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ErwIn Vs. Lowry

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Court : US Supreme Court

Decided On : 1849

Appeal No. : 48 U.S. 172

Appellant : Erwin

Respondent : Lowry

Judgement :

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Erwin v. Lowry

48 U.S. (7 How.) 172

ERROR TO THE SUPREME COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

SYLLABUS

Where a petition for the seizure and sale of the mortgaged property of a deceased person was filed in the Circuit Court of the United States for Louisiana against the executor of that deceased person, which petition alleged the plaintiff to be a citizen

of Tennessee and the defendant to be a citizen of Louisiana, and the proceedings went on to a sale without any objection to the jurisdiction of the court being made by the executor upon the ground of residence of parties, it is too late for a curator, appointed in the place of the executor, to raise the objection in a state court against a purchaser at the sale and attempt to prove that the circuit court had no jurisdiction over the case because the executor was not a citizen of Louisiana. Evidence *dehors* the record cannot be introduced to disprove it.

Where a lien existed on property by a special mortgage before the debtor's death, and

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the property passed, with the lien attached, into the hands of an executor, and was in the course of administration in the probate court, the circuit court of the United States had jurisdiction, notwithstanding, to proceed against the property, enforce the creditor's lien, and decree a sale of the property. And such sale was valid.

The circuit court of the United States, having jurisdiction over the parties and subject matter and having issued an order of seizure and sale, the presumption must be, in favor of a purchaser, that the facts which were necessary to be proved in order to confer jurisdiction were proved. No other court can inquire into those facts.

Although the marshal did not give the notice required by law to the executor against whom the petition was filed, yet if the executor was served with process on the spot where the property was situated and where the advertisements were posted up, was present at the sale and named one of the appraisers, and requested that the land and negroes should be sold together, he cannot afterwards impeach the sale because formal steps were not strictly complied with. Nor can the curator who subsequently represented the same estate.

Where the court below ordered that a sum of money should be paid over by the party in whose favor they decided to the losing party, the reception of this money by the losing party, before the writ of error was sued out, will not be a sufficient

cause for dismissing the writ of error.

In the beginning of the year 1835, Dawson and Nutt were the owners of some land situated in the Parish of Carroll, in the State of Louisiana, on the waters of the Walnut Bayou, amounting to 640 acres, and also of a number of slaves. On 8 January, 1835, they sold the land and slaves to Alexander McNeill, of the State of Mississippi, for one hundred and five thousand dollars, payable in five payments; the first four of twenty-five thousand dollars each, and the last of five thousand. McNeill gave a mortgage upon the land and slaves to secure the last four payments.

Whether notes were given for all these payments, and when they were to be made, the record did not show. But by an endorsement upon the mortgage under date of January 15, 1838, it appeared that all the payments had been made except the fourth.

About 28 May, 1839, Alexander McNeill died in Mississippi.

By his will, which contains several legacies of small value, he bequeathed the mass of his estate to Hector McNeill, also a resident and citizen of Mississippi, whom he appointed his testamentary executor. On 6 June, 1839, this executor, stating himself to be a citizen of Coahoma County, in Mississippi, presented a petition to the judge of probates of the Parish of Madison, in which, after stating that his testator had died on the date above stated, in Mississippi, and left a will, in which he was appointed sole executor and principal legatee, an authenticated copy of which was annexed to the petition, he proceeds

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to say, that two large estates were in the possession of his testator, situated in this parish.

He says further that, by the laws of Mississippi, as executor of the will, he was bound to present it for probate in Warren County in that state, without delay, but as the court would not sit for some weeks, he could not then have the will proved and

recorded, nor could he then present a duly certified copy of it to be recorded in the said Probate Court of Madison. He says he is

"desirous of taking on himself the succession of his deceased brother's estate, according to the terms of his last will and testament and the laws of the state; he therefore prays that an inventory of all the property in the parish, belonging to the estate of said Alexander McNeill, deceased, be taken."

