Louisiana Term Reports,

OR

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

BY FRANCOIS-XAVIER MARTIN,

ONE OF THE JUDGES OF SAID COURT.

Decisiones & sententiæ tribunalium supremorum, pro lege servandæ & faciunt jus ad similes decidendas.

Castillo, lib. 7, cap. 30, n. 4.

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CHRONOLOGICAL

TABLE OF CASES.

EASTERN DISTRICT, MAY TERM, 1821.*

Bouthemy & al. *vs.* Dreux & al. . . . 1
Casanovichi & al. *vs.* Debon & al. . . . 11
Harrod & al. *vs.* Norris' heirs & al. . . . 16
Shamburgh *vs.* Commagere & al. . . . 18
Wiltz *vs.* Dufau & al. 20
Hewes *vs.* Lauve, ... 21
Torry & al. syndics *vs.* Shamburgh, . . 23
Marie *vs.* Avart's heirs, ... 25
St. Romes *vs.* Poré, ... 30
Ferrers *vs.* Bossel, ... 35
Lewis *vs.* Peytavin, ... 36
Mitchell *vs.* Armitage, ... 38
Canfield *vs.* M'Laughlin, ... 48
Seghers *vs.* Hanna's creditors, ... 53
Seghers *vs.* his creditors, ... 54

JUNE.

Bayon *vs.* Vavasseur, ... 61
Gitzandener *vs.* Macarty, ... 70
Doane *vs.* Farrow, ... 74
Smith *vs.* Crawford 81
Muirhead *vs.* M'Micken, ... 83

* Continued from the preceding volume.

Miltenberger *vs.* Canon, ... 85
Spencer *vs.* Stirling, ... 88
Hatton *vs.* Stilwell & al. 91
Waters *vs.* Banks, ... 94
Chauveau *vs.* Walden, ... 100
Bolton & al. *vs.* Harrod & al. 115
Sedwell's assignee *vs.* Moore, ... 117
Patterson & al. *vs.* M'Gahey, ... 122
Michel de Armas' case, ... 123

JULY.

General rules, ... 125
Kirkman *vs.* Wyer, ... 126
De Armas' case, ... 152
Lecesne *vs.* Cottin, ... 174
Shamburgh *vs.* Torry & al. syndics, . . 178
Labarre *vs.* Durnford, ... 180
Seghers *vs.* Hanna's syndics, ... 182
Dunbar *vs.* Nichols, ... 184
Frederic *vs.* Frederic, ... 188
Wood & al. *vs.* Fitz, ... 196
Day *vs.* Booktèr, ... 201
St. Romes *vs.* Poré, ... 203

WESTERN DISTRICT, AUGUST.

Wray *vs.* Hervy, ... 222

SEPTEMBER.

Melançon's heirs *vs.* Duhamel, ... 225
Brookes' syndics *vs.* Hamilton, ... 285
Calvet *vs.* Innis, ... 287
Innis *vs.* Miller & al. 289
Murray *vs.* Boissier, ... 293

Lepretre & al. *vs.* Sibley, ... 302
Fleming & wife *vs.* Lockart, ... 308
Welsh *vs.* Brown, ... 310
Scott *vs.* Turnbull & al. 335
Boniol & al. *vs.* Henaire & al. 357
Vienne *vs.* Boissier, ... 359
Sompeyrac *vs.* Cable, ... 361
Meaux's heirs *vs.* Breaux, ... 364
Chamard *vs.* Sibley, ... 396
Fleming & ux. *vs.* Lockart, ... 400
Smith *vs.* Smith, ... 400
Wyche *vs.* Wyche, ... 408
Baldwin *vs.* Stafford & al. 416
Turnbull *vs.* Martin 419
Bynum *vs.* Jackson, ... 424
Brown *vs.* Compton, ... 425
Ware & wife *vs.* Welsh's heirs, ... 430
Dromgoole *vs.* Gardner's widow & heirs, . . 433
Fort & wife *vs.* Metayer & al. 436
Key's curator *vs.* O'Daniel, ... 441

EASTERN DISTRICT, DECEMBER.

Hawkins *vs.* Livingston, ... 443
Chiapella *vs.* Lanusse's syndics, ... 448
Hunter *vs.* Postlethwaite, ... 456
Crum & al. *vs.* Laidlaw & al. syndics, . . . 468
Stockton & al. *vs.* Hasluck & al. 472

JANUARY, 1822.

Ward *vs.* Brandt & al. 478
Gaillard *vs.* Anceline, ... 479
Bernard & al. *vs.* Vignaud, ... 482

Hanna's syndics *vs.* Lawring & al. . . . 568
M'Micken *vs.* Stewart, ... 571
Kenney & al. *vs.* Dow, ... 577
David *vs.* Sittig, ... 607
Carrol *vs.* M'Donogh, ... 609
Bernard & al. *vs.* Vignaud 633
Johnson & al. *vs.* Brandt & al. 638
Ward *vs.* Brandt & al. 641
Hepburn *vs.* Toledano, ... 643
Mitchel *vs.* Jewell, ... 645

FEBRUARY.*

Wikoff & al. *vs.* Duncan's heirs, . . . 667
Moulon *vs.* Brandt & al. syndics, . . . 669
Dunn & wife *vs.* Duncan's heirs, . . . 671
Wooters *vs.* Thompson, ... 674
Steer *vs.* Ward & al. 679
Lee *vs.* Andrews & al. 682
Watson & al. *vs.* Yates, ... 687
Planters' bank & al. *vs.* Lanusse & al. . . 690
Conrad *vs.* Louisiana Bank, ... 700
Ritchie & al. syndics *vs.* Sands & al. syndics, . 704
Johnson's ex. *vs.* Duncan & al. syndics, . . 706
Norwood's ex. *vs.* Duncan & al., . . 708
Chesneau's heirs *vs.* Sadler, 726

* Continued in next volume.

ALPHABETICAL

TABLE OF CASES.

Andrews & al. *ads.* Lee, *Continuance*, . . 682
Anceline *ads.* Gaillard, *Justice of the Peace*, . 479
Armitage *ads.* Mitchell, *Apprentice*, . . 38
Avart's heirs *ads.* Marie, *Testament*, . . 25

Baldwin *vs.* Stafford & al., *Limits, survey*, . . 416
Banks *ads.* Waters, *Lease*, ... 94
Bayon *vs.* Vavasseur, *Judge's charge, warranty*, . 61
Bernard & al. *vs.* Vignaud, *Witness*, . . 482
——— *vs.* ——— *Rehearing*, . . 634
Boissier *ads.* Murray, *Pleadings*, . . . 293
——— *ads.* Vienne, *Renunciation*, . . . 359
Bolton & al. *vs.* Harrod & al., *Endorser*, . . 115
Boniol *vs.* Henaire & al., *Contracts*, . . . 357
Bookter *ads.* Day, *Damages*, ... 201
Bosel *ads.* Ferrers, *Notarial act*, . . . 35
Bouthemy & al. *vs.* Dreux & al. *Probate, constitution*, 1
Brandt & al. *ads.* Johnson & al., *Attorney, partner*, 638
——— syndics *ads.* Moulon, *Certificate*, . 669
——— *ads.* Ward & al., *Former judgment*, . 478
——— *ads.* ———, *Respite*, . . 641
Breaux *ads.* Meaux's heirs, *Boundary*, . . 364
Brookes' syndics *vs.* Hamilton, *Partnership*, . 285
Brown *vs.* Compton, *Evidence*, . . . 425

Brown *ads.* Welsh, *Authority*, . . . 310
Bynum *vs.* Jackson, *Twelve-months bond*, . . 424

Cable *ads.* Sompeyrac, *Bail*, ... 361
Calvit *vs.* Innis, *Location, prescription*, . . 287
Canfield *vs.* M'Laughlin, *Attachment*, . . 48
Canon *ads.* Miltenberger, *Notarial act*, . . 85
Carrol *vs.* M'Donogh, *Attachment*, . . 609
Casanovichi & al. *vs.* Debon & al., *Court of probates*, 11
Chamart *vs.* Sibley, *Dowry*, ... 396
Chauveau *vs.* Walden, *Salvage*, . . . 100
Chesneau's heirs *vs.* Sadler, *Minor's land*, . 726
Chiapella *vs.* Lanusse's syndics, *Privilege*, . 448
Commagere & al. *ads.* Shamburgh, *Promissory note*, 18
Compton *ads.* Brown, *Evidence*, . . . 425
Conrad *vs.* Louisiana Bank, *Evidence*, . . 700
Cottin *ads.* Lecesne, *Appeal, garnishee*, . . 174
Crawford *ads.* Smith, *New trial*, . . . 81
Creditors *ads.* Seghers, *Insolvent*, . . . 54
Crum & al. *vs.* Laidlaw & al. syndics, *Lien*, . 468

David *vs.* Sittig, *Nonage*, ... 607
Day *vs.* Bookter, *Damages*, ... 201
De Armas', Michel, case of, *Attorney suspended*, 123, 158
Debon & al. *ads.* Casanovichi & al. *Court of probates*, 11
Doane *vs.* Farrow, *Appeal bond, evidence*, . . 74
Dow *ads.* Kenney & al., *Alienation*, . . 577
Dreaux & al. *ads.* Bouthemy & al. *Probates, constitution*, 1
Dromgoole *vs.* Gardner's widow and heirs, *Appeal, partnership*, ... 433
Dufau & al. *ads.* Wiltz, *Statement of facts*, . 20
Duhamel *ads.* Melançon's heirs, *Minor's land*, . 225
Dunbar *vs.* Nichols, *Prescription*, . . . 184

Duncan's heirs *ads.* Dunn & wife, *Verdict*, . 671
——————— *ads.* Wikoff & al., *Forced surrender*, 667
Dunn & wife *vs.* Duncan's heirs, *Verdict*, . 671
Durnford *ads.* Labarre, *Sale, bail*, . . . 180

Farrow *ads.* Doane, *Appeal bond, evidence*, . 74
Ferrers *vs.* Bosel, *Notarial act*, . . . 35
Fitz *ads.* Wood & al., *Prison bounds*, . . . 196
Fleming & ux. *vs.* Lockart, *Sheriff's sale*, . . 398
Fort & wife *vs.* Metayer & al., *Evidence*, . 436
Frederic *vs.* Frederic, *Widow's rights*, . . 188

Gaillard *vs.* Anceline, *Justice of the peace*, . 479
Gardner's widow & heirs *ads.* Dromgoole, *Appeal, partnership*, ... 433
Gitzandener *vs.* Macarty, *Interrogatories*, - - 70

Hamilton *ads.* Brookes' syndics, *Partnership*, - 285
Hanna's syndics *vs.* Lawring & al. *Garnishee*, . 568
——————— *ads.* Seghers, *Attorney's compensation*, ... 53, 182
Harrod & al. *vs.* Norris' heirs, *Court of probates*, 16
——————— *ads.* Bolton & al., *Endorser*, . . 115
Hasluck & al. *ads.* Stockton & al. *Sequestration*, . 472
Hatton *vs.* Stillwell & al., *Attachment, amendment*, 91
Hawkins *vs.* Livingston, *Appeal*, . . . 443
Henarie & al. *ads.* Boniol, *Contract*, . . . 357
Hervey *ads.* Wray, *Order of seizure*, . . 222
Hepburn *vs.* Toledano, *Promissory note*, . . 643
Hewes *vs.* Lauve, *Auctioneer*, ... 21
Hunter *vs.* Postlethwaite, *Executor*, . . . 456

Innis *ads.* Calvit, *Location, prescription*, . . 287
—— *vs.* Miller & al.. *Location*, ... 289

Jackson *ads.* Bynum, *Twelve-months bond*, . . 424
Jewel *ads.* Mitchel, *Statement of facts*, . . 645
Johnson & al. *vs.* Brandt & al., *Attorney, partner*, 638
Johnson's ex. *vs.* Duncan & al., syndics, *Endorser*, 706

Key's curator *vs.* O'Daniel, *Deposition*, . . 441
Kenney & al. *vs.* Dow, *Alienation*, . . . 577
Kirkman *vs.* Wyer, *Attachment, bail*, . . 126

Labarre *vs.* Durnford, *Sale, bail*, . . . 180
Laidlaw & al. syndics *ads.* Crum & al. *Lien*, . 468
Lanusse's syndics *ads.* Chiapella, *Vendor's privilege*, 448
——— & al. *ads.* Planters' bank, *Surrender*, 690
Lepretre & al. *vs.* Sibley, *de non numeratâ pecuniâ*, 302
Lawring & al. *ads.* Hanna's syndics, *Garnishee*, . 568
Lauve *ads.* Hewes, *Auctioneer*, . . . 21
Lewes *vs.* Peytavin, *Replication*, . . . 36
Lecesne *vs.* Cottin, *Appeal, garnishee*, . . 174
Lee *vs.* Andrews & al., *Continuance*, . . 682
Livingston *ads.* Hawkins, *Appeal*, . . . 443
Lockart *ads.* Fleming & ux., *Sheriff's sale*, . 398

Macarty *ads.* Gitzandener, *Interrogation*, . . 70
Marie *vs.* Avart's heirs, *Testament*, . . . 25
Martin *ads.* Turnbull, *Evidence*, . . . 419
Meaux's heirs *vs.* Breaux, *Boundary*, . . . 364
Metayer *ads.* Fort & wife, *Evidence*, . . . 436
M'Donogh *ads.* Carrol, *Attachment*, . . . 609
Miller & al. *ads.* Innis, *Location*, . . . 289
Miltenberger *vs.* Cannon, *Notarial act*, . . 85
Mitchel *vs.* Jewel, *Statement of facts*, . . . 645
——— *vs.* Armitage, *Apprentice*, . . , 38
M'Gahey *ads.* Patterson, *Former judgment*. . 129

M'Laughlin *ads.* Canfield & al. *Attachment*, . . 48
M'Micken *vs.* Stewart, *Commission, constitution*, 571
——— *ads.* Muirhead, *New trial*, . . 83
Moore *ads.* Sedwell's assignee, *Practice*, . 117
Muirhead *vs.* Micken, *New trial*, . . . 83
Murray *vs.* Boissier, *Pleadings*, . . . 223

Nichols *ads.* Dunbar, *Prescription*, . . . 184
Norris' heirs *ads.* Harrod & al., *Court of probates*, 16
Norwood's ex.'s *vs.* Duncan & al. *Executor*, . 708

O'Daniel *ads.* Key's curator, *Deposition*, . 441

Patterson & al. *vs.* M'Gahey, *Former judgment*, . 122
Peytavin *ads.* Lewes, *Replication*, . . . 36
Planters' bank & al. *vs.* Lanusse & al., *Surrender*, ... 690
Poré *ads.* St. Romes, *Sale of a slave*, . . . 30
Postlethwaite *ads.* Hunter, *Executor*, . 456

Ritchie & al. syndics *vs.* Sands & al. syndics, *Insolvent*, ... 704

Sands & al. syndics *ads.* Ritchie & al. syndics, *Insolvent*, 704
Sadler *ads.* Chesneau's heirs, *Minor's land*, . 726
Scott *vs.* Turnbull & al., *Verdict*, . . . 335
Sedwell's assignee, *vs.* Moore, *Practice*, . . 117
Seghers *vs.* Hanna's creditors, *Compensation*, 53, 132
——— *vs.* his creditors, *Insolvent*, . . . 54
Sibley *ads.* Chamard, *Interest*, ... 396
——— *ads.* Lepretre & al., *de non numeratâ pecuniâ*, 302
Sittig *ads.* David, *Nonage*, ... 607
Shamburgh *vs.* Commagere & al., *Promissory note*, 18
——— *ads.* Torry & al. syndics. *Mortgage*. 23, 178

Smith *vs.* Smith, *Wages*, ... 400
——— *vs.* Crawford, *New trial*, . . . 81
Sompeyrac *vs.* Cable, *Bail*, ... 361
Spencer *vs.* Stirling, *Bill of exchange*, . . 88
St. Romes *vs.* Poré, *Sale of a slave*, . . . 30
Stafford & al. *ads.* Baldwin, *Limits, survey*, . 416
Stewart *ads.* M'Micken, *Commission, construction*, 571
Stillwell & al. *ads.* Hatton, *Attachment, amendment*, 91
Stirling *ads.* Spencer, *Bill of exchange*, . . 88
Stockton & al. *vs.* Hasluck & al. *Sequestration*, . 472

Thompson *ads.* Wooters, *Verdict*, . . . 674
Toledano *ads.* Hepburn, *Promissory note*, . 643
Torry & al. syndics *ads.* Shamburgh, *Insolvent*, . 178
——————— *vs.* ——————— *Mortgage*, 28
Turnbull *vs.* Martin's, *Evidence*, . . . 419
——— & al. *ads.* Scott, *Verdict*, . . . 335

Vavasseur *ads.* Bayon, *Charge, warranty*, . 61
Vienne *vs.* Boissier, *Renunciation*, . . . 359

Walden *ads.* Chauveau, *Salvage*, . . . 100
Ward *vs.* Brandt & al., *Respite*, . . . 478, 641
Ware & wife *vs.* Welsh's heirs, *Curator*, . . 430
Waters *vs.* Banks, *Lease*, ... 94
Welsh heirs *ads.* Ware & wife, *Curator*, . 430
Wikóff & al. *vs.* Duncan's heirs, *Surrender*, . 667
Wiltz *vs.* Dufau & al. *Statement of facts*, . . 20
Wood & al. *vs.* Fitz, *Prison bounds*, . . 196
Wooters *ads.* Thompson, *Verdict*, . . . 674
Wray *ads.* Hervey, *Order of seizure*, . . 222
Wyche *vs.* Wyche, *Witness*, ... 402
Wyer *ads.* Kirkman, *Attachment, bail*, . . 126

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, MAY TERM, 1821.*

East'n District. *May*, 1821.

BOUTHEMY & AL. *vs.* DREUX & AL.

BOUTHEMY & AL. vs. *DREUX & AL.*

APPEAL from the court of the first district.

Although the court of probates, of the parish and city of New-Orleans, has ordered the execution of a will, any person interested to have it set aside, may bring suit in the district court.

The constitution began to be binding on the people, and all the officers of government, as soon as the state was admitted in the union, and thenceforth, judicial proceed-

PORTER, J. I concur in the opinions which judge Martin has prepared, and as there has not been an uniformity of decision, on the point, which decides the cause as it is now presented to the court, I wish to state the reasons which influence my opinion, respecting the regularity of the proceedings before the court of probates.

It is contended by the plaintiff, that the constitution required, that the record of that court should be preserved in that language

* Continued from the preceding volume.

East'n District. *May*, 1821.

BOUTHEMY & AL. *vs.* DREUX & AL.

in which the constitution of the united states is written.

The general principle seems to be admitted by the defendants. But they urge, that as the proceedings, ordering execution of this will, took place on the 12th of December, 1812, while the government was administered under the schedule; that the provision in the constitution, in regard to the language in which our public records was to be preserved, was not then in operation.

ings were to be preserved in the language in which the constitution of the united states is written.

To decide this point, it is necessary to ascertain when the constitution was in force. I think from the moment it was accepted by congress, and Louisiana admitted into the union, and from the same time the territorial government was at end. To adopt the other construction, and consider the judges territorial officers, we must suppose two governments exercising their functions within the limits of this state, at the same time.

If this construction is adopted, then the constitution did not come into operation at once, but spread itself gradually through every department of government, and the territorial system expired, by degrees, as the new government was carried into operation.

in the executive, the legislative and the judiciary.

Had the schedule not provided that the officers, under the territorial government, should continue in their respective situations, until others were appointed, I suppose there can be little doubt but their function would have expired the moment the state became independent and sovereign.

But the schedule, in providing that these officers should remain in the exercise of their respective functions, until new ones were appointed, did not preserve those laws, which were contrary to its policy or its provisions; on the contrary, the very section which follows, directing that the judges, governor, and secretary shall remain in office, declares, that the laws not inconsistent with the constitution, shall remain in force until repealed. This is the same thing as if it had said, that laws inconsistent with it were repealed.

It was inconsistent with a provision of that instrument, that judicial proceedings should

not be so certified to the court of probates,

East'n District. *May*, 1821.

BOUTHEMY & AL. *vs.* DREUX & AL.

were it not for the decisions which have taken place in this court. But on constitutional questions, great as my respect is for those who thought differently, I cannot yield up my own opinion.

As this point was not made in the court below, and the will was not annulled by the irregularity, I am of opinion, that the cause be remanded, with directions to the judge to have it tried on its merits, and that the defendants and appellees pay the costs of this appeal.

MARTIN, J. The plaintiffs seek to annul the will of their brother, the testator of the defendants, and if they fail to do so, to set aside a legacy therein contained, to obtain the delivery of the estate.

The district court dismissed the petition, being of opinion, that " the court of probates, of the parish of New-Orleans, is not a court of inferior jurisdiction to this court, (that of the final judicial district.) An appeal from that court lies immediately from that to the court of appeals; and any order, judgment or decree which this court (the district court) may make, declaring any act of the court of probates void, could have no effect, as it could

not be so certified to the court of probates, nor could that court be bound to obey or notice it, until the will is declared void by a competent court; this (the district court) can make no order in regard to the estate in the hands of the executor." The plaintiff appealed.

It appears to me, the probate of a will, in the court of probates, is not conclusive against persons who were not cited and offered the opportunity of contesting it. It is true, no will can be executed in this state, until it be presented to the parish judge, who, after due proof of it, is to order its execution. *Civ. Code*, 202, *art.* 153. There cannot be any doubt, that, after the formality has been complied with, any person interested in setting aside the will, may be heard against it, in the district court. In the case of *Broutin & al.* vs. *Vassant*, 5 *Martin*, 169, the will of the defendant's wife, having been admitted in the court of probates, a suit was brought in that of the first judicial district, where it was actually set aside. It is true, on the appeal, the decree of the district court was reversed, but not on the ground of its want of jurisdiction, which was not contested. I conclude, that

East'n District. *May*, 1821.

BOUTHEMY & AL. *vs.* DREUX & AL.

the district judge erred, and the judgment ought to be reversed.

The proceedings of the court of probates upon this will are of the 12th of December, 1812, and were recorded in the French language, and the plaintiffs' counsel insists, that they are, on this ground, absolutely void, under the 15th section of the 6th article of the constitution. 1 *Martin's Digest*, 122.

The defendants' counsel replies, that as the parish judge derived his authority from the 3d section of the schedule, and had no commission from the state, he was not bound to regard, in his proceedings, the provision of the constitution, and cites the case of *Dufan & al.* vs. *Massicot & al.* 3 *Martin*, 289, and that of *Rumudez* vs. *Ibanez*, *ib.* 2.

In *W. F. Macarty's* case, 2 *Martin*, 278, which was in the fall of 1812, the superior court of the late territory, the members of which were then acting under the authority derived from the schedule, declared, that they could not recognise any validity or force in any judicial proceeding, couched in any other language than that in which the constitution of the united states is written.

I therefore conclude, that the question is

not perfectly settled, and still open for interrogation.

In my view of the constitution, the state borrowed from the territorial government, its officers, and laws not repugnant to the constitution. It did not continue the territorial government, but intended, that the state government should commence as soon as the state was declared by congress to be one of the United States of America. For the schedule itself, after stating that the territorial officers shall continue in the exercise of the duties of their respective departments, expressed what laws are to be in force, all those then in force in the territory, not inconsistent with the constitution. Hence I apprehend the constitution was in full force, as soon as the state became a member of the union.

The court of probates then, which passed on the will, which is the object of the present suit, was then a state court; its judge derived his powers from the constitution, which, as to the language in which the written proceedings of the court were to be promulgated, preserved and conducted, afforded the only legitimate rule of conduct.

East'n District.
May, 1821.

BOUTHEMY & AL. vs. DREUX & AL.

On the 12th of December, 1812, the state of Louisiana had been for seven months a member of the union. The executive and legislative departments had been filled by persons elected under the constitution. A session of the legislative body had been held. It is true, the judges had not received any new commission; but the territorial government existed no longer; that of the state had taken its place, and every part of it was to be administered according to the provisions of the constitution.

I therefore conclude, that the proceedings of the court of probates, of the parish and city of New-Orleans, on the will, which is the object of this suit, having been promulgated, preserved and conducted in the French language, cannot be considered by us as having any force or validity.

As the objection which I have just now examined, appears not to have been made in the district court, I think it our duty to remand the cause, with directions to the judge to hear and determine the cause on its merits. The costs of this appeal ought to be borne by the defendants and appellees.

MATHEWS, J. In dissenting from the opinion and judgment of the majority of the court, in this case, I feel much relieved from the diffidence and unpleasantness which must always occur in similar situations, by the circumstance of finding myself adhering to principles heretofore settled by two decisions, *viz.* in the case of *Bermudez* vs. *Ibanez*, and *Dufau* vs. *Massicot & al.* I am still of opinion, that the interpretation given to that part of our state constitution, which requires the records of judicial proceedings to be kept in the language in which the constitution of the united states is written, furnishes the only just and equitable grounds on which the change from the territorial to the state government took place. It was, from necessity, gradual, and the former laws and authorities were not instantly destroyed by the formation of the new government, but yielded to constitutional legislation and appointments.

It is true, that the convention did, by a schedule annexed to the constitution, provide for the continuance of the former government: but I do not believe that it would have ceased to exist in all its parts, unsupported by this instrument. The same then, would have

East'n District. *May*, 1821.

BOUTHEMY & AL. *vs.* DREUX & AL.

taken place, without the interference of the convention; founded on the political maxim, that a government, in operation over a civil society, does not cease by the most radical change in form, until the means of giving full effect to the new constitution be provided. For, an *interregnum* cannot be tolerated. The executive power of the territorial government ceased only by the appointment of a governor under the constitution. The legislative power, as established by congress, was at an end immediately on the adoption of the new form of government, and could only be revived conformably to its provisions, during the cessation of legislative power—the laws must have remained as they were previous to that interval. The judicial authorities, like the executive, continued in force, until supplanted by new appointments, in pursuance of the state constitution, and were not bound to enforce its provisions, as they did not derive the power from it.

It must be confessed, that this view of the subject exhibits an appearance somewhat anomalous; but may be considered as neces-

sarily resulting from a change in government, like that which this country experienced in becoming a sovereign and independent state, from collonial dependence.

It is ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the case be remanded to be heard on its merits; and it is ordered, that the defendants and appellees pay the costs of this appeal.

Seghers for the plaintiffs, *Cuvillier* for the defendants.

CASANOVICHI & AL. vs. *DEBON & AL.*

Before the act of 1820, the court of probates had power to decree the exhibiting and filing of an executor's account, and a *distringas* was the proper writ of execution.

APPEAL from the court of probates of the parish and city of New-Orleans.

PORTER, J. Judge Martin has communicated to me an opinion he has prepared in this case. It expresses so fully my ideas on the question which the cause presents, that I deem it sufficient to state, that I agree in the conclusion to which he has arrived; and am of opinion, that the judgment of the parish court, denying the party the benefit of the decree formerly rendered in the cause, which

East'n District. *May*, 1821.

CASANOVICHI & AL. *vs.* DEBON & AL.

directed the executor to file the accounts, be annulled, avoided and reversed; and that this cause be remanded, with directions to the judge of probates, to proceed on the judgment ordering the executor to account, and that the appellees pay the costs of this appeal.

MARTIN, J. The plaintiffs, heirs of E. Greffin, brought this suit against the defendants, his executors (for an account of the estate, and the delivery of the residue) in the court of probates of the parish and city of New-Orleans.

The defendant, Debon, filed a plea, declining the jurisdiction of the court. This plea was over-ruled, and he was ordered to answer over. Judgment was taken by default, against the other defendant, for want of a plea or answer; neither of the defendants having taken any further step, the judgment by default was confirmed, and the court decreed, that both the defendants should exhibit, and file the accounts of their executorship.

No account having been exhibited, the

plaintiffs moved for a writ of *distringas*, which was refused; the court of probates being of opinion, that all the proceedings in the case were irregular, as the court was hitherto without any jurisdiction in the case, and could not decide it, only from the late act of the legislature, approved on the 18th of March, 1820. So that, if any thing was now claimed, in consequence of that act, the proceedings must be begun *de novo*.

The plaintiffs contend, that at the time of the inception of the suit, the matter was cognizable in the court of probates, and no other; and if it was not, the plaintiffs were without a remedy. They refer us to the part of the *Code*, which provides, that the jurisdiction exercised by parish judges, by virtue of the law in general, as well as by the provisions contained in the present *Code*, with respect to the opening, &c. of wills, the appointment, &c. of testamentary executors, &c. the inventory, appraisement, and sales of estates where absent heirs are interested, and generally, all judicial acts relative to said persons, and the administration of their property, shall be exercised, as it regards the parish of New-Orleans, by the city judge, &c.

East'n District. *May*, 1821.

CASANOVICHI & AL. *vs.* DEBON & AL.

Civ. Code, 182, *art.* 153. It is true, that the executor must render an account of his administration, at the expiration of the year of his executorship. *Civil Code*, 246, *art.* 173, and we are further referred to the *Code*, 246, *art.* 174, 182, *art.* 152, 180, *art.* 142, 6, 176, *art*, 135, 70, *art.* 69.

It appears to me, that at the expiration of a year and a day (if the time be not prolonged) from the date of the letters testamentary, the office of the executor expires; that during that period, he must, if called upon, render an account of his executorship, and is bound at its expiration, to exhibit and file his general account.

In the present case, the defendants (the year of executorship having expired, and no application having been made for its prolongation) were bound to account, and on their neglect the judge certainly could (before the passage of the late act) have directed them to do so; and his order, in that respect, is not less valid, for having been provoked by the party interested in the estate.

The court having, in my opinion, properly made the order, it is clear, had the power, and it was its duty to enforce it. This has

been endeavoured to be done by a writ of *distringas*, which is justified under an act of the legislative council, *ch.* 26, *sect.* 17, which provides, that writ for the execution of judgments, to be performed otherwise than by the payment of money. This provision, I think, relates only to final judgments, not to an interlocutory order, as those for the production of accounts or papers, which are more promptly enforced by a writ of attachment.

I therefore think, that we ought to reverse the decree or judgment of the court of probates, directing the plaintiffs to proceed *de novo*, and remand the cause, with directions to the judge to enforce his decree, directing the defendants to file and exhibit their accounts, and that the costs of this appeal be borne by the defendants and appellees.

MATHEWS, J. I concur in this opinion.

It is therefore ordered, adjudged and decreed, that judgment of the court of probates be annulled, avoided and reversed; and that the cause be remanded, with directions to the judge to enforce his order, directing the defendants to exhibit and file the accounts of their executorships; and it is further ordered,

East'n District. *May*, 1821.

CASANOVICHI & AL. *vs.* DEBON & AL.

that the costs of this appeal be borne by the defendants and appellees.

Smith for the plaintiffs, ——— for the defendants.

HARROD & AL. vs. *NORRIS' HEIRS & AL.*

The attorney, appointed by a court of probates to represent absent heirs, cannot do so in another court.

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. The only question which this case presents, is whether the attorney for absent heirs, appointed by the court of probates, is authorised to defend their interests before another tribunal.

The act relative to that court, passed on the 22d of February, 1817. *sect.* 5, directs, that in all vacant estates, it shall be the duty of every judge of probates, to appoint a person, learned in the law, to defend the interest of the absent heirs.

This is not a vacant estate, but if it was, I am of opinion that the attorney thus appointed, can act only in the court for which he is appointed. The statute treats of that court alone, as its title imports, and there is nothing contained in it, from which I can learn that it was in contemplation of the legislature to extend their authority to any other.

By the *Partida*, 3, 2, 12, it is provided; that when a suit is to be commenced against a person who is absent, the plaintiff may petition the judge to appoint a curator, and it shall be the duty of the judge to do so. This shews clearly, that when an action of this kind is brought, there must be a person specially nominated to defend the rights and interest of the absentee.

A suit against such curator, says the law just cited, forms the *res judicata* between the parties, provided the other formalities of the law are pursued—a suit against any other, I do not think has that effect.

I am therefore of opinion, that the judgment of the parish court be annulled, avoided and reversed, and that this cause be remanded for a new trial; and that the plaintiffs and appellees pay the costs of this appeal.

MARTIN, J. I think so.

MATHEWS, J. So do I.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the costs of this appeal be borne by the plaintiffs and appellees.

East'n District.
May, 1821.

SHAMBURGH
vs.
COMMAGERE
& AL.

SHAMBURGH vs. *COMMAGERE & AL.*

APPEAL from the court of the parish and city of New-Orleans.

An endorser may prove an alteration in the note, made after the endorsement.

The maker of a note is to be called upon, at his domicil.

PORTER J. This is an action by the endorsee, against the endorser of a promissory note. The defence set up is forgery, and alteration in the note after it was endorsed; also want of regular protest and due notice.

On the trial, the defendants offered the first endorser of the note, to prove that it was altered after he put his name on it, as well in date as in amount; the court rejected him, and an exception has been taken to that opinion.

The question of the admissibility of a party to a negotiable instrument, to come in as a witness, and destroy a paper to which his name has given currency, appears to be now settled by authority in the negative: but that rule applies to any thing which occurred before he put his name on it, not after; if the note in this case was altered subsequent to the endorsment, the endorser never gave that note, *so altered*, credit; it was a paper of a different kind that he put his name on.

But admitting that the witness had proved every thing, which the party offering him aver-

red he could prove, his testimony could not have varied the result; for the question is not whether it was altered after Morse endorsed it, but whether any change was made after the defendants put their names on it? The evidence on this head is completely opposed to this idea; it satisfies me that when endorsed by the defendants, it was already filled up for the amount stated in the petition.

The protest was regularly made, and due notice given, *Chitty on Bills*, 266. A man's residence is the place where it is presumed he is to be found, and has funds to meet the demand, and there is no obligation on the holder to seek for him elsewhere.

I am therefore of opinion, that the judgment of the parish court be affirmed with costs.

MARTIN, J. I concur in this opinion.

MATHEWS, J. I do likewise.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Hoffman for the plaintiff, *Eustis* for the defendants.

East'n District.
May, 1821.

WILTZ
vs.
DUFAU & AL.

WILTZ vs. *DUFAU & AL.*

When the parol evidence is not taken down in open court, it cannot be used on appeal without a statement of facts.

APPEAL from the court of the first district.

MARTIN, J.* There being long and intricate accounts to examine in this suit, they were submitted to referees, and on their report, objections were made by the defendants' counsel, on several grounds, particularly, because an allowance was made to one of the parties for a sum, as paid for the account of the others, whilst he had paid it in discharge of a private debt of his.

This objection was over-ruled, and to redress the injury, resulting from the refusal of the judge to correct the alleged error of the referees, is the object of this appeal.

There is not any statement of facts; but by an agreement of the parties, the award of the referees, and all accounts made by them, in support of the said award, are to be read in this court.

The counsel for the appellees has imagined, that this agreement authorises him to read here, depositions taken before a magistrate, and read in the district court.

* PORTER, J. was absent till the beginning of December, with the leave of the legislature.

I think that when the parol evidence is not reduced to writing in open court, the party has no right to bring it before us, otherwise than by a statement of facts, agreed on between the parties; or on failure of such, by the judge.

I therefore conclude, that the appeal ought to be dismissed with costs.

MATHEWS, J. I concur in this opinion for the reasons therein expressed, which shew it to be entirely conformable to law, and the uniform practice of this court.

It is therefore ordered, that the appeal be dismissed with costs.

Livingston for plaintiff, *Moreau* for defendants.

HEWES vs. *LAUVE*.

APPEAL from the court of the first district.

If A. give goods to B. to sell, and B. pronounce C. an auctioneer to sell them, C. is accountable to B. only.

MARTIN, J. This case was before us about two years ago, and was remanded for a new trial; judgment was given as before, and the case is brought back by the same party. 6 *Martin*, 502.

It appears that the plaintiff gave certain goods to J. Howe & co. to be sold at auction;

East'n District. *May*, 1821.

HEWES *vs.* LAUVE.

that they were so sold, and said J. Howe & co. have absconded, and the proceeds are still unpaid to the plaintiff, who thinks he has a claim therefore against the defendant. He has endeavoured to shew, that a partnership existed between the defendant and J. Howe & co., but on this point I think the district judge did not err in concluding that he failed.

An attempt has been next made to charge the defendant, on the ground that J. Howe & co. were his agents, and he is liable for their misconduct. But the evidence rather shews that the defendant was the agent of J. Howe & co. The defendant, as auctioneer, attended at the call of J. Howe & co. at their store, to sell as an auctioneer, such goods as had been committed to their care, for the purpose of being so sold. He did so, content with receiving reduced commissions, expecting to be indemnified by the quantity of goods they had induced him to believe they would procure. The plaintiff gave them his, in order that they might procure the sale of them among those of their other customers. In selling them, the defendant acted as the direct agent of J. Howe & co., and was accountable to them for the proceeds: there was no privity between the plaintiff and

defendant. The goods were sold by the latter, as the property of J. Howe & co., and he is in no way liable to him.

I therefore conclude, that the judgment of the district court ought to be affirmed with costs.

MATHEWS, J. I concur in this opinion.

There is no evidence of any partnership between J. Howe & co. and the defendant, and the latter must be considered as having acted in his capacity of auctioneer for Howe & co., who were agents for the plaintiff, and are alone responsible to him.

It is therefore ordered, that the judgment of the district court be affirmed with costs.

Maybin for the plaintiff, *Livingston* for the defendant.

[M]ORRY & AL. SYNDICS vs. *SLAMBURGH.*

The stay of proceedings does not prevent the record of a mortgage.

APPEAL from the court of the first district.

MARTIN, J. Judge Mathews has communicated to me an opinion he has prepared in this case, and in which I concur.

MATHEWS, J. This is a suit brought to ob-

East'n District. *May*, 1821.

TORRY & AL. SYNDICS vs. SHAMBURG.

tain a rescission of a judicial mortgage, which the appellee caused to be recorded after the failure and *cessio bonorum* of the persons whom the appellants represent as syndics aforesaid.

The judgment alluded to was given in favor of the defendant, previous to the cession of property by the insolvents, but was recorded subsequent to an order granted, in the usual form, to stay proceedings against them.

I am of the opinion of the district court, that the conduct of the appellee, in causing his judgment to be recorded, was not in violation of the order by which proceedings were stayed: and that the mortgage ought not in the present mode to be annulled and rescinded.

The effect which it must have on the credit of the defendant, in relation to other creditors, will be regularly ascertained at the time when the appellants are about to distribute the insolvents' estate.

It is therefore ordered, adjudged and decreed, that the judgment of the court *a quo* be affirmed with costs.

Hoffman for the plaintiffs, *Eustis* for the defendant.

MARIE vs. *AVART'S HEIRS.*

East'n District.
May, 1821.

MARIE
vs.
AVART'S HEIRS

APPEAL from the court of the parish and city of New-Orleans. 8 *Martin*, 618.

The heir may avail himself of the testator's insanity, although his interdiction was not provoked.

A public act may be impeached by the subscribing witnesses.

This opinion was pronounced in December term last, and was suspended by a motion for a rehearing, which was granted; it is now printed with the opinion after the rehearing.

MARTIN, J. delivered the opinion of the court last December. The plaintiff's counsel urges, that a will cannot be attacked on the ground of the testator's insanity, unless his interdiction was at least provoked during his life; that when a will contains a clause attesting the testator's sanity, parol evidence cannot be admitted to disprove it; that an affidavit for a continuance, on the ground of newly discovered evidence, needs not to be made by the party himself, but may be so by the counsel. or attorney-at-law.

I. Both parties admit, that before the promulgation of the *Code*, the party attacking a will. on account of the insanity of the testator, had no need to shew that the interdiction of the latter had been provoked.

The *Code* therefore affords us the only rule

East'n District. *May*, 1821.

MARIE *vs.* AVART'S HEIRS

of conduct, though we may be aided by the labours of law writers, and by the decisions of courts.

It is difficult to find any sense in the article relied on by the plaintiff's counsel, "after the death of a person interdicted, the validity of acts done by him or her, cannot be contested for cause of insanity, unless the interdiction was pronounced or petitioned for, previous to the death of such a person." *Code Civil*, 80, *art.* 16.

In the French text, the words *person interdicted*, are rendered by *un interdit.*

Now can there be any interdicted person, whose interdiction was not pronounced previous to the death of such person? Can any one be interdicted after his death?

It is evident that in transcribing the corresponding article of the *Napoleon Code*, the words *un interdit*, have been substituted to the words *un individu.*

Are we at liberty to correct this error, and to substitute in the English text, the words *an individual*, to the words *a person interdicted*, or to erase the word *interdicted?*

The counsel of both parties have argued as if we were, and it is the only manner of giving any meaning to the words of the legislature.

Taking this for granted, it is clear that if no other part of the *Code* control this article, *donations* are not excepted from it.

The defendants present the following, as a part of the *Code* which controls this article, "to make a donation *inter vivos* or *mortis causâ*, one must be of sound mind." *Id.* 208, *art.* 5.

The sanity of an *alienor* is, without this article, required in *every* case. Not less in a sale, exchange, &c. than in a *donation.*

A statute ought to be so construed, that every part of it may have some meaning and effect. If a donation be not put on a different ground than any other alienation, what effect has this last article of the *Code?*

In emphatically and expressly requiring the sanity of a donor, the legislature made it more particularly a *sine quâ non* of this kind of alienation, which the donee, or the person claiming under him, may be called on to establish, even when the donation is not formally attacked, on account of its absence; we incline to the opinion of the jurists and courts of France, who have held that the two corresponding articles of the *Napoleon Code* are to be construed together, so as to exclude donations from the operation of the first.

East'n District. *May*, 1821.

MARIE. *vs.* AVART'S HEIRS

The evident object of this article was the protection of *alienees*, from the rapacity of near relations of an insane person, who might neglect to have him interdicted, in order to induce purchases from him, with the view of causing them to be afterwards set aside.

A donee, legatee, or instituted heir. needs no such protection; as he gives nothing, he cannot be injured.

If this be the case, as to a donation *inter vivos*, it must be particularly so as to a last will. The persons, around a dying man, might easily defeat the rights of the heir at law, if they could improve a moment of delirium or stupor so ordinary before dissolution, to procure an apparent will, that would baffle investigation; unless the heir had such timely notice as would enable him to provoke the interdiction of the dying man.

II. The next point seems to have been before us in the case of *Langlish* vs. *Schons & al.* 5 *Martin*, 405. We there held that a public act might be impeached, by the witnesses who subscribed it. The declaration of such witnesses, in this as in every other case, may be opposed by other testimony.

III. The affidavit of the attorney-at-law, or counsel, stating the discovery of new evidence, not in the knowlege of the party, and which the latter could not have discovered, is not sufficient, when his silence or absence is not accounted for.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

The following opinion was now pronounced after a rehearing;—

MARTIN, J. After a mature reconsideration of the opinion pronounced in this cause in December last, it does not appear to me that there would be any propriety in making an alteration in its dispositions.

It seems to me, the continuance was rightly denied, even if it be clear that the affidavit was properly made by the attorney-at-law instead of the plaintiff.

I express no opinion whether an attorney in fact, who represents a slave suing for his freedom, may be received instead of the party. Judge Porter, before his departure, having doubted the correctness of the opinion of the court in this respect, but acquiescing with

East'n District. *May*, 1821.

MARIE *vs.* AVART'S HEIRS

us in all the other parts of it, admitting the propriety of the continuance being denied on the affidavit, even if it were made by the party herself. I think it better to reserve the final settlement of the question, for a case in which the solution of it may be necessary to a decision.

MATHEWS, J. concurred.

Livingston for the plaintiff, *Mazerau* for the defendants.

ST. ROMES vs. *PORE.*

If the disease was curable in its origin, but incurable at the time of the sale, the case is a redhibitory one.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. This is an action for the rescission of the sale of a negro woman, on the ground that she was attacked with the malady of which she died soon after the sale, previous and at the time of the contract. The defence is, that the defendant, *finding that the woman was sick*, had her sold at auction, on the 2d of May, when she was struck to the plaintiff. That soon after, the plaintiff informed him he would not take the woman, as she was sick; to which the defendant replied, he thought he was bound to take her, as she had, according

to the defendant's orders, been sold, with the only warranty of the redhibitory diseases; that on the 9th, the plaintiff informed him, he would accept the sale, and the defendant executed the bill of sale for her to the plaintiff, before a notary-public.

There was judgment for the plaintiff, and the defendant appealed.

The defendant, by interrogatories, drew the following facts from the plaintiff:—

The plaintiff, after the auction, and before the execution of the sale before the notary, told the defendant he would not take the wench, as he had discovered that she was sick: to which the defendant replied, *he did not know whether she was*, but that, at all events, he meant to sell, and had actually sold, her as he had bought her, *i. e.* with a warranty of all redhibitory diseases. To the best of the plaintiff's recollection, of the correctness of which he declared himself sure, the defendant did not say, that unless the plaintiff could prove that the woman's disease was a redhibitory one, he could not help taking her, as those only were warranted against. Some days after, and in consequence of the defendant's declarations, the parties met at the notary's office, and executed the act of sale.

East'n District.
May, 1821.

ST. ROMES
vs.
PORE.

The statement of facts shews—that Dr. Dow deposed, that he was called upon to see the woman, just after the defendant bought her, and recognised her as a patient whom he had visited at her former mistress's seven months before; at that time she laboured under an intermittent fever, occasioned by a suppression of the menstrual discharge; he ordered the ordinary remedies, wine, bark, and a generous diet, with exercise; when he saw her at the defendant's, he found her weak, her legs swollen, and told him a generous diet and proper medicines would effect her cure; and as he did not consider her as incurable, and as she was a valuable servant, he advised him to have her well attended. He has not seen her since.

Dr. Dupuy said, he was called upon by the plaintiff, to the woman, she appeared very sick, and he supposed her incurable. He attended her from the 17th of May, 1818, till the 13th of June, when she died; on the second day of his attendance, she was in a state of complete *marasme*, with all the symptoms of a chronic disease in its last stage; her legs swollen. He attended her carefully, but, as he had supposed, to no purpose. The disease he believes

was of seven or eight months standing, and quite incurable when he saw her.

Giguel, the plaintiff's brother-in-law, deposed, he knew the woman, who had before been his property. The defendant applied to him before he bought her, and he told him she was a good servant. He did not know her to be sick before she died at his house, on the 13th of June, the plaintiff having put her there.

It is contended, that the plaintiff cannot recover, as the sickness of the slave was known to him at the time of the execution of the act of sale.

It is not easy to conclude, from the evidence in the case, that he knew the disease was an incurable one; and he had the plaintiff's assurance, that if it was a redhibitory one, it was warranted against; so that our sole inquiry is, was the disease a redhibitory one?

Ailments or infirmities constitute redhibitory defects, when they are incurable by their nature. So that the slave subject thereto is absolutely unfit for the services for which he is destined, or these services are so inconvenient, difficult and interrupted, that it is to

East'n District. *May*, 1821.

ST. ROMES *vs.* PORE.

be presumed, the buyer would not have bought her at all, if he had been acquainted with the defect; or that he would not have given so high a price, had he known that such a slave was subject to that sickness or infirmity. *Civ. Code*, 358, *art.* 80.

I understand this to mean, if the buyer knows the nature of the disease, *i. e.* that it is incurable. In the present case, the disease existed before the sale, and though curable in its origin, had now become incurable. This certainly was not known to the plaintiff; for who can believe, that if it was, he would have bought? He knew the slave to be sick, informed the vendor of it, and received for answer, that she was sold with a warranty of redhibitory diseases; among these, the law has classed incurable ones, such as that under which the slave laboured. It appears to me, the parties contemplated, that the vendee's claim would depend on the issue of the disease.

I think we ought to affirm the judgment of the parish court.

MATHEWS, J. I concur in this opinion for the reasons therein expressed.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Canonge for the plaintiff, *De Armas* for the defendant.

FERRERS vs. *BOSEL.*

APPEAL from the court of probates of the city of New-Orleans.

A Spanish notarial instrument, attested by three notaries of the district, and the constitutional alcade, accompanied with a certificate under the hand and seal of the American consul, may be received in evidence on proof of the notarie's signature.

MARTIN, J. The only question in this case is, as to the admission in evidence of notarial instruments, executed at Bagur, in the kingdom of Spain.

The signature of Jose Puig y Pui, the notary before whom these instruments were executed, as well as his official capacity, are proven by the signatures and *signos* of three notaries of the district; by that of the constitutional alcade, at Bagur, and also by the American consul at Barcelona, who has also certified that of the alcade.

The authenticity given by Spanish officers, to these instruments, would give them credit in the tribunals of Spain; and I think, when the signature and seal of the American consul

East'n District. *May*, 1821.

FERRERS *vs.* BOSEL.

are added to the proof of the hand writing of the notaries, they ought to be received in this.

I think therefore that the judgment of the court *a quo* ought to be affirmed with costs.

MATHEWS, J. I concur in the opinion.

It is therefore ordered and decreed, that the judgment of the court *a quo* be affirmed with costs.

Moreau for the plaintiff, *Livingston* for the defendant.

LEWIS vs. *PEYTAVIN.*

A replication admits any new fact set forth in the answer, in avoidment of the claim, which it does not deny.

APPEAL from the court of the second district.

MARTIN, J. The plaintiff claims the price of a number of cattle by him sold to the defendant. The latter pleaded the general issue, and that if he did buy the cattle, he gave, and the plaintiff received, in full payment and satisfaction of it, his promissory note, which he is ready to pay on presentation.

The plaintiff replied that the note given by the defendant is lost, so that he was forced to sue on a *quantum meruit.*

The district court gave judgment for the

plaintiff, being of opinion that it was better the defendant should run the chance of a future loss, than plaintiff should now sustain a present and real one. The defendant appealed.

It seems to me the replication admits every new fact set up in avoidance of the claim in the answer, which it does not deny. The defendant having alleged that the note was given and received in satisfaction of the price of the cattle, and the note being admitted to have been given, this last circumstance, its having been given and received in satisfaction and payment, is admitted. If it is, the defendant is suable on the note only, and the contract of sale is fully executed, and can no longer support the vendor's claim for the price.

I think that the district court erred, and our judgment should be for the defendant.

MATHEWS, J. I concur in this opinion.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that there be judgment for the defendant, with costs in both courts.

Livermore for plaintiff, *Workman* for defendant.

East'n District.
May, 1821.

MITCHELL
vs.
ARMITAGE.

MITCHELL vs. *ARMITAGE.*

APPEAL from the court of the parish and city of New-Orleans.

A master may correct his apprentice, but not in a wanton or cruel manner.

MARTIN, J. This is an action for the rescision of the indenture, by which the plaintiff's son was bound as an apprentice to the defendant, on account of cruel treatment; the defendant pleaded the general issue, and that he moderately chastised the plaintiff's son for his ill conduct, and particularly for having stabbed another apprentice of the defendant's:— There was judgment for the plaintiff, and the defendant appealed.

By consent, the judge's notes of the testimony came up with the record, in lieu of statement of facts, and the case has been submitted to us without an argument.

Dr. L'homoca deposed, that on the 23d of December, he was sent for to plaintiff's son, who had some fever for three days, in consequence, he believes, of a flogging. He had been severely whipped from the shoulders downwards, and the bruises were apparent; there were already some scabs on his wounds, but they must have bled much. The deponent said, that in his opinion, a master has no right

to beat so much (*martiriser*) his apprentice; the boy deserved to be more severely punished, but not by the master himself.

Blache deposed, the plaintiff's son was brought to the mayor on the 23d, two days after he was whipt; he appeared to have been severely flogged; his shirt had blood on it; there were bluish marks of the whipping, which he thinks too severe for a master: the witness being asked whether he had seen these marks, answered yes, a little cut through, bluish, and a little bloody.

Carlos deposed, that the plaintiff's son quarrelled, at their common shop, where four apprentices were at work by a candle, with a black boy, a slave of their master, the defendant. The white boy wounded the black on his side, and was himself wounded. The plaintiff's son was taken into another room to be whipped; he came back bleeding through his shirt, and was sent to work again. They wished to whip him a second time, but the defendant's partner begged him off.

On his cross-examination, this witness said he has been with the defendent since May, 1817; is well treated, as well as the other apprentices. When any quarrel arises among

East'n District. *May*, 1821.

MITCHELL vs. ARMITAGE.

the apprentices, the defendant must be informed of it, in order to settle it—they are rare. The plaintiff's son was reproached with not having referred his quarrel with the black boy, to the defendant, and answered he had not the patience; to which the defendant replied, he would have the patience to whip him; he begged pardon; the defendant gave him many lashes; the witness does not recollect how many. The black boy was not punished.

Simon declared, he is the defendant's neighbour, and saw the plaintiff's son with his shirt bloody, having been severely whipt. He has apprentices but would not whip them so. He has not seen white apprentices more or so much whipt by any master. He saw the plaintiff's son on the 22d, he might not be much cut, but bleeding.

Clifford deposed, he saw the plaintiff's son's shirt, with blood on it, and on the next day saw him in bed with a high fever.

Longbottom, defendant's partner, deposed—a quarrel arose between the plaintiff's son and a black boy of defendant's, who was wounded, by being stabbed in his side. He told the plaintiff's son to complain to defendant, he said he had not patience. He saw the plaintiff's son

whipt, and conceives the defendant might have chastised his own son in the same manner, for the same fault; he would have done so himself. He has seen, on other occasions, the defendant whip the black boy and others, on complaint. He has ordered them on such occasions to apply to him for redress.

Odder deposed as the preceding witness, in regard to the struggle between the white and black boys. The latter was wounded with scissors, and did not complain; the plaintiff's son was wounded in his fingers. The quarrel arose about coming nearer to the light, and the whipping of the plaintiff's son ensued; the defendant gave him about twenty or thirty strokes of a cow-skin; he would have whipped him a second time, but his partner begged his pardon; the defendant was in a great passion; the plaintiff's son was not compelled to return to his work; the deponent, tho' sleeping in the same room, did not hear him complain; he told him only not to come near him, in order likely not to hurt him; the black boy was not punished; the witness has lived five years with the defendant, and is well treated, whipped only when he deserves it, and no more; the scissors were long ones, with a side sharp:

East'n District. *May*, 1821.

MITCHELL *vs.* ARMITAGE.

the plaintiff's son was whipt in the next room, and the deponent heard him say—enough, enough.

Homes deposed, that he had been three years with the defendant; he treats his apprentices as his own children, and not so severely as they occasionally deserve; he has had several apprentices, and the witness has never heard of a complaint among them.

Stawlons declared, that he has been five years with the defendant, and was only once corrected, more than he deserved, with a cow-skin:—on his cross-examination he said, that he was cruelly beaten; it was about two years ago; he was more beaten than the plaintiff's son, who was severely beat, and had many cuts; he had no parents.

Anderson declares that he has been twelve years with the defendant; his apprentices are well treated; the plaintiff's son was his confidential boy, and is treated with great kindness, and better than his own son; he has always corrected him with a cow-skin, and he has never heard of a complaint; the witness was himself an apprentice; and has been ten times corrected so; and sometimes more than the plaintiff's son; it has often appeared that

apprentices having been whipt and being gone home, were whipt by their parents and sent back.

Another witness (not named in the judge's notes) declared, that he has been in the same situation, and a master cannot do without a cow-skin.

Dr. Deveze deposed, that on the 27th of December, at the request of the defendant, he visited the plaintiff's son, who had been very lightly flogged; he thinks hardly to hurt him through the epidermis. The correction appeared to him severe, as to local circumstances; that is to say, on a quarrel with a black boy, but without danger.

The judge adds to his notes of the evidence, that the plaintiff's son exhibited his back and shoulders to him, where he saw the marks of twenty lashes at least, of a black or bluish colour, attesting the defendant's severity. This was on the 9th of January last, eighteen days after the whipping.

These proceedings appear to me, grounded on a provision of our law, that if any master shall abuse, or cruelly, or evilly treat his indented servant or apprentice, or shall not discharge his duty towards him, in any of

East'n District. *May*, 1821.

MITCHELL *vs.* ARMITAGE.

these cases, there will be sufficient cause to release the aggrieved party from his engagement, or to grant him such other redress as the equity or the nature of the case may require, in the discretion of the judge. *Civ. Code*, 38, *art.* 9.

That a master may lawfully correct his apprentice is expressly provided by law; that he must not do so in a wanton or cruel manner, is equally undeniable. So that, the only inquiry in the present case is, whether the whipping inflicted on the plaintiff's son, was so cruel, as to call for the forfeiture of the defendant's right to the boy's services, during the remaining years of his apprenticeship. Apprentices ought to be protected against the cruelty of their masters, but the latter purchase, during the first years of the apprenticeship, by the labour and trouble which they bestow on the instruction of the youth, and the expences of his maintenance, a right to his services, during the last years of the apprenticeship; a right of which they are not to be deprived, without a sufficient cause.

The witnesses for the plaintiff, present a strong case, which, if considered with the feelings that accompany the consideration of

a helpless white boy, severely whipt for a struggle with a slave, may easily magnify his sufferings, so as to excite indignation against the author of them. But if the evidence these witnesses give, be patiently considered, this indignation will considerably subside.

Dr. L'homoca, who saw the plaintiff's son two days after he was whipt, says the bruises were apparent; the wounds had scabs already, though they appeared to have bled much. His opinion is, that the boy deserved to be more severely punished, though he thinks the master ought not to have done it. Blache, who saw the boy on the same day, at the mayor's, thinks the whipping was too severe for a master. The boy's shirt had blood on it, and he describes the boy's back as a little cut through, having bluish marks, and being bloody. Simon, who saw him on the 22d, the next day after the whipping, says, he never saw an apprentice so severely whipt by his master; and describes his back as not much cut, but bleeding. Thus the testimony of the plaintiff's witnesses present the case of a boy severely whipt; his back cut and bleeding.

When we attend to the testimony of the defendant's witnesses, we find, that they think the whipping was not, in their opinion, too

East'n District. *May*, 1821.

MITCHELL *vs.* ARMITAGE.

severe; that the boy was not thereby disabled a moment, to attend to his work. A gentleman of the faculty, who saw the boy six days after the whipping, thinks he was hardly whipt through the epidermis; another witness says, he would have whipt the boy as severely, if he had been his master.

If we divest the case of every thing which is matter of opinion, the result is, that the plaintiff's son was whipt with a cow-skin; received twenty or thirty lashes; that his back bled; exhibited small cuts, and bluish marks, for having wounded a black boy, with a sharp instrument, in a quarrel. I am ready to say, that the correction appears to me a severe one; such as ought not to be countenanced. But it appears to me, that the case is not of so black a die as to deserve an absolute forfeiture of the defendant's right to the boy's services, during the rest of his apprenticeship. I therefore think, that the judgment of the parish court ought to be reversed, and that the defendant ought to pay the costs of the appeal.

MATHEWS, J. I concur in the opinion delivered by judge Martin. The right of a master to correct his apprentice for negligence.

or misbehaviour, provided he does it with moderation, is expressly recognised by our *Civil Code.* The different degrees within which correction of this kind ought to be limited, by the term moderation, must be governed by the extent and nature of the offence committed by the apprentice. In the present case, it appears by the evidence, that the chastisement was inflicted, in consequence of the apprentice having wounded a slave of the appellant, whilst they were employed in the business of their master. Whether from the instrument used, or manner of giving the wound, it had a tendency to do a serious injury to the slave, does not appear. But the conduct of the plaintiff's son was certainly a gross violation of the order which ought to prevail in the shop of a mechanic, and which, it is probable, cannot be supported without strict discipline and a full portion of correction, properly applied. Although the punishment complained of in this suit, appears to have been somewhat severe; and although it is unpleasant, in consequence of the feeling which may be presumed to be excited between the parties, to place the apprentice again in the power of his master; yet I do

East'n District. *May*, 1821.

MITCHELL *vs.* ARMITAGE.

not think, that the circumstances of the case, as disclosed by the evidence, are sufficient to authorise a court of justice to release the former from his apprenticeship; especially as it is a single act of correction, and nothing appears, which shews any deliberate cruelty on the part of the appellant towards his apprentices.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the cost of the appeal be borne by the defendant.

Preston for the plaintiff, *Hennen* for the defendant.

CANFIELD vs. *M'LAUGHLIN.*

A party who claims property attached, and has it delivered in bond, is not accountable for any money he became bound to pay to the defendant, and which he did pay.

APPEAL from the court of the first district.

MARTIN, J. This case was remanded to the district court, in February last, where it was decreed, that the plaintiff recover from the defendant $358 7 cents. &c. and that "the claimants, having bonded the cotton shortly after the attachment, and sold it at the then market price (being a higher price than could

be had at this time) have a lien on the proceeds for the balance of account due them by the defendant, which, credited to the defendant, balances their general account. Judgment was, therefore, given to the claimants, for the proceeds of the cotton. The plaintiff appealed from so much of the judgment as relates to the claimants.

The statement of facts refers us to the record of the case, as it stood before us in February last, and to the following deposition.

Mathews, a witness for the claimants, deposed, that they are the defendant's factors; that, at the time the cotton was attached and bonded, he was indebted to them, in the sum of $4,500.

On his cross-examination, the witness declared, that the account of the defendant with the claimants, after crediting him with the proceeds of the cotton, is balanced; that since the attachment, the claimants have received from the defendant, 105 bales of cotton; ten of which the witness has delivered to Beatty & Greeves; and three to B. Levy & Co., for debts due them, and which they had commissioned them to receive from the defendant; that the net proceeds of the

East'n District. *May*, 1821.

CANFIELD *vs.* M'LAUGHLIN.

ninety-two bales remaining, amounted to $; that the witness went over to the defendant's plantation, to purchase from him the cotton last mentioned; and after it was weighed and delivered, and the price agreed on, *viz.* fifteen cents per pound, and before he left the plantation, he delivered to the defendant a draft on the claimants for $1500, and over; that in balancing the account between the parties, the amount of this draft is credited to the defendant, as if paid in cash: it has never been presented; the claimants wrote to the defendant, after it was drawn, that it would be honoured; the claimants are indebted to the defendant for its amount, till it is paid. When the witness went to the defendant's, he took with him the account current between the defendant and claimants. After receiving it, he gave the former credit for the amount, and gave the aforesaid draft for the balance: this was in the latter part of March; the witness is sure it was after the 15th. The principal examination being resumed, the witness added, that the proceeds of the eighteen bales of cotton attached, amounted to $878 6 cts.; and this sum was carried by the claimants to the credit of the defendant's account. The sale was made (without any authority from the court

or the defendant) for a fair, and the highest market price. The witness was sent by the claimants to purchase the defendant's cotton, and then he received the ninety-two bales. On his departure, the claimants told him any draft given by him on them, for the purchase of the cotton, would be honored.

It is clear to me, that the claimants having a lien on the cotton attached, they are only accountable on their bond for the balance that may remain in their hands, after the payment of the balance due them. The evidence shews, that at the time of the attachment, and of the delivery of the cotton to them, on their bond, that balance was considerably above the value of the cotton. Had this been known at the time of the attachment, the cotton ought not to have been taken from them. Since they had a lien on it, they well might, on its return into their hands, sell it to pay themselves; this they have done, and it is not contended, that it was unfairly done. The condition of their bond was, that they should abide the order of the court, *i. e.* deliver the cotton or its value, if it appeared to the court that they had no legal claim thereto.

It appears, that seeing the cotton attached was not sufficient to cover their claim, they

East'n District. *May*, 1821.

CANFIELD *vs.* M'LAUGHLIN.

deemed it advisable to purchase other cotton, which the defendant had, to a greater amount than that of their claim; and in so doing, it became necessary to provide for the payment of the balance to the defendant. I see no impropriety in this; they were not garnishees, bound to hold any property of the defendant, in their hands; they were claimants of property of his, on which they had a lien; this property they obtained on giving bond to support their claim; they have done so, and nothing can be claimed of them.

I do not know that they were bound to retain, or even could have justified themselves in retaining, any property of the defendant, which came to their hands, after they received the cotton from the sheriff.

Nothing prevented the claimants from purchasing other cotton from the defendant, and paying him cash therefor. Their agent, instead of paying cash, gave a draft on the claimants, which they had previously bound themselves to accept, and which, when they were informed of its having been given, they promised to honor. It is not probable that any cotton could have been obtained by the claimants, beyond the amount of their claims, without paying cash, or giving the equivalent.

The whole transaction appears to me perfectly fair.

I think the judgment of the district court should be affirmed with costs.

MATHEWS, J. I concur in this opinion. The claimants had a privilege and preference on the cotton attached, at the time of levying of the attachment, to an amount exceeding its value, and it does not appear to me, that any thing has occurred to destroy their lien.

Hoffman for the plaintiff, *Maybin* for the defendant, *Eustis* for the claimants.

SEGHERS vs. *HANNA'S CREDITORS.*

If the syndics' attorney stipulate for a fixed sum, in writing, he must sue on the contract, and cannot have judgment on a rule.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. The plaintiff, having entered into a written agreement with the syndics of the insolvent, by which they stipulated to pay him $500 for his professional services in the affairs of the estate, obtained a rule against them, to shew cause why they should not pay him that sum, as a privileged debt, according to said agreement, it being first approved by the court; the syndics testified their willingness

East'n District. *May*, 1821.

SEGHERS *vs.* HANNA'S CREDITORS.

to submit to the rule, provided the payment was made $300 now, and the rest on the conclusion of the affairs.

H. R. Denis, the counsel appointed to defend the interests of the absent creditors, opposed the rule, and the court having discharged it, the plaintiff appealed.

It appears to me that the special contract made with the syndics cannot be enforced on a rule to shew cause; the party did not rely on payment on a *quantum meruit* as is ordinarily done, in cases of insolvency, but chose to enter into a special contract; he must therefore seek his remedy there, and the judgment of the parish court ought to be affirmed with costs.

MATHEWS, J. concurred. See *July Term.*

The plaintiff, *in propriâ personâ*, *Denis* for the defendants.

SEGHERS vs. *HIS CREDITORS.*

Creditors, who prove their debts, at a meeting, need not renew the proof, at a subsequent one.

A notary can-

APPEAL from the court of the first district.

MARTIN, J. The insolvent's creditors having met before a notary to appoint a syndic, and the proceedings of their meeting being brought

to court for homologation, J. H. Holland, one of them, opposed their homologation, on the ground, that Cucullu, the creditor who appears as having been appointed syndic, was not the person legally chosen, but that he, Holland, the opposing creditor, was. The proceedings were homologated, and Holland appealed.

The opposition was grounded, on the admission at the meeting of the following persons, as creditors of the insolvent, *viz.* Rion, Gurly and Guillot, the Ursuline nuns, Labatut, Mercier, Labarthe, Morgan and Sainet.

1. Because, none of the said persons, Sainet excepted, have sworn, in the manner required by law, to the truth and legality of their respective debts; the oaths having been taken by proxy.

2. Because, the persons appearing for them (principally Rion) produced none, or an inadmissible power.

3. Because, Sainet and Mercier had ceased to be creditors, the former having been paid in full, and the amount of the latter's claim having, long before, been at her disposal, and she having delayed to receive it, in order to interfere in the affairs of the creditors.

not certify any thing that happened at a meeting of creditors, otherwise than by a copy of his minutes—if nothing appears there, he must swear.

A creditor who was present at a meeting, and did not object to any vote, cannot oppose the homologation of the proceedings, on the allegation that proper powers were not produced.

A judgment of homologation must, according to the constitution, contain the reasons on which it is grounded.

East'n District. *May*, 1821.

SEGHERS *vs.* HIS CREDITORS

4. Because, Labarthe and Morgan, respectively claim the same sum, a suit depending, which is to ascertain to whom it is due.

Eighteen persons claiming $41,301 appeared at the meeting; ten of whom, claiming $21,641, voted for Cucullu, as syndic; and eight claiming $19,660, voted for Holland. The claims of the persons whose votes, it is contended, ought not to have been received, amount to $16,516.

The counsel for the appellant contends, that the judgment appealed from ought to be reversed, because it contains none of the reasons on which it was grounded.

I think this objection must prevail; the constitution requires judges to give their reasons in final judgments. The present was such a one.

But as the whole evidence is before us, we are enabled to proceed and give the judgment which the district court ought, in our opinion, to have given.

The second ground of opposition is the only one, which, in my opinion, presents the least difficulty.

It appears to me useless to express any opinion as to the manner in which the parties

swore to their debts at the meeting under consideration. I have confined my enquiry, in this respect, to the parties objected to in the district court, and find that all of them, except Guillot and Gurly, proved their debts without any objection as to the mode, at the first meeting of the insolvent's creditors, the proceedings of which have been homologated. This, in my opinion, suffices; and it appears to me unnecessary, at any other period, that they should prove them. The debt of Gurly and Guillot, is only $190; and if they were excluded, there would still remain a majority of creditors, in persons and amount, in favour of Cucullu.

Sainet appears, by the record, to have received the amount of his claim, under restrictions; what these restrictions are, do not appear; and since he swore that it was still due, duty and inclination lead me to the belief, that he received it, in such a manner, that the amount is not absolutely his, and consequently his claim is not yet extinguished. This is the more probable, that he was, and still is, a syndic; and he may still be considered as accountable for the money as such. I see no evidence to support the allegation.

East'n District. *May*, 1821.

SEGHERS *vs.* HIS CREDITORS

that the account of madame Mercier's claim, ever was at her disposal.

Labarthe voted for Cucullu, and Morgan for Holland; and if, as is contended, these persons are creditors of one and the same claim, and a suit be depending to determine which of them is the legal claimant, both, if either of the votes are to be rejected; and if so, the result of the election is the same, as if they are retained.

So that, the only ground of objection to be considered, is the second, *viz.* the absence or illegality of the powers of those who appeared to vote for others.

In this respect, the votes of the nuns, Rion, Labatut, and Mercier, only are exceptionable.

The holy ladies' vote was given by F. Lambert, who had a power to represent them in Seghers' affairs, subscribed R. K. André, for the mother St. Michel Gensoul; and the appellant's counsel has informed us, that the same attorney appeared without any power at all, at the first meeting, and took the oath.

Rion was represented under a power, executed by his wife.

Labatut and Mercier were so, by persons styling themselves their attornies, but who do not appear to have produced any power.

The notary has given a certificate (which comes up with the record) stating, that the powers of attorney, shewn here, are annexed to the proceedings; that none other were shewn there. I have disregarded this certificate, believing, that a notary can only legally certify copies of proceedings in his office, and that any other fact, in his knowlege, must be disclosed on oath.

The opponent or appellant does not allege, that the persons who represented the nuns, Labatut, Rion, or Mercier, were not duly authorised, but only, that they did not produce any power at all, or such as were not admissible. He was present at the meeting; neither he, the notary, nor any of the other creditors opposed the votes now complained of, on the ground of a want of authority in the persons who offered them, and these persons were without any difficulty permitted to vote.

I therefore think, that we cannot now listen to the opponent and appellant, who had the opportunity to make their objections at the meeting, before the votes were received, when the parties might probably have, with facility, supplied any deficiency in the evidence, which they produced, of their authority to

East'n District. *May*, 1821.

SEGHERS *vs.* HIS CREDITORS

represent their principals. I conclude, that we ought to homologate the proceedings: but as there was not any reason in the judgment, the appeal was properly taken, and the appellee ought to pay the costs of it.

MATHEWS, J. I concur in the opinion for the reasons expressed therein.

It is therefore ordered, adjudged and decreed, that the proceedings had before the notary, be homologated, but as there was not any reason in the judgment of the district court, the appeal was properly taken; and it is further ordered, that the appellees pay the costs of it.

Seghers for the opposing creditor, ——— for the defendants.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JUNE TERM, 1821.

East'n District.
June, 1821.

BAYON
vs.
VAVASSEUR.

BAYON vs. *VAVASSEUR.*

APPEAL from the court of the second district.

A party who does not object to the judge's charge, cannot complain of it on the appeal.

Warranty is of the nature of the contract of sale, not of its essence.

MARTIN, J. The plaintiff demands the rescission of the sale of a slave, on the ground of his being epileptic, and in the habit of running away; circumstances which, he alleges, were deceitfully and fraudulently concealed from him. By a special clause in the bill of sale, it is declared, that the seller does not guarantee that the slave is free from any disease, habit of running away, or other defect.

The answer denies only the alleged fraudulent or deceitful concealment. To this is added a general demurrer.

East'n District. *June*, 1821.

BAYON *vs.* VAVASSEUR.

There was a verdict, and judgment for the defendant, and the plaintiff appealed.

The record shews, that the defendant having introduced a witness to shew, that the slave was not epileptic, the plaintiff objected thereto, and the objection being over-ruled, took his bill of exceptions.

Mrs. Englesheim deposed, that she knew the slave bought by the plaintiff from the defendant, who is the object of the present suit. That she heard the plaintiff propose to the latter, to take the slave back, as he was epileptic, observing, that the defendant ought to recollect, that when he sold him to the plaintiff, the latter mentioned, he did not think any thing of the sore on his leg, but that if he had epileptic fits, or any other redhibitory disease, he would not take him on any consideration. When the defendant replied, the fellow had only a sore on one of his legs, and that he did not mention any other disorder in the bill of sale; but that this was only to avoid difficulties. He gave his word of honor, that the slave had no epileptic fits. He acknowleged, that the above conversation took place at the time of the sale, but that, although the slave, while in his posses-

sion, had fallen five or six times, had burnt his arm, and would have perished, had not assistance been procured; he was not convinced, that these were epileptic fits; and that, for this reason, he gave his word, that the slave had no incurable disease; that he would consider of the proposition of taking him back, and would give his answer in three or four days. The witness, from this conversation, verily believed, the defendant knew the slave was subject to epileptic fits, when he sold him.

Salon deposed, that about two years ago, he was working at the plantation of Chapduc, where he had the slave under his order; that he heard him, on the upper floor of the mill, groaning, as suffering great pain; that as soon as he saw the defendant, then his owner, he informed him of it, when he replied, he cared not whether he died; and begged the deponent to keep him, which he refused, fearful of employing him, as he was falling into epileptic fits, which made it dangerous to work with him. It was then understood between Chapduc and the defendant, that the slave was epileptic. The defendant told the witness not to be afraid of any thing happen-

East'n District. *June*, 1821.

BAYON *vs.* VAVASSEUR.

ing to the slave, for he felt the approaches of the fit. During the fits, the slave foamed at the mouth, and rolled his eyes most horribly. This was in June or July, 1818.

Renaud deposed, that in the beginning of August, 1819, he was present, when the defendant offered to sell the slave to the plaintiff, for $600, payable in one year. He said the slave had a sore leg; felt no inconvenience from it, and worked full as well. That he would not guarantee any thing in the bill of sale, as to that sore leg, but the plaintiff might rest assured, it was a slight defect. The plaintiff said, if the fellow was epileptic, or had any redhibitory disease, he would have nothing to do with him; and on the assurance of the defendant, that he had only a sore leg, he determined on purchasing. Fifteen or twenty days after, the slave fell into epileptic fits, and has fallen since, many times. When he drinks strong liquor, he invariably has fits. The plaintiff had hardly any benefit from him since the purchase, as he is addicted to drinking and running away: he has been kept in irons for some time.

Lamothe, the city jailor, deposed, that the slave was sold by the defendant to the plain-

tiff, in jail. The defendant sold him as he was, and declared him to be a bad subject; he had a sore leg. The witness was present at the first conversation of the parties, about the sale; he did not hear the defendant say the slave was epileptic, a run-away, or thief. He has always known him for a bad negro, *mauvais sujet.*

Fontaine deposed, he was the defendant's overseer during the seven or eight months preceding the sale. During that time, the slave behaved well and had no fits, to the witness's knowledge. He would have been worth, if he had not been afflicted with a sore leg and addicted to run away, $2000.

Bourgeois deposed, he knew the slave for the four years preceding the sale: he was a fine looking fellow, a creole and something of a carpenter. Had he not been addicted to run away and had his leg not been sore, he would have sold for $3000.

Beckle, a carpenter, deposed the slave is a good sawyer and hewer.

We are not informed by the record, of the name of the witness referred to in the bill of exceptions, and from the nature of the objection, I take him to be Fontaine, whose testi-

East'n District. *June*, 1821.

BAYON *vs.* VAVASSEUR.

mony tends to shew, that the slave was not subject to epileptic fits before the sale; but as his testimony shews, that he had no fit during seven or eight months, this circumstance might go some way in repelling the idea of a deceitful and fraudulent concealment in the defendant, as it tends to shew, that he might, as well as his overseer, be ignorant of the epilepsy of the slave. It does not appear to me, that the testimony was illegal.

Our attention is next drawn to a part of the judgment, in which it is stated, that the judge told the jury, that the bill of sale prevented the defendant from being liable in the ordinary way, for the diseases prohibited by law. It is, and I believe correctly, objected to by the defendant's counsel, that even if this part of the charge was erroneous, the plaintiff cannot be relieved against it in this court, as he did not file his bill of exceptions, nor complain of it in the district court.

It appears to me, the opinion expressed by the court is correct; warranty for redhibitory diseases is not of the essence, but only of the nature of the contract of sale, was introduced for the protection of vendees; and nothing prevents its being excluded from the

contract by an express stipulation, as in the present case.

The plaintiff and appellant urges, that the judgment is erroneous, inasmuch as the testimony shews, that the defendant knew of the existence of the redhibitory defects complained of, before the sale, and did not make them known. 1 *Martin*, 149, *Macarty* vs. *Bagneres*, *Cur. Phil.* 328, *n.* 28 & 30.

The defendant's counsel urges, that as to his knowlege of the existence of the redhibitory disease, the testimony is contradictory; and on this knowlege, it was the province and right of the jury to decide; that their decision, if erroneous, could be properly set aside, on a motion for a new trial only, and in such a case, this court would not disturb the finding of the jury. 5 *Martin's Rep.* 323. 8 *id.* 363, 393. That there is good reason to presume, from the low price, or other circumstances, that the plaintiff knew of the defect: *Cur. Phil. com. ter. cap.* 13, *n.* 29, *ff.* 21, 1, 1, *sec.* 6, in which case, there was no necessity for any disclosure by the defendant.

The defendant's answer admits, as it does not deny, the existence of the epilepsy and the habit of running away; nothing is put in

East'n District. *June*, 1821.

BAYON *vs.* VAVASSEUR.

issue but the deceitful and fraudulent concealment of these rehibitory defects. I have no doubt, that the defendant was bound to disclose them, unless they were known to the plaintiff; and therefore, if he withheld that knowlege, he concealed fraudulently and deceitfully. He was bound to prove this disclosure; he has not done so; we must conclude, he did not disclose. So that the fraud and deceit is manifest, unless the knowlege of the plaintiff rendered this disclosure vain and needless: *lex neminem cogit ad vana.*

The counsel insists, that the modicity of the price is evidence that these defects were known. A witness swears, had he not had a sore leg and been a run-away, he was worth $3000; another $2000. The price given is $600, at 12 months; less than one-third of the smallest sum. The circumstance of his being sold in jail, without any warranty, is presented as one, from which the knowlege of his being a run-away may well be implied in the plaintiff.

The modicity of the price; the place of the sale; the stipulation that the defendant would not be liable for any disease or defect, even redhibitory ones, are circumstances

which may be supposed to have gone a considerable way in inducing the jury to imply a knowlege in the plaintiff. They may have refused credit to the principal witness, Mrs. Englesheim, on account of some circumstance which affected her credibility. The judge mentions her near connection to one of the parties as such, and declares himself satisfied with the verdict.

It is true, the facts stated in the judgment cannot control, or be taken as, a statement on which this court may act; but the opinion of the judge, who tried the cause, of the correctness of the verdict, whether expressed in over-ruling a motion for a new trial, or in giving his judgment, is satisfactorily shewn by his declaration in his own court. I do not take his suggestion of the fact that considerations of friendship and connection, induced the jury to disbelieve a witness, as conclusive. It suffices, that they may have existed.

The neglect of the plaintiff, to apply for a new trial, is a circumstance which adds to the weight of others.

On the other side, the evidence in favour of the plaintiff, is so positive, and must be so decisive, if believed, that I think the verdict

East'n District. *June*, 1821.

BAYON *vs.* VAVASSEUR.

of the jury ought not to be conclusive upon us. I feel inclined to reverse the judgment and remand the case, with directions to the judge to submit it to a new trial.

MATHEWS, J. I concur in the opinion of my colleague.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the case remanded, with directions to the judge to submit it to a new trial.

Davesac for the plaintiff, ——— for the defendant.

GITZANDENER vs. *MACARTY.*

The capacity and signature of a justice of the peace to the *jurat*, of an answer to interrogatories is not to be certified as the record of a court, under the act of congress.

If the defendant do not move to dismiss the suit, for want of an answer to his interrogatory, he cannot assign it as error.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. This is an action on a promissory note; the defendant pleaded the general issue and set-off, and filed interrogatories, which the judge directed the plaintiff to answer on oath. He did so, before a person who styles himself a justice of the peace, for Frederic county, Maryland: the clerk of the

court of that county has certified the justice's capacity, and the chief judge of the fifth circuit, of which Frederic county constitutes a part, that of the clerk who certifies that of the chief judge; the seal of the county is affixed.

At the trial, the defendant's counsel objected to the reading of the plaintiff's answers to his interrogatories, on the ground that it did not appear that the answers were given before a person legally authorised; the court over-ruled the objections, and a bill of exceptions was taken.

The note being proven, judgment was given for its amount, the set-off was not allowed, and the defendant appealed.

He contends he was in time to make his objections, and it ought to have prevailed, and cites the case of *Center* vs. *Stockton & al.* 8 *Martin*, 212, and 2 *Martin's Digest*, 161.

The case fully establishes the proposition that the objection was timely.

But, I see no legal evidence of the official capacity, nor of the signature of the person before whom the answers purport to be sworn to. An attempt has been made to read these answers, under the act of congress prescribing the mode, in which records, in each

East'n District. *June*, 1821.

GITZANDENER *vs.* MACARTY.

state, shall be authenticated so as to take effect in every other state, approved May 26, 1790.

This act requires that the record should have the attestation of the clerk, and the seal of the court annexed, if there be a seal; together with the certificate of the judge, chief judge or presiding magistrate; now the clerk, judge and magistrate here spoken of, must be the officers of the court in which the record is kept. From any thing that appears here, the clerk of Frederic county has no more to do with the proceedings of a justice of the peace of that county, than the clerk of a parish court has to do with the proceedings of a justice of his parish, in this state, *i. e.* nothing at all—nor the chief judge of the fifth circuit of Maryland, with the record of the county court of Frederic county, than any district judge of this state has with the record of any of the parishes in his district. The answer cannot be read as a record of the state of Maryland, under the act of congress; and the signature and official capacity of the justice are not proved by testimony, nor certified by the executive of that state.

I conclude that the parish judge erred in suffering them to be read.

But the defendant concludes, that the suit must be dismissed, as the plaintiff did not file answers legally sworn to; that the consequence must be the same as if he had filed no answer at all.

It is true that the law has provided, that on failure of the plaintiff to answer the defendant's interrogatories, "his suit shall be dismissed at his costs, *on motion of the defendant.*"

It lies with the defendant to move for the dismissal of the suit; nothing obliges him to do it. The matter is at his election—but in this case, as in all others, where the party who may make the election, has done so, it can no longer recall it.

In this case it appears to me the defendant made his election not to move for the dismissal of the suit, because he suffered it to be put down for trial, without opposition; he permitted the trial to proceed, till the plaintiff established his claim by the proof of the defendant's signature at the bottom of the note. He took a chance of a judgment in his own favor, if the plaintiff had failed to make out his case, *actore non probante, absolvitur reus.* I think after all this, it was too late to move for a dismissal of the suit.

East'n District. *June*, 1821.

GITZANDENER *vs.* MACARTY.

The consequence is, that the judgment of the parish court ought, in my opinion, to be affirmed with costs.

MATHEWS, J. I concur in this opinion.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Preston for the plaintiff, *Carleton* for the defendant.

DOANE vs. *FARROW.*

It is not necessary for the validity of an appeal bond, that it be signed by the appellant

Admission of a party that he is one of the members of a firm, may be received in evidence, although it appear that articles of partnership exist, & are not produced.

APPEAL from the court of the first district.

