

accompanied by exceptions and assignments of error. The question is, is this judgment on the demurrer a final judgment? A judgment or decree, to be final, for the purpose of review, must terminate litigation on the merits, so that on affirmance by this court the court below would have nothing to do but to execute the judgment or decree already rendered. *Bostwick v. Brinkerhoff*, 106 U. S. 3, 1 Sup. Ct. 15. Illustrating this rule, we find in *Insurance Co. v. Adams*, 9 Pet. 571, though the merits of the cause have been substantially decided, while anything, though formal, remains to be done, this court cannot pass on the subject. So, also, in *Latta v. Kilbourn*, 150 U. S. 524, 14 Sup. Ct. 201, a decree which refers a case to a master to state an account between the parties, upon which a further decree is to be entered, is not final. In *Railway Co. v. Simmons*, 123 U. S. 52, 8 Sup. Ct. 58, a decree establishing the right of a junior mortgagee to redeem from a prior mortgage, but not determining the amount he must pay, or the amount due on the mortgage, is interlocutory. In *The Palmyra*, 10 Wheat. 502, a decree for restitution, with costs and damages, was held not to be final, as the damages were yet to be ascertained. In *Chace v. Vasquez*, 11 Wheat. 429, where a decree for damages was allowed on a libel, and commissioners were appointed to ascertain the amount of damages, it was held that no appeal would lie until the commissioners reported, for it was not a final decree. The matter seems to be settled by *Luxton v. Bridge Co.*, 147 U. S. 341, 13 Sup. Ct. 356. That was a case of condemnation of land. It came up on writ of error, seeking to reverse an order appointing commissioners on petition for that purpose. The court says:

"The case, throughout, from the application of the corporation for the appointment of commissioners to assess damages to the owner of the land proposed to be taken, until judgment upon the award of the commissioners, or upon the verdict of a jury assessing those damages, remains in the circuit court of the United States, and under its supervision and control. The action of that court in this case, as in other cases on the common-law side, is not reviewable by this court by certiorari, but only by writ of error, which does not lie until after final judgment disposing of the whole case, and adjudicating all the rights, whether of title or of damages, involved in the litigation. The case is not to be sent up in fragments by successive writs of error."

These authorities lead to the conclusion that there is no final judgment in this case. The petition for writ of error is refused.

CITY OF WILMINGTON v. RICAUD.

(Circuit Court of Appeals, Fourth Circuit. November 1, 1898.)

No. 268.

1. APPEAL AND ERROR—PETITION FOR ALLOWANCE—DISMISSAL.

A writ of error is the only mode by which a judgment at law can be brought up for review, but such a writ, properly issued and in the record, will not be dismissed because the petition and order were for the allowance of an appeal, and not a writ of error. The petition and order, while required by proper practice, are not essential to the jurisdiction of the appellate court.

3. SAME—DISMISSAL—BILL OF EXCEPTIONS.

A writ of error will not be dismissed because of the absence of any bill of exceptions, where the only questions in the case are of law, and the errors, if any, are apparent of record.

In Error to the Circuit Court of the United States for the Eastern District of North Carolina.

Motion to dismiss appeal.

E. K. Bryan, for the motion.

H. McClammy, opposed.

Before SIMONTON, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

SIMONTON, Circuit Judge. The appellee interposes a motion to dismiss this appeal on the following grounds: (1) That no petition for a writ of error has ever been filed or presented, but instead thereof a petition for an appeal. (2) That no order has been made granting or allowing a writ of error, but the order made allows an appeal. (3) That no bond accompanied the petition, and the bond filed subsequent to the order is without surety. (4) That the citation was issued before any writ of error was allowed or issued.

