

*WILLIAM M. GWIN, Marshal of the Southern District of Mississippi,
Plaintiff in error, v. JAMES H. BREEDLOVE, Defendant in error.

Practice.

A case, on a writ of error to the southern district of Mississippi, was docketed and dismissed on the 9th of February, of the present term, upon motion of the defendant in error, under the 43d rule of the court; and on the 11th of February, a mandate, on a like motion, was ordered to issue to the circuit court, to proceed in the case; which was issued on the next day; on the 6th of 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 to strike off the judgment of dismissal, and to continue the case. The judgment of dismissal under the rule, is a judgment *nisi*; and it may be stricken out at any time during the court, 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. The motion was granted.

Had the record in this case been filed at the time of the motion to dismiss, it is now evident, from the state of the business of the term, that the case could not have been reached and disposed of during the present session of the court. *Owings v. Tiernan*, 10 Pet. 14, cited.

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.

The motion was opposed by *Key*, for the defendant in error.

*TANEY, Ch. J., delivered the opinion of the court.—This case [*285 was docketed and dismissed on the 9th of 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 the 6th of 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 to be allowed; 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

Young v. Smith.

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 *of error in the above-
 *286] entitled cause, on Tuesday, the 9th day of 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.

*287] *JANE YOUNG and others, Legatees of JOHN PARKS, deceased,
 Appellants, v. EDWARD L. SMITH and HENRY N. ALLEN, Executors of the last will and testament of JOHN PARKS, deceased.

Appeal.—Final decree.

A bill was filed by residuary legatees, claiming to receive from the executors their respective proportions of the estate of the testator; on a reference to a master to take an account, the master reported \$1795.27 to be in the hands of the executors, which sum was paid by them into court. The report was referred back to the master, who made his final report, by which he found a further sum in the hands of the executors, exclusive of sundry uncollected debts, then outstanding, some bad, and some good; exceptions were filed to this report, which were disallowed by the court. The circuit court decreed, that the report should be accepted, and that the complainants should have execution for the sum reported in the hands of the executors; and as to the residue of the debts due the estate, as soon as the same, or part of them should be collected, the amount should be paid into court for distribution, to be made under the direction of the court: *Held*, that this was an interlocutory, and not a final decree, in the sense of the act of congress; and an appeal from the same could not be taken.¹

APPEAL from the Circuit Court for the Southern District of Alabama. This case was before the court, on a motion to dismiss the appeal; the decree of the circuit court of Alabama, being, as was contended by *Sergeant*, for the appellees, an interlocutory, and not a final decree. *Key* opposed the motion.

STORY, Justice, delivered the opinion of the court.—This is an appeal from the decree of the circuit court of the southern district of Alabama, in a suit in equity; and the only question now submitted for our consider-

¹ See note to *Lea v. Kelly*, *ante*, p. 213.