Orleans Term Reports,

OR

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

TERRITORY OF ORLEANS.

By FRANCOIS-XAVIER MARTIN,
ONE OF THE JUDGES OF SAID COURT.

Ces Tribunaux donnent des décisions ; elles doivent être conservées; elles doivent être apprises, pour que l'on juge aujourd'hui comme on y a jugé hier, et que la propriété et la vie des citoyens y soient assûrées et fixes comme la constitution même de l'état.

Instructions de l'Imperatrice de Russie pour la commission chargée de dresser le projet d'un nouveau Code de Lois. Art. 101.

VOL. I.

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PREFACE.

THE Publisher of the following sheets felt so severely, on his being honored with a seat on the bench, the dearth of correct information, in regard to the decisions of the Superior Court, before his arrival, that, he was not long without resolving to guard against the increase and, if possible, the continuance of this evil. For this purpose, he took a note of every case argued afterwards, and the leisure of the vacation, in the autumnal months of 1810, was employed in collecting from the minutes and files of the court, such opinions as were given in writing, and as many of the facts in each case, as could be obtained from the records. Judge Lewis allowed him the use of his notes, and

his friends at the bar, of such briefs as they had preserved.

THE cases thus collected, soon appeared so numerous as to encourage the hope that he could furnish sufficient matter to justify the offer of publishing, in periodical numbers, THE CASES ARGUED AND DETERMINED IN THE SUPERIOR COURT of this Territory. One circumstance was calculated to deter him from the undertaking.

No one could more earnestly deplore, for no one more distressingly felt, the inconveniencies of our present judicial system. From the smallness of the number of the Judges of the Superior Court, the remoteness of the places where it sits, and the multiplicity of business, it has become indispensable to allow a quorum to consist of a single judge, who often finds himself compelled, alone and unaided, to determine the most intricate and impor-

tant questions, both of law and fact, in cases of greater magnitude, as to the object in dispute, than are generally known in the State courts—while from the jurisprudence of this newly acquired territory, possessed at different periods by different nations, a number of foreign laws are to be examined and compared, and their compatibility with the general constitution and laws ascertained—an ardous task any where, but rendered extremely so here, from the scarcity of the works of foreign jurists. Add to this, that the distress naturally attending his delicate situation, is not a little increased by the dreadful reflection, that if it should be his misfortune to form an incorrect conclusion, there is no earthly tribunal, in which the consequences of his error may be redressed or lessened.

The publisher could not but be sensible that the decisions of a tribunal thus constituted, could not

be treasured up, as those of such courts of dernier resort, in which the concurrence of a majority of the persons, in whom the supreme judicial power of the country resides, is necessary in the determination of any question: where, at the same time that the rights of the parties in the suit are pronounced upon, a rule is forming by which every future case of the same kind, will be determined, and the opinion of the court becomes the evidence of the law of the land.

He has however believed, that although these considerations certainly lessen the utility of the present publication, they do not entirely destroy it. It is true that no judge in deciding any future question, will think his conscience bound by the opinion of any one of his brethren or any number of them, less than a majority; but he may derive aid or confidence from the knowledge of anterior decisions, the

arguments of counsel, and the opinion of an other judge, in points on which he has to decide. In matters of practice, he will at times conform himself to what has been already done, though, had there been no determination, he might have suspended his assent. General and fixed rules are in this respect a great *desideratum*. At all events, a knowledge of the decisions of the court will tend to the introduction of more order and regularity in practice, and uniformity in determinations.

The time, bestowed on the preparation of this work, has been actually stolen from the important avocations of office, or the short leisure of intervening hours. The cases, however, were extended from the notes taken in court, often, before an opinion was delivered from the bench and never so long after as to allow the slightest obliteration of

the impression, made on the mind of the reporter by the discussion of a question.

In several cases, he was favoured with writen arguments by the counsel, and he owes more particular thanks on this score, to Messrs. *Ellery*, *Livingston*, *Moreau* and *Smith*.

The rapidity, with which these sheets passed thro' the press, will be, perhaps, too apparent from the number of typographical errors, that escaped his notice in the hurry of business.

That the imperfections of the work will be forgiven on account of the good motives which gave it rise, and if it be not itself of utility to his fellow citizens of this territory, it may prepare the way for a better, which may reduce the scattered principles of our jurisprudence, into a connected system, is his fondest wish and proudest hope.

A few cases have been extended far beyond what the points of law, which arose in them, seem to justify, with a view to correct misrepresentations.

New-Orleans, Oct. 30th 1811.

In the beginning of the Fall Term, 1809, the Judges of the Territory of Orleans were

GEORGE MATHEWS,
JOSHUA LEWIS, and
JOHN THOMPSON.

In the month of February, 1810, Judge Thompon died and

On the 21st of March following, FRANCOIS-XAVIER MARTIN, then a Judge of the Mississipi Territory, was appointed in his stead.

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CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

TERRITORY OF ORLEANS.

FALL TERM—1809—FIRST DISTRICT.

FALL 1809.
First District.

DEWEES
vs.
MORGAN.

DEWEES vs. *MORGAN.*

THIS was an action brought to recover the price of a negro man sold, with his wife and children, to the plaintiff, at public auction, by the defendant, consignee of a cargo of negroes.

If a slave has at the time of the sale, the seeds of a disease of which he afterwards dies, the vendor shall restore the price.

THE petition alleged that the negro man, who died ten or twelve days after the sale, had the seeds of the fatal disease in him before, and therefore the plaintiff was entitled to recover the consideration money.

IT appeared in evidence that the slave had been slightly unwell a few days before the sale, tho' the physician who attended him did not consider him, at the time, as dangerously ill; but the doctor, under whose care he was placed by his new master, testified that the negro died of the yellow fever, a disorder which he considered as incurable in its stage at the time of the sale.

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THE defendant proved that before the sale began, notice was given that it was expected that if any objection lay to any of the negroes, it should be communicated in the course of the following day—that the plaintiff was present when this notice was given—and that he had forborne to make any objection until the third day.

No fraud was suggested, neither was it pretended that the defendant was aware of the dangerous situation of the slave.

Brown for the plaintiff. By the statute of this territory, commonly called the *Civil Code*, 358, and 80, leprosy, madness, and epilepsy, are enumerated as redhibitory defects, in the sale of slaves. Other infirmities are declared redhibitory defects in such cases only, in which they are incurable by their nature, so that the slave subject thereto is absolutely unfit for the services for which he is destined, or his services are so difficult, inconvenient and interrupted, that it is presumed the buyer would not have bought him at all, or would not have given the same sum, if he had known that he laboured under the infirmity.

IN this instance, the statute follows the law of this country as it stood before its passage. The redhibitory action was not confined to any particular or definite disease, but extended to all such as baffle the skill of the physician, particularly *malignant fevers;* and when the disorder existed at the time of the sale, or manifested itself *within three days*, the sale was considered as void, and the consideration recoverable.

Asimismo se segue haber lugar la redhibitoria, o quanto minoris, *en el esclavo por defecto corporal de tener alguna mala enfermetad, segun unas leyes de partidas. L.* 64. 65 *T.* 5. *P.* 5, *como* calentura grande *e non pequena, como si dice en el derecho; Pand. L* 21, *T.* 1. *L.* 4, § 6. *Non denique febriculam quantamlibet ad causam hujus edicti pertinere. Cur. Phil. Commercio Terrestre, Cap* 13, *Redhibitoria* § 14.

Si el siervo ouiesse alguna enfermedad mala en cubierta, Part. 5, *T.* 5. *L.* 6.

Si es nacido el vicio incontinente, o tres dias *despues de la venta se presuma ser habido antes de ella, y se puede pedir. Cur. Phil. ibid*, § 25.

Selling for a sound price implies a warranty of all faults and defects *known and unknown* to the seller. And although a man does not warrant the longevity of a negro, yet if he had the seeds of a disorder in him at the time of the sale, the seller is liable in case of his death—*Timrod* vs. *Shoolbred.* 1 *Bay* 324.

Hennen for the defendant. In sales at auction purchasers take negroes at all risks, and as the plaintiff knew that the negro was sick he cannot now call on the seller as the insurer of the risk he ran. This knowledge of the sickness, the lowness of the price, and the season of the year, tend to shew that the bid must have been made with an eye to the probable danger.

THIS principle is recognized by *Domat, book*

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1, *T.* 2. *S.* 7, § 2, supported from the institutes of Justinian. *Periculum rei venditæ statim ad emptorem pertinet, tametsi adhuc ea res emptori redita non sit* and the Code also. *Post perfectam venditionem, omne commodum & incommodum quod rei venditæ contingit, ad emptorem pertinet.* The same doctrine is also found in the 5 *Partida*, *Tit.* 5 *L.* 23. When a sale is completed all risks attending the property fall on the vendee, though there has been no delivery, unless the injury be occasioned by the fault of the vendor, and an example is given of a slave buying after the sale. *Como si ouiesse comprado alguno siervo o otra cosa qualquierra e despues que la vendida fuesse complida, enfermare, en guisa que pierda alguno miembro o se muriesse ; sin culpa del vendedor,* in which case, the loss falls upon the vendee. The case of the slave dying, *Gregorio de Lopez*, in his commentary on the *partida* cited, says is also put in the Roman law. *Code L.* 4, *Tit.* 48, *L.* 6.

THE act of the legislature of this territory was penned with a view to a specification of the defects which particularly give the redhibitory action, and the defects which are mentioned in the article cited after leprosy, madness, and epilepsy, must be of the same nature, *lasting disorders*, and not merely a violent sickness which destroys at once.

By the Court, LEWIS *J. alone*, In this case

there is certainly more of hardship than difficulty. The loss cannot be divided and it seems hard that either party should sustain it entire. But as it must be done by one of the parties only, the hardship will be less if it fall on the vendor. The vendor by restoring the price of the slave will be no poorer than if he had not sold him; for in all human probability, the slave would have died at the time he did, if no sale had been made. The Court, however, is to decide upon the law, not upon the hardship of the case.

THE doctrine upon the sale of defective property is plainly laid down in the statute of the territory which has been cited. Where the vendor is apprised of the defect of the thing sold, he is liable to the vendee, not only for the restoration of the price, but such damages as he may have sustained. *Civile Code* 358, *art.* 71, but if he be ignorant of the defect he shall restore only the price and costs of sale—*Ibid.* 72.

IN the present case it appears to me the plaintiff paid a sound price; the difference between the proceeds of the remaining part the family, at a private sale, and the price paid for them at the auction, is no greater than what might have been expected. Property generally brings more when the vendor deliberately looks for a purchaser, than when it is brought under the hammer, and I recognize the principle that a sound price implies a warranty of the soundness of the chattel.

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BUT it is contended, by the defendant's counsel, that the principle, with regard to the sales of slaves, is confined in the 20th article, p. 358 of the *Civil Code*, to the cases of leprosy, madness, epilepsy and the like, and extends not to such ailment or infirmity which is in its nature incurable. The code contemplates such maladies as pursue the subject through life, and though rarely, of themselves, the immediate cause of death, do not yield to the influence of medicine.

THE construction which I give to this article is a plain, and I trust, a just one, and in unison with the doctrine laid down in the preceding articles. It is this: If a slave at the time of the sale be a leper, mad, or epilectic, the redhibitory action accrues immediately, and the vendee is not bound to attempt the cure of a disease which is presumed incurable. It is the same with regard to such other infirmities as may he considered as incurable, and render the slave unfit for any service, particularly for the one for which he is intended—such as a confirmed rheumatism, the gravel, a broken arm in the case of a negro intended to be employed in a blacksmith's shop.

BUT if the disorder be such as from its nature will yield to medicine in a reasonable time, as a fever or the like, the redhibitory action does not accrue to the vendee on his discovering it, unless the vendor knew the situation of the slave; but if the slave die of that malady, without the fault or neglect of the vendee, the action will

attach. For the injury to him would be the same as if the malady had been one of those which are incurable, and this will bring the case within the 73d. art. p. 358 of the *Civil Code;* that if a thing perish by reason of some inherent vice, existing, at the time of sale, the vendor is liable to restore the price, as soon as the loss is ascertained.

IT appearing in this case that the negro was unwell before the sale, and that within three days after he was afflicted with a disease of which he shortly afterwards died, it is to be presumed that the malady had inception previous to, and existed at the time of, the sale, and the judgment of the Court is, that the plaintiff do recover the consideration paid.

CAISERGUES vs. *DUJARREAU.*

THE plaintiff in this case claimed the sum of eighteen thousand seven hundred dollars on a mortage.

Conventional interest, when not above the customary rate, is lawful.

Alexander for the defendant. The mortgage is void, for the interest was included in, and made part of the principal, and computed at twelve per cent, which is more than the law allows. *Recopilacion de las leyes de Castilla.*

Mazureau for the plaintiff. I. Even admitting that the contract is usurious, and that it is unlawful to include principal and interest in the

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mortgage, yet the debtor ought to be condemned to the payment of the principal.

ALL usurious contracts are void, says *Febrero*, execution cannot issue on them, for usury may be pleaded against them. But this relates to the interest only, and as to the principal, execution is ordered for it, notwithstanding the disposition of the Recopilation—because as to what is divisible, *utile per inutile non vitiatur.* 2 *Febrero de Escrituras* 32, *n.* 37.

IN this case the division of the principal from the interest is made in the answer to the interrogatories filed by the defendant.

SEE farther *Curia Philip.* 350, *n.* 36, *Illustr. a la Cur.* 217, *n.* 33, *Siguenza, Lib.* 1. 79, *n.* 5 *Partida, l.* 31 *tit.*

II. THE dispositions of the laws prohibiting the loan at interest, preserved in the Recopilation, are abrogated.

THE instructions, says *Martinez*, of the visiters in the bishopric of Toledo are the same as those given in the other bishoprics, after those established in the Synod, in 1620, by the Archbishop Don Ferdinand, Infant of Spain. When they will have to proceed against usurers, they shall not consider as such those who lend money at interest according to the usage of trade, at two and a half or three per cent. 2 *Libreria de Juez* 146, *n.* 31. Such contracts are lawful and are executed in all the tribunals of Spain, by virtue of a Royal Resolution of the 4th of July

1764. Interest then according to the usage of commerce is lawful. It varies according to times and circumstances. 8 *Martinez* 145, *n.* 44.

IT is forbidden by one of the laws of the Recopilation to lend money to shop-keepers and merchants, to employ it in their own affairs, unless the lender share the loss or profit. It was also heretofore forbidden to take interest on monies deposited with, or lent to merchants, even under the pretence of *lucro cessante*, or *damno emergente*, and this under the forfeiture of the money lent and the nullity of the contract. But, at this day, he who loans, holding his money, as it is practised and presumed, for his utility and to make advantage of his own industry, may stipulate for the payment of the interest, and the contract is lawful and obligatory *in foro exteriori*, and judgment is to be given accordingly, in obedience to a Royal Schedule, given at *Buen Retiro*, July 10, 1764. 2 *Febrero de Ecrituras*, *p.* 27, *n.* 28.

III. INTEREST may be lawfully stipulated in the contract of loan, and the rate of it is regulated according to circumstances and the usage of trade.

THE lender, says *Febrero*, may take more than the principal, without being guilty of usury, and the Notary, consequently execute the writings for it, in six cases besides the one expressed in

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no. 28—The first * * * * *, the third, on account of the risk or reasonable apprehension of losing the principal or the probable difficulty of recovering it. 2 *Febrero de Escrituras* 32, *no.* 28, *Politica Indiana lib.* 6. *cap.* 14. *p.* 502, *n.* 21. *Illustr. a la Curia* 216, *in finem.*

IN this case it is in evidence that the defendant was in bad circumstances, and his plea is not evidence of good faith.

IV. THE debtor who pretends to avoid paying the principal, on the plea of usury, must fail; for independently of what I have advanced as my first proposition, if the law denounces any penalty against the lender, the same is also incurred by the borrower.

IN *foro seculari*, says the author of *Curia Philipica*, the punishment of usury is perpetual infamy, and the loss of the principal for the benefit of the borrower.

AND by a new pragmatic (dated May 1, 1608 and published at Madrid the 8th. of the same month) this penalty, and the application of it have been altered. The lender is for the first time to forfeit his money—one third to the king, one third to the judge and the other to the informer, and the borrower incurs the penalty *de otro tanto. Cur. Phil.* 352, *n.* 40. *Illustr. a la Cur.* 218, *n.* 37.

By the Court, LEWIS, *J. alone.* There appear

to be two kinds of interest known to the laws of Spain, viz: judicial and conventional.

I UNDERSTAND judicial interest to be a certain rate of interest established and declared by a general law of the country, to be computed from the time of the judicial demand, in all cases in which no express stipulation has been made.

BY conventional interest, I understand a certain rate of interest agreed upon by the parties which may be more or less than the rate established by the general law of the country, according to the custom and usage of particular places, which is always regulated according to the relative value of the sum loaned and the profits arising from the use.

As the law of Spain, which is to form the rule of decision in this case, recognizes two kinds of interest, it would be absurd to suppose that both were to be computed at one and the same rate. The commerce of that monarchy being confined to a few places, the general established interest of the country would not give the same relative proportion of gain to the lender and borrower in every town; because in commercial parts the borrower often makes fifty per cent. and more, on the sum loaned, and the lender receives but five, and in other parts that are not commercial, five per cent. would not be more than a relative premium. It is for this reason, I conclude, that the laws of Spain have permitted the general rate of interest to be departed from,

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by special agreement, as advantages resulting from the use of circulating medium in particular places may inhance its value.

USURY is forbidden in Spain; and I know no other interpretation to give to that word, than the taking a greater rate of interest upon a loan than is fixed by positive law, or established and permitted usage.

THE quantum of interest is claimed by the plaintiff on the ground of a special agreement, which to be usurious must exceed the customary rate of interest at the time it was made. Let therefore a jury be impanelled to ascertain that fact.

THE jury found the commercial interest, at the time of the loan was, according to usage, ten per cent. Two per cent. per ann. were accordingly deducted.

MINER vs. *THE BANK OF LOUISIANA.*

A bank bill may be good without the signatures of the president & cashier.

THIS was an action brought to recover one hundred dollars, the amount of a bank-note of said bank, the lower part of which was torn or worn out so that the signatures of the president and cashier were missing.

Two of the tellers deposed that they believed the note to be a genuine one, and that the blanks had been filled up by them.

THE testimony of the cashier of the bank of

the United States was introduced. This gentleman testified that if a bill of that bank had been presented to him in the same plight, as the one before the court, he would have thought it his duty to pay it—that the bills of that bank were first signed and the blanks afterwards filled up. Hence on seeing a bill properly filled up by the clerk intrusted with this part of the business of the bank he had a moral certainty that it once had the signatures of the president and cashier.

THE tellers of the bank being again examined, deposed that if the bill produced had been emitted by the bank, it must have been issued on the 2d of April 1805, when the operations of that institution commenced, on which day a very large sum was issued—that the bills then issued had the blanks filled up before they received the signatures of the president and cashier—that no notice is taken of the numbers of the bills issued by the bank, the amount only being recorded—that in a particular instance a counterfeited bill had appeared so well imitated in the engraving and paper, that the signature of the president had afforded the only clue in detecting the imposition.

ON this testimony, *Duncan* for the plaintiff, hoped for the judgment of the court.

Moreau, for the defendants. If the bank can be called upon to pay bills which are not sanctioned by the signatures of the president and

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cashier, who are the only officers by whose acts they may, in instances like this, be bound: there will be very little safety for them, and no security against the frauds of counterfeiters. Let us therefore consider—

1st. WHETHER the payment of a note, deprived of the signature, could be required of an individual?

2d. WHETHER there be any difference in the case of a corporation?

I. THE principles of the civil and Spanish laws which regulated this territory in the year 1805, when the note was issued, are in unison with those of the common law of England. Debts like all other kinds of obligations are to be proven by an authentic title or matter of record —by the signature of the debtor or by witnesses. Each of these modes of proof has its particular rules, which we are not to confound.

THE plaintiff does not pretend that his claim is proven by an authentic title or record, or by witnesses, but by a writing which is not sanctioned by the signature of the defendants.

IF the party writes an instrument with his own hand, or directs another to do it for him, or seals or causes it to be sealed with his seal, the instrument, if denied, shall not be admitted against him, unless his adversary prove that it was written or sealed by him or by his order. *L.* 114, *tit.* 18. *Partida* 3.

THE principles of the civil law are conformable to the Spanish law.

No judgment can be obtained upon a note, unless the defendant's signature be admitted.—If it be denied, it must be proved. 2 *Pothier on Obligations, part* 4, *ch.* 1. *art.* 2, § 1, *no*, 708.

IF therefore the acknowledgment or proof of the signature be indispensable, how can judgment be had on an unsigned note?

AN instrument without a signature can only be considered as a beginning of proof. *Id. no.* 711. How can a note, the signature of which has been torn or destroyed, have a greater effect?

IT will perhaps be said that if there were not any note at all, or if the note had been lost, the plaintiff might prove the existence of the obligation. This is true. But how should this proof be made? In the first instance, by witnesses deposing to the consideration and the promise: in the other, to the existence of the note and the loss or destruction of it. *Id. no.* 781. If therefore the plaintiff were to prove that the note produced was seen in his hands with the signatures of the officers of the bank, who have the power of binding the corporation, the case would be made out, but he rests his claim on the proof that the blanks in the note were filled up by the clerks of the bank. How dangerous will it be to admit the sufficiency of such testimony! In common practice many persons in paying their notes think it sufficient to take them up—Some destroy them; and others more cautious cancel their signatures and file the paper. If one of those

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cancelled notes, which seldom are kept with extraordinary attention, happened to fall into the hands of the payee, he might recover payment, by tearing the cancelled signature. He might prove the note to be in the defendant's handwriting, which would be conclusive evidence, if we take as such the testimony of witnesses who depose that the blanks were filled up by the ordinary clerks of the bank.

II. LET us next enquire whether there be any difference, in the case of a corporation, like the bank of Louisiana.

CORPORATIONS are artificial bodies, the affairs of which are regulated by the same principles as those of natural persons. The same principles apply to the obligations which they contract, and it seems natural to conclude that when sued, they are entitled to the same pleas and exceptions, and have the same means of defence as individuals.

I HAVE shewn that the proof on which the plaintiff builds his hope of success would be deemed insufficient, in the case of the note of hand of an individual; the difficulty must be much greater in the case of a bank note, the greater part of the body of which is printed, and the written part of which, except the signature, is in the hand of a person who has no authority to bind the corporation. To establish the doctrine contended for by the plaintiff would be to leave banks a prey to counterfeiters, by depriving them from

one of their greatest safeguards, their dependence on the signatures of their head officers; and without protection against the frauds of their clerks, in whom from their situation, it appears no great confidence or trust is placed, as they have no power to bind the institution—who do nothing but to insert in blank spaces, the number, name of a fictitious payee, and date—none of which are of the essence of the obligation contracted.

It is in evidence that if the bill before the court was really emitted by the bank, it was issued on the 2nd of April 1805, the day on which the operations of that institution began—that the bills then sent afloat were all filled up by the clerks before the signatures of the president and cashier were put to them—and that when bills are paid by the bank, no notice is taken, nor any entry made of the numbers. Hence it follows that proof of the bills of that emission having been filled up by the clerk is no evidence of the signing by the president and cashier, a circumstance which as to all these notes was posterior to the filling up—and that even if it be admitted that the bill was once signed, it cannot be ascertained whether it was paid and cancelled by tearing off the signatures.

Mazureau on the same side. It behooves the plaintiff to prove—1st. That the signatures of the officers of the bank who have authority to bind the institution were to the bill, when it came to his hands. 2d. That it is by accident they have

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ceased to be there. Such at least is the proof which would be required of him if he had sued an individual, and certainly the court will not require less in a suit against a corporation sanctioned by the legislature, in whose safety most of the citizens of the territory are interested.

THE bill when it came to the plaintiff's hands, had the requisite signatures or not. If it had, he might have prevented the accident which has deprived it of them, or be able to account for it. If he received it already mutilated, he was guilty of a gross neglect. In either case, he carelessly and voluntarily exposed himself to lose the amount of the bill. The loss is *damnum absque injuriâ*.—He must impute it to his own carelessness or folly. *Damnum quod quis suâ culpâ sentit, sibi non aliis debet imputare.*

THE veracity of the cashier of the bank of United States is not intended to be impeached—but we are on a question of law, which is not to be settled by witnesses.

We contend that no instrument, an essential part of which is wanting, as the name of the parties or of the witnesses, can have any effect. *Curia Philipica*, 92, *n.* 34.

Duncan for the plaintiff. This case is improperly likened to that of a lost instrument, the original of which must have been proven to be genuine, before evidence could be gone into of its contents, or a copy introduced.

THE question turns entirely upon the effect of the mutilation of the bill offered as evidence of the debt, which it is contended was cancelled by the destruction of, or could not exist without, the signatures.

ACCORDING to the laws of Spain and common law of England, the mutilation of an instrument in an immaterial part, does not impair its validity. 4 *Rose's Comyns*, 168. *Sedgwick's Gilbert* 93, citing 11 *Coke*, 27 *a.* 2 *Strange* 1160, *Curia Philipica*, 92 *n.* 34. This principle being established, it remains to be shewn that the signatures are not of the essence of the obligation. A note, in the handwriting of the maker, without his signature or subscription is good. 5 *Rose's Comyns*, 94, 1 *Strange*, 399. *Taylor* vs. *Dobbin.* 2 *Lord Raymond*, 1376, *Elliot* vs. *Cooper*, 1 *Strange* 609. 8 *Modern* 307.

Pothier, it is true, *n.* 771, considers such a note as a beginning of proof. Be this admitted, we are then to be allowed to complete our evidence: we have done so by the testimony of the tellers, and I trust satisfactorily.

IF this principle be correct in regard to the notes of individuals, it is much stronger in the case of a bank bill. The obligation of which it is in evidence, does not arise so much from the signatures of the officers, than from the circumstance of its having been emitted by order of the board of directors.

By the Court, MATHEWS, *J. and* LEWIS, *J.*— This case has been likened to those of lost notes.

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bonds, deeds, or other evidences of debt. Although there is a strong analogy, we are not able to perceive a complete likeness.

Is it true, according to legal principles, that when a party intends to rely on the copy of a lost instrument, he must satisfactorily establish the previous existence of the original, but when a bank note is totally lost, or destroyed, we can conceive no possible means by which a copy could be established so as to inforce the payment of the lost note, without subjecting the bank to destructive frauds and impositions. So well are these corporations convinced of this, that in their dividends, lost notes are considered as constituting a part of their profits. Having this advantage over individuals, it would perhaps be unreasonable to confine the holder of a bank note to the same rigid principles which govern in the ordinary cases of mutilated paper: that is, that the loss of the signature or seal of the promisor or obligor must be considered as an entire destruction of the evidence of the debt.

THE signatures of the president and cashier do not bind the corporation, only because they are their agents and declare that the sums mentioned will be paid out of their funds. And if a bank note were fairly to go into circulation without any signature, would not the corporation be bound? However it is unnecessary to determine this point in this case. It is in evidence that a number of notes, of the amount, tenor and date

of that which is the object of this suit, were put afloat by the bank—that the parts of the note which remain, are proved to be genuine, and we are to infer that the remainder which is destroyed was equally so, unless we suppose that which cannot be presumed, that the clerks of the bank have contrived to defraud the corporation.

JUDGMENT FOR THE PLAINTIFF.

SAUL. vs. *AILIER.*

Bail not required on penal statutes.

THE plaintiff as special administrator, brought this action to recover the forfeiture under the ordinance of the officer exercising the functions of Governor-General & Intendant in the province of Louisiana, of the 7th of September 1804, for the appointment of a special administrator; the defendant being charged with having neglected to give notice of the death of a person, who had died in his house, and whose estate was liable to be administrated upon by the special administrator.

Porter, for the defendant, moved that his bail might be discharged. He contended that in an action on a penal statute, bail cannot be legally required, unles the statute especially authorizes the demand of it, as every man is to be presumed innocent, until the contrary appears. 1 *Bac. Abr.* 330. *Seld. Prac.* 50. *Barnes* 80, *Tid* 19.

Duncan, contra. The authorities cited by the

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defendant's counsel, do not apply to this country. The statute of the territory authorizes the plaintiff to demand bail, in all cases in which the sum demanded is above one hundred dollars.

Porter in reply. It is not pretended that the English decisions are binding on this court as precedents, and they are not referred to under that idea. But they are referred to, for information on a subject depending on sound reason. In England the statute of George, on the subject of bail, is as general as that of our territory referred to by the plantiff's counsel, and cases like the present are not excepted from its provisions, yet the court has made the exception founded on the maxim which I have stated.

By the Court, LEWIS, J. *alone.* Let the bail be discharged.

MANN & BERNARD vs. *HUNT & SMITH.*

Persons applying for a commission must disclose the facts intended to be proven.

THE defendants moved for a commission to examine witnesses abroad on their affidavit, setting forth the names of the witnesses and the materiality of their testimony.

Brown and *Livingston* for the plaintiffs. The affidavit ought to have gone further and set forth the facts intended to be proven, in order that the court might judge of the importance of the testimony.

Alexander for the defendants. It has hitherto been the practice to grant commissions without requiring such a disclosure as the plaintiff's counsel calls for. It may be dangerous to make it, as an opportunity may thereby be afforded to the adverse party to tamper with the witnesses, and perhaps falsify testimony.

By the Court, MATHEWS, J. & LEWIS, J. It does not appear to us that there has been any established practice in this court, authorizing or dispensing with what is asked by the plaintiffs. It will certainly cut off a great source of delay if we require that the party applying for a commission to examine witnesses abroad should disclose on oath the facts intended to be proven, that we may judge of their materiality, and the adverse party be offered the opportunity of admitting them. Neither do we conceive any danger in witnesses being tampered with, or testimony fabricated. If the party against whom the testimony is used is surprised by it, the court must indulge him with the opportunity to introduce such counter testimony as he may state on oath to be within his reach.

ORLEANS NAVIGATION COMPANY vs. *THE MAYOR, ALDERMEN & INHABITANTS OF THE CITY OF NEW-ORLEANS.*

Defendant is not bound to answer on oath, and

THE plaintiffs had filed a petition praying that the defendants might be enjoined from further

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proceeding in building a bridge across the Bayou St. John, to the obstruction of its navigation, and in violation of certain rights secured to the plaintiffs by their act of incorporation. The injunction having issued, the defendants put in an answer, in the form used in the British court of chancery, negativing on oath, all the substantial facts alledged in the petition.

cannot take advantage of his voluntary affidavit.

Duncan for the defendants. The injunction ought to be dissolved, as the answer has sworn away all the equity of the petition, the foundation on which the injunction is supported.

Brown for the plantiffs. This court is not regulated by the rules of practice of a British court of chancery. The statute of this territory approved the 10th of April 1805, *Chap.* 26, has pointed out the mode of proceeding in this case. The defendants were not called upon to answer on oath, they cannot derive any advantage from the circumstance of having voluntarily annexed an affidavit to their answer.

By the Court, LEWIS, J. *alone.* The court has never adopted the rules of the British court of chancery, and I see nothing in this case that would warrant a deviation from its accustomed mode of proceeding, under the statute of the territory.

MOTION OVERRULED.

SMITH vs. *DUNCAN & JACKSON.*

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A private debt cannot be set off against a partnership claim.

THE plaintiff claimed the proceeds of ten bales of cotton consigned to the defendants, on his private account and risque, which they retained in part of a partnership debt due by the plaintiff and Nancarrow.

Grymes, for the plaintiff. This being a debt due to the plaintiff in his private capacity, the amount of it could not be retained by the defendants in satisfaction of a partnership debt: for although partners are jointly and severally liable, they are only severally so after the partnership has become insolvent and the partnership fund is exhausted.

Duncan, for the defendants. Partners are severally liable for partnership debts, even before the insufficiency of the partnership fund. *Watson*, 234, 238. One partner may be sued without joining the other. *Ibid.* 432. &c. *Burrows*, 2613. A judgment recovered against a firm may be set off against a judgment obtained by one of the partners. *Lex Merc. Am.* 442, *Tidd*, 604.

The distinction in the books is this: partnership effects cannot be applied to private debts, but private effects may to partnership debts. Under an execution against partners, the private property of any of them may be taken. A debt due to a defendant as surviving partner, may be set off

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against a demand on him in his own right. 6 *Term Rep.* 582, *Tidd* 560.

Grymes, in reply. All the authorities cited, go merely to prove the general principle of the joint and several liability of partners, and whenever the books speak of their several liability, the position is predicated, on the ground that the partnership fund is exhausted.

The Court, LEWIS, *J. alone* gave

JUDGMENT FOR THE PLAINTIFF.

W. W. WOOLSEY vs. *CENAS.*

The bill of lading does not vest the property in the consignee.

GEORGE M. WOOLSEY, being in this city of New-Orleans, shipped on board of the brig Troy, a number of kegs, containing forty thousand dollars in silver, marked W. W. W. which he consigned to the plaintiff, and drew bills on him for the whole amount. The bills of lading expressed that the money was shipped as the property of the consignor. While the brig was floating down the Mississippi, a writ of attachment against the property of George M. Woolsey was put into the hands of the defendant (the sheriff of the district) who having overtaken the brig at the Balize, seized upon and brought the money to the city; whereupon the plaintiff brought his action for the recovery of the money.

IT was in evidence that the bills drawn by

George M. Woolsey had been presented to, accepted and paid by the plaintiff, and there was attached to the petition an affidavit made before a notary public, in the city of New-York, to prove the property of the plaintiff in the money. The jury found a verdict for the defendant, and the plaintiff moved for a new trial.

Brown and *Alexander* for the plaintiff. The verdict is contrary to law: From the moment that the bills of lading were signed by the captain, the property was divested out of George M. Woolsey and vested in the plaintiff, and it was no longer in the power of the consignor to destroy the right of the consignee; unless the former had arrested the money *in transitû* in case the latter had failed, *Abbot* 232, and if property be consigned to meet an acceptance, it cannot be stopped *in transitû*, *Abbot* 238, for the right of stopping *in transitû* belongs only to the consignor and he can exert it only in case of the failure of the consignee. As to third persons, the delivery of the bill of lading is a deliverey of the property. 2 *Term Reports*, 7, 1 *Johnston*, *Ludlow*, vs. ——. The bill of lading is the title by which the property is to be determined. 12 *Mo.* 156. Had this property been consigned to the person in whose favour the bills were drawn, there could not have been a doubt on the question, because it would have been a consignment to discharge a debt, and the property would have vested immediately on the receipt of the dollars by the captain. It

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is difficult to discover a great difference in the present case. The shipment was made for the purpose of satisfying a creditor.

Duncan and *Robertson* for the defendant. There cannot be a doubt that the money was shipped as the property of George M. Woolsey. It was at his risque and he must have borne the loss, if the brig had sunk before the attachment was levied. Neither the plaintiff, nor the person in whose favour the bills were drawn, had any interest or would have been affected by the loss of the vessel.

THE case might have been altered, if the bill of lading had reached the plaintiff's hands, and he had accepted the bill in consequence of it, but before the arrival of the bill of lading and acceptance of the bill of exchange, the property was at least in abeyance and at the risque of the consignor. The consignee was not bound to do honour to the bill, nor to accept the consignment.

IT is said the consignor can only stop the goods *in transitû*, in case of the failure of the consignee. Is he not at liberty to stop them, if the bill of lading be not negociable, or while it remains unassigned, and can he not compel the captain to deliver them back as long as no assignment of the bill of lading has taken place?

Brown, in reply. The general principle that the delivery of goods to the master of a ship, and his signing the bill of lading for them, vest

the property in the consignee, cannot be questioned. The master then becomes his agent, and a delivery to him is a delivery to the consignee. If this position be correct, it follows, that as George M. Woolsey could not have stopped the goods, neither his creditors, nor the sheriff, can exercise any act of ownership which he might not have exercised. He had totally divested himself of his rights to the property, except that of stopping it in case of the failure of the consignee. W. W. Woolsey's title was defeasible upon the happening of this contingency alone. It is the bill of lading that stamps the title on the property. It is the mercantile instrument which designates the ownership. 12 *Mo.* 156. No matter what the consideration may have been; like that of a bill of exchange, it cannot be inquired into. This is for the ease and facility of commerce.

BUT it is said that the solution of the question, at whose risk was the money at the time the attachment was levied, will afford the proper criterion to determine who was the right owner; and that the money was at the consignor's risque. This general rule has its exception, introduced for the convenience and safety of merchants. When goods are insured, the insurer runs the risque, without the property being in him. So in consignments, the consignor runs the risque, and is as the insurer. If this be not the case, how is the principle to be reconciled, that a delivery

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to the master is a constructive delivery to the consignee, and that delivery vests the property?

Again, it is said that the money when attached was the property of George M. Woolsey, and W. W. Woolsey had yet acquired no right. But as soon as the latter received the bill of lading and accepted the bill of exchange, without notice of the attachment, his right, if it were only inchoate before, became complete.

BILLS of lading, like bills of exchange, are transferable by endorsement, and the *bona fide* holder is the only person who can demand the contents, and in whom the property vests. If A. draw in favour of B. on C. who accepts, and D. a creditor of B. attaches in the hands of C. and the bill afterwards be endorsed to E. who had no notice of the attachment, E. will recover notwithstanding it. This is our case: the consignee's right cannot be affected by the attachment.

By the Court, LEWIS, *J. alone.* It is not considered as material in this case to determine whether property can be stopped *in transitû*. In order to support this action, all the plaintiff has to do, is to shew that the money was his, at the time the attachment was levied on it. Were it material, I would incline to the opinion that under our statute, the property of an absconding debtor is liable to be attached wherever it may be found within this territory.

WHETHER the money was the property of George M. Woolsey, was a question for the de-

termination of the jury on the evidence before them, and in bringing a verdict in favour of the defendant, they have determined it in the affirmative.

As to the point of law which arises as to the effect of the transfer, it seems to me the property did not vest in W. W. Woolsey, as there was no antecedent debt existing, no consideration paid and no privity in the transaction between him and the consignor, to whose proposition he was not bound to accede, and at whose risque the money remained. A consignor cannot vest a right in the consignee unless the will of the latter concur in the acquisition of it. The contract by which the right of property passes from the one to the other is only inchoate, until it receives the assent of both: while it is the act of one party only, the other is under no obligation and acquires no right. The promise is what civilians call a pollicitation, which is not binding till, by the assent of both parties, it ripens into a contract. *Pollicitatio est solius accipientis promissum.* 1 *Pothier on Obligations*, 5, *no.* 4.

IT seems absurd to say that a person can be the rightful and exclusive owner of property and yet sustain no loss by the destruction of it, and this would be the case if the right of property was considered in the consignee, while the goods are at the risque of the consignor.

MOTION OVERRULED.

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Notice on a protested bill.

DUNCAN vs. *YOUNG.*

THIS was an action on a bill of exchange, drawn by M. G. Cullen of New-Orleans, in favour of the defendant, on Liverpool, payable in eight months after date, on the 29th of April 1807, and endorsed by the defendant to the plaintiff, who resided in Charleston.

THE plaintiff's agent in Liverpool, presented the bill for acceptance on the 21st of July following, and the drawee refused to accept it. But of this fact the only evidence was the protest for non-payment, in which it was stated that the bill had been regularly protested for non-acceptance. The plaintiff received information of the refusal of the drawee, on the 25th of September, and on the next day put a letter in the post-office, informing the defendant of it, and the letter reached him on the 24th of October. On the 15th of October, the defendant attached the property of the drawer.

ON the part of the defendant, it was proven that two ships left Liverpool for New-Orleans about the middle of August 1807, one of which arrived at the Balize on the 11th of October following, and reached the city on the 15th.

Alexander and *Duncan* for the defendant. There has been a want of due diligence in giving notice. The notice itself was insufficient, as the defendant was informed that the bill was noted for non-acceptance, while he ought to have been apprised of the protest.

IT is the duty of the holder of a dishonored bill to give the earliest notice to the person to whom he intends to resort for payment; and if he fail, without being able rationally to account therefore, he will not recover. 2 *Smith* 196, *Burrows* 2670. In the present case, two ships left Liverpool, bound directly to New-Orleans, after the drawee's refusal to accept and no notice was given by either of them to the defendant. The plaintiff knew that the defendant resided in New-Orleans, and was therefore bound to possess his agent at Liverpool with that information, in sending the bill, that in case of an unfavourable contingency notice might be sent to the defendant, without delay.

NOTICE of a foreign bill having been noted for non-acceptance, is not sufficient, there must be notice of the protest itself. There must be a protest for non-acceptance, and the want of it cannot be supplied by witnesses. *Buller's N. P.* 271. *Chitty* 90.

Ellery and *Robertson* for the plaintiff. It is not believed that there can be a doubt with regard to the regularity of the notice: but it is said it came in a circuitous, while it might have come in a direct way.—That the agent forwarded the information to his principal at Charleston, who sent it by the post to New-Orleans, while if the opportunity of the ships had been improved the defendant might have had notice nine days earlier,

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and might have taken measures for his security. But it is in evidence that on the 15th of October, on the very day of the arrival of the ship which reached the city first, an attachment was issued at the instance of the defendant, and the property of the drawer levied upon, so that it appears he had as early information as could possibly have been given, and took measures accordingly.

The protest for non-payment to which all courts give credit, proves that the bill was duly protested for non-acceptance. The plaintiff perhaps did not use the legal term in his notice, but he informed the defendant that the bill was dishonored, which is sufficient.

The Court, LEWIS, *J. alone*, charged the jury in favour of the plaintiff on each of the points, and there was a

VERDICT FOR THE PLAINTIFF.

BROWN vs. *FORT & GIRAUD.*

The consideration of a note enquired into.

ACTION upon a note of hand. The ship Clara, owned by Foster & Giraud of New-York, being libelled in the district court of the United States, in New-Orleans, under the act of Congress, prohibiting the importation of slaves, 8 *Laws U. S.* 262, the defendants were desired by the owners to act for them, and consequently, the ship being afterwards condemned and sold, they bought her in, and gave their note for the

price to the plaintiff, the collector for the port of New-Orleans, with an endorser—This paper was payable on a future day and deposited with the clerk of the District Court. The forfeiture being remitted by law, the defendants refused payment.

Alexander, for the defendants, praying leave to prove these facts, was opposed by

Grymes for the plaintiff. The defendants cannot be allowed to introduce proof, oral or written, to show the want of a consideration paid by the plaintiff, *Kidd* 34, 35, an indorsed note is like a bill of exchange, the acceptor of which is liable, although he knows that no consideration was given, *Ibid.* 83, 85. *Ex nudo pacto, non oritur actio;* but any degree of reciprocity takes a case out of this rule: the execution of the note is that degree of reciprocity. No proof is admissible of what passed between other persons than the parties to the suit. The defendants gave the note, they are not parties to the remission, and it cannot avail them. Fort & Giraud alone can claim the benefit of it. *Pillans & Rose* vs. *Van Mierop & Hopkins*, 3 *Burr.* 1663.

Brown, for the defendants. An inquiry into the consideration of a note, when the plaintiff is an endorsee, is denied only when he came fairly by it and without notice. *Kidd*, 34. It is allowed when the endorsement is posterior to the

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day of payment. 3 *Term R.* 82, 83. 4 *Dallas* 371. An assignee of a negociable paper takes it subject to all the equity to which the assignor is subject, whenever he has notice actual or constructive.

By the Court, LEWIS, J. *alone.* The evidence is proper. The note was endorsed merely for the purpose of securing the payment of it. The plaintiff may be considered as the original payee, for he received the note from the makers.

The defendants having introduced witnesses, and the facts being proved, the plaintiff voluntarily suffered a NON SUIT.

ST. MARC vs. *LA CHAPELLA & HARRISON.*

Ship owners liable for all damages occasioned by a master and joint owner.

THE plaintiff's agent in Bourdeaux, shipped on board of the Catherine, of which the defendants were owners, and one of them master, a quantity of merchandise, for which Harrison, the master, signed bills of lading, engaging to deliver them at New-Orleans. The Catherine went to St. Thomas's, in order to land some passengers, where the merchandise was sold, and the plaintiffs claimed a sum of about twenty-five thousand dollars, stating it to be the amount which he would have received from the sale of the merchandise, in cash, after deducting the freight, duties, and all other charges, if they had been delivered according to the bill of lading, deduct-

ing the sum of three thousand dollars paid him by La Chapella, which this defendant judged the plaintiff entitled to require from him, as his proportion of the sale at St. Thomas's. Interest was also demanded.

IT was in evidence also that while the Catherine was at St Thomas's, a British privateer was cruising off the island, a circumstance which determined the master, with the advice of some of the freighters, who were there, to sell his cargo, and proceed to New-Orleans in ballast.

Moreau and *Derbigny*, for the defendants. As the shipment was made in France, the consequences of it must be regulated by the laws of that country. They limit the liability of owners of vessels, for the acts of the master, and permit the owner to discharge himself by the abandonment of the vessel and freight. 1. *Ordonnance de la Marine, liv.* 2. *t.* 8. *art.* 2.

ADMITTING that the contract is to be regulated by the laws of this territory, it would seem that damages, for the misconduct of the master, may be recovered from him and the owner *in solido*. But this severe provision appears mitigated by the provision that a master of a vessel shall give security to the owner for the value of the vessel and the damages which he may cause, *Ord. of Bilboa* 224: a provision which seems controlled by the obligation imposed on the officers of the customs in Spanish ports, to require

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surety from the owner to the amount of the value of the vessel and freight, before a clearance be granted. *Curia Philipica* 467. This reduces the liability of ship owners in Spain, to the same degree as the ordinance of France. The British statute of 7 *Geo.* 2. *c.* 15, contains the same provision, which is supposed to have been adopted by all the mercantile nations of Europe.

Seghers, *Alexander* and *Brown* for the plaintiff. Even, if the liability of La Chapella be to be measured by the ordinance of France, he ought to be charged to the whole extent of the plaintiff's loss, inasmuch as Harrison was not only master, but joint owner, and the vessel went to St. Thomas's in consequence of a preconcerted arrangement between the defendants, beneficial to themselves and evidently prejudicial to the plaintiff, as it hazarded his insurance. The going into St. Thomas's being only a deviation, not a barratry, which is an offence, which can be committed *against the owner* of the ship only. If the master of a ship be also the owner, he cannot be guilty of barratry. *Park* 194, 1 *Term R.* 323.

The French ordinance and the British statute were intended to afford protection to honest ship owners, against the dishonesty of captains, but not to present a legal shelter to those who participate in the guilt of the master. The latter statute expressly confines the relief to acts done *without the privity or knowledge of such owner or owners.* 3 *Bac. Abr.* 612, 613.

We contend that the extent of the defendants' liability is to be ascertained by a reference to the laws of this Territory. The Catherine was an American bottom. The plaintiff and both defendants are American citizens, and the master's engagement to carry the articles had a reference to and was to have its completion in this Territory. By the ordinance of Bilboa, which is here part of the law of the land, and which the defendants have cited, it is the duty of the master of a vessel to give security to the owner to indemnify him against all losses occasioned by his misconduct. The inference is unavoidable that the owner is liable for the whole. The part quoted out of *Curia Philipica* goes the full length of the principle we rely upon. It is there stated that the owner is answerable in all respects for the acts of the master.

This being an action sounding in damages, the only just criterion is the cash price of similar articles in the market of New-Orleans, deducting proper charges.

By the Court, LEWIS, J. *alone.* The defendants are liable to the plaintiff for the misconduct of Harrison, as master and joint-owner of the vessel. They must therefore be liable for the whole loss. All persons undertaking to carry goods for hire are responsible for the value of the goods at the place of delivery at the time they ought to have arrived, whenever the goods are lost by the misconduct of the carrier.

JUDGMENT FOR THE PLAINTIFF.

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DEBORA vs. *COFFIN & WIFE.*

The right of a Spaniard to sue a Frenchman here whose property was confiscated in Spain.

THIS was an action beginning by an order of seizure, obtained from the Judge of the City Court of New-Orleans, against five negroes belonging to the defendants, and founded on a mortgage specially of five other negroes, (one excepted) than those embraced by the seizure, and generally of all the estate of the defendants, executed by them in the year 1808, at the Havana, where they then resided, for the payment of $ 1400, at the expiration of twelve months thereafter. The material facts set forth by the defendants' plea and afterwards admitted by the plaintiff, were as follows: the money was lent to be employed in a flourishing manufactory of earthenware belonging to the defendants, in the vicinity of the Havana, and was so employed. Before the expiration of the twelve months, the defendants were banished from Cuba, and all their property (excepting the negroes in question, who followed their master) had without any fault of theirs, been seized and confiscated under a general act of confiscation and banishment against all Frenchmen residents in the island; *by which act* of confiscation, &c. the *proceeds of their estates* were held by the government, subject in the *first place* to the *payment of their respective* SPANISH *creditors.* The property of the defendants, *so seized and confiscated* was much *more than sufficient* for the *payment of all their debts.* The confiscation act points out

the mode in which the Spanish creditors may apply for and obtain payment.

The *plaintiff* is a *Spaniard*, resident at the Havana, where the property of the defendants so seized and confiscated lies, *and might have obtained payment* out of the proceeds of the defendants' property in the hands of the government.

UPON this case judgment had been given for the plaintiff in the Court below, from which the cause came up by appeal.

Smith, for the defendants. The judgment of the Court below ought to be reversed upon three grounds:

1st. BECAUSE after the act of confiscation and banishment, neither this form of action nor any other could be sustained against the defendants in a court of justice in Cuba;

2d. BECAUSE it is substantially giving effect to the *penal laws* of a foreign government;

3d. BECAUSE as the *proceeds of the defendants' property* seized by the Spanish government are *sufficient* for *the payment of this debt*, and are *accessible to the plaintiff*, and *not* to defendants---that judgment is contrary to equity and moral justice---and therefore not to be sustained in this court of equity as well as law.

I. IT ought to be reversed, because after the act of confiscation and banishment, neither this form of action, nor any other, could be sustained against the defendants in Cuba.

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By the act of confiscation the defendants were reduced to an actual insolvency.---By that act, the title to all their property in Cuba was divested out of them and vested in the government.---In Cuba, the parties to the contract, the *security* for its fulfilment and the *mode of proceeding* to obtain it were by that act all equally changed. If a remedy against the defendants could have been pursued by the plaintiff in Cuba, it must have been by an action, either *in rem* or *in personam*.--- But the plaintiff could not have supported "an order of seizure," or any other process, in the ordinary form, against the property of the defendants, in any of the judicial tribunals of the country, because, by the act of confiscation, &c.--- there the supreme law of the land, all the property of the defendants vested *ipso facto* in the government. And by that act it was ordained that *Spanish* creditors of whatever degree should prove their debts and solicit payment only in conformity to the mode therein pointed out. It would therefore have been as unnecessary and indecorous as inadmissible to have instutited an action in Cuba against the property of the defendants.--- Equally was the plaintiff precluded by that act from any civil proceeding *in personam* against the defendants there. The government had jealously reserved to itself the exclusive privilege of pursuing the persons of the defendants, and that by the criminal mode of banishment. The execution of that sentence was wholly incompatible

with the indulgence to any private individual of civil proceedings against the persons of the defendants.

BUT, on the supposition that the defendants would, after the act of confiscation, have been liable to a real or a personal action in a court of justice in Cuba, could they not, in the one case, have pleaded with effect the act of confiscation, and in the other, is it not too revolting to justice and morality to suppose that after the seizure of all their property by the government, without their fault and subject to the payment of their debts, a court of justice would suffer the plaintiff in the first instance to imprison the persons of the defendants, and not compel him to resort to the sufficient fund held out by the government, which was accessible to him and not to them? If these pleas would have been effectual there, shall they not be here? Shall the plaintiff be permitted to pursue remedies here against the defendants, which would have been inadmissible in his own country—the very country where the contract was made, and where the defendants have experienced from the government a rigour they could not elsewhere have been exposed to? So far was the plaintiff from a capability of maintaining an action in Cuba against the defendants, that he could not lawfully even have *received payment* from them of his debt—any payment made to him, after the act of confiscation, would have accrued to the use of the government, he would

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have been obliged to deposit that money in the public treasury, and must have been content to receive back the amount of his debt, at such time, in such manner, and under such circumstances, as it pleased to prescribe. If the government had pleased to lay a tax on the debt of every Spanish creditor so received from the Spanish treasury, is it possible that any one would maintain that the Spanish creditors could in such case lawfully pursue the unfortunate exiles in foreign countries to compel them to refund the deficiency thereby produced? If the plaintiff could neither sue nor receive payment from the defendants in Cuba, and that by a law of his own country which he was bound to obey---shall he not *à fortiori* be prohibited from suing here?

"The civil law can hinder, or make void the "obligation of a promise, or contract two ways, "or, by such an act as affects the promiser or "contracter immediately, either by such an act "as immediately affects those to whom the pro- "mise or contract relates, and, in the mean time "affects him, only remotely. And, further, where "the act of the civil law affects him immediately "it may be antecedent, or *subsequent to* the pro- "mise or contract." *Rutherf. Inst. N. L. b. 2. ch. 6. § 11. p. 247.* ***** "He bound himself by "the social compact to obey the laws: and "this obligation is antecedent to his pro- "mise or contract." *Ibm. 253.* ***** "If we "make a promise or contract by which any per-

"son acquires a right, and the civil law takes from "him the right so acquired, this act of the "law affects him immediately and directly; but, "at the same time will remotely and indirectly "affect us and discharge our obligation." *Ibid.* 254. The government then, by the act of confiscation, not only actually prohibited any future payment of their debt by the defendants to the plaintiff in Cuba, but it had a right so to do. It not only prevented the plaintiff from acquiring the right which he might otherwise have acquired of suing the defendants upon their contract in Cuba, but it exercised that power consistently with the principles of natural law. For it is most evidently just, that when the sovereign power in the state takes from an individual, without his fault, and only to effect a general benefit, the property with which he intended to discharge his debts, it should protect that individual from suits that might be instituted against him for not so employing the property of which he is thus deprived. This confiscation of the defendants' property, to an amount sufficient for the payment of all their debts, and subject to such payment, may be not inaptly considered as the forced payment of a debt to a person constituted by law to receive it for the real creditor, and resembles payments made to curators, tutors, husbands, receivers of hospitals, &c. payments which would be valid, even though the money might happen not

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to be received, or enjoyed by the real creditor. *Pothier, Traité des Oblig. part.* 3, *ch.* 1, § 3.

"Contracts are to be decided upon and exe-
"cuted only according to the laws of the place
"of residence of the parties at the time of mak-
"ing them, unless another intention appear." *Pothier, Cont. de Société*, § 159, *p.* 133. "Dis-
"putes between foreigners or strangers to be de-
"cided according to their own laws." 3 *Partid. tit.* 15, *L.* 15.

"The laws of every empire have force and are
"obligatory upon all who are within its limits,"
—"and by the courtesy of nations, whatever laws
"are carried into execution in one government,
"are considered as having the same effect every
"where, provided they do not occasion a preju-
"dice to other governments, or those who are
"entitled to their protection." 3 *Dall.* 370, *note.*

So far as the act of confiscation has been carried into effect upon the property of the defendants in Cuba, they must be bound by it—but they are clearly released from all future obedience to a government which has banished them from its protection—with regard therefore to the miserable remnant of property which they have been able to withdraw from the sphere of confiscation, they are entitled here to the protection as well of law as of humanity.

BUT how stands it with the plaintiff—a native and resident of Spain? He is to be viewed, as to this question, only as the indefeisible subject

of the laws of his own government. It does not belong to him, a Spaniard, to alledge the invalidity of a Spanish act of confiscation. With regard to him, that act is absolutely obligatory, not only in Spain but elsewhere; not only so far as it is executed, but in whatever it is only *executory*. With regard to his claims, the title to the whole of what was the property of the defendants, is out of them and in the Spanish government. This is not only law, to him, but is equity, since, in the transfer of title effected by the act of confiscation his interests have not been neglected. If then a recovery could be had against the property of the defendants here, for this debt, the action ought to be instituted in the name of the Spanish government, to the benefit of which it would inure.

II. THIS leads to the second ground on which the judgment of the court below ought to be reversed—viz: because it is substantially giving effect to the penal laws of a foreign government. What is the situation of the plaintiff under the act of confiscation, as to this debt? He is entitled to demand payment out of the proceeds of the defendants' property in the hands of the Spanish government. Instead of so doing, he institutes a suit against the defendants in this country to recover from them payment of the very debt for which the Spanish government would account to him. Whatever surplus may remain in its hands after payment of Spanish creditors is to become a forfeiture to the state. If the plaintiff

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recover in this action he thereby precludes himself from demanding from the Spanish treasury that amount, and which he would be entitled to receive. Does it not follow irresistibly, that a recovery by the plaintiff in this suit, would inure substantially to the benefit of the Spanish government—if, indeed, he would not be obliged to account to it immediately as its agent for the money so recovered here? Nothing but the glaring impossibility of that government sustaining a suit in its own name to recover the forfeiture of the remainder of the defendants' property now pursued by the plaintiff would prevent such an account being exacted: and shall we suffer that to be done in our courts indirectly, which we would reject with indignation if directly demanded of us?

III. As the fund in the hands of the Spanish government is sufficient for the payment of the defendants' debts, and is accessible to the plaintiff, and not to the defendants, the judgment of the court below is contrary to equity, and therefore ought to be reversed in this court of equity as well as law. And in support of this ground we rely on the principles laid down by the Lord Chancellor in the case of *Wright* vs. *Nutt*, in which he says among other things—"There is "no doubt in the world, but that according to "the general principles of a court of equity, "where a man who has not actual possession of "his debt (for if he had actual possession, I "should conceive, that it would be payment even

"that might be available in a court of law, but if "not so at law, it would at least in a court of equi- "ty be considered as actual payment, and that a "man was vexed twice for the same demand upon "some formal difficulty of making the fact of pay- "ment available at law;) but has the power of "paying the debt depending upon his own act, "whether he will resort to a particular fund or "not, if instead of making use of that power he "will pursue the debtor, it would be too much "for a court of equity to permit to him to sue the "person and relinquish the exercise of that pow- "er which he has at the time in his own hands.

"This case is attended with a circumstance "still more peculiar; which is, that it is totally "impossible for him to assign over that right to "the party debtor here, in order for him to make "it available." 1 *Hen. Black.* 120.

Rodriguez, for the plaintiff. The contract between the parties was absolute, and it was not in the power of the Spanish government to abrogate it.—And the defendants were morally bound to fulfil their engagement. The many political misfortunes and losses of the defendants could not mar the plaintiff's title to the payment of a lawful debt. He was under no legal or moral obligation to call upon the Spanish government for payment of a debt not contracted by it—no equitable circumstance in favour of the defendants,

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however strong in a question between them and the Spanish government, can take from him his legal vested right.

A debt is created by contract and exists till the contract is performed. The interference of government to exonerate a debtor from the performance of his contract, whether upon or without conditions, or to take from the creditor the protection of the law, does not in strictness destroy the debt, though it may locally the remedy for it. The debt remains, and in a foreign country payment is frequently enforced. *Per C. J. Ellsworth, Hamilton* vs. *Eaton, Martin's notes*, 76.

The passage cited by the defendants' counsel, out of Rutherforth, is certainly not law. It is not true that *the law can make void the obligation of a promise or contract*, though it may, what to a dishonest debtor is the same thing, withhold from the creditor the legal means of enforcing compliance; it may create a legal impediment, it may destroy the remedy, but the right of the creditor may only be destroyed by his own act, until the debtor fulfils his obligation.—Parties alone can destroy ormodify contracts.

The obligation of contracts is not only founded on moral principles, but that necessity of individual confidence so essential to the well-being of man, and indispensable to the existence of human society. The moral is scarcely distinguishable from the legal obligation, and the collected power of the society immediately follows to enforce it.

By the law of nations, contracts between individuals of different nations shall meet with no legal impediments to their execution in time of peace, and shall have the benefit of the constituted authorities of the country where the creditor finds the debtor to enforce their fulfilment.

Legal impediments are temporary and local. War does not extinguish the rights nor dissolve the obligations of individuals of the belligerent nations, it only suspends the right of bringing suit, *during the continuance of the war.*

The statute of limitation affects the remedy, but affects it *locally* ONLY, within the dominions of the power who passed it.

In *Rugley* vs. *Keeler*, 3 *Johnson*, 261, the Superior Court of the state of New-York held that they were not governed by the statute of limitations of another state, in actions or contracts entered into there. The same decision took place, *Lodge* vs. *Phelps*, 1 *Johnson's cases*, 139, and in *Pearsall & al.* vs. *Dwight & al.* 2 *Mass. Reports*, 84. In all those cases the plaintiffs could not have sued in the states in which the contracts were made, but were allowed to recover in another state: because the *legal impediment* which existed in the place where the contract was made was *local.*

THE act of confiscation did not destroy the debt, for, independently of its effect being *local*, it is *temporary.* If it were repealed, whatever might *have been* the consequences of it during its

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existence, it cannot be doubted but the *remedy would be revived.*

DURING the war of independence, debts due to the enemy were confiscated, and American debtors were compelled to pay what they owed to British individuals into the public treasury. It cannot be doubted that these acts did not destroy the debt; they affected the remedy. A clause in the treaty made by Mr. Jay provided that British creditors should meet with no *lawful impediment* to the recovery of their debts. *Art.* 4, and in the case of *Hamilton* vs. *Eaton*, already cited, the Circuit Court of the United States, presided in by Chief Justice Ellsworth, determined that the confiscation act of North Carolina had not destroyed the debt, but was only *a lawful impediment* to the recovery, essentially temporary, the duration of which, was put an end to, by the repeal of the confiscation act in the treaty.

EATON, before the year 1777, had given his bond for one thousand pounds to Hamilton. In that year the property of British subjects was confiscated by law, and commissioners were appointed to call on all persons suspected to be indebted to British subjects, examine them on oath and enforce payment of the debt into the treasury by committing the debtor. Hamilton having joined the British, the commissioners called on Eaton, and on oath was compelled to declare he owed one thousand pounds to Hamilton and to

pay the money into the treasury, in order to avoid imprisonment. Yet, the debt was held not to be extinguished, and the Circuit Court was unanimous in the opinion that the confiscation law had created nothing but a *local* and *temporary impediment* to the recovery of the debt, without affecting its existence.

WE therefore contend that the Spanish confiscation act is of the same species—and consequently is only *a lawful impediment*; if it be so, its effect is *local* and *temporary*. As to place it is, to give it the utmost extension to allow it to operate throughout the dominions of Spain; for, it is only the act of the government of the Island of Cuba—as to time, the impediment must cease to have effect, as soon as the act which created it is repealed. As the plaintiff has brought his suit in a country, within which the act of the government of Spain cannot have any effect, he trusts he will be allowed to recover.

Smith, in reply. A *lawful impediment* to the recovery of a debt, in the country where it arose, may without discharging the moral obligation of payment, be *universal*. This is a fundamental principle of insolvent laws. The title of assignees of creditors of an insolvent in one country, is recognised throughout the world. A discharge of an insolvent under a law of one country from debts contracted there, is a legal impediment to their future recovery from him, not only in that

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country but in every other—and yet his moral obligation to pay his debts, is undiminished. It is far, therefore, from a consequence, that because an impediment to the recovery of a debt in one country is only a legal, and is not, also, a moral one, that it must be merely local in its nature, and should be in-operative in other countries.—That must depend on the nature of the impediment and the principles of justice, or sound policy on which it may be founded. It is the policy of commercial states, and it is for the benefit of commerce, that the impediment to the recovery of anterior debts from a discharged insolvent, should be both permanent and general. And there is a strong analogy between a discharged insolvent, as to a suit that might be instituted against him for the recovery of a former debt—and the defendants, as to the present action, in this respect, that in both instances their estates have passed into the hands of persons indicated by law to protect the interests of creditors.—The act of confiscation has pursued the principles of an insolvent law both as to the mode of classification and payment of *Spanish* creditors, and in precluding the institution of private suits against their debtors who were the objects of it. And the defendants have thereby, *in fact*, been deprived of an ample estate which has vested in the government as a fund, in the first place, for the payment of their *Spanish* creditors. That fund is more than *sufficient* for the purpose—but, there is

no reversion of the *surplus* to the former owners. Do not then the principles of sound policy, of natural law, of moral justice, all equally require that this court should in the present case, adhere to the principles which regulate it in cases arising under foreign insolvent laws? Ought it not to judge the plaintiff by the strict rule of his own laws? and deny him every remedy that could not be indulged to him under the act of confiscation? *Potter* vs. *Brown*, 5 *East* 131. Shall we not otherwise be aiding the execution of the *penal* laws of a foreign government? If, in the present case, the plaintiff should prevail, if the funds seized by the Spanish government are not to be allowed to operate the extinction of their Spanish debts, the defendants would be rendered unnecessarily insolvent. The act in question was not penal but *beneficial* and *remedial* to the plaintiff. Can then the defendants be morally obliged to provide a further payment for this favored debt at the expense of their other creditors, and to the beggary of their offspring? Will he receive any injustice by their refusal? Even if the Spanish government had not a right, for their own benefit, to extinguish the debt due to one of their subjects, may they not, at least while they preserve the debt, modify the form and manner, and prescribe the time of payment, and thereby morally as well as legally discharge the debtor? Is it not flagrant iniquity in the plaintiff then to turn his back upon the offered payment of his debt, only to pursue

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and harass the exiled defendants, and rob them of the last of the wreck? And has not a court of equity power to repress the iniquity, and compel the party to resort to the sufficient security within his reach, and which, as he cannot assign it to the defendants, cannot otherwise avail them?

One word as to the case of *Hamilton* vs. *Eaton*, decided in the Circuit Court of North Carolina. It seems to have no material feature of resemblance to this. There the British creditor was not a resident of the state that passed the act of confiscation, nor was he subject to its laws, nor had any fund been provided for the payment of his debt. That act was a species of national hostility, which they thought fit, afterwards, and before the institution of that suit, to recall. So far as that act compelled the deposit of the amount of debts due to British subjects into the treasury of the state, it could be viewed only as an act of oppression to their own citizens, not releasing them from their moral obligation to their creditors. It may well, therefore, be said, that the impediment thereby created to the recovery of the debt, was a local and a temporary one, removed by the acknowledgement of the treaty of peace.

By the Court, LEWIS, *J. alone.* The plaintiff is a Spaniard, and the defendants are French emigrants from the island of Cuba, forced away by the government.—A proclamation of the Spanish government compelling the French to leave the island, has directed their property to be confiscated and ordered the payment of

Spanish creditors out of its proceeds. It is agreed, that the defendants had property confiscated to more than a sufficient amount to satisfy his Spanish creditors.

It is therefore, considered, that, as the government has by its act pointed out the mode in which the Spanish creditor should be paid, that mode should be first resorted to, before he could pursue the debtor in this country. And this principle is consonant to equity, justice and humanity.

JUDGMENT REVERSED

SANDRY vs. *LYNCH.*

Voyage broken before sailing; one fourth of the freight allowed.

THE defendant having chartered the plaintiff's vessel for a voyage from New-Orleans to Charleston and back with a return cargo, engaged to pay him two thousand dollars for the voyage. After the cargo was mostly on board an attachment was levied on it, and the voyage broken. The plaintiff brought his action claiming the two thousand dollars.

Derbigny, for the plaintiff. This was an entire contract. The defendant stipulated for the performance of a voyage of which New-Orleans was the *terminus a quo*, and *ad quem*. The plaintiff made the necessary preparations and, without any fault in him, the voyage was broken;

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he is entitled to the consideration money; it is an entire sum, it cannot be divided.

Duncan, for the defendant. In charter parties freight is not earned until the voyage is performed, *Abbot* 179. In this case, it was not even begun: all that the plaintiff can require is payment for lading the vessel and for time lost. To allow the whole freight out and home, would be to make the freighter, in the present case, and in that of the loss of the vessel, an insurer. The Ordinance of Bilboa, our commercial code, does not allow in a case like this more than one half of the price agreed on for the outward voyage.

If any freighter, after he has loaded a vessel with his merchandise, should wish to annul the charter party, and unload his merchandise, he may do it. But he shall be obliged to pay the expences of loading and unloading; and shall also pay the captain or owner, one half of the freight agreed upon: with this circumstance, that if the charter-party has been made for the outward and the homeward voyage, it is to be understood that *he is to have only the half of the freight, which corresponds to the outward voyage. Chap.* 13, *art.* 9.

By the Court, LEWIS, *J. alone.* If the voyage were to have ended at the port of Charleston, and the vessel there to be at the disposal of the master, I should have no doubt (according to the Spanish authorities) that the master would

have been entitled to one moiety of the freight agreed upon; but where a vessel is chartered to go from one port to another, and back with a return cargo upon a distinct freight for the outward and homeward voyage, and the voyage be broken, the shipper is accountable for one moiety only as regards the outward voyage. The amount of freight agreed upon for the outward and homeward voyage, was an entire sum, and the only difficulty is in ascertaining the amount of the outward voyage.

Had the shipped in this instance, chartered the vessel only to the port of Charleston, there to be delivered to the master, it is presumable, he would not have undertaken to give more than half the sum here agreed upon for the whole voyage; and the voyage being broken, the master then would be entitled to only one moiety of that sum. The vessel not being employed in the homeward voyage, nor the master deprived of the use of her, I consider the law does not contemplate that the master should be entitled to the amount of freight for the whole voyage. And there seems to be no other standard for ascertaining the moiety of the outward voyage, than by allowing one fourth part of the freight agreed upon for the whole voyage, which is accordingly adjudged and decreed to the plaintiff.

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PACKWOOD vs. *FOELCKELL.*

A debtor who has taken benefit of the insolvent act and afterwards assumes a debt previously contracted, cannot be holden to bail.

THIS was an action brought to recover a debt contracted by the defendant prior to his insolvency, but subsequently assumed by him.

Ellery moved that the bail be disharged.

Mc Shane, for the plaintiff. The defendant ought not to be discharged from his bail. This debt is supported by a good consideration; and though the insolvency of the defendant had barred the legal remedy of the plaintiff, it had not extinguished the defendant's moral obligation to pay. His subsequent assumption of the debt has now revived the plaintiff's remedy, which ought to be extended to him in all its forms, and not be curtailed in its most material parts. The Spanish law makes no difference between the process to compel the payment of debts thus revived, after the debtor's insolvency, from those subsequently contracted, and the principles of the Spanish, and not those of the common law, ought to prevail.

Ellery, in reply. Bail is not known to the Spanish law; it is derived from the common law, and introduced into this country by our statute, of course we naturally look for the construction of our statute to the source from whence it is derived. In England and in the United States, this point has been repeatedly settled, and no defendant who thus conscientiously revives a debt

can be holden to special bail; nor will the court turn his honesty into the means of his imprisonment; this, to use the expression of Lord Mansfield, would be taking an advantage of conscientiousness, to use it against all conscience. 2 *Strange*, 1233, 2 *Bur.* 737, 1 *Mass. Rep.* 283.

By the Court, LEWIS, *J. alone.* Let the bail be discharged.

PARISII vs. *SYNDICS OF PHILLIPS.*

A fraudulent mortgage void in the hands of assignees with notice.

THE petition stated that George T. Phillips on the 11th of May, 1807, executed to George M. Woolsey, three several mortgages for the total sum of seventy-six thousand dollars, payable by instalments. That Woolsey, in the month of March following, for a valuable consideration, transferred those mortgages to the plaintiff, after which Phillips became a bankrupt, and his estate was vested in the defendants, in trust, &c. In the conclusion an order of seizure was prayed for.

THE answer admitted the mortgages, their transfer and the bankruptcy, but stated that Woolsey was at the time the mortgages were executed, and long prior thereto, a dormant partner of Phillips, and that the mortgages were received by him with a full knowledge of Phillips' deranged affairs, and in fraud of his creditors: that Totter, who received the assignment of the mortgages in the name of the plaintiff, was at the time

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the agent of Woolsey, and had also full notice of the obligations of Phillips as to such partnership, and accepted the assignment with such a knowledge and without the authority of the plaintiff, and in fraud of the creditors of Phillips.

A JURY was impannelled to try several issues submitted to them by the court, and found the following facts:

1. A PARTNERSHIP existed between Phillips, Woolsey, and one Coit.

2. THIS partnership was dissolved on an offer made by Phillips on the 5th of September, 1805, to pay eight thousand dollars to each of his partners.

3. THE partnership was renewed between Woolsey and Phillips, and not dissolved previous to the bankruptcy of Phillips.

4 WHEN the mortgage was made by Phillips to Woolsey, the former was in failing circumstances, without the knowledge of the latter.

5. TOTTER, through whose agency the assignment was made to the plaintiff, had full knowledge of the failing circumstances of Phillips, at the time of the assignment.

Prevost, *Ellery* and *Robertson*, for the defendants. After the affairs of Phillips became deranged, no act, even a public one, of Woolsey, could dissolve the partnership; for no partner can fraudulently and unseasonably renounce a partnership. 1 *Dom.* 162, *Lex. Merc.* 459. 4 *Brown* 428, *Matley's case.*

The partnership rendered Woolsey liable to the payment of the partnership debts, in their full extent, *Watson* 46, 168. *Lex. Merc.* 123, 430. 2 *Blackstone* 98. 5 *Term. R.* 601.

WOOLSEY being a partner, the mortgage executed in his favour by Phillips, was in fraud of the creditors of the firm, which at that time was actually, if not declaredly, insolvent; and supposing him a creditor, still as a partner this claim could only be satisfied out of the surplus sum of the firm. *Curia Phil.* 406, *Ord. Bilboa*, 107. But Woolsey was not even a creditor and the mortgage was without consideration, and subject to the exception of *non enumeratâ pecuniâ.* 3 *Febrero* 405. 1 *Brown* 428. 3 *Wilson* 187. 2 *Hen. Blacks.* 4000. Fraud in cases of insolvency, is always presumed. *Cur. Philip.* 408. May be proved by circumstances. *Atk.* 352, *Pothier* 20. Equity relieves even against presumptive fraud. 1 *Atkins* 352.

Whether there was a partnership or not, the mortgages are equally fraudulent, and voidable at the instance of the creditors at large, Phillips being then insolvent. This principle was adopted by the Roman law, and founded in strict morals. It has been received and recognised by all the civilized world. It is the law in Spain and France, and accords with the common and statute law of Great Britain. *Digest, tit.* 8, § 1. *Fonblanque*, 260, 267. *Cowper*, 424. *Lord Mansfield's opinion.*

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THE assignment partakes of the nature of the original mortgage, and was polluted by the same fraud. Fraud is an *exceptio in rem*, and follows the subject matter through all its changes. 3 *Febrero* 591. *Watson* 286. *Fonblanque* 139. The assignee had knowledge, if not notice of the fraudulent execution of the mortgage. This appears from the person chosen to represent the assignee, from the date of the assignment, and the circumstances attending it. Totter, who undertook to represent the plaintiff, was not authorized by him, on the contrary, he was Woolsey's man. If he was authorized by the assignee, he had full notice of the situation of Phillips' affairs, and notice to him was notice to his principal. 1 *Pow.* 485. If on the contrary, he was not authorized, he could give no validity to the assignment. Notice is charged in the answer and has not been denied. 1 *Pow.* 45. 1 *Vernon* 481. *Wally* vs. *Wally.*

CASE ADJOURNED.—*See Post* 97.

FOLK & AL. vs. *SOLIS.*

No bail in actions for a libel, on plaintiff's affidavit.

ACTION for a libel. The defendants had been held to bail, on an order obtained from a judge at his chambers, in the sum of fifty thousand dollars, and now moved for his discharge.

Brown and *Porter* in support of the motion.

The order is unsupported by any principle of the laws of the United States, the acts of the territory, or the civil or Spanish law, the only sources from which the court can derive any legitimate authority.

THE acts of the territorial legislature have some provisions on the subject of bail, but they are far from authorizing the demand of it in a case like the present. The act regulating the practice of the Superior Court, 1805, *chap.* 26, § 12, points out the cases in which bail is to be required, viz. in suits *for the recovery of any debt or damages on a note, bond, contract, or open account, or for damages or injury to, or detention of the property of the petitioner.* The present case is for the recovery of damages for a personal injury, affecting the feelings, the fame, but not the property of the plaintiff.

BY the civil law bail is only required in civil cases, for injuries accompanied with force. 3 *Bl. Com.* 280, 281.

Mazureau on the same side. The laws of Spain allow the plaintiff in all civil suits without any exception, to demand from the defendant, when he is about to depart and even where he is not a freeholder, surety *judicio sisti.* 3 *Partida, L.* 41, *tit.* 2. *Politica de Villadiego,* 3 *art.* 2, 7, *art.* 7. This kind of surety corresponds to the special bail of the English lawyers, if we adopt the definition of *Febrero.* 2 *Libreria de escribanos, chapter* 4, § 5, 141. But the

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order of the judge to authorize the demand of the surety had certain prerequisities. The affidavit of the plaintiff is not one of them. Spanish courts respect the maxim, *nemo testis in propriâ causâ*, and the existence of the debt and of the defendant's intention to depart, &c. are required to be established by indifferent, though *ex parte* testimony, or by some authentic document. 1 *Recopilacion de Castilla, lib.* 5, *tit.* 16, *c.* 3. *Politica de Villadiego, loco citato.*

Alexander, *Moreau* and *Duncan* for the plaintiffs. The act of the territory cited by the defendant's counsel, fully justifies the order of bail, in every case of an injury to the property, tho' not perhaps in the case of a mere personal injury. The plaintiffs claim special damages.

ORDERS of bail in case of a libel are not rare incidents in Great Britain and the United States. 2 *Johnson*, 293.

Porter in reply. An action for a libel is not instituted to recover damages for an injury to the property of the plaintiff, and there exists a clear distinction between injuries to the person and injuries to the property. 3 *Blackst. Com.* 123, 141. The loss of commercial advantages and credit is stated as the consequence of the injury of which the plaintiffs complain. But this is only a matter of aggravation. The real gist of the action is the injury to the person.

IF it be the practice in some of the States to

require bail, in an action for a libel, it must have been introduced by statute. It is not demandable by the common law. *Tidd.* 13, 67. *Blackstone*, 3 *Com.* 281.

The Court, LEWIS, *J. alone.* The words of the statute are too plain to leave a doubt. The obvious meaning and import of these expressions, *injury to or detention of property*, confine the case, in which bail is demandable to suits for direct and specific injuries, accompanied with force; the amount of which may be ascertained and furnish the judge a *datum* as to the amount of the bail. But it is impossible that slanderous or libellous expressions could do any possible injury to the property within the words and meaning of the statute: for although a person by means of the slander, should become a bankrupt, yet neither the quality or the condition of his property can be thereby injured or changed.

CONSIDERING then this case as without the words and meaning of the Territorial Act, it remains to be considered whether the laws of Spain, or common law of England, have provided a remedy like the one to which the plaintiffs have resorted.

THE Spanish authorities mention two kinds of sureties analogous to what British and American lawyers call bail. The surety *Judicio sisti* and that *Judicatum solvi*—the latter kind of surety is distinguishable from bail by this particular circumstance, that it insures actual payment. But

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the judge can issue an order of bail, or rather for one of these kinds of surety, when surety was stipulated for at the time of the contract, or when, after it, the affairs of the debtor become deranged, or when he meditates a removal: and the fact on which the plaintiff applies for remedy, must be satisfactorily made out by indifferent testimony.

THE common law has no principle on which a demand of bail may in this case be established.

IT seems, therefore, that the law of Spain alone may be invoked by the plaintiffs, and as they have not complied with what it requires, I am bound to say that they cannot have the benefit of it.

BAIL DISCHARGED.

W. P. MEEKER's Assignees vs. *S. P. MEEKER.*

Bail discharged, the affiant deriving all his knowledge from plaintiff.

IN this case, the court, LEWIS J. alone, held that an affidavit of the agent of the plaintiff, who appeared to derive all his knowledge from the communications of his principal, was insufficient to hold the defendant to bail.

Duncan for the plaintiff and *Robertson* for the defendant.

W. P. MEEKER vs. *HIS CREDITORS.*

A *cessio bonorum* refused to be homologated.

MEEKER, a merchant in London, became a bankrupt, made an assignment of all his property and obtained his certificate. One of his cre-

ditors in the city of New-Orleans, having discovered some property of his, levied an attachment on it. In the mean while, the bankrupt came over, and, during the pendency of the suit, made a *cessio bonorum* to the same persons for whose benefit the assignment in England had been made.

Duncan, for the bankrupt, moved that the proceedings be homologated.

Robertson and *Brown* contra. The proceedings ought not to be homologated, for they are in fraud of the attaching creditor. The assignment in London has no effect on the property in the United States, which remains liable to the pursuits of British as well as American creditors. *Kirby*, 313. 3 *Dallas*, 369. *Judge Iredell's opinion.* 4 *Term R.* 192. *Johnson* 118, where it is said that the assignees of the bankrupt in England cannot sue here.

LETTERS of administration granted in Maryland do not authorize a suit in the district of Columbia: new letters must be obtained. So, of the assignment of a bankrupt's estate in England. 2 *Cranch.*

BANKRUPT laws of England have no force in Ireland. 1 *Atkins* 82, nor in Scotland, *Kaimes* 573, nor in the United States, *Kirby* 313. Irish bankrupt law not in force in England, 1 *Anstruther* 80. Bankrupt law of one state not in force in another. 3 *Dallas* 369.

A CREDITOR has his election to pursue the

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bankrupt or to prove his debt under the commission. 1 *Atkins* 153.

LORD MANSFIELD said, in *Chevallier* vs. *Lynch*, *Douglas* 169, where after bankruptcy, money is attached by regular process out of England, according to the law of the place, the assignees cannot recover the debt.

THE assignment of a bankrupt's estate is binding only in the state in which the commission issues. *Douglas* 160.

AN assignment by commission is a voluntary assignment with regard to foreign nations and does not effect their rights. *Cooke's Bankrupt Law* 243, 370. Assignment voluntary. *Richards* vs. *Hudson* and *Warring* vs. *Knight*, cited in *Hunter* vs. *Potts*, 4 *Term R.*

Duncan, in support of the motion. The attaching creditor and the bankrupt are both British subjects. The debt accrued in England and previous to the bankruptcy. The *lex loci* must govern. 1 *H. Blackst.* 655, 2 *do.* 402. 4 *Term R.* 182. 3 *Dallas* 370, 2 *do.* 256. *Cooke's B. L.* 497.

THE assignment, under the commission, is equal to a voluntary conveyance, 2 *Johnson* 342.

By the Court, LEWIS, J. *alone.* I am not satisfied that a *cessio bonorum* can be made in this country by a bankrupt after having obtained his certificate in England.

IT would be prejudging the main question to be tried, in the suit by attachment, viz. whether

the attachment in England transferred the property here to the assignees, so that it ceased to be liable to the attachment. For, if it should be considered that the assignment vested the property in the assignees, Meeker has no property to surrender, none to be attached. The suit against him must fail and the *cessio bonorum* is a nullity. If it should be determined, that the assignment in England did not vest the property here in the assignees, it will perhaps be contended that the property attached was in the custody of the law, and the bankrupt had not the power to make any disposition of it.

I will not sanction a measure for the sake of an experiment, and this mode of proceeding is one which ought not to be favoured.

MOTION DENIED.

*** THE attachment suit was made up, so that the question was not finally determined.

MERCIER'S ADX. vs. *SARPY'S ADX.*

Depreciation of assignats—claim of interest—allowance of bad debts.

THE plaintiff's intestate had sent from Bourdeaux to the defendant's intestate, sundry vessels loaded with goods for their joint account, and had made all the advances. This happened at a time when assignats were the currency of France, and their value was below the nominal amount. The defendant's intestate received the cargoes in New-Orleans, and sold them for the joint account and made returns, which were disposed of

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in France, while the assignats continued below par. Part of the goods were sold on credit by the defendant's intestate, and some of the purchasers failed.

THE plaintiff claimed a balance of about thirty thousand dollars, including interest and reducing the nominal sums in assignats, according to a scale of depreciation published by the French government.

THE defendant introduced a letter from the plaintiff's intestate, instructing her intestate to retain his funds, and it did not appear that this instruction was countermanded until the 29th of August 1796—and also another relating to former transactions in which a claim to interest was waved.

Prevost for the defendant. Interest ought not to be allowed. It is only admitted where custom or agreement authorizes it; it is true when nothing appears in the transactions of parties which affords a rule of interpretation, their contracts must be construed according to the usage and custom of the place. But here, it is in evidence that in the anterior transactions, with the defendant's intestate, the plaintiff's intestate claimed no interest, we are to conclude that if the intention of any of the parties had been to alter their mode of dealing, he ought to have stipulated for a change.

THE books of Mercier shew that during the life of the parties, a reduction of the assignats was never thought of. The cargoes were purchased, and the returns sold, in assignats.

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MERCIER'S ADX. *vs.* SARPY'S ADX.

THE bad debts ought to be deducted—the parties were quasi-partners. Each was to do for the best—and as the profits were to be borne by both, so must the loss.

Derbigny, for the plaintiff. It is not denied that interest is allowed among merchants as a compensation for the privation of a portion of the creditor's capital, and it is also in evidence, that in the city of Bourdeaux, the ordinary rate sanctioned by government, is six per cent. so that unless the court presume that the plaintiff's intestate renounced his right, interest must be given. *Nemo presumitur donare.* As to the period from which the interest is to be computed, it seems that the defendant's intestate was without an excuse in keeping Mercier's funds from the day he received the order to forbear to retain them, admitting that there was no improper detention anterior to the letter.

ASSIGNATS were the currency of France during the time that the intestates of the parties dealt together. They were the circulating medium and the money of account of the country, and at times of less and at others of more value, and the true situation of the parties could be ascertained in no other way than by striking a balance at stated periods, and finding the real value of such a balance in gold and silver, according to the scale of depreciation established by law.

IF the defendant claims an allowance for bad debts, it must be shown that the persons to whom

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sales were made, were solvent at the time, and that the necessary steps for the recovery of the debts have not been omitted or delayed.

By the Court, LEWIS, *J. alone.* Mercier's letter furnishes ample proof that his funds were not detained, after the receipt of his letter, for the benefit of the defendant's intestate, in whose hands it was a deposit for the advantage of Mercier, till his instructions were countermanded in 1796. After that period interest is to begin at six per cent. the commercial rate of interest both in Bourdeaux and New-Orleans.

THE depreciation of assignats ought not to affect the defendant. Her intestate shipped colonial produce, which Mercier sold, no doubt in assignats: the proceeds were a legal payment according to the laws of the country, and the nominal value was a proper set off to Mercier's demand, on the day of the sale. If he kept them till they were depreciated farther, he must bear the loss.

SARPY, who was jointly interested in the sales at New-Orleans, must be presumed to have acted fairly, until the contrary be proven. If he sold to persons notoriously insolvent, he committed a fraud, and fraud is never presumed. The same principle applies to the degree of industry which was to be exercised in the collection. His intestate is only to account for what he received.

SEGUR vs. *HIS CREDITORS.*

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THE debtor in his concordat with his creditors, had promised to pay the usual interest, *les intérêts usités*, and they claimed *ten* per cent. offering evidence that this was the customary rate.

The usual, is the legal, interest.

By the Court, LEWIS, *J. alone.* It has been already determined in this court, in *Caisergues* vs. *Dujarreau*,* that conventional interest may exceed legal or judicial interest, provided it does not exceed the usual rate in the market. The difficulty in this case arises from the meaning of the word *usités*, which the parties have adopted to express their meaning. When stipulation is made for any rate of interest, other than that established by law, the convention should be precise and certain. No word of indefinite import can alter the provisions of the law. In the case cited, *ten* per cent. was allowed, and was considered as a fair premium. Less than that, and more than the rate established by law, has been frequently demanded and given; but in all such cases the parties had made a special convention.

* *Ante p.* 1.

A CONVENTION to pay the usual interest, where there is no uniform usage, is too vague and uncertain, to fix upon and determine any other rate, than the general one which is settled and ascertained by law. Let the interest, therefore, be calculated at *five* per cent.

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D'ARGY, appellant, vs. *GODEFROI, appellee.*

An authentic or private writing, to be binding, must be signed.

APPEAL from the Court of the parish of the city of New-Orleans.

THE action was brought to dispossess the appellant of a house and lot, on the Bayou road, rented of the appellee. No particular agreement, as it respects the term, for which the premises should be occupied, appeared in testimony, though the appellant produced the rough draught of a lease in the handwriting of the appellee, but signed by neither of the parties.

Ellery for appellee. According to the usage in this city, when no agreement is made between the landlord and tenant, the house is always considered as rented from month to month, and the tenant liable to be turned out at the expiration of every month. In the present case, there appears to have been no agreement between the parties respecting the period the house should be occupied; the tenant at sufferance, however, pleased with the situation of the premises, is willing gratuitously to prolong his term for one year, and though duly notified to quit, refuses to go out.

D'Argy, the appellant. A lease written by the party himself, ought surely to be binding, though not signed. No better testimony can be produced than the handwriting of the party; and by this lease the premises are leased for one year, of which but a few months have elapsed.—Again. Suppose this lease void; and suppose the

usage in this city, as stated by the appellee's counsel, correct, that where no agreement is made between the landlord and tenant, the tenant holds only from month to month; still the principle does not embrace the present case. This is not a house in town, but a house and garden of considerable extent on the Bayou road, upon which the tenant has expended considerable pains and expense, and of which he sanguinely calculated to reap the profits. It comes under the title of a prœdial estate, *un fonds rural, ou bien de campagne*, in which case, our Digest says, if no time has been specified, the lease is presumed to be for one year. *Chap.* 2, § 1, *art.* 12.

Ellery in reply. The rough draught of the lease produced, besides its erasures and interlineations, has neither been executed nor signed. That it has not, I think, is a proof, that the parties had not agreed upon the terms contained in it. It surely can have no weight. In the Digest which has been quoted, it is said, that the manner of proving the validity of a lease is agreeable to the rules laid down under the title of Contracts and Conventional Obligations in general. *Chap.* 2, § 1, *art.* 8. What are these rules? It is there said, a title, which is not an authentic title, may avail as a private writing, provided it has been signed by the parties, *Chap.* 6, § 1, *art.* 218. Their signature appears to be an essential requisite, and is again mentioned in *art.*

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223. This rough draught of a lease, then, unsigned by the parties, can avail neither party. It affords, on the contrary, a presumption, from its being thus unsigned, that it was agreeable to neither party. But this house and lot is to be a prœdial estate, and, therefore, in default of any agreement, a year's lease in it, ought to be presumed. The principle is correct, as it regards a prœdial estate, but not, in the least, applicable to the present case. In prœdial estates, where no time is specified, the lease is presumed to be for one year, in order to give the farmer time to make and gather in this crop. And in his it resembles a tenancy at will, at common law; where, if the tenant, after sowing his land, is put out by the landlord, yet he shall have the emblements, and not be obstructed in cutting and carrying away the profits. But can this be made to apply to a small lot in the skirts of the town?

By the Court, LEWIS, *J. alone.* Writings not signed, upon loose papers, which tend to oblige the person who has written them, such as a promissory note, an instrument of sale, &c.; although they are found in the hands of him towards whom the obligation was to be contracted, are no evidence however against the person who has written them, that the obligation has really been contracted, and they pass only for simple projects which have not been executed. 2 *Pothier* 196. Let the judgment of the City Court be affirmed.

PITOT & AL. vs. *ELMES & AL.*

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Sequestration creates no lien.

PHILIP JOUBERT, being in failing circumstances, the defendants, who had a claim against him, observing he was wasting his goods, made application to a judge, and obtained an order, in virtue of which his property was sequestered. In the mean while, he presented a petition for a meeting of his creditors, and obtained a stay of proceedings against him. At the meeting, the plaintiffs were appointed his syndics, and they moved the court that the sequestered property might be placed in their hands for the benefit of the mass of his creditors.

THE defendants contended that they had by their diligence acquired a lien on the sequestered property for the payment of their debts, as in case of attachment.

By the Court, LEWIS, *J. alone.* The only case of sequestration known to the civil law, is when two persons, or more, lay claim to the same property. In this case, the judge orders that, *pendente lite*, the property in dispute shall remain in the hands of sequestrators.

ACCORDING to the laws of Spain, when a creditor proves his demand, and shows, to the satisfaction of the judge, that the debtor is wasting his goods, so that there is danger that, without some summary relief, the property of the debtor will be destroyed or removed out of the reach of the creditor, before, in the ordinary course of

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business, judgment may be obtained, the judge orders the debtor's property to be sequestered, unless he gives surety to the creditor.

THIS sequestration is not a proceeding *in rem.* It creates no lien in favour of the person who obtains it. It is not always an orignal process : it is a mere provisional order, which may be had at any stage of the suit, and the judgment that intervenes is against the estate of the debtor generally, not more against the sequestered property than against any other part of it. It consequently creates no lien, no privilege.

MOTION GRANTED.

TROUARD vs. *BEAUREGARD*

He, who bespeaks work for another, is a good witness.

WORK and labour done. The defendant employed one Latour to make certain plans for him. Latour finding it inconvenient to do them himself, employed the plaintiff, with the knowledge and without any objection made thereto by the defendant. At the trial, the plaintiff introduced Latour as a witness in his behalf.

Ellery for the defendant. The testimony of Latour is inadmissible, for he has an interest in the suit. He is liable to the plaintiff, and if the money is recovered from the defendant, he will be discharged. "He," the witness, "must besides be not interested, neither directly nor indirectly in the cause." *Civ. Cod.* 312, *art* 248.

Mazureau, for the plaintiff. Latour has no interest in the suit, either direct or indirect. He employed the plaintiff to do the defendant's work, with his (the defendant's) knowledge and approbation. The plaintiff knew that the witness was only the agent of the defendant, and had no other concern in the affair than to procure the defendant's work to be done. By bringing this action, the plaintiff, if he had any election, as to the person on whom he should call for payment, has determined his choice. *Peake* 112, *Straham*, 506.

