ARMIJO V. NEHER, 1902-NMSC-010, 11 N.M. 354, 68 P. 914 (S. Ct. 1902)

AMBROSIO ARMIJO et al., Plaintiffs in Error,
vs.
GEORGE K. NEHER, Defendant in Error

No. 924

SUPREME COURT OF NEW MEXICO

1902-NMSC-010, 11 N.M. 354, 68 P. 914

April 25, 1902

Error to the District Court of Bernalillo County, before J. W. Crumpacker, Associate Justice.

SYLLABUS

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When one of the parties to a suit sues out an appeal which is heard, it does not prevent the other party to the cause from suing out a writ of error to review certain errors alleged to have occurred on the trial, and which were not reviewed on appeal.

COUNSEL

Neill B. Field for plaintiffs in error.

William B. Childers for defendant in error.

JUDGES

Mills, C. J. Parker, Baker, McFie and McMillan, JJ., concur.

AUTHOR: MILLS

OPINION

*{*354}* OPINION OF THE COURT.

{1} The defendant in error, George K. Neher, brought suit in the district court of Bernalillo county, against the plaintiffs in error, Ambrosio Armijo and Anita Armijo, to partition certain real property situated in the city of Albuquerque. In this suit a cross-

complaint was filed by the Armijos to recover a certain part of the rents, issues and profits alleged to have been received by Neher as their cotenant.

{2} On December 1, 1900, a final judgment was entered in the case by the district court, directing the sale of the property and the payment to the Armijos of a fixed amount of the rents, issues and profits, out of the proceeds of the sale as their share. On December 3, 1900, Neher appealed and the case came on for hearing at the January, 1901, term of this court. At the hearing plaintiffs in error herein insisted that there was no error prejudicial to Neher in the judgment, but that there was *{*355}* error prejudicial to themselves. They did not however file any cross-appeal, but their counsel stated that if "a cross-appeal is deemed by the court to be necessary to enable it to review the action of the trial court in this regard, a cross-appeal will be taken by appellees, but it is earnestly urged that no such cross-appeal is necessary."

{3} On October 1, 1901, an opinion was filed in the case by Mr. Justice Parker, affirming the judgment of the court below, and in his opinion he refused to consider certain errors claimed to exist by appellees, saying:

"Appellees complain that error was committed by the court below against them in not charging appellant with interest on the annual receipts of rents and profits which belonged to them, and in allowing appellant certain items of taxes paid by him after the institution of the ejectment suit, exceptions to which were duly saved; but no appeal or cross-appeal was taken by them, and no assignments of error filed. It requires no citation of authority to establish the proposition that, independent of some statute providing a different rule, appeal and assignment of errors are quite as essential to present a question to an appellate court for review as are objections and exceptions to the errors complained of. Counsel seems to concede the general rule, but insists that under the peculiar terms of our statute it is the duty of this court to correct the errors of which he complains. The statute relied upon is as follows: 'In all cases now pending in the Supreme Court, or which may hereafter be pending in the Supreme Court, and which may have been tried by the equity side of the court, or which may have been tried by a jury on the common law side of the court, or in which a jury may have been waived, and the cause tried by the court or the judge thereof, it shall be the duty of the Supreme Court to look into all the rulings and decisions of the court which may be apparent upon the records, or which may be incorporated in a bill of exceptions, and pass upon all of them, and *{*356}* upon the errors, if any shall be found therein, in the rulings and decisions of the court below, grant a new trial or render such other judgment as may be right and just and in accordance with law; and said Supreme Court shall not decline to pass upon any question of law or fact which may appear in any record either upon the face of the record or in the bill of exceptions because the cause was tried by the court or judge thereof without a jury, but shall review said cause in the same manner and to the same extent as if it had been tried by a jury.' Comp. Laws of 1897, sec. 897. If the interpretation of this section of the statute invoked by appellees is to be adopted, it is easily made manifest to what absurd results we will be brought.

"It will be no longer necessary to make objection or save exception in the trial courts of this Territory. Learned counsel may sit by, and see the trial court, in the hurry and tedium of a protracted trial, commit any sort of error, and never call attention to the same, or lend the court the aid to which it is entitled in arriving at a correct conclusion. If unsuccessful, he may appeal to this court, and assign errors, or, failing in that, may call attention to the errors complained of in his brief, or, failing in that, he may turn over the record and bill of exceptions to this court, and say: 'Here is this record. It is full of errors. Take it, examine it, and render such judgment as may be right and just, and in accordance with law.' And the successful party may do the same thing in case of an appeal by his opponent, as in this case. It is apparent that the Legislature never intended the statute to have an effect so inconsistent with all the principles of trial and appellate procedure and the due administration of justice. This statute does not pretend to deal with methods of saving exceptions and presenting errors to the appellate court. It simply provides that errors shall be passed upon. Can it contend that immaterial, invited, or waived errors are to be passed upon? We think not. An error of the trial *{*357}* court ceases to be such in the appellate court if the same is immaterial, invited, or has been waived. We think the errors mentioned in the statute are such errors only as have been made available by the party presenting them. We are confirmed in this conclusion by the persistent ruling of this court ever since this statute was passed in 1889 to the effect that only such errors as are properly saved and presented will be considered. See Laird v. Upton, 8 N.M. 409, 45 P. 1010; Padilla v. Territory, 8 N.M. 562, 45 P. 1120; Grayson v. Lynch, 163 U.S. 468, 16 S. Ct. 1064, 41 L. Ed. 230, in each of which this section was held not to modify existing rules of procedure. It is likewise to be understood that we recognize the exceptions to the general rule which authorizes this court to notice without exceptions or presentation jurisdictional and other matters which may render a case inherently and fatally defective, and require a reversal." Neher v. Armijo, 11 N.M. 67, 66 P. 517.

