South Carolina Law Review

Volume 24 | Issue 4 Article 2

1972

Appeal

Wallace H. Cheney

APPEAL

I. FORM AND REQUISITES

A. *Non-Compliance with Supreme Court Rules*

Phillips Refrigeration Co. v. Commercial Credit Co.[1] was an action brought by the plaintiff to recover under an alleged express contract for the storage of the defendant's equipment and, in the second cause of action, for services in picking up, transporting and repairing certain equipment.

The trial court granted the defendant's motion for a nonsuit at the conclusion of the plantiff's testimony[2] and the plaintiff appealed on eleven exceptions, of which exceptions nine and ten were abandoned. The South Carolina Supreme Court found no merit in the remaining exceptions. The court noted especially that exceptions 1-3, 6 and 7[3] were not in compliance with supreme court Rule 4, Section 6.[4] Section 6 re-

1. 256 S.C. 500, 183 S.E.2d 330 (1971).

2. The trial court listed its reasons for granting the nonsuit as: (1) the lack of evidence to establish the contract alleged in the first cause of action and (2) in regard to the second cause of action, a finding that Phillips had operated on a commission rather than a flat fee basis.

3. Exceptions 1-3, 6 and 7 as recorded in the transcript at 457-458, 461 were as follows:

(1) That His Honor erred in granting defendant's motion for an involuntary nonsuit in that the testimony and inferences to be drawn therefrom were sufficient to give rise to causes of action alleged in the complaint.

(2) That His Honor erred in granting an involuntary nonsuit against the plaintiff in that the testimony and inferences to be drawn therefrom were solely considerations for the jury.

(3) That His Honor erred in granting defendant's motion for an involuntary nonsuit upon the evidence, not upon the insufficiency of the evidence, the error being that the evidence and all inferences were considerations to be determined by the jury, not the trial judge.

(6) That His Honor erred in granting defendant's motion for an involuntary nonsuit, the error being that the only reasonable inference to be drawn from the testimony was that it was sufficient to be submitted to the jury, the testimony showing the basis and facts which gave rise to the causes of action.

(7) That His Honor erred in granting defendant's motion for an involuntary nonsuit in that His Honor performed the function of the jury by passing upon the weight of the testimony and its sufficiency in granting said motion.

4. S.C. CODE ANN., Sup. Ct. Rule 4, §6 (1962).

quires each exception to be a concise statement of law or fact, complete within itself, and the court found these particular exceptions to be too vague for their consideration. The court stated:

> The first three exceptions are mere general complaints that the court erred in granting a nonsuit. They do not discriminate between the causes of action, and, in effect, merely assert that the evidence was sufficient to require submission of the case to the jury. These five exceptions completely disregard Rule 4, Section 6 of the Rules of this Court, and are entirely too vague and indefinite to require consideration by us.[5]

The court's present position as to exceptions reiterates the long-standing principle that:

> . . . [E]very ground of appeal ought to be so distinctly stated that the court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue.[6]

B. Issues Not Raised in the Court Below

In *Maus v. Pickens Sentinel Co.*,[7] the plaintiff sold a printing press to the Pickens Sentinel Company. The press was to be delivered from the plaintiff's place of business in Tennessee to the *Sentinel* in Pickens, at which time the *Sentinel* was to off-load the press and store it until the plaintiff could install it. The press was shipped and, upon its arrival, was dropped and damaged by defendants Hinkle and Murphree who were engaged by the defendant, Pickens Sentinel Company, to off-load the press.

The Pickens Sentinel Company was eliminated from the case on motion of non-suit, and the court below, through a jury trial, found for the plaintiff. The defendants Hinkle and Murphree appealed. Their appeal brief cited numerous times the judge below had allegedly interjected himself into the trial proceedings and, by allegedly so doing, influenced the jury's verdict.[8] The supreme court, however, held it could not

5. Phillips Refrigeration Co. v. Commercial Credit Co., 256 S.C. 500, 502-503, 183 S.E.2d 330, 331 (1971).

6. Brady v. Brady, 222 S.C. 242, 245, 72 S.E.2d 193, 194 (1952); Gordon v. Rothberg, 213 S.C. 492, 50 S.E.2d 202 (1948); Pate v. C.I.T. Corp., 199 S.C. 244, 19 S.E.2d 107 (1942); Elkins v. S.C.&G.R. Co., 59 S.C. 1, 37 S.E. 20 (1900).

