

WHEELER V. FICK, 1887-NMSC-029, 4 N.M. 303, 13 P. 217 (S. Ct. 1887)

**Charles Wheeler
vs.
Henry Fick**

No. 236

SUPREME COURT OF NEW MEXICO

1887-NMSC-029, 4 N.M. 303, 13 P. 217

February 04, 1887

Appeal from District Court, First Judicial District, Sitting in the County of Colfax.

COUNSEL

Wm. Breeden, Atty. Gen., for appellee.

Fiske & Warren, for appellant.

OPINION

{1} On a former day of this term we struck from the files the record and bill of exceptions filed by plaintiff in error, because the same were not signed and sealed by the judge before whom the judgment was obtained. 4 N.M. 14, 12 P. 625.¹ Plaintiff in error now asks us to order the court below to grant him a new trial for the reason that, by the resignation of the judge before whom the cause was tried, he has been deprived of his record and bill of exceptions, and therefore prevented from having the judgment of the lower court reviewed.

{2} The record having been stricken out, leaves the cause in this court as if no attempt had ever been made to file such record here. In this state of the case, defendant in error comes and files a transcript of the record, and a motion to affirm, under the terms of section 2189, Comp. Laws. We must deny the motion of the plaintiff in error, because before the filing of the transcript, and motion by defendant in error, there was nothing in this court upon which we could act. If the bill of exceptions alone had been stricken out, leaving the record proper here, then a different view might be taken of the question; but in the present condition of the case we cannot see our way clear to give plaintiff in error the relief he seeks without abrogating the rules governing the bringing of causes to this court. The motion of defendant in error must also be denied, because the transcript filed by him does not show that an appeal has been allowed, or writ of error issued in the cause. Section 2189, Comp. Laws 1884.

[1](#) Same case, **ante**, 36.