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Reynolds, Ex'r, use etc. vs. McCallum, Adm'r.

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REYNOLDS, Ex'r, use etc., vs. MCCALLUM, Adm'r.

SUPREME COURT—PRACTICE: *When cause submitted, dismissed.*

Where a cause has been submitted and it appears that the transcript was not filed within three years after the rendition of the judgment, and no extension of time was asked for the filing of the same, the submission will be set aside and the cause dismissed.

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APPEAL from *La Fayette* Circuit Court.

Hon. G. W. McCOWN, Circuit Judge.

*Rose & Green*, for appellant.

McCLURE, C. J. On the 23d day of May, 1870, an appeal was granted by the circuit court of La Fayette county, and, on the 29th of August, 1873, the transcript was filed in this court. On the last mentioned day a summons was issued, directed to the administrator of the estate of Lucy Hamilton, deceased, service of which was accepted by appellee's attorney, waiving exceptions to form of service, but as to nothing else. On the first day of the present term, the cause was called and submitted at the instance of the appellant, the court not noticing that the appeal had been granted more than three years before the filing of the transcript. On the 17th of December, 1873, counsel for the appellee filed a motion to dismiss the appeal on the ground that the transcript had not been filed in this court within the time prescribed by law. On the next day, counsel for appellant filed a motion to strike the motion to dismiss from the files, on the ground that the cause was submitted before the filing of the motion to dismiss.

The code provides that either party to an action shall be granted an appeal as a matter of right, on motion made in the circuit court, or by the clerk of this court in vacation. Sec. 859. By section 862 of the code, it is made the duty of the appellant to file an authenticated copy of the record in the clerk's office of the supreme court, within ninety days after the appeal is granted, and this court, for good cause shown, is authorized to extend the time within which the transcript may be filed. No extension of time has ever been asked in this case, nor has any showing been made why the transcript was not sooner filed. Section 867 of the code de-

clares that an appeal shall not be granted after the expiration of three years from the date of the rendition of the judgment.

In view of the fact that the transcript was not filed here within three years after the rendition of judgment, we direct that the submission heretofore had be set aside, and the cause is dismissed, and the clerk of this court is hereby directed not to docket a cause or file a transcript in his office, after the expiration of ninety days, in cases where the appeal was granted in the court below.

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