7. 258 S.C. 6, 186 S.E.2d 809 (1972).

8. Brief for Appellant at 8-13.

review these interjections because they were not the subject of objection at the trial, nor had appellants used them as a ground for their motion for a new trial.[9]

The court also held, on the same principle, that the appellants were precluded from objecting to an instruction of the trial court where no objection was made below and, likewise, that an exception which appellants had made to a request to charge was waived since that exception was not argued in their appellate brief.[10]

Additionally, the supreme court would not review the evidence concerning the appellants' question as to their own actionable negligence since the appellants' motion for a directed verdict had been on the sole ground of the plaintiff's contributory negligence. The sufficiency of the evidence in regard to the appellants' actionable negligence was not raised at the appropriate time below and, therefore, could not be reviewed on appeal.[11]

Bass v. Honey Fried Chicken Corp.[12] reaffirmed the requirement that issues must be raised below before they are available at the appellate level. The plaintiff in *Bass* brought action under an alleged breach by the defendant of a stock subscription contract whereby the defendant was to sell shares of its capital stock to the plaintiff. The lower court found that there was a valid contract and that, when the plaintiff had tendered the agreed sum in accordance with the contract, the defendant had refused to transfer the stock. Judgment below was awarded to the plaintiff and the defendant appealed.

On appeal the defendant attempted to show that the plaintiff had failed to prove the existence of a written agreement and, therefore, the judgment of the trial court should be reversed.[13] The supreme court, however, refused to allow the defendant to pursue that course of argument by stating:

> Any failure by plaintiff to prove compliance with legal requirements in this respect is not available to defendant on this appeal, because

9. Maus v. Pickens Sentinel Co., 258 S.C. 6, 11, 186 S.E.2d 809, 811 (1972).
10. *Id.* at 14, 186 S.E.2d at 812.
11. *Id.* at 15, 186 S.E.2d at 813.
12. 257 S.C. 430, 186 S.E.2d 243 (1972).
13. Brief for Appellant at 2-12.

> the lack of a written subscription was not pled as a defense, nor was it otherwise presented to or passed upon by the circuit court.[14]

Although *City of Greenville v. Bryant*[15] will be discussed in more detail under another section of this article, it should be noted that the supreme court pointed out in *Bryant* the same basic principle discussed above and refused to allow the appellants to challenge the validity of certain sections of the city code as unconstitutional because the issue was not raised in any of the proceedings below.[16]

II. Sufficiency of Factual Findings Below

Eargle v. Moak[17] was an action in equity to determine the correct boundary line between adjoining lands. Both the appellant and the respondent relied on their respective conflicting plats. No request was made for a court ordered survey.

Concurrent findings were made by the master and trial judge in the respondent's favor and the supreme court held that it was well settled that such concurrent findings would not be disturbed unless there was no evidentiary support for the findings or they were against the clear preponderance of the evidence.[18] In making its decision the court relied on *Metze v. Metze*,[19] which stated very plainly the principle referred to by the court concerning concurrent findings.[20]

In *New Foundation Baptist Church v. Davis*,[21] the plaintiff church's sanctuary floor collapsed during funeral services and the church brought an action against the contractor for negligent construction. Both actual and punitive damages were sought. The verdict of the jury was for $6500 actual damages. On appeal the appellant claimed the respondent had failed to prove actual damages to the extent awarded. The

14. Bass v. Honey Fried Chicken Corp., 257 S.C. 430, 432, 186 S.E.2d 243, 244 (1972); *e.g.*, Waltz v. Equitable Life Assurance Soc'y of U.S., 233 S.C. 210, 104 S.E.2d 384 (1958); Davis v. Greenwood-United Tel. Co., 253 S.C. 318, 170 S.E.2d 384 (1969); McCormick v. State Capital Life Ins. Co., 253 S.C. 544, 172 S.E.2d 308 (1970).

15. 257 S.C. 448, 186 S.E.2d 236 (1972).

16. *Id.* at 453, 186 S.E.2d at 237.

17. 257 S.C. 359, 185 S.E.2d 894 (1971).

18. *Id.*

19. 231 S.C. 154, 97 S.E.2d 514 (1957).

20. *Id.* at 157, 97 S.E.2d at 515.

