

State on the relation of the
Board of Commissioners
of Wake County -

Against
Albert Maguire & others

I - The objection of a defect of parties plaintiff
or defendant can be taken by demurrer
only, if it appears on the face of the complaint -
~~Code § 95 and 99, and if not taken by de-~~
§ 95 to 99 - inclusive - *Reum v Ashworth*
72-496 -

II - If a defendant answers after having demur-
red, it is admitted, that he waives all
advantages from his demurrer -
Reum v Mcclus

Appeal will not lie.

1 - From a refusal to dismiss on motion
Carlton v Byer { *Perry v Whitaker*
71-331 - 71-102 - *Mitchel Kilborn*
71-483

2 - From a postponement of a decision -
Chiles v Martin - 68-307
Gray v Guithen

3 - From a ruling upon the admission
of testimony either before or at the trial -
Wallington v Montgomery {
74-372 -

4 - The setting aside of verdict where it is against
the weight of testimony - or -
Watts v Bell - 71-405 - *West v Cooper*
68-131 -

Or any matter of mere discretion -
* *Futrell v Spivey*, 63-527 - *Smith v Mitchell* - 63-620

In case of refusing to give a judgment on
a motion
Maxwell v Caldwell -
72-450

Notes of a

Brief upon

the question

of appeal

from an over

ruled demand

over - with

leave to answer

Brady & Maguire

CHAUTAQUA COUNTY NY HISTORICAL SOCIETY

IV

Section 299, of the Code, provides for appeals ~~in~~ from every judicial order or determination, upon or involving a matter of law or legal inference which

- 1- Affects a substantial right claimed in any action or proceeding; or
- 2- In effect determines the action; ~~and~~
~~&~~ prevents a judgment from which an appeal might be taken; or
- 3- Discontinues the action; or,
- 4- Grants or refuses a new trial.

Section 344 - defines an order to be "Every direction of a judge, made or entered in writing and not included in a judgment".

Section 216 - defines a judgment to be - "A final determination of the rights of the parties in the action."

Section 313 - provides that, "On an appeal from a judgment the court may review any intermediate order involving the merits and substantially necessarily affecting the judgment."

Collecting these provisions, it is submitted,

(1) - That the term "intermediate order"

* The defendant alleges that the plaintiff has no right to sue. The court overrules this objection, thus determining that the plaintiff has a right to sue in the premises. The substantial right of the defendant is that they shall not be required to defend, though a tedious litigation against one who has no right to prosecute, or who has not stated a cause of action in his complaint. This is of the most substantial of rights since it involves the whole controversy?

ought not to be construed as co-extensive, in its import, with the "order or determination upon, or involving, a matter of law or legal inference" in regard to which an appeal is allowed by § 299, - since it is contrary to reason that a party should be allowed advantage from an objection which he failed to take ^{and rely upon} ~~substantive~~ in apt time - For instance, if a party recover a verdict and the judge grant a new trial from a misapprehension of the law, and the defendant do not appeal, could he after a second trial, ^{upon} and a verdict against him, raise the question as to the order of the judge setting aside the first?

- (2) The overruling of a demurrer is, evidently, an order "affecting a substantial right claimed in the action". *
- (3) The very object of an issue of law raised by demurrer, in every system of pleading, is to avoid the unnecessary trial of issues of fact. Consequently, if a party fail to stand upon his demurrer, but answer over

(4) - It is evident that §§ 97, includes more than an appeal from a judgment - It uses the term "order which is expressly defined not to be a judgment and the word "determination" which embraces both "order" and "judgment".

and proceed to trial, he loses the advantage of his demurrer -

Upon this point see

Wiles v. Syon - 2 Gibbs (Mich.) 276

Trigg v. Shields - 1 - Hurdin (Ky) 168

Moore v. Ross 1 - Morris (Iowa) 401

Buchmaster v. Gentry - 1 - Deussen - 310

Gilbert v. Maygood 1 " 471-

V.

From a general ^{of the right to appeal from such an order} ~~discussion of the questions~~ ~~involved in this question~~, we refer the Court

to

2 - Whitaker's Practice, pp. 760 to 763 inclusive

" " " " 493 to 495 "

VI -

The order in this case "permits" an answer. It does not direct one to be made but only allows it. Then the judge refuses to allow notice of appeal to be entered and verbally directs the clerk ^{not} to send up the transcript - If the defendants answer under the order, it is a voluntary act and they thereby abandon their demurrer and entirely lose all advantage from one of its grounds of objection.

