

Gwin Vs. Breedlove

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Court : US Supreme Court

Decided On : 1841

Appeal No. : 40 U.S. 284

Appellant : Gwin

Respondent : Breedlove

Judgement :

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Gwin v. Breedlove

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ERROR TO THE CIRCUIT COURT FOR THE

SOUTHERN DISTRICT OF MISSISSIPPI

Walker, for the plaintiff in error, stated, that he had a transcript of the record in this case, duly authenticated, which he was ready to file, and to docket the case, under the rules of the Court, and he moved the Court to set aside and annul the judgment of the court docketing and dismissing the writ of error rendered on a prior day of this term, and also to revoke the mandate of this Court, issued and

addressed to the judges of the Circuit Court of the Southern District of Mississippi, in this cause.

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TANEY, CH.J., delivered the opinion of the Court.

This case was docketed and dismissed on 9 February of the present term upon the motion of the defendant in error under the 43d rule of the Court, and upon the 11th of the same month, upon a like motion, a mandate was ordered to issue to the circuit court to proceed in the case, which was accordingly issued on the next day. On 6 March, the plaintiff in error appeared in Court by his counsel and produced and filed with the clerk the record of the case and moved the Court to strike out the judgment of dismissal and to continue the case.

The judgment of dismissal, under the rule above mentioned, is a judgment *nisi*, and it may be stricken out at any time during the term upon motion unless it appears that the omission to file the record and docket the case, at an earlier period of the Court has been injurious to the interests of the defendant in error. The motion to reinstate addresses itself to the sound discretion of the Court, and care will always be taken, in granting the rule, that no injustice is done to the opposite party. In the case of [Owings v. Tiernan's Lessee](#), 10 Pet. 24, the motion to dismiss and the motion by the plaintiff in error to docket the case were contemporaneous, and the Court said that the motion of the plaintiff ought had been sued out although in that case it appeared that the writ of error had been sued out to the preceding term of this Court. According to this decision, the motion of the plaintiff in error must have prevailed if it had been contemporaneous with that of the defendant, and the delay since does not appear to have operated injuriously to him nor to have retarded in any degree the ultimate decision of the case. For if the record had been filed at the time of the motion to dismiss, it is now evident from the state of the term that the case could not have been reached and disposed of during the present session of the Court. The Court therefore will order it to be reinstated on the docket and continued, and the mandate, which was

improvidently issued, to be recalled.

On consideration of the motion and of the arguments of counsel thereupon had, as well against as in support of said motion, it is now here ordered and adjudged by this Court that the judgment of this Court docketing and dismissing, with costs, the writ

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of error in the above-entitled cause on Tuesday, 9 February last, of the present term of this Court be and the same is hereby declared utterly null and void, and that the mandate of this Court, directed to the judges of the said circuit court in this cause, be and the same is hereby revoked, and it is also now here further ordered that the clerk of this Court do forthwith send to the judges of the Circuit Court of the United States for the Southern District of Mississippi a copy of this order of Court under seal of this Court.

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