21. 257 S.C. 443, 186 S.E.2d 247 (1972).

supreme court found, however, that the evidence was sufficient to support the jury's finding.[22] In addition, the supreme court found that since the jury had only awarded actual damages, appellant's question concerning punitive damages was now moot and any error harmless.[23] Appellant also took exception to the judge's refusal to give a charge concerning the time that had elapsed from the contractor's work until the accident. The supreme court, however, found that the appellant's counsel at the trial level had been very unclear in his request for charge and had never presented the request to the trial judge in the accepted form.[24]

As noted in *New Foundation Baptist Church,* the supreme court will not disrupt the decision of the lower court if the conclusion reached below is sufficiently supported by the evidence.

The trial court decision in *Zimmerman v. Graves,*[25] an action involving title to land, was challenged on appeal on the ground that the judgment below was without sufficient factual support. The supreme court disallowed this challenge by stating:

> Since this is action at law, the conclusions of fact by the lower court are binding upon this court, unless they are without evidentiary support.[26]

In *Zimmerman,* the special referee and the trial judge concurred in their findings and the supreme court concluded their judgment had ample factual support.[27] In a similar action to try title to a strip of land in Spartanburg County, the supreme court, Littlejohn, J., held in *Dillard v. Blackmon*[28] that the evidence supported the concurrent findings of the Master in Equity and the trial judge.

22. *Id.* at 446, 186 S.E.2d at 249. The issue of application of the collateral source rule was also involved in this case. The court felt that, although the rule applied, the evidence supporting the verdict was sufficient even without applying the rule.

23. *Id.*

24. *Id.* The court indicated that even if counsel had followed correct procedure in submitting the request, it would have been without merit based on the evidence presented at the trial level.

25. 256 S.C. 471, 182 S.E.2d 885 (1971).

26. *Id.* at 474, 182 S.E.2d at 886.

27. *Id.*

28. 258 S.C. 158, 187 S.E.2d 643 (1972).

Using the well established principle concerning review of the findings below, the court once again made its position clear in *Terry v. Pratt.*[29] Terry had made application to the Alcoholic Beverage Control (ABC) Commission for a license to sell liquor on the retail market at a location near the City of Anderson. The ABC Commission conducted a hearing into the application and denied the license because the "location is unsuitable for the sale of alcoholic liquors"[30] since the "locality was not under proper police protection."[31]

After the license was denied by the Commission, the decision was reviewed on writ of certiorari by the judge of the tenth judicial circuit. The Commission's decision was affirmed and Terry appealed to the supreme court.

The supreme court stated that the issue of granting the license "ordinarily rests in the sound discretion of the body or official to whom the duty of issuing it is committed."[32] The ABC Commission has been given the authority to refuse to grant a license if it is of the opinion that the place is not suitable[33] and, therefore, the supreme court refused to review the Commission's findings of fact without some showing that the findings were wholly unsupported by the evidence.[34] In speaking to the lower court's review, the supreme court stated that "[j]udges of the courts of common pleas are bound by this same rule and limitation."[35] The supreme court, therefore, affirmed the decision of the court below.

B. External Factors Hampering Juror's Deliberation

State v. Lake[36] brought forward on appeal the question of the interference of external forces on the due deliberation

29. 258 S.C. 177, 187 S.E.2d 884 (1972).

30. *Id.* at 177, 187 S.E.2d at 885.

31. *Id.*

32. *Id.*

33. S.C. CODE ANN. §4-53(2) (1962). The appellant also challenged the constitutionality of §4-53(2) by contending it was an unconstitutional delegation of power from the legislature to the commission. The supreme court held, however, that the statute was complete on its face and the legislature had only given the commission the discretion in the execution of the statute. For the commission's authority to refuse the license due to improper police protection *see* S.C. CODE ANN. §4-37 (1962).

34. Terry v. Pratt, 258 S.C. 177, 187 S.E.2d 884 (1972).

35. *Id.*

36. 257 S.C. 407, 186 S.E.2d 256 (1972).

of a juror. The defendant was convicted in the trial court of armed robbery and assault and battery of a high and aggravated nature. He appealed on the ground that a mistrial should have been declared because a woman juror had been emotionally distressed due to her concern about who was going to care for her children while she was at the court. She was, alleged the defendant, unable to give the due deliberation to the defendant's guilt or innocence which he was entitled to have.

