

**MCMILLEN V. FIRST NAT'L BANK OF CLOVIS, 1913-NMSC-076, 18 N.M. 285, 135
P. 1176 (S. Ct. 1913)**

**A. B. M'MILLEN, Appellee,
vs.
FIRST NATIONAL BANK OF CLOVIS, Appellant**

No. 1613

SUPREME COURT OF NEW MEXICO

1913-NMSC-076, 18 N.M. 285, 135 P. 1176

October 30, 1913

Appeal from District Court of Bernalillo County; Herbert F. Reynolds, District Judge.

SYLLABUS

SYLLABUS (BY THE COURT)

1. Where a party who is in default, having failed to file briefs within the time limited by the rules of the court, tenders such briefs for filing at the same time that a motion to affirm the judgment because of such default is tendered, the motion to affirm will be denied. P. 286

COUNSEL

A. B. McMillen, Albuquerque, New Mexico, for appellee.

H. L. Patton, Clovis, New Mexico, for appellant.

JUDGES

Roberts, C. J. Justice Hanna being absent from the State, did not participate.

AUTHOR: ROBERTS

OPINION

{*286} OPINION OF THE COURT.

{1} The question now before the Court arises upon a motion filed by appellee to affirm the judgment of the trial court, because of appellant's failure to file briefs within the time prescribed by the rules of the Court. Appellants' time expired on the 15th day of

October. The motion was filed on the 29th day of the same month. However, the clerk of the Court received appellant's briefs by the same mail, and at the same time appellee's motion was received. Consequently, at the time the motion was filed, appellant was not in default, as his briefs were in the hands of the clerk, and he had cured the default before advantage had been taken of the same. The motion to affirm the judgment will, therefore, be denied, and it is so ordered.