C
90 Md. 696, 45 A. 884

Court of Appeals of Maryland.
ELLINGER et al.
v.
MAYOR, ETC., OF **BALTIMORE**.
Feb. 15, 1900.

Appeal from superior court of Baltimore city; J. Upshur Dennis, Judge.

"To be officially reported."

Action by Julian O. Ellinger and another against the mayor and city council of Baltimore. From a judgment in favor of defendant, complainants appeal. Dismissed.

West Headnotes

Appeal and Error 30 ⚿628(1)
30k628(1) Most Cited Cases
That the transcript of a record on appeal was not sent to the supreme court within three months from the date of the appeal was not ground for dismissing the appeal, where affidavits of the clerk of the court from which the appeal was taken, and of his deputy, not controverted, exonerated the appellant from fault in the delay.

Appeal and Error 30 ⚿870(5)
30k870(5) Most Cited Cases
Where there are questions on demurrer, and also issues of fact, involved in the trial of a case, and the demurrer is determined adversely to the party appealing, and verdict and judgment are against him on the facts, an appeal from the final judgment takes the ruling on the demurrer up for review.

Pleading 302 ⚿418(1)
302k418(1) Most Cited Cases
Error in overruling a demurrer is waived by pleading over.

Argued before MCSHERRY, C. J., and FOWLER, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

***885** William A. Fisher and J. Piper, for appellants. John V. L. Findlay, for appellee.

JONES, J.
In this case a motion has been submitted upon the part of the appellee to dismiss the appeal, based upon two grounds: First, that the transcript of record was not sent up to this court within three months from the date of the appeal taken; secondly, that the record here presents no question for the consideration of the appellate court. The first ground of the motion is disposed of by the affidavits produced by the appellants, and made by the clerk of the superior court, from which this appeal comes, and his deputy, which, in the absence of countervailing evidence, are sufficient to exonerate the appellants from fault in the delay of the transcript of record. Bixler v. Sellman, 77 Md. 494, 27 Atl. 137; Brown v. Ravenscraft, 88 Md. 216, 44 Atl. 170; Baldwin v. Mitchell, 86 Md. 379, 38 Atl. 775. In considering the second ground of the motion, a scrutiny of the record will be requisite. That shows the action in this case to have been begun below by the appellants on the 12th day of August, 1895, when they filed in the superior court the titling Thereafter they filed their narr., consisting of a single count, and concluding with a claim of $10,000 damages. To this the defendant (appellee here) pleaded the general issue, and issue was joined. Thereafter the plaintiffs, with leave of the court, amended the declaration by filing what are styled in the record "first and second additional counts." To these last-named counts the defendant demurred. On July 19, 1898, the entry appears in the record as an order by the court "that the demurrer to the narr. in this case be, and the same is hereby, sustained, with leave to plaintiffs to file an amended narr." On the 29th of September, 1898, the plaintiffs filed what appears in the record, eo