The trial judge refused the motion for mistrial, stating the juror's distress had been sufficiently eliminated. The judge was informed of the juror's anxiety after the jury had been deliberating for some five hours and the judge was preparing to send them to supper. The juror's husband had to go to work at 3:00 a.m. the following morning and she was concerned that there would be no one to care for her children if she was not at home by that time. The judge, with the permission of both the defense and prosecution, allowed her to call and make arrangements for her husband to stay at home if she had not returned by 3:00 a.m. It was the trial court's conclusion that this action relieved any interference with her deliberation.

The supreme court held that the granting or denial of a mistrial motion was within the trial judge's discretion and that his discretion would not be disturbed in the absence of abuse which amounted to an error of law.[37] At the time the trial judge allowed the juror to call her husband, the defense made no motion for mistrial. Defense counsel did express concern that the juror's deliberation might be affected. The actual motion for mistrial, however, came just thirteen minutes before the verdict was returned. The supreme court found that there was no information in the record to indicate that the trial judge's understanding of the situation was not correct and, therefore, there was no reason to disturb his decision.[38]

III. EFFECT OF GIVING A CHARGE OUT OF SEQUENCE

In *Dickard v. Merritt*[39] the defendant's truck had collided with the plaintiff's car after the truck had a blowout and the

37. *Id.* at 409, 186 S.E.2d at 257.
38. *Id.* at 411, 186 S.E.2d at 258.
39. 256 S.C. 458, 182 S.E.2d 886 (1971).

defendant had lost control of his vehicle, causing it to veer over the centerline into the plaintiff's path. The speed limit was 35 m.p.h. and evidence showed the defendant was traveling as fast as 50 m.p.h. when the blowout occurred. The trial court found for the plaintiff and the defendant appealed.

The supreme court found there was evidence of the defendant's actionable negligence and his motion for a directed verdict or judgment *non obstante veredicto* was properly denied below.

The defendant also asserted that the trial judge had erred to the defendant's prejudice when he gave a charge out of context.[40] The trial judge had unintentionally overlooked charging the jury that the violation of traffic statutes constitutes negligence per se. When this was pointed out to him, the judge included a standard instruction concerning it in his supplemental charge. The defendant, however, felt this was prejudicial because his requested charge in connection with this area, which had already been charged earlier, was not repeated again in conjunction with the standard charge.[41] The trial judge stated at the time of the defense objection that he had already given the requested charge to the jury, and the defense did not further pursue the matter. No contention of prejudice was raised at that particular time but, even so, the supreme court found the jury was not in any way misled to the defendant's prejudice. The court stated:

> It is an elementary proposition of law that the charge of a trial judge must be considered as a whole and the individual portions thereof viewed in the light of and in context with the rest of the charge.[42]

IV. Absence of Jurisdiction Below

The defendant in *State v. Gorie*[43] was convicted of manslaughter in the shooting death of his wife following an argument outside their home. He was sentenced by the judge of the fifteenth judicial circuit, who was then presiding over the eighth circuit, where the trial was conducted. There was no appeal or motion for a new trial or judgment n.o.v. at that

40. Brief for Appellant at 21-24.

41. *Id.*

42. Dickard v. Merritt, 256 S.C. 458, 465, 182 S.E.2d 886, 890 (1971); Smith v. Winningham, 252 S.C. 462, 166 S.E.2d 825 (1969).

43. 256 S.C. 539, 183 S.E.2d 334 (1971).

time. Later, the resident eighth circuit judge denied a petition for writ of habeas corpus. The denial was not appealed. Then, some fourteen months later, the defendant's counsel submitted by letter, with prosecution approval, a motion for judgment *non obstante veredicto* and, in the alternative, a new trial to the judge of the fifteenth circuit who had presided at trial. The judge denied appellant's motions on the merits and appeal was made to the supreme court.