MARTIN, J. The petition states, that one R. Harris, in 1818, made a contract with the government of the united states, for the erection of fortifications on Dauphine Island, and immediately after entered into partnership with the defendant, on an equal footing, for carrying into effect Harris's engagement with government; and some time in May, 1819, the plaintiff and Harris entered into an engagement, by which the former undertook to make all the centers, scaffolds, &c., required in the erection of said fortifications; and also to cover the walls, and pump the water, when re-

quired by the masons, for the sum of two dollars for every thousand bricks laid; that in consequence the plaintiff went to Massachusetts, and soon after returned with twenty seven labourers and carpenters, paying forty dollars for the passage of each of them, besides their provisions, and necessary previous expenses, materials, &c.; that the plaintiff, with his said labourers, worked on the fortifications, and when he applied for money to the said Harris, he refused to pay any till the arrival of his partner, the defendant; that on the 31st of May, they made another agreement, by which the plaintiff agreed to furnish him, the said Harris, with five carpenters, Harris furnishing them with provisions, quarters, &c., and paying the plaintiff fifty-five dollars a month, for each of them; that there is due to the plaintiff thereon $12,362 85 cents, for his expenditures, the labour of his hands, &c., for which the said Harris and the defendant are liable.

The defendant pleaded the pendency of another suit in the state of Alabama, and the general issue.

There was judgment for the defendant, as in case of a non-suit, and the plaintiff appealed.

East'n District. *June*, 1821.

DOANE *vs.* FARROW.

The defendant and appellee prayed that the appeal might be dismissed, on the ground, that the appeal bond was not signed by the appellant, but by Livermore, his attorney, who does not style himself attorney in fact; who does not appear to have had any authority to execute the bond, and who filed the ordinary answer that there is not any error.

The record shews, that at the trial, the plaintiff offered J. Gordon as a witness, to prove that the defendant had admitted himself a partner of Harris, as set forth in the petition. This witness being admitted, declared he had seen written articles of partnership, between Harris and the defendant; that he had a certified copy of them, and believed the original was on record at Mobile, whereupon the defendant objected to any evidence being given of his admission, until the contract of partnership was produced, or shewn to be lost, as no notice had been given him to produce it.

The plaintiff next offered the testimony of E. Clark, and C. Clive, being the authorised agents of the defendant; and Harris, of the former having acknowleged them as such.—He also offered to prove the signatures of

Harris, Clive, and D. H. Henneway, and the residence of the two latter persons, in the state of Alabama.

These signatures are affixed to a contract, purporting to have been entered into by Harris and the present defendant, with the plaintiff, for work to be performed by the latter on the fortifications. That of Harris appeared as that of principal, and the two other as those of subscribing witnesses.

The reason which induced the court *a quo* to sustain these objections, are not very apparent from the record. We take them to be, that the court thought that no evidence of the plaintiff's claim ought to be admitted, till the existence of the pretended partnership was proved by the exhibition of the articles, or the absence of the document accounted for.

The case is thus before us on the exception to the legality of the appeal, and the two bills.

I think the appeal was properly granted; the appellant is only required to give security. This, in my opinion, may be done, without his obliging himself to a bond. The law binds him sufficiently to the performance of the decree of the supreme court, and one may

East'n District. *June*, 1821.

DOANE *vs.* FARROW.

as well give security for an obligation which the law imposes, as for one which he voluntarily enters into.

It is not contended that the surety was not legally bound, nor that he was not sufficient.

The two bills of exceptions depending on the same point may be considered together.

Articles of partnership are not of the essence of the contract; they may regulate its duration, the liability of each member among the rest, but not in regard to creditors of the partnership, and if the members continue to transact business, after the expiration of the contract, by its own limitation, they are nevertheless liable as before.

I think the district court erred in sustaining the defendant's objections, and that the judgment ought to be reversed, and the case remanded, with directions to admit the evidence mentioned in the two bills of exceptions, and that the costs in this court ought to be borne by the defendant and appellee.

MATHEWS, J. This case comes up on two bills of exceptions, and the appeal is required to be dismissed on account of irregularity and insufficiency in the appeal bond. It is

complained of as not having been signed by the appellant, or any person regularly authorised by him; having only the signature of the attorney who prosecutes the suit, as surety. The object of the bond in the present case, is to secure payment of the costs, and can extend no further. I am of opinion that a reasonable construction of our law, on the subject of appeal bonds, will not require that they should be executed by an appellant, especially in the case of a non-resident, as his bond would not create any new or additional obligation on him, beyond what is fixed and determined by the judgment. It ought to suffice if the bond be executed by a solvent surety.

The first bill of exceptions relates to the rejection of parol evidence, to establish the existence of a partnership, between the appellee and Harris, as set forth in the plaintiff's petition. The principle, on which the judge of the court below seems to have acted, is that which will not permit oral testimony in proof of facts contained in an instrument of writing, unless under certain circumstances, as authorised by law on the subject of evidence; as by giving notice to the opposite par-

East'n District. *June*, 1821.

DOANE vs. FARROW.

ty to produce the writing, or obtaining a subpœna for a witness, as it may be in the power of either. This would be correct in a contest between partners; but when one of a partnership is pursued as liable to a third person, on account of such partnership, I am of opinion that the plaintiff is not bound to shew any articles of partnership, which may have been reduced to writing between the partners themselves, to which he cannot in any way be presumed to be a party, they being entirely *res inter alios acta.* See *Watson on Part. p.* 5, *and seq.; and* 1 *Dallas' Reports*, 269. I therefore think the district court erred in rejecting the testimony offered to prove the partnership. The correctness or error of the opinion of the district court, to which the second bill of exceptions was filed, depends entirely on the first for its support, and as I believe that to be erroneous, the latter is without foundation.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the case remanded with direction to the judge to receive the evidence excepted to; the costs of the appeal to be paid by the defendant and appellee. *Richardson* vs. *Terrel*, 9 *Martin*, 1.

Pierce for the plaintiff, *Smith* for the defendant.

SMITH vs. *CRAWFORD.*

APPEAL from the court of the third district.

Whether a party, who has not pleaded a release, can have a new trial on his affidavit that he has discovered, since the trial, the means of proving it.

MARTIN, J. A new trial was prayed for, on the affidavit of the defendant, that he had, since the trial, discovered material evidence, which he could not, by reasonable diligence, have discovered before.

The facts are, that the vaccine lottery never was drawn; that the plaintiff was only an agent, and could not sue in his own name; that the tickets received by the affiant, were returned before the commencement of the suit; that the holders of tickets for sale were released from all liability, before the commencement of the suit.

This evidence is sworn, to have been discovered in a conversation which the defendant's counsel had with A. Harraldson, who was examined as a witness on the occasion, and whose memory did not serve him with sufficient certainty, till he had recourse to certain papers.

The witnesses, by whom the facts newly

East'n District. *June*, 1821.

SMITH *vs.* CRAWFORD.

discovered, are expected to be proved, are N. Robinson, and the conscience of the plaintiff.

The affiant swears to all this, from his confidence in Harraldson's statement, and the opinion of his counsel.

The new trial being denied, the defendant appealed.

I think the judge did not err in denying the new trial.

It was immaterial, whether the vaccine lottery was drawn; this circumstance could not discharge the defendant from his liability to account for the tickets. The plaintiff being only an agent is a circumstance which does not affect the merits of the case. The return of the tickets, and the release of the holders, are circumstances which the defendant did not plead.

I conclude the judgment ought to be affirmed with costs.

MATHEWS, J. Whether the defendant was bound to plead the return of the tickets, and consequent release of his obligation to account for them, or might have given these facts in evidence on the general issue, does

not, in my opinion, alter his situation in the present application for a new trial. They are facts which must have been completely within his own knowlege, and which he ought to have been prepared to prove on the trial of the cause.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Eustis for the plaintiff, *Hennen* for the defendant.

MUIRHEAD vs. *M'MICKEN.*

APPEAL from the court of the third district.

A new trial would not be granted, on the late discovery of evidence to be obtained from the opposite party.

MARTIN, J. This is an appeal from the denial of a new trial, on the affidavit of the defendant, stating the late discovery of new and material evidence, which reasonable diligence could not enable him to discover before the trial. This evidence is expected to be drawn from the conscience of the plaintiff, and the testimony of P. Ewing.

By the plaintiff, the defendant expects to prove that the goods, the price of which is sought to be recovered, were by him sold to

st'n District. *June*, 1821.

MUIRHEAD *vs.* M'MICKEN.

J. H. Ficklin, and not to Ficklin & M'Micken; that the account was made out against Ficklin alone, and that the plaintiff never thought of making the defendant liable, till after Ficklin's death; and that the defendant discovered this, in a conversation with the plaintiff's counsel, who read him part of a letter from R. Lashaw, one of the plaintiff's partners.

The defendant does not inform the court, in his affidavit, of any thing which P. Ewing can prove.

The plaintiff's testimony can only be obtained in the mode pointed out by law, *i. e.* by filing interrogatories in the answer, and obtaining the judge's order.

I think the judgment of the district court ought to be affirmed with costs.

MATHEWS, J. I concur in this opinion. It is in my view so evidently conformable to law, and sound principles of practice in courts of justice, as to require no additional reasons to prove its correctness.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Eustis for plaintiff, *Hennen* for defendant.

MILTENBERGER vs. *CANON*.

East'n Distri
June, 1821.

MILTENBER-
GER.
vs.
CANON.

APPEAL from the court of the parish and city of New-Orleans.

The sale of a slave is not completed till the notarial act, intended for it, be signed by the parties.

MARTIN, J. The plaintiff states, the defendant promised to sell him a negro man, for the price of $650, engaging to secure him against any future claim, or to deliver him his title, whereupon the plaintiff paid the said sum, and received the slave; and the act of sale was postponed till the compliance of the defendant with either part of his engagement; that he has not complied, and refuses to receive the slave and return the price.

The answer states, that the sale was a perfect one; the slave was delivered, and the price paid; alleges the title was a good one. The defendant bought the slave from Dr. Williams of Baton rouge, before the parish judge, and would have given the plaintiff a copy of the sale, if the letter by which he applied for it, had not miscarried. He is now ready to do so. He concluded by a general denial.

There was judgment for the plaintiff, and the defendant appealed.

Carlisle Pollock deposed, that by the direc-

ast'n District. *June*, 1821.

MILTENBERGER. *vs.* CANON.

tions of both parties, he drew an act of sale for the slave, which being read to them, the plaintiff refused to sign, as the defendant did not produce his title. The latter was then in possession of the former's note for the price of the slave, and promised to send up the river for the title, and to produce it on a given day, and the note was left with the deponent, it being agreed, that if the latter was not produced on the given day, the plaintiff should resume his note and the defendant the slave. The title was not produced on the given day. In the mean time, this deponent was told by the plaintiff, that he had discovered defects in the slave; was suspicious of the title, and requested him not to suffer the act to be executed. The defendant came some time after, and told the deponent he had seen the plaintiff, at whose desire he came to subscribe the act. The deponent, confiding in him, allowed him to sign. The plaintiff came after, denied having consented to the signature of the act, and declared his unwillingness to sign it. The defendant had received the plaintiff's note, on his special promise not to use it till the completion of the act, and on its being demanded of him by

the plaintiff, said he had negotiated it. The deponent thinks the time agreed upon to produce the title was four or five days, and it was expired, when the plaintiff desired the act might not be signed.

A bill of exceptions was taken to the admission of testimony, and the deposition was properly received.

The promise to sell not being written, was of no effect, *Civ. Code;* and according to the decision of this court, in the case of *De Clouet* vs. *Villere & al.* the defendant was not bound till the act was completed by the signature of the plaintiff. The latter could not be till he signed. Had the defendant negotiated the note of the plaintiff, before he deposited it with the notary, and made use of the proceeds; he might have insisted on the completion of the sale, if he produced the title, or give surety in due time. But he improperly obtained it from the notary, and is, therefore, bound to refund. I think we ought to affirm the judgment of the parish court.

MATHEWS, J. I concur in this opinion. According to the doctrine laid down in the case of *De Clouet* vs. *Villere & al.* and which I believe

st'n District. *June*, 1821.

MILTENBERGER. vs. CANON.

to be sound, there can be no doubt of the correctness of the judgment of the parish court. It is therefore ordered, adjudged and decreed, that it be affirmed with costs.

Davesac for the plaintiff, *Preston* for the defendant.

SPENCER vs. *STIRLING.*

Reasonable notice to the endorser is a mixed question of law and fact.

APPEAL from the court of the third district.

MARTIN, J. In this case, we gave judgment in March, 1819, and a re-hearing was soon after obtained. Nothing has been done in it since, and it is now submitted without an argument. It becomes, in my opinion, unnecessary for us to say any thing, except that the contested point, *viz.* the irregularity of the notice, has been re-examined in the case of *Chandler* vs. *Sterling*, in April last. 9 *Martin*, 565.

I conclude, that the former judgment ought to remain undisturbed.

MATHEWS, J. I think so.

It is therefore ordered, adjudged and decreed, that the former judgment of this court

be certified to the district court, as if no rehearing had been granted.

The judgment given in March, 1819, was as follows :—

MATHEWS, J. delivered the opinion of the court. In this case, Spencer, the holder of a bill of exchange, sues the defendant as endorser, and having obtained judgment against him in the court below, took the present appeal.

The only ground, on which the appellant resists payment, is want of due and reasonable notice of the dishonor of the bill by the drawer. It appears by the evidence in the case, that the holder made no attempt to communicate its fate to his immediate endorser, until about a month after the bill was protested.

Questions relating to the reasonableness of notice, in cases like the present, partake both of law and fact; they depend on facts such as the distance at which the parties live from each other, the course of the posts, &c. But when those facts are established, reasonableness of time becomes a question of law. Notice must be given by the earliest ordinary conveyance, unless under extraordinary cir-

cumstances, which may excuse a greater delay. But the application of this rule of the law of merchants must depend on the proof of facts which shew the course of such conveyances, and the period at which they leave the place from where notice is to be given, destined to that where it is intended to send it, &c.

The laws of congress, on the subject of posts, do not fix and determine the period at which they are to leave any particular place in the united states, in their course through the union. It is believed that such regulations are left to the post-master general, and can be ascertained only by evidence, as in matter of fact. There is nothing found in the record of the present suit, shewing the periods at which the post leaves Nashville, or Charlotte, in Tennessee, for St. Francisville, in this state. The case was submitted to a jury in the district court, who found a general verdict in favour of the plaintiff, which amounts to a finding of all facts necessary to the support of their verdict; and it does not appear that any evidence was produced to establish such facts as are necessary to reduce the question of reasonableness, in relation to the

time of giving notice, to one of law alone. We are of opinion that there is no error in the judgment of the district court.

It is therefore ordered, adjudged and decreed, that the judgment of the court below be affirmed with costs.

Morse for the plaintiff, *Duncan* for the defendant.

HATTON vs. *STILLWELL & AL.*

APPEAL from the court of the first district.

The plaintiff cannot read, in a suit against two defendants, a deposition taken in his suit, against one of them.

A suit brought on an attachment bond is not a continuation of the original one—so that the sheriff's return, in the former, may be amended, during the pendency of the latter.

MARTIN, J. Stillwell as principal, and Morse as surety, are sued on an attachment bond, and plead the general issue, and the pendency of another suit, in the same court, for the same cause of action, still undetermined: there was judgment, after a verdict, for the defendants, and the plaintiff appealed.

The case is placed before us on two bills of exceptions.

1. The plaintiff's counsel offered the deposition of one Bigelow, taken in the case of Hatton *vs.* Stillwell, and the records of the court, to shew that there have been but three suits in it, in which Hatton was plaintiff, two against Stillwell alone, and one against

Stillwell & Morse. The district court was of opinion that the deposition was inadmissible, as it was taken in a suit between different parties, and not in the present.

2. He offered the deputy-sheriff as a witness to prove that the original process of attachment, in which the bond sued upon was given, was levied on the 20th of March, 1820, and prayed that the sheriff's return might accordingly be amended, which was refused.

I. It is urged that the deposition was taken in a suit brought by the present plaintiff, against the present defendant, Stillwell, alone, with whom the other defendant Morse, is now sued as surety. If, on inspection, the court is satisfied, the deposition was taken in the present suit, they will direct any misdescription of the parties to be amended.

But it is said there is no misdescription, Stillwell was the principal, and the mention of his name sufficed; particularly as it appears that Morse appeared by his attorney, before the commissioner.

II. During the pendency of the suit, it is contended, the officer may amend any error in his returns,

The present suit is said to have begun by the prayer of Stillwell, for an attachment, or giving bond with Morse as his surety; on its being obtained, a contingent responsibility attached on Morse; the dissolution of the attachment rendered it absolute. Hence, the present suit is a continuation only of the first.

It appears clear to me, that the court *a quo* did not err in rejecting depositions taken in a suit to which one of the present defendants, Morse, was not a party, though he may have been present, and cross-examined the witness, as the attorney, of one of the parties.

I cannot consider the present suit as a continuation of that brought by attachment, by one of the present defendants, against the now plaintiff; and the counsel admits that no amendment can be suffered, after the termination of the suit.

I conclude, the judgment ought to be affirmed.

MATHEWS, J. The depositions offered in evidence in this case, and rejected by the court below, as shewn by the record, were taken in another suit, and ought not to have been admitted against Morse, who was no party to that suit.

East'n District. *June*, 1821.

HATTON *vs.* STILLWELL & AL.

I am clearly of opinion that the sheriff ought not to have been allowed to alter or amend his action, on the process and attachment, after the final determination of the original cause, which seems to have taken place before the commencement of this action.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Ripley for the plaintiff, *Morse* for the defendants.

WATERS vs. *BANKS.*

If the lessee, during the lease, divides the house, and underlets one half of it, and after the determination of the lease, the lessor receives one half of the rent from each party, he cannot afterwards charge his original lessee with the whole rent.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. The plaintiff claims $450, for three months rent of a house. The defendant contends, he only owes rent for one-half of the house, and for two months and a half only, *viz.* $187 50 cents, which he has always been ready to pay, and he has often tendered, and he has paid the said sum into the hands of the sheriff, for the use of the plaintiff.

There was judgment for the latter, and the defendant appealed.

The facts, as they appear on the record, are these :—On the 23d of December, 1818, the defendant rented the plaintiff's house for one year, at $150 a month. He immediately divided, and underlet one half of it to Tripp and Procter, for one year, at $75 per month, and in May following, he gave a power to the plaintiff, to collect the rent. It is not urged that any part of the rent is due for the period of the lease, before the expiration of which, the defendant rented the other half of the house to Passement.

At the expiration of the lease, Passement was in and kept possession of his half of the house, and the defendant of the other half, which had been before underlet to Tripp and Procter. Passement applied to the plaintiff's wife, who had a general power from her husband, to rent the half which he occupied ; and was answered, she could not say, whether the plaintiff would not wish to occupy it himself. The defendant made the like application; received the same answer; was promised the refusal, and told he might have it for one month.

On the 23d of January, 1820, the first month being expired, after the expiration of the writ-

East'n District. *June*, 1821.

WATERS *vs.* BANKS.

ten lease, for one year, the plaintiff's clerk went to Passement and the defendant, collected from each of them, one month's rent of their respective parts of the house, and paid the plaintiff's wife, who made no inquiry into the manner in which the rent was paid.

After the 23d of February, a second month being due, the clerk went to Passement, and collected from him $75, the month's rent, for his half of the house, and when he brought it to the plaintiff's wife, she inquired who had paid these $75, and being answered it was Passement, she told the clerk he had done wrong; he had nothing to do with Passement, and the whole rent ought to have been collected from the defendant. She afterwards received from the defendant, his second month's rent, and gave him a receipt therefor.

On the 23d of March, the rent, being due for the third month, was collected and receipted for, from the defendant and Passement separately.

That for April and May was demanded by the same clerk, from the defendant's wife, at the rate of $150 for the whole house; she refused payment, but tendered it for her husband's half. It was refused.

Before the expiration of the fifth month, (May) the defendant gave notice of his intention to quit the house in a fortnight.

On this, the defendant contends, he was indebted, at the inception of the suit, June 5, 1820, for the rent of the two months, which expired on the 23d of May, at the rate of $75 per month only, and for the half month, after the fifteen days notice, which did not expire till the 9th of June.

It is in evidence, that the plaintiff's wife acts for him, under a general power, even when he is present, and that he is frequently absent. Her acts, therefore, must bind him; and he must also be in the same manner bound by those of his clerk.

Had the defendant and Passement kept possession of the plaintiff's house, without any act of the plaintiff, or of the defendant and Passement, evidencing the parties desire that the lease of the house should be divided, the defendant would certainly have been bound, as under the lease for the rent of the whole house.

The wish of Passement to hold, individually, one half of the house, is evidenced by his application to the plaintiff's wife, to omit this

East'n District. *June*, 1821.

WATERS *vs.* BANKS.

half, by his payment of the rent for the months ending the 23d January, February and March; if he remained in it afterwards, this application and these payments would be evidence on which the rent might afterwards be demanded from him, at the rate at which he had paid it; and he could not, in such a case, meet the landlord's demand, by shewing a payment to the defendant.

The plaintiff's assent to each of the occupants holding separately results from the separate receipts given to each occupant, at the expiration of each of the three first months, which followed the expiration of the original lease. The objection of the plaintiff's wife, made to the clerk in February, while it was not made known to the parties, cannot avail the plaintiff, and appears to have been abandoned, by his receiving, without saying any thing, the rent paid by the defendant in February, and the clerk giving again separate receipts in March, to each occupant.

It seems to me clear, the rent was divided by the consent of all.

It is in evidence, that the defendant tendered all what he owed, and deposited it with the sheriff, for the use of the plaintiff.

I therefore think, that the judgment ought to be reversed, and ours ought to be for the defendant, with costs in both courts.

MATHEWS, J. Having examined the record in this case, I am fully satisfied with the opinion just pronounced. The only doubt I had relates to the costs; whether the tender and deposit of the money, in the hands of the sheriff, ought to exonerate the defendant from law charges. Our law is peculiarly careful, that defendants should not be vexed by unnecessary costs, as in order to charge them, an amicable demand is required on the part of the plaintiffs. In the present case, the defendant having tendered and deposited with the sheriff, the full amount of the plaintiff's just claim, I think, the former ought to be relieved from costs.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that there be judgment for the defendant, with costs in both courts.

Hennen for the plaintiff, *Pierce* for the defendant.

ast'n District.
June, 1821.

CHAUVEAU
vs.
WALDEN.

CHAUVEAU vs. *WALDEN.*

APPEAL from the court of the first district.

The *quantum* of salvage is left to the discretion of the original court, and the supreme court will not disturb the judgment, when it does not appear that the discretion was improperly exercised.

MARTIN, J. This is an action for money, had and received. The defendant, as owner, and J. W. Brown, as master, of the brig Ceylon, filed their answer and claim, stating that the money claimed was saved at sea, from imminent danger and total loss, by the exertions and assistance of capt. Brown, and that they have a lien thereon for salvage. The district court allowed eight per cent. for salvage, and gave judgment for the balance in favour of the plaintiff; the defendant appealed.

The facts appear by a number of depositions.

Helot deposed, he was passenger on board of *le Navigateur*, of which the plaintiff was master, which was lost on the 6th of March last, on Chandeleur islands, about 2 A. M.; and he, the other passengers and some sailors, left the wreck at eight o'clock, in the long boat; and about four descried three vessels, among which was the brig Ceylon, on board of which they were received. A sloop, the foremost of the three vessels, appeared to avoid the long boat, while she made for her. but layed-to in

order to enable the boat to reach her. The boat, from the moment she left the wreck, leaked very much, and they kept one man constantly bailing her, and sometimes two; the sea was rough. After they reached the Ceylon, the weather grew bad, and continued so during the next day. He believes that had they not met the Ceylon, they must inevitably have been lost; the boat, in the opinion of the officer who commanded her, having avoided the shore, lest she should fall on the breakers. He, and most of his companions, remained on board of the Ceylon, from the 6th to the 20th of March, 9 o'clock A. M., when he left her with some of them, others remaining. When she reached the Balize, the wind grew back, and she broke her cable; and the wind blowing on land, she ran the risk of going ashore. The deponent, one hour after he got on board of the brig, took notice that the boat in which he came was almost full of water, and three hours after she disappeared. Capt. Brown informed him that when the boat got alongside the brig, she might have reached the Balize in two or three hours.

Hottine, Le Francais and Bressiere, deposed, that they were sailors on board of

le Navigateur, which was lost near the Chandeleur islands, on the 6th of March last, at 2 A. M.; and after uselessly trying to save her, the people took to the *portemanteau* and long boat, in order to save themselves; the deponents, mate and passengers, got on board of the latter, and left the wreck at half-past seven A. M. They sailed along the islands, till they were compelled by the apprehension of falling on the breakers, to push off. At four P. M. they saw a sloop at anchor, and two vessels under sail. The sloop soon after sailed in such a direction, as induced the belief that she sought to avoid the long boat; the other vessels approaching, one of them the Ceylon. shortened sail, and afforded the boat the opportunity of reaching her; and the deponents, and their companions, got on board, and the Ceylon continuing her rout, cast anchor about half an hour afterwards, in seven fathoms of water. The Balize was about four miles distant when the boat reached the Ceylon. During the night it blew very fresh from N. E.; and at 10 o'clock P. M., the cable broke, and the Ceylon went adrift. The weather continued bad during the following day, and the deponents believe that had they not met

with the Ceylon, they could not have reached land before night, and they cannot tell what would have been the consequence. They believe they would have reached the Balize at dark. There were oars and a hawser.

Bribert, Le Villain, Quintin, Robillard and Cavet, deposed, they were passengers on board of *le Navigateur*, cast ashore on the Chandeleur islands, on the 6th of March, at 2 A. M.; that after pumping a long while, and endeavouring to save her, they forsook her. . The mate, three sailors and the passengers, at half after seven got into the long boat. The passengers could take but a small part of their goods, as 600 lbs. of silver were put on board; the seams of the boat were not well closed, she made water, and one hand was constantly employed in bailing her. They sailed towards the island, but on approaching they were compelled to push off lest they should fall on the breakers. At 4 o'clock they perceived a sloop at anchor, which on seeing the boat, sailed, as if avoiding the boat, which perhaps was mistaken for that of some pirate. There were also two other vessels, one of which the Ceylon, shortened sail to allow the boat to reach her. They got on board at about five:

ast'n District. ne, 1821.

CHAUVEAU vs. WALDEN.

the weather was cloudy, and it grew quite dark about one hour after. The anchor was cast about half an hour after the deponents reached the Ceylon, but no land could be seen. During the night the wind freshened, and the Ceylon went adrift. The weather continued bad on the following day. There was neither chart nor light on board the boat, but there was a compass. The captain of the third vessel hailed the Ceylon, and proposed to receive part of the people off the long boat, which the captain of the Ceylon declined, having a sufficiency of provisions. The deponents saw the plaintiff, master of *le Navigateur*, take a bag of money from the Ceylon. They are ignorant of the amount; from the bulk, they suppose, that if the bag contained silver only, there might be from $11 to 1200. From the condition of the long boat, and the state of the weather during the night, they believe that had not they been taken up, they would have inevitably perished. From the difference of opinion between the mate and one of the sailors on board of the boat, as to the bearing of the Balize, the deponents believe that their information was very incorrect, and they very little knew where they were.

B. Brown deposed, that he is the master of the Vigilant; he was sailing for the Balize in company with the Ceylon; at about 4 P. M. he discovered a boat steering about S. E., the Ceylon, being nearer to her, bore down, as did the Vigilant. The Ceylon soon came up with, and boarded the boat, and when the Vigilant came near, the people of the boat were getting on board of the Ceylon, and he understood they belonged to a French ship, cast away on the Chandeleur islands. In all appearance the boat was in great distress, and the people employed in bailing her. He thinks that when he first discovered her she might be at the distance of fifteen miles from the Balize. The wind had been blowing very fresh in the morning, and the day before, but moderated a little. After the captain of the Ceylon, had taken the people of the boat on board, he hailed the deponent, requesting that he might remain in company till the morning, as he was short of provisions, and might perhaps be able to send some of them on board of the Vigilant. Within half an hour, the wind began to increase and blow very fresh. The sea was running very high, even at the time the boat was taken on board, a fresh gale blew.

East'n District. June, 1821.

CHAUVEAU vs. WALDEN.

The opinion of the deponent (a very experienced seaman, who has been at sea for seventeen years) is, that the boat could not have survived an hour longer, had she not been received by some vessel. When the boat reached the Ceylon, the land was not to be seen. The weather was dark and cloudy, but even, had it been clear, he believes it was at too great a distance to be seen. After having run about eight hours from the time of meeting the boat, the deponent fell in with a schooner, from which he learned that they had seen land that afternoon, and that they judged the light-house to bear S. E. and by S. The deponent had been running an hour and a quarter to make these eight miles, and hove about to inform the captain of the Ceylon of what the schooner said. They agreed to come to an anchor. The wind kept increasing all the time, and during the night blew an extraordinary gale. It was so strong during the night that the deponent was obliged to pay about seventy-five fathoms of cable to his anchor, and still dragged it, and from thirteen fathoms he drifted into five. There was a current setting out, which broke up a sea over the deponent's vessel; not having a single man

dry on board. The boat of the *le Navigateur* would not have lived five minutes in that sea, and from the course she was steering, when she was picked up, she must have gone into it. The gale still continued on the following day. The deponent remained at anchor during the night, so did the Ceylon, at the distance of three quarters of a mile; on the morning of the 8th, the deponent set sail with the Ceylon, to get into the Balize. The wind was so strong, that the pilot could not come out, and both vessels were driven to sea. The deponent remained out six or seven days, and came to anchor inside of the Balize, the same day as the Ceylon, *viz.* on the 19th, having remained some days at anchor outside of the bar. As the deponent was bearing for the boat, he met with a sloop, which had been laying at anchor, and was making sail. He heard from her, that she had not dared to board the boat, being afraid the people were pirates, although stated to have been cast away. About the time he was speaking to the sloop, the Ceylon was bearing to for the boat. He has been a regular trader out of this port since 1817; at the time the boat was picked up, he had not had a good observation for

ast'n District. *June*, 1821.

CHAUVEAU *vs.* WALDEN.

four days, and did not know where he was, owing to the cloudiness of the weather.

On his cross-examination, deponent said his ship's company consisted of seven, including himself and a boy. The Ceylon may be a brig of about 120 tons, he knows not what was the number of her crew. When he first descried the boat from his fore-yard, he took her to be the light-house; the weather was hazy, and he thinks he was about four miles from her. The boat was making sail towards the Ceylon, which bore down upon her. He perceived the distress of the boat, when he came up with the Ceylon, along side of which she then was. He inferred her distress from the number of persons on board, and the quantity of baggage passing on board of the Ceylon, and the bailing of the boat; she had one or two sails, but he saw no oar, and thinks from the quantity of people on board, none could be used. The Ceylon was detained a quarter or half an hour in taking on board the contents of the boat, and she came to an anchor that night, on account of the shortness of her provisions, as the captain stated, and in hope of being able the next morning to send some of the people on board of the Vigilant.

A wish to assist the Ceylon in that object, induced the deponent to come to an anchor that night, which, in the deponent's opinion, was a deviation from the voyage. It was about six P. M. when both vessels came to an anchor. The deponent thinks they must have been about eight miles from the nearest land, when the boat was picked up, and he believes they were sailing at the rate of five miles an hour.

Hallowells deposed, he was a passenger, and acted as master on board of the Ceylon; about 4 P. M. of the 7th of March last, they discovered a boat, about fifteen miles from land, which was making signals, they stood towards her, and took the people on board. They proved to be the passengers, and part of the crew of the French brig *le Navigateur*, wrecked on the Chandeleur islands; that at the time they received the people on board, the weather was thick and rainy, and land was not in sight. In the course of the night it came on to blow a violent gale of wind, and the deponent is certain that the boat could not have lived after the men were picked up. The Ceylon parted her cable that night in the gale, which continued three or four days. From the nature of the coast, or the direction

East'n District. *June*, 1821.

CHAUVEAU vs. WALDEN.

in which the boat was sailing, even if they had reached the shore, they could not have saved themselves. The boat had a compass on board, but the glass was broke so as to render it nearly useless. The Ceylon was short of provisions at the time they received the crew of the boat, and was obliged to purchase before she reached the port; she was eighteen days from New-York. The people of the boat were fed by the captain of the Ceylon, while they were on board of her. The deponent judges that when they took up the boat, the Ceylon was sailing S. W. by W. The passengers of the boat said, at the time they were taken up, they did not know where they were going. The wind was N. E., the boat was veered astern of the Ceylon, by a hawser, and sunk that night in the gale. The light-house at the Balize is two leagues from the sea.

M'Clintock deposed, that on the 6th or 7th of March, he was in the schooner Caroline, which he commanded, standing in for the Balize; at night it came on to blow a violent gale of wind, which considerably damaged his sails. He does not think that a long boat could have lived in the gale, and even if she

had been driven ashore, she must have been stove, and the persons on board must have perished. In standing in for the land, the deponent spoke two vessels, one of them a brig, having a large boat in tow. They inquired of him where they were, and the deponent having made the land, directed them as to the course they should steer, to the best of his judgment, as he was not certain himself. The weather had been thick for two days before. and he had not been able to take an observation.

This concluded the testimony for the defendant and appellee.

Heuze deposed, he was mate on board of the French brig *le Navigateur*, lost on the 6th of March, on Chandeleur islands, and took the command of the long boat, in which all the passengers, five sailors, and a raw hand, embarked. She was provided with two suits of sail, five oars, one of which was used as a mast, caulking irons, tar and every thing necessary to repair her, in case of accident; two anchors, fifty fathoms of three inch rope, entirely new, and half a piece, or sixty fathoms of string, new also; twelve gallons of water, half a barrel biscuit, a whole cheese, twenty

East'n District. *June*, 1821.

CHAUVEAU *vs.* WALDEN.

bottles of wine, a compass and a sextant.—A barrel, four boxes and nine bags of money were put on board. The boat left the wreck about 8 A. M., the weather was fair, and the sea calm, the wind at N. He steered S. W. till about 2 P. M., then alternately S. and S. W.; at about half after three he descried a sloop at anchor, and steered for her, *i. e.* S.S.E.; when the boat was within a quarter of a league from her, she started, in order to avoid the boat. The deponent finding himself unable to overtake her, lay-to for two vessels which were behind, sailing towards him, with a fair wind; one of them, a brig, passed within hail without stopping: the deponent made a signal of distress, and she shortened sail in order to enable the deponent to reach her. He did so in ten minutes, and found her to be the Ceylon of New-York, the master of which consented to receive the people and contents of the boat, and took the money under his care. He was informed by the master, that the Balize was, according to his reckoning, four miles distant. The Ceylon continued her rout till about 5 o'clock, when she cast anchor in eight or nine fathoms. The wind rose during the night and she parted her cable. The

master appeared uneasy on account of the vicinity of the land, and sailed off and on. In the moment the deponent saw the light-house of the Balize, at the distance of half an hour's sail. The wind having changed, the Ceylon could not enter the river, and put to sea, where a calm retained her for several days, so that she did not reach the bar before the fourth day. He cast anchor, and entered only four days after. The deponent is a stranger to the country, and never sailed in these seas. The glass of the compass was broke when the boat reached the Ceylon, but might still be used. There were in all twenty-one persons in the boat. The deponent is master of the vessel, twenty-five years of age, and navigator since he was nine years old; he has no doubt that he would have reached the land before night, had he not met the Ceylon, as the boat went at the rate of four knots an hour.

He knew what course he ought to have taken from the Chandeleur islands, to reach the land, it was S. S. W.; when they were taken up by the Ceylon, it was fine weather. He made no allowance for the current, thinking the distance too short to require any. He considered he was about two leagues from the land.

East'n District. *June*, 1821.

CHAUVEAU *vs.* WALDEN.

He had not seen it for two hours, but had followed it. The land he had seen two hours before was Chandeleur islands, and Grand Gozier.

Dumont deposed, that he was lieutenant on board of *le Navigateur*, and left her with the captain, in the small boat, about 10 o'clock. There were about eight persons in this boat, and it had but one seat. They landed at about 6 P. M., on Breton island, distant about ten leagues from the wreck. They passed the night there. The small boat was deeper loaded than the long one, and had only six inches out of water, while the long boat had a foot at least. The weather was bad when they landed, and the sea grew high soon after they entered the river, at Plaquemine. On board of the long boat there were two persons acquainted with the coast.

Thimothy Dawes deposed, he has been at sea thirty years. A compass in an open boat, with the glass broke, in stormy weather, is unfit for navigation.

The *quantum* of salvage is, in every case, left to the discretion of the court, and in the present, it does not appear to me that the district judge exercised his improperly. The judgment should be affirmed.

MATHEWS, J. I concur in this opinion. On examining the evidence in the case, I see nothing attendant on the transaction, either in relation to labour, peril or risk, that would authorise a larger portion of the property saved to be decreed to the sailors, than that which has been allowed by the district court.

As to the expense of supporting the persons who were taken up and brought into port, it might have been made a separate charge, but ought not to be taken into consideration in estimating salvage on account of the property.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Moreau for the plaintiff, *Carleton* for the defendant.

BOLTON & AL. vs. *HARROD & AL.*

APPEAL from the court of the first district.

If the endorser be sued on the protest for non acceptance, in order to compel him to give security, and afterwards, on the protest for non payment, on

MARTIN, J. On the 30th of August, 1819, the present suit was brought for the purpose of obtaining security for the payment of a bill of exchange (endorsed by the defendants

East'n District. *June*, 1821.

BOLTON & AL. *vs.* HARROD & AL.

judgment being obtained in the last suit, the plaintiff cannot recover costs in the former.

to the plaintiffs, and protested for non-acceptance) at its maturity.

On the 20th of November following, the present plaintiffs instituted another suit against the defendants, to obtain the payment of the amount of the bill, which had been, in the mean while, protested for non-payment, in which a judgment was given for the plaintiffs, which was affirmed by this court, on the 7th of March last. 9 *Martin*, 326.

On the 12th of April last, the district court gave the following judgment: "This court is now called on to give judgment for costs against the defendants. This cannot be done. Costs are incidental to a judgment, as interest to to the principal. If that be paid, judgment cannot be rendered for the interest. Neither can a party be decreed to pay costs, unless there be a final judgment in the matter in controversy between the parties, or a judgment of non-suit or dismissal. As no decree can be made in favour of the plaintiffs, the petition must be dismissed; and on all cases of dismissal, the plaintiffs must pay costs. It is ordered the petition be dismissed with costs."

I think the district court was perfectly correct. The plaintiff's right of action, or the protest for non-acceptance, was merged in

the right which resulted from the protest of non-payment, and when the matter became *res judicata*, by the judgment, all antecedent right was destroyed.

The principles invoked by the district court, were recognised by the superior court of the late territory. *Pitot* vs. *Faurie*, 2 *Martin*, 83. *Nugent* vs. *Delhome*, 383.

MATHEWS, J. This case, as it now stands before the court, relates solely to a dispute about costs. The general rule is, that costs must follow the judgment; and I see nothing in the manner in which the present cause has been conducted, to require that it should be made an exception to that rule.

It is therefore ordered, that the judgment of the district court be affirmed with costs.

Hennen for the plaintiff, *Livingston* for the defendant.

SEDWELL'S ASSIGNEE vs. *MOORE.*

APPEAL from the court of the third district.

The assignee may sue in his own name.

MARTIN, J. This is an action on a judgment obtained in Kentucky, by Sedwell, against the present defendant, and one Craig, which was

East'n District. *June*, 1821.

SEDWELL'S ASSIGNEE *vs.* MOORE.

afterwards assigned to the present plaintiff. The defendant pleaded, that the judgment was obtained through the fraud of the present plaintiff. There was judgment for the plaintiff and the defendant appealed.

The only piece of evidence in the cause, is the deposition of Sedwell, the plaintiff's assignee. He deposes, that in 1805 or 1806, Moore and Craig bargained with him for a quantity of whiskey, amounting to $216 75 cents, including the barrels, which he delivered to the present plaintiff, who carried it away; and the deponent charged the said Moore and Craig therewith; they having previously made arrangements with the deponent, that he, the plaintiff, would give him his note for the whiskey, but he ever evaded doing so, whereupon the deponent instituted a suit against Moore and Craig, when Craig represented to him, that Moore had received exclusively the proceeds of the whiskey, and it would be hard, if he, Craig, was obliged to pay therefor, and proposed, to give his note with the present plaintiff, as his surety, provided the deponent indulged them with some time, and permitted them to use his name, in order to recover from Moore. This being

assented to, Craig and the present plaintiff, gave the deponent their note, which has since been paid. A suit was brought accordingly, against Moore and Craig, by the present plaintiff, in this deponent's name, who was assured that he would be indemnified against the costs, which have, however, been since claimed from him; and the plaintiff has retained about $40 for his attendance on the said suit, &c. and he was surprised to find, that the present plaintiff was a witness in said suit, knowing that he had an interest therein. The deponent believes he had given the present plaintiff some authority to receive or recover the money from Moore, Craig being insolvent.

1. The defendant and appellant contends, that the plaintiff has irregularly brought his action in his own name, as assignee of Sedwell, and ought to have brought it in Sedwell's name, on the general principle of law, that a chose in action is not assignable. He cites *Co. Litt.* 204, and urges, that the assignment only gave to the assignee the right to using the assigner's name.

2. That the defendant has proved, by Sedwell himself, that he had no cause of action

East'n District. *June*, 1821.

SEDWELL'S ASSIGNEE vs. MOORE.

against him, when he instituted the suit, and obtained the judgment, on which the present suit is brought. That the testimony of Sedwell is legal, and conclusively proves, that he could not recover in the present suit, therefore, his assignee cannot.

3. That the evidence shews fraud in obtaining the judgment. He used Sedwell's name, obtained the judgment on his own testimony and now sues to enforce it.

The plaintiff and appellee has failed to appear and answer in this court, and the case, after the expiration of the legal delay, is heard *ex-parte.*

I. There does not appear to be any weight in the first objection. The principle of the common law cited, not being recognised in this state. An assignee may either sue in his own name, or such as use his assignee's name.

II. The testimony of Sedwell shews, that the present defendant owes the money, and has never paid any part of it. That the assignee paid, on the condition that he should receive a transfer of the plaintiff's right of action.

III. It does not appear that more was recovered from the defendant, than he actually owed; indeed, the deposition of Sedwell shews, that no more was recovered; that there cannot be any fraud. The irregularity of the testimony received cannot affect a judgment which is correct, as to the claim which it establishes.

I think the judgment ought to be affirmed with costs.

MATHEWS, J. Having consulted with the judge who has drawn up this opinion, whilst he was reducing it to writing, and being perfectly satisfied with the reasons therein adduced, I have barely to say, that I concur therein, deeming it useless to enter into any further discussion of the cause.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Clark for the plaintiff. *Preston* for the defendant.

ast'n District.
June, 1821.

PATTERSON & AL. vs. M'GAHEY.

Former judgment considered

PATTERSON & AL. vs. *M'GAHEY.*

Judgment was given in this case, in July 1820, 8 *Martin*, 486, a few days before the close of the eastern circuit. On the return of the court, in the winter, a rehearing was granted.

MARTIN, J. We have re-examined this case with great attention. The claimant has established his right; and the plaintiff has not, in my opinion, clearly shewn that the claimant's lien has been destroyed, by the mortgage given by the defendant. It does not satisfactorily appear, that its object was the security of the same debt, nor is the real state of the accounts between the claimant and the defendant shewn to have been reduced to the sum stated by the plaintiff.

I think no alteration ought to be made in the judgment already given.

MATHEWS, J. I am of the same opinion.

It is therefore decreed, that the judgment of this court, pronounced in July last, remain unaltered, and be certified accordingly.

Smith for the plaintiffs, *Turner* for the defendant, *Morse* for the claimant.

An attorney suspended from his practice, for using indecorous language to the court.

The judges having noticed indecorous expressions, in a written application of this gentleman for a rehearing, in the case of *St. Romes* vs. *Pore*, determined during the last term, *ante* 30, requested the clerk to draw his attention thereto. On the report of the latter, that the former declined amending his application, an order was made, that he answer for the contempt.

He appeared accordingly, admitted himself to be the writer of the paper, and in his attempt at a justification, forgot himself so far as to suggest that the court were disposed to punish him, as the author of some publications, in which he had denounced, in the *Ami des loix*, their declaration made in May last. 9 *Martin*, 642.*

MARTIN, J. Considering the application to be written in arrogant and indecorous language, such as the law forbids us to suffer, I think the attorney ought to be suspended

* It was represented, in that paper, as an assumption of legislative powers, and as an evidence of the court's evil disposition towards that portion of the citizens of this state, whose vernacular language is not the English.

East'n District. *June*, 1821.

MICHEL DE ARMAS' CASE.

from his practice in this court during twelve months. *Part.* 3.

MATHEWS, J. I concur in this opinion.

It is therefore ordered, adjudged and decreed, that Michel de Armas be suspended from his practice in this court, for twelve months.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JULY TERM, 1821.

East'n District. *July*, 1821.

GENERAL RULES.

GENERAL RULES.

During the July term, no application for a rehearing will be received, unless the petition be filed with the clerk, within four days after the judgment or decree is pronounced.

The rule of this court, relative to the filing of notes of the points and authorities in each case set down for hearing, will after the seventh day of October next, be amended, by substituting in place of these words, *and no rehearing shall be granted on any point which the parties may have omitted to furnish, in compliance with this rule*, the words, *and if any point, not stated in the notes of either party, be made by him at the trial, the opposite party may be allowed, if he desire it, four days to answer such points in writing.* 9 *Martin*, 641.

East'n District. *July*, 1821.

KIRKMAN vs. WYER.

KIRKMAN vs. *WYER.*

APPEAL from the court of the first district.

The affidavit to obtain an attachment, may be sworn to before the deputy clerk.

Judgment may be had against the bail, without the suit being formally set down.

The assignment of the bail-bond, need not be proven, when the general issue is not pleaded, nor the assignment denied

Preston, for the defendant. William Wyer, is called upon as bail of the defendant, Hamilton, to pay the amount of the judgment rendered in this case, in favor of the plaintiff, against the said defendant. To exonerate himself from this demand: he contends, first, that H. Farrie, who purports as deputy clerk of the district court, to have received the affidavit of the plaintiff, to hold the defendant to bail, and subsequently to have issued the writs of *fieri facias* and *capias ad satisfaciendum* in this case, was not an officer known to the laws of the state of Louisiana, or authorised to exercise the functions of clerk of the district court. The question is, whether the clerk of the district court is authorised by law to appoint a deputy with power to administer oaths and issue executory writs, I contend that he is not. The system of exercising offices by deputy is essentially contrary to good policy; those men are appointed to office who are supposed to be best qualified to discharge the duties of the office. They are adequately paid by the

state, and the state expects, and has a right to expect, the performance of those duties by them. If I employ a lawyer to advocate my cause, and give him an adequate fee, he violates his trust, by confiding my case to another. Besides, justice requires that he who does the labour of an office should enjoy the honor and profit attached to it. If the profits be such that the officer can live on them, beside paying his deputies for doing the duties of the office, they are too great and ought to be reduced. The state in such a case pays more than an equivalent for the advantage it receives, and the office is a sinecure. But sinecures are a curse to any country and are peculiarly repugnant to the spirit of our government. My premises then are, that the exercise of public offices by deputy, is generally opposed to good policy, contrary to justice, and repugnant to the spirit of our government. The conclusion, I think is reasonable, that if it be permitted in any case it must be by express law.

Previously to the act of 1817, no one will pretend that power was granted by law, to the clerks of our courts to administer oaths, or issue writs by deputy. The act of 1813, or-

ganizing our courts, declares that there shall be appointed in each parish, a clerk, who shall be sworn in the manner prescribed by the constitution, and whose duties and functions, until otherwise prescribed, shall be the same which were before fulfilled by the clerks of the late superior court. The act does not authorise the appointment of clerks to each court by the judge, but a clerk; much less does it authorise the appointment of deputy clerks, by the clerk. The previous laws in speaking of the duties and functions of the clerks of the superior court, invariably use the term clerk, or clerks; they no where recognise a deputy, nor power to perform those functions vested in any other person than the clerk.

The section of the act which gives part of the power which has been exercised in the present case, by a deputy, is, in these words, "That the clerks of the superior and county courts, be, and they are hereby authorised to take affidavits, for holding debtors to special bail." *Act, July* 3, 1805, *sec.* 8. The act which gives the remaining power, which has been exercised in this case, that of issuing writs of execution, prescribes the very form

of those writs, and in directing how they shall be signed, declares that they shall be signed, "S. H. clerk." *Act*, 10*th April*, 1805, *sec.* 14.

The important functions exercised by deputy, in the present case, could not then be legally exercised by deputy, previously to the act of 1817. Does that act grant the power of exercising them by deputy? It does not. When we look at the terms of the act there is not a donatory term contained in it. It is a prohibitory act altogether. How powers can be granted by prohibitory terms, is to me inexplicable. I think the English language does not admit of such a solicism. When we look to the object of the law, we find that it was not to create new officers, but to prescribe regulations of a prohibitory character, with regard to officers already legally created; to prescribe the compliance with certain formalities as a precedent condition to their exercising the functions of their office.

The application of the law of 1817, is seen and felt without applying it to the deputies of clerks. It is applicable to the deputy of the attorney-general, and to the deputies of the sheriff, which our legislature thought it ne-

cessary to create by express statute. Our legislature in enacting these deputies by express statute, it seems to me, have, by implication, prohibited other officers from acting by deputy on the principle, *inclusio unius est exclusio alterius.* In numerous instances, the legislature have given power to public officers to act by deputy. They have even provided that a deputy may be appointed to the inspector of the levee. *Acts* 1816, 112. As to pilots, *Acts* 1806, 100. If they deemed express legislative provision necessary to authorise so trivial an officer, to act by deputy, is it not conclusive that an important officer charged with our liberty and property, cannot confide such a trust to a deputy without legislative provision?

The mode of reasoning, I presume, by which they arrive at the conclusion, that power is granted to clerks to appoint deputies, by the act of 1817, is of this kind. The clerks were in the habit of acting by deputy, previously to that act, to the knowlege of the legislature. By speaking of deputies generally in that act, it is presumed they intended those who were employed in practice, as well as those who were authorised by law;

that therefore, by implication, they sanctioned what had been done, and then existed. To this I answer, that those deputies who were employed in practice, without the previous authority of law, were wrongfully and illegally employed, and that the legislature cannot be supposed by implication, without express words to sanction that which was wrong and illegal. Indeed, I think I might advance it as a sound principle, that offices cannot be the result of implication, they must be enacted by express words.

It is urged that the security in the bail bond, cannot take advantage of the fact that the affidavit was not received by an authorised person, nor the writs of *fieri facias* and *capias ad satisfaciendum*, issued by a person authorised to sign them. On this point I might enlarge much, but cannot persuade myself that it is necessary. Our statute of 1808 makes the affidavit the very foundation of the bail, of the authority of the sheriff to arrest the defendant. If he be arrested without an affidavit, he is not in legal custody, but in false imprisonment. The bail bond, like every other bond, must have a consideration. Its true, consideration is the discharge of the defen-

dant from legal custody. His discharge from false imprisonment is no consideration, it is the duty of the sheriff without a bond. A bond founded on such a pretence is therefore without consideration, and void, both as to principal and security.

The authority quoted from the English law, that the security cannot take advantage of the want of an affidavit, is not adverse to this conclusion. By the English law, bail was demandable before the statute requiring an affidavit. That statute required an affidavit of the amount of the debt, not as the foundation of the demand for bail, or a condition precedent to obtaining it, but merely as a direction to the sheriff, as to the amount of bail. See 1 *Burrows' Rep.* 332. But our law is different. Bail could not be demanded before the statute. It is the very foundation of that process. It requires that an affidavit shall be made as a condition precedent to arresting the defendant. With regard to the writs of execution, it is still more clear, that the security may take advantage of the want of, or defect in them. The very condition of the bond is that the defendant shall surrender himself in execution. If the executions are signed by

persons not authorised to sign them, it is the same as if no executions had been issued at all, and no legal executions having been issued, the defendant cannot legally surrender himself in execution. It is legally impossible for him to break the condition of his bond. It is therefore not forfeited, and the security cannot be rendered liable.

The consequence of the decision, I demand, is urged against it as a strong argument. The argument *ab inconvencienti*, should have but little weight in a question of pure law. The consequence may be, that in very few cases, creditors who have resorted to the severe process of arrest against their debtors, may be remitted to those debtors again, instead of compelling their securities to pay their debts for the friendly, generous act of releiving them from prison. Some creditors who hoped to secure their debts from those who do not owe them, will be disappointed, and compelled to resort for payment to those who do. This, in my opinion, is a very small consideration. The evils consequent on a contrary decision are far more serious. The statute requiring an affidavit, to hold to bail, was intended to protect the liber-

East'n District. *July*, 1821.

KIRKMAN *vs.* WYER.

ty of the citizen, by the pains of perjury, from false imprisonment. But however solemn the asseveration of a person, to that which is false, he cannot be convicted of perjury, unless it be received by a person authorised to administer oaths. Now it is impossible that a court of criminal jurisdiction, on an indictment for perjury, could convict the accused for a false oath, received by a person of so dubious authority as H. Farrie. This court then, by deciding that an oath so taken is sufficient to hold to bail, would break down the barrier which the law has erected between the liberty of the citizen, and oppression under the forms of law.

If the act of 1817, authorises the clerk to appoint a deputy, H. Farrie has not been appointed in the manner prescribed by that act, nor has he complied with those requisites of law, which authorise him to act as a deputy. That act requires that the acceptance of the deputy shall be recorded on the day on which he is presented as such, and takes the oath of office, in the office of the clerk of the court. The evidence shews, that this has not been done. The third section of an act passed the 6th of February, 1815, prescribes that

the oath of office, of officers of limited jurisdiction, shall be recorded in the clerk's office of the parish. The evidence shews that this has not been done.

In the next place, I have urged as a reason for remanding the cause to be re-tried by the district court, that the judge of that court compelled me to trial on Saturday, in violation of the established rules of practice of that court, with regard to fixing ordinary causes for trial. I am answered, that judgment is demanded against the bail, by motion, and that Saturday is fixed for the hearing of motions. This court have decided in the case of *Labarre* vs. *Fry & Durnford*, that "the proceeding against bail is, in its nature, an original action, and that the bail is entitled to the same privileges on the trial, as if suit had been commenced by petition. It has every feature of an original suit, except that it is carried on by written notice of a motion, instead of the ordinary petition." The court say, further "proof is required of the obligation, on which judgment is sought in the same manner, as in the common case of a promissory note: judgment is given for the first time on this proof. and an appeal lies from it to

East'n District. July, 1821.

KIRKMAN vs. WYER.

this court." The court then solemnly decide, that the bail is entitled to a jury. They decided the same principles in the case of the *State* vs. *Montegut and others*, "that a summary proceeding must be a legal one, that summary and arbitrary were not synonymous terms." On the authority of these decisions, I maintain that the proceeding against bail, when contested by him, loses the character of a mere motion, and becomes the *contestatio* of the Roman law. The suit is at issue by our law, and is governed by the rules of practice established for other suits at issue, and is entitled to all the privileges belonging to them.

The last point on which I rely, in exoneration of the bail is, that the assignment by the sheriff to the plaintiff, was not proved on the trial. I urge this point, on the supposition that the bond has been regularly taken, payable to the sheriff. If the bond is legally taken, payable to the sheriff, of course, the sheriff must assign it to the plaintiff, in order to enable him to recover judgment. The question is, whether the proof of that assignment was necessary on the trial. It is contended that it was not, in this particular case, because I admit the assignment by not de-

nying it in my answer. This reasoning is founded on decisions of this court, in effect, that if facts are alleged in the petition, and not denied in the answer, they are to be taken for confessed, on the trial. This was certainly stretching logic to its extent, especially when we consider, that if the defendant had filed no answer at all, the allegations in the petition, except in particular cases, would not have been taken for confessed. but the plaintiff would have been required to prove them. But the decisions are not applicable to the present case. In this case before the court, there is no petition; there are no formal allegations to avow or disavow. By answering one thing, we do not admit others, because they are not alleged against us. I boldly say, no person can see in my answer, an admission of the assignment of the bail bond, unless he is predetermined to see it.

It is next contended, that it is not necessary to prove the execution and assignment of the bail bond in any case. I maintain, that it is necessary in every case. It was deemed necessary in England, from whence we derive the principles of our bail; because, it was invariably practiced. The English statute re-

East'n District. *July*, 1821.

KIRKMAN vs. WYER.

quired, that the assignment should be proved by two witnesses. 1 *Sellon's Prac.* 176. It has been the invariable practice, in this state, to prove the execution and assignment of the bail bond. The plaintiff seems to have deemed it necessary, in the present case, in requiring of me the admission of the execution of the bond, for surely no reason can be given why proof of the execution of the bond must be made, if proof of the assignment can be dispensed with. The proof of the assignment was peculiarly necessary in the present case, because the bond purports to have been assigned by a deputy-sheriff. We do not know all the deputies of the sheriff, and could not know, therefore, whether the bond was assigned or not. But one thing we do know, which is fatal to this action, that a deputy-sheriff cannot assign a bail bond. See *Strange's Reports*, 60, the case of *Ketson* vs. *Fagg*. In the case already cited, of *Labarre* vs. *Fry & Durnford*, this court have said, "that proof is required of the obligation on which judgment is sought, in the same manner as in the common case of a promissory note." Now, who ever recovered judgment as assignee of a promissory note, without proving the assignment?

But why search for authorities in support of a principle founded on the first axiom of our law of evidence. "He who claims the execution of an obligation, must prove it." *Civ. Code*, 304. A record of court, or notarial act under seal, proves itself. A bail bond is neither. The sheriff's officer is obliged to receive it, in whatever place he arrests the defendant, if security is offered.

There is still another ground on which I rely with considerable confidence, for the exoneration of the security. In my opinion, the bond in the present case, was not taken in pursuance of the statute. If so, it is void. See *Pennington's Reports*, I beseech the court to examine, attentively, the 10th section of the act of 1808, under which this bond was taken, and decide this point. This bond is payable to the sheriff and assigned by him. That act does not authorise the sheriff to take the bond payable to himself, and the fact, that nothing is said of the assignment, proves, conclusively, that the statute contemplated a bond, payable to the plaintiff, of which no assignment was necessary. The act declares, that if the condition of the bond shall appear to be broken, judgment thereon shall be ren-

East'n District. *July*, 1821.

KIRKMAN vs. WYER.

dered against the security. If the legislature had intended, that the bond should be taken payable to the sheriff, they would have declared, that the bond should be assigned, or that judgment should be rendered in favour of the sheriff, for the use of the plaintiff.

I am supported in this construction of the 10th section of the act, by its comparison with the 13th section, relative to the prison bounds. The 13th section declares expressly, that the bond shall be given to the sheriff; the 10th does not; the 13th section declares, expressly, that the bond shall be assigned; the 10th does not. So the 12th section of the act of 1805, commonly called the *ne-exeat* law, expressly declares, that the bond shall be taken payable to the sheriff, and shall be by him assigned. So the English statute prohibited the sheriff from taking the obligation to any person, only himself, and by the name of his office. 1 *Sellon's Practice*, 128. If our legislature had intended to follow these statutes in principle, they would have followed them in words. But by prescribing a bail bond, without mentioning to whom payable, they manifestly intended, that it should be taken payable to the person interested, the plaintiff in

the cause, by prescribing a bond on which, if broken, judgment should be rendered for the plaintiff, they manifestly intended a bond to which the plaintiff was obligee. Such a bond has not been signed by my client, and however he may be sued on his contract with the sheriff, he cannot be prosecuted by motion, as bail of the defendant.

If the objections I have made to the demand of the plaintiff, render this a doubtful case, surely the court will incline in favour of my client. In every case, *melior est conditio possidentis*, and how much more so in the present case, when my client is called upon to pay the debt of another, merely on account of the excess of his generosity. It is true, I have insisted upon strict law, but this court will not depart from strict law, nor permit ministerial officers to depart therefrom. If they do, they at once cut the cable on which every man in the community has anchored his fortune, and launch us into an ocean of lawless uncertainty, whose shores we shall never see.

Livermore, for the plaintiff. It is objected, that the plaintiff is not entitled to a judgment against the bail, because the affidavit was

East'n District. *July*, 1821.

KIRKMAN *vs.* WYER.

sworn to before the deputy clerk, and because, the writs of *fi. fa.* and *ca. sa.* were signed by him, and not by the principal clerk. On the first ground it is contended, that the bond is void; and on the second, that the condition has not been broken.

With respect to the first objection, I will not deny, that the power to administer an oath, being a judicial act, cannot be extended to mere ministerial officers, except by express provision of law. Clerks of courts are properly ministerial officers, and are not competent to administer oaths, except in the presence and under the direction of the court. But the power to take affidavits, in certain cases, is given to them by statute. As ministerial officers, have they not a right to act by deputy? Generally, this is a right attached to ministerial officers, and it is a right which can only be confined by statute. The right of a sheriff to appoint a deputy, is incident to his office. 9 *Rep.* 49. And although this right has been sanctioned by an act of the legislature, it does not follow, that he would not have had the right, independent of that act. We find, that in the superior courts of Westminster-hall, most of the clerks have deputies.

Here they have been always known, and have been considered as duly authorised to act for the clerks. The act of 1817, *sec.* 27, concerning the practice of the courts, expressly recognises them, and requires, that they should be sworn, and a record made of their appointment and acceptance. It is said, that this action applies only to the deputies of the sheriff and of the attorney-general. The statute speaks of the deputies of "officers of the courts." This must mean more than the sheriff, for he is but one; and I find no statute which gives to the attorney-general the power of appointing a deputy. His office is neither judicial nor ministerial; but it is a trust and confidence which he cannot transfer. Supposing then, the appointment to be legal, I submit it to the court, whether the power given by statute, to the clerk, to take affidavits, must not be considered as extending to his deputy.

But, supposing the affidavit to be insufficient, or that there was no affidavit, the objection cannot be made in this stage of the proceedings. The object of the act, in requiring an affidavit, is to save persons from vexatious arrests, by requiring some proof,

East'n District. *July*, 1821.

KIRKMAN vs. WYER.

that something is due. It is a provision, introduced for the defendant's benefit, and may be waived by him. If arrested without an affidavit, or upon an insufficient affidavit, he may apply to the court to be discharged, or he may give bail, and apply to have the bail bond delivered up to be cancelled. If we do neither, he admits the previous proceedings to be regular. Upon this application he would be entitled to his discharge, because there would be no evidence of the debt. But if he appear and plead, and the cause proceed to a final judgment against him, the debt is then established by the highest evidence. The acts of 1805, and 1807, 1 *Martin's Dig.* 474, 480, being in *pari materia*, may be resorted to, for the purpose of interpreting the act of 1808, and to shew that the intention of the legislature, in requiring an affidavit, was merely to satisfy the court of the existence of the debt. By the two first of these acts, the defendant was permitted to shew, by evidence, that the facts stated in the affidavit were untrue, and to be discharged upon proving this to the satisfaction of the judge. But if he suffered the proper time to pass, he is precluded. Upon the trial of a cause, if a deposition be offered

in evidence, which has not been properly taken, it will not be admitted if objected to, for it is no evidence; but if no objection be made at the time, the party against whom it is offered, will be precluded from shewing this on motion for a new trial, or upon an appeal. This question has been expressly decided in England, upon the statute, 12 G. I. *c.* 29. This statute requires, that an affidavit shall be made of the cause of action, and that the sum sworn to shall be endorsed on the back of the writ, "for which sum or sums so endorsed, the sheriff, or other officer, to whom such writ shall be directed, shall take bail, and for no more." Upon this it has been held, that the bail bond is not avoided, where there is no affidavit of the cause of action, or the sum sworn to is not endorsed on the back of the writ, or the sheriff takes bail for more than the sum sworn to and endorsed on the writ. 1 *Burr.* 330. 2 *Wils.* 69. 1 *H. Black.* 76. But the court will discharge the defendant on motion, if made in proper time. I am unable to comprehend the distinction which is attempted to be made between the English statute and ours. Before the act of 1808, the defendant could not be held to bail without proof

East'n District. *July*, 1821.

KIRKMAN *vs.* WYER.

of an intention to depart from the territory; and by that act, an affidavit of the debt was required. After the statute of 12 G. I. an affidavit of the debt, and an endorsement of the sum sworn to was required, in order to authorise the sheriff to take bail, and the sheriff was prohibited from taking bail without the affidavit and endorsement. Whatever legal power, therefore, the sheriff had before the statute was taken from him, and the arrest of the defendant, where the provisions of the statute were not complied with, was as illegal as if bail had never before been required. This is proved by the discharging of the defendant on common bail, for want of a sufficient affidavit. How can the affidavit required by our statute, be considered as a condition precedent, more than the affidavit required by the English statute? It is said that the affidavit is the very foundation of the bail. This is a mistake. The debt is the foundation, and the affidavit is merely required as evidence. This, like all other evidence, may be dispensed with by the party against whom the evidence is required. As to the doctrine of want of consideration, the gentleman ought to know, that it has no application to bonds.

Another objection taken to this bond is, that it is made to the sheriff, and not to the plaintiff. The bond required by the act is a bail bond; and when the legislature speaks of bail bonds to be taken by the sheriff, it must be presumed, that it is with reference to the system of laws from which they have been introduced, and that a bond to the sheriff, by his name of office, is the bond intended. Besides, it is a settled rule of law, that courts will not decide against a long course of practice, unless that practice be most clearly against law.

The above are the only objections which go to the right of the plaintiff to recover from the bail. These which remain to be considered, respect only the right to have the present judgment affirmed, and the real purpose of the defendant, Hamilton, which is delay.

It is said, that the condition of the bond has not been broken, because no writs of execution have been issued. The condition of the bond is, "that in case the defendant in action, shall be cast in said trial, that he will pay, and satisfy the said condemnation of the court, or surrender himself in execution to the sheriff." The objection is, that no legal exe-

East'n District. July, 1821.

KIRKMAN vs. WYER.

cution having been issued, it was impossible for the defendant to have surrendered himself in execution. I believe, however, the defendant might have surrendered himself in execution, even if no writ of execution had been issued. The writs of *fi. fa.* and *ca. sa.* were signed by the deputy clerk. The issuing of these writs, is a mere ministerial act, and as such, may be done by deputy. Great stress is put on the circumstance of the legislature having prescribed a form for the writ of *fierie facias*, and that it is to be signed "S. H. clerk." Whereas, the *fi. fa.* in this case, is signed "H. Farrie, dy. clerk." Independent of the act, the signature of the clerk would not be required. The writs of *fi. fa.* and *ca. sa.* are borrowed from the common law, and we find from the form given by *Blackstone*, that they are not signed by any clerk, but tested by the chief justice. This, and the seal of the court, mark their authenticity. The form of the writ of *capias ad satisfaciendum* is not given by our legislature, nor is it required that it should be signed by the clerk. The question concerning the appointment of a deputy clerk, cannot be material in this instance; for the validity of the *fi. fa.* cannot be brought in question in

this stage of the proceedings. It is sufficient that a writ of *ca. sa.* has regularly issued after the lapse of time allowed, and that it has been returned *non est inventus.* If the writ of *ca. sa.* issued irregularly, it might have been quashed. But it is too late to contest its regularity after the return.

It seems, however, that this cause was tried on Saturday. It is not alleged that any injury was sustained by the defendant on that account, except in point of time. But delay was wanted, and the refusal to grant it is alleged as an act of tyranny and oppression. The observations of the court, in the case of the *State* vs. *Montegut*, are quoted, to shew that summary and arbitrary are not convertible terms; but certainly summary and dilatory are not synonymous. The arguments of the court in *Labarre* vs. *Durnford*, are also quoted. The arguments of the court are to be considered with reference to the matter before them. In *Labarre* vs. *Durnford*, the question was, whether the bail was not entitled to a jury to try a fact in issue between the parties. It is true, that injustice should not be done in summary proceedings. and that where good cause can be shewn for delay, it should be granted,

East'n District. *July*, 1821.

KIRKMAN *vs.* WYER.

as in other cases. The bail is entitled to the same privileges on the trial as if the suit had been commenced by petition. "But it does not follow that he is entitled to have the cause tried in the same order as other causes." The act gives to the plaintiff the right to have judgment, on motion against the bail, after ten days notice. Upon the expiration of the ten days, the bail may appear and shew cause why judgment should not be rendered against him, and it would be the duty of the court to decide immediately upon the matter, unless some good cause could be shewn for putting off the hearing. Can the prayer for a jury have any further effect, except so far as is incidental to the summoning and return of a jury? Certainly it would defeat the intention of the legislature to sustain this objection.

The next objection is, that the assignment of the bail bond, was not proved. The bond purports to be assigned by the sheriff, and is returned with the writ, as is prescribed by the act. The assignment of the bond, and the return are by the same deputy, and the bond thus returned, with the assignment on its back, has always since remained in the custody of the court, as a part of the record. Under these

circumstances, I conceive that the highest evidence of an assignment of the bond is before the court; and that the English rule, which requires proof of the assignment by witnesses, is not applicable to this case. The difference is, that here the bond makes part of the return; whereas in England it remains in the sheriff's possession until it be assigned. Certainly there is *prima facie* evidence in this case, that the bond has been assigned.

A further answer to this objection is, that the assignment was not in issue between the parties. Evidence is to be applied to the issue, and what is not disputed need not be proved. The statute requires proof of the breach of the condition, even where the bail makes default; and this is proved by the sheriff's return upon the *ca. sa.* In case the bail did not appear at the expiration of the ten days, the plaintiff would not have been obliged to prove the execution of the bond, the assignment, nor any thing else, but that the condition had been broken. But the bail may appear and answer, may deny that he executed the bond, may shew that he was a minor, under curatorship at the time, or that the *ca. sa.* has not been returned, or any other matter which may shew

East'n District. *July*, 1821.

KIRKMAN *vs.* WYER.

that he is not liable; and any matters of fact which he may put in issue, he is entitled to have tried, and by a jury if he please. He cannot, however, require the plaintiff to prove any fact which he does not deny. The only matter put in issue by the answer in this case is, whether W. Wyer did execute the bail bond, and whether that bond be good or void. It is substantially the plea of *non est factum*. Under this plea the plaintiff has only to prove the execution of the bond, and need not prove the writ or the assignment by the sheriff. *Peake's Ev.* 269. The defendant contends, that the assignment by the sheriff must be proved in the same manner as the endorser of a promissory note is bound to prove the hand writing of the first endorser, upon the general issue of *non assumpsit*, or *nil debet*. The cases are very different. The rules of evidence upon this subject of proving the hand writing of the first endorser are taken from the common law; and that proof is required by the same rule of evidence, being applied to the pleadings. The plea of *non-assumpsit* not only denies the making of the note, but also the title of the plaintiff. If the note has not been endorsed to him, then the law raises no *assumpsit* from the defendant to him.

The last ground of defence is, that a deputy sheriff cannot assign the bail bond; and to prove this, a case in *Strange* is cited, which proves the precise contrary, for it is there laid down, that the under sheriff may assign the bond in the sheriff's name, but that the under sheriff's clerk cannot. The under sheriff is the sheriff's deputy, and all official acts of the sheriff may be done by his deputy.

MARTIN, J. This is an action on a bail bond, against the original defendant and his bail; there was judgment for the plaintiff, and the defendants appealed.

They contend that the judgment ought to be reversed.

1. Because, in the original suit, the oath required by law, previously to the defendant being held to bail, was not made before the clerk, or judge of the court, or any person authorised by law, to administer it; consequently bail was irregularly required, and the bond is void. So no legal *fi. fa.* or *ca. sa.* issued, therefore, the bond, if not void, is not broken.

2. Because, the present suit was fixed for trial, and tried contrary to the rules of the district court.

East'n District. *July*, 1821.

KIRKMAN *vs.* WYER.

3. Because, the assignment of the bail bond was not proved.

1. The plaintiff and appellee replies that the oath was properly taken before the deputy of the clerk of the district court, and if this was irregular, the objection is taken too late.

2. The rule of court, alluded to by the defendants, does not apply to the present case, and the plaintiff had a right to have a jury impannelled *instanter*.

3. The assignment is admitted by the pleadings; the only issue being bail or not.

4. If it ought to be proven, this ought to have been required in the district court, and a non-suit claimed. After a general verdict, every thing requisite must be presumed to have been proved.

5. The present suit is under the act of 1808, 16, *sec.* 10; no assignment, or at least no proof of it is required, and the court is directed to give judgment, on proof of the breach of the condition. This act differs from that of 1805. If the plaintiff objected to the sufficiency of the bail, he was required to file his objection within ten days. If none were filed,

he was precluded from any recourse against the sheriff, and the bond was assigned. Under this act, the proceedings are for the benefit of the sheriff, as well as the plaintiff.

I. Clerks of courts have had deputies ever since the establishment of the American government in this country; and the act of 1817, appears to have recognsied such deputies. The clerk and the sheriff are the only officers which the legislature may have had in view under that act. The attorney-general is not an officer particularly attached to any court. It seems to me, to be too late now to call in question acts done by a deputy clerk.

A deputy clerk may do all acts which his principal can; the administering of an oath, though pretty generally done by a judge, does not seem of itself to be an act strictly in the province of a judge. He pronounces a *formula.* and *certifies* that the party swears: this certainly is not exclusively a judicial act, and does not require the exercise of more judgment than many acts performed by ministerial officers. I think the affidavit was legally taken by the deputy clerk.

There were a regular *fi. fa.* and *ca. sa.* in

East'n District. *July*, 1821.

KIRKMAN *vs.* WYER.

the cause. Such writs may be issued by a deputy, and when he pursues a form prescribed by law to his principal, he follows it *mutatis mutandis*.

The entry on the record, that the person acting as deputy clerk, was sworn as such, and his deposition, that he has constantly acted as such, shew him to be deputy clerk *de facto*, and his acts as such are entitled to credit, even if an informality was shewn in his appointment.

II. Judgment is taken, according to law, against bail on motion. In such a case like that of a rule against syndics, why they should not be ordered to pay a sum of money, the proceedings are in a summary way; that is to say, a trial or hearing is without a formal setting down of the cause, but the party at the trial or hearing has every advantage which is enjoyed in a case commenced by petition. *Meeker's ass.* vs. *Williamson & al. syndics.* 7 *Martin*, 315. I think the case was regularly brought on.

III. There was not any need of the proof of the assignment of the bond, as the general issue was not pleaded, and the assignment was not denied.

I think the judgment should be affirmed with costs.

MATHEWS, J. The grounds relied on by the appellant for a reversal of the judgment are: 1. Want of authority in the deputy clerk, to administer the usual oath on which bail may be required. 2. A violation of the rules of the district court, in the trial of the case against the bail, and want of proof of the assignment of the bail bond by the sheriff.

I believe it may be laid down as an undeniable fact, that the clerks of the different courts of the late territorial government, were in the constant habit of acting by deputy, wherever their convenience required it. The same practice has prevailed under the state government; without its legality or propriety having been ever before called in question. It has then been a custom coeval with the American government of the country, and even were we to allow that it originated in error, the maxim would then (if in any case) apply that *communis error facit jus.* I am of opinion with judge Martin, that this custom has been sanctioned by the legislature in the act relative to deputies of the officers of our courts.

East'n District. *July*, 1821.

KIRKMAN *vs.* WYER.

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Being satisfied with what has been expressed on the subject of the right of a deputy to perform all the duties which may appertain to the office of his principal in conformity with the general rule, that *qui facit per alium, facit perse*, and also with that part of judge Martin's opinion, which relates to the trial of the case in the court below. I shall barely remark that as the execution of the bond is not denied, or rather seems to be admitted, on the part of the bail, the plaintiff was not obliged to prove the assignment of the sheriff. See *Peake's Evidence*, 269.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

DE ARMAS' CASE, ante 123.

A rehearing denied.

Mazureau, the attorney-general, as *amicus curiæ*, made application for a rehearing, in this case, on the following grounds.

1. The decision is, to all intents and purposes, a definitive judgment. No appeal can be had against it.

As such, it ought to contain a reference to

the particular law in virtue of which it was rendered.

Now the truth is, that it refers not particularly to a law, but generally to the third *Partida*, which contains 616 laws.

Which of them is the particular one that is referred to?

It is obvious, that the requisite of the constitution has not been complied with.

The necessary conclusion is, that the decision is null, as being unconstitutional. *Constitution of the State, sec.* 2, *art.* 4. 4 *Martin*, 463.

2. The offence of contempt is unknown to the Spanish laws.

Advocates were bound to be modest; to address courts in a respectful manner and language.

They could be suspended for divers causes; but those causes are all declared and enumerated in different laws; and constitute each a separate offence. They are no where described under any general name or appellation. And an appeal was allowed of the judgment that ordered the suspension. *Villadiego*, 250, *n.* 26. *Partida*, 3, 6, 7, 11, & 12.

3. The Spanish law forbids the judges to suffer lawyers to speak to them in an insolent

East'n District. July, 1821.

DE ARMAS' CASE.

manner; but, in that respect, the law is not penal. It only contains instructions to the judges, in order to save them from incurring contempt. *Partida*, 3, 4, 8. *Villadiego*, 251, *n.* 50.

With the same motive, the law forbids also the judges to live with any advocate or notary, *Recopilacion de Castilla*, 6, 2, 59.

It cannot be said, I suppose, that the lawyer or advocate, who is suffered to do either the one or the other, is guilty of contempt.

The judge's duty is to forbid it; and if it is persevered in, then, but not until then, the provision of the *Part.* 3, 6, 7 may be applied; not as a punishment for contempt, but as a punishment for the breach of a positive and particular law.

4. Admitting the offence of contempt to be known to the Spanish laws, and thereby punished in the manner laid in the decision of this honourable court; the statute of the state has, with respect to the punishment, repealed the Spanish laws.

The true rule is, I believe, that the new laws, providing on the same subjects as the old ones, in a different manner, repeal them virtually.

This holds chiefly in penal cases; for the same offence cannot be punished in two different manners.

The rule besides, is laid down and put into practice in the *Recopilacion de Castilla.* 2, 1, 3.

Now, De Armas was, according to the rule made by the supreme court against him, charged with the offence of contempt, and from the judgment, passed after hearing him, it appears he was found guilty of it.

An offence of that description can only be punished by fine and imprisonment. See an act to organise the supreme court, &c. passed on the 10th of February, 1813, *sec.* 13.

MARTIN, J. observed that the rehearing was not prayed for, with the hope of shewing the absence of guilt in the defendant, nor on the ground of the punishment inflicted being excessive.

1. That the case relied on by the counsel, *Gray & al.* vs *Laverty*, 4 *Martin*, 436, in order to establish his first position, (*viz.* that the judgment of this court is unconstitutional and null; the reference being only to the third *Partida*) proves the contrary proposition, even in the case of a judgment, which contains no

East'n District. *July*, 1821.

DE ARMAS' CASE.

reference. "When it (the reference) is not made, those who are to pass on the conduct of the judge, in case he may be prosecuted therefor, may make a strict enquiry; but a court who is required to reverse a judgment, may fairly conclude, even when the reference is obvious, that it was impossible for the judge to make it, on the score of his having been ignorant of it. So, a good judgment, rendered according to the light of the judge's understanding, must be supported."

The absence of any reference at all does not, therefore, render the judgment null.

The judge may not be ignorant of the law on which he pronounces; he may well recollect the very words of it, and yet not remember the number of the chapter, nor the page of the text; and the volume containing it may be out of his reach. There are certain parts in the state, in which a particular volume, containing the textual law on which a judgment is grounded, may not be within a circle of one hundred miles. Will it not suffice there, that the judge should refer to the particular law, by quoting its very words, or referring to the particular volume which contains it?

The framers of the constitution foresaw this, and required the reference to the particular law, as often as it may be possible; but the reasons in all cases.

"The ignorance of a particular law," said the court, in the case quoted by the counsel, "is possible, in a judge not bred to the profession; it may exist even in those who are; but it cannot be presumed, that a judgment was rendered, without the judge knowing the reasons which determined him." *Id.* 464.

In the present case, the law on which the judgment is grounded, is referred to by the volume which contains it, the third *Partida*, and by its contents, *viz.* that which forbids the judges to suffer the arrogant and indecorous language of lawyers; and the clerk assures us, he informed the defendant, when he permitted him to take a copy of the judgment, that the court had made enquiry for the volume, and finding that it was not within its reach at the moment, observed the reference might be extended at leisure.

2. That contempt of court is an offence noticed by the Spanish law. Judges are directed so to demean themselves, that their authority may not be contemned: *que no les*

East'n District. July, 1821.

DE ARMAS' CASE.

nasca en despreciamento. Part. 3, 4, 8; as *Lopez* expresses it, *quod honori suo contemptus non generetur*; or according to the Roman law, *ne contemni patiatur. ff.* 1, 18, 20. "This," proceeds the *Partida*, "would be, if any one was to argue before them with arrogance, *con sobervia. Loco citato.*

Lawyers, who demean themselves contemptuously before the court, may be suspended. The laws, cited by the counsel, contradict his assertion, that the causes, for which suspension may be pronounced, are all declared and enumerated in different laws, and no where declared under any general name or appellation.

If the judge, by his sentence against any lawyer, on account of his ill fame, or any other just cause, *o por alguna razon derecha*, forbid him to practice, he will no longer be permitted to practice. *Part.* 3, 6, 11.

If the judge forbid any lawyer to practice before him, for any just cause, *por alguna razon derecha*, during a fixed period: as if the lawyer be tedious, contradictory, or for speaking too much, or for any other like cause, *for alguna razon semejante destas*, henceforth he may not practice. *Part.* 3, 6, 12.

Lawyers should not interrupt each other, nor should they make use, in their arguments, of any improper or indecent expressions, &c. Those who conduct themselves, as is here ordered, are to be treated with respect, and listened to by the judge; and he may prohibit those from speaking before him, who conduct themselves otherwise: *e a los que contra esto feciessen, puede les defender, que no razonen ante el. Part.* 3, 6, 7.

3. That the Spanish law, which thus forbids the judge to suffer any contempt of his authority, is a penal one. For it cannot be carried into effect without inflicting some penalty. And a lawyer guilty towards the court, of any contemptuous action, expression or gesture, may be instantly punished, by suspension, at least; and nothing, as is gratuitously asserted, requires the judge to forbear punishing, till the offence be repeated.

4. That no statute of this state has repealed those parts of the law of Spain, which authorise a court to punish the contemptuous behaviour of a lawyer, by suspension.

A statute is said to repeal a former one, when it is contrary thereto in matter. *Leges posteriores, priores* CONTRARIAS *abrogant.* It is

East'n District. *July*, 1821.

DE ARMAS' CASE.

not enough that the latter statute be different in its matter, it must be contrary.

The statute of 33 *H.* 8, 3, provided, that any examined before the king's counsel, who confesses treason, shall be tried in the county where the king pleases, and it was held to be repealed by that of 2 *Ph.* and *M.*, which directs that all trials for treason, shall be according to the common law. 11 *Co.* 63, *a.* The reason is apparent; for the latter statute directed that all trials for treason, which include those of persons mentioned in the statute of *Hen.* 8. should be in the course pointed out by the common law, and this was contrary to the provision of the statute of *H.* 8.

A statute is also said to repeal a former one, where it enacts a thing inconsistent with it.

So the statute of 1 *Ed.* 6, 2, which provided, that "process shall be in the king's name," was held to have been repealed by that of 1 and 2 *Ph.* and *M.* 2, which provides, that "all ecclesiastical jurisdiction of bishops, &c. shall be in the same estate as to process, as it was in the time of *H.* 8." For the two provisions were inconsistent. 12 *Co.* 8.

But though the provision of the latter statute be different, if they be neither contra-

ry nor inconsistent, the former statute is not repealed.

As if by a statute, an offence be made indictable at the quarter sessions, and a subsequent one makes the same offence indictable at the assizes, the former statute is not repealed; because the provisions of the latter are neither inconsistent, nor contrary with those of the former. Both statutes then may, and ought to stand in force, and the quarter sessions and the assizes shall have concurrent jurisdiction. 1 *Bl.* 89, 90.

And if the two statutes may be reconciled together, the former shall not be held to be repealed.

So the statute of 16 *R.* 2, 5, providing that a person attainted on a *premunire* shall forfeit *all* his land, was held not to repeal the statute *de donis* as to land in tail, against the issue in tail. 11 *Co.* 636.

The statute of 5 *El.* 4, which provided that none should use a trade, without being an apprentice, was held not to repeal the 4 and 5 *Ph.* and *M.* which directed that no weaver use, &c. 6 *Co.* 196.

