**ALEXANDER HAMILTON INST. V. SMITH, 1929-NMSC-002, 33 N.M. 631, 274 P. 51 (S. Ct. 1929)**

**ALEXANDER HAMILTON INSTITUTE**
**vs.**
**SMITH**

No. 3402

SUPREME COURT OF NEW MEXICO

1929-NMSC-002, 33 N.M. 631, 274 P. 51

January 06, 1929

Appeal from District Court, Eddy County; Richardson, Judge.

Action between the Alexander Hamilton Institute and Dean Smith. Judgment for the latter, and the former appeals. On motion to dismiss appeal.

## SYLLABUS

SYLLABUS BY THE COURT

Where appellant has filed in the office of the clerk of the district court a praecipe calling for less than the entire record, and fails to set forth the questions he desires to have reviewed, and the appellee, without objection to the omission, files his praecipe calling for the portions of the record omitted, the appeal will not be dismissed on appellee's motion; there being no satisfactory showing of prejudice, as required by section 3 of rule 14 of the Rules of Appellate Procedure.

## COUNSEL

D. C. Grantham, of Carlsbad, and J. O. Seth. of Santa Fe, for appellant.

J. M. Dillard, of Carlsbad, for appellee.

## JUDGES

Bickley, C. J. Watson and Parker, JJ., concur.

**AUTHOR:** BICKLEY

## OPINION

*{*632}* **{1}** OPINION OF THE COURT A motion to dismiss the appeal has been filed by appellee, based upon the proposition that the praecipe for the transcript of record calls for a partial record, and the praecipe contains no statement of the questions sought to be reviewed.

**{2}** It is true that the praecipe of appellant calls for only a part of the record. The appellees, however, filed a praecipe calling for certain portions of the record which it claims were omitted by appellant. So the transcript of the record, as prepared in response to these praecipes, is apparently complete.

**{3}** Appellee invokes section 4 of rule 11 of our rules, which is in part as follows:

> "If the appellant or plaintiff in error desires to take up less than the entire record, he shall file in the office of the clerk of the district court a praecipe setting forth the questions he desires to have reviewed, and calling for those portions of the record and proceedings he deems necessary for such review, and he shall serve opposing counsel with a true copy of the praecipe so filed within five days after filing the praecipe in the office of said clerk; and upon receipt of said praecipe the attorney for the appellee or defendant in error may file a supplemental praecipe to include such portions of the record and proceedings which may have been omitted from the praecipe for the appellant or plaintiff in error, as he may deem necessary for the proper review of such questions."

**{4}** Since the alleged deficiencies of the record have been supplied at the instance of appellee, we see no prejudice to it, in the absence, from appellant's praecipe, of a statement setting forth the question he desires to have reviewed.

**{5}** Appellee cites in support of his contention, Norment v. Mardorf, 26 N.M. 210, 190 P. 733; Southern Surety Co. v. Colburn, 32 N.M. 243, 255 P. 405; Smith v. Kapich, 33 N.M. 116, *{*633}* 263 P. 510. See, also, Savage v. Nesteroff, 31 N.M. 88, 240 P. 987, all of which construed section 32, chapter 43, Laws of 1917.

**{6}** It is to be noted, however, that said section 32, and other portions of said chapter 43, were repealed by chapter 93, Laws of 1927, and the repealed provisions superseded by rules of this court. The changes and additions result in liberalizing the procedure. For instance, certain limitations upon the allowance of certiorari for diminution of the record imposed in sections 33 and 34 of chapter 43, Laws of 1917, have been removed by the repeal of those sections, and the adoption of rule 10, and particularly section 14, thereof. Also by section 3 of rule 14, it is provided:

> "No motion to dismiss an appeal or writ of error, strike a bill of exceptions or otherwise dispose of any cause except upon its merits, where such motion is based upon other than jurisdictional grounds, will be granted except upon a showing, satisfactory to the court, of prejudice to the moving party, or that the ends of justice require the granting thereof. No such motion will be entertained unless filed before the movant has filed his brief on the merits."

**{7}** Thus, we are invested with a discretion we did not enjoy when the cases cited supra were decided.

**{8}** Finding no prejudice to the appellee by the omissions complained of, the motion will be denied, and it is so ordered.