

PALMER V. ALLEN, 1914-NMSC-044, 19 N.M. 175, 141 P. 998 (S. Ct. 1914)

**J. M. PALMER, Plaintiff in Error,
vs.
FRANK B. ALLEN, Defendant in Error**

No. 1655

SUPREME COURT OF NEW MEXICO

1914-NMSC-044, 19 N.M. 175, 141 P. 998

June 15, 1914

Error to District Court, San Juan County, Edmund C. Abbott, Presiding Judge.

SYLLABUS

SYLLABUS BY THE COURT

1. Where plaintiff in error fails to file a cost bond within thirty days, after suing out such writ of error, as required by Section 14, Chapter 57, S. L. 1907, and such default has not been waived by defendant in error, the court will, upon motion, dismiss the writ of error. P. 176

COUNSEL

J. M. Palmer and Perkins & Main, for Plaintiff in Error.

Valuation. 70 Pac. 603; 105 U.S. 45; S. C. 26th Law Ed. 125.

SUPPLEMENTAL BRIEF OF PLAINTIFF.

Motion to Permit Plaintiff to File Cost Bond. 138 Pac. 200.

Frank A. Burdick, for Defendant in Error.

Motion that writ of error issued be quashed and action dismissed. 136 Pac. 216; 24 Pac. 2.

REPLY BRIEF OF PLAINTIFF.

Motion to quash writ. 94 Pac. 945; 124 Pac. 2.

JUDGES

Roberts, C. J.

AUTHOR: ROBERTS

OPINION

{*176} OPINION.

{1} The writ of error herein was sued out on the 8th day of January, A. D. 1914. Plaintiff in error failed to file a cost bond within thirty days as required by Sec. 14, Chap. 57, S. L. 1907, and on February 17th, thereafter, defendant in error filed a motion to dismiss the action and quash the writ of error because plaintiff in error had failed to comply with the statute in that regard. Under the rule announced by this court in the case of Farmers' Development Co. vs. Rayado Land & Irrigation Co. 18 N.M. 138, 134 P. 216, and Canavan vs. Canavan, 18 N.M. 468, 138 P. 200, we are compelled to sustain the motion. In the Canavan case we held that the appellee or defendant in error could waive the giving of a cost bond, and that he does so where he appears and interposes no objection to the irregularity. In this case, however, there is no waiver, as defendant in error has never appeared for any purpose, except to ask a dismissal of the cause because no bond has been filed. Plaintiff in error argues that defendant in error, by asking that the writ of error be quashed, has appeared generally and to the merits. There is no merit in this contention, because it is apparent that defendant was seeking to secure only the dismissal of the writ of error on the sole ground of plaintiff's failure to comply with the statutory requirement as to the giving of a cost bond.

{2} For the reasons stated, the cause will be dismissed, and it is so ordered.