make it unnecessary to try the other issues, separate trial of that issue may be desirable to save the time of the court and reduce the expenses of the parties. If, however, the preliminary and separate trial of an issue will involve extensive proof and substantially the same facts as the other issues, or if any saving in time and expense is wholly speculative, a separate trial should be denied. A separate trial may also be ordered to avoid prejudice, as where evidence admissible only on a certain issue may prejudice a party in the minds of the jury on other issues. For example, this principle may be applied, and a separate trial ordered though a single trial would otherwise be preferable, because in a single trial the jury would learn that defendant is insured. The possibility of such prejudice, however remote, justifies a separate trial if the issues are so unrelated that there is no advantage in trying them together. But if the issues are related, there is considerable authority to the effect that jurors today assume the presence of insurance, that knowledge of the fact of insurance is therefore not prejudicial, and that a separate trial should not be ordered.

Ultimately the question of separate trials should be, and is, within the discretion of the trial court. It must weigh whether one trial or separate trials will best serve the convenience of the parties and court, avoid prejudice, and minimize expense and delay. The major consideration, of course, must be which procedure is more likely to result in a just, final disposition of the litigation.

Any party may move for a separate trial. The motion may properly be made at a pre-trial conference; a motion is not required, however. The court may order a separate trial on its own motion. See Sherman v. Stewart, 216 Miss. 549, 556, 62 So.2d 876, 877-78 (1953) (although the submission for one trial of the issues of accord and satisfaction and the denial of the debt would have been better, the question of separate trials is a question within the sound discretion of the trial judge); Christopher v. Brown, 211 Miss. 322, 329, 51 So.2d 579, 582 (1951) (to prevent undue expense and loss of time and delay, discretion is vested in the trial judge to determine when and in what cases separate hearings may be had). An example is when a single issue could dispose of the case and make trial of the other issues unnecessary. See Miss.Code Ann. § 11-7-59 (1972) (defense which used to be set up in a plea but is set up in the answer in such a manner as to be clearly distinct and readily separable, and which goes to the entire cause of action, may on motion of either party be separately disposed of before the principal trial of the cause, in the sound discretion of the court). As with MRCP 42(a), an order granting or denying separate trials under 42(b) is not appealable as a final judgment. See 9 Wright & Miller, Federal Practice and Procedure, Civil §§ 2381-2392 (1971); 5 Moore's Federal Practice ¶¶ 42.02-.03 (1974).

[Comment amended February 20, 2004.]

RULE 43. TAKING OF TESTIMONY

(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules or the Mississippi Rules of Evidence.

(b) [Abrogated].

(c) [Abrogated].

(d) Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

(f) Interpreters. The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct and may be taxed ultimately as costs, in the discretion of the court. However, in the event and to the extent that such interpreters are required to be provided under the provisions of the Americans with Disabilities Act, 42 U.S.C. § 12131, et seq. or under rules or regulations promulgated pursuant thereto, such compensation and

defendant. Additional discovery time may be allowed with leave of court upon written motion setting forth good cause for the extension. Absent special circumstances the court will not allow testimony at trial of an expert witness who was not designated as an expert witness to all attorneys of record at least sixty days before trial.

B. When responding to discovery requests, interrogatories, requests for production, and requests for admission, the responding party shall, as part of the responses, set forth immediately preceding the response the question or request to which such response is given. Responses shall not be deemed to have been served without compliance to this subdivision.

C. No motion to compel shall be heard unless the moving party shall incorporate in the motion a certificate that movant has conferred in good faith with the opposing attorney in an effort to resolve the dispute and has been unable to do so. Motions to compel shall quote verbatim each contested request, the specific objection to the request, the grounds for the objection and the reasons supporting the motion.

RULE 1.11 MOTIONS FOR RECUSAL OF JUDGES

Any party may move for the recusal of a judge of the chancery court if it appears that the judge's impartially might be questioned by a reasonable person knowing all the circumstances, or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law. A motion seeking recusal shall be filed with an affidavit of the party or the party's attorney setting forth the factual basis underlying the asserted grounds for recusal and declaring that the motion is filed in good faith and that the affiant truly believes the facts underlying the grounds stated to be true. Such motion shall, in the first instance, be filed with the judge who is the subject of the motion within 30 days following notification to the parties of the name of the judge assigned to the case; or, if it is based upon facts which could not reasonably have been known to the filing party within such time, it shall be filed within 30 days after the filing party could reasonably discover the facts underlying the grounds asserted. The subject judge shall consider and rule on the motion within 30 days of the filing of the motion, with hearing if necessary. If a hearing is held, it shall be on the record in open court. The denial of a motion to recuse is subject to review by the Supreme Court on motion of the party filing the motion as provided in M.R.A.P. 48B.

[Adopted April 4, 2002.]

RULE 1.12 ELECTRONIC MEDIA COVERAGE

Electronic media coverage of judicial proceedings by means of cameras, television and other electronic devises is governed by the Rules for Electronic and Photographic Coverage of Judicial Proceedings.

[Adopted effective April 17, 2003 for proceedings conducted from and after July 1, 2003.]

Comment

Section 3B(12) of the Code of Judicial Conduct prohibits broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto except as authorized by rule or order of the Supreme Court. The Supreme Court has now adopted the Rules for Electronic and Photographic Coverage of Judicial Proceedings which provides detailed guidance for such coverage.

[Adopted effective April 17, 2003.]

2.00 RULES CONCERNING PLEADINGS

RULE 2.01 [DELETED]

RULE 2.02 PLEADINGS MUST BE FILED BEFORE PRESENTED

All pleadings, accounts and other papers in any action shall be filed with the Clerk of the proper Court before being presented to the Chancellor. If to do so would inflict undue hardship on the attorney, or in emergency matters, the papers may be presented to the Chancellor and marked filed by him as provided in M.R.C.P. 5(e). Thereafter, the said papers shall be forthwith transmitted by the attorney to the proper Clerk.

RULE 2.03 NO BLANKS IN PLEADINGS

No blanks shall be contained in any pleading.

RULES 2.04 AND 2.05 [DELETED]

[Deleted September 19, 1979.]

RULE 2.06 BLANKS IN PLEADINGS MUST BE FILLED IN

All blanks contained in any pleading must be properly filled in according to the fact or facts before being filed with the clerk or presented for consideration by the Court or Chancellor. If the pleader does not know, and is unable to learn, the necessary fact or facts to enable him to fill in such blanks accurately, he must so state in his pleading.

RULE 2.07 PLEADINGS MUST BE PARAGRAPHED

Each of the several facts on which a complainant may rely for relief shall be set forth in his bill of