{4} On the day this opinion was handed down, or soon after, counsel for Neher filed a motion for a rehearing of the case, which motion was overruled at the January, 1902, term of this court.

{5} On October 4, 1901, which was within the statutory time, plaintiff in error sued out a writ of error, and caused the same to be served upon the defendant in error, Neher.

{6} Counsel for defendant in error filed a plea setting up that the action of this court in case No. 902, Neher v. Armijo et al., 11 N.M. 67, 66 P. 517, was a bar to the prosecution of this writ of error. To this plea defendant demurred, so that there is but one point for us to consider in passing on this case, in its present shape, viz.: Where a party to an action has taken an appeal, and the other party has taken no cross-appeal and consequently has assigned no errors, and a judgment is given on such appeal, is the other party estopped thereby from suing out a writ of error, and having the same heard?

{7} Writs of error had their origin in the common law, *{*358}* and have been adopted in the United States as a part of the common-law system. 2 Cyc. 508; Harding v. Larkin,

41 Ill. 413. The remedy by appeal was unknown to the common law, and is a right which has been given by statute. 2 Cyc. 507; Harding v. Larkin, 41 Ill. 413.

{8} In the absence of constitutional limitations the Legislature may prescribe the mode and specify the manner in which a cause shall be brought up from the lower courts to the appellate court for review. Dismukes v. Stokes, 41 Miss. 430.

{9} In this Territory the right is given for any party to a suit who considers himself aggrieved by the judgment rendered in a suit to either appeal or sue out a writ of error. No provision is in our statutes providing for cross-appeals or for the assignment of errors on a cross-appeal, if one is taken.

{10} Cross-appeals have frequently been brought before us, and we have as frequently considered them, i.e., both parties have appealed from the same judgment and have assigned errors, which we have reviewed at the same hearing and have decided at the same time. In the case at bar, however, only one party appealed, and assigned errors, while the other sued out a writ of error.

{11} Many of the States have statutes on the subject of cross-appeals, some of which provide that if one party appeals, or sues out a writ of error from a judgment and the other considers himself aggrieved, that he must join in the appeal or writ of error and assign errors, which are considered by the court at the same time as the original appeal, and that if he does not do so, that he shall be barred from thereafter making an appeal or suing out a writ of error.

{12} In other jurisdictions there is express statutory authorization for the assignment of cross-errors which do not deprive the defendant in error of the right to sue out a writ of error, if he prefers to do so. But if he avails himself of the statutory remedy, he is precluded from thereafter suing out a separate writ of error. 7 Ency. *{*359}* P. and P. 855, citing Page v. People, 99 Ill. 418; Wickliffe v. Buckman, 51 Ky. 424, 12 B. Mon. 424.

{13} In this case, the defendant in error relies almost entirely to sustain the plea which he has interposed upon the case of Caston v. Caston, 54 Miss. 512; a case which was decided in 1877. In that case the appellee appealed from a decree which he sought to have reversed but which decree was affirmed, and subsequently the appellants also appealed. The court held that a party could not resist an appeal, obtain an affirmance of the decree, and afterwards prosecute an appeal from the decree, which he insisted should be affirmed.

{14} The great weight of authority seems to be against the holding of the Supreme Court of Mississippi, and besides this case can readily be distinguished from it, for in that case, after one appeal had been decided, the other party sought, to appeal, while in this case after the appeal had been decided, the other party seeks to sue out a writ of error, to review certain errors alleged to have occurred in the trial of the cause below, which were not reviewed on the appeal.

{15} In Northern Pac. R. Co. v. Glaspell, 49 F. 482, Judge Shiras holds that one party can sue out a writ of error to the Supreme Court of the United States for the purpose of presenting the question of jurisdiction, while the other party appealed to the circuit court of appeals, and that the appeal would be continued in the circuit court of appeals to await the decision of the Supreme Court on the question of jurisdiction.

{16} Where a system of appellate procedure has been adopted which contemplates both the remedies by appeal and by writ of error, but makes no provision for the assignment of cross-errors, one party may appeal and the other prosecute a writ of error. 2 Cyc. 530.

{17} In Harding v. Larkin, 41 Ill. 413, the court holds that a plaintiff may prosecute a writ of error, although the defendant has appealed from the same judgment, *{*360}* and that one of these proceedings does not affect the other, and that both may progress at the same time.

{18} Brennan v. Bank, 10 Colo. App. 368, 50 P. 1076, holds that the failure of an appellee in the court of appeals to assign cross-errors does not cut him off from the right to a subsequent writ of error, and the same doctrine is held in Page v. People, 99 Ill. 418.

{19} On the review of this case on the writ of error, nothing of course can be considered which was decided in the case of Neher v. Armijo, 11 N.M. 67, 66 P. 517, as that is already **res judicata,** but we can see no good reason if error intervened against the plaintiffs in error on the trial of this cause in the lower court which were not considered by us on hearing of the appeal, because cross-assignments of error were not made, why such matters should not now be considered by us.

{20} It is therefore ordered that the demurrer filed to the plea in this case be sustained, and the plea overruled, and it is so ordered.