

PRICE *v.* HEMINGWAY.

Opinion delivered June 24, 1929.

MORTGAGES—SETTING ASIDE FORECLOSURE SALE.—Under Crawford & Moses' Dig., §§ 1062-5, 6311, it was error to vacate a decree condemning defendant's lands, on a subsequent order reviving the cause after defendant's death on his administrator and heirs.

Appeal from Arkansas Chancery Court, Southern District; *H. R. Lucas*, Chancellor; reversed.

STATEMENT OF FACTS.

This appeal is prosecuted from a decree of the chancery court setting aside a former decree *in rem* rendered against lands of J. A. Price, and ordering the sale of

these lands mortgaged by Price to secure an indebtedness to appellees.

Suit was first brought by appellees against J. A. Price for foreclosure of a mortgage given by him to secure an indebtedness to appellees. A decree was rendered for \$26,000, which was later vacated by consent, the amount of the indebtedness having been incorrectly stated therein, and another decree entered for \$53,683.98, the correct amount of the indebtedness. Price entered his appearance to this suit, in which it was agreed that no personal judgment should be taken against him, but judgment only *in rem* for a foreclosure for the corrected amount against the lands. After this judgment was entered and the lands advertised for sale, J. A. Price died. Appellees then asked that the last decree, as corrected, be vacated, and the cause revived against the administrator and heirs of the decedent. The court vacated the decree, and appellees filed a motion to dismiss their suit, and this appeal is prosecuted from the decree vacating the corrected decree.

Peyton D. Moncrief, A. G. Meehan and John W. Moncrief, for appellant.

T. J. Moher and Carmichael & Hendricks, for appellee.

KIRBY, J., (after stating the facts). Appellants concede the right of appellees, whose judgment survived against them, to revive the cause against the heirs of J. A. Price, deceased, and contend correctly that the court erred in setting aside the decree of foreclosure in making such order of revival. Sections 1062-65, 6311, C. & M. Digest; *Thompson v. Lee*, 174 Ark. 868, 296 S. W. 706; *Hill v. Brittain*, 178 Ark. 784, 12 S. W. (2d) 869.

The decree erroneously vacated had been entered at a former term of the court against J. A. Price, foreclosing the lien against his lands only, and there was no ground alleged or existing for its vacation, but only proper allegations for the revival of the cause against his heirs, who succeeded to his interest, necessary to be

had for execution of their judgment, which survived to appellees against said heirs. Section 6311, C. & M. Digest; *DeYampert v. Manley*, 127 Ark. 153, 191 S. W. 905.

It was necessary that the parties in interest be before the court for execution of the decree, since the foreclosure could not be effected without a sale of the lands and confirmation thereof, and the action had to be revived in the name of the successors to the title to give them an opportunity to be heard relative thereto. The heirs only succeeded by inheritance to the rights of the decedent, J. A. Price, and the valid decree of foreclosure of the mortgage against these lands only survived to appellees. None of the parties, the heirs or the judgment creditors, had any right to the vacation of the decree, and the court erred in making any such order.

The said decree vacating the judgment is reversed, and the cause will be remanded, with directions to proceed regularly to its execution and the foreclosure against the lands after proper revival of the cause has been completed. It is so ordered.
