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Appeal

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APPEAL

I. Form and Requisites

A. *Changes in Appellate Procedure*

Supreme Court Rule 1, Section 1,[1] as recently amended, requires that a case be docketed in the court no later than 210 days after the date of the service of the Notice of Intention to Appeal (which notice must be served no later than 10 days after the lower court renders a decision[2]); there was previously no such limitation upon the time for docketing a case. The court reserves the right to extend the time limit for docketing upon a showing of good cause why the case was not so scheduled. Furthermore, by addition to Rule 4, Section 3,[3] the "statement" in the appellate brief must also contain the date of the service of the Notice of Intention to Appeal.

The supreme court added a second section to Rule 1 in regard to court reporters.[4] When the record on appeal includes testimony which must be transcribed by the court reporter, the appellant must make arrangements with the reporter at the time of service of the Notice of Intention to Appeal to have him deliver the transcribed testimony to the appellant within 30 days. The trial judge may grant as many as 60 extra days for such delivery upon a showing of good cause for the delay, but he must provide for service of the order on all interested parties and file such order with the clerk of the supreme court. Only the supreme court may extend the time for delivery beyond the 60 days, and there must be a showing of unusual circumstances which make the granting of such relief necessary.

Any court reporter unable to deliver a record within the prescribed period must promptly notify the clerk of the supreme court so that another reporter can be assigned. Failure of a reporter to comply with these provisions may be adjudged contempt of court.

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1. S.C. Sup. Ct. R. 1(1), *as amended,* Smith's Adv. Sht. No. 20 (Jun. 20, 1970).
2. S.C. Code Ann. § 7-405 (1962).
3. S.C. Sup. Ct. R. 4(3), *as amended,* Smith's Adv. Sht. No. 20 (Jun. 20, 1970).
4. See note 1 *supra.*
5. 253 S.C. 370, 171 S.E.2d 155 (1969).

B. *Penalties for Non-Compliance with Rules*

In *Long v. Gibbs Auto Wrecking Company*[5] the plaintiff brought an action for conversion against Darrell Boatwright, operator of a wrecker service, and Gibbs Auto Wrecking Company, an automobile salvage corporation. Gibbs' agents had removed a car from the wrecker service's possession and sold it. Boatwright filed a cross-complaint against his co-defendant, Gibbs, to recover his expenses in attempting to regain possession of the automobile. The trial resulted in a verdict for the plaintiff against Gibbs for actual and punitive damages and a verdict in Boatwright's favor against Gibbs for actual damages; Gibbs appealed.

The supreme court refused to consider the appellant's exceptions with regard to Boatwright, because, while Gibbs served a Notice of Intention to Appeal from the judgment for the plaintiff, he failed to serve such a notice with respect to the judgment for Boatwright on the cross-action. In the absence of such notice, the court held that it had no jurisdiction to review the judgment entered on the cross action.[6]

Supreme Court Rule 4, Section 6,[7] requires that each exception contain a concise statement of law or fact which the court is asked to review and that each be within itself a complete assignment of error. In *Mastropole v. Transit Homes*,[8] which was decided on other exceptions, the supreme court refused to consider the defendant-appellant's fourth exception because the justices contended that they were unable to ascertain what proposition of law or fact the appellant wished them to consider. The court added parenthetically, however, that the particular law which the appellant was apparently attempting to invoke would not have been applicable anyway. This statement leads one to question whether the court would have scrutinized the exception so harshly had there been any significant point for review contained in the exception.

In *State v. Hinson*[9] the supreme court acknowledged that it has the power, in criminal cases, to waive failure to comply with Circuit Court Rule 76.[10] Under this rule a motion for nonsuit or a motion for a directed verdict must be timely made. The

6. S.C. CODE ANN. § 7-405 (1962).
7. S.C. SUP. CT. R. 4(6).
8. Smith's Adv. Sht. No. 20 (S.C. Jun. 20, 1970).
9. 253 S.C. 607, 172 S.E.2d 548 (1970).
10. S.C. SUP. CT. R. 76.

motion for a directed verdict in this instance was not timely, since it was made after the trial. The court found that the motion for a directed verdict had been properly denied and would have resulted in the same outcome even if it had been timely made.