There can be no question that the only mode of giving this court jurisdiction for the correction of errors in a law case is by writ of error. An appeal cannot have this result. *Brooks v. Norris*, 11 How. 204; *Barry v. Mercein*, 5 How. 103; *U. S. v. Curry*, 6 How. 106. In *Stevens v. Clark*, 18 U. S. App. 584, 10 C. C. A. 379, and 62 Fed. 321, the law is stated. The supreme court and the circuit court of appeals possess no appellate power in any case, unless conferred upon them by act of congress. Nor can such jurisdiction, when conferred, be exercised in any other form or by any other mode of proceeding than that which the law prescribes. Chief Justice Taney held in *Sarchet v. U. S.*, 12 Pet. 143, that an action at law could not be brought to the supreme court by an appeal, but must come up on writ of error; in no other way could the court get jurisdiction. So, also, we have the same conclusion in *Ballance v. Forsyth*, 21 How. 389. See, also, *Chase v. U. S.*, 155 U. S. 496, 15 Sup. Ct. 174; *Nelson v. Huidekoper*, 13 C. C. A. 658, 66 Fed. 616, and 30 U. S. App. 88; *U. S. v. Fletcher*, 8 C. C. A. 453, 60 Fed. 53, and 8 U. S. App. 481; *U. S. v. Tinsley*, 25 U. S. App. 266, 19 C. C. A. 515, and 73 Fed. 369.

In the present case there is a writ of error, and it is in the record. It is true that the petition is for granting an appeal, and an appeal was allowed. But evidently both counsel and court did not understand that the word was used in its technical sense, but only as a review by an appellate court of the action of the trial court; for, when the prayer of the petition and the action of the court thereon were carried out, a writ of error was issued. While it is the practice (and one which should never be departed from) to present a petition to the court when a review is desired, asking for a writ of error or an appeal, as the one or other is the appropriate remedy,

such petition and the order thereon are neither of them absolutely necessary. When the case comes up, the writ of error gives the court jurisdiction. *Ex parte Ralston*, 119 U. S. 613, 7 Sup. Ct. 317. In *Trust Co. v. Stockton*, 18 C. C. A. 408, 72 Fed. 1, it is held that a formal petition for the allowance of a writ of error is not requisite to the vesting of the jurisdiction in the circuit court of appeals. Therefore, when the writ was tested by the clerk of the circuit court, without the filing of any petition therefor, or the allowance thereof by any judge, but the judge subsequently, and within the time limited, signed a bill of exceptions and a citation, held, that this was sufficient to give jurisdiction to the appellate court. *Ex parte Virginia Com'rs*, 112 U. S. 178, 5 Sup. Ct. 421; *Davidson v. Lanier*, 4 Wall. 453. This ground for dismissing the writ cannot prevail.

So also with the other ground,—the absence of a bill of exceptions. The errors complained of are errors, if any, patent on the record. There is no disputed question of fact, nor any ruling on any question of fact. The only question in the case is one of law. No bill of exceptions was necessary. *Plow Co. v. Webb*, 141 U. S. 623, 12 Sup. Ct. 100; *Baltimore & P. R. Co. v. Trustees of Sixth Presbyterian Church*, 91 U. S. 127; *Young v. Martin*, 8 Wall. 354; *Clinton v. Railway Co.*, 122 U. S. 469, 7 Sup. Ct. 1268.

The objections as to the bond cannot be sustained. The bond distinctly states that W. C. McQueens signs as surety. It was approved by the judge on 18th March, 1898, and the citation bears date the same day. The motion is dismissed, with costs.

CITY OF WILMINGTON v. RICAUD.

(Circuit Court of Appeals, Fourth Circuit. November 1, 1898.)

No. 268.

1. TAXATION—ERRONEOUS LISTING OF PROPERTY BY CORPORATION—ESTOPPEL.

The action of the cashier of a national bank in giving in to the officers of the city for taxation against the bank a number of the shares of its stock, taxable under the laws of the state to the stockholders, does not estop a receiver subsequently appointed for the bank, but before the tax is paid, from setting up the mistake.

2. SAME—ACTION TO RECOVER TAX PAID.

Under a statute of North Carolina which prohibits the issuance of an injunction to restrain the collection of any tax, and requires the payment of all taxes levied, but authorizes the bringing of an action therefor after demand, and their recovery back, if found for any reason invalid or excessive, the fact that a board is provided for the correction of mistakes in tax lists does not exclude the right of action to recover a tax paid, on the ground that the property was listed by mistake.

In Error to the Circuit Court of the United States for the Eastern District of North Carolina.

This case comes up on writ of error from the circuit court of the United States for the Eastern district of North Carolina. The action was at law, and was by stipulation heard by the court without the intervention of a jury. The court below found for the plaintiff, and the case is here on