The statute of *P.* and *M.* directed the forfeiture of any woollen cloth or kersies, wove

East'n District. July, 1821.

DE ARMAS' CASE.

by any person not an apprentice, or not having exercised the trade for seven years. That of *Elizabeth* repealed "all the statutes, heretofore made, and every branch of them, as touch or concern the hiring, keeping, depending, working, wages or order of servants, workmen, artificers, apprentices and labourers, or any of them, and the penalties, and forfeitures concerning the same, shall be, &c. repealed, utterly void, and of none effect."

Yet *Cogeril*, having had judgment for a forfeiture, under the statute of *P.* and *M.*, *Plashfield*, the defendant, brought a writ of error to reverse it, on the ground, among others, that the statute relied on was repealed by that of *Elizabeth; sed non allocatur.* For, looking into the statutes, they may stand together; and it was said that a latter statute in the affirmative, shall not take away a former act, and the rather, if the former be particular, and the latter general. *Griffin's* case. 6 *Co. Ne.*

This case places the rule (that where the legislative will has once been expressed, its binding force shall continue till it be unequivocally recalled) in the clearest point of view. For, in the preamble of the latter statute, the intention of parliament is formally expressed,

that "the substance of as many of the said laws (the former) as are meet to be continued, shall be digested and reduced into one sole law and statute." "Clothiers, woollen-cloth weavers, cloth-workers, are mentioned as tradesmen, who are the particular objects of the statute.

In the criminal law, where the utmost rigour prevails against the extension of offences, and punishment is so strictly guarded against, (we find it established by numerous decisions) that a positive statute does not repeal the common law, and the state prosecutes either on the statute, or at common law.

The 19th section of the first judicial act of 1813, provides, that the superior courts shall have authority "to punish all contempts by fine, not exceeding fifty dollars for each offence, and also by imprisonment not exceeding ten days."

Now, here are no negative words. The substance of the new act may well stand with that of the *Partida*. The two provisions are not contradictory, and may fairly exist together.

The above provision is literally copied from the 17th section of the act of 1805, chap-

East'n District. *July*, 1821.

DE ARMAS' CASE.

ter 26, 2 *Martin's Digest*, 116, which gave authority to the superior court of the late territory of Orleans, to punish contempts. Yet that court did not think, that the authority given them by that act, deprived them of the power of striking off attornies from the roll, much less of suspending them. See judgments of that court, 1808, 1812, and 1 *Martin*, 129. 2 *id.* 305.

Judge Morcau and Mr. Carleton, the two gentlemen, who under an act of the legislature, have lately published, *The laws of las Siete Partidas, which are still in force*, in the state of Louisiana, have preserved the laws of the third *Partida*, under consideration, as unrepealed by any law of the state.

Indeed, who can say that a Spanish judge would consider as incompatible, the authority given him by the third *Partida*, to suspend a lawyer who indulged himself with indecorous language towards him, and that of sending to prison any other individual taking the same liberty.

The judges of England do not think their power of punishing contempts of their authority, by fine and imprisonment, incompatible with that of punishing by a suspension, such

attornies as are not restrained by a sense of duty, from the indulgence of angry passions in the exercise of their functions, in the presence of a court.

In what state of this union are the two powers considered as incompatible?

That nothing was said of the law of the *Recopilacion de Castilla*, which forbids judges to live with any advocate or notary—it not being easy to discover in it any bearing upon the question under consideration.

That, upon the whole, after a most minute investigation of the reasons adduced by the counsel, nothing was discovered in them that gave rise to the least doubt, and consequently no rehearing ought to be granted.

MATHEWS, J. said that he assumed it, as incontrovertibly true, that according to the Spanish laws, an advocate may be punished by suspending him from the exercise of his profession, before a court which he has offended by arrogant and contemptuous behaviour. And that these laws (so far as they are not repealed by the legislative authority of the late territorial and the present state government) establish rules of proceeding in

East'n District. *July*, 1821.

DE ARMAS' CASE.

all cases similar to that of the present. In opposition to the correctness and legality of our proceedings against the offender in this case, it is contended, that the laws of Spain, on the subject, are virtually repealed by the 17th section of the judiciary act of 1813, in which it is declared, that "the supreme court shall have power to punish all contempts by fine, not exceeding fifty dollars for each offence, and also by imprisonment, not exceeding ten days." To ascertain whether this provision of the act abrogates and repeals all former laws authorising punishment for contempts, it is necessary to resort to known and established rules of abrogation and repeal. The first is, that old laws are abrogated and repealed by those which are posterior, only when the latter are couched in negative terms, or are so clearly repugnant to the former, as to imply a negative. Second, a particular law is not repealed by a subsequent general law, unless there be such repugnancy between them, that they cannot both be complied with, under any circumstances. Thirdly, if many laws be made on the same subject, which are not repugnant in their provisions, they ought to be considered as one law and so construed.

The slightest application of these rules, to the case under consideration, will shew most evidently, that the Spanish laws, which relate to the deportment and government of advocates, are not repealed by the act of the legislature relied on as having produced this effect. So far as it relates to punishment for contempts, it is not couched in negative terms, nor is the matter contained in it, so repugnant to former laws, as to imply a negative.—The law which forms the rules of conduct for advocates, and provides the necessary sanctions for keeping them orderly and decorous, and preventing insults and contumely to courts of justice, is particular, being limited to a certain class of citizens; the section of the act cited, is general, and relating to all persons, and the provisions of both may be easily complied with. Considered as one law, providing for different things, there is clearly no repugnancy between the special and general inactment, and each ought to have its due effect.

Is it not a sound legal axiom that there can be but one kind of punishment, for one and the same offence? Contempts committed by persons who do not stand in any particular relation to the court, may be punished by

East'n District. *July*, 1821.

DE ARMAS' CASE.

fine or imprisonment, or by both fine and imprisonment. An officer, such as an attorney and counsellor, is punishable by suspension, from the exercise of the functions of his office, in the court which he has offended by arrogance and contempt; and when the offence, as in the present case, has been committed, under colour of his profession, I think it most proper, that he should be punished in relation to his office.

As the judgment is not complained against on account of the severity of the punishment, it is useless to express any opinion on that matter.

LECESNE vs. *COTTIN.*

An appeal lies from the discharge of a rule on the sheriff, to shew cause why he does not release attached property.

The garnishee has a right to retain funds attached in his hands, though he did not expressly admit his having any—having neglected to answer.

APPEAL from the court of the first district.

MARTIN, J. This case was before us last spring, and remanded to the district court. 9 *Martin*, 424. Soon after its return there, the defendant's counsel suggested, that the sheriff had, at the defendant's request, been furnished with an alias attachment; and a bond, with sufficient sureties for the performance of the judgment, having been tendered him, he had

refused to release the attachment, whereon a rule was obtained, that the sheriff shew cause why he refuses to release, according to the 11th sec. of the act of 1805, and the 3d of that of Jan. 28, 1817.

After argument, the rule was discharged; the court being of opinion that there was no specific property attached, susceptible of being delivered on bond: nothing being attached but rights and credits, which, in their nature, are untangible, and therefore not susceptible of being bonded. From this decision the defendant appealed.

The plaintiff and appellee contends:—

1. That the decision is not such as is appealable from, and relies on the 11th sec. of the act organising the supreme court. *Part.* 3, 23, 13. *Fortier* vs. *Brognier.* 3 *Martin*, 17. *Chedoteau's heir* vs. *Dominguez.* 7 *id.* 521.

2. That if an appeal lies, the decision is correct, the garnishee, though interrogated on oath, having made no declaration of any money due by him.

The defendant and appellant urges, that a defendant is entitled, at any time before trial, to a release, and to the discharge of the gar-

nishee, by giving bond. 1 *Martin's Digest*, 516, which cannot be procured without a lien attachment.

I. The injury which a defendant in attachment sustains when his funds are wrongfully withheld from him, especially when a suit is continued till evidence comes from Europe, may occasion his ruin, and is, in my opinion, a grievance irreparable; and I think an appeal ought to lie in such a case.

II. The garnishee having failed to answer, admitted he had funds of the defendant, sufficient to cover the plaintiff's claim; this entitled him to keep so much from the defendant, till the latter released him from his liability, by giving bond to the sheriff, and the circumstance of the property attached, being rights and credits untangible, as the judge *a quo* says, does not prevent the release of the garnishee. Funds, in the hands of a third person, are as useful to the owner as any kind of tangible property, and he ought not to be restrained from the use of them, where he tenders that security, on the giving of which, the law has provided, that attached property shall be released.

I therefore think, that we ought to reverse the judgment of the district court; reinstate the rule discharged; and remand the case, with directions to the judge, to proceed thereon according to law.

MATHEWS, J. A defendant in attachment, has a right to obtain a release of his property which may have been seized, by giving bond to the sheriff, with sufficient surety to defend the suit and abide the judgment of the court. 1 *Martin's Dig.* 516. This release may be required at any time before trial, and if refused, may work an irreparable injury to the defendant, by depriving him of the use of his property and funds. It is true, I believe, that the sheriff must judge of the sufficiency of the security of funds, and take it at his peril, as in case of bail. In the one case, the person of the defendant is discharged from custody, and in the other, his property is released from seizure: and whether the attachment be executed by a real levy on property, or by stopping the funds of the defendant in the hands of his debtor, I can see no good reason why the latter should not be released, so as to allow them to be recovered and used by the owner,

East'n District. *July*, 1821.

LECESNE *vs.* COTTIN.

in the same manner as he would be authorised to take and dispose of his property, on giving surety, as required by law. I therefore concur in the opinion delivered by judge Martin, being satisfied with the reasons on which it is founded.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed; the discharged rule reinstated, and the case remanded, with directions to the judge to proceed thereon according to law.

Moreau for the plaintiff, *Seghers* for the defendant.

SHAUMBURG vs. *TORRY & AL. SYNDICS.*

If the defendant cede his goods before a judgment against him be signed, the syndics must be brought in.

APPEAL from the court of the first district.

MARTIN, J. On the 8th of June, 1820, the plaintiff obtained judgment against the present insolvents, who, on the 12th, presented their petition for a surrender of their property to their creditors, and obtained a stay of all proceedings against them. Afterwards the judgment was signed and recorded.

The plaintiff was ordered to be placed as a creditor on the tableau of distribution, as a

judgment, and consequently, mortgage creditor of the insolvents. The syndics appealed.

They contend, and I think justly, that at the time of the surrender, and order of stay of proceedings, there was not any complete judgment against the insolvents; that the syndics had a right to be heard against the judgment given, and be allowed to shew, that it ought not to have been signed; and when it was completed by the signature of the judge, the present insolvents had begun to have the ability of standing in suit as parties, and therefore, the plaintiff, who was not a judgment creditor, at the time of the surrender, could not have become so, except on a call of the syndics into court. 3 *Martin*, 204.

I think the district court erred, and that we ought to reverse the judgment, and order, that the plaintiff be placed on the tableau as a simple creditor, and that he ought to pay costs in both courts.

MATHEWS, J. The judgment obtained by Shaumburg being incomplete, for want of the judge's signature, at the period of the *cessio bonorum* by the insolvents, gave him no benefit as a mortgage creditor, and cannot alter his

East'n District. July, 1821.

SHAUMBURG vs. TORRY & AL. SYNDICS.

situation in relation to other creditors, whose credits were equal to his at the time of commencing suit.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the plaintiff be placed on the tableau of distribution, as a simple creditor, and that he pay costs in both courts.

Hoffman for plaintiff, *Eustis* for defendants.

LABARRE vs. *DURNFORD.*

The sealing or formal delivery of a bond is not required by our law. There is no need of the prayer for bail in the petition.

APPEAL from the court of the first district.

MARTIN, J. This case was lately before us, 9 *Martin*, 381, and was remanded for a new trial. It is an application for judgment against bail, on notice. The defendant, in his answer, denied that he sealed and delivered the bond; averred that no bail was prayed for; that the sheriff was not authorised by law to take or demand any, neither did he take any bond in the legal form: farther, that the original defendant, J. or Jacob Fry, was never arrested by the sheriff; that all the proceedings were irregular, nor was any judgment ren-

dered on said suit, nor was any legal writ of *ca. sa.* or *fi. fa.* issued; that admitting the defendant became bail, he is not bound to pay any money whatever; that Fry, the original defendant, is dead.

The following facts were found by a jury—

The defendant did not put any seal of wax to the bail bond. Instead of a seal, are the letters, L. S. There is no other seal. There is no proof of Fry's death.

There was judgment for the plaintiff, and the defendant appealed.

The defendant assigned as errors, apparent on the record, that no proof was given of the assignment of the bond by the sheriff, and that the *fi. fa.* issued four days after the judgment.

1. The sealing, or formal delivery of a bond or obligation, is not required by any law of the state.

2. Nothing renders it necessary, that the plaintiff should pray for bail in the petition, nor that his attorney should require the sheriff to demand it. The officer must, himself, require it, in cases in which it is by law to be taken.

3. A bail bond in the regular form appears, and the sheriff's deputy has sworn that J. Fry was arrested.

East'n District. *July*, 1821

LABARRE *vs.* DURNFORD.

4. We find on the record, regular proceedings to judgment, and a *fi. fa.* and *ca. sa.*

5. We have lately decided, that the signature of the sheriff to a bail bond, is a matter of record, and need not be proven.

6. I do not know that any thing prevents the execution from issuing till ten days after the judgment is signed; though the party may appeal and stay it. In such a case, it would be staid in the sheriff's hands.

I think the judgment ought to be affirmed with costs.

MATHEWS, J. I concur in this opinion.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Workman for the plaintiff, *Hennen* for the defendant.

SEGHERS vs. *HANNA'S SYNDICS.*

Former judgment amended.

MARTIN, J. We have granted a rehearing to the plaintiff, who suggests, that the court overlooked a clause in the agreement on which his claim is grounded, making its effects to depend

on the approbation of the parish court. An approbation which it was the primary object of the rule to obtain; and it is urged, that if we do not think that the parish judge erred in refusing to approve the agreement, we ought to have directed a judgment of non-suit to be entered. *Ante*, 54.

Whatever may have been the intention of the plaintiff in obtaining the rule, the apparent object of it was to obtain an order for the payment of the specific sum claimed; the syndics do not appear to have been willing to take on themselves, absolutely, to fix the plaintiff's compensation, and were willing to submit to the decision of the court, if the time of payment was extended, but an approbation of the compensation by the court, they did require.

The parish judge does not appear to me to have considered the case as standing before him, as one in which he was to enquire into the value of the services and ascertain the compensation due, but one in which a specific claim was made. It does not appear to me that he erred; and the only modification that we can make to our judgment, and which we should do, is to reserve to the plaintiff his

East'n District. July, 1821.

SEGHERS vs. HANNA'S SYNDICS.

right to have his services enquired into, and and a compensation made therefor, according to law. The judgment must therefore be reversed, and ours a judgment of non-suit; the costs of appeal to be borne by the estate.

MATHEWS, J. I concur in the opinion for the reasons adduced.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that there be judgment of non-suit; the costs of the appeal be borne by the estate.

Seghers for plaintiff, *Denis* for defendants.

DUNBAR vs. *NICHOLS.*

A party who relies on prescription must plead it.

The want of a plea of this kind cannot be supplied *ex officio* by the court.

APPEAL from the court of the first district.

MARTIN, J. The plaintiff demands the rescission of the sale of a slave he bought from the defendant, on account of her having been attacked with an incurable disease, at the time of the sale. She being dead since, the defendant pleaded the general issue only.—There was a verdict and judgment for him, and the plaintiff appealed.

Our attention is first arrested by a bill of exceptions, to a part of the judge's charge, in which he said, that "in the opinion of the court the plaintiff was not founded in his right of action, not having filed his petition within six months after the discovery of the disease."

The law has provided defendants with the plea of prescription, that they may use it as a shield, to protect themselves against unjust claims, not to use it as a weapon to destroy just rights. The party who uses it in an unrighteous case sins greviously, and the court neither can or ought to supply the want of it, *ex officio*. When the plea is not made, the presumption is, that the defendant thinks it would not avail him at all, and that he cannot righteously avail himself of it.

The district court, in my opinion, erred in directing the jury to disregard the plaintiff's right, on the ground that it was exercised too late, and I think the judgment ought to be reversed.

Proceeding then to discover what judgment ought to have been given below, I find the evidence contained in two depositions; after the proof of the execution of the bill of sale.

Dr. Smith deposes, that in the summer of 1818, he thinks in August, he examined the slave, and told the plaintiff he could neither cure nor relieve her. The ailment appeared to be an enlargement of the mesenterie gland, of long standing. The plaintiff desired him to attend her as well as he could, and if she died, to open and examine her. She died soon after, and on opening the body he found the mesenterie gland in a scirrhous state, and very much enlarged; it formed a solid tumour about six inches long, and at least three quarters of an inch in diameter.— The uterus was diseased and contracted. He is satisfied the malady must have existed six months before her death. From his own view, and the declarations of the slave, he thinks it must have existed two years.

Cobler deposed, that the wench was brought to the defendant's plantation, in the latter part of February, 1818, and was there about two months. About the first of March, the plaintiff came there and bought a negro man, whose wife was desirous of going with him. She was sick in the house, when her husband was bought. The plaintiff afterwards bought her, when she was working in the field; the wit-

ness understood the plaintiff did not buy her at first, on account of her sickness. The witness is not a physician, and cannot tell whether the disease be curable or incurable. She worked two days on the defendant's plantation. She complained of a dysentry, which he does not think incurable, and he thinks she was well cured when the plaintiff bought her.

The bill of sale bears date of April 24th, 1818.

Admitting there cannot be any doubt that the slave died of a disease incurable, in the month of August, 1818; and that the disease existed at the time of sale, whether it might not have yielded to the healing art, if medical aid had been procured in the months of May, June and July, is a question not easy for us to solve. A jury was prayed for below, who, the presumption is, found for the defendant, on the charge of the court, that the prescription availed. We cannot say, however, that they did not attend to the merits of the case, and in such a circumstance, we would not easily distrust their verdict.

I conclude, that the case ought to be reman-

n District. ly, 1821.

DUNBAR vs. NICHOLS.

ded for a new trial, with directions to the judge, not to give the part of the charge excepted to; the costs of this appeal to be borne by the defendant and appellee.

MATHEWS, J. I concur in this opinion.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled and reversed; and that the cause be remanded, with directions to the judge not to give the part of the charge excepted to.

Livingston for the plaintiff, *Duncan* and *Conrad* for the defendant.

FREDERIC vs. *FREDERIC.*

Widows have a right to mourning dresses out of succession of their deceased husband.

Married persons cannot, during marriage make to each other, by an act *inter vivos* or *mortis causa*, any mutual or reciprocal donation.

When there is no contract of marriage, the child of a slave belonging to the

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. The plaintiff states, that in the year 1805, she was married to the defendant's son, to whom she brought $8599, in money or credits, cattle, and furniture; that she then possessed a negro woman, who has since had a child, now eight years of age; and during her marriage, a brother of her's, gave her four cows and two heifers; that at her marriage, the defendant's son had

only a lot in the suburb St. Mary, worth $350, on which he afterwards erected several buildings, with monies which the plaintiff had at interest, and he collected. That she became a widow in 1820, and on the 12th day after, had an inventory made of the common property in the parish of St. Charles, and soon after, of that in the parish of Orleans. That on the 17th of August, 1809, her husband and herself, made a mutual donation to the survivor of them, of the usufruct of all the property which should be in their possession, at the time of the death of the party dying first.

East'n Distr't. *July*, 1821.

FREDERIC vs. FREDERIC.

wife, is paraphernal.

Wife has not a right to interest on paraphernal property during the year of mourning.

The petition concluded, that the plaintiff might be allowed to retain the negro woman and child, four cows, and two heifers, above mentioned, erroneously included in the inventory of the common estate, her *armorie* bed, bedding, and wearing apparel. That out of the sale of the common property, she may be allowed $8599, the amount of her matrimonial rights, with interest from the 19th of July last; $100 for mourning dresses; $2 per day for the keeping of the property of the community, and that the balance, after the payment of the debts of the community, be divided between her and the defendant; and that the furniture

East'n District. *July*, 1821.

FREDERIC vs. FREDERIC.

of the community be given her, at the price of the estimation.

The defendant pleaded the general issue, and the nullity of the donation.

The judgment allows to the plaintiff the usufruct of the common property, possessed at the death of the husband, and the negro woman, whose child is declared to be common property, or *acquet;* the cows and heifers, and wearing apparel; $100 for mourning dresses; $8599 for her matrimonial rights; and the surplus to be equally devided, each party paying their own costs.

From this judgment, the defendant appealed, generally, and the plaintiff from so much of it as decrees, that the child of the negro woman was *acquet;* and also on account of no interest being allowed her for her dotal rights, at least from her husband's death.

At the hearing in this court, the defendant's counsel confined his objections to the judgment of the district court—

1. To a sum of $818 33 cents, which he urges, was improperly allowed for interest.

2. To that of $620, allowed for the price of 31 head of cattle, which he thinks excessive.

3. To the allowance for mourning dresses,

which he insists ought not to have been made, the plaintiff being much richer than the deceased; and if made at all, ought to be reduced.

4. To the admission of the donation as a valid one.

I. It does not appear to me, that there is sufficient evidence on the record, to justify the allowance of $813 claimed for interest.

II. By consent of counsel, the sum of $600, allowed by the court *a quo*, for the cattle is reduced to $372.

III. The allowance for mourning dress, does not appear to me extravagant. Widows are to be supplied with habitation and mourning dresses out of the succession. *Civ. Code*, 332, *art.* 52. *id.* 340, 83. *Febrero addicionada*, 2, 1, 7, *sec.* 3, *n.* 53, and no distinction is to be made between widows richer than the husband and others.

IV. The donation was absolutely void. "Married persons cannot, during marriage, make to each other, by an act *inter vivos*, or *mortis causa*, any mutual or reciprocal donation, by one and the same act." *Civ. Code.*

East'n District. *July*, 1821.

FREDERIC vs. FREDERIC.

258, *art.* 225. It is not contended, that the donation in the present case, is not exactly such a one as is described in the above article, but it is urged, that the article is not a prohibiting one, and therefore does not import a nullity, as none is expressed. *Id.* 4, *art.* 12. I do not see how it could be possible to say, that what the law has said must not be done, can be valid.

1. The plaintiff complains, that the negro child was improperly considered as an *acquet*.

2. That no interest was allowed on her dotal right.

I. To shew that the child was not *acquet*, the plaintiff's counsel has cited, *Part.* 4, 11, 20, and *Civ. Code*, 332, *art.* 50.

There was not any matrimonial convention between the parties; hence there was no dot or dowry, and all the wife's property was paraphernal. The child issued from a paraphernal slave, follows the condition of the mother, and as such is paraphernal.

II. Interest is claimed under the *Civ. Code*, 332, *art.* 52, where it is shewn, that the widow has her choice, either to claim the interest of her dowry, during the year of mourning, or to claim a sustenance out of the succession of

her husband. This does not shew that she has a right to interest on the proceeds of her paraphernal property, in the hands of her husband's representatives.

I think the parish judge erred in allowing to the plaintiff the sum of $818 33 cents, in the allowance for cattle, which is too high in supporting the donation, and in considering the negro child as an *acquet;* that consequently, we ought to reverse the judgment, and ours ought to be—

That the dotal rights be recovered without interest; that the allowance for the cattle be reduced to $372; and that the allowance for mourning dresses be confirmed.

MATHEWS, J. I concur in this opinion.

It is therefore ordered, adjudged and decreed, that the judgment ought to be annulled, avoided and reversed, and that the plaintiff recover her dotal rights with interest, the sum of one hundred dollars for her mourning, and that of three hundred and seventy-two dollars for the cattle.

Moreau for the plaintiff, *Morel* for the defendant.

East'n District.
July, 1821.

WOOD & AL. vs. FITZ.

WOOD & AL.
vs.
FITZ.

WOOD & AL. vs. FITZ.

APPEAL from the court of the first district.

The plaintiff may sue the surety on a prison bounds bond, without the principal, and before judgment against the latter.

The condition of the bond needs not be literally that on the statute.

The party cannot object that he was in custody when he signed such a bond.

The signature of an officer on a bond which he is bound to take by law proves itself.

This case was determined in July, 1820, but the judgment was suspended, on a motion for a rehearing, which finally prevailed. The first judgment is as follows:—

MARTIN, J. delivered the opinion of the court.* The defendant, being sued on a prison bound bond, executed by him as surety for A. Elliot, pleaded—

1. That the principal ought to have been sued with him.

2. That the plaintiffs ought first to have obtained judgment against the principal.

3. That the bond was not taken in pursuance of the statute.

4. That the bond was given without any legal consideration, while the defendant was in duress and in illegal confinement.

The defendant further denied all the facts alleged in the petition.

There was judgment for the plaintiffs, the court *a quo* being satisfied with the testimony taken in the case. The defendant appealed.

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* MATHEWS, J. did not sit in this case at the first hearing.

The statement of facts shew, that Elliot was arrested on a *ca. sa.*, issued on a judgment obtained by the plaintiffs against him, and whilst at the sheriff's office, and in his custody, executed the bond, with the defendant, for the purpose of obtaining the benefit of the prison bounds; that he was not committed to prison; and shortly after executing the bond, left the bounds, without the consent of the plaintiffs, and without satisfying them.

Neither the plaintiffs nor their agent paid, or offered to pay, or advance the allowance required by law for the debtor's sustenance. Elliot, on being arrested on the *ca. sa.*, was carried to prison, but the key was not turned on him. While there, he executed the bond.

The defendant having executed a bond, jointly and severally, with the principal, is suable without him; and we do not know any reason why a previous judgment against the latter should be required.

The bond appears to us taken in pursuance of the statute. The form of the bond to be given is not prescribed by law. It is provided, that the condition be, "not to break or depart therefrom, (the bounds) without the leave of the court, or being released by order

East'n District. *July*, 1821.

WOOD & AL. *vs.* FITZ.

of the plaintiff, at whose suit he (the debtor) is confined." The condition of the bond in suit is, that the debtor "shall remain within the boundaries of the public prison, &c. until he may be duly discharged therefrom, by order of court, or otherwise, in due course of law." We are of opinion, that the spirit of the law is complied with, and the words used, convey the same idea, though they be not literally those of the statute.

The bond had a legal consideration;—the exemption it procured to the debtor from being locked up within the jail.

The violence which avoids a convention, must be an illegal one. *Pothier's Obligations.* The sheriff having arrested the debtor on a *ca. sa.*, was bound to detain him till he was delivered to the jailor, or admitted to the bounds, after giving bond.

But it is contended, that the detention was illegal, because the creditor had not made the advance which was prescribed by the act, approved on the 17th of February, 1817.

It is far from being clear, that debtors, not confined within the walls of the prison, are entitled to the allowance.

The act provides, that "no person shall be

kept in confinement at the suit of any creditor, in this state, unless the said creditor pays to the keeper of the jail, a sum of three dollars and fifty cents a week, to be paid in advance, by the said creditor, to the keeper of the jail, when he, the said debtor, is committed, for the use of said debtor; and in case the said creditor should fail to pay the said sum, then the said debtor may be set at liberty.

The allowance is to be paid to the keeper of the jail, where the debtor is committed. It must suffice then, to pay after, or at least when the debtor is committed to the keeper of the jail. The consequence of the failure of payment, is that the debtor may be set at liberty.

The sheriff cannot refuse to arrest the party against whom a *ca. sa.* is in his hands, because the allowance is not paid, nor to commit him to the keeper of the jail. For till then, there is not any keeper of the jail to which the debtor is committed; and until after confinement, there is no failure in the creditor; because it is not certain that there will be an arrest and commitment. The arrest and detention of Elliot was not illegal, because the allowance was not paid. Before the commitment, ac-

East'n District. *July*, 1821.

WOOD & AL. *vs.* FITZ.

cording to the statement of facts, Elliot asked to be admitted to the prison bounds, and executed a bond therefor. There was no commitment to jail. No illegal violence was exercised against Elliot.

If the defendant intended to avail himself of the want of payment of Elliot's allowance to justify his departure from the bounds, on the ground that he might set himself at liberty, this ought to have been pleaded.

All that the plaintiffs may be required to prove is, that the bond was legally taken, and the condition of it broken. This clearly appears from the record.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

After the rehearing, the following judgment was given :—

MARTIN, J. A rehearing was granted, on the defendant having drawn our attention to the absence of any evidence of the bail bond having been assigned by the sheriff. On a suggestion of a diminution of the record, a writ of *certiorari* issued, and the copy of the assignment of the bail bond came up. The de-

fendant now alleges, that no proof was exhibited below, of the signature of the sheriff at the foot of the assignment.

I think that the bonds taken by the officers of the court, in pursuance to law, are matters of record, when put on the files of the court, and need no proof of the officer's signature.

I think the former judgment ought not to be disturbed, but be certified to the district court.

MATHEWS, J. I concur in the opinion.

It is therefore ordered, adjudged and decreed, that the judgment formerly pronounced in this case remain untouched.

Preston for the plaintiffs, *Morse* for the defendant.

DAY vs. *BOOKTER.*

Damages allowed for a frivolous appeal.

APPEAL from the court of the third district.

MARTIN, J. This is an action on two promissory notes; the defendant pleaded the general issue; the notes were duly proven, and the defendant offered no testimony; there was judgment for the plaintiff; the defendant appealed; brought up the record, but no

East'n District. *July*, 1821.

DAY *vs.* BOOKTER.

counsel appeared in his behalf. The case has been heard *ex-parte*, and it clearly results, that delay was the only object of the defendant in appealing; the plaintiff and appellee has prayed for the damages, which we are by law authorised to grant.

I think, that we ought to affirm the judgment of the district court, and allow ten per cent to the plaintiff and appellee, on the amount of the judgment, for the damage he has sustained by the frivolous appeal of the defendant, with costs of suit in both courts.

MATHEWS, J. This appeal was evidently taken for delay only, and in affirming the judgment of the court *a quo*, damages ought to be allowed to the appellee.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, and that the plaintiff and appellee recover, in addition to the judgment, ten per cent thereon, for the damages he has sustained by the wrongful appeal of the defendant.

Preston for the plaintiff.

ST. ROMES vs. PORE.

Former judgment confirmed.

ST. ROMES vs. *PORE.*

On an application for a rehearing, in this case, which was determined in May last, *ante* 30, it was urged, that—

Any kind of defect in the thing sold, is not a ground for the action of redhibition; such defects alone are considered as render the thing absolutely unfit for the purpose for which it was intended in commerce, or such as so far diminish its utility, or render it so inconvenient, that it is presumable, that if these defects had been known to the buyer, he would not have bought at all, or would have bought at a reduced price. *Civil Code*, 356, *art.* 67.

The seller is not accountable for the apparent defects or vices which the buyer could have seen himself; as for example, if a horse had lost his eyes, the buyer cannot complain of a defect, of which he is ignorant, only through his own fault, any more than those the seller may have declared to him. *Id. art.* 69. *Vigilantibus non dormientibus leges subserviunt.*

The redhibitory defects, owing to the sickness or infirmities of slaves, consist principally in the three following diseases, *viz.* leprosy.

East'n District. *July*, 1821.

ST. ROMES *vs.* PORE.

madness and epilepsy. With regard to other ailments or infirmities, with which slaves may be attacked, they form or constitute redhibitory defects, only when they are incurable by their nature. So that the slave subject thereto, is absolutely unfit for the services for which he is destined, or that his services are so difficult, inconvenient or interrupted, that it is presumed, that the buyer would not have bought him at all, if he had been acquainted with the defects, or that he would not have given so high a price, had he known that the slave was subject to that sickness. *Id.* 358, *art.* 80.

According to this part of the law, which being clear and free from ambiguity, the judges are forbidden to disregard the letter, under the pretence of pursuing its spirit. (*Id.* 5, *art.* 13,) any infirmity, other than one of the three mentioned, in order to constitute a redhibitory defect, must be incurable in its nature, and render the slave absolutely unfit for the services for which it is destined; or at least render those services so inconvenient, difficult and interrupted, that it is to be presumed, that if the buyer had been acquainted with these defects, he would not have bought at all, or at least, not for the price given.

The testimony of Dr. Dupuy shews that the infirmity of the slave must have been apparent at the time of the sale; but we have a better proof of this. The plaintiff himself admits in his answer to our interrogatory, that he knew the infirmity of the slave before he signed the act of sale. So that, it cannot be presumed, that he would not have bought her had he known the infirmity. The obligation of the seller to declare the defects of the thing sold, does not hold true; because the defect was apparent, and the purchaser knew the infirmity. *Scientia utriusque par pares facit contrahentes.*

An infirmity is incurable either by its nature or by the progress it has made, or by the ignorance of the physician. When an infirmity results from the injury of one of the organs necessary to life, as the brain, the heart, or the lungs, it is, and will always be, incurable by its nature. It is also said, though not very correctly, to be incurable by its nature, when the healing art has no remedy to cure it; as the yellow fever, the bite of a rattle-snake in one of the arteries, the hydrophobia, or *rabies canina*, &c., which one day may cease to be incurable. When an infirmity.

East'n District. *July*, 1821.

ST. ROMES *vs.* PORE.

curable by its nature, has been neglected or ill-treated in its beginning, it reaches a stage where it ceases to be curable, and is said to be incurable by the progress it has made. When the infirmity is such that the physician called to heal it, is ignorant of the means of cure, it is said to be incurable by the ignorance of the physician.

Out of these three classes of incurable infirmities, the law gives the redhibitory action, in the case of those which are incurable by their nature. Indeed all infirmities, incurable by their nature, do not give rise to the redhibitory action. The infirmity must be such as to render the slave absolutely unfit for the service, &c.

The only proof adduced by the plaintiff is, that on the 17th of May, eight days after the sale, he had the slave examined by Dr. Dupuy, to whom she appeared very sick, and who supposed her to be incurable, but the doctor is neither positive as to the incurability of the disease, nor explicit as to the causes of it. Admitting that he was, does it follow that the disease was incurable, on the day of the sale, eight days before? One might as well conclude, that, because a disease was incur-

able on the last day of December, it was so on the first of January. Without having studied either Hypocrates or Celsus, every one who has the use of his reason, knows that there are diseases so rapid in their progress, that they become incurable in one day, one hour; nay, in one minute.

To say that the redhibitory action is taken from the buyer, only when he knows the nature of the disease, *i. e.* that it is incurable, is a cavil. The nature of a thing is what constitutes it what it is. *Rerum natura illa est, quâ res quæque consistunt.*

The nature of things is known only to the supreme maker of them. The only thing, the knowlege of which we, ignorant men, are by our limited nature, permitted to attain, is the effect produced by the nature of things. We are all ignorant of the nature of fire, but we know it is warm by its nature. We are ignorant of the nature of matter, but we know it is indestructible by its nature. We are all ignorant of the nature of infirmities, but we know that some of them are incurable by their nature. To say that the nature of fire is warm, that of matter indestructible, that of an infirmity incurable; is to say what consti-

East'n District. *July*, 1821.

ST. ROMES *vs.* PORE.

tutes fire to be warm, is warm, what constitutes matter to be matter, is indestructible; or what constitutes an incurable infirmity, to be incurable, is incurable, is nonsense, because it is giving attributes to *entes rationis.*

An infirmity, incurable in is nature, is one which, in consequence of what constitutes it what it is (which we have agreed to call its nature) admits of no cure. If the intention of the legislature had been to give the redhibitory action to a purchaser, for all incurable infirmities, certainly it would not have made use of the words, *incurable by their nature.* If the maxim *inclusio unius est exclusio alterius* be correct, it is clear, by the words of the statute, that the redhibitory action is given only for infirmities incurable by their nature. Very little reflection will be needed to satisfy us, that the action is not given in cases of infirmities, incurable by the ignorance of the physician, or by their progress.

In the first case, it would be unjust to let the seller suffer, in consequence of the error of a man whom he had not chosen.—*Factum suum cuique, non adversario, nocere debet. De reg, jur.* 155. In the second, it must be apparent, from the nature of things, that the buy-

er may perceive the infirmity, and if he purchase, notwithstanding this, *volenti non fit injuria.*

Certainly, if the plaintiff, endowed with the faculty of penetrating into the mysteries of nature, had seen that the slave's disease was incurable, or would terminate fatally, no one can believe that he would have bought.

But, *spei emptio est, ff. de contr. empt. C.* 8. When a man buys the casting of a fisherman's net, who is silly enough to think the bargain would have been made, if the buyer had known that no fish would be caught. He bought with the hope of fish being caught. So he, the plaintiff, bought for $500, the hope of curing a slave, who one month before, had been sold for $900. That he bought such an hope is proven, by his placing the slave under the care of a physician, and having her nursed for a month, although he was informed the disease was incurable, his making no claim, and neglecting all means of preserving his pretended right till his hope had entirely vanished.

The plaintiff, as is often the case with the purchaser of the casting of a net, has been disappointed, yet he must pay, *veluti cum jactum*

East'n District. July, 1821.

ST. ROMES vs. PORE.

retis a piscatore emimus, aut indaginem plagis positis á venatore, vel pantheram ab aucupe: nam etiamsi nihil capit, nihilominus emptor pretium præstare necesse habebit. ff. l. 11, *in fine de actionibus empti et venditi.*

Another reflection will suffice to refute the idea that the parties contemplated that the vendee's claim would depend on the issue of the disease. Any one, even the least acquainted with the human heart, knows, that every one, however unfit he may be for the purpose, is more willing to trust his own concerns to himself, than others. Can it be believed that the defendant, selling for $500, a slave, who a little before had cost him $900, intended to trust his cure to the plaintiff, a bachelor, unacquainted with the healing art, in the expectation, that in case of his cure, the benefit would result to the purchaser, and in case of a fatal termination, the loss would be the seller's.

The infirmity was apparent and known to the purchaser. It was not incurable either in its nature, nor by its progress, at the time of sale. At least no proof is administered of such incurability; none certainly results from the death of the slave. Every treatise of logic warns us against the sophism, under the title

non causa pro causâ; such a reasoning reduced to its simplest expression, being *post hoc, ergo propter hoc*, which is absurd.

MARTIN, J. observed, that the defendant suggested, that the court erred in affirming the judgment of the parish court, because the disease was not incurable in its nature, and did not render the slave absolutely unfit for the service for which she was intended; nor render her services so inconvenient, difficult and interrupted, that it may be presumed, that if the buyer had been acquainted with the disease, he would not have bought her at all, or would not have given so high a price. *Civ. Code*, 356, *art.* 67, 69, *id.* 358, *art.* 80.

That the counsel seemed to believe, that it is necessary, that all these circumstances should occur, and that a disease incurable in its nature, is not *per se* a redhibitory one: that the absolute unfitness of the slave, for the services for which she was destined, &c. must be also shewn to exist.

That he could not see how it can be doubted, that the sole circumstance of a slave being attacked with a disease, which the medical

East'n District. July, 1821.

ST. ROMES vs. PORE.

art cannot cure, and must shortly terminate fatally, is a redhibitory one.

That the chief enquiry is, what was the disease of the slave in the present case?

That the disease was so, when Dr. Dupuy was called, cannot be doubted. He swears, he thought her incurable. On the second day she appeared in a state of complete *marasme*, with all the symptoms of a chronic disease, in its last stage. He attended her carefully, but to no purpose. She died on the 18th day. He supposed the disease was seven or eight months old. Dr. Dow informs us, he was called to visit her soon after the defendant bought her, and he recognised her as a former patient of his, whom he had attended seven months before.

That the defendant informed the court, that he purchased the slave about seven months before he sold her to the plaintiff; and some days after, discovered "that she was sick, and had been so at the time and previous to the purchase; and not knowing that he had a redhibitory action against his vendor, he caused her to be sold at auction, and the plaintiff purchased her."

He did not cause the sickness to be dis-

closed to the bidder; and when the plaintiff informed him that she was sick, he did not admit that she was, and that this was the reason he sold her; but falsely declared, he did not know that she was, but meant to sell her (as he had bought her) with a warranty of redhibitory diseases.

That the impression on the mind, after maturely weighing the testimony, is, that at the time Dr. Dupuy saw her, she laboured under a disease then incurable; the seeds of which existed in her for nine or ten months before the sale.

That a distinction was attempted to be made between a disease incurable in its nature, and one curable in its origin, but in a stage of incurability, on account of its progress; that he had conversed with medical men of talents, on a point like this; and was not able to draw correct information from them or medical books; and they hardly recognise any disease, which, in its incipient stage, may not yield to the healing art. Surely if a vendor is not permitted to sell a slave attacked with a disease (if such there be) incurable in its incipient stage, it cannot be lawful to sell him attacked by one, which might once have been cured, but has

East'n District. *July*, 1821.

ST. ROMES *vs.* PORE.

become absolutely incurable by its progress, without disclosing the fact; it is difficult to see any difference in the turpitude of either sale, and it is believed, there is not any in the illegality.

That it was said, that the court ought to have reversed the judgment of the parish court, because, from the circumstance of Dr. Dupuy swearing that he conceived the disease incurable when he was called, the judge has drawn an illogical conclusion, that it was so at the time of the sale.

The court often said, that on questions of fact, the conclusion of a jury or of a judge *a quo*, would have considerable weight with it, and could not be disregarded, unless it appeared manifestly wrong; and in a late case, its appearing so, they thought it best to send the record back, with directions to the judge to submit the question to another jury. When a case is submitted to a jury on distinct issues of fact, unmixed with any legal questions, the law makes the finding of a jury conclusive in this court.

That the act of sale, bears date the 9th of May, and the doctor attended her, for the first time, on the 17th. So that during the

intermediate days, the disease may have reached its stage of incurability, and so *non constat*, that the disease was incurable on the day of sale: the neglect of the vendee to have the slave attended by a physician, is also presented as a probable cause of the disease having reached its stage of incurability.

The defendant might have put this question beyond a doubt, by enquiring from the doctor, whether he conceived that had he been called eight days before, he might have cured her. Many diseases are deceiving in their appearances, and often a resort is not had to medical men, till family remedies appear unsuccessful. If the defendant had thought it of any avail, he might have questioned Giguel, the friend under whose care the plaintiff placed the slave, and he might have known what care was taken of her. Perhaps the plaintiff was lulled into security by the false statement of the defendant, that he did not know that a slave, whom he sold after keeping her two months, had any ailment.

That the merits of the case are certainly with the defendant; *certat de damno vitando*, he seeks to avoid a loss, by rescinding a sale to which he was induced to accede, on the as-

East'n District. *July*, 1821.

ST. ROMES *vs.* PORE.

surance that the vendor knew not of any ailment in the slave. The defendant *certat de lucro captando*, unconscientiously to gain the price of a slave really worth nothing at all. He seeks to enrich himself by the loss of the plaintiff. The former must, therefore, be held to very strict proof of his allegations.

That much stress was laid on the plaintiff's knowlege of the sickness of the slave, before he executed the deed; a circumstance which is presented as destroying his right to the redhibitory action. This would be the case, if he had not insisted on the warranty. But the representation of the vendor, that there was a warranty against redhibitory defects, appears to have induced him to sign the act, and pay the price. The knowlege of the vendee does not prevent his availing himself of the redhibitory action, says *Pothier*, when he has stipulated that there should be a warranty. *Traité du contrat de vente*, *n.* 209, *ff. l.* 4, *sec.* 5, *de dolo et met.* But in the present case, the plaintiff, though he had discovered something was the matter with the slave, appears to have been ignorant that her indisposition was a tedious one. His vendor assured him he had no knowlege of the slave

being sick, though this knowlege was the inducement he had to sell; and hinted, that if the disorder was a redhibitory one, the vendee was secured by the clause of warranty.

That it is objected, that the court erred in affirming the judgment of the parish court, who did not consider the case in its true light, that the vendee bought for $500, the hope of curing a slave, who had, but one month previous, sold for $900; and the proof of this is presented in his placing the slave in the hands of a physician; causing her to be treated as sick, during one month, though the physician had told him, he supposed her incurable, and not claiming, or performing any act conservatory of his pretended right, till that hope had vanished.

This care, which the plaintiff is now said to have taken of the slave, must acquit him of any neglect of her cure, and repel the idea that it was for want of attention to her, that the disease so far progressed, while she was in the plaintiff's hands, as to reach its period of incurability.

That every thing on the record contradicts the assertion, that the plaintiff did intend to purchase any other but a sound negro; at least,

East'n District. July, 1821.

ST. ROMES vs. PORE.

any but one free from an incurable disease. The auctioneer was directed by the defendant to sell a negro, without disclosing any thing of her being sick; though the vendor knew she was, and this circumstance alone induced him to sell. It is true, she was sold for a little below the price at which the defendant had bought her. But this circumstance happens daily in sales at auction.

The judge thought there was nothing in what was offered, to induce the court to grant a rehearing, or that could authorise it. The plaintiff had fully proven his case. He might have demanded the rescission of the sale, on account of the false declaration of the vendor, that he knew not of any ailment of the slave; but he had put it on the fairest ground. He had stated, he bought a slave, whom he knew before the execution of the act of sale, but not when he bid her off, to be sick. He knew not whether the disease was curable or not; he hesitated to pay his money, and paid it on the assurance, that if the disease was incurable, his money would be returned. The event has made what was doubtful certain,

He concluded that no rehearing ought to be granted.

MATHEWS, J. observed, that he had attentively considered the reasons offered on the part of the appellant, for a reconsideration of this case, and was not able to discover that justice, or a proper application of the principles of law on which it depends, require any change in the judgment heretofore pronounced.

The nature of the action, the evidence on which the respective rights of the parties rest, and the law that must govern the case, had been so fully and satisfactorily examined and explained by judge Martin, that he deemed it scarcely necessary to add any thing to what has been said.

The plaintiff's right to recover, depends on a proper interpretation of the 80*th art.* of the *Civ. Code*, wherein it treats of the warranty of defects of things sold, and redhibitory vices.

This law, after enumerating three distinct cases by name, as redhibitory defects, proceeds to express generally, that all other diseases and infirmities which are incurable by their nature, so that they render the slave subject thereto, unfit for the service for which he is destined, &c., do authorise a redhibitory action. The difficulty in the interpretation of

East'n District. *July*, 1821.

ST. ROMES *vs.* PORE.

this article, consists in the proper meaning to be given to the words, *incurable by their nature.* He had made some enquiries, and looked a little into the subject of nosology, and had not been able to discover in the classification of diseases, any class of them which are said to be incurable in their nature. It is certainly the nature of all diseases to give pain, and interrupt more or less the ordinary pursuits and labours of men, and to cause death, especially " when any of the principal organs of animal life are attacked."

He believed the just and true meaning to be given to our laws, on the subject of diseases in slaves, is that whenever the evidence in the case shews that the slave was diseased at the the time of sale, and that such disease progresses without interruption, so as to entirely destroy the utility of the slave, it ought to be considered as a redhibitory defect; unless it appears clearly that the purchaser knew the nature and extent of the disorder, and consented to purchase under all risks. This would be purchasing the hope or chance of gain. But it is clear from the evidence in the present case, that St. Romes had no intention of making such a pur-

chase. He bought with a guarantee against the diseases provided for by the *Civ. Code*; and from all the circumstances shewn by the testimony, the court was of opinion that the slave was, at the time of sale, afflicted with one of those diseases.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

West'n District. *Aug.* 1821.

WESTERN DISTRICT, AUGUST TERM, 1821.

WRAY *vs.* HENRY.

An order of seizure cannot be obtained on the affidavit of the plaintiff, that the money is unpaid; and of another person, that the endorsement of the note is in the hand-writing of the original payee. If it should, the defendant may have it set aside, on shewing the irregularity, & without denying the plaintiff's right to the money.

WRAY vs. *HENRY.*

APPEAL from the court of the sixth district.

MARTIN, J. The plaintiff, endorser of the defendant's promissory note, the payment of which was secured by mortgage, obtained, on his affidavit, that the amount of the note was unpaid, and on that of another person, that the endorsement was in the hand writing of the original payee, an order of seizure.

The defendant obtained a provisional injunction, on a suggestion that the original payee had not divested himself from his interest by an authentic act, and that there was no authentic act, evidencing the plaintiff's in-

terest; so that the order of seizure had been improvidently granted.

The injunction was made perpetual, and the plaintiff appealed.

His counsel urges, that the court *a quo* erred, inasmuch as the defendant did not deny the plaintiff's right, but complained only of the want of evidence of it, and that, at all events, there ought to have been judgment that the defendant pay the money, and that the mortgaged property be levied upon.

It appears clear to me, that the order was improperly granted. A judge at his chamber cannot try a question of fact, a matter *in pays*, *viz.* the verity or genuineness of an endorsement, or the signature of a party to a *sous seing prive*. All the positive facts, in a case like the present, must be established before him, by authentic acts. The negative one, that the money is not paid, is before him, required to be made out by the oath of the creditor, although, generally speaking, one be not bound to prove a negative.

If the order of seizure issued improperly, the defendant had only to shew this, to procure it to be set aside. He had no need to go into the merits of the case. It sufficed, that he

West'n District. Aug. 1821.

WRAY vs. HENRY.

should make it appear, that the requisites of the law were not complied with. The plaintiff having prayed for an order of seizure only, the court could not proceed to give him judgment. The defendant not having been cited, was not bound to answer any claim or demand of the plaintiff. He came into court for the sole purpose of shewing, that the order of seizure issued improvidently. He was rather a plaintiff than a defendant.

I think we ought to affirm the judgment of the district court with costs.

MATHEWS, J. I concur.

It is therefore ordered, that the judgment of the district court be affirmed with cost.

Scott for the plaintiff, *Thomas* for the defendant.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, SEPTEMBER TERM, 1821.

MELANCON'S HEIRS vs. *DUHAMEL.*

MELANÇON'S HEIRS *vs.* DUHAMEL.

The process verbal of the sale of a minor's real estate, by the parish judge, is valid, altho' it be reduced to writing in the French language; as the sale might have been made by any other auctioneer.

The formalities, which the law prescribe for the sale of a minor's estate, are introduced for his exclusive advantage, and a vendee cannot successfully allege the want of any of them; so

APPEAL from the court of the fifth district.

Brownson, for the plaintiffs. The plaintiffs demand one half of the price of a plantation, belonging, in common, to the widow and to the heirs of Charles Melançon, deceased.

The payment is resisted, on the ground that the proceedings of the family meeting, which recommended the sale, are not written in the English language. *Constitution*, *art.* 6, *sec.* 16.

The court will perceive, that the heirs of Charles Melançon are three majors and four minors; and the defence goes upon the ground,

West'n District. *Sept.* 1821.

MELANÇON'S HEIRS. *vs.* DUHAMEL.

that the sale is absolutely void, not merely as it regards the latter, but as it regards the former and the widow; and that its nullity may be claimed, even by the purchaser.

He cannot [illegible] pay- [illegible] the pur- money, on ground, that the inventory & other proceed- ings preceding the sale, are in the French lan- guage.

1. No family meeting was necessary to make the sale a legal one.

2. If a family meeting were necessary, its proceedings needed not be written in the English language.

3. Admitting such meeting to have been necessary, and that its proceedings are required to be in English, the defendant cannot take advantage of the irregularity.

I. Before the act of 1811, it was the duty of the parish judge to proceed to the sale of a succession, within convenient time after it should be opened. *Civ. Code* 174, *art.* 128, and 68, *art.* 56. By the act of 1809, the natural tutor, with the consent of the under tutor, might petition and be authorised not to sell a part, or the whole of his ward's estate. 3 *Martin's Dig.* 126, *sec.* 10. By the act of 1811, minor's property is to be kept unsold, unless the tutor, with the consent of the under tutor, and of at least five of the nearest relations of

the minor, or of an equal number of friends, if there are no relations, " duly sworn to declare the truth, the whole truth and nothing but the truth; shall declare, that it is for the interest of the minor, that said property, or part thereof, be sold." 3 *Martin's Dig.* 132, *sec.* 19. There is nothing, in this section of the act of 1811, which speaks of a meeting of family. Nothing which directs that the tutor, under tutor and nearest relations, shall be together when they make the declaration required. Indeed, they are not called upon by this law, to deliberate; but to declare, under the solemnities of an oath. They must all declare in favour of the sale; not merely the five nearest relations, of which a family meeting is composed in other cases, but the tutor and under tutor must declare also. There is surely nothing of a deliberative character in such a proceeding; nothing like canvassing different and contradictory opinions, and setting forth the opposing motives and arguments of each. In other cases, when a meeting of family is called, it is usually to deliberate upon some matter on which an unanimity of opinion is scarcely expected and certainly not indispensible.

West'n District. *Sept.* 1821.

MELANÇON'S HEIRS *vs.* DUHAMEL.

Thus a judge appoints a tutor by and with the advice of a meeting of family. "In such case (says the *Civil Code*, 62, *art.* 21) and indeed, in every case where it is prescribed and necessary, that a meeting of family shall be called, such meeting shall consist of at least five of the relations; or if there be no relations of the friends of the minor called, by order of the judge, who is to appoint the tutor, in the office of any notary or justice of the peace, residing in the place, which said notary, or justice of the peace, shall put their deliberations in writing, and cause it to be signed by such of the attending relations or friends as know how to sign, and shall also sign himself." Let us suppose the case, in which three candidates present themselves, to claim the tutorship of some minor. In obedience to our laws, a meeting of family is called to deliberate upon the interests of the minor, and to select a suitable tutor for him. In this case, the importance of reducing the deliberations of the meeting to writing, would be apparent. The judge, who would be obliged to select from among the candidates, ought to have the whole of the particulars before him, as who had been proposed, by whom, and what arguments or

reasons were urged against and in favor of each.

The act of 1811 does not even require, that the declarations, made under oath, should be put in writing. The judges would, no doubt, always do it, in order to preserve the evidence of the formality having been complied with. And I suppose it might be done in the common form of affidavits, containing the necessary substance, made all of them at the same time, or at different times, as would be most convenient to those from whom they are exacted. If I am correct in this, then these declarations, which may be made before any one competent to administer an oath, can in no respect be considered a written judicial proceeding, within the meaning of the constitution. As a matter of expediency, they are written to be sure, but not because the law imperatively commands it. A deposition is as much a written proceeding as these declarations, and yet they are made every day in French. But there is another ground upon which this sale may be justified, without the necessity of even the declarations prescribed by the act of 1811. It will be seen from the authenticated extract in this record, where

West'n District. Sept. 1821.

MELANÇON'S HEIRS vs. DUHAMEL.

it says, *les esclaves ainsi que l'habitation restant hypothiqués, &c.* That there was only one tract of land belonging to the succession, which was that sold to the defendant. Now, one ultimate object of the sale was undoubtedly to effect a partition. For it will be obvious, on a little reflection, that a partition in nature could not be made without almost a total sacrifice. On such a partition, the widow would take one half, which would have left only two and a half arpents front, to be divided among seven heirs, giving to each a small fraction more than a quarter of an arpent; a portion evidently too small for any agricultural purpose. If then a partition could not have been made in nature, this sale comes within the exception stated in that very act of 1811, which prohibits in general the sale of minor's property, except with certain formalities. *Martin's Dig.* 134, *sec.* 21, says, "that nothing contained in the preceding sections shall be construed, in any case, in such a manner as to prevent any sale of minor's property, should said sale be necessary, either for the payment of the debts of the estate, or for the division thereof, when there are heirs, who having attained the age

of-majority, or being emancipated, shall claim their portion of the same. In this case, there were major heirs, and the sale was necessary for a division. The general prohibition can only apply to cases where the minor holds property in severalty, or where being in common with others, a partition cannot be made in nature.

It would be absurd, as well as contrary to the exception contained in this statute, to say that majors must remain in common, because a meeting of family, deliberating upon the interests of minors only, might happen to be of opinion, that their interests would not be promoted by the sale, or because the declarations required by the statute, could not be obtained. The enjoyment of one's rights cannot be so clogged and shackled, not even for the benefit of minors.

The *Civil Code*, 184, *art.* 156, has expressly declared, that " none of the co-heirs or co-proprietors of an undivided thing or estate, can be obliged always to remain in that state. Thus, any of the co-heirs or co-proprietors of age, or minors, can compel the others to a partition of the estate, which they possess jointly, whatever be the lapse of time during

West'n District. Sept. 1821.

MELANÇON'S HEIRS vs. DUHAMEL.

which the joint tenancy may have lasted." Again, 188, *art.* 171, "where things are by their nature indivisible, or when they cannot conveniently be partaken, their sale must be proceeded by *cant* or *licitation*. *Id. art* 172. *Cant* or *licitation* is the act by which an immoveable, which is common to several persons, and cannot be partaken conveniently, is adjudged to one of them, or to some other person." We can scarcely need any direct proof, that the majors had claimed their portion of the succession, since they could have no motive for wishing to abandon, for a long time, the enjoyment of their rights. It will be seen, however, that the sale was made at the instance of all the heirs; of the majors, as well in their own names, as in the names of the minors whom some of them represented. What personal interest could have prompted them to solicit the sale, but to obtain their portion of the succession. It will not be expected that we should shew that a petition had been filed in the office of the parish judge, claiming a partition in form. It cannot be difficult to comprehend, that in these small successions in the country, where there are many heirs, and where the portion coming to

each, is but small, the parties interested are desirous to get what is coming to them, as speedily as they can, and as little as possible incumbered with charges and expences, that lawyers are very seldom employed in these cases, and that no rigid observance of forms is exacted. The truth is, we have never had any known and established rules of proceeding in the parish court, before the act of 1820, and applications to the parish judge, for the exercise of his official duties, were more frequently made verbally, than in any other manner. In the case under consideration, it was obvious that the property must be sold, as a partition could not otherwise be made; and when once sold, there could be no difficulty in dividing the proceeds among the heirs, and that, without any formal petition for that purpose. Indeed, there could be no necessity for a formal petition to do that which all the heirs were ready and willing to do amicably, and without coercion. What is called a meeting of family, in this case, the proceedings of which are objected to, as being written in French, may with more propriety, be considered a meeting of co-proprietors; and their deliberations may rather be regarded as a

West'n District. Sept. 1821.

MELANÇON'S HEIRS vs. DUHAMEL.

mutual expression of their consent that a sale should be made, in order to enable them to divide and enjoy, in severalty, their respective interests, than as the proceedings of a meeting of family, assembled to deliberate exclusively upon the interests of minors. The sale was a necessary preparatory step towards a partition, without which, the partition could not be effected; a measure which might have been coerced, if necessary, by the majors, and which was, therefore, properly assented to by those who represented the minors. The sale was a *cant* or *licitation*, which it was competent for the judge to decree, on seeing that a partition was otherwise impracticable, even though it had been opposed by the representatives of the minors. And can their consent make the sale less legal? I should think not.

II. It has been contended that the section of our constitution under consideration, should receive a most liberal interpretation, that what is called the policy of the law exacts it; that the government of the united states, in having required as a condition to our admission into the union, a provision like that, con-

tained in our constitution before quoted, had a deep design to produce by it a change in the language and manners of the people of this state; that courts of justice ought to lend their aid for the accomplishment of this object, by a construction, which will extend as widely as possible, the influence of the provision.—I think, however, that another and far different motive may be attributed to the government of the united states, for having stipulated the condition of which I am speaking; a motive which is much more obvious, rational and consistent with truth, than the one which is suggested by the counsel for the defendant. The constitution of the united states, *art.* 4, *sec.* 1, says, that "full faith and credit shall be given in each state, to the public acts, records and judicial proceedings of every other state." It was undoubtedly the object of this section, to place the acts, records and proceedings of each state, on a more favourable footing in the other states, than those of foreign countries; and as they possess these privileges and advantages, it is but fair that they should be written in a language the least likely to embarrass those who are thus to be governed and affected by them. Hence, the propriety

West'n District. *Sept.* 1821.

MELANÇON'S HEIRS vs. DUHAMEL.

of the condition, as it regards the "laws, records and judicial and legislative written proceedings of this state." We have no need of the forced hypothesis put forth in the defence, to account for this condition. It is the very excellency and distinguishing feature in the government of these united states, that it is conducted upon a plan diametrically opposed to those refinements in policy, which, for the most part, characterise the intrigues and politcs of courts; that it leaves human affairs to proceed as far as is consistent with the public good, in their natural channels; that it does not entangle itself by artifice and insincerity, nor intermeddle more than is necessary with merely private and ordinary affairs. It is to this unrestrained liberty in every thing, that we shall owe our future greatness; and it is because I am fully persuaded that the government of the united states has hitherto been administered upon this simple and unartificial system of policy, that I cannot credit those deep and far-fetched views which have been imputed to it in this case. But, however this may be as it regards the general government, it is certainly the duty of courts of justice, in the construction of laws, to carry

into effect the most obvious, natural and authorised intentions of the legislature, not those which an ingenious mind may conceive as merely possible. This court will not therefore, I am persuaded, strain the constitution for the purpose of promoting intentions which are neither obvious nor natural, and which by some, may also be thought unauthorised. Are there not inducements enough for the cultivation of a language, in which are written our constitution and laws, in which is to be embodied our future history? Would it be difficult to prove that this state must, in the natural course of things, assimilate in its language and manners to the rest of the united states? Is it necessary to resort to an insidious policy, to force us to become one people? Must those changes, which if uncoerced, would be yielded to with cordiality, be rendered ungracious by a haughty and unconciliating air of compulsion? I can see no necessity for all this, and it appears to me, that if the government of the united states have so intended, they have intended a very foolish thing. But to come to the question. The words of the constitution are, that "all laws that may be passed by the legislature, and

West'n District. Sept. 1821.

MELANÇON'S HEIRS vs. DUHAMEL.

the public records of this state, and the judicial and written legislative proceedings of the same, shall be promulgated, preserved and conducted in the language in which the constitution of the united states is written."

It will not, I imagine, be contended that the proceedings arraigned in this suit, come within the meaning of the words, "public records." It will be admitted on all hands, that the word *public*, as here used, means *political;* that the term is used to designate records, which regard *public*, as contra-distinguished to *private* affairs, that is the records which are kept of the acts of that ideal, being called the public.

If there could be any doubt in the English text, there can be none in the French, the corresponding words of which, are *les archieves de cet etat.* It has, however, been contended, and I suppose will be again contended, that the proceedings of a meeting of family are *judicial proceedings*, within the meaning of the constitution, and must therefore be written in the English language. Perhaps this question does not open a very wide field of argument. But it appears to me, that if the term *judicial* is restrained to its natural and ordinary meaning, it cannot be applied to the

proceedings of a meeting of family. I should call no proceedings *judicial*, excepting those either of a judge of a court, or of some of its officers; and the proceedings in question, are neither those of a judge of a court, or of any of its officers, which I think I shall be able to demonstrate.

The *Civil Code*, (before quoted) *page* 62, *art.* 21, says, that in every case where it is prescribed and necessary that a meeting of family shall be called, such meeting shall be called in the "office of a notary or justice of the peace," &c. It is no where said that such a meeting shall be called before a judge, before a court, or before any officer of a court.—Neither is the duty of the officer before whom the meeting is called, a judicial duty. It is merely notarial. He shall put, says the law, "their deliberations in writing, and cause it to be signed," &c. He does not assist at their deliberations. He does not direct and control them. Nothing can be more apparent than the difference between the duties of a judge and those of a notary. They are two distinct and independent bodies of magistracy. It is the duty of a judge to declare what the law is. It is the business of the notary to note

West'n District. Sept. 1821.

MELANÇON'S HEIRS vs. DUHAMEL.

what laws the parties, by their agreements, impose upon themselves. It is the duty of a judge to decide what the parties shall do.— It is the business of a notary to reduce to writing and record, what the parties agree to do. The one is an officer, in whose capacity to judge what is right, the law has placed confidence, and to whose decrees it therefore exacts submission. The other is an officer, in whose capacity and fidelity to put the thoughts, opinions and engagements of others in writing and in form, the law has placed confidence, and therefore calls their acts authentic, and gives them the privilege and pre-eminence over other instruments, of being full proof of what they contain. The judge commands our respect and forces our obedience. The notary exercises his functions in retirement and seclusion, and his acts are subject to the superintending authority of courts, who regulate and control them. The duties of the notary are merely ministerial duties.— They can have no pretentions to be called *judicial.* Why then call the proceedings necessarily had before such an officer, *judicial proceedings?* It will perhaps be said that the meeting of family *may* be called in the office

of a justice of the peace, who is a judicial officer, and therefore that the proceedings *may* be judicial. But no one can seriously believe that these proceedings are to possess a varying and shifting character, according to the description of magistracy before which they may take place. If, however, such could be the case, it would be sufficient to shew that the officer before whom the proceedings were had in this instance, was a notarial officer, as well as a judicial one. The court will not presume that a notarial duty was performed by him, in his judicial, rather than his notarial capacity, merely to make the proceedings had before him, void. If justices of the peace have been by law deemed competent to the discharge of these notarial duties; if meetings of family may be convened indifferently, before a notary or justice of the peace, it was probably permitted with the view of multiplying, as much as possible, the facilities of these proceedings, and because they are not extremely difficult, and because, at all events, they are subject to revision before another officer, who can take the necessary steps to correct what may be found erronious in them.

It may be contended that these proceedings

West'n District. Sept. 1821.

MELANÇON'S HEIRS vs. DUHAMEL.

were had before the judge himself, and therefore are judicial. This court, however, well knows that parish judges are *ex officio*, both notaries and justices of the peace. 3 *Martin's Dig.* 270, *n.* 13. & *Id. vol.* 2, 214, *sec.* 5. So that, as to these proceedings, he must have acted in one or the other of those capacities, since there is no authority for calling a family meeting, before a judge, as such. There is a case in 1 *Martin*, 137, 9, which perhaps bears upon this point, the case of *Detournion* vs. *Dormenon.*

In that case, it was decided that the parish judge, who was then *ex officio* sheriff, could not punish for a contempt of his authority, as judge, while performing the duties of sheriff. This decision shews, if any decision were necessary to shew, that where more than one office is united in the same person, the law will judge of the capacity in which he acts, from the nature of the duties which he is discharging.

I know of but one ground more, upon which it can be urged, with the least colour, that these proceedings are judicial. It may be said that they are so, because they have been had in obedience to the order of a judge;

that though not directly, they are indirectly the proceedings of a judge, and consequently *judicial.* If, however, these secondary and remote consequences are to be brought within the prohibition of the constitution, there are few proceedings in this state, which will stand a scrutiny. For instance, the sale of a succession, made in obedience to an order of the parish judge, by an auctioneer, would be a judicial proceeding; and the written part of it, the process-verbal of the sale, would be required to be in English. The taking of a deposition out of the state, by an order of court, under a commission issued for that purpose, would be a judicial written proceeding, as such deposition cannot otherwise be taken than in writing. The answering of interrogatories, in compliance with an order of court requiring it, would be a judicial written proceeding. Fifty other cases might probably be stated, which would be equally as objectionable as the one before the court. If any object of great public utility were to be promoted by such a construction, it would be the less censurable. But instead of that, it lets in a confused and inexhaustible train of evils and abuses. It invites litigation and bad faith.

West'n District. Sept. 1821.

MELANÇON'S HEIRS vs. DUHAMEL.

produces ruin to parties, and disorder to the public.

On principle, therefore, I think that such a construction ought not to prevail; and on the score of precedent, I think there is quite as little pretence for it. The first decision which I can find in this court, that bears any analogy to the present case, is in the suit of *Clark's ex. & al.* vs. *Farrar*, 3 *Martin*, 248, upon a bill of exceptions. In that case the instrument of sale and mortgage, on which the suit was brought, being attached to the petition, and made a part of it, it was contended that it should have been translated into English, and furnished to the defendant. But the court decided that it was mere evidence, and need not be translated. This decision will not, I presume, be invoked by the defendant. The next case in point of time, is that of *Dufau & al.* vs. *Massicot & al.* 3 *Martin*, 291, in which it was decided that the judgment of the parish court of Placquemines, and the proceedings in execution of it, were had during the interim between the territorial and state governments, and were not therefore unconstitutional. As yet we find nothing against the plaintiff's right of recovery in this suit. The next case is that of *Dussuau's syndics* vs. *Bre-*

deaux. 4 *Martin*, 450. Here the defendant's mistake may be said to have commenced; the court says "We incline indeed, to think that the acts of creditors, convened by a court of justice, are part of the judicial proceedings, the whole course of which forms what is called *juicio de concurso;* and as our constitution directs that all judicial proceedings shall be recorded, and conducted in English, we are disposed to believe that if the objection raised, had come from a person who had no concern in, nor adhered to the proceedings complained of, it would be our duty to declare they were not legal." The opinion here intimated has, however, been confirmed by a subsequent decision. 7 *Martin*, 409. So that the law, in regard to the proceedings of insolvent debtors, may now be considered as settled. But let it be remembered, that this decision has been made with an express reference to the Spanish law, where such proceedings are denominated *juicio de concurso;* that they take place in a *contentious tribunal;* that there are in such proceedings, two parties opposed to each other, the insolvent debtor on the one side, and his creditors on the other; that an appeal is made by both parties, to a tribunal

West'n District. Sept. 1821.

MELANÇON'S HEIRS vs. DUHAMEL.

appointed by the law to decide between them; and consequently, that the proceedings have every requisite necessary to give them the character of *judicial proceedings*. I come now to the last reported case, which I shall notice on the subject of these proceedings, a case triumphantly quoted by the defendant's counsel, and considered by him as putting all controversy at rest. It is the case of *Tregre* vs. *Tregre*. 6 *Martin*, 665, 9. The facts, as stated by the court, were, that *Antoine Tregre*, the defendant, after the death of *Mary Hydel* his wife, caused an inventory of their joint estate to be made, and obtained the whole estate to be adjudicated to himself. Four of the children of the deceased claimed the nullity of the adjudication, on the ground that the family meeting, whose consent is required by law, to an adjudication of this nature, was irregular and incomplete, and that the proceedings on the adjudication were not written in English, as all judicial proceedings ought to be. Upon this case the court observes, " it has been debated between the parties whether these proceedings are such as the law calls *judicial*.— But having no doubts that the acts of a judge, presiding as such, to the petition of an estate, and decreeing the adjudication of it, accor-

ding to law, are stamped with the character of judicial proceedings, it is our duty to declare, that unless such proceedings are written in English, as the constitution directs, we are bound to pronounce them void." If I could have felt any doubts of the correctness of the position which I have been labouring in this argument to maintain, the reasoning of this case would completely have dispelled them. So far from its being an authority for the defendant, I consider it almost a conclusive one for the plaintiffs. The very distinction which I have endeavoured to illustrate between the proceedings of a judge, and those of a notary, though not expressly stated, is very strongly implied. To the meeting of family, it was objected that the proceedings were "irregular and incomplete," and we learn from the history of the case, that an attempt was made to establish this objection by parol evidence; so that the irregularity must have related to something else than the mere language in which the proceedings were written and recorded; though the last objection was urged also, not however, to the proceedings of a mere meeting of family, but as if to distinguish it from the other, "irregular and incomplete"

West'n District. Sept. 1821.

MELANÇON'S HEIRS. vs. DUHAMEL.

proceedings. The learned judge who delivered the opinion, proceeds to state, as an additional objection, that "the proceedings on the *adjudication* were not written in English." But, observe the language of the opinion.—"Having no doubts that the acts of a judge, presiding as such, to the partition of an estate, and decreeing the adjudication of it according to law." It was the "acts of a judge," then, that were in question before the court, not in his capacity of notary, auctioneer, or justice of the peace, but "presiding as such;" that is, as judge to the partition of an estate, which shews also, that the court looked to the nature of the duties that the judge was discharging, in order to ascertain the character of his acts, an inference strengthened, and it appears to me, put beyond doubt, by the concluding clause, "and decreeing the adjudication of it according to law." The court might well say, under such circumstances, that there was no doubt. It was too plain a case to admit of doubt, and if the facts in this suit had been similar to the facts in that, I should also have felt that there was no doubt, and should not have troubled the court with this argument. But here the only decree given by

the judge is in English. He has kept up, throughout, the distinction between his judicial and notarial duties. As notary, he has recorded the deliberations, if they may be so called, of the meeting of family convened before himself. As judge, he has decreed the homologation and confirmation of these proceedings, and orders their execution; and has decreed also, the adjudication to the widow, as recommended by the meeting. He speaks of himself as connected with these proceedings in the third person. "Let the foregoing proceedings of the meeting of family had before the judge of the parish of St. Martin," &c. If the constitution is to be extended, to make void such proceedings, we are in a most lamentable condition in this part of the country; and many will be led to regard the law as a mere cover for legal swindling. Some estates to the amount of more than a hundred thousand dollars, and a still greater number under that sum, have been sold in this parish, with precisely the same formalities; and I make no doubt that the same thing has been done in other parts of the state. This I know is not an argument for the court to give an illegal decision. But

in a doubtful case, it is certainly right to look to consequences; and the court will not, I am certain, rashly entail upon the public evils so serious, without a pretty urgent and obvious necessity for so doing. Before concluding this point, it may not be amiss to notice, that I have understood that this court should have decided the award of arbitrators to be *judicial proceedings*, within the meaning of the constitution. If so, it must probably has been on the ground, that arbitrators are judges, appointed by the parties, and that their award is in itself a judgment, that cannot, if legally given, be altered or varied by the court; and I cannot conceive that such a decision should militate the least against the principles which I have been endeavouring to maintain in this suit.

III. Admitting all that I have hitherto said to be fallacious; admitting a meeting of family to have been necessary in such a case as this, and that its proceedings are required to be in English, still another question lies in the way of a decision for the defendant; can he take advantage of the irregularity? Will the law permit him to dispute the title which he

has acquired? Can he claim; not that the title shall be made good to him; not that he shall be secured a satisfactory indemnity, in case of a possible eviction, at some future period, but that the sale shall be avoided and set aside altogether, in his favour? It is difficult to say, whether reason or authority is most strongly opposed to such pretentions. I do not know whether the defence, in this case, will strike every body in the light it does me; but to me it has the appearance of trifling with good faith, to say the least of it. That part of the answer which relates to Pierre Broussard's claim, the court will perceive, is not supported by a scintilla of evidence; and as to the last plea, that "the proceedings in the inventory and sale, were conducted and carried on in the French language," the court cannot mistake its object. The court will see in it the desperate efforts of a man, who wishes to shake off, by any means, a bargain that he has become tired of. It is not because he seriously apprehends any danger from this quarter, that such a plea is resorted to. Had that been the case, he would have been satisfied with the offers made him by the plaintiffs. In vain do they tell

West'n District. Sept. 1821.

MELANÇON'S HEIRS vs. DUHAMEL.

him, "sir, you have got an unquestionable title to about three-fourths of the plantation. You have the rights of the widow, who was entitled to one half. You have the rights of the three major heirs; at least, these proceedings are binding upon them, and it is extremely questionable whether even the minors can object to them. But whether they can or not, we are willing to give security to any extent, that they shall never do it." A reasonable man, fond of his purchase, and wishing to retain it, would certainly have been satisfied with all this; but not so doctor Duhamel. A confirmation in the most ample form, cannot satisfy him; nor security to any extent. Nothing, indeed, will satisfy him, but to set aside the sale; and in this, it appears to me, he is too unreasonable to be indulged. The court will please to observe too, that the defendant is, at this moment, in the actual and undisturbed possession and enjoyment of the property sold to him; that one year's crop had been drawn from it before the commencement of this suit; and that profits are probably yet derived from it by the defendant. Suppose the sale to be set aside, what are to become of all these? Is the de-

fendant to account for them? Or do the vendors forfeit them, as a sort of punishment for having made an illegal sale of their property? Is the cause of nullity good, only by way of defence? Or, suppose the price to have been paid at the time of the sale, could the defendant have asserted its nullity by an original action? If so, within what time must such action be brought? Can the defendant enjoy the property as long as he pleases, and when he gets tired of it, annul the sale, and claim the re-payment of the price? These are a few of the absurd difficulties which the defence suggests. I appeal to the experience and knowlege of this court, whether applications to annul the sale of a piece of property for alleged defect of title, are frequently made by a vendee while in the full and undisturbed possession and enjoyment of such property? On the contrary, is not the whole policy of the law opposed to such a practice? What would be the consequence of permitting it? The consequence would be, as in this case, that whenever the vendee was called upon for the price, he would begin to cavil about the title. Or if, in the fluctuation of events, the property should become less valuable, the vendee would begin to

West'n District. Sept. 1821.

DELANÇON'S HEIRS vs. DUHAMEL.

search for some defect in the title, which would enable him to throw the property back again upon the hands of the vendor. But this court has already decided, 7 *Martin*, 223, that the vendee cannot refuse payment of the price, nor can he require even security from the vendor, until disturbed by a suit actually brought to evict him. The law only speaks of "suspending payment" in certain cases, but no where of withholding it altogether; and those cases in which it may be suspended, are stated to be, when the purchaser is disturbed by an action, *soit hypothecaire, soit en revendication. Civil Code*, 381, *art.* 85. What are the obligations of the vendor in the contract of sale? The *Civil Code*, 348, *art.* 24, says, that there are two principal obligations, *viz.* that of delivery and warranting the thing sold. The first of these objections the plaintiffs have already complied with. The delivery has been made. As to the second, the same authority says, *art.* 25, that it has reference to two objects. First—peaceable possession: secondly—hidden defects or redhibitory vices. As long then, as that peaceable possession, which the vendor is bound to warrant, remains undisturbed, no breach of the vendor's obligation of warranty can be alleg-

ed. But it may be said, perhaps, that it is of the essence of the contract of sale, that a title should be given to the thing sold. That whenever this is not done, there can be no sale. A slight examination of authorities will, however shew, that a valid title to the thing sold, is not of the essence of the contract of sale. A man may sell a thing to which he has no title at all. the thing of another; and do it without the owner's consent, and the sale will be valid. Not, indeed, so as to transfer the property to the purchaser, but so as to bind the parties to their contract. The vendor obligates himself by such sale to delivery and warranty, the same as if the title had been in him, and the vendee becomes liable on delivery, to pay the price. On this subject I refer the court to *ff.* 18, 1, 28. *Domat, part* 1, *liv.* 3, *tit.* 2, *sec.* 4, *art. or n.* 13, *Pothier Traité du contrat de vente, part* 1, *sec.* 2, *art.* 1, *n.* 7. 5 *Partida, tit.* 5, *ley* 19. *Febrero addicionado ó libreria de escribanos, part* 1, *cap.* 10, *sec.* 1, *n.* 7, *vol.* 2, *p.* 363.

Such is the general doctrine, when a man sells as his own, the thing of another. And if the purchaser was aware of it at the time of the sale, the seller is not even liable in damages, nor bound to restore the price, unless

West'n District. Sept. 1821.

MELANÇON'S HEIRS vs. DUHAMEL.

it is expressly so agreed. *Febrero, ib.*, 5 *Partida, ib.* I am now going upon the hypothesis, that the proceedings of the meeting of family are, as the defendant contends, void; that this sale is the same as it would have been without any such proceedings. Upon this hypothesis, it is the sale of minor's property, without being legally authorised, and such a sale, I admit, is null; though a further examination of authorities will shew, that this is a mere relative, and not an absolute nullity; that though it may be asserted in favor of the minor, it cannot against him. On this point I refer the court again to the same *Treatise of Pothier, part* 1, *sec.* 2, *art.* 1, *n.* 13, *p.* 9, where it is said, that we cannot purchase property of which we have the administration. That a tutor cannot purchase property belonging to his ward, &c. but that the nullity of these sales is not absolute, like that of the property out of commerce; that the nullity is only pronounced against the tutor in favor of the minor; that it is established to prevent the frauds of a tutor, who, for his own interest, might be induced to purchase at too low a price; or to become the purchaser of those things which it was not the interest of his ward to sell; and fur-

ther on, under *n.* 14. the author says, that there is also reckoned among things which cannot be sold, *les heritages et autres immeubles des mineurs, &c.* That these things can only be sold for some just cause, in virtue of the decree of the judge, and on observing certain preliminary formalities. But continues the author, *la nullité de la vente de ces choses n'est aussi qu'une nullité relative, etablie contre l'acheteur, qui n'en peut opposer la nullité.* The author then goes on to state, that if a third person sells, as belonging to himself, *un heritage*, a piece of ground which belonged to the church, to minors, or to other persons similarly circumstanced, the sale is valid, *de méme que nous avons vu que l'étoit la vente de la chose d'autrui.* It had formerly been supposed by some, that the *art.* 1599 of the *Napoleon Code* had changed the ancient laws of France on this subject. The article is in these words, *la vente de la chose d'autrui est nulle—elle peut donner lieu á des dommages—interests, lorsque l'acheteur a ignoré que la chose fut â autrui.* Many decisions have, however, taken place in France, subsequent to the adoption of this article, which shew, that even now the sale of minors property, without pursuing the necessary formalities,

for such sales are not considered absolutely void; that the nullity is considered merely relative, and only to be taken advantage of by the minor himself. In a work entitled *Jurisprudence du Code Civil.* I have found many decisions which go to support the general principle, that the omission of a formality established in favor of minors, can only be objected to by them, and cannot benefit others. In *vol.* 8, *p.* 147, of this work, the following principle is decided, as stated by the author, *to wit*, *La restitution des mineurs ne profiterait point aux majeurs.* In *vol.* 16, of the same work, *p.* 456, the following principle is decided, as appears from the author's note at the head of the case reported. *On ne peut opposer au mineur le defaut d'autorisation dans les actes òn elle est impèrieusement exigée par la loi.* In *vol.* 21, *p.* 294, of the same work, the following note is at the head of the case decided. *La nullité résultant de ce que le tuteur n'a pas été autorisé pour plaider n'est relative qu'au mineur, et ne peut être invoquée par l'autre partie. Voyez ce que nous avons dit sur les nullités, p.* 65, *et* 356, *1er volume de cet ouvrage.* On referring, as directed by the above note, I find the following remarks in *p.* 65. *Nous observerons d'abord*

que les nullités se divisent en absolues et en relatives. Les premieres proviennent de la violation d'une loi dont l'interet public est le principal objet; tout individu a le droit de les opposer; teles sont celles resultant de la contravention aux art. 144, 147, 161, *et suiv. du Code. Les secondes naissent de l'infraction d'une loi qui ne concerne que l'interêt privé des parties. On en voit de examples dans les art.* 180, *et* 182. But in *vol.* 17, *p.* 432, of this work, there is a case in which the *art.* 1599 of the *Code Civil*, before quoted, is fully discussed. From the report of this case, it appears, that one Pasquale sold to a madame Panialis, at private sale, an estate belonging to his children. The purchaser, after enjoying, without disturbance, for three years, brought suit against Pasquale and his children, to get the sale annulled, pretending that it had not been made in conformity with the *articles* 452 and 457, of the *Civil Code*. But as these articles do not expressly declare that sales made in contravention of them, shall be null, she probably despaired of success, and abandoned the suit. At the same time, however, she commenced a new suit against Pasquale, the father, claiming that the sale should be annulled, as being in violation of article 1599.

West'n District. Sept. 1821.

MELANÇON'S HEIRS vs. DUHAMEL.

It is scarcely necessary to add, that the court decided against her pretentions. The court, in giving their opinion, observe, *p.* 438, *Le vendeur dans le cas dont il s'agit, n'est point un tiers non interessé qui dispose sans l'aveu du proprietaire de la chose d'autrui, mais il est un mandataire que se charge de l'interet du proprietaire, qui promet en propre de l'exécution du contrat, et de la ratification de celui an nom duquel il vend. La vente dans se cas se resout en une vente sous la condition de la ratification du proprietaire à être rapportée par le vendeur, mais dés le moment où cette ratification ou expresse ou tacite existe, le contrat est parfait, et la condition est remplie.* So in the present case, admitting the proceedings relative to the meeting of family to be irregular and void, the vendors can be in no worse situation than they would have been without any such proceedings. The nullity of the sale could only be regarded as relative, and not absolute. On being hereafter ratified by the minors, it would become perfect and complete, a condition impliedly stipulated in the act of selling; and the performance of which is further expressly guaranteed by offering security. Besides, if the sale were

totally void, its nullity might as well be asserted by the widow and majors, as by the minors. But would it not be perfectly ridiculous for the former to attempt such a thing?

Once more, for the last time; to sell the property of minors without observing the formalities prescribed by law, concerns only the private interests of the parties. It does not concern, chiefly, the public interest; and for this reason, the nullity is merely relative; which is in perfect accordance with the principles extracted from the 1st vol. of the work before referred to.