And he prays the judge to grant him the succession of the deceased Alexander McNeill according to the terms of the will and the laws of the state, and that he will grant any other and whatever order may be necessary to entitle him (Hector) to the possession and succession of the property left by the deceased. Upon this petition no order or judgment was given by the probate judge, but on 2 July following, he proceeded to make an inventory of the property composing Alexander McNeill's succession, which is signed by Hector McNeill as executor. The will was probated in Warren County, Mississippi, on 24 June, 1839, and a copy of it, and the proceedings in the aforesaid court, recorded in the Probate court of Madison on 1 July, 1839, one day before the taking of the inventory, but no order taken on it further than to record it.

By the inventory and appraisement, the whole property of the deceased in that parish amounted to $245,317.

On 1 November, 1839, Hector McNeill presented the following petition:

"To the Honorable Richard Charles Downes, Parish Judge in and for the Parish of Madison, State of Louisiana."

"Hector McNeill, heretofore a resident of Warren County, State of Mississippi, respectfully represents to your honor, that he is the owner of large possessions in this parish, consisting of plantations, negroes &c.; that he is desirous of acquiring residence, and to be entitled to the privileges &c.;, of a resident of this parish; that he is aged thirty-one years; that he is from the State of Mississippi, as aforesaid, and that he desires to pursue planting in this parish, and to reside and make his permanent domicile and home on the Walnut Bayou, Parish of Madison,

Louisiana. Wherefore he prays this notice may be duly filed and recorded."

"H. Mc NEILL"

" *Walnut Bayou, La., Nov. 1, 1839* "

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On 23 May, 1840, Andrew Erwin filed the following petition in the circuit court of the United States:

"To the Honorable the Judges of the Circuit Court of the United States for the Ninth circuit of Louisiana."

"The petition of Andrew Erwin, a citizen of the State of Tennessee, therein residing, respectfully shows:"

"That Hector McNeill, testamentary executor of Alexander McNeill, a citizen of the State of Louisiana, residing in the Parish of Madison, within the jurisdiction of this Honorable Court, is justly indebted to your petitioner in the sum of seventeen thousand five hundred dollars, besides interest on the promissory notes hereto annexed for reference and greater certainty, drawn on 8 January, 1835, and payable four years after date, and duly protested when due for want of payment, as will further appear from the protests thereof hereunto annexed for reference, one of which notes was payable to the order of Conway R. Nutt, a citizen of the State of Mississippi, and by him duly endorsed to your petitioner, and the other to Henry S. Dawson, also a citizen of the State of Mississippi, and by him duly endorsed to your petitioner, who avers that the assignors of said notes could have maintained an action in your Honorable Court on the said notes against the said Alexander McNeill, previously to the assignment thereof; that on the balance of one of said notes, seven thousand five hundred dollars interest is due at the rate of ten percent per annum, from 11 January, 1839, until paid, and on the balance of the other five thousand dollars, interest is due from the same date, 11 January, 1839, until paid, and which, though amicably requested, the said Alexander McNeill, as well as his testamentary executor, has neglected to pay."

"Your petitioner further shows that said notes were given in purchase of a plantation situated in the Parish of Madison aforesaid and certain slaves, and for securing the payment thereof, the said plantation and slaves were duly mortgaged, as will further appear from a certified copy thereof hereto annexed to make part and parcel of this present petition, and to which for greater certainty your petitioner refers, and thence your petitioner is entitled to an order of seizure and sale for the payment of the balance aforesaid of seventeen thousand five hundred dollars, with the interest from 11 January, 1839, of ten percent on the sum of seven thousand five hundred dollars, and on ten thousand dollars interest at the rate of five percent until paid, and the costs of the protests of said notes, ten dollars and fifty cents. Wherefore your petitioner prays that an order of seizure and sale may issue

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against the said plantation, and the negroes mentioned and described in the act of sale and mortgage aforesaid, hereunto annexed, to pay and satisfy said sum of seventeen thousand five hundred dollars, with interest as aforesaid, from 11 January, 1839, until paid, with $10.50 costs of protest and the costs of suit. And your petitioner prays for all such other and further relief as the nature of the case may require and to equity and justice may appertain, and as in duty bound will ever pray your petitioner. (Seventeen thousand and five hundred dollars, besides interest and costs, claimed.)"