By the Court, LEWIS, *J. alone.* Were a witness in the situation of the present, to be rejected, many debts would be lost for want of testimony. From the necessity of the case, the witness must be admitted, and his credibility left to be judged by the jury. It does not appear that he acted for himself, but for the defendant, with his knowledge and consent.

WITNESS SWORN.

RULES OF COURT.

COURT RULES.

ORDERED, that in case a struck jury be directed to be summoned, the sheriff shall return forthwith, a list of forty-eight names of persons qualified to serve on such a jury, that each of the parties then shall strike off twelve names, that thereupon a *Venire* shall issue for the remaining twenty-four.

ORDERED, that in all cases of jury causes, the plaintiff shall set them down for trial for the first day of the succeeding term, and that whenever, and only when, there shall be any such cause so set down, a general *Venire*, for thirty-six jurors for the trial of jury causes for that term, shall issue returnable on the first day of the term. That the jury causes shall be first called off, when those that are ready, shall be tried, and all others shall be deferred till the first day of the succeeding term.

ORDERED, that no copy of any record of criminal proceedings, be delivered without the previous permission of the court.

ORDERED, that the eighth rule, among the rules of practice originally adopted by this court, in the following words—"All the proceeding "verdicts, orders in a cause, shall in succession,

" as they come in, or are made, be annexed to " the petition, and when a final judgment shall " be rendered, it shall be copied by the clerk, " annexed to the other proceedings, signed by " the judge and certified by the clerk," be revived. COURT RULES.

ORDERED, that hereafter, in all cases in which judgment shall be rendered in this court, upon promissory notes or other obligations in writing, the instrument shall first be exhibited in open court, and it shall be the duty of the clerk to endorse on such instrument, a short note, stating that judgment hath been obtained, together with the date of such judgment.

ORDERED, that hereafter, in all cases of indictments, and other papers presented by a grand jury to the court, no copies shall be given without the previous permission of the court.

ORDERED, that hereafter, no application by motion or otherwise, shall be made, nor any petition, or other paper, be read in the court, while in session, by any counsellor of this court except while standing within the bar.

ORDERED, that in all cases of suits instituted in this court, in behalf of any person, not an inhabitant of this territory, against any person residing in the same, the defendant before he files in his answer, may require security to be filed in the clerk's office, on the part of the plaintiff, for the costs of suit.

COURT RULES. ORDERED, that in all cases where either party in a suit, shall move for a commission, to take the deposition of witnesses residing out of the territory, the affidavit to obtain the same, must state the material facts to be proved, by the said witnesses.

Saturday, the 6th. May, 1809.

ORDERED, hereafter, that all applications for commissions to take the depositions of witnesses residing out of this territory, shall be made at least fifteen days after issue joined, except in cases, where testimony shall come to the knowledge of the party applying, after such issue joined; in which case, application shall be made within fifteen days after the discovery of such testimony.

Thursday, 22d June, 1809.

IT is ordered, that hereafter, no person shall be admitted to practice in this court, as an attorney and counsellor at law, who shall not be, at the time of his application, a citizen of the United States.

Rules adopted on Monday, the 11th June, 1810.

1st. IT shall be the duty of the clerk to keep a trial list, upon which the gentlemen of the bar shall place their causes for trial; and also to provide and keep two trial dockets, one of which shall be appropriated for issues to the court, and

special juries, and the other for issues to the country. COURT RULES.

2d. It shall also be the duty of the clerk to transfer the issues from the trial list to their respective dockets, and place them upon the same, according to seniority.

3d. The causes shall be taken up in rotation as they stand upon the issue dockets, commencing with the first, and be tried, continued, or dismissed.

4th. Every other week, shall be appropriated to jury trials, and it shall be the duty of the clerk to issue a *Venire* in due time to the sheriff, whose duty it shall be, to summons and return to the first day of the week, thirty-six jurors, who shall serve during the week.

5th. The intervening time, not appropriated to common jury trials, shall be for special juries and trials of issues to the court.

6th. It shall be the duty of the clerk, within four days after the expiration of each week appropriated for jury trials, to renew his trial docket of issues to the country, and place first upon the new docket the causes remaining entered upon the old docket, in the order they stand upon the same, which shall have the preference. The same rule shall be observed, with respect to the docket of issues to the court.

7th. The causes now upon the trial list, shall

COURT RULES. have the preference to all others, and shall be placed first upon their respective trial dockets as aforesaid.

8th. THE above rules shall go into operation on Monday the eighteenth day of June, (inst.) commencing with issues to the country, and the clerk is directed to make out his docket, and issue a *Venire* accordingly.

Thursday, 14th June, 1810.

IT is ordered by the court, that hereafter, the plaintiff or party filing a petition, shall before he sues out process, pay into the hands of the clerk, the translator's and lawyers' fees.

☞ *The following case has excited so much interest and curiosity, that it has been deemed proper to be inserted, although the original plan of this work did not extend to cases determined in the District Court of the U. States.*

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LIVINGSTON vs. *D'ORGENOY.*

Proceedings staid by a third person.

THE original petition stated that the plaintiff was in possession of the Batture, a tract of land within the limits of the city of New-Orleans, and that the defendant ousted him of his possession, and still kept him out; besides a claim of one hundred and fifty thousand dollars, for damages, it concluded with a prayer that the plaintiff might be restored to his possession.

THE defendant justified the ouster, as an official act, while he was Marshal of the U. States, in pursuance of an act of Congress, 8 *Laws U. S.* 317, and he denied any other removal, interference, or possession of the premises.

THE pleadings were amended by consent. The new petition stated the plaintiff's title to the premises, the claim set up by the corporation of the city, the judgment thereon and a perpetual injunction quieting his title, and the ouster. It concluded with a prayer for restitution and general relief.

To this amended petition, the defendant's answer was the same as to the original: except that the last clause (denying the removal, otherwise than as Marshal, the interference and possession) was omitted.

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THE plaintiff demurred to the answer and the defendant joined in the demurrer.

WHEN the demurrer was about to be argued, the Attorney of the United States, *T. Robinson*, read the affidavit of James Mather, stating the possession of the United States, their exercise of acts of ownership on the premises, their officers having at one time allowed the people to take dirt therefrom, and at another recalled this permission, the want of interest in the defendant, and the deponent's belief that the sole object of the plaintiff was to gain possession and oust the United States.

THE Attorney next drew the attention of the Court to the original and amended pleadings. He observed that the first petition claimed one hundred and fifty thousand dollars, and the answer thereto denied every thing but the ouster, which it justified—that the second petition claimed no special damage, and the answer was amended by striking out whatever had been at first denied. On these suggestions he moved that the plaintiff be ordered to shew cause why the proceedings should not be stayed, as fictitious and collusive: and because too the defendant claimed not (notwithstanding his implied admission in the answer) any right of possession or property, in the premises, and therefore was entirely uninterested, while the interest of a third party, viz. the United States was sought to be affected, and the possession of the premises obtained from them.

ON this the plaintiff offered to allow the U. States to be made parties to the suit; but the offer was not accepted; on the ground that the United States could not be made defendants in any case, and in the present could not make themselves plaintiffs, for no right of theirs had been violated and they had nothing to claim.

THE plaintiff next shewed cause. He denied the fiction and collusion, the want of interest in the defendant, and that, his only motive in bringing the suit was to affect the interest of the United States.

AT his request, and by consent, the defendant was sworn. He deposed that he did not claim any right of property or possession in the premises, and asserted he would not prevent the plaintiff from taking possession, if he attempted it. He admitted he had given his consent to the amendment of the pleadings, on the assurance he had received, that the plaintiff would claim no damages from him, and had no other object in view but the possession of the premises; and that if such assurance had not been given him, he never would have consented to the amendment.

HE declared that no communication, verbal or written, had passed between him and the plaintiff, except a letter announcing the plaintiff's intention to bring the suit.

THE Attorney having advanced, as a presumption of collusion, that Paillette, the general agent of the plaintiff, was the defendant's counsel, the plaintiff admitted the fact; but said that

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Paillette had no other agency in the plaintiff's behalf, but receiving the petition, inclosed to him from New-York, filing it, and delivering the plaintiff's letter to the defendant.

PAILLETTE, being sworn, deposed he had given the defendant to understand that the plaintiff would not claim damages from him, and expected only to gain possession; and that he had advised the defendant to consent to the amendment.

A LETTER of the defendant to the Recorder was then read: it contained these expressions: "it appears that Mr. Livingston has desisted from all pursuit against me and that his only object is to be reinstated in his possession." In the conclusion, the defendant begged the Recorder not to communicate this information which he declared to appear to him very true.

ANOTHER letter was also read, in which the defendant declined allowing the law officers of the corporation to join his counsel in the defence of the suit.

THE *Attorney of the United States*, *Moreau* and *Martin* in support of the motion. Where proceedings are fictitious or collusive, and where they are set on foot for no other purpose than to affect the interest of a third party, the court will stay them on the application of the party liable to be injured. The ground upon which the court interferes in these cases is that the proceedings are a *contempt* of the court. *Dacosta* vs.

Jones, Cowper 729. *Coxe* vs. *Phillips, cases Temp. Hardw.* 237.

1. THE present suit is fictitious—and

2. Collusive.

3. It is set on foot for no other purpose than to affect the interest of persons not parties thereto.

I. It is fictitious. A suit may be called fictitious, when the parties, or one of them, have no existence *in rerum naturâ*, or as a corporation: or when one of them is *uninterested*, or stranger to the matter in dispute, and cannot be affected by the event, otherwise than by a liability to costs, which in such a case will be presumed to be intended to be paid by the other party, the person really interested, and for whose benefit the suit is brought.

IN the present case it is contended the defendant is wholly uninterested; no damages are asked of him, he does not pretend to keep possession, so that he cannot lose any thing.

II. THE suit is collusive. Collusion is fraud, and therefore although it must be proved and is not to be presumed, direct and positive evidence of it is not to be expected. The proof must be composed of a number of circumstances, none of which are perhaps sufficient to satisfy the mind, but which from their coincidence command conviction. In the present case we have:

1st. THE suspicion which attaches in the selection of the plaintiff's agent as the defendant's attorney;

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2d. THE refusal of the permission to the law-officers of the corporation to co-operate with the defendant's counsel;

3d. THE evidently concerted amendment of the petition and answer, the implied admission of the possession—the omission of the claim for damages being the clear consideration therefore;

4th. IF there had been no collusion, the defendant had an easy way to get rid of the suit by a disclaimer, by averring he was no longer Marshal.

III. THE suit is evidently set on foot for no other purpose than to affect the interest of persons not parties to it.

THE United States claim the premises: they have exercised an evident act of ownership, by dispossessing the defendant—the object of the suit is nothing but to regain the possession—they are not parties to the suit and their rights are to be affected by it, and the rights of no other person can thereby be affected.

No court will allow a possessory action to be carried against a person who is not in, and does not claim, possession.

W. caused a lease to be made by a stranger to B. and then caused B. to bring an ejectment against J. S., in order and with intent to get R. out of possession—this was held to be an abuse of the court. 5 *Viner* 444.

IT is a contempt in an attorney to deliver a declaration in ejectment to a man who feigns himself tenant and so to obtain possession. *Mod. Cases*, 16.

OR to bring a *præcipe quod reddat*, against a person whom the party knows to have nothing in the land, and to gain possession against the terretenant, 2 *Inst.* 215.

OR to make a lease to A. of the land of B. and afterwards procure B. to bring an action against the casual ejector, *Sav.* 31.

PROCEEDINGS in an ejectment staid till the plaintiff gave notice where the lessee lived, *Shirt* vs. *King*, 2 *Strange* 681.

IT is a contempt of court to bring a fictitious suit, 1 *Comyns* 593. 4 *Durnford* & *East* 402. or to use its process as a handle to do wrong. 5 *Vin.* 443. Without the essential aid of learned counsel, who, by previously investigating a complicated case, are enabled to present, in a clear and distinct view, the principles and authorities upon which it is to be determined, the best informed judge is liable to err and the most cautious to mistake. If the arguments of the bar are of such importance in the rightful determination of a cause, it is of the utmost importance that such arguments should be earnestly and fairly made. They will not be earnestly made, if the person who employs the counsel has no interest in the object in dispute: counsel will be careless, where the client is easy. They will not be fairly made, if the client desires that the point be determined against him. Nothing but interest will draw forth the solution of latent difficulties. The court will not pronounce with safe-

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ty on an argument in which the industry of the maker has not been spurred up by the interest of the client.

THE plaintiff did not controvert the principle laid down by the supporters of the motion, but denied the existence of any of the facts on which it was grounded.

HE introduced the affidavit of Paillette and Alexander, the defendant's counsel, denying the collusion. The former stated that in informing the defendant that no damages were expected from him, he had acted from the influence of his own conclusions, drawn from the amendment of the petition, and not from any communication with the plaintiff.

HALL, *District Judge.* It appears that the defendant is not in the least interested in the decision of this case: no damages are to be recovered of him, because none are prayed for: he is not to be deprived of possession, because he never had any; and if ever he had, he has since ceased to hold it.

THE circumstance of Paillette being the plaintiff's agent and the defendant's counsel, at first blush might excite suspicion: but when it appears he has always been of counsel for the defendant, in his causes, collusion cannot be inferred from it.

ALTHOUGH there is no direct evidence of collusion between the parties, yet it is certain a

kind of understanding exists between them. The impression made on the defendant's mind, clearly was, that he was totally *hors de combat*, that no damages were to be recovered of him, and therefore he was totally uninterested, and became quite indifferent as to the issue of the suit: for, he has told us he had neither possession nor property, and he should have averred so in the pleadings. I do not think that his refusal to blend his interest with that of the corporation, ought to have any influence in the decision of the motion.

IT is clear that the United States claim the premises. They have dispossessed the plaintiff, and his object now is to regain the possession. If any one is in possesion, the United States are; and this fact is sworn to by Mather.

THE interests of the United States alone are at stake. The defendant cannot be expected to defend them. It is immaterial to him what opinion the court pronounces on the legality of the President's orders, or whether it adjudges the possession of the batture to the plaintiff or not. There is nothing adverse in the case.

Courts of justice are to decide on real contests, they are never to be used as instruments to work injustice, wound the feelings or affect the interest of others, through the intervention of fictitious or uninterested parties.

THE defendant can only be considered as a FEIGNED *ejector*. It is a standing rule in actions of ejectments that no plaintiff shall proceed to recover the land without giving the tenant in

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possession a declaration and making him a defendant. Otherwise the court would be instrumental in doing an injury to a third person; because a declaration might be served on a *stranger*, a feint defence made and a verdict, judgment and execution obtained, without the tenant having any notice of it. This would be the case, if the court were to proceed in this suit. The defendant is no longer an officer of the United States, it would be wrong to decide on their rights in a suit against him.

IF the United States, who claim the premises cannot be made defendants, it becomes their dignity to establish a tribunal in which the controversy may be determined. It is much regretted, that it has not been already done.

PROCEEDINGS are not often staid at the instance of a third party; but the court certainly possess the power to stay them. In the case cited from *Cowper*, lord Mansfield said, "If the Chevalier "d'Eon had applied to the court, as a person "whose feelings were sought to be wounded in "the suit, and prayed that the suit might be stop-"ped, the court would have instantly done it."

PROCEEDINGS STAYED.

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

TERRITORY OF ORLEANS.

SPRING TERM—1810—FIRST DISTRICT.

☞ *At the opening of the Court, a commission was read, dated the 21st of March,* 1810, *by which* FRANCOIS-XAVIER MARTIN, *(then a Judge of the Mississippi Territory) was appointed one of the Judges of this Territory in the room of Judge Thompson, deceased.*

PARISH vs. *SYNDICS OF PHILLIPS.* *ante* 64.

Brown for the plaintiff. The dissolution of the partnership by Woolsey cannot be said to be fraudulent, for it left the creditors in as safe a situation as they were during the continuation of the partnership.

A party to a contract cannot render the situation of the other harder or more difficult.

THE mortgages taken by Woolsey, notwithstanding the insolvency of Phillips, cannot be said to be in fraud of the creditors of the firm, for the premises were equally liable to their claims after, as before, the execution of the mortgages—the mortgagor and mortgagee being both bound for the payment of them.

NEITHER can the assignment to Parish be

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PARISH vs. SYNDICS OF PHILLIPS.

said to be fraudulent, while it is not even suggested that Woolsey is insolvent. Every man is presumed solvent until the contrary appears Woolsey's solvency could easily be established, if it were required. If it be admitted, there is not a shadow of doubt as to the fairness of the transaction between Woolsey and Parish. For, a solvent man may dispose of his property at pleasure.

IF the assignment be not fraudulent, it is immaterial to shew the authority of the agent. Parish has adopted his act; his acceptance of the mortgages has a retrospective effect. The ratification of the principle cures all the defects that may have existed as to the nature of the agent's powers.

By the Court, LEWIS, *J. alone.** However solvent Woolsey may be, he cannot by his own act deprive the creditors of the firm of their right to have their debts paid out of the estate of Phillips in this country. A party to a contract cannot render the situation of the other harder and more difficult. It is a fraud to the creditors to remove from their reach the property which they have a right to consider as the pledge of their claims. Woolsey may be solvent, but his solvency cannot authorize him to take from them their lien on the property of Phillips. It is much

* MARTIN, J. declined giving an opinion, as the case had been argued before he took his seat.
MATHEWS, J. did not sit during this term.

more advantageous for them to have their debt paid out of the property of their debtor here, than to be compelled to look for Woolsey out of the territory.

JUDGMENT FOR THE DEFENDANTS.

MOREAU vs. *DUNCAN.*

Whether plaintiff's attorney be liable to pay the tax on the suit? Quere.

THE plaintiff, who is Judge of a Parish Court, claimed the sum of one hundred dollars, for the tax, laid by the act of this territory, 1809, *c.* 7, stating that the defendant, as attorney to several persons, had lately brought one hundred suits in the plaintiff's court.

THE act provides that "the attorney's fee, "in each case, shall be eleven dollars, to be taxed . . . . . by the Parish Judges respectively, and paid by the party cast." It afterwards imposes "a tax of one dollar" on all suits "prosecuted in the Parish Courts . . . . . "to be deducted out of the said attorney's fee "in each cause," and makes it the duty of the Judge to collect and account for the tax.

LEWIS, *J.* The plaintiff ought to recover, for he is liable for the tax. He ought to receive it at the time the process issues. It would be inconvenient and unsafe to wait till the determination of the suit to exact it from the party cast, who might not be able to pay it.

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THE defendant having obtained the process on the issuing of which the tax was demandable, ought then to have paid the tax, and if the plaintiff has indulged him, a suit may now be maintained.

MARTIN, *J.* It certainly would have been the best way to render this imposition productive, and the collection of it easy, to have required the payment of the tax, at the *inception* of the suit. But the Legislature having provided, at the time they imposed the tax, that it should be *deducted* out of a certain fee, to be taxed by the Judge and paid by the party cast, has certainly postponed the collection of it to the *conclusion* of the suit.

THE tax being expressly required to be paid out of the fee taxed for the attorney of the successful party, it appears to me the fisc cannot expect any tax in cases in which no attorney's fee is taxed, or where the successful party has appeared in *propriâ personâ*, in cases in which the object of dispute is less than $100, or in cases in which the party cast, is not able to pay.

I CONSIDER this as an imposition, on attorney's taxed fees paid by the party cast, which is not to be *advanced* or *insured* by the person who brings the suit, nor his attorney.

THE TERRITORY vs. *THIERRY.*

SPRING, 1810.
First District.

Written interrogatories not necessary in all cases of contempt.

THIS was an attachment for a contempt of this Court, by a libellous publication subscribed with the defendant's name, and printed in the *Courrier de la Louisiane*, of which he was one of the editors. It was grossly and indecently abusive, and appeared to have been written for the purpose of making an improper impression on the public mind, in favor of a person against whom the Grand Jury had just found an indictment for a libel.

THE paper being produced in Court, and proof made that the defendant was editor and printer of it, the Court,* MARTIN, *J. alone*, directed the attachment to issue in the first instance.

ON the defendant being brought in, the paper was shewn to him, and he acknowledged he was the editor of it and the writer of the piece: whereupon the Court informed him no advantage would be taken of his admission, but he must give bail for his appearance on a future day, to answer interrogatories.

HE replied he needed no time.

THE Court then advised him to speak to an attorney.

HE answered he had no occasion for counsel, and on his repeating he wanted no delay:

HE was sworn, and the paper being again

* LEWIS, J. being personally alluded to in the piece, refused to take any part in this case.

SPRING, 1810. First District.

TERRITORY *vs.* THIERRY.

shewn him, he repeated his former acknowledgment.

THE Court directed it be recorded, and having heard him in his defence, gave judgment that he pay a fine of fifty dollars, and be imprisoned during ten days.

ON the next day, *Duncan* for the defendant, moved that the proceedings against him from the time of his appearance in Court, be set aside, and that he might be admitted to give bail to answer interrogatories. He said that no judgment could be given, nor could any defendant be compelled to answer in any case, except that of a contempt committed in the face of the Court, until a *written* charge or accusation was filed against him.

By the Court. When the contempt is of such a nature, that when the fact is once acknowledged, the Court cannot receive any further information by interrogatories than it is already possessed of, the defendant may be admitted to make such simple acknowledgment, without answering interrogatories. 4 *Black.* 287.

ON the tenth day the Court directed the sheriff to discharge him, reckoning the fraction of the day of commitment as a whole day.

TERRITORY vs. *NUGENT.*

SPRING, 1810.
First District.

Security for good behaviour may be required of a libeller.

1m 103
116 532

PROCESS of attachment having issued against the defendant for a contempt of court by a libellous publication; he was brought in and gave bail to answer interrogatories.

CIRCUMSTANCES of aggravation attending this case, the Court* required him to give security for his good behaviour during six months: and he gave it accordingly.

AFTERWARDS, *Holmes*, moved that he might be released from his bond, and cited the case of the *King* vs. *Wilkes*, 2 *Wilson* 159, in which Lord C. J. Campden says: "We are all of opinion "that a libel is not a breach of the peace: it tends "to a breach of the peace, and that is the utmost. "I cannot find that a libeller is bound to find "surety of the peace in any book whatever, nor "ever was in any case, except that of the seven "Bishops, where three judges said that surety of "the peace is required in case of a libel. Judge "Powell, the only honest man of the four judges, "dissented, and I am bold to be of his opinion, "and to say that case is not law, but it shews the "miserable condition of the state at that time. "Upon the whole, it is absurd to require surety "of the peace or bail in the case of a libeller."

By the Court. I cannot, even upon the high

* THE same considerations as in the preceding case, had induced LEWIS, J. to leave the bench.

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authority which is offered, admit the proposition that it is absurd to require bail from a libeller. To publish a libel is an indictable offence, and I do not see how the prosecution is to be carried on, if the person of the offender be not at first secured, and how, after arrest, he may be discharged, except upon bail.

WITH regard to surety of the peace, if it be not to be required of a libeller, it is because the publication of a libel is said not to be a breach of the peace—and therefore requiring that surety would not have the effect of preventing a reiteration of the offence, as such a reiteration would not be a breach of the peace, and consequently would not occasion the forfeiture of the recognizance. In this sense I understand Lord Chief Justice Cambden. The defendant in the case cited, Mr. Wilkes, was a member of parliament, and was charged with the publication of a libel. He contended, and, I admit, with propriety, that his situation protected him from an arrest, in all cases except treason, felony, and a breach of the peace, and the offence with which he stood charged was not treason, felony, nor a breach of the peace: but I am not to conclude that if he had not been a member of parliament surety for his good behavior could not have been required of him.

ALL the elementary writers agree that surety for the good behavior may be required of the

persons charged with the offence sworn to have been committed by the present defendant.

ONE may be bound to his good behaviour..... for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office. 4 *Blackst.* 258. For speaking words of contempt of an inferior magistrate, as a justice of the peace and a mayor, though he be not then in the actual execution of his office; and of an inferior officer of justice, as a constable, and such like, being in the execution of his office. 1 *Hawk.* 132.

IN the 18th year of Edward 3d, one John de Northampton acknowledged himself the writer of a letter, deemed by the court to be a libel against John Fenners, one of the king's council, and *committitur marescallo, et postea invenit* 6 *manucaptores pro bono gestu.* 3 *Co. Inst. c.* 76, 174.

THE common law has provided a proper method for the punishment of scandalous words, [spoken of magistrates,] viz. binding to the good behaviour: by *Holt, C. J.* in *Regina* vs. *Rogers.* 2 *Ld. Raymond* 778.

LANGLEY was indicted for speaking these words to the mayor of Salisbury, "you are a rogue and a rascal," and by Holt, C. J. the mayor had done well if he had bound the defendant over to his good behaviour. *Id.* 1029. 2 *Salk.* 697.

A MAGISTRATE may bind to good behaviour a person who abuses him. 1. *Cro.* 78.

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THE practice of requiring surety for the good behaviour from libellers prevails in the United States. Chief Justice M'Kean of Pennsylvania demanded it from Cobbett. 1 *Am. law journ.* 287. In the case of the *Commonwealth* vs. *Duane*, *id.* 168. Chief Justice Tilghman said: "I "will not say that there are not circumstances in "which surety for the good behaviour might be "exacted in cases of libels, before conviction; "on the contrary, I have no doubt, but there are "occasions, on which it may be proper and neces-"sary to insist on it." It is true the Chief Justice declared his opinion, that as a general rule, it would be better not to require it. But the defendant has for a long time persisted in the practice, and it is time to put a stop to it. It is better to prevent, than to punish crimes.

IT is also proper to be observed, that the case on which the defendant relies is generally believed not to have been very accurately reported. Ridgeway, in his edition of *Cases tempore Hardwicke*, mentions it among the cases doubted or denied to be law, and *p.* 102 *in notis* informs us that Lord Chief Baron Yelverton, in a case tried before him, *Griffin* vs. *Carleton*, mentioned the principle contended for as depending on a loose saying of Lord Cambden in Wilkes's case, and stated his apprehension that the report of it is not correct. The editor also mentions the cases of the *King* vs. *Rowan*, and the *King* vs. *Dren-*

nan, as recent instances of a contrary practice in Ireland.

MOTION OVERRULED.

A FEW days after, the defendant appeared to answer interrogatories, and admitting that he was the writer of the libel, averred on oath he had not, in publishing it, any intention of offering any contempt to the court, or any of its members.

WHEREUPON *Holmes* and *Davezac* contended he must be discharged: for any act in order to be punishable must be criminal, and nothing can be said to be criminal that is not done *malo animo*, and the defendant's answer must be taken together: no part of it can be rejected.

By the Court. Where the writing is so clear as to amount of itself to a libel, all foreign circumstances introduced upon the record are unnecessary, *Rex.* vs. *Home. Cowper* 683. The publication being confessed, the court has only to announce whether it amounts to a contempt or not. The intention, giving it the utmost latitude, can be taken only in mitigation. It cannot make the publication less a contempt—a man may not justify his conduct by saying, I have offended, but did not mean to sin. Denying any disrespectful intention is no justification, if the words published be, in the opinion of the court, contemptuous. *The People* vs. *Frier. Cains*, 485.

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TERRITORY *vs.* NUGENT.

WHEN I consider this part of the defendant's answer, with a view to determine whether it will bear me out in lessening his punishment, I am amazed. What am I to think of the conscience of a man, who calls his God to witness that he had no intention of treating one of the members of this court with disrespect, when he published these words to the world, "I have ever believ-"ed him (the Judge) capable of all that is base "and villainous?" What credit can I give to such testimony? It is my duty to inflict the highest punishment which the act of the Legislature authorizes.

HE was accordingly fined fifty dollars, and committed for ten days.

THE TERRITORY vs. *NUGENT.*

Notwithstanding the affidavit be sufficiently strong, no continuance will be granted if suspicious circumstances are not accounted for.

Martin. 1 m 108 47 1228

By the Court, MARTIN, *J. alone.** The defendant has been indicted and found guilty of the publication of a malicious libel, and has moved for a new trial on the following grounds:

1. Because a continuance was denied him, although an affidavit sufficiently strong to entitle him to it, was made.

BECAUSE the court rejected proper, and admitted improper testimony.

I. THE affidavit stated in the usual form, the materiality of the testimony of Cadet Bayon, and

* LEWIS, J. had quitted the bench. See note p. 101.

others—the defendant's diligence to obtain their attendance—their absence, and the probable expectation of their presence at a future term—denying collusion, &c. 2. His ill state of health, which disabled him from undergoing the fatigue of a *public examination.* 3. The absence of another material witness whom he had not been able to subpœna in time.

IT must be admitted that this affidavit was sufficiently strong, and the court ought to, and would certainly have granted the continuance of the cause on it, if such suspicious circumstances had not existed and been presented to the court, as must have created a belief that the affidavit was made with a view to obtain a delay which could not have been of any advantage to the defendant, except in protracting the trial, and affording him an opportunity of working on the public mind by his publications.

THE defendant, in an affidavit which he had caused to be printed, at the foot of a very gross libel, (evidently circulated in town to induce a belief that he was prosecuted and hunted down as a martyr to the liberty of the press, and that the court would act corruptly on his trial,) had stated that Cadet Bayon and the other witnesses named in the affidavit, would prove most of the facts charged in the libel, for the publication of which he was indicted. Hence the court could not but strongly suspect, as the defendant had

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expressed in several of his publications, his opinion that the court would not admit evidence of the truth of the facts charged in the libel, that he had made the affidavit with the consciousness that the witnesses to the materiality of which he had sworn, were inadmissible, and that therefore their absence from the trial could not be injurious to his cause.

As the court must have received an impression, from this circumstance, that the defendant allowed himself great latitude in his affidavit, it was thought a duty to the territory to require that he would state in a supplemental affidavit what fact was intended to be proven by the absent witness—His refusal to do so was calculated to induce the court to believe that no injury would be done to the defendant in ruling him to trial, notwithstanding the absence of this witness.

THE two first reasons for a new trial, having appeared to the court frivolous and groundless, it was not easy to approach the last without some degree of caution. The presence of the defendant in court, in apparent high health, the attendance of several gentlemen as his counsel, confirmed the court in the belief (which had been created by the consideration of the two first parts of the affidavit) that delay only was the defendant's object. His subsequent active conduct, in the course of the trial, precludes the possibility of thinking he suffered any injury on that score.

ON this part of the case, it does not appear that the court erred in denying the continuance on the affidavit produced.

II. A NEW trial is also asked, because the court rejected proper, and admitted improper evidence.

The truth of a libel not admissible evidence.

PROPER evidence is said to have been rejected, inasmuch as witnesses were not admitted to prove the truth of the facts contained in the libel.

IN criminal prosecutions, in the courts of this territory, the rules of evidence are, by an act of the Legislature, declared to be those of the common law of England. 1805, *c.* 50, § 33.

THE truth of a libel is not admissible evidence: neither is the bad reputation of the person libelled. 2 *M'Nally's Ev.* 649. *Hawk. P. C. ca.* 73. 3 *Bac.* 495.

IT is immaterial with respect to the essence of the libel, whether the matter be true or false, since the provocation, and not the falsity, is the thing to be punished, 4 *Blackst.* 150. *Wood's Inst* 424. For in a settled state of government, the party grieved ought to complain for every injury done to him, in the ordinary course of law, and not by any means to revenge himself by the odious course of libelling or otherwise. The case *de libellis famosis.* 5 *Co.* 125. *b.*

A LIBEL, though the contents be true, is not to be justified. *Hob.* 253. It is punishable though the matter be true. *Moor.* 627. It is a libel,

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though it be true, for it tends to private quarrels and revenge. 4 *Com.* 150.

A MAN may justify in an action for words or a libel, otherwise in an indictment. *per Holt, C. J.* 3 *Salk.* 326, 11 *Mo.* 99.

AND yet, although the law allows the party to justify in an action for words *spoken*, it does not for *written* scandal. 3 *Bac.* 495.

AFTER so many concurring authorities from the English elementary writers and reporters, it must be concluded that, according to the rules of the common law, the court could not have allowed the defendant in this case to have introduced witnesses to prove the truth of the facts charged in the libel. But it is contended that the people of this country have a constitutional right to the liberty of the press, and this principle of the common law, being irreconcileable with this right, is not binding on the court, although recognised by the act of the Legislature.

CONSTITUTIONAL, as well as all other rights, are to be exercised, so as they work no injury to others. *Sic utere tuo ne alios lædas.* Our fellow citizens in the states of Connecticut, New-York and Virginia, are in as full possession of this right as we. Yet their jurists recognise the common law principle complained of, in its full extent. In 2 *Swift's system, p.* 346, the distinction between the right of giving the truth in evidence in criminal prosecutions, and in actions for defamation, is laid down as the law of Con-

necticut, although the author informs us there has been no *express* recognition of it. The Supreme Court of the State of New-York admitted the principle in the case of *the people* vs. *Croswell*, and Judge Tucker, in a work avowedly written with the view of pointing out the discrepancies of the laws of Virginia from the common law, although he warns the student of the necessity of considering the reasonableness of the doctrine established in 5 *Co.* 125, does not hint at any modification of it, peculiar to the American States. 4 *Tucker's Bl.* 150.

IN Pennsylvania, the principle was abrogated in 1809, by an act of the Legislature. *Binney* 601—in North Carolina in 1802, *c.* 8, *p.* 215, and this is negative evidence that it was enforced in those States before those periods.

IF any doubt remained, the absence of any case, in which it was overruled in England, or such of the United States, in which no legal provision exists, would be conclusive, especially when it is considered that the French and Spanish laws, which were heretofore in force here, are conformable in this respect to the common law of England.

Mais quelque vraie que soit l'injure, lorsqu'elle est faite ailleurs qu'en justice, dans le dessein d'injurier, elle est punissable, quand même elle ferait connaître un crime dont il conviendrait de tirer vengeance pour l'intérêt public. 31 Repert. Un. et Rais. de Jurisp. *Verbo Injure, p.* 318.

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Celui qui a écrit ou lu un libelle . . . . ne sera pas reçu a demander a faire preuve des faits contenus dans le libelle. Salviat, Jurisp. Parl. Bord 350.

Ca maguer quiera probar aquel que fizo la cantiga, o rima, o dictado malo, que es verdad aquel mal o denuesto que dixo de aquel contra quien lo fizo, non deue ser oydo, nin le deuen cabar la prueba. 7 *Part. tit.* 9. *ley* 3.

FROM all these authorities, it appears to me safe to conclude, that in refusing to allow witnesses to be examined as to the truth of the facts charged in the libel, the court did not reject proper evidence.

IT is next complained that improper evidence has been admitted. The fact is, that a witness introduced by the Attorney General, being asked whether he knew who was the author of the libel in the indictment, answered he could not answer this question with safety. The Attorney General then asked him whether it was not within his knowledge whether the defendant was the author of it, he hesitated, and an appeal was made to the court whether the question was proper, the witness contending he might criminate himself by answering it. On the part of the defendant, the case of Willie, one of the witnesses on the trial of Burr, was read, in which Chief Justice Marshal said, that a witness is the sole judge whether he will, or will not, be committed by answering a question put to him—but it appears that the Chief Justice in this very instance compelled

the witness to answer. 1 *Burr's trial, p.* 245. In examining the abstract proposition attributed to the Chief Justice, it seems an immense latitude is left to the witnesses, if when a question is put to him, the answer to which cannot implicate him, he may screen the defendant, by refusing to answer, alleging that he may not do so without danger—an allegation to which common sense may give the lie, and in which he cannot be contradicted. The witness answered he knew the defendant was the author of the libel—he had acknowledged it to him. In reviewing anew the decision of the court, it does not appear how this answer could have criminated the witness, and the conclusion follows that, in this respect, no improper testimony was permitted to go to the jury.

NEW TRIAL REFUSED.

THE defendant's counsel now moved in arrest of judgment, that it did not appear by the indictment that the offence was committed within the jurisdiction of the court. The district was mentioned in the margin, and the offence was stated to have been committed in the city of New-Orleans, without adding the words *in the district aforesaid*, nor was the district referred to in any other manner.

THEY said that the true venue, by the laws of the territory, is the district. *The city of New-Orleans* is not of itself a sufficient description of the place. The Grand Jury must be of

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the proper district and vicinage. They commented on the excellence of the trial by Jury, and the necessity of a strict adherence to rigid rules in criminal cases. It must appear on the face of the indictment, that the court and jury have jurisdiction 2 *Hawk.* 303, and, as to the necessity of the inserting the venue, they cited 2 *Hale* 180.

THE Attorney General (Grymes) in reply cited 3 *Bacon* 220, where it is stated that when the county is in the margin, it will be implied that the town in the indictment is within it: but he relied mostly on the 33d section of the act of 1805, *c.* 5. which provides "that the forms of indict-"ments (divested however of unnecessary pro-"lixity).....changing what ought to be chang-"ed, shall, except as by this act is provided, be "according to the said common law."

By the Court. I believe the authorities cited by the defendant's counsel from Hawkins and Hale are conclusive. There are a number of others. The Court held so in the case of *Rex* vs. *Burridge*, 3 *P. W.* 496, and relied on the cases of *Parker* vs. *Ladd.* 1 *Sidney* 345 and *Rex* vs. *Fossett*, 12 *W.* 3. *Easter Term. B. R.* I have known the same principle determined in the Superior Court of North Carolina in the case of the *State* vs. *Adams*, for murder, at Newbern, in March term 1793, *Martin's notes*, 30; so that there can be but little doubt, unless the act of the Legislature of the territory has altered the common law in this respect.

INDICTMENTS by this act must be as at common law, but divested of unnecessary prolixity. But the defendant contends that in the present case there is a total omission of a material circumstance, not that it is too succinctly detailed. In the case in North Carolina, an argument was attempted to be drawn, in order to excuse the omission, from the niceties spoken of by Blackstone as condemned by Hale, but Williams, J. observed these were niceties of another kind. After all, it deserves great consideration, before the court should determine that they will consider as unnecessary any circumstance, which the judges who have preceded them, have held *essential* to the sufficiency of the indictment: whether the judgments of the individuals or individual who fills the bench, is to be the sole rule of decision, in criminal cases. I cannot alone, unaided nnd unchecked by any of my brothers, take on myself to go so far.

CURIA ADVISARE VULT. *Post* 169.

WEEKS vs. *TRASK.*

If the affidavit does not clearly show that a specific sum is due, bail cannot be demanded.

THE defendant had been held to bail on the plaintiff's affidavit that the account annexed to the petition was just and true, and that no part of it was paid, *except as far as the defendant might have an account against him for goods furnished;* a motion was now made for his discharge, on account of the insufficiency of the affidavit.

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Ellery in support of the motion. There are three acts of the Legislature of this territory, on the subject of bail, and the plaintiff does not appear to have complied with the requisites of any of them. The affidavit was doubtless grounded on the act of 1808, *c.* 16. The 10th section of it provides, "that in all actions where the amount "of the sum due is above one hundred dollars, "whether upon bond, bill of exchange, promis- "sory note, liquidated account, and in every case, "where the amount of the debt is ascertained "and specified, the plaintiff, on making affidavit "of the amount really due of any debt or de- "mand," shall be entitled to require bail. In the present case, the plaintiff has not sworn that any specific sum is due to him: he admits he has received goods in payment, but does not say to what amount. Indeed, for aught that appears in the affidavit, the defendant's account for goods may be larger than that of the plaintiff.

Hennen, contra. The plaintiff has sworn that the account annexed to the petition, is just and true, and that the defendant owes him the amount of it: it is true he has added that the defendant has an account for goods against him. When there are accounts between two persons, each of them may safely swear that the amount of his own account is due to him. The law does not require an actual settlement of accounts, which neither party can effect without the consent of the other: nor should a man be bound

to give credit for the amount of an account of which he has no accurate knowledge: all that is required of him is, that he should swear to the amount of his own demand.

Ellery, in reply. The relative situation of the parties in this case, appears from the petition and the plaintiff's account. It seems he was the defendant's overseer. From this circumstance it will be presumed that the goods with which he admits the defendant supplied him, were furnished to him in part payment of his wages. They therefore must lessen, and perhaps will balance, or surpass his claim.

By the Court, MARTIN, *J. alone.* This action appears to have been brought for work and labour done by the plaintiff, as overseer of the defendant. The affidavit admits that the defendant supplied the plaintiff with goods, the amount of which was to be deducted out of his wages, and the plaintiff qualifies his affidavit by swearing that the amount of the account is due, *except, &c.* The claim must therefore be considered as unliquidated, since it is sworn that the whole of it is not due. Certainly, if the whole be not due, the defendant cannot be compelled to give bail for the gross sum, and the affidavit furnishes no *datum*, according to which it may be reduced. Indeed, for any thing that is sworn to, it does not clearly appear that the balance will be found against the defendant.

BAIL DISCHARGED.

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BLANC & AL. vs. *THE MAYOR, &c. OF NEW-ORLEANS.*

Whether the Corporation of N. Orleans may lay a toll on boats at the Bayou bridge?

By the Court, MARTIN, *J. alone.* The complainants state, that they are owners of vessels navigating the Bayou St. John—that in pursuance of an ordinance of the City Council of New-Orleans, sanctioned by the Mayor, the officers of the corporation are preparing to collect a tax which will materially affect their respective interests, and suggesting that the City Council has exceeded its powers, pray the Court to declare the ordinance null and void, and in the mean while, to inhibit the Mayor and City Council, and their officers, agents or farmers, from collecting the tax until the matter in the bill shall be fully pronounced upon.

THE facts in the case are these:

BEFORE the year 1797, there had existed a dormant bridge across the Bayou St. John. At that time the Canal Carondelet being perfected, the Cabildo of the City of New-Orleans spent in building a draw-bridge, a sum of money, part of a larger one appropriated to another use. With a view to replace the money thus diverted, and to provide a fund to furnish to the repairs of the bridge, that body laid a tax of one dollar upon every schooner entering the Bayou.

IN the year 1808, the bridge being much damaged, the Legislature of the Territory authorised the Corporation of the City of New-Orleans to receive this dollar tax or toll, which was

extended to every embarkation except pirogues and fishermen's boats; making it the duty of the Corporation to rebuild the bridge, in the same manner and dimensions, and to keep it in repair. In the following year, so much of this act as related to the manner of building and the dimensions of the bridge, was repealed.

IN pursuance of these two acts, the corporation built a new draw-bridge, and on their attempting to collect the dollar toll, an injunction was obtained by the Orleans Navigation Company, which has since been made perpetual. The court expressing an opinion that "the charge "was onerous and without public utility, and in "violation of the rights secured to the Naviga- "tion Company, which were considered as par- "amount to the subsequent law authorizing the "city to impose the toll upon vessels."

ON the 21st of July last, the ordinance complained of was passed.

THE Council in the preamble begin by referring to the act of the Legislature for building the bridge and the decree of the Superior Court inhibiting the collection of the toll. They next state their right of laying taxes, and set forth, "that there had existed formerly a dormant "bridge on the bayou, so that the portcullis was "constructed only for the advantage of naviga- "tion, and consequently it is most equitable to "subject to the payment of a retribution all boats "&c. for whose passage it is necessary to open

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"the portcullis, for which purpose a person is "paid constantly to attend the same: whereas "the salary of the person employed to attend "the bridge, also the expenses of the repairs of "the said bridge and portcullis are to be defray-"ed by the corporation."

AFTER this preamble the Council proceed to decree that "for every boat, barge, schooner or "other vessel for whose passage it shall be ne-"cessary to open the portcullis on the bayou St. "John, shall be received a toll of two dollars."

ON these facts the complainants contend that the act of incorporation does not authorize the laying of this toll.

2. THAT this ordinance violates the constitution of the United States, which forbids the imposition of tonnage duty without the consent of congress.

3. THAT it is contrary to the charter of the Navigation Company.

4. THAT it is an infraction of the decree of the Superior Court which prohibits the collection of the dollar tax.

I. IN support of the first proposition, that the act of incorporation does not authorize the laying of this toll or tax, it is said, that it is in vain sought to be justified by the 6th section of the act of incorporation which the ordinance sets forth in the preamble in these words—"The Mayor and "City Council are authorized to levy taxes in "the manner that they may deem expedient, on

"real and personal property *situated within the* "*limits of the city*," for the boats on which the toll is attempted to be levied are not property *situated within the limits of New-Orleans.* The situation which authorizes a toll, must be a *situation with some degree of permanence.* It is true the word *situated* is not to be found in the English part of the act of incorporation, but it is implied. The translator of the act understood it so: the City Council understood it so, in the French and English copies of their own ordinance which they have published. Nay, the territorial legislature understood it so, for otherwise it would have been in vain to have authorized the City Council to receive the dollar tax laid by the Cabildo. For the City Council required no sanction but that of their ordinance, if the word *situated* be not necessarily implied.

ON this point I incline to admit the objection made by the complainants. For if it be not valid, the corporation may extend their power of taxation to negroes residing on distant plantations, or territories, occasionally coming to, or passing through the city, to the carriages, horses and baggage of travellers, to every pound of cotton coming down the river, to every ship and dollar's worth of goods entering it.

II. The second objection is that the ordinance violates the constitution of the United States, which prohibits the imposition of tonnage duty, unless with the consent of congress.

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THE imposition, it is contended by the defendants, is not a tonnage duty; because the amount of it is not ascertained by the number of tons—but the complainants reply, that a tonnage duty is a duty on *shipping*—in the same manner as a poll tax is a tax on *persons;* that as a corporation inhibited by its charter to lay a poll tax, would violate it, if it laid a tax on the human body or any of its members; so a prohibition to lay tonnage duty must imply a prohibition to lay a duty on the number of square inches or feet in the hull of a vessel, or the length of her keel, or on the vessel herself.

III. THE third objection is, that the ordinance is contrary to the charter of the Navigation Company.

IT is said that, as the legislature itself cannot violate this charter, it would be absurd to pretend that a corporation, which draws their existence from the legislature, may.

ON this point it seems to me that the act incorporating the Navigation Company being a private act, I cannot take in this suit any notice of it, and that the complainants, who derive no authority from that body, cannot invoke a charter which is private property.

IV. THE fourth objection is, that the ordinance is an infraction of the decree of the Superior Court which forbids the collection of the dollar toll.

THE decree here alluded to was made in a suit, the parties of which were the Navigation Company and the present defendants. The present complainants were not parties in it—As to them it is *res inter alios acta*. It could not impair, it cannot better, their rights.

BUT the City Council contend,

1. THAT they have the power of laying taxes independently of their act of incorporation, that power being incident to all corporations.

2. THAT the toll is not a tax or duty, but a fair retribution for services rendered.

3. THAT the application of the complainants is premature and improper.

I. THE first position does not appear to me supportable. It is true that corporations, the charters of which are silent as to the right of laying taxes, must have that right as incident to their incorporation; it rises *ex necessitate rei*.—The government of a city cannot be supported without money, any more than that of an empire, and as money cannot be raised without taxes, the authority to govern must necessarily draw with itself that of raising taxes.

BUT as the power of raising money is very liable to abuse, it is seldom granted without limitation and restraint, and this may be done *positively* by the exclusion of certain articles from taxation, or *negatively* by a specification of the objects of taxation—A specification which necessarily confining the power of the corporation

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to the detailed objects, must exclude it from all others.

THIS principle was recognised by Lord Macclesfield in the case of *Childs* vs. *the Hudson's Bay Company*. "A corporation has an implied "power to make by-laws, they can only make "them in such cases as they are enabled to do "by the charter: for such a power given by the "charter implies a negative that they shall not "make by-laws in any other case." 2 *P. W.* 209.

IN the city charter, power is given to lay taxes on property situated *within* the city. Such a power given by the charter, implies a negative that they shall not lay taxes in any other case—on property *without*.

II. It is averred that the toll is not a tax nor a duty, but a fair retribution for services rendered.

IT is not on the score of taxation alone that a corporation may direct or require the payment of money—if there be services which must necessarily be performed by their officers, or by persons whose capacities must necessarily be ascertained before they are allowed to render them, the corporation may by law fix the amount of their retribution—as a fee to their clerk for furnishing records—or a pilot. If, therefore, the genuine character of this imposition be once ascertained, the question will be solved.

The complainants urge that the real intention

of the corporation is not the remuneration of the hands employed in raising the portcullis, but to fill the city coffers. In the preamble, the ordinance brings to view the necessity of procuring money, and the failure of the extraordinary fund which the Legislature had provided beyond the ordinary legitimate means of raising supplies—manifesting, in the opinion of the counsel of the claimants, an intention indirectly to require the payment of the dollar toll, which the Superior Court has pronounced could not be demanded—transferring the place of exaction from the mouth of the bayou to the bridge, and as by this means the number of objects of taxation must be lessened, increasing the tax to four-fold. The complainants next draw my attention to the extravagance of the toll, considered on the score of a fair retribution—four dollars for passing and repassing. Hence they conclude that money is to be raised beyond the fair expense of raising and repairing the portcullis—even the whole cost of the whole bridge and its repairs. If this be the case, the court will be obliged to consider the toll as an imposition laid to fill the city coffers, on objects not within its reach, disguised under a call for a fair retribution of services rendered.

THE corporation endeavor to assimilate their right to the toll to that of the Cabildo to the dollar tax, and consider their's as much stronger, as the money is demanded on the raising of the portcullis only—but the complainants reply, that in

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the deliberation of the Cabildo, the tax is justified on the ground that great expenses had been incurred for the benefit of navigation, in digging the Canal Carondelet, which saved to the crafts the expense of carting their cargoes to the city, by enabling them to land and take them on the margin of the basin, near the hospital. "*Siendo este, (el canal* not *el puente) a beneficio de los que navigan desde el bayou para Pensacola, Mobila & otros pareses, quienes ahorran quanto les coste los carruages, respecto que ahora llegan para cargar & descargar hasta las imediaciones del hospital de la carita.*" It is clear that in this deliberation, the portcullis of the bridge were considered as the toll gates of a turnpike road (the canal.) But now that the canal has become impassable, there is no similarity in the pretensions, nor could there be, since the power of deepening the canal is vested in another corporation.

III. LASTLY; the defendants complain by their counsel, that the application for relief in the present mode is improper, or at least premature.

THE complainants might have waited till the toll was actually exacted, and then have brought their action for money had and received, to recover the toll, if it be illegal. To many, especially those who may not be resident of the neighborhood, this sort of remedy would have been worse than the disease. It would be more to their interest to submit to the imposition than to wait the tedious process of a suit which must

necessarily originate before a justice of the peace, with whose determination the party cast would not likely rest satisfied. If the injunction be granted, the question will much sooner be put at rest, and not only the present complainants, but a vast number of other persons will be relieved. The whole community has an interest in the solution of the point in dispute, and the mode of relief resorted to, appears to me the speediest, the easiest, and the cheapest. Therefore

LET AN INJUNCTION ISSUE.

DORMENON'S CASE.

If a fact be discovered which would have prevented the admission of an attorney, he may be stricken off the roll.

Martin. 1 m 129. 49 1018.

By the Court, LEWIS, *J. alone.** IN the month of June, 1809, on the motion of *Derbigny*, founded upon the affidavit of Mr. Guiet, the following rule was obtained against Pierre Dormenon.

"IT is ordered that Pierre Dormenon shew cause on the first Monday in August next, before the Superior Court, to be holden at the City Hall, at the City of New-Orleans, why his name as attorney and counsellor at law, should not be stricken off the rules of said court, for having (as it is alleged upon oath) headed, aided and assisted the negroes of St. Domingo, in their horrible massacres, and other outrages against the whites, in and about the year 1793."

* MARTIN, J. declined giving an opinion, as the case had been argued before he came to this court.

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At which day Mr. Dormenon appeared and denied the charge.

Whereupon a number of witnesses were called, and their examination taken in writing in open court; and the said Dormenon requesting time to procure exculpatory testimony, he was allowed until the first day of January following. Shortly after which day he appeared and submitted his proof and defence.

The examination in support of the charge set forth in the rule was lengthy, and is placed upon the files of this court. The witnesses appeared to be men of veracity—the credit of none has been impeached. It does not appear that either of them has had the least personal animosity towards Mr. Dormenon, or that they were actuated by motives of revenge or persecution, or felt any other sentiment than that which the recollection of their past sufferings, in the presence of the person whom they considered to have been a principal author of them, was calculated to inspire. And their testimony, if true, fully substantiates the fact charged in the rule.

To repel the force of this testimony, Mr. Dormenon has produced testimonial proof (which is not denied) that in the various public employments in which the witnesses have known him, his conduct has been without reproach, and in his private life, exemplary and much esteemed; and as an additional evidence of his having en-

joyed public confidence, he has exhibited a list of appointments in the judiciary, made by Gen. Rochambeau, on which his name appears.

THIS may be all true, but, as it relates to an epoch some considerable time subsequent to the year 1793, does not contradict the witnesses, who speak of his conduct only in that year.

MR. Dormenon, in his defence in writing, has laboured totally to discredit the witnesses against him, by attempting to shew gross contradictions and absurdities in their testimony. If there be not a perfect coincidence in the witnesses in all the details of their testimony, they certainly agreed upon the important fact.

IT is proved that Mr. Dormenon was a municipal officer under the commissaries Polverell and Santhonax, in the year 1793, when the general freedom of the slaves was proclaimed. This Mr. Dormenon admits.

IT is proved also, that in that character, wearing a scarf, his badge of office, he marched at the head of the brigands, acting in concert with their leaders, whose sole purpose and employment was the indiscriminate murder and massacre of the whites who refused to conform to the orders of the commissaries; and that their conduct in various expeditions in pursuit of the whites, was marked with unexampled cruelty and barbarity. It is equally in testimony, that Dormenon associated and was the intimate friend of De Lisle, Brissot, Faubert and Gai, who

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headed the brigands in the quarter of Jacmel, Jeremy, and its dependencies.

THERE are many circumstances detailed by the witnesses which warrant a belief of these facts. In fact, they are as satisfactorily proven, as that Dormenon was a municipal officer, and can with as little plausibility be denied.

HAD the same evidence of these facts accompanied Mr. Dormenon's application for admission to the bar, I have no doubt he would have been refused.—The court now being possessed of it, it is equally their duty to exclude him. It is considered that the safety of the country requires that no person who has acted in concert with the negroes and mulattoes of St. Domingo, in destroying the whites, ought to hold any kind of office here, however fair their conduct may since have been.

AND from the evidence, no unprejudiced mind can doubt that such has been the conduct of Mr. Dormenon.

RULE MADE ABSOLUTE.

See vol. II, 305.

ANONYMOUS.

Whether a sale under an order of seizure is to be as under a *fi fa?*

LEWIS, *J.* The sale of mortgaged premises, under an order of seizure, must be executed in the same manner as sales under writs of *fieri facias*, issued by clerks of court after judgment.

MARTIN, *J.* The acts of the Legislature of

this territory, 1805, 25, § 9, 1805, 46, 1808, 15, which point out the mode of selling property taken under the writ of *fieri facias*, make no allusion to the orders of seizure of mortgaged premises, any further than recognizing the power of issuing them. It seems to me, therefore, that sales under the latter must be conducted in the same manner as they were before the passage of the act regulating sales under a *fieri facias*. A different construction would give rise to a serious inconvenience, and in some degree to a violation of the constitution of the United States. For as in sales on a *fieri facias*, if the property does not bring a certain proportion of the appraised value, it must be sold on a credit of twelve months, under a mortgage—it would follow, if, on the order of seizure obtained on the mortgage, the property cannot be sold absolutely, the creditors would be legally compelled to take the property in discharge of the debt, at a certain proportion of the estimated value, or wait from year to year till somebody else should.

MITCHELL vs. *COMYNS.*

A sale in a notary's office is not a sale in market overt.

THE petition stated, that the plaintiff was the owner of a negro girl, who left his plantation, in the state of Maryland, without his consent or knowledge, and came to the city of New-Orleans, where she lived with the defendant, who

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was about to remove her to the province of West Florida. On the affidavit of one Hubbard, to these facts, a writ of sequestration issued, and she was thereupon apprehended.

AND now *Hennen*, for the defendant, pleaded in abatement, the want of a power of attorney from the plaintiff, or any authority from him for the institution of the suit.

By the Court. This is not pleadable in abatement: all that can be required, as the plaintiff appears to reside without the jurisdiction of this court, is that the person who prosecutes for him should give security for the costs of suit: but this is unnecessary, since security has been given before the issuing of the writ of sequestration.

THE answer did not deny the facts stated in the petition, but set up a claim to the girl grounded on a contract of sale duly entered into, before a notary public, in the city of New-Orleans, for a valuable consideration.

Hennen for the defendant. The purchase of the girl having been made from a person in open possession of her, the contract of sale being *bona fide* passed, in the office of a notary public, the defendant cannot be compelled by the judgment of this court to surrender the slave to her real, but till now latent, master, unless the latter refunds the purchase money. *Civil Code*. 488 *art.* 76.

THE office of a notary must be considered as a market overt, and it is in evidence that the vendor was a dealer in negroes. These two circumstances clearly bring the present case within the provisions of the Code.

ALTHOUGH by a statute of this territory, slaves are things, and conveyed as real property, yet in some cases they are considered as personal property: for larceny may be committed of a slave. If we therefore consider a slave as personal property, it will follow that his owner must be precluded from a recovery against a person to whom a *bonâ fide* transfer has been made, for a valuable consideration, although the transferer may have unfairly obtained possession of the slave.

Prevost for the plaintiff. Although the office of a notary public be a public office, and its acts generally of great public notoriety, yet it is not a place in which it may be expected, horses, cattle and negroes are usually brought for sale, as in a fair or market.

By the Court. The Code provides that if the thing stolen has been purchased at a public market, or a fair, or at a public auction, the former owner shall not recover it without reimbursing the sum paid by the purchaser. We do not know that it would suffice that a bill of sale should be executed in a market or a fair. The chattel purchased ought to be brought and the contract made there. Markets and fairs are places to which

Spring, 1810.
First District.

Mitchell
vs.
Comyns.

wares are brought and exposed for sale, where notice may be taken of the disposal of them—where the owner of lost or stolen property may look for and be apprised of the presence of it. It is otherwise of the office of a Notary Public. It is not a place in which bargains are made; altho' after the parties have agreed, they may resort thither to have the evidence of their respective rights and obligations recorded and perpetuated. The thing which is the object of the contract is very seldom brought thither, so that the redaction and execution of an instrument by a Notary Public does not expose a fraudulent vendor to detection in the same manner as the production of the thing at a market or fair of sale. The case is neither within the words nor the spirit of the Code.

Judgment for Plaintiff.

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

TERRITORY OF ORLEANS.

FALL TERM—1810—THIRD DISTRICT.

DETOURNION vs. *DORMENON.*

One disturbing a parish judge acting as sheriff, cannot be prosecuted for a contempt.

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119 1024

DORMENON, whilst Judge, and as such *ex officio* Sheriff, of the Parish of Pointe Coupée, conceiving himself insulted by Detournion, while he was engaged in selling, at auction, property which he had seized, upon an execution issued by himself, issued an attachment, and fined and imprisoned him for the contempt. Detournion having paid the fine and the costs of the prosecution, brought the present action to recover the moneys thus paid, with damages for the imprisonment.

Davezac for the plaintiff. Although the defendant, as Parish Judge, was *ex officio* Sheriff, the two offices were distinct. An insult offered him while he was acting in the latter, could not be considered as a contempt of his authority in the former; consequently the money, which he

FALL, 1810. Third District.

DETOURNION vs. DORMENON.

has compelled the plaintiff to pay, has been illegally received, and he is bound to refund it.

Fromentin, for the defendant. The defendant acted as Sheriff by virtue of his commission as Parish Judge. The two offices were inseparably united by law in his person, and derived from the same appointment and commission. An insult offered to him while he was discharging his duty as Sheriff, was a contempt of his authority as a Judge; as much so, as if offered when he was sitting on the bench for the trial of a cause. Whether the behaviour of the plaintiff at the auction amounted to a contempt, is a question of which the defendant had the exclusive cognizance. The power to punish it, in this summary manner, was vested in Parish Judges, to enable them to support the dignity of the office. The exercise of it was a judicial act, and if, in doing it, the defendant misconceived his authority, the error was a judicial one, for which he is not liable to a suit.

Davezac, in reply. This Court being the supreme tribunal of the territory, has constitutionally a controlling power over all inferior Courts and magistrates. Whenever any of them err or act in a tyrannical or illegal manner, this Court has the power and is bound to correct the error and redress the injury.

By the Court, MATTHEWS, *J.* & LEWIS, *J.* The

insult offered to the defendant, cannot be considered as a contempt of his judicial authority, which he had power to punish in this manner. This Court is bound to keep all inferior Courts and magistrates within the limits of their respective powers, and to punish wilful transgressions of them.

JUDGMENT FOR THE PLAINTIFF.

RULES OF COURT.

Friday, 23d November, 1810.

COURT RULES.

At the request and on the application of a large majority of the members of the Bar,

It is Ordered by the Court, that the following Rules be adopted, viz.:

1st. That before the first Monday in December next, every person practising in this Court as Counsellor or Attorney, shall elect, whether he will practice as Attorney or as Counsellor, for the term of one year from the time of such election:

2d. That after the said first Monday in December next, no person shall practice in this Court both as Counsellor and Attorney at the same time.

3d. That the duty of the Attorneys shall be to prepare, sign, and file all pleadings, to take out writs, and citations, to see that all entries and orders of Court be duly made, to superintend the summoning of witnesses, and setting down and preparing the cause for trial or argument, and to make all motions in Court which require no argument by the opposite party.

4th. That it shall be the duty of the Counsel to examine and correct all pleadings when required by his Client or the Attorney, to manage and argue every special motion, argument or trial. COURT RULES.

5th. All persons applying for admission to practice at this Bar, shall elect, at the time of making such application, whether they intend to practice as Counsellors or Attorneys, and the Judges expect that no one will apply to be admitted as a Counsellor until he shall have practised two years as Attorney, except such as have now commenced their studies with some practitioner at this Bar.

6th. That no person shall be permitted to practice as a Counsellor in this Court who shall practice as a Counsellor or Attorney in the Parish Court of the City of New-Orleans; this act not to extend to causes which may originate in the Court of Probates.

Saturday, 2d February, 1811.

Ordered by the Court, that it shall be the duty of the Clerk to keep a Motion Docket, upon which the gentlemen of the Bar shall place their motions for argument, with the dates of the rules thereon respectively obtained, and for what; which said motions shall be taken up on their seniority, beginning with the motions for new trials, to be then argued, continued or dismissed; and every such motion when continued, shall be placed at the foot of the said Docket.

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

TERRITORY OF ORLEANS.

FALL, 1810.
First District.

FALL TERM—1810—FIRST DISTRICT.

TERRITORY
vs.
BENOIT.

THE TERRITORY vs. *BENOIT.*

One indicted for a capital crime cannot be bailed.

THE Grand Jury had found an Indictment against the defendant for an assault with intent to murder, which is a capital offence.

Derbigny moved to have him bailed.

By the Court. It cannot be done. Bail is never allowed in offences punishable by death, when the proof is evident or the presumption great. On a Coroner's inquest finding a person guilty of a capital crime, the Judges have often looked into the testimony which the Coroner is bound to record, and when they have been of opinion that the jurors had drawn an illogical conclusion, admitted the party to bail. But as the evidence before the Grand Jury is not written and cannot be disclosed, the same discretion and control cannot be exercised, and the judges cannot help considering the finding of the Grand

Jury as too great a presumption of the defendant's guilt to bail him. We recollect no case in which it was done.

C. J. Marshall who, on the examination of Aaron Burr, had admitted him to bail, concurred in the opinion of the Court that he was no longer entitled to that indulgence after the Grand Jury found the bill against him.

BAIL DENIED.

HUDSON vs. *GRIEVE.*

A parish judge cannot appear in a suit brought up by consent.

THIS suit was originally brought in the Parish Court, and before any decision made thereon, was by consent removed into this Court.

The plaintiff employed *Moreau*, the Parish Judge.

By the Court, MARTIN, *J. alone.* Judge Moreau cannot appear as counsel in this case. The act of 1808, chap. 30, sect. 8, prohibits a Parish Judge to appear "in any case of appeal from a decision had before him." But the French part goes further: it forbids him *de s'y présenter pour les affaires qui auraient été déjà portées à leur tribunal*—to appear in any affair which may have been brought in their respective Courts.

IN this territory the laws are passed in both

FALL, 1810. First District.

LARRAT *vs.* CARLIER.

the French and English languages, and the signatures of the President and Speaker, as well as the approbation of the Governor, are put to a bill drawn in each language. There are therefore two originals of the same strength and validity, neither can control the other—they must be taken as two laws on the same subject, and construed together. The Parish Judge being excluded by the French part, is as well excluded as if he had been so in both originals.

LARRAT vs. *CARLIER.*

A cause will be continued though the plaintiff offer to admit the witness would swear to a certain fact.

THE defendant prayed a continuance on an affidavit stating a certain fact which he expected to prove by the absent witness.

Mazureau for the plaintiff. I will admit, at the trial, the fact to have been sworn to by the witness.

Brown for the defendant. If the counsel for the plaintiff will admit the existence of the fact, we have no objection to proceed to trial. But if the fact is only admitted as if sworn to, and witnesses are to be introduced to contradict it, by the detail of circumstances from which it is expected to draw an inference that the fact cannot have existed, and cannot have been sworn to without perjury, we will want the absent witness, in order that by giving his testimony with the same par-

ticularity he may show that he is entitled to belief.

By the Court, MARTIN, *J. alone.* When circumstances exist which give rise to suspect that a party insists on the presence of his witness at the trial for the sole purpose of delay, the court may impose terms on him. In this case, although the suit has been a considerable time on the docket, it does not appear that it ever was continued on the affidavit of the defendant. He has taken every legal means in his power to have the witness here, he not only subpœnaed him, but has taken process of attachment against his person, he may therefore demand the continuance *ex debito justitiæ.*

IF any term could be imposed, perhaps those offered by the plaintiff's counsel could not be considered too hard. I am however unable to recollect any case in which the court has ever gone so far, in Great Britain or the United States: except in the state of Massachusetts, in which, by a rule of the Supreme Court, the party praying a continuance, cannot have it, if his opponent offers what is now proposed to the defendant. *Amer. Precedents*, 570. I am unwilling to say that this rule is an improper one, but, I cannot impose it in a particular case, in which the refusal to accept the terms is the only ground of suspicion.

CONTINUANCE GRANTED.

FALL, 1810.
First District.

TERRITORY
vs.
ROSS.

THE TERRITORY vs. *ROSS.*

THE defendant was found guilty, under the act of 1805, chap. 50, sect. 15, of aiding and assisting in the false making and counterfeiting a bank-note of the bank of the U. States, the punishment of which is imprisonment for life at hard labour.

Counterfeiting a note of the bank of the U. S. is an offence against the territory.

Alexander for the defendant. The judgment ought to be arrested. The fact stated in the indictment is an offence against the United States. 8 *Laws U. S.* 257, for which congress has provided a different punishment: imprisonment for a period not less than three, nor more than ten years, and a fine not exceeding five thousand dollars. Crimes against the United States are exclusively cognizable in their courts. 1 *Laws U. S.* 55. There being therefore two laws on the same subject, the act of Congress, which is the supreme law of the land, *Const. U. S. art.* 6, destroys the validity of the act of the territory. The subject being legislated upon by the U. States, the territorial legislature could not act on it. The truth of this position appears from the act of Congress which contains an express proviso specially authorizing the States to pass laws on the same subject, making an exception in this particular to the general rule. *Exceptio probat regulam.* The proviso is confined to the state legislatures and does not extend to those of the territories. The statute therefore on which the defendant is indicted and has been found guilty, be-

ing contrary to the act of Congress, the supreme law of the land, is void and of no effect. It cannot support the court in giving judgment.

The Attorney-General, Grymes. The proviso in the act of Congress preserving, to the courts of the individual states, a jurisdiction under the laws of their respective states, over the offence made punishable under the act of Congress, impliedly secures the same advantage to the territorial courts and legislatures, which within their respective territories must have the same jurisdiction and power as are exercised in a state by its own courts and legislature.

By the Court. The proviso, in the act of Congress, seems to have been introduced rather to guard against a misconstruction of the enacting clause, than to create or preserve a right to the states. The passing counterfeited notes of any bank, to the people of any state, is an injury which they certainly possess the right of preventing, and if the same act becomes hurtful also to the interest of the United States, they must also have the power of preventing the commission of it. The two rights may exist independently of each other, and the exercise of it on one part cannot prevent it on the other.

IF the states possessed the right of preventing injury to their citizens from the making and passing counterfeited securities, they could not be deprived of it by the passage of an act of Con-

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ANDRE' *vs.* BIENVENU.

gress intended to guard their interest. The states could not be restrained in the choice of the means which they may see fit to adopt. In some of the states the forgery of bank notes is a capital offence, in others a high misdemeanor only.

IT does not appear to us that the validity of the act of this territory is in any degree impaired by the act of Congress.

MOTION DENIED.

ANDRE' vs. *BIENVENU.*

The witness must be named, and the nature of the evidence lately discovered, stated in order to obtain a new trial.

MOTION for a new trial, on the ground of new evidence discovered since the trial.

Duncan, against the motion. The affidavit is insufficient, for it does not state the name of the witness, nor the nature of the evidence. This court requires it before they will grant a commission to take depositions.

Ellery, contra. The act of 1805, *chap.* 26, *sec.* 6, provides, that a new trial shall be granted "whenever new evidence material to the cause "shall have been discovered after trial, which "the party by reasonable diligence could not "have discovered before." The affidavit has brought the case within the very words of the law. It is all that can be required.

By the Court. New trials are always in the discretion of the court, they ought to be enabled

to judge of the materiality of the facts for the proof of which another trial is desired. We required it before a continuance was granted in the case of *Mann & Bernard* vs. *Hunt & Smith*, *ante* 22.

MOTION DENIED.

MACARTY vs. *BAGNIERES.*

If a redhibitory defect be *mala fide* excluded, the vendor remains liable.

By the Court. On the sale of a negro it was stipulated, that the vendor would be liable to a warranty, in the sole case of one of the maladies specified in the Civil Code, and the plaintiff states that the negro was, in the knowledge of the defendant, addicted to the habit of running away, a circumstance which was not communicated to him.

THE defendant denies the habit imputed to the negro, and contends that if the fact be determined against him, yet the judgment of the court must be in his favour, because although the habit of running away be a redhibitory vice, yet the liability of the vendor, even in this case, is only an incident, but not of the essence of the contract of sale, and that he might lawfully, and did, stipulate that he should not be liable for this defect.

IT is in evidence that the negro was kept in jail for five months preceding the day of the sale, for running away; but the defendant contends that this is only *one act* of running away, which alone

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MACARTY
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BAGNIERES.

does not constitute *a habit.* But it appears that soon after the sale the negro ran away again, and the two acts are considered by the plaintiff as evidence of the habit. When the length of the confinement is considered, and when we reflect that it terminated only by the sale, we must believe that the defendant was conscious that the negro had such a habit or disposition to run away, as rendered it dangerous to allow him that degree of freedom, without which a negro is of little service. It appears also that some time before, the defendant had been obliged to send the negro to jail, and we have no evidence, out of the defendant's argument, of the nature of the fault he had committed. We are induced to conclude, from the presumption which rises from the long confinement of the negro, and the unwillingness of the defendant to trust him out of jail, that the negro was addicted to running away, in the knowledge of the defendant. This is a redhibitory defect in the civil code, 359, 367. It was so in the Roman law. *Servus fugitivus vitiosus*, and the plaintiff has cited a number of authorities from the Spanish jurists.

BUT the defendant contends that the parties have a special contract; the vendor has stipulated that he should not warrant against the defect complained of, and the plaintiff has impliedly renounced his right.

IN order that a redhibitory defect may be excluded from among those which give a right of

action to the vendee, it must have been excluded *in good faith* by a particular clause.

THE exception is in good faith, when the vendor, ignorant that the thing sold has a particular defect, stipulates that he shall not be liable to warranty in this respect, under an apprehension that the defect may exist. But if the vendor has knowledge of the defect, and instead of declaring it, as he ought to, stipulates he shall not be liable on account of it, his dissimulation is a fraud which will render him liable to the warranty, notwithstanding the clause derogating to the plaintiff's right. *L.* 14, § 9, *ff. de Ædil. Pothier Contrat de Vente*, 220, *n.* 110.

JUDGMENT FOR PLAINTIFF.

NEWCOMBE vs. *SKIPWITH.*

Montesano is within the territory of Orleans.

By the Court, MARTIN, *J. alone.* This is an action on which process of attachment has been sued out and levied on a negro woman, the property of the defendant, who is stated to be a resident of the village of Montesano, near Baton Rouge, under the 11th section of the act of 1805, ch. 25, which authorises the issuing of that process, "for the recovery of a debt due from a person residing out of the territory." The defendant alleging that Montesano is within this territory, has prayed that the process of attachment may be set aside.

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NEWCOMBE
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SKIPWITH.

IT is admitted by both parties that this village lies within that tract of country, of which the Governor of this territory has lately taken possession, under the proclamation of the President of the United States of the 27th of October last, and which was hitherto known under the name of West-Florida.

THE plaintiff's counsel has resisted the motion of the defendant's, on the ground that this proclamation and the proceedings of the Governor under it, were acts wholly unauthorised by law, and therefore have wrought no change in the national character of the people, nor impaired the right of the Spanish crown to the soil; further that, admitting that by these proceedings the right of the United States has ripened into a complete title by the possession, still the country could not by the proclamation be added to this territory, the boundaries of which are fixed by law, and can neither be enlarged or narrowed by the executive of the union.

HE has contended that, although the lands on the eastern bank of the Mississippi to the river Perdido were, before the peace of 1763, part of the *province* of Louisiana, they were at that time carved out and transferred to the British, who erected them into a distinct province, under the name of West-Florida, and that on the surrender of the British title to Spain, at the peace of 1783, although the provinces of Louisiana and West-Florida were placed under the administration of

one officer, yet they were still considered as distinct provinces—the administrator taking the title of Governor-General *de las provincias* (in the plural) *de la Louisiana y la Florida occidental*—that by the treaty of St. Ildefonso, Spain having parted with nothing but the colony or province of Louisiana, her title to that of West Florida is unimpaired; and the defendant must therefore be considered as residing within the Spanish dominions, and his property, in this territory, consequently liable to be taken hold of by process of attachment.

THE defendant's counsel has replied, that the province of Louisiana was ceded with the extent it had, at the cession, in the hands of Spain—and that it had when France possessed it—and such as it should be after the treaties subsequently entered into between Spain and other states:

THAT although the governor-general took the title mentioned by the plaintiff's counsel, yet the records of the country show that for certain purposes, the province of Louisiana, in the hands of Spain, extended to the eastern shore of the Mississippi. We frequently meet with papers entitled *Provincia de la Luisiana, Distrito de Natchez, Provincia de la Luisiana, Distrito de la Mobile.*

THAT France occupied the country on both sides of the river from the year 1698, when she began her establishments at Biloxi, under the name of Louisiana, till the 3d of November 1762, when by a secret treaty the island on which

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SKIPWITH.

stands the city of New-Orleans and her possessions on the western banks of the Mississippi, were ceded to Spain. It is true, almost seven years elapsed before the Spanish troops took actual possession of the country, but during that interval, since the court of France put no obstacle to the possession of the country, it must be intended between France and Spain, the possession of the former was the possession of the latter. On the same day, that the secret treaty transferred the western bank to Spain, were signed the preliminary articles by which the eastern was transferred to Great Britain, and the definitive treaty was signed on the 10th of February following—so that the title of France to all her possessions on the Mississippi, to the whole province of Louisiana, was transferred on the same day: The words *when France possessed it*, (the province of Louisiana) must refer to her possession anterior to the transfer, and cannot be satisfied, if the eastern bank of the Mississippi, on which Montesano stands, be excluded.

LASTLY, the province is transferred "as it "should be after the treaties subsequently enter-"ed into between Spain and other states." From the year 1763 till the peace of 1783, the province of Louisiana was confined to the island on which the city of New-Orleans stands, on the eastern bank of the Mississippi. In that year took place the only treaty *between Spain and other states*, which may have wrought any change—after it, the eastern bank fell again under the ad-

ministration of the Spanish officer who governed Louisiana, and may perhaps, though not strictly, be said to be part of Louisiana: but these latter expressions have no meaning unless they are intended to attach West Florida to Louisiana in the cession, in the same manner it was in the administration of government.

AND the counsel has concluded, that as West-Florida was ceded, and ceded as part of the colony or province of Louisiana, it follows under the act of congress that it is part of this territory.

THE right of the United States to the country latety occupied by them, appears to me improperly brought before the court. *Non nostrum.... tantas componere lites.* When a sovereign takes possession of a tract of country, respecting which the claim of a foreign power comes in collision with his own, his courts of justice cannot inquire into the validity of his title. It suffices for them that the new territory has been *de facto* annexed to the general domain. Whether the annexation violates the rights of another power is a *political*, not a legal question. In vain would they inquire into a case in which they could apply no remedy. If they considered the occupation of the ground as an illegal act, they could not order the sovereign's force to retire; if they judged it legal, they could not aid him in maintaining his possession. The country once in his power must be governed by his laws; and his judges must yield their aid in carrying them into execution.

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BUT it is not enough for the defendant to have shown that the place of his residence is within the dominions of the United States ; in order that he should have the benefit of his motion, he must show that it is within the territory of Orleans.

THE boundaries of that territory are established by an act of Congress, 7 *Laws U. S.* 112. On the eastern side of the Mississippi they include all that portion of country ceded by France to the United States, under the name of Louisinna, which lies south of the Mississippi territory.

ALL the lands ceded by France to the United States, are described in the treaty of cession by the appellation of Louisiana.

THE Congress must have considered West-Florida as part of the ceded territory, otherwise they would not have referred to the Mississippi territory as the country to the north of it. They would have given to the territory of Orleans a natural boundary, the bayou Manshac, which would have bounded it on the north-east, if West-Florida were not to make a part of it.

IN this act the intention of the legislature of the union to consider West-Florida as part of this territory is very strongly implied, and it most pointedly appears in another, that they viewed it as part of their dominions. 7 *Laws U. S.* 34. The President is authorised to erect the shores of the bay and river Mobile, &c. and west thereof to the Pascagoula, a separate district for the collection of customs.

IT follows that by *the law of the land*, by a treaty constitutionally made, according to the construction and interpretation of Congress, West-Florida has become the domain of the United States, and has been, by the act establishing this territory, included within the limits of it.

CONGRESS are the legitimate interpreters of treaties. To their interpretation every citizen is obliged to submit. They have the power to repeal them; for they may declare war, and a declaration of war is a repeal of a treaty of peace, which generally begins: *There shall be a firm, inviolable and universal peace, and a true and sincere friendship between, &c.* They may declare a treaty no longer obligatory, as in the case of the treaties with France, in 1798, 4 *Laws U. S.* 162, *chap.* 84. The power of repealing must include that of interpreting, *omne majus includit in se minus.* To the interpretation of the legislature, the President of the United States was bound to conform; he could adopt no other rule; and the law of the land having made West-Florida part of this territory, he was bound to see that it should be thereto annexed, if it could be done, without waging war against a nation with whom the United States were at peace. His proclamation was therefore legal: so were the proceedings of the governor under it.

IT is true, that till lately the officers of the territory, and till now its supreme judicial magistrates, have exercised no jurisdiction beyond the

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BROWN'S CASE.

bayou Manchac. An impediment existing thereto, to wit: the possession of the country by the armed force of Spain. *Inter arma silent leges.* The impediment is now generally removed, and exists only in a small corner: and the United States are now *de facto* in possession; their flag is displayed in it. The chief executive magistrate of the territory, and his officers, as well as the inferior judicial magistrates, exercise peacefully their respective powers. This court cannot refuse to recognise the inhabitants as intitled to the protection of, and subject to the laws of the territory.

ATTACHMENT SET ASIDE.

Ellery for the plaintiff.

Alexander for the defendant.

BROWN'S CASE.

A dishonest debtor is not entitled to relief, under the insolvent laws.

ON application to one of the judges, at his chambers, an order was obtained for a meeting of this man's creditors, and for a stay of all proceedings against him.

Porter, in behalf of D. Clark, one of the creditors, read an affidavit, stating that Brown had fraudulently departed from this territotry, carrying off large sums of money belonging to the United States, and several individuals, and had been arrested in London, on application of the minister of the United States, and having obtain-

ed his liberty, by surrendering the moneys at that time in his hands, had returned to this territory—that his having held the office of collector of the customs, for a long time before his departure, was a circumstance which precluded the possibility of his having met with mercantile losses, and it was not known that any particular misfortune had lessened his ability to discharge his debts.

A rule to show cause why the order for the stay of the proceedings should not be rescinded was granted, and

No counter-affidavit being offered:

By the Court. The relief granted by the legislature to insolvent debtors is not to be extended to dishonest ones.

THE voluntary surrender is a benefit which the law grants to the *honest but unfortunate* debtor. *Civil Code*, 194, *art.* 107.

HUMANITY, as well as policy, requires that relief in certain cases should be afforded to the *honest and unfortunate* debtor, who, from loss or misfortune in trade, may be unable to pay or satisfy the debt for which he is confined. *Preamble to the act of* 1808, *chap.* 16.

So that whether application be made to stop the pursuits of creditors, or liberate the debtor from prison, relief is to be extended to those who are both *honest and unfortunate.* Honesty alone will not be a title, if the debtor has come

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DEBON vs. BACHE & AL.

to his ruin by his own imprudence, without misfortune.

THE preamble of the act goes further. Justice equally demands that due care should be taken to prevent the fraudulent debtor from availing himself of that relief, and thereby depriving the honest and industrious part of the community of their property.

IN this case, the debtor is charged with positive fraud and dishonesty. The fact is not denied. He is unable to account for his alleged inability to meet his engagements, on the score of accident or misfortune. He solicits that relief which the legislature has provided for the honest and unfortunate. He does not enter the sanctuary of the justice of his country with clean hands; its ministers must answer, *Procul, procul estote, prophani.*

ORDER RESCINDED.

DEBON, CURATOR OF MORGAN, vs. BACHE & AL.

Whether an insolvent debtor can give preference to one creditor to the exclusion of the rest?

The plaintiff in behalf of the creditors of Morgan, claimed one third of the brig Holker, and both parties agreed to submit the cause to the court on the following statement.

"JOHN MORGAN, junior, was a merchant trading in the city of New-Orleans prior to, and at the time of his death. Prior to his death and the transfer hereinafter stated, he became in-

solvent, and largely indebted to the defendants and others, as appears from an inspection of his books. The defendants, merchants of New-York, repeatedly pressed for the balance due them, and John Morgan, afterwards, to wit: sometime in the latter end of May, among other property, made a transfer of one third of the brig Holker to the defendants.

"The following is the copy of a letter addressed by the defendants to John Morgan, and received after his death by the plaintiff.

"NEW-YORK, June 26, 1809.

"*Mr. John Morgan, junior.*

"DEAR SIR,

"WE fully received your sundry documents, say one third of the brig, assignment of property in England, and a letter from Prevost, relative to Leonard's notes. We need not say how much they surprised and perplexed us. Your letters, also, perhaps written under an agitated mind, are not so explicit as they ought to be, and excite consequent and alternate hopes and fears. You may be unable to extricate us, should the worst come to the worst, in the manner you might wish or expect; and it grieves us to say the frequent losses and disappointments we have met with from various quarters, render us very unfit to bear any more. Do, pray, send us a conditional draft on Page for the amount of insurance.

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"THE property in England will be tedious as well as troublesome to get at.

"WE had hoped to have found you had connected yourself with Wellman. He seems much your friend, and will, we hope, relieve your mind on his arrival, as we have no doubt of his friendly intentions. He had just sailed when your several favors came to hand. The full of your account is 13,000 dollars, which, with our shares, &c. of adventures, must make it nearly 20,000 dollars. Brown has received your letters as to the brig. As yet, nothing has been done in it, but no doubt he will do every thing that is right. With every body but Brown, things are as before. In the hope that you may be able to recover yourself, we have kept it a profound secret.

"BROWN has lately bought one half of the ship Atlantic; Elms owns the other half; of course he cannot address her to you.

"ATTEND to our account with expedition.

"WE mean that except Brown, no body can even guess at your letters to us, &c. Not that Brown is likely to act differently than what he always has, and which our former sentence might reasonably imply.

"We are, &c.

"R. BACHE & Co."

"IT is further agreed, that the letter herein referred to, addressed to the defendants, was sent by the Holker, which was consigned to them;

and that John Morgan died the 24th of August, 1809.

"*A. R. Ellery* for plaintiff."

"*James Alexander* for defendants."

Ellery for the plaintiff. The transfer of Morgan's interest in the brig is void. He was insolvent at the time of the transfer. It is so stated in the case.

AN insolvent is he who fails in his contract for want of goods. *Curia Phil. lib.* 2, *chap.* 11, *art.* 3, *p.* 406. *Ord. of Bilboa, chap.* 16, *n.* 2, *p.* 126.

THE disposition of an insolvent's property in favor of any one of his creditors is fraudulent. *Recopilacion de las leyes de Castilla, tit.* 5, *ley.* 19, *lib.* 5.

PAYMENT to a creditor in preference to the others is a fraud. *Cur. Phil. lib.* 2, *chap.* 9, *art.* 15. Fraud is presumed in those who fail. Presumptions against them are considered as proofs. *ib. art.* 16.

ASSIGNING over property to a creditor, in preference of the others, unless the debtor be compelled by legal means, or payment be made in the ordinary way as money, paid on a bill or note; but otherwise of the delivery of property even in satisfaction of a *bona fide* debt. *Cooke's B. L.* 426.

PAYMENT is fairly made when compelled by legal means; otherwise in case of a deliberate disposal of property. *Ib.*

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A preference has, however, been held to be fair, when given under fear of legal process, and not absolutely voluntary. 1 *T. R.* 155, *Thompson* vs. *Freeman.*

IN this case, the defendants knew Morgan's failing circumstances, and combined with him to acquire a preference to themselves over the rest of the creditors, and leave Morgan's property a mere wreck.

THE act of this territory, 1808, *chap.* 16, declares void, to all intents and purposes, all assignments giving an undue preference to one creditor, in exclusion of others.

Alexander for the defendants. The mere circumstance of a man's failure is not necessarily an evidence of fraud, and a failure may be fraudulent, and yet antecedent transactions held to be fair.

PAYMENT made to a creditor on pressing and repeated demands, has been considered to be compulsory, and therefore not fraudulent.

THE Ordinance of Bilboa, *chap.* 17, *sec.* 23, provides, that if a debtor, near failing, or before he makes his situation known, pays a debt not yet due, such a payment is to be considered as fraudulent. The converse proposition must be correct—that if he pays a debt already due, the payment will be deemed a fair one.

IT never was determined that a voluntary payment, security, or conveyance, made without contemplation of bankruptcy, although with

knowledge in the debtor, (and even in the creditor so paid) of the debtor's *insolvency*, and completed by delivery of possession, shall amount to an act of bankruptcy, or be void, unless it be attended with other circumstances of legal or actual fraud. *Cooper's B. L.* 147. *Hopkins* vs. *Gerry*, 7 *Mod.* 139.

PAYMENT at the instance or on the pursuit of a creditor is a *forced* payment; even a transfer of property. Payment not voluntary when there is an intermediate demand. *Baily's ass.* vs. *Bernard & others*, *Campbell N. P.* 416.

THE act of 1808, chap. 16, is an act *sui generis*, the provisions of which ought not to be extended to other cases by implication.

A debtor, in insolvent circumstances, may *bona fide* give a preference to one creditor to the exclusion of others, and such preference, though *voluntary*, is valid, unless done in contemplation of bankruptcy. And even if an act of bankruptcy be contemplated by the debtor, yet, if at the instance, and on the application of a particular creditor, he pays such a creditor, or assigns him property, such payment or assignment will be valid, as against the assigns of the bankrupt. 5 *Johnson*, 413.

FURTHER ARGUMENT. *See Post.*

BOURCIER & LANUSSE vs. *SCHOONER ANN.*

THIS was an action brought to recover the Provisions fur-

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nished for vessels create a privilege, which is not destroyed by her sailing.

amount of an account of provisions furnished the schooner Ann by the plaintiffs. The schooner had been suffered to proceed on her voyage, and during her absence, the owner became insolvent. Upon her return, she was seized by the plaintiffs, who claimed their debt, as one privileged upon the schooner.

Ellery for the plaintiffs. By the Spanish law, the doctrine of privileges is carried further than by the common law. Provisions furnished a vessel here constitute a privileged debt upon the vessel herself, in favor of those furnishing them; and this privilege is expressly stated in the *Curia Phillippica*, *lib.* 2, *cap.* 12, *art.* 25.

Duncan contra. The Spanish law undoubtedly gives the privilege claimed; but it is not one of an indefinite or indeterminable nature. It is similar to the lien, at common law, in favor of sailors who serve on board of a vessel, or carpenters who repair her. So long as they are actually or constructively in possession, the lien endures, but parting with the possession, severs the lien. Here we find, that the vessel was suffered to depart from port, and no steps taken to arrest her; of course, the plaintiffs gave up all claim to the vessel, and looked only to the owner for the payment of their demand. Under such circumstances, would sailors have a right to libel? and will the principle be carried further in favor of the purveyors of a vessel, than those who

serve on board of her? If this lien still exists, after the vessel has performed one voyage, would it not equally exist after she had performed a dozen? Where then shall we find the boundary or draw the line? Is it to be an indefeasible one, unaffected by time or circumstance? Has not the law fixed its limits and duration, as in the case of all liens, namely, during the possession by the claimant of the subject matter, to which the lien attaches, and which applies equally to factors, bailees, landlords, carpenters, sailors, &c. A voluntary parting with the possession, operates a severance of the lien; the moment this vessel was suffered to leave this port, this lien was dissevered.

Ellery in reply. Having shown the general principle, as established by the Spanish law, I left it to the opposite counsel to point out an exception in this case, if any existed. I am referred to liens, under the common law, where keeping possession is necessary to their preservation. But I never concluded this was a lien; I claimed it as a privilege. Liens, I know, imply possession on the part of the claimant, and are destroyed by a voluntary surrender; but a privilege does not imply such possession, and is destroyed only by novation or prescription. Possession is necessary to the formation and existence of the one, the other depends upon the quality of the debt; the one is rather the offspring of the common law;

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the other owes its existence to the civil. The privilege of workmen, for instance, upon the building upon which their sevices have been rendered, implies and requires no possession, actual or constructive, on their part, and though the building may have been sold and resold, still their privilege, which forms upon it a legal mortgage, follows it through all its changes and transfers, and enures until barred by a lapse of time, or a change of the debt. The privilege of those who provision a vessel, is placed upon the same footing, and ranked in the same class.—Neither is the present claim weakened by any laches or want of diligence on the part of the plaintiffs. The provisions furnished were for the very voyage from which the vessel has just returned, and probably were the last articles laid in before her departure. The plaintiffs never had possession of her, neither were they supposed to know the moment of her departure. These claims, too, are generally the last accounts settled by the owners. If the vessel had been sold, a new question might have arisen; though in that case, I contend she would have been bought with all her bills and incumbrances upon her; but here the property was not substantially deserted, it is in the hands of the syndics of the creditors of the owner.

By the Court, MARTIN, *J.* alone. The authority cited out of the *Curia Philippica* is conclusive as to the creation of the privilege, and I am not able to say that the departure of the ves-

sel destroys it. Provisions, as well as the cargo of a vessel, are often purchased at a short credit, and the bills are seldom brought in till the vessel has sailed. Both the authorities and principles are in favor of the privilege and its continuance.

JUDGMENT FOR PLAINTIFFS.

TERRITORY vs. *NUGENT*, *Ante p.* 117.

The offence must be expressly stated to have been committed within the jurisdiction of the court.

By the Court, MARTIN, *J. alone.* The defendant's counsel has moved in arrest of judgment, on account of the insufficiency of the indictment; it not appearing, with the requisite certainty, that the offence has been committed within the jurisdiction of this court.

THE words, *Territory of Orleans : First District*, are in the margin, and the offence is stated to have been committed *in the city of New-Orleans*. It is contended that the indictment ought to have gone further, in the description of the place; that the words, *in the district aforesaid*, ought at least to have been added, in order to connect the city with the district, in the margin.

IN support of this position, the counsel has first introduced the case of *the king* vs. *Fosset*, cited in 3 *P. Wms.* 497, in which the court said that "if the county is in the margin, and the "place, in which the act is supposed to have "been done, is not said to be in *comitatu prædicto*, it is ill."

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THE authority of Hales, in the *Pleas of the Crown, vol.* 2, 180, is next invoked. "*Suffolk* "in the margin, the indictment supposing a fact "done, *apud S. in comitatu prædicto*, is good, "for it refers to the county in the margin." From which it is implied, that without such a reference, it would have been bad.

THE attention of the court is next drawn to 3 *Bacon*, 99, *Verbo* INDICTMENT, where it is said to have been "*generally* holden that the want of an "express allegation of the precinct, where the "offence happened, is not supplied by putting it "in the margin of the indictment, unless it goes "further, as by adding *in comitatu prædicto*."

BUT the Attorney-General has replied, that the dictrict is in the margin of the indictment, which is sufficient: and he relies, first, on 4 *Comyns* 393, where it is said that, the place is sufficient, without the county, if the county be in the margin. Secondly, on *Hawkins P. C.* 220. "In some cases it has been holden—that "if the county be expressed in the margin, the "place in which the offence is laid, shall be in-"tended to be in the same county."

ON examining the last authority, I find that the author adds "but the greater number of authorities require a greater certainty."

HE cites, as to the first part of his proposition, 1 *Bullstrod*, 203, *Kelway*, 33. 1 *Siderfin*, 312, *and Croke James*, 167. The two first reports are not within my reach. The case in *Siderfin* is that of *Rex* vs. *Skerrett & others*, and

supports the proposition. That in *Croke* is *Leach's* case, which rather supports the converse.