Baker, for the defendant. The *Civil Code* is quoted to prove, that before the act of 1811, it was the duty of the parish judge to proceed to the sale of an estate, within convenient time after it was opened. The first quotation, 174, *art.* 128, relates to vacant estates, and can have no application here.

As to the second, 68, *art.* 56, we find immediately after, in *art.* 58, that it is required that "the judge, at the time of authorising the sale, shall fix, with the advice of the meeting of the family, the several terms of credit at which the minor's property shall be sold, as

West'n District. *Sept.* 1821.

MELANÇON'S HEIRS vs. DUHAMEL.

well as the rate of interest, the securities to be given by the purchaser, and the other conditions of the sale, as the case may require." The act of 1809. 3 *Martin's Dig.* 128, *n.* 12, declares, that "whenever the estate of the minor shall consist of property not liable to decay or repairs, such as uncultivated lands, or lots not built on, the tutor shall not be at liberty to sell the same, but it shall be his duty to keep the same for the minor, unless he is authorised by the judge to sell either the whole or a part of the same, whenever said judge shall be satisfied, by and with the advice of the under tutor, and of the assembly of the family, that this sale is indispensably necessary to, or evidently to the advantage of the minor." The extract just made from the *Civil Code*, proves that the sale must be made with the advice of the meeting of the family, a legal and indispensable requisite; and further states, the particular objects, about which they are to consult, advise and deliberate. I make the other extract from 3 *Martin*, 128, to shew the general provisions of the law, in submitting the concerns of successions where there are minors, to a meeting of the family; and most respectfully submit to the court, if a meeting of

the family under this section, does not become necessary, where any part of the minor's estate consists in unimproved lands, which never fails to be the case, in any country part of this state, where land is a part of the inheritance.

Thinking it is made sufficiently obvious, that before 1811, a meeting of the family was absolutely necessary, to decree the sale of a minor's property, the terms, credits, &c., let us examine if any change was made in the laws then existing, by the act of that year, dispensing with this preliminary.

The first section of this act, 3 *Martin's Dig.* 132, *n.* 19, declares, " that from the passing of this act, the property of minors shall be kept unsold, unless the tutor, with the consent of the under guardian, and of at least five of the nearest relatives of the minor, or of an equal number of friends, if there are no relations, duly sworn to declare the truth, the whole truth, and nothing but the truth, shall declare, that it is for the interest of the minor that the said property, or part thereof, be sold." The repealing clause at the end of this act, see 3 *Martin's Dig.* 136, *n.* 25, only repeals certain devisions in the *Civil Code*, and of the act of

West'n District. Sept. 1821.

DELANÇON'S HEIRS vs. DUHAMEL.

March 18th, 1809, as "are contrary to this act;" and the whole of the law must be considered as amendatory of the former laws, except where their provisions are directly contrary. The relations or friends, named in the section quoted above, at full length, it is true, are not called a meeting of the family, in express terms; but this assembly, consists of the same precise persons, required to compose a meeting of the family, by *art.* 21, *page* 62, of the *Civil Code*, it can be called by no other name, or considered as any thing else. One of the objects of the section under consideration, seems to have been to add the tutor and under guardian to the meeting; their consent to the sale, along with that of the five friends or relatives, being also required. The section also demands, that those who make the declaration it ordains, should be "duly sworn to declare the truth, the whole truth and nothing but the truth," a solemnity which gives their proceedings at least much the character and authenticity of an award of arbitrators; and like arbitrators, the members who compose the meeting act under an order of a court, which has complete and entire jurisdiction in the matter submitted to them. This

same law, decreeing that the property of minors shall be kept unsold; without such a declaration, it becomes an indispensable preliminary to a sale of their property: and how, let me ask, is this declaration to be had without a meeting of the tutor, under guardian, and five of the nearest relations or friends, by an order or decree of the judge of probates to that effect.

The practice has been under this law, to hold the proceedings of the persons named in this act, before the parish judge, who generally signs with them, and this must be what the law contemplated. That the judge does this, sitting as a court of probates, is a natural consequence, and the declaration when made, cannot be considered any thing else but a judicial proceeding. To perpetuate the testimony of such a necessary deliberation, or decision, (I care not by what name it be called) it must be submitted to writing, to shew that the court of probates has caused all to be done which the law requires, to render valid the sale of a succession, where minors are concerned. All sales and transfers of real estate, must be made by public acts, or under private signature, and surely, where minors are

West'n District. *Sept.* 1821.

MELANÇON'S HEIRS *vs.* DUHAMEL.

concerned, the law does and will require all necessary proceedings, to perfect the sale of their real estate and slaves, to be written.

The 3d sect. of the act of 1811, 3 *Martin's Dig.* 134, *n.* 21, says, "nothing contained in the preceding sections shall be construed, in any case, in such a manner as to prevent the sale of minors property, should said sale be necessary, either for the payment of the debts of the estate, or for the division thereof; when there are heirs, who having attained the age of majority, or being emancipated, shall claim their portion of the same. *Art.* 156, from *p.* 184, and *art.* 171, from *p.* 188, of the *Civil Code*, are brought forward by the appellant's counsel, to support this authority just given from the act of 1811; and he argues from thence, that the sale must take place under the circumstances described therein; and is good even without the usual formalities.—Allowing for a moment this construction of the law, to be a sound one, does the evidence submitted, shew the situation of Melançon's estate to have been such as to have made a division impractible? The extract from the process-verbal, made by the adverse counsel, may leave an inference that there was only

one plantation, but cannot be so construed as to be evidence that there was no other land belonging to the succession. It is quoted from the inventory, as lot No. 57, and according to the usual mode of inventorying an estate, by putting the most valuable lots first, leaves a strong inference that there were many lots more valuable. Those indivisible successions, however, being exceptions to the general law, I conceive, before any benefit can be taken of such an exception, evidence must be produced that this case is not to be governed by the common rule.

My opinion, however is, that a meeting of the family, such as is required in the 15th section of the act of 1811, acting with the judge superintending their deliberations, to keep them within the law, is the proper tribunal to decide if an estate is so circumstanced as to make a sale necessary. The meeting is composed of the nearest friends or relatives, who know all the concerns of the succession, and as the relatives or friends of the heirs, must be supposed best qualified to judge of their interest.

This is the only true construction: otherwise the first section of the law of 1811, which

West'n District. *Sept.* 1821.

MELANÇON'S HEIRS *vs.* DUHAMEL.

seems to contain the main intention of the legislature in passing it, would be a dead letter; for on any other construction, it would be in the power of the major heir or heirs, in every estate where there are minors, to force a sale, by alleging the estate indivisible.—Whether it be expedient for the estate to be sold, is for the tutor, under guardian and relatives or friends to decide, as ordered by the act of 1811; and the law gives them authority in the clauses pressed into service by the learned advocate, to sell if they see fit; and points out the circumstances which demand and require such a decision; making them, however the proper judges to decide what should be done, when sworn and called in to act.

A demand of some of the major heirs is also required by the third section of the act of 1811, and the articles cited in support of it from the *Civil Code.*

No demand in this case is proved to have been made, and the presumption follows, that none was ever made.

The circumstance of several of the major heirs having acted as members of the family meeting, and having recommended the sale,

proves no demand of sale; but is, on the contrary, a strong proof that their intention was to proceed in the usual judicial manner, to determine if a sale was needful. The instrument was illegal and faulty, but being essentially necessary, they must suffer the consequence of their own indiscretion and irregular procedure.

II. The principle attacked by the plaintiff's counsel, is fully decided in the case of *Tregre* vs. *Tregre*, 6 *Mart.* 665, and little more is needful than to refer to it. We find in the margin this summary of the case, made no doubt, by the reporter—"parol evidence cannot be received of the irregularity of the proceedings of a family meeting before the parish judge; if such proceedings be written in French, they will be set aside." The text is still more explicit, and that part of the decision which relates to the proceedings before the judge, consisting almost entirely of the acts of a meeting of the family, ends in these words:—"but having no doubt that the acts of a judge, presiding as such, to the partition of an estate, and decreeing the adjudication of it according to law, are stamped with the character

West'n District. *Sept.* 1821.

MELANÇON'S HEIRS vs. DUHAMEL.

of judicial proceedings, it is our duty to declare, that unless such proceedings are written in English, as the constitution directs, we are bound to pronounce them void."

To me it seems, that this case is exactly in point, and embraces the matter in controversy, in all its points and bearings. That decision, though other matters are decided in it, turns principally on the proceedings of the family meeting having been in French, pronounces them "judicial proceedings," within the purview of the constitution, and declares them void. There are majors and minors among Melançon's heirs, as in the case of *Tregre* vs. *Tregre*. The proceedings of the family meeting filed here are in French, and were made before the parish judge, in his capacity of judge of probates.

Much has been said of the proceedings of the meeting of a family, being a merely notarial and not a judicial proceeding. Independent of the opinion of the court, in the case last quoted, being in positive contradiction to this notion; the decision in the case of *Durnford* vs. *Seghers' syndics*, 7 *Martin*, 409, contains matter enough to put the question at rest. It regards the proceedings of the meeting of creditors of an insolvent, which are generally had

before a notary as judicial proceedings; allowing then, that the judge acts as a notary, pending the proceedings of the family meeting, it does not alter their character. Among the papers filed in this case, however, next after the meeting of the family, written in French, we find the following order from the court of probates:—

"Let the foregoing proceedings of the meeting of the family, had before the parish judge of the parish of St. Martin, on this day, the 4th of February, A. D. 1819, be homologated, and the same executed according to its tenor.—Therefore it is ordered, adjudged and decreed, that all the property composing the community, between Charles Melançon, deceased, and Scholastique Bourgeois, his widow, except the negro woman named Sophie, and her child named Etienne, be sold at public auction, in manner and form as recommended by the meeting of the family." Even without the lights cast on the subject by the decisions in *Martin*, does not this paper make it sufficiently clear that the family meeting was a judicial proceeding of the judge of the court of probates, not acting as a notary, but in his character of judge? First, he orders the pro-

West'n District. *Sept.* 1821.

MELANÇON'S HEIRS. *vs.* DUHAMEL.

ceedings to "be homologated, and to be executed conformably to its tenor." The property of the community is moreover decreed to be sold, "in the manner and form recommended by the meeting of the family;" and as this instrument is void and defective, the sale made by virtue of it is also void, and all obligations made in virtue of it, extinguished.

The policy of the provision in the constitution is most apparent, and it cannot be intended that it should have any other construction than was designed by congress.

What the intention of that body was, appears in an "act to enable the people of the territory of Orleans, to form a constitution and state government, and for the admission of said state into the union, on an equal footing with the original states, and for other purposes." 1 *Martin's Dig.* 212, 16. "That after the admission of the said territory of Orleans, as a state, into the union, the laws, which such state may pass, shall be promulgated, and its records of every description, shall be preserved, and its judicial and legislative written proceedings, conducted, in the language in which the laws and the judicial and legislative written proceedings of the united states

are now published and conducted." It is notorious that the convention accepted the conditions offered by congress; so that in construing our constitution, we are to look to the law admitting us into the union, in which, in the portion just extracted, we may discover the intention of the national legislature, to have been to hold out the strongest inducement to the newly acquired population, to become acquainted with the national tongue, and as early as practible, to wear out every mark of difference which might distinguish them from the rest of the American people.

Is it not the policy of every wise government to destroy all distinctions which operate against the perfect union of its people; and is there one to be found more formidable than that of language? Men must understand each other before perfect harmony can exist among them; and this can never be the case till the same language prevails.

A few Germans of Pennsylvania, and perhaps one-third of the population of Louisiana, are all the citizens of the united states. who cannot express themselves freely, and transact all their business in the English language. Whether those people, politically speaking, become acquainted with our language, is a

West'n District. *Sept.* 1821.

MELANÇON'S HEIRS vs. DUHAMEL.

matter of no very vital concern to the grand majority of the nation; but certainly it most nearly regards those people themselves. who cannot, even with all the spirit of liberality mingled in our institutions, come to a full and entire enjoyment of their best rights and privileges, till they speak the English language. Our convention accepted conditions, and engrafted a provision in our constitution, which virtually disqualify all those who do not understand English, for any place in any department of our judiciary. Civil situations under the general government, appointments in our army and navy, all require an acquaintance with English, to discharge the several duties they impose.

Will not the French population then be the greatest gainers by a change of their language? Instead of being an isolated people, will they not then arrive at the entire enjoyment of the high prerogatives of American citizens? Their feelings will become wholly American. They will inspire general confidence, and we will see that worth and gallantry which was of late so distinguished for martial prowess. unfolding new sources of genius and mental excellence, to add to the

strength and glory of a great nation. Habits and early prejudices may bind this portion of our fellow citizens to the language of their fathers; but their best interests, commercial and political, must daily lessen their prejudices against the English tongue, if any such prejudices really exist. There are very many enlightened fathers among the population, who speak French, that will not neglect the best interests of the rising generation; and the daily and constant intercourse among all classes, has already so far introduced the English tongue into the state, as to make it every where in very general use. All judges and lawyers speak that language, and it certainly operates no great hardship to have all the written judicial proceedings in it. Add to this that all judges of probates, have always had before their eyes the constitution, laws and decisions which require those proceedings to be in English, and if they failed to act and decree, according to law, and in legal manner and form, their decisions, and all things dependent on them, are an absolute nullity.

Clamour and detraction have been busy and violent in attacking this court of late, for deciding as they are sworn to do, under the

West'n District. *Sept.* 1821.

MELANÇON'S HEIRS *vs.* DUHAMEL.

oaths they have taken, that certain proceedings in French were null.

The constitution, which all should hold sacred and revere, has for the wisest purposes fenced round the judicial authority, in such a way as to keep it sacred and inviolable from the sudden gusts of party and faction, which may assail it. The fearless integrity, and unyielding independence of the judges, must fulfil the noble design contemplated by the constitution, and act the part intended by their creation. One uniform rule of conduct is needful for this high tribunal, and essential to the best interests of the state. The patient may recoil at the necessity which lops off a decayed or mortified member, but the surgeon must go on fearlessly, and finish the operation. Let it be firmly and promptly decided, that the letter and spirit of the constitution shall be adhered to, and we will daily hear less and less of the hardship of obeying the laws; a hardship, however, which only springs from the neglect or caprice of its functionaries. If things of this kind have been illegally done in settling successions, it is certainly a singular application to this high tribunal, to descend from its high duties, to cob-

ble up the acts and decrees of inferior judges. The laws exact obedience, and experience in all ages and nations proves that their strict execution is ever attended with the most beneficial results.

III. That the price of a thing sold at a sale, which is declared illegal, null and void, should be recoverable, is a strange doctrine.

The decisions from *Martin* hitherto noticed, go to prove the sale, without the necessary formalities, void; but the civil law authorities all concur in declaring sales of this kind absolutely null. In *Domat*, *tit.* 2, *sec.* 7, *art.* 4, we find, *Les mineurs, ceux qui sont interdit et autres personnes qui n'ont pas la disposition de leurs biens, ne peuvent les vendre, et leurs ventes sont nulles, si elles n'ont été faites dans les formes.*

In a note to *art.* 6, of the same section, regarding the estates of minors, it is said, *ils peuvent etre vendus aussi par autorité du tuteur ou curateur avec l'avis de parens; mais en ce dernier cas les mineurs peuvent se faire restituer s'ils sont leses.*

Other authorities, *viz.* 2 *La clef des lois Romaines*, 728, *Napoleon Code*, *art.* 452. *Idem. art.* 457, all go to establish the same doctrine.

The good faith of the defendant is attacked,

West'n District. *Sept.* 1821.

MELANÇON'S HEIRS *vs.* DUHAMEL.

because, forsooth, he refuses to pay a large sum for a tract of land, which still in the sight of the law, virtually and absolutely belongs to those who sold it. True it is, the plaintiffs hold a deed null and void in law, in which they are bound to pay. The sale being made by the parish judge, the defendant had much reason to give due faith and credit to the acts of the judge; but if those acts and proceedings were illegal and unconstitutional, is it not absurd to say, they shall be void with regard to all the parties, except that party who is most materially effected by that nullity?

A number of authorities are cited to prove, not that a nullity can be enforced, but that the buyer, in ordinary cases, cannot refuse payment of the price of the thing sold, though it be the property of a third person, when it is delivered and warranted, unless he be actually evicted by the title of a third person; or after a suit instituted by such third person, and even in the latter case, he will have to pay his obligation, if the seller give security against the claimant. The whole law is laid down in the case cited from 7 *Martin*, 223, and alludes to claims of third persons not parties to the contract, and cannot certainly affect this case.

A tract of land has been sold by the decree of a family meeting, which belongs to the succession; the sale was made by the parish judge, and for want of legal requisites, becomes null and void. The land still belongs to the succession, to the widow, the major heirs, and the minor heirs of Melançon; and the obligation given, in consideration of that sale, as a price of property, which is still in the vendors, must certainly be extinguished.

If we are liable to damages, or ought to make compensation for the use had of the property, it will be time to discuss that point when something of the sort is required of us.

We do not complain of Melançon's heirs having sold us the property of a third person; or at least, we do not rely on that to annul our obligation, but we do contend, they cannot force us to pay the amount claimed as the price of a thing which is still theirs.

It is said, it was the defendant's business to bring a suit to annul the sale, if it were really defective, and he wished it annulled. The defect, however, goes to the very essence and origin of the contract. The defendant was advised, as he states in his answer, that the sale was null in law, and properly con-

West'n District. *Sept.* 1821.

MELANÇON'S HEIRS *vs.* DUHAMEL.

ceived himself absolved from his obligation, without the vexation and expence of a law-suit.

A last attempt is made, to prove that this sale, though null, is a mere relative nullity, and as such can be taken advantage of by the minors only. This view of the case cannot prevail; for when the original sale, the single act, which at the same time, transfers the property, and binds the defendant, is annulled: that nullity is so active, that it becomes absolute. A slight notice of the authorities adduced to bolster up this singular opinion, will close my argument.

The first authority is from *Pothier*, *Traité du Contrat de vente*, which goes to shew, what we never thought of denying; *to wit*, that a purchase, made by the tutor of his ward's property, cannot be set aside, but at the will of the minor; and can be made valid by his confirmation. This would be good authority in a controversy between a tutor and his pupil; but has nothing to do with the constitution of this state, and the rule of succession to persons who are not acting as tutors or curators. Several of the gentleman's authorities from *Jurisprudence du Code Civil* are to the same effect.

MARTIN, J. The defendant was sued for the price of a tract of land purchased by him, at the auction of the property of the estate of the deceased. He pleaded the general issue; averring, that one Broussart forbid the sale, &c., and that the judicial proceedings in the inventory and sale of the property, were carried on and conducted in the French language.

The district court was of opinion, that the plaintiffs had not substantiated their claim, and gave judgment for the defendant. They appealed.

The statement of facts shews, that the plaintiffs gave in evidence, an extract of the process-verbal of the sale of the property of the estate, subscribed by the defendant and one Latiolais, as his surety, whereby it appears that the property was struck to him: also, the proceedings of a family meeting, recommending the sale, and the decree of the judge authorising it; the process-verbal and the proceedings of the family meeting are in the French language and the decree is in the English.

The parish judge deposed, that immediately after the sale, the defendant took pos-

session of and still retains the estate, and has made a crop thereon.

The plaintiffs' counsel contends, that no family meeting was necessary; that the proceedings of such a meeting, in the present case, may be recorded in the French language; that admitting that a meeting was necessary, and its proceedings could not be recorded in French, the objection cannot avail the defendant.

Our task may be shortened by taking up the last proposition first.

The *Civil Code* requires, that the property real and personal, of minors, be sold by the tutor, *Civil Code*, 68, *art.* 56, and he must be authorised by the judge, *id.* 57. The act of 1811 provides, that this sale shall not take place, unless a certain number of the relatives recommend it. 3 *Martin's Dig.* 132.

Hence, the sale is not necessarily to be made by the judge, but must be by the tutor, and through an auctioneer; for minors property must so be sold; but certain formalities must precede it.

Here then, the process-verbal of sale is, in my opinion, the evidence of the sale by the tutor, through an auctioneer, *i. e.* through the parish judge, in his capacity of an auctioneer;

and in parishes in which there are other auctioneers than the judge, the assistance of the latter is needless in the sale; though he must authorise it. I consider then, this process-verbal as the act of an auctioneer, evidencing a contract made by his ministry; and such a contract may be recorded in the French language.

I therefore conclude, that the plea of the general issue is supported.

Admitting that the family meeting was required by law, and that its proceedings, if recorded in the French language, are a nullity, the case cannot be better for the defendant, than if there had been no such meeting; no recommendation by any of the minor's relations.

The want of such a meeting or recommendation cannot be alleged to avoid a sale on the part of the vendee.

The formalities which the law has established to protect minors, in the sale of their estates, are exclusively established for their benefit. If they are omitted, they alone can avail themselves of the omission and avoid the sale. But the vendee cannot refuse complying with his obligation, because some of

est'n District. Sept. 1821.

BELANÇON'S HEIRS vs. DUHAMEL.

the formalities which the law requires, have not been attended to. *Pothier, Vente, n.* 14.

There is not any evidence to support the allegation, that Broussart forbid the sale, &c.

The use of the French language in the inventory, and the proceedings relating thereto, cannot certainly affect the sale.

I think the district judge erred. We ought to reverse his judgment, and ours ought to be for the plaintiffs, with costs of suit in both courts.

MATHEWS, J. As the important question relative to the effect of proceedings had by family meetings, for the purpose of giving advice in the disposition of the property of minors, is not decided by this opinion, I deem it unnecessary further to investigate this case; being satisfied with the points adjudged therein, for the reasons adduced.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and this court proceeding to give the judgment, which in their opinion, ought to have been given below, it is ordered, adjudged and decreed, that there be judgment for the plaintiffs with costs in both courts.

BROOKS' SYNDICS vs. *HAMILTON.*

West'n District
Sept. 1821.

Brooks' syndics
vs.
Hamilton.

If in a commercial partnership it be provided that real estate shall be purchased for the conveniency of carrying on trade, and one of the partners purchases upwards of 20,000 arpents, the purchase will not bind the others.

Appeal from the court of the seventh district.

Martin, J. The plaintiffs state, that their insolvent, the defendant, and Miller were partners; that the affairs of the partnership in Washita, were carried on under the firm of Hamilton & Miller; that the capital was to be furnished by their insolvent, and the other partners were only to yield their care and industry; that the profits and losses were to be divided, one half to their insolvent and one quarter to each of the other partners. That their insolvent purchased goods to the value of $15,875 19 cents. That $3,929 52 cents alone were received, and the balance of the monies and debts of the partnership, were applied by the defendant, to his own use.

The answer denies the plaintiffs to be the legal representatives of Brooks; avers he is dead, and his legal representatives are not parties to the suit; that the articles of partnership contained a clause, that all differences should be settled by arbitration; finally, the general issue is pleaded.

By a rule of court, arbitrators were appointed, and it was ordered, that their award should be the judgment of the court.

West'n District. Sept. 1821.

BROOKS' SYND. vs. HAMILTON.

They found $17,316 22 cents, in favour of the plaintiffs, and $9806 28 cents in favour of Hamilton & Miller, making the total amount of the property of the concern $27,122 50 cents. Entertaining a doubt of their authority to estimate the property, they observed, that the statement they had made will shew the respective situation of the parties.

The court confirmed the award, and decreed, that the parish judge make a partition of the land, according to the spirit and meaning of the award; that the plaintiffs pay all costs before the submission to the arbitrators, and the rest be equally borne by each party. The plaintiffs appealed.

The counsel shews, that according to the articles of partnership which accompany the record, the sale of goods and merchandise was the only object of the partnership, and real estate was only to be purchased when necessary, for the purpose of conveniency in carrying on the joint trade; and 20,638 arpents are said to have been purchased by the defendant, on account of the partnership, and directed by the award to be divided among the partners. In *Kemper* vs. *Smith*, 3 *Martin*, 627, this court held, that in a commercial

partnership, all mercantile transactions of one of the partners are binding on the others; but it would be monstrous to make the latter answerable for any act of the former, out of the course of trade. A partner must be considered as vested by his co-partners, with certain powers for certain purposes. If he travel out of these, his acts can no more be binding on the others, than those of an attorney, who exceeds his powers, are obligatory on his constituents.

The plea to the persons of the plaintiffs appears to have been waved.

I think the district judge erred in directing a partition of the laws; the case must be remanded, with directions to the district judge to proceed therein according to law.

MATHEWS, J. concurred.

Bullard for plaintiffs, *Thomas* for defendant.

CALVIT vs. *INNIS.*

APPEAL from the court of the sixth district.

The prescription of ten years does not run against a minor.

MARTIN, J. I have examined the opinion which judge Mathews has prepared in this case, and concur therein.

West'n District. Sept 1821.

CALVIT vs. INNIS.

MATHEWS, J. The appellant, who was plaintiff in the court below, claims a tract of land described in his petition, by a title derived from S. Cuney, which is evidenced by a requete and order of survey, under the Spanish government, and a confirmation by the land commissioners of the united states.

The defendant and appellant sets up a title of the same kind, as that under which the plaintiff claims. granted to his brother, who is dead, and whose estate he claims as heir, posterior in date to Cuney's, but which he attempts to carry back to an anterior period, by fixing it on a place formerly claimed by one Points. He also claims by prescription, under a possession of more than ten years.

As there is no evidence of the nature of Points' claim, nor of a transfer of his title, whatever it may have been, to the defendant or his brother, it cannot be noticed in the decision of this court.

There is no dispute as to the *locus in quo*, and the title under which the plaintiff claims, being of equal dignity and solemnity with that of the defendant, but anterior in date, he must recover the premises in dispute, unless he has lost his right by latches, in

suffering the defendant to remain in quiet possession during a time sufficient to gain a title by prescription.

It is believed that prescription might have produced this effect, had it not been for the minority of the grantor, under whose title the plaintiff claims, as shewn by the evidence in the cause. It being a clear principle of law, that a possessor cannot avail himself of prescription against minors.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Bullard and *Wilson* for the plaintiff, *Baldwin* and *Thomas* for the defendant.

INNIS vs. *MILLER & AL.*

APPEAL from the court of the sixth district.

In order that the possessor may unite the possession of his predecessor to his own, that of the latter must have been in good faith—it must be continued, and without interruption—it must be that which he had at the time of the tradition.

MARTIN, J. I concur in the opinion which judge Mathews has prepared in this case.

MATHEWS, J. The plaintiff claims a tract of land at the mouth of the bayou Castor, of twelve arpents in front, with the usual depth, to run with the bayou Jean de Jean. He

st'n District. *ept.* 1821.

INNIS vs. LER & AL.

founds his title on a requete in the French language, addressed to the proper authority of the French government, while it exercised jurisdiction over the province of Louisiana, an order of survey, and the confirmation of the land commissioners of the united states.

His title is opposed on two grounds: —

1. That the land claimed, if it were located properly, according to the requete, would not interfere with the land occupied by the defendants; and that being in possession, they ought not to be disturbed, as the plaintiff's title does not cover the land in dispute.

2. That admitting the plaintiff's claim to be properly located, they have a better title than him, founded on possession and prescription.

In determining on the propriety of the plaintiff's location, it is necessary to attend particularly to the contents of his requete. He there states, that he is desirous of forming his establishment on the bayou Castor, and prays for twelve arpents in front, at its mouth, running on the bayou Jean de Jean, with the ordinary depth. These calls have been considered by the commissioners, and the surveyor of the united states, as giving to the claim-

ant his front of twelve arpents on the bayou Castor, and to run with or on the bayou Jean de Jean, for the ordinary depth of forty arpents. I do not profess to have much knowlege of the language in which the requete is written, as to the force and effect of its idioms or phraseology. In translating the expressions literally into English, although there is some ambiguity as to the location of the front of the plaintiff's land, I am of opinion, they have been well construed by the commissioners and surveyor, in adopting the meaning above cited, which seems to be conformable to the intentions of the applicant. The evidence of title has been viewed in the same light by the court *a quo*, and I do not believe it erroneous.

In relation to the title set up on the part of the defendants, by prescription, as they have not been in possession under their purchase, made in 1809, a sufficient length of time to give them a prescriptive right, they claim the privilege which the law allows in certain cases, of uniting their own possession with that of their predecessor. Being possessors, *â titre singulier*, as expressed by *Pothier* in his *Traité de la possession et prescription*, three things

West'n District. *Sept.* 1821.

INNIS *vs.* MILLER & AL.

must concur, in order that they may unite the possession of their predecessor to their own:—1. He must have possessed in good faith and under colour of title. 2. It must be continued, and without interruption. 3. It must be that which the possessor had at the moment of the tradition.

The defendants have failed to bring themselves within either of those rules.

The possession of Procella, under whom they claim, in virtue of a sale made by the parish judge in 1809, cannot avail them, because he had previously sold and delivered a tract of eight arpents in front, part of which is the land in dispute, to one M'Lauchlin, who held it for some time; and it does not appear that Procella was ever afterwards in possession; but admitting that the latter held possession, at the time of the transfer to the defendant, no title whatever is shewn in him. I conclude, that they have failed to establish a title by prescription.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Wilson for the plaintiff, *Bullard* for the defendants.

MURRAY vs. *BOISSIER.*

APPEAL from the court of the sixth judicial district.

If the plea of the general issue be followed by an averment, that the defendant has a better title than the plaintiff, the averment does not controul the plea.

The plaintiff, *in propriâ personâ.* The plaintiff and appellant, claims a tract of land, of ten arpents front, with the ordinary depth on each side of the bayou, or river Conan. His claim is founded on an order of survey, in the name of Marie Antoine, a sale from her to David Case, in whose name the claim was confirmed by the commissioner's report and the act of congress, and a sale from the said Case to the plaintiff. The plaintiff believed that the *locus in quo* was admitted by the answer of the defendant, and summoned no witnesses. He contends that the *locus in quo* is admitted by the defendant's answer, and if not, is proved by the notice of the defendant in the register office, which calls for "a tract of land at St. Maurice," and by the witnesses examined on the part of the defendant, who are particularly entitled to belief in this case, as they are the legal owners of all right that Pierre Derbanne had to the land, if any he had, as they declare themselves heirs, and that they have given no title "in writing" to the land.

West'n District. *Sept.* 1821.

MURRAY *vs.* BOISSIER.

The plaintiff's title is for a tract of land at a place called St. Maurice. The interested witnesses say, that the place called St. Maurice is a point of high land; the defendant's notice is for a tract of land at St. Maurice, at a point well known, and requiring no further description than the *locus in quo*, is admitted by the answer, or by the witnesses who has the best title.

The plaintiff has an order of survey for the land in controversy, regularly transferred to him by D. Case, for the sum of fifteen hundred dollars, as will appear by the sale in writing, and of record.

The defendant has a confirmation of the favorable report of the commissioners by congress, for as much land as has been conveyed to him by Pierre Derbanne's representatives. But this confirmation has been made in error, as will appear by comparing the testimony of a brother of the defendant, on which the report was made, and the testimony of the witnesses adduced on the trial of the cause. Boissier, the brother, proves an occupation, cultivation and possession, from 1786, until eight or nine years previous to the time of giving

his testimony in February 1813, which brought the claim under the act of congress. The witnesses examined in the cause, prove that the land was occupied without a title; that at the death of Derbanne, the claim was not inserted in his inventory; and that it is forty or forty-six years since the *vacherie* of his ancestor was removed from St. Maurice (the time is in figures, and doubtful which) and it has not been possessed by them since.

The confirmation is for so much land, not more than 640 acres, as was conveyed to the defendant, by the heirs of Derbanne; none has been conveyed on the contrary, the heirs of Derbanne (or some of them will not convey.) This, however, will have no great weight, except as to the quantity.

The case by their own statement is as first stated; the pleadings will shew that the *locus in quo*, is admitted, and the interested witnesses themselves prove it; I do not believe, that Brevel ever had a line established, it is consequently uncertain; the place called St. Maurice is certain, as I state above; the defendant, had he proved the facts, as they were before the commissioners, would not

West'n District. *Sept.* 1821.

MURRAY *vs.* BOISSIER.

have had any title under the acts of congress. I apprehend that in this case, as both persons call for St. Maurice, the court will give the preference to the title in good faith, against a title obtained in error, to give it no worse appellation.

Mills and *Bullard*, for the defendant. The appellant claims a tract of land ten arpents, front on each side of the river Conan, bounded above by the land of J. B. Brevel, and below by vacant lands, under the petition and order of survey of Marie Antoine, of which he says the appellee is in possession. The appellee is in possession of six hundred and forty acres, by virtue of a settlement right, confirmed to him by an act of congress, under the recommendation of the commissioners, which is in the same section of country, but it is contended is not the same land.

The evidence shews, that a *quartier*, or section of country, of considerable extent, on the Conan, is vulgarly known by the name of St. Maurice. The spot, where a man by the name of St. Maurice first settled, at a very early period, is the high point of land, where the defendant has made his improvements.

This point or *ecor*, is also called at this time, St. Maurice. This section of country is, what Marie Antoine calls in her requete, *le lieu vulgairement nommé St. Maurice.* Her requete has therefore, but one definite call; *to wit*, Brevel's land above. Now, it is clearly proved that Brevel's improvement was more than a league from the defendant's settlement, higher up the river. Marie Antoine, and those who claim under, have never made any settlement on their land; never had a survey made; never performed any of the usual conditions of an order of survey; but the title, such as it is, remained dormant, until the inception of this suit. There being but one definite call, the appellant is bound by it; he must take his land adjoining J. B. Brevel, and running down the bayou for his front, and he cannot recover of the appellee, unless he can shew, that such a location would cover the land occupied by the appellee. He must recover by the strength of his title, the *onus probandi* is on him. The evidence shews that Brevel was a league and half above Boissier, and in the *quartier*, or the place *vulgairement nommé St. Maurice.*

It is said by the appellant, that the *locus in*

West'n District. *Sept.* 1821.

MURRAY *vs.* BOISSIER.

quo is admitted by the answer. The first part of the answer is the general issue; a denial of all the facts and allegations contained in the petition. The most material allegation in the petition is, that the appellee is in possession of the land covered by the title of the appellant. If the appellee had gone no further, and had relied on a naked possession, is the evidence sufficient to have entitled the plaintiff to a recovery? The suit is in the nature of an action of tresspass; the fact of intruding upon the soil of the plaintiff, is the most essential to be made out. It was impossible for the defendant to be more particular in denying the identity of the land, in as much as the calls of the plaintiff's order of survey are not particularly set forth in the petition.

In addition to the expressions of the order of survey, there are other circumstances which induce a belief, that Marie Antoine did not mean the identical spot in the possession of the appellee. The family of Derbanne had occupied that place for many years, and it is not to be presumed, that she intended to ask for land already settled, or that the Spanish authorities would have sanctioned it.

There can be no doubt that Boissier has a

title out of government, a settlement right.— The manner in which he acquired it is not a question between the parties in this suit; if he has usurped the rights of the family of Derbanne, the certificate he had obtained, might be decreed in a suit between him and Derbanne's heirs to accrue to their benefit. The plaintiff cannot take advantage of that circumstance; by destroying our title he does not better his own.

In fine, neither title has ever been located, and there is land enough in the place commonly called St. Maurice, for both of them; the appellant can take a league and a half from Brevel's land, down the bayou, and still leave us in possession of our settlement; a surveyor in locating the order of survey, would commence at Brevel's line, and run down ten arpents; and this court, in deciding what the location ought to be, will do the same.

MARTIN, J. I concur in the opinion which my colleague is about to deliver.

MATHEWS, J. In this case the plaintiff and appellant claims a tract of land, of ten arpents in front, situated in the parish of Natchi-

West'n District. *Sept.* 1821.

MURRAY *vs.* BOISSIER.

toches, on the bayou, or river Conan, at a place called St. Maurice.

The evidences of title offered by him, are a requete, order of survey, and favourable report of the land commissioners of the united states, and confirmation by the act of congress of 1816.

The requete, which is the foundation of his title, calls for the place above stated, and prays for land to be bounded above by J. B. Brevel, and below by vacant lands.

The defendant pleaded the general issue and prescription. By an amendment to the answer, in the original plea, after a general denial of the facts contained in the petition, the defendant alleged he had a better title to the land claimed, than the plaintiff. This is relied on by the latter, as an admission of the *locus in quo*, and he urges, that in consequence of this admission he produced no witness below, to fix with certainty the location of his land, believing that the decision of the case depended entirely on the strength of the opposite titles of the parties.

The *onus probandi* is always placed on him who alleges a fact, when it is denied: but it is most clearly otherwise, when it is admitted

in the whole or in part. In the present case, a question arises, how far the general denial ought to be controled by the subsequent allegation of title. I am of opinion that this allegation does not impair the force and effect of the plea of the general issue. For should it prove to be true, that the plaintiff has no title to the land occupied by the defendant, it is clear that the latter has a better right to remain in possession than the former has to turn him out.

In a petitory action, the demandant must shew title, and make it out satisfactorily in all points, to entitle himself to a recovery, both as to title and identity of the land.

In this case the plaintiff has shewn a title for the quantity of land claimed in his petition, at a place vulgarly called St. Maurice. The defendant, by exhibiting the certificate of the land commissioners, and the act of congress of 1816, relating to land claims, has also shewn title to a tract of land, at the same place, of 640 acres, under what is called a settlement right, founded on no title, from the Spanish government, either in part or complete. I am inclined to think, that the title offered by the plaintiff is good, as to the land it

West'n District. *Sept.* 1821.

MURRAY *vs.* BOISSIER.

calls for. Nothing in the evidence, as it comes up with the record, shews that his title must be located on the identical part possessed by the defendant. On the contrary, it is proved by the witnesses introduced by the latter, who were properly admitted to testify, as they do not appear to have been called to support their own interest, that the place called St. Maurice, is a district of considerable extent, and that the land of Brevel, which the plaintiff calls for, as his upper boundary, is distant from that occupied and claimed by the defendant, about one league.

Upon the whole, I am of opinion that the plaintiff and appellant has not made out his title to the land in the possession of the defendant and appellee.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

LEPRETRE & AL. vs. *SIBLEY.*

The vendor may not avail himself of the exception *de non numeratâ pecuni* after thirty days.

APPEAL from the court of the sixth district.

MARTIN, J. The plaintiffs obtained an injunction against the defendant, who, they alleged, levied an execution issued on a judg-

ment, rendered on the 23d of June, 1820, on a tract of land, purchased by them, on the 30th of December, 1819, from W. Rousset, the defendant's debtor.

The defendant shewed, that he sold the land in question, to Rousset, (who afterwards sold it to the plaintiffs) for $2000, by a deed, in which the consideration was acknowleged to have been received, and averred, nevertheless, the $1000 for which he obtained judgment, were due on a note which he took from Rousset, as part of the consideration.

The injunction was made perpetual, and the defendant appealed.

The plaintiffs contend, that the defendant is estopped by his acknowlegement in the deed, that he received the consideration.

The defendant urges, that he is not, and that he may avail himself of the exception *de non numeratâ pecuniâ*, as the deed does not make any mention of the money having been paid in the presence of the notary and witnesses, nor of their exception having been renounced.

Febrero, in his second volume of the *Libreria de los escribanos*, *ch.* 4, *sec.* 8, *n.* 163, cited in *Berthole* vs. *Mace*. 5 *Martin*, 576, is of opi-

West'n District. *Sept.* 1821.

LEPRETRE & AL. vs. SIBLEY.

nion, that in a *carta de paga*, or other deed, acknowleging the payment of a sum of money, not delivered at the time of the execution of the deed, the payee ought to renounce the exception *de non numeratâ pecuniâ*, and refers to the *Partida*, 5, 1, 9, and the law *in contractibus* of the title *de non numeratâ pecuniâ* of the Roman *Code*. In the form of a deed of sale, in the last section of the fifth chapter of the same volume, he adds a clause, in which the exception *de non numeratâ pecuniâ* is renounced by the vendor, and informs us, that when the purchase-money is not paid in before the notary and witnesses, at the time the deed is executed, this clause is necessary, and refers to the *Partida*, 5, 1, 9. No other commentator of the Spanish law, on this subject, is within our reach at this place.

The law of the *Partida* cited, speaks only of the contract of loan, and *Gregorio Lopez* is of opinion, it relates only to that of *mutuum*, or loan of such things as are delivered by number, weight, or measure. He refers to the opinions of several Roman jurists, who confine the law *in contractibus* to this contract. Several French writers, among whom is *Desquiron*, think the exception *de non numeratâ pe-*

cuniâ, applied in Rome, to the contract of loan only. *Esprit des Institutes.*

In the third *Partida*, we have the forms of a great many deeds of sale, and I notice, that the legislator, with a single exception, in the form which he prescribes, introduces a clause, mentioning the payment of the money before the notary and witnesses, and in the only case which forms the exception, a clause is inserted, by which the exception *de non numeratâ pecuniâ* is renounced. *Gregorio Lopez*, in his note on this case, informs us, that the party has only thirty days to avail himself of this exception. He refers to the laws, *In contractibus et in Cœtreis*, of the title *de non numeratâ pecuniâ* in the Roman *Code.*

I think, that when the legislator prescribes forms with clauses, mentioning the numeration of the money, or the remuneration of the exception *de non numeratâ pecuniâ*, such clauses must be considered as evidence of his intention, that the purchase-money should be paid, at the execution of the deed, before the notary and witnesses; or the exception resulting from the want of such numeration renounced; of his intention to preserve to his subjects the benefit of such an exception, when it is not

West'n District. *Sept.* 1821.

LEPRETRE & AL. *vs.* SIBLEY.

renounced. Otherwise, why does he prescribe the enunciation? This seems to have been admitted by the defendant's counsel in *Berthole* vs. *Mace.*

The time within which the exception or plea may avail, is the next object of our attention.

In *Berthole* vs. *Mace*, this passed *sub silentio;* and the period mentioned by *Febrero* (two years) and the *Partida*, 5, 1, 9, was taken as the true one, by the counsel of both parties, and the court.

I have not found the exception *de non numeratâ pecuniâ* mentioned in any other part of the Spanish statutes, than the third and fifth *Partidas.* The former is silent as to the period within which it may avail, the latter mentions that of two years.

As the exception comes to the Spanish from the Roman law, it is in the latter that we must look for the solution of the question.

After a close and tedious examination, I find no mention of this exception in the *Pandects.* In the *Code*, it is mentioned only in the title, in which it is treated *ex professo.* In the institutes, there are two titles relating to it. *C.* 4, 30. *Inst.* 3, 22, *et* 413.

This distinction appears to me to be clearly established. When the acknowlegement of the receipt of the money is made *onerandi causâ*, by a person who binds himself to repay it, or to give or do something therefor, as in the contract of loan or the like, the party may avail himself of the exception, within two years. But, when it is made *liberandi causâ*, to dissolve the obligation of the payee, as in the contract of sale, and the like, the period is of thirty days only.

In the present case, the acknowlegement of the payment was made by the vendor, *liberandi causâ*, to disturb the obligation of the vendee, to pay the price.

The note taken by the vendor from his vendee, is a counter letter, which, according to the *Civil Code*, cannot prejudice a third party.

I think the opinion of *Lopez* ought to prevail over that of *Febrero*, and that we ought to affirm the judgment of the district court with costs.

MATHEWS, J. Having examined the laws to which judge Martin refers, and being perfectly satisfied that his interpretation of them is correct, I concur in his opinion.

West'n District. *Sept.* 1821.

LEPRETRE & AL. *vs.* SIBLEY.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Bullard for the plaintiffs, *Baldwin* for the defendant.

FLEMING & WIFE vs. *LOCKART.*

If a sheriff sell a runaway slave without fulfilling the formalities which the law requires, and in consequence the negro be recovered from his vendee, the latter may recover damages therefor.

In such a suit, notice to the sheriff of the former suit need not be proven to have been given him, that he might defend his vendee, but he may shew any thing which his vendee might have shewn to resist the claim of the former owner of the negro.

APPEAL from the court of the sixth district.

MARTIN, J. The plaintiffs seek to recover damages, on account of a negro (sold as a run-away by the defendant, as sheriff) having been recovered from Mrs. Fleming, by his former owner. Some of the formalities which the law requires, previous to such a sale, having been neglected by the vendor, there was judgment for her, and the plaintiffs appealed.

The sale and recovery are proven, and the defendant has produced the printer's receipt, in order to shew how often the sale of the negro was advertised; and it thereby appears, that the advertisement was not continued as long as the law requires.

The defendant's counsel further urges, that the present plaintiffs gave him no notice of the suit in which the negro was recovered.

I think, the only consequence of the want of such a notice, is the faculty which the defendant has exercised of shewing any thing which, in his opinion, might have prevented such a recovery. In this, however, he has failed.

Surely, if a sheriff sell any thing, without previously doing what the law requires from him, for the validity of the sale, and his vendee be obliged to abandon the thing bought, in consequence of his vendor's neglect, the latter ought to indemnify the former.

We ought to reverse the judgment and remand the cause, in order that the plaintiffs damages be ascertained, and the costs of this appeal ought to be borne by the appellee.

MATHEWS, J. I concur.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and the case remanded, that the damage be ascertained: the costs to be borne by the appellee.

Baldwin for the plaintiffs, *Bullard* for the defendant.

West'n District. *Sept.* 1821.

WELSH vs. BROWN.

WELSH
vs.
BROWN.

WELSH vs. *BROWN*.

APPEAL from the court of the fifth district.

Payment of a note to a person who has not, at the time the possession of the note, or any authority to receive its amount cannot avail, although he afterwards receive the note with authority to collect its amount.

Brent, for the plaintiff. This suit was instituted to recover a balance due on a note of the defendant. The defendant pleaded the general issue, and that "he paid the note to one J. S. Edwards, the petitioner's agent." There was judgment for the plaintiff, and the defendant appealed.

The appeal must be dismissed, this court having no jurisdiction of it.

The constitution of the state declares, that the supreme court shall have appellate jurisdiction only, which jurisdiction shall extend to all civil cases, when the matter in dispute shall exceed the sum of three hundred dollars.

The sum claimed in the petition was only three hundred dollars, of course this court has no jurisdiction, and the appeal ought to be dismissed.

The execution of the note is proven by the testimony of M'Nutt.

The defendant alleges, that he had paid the full amount of the note to one John S. Edwards, and to prove it, he produces the receipt of Edwards, dated the 28th Septem-

ber, 1816, at Natchez: 1. No payment to Edwards was good. 2. At the time of the alleged payment, Edwards had not the note in his possession, nor was he authorised to receive payment.

I. No principle in law is clearer, than that which declares no person shall collect the money of an other, without his authority. The defendant relies upon two circumstances to shew that Edwards was the agent of the petitioner; the one, that the note upon which this suit was brought, was found amongst his papers; and the other, that Thomas Welsh gave the note to Edwards, as appears by his receipt (the only evidence of the fact) upon the 25th of August, 1817, nearly one year after the defendant shews he gave the money to Edwards.

The court cannot infer from that circumstance, that Edwards was authorised to collect the money, or that the note belonged to him. By refering to the note, it will be seen that it is payable alone to Martha Welsh, or her order; and that the note never was endorsed by her, or assigned over to any other person; of course, it did not belong to Edwards as his property; and as to its being found in his

West n District. Sept. 1831.

WELSH vs. BROWN.

possession, it cannot be construed into an agency to collect, without some proof that it was delivered to Edwards by Martha Welsh, for that purpose; and without Edwards or the defendant can shew that he was authorised to collect the money by the petitioner, this court will presume, that he was in possession of the note illegally. For example, if A. give his note payable to B. or order, for $1000, and afterwards D. presents it for payment, without endorsement or authority to collect, and A. pays it, cannot B. recover the money from A., although he had paid it to D.? He certainly can, but it would be the contrary if the note had been made payable to B. or bearer. In support of the above principles, I refer the court to *Pothier*, *Traité du contrat de change*, *nos.* 164, 168. 4 *Bacon's Abridg. tit. merchant*, 703, *no.* 4. 1 *Espinasse's Nisi Prius.* Title Assumption. *Chitty on Bills*, *American edition*, 97.

It is clear from these authorities, that the property of the note is yet in the petitioner, and that J. S. Edwards had no right to it.—We will now examine if he had any authority as agent. The defendant has proven no agency from Martha Welsh, the petitioner,

and the note being amongst Edwards' papers, is no proof thereof; for Edwards might have obtained it illegally, or found it, or it might have been delivered to him by a person who came improperly by it.

But the defendant contends, that Thomas Welsh gave him the note to collect. I will ask, where is the authority of Thomas Welsh? It is not proven that he had any right to the note, or that he was agent of the petitioner; Martha Welsh, the petitioner, and Thomas Welsh, are two different persons; and upon this ground the defendant cannot succeed: for Thomas Welsh, who had no right to the note, either as his property, or as agent of Martha Welsh, could not transfer any power to Edwards; and the defendant before he paid it, if ever he did, ought to have first satisfied himself that Edwards was duly authorised to receive payment, and if he made the payment, it was at his own risk.

II. The receipt of Edwards to the defendant, is dated upon the 28th of September, 1816, and Edwards' receipt of the note from Thomas Welsh, is shewn to the court, to prove that even Thomas Welsh (who, it appears,

West'n District. *Sept.* 1821.

WELSH *vs.* BROWN.

had no right to do what he did) did not authorise Edwards to collect the note before the 25th of August, 1817, nearly one year after defendant says he paid the money.—. Turn to documents and receipts filed in the suit, and referred to in statement of facts, so that it clearly appears, that at the time the money is said to have been paid at Natchez, Edwards had no power from any person to collect it; and having no power at that time to receive, the payment then made was unauthorised; the defendant did it at his own peril, upon the word alone of Edwards; that the note was his, and he must abide by the consequences; and if he really did make the payment to Edwards, he must be left to his action against Edwards, or his representatives, to recover back the money he had paid through error. But my client cannot be made the victim.

Brownson, for the defendant. The note on which this suit is brought, is dated on the 11th day of December, 1815, and payable on the 1st day of March following. The defendant pleads payment, and shews against the note, a receipt signed by John S. Edwards.

The receipt is dated 28th of September, 1816, for six hundred dollars, and the interest, and appears to have been given in discharge of the note.

The first question to be decided is, whether this court has jurisdiction of this appeal? The words of the constitution are, that the supreme court shall have appellate jurisdiction only, which jurisdiction shall extend to all civil cases, when the matter in dispute shall exceed the sum of three hundred dollars. 1 *Martin's Dig.* 102.

It is only necessary to enquire what is in dispute between the parties in this case? First—there is the sum of three hundred dollars. Second—there is the interest upon that amount, from the 1st of March, 1816, until paid, which was nearly one hundred and fifty dollars at the time judgment was rendered in the district court.

So, that principal and interest amounted, at that time, to about four hundred and fifty dollars. It cannot be necessary, I think, to pursue this point any farther.

It is again contended, by the petitioner's counsel, that the payment to Edwards cannot be held good, unless we shew that he was

West'n District. *Sept.* 1821.

WELSH *vs.* BROWN.

authorised to receive it by Martha Welsh, to whom the note belonged.

We think we have sufficiently established that point. See statement of facts. If there is no positive evidence, it does not necessarily follow, that it is not proven. We are oftentimes obliged to content ourselves with evidence which is much less than positive; and sometimes circumstances speak a language even more unerring than positive testimony. Let us see if there is not, at least, a violent presumption that Edwards was authorised to receive the money from Brown, at the time the receipt was given to him; or, if not then authorised, whether Edwards' acts have not since been virtually ratified by the petitioner.

Smith swears, that Edwards said at the time the receipt was given to Brown, that the note was in his, Edwards' trunk, at Natchitoches; and that he was sorry he had not brought it with him. What the agent says, when acting for another, is taken as part of the *res gestæ*, and may be received in evidence against the principal. *Swift's Evidence*, 127. 1 *Esp.* 142.

It is proven by Rogers, that Thomas Welsh admitted, that he had received from Edwards three hundred dollars on the note, which also

appears from the endorsement, dated 5th May, 1816. This circumstance increases the probability, that Edwards might be authorised to collect the balance from Brown. At all events, it furnishes a motive which might have influenced the petitioner in delivering the note to Edwards.

I feel no disposition to controvert the doctrine invoked by the petitioner's counsel, that no person shall collect the money of an other without his authority. I am arguing to shew, that in this case, such an authority existed. The case supposed, and the authorities cited by him, only go to shew, that when the fact of want of authority is clearly established, as when it is proven that the note had been stolen, or that it had been lost, and subsequently found by a person who should present it for payment, and actually receive payment upon it, that in all such cases, the payment would not be good. But surely there can be no analogy between such cases and this. Here, there is no proof that the note was either lost or stolen. No such thing is even pretended. It is said, to be sure, that there is no proof that the note was delivered to Edwards by Martha Welsh, and therefore,

West'n District. *Sept.* 1821.

WELSH *vs.* BROWN.

the court will presume that he possessed it illegally. But I can scarcely conceive why the court should adopt such a forced presumption, especially as there is strong circumstancial, if not positive evidence, to the contrary. It cannot be contended, that Thomas Welsh was not authorised to act for Martha Welsh. Indeed, the name of Martha Welsh is no where seen but in the note. It is Thomas Welsh who talks, and Thomas Welsh who acts. He took the receipt from Edwards. He endorsed the three hundred dollars on the back of the note, a payment recognised to be good in the petition itself, and consequently an admission that he was authorised to receive.

But it is said, the receipt given by Edwards to Thomas Welsh, dated 25th of August, 1817, is proof that the former could not have been authorised to collect before that time. I do not see that such an inference is inevitable. We may conjecture, that when the note was first handed over to Edwards, a receipt was not exacted, and that afterwards, Welsh finding it would probably be a long time before the note would be paid, thought it advisable to take one. This was not a commer-

cial transaction, in which we must expect great exactitude. On the contrary, it was a transaction between men in the country, where a very little experience will teach us not to be surprised at the greatest apparent contradictions, arising out of affairs loosely and improvidently managed.

As to the letter from Brown to captain Dill, it only shews that Brown was owing Thomas Welsh, and that he wished Welsh to get from Edwards the balance coming to him. We have no means of ascertaining whether this letter related to the note on which this suit is brought. But supposing it did, it strengthens two points for the defendant. First—it shews that Thomas Welsh was, on all hands, considered as either the agent to collect the note, or as its proprietor. Second—it strengthens the probability that an arrangement had been entered into for Edwards to pay the note; an arrangement, it would seem, which had been made known to Welsh; because Welsh is merely requested to receive the balance of his money, as captain Edwards comes up; an expression which would be wholly unintelligible without a knowlege of some previous circumstance to give it a meaning.

West'n District. Sept. 1821.

WELSH vs. BROWN.

Had it been information communicated for the first time, Brown would probably have been more explicit and circumstantial.

But secondly, supposing the court should think that there is not sufficient evidence that Edwards was, in fact, authorised to collect the note at the time he gave the receipt to Brown; still we contend, that his subsequently procuring the note, although for collection, ratified the payment previously made to him, and rendered it good. *Pothier, Traité des obligations, part.* 1, *chap.* 1, *sect.* 1, *art.* 5, *n.* 75, says, *Si je contracte au nom d'une personne qui ne m'avoit point donné de procuration, sa ratification la fera pareillement reputer comme ayant contracté elle meme par mon ministère; car la ratification équipolle a prócuration; ratihabitio mandato comparatur.*

What then were the engagements entered into by Edwards, in the receipt given to Brown? Was it not one, that he was authorised by Martha Welsh to receive payment of the note; suppose that that authority was in fact wanting, the consequence would be, that the engagement must be considered defective, as it regards the principal, until ratified, by giving to his agent the authority required.

The moment that authority is given, the engagement of the agent becomes complete, and the rights of Brown must be considered as perfected. Let me ask, could Edwards, in consequence of the authority subsequently received, have had a right to collect the note a second time of Brown? On the contrary, had not Brown a right to demand the note of Edwards, the moment it passed into his hands? And if Edwards failed to deliver it up, can that circumstance have revived any former right in favour of the petitioner, which had been once extinguished? Brown ought not to be responsible for the fault of Edwards, in not paying over the money. The petitioner seems to have been content that Edwards should receive it, and was willing to take the risk of his misapplying it. It was also in the power of the petitioner to have recovered the money from Edwards, but it was not in the power of Brown to have done it. Martha Welsh has also now a claim against Edwards' succession for the money, but Brown has none, unless the result of this suit should give him one.

Baldwin, in reply. It seems to me, that the defendant's counsel is in an error, in consi-

West'n District. *Sept.* 1821.

WELSH *vs.* BROWN.

dering Edwards as an agent at the time he gave the receipt to Brown; and that his declaration, that he had the note in his trunk, at Natchitoches, was to be taken as evidence of the fact. At that time he was not agent, unless the note was in truth, in his possession, (for he relies upon no other authority) and his declaring that he had it, is only declaring that he had a right to receive the money, which is the question in dispute. Agency must be proved by some better testimony than the naked declarations of him who pretends to be agent. Admit the rule, that a man can make himself an agent by his own declaration, then any one can become so, for any purpose, at his will and pleasure; a verbal power may be given, but it must be proven. *Civil Code*, 422, *art.* 6. Edwards' assertion then, that he had the note in his possession, is no evidence for Brown.

The testimony of Rogers does not prove the agency at the time Edwards gave the receipt to Brown, as this conversation was some time in the year 1818, and only proves what the credit on it now admits.

The defendant's counsel must rely on the ratification of the act of Edwards, in receiving

the money by Welsh, putting the note in his hands to collect, and has cited *Pothier*. It seems to me that this doctrine does not apply. If A. acts for B., and B. ratifies, the act is complete. This is correct, but before A. ratifies, he is made acquainted with what B. has done, which was not the case here; Edwards received the money, or more correctly speaking, he gave the receipt when the note was not in his possession, and when he had no authority to receive. He did not upon this apply to to Welsh to ratify what he had done, and make arrangement with him for payment of the sum collected, but took the note for collection. Now, it is clear, that no previous act was ratified; no application was made for that purpose; it was a new act on the part of both; one gave and the other received the note for collection. Would Welsh have done this if he had known that the money was already in Edwards' hands? If this had been communicated to Welsh, the transaction would have changed its character, from a promise to collect, to a promise to pay what had been collected.

It is further said, that the delivering of the note to Edwards did not enable him to collect

West'n District. *Sept.* 1821.

WELSH *vs.* BROWN.

the money of Brown, as he had already received it.

I am not prepared to admit this to be correct, though I do not consider it important. The question is, whether the payment at the time it was made was a discharge of the obligation? It is clear to me that it was not. How then can any act on the part of Welsh, less than a ratification, have that effect?

If he had delivered the note to any other person, the payment to Edwards would not have operated as an extinguishment. On the 25th of August, 1817, he received the note to collect or return. He did not collect it (the defendant says he had already done that) but he did what was equivalent, or his representative did it for him; he returned the note. If Brown had taken up the note from Edwards, he would have some reason to say that the right of recovery against him was lost, as a payment made to him, who holds the evidence of the debt, is good, though that made to a person who may by some possibility afterwards obtain it, is not. Now, it seems clear, and the evidence is certainly very strong in favor of the conclusion, that the note came to Edwards' hands on the day of the date of his re-

ceipt; nothing contradicts it, but the declaration of Edwards, which is not so strong as his writing, even if there was no doubt of his having made the declaration, which depends upon secondary testimony, *to wit*, the oath of a witness. It would then be raising a presumption without any foundation, to suppose that he had the note in his possession when he gave the receipt to Brown, and argue from that presumption against the written voucher.

To say that the receipt of Edwards to Brown, should lie dormant and inoperative from the 28th of September, 1816, to the 25th of August, 1817, and then spring into full force and effect, so as to extinguish the date by operation of law, without a delivery of the note to Brown, is reasoning very strongly in his favor. But I scarcely know what to call that operation of the mind, which would bring it to a conclusion, that this effect should be produced, notwithstanding the note should be redelivered to Welsh, without any alteration, and in its original condition. The silent operation of law can do a great deal, though it cannot do this much.

Among the different modes of extinguishing debts, one is mentioned as the operation of

West'n District. *Sept.* 1821.

WELSH *vs.* BROWN.

law, *to wit*, by confusion (and no other is recollected.) But here the two questions of debtor and creditor were not united.

Edwards was never for one moment the proprietor of the note; so that his situation is different from that of a person who sells a tract of land, and afterwards acquires a title—suppose Edwards had returned this note to Welsh before he left the house, would the previous receipt from Edwards to Brown have prevented Welsh from recovering the debt? It certainly would not; shall the period of one or two months then have this effect? Payment made *bona fide* to him who is in the possession of the voucher of the credit, is valid. *Civil Code*, 288, *art.* 140. But a judgment cannot be good, made only in anticipation that the voucher may come to the hands or possession of him who receives. It is contended by the defendant, that Welsh can recover the sum of the estate of Edwards. Suppose on such a suit, it should be made appear, that the receipt relied on by the defendant, was a forgery, which I have strong reasons to believe is the truth; of whom then would the money be obtained? This judgment would preclude a second demand of Brown.

It is not a good argument to say, that if Edwards could not recover the money of Brown, that Welsh cannot. Their situations are different; while the note was in Edwards' hands, he could *bona fide* receive payment; or having *bona fide* received the amount before the note came to his hands, for the purpose of applying it to that purpose; when the note was received he would be bound to give it that application; and when it was thus applied *bona fide* it might extinguish the debt as to him, for he would be bound in equity and good conscience to make that application. This principle does not apply to Welsh. He is entitled to the money, but he cannot, the defendant says, recover it of him, because he holds the receipt of Edwards. He cannot recover it of the estate of Edwards, because the receipt is a forgery—a sad predicament for a plaintiff to be in.

The real and true question for the court to determine is, who ought to resort to the estate of Edwards? Brown, who (paid if it is true) when Edwards had no right to receive, or Welsh, who cannot recover if the receipt is forged. But how can Welsh resort to the estate of Edwards when one of the conditions of the receipt is fulfilled. *to wit*, the note re-

West'n District. *Sept.* 1821.

WELSH *vs.* BROWN.

turned? For it is Welsh who brings suit against Brown. upon the note.

The case in 7 *Martin*, 247, is distinct from this. There the amount reached the hands of the only person authorised to receive it.—Here the amount was received by one person a long time before the voucher came to his hands, which he did not apply as was intended; but re-delivered the same voucher to the owner. who never did part with his property, but barely parted with the possession which he regained. It seems to me that Edwards was Brown's agent, in receiving the amount of the note to take it up, and that he failed in his undertaking, and to discharge the duties of his agency. Brown has an action for money had and received to his use, though Welsh has not. If the latter was to bring suit, the representatives would answer, that the note was returned, and bore a recovery.

I have said, that if Welsh, as soon as he had delivered the note to Edwards, and taken his receipt, had changed his mind, and retained this note, that Brown might in vain, prove this fact, in opposition to the judicial demand, which I believe will be admitted to be correct; and yet, if the principle of the operation of

law is admitted to apply to the case, the plea would be good; and it necessarily follows, that the note was discharged as to Brown, the very moment it was delivered to Edwards, or it is not at this time.

MARTIN, J. This suit was brought on the defendant's promissory note for $600, payable to the plaintiff, on the 1st of March, 1816.

The defendant pleaded the general issue and payment, averring it had been given to one Edwards for collection, to whom the defendant paid it, on the 28th of March, 1816, at Natchez, and took his receipt. Edwards saying the note was in his trunk, at Natchitoches; that the note was found among Edwards' papers, after his death, in the fall of 1817, at New-Orleans.

The district court gave judgment for the plaintiff, "the law and evidence being in his favor," and the defendant appealed.

The statement of facts shews, that the plaintiff gave the note in evidence, and proved its execution. A receipt for $300, paid on the 5th of May, 1816, was on the back of it, subscribed T. Welsh.

The defendant gave in evidence, Edwards'

West'n District. *Sept.* 1821.

WELSH vs. BROWN.

receipt, and the deposition of Smith and Rogers.

Smith, after proving Edwards' signature at the foot of the receipt, deposed that he heard him say to the defendant, that the note was in his trunk at Natchitoches, and he was sorry he had not brought it.

Rogers deposed, he had heard T. Welsh tell the defendant, some time in 1818, that part of the note had been paid him by Edwards, he thinks about $300, but the rest was due; that the note had been given to Edwards for collection, and was lost.

It was admitted, that it was found among Edwards' papers, after his death, at New-Orleans, in the fall of 1817.

The plaintiff, to rebut the defendant's evidence, read Edwards' receipt, on the 25th of August, 1817, acknowledging that the note was given him to collect its amount; and a letter of the defendant to one Dill, in which are the following expressions: "I wish you would inform T. Welsh, that I wish he would sue Kennedy for the mule, and when it is recovered, to keep it himself for the delay of the payment of his money. It will be out of my power to return very soon, and I wish to

receive the balance of his money when Edwards comes up." This letter is of May, 23, 1816.

The defendant's counsel has prayed, that the appeal be dismissed for want of jurisdiction in this court. The note is for $600, with interest, at 10 per cent. till paid. $300 are claimed of the principal, and interest for a considerable time, on the whole sum and the balance; it is therefore clear, that the plaintiff's demand exceeds the sum of $300 by this interest; and that, consequently, this court has jurisdiction.

The plea of the general issue is supported.

The defendant has produced Edwards' receipt for the whole sum; but he has not shewn that Edwards, when he gave this receipt, had authority to receive payment. He has shewn that the note was given to Edwards for collection, by one T. Welsh; but has not shewn that this was before the date of Edwards' receipt. The plaintiff on the contrary, has shewn that Edwards gave a receipt therefor, to T. Welsh, about eleven months after he received payment from the defendant.

Who this T. Welsh was, and his authority

West'n District. *Sept.* 1821.

WELSH *vs.* BROWN.

to act as the plaintiff's agent, does not appear; but as the plaintiff has produced the receipt which he took from Edwards for the note, and the receipt for $300, which he endorsed on the note, must be taken to have been written with his consent; I conclude that he is sufficiently shewn to have been the plaintiff's agent, and this does not appear to be denied, but rather admitted in the argument of the counsel.

As the authority of Edwards to receive payment for the plaintiff, does not appear, it must be presumed not to have existed at the time the defendant took his receipt. It is true, it is in evidence, that he paid the $300 which T. Welsh endorsed on the note; but this circumstance does not establish, that he had received that sum as the agent of the plaintiff, any more than that he undertook to convey and pay it for the defendant.

Does the authority to collect, given in 1817, amount to a ratification of the payment made in 1816, by the defendant to Edwards? Certainly not. It does not appear, that this payment was known to Welsh when he gave the note to Edwards. *Iniquum est perimi de pacto id de quo cogitatum non est.* Indeed the deli-

very of the note for collection, would rather go to prove a disavowal of that payment. For to what purpose would be the authority to collect a sum already paid ?

The declaration of Edwards, that he had the note in his trunk at Natchitoches, is no evidence against the plaintiff, as there does not appear that there was any privity between him and Edwards.

Edwards' receipt to the defendant shews, that he intended to receive, and the defendant to pay, a sum due to Edwards, in his own right, as the plaintiff's assignee; for he gives the receipt in his own name, not as agent of the plaintiff in receiving payment, nor of the defendant, in receiving a sum which was intended to be paid through him to the plaintiff.

The receipt of this money, under a suggestion (which, as it is not proven, we must consider untrue) that he was the assignee, or proprietor of the note, rendered him liable to the present defendant's action to recover the money. Has the claim of the defendant been marred, suspended, or destroyed by any thing done by the plaintiff or T. Welsh, her agent ?

West'n District. *Sept.* 1821.

WELSH *vs.* BROWN.

The authority given to Edwards to collect, could not have availed him. if the defendant had brought his action for money had and received; even if Edwards had shewn payment to the plaintiff, unless he could have shewn, which does not appear, that he received the money from the defendant, to convey it to the plaintiff: or that he had authority, at the time he received it, he could not have resisted the present defendant's claim.

Without such authority, either from the plaintiff to receive, or from the defendant to pay over—payment to the plaintiff could be of no avail: for the present defendant, shewing that he paid, thro' error, the money must be considered as his own still. and rightly due him by Edwards, who could no more avail himself of payment to the present plaintiff, than of payment to any other real or pretended creditor of the present defendant.

I conclude, we ought to affirm the judgment of the district court with costs.

MATHEWS, J. I concur in this opinion, for the reasons therein adduced. believing that the case cannot be better explained by any additional remarks.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

SCOTT vs. *TURNBULL & AL.*

APPEAL from the court of the sixth district.

When questions of limits depend on matters of fact, rather than principles of law, the verdict of a jury will not be disturbed if it do not clearly appear contrary to the evidence.

Scott, for the plaintiff. The parties respectively are owners of land which adjoin on the right bank of the bayou Rapide, in descending. There is no disagreement as to the point of beginning, which is represented on the plat filed in the cause by the letter A.; but they differ as to the course of their dividing line.

In the court below, there was a general verdict of the jury in favour of the plaintiff, which establishes the course of the dividing line between him and the defendants, to run from the bayou S. 30 E. This verdict will not now be disturbed, unless it can be shewn to be manifestly against the evidence. 5 *Martin*, 323. 8 *id.* 363.

The plaintiff's claim is founded on a requete and order of survey, in favour of Lewis Huet, dated in 1788, and on a continued and peaceable possession long before, and ever since that period, either by the plaintiff or

West'n District. *Sept.* 1821.

SCOTT *vs.* TURNBULL & AL.

those under whom he claims; together with a confirmation by the commissioners of the united states. It is probable, that no survey was ever made of this track of land, until the year 1806, when it was run out and marked by M. Stone, a regularly authorised surveyor under the American government. He was acting under his instructions as a public officer, and he has adopted a course for the side lines, at right angles, as nearly as practicable with the general course of the bayou in the neighbourhood, *to wit*, S. 30 E. This fact is established by the testimony of M'Curmin, and from whose testimony he could not have done otherwise, without interfering with old and established lines on the lower side; for he says that the general ccurse of the lines on the right bank of the bayou Rapide is S. 30 E. until you arrive at P. Baillio's land, which adjoins the defendants above, where it is S. 28 E. This survey has alloted to the plaintiff his proper quantity of land, and exhibits the courses which he contends for. It is believed to be strictly conformable to the usage of the Spanish government, in thus running, at right angles, as nearly as practicable with the general course of the bayou, and in

conforming to established courses in the neighbourhood.

The defendants, on the other hand, shew no original title papers, but rely on a string of conveyances, commencing with V. Poiret, in the year , and plat of survey, purporting to be made by C. Trudeau, in the year 1801, together with a commissioner's certificate, and long possession.

Prescription has not been contended for in the court below, because both parties have occupied for such a length of time, that no person can now be found who recollects the commencement. The evidence, although not fully spread on the record, shews clearly that Delorie's field, which was encircled by the gully, and which was cultivated by him more than thirty-years ago, extended even above the line which the plaintiff contends for, while the defendants might have occupied the land in his rear, so far as to get fire wood, and for negroes' potatoe patches, &c. for it was never actually enclosed.

The defendants then set up two deeds, under which they claim. The one from V. Poiret to E. Muillian, for six arpents of front, with the ordinary depth, bounded on the upper side by lands of P. Baillio, and on the lower

West'n District. *Sept.* 1821.

SCOTT *vs.* TURNBULL & AL.

side by lands of Louis Delorie. The other from L. Delorie to E. Muillian, for one and a half chains of front, being the upper part of Delorie's land, and adjoining that of the purchaser. All the front and depth called for by these deeds is conceded to the defendants.

But not satisfied, they present a plat of survey, purporting to be made by C. Trudeau, in the year 1801, diverging their lines above and below, so as to include a much greater quantity of land than their deeds call for; and interfering with the plaintiff on the lower side. The truth is, that there never was an actual survey as then represented. For the testimony of M'Curmin, although imperfectly spread on the record, shews that he run out the lines of this tract of land after the year 1807, and found no marks which appeared to be older than three or four years. They were marks of the same appearance with those along the plaintiff's line. And if such old marks existed, the defendants might easily have shewn it. M'Curmin's statement, although it has been omitted to be so stated on the record, amounts to this, that about the year 1810, he was public surveyor, and run out the lands of the plaintiff, as well as the

defendants; he found marks on both lines, which appeared to be three or four years old. He believed them to be those made by Stone, in the year 1806. But independently of M'Curmin's testimony, let us view the face of this pretended plat of survey. The certificate which accompanies it, represents that it has been made in the presence, and with the consent of the adjoining proprietors, *to wit*, M. P. Baillio above, and some person who was appointed to represent Delorie below. Now, unfortunately for the defendants and this pretended survey, Delorie was not at the time, nor had he been for twelve months before, the proprietor of the land below; having sold and conveyed it to J. Poydras, by authentic act, as shewn on the record. Again, on the upper side, a course has been pursued S. 17 E. as far as Muillian desired it to run in that direction; then, after making a right angle, it proceeds S. 31 E. to the back line. On what principle was all this done? And yet it is represented, that M. Baillio was present and consenting. The thing was too absurd to be contended for; and the defendants, and those under whom they claim, without setting up any pretention to these courses.

West'n District. *Sept.* 1821.

SCOTT vs. TURNBULL & AL.

have conformed to M. Baillio's line running S. 28 E. it being the general course of the bayou at that point, according to M'Curmin's testimony. With what justice then can the defendants contend for the course of the lower line. It would give them double, or nearly double, the quantity of land which their original purchase entitled them to.

But in running out their lines they must surely be governed by some general principle, either run at right angles from the general course of the bayou, in the neighbourhood, or conform to some established line, by the side of them. In either case, the plaintiff will not be disturbed; it may be remarked, however, that owing to a peculiar bend in the bayou, the defendants might diverge in some degree above and below, without interfering with any person; and it is extremely probable, that M. Muillian's only motive in procuring Trudeau's certificate of survey, was to effect that object; for in selling to Stewart, although he sells by that plat, yet he carefully guards against any warranty.

The plaintiff has no means of shewing, with any precision, the nature and extent of Trudeau's powers as surveyor-general of the pro-

vince. So far as he can learn them, however, they did not exceed those of other surveyors, in running and marking lines, between individuals, under sales from one to the other.

In surveying lands under incomplete or complete titles, derived from the king or his officers, his acts were generally, and perhaps always approved; and although the survey might contain a greater quantity, or even differ from the place designated in the incomplete title, yet the survey was considered as conclusive, so far as the public domain was affected. But this authority could not extend to surveys, made under sales from one individual to another, or to disputes between adjoining claimants.

For if it should, he could take from one and give to another; and if A. sold to B. one arpent front, he could give two, three, or more, at discretion; or as in the present case, if he did not choose to exercise his partiality by enlarging the front, he might do so by diverging the lines. A power so extensive as this will not be presumed, it must be shewn, which has not been done. It is believed, therefore, that the survey which has been presented on the part of the defendants, can give them no title what-

West'n District. *Sept.* 1821.

SCOTT *vs.* TURNBULL & AL.

ever; because, first, it is altogether of a private nature, for it says at the request of Muillian. Secondly, so far as it is pretended, that the adjoining proprietors were present and consenting, it is untrue, for Delorie had previously sold to Poydras. And thirdly, there was no authority for diverging the lines.

The defendants then must rely on their two deeds of conveyance, before referred to.—That from V. Poiret transfers six arpents of front, with the ordinary depth, adjoining Baillio's on the upper side. This line is established to be S. 28 E., first, by M'Curmin's testimony. And secondly, by Stone's survey, a plat of which accompanies the defendants' claim before the commissioners. The lower line must run parrallel with it, and Huet's requete calls for land adjoining it. But the deed from Delorie to Muillian transfers one and a half chains of front, to be taken from the upper side of his claim, and it is under this deed that the defendants set up their pretended right, to diverge on their lower side. The expression which they rely on is this, *partant d'une souche de liard qui a été toujours reconnue pour borne entre la terre que le dit acquereur a acquis de dame veuve Poiret et celle que j'ai acquis*

du sieur Louis Huet, courant sur cette derniere, dont elle est separée et co .stituée par une borne plantée en presence du dit acquereur.

There is not a word about any particular course; the expression is easily understood. It means this, and nothing more: that Delorie sells one and half chains of front, with the ordinary depth; commencing at a cotton wood tree on the bayou, which was known and established to be the line between the vendor and vendee; thence running down the bayou, one and a half chains into the land of the vendor, to a post, which was planted in the presence of the parties. But let it be remarked, that if this deed could bear the construction, which the defendants have attempted to give it, it is a *sous seing prive;* whilst the conveyance from Delorie to Poydras, under whom the plaintiff claims, is an authentic act. In case of interference, the latter must prevail.

On the whole, the plaintiff is persuaded that the verdict of the jury is strictly conformable to law and evidence, and that it will not be disturbed.

Bullard, for the defendants. The land in controversy, in this case. is represented on

West'n District. *Sept.* 1821.

SCOTT *vs.* TURNBULL & AL.

the plat of survey, marked No. 10, on the record, by the triangle A. B. F. The plaintiff contends, that the line A. F. is our lower boundary, and we contend for the line A. B., down to which we now hold. The question, therefore is, which of the parties has exhibited the best title to that portion of land. It is emphatically a question of title and not of simple boundary, as the plaintiff appears to suppose. The court is to decide who is the owner of that triangle, and not merely what division line has been heretofore recognised by the parties; so as to bind them in this suit. If the defendants are evicted, they have less land than their title calls for; if the plaintiff succeeds, it must be by the superior strength of his.

I will first examine the title of the defendants in itself, and as strengthened by the equity of possession.

Whether Vincent Poiret, from whom the defendants derive their right, had any written evidence of title, emanating from the Spanish government or not, is of no importance in this case. He had, at least, a notorious, public, and authorised possession of the tract of land adjoining Baillio, as early

as the year 1788. Huet, from whom the title of the plaintiff is derived, in his requete, asks to be bounded above by him. After Poiret's sale to Muillian, the latter in 1795, purchased of Delorie, to whom Huet had previously sold the whole of his title, the upper chain and a half; so that both parties, as respects a part of the land in contestation, claims under the same person.

In 1801, Muillian had the land which he had purchased from Poiret and Delorie, surveyed by C. Trudeau, the then surveyor-general of the province, who establishes the course of the lower line at A. B., S. 40 E.

Muillian continued in the occupancy and cultivation of the land, and after the change of government, having no inchoate grant, and only long and uninterrupted possession. applied to the commissioners for a confirmation under the second section of the act of congress of March 2, 1805. He was confirmed in his right to the number of arpents comprised in Trudeau's survey. He has, therefore, what is usually called a settlement right. It is such a title as may form the basis of the ten years prescription, to commence from the date of the act of congress. *King & al.* vs. *Martin.* 5 *Martin's Rep.* 179.

West'n District. *Sept.* 1821.

SCOTT *vs.* TURNBULL & AL.

I am not disposed to contest the principle contended for by the plaintiff, that the operations of the surveyor-general could not confer title. I attach no importance to that survey of Trudeau, as forming a part of the original title of the defendants. I know that a surveyor cannot take land from one man and give it to his neighbour; and that without a subsequent ratification, his acts are no evidence of title out of the crown. Nor do I insist, that it proves the express assent of Delorie to the surveying. I rely on it, simply to shew the extent of our possession; a taking possession, as an act of Muillan marking out to the whole world the limits of his claim. It was not as an official act of the surveyor, that it has added to or established the extent of our right, but as a public, notorious, and recorded declaration by Muillian, in 1801, that he held within such boundaries, and to call on others who might have a better right to contest it. The purchasers under Muillian, have bought by the same limits and description, and with reference to that survey, and nearly twenty years had elapsed before any one was found to dispute it. The actual possession has conformed to

that survey ever since its date, with the exception of a small spot in the bend of the gully, in the shape of a horse shoe, at M. on the plat. The certificate of the commissioners refers to that survey, and confines the claimant in the same quantity comprised in it.

The defendants therefore, have a legal title to the whole quantity of land, granted by the united states, to Muillian, and consequently to the small triangle in dispute, independently of any right acquired by possession, since that period. The whole tract is to be considered as one entire thing; the same reasoning applies to every part of it: the title, such as it is, covers the whole, and possession of a part, is possession of the whole, under their title.

Even supposing, then, that the title exhibited by the plaintiff were of prior date and equal dignity, and calling expressly for the whole of the same land, or only for the triangle, according to the uniform decisions of this court, the party in possession must be maintained.

Thus far, as to the title of the defendants in itself, independently of possession since 1805. Let us enquire how it stands under the se-

West n District. *Sept.* 1821.

SCOTT *vs.* TURNBULL & AL.

cond plea, on the record, that of the ten years prescription.

I have heretofore supposed a case the most unfavourable to the pretentions of my clients, namely, that the order of survey of Huet, from whom the plaintiff derives title, calls expressly for the whole or a part of the same land occupied by the defendants. The case of *King & al.* vs. *Martin*, before cited, has decided this case even under that supposition. The titles of the plaintiff in both cases, are of the same nature, an order of survey with a commissioner's certificate. The defendants in both cases have settlement rights. In that case, the court said the defendants should not be disturbed, and sustained their plea of prescription.

The only question then to be examined is, whether the possession of the defendants since the year 1805, has the qualities required by law, to give title by prescription.

The possession required by law to operate the ten years prescription, should be a civil possession and in good faith. The natural naked possession of an usurper does not suffice. Civil possession is a possession *animo domini*, and good faith is said to be *justa opinio quæsiti dominii*, under a title translative of

the property in the thing. *Pothier, Traité de la pos.* 108.

The possession once acquired is continued and preserved by the mere will of the possessor. *Id.* 34 & 5.

There must be an original taking of possession. This is proved by the act of Muillian, in 1801, in having a survey made, marking the line, and cultivating the field, represented on the plat within the triangle; his actual occupation of the principal plantation is a taking possession of every part, and consequently of the part in dispute. *Id.* 28.

The possession once acquired under the title, and continued for ten years without interruption, gives a prescriptive right to all the land comprised in the calls of the deed or other title. If the defendants have a good prescriptive right to the spot where their house stands, they have to the triangle, which is a part of the same land. An actual, corporeal possession is not required, to acquire by the 30 years prescription; the possessor gains by his inclosures, inch by inch; by that of ten years, he holds and prescribes by the terms and limits of his deed.

These are well established principles, and expressly recognised by this court, as well in

West'n District. Sept. 1821.

SCOTT vs. TURNBULL & AL.

the case above cited, as in the case of *Provost's heirs*, against *Singleton* and *Johnson*, decided at the last term. The case of *King* vs. *Martin*, is a much stronger one on the part of the plaintiffs. in as much as their order of survey called expressly, *eo nomine*, for the same land held by the defendant.

It is time to look at the title under which this court is called on to take this land from us, and decree it to the plaintiff. Huet's order of survey in 1788, calls to be bounded above by Poiret under whom we hold, and below by the domain. In 1795, Muillian acquired from Delorie, then the owner of Huet's title, the upper chain and one half. Huet, having obtained the order of survey, appears to have done nothing more towards completing his grant, had no survey been made; and has given his land no definite location, and does not appear to have done any act which would amount to a taking possession of any land represented in the triangle. Nothing was done till 1806, when the surveyor run a line S. 30 E., and yet the owners of the adjacent tract, continued, and still continue, to disregard it. What did Huet acquire? A right to two hundred and forty arpents, to be bounded

above by Poiret or Muillian, and below by unappropriated lands.

It is contended, that the upper line of Huet's should run S. 30 E., for two reasons—first, because that course would run at right angles, with the general course of the bayou Rapide, in conformity with the ancient usages of surveyors in this country; and—secondly, because it would be parallel with the lower line of the tract.

As to the first, I deny that there is any evidence on the record to establish the fact; and an inspection of the plat will shew, that forty is nearer at right angles with the course of the bayou at that place, than 30 would be.

The second can be removed in a most satisfactory manner, and will be found to be entirely fallacious; being bounded below by the domain, it is clear, that there can be no better titles below, which would compel them to run the course they have done, in preference to any other. They might as well have run S. 40 E. and completed their quantity of land as S. 30 E. It may be asked how was that line established which they set up, as the standard? By whom? By those who held under Huet, through the agency of the surveyor in 1806. They have then assumed a line below,

West'n District. *Sept.* 1821.