The State on the Relation
of The Board of Commis-
sioners of Wake County
Against
Albert Magnin, J. N.
Remiting & others

2 cases
Brief of
Sefli's Comm-
rel on
Motion to
direct clerk
to furnish a
transcript

10953

I - The defendants have complied with all the provisions of Article XII of the Code of Procedure in regard to appeals.
See copies of record furnished the Court.

II - The defendants have a right to an appeal on the overruling of their demurrer.

(1) Such is the general and established practice of the Court. In the hasty examination we have been able to give the question, we find that the Court has entertained appeals from the orders overruling demurrers to the complaint, in the following cases. These cases embrace every ground of demurrer

- Powell v Allen - 75-450
- Mullen v Whitmore 74-477
- Haywood v Roger 73-320
- Allen v Farmers Bank - 72-262
- Love v Comers of Chatham 64-706
- Jacobs v Smallwood 63-112
- Rice v Williams - 63-128

allowed by the Code, including, then specified in subsections 1 & 6 of § 95.

~~III~~ All the cases in which
the Court has decided that
an appeal will not lie,
so far as we can discover,
are of the following classes -

(1) Where the order, ^{sought to be appealed} is purely dis-
_{cretionary} -

Beck v Cooper - 68-131

Watts v Bell - 71-405

Futral v Spring 68-527

Smith v Mitchell 63-620

(2) A refusal to dismiss on mo-
tion -

Curleton v Byer,

71-331,

Mitchell v Kilborne,

71-488,

Perry v Whitaker

77-102 *

(3) A postponement of decis-
ion, or refusal to give
judgment at the time de-
manded - or an order to show
cause.

Childs v Martin - 68-307

Gray v Gaither - 71-55*

Maxwell v Caldwell

72-450

(4) A ruling merely incidental
to the trial, as upon the ad-
missibility of testimony -

Wallington v Montgomery

74-372 *

The court has entertained
appeals from the over-~~ru~~
ling of demurrers in the fol-
lowing cases-

Powell v Allen
75-450

Mullen v Whitmore.
74-477-

In this case the record states
that the demurrer was over-
ruled and leave to answer
granted -

~~Wilson & Doherty v Bank~~
~~of Lexington -~~
72-

Jones v Lewis of Bladen
73-182

Haywood v Rogers
73-320

In this case judgment was
given on the overruling of the
demurrer to the answer

Will v Fairley
73-464

Demurrer overruled and de-
fendant required to answer
McFarland v McKay - 74-258.

The same in

Land Co. v Beatty
69-329

~~Demurrer to answer~~

Gleason v Farmer's Bank
72-626 -

Jones v Corns of Bladen
73-182

Wall v Fuirly - 73-464

Sund Co v Beatty - 69-329

McFarland v McKay
74-258.

(2) In McFarland v McKay, ⁷⁴⁻²⁵⁸ and
Sund Co v Beatty, ⁶⁹⁻³²⁹ the re-
port shows the record to
have been, "demurrer over-
ruled and defendant re-
quired to answer".

(3) In Mullan v Whitmore, ⁷⁴⁻⁴⁷⁷
the entry appealed from was
"The demurrer was over-
ruled and leave to
answer granted".

(4) The attention of the court has
been directed to the character
of the order, in such cases.
In Bank v Britton 66-365,
Rodman, J., says, "This appeal
is from the interlocutory judg-
ment overruling the demurrer".
Yet it is ^{was} entertained and de-
cided <sup>without any intimation of ir-
regularity</sup> without any intimation of ir-
regularity.

(5) - There is no case, ^{that we have found} in which the
court has intimated that an
order, overruling a demurrer
is not appealable.

L

Bank \leq Britton

66 - 365-

In this Rodman J. says - "The
Appeal is from the interlocutory
judgment overruling the
demurrer."

Love \leq Comrs of Chatham

63 - 112

Jacob \leq Smallwood

63 - 112

Rice \leq Williams

63 - 128

CHAUTAQUA COUNTY HISTORICAL SOCIETY 2013