IN order to show that a greater certainty is required, he cites 1 *Siderfin* 345, *Croke Eliza*, 606, 677, 738, 751, *Croke James*, 96, 276, 2 *Keble* 302, 3 *P. Wms.* 439.

THE case in *Siderfin* is in point, but is only an *obiter dictum.*

THE first in *Croke Eliza* is *Child's* case, in which the objection prevailed. The next is *Lewson* vs. *Reddlestone*, a civil case, in which the court rejected it. The following is *Ludlow's* case, wherein two objections were made: the first, that now under consideration; the other, that it did not appear before what justices the indictment was taken: the indictment was held insufficient. The last is *Hammond* vs. *the Queen*, in which the objection prevailed.

THE first case in *Croke James* is *Quarles* vs. *Searle*—it goes but little way to support the position, being a civil action. In the other, *Thomas's* case, it does not appear the county was in the margin.

THE case in *Keble* is *the King* vs. *Yarrington*, on an indictment for a riot, and fully supports the objection.

THE case in *Peere Williams* is the one relied upon by the defendant's counsel.

So that it must be concluded from the examination of the authorities cited by *Hawkins* to establish the principles contended for by the defendant, that his conclusion is correct.

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BUT the Attorney-General has urged that the repetition of the district in the margin, is an *unnecessary prolixity*, and the legislature of this territory has provided that the forms of indictments, *divested of unnecessary prolixity*, should be according to the common law of England. 1805, *chap.* 20, *sec.* 33.

THE forms of indictments are to be according to the common law of England.

Blackstone lays it down as a general rule, that the decisions of courts of justice are the evidence of what is common law. 1 *Comm.* 71. According to this writer, the judge's knowledge of that law, is derived from experience and study, from their being long personally accustomed to the judicial decisions of their predecessors; and these are the principal and most authoritative evidence that can be given of the existence of that, which forms the common law. It is an established rule to abide by former precedents, where the same points come again in litigation, as well to keep the scale of justice even and steady and not liable to waver with every new judge's opinion, as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private judgment, but according to the known law of the land; not delegated to pronounce a new law, but to maintain and expound the old one. *Ib.* 69.

IN the present case, I find, that according to the greatest number of decisions, and opinion of the most authoritative writers, the indictment has not that sufficient certainty, in the description of the place, in which the offence was committed, which the common law requires. In similar cases, the judges in England, and in the United States, have not deemed themselves warranted to pass judgment. I must follow their example, unless there be some clause in our statute book, which authorises a deviation from the marked path.

THE Attorney-General presents one. He says the legislature has authorised the judges not to require *unnecessary prolixity.*

How shall I ascertain what is *unnecessary prolixity ?* If I open the records of the cases which have hitherto been decided, I find that what the prosecutor for the territory calls an *unnecessary prolixity*, has been held, by wise judges, *an essential averment*, the absence of which vitiates the indictment.

BUT it is replied, that the legislature were conscious that, under the strict principles of the common law, there are frequent instances of culprits escaping the punishment due their crimes, through the over nicety of the judge, in allowing objections to the sufficiency of the indictment. This may be. But in thus requiring courts of criminal jurisdiction to swerve from the common law, some clue, some standard, ought to have

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been given them, besides human reason, that is as various as the physical and mental capacities of men. If this is to be the rule, the judge must not declare, but make the law, as he proceeds.

THE offence, charged in the indictment, being the publication of a libel against one of the judges of this court, it will not be readily imagined, that any of the others could be without a due sense of the necessity of punishing it; whatever may be the ideas out of doors, at the present juncture.

HOWEVER anxious any gentleman, honored with a seat on this bench, may be of the testimony of his own conscience, he will deem it his duty not to remain satisfied therewith. Jealous of his honor, as well as of the integrity of his mind, he will remember that his reputation is no longer his property, that his country views it as a chattel of which she considers herself as the owner—that it would be to betray her interest, to disregard the opinion of the public, an inflexible censor, who fails not to impute to the body the faults of any of its members—that a suspected judge, casts often on those among whom he sits, the fatal contagion of a tainted reputation.

UNDER these impressions, although I regret to suffer this opportunity of making a necessary example to pass by, I should regret still more a decision which would disable the people of this territory from saying, with our fellow-citizens of the

United States, and a celebrated British jurist, "The freedom of our constitution will not permit that, in criminal cases, a power should be lodged in any judge, to construe the law, otherwise than according to the letter."

JUDGMENT ARRESTED.

ASTON vs. *MORGAN.*

MOTION for leave to amend.

Amendment after answer.

Martin. 1m 175 45 795

THE original petition stated in substance, that the defendant, formerly of Philadelphia, but now of New-Orleans, being before that time indebted to the plaintiff £4000 Pennsylvania currency, the plaintiff, on the day of 1808, recovered a judgment for the said sum in the court of Common Pleas of Philadelphia, which judgment is unsatisfied and unreversed—and that the said sum is now due—Wherefore, &c.—and concluded with a prayer for general relief. The motion was for leave to file an amendment to the petition, which stated in substance—that the debt for which the defendant was formerly indebted as aforesaid, was incurred on the 7th day of July, 1796, on which day the defendant, with two others, obliged themselves, jointly and severally, by their certain bond or writing obligatory, &c. (which is hereto annexed, and prayed to be taken as a part of this petition), to pay to the plaintiff, &c. £4000, which, when due,

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not having been paid, &c. and the said defendant having departed the state of Pennsylvania, without having made provision therefor, the plaintiff instituted a suit against the defendant by foreign attachment, in the court of Common Pleas of Philadelphia, in which the judgment herein before mentioned was rendered against the defendant—but that the defendant having no property known to the plaintiff in Philadelphia, wherewith the said debt could be satisfied, the said debt is wholly unpaid and due. "Where- "fore your petitioner prays the aid and advice "of the court in the premises, and that for the "said debt, created as aforesaid, and for the re- "covery whereof the proceedings aforesaid, in "the court of Common Pleas aforesaid, have "been had, he may have judgment, and if, upon "examination of the said proceedings, the court "should be of opinion that the same are, from "any cause, invalid, or insufficient, to be a foun- "dation for the judgment of this court, that then "your petitioner may have judgment for the said "debt upon the said bond, or writing obligatory, "upon which the said proceedings were original- "ly grounded."

Smith for the plaintiff.

I. As to the fitness of the amendment itself.

THIS court acknowledges no specific forms of action, whether of the common or civil law. It asks of a party only a full and fair statement of his demand; it will even aid him in framing it, so

far as it may consistently with the substantial rights of the opposite party, and will, if possible, decide, in the first instance, according to the equity of the case, without suffering justice to be entangled in forms—judgment may be regularly rendered upon the petition so amended.—The amendment corresponds with the truth of the case —it sets forth the origin of the debt, only with more particularity of dates and circumstances, and concludes with a prayer for relief with a double aspect—*Mitford* 39, 1 *Atkins* 325. The defendant need not even alter his plea, [which is the general issue "That he is not indebted, &c."] as might have been necessary if his plea had been special. The proceedings on the foreign attachment in Pennsylvania are, alone, a sufficient foundation for the judgment of this court, or they are not—if sufficient, then judgment may well be rendered upon the whole case, as it will now appear, setting forth the foundation of those proceedings with more minuteness, and containing a prayer for relief in the alternative. If insufficient, justice requires that the plaintiff should recover his debt in some form, and the amendment asks only particularly for that which, perhaps, might be granted under the general prayer.

But if the amendment be refused, the plaintiff may discontinue and commence *de novo*, a course which would subject him only to further expense and delay, without advantage to the defendant.

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II. Is it any objection to this amendment, that the cause is at issue.

THE general rule that governs even the stricter practice of the courts of Great Britain, on the subject of amendments, is that they shall be granted, or refused, as may best tend to the furtherance of justice—*7th T. R.* 703—with these exceptions only, that the amendment be not wholly foreign to the case, that the plaintiff has not been guilty of any unusual delay, or vexatious practice—that the defendant be not surprised or oppressed—[the latter exceptions to the operation of the rule will not be urged in this case.]

ON this principle, in chancery, if, after answer, the plaintiff thinks his bill not framed to suit his case, he may obtain leave to amend and adapt it to his case as he is advised—*Mitford* 263. So, too, after a cause has been at issue, witnesses examined, and publication passed, a plaintiff has been permitted to amend by adding a prayer omitted by mistake.—*Mitford* 263, *referring to* 3 *Atk.* 583.

IN the case of the executors of *Marlborough* vs. *Widmore*, after plea of the statute of limitations pleaded, the declaration amended so as to charge the promise to have been made to the executor, instead of the testator—2*d Stra.* 890. So in *Rex.* vs. *Armstrong*, after issue joined and the cause had been carried down to trial, and not tried merely from pressure of business at the

assizes—plea withdrawn and substantially changed. *Andrews* 113.

IN *Rex.* vs. *Wilkes*, 4 *Burr.* 2568, information amended after plea pleaded, and this may be done though the defendant is thereby compelled to alter his defence—*same case, page* 2572, *Justice Aston.* In *Cross* vs. *Hayen*, 6 *T. R.* 543-4, penal action, leave was granted to amend the declaration after the cause was carried down to trial, and after the time limited for bringing a new action had expired.

IN *Petre* vs. *Kraft*, 4 *East.* 433, a penal action on the statute against bribery, leave was given to change the venue after issue joined, and after the time limited for bringing a new action, though without affidavit, that it was the same fact for which the action was originally brought.

Dover vs. *Maester*, *Ibm.* 435. the same point decided.

THE doctrine, that there must be something to amend by, is a nicety now exploded in the courts of Great-Britain.

Mullett vs. *Denny*, 2 *Stra.* 806, amendment may be made though there be nothing to amend by.

Wilder vs. *Handy*, *Ibm.* 1151, same point and after verdict.

Marshal vs. *Biggs*, *Ibm.* 1162, same point—also 1 *Stra.* 583. leave given to file a new bill to amend by.

7 *T. R.* 299, 300, an original may be amended.

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THE following authorities were also cited in support of the amendment—1 *Burr.* 397, *Rex.* vs. *Philips.* 7 *T. R.* 55.

Tomlinson and another vs. *Blacksmith*, 7 *T. R.* 132. *Bishop* vs. *Stacy*, 2 *Stra.* 954. *Ayers* vs. *Wilson*, *Doug.* 385. 2 *Doug.* 544. *Cowper* 843. *Washington* 318. 2 *Burr.* 755, *Aldon* vs. *Chip. and* 2 *Burr.* 1099, *Bonfield qui tam* vs. *Milner.*

Ellery and *Duncan* for defendants. IT is difficult exactly to know the principles which governed the practice of the Spanish tribunals upon the subject of amendments, as they had no reporters, and we are favored with no adjudged cases; and from the difference also of our proceedings, it may not, perhaps, be possible to find in that quarter opposite principles. At all adventures, had any principle or precedent there existed in favor of the proposed amendment, the industry of the counsel would have discovered it. Let us then look to those courts from which our forms of proceedings are copied, or to which they are closely assimilated, and to which also we are referred. In courts of chancery, great liberality upon the subject of amendment has always been indulged, and every necessary aid is there given to parties, in suffering them so to shape and model their proceedings, as will best adapt them to their case. But this principle has its limits: there is, in every cause, a point, where no substantial amendments can be

introduced, or change of the proceedings be suffered; and this is, after publication passed, and the cause set down for hearing. At this period, it will be found, that all amendments are excluded, except that of correcting mistakes, clerical omissions, or adding new or proper parties, but no new changes can then be introduced, nor any new material fact put in issue, which was not before in the cause. 1 *Har. Chan.* 94, 3 *Atk.* 371. *Goodwin* vs. *Goodwin*. *Dig. Chan. Rep.* 374. The party, however, has always his remedy, by a supplemental bill, or after a decree, by a bill of review. Neither is this principle affected by the authorities produced on the part of the petitioner: they apply generally to amendments made in a more early stage of the proceedings, or to the rectification of errors, or the insertion of matter omitted by mistake, like the prayer of a petition, which, perhaps, the court itself would have rectified or supplied. The amendment is contended to be a fit one, and the time reasonable, within which it ought to be introduced: but the fitness of it may well be questioned, and the late period when it is brought forward, even if intrinsically proper, would now render it unfit. About a year has elapsed since the filing of the petition, the issue has been joined, the answer filed, and the cause marked for hearing. Cannot this be deemed an unreasonable delay, and will not the court be scrupulous in admitting an amendment, after so great a lapse of time, and

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in so late a stage of the cause? Again, does the amendment proposed to be made, consist of any new matter discovered subsequent to the institution of the suit? No, the bond which is wished to be made part of the pleadings, has always been in the power of the petitioner; shall he be permitted, with no show of diligence, to depart from the uniform practice of the courts? If the introduction of this bond is so important, is there no other way, by which he may be benefitted by it? Can he not discontinue and institute a fresh suit in a form more to his mind? And as there is no seizure, attachment, or bail in the present case, he will lose no security by a discontinuance. Neither in point of time will he be much a loser, as we shall have to file a new answer to his amended bill. This amendment is objected to, not so much from any apprehension of its effect, when made, for we think it favorable to us, but to preserve a fair, certain and uniform practice. And if, under these circumstances, and at this late stage of the cause, this amendment is allowed, when shall we ever be ready for trial? New counts may be wished to be added, and new facts put in issue; thus the certainty of proceedings will be lost, the expense of suits augmented, and the practice of the court perplexed.

By the Court. When the court believes, that, by allowing an amendment, they will enable the

parties sooner to arrive at the determination of their differences, than by rejecting it, and the party who resists the amendment is unable to point out any injury which he is likely to sustain by the amendment; they will consider that injury would be done to both if they compelled the plaintiff to dismiss his suit.

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MOTION GRANTED.

ADELLE vs. *BEAUREGARD.*

THE plaintiff, a woman of colour, claimed her freedom.

Persons of colour are presumed free: negroes otherwise.

Paillette for the defendant. The plaintiff must prove that she was born free, or has been emancipated.

Ellery for the plaintiff. Even if the defendant could prove his possession of the plaintiff as his slave, still the Spanish law would require him to produce some written title, or at least that he acquired possession of her without fraud. *Partida* 3 *tit.* 14, *l.* 5.

By the Court. Although it is in general correct, to require the plaintiff to produce his proof before the defendant can be called upon for his, it is otherwise, when the question is slavery or freedom. The law cited by the plaintiff is certainly applicable to the present case. We do not say that it would be so if the plaintiff were a negro, who perhaps would be required to establish his right by such evidence, as would de-

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stroy the force of the presumption arising from colour: negroes brought to this country being generally slaves, their descendants may perhaps fairly be presumed to have continued so, till they show the contrary. Persons of colour may have descended from Indians on both sides, from a white parent, or mulatto parents in possession of their freedom. Considering how much probability there is in favor of the liberty of those persons, they ought not to be deprived of it upon mere presumption, more especially as the right of holding them in slavery, if it exists, is in most instances capable of being satisfactorily proved. *Gobu* vs. *Gobu*, *Taylor* 115.

THE defendant then proved he had brought the plaintiff from the West-Indies; had placed her in a boarding school in New-York, and in a few years after sent for her to New-Orleans, where she resided a few months with him, and left his house, and in a few days after brought the present suit.

THE plaintiff claimed wages for the time she had resided with the defendant, but the court, inclining to view her services as the return of gratitude for the trouble and expense attending her education, withdrew her claim therefor.

JUDGMENT FOR PLAINTIFF.

DAUBLIN vs. *MAYOR &c. OF NEW-ORLEANS.* FALL 1810.
First District.

Corporation may remove houses built in the streets.

Martin. 1m 185 52 2102

THE Plaintiff stated he was in possession of a lot of ground in the faubourg St. Mary, whereupon he had built a house and defendants sent the forçats or galley slaves, who pulled down and destroyed the house and drove off the plaintiff from the premises.

THE defendants admitted the demolition of the house by their order, but justified it on the ground, that it was a new house, and was built in one of the streets of the said faubourg. Issue being joined:

THE city-surveyor proved, that hearing that the plaintiff was building a house in the street he went on the premises, and drew the line of the street, on which he directed the plaintiff to place the house, at a time when three tiers of bricks only were laid. Nevertheless the plaintiff went on, and placed his house eighteen feet in the street.

SOME doubt arose on the accuracy of the line drawn by the city-surveyor, but the cause principally turned on the question whether admiting that the house was in the street, the defendants could lawfully demolish it.

Duncan and *Moreau* for the defendants. Any one may pull down or otherwise destroy a common nuisance as a new gate or even a new house erected on the highway. 3 *Bac. Abr.* 687.

FALL 1810. First District.

DAUBLIN vs. MAYOR OF N. ORLEANS.

If one puts wood in the street before his house it is a nuisance. 3 *Com. Dig.* 28.

THE Corporation are by law authorised to make bye-laws for the regulation of the streets *Acts Leg. Co. p.* 15, and in pursuance thereto they have enacted, *Ord. Corp. p.* 87 that every house to be built should be erected on the line of the street, to be given by the city-surveyor, and that every building erected in the street should be demolished at the expence of the owner.

BY the 3 *part. lib.* 23. *tit.* 32. If a house be built on the street, or on the commons, the Corporation may destroy it. *Greg. Lopez's* note.

Mazureau and *Paillette* for the plaintiff. The authorities cited from *Bacon* and *Comyns* are evidence of the common law of England, but we are not in this territory regulated by that law.

THE ordinance of the Corporation cannot avail the defendants, because it is contrary to the Constitution of the U. S. and contrary to the laws of the territory, and their power to make ordinances is limited by their charter—their ordinances, when contrary to that constitution and those laws, are void.

THE laws of Spain as they were at the cession, are the laws of the territory, and every ordinance of the corporation repugnant thereto is void.

THE ordinance cited is contrary to one of the *Leyes del Ordonamiente Real, Ley.* 2. *lib.* 3, *tit.* 14. re-enacted in the *Recopilacion de Castilla, Ley* 1. *lib.* 4, *tit.* 13. to *Curia Philipica* 175 *Art:* 22.

THESE laws expressly provide that if the corporation of any city are dissesed of any of their land, they shall bring suit therefore, and if they use force to regain possession they shall forfeit their title to the premises.

By the Court, MARTIN *J. alone.* There is no necessity to determine whether according to the laws of this territory a nuisance may be abated by any individual.

THE ordinance of the corporation is not repugnant to the constitution of the U. S. nor to any of the laws of the Territory.

THE Spanish Laws quoted by the plaintiff's counsel relate only to lands belonging to the corporation, as their private property.

STREETS are not the property of any one, they belong to the whole community. They are not the property of the corporation, for if they were the corporation could exclude the whole world from the use of them—on the contrary the use of them belongs to the whole world. They are *hors de commerce*, and cannot be the object of a contract of sale, *Pothier Contract de Vente* 13.

THEY have not seised the premises—they have only removed an obstruction—they have taken no possession.

FALL 1810. First District.

WHETON vs. TOWNSEND.

THE 3d *partida* and the commentary of *Greg. Lopez* are authorities in point and accord with the Roman Law. *Curent autem.....Ædiles....ut nullus effodiat vias—neque construat in viis alquid....si liber demonstretur ædilibus. Ædiles autem mulctent eum secundum legem, and quod factum est dissolvant; Dig. lib.* 43, *tit.* 10.

JUDGMENT FOR THE DEFENDANTS.

WHETTON vs. *TOWNSEND.*

Affidavit made before the debt is payable, bad.

Morse, had obtained an order to arrest the defendant, on a petition dated the 7th of February, to which was annexed the plaintiff's affidavit, before a notary in New-York, stating that the defendant owed him a sum of money on a note which would become payable on the 13th of February and the affidavit of the plaintiff's agent in New-Orleans, stating his belief of the defendant's intention to remove, &c. under the 22d section of the act of 1807, *chap.* 1.

Alexander for the defendant. The order must be rescinded and the defendant discharged, for the affidavit is insufficient. The plaintiff has made oath at a time when there existed no debt.

By the Court. The oath was made seven days before the note was payable. There is not any fact sworn to which could justify the order to arrest.

ORDER SET ASIDE.

BARRET vs. *BAIL OF LEWIS.*

FALL 1810.
First District.

Proceedings against bail stayed, on collusion of plaintiff.

AN action having been brought on several notes of hand originally payable to Jno. Wood & Co. executed by Lewis in Baltimore. The defendant, some time after, was confined for debt, made application to one of the Judges for the benefit of the insolvent law of the state of Maryland, executed a bond for his appearance on a future day to answer the allegations of his creditors, was liberated and came to New-Orleans, where the plaintiff, indorser of said notes, followed him and held him to bail. Lewis returned to Baltimore, in compliance with the condition of his bond: in the mean while judgment was had on the notes, and the plaintiff proceeded against the bail.

A motion was now made to stay the proceedings, supported on an affidavit of Lewis and one of Shepperd, the bail. Lewis deposed that a notice of his intention, to apply for the benefit of the act of insolvency, had been timely served on one of the firm of Jno. Wood & Co. and of the day on which he had been bound to appear and answer the allegations of his creditors. That he had appeared accordingly and the matter had been postponed, from day to day, on the motion of the counsel of the firm, with the consent of the deponent to give his creditors the opportunity of examining his books, papers and transactions in business. That the matter

FALL 1810. First District.

BARRET vs. BAIL OF LEWIS.

being thus delayed till the latter part of the term, the counsel of the firm and that of Atterbury, another of his creditors, filed allegations which imposed upon him the necessity of procuring evidence from New Orleans, so that the consideration of the allegations could not take place during the term and were accordingly postponed till the next. The deponent further made oath of his belief that the allegations were filed with a view to delay him in obtaining his discharge, until judgment could be had against him in New-Orleans: and his bail could be fixed with the debt, and to the declaration of one of the firm of their expectation of saddling the bail with the debt.

Shepperd, the bail, stated in his affidavit the inability of Lewis to pay the debt, that the testimony had been procured and forwarded to Baltimore, and would in the deponent's belief enable Lewis to refute the allegations of his creditors, and that the plaintiff was a partner of Jno. Wood & Company.

Prevost and *J. R. Grymes*, in support of the motion. The collusion between the plaintiff and his partner, in Baltimore, in attempting to prevent Lewis from obtaining his certificate till it would be too late for his bail to plead it in their discharge, in the present action, will no doubt induce the court, if they grant no other relief to suspend the proceedings against the bail, till it

be known whether Lewis will obtain his certificate. The bail is always treated with indulgence, where no injury is thereby done to the plaintiff. 3 *Dallas* 478.

No injury would be done to the plaintiff by a stay of the proceedings, for if the principal was surrendered or in custody upon an execution and afterwards obtained his certificate, the court would discharge him, as they would the bankrupt's property in the hands of the Sheriff. 2 *Strange* 1196. 1 *Bos. and Pull.* 427. 1 *Burr.* 244.

THE principal is priviledged from arrest, in Maryland, in consequence of the Judge's order there and therefore the bail could not take him there untill the proceedings on his application for relief are ended and his final discharge granted or denied, 1 *Bac.* 342, 3 *Dallas* 378.

ALL the plaintiff ought to expect is that the bail may stand as security for the principal's final discharge or surrender. 1 *Strange* 419, 3 *Dallas* 478.

Duncan and *Alexander*, *Contra*. The authorities cited are decisions on the doctrine of bail as known to the common law of England, or regulated by British statutes. The territorial statute gives a remedy, tho' much more summary, bearing a considerable analogy to the English *Sci. fa.* It allows us, on the return of the *non est inventus* after ten days notice, to obtain

FALL 1810. First District.

ELMES *vs.* ESTEVAN.

judgment on motion against the bail, unless good cause be shewn. When at this point we are precisely where bail on a *Sci. fa.* would be when called upon to shew cause. The same cause which could successfully be shewn in England would prevail here, with perhaps the exception of a forced surrender, as our statute contemplates a voluntary one only.

By the Court. Bail is required in this territory for the purpose of securing the plaintiff from the flight of the defendant and for no other purpose. It is the same in England. The court will therefore think themselves justified, if in the attainment of justice, they grant to persons who become bail the same indulgence, which the British Judges have granted, when it does not appear that the indulgence was granted there in pursuance of a statutory clause, which is not to be found in our Code.

THEY protect the bail against collusion. So must we. The case appears sufficiently strong to induce us to give time to the parties to place the whole matter fairly before the court.

PROCEEDINGS STAID.

1m 192
50 624

ELMES vs. *ESTEVAN.*

PENDING the suit, the defendant made a *cessio bonorum*, and the plaintiff proceeded to judgment.

Brown for the Syndics. The judgment is irregular and ought to be set aside. When a debtor cedes his goods to his creditors, the Judge who orders a meeting of the creditors, directs a stay of proceedings. It is therefore irregular to go on to judgment in suits against him. Farther, the cession operates the civil death of the debtor. He cannot consequently remain a party in a suit.

Prevost for the plaintiff. The suit originated by a writ of seizure, which is a proceeding *in rem*. On the cession the premises pass to the creditors *cum onere*. A creditor who has a lien on any part of the estate of his debtor, is not bound to take any notice of an assignment made by the debtor. Whoever has acquired any interest in the premises is sufficiently notified by the seizure, and will on application be admitted to defend the suit.

By the Court. The Judge's order stops all proceedings against the debtor, whether they be carried on against his person, general estate, or any part of it. All proceedings against his person or property are irregular. He becomes by his cession disinterested, in a certain degree. His rights pass to other persons, and cannot be affected by legal proceedings to which the new owners are not parties.

JUDGMENT SET ASIDE.

FALL 1810.
First District.

BAKER vs. *HUNT & AL.*

Attachment on the oath of a third person, when bad.

Alexander moved to dissolve an attachment issued on the affidavit of a third person, who did not state himself to be the plaintiff's agent, nor appeared to have any personal knowledge of the claim.

Duncan, contra. The law requires only that the debt be sworn to. In this case, however, the objection comes too late, for the property attached has been bonded.

Alexander for the defendant. It was bonded by the garnishee and likely with a view to obtain relief by shewing the illegality of the process.

By the Court. The Judge who orders the attachment must be satisfied of the justice of the plaintiff's demand. The oath of a person who does not appear to have any knowledge of it, except what he receives from the principal who does not swear, can go but little way to satisfy him. If the process issued improperly, the property might be rightfully obtained by giving bond, without thereby waving any legal objection.

ATTACHMENT DISSOLVED.

JOHN GRIEVE'S CASE.

Proceedings not stayed till schedule filed.

Cessio Bonorum. The Court refused to stay proceedings and appoint provisional syndics, no schedule, accompanying the petition : time being prayed to make one.

MONRO vs. OWNERS OF SHIP BALTIC. FALL 1810. First District.

Freighter carrying away his goods, discharges the ship.

THIS was an action to recover damages for a stated embezzlement of sundry goods taken out of several boxes, shipped for the plaintiff's account. *Plea*, the general issue.

THE evidence was that after the arrival of the ship, the boxes were landed on the levee and carted to the plaintiff's warehouse. Afterwards some customers attending, one of the boxes was opened to shew them the contents, and a deficiency was discovered. The master of the ship was immediately sent for, and an examination of the boxes took place in his presence: several of the boxes evidently appeared to have been broken in, and a witness examined two or three days after, deposed that when the goods were landing, he had noticed that several ropes round the boxes were broken.

Brown for the defendant. The liability of the master ended, when the goods were received by the clerk, on the levee, and carted away to the warehouse. On the arrival of the ship, the freighter is entitled to the delivery of his goods—he is generally unknown to the master—his cartmen, clerks and servants are still more so. Neither is the master to be accountable for the infidelity of the freighter's agents at the place of shipment. His signature, at the foot of the bill of lading, proves only the general, exterior and ap-

FALL 1810. First District.

MONROE vs. OWNERS OF THE SHIP BALTIC.

parent quality of the packages receipted for. He is to deliver the goods, as he received them. 1 *Valin, Ord. de la Marine.*

Prevost for the plaintiff. The bill of lading proves that the goods were *shipped in good order and well conditioned.* There is evidence that they were not landed thus. One witness swears the ropes round the boxes appeared broken. The freighter was guilty of no neglect in not examining the contents of the boxes before his clerk took them away : he could not open the boxes, and spread the goods on the levee.

By the Court. The receipt of the goods by the consignee, without any objection made, is conclusive evidence of his being satisfied, that they are in the condition in which they were to be delivered. If the consignee discovers, from the outward appearance of the boxes or bales, that they have been opened, he ought either to refuse to receive them till the contents be examined, or inform the master of his suspicion, and require his attendance, or that of some of the persons in the ship, at the warehouse or other convenient place. But if he takes them away, out of the sight of the master, without saying any thing, and deposits them in such place where he and his agents only have access, he will be precluded, by his absolute and unqualified acceptance of the goods.

JUDGMENT FOR DEFENDANTS.

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

TERRITORY OF ORLEANS.

SPRING TERM—1811—SECOND DISTRICT.

LEWIS vs. *ANDREWS.*

SPRING 1811. II. District.

Court cannot try a fact, unless the party has an opportunity of asking for a jury.

Baldwin for the plaintiff, produced the defendant's power of attorney, and moved that the court might, on proof of the execution of it, order judgment to be entered.

By the Court, MARTIN, *J. alone.* It cannot be done. The proof of the execution of the power, is a matter of fact which is properly triable by a jury. The defendant, having had no opportunity of praying for a jury, cannot be said to have waved his right thereto.

MOTION DENIED.

GRAHAM vs. *FORKER & ELAN.*

Leaving petition at a defendant's house, no white person being there is bad.

ONE of the defendants having left the territory upwards of one year, and the process being left at the house in which he last dwelt, there being no white person in the family :

SPRING 1811. II. District.

PORCHE'S HEIRS vs. POYDRAS.

The Court, MARTIN, *J. alone*, held the service was bad.

Butler for the plaintiff, *Turner* for the defendants.

PORCHE'S HEIRS vs. *POYDRAS.* *

Decisory oath cannot be tendered in this territory.

By the Court, MATHEWS, *J. alone.* This action was originally instituted in the Parish Court of Point Coupee on a writing subscribed by the defendant.

IN the course of the proceedings the plaintiffs appealed to the conscience of the defendant, and required him to support his plea of payment by his oath. On his doing so, the Parish Judge gave judgment against the plaintiffs.

THE defendant's counsel contends that this mode of a party being interrogated by his adversary and compelled to answer on oath or refer the oath to his adversary, on the point in dispute, is authorised by the civil law, and that the oath thus taken by one of the parties, called *juramèntum decisorium*, is conclusive.

THE oath, according to the principles of the Roman law, can be tendered in two ways: either by the judge, where the scales of evidence being poised, he is permitted to satisfy his conscience by an appeal to that of one of the parties; or

* This case and the following were determined at a preceding term. The opinion of the court is extracted from the minutes.

when one of them tenders it to the other, with a view to the proof of a fact important to the prosecution or defence. But if the fact respecting which the oath is tendered, be immaterial to the success of the party who proposes it, the judge will reject the application.

IF the present suit had been prosecuted according to the rules of practice, which governed the tribunals of this country under the Spanish government, the production of the writing under the signature of the defendant, acknowledged by the pleadings, would have entitled the plaintiffs to an immediate execution, or it would have had the force of a judgment, *aparejada executoria*, in the language of those tribunals.

ON an order of seizure being awarded the defendant might have opposed the proceedings by a plea of payment. In this case the solution of the question, payment or no payment, would have rendered the establishment of the fact of payment a point necessary to the defendant, in his defence only, not at all important to the plaintiffs, in the prosecution of their right. If the defendant, therefore, had refused to answer, nothing could have been taken for confessed or admitted.

IN this view of the case, I think the oath was improperly tendered, and the plaintiffs could not have been compelled to take or refer it—that it is a nullity, and affords no evidence.

BUT, proceeding according to the acts of the

SPRING 1811. II. District.

MAGDELEINE vs. MAYOR.

legislature of this territory, it appears to me the parties cannot give evidence in any suit, except by answer to interrogatories, under the act of 1805, C 6. which virtually repeals all rules relating to the decisory oath.

JUDGMENT FOR THE PLAINTIFFS.

MAGDELEINE vs. MAYOR.

Mother's right to the guardianship.

By the Court. MATHEWS, *J. alone.* The plaintiff demands an account of certain property left to her children by the will of George Olivar, their natural father, contending that she is by law and by the will, tutrix or guardian of her said children, and that therefore, she is the only person entitled to the administration and management of their property, and further, that she has, by the will, an indisputable title to a portion of the property during her life.

THE answer admits the existence of the will, but traverses her right to the guardianship, which she claims under the appointment of the court of probate of Pointe-Coupee.

TWO questions arise, 1st, is the plaintiff by the will or by law, guardian of these children?

2. If she is, could the tutorship be given to another person, to her exclusion?

I. IT appears, on the face of will, that the testator ordered that the plaintiff should remain in possession of the property, to cultivate and

manage it, till the age of majority of her children. It, therefore, may be fairly inferred that although she be not expressly named as guardian, the intention of the testator was that she should act as such.

II. IT appears, by the record produced by the defendant, that he derives the guardianship from the civil commandant of Pointe-Coupee and that he received it in the month of November, 1804, at which time it is very doubtfull, whether any other tribunal, than the superior court sitting at New-Orleans, was competent to appoint to the office, which the Spanish laws, then in force, call a tutor dative, which is not to be given, when there exists a testamentary or legitimate tutor.

THE plaintiff was, therefore, if not expressly by the will, at least by the said law, the tutrix or guardian of her children, and the appointment of the civil commandant is consequently void.

JUDGMENT FOR THE PLAINTIFF.

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

TERRITORY OF ORLEANS.

SPRING TERM—1811—FIRST DISTRICT.

DURNFORD vs. *CLARK.*

SPRING 1811. First District.

Witness cross examined on a new point.

MOTION for a new trial. During the trial, a witness having been introduced for the plaintiff, was turned over to the defendant's counsel to be cross-examined: The counsel, in interrogating the witness on other matters, drew from him the disclosure of a distinct fact, which had a very material influence in the determination of the cause.

THE plaintiff's counsel objected at the time to the question, put by the opposite counsel, but being overruled by the court, now moved for a new trial, on this ground.

Ellery for the plaintiff. In the case of the *Dean &c. of Eli* vs. *Stewart*, Lord Chancellor Hardwicke said: when at law a witness is introduced to a single point by the plaintiff or defendant, the adverse party may cross-examine to the same individual point, but not to any new mat-

ter : so, in equity, if a great variety of facts and points arise, and a plaintiff examines only as to one, the defendant may cross-examine as to the same point, but cannot make use of such witness to prove a different fact. 2 *Atkins*, 44.

By the Court, MARTIN, *J. alone.* I have never known this practice to prevail, and I cannot, on this dictum, set the verdict of the jury aside. It must be understood as a rule of discipline, introduced for the purpose of preserving regularity, in the admission of testimony. Every witness must be sworn to tell the whole truth, and if the defendant is not allowed to examine the plaintiff's witness, at first, to any point material to the defence, he has certainly a right to call back the witness and examine him while introducing his own testimony. If, therefore, the defendant's counsel, in the present case, might, at any stage of the trial, have compelled the witness to disclose the fact which has been drawn during the cross-examination, no injury has been done to the plaintiff, by obtaining this part of the evidence, a little earlier than in the regular way.

FARTHER : the witness closed the plaintiff's testimony, and I cannot tell that there was any necessity for the defendant's counsel to dismiss him from the cross-examination and instantly call him as his own witness. *Lex neminem cogit ad* VANA *seu impossibilia.*

MOTION OVERRULED.

SPRING 1811. First District.

TAYLOR & HOOD vs. *MORGAN.*

Answer to interrogatories extended to a fact, avoiding the debt.

THE Plaintiff in the petition prayed that the defendant might answer whether he had not received the goods, for the amount of which the suit was brought, accompanied with an invoice in which he was charged therewith as a purchaser. The defendant answered in the affirmative, but added, that he had given no order therefor, and that the goods were shipped by order and for the account of a third person.

Depeyster now moved that the latter part of the answer might be striken off, as not called for by the question.

Ellery contra. The testimony of the defendant is called for by the plaintiff; he is therefore, like another witness to tell the *whole* truth, as well what charges, as what discharges, him.

By the Court. This mode of calling for testimony out of the defendant's mouth, established by an act of assembly, may properly be likened to the examination of the party on interrogatories. There is a case in *Ambler* which supports the defendant's position. The plaintiffs, in their examination, admitted the receipt of a parcel of sattins from the defendant, and in the same sentence one of them swore he had paid the defendant for them. The master refused to charge the plaintiffs with them. The defendant took the general exception and insisted that the plaintiffs

ought to have proven the avoidance, as they had confessed the receipt. But the chancellor overruled the objection. *Kilpatrick & Thrupp* vs. *Love. Ambler*, 589.

SPRING 1811. First District.

ASTON vs. MORGAN.

IN the case before this court there is a greater necessity of extending this rule; for the fact that the goods were shipped at the instance and request of the plaintiffs, if it be proven that they were charged to them as purchasers, in the invoice accompanying them, will, perhaps, easily be presumed by the jury, as the fact of their not being ordered by them is a negative fact, which is incapable of any other proof, than the one which accompanies the admission.

THE case in *Ambler* is not a solitary one; the last editor refers in the margin to that of *Talbot* and *Rutledge*, in which the same decision was made.

MOTION OVERRULED.

ASTON vs. *MORGAN.*

After amended petition, new answer before issue.

THE plaintiff having obtained leave to amend his petition, and having done so, since the last term, and the defendant having filed no new answer, the cause was set down for trial.

Ellery for the defendant. It was improperly set down for trial, for the parties were not at issue. The plaintiff for want of an answer, might have taken judgment.

SPRING 1811. First District.

ROBINSON vs. DRURY.

Smith for the plaintiff. The defendant was not necessarily bound to file a new answer, and if he forebore doing so, the plaintiff might consider the former answer as an answer to the amended petition.

By the Court. When the plaintiff withdraws his petition for amendment, the pleadings, on the return of it, must be made anew, and if the defendant attempts to delay the plaintiff improperly, he is to be quickened by the same means as in the beginning of the suit.

LEAVE TO ANSWER.

ROBINSON vs. *DRURY.*

Defendant by answering waves irregularity in the attachment.

ATTACHMENT levied on a quantity of oil of *palma christi.* The defendant put in an answer. WHEN the jurors were called to the book, a claim to the oil was put in by a third person.

Depeyster for the defendant, prayed that the jury might not be sworn, because it was going to be proven that the property attached did not belong to the defendant; so that, as he was not properly in, the court could not have jurisdiction of the case.

By the Court, MARTIN, *J. alone.* The defendant, by filing his answer, and putting the cause at issue, has admitted that he was properly brought in, and given jurisdiction to the court.

JURY SWORN.

DAVID vs. *HEARN.*

SPRING 1811.
First District.

Plaintiff cannot proceed to judgment after a cession.

THE defendant, *pendente lite*, became insolvent and obtained a stay of proceedings; no answer being filed the plaintiff took judgment.

Alexander moving to set it a side. Creditors are to take their ranks, according to the dignity of their respective debts, at the declaration of the insolvency. The plaintiff cannot, by any act of his, ripen his debt into a more priviledged one.

Depeyster for the plaintiff. As syndics are not yet appointed, the defendant notwithstanding the cession remains the representative of the property ceded. This case differs from *Elmes* vs. *Estevan*, *ante* 192. The stay of proceedings prevents any interference with the person or property of the defendant. Proceeding to judgment is not such as interference. The plaintiff cannot be deprived of the benefit, which his vigilance and industry have fairly acquired.

By the Court. This case cannot be distinguished, from the one cited. No suit can be carried on without *parties*. The defendant was *civiliter mortuus*. The plaintiff was the only party.

JUDGMENT SET ASIDE.

SPRING 1811.
First District.

TERRITORY vs. *BARRAN.*

The apparent indorser of a note, admitted to prove the forgery of his name.

INDICTMENT for forgery. Bellechasse, whose signature, as the first endorser of a note, was charged to have been forged, was offered as a witness on the part of the territory. He was asked whether he had a release from the subsequent endorser, and answered in the negative.

Livingston and *Moreau* for the defendant. He cannot be sworn. It is provided by the 33d section of the act of 1805, chap. 50, that the rules of evidence in criminal cases, shall be according to the common law.

A person whose property may be affected by a forgery, is no evidence to prove it upon an indictment. 2. *Hawkins's P. C.* 611.

WHEN a man is indicted for forgery, the party, whose hand is said to be forged, shall not be admitted to prove the fact. For his hand apparently against him is evidence (until the contrary be proved) of an obligation; and, therefore, he shall not be permitted in the indictments, to make proof, while he has an interest in the question (the supposed obligation standing in apparent force against him) that it was not his hand. *Loft's Gilbert* 222, *Buller's N. P.* 288. 1. *Mc Nally* 141.

THE authorities which support this principle are numerous. The British precedents are also supported by American decisions.

IN the case of *the King* vs. *Russel*, the court held that *Gately*, the person whose name was stated to be forged, was an incompetent witness to prove that fact. 1 *Leach C. C.* 10. In that of *the King* vs. *Taylor*, it was determined that the drawer of a bill was not a competent witness to prove that a receipt, endorsed for the value of it, was a forgery. *id.* 225. In the case of *the King* vs. *Boston*, Lord *Ellenborough* said: a prosecutor shall not be allowed to say that a bond purporting to be made by him, was forged. 4 *East*, 582.

THE exceptions, which occur in the books, prove the correctness of the principle. *Dr. Dodd*, having forged a bond, in the name of Lord *Chesterfield*, that nobleman was allowed to prove the forgery, a release having been executed, by the apparent obligees. 1 *Leach C. C.* 185. In the case of *the King* vs. *Akehurst*, the supposed drawer of a note, holding a release from the payor, was admitted as a witness. *id.* 178.

THE courts of the states of New-York, Vermont and Connecticut, haved acted upon this principle.

C. J. *Kent*, in the case of *the People* vs. *Howell*, expressed himself thus: the ancient rule in England that a witness, whose name was forged, was incompetent to prove the forgery on an indictment, because he was interested in the question, still prevails in this court; and it was adopted in 1794. The grounds and reasons of

SPRING 1811. First District.

TERRITORY vs. BARRAN.

that decision are not before the public, and we, therefore, do not known them. It is probable, that the court assumed the English principle, as they found it then existing : but since that time, the question of interest in a witness, has been investigated and defined with more precision, both in England and in this state. The rule now in all such cases, and I believe, I may say in all criminal cases, except in the case of a forged instrument, is that a witness is to be received, if he be not interested, in the event of the suit, so that the verdict could be given in evidence, in an action to which he was a party. 4 *Johnson* 302.

IN the case of the *State* vs. *Bunson*, the supreme court of the state of Connecticut held, that the person, whose name was forged, could not be allowed to prove the forgery. 1 *Root* 307. The same decision was made by the same court, in that of *the State* vs. *Blodget. id.* 354.

AND in the state of Vermont, in the case of *the State* vs. *A. W.* 1 *Tyler.* 261.

J. R. Grymes and *Derbigny*, for the territory. In ascertaining what was the principle of the common law, we are not give implicit faith to the crude and undigested ideas of the first law writers, but avail ourselves of the learning and industry of modern ones, and this court is to declare the law, in the same manner as a British court of justice would at this day, unshackled

and unbiassed by any statutory provision, or any decision grounded on a statute.

ALL the decisions which have just now been quoted, are since the statute of 5 Elizabeth. This statute has wrought a considerable difference in the admission of testimony, in cases of forgery, and an examination of the authorities, relied upon by the defendant, will show, that we have not sufficient materials to enable us to discover, that the difference which now exists, in the courts of England, in cases of forgery, is bottomed on the principles of the common law.

Hawkins is first relied upon. This writer does not speak decisively, in the part of his work which is quoted. His expressions are, *I take it to be generally agreed &c.* and he concludes, by informing us that the rules of evidence concerning this matter seem not to be clearly settled. 2 *Hawkins* 611. and Lord *Ellenborough*, in the case cited, recognising the position, as established too firmly to allow any deviation from it, without the authority of parliament, owns his inability to discover upon what principles the anomalous exception from the general rule, in cases of forgery, is grounded. 4 *East*, 582.

THE principle, that a person whose property may be affected, shall not be admitted to prove the fact from which the injury arises, upon an indictment, is far from being universal : and the books are full of cases in which a person, to whose damage, an indictment concludes, has

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been allowed and admitted an evidence, and his credit left to the jury.

IN *Parris's* case, an information being brought against him, for that he, *fraudulenter & deceptive*, procured one Ann Wigmore, to give a warrant to confess judgment, and she being brought forward to prove the cheat, it was debated whether she might be admitted; for if he was convicted, the court would set the judgment aside: nevertheless she was sworn. 1 *Ventris*, 49.

A person beaten, and generally any other person to whose damage a criminal information concludes, is a good evidence to prove the battery or other misdemeanor, notwithstanding he may have an action. 2. *Hawk.* 611.

LORD Holt, in *Regina* vs. *Macartney & al.* admitted a person who had been cheated to prove the fact on the indictment. 1 *Salkeld*, 286. 6 *Mod.* 391. 2 *Ld. Ray.* 1179.

IF a woman give a bond or note to a man to procure her the love of J. I. by some spell or charm, in an indictment for the cheat, tho' it tend to avoid the note, yet she shall be a witness. *Per Holt. C. J. Regina* vs. *Sewell*, 7 *Mod.* 119.

THE proprietor of a note was admitted to prove the tearing of it by the maker, on an indictment. *King* vs. *Moyse*, 1 *Strange*, 595.

SIR William Lee allowed a party, supposed to be defrauded to be witness on an indictment for perjury. 2 *Strange*, 229. *Rex* vs. *Broughton.*

IN *Abrahams qui tam* vs. *Bunn*, Lord Mansfield held that the borrower of money, was a competent witness to prove both the usurious contract and the payment of the money. 4 *Burr.* 2251.

HAVING established that the admission of Bellechasse is not contrary to the general principle; it remains to shew that the particular exception, which is said to prevail in Great Britain in cases of forgery, is not absolutely recognised in the American courts.

IN the case of Hutchinson, the Superior Court of the state of Massachusetts said, that although they believed it to be now settled in England that the person, whose name is said to be forged, is not a competent witness to prove the forgery, yet the practice had been for a long time, otherwise, in that state. *Mass. R.* 8.

IN the case of one Keating, tried in Pennsylvania, Meng, the person whose hand was stated to be forged to a note, was admitted to prove the forgery. *C. J. M'Kean*, citing several cases in which it had been thus determined. 1 *Dallas*, 110.

IN Ross's case, in the same court, Heister, the apparent maker of the note stated to be forged, was allowed to prove the forgery. The Chief Justice saying: I admit that early in life I entertained a different opinion on this point: conceiving then, that the weight of adjudged cases was adverse to the competency of the witness, tho' I thought it hard that the law should be so. My

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opinion has been changed by the modern authorities, which give an evident preponderance to the opposite scale. In general, the judges of late have been inclined to a more liberal admission of testimony, applying exceptions rather to the credit than to the competency of witnesses.—Every principle of policy must enforce the necessity of allowing the person whose name is said to be forged to give evidence of the fact. 2 *Dallas*, 240.

By the Court. The general principle of the common law, in regard to the inadmissibility of a witness on account of interest in the event of the suit, is now clearly understood. It is confined to such cases in which the verdict may be given in evidence in a suit brought for or against the witness. In other cases, the objection is said to go to his credibility only. In this manner, is the law now understood in England and the United States.

IT cannot, however, be denied, that in indictments for forgery, a different rule prevails in the former, and in some of the latter, country. One which forms a wide exception. In some of these states, in which the proceedings are according to the common law, however, the exception does not seem to have been received.

IN examining the cases cited and those to which we are able to have acess, it does not appear that the exception was admitted before the reign of Elizabeth, in the fifth year of which was passed

the statute, on which most indictments for forgery are brought; and British writers seem to admit that the exception is, at least in a considerable degree, bottomed on some of the provisions of that statute.

THE exception cannot be traced to the common law. Cases for forgery, in which the person whose hand was charged to be forged, might be brought to disprove it, must have been very rare. Three kinds of instruments only were the subject of forgery: records, wills, and deeds. The former depended on the evidence of uninterested persons generally. In the case of a will, the testator could not be offered to prove the instrument. The efficacy of deeds depended on the *sealing* and *delivery*, not on the signature of the grantor. Indeed, they were not, it is believed, signed by him.

THE general rule is certainly binding upon the court, in all cases in which the exception has not the same force. According to it the witness is not to be rejected, and his credibility is to be weighed by the jury.

THE exception is bottomed on decisions, all of which appear made since the statute of Elizabeth. It does not appear that it existed at common law. The courts of Pennsylvania and Massachusetts, who were not authorised to reject it by statute, support us in saying so.

WITNESS SWORN.

THE defendant's counsel offered a witness to prove that the defendant had himself given in-

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formation of the forgery to a justice of the peace, in order that a prosecution might be instituted: but the court, after hearing argument, declared the testimony inadmissible saying; a man could not fabricate evidence for himself.

THE jury not agreing on a verdict, a mistrial took place by consent, and the governor ordered a *nolle prosequi* to be entered.

TERRITORY vs. *M'FARLANE.*

Bail denied on indictment for murder.

THE defendant, being charged with murder, was brought before one of the judges of this court at his chambers, who thinking the presumption of his guilt but slight, was willing to bail him. It being late in the night, the defendant found it impossible to procure bail and was committed. At the opening of the court on the next day, the grand jury brought in a bill of indictment, charging the defendant with murder. He prayed to be admited to bail. His motion was opposed by the attorney general, who relied on the case of *the Territory* vs. *Benoit*, *ante*, p. 142.

Ellery, in support of the motion. This court, being the superior court of the territory, and having common law jurisdiction, has necessarily the same power as the Court of King's Bench in England.

THE Court of King's Bench may, *virtute offi-*

eii bail any person brought before them, of what nature soever the crime is, even for treason or *murder*. 2. *Hale's P. C.* 148. And this bailment may be upon *original indictment* before them in the county where they sit, or upon *indictment removed* by *certiorari*, or upon a prisoner removed by *Habeas Corpus*, before or after indictment taken. *id.* 129.

By the Court. When the grand jury find a bill for a capital offence, the party charged lies, from the finding alone, under such a violent suspicion of guilt, that the court will instantly commit him, if he be present, or direct a capias against him; and as the trial, in the ordinary course, is not long delayed, it is the practice of the court not to lend its ear to a motion for bail.

THIS is the general rule. We will not say that it may not have its exceptions. As, if the party, charged to have been murdered, were to make his appearance in court.

IN case of a mistrial or of a continuance, at the instance of the territory, as the confinement may be extended to a considerable length, there would be no impropriety in listening to a motion to bail; but when the attorney-general is ready for trial, the court, except in a very extraordinary case, will not admit the application.

BUT in all these cases the bailing is in the discretion of the court, and none can challenge it *de jure*. *Hale's P. C. loco citato.*

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BY the ordinance of Congress which is the constitution of this territory, bail is to be taken, unless for capital offences where the proof shall be evident or the *presumption great.* *Art.* 2.

IN the present case there are circumstances which seem to preclude the defendant from the indulgence he requests. It appears one McBride was beaten with a stick by one Byrns, of which beating he afterwards died, and that the defendants tood by, encouraging Byrns to beat the deceased well.—That Byrns and the defendant were gamblers, and the deceased had given such information to a magistrate, upon which they had been arrested. It did not appear whether Byrns' anger proceeded from any outrageous behaviour of the deceased on an encounter, or from an irritation excited in him and the defendant, by the prosecution which the deceased had provoked. Now the grand jury have brought bills against Byrns and the defendant, charging them with murder.

THE defendant has clearly, and from his own admission, participated at least, in an aggravated battery, from which death has ensued. If his offence is reduced by the petit jury to manslaughter or battery, the court will, in fixing the time of his imprisonment, give him the benefit of any extenuating circumstances which may appear at the trial.

THE rule laid down, in *Benoit's* case, is, it is

believed, a correct one. It will not, however, be rigidly extended, to cases in which the defendant has not the benefit of a trial, during the term, in which the indictment is found, when the continuance is not granted, at his solicitation.

MOTION OVERRULED.

PERETZ vs. *PERETZ & AL.*

Maker and indorser suable jointly.

THE defendants were the maker and endorser of a note of hand, and the plaintiff the last endorser.

Ellery for the defendant. A joint suit was improperly brought, the defendants' obligations are several, and arose at different periods; that of the maker is absolute, and that of the endorser, conditional. The remedy must be of the same nature as the cause of action. The one cannot be joint, when the other is several.

Fromentin for the plaintiff. That is the rule of the common law of England. It prevails, perhaps, in such of the United States, in which the law and equity jurisdiction is divided, and there in courts of law only. The Spanish law, following the principles of the civil, gives the action *contra todos y cada uno.* 3 *Febrero*, 405. *n.* 13.

By the Court. The suit is rightly brought.

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SYNDICS OF McCULLOUGH vs. FANCHONETE.

The Spanish authority, cited by the plaintiff's counsel, fully supports him. The rule is the same in the courts of equity in the United States and in the court of chancery in England, in which the practice is according to the rules of the civil law. If a debt be joint and several, each of the debtors must be brought before the court. *Madox* vs. *Jackson*, 3 *Atkins*, 406. All concerned in the demand ought to be made parties. 2 *Ventris*, 348.

ACTION SUSTAINED.

SYNDICS OF McCULLOUGH vs. *FANCHONETTE.*

Judgment against the holder of sequestered property, not cited, set a side.

A writ of sequestration being prayed for and obtained, a copy of the petition was left at the domicil of the person who held the property, without a citation. Judgment by default, being taken against him, the court, on the motion of *Depeyster*, sat it aside : saying that no judgment could be taken against a man who was not cited to appear.

Hennen for the plaintiffs.

McFARLANE vs. *RENAUD.*

Seven judicial days allowed to move for a new trial.

IN this cause, it was determined that the seven days, allowed by the act of 1805, Chap. 16, to move, for a new trial, are to be court days. The two Sundays and the fourth of July, on which

the court did not sit, were therefore excluded.

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J. R. Grymes for the plaintiff and *Duncan* for the defendant.

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By the Court. The prisoner has been found guilty of murder of the second degree, and we are now moved to arrest the judgment on the following grounds:

The caption is not a part of the indictment

The words *vi et armis*, not necessary in an indictment for murder.

1st. That the caption does not contain the day or term on which the indictment was found.

2. That the words *vi et armis* are not in the indictment.

3. That the indictment is inconsistent and repugnant.

4. That the offence is not described in the words of the statute.

I. In support of the first ground, the counsel for the prisoner has cited 2 *Hawkins*, 362. *c.* 35, *s.* 127. "The caption must set forth a certain day and year, when the Court was holden."

WE are of opinion that the caption, of which *Hawkins* speaks here, makes no part of the indictment. The caption is the inception of the record, both in civil and criminal suits; it is that part of it which precedes the declaration or indictment.

Hawkins and *Bacon* after him, so consider the

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caption and the indictment : for they treat of the former separately, and after having treated of the latter. And *Blackstone*, in the record, in the appendix to the last volume of the commentaries, clearly distinguishes the indictment from the caption.

Hawkins cites as a necessary, nay essential, part of the caption, that it should contain the name sof the jurors, or at least it should expressly appear that they were at least twelve in number : circumstances which are never found in any form of indictment.

Foster also impliedly admits that the caption and indictment are distinct things : for he informs us that the prisoner is to be furnished with copies of both. *Foster's C. L.* 229.

SIR *Mathew Hale* puts this question, however, out of all doubt. Touching the forms of indictments, says he, there are two things considerable : 1st, the caption of the indictment : 2d, the indictment itself.

THE caption of the indictment, is no part of the indictment itself; but it is the style or preamble on the return that is made from an inferior to a superior court from whence a certiorari issues to remove : or when the whole record is made up in form. Whereas the record of the indictment, as it stands upon the file in the court, wherein it is taken, is only thus : *Juratores pro domino rege &c.* When it comes to be return-

ed upon a certiorari, it is more full and explicit, *Norff. Ad generalem sessionem &c.* 2 *Hale's P. C.* 65.

II. THE omission of the words *vi et armis* is the second ground. The counsel rely on 2 *Hale*, 187. " In all indictments for felony, there must be *felonice*, so it must be laid to be done *vi et armis*, at common law. He cites *Stamf. P. C.* 94. *a.*

Hawkins does not speak in so unqualified a manner. " It is taken for granted in some books, " that they, (these words) were necessary at " common law, in all indictments for offences " which amount to an actual breach of the peace, " as rescouses, assaults and the like : yet I do not " find that they were ever necessary in such in- " dictments, wherein it would seem absurd to " put them in, as in indictments for conspira- " cies, cheats, slander and such like, or nui- " sances committed in a man's own ground. 2 *Hawkins.* 343 *s.* 90.

THESE words, however, are no longer held necessary, according to most English writers, since the statute of 37 *H.* 8 *c.* 8. The preamble of this statute recites that " in all indictments of " felony and trespass, and divers others, it was " common to declare the manner of the force and " arms, that is to say, *vi et armis*, viz, *baculis* " *arcubus et sagittis*, or other such like words; " where in truth the parties had no such weapons " at the time of the offence, yet for lack of such

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"words, the said indictments were taken as "void, and had been avoided by writ of error "and plea, &c." The statute then proceeds to declare these words unessential.

IT is to be observed that the statute informs us, that the insertion of these words was *common*, not *universal.*

SINCE the statute, lawyers have been found who contend, and courts have often determined, that the statute in the enacting part, did not refer to the words *vi et armis,* but only to those which follow, viz, *baculis, sagittis et arcubus*, or such like, which *declare the* MANNER *of the force and arms*, and that the omission of the words *vi et armis,* is not helped by the statute. 2 *Hawk. P. C.* 94. 2 *Levinz*, 261. 1 *Siderfine*, 140. 1 *Bulftrode*, 205. 1 *Levinz*, 206. 1 *Keble*, 101. 2 *Keble*, 154. *Popham*, 206. Yet among some of these, the opinion prevails, that neither at common law nor at present, were the words *vi et armis* essential, where they are implied by others as *rescussit ro manu forti. Croke J.* 345. 2 *Bulstr.* 208. In an indictment for a riot the words *vi et armis* are implied in the words *riotose cesserunt, fregerunt, prostaverunt.* 2 *Hawkins*, 344 *c.* 25 *sec.* 91. in margin. 2 *Strange*, 834.

IT has been adjudged that the words *vi et armis*, are not necessary in an appeal of death, because they are so fully implied. *Smith* and *Boden, Mich* 7. *Ann.* 8. tho' if the killing were with a

weapon, the count must shew with what particular weapon; and if it were not by any weapon, but by some other means, as by poisoning, drowning, suffocating, or the like, the circumstances of the fact must be set forth, as specially as the nature of it will admit.

IN the present case, the indictment describing the weapon, with which the mortal wound was given, we think *the manner of the force and arms*, being *particularly* declared, it was not necessary that the *force and arms*, should be *generally* expressed. *Vi et armis* implied in murder. 1 *East* 346.

III. As to the repugnancy. The indictment sets forth, that the prisoner and one Byrns, on the 6th of April, assaulted the deceased, that Byrns gave the mortal blow, that the deceased languished till the 10th, when he died, that the prisoner was then and there abetting Byrns, and concludes that the prisoner and Byrns murdered the deceased.

IT is contended that there is here a fatal repugnancy. The words, then and there, referring to neither of the periods previously mentioned in particular: and if the reference is to be made according to the ordinary rule of the construction, to the last antecedent, it relates to the time of the death, and not to that of the stroke.

Hawkins is again invoked. "An indictment "of death, laying the stroke at *A.* and the death

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"at *B.* or the stroke on the 1st of May, and "the death on the 10th, is insufficient for the re- "pugnancy.....because it supposes the murder to "have been committed at a place in the first "case and on a day in the second, in which it ap- "pears, by the indictment itself, that the party "was not killed, but only wounded." 2 *Hawk. P. C.* 325 *c.* 25. *s.* 62.

IF in the present case, instead of the words *then and there*, the words *on the 6th of April*, had been substituted, the cases would have been parallel. But we find one similar to that of the prisoner, in 2 *Hawkins*, 264. *c.* 23 *s.* 89.

"WHERE it is alledged that the principal such "a day, made the assault and gave the stroke "and that the party died on such a subsequent "day, and that *A. B.* was *adtunc et ibidem abet-* "*tans*.....the words *adtunc et ibidem*, from the "manifest import of the whole, shall be refer- "red to the time of the stroke.....Yet, if *A. B.* "had been said to have been present, at the time "of the felony and murder aforesaid, viz: on "the day of the stroke, *tunc et ibidem*, abetting, "&c. it seems the appeal would be insufficient, "as to *A. B.* for the repugnancy."

IN the indictment under our consideration, the words, *then and there*, are not confined by any subsequent expression, to either of the antece- dent periods, so as to prevent their being ex- tended to both, and thus avoid the rupugnancy.

IT does not appear to us that, even if the repugnancy existed, the part in which it is found, would necessarily be deemed material. The indictment begins by stating the joint felonious assault, refers to the mortal wound by one of the parties, the death, and finally charges both with murder, so that the clause, stating the presence of the prisoner specifically, is an useless one.

IV. IT is objected that the indictment is insufficient in as much as it does not describe the offence in the words of the statute.

THE indictment in this particular, is worded according to the common law forms, with the proper conclusion in statutory offences.

THE first section of our act of May, 1805. *c.* 50, provides the punishment of death for the crime of *wilful murder*, the 22d section that of a fine and imprisonment at hard labour for that of *manslaughter*.

THE act of July, 1805. *c.* 4. provides, "that "all murder which shall be perpetrated by "means of poison, or by laying in wait, or by any "other kind of wilful, deliberate or premeditated killing, or which shall be committed in "the perpetration, or attempt to perpetrate, any "arson, robbery, or burglary, shall be deemed "murder of the first degree, and all other kinds "of murder, shall be deemed murder of the second degree.....and the jury shall ascertain in "their verdict, whether it be murder of the first "or second degree."

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STACKHOUSE & AL vs. FOLEY'S SYNDICS.

MURDER of the first degree is punished with death, and murder of the second degree, with imprisonment at hard labour.

IN this case, the jury found the prisoner, not guilty of murder of the first degree, but guilty of murder of the second degree.

MURDER of the second degree is any kind of murder not enumerated in the first part of the section. The indictment charges the prisoner with wilful murder, with malice aforethought. Perhaps if it had simply charged him with murder, his counsel could not have successfully resisted the motion of the attorney general for judgment of imprisonment at hard labour.

MOTION OVERRULED.

STACKHOUSE & AL. vs. *FOLEY'S SYNDICS.*

Vendor, who sells for a note, retains his lien in case of bankruptcy, but loses it, if the goods sold be altered, as wine by mixture.

THE plaintiffs, shortly before the bankrupt's failure, had sold him six pipes of wine, for which they had taken his note. On his making a *cessio bonorum*, and obtaining a stay of proceedings, the plaintiffs applied for a writ of sequestration against the wine, which was executed on five of the six pipes. Two of them were untouched, but from each of the three others, one third of the wine had been drawn, and an equal quantity of wine of another quality, substituted, with the view to the improvement of the liquor.

Alexander for the syndics. The plaintiffs are

not entitled to the wine, for they have received that payment which was stipulated for, at the time of the contract. They must, for the amount of their note, come in as other creditors. 1 *Evan's Pothier* 381, *note a.* *Kearslake* vs. *Morgan.* 5 *T. R.* 513. *Louvier* vs. *Lawbray* 10 *Mod.* 36.

THE three pipes, from which a part of the original wine has been drawn, and in which other wine has been put, cannot be considered as the merchandize sold by the plaintiffs, if it be admitted that the note was no payment.

Hennen for the plaintiffs. The bankrupt's note, cannot be considered as a payment, either on the principles of the common law, or the commercial laws. *Tipley* vs. *Martens*, 8. *T. R.* 451. 5 *Comyn's Digest by Rose* 96. 1 *Wilson's Bacon's Abridg't* 286. *Owenton* vs. *Morse.* 7, *T. R.* 64. *Ord. Bilb. cap.* 17. *n.* 37. *Gould's Espinasse part* 1, 130. *Murray* vs. *Gouverneur and others, in error.* 2 *Johnson's* cases, 438.

NAY, if there were evidence of its being accepted, as absolute payment, the contract being at the eve of a bankruptcy, it would be presumed that the bankrupt was aware of the approaching catastrophe, and the note would then be considered as a piece of waste paper. For when one gave the note of a third person in payment, and the vendor took it absolutely as a payment, yet it being shown, that the party giving the note, knew the third person to be in failing circumstances,

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on the failure, the court considered the note as no payment. *Popley* vs. *Ashley*, *Holt* 122.

WITH regard to the three pipes, part of the contents of which has been drawn off, the whole mass must take its character from the nature of the greater part. The wine which has been substituted, has lost its character by confusion. In determining so, no injury will be done to the mass of creditors, for the wine drawn off, will be presumed to be a fair compensation for that which has been put in.

By the Court. The ordinance of *Bilbao* must determine this case. The 37th section of it, provides that, "if a seller of merchandize take "in payment a bill, becoming due within a cer- "tain time, within which the purchaser of the "goods, the drawer or indorser should become "insolvent, it is ordained that if the merchandize "be found in the possession of the insolvent..... "and the whole or part of said bill be not paid, "a quantity proportioned to the sum unpaid, "shall be delivered up to the bill holder."

THERE can therefore be no doubt, that the plaintiffs are entitled to the two pipes, in the contents of which there has been no alteration.

WITH regard to the other three, we consider that the seller's privilege, ought not to be extended to them. It is an odious one, as it destroys that equality, which alone is equity. Commercial misfortunes cannot be averted by law,

it can, however, lessen their consequences by dividing them. These three pipes are, therefore, to go to the common stock, and the plaintiffs, as to their value, come in for a dividend, as ordinary creditors, and not as creditors upon lien.

SEGUR vs. *SYNDICS OF ST. MAXENT.*

Gayoso's line, near New Orleans recognised.

THE plaintiff claimed a deduction from the price of a plantation, part of which had been taken by the Spanish government.

IT appeared in evidence that in October 1776. Madam de Mauleon, had sold to Gilbert de St. Maxent, a plantation of seven arpents and eighteen toises, front on the river, bounded on one of the sides by a pallissadoe, which enclosed the city of New-Orleans.

THAT in August 1789, St. Maxent sold the premises to the plaintiff for $ 72,000.

THAT in 1794, the Spanish governor surrounded the city with new fortifications, which in some parts, took in ground which was not covered by the original fortifications, under the French government, while in others, they left out ground, which the old fortifications had occupied.

THAT the plaintiff having laid his claim for an indemnification, the Spanish governor, on the 4th of November 1797, had rejected it on the ground, that "neither the plaintiff nor the per-

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"sons from whom he held, could have acquired "any right on the ground within the lines of "the old fortifications, altho' thro' error, inat- "tention, or indulgence they might have been "suffered to possess it: that, with regard to the "angles of fort St. Charles, which might ex- "ceed the old fortifications, the plaintiff could "not have a better title to an indemnity from "government: because, in all concessions made "under the French government, the king had al- "ways reserved the right of taking out of the "lands granted, the ground necessary, for ex- "tending the fortifications of the city: a right "to which the king of Spain had succeeded."

THAT St. Maxent having died in the mean-while, the plaintiff, in the year 1798, brought a suit against his estate, in order to obtain a de-cree authorising the plaintiff, to retain out of the part of the purchase money, which still remain-ed due, a sum sufficient to indemnify him, for the ground he had lost.

THAT in June, 1800, the Spanish tribunal, or-dered a valuation of the land sold by St. Maxent, beyond that sold him by Madam de Mauleon, "which" says the decree, "did not belong to him, "and for the possession of which he had no "title." *No eran suyas, careciendo de titulo que autorisase la detencion en que se hallaba.*

THAT after the valuation, the Spanish tribu-nal granted to the plaintiff, in February, 1801,

an indemnity of $ 25,557, the reported value at the time of sale, of 21 square arpents, covered by the old fortifications.

THAT before the final determination of the suit, the officers of the king of Spain discovered a declaration of Villars Dubreuil, made on the 17th of November, 1758, while the premises were selling, at public auction, whereby Dubreuil acknowledged that, "out of the seven "arpents and eighteen toises, which the planta- "tion was said to contain, there were two ar- "pents and twelve toises, which belonged to "the king, and that it was only, out of consi- "deration for Mons. Dubreuil, that the king "had consented that he should occupy them, and "erect buildings thereon, and that the same were "selling, and as such would be, in the hands of "the purchaser, liable to be resumed by the "king, at the will of his representative, who "would allow the removal of any building or "improvement."

THE following extract of the proces verbal of the sale and adjudication, was read, "where- "as the greatest part of the buildings of the "plantation are erected on a piece of ground, "which belongs to the king, and which H. M. "has reserved for his use, and is not compre- "hended, in the said seven arpents and eighteen "toises, on the river, we have caused it to be "loudly proclaimed, that it should be lawful, for

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"the king, to resume the said ground, belonging to H. M whenever he may see fit: the purchaser remaining at liberty to remove every building or improvement thereon."

THAT in consequence of this declaration, Don Gayoso de Lemos, governor of the province, in the month of November, 1798, resumed this ground, causing a line to be drawn, at the distance of two arpents and twelve toises, in length, from the angle of the barracks and parallel to the last squares of the city, whereby the plaintiff lost a portion of his land, besides that for which he was indemnified by the decree of the 25th of February, 1801; wherefore he brought his claim before the Spanish tribunal, on the 3d of January, 1802, with a view to obtain an indemnification for the land thus taken from him, and which lies between Gayoso's line, and that of the French fortifications, which is the object of the present suit.

Brown for the defendant. The piece of ground, mentioned in Dubreuil's declaration and the proces-verbal, was only of the extent of two arpents and twelve toises, in superficies; not of front on the river, according to Gayoso's reckoning.

Derbigny for the plaintiff. In the settlement of this country, lands were reckoned by the extent of their front on the river, with the usual

depth of forty acres. Concessions were uniformly granted in that manner.

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THE declaration of Dubreuil, under whom, the defendant's title accrues, "that out of the "seven arpents and eighteen toises, which the "plantation was said to contain, there were two "arpents and twelve toises, which belonged to "the king," is conclusive evidence. For Dubreuil makes no distinction, speaks of arpents absolutely, when he describes the extent of the plantation and that of the king's ground. *Verba fortius accipiuntur contra proferentem.*

THE question, if any doubt was entertained, must have been considered by Gayoso. His decision was not complained of: it cannot be considered as an unauthorised stretch of authority.

By the Court, MARTIN, *J. alone.* The land was bought by St. Maxent, with the reservation of the king's right, to a certain part of it. According to the laws of the country, no suit was necessary to ascertain the royal portion. It was laid off according to the known rule and usage, and the governor's construction is warranted by the cotemporaneous exposition of the word arpents, in grants and concessions of those days; if superficial arpents were meant, it would have been necessary to have described the particular spot, with more accuracy, than by saying, the ground on which the buildings stood. The decision

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does not appear incorrect, and it was made by the only legitimate authority at the time, tho' doubtless it was liable to the revision of the sovereign. The parties seem to have been satisfied therewith; and the plaintiff, having lost part of the purchased land, by a legal determination, is entitled to compensation.

JUDGMENT FOR THE PLAINTIFF.

URQUHARTS vs. *ROBINSON.*

An invoice accompanying the goods, is no evidence against the master of the ship.

By the Court. This is a motion for a new trial, on the ground of the rejection of proper evidence.

THE plaintiffs received by the vessel, of which the defendant is master, a quantity of goods. Their clerk took notice, on the landing, that two of the boxes had been opened, and calling the attention of the defendant to this circumstance, the contents of the boxes were ascertained with him. A suit was brought to recover damages for the deficiency, and at the trial, the plaintiffs' counsel offered as evidence of the contents of the boxes, at the time of the shipment, an invoice which the defendant's counsel admitted, had been inclosed in a letter which came with the goods. The court, being of opinion that it was not proper evidence, and the plaintiffs having no other, nominal damages only were given: and we are requested to reconsider the opinion which excluded the letter.

IN doing so, we have been induced, rather by a desire to correct a popular error, which prevails here, than from the idea that the question is attended with any difficulty.

IN every case, the plaintiff must, not only prove the breach of contract or injury upon which his cause of action arises, but also, the amount of the damage, or the extent of the injury which he has sustained: and both must be proven by *legal* testimony.

IN the present case, the plaintiffs have proven the breach of the defendant's contract, in failing to deliver the goods, shipped in good order and well conditioned, *in the like order*, since they have proved the boxes were broken. This entitles them to damages. But it remained for them to shew the *amount* of these damages, the extent of the injury the defendant has done them. This amount was the quantity of the goods *not delivered* or their value: and this they were bound to do by *legal* evidence.

THEY have shewn what remained in the boxes; to ascertain the deficiency, they have attempted to shew what goods were in the boxes, at the time of the shipment, by producing the invoice transmitted by the shipper.

THIS invoice, the defendant has contended, could not be received:

1. Because it could not bind the defendant, as an instrument of writing or a written contract.

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2. Because it could not be received as the evidence or testimony of the shipper.

I. Men are only bound by the contracts to which they are parties; by the instruments of writing which they subscribe, or to the confection of which they concur, or which they afterwards acknowledge.

THE defendant was not a party to any contract resulting from this invoice. It was not subscribed by him; he did not concur to the confection of it; neither, has he ever acknowledged its correctness.

THE invoice has therefore, no binding force in regard to the defendant. It is not to be read, as the evidence of a contract.

II. It remains for us to inquire whether it can be read as the evidence, or testimony of the shipper: and this the defendant's counsel, has contended cannot be done, because, it is not regularly taken: because, if it were, it could not be read, the shipper of the goods having an interest to charge the master, in order that he may thereby discharge himself.

THE testimony is not regularly taken, because, it is not under oath—because, it was taken *ex parte.*

Testis injuratus fidem non facit, says the code *lib.* 4. *tit.* 20 *de jurejurando ; in notis.*

EVERY witness before he is examined must be *sworn. Esp. N. P.* 728. *Ley* 31. *tit.* 16. *Part.* 3. *cerca del fin. cap. de testibus et ibi gloss. hoc tit.*

EVIDENCE must be given in the presence of the party against whom it is to be used. For where the jury having withdrawn, called back one of the witnesses, who repeated his evidence, altho' the evidence was the same, that had been given before, *et non alia nec diversa*, their verdict was set aside.

Neither can, an argument be drawn *ab inconvenienti* from the difficulty of sending across the Ocean, to procure testimony. Till the 26th of George the third, bonds executed in the East-Indies, could not be proved without being sent thither, if the subscribing witness resided there. In that year, a statute was made, making an exception to the general rule.

IN *Coghlan* vs. *Williamson*, the hand writing of Steele the subscribing witness, who resided in the West-Indies, to a bond, was not allowed to be proven, till it was established, that the defendant had declared, that the plaintiff could not recover, for the bond was executed on ship board, and that he could not get the witness: thus acknowledging impliedly the execution of the bond. *Douglas* 93.

LASTLY, the shipper's testimony is said to be objectionable, for if the goods were not put in the boxes or taken out of them, before the shipment, he would be discharged, if the plaintiffs were to recover from the defendant: as they could not have two compensations.

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However, on the ground of the paper not being *sworn to*, it was impossible to receive it as evidence.

In the case of *Riche* and *Richard* vs. *Broadsell*, determined before the revolution, in Pennsylvania, a different opinion was given, and an account of sales unsworn to, was admitted: the court saying the strict rules of evidence, were not to be extended to mercantile cases. But this is a solitary case which, being contrary to every precedent and principle, cannot be received by us as evidence of the law. For if the rule which requires that testimony should be *on oath*, that which demands that it should be taken *in presence of the party*, against whom it is to be used, and that which repels an *interested witness*, be *strict rules*, which may be disregarded in mercantile cases, it will follow, that the court have no rule in these cases, but the will or whim of the judges.

MOTION OVERRULED.

Duncan for the plaintiffs. *J. R. Grymes* for the defendant.

DEBON, CURATOR &c. vs. *BACHE & AL.* *Ante* 160.

Transfer of property, in fraud of the insolvent's creditors, void.

By the Court. The Spanish authorities cited support the plaintiff. This was not a payment, in the ordinary course of business, but a transfer of property, uncalled for by the defendants who, tho' they pressed for the payment, appeared to

have no notice of their debtor's circumstances, till the receipt of the instrument intended to vest the property in them, and therefore, cannot be presumed to have solicited the assignment—This, therefore, was a deliberate disposal of property, after the transferor had become insolvent, with a view of giving the transferees an undue advantage over the other creditors, and is consequently a fraud on them, and void.

JUDGMENT FOR THE PLAINTIFFS.

RAMOZAY & AL. vs. *THE MAYOR &c. OF NEW-ORLEANS.*

Whether the Corporation may cumulate licenses for retailing liquors, billiard-tables and boarding-houses?

CONDICTIO INDEBITI. The plaintiffs were keepers of grog-shops, and for several years past, had paid the sum of one hundred dollars each, into the treasury of the city, for a license to retail liquors by the small measure, keep a billiard table and a boarding-house or tavern. By consent of the defendants, they joined in a suit, to recover back the greatest part of the money thus paid, on the ground that this general license had been forced upon them, the officers of the Mayoralty, having made it a rule not to grant licenses for retailing liquors only, and to grant only licenses for the cumulated objects of retailing liquors, keeping a billiard table, and an hotel, tavern or boarding-house.

THE above rule was admitted by the defen-

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dants' counsel, to have been that which governed the conduct of the officers of the Mayoralty, but there was no evidence that any of the defendants had made application for a license, for the sole object of retailing liquors. Their licenses were not produced, nor evidence given of the contents of any of them in particular, but the books of the mayoralty, which were produced by consent, shewed that the defendants were entered as holders of a license for the three objects.

Livingston for the plaintiffs. The defendants contend that they have a right to receive this sum

1. By the powers vested in them by the charter of 1805 :

2. By those conferred on the cabildo, under the Spanish government and confirmed by the charter of 1805.

1. What are the original powers conferred by the charter of 1805, as applicable to this subject ?

"COUNCIL shall have powers to pass bye-laws, " for the better government of the affairs of the " corporation, for regulating the police and pre- " serving the peace and good order of the city : " provided that no such bye-law be contrary to " the *charter*, to the *constitution of the U. S.* or " the *laws of the Territory*.—They shall have " power to raise by tax, in such manner as they " shall deem proper, upon the *real* and *personal*

"*estate*, within the said city, such sum as may "be necessary for lighting, paving, &c.

"Provided that the said Mayor, &c. shall not "have power to regulate the price of any other "provisions than bread, or the price of mer-"chandize brought or imported into the said "city.—Nor to tax *butchers* or *bakers*, nor *carts* "nor *drays*, otherwise than for the licenses "herein after provided for.

"The Mayor shall licence all taverns and board-"ing-houses, hackney coaches, carts and drays, "*subject to such restrictions*, as the Mayor and "City Council shall *by ordinance* direct. And "the Mayor shall be entitled to receive for every "license, the sum of two dollars and an half." *Act of February* 17, 1805, *ch.* 12. *sec.* 6 *and* 11.

THIS charter, like all other statutes in derogation of general law, erecting new jurisdictions and vesting new powers, ought to be *strictly* construed.

THIS power, to wit: that of taxing, being one of the attributes of sovereignty, shall not be presumed to be granted, but by express words and shall never be enlarged by construction—Thus in the present instance, a power is given to *tax*, but it shall be strictly confined to the objects expressly designated, viz: *real* and *personal estate*. A power is given to take two dollars and an half, for a license; it shall not go beyond that sum.

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THE council are authorised to make "bye-"laws, for the better government of the affairs "of the corporation, for *regulating the police* and "*preserving peace* and *good order.*" Their bye-laws must have no other objects, nor will these general expressions authorise an imposition *ad libitum* on taverns or any other profession or calling, more especially as the means of obtaining a revenue to carry these objects into effect, are pointed out in the charter by *tax* on *real* and *personal estate.*

THE expression used in the clause giving power to the Mayor to license, "subject to *such* "*restrictions* as the Mayor and city council, shall "*by ordinance* direct," evidently relates to the restriction of number, to the rules which may be made, for regulating the conduct of innkeepers as to the time their houses shall be kept open, the security they shall give, the duration of their licenses, and other objects of the like nature. But in this case, it cannot by any reasoning, be made to apply, as the only *ordinance* produced is one made within the last of the four years, for which we claim a return of the imposition.

THE only remaining argument is drawn from the *proviso*, that the Mayor &c. shall not have power to regulate the price of merchandize, provisions, &c. nor to tax *butchers* or *bakers*, nor *carts* nor *drays*, otherwise than for the licenses therein provided for. The taverns, it is said, are omitted here, and therefore, there is a right to

tax them. This is strange reasoning and would go to permit an indefinite tax on any particular calling, profession or trade, except *butchers, bakers, carts* and *drays*. Physicians, merchants, shop-keepers, lawyers, tradesmen of every description, are made liable to an arbitrary tax, and the whole expences of the city may be thrown on one description of citizens (retail shop-keepers for instance) who may not happen to have a proper interest in the city council. This is certainly a power which shall not be supported by implication, nor without the most express grant.

It is also worthy of remark that the charter gives a power to make such bye-laws only, as shall not be contrary to the *Constitution of the U. S.* If this means any thing, it must mean that the bye-laws shall not be contrary to the regulations of the Constitution of the U. S in *pari materia :* otherwise, it is difficult to conceive how the bye-laws of a corporation can be contrary to the Constitution of the U. S. If this be the case, then the power contented for, would be forbidden by the section which declares that all duties, impositions and excise, shall be equal.

This first point has not been strongly urged, and I think we may safely say, that there is nothing in the law of 1805, incorporating the city, which vests in the defendants, the right of exacting an arbitrary sum, from any particular profession or trade. I think it goes further and, by

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designating a sum to be paid for a license, excludes all other impositions. It has been said that this sum is only a perquisite of the Mayor, and therefore, not a tax. It is a perquisite, but not less a tax; the application is indifferent to the person who pays, whether it goes into the pocket of the Mayor or the coffers of the corporation, makes no difference to him.

II. If the city then have no original power given them by the act of incorporation to lay this tax, can they derive it from any former powers of the cabildo, confirmed to them by that act?

THE 13th section enacts "that all the estates, "whether real or personal, the rights, dues, debts, "claims, or property whatsoever, which here-"tofore belonged to the city of New-Orleans, "or was held for its use by the cabildo, under "the Spanish government, the municipality, af-"ter the transfer of the province, in the year "1803 to France, or the municipality now ex-"isting, which has not been legally *alienated* or "*lost* or *barred*, shall be vested in the said Mayor, "&c. to be enjoyed, received, collected and sued "by them and their successors forever."

HERE, three enquiries present themselves:

1. Whether this power of taxing inns and taverns, supposing it to have been legally exercised by the cabildo, is by this section vested in the Mayor, aldermen and inhabitants of the city of New-Orleans.

2. Whether it was ever vested in the cabildo, and to what extent.

3. Whether, if it were *vested* in the cabildo, it was not *lost*, prior to the act of 1805.

I. The words are *rights, dues, debts, claims, or property whatsoever.* What is the thing contended for? A *power* to tax a particular description of persons—will this be given by the expression *rights*, which is the one selected as conveying it? It may, I think, very reasonably be doubted, more particularly as this term may be fully satisfied without recurring to the broad exposition which is contended for, as there are among the objects secured to them, certain rights strictly so called, such as a right to a perpetual rent, &c. The observations before made, as to a strict construction of this kind of grants, will here forcibly apply. Suppose the cabildo had formerly the power of laying all kinds of taxes in the most unlimited manner; and this charter had no other clause on that subject, than the one now under discussion—would these general words have revived the right of taxation? It is believed they could not. This is certainly a *political power*, and I think the true construction of the clause in question, is that it transfers from the cabildo to the corporation, only *private rights*: an opinion which, I believe, will be strenghtened by a consideration of the context. "All the estates "and rights, dues, debts, claims, or property "whatsoever, which, heretofore, *belonged* to the

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"city of New-Orleans, or was held for its use." Now the terms "*belonged*" *and held for its use*" evidently apply to *private property*, not the *power of taxation.*—

BUT, if these words should be deemed sufficiently operative to vest the power, they can give no more that was legally exercised by the cabildo, and not even that, if it shall appear to have been *lost*, at any time before the incorporation.—

II. We must enquire then, whether this power was ever legally vested in the cabildo—to what extent, and whether it has not (if it ever existed) been lost by the events which took place prior to the passage of the incorporating law.—

To prove this power legally vested in the cabildo, an ordinance is produced promulgated by O'Reilly in 1770, in which he says, that pursuant to the *spirit* of the 1*st law of the* 13*th tit.* 4*th Book of the laws of the Indies*, he should proceed to assign to the city of New-Orleans, the corporate property *(proprios)* necessary for the city expences. That therefore, untill his majesty should pronounce thereon, he had assigned, *inter alia*, 40 dollars, which each of *the* 12 *taverns, (tabernas) which are permitted* in the city are to pay annually.—Also, other 40 dollars, which, each of the six billiard-tables, are to pay annually; other 40 dollars, to be paid annually by the house in which lemonade and other refreshments are sold, and 20 dollars, which are

annually to be paid by each of the six inns or eating houses *(posadas.)*

Now by referring to the law, the spirit of which Mr. O'Reilly thinks will warrant his transferring this power, it will be found that neither the letter nor the spirit, will bear this construction. The law reads as follows: "The vice-roys "and governors who have the power, shall de- "signate to every town and place, which shall "be *newly founded* and *settled* the *lands* and *lots* "*(tierras y solares)* which may be necessary, "and which may be given without prejudice to a "third person or corporate property *(proprios)* "and shall send us an account of what shall "have been designated and given to each one, in "order that we may *order it to be confirmed.*" This law was applicable only to *newly founded cities;* the spirit, however, might without a forced construction extend it to a city acquired by conquest or cession: but, neither the letter nor the spirit, could ever authorise the transfer in favor of a city of the right of taxing. The words are explicit, shall designate lands and lots, and those only on condition of their being confirmed. There is also, a positive prohibition on this subject, contained in the 1*st. law*, 15 *tit.* 4 *Lib. of the law of the Indies.* "We ordain that no com- "munity, nor individual of whatever state, dig- "nity or condition he may be, shall impose any "*excise, duty or contribution*, without our special

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"license, unless it be in the cases permitted by "law and the laws of this book, and we revoke "and hold for null those which shall be introduced in any other manner." Here then, it appears that the law which the governor cited as his authority for vesting the cabildo, did not give it him, and that he was moreover expressly forbidden by another law, from exercising it. If he had not cited his authority, the court might, perhaps, have presumed that it was duly exercised, but since he has done so, they are bound to examine it.—If the grant, therefore, was made by an officer who had no power to make it, nothing passed by his grant, no power was legally vested in the cabildo, and of course, nothing was transferred to the corporation of New-Orleans, by the territorial act.

BUT if he had the power, the grant was made subject to the confirmation of the king, and that confirmation has never been obtained: it is, therefore, void. See the words of the act I have quoted, the governor "shall send an account of what shall have been designated *that we may order it to be confirmed*"—O'Reilly's ordinance too contains the same claim.

BUT, if this power was legally vested in the cabildo, what was the extent of that power? Clearly, I think, no greater than is warranted by the words of O'Reilly's grant, that is, 40 dollars on *twelve* taverns, *six* billiard-tables, *one* coffee-house; and 20 dollars on *six* eating houses.

There is no *reason of policy*, or *probable intent* of the grantor, that will authorise an *enlarging construction*. All these are for narrowing it.

1. *Policy.* It is certainly contrary to every rule of public policy, that a temptation should be held out to intemperance and gaming by multiplying the opportunities for indulgence in them. Such would, undoubtedly, be the effect of suffering the same persons, who draw a revenue from these sources, to encrease the number. Public policy too, would, I think, be for a *narrowing*, rather then an *enlarging* construction of a grant, that trenched even in its strictest construction on so important an attribute of sovereignty as the right of taxation.

2. *Probable intent of the legislator.* This is referred to, by the best writers as the surest test of the true meaning of an act. It is to be gathered first, from the words "*the twelve taverns*, that are permitted in this city." Here pains seem to have been taken, and certainly several words employed which would have been useless, if the construction contented for was the true one. Why speak of the number at all? Why recite that that number was permitted? But to restrain—when a single word would have given the enlarged construction. Forty dollars on *all the taverns* which shall be kept" would have been the natural and obvious expression: if the enlarged construction had been the true intent, and the restrictive expressions shew, as strongly as it

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is possible for words to do, the limited nature of the power—if too the inconveniences which I have pointed out, under the head of public policy, would result, it is not reasonable to suppose that it was the intent of the legislator to permit them.

IF, therefore, the grant be valid and vested any right in the cabildo, it was only for the objects specified in the ordinance, and cannot be extended beyond them.—Should I, however, be again mistaken in my reasoning, and should the court think the cabildo was not by the ordinance confined to the specified number, yet they had no right to exact any thing beyond the forty dollars per annum, imposed by that grant upon taverns. Here again, we must recur to the probable intent of the act, and from the words of the instrument, as well as the nature of the thing, there is every reason to believe, that the intent was to keep the several licenses separate, and they were kept so during the whole of the Spanish government here, except in a single instance, that of billiard-tables being kept in *boarding-houses, (posadas)* not taverns *(tabernas.)* Where they were joined in this manner, the two taxes or *sixty* dollars were paid, and this is the highest sum ever received before the year 1805, and that only in cases where the parties applied specially for the two licenses to keep a billiard-table and a boarding house.

Now it is attempted to make another stride,

and not only cumulate the whole of the taxes on an individual desiring the several licenses, but, to impose the taxes of all three on an individual desiring only one—the clerk of the Mayor tells us that no individual, desiring a license to retail liquor, can get any other than one for which he must pay 100 dollars, and which in the opinion of the witness, gives a right to keep an *inn*, a *boarding-house* a *coffee-house*, and a *billiard-table*, but which from an inspection of the license as filled up, gives no such right. It is simply to keep a *tavern*. It is true there is also a clause, that if in addition to the tavern *he keeps* a boarding house, he must comply with the regulations of the police on that subject. This however gives no license for keeping a boarding-house, nor would it be a defence in a suit brought for the penalty (if there be any) for keeping one. But even if it should give these, and even other rights; it is surely an imposition to make a man pay for that which he does not want: before you will give him that which he does, and the Mayor might just as well refuse to give a license to an hackney coach-man, unless he would also take and pay for a marshall's warrant, the commission of scavenger and the liberty of keeping a billiard-table, tavern and eating house in his coach.

IT was admitted on the first hearing and will appear by the books of the corporation that the licenses of the plaintiffs were simply *tavern licenses* and that they paid for each of them one

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hundred dollars per annum. So that they are at any rate intitled to a return of 60 dollars per annum, illegally exacted, if the powers of the cabildo are vested in the corporation and those powers were legal. But I contend further

3. That the power of taxing taverns, even if it were vested in the cabildo, has not been transferred to the corporation, because it comes within the exception, in the latter part of the clause. It is one of those rights, if it be one, which are *lost* or *barred.*

THE power of taxing is a political one. It is an essential part of the *sovereignty* of a nation. However they may delegate it for particular purposes, that delegation can last no longer than while that government retains the sovereignty. When that sovereignty is lost, either by cession or conquest, it goes unincumbered into the hands of the acquiring power, unless there be some special reservation. Now, here the only reservation in the treaty, is that the inhabitants shall be preserved in the enjoyment of their *liberty, property* and *religion:* nothing even by *implication* in favor of this delegation of sovereign power, therefore, as the whole sovereignty was ceded first to France and afterwards to the United States, they must take it unincumbered. The power (or right, if they prefer so to call it) of laying this imposition is one of those which were *lost* by the political operation of the double transfer and

is, therefore, one of those expressly excepted by the act of incorporation, even if it be proved that it was legally vested in the cabildo. And the corporation might as well now pretend to the nomination of the *judges*, because the cabildo had the right of electing the *Alcaldes*, as they can now pretend to lay a tax on the taverns, because the cabildo had that right. The right of appointing to office is not more inseparable from sovereignty, than the right of laying a tax: neither can be exercised without the express delegation of the sovereign *de facto*. And both have therefore been *lost* by the transfer of dominion and, of course, are not included in the act.

I have endeavoured to shew

I. That, neither by the words nor the spirit of the act incorporating the city, any *general power* of taxing taverns or other objects specifically is given.

AND that in this instance, it is particularly restrained to the sum designated to be paid for the license.

II. That this power is not given by the reference in the 13th section, to the rights vested in the cabildo.

1. Because, the words of the act of incorporation, are not sufficiently operative to vest these powers.

2. Because, the cabildo itself never rightfully held them. The governor having no power to grant, and his grant wanting confirmation.

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3. Because, if the cabildo ever had such a power it was limited to only twelve taverns and at any rate only to the exaction of 40, not 100 dollars.

4. Because, this power is one that comes within the exception of those rights, &c. which had been before the passage of the law *barred* or *lost*.

THERE remains only one objection to our right of action. It is said that this sum has been voluntarily paid, and that *volenti not fit injuria*.— There are two answers to this objection, one is contained in the authority used to support it. *Evans' essay on money had &c.* says, that this objection can not avail where the money has been taken to permit the enjoyment of a natural right. Now every man has a natural right to pursue such profession as he pleases, provided it be not immoral or immediately injurious. If therefore, any person claiming a power to restrain this right, shall exact money for it, and it afterwards appears he has no such power, the money may be recovered back. Now tho' the corporation have a right to restrict the number of inns, yet they have not yet done it. And the trade is, therefore, *free to all*.