SCOTT *vs.* TURNBULL & AL.

to which their title does not limit them; and then pretend that the upper line must run parallel with it, thereby making their own gratuitous act, binding on and conclusive against us. Their reasoning amounts to this: we have chosen to fix our line below, at S. 30 E.; therefore you must yield us the same course above, this is reasoning in a circle.—We answer them, make your lines parallel if you will; take the quantity of land you are entitled to, but take it from the domain below, or from younger titles, and not from an older one above, by which you called to be bounded. Go upon land which, at any rate, belonged to the crown, at the date of your order of survey, and which you might then have covered with your title, and not upon ours, which we have cleared, cultivated, and improved, in good faith, and occupied for more that twenty years, and to which we have acquired an incontestable title; not by clandestine means, but through the agency of the public surveyor, whose act has been sanctioned by the succeeding sovereign of the country. A title, originating under the Spanish government, by the *droit de trâcte*, and acknowleged to exist, by yourselves, in 1788. No good reason can be given for fixing the

lower line at S. 30 E. It is impossible a different course could interfere with established lines, and better rights, as the plaintiff appears to imagine.

Shall the plaintiff then, whose vendors have for so long a time, acquiesced in the line run by Trudeau or Muillian, and made a matter of record and notice to the whole world, be now permitted to alter it, and that only, for the sake of running it parallel with an arbitrary one of their own?

There is another feature in this case, which merits attention. Both parties claim the land adjacent to the upper line above and below, under Huet, who sold the whole to Delorie, and the latter sold a chain and a half to Muillian. In that deed, certain land-marks are referred to, and fixed between the two tracts, as will appear from the deed; those *bornes* were established by Delorie, from whom the plaintiff claims title. Can those who claim under Delorie, the balance of Huet's tract, now recover of the defendants, without proving, that the line now contended for, varies from that established by the deed? It was competent for Delorie, at that time, to fix any division line he thought proper, or in

West'n District. *Sept.* 1821.

SCOTT *vs.* TURNBULL & AL.

other words, to locate the order of survey. Is there a particle of evidence on the record, to shew that the line A. B. differs from the deed? The *trone de liard* is mentioned in the deed, but not once alluded to in evidence; will the court presume, that the line A. B. varies from the contract of the parties? Or will they not rather presume, from the long silence and acquiescence of those who hold under Delorie, that it is the same, and conforms to the intention of the parties? If Delorie had established that line, nothing can be more clear, than that it would be binding on the plaintiff, and conclusive as to his location. If a different one was intended, it ought to be shewn. But it is said, that Muillian, by diverging his lines, takes more than his purchase entitled him to. How can this be made appear, unless a previous line be proved, and from which the vendee has varied?

Upon the whole, from a view of all the circumstances of the case, I cannot perceive sufficient ground to support the court, under the authority of its own solemn decisions, in affirming the judgment of the district court. The plaintiff does not appear to me, to have

established a title to the land comprised in the triangle, of sufficient strength and dignity, to entitle him to the land in preference to the present possessors.

Something has been said as to the authority of the general verdict in the court below. It is certainly in the power of this court, as it is its duty, to render such a judgment as ought to have been given in the district court, when all the evidence is before it. The whole evidence is spread upon the record. The cause was submitted to a jury for a general verdict. The jury have found a particular line of division between the two tracts of land, and the court below refused to grant a new trial, but gave judgment according to the verdict. Did the court err in not granting a new trial, on the ground, that the verdict was contrary to law and evidence? If so, this court will do what the court and jury ought to have done.

MARTIN, J. I concur with my colleague's opinion.

MATHEWS, J. It appears, from the whole evidence in this case, that the contending

West'n District. *Sept.* 1821.

SCOTT *vs.* TURNBULL & AL.

parties, and those under whom they claim title to the property in dispute, have for many years, and a nearly equal period, claimed and occupied two contiguous tracts of land, never separated nor divided by any well marked, known and established limits.

Considering the titles of the respective claimants as of equal force and dignity, and that no part of the disputed premises has ever been enclosed or occupied by either, as to gain title by prescription; I think the case must be viewed as embracing a contest relating entirely to limits, in which the rights of the parties depend rather on matters of fact than on principles of law.

The case has been submitted to a jury, whose verdict has settled the line of division satisfactorily to the plaintiff; and as I do not see that it violates any rule of law, or is contrary to the evidence, neither it nor the judgment rendered thereon, ought to be disturbed.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

BONIOL & AL. vs. *HENAIRE & AL.*

BONIOL & AL. vs. HENAIRE & AL.

If A. deliver his boat to B. on his promise to pay two dollars a day, or $200 if she be lost, or he chose to keep her, the last sum will discharge B's obligation, at any time before, or on a demand.

APPEAL from the court of the sixth district.

MARTIN, J. This action is brought on a promise of the defendants, that they, or either of them, would pay the plaintiffs, or their orders, two dollars a day, for every day they should keep the latter's keel-boat, in the possession of the former, from February 7th, 1820, in the morning; and that in case of her loss, or they thought proper to keep her, they should pay $200 for her, besides the two dollars per day, till the purchase money be paid. The petition charges, that the defendants kept the boat till the 4th of June, when they refused delivering her.

Both defendants were cited, but Fristoe alone answered. He denied all the facts alleged, and averred, that he, the plaintiff, can only recover $200, the value of the boat, and the defendants cannot be bound to pay the price of the boat, and two dollars a day for the use of her. That he had a right to keep the boat, from the day it was delivered, at $200, and he so kept her.

The district judge deeming "the law and evidence for the plaintiff," gave judgment that

West'n District. *Sept.* 1821.

BONIOL & AL. *vs.* HENAIRE & AL

the defendants pay $200, with interest, at ten per cent, till paid, with costs. The plaintiff appealed.

The instrument may be considered as proven, because Fristoe, although called upon to answer on oath, whether he signed it, did not do so.

It appears from the very words of the instrument, that the defendants might consider the contract in the light of a contract of sale, since $200 are mentioned as the purchase money. No period was fixed at which they were to make their election to consider it in the other alternative, that of a contract of hire; neither were they bound, at any time, to give any notice of their having made their option.

The district judge was therefore correct in allowing to the plaintiffs the purchase money, *viz.* $200. He could not allow the two dollars per day, till payment; for that would be more than the ten per cent. which is the maximum which the law permits, for the use or detention of money; and he was likely induced to allow interest at that rate, by the decision of the superior court of the late territory, in the case of *Caizergues* vs. *Jarreau*, where exorbitant interest was reduced to the

highest constitutional rate. As the defendant has not appealed, we cannot enquire into the legality of this allowance.

I think we ought to affirm the judgment.

MATHEWS, J. I concur in this opinion in all respects, except that I am not willing to agree to the proposition, that in usurious contracts, the interest stipulated may be reduced to the rate of conventional interest, allowed by law. I am of opinion that a contract which stipulates for more than ten per cent, per annum, ought to be avoided *in toto*, in relation to interest.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Baldwin for the plaintiffs, *Thomas* for the defendants.

VIENNE vs. *BOISSIER.*

APPEAL from the court of the sixth district.

Although the heirs renounce the inheritance, a creditor cannot, without obtaining letters of curatorship, obtain an injunction to stay a

MARTIN, J. The petition states, that the heir of O. Bruard, having renounced his inheritance, his property vested in all his creditors,

West'n District. Sept. 1821.

VIENNE vs. BOISSIER.

Sale, under execution issued on a judgment obtained against the deceased in his life time.

one of whom the petitioner alleges himself to be; and as such, he prays an injunction, directed to Boissier and the sheriff, inhibiting the sale of a negro slave of the deceased, siezed (as is alleged) improperly; an execution issued on a judgment obtained by Boissier against the deceased; the injunction was made perpetual, and Boissier appealed.

His counsel (among other matters) alleges, as an error apparent on the face of the record, the absence of any right or capacity in the petitioner, to interfere in the affairs of the estate.

It seems to me, that admitting what is denied by Boissier, that all the heirs of O. Bruard have renounced the inheritance, the petitioner ought to have procured letters of curatorship, or provoked the appointment of a curator, who alone can legally represent in court the estate of a deceased, whose inheritance is repudiated. That no creditor has a right, aloof from the others, to stand in judgment, and oppose the rights or actions of another.

I think that the judgment ought to be reversed, and ours ought to be, that the injunction be dissolved, and that the petitioner pay the costs of this appeal, and those in the district court.

West'n District. *Sept.* 1821.

VIENNE *vs* BOISSIER.

MATHEWS, J. I have examined this case with the judge who delivers this opinion, and concur for the reasons therein stated.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and this court proceeding to give such a judgment, as in their opinion ought to have been given in the district court; it is ordered, adjudged and decreed, that the injunction be dissolved, and that the plaintiff pay costs in both courts.

No counsel for the plaintiff, *Bullard* for the defendant.

SOMPEYRAC vs. *CABLE.*

APPEAL from the court of the sixth district.

A bail-bond taken under the act of 1808, 5 *c.* needs not to be assigned by the sheriff: one taken under the act of 1805, 1 *c.* must.

MARTIN, J. The plaintiff brought his action against Long and Walker, on their promissory note, and on his affidavit, that they were indebted to him $378 87 cents, bail being demanded from Walker, Cable, Brown and Johnson, executed a bond with him to the sheriff, as required by the 12th section of the act of 1805, *C.* 26. 1 *Martin's Dig.* 476, conditioned, that the defendant shall not de-

West'n District. *Sept.* 1821.

SOMPEYRAC *vs.* CABLE.

part from the state without the leave of the court; or in case of departure without leave, that the securities will be answerable and pay to the sheriff the amount of the final judgment, order or decree of the court. Judgment being had against Walker, and a *ca. sa.* duly returned, notice was given to Cable, and judgment being obtained, he appealed.

His counsel assigns, as errors apparent on the record:—

1. That no law authorises it.

2. That the bond is not proven to have been endorsed by the sheriff.

3. That the defendant is only liable for one third of the debt.

4. That the breach of the condition is not proven.

I. The bond which has been taken, is that which is required by the act of 1805; the prerequisites of it are, that the plaintiff satisfy one of the judges, by oath, of the truth of his debt; and make oath further, that he verily believes that the defendant is about permanently to remove from the territory before judgment on the petition can be obtained, &c.; the law requires the assignment of this bond by the sheriff.

On the oath annexed to the petition, in the present case, which is that required by the 10th section of the act of 1808, *C.* 16, a bond ought to have been taken, that in case the defendant shall be cast in the suit, he will pay and satisfy the condemnation of the court, or surrender himself in execution to the sheriff. This bond is to be retained by the sheriff; and if the condition shall appear to have been broken, there shall be judgment on notice against the surety, for the amount of the judgment. *Id.* 484. There is nothing said of any assignment, and this court has lately determined that none is essentially required.

Admitting that the error committed in taking the bail prescribed by the act of 1805, under the oath prescribed by the act of 1808, is not fatal, the assignment of the bond is expressly required by law, and we cannot dispense with it.

The bond taken requires proof of the defendant's departure from the state; and it is only shewn that he cannot be found in the parish of Natchitoches.

These two objections appear to me fatal, and I think the judgment ought to be reversed, and ours must be for the defendant. as in

West'n District. *Sept.* 1821.

SOMPEYRAC vs. CABLE.

the case of a non-suit, with costs in both courts.

MATHEWS, J. I concur, being satisfied with the reasons of this opinion.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and this court proceeding to give such a judgment as in their opinion ought to have been given in the court below; it is ordered, adjudged and decreed, that there be judgment as in case of non-suit, and that the plaintiff pay costs in both courts.

Bullard for the plaintiff, *Mills* for the defendant.

MEAUX'S HEIRS vs. *BREAUX.*

In a grant for land on both sides of a stream with calls for the line of another grant, as its upper limits, it does not necessarily follow, that such a line be the limit on both sides of the stream, if the contrary be shewn by proper evidence.

APPEAL from the court of the fifth district.

Brent, for the defendant. The present suit was instituted to recover a tract of land, in the possession of which, the petitioners allege they had been for many years; until the defendant, in January, 1813, by force and arms, took possession of it. They pray that the defendant may be compelled to leave the land, pay damages, &c.

The defendant answered, that the facts stated, are untrue. That he holds the land in virtue of good titles, better than the petitioners; and that himself, and those under whom he claims, have been in possession for upwards of thirty years.

The petitioners deny all the facts set forth; plead a thirty years possession; the defendant denying all this, pleaded a ten years possession in good faith, and in virtue of just titles, &c. The cause was called for trial, but before entering into the trial, to save time, a case stated was made, and the following agreement entered into. "The grant of Meaux calls to bind on the lower line of René Trahan's grant, as his upper boundary; and it has already been decided by the superior court, that Trahan's upper boundary began at the isle des Copalmes, on the west side, from thence descending. The question submitted to the court is, whether on the west side of the bayou, the lower line of Trahan's grant, supposing it to begin at the isle des Copalmes, and descend for quantity, shall serve as the upper line of Meaux's grant? Or whether the Coulee des Porches, upon the east side of the Vermillion, and a line running *vis-à-vis*, shall

West'n District. *Sept.* 1821.

MEAUX'S HEIRS *vs.* BREAUX.

be considered as the upper line of Meaux's grant?"

The district court decreed, that the upper line of Meaux's grant, on the west side of the Vermillion, does not join the lower line of Trahan's grant, as called for, but that a line drawn from the Coulee des Porches, *vis-à-vis*, shall serve as the upper line of Meaux's grant. The defendant appealed.

The petitioners have failed in proving their possession of the land before it was possessed by the defendant.

Before we examine the testimony, I beg leave to state, that the surveyor, De Clouet, who first gave possession to Trahan and Meaux, surveyed the land upon both sides of the Vermillion; and that it appears he did not consider the survey and possession given upon the east side, as the survey and possession upon the west side; for the witnesses all state, that after the land was surveyed upon the east side, he crossed over to survey upon the west side; and it is the location on the west side, that is now in dispute; of course, when the petitioners state they were in the possession of the land, they must be understood to allude alone to the land upon the

west side; and the testimony must be so understood, not to confound the possession on the east side of the Vermillion, with that on the west side.

Pierre Broussard says, that Michel Meaux first settled upon the east side of the Vermillion, fifty years ago, which is six years before his title, which is dated in 1776; and his testimony was given in October, 1820; and that he, Meaux, lived there; but he does not know upon which side of the river Meaux died. He does not speak of any possession whatsoever, of Meaux upon the west side; and of course, proves no possession whatsoever of the land in dispute.

Jean Baptiste Broussard, states, he was present when De Clouet put Meaux, Breaux, and Trahan in possession, upon the east side of the Vermillion, but was not present when he surveyed the land upon the west side. De Clouet did make a survey upon the west side. Meaux lived ten or eleven years upon the east side, and then crossed over to the west side, where he died. Meaux's house was nearly opposite to the witness's, upon the east side. Breaux first settled upon the east side, where he lived four or five years. This

West'n District. *Sept.* 1821.

MEAUX'S HEIRS vs. BREAUX.

witness, so far from proving that Meaux ever was in possession of the land in dispute, proves the contrary; for the court will notice, that the land now claimed by the petitioners, is not in virtue of Meaux's title or grant, but in virtue of Joseph Broussard's grant, which is bounded by Meaux's lower line; and if the petitioners claim the land in dispute, as being covered by Joseph Broussard's grant. which bounds upon Meaux's lower line, it follows, of course, that the settlement of Meaux, upon the west side of the Vermillion, must have been higher up, and off the land in dispute; for his settlement upon the west side was under his own title, and only a removal from one side of the bayou to the other, as he supposed, upon his own land; nor does this witness say that he ever took possession of the land in dispute, nor does he locate his settlement at any particular place upon the west side of the bayou; only stating, that his house upon the west side, was nearly opposite his house upon the east side, about five or six arpents lower than the Coulee des Porches. He only speaks in an uncertain manner, and in a way by which we can ascertain no certain place of location upon the west side.

And this court knows full well, what confidence ought to be placed in so vague description of a location; a description which is contradicted by Pierre Broussard; who says the settlement of Meaux, upon the east side of the Vermillion, was eight or ten arpents below the Coulee des Porches; and if the house of Meaux, on the west side, was opposite the house on the east, it would make a difference of from two to four arpents of location, between these two witnesses. This clearly shews, that no confidence or calculation can be made from the recollection of witnesses, describing lines and situations relative to events which happened forty years ago; when they speak only from recollection, without being positive as to the facts by them stated; and when they undertake to describe a location, by stating it to be nearly in such and such a direction. This witness, instead of proving Meaux's or Broussard's possession of the land in dispute, clearly shews that Breaux, the defendant's ancestor, was in possession before Meaux moved upon the west side of the Vermillion. Jean Baptiste Broussard says, that Meaux, Breaux and Trahan were put into possession of their lands upon

West'n District. *Sept.* 1821.

MEAUX'S HEIRS *vs.* BREAUX.

the east side of the Vermillion, upon the same day. He also states, that Meaux lived on his land, upon the east side, for ten or eleven years after he was put into possession; and that Breaux lived upon his land, on the east side, four or five years, and then moved to the west side, where he settled, and where he has possessed ever since, as I will shew. So, that taking the testimony of this witness, as it will be seen by the statement of facts, Breaux and Meaux were put in possession of their lands, upon the east side, at the same time; and Breaux, after five years, moved over to the west side, and Meaux remained on the east side for eleven years, when he moved over to the west side. So that Breaux took possession five or six years before Meaux moved from the east side of the Vermillion to the west.

Athanase Hébert states, that Meaux first settled upon the east side of the bayou Vermillion, six or seven arpents below the Coulee des Porches; that he afterwards moved to the west side, six or seven arpents below his settlement, upon the east side. And here I will observe to the court, that this witness positively contradicts their other witness—

Jean Baptiste Broussard, who swears that the settlement of Meaux on the west side, was nearly opposite his settlement upon the east.

The witness further says, that it had been from thirty-five to thirty-eight years since Meaux first settled upon the west side of the Vermillion. The fair way is to take the medium, and it will establish Meaux upon the west side, thirty-six and a half years ago; also says, that about the same time he was at Breaux's house, within fifteen feet of the place where the present defendant now lives; and that, at that time, Joseph Broussard, under whose grant the petitioners claim, lived upon the east side, where he always lived, and that he never moved to the west side. Breaux must have been established there for several years before, for in those early days, before slaves were introduced, and every man had to depend upon the labour of his own hands, to erect his buildings, and the population of the country was small, it must have taken Breaux, a poor man as he was, some time to have established himself there, and built an house, which is proven by other witnesses. Hébert, like the other witnesses of the petitioners, does not prove any

West'n District. *Sept.* 1821.

MEAUX'S HEIRS *vs.* BREAUX.

possession of the land prior to the defendant's; nor do one of their witnesses prove that the petitioners, or any person under whom they claim, were ever in the possession of the defendant's land.

The court cannot consider the possession of Michel Meaux, possession in right of Joseph Broussard's grant, for they have shewn by their titles, that Joseph Broussard did not convey them the land he claimed in virtue of his grant, until the years 1808 and 1815; of course, if they possessed the land at all, they did it without title, and their possession without title, cannot avail against our possession with title, and in good faith. And mark the contradiction, the want of truth, the bad faith contained in the act of 1815. J. Broussard's grant was for only ten arpents front; by the deed of 1808, he sold to Pierre Meaux, seven of these arpents; and by the deed of 1815, he sells to the heirs of Michel Meaux, of whom Pierre was one, two arpents more, and conveys one arpent, which he says he had given to Michel Meaux, their father, in the year 1808; and by the statement of facts, it will appear that Michel Meaux died in the year 1784, twenty-four years before Broussard says he gave him the land.

It clearly appears then, that the petitioners had no right or title to the land of Broussard, until 1808 and 1815; and of course, the possession of Michel Meaux, upon the west side of the bayou, was alone in virtue of his own grant; and whether we begin at isle des Copalmes, or near a line *vis-à-vis*, the Coulee des Porches, by referring to the map, the court will see that Meaux's grant does not interfere with the defendant's land. It is Joseph Broussard's grant alone.

Jean Broussard says, he saw Meaux upon the west side, but does not know where he lived. This witness does not prove that even Meaux was upon the present land. He knows nothing about it. He proves nothing, except that François Meaux, the son of Michel, now resides a little lower than where his father did, but does not prove that either ever possessed the defendant's land.

Let us now view the testimony offered by us.

André Martin proves, that Breaux first lived upon the east side of the Vermillion, and afterwards moved over to the west side nearly in a line with his house, on the east side, and exactly on a line where the present defendant's

West'n District. *Sept.* 1821.

MEAUX'S HEIRS *vs.* BREAUX.

house now stands. That Meaux and Breaux crossed over to the west side, about the same time; and that Meaux lived where J. B. Broussard now resides. By the testimony of this witness, the defendant proves positively, that his father settled upon the west side of the Vermillion, upon the spot he now lives; and that he has possessed it ever since, and that it has been thirty-five years or more since.—He also proves, that Meaux settled higher up, and not on the defendant's land. He also proves that Joseph Broussard always lived on the east side. Now, how can the petitioners claim by possession, without they prove that Joseph Broussard, under whose grant they hold, or some person under him, possessed the land in dispute: this they cannot do; whilst the defendant, on the contrary, proves positive and uninterrupted possession of the particular spot, under good title, for upwards of thirty-five years.

John Coleman proves the defendant's possession since 1788, positively.

In support of the positive testimony of these two witnesses, I will refer the court to the deposition of J. C. Hébert. This witness swears positively, that since forty years, Breaux and

his representatives, have always possessed and cultivated the land in dispute.

The same fact is proven by all the witnesses in the case.

To shew the court why this question, which we have agreed to submit, has any bearing upon the case; I will state, that René Trahan's grant calls for forty arpents of land, bounded upon one side of the domain, and upon the other by Meaux; and that Meaux's grant calls for Trahan's land above, and Broussard's below; and Broussard's grant calls for Meaux's above, and Breaux's land below; and Breaux's grant calls for Broussard's land above: so that these several tracts form a chain, and call for the one and the other. The defendant contends that the lands must be located by the proper authority. The petitioners, on the contrary, contend, that no attention is to be paid to the calls of the grant, and that the lands had been located differently from their calls; and if the lands must be located according to their calls, or were so located, then the defendant must succeed; if they were located differently, and as contended for by the petitioners, then as to this point (if not precluded by others) the judgment of the court below must be affirmed.

West'n District. *Sept.* 1821.

MEAUX'S HEIRS *vs.* BREAUX.

The beginning of the survey and location of these several tracts, was at the isle des Copalmes, on the west side; that is, the isle des Copalmes must be considered as the point of departure. In taking it as the point of departure, each tract must be, and has been surveyed and located, bounding on each other on the west side.

In order to establish the isle des Copalmes, as the beginning boundary upon the west side of the Vermillion, I need only refer to the case of *Meaux* vs. *Breaux*, 5 *Martin*, 215, and observe, that is the very case now before the court.

The court will see by the record, that the petitioners and the defendant's ancestor were then the parties litigating; and that the beginning of Trahan's grant upon the west side was then the question; and that it has been decided to begin as the defendant contends for, at the isle des Copalmes.

But putting these decisions of this court out of the question, the beginning of Trahan's grant at isle des Copalmes, is established by the proof in this cause, beyond a doubt, and uncontradicted by any witness. All the witnesses agree in the fact, and J. C. Hébert

proves the positive fact, that old colonel De Clouet, who made the original surveys, and located Trahan and Meaux under their titles, told him that he had delivered possession to Trahan, and surveyed the land under his grant, by beginning at and establishing the isle des Copalmes as the upper boundary of Trahan's grant. The declarations of De Clouet (who is dead) the very surveyor who put them in possession, as directed by the Spanish government, is good evidence; and I need not refer this court to decisions, to shew that in cases of boundary, the declarations of deceased persons are good evidence; and if so, the declarations of the surveyor himself, are certainly the best evidence that can be produced.

The first piece of evidence I shall refer to, to prove that the upper line of Meaux's adjoined Trahan's lower line, on the west side, will be the written acknowlegement of Meaux himself, contained in his grant, shewn by the petitioners; and also in sales made by him. together with the certificate of the surveyor. who first surveyed the land, and put the several claimants in possession.

I begin by calling the attention of the court

West'n District. *Sept.* 1821.

MEAUX'S HEIRS *vs.* BREAUX.

to Meaux's grant, for fifteen arpents of land on both sides of the Vermillion. The court will see by reading the certificate of survey, that Michel Meaux, under his signature, has acknowleged that De Clouet put him in possession of his fifteen arpents, front of land upon the west, as well as the east side of the Vermillion, adjoining (attenant) upon both sides, to the land of René Trahan.

Nor is this the only act wherein he has acknowleged that his land adjoined the land of Trahan. Upon the 20th of July, 1778, subsequently to the survey and location, which De Clouet certifies he made in 1776, Michel Meaux sold the five upper arpents of his grant, to one F. Broussard; and in this deed he states, that his land adjoined the land of René Trahan upon both sides of the bayou.

How is it possible, that the petitioners can expect to establish the location of Michel Meaux's land, different from his written acknowlegement.

But even suppose that Meaux had never made a written acknowlegement that his land adjoined Trahan's, is not the official certificate of the surveyor, who states he put him in possession of his land adjoining Trahan's,

boundaries, and upon which alone the grant issued, good evidence of the location, until the contrary is proven? And has it been proven? No not one word of testimony proves any other location. Their witnesses only go so far as to say, that they never knew of any survey upon the west side, for Meaux. They do not dare to say, that no survey was ever made—they could not say it. How then can this court do otherwise, than to establish the location of the land, according to the written acknowlegements of Meaux himself, the certificate of location of the surveyor, and the grant of Meaux, which, from the petition to the last order, calls to bind upon Trahan, upon both sides of the Vermillion; they cannot in law or justice.

But supposing that there had been no written acknowlegements of Meaux, no certificate of location by the surveyor, and that the grant of Meaux did nôt call to bound upon Trahan's land upon both sides of the Vermillion. I will shew that there was an actual survey and location of Meaux's land upon the west side of the Vermillion, and adjoining the land of René Trahan.

West'n District. *Sept.* 1821.

MEAUX'S HEIRS *vs.* BREAUX.

I refer to the fact stated in the testimony of all the witnesses, whose evidence I have commented upon, and which is this, *viz* that after the land was surveyed in 1776, upon the east side of the Vermillion, for Trahan, Meaux, Broussard and Breaux, the surveyor crossed over to the west side to make the survey. If the evidence had stopt here, it would be sufficient to induce the presumption that the survey had been made, without the contrary had been proved by the petitioners; and the defendant having established the fact that a survey at that time was made, which began at the isle des Copalmes, and that each of these tracts called for the other, this court would presume, until the contrary was proven, that this boundary was given at the place of departure, to govern the location of all the said tracts on the west side, and that the survey and location of the same, was then made accordingly, particularly when the surveyor who made the same so certifies it, and the parties themselves sign a written acknowlegement of the fact, upon which their grants issue. But our testimony stops not here. The defendant proves the fact of an actual survey and location in 1776, as contended for by him. I will shew it.

In the trial of this cause, an old Spanish record of certain proceedings, was admitted to be read, and to which I refer the court. It accompanies the record of this case, by agreement.

By the depositions therein contained, of old persons now dead, some of whom were present at the survey of 1776, the court will see that an actual survey was then made upon the west side of Vermillion, and Broussard under whom alone the petitioners claim, expressly states, that he understood that a survey had been made of all their lands upon the west side of the Vermillion in 1776, and that it was different from the survey made upon the east side, and that he never heard of any dissatisfaction until some years after. He does not deny the survey of 1776, upon the west side, but only says he does not know where it began. The deposition of the widow Meaux, mother of the petitioners, proves that the survey upon the west side, began at the isle des Copalmes.

But if all this be not sufficient, I will ask if the defendant proves positively, that the land was surveyed for Meaux, adjoining Trahan's, and then for Broussard, and then Breaux, and that according to said survey, the defen-

West'n District. *Sept.* 1821.

MEAUX'S HEIRS vs. BREAUX.

dant is rightly located, will not the judgment of the inferior court be reversed? If so, we have positive proof of the survey being made as the defendant contends for. Look at the deposition of J. H. Hébert. He proves the survey and location as the defendant contends for. Hébert is asked by the defendant, if he has any knowlege of the survey of 1776 or 1778, and how it was made. He answers in these words, "I have a knowledge of said survey upon the west side of the Vermillion; De Clouet who made the said survey, told me how it was made. I was not present." He is then asked if the said survey (alluding to the survey of 1776) was not made by beginning at the isle des Copalmes, and first running off Trahan's land, and then Meaux's adjoining to Trahan. His answer is: "the survey was made of the tracts of land in the manner as stated." He also states, that he had seen a boundary below Breaux's land. He further states, that, he was present when the boundary of Breaux was verified by De Blanc and Duralde, and found correct. Now, it appears to me that this is positive testimony. Suppose De Clouet was living, and now before this court, and was to swear that in 1776, he surveyed Meaux's land

on the west side of the Vermillion, adjoining Trahan's land, and then Broussard's, and then Breaux's, all adjoining, would not his testimony be received, and would it not be conclusive, if not contradicted. And if it would, as he is now dead, the law says his declaration as to locations, shall be received in evidence. If so, an actual location is proved, adjoining Trahan's land; for De Clouet told Hébert that he so surveyed and delivered the land.

But the fact of there having been a survey and location of lands adjoining each other, from the isle des Copalmes down, is established by other and stronger testimony, if possible.— It appears, that by looking into the depositions to which I have before referred the court, that about ten or eleven years after the survey of 1776, the present petitioners, or some other persons, began to disturb the defendant's ancestor, and that De Clouet, who was then living, and the same surveyor who had surveyed the lands in 1776, went upon the ground and re-surveyed the several tracts of land, beginning at the isle des Copalmes, and so on, and verified his survey of 1776, and declared Breaux, in possession of his land, as surveyed in 1776, and as possessed this day;

West'n District. *Sept.* 1821.

MEAUX'S HEIRS *vs.* BREAUX.

what better or stronger testimony, or proof of a former survey can be had, than the same surveyor retracing the lines run by himself at the first survey, and declaring the same to the persons present ? This is in fact, shewing the boundaries and lines by him given, and is the very best evidence that can be offered. I refer particularly to the testimony of François Louriere, on the record, as well as to all the others.

In addition to this host of testimony, I refer the court to the verification of the boundaries by which it will be seen, that the two commandants of Oppelousas and Attakapas, by order of the Spanish government, run off the said several tracts of land, beginning at the isle des Copalmes, and that at the line on the west side they found the hole in which a boundary had once been placed ; and that Jos. Broussard, under whom the petitioners claim, acknowleged that he had pulled up a post from that place, and which boundary was shewn by André Martin. I will ask, if this does not prove that a survey had been made, and that this was the dividing boundary between Broussard and Breaux, as the defendant contends. How is it possible for the court to re-

sist this host of evidence? How could it be possible for the defendant to prove the fact clearer than he has done? Have the petitioners shewn by one witness, by one circumstance, that a different location was given? They have not. In establishing the lands adjoining, as the defendant contends for, every claimant gets his quantity, and there is no confusion; but establish the lines as the petitioners claim, and the court will leave a vacancy of about seventeen arpents in a straight line between Trahan's land and Meaux's, for which no title or demand was ever given or made under the Spanish government, and will throw the entire country from the isle des Copalmes, to the mouth of the Vermillion, into confusion, and change the location of every tract of land on the Vermillion river. But in deciding, as contended for by the defendant, every inhabitant will remain as he now is; it will put an end to litigation, and the petitioners' in lieu of taking from my client his land, upon which his forefathers and himself have lived and raised their families these forty years; they will get their land also, superior in point of situation and quality, to that which they so unjustly ask for.

West'n District. *Sept.* 1821.

MEUX'S HEIRS *vs.* BREAUX.

Even supposing that the defendant should not have succeeded in establishing the survey of 1776, as contended for by him, that the petitioners are barred from recovering from him, by prescription of thirty years, without a title, and if not barred by it, that they are by the prescription of ten years, under possession in good faith and just title.

Let us consider this case at first, as if the defendant had no title, and relied alone upon the plea of thirty years prescription. *Si aucun a joint, usé et possedé un héritage ou rente, ou autre chose prescriptible, pour l'espace de trente ans, continuellement, tant par lui que ses predécesseurs, franchément, publiquement, et sans aucune inquiétation, supposé qu'il ne fasse apparoir de titre, il a acquis prescription entre âgés et non privilegies.* The thirty years prescription has been pleaded, and the petitioners have admitted that they were neither under age or privileged by their not pleading it; nor have they shewn, by any evidence, that they were either the one or the other: of course, the case must be considered as between parties against whom prescription would run, and as such I will examine it. *Pothier, Prescription, n.* 162.

The defendant proves, by the testimony of

J. C. Hébert, that for forty years the ancestor of the defendant, and the defendant, have actually resided upon and cultivated the land in dispute. Pierre Broussard says, that it has been forty years since Breaux settled upon the land in dispute. Athanase Hébert says, that thirty-five or thirty-seven years ago, he saw Breaux's house in the place where it now is. Breaux had already established the place. John Coleman says, when he came into the country, in 1788, Breaux was residing upon the land. The testimony of all the witnesses is supported by the depositions referred to in the Spanish record. All of these witnesses' testimony goes to prove, that Breaux enjoyed, used and possessed the land for thirty years before this suit, openly, publicly and without interruption, and clearly establishes the defendant's right to be maintained in possession of said land.

The defendant has proven, that his father and himself, for more than ten years previous to any disturbance, resided upon and possessed the land, publicly, openly and in the view of the whole world. And he has also shewn, that it was in virtue of a good and just title: a grant from the Spanish government. The

West'n District. *Sept.* 1821.

MEAUX'S HEIRS *vs.* BREAUX.

petitioners have endeavoured to shew, that Broussard's grant was the oldest; but the court will look at Broussard's grant, and they will see that it calls to bound upon Breaux's land below; and although it appears from the extract of Breaux's grant, that the date of the patent of Breaux was not as old as Broussard's, this court will presume, that the petition, order of survey, and certificate of survey, upon which the patent issued, were as old as Broussard's, or why would Broussard's grant call for Breaux's. *Pothier*, *Prescription*, *n.* 6, *§* 26.

Baldwin, for the plaintiffs. The only question to be determined in this case, is the upper line of the grant to Michel Meaux, on the west side of the Vermillion. The plaintiffs contend, that it ought to be at right angles from the Coulee des Porches, situated on the east side of the same bayou. If this is determined to be the true line, then the decree will follow as a necessary consequence, that they ought to be quieted in their possession; for if this is the correct line, the defendant was on the plaintiffs' land. This agreement was entered into after the suit was at issue, and after the parties and their attor-

nies were well acquainted with the facts of the case, to simplify the enquiry, and to settle a question which had been too long in discussion; and which, if the parties had felt disposed to prolong and embarrass the proceedings, might have been rendered complicated and perplexing. Each party was fatigued with discussion, and wished to direct their attention to the single point, on which the whole case, in truth, depends. The defendant relied very much on the opinion, that the question had been settled in the former suit of the Broussard's and Trahan's; but this court by their decision in 8 *Martin*, have determined, that the *res judicata* did not apply: and the question is to rest upon the evidence adduced.

The defendant relies altogether upon prescription, which does not seem to me to grow out of the question submitted by the agreement. It was well known at the time, that the question of prescription could not arise, as the plaintiffs and defendant had been in possession of some part of their tract for many years, and that a possession of part was a possession of the whole, so far as to permit the effect of that doctrine.

West'n District. *Sept.* 1821.

MEAUX'S HEIRS *vs.* BREAUX.

Though it was necessary in the district court to prove the length of possession, as well as the particular place where the plaintiffs were situated, to ascertain the correctness of the location.

I conceive that the title is of itself sufficiently explanatory.

The parol evidence establishes the fact of the possession of the plaintiffs, and their ancestor, on the land, beginning at the Coulee des Porches, for at least forty years; and that it began at the period, if not before the date of the grant. This is not contested. But the defendant's counsel labours to destroy the effect of this settlement and occupancy, and offers in his argument, the evidence of a survey made by De Clouet.

This survey of itself proves nothing beyond the single fact, that he surveyed the land, as well as that of the other grantees, on both sides of the river Vermillion, and planted boundaries. To judge from the survey alone, the mind would not hesitate in coming to the conclusion, that the fronts were directly opposite each other. To prevent this, the defendant offers testimony to shew that a different location was made on the west side, for

Trahan. Admitting that this is proven, it answers no purpose. It must be proved that he surveyed Meaux's adjoining; and even this will still be ineffectual, unless he proves that it was done by Meaux's consent, and that the title would justify it. Both of which he has failed to do. The title calls for the Coulee des Porches as the only boundary. No other could correctly be taken. No one of the witnesses state that Meaux was present at the survey on the west side; or that he ever consented to be bound by Trahan's line, beginning at the isle des Copalmes.

This case then, unconnected with the Meaux in the case of the Broussard and Trahan's, rests upon the grant and possession under it, and which is simply this;—Meaux calls to join on Trahan, and Trahan refers to the Coulee des Porches as his own boundary; consequently it is the upper boundary of Meaux, who went into possession about forty years ago, and his heirs, the present plaintiffs, have continued ever since.

This coulee is admitted, by the defendant's counsel, to be the correct limit on the east side. It must serve for the west side, unless something more certain interferes to prevent

West'n District. *Sept.* 1821.

MEAUX'S HEIRS *vs.* BREAUX.

it. Nothing is offered but parol testimony of De Clouet's survey, made in the absence of Meaux, and never assented to by him. Trahan might have requested the surveyor to give him a different front on the west side, as one of the witnesses, if not more, states, that Trahan did not wish to include the bend of the river in his tract, and requested that it might be surveyed higher up. A very strong reason why Meaux would not wish to change his front, as he would then take the bend rejected by Trahan.

It seems clear then, that the plaintiffs have a right to continue in possession of the land, thus occupied by them and their ancestors, for forty years, at least; and that the Coulee des Porches must serve as the boundary on the east side; and a line crossing the river or bayou directly opposite, as the upper boundary on the west side; and which, by the agreement, is the only question submitted for decision.

It may, however, not be amiss to look a little at the defendant's pretentions. He claims under a sale from Anselme Thibeaudeau to Firmin Breaux, in one of which sales he conveys two arpents and one half in front, situated

on the river Vermillion, with the like quantity upon the same line, on the other side of said river. On the same day, he sold two and one half arpents more to J. Broussard, in the same manner, on both sides of the river. How then can the defendant, under such a sale, contend that his land does not lie opposite, and that the plaintiffs must change their possession and lines to accommodate him?

The defendant's counsel has asserted, that if the Meaux are permitted to remain where they are, it will require a change of all the lines and settlements on the Vermillion.—The contrary of this is well known to the court, and that all the evils apprehended by the defendant's counsel will be introduced by deciding against the plaintiffs.

For a further and much better illustration of the case, the opinion and view taken of it by the district judge, is referred to.

MARTIN, J. I concur in the opinion of my colleague, for the reasons therein adduced.

MATHEWS, J. The question as to the effect of the judgment obtained in the superior court of the late territory of Orleans, in the case of *Trahan's heirs* vs. *Broussard*, 2 *Martin*, 133, as

West'n District. *Sept.* 1821.

MEAUX'S HEIRS *vs.* BREAUX.

forming *rem judicatam*, in the matter in dispute between the parties to the present, having been settled by a decision of this court. 5 *Id.* 214, it now only remains to decide this case on the merits.

The plaintiffs and defendant claim a tract of land on the western side of the bayou Vermillion, of twenty-five arpents in front, fifteen of which were acquired by a grant to their ancestor, and ten by purchase from Broussard, an original grantee.

The principal difficulty in the case, is to fix the upper limits of the grant to the plaintiff's ancestor. It calls for Trahan's grant, and purports to be of an entire tract of land, of fifteen arpents in front, on both sides of the bayou. The lower line of Trahan's land, on the east side of the stream, is established beyond dispute, and determines satisfactorily that of the grant of the plaintiff's ancestor on that side. But on the other, Trahan's land is, by the judgment of the superior court of the late territory, referred to, to have for its limit, on the upper side, a place called isle des Copalmes. and run down the bayou for its front, which places this part of his claim some distance above his grant, as located on the eastern side.

The question which relates to the location of this land, must be solved by ascertaining whether or not Meaux's line, on the upper side, and Trahan's on the lower, must necessarily be the same on both sides of the water, according to the title on which the former claims. I think not.

The plaintiffs' claim calls for an entire tract of land, containing fifteen arpents in front, on each side of the bayou, and as its location on the other side is fixed beyond a doubt, its western ought to correspond with such lines as are thus clear and certain, unless they interfere with an older or better title, which does not appear to be the case here.

The defendant's claim, by possession and prescription, is not in my opinion supported by evidence. They do not shew that their title, such as it appears on the record, covers any part of the land claimed by the plaintiffs. Their possession being without colour of title, they can only avail themselves of the prescription *longi temporis*, and they shew no claim on that score.

It is true, that the testimony of one of the witnesses (Huet) shews a very long possession in the defendant, and his ancestors; but it

West'n District. *Sept.* 1821.

MEAUX'S HEIRS *vs.* BREAUX.

is by no means explicit as to the precise spot or its extent. His evidence is too vague to support a judgment. Admitting it to be otherwise, it is contradicted by another witness (Montice) which proves an interruption.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Baldwin for the plaintiffs, *Brent* for the defendant.

CHAMARD vs. *SIBLEY*.

When the *douaire* consists in a sum of money, once to be paid, interest is due from the judicial demand only.

APPEAL from the court of the sixth district.

MARTIN, J. The petition states, that the plaintiff, in 1767, married Louis Chamard, to whom she brought $400 in marriage; that her *douaire prefix*, according to the custom of Paris, was $200; that during her marriage, she inherited from her mother $4675; that her husband died in 1808; that the defendant possessed himself of his estate; caused it to be sold, and has rendered no account of it; that he thereby intermeddled in the succession, so as to render himself liable for the plaintiff's privileged debt.

The defendant pleaded the general issue; averring, that if he did take possession of Louis Chamard's estate, he was fully authorised as curator, &c.; and he administered fully and faithfully, &c.; that she has received what is due from him.

There was judgment for the plaintiff for $346 53 cents, with interest at 5 per cent. till paid. The defendant appealed.

The $600 due under the marriage contract, appear by an authentic instrument, and are not denied. It is admitted that the defendant was duly appointed curator of the estate. The sum inherited from her mother is proven, and it is admitted, she bought at the sale of the estate, a house and lot for $411; and other small articles, amounting to $19 50 cents.

The only question is as to the interest. It has been allowed from the death of the husband in 1808; the defendant contends it ought to have been allowed from the judicial demand. *Pothier* in his treatise, *Du Douaire*, *art.* 206, says, that when the dower is to be paid *en deniers une fois payés*, a sum of money once paid, interest is only due from the judicial demand. *Coutume de Paris. Title Douaire*, 152.

West'n District. *Sept.* 1821.

CHAMARD vs. SIBLEY.

I think the judgment of the district court ought to be reversed, and the interest of the dower is to be allowed only from the judicial demand. The costs of this appeal to be borne by the appellee.

MATHEWS, J. I concur in the opinion of my colleague.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the court proceeding to give such a judgment as, in our opinion, should have been given below; it is ordered, adjudged and decreed, that there be judgment for the plaintiff, as in the district court, but that she recover interest on the decree, from the judicial demand only, with costs in the district court, but that she pay them in this.

Johnson and *Mills* for the plaintiff, *Bullard* for the defendant.

FLEMING & UX. vs. *LOCKART.*

If a sheriff sell a runaway slave without fulfilling the formalities which the law enjoins, and, in consequence, the ne-

APPEAL from the court of the sixth district.

MARTIN, J. The plaintiffs seek to recover damages, on account of a negro sold, as a runaway, by the defendant, as sheriff, having

been recovered from her by his previous owner. Some of the formalities which the law requires, previous to such a sale, having been neglected by the vendor.

He pleaded the general issue, the want of notice of the suit in which the negro was recovered, and that he was not liable for his *bonâ fide* acts as sheriff.

There was judgment for him, and the plaintiffs appealed.

The sale and recovery are proven, and the defendant has produced the receipt of the printers, to shew how often the negro was advertised; and it appears that the advertisements were not continued as long as the law requires.

I think that the only consequence of the want of notice to the present defendant, of the suit in which the negro was recovered, is the faculty, which he has exercised, of shewing any thing which might have prevented a recovery. In this, however, I believe he failed.

Surely if a sheriff sell any thing, without previously doing what the law requires from him, for the validity of the sale, and his vendee is obliged to abandon the thing sold, in consequence of the vendor's neglect, the latter is bound to indemnify him.

gro be recovered from his vendee, the latter may recover damages therefor.

In such a suit, notice to the sheriff of the former suit need not be proven to have been given him, that he might defend his vendee, but he may shew any thing which his vendee might have shown to resist the claim of the former owner of the negro.

West'n District. *Sept.* 1821.

FLEMING & UX *vs.* LOCKART.

We ought to reverse the judgment, and the case must be remanded, in order that the damages may be assessed; and the costs of this appeal must be borne by the defendant and appellee.

MATHEWS, J. I concur in this opinion.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the cause be remanded to the district court, in order that the damages be assessed; and it is ordered that the defendant and appellee pay costs in this court.

Baldwin for the plaintiffs, *Bullard* for the defendant.

SMITH vs. *SMITH.*

One who, on his father's death, takes home a destitute younger brother and occupies him on his farm, is not necessarily bound to pay him wages: but circumstances may entitle the latter to them.

APPEAL from the court of the sixth district.

MARTIN J. Action for work and labour done, on a *quantum meruit*. The answer alleges, that the parties are brothers; that their father died in 1810, without leaving any estate; that the plaintiff being then very young, the defendant took him home, furnishing him with food, raiment and schooling; that in 1813 or

1814, their grandfather gave the plaintiff a very young negro boy, who came to the defendant's, and the plaintiff and said boy remained there till the 20th of April last; that it is true, they both, at times, worked for the defendant, but the value of their services did not amount to the expences he incurred in their maintenance.

The plaintiff had a verdict, and judgment for and the defendant appealed.

Jet deposed, he has seen the plaintiff on defendant's plantation always industriously employed, as much as he has ever seen any boy; ploughing, driving oxen, and he thinks, picking cotton. Since 1815, the plaintiff was employed, every day, at work, when the witness saw him. He staid one night at the defendant's, and saw the plaintiff up at daylight. He told the defendant he ought to pay plaintiff $20 per month. He believes the plaintiff could have earned from $12 to $15 per month, any where; and he saw him passing and repassing often in great haste. The plaintiff left the defendant last spring. He may be about seventeen or eighteen years of age. The defendant said, he had sent him to school but for a little time. He was com-

West'n District. *Sept.* 1821.

SMITH *vs.* SMITH

fortably clad. He thinks his services always worth his victuals and clothes. During the war, negroes earned only their victuals, clothes and taxes.

A. Smith, a brother of the parties, deposed, their father died on the 16th of March, 1811. In the end of the year, the plaintiff was sent to their grandfather, but was detained from him. Their grandfather died, leaving him some horses and a negro boy. In the latter end of 1812, the defendant directed the plaintiff to go to his house with his boy and horses. They staid there till April 25, 1820, and worked under the direction of the witness, who was employed by the defendant, who employed besides, a brother-in-law of theirs, and occasionally a negro. This was in 1813, 14, and 15, the crops only answering for a support. The crop made by the witness, plaintiff, his boy, and a hireling, sold for $400 in 1814. They were treated like negroes. They rose early and worked late. In 1816, plaintiff was always employed in ploughing, hoeing, and picking cotton. He was not indulged when he lost time; he was told of it. He was obedient, and made a crop. He was born in 1800. He was unhealthy, as well as

his negro boy. No doctor was ever called for him. He was a drudge, and went to the mill and on errands. In 1818, he agreed to work, and worked till March, when he left the plantation, but returned in the fall and helped to gather the crop. The negro was sick. They performed well in 1819. The witness took the negro to make an engagement with Miller, and settled with the defendant for the hire of the boy; but is certain he did not earn much. He has been hired this year for $10 a month. He is also twenty years of age. He has been kept at hoe and picking cotton, though able to plough these two years. Three years ago the defendant promised to do something for the plaintiff, but has failed. The witness is twenty-six years of age. He remonstrated with the defendant, because he did not educate the plaintiff. The defendant supported the plaintiff in 1813. There was no more than a support made in 1814, and the defendant got only $10. The witness had only $40 for his share in 1815. The crop made by the witness, the plaintiff, a negro, and sometimes a hireling, sold only for $400. In 1816 there were two negroes more; two negro men, a

West'n District. *Sept.* 1821.

SMITH *vs.* SMITH

negro girl, the plaintiff, and a negro woman, at the house, and the crop sold for about $650. In 1817, there was a white man employed, and the crop sold for $1100. In 1818, thirty-two or thirty-three bales were made; but a negro woman and a girl were added to the hands. The plaintiff is small, and the witness thinks he would have been able to plough two years ago. He was a few weeks at school in 1813, and was taken from it to work on the crop, and was sent another time. He was not treated cruelly. He was not clothed as other boys are; the negro was mostly naked. The crops were small, because land was cleared.

Madan deposed, plaintiff lived with him about seven months. He is well disposed, and appears to be between seventeen and eighteen. The negro boy is nearly the same age, small and steady; he gives $10 a month for him, and would be glad to keep him a year.

Jones deposed, the plaintiff lived with the defendant, worked in the field, is laborious and steady; hardy and strong, though small of his age. Though twenty years of age, is no larger than a boy of fifteen or sixteen.

P. Smith, a relation to the parties, deposed, that in 1811, or early in 1812, the plaintiff lived with the defendant, and was then eight or ten years old, destitute of a home, and unable to procure a support. About that time his grandfather died, and left him a negro boy, eight years old. The boy was sickly, and the witness thinks he would not have supported the plaintiff and his boy for their labour, unless on motives of benevolence. The defendant did a fair part towards his brother, and was incapable of taking any advantage of him.

Hawes deposed, the plaintiff ought to have earned something more than his victuals and clothes. He was small but smart and industrious.

Myers deposed, he lived with the defendant in 1818; the plaintiff was not considered as a hand; he only went on errands. The witness lived two years and a half, and had a share in the crop. So he had in 1819. The plaintiff worked on the crop.

A man, who on the death of his father, takes home his brother, a boy of nine or ten years of age, destitute of property and a home, and keeps him on his farm, employing him there-

West'n District. *Sept.* 1821.

SMITH *vs.* SMITH

on, is not necessarily bound to allow him wages, although he keep him steadily engaged from sun rise till dark. As long as the lad is unable to act or judge for himself, it is fortunate that he fell into the hands of somebody who raised him in the habits of sobriety and industry; and such a person, in my judgment, is not bound to make him any compensation. When the lad is able to act or judge for himself, he ought to make a bargain with his employer, or seek labour elsewhere. But the agreement need not be express, it may be inferred from circumstances, and of these there can be no better judge than a jury of the neighbourhood; and they require no other direction from the court, than that the employer ought to allow to the person who has laboured for him, what he might reasonably be believed to expect, taking all circumstances into consideration.—In the present case, a jury has allowed $ the defendant has not deemed it worth his while to apply for a new trial, on account of the excessiveness of the sum. I am not ready to say whether it is that which I would have voted for, had I had the honor of being associated with such of my fellow-citizens as gave

the verdict; but I cannot say they erred. They had means of information not within my reach, and if I do not give an unqualified approbation to the verdict, it is because I wish not to have it believed, that any member of this court, considers a man, who harbours and employs, and who keeps steadily at work, a houseless and pennyless relation or stranger, is, in every case, bound to pay him wages.

Independently of this circumstance, the plaintiff had a negro boy (who worked with him for the defendant) and whose services, though not very valuable, entitled him likely to some compensation.

We ought to affirm the judgment of the district court.

MATHEWS, J. I concur in the opinion of the district court. It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Wilson for the plaintiff. *Thomas* for the defendant.

West'n District. *Sept.* 1821.

WYCHE *vs.* WYCHE.

WYCHE vs. *WYCHE.*

APPEAL from the court of the seventh district.

It is no objection to the reading of an instrument, that the witness who proves the party's hand-writing (his mother's) was young at the time, that she has been dead long ago, and that he does not well read handwriting.

MARTIN, J. The plaintiff claims certain negroes, under a marriage contract, and complains that the defendant has taken them from her, and detains them, without right.

The defendant pleads the general issue; that if the plaintiff ever had any title to the negroes, she has forfeited it, by selling them contrary to law. That she never was married to the man mentioned in the marriage contract, as her future husband. That the negroes are the property of the defendant, by descent from his father, and by purchase.

There was judgment in favor of the plaintiff, for the return of the negroes, and $50 damages; and the defendant appealed.

The statement of facts shews, that—

E. Howden deposed, that he knew Susan Howden, one of the subscribing witnesses to the marriage contract. She was his mother, and died in 1801, about two years after its date. He knew also J. Blunt, the other witness, who was old at the time, and he does not know whether he be alive or dead; he

never was in this state to the witness's knowlege. He has seen his mother write often, and believes the signature S. Howden, at the foot of the contract, to be hers. He has seen G. Wyche, the plaintiff's husband write, and believes the signature, G. Wyche, at the foot of the instrument, to be his. He knows the negroes, in the petition, are those named in the contract, and they are now in the defendant's possession. The plaintiff, or her husband, had possession of them since he married her, till about the commencement of the suit. Soon after the signature of the marriage contract, G. Wyche went to Savannah, and brought back a paper which the witness's father read in his presence, and said it was a license. He was not present when G. Wyche and the plaintiff were married; they always passed for man and wife. They had no children. G. Wyche died on the return of the militia from New-Orleans. The witness understood the negroes belonged to G. Wyche's father. They were sold at public sale; the witness saw the advertisement. G. Wyche brought them home the day they were to be sold. The witness was not present at the sale, and cannot swear they were sold. He

West'n District. *Sept.* 1821.

WYCHE *vs.* WYCHE.

is thirty years of age; cannot well read writing. He cannot do much more than write his own name. His mother wrote often, as his father kept a tavern, and she kept the accounts when he was absent.

The witness being asked to point out his mother's signature, put his finger on it.

He added, that he knew A. Jackson (another subscribing witness, by whose oath the marriage was proven before it was admitted to be recorded) lived in Georgia about the time, but he does not know where he lives now. He never knew of any conveyance of the negroes to G. Wyche, nor does he know that he and the defendant were brothers. They called themselves so, and were so believed to be.

Burn deposed, that he heard the plaintiff say, that Luke, one of the negroes in the marriage contract, now belonging to C. Adams, was sold to Turner and Linton, to pay a debt of her husband, which she was induced to assume. That some advantage was taken of her. One or two had been sold in that way. Some of the others had been given up to the defendant, in 1815, and the others in 1817. She acknowleged him to be her husband's

brother; and that they had a sister or brother. He understood that she had once conveyed the negroes to Prother, to prevent the defendant from getting them. Both parties admitted they had been given to the defendant, under a verbal agreement, that he would do with them as he saw fit, and furnish the plaintiff a decent support for life. They appeared very friendly. She said she expected he would get part of the property—it would be his at her death. At all events, all she wanted was a decent support for life. She lived at his house after the agreement. The negroes were taxed as the defendant's. The defendant told the witness, the plaintiff would not live at his house. She had violated her agreement, and he was no longer bound.—He gave her credit in the stores in town, and with the witness, without limitation; he paid him, and said he was still willing to support her.

Palford deposed, he heard G. Wyche say, he had been in hell since he married the plaintiff. She had got some negroes of her father's estate, before he had come from Georgia. He said he had a brother, and she did not deny it. She said, two of the negroes had

West'n District. *Sept.* 1821.

WYCHE vs. WYCHE.

been sold with her consent. She had been induced to assume a debt of her husband. She had been entrapped. G. Wyche died in the spring of 1815.

M'Carrol, a witness of the defendant, deposed, the plaintiff told him she had given the property to the defendant, under an agreement for her support. That the negroes came from the estate of her father, at whose death her husband administered on the estate, had the negroes sold, and bought them. She was then living at the defendant's.

Welsh and Gay deposed, that the defendant had Lewis, one of the negroes, in Natchitoches, in 1817 and 1819; and sent him to Catahoula. The negro was considered as his property.

Prother deposed, he had once a conveyance from the plaintiff for four of the negroes. Two remained with him afterwards. He gave up the two on the compromise between the plaintiff and defendant. His quit claim for the four negroes was given up by the defendant. He wrote to the parish judge to cancel the plaintiff's coveyance. He left them as he found them. The defendant said, he considered himself the owner of the negroes.

and had used deception to get possession of them, and had told the plaintiff so. He said he had a sister. He had conveyed and delivered four negroes to the defendant, at the plaintiff's request, and the conveyance was afterwards returned to him by the defendant, who said he had right to them as hers. The plaintiff moved into the territory of Orleans, with her husband, in February, 1809.

Cox deposed, that he heard the plaintiff, in the defendant's absence, say, she wished he might come home, she wanted to give up the negroes to him. He was heir to the property, and she was tired of keeping it. This was before the agreement.

Clarkson deposed, that since the commencement of this suit, plaintiff told him she wished to be placed in her former situation; all she wanted was a decent support. The defendant offered to build her a house and maintain her. She left him of her own accord. She told the witness the defendant had treated her well. She authorised the witness to tell the defendant, she was willing to accept the same terms. The defendant paid the taxes till 1816.

Ussey deposed, that the defendant is G.

West'n District. Sept. 1821.

WYCHE vs. WYCHE.

Wyche's brother. The negroes, Luke, Mary and Charles, part of the property sold, are worth $3000.

The defendant's counsel objected to the reading the marriage contract, as not sufficiently proven, and took a bill of exceptions to the opinion of the district judge over-ruling the objection.

They urge, that the witness cannot possibly recognise his mother's signature to the instrument, as she had been dead long ago, and he admits he does not well read writing. An instrument is produced, in which the witness's mother made her cross, or mark, instead of signing. This, in my opinion, may have been the case in the latter part of her life; and happens, at any time, to persons to whom writing is not familiar or easy.

I think the judge did not err. The witness swears, he recognises the signature, and he has often seen his mother write. The alleged improbability of his knowing the signature, must yield to his direct assertion, that he does, when there is no material circumstance that renders his deposition suspicious. Particularly as the deed derives appearance of genuineness from the certificate of its probate

and record in Georgia; and if it was a forgery, the signature of G. Wyche, who lived and lately died near the place of trial, being supposed to be well known there, the imposition might have been easily detected.

The deed being proven, the possession of G. Wyche and the plaintiff, since his death, establishes her right to the slaves *primâ facie.* No forfeiture of this right is shewn. The actual celebration of the marriage ceremony is not required to be proven, in a case like this. The subsequent cohabitation as man and wife, and common reputation while G. Wyche lived, suffice. There is no evidence that the slaves became the property of the defendant, by descent, from his father. The evidence rather shews, that they were the property of G. Wyche, the brother of the defendant. Nothing shews, that in Georgia, children are forced heirs; that the slaves made part of the defendant's share of the estate; from the long silence of the defendant, the presumption is very strong against him, and prescription appears to have destroyed his title.

No evidence of a purchase is produced.

The argument, that the defendant should have the negroes. and support the plaintiff.

West'n District. *Sept.* 1821.

WYCHE vs. WYCHE.

appears to have been waved and abandoned by the parties.

The judgment ought to be affirmed with costs.

MATHEWS, J. I concur in the opinion of my colleague.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Bullard for the plaintiff, *Thomas* and *Wilson* for the defendant.

BALDWIN vs. *STAFFORD & AL.*

The limits of the post of Rapides never having been correctly defined by any act of the Spanish government, they must be taken as they were recognised *de facto* by the officers of that government and those of the late territory.

A plat of survey never returned to the proper office, does not bind third persons.

APPEAL from the court of the sixth district.

MARTIN, J. I concur with the opinion which judge Mathews is about reading.

MATHEWS, J. In this suit, the subject of controversy between the parties, is the location of two several orders of survey, granted by the Spanish government, and confirmed by the land commissioners of the united states.

The order, under which the plaintiff claims.

purports to grant land in the post of Rapides, (as it was termed by that government) and that of the defendants in the post of Oppelousas.

The line of division between these two posts, seems never to have been established by an act of any competent authority, referring to an actual survey, natural boundary, or degree of latitude or longitude. This want of certainty, in the relative extent of these divisions of the country, creates the first difficulty in the decision of the present case.

On the part of the plaintiff, it is shewn that the local authorities of the Spanish government, those of the late territorial government of the united states, and the late superior court, have claimed and exercised jurisdiction in the parish or county of Rapides, to a point beyond the tract of land in dispute, *viz.* a place now called Ray's ferry, on bayou Beuf. These facts shew that the southern or south-eastern limits of the division of country, denominated Rapides, did extend to the last mentioned place, at least *de facto;* and as it is not shewn, that those who considered it to have that extent erred, by assuming limits contrary to right, I am of opinion, that as it relates to this suit, Ray's ferry must be recognised as the limit of the post of Rapides.

The limits established by the surveyor and commissioners of the united states, relied on by the defendants, were no doubt fixed with the best intentions to quiet land claims, and suppress litigation, but cannot certainly be received in opposition to individual rights, having a previous existence.

The defendants and appellants also rely on a survey made by one Hazzard, the plat of which seems never to have been returned to the office of the principal deputy surveyor. It is older in date than that exhibited by the plaintiff, but I am of opinion that it cannot affect his claim; as from its not having been returned to the proper office, third persons were not bound by it.

The case then rests on the original orders of survey, their execution, return to the proper office, and legality of location. That of the plaintiff is prior, both in execution and return. It has been located on land, as I believe, within the limits of the former post of Rapides (at all events *de facto*) and ought in all respects to be preferred to that of the defendants, because it is laid on land, according with the order of the Spanish government, and consequently gives a better title than that exhibited by the defendants.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

The plaintiff *in propriâ personâ*, *Wilson* for the defendants.

TURNBULL vs. *MARTIN.*

He who alleges a fact, must establish it fully. It does suffice that he introduces evidence that render it probable.

APPEAL from the court of the sixth district.

MARTIN, J. The plaintiff states, that he and the defendant gave their note to Davis for fifty bales of cotton, as sureties of J. M. Martin; that the plaintiff paid $3000 thereon, and Davis afterwards obtained judgment against him, and present defendant, for $2950; a great part whereof the plaintiff has paid. So that the defendant is liable to refund whatever has been so paid, above one-half of the sum due to Davis, which is averred to be $1500.

The defendant pleaded the general issue; and averred, that John M. Martin, now dead, owed to Davis $2950, and the plaintiff to Towles, $3000. The plaintiff applied to J. M. Martin to procure him the loan of that sum; that J. M. Martin applied to Davis, who

West'n District. *Sept.* 1821.

TURNBULL *vs.* MARTIN.

consented, on condition that Martin should deliver him fifty bales of cotton, to be applied to the payment of what Martin owed him, and to the sum wanted by the plaintiff, which was supplied him, and applied to the plaintiff's use; and the defendant avers he has paid, as surety of J. M. Martin, his full proportion of the sum of $2950, due by the latter.

The plaintiff had judgment for $1500, with interest, from November 14, 1820, till paid, and costs. The defendant appealed.

The statement of facts shews the plaintiff gave in evidence the record of the suit, *Davis* vs. *Turnbull*—and that

Davis deposed, that the $3000 credited on the obligation, were paid by the present plaintiff, and the balance was paid by both the parties equally. A short time before this obligation was given, J. M. Martin came to borrow $3000 from the witness, who consented, on condition that Martin would give him fifty bales of cotton, on the terms mentioned in the obligation; Martin consented, and the witness gave a draft on Baltimore, which came into the hands of Towles. The money was lent to Martin, at the solicitation of the present plaintiff. Martin having gone to New-

Orleans, without delivering the cotton, about two months after, the witness called on the present plaintiff, who had pledged himself for the delivery of the cotton, and who now said it would be sent by the next boat. Frequent and unsuccessful applications having afterwards been made by the witness to the plaintiff, and an obligation being mentioned, he said, that the defendant, who was as much interested in giving the obligation, was absent; and the witness believes something was said about the crop. The draft was given in favour of Towles, to pay a debt of plaintiff to Towles, as the witness understood. He also understood, that Martin owed the plaintiff. He confided principally in the plaintiff's promise, that the cotton would be delivered. On suit being brought, the plaintiff paid $3000, on condition that the judgment and execution should be staid against him. He said, he thought himself bound for that sum, and would pay it. It was credited to him.

Bynum deposed, that he heard that Martin got $3000 from Davis for the plaintiff, on account of a debt due by Martin to the plaintiff. When the suit was brought and put off, the latter expressed his uneasiness at it, as he had pledged himself to Davis for the payment

West'n District. *Sept.* 1821.

TURNBULL *vs.* MARTIN.

of the $3000, as the money was had for his use.

Scott deposed, that he brought suit for the present plaintiff, against Martin, for a large amount; he sent the account to be demanded by the deputy sheriff. Martin kept the account, and refused to return it. When suit was brought by Davis against Turnbull and Martin, he was spoken by J. M. Martin to defend it.

The note on which Davis sued. is in the following words: "We, or either of us, promise to deliver A. J. Davis, or his agent in New-Orleans, fifty bales of cotton, to average 350 lb. each; to be good cotton of last year's crop, as soon as practicable; or to be accounted for at the highest market price, at the time of delivery, agreeable to J. M. Martin's contract with said Davis. Alexandria, Jan. 20, 1818. Walter Turnbull, Robert Martin."

The plaintiff, it seems to me, has proven his allegation, that he and the defendant gave their note to Davis, as sureties of J. M. Martin. This instrument shews, that they considered each other as co-debtors of Davis; principal debtors of a quantity of cotton,

which J. M. Martin had agreed to sell to him.

The defendant alleges, that this cotton was promised to be paid to Davis, by J. M. Martin, partly on his own account, and partly on that of the present plaintiff.

Davis's testimony shews, that Martin was considered by all as the principal debtor of the whole sum. Bynum's testimony places this beyond the possibility of a doubt; but he speaks of what he has heard.

The liability of the plaintiff, otherwise than as a co-debtor of the defendant, according to the note, is pleaded by the defendant; the *onus probandi* of it, therefore, lies on the latter. He ought to establish it fully, and it does not appear to me that the evidence renders it even probable.

I think the judgment ought to be affirmed with costs in both courts.

MATHEWS, J. I concur.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Bullard for the plaintiff. *Thomas* for the defendant.

West'n District.
Sept. 1821.

BYNUM
vs.
JACKSON.

BYNUM vs. *JACKSON.*

The surety on a twelve-month bond is immediately liable, although his principal died since its execution.

APPEAL from the court of the sixth district.

MARTIN, J. The plaintiff was surety, on a twelve-month bond, under the act of 1817, for Martin, on a *fi. fa.* against the latter, and Mulhollan. Martin died before the expiration of the year, and the present defendant, plaintiff in the execution, took a *fi. fa.* against the present plaintiff, who obtained an injunction on an allegation, that his principal has left a considerable estate, &c. On a dissolution of the injunction, and setting aside the *fi. fa.*, the present defendant, plaintiff in the execution, appealed.

The 15th section of the act cited, provides, that the bond shall be returned with the execution, lodged with the clerk, and shall have the force of a judgment.

It is contended, that Bynum, the appellee, is only a surety, and as such entitled to all the benefits which his principal may claim; that the judgment as to the latter, cannot be executed, till revived against his heirs.

The appellee is liable as upon a final judgment; the death of Martin does not place him in a better condition. It is true, the heirs

of the latter may discharge themselves, by shewing an acceptance under the benefit of an inventory and want of assets. But this was not one of the benefits which their ancestor might have claimed. Such a circumstance would be one of those which the law meant to provide against by requiring a surety.

I think the district judge erred; the judgment ought to be reversed, so far as it sets the execution aside, and the appellee must pay the costs of this appeal.

MATHEWS, J. I concur for the reasons adduced.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, so far as it sets the *fi. fa.* aside; and affirmed as to the costs, and that the defendant and appellee pay the costs of this appeal.

Baldwin for the plaintiff, *Wilson* for the defendant.

BROWN vs. *COMPTON.*

A party sued for giving a pass to the plaintiff's slave, whereby she escaped, may give the freedom of the negro in evidence.

APPEAL from the court of the sixth district.

MARTIN, J. The petition charges the defendant as fraudulently giving a pass to the plain-

West'n District. *Sept.* 1821.

BROWN *vs.* COMPTON.

tiff's slave, whereby she effected her escape. The defendant relied on the general issue principally. The plaintiff had a verdict and judgment, and the defendant appealed.

The statement of facts shews the plaintiff's witnesses fully established that he was for several years in possession of the wench named in the petition, as one of his slaves; that she was taken up in a neighbouring parish, but released on producing a pass given her by the defendant.

M'Micken deposed, that in the year 1812, the plaintiff lived about a couple of miles from him, and he hired from him the slave named in the petition, which he then held as his slave; that one day she came to the witness, fell on her knees, in tears, saying that if she had her right she would be free, and handed him a paper, purporting to be her deed of manumission, which she said was handed her by one Charles Henderson, whose name appeared to be subscribed thereto; she requested him to keep it, till she could make a trusty friend to take care of it for her, in case she was sent away and sold in a distant country; for she was afraid her master would get it from her, as he had frequently demanded it from

her, and she had always denied having it. He threatened to whip her. On examining the paper, the witness found the period at which she was to enjoy her freedom, was not yet arrived, nor was the deed properly authenticated; and he informed her he would procure one properly authenticated, by the time she was to be free, which was done, and the woman has since passed, and been reputed a free woman of color, in the parish of Feliciana, and the state of Mississippi, with these papers, which have been read to the plaintiff.

A copy of the document is annexed to the record, *viz.* a manumission deed executed by Joshua Barnes, of Ohio county, state of Kentucky, manumitting his negro woman slave Minthy, at the time she arrives at the age of 35, *viz.* in August 1817, bearing date August 12th, 1805. The deed is certified by the clerk of Ohio county court, at the August term, 1805, and ordered to be recorded. The said clerk has certified a true copy of the order, and the deed has been taken from the records of his office, and the presiding magistrate of the court has given his certificate, according to the act of congress, and his signature

West'n District. Sept. 1821.

BROWN vs. COMPTON.

and official capacity, are attested by the governor under the seal of the state.

It is contended by the plaintiff, that the freedom of the slave cannot be tried incidentally in this case; and that if it can, there is no evidence that Joshua Barnes, who appears to have manumitted the woman, was her master at the time.

I think the freedom of the slave may well be offered to disprove the allegation, that the person to whom the defendant gave a pass, was not a slave of the plaintiff's; that the defendant has a right to establish this fact in the present suit, without waiting for the woman's assertion of her freedom, in a suit against the present plaintiff.

That the deed of manumission having been duly acknowleged and ordered in open court to be recorded, is a strong presumptive evidence of the freedom of the woman; and as no evidence contradicts it, it ought to have been considered as conclusive by the jury.

At the time of the alleged injury in April 1819, the woman had been free for about twenty months. She was not then the plaintiff's slave, as is alleged in the petition.

It is said she was *de facto* the plaintiff's

slave, and the defendant had no right to aid her in shaking off the yoke of slavery.

I apprehend any man may very conscientiously assist a person, unlawfully held in slavery, to regain his freedom. The attempt is, indeed, made at the peril of the party affording the aid, who is liable in damages or not, as the freedom or slavery is finally established.

The original of the deed of manumission, ought, it is said, to have been accounted for before the official copy from the record was allowed to be read, and we are said to have only the copy of a copy.

This objection ought to have been made to the reading of the document below; and I am not clear that it ought to have prevailed in a suit between persons, neither of whom were parties to the deed principally; as till the woman was proven to be free, she could not have established, by her oath, the absence of the deed from her friends, or control, nor her ignorance of the place of its existence. The deed was never in the defendant's possession, and circumstances prevented his accounting for its absence.

We ought to reverse the judgment of the district court, and ours ought to be for the defendant.

West'n District. *Sept.* 1821.

BROWN *vs.* COMPTON.

MATHEWS, J. I concur in this opinion.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and this court proceeding to give such a judgment as in their opinion ought to have been given in the court below; it is ordered, adjudged and decreed, that there be judgment for the defendant, with costs in both courts.

Johnson for the plaintiff, *Baldwin* for the defendant.

WARE & WIFE vs. *WELSH'S HEIRS.*

If a curator *ad bona* be appointed while all the heirs are present, altho' the appointment be illegal, the person appointed is answerable as their agent.

APPEAL from the court of the sixth district.

MARTIN, J. The object of the plaintiffs is to obtain Mrs. Ware's share of the estate of N. Welsh, her father, which cannot be done without a partition: for this purpose the district court directed that an inventory and appraisement of the estate should take place. It appears that such an inventory had been made immediately after N. Welsh's death, and that Thos. Welsh, his eldest son, one of the defendants, had taken on himself the management of the estate, with the consent of his co-heirs

of age, and among them Mrs. Ware, under the appellation of curator *ad bona* of the estate. His mother, the natural tutrix of the minor co-heirs, acquiesced in his administration.—M'Nutt, the husband of one of the heirs of age, had long before the death of N. Welsh, been put in possession of a tract of land, as an advancement, without any title in writing; afterwards Texada, the husband of another heir, received another tract, under the same circumstances.

The district court decreed, that T. Welsh should account for all the crops made on the plantation of the estate, since it came to his hands, allowing him credit for all debts paid, and improvements; that the value of the land in the possession of M'Nutt and Texada, at the time of the last inventory, independently of improvements, should be collated by them, and that a partition be accordingly made by the parish court. The plaintiffs appealed.

Although, while all the co-heirs were present, and the minor ones represented by their tutrix, there could not legally be a curator *ad bona*. T. Welsh must be considered as the agent of his co-heirs, and as such accountable to them; he ought to be credited for all the

West'n District. *Sept.* 1821.

WARE & WIFE vs. WELSH'S HEIRS.

monies expended by him in the payment of the debts of the estate, and useful improvements.

M'Nutt and Texada are bound to return, in kind, the property which they received from the deceased, as he never made any legal title to them; but they are entitled to the full value of all improvements made by them, and the debts due them by the deceased.

The decree ought therefore to be reversed, and the parties remanded before the court of probates, for a partition, according to the above principles. The costs of this appeal to be borne by the estate.

MATHEWS, J. I concur in the opinion of my colleague.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is ordered, adjudged and decreed, that the case be removed to the court of probates for a partition, according to the principles above stated, and that the costs of the appeal be borne by the estate.

Thomas for the plaintiffs, *Baldwin* for the defendants.

DROMGOOLE vs. *GARDNER'S WIDOW & HEIRS.*

West'n District. *Sept.* 1821.

DROMGOOLE vs. GARDNER'S WIDOW & HEIRS

The appeal will not be dismissed, because the judge *a quo* has certified, that the statement of facts which he made, contains a note of the evidence. The court will presume, that he meant the evidence.

A partner has no action against his partner, for any sum paid for the partnership, nor any funds placed in it, until a final settlement takes place, and then only for the balance which appears due.

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APPEAL from the court of the sixth district.

MARTIN, J. The plaintiff alleges, that he was a partner of Gardner, and paid out of his private monies, a large sum to Gardner and Bernard, on account of the partnership; that he gave to Gardner a note of Scott, and another of Brice and Reeves, amounting together, to $318, to be applied to the payment of a mortgage, but Gardner applied it to his own use, whereby, &c.

The widow answered, she had formally renounced the community, and was therefore not liable.

The heirs pleaded the general issue, that if any partnership ever existed between the plaintiff and Gardner, it was instituted for his sole benefit, Gardner lending his name to give credit to the plaintiff, &c.

The plaintiff had judgment for $1452 1 cent, with interest from April 3d, 1820. The defendants appealed.

The statement of facts shews, that the plaintiff gave in evidence, two drafts of Dromgoole & Gardner, in favor of Gardner & Bernard, on Bartlett & Cox, for $857 49

West'n District. *Sept.* 1821.

DROMGOOLE *vs.* GARDNER'S WIDOW&HEIRS

cents, duly protested for non-payment, paid by him.

Harvey said, that the plaintiff and Gardner were in partnership for the sale of groceries; Gardner told him he would sell out, and the witness might join either of the partners; the plaintiff said he would purchase, and did purchase Gardner's interest in the firm. The witness became interested in the goods on hand, but he is ignorant of the terms on which the dissolution took place. Each partner complained of the other as his debtor.

Scott deposed, he owed the plaintiff about $100, on a note; Gardner called and had payment before it was due. He does not recollect whether it was endorsed.

Reeves said, Brice and Reeves paid to Gardner a note they had given the plaintiff, but he does not recollect whether it was endorsed.

Bynum, a witness for the defendants, deposed, the plaintiff and Gardner said they wanted $1000 worth of cotton, to pay an acceptance of Bartlett & Cox. Cotton was accordingly delivered to an amount not recollected, and a negro pledged, payment was afterwards made by Gardner.

A note of the plaintiff to Gardner, for $2000, dated June 4th, 1819, endorsed by the widow for herself and the heirs, was produced to J. Rippey, with the judgment recovered thereon by Rippey, against the plaintiff, and Sarah Gardner.

A motion has been made by the plaintiff and appellee, that the appeal be dismissed, the judge having certified that the statement contains a note of the evidence. I think this motion ought not to prevail; we must consider the judge meant the evidence by a note of it.

On the merits, it appears that the plaintiff has proven the payments he made for the partnership. There is no evidence that the notes he had of Scott, Brice and Reeves, were given to Gardner, to be applied, as is alleged. to the payment of a mortgage; the presumption is, that they were given to Gardner to meet the exigencies of the firm.

I agree with the defendants' counsel, that a partner has no action against another for any sum paid for a partnership, or any funds placed in it, until a final settlement takes place, and then for the balance which appears due him.

West'n District. *Sept.* 1821.

DROMGOOLE *vs.* GARDNER'S WIDOW&HEIRS

I think we ought te reverse the judgment. and ours must be for the defendants, with costs in both courts.

MATHEWS, J. Having examined this opinion, I concur in it, both as to the effect of the evidence, and principles of law therein recognised, in relation to partners in trade, although it would perhaps be otherwise when an express stipulation should be shewn, that one partner who paid a partnership debt, out of his separate fund, was to be immediately repaid.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed. and that there be judgment for the defendant with costs.

Thomas for the plaintiff, *Bullard* for the defendants.

FORT & WIFE vs. *METAYER & AL.*

He who alleges a fact, must establish it fully. It does not suffice, that he introduces evidence that render it probable; especially when fraud is alleged.

APPEAL from the court of the sixth district.

MARTIN, J. The plaintiffs claim part of two tracts of land, in the right of Mrs. Fort.

in the possession of the defendants; their title is not denied, but the defendants rely on the prescription of ten years. They shew that the land was granted to the widow Hymel in 1796; that she sold it to A. Hymel in 1802, and that he conveyed to Metayer the part claimed by him in 1810, and to Rachel, that which he claims in 1818. The present suit was brought in 1821.

There is not any doubt, that if A. Hymel was a *bona fide* purchaser, the defendants plea must be supported. The plaintiffs therefore contend that he was not.

They shew that the premises, the patent for which was granted to Mrs. Hymel in 1796, had been surveyed for her in consequence of the permission of the commandant of Natchitoches, and the subsequent order of the governor general, as early as 1782, in the lifetime of her husband, and during their marriage; that she inventoried them after his death, as common property, in 1792, and that consequently A. Hymel, her son, from whom the defendants purchased, bought from his mother, in bad faith; because it is alleged, he knew the premises being common, one half of them belonged to his father's estate. and had descend-

West'n District. *Sept.* 1821.

FORT & WIFE *vs.* METAYER & AL

ed to himself, and his two sisters, one of whom was Mrs. Fort's mother; and consequently he knew that his mother sold what she had no right to, when she disposed of the sixth part of the premises, which belonged to her daughter, the vendor's sister, the mother of Mrs. Fort. It is admitted that she had acquired the right of the other daughter to the estate.

The presumption is, that A. Hymel, who was 14 years of age at the death of his father, 16 when his mother obtained a patent for the premises in her own name, and 24 when he purchased them from her, must have known that they constituted part of his father's estate, since they are the whole real property which appears in the inventory.

But the presumption is nearly as strong, that his sister, the plaintiff's mother, who is only two years younger than him, and who consequently was of age when he acquired, and must have been acquainted with the sale, which is authentic, must have known whether her property was alienated or not.

If we add to this, that one of the defendants acquired this part of the land eight years after the sale to her brother; that she was then 29

years of age, and that she lived more than ten years after, and died without making any claim, it will appear equally improbable that the violation of her rights was unknown to her, as that it was otherwise to her brother.

The precise time of her death does not appear on the record, but her name does in the marriage contract of Mr. Fort, which bears date of May 12th, 1820, upwards of ten years after the sale, to one of the defendants, and of eighteen years after that to her brother.

Every party is bound to prove his allegation, that is to say, to bring the weight of evidence on his side; it does not suffice that he render his allegation probable; and he who alleges ill faith, is bound to the strictest proof, for the presumption is against him.

In the present case, A. Hymel seeing a complete patent in his mother's hand, notwithstanding the formalities which preceded the grant, shewed that the law had been applied to during the marriage, might well have believed that her title was complete. He knew she had settled with one of his sisters for her share, and might believe that she had done so with the other, whose silence for 18 years, during the whole of her life, renders this more than probable.

West'n District. Sept. 1821.

FORT & WIFE vs. METAYER & AL

As to Metayer, the case stands on the safest ground: he possessed ten years, with a title. His good faith is impeached, on the only ground that he knew the widow was in possession of her husband's estate, and that he was a creditor of it.

The silence of Mrs. Fort's mother as to him, must, in my opinion, help the other defendant, whose deed from A. Hymel, is of the year 1818. For this silence continued after Hymel exercised an act of ownership, which could not be mistaken, *viz.* his sale of part of the land acquired from his mother, is evidence that his sister considered him as a fair purchaser.

I think we ought to affirm the decree of the district court, questioning the defendants on their titles, with costs in both courts.

MATHEWS, J. I concur for the reasons adduced.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs in both courts.

Rost for the plaintiffs. *Bullard* for the defendants.

KEY'S CURATOR vs. *O'DANIEL.*

APPEAL from the court of the sixth district.

MARTIN, J. Our attention is arrested on a bill of exceptions to the opinion of the district court, in permitting the reading of the deposition of Charity Watkins, taken on a suggestion of her being very old and infirm.

A deposition must be reduced to writing by the deponent, the magistrate who receives it, or an indifferent person. It is inadmissible, if it be in the hand-writing of the party who offers it, or that of his attorney.

It appears she was in court during the trial; was examined in part, but withdrew, unable any longer to withstand an examination, being intoxicated. On this the defendant's counsel objected to her deposition being read, as she might, at another time be examined; and as the deposition was reduced to writing by the counsel for the plaintiff, who sought to avail himself of her testimony.

I think the latter objection would alone suffice. The deposition of a witness must be reduced to writing by him, the justice, or an indifferent person. It is inadmissible in the hand-writing of the party or his counsel.

The judgment ought to be reversed, and the case remanded for a new trial, with directions to the judge not to suffer the deposition of the woman to be read; and the costs of the appeal ought to be borne by the plaintiff and appellee.

West'n District. *Sept.* 1821.

KEY S CURATOR *vs.* O'DANIEL.

MATHEWS, J. I concur in the opinion just pronounced.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the cause remanded, with directions to the judge not to permit the deposition of Charity Watkins, written by the plaintiff's counsel, to be read; and it is ordered, that the costs of the appeal be borne by the plaintiff and appellee.

Johnson for the plaintiff, *Baldwin* for the defendant.

*** There was not any case determined in the months of October or November.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, DECEMBER TERM, 1821.

HAWKINS vs. *LIVINGSTON.*

No appeal lies from an order for a special jury.

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APPLICATION for a *mandamus.*

PORTER, J. The defendant claimed in the court below, an appeal from an order of the judge, which directed a special jury to be summoned, for the trial of the facts put at issue by the pleadings. This was refused, and application is now made, that a rule issue on him, to shew cause why he did not grant it.

The first question presented for decision is, whether this is a judgment or decree of that description from which an appeal lies to this court.

It has been more than once declared, that whenever an inferior court decides on the

East'n District. *Dec.* 1821.

HAWKINS *vs.* LIVINGSTON.

rights of parties, in such a way as to work an irreparable injury, such decision could be reviewed, and the error, if any, corrected here.

In the case now before the court, I do not perceive that any such consequence must, or indeed can, flow from the order complained of. For if it should appear, when it becomes necessary to decide the question, that this is not a case which can be legally submitted to a special jury, the verdict will, of course, go for nothing, and the cause be remanded for a new trial.

