FARISH V. NEW MEXICO MINING CO., 1889-NMSC-004, 5 N.M. 234, 21 P. 82 (S. Ct. 1889)

EDWARD T. FARISH et al., Plaintiffs in Error,
vs.
NEW MEXICO MINING COMPANY et. al., Defendants in Error

No. 374

SUPREME COURT OF NEW MEXICO

1889-NMSC-004, 5 N.M. 234, 21 P. 82

January 1889, Term

Error to the First Judicial District Court, Santa Fe County. Motion to dismiss writ of error, and strike the record from the files.

The facts are stated in the opinion of the court.

COUNSEL

Francis Downs for plaintiffs in error.

W. T. Thornton and E. L. Bartlett for defendants in error.

JUDGES

Brinker, J. Long, C. J., and Henderson and Reeves, JJ., concur.

AUTHOR: BRINKER

OPINION

*{*235}* **{1}** This is a motion to dismiss the writ of error, and strike the record from the files, for the reasons: First. Because a writ of error does not lie to review a decree in chancery; second, because the folios of the transcript are not numbered, nor the pages and margins the size required by the rules; third, because the plaintiff in error failed to deliver to the solicitor for defendant in error copies of the printed record; fourth, because the record shows that a proposed record and bill of exceptions was not settled *{*236}* and signed by the judge of the court below, as required by rule 24. This court held in accordance with the practice of the federal courts, that a writ of error would not lie in a cause in chancery. Kidder v. Bennett, 2 N.M. 37. The decision was rendered January 24, 1880. On January 26, 1880, the legislature passed an act, the first section of which is in these words: "All cases, either in law or equity, finally adjudged or determined in

the district courts, may be removed into the supreme court of the territory for review, either by appeal or writ of error." This section is in the Compiled Laws, 1884, section 2193. The enactment of this section so soon after the decision in Kidder v. Bennett, supra, shows conclusively that the legislature intended to abrogate the rule announced in that case. As to the second point we think the requirement of the rule as to numbering the folios of the transcript is directory, and the record should not be stricken out for a failure to comply with it. We held in Mora v. Schick, 4 N.M. 301, 13 P. 341, in considering a similar provision, that as no penalty was prescribed for violating the rule we would not strike out the record. In Miller v. Preston, 4 N.M. 396, 17 P. 565, we held that the section of the statute requiring instructions to be numbered was directory, and would not be strictly enforced unless prejudicial error resulted. The third point was waived upon the argument. We will say, however, that it was not well taken. The motion was not filed on the second day of the term, nor supported by affidavit, and twenty-four hours' notice of the intention to file it was not given as required by rule 23. Mora v. Schick, 4 N.M. 301, 13 P. 341. We do not think the fourth ground of the motion tenable. Rule 24 provides: "Whenever it shall be intended to review by appeal or writ of error a judgment of the district court, a record of the pleadings and proceedings in the case, containing a *{*237}* proposed bill of exceptions if the appellant desires to present exceptions not appearing on the record, shall be prepared by the appellant," etc. This rule is certainly broad enough to cover chancery as well as law cases. Section 522, Compiled Laws, 1884, requires the supreme and district courts in the exercise of chancery jurisdiction to conform their decisions, decrees, and proceedings to the laws and usages peculiar to that jurisdiction in this territory, and in the United States courts. This section is a limitation upon the power conferred upon the courts by section 521, Compiled Laws, 1884, to adopt rules of procedure, so far as it affects proceedings in chancery. It is well known that no bill of exceptions is necessary in a case in equity (section 2197, Comp. Laws, 1884; Williams v. Thomas, 3 N.M. 550, 9 P. 356; and the record in such cases consists of the pleadings, report of the master, all papers and exhibits filed, all depositions and other evidence reduced to writing and filed, all exceptions filed, and the decree. Freem. Judgm., sec. 88; Ferris v. McClure, 40 Ill. 99; Smith v. Newland, 40 Ill. 100; Putnam v. Day, 89 U.S. 60, 22 Wall. 60, 22 L. Ed. 764. The case last cited was upon a bill of review, but the definition of a record there given is applicable here. We can not think that the court, by the language used in this rule 24, intended to violate section 522, supra. The above observations will apply to and govern the other motions argued and submitted with this. The motion is denied.