THE other answer is, that whenever money has been paid, by one party *bona fide* to another who innocently or designedly mistakes his powers, it is subject to repetition.

IT was suggested from the bench, that if the right to tax taverns was limited to twelve, that

then all the others acted illegally in procuring their licenses, and as *participes criminis*, cannot recover the money they have paid. But, there can be no *particeps criminis*, unless there be a corrupt or *criminal intent*, which is not suggested against the plaintiffs. And as strong an answer is, that altho' the cabildo should be limited to recover the tax upon only twelve taverns, yet, it by no means follows that all the others are illegal. They will not become so, untill some law has been passed, restricting the number, which has not appeared.

Moreau and *Duncan* for the defendants. We are not unwilling to admit, with the plaintiffs' counsel, that the charter of the city of New-Orleans, like all other statutes made in derogation of the general law, ought to be construed *strictly:* but we cannot join him in his assertion, that the power of taxing, being one of the attributes of the sovereignty, is not to be presumed to be granted, but by *express words*. For, in the case of *Blanc & al.* vs. *the Mayor &c. ante* 125, the court said, that corporations, the charters of which are silent as to the right of laying taxes, must have that right, as an incident to their incorporation : that it rises *ex necessitat rei*, and as the government of a city, cannot be supported without money, and as money cannot be raised without taxes, the authority to govern necessarily draws with itself that of laying taxes.

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THE corporation is very far from raising its pretentions to the right of laying any indefinite tax on any calling or profession, or to lay any tax on any profession, which is not specially and expressly liable to taxation, under their charter.

IT is under the 13th section of their act of incorporation, cited by the plaintiffs' counsel, *ante* 246, that the defendants conceive they are authorised to retain the money which the plaintiffs have paid them, for their respective licenses to sell liquors, keep a billiard-table and boarding-house.

THAT section vests in the defendants all the rights which heretofore belonged to the city of New Orleans, and our adversaries have shown, that in the year 1770, the city was endowed with the right of receiving 40 dollars, for each tavern and billiard-table, and 20 dollars, for each of the boarding-houses which were then established and allowed, within the city. In this clause, the tax has appeared to them fixed and definite, and the keepers of taverns, billiard-tables and boarding-houses, expressly pointed out, as the persons from whom it might be exacted.

IT is thought useless to inquire whether O'Reilly exceeded his powers, and wrongfully construed the Spanish law, under which he assigned the *proprios* of the city. It suffices for us that he made the assignment, and that the right assigned was held by the city, under his

grant, as long as the country remained under the dominion of Spain. The act of incorporation vests in the Mayor &c. *all the rights..... which heretofore belonged to the city of New-Orleans.* The right of receiving the tax, belonged, at least *de facto*, and we contend *de jure*, to the city. It was therefore granted by the charter.

THE *right of taxing* is not claimed: but only that of receiving a tax already imposed. So that the law of the Indies, cited by the plaintiffs, was not violated.

O'REILLY'S assignment, of the *proprios*, is expressly made, till *the king's pleasure shall be known.* It had, therefore, an immediate effect, which might be suspended or destroyed by a contrary declaration of the royal will. The king's confirmation was not essential to its validity, it perhaps would have had no other effect, than to strengthen the assignment, so as to take it out of the governor's power to make any alteration, which, till after the royal confirmation, he perhaps might do. *Eodem modo quo quid construitur, eadem modo destruitur.*

BUT, it is contended that the assignment did not authorise the city, to collect any money from a greater number of taverns, billiard-tables and boarding-houses, than that mentioned by O'Reilly. Policy seems to require, it is said, that the temptation to intemperance and gaming, should not be encreased, by multiplying the opportunities of indulgence; which would be the effect

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of suffering the persons who draw a revenue from these sources, to increase the number.

TAVERNS, billiard-tables and boarding-houses, were licensed under the Spanish government, by the governor : so that the officers of the city, who drew a revenue from them, could be under no temptation improperly to increase it; for they were without the power.

As the population of the city increased, new houses were licensed, and as the wants of the city kept pace naturally with the increase of its inhabitants, it was in the order of things, that the sources of its supplies, should also be multiplied. It would have been hard, when the number of these houses was doubled, that a half of them alone should be mulcted.

O'REILLY subjected *all* the taverns, billiard-tables and boarding-houses, at the time in the city, to the tax : and when new ones arose, it was right for the city to say, they should pay also. *Ubi eadem est ratio, eadem est lex.*

THIS, no doubt, is the construction that we would give to the assignment, if we were not furnished with complete evidence, that it was the one which prevailed as long as the Spaniards had possession of the country. This appears from the return of Don Juan de Castanedo, *mayordomo de proprios* of the city, a short time before the cession : from which it appears that there were then sixty two keepers of *tabernas* in the

city, paying the 40 dollar tax each : ten keepers of *posadas* and billiard-tables, paying 60 dollars each : eight keepers of billiard-tables, paying 40 dollars each and eight keepers of *posadas* paying 20 dollars each. The assignment was then, therefore, construed to extend to all taverns &c. existing at the time of the collection. *Optima est cotemporanea expositio.*

IT is next contended, that the corporation has no right to cumulate the permissions of keeping a tavern, billiard-table and boarding-house.

THE return of the *mayordomo* is evidence that such a cumulation prevailed in the case of boarding-houses and billiard-tables. In addition there is a resolve of the cabildo, on the representation of the *mayordomo*, authorising the cumulation of these several taxes, on a license for the several objects.

AN ordinance of the municipality during the short time, that the province of Louisiana was in the possession of the French, fixes the tax on taverns, *cabarets* or grog-shops, at 60 dollars per annum.

AND an ordinance of governor Claiborne, of the 25th of February, 1805, while he exercised the functions of governor-general and intendant, authorises the municipality to give licenses to keep coffee-houses, inns, billiard-tables and grog-shops, and appropriates the tax imposed on each of said licenses, to the use of the city.

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So that the right, not of taxing, but of receiving taxes imposed on, taverns, billiard-tables and boarding-houses, belonged to the city of N. Orleans, at the time it received its present charter and was therefore confirmed by it, unless it can be shewn that it *has been legally alienated, lost or barred.*

The plaintiffs' counsel contends, that the power of taxing is a political one, an essential part of the sovereignty, which must, by the cession have passed to the United States. There is certainly a difference between the power of taxing and the right of receiving the produce of a tax, already imposed. This right the city never lost, for they exercised it without interruption, under the Spanish, French and American governments, till it was confirmed by the charter and have ever since continued to enjoy it under that instrument.

MARTIN *J.* The city having enjoyed the right of receiving a tax on billiard-tables, taverns and boarding-houses, during a period of upwards of forty years, the whole time that it was under the dominion of Spain, that right would be considered as one of those to which the legislature made a reference by the words, *rights....which heretofore belonged to the city*, even if it were clearly proved, that O'Reilly had exceeded his authority.

THE number of taverns &c. which existed at the time of the assignment, appears to me to

have been inserted, to describe rather than to limit, the objects of taxation. The reason of the thing, and the cotemporaneous construction of the officers of Spain, lead to this conclusion. The act of 1806 ch. 10, which lays an imposition on taverns *without the city*, impliedly recognises the liability of those within, to a tax for the benefit of the city. I feel no difficulty, therefore, in saying that the city may exact the tax from every tavern, billiard-table and boarding-house.

WHETHER they may cumulate two or the three taxes in one license, is a question which must surely be answered in the affirmative, in every case in which the applicant for a license desires it for the cumulated objects. As it appears from the books of the mayoralty, which have by consent been read in evidence, that a license authorising the plaintiffs respectively, to keep a tavern, billiard-table and boarding-house, was received and paid for, by each of them, and there is no proof of an application for a limited license, the court cannot presume, that the plaintiffs were not satisfied therewith. They have enjoyed the faculty for which they have paid.

I am, however, not ready positively to say that, if it were in proof, that one of the plaintiffs had made application for a license to sell liquors, keep tavern, *taberna*, and expressed his unwillingness to receive one, authorising the keeping of a billiard-table, &c. and on the refusal of the

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officers of the Mayor, had yielded to the necessity and taken a license and paid for the cumulated objects, he could have been relieved. For, it would have, perhaps, been his duty to apply to the city council, who might have considered his application, and given orders to accomodate him.

NEITHER is it very clear, that this cumulation is an extortion. No one has an absolute right to demand a license. The city council might from reasons of policy confine to boarding-houses, the sale of liquors and the keeping of billiard-tables. By confining to a small number, establishments which have a tendency to promote noise and disorder, the vigilance of the officers may be more successfully employed.

It is true, the passing such ordinance might be attributed to motives of avarice. But improper views will not be presumed in a body of magistrates, while correct ones naturally present themselves. Whether it would increase the revenues of the city, is a problematical question. Many who willingly would take a license for any one of these objects, would abstain from it, if it could not be obtained without being joined to the others.

LEWIS *J.* Neither of the plaintiffs is entitled to relief, unless he shew that his application was for a single license. If he took one for the cumulated objects, on the presumption that a single

one could, by no means, be obtained, he must fail in his application to be reimbursed, because he has neglected to provide the evidence of the injustice, which he contends has been done to him.

I cannot join, however, in the opinion that the city council may lawfully withhold a license for one of the three enumerated objects, with a view to raise the tax on it, by compelling the applicant to take one for the other two also.

CUR. ADVIS. VULT.

EMERSON vs. *LOZANO.*

Party, disabled timely to pray an appeal, relieved.

JUDGMENT being had in the parish court, against the defendant, who was absolutely disabled to attend to his suit, by a violent sickness, in the paroxysms of which he was frequently delirious; after the time during which an appeal could be successfully prayed, so as to prevent the execution issuing, he moved for a *certiorari* to bring up the record of the suit, and a *supersedeas* to the sheriff: upon affidavit of merits, stating the deranged situation of the affairs of the plaintiff, which rendered it doubtful that, in case of success, the defendant might obtain his money back, if he paid it to the sheriff. The defendant further offered to pay the amount of the judgment in the clerk's office, on the court making an order that it might remain there, till the appeal was de-

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termined. The defendant had no counsel in the parish court, being himself an attorney.

By the Court. Since the defendant offers to pay the money into court, it would be wrong in the court not to hold him thereto. When the merits of the cause are sworn to be with the party who seeks for a reconsideration of the case in this court, and it clearly appears that without any latches on his part, and by events not within his control, he has been disabled from praying the appeal in due time, so as to prevent the issuing of the execution, this court will relieve against the accident, if the applicant be ready to place his adversary in as safe a situation, as if the application had been made below in due time.

MOTION ALLOWED.

Livingston for the motion. *Depeyster* contra.

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Referees may report specially.

THIS suit having been submitted to referees, under the acts of assembly of 1804, *c.* 2. *s.* 2. and 1805. *c.* 26. *s.* 20. They made a report, stating the accounts of the parties, referring the determination of the question that arose upon them, to the court.

Mazureau, moving that the account might be

recommitted. The referees ought to have finally passed on the whole matter in dispute.

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Duncan contra. By the first act, the referees are to state the accounts, and report their opinion thereon to the court. By the latter, they are to make their report, "which shall be conclusive "*as to the state of such accounts*, if the same "shall be confirmed by the court."

By the Court. An award must be final, because the arbitrators are the judges whom the parties have chosen for themselves. Not so, the report of referees, who are only appointed to ease the court of the labour of scrutinising long and intricate accounts. This is the principle of the Spanish law: *no se han de nombrar para ningun articulo que consista in* DERECHO; but, *en caso que consista en cuenta ô tassacion, ô pericia de persona ô arte. Cur. Phil.* 89. *n.* 26.

MOTION OVERRULED.

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Strict proof required of notice to the endorser.

SUIT on the defendant's endorsement of a note. The note was produced with the protest containing a clause by which the notary public certified that he had given notice of the want of payment to the endorser.

A witness who had been a clerk to the notary public, now dead, testified that he was a man

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scrupulously attentive to his business, executing every part of it with minute attention.

By the Court. The clause in the protest, certifying that the notary gave the notice is not evidence. It is no part of the duty of these officers to give notice, in case of a protest; and if they give it, they do so as private individuals and as such must prove the fact, like all other witnesses, upon oath. The proof of notice is a matter *stricti juris:* we cannot take it on the presumption which arises from the notary's reputation of great correctness.

In a late case, the notary of one of the banks informed us, it was customary for him to give notice and to certify that he had done so: and when the endorser, after a reasonable search after him, could not be found in town and had no domicil, at which notice might be left, to certify that notice had been given—that such were the directions he had received at the bank. It is possible that Mr. Fitch, the notary whose protest is before the court, may have acted on the presumption that such a conduct might be justified. It is extremely improper. There being no proof of notice to the endorser there must be

JUDGMENT FOR THE DEFENDANT.

Brown for the plaintiffs. *Ellery* for the defendant.

THE ORLEANS NAVIGATION COMPANY
vs.
THE MAYOR &c. OF NEW-ORLEANS.

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Whether the city of New-Orleans may drain its waters in the canal Carondelet?

THIS was an action brought to try the right of the corporation of the city of New-Orleans, to drain the waters of the city into the bayou St. John, through the canal Carondelet.

THE city is built on the Mississippi, the banks of which gradually slope from the river, so that the rain water runs from them into a cypress swamp, which lies behind the city, parallel to the river, and through which runs a creek called the bayou St. John.

IN the year 1794, a canal was dug from the city, through the swamp, to the bayou St. John, which the corporation of the city contended irrevocably altered the natural course of the waters from the city and its environs.

THE navigation company considered the canal as one of the navigable waters, which their charter authorises them to occupy and improve: under the idea that whatever might have been the original destination of the canal, its last and permanent one was to be exclusively applied to the purpose of navigation. They erected a dam to give a new direction to the water, so as to prevent its falling into the canal.

THIS dam having been destroyed by order of the city council, the present suit was brought.

BY consent, a paragraph from the *Moniteur de la Louisiane*, of the 26th of May 1794, was

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read, announcing the intention of government to dig a canal, which, carrying the waters of the city and its environs, in one of the branches of the bayou, would rid it of the stagnating ponds which contributed to its sickness, and the vast quantities of musquitoes, that rendered it unpleasant in summer.

THE paper further states that the expenses of the war allowing no hope, to obtain any aid from the royal treasury, for the digging of a considerable canal of navigation, government had asked nothing from his majesty, but the stay of the chain-negroes, by whose labour and that of such hands as might be supplied by zealous individuals, a canal *d'égoutement*, for carrying off the water, might be dug, which in successive years might be changed into a canal of navigation for schooners—that the king had assented to the proposition. The intention of the government is next announced, to request from the inhabitants of the city, in the month of June following, such number of negroes, as they might supply, to clear the ground thro' which the canal was to pass: promising that, this being done, the chain-negroes would dig the canal.

AN eight foot passage, it is said, will be left on each side of the canal, for the horses drawing the flat-boats, and in time the schooners; and a wide levee is to be destined to foot travellers, and, under a double row of trees, afford an agreeable walk.

ANOTHER paragraph of the same paper, dated the 19th of November 1795, announces that six days of the labour of the negroes in the city, and within fifteen miles around it, will enable government to complete the canal, so far that the schooners might come up to the city: and the people are solicited to send their slaves.

A circular of the 15th of September, noticing the advantages the city had derived from the canal, in procuring fire wood with greater ease, in the marked diminution of mortality during the preceding season, and the draining of the water from the back part of the city, presses the civil officers, to solicit from the inhabitants, additional aid of slaves, expatiates on the advantage the commerce of the city will derive from the canal and the satisfaction the people will have in beautiful shaded walks, on each side of the canal.

A paragraph in the *Moniteur* of the 23d of November, asks for eight days work of a slave from each of the inhabitants of the city and neighbourhood, promising that after this aid, the chain-negroes would be able to complete the canal.

A royal schedule was next introduced, dated May 10, 1801, by which the king yielded his assent to the governor's representation that the three hundred toises, *de las tierras comunes*, of the commons, out of the city, nearest to the

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fortifications, which in their situation produced nothing, being covered by water more than six months in the year, might be divided into small lots of seventy toises in front and one hundred and fifty in depth, and let out for a moderate rent, to such inhabitants of the city, as might wish to occupy them as gardens, and the money thus raised applied to the lighting of the city: so that in the course of a few years, the whole ground might, by tillage, be raised above the level of the water: the occupiers of these lots draining them by trenches into the canal Carondelet, so as to put an end to the putrid fevers occasioned by the stagnation of waters in ponds near the city, which were attended with so much mortality.

THE engineer, who directed the digging of the canal, testified that before that time, the ordinary and natural disgorgement of the waters of the city, was on the place on which the canal was dug: tho' another respectable witness assured that it was at some distance, behind the hospital.

IT was in evidence that the inhabitants of the city and neighbourhood freely sent their slaves to work.

A resolve of the city council was offered, by which that body determined not to prevent the throwing up of the dam, raised by the navigation company. This resolve, however, had not the approbation of the Mayor; nor did it appear to have been sent to that officer for it.

Livingston for the plaintiffs. The charter of the navigation company, 1805, *c.* 1. *sec.* 7, authorises the plaintiffs to "enter into and upon "all and singular the lands covered with water" for the purpose of improving the navigation of the territory: and the 12th section provides that "if any person shall break down or destroy "any embankment or other work, lawfully erected by virtue of this act.....besides making good "all the damage occasioned thereby...shall forfeit and pay,...the sum of one hundred dollars."

IT is to be observed that this act ought to have the force of an act of congress, for it was passed by the legislative council of the territory, whose acts were liable to be repealed by congress: and congress, not having done so, have impliedly given it their sanction. Nay they have recognised it, having made it an express condition of a grant of land to the city, that a gratuitous conveyance should be made to the plaintiffs, of as much of the commons of the city, as shall be necessary to continue the canal Carondelet, from the present basin, to the Mississippi. 1807, *chap.* 27.

THE plaintiffs were then authorised by the legislature of the territory and that of the Union, to enter upon the land on which the trespass has been committed and prepare the water course for navigation. In the execution of this authority, they erected the dam, which the defendants

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have destroyed—a *work*, in the language of the plaintiffs' charter, *lawfully erected by virtue of this act.*

THE publications, in the *Moniteur*, clearly shew that the primary object of the canal was navigation, altho' at first and until this end could be attained, another was held out as an inducement to the people to send their negroes, the draining the stagnating water from the back of the city.

BOTH the objects could not be simultaneous for one would necessarilly prevent the other. The draining the waters and carrying off all the filth of the city into the canal, must, in a very short time, fill it up and render it absolutely unfit for navigation.

THE paragraphs in the *Moniteur*, which are believed to be official, convey ideas which repel the presumption that the canal was intended to be the receptacle of the filth of the city. They speak of *double rows of trees, affording an agreable walk*, of *the satisfaction the people will have in beautiful shaded walks on each side of the canal:* advantages inconsistent with the belief that the surface of the water, between these promenades, will be covered with dead animals and the sweepings of the yards and streets of the city.

THERE was then a time, when the destination of the canal was to be altered and instead of being a canal *d'égoutement*, it was to become a

canal of navigation. The legislature have declared that that moment was arrived, when they vested in the plaintiffs, the right of improving this water-course, as well as all others susceptible of that kind of improvement.

LASTLY: were we to admit the right of the city to the canal as a drain, the city council, by their resolve, have completely parted with it. It is true this resolve does not appear to have been sent to the Mayor for his consideration. By the 11th section of the act of incorporation, all resolutions of the city council for the disposal of public property are to be "sent by the said council to the "Mayor, immediately after the same shall be "passed." Of this sending, in the present case, the plaintiffs cannot have any evidence. But the rule *omnia recte acta* is surely applicable to this case, and the council are not to complain, when we presume they have done their duty.

Moreau for the defendants. Every undertaking which alters the running of the public water, is forbidden. *Arg. legis* 16 *ff. Loix Civiles, liv.* 2, *tit.* 8, *s.* 3, *n.* 11. *Franc. Marc. t.* 1, *q.* 589, 597. Inferior land must receive the water of supérior. *Lelaure des Servitudes*, 19. Servitudes are acquired by grant or use. 3 *p. l.* 14, *t.* 31. *Ley* 15, *eod. tit.*

THE plaintiffs are incorporated "for the "purpose of improving the internal navigation "of this territory." This, perhaps, authorises them to occupy and improve all natural water

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courses susceptible of improvement, but certainly, does not vest in them artificial canals, made at the expense of other persons, and for particular purposes, as the canal Carondelet and the canal Marigny.

THE canal Carondelet was dug, at the expense of the inhabitants of New-Orleans, with the aid of the chain negroes, *granted to them* by the king, on the representation of the governor, whose name it bears: and we are informed, from high authority, that, if the expenses of the war had not forbidden it, an aid would have been obtained from the royal treasury.

THE papers read in evidence clearly establish this proposition that the canal was built at the expense of the inhabitants, who spared their negroes, aided by the king's grant of the labour of the chain negroes, at the instance and solicitation of his representative in the province.

IT was dug for a particular purpose: that of ridding the city "of the stagnating ponds which "contributed to its sickness and the vast quanti-"ties of musquitoes, that rendered it unpleas-"ant in summer," and the idea is held out that, in successive years, it might be changed into a canal of navigation for schooners.

SURELY, the city, from the moment the canal was dug, rightfully claimed the use of this canal, which it had acquired partly for a *valuable* and partly for a *good* consideration. A right which

if it wanted confirmation, and if that confirmation could be given it by the legislature of the territory, was confirmed by that body, in the charter of the defendants, which is anterior to that of the plaintiffs.

ADMITTING for argument's sake, that the charter of the plaintiffs vested any right to the use of the canal, it did not authorise them to alter the course of the water. It did not vest in them the right of determining (alone and without the concurrence of the party, who had an interest in resisting the change) that the moment had arrived when the canal was to become a canal of navigation and a canal of navigation only. The act of the legislature cannot be said to have done so, by implication: for they do not appear to have had this canal in contemplation, indeed any artificial canal dug for a particular purpose, *iniquum est perimi pacto, id quod cogitatum non est.* And had they thought of it, they could not have done it; for such canal has necessarily an owner: and that owner was, either the city, or the United States, who might claim it as successors to the crown of Spain.

BUT, surely, even if the city have no right to the canal, they certainly have that of preventing a diversion from the actual course of the water. The present direction is, either the natural one, as one of the witnesses has sworn, or the one which has been given to it, by the concurrent

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act of the king and the city, the only parties who had an interest therein.

LEWIS *J.* The city have no right in the canal. They never had any. The negroes who were sent to aid those of the king, (the chain-negroes,) were the property of individuals, who willingly yielded their labour, without stipulating for any advantage to themselves or to the city. It was a voluntary curtesy. Nay, if the advantages held out by the governor to induce the inhabitants to send their negroes, may be viewed as the consideration of their services, they have already had the full benefit of it. The canal was not to be used as a drain for ever. It was expressly mentioned to them, that in time it would be changed into a canal of navigation for schooners. This time has arrived, and as the use of the canal, as a drain, is incompatible with the use of it, as a canal of navigation, the city have no longer the right to empty the waters of their streets into it.

MARTIN *J.* I think differently. It is far from being clear to me, that the canal cannot be used both as a drain and a stream for navigation. Witnesses have informed us, that in the latter years of the Spanish government, large wooden gutters, *gargouilles*, had been placed on each side of the canal, the issues, of which were stopped in time of rain, and the water suffered to settle and deposit the earth, it brought down, and when perfectly clear, it was allowed to find its way thro' the canal. Thus the filling up of

the canal was prevented and dirt was procured to raise the ground near it. As late as the year 1801, the royal schedule mentions the king's intention that trenches might be dug to convey the water from the commons into the canal. Hence, I infer that the natural direction of the waters, of the city and the commons was, by the sovereign's authority, changed and established as it now is. No one has a right to alter it.

Denisart, verbo LABOUR, cites a case determined in one of the parliaments of France, *Laurent vs. Warin*, in which the court held that "when in a "piece of land, there is a water course which "carries off the rain water, it is not lawful for "the owner of the land to give it another direc- "tion over the land, if the alteration occasion "any detriment to the adjacent estates." Thus the law of France, the original law of this country, corresponds with that of Spain. If a new direction is now given to the waters of the city, the owners of estates below it, down to the bayou, will not be obliged to give it passage over their land, in which they may have made improvements incompatible with the passage of these waters. Having bought their estates free from such a burden, they will now resist the imposition of it.

NEITHER, can I refrain from considering the advantage, held out to the inhabitants, the clearing of stagnating ponds, which occasioned deadly fevers, and gave birth to myriads of musquit-

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oes, which so desolated them, that their houses became inhabitable, as objects of major importance, and as the price promised them for the labour of their negroes. If the all-powerful hand of the sovereign might at all times, despoil them of these purchased advantages, of which there is no evidence, their right to them, like all other rights, has been strengthened and rendered less precarious by the change of government. Surely in the most despotic, they could not fairly have been deprived of it. *Turpis est fidem fallere.*

I cannot construe the plaintiffs' charter as affecting the defendants' rights. According to the counsel of the former, the city are to lose both the promised advantages—the use of the canal as a drain—the use of it as a stream of navigation. For it is to lose it as a stream of navigation, if they must pay for navigating it: the canal then will not be the property of the defendants, but of the plaintiffs.

THE city council have not parted with any of their rights by their resolve. It is not to be presumed that it was their intention to make a present to the plaintiffs. *Nemo presumitur donare.* The reason, that this resolve was not sent to the Mayor for his consideration appears to me to be, that it is not *for the disposal of any public property, or the payment of any monies.* Resolves, for these objects, being the only ones that require the Mayor's consideration.

BEAUREGARD EX'TOR &c. vs. *PIERNAS & WIFE.* SPRING 1811. First District.

Wife, becoming surety for her husband must *specially* renounce the laws in favour of women & wives.

THIS was an action brought to recover, out of the property of the wife, (the husband having become insolvent) the price of a slave, sold by the testator to the husband, by a notarial act of sale, to which the wife became a party, as a surety, and as such, in conjunction with her husband, hypothecated her property, present and to come. Upon the failure of the husband, a suit was instituted against the wife, before the Spanish tribunal, in which, an order of seizure was granted, and certain property of the wife seized by the alguazil mayor and put in deposit; but all proceedings therein, had been suspended by the change of government.

Ellery for the plaintiff. In this suit I rely,

1. Upon the Spanish proceedings.

2. Upon the notarial bill of sale, to which the wife, as surety, voluntarily made herself a party, and which, by the laws of this country, makes the contract binding upon her, and renders her property liable, upon the default of her husband.

I. From an examination of the Spanish proceedings, it appears that this suit, before the Spanish tribunal, had gone through its several stages, and that the legal contestation of the parties terminated in an execution, by virtue of which, the goods of the wife had been seized, and put into the custody of the law, from which

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they were only released by the change of government, which suspended all judicial proceedings. This execution, or *fi. fa.* into which the order of seizure granted in the beginning of the suit had ripened, always supposes, as indeed does an order of seizure, (if in this case, it should be construed to be an order of seizure, rather than an execution) a previous judgment to support it, either judicially delivered, or legally implied, from the nature of the instrument declared upon, which by the principles of the Spanish law, may either import a *confession of judgment*, or carry with it the *authority of the thing judged.* In this case, the proceedings before the Spanish tribunal, were matured into an execution, proceeding from a judgment, judicially delivered and which, though not pronounced in the form of our judicial decisions, is yet sufficiently clear and certain. The counsel of the defendant, must, therefore, dispose of this judgment, before he comes to the intrinsic merits of this action.

II. Should the court not be with me upon this point, I rely, with confidence, upon the nature of the instrument produced, which is not only founded upon the principles of the Spanish law, but minutely and laboriously observant of all its forms and technicalities. The Spanish law, like the common, supposes the wife under the coercion of her husband, and examines with attention, if not also with jealousy and suspicion, every act executed by her during coverture,

in favor of her husband, and a variety of provisions have been made to secure her rights and privileges from infringement or invasion. But this has not been carried so far, as wholly to lock up her property, or to deprive her totally of the power of pledging or alienating it. Her privileges are all summed up in the 61st law of *Toro*, as inserted in the *Recopilacion de Castilla*, and found also in the *Partidas*. Of this law, the leading principle is, that the wife shall not be bound *in solidum* with her husband, or become a surety for him. *Recop. de Cas. T.* 1. *L.* 7. *F.* 709. But to this principle, there are exceptions, and the present case will be found to fall under them. These exceptions are numerous and important, of which the third meets and embraces our case, viz ; " That when the wife, " apprized and knowing, that she is not allowed " or compellable by law, to be a surety, af- " terwards renounces her privilege, and waves " the right which the law secures to married " women, in this behalf." " *La tercera es,* " *quando la muger fuesse sabidora e cierta que no* " *podia nin decia entrar fiadora : si despues lo* " *fiesse, renunciando de su grado y desamparando* " *el derecho que la ley otorgo à las mugeres en esta* " *razon*" 5 *part.* 3 *l.* 12 *p.* 2 *Feb. de escrit.* 4 *c.* 35. *n.* 125. Now by the notarial bill of sale, we find, that the wife was fully knowing and apprized of the existence and purport of the laws made in her favor, and voluntarily and deliber-

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ately renounced them, and that this renunciation was made in a solemn and legal form. Thus have we brought ourselves completely within this exception, and should the judgment of the Spanish court be questioned or denied, still are we entitled to the amount we claim, by virtue of this notarial act, to which the wife voluntarily and knowingly made herself a party, and bound herself in conformity to the principles and forms of the Spanish law, and made her property liable, upon the default of her husband.

Moreau for the defendant. As it respects the order of seizure, granted by the Spanish tribunal, although called an execution, no great reliance can be placed upon it. It is a provisional order of seizure and rather in the nature of an attachment, than an execution ; it terminates, indeed, in an execution, if not opposed ; but it is always notified to the defendant, who has three days within which to make his defence or opposition ; here such defence or opposition was made, and no definitive judgment has been pointed out, or was rendered ; the proceedings were left incomplete at the cession. With regard to the bill of sale, wherein the wife became a surety for her husband, it will be found illegal and invalid, and not made conformable either to the principles or forms of the Spanish law. This law is not only unfavorable to, but prohibitory of any such engagement, on the part of the wife.

The wife is considered as a minor. And her rights are not only liberally extended, but jealously watched, and securely guarded. But we are told of exceptions, and that the present case makes one of these exceptions. To this effect, the third exception has been quoted, but too many of the legal requisites and provisions have been neglected or violated, to permit the party to hope for the benefit of this exception, and I will proceed to shew,

1. That the wife was not duly authorised to become a surety for her husband.

2. And if so authorised, that she has not legally renounced the laws forbidding her to become such surety.

3. That the property purchased, has not been proven, as the law requires, to have been converted to her use, or purchased upon her account.

I. The 2 *law*, 3 *tit.* 5 *lib.* of the *Recopilacion de Castilla* ordains, 'that the wife can neither make a contract, nor renounce those in her favor, nor appear in court either as plaintiff or defendant, without the express authority of her husband. But in this bill of sale where she is brought to be made a surety, no such authority is given. It is true, that the clause of surety is inserted in the bill of sale, and therefore a tacit authority may be thought to be inferred, but the law upon this point, is imperative, and requires a formal written act of

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authorisation. *Pot. traité de la puissance maritale* 67. *n.* 69. 2 *Febrero, Libreria de escribanos* 99. *cap.* 6 *s.* 4. *n.* 109.

II. The law 2 *tit.* 12, *Partida* 5, which is drawn from the famous senatus-consultus Velleianus, forbidding a woman to become surety, annuls all obligations contracted in violation of its disposition. The reason is, that it is presumed that it is thro' ignorance or weakness that she binds herself for another.

THIS reason operates more powerfully in the case of a wife, who binds herself for her husband. The law 61 of *Toro*, which is the *l.* 9, *tit.* 3. *lib.* 5, *de la Recopilacion de Castilla*, declares null and void, any obligation contracted jointly with her husband, or to secure any debt due from him: even when the instrument mentions that the obligation is contracted for her benefit: unless it be actually proved that it turned to her advantage, and that the thing, which is the object of the obligation, is not one of those which the husband is bound to supply: as raiment, food and others necessary to her.

III. It is true that the law 3, *tit.* 12, *Partida* 5, contains an exception to that which forbids women becoming sureties, authorising them to derogate from a law established for their benefit. But, how is this derogation from the law, this renunciation of the benefit, to be effected in order to validate the suretyship? It is necessary, says the law cited, that the woman have a certain

knowledge, *sea sabidora y cierta*, of the dispositions of the law, to which she is about to renounce.

Febrero requires that the notary, who receives the instrument, should explain these dispositions to her, 2 *Libreria de los Escribanos, cap.* 4 *s.* 4 *n.* 15. If it appears from the drawing of the instrument, or from the interrogatories put to him, that he is not well acquainted with the laws, to which he makes a woman renounce, the instrument is to be declared void, because, says *Febrero*, the notary cannot properly have explained what he was not well acquainted with. *id.*

HENCE the wife must expressly renounce to the prohibitory law established for her benefit : and a general renunciation to all laws concerning women would not suffice to give effect to her obligation as surety. 2 *Colomb. Instruccion de Escribanos*, 154. *n.* 4.

HERE the notary has caused the wife, to renounce to the benefit of the law 61 *de Toro* or the law 9. *tit.* 3, *lib.* 5. which are the only Spanish laws, declaring that a wife cannot become surety for her husband. He has also caused her to renounce *generally* to the laws of the Emperor Justinian, to the senatus-consultus Velleianus, to the laws *del Toro*, of Madrid, of the *Partidas*, to the ancient and modern constitutions, and to the others laws in favor of women : that is to say, to a crowd of laws mostly foreign to

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the subject, in which no doubt are mixed with others, most of, and likely all, the dispositions to which it was necessary she should renounce, in order to give validity to the contract, and of which the notary ought carefully to have given her, detailed and particular information. This bungling way of making the renunciation announces the confused idea which the officer had of these laws, and shows how impossible it is that the wife should have had a clear and distinct view of the dispositions in her favor, in a number of laws so generally and vaguely cited. Lastly, when the notary was particularly interrogated, by the Spanish judge, and required to specify the particular laws, by titles and numbers, which he had informed the wife were to be renounced, his answer clearly indicated that he had no correct idea of what it was his duty to explain to her.

IT is conceded that if it were in proof that the contract for the performance of which she became surety had been for her benefit or advantage, the court ought not to listen to her objection. But of this, there is not the slightest proof. For the declaration drawn from her, in the notarial instrument, cannot prejudice her according to the authority cited *l.* 9, *tit.* 5, *lib.* 5, of the *Recopilacion de Castilla.* For if this declaration were to bind a wife, it would be easy to elude all the laws provided for her defence and

protection, and it would be in vain to have established it as a principle that the husband can in no ways alien or bind the dotal property of the wife during the coverture, *even with her consent.*

Ellery in reply. The court will determine, from an inspection of the Spanish record, whether the executory proceedings had in the suit, before that court, were limited to a provisional order of seizure, or whether they did not ripen into an execution. The provisional order of seizure is the first process of the court, and was here issued in May 1798, and it was not, until July following, that execution was ordered, and not until the succeeding September, that the property of the defendant was seized by the alguazil mayor, and put in the hands of the public depositary, where it remained until the cession. But we are not obliged to rely upon the Spanish proceedings, the nature of the instrument produced, and the form of its execution, bear us fully out in our claim. We have proven by it, that the wife voluntarily made herself a surety for the payment of the debt, and that she renounced all the laws existing in her favor.—But it is objected,

1. That she was not duly authorised by her husband to become such surety, and that a notarial act to this effect, on the part of the husband, should have been first executed. This

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undoubtedly would have been necessary, were the wife to become a surety for a *third* person, in order to protect her husband from the effects of any rash engagement into which the wife might be seduced, but certainly it cannot apply to a case where she acts for and with her husband. Her signing the instrument before a notary public, in presence of, and in conjunction with her husband, is sufficient authority. Again if this authority is to be questioned, by whom, but by the husband can it be questioned?

2. But it is next contended, that even if the wife were duly authorised so to sign as a surety, still, the clause of renunciation is too vague and indefinite, and that instead of renouncing all and every law made in her favor, the wife ought specially to have enumerated and distinctly renounced the 61st law of *Toro*. But in the *Partidas*, (the original text) no form of renunciation is prescribed or indicated; and though a particular form is suggested in *Febrero* (who is a mere commentator,) still it is not by him stated, to be a necessary, but only a convenient one, and may or may not be adopted. He himself observes, that it is not necessary to the validity of the obligation, but only conducive to the neatness of the instrument in which the obligation is contained, and is given, as he quaintly expresses it, to guard notaries from the commission of *classical* errors, and the unnecessary

repetition and renunciation of laws which have no bearing upon the subject. We do not deny the necessity of a clause of renunciation on the part of the wife, but we contend that the one here inserted is sufficient. It is, indeed, difficult to imagine one more solemn, to which are superadded the rites of religion, the solemnity of an oath, and if violated, the imprecation of infamy. The words are remarkable. The wife, here renounces the laws of the Emperor Justinian, the senatus consultus Veleianus, the laws of *Toro* and of Madrid, the new *Partida*, and the old constitutions, as well as all other laws enacted in favor of the wife, acknowledging that she has been informed of them, and that with this knowledge, she renounces them, and then *swears* by our Lord, making the sign of the cross, according to law, that to execute this instrument, she was not enticed nor intimidated, by her husband, nor by any other person, and declares that she did it of her own free will and authority, in order to convert the property purchased to her own use; and that to invalidate this oath, she has made no protestation or mental reservation, and even if authorised to revoke it, that she will not, neither will she receive any absolution, relaxation, or change therefrom, either from our holy father the pope, his nuncio, or legate, or any one invested with authority to this effect, and if it should be dispensed with, that she will not avail herself of such

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dispensation, under pain of perjury, and of falling into infamy &c. It is difficult to dress up a clause of renunciation with more solemnity, or to invest it with greater terrors. It also closely follows the form pointed out by the classic *Febrero* vid 2 *Feb. de Cont. cap.* 4 *s.* 4 *Ar.* 117. But it seems, that the 61st law of *Toro*, is not particularly recited and renounced, in conformity to the form given by *Febrero*. I have already stated that it is not required by the *Partida*, and that it is not made indispensably necessary by *Febrero*. But suppose it were, in renouncing all the laws of *Toro*, is not the 61st law of *Toro* renounced? In renouncing the whole, are not the parts forming that whole, renounced? And was it not stronger on the part of the wife, as well as safer on the part of the Notary, to renounce every law, than to limit the renunciation to any particular law? *Febrero* to be sure thinks it sufficient to renounce only the 61st law of *Toro*, but *Martinez*, it seems, another commentator, makes mention only of the *Partida*, and perhaps, another commentator might be found, who thinks other laws equally necessary to be the subject of renunciation. In these perplexed paths, what guide are we to follow, and who will decide, when doctors disagree? One says, renounce the *Partida*, another the 61st law of *Toro*. According to one, if we step out of the *Partidas* we are lost, according to the other, there is no safety but in the 61st law of *Toro*. Even if

both had been renounced, and the extension of the clause of renunciation to embrace the two, had not weakened its validity, still is it not probable that in the numerous codes of laws, forming the motly system of Spanish jurisprudence, (laws always increasing, and never expiring) that some pretermitted clause or provision, some dormant principle, buried in the legal lumber of ages, might be dug up to destroy this instrument. The navigation among these codes and *Recopilacion* is certainly difficult and dangerous, thick-set with points, and abounding in sands and shoals: the path dazzled by the deceitful lights of expositors, and pursued with unskilful pilotage; we have weathered the *Partidas* and the *Recopilacion*, we have steered clear of the laws of Madrid and *Toro*, but is there no risk of striking upon the *Fuero Real*, or *Fuero Juezgo*, or being lost upon the shoals of the *Ordonamiento*, even a senatus consultus Veleianus, or an unheeded law of Justinian might prove fatal to our voyage. Safety, therefore, required, that we should insure against all these laws. But it is suggested that the notary could hardly have time to instruct the wife in all the laws, which she is here made to renounce; neither was it necessary: it was sufficient, that he apprized her, that there were laws in existence in the different codes, by which her rights were protected, and she secured from the coercion of her husband, by which she was not obliged to become a surety for him;

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without her free consent, and that if she wished to give validity to the instrument, that she must renounce them. Again, a notary public, is an officer worthy of credit, whose acts import verity, and if her renunciation is there recorded, we have no right to travel or enquire out of this record. When a wife, under the common law, releases her right of dower, the certificate of the judge or justice of the peace, before whom the release is made, that she did it free from the coercion of her husband, is sufficient.

By the Court. It clearly appears that the proceedings before the Spanish tribunal, had not ripened into a final judgment. It is true, at the inception of the suit, a writ of seizure was awarded against the property of the husband and afterwards another against that of the wife, but these writs of seizure, like writs of attachment, are original writs to bring in parties into court, as the nature of the case requires.

THE renunciation of the wife, is not, as the plaintiff contends, a *matter of form*, introduced by practitioners. The civil law considers women generally to certain purposes as in a kind of perpetual nonage and the *law* 2, *tit.* 12, *part.* 5, declares null all contracts of suretiship, entered by a woman, for any other person than her husband. It is true that the *law* 3, *tit.* 12, *part.* 5, allows a woman to renounce the former, but it requires she should be made acquainted with its provisions.

Febrero, informs us, that the notary, who receives the contract, is bound to make the woman acquainted with the disposition of the law in her favor, and the consequences of her renunciation, and he ought to certify that this has been done, 2 *Libreria de los Escribanos*, *cap.* 4, *sect* 4, *n.* 115, unless he takes the trouble to recite at full length, the law itself. If he neglect to do so and does not apprise the woman, he incurs corporal punishment, and *the act ought to be declared* NULL. *Loco citato.*

THE act is also to be annulled, if it appear by the interrogatories that the notary was not himself master of the dispositions which it was his duty to make known. *id.*

IN the present case, from the generality of the laws cited, out of the Spanish and Roman codes, we are perhaps justified in presuming the ignorance of the notary. His examination manifests his inability to refer to the particular law of the *Toro*, all of which, 83 in number, are renounced in the lump. The case is rendered much stronger from the deposition of a person, present at the execution of the act, who contradicts the notary in the belief which he expresses of the ability of the wife to have understood these laws, had they been read to her, from her very imperfect knowledge of the Spanish language.

IF this renunciation be *stricti juris*, when the wife becomes surety for a stranger, as she then has the aid of her husband, it is much more to

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be required, when *inops consilii*, he makes her take an engagement for his benefit: since the civil law, in order to protect the wife, against the consequences of conjugal affection, will not allow her dotal property to be aliened, during the converture, even with her consent. *Law* 7 *tit.* 11. *Part.* 4. For it would be to expose her to remain without property, *indotata*, to allow her to become his surety, since on defect of his, her goods would have to be taken.

ON this principle, the law 61 *del Toro*, which is the *law* 9, *tit.* 3. *lib.* 5, *de la Recopilacion de Castilla*, declares void, any contract in which the wife binds herself *in solidum* with her husband, or becomes his surety for any debt of his, unless contracted for her particular benefit, and for some article which he was not bound to provide for her. This last law, has no clause allowing a renunciation to its dispositions, but, it appears, that the courts of Spain have in practice, construed it as admitting it.

BUT, the uniform opinion of every Spanish writer is, that, when the wife becomes surety for the husband, the instrument is to be clothed with all the formalities required, in cases in which she binds herself for another person.

Colom, formally says, that in all cases of suretyship, the laws in favor of women, must be SPECIALLY renounced, because A GENERAL *renunciation to all laws in favor of women, would*

not be sufficient to render the instrument valid. 2 *Libreria de los Escribanos*, 154. *n.* 4.

Febrero, speaking of general renunciations, says, they are absurd, and tend only to introduce error and confusion.

THIS point was also determined, in a judgment rendered in this city, when under the dominion of Spain, July 13th 1803, in the case of *Fletcher* vs. *Piernas*.

AS we are of opinion, that the renunciation ought to have been special, it is unnecessary to inquire, whether the wife ought not to have been authorised.

JUDGMENT FOR THE DEFENDANT.

DENIS vs. *LECLERC.*

The receiver of a letter has no right to publish it, in spight of the writer.

ATTACHMENT for contempt. The original petition stated that the defendant having, by improper means, obtained a letter, written by the plaintiff to a third person, was preparing to publish it, with indecent commentaries: and prayed for an injunction staying the publication, which was granted *as to the letter.*

ON the following day, the defendant filed his answer to which was annexed a copy of the letter, denying that he obtained it through improper means, and averring it had been sent to him, by the person to whom it was directed. The court thought it proper to sustain the injunction till the hearing.

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THE defendant, a few days after this decision, inserted an advertisement in a newspaper, inviting all persons, who might be desirous to see the letter, to go to the clerk's office, where a copy was annexed to his answer, or come to his printing-office, where one was stuck up for public inspection.

ON an affidavit of these facts, the plaintiff moved for and obtained process of attachment for a contempt of the authority of the court, and a disobedience to the injunction: on the return of the process, the defendant admitted the publication of the advertisement, but denied that any copy, or the original of the letter, was stuck up in his office: and a witness who was introduced and examined *viva voce*, by consent, deposed, that he had called at the office for a sight of the letter, and was taken into a private room, where it was shown to him, with an injunction of secrecy: and that, to his knowledge, another person had been indulged with the reading of it.

THE case was argued by *Alexander*, *Depeyster* and *Smith*, for the plaintiff, and *Morel* and *Wilson* for the defendant. Mr. *Blanque*, a lay gentleman was, with the consent of the bar, permitted by the court to speak on that side.

By the Court, MARTIN, *J. alone.* Although it has been deemed improper, upon this motion, to allow the discussion of the propriety of grant-

ing the injunction, that having been gone into at large on the motion to dissolve it, I believe it advisable to detail the principles which influenced the court in declining to dissolve it before the final hearing, as these principles have been for purposes, not necessary to be now examined, industriously and eggregiously misrepresented.

THE injunction was claimed and the dissolution of it resisted on the ground,

1. That a letter is an object of property :

2. That, after the person to whom it is directed receives it, the property of the writer still continues in it, to a certain degree. The former having only therein a joint property with the latter :

3. That the right of publishing it, remains exclusively in the writer, until he abandons it, and at his death passes to his representatives ;

4. That the property of the writer may be violated, by multiplying copies of, or suffering the letter to be used contrary to his presumed intention.

I. A letter is an object of property.

THERE is nothing that a man may so emphatically call his own, or more incapable of being mistaken, than his ideas thrown upon paper, his literary works. 4 *Burrows* 2345. *Millar* vs. *Taylor*.

ACCORDING to the laws of France, a letter is recognised as a chattel, which may be the ob-

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ject of larceny. An action lies, and even a criminal prosecution may be instituted, against a person who, having undertaken to carry a letter, violates his trust and detains it. *Il y a action en justice, et même on peut prendre la voie extraordinaire, contre celui qui s'étant chargé de porter une lettre, ne s'est point acquitté de son message et la retient.* 3 *Collection de Jurisprudence.* 312.

AT Rome, an unfaithfull messenger, detaining a letter, was prosecuted as for forgery. *Nuntius non restituens litteras ei, cum mandatum restituere susceperit, incidit in crimen falsi. Bartolus in lege Titio* 36, *n.* 3.

IN the United States by an act of Congress, it is made penal to print the manuscript of another, and the property of the writer is secured from invasion. 1 *Laws, U. S.* 118.

THIS act is expressly extended and declared to be in force and effect in this territory. 7 *Laws U. S.* 117.

II. The second proposition was expressly recognised by Lord Hardwicke, in the case of *Pope* vs. *Curl,* in which the plaintiff complaining, that the defendant was about publishing letters which he, the plaintiff, had written to several persons, obtained an injunction to stay the publication.

THE Lord Chancellor holding that "the receiver of a letter has at most a joint property

" with the writer and the possession does not " give him a licence to publish it." To the authority of this decision, invoked by the plaintiff, the defendant has objected that the British Chancellor spoke only of letters, as objects of literary value, written for the purpose of raising money by a sale: but the plaintiff's counsel has drawn the attention of the court to the latter part of the case, from which it appears that the letters which *Curl* was about to publish, were *only letters on particular subjects and inquiries about the health of friends.* 2 *Atkins* 341. Foiled in this way, the defendant has insisted, that from the reputation of *Pope*, an illustrious writer, even letters of this kind might be considered as valuable, as those of ordinary persons on scientific subjects: and that the case of *Pope* vs. *Curl*, is a solitary one, which must not be made to controul others out of its species, and the present plaintiff, altho' a lawyer, being no author, (the letter being clearly written without a view to publication,) cannot identify himself with the plaintiff in the case cited. This objection has been met by the production of a case in which lord Apsly, extended the same principle to letters written by Lord Chesterfield, a nobleman from whose pen nothing had yet been given to the world, but some parliamentary speeches. *Ambler* 737.

ON this second proposition, therefore, the court could not help saying, (without binding

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itself, as to the final opinion, it will have to pronounce on the hearing) that the person to whom the plaintiff directed his letter, had not the right of publishing it, and consequently, the present defendant could not derive it from her: notwithstanding, the letter was not written with a view to profit, nor by a person whose employment it was to write for that purpose.

III. The third point made by the plaintiff's counsel is that the right of publishing a letter remains exclusively in the writer, till he abandons it, and if not abandoned, passes at his death to his representatives. This proposition is so natural a corollary of the preceding, that it is only with a view to show that the court has attentively weighed every thing in this case, that the trouble is taken of stating it.

IT flows from a principle established in the case of *Millar* vs. *Taylor*, viz: a partial disposition, by the true proprietor of a thing, is not to be carried beyond the intent and measure of the proprietor's assent and appropriation, in that behalf, whether it be the case of borrowing, hiring or any other kind of contract or bailment. In the application of this principle to the present case, the plaintiff contends that the letter was sent, for the sole purpose of being perused by the person to whom it was directed, and therefore any other use of it, being contrary to, and beyond the intent and measure of his assent and

appropriation, is tortious and illegal, and the court ought to restrain it.

FOR this purpose, the case of *the Executors of Lord Chesterfield* vs. *Stanhope & al.* is invoked. *Ambler* 737. It differs but little from that of *Pope* vs. *Curl*, which it strongly confirms. The Earl had had a natural son, of whom the defendant Stanhope was the widow, and at whose death she became possessed of a number of letters written to him by the Earl, on education and politics; some of which contained characters of persons in office. The lady, some time after her widowhood, mentioned the letters to the Earl and expressed her belief that, if published, they would form a valuable system of education. His Lordship answered, "Why, that is true, but there is "too much latin in them" and did not express any disapprobation of the publication. Shortly after, he requested her to restore to him the letters containing the characters, declaring, upon his word and honor, he desired them only with an intent to burn or destroy them. She carried, accordingly, all the letters to him. He took out those which contained the characters, repeated his assurance on his word and honor, that he meant to burn or destroy them, and told her she might keep the rest. After his death, she contracted with Dodsley, the other defendant, for an edition of them. On the application of the executors of the late lord, an injuction was issued to stay the publication. The defendants insisted on the

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presumed assent of the deceased. The plaintiffs contended, that a person has no right to print or publish letters which he receives, without the consent of the correspondent who wrote them: that his property in the letter does not extend so far, and if it did mischievous consequences would follow in abundance of cases—that the consent of the Earl, was necessary, or that of his executors, after his death—that his taking the characters and leaving the other letters in her hands, was no evidence of his consent to their being printed. Of this opinion was the chancellor, Lord Apsly.

IT is observable that the permission to publish might, perhaps, have been correctly inferred, from the want of any actual objection, on the part of the writer, when informed by one of the defendants, that she thought of a publication of his letters—from the strong and repeated asseverations, under the word and honor of the Peer, that the letters containing the characters were taken for the sole purpose of being destroyed. For those asseverations can only be accounted for, by being considered as evidence of the Lord's intention, to repel the idea that the characters were desired to be returned, with a view to any profit to be derived from them, which would unnecessarily diminish that which the lady might promise to herself from the publication hinted at.

IN this case, the chancellor recognised the principle, established by Lord Hardwicke, as the

ground of several decrees made since, in the cases of Mr. Webb, Mr. Foster and others. According to this principle, the right of publishing a letter belongs exclusively to the writer: the receiver has not such interest in it, as will enable him to prevent its publication. For Lord Hardwicke continued the injunction as to the letters written *by* Pope, but refused to continue it as to those written *to* him.

THE present case has been endeavoured to be distinguished from those cited in regard to the nature of the attempt—not to print a letter, with a view of appropriating to one's self the profit of the sale, and thus depriving the writer of the benefit secured to him by law, under the denomination of *copy right*; but with the sole view of disclosing the writer's secrets and wounding his feelings. A defendant is not to be enjoined from doing an act, on account of the benefit which he expects to derive therefrom, but on account of the injury which it may occasion to the plaintiff. Here the plaintiff complains that his property is about to be violated. Can the defendant resist the claim of the plaintiff, by saying: true it is, I am about violating your property, but I seek not thereby any pecuniary benefit, nor any advantage, but the gratuitous pleasure of working an injury? In *foro legis*, the measure of relief or damage must be the same, whether any advantage be contemplated by the wrongdoer or not—while, in *foro conscientiæ*, his turpitude is

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surely the greater, if none be expected. If a man is to be enjoined to print my letters, when he expects thereby to support his family, *a fortiori*, when his only view is to do me harm.

THE case is attempted farther to be distinguished, because the *subject of the injunction* is one single letter, which cannot be said to constitute a literary work. The defendant's counsel have quoted no case in support of the distinction, and the court has not been able to recollect any. Would the judges who granted the injunctions in the cases in *Ambler* and *Atkins* have permitted the letters to be printed *singly?* and if they had been thus given to the world, how could the collection of them have been prevented?

THE plaintiff having established, as far as the authorities on which he relies are entitled to respect, his right to the injunction, the defendant's counsel has replied, that the decisions of foreign judges ought not be considered as binding on the conscience of this court. This is not pretended: but the court cannot help considering the opinions of the British judges, as those of men of great learning and integrity. It is not their opinion to which the court gives its assent, but the arguments and reasons on which it is grounded. In the cases under consideration, the British court grounded its decisions upon a principle of the common law and a statute of Great Britain.

THE common law principle is this : *A partial disposition of a thing is not to be carried beyond the intent and measure of the proprietor's assent and appropriation, in that behalf.* In describing the act, we have here only an extended translation of the definition of larceny by the Roman lawyers : *Contrectatio rei alienæ, invito domino cujus illa fuit*, a diversion of the thing of another, contrary to the will of him, to whom it belongs.

IF upon this axiom Lord Hardwicke held that Curl's attempt to publish Pope's letters, ought to be restrained, because Pope by sending those letters to his friends, had made a *partial disposition* of them only, which Curl was carrying *beyond the intent and measure of Pope's assent and appropriation, in that behalf:* deciding on the civil law principle, this court must determine that the present defendant ought to be enjoined, because he is endeavouring to make *a diversion of the thing of another, contrary to the will of him to whom it belongs.*

IF in construing a British statute, made in the reign of queen Ann, for the protection of literary property, the same judge held that a letter was a literary work, against the invasion of which protection was to be extended, why should not an American judge, construing an act of congress *in pari materia*, extend the same benefit to his fellow-citizens, and hold that a

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letter is a manuscript, within the meaning of the act of congress.

IN acceding to the determinations quoted, this court keeps within the boundaries of its legitimate powers: to disregard them would be to overleap those bounds and destroy the ancient land marks. And the wise man has said: overleap not the ancient bounds which thy fathers have placed: *ne transgrediaris terminos antiquos quos posuerunt patres tui. Prov.* 2.

LASTLY it is made a subject of complaint that the injunction granted to the plaintiff prohibits the printing and publishing—while, in the cases quoted, the court only prohibited the *printing*, without restraining the defendants from publishing the contents of the letters, by other means than that of the press. Neither the statute of Ann, nor the act of congress, would authorise the extension of the injunction so far as has been done in the present case, in Great Britain or the United States. But the court has believed that, in supporting his last proposition, the present plaintiff has nearly shewn that he was entitled to this extention.

IV. This proposition is, that the property of the writer of a letter may be violated, by multiplying the copies of it, or suffering it to be used contrary to his will.

AS we are examining the question, in regard to a violation of property, by a tortious use of a

letter, otherwise, than by the press, the argument needs not to be extended to the consequences of a multiplication of the copies.

THE plaintiff says the laws of his country, protect his correspondence; and although this court will give damages, in case of its abuse, yet he needs not wait till the commission of the trespass, but may solicit the aid of the judges to avert it. The prevention of mischief, which should be one the principal objects of every system of jurisprudence, constitutes a very important branch of the jurisdiction of this court.

FOR this purpose, the counsel endeavours to shew that the law so much abhors the violation of a man's correspondence, that it prefers a failure of justice: and the position is supported by the following authorities.

Pigeau, speaking of written evidence, observes that, "Writings, which were intended to remain "secret, cannot be used—as a confession. Neither could be offered a letter written with mistery and confidence: the person, who received "it, could not lawfully reveal the secrets with "which he was intrusted—nor an intercepted "letter: he, who resorts to such expedients in "order to procure testimony, ought to be punished. For *it is a* CRIME *to disturb such correspondence, which all nations agree in considering as* SACRED." 1 *Procedure du Chatelet*, 225. This author considers the disclosure of the contents of a confidential communication, and

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the interception of a letter as acts of the same kind, which ought to be punished.

"THERE are cases," says Denisart, *verbo* LETTRES MISSIVES, "in which the person, to "whom letters are directed, *cannot bring them* "*to light* WITHOUT CRIME; especially when "they are written with mystery and contain con- "fidential things. *The* CRIME IS STILL GREA- "TER when the secret of a letter is unveiled *with* "*the only design of* DOING AN INJURY to the "writer, who thought he might open his heart, "without any apprehension of that being re- "vealed, which he was writing for a friend "only, and which he wished to remain concealed "from the rest of the world. The court, in "such cases, has uniformly ordered that the letter "should be restored to the writer, whatever re- "lation it might have to the object in dispute. *Il n'est pas toujours permis de se servir des lettres missives dans les affaires; il est des cas où celui à qui elles sont écrites, ne peut les mettre au jour sans crime, surtout lorsqu'elles ont été écrites avec mystère, et qu'elles renferment des confidences. Le crime est encore plus grand, lorsqu'on dévoile le secret d'une lettre, dans l'unique but de faire injure à celui qui en est l'auteur, et qui a cru pouvoir ouvrir son cœur, sans craindre de voir revêler ce qu'il n'écrivait que pour un ami, et ce qu'il voulait n'être sû de personne. La justice, dans ces sortes d'occasion, a*

toujours ordonné que les lettres missives seraient rendues, quelque relation qu'elles pussent avoir à l'affaire. Son motif a été, que le dépot du secret ayant été violé, on ne devait y avoir aucun égard.

Cicero, in his second Phillipic, *in M. Antonium*, elegantly inveighs against a person who had shown letters, which he had written him. "This man" says the Prince of Roman eloquence, "skilled in rhetoric and belles-lettres, "yet ignorant of good manners, has produced "letters, which he says I wrote to him. Who- "ever, having the least tincture of civility or de- "cency, on a misunderstanding between himself "and his friend, ever produced or read publicly, "the letters he had received from him? What "is this but to destroy the very life of society? "How many jokes may be indulged in, in a letter, "which, when openly divulged, are improper! "How many serious things proper to be com- "municated in the privacy of one's correspon- "dence, are unfit for the public eye....I thought I "was writing to a citizen and a good man, not to "a VILLAIN AND A THIEF." *At etiam litteras, quas me sibi misisse diceret, recitavit, homo et humanitatis expers, et vitæ communis ignarus. Quis enim umquam, qui paullùm modo bonorum consuetudinem nosset, litteras ad se ab amico missas, offensione aliqua interposita, in medium protulit palamque recitavit? quid est aliud, tollere è vita vitæ societatem, quàm tollere amicorum*

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colloquia absentium? quàm multa joca solent esse in epistolis, quæ prolata si sint inepta esse videantur? quàm multa seria, neque tamen ullo modo divulganda?.....Quod scribam tamquam ad civem, tamquam at bonum virum; non tanquam ad SCELERATUM ET LATRONEM.

IT would not have been easy for the plaintiff's counsel, in the various codes from which the jurisprudence of this territory draws its maxims, to have lighted upon authorities more decidedly in point. The letter it is insinuated is not written on a scientific subject: it was prepared for a lady to whom the plaintiff was paying his addresses and relates only to the object he had in view. Be it so: we are then fairly to presume it written in "mystery and confidence." Then the defendant could not produce it to light WITHOUT CRIME.

HE has not alledged, surely he has not enabled us to believe, that he had any other view than to vex the plaintiff. Then his "CRIME IS STILL "GREATER: for he seeks to unveil the secret "of a letter, with the only design of doing an "INJURY TO THE WRITER, who thought he "might open his heart, without apprehension "of that being revealed, which he was writing "for a friend only, and which he wished to re-"main concealed from the rest of the world."

IF he were to produce such a letter, in a court of justice, for the discovery of truth, and the at-

tainment of his legal rights, Denisart informs us the judge would indignantly repel the hand that proferred it : he would order the letter to be restored to the writer, and Pigeau adds, the attempt should be punished : " for it is a crime to " disturb such a correspondence, which all na- " tions agree in considering AS SACRED."

Is it possible to believe that the law should respect the sacredness of a man's correspondence so far as to disallow its violation for a just purpose, the discovery of truth in the attainment of justice, and yet allow the same violation for the purpose of wanton injury ? Would the judge who would thus reject a confidential letter, and punish the person who presented it to be used in court, patiently permit the same individual to commit it to the press, to gratify his malice or revenge ?

SUCH is the law of France, which was in force here, on the arrival of the Spaniards. Have these, have the Americans changed it in this respect ?

IT is not pretended that the Spanish code has wrought in this respect, any change in the jurisprudence of the country : but the defendant's counsel has contended that, altho' a man's correspondence was thus held sacred in Rome, and is yet considered so in London, Paris and Madrid, it must be otherwise in the United States. Their constitution has virtually repealed all the provisions which the plaintiff has invoked, by proclaiming the freedom of the press.

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If this argument could avail the defendant, this pretended proclamation of the freedom of the press would be as fatal to the people of these states, as the proclamation of the freedom of the negroes to the Hispaniola planters.

A brother may correspond with his brother, and grieve with him on the distresses of the family, occasioned by the misconduct of their father, and devise the means of alleviating the consequences of it. With secrecy he may succeed : but if a gazetteer, in whose hands accident or knavery may place his letter, cannot be compelled to respect the privacy of these family secrets, the writer will innocently incur the odium of the conduct of the younger son of Noah.

An injured wife may commit to paper, for the information of a parent, the cause of family disquietude ; if the dishonest holder of a press, may give publicity to the complaint, adieu to all her hopes of domestic felicity.

If a father remonstrate with a daughter on the errors of her conduct, the remedy which parental fondness and solicitude had prepared may, by the touch of a knavish printer, be turned into a deadly poison.

A merchant may communicate to his friend the danger of his situation, solicit a timely relief, which will certainly avert his ruin, the indiscretion or malice of the messenger, may plunge him in the abyss, from which secrecy might have saved him.

THE constitution of the United States does not contain any thing relating to the liberty of the press: but one of the amendments of it, art. 3, provides that "congress shall make no law.... "abridging the freedom of speech or of the "press."

IF this article can be invoked to support the defendant, in the right of printing the work of another, or violating the secrets of his correspondence, it will protect the propagation of any slander or libel. Neither congress, nor the circuit court of the United States, seem to have ever considered this article as susceptible of so strange a construction. Congress have passed an act to punish certain libels and we have seen the judges of the supreme court of the U. States carrying it into effect on the circuit. *United States* vs. *Lyon*, in Vermont, and *United States* vs. *Cooper*, in Pennsylvania. In every state, actions for defamation and prosecutions for libels, are daily carried on; and this court has overruled the objection, in the case of *Territory* vs. *Nugent*, *ante* 112.

LASTLY, the subject of the plaintiff's suit has been represented as too trifling for the attention, and the discussion of it as incompatible with the gravity, of the court.

The defendant, however, seems to have attached an extraordinary degree of importance to his claim, and we have been employed several days

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in examining the extraordinary pretentions he sets up. Surely, if one party so pertinaciously insist on his right to attack the other, the latter ought to be forgiven if he exert the same degree of industry, in endeavouring to avert the meditated mischief.

THE court of King's Bench in Great Britain did not think it repugnant to its gravity, nor a diminution of its dignity, to sit upon and determine a question arising on a most indecorous transaction : two young-men, tired of running their horses, at New-Market, terminating the frolic of the day, by making a race on their fathers' lives : on the very day of the death of one of them. 5 *Burrows*, 2802, *Earl of March* vs. *Pigot*.

PERHAPS, the judicial officers of this colony, under the government of Spain, might, when out of humour, turn off their fellow subjects, if approached with complaints on matters, which they deemed unimportant. No American magistrate ever did so. Whatever be the value, whatever the nature of the demand, or the motive that gives it rise, if it be authorised by law, the individual is entitled to the ear and the aid of the judge.

THE court feels no hesitation in avowing that, even if the authorities, adduced by the plaintiff's counsel, had not so powerfully supported his application, the circumstances of his case would have procured him the opportunity of having it

inquired into. Altho' the principal occupation of the members of this court be to administer distributive justice, every one of them, it is hoped, will, at all times, remember that his, is a ministry of the peace—that he is *ex officio* a general conservator of it, throughout the territory—that this court, being the tribunal of dernier resort and being vested with common law jurisdiction, is the *custos morum* of the country. He would have remembered that of all kinds of libelling, the one attempted by the defendant, is the most likely to excite the injured to seek redress by a resort to arms—that a judicial declaration that the municipal law was insufficient to the prevention of the injury, would have extenuated, and likely in the mind of the plaintiff justified, his conclusion that nature resumed her rights, and authorised the use of violence in averting the impending evil, or obtaining satisfaction for it. It is not unlikely, the judge would have considered the defendant's attempt as a flagitious outrage on good manners and decorum, the completion of which must have made decency weep.

IN balancing against all these considerations the small inconvenience which the defendant might sustain in being delayed a little while in the wanton exercise of a right, at least dubious, no judge could have pondered much before he would determine, that the plaintiff had a fair right to the oportunity of contesting such strong pretentions, and to a process calculated

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if not to prevent, at least to delay, the disturbance of the public tranquility, which is the first object of the law and the first care of the magistrate, because it is the first blessing of society.

THE court is now called upon to punish the defendant for a contempt of its authority and a disobedience of its injunction.

THE facts which are presented as constituting his offence are : 1. The insertion of an advertisement in a news-paper, inviting all such persons as felt an inclination to see the letter, to gratify their curiosity and pointing out the means. 2. The annexing of a copy of the letter to the answer, and communicating the original to several persons applying for it, in pursuance of the advertisement.

I. It is contended, on the part of the plaintiff, that the advertisement is of itself a contempt of this court and would be considered as such, even if no copy had been annexed to the answer, nor the original communicated to any person.

It is impossible to read this advertisement without considering it as an evidence of the plaintiff's determination to effect obliquely that which the judge had inhibited him from doing, and deprive his antagonist of almost all the relief which the injunction was intended to afford him—as this determination could not be carried into

effect with impunity, the avowal of it seems to put the court at defiance.

II. The plaintiff's counsel further insists, that he has produced sufficient evidence of a publication, inasmuch as there was no necessity for a copy of the letter, with the answer, and that the production of the original to two persons, is a direct breach of the injunction.

THE counsel for the defendant says, he might lawfully annex a copy of the letter to the answer as part of that instrument.—That no matter which is stated in any memorial or petition for the redress of grievances, and addressed in the proper channel, however defamatory, is libellous—that the communication of the letter was in secret and confidence, and had the letter been a libel, the shewing of it in this manner would not have been held a libellous publication. *Esp. N. P.* 506. *Campbell N. P.* 267.

THE annexation of the copy to the answer and the production of the original to two gentlemen, are acts which, like all others, must receive their characters, from the motives in which they originated. If the copy was in the least necessary or usefull to the defendant in the suit, he had a right to annex it, but if it was irrelevant, if it could be of no service in the cause, there can be no excuse for thus giving publicity to a paper which the defendant had been enjoined from publishing.

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The court could not with propriety read the copy to ascertain this fact, but from no reference to the copy in the answer, nor from any argument offered, can it presume that the copy was annexed with any view of affording aid in the suit—the presumption, which naturally presents itself, is, that it was annexed for the sole purpose of publishing it: and this presumption has now ripened into evidence; for it is confirmed by the use which the defendant has since made of the copy, by referring all persons desirous of seeing the letter to the records of this court.

It is true that the communication of information, disadvantageous to a third person and affecting his reputation, is not considered as illegal when made fairly and confidentially: it is however, otherwise when made for the sole purpose of working an injury.

This proposition, the defendant's counsel supports on the authority of *Campbell's N. P.* The case there reported *M'Dougall* vs. *Clarige* 267, certainly maintains it, but the decision cannot aid the defendant. The court determined that a letter written confidentially to persons who employed M'Dougall, as their solicitor, conveying charges, injurious to his professional character, in the management of certain concerns which they had intrusted to him, and in which the writer of the letter was likewise interested, could not be considered as a libel and made the sub-

ject of an action. Lord Ellenborough observing that, if the defendant having acted *bona fide*, with a view to the interests of himself and the persons whom he addressed, a communication of this sort, *which was not meant to go beyond those immediately interested in it*, were the subject of an action, it would be impossible for the affairs of mankind to be conducted.

THIS decision is only the echo of that cited out of *Espinasse*, *Rex* vs. *Bailie*, 506. Lord Mansfield there held that *a distribution of the copies to the persons* ONLY, *who were from their situation called on to redress the grievances and had, from this situation, power to do it*, was not a publication, that could be punished.

IN the present case, the publication was not intended for the court, but for the public. The object the defendant had in view was not to procure any benefit to himself, but to do an injury to the plaintiff. The court is therefore bound to say it was tortious.

IN considering whether there be any extenuating circumstance in the defendant's case, the court finds hardly any thing but matters of aggravation. His conduct in court has been far from authorising a contrary conclusion. The court is, therefore, bound to say, that the defendant must pay a fine of fifty dollars and be imprisoned during ten days.

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The Bank of the U. S. had no lien on notes deposited for collection.

THE plaintiffs claimed sundry promissory notes deposited in the defendants' office of discount and deposit, by the insolvents prior to their failure, which the defendants retained, claiming a lien thereon for monies due them by the insolvents.

IT was admitted that the insolvents, before and till the period of their failure, had dealings with the defendants, depositing gold, silver, bank bills, and notes and bills for collection, which gold, silver and bank bills and the proceeds of the notes and bills for collection, were placed to the insolvents' credit, in their account with the defendants. The insolvents, from time to time, applied and received from the defendants discounts on their own bills or notes, the net proceeds of which were placed to their credit, and the full amount of said bills or notes at maturity carried to their debit. The defendants regulate the accommodation, which they extend to their customers, by the usual course and amount of their respective pecuniary dealings and transactions with the defendants: keeping an account of such dealings, with each customer, and at the maturity of his notes, discounted by the defendants, debiting him therefore, appropriating for this purpose, as much as is necessary of the customer's money in the

hands of the defendants, proceeding from deposits or collections, without any protest or demand, when the money at the customer's credit suffices. The insolvents' failure was made public about, and the plaintiffs were appointed their provisional syndics on, the 22d of February. On the 28th and on the following days, notes of the insolvents, and of other individuals whose endorsers they were, were protested to a considerable amount. There was no evidence of the precise day, on which the plaintiffs made a demand of the notes which are the subject of the suit. On the day on which it was brought, the insolvents had to their credit, on the defendants' books and in their hands, monies, notes or bills for collection, to a considerable amount, but the insolvents were indebted to the defendants, as drawers and endorsers, to a sum more than double that to their credit, leaving a great excess of debt, even if all the notes deposited for collection proved good.

Smith for the defendants. The defendants had a lien upon these notes for the general balance of account due from the insolvents,

1. Upon principle,
2. Upon authority.

I. On the first ground, a *lien*, in the ordinary acceptation of the term in the English law, may be defined to be a hold, which a person has upon the goods or property of another, and which he

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has a right, at least to detain until payment of what is due to him from the owner; generally arising upon possession, and expiring with it.

LIENS are supported by natural equity, and certainly are highly favorable to commerce. They seem to rest in part upon the same equity with that of deciding, as far as possible, cross demands in the same action, rather than turning parties round to seek their remedies in distinct suits. The time was, before the influence of trade and of general intercourse had produced their due effect in softening the harsh and inconvenient rules of law, when every right required to be asserted in a distinct action and of consequence when remedies were often circuitous, difficult and defective. Perhaps the law of England even yet may not be quite sufficiently unfettered on this subject, to afford all the encouragement that the varied and complex relations of commerce require. But that a factor has a lien upon goods in his possession, not only for incident charges, but as an item of mutual account for the general balance, must be admitted to be law there as well as here. The first solemn decision on the subject [*Krutzer* vs. *Wilcox*, referred to in 1 *Burr.* 494.] was so evidently equitable and beneficial to commerce, that it has been ever since referred to as a standard case. It is equally law there that a banker has a lien for his general balance upon all paper securities of a customer that may happen to be in his hands. 5. *T. R.* 488.

Ib. 494. 1 *Esp.* 66. It is now decided also, that a packer, being in the nature of a factor, has an equal lien upon goods sent to him to be packed, *ex-parte Deeze.* 1 *Atk.* 228. So too, of calico-printers as to goods in their hands to be printed. *Cook's B. Laws.* 515. And wharfingers have now been decided to have a lien upon goods in their possession, not only for wharfage, but for a general balance of account. 1 *Esp.* 109, and such is the force of this equitable right of lien, that it has been decided to hold in favor of a balance, including debts of which the recovery might otherwise be barred, by the statute of limitations. 3 *Esp.* 81. And the lien of an insurance broker, upon a policy, is now decreed to be equally general and even though he may have parted with the possession of it, provided he afterwards, by any means whatever, have recovered it. *Cook's B. L.* 349.

AND so strongly do the courts of England incline in favor of liens, that they are now supported, not only when they are founded upon express contract, but whenever a contract is implied from the usage of trade or from the manner of dealing between the parties. From the course of these decisions, the doctrine of liens, as established in favor of factors, seems to be evidently widening every day, and perhaps may, at no very distant period, be established as the general law, in favor of almost every species of agent,

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and wherever almost there are mutual dealings and demands of any sort, at least in the event of bankruptcy or death.

BUT what is the reason of the law in favor of a factor's right to detain? There is no express agreement between the factor and his principal—The law implies such an agreement from the relations between them—from the mutual dealings and accounts—from the continual receiving and paying—from the mutual debts and credits—it being equitable that the goods in the hands of the factor should enter as items into the mutual account, of which nothing but the general balance ought to be the debt between them. The factor is *in possession*, and he is presumed, in virtue of that possession, to have relied on it as a security. If the merchandize in his hands were sold and reduced into money, then, clearly there would be by mere operation of law, an instant compensation of the amount of the general balance by the funds in his hands; so far as they would go, and the reason of the law is equally in support of the right to detain. It has been long ago decided, that if a first mortgagee lend a further sum upon a third mortgage, without notice of the second, he shall retain in preference to the intervening mortgagee, until both his securities be paid—because, as it is to be presumed, that in lending his money upon the third mortgage, he relied upon the hold, he already had upon the land by the first,

2 *P. Wms.* 494, it is equitable that he should retain. Possession, united with this equity, overcomes the strong equity in favor of the second mortgagee, who must be presumed to have advanced his money upon a knowledge of the sufficiency of the land, to discharge both the previous incumbrance and his own. On the same principle, a trustee of land, having in him of course merely the legal estate and possession of the titles, shall retain them, until paid not only expences incident upon the trust, but every other debt since contracted to him by the *cestui que trust*, and whether it was or was not incurred with any reference to the trust estate as a security. 1 *Binney* 126, *Lessee of Frazer & al.* vs. *Hallowell.*

WHAT has been said of a factor, is equally applicable to a banker, in their respective relations.

AND the condition of a broker or a factor, seems to bear a perfect ressemblance to that of the defendants, in the point of view in which they must be regarded for a decision of this question. Between the defendants and the insolvents, there was mutual dealing—mutual receiving and paying—mutual credit given—and a general running account, including the notes in question as items. And, as the bank is in the actual possession of these notes, it is to be presumed that it relied upon them, as one of its securities. But, further,

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it is an admitted fact, that the bank actually regulates the amount of its discounts, in part, by the average amount of the deposits it receives. It is further an admitted fact, that the bank is accustomed to appropriate any money that may be standing to the credit of a customer on its books, (and the whole *must* be equally *a deposit*) to the payment of any of his notes, that may have become payable without being redeemed by him in time, and it is well known that discounts are refused for those whose deposits are made in another bank. There is then, in favor of the claim of the defendants, equal equity—equal presumption of a contract from the usage and practice of the bank, and from the manner of dealing, between the parties, to that in favor of the lien of a factor or a banker. And where there is the like reason there should be the like law.

To the claim of the defendants two leading objections are made,

1. That the notes in question are a deposit, and that to a demand of a deposit a plea of compensation is inadmissible,

2. That as they were lodged in the bank for a special purpose, they cannot be detained as a security for the general balance due from the insolvents' estate.

To the first objection, it may be answered that, notwithstanding all the imposition of a name, the bailment of these notes to the defendants, though

in some points resembling it, is nevertheless not a pure and strict deposit.

"A deposit" is defined by Sir Wm. Jones to be, "a naked bailment, without reward, of goods to be kept for the bailor." The undertaking of the depositary is a benevolent and friendly act. The essential object of the deposit is that it be kept, and exclusively for the benefit of the depositor, and, of course, subject to be restored upon his demand. From the disinterestedness and benevolence of the depositary in assuming the trust, the law, on the one hand holds him responsible only for such gross neglect as is an evidence of fraud, and on the other, will not suffer him to refuse to restore the deposit, on the plea of compensation. The sacredness of the trust would be prophaned if the depositary were to think of withholding what had been confided to him, on account of any preexisting debt. The exalted purity of the motive, in accepting the confidence, in the eye of the law, refuses to mingle with any interested thought. Let us inquire then, what are the points of resemblance and of dissimilitude between what are called acts of deposit in the bank and the contract of pure and strict deposit. Like it, they are received without any direct hire, or reward, to be paid for their being kept, though they are to be safely kept—like it also, they are, by the rules of the bank, held in general subject to the order of him by whom they

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are made—and they are made, too, in part for the purpose of being kept, and so far, also resemble a true deposit. But this is the utmost reach of the resemblance.

THEY differ in the following respects:

THEY are not lodged in the bank [by its customers at least, and with such only, can the question of lien arise,] for the purpose, *solely*, of being kept.

2. Though no direct hire nor reward be paid for the diligence bestowed in keeping them, they are nevertheless not the object of a gratuitous, benevolent contract, exclusively for the benefit of the depositor, but, of an interested contract, for the benefit of both parties.

3. The bank would be responsible for less than gross neglect, which is the sole measure of the responsibility of a real depositary.

IN order to see in a clear light the character of the contract that subsists between the bank and its customers, in making and receiving their deposits, it will be well to recur to the nature and objects of that institution. It is a corporation created by law for certain public purposes of finance and trade, and, as conducive to those objects, for advancing, more immediately the pecuniary interests of the private individuals who have become subscribers to the stock. The exclusive object of every member of that corporation, as such, is simply to derive the largest possible in-

come from the capital he has invested in the stock. This is effected by the discount of negotiable paper, at a permitted interest, to as great an extent as their capital will allow. As incident to, and with the view of enabling themselves to extend, their operations of discounting, the bank is made a safe and convenient place of deposit, where they receive money, bullion, plate, &c. to be kept according to the practice of banks, and as is contemplated, and, perhaps, even required by the act of incorporation. 1 *Laws of U. S. p.* 289, *sec.* 10. *Ib. p.* 292, *sect.* 15. So far as the receiving of deposits by the bank is not exacted by the law—the motive of the corporation in taking the charge of receiving them, can be only to obtain a more extended fund with which to carry on their banking operations—and it appears, that the bank does actually enlarge its discounts beyond the amount that its own capital alone would justify, in a certain proportion to the average sum total of the deposits in its vaults. And the value, it sets on the receipt of these deposits, appears in this, that it will measure its discounts with a rather more sparing hand to those, who are in the practice of diverting their deposits into other banks, than it uses to its standing customers.

ON the other hand, every customer of the bank, as he must occasionally need its aid, must be desirous of augmenting, as much as possible,

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his credit with it. And his deposits, so far at least as they are made in one bank in preference to another, may therefore be presumed to be made with the view of increasing that credit. Besides it is notorious, that the controul of money is sometimes borrowed with that object alone, and is confined to the mere advantage of having the money deposited in the name of the borrower.

To form then a just idea of the contract that arises from making what are called deposits in the bank, the whole nature, object and practice of the institution must be viewed in connexion. In this point of view, it is evidently merely incidental and accessary to the principal business of the bank, which is, that of drawing an interest from money by discounting negotiable paper. Partaking of the same nature, being its immediate offspring, having with it an inseparable existence, it must be subject to the same law. Is there, then, in the receipt of deposits by the bank, any thing of that disinterestedness and benevolence, which the law presumes to actuate the real depositary, and which form so distinguished a feature of the contract of deposit? Are the deposits received, exclusively, for the benefit of him, who makes them? Is not the bank responsible for more, than mere good faith in the discharge of its trust, and which is all, that can be exacted from the friendly depositary? Is not the contract founded on motives of mere interest, and, mutually beneficial to the parties?

WHAT is called depositing in the bank, may be not inaptly likened to certain deposits, improperly so called, which are made in consequence of, and as accessary to some other contract of a lucrative kind, and in which, though no direct recompense is made for the care and fidelity bestowed in discharging the trust, are, nevertheless, on account of their connexion with the principal contract, deemed to be founded on motives of interest, and for the mutual advantage of the parties, and in which, the person called depositary is bound to exert a greater degree of care than is required by mere good faith in the discharge of his trust, and who has a lien on the things deposited, for the fulfilment of the principal contract with him—such are the deposit of a trunk with an innkeeper or a ferryman, who derive their profits from the entertainment or transport of travellers, or the deposit of clothes, with a man who is paid for the use of his bath.

"WHEN the bailee, improperly called a depositary," says Sir William Jones, speaking of the degrees of responsibility for neglect, "takes charge of goods *in consequence of* "some *lucrative* contract, he becomes answer- "rable for *ordinary* neglect; since in truth, he "is a *conductor operis*, and *lets out* his mental "labor at a just price; thus, when clothes are "left with a man who is paid for the use of his "bath, or a trunk with an inn-keeper, or his "servants, or with a ferry-man, the bailees are

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" as much bound to indemnify the owners, if the " goods be lost, or damaged through their want " of *ordinary* circumspection, as if they were to " receive a stipulated recompense for their at- " tention and pains"—*Jones on Bailm.* 49, 50.

And of deposits with an inn-keeper, Pothier observes, " this contract *degenerates* from the or- " dinary contract of deposit, in this respect, " that, the inn-keeper takes charge of the deposit " not, as in ordinary deposits, *from a motive* " *of mere friendship* but as *a consequence of* his " *condition* of inn-keeper and *in consideration* of " the *profit* he draws from the travellers who " lodge in his inn.

" ALTHOUGH, from this deposit separately " considered, he receive no compensation, never- " theless, as it is a consequence of the principal " contract between the inn-keeper and the tra- " veller, for lodging and for entertainment, which " contract is, reciprocally an interested one, *et in* " *quo utriusque contrahentis utilitas vertitur*; we " may regard the deposit which ensues as a con- " sequence of this contract, as a deposit *in quo* " *vertitur utriusque contrahentis utilitas*, and " which, of consequence, ought to hold the inn- " keeper responsible for *slight* neglect." *Poth. cont. de dépôt, p.* 84, 5, *ch.* 3. *sec.* 2. *du dépôt d'hostelleric.*

IN as much, then, as the bank takes charge of its deposits—not from any motive of mere friendship—not exclusively for the benefit of its

customers—but, that, although it receives no direct recompense for its care, it has a real interest, which is its sole motive in receiving them, and is bound to exert a higher degree of diligence in discharging its trust, than mere good faith demands—there must be an end of the objection drawn from the rule, that the sacredness of a deposit shall not be prophaned by a refusal to restore it on the interested plea of compensation.

BUT it is said in the next place, that these notes cannot be detained by the bank, as a security for the payment of the general balance against the insolvents' estate—having been lodged in the bank for a *special purpose.*

THIS objection is at war with the facts in the case. They were lodged indeed for the purpose, in the first instance, of collection (resembling therein, more a mandate than a deposit, which, however, does not vary the question) but, that purpose was to terminate in a deposit of their value, with the mass of money, that might be standing to the credit of the insolvents, on the books of the bank. The whole of the money credited to a customer on the books of the bank, must be deemed to be, equally, money *deposited*—whether it be obtained by loan upon discount and not yet, drawn out—or, money, originally, deposited—or, the proceeds of notes, collected for him by the bank;—for the whole forms one *undistinguished*

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mass—the whole is passed equally to his *general credit*, and the whole is drawn out by him, in the same manner—by order at sight:—and there will be, hardly a question about the right of the bank (in case of the insolvency of a customer) to detain the *very money*, the specific "value received" that may have been discounted to him, and may have not, yet, been drawn out, as a security for the payment of the note that has been given for it.—As to this objection that the notes were lodged for a *special purpose*, take the case of *Jourdaine, assignee of a bankrupt* vs. *Lefevre and others—bankers*, 2 *Espin.* 66. The question was, as to the *lien* of the defendants, who were bankers, on a certain note, that had been paid into their house, by the bankrupt, the day before his failure. The defendants had kept *two* accounts with the bankrupt—one, a *cash* account, on which, the balance was in favor of the bankrupt—the other a *discount* account, of which, the balance was against him, and, which two accounts, were distinct and separate. The note in question, when paid in, was *written short* in the *cash* account, of which, the balance was, already, *in favor* of the bankrupt—yet, Lord Kenyon decided, that the defendants had a *lien* on the note for the payment of the *general balance*. The expressions, *paid in*, must be merely technical, and cannot, therefore, vary the case;—for, as the note was placed to the cash account, on which the bankrupt was a creditor, it was evidently the inten-

tion of the payor that it should not go towards the extinguishment of that balance which was against him—but be, as cash, subject to his order.

So much for the principle of the case—but we rely

II. On authority.—In the *Ordinanza de Bilbao, p.* 137, *ch.* 17, *sect.* 27, it is provided that "To avoid the doubts and differences which "hitherto have been experienced as to the prefe- "rence claimed on account of bonds, bills of ex- "change, notes, merchandize and other things "that may be found deposited with the insolvent, "in confidence, or on commission, it is ordained "that in future those creditors who shall satis- "factorily prove that they had, in the hands of the "insolvent, bonds, bills of exchange, drafts, "jewels, merchandize or any other property, in "packages, hogsheads or boxes, whole with "their marks and numbers, or open and began "to be sold, and that the same had been received "by the insolvent, on commission or confiden- "tially,—the president and consuls shall cause "all such property to be delivered up, in the "same state in which it is found, to the legal "owners or to their order, on payment of the "costs thereon: but if the owner of such pro- "perty, in his account current with the insol- "vent, be found to be in arrears, in consequence "of advances made upon such effects, or in any "other way, he shall, in the first place, refund the

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amount he owes, before the property or effects "be delivered up."

IF the bank were insolvent, then unquestionably, this would be conclusive authority—and, certainly, that which is law, in favor of an insolvent's estate, must *mutatis mutandis*—be law against it.—*App. to Cooper's B. L.* xix.

Livingston for the plaintiffs. THIS is a suit brought by the syndics of a bankrupt for certain promissory notes, lodged by the bankrupt in the office of the bank of the U. S. in this city, for collection. They refuse to deliver them, alledging a right to apply the proceeds of these notes, to the payment of others, drawn by the bankrupt and discounted at the bank, which have been protested for non payment.—To determine on this alledged right, we must, first, ascertain the nature of the contract, by which the notes in question were placed in the custody of the bank. It has been likened to a contract of factorage, to a pledge, to a mandatory contract, to a deposit,—

LET us, first, determine what the contract was, and it will be then less difficult to determine to which class it ought to belong.—We have, on this point, no other evidence than that we can derive from the nature of the corporation, with which the bankrupt dealt and their general course of business, for it is not alledged there was any unusual stipulation between the parties, at the time these notes were deposited.

BY the act incorporating the bank of the U. States, it is provided in the 15th section "that the directors may establish offices, wherever they think fit, within the U. S. for the purposes of *discount* and *deposit only*, and upon the same term, and in the same manner, as shall be practised at the bank"—"subject to such regulations as they shall deem proper." In another section, an office of discount and deposit was established at N. Orleans, and the following regulations, established for regulating the discounts and deposits. *

THESE notes, then, must, according to the terms of the law, have been either *deposited* or *discounted* at the bank, but, the latter is not pretended. Supposing, therefore, that the office in N. Orleans, have adhered to their instructions, and to the act of incorporation, we must say, then, the notes, according to the *letter* of the law, were a *deposit*. Where they not so, also, according to its spirit, and the intent of the parties to the contract? We have seen, that the office here, was opened for the two sole purposes of *discounting*, or in other words, *purchasing* bills, and receiving deposits of securities, specie and other valuable articles.—This last operation, is perfectly distinct from the former. Notes are purchased,

* These regulations have not been furnished to the reporter, but they were in substance, that money and other articles deposited should be restored *free from expence*, and that *discounts*, should be made on the credit of the drawers and indorsers.

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not with any reference to, or on the credit of the deposits, but on the credit of the drawer and indorsers.—The cash is deposited for safe keeping, and for the ease of making payments. It is held at the immediate will of the depositor, and must be paid at the instant his drafts are presented. It admits of no *compensation*, or set off, as it is called in the English jurisprudence. So, that a person owing a thousand dollars to the bank, by a protested note, and having a similar sum due to him, on his deposit account, might draw for it, and the bank must, according to the law, which has been read, honor the draft. *See part.* 5, *t.* 3, *l.* 5.

A note *deposited* in the same situation, before collection, protest or discount, is a strict regular deposit. *Pothier, traité du dépôt. Prel. art.* "A deposit is a contract, by which, one of the parties gives an article to the other to keep for him, who, on his part, takes charge of it gratuitously, and engages to restore it, as soon as it shall be demanded."—The same definition, is gives in substance in 5 *part. t.* 3, *l.* 1.—*Dig.* 16. 3. 1. and in the civil code of this territory, *tit.* 11 *ch.* 2 *art.* 2, the very words of Pothier's definition are enacted into a law.—Here, the contract in question comes within every branch of the definition. The notes were "put into the possession" of the bank—"gratuitously"—for the purpose of safe keeping, and to be restored on demand.

IT is said, however, that this undertaking is not *gratuitous*, because the bank derive a *benefit*, and the customer a *credit*, from the deposit. This reasoning, if it apply at all, applies to deposits of specie, not of notes, for the bank can never increase its operations in consequence of an increased deposit of notes; they can never make use of them on pressing occasions as they can of specie. They must, by the terms of the contract, remain in the bank until called for by the owner, or until changed into specie (which represents them) by payment. A bank which should paesume to negociate notes or bills of exchange, left in the hands of its officers, would be guilty of a flagrant breach of trust, and perhaps of theft. Whereas, in case of a deposit of money, the bank may make use of it: it may pass through a thousand hands, without any breach of trust, for the only obligation the bank contracts is to restore an *equal sum* and not the *same money* that was deposited.—The first is a *regular*, the other *an irregular*, deposit; a distinction familar in the civil law.

ALL manner of things may be given in deposit—that only is a deposit where no price or hire is taken for keeping them—if any thing should be taken, it would be an hiring. "And it is declared that the property and possession of the thing deposited does not pass to the depositary, unless it be of those things which consist in *number*, *weight* or *measure*, for then the property passes,

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but the depositary is bound to return the same thing or another as good and of the same kind as that deposited." *Feb. 2. p. l. 3. c. 3. s. 2. n. 200.*

"THAT is a *regular* deposit which is made of any thing which does not consist in number, weight or measure; or if it be money, it is enclosed in a purse, bag or any other thing sealed or locked, and which is given to the depositary not that he should *use* but that he should *keep* it, and therefore he is obliged to return the *same thing*, and not another, although it be of equal quality and value, under the penalties of theft and those I mentioned in my third point," &c. *Ib. no.* 201. "A deposit, called irregular, is that, which is made of money or any other thing consisting in number, weight or measure, as wheat, wine, &c. and which are not delivered to the depositary locked up, sealed or marked, so as to shew that they are the same, and of which the use is not prohibited, but only the obligation contracted to restore them or others of equal quality and value, in number and weight. Because the depositor does not preserve his *dominum*, which is transferred to the depositary, who may negociate with, and use them to his own advantage, and if they are lost by *accident*, they are at his risque, not at that of the depositor. The *reverse* of which is the case in a *regular deposit*."

THIS being a deposit of securities, not of *money*, is a *regular* deposit, which does not, ac-

cording to the authorities cited, transfer the possession or property to the depositary, both of which remain in the depositor, and therefore the bank cannot pretend to take away the *gratuitous* character of the transaction, by saying that they derive an advantage from it, because they cannot derive that advantage without violating a trust.—As little can the increase of *credit*, given to the depositor from the generality of his deposits, alter the nature of the contract.—If it should increase his credit, it can only be because it is an evidence of his ability to pay—but not from any *obligation* which the bank contract to increase his credit in proportion to his deposit; but, if there is no *obligation*, there is no *contract*, and if there be no contract, it follows that there is no other advantage to the depositor, than that arising from a strict deposit. Therefore, the contract is *gratuitous*, as far as respects the depositor, and we have seen that it is so, with respect to the depositary.