"ALFRED HENNEN, *Attorney for Petitioner* "

On the day of the filing of the petition, the following order was issued, *viz.:*

"Inasmuch as the mortgage within mentioned imports a confession of judgment, let an order of seizure and sale issue for the sale of the property mortgaged, if the sum within claimed is not paid after legal notice."

"P. K. LAWRENCE, *U.S. Judge* "

"New Orleans, 23 May, 1840"

Afterwards, to-wit, on 23 May, 1840, the following writ of seizure and sale was issued:

" *United States of America:* "

"The President of the United States to the Marshal of the Eastern District of Louisiana or his lawful deputy, greeting: "

"You are hereby commanded to seize and sell, after legal demand, for cash, the following described property, to-wit: [then followed a list of the property, namely, land and slaves]."

The return of the marshal was as follows:

"Received this order of seizure and sale on 25 May, 1840, and on 29 May I delivered the order of court and copy of mortgage issued by the clerk of this Court to the defendant; also a copy of a notice of demand, which notice is herewith returned (marked A). On 1 June, I seized the land and fifty-seven slaves, mentioned in this order of seizure and sale, and delivered to said defendant a copy of notice of said seizure, which is also herewith returned (marked B). On 4 June, 1840, I affixed copies of an advertisement (marked C), and herewith filed, to the door of the courthouse, the door of the parish judge's office, and at other places, in the Parish of Madison and State of Louisiana, in which the said

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property is situated, announcing that the said property would be offered for sale on the said premises, to the highest bidder for cash on Monday, 6 July, 1840, being full thirty days, exclusive of the day on which the advertisements were posted up, *viz.,* 4 June, 1840, and the day of sale. On the said 6 July, 1840, I repaired to the premises aforesaid, and after the appraisers, James Brooks and Jesse Couch, duly qualified citizens of Louisiana, selected by the plaintiff and defendant in this case for that purpose, were duly sworn, they proceeded to appraise the said land and forty-four of the negroes in this order of seizure and sale, and the same conveyed by deed from the marshal to the purchaser, bearing date 7 July, 1840,

and of record of this Court. Thirteen of the said fifty-seven negroes which were seized by me, proving to be others than those named in this process, were not appraised, neither could the said thirteen be found, as reported by the said appraisers in their report, now filed in the court, and marked D. The said land was appraised at $13 per acre; the 640 acres at $13, amount $8,320. The said forty-four negroes were appraised separately and in families and the amount of the whole when added was $15,525, making the aggregate amount for the land and negroes $23,845. After said appraisement was completed and between the hours of 12 A.M. and 1 P.M., I offered the said land and forty-four negroes for sale; after making all the declarations required by law in relation to the nature and description of the same, and after exhibiting and reading, in an audible voice, a certificate of the recorder of mortgages of the said Parish of Madison; and after repeatedly crying the said property, James Erwin, Esq. bid the sum of $16,000, which being the highest and last bid, and more than two-thirds of the appraisement thereof, the said land and negroes were adjudged to him, and on 7 July, 1840, were conveyed by deed, now of record in this Court."

On 7 July, 1840, the marshal executed a deed of the above property to James Erwin, reciting the circumstances attending the public sale.

On 23 March, 1841, the Court of Probate in the Parish of Madison appointed Alfred J. Lowry curator of the vacant succession of Alexander McNeill.

On 16 August, 1841, Lowry, the curator, filed a petition in the Ninth Judicial District Court in and for the Parish of Madison (state court). It represented that McNeill, at his death, was the owner of the estate, and that James Erwin had illegally, and by fraud and collusion, taken possession of it. It then prayed for a restoration of the property, and an account of the rents and profits.

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On 5 May, 1842, Erwin filed his answer, reciting the above facts and claiming title under the sale.

Evidence having been taken, the district court, at December term, 1842, pronounced a judgment in favor of the petitioner, the curator.

An appeal was taken by Erwin from this judgment to the supreme court of the state, which, in October, 1843, affirmed the judgment of the court below. A writ of error, sued out under the twenty-fifth section of the Judiciary Act, brought the case up to this Court.

MR. JUSTICE CATRON delivered the opinion of the Court.

