

TIMM V. WHITE, 1921-NMSC-036, 27 N.M. 103, 196 P. 173 (S. Ct. 1921)

TIMM et al.
vs.
WHITE. SAME v. EARICKSON et al.

No. 2541

SUPREME COURT OF NEW MEXICO

1921-NMSC-036, 27 N.M. 103, 196 P. 173

March 18, 1921

Appeal from District Court, De Baca County; Brice, Judge.

Actions by H. F. Timm and another against John F. White and against A. J. Earickson and others. On motion to dismiss appeal.

SYLLABUS

SYLLABUS BY THE COURT

Although it is improper under the statute for the liability of the parties on a cost bond to be limited by any stipulated amount, yet where a bond limiting the liability to a stipulated amount has been approved by the clerk of the district court, the appeal will not be dismissed, but the appellee's remedy is to move in this court for a proper bond.

COUNSEL

E. F. Faircloth of Santa Rosa, for appellants.

Chas. F. Fishback and Harold Nuzum, both of Ft. Sumner, and Patton & Hatch and R. E. Rowells, all of Clovis, for appellees.

JUDGES

Roberts, C. J. Raynolds and Parker, JJ., concur.

AUTHOR: ROBERTS

OPINION

{*104} {1} OPINION OF THE COURT. In this case appellant filed a cost bond with the clerk of the district court, which was approved. The penalty in the bond was filed at \$

100. Appellees moved to dismiss the appeal because no sufficient bond was given; it being their contention that it is improper under the statute to limit the liability under such a bond, because the appellant is required to execute a bond to pay all costs which may be assessed against him. Appellees are correct in their contention, and the bond is improper in this regard, but it met with the approval of the clerk of the district court, and we held in the case of *Bank of Commerce v. Duckworth*, 26 N.M. 437, 194 P. 367:

"The cost bond referred to is to be approved by the clerk, and we believe that, where appellant has tendered a cost bond which has been so approved, it would be going beyond the letter of the statute to hold that an appellant must tender, not only a bond which will be approved by the clerk, but one which will withstand the judicial scrutiny as to form and sureties."

{2} Appellees' remedy is to move in this court for a new bond. The motion to dismiss the appeal will be denied; and it is so ordered.