Another case dealing with Circuit Court Rule 76[11] involved a tort action against the owner of a freezer, who was also the grandfather of the plaintiff. The minor plaintiff had lost the sight of his left eye when it was lacerated by the sharp, jagged corner of a handle on the freezer. In deciding *Stevens v. McGaha*,[12] the supreme court refused to consider exceptions which challenged the sufficiency of the evidence to sustain the verdict. In order to appeal from a verdict because of lack of evidence, the appellant must have moved for a nonsuit or a directed verdict at the close of the respondent's evidence. Here the record failed to show a trial motion for a non-suit or a directed verdict; therefore, the court held that it could not consider the exceptions which challenged the adequacy of the evidence to sustain the verdict.

C. *Raising Question for First Time on Appeal*

The most frequently discussed problem in the area of appeal concerned the right of raising questions on appeal that were not raised at the trial level. In *State v. Anderson*[13] the defense tried to invoke the *in favorem vitae* doctrine which states that in a capital case the appellate court will take notice of any error apparent on the record affecting the substantial rights of the accused, even though the error was not made a ground for appeal.[14] The defendant, Anderson, was accused of murdering his wife and was found guilty with a recommendation of mercy. He received a life sentence as required by statute.[15] A number of exceptions were made on appeal which admittedly were not properly preserved during the trial; the appellant based his right to raise these issues on appeal on the above mentioned *in favorem vitae* doctrine. The supreme court, however, held that the "policy of reviewing questions not preserved during trial does not extend to cases in which the defendant has received a sentence less than death."[16] The fact that the defendant *might* have

11. *Id.*
12. 253 S.C. 378, 170 S.E.2d 758 (1969).
13. 253 S.C. 168, 169 S.E.2d 706 (1969).
14. *See* State v. Bigham, 133 S.C. 491, 131 S.E. 603 (1926).
15. S.C. CODE ANN. § 16-52 (1962).
16. 253 S.C. at 184, 169 S.E.2d at 714.

been given the death penalty does not cause this doctrine to become available.

In *State v. Hall*[17] the defendant failed to object to certain jury instructions at the trial. The supreme court held that, by failing to object, the defendant waived his right to complain of errors in the charge on appeal. If a defendant fails to object to charges or submit his own request for a particular charge, he is estopped from challenging them on appeal.[18]

In *Martin v. Mobley*,[19] the plaintiff-respondent was injured in an automobile accident and brought this action to recover damages. The jury awarded a verdict in the plaintiff's favor for $7500. On appeal, the defendant contended that certain testimony which concerned the plaintiff's having to support a minor child was prejudicial, irrelevant, and immaterial. At the trial, however, the defendant objected to the evidence only on the ground that it was self-serving, and during previous questioning did not even object to the plaintiff's going into her family situation, including the support of her son. Since the objection that this testimony was damaging to the defendant was urged for the first time on appeal and since the plaintiff had testified in this area during the trial without objection, the supreme court decided that such an exception could not be raised and considered on appeal.[20]

D. *Issues Not Included in the Record or Argued in the Brief*

American Motorists Insurance Co. v. Murphy[21] presents the issue of whether or not evidence, which was not included in the trial record, can be considered by the supreme court on appeal. In this case the plaintiff insurance company brought an action to recover premiums on policies sold by the defendant, a former agent of the plaintiff. The plaintiff alleged that the liability of the agent for the premiums continued, even though the agency relationship had been terminated, because of a provision in the written agency agreement.

The brief of the appellant recited certain provisions of the agency agreement upon which the appellant based liability.

