

**ROBINSON V. T. D. NEAL MERCANTILE CO., 1929-NMSC-098, 34 N.M. 436, 283 P. 52 (S. Ct. 1929)**

**ROBINSON  
vs.  
T. D. NEAL MERCANTILE CO. et al.**

No. 3473

SUPREME COURT OF NEW MEXICO

1929-NMSC-098, 34 N.M. 436, 283 P. 52

December 05, 1929

Appeal from District Court, Colfax County; Kiker, Judge.

Action by B. F. Robinson against the T. D. Neal Mercantile Company, a copartnership composed of T. D. Neal and another. From an adverse judgment, plaintiff appeals. On motion to dismiss appeal.

**SYLLABUS**

**SYLLABUS BY THE COURT**

1. Failure to give the five days' notice of appeal required by section 2, rule 5, Rules of Appellate Procedure, is not jurisdictional defect, and where citation has been issued and served by clerk of Supreme Court before appellees move to dismiss appeal, motion will be denied.
2. Appeal will not be dismissed for failure of record to show proof of service of five-day notice required by section 8, rule 2, Rules of Appellate Procedure.
3. Failure of appellant, bringing up less than entire record, to set forth question to be reviewed, does not result in dismissal of appeal.

**COUNSEL**

A. C. Voorhees, of Raton, for appellant.

Geo. E. Remley, of Raton, for appellees.

**JUDGES**

Simms, J. Watson and Catron, JJ., concur. Bickley, C. J., and Parker, J., did not participate.

**AUTHOR: SIMMS**

## **OPINION**

{\*437} {1} OPINION OF THE COURT Appellees move to dismiss this appeal on grounds which they claim are jurisdictional.

{2} First, they say that no notice of appeal was given by appellant, as required by section 2, rule 5, Rules of Appellate Procedure, within five days after taking the appeal. It appears that a certain notice, properly captioned and entitled in the correct cause, was served by mail three days after the appeal was taken, but the body of the notice contained what was evidently a typographical error, in that it stated that a stranger to the record, by name, was taking the appeal. Failure to give this notice is not a jurisdictional defect, and appellees have neither alleged nor shown prejudice. *Conley v. Davidson*, 34 N.M. 421, 283 P. 52. The transcript was filed and docketed here September 23, 1929, on which day our clerk issued and mailed to counsel for appellee the citation required by section 1, rule 5. Appellees filed their motion to dismiss on the 18th of October following.

{3} Next, appellees urge that the record does not contain any proof of service of the notice of appeal required by section 2, rule 5. What we have said in the foregoing paragraph disposes of this point also.

{4} Finally, appellees contend that it appears from the face of the transcript herein that it contains less than the entire record, and that no praecipe was served upon their attorney, as required by section 4, rule 11. If this be true, it affords no ground to question jurisdiction, but appellees have their remedy under the provisions of section 14, rule 10, by the terms of which they may take steps to compel appellant to correct any omissions or deficiencies in the record. *Farmers' Cotton Finance Corporation v. Green*, 34 N.M. 206, 279 P. 562.

{5} Since we find none of the objections jurisdictional, and no prejudice being alleged or shown, the motion of appellees to dismiss this appeal should be overruled; and it is so ordered.