IT is also, for the purpose of *safe keeping*, which is another of the characters of the definition: for, the cashier, on being examined to this point, declared, that the person depositing frequently withdrew them before they became due, and the bank never pretended to control him in this use of his property.—This, therefore, has all the characteristics of a *regular deposit*.—What are its effects, as to the right claimed by the defendants of retaining the deposit, as a set

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off for other debts?—Here, the answer is precise. A positive statute declares, *(part. 5, tit. 3 l. 5,)* "*tenudo es el que rescibe la cosa en guarda, e sus herederos de la tornar à aquel que la dio à guardar, o à los que heredassen lo suyo, cada que la demandassen, e maguer que le ouiesse à dar alguna cosa, aquel que la encomendassen : con todo esso, non que la debe tener, el que rescibio el condessijo por razon de prenda, à que decer en latin,* COMPENSATIO, *que quiere tanto decir, como descontar una deuda por otra ; ante debele luego entregar de ella ; e despues de esto, puedele demandar aquello que le debiere.*"—The simple and antiquated language of this law is very strong.—He, who hath received a thing in keeping, and his heirs, are bound to return it to him, or to his heirs, who gave it him to keep, *whenever* they shall demand it, and that altho' the depositor *may be indebted to him* ; for all this, he, who hath received the deposit, cannot retain it as a *pledge*, or on account of what in latin is called *compensatio*, which, means the setting off of one debt against another—but, *first, he must deliver the deposit*, and, afterwards, he may demand that which is due to him." Nor can the deposit be retained, even for the expences attending its custody.

Febrero, c. 4. s. 3, n. 47. "The depositary or his heirs, must restore the deposit, altho' the owner may be his debtor, nor can he retain it, as a compensation, as a pledge, or in any other

manner, but, he is obliged to restore it immediately on demand,—and if he refuse the delivery, without just cause, he incurs the penalties of theft."

THIS explicit language of positive law makes all answer to the reasonings, from the British cases, unnecessary. They form the law of England, as applied to the circumstances of the several cases cited, but can have no bearing on a case arising here, where we are governed by other laws.—Indeed, they are all, without exception, adjudicated in conformity to the special *usage* of the different trades in which they arose.

A sufficient answer to the argument drawn from the 27th article of the ordinance of Bilboa, is that the article produces a special remedy for a case which is not the one now before the court. It alters the general law I have quoted, by giving a set off *in favor* of the creditors of a bankrupt *depositary*, but it makes no change where the *depositor* is the bankrupt. That case is left to the operation of the general laws I have quoted, and as has been seen, they expressly direct there shall be no set off.

By the Court. Whether there be a general balance of account, due from the insolvents to the defendants, is a question which is to be determined by the nature of the dealings and transactions between the parties; not from the

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manner in which the defendants have made entries in their books.

THE Bank of the United States, and it is believed, like it, every other incorporated bank in these states, carry on business in a manner quite different, than English bankers do. The latter make actual loans and advances of money to their customers, the American banks deal no otherwise, in advances of money, than by discounting or purchasing bills or notes. Cash is obtained from the defendants on contracts *executed:* never on an *executory* one. On the discount being effected, the net proceeds of the note are instantly placed to the credit of the person presenting it, as if he had actually deposited the specie: and when the day of payment arrives, they present *always a note, never an account*, for payment: so that they never are creditors of a balance of account. They cannot, therefore, successfully invoke the principles, on which factors and others are allowed to retain the property of their principals, for the payment of the general balance of their accounts.

THE claim, which the defendants have on the insolvents, arises, therefore, on their notes, discounted for their (the insolvents') benefit, or that of other persons. As to the notes which were discounted for the benefit of the insolvents, the discount was effected, according to the rules of the bank, (art. 4, pages 17-50) *on* PERSONAL

security only, with at least, two responsible names. It cannot be pretended, that the insolvents impliedly assented to the lenders having any security, in addition to that on which the money was obtained.—The defendants, therefore, have no lien on any property of the insolvents, which, at the time of the discount, happened to be in their hands, or has fallen into them since—unless they are intitled thereto, under the ordinance of Bilboa.

As to notes of the insolvents, which were discounted, for the benefit of other persons, the defendants are much less founded in claiming the lien.

WITH regard to the defendants' right of setting off the debt, due them by the insolvents, against the claim of the plaintiffs, it appears to the court, that, from the nature of that claim and the things which are the object of it, no set off, or compensation can be admitted against it.

BY the 4th article of the regulations of the bank, (pages 22-79) on the faith of which the notes in dispute were placed in the defendants' hands, "notes or bills *deposited* for collection..... shall remain subject to the order of the depositor, as is provided in cases of other deposits." The bank (id. pages 28-109) "shall take charge of the cash.....shall receive deposits of ingots of gold, &c. and return them, on demand, to the depositor."

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THE defendants, in all these cases, being depositaries, cannot oppose any set off or compensation against the claim of the deposit. *In causa depositi compensationi locus non est. Paul sent.* 11. 12. 13.

Pothier thinks that this is to be understood of an *irregular* deposit, such as is spoken of in the laws 24. 25. *s.* 1. and 26. *s.* 1 *ff. depos.* by which, (like in deposits of money in a bank) one gives, in trust to another, a sum of money to be put with other sums, deposited by other persons, and return, not the same pieces, but the same sum. For, in the case of a *regular* deposit, as that of a bag sealed, an ingot of gold or the like, no set off or compensation can be opposed, not only because a deposit is claimed, but on account of the general rule, that on claims of a thing certain, no set off or compensation is to be admitted. 2 *Pothier on obligations* 95.

THE ordinance of Bilbao is not applicable to the present case. It does not expressly reach it and we cannot extend it by implication: for the cases are not parallel. If I deposit my goods in a merchant's warehouse, I hereby give him credit and induce others, who are ignorant of the nature of the bailment, by which he acquires the possession of them, to place a greater confidence in the depositary, than they otherwise would—while, if I deposit them with my creditor, he cannot be deceived and extend credit to me on

that account, for he knows that his, is my possession and that his precarious hold *will not* avail him, if he make advances to me.

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ERRATA.

PAGE.	LINE.	
52.	32.	For *and* read *who.*
56.	after the last,	add *fiscated and ordered the payment of.*
82.	24.	For *proceeding* read *proceedings.*
84.	11.	— *least—farthest.*
98.	5.	— *their— there.*
	14.	—*principle—principal.*
126.	6.	After *bye-law* add; *but where the charter gives the company a power to make by-laws.*
128.	17.	For *impassible* read *impassable.*
188.	8.	Read *verdict for defts. for the part in the street.*
206.	3.	For *forebore,* read *forbore.*
209.	20.	— *payor—payee.*
224.	22.	— *ro—or.*
250.	25.	— *claim—clause.*
280.	2.	— *inhabitable—uninhabitable.*
287.	21.	After *has* add *not.*
	25.	For *also* read *only.*
318.	24.	— *plaintiff's—defendant's.*
337.	1.	— *prayer—payor.*

☞ *The following paragraph, relating to the case of* Denis *vs.* Leclerc, *ante* 297, *has lately come to the Reporter's knowledge.*

In the beginning of the present year (1797) a confidential paper, written by the late Mr. Burke, was subreptitiously published in his name.....some of his friends (he was himself at Bath struggling with the disease which ultimately proved fatal to him) obtained an injunction from the court of chancery, on the very day of publication. *Burke's posthumous works, preface p.* 1.

Orleans Term Reports,

OR

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

TERRITORY OF ORLEANS.

By FRANCOIS-XAVIER MARTIN,
ONE OF THE JUDGES OF SAID COURT.

Ces Tribunaux donnent des décisions ; elles doivent être conservées ; elles doivent être apprises, pour que l'on juge aujourd'hui comme on y a jugé hier, et que la propriété et la vie des citoyens y soient assurées et fixes comme la constitution même de l'état.

Instructions de l'Impératrice de Russie pour la commission chargée de dresser le projet d'un nouveau Code de lois. Art. 101

VOL. II.

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1813.

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CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

TERRITORY OF ORLEANS.

FALL TERM—1811—FIRST DISTRICT.

COURT RULES.

November 11, 1811.

COURT RULES.

It is ordered that the clerk be authorised and directed, before the opening of each term, to issue a *venire facias* for Grand Juries, without the attorney general moving the Court therefor.

November 16, 1811.

It is ordered that the rules made on Monday 11th June, 1810, Friday 23d November, 1810, and Saturday the 2d February, 1811, relative to the practice of this Court in civil causes be annulled, and that for the future the following rules be observed:

Art. 1. On Saturday the 16th instant, the clerk shall form a roll to be called the Calendar of Civil Causes.

COURT RULES.

ART. 2. Immediately after, and from that day forward, on the Saturday of each week, the court on the application of the attornies for the plaintiffs in causes where issue is joined, will order to be entered on the said calendar the causes that are to be tried on each day of the week after the one next ensuing, giving preference always to the oldest cause according to the number, and to this end the attornies on making such application shall shew to the court the number on their petition.

3d. IT shall be the duty of the attorney who shall have had his cause thus entered in the calendar to give notice thereof to the adverse party or his attorney, at least eight days prior to the day of trial.

4th. The court will not suffer a greater number of causes to be entered for the same day upon the calendar than there may be reasonably time to try at one session.

5th. The causes set upon the calendar shall be tried according to their age, which shall be calculated from the date of the petition; and such causes as may not be tried for want of time on the day set for the trial of them, may be entered anew upon the calendar to be tried at a period not less than eight days afterwards, unless in the meanwhile there may be some court day otherwise wholly unoccupied.

6th. On the day to which a cause may be postponed according to the preceding article, the

cause so postponed shall have preference of every other. COURT RULES.

7th. AFTER the 24th day of November instant, no cause shall be tried or called up for trial unless it has been previously entered on the calendar and with notice according to the 3d or 4th articles of these rules; but until the 24th instant any causes in which the attornies may be ready may be tried by consent.

8th. IF within eight days after the filing of the answer, the plaintiff have not had his cause entered on the calendar in conformity to the 3d and 4th articles of these rules, the defendant may himself cause it to be set for trial, observing the same formalities.

9th. IF on the day on which a cause is to be tried, it be called and the defendant do not appear and go to trial, he shall suffer judgment by default for principal, interest and costs; unless he offer legal proof that his witnesses, although they do not appear, were summoned, and that their testimony is material to his defence; and in such case the trial of the cause shall be postponed eight days and no more, if the defendant do not appear and go to trial, he shall suffer judgment without delay.

10th. The strictness of the 2d provision of the preceding article shall be relaxed, when the defendant shall, at the expiration of the eight days, prove legally and in good faith, that since the summoning of the witnesses whose testimony is

COURT RULES. necessary to him, they have absented themselves from the territory or district without his act or neglect and that it has been impossible to summon them and obtain their attendance in ten days.

UPON such proof the court will grant a reasonable time for the production of the absent witnesses, during which interval the party shall be obliged to exert due diligence to procure their deposition to be legally taken, under penalty, at the expiration of the time granted, of suffering judgment without further delay.

11th. THE provisions of the 9th and 10th articles relative to defendants, shall be applicable to plaintiffs under like circumstances.

12th. THREE days after judgment for default of appearance or of going to trial, in conformity to the 9th, 10th and 11th articles, judgment shall be confirmed in open court, if the court be in session, unless the party in default offer to go to trial forthwith.

13th. IN the case provided for in the preceding article the cause shall be tried in preference to every other on the calendar, even to that mentioned in the sixth article.

14th. FOR the future no commission for the examination of absent witnesses, nor any delay for obtaining material evidence from any place without the territory, nor from any other part of the territory, shall be granted, unless application be made, supported by an affidavit, whether by motion in court, or by petition to one of the

judges, if the court be not in session, and within three days at farthest, after the date of the answer; notice of the motion or of the petition having been previously given to the adverse party—and to the end that no one may alledge ignorance of the answer being filed, the attorney for the defendant on the day on which he files his answer shall give notice thereof in writing to the attorney of the plaintiff, and in the following manner, to wit: COURT RULES.

Superior Court.

A. B. adsm. C. D. } Answer filed this day. New-Orleans, this 18 (Signed)

THERE shall be the following exceptions to the preceding article, to wit: When it shall be proved, 1st, that witnesses have departed the territory after having been summoned; 2d, that the names or places of residence of witnesses absent from the territory or from the district have been discovered by the party only after the expiration of the three days posterior to the filing of the answer; 3d, that witnesses who were within the territory or district at the time of filing the answer have absented themselves since the expiration of the said delay.

UPON an affidavit of either of these facts, and further, 1st. that the witnesses are material; 2d, that the departure of the witnesses (when that has happened) was unforeseen; 3d, setting forth therein what is expected to be proved by them, a

COURT RULES.

commission may issue provided it be asked for, at least three days previous to the day set for trial of the cause—but it must be after the causes of the day have been disposed of and after notice to the adverse party.

16th. No motion shall be argued on any other day of the week than Saturday, and the party who intends to make one, shall give three days notice thereof to the adverse party.

17th. ALL pleas, whether dilatory or in bar, must be set forth in the answer, and none shall be afterwards received.

18th. No amendment shall be permitted in any petition or answer if moved for, later than the session of the court next after the day on which the notice of the cause being set for trial, shall have been given, and if any objection be then made by the adverse party, the argument thereupon shall be postponed to the day fixed for the trial of the merits; in consequence on that day both parties must be ready with all their proofs and means, at all events.

19th. No amendment shall be permitted tending wholly to alter the nature of the action or of the defence, after issue joined; saving always to the plaintiff his right of discontinuing his cause and commencing *de novo*.

20th. THERE shall be no longer a week set apart for the trial of jury causes—but the attorney of the party applying for a jury must take out his *venire* at least five days previous to the

day set for trial; and if more than two *writs of* COURT RULES.
venire for the same day be received by the sheriff, he shall nevertheless summon only two juries for the trial of all the causes for that day; excepting however the case of special juries.

21st. When the trial of a cause shall have been commenced, it shall be continued without interruption, interval or delay, except in particular cases by order of the court; and until the trial of a cause that has been begun be concluded, it shall have preference over all others, even criminal cases.

22d. ALL motions shall be made from within the bar with a loud and intelligible voice, and the judge before he pronounce sentence thereupon, shall repeat the title of the cause and the object of the motion, so that the whole bar may be apprized thereof.

23d. THE party who would obtain a new trial, must on moving therefor, furnish the court with a written statement of the grounds on which he means to rely; and if on reading it the court shall deem them insufficient, the motion shall be forthwith overruled; if, on the contrary, they shall appear plausible or at least susceptible of an useful and reasonable discussion, the court shall permit the motion to be entered for argument on a Saturday, in conformity to article 16. The ordinary affidavit nevertheless must also be made and both it and the said statement be com-

COURT RULES. municated to the adverse party at the same time with the notice required by said article 16.

24th. In order to put an end to frivolous delays in cases where there is no real defence to be made, such as those instituted on bills of exchange, promissory notes, or other commercial instruments, or on a balance of accounts adjusted between debtor and creditor, the defendant's attorney shall, on filing his answer, endorse thereon the word *defence*, if he be informed by his client and has reason to believe that there is a real and *bone fide* defence to be made.

When the defendant's attorney shall have thus endorsed his answer, he shall be considered as guarantee, that it is not done with the view of gaining any unjust delay, and if, by the event of the suit, it plainly appear that it was so endorsed with that intention, and that there was no real defence to be made, the attorney who shall have so done, shall for the first time be publicly censured by the court; and in case of repetition, shall be suspended for three months, unless he can shew by the affidavit of his client, or his agent, or by his own, that at the time of filing the answer he had reason to believe that there was a real defence to be made.

25th. The provisions of the preceding article shall equally apply to causes of appeal of the same nature.

26th. Friday in every week shall be set apart for the decision of causes instituted upon bills

of exchange, promissory notes, or other commercial instruments, or on balances of accounts adjusted between creditor and debtor, in which the defendants have not endorsed the word *defence* upon their answer, without the necessity of having such causes entered on the calendar.

27th. And to put an end also to the delay that may have been and may yet be experienced in causes now pending, of the nature of any of those mentioned in the three preceding articles, it is ordered that between this and the 30th of this month, the attorneys of defendants who have a real defence to make, write the word *defence* on such answers as they have already filed—and after the said day all those causes, in which this formality shall not have been complied with, may be called up and decided upon on Fridays, according to the spirit of the 26th article.

28th. During the sessions of the court the members of the bar shall keep their respective seats in a decent posture, and if they are not called out of their places by the court, they shall not occupy those assigned to the clerk, sheriff, criers and witnesses.

29th. The sheriff and criers shall take care that no other person than counsellors and attorneys place themselves within the bar—and if other persons should do so, those officers shall cause them forthwith to retire.

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Whether the city of New-Orleans may drain its waters in the Canal Carondelet?

THE Court having been divided, on the first argument of this case, their attention was again drawn to it.

BY consent, three paragraphs of the *Moniteur de la Louisiane*, a paper printed under the eye of the Baron de Carondelet, were read in evidence. They were allowed to be official.

I. THE first is in No. 13, dated May 24, 1794, it announces the project of *a canal, which, carrying the waters of the city and its environs into one of the branches of the Bayou St. John, will rid it of the stagnating waters which contribute in a great degree to its insalubrity and the vast quantities of musquitoes which render it so unpleasant in summer.*

IT farther states that, the war precluding the hope that the royal treasury would contribute to the expense of *a considerable canal of navigation*, Government had only solicited H. M. to allow the convicts (who were about to be sent to Pensacola) to remain in New-Orleans, engaging with them and the help of zealous inhabitants to cut A DRAIN *which* IN SUCCESSIVE YEARS *will be* CHANGED *into* A CANAL OF NAVIGATION FOR SCHOONERS

THE paper states lastly that government having obtained this FAVOUR *(grâce)* intended, in the course of the month of June, to ask of the

inhabitants of the city such number of negroes as they could spare to cut down the trees.

Two large banquettes are spoken of, which, when planted with rows of trees, will afford *an agreable promenade.*

II. THE second paragraph is of the 19th of Oct. 1795, No. 70. It brings to view the future greatness of the city—its encreasing commerce and presses the necessity of opening a communication with the sea thro' the lakes.

IT contains an official letter alluding to the great advantages the citizens had experienced by the facility with which they had been supplied with wood, and the marked diminution of mortality which prevailed in September and October hitherto and the disgorgement of the waters which stagnated behind the city. The governor then presses the commissaries to prevail on the citizens to continue their aid to hasten the complete advantage contemplated by facilitating the navigation. The Baron expresses his hopes that if the planters also lend their aid, schooners will soon be able to come to the city.

A draw-bridge on the Bayou to be built *at the expense of the city* is announced.

THE intended *promenade* is again brought to view.

III. THE third paragraph is of the 23d of Nov. No. 72. It notices the completion of the *canal of the City* as far as the bayou, with a width of 15 feet, and mentions they are deepening it one foot

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farther from the high lands of the Lepers, so as to enable schooners to come to the city: a work which it is said will be completed in eight days if the planters and citizens will lend one negro each for three days—" a service of little moment which " however will *rid them* TOTALLY *of the stag-* " *nating waters and consequently of the sickness* " *common in the fall*—while it will allow the " completion of the port for schooners already " began—for without this deepening, schooners " will not be able to come up to the city."

A royal schedule of the 10th of May 1801 was also read. *See the contents of it, vol.* 1, p. 271 & 272.

A number of witnesses were next examined.

Beré deposed that the canal was dug for the salubrity of the city; an object which was expected to be attained by conveying the waters of the city and the commons through the canal. The inhabitants furnished their negroes cheerfully. He dwelt at the distance of five miles from the city and sent his gang.

Metzinger deposed that he was one of the aids-de-camp of the Baron de Carondelet, and began the canal with sixty negroes, supplied by the inhabitants of the city. It was originally only six feet wide and turned round the large trees; the object of it being the conveyance of the waters of the city to the bayou. In the second

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year, the canal was widened and the work carried on with the negroes furnished by their owners: such individuals, as had none, working themselves or furnishing an equivalent in money. The number of negroes thus employed was on an average, after the first year, from 160 to 175. The *presidios* or convicts were about the same number; but worked only when there was no employment for them elsewhere. The negroes dug and the convicts carried away the dirt. In his judgment the convicts did not do one fourth of the work. The negroes were fed by government, and went to their masters at night. The waters of the city began to run into the canal soon after its completion. The witness observing that in heavy rains, these waters brought so much dirt that the canal would soon be filled up, he represented this circumstance to the Baron, who replied the canal was dug for the conveyance of the waters of the city, as well as for the purpose of navigation, and must answer both the intended objects. The Baron had three large wooden gutters placed on each side of the canal, the issues of which were stopped up, in time of rain, and opened, after the water had deposited its sediment, to let it, thus clear, find its way through the canal. A keeper was appointed for this service.

Lavigne deposed that he has lived fifteen years near the canal, and lives there at this moment—has always observed the waters of the city to

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run into the fortification ditch, and from thence into the canal. The waters of the commons found their way into it, through gutters with floodgates.

Bretonnier deposed he was employed by the Baron to solicit his neighbours to send their negroes to work on the canal: He does not believe any of them would have sent any, if they had believed the object of it was not for the benefit of the city. The waters of it have ran into the canal since it exists. Before, they spread on the commons. The spot, on which the canal is, was the lowest; not so much however as to prevent the spreading of the water along the sides, but in heavy rains a sensible current appeared in the present direction of the canal. The canal was always used for the purpose of a drain and that of navigation. It filled up, after attention ceased to be paid to the trunks or *gargouilles*.

Castanedo deposed he was the treasurer of the city, when the Baron began the canal. His avowed object was to relieve the city from the great mortality which was occasioned by a quantity of putrid water, which lodged on the commons. The inhabitants cheerfully yielded their negroes; he sent his. When the convicts were not at work on the fortifications they were sent to the canal. The Baron intended to have the canal thirty feet wide, double its present width, and four feet deep, and to have a *marie salope* or drag to keep it from filling up. The King's engineer had repor-

ted this could be done The general opinion of the people was that the canal would answer the purposes of a drain and of navigation. After the canal was dug the city built a draw-bridge on the bayou at its expence.

Tanesse, the city surveyor, deposed that the declivity of the land from the bayou road to the canal is thirteen inches; less than one inch on the hundred feet. The natural course of the water was originally on the spot on which the canal has been dug. This is still perceivable. He believes that the present declivity, which now renders a spot, before the middle of the square, between Maine and St. Philippe streets, the lowest part between the road and the canal, is artificial. The water, falling on the opposite or left side of the canal, naturally runs into it. If the water of the city were conveyed to the bayou, by a new drain they would fill the bayou up, as they now fill the canal.

The navigation of the bayou is now obstructed from the mouth of the canal to the draw-bridge, because the canal has not been kept clean. If the canal was dug about four feet deep it could bear a *marie salope* or drag and would drain the city and answer the purpose of navigation.

Dorville deposed he has long lived near the bayou, the canal was at first intended as a drain.

Latour, an engineer, deposed that water will run on a slope of a line in the toise. If the ground be uneven more is required. He gene-

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rally gives one inch to the toise. He has never noticed any obstruction in the bayou near the mouth of the canal. He cannot however affirm that none exists.

Livingston, for the plaintiffs. The plaintiffs claim the right of entering upon and clearing the canal Carondelet, under their act of incorporation. July 3, 1805, chap. 1.

THE 7th section authorises them to enter into and upon all and singular the land and lands covered with water where they shall deem it proper to carry the canals and navigation herein particularly assigned.

THE 9th section authorises them to receive certain tolls when the improvements made by them shall permit vessels drawing three feet water to pass from the Bayou St. John, by the canal Carondelet, to the basin terminating the same at the city ditch.

THIS grant, however, being made by the Legislative Council, would have been void, as that body had no right to dispose of the land which had passed to the United States by the cession: but it has received the sanction of Congress. The governor was directed to transmit the acts of the Legislative Council to Congress, who had reserved the right of repealing them. Congress, not having exercised that right, must therefore be considered as having approved the act of incorporation. If a farther sanction be necessary,

the plaintiffs have it in the act of Congress, (1807, c. 81,) the 3d section of which imposes on the corporation of the city the obligation of conveying to the plaintiffs as much of the commons of the city as shall be necessary to continue the canal Carondelet to the Mississippi, as a condition of the recognition of the title of the city to part of the commons. To this the defendants have assented by accepting the grant and making the conveyance.

THE defendants have also impliedly recognised the validity of the plaintiffs' charter, by taking the shares which were reserved for their benefit.

THE plaintiffs have therefore validly acquired the rights which the defendants had in the soil before the charter: but it is contended that admitting that the defendants have thus lost their right in the soil, still they have a servitude therein.

SERVITUDES may be acquired by nature, by grant or convention, lastly by prescription.

I. As the present canal is an artificial work, it cannot be contended that nature gave any right therein. Neither, in my apprehension, have the defendants shewn any right of servitude to have existed, before the digging of the canal.

THE defendants, however, claim one from the situation of the ground: the city being naturally higher, must drain its waters, on the ground in the back of it. But it is in evidence that the

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natural drain is between St. Phillip and Maine streets, at a considerable distance from the canal.

II. SERVITUDES are also acquired by grant or convention. In the present case, it is admitted that the land was originally the property of the sovereign. In order therefore to establish an adverse right, a grant must be produced or a convention or agreement clearly proved.

THE defendants do not pretend that they possess any formal grant, but claim the servitude under an agreement and convention which took place between the sovereign, represented by his governor, the Baron de Carondelet, on the one part and certain inhabitants of the city of New-Orleans and its vicinity, on the other.

THE evidence of this agreement and convention has been preserved in certain paragraphs of the *Moniteur de la Louisiane.*

THE Baron there solicits the aid of a few negroes for the digging of a canal, which at first is to serve as a drain to the waters of the city; but at the same time, he declares that the canal is only to be destined to this object for a short time; it is afterwards to be *changed* into a canal of navigation. If the canal was to undergo a *change*, it is absurd to say it was to continue after, what it was before it. If the canal was intended forever to continue as a drain, it would have been absurd to announce that it was to be *changed into a canal of navigation.*

THE particular manner in which the Baron en-

larges upon the vast advantage which the commercial and agricultural interests of the province will derive from a canal connecting the navigation of the Mississippi and that of the lakes, evinces that this was his grand, his main object. It is true the Baron presents also as an inducement the draining of the waters of the city; an object which is announced to be temporary, but which must however be in a great degree permanently effected, as long as the canal remains, as it must insensibly drain the adjoining ground.

It is also clear that the canal was not intended, when arrived to its perfection, to continue to be the common sewer of the city. If it must receive all the filth of the streets, it will always be full of a quantity of putrescent matter, vegetable and animal, which in this hot climate must generate disease. Every stroke of the paddle or oar, every motion of the pole must stir up this body of putrid water and impregnate the air with pestiferous miasmata. Can it be supposed that the banks of such a sewer would be selected for shady walks, affording the inhabitants of the city a delightful promenade?

III. A servitude in ordinary cases may be acquired by prescription: In the present, however, the defendants cannot pretend to any right on that score, for there cannot be any prescription against the sovereign.

Moreau, for the defendants. The plaintiffs

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cannot claim any right to the premises, under the act of the Territorial Legislature. They could not interfere in the disposal of public lands. The plaintiffs' charter cannot in this respect derive any validity from the silence of Congress. Until that body act upon the laws of the territory, their right of repeal continues. The Governor was directed to send the laws to the President to be laid before Congress, who had the power of disapproving them. 7, *Laws U. S.* 114. It would be going very far, to say that they derived any sanction from the circumstance of there being no evidence of their having been acted upon.

Neither, have the defendants precluded themselves from contesting the plaintiffs' pretensions, by taking a certain part of the stock, which the legislature had reserved for them. They having acquired an interest, in the plaintiffs' affairs, is no reason why they should not be allowed to contest any claim which the plaintiffs may set up against them. The mortgagee of an estate, the fee of which is held in common by several persons, may purchase or otherwise acquire the share of one of the mortgagors, without affecting his rights against the others.

THE plaintiffs' counsel having admitted that the owner of the superior estate may claim by nature a right of servitude over the inferior, in order to carry away the water which falls on the superior estate, it will be useless to produce any

authority in support of this proposition. It is not denied that the city stands higher than the ground on which the canal is dug. It follows then as a necessary consequence that the water of the city must have its way naturally over the ground behind it.

But the defendants chiefly rely as to the right which they claim of conveying the waters of the city, thro' the canal Carondelet into one of the branches of the Bayou St.-John, on an agreement or convention between the sovereign on the country at the time the canal was dug, thro' his representative the Baron de Carondelet, of the one part, and certain inhabitants of the city of New-Orleans and its environs, on the other.

IT is contended on the part of the defendants, that, by this contract, the king, who was the owner of the inferior estate, consented to alter the natural course of the waters of the city, and to a new direction being given them, and that this contract has produced an obligation on the part of the owner of the inferior estate, to receive the water of the superior, not in the natural way, that is to say throughout every part of the land, but thro' a canal dug for a particular purpose at the expence of both the contracting parties. In other words, that the owner of the superior estate has thereby acquired a right of servitude in a particular spot.

IT cannot be denied that the first object, *in point of time*, was the conveyance of the waters

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of the city through the canal into the bayou. The first paragraph, read out of the Moniteur, announces that such is the intended use of the canal. But the plaintiffs contend that the same papers contain certain evidence that the canal was to afford this advantage for a short time only. It was to be *changed*, that is to say, it was to cease to be what it was at first, and become exclusively a canal of navigation.

ON the part of the defendants, however it is contended that taking all the communications of the Baron together, it clearly appears that his intention was that the canal should never cease to drain the city, not only by carrying off a part of the waters of it by filtration, after they were spread upon the commons, but directly by receiving the whole immediately; that the draining of the city, its health, the freeing it from the myriads of musquetoes which desolated it, was the first object in point of time and importance: one which was looked upon as secondary to no other, not even that of the extension of agriculture and commerce.

THIS intention having been communicated and aid having been solicited and obtained to carry it into effect, the advantages thus held out must be considered by the court, as the retribution which those, who accepted the offer, and on the faith of it sent their negroes, afforded their personal labour, or paid their money, have a complete right to require.

During the existence of the Spanish government, in this country, it appears the right of the defendants was never questioned. When the Baron is informed that the draining of the city will fill up the canal, he answers, it was dug for this object and means must be taken to make it answer it.

In 1801, seven years after the canal was completed as a canal of navigation for schooners, the Sovereign himself declares by his schedule, that the water of the commons must not be suffered to lie on them, until the earth absordes them, or a part of them find their way into the canal by filtration: but trenches must be dug, in order that the waters may flow directly into the canal.

The right of drain thus recognized by the Baron de Carondelet and the King himself, after the period was passed, when according to the plaintiffs' construction of the words of the Baron, in the paragraph first read, the canal was to *change* its nature, cease to be used as a drain and be exclusively appropriated to navigation, are confirmed to the city by its charter; and it cannot be believed that the legislative council, in granting certain priviledges to the plaintiffs, meant to destroy any of those of the defendants. The legislative council has not said so by express words —it could not have said it. If the plaintiffs, in the exercise of the rights vested in them, must affect those of other persons, their act of incorporation directs compensation to be made.

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If in improving the navigation of a creek or bayou it becomes necessary to dig a canal they may do so, compensating those who thereby lose their land—If in order to improve the navigation of a canal, it becomes necessary that an individual or a corporation, who has the right of using it as a drain, should cease to exercise that right, the plaintiffs may insist on it, but they are bound to afford to the party at their own expence a drain equally convenient.

CONGRESS, in yielding their aid and countenance to the plaintiffs, could not sacrifice the rights of the defendants: it is not to be inferred from the circumstance of their having acted with liberality to the former, they have intended to act with injustice to the latter.

CUR. ADV. VULT.

LEWIS *J.* read the following opinion subscribed by MATHEWS *J.* and himself.*

THIS action is brought by the plaintiffs to ascertain and secure the right to the canal Carondelet, as a canal of navigation to the exclusion of the city of New-Orleans, using it as a drain and place of deposit for the water and filth running from the town.

IT is unnecessary to investigate minutely the title of the plaintiffs, as it is admitted by the coun-

* MARTIN, *J.* was occasionally absent.

sel of the defendants, that they have a right to improve the property, the subject of this contest, for the purpose of navigation, but burthened with their right of service to drain the city. This service, if it has an existence, must be considered in its nature a predial one—By the Civil Law, predial services are defined to be charges laid on an estate to the use of another estate, belonging to another proprietor. They originate either in the natural situation of the place, in the obligation imposed by law, or in agreement between several proprietors; the service claimed by the defendants must have its origin in the first or the last of these ways.

IT cannot be considered as one originating in the natural situation of the place; because it has been erected by the industry of man. It is not a right of service vested by grant or convention; for, in all grants, deeds, conventions or agreements, there must be two parties, the grantor and grantee, the contractor and the person contracted with, the party giving rights and the one receiving them. A property such as the defendants insist on in this case, belongs to that class called in the Common Law, *Incorporeal Hereditaments*, which are said to lie only in grant. No grant has been produced, giving the right of service contended for by them, nor has time sufficient elapsed to presume one and give a prescriptive title; no convention or agreement has taken place by which this right has become vested in the city,

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for, being a body corporate, it could only covenant or agree by its head or representatives, the Cabildo.

THE use which the city has had of the canal in dispute, seems to have been nothing more than a permissive right allowed by the sovereign of the country, on account of that portion of labour furnished by the inhabitants of the city and country more immediately interested in its health and prosperity. From the evidence before us, we believe that the canal was originally made, for the two-fold purpose of draining the city, the low land in the rear of it, and that of navigation: the draining of the city is incompatible with its use for the latter purpose; from the nature of things, it must and will drain the low lands in the rear of the city, and the wider and deeper it shall be made by the navigation company, the more effectually will it answer that end. It has been used by the city as a common sewer, until it has become unfit for any other service, and as the defendants have no absolute legal right to a sewer in it of that kind, their pretensions are unfound-in law: nor do we believe then better founded in equity and good conscience, in claiming compensation for the portion of labour they gave in the original formation of the canal, having so long used it to the total destruction of the most important purpose for which it was made; but as some inconvenience may arise to the city if immediately enjoined from emptying its waters and filth into the canal as heretofore it has done.

IT is therefore ordered, adjudged and decreed, and we order, adjudge and decree, that the defendants be and are hereby permitted to use the Canal Carondelet, as heretofore they have done during one month from this date, and that from and after the expiration of said month they shall be and are by this judgment for ever enjoined and prohibited from interposing or in any manner interrupting the plaintiffs in any work or improvement they may chuse to make on said Canal to facilitate its navigation, and that from and after the expiration of said period it shall no longer be a common sewer for the city of New-Orleans.

Moreau, for the defendants, moved for a new trial on the following grounds: because the judgment is contrary to evidence, and contrary to law.

1. Inasmuch as it declares the servitude, which the defendants claim, not established by nature.

2. Inasmuch as it declares the defendants, without a title, on the ground that there is no grant nor any agreement, or convention to which the cabildo, the legal representative of the city, was a party.

3. Inasmuch as it deprives the inhabitants of the city, and its environs, of the use of the canal as a drain, which they acquired for a valuable consideration, having furnished the greatest portion of the labour, employed in digging it.

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4. Inasmuch as it impairs the right of the defendants, accruing under an implied contract between the sovereign and the inhabitants of the city and its environs.

I. It will be shewn from authorities derived from the Roman law, that when it is said, that the right of draining an estate is confined to the waters running down, without any alteration produced by the hand of man, such works only are intended as are erected by the owner of the superior estate, which tend to aggravate the condition of the inferior, as by encreasing the rapidity of the water; not such works as are made, in order to convey the water to a particular spot, as a canal. Since an express law of the *Digest. l.* 8. *lib.* 43. *t.* 20. grants to the owner of the superior estate, the right of conducting his drain through such part of the inferior as he may chuse.

II. It will be shewn by Spanish laws, and by evidence of the usages which prevail in Spain, that the king often grants, by edicts, declarations, and even by royal letters, privileges and immunities, and transfers property to corporations, and individuals, even to provinces, and even the public in general; and that although such favour may not have been solicited, such edicts, declarations or letters, are not less valid, are considered as obligatory on the crown, and are allowed in courts, to have the same effect, as contracts between individuals. Hence it

follows that the publication of the Baron de Carondelet, made with a view, to induce the inhabitants, to yield the labour of their negroes, formed a valid contract between the sovereign and those who in pursuance of these publications sent their negroes to dig the canal.

III. The defendants expect to shew, that it is contrary to law, equity, and the ordinance of 1787 art. 2, to deprive the inhabitants of the just retribution promised them, the *quid pro quo* for the labour of their slaves. The judgment is grounded on the proposition, that the canal has been used as a drain till now, but it is difficult to guess, by what rule the court ascertained that this temporay use was a *sufficient* compensation, while a perpetual one was stipulated.

IV. The judgment admits the canal was dug for the double purpose of a drain and navigation; that such was therefore the intention of the parties. It is difficult to understand on what ground the court can after this admission interpose its authority and destroy the rights of the parties on the ground that the two purposes are incompatible.

Livingston, for the plaintiffs, moved that the reasons be overruled, under the 23d article of the rules of this court, *ante p.* 7, as not plausible nor susceptible of an useful or reasonable discussion.

LEWIS *J.* They ought to be so. The case has been twice and very fully argued.

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MARTIN, *J.* It is not in my power to concur. The opinion, which has now become that of the court, was shewn to me after the departure of Judge Mathews, and I then declared my inability to join in it.

As the defendants' counsel are dissatisfied, and have filed reasons for a new trial, it will naturally follow that one of the members of the court, who deemed it his duty to dissent from the opinion of the majority, will readily incline to a rehearing and will reluctantly forego the opportunity of listening to an argument which may elucidate the points upon which the judges hold different opinions. I am, therefore, averse to overrule the motion. It does not clearly appear to me, the language of our rules, that the grounds on which the defendants have built their hope of a new trial are not "plausible or at least susceptible "of an useful and reasonable discussion."

As the parties have treated the case as one of considerable importance, and as, it having been my misfortune when it was first argued, to differ from the opinion of one of my brothers and now with that of the other, it is likely that I labour under an error, I deem it proper to state the grounds on which, after the most mature deliberation and attention which I am able to give the subject, I have concluded that the defendants ought not to be prevented to use the canal Carondelet as a drain for the waters of the city, until the plaintiffs shall have given them a drain equally convenient.

To two propositions in the judgment of the court I am unable to give my assent. The first is that the claim of the defendants ought to be rejected, as it "belongs to that class called in "the common law *incorporeal hereditaments*, "which are said to lie in grant" and "no grant "has been produced giving the right of service "contended for." The other is that the claim is likewise to be disallowed, as "on *convention* or "*agreement* has taken place, by which a right "has been vested in the city, because being a bo- "dy corporate it could only covenant or agree by "its heads or representatives, the Cabildo," which does not appear to have been done.

As the claim of the defendants ripened into a title long before the inhabitants of Louisiana, had any connexion with a people who recognize the common law of Great Britain as a rule of conduct, I am at a loss to discover how the discussion of that claim may be aided by ascertaining its character, under the principles of the common law, and how we can declare it void, on account of the absence of a formality required only by the common law.

WE should rather ascertain its character by the principles of the civil law, which was the *lex loci* and enquire only whether it was created or modified into its present shape, in the manner which that law prescribes.

I. THE defendants claim the right of emptying the waters of the city into the canal Carondelet,

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and conveying them through it to the Bayou St. John: *Jus cloacæ mittendæ.*

THIS right is a SERVITUDE. *Jus cloacæ mittendæ servitus est. Dig. lib.* 8. *tit.* 1. *b.* 7.

SERVITUDES are established by conventions or stipulations, or by will. *Si quis velit vicino aliquod jus constituere pactionibus atque stipulationibus id efficere debet. Potest etiam testamento quis hæredem suum damnare . . . . . ut patiatur eum (vicinum) per fundum ire, agere aquamve ex eo ducere. Inst. lib.* 2. *tit.* 3. *s.* 4.

PERMISSION and forbearance establish servitudes. *Traditio plane et patientia servitutum inducit officium prætoris. Dig. lib.* 8. *tit.* 3. *b.* 1. § 2. The commentator understands that permission alone establishes a servitude, in the same manner as forbearance *(note* 18.*) Aut ita legendum, aut hic sensus est! Patientia plane, ut traditione servitutem inducet officium prætoris.*

II. A right may vest in a person, natural or corporate, without any covenant or agreement of such a person. In the present case a convention or agreement between the government or the Baron de Carondelet and certain inhabitants of the city and its neighbourhood may have vested the right of drain in the city.

WHAT concerns the interest of a third person may be the object of a contract, *in conditione aut in modo. In modo, i. e.* that although I cannot directly stipulate what concerns the interest of

a third person, yet I may alien what belongs to me, with a stipulation that the person to whom I alien it, shall do a thing which concerns the interest of a third person. 1 *Pothier on Obligations*, 64, *n.* 71. Thus the individuals, who paid money or furnished the labour of their slaves, might fairly stipulate with the Baron, that the city should have the use of the canal for a drain.

ACCORDING to the principles of the old Roman law, a third person, who had not been a party to the contract derived no right of action therefrom. But according to the constitutions of the Emperors, a third person, in whose favour a donor adds a charge to the gift, has an action to compel the donee to fulfill the intention of the donor. *Cod. lib.* 8, *tit.* 55, *l.* 3, *note* 18, *speciale est in donationibus, contractibus, ut alteri per alterum quæratur actio.* The action of the third party was called *actio utilis*, the name Roman lawyers gave to actions, which had no other foundation than equity. *Quæ contra subtilitatem juris, utilitate exigente ex solâ æquitate concedebantur*, 2 *Pothier on Obligations*, 50 *no.* 72.

THUS could a right be vested in the corporation of the city, without any covenant or agreement made by its head or representative, the Cabildo.

NEITHER is it clear that a person, who was not one of the parties to a contract, cannot, in countries where the common law prevails, acquire a right of action under it. In many cases the courts of Great-Britain have allowed such a right.

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A promise was made to the after husband's father to pay him *L.* 10 and the husband brought the action—held to lie: for *the party to whom the benefit accrues may bring the action. Provender* vs. *Wood. Hett.* 30.

WHERE a man promised to another to make satisfaction for all the debts which he owed to another, who was absent, the *creditor* brought an action and held to lie. *Het.* 177, *cites* 43 *and* 44, *Eliz. Rixon* vs. *Horton.*

A. promised B. that in consideration B. will make unto A. a lease of certain lands, A. will assign them to B's servant—the *servant shall have the action* and not B. *Arg.* 2 *Le.* 205, *pl.* 225, *cites it as* 25 *El. Crew's case.*

AN action may be maintained by a daughter *on a promise to her father* for her benefit, on a consideration moving from the father. *Dutton* vs. *Poole.* 1 *Ventris* 318, 332; *T. Jones* 103. In *Martin* vs. *Hind, Douglas,* 146, lord Mansfield said it was difficult to conceive how a doubt could be entertained on this point.

IN *Marchington* vs. *Kernon,* 1 *Bos. & Pull.* 101, *Buller J.* said that if a person make a promise to another for the benefit of a third, *the latter may maintain an action upon it.*

CANDOR induces me to acknowledge that the authorities on the other side of the question are the most numerous and perhaps the most conclusive. *See* 1 *Viner* 333—37, 2 *Evans' Pothier* 32; 3 *Bos. & Pul.* 149, *n.* 1, *Ventris* 6. 1. *Str* 592.

IN my view of the case, the defendants had by nature the right of emptying part of the waters of the city, on the spot on which the canal has been dug, and they have acquired that of of conveying the whole thro' the canal by a convention or agreement.

IT is in evidence that all the lands immediately behind the city lie lower and naturally receive the waters of it—that behind Fort Ferdinand, which stands close to the former ramparts and opposite to the middle of the city, the land is higher than on each side and gradually slopes towards the middle of the square between St. Philip and Maine streets, on one side, and towards the very spot on which the canal is dug, on the other; that spot being lower than both the sides of it. So that naturally part of the waters of the city flowed on it; and although the lateral slope has very little steepness, yet, in high water, the thread of the stream was plainly perceivable in the present line of the canal.

THE city has therefore a right of draining its water as a natural servitude on the land behind it. *si tamen lex non sit agro dicta, agri naturam esse servandam & semper inferiorem, superiori servire, Dig.* 31, *lib.* 39, *tit*, 3, *s.* 23, and this right exists on every part of the land behind the city. *Quæcunque servitus fundo debitur, omnibus ejus partibus debitur, Dig. lib.* 8, *tit.* 3, *l.* 21, *s.* 3. The right is on the whole and each part. *Jus servitutis totum est in toto et qualibet ejus*

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parte, civiliter tantum. Bart. vid. l. 1, *s.* 16 *de aqua quotid.*

So that the owner of the inferior land cannot free any part of it from the servitude. In deepening this lower spot into a canal, the right of the owner of the superior land, to convey the water which before flowed on it, could not be affected, without affording him elsewhere a conveyance equally convenient.

THIS natural right of servitude was in the year 1794 modified by a convention or agreement.

THE parties have laid before us several papers which are admitted to be official.

THE first announces the intended digging of the canal Carondelet : It is spoken of as a canal which *(emptying the waters of the city and* " *its environs*, into one of the branches of the " bayou) will rid it of the stagnating waters " which contribute peculiarly to its insalubrity " and the myriads of musquittoes which render " it so unpleasant an abode, during summer."

IT states that " the expences of the war preclud- " ing the hope that the royal treasury would con- " tribute to the expence of a *considerable canal* " *of navigation*, government had only solicited " the king to allow the convicts (which were a- " bout to be transported to Pensacola) to remain " in New-Orleans, engaging with their aid and " that of several inhabitants, zealous for the pub- " lic good, to dig a *canal d'egoutement*, (a canal

" for draining,) which *will be changed* in succes-
" sive years into a canal of navigation for schoon-
" ers."

ANOTHER paper announces the completion of the *canal of the city* as far as the bayou, with a width of fifteen feet, and the intention of the governor to have it dug one foot deeper, from the high land of the Lepers to the city, so as to enable the schooners to reach its gates. It concludes " The work could be completed in eight " days, if the planters and inhabitants of the city " would aid it with one negro each, during three " days—an object of little moment which never-" theless will *rid them* TOTALLY *(les délivrera* " *totalement)* of the stagnating waters and con-" sequently of the sickness so common in the " fall."

IT is in evidence that the inhabitants and neighbouring planters very cheerfully complied with the Baron's requisition—those among the former who had no slaves, working personally on the canal, or furnishing an equivalent in money. Indeed a gentleman who surveyed the works under the Baron's order, has deposed that in his belief the convicts did not effect one third of the work.

WE are further apprised that the Baron's intention was to extend the canal to a width of thirty feet in course of time, and that he caused *gargouilles*, (large wooden gutters,) to be placed, at a reasonable distance from each other, on each side of the canal, the issues of which were stop-

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ped in time of rain, the water suffered to settle and deposit the earth it brought down, and when perfectly clear allowed to find its way thro' the canal to the bayou. A keeper was appointed for this service.

LASTLY, a royal schedule of the 10th of May, 1801, six years after the completion of the canal, directs the commons of the city to be drained by trenches into the canal, so as to put an end to the putrid fevers occasioned by stagnating waters, and yet attended with great mortality.

FROM all this testimony the impression which my mind receives is that the defendants have satisfactorily proved the right of the city to a drain through the canal—a right which naturally existed over this particular spot, in a more eminent degree than over any other part of the commons, except on another between Maine and St. Phillip streets, and has been altered into its present form by a convention or *agreement*, between the King or the Baron of Carondelet, as his representative, and a number of inhabitants of the city and planters of the neighbourhood.

AN agreement or a pact is the assent of two or more persons on the same object. *Duorum vel plurium in idem placitum consensus. Dig. de Pactis l.* 1. *s.* 1. *Domat p.* 1. *b.* 1. *t.* 1.

Now, in the present case, the proposition of the Baron, that the persons to whom it was made should afford the aid he wanted for digging a canal, *emptying the waters of the city and its*

commons into one of the branches of the bayou was accepted, the aid furnished, and the Baron undertook to apply it to the object for which it was yielded. Here is then a complete pact or agreement. It has been faithfully carried into effect: the parties to it must reap the promised advantage—their right thereto is perfect.

THE inhabitants of the city and planters, who furnished the consideration, have the right of claiming it back, if the promised advantages are withheld. The civil law gives them an action called *condictio ob causam dati, causâ non secutâ.* If the advantages were intended for a third person, natural or corporate, who was not a party to the agreement, there results for him the *actio utilis, quæ contra subtilitatem juris, utilitate ita exigente, ex sola æquitate concedebatur.* 1 Pothier on Obligations, 50, n. 72.

THE plaintiffs' counsel has however contended that the canal was intended for two objects, which cannot exist together, navigation and a drain—that the first was the main one, the other merely incidental, during a short period, and necessarily intended to give way to the principal one.

THE evidence of this fact is sought in the first paragraph of the Moniteur, read in evidence. The canal is there called *a canal of drain which will be changed in successive years into a canal of navigation for schooners.*

THE word *changed* is represented as a sacra-

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mental word, which must be construed strictly —and thus necessarily precludes the idea of the canal remaining *after* the change, what it was *before*.

WORDS are not always to be understood in their strict grammatical sense—the intention of the party who utters them is to be considered. Now in the case before us, the canal is presented to our view in its original plan, and in two improved ones. It is mentioned as a canal for a drain, a canal of navigation for schooners, with a width of fifteen feet, lastly, as a *considerable canal of navigation* of double that width, as one witness, *Castanedo*, has sworn, and as the paragraph in the Moniteur describes as one, *the expenses of the war precluding the hope that the royal treasury would contribute to.*

Now that the objects of a drain and of a canal of navigation for schooners could be simultaneous, in the contemplation of the Baron, clearly appears. For when he announces, in the third paragraph, that with the help of a certain number of negroes during three days, the work will be completed as a canal of navigation for schooners, these vessels being enabled to come up to the very gate of the city, he assures the persons from whom he solicits this last aid, that by yielding it, they will be *totally* rid of the insalubrity of the city: an advantage which is presented as a prominent object, and that of the approach of the schooners as far as the gates as the secondary one.

mode of expression which repels the idea, that the two objects were not to be simultaneous —or that the canal, being navigable for schooners, had undergone such a *change*, as to render it necessary that the people should be at the trouble and expense of a new canal, to serve as a drain to the waters of the city—while they were promised that they would be *totally* rid of them.

THE intention of the Baron, if it was not sufficiently expressed by his words, is manifested by the fixing of the *gargouilles*, or wooden trenches, through which the stagnating waters, on the back of the city, were to be conveyed to the canal, and the establishment of a keeper to attend to them, after the canal had become fit for the navigation of schooners: and six years after the plan of the Baron, in this respect, incidentally received the sanction of the king, by the schedule of 1801.

THE canal was to undergo its change from a *drain* to a *canal of navigation for schooners* and afterwards *a considerable canal of navigation*, of the width of thirty feet, and still continue to answer its primitive and posterior destination and serve as a drain and a canal of navigation for schooners, in the same manner as an individual passes through the stages of childhood, adolescence and virility, without ceasing to be the same person.

THE change was to be effected *in successive years*. If it was to have taken place, by the canal ceasing to be used as a drain, successive years

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would not have been required for this purpose. It would only have taken one day to throw a dam across the spot on which the waters of the city entered the canal. If, on the contrary, the change was to happen by gradual deepening and widening, then the words *successive years* are properly used. They are senseless, if the change is to be a sudden one, as the plaintiffs' counsel imagines.

But, the last paragraph, *ante* 11—12, puts the matter beyond the possibility of a doubt.—Read it, in connection with the other two, and it clearly repels the idea, that the word *changed* in the first, is to be taken in any other sense, than as synonimous with the word *improved.* Read it without a connection with the others, it creates a new contract. If the planters and citizens, says the Baron, will send one negro each for three days, they will be rid TOTALLY of the *stagnating waters and consequently of the sickness common in the fall.* Can the court understand that his meaning was, that in order to get rid of these stagnating waters, the people would be called upon to dig another canal? He assures them they will get *rid of them* TOTALLY.

THE counsel for the plaintiffs have finally pressed upon the court, as conclusive evidence, that the Baron never intended, that the waters of the city should pass through the canal, the two walks bordered with trees, which are mentioned as affording a delightful promenade. These walks do

not appear to have been intended to be made, till the canal had reached its utmost width, the double of the present. At the cession of this country, eight years after the completion of the work in its second stage, as a canal of navigation for schooners, the walks were not begun—and they could not be—since the intended margins of the canal were not yet fixed upon. When the canal had obtained a width of 30 feet, with a proportionate depth, the mass of water would be too considerable, to be affected with the portion of the filth of the city, which might reach it.

ADMITTING that the agreement or convention was not evidenced, by any words or communications, it would be the duty of the court to imply it, from what has been done. If a canal be made to convey the waters of two estates, by the proprietors, or a person have the right of conveying the water of his field through the neighbouring one, when once a canal is dug for this purpose, it cannot afterwards be altered. This is the opinion of Sabinus. *Sabino quoque videbatur qui argumento rivi utebatur: quem primo qualibet ducere liquisset, posteaquam ductus esse, transferre non liceret. Dig. l.* 8. *tit.* 1. *b.* 9. The canal having been dug by mutual consent, no one has a right to change its direction.

I CONCLUDE that the Baron does not appear, in any of his communications or proceedings, to have ever expressed or entertained the idea that there would be occasion of digging any other ca-

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nal: on the contrary, he clearly expressed and manifested a contrary idea.

BUT the counsel for the plaintiffs say, that, whatever may have been the intention of the parties, as the canal was avowedly dug for two purposes —the draining of the city and navigation, it now clearly appears both purposes cannot be answered and therefore the less important must be abandoned.

THE fact is far from being established. An engineer *(Tanesse)* has deposed that were the canal carried to its intended width, a drag, or *marie salope*, might clear it of the earth, the waters of the city would carry with them.

BUT admitting the fact. Congress or the Legislature, in sanctioning the improvement of the canal by the plaintiffs, do not appear to have intended, if they possessed the power, to have destroyed the right of the defendants. If the exercise of this right be incompatible with the intended improvement, the civil code has provided the means, by which the interests of both parties may be reconciled.

IT authorises the plaintiffs to free themselves from the inconvenience of receiving the waters of the city, thro' the canal, by affording to the defendants a drain, equally convenient elsewhere. "Yet, if this primitive assignation has become "more burthensome to the proprietor of the es-"tate, which owes the service, or if he is there-"by prevented from making on his estate some "advantageous repairs, he may offer to the pro-

"prietor of the other estate, a place equally con- "convenient for the exercise of his right, and "the owner of the estate, to which the service is "due, cannot refuse it." *Civil Code* 140, *art.* 64.

IN cases of doubt the court will ever lean in favor of the party, *qui certat de damno vitando.* The other, *qui certat de lucro captando*, is not to be favored.

THE plaintiffs in this case are mere donees or volunteers—They have paid no consideration. The defendants, on the contrary, if the judgment of the court be against them, lose the whole labour and expence of digging the canal. I say *the whole*, because three fourths of the canal were dug by the personal labour of some of the inhabitants of the city and neighbouring planters, the labour of their negroes, and with the money of others—and the other fourth by the labour of the convicts which the Sovereign bestowed as a favour (*grace.*) So says the Baron. Now the right of the city, in this last fourth, is as strong as in the other three. Surely, the sovereign, having bestowed this gift, favour or grace, could not fairly recall it. Altho' the city did not make any advances, from the corporate chest, yet her rights are the same: for the canal was dug to avoid an expence, the city would have been compelled to undergo, if her administrators respected the health and lives of her inhabitants. The very persons, who furnished the aid directly,

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would have been necessarily called upon to enable the corporate chest to perform the work. If a drain is now to be dug by the city, such of those persons who are still living, and the descendants of the others, must put their hands into their pockets, to do that once more which has already been done at their cost.

THE act of 1811, *c.* 6, directing a new trial in all cases in which the court are divided: the motion was set down for argument, at the next term.

RIVIERE vs. *ROSS.*

No summary relief against a sheriff, who does not pay over money levied.

THE defendant, being Sheriff of the county, had a writ of execution directed to him.

Seghers, for the plaintiff, suggesting that the money was paid, moved that a rule to shew cause might issue against the defendant, who had failed to pay it over, and judgment be entered.

By the Court. If he has made no return, we will amerce him for the neglect. If the money be in his hands, the party entitled thereto must, after demand made, put his bond in suit.

MOTION OVERRULED.

MOREAU vs. DUNCAN. *Vol.* 1, 99.

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The tax on suits is not to be advanced.

This case was argued, in the presence of the three Judges, and *Mathews, J.* concurring in opinion with *Martin, J.* there was

JUDGMENT FOR THE DEFENDANT.

KELLY & LAMBERT vs. *BARBIN.*

If the plaintiff has prayed for a jury, he cannot wave it and compel defendant to allow judgment to be entered.

THIS was a suit upon a note of hand; the defendant plead the general issue, and prayed for a trial by jury: the word *defence* had not been written on the back of the answer.

Ellery for the plaintiffs. We are entitled to judgment, according to one of the rules of this court, *art.* 27, *ante* 9.

Hennen for the defendant. A jury has been prayed for; therefore the court cannot assess damages. To give to the rule the construction, which the plaintiffs' counsel proposes, would be to deprive the defendant of a trial by jury, which the ordinance and act of congress secure to him.

By the Court, LEWIS, *J. alone.* The rule can only reach such suits, in which the court are to try both the law and the fact. A jury being prayed for, the defendant must have it.

SUIT CONTINUED.

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SWEENY & CARR vs. *BARBIN.*

If the plaintiff prays for a jury the defendant may insist on one, without having asked it.

THE plaintiffs had asked for a jury in their petition, and now *Ellery* moved that he might be allowed to wave the jury, the suit being bro't upon a promissory note, and the defendant's counsel might be compelled to suffer judgment to be entered, unless he wrote the word *defence*, on the answer, according to the rule of court. *Ante* 9.

Hennen, contra. The plaintiffs having prayed a jury, the defendant was not bound to make the same prayer. It would have been vain and useless. *Lex neminem cogit ad vana seu impossibilia.*

By the Court, LEWIS, *J. alone.* Neither party can, without his neglect or consent, be deprived of his right to a jury. No latches can be imputed to the defendant. Judgment cannot be entered. If the plaintiffs wave their right to a jury, the defendant must be allowed to pray for one, or his attorney offered an opportunity of consulting with him, to ascertain whether a defence be not necessary.

MOTION OVERRULED.

TERRITORY vs. *MATHER.*

The crime of stabbing, with an

THIS was an indictment against the defendant, for stabbing, with an intent to murder.

THE Attorney General, *Duncan*. The frequency of this crime, and the facility with which offenders escaped from justice, induced the Legislature, in the year 1806, to specify and add it to our criminal code, and make it the subject of capital punishment. Our statute enacts, that whoever "shall shoot or stab any person, with "the intent to commit the crime of murder, such "person or persons so offending, on conviction "thereof, shall suffer death." 1806, *c.* 29. The dangerous practice also, which obtained in this country, and which still too generally obtains, of wearing concealed weapons, ready to carry into effect the irascible, malicious, and vindictive feelings of their owners, had its influence with the Legislature, in annexing to this offence so severe a punishment: and, though the person so shot or stabbed, might survive the attack, or recover from his wounds, yet such a fortunate escape, or accidental recovery, was not thought sufficient to free the assassin from his incurred guilt, or shield him from his merited punishment. In England, we find, that even stabbing with an intent only to maim or disfigure, is punishable with death; and the *statute of stabbing*, as it is called, made at the accession of James I. ousted of clergy, the manslaughter which might have ensued; this statute, like our own, being principally intended to stop the outrages frequently committed, by persons wearing concealed dirks, poignards, or daggers. The English

intent to murder, intends murder of the first degree.

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statute, commonly called the *Black Act*, also contains provisions similar to our own; and in the Spanish Criminal Code we also find a similar law, and annexing to the same offence, the same punishment.—It is the province of the jury to aid the legislature in their intentions, and carry into effect the provisions of a salutary law; and certainly, the man, who shoots or stabs another, with an intent to murder him, can derive but small alleviation of his guilt, or extenuation of his crime, from the accidental escape or recovery of his victim.

In this crime, as well as that of murder, the intention forms the principal ingredient; and the same frame of feeling and disposition of mind must be shewn to exist in both cases; for, tho' the offence of murder be not actually committed, the intention to commit it must be distinctly proven. The definition of murder will shew what this intention must be. Murder is the unlawful killing of any person, with *malice aforethought, either express or implied.* 4 *Bl.* 195. If, therefore the prisoner at the bar made this stab or thrust with *malice aforethought*, the crime is completed though no death ensued, and he is subject to the punishment, however severe, inflicted by the law: and this malice aforethought, as all the books tell us, is not to be taken in a narrow or restrained sense; it need not be shewn to be any particular spite or malevolence against the person so killed; it is enough, if it be an

evil design in general; if the fact be attended with such circumstances as shew it to be the dictate of a wicked, depraved and malignant heart; as flowing from a wicked and corrupt motive, and denoting a wicked, perverse and incorrigible disposition. 4 *Bl.* 198, 199. *Fost.* 256, 257. It is therefore *implied* from any cruel act against another, however sudden. 1 *East P. C.* 215. From an attentive examination and review of the circumstances attending the present case, the jury will determine whether this *malice aforethought* exist, and if the thrust were made by the prisoner at the bar, with an intent to commit the crime of murder. (The Attorney-General here introduced the testimony of the territory.)

Ellery, for the defendant. By this indictment, the prisoner stands charged with stabbing, not with an intent to *kill*, but with an intent to *murder*. This is an important distinction and must be carefully kept in mind; for though there should even be evidence sufficient to shew an intention to *kill*, yet, if it be not satisfactorily and beyond a doubt proven that the intention was to *murder*, the prisoner is entitled to a verdict of acquittal. The malice prepense or aforethought necessary to constitute the crime, with which the prisoner is charged, must not, as in cases of murder, be *implied*, it must here be *proven*. The general rule is, that all killing or homicide is *malicious*, and of course amounts to murder; and when the

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homicide is *proven* by the prosecution, the malice is *implied* by the law; and it is for the party accused to rebut this *legal presumption*; to disprove this *implied malice*, by shewing circumstances which may justify, excuse or alleviate the homicide. But here express malice is of the essence of the charge; it constitutes the crime; there is no *killing*, from which it may be *implied*; from a mere wounding it cannot be; for then any wound, however slight, would indicate murder; it is, therefore, incumbent upon the prosecution, fairly to make out, distinctly to shew, and satisfactorily to prove the existence of this *malice*, and of these *murderous* intentions.—In other offences, the act and the intent must be coupled together, in order to complete the crime; but here it is the intent alone.—And the law itself, upon which this indictment is founded, appears both singular and severe, and such a one as will make a jury require more proof of the crime charged under it. It is in fact a law punishing *intentions* with more severity than would be punished the *execution* of these intentions. The *attempt* here to commit the crime is made more criminal than the *crime* itself. By our statute, murder is divided into that of the *first* and *second* degree. The act says; "all murder which "shall be perpetrated by means of poison, or by "lying in wait, or by any other kind of willful, "deliberate and premeditated killing, or which "shall be committed in the perpetration or at-

"tempt to perpetrate any arson, rape, robbery or "burglary shall be deemed murder of the first "degree; and all other kinds of murder shall be "deemed murder of the second degree." The act then declares: "that every person duly con- "victed of murder in the first degree, shall suf- "fer death; and every person duly convicted of "murder in the second degree, shall suffer im- "prisonment at hard labor, not less than five nor "more than fourteen years." 1805, *ch.* 4. Murder in the *second* degree, as it may be perpetrated without malice, would here appear to mean manslaughter, had not the Legislature, in another part of our criminal code, particularly specified this crime and annexed to it a different and lighter punishment; viz: fine and imprisonment: the fine not to exceed five hundred dollars; the imprisonment at hard labor or otherwise not to exceed twelve months. 1805, *ch.* 50. Be this, however, as it may, we find that murder in the *second* degree is punishable only with *imprisonment*; and what is the punishment for stabbing with an intent to murder? *Death.* Thus the *intent* is made more criminal than the *act;* and the *design* to commit the *crime*, punished more severely than the actual *commission* of it. Is this not a soleecism in Legislation? The object of all criminal laws is to prevent the commission of crimes; this, on the contrary, appears to encourage it. The assassin is told to make sure work; if he fail in the *attempt*, he is sure to be hung;

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but if he succeed, the *perpetration* of the crime may lighten the severity of the punishment. If the law had said "stabbing, with an intent to commit the crime of murder in the *first* degree, should be punished with death :"—this reasoning could not be supported; but murder, by our law, is made a generic term, and the offence is divided into distinct species and degrees, and the intent to commit murder, by stabbing, is made capital, without specifying the species or degree. The English *statute of stabbing*, to which this is compared, bears but little analogy to it; This statute was of a temporary nature, and made for a particular occasion, and should have expired, with the necessity which produced it ; but under this statute *death* must ensue ; the crime is that of *mortally* stabbing, upon sudden provocation, which amounts only to manslaughter, a clergyable offence, but from which, in this case, this statute took away the benefit of clergy. The *Coventry act* also alluded to, has been but little acted upon ; and there, the actual mayhem or disfiguration must be shewn, as well as the lying in wait, to bring it within the act. The *Black Act* is certainly more similar. But I suspect our own law boasts a Spanish parentage, and seems, indeed, to have been copied verbatim, from their criminal code. *Vid. Anto. Gomez variar. Resol lib.* 3. *cap.* 5, *l.* 2, 6, 10. The same law also is inserted in the Regulations or Instructions of *O'Reilley*, in the following words : " *Celui qui*

"*blessera ou tuera de guet-a-pens, et de dessein* "*prémedité, sera condamné à mort, quoique le* "*blessé ne meure pas: le coupable sera conduit* "*au supplice, attaché à la queuë d'un animal, et* "*la moitie de ses biens seront confisqués au pro-* "*fit du fisc, ou du tresor royal.*" *O'Reilly*, § 5, *ar.* 20, *p.* 27.

BUT whatever be the origin of this law, or however singular and severe its conditions, we must still be bound by it; though certainly the jury will require more proof of the offence charged under it:—the reasons must be strong, and the proof great, to carry into effect the severity of its punishment.

IN order to ascertain the character of the offence with which the prisoner at the bar stands charged, and to determine if the present case be within our act, we must first see of what species would have been the homicide, if death had ensued. If this homicide would have been justifiable or excusable, no offence could have been committed: or even if the homicide would have been felonious, but amounting to no more than manslaughter, still we are not brought within this act. We are charged with stabbing, with an intent to *murder*, not to *kill;* and it must be proven to have been such a stabbing, as if death had ensued, the *homicide* would have amounted to *murder*. This was the decision of the Chief Justice in *Milton's* case, indicted for an assault, with an intent to murder. Lord Kenyon C. J. be-

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ing of opinion, that if death had ensued, it would only have been manslaughter, directed the jury to acquit the defendant upon the first count of the indictment, charging the assault with intent to murder. 1 *East. P. C.* 411.

By the Court, LEWIS, *J. alone.* Surely, if the jury are of opinion that, had the person stabbed died, they ought to have found the defendant guilty of murder of the second degree only, they will acquit him.

VERDICT FOR THE DEFENDANT.

MEUNIER vs. *COUET.*

Saving and reserving, &c. are words of course, which imply no denial.

THIS suit was brought to recover a negro slave, in the possession of the defendant. The answer stated the possession of the defendant during six years, with the plaintiff's knowledge. It began by the usual manner of reserving of *all and every manner of advantage*, &c. and did not deny the plaintiff's title.

Concubinage goes to the credit only, of a witness.

Vendee's daughter an inadmissiable witness.

Mazureau for the plaintiff. We need not adduce evidence of our title.—We have set it forth in the petition, and the answer does not deny it.

Derbigny contra. We admitted nothing and we have reserved all our rights, by an express clause.

By the Court. The words used in the beginning of the answer, are words of course and which do not imply any denegation of what the plaintiff sets forth in the petition. As you have not denied his title, he is not to be required to prove it.

THE defendant offered a witness who was objected, to on the ground that the defendant lived with him as his wife, although they were not married. The objection was overruled; as this circumstance goes only to the witness's credit and does not affect his competency. *Hill* vs. *Wood, Esp.* 722.

THE daughter of the defendant's vendee, who had warranted the title, was next offered, but not allowed to be sworn. *Civil Code*, 312. *a't.* 248.

HENDERSON vs. *LYND, BAIL OF BROWN.*

A stay of proceedings does not release the bail.

THE defendant had been bail, in the original action, during the pendency of which, Brown, the defendant, obtained a stay of proceedings; no discharge being granted by the creditors, the plaintiff proceeded to judgment against the principal, and there being no surrender, judgment was now prayed against the bail.

Livingston, for the defendant. The bail was discharged by the order of the judge granting a stay of proceedings. The bail, after it, could not take the principal to surrender him, without being guilty of a breach of the judge's order.

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Depeyster, contra. It is not clear that, in this territory, the bail may take the principal in order to surrender him; the bail is discharged when the judgment is in favour of the principal, or when he pays the debt or surrenders himself. The record of our suit shews no delivery of the principal to the bail. The latter is with us, like the bail in error in England, which undertakes to pay the debt, if the principal does not.

By the Court. The bail, in this country, as in England, are *ex vi termini*, the bailees, the keepers of the principal. Sir Wm. Blackstone, 3 *Com.* 290, says, the security, given for the appearance of a party arrested, is called *bail*, because the defendant is given to him, and is supposed to continue in his custody, instead of going to jail.

FROM the relation in which the parties stand to each other, *bailed* and *bailee*; from the undertaking of the latter, results his right to keep, to take and surrender the former. Bail, in the language of the books, 6 *Mod.* 261, have the principal always upon a string, which they may pull whenever they please, and surrender him in their own discharge.

THAT this power results from the relation of the parties, not from any authority given by the Court, which receives the bail, or the laws of the country, in which the court is held, appears from the bail being allowed to arrest the principal, out

of the district to which the jurisdiction of the Court extends, and even out of the state in which the suit is brought.

OUR bail cannot be likened to the English bail in error: for our statute provides that the surrender of the principal shall exonerate the bail.

CONSIDERING therefore the principal as standing in the situation of a prisoner, whenever he resists the will of his keeper, he is guilty of an escape, and the bail has the same power over him, as an officer has over a person in his custody, who effects his escape. While at liberty, by the permission of the bail, the principal is really in the custody of the bail. If he obtains a stay of proceedings, his situation with regard to the bail, is the same as that of a prisoner in the actual custody of the sheriff. If he attempt to escape, the bail is bound to prevent his going out of his reach, in the same manner as the sheriff would be to prevent the escape of a defendant in gaol. As, therefore, the stay of proceedings would not have released the principal from gaol, it does not release him from the custody of the bail.—The defendant was therefore bound to prevent the escape of the principal, and might have arrested him, without being guilty of a breach of the judge's order. See *Nicolls* vs. *Ingersol*, 1 *Johnson*, 145.

JUGDMENT FOR PLAINTIFF.

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READ vs. *BAILEY.*

Whether the whole answer to an interrogatory be evidence for the respondent?

THIS was an action brought to recover the price of a negro, sold by the defendant for the plaintiff.

BY one of the interrogatories, the defendant was required to recognise the copy of a letter, by which he had informed the plaintiff that he had sold the negro, on a credit, and promised to remit the price, as soon as it came to his hands.

THE defendant recognised the paper, annexed to the petition, as the copy of a letter he had written to the plaintiff in reply to one, by which the plaintiff had directed him to remit the proceeds of the sale of the negro, in good bills on Charleston—adding he had informed the plaintiff of the receipt of the price of the negro, and required his further instructions, as no bills on Charleston could be procured: that on the receipt of the defendant's letter, the plaintiff, or his brother, as his agent, shewed it to the defendant's brother, who, observing that the money was in the defendant's hands, at the request of the plaintiff, or his brother, as his agent, gave his own note, for the amount, and charged the defendant therewith.

Ellery, for the plaintiff. I rely, in this case, upon the testimony drawn from the defendant upon the interrogatories exhibited by the plaintiff. He has there established our demand, by admitting the debt; it is now incumbent on him, to

prove the facts, which he has set up by way of avoidance.

Grymes, for the defendant. The defendant in his answer has charged and discharged himself; his testimony cannot be divided against him; it must be taken whole and together. These principles obtain both in courts of common law, and in those of equity; they are more particularly recognised in the case of *Kilpatrick & Thrupp* vs. *Love*. *Ambler* 589; and have been recently acted upon in this court, in the case of *Taylor & Hood* vs. *Morgan*. 1 *Martin*, 204. And this testimony, thus furnished by the defendant, at the instance of the plaintiff, must be received as true, unless disproved by the oath of two credible witnesses, or of one credible witness, and strong corroborating circumstances. *O. L.* 1805, *ch.* 26, *sect.* 9.

Ellery, for the plaintiff. The principle, which obtains in courts of common law, I know to be, that the party producing the answer in evidence, makes the whole of it *admissible*, though not *conclusive*, testimony for the party making such answer, and that it is not to be separated against him, but to be received entire and unbroken.

Although it must be thus taken together, and the whole of it read, yet, in many instances, the defendant will be called upon to prove his allegations. 2 *Esp. N. P.* 753. And in a recent case, it has been decided, that the production of the

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answer in evidence, makes the *whole* admissible, only so far as to wave any objection to the competency of the defendant, but not so as to admit facts which appear in it to have been stated upon hearsay. 2 *Boss. & Pull.* 548; and *Lord Mansfield*, in the case of *Bernion* vs. *Woodbridge*, says, though the *whole* of an affidavit or answer, must be *read*, if any part is, yet you need not *believe* all equally. You may believe what makes against his point, who swears, without believing what makes for it. *Doug.* 788. But in courts, like ours, possessing chancery power and equitable jurisdiction, this principle is carried much further; it is there distinctly laid down, that the admissions of defendant in his answer, shall be taken as *conclusive* evidence against him, and that if he set up any *distinct fact*, by way of avoidance, he shall be put to the strict proof of it. And this reason is assigned; that his admissions may have been produced, from an apprehension they might have been proven, and therefore ought not to profit him, so far as to make pass for truth, whatever he says in avoidance. *Gilb. Law of Ev.* 52. *Bull. N. P.* 237. 2 *Esp. N. P.* 752. *Peake*, 38, *note (i)*. The case of the bill exhibited by creditors against an executor, cited in the above authors, strongly confirms and illustrates this principle. The executor answered, that 1100*l.* had been deposited in his hands by testator, but, that afterwards, upon a settlement of accounts, he gave his bond for 1000*l.* and that

the remaining 100*l.* was remitted to him by the testator, as a compensation for his services. Here, though there was no other evidence of the deposit of the 1100*l.* but the executor's own oath, it was nevertheless held, that when an answer is put in issue, what is confessed and admitted, need not be proven by plaintiff, but that it behoved defendant to make out by proof what was insisted upon, by way of avoidance; but with this distinction, that if defendant admitted a fact, and insisted upon a *distinct* fact by way of avoidance, there he ought to prove the matter of his defence; but, if it had been but *one fact*, as if defendant had said, that the testafor had given him the 100*l.* it ought to have been allowed, unless disproved, because nothing of the fact charged, is admitted, and the plaintiff may disprove the whole fact, as sworn, if he can do it.

Neither of the cases reported in *Ambler* and *Martin*, appear to be at variance with this principle, so modified: in both these cases, no *distinct facts* are set up in avoidance, but the whole constitutes but *one fact*, which fact is not *admitted*, but *denied*. This also is perfectly correspondent with the principles of the civil law. *Pothier* distinguishes the oath which the defendant takes upon interrogatories exhibited by plaintiff, from the *decisory oath*. The latter is proof *for* him who takes it; whereas, on the contrary, the answers, which the party interrogated makes, are proof only *against* him; because the plaintiff put to the

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defendant these interrogatories, in order to derive some proofs from his admissions or contradictions: *ut confitendo vel mentiendo se oneret.* *L.* 4, *ff.* At the same time, the general principle, that the defendant's answers are not to be divided against him, applies; if, for example, the defendant acknowledges, that he received, but adds, that he returned, a loan, his declaration must be taken entire. 2 *Pothier on Ob.* 303. 2 *Evan's Pot. Ap. no.* 16. 156. But say that the cases in *Ambler* and *Martin*, form an exception to the general rule of evidence, which obtains in courts, possessing equitable jurisdiction, has the present defendant brought himself fairly within it?

In the case in *Ambler*, the party charged and discharged himself in the same sentence, and the Lord Chancellor is made to say, "*otherwise it* "*had been, if the discharge or avoidance had been* "*in distinct sentences;*" and the argument of the case sums up the principle decided in it, by saying, that "the party may charge and discharge "himself in the same sentence, but not in differ- "ent sentences." The party here admitted in his answer, the receipt of a parcel of sattins, but, in the same sentence, swore, he had paid for them. And this was the only *fact* charged But, in this case, at present before the court, does the defendant rely only upon *one fact* in his discharge, or does he charge and discharge himself in the *same sentence?* The interrogatory, administered to him, is, whether he was the writer of a

certain letter, the copy of which is inserted in the interrogatory, in which defendant acknowledges the debt. He answers in the affirmative, and thereby *charges* himself; but instead of *discharging* himself in the *same sentence*, he sets up a number of *distinct facts* in avoidance; he goes on in his answer, to give an account of the correspondence between him and plaintiff;—an history of their dealings;—a narration of certain transactions between his brother and the brother of the plaintiff, and his brother and himself;—of a note, given by his brother to the plaintiff, or perhaps the plaintiff's brother, on account of this debt; which, however, he does not state to have been paid, but only leaves it to be inferred. This answer is spread over many *sentences*, and covers a great deal of ground, and comprizes a variety of matter. Can it be seriously likened then to the case in *Ambler*, where the whole constitutes but *one fact*, and the party swears positively and distinctly, and charges and discharges himself in the *same sentence?* A sentence is generally taken to be a *period in writing;* here we find a number of them; and no species of punctuation, either legal or grammatical, can confine his answer within the limits of a single one. And if the word *sentence* be made to overrun a period, so as to embrace this case, what bounds can be assigned to it, short of the whole answer to an interrogatory, however long or broken it may be, and, setting up ever so many distinct facts in

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avoidance: but this is not the sense in which this word is used by the Lord Chancellor; otherwise, he would have said, if the party charged and discharged himself in the same *answer*, not in the same *sentence*. His idea undoubtedly was, where the whole constitutes but *one fact*, and, of course, is comprised in *one* sentence.

NOR is the defendant better supported by the case in *Martin*, determined on the same principles. There but *one fact* was put in issue, no *distinct* ones set up in avoidance, or *separate* sentences employed. The defendant is there asked, if he did not receive certain goods, &c.? He answers, that he did receive them, but adds as a consignee, not as a purchaser. His answer is a complete negative to the interrogatory administered, the object of which was to ascertain the purchaser. The defendant is certainly allowed so to qualify his answer as correctly to meet the question proposed; and this fact, viz: the manner of receiving the goods is but a proper qualification of his answer, of which it forms a necessary and indivisible part. That he was the purchaser of the goods, is the fact charged in the petition and put in issue; now, nothing of this fact is admitted in the answer; but, on the contrary, the whole of it is positively denied; of course, the defendant, by his own answer, stands completely discharged, and discharged too in the *same sentence*. The question put to him, is, substantially: are you the purchaser of these goods? The answer to it,

is, substantially, no; I am only the consignee. So, in the case of the bill in chancery exhibited against the executor, stated above; if the executor had only answered, that he had received the 100*l.* as a gift from the testator, he would have been discharged, and it would have been allowed, unless disproved by the plaintiffs; and so in the case of the loan, mentioned in *Pothier:* because, as in the case of *Taylor & Hood* vs. *Morgan*, but *one fact* is put in issue, and because nothing of that fact so charged, is admitted by the answer, and the plaintiff might disprove the whole fact, if he could. And this rule, says *Evans*, where the whole constitutes but *one fact*, is founded upon the most evident principles of justice. Although relying upon the admission of *one* fact, shall not completely establish the assertion of *another*, the representation of *one and the same fact*, must not be garbled or distorted. 2 *Evans' Pot. Ap. no.* 16, *p.* 158. By none of these cases then, is the present defendant borne out.

BUT take, for a moment, this answer of the defendant, upon its own merits; and see, whether it be such, as ought to discharge him, under our own act, which requires, that the interrogatories exhibited by either of the litigant parties, should be *distinctly* answered. *O. L.* 1805, *ch.* 25.

HAS this requisition been complied with? Is this interrogatory fairly and *distinctly* answered? On the contrary, is not the answer vague, uncertain, insufficient and unsatisfactory; made up of

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deductions and inferences; of statements and relations, which bear the evident impression of second-hand and hearsay? Does he positively and *distinctly* swear, that he has discharged this debt, or that this debt has been discharged? Does he positively swear, that the plaintiff ever received the note given by his brother; or that the plaintiff's brother ever received it; or that he ever remitted this amount in *good bills upon Charleston*, as he was bound to do? No;—but that his brother, unrequested by him, has given the plaintiff's brother, *or* the plaintiff, for the sentence is in the disjunctive, he does not know which, a note, about the fate of which we are left in the dark.

THUS are we left to find our way out of this transaction, and charitably to suppose an extinguishment of the debt. Is it probable, if the facts therein stated, actually existed, (as the plaintiff lives in the state of South Carolina, and the defendant in this territory,) they could have existed within the *personal knowledge* of the defendant? Does it appear, that the defendant was authorised to give, or the plaintiff's brother to receive, this note, in payment of this debt? Why is this not better explained, more positively sworn to, and more fully proven? Why is not this correspondence alluded to, between plaintiff and defendant, produced? Must not the plaintiff's letter be in the possession of the defendant? Why is not the power of attorney, or letter of instructions, with which plaintiff's brother must have

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led to the stand. Neither his feelings nor obligations are such; he is not sworn nor bound, to tell the *whole truth*, touching the matter in controversy, but only to answer truly to the interrogatories exhibited. And in swearing to his answers, does he not swear to the best of his *knowledge and belief?* How shall we separate what he *knows*, from what he *believes*, or is informed, in the present answer, the major part of which evidently appears to have been out of his personal knowledge. If he is discharged upon such an answer, so historical, argumentative and circuitous, it will go far to defeat the provisions of our act, and render it a dead letter. No plaintiff will ever think of resorting to it.

Grymes, for the defendant. The plaintiff, in this case, has resorted to the defendant for the evidence of the facts upon which he rests his claim. The defendant acknowledges the facts set forth, but at the same time, swears that he has paid the claim.

THE plaintiff objects to this part of the answer as irrelevant and impertinent. I rely upon the defendant in this case: 1st, upon the general principle that the defendant shall not be obliged to commit himself by a mutilated answer; 2dly, that the measure of resorting to the defendant is a voluntary one, on the part of the plaintiff, and that a party's confession is to be taken altogether as well for as against him; that the matter alledged in evi-

been invested, to settle this demand, exhibited? Why is not the receipt which defendant's brother must have received, upon delivering this note, brought forward? Why is it not produced to put the plaintiff to shame? Has not sufficient time been given to the defendant, since the institution of this suit, to procure any and every paper and document, material to his defence? What has become of the commission, taken out by him, above a year since, to examine witnesses, whose testimony was sworn to be material and necessary to his defence, and without the benefit of which, he could not safely proceed to trial?

IF the defendant relied upon his answer, as discharging him, why resort at all to the commission? Or, if the testimony so to be produced, or produced by it, is not of an unfavorable nature, why is it not brought forward? Again, had not the defendant, if fearful of too deeply charging himself in his answer, a right to resort, in turn, to the conscience of the plaintiff, for discovery? Was not this the intention of our act, and is not its object to open the road to the conscience of each praty, and make the one as accessible as the other?

FURTHER, it will be recollected, that the defendant is a witness in his own cause, made so by the necessity of the case; his declarations ought, therefore, to be more strictly examined, and more rigourously construed. He cannot be considered as an indifferent witness cal-

dence in this case, is not distinct from, and collateral to, the cause of action, but arises out of it.

THIS doctrine is recognized fully in the case in *Ambler*, 589, and contradicted no where that I know of: but, on the contrary, confirmed by a solemn decision of this court, in *Taylor & Hood* vs. *Morgan*. 1 *Martin*, 204. In support of the necessity of this position, I would further observe that, the fact alledged in avoidance here, is such a one as might be confined exclusively to plaintiff and defendant. The plaintiff, in such case, would have the advantage of calling upon the defendant for the acknowledgment of a fact which would charge him, and the defendant be compelled to lose his money or trust to the conscience of a bad man, who, perhaps, he had no confidence in, and who had given him reason to think so, from the very fact of bringing the suit.

THE cases in *Peake* and *Buller*, are not at all relevant, and do not contradict the case in *Ambler*. For they allude entirely to the defendant introducing distinct or collateral facts, as his swearing to a gift from the plaintiff or his testator. This is a distinct substantive fact, which perhaps the defendant ought not to be permitted to prove himself, for if he had a gift made him, he ought to have something to shew for it, but the payment on the part of the defendant in this case, is a fact arising out of, and directly connected with, the single transaction between the parties.

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MARTIN, *J.* It is not easy to distinguish this case from that cited out of *Ambler*. There the defendant interrogated whether he had not received a quantity of satins from the plaintiff, answered he had, but he had paid for them. In the present, the defendant, interrogated whether a paper presented to him is not a true copy of a letter which establishes the plaintiff's claim, answers, it is, but the plaintiff has received by himself, or his agent, a paper, which, if not accounted for, prevents the plaintiff's recovery.

THE plaintiff's counsel admits, that in a court of common law, the party producing his antagonist's answer, makes the whole of it admissible, but not conclusive testimony—that it is not to be separated, but to be received entire and unbroken. Examining, therefore, the case on this ground, we find a fact sworn to, which, if believed, must protect the defendant. This fact is, that the plaintiff has received by himself, or his agent, a paper which, *prima facie*, bars his recovery. It is true we have not the ground of the knowledge of the party who swears, but the fact is positively sworn to. The information may have been obtained in a conversrtion with the plaintiff, or by the sight of an instrument in the plaintiff's hand, a receipt or an account.

THE plaintiff has chosen to call the defendant as a witness. After the answer was put in, he has not put interrogatories to obtain the ground of the defendant's knowledge. He has not moved;

as he might, if, as it is contended, the case is to be distinguished from that of *Taylor & Hood* vs. *Morgan*, that such part of the answer which was not called for by the interrogatory, be stricken off, but has proceeded to trial, and now contends that the court is to stop in reading the defendant's answer, after that part of it which admits the copy shewn to be substantially correct: all the rest being inadmissible testimony, and if admissible, not conclusive.

I ADMIT that there is some difference between this and the case of *Taylor & Hood* vs. *Morgan*. In that case the answer of the defendant was necessarily qualified, and advanced a fact which prevented the natural consequence of an absolute answer. He answered he received the goods, as the consignee of a third person, to prevent the conclusion that he received them, as a purchaser from the plaintiff. But in the case in *Ambler*, the defendant answered, he had received the satins, but had paid for them, and this was held evidence of the payment. Here the defendant admits a paper which proves he received the proceeds of the sale of a chattel, and adds, the plaintiff, on whose account the money came to his hands, has received a note therefor, which is not accounted for. I am therefore led to the same conclusion which influenced the chancellor, and must conclude that the receipt of that paper is proven. The cases are not to be distinguished, because the defen-

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dant has fairly related particulars which he was not bound to detail.

THE case of the executor, supports the position contended for by the plaintiff: but if we give it all the force which his counsel insists it is to have, it is at variance with all others. *Evans* forewarns us that the rule laid down in that case, is principally applicable to proceedings in courts of equity, and *Peake* adds: that the contrary principle appears to him more consonant to reason and justice.

IF the case was of binding authority in this court, we would certainly confine its operation to the *answer to the bill*, and we should find ourselves authorised to make a distinction between *an answer to a bill* and *an answer to interrogatories*. In doing so, we should reconcile the case cited, with that in *Ambler*.

WHATEVER may be the rule, in courts which exercise their common law and equity jurisdiction, distinctly, *Pothier* gives us that which prevails in other tribunals.

" Observe," says he, " that he who would a-
" vail himself of the admissions which a party *in*
" *his answers to the interrogatories* has made,
" ought not to divide them, but to take them
" united. If for example, not having any proof
" of the loan which I pretend to have made to
" you of a certain sum of money; I cause you
" to be examined on interrogatories, and in your
" answer you confess the loan, *but add that you*

"*have since returned the sum:* I cannot avail "myself of the admission you have made of the "loan, and set aside what you have added, that "you returned the sum; but I must take your "declaration entire. Therefore, if I wished your "admission to prove the loan, I must admit it "also to prove the payment, without your be- "ing obliged to make any proof of it, unless I "should be able to prove that the payment could "not have been made, in the time and place, in "which you have said it was made. 2 *Pothier on Obligations*, 308, *no.* 827.

IN weighing the evidence before us, it does not appear to me that there is the least improbability in the defendant's statement. It is true, we have not the ground of his knowledge, but witnesses seldom give that, till they are particularly interrogated. Perhaps we are not at liberty to set the testimony aside, unless the plaintiff contradicts it by the introduction of two witnesses, or of one, with corroborating circumstances. *O. L.* 1805, *ch.* 26.

IT being proved that the plaintiff received the note of the defendant's brother for the amount of his claim, the presumption is, as the note is not produced, that the plaintiff has received payment or negociated it. The Superior Court of the state of New-York has determined that if a negociable note, or bill of exchange, be given for a simple contract debt, the party cannot recover on the original contract, unless he shews the

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note to be lost, or produces and cancels it, at the trial. 1 *Johns.* 34. *Holmes* vs. *D'Camp.* It seems to me just that, before we give judgment against the defendant, the note should be accounted for.

LEWIS, *J.* The reason of the law in permitting a party to resort to the conscience of his adversary for a diclosure of facts, is founded in necessity; and is intended to apply only in cases where the evidence sought for is wholly in the power of the party called upon to disclose. He is there made a witness, under certain restrictions, both for and against himself; and his answer, when in his own favour, ought to be allowed as evidence only where it discloses the evidence of facts exclusively confined to his own breast. But where the answer shews that the parts disclosed are susceptible of other proof and within the power of the party, his answer is not the best evidence, nor ought it to be taken as proof of the facts.

THE defendant in his answer, acknowledges the receipt of the plaintiff's money, but further answers, in avoidance, that his, (the defendant's brother, in Charleston, S. C.) executed his note to the plaintiff or his agent, for the amount of monies received by the defendant, by means of which the demand became transferred and the defendant absolved from further liability. The plaintiff and the defendant's brother reside in Charleston. It does not appear that there has

been any personal communication between either of them and the defendant, since the execution of the note. The defendant does not appear to have any *positive* knowledge of the fact disclosed in avoidance, for he does not know whether the note was executed to the plaintiff or his agent. This part of the answer, is at most, not stronger than hearsay testimony, and ought to be rejected.

SUIT CONTINUED.

TAYLOR & HOOD vs. *MORGAN.*

An injuction will not be dissolved till the party answer.

THE plaintiffs had obtained judgment for the delivery of certain goods: and the defendant, on his affidavit that he had delivered all the goods, and shewing a receipt therefor, obtained an injunction against an execution which was in the sheriff's hands, and which the agent of the plaintiffs pressed him to enforce.

Depeyster, for the plaintiff, moved to be permitted to shew that the goods delivered were not all the goods for which judgment had been obtained. He had no answer to file; the plaintiffs' being out of the territory, their oath could not be procured.

By the Court. The injunction having been regularly obtained, cannot be dissolved until an answer under the oath of the plaintiffs is filed.

MOTION OVERRULED.

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First District.

MARTIN'S CASE.

If the creditors do not shew cause, on the day appointed, the insolvent may be discharged without further notice.

Case 1. 2m 78 45 950

HE was confined for debt, and prayed to be admitted to the benefit of the act for the relief of insolvent debtors. The creditors failed to make any opposition before, or on the day appointed for hearing them. No motion was made for his discharge on that day, and afterwards, the Court, MATHEWS, *J.* and MARTIN, *J.* held on the motion of *Gales*, for the insolvent, (there being no opposition made by any of the creditors) that he might, and he was accordingly, discharged, on a subsequent day, without a new notice to the creditors.

TOUSSAINT vs. *DELOGNY.*

Evidence of a promise to pay interest shall not be admitted, if no mention made of it in the note.

ACTION on a promissory note. The instrument was produced and contained no promise to pay any interest.

Caume, for the plaintiff, offered to prove by a witness, that the defendant had promised to pay interest at the rate of ten per cent.

Hennen, for the defendant. This cannot be done. It would be, to admit parol evidence, beyond what is contained in the note. This the Civil Code forbids as well as to admit it of what has been said before, at the time of making the note, or since. *Civil Code*, 310, *art.* 242.

EVIDENCE REJECTED.

FALL, 1811.
First District.

FISHER vs. *TAYLOR & HOOD.*

Evidence disproving the debt, in order to release goods attached, is inadmissible.

THE defendants' property was attached, and *Depeyster* moved to be allowed to shew that the debt was not due, in order to have the goods released.

By the Court. This cannot be done. The defendant must answer: and the court cannot go into the merits of the case until issue be properly joined.

MOTION OVERRULED.

RIVIERE vs. *SPENCER.*

The front squares on Levee-street, in New-Orleans, having been extended, by encroachment, have still their original back line.

By the Court. The plaintiff claims thirteen feet of ground on Bienville-street, in the possession of the defendant.

