

appellant's wharf had been pulled out or had yielded through the tension of mooring lines. The evidence fails to disclose anything which could reasonably have caused the appellant prior to the accident to anticipate such an occurrence. The wharf had been extensively repaired in October and November, 1893. In addition to other work, some of the old posts were replaced with new ones, and others were re-set, and all the new posts and those which were re-set were fastened and braced in the wharf. The wharf builders were instructed by the appellant's superintendent to do all that was necessary to make the wharf strong and sufficient for the purposes for which it was used. There is uncontradicted evidence of the most positive and satisfactory character that the wharf as so repaired, including the mooring posts, was considered by wharf builders constructed in the most approved manner, staunch and strong, and to compare not unfavorably with other wharves at which large vessels were accustomed to moor. The evidence on the part of the libellant as to the condition of the wharf is based upon its appearance after the accident, and is loose and unsatisfactory. It appears that during the storm and prior to the day of the collision two of the mooring posts were pulled out under the upward strain of the mooring lines. We think it may safely be assumed that it was impracticable then and before the time of the accident to replace those posts and re-set and brace the others. The fact that longer posts were subsequently placed in the wharf is immaterial on the question of negligence. We are satisfied under the evidence adduced that the libel should have been dismissed with costs. The decree below is reversed.

NOONAN v. CHESTER PARK ATHLETIC CLUB CO.

(Circuit Court of Appeals, Sixth Circuit. March 28, 1899.)

No. 668.

APPEAL—TIME FOR TAKING AND PERFECTING.

The allowance of an appeal by the trial court within six months from the entry of the decree is sufficient to save the case from the bar of the statute, as neither the filing of the bond nor the issuance of citation within the time is jurisdictional.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

George J. Murray, for appellant.

Wood & Boyd, for appellee.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

PER CURIAM. A motion is made to dismiss the appeal in this case on the ground that it was not taken in time. It appears that the final decree was entered in the circuit court March 21, 1898. The appeal was allowed on the 20th of September of the same year. The bond was not given, however, until the 26th of September, or more

than six months after the decree was entered. The citation was duly issued, and the transcript of record was filed in this court in October following. The motion to dismiss is pressed on the ground that the appeal was not perfected within six months after the date of the decree appealed from. This is not necessary. The bar of the statute is saved by the allowance of the appeal. If the appeal is not subsequently perfected, either by the filing of the bond or issuing of the citation or the filing of the transcript in due course, the appeal may become inoperative, and the court will then dismiss it. *Altenberg v. Grant*, 54 U. S. App. 312, 28 C. C. A. 244, and 83 Fed. 980; *Railroad Equipment Co. v. Southern Ry. Co.* (a decision by this court at the present term) 34 C. C. A. 519, 92 Fed. 541. It has been expressly decided by the supreme court in a number of instances that it is the allowance of the appeal, and not the perfecting of all the steps necessary to a hearing of the appeal in the court above, which saves the appellant or plaintiff in error from the bar of the statutory period of limitation fixed for the bringing of appeals and writs of error. Neither the issuing of the citation nor the giving of bond is jurisdictional. *Evans v. Bank*, 134 U. S. 330, 10 Sup. Ct. 493; *Dodge v. Knowles*, 114 U. S. 430-438, 5 Sup. Ct. 1108, 1197; *Pengh v. Davis*, 110 U. S. 227, 4 Sup. Ct. 17; *The Dos Hermanos*, 10 Wheat. 306-311. The motion to dismiss is denied.

RUBY et al. v. ATKINSON et al.

(Circuit Court of Appeals, Fifth Circuit. April 18, 1899.)

No. 693.

1. APPEAL—TRANSCRIPT—CERTIFICATE.

A certificate to a transcript is insufficient where it is limited to the correctness of the pleadings, and omits all reference to the decrees or orders of the court, and the proceedings to bring up the case on appeal, and only certifies the evidence as furnished by counsel for appellants, "which is said by him to have been agreed upon by counsel for both parties."

2. SAME—CITATION.

Where an appeal is allowed in open court, but is not perfected during the term, a citation to the other party is necessary, and should be issued and served within the return day for the appeal.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

Scarborough & Scarborough, for appellants.

W. M. Sleeper, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. When this cause was first before this court (18 C. C. A. 249, 71 Fed. 567) it was disposed of as follows:

"The decree appealed from is reversed, and the cause is remanded to the circuit court, with directions to set aside all the alleged pleadings filed subsequently to the original bill, to grant leave to complainants to amend their original bill, so as to make it conform to the equity rules, and on such terms as may be just, and thereafter to proceed in the cause as the equity rules adopted by the supreme court of the United States provide, and as equity and good conscience shall require. Neither party to recover costs on this appeal."