17. 253 S.C. 294, 170 S.E.2d 379 (1969).
18. S.C. CODE ANN. § 10-1210 (1962).
19. 253 S.C. 103, 169 S.E.2d 278 (1969).
20. *See, e.g.*, McCormick v. State Capital Life Ins. Co., 253 S.C. 544, 172 S.E.2d 308 (1970) and Davis v. Greenwood United Telephone Co., 253 S.C. 318, 170 S.E.2d 384 (1969), two other cases decided during this survey period which dealt with the same principle of law.
21. 253 S.C. 346, 170 S.E.2d 663 (1969).

These provisions were not included in the parts of the agreement entered as evidence at the trial and filed as the record on appeal; therefore, the court decided that they could not be considered on appeal. Furthermore, the court affirmed the trial judge's granting of a nonsuit, but did so based on a different ground, as allowed by Supreme Court Rule 4, Section 8, which gives the court the right "to sustain any ruling, order or judgment upon any grounds appearing in the record."[22]

The question of abandonment of a point not argued in the appellant's brief was presented in *State v. Stalling*.[23] The defendant was accused of assault with intent to ravish and assault and battery of a high and aggravated nature and was convicted of assault with intent to ravish. Included in the list of alleged violations of the defendant's constitutional rights was the assertion that "the jury was not drawn in accordance with Section 38-52 of the Code, because two-thirds of the names of male electors between the age of 21-65, were not in the jury box."[24] The appellant, however, failed to argue this issue in his brief; therefore, the supreme court decided that the point had been abandoned in accord with the general rule.[25] The question of abandonment was also discussed in *Shirer v. O.W.S. & Associates*[26] where two exceptions were not considered on appeal, because the court found that the exceptions were neither raised by the questions involved on appeal nor argued in the brief.

II. FUNCTIONS OF SUPREME COURT AS COURT OF REVIEW

A. *Review of Findings of Fact and Points of Law*

In *Shelley v. Shelley*[27] the supreme court, on its own initiative, reconsidered a prior ruling in the same case and reiterated the doctrine that the court has no authority to review findings of fact in legal actions. On a prior appeal,[28] *Shelley* was remanded for a determination of where the testator, the father of the plaintiff and the defendant, intended a certain property dividing line to be. On remand, the master to whom the matter was referred found for Bevan Shelley, the defendant. The

22. S.C. SUP. CT. R. 4(8).
23. 253 S.C. 451, 171 S.E.2d 588 (1969).
24. *Id.* at 454, 171 S.E.2d at 589.
25. *See* State v. Johnson, 241 S.C. 366, 128 S.E.2d 664 (1962); State v. Collins, 235 S.C. 65, 110 S.E.2d 270 (1959).
26. 253 S.C. 232, 169 S.E.2d 621 (1969).
27. 253 S.C. 238, 169 S.E.2d 764 (1969).
28. Shelley v. Shelley, 244 S.C. 598, 137 S.E.2d 851 (1964).

plaintiff, Lanneau Shelley, appealed. The trial court without a jury then entered a decree in favor of the plaintiff, from which the defendant brought this second appeal. The second appeal challenged the trial judge's factual determination as to where the testator intended the dividing line to be.

The supreme court began the per curiam opinion by stating that the justices were unsure of the soundness of their prior ruling in which they decided that the will contained an equivocation which could be explained by parol evidence. This statement by the court is unusual, because the prior ruling was in no way brought up as a point of appeal by the appellant. The decision does, however, conclude that the first ruling was correct; therefore, the precedential value of the original *Shelley* case is not impugned.