ON the 4th of November, 1758, Harang purchased at the vendue of the real property of Favre Daunoy, deceased, a lot of ground, at the corner of Bienville and Levee streets, *face au fleuve*, fronting to the river, 60 feet on Levee-street, and 138 on Bienville-street.

THIS lot was a few years after ceded to Laurent Bailly, as his share of Harang's estate, and

ON the 1st of March 1797, Bailly sold it to Riviere, the plaintiff's husband, in whose right she now holds it.

THE defendant claims the next lot, on Bienville-street, and has proved that

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RIVIERE
vs.
SPENCER.

ON the 23d of March 1782, Zeringue had sold it to D'Orgenoy, as having 60 feet on Bienville-street and running back along Bailly's line, (that is the line of the lot now claimed by the plaintiff) 120 feet.

ON the 22d of November 1793, D'Orgenoy caused his lot to be surveyed by the surveyor-general of the province, who informed him that it had 73 feet on Bienville-street: in consequence of which, he sold it, on the following day, to Dessuau de la Croix, as having 73 feet in front on Bienville-street, declaring, however, he had purchased it as having sixty only, and warranted the purchaser's title to that quantity only, though he passed away his right to the seventy-three feet.

ON the 7th of April 1796, Dessuau sold the lot to Wilcox, as having 60 feet in front, and Wilcox some time after sold it to Spencer.

IT is proven that the present government-house and the two large stores, on the corners of Maine-street, on Levee-street, were built by the French while they possessed the province—that all these three buildings are on the same line, and that formerly most of the private buildings on Levee-street ranged with these public ones. Hence the plaintiff inferred that this line was that of Levee street: there being no other way of ascertaining the line.

THAT in the year 1776, Don Galvez added a large piazza or gallery to the government house,

encroaching about 18 feet from the supposed original line of the street, towards the river, and from that time, especially after the great conflagration in the year 1788, most, and at this time all, the houses on Levee-street are built on a line with the piazza or gallery of the government-house. In this way, the front squares of the city, which on the original plan of the city were only 320 in depth, are now 338.

RIVIERE, the plaintiff's husband, imitating the example of the owners of the front lots, built his house on a range with the piazza, or gallery of the government house. Bailly's deed to him, describes the lot as running 138 feet on Bienville-street, from the corner of that and Levee-street, to Wilcox's line, to wit: that of the lot now the property of the defendant.

THE defendant in fixing his fence, measured 138 feet, for the length of the plaintiff's lot (according to her deed) taking the corner of the plaintiff's house, as the point of departure, thus, leaving in his lot, the ground gained by the encroachment made on the street; contending that, as the line of the lot had been removed, before the date of Riviere's deed, which described the point of departure as at the distance of 138 feet from Wilcox's lot, the plaintiff could only claim a depth of that quantity of ground.

ON these facts we are of opinion that the sur-

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plus of ground is the property of the plaintiff, it being proven it was part of the lot in its original dimensions.

THE defandant has contended, 1st. that the plaintiff ought not to succeed, for her deed gives her a right to one hundred and thirty-eight feet on Bienville-street, and in measuring that quantity of ground from the corner of her house on that street, the disputed premises are not included—2d. that his possession entitles him to hold the premisses on the plea of prescription, even if the plaintiff's vendees or any of them ever had a title thereto.

I. RIVIERE, the plaintiff's husband, acquired Bailly's title, which was the whole of the corner lot which Harang had purchased in 1758, long before there was any encroachment on the street. The back line of this lot has never been altered, although the front one has been advanced. The ground which has been thus gained is a new acquisition, perhaps a precarious one.

II. THE defendant, if he wishes to avail himself of the plea of prescription, must shew a continued, uninterrupted possession during ten years, in him or his vendees.

NEITHER Zeringue, nor D'Orgenoy, till the eve of the day in which he parted with the property, ever claimed or possessed more than the sixty feet behind the back line of Bailly's lot,

now Riviere's, which stood at the distance of upwards of one hundred and fifty feet from the corner of the present house of the plaintiff, on Levee and Bienville-streets. So that the defendant's possession of the thirteen additional feet cannot be said to have begun till the 23d of November 1793—It was interrupted by a suit of the plaintiff's husband, before the Spanish court in the year 1795, which was kept alive till the cession of the country in 1801—and the present suit was instituted about eight years after, viz. in November 1810. When the possession is interrupted, full time, (viz. ten years) must be reckoned from the cessation of the interruption. 1 *Domat.* 488.

The full period of presciption must be reckoned from its interruption.

JUDGMENT FOR PLAINTIFF.

Moreau, for the plaintiff.

Smith, for the defendant.

FAURIE vs. *PITOT & AL. SYNDICS, &c.*

THE plaintiff had brought suit for her dotal rights, against the defendants, syndics of her husband's estate, and obtained judgment, but no allowance was made to her for interest: none having been prayed: she now instituted the present suit to recover the interest.

Interest cannot be sued for in a distinct action.

By the Court. Interest cannot be sued distinctly from the principal. It is an accessory of

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the debt, and when that is cancelled, the right to the interest is also destroyed.

JUDGMENT FOR DEFENDANT.

Derbigny, for the plaintiff.

Paillette, for the defendant.

ORLEANS NAVIGATION COMPANY vs. *BOUTTE'S EX'RS.*

A workman who undertakes a work on a plan furnished by himself, stipulates that it is feasible.

THIS action was brought to recover damages for the neglect of the defendant's testator to fulfill certain engagements with the plaintiffs.

THE Company being desirous to improve the navigation of the Bayou St. John, invited persons, in a situation to fulfil their intentions, to make proposals.

THE defendants' testator offered a plan, which he undertook to complete before the last of March 1807, and the plaintiffs engaged to pay him therefor forty-one thousand dollars.

THE defendants' testator agreed that if the work was not completed at the fixed time, he would pay an indemnity of two thousand dollars per month, till it was finished.

THE work being in some degree of forwardness, was almost totally destroyed by a storm; and the plaintiffs in consideration of this unforeseen event, made the contractor a grant of five

thousand dollars and protracted the time allowed him, till the month of January 1808.

IN April 1808, the contractor abandoned the work and avowed his inability to carry it on.

THE plaintiffs then undertook to complete it, and spent, in doing so, about nineteen thousand dollars.

THE defendant's testator rested his defence on the impossibility of carrying the work into execution, on the original plan.

Mazureau, for the defendants. The defendants' testator abandoned the work when the completion of it appeared clearly impossible.

THE plaintiffs have themselves admitted that the work could not be completed on the original plan. They had reserved to themselves in the contract, the right of making alterations in the plan. This was admitting that the possibility, or at least, the propriety of carrying it on, was questionable and uncertain. Circumstances have proven the impossibility : it was the province of the plaintiffs to apply the remedy.

THE plaintiffs by public advertisement invited artists to come forward with their plans—several were submitted to them. The defendants' testator offered that which he thought to be the best. The plaintiffs were to be the judges. Their ideas coincided with his—His plan appeared to be the best. Undertakings of this kind are always lia-

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ble to accidents: and time and experience afford the only infallible test of the goodness of a plan.

Moreau, for the plaintiffs. It is true that a contract, which is impossible to be performed, is not binding: but the possibility, which is an essential ingredient, is a physical possibility. The fact must be possible in itself, not necessarily possible to the party who engages to perform it.

THE promisee is not bound to inquire into the ability of the promisor. 1 *Pothier on Obligations, no.* 136. *Idem, Contract de louage, no.* 395.

EVERY undertaker of a work of art, the impossibility of which is not manifestly apparent, stipulates that it is possible—insures its possibility.

IF the contractor, who professed skill in his art, abused the confidence of the plaintiffs in his assurances and in his skill, he deceived them and ought to make reparation for the injury.

THE plaintiffs therefore are entitled to recover the money they expended in finishing the work which the contractor had undertaken to complete, and to damages for the delay, which has proceeded from his failure.

By the Court. Every man who professes a particular art, stipulates that he possesses the requisite skill. The workman who proffers a plan stipulates that it is feasible. The plaintiffs, how-

ever, having undertaken to complete the work, it will be the duty of the jury to consider, whether this is not a rescision of that part of the contract which relates to the indemnity for the delay, after the defendants' testator was discharged of the whole by the plaintiff's receiving it.

☞ THE jury gave a verdict for the overplus of the advances made by the plaintiffs to the defendant, charging him with the money paid for completing the work.

TERRITORY vs. *HATTICK.*

HABEAS CORPUS. He was committed by the Mayor of the city of New-Orleans, who is a Justice of the peace *ex officio*, on a judgment condemning him to fine and imprisonment.

The parts of the constitution of U. S. requiring all trials to be by jury, relate only to offences against the U. S.

Hennen, for the defendant. He ought to be discharged: for the act authorising justices of the peace to fine and imprison, is unconstitutional. It violates the constitution of the United States, *art.* 3, *sec.* 2, which requires that the trial of all crimes should be by a jury and the 6th article of the amendments, which requires the intervention of a grand jury also.

IF the authority can be constitutionally exercised, the *mittimus* is insufficient. For it does not shew that the defendant was charged on oath, nor that he was duly served with process and had an

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opportunity of introducing his testimony, as the 8th amendment to the constitution of the United States requires.

THE Attorney-General, *Duncan*. The parts of the constitution of the United States, and its amendments, invoked, relate only to the trials of crimes against the United States.

THE *mittimus* is sufficient. It describes the offence and states that judgment was given.

LEWIS, *J.** The Attorney-General is certainly in the right. The part of the constitution of the United States quoted, relates only to the exercise of the judicial powers of the United States. Admitting, however, that the trial should have been by a jury, the objection will not prevail on an *habeas corpus*, for it does not appear on the face of the *mittimus* that it was otherwise. The same observation is also applicable to the second point made by the defendant. The objection might be listened to on a writ to quash the proceedings. The *mittimus* is complete, if it shews that there was a judgment by a magistrate or a court authorised to give it.

MARTIN, *J.* concurred.

PRISONER REMANDED.

* THIS decision took place out of Court.

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An attachment gives no lien, in case of insolvency.

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ON the 25th of February, the plaintiff attached a debt due to the defendant, who, on the 28th of the same month, made a *cessio bonorum*, and obtained a stay of proceedings. On the 7th of March, the syndics of the defendant moved to have the attachment dissolved.

Livingston for the plaintiff. This cannot be done. The attachment has created a lien, which the defendant cannot, by any act of his, dissolve or impair. His syndics cannot have acquired, by the cession, more than the ceding debtor possessed.

OUR attachment is like the *prætorium pignus* of the civil law: *quod a judicibus datur et prætorium nuncupatur. Cod. lib.* 8, *tit.* 22, *l.* 2. *Veteris*, *&c.*

IT is true, by the Roman law, the creditor was put in possession, and by our process of attachment the goods remain in the sheriff's hands. But it seems immaterial, on the merits, whether a party be put in possession, or the sheriff for him. Neither was the possession, in every case, given to the plaintiff, at Rome. Sometimes it remained with the *executor judicii*.

LET us inquire into the nature and effects of the *pignus*, according to the Roman law.

Prætorium dicitur, because taken by virtue of the prætorian law. *Loco citato n.* 1.

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IT was *in securitatem crediti.* 1. *Huberus* 358. 2 *Struvius* 3. *Necessarium, prætorium vel legale, Prætorium, vel ex causâ judicatâ* or *ex prætorio jussû. Id.* 6, *n.* 9. *Ante litem contestatam servandi causâ cautionem. Id.* By the decree of the prætor, on summary proof, danger shewn, and reason why this mode of proceeding should be resorted to.

So our process of attachment, by the act of 1805, ch. 26.

EVERY nation regulates the *mode* by which relief is to be obtained in her tribunals. Our legislature has pointed *that* to us, in cases of attachment; leaving the *effect* to be regulated by pre-existing laws.

THIS process is a *means* of obtaining *security* for the debt; not a *mode* only of giving jurisdiction to the court: a proceeding *in rem*, a means of securing and preventing its being diverted, so as to defeat the plaintiff's claim.

OUR legislature has pointed the two modes, by which the lien acquired, by the attaching creditor, on the goods seized, may be dissolved—disproving the facts alledged to obtain it—giving security to pay the debt. 1805, c. 26.

IF giving jurisdiction to the court was the only object, property of the least value would suffice; and after plea, the end being obtained, the proper-

ty should be restored. But the act expressly requires goods to be taken, to the amount of the debt and costs; and if the fact advanced be not denied, that the goods be kept till there be security to pay.

THE Spanish law has a provision still more favourable to the creditor. "If any one, &c. any "creditor may take the debtor's goods, if there be "no judge, and retain them till he be paid, *with-* "*out being obliged to divide* with the other credi- "tors." 5 *Partida l.* 15. It is true this relates only to the case of a creditor seizing goods, which the debtor is carrying away in his flight. Why may we not extend, in the *spirit* of this law, the *effect* of ours, so as to give a preference to an industrious creditor, the object being equally obtained by taking any *other* property?

HERE, the property attached was *incorporeal*, not tangible. It, therefore, accompanied the party, the property or right always residing in him wherever he went.

THE priviledge is given to the attaching creditor as a reward for his securing so much property from the debtor running away. Had the present plaintiff followed the debtor, he could not have *taken* the property attached; all that could be done to secure, was to *attach*, it. By his diligence the object has been attained, the property secured for the plaintiff, and the balance, after paying him, for

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the other creditors. He is therefore fairly entitled to a preference.

SUCH is the opinion of *Febrero*, *lib.* 3, *ch.* 3, *sec.* 2, *n.* 96. See also *Curia Phillipica.*

BEFORE the creditors at large be put in possession, those who acquired prior rights must be satisfied. *Dig. l.* 42, *tit.* 8, *l.* 6, *s.* 6. *Apud Labeonem scriptum est. Id. lib.* 10, *s.* 16. *Si debitorem meum.*

Labeo says: he who receives his own, does not take in fraud, for he takes nothing but what belongs to him. The words *quæ in fraudem creditorum facta sunt*, relate only to contracts, and surely cannot affect cases, in which possession or a pledge was obtained by a judge's order.

I HAVE thus shewn that the *prætorium pignus* vested a *right*, and was something more than a mere *process* to give jurisdiction. I conclude that our attachment has the same effect. The principles of the Roman and Spanish laws remaining in full vigour, unimpaired, and perhaps strengthened by our attachment law.

THE *means* shews the nature of the *end.* The goods are not released after a *plea*, or even *bail.* The defendant, if he do not deny the suggestions of the plaintiff, cannot recover his property, without giving security *to pay.*

Mazureau for the syndics. All the propositions, advanced by the plaintiff's counsel, are perfectly correct, when the property of the debtor suffices to pay all his creditors.

BUT, when the failure is open by the debtor's flight, a guarnished creditor must bring into hotchpot, what he was allowed to attach for the benefit of all the creditors, not for his own only.

THERE is no difference, in this case, in the Roman law, that of Spain and ours—the similitude is almost perfect between the *prætorium pignus*, the *prætorian prenda*, and our process of attachment.

A THIRD mode of hypotecation, is the *prætorian (prenda)* when the judge, in case of contumace or default of the defendant, puts his goods in the possession of the plaintiff. *Curia Phillipica* 361, *n.* 3, 4 *Febrero* 44, *n.* 56, in the *assentamiento*, or putting in possession.

Rebeldes ought not to be in a better situation than those who appear: the proceedings in case of *rebeldia*, are to be the same as in case of contestation.

IF the plaintiff ask to be put in possession, the judge shall grant it. If the suit be for real property, possession shall be given till the *rebeldia* be purged. If the suit be for damages or for personal property, goods to the amount of the debt shall be given to the plaintiff, or real property. 1 *Re-*

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cop. de Castilla, 587, *tit.* 11, *l.* 1. 3 *Partida l.* 1, *tit.* 8.

ONE of the modes of proceeding against debtors, says *Villadiego*, is *por via de assentamiento*, by putting the plaintiff in possession, and requiring the defendant to constitute a known attorney in his stead. If he do not appear, the plaintiff demands a sale. If he appear, he is required, before the property be restored to him, to give *fianzas de estar in derecho*, and *judicatum solvi*. *Villadiego* 23, *n.* 57.

IF an appearance and plea entitled him to the liberation of the property, he would come in, take it away, and waste it. But the provision, in this respect, is merely to prevent the debtor's fraud—not to allow the plaintiff to pounce on his property, and entirely to exclude the other creditors.

THE *prenda*, however, differs in its effects from our attachment. Like the Roman *pignus*, it is an interlocutory judgment, and puts the plaintiff into actual possession; while the attachment authorises the sheriff to seize the goods only, without allowing the plaintiff to touch them.

IN case of insolvency, neither gives any lien or preference.

IN France, the *saisie-arrêt*, which is the corresponding process, is not more favourable to the plaintiff. The goods seized fall into a hotchpot,

if the debtor be unable to pay all his creditors. Contribution takes place between all the creditors in case of insolvency. 3 *Jurisp. Encycl.* 302, *Verbo Contribution.* The seizing creditor is preferred, except in case of insolvency. 7 *id.* 507. *Verbo Saisissant.* The diligence of a chirographary creditor avails him: but in case of insolvency, he saves the property from dilapidation only. 16 *Repert. de Jurisp.* 406, 411, 412. A pawnee is preferred, but not a seizing creditor, in case of insolvency. 1 *Domat*, 326, *lib.* 4, *sect.* 2. Citing 2 *Coutume de Paris*, *art.* 178, *p.* 1348 *in textu.* The industry of the seizing creditor does not avail him to the exclusion of others, if the debtor prove insolvent: his goods must be divided. *Ferriere.*

THE prætor puts in possession, not only the attaching creditors, but all others. *Cada uno por su orden.* 16 *Rodriguez's Digest*, 245. Contribution, *a prorata:* one creditor may seize the goods, but he must account to the others. The condition of the occupant is sometimes like that of the rest. *Id.*

THE *prenda* has no greater effect than the *saisie-arrêt.*

THERE is a difference between the *prætorian* and the *judicial prenda.* The first puts the plaintiff in possession for all the creditors. Otherwise

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the *judicial. Cur. Phil.* 364, *n.* 37, 2 *Febrero*, 44, 45, *art.* 56.

THE judge orders the plaintiff in possession, on default, or *por juicio—pignus judiciale.* 5 *Partida l.* 1, *tit.* 12, *Greg. Lopez's Comm.* He, whom the prætor allows to take hold, does not do it for himself alone; the order of creditors is not thereby deranged. All *ex ordine.*

THE only case, in which the seizing creditor is preferred, is where he takes hold of property which the debtor is flying with. For then, it clearly appears that it is only by his industry and labour, that this is saved. Therefore the 5 *Partida, tit.* 15, *l.* 10, gives a priviledge to the creditor who actually takes the property, which the debtor is carrying away, in his flight.

THE plaintiff, in this case, did not arrest the defendant, neither did he go after him, neither did he seize any thing that he was carrying away. *Tomar lo que llevava; creditor retardara el con todo que llevava con sigo.*

A CREDITOR, who arrests his debtor who is running away, acquires no lien, no priviledge on any property left behind.

IT is correct to say, as a general principle, that a creditor may retain his own, when he acquires it without fraud: But, in case of insolvency,

exceptions have been made, in every commercial country, and an equal distribution is to be made.

Livingston, in reply. The *prætorium pignus* was, at Rome, a mode of obtaining security for a debt, at the inception of a suit: and although the process may have been variously modified, by different nations, in most, and in this in particular, it gives a pledge or lien.

IN France, the effect of a *saisie-arrêt* is determined by express and positive laws; and the writers of that nation, to whom the counsel of the syndics has had recourse, give an account of the effect of the law of their own country.

Domat, who may emphatically be stiled a writer on the Roman law, who invariably quotes it, when he derives his principles from it; and the main object of whose work was perhaps to shew the discrepancies between the French and Roman laws, says; it is so determined in a number of *coutumes*, citing that of Paris. We must, therefore, conclude that he did not ground his opinion on any maxim of the Roman law.

IT does not appear that the principle, contended for, was in vigour in any of the French provinces *de droit écrit*, in which the Roman law more eminently prevailed.

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Villadiego, cited by the counsel of the syndics, states that the *prætorian prenda* is not dissolved, without giving security. *Febrero*, and the author of *Curia Phillipica*, think there is no *prelacion* preference, and refer to the Digest. The court will make their own conclusions. *Febrero*'s writings are esteemed as affording a good practical work, but of no great authority on doctrinal points.

WHATEVER may be the construction, given to the effect of the *prenda* and *saisie-arrêt* in Spain and France, I have shewn that the *prætorium pignus*, at Rome, gave a lien to the plaintiff; and the act of our legislature supports me in saying that our process of attachment must have the same effect here; for the property is to remain in the sheriff's hands, when the allegations of the plaintiff are not disproved, till security to pay the debt be given, 1805, *ch.* 26: and another act recognises the lien created by attachments. All liens by judgment or attachment, to continue. 1805, *ch.* 29.

By the Court. Admitting that, as the counsel for the plaintiff contends, the *prætorium pignus* gave to the plaintiff a lien, which enabled him to repel the rest of the defendant's creditors; as this mode of relief, or the corresponding process, has originally come to us from the French or Spanish

law, it follows, if our statute provides only a *mode* of relief, leaving the *effect* of the process to be ascertained by pre-existing laws, as neither *prenda* nor the *saisie-arrêt*, entitled the plaintiff to the strong lien which is now claimed, the court must say that the property attached must be considered as part of the general fund, from which all the creditors are to be paid.

SUCH was, however, the law at Rome. The *prætorium pignus* did not avail to the creditor, so as to enable him to exclude his co-creditors. *Nec sibi quiquam adquirit cui prætor permittit: sed aliquid ex ordine facit, et ideo* COETERIS QUOQUE PRODEST. Dig. l. 42, tit. 5, l. 12, and in note 54. UNO *creditorum misso,* OMNES *alii creditores missi intelliguntur.*

BY our act of assembly the goods are not to be withheld from the defendant, till he gives security *to pay the debt*, but *to defend such suit and abide the judgment of the court.* Such a security, says *Villadiego*, is required in the tribunals of Spain, upon the *prætorian prenda: fianzas de estar in derecho et judicatum solvi.*

IN the present case, had the defendant relieved himself from the seizure, he would have given security to defend the suit, and abide the judgment of the court. Could the penalty of the bond have been recovered, when afterwards, and before

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judgment, the proceedings were staid, so that no judgment could be obtained, and the debt became by law, or the consent of the majority of the creditors, reduced in its amount, and payable out of a certain fund only?

ATTACHMENT DISSOLVED.

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A *ded. pot.* will issue, tho' the party cannot name the witness.

Livingston moved for a *dedimus protestatem*, stating that the bill of exchange, on which the suit was brought, was drawn and delivered for the special purpose of taking up another, which had not been taken up: so that the consideration for which it was given had failed. The deponent swearing he believed he would be able to prove, from the books of the original holder, the clerks of the bankrupt, or the bankrupt himself, if allowable, that the bill was endorsed to the plaintiff, after the bankruptcy.

Alexander, contra. A *feeling* commission is never allowed. A party shall not be put to the certain inconveniency of the delay which the granting of the commission will occasion, on the *probable* expectation of his opponent being able to make certain proof. The witness must be named. Here we have no person named, but the bankrupt, and he cannot testify.

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Livingston in reply. The defendant has set forth the fact which he intends to prove—a fact which the plaintiff has an opportunity of admitting. The defendant states the sources from which he expects to draw the evidence—the books of the original holder: if no entry appear there, suspicion will arise that the bill was delivered after the bankruptcy. The clerks of the late bankrupt are sufficiently described; the defendant not being possessed of their names. The bankrupt himself, if he have a discharge from his creditors, may be heard. The deponent, being at a distance from the scene of action, cannot with safety swear more positively. It would be to put his conscience to too severe a trial, to require him to swear further. The existence of sufficient grounds of belief is sufficient.

Ded. Pot. ORDERED.

ST. MARK vs. *DELARUE.*

Amendment suggesting fraud, allowed after plea of payment.

Seghers, for the appellant, defendant below, moved for leave to amend his answer, by stating that the note on which the suit was brought, was obtained by fraud.

Paillette for the appellee. The defendant has answered that he has paid the note; an amendment denying the fact advanced, cannot be received.

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ST. MARK *vs.* DELARUE.

By the Court. Amendments will ever be allowed, when justice appears to require it. There cannot be a better ground of defence, than the one proposed; the appellant may have refrained from resorting to it sooner, from his inability to establish it. If, since the trial below, he has discovered evidence that enables him to support this plea, he ought not to be precluded from availing himself of it.

AMENDMENT ALLOWED.

DUPLANTIER vs. *LYND.*

Party's admission to be received *in toto.*

SUIT for goods sold to defendant. The only testimony was that of a clerk, who called on him, with a bill, a long time after the delivery of the goods. The clerk deposed the defendant returned the bill, saying *he believed he had paid it.*

NONSUIT.

SIMONTON'S CASE.

Defendant in jail cannot make a cession, under the *civil code.*

HE became insolvent in the city of Philadelphia, in which he carried on commerce, assigned all his property for the benefit of a small number of his creditors, and the balance, after paying these, for the benefit of the rest. Without obtaining any discharge, he came to New-Orleans, where he

brought, or received, a power of attorney from his trustees, to collect for them a considerable sum, due him, before the assignment. One of his creditors in Philadelphia, not named in the bill of trust, brought suit against him; he was arrested and committed to prison. With the view of obtaining his liberty, he called a meeting of his creditors, a discharge was granted to him, and the homologation of the proceedings of the creditors, before the notary, was now moved for.

Hennen and *Duncan*, contra. A bankrupt who makes a cession of his goods abroad, cannot come and claim here the benefit of our insolvent law. *Meeker* vs. *his creditors.* 1 *Martin* 68.

THE proceedings in Philadelphia were fraudulent against the creditors, postponed till the full payment of the favoured few. A postponement which operates a total exclusion: the property ceded hardly sufficing to the payment of the preferred creditors.

Immoral fraud is not charged—*legal* suffices.

IN ascertaining the character of the assignment, we will be supplied with a clue from considering its effect. If it secure the person of the debtor in Pennsylvania, it will secure him here.

A VOLUNTARY assignment is no protection. It is a legal fraud in favour of certain creditors against the others.

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WHAT may be the effect of the assignment, on the *property* here, is not a necessary inquiry, we are to examine its effect on the *person* of the debtor. He came without a discharge, protected by his assignment only, and that, it is admitted, would be no shield in Pennsylvania.

IT is said that a debtor may favour particular creditors. The right has been allowed, perhaps, on principles of humanity, or in favour of just debts, to exclude debts at law, not strictly *ex debito justitiæ*. I do not think that the practice should be encouraged. It is calculated to create confusion, uncertainty, and collusion. I see nothing that will prevent the mischiefs of voluntary settlements and conveyances, but a general declaration, that they are all void, as against creditors. *Brackenridge* J. in *Byrd* vs. *Smith*. 4 *Dallas*, 88.

THE debtor, who, in fraud of his creditors, conceals or aliens his goods, *enagena sus bienes*, cannot make a cession of his goods. *Cur. Phil.* 166, *n.* 5. *id.* 406, *n.* 3.

A TRADER may shew a preference to a particular set of his creditors, provided it be not done under the apprehension of an impending bankruptcy, and the property, which he sets aparts for the payment of those favourite creditors, does not exhaust his whole estate, or approach so near to the whole, that the exception is merely colourable. But, if the assignment be of the whole of his ef-

fects, or though of part only, if in contemplation of bankruptcy, it is fraudulent and void. *Newland on contracts*, 382, 1 *Burrows*, 478, 481. 3 *Wils.* 47. 1 *Douglas*, 85. *Cooke's B. L.* 114. 4 *Burr.* 2285, 2174. *Cowper* 117, 619.

A CREDITOR expresses to his debtor his dissatisfaction at the appearance of his affairs: a fortnight after, the debtor, in contemplation of his bankruptcy, transfers to the creditor certain promissory notes, as a collateral security for the debt, and the next day commits an act of bankruptcy. Such a transfer is fraudulent and void, as against the creditors and the policy of the bankrupt laws. The notes are the property of the assignees of the bankrupt, notwithstanding such transfer. 3 *Mass. Rep.* 325. *Locke* vs. *Winning*.

SIMILI modo ad cessionem haud admittendus qui bona in fraudem creditorum dissipavit ac decoxit: quia æquum non est dolum suum quemquam relevare; longeque justius puniri eum qui se se ita bonis exuit. Idemque dicendum in eo qui dolosi corradendo, celando, interventendo, abducendo res suas creditoris fraudat. 2 *Voet.* p. 664, *n.* 5.

IN the case of D. C. Stewart, chief justice Nicholson, of Maryland, said, "I have always "thought that an assignment of property to one "or more creditors, to the exclusion of others, in "contemplation of insolvency, was an undue and

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" improper preference, within the meaning of the " act of 1805. 2 *Am. Journal*, 192. I think the " most laborious research may be defied to pro- " duce a single instance, in which the assignment " by the debtor of his whole effects, to one or " more creditors, in exclusion of all the rest, has " been sustained, when the assignment was made " at a time that the debtor knew of his own insol- " vency, and with no other intent than to give a " preference. *id.* 189.

Livingston for the insolvent. It would be too severe to say that, whenever there is a fraud, the party shall not be enabled to have the benefit of a cession of his goods.

THE assignment is *legal* or not. If legal, not fraudulent; if fraudulent, void: something or nothing. If legal it must protect, if illegal it cannot injure, for it is null and void: *quod nullum est, nullum habet effectum.*

IN *Mecker*'s case, this court considered a creditor as having acquired a hold on some property, which he considered himself exclusively entitled to, against the rest of the creditors.

THE creditor here who opposes the insolvent's discharge, seeks that advantage, which he complains certain creditors in Pennsylvania have obtained: and this is asked of the court, in the most odious way, by requiring the detention of the insolvent.

DEBTS are always recoverable out of the *property*, never by torturing the debtor's *person*.

No suspicion of, no hint to, any reservation.

THE assignment is said to be legally, not morally, fraudulent: not positively so, by taking off any part of the property from the stock, for the benefit of the debtor.

NATURALLY, the debtor would secure such friends as helped him in the time of need, in preference to shavers and others. If so, the assignees are entitled to the property assigned, and the insolvent, having no control over it, cannot be detained on account of it.

IF A. indebted to B., after being sued to judgment and execution by B., go to C. and voluntarily give him a warrant of attorney to confess judgment, on which judgment is immediately entered and execution levied, on the same day, on which B. would have been entitled to execution, and had threatened to sue it out, the preference so given by A. to C. is not fraudulent. *Holbird* vs. *Anderson & al.* 5 *T. R.* 235.

THERE cannot be any doubt of the right of a debtor (and cases may be easily conceived in which it would be a duty) independent of the bankrupt laws, to give a preference to some of his creditors, in exclusion of the rest: and from such a preference alone, the court would not be disposed,

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hastily to infer collusion, secret trusts, or meditated frauds. *Per Smith, J.* in *Byrd* vs. *Smith.* 4 *Dallas*, 86.

A FAIR voluntary conveyance may be good against creditors, notwithstanding its being voluntary. The circumstance of a man being indebted, at the time of his making a voluntary conveyance, is no argument of fraud. The question, in every case, is, whether the act done is a *bona fide* transaction, or whether it is a trick and contrivance to defeat creditors. *Cadogan* vs. *Kennet*, *Cowper*, 434, 475.

IN the case of *Nunn* vs. *Wilmore*, lord Kenyon said that, putting the bankrupt law out of the case, a debtor might assign all his effects for the benefit of particular creditors. For the consideration is a valuable one. 8 *T. R.* 528, *Newland on contracts.*

By the Court. It does not appear material in this case, to ascertain the character and validity of the transfer, made by the insolvent to some of his creditors in Philadelphia. Admitting the fairness and legality of it, it is perhaps an obstacle to the *cessio bonorum* of this territory; for by this transfer the debtor has deprived himself of the means of complying with the requisites of our law.

THE *cessio bonorum* is the relinquishment that a debtor makes of all his property to his creditors,

when he finds himself unable to pay his debts. *Civil Code.* 294, *art.* 166.

IN the present case, the insolvent, *when he found himself unable to pay his debts*, instead of surrendering his property for the benefit of all his creditors, did assign and transfer it all to *a few of them.* The liberation which the cession operates, is perhaps a reward held out, as an inducement to debtors, fairly to cede their property to all their creditors, and to deter them from sacrificing the interests of all, to the advantage of a few.

THE cession, to be valid, must be a serious and fair one. Is that cession a serious and fair one, which is made of nothing at all, of a snuff box, or a few desperate debts, while, a few days before, the debtor, *when he found himself unable to pay his debts*, disabled himself to make a cession, as the civil code requires, by assigning all his property to one or a few of his creditors?

BY the act of 1808, *ch.* 16, which received the governor's signature on the 25th of March, an imprisoned debtor may obtain his release, by depositing in the office of the clerk of the court, under whose process he was arrested, all his books and accounts (if he be a merchant or trader) and obtaining an order for the meeting of his creditors, who may examine him on oath, on the state of his affairs, in presence of the court; and should the

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court be satisfied with the fairness and regularity of his books, and *two thirds* of his creditors, in number and amount, consent to his discharge, he is to be released from all his debts.

BUT, if that number do not consent, three commissioners are to be appointed, to investigate the accounts and papers of the debtor; and on their report, the judge may, in his discretion, release him from confinement, on his assigning over all his property.

No debtor may have the benefit of this act, unless he have resided one year in the territory and be in actual custody; nor if fraud be proven against him; nor if, in contemplation of the benefit of this act, he have, within three months previous to his arrest, *assigned any part of his effects in trust*, or as a donation or gift, mortgaged his property, confessed a judgment, or otherwise disposed of the same: all such assignments, mortgages, confessions of judgment, or *giving an undue preference to any one or more creditors*, in exclusion of other creditors, are void, unless at the time of such assignment, mortgage, or confession of judgment, he received a *bona fide* consideration therefor.

AN act of the same year, *ch.* 17, approved the 31st of the same month, as a supplement to the above, excludes all bankrupts who have disposed

of funds, entrusted to them, in deposit, commission, or trust.

BY the *Civil Code*, *p.* 294, *s.* 5, which was approved on the same day, the *cessio bonorum* is defined as the relinquishment which a debtor makes of all his property to his creditors, when he finds himself unable to pay them.

IT is declared subject to formalities prescribed by special laws.

THE consent of the *majority* of the creditors in number and amount, releases the debtor from his debts.

A QUESTION presents itself. Do the provisions in the *Civil Code*, virtually repeal the acts of 1808, *ch.* 16 & 17? The latter was approved on the same day as the code, and the former probably passed the houses after the code, and was signed by the governor six days only, before the date of the approbation of the code, which, from its bulk, must be presumed to have remained several days in the governor's hands.

WE imagine the code repeals neither of the acts cited; that they are some of those special laws, to the formalities of which the *cessio bonorum* is declared to be subject. *Art.* 169.

IN this view of the case, these acts and the code are to be construed together, being *in pari materia*, as forming one law.

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THEN, it is impossible to give effect to the two first acts, unless the court declare that no debtor can, while in custody, validly make a *cessio bonorum* under the *Civil Code*—for if a prisoner could, the two first acts would be of no force and effect.

No debtor would ever seek the benefit of these acts, as they require very inconvenient formalities —the debtor must deposit his books, be examined on oath, *two thirds* of his creditors must agree. If he have violated the trust of a deposit, &c. he is to be excluded. Under the *Civil Code* the road is broad and easy: a simple cession suffices; the inconveniency of producing books, and of answering on oath the questions of importunate creditors, is avoided—neither can any objection be apprehended on the score of a violation of trust—the concurrence of a *majority* of the creditors suffices.

CONSIDERING, therefore, the two first acts as in force, and the only ones under which a prisoner can procure his discharge, it remains to inquire whether a person, who has not remained one year in the territory, and is therefore excluded from the benefit of these acts, may be relieved by the simple cession under the *Civil Code*.

IF the Court be obliged to say that a person, who has been a resident of the territory upwards of one year, could not successfully have the benefit of a cession under the provisions of the code, it will

be difficult for them to say that a stranger could do it. This case appears a *casus omissus*, for which it is not in the power of the court to provide a remedy.

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SIMONTON'S CASE.

HOMOLOGATION DENIED.*

PICKET & LACROIX vs. *MORE.*

THE defendant had obtained a stay of proceedings: *Livingston*, for the plaintiffs, on affidavit that a number of negroes mortgaged by him, were concealed, and likely to be removed out of the territory, obtained an order of seizure, notwithstanding the stay of proceedings.

If there be danger, goods will be seized, notwithstanding the stay.

FISHER & TAYLOR vs. *HOOD.*

ATTACHMENT. *Depeyster*, for the defendant, moved for leave to disprove the debt, with a view afterwards to pray for a dissolution of the attachment.

The debt cannot be summarily disproved, to dissolve the attachment.

By the Court. This cannot be done, for that would be to try the cause on a collateral issue.

MOTION DENIED.

* THE insolvent was afterwards relieved by a special act of assembly—June session, 1812.

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POLK vs. *DUPLANTIER.*

Appeal summarily tried, if *defence* be not endorsed.

APPEAL. The three judges held that if the word *defence* be not endorsed on the answer to a petition for an appeal, the cause is to be tried summarily on Friday, as in the case of an original suit. See *Rules of Court*, art. 26 & 27, *ante* 8, 9.

CHEW & RELF vs. *DELOGNY.*

No summary relief against sheriff failing to bring money into Court.

THE Court, in this case, recognised and confirmed the decision in *Riviere* vs. *Ross*, *ante* 46, the three judges being present, saying, that if the sheriff do not return an execution, make an insufficient return, or fail to pay the money levied, the party injured cannot have relief, in a summary manner, so as to have judgment against the sheriff.

Smith for the plaintiff.

Caune for the defendant.

PLEASANTS vs. *ROSS.*†

Person, entrusted with goods, no witness against the detainer.

THE petition stated that the defendant, as sheriff, levied an attachment against the goods of one Da-

† This, and the following case, were omitted in their proper places.

vis, on certain goods of the plaintiff. To prove the property, Davis was offered as a witness, the goods having been entrusted to him, to bring them to New-Orleans and sell them on commission, and left by him in the store of the person in whose hands they were attached—but the Court (MARTIN, J. alone) rejected his testimony.

FALL 1811. First district. PLEASANTS *vs.* Ross.

DAVIS vs. *MITCHELL.*

THIS was an action on two promissory notes. The defendant, after the day of the date and before that of payment, called his creditors, from whom he obtained a respite, and the proceedings before the notary were homologated. A motion was now made to discharge the bail.

Party, who obtains time, cannot be held to bail, for an anterior debt.

Livingston for the plaintiff. The defendant resists our suit, in consequence of a FORCED *respite*, which it is contended he has obtained under the 16th title of the *Civil Code*, 438.

THE forced respite takes place, where the creditors do not all agree: for then, the opinion of the three-fourths in number and in amount prevails, and if the judge shall approve such opinion, it shall be binding on the creditors who did not agree.

BUT, in order that a respite may produce this effect, it is necessary that the debtor should file a

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true and exact schedule, sworn by him, of all his moveable and immoveable property, and of his debts—that all the creditors be summoned—that the creditors called in, should swear to their debts, and it is provided that those who do not swear, be not reckoned, so as to make a part of the three-fourths, whose opinion is to bind the whole.

IN the present case, no *true and exact* schedule was filed for the debt, which is the object of the present suit; and another debt, existing at the filing of the schedule and since discharged, was omitted.

FARTHER, the plaintiff was not summoned—neither could he be, as he was not put down as a creditor.

Duncan for the defendant. As the proceedings of the creditors before the notary, were homologated by the court, every thing must now be presumed to have been regularly done.

THE homologation is a solemn act, binding on all the creditors—it is a proceeding, as if it were, against all the world—all parties concerned are solemnly called to shew cause against it, by public advertisement. The records shew that three-fourths of the creditors consented, and how can this be gainsaid? This court has no chancery power over its judgments, neither can it revise them on a writ of error.

IN the case of *Norwood* vs. *Leblanc*, this court solemnly decided that the discovery of a receipt, after the judgment is completed, would not authorise them to re-open it.

THE homologation has passed *in rem judicatam.*

THE stay of proceedings granted, at the time the defendant called a meeting of his creditors, is still in full force; and would protect him, even if the homologation was set aside.

IF the debt had ripened into a judgment before the defendant's failure, the plaintiff could not at this moment take out a *ca. sa.*—much less can he have process to hold the defendant to bail.

Livingston for the plaintiff. In order that the *espera*, (respite) which the creditors grant, may have effect, they *must* appear with their documents. 6 *Febrero* 723, *no.* 129. Perhaps, our *Civil Code*, instead of requiring documents, is satisfied with the creditor's oath. But as the *espera* was heretofore void, if the creditors who granted it appeared without their documents, the respite of our code must be of no effect, if the creditors grant it, without an oath establishing their debts.

THE schedule is made at the debtor's peril. He shall not invoke a special clause in his favour, if he has not complied with the formalities which

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DAVIS vs. MITCHELL.

the other clauses of the statute require, for the protection of his creditors.

THE defendant contends that we are to presume that the notary did his duty: but a party who seeks protection under a record, must shew that it contains every thing that is essential to its validity. The notary is a mere ministerial officer, whose province it is merely to record what is passing on, before him.

THE express authority from *Febrero*, that the *espera* is void, if the formalities required are not all fulfilled, furnishes a fair induction, from which we are to conclude, that the respite mentioned in our code, is likewise vitiated by the absence of a material part of what the statute requires.

FARTHER, the petition states that the defendant is about to depart. The creditors who granted the respite, did it in the expectation that the debtor would, in the meanwhile, remain within their reach.

MATERIAL irregularity avoids all proceedings. The plaintiff, in this case, remains at full liberty to exercise his rights.

By the Court. All proceedings having been staid against the defendant—his creditors summoned, by advertisement, to meet at the notary's office—time given—and the creditors called again to shew cause against the homologation of the pro-

ceedings, and the homologation fairly obtained— it is, perhaps, irregular to proceed for a debt contracted before the call of the creditors. It is not for the Court, at present, to say whether the homologation can by any, if any, by what, means be avoided: but surely, while it stands in force, it must afford protection against all anterior debts, at least, so far as to protect the person in the meantime.

BAIL DISCHARGED.

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

TERRITORY OF ORLEANS.

SPRING TERM—1812—FOURTH DISTRICT.

TERRITORY vs. *DUROSSAT & AL.*

SPRING 1812. IV. District.

INDICTMENT for robbery, on one Mariann Lopez, a Spaniard, of twenty mules, and merchandize to the value of six thousand dollars.

The jurisdiction of the Court, extends to the *Sabine.*

THE robbery appeared to have been committed, on the public road, leading from *Natchitoches* to *Nacogdoches*, and west of the *Rio Hondo.*

IT was contended, for the defendants, that the place where the act was committed, was not within the limits of the territory, and consequently, out of the jurisdiction of the court. That the *Rio Hondo*, under the former governments, had been considered the boundary, and no jurisdiction was exercised by the present, beyond that river.

The offence is alledged to have been committed in the parish of *Natchitoches:* it is necessary to shew this fact, by proving it to have been committed within the limits of that parish, or, if there be no limits established by law, by shewing that jurisdiction had actually been extended. Some occurrences were referred to, and spoken of, as matters of public notoriety, and as historical facts; it was said, that a treaty which had met the approbation of our government, had been formed between the Spanish governor Herrera, and general Wilkinson, by which it was stipulated that the tract of country between the *Rio Hondo* and the *Sabine*, should be considered neutral ground; and that, in consequence, Wilkinson had proceeded, in conjunction with the Spaniards, to remove the settlers. The grand jury are sworn to enquire for the body of the district, but if the scene of the robbery was not within the parish of *Natchitoches*, which forms an integral part of the district, although it might be within the bounds of the territory, yet not being included in the district for which the grand jury is selected, they have no right to find a bill, and a court has no right to act on a bill so found. *Davezac*, *Wallace*, and *Low* for the defendants.

Brackenridge for the territory. The question of boundary, or limits of a territory, is a *political*, not

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TERRITORY vs. DUROSSAT & AL.

a legal question. 1 *Martin* 151. The government is the proper power to declare the limits of the country over which it presides, or to settle them with foreign nations by treaty. When this has once been done, no subordinate power or department is competent to the examination of the justice or propriety of such act, but all must implicitly acquiesce. By an act of Congress, erecting this territory into a state government, the boundary is fixed at the *Sabine;* this is not, however, extending the limits of Louisiana, but a declaration that Louisiana, under the territorial government, does extend, at least, as far as that river. This was made previously to the commission of the offences charged against the defendants; and if the question, as to the boundaries of the territory, was otherwise doubtful, it would be wanting in respect to the supreme power of the land, to disregard this solemn declaration. But it appears that in various instances, jurisdiction was actually exercised, beyond the *Rio Hondo*, by the civil magistrate; so that, even if this were to be considered the criterion, no doubt can arise. It must, however, be observed that there has not been produced any official authentic documents, or in fact evidence of any kind, to prove that the *Rio Hondo* had been fixed upon as the line between former governments, or between the United States and Spain; nor, indeed, is it alledged to have been en-

tered into by persons duly authorised, or to be any thing more than the private understanding of subordinate officers of either nation.

IT is not material that the place, where the act is alledged to have been committed, should be a part of the parish of *Natchitoches*—it is sufficient if it be within the territory of Orleans. This Court is appointed to preside over the territory, by the government of the United States, and no subdivisions into districts, by the territorial legislature, can possibly have the effect of abridging the power, or jurisdiction, given to it by Congress.

The Court, MATHEWS, *J. alone.* The Court has jurisdiction—because the sovereign power has exercised the right of legislation over the tract of country, on which the offence was committed.

THE executive of the United States has extended its authority, by ordering its army to occupy the ground, and not to permit the Spaniards to advance on it.

THE jurisdiction of the Superior Court is coextensive with the territory—the offenders, therefore, could be tried here or in any other district, where a jury could be procured according to the laws of the territory. This being the nearest, is, therefore, the most proper district.

SPRING 1812. IV. District.

TERRITORY vs. DUROSSAT & AL.

THE sovereign having legislated for it—the executive having acted on it—the judicial authority must be exercised, in order that government may be completely carried on. The other powers of government having acted, it does not behove the third to enquire into the legality of their act.

Ex. rel. Brackenrige.

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

TERRITORY OF ORLEANS.

SPRING TERM—1812—FIFTH DISTRICT.

AUZAN'S CASE.

SPRING 1812. V. District.

Juror discharged, on his own motion.

He was summoned as a juror to this court, from the county of Attakapas, and contending that he had been illegally summoned, prayed to be discharged.

By the act of 1810, ch. 10, sect. 4, parish sheriffs are directed to send every year, *in the month of January*, to the *sheriff* of the Superior Court district, a list of the persons in the parish qualified to serve as jurors; and the sheriff of the district is required to write their names on ballots, to be kept in separate boxes, *one for each parish*, and in proper time to draw out of each box, the requisite number of ballots.

SPRING 1812. V. District.

AUZAN'S CASE.

IN the following year the county of Attakapas was divided into two parishes.

In the month of March, the return from one of those parishes, was made to the clerk of the Superior Court: and the sheriff of the district, not noticing the division of the county, placed the ballots from both the parishes into *one box*.

ON this statement, the correctness of which was admitted, Auzan asked to be discharged.

Davezac, in support of the motion. The juror was not legally summoned, and is therefore entitled to his discharge. The act requires parish sheriffs to send their lists to the sheriff of the district in the month of January. The parish sheriff has made his *return* to a wrong *person*, and in a wrong *time;* and the district sheriff has, by mixing together the names of the persons, returned from both the parishes, into one box, prevented that equal proportion of jurors from each parish, which the law contemplates.

I. Baldwin and *Porter*, contra. No juror can object to the return made by the sheriff. Challenges are to be made, either to the array or to the polls, by the parties only, and at the trial.

THE *time* of the return is not material, provided it be anterior to the drawing.

THE returns, in this case, having reached the

sheriff of the district, the Court will not inquire whether they did so directly, or whether through the medium of the clerk, whose office is, perhaps, the most proper place of deposit, for returns to be made to the sheriff, when he is from home, as he often is, executing writs.

IN examining the returns, it appears the parish had its full proportion of jurors, and rather more.

By the Court,* It is every day's practice to discharge, on his application, a juror who is superannuated, who lacks any of the requisite qualifications, or who has not been regularly summoned.

As the sheriff of the district had the returns from the parish sheriff, at the time they were to be made use of, the delay of the latter was, perhaps, thereby saved—and it is surely immaterial whether the returns be enclosed to the clerk, to be handed to the sheriff.

THE error of the sheriff of the district, in placing into *one* box, the names of the jurors of both parishes, which the law requires to be kept in separate ones, is fatal. If the parish from which the applicant comes, had *its full proportion and rather more*, it follows that the other had *rather less* than its own.

JUROR DISCHARGED.

* MARTIN, J. sat alone, during this term.

SPRING 1812. V. District.

COLLINS vs. *NICHOLS & AL.*

Copy of conveyance by parish judge, in a certain case, inadmissible.

I. Baldwin, for the plaintiff, offered in evidence an authenticated copy, made by the parish judge, of a conveyance of property, sold under execution in pursuance of the 26th section of the act of 1807, ch. 1.

Morse for the defendants. It cannot be read. This act provides that sales under execution shall be made, as prescribed by the act of 1805, ch. 46, sect. 15, which refers us to the act of the same year, ch. 25, sect. 10.

THIS latter act provides that the sheriff shall deliver, to the purchaser, a conveyance, which shall be recorded by the clerk; and a certificate that the same has been recorded, being endorsed on the original, the same shall be admitted in all courts, as evidence, without further proof of the execution.

THE original then, and not, while it exists, a copy of the record, is the legal evidence of the conveyance.

I. Baldwin, in reply. The Civil Code, 238 *art.* 234, provides that the copies of the acts, which are certified true copies from the originals by the notaries, who are depositories of such originals, make proof of what is contained in said

originals, unless it be proved that such copies are incorrect.

BY the act of 1807, ch. 1, sect. 16, parish judges act as notaries.

By the Court. The evidence is inadmissible. The Civil Code refers only to copies made by notaries who are depositaries of the originals. In this case, the conveyance is ordered to be recorded, and the original returned to the party. If the clerk gives a copy, it must be presumed to be taken from his record book, and then it is only the copy of a copy.

THE act of 1805, ch. 25, sect. 10, positively says the original shall be admitted as evidence.

CONVEYANCES taken by notaries public, are written and signed in their books. They, therefore, cannot be carried to court, without bringing the whole book or tearing off the conveyance. On account of the great inconvenience, and the risk that would attend the removal, the law allows the production of an authentic copy. The original being accessible to both parties. But in the case of a conveyance, which remains in the possession of the party, a loose paper, it is proper and convenient, and the law requires, that the original should be brought forth.

COPY REJECTED.

SPRING 1812. V. District.

COLLINS vs. NICHOLS & AL.

THE plaintiff suffered a nonsuit, and obtained a rule to shew cause, why the nonsuit should not be set aside, relying on the following cases.

PLAINTIFF having been nonsuited, for want of evidence, nonsuit set aside. *Van Vechten* vs. *Graves*. 4 *Johns*. 407.

A *non pros*. being entered by consent, was set aside. *German* vs. *Wainwright*. 2 *Dallas*, 266.

NONSUIT set aside, party being surprised. *Stephenson* vs. *Mortimer*. *Cowper*, 805.

Porter and *Morse*, shewing cause. A voluntary nonsuit cannot be set aside. The suit here was abandoned, by choice and desire. A distinction is to be taken between the cases, in which the party is nonsuited by the court, and those in which he willingly submits to a nonsuit. In the first, the party may say the court has erred. In the latter, he cannot complain, for the nonsuit has been taken as a benefit: for the plaintiff cannot be nonsuited without his consent. 2 *Binney* 234, *Gerrard* vs. *Hetten*.

EVERY plaintiff must come to trial, prepared for action, on the strength of his proofs. No party shall take advantage of his own negligence in not keeping his deeds, which in all cases ought to be produced. 2 *Gould's Esp*. 485. *tit. Evidence*.

THERE cannot be a case more in point, than that of *Thompson* vs. *Thompson*, 1 *Haywood* 405.

The plaintiff moved to set aside a nonsuit suffered, because at the trial he had offered the attested copy of a bill of sale, without accounting for the original, and had been nonsuited, finding himself surprised. *Taylor*, J. said this is not a nonsuit by surprise, but *suâ negligentiâ*, and it ought not to be set aside.

IN *Arrington's ad.* vs. *Coleman*, the deposition of a witness was rejected, because he was surety for the costs of the suit—and *M'Coy*, J. refused to set the verdict aside. 2 *Haywood*, 300.

IN *Murray & Murray* vs. *Marsh & Marsh*, *Marshall*, C. J. and *Porter*, D. J. held that if the plaintiff, supposing himself ready, press for a trial, and it is found that the testimony he relied upon, cannot be given in evidence as he expected, and he be nonsuited, the allegation of surprise shall not prevail to set aside the nonsuit. *Id.* 290.

By the Court. No case is adduced, in which a nonsuit was set aside, when the party was not led to a submision to it, by an error of the Court. In the case of *Van Vechten* vs. *Graves*, the Supreme Court held that the judge, who tried the cause, had erroneously decided that notice from the plaintiff, was necessary to support the action, while they held the assignees were the proper persons to give the notice—the plaintiff having, therefore, been guilty of no latches, was relieved from the

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COLLINS *vs.* NICHOLS & AL.

inconvenience, in which he had been compelled to place himself, by the error of the judge.

IN the case in *Dallas*, the *non pros.* was set aside on terms, acceded to by the party moved against.

IN the case out of *Cowper*, the Court of King's Bench was of opinion that Mr. Sergeant Sayer, who had tried the cause, had erroneously held that the plaintiffs could not bring the action in their own names—and thereupon the nonsuit was set aside.

THERE being no case within the knowledge of the Court, in which a nonsuit suffered by a plaintiff, through his own neglect, or the unskilfulness or mistake of his counsel, was ever set aside; and the cases cited by the defendant's counsel, especially those out of Haywood, referring to instances in which the bench erred—the Court, however unwilling to see the plaintiff turned round and compelled to bring a new action, must say that the nonsuit ought not to be set aside.

MOTION DENIED.

2m 135
114 730

GUIDERY vs. *GUIDERY.*

On a decree for the wife, a sale will not be ordered *ex parte.*

ALIMONY. After a decree for the wife, *Morse* moved that the property distrained, should be sold to satisfy her claim.

GUIDERY
vs.
GUIDERY.

By the Court. This cannot be ordered without notice to the husband.

Johnson for the defendant.

BROUSSART vs. *TRAHAN & AL.*

If plea be overruled, no trial can be had, till answer filed.

THE petition stated that the plaintiff bought a tract of land, from the defendants' ancestor, and that they had dispossessed him. He claimed a restoration of the land, or damages.

THE defendants pleaded that they were not bound to answer, because the matter had been settled in a suit, determined in New-Orleans at a former term.

The Court, MATHEWS, *J. alone*, had overruled the plea and ordered the cause to be continued.

THE cause being called, it appeared there was no answer filed.

Porter, for the plaintiffs. The cause ought to be tried: nothing remains but to assess the damages.

Lewis, for the defendants. The plea having been overruled, the suit remains to be tried on the merits. It cannot be tried without an issue be

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BROUSSART *vs.* TRAHAN & AL.

made up, and that cannot be done without an answer.

The Court being of that opinion, the plaintiff's counsel entered judgment by default; the plea having been overruled upwards of one year.

LAMBERT vs. *MOORE.*

Appeal bro't without a citation, dismissed.

APPEAL. The transcript of the record was filed, but no citation was returned, therefore the appeal was dismissed; the act of 1807, ch. 1, sect. 20, making it the duty of the appellant to return the petition of appeal, the transcript of the proceedings, *with* the citation on the return day.

IT was said the same decision had taken place, in the cases of *M'Donald* vs. *Murphy* and *Hartosder* vs. *Gregg.*

Sutton, for plaintiff. *I. Baldwin*, for defendant.

PERILLAT vs. *TIFFANY.*

Party praying a continuance, need not state the fact to be proved.

THIS suit having been before continued, on the motion of each of the parties, the defendant prayed for a continuance on the ordinary affidavit.

Porter, for the plaintiff. The affidavit is in-

PERILLAT vs. TIFFANY.

sufficient, as the fact intended to be proved, is not stated.

Parrot, for the defendant. It need not be stated. The Court, indeed, when a suit is continued often, may require the applicant to satisfy them of the materiality of the testimony expected to be drawn from the absent witness, so as to afford the adverse party the opportunity of trying the cause, by admitting the fact, if he chooses. But this is never done till the Court demand it.

CONTINUANCE GRANTED.

WEEKS vs. *DEBLANC*.

Ded. pot. on affidavit of an agent.

THE plaintiff residing at some distance, viz. in the county of Feliciana, his agent was permitted to make the necessary oath, to obtain a commission to examine witnesses.

Morse, for plaintiff. *Porter*, for defendant.

LEFEVRE vs. *BROUSSARD*.

Appeal from a nonsuit. The value of the matter in dispute taken as stated, unless, especially contradicted.

APPEAL from a judgment of nonsuit.

Porter, for the appellee. The appeal cannot be sustained. The act of 1807, ch. 1, sec. 19. authorises appeals in cases of final judgment. A

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LEFEVRE *vs.* BROUSSARD.

judgment of nonsuit is not final—neither will the Court take cognizance of a suit below 100 dollars. The costs in the present cause do not exceed 17 dollars.

Johnston, for the appellant. A judgment of nonsuit is final in the case, and the sum in dispute, and not that which is recovered, gives the jurisdiction.

By the Court. An appeal surely lies from a judgment of nonsuit. If it was otherwise, the party injured would be without a remedy. For, although he might bring a new suit, the Parish Court would likely give the same judgment.

IN ascertaining the value of the matter in dispute, we cannot travel out of the pleadings, and when the defendant has not, in his plea, averred that the value is below that mentioned in the writ or petition, but so small that the Court has no jurisdiction, he will be prevented from availing himself of this objection, which is only to be noticed in a plea in abasement, when it goes to the jurisdiction of the Court.

LIKEWISE, if an appeal be prayed, and the matter in dispute be really of so little value, that an appeal does not lie for it, the appellee must set forth this matter on the record, so that the appellant may take issue on the fact—otherwise the

Court will take it for granted that the value of the object is fairly stated by the original petition, and will sustain the appeal.

THIS opinion is supported by the argument of the Superior Court of North Carolina, in giving judgment in an anonymous case. 2 *Hayw.* 71. County courts there are ousted of jurisdiction in all suits under 20*l.* The plaintiff had a verdict for less than 20*l.* and the County Court nonsuited him. He appealed, and the jury above found a verdict for upwards of 20*l.* the interest arising pending the suit having increased his demand. The defendant resisted entering the judgment on the ground that the County Court had no jurisdiction of the case, at the inception of the suit, *M'Coy, J.* and *Haywood, J.* said—the defendant should have pleaded that the sum, really due to the plaintiff, was under 20*l.* at the time of the action commenced, and then the jury would have been bound to find the value at the commencement of the action, as well as the value at this day, and the judgment of the court would have been against or in favour of the plea, according with the verdict. Such plea would have admitted the execution of the instrument, and questioned only the *quantum.* 1 *Wils.* 19, 20. Had the plaintiff taken a writ of error upon the judgment of nonsuit, the Court could examine the record, to see whether

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the County Court had given a proper judgment: but, having appealed, it is to be taken that the complaint against the decision below, regards some mistake of the jury, and then there can only be a new trial by a jury here. The safest way, therefore, must be to plead to the jurisdiction, and tie up the enquiry to the value of the demand, at the time when the action is commenced.

IN the present case, the appellee might have placed the point he insists upon, on the record, which would have enabled the appellant to contradict it, and the Court to pronounce with safety. The objection, not appearing in the pleadings, cannot be noticed.

APPEAL SUSTAINED.

HAYES vs. *BERWICK.*

Spanish governors' orders, prove themselves.

Long absence, when evidence of death.

THE plaintiff claimed a tract of land, by right of succession from her husband, in the defendant's possession.

To prove the husband's title, a petition for the land, addressed by him to governor De Galvez, was introduced with the governor's *como pide* or *fiat.*

By the Court. Papers of this kind are considered as records, and prove themselves, altho'

no seal was ever affixed to any of them. Such papers being, in general, the only evidence which settlers had of their titles under the Spanish government, it being very seldom the case that the incipient right acquired by the governor's signature, ripened into a formal grant. The governor's signature proves itself—being of sufficient notoriety, without the addition of a seal. It has been the practice of the Court of this country, since the establishment of the American government to consider these papers as entitled to the same credit as grants.

THE plaintiff then offered to prove the death of her husband, by witnesses who were ready to testify that he left the province of Louisiana, about twenty years ago, for one of the northern states, intending to collect some property and return immediately, and that he has never been heard of.

Porter, for the defendant. This evidence is inadmissible. Long absence does not authorise the presumption of the ancestor's death, so as to authorise the heir to enter upon the land.

THE *Civil Code* provides that, where a person shall not have appeared at the place of his residence, and shall not have been heard of for five years, his presumptive heir, at the time he was heard of for the last time, may, by administering the proof of this fact, cause himself to be put, by the compe-

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HAYES vs. BERWICK.

tent judge, into provisional possession of the estate, which belonged to the absentee, giving security for the faithful administration thereof. *Civil Code* 16, *art.* 9.

THE estate does not seem to vest absolutely in the heir, till thirty years after he may have obtained provisional possession, or after one hundred years have elaped since the birth of the absentee. *Id.* 18, *art.* 19.

I, Baldwin, for the plaintiff. The party, in the present case, went away long before the adoption of the *Civil Code*, and possession was taken when the principles invoked by the defendant's counsel, were not yet established.

By the Court. What we call the *Civil Code*, is but a digest of the civil law, which regulated this country under the French and Spanish monarchs. It is true, some new principles have been intercalated, and others abrogated or omitted.

BY a maxim, consecrated by the best authorities, every absentee, whose death is not clearly and precisely established, is presumed to live until the age of one hundred years; that is to say, the most remote period of the ordinary life of man. 1 *Denisart* 13, *Verbo Absens.*

AN absentee is presumed to live till the contrary is proved: otherwise the absence must be such, that the life of a man, who may live one

hundred years, should be presumed to have ended. 1 *Ferriere* 13, *Verbo Absens.*

DEATH is never presumed from absence; therefore, he who claims an estate, on account of a man's death, is always held to prove it. An absentee is always reputed living, until his death be proved—or until one hundred years have elapsed since his birth. 2 *Ferriere*, 226, *Verbo Mort.*

ALTHOUGH a man be absent, and there be no account of him, his death is not to be presumed: they do not proceed to the division of his estate, for he is presumed to live one hundred years. 2 *Pigeau*, 2.

THESE principles are drawn from the Roman law. *Placuit centum annos tuendos esse municipes, quia is finis vitæ longævi humanis est. ff. lib.* 7, *tit.* 1, *b.* 56. *Centos annos observandos esse constat, qui finis vitæ longissimum est. Id. lib.* 33, *tit.* 2, *l.* 8. *Non aliter actionem finiri concedimus, nisi centum annorum curricula excesserint. Cod. lib.* 1, *tit.* 2, *l.* 23. *Sæculum* 100 *annorum spatium longissimæ vitæ in homine esse refert. Plin.* 11, *c.* 37, *Varro* 5.

EVIDENCE REJECTED.

SPRING 1812. V. District.

DELAHAYE vs. *PELLERIN.*

A suit for a negro & damages, shall bar one for damages: tho' nothing be said as to them in the first judgment.

THE plaintiff had heretofore brought a suit, in the Parish Court, against the defendant, for the recovery of a negro slave, *and damages for the detention*, and obtained a judgment for the restoration of the slave; nothing being said *as to the damages*. The object of the present suit, was to recover *damages*, the slave being restored.

THE Court held that the suit in the Parish Court was a complete bar, being brought *for the slave and damages*. That suit being at an end, the judgment was complete, or not. If it was not, the judgment must be completed below. If complete, it must forever be a bar.

MARTIN, *J.* being alone on the bench, took the case to New-Orleans, to be considered by LEWIS, *J.* who concurred in this opinion.

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

TERRITORY OF ORLEANS.

SPRING TERM—1812—SECOND DISTRICT.

LIVAUDAIS vs. *HENRY.*

A NEW trial was moved for, on the ground that the defendant, sometime before the trial, had obtained a stay of proceedings, and made a cession of his goods to his creditors. The motion was overruled, as the defendant had gone to trial, and had taken his chance of obtaining a verdict, and as it did not appear that the proceedings, against the creditors, had been continued.

SPRING 1812. II. District.

If *pendente lite* a stay be ordered, and suit proceed, no new-trial shall be granted.

CURACEL vs. *COULON.*

Sumner, for the plaintiff, moved for leave to amend the petition, by striking out the name of *Curacel*, and inserting that of *Ganeson.*

A petition shall not be amended, by substituting another name.

SPRING 1812.
II. District.

CURACEL
vs.
COULON.

*By the Court.** This cannot be done. It would not be amending, but making a new petition, and consequently making a new suit. If that could be allowed, the names of both parties could be changed, consequently an entire new suit substituted. In this way, a party, whose right of action was lost by prescription, could, by engrafting his action upon another, brought some time before, deprive the defendant of his right, if he could find any suit standing against him, and obtain the plaintiff's leave to substitute his own name by an amendment; and afterwards, by another, change the nature of the action.

IT is true, parties are often added by leave of the Court—but this is very different from substituting a new plaintiff, in the room of the original one.

MOTION DENIED.

MOLLERE vs. *BAYON.*

A suit cannot be dismissed in the vacation.

If appeal be abandoned, execution shall not issue from the Court above.

THE plaintiff had judgment below, and the defendant appealed, signing himself the petition for the appeal. The papers were brought up, but, in the vacation, the defendant's attorney below ordered the clerk to enter a dismission of the appeal, which was done.

* MARTIN, *J.* sat alone during this term.

THE defendant, read an affidavit, stating that he had employed no attorney to prosecute the appeal—moved that the Court should order the clerk to rescind the entry, and that the cause might be reinstated.

Hopkins, for the plaintiff, opposed the reinstatement of the suit, on the ground that two terms had intervened since the dismission.

By the Court. A suit cannot be dismissed without the leave of the Court. In term time, a dismission, on payment of the costs, is generally entered, while the Court is open, as a matter of course, without any formal leave being asked: leave being presumed. But, however irregular the dismission may have been, the suit is now discontinued—the parties, two terms having intervened, are out of Court—the cause cannot be reinstated.

MOTION DENIED.

I. Baldwin, for the defendant, shewing that since the dismission, execution had issued from this Court, prayed a *supersedeas*.

By the Court. It must issue. The Parish Court is ousted of all jurisdiction in the suit, after the filing of the petition and the execution of the bond. The act of 1807, ch. 1, s. 19, directs that "whenever any petition for an appeal shall

SPRING 1812. II. District.

MOLLERE *vs.* BAYON.

"be filed, and a bond executed and given, all "proceedings in such suit, in the Parish Court, "shall cease." The appellee is to take his remedy upon the bond.

WRIT ORDERED.

HUBBARD & HOPKINS vs. *BALDWIN & BLANCHARD.*

Whether the sheriff's commission be due, on an order of seizure, without a sale.

THE plaintiffs, having sued out an order of seizure, under which the property of the defendants was taken, they filed an answer, and an order was obtained for the suspension of the sale: the cause was tried, and judgment being given for the plaintiffs, the defendants paid the amount of it, before any writ issued for the sale of the property seized.

Hopkins, on the behalf of the sheriff. Before the property should be restored, the defendants should pay his poundage, under the act of 1805, ch. 49, which provides that the sheriff shall be entitled to receive the compensation specified in the act of the same year, ch. 36, s. 3, for the levying monies by writ of *fieri facias*, in all cases where the money shall not be paid within seventy-two hours from the time the said writ of execution shall have been served. A writ of seizure is as completely a *fieri facias*, or writ of execution, as that which issues after judgment in Court.

I. Baldwin, for the defendants. A writ of seizure is the original process, in a suit for the recovery of money, secured by mortgage. If the parties disagree on their respective rights, this mode of instituting a suit, is the only proper one. More than seventy-two hours must elapse in every case, before the controversy be determined, and according to the proposition advanced, the defendant must ever be mulcted. If he succeeds, surely he must get rid of the poundage; the rule must be the same if, during the pendency of the suit, and even afterwards, the matter be settled in any manner that renders a sale unnecessary.

By the Court. Whatever may be the compensation due to the sheriff, when a writ of seizure is proceeded upon until the property is actually sold, he has no right of poundage till then. Surely he must be remunerated, for his pains and responsibility in seizing and keeping the property. The act of 1805, ch. 36, did not allow any poundage to the sheriff, on a writ of *fieri facias* which was not followed by a sale: and the act of the same year, chap. 49, which allows poundage when the money is not paid within seventy-two hours after the writ is served, must be construed strictly, and confined to writs of *fieri facias*, and not extended to similar writs. Most writs of seizure issue against landed property, the seizing and

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keeping of which require, in general, but little care.

HUBBARD & HOPKINS *vs.* BALDWIN & BLANCHARD.

THE writ of seizure, when it does not occasion a sale, has a greater resemblance to the writ of attachment—it requires no greater trouble or care, and is not attended with more responsibility. The act of 1805, ch. 36, provides that the sheriff's account, for keeping property seized and held under attachment, shall be settled and allowed by the Court, in case of dispute. The rule ought to be the same in this case.

*** THE sheriff appearing dissatisfied, and it being suggested that the practice had been otherwise, no judgment was given, and the case was reserved for the opinion of all the judges.

BAYON vs. *RIVET.*

If a jury be prayed below the fact shall not be tried by the Court, above.

THE defendant, in the Court below, had prayed for a jury, judgment was had against him, and he appealed; the plaintiff filed the common answer to the petition for the appeal, "that there is no error," &c. and now the defendant insisted on the cause being tried by a jury.

Gilbert, for the plaintiff. No jury was prayed for in this Court. The cause is to be tried *de*

novo: a jury, therefore, ought to be asked, or the trial will be by the Court.

Hopkins, for the defendant. The act of 1807, ch. 1, s. 20, directs that, on the appellee answering the petition for the appeal, by a declaration in writing that there is not any error in the proceedings below, the Superior Court shall proceed to hear the cause, on the pleadings transmitted from the Parish Court. The answer below is, then, emphatically the answer above. In this case it prays for a trial by jury: it was useless to repeat the prayer in the petition for the appeal.

By the Court. We would always lean in favor of an application, for a trial of a matter of fact by a jury. In this case, the applicant has been guilty of no latches.

MOTION ALLOWED.

SPENCER'S CASE.

Insolvent's commissioners' return, is to be *under seal.*

BEING imprisoned for debt, he had applied for relief, under the act of 1808, ch. 16, and the Court under the 6th section of that act, had appointed commissioners to investigate his affairs. They made their report, which was, on the motion of *Baldwin*, on behalf of the creditors, rejected, because it was not *under seal*, as the act requires.

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II. District.

BAYON vs. *RIVET.*

Suit abated, it appearing by the pleading that $50 only were due.

PLEA in abatement. The suit was brought to recover 125 dollars, lent by the plaintiff to the defendant, who pleaded that the sum demanded was not due, and that the plaintiff had claimed that sum, with a view to give jurisdiction to the Court.

THE plaintiff filed an interrogatory, to which the defendant answered, he had received from the plaintiff, the sum of 50 dollars, and no more.

Gilbert, for the plaintiff. Judgment must be given for the sum, which appears due from the defendant's own shewing. The Court may, perhaps, order the plaintiff to pay costs. There are frequent instances of judgment being given in this Court for less than one hundred dollars.

Baldwin, for the defendant. If the conclusion of the plaintiff's counsel be correct, a suit may be commenced, in this Court, for one dollar, and a rich man, willing to pay costs, may harrass his poor neighbour, by bringing him from a distant parish. The Court will not suffer the plaintiff thus to evade the law.

By the Court. This question was settled, a few days ago, in the fifth district, in the case of *Lefevre* vs. *Broussart*, *ante* 135. The plea is a good one, and must prevail.

JUDGMENT FOR DEFENDANT.

RAOUL vs. *DANBOIS.*

SPRING 1812. II. District.

I. Baldwin, moved to set aside a judgment by default, on an affidavit of the defendant, that he had a good and equitable defence.

Defendant's affidavit, of *a good & equitable defence*, will not set aside a judgment by default.

Hopkins, for the plaintiff. The affidavit is insufficient, the cause ought to be set forth. The Court always require it, on a motion for a new trial. 1 *Martin*, 148. *André* vs. *Bienvénu.*

By the Court. The case of a new trial is not perfectly analogous, because the presumption which arises from the verdict or judgment of the Court, is much stronger than that which results from the delay or neglect of the party: but, by the act of 1805, ch. 46, sect. 4, a judgment by default is to be set aside, on *shewing*, not on *alledging* good cause.

MOTION DENIED.

ORILLON vs. *ROMAN.*

APPEAL. No bond having been filed:

Whether an appeal, without a bond, is to be sustained?

Hopkins, for the appellee. The appeal ought to be dismissed, In the case of *Wall* vs. *Pousset's executors*, Judge Mathews held that there could be no appeal, unless a bond was filed. The

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ORILLON vs. ROMAN.

act of the legislature has made no provision for any appeal, from the Parish Court, without bond.

Baldwin, for the appellant. No law requires that the appellant should give bond. Every citizen has a right to the opinion of the Superior Court: but, as a strong presumption arises, from the judgment of the Parish Court, that the party cast is liable, security is required of him, in order to suspend the execution, that, while the cause is depending in the Superior Court, he will not waste his property—that the time necessarily employed in ascertaining his rights, will not be improved in rendering those of the successful party inefficacious.

THE act of 1807, ch. 1, provides that *no appeal shall stay execution*, unless the appellant shall, before execution, give bond, with one sufficient security, for prosecuting the appeal with effect. This impliedly admits that other appeals, that is, such in which no bond is given, *shall not* stay execution. *Exceptio probat regulam.* It would have been vain to have thus made this implied exception, if it had not been understood that such appeals, which did not stay executions, could exist.

IN the next paragraph, the legislature directs that "whensoever such petition, for an appeal, "shall be filed, *and such bond executed and given*,

"all proceedings in such suit, in the Parish "Court, shall cease"—clearly implying that whensoever such a petition shall be filed, *and* NO *such bond executed*, the proceedings in such suits, in the Parish Court, *shall* NOT *cease*, notwithstanding the appeal; but the successful party shall proceed to execution.

By the Court. The implication is sufficiently strong, to warrant the conclusion drawn by the appellant's counsel. The appeal will be sustained, and the cause continued, as one of the judges has entertained a different opinion, and the Court is now composed of one judge only, in order that the opinion of the third judge may be had.

APPEAL SUSTAINED.

BERTUS vs. *HARBOUR.*

I. Baldwin, shortly after filing his answer, moved for leave to amend it, by adding a prayer for a jury.

Petition amended, by praying for a jury.

Hopkins, contra. The Court will not grant it, unless they be convinced of the necessity of the amendment, and that the only object of it, is not to delay the trial.

By the Court. We will always be induced to gratify a party, who wishes to draw the trial of a

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BERTUS *vs.* HARBOUR.

matter of fact, from the Court, to its constitutional triers: provided the party applying does not come too late. The present defendant had the whole of this day to file his answer.

LEAVE GRANTED.

WATKINS vs. *McDONOUGH.*

Parol evidence, of warranty in the sale of a slave, inadmissible.

SUIT on a warranty for the soundness of a negro sold by the defendant. The answer denied all the allegations in the petition.

Hopkins, for the plaintiff, offered a witness to prove the sale.

Morse, for the defendant. The evidence is inadmissible. The *Civil Code* provides that every covenant, tending to dispose, by a gratuitous or incumbered title *(un titre gratuit ou onéreux)* of any immoveable property or slaves in this territory, must be *reduced to writing*, and in case the existence of such a covenant should be denied, no *parol evidence* shall be admitted to prove it. *Art.* 241, *p.* 310.

WITNESS REJECTED.

Whether one may be interrogated, as to the genuineness of his signature?

GRAY & AL. vs. *GENTRY.*

SUIT on a promissory note, with a subscribing witness. The petition contained an interrogato-

ry, by which the defendant was required to say, whether the signature, at the foot of the note, was not in his hand-writing.

Hopkins, for the defendant. The interrogatory is inadmissible. This mode of probing the defendant's conscience, can only be resorted to, where a fact cannot otherwise be proven.

IN *Read* vs. *Bailey*, it was said by LEWIS, *J.* that the reason of the law, in permitting a party to resort to the conscience of his adversary, for a disclosure of facts, is founded in necessity, and is intended to apply only in cases where the evidence sought for, is wholly in the power of the party, called upon to disclose. *Ante* 76.

IN *Randle's adrs.* vs. *Judice*, and *Hart & al.* vs. *Bourgeois*—the Court, LEWIS, *J.* alone, ruled that the defendants could not be called upon to answer interrogatories, concerning the genuineness of the notes.

THE party, *who acknowledges he has no proof, or an insufficient one*, may require the oath of his opponent. 1 *Domat*, *l.* 3, *t.* 6, *sect.* 4.

AS it often happens that he, who has to prove a contested fact, has *neither writing, nor witnesses*, nor sufficient presumptions, the confession of it is obtained from the mouth of his adversary. *Id. sect.* 5.

THE third manner of obtaining a party's con-

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GRAY & AL. vs. GENTRY.

fession, is, *where he who cannot have the proof of a fact*, which he alledges, refers himself to the oath of his adversary. *Id.*

OUR statute points out the mode in which a contested signature to a note, is to be proven. In case the party disavows his signature, proof of it may be given by at least one credible witness, declaring positively that he knows the signature, as having seen the obligation signed; or the signature must be ascertained by two persons having skill to judge of hand-writing, after having compared it with papers, acknowledged to have been signed by the party. *Civil Code*, 306, *art.* 226.

IN this case, it clearly appears that the plaintiffs have proofs within their power—they cannot, therefore, call on the defendants to supply them with evidence. On general principles, therefore, the interrogatory is improper. Farther, the law has made a special provision for this case. It appears there is a subscribing witness, he, therefore, must be brought forth—if there were none, a report of experts, or the answer of the defendant, might be the proper criterion.

Baldwin, contra. Our statute has expressly provided that, "when any plaintiff *shall wish* to "obtain a discovery, from the defendant on oath, "such plaintiff may insert, in his petition, perti-"nent interrogatories." 1805, *ch.* 26, *s.* 7.

IT is not necessary that the plaintiff should *need*, it suffices that he *wishes* such a discovery.

THE statute has but one exception—provided that the interrogatory does not charge the defendant with any crime or offence.

THE *Civil Code*, 316, contains nearly the same provisions. It provides for the case, in which the judge may wholly, or in part, dispense with the answer of the party interrogated, viz. when the interrogatory is impertinent, and has no reference to the issue. *Id. art.* 262. In all other cases, it seems the party must answer.

As the law often gives concurrent remedies, there is no incongruity in allowing concurrent means of proof.

By the Court. A party, with an ill grace, complains that his adversary constitutes him a judge in the cause: and a case can hardly be imagined, in which a defendant may suffer by being compelled to acknowledge, disown, or declare that he does not recognise, a paper, apparently subscribed by him.

OUR statute having expressed the cases, in which a party may require his adversary to swear, the Court cannot admit the exception contended for, on the supposition that it exists in France. *Domat* cites no authority, and does not positively re-

SPRING 1812. II. District.

cognise, though the language he uses impliedly admits, it.

GRAY & AL. *vs.* GENTRY.

IT would not be admitted in any of the courts of equity in the United States, and it is clear the Roman law precluded it: *Ait Prætor: eum a quo jurisjurandum petetur, solvere aut jurare cogam: Alterum itaque eligat reus: aut solvat aut juret: si non jurat, solvere cogendus erit a prætore. ff. lib.* 12, *tit.* 2, *l.* 34, *s.* 6.

HOWEVER, as it is advanced by a gentleman of the bar, that, in two cases, the objection prevailed, and this is not contradicted, the case must stand over for further argument, and the opinion of a full bench.

CUR. ADV. VULT.

SCOTT vs. *BILLINGS.*

Whether one may be interrogated, on the genuineness of his signature?

PROMISSORY *note, without a subscribing witness.* The petition contained an interrogatory, as in the preceding case. The same objection was made, and the question in like manner reserved.

Baldwin, for plaintiff. *Hopkins*, for defendant.

APPENDIX

CONTAINING

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF

THE STATE OF LOUISIANA.

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF

THE STATE OF LOUISIANA.

SPRING TERM—1812—FIRST DISTRICT.

PART of the territory of Orleans having, since the first of May last, become the state of Louisiana, the judges of the former territory proceeded to hold the Superior Court of the state, on the first Monday of June, under the schedule of the state constitution.

Shortly after, they resigned, to the President of the United States, their commissions as judges of the territory; and a question arising whether they were thereby disabled to act as judges of the state, they laid, in the following letter, before the Senate, at the request of that body, the reasons which in their opinion, authorised the continuance of their functions, as state officers.

SPRING 1812.
1. District.

New-Orleans, August 14th, 1812.

GENTLEMEN,

WE find by a resolution of the Senate, which you have done us the honor of enclosing to us, that you have been appointed, as a committee, "to wait on the judges of the Supe-"rior Court, and request them to state, in writing, "at what period they resigned their commissions; "and whether they consider themselves authoris-"ed, under the schedule of the constitution of the "state, to continue in the discharge of their du-"ties."

IN compliance with this request, we apprise you, for the information of the Senate, that on the 7th of last month, two of the judges (*Lewis* and *Martin*) wrote a letter, a copy of which is inclosed, to the secretary of state for the United States,* and that a few days after, the other judge (*Mathews*) wrote a similar one to the same officer, a copy of which he has not preserved.

FURTHER, that since the erection of the state, we have considered, and still do consider ourselves, authorised, under the schedule of the constitution, to continue in the discharge of our duties

* The letter contained a resignation of the offices of judges of the territory of Orleans.

as judges of the Superior Court of the state, "until "superceded under the authority of the constitu- "tion." SPRING 1812. I. District.

AT the dates of our letters to the secretary of state of the United States, the government of the union entertained an opinion, to which we were not able to give our assent. It appeared by a letter from the head of the department of the treasury, that the erection of the state of Louisiana, had worked a dissolution of the whole territory of Orleans, in the judgment of that officer: and that, consequently, the commissions of the territorial officers were no longer the evidence of existing authority and power, and a title to compensation, but mere memorials of the confidence of the government. It did not appear very extraordinary that an opinion, which we believed to have been formed in the hurry and bustle of official affairs, should vary from that which we had formed in the silence of the closet. An attentive perusal of an act of congress, convinced us, however, that the opinion of the legislature of the union, seemed to concur with that of the treasury department. In erecting Louisiana into a state, the office of district judge for the district of Orleans, was considered as determined by the supposed dissolution of the territory of Orleans. Judge Hall ceased to exercise the duties of it, and a few weeks after was in.

SPRING 1812. I. District.

vested with a new office. In this opinion, we have always concurred, so far as it relates to that part of the territory, which became the state of Louisiana, on the 30th of April last.

ON the opening of the term of the Superior Court for the first district, early in May last, it appeared that the opinion entertained at Washington City, had some partizans among the gentlemen of the bar, and the judges thought it their duty to desire that, if any doubt was entertained of their authority, as judges of the Superior Court of the state, they might be favored with an argument on that subject.

AFTER a patient hearing of every thing that was offered in favor or against that authority of the Court, the two judges present (*Lewis* and *Martin*) determined that the territory of Orleans was *dismembered*, but not *dissolved*. That the tract of country between the Mississippi and Pearl river, and the 31st degree of N. latitude, and the Iberville and the lakes, was still the territory of Orleans. That the judges on the bench considered themselves invested (besides the office of judges of the territory of Orleans) with that of judges of the Superior Court of the state of Louisiana.

THE 3d section of the schedule having required the territorial officers to continue the exercise of

the duties of their respective departments, the judges considered themselves as appointed by an official description, as pointed as a personal one, to the offices, under the authority of the state, which they had exercised under the authority of the United States. SPRING 1812. I. District.

AN office consists in *power*, *duties*, *emoluments*, and *responsibility*.

1. The judges found themselves clothed with *power* under the authority of the state.

2. They had *duties* to perform for the state, and a late resolution of the senate, has sanctioned the opinion the judges had formed, that for the exercise of the powers, and the performance of these duties,

3. They were entitled to *emoluments* from the state.

4. And the judges could never entertain any doubt that they were *responsible* to the state. So, that if it had been the misfortune of any of them to deviate from the path of duty, he would have been liable to impeachment and prosecution in the courts of the state.

IT is true, they were without a *commission* from the state. The reason of this was, that the office was bestowed on them by the constitution: and that conventions and legislatures, and indeed

SPRING 1812. I. District.

all large bodies of men, do not usually commission officers appointed by them.

THE present legislature of this state has already appointed a state treasurer and two state printers, without commissioning them. The entries on the minutes of the legislature, are the evidence of the appointment of these officers, as the 3d section of the schedule is the evidence of the appointment of the judges of the Superior Court.

THE present judges having come to office, by being the persons invested with corresponding offices under the territorial government, it remained to be considered whether their continuance in, and the duration of, the office of territorial judges, was necessary to their continuance in the office of judges of the Superior Court of the state.

THERE is nothing in the schedule that induces us to answer that proposition in the affirmative.

THE schedule uses the expressions, "the go- "vernor, secretary, and judges"—clearly relating to the governor, secretary, and judges, vested with offices at the change of government—not certainly, to any future officer sent, by the President of the United States, to govern the remaining part of the territory.

WISDOM is to be presumed in the Convention, and wisdom directs to means adequate to the end.

THE end was, "to prevent such inconvenien- "cies, as might arise from the change of a territo- "rial to a permanent government."

NOW, when the constitution was drafted, it was foreseen that the part of the territory not represented in the convention, would be disposed of by being annexed to an adjacent territory, or to the new state, or erected into a separate government. In either of which cases, if the state offices expired with the territorial government, the powers of the governor, secretary, and judges would expire and be determined; and the provision would thereby prove incommensurate with the object; anarchy and confusion would be the inevitable result. Every consideration, therefore, must repel a construction so unnecessary and disastrous.

ADOPT this construction, and the mischief here referred to, has already happened. By the consent of the legislature, the remainder of the former territory of Orleans, out of the original limits of Louisiana, has been entirely disposed of, by its annexation to this state and the Mississippi territory—so that the offices of the territorial judges are completely determined, since there exists not a square foot of ground, over which the *authority*, given them by their commissions under the United States, can be exercised.

THIS power being gone, there remains no *duty* to be performed, and, consequently, no *compen-*

SPRING 1812. I. District.

sation or emolument to be claimed, and all *responsibility* is dissolved.

THE office is, therefore, as much *extinct*, as if it had been *determined by the expiration of the time for which it was granted*, or by resignation duly accepted.

THE Court, therefore, considered the offices of its members, as vested in them by the constitution, as effectually as if the convention had directed its president nominally to commission the judges.

THEY believed that, if the balance of the territory had continued a distinct territory under the same name, any person appointed a judge after the erection of the state, could not have come over to exercise judicial duties: as the convention had only confided in the judges—not every judge of the territory of Orleans, that might afterwards arrive; but the judges in office at the change of government.

FURTHER, that on the death or resignation of any of the present judges, the state, and not the United States, was to give him a successor. The office of judge of the Superior Court of the state, being sufficiently settled and established, to admit of its being filled, as any other office in the event of a vacancy.

THE Court proceeded to business without any further difficulty. Upon the rising of it, information was received from Bayou Sarah, that the inhabitants in that quarter felt but little disposition to recognise the authority of the judges. Gentlemen of the bar wrote to us, that apprehensions were entertained, that an attempt to hold Court, might excite tumult and riot. This information was confirmed by a memorial from a number of respectable inhabitants.

THE judges now found themselves compelled to determine whether they would proceed to St. Francisville, and exercise their judicial duties, in a part of the country, the inhabitants of which were disposed to question the authority of officers, whom the government of the United States appeared to disown.

THE general result of their reflections, aided by all the sources of information, and every advice within their reach, was, that their authority, as territorial judges, remained unimpaired in the seventh district of the former territory.

THIS was to be rule of their conduct, although contrary to the opinion which they were bound to weigh and respect, but to which they could not submit, without a dereliction of duty; the authority was to be exercised or surrendered: the latter alternative was adopted.

SPRING 1812. I. District.

IN resigning, the judges understood they resigned no authority under the state—they resigned to the President of the United States; and, therefore, those powers only, the resignation of which he could accept, to wit, those he had given. They considered their authority, under the schedule, as unimpaired, and have continued in the daily exercise of it.

THEY believe that the state having acquired a right to their services, no resignation to which the state was not a party, could possibly dissolve the relation between them and their fellow-citizens of the state.

THEY now consider their power, under the state, such as it was under the territory—a power which ought to be exercised, until superceded under the authority of the constitution.

With sentiments of great respect,
We are, Gentlemen,
Your most obedient servants,

GEO: MATHEWS, JUN.
JOSHUA LEWIS,
F. X. MARTIN.

Hon. David B. Morgan,
and Joseph Landry, Esq's.

M'FALL'S CASE.

SPRING 1812. I. District.

THIS man, an inhabitant of the state of Kentucky, came down on a trading voyage to New-Orleans, and was recognised as a witness to attend the trial of an indictment.

Witness summoned in town, and staying till Court, not allowed milage back.

Morse, on his behalf, now claimed the daily allowance, made by the act of 1807, chap. 2, sect. 8, and milage to his place of residence in Kentucky.

Detained in town, allowed pay from the date of his recognizance.

THE daily allowance was claimed, from the date of the recognisance till the indictment was disposed of.

By the Court. Milage cannot be allowed, for witnesses are to be allowed only "for every mile "they shall necessarily ride going and coming"—now, if this man is under the necessity of *returning* home, it is not on account of the summons he has received, for he was not compelled to remove from the city of New-Orleans, in which he was summoned; so the necessity he is under, of returning to Kentucky, is not occasioned by the summons.

THE English part of the act, provides an allowance "for each day, they (witnesses) shall be "detained on the trial of any cause;" while in the French part, the allowance is, "for every day they "shall be detained near the Court"—*qu'ils seront*

SPRING 1812. I. District.

M'FALL'S CASE.

détenus près du tribunal. The first allows for every's days actual attendance on the trial, the second for every day's detention.

IN this case, the witness was recognised as he was returning home, and was compelled to wait till the meeting of the Court—the time being too short to allow him to go home and return. It is, therefore, but just the territory should pay him during the time he waited in town, for the meeting of the Court. Indeed, his case comes within the very letter of the French part of the act: he was detained near the Court—*détenu près du tribunal.*

HUDSON'S CASE.

Intention to depart, easily presumed, when a fraudulent or suspicious disposal of property is proven.

HE was arrested under the 22d sect. of the act of 1807, ch. 1, on the affidavit of the agent of one of his creditors.

Livingston and *Depeyster* moved that they might be allowed to disprove the intention "fraudulently and permanently to depart"—in order to obtain his release, without giving security.

WITNESSES were accordingly introduced, which testified to their belief that he meant to remain in the territory, till his affairs (particularly the present debt) were settled: a belief which arose

from their conversations with him, and the nature of certain transactions, in which he had lately engaged.

Smith and *Duncan*, who had obtained the judge's order, insisted on the proof resulting from the affidavit on which it had issued; and on the proof which they made, that he had sold a quantity of goods to the amount of about 60,000 dollars, to a person, who had failed the year before, on a simple note, without any endorser or any kind of security. The goods being the ground of the present debt, for which judgment had been confessed, with a long stay of execution. It was farther proved that the debtor, some time before, in an attempt to obtain the benefit of an insolvent law, had sworn to a schedule of his property, from which a considerable part of his estate was suspected to be omitted.

Livingston and *Depeyster*. The affidavit goes only to the belief of the deponent—this kind of proof is only admissible, when the statute authorises it. The section, under which the judge's order issued, requires proof "to the satisfaction of "any judge of the Superior Court."

PERHAPS the affidavit would have entitled the creditor to a writ of sequestration, but surely not to the arrest of the debtor, before the debt became payable.

SPRING 1812. I. District.

HUDSON'S CASE.

By the Court. Proof is the offer of circumstances which create conviction. A debtor may conceal his intention, so as to deprive his creditor of the means of administering positive evidence of it. Circumstantial evidence must then be admitted.

PACKING off goods is admitted to be evidence of intended flight. Reducing all one's goods into cash, paper, or portable effects, will operate as strongly upon the mind.

IF the intention to defraud be proven, a magistrate will be satisfied with facility of the intention to depart.

IN the present case, the disposal of so large a quantity of goods, by far the greatest part, if not the whole, of the property in the defendant's possession, in such a manner that when the execution will be at its maturity, they will be removed from its effects—the sale too, to a man who failed the year before, who has no visible property, without any surety, is a circumstance so uncommon, as to excite great suspicion, and amount to positive evidence, if not plausibly accounted for. In every bailee, very gross negligence amounts to fraud.

THE impossibility of coming to any property of the debtor, certainly excuses the creditor, if he does not resort to this mode of relief.

THE evidence before the Court, does not disprove the alledged intention. The judge who

granted the order, was satisfied with the proof offered; and there is nothing in what is presented to us, to induce us to believe that the intention to depart does not exist.

SPRING 1812.
I. District.
HUDSON'S CASE.

RELEASE DENIED.

BLOIS vs. *DENESSE.*

By the Court. If a debtor has time given him by his creditors, and afterwards denies the debt of one of them, he may bring a suit for a recognition of the debt, notwithstanding that the convention between the creditors and the debtor, allowing him a delay, has been homologated; for during the time given, the evidence of the debt may perish.

