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## *New Rules of the Supreme Court of Ohio* (An Analysis)

*Lee E. Skeel\**

**T**HE SUPREME COURT OF OHIO recently completed revision of its Rules of Practice. They became effective on July 1, 1964. Three subjects coming within the inherent power and within the constitutional and statutory jurisdiction of the Court are contained in the revision; that is, procedures for presenting cases in which the Court has original jurisdiction, cases which come within its appellate and revisory jurisdiction as provided in each case by the Constitution and Statutes of Ohio (Article IV, Sections 2 and 6), and admission to the practice of the law in Ohio and disciplinary procedures for members of the bar of Ohio, including the adopting of rules of professional conduct.

No comment seems necessary as to the rules prescribed by the Court for admission to the bar, nor as to those dealing with disciplinary matters or rules of professional conduct. Attention will therefore be directed to the new rules of practice.

Rule VIII deals with original actions. All such actions (quo warranto, mandamus, habeas corpus, prohibition and procedendo), except habeas corpus, are instituted by filing a petition (with seventeen copies), a filing fee of twenty dollars and thirty dollars as security for costs, and a precipe directing the Clerk to issue service of summons. Only under extraordinary circumstances, except in actions in habeas corpus, will an alternative writ be issued.

Where a demurrer is filed, eighteen copies of a supporting brief must be filed therewith, together with a statement of the party filing the demurrer as to whether or not a ruling on the demurrer will be dispositive of the case. Where a demurrer and a statement that the ruling on the demurrer will be dispositive of the case is filed, the Clerk shall forthwith request all opposing parties to state, and they shall state forthwith in writing, whether a ruling on the demurrer will be dispositive of the case. Eighteen copies of any brief in opposition must be filed within thirty days of the filing of such demurrer.

Motions and demurrers are decided without oral argument

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\* Judge, Court of Appeals of Ohio, Eighth Appellate District.

except upon request of the Court or where the parties agree that the ruling on the demurrer will dispose of the case.

Section 8 of Rule VIII, dealing with the evidence, provides that wherever possible an agreed statement of the facts should be filed. Where a case is not submitted on demurrer or by an agreement as to the facts, at the time for filing a reply the case shall be referred to the Clerk of the Supreme Court and the parties shall appear before the Clerk at a reasonable time upon not less than ten days notice before the time and place of meeting as designated by the Clerk, there to present or make arrangements for presenting all evidence which the parties desire to offer. A word about pleadings should be said, since the meeting to determine the evidence is fixed by the time for filing a reply. Section 1 of Rule VIII provides that after directing the Clerk to issue service of summons, such action shall proceed as any civil action. The only actions that may be instituted originally in the Supreme Court are the five writs above enumerated. Revised Code Sections 2309.41 and 2309.42 are the general statutes on rule days. In mandamus the rule days are fixed by R. C. Section 2731.09. This section provides that the return day of an alternative writ of mandamus, or such further day as the Court allows the defendant to answer, is as in a civil action. No time is fixed for the reply which is provided for in this section, but because of the character of the proceeding the Court can and usually does advance pleading days to facilitate the trial of the issues. In quo warranto, R. C. Section 2733.12 provides that a demurrer or answer may be filed within thirty days of filing the petition if it was filed on leave or notice or after the return day of summons. The plaintiff may file a demurrer or reply to such answer within thirty days thereafter.

The statutes in these cases must be followed in determining the date for presenting the evidence.

Briefs on the merits are to be filed within fifteen days after the completion of taking the evidence. This section (Section 9 of Rule VIII) does not specify the number of copies of plaintiff's and defendant's briefs to be filed, but it must be that it was intended that eighteen copies should be filed.

The form and requirement of content of the briefs is set out in specific statutes and by Rule VI and in all cases it is the duty of a party to serve copies of pleadings filed after the petition and briefs, on all opposing parties or their counsel of record, and to

file proof of such service with the Clerk at the time such document is filed.