On the second appeal the court reiterated that the court was "limited to the correction of errors of law and . . . [was] bound by the findings of fact of the circuit judge unless they are without support in the evidence or manifestly controlled by error of law."[29] Since the appellant erroneously based his appeal solely on the supreme court's power to review the factual determination made by the trial court, the court held that there was no issue to be decided by it and thus affirmed the trial court's order. If the case had been one in equity, the court could have reviewed the facts; however, the court's prior determination that only legal issues were involved in the retrial precluded the supreme court from reviewing any factual findings unless absolutely unsupported by the evidence.[30]

An example of the supreme court's authority to reverse findings of fact in equity proceedings is found in *Mixson v. Mixson*.[31] The trial judge, by his own admission, let it be known that he was unable to determine conclusively what amount of back alimony was due the plaintiff-appellant. He stated that he had placed the amount at $750.00, because that was the amount which she was behind in her house payments. Thus, the trial judge clearly invited the supreme court to review his factual findings on appeal, which the court was free to do, since this was a proceeding in equity.

In order for the court to review the findings of fact in an equity case, the appellant must, however, show the court that

29. 253 S.C. at 240, 169 S.E.2d at 765.
30. *Id.*
31. 253 S.C. 436, 171 S.E.2d 581 (1969).

the factual findings are "against the clear preponderance of the evidence."[32] The supreme court can, therefore, act as a jury in equity cases whenever the facts are open to more than one reasonable inference. Here the court completely rehashed the arrearage issue and decided on an appreciably higher sum for the appellant based on the facts of the case.

B. *Power to Consider Appeal Before Final Lower Court Adjudication*

An interesting predicament arose in the two cases of *Young v. Martin*[33] which were separate actions, one brought by Dorothy Young for personal injuries suffered in an automobile accident and the other brought by her husband, James, for loss of consortium and the medical expenses of Dorothy and their minor daughter. The wife's case resulted in a $10,000 verdict in her favor, but the husband's case, tried by a different jury, was decided in the defendant's favor. The defendant moved for a new trial in the wife's case; the motion was denied by the trial judge. The plaintiff, James Young, moved for a new trial in his case, but did not specify any grounds for the motion.

The judge overruled the defendant's motion and issued an order captioned for both cases which stated that, if for any reason the verdict in the wife's case was overruled, the husband's case should be re-tried as well as the wife's. The trial judge then stated that he would hold the husband's motion for a new trial in abeyance.

Uncertain as to the significance of this order, the defendant appealed the two separate cases and the consolidated order. The wife's case was reversed and remanded for a new trial because of substantive matters unrelated to this survey topic. Turning to the husband's case, the supreme court then stated that the trial judge should not have ruled on a motion for a new trial before arguments were heard and further contended that he should not have expressed his opinion on the case. The supreme court stated that the actions were separate, so it did not follow that the husband was entitled to a new trial simply because the wife had to retry her case. The husband's case was not finally disposed of by the trial court, so the supreme court made no decision as to the propriety of the husband's motion for a new

32. *Id.* at 450, 171 S.E.2d at 588, *citing* Odom v. Odom, 248 S.C. 144, 149 S.E.2d 353 (1966); Todd v. Todd, 242 S.C. 263, 130 S.E.2d 552 (1963).
33. 173 S.E.2d 361 (S.C. 1970).

trial.[34] Rather, the court said that he could proceed in any manner which was not inconsistent with the court's opinion. Presumably, the trial judge's order saying that the husband should automatically get a new trial is inconsistent with this opinion, and the husband must state and argue grounds for a re-trial, before the trial judge will be permitted to make a final determination on that point.

C. *Power to Review Moot Questions*

In *Ex Parte: South Carolina State Highway Department*,[35] the trial judge required that a pre-trial hearing be held. As is the usual procedure in condemnation proceedings, counsel for both parties were required to exchange expert evaluation figures and data relied upon by the experts. The highway department objected to this exchange, but the trial judge refused to rescind the order to exchange the data.

After giving notice of intent to appeal, the appellant, reserving any objections, exchanged the information; and the case went to trial. After all the evidence was presented, the case was settled. Following the settlement, the appeal was perfected from the order requiring the exchange of the expert material. The supreme court refused to consider this appeal, since the record showed that the case had been settled; the court felt that the settlement ended the litigation and rendered the issue moot.

