They must also be charged with interest on the balance found due the complainants, from the day of the sale to the day of the final decree in this suit.

THE DECREE of the Circuit Court is REVERSED, and the cause remanded, with directions to proceed in CONFORMITY WITH THIS OPINION.

EDMONSON *v.* BLOOMSHIRE.

1. If it is apparent from the record that this court has not acquired jurisdiction of a case for want of proper appeal or writ of error, it will be dismissed, although neither party ask it.
2. An appeal or writ of error which does not bring to this court a transcript of the record before the expiration of the term to which it is returnable, is no longer a valid appeal or writ.
3. Although a prayer for an appeal, and its allowance by the court below, constitute a valid appeal though no bond be given (the bond being to be given with effect at any time while the appeal is in force), yet if no transcript is filed in this court at the term next succeeding the allowance of the appeal, it has lost its vitality as an appeal.
4. Such vitality cannot be restored by an order of the Circuit Court made afterwards, accepting a bond made to perfect that appeal. Nor does a recital in the citation, issued after such order, that the appeal was taken as of that date, revive the defunct appeal or constitute a new one.

APPEAL from the Circuit Court for the Southern District of Ohio; the case being thus:

The Judiciary Act provides that final decrees in a circuit court may be re-examined, reversed, or affirmed here "upon a writ of error whereto shall be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and prayer for reversal, with a citation to the adverse party."

It further enacts that "writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of, or in case the person entitled to such writ of error be a *feme covert*, &c., then within five years as aforesaid, exclusive of the time of such disability."

Statement of the case.

By an amendatory act, appeals in cases of equity are allowed "subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error."

With these provisions of law in force, John Edmonson, Littleton Waddell and Elizabeth, his wife, filed a bill in 1854 in the court below, against Bloomshire and others, to compel a release of title to certain lands, and on the 16th July, 1859, the bill was finally dismissed. On the 26th May "an appeal to the Supreme Court of the United States was allowed," and the appellants ordered to give bond in $1000. No further step was taken in the case till November 14, 1865, when a petition was filed in the Circuit Court, reciting the decree, and the allowance (May 26, 1860) of the appeal, and setting forth the death of the plaintiff Edmonson, intestate, on the 30th June, 1862, leaving a part of the petitioners his only heirs-at-law; and that, on the 20th June, 1864, the plaintiff Elizabeth Waddell also died intestate, leaving the other petitioners her only heirs-at-law, and that the interest of said intestates had descended to said petitioners as their respective heirs-at-law; and further setting forth, that no appeal-bond had been given under said order allowing the appeal. The prayer of the petition was that the petitioners be allowed "to become parties to the appeal, and to perfect the same by now entering into bond for the appeal."

Thereupon, on the same 14th November, 1865, this entry was made by the court:

"WADDELL, EDMONSON *et al.*,
v.
BLOOMSHIRE *et al.*

426.—*Petition to perfect appeal.*

"And now come the said petitioners, and the court being satisfied that the facts set forth in said petition are true, and that the prayer thereof ought to be granted, do order that said petitioners [naming the heirs of Edmonson], be admitted as parties plaintiff, in the place of said John Edmonson, deceased; and that the said [naming the heirs of Mrs. Waddell], be admitted as parties plaintiff in the place of the said Elizabeth Waddell, deceased; and that said petitioners have leave to perfect said

appeal *so allowed at the June Term*, 1859, of this court, by giving bond in the sum of $1000, as therein provided."

An appeal-bond was accordingly filed with, and approved by, the clerk, November 22, 1865. A citation (duly served) was issued on the 8th December, 1865, reciting *the allowance of an appeal at the October Term*, 1865, of the court, and citing the appellees to appear "at the next term of the Supreme Court, to be holden on the first Monday of December next." The transcript was filed here by the appellants for the first time on the 3d of January, 1866.

The case having been fully argued on the merits *by Messrs. Stanbery and Baldwin, for the appellants, and by Mr. J. W. Robinson, by brief, contra*, it was suggested from the bench that doubts were entertained by it as to the jurisdiction of the court over the case; the ground of the doubt, as the reporter understood it, being, that while the record showed that the only appeal asked for or allowed, was that of May 26th, 1860, the transcript was not filed during the term next succeeding the allowance of the appeal, nor till January, 1866; and thus that while the appeal had been taken in time the record had not been filed here in time to save it.