Special pleading days and time for filing briefs of five days in each case are provided by Section 12 of Rule VIII for election cases, to facilitate the prompt disposition of such cases where such actions are filed within ninety days prior to a pending election.

Oral arguments may be had in an original action upon approval of a request made in writing at the time of filing of a party's original pleading.

Section 14 of Rule VIII provides that the Court in an original action may refer the hearing and argument to a regular or special master commissioner. Such commissioner shall, after hearing and argument, report in writing to the court his conclusions of law and the facts involved in the issues. Copies of such report shall be mailed to each party or his attorney of record. Exceptions thereto may be made by either party within twenty days of the mailing of the report and, upon consideration of such report and exceptions, if any, the court may affirm, modify or set aside the report.

This section (Section 14 of Rule VIII) is new and some doubt might be experienced in the manner or method of presenting "exceptions" to the commissioner's report. It would undoubtedly require that the commissioner file the transcript of the evidence with the court in making his report where the evidence and the conclusion to be drawn therefrom are involved in the exceptions. See R. C. Section 2315.40 and R. C. Section 2315.42.

Where the judges of a Court of Appeals (under constitutional authority) (Article IV, Section 6) find that a judgment upon which they have agreed is in conflict with a judgment pronounced on the same question by any other Court of Appeals, they shall certify the record of the case to the Supreme Court for review and final determination. By the provisions of Rule III, when a Court of Appeals enters an order certifying its record to the Supreme Court because of conflict, the party who would be adversely affected by the judgment so agreed upon shall, within twenty days of such order of certification, file in the Supreme Court a certified copy of such order, which must be accompanied by a filing fee of twenty dollars. Copies of such order of certification must be served on all other parties or their attorneys and proof of such service filed with the certification. The names and

addresses of all counsel of record must also be filed with the Clerk of the Supreme Court.

Failure to file a certified copy of the certification in the Supreme Court (or offer to file it under Rule I, Section 4) under this rule will result in the judgment agreed upon by the judges of the Court of Appeals becoming the judgment in the case.

The rule does not set out the procedure to be followed upon the filing of the certificate of certification, but it must be assumed that the filing of such certification vests the Supreme Court with jurisdiction if the case is one which did not originate in the Court of Appeals.

Where the certificate of certification entered by the Court of Appeals is filed as provided by this rule, if the case is a civil case, the next procedural step is to comply with Rule IV dealing with copies of the record and Rule V providing for briefs on the merits, both hereafter considered under appeals generally.

The procedure to be used in an appeal from a judgment or decree entered by a Court of Appeals in the exercise of its original jurisdiction is not considered by the rules. The notice of appeal in such a case must be filed as provided by R. C. Section 2505.07 and the precept for the transcript as provided by R. C. Section 2505.08. The notice of appeal and its filing, however, should comply with the requirements of Rule I, Section 1 (A) and (B).

Upon filing the copy of the notice of appeal in the Supreme Court within twenty days of filing the notice of appeal in the Court of Appeals, a filing fee of twenty dollars must be paid. Such notice of appeal may be deposited in the Supreme Court conditionally as provided by Rule I, Section 4 (the purpose of such filing hereafter considered). When the notice of appeal is filed, the Supreme Court is vested with jurisdiction and the procedure must be followed as in other civil cases after the Court has granted an alleged motion to certify, it being considered by the Court that questions of law of public or great general interest are involved, or in overruling an alleged motion to dismiss a claimed appeal as of right, it being considered by the Court that a substantial constitutional question is presented.

An appeal to the Supreme Court from a judgment, decree or final order of the Court of Appeals in civil and criminal cases generally (with noted differences in each class of case) begins with filing a notice of appeal in the Court of Appeals, within

twenty days in a civil case, and thirty days in a criminal case, from the entry of judgment or final order appealed from, setting forth:

- a. The judgment or order appealed from
- b. Whether the case originated in the Court of Appeals, and
- c. Whether the case involves a substantial constitutional question.