The supreme court held there was a lack of jurisdiction and, therefore, the order appealed from was a nullity requiring no consideration or decision by the court. The court stated:

> It is clear . . . that the judge had no jurisdiction . . . having long since adjourned court and departed the circuit.[44] The jurisdiction of a court or of a particular judge over the subject matter of a proceeding depends upon the authority granted by the constitution and laws of the state, and is fundamental. Lack of jurisdiction of the subject matter cannot be waived even by consent and therefore such lack can and should be taken notice of by this Court ex mero motu.[45]

Another case which has received much publicity and deals with the jurisdictional issue is *New South Life Ins. Co. v. Lindsay.*[46] This case came to the supreme court when an endowment policyholder and party in this action made application to the court in its original jurisdiction for a writ of prohibition against the Richland County Court to restrain the county court from further proceedings in this case on the ground that the county court had no jurisdiction over the subject matter. The New South Life Insurance Co. had commenced the action in an attempt to get the county court to order a plan of rehabilitation for the company due to an $8 million deficit in its reserves.[47]

---

44. Jurisdiction would have been present had the defense counsel made the motions for a new trial or judgement n.o.v. after the return of the verdict but before adjournment. Then the motions could have been ruled on by the judge, if necessary, after he had left the circuit. This holds, with certain exceptions, only if the motions were made before the judge prior to adjournment of court. For exceptions and other discussion *see generally,* Smith v. Quattlebaum, 223 S.C. 384, 76 S.E.2d 154 (1953); Shillito v. City of Spartanburg, 215 S.C. 83, 54 S.E.2d 521 (1949); Burns v. Babb, 190 S.C. 508, 3 S.E.2d 247 (1939).

45. State v. Gorie, 256 S.C. 539, 541, 183 S.E.2d 334, 335 (1971).

46. 258 S.C. 198, 187 S.E.2d 794 (1972).

47. In explaining the rehabilitation plan, the court said at 796 that:
> it . . . would permit the insurance company to continue its normal mode of operation but would impose liens on the cash surrender

New South alleged in its return to the application to the supreme court that the county court did, in fact, have jurisdiction over the subject matter involved. This allegation was in three parts, the first of which stated that the county court had jurisdiction because New South was seeking a review of an order of the insurance commissioner pursuant to the Code.[48]

The supreme court found, however, that the insurance company was not seeking a review of the commissioner's decision but was only seeking the county court's approval of a rehabilitation plan.[49]

The insurance company asserted, secondly, that the Richland County Court had jurisdiction over the subject matter since this was a civil case or special proceeding in which there is no money demand, and that the cause is one in which the right involved cannot be monetarily measured.[50] The supreme court held that the value of the property did exceed the monetary limit of the county court's jurisdiction and the right involved could be monetarily measured.[51]

New South's third contention was that the county court should have jurisdiction under a provision of the Code which relates to actions for rehabilitation being brought in the circuit courts.[52] New South alleged that §§37-297.1 and 37-297.2 of the South Carolina Code, which would allow the rehabilitation action to be brought in the circuit court, and §15-766 of the Code[53] would combine to give jurisdiction to the Richland County Court. The supreme court, however, pointed out

---

and loan values of certain policies and the maturity value of endowment policies, all in the amount of 50%, such being applicable to all policies existing as of Dec. 31, 1971.

48. New South claimed that jurisdiction was valid under S.C. CODE ANN. §15-764.2 (1971 Supp.). Since S.C. CODE ANN. §37-70 (1962) gave circuit courts authority to review orders of the insurance commissioner on petition of any aggrieved party, the county court under §15-764.2 should also be able to conduct the review, stated New South.

49. New South Life Ins. Co. v. Lindsay, 258 S.C. 198, 203, 187 S.E.2d 794, 798 (1972).

50. S.C. CODE ANN. §15-764, as amended (1971 Supp.).

51. New South Life Ins. Co. v. Lindsay, 258 S.C. 198, 205, 187 S.E.2d 794, 798 (1972).

52. S.C. CODE ANN. §37-297.1 (1971 Supp.).

53. S.C. CODE ANN. §15-766 (1962).

that §15-766 does not *confer* jurisdiction on the county court.[54] Jurisdiction must first be present before §15-766 would operate to give the Richland County Court authority to act on this matter. Jurisdiction was not present in *New South,* as the supreme court indicated, because the value of the property exceeded the jurisdictional limit of the county court.

V. LOWER COURTS OR BODIES ACTING IN AN APPELLATE CAPACITY

In *City of Greenville v. Bryant*[55] the Greenville City Council revoked the business license of the Carolina Book Store because of its sale of "obscene" material. The city council provided the operators of the bookstore, appellants in this action, with an adversary hearing into the matter and revocation of the license was the result reached by council. Appellants, upon application, had the action of the council reviewed upon certiorari by the judge of the thirteenth circuit. The judge refused to allow additional testimony to be heard by the court and, after review of the record and exhibits that had been before the city council, he affirmed the council decision.