The appellant argued that, although this case had been finally settled, the trial judge's ruling would affect in the same manner every highway condemnation case which might come before the trial judge in question. Furthermore, the appellant urged that the issue should be decided because of its effects on presently pending cases. The court, following precedent, held that the question was not a proper matter for review because of mootness.[36] "[T]he mere fact that the same question may arise in other cases does not preserve the issue for determination in this appeal. The settlement of this case simply left nothing for the court to decide."[37]

D. *Disposition of Question of Novel Impression on Demurrer*

In *Gantt v. Universal C.I.T. Credit Corporation*,[38] a tort action for invasion of privacy, libel and slander, and conversion of

34. S.C. CODE ANN. §§ 20-216, 20-201 *et seq.* (1962).
35. 174 S.E.2d 342 (S.C. 1970).
36. *See* Berry v. Zahler, 220 S.C. 86, 66 S.E.2d 459 (1951).
37. 174 S.E.2d at 344.
38. 173 S.E.2d 658 (S.C. 1970).

personal property, the supreme court refused to decide a question of novel impression on demurrer — "Do mere oral declarations afford a basis for the action based on invasion of right of privacy?"[39] In citing an earlier South Carolina decision,[40] the court held that to decide a novel issue on demurrer would be unfair to the current parties and to future litigants. The court reached this decision, it would seem, because it was obvious that the controversy, because of other issues, would be given full treatment in the trial court, and there was, consequently, no need to isolate this one point of law for immediate consideration.

E. *Power to Remand for Further Lower Court Determination*

An interesting situation arose in *Smith v. Smith*,[41] a divorce action in which the appellant-wife was granted neither a divorce nor a separation. The supreme court felt that the trial judge's order refusing the divorce was so brief and incomprehensible that she had not been given a thorough hearing. The cause was remanded for specific findings of fact and law. The court stated, "We intimate no opinion as to whether or not the wife is entitled to a divorce, holding only that she is entitled to a judicious and comprehensive decision of that issue."[42]

F. *Power to Make Result Come Out "Fair"*

In an amazingly frank opinion in *Adams v. Marchbank*,[43] the supreme court admitted tailoring the principles of law to reach the desired result. In an action by the purchaser against the vendor for conversion of a dock and ramp which the purchaser alleged to be part of the property sold, the trial court admitted parol evidence which apparently contradicted terms of the written agreement. On appeal the supreme court went through legal gymnastics to say that the law in this state precluded admission of the testimony; but, since the result of the trial court's action was just, the court found that the admission of the evidence was non-prejudicial and came under the harmless error rule.

39. *Id.* at 660.
40. Springfield v. Williams Plumbing Supply Co., 249 S.C. 130, 153 S.E.2d 184 (1967).
41. 253 S.C. 350, 170 S.E.2d 650 (1969).
42. *Id.* at 356, 170 S.E.2d at 652.
43. 253 S.C. 280, 170 S.E.2d 214 (1969).

III. PARTIES AGGRIEVED

In *Bivens v. Knight*,[44] in testimony before a master, the defendant, M.E. Knight, swore that certain stock in a merchandise store belonged to his wife. The master found, however, that the defendant was the true owner, and, therefore, permitted the stock to be taken for the previous judgment. Section 7-2 of the Code[45] permits any person aggrieved to appeal, but the court found that, since Knight had testified that he did not own the store stock, he was not an aggrieved party within the meaning of that section.

The court stated that an aggrieved party, as that term is used in section 7-2, is "one who is injured in a legal sense; one who has suffered an injury to person or property."[46] Where the defendant owned no property which could be affected by the court's order, the defendant could not be an aggrieved party.

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44. 254 S.C. 10, 173 S.E.2d 150 (1970).
45. S.C. CODE ANN. § 7-2 (1962).
46. 254 S.C. at 10, 173 S.E.2d at 152.