

was expressly affirmed by the Supreme Court of Ohio, though the result upon the facts was in favor of the creditors. The facts of the case in hand are more favorable for the support of the deed than those in *Van Wick v. Seward*. Here the debtor reserved property worth more than twice and a half the amount of his debts. He expected and intended to pay all he owed. He continued able to do so until he lost his means by the hazards of business. The creditor rested supine for a long time. He did not take his judgment until more than eight years after the second note matured, and more than six years after the execution of the trust-deed. More than seven years had elapsed when the levy was made. The validity of the deed was then challenged for the first time. The creditor quietly looked on until after misfortune had deprived the debtor of the ample means of payment which he had reserved, and now seeks to wrest from the wife the small remnant of property which her husband acquired by means derived wholly from her estate, and which, in part fulfilment of his promise repeatedly made both before and after his marriage, he endeavored to secure to her and her children.

The evidence, as it stands in the record, satisfies us of the honesty of the transaction on his part. The non-payment and the inability to pay are the results, not of fraud, but of accident and misfortune. When Fulton executed the deed, he did what he then had the right to do, and was morally, though not legally, bound to do.

The proofs would not warrant us in holding that the settlement does not rest upon a basis of good faith, or that it is not free from the taint of any dishonest purpose.

*The decree of the Circuit Court is affirmed.*

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ZELLER ET AL. *v.* SWITZER.

Where the Supreme Court of a State on appeal overruled an exception which had been sustained in a lower court, and, on setting aside the judgment below, remanded the case to be proceeded with according to law, — *Held*, that the judgment of such Supreme Court was not final, and that the writ of error must be dismissed.

ERROR to the Supreme Court of the State of Louisiana.

This action was brought upon a bond given to release the steamboat "Frolic" from a provisional seizure. The defendants answered the petition Nov. 25, 1870, setting up several defences, and, Dec. 5, 1870, filed a peremptory exception. The court below, upon hearing, sustained this exception, and gave judgment in favor of the defendants. The defences set up in the answer were not passed upon.

From this judgment an appeal was taken to the Supreme Court, where a judgment was entered as follows:—

"On appeal from the Second Judicial Court, parish of Jefferson, it is ordered and adjudged that the judgment of the lower court be set aside; that the exception be overruled; that the case be remanded to be proceeded with according to law; and that the appellant pay costs of appeal."

To reverse this judgment the present writ of error has been prosecuted.

*Mr. John A. Grow* moved to dismiss the writ of error for want of jurisdiction, the judgment below not being final.

*Mr. E. T. Merrick* and *Mr. G. W. Race, contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

We think this motion must be granted. The judgment is one of reversal only, and the case is remanded to be proceeded with according to law. The Supreme Court decided that the defence set forth in the peremptory exception was not good; and that is all that court decided. The case was, therefore, sent back for trial upon the defences set up in the answer, or any other that might be properly presented. If the decision below upon the exception had been correct, such a trial would have been unnecessary. The Supreme Court having decided that it was not correct, the inferior court must now proceed further. This brings the case within our ruling at the present term in *Ex parte French, supra*, p. 423.

*The writ is dismissed.*