A copy of that notice of appeal must be filed or offered for filing in the Supreme Court not later than twenty days from the filing of such notice in the Court of Appeals. Section 4 of Rule I provides for the depositing of the copy of a valid notice of appeal filed in the Court of Appeals with the Clerk of the Supreme Court with instructions to file the same in the Supreme Court only and immediately upon the filing of a notice of appeal by an adverse party. Such notice of cross appeal shall be filed and considered as filed in the Supreme Court only in accordance with those instructions. The purpose of this procedure is to allow a party who is satisfied to abide by the judgment of the Court of Appeals, although he is of the opinion that some error in the review of the case was committed to his prejudice, yet only in case an adverse party appeals the judgment to the Supreme Court, to have his claims of error considered. In order to present such claims of error, such appellee (appellant) must proceed as other appellants to secure the jurisdiction of the Court; that is, he must follow the procedure from the filing of his conditional notice of appeal with which a memorandum supporting his claim to present his appeal if the case is one in which the Court of Appeals did not exercise its original jurisdiction, and each subsequent step imposed by the rules on appellants in such cases. Such appellee (appellant) is as to his notice of appeal an appellant and must conduct his appeal as an appellant. A filing fee of twenty dollars, in either case, must accompany the filing or depositing of the notice of appeal with the Clerk of the Court. Copies of the notice of appeal must be served on all parties or their attorneys and proof of service filed with the notice of appeal together with the address of counsel for the respective parties.

A notice of appeal in a case not originating in the Court of Appeals, when filed in the Supreme Court will be considered as a motion either for leave to appeal (in a felony case) or to require the Court of Appeals to certify its record for review in all

other cases, and if a constitutional question is claimed, as a motion to dismiss such appeal as not presenting a substantial constitutional question. If both claims are made, the questions will be considered together. Such notice of appeal, when thus considered as a motion or motions, shall be accompanied by a memorandum supporting the claim of jurisdiction. Rule II, Section 4, provides that such memorandum must have a cover page complying with Rule VI, Section 2, and must set forth

- a. A table of contents,
- b. A table of authorities properly listed,
- c. A copy of the notice of appeal,
- d. A concise statement of the facts,
- e. A concise statement of the question of law presented,
- f. A statement of the reasons why such case is of public or great general interest or why leave to appeal should be granted or why a substantial constitutional question exists,
- g. An appendix containing complete copies of all prior opinions in the case, orders, journal entries (including the judgment or order appealed from), statutes, constitutional provisions and administrative regulations relating to the issues presented.

Failure to comply with these requirements is sufficient reason to deny the motion to certify or leave to appeal or to grant the motion to dismiss as not involving a substantial constitutional question.

Eighteen copies of such memorandum, together with proof of service of copies on all other parties, must be filed pursuant to Rule I, Section 1(B) with the notice of appeal. The appellee may file eighteen copies of a memorandum within thirty days of the filing of the notice of appeal together with proof of service of copies on all other parties or their attorneys of record opposing appellant's claim of jurisdiction. Such memorandum must comply with the requirements as to form and content with the provisions of this rule and Rule VI.

In felony cases, where the time has expired for filing a notice of appeal either in the Court of Appeals or in the Supreme Court, "adequate reasons for the delay in such filing must be

given and where based on facts, those facts must be evidenced by affidavit or deposition filed in support of a motion for leave to appeal." Such motion must be filed in the Supreme Court with a filing fee of two dollars.

Excepting in cases originating in the Court of Appeals, unless otherwise ordered and notwithstanding R. C. Section 2505.08, the original papers and the bill of exceptions shall not be transmitted to the Supreme Court until one or more of the motions to certify or for leave to appeal is granted or where a constitutional question is claimed and the motion to dismiss is overruled. Rule II, Sections 2 and 3.

Upon accepting jurisdiction in the granting of leave to appeal or requiring the Court of Appeals to certify its record or by overruling the motion to dismiss in an appeal as of right, the Clerk of the Supreme Court shall order the Clerk of the Court of Appeals, upon receiving the proper fee, to prepare a transcript of the docket entries in said cause in the Court of Appeals and transmit said transcript and all original papers (including the bill of exceptions, if one has been filed) to the Clerk of the Supreme Court within ten days. The ten day period must be calculated from the date of the order.