Creditor, whose debt is denied, may sue, notwithstanding the delay granted.

Caune, for the plaintiff.
Seghers, for the defendant.

DELOGNY vs. *RENTOUL.*

Ellery, opposed the introduction of testimony to prove admissions made, while a compromise was in contemplation.

Conversation of a party, while a compromise is in view, admitted to prove a fact.

Livingston, contra. Proposals made while a compromise is on the carpet, do not bind; but conversations, in which a fact is disclosed, may be admitted to prove it.

Case 2. 2 m 175 48 1530

SPRING 1812. I. District.

OF this opinion was *the Court.*

CHABAUD vs. *GODWIN.*

Appellee must confine himself to the general answer, unless he have leave.

By the Court. The appellee, in answering the petition for the appeal, cannot insert any new matter, much less annex any document, and entitle himself to read it, without leave of the Court—but must confine himself to the general answer, to wit, that there is no error, &c.

Hennen, for the plaintiff.

Depeyster, for defendant.

RALPH & CO. vs. *F. L. CLAIBORNE.*

No appeal from an interlocutory judgment.

THE defendant prayed for a mandamus to the parish court.

HE is a citizen of the Mississippi territory, and being sued by a citizen of one of the United States, he filed his petition under the act of Congress, 1 *U. S. laws*, 56, for the removal of the cause for trial into the district court of the United States. The parish court rejected his application, whereupon he prayed an appeal, which was refused. His application was for the writ of this Court commanding the parish court to admit the appeal —on the ground that he could not proceed before the parish court, without waving, by his plea, the

right of removing the cause into the district court.

SPRING 1812.
I. District.

RALPH & Co. *vs.* CLAIBORNE.

By the Court. The interlocutory judgment cannot be the ground of an appeal.

MANDAMUS DENIED.

STATE vs. *DUPUY.*

By the Court. The defendant is indicted for *shooting at* a man, with intent to murder him: and we are applied to, to bail him.

The French and English part of an act, construed together, not viewed as distinct acts.

BY the act of 1805, ch. 50, sect. 24, an assault by wilfully *shooting at*, with intent to commit murder, is made a high misdemeanor.

BY that of 1806, ch. 29, sect. 1, *shooting* any person, with intent to commit the crime of murder, is made a capital offence. In the French part, however, of this act, *shooting at*, is made capital; when done with a murderous intent—*qui tireront avec un arme à feu sur quelque personne.*

SINCE the year 1806, inclusively, the acts of the legislature are passed in both languages, and an original in each, receives the signatures of the speaker of the house of representatives, the president of the council, and the approbation of the governor. So that they are both the text: and the practice of the Court has been, to construe them, one by the other. Neither of them is a translation of the other.

SPRING 1812. I. District.

STATE *vs.* DUPUY.

BUT we cannot consider the two acts otherwise than as parts of a whole, and not as distinct expressions of the will of the legislature—as *two* acts.

IF we were, the French part of the act of 1806 would take the offence of *shooting at*, with the intention of committing murder, from the class of misdemeanors, and place it into that of capital offences.

CONSTRUING it, however, with the English part, the French is controlled by it, and the shooting remains in the class of misdemeanors, when the party aimed at is missed. We do not allow the French to control the English, because the mode of construction most favourable to the defendant must prevail.

BAIL ADMITTED.

POUTZ & AL. vs. *DUPLANTIER.*

A sale, on credit of the goods of the maker of a note, does not discharge the indorser.

THE defendant was sued as endorser of a note. The plaintiffs had brought suit and obtained judgment against the maker, whose property was taken in execution and sold at twelve months credit, under the act of 1808, ch. 15.

Hennen, for the defendant. This is complete payment, the maker's property being taken from him and sold to discharge the judgment: the debt is completely satisfied. The seizure made by the

sheriff, has divested the maker of the note from his right on the land taken in execution. He stands completely discharged. Surely the plaintiffs could not take him on a *ca' sa'*. The law will not take the maker's property, and the endorser's cash, to discharge the note, if the property seized be sufficient. If the plaintiffs recover in the present suit, the present defendants will turn round, after having paid the judgment, and bring their action against the maker of the note, for money paid for him; and thus he will be twice charged. The seizure, or forced sale, of the goods and chattels of a debtor, transfers the property of the thing seized to the purchaser or vendee. *Civil Code*, 490, *art.* 1.

Morel, for the plaintiffs. The holder of a note cannot lose his claim on any of the parties whose name appears on the face or back of it, till he actually receives the amount of it. Even the capture, detention, and discharge from imprisonment of a co-obligee, does not discharge the others: nothing but actual payment will do it. *Hayling* vs. *Mulhall*, 2 *Bl. Rep.* 1235. A levy of sufficient property to satisfy the debt, will be of no avail to a co-obligee, unless an actual sale has taken place: till the money be paid.

By the Court. If the act of our legislature were susceptible of no other mode of construction,

SPRING 1812. I. District.

POUTZ & AL. *vs.* DUPLANTIER.

than that for which the defendant's counsel contends, we would be bound to declare it unconstitutional. The tenth section of the first article of the constitution of the United States, provides that no state shall make any thing but gold or silver coin, a tender in payment of debts. If the plaintiffs were compelled to discharge the defendant, they would have nothing for the debt but the note and surety given by the purchaser of the property, at the sale under the execution, and the lien or mortgage on that property. That property, if it consist in negroes or goods, may perish—even lands are, in this country, liable to deterioration and destruction by the Mississippi. The law would, then, make such a note, a chose in action, and the lien on the goods sold, a tender in payment of debts. This the constitution of the United States has forbidden.

THE execution, till the money be actually got, is an ineffectual execution, and that is no bar to the plaintiff's claim, against a co-obligee, according to the cases cited on the part of the plaintiffs.

THE jury, however, found a verdict in favor of the defendant.

BERMUDEZ vs. *BERMUDEZ.*

[A wife, living out of her husband's house, not allowed to keep her daughter.

THE plaintiff had procured a writ of *habeas*

2m 180
52 683
2m 180
105 744
105 745

2m 180
121 93

corpora against his wife, for his two sons and daughter.

ABOUT eight or nine years ago, he was under the necessity of visiting the internal provinces of Spain near Louisiana, and was imprisoned on an alledged breach of their laws; and several years elapsed before he could return to New-Orleans, his place of residence. He had left the whole of his effects with his wife, for her support and that of their children, and had directed, besides, the payment of a monthly allowance to her; and during his captivity and absence, had taken measures for the disposal of a tract of land near the city, and the application of as much of the proceeds as would appear needful, to the wants of the family.

ON his return, the lady, who lived in her brother's house, declined returning, or sending the children, to her husband.

SHE brought the children into Court, in obedience to the writ, declared her readiness to submit to its order, but insisted on her right to retain her children, especially the girl, who appeared to be about eleven years, to whom, in her judgment, the cares and attentions of a mother were more necessary than those of a father.

THE Court asked her, why she had refused returning to her husband—she answered, she had reasons which she declined giving.

SPRING 1812. I. District.

BERMUDEZ vs. BERMUDEZ.

SHE was farther asked, whether she had any grounds of complaint against him—whether she Judged him to want the ability or disposition, to educate the children well—or whether she could alledge any instance of misconduct in him, which it might be improper that the children should witness? She answered all these questions in the negative.

By the Court. The paternal house is the proper residence of the family. If the wife chuses to absent herself from it, without offering to the Court any reason therefor, the Court will presume that none exist. *De non apparentibus et non existentibus, eadem est lex.* In such a case, they must consider her as the faulty parent.

THE father is the master of the family. His authority, as to its civil force, is founded in nature, and the care which it is presumed he will have of their education. While his conduct is proper, the Court cannot interfere with his authority, and will cause it to be respected.

THE mother, however, is not without her rights. If she be compelled to live separated from him, on account of ill treatment—if, from his conduct, she can shew that the children are not likely to receive a proper education, or that it will be a dangerous example to them, the Court will afford

their aid to her solicitude, especially in regard to the daughters, and deprive the father of a power which it is likely that he will abuse. For the right of the community to superintend the education of its members, and disallow what, for its own security and wellfare, it sees good to disallow, goes beyond the right and authority of the father. *Blisset's case, Lofft's Reports,* 748-749.

THE Court orders that the plaintiff's sons and daughter be delivered to him.

DURNFORD vs. *JOHNSON.*

An ineffectual attempt to present the note to the maker, does not suffice to charge the indorser.

THIS was a suit against the indorser of a promissory note. The maker, at the time it was given, resided in New-Orleans, from whence the note bore date. Before it became due, he went to Europe, and on his return went to reside, with his wife's mother, in the county of the German Coast.

THE note, which was deposited in the bank for collection, was, on the last day of grace, handed to a notary, with a charge to be strict in making the protest. He accordingly went to the ferry, in order to cross the river—but was told the wind was too high to admit of his going over, whereupon he rode a considerable distance up the river without being able to cross, and was informe dit would

SPRING 1812. I. District.

DURNFORD vs. JOHNSON.

be in vain to go higher, as no craft were to be had. This being late on Saturday, he declined proceeding farther: the next day he returned home, and on Monday morning made a protest in his office, and gave notice to the indorser.

THERE was not any evidence of any other call, or of any demand, on the maker.

ON this, *Hennen*, for the defendant, prayed for a non-suit, and the Court intimating an opinion that the plaintiff had not made out his case, and ought to be non-suited—*Depeyster* and *Porter*, for the plaintiff, declined to submit to a non-suit, *Hennen* objected to the note and protest going to the jury.

By the Court. The plaintiff having the right, notwithstanding the opinion of the Court, to put his case to the jury, it follows that the jury must have all the writings which have been properly offered to them.

THE Court charged the jury, that the indorser, being only liable on the default of the maker, the latter ought to be called upon before the former was resorted to, and that the plaintiff having neglected to do so, was not entitled to their verdict.

THE jury could not, however, agree upon a verdict; and one of them was withdrawn by consent. See 1 *Gould's Espinasse*, 96-7-8, *and the cases there cited.*

DESBOIS'S CASE.

MARTIN, *J.* delivered the opinion of the Court. SPRING 1812. I. District.

Jean Baptiste Desbois has applied for a licence to practice, as a counsellor and attorney at law, in the superior courts of this state. By one of the rules of this Court, the application is not to be admitted, unless he be a citizen of the United States. 1 *Martin*, 84.

Inhabitants of the territory of Orleans became citizens of Louisiana, and of the U. States, by the admission of the country as one of the U. States.

HE admits he has no claim to citizenship by birth, nor by naturalization, under the acts of congress to establish an uniform rule of naturalization. 6 *Laws U. S.* 74 & 7 *Laws U. S.* 136; having never complied with the formalities required by any of these laws.

HE contends, however, that natural birth, and a compliance with the formalities of these laws, are not the only modes of acquiring the citizenship of the United States: that the constitution itself has provided a third, viz. the admission into the Union, of a state of which one is a citizen.

BY the 3d section of the 4th article of the constitution of the United States, it is provided that "new states may be admitted by the congress into the union"—and the 2d section of the same article directs that "the citizens of each state shall be entitled *to all the priviledges and immunities of citizens in the several states.*" It is impossi-

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ble to give to the provisions of these two sections their effect, in the opinion of the counsel for the motion, without recognising, as a constitutional principle, the position that, on the admission of a new state into the union, its citizens, the members who compose it, become *ipso facto* entitled to all priviledges and immunities of citizens in the several states, consequently to those of citizens of the United States.

IN the confidence that this position will be recognized by the Court, he has built his hopes of success on the establishment of the following facts:

1. That the state of Louisiana was, on the 30th of April last, "declared to be one of the United "States of America, and admitted into the union, "on an equal footing with the original states, in "all respects whatsoever."

2. That at the time, he was a citizen of the state of Louisiana.

To establish his citizenship of the state of Louisiana, he has proved that some time in the year 1806, he removed to, and settled with his family in, the city of New-Orleans, within the territory of Orleans, in contemplation of the enjoyment of all the advantages, which the laws of the territory, and of the United States, held out to foreigners removing into that territory, which he has ever since considered as his adopted country.

That on the 16th of February, 1811, "the *in-* "*habitants* of all that part of the territory or coun- "try, ceded under the name of Louisiana, by the "treaty made at Paris on the 30th of April, 1803, "between the United States and France, contain- "ed within the following limits" (including the city of New-Orleans) were "authorised to form, "*for themselves*, a constitution or state govern- "ment:" that accordingly, a constitution was formed, and the inhabitants of that part of the former territory of Orleans, which includes the city of New-Orleans, became an independent state, by the name and stile of the state of Louisiana, of which, in his judgment, he is a component member, a citizen.

THERE cannot be any doubt of the correctness of this reasoning, if the word *inhabitants*, used in the part of the act of congress cited, is to be understood *lato sensu*, so as to comprehend every inhabitant, actually settled: but it is contended this word is to be taken in a *restricted sense*, so as to exclude such inhabitants, as were not in the country at the cession.

THE grounds on which it is expected that the latter interpretation will prevail, are:

1. THAT it was only in favour of the persons who inhabited the country, at the time of the cession, that the incorporation into the union, and the

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admission to the rights of citizens of the United States, were stipulated in the treaty. *Art.* 3.

2. THAT the promise, made by congress in 1805, 7. *Laws U. S.* 283, "That as soon as it "shall have been ascertained by an actual census, "or enumeration of the inhabitants of the territo- "ry of Orleans, taken by proper authority, that "the number of free inhabitants, included there- "in, shall amount to 60,000, they shall thereup- "on be authorised to form for themselves a con- "stitution or state government and be admitted "into the union, upon the footing of the original "states in all respects whatsoever," was accompanied with a declaration that the admission should be made "conformably to the provisions of the 3d "article of the treaty." Therefore no person can claim the benefit of this new promise, who could not that of the stipulation in the treaty.

3. THAT the persons, in whose favour the act of congress of the 16th of February, 1811, was made, are described as "the inhabitants of all that "part of the *territory or country ceded, under* "*the name of Louisiana, by the treaty made at* "*Paris, &c.* contained within the following lim- "its;" whilst it would have been far easier to have said: "the inhabitants of all that part of the *terri-* "*tory of Orleans*, contained within the following "limits, &c." if congress had not intended, by a reference to the treaty, the more markedly to point

out those for whose advantage the law was passed, viz. the inhabitants of the territory ceded, at the cession.

4. THIS construction is corroborated by the distinction made by congress in one of their acts. (7 *Laws U. S.* 51.) They there extend the right of owning ships and vessels of the United States, "to the inhabitants of the ceded territory, *who* "*were residents thereof on the* 30*th of April*, "1803:" clearly excluding those who had arrived since, and were consequently, as it is contended, no part of these inhabitants, in whose favour the stipulation in the treaty was made.

THIS interpretation is resisted on these grounds:

1. THAT the word "the inhabitants of all that "part of the territory or country CEDED," are plain and explicit: and that the Court ought not to permit itself to resort to any rule of construction, when the meaning of the legislator is not expressed in words of a dubious meaning.

2. THAT if the expression was a doubtful one, it would be fairer to look for a clue, in the other parts of the act, than to seek it in other acts, passed several years before, and by other legislatures,—and that it is safer to judge of the legislator's meaning by what he has *done*, than by what he has *said*. Whatever congress may have *said*, as to the persons entitled to be members of the new state,

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they have actually *vested* the right of composing the body, who was to frame the constitution, in some inhabitants who arrived since the cession.

3. THAT to construe the word *inhabitants*, so as to include all *actual* inhabitants, at the time the word was used, is not to construe it *lato sensu*, but to give it its plain and obvious meaning only.

4. THAT if the word be ambiguous, the Court is to look for the meaning of the legislator, in the usage of the country before the passage of the act. Common usage being the best interpreter of the law. *Si enim de ambiguitate legis quæratur, imprimis inspiciendum erit quo jure civitas* RETRO *in ejusmodi casibus uta sit. Stabilia ac optima legum interpres sit consuetudo. Pand. lib.* 1, *tit.* 3, *l.* 37.

5. THAT construction ought, *cæteris paribus*, to preponderate, by which, in the charter of the sovereign, his beneficence shall have the most extention. *Beneficium imperatoris quod a divina scilicet ejus indulgentia profiscicitur quam plenissime interpretare debemus. Did. lib.* 1, *tit.* 4, *l.* 3.

I. IT is true that if the words "the inhabitants "of all that part of the territory or country ceded" stood aloof from others, which may give them another meaning, the Court would not resort to any rule of construction. *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda*

est. 2 *Saund.* 157. But to admit that the words are susceptible of that meaning only, in which the counsel for the motion understand it, is to give up the whole question.

II. SURELY, the legislator's meaning will be more safely ascertained from a comparison of the different parts of a statute; but it is also proper to consider all other statutes *in pari materia;* and as *actions* denote intentions more forcibly than *words*, what the legislator has *done*, will be better evidence of his will, than what he has *said.*

THE doubt which arises as to the meaning of the word *inhabitants*, used in the first part of the first section of the act of 1811, when we compare it with antecedent acts, must be much weakened, when we do so, with what is *said* and *done*, in the second section.

WE are to take notice that in the first, the persons who are to constitute the new state are pointed out. The object of the second is, to select from among them those who, on the day of election, are to pronounce the will of the future citizens, in the choice of their representatives. Here we find that inhabitants of the territory ceded, arrived since the cession, even within two years, are authorised to vote. The inference is very strong that, since they are thus called, by an express provision, with those who were in the country at the cession, to

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co-operate in the formation of the constitution, they were intended by congress to have the same rights, at least, as those of the inhabitants at the cession, who for want of certain qualifications were excluded from the poll.

IF the inhabitants, who were here at the cession, were the exclusive object of the congress's attention and favour in the *first* section, it is strange that in the *second*, the most important, they should be entirely pretermitted. In pointing out the voters, no right is given to, them as such.

III. IV. Let us now seek the meaning of the word, in the laws and usages of the country before the passage of the act.

THE act of congress, authorising the formation of the constitution of this state, 10 *Laws U. S.* 322, was almost litterally copied from that which authorised that of the state of Ohio. 6 *Laws U. S.* 120. In the first section of the latter, "the *inha-* "*bitants* of the eastern division of the territory "north-west of the river Ohio," are authorised to form, for themselves, a state constitution." In the 4th section, the persons entitled to vote for members of the convention, are described—first, all male citizens of the United States—next, all other persons having, &c.

THE word *inhabitants*, in the first section of this act, must be taken *lato sensu*, it cannot be

restrained so as to include citizens of the United States only; for other persons are afterwards called upon to vote. There is not any treaty, or other instrument, which may be said to control it. Every attempt to restrict it, must proceed on principles absolutely arbitrary. If the word is to be taken *lato sensu* in the act passed in favour of the people of one territory, is there any reason to say that we are to restrain it, in another act, passed for similar purposes, in favour of the people of another territory?

IT is one of the oldest principles of Anglo-American jurisprudence, that the soil of the United States is that of UNIVERSAL NATURALISATION. An alien in America before the revolution, was entitled to many more rights than an alien in England. 1. By the very act of *migration* to, and settlement in, America, he became *ipso facto* a denizen, under the express stipulations of the colonial charters (all of which, it is believed, contained similar clauses) whereby it was stipulated, for the better encouragement of all who would engage in the settlement of the colonies, that they, and every one of them, that should inhabit the same, should and might have all the priviledges of free denizens or persons natives of England. *Q. Elizabeth's charter to sir W. Raleigh.* 2. By the same act of migration, he had a right to be natura-

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lised under the sanction of a pre-existing law, made not only for the benefit, but for *the encouragement*, of all in a similar situation with himself. The operation of these laws was *immediate* not *remote:* he became a denizen, as of right, instantly; he became naturalised. upon payment of the legal fees for his letters of naturalisation, and taking the oaths. 1 *Tucker's Blackstone*, *part* 2, *app.* 99.

AFTER the revolution, this principle was engrafted in the constitutions of most of the states. Every foreigner, says the 49th article of that of North Carolina, who comes to settle in this state, having first taken an oath of allegiance to the same, may purchase, and by other lawful means, acquire, hold, and transfer land and other real estate, and after one year's residence, shall be deemed a free citizen.

BY the adoption of the constitution of the United States, the right of aliens to become citizens, was by no means intended to be taken away. On the contrary, it is expressly provided that "congress shall have power to establish *an uniform* "*rule* of naturalisation." *Art.* 1, *sect.* 8. Here we may observe that congress are authorised to prescribe the *mode*, by which aliens are naturalised; but it never was intended to authorise them to take away the *right*. For, among the acts of misrule, alledged against George III. in the declaration

of independence, it is asserted that "he has endea- "voured to prevent the population of these states; "for that purpose, obstructing the law for the na- "turalisation of foreigners, and refusing to pass "others to encourage their migration thither." Every alien, coming to the United States in time of peace, therefore, acquires an inchoate right under the constitution to become a citizen. 1 *Tucker's Blackstone, part* 2, 99, 100.

EVERY European nation possessed of colonial establishments in America, except, perhaps, the Spanish, admitted foreigners to naturalisation in them, without difficulty; and whatever might be the conduct of Spain in her other American colonies, in Louisiana, naturalisation was obtained with great facility. Foreigners were permitted to settle, lands were allotted them, and the expence of their migration was often borne by the crown, who in many instances supplied them with the means of subsistence during the infancy of their establishments. *See Gayoso's instructions and Carondelet's contracts with Bastrop and Maison Rouge. Land laws U. S. appendix* 63, 67, 70. Frequent instances occurred, under the Spanish government, of such naturalised citizens, being appointed to offices of high trust and profit.

IT is, therefore, correct to conclude that foreigners who migrated into the territory of Or-

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leans after the cession, acquired, by the very act of migration, an inchoate right of naturalisation or territorial citizenship, under the particular laws of the land (we mean those by which the country had been regulated under the dominion of Spain, and which remained unrepealed) and the general principles of the American government.

IN 1805, in extending to their newly acquired possession the second grade of territorial government, congress vested new rights in the inhabitants; and as these rights expressly extended to future immigrants, held out new inducements to foreigners disposed to migrate—inducements to which is perhaps due, in a considerable degree, the extraordinary increase of the population of the territory.

THE rights which foreigners acquired before 1805, in migrating into the territory, were that of purchasing and holding land, and consequently establishing themselves thereon.

IT does not appear that they were under any disqualification, express or implied, from holding any office in the territorial government. The contrary is to be presumed; for their eligibility (after a certain period) to seats in the legislative council, had been declared. That body was to be composed of thirteen of the most fit and discreet *persons* of the territory, chosen among those holding

real estate therein, and who shall have resided *one year* at least in said territory. 7 *Laws U. S.* 113.

IN 1805, to those rights were added:

1. That of voting for members of the house of representatives, after a residence of two years.
2. That of being eligible as a representative, after three,
3. And as a member of the legislative council—*Ordinance of* 1787.

THEY were not disqualified from holding any office.

IT is true some real property was required, to exercise those rights; but the same property qualification was indispensable to the inhabitants of the ceded territory residing there at the session.

SO that, as to the rights of a territorial citizen, inhabitants arrived since the cession, were *on a perfect equality* with those who were residents at the session.

PERSONS, endowed by the laws of the territory and of the union, with such extensive, such valuable rights, could not be considered on the footing of aliens, in any sense of the word. They had acquired civil rights, of which they could not be wantonly deprived, without a violation of some of the most sacred principles of political justice, as well as of moral obligation. They might emphatically call that country *their own*, in which they

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were permitted to exercise such rights—rights for which some of them had paid a valuable consideration.

THOSE who have served the territory in the legislature, or accepted offices, have, in many instances, forfeited their civil rights and become aliens in the country from which they migrated. *La qualité de Français*, that is to say, French citizenship, shall be lost: 1. By naturalisation acquired in a foreign country: 2. By *the acceptance of public functions*, unauthorised by the emperor, *conferred by a foreign government*: 3. By every establishment in a foreign country, without the intention of returning. *Napoleon Code, livre* 1, *chap.* 2, *sect.* 1, *art.* 17.

SURELY, he, who thus engaged in the service of his adopted country, did it in a confidence, which the American government had excited, and consequently was bound not to disappoint wantonly, that its protection should not be withdrawn without cause; that it should not betray him, by sending him back, a stranger in the whole world, liable to be taken and delivered to the very sovereign whose resentment he had excited, by an attempt to throw off his allegiance.

IF an individual, who thus forfeited his rights in his native country, is not, by the late change of government, a citizen of the state of Louisiana, he

is *an alien* TO ALL INTENTS and PURPOSES WHATEVER. When he finds himself thus thrown away, an outcast upon the world, he may well address congress thus: "You have declared me *an* "*alien*. On a war breaking out with my former "country, you will consider me as AN ALIEN "ENEMY. If ever the same laws are enacted as "were passed in 1798 (4 *Laws U. S.* 143) I may "be shipped away. I settled in one of your ter- "ritories, in which your laws offered me a domi- "cil, the right of holding land, elective franchise, eli- "gibility to every office, capacity to exercise legisla- "tive functions: brilliant prerogatives from which "my dazzled mind could not by any possibility "separate the quality of a citizen. I have taken a "wife, children are born to me. These are citi- "zens. Shall I take them with me out of the "only country, in which they have any right, and "wander with them, outcast and forlorn, till I "find an hospitable nation, from whose genero- "sity we may obtain, what we vainly claimed from "your justice. Or shall I part from them and "with the civil rights, of which I am despoiled, "lose those of a husband and a father?

"IT is true I cannot turn to any part of your "statutes in which the citizenship of the United "States was *expressly* promised to me. But

"The obligation of promises, says archdeacon "Paley, depends upon the expectations, which

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"we knowingly and voluntarily excite; conse-
"quently any action or conduct towards another,
"which we are sensible excites expectations in
"him, is as much a promise and creates as strict
"an obligation, as the most express assurances.
"Taking, for instance, a kinsman's child, and
"educating him for the heir of a large fortune, as
"much obliges us to place him in that profession,
"or to leave him such a fortune, as if we had giv-
"en him a promise to do so, *under our hands and*
"*seals. Paley's Ph.* 99, 100.

"Now, if nations are bound by moral obliga-
"tions, receiving a foreigner, allowing him to pur-
"chase land, bestowing on him elective franchise,
"passing laws to authorise him to exercise legis-
"lative functions, that is to say, the sovereign
"power of the country, naturally excite expecta-
"tions, which cannot be wantonly disappointed,
"without a flagrant breach of faith. The expec-
"tation which your conduct excited in me was,
"that I should never be reduced to the condition
"of an alien, without some fault on me."

V. THE Court recognizes the principle that the *act to enable the people of the territory of Orleans to form a constitution, &c.* ought to have a *liberal* construction, and that, without the utmost necessity, no part of it ought to be so interpreted so as to destroy acquired *rights*. In ordinary affairs, the benignity of the law, says lord

Bacon, is such that when, to preserve the principles and grounds of the law, it deprives a man of his remedy, it will rather put him a better degree and condition than in a worse, *nam quod remedio destituitur, ipsa ratione valet,* SI CAUSA ABSIT. *Bacon's Elem. c.* 9. If a man shall not lose his *remedy* without his fault, shall he be presumed to lose his *right*? The presumption, then, must be, that congress, in establishing a government, which necessarily must have deprived certain individuals of their civil rights, would be inclined to give them better—rather raise them to the high situation of a citizen of the United States, than to degrade them to the degree and condition of an alien.

ON the best view of the case, we are of opinion that the reference to the treaty, and the distinction made, in favour of the inhabitants, who were here at the cession, in the sole instance of owning vessels of the United States, are not sufficient circumstances, from which we may imply the intention of congress to exclude from the rights of a citizen of the state of Louisiana, *any person actually and bona fide an inhabitant* of that part of the territory of Orleans, described in the act, at the time of its passage.

THE consequence of this opinion, on the present case, is, that the applicant must be considered as a citizen of the state of Louisiana, and as such

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is entitled to all the rights and priviledges of a citizen of the United States.

Duncan, *Brackenridge*, and *Gales*, for the motion.

Robertson, *Dick*, and *Wilson*, contra.

SAUVE vs. *DAWSON.*

Note to be proved by the report of exports. Appeal bond a good piece of comparison.

Smith, for the plaintiff, offered to prove a promissory note of the defendant, by the introduction of a witness ready to testify to his acquaintance with his hand-writing, and to his belief that the signature at the bottom of the note, was in his hand-writing.

Hennen, for the defendant. This mode of proof is not to be resorted to. The note is denied, and the *Civil Code (p.* 306, *art.* 226*)* provides that "in case the party disavows his signature, proof "of it may be given under oath or affirmation, "by at least one credible witness, declaring positively that he knows the signature, as having "seen the obligation signed by the person from "payment is demanded, and if there be no such "deposition, the signature of the person must be "ascertained by two persons having skill to judge "of hand-writing, appointed by the judge before

" whom the cause is pending, which two persons " shall report on oath, whether the signature ap- " pears to them to be that of the person, whose it " is alledged to be, on their having compared it " with papers acknowledged to have been signed " by him."

Smith, contra. This is a commercial instrument, the proof of which is not to be regulated by the general law. Papers of this kind are very seldom attested by a subscribing witness. The provisions of the *Civil Code* do not controul the established law and usages of commerce, *p.* 470, *art.* 74, and this is the best evidence the nature of the case admits.

By the Court. The part of the *Civil Code* invoked by the plaintiff's counsel, is expressly confined to *claims on the thing sold.* The evidence which we must require, is that which the legislature has pointed out, even when in our opinion, it appears weaker than that which is offered.

WITNESS REJECTED.

Smith then offered the appeal bond, executed by the defendant, as a piece of comparison.

Hennen, contra. It has a subscribing witness, and before it be used, that witness must be bro't to prove it.

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By the Court. The bond having been filed in the office by the appellant, has become a matter of record, and cannot be denied.

THE note was accordingly proven by a comparison with the signature at the bottom of the appeal bond.

PHILIBERT vs. *WOOD.*

Depositions must be returned by the persons receiving them —even when taken by consent.

Smith, for the plaintiff, offered a deposition taken by consent of the defendant's counsel. It was on a loose sheet of paper, and had remained since the taking, in the possession of *Smith.*

Hennen, for the defendant. It cannot be read. The act of 1805, ch. 26, sect. 19, requires that the person taking the deposition of a witness, "shall enclose the same, under his seal, and direct "it to the clerk of the Superior Court." It is his duty to prevent any change or alteration from being made, by enclosing it under his seal, and he should transmit it to the clerk—not deliver it, for keeping, to either of the parties, who may, if the testimony does not suit him, suppress it. The deposition, when taken, belongs to both the parties—neither of them ought to be allowed the facility of depriving the other of it.

Smith, in reply. This act relates only to depo-

sitions taken under it, and by a rule of Court. In the present case, the deposition was taken by the consent of both parties, who therefore impliedly agreed that it should be read, and as they imposed no condition, it must be read absolutely.

By the Court. The party, by consenting that the deposition should be taken, cannot be presumed to have dispensed with any of the formalities required by law, in receiving testimony out of Court.

DEPOSITION REJECTED.

AUGENT vs. *TREPAGNIER.*

THE defendant was sued as the endorser of a promissory note.

Juror who tried a suit of plaintiff's against another indorser not absolutely incompetent. Objection too late after trial begun.

DURING the trial, *Depeyster*, the defendant's attorney, observed that one of the jurors had tried a suit brought by the plaintiff against another indorser of the note, and prayed he might be discharged; observing that the objection would prevail on a motion for a new trial, and it would save the time of the Court to make it now.

By the Court. It is not clear that the juror is incompetent. Likely, as this case may turn on the same point, as the one which the juror has tried, if the attention of the Court had been drawn

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to this circumstance, they would have been readily induced to dispense with his attendance.

IF the witness was incompetent, the Court would discharge him now. In *Kaighn & al.* vs. *Kennedy*, one of the jurors looking at the deposition, recognised on the back of it some figures, which he had made in casting up the interest, on the trial, in the court below, having been a juror there, and *Moore* objected to his trying the cause now, as he had already done so once: On this the cause was continued. *Martin's Notes*, 38.

MOTION OVERRULED.

TONNELIER vs. *MAURIN'S EX'R.*

A person of colour, living with the deceased, and allowing him to receive her negroes' hire without calling him to account, presumed to have allowed the hire as her part of their joint expence.

THE plaintiff lived with the defendant's testator as his *ménagère*. She had with her in his family, several grown daughters of hers. It was in evidence that he hired out some of the plaintiff's slaves, and received their wages. They had lived together in this manner for several years, in Hispaniola, St. Yago de Cuba, and New-Orleans.

By the Court. There being no evidence of the plaintiff having been accounted with, or of any claim of hers in the life time of the testator of the defendant, it must be presumed that the parties had joined their stock for their mutual support. The plaintiff might as well claim wages for her

services in the house, or might be sued for her board and that of her children.

JUDGMENT FOR DEFENDANT.

Seghers, for the plaintiff.
Cauchois, for the defendant.

SHADDOCK'S CASE.

Witness losing her passage, &c. by being recognised, not entitled to any allowance therefor.

THIS woman claimed the daily allowance of a witness, from the date of her recognizance, on the authority of *M'Fall's Case*, *ante* 171. It appeared she came from New-York, about nine or ten months ago, for the purpose of collecting some debts due to her. She was part of that time in Florida, returned to New-Orleans, where she kept a boarding-house for two months—afterwards she gave up the house, and engaged her passage on board of a vessel bound to the Havanah. She was deprived of the opportunity of sailing in her, by being recognised to attend this Court as a witness.

By the Court. We went sufficiently far in the case cited, and the principle on which it was determined is not susceptible of extension. The applicant was not deprived, by being bound as a witness, to follow her former mode of obtaining a support. The means through which she had maintained herself during the preceding nine

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months, at the time of the call made on her, were not thereby taken from her. M'Fall was a Kentucky trader, who had come to dispose of a cargo —had he gone home and returned to Court, the milage would have amounted to more than the daily allowance. Havanah, where the present applicant wished to go, was not more her place of residence, indeed much less so, than New-Orleans.

CLAIM DISALLOWED.

Young, for the applicant.

STATE vs. *CECIL.*

Coloured persons presumed free. Collateral & incidental facts, not proven as strictly as facts in issue.

A WOMAN of colour was offered as a witness, by the attorney-general, and a gentleman swore that she was once a slave, but he had liberated her. She had a copy of the act of liberation; the original of which was in New-York.

Wilson, for the prisoner. The Court will not look at the copy, while the original is admitted to exist.

By the Court. The woman being of colour, the presumption is that she was born free. *Adele* vs. *Beauregard*, 1 *Martin* 183. But this presumption is destroyed by the declaration of her former master. This declaration, however, must be taken *in toto*, and it establishes her emancipation

in the same breath. Neither are we ready to say that when, in the trial of a cause, a fact comes incidentally and collaterally to be proved, the rules of evidence are as strictly to be insisted on, as when the facts put in issue are to be made out. In the latter case, the party has previous notice and time to procure the best testimony, which consequently will be required. Not so in the former case, as on a motion for a new trial or for a continuance—when a witness is examined on the *voir dire*.

WITNESS SWORN.

MILNE vs. *AMELUNG'S SYNDICS.*

Vendor, who has received part of his payment, may demand the whole thing sold, on returning it, or that it be sold to raise the balance.

By the Court. The petition states that the plaintiff sold to the insolvents two hundred and four bales of cotton. One half of the amount was paid down, and the insolvent's notes received for the other half, payable at sixty days. Before the maturity of the notes, the insolvents failed, and the plaintiff filed his petition, praying for an order of sequestration of the whole cotton, which was granted, and the same was accordingly landed, from a vessel on board of which the insolvents had shipped it.

THE prayer of the present petition is, "that "the said cotton may be declared to be the pro- "perty of the petitioner, and delivered to him, or

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" so much thereof as may be sufficient to satisfy " the three notes of hand aforesaid."

A VENDOR has a priviledge over the thing sold, that is to say, the right of requiring the sale of it, in order to obtain his payment, *Civil Code*, 470, *art.* 74, *sect.* 5, or of demanding the restoration of the thing sold. In the latter case, he is to refund what he has received, and he may prosecute that right, on the whole of the thing sold, even when it is divisible, and he has received part of the payment. *Ord. Bilboa, chap.* 17, *sect.* 40.

THE defendants having interpleaded and depended on the general issue, it would have been the duty of the Court, on proof of the facts in the petition, to have ordered, as the petition prays, that the whole cotton taken be declared to be the property of the plaintiff; he paying the expences of unlading, and reimbursing the part of the price paid him: but the parties have placed their controversy before the Court, on the following case agreed.

" ON the 16th of February, F. & H. Amelung " purchased of Andrew Milne two hundred and " four bales of cotton, weighing 65,728*lb.* at fif- " teen cents per pound, amounting to the sum of " $9,859 20, for which they paid one half in cash " and the other in their three promissory notes, " endorsed by Thomas Elmes. Before the said

" notes became due, Andrew Milne sued out a " special writ of sequestration, by virtue of which " the sheriff seized the whole cotton, on board of " the ship William, then bound to New-York, " consigned to Corp, Ellis & Shaw. Afterwards " the cotton, while in the possession of the sheriff, " was bonded for, under a rule of Court, and sold " at twelve cents and one half per pound, at 60 " days, the market price being fifteen cents in " cash: and Andrew Milne presents the annexed " account of charges, on the allowance of which " he is ready to hand over the balance in his hands."

" ON the above statement, the following points " are submitted to the consideration of the Court.

" 1. WHETHER Andrew Milne was entitled to " a special writ of sequestration?

" 2. IF so, whether the debts be entitled to pre- " ference or priviledge?

" 3. IF so, whether the preference or priviledge " be not confined to one half of the cotton, the " other being paid for?

" 4. WHETHER the costs and charges be not " to be deducted out of the said one half?

" 5. WHETHER the loss, if any, arising on the " sale of the cotton, bonded by Andrew Milne, as " aforesaid, is not to be charged exclusively to " him?

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"6. WHETHER the charges in the annexed "account be correct?

"*A. L. Duncan*, for plaintiff.
"*A. R. Ellery*, for defendants."

As by the consent of the parties, the cotton has been sold, and the specific prayer for a restitution cannot be granted, the case is before the Court, as if the prayer of the petition had been for the vendor's priviledge on the cotton, for the purpose of being paid out of the proceeds.

1. THE Court is of opinion, on the first point made in the case agreed, that the plaintiff was entitled to the special writ of sequestration.

2. ON the second, that the debt is such one as gives a preference and priviledge.

3. THAT the priviledge is not confined to a part, but extends to the whole.

4. THAT the charges are not to be deducted, but the plaintiff is entitled to the whole balance of his debt.

5. THAT the difference between the price at the two sales, is to be borne by the defendants, and not by the plaintiff: the action being, by the act of both parties, changed, from an action for the restitution of the thing sold, to an action for the payment of the debt.

6. THAT the charges in the account current not being supported by vouchers, cannot be admitted if denied: but it does not appear necessary

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to determine their legality, as the plaintiff is not to be charged therewith.

THE plaintiff is, therefore, to be paid the amount of the note with interest, from the day of their maturity; it being posterior to that of the demand.

BROFIELD'S HEIRS vs. *LYND.*

If after execution issued the plaintiffs become alien enemies, the Court will not interfere on a summary application.

JUDGMENT had been obtained and execution issued before intelligence arrived of the declaration of war by the United States against Great Britain. On a suggestion that the plaintiffs were subjects of the king of Great Britain, and are therefore alien enemies,

Livingston, for the defendant, moved that the execution be staid, on the ground that an alien enemy has no right of action whatever during the war. *Wilcox & al.* vs. *Henry.* 1 *Dallas*, 71.

Duncan, contra. The defendant cannot take advantage of this in this way. The court of King's Bench, in *Vanbrynen & al.* vs. *Wilson*, refused to stay judgment and execution on a summary application, because the plaintiffs after verdict became alien enemies. 9 *East*, 321. This is a stronger case against relief: for judgment has been given

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and execution issued. *Le Bret* vs. *Lapollon*, 4 *East*, 521, is also a case in point.

MOTION OVERRULED.

ORLEANS NAVIGATION COMPANY vs. *MAYOR &c. OF NEW-ORLEANS.* *ANTE* P. 10.

Servitudes are like incorporeal hereditaments and do not pass without a grant.

THIS case was now argued before the three judges.

Moreau for the defendants.

THE defendants have the right to continue to drain the waters of the city through the canal Carondelet, unless the plaintiffs furnish them another drain at their own expense.

1st. BECAUSE they are the owners of the spot on which the canal Carondelet is dug, or have at least the right to enjoy it, as making a part of the commons of the city:

2dly. BECAUSE they are entitled to the use of that service by the situation of the place.

I. THE defendants are owners, or have the use, of the spot of the canal, as making a part of the commons.

THERE existed commons under the French and Spanish government.

SEE the *procès verbal d'Olivier Devesin*, the surveyor-general of the province of Louisiana,

made on the 14th of July, 1763, by order of the king of France, to survey the plantation of the Jesuits (now the suburb St. Mary) when the property of the Jesuits was forfeited to the crown—the deliberations of the cabildo—the royal schedule of the king of Spain, dated the 21st December, 1797.

THOSE documents shew that the defendants had a title to the exclusive use of those commons.

RECOGNITIVE acts, when supported by a possession of thirty years, dispense of shewing the primitive title. *Civil Code*, 308, 310, *art.* 237.

THE canal Carondelet was included in the commons of the city.

1st. THE *procès verbal* of Devezin, says that the commons of the city extended in their depth as far as the bayou St. John:

2dly. THE royal schedule of the 21st of December, 1797, says that the three hundred toises to be rented and divided in small lots, were to be taken out of that part of the commons *which were, during six months of the year, covered with water*, a description which, according to the evidence, could only apply to the low spot where the canal Carondelet is situated.

3dly. THE deliberation of the cabildo under the date of the 13th March, 1795, granting three hundred square feet of the commons, to Alex. Baudin, for a certain time and for public utility, says that

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"*the canal Carondelet is situated on the commons* "*of the city.*"

THIS deliberation is signed by the Baron de Carondelet, as president of the cabildo. Let us enquire—in what consisted this right of commons?

WHAT constitutes the right of commons in France? 3 *Encyclopédie de Jurisprudence*, 74, *verbo Communes.*

IN France commons may be held either in ownership or only in use. 3 *Encyclopédie de Jurisprudence* 76, *verbo Communes.*

WHEN the lords who granted that right, had not divested themselves of their property, they were allowed to take a third part of the commons, for their separate use.

IN the year 1667, the king of France solemnly renounced that right on the commons held under the crown: he rendered an ordinance for that purpose. 3 *Encyclopédie de Jurisprudence*, 77, *verbo Communes.*

ROYAL ordinances and edicts extended their effect as far as the bounds of the empire, and therefore were in force in the French colonies. *Recueil des Edits et ordonnances royaux par Neron et Girard. Introduction, p.* 1.

UNDER the Spanish government, the cabildo made regulations to prevent the usurpations which were made on the commons of the city by several individuals, and to secure to the inhabitants of

New-Orleans, *the right of cutting wood thereon. Arrêté of the Cabildo, dated the 15th July*, 1796.

THE cabildo granted temporarily some parts of the commons for public utility.

A GRANT was made to Alex. Baudin, of a tract near the canal Carondelet, on the 13th March, 1795. *See translations of documents numb.* 2.

THE cabildo vested sometimes a part of the commons for the benefit of the city.

AN ordinance or *arrêté* was issued on the 5th October, 1792, by the cabildo, on the suggestion of governor Carondelet, by which they ordered to inclose certain parts of the commons, to be rented to the butchers for the benefit of the city.

A GRANT made by the king of Spain himself to one Bermudez, on the 3d May, 1799, which proves that the assent of the cabildo was necessary for such grants, even when they were made for public utility, and that when the condition or the express purpose of the grant was not fulfilled, the cabildo had the right to remove the grantee, and to cause the premises to return to their former nature of commons.

THE king himself, and therefore congress, had not the right to deprive the inhabitants of New-Orleans of the use of their commons, without their consent.

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COMMONS make undoubtedly a part of the things belonging to a community or corporation.

THINGS held in common by a corporation or community, are subject to the same rules as the goods held in common by the whole nation. *Vattel's Law of Nations*, 170, *numb.* 234 *and* 235.

THE sovereign has a right over public and common things, and they make a part of the royal domain, *Vattel*, 174, *numb.* 245 & 246—but he cannot alien or dispose of the public property, and if he alien or dispose of it, the alienation will be invalid. *Vattel*, 178, *numb.* 259 *and* 260.

THE law, 30*th*, *t.* 18, *partida* 3, declares without effect, the grants made by the king to the prejudice of the corporations or communities, unless he manifests a second time his intention to be obeyed.

THE law, 2*d*, *tit.* 5, *book* 7*th*, of the recopilation of Castille, which is posterior to the laws of the *partidas*, declare absolutely null, all grants made by the king, of things belonging to the corporations or communities.

THE rights which the city held under the former governments, were confirmed by an act of incorporation, of the legislative council, dated the 17th February, 1805, *sect.* 13, and afterwards by an act of congress, dated 3d March, 1808, which recognises and confirms the right of the city to

three hundred toises of the commons out and from the fortifications.

THE right of the city to the commons, cannot be affected by the charter of the Navigation Company, which is posterior to the act of incorporation, having been enacted but on the 3d of July, 1805.

THESE rights cannot be affected by the renunciation required by the act of congress, since this renunciation relates only to the land which lies between the basin and the river.

THEY cannot be affected, even impliedly, by the shares which the corporation have taken in the stock of the Navigation Company, since the charter has not vested them with the property of the soil, but only with the right to improve the navigation of the canal.

II. THE defendants are entitled to the service which they exercise on the canal Carondelet by the situation of the place.

SERVICES originate not only from covenant or prescription, but also from the nature of the things. *Civil Code*, 127, *art.* 3. *Domat*, 207, *numb.* 5, *of services*, *English translation.*

THE land situated below, must receive the waters which run naturally from the land above. *Civil Code*, 128, *art.* 4, *Digest*, *book* 39, *tit.* 3, *law*

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1*st*, *sect.* 13 & 22, *and law* 2*d. Ibid. Traité des Servitudes*, 494, 496, 497.

THE proprietor above can do nothing whereby the natural service, due by the land below, may be rendered more burthensome. *Civil Code*, 128, *art.* 4.

BUT the proprietor above may choose or assign the place where his canal is to pass. *Digest, book* 43, *tit.* 20, *law* 8. *Traité des Servitudes*, 563.

THE Civil Code is not repugnant to this assignment, since it presupposes it, when it speaks of the right which the owner of the land, subject to the service, has to change the place of it. *Civil Code*, 140, *art.* 64.

IF the primitive place of the service becomes inconvenient, the owner of the land subject to the service, may offer another place equally convenient for the exercise of it, and the owner of the land, to which the service is due, cannot refuse it. *Civil Code*, 140, *art.* 64.

THO' the Navigation Company be not the proprietors of the land adjoining the canal, they cannot be dispensed from furnishing to the defendants another place of drain, if they will not receive the waters of the city through the canal Carondelet.

THEY may buy the necessary lands from the neighbouring owners, and if these owners refuse to sell the same, they may compell them to do it, on account of public utility. *Civil Code*, 102, *art.* 2,

which is agreeable to the 7th article of the amendments of the constitution.

THE Navigation Company cannot be at liberty to change the place of the service, by offering only another convenient place, but they must furnish another canal of drain at their expence.

1st. BECAUSE the canal Carondelet was dug, at least for three fourth parts of the work, by the negroes of the city and its jurisdiction, within 15 miles.

2dly. BECAUSE it was dug by the consent of government, under whose title the plaintiffs claim, for the double purpose of navigation and of draining the waters of the city and neighbourhood. See *publications made by order of the Spanish government on the* 26 *May*, 1794, 15 *Sept.* 1795, 19 *Oct.* 1795, & 9 *December*, 1795.

IT is immaterial whether it be difficult, or even impossible, to have a canal of navigation, by continuing to drain the waters of the city through the canal Carondelet (though this impossibility has not in any manner been proved); the only enquiry is, whether or not the government intended that this canal should serve for this double purpose, and induced thereby the citizens to lend their negroes for that work.

IT is true that in the publication made the 26th May, 1792, it is said that "by the time the canal "Carondelet will be changed into a canal of navi-

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"gation," but these words were so little intended to exclude the draining of the waters, that in the publication made the 9th December, 1795, when the canal was nearly completed, so as to be navigable for schooners, the baron repeats that the inhabitants shall have thereby the benefit of draining *their stagnant waters.*

FROM its natural situation, all the land beyond the city, was liable to receive its water. By the convention which has taken place, every part of the land, except the spot on which the canal is dug, was freed from the natural servitude, which affected the king's property, as well as that of individuals.

IF the king had been the owner of all the land between the city and the bayou St. John, a navigable stream, he would have been bound to afford a way, though he might, like an individual, have required compensation: for he is liable to the laws as well as his subjects. 1 *Partida, l.* 15 & 16.

THE Court has said the servitude is not to be considered as a natural one, because created by the act of man: they have confounded the *right* with the *means* of exercising it. The owner having consented to the exercise of the right, on a particular spot, does not alter or change its nature.

THE intention of the king, in digging the canal was, in some degree, to rid the rest of his land

from the natural servitude with which it was burthened. The United States have succeeded to his rights, and transferred them to the plaintiffs, *cum onere.*

HAD the United States sold the land by parcels, the purchasers, might have resisted the return of things to the ancient form: and rightly claimed to hold these lands free from the burthen from which the king of Spain, in whose rights they would stand, had freed them. Is the case different, because one corporation has acquired the whole?

THE Court, in my humble opinion, erred in considering the servitude as created by the act of man. One party cannot raise a dam to stop the water, nor the other any work by which the burthen of the inferior estate may be encreased. *The work of man* does not refer to a *canal* dug, since the owner may do it at his expence.

MATHEWS, J. The canal was made by him by whose authority it was dug: the king of Spain, not the city.

Moreau, continuing. The Court also erred in determining this case on a principle of the common law of England, not applicable to us, in contradiction to the *lex loci.*

MATHEWS, J. It was at least on a principle consonant to reason. The right, having no corporal

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existence, could not be transferred by *delivery*, it must therefore pass by *grant*.

Moreau, continuing. The civil law knows not this distinction between corporal and incorporal rights. *Both* pass by *delivery*. No grant was necessary.

NEITHER was the Court correct in saying the city cannot take advantage of a contract, in which it did not intervene as a party. It does not represent, but has succeeded to the rights of, those by whose aid the king was enabled to dig the canal.

IF the sovereign cannot vest any property or right in a city without a grant, that of New-Orleans may be deprived of every part of its property: for it has no grant. The ground on which this hall stands, that on which the church was built, the jail, the hospital, all have passed without a grant.

MATHEWS, J. No person to accept.

Moreau, continuing. The three hundred toises around the fortifications, were not accepted by the cabildo, yet congress have recognised the right of the city, and confirmed their title.

MATHEWS, J. The sovereign can revoke his gift. The United States have done so, by granting to the present plaintiffs a right incompatible with that claimed by the city. The city cannot

complain, for congress gave it property of much greater value.

Moreau, continuing. The cabildo represented the city, and draining its streets being an object of public concern, might claim from the king the priviledge of emptying the waters of the city, over the king's land, into the bayou. The city council, having succeeded to that body, may lawfully claim a continuance of a right which the cabildo might insist upon.

THE defendants have a strong claim on the score of equity. The king said his situation, on account of the war, compelled him to set bounds to his munificence. He was unable to dig the canal without the help of the inhabitants of the city. He solicited that. Negroes, cash, were supplied by the wealthy; actual personal labour by the poor. This is surely a valuable consideration.

MATHEWS, *J.* This consideration has been repaid. The use, which the city has had till now, was more than an equivalent.

Moreau, continuing. The consideration a party gives, whatever it may be, entitles him, not to an equivalent, but to every thing that is promised, every thing in the expectation of which the consideration is furnished.

THE Baron de Carondelet, in his last commu-

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nication, acknowledges the proposed advantages were to be *perpetually* enjoyed. "A service of "little moment which, however, will *rid them* "TOTALLY of the stagnating waters, and conse- "quently of the sickness so common in the fall." *Ante* 12.

THE incompatibility of the use of the canal for the purpose of navigation, and that of a drain, does not destroy the contract. For the incompatibility of these two uses, does not exist in regard to *impossibility*, but in regard to *difficulty* and expence.

THE Baron told *Metzinger* "the canal was "dug for the conveyance of the waters of the city, "as well as for the purpose of navigation, and "must answer both the intended objects." *Ante* 13. The Baron intended to increase the canal to double its width, and to have a *marie salope*, to keep it clean. Persons of the art have declared that, with these improvements, the canal might well serve for both the intended purposes. See *Tanesse* and *Castanedo's* testimony. *Ante* 15.

THE impossibility which avoids the obligation of a contract, must be an absolute one. Great difficulty, trouble and expence, do not.

ORIGINALLY the servitude existed over the whole land; by the consent, nay, the act of both parties, and for their mutual interest and convenience, it has been altered. If now the private in-

terest or convenience of either party, requires another change, let the alteration be made at the expence of the party to be benefited thereby.

THE counsel for the plaintiffs declined replying.

CUR. ADV. VUTT.

THE Court, a few days after, delivered their opinion:

MATHEWS, *J.*† This suit having been twice heard, and determined on its merits, is now again to be decided on a motion for a new trial. Was it not for the great pains and labour, used by the dissenting judge, in giving his opinion or argument in opposition to the decision of the Court, it might be sufficient barely to say, that we can perceive no good grounds for altering our former judgment.

THE defendant's counsel, and the learned judge in opposition, having abandoned all pretensions to an absolute title to the disputed property itself, and reduced their whole claim to that of a servitude, this alone we are bound to notice or examine.

IT is a little surprising, that one brother judge should seem to turn, with apparent disgust, from any expressions drawn from the common law, to ascertain the character, or name, of the right claim-

† Judge Mathews had the politeness to favour the reporter, with the manuscript, from which his opinion is printed.

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ed by the defendants, as the character and name thus deduced, is not only that of the common law, but of common sense, and also of the Roman law, from which he insists on drawing all authority, for the decision of the present cause; and we are surprised that in quoting the institutes, *lib.* 2, *s.* 3, he did not observe, in the title immediately preceding, and on the same page, *de rebus corporalibus et incorporalibus*, in which it is said, *ss.* 2, *incorporales sunt quæ tangi non possunt, eodemque numero sunt jura prædiorum urbanorum et rusticorum, quæ etiam* SERVITUTES *vocantur.* That a servitude is properly termed an *hereditament*, or that which may be inherited or succeeded to, we believe will not be denied on any hand; and here it may be observed that, in our view, it is very immaterial whether we named things by the common or civil law, if the names are proper according to the rules of common sense and common parlance; and it is quite unnecessary, being the same in both systems of laws, to enquire whether they have been established by the *dictum* of a Roman prætor, the edict of an emperor, or denominated by a learned English law-writer.

THE first position, laid down by the judge dissenting, is, *jus cloacæ mittendæ servitus est;* true, and a very dirty one it is, as it relates to those persons bound to submit to it; and being so burthensome, those claiming such servitude,

ought very clearly to establish their right, before it should be allowed to them.

HE next goes on to shew how servitudes are established, and for this purpose cites the Institutes as above stated, wherein it is said "*si quis* "*velit vicino aliquod jus constituere pactionibus* "*atque stipulationibus, id efficere debet;*" also, that a testator may, to the prejudice of his heir, burther his farm with a servitude. The latter clause of this authority, having no bearing whatever on the case before us, we pass in silence. The first sentence comes completely in aid of the opinion of the Court, for we have not been able to discover any pact, or stipulation, by which the defendants have established their right to the servitude claimed: still believing that, to all contracts, agreements and stipulations, two parties are necessary in some shape or other.

IT is said and insisted on, "that permission and "forbearance establish servitudes," and in support of this position, is cited the digest, *b.* 8, *s.* 3, where it is stated *traditio plane et patientia servitutum inducet officium praetoris;* and here it might be observed, that the judge is a little unfortunate, after having thrown aside the common law, as affording no legitimate aid to the determination of this cause, to have fallen on a sentence in the Roman law, which it is almost impossible to understand, except by the assistance of a commen-

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tator, who has been obliged to give it a totally new structure, in order to make it intelligible ; and says that it ought to be thus read, *patientia plane, ut traditione, servitutem inducet officium prætoris ;* which, we suppose, may be thus construed, " by " long and open forbearance, *as by being trans-* " *mitted from one to another*, it is the duty of the " prætor to consider it a servitude ;" this right must partake of the nature of prescription, and to end all discussion on this point, it is sufficient to observe that, against the sovereign, prescription cannot run.

WITHOUT determining on the correctness or incorrectness of the judge's second proposition, in which he states that " a right may vest in a person, " natural or corporate, without any covenant or " agreement of such a person," it will suffice to shew, that the authorities brought in support of it are not applicable to the present cause. To effect a proper application of the citation from *Pothier* to this suit, it is necessary to shew that the Baron Carondelet had a right to burthen the royal domain with servitude, or to alter and modify those which existed by nature. It is not contended that he had such a power, arising from his office as governor, nor does it appear that he had any special authority to convey, or give in any manner, the right now claimed by the city ; such a power can only be dubiously implied from one of the

official papers laid before the Court, which states that "the expences of the war, precluding the "hope that the royal treasury would contribute "to the expence of a considerable canal of navi- "gation, government had only solicited the king "to allow the convicts (that were about to be "transported to Pensacola) to remain in New- "Orleans, engaging with their aid, and that of "several inhabitants zealous for the *public* good, "to dig *a canal for draining*, which will be "changed in successive years into a canal of navi- "gation for schooners."

IT seems to us, from this paper, that the intention of the governor, and his master the king, had been to make a *considerable canal* of navigation; but the deficiency in the public funds, rendering it impossible at that time to execute so expensive a project, they were content that the city of New-Orleans might aid in making, for the present, a canal for draining—permitting them to use it for that purpose, until it should be convenient to render it fit for the first great end intended—*a canal of navigation.* Now if the Baron had no right to give, grant or sell a servitude, the doctrine of the "*actio utilis*" cannot be made to touch the present cause, for the donor having no power to give, the donation itself fails, and every correlative must fall with it, and the party for whose benefit it was intended, can claim nothing by the

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gift. But admit that the governor had a right to give, grant, or stipulate relative to servitudes on the public domain, is there stronger evidence that he stipulated with those individuals who gave the service of the negroes, that the canal should forever remain a sewer for the city, than that it should be made a canal of navigation? If we recollect the testimony correctly, it appears to have been intended more for the latter purpose than for the former; indeed it appears, that the primary object and ultimate end of all concerned in it, was to make it a canal of navigation. We are of opinion that it cannot answer the two-fold use of a common sewer to the city, and of a navigable canal; and that the community must lose all the advantages which might be derived from its navigation, or the city must desist from using it as has been heretofore done, and as there is no contract or stipulation, vesting in the corporation the right which they claim, they have no legal pretensions to the servitude as arising from grant or contract.

BUT it is said they have a right *ex natura loci*, because the canal is on land lower than that on which the city stands, and that by the civil law the lower ground owes a natural servitude to the higher, to receive its waters, and that the judgment of the Court is erroneous in requiring evidence of a grant of this right, which arises from the nature of the place. It is true that the owner of the lower

ground is bound to receive the water running from that of the superior landholder; but it must be received as it flows by the course of nature, and cannot be altered or modified except by compact or agreement betwixt the parties interested, and it would be proper to require the same power to change and modify a right, as to grant it originally. It is equally true that we have it in evidence, that all the lands immediately behind the city are lower, and naturally receive the water of it; they receive it as an inclined plane, each space receiving the water immediately descending on it, there stagnating, and not flowing in any particular stream or direction, except in very high water; and it is said, that because *quacunque servitus Fundo debitur, omnibus ejus partibus debitur*, therefore, the owner of the inferior land cannot free any part of it from the servitude. True, the canal must bear its proportion of the natural servitude, and we suppose that the plaintiffs would never have complained, were it not for the attempt to make them submit to the whole drainings of the city from one end to the other, whereas by nature they are only bound to receive such portion of the water as would occupy an extent on the upper ground, equal to the width of the canal on the lower.

WE are not able to feel the force of the objection made by the dissenting judge, to favouring

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the pretensions of the plaintiffs, because they are mere donees or volunteers. The donee certainly succeeds to all the rights of the donor, as well as to the burthens on the thing given. Suppose the United States still held their right to the canal, and granted to the city, as they have done all the balance of the land in its rear to the distance of 600 yards, with what just or equitable pretensions could the defendants insist on the exercise of a servitude on the part retained, which was only due by the whole commons, and that to the utter destruction of the part retained, for the purposes intended by its retention, or with what face could they demand of the general government to give them another canal, when they have granted to them the very land through which it must pass? and to the value of perhaps more than ten times the cost of the canal: and as the plaintiffs have succeeded to all the rights and privileges of the United States, they are not bound by law, or in equity and good faith, to do more than the government would have been obliged to perform had they retained the canal. The servitude claimed being a natural one, due by the whole extent of land in the rear of the city, must be apportioned according to the extent of the grant to the plaintiffs and defendants, as it is said in the digest, book the 8th, tit. law 25th—"*Si partem fundi mei certam tibi vendidero, aquæductus jus etiamsi al-*

terius partis causa plerumque ducatur te quoque sequetur: neque ibi aut benignitatis agri, aut usus ejus aquæ ratio habenda est: ita, ut eam solam partem fundi, quæ pretiosissima sit, aut maxime usum ejus aquæ desideret, jus ejus ducendæ sequatur: sed pro modo agri detenti, aut alienati, fiat ejus aquæ divisio. This is when the aquæduct is beneficial, and if a benefit is to be divided, by analogy, so ought a burthen.

THE defendants ought to take nothing by the motion.

LEWIS, *J.* concurred.

MOTION OVERRULED.

THE opinion of the Court, was delivered immediately after its opening, and before MARTIN, *J.* took his seat. He had prepared the following:

UNABLE to concur with my brothers, in some of the points on which the judgment of the Court is founded, and particularly a principal one, upon which one of them has insisted, during the last argument, *ante*, 223 & 224, I have again given to this case all the attention of which I am capable, and I have to lament my utter inability to recognise some of the principles upon which it has been determined.

I ADMIT that, according to a well known rule of the common law of England, the right which

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the defendants claim, "having no corporal exis-"tence, could not pass by *delivery*, it must there-"fore pass by *grant*." Neither am I willing to contest whether this rule be *grounded on reason?* But I have said the common law of England was not the rule of conduct which the parties recognised. On the contrary, the rule of the civil law, the law of the land, in this respect, differs *toto cælo* from that which it has pleased the Court to establish.

Res incorporales, says Bracton, TRADITIONEM *non patiuntur, l.* 2, *c.* 18.

TRADITIO *servitutum*, says the Digest, *inducet officium prætoris. l.* 8, *tit.* 3, *l.* 1, *s.* 2.

IN the institutes incorporeal things are defined: those which cannot be touched. *Incorporales autem sunt que tangi non passunt*, l. 2, *tit.* 2, *s.* 1, and a note is introduced in the margin, by Gothefred, whether they are susceptible of *delivery? An* TRADI *possunt?* For the solution we are referred to the digest. Here the query is answered in the negative. *Incorporales res* TRADITIONEM *non recipere manifestum est. l.* 46, *tit.* 1, *l.* 43, *s.* 1. But, adds the commentator, they are susceptible of a FICTITIOUS *delivery. Nisi fictam scil. alias mero jure*, but are considered as *delivered* when we are permitted to enjoy them. TRADITÆ *censuntur cum alius patitur nos iis uti.* We are referred to the 6th book of the digest. It

is there said that if a servitude be delivered the right of the person thus acquiring it, shall be protected. *Si de usufructo agatur* TRADITO, *publiciana actio datur, itemque* SERVITUTIBUS *urbanorum prædiorum, per* TRADITIONEM *constitutis, vel per patientiam. Forte si per domum quis suam passus est acquæductum traduci: item, rusticorum prædiorum: nam et hic* TRADITIONEM *et patientiam tuendam constat. l.* 11, *s.* 1.

THE annotator adds that incorporal things are susceptible of a *quasi-delivery. Proprie, scil,* QUASI-TRADITIONEM *recipiunt.*

AFTER this, it is difficult to misunderstand, or find any ambiguity or obscurity in the position that servitudes pass *by delivery.* TRADITIO *plane et patientia servitutum inducet officium prætoris. Dig. lib.* 8, *tit.* 3, *l.* 1, *s.* 2. *Delivery* certainly, and forbearance of servitudes, give rise to the interference of the prætor. Neither is the note less plain. *Aut ita legendum est, ut* TRADITIONE *servitutum inducet officium prætoris. Neque interea displicet quod a Baldo traditur, servitutes tradi patiendo seu patientia: deberi officio judicis.*

FROM these different texts, I have inferred that a servitude, although an incorporal thing, may pass by *delivery*, according to the principles of the civil law. Though not susceptible of a corporal *delivery*, or *delivery* DE FACTO, it is sus-

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ceptible of a *delivery* DE JURE, and will therefore pass *without a grant.* For example: If I purchase a right of view over my neighbour's estate, and he does actually pull down, for the purpose, as much of his wall, or of his house, as before obstructed my windows, the act of pulling down will be a *delivery* of the right of view. TRADITIO *quæ inducet officium prætoris.* If I demolish myself the part of the wall or house, in consequence of an agreement between him and me, his forbearance will perhaps be an equal evidence of my right. PATENTIA *quæ inducet officium prætoris.*

THE French law writers recognise this principle of the civil law. "A third manner of acquiring property" says Pothier, "is *delivery*, by "which the property of a thing, passes from one "person to another. Doctors call it, *modus acquirendi dominii derivativus.* This manner of "acquiring property is derived from natural law." *Traité de la propriété*, 192, *n.* 193.

Hæ quoque res, quæ TRADITIONE *nostræ fiunt, jure gentium nobis acquiruntur. Nihil enim est tam conveniens naturali æquitate, quam voluntatem domini rem suam in alium transferre ratam haberi. l.* 9, *s.* 3, *ff. de acq. rer. dom.*

"Incorporeal things," continues Pothier, "not "being susceptible of possession, since possession consists in the corporal detention of a thing,

"it follows as a consequence, that they are not "more susceptible of delivery: delivery being "only a transfer of the possession. Yet, as for "want of a possession, strictly speaking, we re- "cognise a quasi-possession of incorporeal things, "which consists in the use which is made of them, "there ought to be also a kind of *delivery* of in- "corporeal things."

"THIS delivery, with regard to real rights, "or the rights of servitude, is done *patientia et* "*usû*, that is to say, when he, in the sight of "whom the right is used, suffers it to be used. "For example: If I bound myself to give you a "right of way over my land, I am holden to make "you a *delivery* of it, when you begin to pass "over it and I suffer it. If I bound myself to "give you a right of view over my house, when "you will make windows and the mean wall, and "I suffer it." *Traité de la proprieté*, 208, *n.* 214.

WE must be careful not to confound two different means of acquiring property, *delivery* and *prescription.*

THE former is derived, as we have seen, *jure gentium:* the other from the municipal law. *Delivery* is a means of acquiring property by the act of the owner. Prescription, is a means of acquiring it, without any act of his, even without his consent or knowledge.

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"Lastly," says the author just cited, "we "lose, without our consent, and even our know- "ledge, the property of a thing, belonging to us, "when he who possesses it, acquires it by *pre-* "*scription.* As soon as the possessor has, by "himself or those from whom he holds, accom- "plished the time required to allow the prescrip- "tion, the law, which establishes prescription, de- "prives us, *ipso facto*, of the property we had in "the thing, and transfers it to the possessor." *Traité de la propriété*, 272, *n.* 276.

IN order that the *delivery* may vest the property, it is necessary it should be made by a person having power to alien it. Now the land, on which the canal was dug, if the plaintiffs have any right on it, was, at the time the canal was dug, the property of the king, vacant, unappropriated land, *terras realinguas*. The power of the governors of Louisiana, to grant the king of Spain's vacant land, is not at this time to be doubted. Few of the planters have any other title to their land, but what proceeds mediately or immediately from a governor's grant or concession. If he could alien the soil, surely he could burthen it with a servitude. *Omne majus includit in se minus.* In this particular instance, the governor acted with his master's knowledge and consent. Before the canal was begun, the king consents that the galley slaves be employed to dig it: after it is completed

he directs that it may be used in draining the lands around the city.

THINKING that the right, which the defendants claim, might pass to them *without a grant*, I must conclude with their counsel, that there was no necessity for a formal, literal acceptance. If it be admitted that the right was acquired *traditione* or *patientia & usû*, it must follow that it was accepted; although there be no *written* evidence of the acceptance.

I CANNOT assent to the position of one of my brothers, *ante*, 224, 225, that as a sovereign can revoke his gift, the United States may have done so, that is, destroyed the title of the defendants, by granting to the present plaintiffs a right incompatible with that claimed by the city: nor that the city cannot complain, for congress gave it property of much greater value.

FIRST. It is very doubtful whether, after the United States have made an absolute donation, they can recall it. But the right claimed by the city, if it exist at all, was acquired for a valuable consideration; labour and money spent in digging the canal.

SECONDLY. The congress has not *given* a foot of land to the city. The confirmation of "the "claim of the corporation to the *commons* adja-

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"cent to the city, within six hundred yards of the "fortifications of the same," was not gratuitous, but made, in consideration of their relinquishing their claim to the rest of the said commons, and of their conveying part of the land within the six hundred yards, to the present plaintiffs. 8 *Laws U. S.* 304.

IN the opinion I delivered last term, *ante* 32, I stated the grounds on which I think that the city might claim a right, accruing under the agreement or convention between the Baron de Carondelet and some of its inhabitants, although the city was not a party thereto.

I CONCLUDE that the principles, upon which the judgment of the Court rests, appearing to me untenable, I think it ought to be reconsidered.

ELLERY vs. *AMELUNG's SYNDICS.*

Attorney's bill not privi-ledged.

SUIT for services as an attorney and counsellor at law. The plaintiff was on the insolvent's *bilan*, as a creditor of five hundred dollars for professional services. The jury allowed him that sum, and he claimed to receive it as a priviledged debt. *Civil Code*, 468, *art.* 72, *s.* 2.

By the Court. He is only to be collocated on the *tableau* for that sum. The code allows a pri-

viledge in favour of *law charges, frais de justice.* The English expression is rather vague—the French one is only, costs of court : taxed costs.

A CREDITOR who claims to be paid, in exclusion of the others, must make out his right strictly. Priviledges are odious and should be restrained.

PRIVILEDGE DENIED.

Mazureau, for the plaintiff. *Moreau*, for the defendants.

SIMPSON vs. *BURNETT.*

THE defendant had been held to bail upon the usual affidavit,

A RULE was obtained to shew cause, why the order to hold to bail, should not be dissolved, upon the ground, that the defendant was an inhabitant of the territory, residing out of the first superior court district.

The disability of the pl'f. can only be taken advantage of at the trial of the cause.

Ellery, in support of the rule. By the "*Act "supplementary to an act, providing for the su-"perior court going district,*" every suit begun against any residing landholder, shall originate before the judge of the parish in which said landholder resides. 1807, *ch.* 1, *sect.* 11. And with respect to all causes which are to be transferred to

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the circuit courts, it is made the duty of the superior court to order, that such of those causes as shall yet be pending before it, when this act shall begin to be in force, shall be transferred to the respective circuit courts of the circuit wherein the defendants reside. 31*st sect.* Every defendant, therefore, must be sued in the parish, or district, wherein he resides; and no process from this court can legally issue against the present defendant, who is a landholder, residing in the parish of Iberville, in the second superior court district. If this suit had been pending in this court, at the time of passing the above act, it would have been the duty of the court to have transferred it to the second district, and this, it would appear, summarily, whenever the residence of the party defendant in that district, was made to appear; and not by a plea in abatement, which would have placed it on the trial list, there to wait its turn, and subject the parties to great expence and loss of time. Neither does it appear that in any cause thus pending when this act went into operation, the defendant was ever compelled to resort to this plea. The present defendant being in a similar situation, is entitled to a similar remedy; the date of the suit ought not exclude him from the benefit of it.

By the Court. This objection is premature. The disability of the plaintiff can only be taken

advantage of by a plea in abatement, or at the trial of the cause. SPRING 1812. I. District.

RULE DISCHARGED.

KERSHAM vs. *COLLINS.*

THE plaintiff had judgment against the defendant, in the county of the Attakapas, and now brought a suit in this court on it. The defendant pleaded *nul tiel record.* On the trial, a certificate of the clerk of the court in which the judgment was had, was produced, attesting that such a judgment was rendered. He transmitted a certified copy of the execution which had issued, returned *nulla bona.*

Clerk's certificate that there is a judgment, is no evidence of it.

2m 245 Case 1 117 791

By the Court. The clerk cannot certify a judgment, in any other manner than by giving a copy of it. From the execution, which is properly shewn, the fact that a judgment was rendered, cannot be inferred.

JUDGMENT FOR DEFENDANT.

Caune, for plaintiff. *Porter*, for defendant.

WELMAN, CURATOR, &c. vs. *CONNOLY.*

THE defendant had been held to bail upon the usual affidavit, for a debt due to the estate, in

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which the necessary oath had been made by the plaintiff, as curator.

Disability of the plaintiff, not a fact to be tried upon a motion to discharge bail, but must be pleaded in abatement.

UPON a motion to shew cause why the bail should not be discharged,

Ellery and *Livingston*, for defendant, offered to prove that the letters of curatorship granted to the plaintiff by the court of probates, had been revoked, in consequence of his having neglected to provide a surety to replace the one originally furnished, who had become insolvent; and that the plaintiff, being thus deprived of the capacity in which only he had a right to sue the defendant, the order to hold to bail should be dissolved, as illegally obtained. That, by the act regulating the practice of the superior court in civil causes, every defendant arrested and held to bail, may be discharged by proving, to the satisfaction of the judge, that the facts stated by the petitioner, in order to hold the defendant to bail, are not true. 1805, *ch.* 26, *sec.* 12.

BUT, *by the Court*—This is not one of those facts contemplated by the act, to be liable to be disproved in this summary way. An intended departure from the territory, the possession by the defendant of sufficient property, if attached, to satisfy the judgment, which the petitioner expects to obtain in the suit, &c. may fairly be put at issue upon a motion to discharge the bail. But the dis-

ability of the plaintiff to prosecute his suit, can only be made to appear on the trial of the cause, in a plea of abatement. Otherwise causes of this description might be tried upon collateral issues, and instead of taking the usual course on the trial list, would obtain an undue preference, and this to the exclusion of the jury.

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MOTION DENIED.

WEEKS vs. *TRASK.*

THE defendant had been held to bail upon the usual affidavit.

If the plaintiff reside in the territory, tho' out of the district, in which the suit is bro't, the court will not stay proceedings, till he give security for the costs.

A RULE was now obtained to shew cause, why the proceedings in this cause should not be stayed, until the plaintiff, who resided out of the first superior court district, should give security for the costs, in case a verdict was rendered against him, or he was nonsuited.

Ellery, in support of the rule. This case would admit of no doubt, if the plaintiff resided out of the territory. In the courts of Common Pleas, and of King's Bench, in England, whenever the plaintiff is shewn to reside abroad, this order is always granted. 1 *T. Rep.* 267. 1 *East Rep.* 431. 2 *Hen. Black.* 384. 2 *Vesey*, 471. The reason of it is evident, inasmuch as the plaintiff would

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not be within reach of the court, so as to have process served upon him for the costs. The same reason applies to the present plaintiff, who though an inhabitant of this territory, resides out of the district where the suit was instituted. By the act supplementary to an act, entitled, *an act providing for the superior court going circuit*, 1807, *ch.* 1, this territory is divided into five superior court districts, where the courts are respectively to be held; and these courts, though composed of the same judges, cannot be considered the same courts. Each has its separate clerk, and sheriff, to make out, certify and serve its processes. There is no intercommunity of jurisdiction. No process from one court can issue, except certified by its own clerk; or be executed, except by its own sheriff. In the present case, for instance, should the plaintiff fail in his suit, can a *fi fa*, for the costs, be executed by the sheriff, out of this district? Would it not be necessary to commence a new suit, and obtain process in the district where the plaintiff resides? In an English court, a plaintiff in Ireland is considered so far abroad, as to oblige him to give security for costs, and for the reason here urged; because the process of the court would not reach him, in case an execution issued for the costs. 1 *T. Rep.* 362, *Fitzgerald* vs. *Whitmore*. And if the process of the court will not reach a plaintiff, residing in a different district,

ought we not to be entitled to the benefit of the same rule?

Hennen, contra. The application of the defendant is founded on a rule of the court, requiring non-residents of the state, to give security for costs. This rule cannot be extended to residents of the state, though residing out of the district. "It was held by the court of King's Bench in a "variety of cases, and those of no very ancient "date, that a plaintiff's residence abroad, or in "Scotland, was not a sufficient ground for staying "the proceedings in the suit, 'till security was "given for the costs, because such a practice it "was said, might operate as a discouragement of "trade and commerce, would be clogging the "course of justice, and in a great measure pre-"clude foreigners from suing in our courts, as in "a strange country they might, frequently, be "unable to find security." 2 *Str.* 1206. 1 *Wils.* 266. 2 *Burr.* 1026, 4 *Burr.* 2105. *Cowp.* 158. *Hullock's law of costs*, 442.

OF late years this rule has been changed, as is proved by the authority in 1 *T. R.* 267 & 491. Nor is it the uniform rule of the court of Common Pleas. 1 *H. B.* 196. The practice of the court of Exchequer has always been uniform: no precedent, of such security having been required, is to be found in that court, *Anstr.* 359, *Beckman*

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vs. *Legrange*. 7 *Bac. Abrid.* 422. The rule itself, then, of requiring security for costs, is founded, I think, on questionable grounds; but to extend it so far as to say, that inhabitants of the same state should be bound to conform to it, would be highly oppressive to the poor, and a great hindrance to justice: a planter, for instance, in the city of New-Orleans, from Washita, might find it difficult to obtain security for costs, in a suit which he might wish to bring against an inhabitant of the city. It would also be extending the rule beyond the spirit of the English decisions —a judgment against the plaintiff for costs, would always be a matter of record, on which the defendant might obtain an order of seizure from the court of the parish, or the superior court of the district, in which the plaintiff might reside.

Ellery, in reply. There is no doubt but in England, both in the courts of King's Bench and of Common Pleas, that security for costs was not always required, when the plaintiff was a foreigner or resided abroad; but, of late years, the practice in that respect, in both courts, has been changed; and now, not only foreigners and plaintiffs residing abroad, in both courts are obliged to furnish this security, but in the court of King's Bench, this rule has been extended to a plaintiff residing in Ireland, who was *quoad hoc* considered as a fo-

reigner. When this was so decided, in the case of *Fitzgerald* vs. *Whitmore*, it was then, as now urged, that such an extension of the rule was impolitic; but the court decided that the same reason which induced it to lay down the rule with respect to foreigners, namely, that the process of the court could not reach them, in case an execution issued for costs, held equally with respect to Irishmen. And this same answer can now be given to the same objection, raised in the present case; that a plaintiff residing out of the district, is *quoad hoc* a foreigner, whom the process of this court cannot reach. And if the rules and decisions of the courts in England are resorted to, should we not rather be influenced by their latest decisions and improved rules, than by obsolete cases and exploded practice!

THE argument *ab inconvenienti* has not much force. In the case supposed, the Wachita planter must have very little confidence in the goodness of his cause, or be very much limited in his funds or credit, if he should find a serious difficulty either to deposit the requisite sum, or furnish the necessary security for the payments of costs, should he be cast in the suit. On the other hand, the defendant, in this event, would be put to serious inconvenience in their recovery. He has, indeed, the remedy pointed out, though a circuitous one, that of an order of seizure; but this implies

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a new suit to be instituted by him in the district where the plaintiff resides. But is not this, in effect, making two suits out of one, and before different tribunals? Again, where the act directs that defendants shall only be sued in the district where they reside, was it not intended that the whole suit should be there decided? Was it supposed, that a branch of it was to extend to the district of the plaintiff, and to be carried before the tribunal in that quarter? Certainly, much less inconvenience will result from the adoption, than the rejection of this rule.

By the Court, LEWIS, *J.* alone. The security which the court requires of foreign plaintiffs, is the *cautio judicatum solvi* of the civil law, which is required from *foreigners* only. The principles cited by the defendant's counsel, are not recognised in the United States. In them, like in this, there are a number of courts, limited in their jurisdiction to a small extent of country; and it could not be endured that every plaintiff suing out of his parish or district, should have his suit stopped, till he came and gave security for the costs.

RULE DISCHARGED.

STATE vs. *PIERCE*.

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Examination of prisoner on oath, rejected.

HORSE-STEALING. The attorney-general offered as evidence the examination of the prisoner, taken by the mayor. It appeared to have been subscribed and *sworn to* by the prisoner.

Hennen for the defendants. It cannot be read. The examination of the person accused ought not to be upon oath. *Hale's P. C.* 584. The confession of a person taken upon oath, cannot be read, in evidence against him. Of course, no prisoner, brought before a magistrate, ought to be sworn. The reasons of this restriction result from the most obvious principles of justice, policy, and humanity. *M'Nally's P. C.* 47. The examination of the prisoner shall be without oath. *Buller's N. P.* 242. 2 *Bacon's Abr.* 664.

OUR act of assembly, 1805, *c.* 8, *sec.* 1, requires the magistrate to take the *voluntary declarations* of such persons so accused.

EXAMINATION REJECTED.

STATE vs. *RODRIGUEZ*.

Viva voce testimony of prisoner's examination, rejected.

HORSE-STEALING. The attorney-general offered *viva voce* evidence of what the prisoner had said, when brought before the magistrate previous to his commitment, relying on 2 *Hawk. P. C.*

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304. It did not appear whether the magistrate had committed the declarations of the prisoner to writing.

Rodriguez, for the prisoner. The testimony cannot be received. The confession of the defendant himself, in discourse with private persons, or before a magistrate, *if not taken in writing*, has always been received against him. *M'Nally's P. C.* 40. Hence, it follows, that if it be taken in writing, it cannot be received: and the proof that it was not, lies on the attorney-general.

THE rule of law is the compass by which the court is to be guided. What a prisoner says, in other places, may undoubtedly be received upon *viva voce* testimony; but as the law requires that his examination before the magistrate, should be reduced to writing and returned to the court, the particulars of such examination cannot be given in evidence *viva voce*, unless it be clearly proved that in fact such examination never was reduced to writing. *Jacob's case*, 1 *Leach*, 349.

IN *Hinkman's case*, *id. in notis*, the prisoner had made a confession before a justice of the peace, but his examination was not returned, and it was uncertain whether it had been reduced to writing. It was objected on the authority of *Jacob's* case, that parol evidence could not be given of any thing which had been disclosed by the pri-

soner before the magistrate: for that it would be permitting his negligence and breach of duty to operate to the prejudice of the prisoner; as a witness, by selecting only part of what was said, or using different words, might give a different colour to the fact. The court refused the oral testimony.

IN *Fisher's* case, *idem*, there being no evidence that the examination was not reduced to writing, *viva voce* testimony of it was rejected. *Bacon* goes farther, for he states absolutely, that if the confession be not reduced to writing, it cannot be used against the accused. 2 *Bacon's Abridg.* 604.

By the Court. It is very clear that we cannot admit the witness, and that the case cited by the attorney-general must be taken as a general rule, to which those produced by the prisoner's counsel form an exception. The superior court of North-Carolina, in the case of *the state* vs. *Grove*, *Martin's Notes*, 43, refused to receive the testimony of the committing magistrate, who had neglected to reduce to writing the declaration of the prisoner before him; neither would they consent that he should write it down in court.

IN this state, the case differs very much from a similar one in England. Our statute, 1805, *ch.* 8, requires the magistrate to take the declarations of the prisoner in writing, *and cause them to be sub-*

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scribed by the declarant, in his presence. It does not put so much confidence in the magistrate, as to allow him to state the prisoner's declarations, in such a manner as to render the statement legal and authentic, without the prisoner's concurrence, His signature is essentially requisite: without it. the examination must be rejected. It may well be doubted whether, while the law so carefully provides for the safety of the accused, against the great facility with which words may be misrepresented, and his declaration coloured, whether the decision in the case of the *State* vs. *Grove* is not much more consonant to the strict principles of justice, than any of those which have been read. If it were to be adopted, the magistrates would be less remiss in their duty. However, this point is not now to be decided. There is no proof that the magistrate did not comply with the act of assembly, and the presumption is that he did. The testimony offered must therefore be rejected.

NELSON & AL. vs. *MORGAN.*

Agent disobeying orders, not liable for the whole value of the thing, but only for the injury sustained.

THE plaintiffs, at New-York, had consigned to the defendant, at New-Orleans, seven pipes of Madeira wine, to be sold at a limited price, but the defendant, after keeping them a long time upon hand, without being able to procure this price, reshipped them, without other directions, to the

plaintiffs, at New-York, who received them, under protest, and wrote him, that they had abandoned them, and held them merely as his property and subject to his orders. They were, however, afterwards sold by them, at auction, at New-York, though at a price inferior to that at which they had limited their sale at New-Orleans, and the proceeds of the sale retained in their hands; of which fact, they gave no information to the defendant. The object of the suit, was to recover damages for the deviation from the plaintiffs' order.

Livingston, for the plaintiffs. The measure of damages ought to be the amount of the whole subject. Look at the facts in this case; this parcel of wine was sent here, for the purpose of being sold at a limited price, and the proceeds remitted to the plaintiffs at New-York; and no proof is exhibited to shew that the original instructions of the defendant had been countermanded, or his discretion, as an agent, enlarged. However well intended or meritorious, then, may have been his motives in the reshipment, it was, notwithstanding, a departure from his instructions, and he has thereby rendered himself liable in damages to his principals. And, though a degree of discretion is necessarily vested in a factor or agent, yet this step far transcended its limits; and it never could seriously have been made a question, whether an agent thus

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situated, had not made himself answerable for so palpable a violation of his orders. The only question now is, how far he has become thus liable, and what is to be the rule by which the damages are to be measured. This will depend upon the nature and extent of the breach of instructions on the part of the agent. If the act proved upon him, has been only a partial violation of them, and but part of the subject affected by such violation, he is to answer only partially in damages, and not to be mulcted beyond the amount so affected; but if, on the contrary, the violation be such as to affect the whole subject, he is answerable in damages for the whole amount. In the present case, the breach of instructions was not a partial, but a general one; it extended to the whole subject; it involved the whole consignment; of course, then, we look to its whole value as the measure of damages, viz: the value of the wines at the price at which the defendant was authorised to sell them. Indeed, no other criterion of damages can well be found, or safely be acted upon; and this has been adopted, I think, invariably. It has been fully and recently recognised, in the celebrated case of *Le Guen* vs. *Governeur & Kemble*, 1 *John. Rep.* 466. You will also see the same principles laid down in the case of *Walker* vs. *Smith*, 4 *Dallas* 390. and in *Bay's Rep.* 169. It will probably be

objected, that this parcel of wine was afterwards received by the plaintiffs at New-York, and by them sold; and that, in this manner, they are attempting to be paid for it twice over. But it must be recollected, in what manner it was received by them, and for whom sold. It was received under a protest, which they lost no time in communicating to the defendant, at the same time formally abandoning the wine; the defendant, by the reshipment, made it his own; and if the plaintiffs now hold the wine, or, if sold, the proceeds of sale, it is as his agents and subject to his orders. They have no further interest in it; to them it has been totally lost; and if any hardship be supposed to exist in this case, it is one of the defendant's own making, and he must submit to the inconveniences he himself has produced.

Ellery, for the defendant. There are many cases, in which an agent or factor must necessarily exercise a discretion, though his duty be *generally* to follow the instructions of his principal; this discretion, in the present case, has been fairly assumed and impartially exercised; the defendant, in the reshipment of the wines, has pursued the interest of his principal at his own expence: to the loss of storage, had the wines remained upon hand; and of commissions, could they have been sold in this city. And I think, if an opportunity

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be given, it will be shewn he did not exceed the limits of a sound discretion—that he rather acted *without* orders, than *against* orders; and rather anticipated the instructions he expected to receive, than violated those he had received. But supposing, on his side, such a departure from his instructions, as to subject him to an action of damages, has not the jury been in an error, in relation to the rule by which they have been measured? and are the plaintiffs entitled to a verdict, as they claim, for the whole amount of these wines, although they have afterwards been received back and sold by the plaintiffs, and the proceeds put in their pockets? There are cases, undoubtedly, where the whole amount of the article may constitute the criterion of damages; but can it fairly be resorted to upon this occasion, and under the present circumstances? In the cases relied upon by the counsel of the plaintiffs, the breach of instructions not only extended to the whole subject, but involved in it the loss of the whole property. In the case of *Le Guen* vs. *Governeur and Kemble*, the defendants assumed an absolute control over the property, and converted it completely to their own use; the only compensation, then, commensurate with the damage actually sustained by the plaintiff, was the amount of the whole subject thus completely lost him. The

same will apply to the other cases cited, where the loss was a total one, or the whole property put completely out of the reach and possession of the plaintiffs. But in our case, the whole subject was preserved entire and safely placed in the hands of the plaintiffs; the wines, though at first received by them under protest, and with a threat of abandonment, were afterwards by them sold in their own names and upon their own account; and, although three years have since nearly elapsed, it does not appear that the defendant was even apprised of this sale, or was ever furnished with any account, or credited for the proceeds. Can they now conscientiously demand the full price of the wines *here*, after having sold and received the full price of them *there?* Are they entitled to the benefits of two markets, and a double sale? If, on the reshipment, the wines had perished, then might the gentleman's rule apply with more force; and with more propriety might he urge that, by this act, we had made them our own, and that we had reshipped them at our own risk, and had become the insurers; but after their safe arrival, reception, and sale, the rule and the objection come too late. As well might the insured come upon the underwriter for a total loss, after the safe arrival of the insured property. But, it is further said the plaintiffs had a right to abandon, and by thus rendering it a total loss, make the breach of in-

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structions extend to the whole subject. Suppose they actually possessed this right, and had even taken the proper steps to secure the exercise of it, have they not retraced them, and by their subsequent conduct completely waved it? By whose instructions, and in whose name, and upon whose account, I again ask, were those wines sold at New-York? Who has disposed of the proceeds, and benefited by the sale? Not the defendant, who has but recently and accidentally come to the knowledge of this fact; but the plaintiffs, who concealed, or at least never communicated it; and the utmost the defendant can be liable for, is the difference of price, and the expences of reshipment. Supposing these wines had sold at a superior price at New-York, according to the reasoning relied upon, the agent would be liable in damages for the profits secured to his constituent.

By the Court. The measure of damages, in this case, ought to be the value of the wine, at the highest market price in this city, at any time till the beginning of the suit, adding thereto the freight to New-York, and deducting therefrom the value of the wine at New-York, when the plaintiffs received it.

DAMAGES are always to be measured by the degree of injury which the party sustained, except in some cases when the defendant has been guilty

of gross fraud or misconduct; then vindictive damages are sometimes given by the jury. In this case, no ill intention can be imputed to the defendant: it is therefore enough, if the plaintiffs be made whole; they are not to be enriched at the expence of the defendant, *neminem oportet alterius damno locupletari.* The value which the plaintiffs put on their goods, is not to be recognised by the jury, unless evidence of its correctness be administered to them. The correct value cannot be more than the highest price, in the market, which the plaintiffs had selected, as the best for the sale of his goods. It is clear that if any individual, by any improper act of his, unmixed with fraud, had occasioned the destruction of the wines, we should have directed the jury to value them at the market price.

VERDICT ACCORDINGLY.

TAYLOR & HOOD vs. *MORGAN.*

Alien enemy not heard, on a motion to dissolve an injunction.

THE defendants had obtained a judgment, and execution had issued against the goods of the defendant, who procured an injunction. The plaintiffs now moved to have it dissolved. The dissolution of it was refused, on the ground that, since the injunction had been obtained, the plaintiffs, who resided in Great Britain, had become *alien enemies* by the late declaration of war between the

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United States and the king of Great Britain. The court declined dissolving the injunction.

Depeyster for the plaintiffs. *Duncan* for the defendants.

ELMES's vs. *ESTEVA's SYNDICS.*

Priviledge on *taxed costs*, only.

SOME property of the defendants had been sold at the instance of the plaintiffs, and the money ordered to be at the order of the court; it was now ordered to be paid over, and the syndics claimed to retain part of it, for expences in law proceedings; and the court, referring to their decision in *Ellery* vs. *Amelung's syndics*, *ante* 244, said a priviledge could be allowed on *taxed costs* only.

Prevost for plaintiffs. *Depeyster* for defendants.

M'MASTER & AL. vs. *DUNCAN & AL.*

Practice on the return of an award.

By the Court. On an award being brought in, the course of practice is, to give notice to the adverse party to shew cause why judgment should not be entered according to the award.

Livingston for plaintiffs. *Duncan* for defendants.

NUGENT vs. *MAZANGE*.

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If the place of payment be altered, parties taking the note after the alteration, are bound by it, and *as to them* the demand is well made at the new place.

