

## Opinion of the court.

ALVISO *v.* UNITED STATES.

An appeal from California dismissed at the last term for apparent want of a citation, now reinstated, it appearing that a citation had in fact been signed, served and filed in the clerk's office, and that the building in which his office was kept had been afterwards partially destroyed by fire, and a great confusion and some loss of records occasioned in consequence.

THIS was a motion to reinstate on the docket an appeal from the District Court for the Northern District of California, that had been dismissed at the last term.\*

The decree was rendered in the United States District Court for California, in favor of the United States, on the 8th September, 1863, and an appeal taken on the 23d February, 1864, returnable at the next term of the court, and the record brought up to this court and filed on the 11th November, 1864, which was in time. At the December Term, 1866, the cause was dismissed for want of a citation. The counsel for the appellant now produced evidence to show that a citation was, in fact, signed by the judge at the time of the allowance of the appeal, and duly served on the district attorney representing the United States, on the same day, and afterwards filed in the clerk's office. In July, 1866, the building in which the clerk's office was kept was partially destroyed by fire, which occasioned great confusion, and some loss of the records, and which embarrassed and delayed the appellant in procuring the evidence of the above facts, and in connection with the distance from the place where this court is held, sufficiently accounted, as the court said, for not making the motion at the last term.

*Mr. J. H. Bradley, in support of the motion ; Mr. Wills, contra.*

Mr. Justice NELSON delivered the opinion of the court.

As the omission to return the citation appears to have arisen from the neglect of the clerk, if it had been shown

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\* 5 Wallace, 824.

## Statement of the case.

that it remained in the office, a *certiorari* would have been sent down on a prayer of diminution; but as it has been satisfactorily proved to have been lost or destroyed, it is not a case for a *certiorari*.

*The Palmyra*\* is an authority for granting the relief sought at the succeeding term of the court in a case like the present. In that case, when the cause was called at the February Term, 1825, upon an inspection of the record, it did not appear from the transcript that there had been a final decree rendered in the court below, and for this reason the appeal was dismissed. At the next term, it having been shown the omission was the error of the clerk in making out the transcript, the cause was reinstated on the docket. Mr. Justice Story says, "The reinstatement of the cause was founded, in the opinion of the court, upon the plain principles of justice, and is according to the known practice of other judicial tribunals in like cases."

MOTION GRANTED.

## DOE, LESSEE OF POOR, v. CONSIDINE.

1. Though a devise to trustees "and their heirs," passes, as a general thing, the fee, yet where the purposes of a trust and the power and duties of the trustees are limited to objects terminating with lives in being,—where the duties of the trustees are wholly passive, and the trust thus perfectly dry,—the trust estate may be considered as terminating on the efflux of the lives. The language used in creating the estate will be limited to the purposes of its creation.
2. Estates in remainder vest at the earliest period possible, unless there be a clear manifestation of the intention of the testator to the contrary. And in furtherance of this principle, the expression "*upon the decease of A., I give and devise the remainder,*" construed to relate to the time of the enjoyment of the estate, and not the time of the vesting in interest.
3. Where the language of a statute, read in the order of clauses as passed, presents no ambiguity, courts will not attempt by transposition of clauses, and from what it can be ingeniously argued was a general intent, to qualify, by construction, the meaning.

· ERROR to the Circuit Court of the United States for the Southern District of Ohio.