Where jurisdiction to review the case is thus granted by the Supreme Court, the appellant in all civil cases must file so much of the record, testimony, and exhibits as may be necessary to be considered by the Court to determine the question presented. Such filing must be within thirty days of the date of filing the original papers and bill of exceptions in the Supreme Court. Service of copies on all other parties or their attorneys of record must be made and proof of service filed with the record. The appellee or party opposing an appeal must within thirty days (the time for filing his brief) of the filing of appellant's brief, file eighteen copies of such additional parts of the record as he will rely on, together with proof of service of copies on opposing counsel. The beginning page in a bill of exceptions or transcript where testimony presented in the record is to be found shall be indicated in parenthesis at the beginning of such quote. The cost of the record filed will, upon filing receipted bill therefor, be taxed as costs. The record filed shall conform with the requirements of Rule VI.

Eighteen copies of appellant's brief on the merits must be filed within ten days of the date copies of the record are filed in

a civil case and within forty days from the date of the allowance of the appeal in a criminal case. Such brief, complying with Rule VI as to form and content, must contain:

- a. If five pages or more, an appropriate subject index including a list of all statutes, constitutional provisions, departmental regulations, cases or other authorities relied on, arranged alphabetically with references to pages of the brief where the citations appear;
- b. A statement of the question of law involved and contentions being made in lieu of an assignment of errors;
- c. A statement of the facts with page references to supporting portions of the record;
- d. The argument with headings indicating portions of argument applicable as to each question or contention set out in the statement of law;
- e. An appendix containing a copy of the judgment or order appealed from and copies of all opinions rendered by any court or board; complete copies of unreported cases cited; rules and regulations of any department, but if too voluminous, then a copy furnished with each copy of the brief and copies of any statute and constitutional provision relied on or to be construed.

Opposing parties must file eighteen copies of their brief, complying with Rule VI as to form and content, within thirty days of appellant's brief, accompanied by proof of service. A reply brief (eighteen copies) may be filed within twenty days of the appellee's brief after service of a copy on all other parties or their attorneys of record, and proof of service filed with brief. Briefs *amicus curiae* may be filed upon leave complying with the requirements of this section (Rule V).

A party whose brief has been filed in compliance with this rule (Rule V), which does not contain all of the authorities upon which such party will rely, may file a brief statement of additional authorities at least five days before oral argument. The appellant, with the filing of his brief, must pay an additional filing fee of five dollars.

The Rules of the Supreme Court make no provision for extending rule days. Section 6 of Rule II of the old rules, without designating any limitation of time, provided for granting an ex-

tension of time for filing records or briefs "upon written application showing reasons for such extension." The Court, in exercise of its inherent power to control procedures in the exercise of its jurisdiction, will undoubtedly grant a reasonable request for the extension of rule days in a proper case upon written request filed within the time provided for such filing. The old rule also provided that the time "for filing succeeding briefs shall be deemed extended for a similar period." Such result would be implied without the necessity of a rule. Serving copies of a motion to extend the time for filing briefs or records and filing proof thereof with the motion should be carried out as required in all other filings.

The provisions on cross appeal (Rule I, Section 4) do not mention nor are they intended to supplement the provisions of R. C. Section 2505.22, which provides:

Assignments of error may be filed on behalf of an appellee which shall be passed upon by a reviewing court before a judgment or order is reversed in whole. The time within which assignments of error on behalf of an appellee may be filed shall be fixed by rule of court.

While the Supreme Court's rules do not deal with this procedure, the court has recognized its provisions in *Parton v. Weilman*, 169 Ohio State 145.

This discussion of the new rules was written before the first of October, 1964. It is quite possible that some revisions may have been made when the Court met in October, so that any changes, if any then were made, should be followed.