This court has decided in *Agnes* vs. *Judice*, 3 *Martin*, 171, and *Kelly* vs. *Breedlove & Bradford*, April term last, that transferring a cause from one court to another, was not such a judgment as could be appealed from. These were stronger cases than the present one, and they are not at all inconsistent with the decision in that of *Poydras* vs. *Livingston*, which was so much pressed on us in argument; for there the judge of the parish of New-Orleans, by sustaining an objection to his competency, gave a judgment that was equivalent to a non-suit, and threw the costs on the plaintiff. On the whole, I am of opinion that the application be refused.

MARTIN, J. The case of *Ralph & al.* vs. *Claiborne*, determined in the superior court of the late territory of Orleans, appears to me perfectly similar to the one under consideration.

General Claiborne, alleging that he was a citizen of the territory of Mississippi, and as such, entitled under the laws of the united states, to have the suit removed into the federal court, filed in due time, his petition, to obtain the transfer. On its being denied, he applied to the parish court for an appeal. which was refused him; and he moved the superior court for a *mandamus;* but it was withheld, on the ground that the judgment was not final. 2 *Martin*, 176.

There was a feature in that case, which gave a stronger title to the defendant, to the interposition of the superior court, of which he availed himself without success. If the parish court, in which he was sued, was permitted to proceed, he must forego his right, by pleading in chief, or suffer a judgment by default. But the court probably thought, that if the allegation was a true one, they could afford him complete relief on his appeal, after a final judgment, by the reversal of it. So may we here.

East'n District. *Dec.* 1821.

HAWKINS vs LIVINGSTON.

But it is urged, that delay will, in this case, work an irreparable injury. This may be alleged on an application for an appeal, at any stage of the cause, and in any cause.

It appears to me, we cannot grant the *mandamus* prayed for.

MATHEWS, J. In this case, a rule is claimed on the district court, to shew cause why an appeal should not be allowed from a decision, by which a *venire* for a special jury is awarded, for the trial of the cause, &c. In support of the motion for the rule, the acts of the legislature, on the subject of juries, and several decisions of the supreme court, are relied on. The present case, as presented to the court, is precisely the reverse of that of *Labatut* vs. *Puche;* there the exception to the opinion of the court, was on a refusal of a *venire* for a special jury; and now it is to a decision by which the writ is granted. Perhaps the expression of opinion, as to the discretion of the district court, in the former case, is rather too broad and indefinite. But I have no doubt of its correctness in principle; that is, that the manner of conducting the trial of a cause must be left to the discretion of the court

before which it is pending, until final judgment, or some decision which causes an irreparable injury to the party desiring to appeal. I cannot adopt the distinction attempted to be made out by one of the counsel, between the remedy, either by a judgment final and conclusive of the appellate court, or by sending the cause back to the original tribunal to be tried *de novo*. It ought to be satisfactory, if the supreme court can, in any manner of proceeding, authorised by law, correct the errors, and remedy the injuries of which complaint may be made, by a party who thinks himself aggrieved, after final judgment in the inferior court. In this view of the subject, I see nothing conflicting between the case of *Poydras* vs. *Livingston*, and that of *Labatut* vs. *Puche*. I am still of opinion, that when two courts, of competent and concurrent jurisdiction, exist, a suitor has a right to select by which he will have his cause decided; and that the court wherein he commences his action, ought to proceed to final judgment on the merits of his case, unless legal causes of recusation be shewn. An absolute and entire refusal of a court to try a cause, has the same effect as a non-suit or dismissal, by compelling the plain-

East'n District. *Dec.* 1821.

HAWKINS *vs.* LIVINGSTON.

tiff to pay costs, and prosecute his claim in some other tribunal; an injury which could, in no manner, be repaired by the appellate court on an appeal from a final judgment, rendered in the second suit. A judgment by which a court wholly declines the trial of a cause, is certainly final in that suit, although it may not be finally decisive on the rights of the parties.

I therefore concur in opinion, that the rule ought not to be granted.

CHIAPELLA vs. *LANUSSE'S SYNDICS.*

APPEAL from the court of the first district.

The vendor cannot have an order of seizure after the failure of the vendee, but must be paid by the syndics.

PORTER, J. The plaintiff in the present action, sold to Paul Lanusse in the year 1818, a plantation and negroes, and retained, as he alleges in his petition, a special mortgage on the property sold, to assure the payment of the purchase money.

In the month of April last, a suit was commenced by certain creditors of the said Lanusse, in order to compel him to a forced surrender of his property, in which the usual order was made by the judge of the first instance, and provisional syndics were appointed.

The petitioner being a privileged creditor, conceived that he was not obliged to await the liquidation of the bankrupt's affairs; and accordingly he instituted this suit, in which he alleges that the sum of $55,500, with interest on a portion of it, is due to him; and prays, that after notice is given to the insolvent, and his provisional syndics, the plantation and other property, purchased from him by Lanusse, may be siezed and sold to pay him the amount claimed in the petition.

The persons made defendants to this suit, appeared and filed various objections to the claim, which it is unnecessary to enumerate. The district judge gave judgment against the petitioner, and from his decision this appeal is taken.

The principal question for decision is, whether a privileged and mortgage creditor, in case of a forced surrender, must come in and be paid by the syndics, out of the general mass, according to the rank and order of his claim: or whether he has not a right to proceed and recover his debt, by due course of law, in the same manner as if no such insolvency had been declared.

In the argument it seems to have been admit-

East'n District. *Dec.* 1821.

CHIAPELLA *vs.* LANUSSE'S SYNDICS.

ted by the counsel, as well for the appellant as appellees; that with the exception of some regulations, not applicable to this case, the rules which apply to a voluntary surrender, govern that of a forced one.

In Spain, it appears clearly by the authorities cited, that in case of failure, whether established by the solicitation of the debtor, or decreed at the suit of his creditors, the practice was to appoint a person to take into possession all the property of the insolvent; collect the debts due to him; and finally, to exercise as far as I have been able to ascertain, the same duties which syndics do here.

The laws which provide for this appointment, make no distinction in regard to the property to be delivered up by the debtor; their language is as comprehensive as can be well imagined. They expressly state, that the whole, *todos los bienes*, is to be put into the hands of the depository; they make no exception as to that on which any of the creditors may have a particular privilege; nor can I find, after a most attentive examination, that they provide for the redelivery of this property to the creditor, or give him any relief, by a suit at his particular instance. On the contrary,

they declare that the property thus deposited, that is the whole, shall be sold, in order that the creditors be paid according to their respective rights. *Cur. Phillip.* 2 *par. sec.* 25, *no.* 12, 167, *idem. lib.* 2, *ch.* 11, *no.* 32, 410. *Par.* 5, *tit.* 15, *l.* 1 & 2.

Under these regulations then, I think it is very plain, that the creditor, who was privileged, did not possess the right of proceeding against the insolvent, until his claim was regularly established in concurrence with the other creditors, and its rank ascertained: indeed, to have permitted such a course of proceeding, would not only have been contrary to the spirit of these laws, but have entirely defeated their end; which was not merely to ascertain the rights of each creditor as against the debtor, but also to determine their rights in relation to each other. Instead of securing the property to attain this object, it would have introduced a scramble of individuals, ending in the greatest confusion, and have enabled the different creditors to exhaust the whole estate of the insolvent, by separate suits, and that, perhaps, to the prejudice of privileges of the highest order.

On examining the statutory provisions of our

East'n District. *Dec.* 1821.

CHIAPELLA *vs.* LANUSSE'S SYNDICS.

own legislature, I cannot perceive they have introduced any change on that part of the law, which is the subject of the present enquiry. Like those of Spain, they provide for the delivery of all the property of the debtor; appoint provisional syndics for receiving and taking care of it; and order the whole to be sold. *Act relative to the voluntary surrender of property, &c., 20th February, 1817.*

A strong argument against the right set up by the plaintiff in this cause, is furnished by the 16th section of the act just quoted: in it the legislature are acting on the very subject before us, the rights of mortgage creditors; and they define these rights by limiting their opposition to having the property sold for cash, in case the other creditors wish to dispose of it on a credit. Now, if those who had a privilege were authorised to sell it themselves, I cannot see the necessity of giving them a right to interfere at all in the proceedings of the other creditors; nor how we can reconcile the power given to the latter to interfere with the sale of the property, with the right claimed here, to dispose of it to satisfy a particular claim.

If any doubt still remains, it is removed by

an examination of the 30th and 31st sections of the same act. The first requires all the property assigned, to be sold at public auction; and the latter evidently contemplates that real estate mortgaged to a particular creditor, makes a part of this property; for it confers an authority on the syndics to give a release of the mortgage, and directs them to hold the proceeds subject to the same rights that existed in the object thus disposed of.

One of the counsel who appeared for the appellants, expressed a doubt whether the act of our legislature on the subject of voluntary surrenders, had any application to the case of forced ones. Admitting this to be correct, we are then thrown back on the law as it anciently stood, and it has been already shewn that it does not differ in this respect from our own.

It was still further insisted, that the *Civil Code*, on the doctrine of respite, must govern this case; but I cannot discover its application. The provisions contained in that title, relate to an entirely different course of proceeding, which bears little or no analogy to that which takes place in case of a forced surrender.

East'n District. *Dec.* 1821.

CHIAPELLA *vs.* LANUSSE'S SYNDICS.

Another ground was taken—it was insisted that the delay thus occasioned to the plaintiff, violated the constitution of the united states, and impaired the obligation of the contract. But it appears to me, that this delay is one necessarily occasioned in ascertaining the rights of the parties interested; and to hold that this impaired the obligation of a contract, would be to decide, that the proceedings in our courts, in ordinary suits, produced the same effect.

The principle involved in the present case, has been already decided in that of *Williamson & al.* vs. *their creditors.* 5 *Mart.* 620. And in the language used there, I am of opinion that as soon as the failure is declared, all property of the debtor passes into the hands of the creditors; and a general liquidation becomes necessary, for which purpose the creditors must resort to a sale of the estate.

I am therefore of opinion, that the judgment of the district court be affirmed with costs.

MARTIN, J. I perfectly concur with every part of the opinion just pronounced.

The mortgaged premises cannot be sold, under an order of seizure, without a previous demand of payment. Now, when the

debtor, by a cession of his goods, voluntary or forced, has lost his faculty of standing in judgment, the demand of payment must be made on some person authorised by law to pay, or resist the payment, if this may be successfully done. The provisional syndics have not the faculty of doing either.

The creditors must then *ex necessitate rei*, wait till there be a person or persons on whom the demand may be made, and who can satisfy or oppose it.

The district judge was perfectly correct, and his judgment ought to be affirmed.

MATHEWS, J. I have examined attentively the opinions, as written and pronounced in this case, and think the conclusion correct on both or either of the grounds therein assumed; and do therefore concur in the judgment of affirmance. If the proceedings against the insolvent be considered as in *limine* only, then, as insisted on by one of the counsel for the appellees, the order to stay proceedings ought to be maintained until final judgment on the concurso.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

East'n District. *Dec.* 1821.

HUNTER vs. POSTLETHWAITE.

HUNTER *vs.* POSTLETHWAITE.

An executor, in an action for money had and received to his use as such, needs not sue as executor, and if he does as such, the defendant cannot contest his capacity.

APPEAL from the court of the first district.

Livermore, for the plaintiff. The only question raised in the case, is whether the defendant having, as agent of the plaintiff, and under his authority, received the rents of a plantation for several years, and having accounted with the plaintiff, can now contest the right of his principal to the money which has been so received. Is not the defendant precluded from disputing the fact, that the plaintiff is executor, and executor in Mississippi? Suppose the plaintiff was not described to be executor, could the defendant object that he was not the owner of the land? A tenant cannot dispute the title of his lessor. 1 *Caines*, 444. 2 *Caines*, 215. 3 *Caines*, 188. 7 *Johns. Rep.* 186. 10 *Johns. Rep.* 358. 12 *Johns. Rep.* 182. The reason is. that having received his possession from the lessor, he is bound to restore it to him, and to account for the value of his possession. The same principle applies to this case. The plaintiff's authority was sufficient for the defendant to receive the money from the tenants of the land: and the

defects now urged, that the plaintiff has not taken out letters of administration in Mississippi, and that an executor has no right to dispose of real estate, are not discovered until the defendant is called on to pay over the money. Is he then to keep this money for his own use? Or to whom must he pay it? The heirs do not deny the plaintiff's authority to act for them. They are content that he should receive the money, and they have the power of making him account to them. In *Peacock* vs. *Harris*, 10 *East*, 104, it was held, that a collector of tolls, though illegally appointed, without the forms prescribed by act of parliament, may recover, upon an account stated, the amount of tolls for which he had credited the defendant. In that case it was objected that the account was stated, with respect to the intestate, in a character, in which, by law, it could not exist, because he was not legally appointed. But lord Ellenborough said:—"If the defendant accounted with him in that character, having received credit from him as such, thereby admitting him to be a person to be accounted with for the tolls, he shall not now be permitted to dispute his title, to recover the balance of

East'n District. *Dec.* 1821.

HUNTER vs. POSTLETHWAITE.

that account. In like manner, as a tenant is taken to admit the title of the landlord, under whom he holds, and which he is not permitted afterwards to dispute." So, when an action for penalties under the post-horse act, was brought by the plaintiff, as farmer-general, proof of his appointment was dispensed with, because the defendant had previously accounted with him as farmer-general. 3 *T. R.* 632.

The defendant has received this money in no other character than that of agent for the plaintiff, and in that character he is to account. *Ex mandato apud eum qui mandatum suscepit nihil remanere oportet. D.* 17, 1, 20. The action *mandati directa* may be maintained by the principal against the agent, although the business do not concern the property of the principal, but of another person. *Pothier, de mand. n.* 62. *Si quis mandaverit alicui gerenda negotia ejus qui ipse sibi mandaverat, habebit mandati actionem quia et ipse tenetur. D.* 17, 1, 8, 3. Upon this law *Pothier* observes: "*Quoique cette loi dise, ejus qui ipse sibi mandaverat, il faut décider de même, quand même je vous aurais chargé de l'affaire d'un tiers qui ne m'en auroit pas chargé ; car par cela seul que je vous en chargé, je deviens chargé et*

comptable envers lui actione negotiorum gestorum. De mand. n. 62. The same doctrine is maintained by *Vinnius, Comm. in Inst.* 3, 27, 3.— Whether the plaintiff, in employing the defendant, has acted as executor or as agent, he is responsible to the heirs. He is therefore entitled to recover from the defendant.

Hawkins, for the defendant. The only point before the court is, whether the petitioner is entitled to bring this action. He sues as executor of A. Hare, but makes no profert of his letters testamentary, nor does he allege where the will of the said A. Hare was made, or where it was proved. He states, however, that he was executor so long ago as 1810, when the defendant began to receive certain monies he now sues for.

The defendant admits, that prior to the year 1810, he leased certain lands under the authority of the petitioner, styling himself executor of the said A. Hare; but avers that the petitioner is not executor in Mississippi, where the said lands are situated.

Now the petitioner must have been appointed the executor of A. Hare, by a will made either in the state of Louisiana or out of it.—

East'n District. *Dec.* 1821.

HUNTER vs. POSTLETHWAITE.

If by a will made in this state, it was as long ago as the year 1810; but in that case the petitioner is certainly not authorised to bring this suit, for his authority as executor expired one year after his appointment. 4 *Martin*, 338, *Lamothe's ex.* vs. *Dufour. Civil Code*, 245, *art.* 166, *Idem.* 247 *art.* 173. It is also to be observed, that the remedy which the petitioner seeks must be in conformity with the *lex fori*, wherever the will was made or proved. 7 *Martin*, 67, *Lynch* vs. *Postlethwaite.* He can have therefore, no greater remedy than what is accorded by the laws of this state, to executors acting under them. If the petitioner however is the executor of A. Hare, by a will made in another state, or a foreign country, then no action can be sustained by virtue of the letters testamentary there granted.—3 *Cranch*, 259, *Dixon's ex.* vs. *Ramsay's ex.* And in order to enable the petitioner to sustain his action, the execution of the will must be ordered by a judge of the court of probates of this state. 5 *Martin*, 568, *Deshon* vs. *Jennings.*

PORTER, J. The plaintiff, in this action, claims $2711 39 cents, which he avers the defendant, a citizen of the state of Mississippi,

owes him, for money had and received to his use, as executor of the estate of one Andrew Hare, deceased; and which monies, he states in an account annexed to the petition, to arise from the rent of a certain tract of land in the state aforesaid.

The defendant being a non-resident, his appearance to this suit has been compelled by an attachment levied on certain credits of his, in the hands of garnishees, residents of this city.

To this demand the defendant, in person, has filed an answer, in which he acknowleges that it is true, he did many years ago, lease a certain tract of land near Fort Adams, in the state of which he is a resident, from the plaintiff, who styled himself executor of Andrew Hare. But that, in fact, the petitioner is not executor of that person; that he has never taken out letters testamentary on the estate of the said deceased; that executors have no control over landed property in that country, and that he is advised by his counsel, he is responsible to the heirs of said Hare for the rents and profits.

The answer goes on to allege, that certain persons, namely Thomas Bryant and Philip

East'n District. *Dec.* 1821.

HUNTER vs. POSTLETHWAITE.

Hickey, claim the land, and pray that they be made parties. In pursuance of this prayer, Bryant has appeared and filed what is, in substance. a petition of intervention.

An objection was taken to the right of the petitioner to maintain this action as executor. The judge sustained it, and ordered the cause to be dismissed. From this judgment an appeal has been taken, and the correctness of that opinion is the only point now submitted for decision.

The defendant insists, that the plaintiff. if executor in this state, cannot maintain this action; because an authority of that kind, which commenced in the year 1810, must have expired before this time, and if acquired in the state of Mississippi, cannot authorise a suit here.

The view which I have taken of the subject renders it unnecessary to examine these questions separately.

If this was a case in which an executor was applying, to carry into effect the will of his testator, by doing any of those acts which the law requires him to perform in the discharge of his duty; I should certainly hold that he was obliged to produce his authority;

and that, if the will was made in another section of the union, that its execution must be ordered here before it could take effect. But this case presents very different features. The petitioner does not ask the aid of the court to give effect to any powers conferred on him as executor; nor to enable him to preserve the property, defend the rights, or enforce the claims of the testator. He applies to it to compel the performance of a contract made with him in that name, it is true, but entered into after the death of the person he is alleged to represent; a contract by which the testator's estate was not bound, which did not bind the heirs, and rendered him, in his private capacity, indebted to the owners of the soil for the rents and profits.

It is clear to me, that the sum of money now demanded, formed no portion of the estate of the testator. At his decease the lands descended to his heirs, and became their property. The profits arising out of them, follow of course, the right to the soil, and the petitioner is responsible to the owners. Being thus responsible in a character distinct from that of executor, I am of opinion he should be allowed to collect the money in

East'n District. *Dec.* 1821.

HUNTER *vs.* POSTLETHWAITE.

the same right in which he became charged with it.

The question then recurs, shall he be barred from maintaining his action, because he styles himself executor? I think not; it is a mere word of description. In a case not in any way dissimilar in principle to the present one, *Urquhart* vs. *Taylor*, 5 *Martin*, 202, where the defendant made his note to the plaintiff's executors, and suit was brought on it many years after, in the same character; the court held, that as the contract was express, and the promise to them, they might have maintained the action in their own names, and that the defence set up of their authority having expired, could not be sustained.

I deem it unnecessary to say any thing on the rights of the other parties to the case, for as it appears this objection was taken at the threshold of the proceedings, and the merits of the cause not gone into; the court below, when it proceeds to trial, can order that to be done which the law and the justice of the case may demand.

I am therefore of opinion that the judgment of the district court should be reversed, and that the cause be remanded, with directions

to the judge to proceed and try this cause, without requiring the plaintiff to produce letters testamentary.

MARTIN, J. It seems to me the capacity of an executor was not necessary to the plaintiff, either to acquire the right of demanding from the defendant, monies which he had collected under his authority, nor to the support of that right by an action.

Without being executor, the plaintiff, if he interfered with the land, so far as to rent out the land, and have the rents and profits collected by the interposition of the defendant, became as a *negotiorum gestor*, accountable to the owner of it for such rents and profits, and must have the consequent right of calling from the defendant's hands, monies which he is accountable for. So that the right of demanding the money from the defendant is perfectly the same, whether the plaintiff be or be not executor.

When the plaintiff comes into court, whether he be or be not executor, letters testamentary cannot be demanded from him. His calling himself executor is a mere matter of description, for he sues on a contract made

East'n District. *Dec.* 1821.

HUNTER *vs.* POSTLETHWAITE.

by himself, not for a right which once existed in his testator.

The averment, that in the state of Mississippi, executors have no authority or control over the lands of the testator, cannot avail. It is unsupported by proof. Admitting it to be correct, the plaintiff is liable as a *negotiorum gestor*, and may call his agent to account.

I wish not to be understood to say, that if the defendant has been warned not to pay the plaintiff, by a person who has a right to the monies in his hands, he has not an equitable right to be protected from the consequence of a payment which he thinks he cannot safely make. Nor that the claimant, if he mistrusted the intention or solvency of the plaintiff, might not voluntarily interfere. And that this interference which, in other states, is made through a court of equity, may not here be resorted to, at once, in the court in which the plaintiff sues.

In the present case, this has been done, and the district court having the whole matter before it, was enabled to do complete justice to all parties.

For the attainment of this, no letters testamentary were needed. If the claimant sup-

ported his claim, the money might have been directed to be paid to him, and by complying with the decree, the defendant would be completely exonerated from the demand of the claimant and that of the plaintiff.

If the claimant failed, and the plaintiff proved the defendant's agency, and the actual receipt of the money, it does not appear to me that the production of the letters testamentary could aid the court in forming a judgment, especially if those letters vested the party with no authority over the land.

I agree in the conclusion drawn by judge Porter.

MATHEWS, J. I consider it useless in the present case, to enter into any examination of the power and authority of executors over the estates of their testators, as established either by the laws of the state of Mississippi or of this state. The defendant acknowleges himself to have been the agent of the plaintiff, and that as such he has received money for the latter. He ought not now be admitted to dispute the legality of the authority under which he acted, unless by shewing, that he is in eminent danger of suffering injury, in consequence

East'n District. *Dec.* 1821.

HUNTER *vs.* POSTLETHWAITE.

of his agency, for one who had no right to give power to act, having none himself.

A simple notice from a person claiming the funds in the hands of the plaintiff, without having commenced suit against him, ought not to stop proceedings in this action; but as one of the claimants has intervened, I think the case should be remanded for trial on its merits, in relation to the rights of all the parties.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and that the case be remanded, with directions to the judge to proceed to trial on the merits, without requiring the production of letters testamentary.

CRUM & AL. vs. *LAIDLAW & AL. SYNDICS*

On the failure of the debtor, creditors cannot resort to property on which they have a lien in the hand of third persons, until they have previously discussed the proceed for which that property was sold, in the hands of the syndics.

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. It is alleged by the plaintiffs in this case, that they obtained a judgment for the sum of $11,239 94 cents, with interest at six per cent, from the 8th of January, 1818; against Peter Laidlaw & Co., and that the

said judgment was duly recorded, whereby it had the force and effect of a mortgage on all real estate owned by the defendants in that suit: that among the property thus affected for the security of this debt, there were certain lots of ground in the Fauxbourg Marigny, which have come into the hands of one Thos. Johnson, who bought them subject to this lien of the petitioners.

It is further alleged, that there is yet due of the judgment already mentioned, $1500, with interest, and that Laidlaw & Co., and Thomas Johnson have become bankrupts. The petition concludes with a prayer, that notice be given to the syndics of those persons, and that the property above described, be seized and sold.

An answer was filed by one of the syndics of Laidlaw & Co., averring that the plaintiffs had a judicial mortgage on all the property owned by that partnership on the 2d of Nov. 1818, and praying the decision of the court, whether under these circumstances the plaintiffs were entitled to the remedy they asked for.

Nathan Morse, who had purchased the premises from Johnson, afterwards intervened, and stated that he was the owner and possessor of them; and among various objections

East'n District. *Dec.* 1821.

CRUM & AL. *vs.* LAIDLAW & AL SYNDICS.

which he made against the right of the petitioners to recover in this suit, averred that there was sufficient property in the possession of Laidlaw & Co. and their syndics, to satisfy this claim, and which property he required to be discussed.

There was judgment for Morse, the intervening petitioner, and the plaintiffs appealed.

It has been already decided by this court in the case of *Chiapella* vs. *Lanusse and others*, that on a failure being decreed, the whole of the property of the insolvent passes into the hands of the syndics, whose duty it is to sell it pursuant to law, and pay each creditor according to the rank and order of his claim. And for the better attainment of this object, an act of the legislature has provided (act relative to the voluntary surrender of property, 20th of February, 1817, *sec.* 31) that the syndics shall be authorised to give a release of the mortgages existing on the property, and that the creditor shall retain on the proceeds the same privilege he had on the thing disposed of.

If therefore these lots of ground still remained in the possession of Laidlaw's syndics, the present plaintiffs could not sue and sell

them at their particular instance, as the law would oblige them to present their demand in the *concurso* formed by the creditors, and compel them to receive payment out of the general mass. Shall they then have the right to do so when the property has come into the hands of a third person? I think not. The money proceeding from the sale of the real estate, stands in place of the thing sold, and the same preference is retained on it. The creditor therefore should seek payment from the syndics, and I am of opinion that the plea by which he is referred to them for that purpose, is fully sustained.

An objection has been made that the sale to Johnson was irregular, that it was not executed in pursuance to the formalities which the law requires, and that the judge did not authorise it. Admitting all this to be correct, I cannot see how it aids the pretentions which the plaintiffs set up. For if it be true that no legal alienation of this property has taken place, then it still remains as a part of the bankrupts' estate; and so situated, no particular creditor has the right of selling it; it yet forms a portion of what was surrendered by the insolvent, and must be disposed of by the syndics.

East'n District. *Dec.* 1821.

CRUM & AL. vs. LAIDLAW & AL SYNDICS.

On the whole, I have no doubt that the judgment of the parish court should be affirmed with costs.

MARTIN, J. I concur with judge Porter.

MATHEWS, J. I do also.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Eustis for the plaintiffs, *Morse* for the defendants.

STOCKTON & AL. vs. *HASLUCK & AL.*

A writ of sequestration is not the proper remedy to compel the appearance of an absent debtor, and obtain a judgment for a debt.

The want of citation, in the mode prescribed by law, is a fatal objection to proceeding by attachment.

APPEAL from the court of the first district.

PORTER, J. The petition in this case states, that the plaintiffs and appellees had come under various indorsements, to a large amount, for the defendants, and that they had also advanced them the sum of $3000 dollars.

It further avers, that the defendants are now residents of the state, and an attachment and sequestration is prayed on a certain quantity of tobacco and merchandise, the property of the appellants.

To this petition, an affidavit in the usual form, was annexed. The judge directed a

writ of sequestration, which was executed, and the same formalities pursued in carrying it into effect, as are prescribed by law, in cases of attachment, except the giving notice by affixing copies of the proceedings as the act of the legislature directs.

On the application of the plaintiffs, this sequestration was afterwards set aside, as to all the property levied on, except twenty-five hogsheads of the tobacco.

The counsel appointed by the court to defend the absent debtor, plead the general issue: there was judgment for the plaintiffs; the defendants appealed; and now insist that this was not a case in which a sequestration could issue, and that it ought to be set aside.

Our jurisprudence does not seem to recognise the writ of sequestration, for the purposes it has been applied to here. *Civil Code*, 418, *art.* 42. The law of the *Partidas*, 3, 9, 1, declares the six cases, and no more, for which the thing in dispute, between the plaintiff and defendant ought to be put in judicial deposit, does not enumerate this as one, and our legislative acts, which refer to this writ, do not contemplate it to be exercised for the purpose of compelling the appearance of an ab-

East'n District. *Dec.* 1824.

STOCKTON & AL. vs HASLUCK & AL.

sent debtor, and holding the property to satisfy the ultimate judgment of the court.

The proper remedy in the case now before us, was by an attachment; and had it appeared that every thing was done here, under the name of sequestration, which the law requires in that proceeding, I must confess, though I do not wish to be understood to expressly decide it, that I should have felt a strong desire to support the judgment of the district court; and that more particularly when the objection is taken at so late a stage of the cause.

But when the record is looked into for this purpose, we are met by the difficulty, that the defendant has not been cited as the law directs. The acts of the legislature on this subject, require notice of the proceedings to be put up at certain public places, and left at the last place of abode of the defendant. This stands in place of citation, and the want of it is fatal. *Curia Philip. p.* 1, *sec.* 12. *Citation, n.* 1, 2. The statute must be construed strictly, as every law should be, that derogates so much from the general principles of our jurisprudence, and decides on the rights of those who are absent. It is a privilege to allow a creditor to pursue his debtor in this way, and

he cannot complain if he is required to follow exactly, the formalities which the act prescribes; and above all, he cannot be permitted to neglect that which the law has substituted for a citation, and is, consequently, the basis on which all the subsequent proceedings in the cause must rest.

It has occurred to the court, as a question worthy of examination, whether this objection was not removed; the attorney appointed by the court having plead to the merits. But I am of opinion, that the want of notice is not cured by this omission; the party alone could wave the defect.

The case of *Watson & al.* vs. *M'Allister & al.* 7 *Martin*, 368, appears opposed to this doctrine, but I have examined the record in that case, and find that the motion made there, to dissolve the attachment, was not for any defect in the proceedings as they appeared on record, but on an allegation that the debtor was a resident of the state.

On the whole, I am of opinion that the judgment of the district court be annulled, avoided and reversed, and that judgment be rendered for the defendant, as in case of nonsuit, with costs in this court and that below.

East'n District. *Dec.* 1821.

STOCKTON & AL. *vs.* HASLUCK & AL.

MARTIN, J. I concur in the opinion of my colleague.

MATHEWS, J. The principles of law, which must govern in this case, are so fully laid down in the preceding opinions, that I deem it wholly superfluous to add to the reasons already adduced. I am clearly of opinion, that the plaintiffs have not presented to the court a case in which an order of sequestration ought to have issued, and that the error in granting such order is not cured by the neglect of the attorney appointed by the court, to move for its reversal. There is nothing in the proceedings which can legally supply the place of notice to the defendants, by the ordinary mode of serving citation, and consequently they have never been properly brought in to answer, and cannot be bound by the acts of a person assuming the functions of their attorney, by an illegal order of the court.—They have been condemned without having been heard, and however equitable the judgment may be in the present case, it is illegal and ought to be annulled.

It is therefore ordered, adjudged and decreed, that the judgment of the district court

be annulled, avoided and reversed, and that there be judgment as in case of a non-suit, and that the plaintiffs pay costs in both courts.

Hawkins for the plaintiffs, *Hennen* for the defendants.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n District. *Jan.* 1822.

EASTERN DISTRICT, JANUARY TERM, 1822.

WARD *vs.* BRANDT & AL.

Former judgment amended.

WARD vs. *BRANDT & AL.*

APPEAL from the court of the first district.

PORTER, J. When this case was formerly before us, we reversed the judgment of the district court, being of opinion that the evidence did not support the allegation of the plaintiff being a creditor of the defendants.

A rehearing has been granted, and the parties have since declared that their intention in referring to the record in the case of *Brandt & Co.* vs. *their creditors*, was not only to establish that they had obtained a respite, but also to prove any other fact of which it offered legal evidence; a consent to that effect entered into previous to the hearing, which

was not among the papers handed to the court when the cause was first examined, has also been laid before us.

The evidence now presented, shews satisfactorily that the defendants were indebted to the plaintiff at the time this action was commenced. I therefore think that the judgment of the district court ought to be affirmed with costs.

MARTIN, J. I concur in judge Porter's opinion.

MATHEWS, J. I do likewise.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Greyson for the plaintiff, *Derbigny* for the defendants.

GAILLARD vs. *ANCELINE.*

APPEAL from the court of the parish and city of New-Orleans.

After a justice is out of office, he cannot certify any proceedings theretofore had before him.

PORTER, J. On the trial of this cause in the court below, the defendant offered in evidence, copies of declarations of certain wit-

East'n District. *Jan.* 1822.

GAILLARD *vs.* ARCELINE.

nesses taken before one Gourjon, a justice of the peace for the city of New-Orleans, in the year 1811, which were admitted by the court, to prove that heretofore the slavery of the defendant had been questioned.

These declarations were certified by Gourjon many years after he had ceased to be a justice of the peace; and the plaintiff objected to their introduction, on the ground that as he was no longer acting in that capacity, his authority had expired to give certified copies of what took place before him while in the exercise of his functions as magistrate.

This presents for decision the question as to that authority, and I am of opinion that the judge *a quo* erred in deciding that it sanctioned the reading of these declarations in evidence.

A person who is no longer a public officer has no more right to give copies of papers than any other individual. Faith and credit is attached to his certificate, when it makes a part of, and is given in, the discharge of the duties appertaining to the office he holds, because the law presumes it is given under the responsibility attached to that situation, and with reference to the obligations that flow from it. But that presumption no longer ex-

ists when the individual ceases to act in that capacity.

The judge below in refusing the motion made for a new trial, noticed this objection, but seemed to consider it unnecessary, to have the cause tried again on this account, as the fact established by the declarations alluded to, was immaterial to the point at issue between the parties. I have great difficulty in coming to that conclusion in a case of this kind, where the evidence was so very contradictory. The fact of frequent claim of freedom may have had an influence on the minds of the jury, and that influence should not have been communicated but through legal proof. 16 *Johns.* 89.

I conclude therefore, that this cause should be remanded for a new trial, with directions to the parish judge not to receive in evidence copies certified by Gourjon, of proceedings had before him while justice of the peace.

MARTIN, J. I concur in the opinion just pronounced.

MATHEWS, J. I do also.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided

East'n District. *Jan.* 1822.

GAILLARD *vs.* ARCELINE.

and reversed, and the case be remanded, with directions to the judge not to receive in evidence the copies certified by Gourjon, of proceedings had before him while justice of the peace.

Denys for the plaintiff, *Smith* for the defendant.

BERNARD vs. *VIGNAUD.*

A father-in-law is not incapacitated from being a witness.

APPEAL from the court of the first district.

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This case was determined in July term, 1820, it was not printed with those of that term, a rehearing having been granted, when they were committed to press. 8 *Martin*, 483.

MARTIN, J. then delivered the opinion of the court.*

The plaintiffs have established, that Fouque, the defendant's vendor, was appointed their testamentary tutor by their surviving parent; that he accepted the trust, appears by the inventory, an authentic instrument, in which he takes the title of tutor. This circumstance, we consider as conclusive evidence of his acceptance of the trust. Our

* MATHEWS, J. was absent.

statute expressly provides, that a succession is accepted expressly when the heir assumes the quality of such, in some authentic or private instrument, or in some judicial proceeding. *Civ. Code*, 162, *art.* 77. A succession is accepted tacitly, when some act is done by which the intention of being heir might necessarily be supposed, *id.* The principle here must be the same, as *ubi eadem est ratio eadem est lex.* We find Fouque's express and tacit acceptance of the tutorship; for he assumes the quality or title of tutor, by subscribing an act, in which it is given him; his assistance as tutor to the inventory, must be presumed to have had in view the giving faith and regularity to the inventory, to which the law imperatively demands the presence of the tutor. Hence the presence of Fouque is an act from which his intention to be tutor must be necessarily supposed.

From the date of the inventory, his property was tacitly bound. The property of the tutor is tacitly mortgaged in favour of the minor, from the day of the appointment of said tutor, for the security of his administration, and the responsibility which results from it. *Id.* 72, *art.* 75.

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

Fouque was appointed tutor by the will of the plaintiffs' mother. The date of that instrument is not the period at which the responsibility begins; for the will itself had no validity till the death of the testatrix. Whether on the tutor's acceptance, this responsibility does not begin, by relation, on the day of the death of the person appointing him, is not a question necessary to be examined in this case. Being of opinion that the presence at, and subscription of the inventory, is an act which evinces the intention to accept; the acceptance must be considered by us as complete on that day. On the seventh day of December, the responsibility of Fouque began, and the tacit lien attached on his property. The defendant, who afterwards, *to wit*, on the 22d of June, 1811, purchased Fouque's slaves, acquired them *cum onere*.

The plaintiffs have shewn, by the highest legal evidence, the record of a suit, in which they obtained judgment against Fouque, their tutor, that he is indebted to them in that capacity. They have, therefore, completely shewn, that the slaves purchased by the defendant from Fouque, are bound for the payment of their claim.

The defendant contends, that the presence of Fouque at, and his subscription on the inventory, was not an administrative, but only a preparatory act, which did not give rise to a tacit lien on his estate. There cannot be any doubt that the law which requires the presence of the tutor, at the inventory, imposes on him the obligation to see that it be faithfully made; and consequently, renders the tutor liable to indemnify the minor, in case any loss ensues from the tutor's negligence or collusion. If, therefore, in the present case, Fouque had sanctioned an inventory, in which a part of the estate was omitted, he incurred a responsibility, and his estate was *ipso facto* bound.

The 3d *sec.* of the act of 1813, *ch.* 49, 1 *Martin's Dig.* 704, *n.* 3, expressly provides, that minors shall not lose the benefit of their tacit lien on the estate of their tutors, although there may not be any record of it.

Fouque having neglected to take the oath, and give the security which the law requires from all tutors, except those by nature, to provoke the appointment of an under-tutor, or take letters of tutorship, are circumstances which cannot alter the extent or nature of his liability.

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

It does not appear to us that the district court erred in rejecting Fouque, when he was offered as a witness by his son-in-law. The law excludes ascendants.

The affinity of one of the married persons with relations to the other, is reputed to be in the same line and degree in which they are related to the latter. 1 *Pothier, Marriage*, 151.

So, the affinity of the defendant with Fouque is in the first degree of the ascending line.

The plaintiffs' judgment against Fouque was proper evidence in the present case; the law requires the mortgagor to obtain judgment against the mortgagee, when the property is in the hands of third persons.

The judgment of the defendant against the syndics of Fouque is evidence of his claim.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that judgment be entered in favour of the plaintiffs and appellants, for the amount of their claim, as stated in the judgment against Fouque, *to wit*: first, for the sum of $3584 38 cents, with legal interest thereon, from the 2d of July, 1812, till paid;—secondly, also interest upon the further sum of $1265 62 cents, from

the 2d of July, 1812, to the 22d of July, 1813; thirdly, also interest upon the further sum of $1050, from the 2d of July, 1812, to the 20th of May, 1814; and—fourthly, for the sum of $53, being the amount of costs in the suit against Fouque, together with costs in both courts. And it is further ordered, adjudged and decreed, that if the defendant and appellee does not pay and satisfy the amount of this judgment, within ten days from its notification, the slaves mentioned in the petition, be sold, or so much of them as will be sufficient.

A rehearing was afterwards applied for by the defendant in the whole case; but as the part of the application which relates to the admissibility of the defendant's father-in-law as a witness, constituted the principal and rather the only difficulty, the rest is not published.

Livingston, for the defendant. Fouque is supposed to have been properly rejected. because he is the father of the plaintiffs' wife. under the *Civ. Code*, 312, *art.* 248. The first part of this article declares, that all persons above 14 years of age, free, of a sound mind. and not rendered infamous. may be witnesses

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

of any fact; provided, that such persons be not directly or indirectly, interested in the cause. Then follow these other provisions. The husband cannot be a witness for or against the wife, nor the wife for or against the husband. Neither can ascendants with respect to their descendants, nor descendants with respect to their ascendants.

No other objection is here made, but that the witness offered, came within the last clause of incompetency—that he was an ascendant; and of this opinion was the court: for all they say on this subject is to quote the words of *Pothier*. "The affinity of one of the married persons with the relations of the other, is reputed to be of the same line and degree in which they are related to the other."

I apprehend, that the court will find that this part of the decision at least, demands reconsideration.

Our law is express: if Fouque was not the ascendant of Vignaud, he ought not to have been excluded. The court say, that he is an ascendant, because he is the father-in-law, or in other words, the father of the plaintiffs' wife.

What is an ascendant, or its co-relative, descendant, in the sense in which they are em-

ployed by our law? They may be defined, those who are related by consanguinity, in the direct ascending or descending line.

This definition by the term consanguinity, excludes the relations by affinity, and by the terms direct, excludes collaterals.

Let us see whether my definition is not supported by every passage in which the terms are used in our *Code*, or in the laws from which it was compiled.

En derecho se conceptuan tres lineas de succession; una de descendientes, que son los hijos, nietos, visnietos, y todos los que descienden y provienen unos de otros, como cadena hasta lo infinito. Otra de ascendientes y son padres, abuelos, visabuelos. y demas que retrociendiendo suben y se encuentran pasto Adam; primer progenitor y padre del linage humano. Febrero de part. lib. 2, c. 7, sec. 1, n. 2.

Muriendo algun intestado, le suceden solamente los hijos como los mas immediatos consanguinos. Id. n. 3.

Here we find, that by the Spanish law, the terms used are the same with those adopted by our *Code*, and that they are defined to mean what I have said, a direct ascending or descending consanguinity.

The English law uses nearly the same

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

terms in the same sense: "lineal consanguinity is that which subsists between persons who are descended from each other in a direct line." 2 *Bl. Com.* 203.

For the French law, take the author quoted by the court. *La parenté que chaque personne peut avoir avec ses differens parents se divise en trois lignes; la directe ascendante, la directe descéndante et la collaterale. La parenté de ligne directe descendante est celle que j'ai avec ceux qui descendent de moi; celle de la ligne directe ascendante, est celle que j'ai avec ceux de qui je descends. Poth. Traité des Successions, ch.* 1, *sec.* 2, *art.* 3.

Now, as no man can be said to have descended from his wife's father, and as this descent is made essential, by *Pothier's* definition, to the relationship in the ascending or descending line between the parties, it would seem, that this accurate writer had made a false definition in the part I quote, or laid down false law, in that quoted by the court. But some attention to the context will remove every difficulty. The passage cited by the court is taken from his treatise on marriage. The second article, in which it is contained, treats of the obstacles which arise to a legal marriage from affinity. The title of the sec-

tion is—*What is affinity?* And this enquiry is one of a series of enquiries and definitions, which, according to this author's usual method, he lays down, in order to determine what degree of affinity will, according to the laws of France, prevent a marriage from being legal.

He defines affinity to be, the relation in which the wife stands to the relations of the husband, or the husband to those of the wife. So, that all the blood relations of the wife are *affins* (a word which we want in our jurisprudence) of the husband, and *vice versa* those of the husband are the *affins* of the wife. We then come to the passage in question, *n.* 151. The whole reads thus, "although, properly speaking, there are neither lines nor degrees in affinity, the relations by affinity (*les affins*) not descending from the same stock, *gradus affinitatis nulli sunt.* Yet in a less proper sense, we distinguish in it both lines and degrees." Then we have the member of the article quoted by the court, "the *affinity* of one of the married persons, with the relations of the other, is reputed to be of the same line and degree in which they are related to the latter." The whole of this clearly shews, that the object of

East'n District. *Jan.* 1822.

BERNARD &AL vs VIGNAUD.

the author is merely to enquire what relation of affinity will bar a marriage; but as there are properly no degrees or lines of affinity, it would be difficult to mark the degree of propinquity that would have this effect. Therefore the degrees of affinity of the wife, are measured by the degree of consanguinity, in which the person stands to the husband; and the law is then enabled to apply its prohibitions to this scale.

But, if an ascendant must have consanguinity with his descendant, of what use is it to enquire by what degrees affinity is to be marked or counted. And *Pothier*, even in the part relied on by the court, only speaks of the manner of affinity; but because a man stands with respect to another in the first descending degree of affinity, does it follow that he is his descendant?

A short review of the obvious meaning of the term, whenever employed in our law, will answer the question. *Civ. Code*, 146. There are three classes of legal heirs, *to wit:* The children, and other lawful descendants; the fathers and mothers, and other lawful ascendants; and the whole collateral kindred.

"The nearest relation in the descending,

ascending, or collateral line, conformable to the rules hereafter established, is called to the legal succession."

It requires but little argument, I believe, to shew, that in these passages (and I refer to the whole title of successions) the terms, ascendant and descendant, are used to mean a direct descent by consanguinity, to the exclusion of relations by affinity. Otherwise, if the doctrine be true, that a relation by affinity, is the same as a relation by consanguinity.—If a man should die, leaving a father and mother, and the father and mother of his wife be alive, they will all inherit equally; and thus a man may leave four relations in the first degree, in the ascending line; or in other words, two fathers and two mothers. First consequence of the doctrine.

If a man die without descendants, leaving a grandfather and grandmother, the father and mother of his wife will exclude them from the succession, for the nearest in degree excludes the others, and the grandfather and grandmother can never inherit while the father and mother are alive. Second consequence.

No man, whose wife's mother or father is alive, can dispose of more than one-third of

East'n District. *Jan.* 1822.

BERNARD & AL. vs. VIGNAUD.

his property, although he have no children.—Third consequence.

A man, by marrying four or five wives in succession, secures to himself a child's portion in the estate of each of the families, because he becomes a descendant of each of his fathers-in-law. Fourth consequence.

In short, the whole law of succession would be overthrown and confounded. And I pray the court to examine every other passage in the *Code*, and in our laws, in which these terms, ascendant and descendant, are used; and I think they will find that there is not one in which they can give it any other meaning than a relation by consanguinity. If this be so in every other passage, why should this form an exception? The *Code* declares, that words are to be understood in their most usual signification. Now, I think, without requiring any thing for my client, I may put his cause on the issue, that no one case in any book or language, or any law, can be found, in which the term ascendant, was used to signify a relation by affinity. And I am bound in defence of my client to say, that I think the court has no right to give any other sense to the words of the legislature, than that in which

they have uniformly employed them, particularly when by doing it, they extend the rules for the exclusion of witnesses, who would otherwise be competent.

The rehearing was granted.

Seghers, for the plaintiffs. This is an action *in rem.* brought principally against the slaves, on which we claim our tacit lien; and in a subsidiary manner, only against the defendant, their actual possessor.

It is in evidence that the wife of the defendant is the daughter of the witness, and that she had married him long before he bought those slaves from the witness.

Though the sale was executed in the husband's name only, yet the wife is entitled to one half of them. *Civil Code*, 336, *art.* 63, 64.

The witness therefore, were he admitted, would give evidence in favour of his daughter, and eventually in his own, because, were his daughter to die without issue, he is her forced heir.

This observation would suffice to justify the decision of the district judge, in rejecting the witness. But we expect to shew that the exclusion pronounced by the *Civil Code* extends to the *affins*, as well as to the *consanguinei*.

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

By the statutes of this state, these exclusions or incapacities are threefold, *viz.* that of intermarrying; that of judging; and that of standing as witness; and in this they agree with the Spanish, as well as with the French and Roman laws.

Our statute provides, that marriage between persons related to each other, in the direct ascending or descending line, is prohibited; and this prohibition is not confined to legitimate children, but extends to children born out of marriage, 124, *art.* 9. And among collateral relations, marriage is prohibited between brother and sister, whether of the whole or of the half blood; whether legitimate or illegitimate; and also between the uncle and the niece, the aunt and the nephew. *Id. art.* 10.

Now, the Spanish law, *Partida* 4, 6, 4, says, "in the degrees of the direct ascending or descending line, marriage can never be contracted, how distant soever be the degree; but in the collateral line, marriage may be contracted beyond the fourth degree." Whether the connections are included in this prohibition, will appear by the 5th law of the title. "When a man contracts a carnal union

with a woman, whether he be married with her or not, by this union, all her relations become the connections of the man, and likewise all his relatives become the connections of the woman; and by reason of such an alliance as this, if any of those from whose union it sprung, should die, the following obstacle would arise—that the surviving person could not marry with any of the relatives of the deceased, within the fourth degree inclusive, in the same manner as in kindred." And *Gregorio Lopez*, on this law observes, that "the obstacle would be perpetual between the connections in the ascending and descending line."

The provisions of our *Code* are the same as those of the *Partida* just quoted, except, that the prohibition has not the same extension in degrees; and as the fifth law contains nothing contrary to, or irreconcilable with, the said provisions, we maintain, that they are to be explained by this law, which is still the law of the land.

The doctrine laid down in this law, is likewise held by *Rodriguez*, in his *Digesto teorico-practico*, 38, 11. "Affinity is a species of kindred established by the civil law, between

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

the husband and the relatives of his wife, and between the latter and the relatives of her husband. And the degrees of affinity in which the wife stands to her husband's relatives, are the same as the degrees of consanguinity in which he stands to them, and *vice versa.* So, that the husband stands in the second degree of affinity to the sister of his wife. But it must be understood, that the husband and wife contract no affinity between themselves; consequently, there is no affinity between their respective relatives. The affinity arising from marriage, extends to the fourth degree inclusive." In the same title we find the Roman law on which this doctrine is founded. *Dig.* 38, 11, 4 (which, in the *Corpus Juris Civilis*, is 38, 10, 4.)

No. 4. The names of the connections are, father-in-law, mother-in-law, son-in-law, daughter-in-law, step-father, step-mother, step-son, step-daughter. No. 7. Between these marriage is prohibited, because by reason of their affinity, they stand to each other in the respective situation of parents and children.

These principles are those of the most eminent writers on the Spanish, French, and Roman laws, as will be sufficiently apparent from the following quotations:—

The relatives of the husband are connected with the wife in the same degree in which they are related to the husband, and *vice versa*. In the ascending and descending line of affinity, marriage is prohibited by the law of nature, between the father-in-law and the daughter-in-law, the son-in-law, and the mother-in-law; between the step-father and the step-daughter, the step-mother and the step-son. For as the husband and wife are but one flesh, the daughter-in-law does in no wise differ from the daughter. And as marriage between father and daughter is null by the law of nature, the same must be said of that between the father-in-law and the daughter-in-law; the reason is, the natural respect due to those ascendants, because they are to each other as parents and children. Affinity in the direct line, is a perpetual obstacle to marriage, as in the case of consanguinity: in the collateral line it does not extend beyond the fourth degree.

Matienzo, in *lib.* 5, *Recopil. p.* 21, *n.* 174, 175. Marriage is forbidden in the first four degrees of affinity. The affinity of which we speak is this; the husband and wife being, by their marriage, but one flesh, all the relatives of the

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

husband become connected with the wife, in the same degree in which they are related to the husband, and *vice versa;* but the relatives of the husband are in no degree connected with those of the wife. It must also be observed, that the affinity continues to exist even after the death of him from whom it sprung. 2 *Martin*, 75, *n.* 123, 126, 127. Affinity, which is a connection of persons proceeding from a carnal union, is an obstacle to marriage between the persons connected, as far as the fourth degree; if the marriage is contracted, it annuls it. *Pothier, Contrat de Mariage, n.* 160.

Since that time (the eighth century) marriages between connections have ever been prohibited in the same degrees as those between relatives; and when permitted between the latter, this permission extended to connections within the same degrees. *Vinius's Institutes, lib.* 1, *tit.* 10, *n.* 6.

We must abstain from certain marriages through regard to affinity, as with a wife's daughter, or a son's wife, for they are both in the place of daughters; and this rule must be so understood as to include those who have been our daughters-in-law.

Vinius's note on this text. The rule of the civil law is, that no marriage can take place

between those who are in the number of parents or children, which is also the case in affinity. *Febrero ad.* 1, *n.* 169. Marriage between near relatives and connections is prohibited as incestuous. The rule for affinity is this—marriage is prohibited on account of affinity, within the same degrees in which it is prohibited on account of consanguinity.

It results from these authorities, that the prohibition pronounced on this head by our statute, includes the connections as well as the relatives; for as we have already stated, the Spanish law, on this subject, contains nothing contrary to, or irreconcilable with this statute, and is therefore still in force. Besides, the concordance of all those authorities shews that they spring from a common source; and as our statute derives likewise from this source, it is to it we must look for the explanation of any difficulty or doubt that may arise in its application. *Heineccius on the Inst. n.* 152, 160.

The same principle of affinity applies to the incapacity of judging. On this subject we will confine ourselves to the Spanish laws and the Spanish writers.

Whenever the judge, before whom a cause

East'n District. Jan. 1832.

BERNARD & AL vs. VIGNAUD.

shall be pending, is in any manner related to either of the parties, it shall be lawful for either of the parties interested in the cause, to challenge the said judge. 2 *Martin's Dig.* 194, *n.* 11.

The Spanish law, on this subject, is as follows:—

We order, that he who challenges any judge, by reason of kindred or affinity, be obliged to state, in particular, the degree of such kindred or affinity, and the medium or cause whence it comes; and that if he makes no such statement, the challenge be not admitted. *Nuev. Rec.* 2, 10, 19, *n.* 4.

The petition for challenging the judge must express the legal cause of it, and if he be challenged by reason of consanguinity or affinity, it must be stated whence it comes, and in what degree. *Cur. Phil.* 1, *sec.* 7, *n.* 18.

It will certainly not be pretended, that these laws are repealed by the statute; and we would ask, if any judge could be found so void of delicacy as to disregard them, and sit on the bench in a cause in which his father-in-law or brother-in-law were a party.

We will dismiss the subject with the two following quotations:—

If the judge is the relative or connection of one of the parties, it is a just cause for challenging him. 1 *Murillo*, 1, 2, 286. There are many causes for challenging the judge as suspected of partiality; the first, for having a great intimacy with one of the parties; the second, for being related to or connected with one of them, but not, if he is so with both. *Feb. ad.* 2, 3, 1, *n.* 431.

Coming now to the exclusion or incapacity of standing as a witness, we find on that head, the following disposition in our *Civil Code*, 312, *art.* 248. The competent witness of any covenant or fact, whatever it may be in civil matters, is that who is above the age of fourteen years complete, of a sound mind, free or enfranchised, and not one of those whom the law deems infamous. He must, besides, be not interested, either directly or indirectly in the cause. The husband cannot be a witness either for or against his wife; nor the wife for or against her husband; neither can ascendents with respect to their descendants, nor the descendants with respect to their ascendants.

This latter part agrees with the Spanish law. *Partida*, 3, 16, 14. The father, grandfather,

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

and other ascendants in the direct line, cannot be witnesses for their sons, grand-sons, and other descendants in the same line; neither can any of these descendants be witnesses for those from whom they descend.

We say, that these laws agree in the exclusion of the ascendants and descendants, as witnesses in favour of each other. As to their exclusion as witnesses against each other, we have, in the same *Partida*, and title the law 11th, which runs as follows:—

All the ascendants and descendants in the direct line, and in the collateral line, relatives, within the fourth degree, cannot be compelled to be witnesses against each other, in suits touching their person, their fame, or the greater part of their fortune. Neither can the son-in-law be compelled to give evidence against his father-in-law, nor the latter against his son-in-law; neither the step-son against his step-father, nor the latter against the former. The reason is, because they must consider each other as father and son. But their voluntary testimony against one another, may be received, and must be looked upon as valid.

And on the subject at large we have the following law:—

Regularly, all persons may be witnesses, except those who are prohibited, among whom are the following:—the relative within the fourth degree; the one who has an interest in the cause; the intimate friend; and capital enemy. *Cur. Phil.* 1, *sec.* 17, *n.* 13.

The note on this article refers to *Barbosa. vot. decisiv. vot.* 9, *n.* 6, where we find the following illustration:—

Those who are related to, or connected with one of the parties in the fourth degree, prove nothing, and deserve no credit. If the witnesses produced by one of the parties, should reap any advantage from their own testimony, because the property in question might thereby become theirs, or their descendants might have it by succession; in that case, it is certain, that they are not proper witnesses. The reason is this; if witnesses do not prove in a case wherein some of their affections are concerned, or some praise or blame might accrue to them, though the suit be not principally against them; much less must those prove who depose in a case whence they might reap a benefit, though only consequential; because they are supposed to be blinded by it.

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

If this authority could leave some doubt in the explanation of the law on this matter, it would be removed by the uniform doctrine of *Murillo* and *Febrero*, which agrees with that of *Barbosa*, as will be seen from the following extracts:—

There are certain persons who cannot be witnesses for each other, thus male and female ascendants in the paternal and maternal line, cannot be witnesses for their descendants in either line, nor the step-father for his step-son, neither can descendants testify in favor of their ascendants; for all these are held as suspicious on account of their natural affection for one another. For the same suspicion of affection, the husband and wife are not admitted as witnesses for each other. Relatives and connections within the fourth degree exclusive, are rejected as witnesses for their relatives and connections in criminal causes, and in civil suits of importance, because affection for one's relations and friends is commonly an obstacle to truth. *Art.* 154, *n.* 6, 289. Parents cannot be witnesses against their children, even if they consent to it; nor can the latter be witnesses against the former; neither can relatives within the fourth degree.

depose against each other, nor the father-in-law against the son-in-law, the wife against her husband, the step-father against the step-son, and *vice versa*. Yet in Spain, though ascendants are not compelled to give evidence against their descendants, they are admitted to depose against them of their own free will. 1 *Murillo*, 287, *art.* 153.

There are various persons who are not compellable to be witnesses against one another:—such are ascendants with respect to their descendants, and *vice versa*, whether in a criminal or civil cause; this is founded on the love of parents for their children, and on the respect due by these to their parents. Under this head are classed the father-in-law and mother-in-law, the son-in-law and daughter-in-law, the step-father and step-son, who, though willing, are not admitted as witnesses by our common law. Neither are relatives and connections, within the fourth degree, obliged to be witnesses, because it were hard to compel them to testify against their own blood. All these however, if they consent of their own accord to be witnesses against the above named persons, are admitted by the Spanish law. *Id.* 301, *art.* 78.

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

Ascendants and descendants are not admitted as witnesses. Ascendants and descendants, as well as collaterals, within the fourth degree, cannot be forced to appear as witnesses against each other, in causes touching their persons, fame, or the greater part of their fortune; neither are the father-in-law, son-in-law, step-father, and step-son, compelled to give evidence against each other, tho' this evidence is admitted if freely given. *Febrero, ad.* 2, 3, 1, *n.* 297 & 300.

These principles are those of the French jurisconsults, as may be collected from the following quotation of *Evans' Pothier, vol.* 1, 518, *n.* 792: we reject the depositions of witnesses, who are related to, or connected with both or either of the parties, as far as the fourth degree of collaterals inclusive. Observe, that relatives and connections of a party, cannot depose in his favour, or even against him. Kindred and alliance induce a suspicion of either amity or hatred, either of which is repugnant to impartiality.

Turning to the Roman law, its doctrine will be found to corroborate the positions we have taken. *La Clef des lois Romaines, tom.* 2, 632, *verbo Temoin.*

The law *Julia*, on public judgments, forbids compelling any one to give evidence against his father-in-law, his son-in-law, his step-father, or step-mother, his cousin, or second cousin, and those who are related to him in a nearer degree. *Dig. lib.* 22, *tit.* 5, *l.* 4.

There are some persons whose testimony is not received but in certain cases; among these are parents against their children, and reciprocally. *Dig. lib.* 22, *tit.* 5, *l.* 9. *Code, lib.* 4, *tit.* 20, *l.* 5.

Those who are not bound to give evidence against one of the parties, are relatives within the seventh degree, and connections who stand in the respective situation of ascendants and descendants. *Dig. lib.* 22, *tit.* 5, *ll.* 4 & 5, *lib.* 38, *tit.* 10, *l.* 10.

It is undeniable, that the Spanish legislator, and the compiler of our *Code*, in using the terms of ascendants and descendants, meant thereby the connections as well as the relatives. The former by his 11th law, had prevented the possibility of a doubt on the subject; the latter derived his disposition from the former, and both from the common source, the Roman law; the true meaning of which is sufficiently expounded by the unanimous

East'n District. *Jan.* 1822.

BERNARD &AL *vs.* VIGNAUD.

opinions of all civilians. Neither can the assertion hold, that the Spanish law, on this subject, is repealed by our statute; for so much of those exclusions as it intended to repeal, has been expressly stated in our *Civ. Code*, 312, *art.* 249, where it is said, the circumstance of the witness being a relation in the collateral line, as far as the fourth degree inclusively, of one of the parties interested in the cause, or engaged in the actual service or salary of one of the said parties, or a free coloured person, is not a sufficient cause to consider the witness as incompetent, but may, according to circumstances, diminish the extent of his credibility. What then would be the use of this article in the *Code*, if it is not to repeal that part of the exclusions pronounced by the Spanish law?

From all this we conclude, and expect to have satisfactorily shewn, that the expressions used in our *Civ. Code*, *loco citato*, of ascendants and descendants, include the *affins* or connections, as well as the *consanguinei*, or relatives.

It is contended, that they are not included, because, if this doctrine should prevail, the connections must be admitted to the right of succeeding to the estates of each other, on the same footing as the relatives.

The doctrine we maintain, remains unimpaired by this observation, for the consequence thereby drawn from the above principle. is precluded by a positive law, as we are taught by *Febrero*, in his edition *Addicionado*, *part.* 1, *cap.* 1, *n.* 169: where he says—affinity gives no right to succeed to the estates of connections; referring by the note to the *Justinion Code*, 6, 59, *v.* 7, where we meet with the following provision; affinity gives no right to successions.

Before concluding this argument, we must moreover observe, that the witness, independantly of the actual interest of his daughter, and his own eventual one, as already stated, has himself a direct and actual interest in the cause, as vendor of the very negroes against whom this action is chiefly brought, as liable to our tacit mortgage. We ground this position on the Spanish law, *Partida*, 3, 16, 19. If a person has purchased a thing from another, and a suit is afterwards instituted against him for that very thing, he cannot produce as his witness, the person from whom he purchased it, because the latter being bound to make it good, is as much concerned in the suit as the purchaser himself.

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

The counsel for the defendant maintains, that even on this head, the witness is uninterested in the event of the suit; for, says he, the plaintiffs are his creditors for the amount of their claim, and they will remain his creditors if there be judgment against them; if, on the contrary, judgment be given in their favor, then the defendant becomes of course his creditor for the same amount, and consequently the witness will only have exchanged one creditor for another, without altering the debt.

This may be true to a certain degree, but the witness is not the less directly interested in the event of the suit; for if there be judgment in favor of the defendant, both credit and debt stand unaltered, the plaintiffs having then no right to charge the witness with the costs of this suit; while on the contrary, if judgment be rendered for the plaintiffs, they recover those costs from the defendant, who thereby becomes the creditor of the witness, not only for the amount of their claim, but moreover, for the amount of those very costs, which therefore at least constitute the direct interest of the witness, in the issue of the cause.

Livingston, for the defendant. Exclusions contained in our *Code*, 312, *art.* 248, which is our only rule on this subject, relate only to persons standing in the enumerated relations to the parties to the suit, not to those who may have those relations to others remotely interested in the event. For instance, a witness sworn on his *voir dire*, declares that he is the plaintiff's security for costs, or that the plaintiff has promised him a certain sum if he recover; either of these facts will exclude his testimony; but was it ever supposed that the father or son of a person standing in the predicament of such witness, would also be excluded? I should think not. The witness would in such case be indirectly interested; that is to say, if the plaintiff was unable to pay the costs, he would be obliged to pay them, which is an indirect interest for loss: and if the plaintiff gained his cause, and if he complied with his promise, he would recover the stipulated sum, which would be an indirect interest for gain; but the *Code* does not exclude the ascendants and descendants of those who have an indirect interest, but the ascendants or descendants of those who are parties; and by a liberal construction, those who have a direct interest: that is, those who

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

must (not those who may) gain or lose by the decision of the cause. The words are, " the husband cannot be a witness for or against his wife, nor the wife for or against her husband. Neither can ascendants with respect to (that is to say, in reference to the prior member of the sentence, for or against) their descendants, &c.

Now, here the wife, if she have any interest, has only an indirect and eventual one.

It is doubtful whether she is in community with her husband. It is true, the *Code* declares that every marriage contracted within this territory, carries with it a community: but how does it appear that those parties were married here. They may be, and probably are, from some other part of the world. Whatever is necessary to support our objection, must be shewn by the party making it. If this fact is necessary, then the plaintiff should have put the evidence of it on the record.

But even if the community did exist, it creates no direct interest in the wife; by the 66 *art. p.* 336, of the *Code*, the husband is head and master of the community; he may sell and even give it away without the consent of

the wife, &c. Now, it appears to me rather paradoxical, to say that I have a direct interest in any thing which another may sell or throw into the fire, without my consent. I may have a direct interest in a thing of which another has the administration; but not in that which he may destroy or give away; these are acts of absolute, undoubted ownership, which preclude the idea of direct interest in any other.

The truth is, that the wife has no interest whatever in the effects which compose the community, while the community lasts; but she has a right to one half of the gains, which, at the dissolution of the community, appear to have been made while it lasted; then her interest becomes vested and direct; until then, it is wholly eventual and uncertain; depending on the will or caprice, or mismanagement of the husband. The words of the law render this clear. She is entitled to the community of acquets or gains, *art.* 63. But this can only be known at the dissolution of the community. In common partnership, the stock and the profits belong as much to one partner as to the other, even if there be no gains; but in the matrimonial partnership, the

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

wife is only entitled to one half of the gains; and therefore, whatever acquisitions have been made, if there is not a balance of gains, she has nothing.

In this case, although Vignaud should be decreed to be the owner of the slaves, it may not increase the community; because he may owe more than their value; and even if he do not, it depends on the event of his future administration, or on his will alone, should he incline to give them away, whether they will increase the amount of the common property at the time of his death. The wife then has only a contingent interest; and that of her father, depending on the existence of profits for his chance to acquire, on her dying before him, and on her dying without children, is still more remote; he is not an interested witness.

Whether he is excluded under the terms of our *Code*, is the main enquiry.

I have laid it down, that all persons not coming under the exclusions in the 248th *art.* of the *Code*, are competent. For the article begins with declaring, who shall be a competent witness—if above fourteen, free, of sound mind, unimpaired by connection of an in-

famous crime, and uninterested, the witness is competent. The only further exclusions are those of persons standing in the relation of husband or wife; or ascendant and descendant. Can it be doubted, that these are the only qualifications and exceptions? If they are not, then intimate friends, inveterate enemies, and the other persons incapacitated by the civil law, would all be excluded. But even if this article of the *Code* should not be deemed to repeal the former laws on this subject, there is a statute which certainly does: The act of 1805, establishing the practice of the superior court, expressly declares, that direct interest or infamy only shall render a witness incompetent. This law is unrepealed, except so far as the *Code* has encreased the number of exceptions. The only question then is, whether the wife's father is the ascendant of the husband; I have shewn the uniform, the invàriable sense in which this term is used in the same *Code*, in which this provision is contained. And I ask them, whether they ought to give it a different interpretation from that which the legislature, unbroken by one single exception, have given.

I cannot but think the reasoning of the

East n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

plaintiffs, on this point, somewhat curious. We are enquiring whether the wife's father is the ascendant of the husband; this is our only enquiry.

And to answer it, we are gravely told, that a man cannot marry his wife's grandmother; and that a judge cannot sit in judgment on the wife of his son. For the learned pages of the plaintiffs brief really tell us nothing more. Now, all this I am perfectly ready to acknowlege; and moreover, to agree, that this is in perfect concordance with the Roman, Spanish, and French laws.

But, does it follow from this, that the ascendant of the wife is also the ascendant of the husband; which is our only enquiry? If the authorities, indeed, had shewn, that the words in a statute had been construed by any commentator, in the way he contends: for, I confess this would have some remote application. Because, even then, our courts must adopt the sense in which our own lawgivers have used the word, rather than that in which commentators have given to it.

The example taken from *Part.* 4, *tit.* 6, *law* 4, is a striking proof, that when this construction is to be given by law, the law takes care

to express it. Here, marriage in the ascending and descending line, is forbidden: according to the plaintiffs' reasoning, this would have been sufficient to exclude relations by marriage or affinity; but the Spanish lawgiver did not think so, for the subsequent law (5th) expressly extends it to the connections by marriage. This law being unrepealed, I agree with the defendant's counsel, that it prevents marriages within the degrees of affinity prohibited, but I really cannot see how this applies to witnesses.

The authority from *Rodriguez's Dig. ley.* 38, is explanatory of the degrees of affinity, which I never intended to dispute; and if our law on the subject of witnesses, had spoken of the degrees of affinity, there would have been an end of the dispute.

Murillo is to the same effect, still speaking of the prohibited degrees of affinity or consanguinity in relation to marriage. Which rules were founded on very different reasons from those which render witnesses incompetent. The same observations apply to *Matanzo*, *Febrero*, *Pothier*, and *Heineccius*.

The authorities on the subject of challenges to a judge, seem doubly unfortunate. For

East'n District. *Jan.* 1822.

BERNARD & AL vs. VIGNAUD.

they are not only inapplicable to the case of witnesses, but shew most explicitly, that whenever the incapacity is intended to be created by affinity as well as consanguinity, they take great care, as in the case of marriages, to express it.

Martin's Dig. p. 194, *n.* 11, the expressions are in "any manner related," which clearly includes a relation by affinity.

The *Recopilation* expressly uses the term "affinity," as well as kindred.

The *Curia Phillippica* uses the same words.

These laws, it is said, are not repealed. It is perfectly indifferent to my argument whether they are or not; if in force, they govern only the cases for which they were made; but whether in force or not, they serve my argument, by shewing, that the Spanish legislators thought affinity and consanguinity two different relations, and when they wished to include the former, they used express words for that purpose.

We come now to the authorities on the subject of witnesses; and here the plaintiff is, if possible, still more unfortunate in his quotations.

The Spaniards, it seems, had a law nearly

in the terms of ours, 3 *Part.* 16, 14, declaring, that ascendants and descendants could not be witnesses at all. But the 11th law, also quoted by plaintiffs, after specifying, particularly, the ascendants and descendants, *eo nomine*, enumerates other relations, and among them, particularly sons-in-law, and fathers-in-law; declaring that they cannot be forced to give testimony for each other; but their voluntary testimony against each other, shall be received. Does not this clearly prove that the Spanish law considered the relations as different, by making different provisions with regard to them. All the commentators follow the text on this subject, as might be supposed; and all particularly enumerate the relations by affinity, as being excluded by this express law, which, as we have seen, provides for their exclusion by name.

The truth then is, that relationship, by affinity, prevents marriage when within the prohibited degrees.

That it is a good cause for challenge to a judge.

And that, under the law, as it stood before our statute, it was a good objection to a witness.

But, that since our repealing statute of

East'n District. *Jan.* 1822.

BERNARD & AL vs. VIGNAUD.

1805, no other objections are good, but those created by that statute or the *Civil Code*, and that no other relations, but direct ascendants or descendants, being contained within those exceptions, no other relationship will disqualify.

The objection of interest, with which the plaintiffs close, I have before answered.

1. By shewing there is no interest.

2. By saying, that this objection was not made at the trial, and that if it had, and the court had sustained it, it might have been removed by a release.

C. 386. 66

Seghers, for the plaintiffs. The *Code* provides an action for the wife against the heirs of her husband, for one half of the common estate, which he might have disposed of to her injury. Does not this clearly shew that she has a direct interest in the common property, though the husband has the administration and even the disposition of it? For otherwise, whence would her action originate?

The reasoning by which the defendant's counsel endeavours to establish the contrary doctrine, is grounded on the first part of the *art.* 66, *p.* 336, already quoted, which says,

that the husband is the head and master of the community; that he may dispose of the effects thereto belonging, without the consent of the wife; because she has no sort of right in them, until the community be dissolved; but here he has overlooked the latter part of the same article, as we have already observed. There is an instance in which the wife may likewise dispose of the effects of the community without the consent of her husband. *Civ. Code*, 28, *art.* 25.

"The community may be considered as a moral being. The stock of the community belongs to both the husband and wife. But the community cannot act by itself; some one must administer its effects; some one must represent it; this will devolve on the husband. Through his agency the community will do whatever it would do by itself were it a real being: all its powers are thus transferred to its administrator. Yet he cannot injure his wife; he can do nothing to defraud her of the rights which she has in the community. The husband is in short an administrator, who has the same power as the owner; that is, the community, to which he is accountable for the use he makes of it." *Leclercq* 5, *Droit Romain*, 9.

East'n District. *Jan.* 1822.

BERNARD &AL *vs* VIGNAUD.

"The wife cannot alone and by herself dispose of any thing of her share in the community while it lasts; but she may do it jointly with her husband. When the husband contracts and disposes alone of the effects of the community, as he is supposed to contract in his capacity, as head of the community, he is supposed to contract both for himself and for his wife; and his wife, though neither present at, nor named in the contract, is supposed to contract with him for the share which she has in the community." *Pothier, Traité de la communauté, n.* 498.

"When the wife is a public merchant, and disposes of the effects of the community, she is deemed to dispose jointly with her husband, who is considered as approving such contracts." *Idem. n.* 500.

To the defendant's counsel, it was reserved to inform us, that the wife has no direct interest in her husband's increasing or impairing the common stock; or in other words, in his growing rich or poor. Could it even be for a moment admitted, according to his doctrine, that the wife has only a contingent interest in the common stock, it were no less true that she has an actual and direct interest

in the increase of that stock, even if it were only with respect to the income. For her daily comforts, and her family's, must keep a proportion with the common revenues which constitute the means of her husband. *Civil Code*, 26, *art.* 20.

The wife then, has not a contingent, but a direct interest; and that of her father, on her dying before him without issue, is not so remote as not to create an indirect interest; he is therefore an interested witness.

It is contended that the civil law was repealed by the act of 1805, establishing the practise of the superior court. It seems indeed, that the common law was thereby introduced on this subject, in the stead of the civil law. But in conformity with our general system of jurisprudence, the latter was restored by our *Civil Code*, confining however the further exclusions to the ascendants and descendants. We do not certainly incline to extend the exceptions any further, but we maintain that the civil law having thus far been restored, the words which it uses must be explained according to its rules, which are far from being impaired by the meaning given to the same terms in other parts of the *Code*.

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

The defendant's counsel contends, that if the *affins* or connections, are under legal incapacities, it is not because the law considers them in the same light as the *consanguinei*, or relatives, but because they are, *eo nomine*, designated in the law. His reasonings present us with a striking instance of his error on the point.

The statute of 1805, which he is pleased to call the repealing statute, is itself repealed *in toto* by the *Code* since, by the two articles 248, and 249, all its dispositions are literally either preserved, altered or repealed; and as we have stated in our former argument to which we must refer the court, those two articles of our *Code*, clearly shew by themselves what incapacities pronounced by the civil law, were thereby intended to be preserved or abrogated.

Marriage between persons related to each other in the direct ascending or descending line, is prohibited. *Civil Code*, 24, *art.* 9.

The husband cannot be a witness for or against his wife; neither can ascendants with respect to their descendants, or the descendants with respect to their ascendants. *Id.* 312, *art.* 248.

Where is the difference between these two provisions, either in their words or in their meaning, to justify the two opposite inferences which the defendant strives to draw from them, that the first includes relatives by affinity, and that the latter does not? Did there exist any, would it not be in favor of the first, which contains the word direct, not to be found in the latter, though the defendant liberally bestows it on this too? It is true, that our legislators have been somewhat more explicit on the incapacity of judging, than on the others; but does it follow that the uniform rule is thereby repealed as to the latter.

By an attentive perusal of the laws quoted, it will be found that their different provisions proceed, not from any distinction between relatives and connections, but from a difference in the cases to which they apply; it will be found moreover, that the 11th law, in enumerating the connections after the relatives, gives the reason why they are considered in the same light. And it is to be observed, that afterwards, the 14th law, speaks only of ascendants and descendants, as does our *Code*, without making any mention of affinity or consanguinity. Yet all the commentators in

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

analyzing this law, do not hesitate to say, do not even make it a question, whether the connections are therein included, as well as the relatives.

"It was necessary in order to perfect the union of marriage, that the husband should take the wife's relations in the same degree, to be the same as his own, without distinction, and so *vice versa;* for if they are to be the same person as was intended by the law of God, they can have no difference in relations; and by consequence, the prohibition touching affinity must be carried as far as the prohibition touching consanguinity." 4 *Bacon's Abridgment*, 527.

"Hence it hath been adjudged that the marriage of two sisters, one after the other, was incestuous, being in the second degree." *Ibid.* 528.

"So it hath been resolved, that marrying the sister's daughter is incestuous, being in the third degree. So it hath been resolved in a variety of books and cases, that the marriage with the wife's sister's daughter was incestuous, being likewise in the third degree, and the degree of affinity being the same with that of consanguinity." *Ibid.* 529.

The reasons on which the rules of prohibition, in relation to marriage, are grounded, are certainly different from those which render witnesses incompetent; but both derive from a common source the intimacy which exists between relations within the prohibited degrees. For, if on one side the familiar intercourse, resulting from this intimacy, would endanger morals; on the other side, this same intimacy must produce such an affection as to blind the witness, and endanger the truth and impartiality of his deposition.

The objection which rested on the costs of this suit, stands unimpaired. It might have been removed, says the defendant, by a release at the trial. The counsel here forgets, that at the trial, the defendant had as yet no claim on the witness for those costs, as they were neither decreed by the court, nor paid by him; and that consequently he could give no release. "A release is the giving or discharging of a right of action which a man hath, or may claim against another, or that which is his." "It is a general rule in our books, that a mere possibility cannot be released, and the reason thereof is, that a release supposeth a right in being." *Jacob's Law Dictionary, verbo Release*, 1 & 5.

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

Some doubts have arisen on the correctness of an assertion contained in the Latin index of the *Partidas, verbo Affinitas, in fine: Affinitatis tres sunt gradus, ascendentes, descendentes et collaterales, n.* 1, *per text. Ibid. leg.* 2, *tit.* 13, *Partida,* 6.

On referring to the indication, we find that this law 2, treats of the degrees of consanguinity only. But it must be recollected, that the Latin index relates to the notes, not to the text. The note on this law refers to *Partida,* 4, *tit.* 6, *l.* 2. *Que cosa es linea, por do desciende ó sube el parentesco: é quantas lineas son.* This law cannot be detached from the law 3, which is but a continuation of it, as appears from the title: *que cosa es el grado, porque se cuenta el parentesco: e quantas maneras son del.* The commentator in his Latin text, explains the law as follows: *Secundùm jus civile alitér considerantur gradus, et aliter secundum jus canonicum. Sed in ascendentibus et descendentibus utrumque jus concordat. Et secundùm primam computationem, gradus dicitur connumeratio singularum personarum, cognatione vel affinitate sibi conjunctarum. Secundum aliam, dicitur gradus enumeratio personarum, cognatione vel affinitate conjunctarum.*

The law 4, gives the manner of counting the degrees of consanguinity; and the law 5, says, *Por tal allegança como esta todos los parientes de la muger se fazen cuñados del varon, e otrosi los parientes del se fazen cuñados de la muger; cada uno dellos en aquel grado en que son parientes.* And the commentator in the Latin text, says, *Copula carnalis per matrimonium facit virum affinem consanguineis fœminæ, in eo gradu in quo tangunt eam per consanguinitatem, et idem, et è contrà.*

It must be remarked, that the Latin index of the *Partidas*, may in some manner be itself considered as an authority. It was composed by the nephew of the commentator. The edition from which the quotation of the index, and the foregoing abstracts are taken, is of 1767; the text, gloss and citations of which, were reviewed and corrected, with the greatest care, by the order of the royal council of Spain. Therefore, I am convinced that the passage quoted, far from being an error, either of the author of the index, or of the editor, is an assertion warranted by the several parts of the text and gloss which I have cited.

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

I am still more strengthened in this opinion, by the uniform doctrine of the elementary writers on the subject.

Elizondo, Practica Universal, tom. 1, 358, *n.* 10. *Entre los affins en la linea recta de ascendientes y descendientes, es prohibido el matrimonio por derecho natural; y en la colateral, por derecho positivo ecclesiastico tan solamente.*

Murillo, lib. 4, *n.* 128, *p.* 78. *Nunc arborem consanguinitatis et affinitatis ob oculos apponere decrevi, ut sic facilius lineæ et gradus percipiantur.* Then *p.* 79, he gives the *arbor consanguinitatis*, in which the first four degrees in the ascending, descending and collateral lines are respectively established; *p.* 80, we find the explanation thereof, *Nomina consanguineorum sunt sequentia : in lineâ rectâ ascendente sunt in primo gradu, &* 5. He then goes on citing them *eo nomine*, as well as the descendants and collaterals; *p.* 81, we meet with the *arbor affinitatis*, in which the first four degrees of affinity in each of the ascending, descending and collateral lines, are likewise laid down. Then *p.* 82, *n.* 129, we find this explanation, *Affines in primo gradu sunt sequentes : in lineâ rectâ ascendente, socer : uxoris vel mariti pater : suegro—socrus : uxoris vel mariti mater :*

suegra—vitricus : vir matris : padrastro—noverca : uxor patris : madrastra. In lineâ rectâ descendente, gener : maritus filiæ, yerno—nurus : uxor filii : nuera—privignus : filius ex alio conjuge : hijastro—privigna : filia ex alio conjuge : hijastra. In lineâ obliquâ sunt, &c.

Heineccii Recitationes, tom. 1, *lib.* 1, *tit.* 10, *n.* 156. *De adfinitate observandum, ejus propriè nullos esse gradus, quia adfinitates non nascuntur ex generatione, sed ex nuptiis. Sed analogicè tamen et in affinitate æquè gradus statuuntur, et eodem modo numerantur, ac in consanguinitate. Sic et schemata eodem modo pinguntur ac in consanguinitate.*

Livingston, for the defendant. My doubt whether the wife, in this instance, has any interest whatever in the community, inasmuch as it is not shewn where the marriage was contracted, it is supposed ought to vanish before the authority quoted from 4 *Martin*, 649; that property acquired here after marriage in a foreign country, is governed by our laws; this may be true, when there is no contract, containing covenants to the contrary; here nothing appears on that subject, and I have shewn that the burthen of making out the

East'n District. *Jan.* 1822.

BERNARD &AL *vs.* VIGNAUD.

whole case, for the exclusion of a witness, is shewn on the party objecting.

Next it is said that I could not have argued that the wife's interest in the community is eventual, if I had read the latter part of the article of the *Code*, 336 (66) which I have quoted; that part declares that the wife may sue the husband's heirs for one half of the acquired estate, which the husband may have fraudulently disposed of, to her injury; I certainly was careless in not drawing the attention of the court to this clause, because it strongly supports my argument, which went to shew that the interest of the wife which was eventual during the life of the husband, vested only on his death; and that then, and not before, an action was given to the wife, to recover what he had fraudulently disposed of; or in other words, had not disposed of at all; for a fraudulent act is null.

If the wife had a vested or direct interest during the life of the husband, surely some means would be pointed out of preserving it during the community, but there is none but by putting an end to it.

The other argument drawn from the *Code*, 28, *art.* 25, is surely no objection to my argu-

ment; for the carrying on the separate trade, which is the subject of that article, depends wholly on the will of the husband, and gives her no other control over that part of the community, than he allows.

The quotations from *Leclercq* and *Pothier*, contain nothing that I contest. The husband certainly administers the community for the eventual benefit of the wife; but none of them say the interest is a direct and present one; if the husband is unfortunate or imprudent, the wife will have no gains; and whatever depends on a contingency, is not present and direct. I do not repeat my former arguments on this point, but pray the court to refer to them; and confidently hope they have shewn that Fouque is not an interested witness.

That he is expressly excluded, the counsel, in addition to his former argument, thinks is clear, because he thinks the *Civil Law*, on the subject of witnesses was restored by the adoption of our *Civil Code*. The court will hesitate long, I believe, before they adopt this strange construction; which I would willingly combat, if I could discover any argument by which it is supported.

When I assert that none of the Spanish

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

commentators shew that the word ascendant or descendant in a statute, has been construed to mean a relation by affinity; I have repeatedly re-perused the authority to which I have been referred, and must seriously declare that I can find nothing in it contradicting my position; perhaps the court may be more fortunate on referring to it; all it says on the subject, is enumerating persons disqualified as witnesses, *el pariente hasta el quarto grado.* Now as I have shewn that there were express statutes, excluding the *affins*, as well as the *consanguinei*, and this is a practical book, which gives the summary of the rules on the subject from whatever source derived; I confess I cannot see how he contradicts my assertion; as to *Barbosa*, not having the book I cannot refer to it; but if he gives that interpretation of the word, the passage ought to have been quoted.

