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116 Md. 338, 81 A. 685

Court of Appeals of Maryland.
WILMER
v.
MAYOR AND **CITY COUNCIL** OF **CITY** OF **BALTIMORE**.
June 24, 1911.

Appeal from Circuit Court of Baltimore City; Alfred S. Niles, Judge.

Suit between Edwin M. Wilmer, trustee, and the Mayor and City Council of Baltimore. From a decree for the latter, the former appeals. Dismissed.

West Headnotes

Appeal and Error 30 ⇐371
30k371 Most Cited Cases
The clerk of the trial court in a suit in equity need not forward the record to the Court of Appeals until it is paid for, and the clerk need not demand payment from appellant.

Appeal and Error 30 ⇐607(1)
30k607(1) Most Cited Cases
Where counsel in a suit in equity fail to agree on what shall be inserted in the record on appeal, the record must be made up as provided by Code Pub.Gen.Laws 1904, art. 5, § 34, and the trial judge may direct appellant's solicitor to submit a statement to him, and, where he fails to do so, there is a default, as the right of appellant to control the record is not without limitation.

Appeal and Error 30 ⇐627.2
30k627.2 Most Cited Cases
(Formerly 30k627(2))
Where appellant, for more than four months after the expiration of the time for the transmission of the record to the Court of Appeals, did nothing to perfect the appeal, and the inaction was unexplained, the appeal will be dismissed.

***685** David Ash and D. Eldridge Monroe, for appellant. Joseph S. Goldsmith and Charles F. Stein, for appellee.

Argued before BOYD, C. J., and PEARCE, BURKE, URNER, and STOCKBRIDGE, JJ.

STOCKBRIDGE, J.
The appeal in this case was dismissed upon the day following the argument upon the motion to dismiss, at which time it was announced that the reasons for such action would be given later. On June 6, 1910, a decree was entered by the circuit court of Baltimore City in this case, and on August 4th, two days before the expiration of the time limited for an appeal, the order for an appeal was filed. Under section 33 of article 4, Code Public General Laws, the record should have been transmitted to this court so as to reach here at the latest by November 3, 1910. It was in fact transmitted on March 31, 1911, reaching this court on April 1st. It is this delay and non-compliance with the statute which forms the ground for the motion to dismiss.

As is usual, affidavits and counter affidavits have been filed as to the cause of the delay. From these it appears that, no agreement having been reached between counsel, the solicitors of the appellant gave an order to the clerk to insert certain enumerated papers as constituting the record, while the clerk suggested that these would not constitute a complete record. The appellant's solicitors then brought the situation to the attention of the judge before whom the case had been heard, who informed them that if they would prepare a statement of what should, in their judgment, be included in the record and submit it to him, he would order the clerk to prepare the record in such manner as might appear proper to him. This the appellant's solicitors said they would do, but in fact never did.

In argument the appellant asserts that he has the right to control the record, and relies on the

decisions in Ewell v. Taylor, 45 Md. 573, and ***686**Estep v. Tuck, 109 Md. 531, 72 Atl. 459, to support this contention. It is true that for many purposes the appellant is entitled to control the record, for example, the time of its transmission (Carroll v. Hutton, 90 Md. 636, 45 Atl. 886); but this right is not without limitation. If it were it would be within the power of an appellant to bring here a record containing only such of the pleadings and evidence as were, in his judgment, favorable to his case, and omit the rest entirely.

[1] Undoubtedly the counsel in a case may agree as to what shall be inserted and what omitted; but, where no such agreement is reached, section 34 of article 5, Code Public General Laws, explicitly provides how the record for appeals in equity cases shall be made up. In the case of appeals in cases at law it is the long-settled practice in this state, in the event of a disagreement between counsel, for the trial judge to determine what shall constitute the record, and the judge who heard this case below was but acting in analogy to this practice when he directed the appellant's solicitors to submit a statement to him. This they should have done, and their failure to do so was a default on their part.

[2] The time for the transmission of the record expired on November 4, 1910. More than four months were then allowed to elapse during which nothing appears to have been done to give vitality to the appeal prayed in August, and during which time one of the counsel of the appellant had the matter brought directly home to him, by the non pros. of an ejectment suit connected with a portion of the same property here involved. The inaction during this interval of more than four months remains entirely unexplained, and is additional evidence of default on the part of the appellant.

[3] The order for the appeal was filed on the 4th of August, 1910, the list of the selected papers for the record was handed to the clerk on or about the 21st day of October, 1910, but the cost of the record of these was not paid for until the 31st of March, 1911, and the clerk is under no obligation to forward the record until it is paid for. Steiner v. Harding, 88 Md. 343, 41 Atl. 799. Nor is it his duty to look up the appellant and demand payment therefor. Parsons v. Padgett, 65 Md. 356, 4 Atl. 410; M. D. & V. Ry. Co. v. Hammond, 110 Md. 126, 72 Atl. 650. The requirement is not met by the appellant saying to the clerk, “I will pay you what I (the appellant) regard as the proper cost of the record.”

It has been held, in a long line of decisions in this state, that the burden is upon an appellant of showing that the failure to forward the record within three months after the entry of the appeal was not the result of his own neglect, but was due to the default of the clerk or appellee. Ewell v. Taylor, 45 Md. 573; Parsons v. Padgett, 65 Md. 356, 4 Atl. 410; Estep v. Tuck, 109 Md. 528, 72 Atl. 459; Warburton v. Robinson, 113 Md. 24, 77 Atl. 127; Horpel v. Hawkins, 80 Atl. 842, decided at January term, 1911.

The burden which the law imposes has not been met by the appellant in this case, and the appeal is, accordingly, dismissed, with costs.

Appeal dismissed, with costs.

Md. 1911.
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