Alfred J. Lowry sued James Erwin in the district court for the Ninth District of Louisiana, for a tract of land of about six hundred acres, and forty-four slaves, who were employed in cultivating the land by growing cotton thereon. The property was situate in the Parish of Madison in that state. The suit was commenced in 1841 by petition which alleges that about July, 1840, one James Erwin, illegally and by fraud and collusion and without any legal title thereto, took possession of

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all the above described property, and is still in possession of the same, has appropriated and wrongfully converted to his own use all the fruits and revenues of said property, and pretends to be the owner thereof and refuses to deliver to the petitioner the possession. The property was not claimed by Lowry in his own right, but as curator of the estate of Alexander McNeill.

To this petition Erwin answered, among other things not within the cognizance of this Court, that on 6 July, 1840, he became the purchaser of the property at public auction at a sale made thereof by the marshal of the United States, who sold the same under a judgment and on a writ of seizure and sale, issued from the Circuit Court of the United States for the Eastern District of Louisiana in a case wherein Andrew Erwin was plaintiff and Hector McNeill, testamentary executor of Alexander McNeill, deceased, was defendant, and that he paid the sum of sixteen thousand dollars in cash therefor, which was applied to the payment of a debt due by mortgage by the succession of Alexander McNeill, and he exhibited a copy of the proceedings on which the sale was founded, and his bill of sale made by the

marshal for the land and negroes. These proceedings and the marshal's deed were given in evidence by the defendant on the trial before the state district court. A judgment was there given against Erwin, and the property decreed to Lowry as curator, from which Erwin appealed to the Supreme Court of Louisiana, where the judgment of the district court was affirmed; and to this judgment Erwin prosecuted a writ of error out of this Court under the twenty-fifth section of the Judiciary Act of 1789, on the ground that there was drawn in question the validity of an authority exercised under the United States and that the decision of the Supreme Court of Louisiana was against its validity. That such was the fact, and that this Court has jurisdiction, is not and cannot be controverted. The judgment ordering the seizure and sale was declared void for several reasons. Such of them as are subject to our cognizance we will proceed to consider.

The whole proceeding, commencing with the petition of Andrew Erwin demanding a seizure and sale to James Erwin's deed from the marshal, was the exercise of one authority, and the question submitted for our consideration is whether the marshal's sale was void on any legal ground -- that is to say whether the deed by the marshal to James Erwin was void for the reason that it was not supported by a lawful judgment or that, for want of a compliance with any legal requirements in conducting the seizure and sale, the deed was void. If void on anyone ground, it would be altogether useless to reverse

the judgment because an error had been committed on some other ground, as, on the cause's being remanded, the state court would pronounce the deed void a second time on the true ground. This Court was compelled so to hold in *Collier v. Stanbrough,* 6 How. 14.

The deed in the case before us was held void by the Supreme Court of Louisiana first because Hector McNeill was not a citizen of that state when Andrew Erwin's petition was filed. This fact the court ascertained by proof dehors the record. The petition alleges that Andrew Erwin was a citizen of the State of Tennessee, therein residing, and that Hector McNeill was a citizen of the State of Louisiana, residing

in the Parish of Madison and within the jurisdiction of the court. On being served with process, Hector McNeill did not dispute the fact nor make any defense; the purchaser found the fact established by the record, nor could it be called in question in a collateral action and disproved, and the purchaser's title defeated by inferior evidence. On this question the case of *McCormick v. Sullivan,* 10 Wheat. 192, is entitled to great weight. There, neither party was averred to be a citizen of any state, and the attempt was made by a second suit to treat the purchaser's title as a nullity because of this defect in the proceeding on which the purchase was founded, but it was held that the purchaser took a good title. In the case before us, the record on its face was perfect, and evidence was let in to contradict and to overthrow it which we deem to be wholly inadmissible in any collateral proceeding. Hector McNeill was estopped to deny the fact, and so is the present party, his successor.