Several issues were raised on appeal to the supreme court.[56] The appellants contended, *inter alia,* that the court below had erred in failing to allow the admission of further testimony or evidence other than that presented at the council hearing. The supreme court found no error in the decision of the court below and stated:

> Counsel for the parties agreed that the matter would be heard by the lower court as if 'on appeal and/or certiorari' from the ruling of City Council. The circuit judge therefore properly considered that the matter was before him on certiorari [and] . . . review was properly limited to the record of the proceedings and evidence upon which City Council acted in revoking the license. Appellants were not entitled to a trial de novo.[57]

54. New South Life Ins. Co. v. Lindsay, 258 S.C. 198, 205, 187 S.E.2d 794, 798 (1972).

55. 257 S.C. 448, 186 S.E.2d 236 (1972).

56. One of those issues, the constitutionality of certain sections of the city code, was discussed earlier under section I.B. of this survey. In addition, the review of certain books admitted into evidence during city council proceedings and the issue of what constitutes obscene material were discussed by the court.

57. City of Greenville v. Bryant, 257 S.C. 448, 453, 186 S.E.2d 236, 238 (1972), *accord,* Whisonant v. Belue, 127 S.C. 483, 121 S.E. 360 (1924); City of Columbia v. S.C. Pub. Serv. Comm., 242 S.C. 528, 131 S.E.2d 705 (1963).

VI. APPEAL FROM INTERLOCUTORY ORDER AS TO LIABILITY ALONE

Nauful v. Milligan[58] was an action for damages for an assault and battery which occurred when the defendant hit the plaintiff because he had made derogatory remarks to the defendant's 11 and 13 year old boys. The plaintiff moved below for summary judgment on the issue of liability only and this motion was granted. The issue of damages remained for determination. The defendant appealed to the supreme court.

The main issue of concern here was whether the defendant could appeal the summary judgment or whether the lower court's order was non-appealable due to its interlocutory nature. The supreme court addressed this issue by reference to the South Carolina Code and the Circuit Court Rules.

First, the court determined that the summary judgment as to liability alone was interlocutory[59] and then held that an interlocutory order on the merits was appealable.[60]

The supreme court found the trial court was not in error in granting a summary judgment on the liability issue but did find the lower court erred when it attempted to decide what testimony would be admissible in the trial on the damages issue. The court said, ". . . the lower court had no authority to rule upon the admissibility of testimony at a subsequent trial to determine damages."[61] Therefore, the judgment was affirmed in regard to granting summary judgment and reversed concerning what would be admissible in a later trial on the issue of damages.

VII. FEDERAL COURTS

A. *Requirements for Removing from State to Federal Courts*

South Carolina v. Moore[62] involved a petition for habeas corpus. A state prisoner accused of murder sought removal of his case to federal court by a petition filed on the morning his trial was to convene in state court. The state court trial

58. 258 S.C. 139, 187 S.E.2d 511 (1972).
59. S.C. CODE ANN., Circuit Court Rules 44(a) and 44(b) (1962).
60. S.C. CODE ANN. §15-123(1) (1962).
61. Nauful v. Milligan, 258 S.C. 139, 147, 187 S.E.2d 511, 515 (1972).
62. 447 F.2d 1067 (1971).

judge proceeded with the trial nevertheless, so the defendant then filed a petition for writ of habeas corpus and requested an order to stop further state action. This petition did not get immediate action by a district judge, and the defendant was convicted in state court of manslaughter and sentenced to three years imprisonment. When the matter did receive the district judge's attention, he denied the removal petition and all other relief sought and remanded the case to state court. The defendant appealed.

The Fourth Circuit Court of Appeals discussed two major areas in announcing its decision. The first matter of concern was the defendant's right to remove the case to federal court. The court held that the defendant's contention that his rights under the Civil Rights Act of 1964 were violated was in error.[63]

Secondly, the court reluctantly[64] found that the defendant must be relieved of his state court conviction due to violation of the United States Code,[65] a provision of which stops state proceedings from the time removal petition is filed until the case is remanded. Since the state court proceeded to conviction rather than discontinuing proceedings against the defendant, its conviction could not stand.