nomine, as an "amended declaration," which in its structure, is a complete narr., with the usual formal commencement of suit, containing six counts, numbered consecutively from 1 to 6, and concluding with the claim of $6,000 damages. To this declaration the general issue was pleaded, followed by a joinder of issue. Afterwards this plea was withdrawn, and a demurrer was entered to the narr., which being overruled, the defendant pleaded the general issue and limitations. These pleas went to issue, and upon the issues so joined the case was tried, and, the verdict and judgment being in favor of the defendant, the plaintiffs appealed. The record contains only the pleadings to which reference has been made, and the entry of the verdict and judgment; and the question presented upon the motion under consideration is, does the appeal here bring up for review, as the plaintiffs claim it does, the ruling of the court below on the demurrer to the two additional counts added by amendment to the original narr.? This question must be determined adversely to the contention of the appellants. From what is disclosed by the record, the plaintiffs must be held to have abandoned their case as made by the original narr., and to have waived their right of appeal, or, rather, not to have put themselves in a position to appeal from the adverse ruling of the court upon the demurrer thereto. They did not submit to judgment upon the demurrer, not did they simply amend the original narr. as to the matter which the court had found obnoxious to the demurrer, nor did they attempt to incorporate new matter into the original pleading by way of adding additional counts thereto, but proceeded, upon the leave of the court which accompanied its ruling here in question, to file an entirely new declaration, complete in itself, presenting throughout a condition of case, as a basis of suit, materially variant from that set out in the original narr., and concluding with a new and different claim of damages. It is apparent that the amended declaration was an entire substitution for the original narr., and that the trial of the case proceeded, and the issues, both of law and fact, were determined, entirely with reference to the state of pleading beginning with and following the filing of the "amended declaration." The amendment by way of the "amended declaration" was pleading de novo, which withdraws from the case the pleadings for which the new pleading is substituted, according to repeated decisions of this court. Mitchell v. Williamson, 9 Gill, 71; Norwood v. State, 45 Md. 68; Lake v. Thomas, 84 Md. 608, 36 Atl. 437; 2 Poe, Pl. & Prac. § 189. It is true, as urged on behalf of the appellants, that where there are questions upon demurrer and also issues of fact involved in the trial of a case, and the demurrer is determined adversely to the party appealing, and the verdict and judgment are also against him on the issues of fact, an appeal from the final judgment brings up for review the ruling on the demurrer. The rule is so stated in 1 Poe, Pl. & Prac. § 707, and its application is illustrated in the cases of Lawson v. Snyder, 1 Md. 77; Tucker v. State, 11 Md. 322; Schindel v. Suman, 13 Md. 310; Avirett v. State, 76 Md. 510, 25 Atl. 676, 987. These were all cases, however, which were tried and went to final judgment upon the original pleadings, and presented, when they came to be reviewed on appeal, no question as to withdrawal of pleadings by amendments made, or as to the state of pleadings upon which the cases were tried. In the case of Gardiner v. Miles, 5 Gill, 94, the defendant, after having twice amended his pleas and pleaded anew, again, upon leave, so amended by filing two pleas, to the first of which the plaintiff joined issue, and to the second demurred. The defendant then obtained leave to amend, and filed pleas numbered 3, 4, and 5, as additional pleas. Judgment being against the plaintiff, he appealed, and it was held that the defendant, in making his last amendment, had not withdrawn the second plea of the next preceding pleading, but this was ***886** put upon the ground that the last amendment was a part of the last preceding pleading, and, having been so indicated by the defendant by filing his pleas, by numbering

and designation, as additional pleas, the intention was shown not to withdraw the preceding pleading, but to incorporate the amendment with it, as a part thereof. The case most in point in its application to the question here under consideration is that of Stoddert v. Newman, 7 Har. & J. 251, where, the plaintiff having demurred to one of the pleas of the defendant, the demurrer was overruled, and leave was afterwards given to the plaintiff to amend, whereupon he filed, as was done in this case, a new declaration, upon which issues were made up, and the case tried. The verdict and judgment being against the plaintiff, upon appeal by him it was insisted that the ruling upon the demurrer (judgment on the demurrer, which appears to have been entered, not having been stricken out) was open for review; but the court said that the judgment on the demurrer did not appear "to be embraced in the appeal taken in the case by the plaintiff," and gave as the reason that, "subsequent to its being pronounced, all the pleadings that led to the demurrer underwent an amendment on his motion, which would hardly have prevailed if a design of appealing had then been avowed by him. Indeed, his very motion to amend implied his acquiescence in the court's decision, and is to be considered a waiver of his right of appeal, if it could be exercised after the pleadings anterior to the demurrer had given place to the new or amended pleadings." According, therefore, to what has been indicated by this court as the correct rule of practice in cases involving amendment and change of pleadings, the ruling of the court below upon the demurrer in this case is not brought up on this appeal for review here, and, there appearing no other question in the record for the consideration of this court, the motion of the appellee must prevail, and the appeal will be dismissed.

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