The next question decided below was that the property, when it was seized and sold, was part of a succession, and, being in the course of administration in the probate court, could not be seized and sold by an execution founded on a proceeding in another court. This question we declined to decide in the case of *Collier v. Stanbrough,* and ruled that cause on another ground. That a special mortgage, where no succession has occurred, may be foreclosed by this mode of proceeding -- that is, by an order of seizure and sale in the Circuit Court of the United States held in Louisiana -- we have no doubt. But the question here is whether jurisdiction could be exercised over mortgaged property whilst it was in a course of administration. That no jurisdiction existed in the United States circuit court was held in the case before us, and so it had been held by the Supreme Court of Louisiana in previous cases. But in 1847 that court reviewed its previous decisions, in the case of *Dupuy v. Bemiss.* In the opinion there given,

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the jurisdiction of the federal court held in Louisiana is so accurately and cogently set forth, and the relative powers and duties of the state and federal judiciaries are so justly appreciated, as to relieve us from all further anxiety and embarrassment on the delicate question of conflict arising in the case of *Collier v. Stanbrough*

and again in this cause. It was held in the case of *Dupuy v. Bemiss* that where a lien existed on property by a special mortgage before the debtor's death and the property passed by death and succession, with the lien attached, into the hands of a curator and was in the course of administration in the probate court, the circuit court of the United States had jurisdiction, notwithstanding, to proceed against the property and to enforce the creditor's lien, and to decree a sale of the property, and that such sale was valid. We accord to this adjudication our decided approbation, but take occasion to say that had we unfortunately been compelled to decide the question without this aid, our judgment would have been, that the decision of the Supreme Court of Louisiana in the cause under consideration was erroneous. It was also assumed by the Supreme Court of Louisiana

"that no explanation was given how the notes secured by the mortgage got into Andrew Erwin's hands in Tennessee, and that no transfer of the mortgage was proved to have been made to him, without which no state judge could have granted an order of seizure and sale without a violation of law."

We hold that wherever a judgment is given by a court having jurisdiction of the parties and of the subject matter, the exercise of jurisdiction warrants the presumption, in favor of a purchaser, that the facts which were necessary to be proved to confer jurisdiction were proved. It was so held by this Court in the case of *Grignon's Lessee v. Astor,* 2 How. 319, and to the principles there laid down we refer for the true rule. The circuit court may have erred in granting the order of seizure and sale, but this does not affect the purchaser's title.

The Supreme Court of Louisiana next held that

"It is well settled in our jurisprudence that in forced alienations of property there must be a reasonable diligence in and compliance with the forms of the law, under a penalty of nullity. When a party resorts to the summary and more severe remedies allowed by law, he is then held to a stricter compliance with every legal formality, and the executory process of seizure and sale may be considered as one of severity. It is obtained *ex parte,* and all the proceedings under it are to be scrutinized closely. It necessarily follows that if the law has not been complied

with, the property is not transferred and the purchaser acquires no title."

This was the doctrine adopted by

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us in the case of *Collier v. Stanbrough,* and is no more open to question in the Circuit Court of Louisiana than it is in the state courts of that state, and the question is how far the marshal complied with the legal formalities in conducting the seizure and sale. He was bound to give three days' notice to the debtor before the seizure if he resided on the spot, and if he did not, to count in addition a day for every twenty miles between the residence of the debtor and the residence of the judge to whom the petition was presented. (Code of Practice 735.) The notice was given to Hector McNeill on 29 May, 1840, requiring him to pay within three days; the property was seized on 1 June; the advertisements were posted up on 4 June, and the property sold on 6 July following. The notice was given in the Parish of Carroll, about four hundred miles from New Orleans, where the judge resided, so that more than twenty days less than the due time required by law was allowed to the defendant, Hector McNeill, to appear before the judge, obtain an injunction, and make opposition to the proceeding instituted by Andrew Erwin; and for this reason the sale would be void, if the defendant, McNeill, had not acted in the matter. But the marshal's returns are required by the practice in Louisiana to show the various steps in the proceedings, and are part of the record on which James Erwin's title depends; these returns show that McNeill was served with process on the spot where the property was, and where the advertisements were posted. When the sale come on, the marshal returns that

"by agreement of the plaintiff and defendant in the suit -- that is, Andrew Erwin and Hector McNeill -- the following individuals were selected as appraisers, to-wit: James Brooks was selected by the plaintiff, and Jesse Couch was selected by the defendant, who, being duly sworn, proceeded to appraise all the property mentioned in the order of seizure and sale; that they appraised the negroes and the land -- that is, each slave separately, and the land separately."

