

**BAGNALL
vs.
ORELL**

No. 2798

SUPREME COURT OF NEW MEXICO

1924-NMSC-015, 29 N.M. 398, 222 P. 934

January 25, 1924

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

Action by Edwin Bagnall against P. G. Orell. From a judgment for plaintiff, defendant appeals.

SYLLABUS

SYLLABUS BY THE COURT

Where a bill of exceptions has been stricken from the record and all of the assignments of error relate to questions appearing in such bill of exceptions only, and where no error appears upon the face of the record proper, the judgment of the district court will be affirmed on motion.

COUNSEL

J. H. Crist, of Santa Fe, for appellant.

Renehan & Gilbert, of Santa Fe, for appellee.

JUDGES

Parker, C. J. Bratton and Botts, JJ., concur.

AUTHOR: PARKER

OPINION

{*398} {1} OPINION OF THE COURT. This cause is before the court on motion for rehearing. We had theretofore sustained a motion to strike the bill of exceptions from the record, and had denied an application for a writ of certiorari filed by appellant

without filing an opinion. We are entirely satisfied with the disposition heretofore made of the case. The bill of exceptions is not certified to by the clerk and the application for the writ of certiorari was not filed for nearly a year after the transcripts were filed and at least four months subsequent to the filing of briefs on the merits by counsel for appellant. We could not recede from the {399} action formerly taken without overturning many cases heretofore decided by the court, in which we have developed the appellate practice and procedure in this court.

{2} A motion to affirm the judgment has been filed by appellee upon the ground that the assignment of errors relates solely to matters appearing in the bill of exceptions, which has been stricken, and no error appears upon the face of the record proper. This motion will be sustained. *Ojo del Espiritu Santo Co. v. Baca*, 28 N.M. 516, 214 P. 771.

{3} It follows from the foregoing that the judgment of the district court should be affirmed and the cause remanded, with directions to enforce the judgment against the appellant and the sureties upon his supersedeas bond, and it is so ordered.