

FRENCH V. TORPEDO MINING CO., 1917-NMSC-048, 22 N.M. 581, 166 P. 1172 (S. Ct. 1917)

**FRENCH
vs.
TORPEDO MINING CO. et al.**

No. 2009

SUPREME COURT OF NEW MEXICO

1917-NMSC-048, 22 N.M. 581, 166 P. 1172

August 15, 1917

Appeal from District Court, Dona Ana County; E. L. Medler, Judge.

Ejectment by Harry William French against the Torpedo Mining Company, etc., E. C. Wade, receiver. Judgment for defendants and plaintiff appeals.

SYLLABUS

SYLLABUS BY THE COURT

Appeal will be dismissed where seasonable advantage is taken of default in filing abstract of record under section 4503, Code 1915, as amended by section 6, c. 77, Laws of 1915.

COUNSEL

M. O. Llewellyn, of Las Cruces, for appellant.

Wade, Taylor & Wade, of Las Cruces, for appellees.

JUDGES

Hanna, C. J. Parker and Roberts, JJ., concur.

AUTHOR: HANNA

OPINION

{*581} {1} OPINION OF THE COURT. Appellees, Torpedo Mining Company and Edward C. Wade, receiver, have moved to dismiss the appeal herein and affirm the judgment of the trial court on the ground that the appellant has failed to file an abstract

of record as required by law, and that he is in default in the filing of his brief. The appeal was perfected long after both the original and extended return days. No abstract of record was filed by appellant prior to the time the motion to dismiss and affirm was filed. The action was in ejectment, brought by appellant, and resulted in a judgment for appellees. The complaint sought to recover \$ 1,000 for damages and \$ 15 for money expended in support of the adverse claim, as well as for restitution of the premises and costs of action. The value of the property in dispute was therefore plainly in excess of \$ 1,000, hence the appellant was required under section 4503, Code 1915, as amended by section 6, c. 77, Laws 1915, to file an abstract of record on or before the return day. Neither by statute, nor rule of court, is a penalty for such default {*582} fixed, but it is clear that the procedure in such instances is irregular and violates the statute. Hence the motion, so far as it asks for a dismissal of the appeal, will be granted; and it is so ordered.