

ROESKE V. LAMB, 1934-NMSC-034, 38 N.M. 309, 32 P.2d 257 (S. Ct. 1934)

**ROESKE
vs.
LAMB et al.**

No. 3980

SUPREME COURT OF NEW MEXICO

1934-NMSC-034, 38 N.M. 309, 32 P.2d 257

April 24, 1934

Appeal from District Court, Santa Fe County; Otero, Judge.

Action by Otto Roeske, doing business under the firm name and style of U-Drive-It Car Company, against J. D. Lamb, as chairman and member of the State Corporation Commission, and others. From an order sustaining a demurrer to the complaint, plaintiff appeals. Motion to dismiss the appeal.

COUNSEL

David A. Grammer, of Albuquerque, for appellant.

E. K. Neumann, Atty. Gen., and Quincy D. Adams, Asst. Atty. Gen., for appellees.

JUDGES

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

AUTHOR: WATSON

OPINION

{*310} {1} This motion to dismiss the appeal presents the question whether an order sustaining a demurrer to a complaint as setting forth no cause of action is appealable.

{2} Appellant contends that the order is appealable as "such (an) interlocutory * * * order * * * as practically dispose(s) of the merits of the action, so that any further proceeding therein, would be only to carry into effect such interlocutory * * * order * * *." N.M. App. Proc. Rule II, § 2.

{3} It is not easy to answer this contention if we treat the taking of the appeal as an election not to plead further, as we believe we should. The complaint having been

adjudged insufficient, and appellant electing to stand upon it, there could be but one further proceeding, viz., a final judgment of dismissal. That judgment would merely carry the order into effect. The merits of the action are practically disposed of by the order.

{4} In *Morrison v. Robinson*, 25 N.M. 417, 184 P. 214, the court dismissed the appeal on the ground that the order sustaining the demurrer was not a final judgment. The court's attention was not called to the then new provision for appeals from interlocutory orders. The decision is deemed not controlling.

{5} *Cornett v. Fulfer*, 26 N.M. 175, 26 N.M. 368, 189 P. 1108, is not in point. It is in a class with *Winans v. Bryan*, 33 N.M. 532, 271 P. 469.

{6} The motion will be overruled. It is so ordered.