

therefore erroneous, whether it is to be treated as proceeding upon a distinct motion filed at the general term, or upon an appeal from the decision of the judge on the original motion filed before him.

As the error appears on the record, no bill of exceptions was necessary to secure the rights of the party aggrieved. *Bennett v. Butterworth*, 11 How. 669. As the erroneous order directed further proceedings in the court below, he could not bring the case to this court until after such proceedings had been had and a final judgment rendered against him. *Baker v. White*, 92 U. S. 176; *Bostwick v. Brinkerhoff*, ante, p. 3. As without that error the final judgment could not have gone against him, the question is open on his writ of error upon the final judgment.

The judgment rendered upon the verdict in favor of the plaintiff having been erroneously set aside, the subsequent final judgment for the defendant must be reversed, and the former judgment for the plaintiff affirmed as of the date when it was rendered, in order to prevent the action from being abated by the subsequent death of the plaintiff. *Mitchell v. Overman*, 103 U. S. 62.

*Ordered accordingly.*

MR. JUSTICE FIELD was not present at the argument, and took no part in the decision of this case.

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BAYLY v. UNIVERSITY.

1. A composition between a bankrupt and his creditors, under sect. 17 of the act of June 22, 1874, c. 390, although ratified by the proper District Court, did not discharge him from a debt or a liability incurred by him while acting in a fiduciary character.
2. That section did not repeal sect. 5117 Rev. Stat. *Wilmot v. Mudge*, 103 U. S. 217, cited upon this point and approved.

ERROR to the Supreme Court of the State of Louisiana.  
The facts are sufficiently stated in the opinion of the court.

Mr. John H. Kennard and Mr. William Wirt Howe for the plaintiff in error.

Mr. James Leovy for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

In the Second District Court of the Parish of Orleans, in the matter of the succession of R. H. Bayly, there was an opposition to the homologation of the account presented by George M. Bayly, executor of said R. H. Bayly, by the Washington and Lee University, which was a legatee under the will of the deceased.

This opposition, so far as the case before us is concerned, was to an item of \$18,021.79, which that court decided to be a debt from the firm of Bayly & Pond, the members of which had been declared bankrupt, and in regard to whom a resolution of composition by the creditors had been confirmed by the District Court of the United States.

The plaintiff in error here relied upon this composition as discharging him, both as executor of the estate of his brother, and as a member of the partnership of Bayly & Pond, from liability for the item; and the inferior court accepting this view of the matter, made an order that it should only be paid in due course of administration.

On appeal of the Washington and Lee University, the Supreme Court of Louisiana decided that the item represented a debt by the executor of a fiduciary character, which was not barred by the composition order, and directed a judgment against Bayly in cash for the amount of it, to which judgment this writ of error is prosecuted.

The proposition argued here, namely, that a composition in a bankruptcy case, ratified by order of the District Court, operates as a discharge of the bankrupt from all his debts, including those arising from fraud or growing out of a fiduciary relation, as well as others, was decided adversely by this court some two years after the present writ of error was sued out, in the case of *Wilmot v. Mudge*, 103 U. S. 217.

It is there held that notwithstanding the comprehensive terms in which sect. 17 of the act of June 22, 1874, c. 390, declares such a composition to be binding, it was not intended

to repeal sect. 5117 of the Revised Statutes, which enacts that "no debt created by fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy."

This disposes of the only question in the record of which this court has jurisdiction, and decides that whatever may be due by plaintiff in error to the succession as executor is not discharged by the proceeding in bankruptcy, and he is left to account with the court in that character as though no composition in bankruptcy had been made. Whether in that accounting he was executor or not, and whether as such he had so dealt with the item in question as to be relieved of liability as executor or to be bound for it, are matters depending on the application of the law of Louisiana to the facts of the case, and involve no question under the bankrupt law.

*Judgment affirmed.*

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### THE "NEW ORLEANS."

1. The court, upon the facts found by the Circuit Court, affirms the decree whereby the steamer "New Orleans" was condemned to pay the damages occasioned by her collision with a schooner.
2. The evidence which in another suit a part owner of the schooner gave as to the extent and cost of the repairs put upon her, is not in this suit admissible against the other part owners.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The owners of the "Allie Bickmore" filed, in their own behalf and as carriers of her cargo, their libel in a cause of collision, civil and maritime, against the "New Orleans." The District Court adjudged the "New Orleans" to be wholly in fault, and rendered a final decree accordingly for \$15,682.37, with interest thereon and costs. Both parties appealed to the Circuit Court, which found the following facts:—

1. A little after five o'clock in the morning of the 6th of September, 1874, a collision occurred between the schooner