But whether the exclusion of *affins* in the Spanish law arose from statute, or was derived from the general principles of the civil law; whether we have it in the statute book, or in the elementary writers; it was still a positive law, bearing upon that direct point, and expressly declaring that *affins* cannot be wit-

nesses; but this law is no longer ours, it is repealed, and express terms are introduced which our court must construe in the sense in which they are used in the same *Code*; and moreover, they must be uniform in that construction; and if they say that ascendants means *affins* in the exclusion of witnesses, they must give it the same construction where it is elsewhere used in the same *Code* of laws. The consequences of this, as respects successions, I have pointed out. There are others no less absurd.

The plaintiffs' counsel has corrected me in two inaccuracies, in referring to the *Partidas*, one of which can hardly be called one, for when I said the relations enumerated could not be witnesses at all, it certainly might be understood that they were excluded only in testifying for those relations, which is the text of the law. The other error pointed out, is one of the pen; but neither at all affects my argument. The 11*th law*, 3*d Partidas*, *tit.* 16, appears decisive. It first provides for the case of ascendants and descendants, and collaterals to the fourth degree; *todos aquellos que suben o descendien, pór la linea derecha de parientesco e los otros, de la linea de traviesso hasta el*

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

quarto grado. Now, if this included the *affins*, there would have been no need of any addition, but the law goes on to provide for them *eo nomine. El yerno contra su suegro ni el suegro contra el ni el annado contra sa padrasto.*

As I admit that the degrees of affinity mentioned in *Bacon*, and the other English authorities, are impediments to marriage in England, I have no observation to make on those authorities, but that I am totally at a loss to discern how they apply. If the English law had said generally, ascendants and descendants shall not intermarry, and these words had been construed to mean *affins*, then they might have had some application; at present I can see none.

The interest which it is supposed Fouque had in the event of the suit, by reason of the costs, is clearly an after thought; but is not like other second thoughts, the best; for it is not certain how the judgment of the court may operate as to costs, they are discretional; and even if given against Vignaud, should the plaintiffs prevail, it is by no means certain that the court would make Fouque pay them, if Vignaud had increased them, in an unnecessary, and unjust defence; as it must be deem-

ed if the plaintiffs prevailed. At any rate, if the objection had been made at the trial, it might have been removed by a release. No! says the plaintiffs' counsel, and he quotes *Jacob* to prove it, your liability to costs is a mere possibility; and therefore, it cannot be released. Is it so? Then, there is no interest; for it never was before imagined that a mere possibility was interest, either direct or indirect. Is it not so? Then the release would operate. Take your choice; but do not say it is an interest, and therefore disqualifies. It is a mere possibility, and therefore cannot be released.

Seghers, for the plaintiffs. Under the *art.* 63, *p.* 337, of our *Code*, there is a legal presumption of the existence of the community. If the defendant's case makes an exception to the general rule, it was for him to prove it. As it is no longer contested that the slaves were acquired here after the marriage, it becomes immaterial where it was contracted. Were it otherwise, it would be no difficulty to trace in the record, the proof that the defendant married here the daughter of the witness, and that from the very day of

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

his marriage, up to the failure of the latter, they resided together in the same house, and made but one family. This fact may be collected from the deposition of the defendant's own witnesses, in the suit of Fouque's syndics against him, the record of which he introduced as evidence in this case.

The true defendant, in the present cause, is the community itself. It must be remembered that this is an action *in rem*, brought chiefly against the slaves, and accidentally against the defendant, as their third possessor. It is in evidence that he acquired them during his marriage, and therefore they belong to the community. The defendant coming into court to defend the suit, represents the community, which does, by his agency, what it would do by itself, were it a real being. In his capacity as head of the community, he is supposed to appear both for himself and for his wife; and the latter, though neither present in court, nor named in the defence, is supposed to appear with him for the share which she has in the community. The wife being then, in fact, a party to the cause, through the agency of her husband, her father is no less inadmissible as a witness than the father of the husband.

The principle, that the wife's disposing of the effects of the community, depends on the will of the husband, is reciprocal, as expounded by *Pothier*, in the passages quoted in my former argument. For *Pothier* says, in his *n.* 509, that when the wife thus disposes, she is deemed to do it jointly with her husband, who is considered as approving the contract.

And in his *n.* 498, he says, that when the husband disposes alone of the effects of the community, he is supposed to contract both for himself and for his wife, who is supposed to contract with him for the share which she has in the community.

Leaving aside, for a while, the wife's interest in the common stock, she is no less directly and actually interested in the increase or decrease of the common revenues, as I have shewn in my former argument, referring to our *Code*, *p.* 26, *art.* 20.

I persist in thinking, that the latter part of the *art.* 248, *p.* 312, of our *Code*, pronouncing the incapacities of ascendants and descendants, was thus far a restoration of the civil law. To this was my assertion confined; for I have shewn, that by *art.* 249, the further incapacities pronounced on that subject by the

East'n District. *Jan.* 1822.

BERNARD & AL. vs. VIGNAUD.

civil law, were repealed. According to the defendant, the statute of 1805 had completely abrogated the civil law on witnesses. This necessarily left an inconsistency in our general system of jurisprudence, which it was the duty of the compilers of the *Code* to remove. That they did so, as far as was compatible with our present government, may easily be collected from the *Code* itself.

Before the statute of 1805 was enacted, the title 16, of the 3d *Partida*, *de los testigos*, was our rule; by that statute, which is nothing but the common law, no other exclusion is admitted than that of husband and wife. Therefore, the law 15, of the title quoted, which pronounces that exclusion, was alone preserved; all the others were repealed. Now, our *Code*, by adding to this exclusion, that of ascendants and descendants, without distinction, did but restore the law 14, as it stood before. From what other source could the compilers have taken this disposition, than that whence is derived the whole system of our laws? That, in fact, they did thereby restore the law 14 to its full extent; that such was their meaning, clearly appears from the care they have taken to remove, by the *art.*

249, all doubts as to the limits within which, in restoring thus far the civil law, they intended to confine its operation.

According to the defendant, by the statute of 1805, we had parted altogether with the civil law on the subject of witnesses. If the *Code* had intended to persevere in that system; if it had not restored to its full extent, the part of the civil law comprised under the law 14; in a word, if it had been the meaning of the compilers solely to add to the former exclusion, the naked expression of ascendants and descendants, to be construed in the strictest manner, without any reference to our former laws on the subject; then, what was the use of the article 249? Certainly there could be no occasion for it. By that article it is provided, that the circumstance of being a relation in the collateral line, as far as the fourth degree inclusively, or engaged in the actual service or salary of one of the parties, does not affect the competency of the witness. Now, under the statute of 1805, none of those persons were excluded; and therefore, that provision in the *Code* was useless, unless it meant to restrain the operation of the civil law, or of so much thereof as was restored

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

by the *art.* 248. It is the civil law which in its dispositions under the *title* 16, already quoted, comprises the very exclusions which are expressly removed by our *art.* 249.

If then the law 14 has been restored by our *Code*, the meaning of the compilers was to restore it to its full extent. That this law, under the denomination of ascendants and descendants, comprises the *affins* as well as *consanguinei*, I think I have satisfactorily shewn in my former arguments; it seems even to have been admitted by the defendant, though on a principle quite different from my own. If any restriction on that law had been intended; if the *affins* were not to be included in its dispositions, this restriction on the civil law would have been added to those provided for by the *art.* 249.

If I have succeeded in proving that the law 14, *tit.* 16, *Partida* 3, is restored, the conclusions which I have drawn from comparing of the two passages of our *Code*, relative to marriages and to witnesses, remains unimpaired: for the incapacities pronounced by the civil law, on either of those heads, proceed from the same principle, that connections or *affins* are considered in the same light as relatives or *consanguinei*.

The defendant maintains, that this is not the reason why the *affins* were included in those incapacities, as well as the *consanguinei;* that they were never comprised but when mentioned *eo nomine*, and that the Spanish legislators thought affinity and consanguinity two relations so different, that when they wished to include the former, they used express words to that purpose. And he concludes with saying, that whether the exclusion of *affins* in the Spanish law, arose from statute, or was derived from the general principles of the civil law; whether we have it in the statute book, or in the elementary writers, it was still *positive law*, bearing upon that direct point, and expressly declaring that *affins* cannot be witnesses.

In corroboration of those strange assertions, he quotes the law 11 of the *title* 16, *Partida* 3, as decisive. It is, indeed, decisive, but in a way quite different from what he asserts.

This *title* 16, as already observed, treats of witnesses at large. The law 10, designates those who cannot be witnesses against others in criminal suits; and the law 11, those who cannot be compelled to be witnesses against each other in criminal suits. *Quales son aquel-*

East n District. Jan. 1822.

BERNARD & AL vs. VIGNAUD.

los que no pueden ser apremiados, que vengan a testiguar unos contra otros en pleyto criminal. That this was not an exclusion but a privilege, appears from the law itself, and the note 1st of *Gregorio Lopez*. The reason given in the outset of the law for this privilege, is worthy of remark; it proceeds from the respect had to the duties which certain persons owe to each other. *Debdos muy grandes han algunos omes entre si, de manera que non tuvieron por bien los sabios antiguos, que fuessen apremiados para testiguar unos contra otros, sobre pleyto que tanxesse a la persona de alguno dellos, ó a su fama, o a daño de la mayor partida de sus bienes.* Then the law enumerates the persons to whom this privilege belongs, as quoted by the defendant. *E son estos, todos aquellos que suben ó descienden por la liña derecha del parentesco, e los otros de la liña de traviesso fasta el quarto grado.* Now, says the defendant, if this included the *affins*, there would have been no need of any addition, but the law goes on to provide for them *eo nomine*. Where the defendant has discovered, that *parentesco* (consanguinity) means also affinity, (*cuñadez*) and that I ever used it in that sense, I cannot tell. It is obvious, that the law, after mentioning consanguinity,

eo nomine, and extending the privilege to the *affins*, must have done it also *eo nomine*. *E esso mismo dezimos, que non debe ser apremiado en tales pleytos el yerno, que venga dar testimonio contra su suegro, ni el suegro contra el, nin el annado contra su padrasto, nin el padrasto contra el annado.* This is also quoted by the defendant, but here he stops short; for what motives he best knows. Had he, however, gone a little further, he would have met with the reason of the law, with the very principle on which it grounds the extension of the privilege to the *affins*, as well as to the *consanguinei*. *E esto es, porque los unos deben aver los otros como fijos, e los otros a ellos como padres.*

The laws 12 and 13, speak of the testimony of slaves, and the law 14 begins to treat of those who can or cannot be admitted as witnesses in civil cases. This law shews, in a striking manner, how groundless is the assertion, that the exclusion of *affins* in the Spanish law, arose from a positive provision bearing upon that direct point, and expressly declaring that *affins* cannot be witnesses. This is the only law of the whole title, on which the exclusion of *affins* as witnesses, in civil cases, is grounded; for the law 11. does but

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

grant a privilege which may be renounced by the witness: that law too, bears only upon criminal suits. And here it will not be amiss to remark, that the Spanish legislator, after having once laid down in the 11th law, the principle upon which the *affins* are to be considered in the same light as the *consanguinei*, mentions them no more *eo nomine*, but includes them all under the general denomination of ascendants and descendants, as may be collected from the law itself, and from all its commentators. The law 14, runs as follows: *Padre, nin abuelo, nin los otros que suben por la liña derecha, non pueden testiguar por sus fijos, nin por sus nietos, ni por los otros que descienden dellos por essa misma liña. Esso mismo dezimos que ninguno destos descendientes que non pueden testiguar, por aquellos de quien descienden.*

On this law, we have the following commentary from *Murillo*, *lib.* 2, *n.* 153. *Aliæ præterea sunt personæ, quæ pro certis personis testificari non possunt. Sic* 1. *Ascendentes masculi vel fœminæ in lineâ paternâ vel maternâ, pro descendentibus in utrâque lineâ, etiamsi filius sit emancipatus, vel naturalis tantùm, vel spurius, vel incestuosus, vel adoptivus, testificari nequeunt: neque vitricus pro privigno: nec è contrà descendentes pro ascendentibus:*

nam hi omnes ob naturalem affectionem suspecti habentur, lib. 14, *tit.* 16, *Partida* 3. 2. *Ob eandem affectionis suspicionem, a testimonio repelluntur conjuges et sponsi pro seipsis ad invicem ; item concubinarius pro concubinâ : consanguinei et affines usque ad quartum gradum exclusivè. pro consanguineis et affinibus in causis criminalibus vel civilibus arduis.*

It remains to shew how the *Curia Phillippica*, with its reference to *Barbosa*, contradicts the defendant's assertion, that it is only by express statutes that the *affins* are excluded, as well as the *consanguinei*. We agree with him, that the *Curia Phillippica* is a practical book, which gives the summary of the rules on the subject, from whatever source derived. The passage quoted from *p.* 86, *n.* 13. *El pariente hasta el quarto grado*, positively indicates the source whence it was taken: *como se declara en unas leyes de Partida*, quoting *ley.* 8, 10, *et seq. usque ad* 22, *tit.* 16, *Partida* 3. Now, as I have already stated, among those laws, the 14th alone relates to ascendants and descendants, in civil suits ; and as the *Curia* refers to *Barbosa* on the subject, *vot.* 98, I will now quote his own words, of which I gave a translation in my first argument on the bill of ex-

East'n District. *Jan.* 1822.

BERNARD & AL vs. VIGNAUD.

ceptions. *Alii sunt inter quartum gradum consanguinei et affines, et ideò non probant nec fidem merentur. Cùm isti testes commodum reportent, ut eorum filii vel descendentes aliquandò in illâ (re) succedant, certum est eos non esse integros testes. Ratio est, quia si deponentes in casu ubi affectionem aliquam habent, aut eis imminent laus vel vituperium, non probant, licèt negotium contra eos principaliter non agatur: multo minus debent probare illi, qui deponunt in casu, ex quo commodum, licèt in consequentiam, reportent; quia illa commodi affectio oculos caligare creditur.*

As it is seen, the first part of this quotation is a commentary on the word *pariente;* the second part is illustrative of these words of the *Curia: El interesado én la causa,* and may be useful in settling the competency of Fouque as an interested witness.

I agree with the defendant, that the words ascendants and descendants must receive an uniform acception throughout the *Code;* that if they comprise affinity as well as consanguinity in the exclusion of witnesses, they must be so understood every where. I know, that the gentleman has pointed out the consequences as respecting successions; he now tells us there are others no less absurd, but he forgets

to designate them, and I am the more sorry for it, as it is in vain I endeavour to find them out. For I know but of three instances where those words are used in the *Code;* evidence, marriage, successions. The consequences drawn from the latter, I have before answered in my first argument on the bill of exceptions. I shall only observe, that this objection is of an old date. The *Roman Digest. lib.* 22, *tit.* 5, *l.* 4, 5, exempts *affins* from testifying against each other, as it does *consanguinei;* and *lib.* 38, *tit.* 10, *l.* 4, *sec.* 7, it prohibits them from intermarrying, and lays down the principle on which both exclusions are founded. *Hos itaque inter se, quòd affinitatis causâ parentum liberorumque loco habentur, matrimonio copulari nefas est.* It seems, that the consequences drawn by the defendant as to successions, must even then have been objected. For in the *Justinian Code, lib.* 6, *tit.* 59, *l.* 7, we find, that under the emperor Diocletian, fifteen centuries ago, a positive provision was made to settle the objection. *Adfinitatis jure nulla successio permittitur. Febrero* in his *Addicionada, part* 1, *cap.* 1, *n.* 169, teaches us, that this law is preserved in Spain, and that, therefore, affinity gives there no right to succession. *Ni da derecho à*

East'n District. *Jan.* 1822.

BERNARD & AL vs. VIGNAUD.

la succession de los bienes de los afines. This law, standing unrepealed in this state, must silence the objection.

As to the incompetency of Fouque from direct interest, I have quoted in my first argument on the bill of exceptions, the law 19, *tit.* 16, *Partida* 3, which excludes him positively, as vendor of the slaves. Of his being the vendor, the proof is on record. This law the defendant has passed unnoticed. But he has supposed that my observation on the liability of Fouque to the costs, was clearly an after thought. So was his own shift of the release. I do not know of any provision of the civil law which admits of such a release on the trial. It is a mere disposition of the common law, which cannot be allowed by our courts, except in trials by jury. Besides, how could that liability be released by the defendant, when it was still uncertain whether he would ever be condemned to costs, and when he had not paid them? Be it as it may, it is now too late for him to plead this ground of defence. Had he intended to make use of it, it must have been done at the trial. His bill of exceptions, shews that I objected to the witness as incompetent, on account of interest: though

it does not state on what grounds the court refused to admit him. I have proved, that he is interested as vendor, and that as such, he is, moreover, liable to the defendant for the costs, in case judgment goes against him. But, says the defendant, the costs are discretional; and besides, it is by no means certain that Fouque be bound to pay them, if the defence be unjust and unnecessary.

I own I am at a loss to conceive on what principle of law or equity the court could exercise a discretion as to the costs of an expensive and tedious law-suit, in which minors are engaged, since several years, for the recovery of their patrimony wasted by their tutor. And even if the defendant were cast, and Fouque was exonerated for the costs of the defence as unjust and unnecessary, yet there would still remain then a part of the costs to which Fouque could have no objection, and for which he was always liable to the defendant, as the latter could not avoid them. The defendant was not the debtor of the plaintiffs, and therefore, their case did not come within the 31st *sec.* of the act of February 10, 1813. 2 *Martin's Dig.* 196. Their action was against the slaves, subject to their

East'n District. *Jan.* 1822.

BERNARD& AL *vs.* VIGNAUD.

lien, of which he was the third possessor, and must, therefore, be governed by *art.* 43, *p.* 460, of our *Code.* According to it, after judgment against Fouque, they have obtained an order of seizure on the slaves, which was notified to the defendant; and he, though not personally liable to the debt, has opposed the seizure, by virtue of the *art.* 44, of the *Code, loco citato.* Hence arose this action; and therefore, if the costs were contested, those only could be so which accrued since his opposition. The filing of the petition *cum annexis,* the order of seizure, and the notification of it by the sheriff, to the defendant, occasioned costs, for which Fouque will always be liable to the defendant, who had, and could have no other notice of the plaintiffs' claim, of which they were not bound to make him any other demand. But if they are cast, they will have no claim on Fouque, even for that part of the costs, which therefore constitutes at least his liability to the costs of the action, and makes him an incompetent witness. *Phillip's Evidence,* 46.

PORTER, J. A rehearing has been granted in this case, and the first question to be de-

cided is, whether the father-in-law of the defendant was a competent witness on the trial of the cause.

The counsel who argued this case, have taken great pains in bringing forward every authority which bears upon the question; and the court has been furnished with abundant materials on which to form a correct judgment.

After all that has been said, I think, however, it will be found that this question lies in a narrow compass; and that it must be decided on the meaning which shall be attached to certain expressions used in our *Code* and statutes.

It appears very satisfactorily, that in Spain, persons standing in the relation of the present witness, could not testify. Whether this was in virtue of any expressions of their positive laws excluding them, or whether it was the consequence of a system, which, acting on different principles from our own, multiplied objections to the competence, and disregarded those which go to the credit, need not be considered. The first and most important enquiry is, what change has been introduced here on this subject by legislative enactment?

East'n District. *Jan.* 1822.

BERNARD &AL *vs* VIGNAUD.

By an act passed in the year 1805, 2 *Martin's Dig.* 160, it is provided, that no free white witness shall be disqualified from testifying on the ground of being incompetent, unless such witness shall, at the time of producing him, be interested or infamous; and all other objections shall go to the credit, not to the competence.

This act made the father-in-law competent to give evidence in cases similar to that now before us. And it is an important observation, and one which it is necessary to bear in mind, when we come hereafter to consider the effect of certain expressions in our *Code*, that this law did not alone enable witnesses to testify who were before excluded; but that it introduced a complete change on this subject, in our jurisprudence: expunged at once all the minute and particular distinctions which formerly existed, as to persons connected with the parties in the suit, or subject to their influence; and by restricting the objections which go to the competence, and increasing those to the credit, established an entirely new system as to evidence and proof.

From the passage of this law, until the promulgation of our *Code*. the witness rejected

in this cause, could have been heard. The jury, or the court before whom he gave evidence, it is true, were authorised to take into consideration the relationship in which he stood to one of the parties, and it might affect his credit. But he was clearly competent, and remains so, unless it has been since declared by the same authority, that his testimony cannot be received.

The *Code*, 312, *art.* 248, after stating who are competent witnesses, declares that ascendants cannot testify in respect to their descendants, nor descendants in respect to their ascendants. These expressions, it is contended, exclude the father-in-law. The counsel for plaintiffs supports this conclusion, by reference to the laws of Spain; and has introduced a variety of authorities to shew, that by its jurisprudence, expressions such as those, include ascendants by affinity, as well as consanguinity. He has not proved this position satisfactorily to my mind. Admitting that he has made it doubtful, we must then consider, if making it so can repeal a former law, and that too, in a case where, as far as I can ascertain the intention and policy of the law-maker, are directly opposed to the doctrine for which he contends.

East'n District. *Jan.* 1822.

BERNARD & AL. *vs.* VIGNAUD.

The first difficulty which suggests itself to the mind, on the perusal of the passage cited is, that if we adopt the construction which the plaintiffs contend for, we affix to the word ascendants, a forced meaning, very different from the ordinary sense in which mankind understands them: and in doing so, violate a rule for the construction of statutes which teaches us, "that the words of a law are to be understood in their known and usual signification—their general and popular use." *Civ. Code*, 4, *art.*

Another difficulty presents itself. If we say that by ascendant is meant the father-in-law, how shall we construe the same words when we are about to ascertain who are forced heirs? It being contrary to the known principles of our laws, to consider as such a relation by affinity.

The first objection is met on the part of the plaintiffs, by contending that the words must be taken in their legal sense; and the second, by shewing, that according to the law, as it stood previous to the enactment of the *Civil Code*, it was provided, that ascendants by affinity could not inherit.

The plaintiffs still further insist, that under

the construction contended for, a man might marry his wife's mother, as the law makes no distinction in that article, where it forbids ascendants and descendants from intermarrying. To this the defendant replies, that the law of Spain expressly prohibited them. *Par.* 4, *tit.* 6, *l.* 5.

Thus, it appears, that the plaintiffs and defendant endeavour to escape from the inconsistencies into which this construction would lead them, by referring the court to the former laws of the country, and they have succeeded perhaps, in shewing that the expressions *ascendants*, in our *Code* does, in the one instance, exclude those by affinity, and in the other, include them; or rather they have proved, that when the legislature used these words, they did not, in either of the cases put, conceive they were at all acting on the rights or duties of relations by affinity.

How then stands the question before the court, in relation to witnesses? Why, according to my opinion, ascendants by consanguinity were alone meant. But admitting, and it is the utmost the defendant can require, that it is doubtful, if it did not extend to relations by marriage: this will not be sufficient

East'n District. *Jan.* 1822.

BERNARD &AL *vs.* VIGNAUD.

to repeal the former law, which rendered the witness competent. More must be done than raising a doubt; the law must be clearly repealed. *Civ. Code*, 6, *art.* 24.

If we have recourse to the intention of the legislature as a guide, it is very evident to me that they did not contemplate augmenting objections to the competence of witnesses further than was absolutely necessary; and that the article which has given rise to this discussion, was passed in the same spirit, and with the same view as the act of the legislative council already cited.

I have examined, with attention, all the authorities cited by defendant's counsel. They fall far short of establishing that whenever the words ascendants and descendants are used in law, they literally mean those who have become so by marriage.

The objection taken on the ground of interest, is too remote; and on the whole, I think the witness was competent.

I am therefore of opinion, that the judgment of the district court be annulled, avoided and reversed, and that the cause be remanded for a new trial, with directions to the district judge not to reject, as an incompetent

witness, the father-in-law of the defendant, unless objections should be made to his testifying other than appears on the record now before this court.

MARTIN, J. I think the district judge was correct in rejecting the testimony of the defendant's father-in-law.

It is admitted, that in Spain he could not have been a proper witness; but held, that under the *Civil Code*, the objection goes only to his credibility.

This would be correct if, as the defendant's counsel urges, the word ascendants had but one signification. I think it has two.

Lato sensu, it includes persons related or connected in the ascending line, by consanguinity or affinity; and in a more restricted sense, it includes only those related by consanguinity. *Ascendentes sunt affines vel consanguinei. Gregorio Lopez.*

When a word has more than one signification, no party has a right to chose *ad libitum* that in which it is to be taken in the argument; it must be understood *secundum subjecti materiam.*

Consanguinity is the basis of the laws which regulate the degrees between which marriage

East'n District. *Jan* 1822.

BERNARD & AL cs. VIGNAUD.

is forbidden; the rules of succession and tutorship, the recusation of judges, and the admission or rejection of persons who are offered as witnesses.

Affinity is the basis of the same laws, with the exception of those which regulate successions. 1 *Domat*, v.

In the following sentence, "marriage between persons related to each other in the ascending or descending line is prohibited;" the words, ascending line, must be understood *lato sensu*, so as to include the line by affinity, and that by consanguinity: because affinity and consanguinity are both the basis of the laws which regulate the prohibition of marriage between persons related to or connected with each other. *Civ. Code*, 24, *art.* 9.

In the following sentence of the same statute, "there are three classes of legal heirs; the father and mother, and other lawful *ascendants*, the last word must be taken in the more restricted sense; because, consanguinity alone, and not affinity, is the basis of the laws which regulate successions. *Civ. Code*, 144, *art.* 10.

Were we to take the word in the same sense, in both these sentences, we would

come to the conclusion *ad absurdum.* The moral sense recoils at the idea of a man uniting himself in marriage with his son's widow; and the social order forbids that she should inherit and carry his estate into her family, to the exclusion of his lineal or near collateral relatives.

If it be granted that the same word may have a different signification in different parts of a *Code*, what is that of the word ascendants in the following sentence? "Neither can ascendants be witnesses with respect to their descendants." *Civil Code*, 312, *art.* 248.

I think *lato sensu*, because both consanguinity and affinity are the basis of the laws which regulate the admission or rejection of witnesses.

No case is better calculated to put the question, in a fair point of view, than the one under consideration.

The defendant seeks to establish the legality of a purchase of certain negroes, during his marriage. The result of the purchase, if it it be established, is the joint title of the defendant and his wife. If he introduced, to support this title, his own father, the objection would be, that the witness came to es-

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

tablish his son's title—that a parent cannot be viewed as an impartial witness, nay a disinterested one, when he comes to support his child's right. But he offers his father-in-law, who, it is contended, is not under the same bias. Why not? By establishing the defendant's purchase, the father-in-law establishes his own daughter's right; a title common to her and her husband. The interest of both fathers in the property in dispute, is precisely the same. Nothing stands between either of them, and his title to the slaves, but the life of his child, if the latter has no issue. On the death of the defendant, his father would, as a forced heir, claim his inheritance, of which one half of the slaves would make a part. On the death of the defendant's wife, his father-in-law, now offered as a witness, would stand precisely in the same situation. To the exclusion of either of these men, there are, in my humble opinion, the same reasons, and *ubi eadem est ratio eadem est lex.*

It is said there is no evidence of a community of goods between the defendant and his wife. Such a community, though not of the essence, is of the nature of the contract of marriage, in this state, and the exclusion of it ought not to be presumed.

If there be any case in which the principle that cases which are within the mischief intended to be prevented, though not within its letter, are to be included in the remedy. (1 *Black.*) this is one of them.

I conclude, that the placing of the father-in-law on a footing with the father, as to the incapacity of testifying, or of contracting marriage, does no violence to the words of the *Code*, and is perfectly within its sense and meaning.

Farther, the witness is interested in the event of the suit, being liable for costs.

And, that the judgment of the district court ought to be reversed.

MATHEWS, J. A rehearing having been granted in this case, I have considered attentively the briefs of argument, and am able to discover nothing erroneous in the judgment given by this court, except that part of it which relates to the rejection of the father-in-law of one of the parties, who was offered as a witness in the court below.

It is clear that the father of a man's wife cannot be a witness for him, according to the provisions of the Spanish law. But after much reflection on the subject, I am of opini-

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

on, that the rules of former laws, on the subject of the competency or incompetency of witnesses, were repealed by our act of the territorial legislature of 1805. It may be assumed, as a just principle in jurisprudence, that all persons are competent to testify in courts of justice, except such as are prohibited by law. The act of the legislative council renders incompetent persons who, for want of age, must be supposed to be deficient in discretion; those who are interested or infamous; a husband for or against his wife, and the wife for or against her husband. These are the only description of persons disqualified from testifying on the ground of incompetency by this law, which certainly repealed the law of Spain on the subject of witnesses.

Our *Civil Code* purports to be a digest of the laws previously in force in the country, but undoubtedly owes its validity and effect to the authority given to it by legislative acts. And in cases when its provisions differ from the rules of the ancient laws, those prescribed by the *Code* must prevail. The doctrine of the Spanish laws, respecting the incompetency of witnesses, has been revised since the introduction of the *Code*, so far as it relates to

ascendants and descendants; but I am of opinion, that these expressions do not *ex vi termini*, embrace relations by affinity. As to the objection raised to the competency of the witness in the present case, on account of interest, arising from the possibilities that his son-in-law may gain property, that his wife may be entitled to one half of the acquets of the community, that they will not be used nor wasted during the partnership, and that her father may succeed to such inheritance; all these circumstances I consider as raising an interest too remote to render the witness incompetent.

Although, from my present view of the subject, I have discovered nothing erroneous in our former judgment, further than that which relates to the bill of exception, yet as the cause must be sent back for a new trial, should it come before this court again, I feel at liberty to change the opinion which I now hold.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the case be remanded for a new trial.

East'n District.
Jan. 1822.

HANNA'S SYNDICS vs. *LAURING & AL.*

HANNA'S SYND
vs.
LAURING & AL

APPEAL from the court of the parish and city of New-Orleans.

The garnishee cannot contest the right of the plaintiff.

PORTER, J. This action was commenced to compel the defendants to return certain notes and obligations which they had received from the insolvent, Hanna, as a collateral security for a debt due by him.

Interrogatories were propounded to the garnishees, who answered that the notes mentioned in the petition were in their possession. The parish court decreed that the defendants should deliver them up to the syndics, that a copy of the judgment be served on Richardson & Fisk, in whose hands they were deposited, and that on their failure to comply with the decree, that execution issue against them.

From this judgment the garnishees have appealed, and insist that Lauring had a privilege on these notes; that they were given as a collateral security by Hanna when he was solvent: and lastly, that the defendants had by the transfer and indorsement, an absolute right in them.

These may be very proper questions, if the cause was placed before the court in such a

way as that they could be enquired into. But I am of opinion, that on an appeal by the garnishees, we cannot investigate the merits of the case between the principal parties. All that the former have a right to complain of is the judgment of the court, so far as it affects their interest, with its legality or justice, otherwise they have nothing to do.

Taking for granted, therefore, that the judgment of the court below is correct, as between plaintiff and defendant, since neither party have appealed from it. I cannot find any thing in the decree against the appellants, which requires, or could justify the interference of this court.

The judgment of the parish court, as far as it affects the appellants, should be affirmed with costs.

MARTIN, J. A garnishee has no right, as such, to plead for the defendant; he cannot oppose the plaintiff's claim against the latter. All he is to do in court is, to tell the truth, and if his declaration be controverted, to support it, and prevent any improper decision being made, as far as his own interest is concerned. If such an improper decision be made, he may certainly bring it up for our ex-

East'n District. *Jan.* 1822.

HANNA'S SYND *vs.* LAURING & AL

amination: but he cannot step out from the parts of the record which concern him, and draw our attention to errors, which affect the interests of the defendant: for these cannot be noticed by us in the absence of the latter.

We should dismiss the appeal.

MATHEWS, J. This appeal, as already stated, was taken and brought up by the garnishees alone. On examination of the case, in refering to the record, and to the points relied on by the counsel of the appellants, it appears that the interest of the garnishees is not brought in question, independent of the rights of the defendants in the attachment; and as they have not appealed, I am of opinion the merits of the cause ought not now to be investigated: and as an affirmance of the judgment of the court *a quo*, so far as relates to the appellants, might create some confusion in an appeal which may yet be taken by the defendants, the best and safest mode of proceeding, is to dismiss the present appeal. I therefore concur with judge Martin, that the appeal be dismissed.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed.

Seghers for plaintiffs, *Maybin* for defendants.

M'MICKEN vs. *STEWART.*

East'n District.
Jan 1822.

M'MICKEN
vs.
STEWART.

When a commission issues to any magistrate of a county or parish, the official capacity of the person who makes the return must be shewn, although he subscribes himself a magistrate or justice.

If a clause is susceptible of two significations, it should be understood in that which will have some effect, rather than that in which it will have none.

APPEAL from the court of the first district.

PORTER, J. The first question to be decided in this cause, is the effect of a bill of exceptions to the introduction of certain testimony, taken under the authority of a commission, directed to any justice of the peace of the state of Mississippi. The return does not shew in any other way than by the averment of the person who took the testimony, that he was a magistrate. This in, my opinion, was not sufficient, and the evidence must be rejected.

This question disposed of, it remains to consider the case on its merits. The action is instituted on the following agreement:—

Woodville, May 9, 1819.

"I promise to pay Charles M'Micken, or order, seven hundred and forty-six dollars; whenever I am advised from David Mimms, or his representatives, of South-Carolina, that he has collected, or has the promise for the payment of the same amount, by William Garrett, or Stephen Garrett, of said place, agreeable to a receipt given for that amount to one Mrs. Martha Melton, dated yesterday: and in

East'n District. *Jan.* 1822.

M'MICKEN *vs.* STEWART.

said receipt, have requested said Garrett to pay said David Mimms, it being for money I collected for David Mimms, and by him directed to be paid over to said Mrs. Melton, formerly Mrs. Wade, but now payable to C. M'Micken, allowing a reasonable time.

Signed, CHARLES STEWART."

This obligation is very obscurely worded, and it is not easy to ascertain for what object the condition was inserted. The parties have not explained it, and differ very much in the meaning they attach to it. The plaintiff contends that it was the duty of the obligor to ascertain the event on which the contract became absolute: while on the other side, it is insisted that the money cannot be demanded until the condition is performed, and that as the payee seeks payment, the burthen of proof lies on him.

Cases of this kind, where the parties have expressed themselves in a loose and confused manner, offer as much difficulty as any that are presented for decision. The best and safest principle to adopt in their examination, is to endeavour to find out the meaning of the parties, and disregarding as much as possible technical rules of construction, to carry the

contract into effect, in the spirit and interest with which it was entered into. This indeed is the direction of the law. "We must endeavour to ascertain what was the common meaning of the parties, rather than adhere to the literal sense." *Civil Code*, 270, 56.

The latitude given by the last clause of the article cited, need not however be assumed in this case; for without deviating from the fair and natural interpretation of the terms used in this agreement, enough, I think, appears to authorise us to say, that the intention of both plaintiff and defendant was, that the obligor should obtain the information wanted.

The situation of the parties to the contract, is the first circumstance which goes to support this conclusion. The obligee, for aught that appears on the record, was a stranger to Mimms, in South-Carolina, from whom the information was to be had: the obligor had been doing business, and collecting money for him: he must be presumed therefore to know him, and it cannot be presumed that M'Micken was to communicate with Mimms, or that the defendant would have wished to rely on intelligence coming through that channel. The manner in which the con-

East'n District. *Jan.* 1822.

M'Millen vs. Stewart.

dition is expressed, strengthens this construction; for it is not that information shall be given to the obligor, nor as soon as it shall be proved to him, or shewn to him, that such an event has taken place, but "as soon as he is advised from Mimms," a person, as has been already stated, for whom he had collected money, and who was transacting other business in which he was concerned.

But if this interpretation still leaves the case doubtful, that doubt I think must cease when we come to consider the last words of the agreement, "that a reasonable time is to be allowed." These expressions were useless, if the person to whom the note was payable, undertook to ascertain the fulfilment of the condition. Because it must be presumed he would lose no time in getting a knowlege of the event and communicating it; and because the maker cannot be supposed to have had any very direct interest in hastening the payment of his obligation. If we adopt the other construction, that the obligor was to enquire and learn when Mimms had collected the money, the expressions, "allowing a reasonable time," are at once explained. It was a proper and necessary precaution on the part of the

obligee. for without it, his payment might have been postponed to such a period of time, as would have greatly diminished the value of the obligation.

There is scarcely any of the rules furnished us for the construction of agreements, more useful in its application, than that which teaches us, that if a clause is susceptible of two significations, it should be understood in that which will have some effect, rather than that in which it will have none. *Civ. Code*, 270, *art.* 57. If we say that the payee of the note was to procure this information, the words of the agreement just alluded to, are useless, and unintelligible; if, on the other hand, we consider the contract in the supposition, that it was the duty of the maker to ascertain the fact, they are important, and such as a prudent man would seek to have inserted. I think therefore we should adopt the latter sense, because in the former they are idle and nugatory.

The obligation is dated May 9, 1819, and suit was commenced 13th November, 1820. This was a sufficient time to enable the defendant to have ascertained whether the event was accomplished, on which his obligation

East'n District. *Jan.* 1822.

M'MICKEN *vs.* STEWART.

became absolute. I am therefore of opinion, that the judgment of the district court be affirmed with cost.

MARTIN, J. I concur in judge Porter's opinion.

MATHEWS, J. I have examined this opinion attentively, and concur in it. In relation to the bill of exceptions, I think it would be a dangerous doctrine, to allow depositions to be read in evidence, in a suit when the commission for the examination of witnesses is directed generally to any justice of the peace, residing in another state, unless it should be made to appear by other evidence, than the simple signature of the commissioner, that he is such. This differs from cases when the commissioners are appointed by name.

The obligations imposed by the instrument, on which the action is founded, on the parties, are so well expounded, and clearly deduced, that I deem it superfluous to add any thing to what has been already stated.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Livermore for the plaintiff. *Porter* and *Duncan* for the defendant.

KENNEY & AL vs. *DOW.*

East'n District.
Jan. 1822.

KENNEY & AL. *vs.* DOW.

APPEAL from the court of the parish and city of New-Orleans.

To set aside an alienation, fraud in the alienor, knowlege in the alienee, and injury to a third party, must be shewn.

Pierce, for the defendant. Timothy Dow being a creditor of Nathaniel Olcott, to the amount of $1800, or upwards, made an agreement with Olcott, by which his effects and stock in trade, in a grocery store, were to be sold to Dow, and credit given according to the appraised value.

Accordingly Dow and Olcott, assisted by the clerk of the latter, having estimated the property at $1400, a bill of sale was executed on the 2d of March, 1821, by which, in consideration of that sum of $1400, which Olcott acknowleged to have received, he transferred all his interest in the business, conducted by him in No. 15, Toulouse-street. Dow took possession, Olcott's sign was removed a few days after, and the affair so slept until about the 9th or 10th of the next month of April, when I. W. Kenney, L. Paimboeuf, and G. C. Forsythe, representing themselves as creditors of the said Olcott, petitioned the parish court to the following effect:—

They complain that Nathaniel Olcott has.

East'n District. *Jan.* 1822.

KENNEY & AL. vs. Dow.

within these few days past, manifested symptoms of a deranged mind, and in consequence of the improper persuasion of T. Dow, one of his creditors, he has assigned, transferred, and sold the whole of his effects and stock in trade, to the said Dow, and that inasmuch as the said sale is without any good consideration in law, and fraudulent against all the creditors of said Olcott, they pray process of sequestration against the said property, and that provisional syndics may be appointed to take charge of the same; that Dow may be cited, and the sale aforesaid be rescinded and annulled.

The plaintiffs then made oath to their alleged claims. The sequestration issued, but was suspended upon motion. T. Dow having then filed an answer, being a general denial, the cause came on for trial. The testimony being heard, the court below decided, that N. Olcott was not insane; that there was no undue influence or persuasion exercised by Dow, but that he acted without fraud, and gave a *bona fide* consideration; yet as Olcott was at that time unable to discharge his other debts, as alleged and sworn to by the plaintiffs, the sale is annulled, as in fact, made in fraud of creditors.

From this Dow appeals, and avers, that it could not be enquired into in the present case, whether Olcott was able or not to pay his debts—1st. Because only one of the plaintiffs proved himself a creditor, and one alone cannot sue for a surrender of his debtor's property, and a rescission of all previous acts. See *Civil Code*, 294, *sec.* 168. For a forced surrender, there must be all or some of the creditors to require it; and though a debtor be unable to pay his debts, one creditor has no right to wrest property out of another creditor's hands, whatever the mass of the creditors might be able to do, if they sued to have it brought into the general fund. 6 *Martin*, 577.

2. Because there was no allegation of Olcott's insolvency, nor was it sworn to, and therefore it could not have been put in issue. The allegations were insanity in Olcott, and undue influence exercised by Dow. It is indeed added, that inasmuch as the sale is without any good consideration in law, and fraudulent as to all the creditors of Olcott, it ought to be rescinded; but the reason why fraud is not alleged, and the sale being fraudulent,

East'n District. *Jan.* 1822.

KENNEY & AL. *vs.* Dow.

can only be a conclusion from some previous allegations.

3. Because Olcott was never made party to the suit, nor cited to appear, though his rights were to be so vitally affected by the judgment rendered; it was not pretended that he had absconded; he was known to be in the city; he was recognised by one of the witnesses on the trial, as being present (which shews the nature of the present cause) yet as he was never made party to the suit, no judgment of sanity or insanity, of solvency or insolvency, could be pronounced concerning him. 6 *Martin*, 577. No property of his could be under the control of the court, and none could be ordered to be surrendered, if he could not be properly adjudged insolvent. The bill of sale from him to Dow could not be rescinded, for that is the ground upon which the judge annulled the sale. There must be a judgment against Olcott before there can be a judgment against Dow, and there cannot be a judgment against Olcott until he be cited.

The defendant Dow further avers, that there is no proof of Olcott's insolvency. The first thing presented to us is the bill of sale.

in which he conveys to Dow all his claims, interest, rights and debts, dues and demands, of all and every nature whatever, in, and belonging to the business conducted by N. Olcott, in No. 15, Toulouse-street; and it has been contended, that this being a conveyance of all his effects, and stock in trade, of itself makes him insolvent; but in the first place it is not proved that he had no other business in another street, or in another part of the state, or the world. Because a man ownsa grocery store, I believe he is not precluded from being master of a plantation, owning ships, hiring out negroes, &c.; and this exclusive concern of Olcott's ought to be proven; it can never be presumed, especially where so serious a thing as fraud is charged. It has been decided in the English courts, that the conveyance of all a man's property is an act of bankruptcy, because he thereby becomes totally incapable of trading; yet if made for valuable consideration, he may be as rich, or richer than before. A man may become a bankrupt, yet be able to pay twenty-five shillings in the pound. See *Doug. Rep.* 91. To be a bankrupt is not to be insolvent.

Say then that this was all his effects, and

East'n District. *Jan.* 1822.

KENNEY & AL. *vs.* DOW.

stock in trade—he might, under the English statute, have been declared bankrupt, though still solvent; but here it is necessary to prove that this would render him insolvent: he may have effects and stock, not in trade, and therefore, this conveyance being for good consideration, is not of itself a proof of insolvency.

The only thing remaining that can be tortured into any meaning concerning the incapability of Olcott to pay his debts, is the testimony of Charles Lee, who received a note of hand, drawn by Olcott, in payment of a negro purchased; and when the note became due, application being made by Lee at the store, he was informed that Olcott was sick; and his clerk, moreover, informed him, that Olcott would not pay the note. A few days afterwards Lee saw Olcott, and agreed to take the negro back, and give up the note, which was accordingly done; no reasons are stated why Olcott refused to pay the note; whether, because he considered the negro as not worth the money, or because he was not in funds. From the subsequent arrangement it appears, however, that the note is paid, and that he had property enough to pay it, even

after the sale of all of his effects in trade to Dow.

That Kenney is creditor for between four and five hundred dollars, has been proved; but one may owe a great deal, and yet be rich; and the being debtor for four or five hundred, or thousands of dollars, does not make a man insolvent; he must be unable to pay the amount, and of this there is no proof; no witnesses testify that any demand was ever made upon Olcott for Kenney's claim: or that if judgment was obtained against him, there would not be sufficient property to seize. There is no evidence of there being executions against him, numerous debts hanging over him, or that the man was ever distressed for money.

There is then no proof of Olcott's insolvency. Again, this defendant avers, that even were there proof of Olcott's being, at the time of the sale, unable to pay his debts; yet, as it was made for valuable consideration, and without fraud on the part of Dow, it is valid.

Three things are required by the Spanish law before a transfer for valuable consideration, "*por titulo oneroso*, can be revoked and annulled, *to wit*: fraud on the part of the

East'n District. *Jan.* 1822.

KENNEY & AL. *vs.* DOW.

transferor, the knowlege of it on the part of the receiver, and that the fraud shall operate to the injury of the creditors, *y asi en la enagenacion por titulo oneroso se requieren tres cosas, fraude de parte del enagenante, y sciencia de el de parte del recibiente y el evento o sucesso del fraude en dano de las acreedores.*" *Curia Phil. lib.* 2, *cap.* 13, *sec.* 16.

Now, we admit for argument, that there was fraud on the part of Olcott, but there is no proof that Dow was knowing to any intention on the part of Olcott to defraud his other creditors; there is no proof that the store and book accounts were the only property possessed by Olcott, or that Dow knew that he had not sufficient to pay his other creditors; there is even no proof that Dow knew he had other creditors; and unless these be proved, it is not a fraudulent transaction on the part of Dow. The judgment of the parish court has freed him from the imputation of any intentional fraud; and we have just seen, that there must be this intentional fraud proven, to revoke the sale. The court below has said, that it is enough that Olcott was unable to pay his other creditors, but our law is otherwise.

Aunque es visto dar en fraude el deudor, que

sabe que tiene acreedores, y que sus bienes no son deficientes para pagarlos y los enagena, no as suficiente para ser participe de fraude el comprador de ellos que deba tener el vendedor acreedores, sino es que tanbien sepa qua sus bienes no son suficientes para pagarlos." *Curia Phil. lib.* 2, *cap.* 13, *sec.* 17, and authorities there referred to.

Nor does it make any difference whether the consideration arose and passed at the time of the transfer; or whether it was a debt already existing, which was given up therefor, for an *enagenacion por titulo oneroso*, is *quando por el no se da de gracia la cosa, sino por algo que por ella se da, como en la compra, permutacion. y otras cosas semejantes.*" *Same book, sec.* 18.

And the case put by *Domat* in his *Lois Civiles*, is one of payment of an antecedent debt. See also 5 *Part.* 15, 19. *Domat*, 219, *sec.* 12, and the authorities is there put.

To this statement of the law, it may however be objected, that it is altered by the 24th section of the statute, relative to the voluntary surrender of property, passed in 1817: by which it is enacted, that "any debtor who shall be convicted of having at any time within the three months next preceding his failure, sold, engaged or mortgaged any of

East'n District. *Jan.* 1822.

KENNEY & AL. *vs.* DOW.

his goods and effects, or having otherwise disposed of the same, or confessed judgment, in order to give an unjust preference to one or more of his creditors, over the others, shall be debarred from the benefit of this act; and the said deed or acts shall be declared null and void; provided, however, that if the purchaser of such property shall prove that the said property was either sold or engaged to him for a true and just consideration, by him *bona fide* delivered at the time of such deed; then and in that case the said sales and mortgages shall be declared valid."

But this section applies only to persons who wish to avail themselves of the act; the words, "they shall be debarred from the benefit of this act, and the said deed or acts shall be declared null and void," shew that this was the intention of the legislature, more especially considering the previous statute of 1808, which was made for the benefit of persons confined for debt, as the statute of 1817 was for those not in actual confinement. The law of 1808, expressly declared, that it must be in contemplation of taking the benefit of the act, otherwise the conveyances, acts, &c., would not be affected. *Mart. Dig.* 455, *sec.* 16.

Under this law the debtor must not only be suing his creditors agreeably to its provisions, in order that any assignment, made within three months previous, should be annulled; but he must at the time of the assignment have had it in his mind, that he would shortly take the benefit of the law. This was found very difficult to prove, and therefore, when a law was made for debtors, not in actual custody, who whished to free their persons from imprisonment by surrendering their estate, these words were omitted; but it was never understood that the law of 1817, was a repealing law, and that of 1808, was at all affected by it. Yet, if the 24th section is to be considered as applying, not only to debtors voluntarily surrendering before in custody, but to all debtors insolvent, the 17th section of the law of 1808, is a dead letter, and is repealed, without any repealing clause in that of 1817; this construction is not to be admitted if it is possible to reconcile the two sections, one with the other, *ut res magis valeat quam pereat*, and they are not at all contradictory, if we suppose the section of the statute of 1817 to apply only to those debtors who are seeking relief under its provisions: and this its very

East'n District. *Jan.* 1822.

KENNEY & AL. *vs* Dow.

wording fully shews: for in the same breath, it declares that the debtor shall be debarred the benefit of the statute, and the act shall be annulled: what use of talking about debarring him, if the legislature had not petitioners under this law, alone in contemplation? If this be the case, as Olcott has never voluntarily surrendered either in custody or out of custody, neither law is applicable to him.

Again, the consideration was "a true and just one, *bona fide* delivered at the time of such deed." Dow released him from a debt of $1400, which was justly owing to him at the time; and this in good faith, agreeably to the evidence in the opinion of the judge below, and Olcott's estate was benefitted to that amount, as it was released from the burthen of the debt.

These things being considered, the defendant asks for a reversal of the judgment of the parish court.

Morse, for the plaintiffs. The petitioners state, that they are creditors of Olcott. That he has, within a few days, manifested evident symptoms of a deranged mind, and has actually, in consequence of the influence and improper persuasion of Timothy Dow, one of his credi-

tors, sold the whole of his effects, and stock in trade, to said Dow; and they believe, had he been at the time in his proper mind, he would not have executed the said sale; and inasmuch as the said sale is without any good consideration in law, and fraudulent against all the creditors of said Olcott, they pray that said property be sequestered, provisional syndics appointed, that Dow be cited, the sale annulled, and other equitable relief. And the petitioners, in order to obtain the sequestration aforesaid, severally make oath to their alleged claims.

The court below gave, as its opinion, that the symptoms of insanity in Olcott must be attributed to momentary abuse in drinking liquor, and not to real insanity. I think in this point it erred, and in order to shew this, shall have recourse to the testimony on record.

The first in order is Mr. Goodale, a respectable merchant of this city; he swears that in a conversation with Dow, the defendant, the said Dow stated, that Mr. Olcott appeared to be deranged, and had lost his mind, which Dow seemed to regret; and deponent avers, that in his opinion, on the day

East'n District. *Jan.* 1822.

KENNEY & AL. *vs.* DOW.

of the conversation, Dow was under the impression and belief that Olcott was not able to conduct his business at that time. The deponent further understood from Dow that he had made some advances to Olcott, and had taken his store. Here is an explicit avowal of the defendant, that he himself believed Olcott to be deranged, and he had then, as he further states, taken Olcott's store.

Pierre Musson also saw Olcott about the time the transaction took place between him and Dow, and believed, from his extraordinary conduct, he was deranged, and that it was not caused by drink.

M. Md. Pellé states, that he had many occasions to see Olcott; had transacted mercantile affairs with him. That he knew him in business; he was not in the habit of drinking; and that when he saw him, his mind was deranged, and he had not been drinking.

Mr. Hewes, from the conversation he had with Dow, was impressed with the belief that Olcott was a little deranged; but Dow subsequently told him that Olcott was subject to intoxication.

The testimony of two of these witnesses goes clearly to shew that Dow himself, at

the time of this pretended sale, was under the impression of Olcott's insanity; and that of the other two established the fact of his derangement from their personal observation, and contradicts the presumption of its being caused by drink.

The only reasons then, upon which the judge could have formed his conclusion, must have been drawn from the testimony of Lee and Devereux, the clerk; and Lee's opinion is drawn from Devereux's. He lent Olcott some money, and on inquiring for him some days after, he thought he was somewhat irregular; and questioned the clerk, Devereux, who answered it was nothing but liquor; and Dow made the same answer. On inquiring some time after, he was told Olcott was unwell. He had known him for four years, and had always found him sober and correct before this last transaction; was but twice in his company; and then considered him a sound man.

Devereux states, that he slept in the same room with Olcott, and has considered him a man of sound mind since he had known him; and further, that about the time of sale, he never observed any derangement on the part

East'n District. *Jan.* 1822.

KENNEY & AL. *vs.* Dow.

of Olcott; on the contrary, always considered him as a sane man.

Madame V. Evan deposes, that Devereux told her directly the contrary. She expressly states, that Devereux told her that Mr. Olcott was crazy, and that one evening said Devereux requested deponent to procure him a bed, because he was afraid to sleep in the same room with Olcott; that she then procured a bed and he slept in the house. This, she stated on the trial, took place four months previous, which fixes it at about the time when the transfer was made to Dow. Deponent also knew that Olcott was insane from her own observation.

Mr. James Henry states, that he knew very little of Mr. Olcott, but believes his insanity was caused by intoxication; and for this sage reason, "That if he were intoxicated to-day he would appear insane to-morrow." Were this a fact, I am fearful the list of interdicts would be very considerably increased.

The testimony then of Goodale, Musson, Pellé, Hewes, and Madame Evan, strongly affirms the fact of Olcott's insanity and character for sobriety, at the time of the transaction. That of Lee's, which is but barely

negative and forced, upon the say-so of Devereux's, demands but little consideration; and as to Devereux, it only rests with the court to decide who is entitled to the most credit, he or Madame Evan. Their testimony is so diametrically opposite, that the verity of the one establishes the falsity of the other. But, supposing it is admitted that Olcott was occasionally intoxicated, does that destroy the fact of his insanity? On the contrary, I think it affords one of the strongest evidences of it. Insanity acts variously with different constitutions; almost every deranged person is seized with a different fancy; liquor was his. Insanity may cause a man to drink, and drink may cause a man's insanity.

On the trial in the court below, the defendant's counsel objected to the admission of so much of this testimony, as went to prove the insanity of Olcott, on the ground, that as there was no judgment of interdiction against Olcott, no act of his could be annulled for insanity until then. The court over ruled the objection, whereupon he took a bill of exceptions; but in his argument before this court, he has not referred to this objection; he has produced no law to support it, and it cannot

East'n District. *Jan.* 1822.

KENNEY & AL. *vs.* DOW.

be maintained. In the case of *Marie* vs. *Avart's heirs, n.* 1, *vol.* 10. *Martin's Rep.* pamphlet form, it is decided, that an heir may avail himself of a testator's insanity, although his interdiction was not procured.

And indeed, it is but reasonable, that in a living person, all acts of his while *non compos*, should be null; although no formal interdiction had been passed or even provoked; for, how are we to judge of his insanity, but from some previous act; and the one previous act might be so extensively ruinous in its consequences, as to involve the whole estate of the unfortunate. Again, he may have no relations or friends, and a stranger might not feel sufficiently interested to take upon himself the trouble and expence incidental to such an application. The object of the law of interdiction is to give public notice of the fact. All acts entered into by a person proved insane at the time are as absolutely null and void, as if he had been formally interdicted; for consent being the essence of a contract, it follows that a person must be capable of giving his consent, and consequently, must have the use of his reason, in order to be able to contract. 1 *Poth. on Obligat.* 29.

Having disposed of this point in the case, there only remains this question to be discussed: Should the judgment of the parish court, in setting aside the sale as fraudulent, be affirmed? On this point, there can be but little doubt. The appellant in his argument, for many reasons, avers, that Olcott's insolvency could not be inquired into in the present case:—Because, 1st, only one of plaintiffs proved himself a creditor, and one alone cannot sue for a surrender of his debtor's property, and a rescission of all previous acts, and cites *Civil Code*, *p.* 294, *art.* 168, and 6 *Martin*, 577. On referring to this passage in the *Code*, we find that a forced surrender is ordered at the instance of some of the debtor's creditors. The appellant's counsel has not given to this suit a distinct and proper character; it was instituted by three creditors of Olcott, to obtain a sequestration of his property, fraudulently obtained; who supported the allegations in the petition, and respectively made affidavit to the amount of their claims. This was the proper manner of bringing the action, and the only formality required by law. It is admitted, that in the course of the trial, Kenney fully proved him-

East'n District. *Jan.* 1822.

KENNEY & AL. *vs.* Dow.

self a creditor; this was sufficient to establish the fraudulency of the conveyance, supposing Olcott to have disposed of all his effects, and left Kenney's debt unliquidated. *Robt. Fraud. Con.* 546. The case in 6 *Martin*, 577, is no way analagous to the present. Because, 2d, there was no allegation of Olcott's insolvency, nor was it sworn to; and therefore it could not have been put in issue. The petitioner alleges that Olcott, in consequence of the influence and improper persuasion of Timothy Dow, one of his creditors, sold the whole of his effects, and stock in trade, to said Dow. The transferring the whole of his effects to one of his creditors, without making any provision for the others, is surely allegation sufficient from which to draw a conclusion of fraud; and we also find the fact itself a very strong evidence of insolvency; for the whole of his effects conveyed to Dow, did but satisfy his claim in part. Dow was a creditor for upwards of $1300, and for all his property, Olcott was only credited in the sum of $1400. I shall here notice an objection, on which the appellant appears strongly to rely, and which runs through the whole vein of his argument. He says, that the bill of sale barely shews,

that Olcott disposed of all his effects, claims, &c., in the business, No. 15, Toulouse-street; and to prove his insolvency, we ought to shew, contrary to every rule of evidence, that he had no other property. No plantation, no ship, no negroes hired out, and many other negations; for, he believes, because a man owns a grocery store, he is not precluded from being master of a plantation, ship, &c. Certainly not, I believe so too. But when a public trader conveys all his effects, claims, and credits of, in, and to that trade, to one creditor, and all of which only extend to a partial satisfaction of that one claim; when he leaves other debts unliquidated and unprovided for; debts which were incurred for and in the course of that trade; this furnishes a violent presumption, that he has no more property; that he is insolvent. It is, indeed, conclusive, and when we make this allegation, it rests with the party affirming, that he has other property, to shew it. Produce it; prove by actual demonstration that he still possesses more than sufficient to pay all his debts, and we shall be defeated; and it is only in this manner that the fact can be brought to light. If this trader had applied

East'n District. *Jan.* 1822.

KENNEY & AL. *vs.* DOW.

for the benefit of the insolvent act, and we had opposed his release, charging him with possessing more property than his schedule exhibited, here we must have ferretted this property out; but in the present case, we have proved that Olcott disposed of all his visible effects; that they, not being sufficient to pay his debts, *de facto*, he is presumed insolvent; and it was then for this defendant to destroy this presumption, by shewing he possessed other property sufficient to satisfy all claims. This would have bettered their condition, and this it was incumbent upon them to have proved. When money is paid to a fair creditor, in the usual course of trade, nothing attends the transaction which can have any tendency to excite suspicion of fraud or injustice on the part of either party; but in cases, where instead of payment, some security is offered, this very circumstance creates a violent presumption that the debtor is not able to pay his debts, and that he is about to fail. 3 *Martin's Rep.* 274. *Robert's Fraud. Con.* 546. The third ground taken by the appellant, is an objection that Olcott's rights are so vitally effected that he should have been made a party to the suit. This, if an error, can only

be attacked by Olcott, and cannot be urged by the defendant. The question here is, whether his claim should not be remitted to its primitive rank, and paid in concurrence with the other creditors?

Although our refutation of the second ground of the appellant's argument, should render any further proof unnecessary, yet to establish beyond all doubt, the insolvency of Olcott, we shall have recourse to the parol testimony; and here the evidence of Charles Lee need not be tortured to this meaning; the fact of which he swears, is clear and conclusive evidence of itself. He made a *bona fide* sale of a negro boy to Olcott, and took his note for the payment; when the note became due, he applied for payment, but the boy stated that Olcott was unwell, and the note could not be paid; and that Olcott had sold his store to Dow; and this boy, Devereux, in his examination, very gravely states, that the reason of Mr. Olcott's not paying his account was, the inconvenience of not having the money. This is surely a sufficient reason, and makes good our allegation; for it is this inconvenience of not having money, that is the essential cause of insolvency. The counsel states, no reason has been given why Olcott refused to

East'n District. *Jan.* 1822.

KENNEY & AL. *vs.* DOW.

pay the note; it was not for us to give this reason; it is presumed, that at that time he was troubled with that same inconvenience. The counsel further says, it appears, however, that the note is paid. It does not so appear. When Lee found he could not get the money for the note, his suspicion was excited; by the subsequent irregular conduct of Olcott, they were confirmed; and he very prudently thought it better to regain his negro boy, his identical property, than run the hazard of obtaining what might have been considered a good price for him.

We will now shew, that Dow himself never considered this pretended sale as binding and effective in law.

Devereux, the clerk of Olcott, states that Olcott was indebted to Dow $1800. Dow, at the meeting of the creditors ordered by the court, makes oath that Nathaniel Olcott is justly indebted to him in the sum of $2099 82 cents. He subsequently filed with the clerk of the court, his account against Olcott, amounting to $2106 52 cents; and swears to its correctness. These acts of his evince that he considered the sale a nullity; for how could Olcott pay him by this sale $1400, and

still be indebted to him in the full sum of this account? It is not pretended there was more than this one account; that any subsequent transaction swelled the sum to its former bulk. The act of 2d of March was a final one. Two thousand dollars, or thereabouts, were the original debt; fourteen hundred dollars of that debt have been paid, and yet, by a novel system of arithmetic, twenty-one hundred dollars remain due.

PORTER, J. This action appears to have been commenced with a double object; to have Olcott declared a bankrupt, and to obtain the rescission of a sale of property made by him to Dow, on the ground that he was insane at the time he made the conveyance; and "inasmuch as it was without any good consideration in law, and fraudulent."

I doubt very much, even under the equitable and liberal practice which our law authorises, if two such causes of action can be properly joined in the same petition. It seems to me, that it must necessarily introduce great confusion, to permit demands, founded on distinct causes, to be carried on against different defendants in the same suit: but I give no opinion on this point, because the defect, if it does

East'n District. *Jan.* 1822.

KENNEY & AL. *vs.* Dow.

exist, is cured by the parties not objecting to it at the proper time.

Dow was cited to answer this petition; Olcott, the other defendant, was not; the former appeared, and the action for a rescission of the sale proceeded against him; evidence was taken, and the parties heard. The court decided that the transfer of the property was null and void, and followed up this decree, by an order that a meeting of the creditors of Olcott take place before a notary. From this judgment Dow has appealed.

The record contains not only the evidence on which this decision was made, but also the subsequent proceedings had against Olcott, which terminated in ordering a forced surrender of his property. The greatest doubt I have had in this case is, whether we were not authorised to notice the fact of this insolvency; but on reflection, I am satisfied that as it did not make a part of the evidence, on which the court pronounced judgment below, we cannot notice it on the appeal.

The first point made by the appellees is, that there is sufficient proof that Olcott was insane at the time he executed the bill of sale to the defendant.

The evidence on this head is in substance as follows:—

Goodale, the first witness, declares that Dow told him Olcott appeared to be deranged.

Masson deposes, that Olcott was not of quiet mind, and deranged; and his reason for thinking so was, that Olcott called for paper and ink, and wrote and tore about eight or ten pages, and asked a lad of 13 or 14 years of age, if a certain account he had drawn was correct.

Pellé states, that he met Olcott in the street in the month of March, that he was "extravagating," offering to give his store to the deponent, and requesting him to stop at a tavern and drink with him, which he did; that he had occasion to see him five or six days after, and he was in the same situation of mind.

Lee declares, that he had lent Olcott some money, that he applied a few days after for it, and thought Olcott was somewhat deranged; he made enquiry of the clerk, who answered it was nothing but liquor; he mentioned the same thing to Dow, who made the same answer; that some days after the deponent applied at the store for payment of a

East'n District. *Jan.* 1822.

KENNEY & AL. *vs.* DOW.

note he held for a negro boy; he was informed it could not be paid. A week afterwards he made an arrangement, and took back the boy. Olcott appeared of sound mind when this transaction took place, though he drank too much.

Hewes swears, that Dow told him in the beginning of March, that his impression was, that said Olcott was a little deranged, and unable to attend to his business. And that in a subsequent conversation, he told the deponent that Olcott was subject to intoxication.

Devereux, the clerk, states, that Olcott is a man of sound mind since he has known him; that he is given sometimes to drinking, that he and Olcott slept in the same room, and that he has seen him drunk at the rate of three times a week.

This last witness is contradicted by one Madame V. Evan, who appears to stand in a situation, in relation to one of the plaintiffs, not very favourable to her credibility.

I agree with the parish judge, that this evidence is not sufficient to establish the insanity of the vendor. The fact must be notorious, and it must be clearly proved. *Code* 80, *art.* 15.

But all I can gather from the testimony is, that he was a drunkard, and that like other men, when in that situation, he talked and acted very foolishly.

The appellees next insist, that the sale was without consideration, and void against creditors.

Had it appeared in evidence, that Olcott was insolvent, or had been declared a bankrupt, a very strong case on the part of the plaintiffs would have been made out; but nothing of this kind is shewn, and of course, none of the provisions of the law which relate to sales made, or preferences given to favourite creditors, on the eve of bankruptcy or insolvency, can apply here; as that bankruptcy and insolvency have not yet been established according to law.

If then the plaintiffs can succeed, they must do so in consequence of rights which the law confers on them, independent of these circumstances of failure or insolvency. One of the rules prescribed for the exercise of those rights is, that to set aside the alienation, three things must be proved; fraud on the part of the vendor; knowledge of that fraud by the person to whom the alienation

East'n District. *Jan.* 1822.

KENNEY & AL. *vs.* DOW.

was made; and an actual injury to the other creditors. *Curia Phillippica, Commercio terrestre, lib.* 2, *cap.* 13, *n.* 16, 17. The evidence does not establish these facts, and the case of the plaintiffs is not made out.

We have been referred to the decision of this court, in *Brown* vs. *Kenner & al.* 3 *Martin*, 270, but in that case as well as *Meeker's assig.* vs. *Williamson & others syndics*, 4 *Martin*, 625, the insolvency of the vendor had been established before suit was brought, and the opinions given there were predicated, on the ground, that the conveyances were made on the eve of bankruptcy, and with a view to it.

I am therefore of opinion, that the judgment of the parish court be reversed, and that judgment be given for the defendant, as in case of non-suit, with costs in both courts.

MARTIN, J. I concur in the opinion just pronounced.

MATHEWS, J. I do also.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that there be judgment for the defendant, as in case of non-suit, with costs of suit in both courts.

DAVID vs. *SITTIG.*

East'n District.
Jan. 1822.

DAVID
vs.
SITTIG.

APPEAL from the court of the parish and city of New-Orleans.

Evidence of the nonage of the defendant, cannot be received on a motion to discharge him from bail.

PORTER, J. This case comes up on an appeal, taken from an order of the judge of the inferior court, discharging the defendant out of custody of the sheriff, on the ground that he was a minor at the time he entered into the contract on which this suit was instituted.

This action it appears, was commenced to obtain payment of notes and obligations executed by the defendant. The only defence set up is the minority of the obligor at the time he signed them.

The evidence introduced to establish the minority, admitting it to be legal, shews that Sittig was twenty-one years of age at the time he was arrested. That arrest was therefore lawful, and if he had not the means of giving bail, he should have remained in the custody of the officer to await the final judgment of the court.

The ground on which the parish judge discharged the defendant, made a part of the merits of the case; or rather it was the only point on which the parties were at issue; so that on an interlocutory motion, he in fact

East'n District. *Jan.* 1822.

DAVID *vs.* SITTIG.

tried the cause and decided it. This was clearly incorrect, and if sanctioned by this court, would tend to introduce confusion in practice, and be often a source of the greatest injustice. In the present case, it is not impossible that when the parties come fully to trial, the defendant may be proved of age, and if so, his discharge from prison now might work an irreparable injury to the plaintiff. I think that the judgment of the parish court should be annulled, avoided and reversed, that this cause should be remanded with directions to the parish judge to proceed in the case as if no rule had been prayed for and granted.

MARTIN, J. This case is nearly similar to that of *Fisher & al.* vs. *Hood*, 2 *Martin*, 113, determined in the superior court of the late territory of Orleans, in which the merits of the case were attempted to be brought before the court, on a motion to dissolve the attachment, by shewing that the debt was not due.

The merits of a case cannot be pronounced upon on a motion; the party has a right to a trial by jury. The judgment ought to be reversed, the case remanded, and the court *a quo* directed to proceed as if no rule had been granted.

MATHEWS, J. I concur with my colleagues.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and the case remanded, with directions to the parish judge to proceed therein as if no rule had been granted.

Seghers for the plaintiff, *Davezac* for the defendant.

CARROL vs. *M'DONOGH.*

APPEAL from the court of the first district.

In cases of attachment, a prior judgment does not destroy the lien of an anterior seizure.

Maybin, for the plaintiff. An attachment was instituted and executed on funds in the hands of John Rogers, the appellant. To the interrogatories proposed him by the plaintiff, he answers, that he has in his possession monies of the defendant, to the amount of $334 82 cents; but that an illegal attachment had been taken out in the state of Pennsylvania, against his own property, in a suit of some person against M'Donogh, and that he intends retaining possession of the funds to indemnify himself for any damage which he may sustain. The district court rendered

East'n District. *Jan.* 1822.

CARROL *vs.* M'DONOGH.

judgment in favour of the plaintiff, against the defendant, and ordered Rogers to pay over the amount of the monies admitted to be in his hands; which order, not having been obeyed, execution has been issued against the garnishee. From the decree of the inferior court, an appeal has been taken by Rogers, the defendant having acquiesced in the judgment.

The ground relied upon is, that the garnishee has a right to retain the funds in his hands, till the suit in Pennsylvania is dismissed, to indemnify himself against its result. His answers expressly admit, that the attachment is illegal. But waving that point for the present; admit it to be legal; and still it is not sufficient to prevent him from paying over the money in his possession. The court which rendered the decree against Rogers, was one of competent jurisdiction; and a compliance with its judgment will always afford him protection, and be a valid plea in bar in any other suit. The payment of the money would not be voluntary, a circumstance which might elsewhere perhaps raise a presumption of collusion; but made in execution of an order expressly rendered against him.

If the court had undoubted jurisdiction of the case, and gave a decree on the whole merits of it, the garnishee is bound to obey it; and that obedience will always prevent him from sustaining any injury. *Le Chevalier*, assignee of *Dormer* vs. *Lynch & al. Douglass*, 169. *Sergeant on Foreign Attachment*, 183, 184. 3 *Term. Rep.* 125, *Allen* vs. *Dundas*. The language employed by Mr. Justice Ashhurst, is particularly applicable to the case before the court; "every person is bound by the judicial acts of a court having competent authority; and during the existence of such judicial act, the law will protect every person obeying it." It was distinctly admitted in argument, by counsel in the case of *Hunter* vs. *Potts*, 4 *Term. Rep.* 187: "That nothing could be more clear, than that a person who had been compelled by a competent jurisdiction, to pay the debt once, should not be compelled to pay it over again." This point I consider so clear that it would be a waste of time to adduce any additional authorities.

It is not a sufficient plea that an attachment had been instituted against the garnishee in Pennsylvania. No evidence has been presented to the court, to shew that the

East'n District. *Jan.* 1822.

CARROL *vs.* M'DONOGH.

suit is still pending; it may, long ere this, have been discontinued, or dissolved by the court; or judgment rendered in favour of the defendant; which would, consequently, exonerate the present garnishee from all responsibility. He should have gone further than pleading the existence of an attachment; he should have plead and proved, that a judgment had been rendered against him, and an execution issued. *Dyer*, 83, *a*. *Rotherton* vs. *Norroy*. 1 *Comyn's Digest*, 427, (Dublin edt. of 1785.) But the garnishee admits, that the attachment in Pennsylvania is illegal. If so, what plea can he now set up against obeying the decree of the inferior court? An illegal suit cannot affect or injure him. As regards him, it is the same as if no suit was in existence at all. The answer of Rogers is to be considered as true unless disproved—this has not been done in the present instance. This court will, therefore, look upon the suit in Pennsylvania as entirely illegal; for the garnishee himself says so. How then can an attachment, which is here shewn to be against law, and of course, altogether inoperative, be a valid plea in bar against the recovery by the plaintiff in this present suit? The garnishee

has, by his own answers, shewn enough to authorise this court to confirm at once the judgment of the court *a quo*.

In the statement of points and authorities submitted by the counsel for the appellant, to this court, two provisions of our *Code* are relied upon in support of the ground taken by him. *Civ. Code*, 414, *art.* 28. *Ib.* 288, *art.* 142. The former of these articles relates to the obligations imposed upon him, by whom a deposit has been made, and gives the depository a right to retain the deposit, until repaid his advances, and indemnified for his costs and losses by the owner. In what manner this part of our law is applicable to the case before the court, I am yet to be informed. The garnishee must shew in what way the circumstance of his being indebted to the defendant, is to be considered a deposit; and then, that he has sustained the losses and incurred the expences alluded to by our *Code*, to authorise him to retain the money, in preference to a *bona fide* attaching creditor. Nothing of this has as yet been done, and I apprehend it cannot very easily be done.

The other article of the *Code* invoked, has as little bearing on this case. That acticle

East'n District. *Jan.* 1822.

CARROL *vs.* M'DONOGH.

declares, that "payment made by a debtor to his creditor, to the prejudice of a seizure or an attachment, is not valid with regard to the creditors seizing or attaching; these may, according to their claims, compel him to pay anew," &c. This provision evidently contemplates a case different from that under consideration. It contemplates a payment to be made voluntarily by the debtor, after an attachment, and after his knowlege of the existence of such an attachment or seizure; but surely it cannot mean a payment made under a decree of a court of competent jurisdiction. *Pothier, Traité des obligations, n.* 469, has a similar provision; and his meaning, as gathered from the article itself, and the context, is that which I have given to the article in the *Code.* The debtor must know of the laying of the attachment, and must voluntarily pay it under that knowlege; and this being in fraud, and to the prejudice of the attaching creditor, the law very correctly says, that he shall be compelled to pay it a second time. Our *Code* goes also on the supposition, that the attachment, to whose prejudice the payment is made, is a legal one. Now, in our case it is illegal, as declared on oath by the

garnishee; consequently, it never could be prejudiced, even admitting that the article invoked is applicable.

Preston, for the garnishee. Rogers shews by his answer, that an attachment had issued against him in the state of Pennsylvania, on account of the funds now attached, and that he would hold the same to indemnify himself against it.

Our *Civil Code* declares, that "payment made by a debtor to his creditor, to the prejudice of a seizure or attachment, is not valid with regard to the creditors seizing or attaching. These may, according to their claims, oblige him to pay anew." The counsel for the plaintiff contends that this article of our *Code* applies to a voluntary payment, not one compelled by a court of justice. But this is evading the controversy between us. The question is, whether the court ought to compel the payment or not? I contend that the court ought not. The payment, if made voluntarily, would not be valid. The reason is, because the debtor ought not to pay, and thereby do injustice to an attaching creditor who had acquired rights in the debt or thing attached.—But if the debtor ought not to pay voluntarily,

East'n District. *Jan.* 1822.

CARROL *vs.* M'DONOGH.

the court ought not to compel him to pay. Neither ought the court to do injustice. But if they compel the garnishee to pay the present attaching creditor, they must do injustice either to the garnishee, or the first attaching creditor: to the first attaching creditor, if they deprive him of his debt, by compelling the garnishee to pay the present plaintiff; or to the garnishee, if by compelling him to pay the present plaintiff, they subject him to pay the same debt twice. The law of atttachment makes it the duty of the garnishee to defend himself against the attaching creditor, and to protect the rights of the defendant, and of course the rights of a previous attaching creditor. It is not sufficient to exempt him from their rights, that he has been compelled by a court of justice to pay the attaching creditor; he must have been compelled to pay, after having defended himself according to law. To make such a defence is the object of the present garnishee.

If the garnishee be compelled to pay the present plaintiff, it will not exempt him from the effect of such payment prescribed by our *Civil Code.* "He may be obliged to pay anew." His answer shews that judicial pro-

dings were pending against him in Pennsylvania, on account of the funds now attached. His answer, by our statute, is made evidence of the existence of those judicial proceedings, and supplies the record itself. His answer that he was indebted by judgment, would bind him, and he would not be exempted from payment because the record was not produced. On the other hand, if he discharges himself by judgment, or other judicial proceeding, it is sufficient, and it is not necessary to produce the record. The answer of the garnishee is sufficient proof that the funds now attached had been previously attached in the state of Pennsylvania. Now the constitution of the united states prescribes, that "full faith and credit shall be given in each state, to the judicial proceedings of every other state."—*Art.* 4, *sec.* 1. The attachment in Pennsylvania therefore, is entitled to the same credit as if it had been commenced in our district court. If the attachments had been commenced here, the first attaching creditor would have had a preference on the thing attached. 8 *Martin's Rep.* 511. The judicial proceeding in Pennsylvania, therefore, gave the attaching creditor there, a preference over the at-

East'n District. *Jan.* 1822.

CARROL vs. M'DONOGH.

taching creditor here. This court cannot deprive him of that preference without violating the article of our constitution just quoted: If this court should deprive him of that preference, the court in Pennsylvania would regard the act as manifestly unconstitutional; and would not only in fact, but rightfully compel the garnishee to pay anew. They would tell him it was his misfortune to have been in Louisiana, where the constitution of the united states was disregarded; but that they could not do injustice to their citizens on account of his misfortunes.

The fact, that judgment has been first obtained in our state, does not affect the rights of the parties. It is not the judgment but the attachment which gives the lien. If two creditors should attach the same thing in our district court, and the first, on account of the difficulty in obtaining his proof, should be the last to obtain judgment, would he be postponed to the other? If so, the vigilant creditor who hunted out the concealed property of an absconding debtor, would subject himself to costs, to see another enjoy the benefit of his industry. The maxim of justice *vigilantibus non dormientibus servit lex*, would be reversed.

The principle for which I contend, has often been decided. A garnishee may plead the pendency of the attachment in bar to or abatement of a suit, commenced against him by the defendant in the attachment. *Serg. l. of att.* 145, 146, 147, and the cases there cited ; and 169, 170. The defendant then has no right to the thing attached, until the attachment is dissolved. But the second attaching creditor can only attach the rights of the defendant to the thing—the right to receive it when the first attachment is set aside. The authorities quoted, therefore, in deciding the principle, that the defendant in the attachment cannot maintain an action for the debt or thing attached, against the garnishee, in effect decide, that the second attaching creditor can acquire no right to it until the first attachment is satisfied or dissolved.

Again, the garnishee (as appears by his answer) does not owe the defendant money, but is only in possession of his funds. The money of the defendant must be in his possession by contract of deposit or mandate.—In either case the garnishee is entitled to indemnity for any losses he may sustain on account of the deposit or mandate. The de-

East'n District. *Jan.* 1822.

CARROL *vs.* M'DONOGH.

positor "is to indemnify the depository for the losses which the thing deposited may have accasioned him. The depository may detain the deposit until repaid what he has advanced, and indemnified for his costs and losses by the owner." *Civil Code*, 414, *art.* 28. "The attorney must also be compensated for such losses as he has sustained on occasion of the management of his principal's affairs, when he cannot be reproached with imprudence." *Civil Code*, 326, *art.* 30. It is true, the loss has not yet actually occurred, but suit has been commenced against the garnishee, which renders its occurrence at least so probable as to entitle him to security against it. *Serg. l. of att.* 169.

Some stress is laid on the circumstance, that Rogers himself believes the attachment in Pennsylvania illegal. That is not for him but for the court to decide. The court may think it a legal attachment, although he may believe it very illegal. Whether it be legal or illegal, he will have the money to pay if the court so decide; and he is equally entitled to indemnity for the loss sustained on account of the thing in his possession, whether by a legal or illegal attachment.

The garnishee acknowleges, in his answer, to have funds of the defendant in his possession, but claims to be discharged at present from the payment of them to the plaintiff. If his claim was not admitted, he was entitled to notice of the day of trial, in order to support it. *Allyn* vs. *Wright*, 9 *Martin's Rep.* 271. The record shews he was not present at the trial, and there was not a witness examined, to prove that he was notified of the time. If he had been present, and his case had been presented to the district court, the judge surely would have required the plaintiff to have waited the event of the suit in Pennsylvania; or to have given the garnishee indemnity against it. I hope therefore the court at least will send this cause back, to enable the district court to afford this equitable protection to the garnishee, before rendering judgment against him.

The answer of the garnishee is not very explicit. He appears not to know precisely the nature of the proceedings against him in Pennsylvania. If I had counselled him with regard to that answer, I surely would have advised him to have obtained delay from the district court, to have procured, and set forth in his

East'n District. *Jan.* 1822.

CARROL *vs.* M'DONOGH.

answer, copies of those proceedings. But that particularity was rather necessary for the plaintiff than for him. He set forth that a suit was pending against him. This was a substantial defence. If the plaintiff wished to know the particulars of the suit, he should have required a more particular answer to his interrogatories. If both have been a little negligent on this subject, and have thereby not afforded the court the means of knowing what is right, at least let the cause go back, in order that the record of the suit in Pennsylvania may be procured, that the court may be enabled to do that justice which will be satisfactory to them, and to the parties

Maybin, in reply. The counsel for the garnishee relies considerably on the 142d *art. p.* 288, *Civil Code*, for the purpose of proving, that payment by Rogers, under the judgment of the inferior court, will not be valid, as it regards the attachment in Pennsylvania. Nothing has, as yet, been urged to weaken the construction I have already given to this provision. The *Code* is describing the manner in which payments are to be made, and the effects of such payments. It is speaking of those made by the debtor to his creditor,

voluntarily; and nothing is said of their being done under judicial process. This article, I still contend, relates to a payment made by a debtor, after an attachment has been issued, after knowlege of the existence of such attachment, and with the view to injure the attaching creditor. But, says the counsel, "if the debtor ought not to pay voluntarily, the court ought not to compel him to pay." This does not follow. Here are conflicting rights. It is not the business of the debtor to decide. The question must be settled by the laws of the country. If then, the debtor undertake to pay one creditor voluntarily, he does that which the law will not permit him to do; and consequently renders himself liable to pay anew. But, because he cannot give a preference to one creditor, and cannot determine upon the respective rights, this surely forms no reason to prohibit the court from settling the question; and its judgment, as I have already endeavoured to shew, will always protect, and be a good plea in bar to the garnishee.

But the *Code*, in this article, is speaking of a payment to be made by a debtor to his creditor. The counsel himself admits, that the

East'n District. *Jan.* 1822.

CARROL *vs.* M'DONOGH.

garnishee does not owe the defendant money; but is only in possession of his funds. This, of course, proves him not to be a debtor; if so, how then can he bring to his aid this passage of our law? If he be no debtor, the article is not in the least applicable; for it is speaking exclusively, of payments made by debtors. Besides, when the *Code* says, that such a payment, made to the "prejudice of a seizure or an attachment, is not valid," &c.; it must surely allude to attachments instituted in this state. It can have no reference to those which are brought in other states, or in other countries, for our laws are not made for cases like those; their operation and effect are confined to the state by which they were enacted.

But the constitution of the united states is brought into action, and for what purpose? To shew that the court must give full faith and credit to the judicial proceedings of Pennsylvania. And what will be the extent of that faith and credit? Why, simply, that an attachment has been instituted against M'Donogh, at the suit of a creditor, in which Rogers' property has been seized. This is not denied. Nothing further can be inferred

by the court. The existence of the attachment is only proven at the time when the answers were made; and nothing is exhibited to shew that it is still pending, or what has been the result of the suit. But I am willing to give the fullest effect in this case to the article of the constitution. Rogers calls that attachment in Pennsylvania illegal. It is a judicial proceeding. Give it full faith and credit, and the consequence will be, that this court must decide that it is illegal; and of course, of no effect in this cause. If, as the counsel contends, the attachment in Pennsylvania is entitled to the same credit as if it had been commenced in our district court, then this court will pronounce it illegal. The garnishee says it is so in that state, it must be also illegal in this; consequently, it cannot affect the rights which the present plaintiff has acquired.

The money of the defendant must be in the possession of the garnishee by contract of deposit or mandate. How this is made out I cannot tell. No evidence is introduced to shew in what capacity, or in what manner he received the funds of the defendant. At all events, let him be considered either as a depo-

East'n District. *Jan.* 1822.

CARROL *vs.* M'DONOGH.

sitory or as an attorney. What losses has he sustained? What advances has he made? And what costs incurred for the owner of the property? Nothing of this is exhibited to the court by the garnishee; till this be done, the articles of the *Code*, relied upon by him, will be of no service to his cause.

