South Carolina Law Review

Volume 11
Issue 5 *SPECIAL ISSUE 3-A*

Article 27

Spring 1959

Other Supreme Court Rules Applicable to a Review

Marcellus S. Whaley

benefit to the several Justices of the Supreme Court, but that it would be very helpful to trial judges if done in Briefs handed to them, especially as they often have to decide matters rather hurriedly when trying a case.

One should watch out for Section 6 of Rule 8 because it provides that if a Brief is more than 20 printed pages, the cost of printing the excess cannot be taxed against the losing party.

It will be noted that the last paragraph of Rule 4 provides that a Brief shall contain an index as to principal matters when it contains more than *ten* pages. However, it may be wise to so index if it contains a few pages less.

OTHER SUPREME COURT RULES APPLICABLE TO A REVIEW

Rule 12 gives the time limits for oral argument. Counsel should prepare accordingly. Since one stands up at a reading desk facing the Court when orally arguing, it is very worthwhile for one to have main phases of his argument, sometimes called key notes, on a few serially numbered cards which he can either keep in his right hand or preferably on the reading desk for ready and quick reference. This helps one in remembering the various steps in his argument, so that he will not leave out something important, and also keeps lapses, distracting to his hearers, from occurring when trying to jog his memory from within with no visual help from without.

When No Oral Argument is Permitted: Be sure that one's appealed case does not fall within Rule 29. If there is no constitutional question involved and the amount involved is $500 or less not only is no oral argument allowed, but the time limits within which the respective Briefs are to be filed with the Clerk of the Supreme Court are greatly shortened since the time period begins to run from the date of filing the Transcript of Record (Rule 1) and not so many days prior to the commencement of a monthly term of the Court. (Rule 8, Section 9). The Court decides such cases solely on the Briefs submitted. Counsel do not appear before it.

There is a matter of ethics involved in Rule 17 relative to a re-hearing. Laxity in this regard subjects one to deserved censure. For a case to have a re-hearing the petition must

be accompanied by a certificate from a member of the Bar, not of counsel in the case, that there is merit in the grounds stated in the petition. This means that such outside attorney should go over the record thoroughly and carefully. He owes that duty not only to the petitioner, but to the Court and to himself, otherwise, he should not undertake the task. *Arnold v. Carolina Power Co.* (1933), 168 S. C. 163, 167 S. E. 234. Special attention is called to *Green et al v. E. B. Gresham Co.* (1932), 168 S. C. 395, 167 S. E. 659, which is a very important case and should have been annotated in the 1952 code. Both the form and substance of outside counsel's certificate is commended by the Supreme Court as being "worthy of emulation" and the certificate in its entirety is set forth in the decision.

The certificate is on page 405 of the *Green* case and is as follows:

Certificate From Counsel

I, Samuel T. Lanham, an attorney at law, practicing at the Spartanburg bar, do hereby certify to the following facts:

At the request of counsel for appellants in *Green v. Gresham* (Case No. 386, Opinion 13555, filed January 12, 1933), I have carefully read the transcript, arguments, the opinion of the Court, and the petition for rehearing, and have given some study and thought to the decisions therein cited, with a view of ascertaining whether or not I could give the opinion required of rule 17.

Being in thorough accord with the pronouncement of the Court in *Arnold v. Carolina Power & Light Co.*, contained in the opinion filed therein January 10, 1933, I have made a conscientious effort fully to comply with the Court's ideas as to what should be done in such a matter, by "counsel not concerned in the case," and now give it as my professional opinion that there is merit in the grounds of the petition for rehearing, and that same is not intended for any purpose of delay.

On page 408 the Court *Per Curiam,* said:

For two reasons, we have given careful consideration to the petition for rehearing presented in this cause. One is the apparent earnestness of counsel for the appellants

that our former opinion was erroneous. The other is due to the certificate of "counsel not concerned in the case," Hon. Samuel T. Lanham, to the effect that, in his opinion, there is merit in the grounds of the petition. For the information of the bar, it is well to have that certificate reported. Eliminating the reference to the opinion of this Court in *Arnold v. Carolina Power & Light Company*, 167 S. E. 234, the certificate presented in this case is worthy of emulation in the preparation of a certificate on a petition for rehearing.

