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

to the stock of the Mississippi and Missouri Railroad Company, and having failed by the ordinary process at law to obtain satisfaction of his judgment, he applied to the Circuit Court for a mandamus to compel the mayor and aldermen, in obedience to the provisions of the ordinance authorizing the issue of these bonds, to levy and collect the requisite tax to pay the judgment.

The court awarded the writ, and commanded the mayor and aldermen forthwith to levy a specific tax upon the taxable property of the city, for the year 1865, sufficient to pay the judgment, interest, and costs; collect the tax and pay the same, or show cause to the contrary by the next term of the court.

The defendants made return to the writ, that "in obedience to the order of the court, they 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."

To this return the relator demurred as insufficient. The court overruled the demurrer and gave judgment accordingly; and the relator brought the case here.

It was submitted on the record and the brief of *Mr. Grant, for the relator, plaintiff in error.*

Mr. Justice DAVIS delivered the opinion of the court.

The sufficiency of the return is the sole question in the case. The return does not deny the obligation of the writ, nor offer an excuse for not obeying it, but states to the court that its command has been obeyed.

Is this true? The writ commanded that the taxes should not only be levied, but collected and paid to the relator, before the return day of the writ, yet, there is no averment of their collection and payment, nor an excuse furnished for non-performance. If it was impossible to collect and pay the taxes in the time allowed, the return should have stated facts from which the court could have inferred a legal

excuse for not doing it. On this point the return is wholly silent.

But the defect in this return reaches much further. In so far as it avers performance, it does it only in the words of the writ, which, if nothing more were required, would put the defendants in place of the court. To make the return properly responsive to the writ, it was necessary to disclose 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.

How could the court decide on the sufficiency of the levy to accomplish the purpose of the writ, without knowing the value of the taxable property of the city? The court should not only have been advised of the amount on which the levy was formed, but as the writ commanded, the year in which the valuation was made. The return is also defective in another important point. The mandate was to levy a specific tax to pay the relator's judgment; the return is, that the tax was levied to pay the judgment and *other claims*. The nature and extent of these claims were not given, and the court had, therefore, no means of ascertaining whether the fund to be raised would be sufficient for their discharge, and the satisfaction of the relator's demand. But, apart from this, there was no authority to import outside claims into this levy.

The relator had been deprived of his annual interest, because these defendants had neglected to provide for it, as they were required to do by the ordinance which authorized the creation of the debt. To compel the performance of this omitted duty the mandamus was issued, and *it* did not empower the mayor and aldermen to embarrass the levy which it directed, by joining with it other obligations against the city, with which this relator had no concern.

Without pursuing the subject further, enough has been said to show that the demurrer to the return should have been sustained.

The judgment of the Circuit Court is REVERSED, and the cause remanded with directions to proceed

IN CONFORMITY WITH THIS OPINION.