

PLATT, ASSIGNEE, V. PRESTON AND ANOTHER.

Circuit Court, S. D. New York.

June 20, 1881.

1. PRACTICE—APPEAL—REV. ST. § 4982.

Under section 4982 of the Revised Statutes, the filing of a petition of appeal is an entry of the appeal.

2. SAME—FILING OF TRANSCRIPT—REV. ST. § 4981.

Under section 4981 of the Revised Statutes, an appeal was claimed by the plaintiff from a decree of the district court, and due notice given to the clerk and the defendant's solicitor. On the same day as that on which such notice was given, a citation was signed by the district judge and served. *Held*, that the transcript of the record from such district court was filed in time, if filed at any time during the term at which the citation was made returnable.

B. F. Tracy, for the motion.

A. Blumenstiel, opposed.

BLATCHFORD, C. J. The decree below was entered October 7, 1880. Under section 4981 an appeal was claimed by the plaintiff, and due notice given to the clerk and the defendants' solicitor, October 15th. On the same day, a citation, returnable on the first Monday of April, 1881, was signed by the district judge and served on the defendant's solicitor; a bond on appeal being also filed and approved, and the appeal allowed. On the twenty-fifth of October a petition of appeal was filed by the plaintiff in this court in due form, and a copy thereof was, on the same day, served on the defendants' solicitor. No transcript of the record from the district court having been filed in this court by May 24th, the defendants move to dismiss the appeal. The transcript was prepared in the district court clerk's office by the eighteenth of March, but the fees therefor were not paid. As an excuse, the counsel for the defendants deposes that he was not intentionally guilty of laches, but delayed filing the transcript because he believed the case could not be heard before next October. He states that he is now

ready to file the transcript, and prays to be allowed to do so.

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It is provided by section 4982 that the appeal shall be—

Entered at the term of the circuit court which shall be held within the district next after the expiration of ten days from the time of claiming the same.”

A term of the circuit court began October 18th. If the filing of the petition of appeal was the entry of the appeal, then the appeal was entered in time, and this court has jurisdiction of it. Perhaps the citation ought to have been made returnable at the term commencing the last Monday of February, but that is of no importance now. The defendants permitted that term to pass, and waited until now, in the April term, before making this motion. I think the filing of the petition of appeal was an entry of the appeal within section 4982. It is still the April term, and still in time to file the transcript at the term to which the citation was returnable. The plaintiff ought to be allowed to file the transcript now, and ten days will be given for that purpose.

An order may be entered granting the motion to dismiss unless that shall be done.

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