The court pointed out that prior to 1948, the removal in civil rights cases was controlled by 28 U.S.C.A. Section 74, which would have allowed the state proceedings to remain valid, even if conducted after the filing of the removal petition and prior to a federal court order remanding the case to the state. The court, however, held the 1948 revision, which to

63. *Id.* at 1069-1072. The distinction drawn by the court was that the Civil Rights Act of 1964 protects the legal rights of law abiding citizens and not the illegal act of "self help". The defendant admitted committing the homicide but claimed the right of self help in exercising his guaranteed rights. Though the defendant had the legal right to be in a place of public accommodation, he could not forcefully assert that right through violence. The court found no such protection was provided in the 1964 Civil Rights Act and therefore the removal petition had been properly denied by the district judge.

64. The court, at 1074, expressed concern with the required interpretation of §1446 and saw the possibility of abuse by persons whose only desire was to interfere with and delay state trials. Several possible solutions to this potential problem were recommended for Congressional action among which were the reinstatement of the pre-1948 procedure discussed briefly below in the survey text.

65. 28 U.S.C. §1446(e) (1970).

date has not been materially changed, would invalidate the state proceedings conducted in the post-petition/pre-remand interval.[66] The court stated:

> It is clear, however, that Section 1446, in providing for the filing of the petition in the district court while promptly thereafter filing a copy in the state court and giving notice to adverse parties was designed to make the removal effective by the performance of those acts. The removal was no longer dependent upon any judicial act in any state or federal court.[67]

The court ordered defendant Moore's conviction voided and ordered a writ of habeas corpus to issue commanding his release, subject to the state's right to retry him.

B. Extention of Time for Filing Notice of Appeal

In *Chinese Maritime Trust, Ltd. v. Carolina Shipping Co.*[68] an employee of Carolina Shipping was injured on board a ship owned by Chinese Maritime Trust, Ltd. of London. The accident occurred while the ship was in port at Charleston Harbor.

The employee sued Chinese Maritime for recovery on his injuries and it in turn brought action for indemnity against the Carolina Shipping Co., charging that Carolina Shipping had breached their warranty of workmanlike performance. In this third-party suit by Chinese Maritime, the district court determined the employee was injured through his own negligence and, therefore, judgment was for the stevedore, Carolina Shipping, since they were deemed not to have breached their warranty.

The fourth circuit reversed the district court, however, based on a case[69] decided subsequent to the district judge's decision but prior to the appeal reaching the Fourth Circuit Court of Appeals.

The issue in the cross-appeal, however, is the significant area in regard to the appeal survey. Carolina Shipping alleged that Chinese Maritime waited too long in filing its notice of appeal and in securing permission to file late. The judgment below was entered on April 22. According to the

66. S.C. v. Moore, 447 F.2d 1067, 1072-73 (1971).
67. *Id.* at 1073.
68. 456 F.2d 192 (1972).
69. United States Lines v. Jarka Corp. of Baltimore, 444 F.2d 26 (1971).

Federal Rules of Appellate Procedure,[70] Chinese Maritime had thirty days to give notice of appeal. It did not note its intention to appeal until June 1. On June 1, Chinese Maritime filed for an extention of time and, at the same time, filed a notice of appeal. Later, on June 29, the district judge held a hearing on the extension and granted it for reasons of "excusable neglect." The extension was for an additional thirty-day period from the end of the first thirty-day period and thereby validated the June 1 notice of appeal.

Evans v. Jones,[71] the case cited by the court as authority for their decision was a 1966 fourth circuit case in which the appellant was one day late in filing due to a delay in mail service. According to *Evans*:

> A finding by the District Judge that the delay in filing was excusable will validate a late filing provided the effect is not to extend the time for filing more than thirty days from the expiration of the original thirty day period.[72]

The court in *Chinese Maritime* found that the notice of appeal fell well within the extension and found the contention of Carolina Shipping that the district judge could not retroactively permit filing of notice of appeal after more than sixty days following judgment to be in error. The district judge had granted the retroactive extension at the hearing on June 29, which was in excess of sixty days from the April 22 judgment, but the court approved this procedure as long as the notice of appeal was filed within the extension period.

WALLACE H. CHENEY

70. F.R.A.P. Rule 4(a), 28 U.S.C. (1970).
71. 366 F.2d 772 (1966).
72. *Id.* at 773.