Mr. Stanbery now spoke in support of the jurisdiction:

The objection to the regularity of the appeal, he contended, comes too late, and had not been made by counsel. The case had been pending in this court more than three years. It had been fully argued on the merits by both parties. No motion had at any time been made by the appellees to dismiss it for any irregularity. The practice he believed to have been uniform to require a motion to dismiss before the case proceeds to a hearing.*

The appeal initiated in 1860 was not perfected until the order of November 14, 1865, when the bond was given. Till that last date there was, in fact, no appeal which required the transcript to be filed. When the appeal was allowed, all that remained to be done was to perfect the appeal so taken

* Mandeville *v.* Riggs, 2 Peters, 490; Brooks *v.* Norris, 11 Howard, 204.

by giving bond and filing the transcript in this court, which might be done by order of court after expiration of five years. In *The Dos Hermanos** it is said:

"It appears that the appeal was prayed for within the five years, and was actually allowed by the court within that period. It is true that the security required by law was not given until after the lapse of the five years, and under such circumstances the court might have disallowed the appeal and refused the security. But, as the court accepted it, it must be considered as a sufficient compliance with the order of the court, and that it had relation back to the time of the allowance of the appeal."

This is our case.

If this is not so, a new appeal may be regarded as having been taken by the proceedings of November, 1865. The citation recites them as being the allowance of an appeal.

If any doubt was entertained by the court as to the efficiency of the appeal, because more than five years elapsed after the decree before the appeal-bond was given and transcript filed in this court, it is to be observed that Mrs. Waddell, the party entitled to an appeal, was under coverture at the date of the decree, and at the time of her death, June 20, 1864. The appeal was saved as to her heirs. Moreover, her interest was so connected with that of her co-plaintiff, Edmonson, that it is also saved as to him or his heirs.†

Mr. Justice MILLER delivered the opinion of the court.

In the cases of *Villabolos* v. *United States*, and *United States* v. *Curry*, decided at the December Term, 1847, and especially in the latter case, it was held, on full consideration, that whether a case was attempted to be brought to this court by writ of error, or appeal, the record must be filed before the end of the term next succeeding the issue of the writ or the allowance of the appeal, or the court had no jurisdiction of

* 10 Wheaton, 306.

† Owings *v.* Kincannon, 7 Peters, 399; Williams *v.* Bank of the United States, 11 Wheaton, 414; Meese *v.* Keefe, 10 Ohio, 362.

the case. This was repeated in the *Steamer Virginia* v. *West*,* *Mesa* v. *United States*,† and *United States* v. *Gomez*.‡

In *Castro* v. *United States*,§ the same question was raised. The importance of the case, together with other considerations, induced the court to consider the matter again at some length. Accordingly, the present Chief Justice delivered an opinion, in the course of which the former cases are considered and the ground of the rule distinctly stated.

Other cases followed that, and in *Mussina* v. *Cavazos*, decided at the last term, the whole doctrine is again reviewed, and the rule placed distinctly on the ground that this court has no jurisdiction of the case unless the transcript be filed during the term next succeeding the allowance of the appeal. The intelligible ground of this decision is, that the writ of error and the appeal are the foundations of our jurisdiction, without which we have no right to revise the action of the inferior court; that the writ of error, like all other common law writs, becomes *functus officio* unless some return is made to it during the term of court to which it is returnable; that the act of 1803, which first allowed appeals to this court, declared that they should be subject to the same rules, regulations, and restrictions, as are prescribed in law, in writs of error. These principles have received the unanimous approval of this court, and have been acted upon in a large number of cases not reported, besides several reported cases not here mentioned. And the court has never hesitated to act on this rule whenever it has appeared from the record that the case came within it, although no motion to dismiss was made by either party. In fact, treating it as a matter involving the jurisdiction of the court, we cannot do otherwise.

In the case of *United States* v. *Curry*, Chief Justice Taney, answering the objection that the rule was extremely technical, replied, that nothing could be treated by this court as merely technical, and for that reason be disregarded, which

* 19 Howard, 182.
† 2 Black, 721.
‡ 1 Wallace, 690.
§ 3 Wallace, 46.

was prescribed by Congress as the mode of exercising the court's appellate jurisdiction. We make the same observation now, and add, that it is better, if the rule is deemed unwise or inconvenient, to resort to the legislature for its correction, than that the court should depart from its settled course of action for a quarter of a century.

We are of opinion that the present case falls within the principle of these decisions. The only appeal that this record shows to have been either asked for or allowed, was that of May 26, 1860. The transcript was not filed during the term next succeeding the allowance of this appeal, nor until January, 1866.

Two grounds are assigned as taking the case out of the rule we have stated.

