

**CULLENDER
vs.
LEVERS**

No. 3917

SUPREME COURT OF NEW MEXICO

1933-NMSC-082, 38 N.M. 112, 28 P.2d 533

September 26, 1933

Appeal from District Court, Chaves County; H. A. Kiker, Judge.

Action by James M. H. Cullender, administrator de bonis non of the estate of Helen M. Daniel, deceased, against R. E. Levers. From the judgment, defendant appeals. On motion to dismiss appeal.

COUNSEL

Reese & Reese, of Roswell, for appellant.

O. E. Little, of Roswell, for appellee.

JUDGES

Watson, Chief Justice. Sadler, Hudspeth, Bickley, and Zinn, JJ., concur.

AUTHOR: WATSON

OPINION

{*113} {1} From the bill of exceptions it appears that this cause was tried before Judge Kiker, of the Eighth District, "sitting by designation of the Chief Justice * * * as judge of the Fifth Judicial District." He signed the judgment as "Judge of the Eighth Judicial District, * * * sitting and acting as and for the Hon. G. A. Richardson, Judge of the Fifth Judicial District, designated by the Chief Justice. * * *" The order granting the appeal was made four months later by Judge McGhee, successor to Judge Richardson.

{2} On these facts appellee moves to dismiss the appeal on the ground that Judge McGhee lacked jurisdiction to allow it.

{3} Appeals are allowed by, and on application to, the district courts. N.M. App. Proc. R. II, § 2, R. III, § 1. The act of a district judge, sitting in his own court, exercising that court's power to grant an appeal, is entitled to every presumption. This record does not show that Judge McGhee was for any reason disqualified to perform this act, or that any other judge had been designated to perform it. It is not made to appear that Judge Kiker was designated to try this particular case, and so *State v. Towndrow*, 25 N.M. 203, 180 P. 282, is not in point, even if applicable otherwise.

{4} To end a long controversy as to settling bills of exceptions, we have provided by rule that the judge who tried the cause, or another district judge by him or by the Chief Justice designated, shall perform this act. N.M. App. Proc. R. XI, § 2. But there is no analogy which would suggest a similar rule or holding as to granting appeals.

{5} The motion to dismiss should be denied, and it is so ordered.