As to dismissal and reinstatement of appeals, see cases in 40 S. C. Reports beginning at page 545. Compare Code Section 7-411 and annotations.

Error Below Must Be Prejudicial: South Carolina follows the general rule that a presumption exists that there was no irregularity or harmful error below and hence any errors complained of on appeal must be prejudicial and the burden is on appellant to show that. If harmless, the lower court will be affirmed. Where the burden is not met of showing either that there was error and, if there was such, that it was harmful, the ruling of the trial court stands. As said in *Armitage, Admix. v. S. A. L. Ry. Co.* (1932), 166 S. C. 21, 164 S. E. 169, at page 34:

> * * * Under the evidence as given, it seems to us that, in all probability, another jury would render a similar verdict, regardless for whose benefit the action was brought. Even when it appears that there has been error in the trial of a cause, this Court is not disposed to reverse the judgment below, unless it is shown that the error was prejudicial, and that the result of the trial, on account of that error, may have been different. A careful examination of the record in this case has not disclosed any legal error, and certainly no error which would have influenced the jury in finding that the respondent was responsible, under the law, for the death of the deceased.

When or Not Does Supreme Court Acquire Jurisdiction? The lower court retains jurisdiction until the Return or Transcript of Record is filed with the Clerk of the Supreme Court. Rules 1 and 18. The jurisdiction of the latter court can attach prior to such filing *only* for the purpose of staying proceedings in the court below.

Of course at all times some court must have jurisdiction of a cause that is in the appeal process. Sometimes the power rests in the circuit court alone. As to this, *Pee Dee Farms Corp. et al. v. Johnson* (1955), 227 S. C. 396, 88 S. E. 2d 254, at page 398, leaves no doubt. Justice Taylor points out:

> In the view of this Court, none of these exceptions is meritorious. It should be borne in mind that upon presentation of motions such as those involved in the various proceedings had in this case, the Judge before whom the matter is heard is the Judge not only of the law but of the facts; and as to those exceptions which impute error to the hearing Judge as to facts, having by his order been resolved adversely to appellant, the issue is closed in so far as this Court is concerned. It is unquestioned that under the rules of the Circuit Court, and of this Court, that the Court below had jurisdiction to entertain motions to dismiss where the noticed appeal had not been perfected. See Section 7-409, Code of Laws for South Carolina, 1952; *State v. Johnson,* 52 S. C. 505, 30 S. E. 592; *State v. Atkins,* 169 S. C. 170, 168 S. E. 540; and *Rylee v. Marett,* 121 S. C. 366, 113 S. E. 483, the last named case holding that where a case and exceptions are not filed as required by Rule 49 of the Circuit Court that the Circuit Court should dismiss the appeal. See also, *McDonald v. Palmetto Theaters,* 196 S. C. 38, 11 S. E. (2d) 444, to the effect that after an appeal is perfected and docketed under Rule 1 of this Court the Circuit Court jurisdiction ceases, the implication being clearly that before perfection and docketing the Circuit Court has jurisdiction.
>
> From the record, it clearly appears that due notice was given of motion to dismiss the appeal and that service was accepted by appellant's then attorneys. It likewise appears from the certificate of the Honorable J. B. Westbrook, Clerk of the Supreme Court, that no return had been filed, neither had the case been docketed in his office.
>
> As previously observed, any differences in the evidence relating to factual matters were properly for the determination of the hearing Judge and whether or not the hearing Judge correctly stated the case upon which his ruling was predicated is of no consequence here. It hav-

ing been made to appear that the appeal was not perfected as required by the rules of both this and the Circuit Court and by statute, it follows that the lower Court was correct in dismissing the appeal.

It is accordingly ordered that all exceptions be and they are hereby overruled and the appeal dismissed.

See also *State v. Cottingham* (1953), 224 S. C. 181, 185; 77 S. E. 2d 897, at page 185.

Under Rule 20 the Supreme Court has certain original jurisdictions or powers as to writs, but, unless public interests are involved or there are special grounds of emergency, such writs must be brought before a lower court when feasible. As pointed out in *King, Ins. Com'r. v. Aetna Ins. Co.* (1932), 168 S. C. 84, 167 S. E. 12, at page 91:

Rule 20, in effect, provides that this Court, and the individual justices thereof, will not entertain motions for the issuance of writs, in the original jurisdiction, when such motions can be made in the Circuit Courts without material prejudice to the rights of the parties; and this Court, and the justices thereof, will only exercise the right to issue such writs, in the original jurisdiction, when it is shown that the public interests are involved, or that special grounds of emergency or other good reasons exist therefor, the facts showing the reasons to be stated in the moving papers, which are to be verified.