Both land and slaves being immovable property, if two-thirds of the appraised value had not been bid at the sale, a second was necessary by the laws of Louisiana. Code of Practice 670, 671. And by Art. 676,

"Slaves seized must be appraised either by the head or by families, and the other effects must be appraised with such minuteness that they may be sold together or separately, to the best advantage of the debtor, and as he may direct."

The marshal's deed to James Erwin recites in general terms all the necessary steps required to be taken previous to the sale, and after describing in detail all the property, the deed says, that

"the marshal proceeded to cry the aforesaid land and

negroes to go together, at the request of the defendant, Hector McNeill, and that James Erwin became the purchaser for the sum of sixteen thousand dollars, being more than two-thirds the appraised value of the land and negroes."

The general principle as respects third persons is that where one having title stands by and knowingly permits another to purchase and expend money on land under the erroneous impression that he is acquiring a good title, and the one who stands by does not make his title known, he shall not afterwards be allowed to set it up against the purchaser. We understand the decisions in Louisiana to conform to this principle, and that it is applicable there in cases of execution sales, and, as lands and slaves stand on the same footing in Louisiana, the rule applies equally to both.

Testing the sale by this principle, how does it stand? The purchaser saw the debtor and the marshal select the appraisers, and saw the appraised value, so that bidders could regulate their bids by it; he heard the debtor order the marshal to sell the plantation and slaves together, and they were so sold. Nor did the debtor make any objection to the sale, but by his acts and presence sanctioned it, and therefore it cannot be impeached because formal steps were not strictly

complied with.

In our opinion, the order of seizure and sale, and the steps taken in its execution, were such as to support the sale adjudicated to James Erwin by the marshal; but we only adjudge the force and effect of the legal proceeding. As to any other questions involved in the cause (if there be any), this Court has no jurisdiction, and consequently leaves them with the state courts.

At October term, 1843, the curator, Lowry, had judgment, but the court below ordered

"That no writ of possession issue in this case to put the plaintiff in possession of the plantation and slaves until he pay the defendant, or deposit in the hands of the sheriff of the parish to the credit of the defendant, $436.55, with interest thereon, at the rate of five percent, per annum, from 18 March in the year 1843 until the day of payment or deposit."

In August, 1844, Lowry paid over the money to the Sheriff of the Parish of Madison, and the sheriff paid it over to Erwin in November, 1844. The writ of error was sued out in May, 1845, and there accompanied the record an assignment of errors. The defendant in error now comes forward and asks to have the writ of error dismissed on production of a copy of Erwin's receipt to the sheriff on the ground that, by receiving the money, Erwin released the errors complained of.

In the first place, we think the motion comes too late to be

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heard, but that if it could be heard, it is no bar. The proceeding was of a mixed character, partaking more of the nature of a proceeding in equity than one at law, and although it can only come here by writ of error, yet his does not change its character. A writ of error in equity proceedings is not peculiar. The twenty-second section of the Judiciary Act of 1789 gave a writ of error in chancery cases, and so the law continued until 1803. Ch. 4. And we take the rule to be that although a decree in equity is fully executed at the instance of the successful party, he cannot

complain of his own voluntary acts if he does perform a condition imposed upon him before he can have the fruits of the decree, although the other party derives a benefit from such performance. If it was otherwise, a writ of error in such a case as the present, or an appeal in equity, might be defeated after the writ of error or appeal was sued out, where there was no supersedeas, and here there was none.

Five years is the time allowed for prosecuting appeals to and writs of error out of this Court, and in many cases decrees and judgments are executed before any step is taken to bring the case here; yet in no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the inferior court, on the cause's being remanded, to restore the parties to their rights.

For the reasons above stated, we order the judgment of the Supreme Court of Louisiana to be

Reversed.

MR. JUSTICE WAYNE and MR. JUSTICE DANIEL dissented.

ORDER

This cause came on to be heard on the transcript of the record from the Supreme Court for the Western District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said supreme court in this cause be and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said supreme court with directions to proceed therein in conformity to the opinion of this Court.

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