THE defendant was sued as the plaintiff's immediate endorser, on a note drawn by Delhomme, and dated "German Coast," in favour of Trepagnier, who endorsed the same to H. Dukeilus, a merchant of the city of New-Orleans. Dukeilus, by a memorandum at the bottom of the note, made it payable at his domicil in New-Orleans, and then endorsed it over to the defendant: this memorandum was made without the knowledge or consent of the maker, or payee, of the note. The German Coast, the domicil of the maker of the note, Delhomme, is about thirty miles above the city. The note was placed in the Louisiana Bank for collection, and, when due, was presented at the domicil of Dukeilus in the city, and protested there for want of payment: notice of the protest was left in the city, at the mother-in-law's of the defendant, who resided a few miles out of the city; where the notary had heretofore left notices of protest, which he had always received. The drawer of the note was a planter in good circumstances, and able to pay the amount of the note. The case was submitted to a jury, who found a verdict for the plaintiff. On a motion for a new trial,

Porter, for the defendant. There is no regular protest, nor due notice, to charge the defen-

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dant, and there is a material alteration in the note, which annuls it.

THE holder of a note is bound to make a demand of payment at the domicil of the maker, or at the place of payment pointed out by the note itself. *Swift*, 254. The note in question was dated "German Coast," the domicil of the maker; and as the place of payment was afterwards altered without his consent, a protest at the domicil of Dukeilus cannot charge the defendant. The analogy between a bill of exchange and a promissory note, begins when the latter is endorsed, and then the rule is exactly the same upon promissory notes as it is upon bills of exchange—consequently, the same strictness in protesting and giving notice, is requisite. 2 *Burr.* 676-7. Before an endorser can be charged, a demand must be made on the acceptor of the bill, and in case of a promissory note, on the maker. No demand has been made on the maker of the note in this case; for a demand at a place not pointed out by him, cannot be considered as such. The defendant as endorser, therefore, cannot be liable, as legal diligence in obtaining payment of the maker, has not been used—moreover, the notice of the protest, by being left at the house of a relation in the city, is not sufficient: it should have been sent by the first post. But this alteration in the place of payment, so material in this action, must be considered as destroy-

ing the validity of the note, even in the hands of an innocent holder. *M'Master* vs. *Miller*, 4 *T. Rep.* 320.

Hennen, contra. This alteration in the note may be considered as discharging the payee and first indorser, without whose consent or knowledge it was made; but all the parties to the note, who took it after Dukeilus had made it payable at his domicil, must be bound by such alteration, their consent in it being implied; a protest, therefore, at the domicil of Dukeilus, was the only one which could possibly charge the defendant, who took the note and passed it off, thus altered. *Swift*, 266. *Selwyn's N. P.* 335, *Gould's Esp. N. P.* 1*st part*, 76, 77, with the cases there stated. The question of our diligence, in giving notice of the protest, has been submitted to the jury, and their verdict should be considered as conclusive. 1 *Dall.* 252, 2 *Dall.* 158, 2 *Hayw.* 302, 333. But as the endorser can receive no damage from want of notice, the maker of the note being in solvent circumstances, the laches of the plaintiff cannot avail the defendant. In actions by endorsers against endorsers, on promissory notes, where there have been laches as to notice, evidence has been repeatedly admitted, to shew that the endorsers had received no injury, and that the circumstances of the maker of the notes were not altered

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since the notes became due. *Story's Chitty*, 162-3.

By the Court. The defendant having passed the note to the plaintiff, after the alteration in the place of payment was made, cannot take advantage of this alteration. It may affect the note as to the maker, and the endorsers through whose hands it passed before it was altered; but endorsers, who received and passed it away after, cannot complain.

WHETHER there was a regular notice, in other words, whether the one given was left at the proper place, was a matter of evidence, properly to be determined by the jury.

NEW TRIAL DENIED.

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

STATE OF LOUISIANA.

FALL TERM—1812—FIRST DISTRICT.

JACOB & AL. vs. *URSULINE NUNS.*

FALL 1812. I. District.

Party, relying on the generosity of him, for whom he works, may not, when disappointed, set up a claim upon his justice.

THE petition stated that the plaintiffs' father, a free black man, acted as overseer on the plantation of the defendants, since the year 1796, till his death in 1811—that in 1801, the superior of the convent made a donation to him of two arpents of land fronting the river, with the usual depth, for his services; and in the year 1804, the superior, and nuns entitled to a vote in the chapter, confirmed the donation—that he remained in possession of the premises till his death, devising it to the plaintiffs—and that the nuns have since sold the premises, and the purchaser has drove off the plaintiffs. The prayer of the petition was, that the defendants might warrant and protect the plain-

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tiffs' possession, or compensate them for the services of their father, whose executors they are.

THE plaintiffs' counsel produced a writing, subscribed by the superior of the convent, by which she makes a donation of the premises "to "Jacob, a free negro, who has served us with so "much fidelity, *without having ever enjoyed his* "*freedom.*"

NEXT was introduced an instrument, by which the superior and vocal nuns give to Jacob the usufruct of the premises.

Livingston, for the defendants. These instruments cannot be received; the nuns could not dispose of their land, without the authority of the ecclesiastical superior, the bishop or his vicar-general.

THE power of the superior (ordinary or bishop) shall extend to spiritual, as well as to *temporal* affairs. *Constitution of U. Nuns, part* 3, *chap.* 1, *art.* 4. He shall sign . . . . . all *contracts* and leases, &c. *art.* 7.

ALL ordinary expenditures shall be made, on the ordinance of the superior nun, and in case of notable or extraordinary expenditures, she shall consult the assistants, *zélatrice*, and depositary, and have the superior's, ordinary or bishop's, leave. *chap.* 4, *art* 12. The superior nun shall not give, by her sole authority, more than 20 sous in

alms or gifts; neither shall she do this often: and she, and the discreet nuns, may only give the value of one crown, *art.* 13.

WHEN it shall become necessary to commute *(commuer)* any part of the real estate of the convent, or to bring a suit, the superior nun shall never do so without good counsel, the advice of the discreet nuns, and the permission of the superior, ordinary or bishop. *art.* 15.

By the Court. Communities, in the civil law, are considered as under a perpetual nonage, and those who administer their estate, cannot alien it, without a special licence.

Morel, for the plaintiffs. The principal object of our suit, is compensation for services rendered. We introduce these writings as a recognition of them.

Livingston, for the defendants. The plaintiffs' father was a black man, once the slave of the defendants; his emancipation must be proven, before his wages are claimed.

Morel, for the plaintiffs. By the instruments before the court, the plaintiffs acknowledge him, and treat with him as a freeman.

By the Court. These instruments do not bind the community, being made without the requisite

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licence. Nothing, therefore, which they contain, can bind the defendants.

ON a *subpœna duces tecum* being obtained, a notary attended, with a proper deed of emancipation, executed with the licence of the bishop of Louisiana. Witnesses were next heard, who deposed that the deceased served the defendants as the overseer and driver of their plantation, since the year of 1796, the time of his emancipation, till his death in 1811, a period of 15 years. He was 60 years of age when liberated, and consequently 75 at his death.

FATHER Antonio, a capuchin monk, swore, by laying his hand on his breast, that he would, *in verbo sacerdotis*, tell the truth, &c. according to the manner in which Roman priests swear.

EVIDENCE was offered of the declaration of several of the nuns.

By the Court. It cannot be received. Individuals of a corporation cannot bind it, by any *act* of theirs; much less by any thing which they *say*.

THE will of the deceased contained a clause that he owed nothing to any body, neither did any person owe him any thing: and the defendants proved that a number of muskets being seized on their plantation, as they had no free person on it,

they were advised to free him—that the land he had occupied, was worth, according to some witnesses, one hundred dollars a year, and according to others, double that sum—that with a very fine gang of negroes, the plantation made nothing to sell, supplying the convent with milk, vegetables, rice, corn, and fuel; the number of the negroes thereon, at different periods, varied from 18 to 42.

THE wages of overseers were proven to be from five to one hundred dollars a month.

Rodriguez, for the plaintiffs. The donation being void, it follows it is no payment, and the deceased's services being still without a reward, the defendants still owe the value of them. No specific price having been agreed upon, the services must be paid what they are fairly worth.

By the Court. A party, who works for another, is only entitled to wages, when he has stipulated for them, or when, by implication, the person who received the services promised to pay them. If the work be performed, in expectation of being rewarded by a gift, or by a legacy, wages will not be demandable.

As where the plaintiff had done much business for Mr. Guy (who bequeathed all his possessions to the hospital) and *had done it in contemplation of a legacy from him.* But being disappointed, after Guy's death, he brought this action

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on a *quantum meruit* for his former services done for Mr. Guy, when it was adjudged, that it would not lie, the business having been done, not with a view to immediate or certain recompense, but with a view to a legacy. *Osborn* vs. *Governors of Guy's hospital.* 2 *Stra.* 728.

So where in an action on an apothecary's bill, for medicines and attendance on the testator. It appeared that the plaintiff had never made any regular entries in his books, but had attended the testator in expectation of a legacy, he being related to him; and that he had declared, that had the testator left him any thing, that he would never have made a charge. The plaintiff was nonsuited on the above principle. *Hiccox* vs. *Proud. Staff. Lent Ass.* 1762, *cor. Wilmot. MSS.*

DURING a period of 15 years, no application was made for payment, and the will of the deceased says nothing is due him. Overseer's wages are paid quarter-yearly, and yearly, at farthest. It is not probable that if any had been expected, the deceased would have forborn any claim during fifteen years. It follows, perhaps, that gratitude for the greatest gift a man may receive, his freedom, induced the new freeman to continue his services, in the expectation that the nuns would continue to supply his wants, as long as he lived. Void as the instrument which contains the donation is, still, as the plaintiffs produced it, it is evidence of the ac-

knowledgment their father was willing to receive. An acknowledgment which precludes the idea that monthly, or yearly wages, were either promised or expected. But if the instrument, which was to be the evidence, was void, still the donation has been otherwise—the deceased has had the full effect of it: he has enjoyed the premises during the whole period mentioned in the instrument.

THE donation was made in 1801, and according to the petition, confirmed in 1804, when the deceased was 65 and 69 years of age: his services, after that age, were not perhaps worth much more than his support: this he appears to have had till his death. If it be believed that no wages were promised, or expected, for his services before the donation, it is for the jury to determine whether there is room to believe that any were expected, or promised, for the posterior services—whether they were not rendered without any hope of wages, but on the expectation that the nuns would provide for his support.

THE jury could not agree on a verdict.

SCULL vs. *MOWRY.*

Interrogatories cannot be stricken off.

APPEAL. The petition below contained interrogatories, which the defendant had answered on oath. A motion was now made on the part of

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the plaintiff, that the petition might be amended by striking out the said interrogatories and answers.

Hennen, for the plaintiff. A party who administers interrogatories to his adversary, is not obliged to use them: he may, if he is able to proceed without them, lay them aside. "The party," says the *Civil Code*, 316, *art.* 264. "*wishing to* "*avail himself* of the avowals made by the ad- "verse party, in his answer to the interrogatories "on facts and articles, must not divide them, but "must take them entire." It follows that the party *not wishing to avail himself* of them, need not take them.

Porter, for the defendant, was stopped

By the Court. The 26th section of the act for establishing parish courts, 1807, *ch.* 1, provides that in regard to the obtaining discoveries from either plaintiff or defendant on oath, and the *effect* of the same, the proceedings shall be the same as in the superior court, 1805, *ch.* 26. The ninth section of that act, directs that, whenever any fact is denied by the answer to an interrogatory of either plaintiff or defendant, such answer so given *shall be received* as true, unless disproved, &c.

THE *Civil Code*, 316, *art.* 259, refers to those acts, and declares that the form of those interroga-

tories, and *the rules that are to be* observed in them, are settled by the law regulating the judicial proceedings. The 264th article, introduces no change; it only declares what the law was before, viz. that the answer is not to be divided, but must be taken entire.* The *rule* that the *answer shall be received as true*, unless, &c. is not changed. If there be a party, who may cause the answer to be received as true, it surely must be the one in whose favour it is, be he the person interrogating or interrogated.

LEAVE DENIED.

W. F. MACARTY'S CASE.

HABEAS CORPUS. The defendant was originally committed for forgery and swindling, and an escape. The offence being alledged to have been committed in the part of the territory of Orleans lately taken possession of by the United States, a rule of court was obtained for his transmission to St. Francisville. On his way thither, he made his escape, and was brought before a French magistrate, who sent him to jail, with a mittimus written in French.

A *mittimus* in French, is bad.

Escape, *ex vi termini*, means from a lawful imprisonment.

* See a quotation from Pothier, *ante*, 74, 75.

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Livingston moved for his discharge, stating that the *mittimus* was unconstitutional, and consequently null and void.

By the Court. The constitution requiring that all judicial proceedings should be in the language in which the laws and constitution of the United States are written, it necessarily follows that we cannot recognize any validity or force in any judicial proceedings couched in any other language.

Duncan, attorney-general. He is still to be retained, under the rule of court, which has not been complied with.

AFTER some conversation, in which the Court said, and *Livingston* did not appear to deny, that the order of court was valid, although the offence, for the trial of which he was directed to be transferred, was not expressed. A mittimus for an escape, in the English language, was produced, and

Livingston, insisted on shewing that the fact, for which he was committed, had been done in the part of the territory lately annexed, before the annexation, and whilst it was in the possession of the Spaniards, so that it was no offence against the state or territory; and the commitment being unlawful, an escape from it was lawful.

By the Court. The word *escape* has a well known legal meaning. *Ex vi termini*, it implies a previous legal restraint; to inquire into the existence or absence of which, would be to try the prisoner on the merits, in the same manner as, on a commitment for *larceny*, it would be, to try whether the prisoner was not the lawful owner of the goods stated to have been stolen.

PRISONER REMANDED.

PAUL MACARTY's CASE.

An order to arrest a person charged with an offence, and to carry him *directly* to jail, is illegal.

Martin. 2m 279 44 1016

HABEAS CORPUS. The gaoler produced, as the cause of his detention, a warrant from a parish judge, stating that from depositions before him, there was strong suspicion that the prisoner was concerned in an insurrection of the slaves, commmanding an officer to arrest him and convey him to jail, and the gaoler to receive and keep him till he was discharged in due course of law. The depositions were sent for, and charged him with conversations, from which a turbulent temper of mind and a disposition to inimity against the whites, were manifest; and the expression of a hope that the Spanish flag would soon be raised in the state; and on hearsay, with expressions directly tending to raise an insurrection.

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Grymes, for the prisoner. He was illegally committed. A party, between his arrest and commitment, is entitled to a hearing, and the opportunity of disproving the facts sworn to against him.

THERE is no charge on oath of any crime. Words from which suspicion may arise, are imputed to him.

Duncan, the attorney-general, informed the Court, he had lately sent to the grand jury a bill against the prisoner, and a number of witnesses were now before them respecting it.

By the Court. Although the prisoner must be released from confinement on the present *mittimus*, as strong suspicion arises against him, we ought not to dismiss him without hearing the witnesses who are before the grand jury: but as they are now under an examination before the proper tribunal, it is much more convenient that we should await the determination of the grand jury, than to suspend or disturb it, by sending for the witnesses from the grand jury room. The prisoner must therefore be committed for a farther inquiry, until the morning, when, if the bill be found not a true bill, he will be discharged.

PRISONER REMANDED.

LIVINGSTON vs. *CORNELL.*

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By the Court. This is a motion for a new trial. The facts, in the case, are as follows:

Attorney and counsellor cannot recover against his client, on a *special* contract.

Bargain on *no purchase no pay*, or for part of the thing sued, iniquitous.

THE plaintiff, having unsuccessfully represented the defendant in a suit on an embargo bond, the penalty of which was the sum of fifteen thousand dollars, proposed to prosecute a writ of error in the supreme court of the United States, if the defendant would allow him, in case of success, ten per cent. or fifteen hundred dollars, and advance one half of that sum for his travelling expences to the city of Washington. The defendant declined to make any advance, but manifested an intention to accept the offer, if the advance was dispensed with; the plaintiff insisting thereon, no contract was made, and a gentleman in the city of Washington was written to, a fee of two hundred dollars was transmitted to him, and he undertook to attend to the suit, expressing his hope that, in case of success in it and two other suits, which were committed to him at the same time, an addition of one thousand dollars to his fee would not be deemed too great. Some time after the plaintiff went to the United States, to attend to his own concerns; and finding that he would likely be detained there till the conclusion of them, wrote to the surety of the defendant in the writ of error,

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that "he should, of course, attend to the suit," and that "in case of success, he should expect "the allowance of ten per cent. from which should "be deducted the sum advanced to Mr. K. "($ 200) *and take upon himself all other charges,* "*and if he did not succeed, he would make no* "*other charge.*" He desired the surety to communicate the letter to the defendant. On this being done, the defendant answered, "*Hang it*— "*let him go: he has been well enough paid:*" referring to a sum of five or six hundred dollars, received by the plaintiff for his services in the court below. The surety did not communicate this reply to the plaintiff. About five months after this application, the suit came on in the supreme court, the plaintiff attended, and the judgment was reversed.

THE plaintiff brought the present suit, stating that "the defendant was indebted to him in the "sum of thirteen hundred and fifty dollars for his "services, as an attorney and counsellor of the su- "preme court of the United States, in prosecut- "ing a writ of error for him, &c. and for divers "sums of money, laid out and expended, &c."

THE jury found a verdict for the plaintiff.

IF this verdict be set aside, it must be because it is *contrary to evidence* or *contrary to law.*

WHETHER the defendant gave his assent to the offer of the plaintiff, is a question which the plaintiff contended the jury ought to infer, from the expressions of the defendant, *Let him go on*—or from his silence, and suffering the plaintiff to proceed, without informing him of his dissent. Whatever may be the opinion of the judges on this point, it is believed that the question was properly of the cognizance of the jury, and the court cannot say that they were *without evidence*, or decided *contrary* thereto.

IF the verdict be *contrary to law*, it is because the contract laid in the petition, and proven to the jury, is one for which *the law gives* NO ACTION.

THE question which, therefore, presents itself for the solution of the court, is—

> DOES the law give an action to an attorney and counsellor, prosecuting a writ of error, on a contract to take upon himself all charges that will accrue, for one tenth part, or ten per cent. on the sum in dispute, in case of success; engaging that if he does not succeed he will make no other charge?

THE French, the Spanish, the English, and the Americans, have drawn those principles of their jurisprudence, by which this question is to be regulated, from the Roman law.

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AT Rome, advocates were not allowed to make *any contract*, with their clients. Let the advocate, says the code, make no contract with the suitor, who gives him his confidence: let him make no convention. *Nullum cum eo litigatore, contractum, quem in propriam recipit fidem, ineat advocatus: Nullam conferat pactionem. Cod. lib.* 2, *tit.* 6, *l.* 6, *s.* 2.

No convention, nor contract, about the suit or his reward. *Nullum neque pactum, neque contractum de lite aut mercede. Synopsi. Bas.* 1, *cap.* 18.

BUT above all, the Roman law reprobated conventions, by which advocates stipulated to receive *part of the thing in dispute.* An attorney, or counsellor, says *Gothofred*, may well advance his money, to carry on his client's suit, and stipulate that he will receive it back with lawful interest. Such a stipulation is honest and lawful: but if he stipulate to receive one half of the thing in dispute, this will be deemed an *iniquitous* bargain. This convention for a part of the thing in dispute, is *unjust. Quod si partem dimidiam ejus quod ex eâ lite fuerit,* PACTUM INIQUUM *censebitur. Pactum hoc de quota litis injustum. Digest, lib.* 2, *tit.* 14, *l.* 53, *n.* 25, 26. 27.

IT is unlawful to make a bargain for a part of the thing in suit. *Villainous* are stipulations of this kind. *De quota litis pacisci non licet: sunt*

enim consceleratæ hujus modi pactiones. L. 1, *Cod. Theo.*

THE remuneration of the advocate could not be fixed by any agreement, nor sued for in any ordinary action. *Nullâ potest definiri conventione, nullâ ordinariâ actione peti. Ad leg. Si quis advocatorum. Cod. de postulando.*

Honoraire, says Ferriere, is what is given to those, the honor of whose profession does not allow them to receive a salary, as advocates and physicians. It is called *honoraire*, because it is *honest* to receive it, but *shameful* to demand it. It cannot be fixed by any convention: it cannot be sued for in any action. *Dict. de Droit, verbo Honoraire.*

ANY convention, which an advocate would make before hand, would be considered as *exaction* on his part, as *weakness* on that of the client. The suitor would give all his property to the advocate, as the sick man to the physician. *Id. Verba Avocat.*

IT is not lawful, therefore, for a lawyer to make any bargain *de quota litis.* This kind of precaution, against the ingratitude of the client, has always been considered as sordid. *Id.*

ONE does not see an advocate plead for his honorary. The disposition of the Roman law, which denied to advocates any action for their honoraries,

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has been adopted by an arrest of the parliament of Paris. *Id.*

MANY instances are to be found in the old French law books, of advocates bringing suits for their fees, and recovering on them; but this has long ago fallen into disuse. In the contest, in 1775, between Mr. Linguet and the order of advocates, one of the charges against him was, that he had written to the Duke d'Aiguillon to demand his fees, and threatened him with an action for them; and that his demand upon the Duke had been referred to arbitration. 7 *Journal Historique du Rétablissement de la Magistrature.* 290.

IN England the fees of counsel are *honorary*, in the strict acceptation of the word.

OTHERWISE, says Lord Coke, of a counsellor at law, for he cannot bring any action. For he is not compellable to be a counsellor, and his fee is *honorarium*, not a debt. 1 *Instit.* 295, *a.*

A COUNSELLOR brought a bill for fees due him by a solicitor; the defendant demurred, the demurrer was allowed, and the bill dismissed. *Moor* vs. *Row. Ch. Rep.* 38.

THE fee of a counsellor is a gift of such a nature, that the able client may not neglect to give it without ingratitude. For it is but a gratuity or taking of thankfulness: yet the worthy counsellor may not demand it, without doing wrong

to his reputation, according to that moral rule: *Multa honeste accipi possunt, quæ tamen peti non possunt. Sir Jno. Davis's preface to his reports.* 22, 23.

No action lies for a counsellor's or physician's fees, they being given as a mere gratuity. 1 *Bacon Abr.* 5.

IT is established with us, says Blackstone, that a counsel can maintain *no action for his fees*, which are given, not as a *locatio vel conductio*, but as *quiddam honorarium:* not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation. 3 *Comm.* 28.

NEITHER is an action sustainable, in England, even in a court of equity. In the case of *Thornhill* vs. *Evans*, Lord Hardwicke expressed great surprise that it could be imagined that a counsellor might demand his fees in a court of equity. *Can it be thought*, said the chancellor, *that this court will suffer a gentleman of the bar to maintain an action for his fees, which is quiddam honorarium?* 2 *Atkins*, 331.

AN attorney cannot carry on a cause for another, at his own expence, with a promise that he never will expect a repayment, unless he carries the cause: or, *upon no purchase no pay. Wood's Inst.* 413.

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IN the case of *Chesley* vs. *Beliot*, the plaintiff, who was a physician, brought his action for fees, for attending, for a considerable time, on the defendant's testator. He obtained a verdict, and the defendant procured a rule to shew cause, why the verdict should not be set aside, on the ground that *no action laid for a physician, any more than a* BARRISTER'S *fees.*

THE plaintiff's counsel, *admitting this position as far it concerns barristers*, contended that it never had been determined, nor were there any authority in the books, for putting the claim of a physician's fees, upon the same footing as those of a barrister. He admitted that, as to the latter, it might have been proper that no temptation should be held out to countenance injustice, that the regulation, as to counsel, was founded *on grounds of public policy*, which were totally applicable to the case of a physician. The verdict was set aside. 4 *T. R.* 317.

NUMEROUS as are the volumes of reports of cases, determined in the courts of these states, those within our reach afford but one single instance, which it is useful to consider. It is the case of *Brackenridge* vs. *M'Farlane. Addison*, 49. The court there recognised the principle that counsellors are not entitled to any action for their fees. But they added that, as in Pennsylvania, the same gentleman was employed as an attorney

and counsellor, and his services in either of those branches could not be distinguished from those in the other, a recovery might be had *for the value of the services.*

IN the other states, the codes or reports of which we are able to have access to, it appears the distinction between an attorney and counsellor seldom prevails. In several of them a tariff exists, regulating the fees of the profession. In others, a gross sum is fixed as the only legal compensation, the practiser can receive or demand. In many, as in this, a gross sum is fixed, not as the measure of the lawyer's claim, but as that of the victorious party against his opponent, in remuneration of what he has paid for the services of his lawyers.

AN act of our legislature, 1808, *ch.* 30, directs that any attorney of the superior court, "who "makes a bargain or agreement, with a plaintiff "or defendant, *dependent on the event of any "suit, to receive any portion or part of the land, "or any other property, that may be in dispute,* "or sued for, as a compensation for the services "of any attorney or counsellor at law, shall be for- "ever disabled, &c. and the said bargain or agree- "ment is hereby declared *null and void* to all in- "tents and purposes." *Sect.* 4.

WE consider this act, not as making any thing unlawful which was lawful before; but declaratory, in the description of the fact, and in the avoidance

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of the contract, of the law, as it stood before its passage; and enforcing obedience, by annexing to it, *as of course*, a penalty which the court might before in their discretion, but which they must now peremptorily, pronounce, whenever the case happens.

We think that *money* is to be considered as included in the word property in the above act. Most men consider money as the best kind of property; and the temptation to obtain the half, or any other part of a sum of money, is equally as powerful as that of obtaining a part of a tract of land, or any other article of property.

NEITHER do we think that the legislature made any alteration in the law, by expressly declaring a bargain *with either plaintiff or defendant*, as the object of the restriction. The Roman law makes no distinction between the advocate of the plaintiff and that of the defendant. *Nullum neque pactum neque contractum de lite aut mercede.* Neither is there any in the case of the *honoraire* of the *avocat* of either party in France. Neither do the English. *Wood* indeed says: no attorney can *carry* a cause, on no purchase, no pay. *Inst.* 413. But he is only a commentator, and the text of the Roman law, which is in this respect his guide, extends indiscriminately to the advocates of either party.

WE admit that, as the act of our legislature speaks of attorneys of the courts of the territory, the suits spoken of in it, must be understood to be those only which are prosecuted in our courts, and the present case, being that of a suit in the supreme court of the United States, is not thereby affected; but we are under an impression, that the act is not introductory of a new principle. The contract, if it exists, received the defendant's assent here, and the payment was to be effected here: it follows it must be tested by our principles of jurisprudence. These, in our opinion, disallow all contracts between counsel and suitor; they protect the ignorance of the latter against the cupidity of the former, in the same manner as the confidence of youth against the cunning of age; the weak mind of a sick man against the impositions of his physician, 1800, *ch.* 9, or the distressed situation of a needy one against the extortions of the money lender. *Civil Code*, 408. *Caizergues* vs. *Dujarreau.* 1 *Martin*, 7.

Constantini, a celebrated Italian lawyer, in his *Lettere Critiche*, speaking of *ladrones occultos*, secret thieves, says, "they (physicians) steal also, "when, pretending that they will receive no pay, "unless they cure the patient, they make him pay "the hundred fold." *Roban tambien con fingir de no querer gratificacion alguna, si no cura el enfer-*

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*mo, haciendo que les paguen entre tanto sus secretos, a ciento por uno.**

BETWEEN client and suitor, special bargains are, generally, what the French call *conventions leonines*, lion's bargains. One party is able to ascertain with considerable accuracy, the value of the risk against which he insures: the other is completely in the dark. If the court were to permit such agreements, an interested lawyer would seldom consent to any other; for none could be so advantageous to him. Seldom would the suitor obtain disinterested advice. Risks, which the party consulted would expect to insure against, would ever be magnified. In the inferior courts, the counsel would decline to avail himself of victorious means of defence, in hopes that the alarms of the client, excited or increased by a failure in the first instance, might prepare his distressed mind to accept relief, at the expence of a considerable part of his fortune, by a bargain on *no purchase no pay. Cliens omnia daret patrono, propter metum litis, ut infirmus propter timorem mortis, medico. Ad leg.* 6. *Cod. de postulando.*

THE plaintiff has contended that the sum claimed by him, is *no part of the thing in dispute*, but a specific sum, measured and ascertained by

* We use a Spanish translation, for want of the original. 10 *Cartas Criticas*, 311.

the amount of the judgment. This appears to us a mere play upon words. Judgments rendered in a circuit court of the United States, are examined in the supreme court, when *the matter in dispute*, exceeds the sum or value of $2000. 1 *Laws U. S.* 62. Now the judgment in this case was carried up, because the *matter in dispute*, was a sum of $ 15,000. The plaintiff claims ten per cent. on, or the *tenth part* of, that sum. Surely this is claiming part of the *matter* or thing, *in dispute.*

FROM a full examination and comparison of the principles of jurisprudence, and the provisions made by the express laws, which we have cited, it appears to us:

1. THAT, by the Roman law, advocates were not allowed ordinarily to resort to a suit, in order to compel ungrateful clients to do them justice, although in certain cases the court might yield their aid—that no contract was permitted between them; and those by which the advocate stipulated for a part of the thing in dispute, as his reward, were highly condemned and reprobated.

2. THAT in *France*, from whence are drawn the original laws of this country, at the period when it was ceded to Spain, *avocats* were not

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permitted to sue, and the other principles of the civil law were in their full vigor.

3. THE plaintiff has not shewn that, whilst this country was under the dominion of *Spain*, any Spanish law was introduced, altering the jurisprudence of the colony in this respect.

4. THAT the common law of *England*, which is imagined to be the ground work of most of, if not all, the United States, except this, the Roman jurisprudence, as to the reward of counsel, is observed with unabated strictness—counsel never being allowed to sue their clients. Attornies, as the *procureurs* in France, being allowed a remuneration, according to a tariff established by law; and for the payment of the fees thus allowed, they are indulged with the benefit of the courts of the country.

5. THAT in most of these states, the same individuals, acting as counsellors and attornies, are permitted to sue for their legal fees, when a statute fixes them; and when there is no statute provision for the value of their services. We are unable to say that, in any case, a suit was brought with success on a special contract.

WE conclude:

I. THAT, in this state, the usage which prevails, having excluded the distinction between counsel and attorney, and the services which are rendered in either of those capacities not being distinguishable, it is much more consonant to justice that the ability to sue, of the attorneys, should be extended to every case of professional services, than to extend the disability of the counsel. That, therefore, a gentleman, acting as an attorney and counsellor at law, may sue for the reward of his services, and claim it, as there is no tariff, according to their real value.

II. THAT this real value is not to be fixed by any previous contract or agreement, but may be established by the allowance of the suitor, after the services are performed—as in the case of *Ellery* vs. *Amelung's syndics*, *ante*, 244.

III. BUT that it cannot, in any case, rest on an agreement depending on the issue of the suit: much less can a contract, on *no purchase no pay*, be the ground of an action.

IV. THAT those principles extend to contracts made and to be completed here, although the suit be depending elsewhere. In suits depending in the courts of the state, the attorney or counsel violating them, incurs, besides the nullity of the contract, the penalties of the statute.

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THE present verdict sanctioning a contract between a counsellor and attorney, on an event depending on the issue of a suit, and the reward stipulated for being a part of the object in dispute, is contrary to law and ought to be set aside.

NEW TRIAL GRANTED.

Mazureau and *Depeyster*, for the plaintiff.
Ellery, for the defendant.

READ vs. *BAILEY*. *ANTE*, 60.

Plaintiff needs not a judge's order to his interrogatories, & cannot file new ones, without leave to amend.

2m 296
45 337

Ellery, for the plaintiff, during the vacation, filed a supplemental answer, in which he inserted additional interrogatories, and had obtained a judge's order, at chambers, that the defendant might answer them.

Grymes, for the defendant. The plaintiff, if he be at all entitled to have his interrogatories answered by the defendant, does not need any judge's order. That is required in cases only when the defendant propounds interrogatories to the plaintiff.

A SUPPLEMENTAL petition is an amendment to the original one. The party is never allowed to amend of course. He must apply for leave *to the Court*, and shew good ground; and his opponent must have an opportunity of shewing cause

against the amendment. This, therefore, cannot be done at the chambers of a judge. FALL 1812. I. District.

OF this opinion was *the Court.*

DUCOURNAU vs. *MORPHY.*

By the Court, LEWIS, *J. alone.* This action is brought to rescind the sale made of a slave, on account of certain redhibitory defects. The petition charges generally, that the slave, at the time of the sale, possessed physical and moral vices; but designates two or three only. Amendment will be allowed, when the issue is not thereby changed.

IT is moved to amend the petition, by further alledging that the slave was, at and before the sale, *an habitual runaway.* It is objected that the amendment proposed, is a distinct cause of action, and being barred by the statute of limitations, cannot now be allowed.

THE rule is, if the issue shall be changed thereby, there shall be no amendment; but where there can be the same issue between the parties, the court will always allow the amendment, in order to save the action. 1 *Bac.* 108, 3 *Lev.* 346, 2 *Stra.* 890.

AMENDMENT ALLOWED.

Morse for plaintiff. *Livingston* for defendant.

FALL 1812. I. District. *EMERSON'S* vs. *M'CULLOUGH'S SYNDICS.*

Jury of merchants denied to try whether a conveyance was fraudulent.

Depeyster, for the plaintiff, prayed for a special jury of merchants, and being asked what question would probably arise, answered the principal one was, whether a certain conveyance was not in fraud of creditors.

By the Court. This is not a mercantile question, but a matter of law.

SPECIAL JURY DENIED.

TALCOTT vs. *M'KIBBEN & AL.*

If a case is left to persons chosen by the parties, whose report is to be the judgment, &c. they need not be sworn, and unless improper conduct be shewn, judgment will be entered, although they report not the grounds of their opinion, nor state any account.

THIS case had been left, by consent, under a rule of court, to five merchants, agreed upon by the counsel, whose report was to be made the judgment of the court. They reported a round sum of $2,941 80 in favor of the plaintiff, without stating any account, or specifying any particulars. Upon a rule obtained upon the defendants, to shew cause, why the report of the referees should not be homologated, and become the judgment of the court, exceptions were filed to the report; and it was now argued upon the exceptions. On the part of the plaintiff, a witness was called, to prove that it was the usage of merchants to charge interest upon advances made.

Duncan, for defendants. This report is exceptionable in a variety of respects; and is at variance with the general laws of the country, as well as the particular acts of the legislature.

1. IT does not appear, that the referees were duly qualified.
2. THEY have presented no stated account between the parties.
3. THEY have allowed interest upon an open account.

1. BY the 20th section of the act, regulating the practice of the superior court in civil causes, the court, in all cases which shall appear to require the investigation of long and intricate accounts, is authorised to refer the statement of them to three proper persons, to be chosen for that purpose by the court, who shall examine the accounts, and the vouchers and other testimony in support of them, and state such accounts in their report to the court; which referees, before they enter upon such reference, shall take before some judge of the court, or some justice of the peace, an oath, the form of which is particularly prescribed in the act. But in the present case, how does it appear, that the referees have taken the prescribed oath? Before what judge or justice, has it been done? Why has it not been annexed to the report, or at least proven before to the court? Without this,

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they were not qualified to act as referees, and their report is as invalid as the verdict of an unsworn jury.

2. THE act also requires a stated account, which requisition has been equally neglected. Indeed, the duty of referees is confined to thus stating an account, upon which the court will then act; and for this purpose only are they employed. They have, therefore, failed in the only object committed to their charge, and the only duty they had to perform. As it is, we are left entirely in the dark with regard to the grounds upon which they went, or the principles by which they were governed. When we ask for statements and facts, we are presented only with a round sum total in figures, without being informed of the items of which it is composed, or of the rule by which it was worked. I know that there is a former act of the legislature upon the subject of referees, and providing for the settlement of litigated accounts, where the same strictness is not required as in this one; but that equally exacts a stated account, for the information and guidance of the court. The referees, by these acts, are not resorted to as a tribunal, to apply principles of law; but as accountants, to audit accounts and to state balances; the court will then do its duty. But here, this duty is entirely taken off its hands, and it has left no

other office to perform, but that of blindly rejecting or confirming their report.

3. BY our law, interest is never allowed upon unliquidated debts or open accounts; and even upon liquidated and ascertained debts, if not stipulated to the contrary, it runs, not from the date of the debt, but from the period of the judicial demand. But here, upon an open account, we find the original sum increased by interest, which must have been allowed, not only from the period when the suit was instituted, but from the date of the debt itself.

Ellery, in reply. Had the counsel attended to the manner in which this reference has been made, and consulted the terms of the submission, much time might have been spared in the discussion. This case is not embraced by either of the acts quoted. Those acts apply to referees, appointed by the court, not to arbitrators chosen by the parties; and they suppose long and intricate accounts, the investigation of which would consume too much of the time of the court, and which they are authorised to leave to referees, as a species of *experts*. But here were no long and intricate accounts for investigation, neither were the referees appointed by the court. Again, the last act, which requires the oath of the referees and prescribes its form, limits the reference to *three* persons—here,

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by consent, *five* have been chosen. We do not then fall under this act; and as for the first act, no oath is required on the part of the referees; therefore, supposing this case embraced by the first act, the want of qualification of the referees, cannot be urged as an exception. But we find, from their report, that they were duly qualified—they there state, "after being first duly sworn:" This is sufficient evidence of the fact; no further can be legally required; and if not true, the contrary ought to be shewn. The referees ought to be presumed to act according to law, without their declaration to this effect, inserted in their report; but we are now told, they are to be presumed to act against law, notwithstanding their recorded declaration to the contrary, in express terms. But no presumption is allowed to overturn an award. 2 *Atk.* 501. But again, is this qualification of the referees, if not particularly required by law (and it is not by the first act) from the nature of their office, indispensably necessary? I think not: by electing this mode of terminating their differences, the parties have chosen their own judges; it is not like a struck jury, to which the gentleman would assimilate it, but is a domestic tribunal, resorted to by the parties, which is to decide upon their case, unincumbered by technical niceties, and divested of forensic forms.

2. BUT, it is contended, that no account has been stated by the referees, and presented by them to the court—neither was it necessary or possible, as there were no accounts between the parties requiring either investigation or statement; no offset was set up by the defendants to the demand of the plaintiff, nor any conflicting claim opposed; a *case* was submitted to them for decision. not an *account* to be stated. The submission mentions the word *case*, thus excluding accounts —and upon this case, as appears from the pleadings, arose a question purely mercantile, viz. whether, by the usage of merchants, the credit allowed by the plaintiff, in the sale of certain merchandize consigned by the defendants, was a departure from his instructions, or such a departure as made him liable for the amount of the loss incurred by giving such credit? By their report, they found the negative; the account itself was never disputed, it consisted of specific and undenied items; the parties were at issue solely upon the principle now settled by the referrees; who, in stating the sum due by the defendants to the plaintiff, sufficiently stated the account.

3. BUT it is further urged, that they have allowed interest, and that this allowance is not according to law. But how does it appear that interest was allowed? Has any sum been set down for the rate, or as the amount of interest? Have

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they not found for the plaintiff in round numbers, without specifying the items? How then can it be shewn, what part belongs to the principal, or what part makes the interest? But conceding, that interest was allowed, it remains yet to be shewn that this allowance was illegal or incorrect. The transaction between the parties was purely a mercantile one, not falling under the general principles of law, but to be construed according to mercantile usage. On this account, and for this reason, was this case committed to five respectable and distinguished merchants. Besides in the digest of the civil code, we find constant exceptions made in favor of mercantile usage; thus, in the case of the privilege of the vendors of property, it says, "nothing therein shall alter or affect "the established laws and usages of commerce," 470. The *lex mercatoria* exists entirely distinct ahd independent of the code.

THUS, upon an examination of this report, we shall find that it is not embraced by either of the acts of our legislature, though conformably to the provisions of both: that it is a voluntary submission by the parties, who agree that the report should be made the judgment of the court; that the report is consistent with the terms of the submission: of course, then, it can never be set aside, except for corruption, partiality, or misconduct, or a plain error or mistake upon the face of it. *Kyd*,

227, 3 *Atk.* 394, 5 *Atk.* 529. These are the principles both of the civil and common law, from the former of which the latter has borrowed them.

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By the Court. This case is not to be compared to that of a reference of accounts. The parties have, by their own act, substituted judges of their own choice. They have not required that they should be sworn, and they have given them full powers. By a mutual stipulation, the report which they have made is to be the judgment of the court. Surely, on good ground, the court would inquire whether there has been any improper conduct; but, in the absence of any suggestion of this kind, there must be judgment according to the report.

DORMENON'S CASE. ANTE, VOL. I. 129.

P. Dormenon restored to his seat at the bar.

By the Court, LEWIS, *J. alone.* Mr. Dormenon has laid before me, a number of affidavits, which he has obtained since his name was stricken off the roll of the attornies and counsellors of this court, tending to disprove the charges which had been made against him.

IT appears that he has lately been elected a member of the house of representatives, and that an enquiry has taken place in that body, in regard

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to his conduct in St. Domingo. The house have unanimously come to a resolution, that the charges against him in that respect are unfounded, and have allowed him to retain his seat. These charges were of a nature which interested the public at large; but there was no complaint against that gentleman, in regard to his conduct, as an officer of this court. Since, then, that branch of the legislature, which immediately represents the body of the people, have declared themselves perfectly satisfied that no imputation attaches on Mr. Dormenon, in regard to his conduct, in the instance in which it appeared reprehensible to this court, there seems to be no good reason to deny his prayer, to be reinstated in his seat at the bar.

THE order which was made him on the 9th day of July, 1810, is therefore rescinded.

DURNFORD vs. *JOHNSON*. *ANTE* 183.

Party may demur to evidence. Plaintiff may discontinue after demurrer to evidence.

THIS cause was submitted to the jury, and the plaintiff's evidence being gone through, the defendant's demurred thereto.

THE plaintiff's counsel contended that they could not be compelled to join in the demurrer, the legislature having provided that it shall be the duty of the jury to decide questions of law, when

they have no doubt, 1805, *ch.* 26, *sect.* 6: but the court overruled the objection.

THEY next moved for leave to discontinue, which was granted, on payment of costs, on the authority of 5 *Bac. Ab.* 476, and the case of *Boucher* vs. *Lawson*, *Cases Temp. Hardwicke*, 194, in which it is held that the court will grant leave to discontinue, after a special verdict, but not in a hard action. It being considered that the parties were nearly in the same situation, after a demurrer to the evidence, as after a special verdict.

NUGENT vs. *DELHOMME.*

THIS was an action by an endorser, against the maker of a promissory note. See *Nugent* vs. *Mazange*, *ante* 265.

A *memorandum* at the foot of the note, shewing a new domicil, does not avoid the note.

Payment by an indorser, discharges the maker.

Costs alone never given by the jury.

Porter, for the defendant, opposed the introduction of the note as evidence, on the ground that, since the making of it, a material alteration had taken place, without the consent or knowledge of the maker, which totally annulled the instrument.

Hennen, for the plaintiff. The alteration of a note, or bill of exchange, must be in a material part, as the date, or sum, to make it void: the leading case on this doctrine, is that of *Master &*

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al. vs. *Miller*, decided in the K. B. 4 *Term. Rep.* 320, and affirmed on error in the exechequer chamber, 2 *Hen. Black.* 141, in which the date of a bill of exchange, drawn on the defendant on the 26th March, 1788, payable three months after date to J. S. and accepted by defendant, was altered by some person unknown, after acceptance and while the bill remained in the hands of J. S. the payee, from the 26th March, 1788, to the 20th March, 1788, without the authority or privity of the defendant: J. S. the payee, afterwards endorsed the bill so altered, to the plaintiff, for a valuable consideration. It did not appear that the plaintiff knew of the alteration, at the time when the bill was endorsed to him. Payment having been refused, plaintiff sued the defendant. The case was twice argued, and it was determined by the court, that the alteration of a bill of exchange, after acceptance, whereby the payment would be accelerated, avoids the instrument; and no action can be afterwards brought upon it by an innocent holder, for a valuable consideration. But alterations in a note or bill, acquiesced in by the parties concerned, *Patton* vs. *Winter*, 1 *Taunt.* 420. *Kershaw* vs. *Cox*, 3 *Esp. N. P. Cas.* 246. and alterations made in an immaterial part, and not affecting the responsibility of the parties to the note or bill, have never been considered as avoiding the instrument. In *Trapp* vs. *Spearman*, 3 *Esp. N. P. C.* where

the action was brought by the indorser against the acceptor of a bill of exchange, and the defence set up was, that an alteration had been made in the bill after it was given, by adding, "when due at "the *Cross-Keys, Blackfriar's road;*" which Erskine contended, rendered the bill void: Lord Kenyon said, "that this was not an alteration "either in the time of payment, or in the sum; "that to make a bill of exchange void by reason "of an alteration, it should be in a material part; "though it had been formerly holden, that even "telling up a sum on a bill, or writing any thing "upon it, would invalidate it, that strictness was "now exploded: and as the alteration in the pre-"sent case was not in a material part, but only "pointing out the place where the bill was to be "paid, it was not such an alteration as should in-"validate the bill."

THE memorandum at the bottom of this note, "*payable at the domicil of Dukeilus,*" cannot be considered as altering the responsibility of the defendant, *Delhomme;* it cannot be considered merely as an indication of the place where payment might be demanded by the holder. It is true that regularly a demand of payment of the acceptor of a bill, and the maker of a note must be made at their domicil, or where the bill or note is payable: particularly would it be necessary, in order to charge an indorser, that the note or bill

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should be protested at the place where payment was to be made, agreeable to the terms of the instrument; yet is it equally true, that the acceptor of a bill of exchange, and the maker of a promissory note are liable universally; that the place of payment forms no part of the contract; nor is it necessary to prove in an action against the maker of promissory note, or the acceptor of a bill of exchange, that payment was demanded at such place. 1 *Camp.* 423, 4, 5, *Lyon* vs. *Sardins*, 2 *Campb.* 656, 7. *Fenton* vs. *Goundry.* In the case of *Foden* vs. *Sharp*, 4 *Johns. Rep.* 184, the court said, that the holder of a bill of exchange need not shew a demand of payment of the acceptor of a bill of exchange, any more than of the maker of a note. It is the business of the acceptor to shew, that he was ready, at the day and place appointed, but that no one came to receive the money; and that he was always ready afterwards to pay.

By the Court. The case of *Trapp* vs. *Spearman* appears conclusive. Let the note go to the jury. If the counsel for the defendant is able to produce contrary authorities, he may move for a new trial.

THE defendant proved that the plaintiff had received from Mazange, one of his endorsers, full payment of the note.

Porter, for the defendant. This has entirely destroyed his right of action. The case of *Gilmore* vs. *Ker*, 2 *Mass.* 171, establishes this position. The court there determined that when an indorser of a promissory note, has recovered judgment and satisfaction in an action against the indorser, he cannot have costs in an action previously commenced against the promisor.

Hennen and *Morel*, for the plaintiff.

ON this new point, that after payment of the debt, interest and costs in the action against the indorser, the action brought at the same time against the maker, is gone, and judgment must be rendered in his favour for costs.

THERE is but one case to be found, in either the English or American reporters, which goes the length contended for by the counsel for the defendant, 2 *Mass. Rep.* 171, and in that case the court have not referred to any adjudged case, as the ground of their decision. In the case of *Tarin* vs. *Morris*, 2 *Dal.* 115, a contrary decision appears to have been sanctioned. In the case of *Austin* vs. *Beneiss*, 8 *Johns. Rep.* 356, it was decided generally, that where separate suits are brought against the maker and endorser of a note, and separate judgments recovered, the plaintiff is entitled to the costs in each suit.

Pothier, *contrat de change*, *No.* 160, says: " Le propriétaire de la lettre de change peut, si

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" bon lui semble, intenter en même temps toutes " ses poursuites contre les différens débiteurs qui " en sont tenus. L'action qu'il a intentée con- " tre l'un d'eux, ne l'exclut pas d'intenter celles " qu'il a contre les autres; mais comme ces dif- " férens débiteurs sont débiteurs envers lui de la " même chose, le payement qui lui est fait par " l'un d'eux, libère d'autant envers lui les autres." See also *Jousse's commentary on the Ord. of* 1673, 61, 2, *Ord. Bilboa, chap.* 14, *no.* 4. The common law having given separate remedies against all the parties to a note or bill, and the civil law considering them as bound *in solido*, and giving the same remedy, it appears to me absurd to say that an action was legally brought against all the parties; and that by pursuing one of them to judgment, and obtaining satisfaction of that judgment alone, all the others should be discharged from their responsibility for the costs. Such remedy must be considered, in many cases at least, illusory as well as nugatory.

By the Court. The plaintiff had a right to bring several actions upon this note: but this right is to be exercised at his peril, as to the costs. Recovery and satisfaction in any of the other actions, would support a plea of satisfaction in this. Payment to the indorser, by any of the parties to the note before trial, is a discharge of the promise. He may have as many actions as there are parties prior to

him, but he can have but one satisfaction—this he has received from Mazange, and therefore cannot maintain his action against Delhomme. This was the opinion of the court in Massachusetts, in the case cited by the defendant.

IN the case of *Austin* vs. *Beneiss*, the claim of the indorser had ripened into a judgment, which the payment reduced *pro tanto;* the defendant was therefore bound to pay the balance, viz. *the costs.*

ACCORDING to *Pothier*, payment by one of the parties, discharges the other *for so much.*

IT remains to be considered, whether the defendant, being discharged from the amount of the note, may be prosecuted for the *costs.*

COSTS are the *accessories* of the judgment. Accessories follow the principal—like interest, they cannot be sued for, apart from the principal. *Faurie* vs. *Pitot*, *ante* 83.

VERDICT FOR DEFENDANT.

PARMELE'S CASE.

A man, renting a store, but boarding out, not qualified to be a juror.

HE was summoned as a juror. It appeared he was a single man, who rented a store, and boarded at another man's table. The act, 1805, *ch.* 26, *sect.* 5, requiring a juror to be *a house-keeper*, he was discharged.

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READ vs. *BAILEY*.

When the court is equally divided, there cannot be any judgment.

UPON the trial of this cause, the court divided in opinion, *ante* 77, and no judgment was rendered; and now the counsel for the plaintiff moved to discontinue.

The plaintiff, except in a hard action, will be permitted to discontinue, before a verdict, or the opinion of the court, is known.

Grymes and *Duncan*, for defendant. The division of the court in this case, amounts, in effect, to a judgment against the plaintiff. He has not gained, neither can he gain, any thing from the trial. The court being divided, the plaintiff, either in a motion, or upon a trial, who does not succeed, of course fails: the division of the court always telling against him. But even if this principle were not admitted to apply to this case, the present plaintiff ought not to be suffered to discontinue. After argument, a discontinuance is always left to the discretion of the court; it cannot then be taken as a matter of course, but must be obtained as a matter of favor; and if the case be a hard one, it will be refused. 1 *Salk.* 178. This case may be considered one of that description. Here the plaintiff has called upon the defendant, to answer upon oath certain interrogatories; and now, instead of proceeding in the cause, he wishes to abandon it, and new shape his action; by which means he will take advantage of the disclosures forced from the defendant, and at the same throw away his testimony, which, by our law,

must be received as true, unless disproved by the oath of two credible witnesses, or of one credible witness and strong corroborating circumstances. *O. L.* 1805, *ch.* 26, *s.* 9.

Ellery, in reply. After argument, there is no doubt but that a discontinuance ceases to be a side bar rule, to be had as a matter of course from the clerk; and that it can now only be obtained, upon motion made and leave granted by the court. But in our courts, it has been adopted as a general rule, to grant a discontinuance, at any period before judgment is rendered, in issues to the court; and before a general verdict, in those to the country. In England, it has been granted, after demurrer argued, 1 *Str.* 76; after judgment upon demurrer for plaintiff, and error brought, *Barnes*, 169; and after special verdict, 1 *Salk.* 178. But it is objected, that a division of the court ought to tell against the plaintiff, who never can succeed, either in motion or upon trial, until the court be agreed. But, it will be recollected, that our court does not always consist of an equal number of judges; and if it did, and they continued divided in opinion, it would make one of the strongest arguments in favour of a discontinuance—that the suit might be brought forward in such a shape as to secure a decision, and justice be no longer delayed. But it is further urged, that the

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present case is a hard one, and that the court will exercise its discretion, in withholding its consent to a discontinuance. But it never can be considered a hard case, when the court is divided upon it in opinion.

By the Court. In France, there are courts, in which the president has a preponderating voice, in case of an equal division of the members. In others, recourse is had to another court. 1 *Ferriere, verbo Departager.*

IN England, in the King's Bench, the Common Pleas, the Exchequer, or in the Exchequer Chamber, where all the justices are assembled, if the justices are equally divided, no judgment can be given ; and so it is in the court of parliament. 12 *Co. Procter's case*, 118.

IN this state, the same rule has always prevailed. *Moreau* vs. *Duncan*, 1 *Martin*, 99, *Orl. Nav. Co.* vs. *City of N. O. id.* 269, *ante, same case*, 10. and there is a strong reason for it, the court being composed of an uneven number of judges.

THE plaintiff is as much entitled to a discontinuance in this case, as in that of *Durnford* vs. *Johnson*, *ante* 306.

DISCONTINUANCE GRANTED.

BERMUDEZ vs. *IBANEZ.*

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Appraisers cannot cast lots for the appointment of an umpire.

REAL property being seized, on a *fi' fa'*, the parties appointed appraisers, and these being unable to agree, it became necessary to appoint an umpire. Some difficulty arising in this, it was got over, by putting the names of three persons in a hat, and the determination left to chance. 1805, *ch.* 15, *Civil Code*, 490, *art.* 3.

ON affidavit of this, and that the person chosen was the personal enemy of the person whose land was seized :

By the Court. The appointment was improperly left to chance. The sheriff is to appoint, if the appraisers cannot agree.

Prevost for plaintiff.
Ellery for defendant.

TREMOULET vs. *TITTERMARY.*

Certified copy of the book of the master and wardens of the port of N. Orleans, received in evidence.

THE plaintiff claimed damages for some injury, which his goods had received on board of the defendant's vessel, through his neglect or that of the crew.

THE defendant offered in evidence a certified copy from the book of the master and wardens of the port of New-Orleans.

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Depeyster, for the plaintiff. It cannot be read; the book itself should be produced.

Hennen, contra. The act of 1805, *ch.* 24, provides that the master and wardens shall keep an office in the city of New-Orleans, and shall cause to be made in a book, to be kept by them, an entry of all their proceedings under that act, to which all persons may have recourse, *sect.* 9. The same act constitutes them surveyors of damaged goods, brought into the port of New-Orleans, in any ship or vessel. They are farther directed to cause entries to be made in a book, to be kept in their office for that purpose, and to issue certificates. *sect.* 11.

Now this book is to be kept in their office, and all persons to have recourse to it. This recourse must, necessarily, be to procure evidence from it; and this cannot be done, unless extracts are obtained therefrom, and permitted to be used. As the book is directed to be kept in the office, it cannot be transported for examination to a distant court, within the state. Neither would any court sitting in the city, order the production of it, in ordinary cases.

CERTIFICATE READ.

A DEPOSITION was offered, at the foot of which the adverse counsel had written his consent to its being read. The reading of it was, how-

ever, opposed, on the authority of the case of *Philibert* vs. *Woods*, *ante* 204, because it had remained open, in the possession of the party, for whose benefit it was taken.

By the Court. The counsel consented to the reading of the deposition absolutely. He put no condition to his consent.

DEPOSITION READ.

CLARK vs. *STACKHOUSE.*

Check, received from a person who obtained it unfairly, will entitle the party to recover on it, if he took it without any knowledge.

THIS suit was brought to recover the amount of a check of the defendant, which had been refused at the bank.

THE check was made payable *to H. M. & Co's. note, or bearer*, and the defendant's clerk proved that a check of that amount, which he believed to be the one presented to him, was drawn by the defendant, and delivered to him to go with a Mr. *Hoyle*, of the house of Hoyle, Miles & Co. to the bank, and take up a note of theirs endorsed by the defendant—that, arriving too late at the bank, they were told the note had been sent to the notary to be protested, that the bank hours being over, and the check being before the witness, *Hoyle* took it up, and said he would go and take up the note therewith.

Hoyle next deposed, that he gave the check to the plaintiff, on the Monday following, towards

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noon, to indemnify him for his endorsement of a note of his house, which the plaintiff had endorsed and was protested on the preceding Saturday—informing him the house had failed, and expressing a hope that the check might prove good.

Hennen and *Ellery*, for defendant. The only question in this case, is, whether the defendant or plaintiff is to be the loser of the sum of money specified in the check. To determine this question, we must enquire:

1. WHETHER the person from whom the plaintiff received it, would be entitled to recover in this suit?
2. WHETHER the plaintiff be in a better situation than the person from whom he received it?

1. ON the first point, there can be but little ground for fair doubt. *Hoyle*, from whom the plaintiff received it, could never recover against the defendant, as he knew it was never intended to be paid to him or his firm, or to be put into circulation, but to take up their note, due on the day of the date of the check, and upon which the defendant stood as an indorser, and also as it was never intended to be delivered to him, but was surreptitiously obtained, or at least unfairly circulated.

2. AND is the present plaintiff in a better situation? Has he not received this check, subject to all the equity arising between the original parties?

This will appear, or be strongly inferred,

1. BECAUSE it was received by him some days after it was due.
2. BECAUSE a knowledge of the circumstances under which it was drawn and circulated, can be fairly and legally imputed to him.

1. It is a settled principle of law, that whoever receives a bill or note after it is due, takes it upon the title of the person from whom he received it, and places himself in the same situation, and becomes subject to the same equity. *Evans*, 107. And the mere act of receiving it, when overdue, is sufficient, legally to infer a knowledge of all the circumstances attending it, and the person so receiving it, shall be taken as having notice of all, the person from whom he received it knew. *Good* vs. *Coe*. This principle has been extended to banker's checks, which, like bank checks, are made payable to bearer. 7 *T. R.* 430, and it has been equally determined, that a banker's check is due on the day of its date, and should be then presented for payment, if the parties reside in the same place. *Evans*, 140. In the present case, the check was nearly three days old; and in what important

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features does a bank check so differ from a banker's check, as to exempt it from the operation and application of the same law? Had the bank failed, would not the retention of this check been construed such a *laches*, as to have exempted the drawer, and thrown the loss exclusively upon the negligent holder. A check must be presented for payment on the *very day* it is received. *Max. Dict.* 61. *Chitty*, 147, *Kyd.* 45, 1 *El. Rep.* 168. At all adventures within *twenty-four hours*, (the parties residing in the same place) after such receipt. *Max. Dict.* 62, *Str.* 415, 910, 1175, 1248. *Ld. Ray.* 928.

2. Have we not a right, both from the face of the check, as well as the circumstances of the case, strongly to infer and impute, a notice and knowledge on the part of the plaintiff, when he received it? There is, first, the post date, which alone would throw a shade of suspicion upon the check; then, its being drawn by the defendant, and made payable to *H. M. and Co's note*, and expressing the exact sum for which, but two days before, the plaintiff endorsed their note, for the avowed purpose of taking up and renewing the one then due and endorsed by defendant, explained beyond contradiction, for what purpose it was drawn, and to what use intended. These facts thus appearing on the face of the check, uncoupled with any other

circumstances, would naturally, not only infuse doubt, but prompt enquiry and produce examination. But when we connect with them the other circumstances in this case, the conviction is irresistible, that the plaintiff was connusant of every material fact, and by taking it with such knowledge, placed himself in the situation of the person from whom he received it, and made himself liable to all the objections which would be admitted against him. He is told by the witness, *Hoyle*, at the time the check was offered to him in payment, that this very note, endorsed by defendant, and due on the day of date of the check, and for which this very check was given, had been dishonored; of course, the plaintiff knew, and from the best authority, that their firm, of which *Hoyle* was one, was actually, as well as legally, insolvent. He was also told, at the same time, that this was the only fund left, out of which he could be paid, and by *expressing* a *wish* that the check might be good, a *fear* was equally *implied* that it might *not* be good.

ON the part of the defendant, every step was taken, to free himself from loss, risk, or difficulty on account of this check. He did not give this check to *Hoyle*, but confided it to his own clerk; and though the words *or bearer*, were not effaced, yet he made it payable to *H. M. & Co's note*, and when he found it had been obtained from

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his clerk, he directed the payment of it in bank to be stopped.

Porter and *Depeyster*, for the plaintiff. Whatever degree of industry the defendant may have exercised, in preventing the misapplication of the check, if he was unsuccessful in conveying to the plaintiff a knowledge of the circumstance under which he parted with it, he cannot resist the payment of it.

ADMITTING that the plaintiff knew that the check had been given to *Hoyle*, for the purpose of taking up the note which the defendant had indorsed, still, as the check was made payable *to the bearer*, the possession was *prima facie* evidence of an authority to pass it away. He might have given the check as a means of payment, which *Hoyle*, if he had any other, might fairly have applied to any use he pleased. Fraud is not to be lightly presumed.

NOTHING can be more peculiarly negociable, than a draft or bill payable *to bearer;* which is from its nature payable from hand, *toties quoties*, *per Yates*, *J.* in *Grant* vs. *Vaughan*, 3 *Burr*, 1529. Such a draft is like a bank note. *Id.* 1530.

CHECKS are considered as cash—they are the great medium of commercial intercourse in Europe. *Swift on bills.* 337.

THE defendant might, with equal propriety, complain that *Hoyle* had paid away cash in bank notes, which he might have given him to take the note he had endorsed for him.

As to the check being overdue. It was given, we have in evidence, on Saturday, about the close of the bank-day—the next was a Sunday, *dies non*, and the morning of the following day, it was received by the plaintiff, within one or two hours after the opening of the bank. If it had been on a private banker, and he had failed before the plaintiff could present it, the defendant would have been discharged: for the keeping it that length of time without presenting it, would not have been such a delay as would have been detrimental to the holder. In *Ward* vs. *Evans*, 2 *Salk.* 442, the court held that the party who had delayed presenting a gold-smith's note till the *next day* after he received it, was in time, as he should have a reasonable time to receive it, and he was not bound, as soon as he got it, to go straight for his money.

IN some cases, keeping a check *three*, *four*, or *five* days, was held to be not too long. 2 *Free.* 247, 257. In another case, it was held that presentment for payment must be made within *two* days. *Str.* 508. The decisions have varied on this subject, but the fair result of them is, that a banker's check, payable in the place where it was given, may be presented at any time before twelve

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o'clock on the day *after* the receipt of it, or at any time within twenty-four hours after such receipt. *Str.* 415, 416, 910, 1175, 1248. *Ld. Raym.* 928. *Holt*, 120, *Kyd.* 45.

Now if the check in the present case, when it came to the plaintiff's hands, was not detained long enough to have dissolved the liability of the maker, it was not *overdue*—not stale enough to be denied circulation on ordinary terms. No presumption, therefore, arises against the plaintiffs on that score.

By the Court. It is clear that *Hoyle* could not maintain an action, against the defendant, on this check:

1. BECAUSE the check was not *given* to him by the drawer, or any person apparently authorised to pass it away.
2. BECAUSE, in his knowledge, the check was not drawn, in order *to be paid*, but for the special purpose of taking up a note.
3. BECAUSE he came by it unfairly, having taken it from the counter, without any authority from a person authorised to pass it away.

BUT a person, who cannot maintain an action upon a paper, may enable another person to sustain one, in certain cases. If the mail be robbed, the thief may not sue on the bank notes he may

have obtained by the robbery; yet if he pays them away to a person unacquainted with the unfair means through which it was obtained, he may maintain one. So, although *Hoyle* could not sue the defendant, he has legally, by the delivery of the check, enabled the plaintiff to sustain an action, if he received it without any knowledge of the particular circumstances under which *Hoyle* had come by it.

WHEN the day of payment of a note, bill, or check, is past, its circulation gives rise to a presumption that it may have been paid, or that the person bound to pay it, has some reason to resist the payment of it. The person, therefore, accepting it, receives it, in some degree, at his risk. But in the present case, the check was received by the plaintiff, very soon indeed after its issue. If the Sunday be not reckoned, and it ought not, the check was not twenty-four hours old.

THE check was payable to *H. M. & Co's note*, OR BEARER. The latter words repel the idea that it was exclusively to be used for the payment of the note. It may be fairly inferred that the words, *H. M. & Co's. note*, were put in, as a memorandum for the drawer.

THE circumstance of the house's failure, of itself, does not perhaps afford such a presumption

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of an improper application of the check, as would amount to a proof that the plaintiff was acquainted with the manner in which *Hoyle* had obtained the check.

VERDICT FOR PLAINTIFF.

POUTZ vs. *DUPLANTIER*. *ANTE* 178.

A blank indorsement allowed to be filled up, at the trial. The sale of a co-obligee's property, on a credit, does not discharge the other.

THIS was a suit against the endorser of a note. A new trial had been granted, the jury having given a verdict contrary to law and the opinion of the court: the note was produced with a blank endorsement.

Hennen, for the defendant. A blank indorsement does not pass the property of the note. The *Ordinance of Bilbao* requires that every indorsement should be filled up with the name of the indorser—it should mention in what the value of a note was received, and have a date.

Morel, for the plaintiff. This part of the ordinance has never been received in this country.

Two gentlemen were introduced as witnesses, who deposed that they had resided, one of them thirty-five, and the other, ten years, in the country, and had done considerable business; and had never known the practice of filling up endorse-

ments, to prevail. Notes being always transferred with blank indorsements.

By the Court. A blank indorsement authorises the holder to write whatever he pleases : an order to pay to any person, a receipt, or a power to receive the contents. It is surely an incomplete indorsement till it be filled up. But the party may fill it up at any time, before the note goes to the jury.

THE indorsement was accordingly filled up.

THE defendant then shewed that the plaintiff had brought suit against the maker of the note, had obtained judgment, and issued an execution against his lands, which had been sold on the ordinary credit, under the act of 1808, *ch.* 15, but the day of payment not being arrived, no payment had yet been made.

AFTER an argument and charge, as *ante*, 178,

VERDICT FOR PLAINTIFF.

FLOTTE vs. *AUBERT*,
AUBERT vs. *MARTINEAU, IN WARRANTY.*

THIS suit was brought, in order to recover a slave, in the possession of the defendant *Aubert*, who had been purchased by *Aubert* of *Martineau*, which latter had been cited to defend the title to the property.

Defendant may cite, and have judgment against his vendor on the warranty.

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Ellery, for *Aubert*. Though no clause of warranty is inserted in the bill of sale we have produced, conveying this slave from *Martineau* to *Aubert*, yet, by the civil, as well as the common law, an implied warranty is annexed to every sale, in respect to the title of the vendor; and if the title prove insufficient, it requires no express warranty to entitle the vendee to recover the amount of the price and damages. The digest of the Civil Code, in case of eviction, contains the same principles and provisions. *Civil Code*, 354, *arts.* 49, 53. If, therefore, we are evicted of this property, we must look for satisfaction to our vendor; and it has been the practice of our courts, conformably to the principles of the civil law, to suffer all the parties interested to be admitted into one action, and with the principal suit, to decide also those instituted in warranty; by which means suits are lessened, expence saved, and justice speedily administered. In this case, we have regularly vouched in our vendor to defend his title; and, in case judgment in the principal suit should be rendered against us, evicting us of this property, we pray that judgment also, at the same time, be entered against him, for the restitution of the price we have paid, as well as costs we have incurred, either in the suit in warranty or principal suit. *Civil Code*, 354, *art.* 54.

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OF this opinion was *the Court*, who, upon deciding the principal cause against the defendant, *Aubert*, directed judgment to be entered against defendant in warranty, in favor of *Aubert*, for the amount of the price specified in the bill of sale, and all costs incurred in the suit in warranty, as well in the principal suit.

Mazureau, for plaintiff.
Hennen, for defendant in warranty.

POUTZ vs. *DUPLANTIER*. *ANTE* 328.

The sale of a co-obligee's property, on a credit, does not discharge the other.

JUDGMENT being had against the maker of the note, execution issued and levied, and property sold on a credit, which was not yet expired, the defendant, endorser of the note, paid into court the costs of the suit, and prayed that execution might be stayed, till it appeared that the property seized was insufficient to satisfy the judgment. The presumption being, that as the amount of the property sold was sufficient to satisfy the judgment, the execution should not issue till the contrary appeared.

Morel, for the plaintiff. The prayer cannot be granted. Having obtained a judgment, we are entitled to all the advantages which legally ensue, to prosecute our execution till the money be had.

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Hennen, for the defendant. It is clear that the holder of a bill, or note, has his remedy against the parties to it, and that he may commence and proceed on actions against all of them at the same time, or sue them all in one action. If he brings several actions, he will not be precluded by judgment, a levy and sale, in one of them, from proceeding to judgment in the others. If he obtains judgment against all, and execution is levied on the estate of one of the defendants, he shall not levy on that of the other, if sufficient property has been taken. So when several actions are commenced and prosecuted to judgment, though execution shall issue for the debt *against one* ONLY, yet it may issue, *in all the actions*, FOR THE COSTS: for until one has actually made satisfaction, all are liable to make it. *Swift's Evidence*, 328, 2 *Vesey*, 115, 2 *Dallas*, 115, *Bayl.* 86, *Kyd.* 198.

ALTHOUGH the holder of a bill may issue execution against the person of all the parties, he cannot, after levying on the goods of one, issue a *fieri facias* to affect the goods of another. *Chitty*, 274.

By the Court. The maker of the note is certainly, for the present, at rest, while property of his, sufficient in the estimation of the sheriff, has been sold. This, however, is not *satisfaction*, even as to him. For, if negroes have been taken

and sold on the legal credit, and the purchaser and his sureties fail, and the negroes die, still will the maker be liable to have other property taken—for a note with surety, and a mortgage on the negroes, are not gold and silver, and the constitution of the United States has provided that no state shall make any thing but gold and silver a tender in the discharge of a debt. *Art.* 1, *sect.* 8.

IT is true, it is stated in several elementary writers, that "although the holder of a bill may issue "execution against the *person* of all the parties. "he cannot, after levying on the *goods* of one, is-"sue a *fieri facias* to affect the goods of another." *Chitty on bills*, 274. *Swift on bills*, 328. *Maxwell's Pock. Dict.* 115.

WE take the meaning of this position to be, that if there be two persons, bound in a note or bond, and a *joint* suit be brought against them, and judgment had, after taking one of them under a *ca' sa'*, execution may issue against the goods of the other: it being now settled that an execution against the *person* of any one of the parties to a bill, will not discharge the others, though with respect to him, it is a *full satisfaction* of the debt. 4 *T. R.* 285. And if execution issue against the *property* of *both*, and be levied on that of *one* of them, to an amount sufficient to pay the judgment, the *other* will be protected: the

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property seized appearing on the record to be the property of the defendants. But if several suits be brought, and judgments be had, separate executions will issue against the parties bound, and their several properties may be taken and proceeded against, until satisfaction be had, that is to say, *gold or silver coin* received, to the amount of the judgment. On that event, and not till it happens, will the party, whose property remains unseized or unsold, succeed in arresting the process of the plaintiff; and even this will not be done, till the costs are paid in the suit against him.

IN order to satisfy us that such is the meaning of these gentlemen, we have only to examine the authorities they quote in support of the principle they advance. The first is *Windham* vs. *Trall*, *Strange*, 515. The plaintiff had judgment in two suits, against the two parties to a note; and, on tender of the *principal and costs* in one suit, and of costs in the other, the court ordered execution to be stayed.

THIS case proves only, that the plaintiff was not to be permitted to proceed, for the principal, against one of the defendants, after it had been tendered to him by the other. *Chitty* and *Maxwell* cite no case but this.

Swift, in the margin of the article quoted, cites besides *Strange*, 2 *Vesey*, 115. 2 *Dallas*, 115. *Bayl.* 86. *Vesey* and *Dallas* support another

part of the same paragraph, which has no bearing on this question. *Bayley* is not within our reach,

THE converse of the proposition, which the defendant's counsel has thus endeavored to support, is, however, established in *Dike* vs. *Mercer*, 2 *Shower*, 394, where two men were bound jointly and severally, and judgment and execution had against one of them, and his goods seized, but the sheriff had not satisfied the plaintiff nor sold the goods: and in an action against the other obligee, he pleaded this matter, and it was held to be no plea; but it was held it would have been a good plea for that defendant, against whom the judgment and execution was obtained, if he had been sued again. 2 *Ld. Raym.* 1072.

THE only difference between that case and the present, is, that the property of the defendant in the first action, the co-obligee of the defendant in this, has been sold: but the money has not yet been made; satisfaction has not been received, and this is all important. An obligee is not discharged by the injury which he sustains, but by the money which the plaintiff receives—that alone dissolves the obligation and destroys the plaintiff's right, and until this right be destroyed, the plaintiff may use every legal means against all his debtors, which the laws and his contract have provided for the payment of the debt. The seizure of land, negroes, or personal property, followed by a sale

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which has not produced gold or silver, creates no satisfaction.

MOTION DENIED.

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Surety, bound jointly and severally, cannot have the plea of discussion.

THIS suit was brought upon two bonds; one bearing date in 1796, and the other in 1800, and both signed jointly and severally by the defendant, and two others, in the city of Philadelphia. To this demand, the defendant put in a plea of discussion, wherein he alledged that he had signed these two bonds, not as a principal, but as a co-surety with his brother; and that the principal resided in the same city with the obligee, and had sufficient property therein to satisfy their amount; and that his property ought to be previously discussed before recourse could be had upon the sureties To substantiate these allegations, the defendan obtained two commissions, for the examination c witnesses in the state of Pennsylvania; but thes not being returned within the prescribed term, th plaintiff proceeded to trial, and obtained judgment without argument, on the last day of the last term the counsel for the defendant, on account of th absence of their testimony, having declined argu ing the cause. During the vacation, both of th commissions were returned executed; and, upo

the opening of the present term, the defendant obtained leave to enter a motion for a new trial. In the argument of this motion, *the Court* doubted whether, in case of a rehearing, the testimony produced by these commissions (being parole) could be received? Or, if received, whether the laws of this state could be permitted so far to prevail, as to enable the defendant to support his plea?—and directed the attention of the counsel to these points. And now,

Ellery and *Duncan*, for defendant. The points raised by the court, for consideration, are:

1. WHETHER, in this case, parole testimony can be admitted, to shew who is principal, and who surety, upon these bonds?
2. How far the laws of this state will be permitted to control those of the state where the bonds were executed?

IF we succeed upon the first point, we shall render applicable the testimony produced by our commissions; and if we shew, upon the second, that the laws of this forum are so far to prevail in this suit, as to maintain the defendant's plea of discussion, the court will then be satisfied that we have a meritorious defence, and we trust will permit us to avail ourselves of it, upon a rehearing. In this event, we shall be able to take the benefit of our own laws, which protect a surety from be-

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ing prosecuted, until a prior discussion had of the property of the principal; unless the plea of discussion be *expressly* renounced by the surety, or the renunciation thereof legally *implied* from the instrument itself. *Civil Code*, 428.

1. THE authorities on the subject of the admissibility of parole testimony, to explain or contradict a deed, are numerous, but contradictory; the general rule undoubtedly is, that it cannot be received; but the exceptions to this rule are numerous, and we think the present case comes within them. Relief will always be granted against deeds, upon the ground of *fraud*, *trust*, *mistake*, *oppression*, or *imposition*; in all which cases, the fact, which is the ground of relief, is permitted to be established by parole testimony. *Ross* vs. *Norvell*. 1 *Wash. Rep.* 16. In this case, there had been an absolute bill of sale of certain slaves, with a warranty, and a receipt for the consideration indorsed; yet, upon the suggestion that the conveyance, though absolute in form, was intended as a mere security, the defendant was suffered to shew this fact by parole testimony; and upon so shewing it, permitted to redeem. In the case of *Washburn* vs. *Merrils*, 1 *Day. Ca.* 139, the court admitted a witness, to prove that a deed, executed as an absolute deed, was intended to have been executed as a mortgage deed; and the court, upon this being thus proven, decreed a redemption of

the land so conveyed. In the case of *Nicholas's Ex'rs.* vs. *Tyler*, 1 *Hen. & Mum. Rep.* 332, the defendant was allowed to prove, by *circumstantial* evidence, that the debt, for which a bond had been given, was originally payable in specie; and therefore the bond, though given in paper money times, not subject to the scale of depreciation. And in the same reporter, *p.* 429, the evidence of *circumstances* was admitted to set aside a contract under seal. So, in the state of New-York, a defendant was permitted to introduce a witness, to prove that the plaintiff, after the execution of a special agreement, agreed to enlarge the term of performing the stipulations contained in it. 1 *John. Ca.* 22, 3 *John.* 528, 2 *Call.* 5, 125. Also, in Pennsylvania, the obligor of a bond had leave to give the special matter in evidence, and prove, by a witness, that the bond was void. 2 *Dall.* 171. *Vide*, also, 1 *Dall.* 17, 193, 424, 3 *Dall.* 506.

IN our own court, the case of *Mann & Bernard* vs. *Heirs of Houghton*, is analogous to the present. Here, there had been an absolute conveyance of a plantation and negroes, by a notarial act, in favor of *Houghton;* yet the court permitted witnesses to prove that he acted as the agent of the plaintiffs in the purchase, and that in reality the purchase was made for them, and with their funds; and that, therefore, *Houghton* was only their trustee.

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IT may be objected, that the digest of the civil code excludes the use of testimonial proof in the explanation of written contracts. This is to be confined, perhaps, to contracts made within the state, and not to extend to those executed abroad. But, at all adventures, we see in the last case cited, that this principle has not always been held sacred. In that case, there was a notarial act of sale in favor of *Houghton*, which, like a bond at common law, imports absolute verity; but nevertheless, from the allegations contained in the bill, though no fraud was charged, it was suffered to be explained by testimonial proof. And however solemn may be the act, or however sacred its import; or in whatever country, or under whatever forms, it may be executed—the Court, upon proper charges and suggestions raised, will suffer it to be enquired into, and its real character ascertained.

IN the present case, it will not be denied, but that we have, in our plea, alledged sufficient matter and shewn sufficient grounds, to entitle us to relief against these bonds. A stronger case but seldom meets the court; the facts, which constitute the ground of relief prayed, are distinctly stated; and all the circumstances of the transaction, are mute, though powerful, witnesses in our favor.

2. ON the second point—how far the laws of this state will control those of the state where the bonds were executed—we think we shall be able to shew, that they will, at least, so far prevail, as to maintain the plea of discussion we have filed.

IT is a principle of general law, that the laws of every country are obligatory upon all those within its limits, either subjects or aliens; the latter, during residence, being considered *quoad hoc* subjects. This principle originally went to the total exclusion of all foreign laws in every case; but, by the courtesy of nations, a relaxation and modification of it was produced, arising from mutual convenience, founded in general utility, and recognised by tacit consent. And now, upon a principle of comity between states and nations, personal contracts, entered into and to be performed in one country, are to be considered and carried into effect, as valid in any other, though a different law there prevail; of course, they are to be *construed* according to the laws of the country, where the contracts are made, and not according to those, where they are sought to be carried into effect. But as the law of a foreign country is of no force *proprio vigore*, but merely admitted by courtesy, this courtesy will not be so far extended as to produce any *inconvenience* to the state or its subjects, thus admitting it. For this reason, it has been decided that, in the *enforcement* of contracts,

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the *lex fori*, and not the *lex loci*, always prevails; and that whoever becomes a suitor in a court, must take the laws of the forum he has elected, and pursue his remedy according to its forms: as it would operate a serious *inconvenience*, to change in his favor the course of judicial proceedings. As it respects the *interpretation* of contracts the *lex loci* is supposed to furnish the rule of construction; still subject, however, to the above exception, that no *inconvenience* result therefrom to the state or its citizens, where the contract is sought to be enforced. In either case, however, we think we are safe; if the laws of this forum, which, according to the authorities we shall produce, apply exclusively to the *enforcement* of the payment of these bonds, will not be so far extended, as to admit our plea of discussion; yet, if its rejection shall be shewn to produce an *injury* to our citizens, in the person of any one of them, it will still, on that ground, be entertained by the court; even if the *validity* of the contract itself be thereby affected. We think, however, according to late decisions, that the *lex fori* in the *enforcement* of a contract made in a different state, has been carried to a sufficient length to embrace our case; and even, in some instances, so far as to encroach upon the *validity* of the contract itself. In our case, however, it will be recollected, that we do not seek to *invali-*

date these bonds, nor to exonerate ourselves from our engagements; but merely to prevent the engagements of a *principal* from being enforced against a *surety*.

LET us first see, how far the *lex fori* has controlled the *lex loci* in the *enforcement* of contracts, made in a different state.

IN the case of *Smith* vs. *Spinolla*, the defendant, a Portuguese, was held to bail in New-York, on a contract made in Madeira, where, by the laws of Portugal, his property was only liable, and his person secure from arrest; the court would not, however, discharge him upon entering a common appearance, or order an *exoneretur* to be entered upon the bail piece; and determined, that the *lex loci* applied only to the *interpretation* of contracts, and that the remedy on them must be prosecuted according to the laws of the country, in which the suit was brought. 2 *John. Rep.* 200.

IN the case of *Ruggles* vs. *Keeler*, before the same tribunal, the court also determined, that the *lex loci* applied only to the validity or interpretation of the contract, and not to the time, mode, or extent of the remedy; it also decided, that in actions upon foreign contracts, it would confine itself to its statute of limitations, without regarding that of the state, where the contract was made. 3 *John. Rep.* 268.

THE same principle was also established, in

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the case of *Nash* vs. *Tupper*, in which the statute of limitations of the state of New-York, was held as a good plea, though the period of limitation in the state of Connecticut, where the cause of action arose, is seventeen years, while that of the state of New-York, where the contract was put in suit, is but six years. 1 *New-York T. R.* 412.

IN the case of *Pearsall & al.* vs. *Dwight & al.* it was decided, that the statute of limitations in the state of New-York was not pleadable in bar to an action brought in the state of Massachusetts, upon a promissory note, made in the state of New-York. 2 *Mass. Rep.* 84.

WE find also the same principle laid down by *Huberus*, and the *lex fori* still further made to control the *lex loci*, in the case supposed of a third possessor of an hypothecated moveable, and in that of an unpublished contract of marriage. *Hub. præ.* 2 *vol.* 1 *b.* 3 *tit. De conflictu legum.*

IN cases, where the statutes of limitation are pleaded, as well as in those put by *Huberus*, it would appear that the *lex fori* was suffered to affect more than the mere form of the demand, and to extend *ad contractûs valorem et ad litis decisionem.* A plea of limitation, by offering a perpetual bar to the action, and totally destroying the remedy, would seem to involve in it the merits. The laws of the forum, which prevent my ever recovering a demand, virtually, at least, inva-

lidate the contract, upon which it is grounded. And this applies still more strongly to the case put in *Huberus*, where a private contract of matrimony, without notice, made in Holland, protects the wife there from the debts of her husband, and yet will not yield her that protection in a suit brought against her in Friezeland, where the law requires a previous publication of the contract.

BE this, however, as it may, the authorities cited bear us out, and shew, that the laws of the forum apply to the time and manner of bringing the action, and to the whole form and extent of the remedy. Compare, then, our plea of discussion, to that of limitation, which has been ruled, to relate only to the *remedy* pursued; the court there, would decide, according to the authorities produced, that the plaintiff, by suffering the prescribed period to elapse, was too late in forming his demand; here, we say, that the plaintiff, by omiting to bring a previous suit against the principal, is too *early* in forming his demand. And if the prescription of our own forum is to be pleaded in bar to the recovery of a debt, without regarding the act of limitation of the state, where the cause of action grew; why may we not equally have recourse to them, in order to defeat a demand, which, though seasonable in the state where the contract was made, is here prematurely brought? Upon what ground, is a plea of prescription, ac-

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cording to our laws, in the one case, to be sustained; and a plea of discussion, according to our laws, in the other, to be rejected? Do they not both equally regard the *time* of bringing the suit? With this difference, however, that the reason is much stronger, and the situation of the plaintiff much less hard, in a case of suretiship, than in that of prescription; inasmuch, as in the latter case, an elapsed period of time can never be recalled; but, in the former, an omitted act may still be performed: in the one case, the bar to the action is perpetual; in the other, but temporary; in the one, the remedy is totally lost; in the other, but only delayed. How would it be, in the case of a promissory note, executed abroad, where three days of grace are given, but prosecuted here, where, we will suppose (as was formerly the case) a longer period is allowed; and this before the full term of grace here was expired; could the plaintiff safely rely upon the law in his own state, which curtailed this period? Is a contract, because made abroad, to give a plaintiff here a *priority* in his demand, not accorded to our own suitors? Is the defendant here, in such a demand, to be placed upon a worse footing, than his fellow citizens? The present defendant, as a surety on a bond, by our laws, can only be legally upon for payment in the default of his principal—and shall any foreign law deprive him of this protection, or

divest him of this right? Does not this fall within the restriction upon the introduction of foreign laws, so often repeated by *Huberus;* viz. that the effects of a contract, entered into at any place, will be allowed, according to the laws of that place, in other countries, *if no inconvenience result therefrom, to the citizens of that other country, with respect to the law, which they demand.* And his application and illustration of this restriction, goes much beyond the present case. He states, as an example, that by the law in Friezeland, the oldest hypothecation of a moveable, is that to be preferred, even against the third possessor; yet, if the article so hypothecated, be sued for against the third possessor in Batavia, the suit would be rejected, because the law of that province protects the right of a third person so acquired; and that this right cannot be divested by the law of another country. Ought not our law equally to protect the right of a surety? And is not the *inconvenience* as great in the one case, as in the other?

WHETHER the defendant has, or has not, by executing these bonds jointly and severally, tacitly renounced the benefit of discussion, does not come within the scope of the present argument. By signing an instrument *in solido*, in this country, he impliedly waves it; but these bonds are neither *in solido*, nor in this country. Neither are

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we now to inquire, whether the property of the principal, pointed out by the defendant for discussion, ought or ought not to lie within this state; these questions do not fall within the points raised by the court for consideration, and can be best urged, should a rehearing be granted.

Smith, for the plaintiff. This motion for a new trial, is grounded on an affidavit, setting forth the arrival of certain depositions taken under two commissions, issued before and returned since the trial of the cause. The object is to have the benefit of these depositions, as evidence, on another trial.

IN no respect is the law better settled, than in relation to the cases in which new trials can be had, in order to let in further evidence. The evidence must be not only sworn to be material, but such as the party, desiring to avail himself of it, had not previously discovered, and could not by the exertion of reasonable diligence, have discovered and produced on the trial. It is, perhaps, needless to cite authority on this point—but see 1 *Will.* 98, 2 *Bay.* 268, 2 *Binney*, 482.

IT would be no difficult task to shew that the motion of the defendant, in every point of view in which it can be regarded, is equally unreasonable and unfounded in law.

SUFFICE it to say, that the defendant, *after*

his interrogatories had been answered by the plaintiff under oath, was indulged with leave to take out commissions to Pennsylvania, returnable at the end of four months, to obtain evidence of facts, of which, and of the place where they might be proved, it appears he was not ignorant at the time of filing his interrogatories, when, if at any time, he ought to have issued his commissions. And that, after the expiration of that delay, instead of being brought to trial at the commencement of the last term, he was again, by a great indulgence, allowed further time for the production of his depositions, until near the close of the term, when, not having eventured to apply for a further continuance, the cause was tried and judgment rendered. Shall he now set aside a judgment, for that, which could not have obtained a postponement of the trial which resulted in that judgment?

IT will be very needless now to examine the extent to which the testimony of witnesses, has sometimes been suffered to be introduced, to explain, modify, or destroy a deed. It is not denied by the defendant's counsel, to be the general rule, that parole evidence is inadmissible for such a purpose; but it is contended that, in cases of fraud, trust, mistake, imposition, or oppression, as exceptions to the general rule, the fact sought to be established may be proved by witnesses, even

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against a deed. The reasonableness of the cases, generally, that have been cited on this point, is not denied—but, their pertinency is less obvious. Whether there be any thing, in this case, of fraud, or trust, or mistake, or imposition, or oppression, is freely submitted to the scrutiny of the court, even on the evidence of these depositions, and with it, the fate of the cause.

WITH regard to the extent of the influence of the *lex loci*, where a contract is made, when it becomes the subject of a suit in another country—it would be hardly necessary to examine here, even if the principles on that subject were less clearly established. For, admitting for the sake of argument, what is expressly contradicted by the plaintiff's answers under oath to the defendant's interrogatories, and what is not established even by the depositions sought to be introduced—that the defendant, though appearing on the face of those bonds as a principal, was in reality a security, his position would not seem to be in the least improved. And admitting, further, that the laws of Pennsylvania could be laid out of view in the decision of this cause, the court would at least regulate itself by principles, applicable to such contracts, known to the civil law, as are most analagous to those in question. The surety in an obligation *in solido* of the civil law, is equally subject with the principal, to the immediate payment o

the whole debt. And even when the surety is not bound *in solido ;* the creditor may still resort immediately to him for the amount of the debt, and cannot be obliged to a previous recurrence to the principal, unless the surety point out to the creditor, property of the principal, within the state, to be pursued ; and also furnish a sufficient sum of money, to enable the creditor to conduct the suit. *Civil Code*, 430.

THE application attempted to be made by the defendant's counsel, of the authorities concerning the influence of the *lex loci*, where a contract was made, when a suit is instituted on it in another country—seems to confound what should always be kept clearly distinguished—that, which belongs to the essence of the contract, and that which is merely accidental to it. All the cases, that have been cited by the defendant's counsel on this point, are admitted to be sound law, and are relied upon by the plaintiff. They uniformly establish, as a general rule, that when a suit is instituted in one country, upon a contract made in another, the *lex loci* must furnish the rule of decision in whatever concerns the validity, the interpretation, the essence of the contract ; but that, is to what is merely accidental to it—the reason ceasing, the law also ceases—the time, the form, and manner of instituting and prosecuting suits—the process allowed, whether arrest of person, attachment of

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property, or mere citation—the pleadings, the judgment, and execution—and the time after which a suit shall no longer be instituted, *i. e.* be subject to prescription, or a statute of limitations—are regulated by the laws of the country where the suit is brought.

Is the liability of the defendant to pay absolutely a certain sum of money in a certain time—or only upon remote contingency—a question of substance, or of form?

By the Court. There is no doubt but the remedy must be prosecuted in every case, according to the course of the *forum* in which the suit is instituted, and this principle has been carried so far as effectually to prevent the *right* from being inforced, when the statute of limitations of the state in which the debtor seeks shelter, prevents a recovery which might be had in the state in which the debt was contracted, and in which the plaintiff and defendant dwelt when they contracted, as in the case of *Nash* vs. *Tupper:* while in other cases, the creditor has been permitted to pursue his debt on a contract, which in the state in which it was entered and the parties did reside, could not support an action, as in the case of *Pearson* vs. *Dwight & al.* The principle, however, is a correct one, and is now too well established in these states, to be shaken. In addition to the cases cited,

there is one determined in the circuit court of the United States for North-Carolina district, in which the plaintiff was permitted, under an act of the legislature of North-Carolina, to maintain a suit against one of the parties to a note executed in Maryland, while, by the laws of the latter state, the defendant's plea, that he was not suable, without his co-obligor, would have availed him. *Patterson*, J.—taking the distinction between the contract and the remedy; and observing that the contract remained the same, notwithstanding the act, and that the remedy only was extended. *Palyart* vs. *Goulding*. *Martin's Notes*, 78.

IT appears unnecessary to determine, whether in this case, parol testimony may be admitted to shew who is principal, and who surety, upon these bonds. For, admitting, as the defendant contends, that he is only a surety, yet he bound himself to pay in the first instance as a principal, and to pay jointly and severally.

A SURETY is presumed to have renounced the plea of discussion, when it is expressed in the contract of suretiship, that he binds himself as a principal debtor. 1 *Pothier on Obligations*, 290, *n.* 408. The surety, who has constituted himself a principal debtor in the contract, cannot claim the benefit of a discussion; nor when he engages to pay, if his principal does not on a given day.

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Neither is the plea of discussion allowed among merchants or bankers. 1 *Ferriere, verbo Discussion.* A surety who bound himself *in solido* with his principal, cannot require a discussion of his property. 1 *Denisart, verbo Discussion. Civil Code*, 428, *art.* 7.

Now, in the present case, the defendant acknowledges he was held and firmly bound, with the principal debtor, in the sum demanded, to the payment of which he bound himself *jointly and severally* with the principal.

HE, therefore, bound himself *as a principal debtor.*

FARTHER, we believe he bound himself *in solido.*

THE words in the bond are, *jointly and severally*, which are synonymous with *in solido, solidairement.*

THE word *solidaire*, is applicable to obligations entered into by several persons, so that each promises and engages to pay alone, the total sum, in the same manner as if he were bound alone. *Dict. de Trevoux, verbo Solidaire.*

THE obligation is *in solido*, or joint and several, between several creditors, when the title expressly gives to each of them the right of demanding payment of the total of what is due, and when the payment made to any one of them, discharges the debtor. *Civil Code*, 278, *art.* 97. There is

an obligation *in solido*, (*solidarité* in the French) on the part of the debtors, when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment made by any of them exonerates the others towards the creditor. *Id. art.* 100.

IT is, therefore, clear that the defendant, both on the score of his being bound as a principal debtor, and that of his being bound jointly and severally, cannot have the benefit of discussing the property of his principal.

IF he had, yet his plea would be overruled. It states that his co-obligors have considerable property in Pennsylvania.

BUT the *Civil Code*, 430, *art.* 1, provides that the creditor shall not be compelled to have the property of the principal debtor discussed, when it lies out of the territory.

IN France, the creditor is thought not to be bound to discuss property in the jurisdiction of another parliament. *Arrêtés de Lamoignon, titre des Discussions, art.* 9.

LASTLY, the Court would at all events be bound to overrule the motion for a new trial, as the defendant did not oppose the plaintiff's taking judgment. From this circumstance, we must infer the defendant concluded he had nothing to offer, that could induce us to grant a continuance; and if the absence of the testimony now intended

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to avail him, was not thought sufficient to obtain a new trial, it must have been deemed so because due diligence was not used in obtaining it, or because it was inadmissible or irrelevant. In either of these cases, we are bound not to disturb the judgment.

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