An again on page 93:

It certainly cannot be said with any degree of force that the provision, permitting an application for a writ in the original jurisdiction to be made to a single justice of the Court, is in conflict in any way with the Code provisions. On the contrary, it helps "to facilitate the work of the Supreme Court," and aids in "the orderly conduct of business in said Court."

* * * * * *

The power given to a justice to issue a writ or order in the Court's original jurisdiction carries with it, necessarily, the right to make that writ returnable to the Court as a whole. Under the rule, authority is given to the justice to *act for the Court,* subject, of course, to the provision that the whole Court may decide later as to taking jurisdiction of the cause. We may say, since

> the question under consideration has been raised, that the procedure followed by Mr. Justice Stabler is one which has been pursued and approved in this Court for many, many years, without any objection so far as we are now informed. The rule of the Court authorizing a single justice to act for the Court is not only for the convenience of the members of the bar and the members of the Court, but it aids materially in the prompt administration of justice. Under our statutes, this Court is in regular session only nine times a year. Much of the time the Court is not in open session, and, accordingly, writs in the original jurisdiction could not be obtained from the whole Court when it is proper for them to be issued. As a matter of fact, few writs are issued by the Court when in session; by far the greater number of them being issued by justices when the Court is not in session.
>
> Whether or not a petition for a writ in the original jurisdiction of this Court meets the requirements of Rule 20 is for the determination, in the first instance, of the justice to whom the petition is presented. The Court, when it reviews the matter, or when it is called to our attention in the proper manner, may finally conclude as to the merits of the showing made for the exercise of our original jurisdiction. . . .

A motion for a new trial on after-discovered evidence should be made when possible in the lower court when it still has jurisdiction of the cause. If the case is on appeal or the appeal has been disposed of, the motion will be made in the lower court but only after the Supreme Court, upon motion made, shall have granted leave for the lower court to take jurisdiction. Rule 24.

An Important Application of Supreme Court Rule 27: Rule 27 gives one food for thought even in trying a case in the lower court. The writer has known several defense attorneys who, when trying a case in the Richland County Court, would at the close of all the testimony make a motion, not for a directed verdict, which would have meant res adjudicata, but for a nonsuit. One stated as his reason for doing so was that the plaintiff could not have moved for a continuance because of the absence of a material witness, since the witness had promised to be present but had not been served with a

subpoena, and he and his client didn't want to take advantage of the situation, but would give the plaintiff the chance to sue again. As a matter of fact, the case was settled.

In a fairly recent case, the Supreme Court in applying Rule 27 adopted the same course, giving the plaintiff another chance where it was shown that additional evidence would be obtainable. In *Moseley v. So. Ry. Co.* (1932), 164 S. C. 193, 162 S. E. 94, the defendant's attorney had made a motion for a nonsuit, and at the close of all the testimony had made a motion for a directed verdict, both of which had been refused. On appeal the Supreme Court declared at page 203:

> We have given this case most earnest consideration and have carefully searched the record for evidence that would sustain the conclusion of the jury. We are constrained to hold that the evidence was insufficient.
>
> In proper instances the Court will order a directed verdict entered in favor of an appellant under the provision of Rule 27, when it appears that this course should have been taken in the lower Court. When it appears, however, that a plaintiff might be able to supply additional evidence to support the cause of action, the Court will not order a directed verdict in favor of the defendant, but will sustain the motion for nonsuit when one has been made. Such motion was made in this case. Under all the circumstances, we do not think there should be a directed verdict in favor of the appellant, but that the case should be remanded for a new trial that the plaintiff may offer additional evidence in this case, where she had to depend entirely upon circumstantial evidence, if such new evidence may properly be obtained.
>
> It is the judgment of this Court, therefore, that the cause be remanded to the Circuit Court and a new trial granted.

Attention is called to the fact that there are about 200 cases in the annotation to this Rule.

THE END