1. It is said that the appeal of 1860 was not perfected until the bond was given under the order of November 14, 1865, and that until this was done there was in fact no appeal which required the transcript to be filed.

The answer to this is, that the prayer for the appeal, and the order allowing it, constituted a valid appeal. The bond was not essential to it. It could have been given here, and cases have been brought here where no bond was approved by the court below, and the court has permitted the appellant to give bond in this court.* In the case of *Seymour* v. *Freer*,† the Chief Justice says, that if, through mistake or accident, no bond or a defective bond had been filed, this court would not dismiss the appeal, but would permit a bond to be given here. And in all cases where the government is appellant, no bond is required. It is not, therefore, an indispensable part of an appeal that a bond should be filed; and the appeal in this case must be held as taken on the 26th day of May, 1860.

It is insisted that this view is in conflict with the case of *The Dos Hermanos*.‡ We do not think so. While the argument of counsel on the merits in that case is fully re-

* Ex parte Milwaukee Railroad Company, 5 Wallace, 188.

† 5 Wallace, 822.

‡ 10 Wheaton, 306.

ported, we have nothing from them on the motion to dismiss. The opinion of the court states that the question made was whether the appeal was in due time, and this is answered by saying, it was prayed and allowed within five years from the date of the decree. The appeal was, therefore, taken in due time. It is further said, that the fact that the bond was given after the expiration of the five years, did not vitiate the appeal. This is in full accord with what we have just stated. The bond may be given with effect at any time while the appeal is alive. There is no question made in the present case about the appeal being taken within time. It was taken in time. But the record was not filed in the court in time to save the appeal; and that question was not made or thought of in the Dos Hermanos case. It is perfectly consistent with all that we know of that case, and, indeed, probable, that, though the taking of the appeal was delayed until near the expiration of the five years, and filing the bond until after that period, the transcript was filed at the next term after the appeal was taken.

2. It is next insisted that a new appeal was taken by the proceedings of the 14th November, 1865.

This, however, is in direct contradiction of the record. The petition of appellants, after reciting the former decree and the order allowing the appeal of May 26, 1860, and the death of some of the plaintiffs in the suit, and that no appeal-bond had been given, concludes as follows: "Your petitioners now appear, and pray your honors to allow them to become parties to said appeal, and to perfect the same by now entering into a bond for the appeal." And the order made is, "that said petitioners have leave to perfect said appeal, so allowed at the June Term, 1859, of this court, by giving bond, &c." The only appeal referred to in the petition, or the order of the court, is the appeal allowed May, 1860, and no language is used in either which refers to a new appeal, or which is consistent with such an idea.

It is true that the citation speaks of the allowance of the appeal as obtained at the October Term, 1865, but this recital does not prove that an appeal was then allowed, when it

Statement of the case.

stands unsupported by the record. Still less can it be permitted to contradict what the record states to have been done on that subject, at that time.

In the case of *United States* v. *Curry*, the same facts almost precisely were relied on as constituting a second appeal, that exist in this case, including the misrecital in the citation. But the court says, "that after very carefully considering the order, no just construction of its language will authorize us to regard it as a second appeal. The citation, which afterwards issued in August, 1847, calls this order an appeal, and speaks of it as an appeal granted on the day it bears date. But this description in the citation cannot change the meaning of the language used in the order." That is precisely the case before us, and we think the ruling a sound one.

The appeal must, for these reasons, be DISMISSED. But, we may add, that for anything we have been able to discover in this record, the appellants have the same right now, whatever that may be, to take a new appeal, that they had in November, 1865, when the unsuccessful effort was made to revive the first one.

BENBOW *v.* IOWA CITY.

A return to a mandamus ordering a municipal corporation forthwith to levy a specific tax upon the taxable property of a city for the year 1865, sufficient to pay a judgment specified, collect the tax and pay the same, or show cause to the contrary by the next term of the court, is not answered by a return that the defendants, "in obedience to the order of the court, did proceed to levy a tax of one per cent. upon the taxable property of the said city, for the purpose of paying the judgment named in the information, and *other claims*, and that the said tax is sufficient in amount to pay the said judgment and other claims for the payment of which it was levied." The return should have disclosed the whole act constituting the levy, so as to enable the court to determine whether it was sufficient to pay the judgment of the relator. It was also erroneous in returning that the tax was levied to pay this judgment "and *other claims*."

ERROR to the Circuit Court for the District of Iowa.

Benbow recovered judgment on the coupons attached to certain bonds which Iowa City issued to pay its subscription