But his counsel contends, that the garnishee was entitled to notice of the day of trial, if his claim was not admitted. Our law requires notice to be given to a garnishee in only one case, and that is, where testimony is to be introduced concerning the interrogatories propounded to, and the answers of, the garnishee; and that notice must be reasonable. *Act of* 1811, *March* 20*th*, *sec.* 5. Now, in the court below, it was not the object of the plaintiff to endeavour to disprove the answers of Rogers. He was willing to believe them true; and as they were admitted to be correct, no testimony was introduced; and of course, no notice of the trial was necessary to be given to the garnishee. The moment he has filed his answers in court, his duty is at an end, except in paying the money over, under the order of the judge. If his answers are to be disproved, then he is entitled to notice, and for this

plain reason, that he is not to be condemned unheard. If the plaintiff acquiesced in this, the garnishee has done that which was required of him, and ceases to be any longer a party to the suit. As, therefore, testimony was not introduced to impugn the correctness of Rogers' answers, it became unnecessary to give him a legal notification of the time of trial of the cause. This is the ground of the decision of this court, in the case of *Allyn* vs. *Wright*, 9 *Martin*, 271.

If both parties, says the counsel, have been a little negligent, this court ought to remand the cause. Whatever negligence has existed in this business, it has been on the part of the garnishee; for, most undoubtedly, the plaintiff has been guilty of none. What are the facts of the case? On the 4th of November, 1820, the garnishee presented his answers to the court. A commission is granted to the plaintiff, to prove the debt against the defendant, it is to be executed in Philadelphia, it is executed and returned to this city, and in last May the cause is tried, and judgment rendered against the defendant and Rogers. What, in the mean time, is done by the garnishee, in order to protect himself? Does he

East'n District. *Jan.* 1822.

CARROL vs. M'DONOGH.

send to Pennsylvania for an authenticated copy of the record of the suit in which his property was attached? While the commission of the plaintiff was executing in that state, had he not time sufficient to obtain evidence to be exhibited to the court below, in his defence? Nothing, however, was done. He seemed satisfied with his own answers; and, I presume, considered himself safe. Though it is not in evidence before the court, every indulgence was evinced by the plaintiff to the garnishee; and it is with a very bad grace that he can, in this court, allege a negligence on the part of the plaintiff. Nothing, I think, has been urged to induce the court to think that the decision of the district court is erroneous.

PORTER, J. Interrogatories were propounded in this case to the garnishee, for the purpose of ascertaining what credits and effects of the defendant were in his hands. He answered, that he had $334 82 cents, which he had ever been willing to pay over, but which he now intended retaining possession of, to indemnify him from any damages he might sustain from an illegal attachment, which had issued from a court in Pennsylvania, against

his property, in a suit of some person against the said M'Donogh.

There was judgment against the principal debtor, and an order that the garnishee pay over the amount due M'Donogh, in satisfaction. From this decree Rogers has appealed.

The appellee insists, that the decision rendered in the inferior court was correct, on two grounds:—

1. On the general principle, that it is not priority of suit but priority of judgment that gives a preference in the thing attached.

2. That admitting the position to be incorrect, the answer of the garnishee fully authorises the decree which the district court rendered in this case.

I. I have looked into many of the authorities on this subject; there are cases to be found not materially different from the present one, in which the garnishee has been protected, and I think justly. In New-York, 5 *John.* 102, where the debtor plead in abatement, that an attachment had been previously levied in Maryland, at the suit of a creditor of the plaintiff, and that he had been summoned as garnishee in it. The court sustained the exception, and ordered the action to

East'n District. *Jan.* 1822.

CARROL *vs.* M'DONOGH.

abate. In a case similarly circumstanced in Massachusetts, 8 *Mass. Rep.* 158, it was decided, that the second suit should stand continued until the result of the first was ascertained.

If the decisions of these courts were of authority here, they would free us from all difficulty in this case; but they are not; and in the absence of any positive rule, the cause must be decided according to equity and justice. *Civil Code. p.* 6, *art.* 21. Taking this principle as a guide, and looking at the facts, we find a person who has committed no fault that I can discover, sued by different creditors, of an individual to whom he is indebted, and placed in a situation in which he runs the risk of being compelled to pay twice. His claim, therefore, to protection is strong, and nothing but positive law can destroy it. If the appellant shewed that he had already paid this money, he could not be compelled to pay it again. If he presented a copy of a judgment in a court of another state, directing him to pay it, I presume there cannot be a doubt but it would be a bar here. If his present situation is one in which both these circumstances may be the result of the pre-

vious proceedings against him, his right to relief is as imperious and as equitable.

There is a well known maxim that may aid us in this investigation, *qui prior est tempore potior est jure*, and this does not, in cases of attachment, apply to the first judgment, for the lien commences with the seizure. The court in Pennsylvania will, no doubt, act on this principle, and I think we should; for we would not permit the act of a garnishee going abroad, and subjecting himself to a recovery in another state, to defeat a privilege which a creditor had acquired by attachment under our law.

II. The answer of the garnishee does not, in my opinion, authorise the order given by the district court. His swearing that it was an illegal attachment that had been taken out in the first suit, ought not to prevent him from holding the effects in his hands to await its final result. For this declaration is nothing more than a matter of opinion; and to make it conclusive, we should be satisfied that the garnishee is a competent judge of a legal question; and that the court before which the attachment was taken out, will not mistake the law. But we doubt the knowlege of the

East'n District. *Jan.* 1822.

CARROL *vs.* M'DONOGH.

appellant, and we cannot be certain that the tribunal before which it is pending, will decide the case correctly.

From the most attentive consideration I have been able to give this case, I think, that both on principles of law and justice, the district court erred in decreeing the garnishee to pay over the money. Time should have been given to await and ascertain the decision of the suit pending in Pennsylvania, before judgment was entered up here.

I conclude, therefore, that the judgment of the district court should be annulled, avoided and reversed, so far as it directs the payment of the money in the garnishee's hands; and that the cause be remanded, with directions to the judge to stay all further proceedings against the garnishee, until the decision of the attachment, pending in Pennsylvania, be ascertained, and that the appellee pay the costs of this appeal.

MARTIN, J. I concur in the opinion just pronounced.

MATHEWS, J. I do also.

It is therefore ordered, adjudged and decreed, that the judgment of the district court

be annulled, avoided and reversed, so far as it directs the payment of the money in the garnishee's hands; and that the cause be remanded, with directions to the judge to stay all further proceedings against the garnishee, until the decision of the attachment, pending in Pennsylvania, be ascertained, and that the appellee pay the costs of this appeal.

BERNARD & AL vs. *VIGNAUD*, *ante* 482.

Rehearing denied.

Seghers, on an application for a rehearing. This court has determined that the testimony of Fouque ought not to be rejected, on account of his affinity. To this decision the plaintiffs respectfully submit. But there are two other grounds of exclusion, on which they beg leave to call the attention of the court. The first, that Fouque is the vendor of the slaves on which they have a lien, and that therefore is excluded from being a witness in the cause. *Partida* 3, *tit.* 16, *l.* 19. This law stands unrepealed, and the point was never controverted by the adverse counsel. The second ground, is the liability of the witness to the costs of the suit. *Phillips' Evid.* 16.

It is true that the court have given it as

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

their opinion, that the interest of the witness was too remote to affect his admissibility. But it is humbly conceived, that this remoteness relates only to the community between the defendant and his wife, daughter of the witness, and to the eventual right of the latter, to inherit under that community, one half of the property in contest.

Certainly the court did not intend to include in this remoteness, the interest of the witness as the vendor, nor his liability to the costs. To his interest as vendor it has been objected, that he would be equally liable to the defendant as to the plaintiffs. I leave it to the court to determine, whether such a distinction can dispense from the strict application of a positive law, whose context admits of none.

I believe I have established the liability of the witness to the costs in my arguments. This liability has never been seriously controverted: the main objection raised against it by the defendant's counsel was, that it ought to have been pleaded at the trial in the court below, when it would have been in the defendant's power to execute a release, and thereby to remove the liability. And here I beg leave

to turn the attention of the court to the bill of exceptions itself; it will easily be found in the record as there is but one. The contents of this bill will convince the court that the only objection raised against the admissibility of the witness, was on account of his being interested in the event of the suit, and that no release was tendered.

The controversy on account of the affinity, grew out of the cause itself, not out of the bill, which therefore stands still undecided upon by this court. The liability of a witness to the costs of the action, or to any part thereof, is a ground of exclusion too well known in the rules of evidence, to require any further elucidation.

I expect that the court, on re-examination of the cause, on the point of this liability, will find that the judge *a quo* acted correctly in rejecting the witness. I therefore confidently hope, that the plaintiffs will not be denied a re-examination of the cause on this point.—Were it otherwise, I would then beg leave to observe, that the court cannot stop there; for if they will take the trouble of reading the final judgment of the court below, they will find that it has been rendered in favour of the

East'n District. *Jan.* 1822.

BERNARD &AL *vs.* VIGNAUD.

defendant. Now, if I am right in my view of the case, a judgment in his favour can certainly not be reversed on a bill of exceptions taken by him, and for his sole benefit; nor would the court take upon themselves to affirm that judgment, to the prejudice of the plaintiffs and appellants, without inquiring into the merits of the cause.

PORTER, J. The plaintiffs, by a petition for a rehearing, have again called the attention of the court to this case.

They complain that the cause has been sent back for a new trial, on an exception taken by the party who succeeded in the inferior court, without any opinion being expressed on its merits. But I think we did express an opinion on the merits, and that in the strongest possible way; for if we had thought with the district court, that the facts, as they appear on the record, authorised judgment for the defendant, we would not have done so vain and useless a thing, as to have remanded the cause for a new trial, to get up testimony which the party did not want.

They also complain that the court took no notice of their objection; that the witness was a vendor of the slaves, and responsible for

the costs. I have looked again into the record, with the intention of delivering an opinion on the point, but I find the objection was taken before the inferior court, in such a manner that we are not authorised to consider the incompetency of the witness on these grounds.

The bill of exceptions merely states, that Fouque, father-in-law of the defendant, was offered as a witness, and that the defendant objected to him on the ground of interest.

The rule on this subject is very clear, and I had supposed, was perfectly understood in practice. It is the duty of a party objecting to the introduction of a witness, not merely to state that he cannot be permitted to testify, but to declare why he is incompetent. This is required, that his adversary may have an opportunity of removing the objection. There are many cases which shew how strictly this rule is enforced. 3 *John.* 558. 4 *ib.* 467. 8 *ib.* 507. 3 *Dallas*, 422. In the language used in one of these cases, the party excepting, must lay his finger on the points which might arise either in admitting or rejecting testimony.

To object to a witness, because he is inter-

East'n District. *Jan.* 1822.

BERNARD & AL *vs.* VIGNAUD.

ested, is doing little more than to say that he is not a good witness. The nature of the interest should be stated, in order that the adversary may not be entrapped by an objection so general, or left in ignorance of the real ground on which his incompetency is alleged, until it is too late, by a release, or otherwise, to restore it.

This case will illustrate the correctness of that rule, and the propriety of enforcing it; for the expressions used in the bill of exceptions, satisfy me that the objection was taken to the interest, as father-in-law. But if I am mistaken in this, I am clear he ought to have stated the particular grounds of interest.

I think, therefore, the rehearing should be refused.

MARTIN, J. My opinion is still the same.

MATHEWS, J. I concur in the opinion of judge Porter.

REHEARING DENIED.

JOHNSON & AL. vs. *BRANDT & AL.*

A licensed attorney cannot be called on for his powers as a matter of course

If a partner sets up an adverse right, the co-partner may have a writ of sequestration.

APPEAL from the court of the first district.

PORTER, J. The first question to be decided in this cause is, whether an attorney and

counsellor, duly licensed to practise in the courts of this state, can be compelled to exhibit his authority for instituting an action at law.

This point has been already decided, 9 *Martin*, 88, *Hayes* vs. *Cuney*, and I think correctly. It was there held, that the court could not presume, that any gentleman of the profession, would commence a suit unless duly empowered to do so; and that they would not require him to produce the power under which he acted, unless on a suggestion, supported by affidavit, that such power was wanting. That course was not pursued here, and I therefore think that the district court erred in requiring the attorney to shew under what authority he acted.

The next question is, whether a proper case was shewn to justify an order of sequestration?

This suit is instituted by certain persons, partners under the late firm of John Brandt & Co. against their former co-partners, charging them with the fraudulent management of the estate; accusing them of an intention to embezzle the common effects, alleging that since the dissolution of the firm they had

East'n District. *Jan.* 1822.

JOHNSON & AL. *vs.* BRANDT & AL.

taken the whole of the property into their hands, and had neglected to apply it to the payment of the debts.

Under this statement, which for the decision of this cause, must be taken as true, I think a proper case was made for the judicial deposit. Partners are joint owners of the property belonging to the partnership, and have each an equal right to take it into possession; if that is refused, and an adverse right set up to it, the very case is presented, when, according to law, a sequestration should be ordered. *Civil Code*, 418, *art.* 42.

If the partnership is considered dissolved, and the defendants, as agents for the late firm, the case is still stronger; for they have no authority to keep the common effects in their hands, without the consent of those to whom these effects belong.

I think, therefore, that the order made by the district judge, quashing the sequestration, should be reversed, and that this cause be remanded, with directions to proceed in it according to law, and that the defendants and appellees pay the cost of this appeal.

MARTIN, J. I concur in the opinion just pronounced.

MATHEWS, J. I do also.

It is therefore ordered, adjudged and decreed, that the order of the district court be set aside, and the case remanded, with directions to the judge to proceed according to law; the cost of the appeal to be borne by the appellees.

Grayson for the plaintiffs, *Livermore* for defendants.

WARD vs. *BRANDT & AL.*

When the respite is granted, the stay of proceedings, which preceded, cannot operate as a bar to an action for the breach of the conditions on which the respite was granted.

APPEAL from the court of the first district.

PORTER, J. This appeal is taken from an order of the inferior court, discharging one of the defendants out of custody of the sheriff. A forced surrender has been since decreed against the firm of Brandt & Co., and the principal object in deciding this cause is, to ascertain on whom the costs must fall.

The judge directed the discharge, on the ground that the order for a stay of proceedings, granted at the time the defendants applied for a respite, was yet in force, and that no suit could be commenced against them until it was set aside.

East'n District. *Jan.* 1822.

WARD *vs.* BRANDT & AL.

The record in the suit of *Brandt & Co.* vs. *their creditors*, which comes up with and makes a part of the proceedings in this case, shews, that on the 28th day of December, 1819, a respite of one, two, and three years was granted to the appellees, and that on the 3d day of January, 1821, the present action was instituted.

The stay of proceedings granted on this application for a respite, was to enable the party applying, to ascertain whether his creditors would accord it, and to prevent any preference being obtained by judgment, or otherwise, during the deliberations. But as soon as the respite was granted, the order had its legal effect, and it cannot be used as a defence in this suit, or operate as a bar to an action, for a breach of the condition on which the creditors extended this indulgence.

I do not enter into the question, whether on the debtor's failure to meet the first instalment the whole of the debt can be demanded of him, because that would be trying the merits on an interlocutory motion, which, in my opinion, cannot be done.

I am therefore of opinion, that the order

granted by the district court, should be set aside and reversed, and that this cause be remanded, with directions to the judge *a quo* to proceed in the same according to law, and that the defendants and appellee pay the costs of this appeal.

MARTIN, J. I concur in the opinion just pronounced.

MATHEWS, J. I do also.

It is therefore ordered, adjudged and decreed, that the order of the district court be set aside, and the case remanded, with directions to the judge to proceed according to law, the costs of the appeal to be borne by the appellee.

Grayson for the plaintiff, *Livermore* for the defendants.

HEPBURN vs. *TOLEDANO.*

APPEAL from the court of the parish and city of New-Orleans.

When the maker of, dated at N.-Orleans, resides in another state, it is sufficient to demand payment at the place where it purports to be executed.

PORTER, J. This is an action against the indorser of a promissory note, and the defence set up, is want of demand on the maker. The

East'n District. *Jan.* 1822.

HEPBURN *vs.* TOLEDANO.

statement of facts shews, that the note was dated in New-Orleans, but not made payable there, and that the drawer resided in Kentucky at the time of the protest, and does so now.

The only question which this case presents, is whether the holder of the note was obliged to go out of the state to demand payment.

There is some difficulty as to the place where demand is to be made, when the maker of a note or acceptor of a bill has been a resident of the state, and before the time of payment, has changed his domicil; but if he lives in another country, the indorsees cannot be presumed to know his residence, and all that the law requires of the holder is due diligence at that place where the note is drawn. Thus, in the case cited by the appellant, 14 *John.* 116, it is stated by the court to have been previously decided, that where a note was dated at Albany, and the drawer of it afterwards removed to Canada, that the demand where it was drawn was sufficient to charge the indorser. *Chitty on Bills*, 335, (edit. 1821.)

I am of opinion, that the demand was properly made in this case, and that the judgment

of the parish court should be affirmed with costs.

MARTIN, J. I concur in the opinion of judge Porter.

MATHEWS, J. I do likewise.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Grymes and *Canonge* for the plaintiff. *Hennen* for the defendant.

MITCHEL vs. *JEWEL.*

APPEAL from the court of the fourth district.

The judge *a quo* cannot, after the record comes up, certify facts, which make part of the statement.

It is not his province to certify what transpires during the trial.

Any admission which it is important to preserve must be put on the record.

This case was determined in February term, 1821, but a rehearing was afterwards obtained. The first opinion was delivered by judge Porter, as follows:—

This suit was brought on the allegation of redhibitory defects in property, constituted in dower by the defendant, on his daughter, wife of the plaintiff. The cause was submitted to a jury, who found for the defendant. There was judgment accordingly, and the plaintiff appealed.

East'n District. *Jan.* 1822.

MITCHEL *vs* JEWEL.

When the cause came first before the court, it appeared, by the record, that one Jean Filiol had been sworn as a witness. His testimony not appearing in the statement of evidence sent up, the plaintiff and appellant, by his counsel, suggested diminution in the record, and prayed a *certiorari*, directed to the judge of the court before whom the cause was tried, to send up the said testimony, or if the same was not reduced to writing, to certify the reason why it was not.

This *certiorari* issued as prayed for, and the judge has made his return, stating, that the testimony of said witness was quite immaterial as to the points in issue, and that the parties had waved the necessity of reducing it to writing.

On this return, a question of some importance has been agitated, and it is now insisted, that said return does not supply the defects of the record, because it makes a part of the statement of facts, and that the judge must make out that statement before judgment signed.

The decision of this question must turn on our statutes, which regulate the practice in bringing before this court, the facts on which the cause has been decided below.

If this was a case, coming within the provisions of the act of 1817, which authorises the judge to certify the record whenever the facts appear by the written documents filed, we should hold, as we have already done, in the case of *Franklin* vs. *Kimball's executors*, 5 *Martin*, 666, that as that act fixes no particular time within which the judge may certify, he may do so at any time in his discretion, as long as his memory serves him.

But this is not a case of that kind; it is one where the facts do not consist of written documents, but, in a great measure, of oral testimony. And where the judge is called on to complete the record, by supplying a defect in the statement of facts, and which statement he is authorised alone to make, under the act establishing the practice of this court, passed the 10th of February, 1813, *Martin's Digest*, *vol.* 1, *p.* 442. It has been already decided in the case of the *syndics of Hellis* vs. *Asselvo*, 3 *Martin*, 204, that this statement must be made out before judgment; and that decision was predicated, as well on the particular wording of the statute, as upon the evident intention of the legislator, and the evils which must ensue from any other construction.

East'n District. *Jan.* 1822.

MITCHEL *vs.* JEWEL.

It was endeavoured in argument, to distinguish this case from that where the judge makes out a statement of facts after judgment, by shewing, that here he did not certify up what evidence was given, he only returned up the reasons why that evidence was not taken down and sent up; and that reason he states to be, that the parties agreed, that the testimony of the witness should be disregarded, and not reduced to writing. This is denied by one of them, who further insists, that as the judge is inhibited from making out a statement unless he does it before judgment signed, that he cannot be permitted now to certify facts, which must, if received, make part of that statement.

This objection, we think, well taken, and the distinction which the plaintiff endeavours to make, between this and ordinary cases, unsound. The law requires the evidence given on the trial to be taken down in writing, and certified up whenever the parties resort to that mode of bringing facts before this court. If part of this comes here, the want of the rest can be dispensed with only by consent. That consent, which stands in place of the evidence, should be made out

before judgment. And there is just as much danger, perhaps more, to permit a judge to make out from memory months after the trial, statements in respect to the admissions of the parties, that they did not want the evidence; as there would be, to permit him to make out the evidence itself.

It is clear, therefore, that the provisions of the statute, in respect to bringing up the facts in the cause, has not been pursued; and on general principles, we do not think, a judge has any authority to certify what transpired in his court during the trial. It is not one of his duties. The admission of the parties should have been part of record, and then the clerk could have furnished a copy of it in the usual way.

It was urged, that if the objection here taken, should be sustained, either party in a cause could, by coming in and suggesting diminution of the record on affidavit, always obtain a dismissal of the appeal, if any agreement took place during the process of the trial, which was not reduced to writing. Here, however, it appeared by the record, that the witness was sworn; and if it was necessary to decide on what is not now before us, a clear

East'n District. *Jan.* 1822.

MITCHEL vs. JEWEL.

distinction could be shewn between this case and that supposed in argument.

Nor will the principle now established, prevent this court from hereafter having a record amended when it becomes necessary to do so. When the record is defective, from not sending up what legally makes a part of it below, the defect may be cured. But when the application is to have the record completed, by adding to it things which do not make a part of it in the court which tried the cause, then the question recurs, can this addition be legally made, at the period of the application? In the case of *Hooper* vs. *Martineau*, 5 *Martin*, 669, the court, when a *certiorari* was applied for, to send up testimony taken in the court below (although the point was not made before them) cautiously limited the order to evidence taken and reduced to writing during the trial of the cause. On the whole, we have no doubt but the law demands, and that the safety of the suitors in our court requires, that, whenever the facts consist of oral testimony, we should rigidly enforce the principles already laid down in the case of *syndics of Hellis* vs. *Asselvo*.— We regret the necessity which compels us to

turn off the appellant on a point not perhaps connected with the merits of the cause. But it would be a subject of much more regret, if from any feeling, we deprived either party of rights, whether technical or otherwise, which the law assures them.

It is therefore ordered, adjudged and decreed, that this appeal be dismissed, and that the costs thereof be paid by the appellant.

The case was heard anew at this term, and judgment given as follows:—

Although in doubtful cases the supreme court yield up their conclusion to those of the jury, in a matter of fact, they cannot do so when the evidence produces an entirely different conviction.

PORTER, J. On the 14th day of December, 1819, a contract of marriage was entered into between the plaintiff in this cause, and the daughter of the defendant; by this contract, three slaves, estimated at the sum of $2650, were given by the father in dowry, and transferred to Mitchel at that price.

On the 20th of January, 1820, the marriage took place, and on the 13th of April following, this suit was commenced, alleging that the said slaves were affected with redhibitory vices; that it was known to the defendant they were so at the time he alienated them: and that they were given with a view of cheating and defrauding the plaintiff. The peti-

East'n District. *Jan.* 1822.

MITCHEL *vs.* JEWEL.

tion concludes with a prayer, that the transfer of the three slaves be annulled and set aside, and that the defendant pay the sum of $3500.

The answer denies these allegations, and the plaintiff's right to sue. The cause was submitted to a jury. There was judgment for the defendant and the plaintiff appealed.

This cause has been already heard here, and it appearing to the court on the view which they then took of the subject, that the record was defective, the appeal was dismissed. A rehearing has been granted and the whole case is again submitted to us.

As to the correctness of the principles contained in the opinion then delivered, I do not entertain a doubt. I still think, that if a witness has been sworn and examined on the trial, his testimony ought to be sent up. That if the parties by consent have waved this, that consent should appear on the record, or make a part of the statement of facts made out according to law; and that the judge cannot, after judgment is signed below, either make out this evidence, or furnish the reasons why it was not taken down. As it is unnecessary to go again into the subject, I refer to the opinion already delivered, as conveying

fully my ideas on the point there examined and decided on.

But, on further consideration, a doubt was excited in the mind of the court, if this case came within the rule there laid down. And the difficulty felt, and the reason for granting a rehearing was, whether enough did not appear on the record to shew that the parties consented to wave the testimony.

The trial was had on the 26th of May; on that day the judge made out, and on the next, filed a statement of the evidence, with the following certificate: "I certify the foregoing facts as all the evidence taken in court, on the trial of this cause." 27th, the following consent was put on record: "The parties in this cause agree that the judge certify the record as containing the facts in the case."— When the cause was formerly decided, I thought that these expressions amounted to nothing more than an agreement, that the judge should certify the proceedings instead of the clerk, as the latter is one of the parties to this suit. But more mature reflection has convinced me that sufficient weight was not given to this consent, and that as the oral testimony taken down by the judge, and de-

East'n District. *Jan.* 1822

MITCHEL *vs.* JEWEL.

clared by him to contain it all, made a part of the record at the time the parties came to this agreement; the admission that he should certify the record, as containing the facts, must be considered to relate to that statement, and is a confession that it was a correct one.

This objection removed, we now come to the merits of the case; they depend on the extent and weight of the evidence taken on the trial, to establish the existence of redhibitory defects in the slaves already mentioned.

The substance of the testimony, is as follows:—

In relation to the negro Tom. Rickenberger swears, that the defendant bought him in Charleston, that the witness refused to buy him, that the vendor sold him for every thing that was bad, and addicted to every vice; and that he was purchased out of a place called the sugar house, where run-away and bad negroes are confined. He further testifies, that Jewel knew the slave was addicted to robbery.

Gould, another witness, proves, that he heard Jewel say that this slave was addicted to robbery. The defendant, to meet this, relies,

first,—on the testimony of the last witness, who was his clerk, familiar with his affairs, and intimate in his family; and who swears, that the reason he had for believing Tom a robber, was because the family stated he had stolen fowls, and had been concerned in the theft of a sheep belonging to his master, Jewel; and that he knows of no other instance of the slave having committed robbery.

Secondly,—On the evidence of Tournois, one of the appraisers, that for several causes, such as stealing, he has put negroes in irons, and that he would give $2000 for slaves he has seen ironed.

Now, great as my disposition is to respect the verdict of a jury, in matters of fact, and in case of doubt, to yield up my conclusions to theirs; yet, so long as the law gives a legal right to parties in a suit, to demand the opinion of this court, on cases tried in this way, they must obtain it. And if the evidence produces an entirely different conviction on our minds, from that which it has done on those of the jury, we must of necessity so pronounce it.

The evidence just detailed is of that kind. It makes out, I think, clearly, and beyond dis-

East'n District. *Jan.* 1822.

MITCHEL *vs.* JEWEL.

pute, the vice complained of. The declaration of Rickenberger, that the person from whom the defendant purchased this slave, sold him as one of the worst character; and the testimony of Gould, another witness, that Jewel acknowleged the negro was addicted to robbery, is as strong proof as any case of this description could well furnish; taken with the other facts detailed, it is insurmountable; and is in no respect, weakened by the declaration of the witness, detailing the particular facts, related by the family, as a ground for his own belief. If there had not been more within the knowlege of the first vendor, and the present defendant, they would not have made the declarations which it has been proved, proceeded from them.

As to the negro Jack, the following evidence was given—Gould, the witness already mentioned, knows that the slave was in irons for having runaway; when the appraisers under the marriage contract, came to estimate him, they were taken off; when they went away he was again ironed. It is within the witness's knowlege that the defendant knew the slave had run-away.

O'Neil, the overseer of Jewel, proved that

the negro was put in irons one month after he arrived from Charleston; he was treated so for having absented himself from work for a few days. From that time, until the estimation already spoken of, these irons were not taken off.

Several witnesses established, that the three negroes mentioned in the marriage contract, have run-away frequently since they came into the possession of the plaintiff.

This evidence is rebutted by the following proof:—

Gould declares, he never knew this slave to run-away more than once. O'Neil says, that he was put in irons for absenting himself, but does not think he was off the plantation. It was principally on account of his sore eyes, and that he was too much pushed, that he ran-away. That he considered the negro too sick to work. When he found him he had his basket and about 20lbs. of cotton. Does not consider him addicted to run-away, but an idle fellow. He never run-away but once. The chain put on him was an iron plow-trace, and he could go, and did go, on any part of the plantation.

The credit of this last witness has been

East'n District. *Jan.* 1822.

MITCHEL *vs.* JEWEL.

assailed, but, in my opinion, unsuccessfully. He was proved on the trial to be an honest, correct man; and the jury has sanctioned that opinion by their verdict.

I cannot, from this testimony, gather, that this slave ever ran-away but once antecedently to the time he came into Mitchel's possession. Indeed, it is not distinctly proved that he was off the plantation; and the overseer assigns as a cause for absence, sore eyes, and being too hard pushed. This, I think, is not sufficient to establish a habit of running away; it is proving but one act of absence, and accounting for it. In the case of *André* vs. *Foy*, to which our attention has been directed, the negro Boucaud, had been committed to jail once as a run-away, and ran-away twice within a few days after the purchase. The court there held, that these facts, when connected with each other, raised a presumption that the habit existed anterior to the sale. Here, however, there is not any fact of sufficient importance to couple with the subsequent elopement after the slave came into the plaintaiff's hands. Another feature of that case was, that a jury had fortified the presumption otherwise flowing from the evidence, by

their verdict. Here they have negatived it, and I do not feel myself authorised to disturb their finding.

In relation to those facts, which, though not proof in themselves of the vice, it is insisted, go far in support of the other evidence. I would remark, that very little can be inferred from the slave being in irons. They are often placed on as a punishment; and in this case, they were not of that description which would have prevented him from absconding, if he had wished to leave his work a second time.

The circumstance of all the slaves leaving Mitchel after he had got them, though only one is charged with having the habit of a run-away before, does not give much additional weight, in my mind, to the claim of the plaintiff. This habit must be proved to exist at the time of the sale. Subsequent acts, to be sure, furnish some clue to ascertain previous habits, but they are not very strong proof, and for an obvious reason, such testimony should be received with great caution. For without being understood to make the remark, in relation to the present defendant, it is clear, that if much importance is attach-

East'n District. *Jan.* 1822.

MITCHEL *vs.* JEWEL.

ed, in general, to such proof, any purchaser dissatisfied with his acquisition, may, by his treatment to the slaves bought, force them to run off, and thus, by his own act, make evidence for himself.

It is possible I may be mistaken in this view of the subject, and that the evidence is entitled to more weight in establishing a redhibitory vice in this slave, than after a most attentive consideration, I have been able to give it. But of one thing I am very certain, it does not so preponderate in favour of the appellant, as, in my opinion, to justify this court in reversing the decision which a jury has pronounced on it.

In regard to the wench Jenny, I deem it sufficient to remark, that I cannot discover, from any thing appearing on the record, that she was affected with a redhibitory vice or defect at the time of the transfer.

Evidence was taken to shew that these were the worst slaves the father-in-law owned; that he stated nothing to the estimators respecting their character; that if the fact of Jack being in irons, had been communicated, he would not have been esteemed at so high a price.

On the other hand, proof was adduced that Mitchel knew the character of the slaves perfectly well. that he had seen Jack in irons, that he was present at the estimation, that he made no objection to it, and remained silent as to their defects.

All this has little to do with the case, which is confined to the enquiry, whether or not there existed redhibitory vices in this property at the time of the transfer? I think these defects have been proved to exist in the negro Tom, and not in the others; and I have gone more into detail in the case, than is usual, because I do not know that this opinion will be that of the court.

On the whole, the judgment of the district court should be annulled, avoided and reversed, and this court proceeding to give such decree as the district court should have rendered, ought, in my opinion, to order, adjudge and decree, that the transfer of the negro Tom, to the plaintiff, made by the act of marriage contract between the appellant and his wife, on the 14th of December, 1819, be annulled; that the plaintiff do recover of the defendant, eight hundred and fifty dollars, with costs of suit in this court and the court.

East'n District. *Jan.* 1822.

MITCHEL *vs.* JEWEL.

below; to be paid by defendant on the delivery or tender of said slave, free from any incumbrance, mortgage, or privilege (other than the marriage contract) created on said slave by said Mitchel. And if on the tender or delivery of said slave, accompanied by a certificate from the register of mortgages of this city, and the parish judge of the parish where the plaintiff resides, that the said slave is free from incumbrance, mortgage or privilege, other than the marriage contract, the said Jewel shall fail to pay over to the said Mitchel the sum of money aforesaid, that then execution do issue from the court *a quo* against the said defendant, for the sum of eight hundred and fifty dollars, the costs incurred by this appeal and those in the district court.

MARTIN, J. I find no difficulty in concurring with any part of the opinion just pronounced, except that which refers to the negro Jack. The case of *Macarty* vs. *Bagneres*, appeared to be so similar, that I at first thought the same decision ought to take place here; but on close examination, I perceive a considerable difference.

The slave sold to Macarty was shewn to

have run-away once before the sale, and did run-away immediately after. But in the present case Jack did not run-away with the intention of escaping from his master; but lurked about for some days on the skirts of the plantation, to avoid working. His being put in irons, is presented to us, on the one side, as a measure deemed essential to prevent an escape; on the other, as a common domestic punishment. Bagneres kept his negro five months in jail, till the very moment of delivery, after the sale. So long a detention, and the consequent loss of his services, in the meanwhile, manifested the master's consciousness that the slave would escape as soon as the opportunity offered.

Notwithstanding all this, the circumstance of the irons being only knocked off when the appraisers arrived, and instantly replaced on their return, manifests perhaps an intention of placing him before them in a more favourable view than candour allowed; but the case comes up fortified, by the finding of the jury in favour of the defendant. This turns the scales against the plaintiff. I conclude that he ought to be relieved in respect of the negro Tom. only.

East'n District. *Jan.* 1822.

MITCHEL *vs.* JEWEL.

MATHEWS, J. I have attentively examined the opinion of the junior judge of the court; and am sorry to be compelled, by my view of the case, to dissent from the conclusion therein expressed, as to the effect of the consent of the parties, in relation to the manner in which the judge of the court *a quo* should certify the record as containing all the facts in the cause. I am still of opinion, that by this consent, nothing more was intended than to substitute the certificate of the judge for that of the clerk, who was a party to the suit, and from that circumstance, ought not, in pursuance of common prudence, as exercised in the affairs of men, to have been allowed to make out and certify the record, without special attention either by the opposite party or by the judge. In ordinary cases, it is the duty of the clerk of the court to certify all matters which may be recorded in the trial of any cause.

According to the act of 1817, the testimony of witnesses must be reduced to writing by the clerk, becomes a part of the record, and is to be sent up to the supreme court, to serve as a statement of facts, whenever required by either of the parties litigant. This law is in-

tended to give to suitors a choice as to the manner in which the facts of a cause shall be brought before the appellate court, either in pursuance of the mode therein prescribed, or in conformity with the provisions of the act of 1813. I am ready to admit that the parties to a suit, may, by consent, wave the necessity of transmitting the whole testimony as taken down in a cause, and substitute in its place, a statement of facts as required by the former law; but their intention ought to be most clear and manifest by the expressions of such consent, before depriving them of the benefits arising from an examination of the whole testimony in both courts. In the present case, the consent of parties, that the judge should certify the record, as containing all facts in the case, does not, in my opinion, amount to an agreement to take the judge's statement as a substitute for the evidence, which it seems was required to be taken down in writing. It has been decided by this court, that in all cases, wherein the testimony is reduced to writing, and sent up on the record, we would presume that it had all been taken down and regularly sent up, until the contrary should be shewn: but it is here shewn, that a witness was sworn and

East'n District. *Jan.* 1822.

MITCHEL *vs.* JEWEL.

examined, and his testimony does not appear, nor does any consent appear on the record, by which the parties have waved the necessity of reducing it to writing, and handing it to this court. This view of the subject leaves the reasoning of the court in our former judgment, in its full strength and vigour, which was then, and still is, satisfactory to my mind.—I therefore conclude, that the first judgment ought not to be disturbed, unless the justice of the case require that the case should be remanded.

It has been the uniform practice of this court, in all cases, when the facts were not brought fully before it (as required by law) either to dismiss the appeal, or to remand the cause for a new trial. The latter course of proceeding has always been pursued, when it was believed that the justice of the case, as exhibited by the record, would authorise it; but I do not think that the present belongs to that class of cases.

Mitchel in *propriâ personâ*, *Livingston* and *Carleton* for the defendant.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, FEBRUARY TERM, 1822.

East'n District.
Feb. 1822.

WIKOFF & AL vs. *DUNCAN'S HEIRS.*

WIKOFF & AL. *vs.* DUNCAN'S HEIRS

APPEAL from the court of the third district.

A forced surrender cannot be obtained on the oath of the applicant alone.

An order for a stay of proceedings, and a call of creditors, make them all parties, and any of them may come in and shew that he is injured thereby.

PORTER, J. It appears by the record, that this action was commenced to obtain a forced surrender of the property belonging to the ancestor of the defendants; and that the judge directed a meeting of the creditors on no other evidence but the oath of the plaintiffs.

We had occasion to examine this question in the suit of *Ward* vs. *Brandt & al.* 9 *Martin*, 625, and after an elaborate argument, and mature reflection, a majority of this court thought that the oath alone of the party ap-

East'n District. *Feb.* 1822.

WIKOFF & AL. *vs.* DUNCAN'S HEIRS.

plying for this remedy, was not sufficient to authorise the judge to grant it.

I am still of the same opinion for the reasons there adduced, and consequently must decide, that the order granting a stay of proceedings, and calling a meeting of creditors, improvidently issued in this case.

It is however urged, that the creditor who made opposition in this cause, had no right to do so. And that the decree of the court below, can only be examined on a defence made and an appeal taken by the debtor.

But I think that an order of this description, which suspends all proceedings, and directs a meeting of the creditors, makes every person to whom the alleged insolvent is indebted, defendants, and authorises them to come in and shew that they are improperly deprived of their right to prosecute their actions at law.

It is unnecessary to examine the other questions raised in this cause, and our judgment should be that that of the district court be affirmed with costs.

MARTIN, J. I have no new reason to yield to the opinion of my colleagues (that a forced

surrender cannot be ordered on the affidavit of the applicants) than its having become the judgment of the court; I nevertheless cheerfully yield.

I concur also in the other part of judge Porter's opinion, as concerns property surrendered; the surrenderees having an interest in it, must be heard before any judgment affecting it may be rendered.

MATHEWS, J. I concur in judge Porter's opinion.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Duncan for the plaintiffs, *Turner* for the defendants.

MOULON vs. *BRANDT & AL. SYNDICS.*

APPEAL from the court of the first district.

The clerk's certificate that he has given a true transcript of the record, does not enable the supreme court to examine the facts of the case.

PORTER, J. It has been repeatedly decided, that this court could not examine the proceedings of inferior tribunals, unless those proceedings were brought before us in the

East'n District. *Feb.* 1822.

MOULON vs. BRANDT & AL. SYNDICS.

manner prescribed by law, 3 *Martin*, 201, 221, 505. 5 *Id.* 91. 9 *Id.* 703.

The act of 1813, to organise the supreme and inferior courts of this state, 1 *Martin's Dig.* 442, declares: "that there shall be no reversal for any error in fact, unless it be on a special verdict, rendered in the district court, or on a statement of the facts agreed on by the parties, or their counsel, or fixed by the said court if they disagree, which statement may be made at any time before judgment."

The statute of 1817, on the practice of our courts, provided two other modes for bringing up causes; the certificate of the judge, when the matters consisted of written documents; and the recording of the verbal evidence by the clerk.

This case does not come before us in the manner directed by either of these laws. There is nothing but a certificate of the clerk, that he has furnished a true transcript of the record in the case of *Moulon* vs. *John Brandt & Co.*, and this may be very true, and yet the record not contain all the matters on which the cause was tried in the first instance.

This appeal should be therefore dismissed with costs.

MARTIN, J. I am of the same opinion.

MATHEWS, J. I think so likewise.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed.

Curillier for the plaintiff, *Livermore* for the defendants.

DUNN & WIFE vs. *DUNCAN'S HEIRS.*

Very strong proof should be offered to authorise the supreme court to disturb a verdict.

APPEAL from the court of the third district.

PORTER, J. The petition alleges, that the plaintiffs sold to one William Duncan, in his life time, 180 merino and common sheep, for the sum of $700, who executed his promissory note for the same, to Margaret Dunn, payable in four months from the 17th of February, 1820, and that the said Duncan has since deceased, leaving the present defendants, his heirs, who have accepted the succession with the benefit of an inventory.

It also contains an averment, that the objects sold, or a large portion of them, are yet in the hands of the defendants, and that the petitioners have a lien on them. Judgment is

East'n District. *Feb.* 1822.

DUNN & WIFE *vs.* DUNCAN'S HEIRS.

asked for the said sum of $700, and that the sheep in possession of the heirs, be seized and sold to satisfy the privilege which, as vendors, the plaintiffs preserved on them.

The answer denied generally the allegations contained in the petition, and prayed time for the heirs to ascertain if the estate of their father was solvent or not.

The cause was submitted to a jury, who found the following verdict :—" We find for the plaintiffs, the amount of the note marked D. but no privilege on the flock of sheep."

Judgment was rendered by the court, in pursuance to the verdict. The plaintiffs appealed, and now insist, that the proof given on the trial clearly establishes the lien on the property sold.

The note referred to by the jury, in their finding, is in the following words : " Four months after date, I promise to pay to Mrs. M. Dunn, or order, seven hundred dollars, for value received.

(*Signed*) WM. DUNCAN."

Feb. 7th, 1820.

As the consideration for which this obligation was executed, is not mentioned in the instrument itself, the plaintiffs have endea-

voured to establish, by verbal evidence, that it was given for the property mentioned in the petition.

On this point it is proved, that the ancestor of the defendants declared, that he had bought a flock of sheep from Dunn, but that he did not tell the witness he gave his note for them; that there was about 150 of them, and that the sheep inventoried, as forming a part of Duncan's estate, were the same that was purchased by William Duncan, from Mr. Dunn; they had always remained in possession of William Duncan, from the time he bought them until they were seized by the sheriff.

Another witness proved, that Mr. Dunn, had in the year 1819, a very large flock of sheep, and that they were healthy and fine looking.

There is nothing in this evidence which proves that the note given to Mrs. Dunn, was in consideration of the sheep sold by her husband; some presumption perhaps is raised that this is the fact, but much stronger proof should be offered to authorise us to disturb the verdict of the jury.

I therefore think that the judgment of

East'n District. *Feb.* 1822.

DUNN & WIFE *vs.* DUNCAN'S HEIRS.

the district court should be affirmed with costs.

MARTIN, J. I concur.

MATHEWS, J. The evidence in this case, does certainly raise a strong presumption that the note declared on by the plaintiffs, was given for the sheep, on which they claim a lien, as sellers, but is not so conclusive, as to authorise this court to discredit the facts impliedly found by the jury in their general verdict, *viz.* that they are not the same sheep, &c.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Turner and *Carleton* for the plaintiffs, *Duncan* for the defendants.

WOOTERS vs. *THOMPSON.*

When the proof is not conclusive, and the court is called on to decide on which side it preponderates, it must draw such conclusions as are best supported by the evidence produced.

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. This is an action to procure a settlement of a partnership concern, payment of the funds advanced, and an equal distribution of the profits.

The petition alleges, that the plaintiff and appellant in the month of March, 1819, entered into partnership with the defendant, in the grocery business; that he furnished $300 in money and merchandise, as stock; that the defendant put in his industry and skill as a grocer; that they were to share equally the profits and loss, and that the profits amounted to $2000.

The answer admits the partnership, but denies that the amount stated was ever furnished, or that any other of the allegations contained in the petition are true, and avers that the defendant is ready to prove that he has settled with the plaintiff.

A supplemental answer was afterwards filed, claiming a right to the profits accruing from the appellant's labour and industry on a plantation. Interrogatories were propounded to the plaintiff, to ascertain the truth of these allegations. He denied on oath that the defendant had such right, or that any contract was ever entered into between them which authorised such a claim.

The parish judge gave judgment for the defendant, and the plaintiff appealed.

The pleadings admit the partnership.—

East'n District. *Feb.* 1822.

WOOTERS vs. THOMPSON.

The evidence adduced to shew the amount advanced and the profits made, is neither clear nor satisfactory. It is however, pretty evident that some money and goods were furnished as stock, by Wooters, and that some profits were made. The only question therefore is, whether the defendant has sustained his plea, that he has settled and paid the plaintiff.

On this point the following evidence was given :—

Cook swore. that he was keeping store for Thompson last spring, that Wooters, the plaintiff, came into it and enquired for Thompson, witness asked him if he wanted any thing in particular with him, and what was his name; he was told that his uame was Wooters, and that he had nothing in particular with him.—Witness asked him if he had settled with Thompson, he told him he had, and that he wanted only a few papers from him, which he had for collection—never saw him afterwards until the trial.

Smith testified, that he is well acquainted with the plaintiff, that being in defendant's store, Wooters called and asked after defendant; deponent asked him what he wanted.

he replied, that he wanted the balance due him by Thompson, which he thinks was either $14 or 27, that he called in two or three mornings after Thompson, and at last threatened to go to a justice of the peace; it was the last time he called that he mentioned the amount. Witness then told Thompson that he ought to pay him, and not triffle with his feelings any longer, for so small a sum;—Thompson said he would do so, and took his hat and went out, as he supposed for that purpose. Deponent thinks this conversation was about the month of May, 1820.

It may be said that this evidence is not conclusive; perhaps it is not so. But proof of this kind cannot be had in every case. And when it is not of that description, as we are obliged to decide in whose favour it preponderates, we must draw such conclusion as appears to us best supported by the testimony furnished. 9 *Martin*, 388, *Herries* vs. *Canfield & al.*

Now, in the present suit, we are reduced to this alternative. Either we must think that the two witnesses produced by defendant swore falsely, or a settlement has taken place between the parties in this suit. Per-

East'n District. *Feb.* 1822.

WOOTERS *vs.* THOMPSON.

jury we are not allowed to presume, and if we believe what is sworn, the plea of defendant is made out, except as to the sum of 27 dollars. I am therefore of opinion, that the judgment of the parish court be annulled, avoided and reversed, and that the plaintiff do recover of the defendant, the sum of $27, with costs in both courts.

MARTIN, J. I am of the same opinion.

MATHEWS, J. The allegations in the petition, and the facts stated in the answer, in this case, are supported only by oral testimony; and I am of opinion, that the weight of evidence is in favour of a belief that the concerns of the partnership have been finally settled, and that the plaintiff has received the amount due to him except about $27.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the plaintiff do recover of the defendant the sum of $27, with costs in both courts.

Preston for the plaintiff, *Pierce* for the defendant.

STEER vs. *WARD & AL.*

East'n District.
Feb. 1822.

STEER
vs.
WARD & AL.

A power of attorney to administer on the principal's property does not authorise the agent to sell slaves.

No particular form is required in a letter of attorney, it is sufficient if the principal distinctly expresses his will.

APPEAL from the court of the third district.

PORTER, J. The questions to be decided in this cause, are, whether a general power of attorney to administer on the principal's property, is a sufficient authority to sell negroes, and if it is not, whether a letter in the following words will support the sale?

New-Orleans, Jan. 11, 1818.

JUDGE TESSIER,

Dear Sir,—Since I left Baton Rouge, I have made up (my) mind to sell Susan and her children; therefore, you will do me a particular favour in aiding and assisting captain Hall in the same, as he is my agent.

(*Signed*) J. M. CLEAVELAND.

The general power to administer did not give a right to sell. Our laws require a special authority to enable the attorney-in-fact to alienate immoveable property. *Civil Code*, 422, *art.* 10.

If the sale therefore is good, it must be in virtue of the letter just transcribed, addressed to the judge of the parish where the property was situated.

East'n District. *Feb.* 1822.

STEER *vs.* WARD & AL.

Our law recognises a power of attorney in this form. *Civil Code*, 422, *art.* 6, *Part.* 5, *tit.* 12, *l.* 24. The only enquiry then is, are the expressions contained in it sufficient to mark clearly the intention of the principal, that his agent should dispose of the property now in contest?

I am quite satisfied that they do express this intention. The writer says he has made up his mind to have certain slaves sold, and requests the judge to assist his agent in doing so.

I do not see how language could convey more clearly his wishes, or recognise more perfectly the authority he intended to confer.

The law has provided no particular form for a power of attorney, it is sufficient if the principal distinctly expresses his will. *Par.* 5, *tit.* 12, *l.* 24. *Pothier, Traité du contrat de mandat, n.* 30. *Sive rogo, sive volo, sive mando, sive alio quocumque verbo scripserit; mandati actio est. Dig. lib.* 17, *tit.* 1, *l.* 1, *n.* 2.

A bill of exceptions was taken to the introduction of the letter to Tessier, but I have been unable to discover any good reason to justify us in rejecting it.

I am therefore of opinion, that the judgment

of the district court be annulled, avoided and reversed; that the defendants do deliver to the plaintiff the slaves mentioned in the petition; that the injunction granted by the district court be made perpetual, and that the appellees pay the costs of this appeal.

MARTIN, J. I am of the same opinion.

MATHEWS, J. From the tenor of the letter addressed to the parish judge, it is evident Cleaveland intended that his agent, Hall, should have power to sell and convey the slaves now in dispute; and it is probable that he thought the general power granted to transact all his business, would authorise such sale; which, although in itself insufficient, when coupled with the letter, gave to his agent full authority to act for him in transfering the property. As it does not appear that there was any bad faith in the transaction, I am of opinion that the plaintiff's title to the slaves ought not to be invalidated.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; that the defendants deliver to the plaintiff the slaves

East'n District. *Feb.* 1822.

STEER *vs.* WARD & AL.

mentioned in the petition; that the injunction granted by the district court be made perpetual, and that the appellees pay the costs of this appeal.

Duncan for the plaintiff, *Eustis* for the defendants.

LEE vs. *ANDREWS & AL.*

APPEAL from the court of the first district.

A party who on order to procure the attendance of a witness, occasions a little delay, which might have been avoided by taking his deposition, is not guilty of such latches as prevent his obtaining a continuance.

PORTER, J. The only question presented in this cause, is the correctness of the opinion of the court in refusing the defendants a continuance.

This action was commenced on the 24th day of May. The petition alleged that Robt. Andrews, the only partner of the firm of Andrews & Co. in the state, was about to depart therefrom, and prayed that he might be held to bail. On the 1st of June, his counsel made an affidavit that there were letters and papers material for the defence, and without which he could not file an answer. Sixty days were granted him to make one.

The 17th of September this answer was put in, and the same day a commission was

granted to take the testimony of certain witnesses residing in the state of Kentucky. On the 7th of November the cause was tried. The defendants, before the case was gone into, moved for a continuance, on affidavits, which will be hereafter noticed; and at the same time, offered then to take the testimony of the witnesses on the part of the plaintiff, and to come under an agreement to go into trial at all events, on the next calling of the cause. The court over-ruled the motion, and the defendants excepted to the decision.

The affidavits on which this application was made, were sworn to by Dorsey, the agent of the appellants, and by their counsel in the cause.

The first mentioned witness declared, that he was informed, and believed, that there was a just defence to the action, and that by letters from the defendants, he was instructed, that one of them was to leave Kentucky on the first of October, and was expected here the first of November, bringing with him one Stockton, as the deponent believed, a materterial witness for the defendants; and that he expected said Stockton to prove the correctness of the items claimed as a set-off against

East'n District. *Feb.* 1822.

LEE *vs.* ANDREWS & AL

the plaintiff's demand, whereby a balance would be found due by them. The affidavit negatived in the usual manner, that it was made for delay, and concluded by stating the expectation of the affiant, that the witness would arrive in this city before the next calling of the docket.

The declaration of the counsel in the cause, was to the same effect; and further added, that the reason of his not having forwarded the commission, was the information he had received, and the belief founded on it, that the witness intended to leave Kentucky about the first of October.

Applications of this kind are addressed to the legal discretion of the court, and must, in a great measure, depend on the particular circumstances of each case. In that now before us, the cause was at issue on the 17th day of September, and a commission was taken out the same day, which appears not to have been executed. I agree entirely with the position taken by the plaintiff's counsel, that the change of determination in the defendants, to execute the commission, cannot affect the opposite party; that the trial ought not to have been postponed, because

they chose to rely on the personal attendance of the witness; and I think that a longer time should not have been extended them than would have been had the commission been forwarded to Kentucky. The question then is, had the defendants proceeded regularly to obtain the testimony, under the authority of the court, would it have been a sound exercise of discretion to have ruled them into trial, under all the circumstances of the case? I think not. Fifty-five days had only elapsed from the period the *dedimus* was taken out, until the trial of the cause. When evidence is to be taken at so great a distance, time must be allowed for all the various contingencies that may prevent its return:—the absence of the commissioner; of the witness; and the uncertainty of conveyance. Diligence cannot be fairly tested by the time in which the distance may be travelled, or a letter conveyed by mail.

It is true, the commission was not taken out here, but from the facts disclosed by the affidavit of counsel, for not acting under it, I think he was entitled to the same delay to procure the witness, that he would have had to procure the testimony from Kentucky.

East'n District. *Feb.* 1822.

LEE *vs.* ANDREWS & AL

This construction imposes no hardship on the plaintiff, and leaves the defendants liable to all the consequences that might flow from his negligence.

We have held in the case of *Lecesne* vs. *Cottin*, 9 *Martin*, 454, where the subject of diligence was strenuously debated, that whenever the propriety of granting a continuance to a defendant was doubtful, the duty of the court was to accord it. Because, if there was error on that side, it produced but delay. If on the other, irreparable injury might be the consequence. Holding still the same opinion, I do not feel myself authorised to say that the defendants here were not entitled to further time.

The circumstances which attended the progress of the cause, before the answer was filed, are not of that nature to authorise us to declare that delay alone was intended from the commencement of the suit.

The judgment of the district court should be reversed, the cause remanded for a new trial, and the appellee pay the costs of this appeal.

MARTIN, J. The examination of witnesses, in open court, is so preferable to that before

a commissioner, that I think a party ought to be indulged who seeks to obtain it, though this be productive of some delay.

I think, that in the present case, the defendants cannot be charged with having no other view than to obtain delay. The court *a quo*, in my opinion, erred in withholding the continuance. We ought to reverse the judgment and remand the cause for trial.

MATHEWS, J. I concur in the opinion of my colleagues.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the case be remanded for trial, and that the appellee pay the costs in this court.

Grymes for plaintiff, *Hawkins* for defendants.

WATSON & AL. vs *YATES.*

APPEAL from the court of the first district.

The invoice, accompanying the bill of lading is not *per se* evidence of the quantity and value of the goods.

PORTER, J. The plaintiffs allege, that the defendant, commander of the brig Eliza, received a box of merchandize at Liverpool, England, which he promised to deliver them in New-Orleans.

East'n District. *Feb.* 1822.

WATSON & AL. *cs.* YATES.

The bill of lading acknowleges the receipt of the box, and the evidence shews satisfactorily, that it has not come into the possession of the plaintiffs.

To prove the value of its contents, the invoice was produced, but the court rejected it; and a bill of exceptions brings the correctness of that opinion before us for examination.

In the case of *Urquhart* vs. *Robinson*, 1 *Martin*, 236, this question received a very serious examination, and there the court, in a case similarly circumstanced to the present one, held that it was not legal evidence.

I am of the same opinion. It is a paper to which the defendant was neither party or privy. It is not a writing emanating from him, it is *res inter alios acta*, and has not the sanction of an oath. Were we to hold it legal evidence, two persons, by combining together, might ruin a third party, without even incuring the risk of perjury.

It has, however, been insisted, that there is other evidence in the record to prove its value. I have examined the whole of the testimony with much attention, and I can discover nothing which would authorise the court to come to that conclusion.

The first witness declares, that his knowlege of the merchandize contained in the box was derived from the persons employed to pack the goods. This is nothing but hearsay. The second, Sabatier, had no knowlege of the contents, except what he derived from the invoice. We have already seen that the paper itself is not evidence. The third, M'Nair, knows nothing of their value, except that which the invoice furnishes.

Notwithstanding the value of the goods has not been proved, it has been satisfactorily established, that the defendant received a box in Liverpool, to be delivered to the plaintiffs in New-Orleans, and that he has not performed his contract. He is responsible, therefore, to some amount, and as the plaintiffs have not proved how much, they can only recover a sum merely nominal. *Lastigue* vs. *Baldwin*, 5 *Martin*, 196.

I think that the judgment of the district court should be reversed, and that the plaintiffs recover one dollar, with costs in both courts.

MARTIN, J. I was one of the judges who tried the case of *Urquhart* vs. *Robinson*, and have never been satisfied with the opinion there given.

East'n District. *Feb.* 1822.

WATSON & AL. *vs.* YATES.

There ought to be judgment for nominal damages.

MATHEWS, J. I concur in the opinion of my colleagues.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the plaintiffs recover one dollar, with costs in both courts.

Smith for the plaintiffs, *Maybin* for the defendant.

PLANTERS' BANK & AL. vs. *LANUSSE & AL.*

The act of 1817, directing the proceedings to be pursued in cases of voluntary surrender, does not govern those which are forced.

Syndics must be appointed by the majority of creditors in amount, and if the claim of those offering to vote is disputed, it must be proved, as in ordinary cases, by legal evidence.

Claims of creditors may be investigated

APPEAL from the court of the first district.

PORTER, J. Several questions of considerable importance have been raised on the argument of this cause. The first is, whether the act of 1817, regulating the manner in which voluntary surrenders should be made, governs those which are forced?

The appellants insist that it does, and rely on the authority of *Febrero*, 2, *lib.* 3, *cap.* 3, *sec.* 1, *n.* 40, who states that the same rules are observed in both *concursos*, in every thing which concerns the substance of the judg-

ment, the validity and preference of the claims of creditors, their classification, their payment, the inventory or sequestration, and the administration of the estate. The question then is, does there exist so close and intimate a connection between the two remedies, that every alteration in the one necessarily extends to, and embraces the other.

The counsel seem to have argued this cause as if there was a general provision in the Spanish law, that the rules on certain points, in the two modes of surrender, were not only the same, but should in future be so. Nothing of that kind has been shewn to us. All we can learn is, that at one time there were several rules common to both. But it does not follow, as a necessary consequence, they should always remain so.

The act of 1817, provides, for "voluntary surrenders," and not for "forced." On what grounds then can we decide, that it includes the latter remedy? No other have been urged, except that it has been shewn that at one time the practice in each *concurso* was alike, and that it is a reasonable inference, that any improvement made in the one should extend to the other. Were we to adopt this construc-

previous to the appointment of syndics.

In cases of forced surrender all the creditors are at once plaintiffs and defendants.

When the amount due to a creditor is disputed, the party opposing it has a right to demand a jury for the trial of the facts at issue.

An endorser, who has not paid his endorsee, cannot be permitted to vote at the deliberation of the creditors for syndics.

The oath of an agent whose knowlege of the amount due his principal, is derivative, is not legal evidence of the debt.

East'n District. *Feb.* 1822.

PLANTERS' BANK & AL. vs. LANUSSE & AL.

tion, it would be disregarding the letter of the law, under the pretext of pursuing its spirit further than it has ever been done before—it would be enacting by analogy, and repealing by it.

I think therefore the provisions of this statute are not applicable to a case such as this, where the surrender has been compelled at the instance of the creditors. If inconvenience attends this decision, the remedy must be sought from that branch of the government in which the constitution has vested the power of making laws.

The want of precise and positive regulations, in the ancient law on this subject, which was no doubt the reason that induced the legislature to pass the act of 1817, respecting voluntary surrenders, cannot but be felt in deciding this cause. The parties have asked our opinion on all the points submitted. I shall confine mine to what is necessary for the decision of the case before us, as I suppose regulations by legislative authority will supersede the necessity of this court going into the question at large, in order to settle the practice.

I shall consider—1. What kind of proof is

required by law, in order to establish the right to vote as creditor for the election of syndics.

2. If other creditors have a right to make opposition to it.

3. If that opposition, when formed on facts, should be tried by a jury.

4. If the persons, whose votes were objected to here, legally established their character as creditors.

I. The Spanish jurisprudence provided, that the administrator should be appointed by the whole of the creditors, or by the majority in amount. *Febrero*, 2, *lib.* 3, *cap.* 3, *sec.* 1, *n.* 26. If all agreed in the nomination, there was little difficulty as to the right to vote, and no occasion to establish it.

If, on the contrary, a difference of opinion existed, or the creditors had different interests, and the majority was to prevail, some mode must have been contemplated to ascertain that majority, and establish the amount of each claim; otherwise, no election, such as the law prescribed, could have taken place.

In what manner those persons who offered to vote, were to prove the sum due to them, the books which treat on this subject do not inform us. How then ought we to presume

East'n District. *Feb.* 1832.

PLANTERS' BANK & AL *vs* LANUSSE & AL.

they were to prove it? I know of no other mode but that which the law requires in every case where facts are contested in courts of justice;—by legal evidence.

Whenever the law declares that certain rights are the consequence of possessing a particular character, proof of that character must precede the exercise of the rights it confers, and if it is silent as to the manner in which this proof is to be made, the evidence must be the same as in other cases. This is the general rule, and I think we are bound to apply it to this case, unless the exception is shewn.

If we depart from this principle, what do we get in its place? Why, that any kind of proof will be sufficient, or none—that all that is required to vote, and for any amount, is the simple assertion of the person who presents himself as creditor. Positive law should be shewn to the court, to induce it to sanction a course of proceeding that would give to persons, who, perhaps had no interest in the estate, the election of syndics, and place in the power of those syndics property to an immense amount, which they might waste, or fraudulently convert to their own emolument.

I think therefore the appointment must be made by those who are really creditors; that if that character is disputed, they must prove it, and that in the same manner any other fact is established by legal evidence.

II. What has been already said on the necessity of the creditors to establish their right to interfere with the management of the insolvent's estate, decides the question as to the authority of the others to oppose it. If, as has been already shewn, it is necessary to have a majority in amount, to controul the rights of the minority, and appoint an agent for them, it would seem to follow, as a consequence, that if there is not that majority in amount, if it is apparent, and not real, the persons who are supposed to be in the minority should have the liberty of proving it; otherwise the syndics would not be appointed in the manner directed by law.

It has been urged, that this examination into the claim of each creditor, cannot take place until the appointment of an administrator or syndic has been made, and *Febrero*, 2, *lib.* 3, *cap.* 3, *sec.* 1, *n.* 26 & 29, has been cited in support of that position. It is very true, that after the appointment, the claims are sub-

East'n District. *Feb.* 1822.

PLANTERS' BANK & AL. *vs.* LANUSSE & AL.

ject to be examined and contested. But I cannot see any thing in this doctrine at all opposed to the rights of *bona fide* creditors, to prevent such as are not so from voting for syndics. I think, on the contrary, the author is speaking of the necessary requisites which precede the payment of the creditors after an administrator has been appointed, and the proceedings are approaching to a close.

The very passage quoted (*Febrero, loco citato*) supports the right to oppose the nomination of syndics. It requires the judge to confirm the person appointed, if fit and proper, and there is neither fraud or collusion. If either appear he should refuse. Have not the parties interested then a right to shew that which it is the duty of the judge to decide on?

There is another material consideration. If this verification of the claims of each creditor can only be made after the administrator is appointed, it would be useless to give a right to make opposition. Before it could be exercised, the whole property of the insolvent might be wasted.

It is said that this double examination of the sums due each creditor, once to vote, and at other time to be paid, is vain and useless.—

But the answer of the appellants' counsel to this argument is satisfactory; changes may have taken place in the mean time; endorsers may have taken up notes; conditional creditors may have become absolute ones; and creditors who did not appear, and were not represented at the first meeting, may come forward by themselves or agent, on the second.

No difficulty is presented by the objection, that the notary is not a judicial officer, and therefore, cannot take the evidence and decide on it. His duty is to record the proof each party presents, and return it to court where it can be acted on. Nor do I find any in the argument, that there is no person to carry on the suit. In cases of this kind, all the creditors are at once plaintiffs and defendants. *Febrero*, 3, *cap.* 3, *sec.* 1, *n.* 29.

It is true, as has been contended, that this course may produce delay and inconvenience; but on the other hand, all the property may be dissipated;—between these evils the choice is easy.

III. The right to make opposition being established, the question by whom it is to be examined, is of easy solution. The trial by jury, is a privilege of which no citizen of this

East'n District. *Feb.* 1822.

PLANTERS' BANK & AL. *vs.* LANUSSE & AL.

state can be deprived, except by his own consent, and consequently cannot be refused to the parties in this suit, if it should appear that facts were put at issue.

The appellees contend, that questions of fact were not at issue between the parties. To ascertain this, the pleadings must be resorted to. The opposition made by the appellants to the nomination before the notary, alleges various reasons why it should not be confirmed. Among others, that Tricou had not paid the endorsements for which he voted; and that the debt of Dutillet & Sagory was compensated, by a larger amount due the debtor Lanusse. The answer to this opposition denied generally, all the matters of fact alleged in it. This, I think, was sufficient to have the case enquired of by a jury.

IV. It is however, insisted, that even admitting the facts to be true, which are alleged in the opposition, that Tricou, as endorser, had a right to vote.

I do not think so. An endorser who has not paid his endorsee, cannot be permitted to vote at the deliberation of the creditors for syndics. Because, he would have no right as

such, to ask or receive payment on the final liquidation of the insolvent's estate. He is not a creditor; he may become one; whether he shall or not, depends on a future event, and until that event takes place, he cannot controul the proceedings of the other persons to whom the insolvent is really indebted. *Pothier, Traité des obligations, n.* 235.

The appellees further insist, that setting aside those votes, still they have the majority, as the judge illegally rejected the vote of madame Lanusse, through her attorney. But under the view I have taken of the law, that every creditor, whose right to vote is disputed, should be obliged to establish that right by legal proof, I agree with the judge *a quo*, that the oath of an agent, whose only knowlege is derivative, is not such evidence as the law requires.

As this case has been conducted below, evidently with a view to the act of 1817, on the subject of voluntary surrenders; I think that the cause ought to be remanded, with directions to the judge to send the parties before a notary to establish their respective claims, and appoint syndics according to law, and that the appellees pay the costs of this appeal.

East'n District. *Feb.* 1822.

PLANTERS' BANK & AL. *vs.* LANUSSE & AL.

MARTIN, J. I concur in the opinion just pronounced.

MATHEWS, J. I do likewise.

It is therefore ordered, adjudged and decreed, that the cause be remanded, with directions to the judge to send the parties before a notary to establish their respective claims, and appoint syndics according to law, and that the appellees pay the costs of this appeal.

Seghers for the plaintiffs, *Derbigny* for the defendants.

CONRAD vs. *LOUISIANA BANK.*

APPEAL from the court of the first district.

To authorise a party to give in evidence, circumstances not immediately connected with the matter in dispute, they must be of such a nature as to produce fair and reasonable presumption of the facts at issue.

A note neither proved to have the signature of the president or cashier of the the bank, or ac-

PORTER, J. This action was commenced against the Louisiana bank, to recover the amount of four of their notes, of $100 each. The defence set up was, that they were forged. The cause was submitted to a jury, and they found a verdict for the defendants. The court gave judgment in pursuance thereof, and the plaintiff has appealed.

Four bills of exceptions were taken on the

trial of the cause, and the questions arising on them, are now submitted without argument.

By the second bill of exceptions it appears, that the plaintiff offered a witness to prove, that the bank had given in payment a note for $100, similar in every respect to those on which this suit was instituted. And that they afterwards declared said note was forged. The court rejected this testimony.

knowleged by them, cannot be laid before experts as a ground of comparison.

A witness may be examined whether the engraving of a note is similar to those which are avowedly genuine.

The plaintiff also offered to prove, that the president and cashier of the bank, when called before a justice of the peace, were unable to distinguish their avowed and genuine notes, from one which they had given in payment to a third person. The court refused to let this testimony to go to the jury, and that refusal forms the ground of the third bill of exceptions.

The extent to which circumstances not immediately connected with the matter under investigation, may be received in evidence to strengthen the testimony which the parties offer directly on the point at issue, is so well and clearly explained in a note to the last edition of *Phillip's Evid.* 134, (edit. 1820) that I shall transcribe it here, as expressing very fully my own ideas on this subject.—" Direct

East'n District. *Feb.* 1822.

CONRAD *vs.* LOUISIANA BANK.

evidence is not to be required or expected; nor is it requisite, that the circumstantial evidence should have a direct relation to the immediate subject of inquiry. Much less, that the inference drawn from the circumstances proved, should be absolutely certain or necessary. It is sufficient if the evidence be such as to produce a fair and reasonable presumption of the facts at issue, and if it has that tendency, it ought to be received, and left to the consideration of the jury, to whom alone it belongs to determine upon the precise force and effect of the circumstances proved."

Applying this rule to the case before the court, I do not see how the fact, that the bank received and paid out a note, which was not genuine, could raise a fair and reasonable presumption, that the notes on which this suit is brought, were put in circulation by them. It would have proved they might have done so; but that is too remote a presumption.

The third bill of exceptions, which relates to the difficulty in which the cashier and president found themselves, to distinguish whether their signatures to a certain note of $100, were forged or not, is easily disposed of; for, according to the statement sent up, it does

not appear to have been even alleged that this note was similar to those on which this action was instituted.

The opinion of the judge, that a note neither proved to have the signature of the president or cashier, or acknowleged by them, could not be laid before the experts, is clearly correct. So also is that which admitted a witness to give testimony concerning the engraving.

I think the judgment of the court below should be affirmed with costs.

MARTIN, J. I cannot entertain any doubt of the correctness of the decision of the district judge, refusing to suffer a note not proven or admitted to have been signed by the defendant's agents, to be used on a trial of comparison.

The judge was perfectly correct in rejecting evidence, that the defendant's agents had paid notes, which the witness offered, considered as perfectly similar to the one sued on.

It follows, that he was likewise correct in the opinion excepted to, in the third bill.

Evidence of the engraving was proper to go to the jury, although it is certainly not conclusive.

East'n District. *Feb.* 1822.

CONRAD vs. LOUISIANA BANK.

I think the judgment ought to be affirmed.

MATHEWS, J. I concur.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

The plaintiff in *propriâ personâ*, *Moreau* for the defendants.

RITCHIE & AL. SYNDICS vs. *SANDS & AL. SYNDICS.*

A payment to a creditor out of the ordinary course of business on the eve of bankruptcy is void.

APPEAL from the court of the first district.

PORTER, J. This is an action to recover the price of twenty-six bags of pepper, sold by Ritchie, Moore & Co., to the defendants.

The general issue was plead, and the statement of facts presents the following case for decision:—

On the 5th of April, Sands, Kelshow & Co. lent to Ritchie, Moore & Co. $500. On the 12th, they purchased the merchandise stated in the petition; and on the 16th of same month, Ritchie, Moore, & Co. filed their petition, to have the benefit of the laws of this state for the relief of insolvent debtors.

The question then is, as to the validity of a payment of this kind, made out of the ordinary course of business, and on the eve of bank-

ruptcy. The principle which decides it has been fully examined in the cases of *Brown* vs. *Kenner & al.* 3 *Martin*, 277. *Mecker's ass.* vs. *Williamson & al. syndics*, 4 *Martin*, 625. I concur entirely with the opinions there expressed; and as it is unnecessary to repeat the reasoning on which the court, in those cases, came to the conclusion, that debtors immediately before their declared insolvency, could not discharge their debts in the manner it was attempted to have been done here, I think that the judgment of the district court should be annulled, avoided and reversed, and that the plaintiff do recover of the defendants, the sum of $311 85 cents, with costs.

MARTIN, J. The case of *Brown* vs. *Kenner*, was decided before I came to this court, and I am perfectly satisfied therewith. I concur with judge Porter.

MATHEWS, J. I concur with my colleagues.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the plaintiff recover from the defendants, the sum of $311 85 cents, with costs.

Hennen for plaintiffs, *Smith* for defendants.

East'n District. *Feb.* 1822.

JOHNSON'S EX. vs. DUNCAN & AL. SYNDICS.

JOHNSON'S EX. vs. DUNCAN & AL. SYNDICS.

Proof of notice to an endorser is essential to a recovery against him.

MARTIN, J.* The petition stated, that one Bell made his promissory note to M'Master & Adams, or order, for $3000. That the latter endorsed it to Duncan & Jackson, who endorsed it to Johnson; that at maturity, Bell neglecting to pay, the note was protested, and due notice given to Duncan & Jackson. That about four months after, Bell made a partial payment of $687 50; and soon after, judgment was obtained against him for the balance, interests and costs; and he afterwards died, and the judgment was revived against D. L. Todd, his representative, and a *fi. fa.* issued, and no property found. That the defendants have in their hands the property of Duncan & Jackson, many of whose creditors they have paid; yet they refuse to pay the plaintiffs. They plead the general issue.

There was judgment for the plaintiffs, and the defendants appealed.

It does not appear. from any part of the record, that notice of the protest was given to the defendants, (the endorsers) but the district judge has thought that this deficiency

* PORTER, J. did not join in this opinion, having been counsel in the cause.

in the evidence is cured by the subsequent admission of the defendants, in their account on file. I have vainly looked for this account of the evidence before us. It is true, Bell's note is referred to in an account current between M'Masters & Adams, and the plaintiffs' testator. Admitting this document to be evidence in the case, it does not appear to me, that it establishes that the notice was either given or waved.

I conclude, that as proof of notice to an endorser is essential to a recovery against him, the plaintiffs cannot recover. We ought to reverse the judgement, and ours should be for the defendants, with costs.

MATHEWS, J. I am unable to discover any thing in the statement of the account as relied on by the court *a quo*, which places this case on a different footing from ordinary suits against endorsers of negociable notes. I therefore concur in the judgment as pronounced.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that judgment be rendered for the defendants, with costs in both courts.

Hennen for plaintiffs, *Livermore* for defendants.

East'n District. *Feb.* 1822.

NORWOOD'S EX.'S *vs.* DUNCAN & AL.

NORWOOD'S EX.'S vs. *DUNCAN & AL.—DUNCAN & AL.* vs. *NORWOOD'S EX.'S.*

APPEAL from the court of the first district.

If an executor suffer three years to elapse without taking any steps for the recovery of a debt, and afterwards give further credit, taking a mortgage in his own name for the debt, and another due to himself (as if the whole was a debt due to him) he becomes liable to the estate.

Hennen, for the executors. This suit was instituted by the plaintiffs, executors of Charles Norwood, deceased, to recover from the defendant, A. L. Duncan, the sum of $6000, deposited in his hands on the 21st of December, 1816, by C. Norwood, as security for whatever balance might appear to be due by him, as one of the executors of the estate of the late William Marshall, of Baton Rouge, on a final settlement. See the receipt of A. L. Duncan annexed to the record.

It is admitted by the plaintiffs, that on a final settlement, C. Norwood was indebted to the estate of W. Marshall, in the sum of $837 25 cents, and that the defendant, A. L. Duncan, did pay over to C. Norwood the further sum of $1450, which two sums being deducted from the $6000, leave a balance of $3712 75 cents, which is sought to be recovered by the present action.

This recovery is resisted by the defendant, on the ground, that C. Norwood, one of the executors of W. Marshall, received a note for

the sum of $2720 37½ cents, dated 11th of November, 1803, and drawn by W. G. Garland, to the order of W. Marshall, payable one year after date, and bearing an interest of 10 per cent. per annum, from the date, until final payment; and that, inasmuch as he did not obtain payment of this note when it came to maturity, he should account for the amount of it.

The facts relative to it are these, as appears from the evidence on record:—C. Norwood, having used every effort to obtain payment from Garland, without effect, did, on the 14th of November, 1807, by a notarial act, passed before N. Broutin, notary-public of New-Orleans, take a mortgage from Garland, on fifteen slaves, for the very purpose of securing the payment of the sum which still remained due to the estate of Marshall. On the same day, 14th of November, 1807, previously to the execution of the mortgage, C. Norwood took the precaution of obtaining from Garland, an affidavit before J. Lynde, notary-public, that his wife had no claim on the slaves thus mortgaged. There is, however, no mention made in the mortgage, that the debt was due to Norwood, as executor of

East'n District
Feb. 1822.

NORWOOD'S EX.'S
vs.
DUNCAN & AL.

Marshall. And it is for this omission that Norwood is considered as answerable for the debt.

No evidence has been offered to shew that Norwood could have recovered the amount of the note from Garland when it orginally became due, or that he neglected using any means for that purpose; nor is any fraud, negligence or fault urged against him, other than the omission in the mortgage above stated. It appears, however, that a gross fraud was practised by Garland on Norwood, and that he lost by him, as well the sum due to the estate of W. Marshall, as a large sum due to himself; for Garland, soon after the execution of the mortgage, became insolvent, filed his bilan, and his wife made claim of her dotal property, which, with other privileged claims, exhausted the whole of his estate, and Norwood got nothing.

It is a principle of law fully established, that every presumption is in favour of the diligence of a factor, tutor, curator, executor, and every other administrator. See *Curia Phillippica*, *lib.* 1. *Comercio Terrestre*, *cap.* 4. *Factores*, *n.* 10, 13. *Illustracion y Continuacion a la Curia Phillippica*, *vol.* 2, *p.* 62, *n.* 11, 12.

The facts of the case, however, fully establish the diligence, care, and good faith of Norwood, without any recourse to this presumption of law.

Marshall, in his lifetime, had loaned this money to Garland (without any security) on his promissory note alone, which, when due, Norwood could not obtain the payment of; but to secure it, he took from Garland the mortgage already recited. Had the note been paid, it would have been the duty of Norwood to put out the money at interest for the benefit of the absent heirs of Marshall; for such was the duty of tutors and curators by the Spanish law. 1 *Sala*, 84, *n.* 35, 4 *Febrero*, 63, *n.* 84.

And by a parity of reasons, such is the duty of an executor. Now, Marshall himself had placed the money in the hands of Garland, at an interest of 10 per cent. And Norwood not being able to recover it from him, only continued the same loan, while, at the same time, he obtained what was considered an ample security for the repayment of it; and certainly thereby made the situation of the heirs better than it had been when the note became due. Moreover, he did nothing contrary to his duty, nor was it in any way mate-

East'n District. *Feb.* 1822.

NORWOOD'S EX.'S vs. DUNCAN & AL.

rial to the interest of the absent heirs to have the insertion made in the mortgage, that he took the security from Garland, in his capacity of executor of Marshall; nor would such insertion at all have benefited them. I am therefore totally at a loss to conceive on what principles of equity, or on what authority of law, it is contemplated to render Norwood's estate liable for this transaction. The estate of Norwood has not been enriched in any way from this debt due by Garland; nor can it be at all urged that Norwood was deficient in diligence, prudence or care; much less that he was guilty of a fault, or any degree of negligence or fraud. I therefore trust this honourable court, guided by the same principles of equity and justice, which influenced the court *a quo*, will confirm its judgment, and restore to the executors of Norwood, the deposit made in the hands of the defendant.

Eustis, contra. The defendant, in the latter case, is a depository of the sum of money mentioned in his receipt, which belongs to one of the two parties to these suits, which have been consolidated. The heirs of Marshall allege that they are entitled to recover from the ex-

ecutors of Norwood, the amount of William Garland's note, in favour of their ancestor, for the reasons alleged in the brief of the plaintiffs' counsel. The executors of Norwood claim the sum deposited with A. L. Duncan, as their own, the conditions of the deposit being fulfilled, and no balance being due by their testator to the estate of the late William Marshall. The depository is ready to pay the money to whomsoever the court shall adjudge it to be due. If Norwood made himself responsible for the amount of Garland's note, there must be judgment for the heirs of Marshall; if he did not, the judgment of the court below must be affirmed.

There is no dispute as to the facts—Norwood, as one of the executors of Marshall, received a note of W. G. Garland, in favour of Marshall, of date November 11th, 1803, payable one year after date, bearing an interest of ten per cent. per annum; and on the 14th of November, 1807, four years after, took a mortgage on certain slaves to secure the payment of this debt from Garland, and also a private debt of his own; this instrument is in his own name, and imports to be for the security of the payment of a certain sum, due by

East'n District. *Feb* 1822.

NORWOOD'S EX.'S *vs.* DUNCAN & AL.

Garland to Norwood individually. We hold that Norwood, by these acts, made himself responsible for the debt, that there must be judgment for the heirs of Marshall, and the funds received by A. L. Duncan, under the receipt by him given to Norwood, must remain in his hands, as the attorney-in-fact of the heirs of Marshall.

He made himself responsible; first, because he ought, as a careful administrator, to have protested the note at its maturity. If the drawer, being a merchant, had been in good credit at that time, the menace of protest would have induced him to discharge the debt; and if he was in bad credit, Norwood ought to have required security without delay: (see his bilan as to his having been a merchant.)

Secondly, because he permitted four years to elapse before any effort was made to secure the debt, during which no information was given to the heirs of Marshall of the state of their business, which amounts to *negligentia crassa.*

Thirdly, so aware was Norwood of his responsibility, that he took the mortgage of the 14th of Nov. 1807, in his own name; con-

fused a private debt of his own with that of his principals, and thereby assumed the payment of the latter. In taking the mortgage, and granting an indulgence to the debtor, after a lapse of four years, from the time the debt became due, he acted beyond his authority, and contrary to his duty, which obliged him to collect the debts of the succession, to render his accounts, and to pay the balance due to the heirs. Even were it doubtful whether he acted within his authority, his having acted in his own name, makes him responsible to his principals.

Procurator in dubio præsumitur voluisse contrahere pro scipso, non pro suo principali, si contrahendo non declaraverit se contrahere uti alterius procuratorem. Casaregis, Discuss. 199, *n.* 31.

The heirs of Marshall never ratified this act; their intention was formed from the purest feelings of humanity; as Norwood was old and infirm, they purposely avoided distressing him in his lifetime, and as their necessities were many, after his death, there was no reason for them to desist from endeavouring to obtain their rights. See testimony of John Nicholson. Norwood acknowleges his responsibility in his letter to the heirs, and

East'n District. *Feb.* 1822.

NORWOOD'S EX.'S *vs* DUNCAN & AL.

throws himself upon their compassion, and not in vain.

The authority quoted by the plaintiffs' counsel, from 4 *Febrero*, 63, applies only to tutors and curators, who have the monies of their pupils in their hands, for a series of years, and are therefore bound to employ it profitable. The duties of an executor are different, he must collect the debts, pay the legacies, and render his accounts within the year.

Though the testimony of the witnesses does not establish the fact, it is admitted that the note never was collected by Norwood. See Norwood's letter.

It is immaterial how the presumptions are in this case: we have facts on our side sufficient to establish such a want of diligence and care, as will entitle the heirs of Marshall to the balance in the hands of A. L. Duncan.

This court, if it affirms the judgment of the court below, must determine, that an executor, where the heirs of the testator are absent, has powers more unlimited than any other agent, with duties to perform, the neglect of which produces no responsibilities, for, if this be not one, it would be difficult to conceive of a case, in which the want of diligence in an executor has made him responsible.

The counsel for the heirs of Marshall trusts that the judgment of the court *a quo* will be reversed, and that his clients will have judgment in their favour.

Hennen, in reply. Three reasons are alleged to shew that C. Norwood made himself responsible for the note of W. G. Garland :—

1. No protest was made.

2. Four years elapsed before the security was taken.

3. The mortgage was taken in favour of Norwood.

To the first I reply, that no protest was necessary. There was no endorser on the note to be rendered responsible by a protest, and interest was due on the face of the note from its date until final payment, agreeably to the contract made with Garland, by Marshall himself, when he loaned the money. Therefore, nothing could have been gained by a protest. At that period, moreover, protests of promissory notes were not usual. Garland was no merchant, but the sheriff of the territory. And recourse to a suit against him might have been worse than useless.

The second reason will be found, on examination, equally unfounded. Three years, not

East'n District. *Feb.* 1822.

NORWOOD'S EX.'S *vs.* DUNCAN & AL.

four, as the counsel of the defendants has miscalculated, elapsed from the time the note became due, before the mortgage was taken. Had the heirs of Marshall made a demand of the amount of this note from Norwood, during this period, the case would present a different aspect. But no such demand was made; it does not even appear that they were known to exist. No proof has been given that Norwood knew of their abode. How could he then correspond with them? As executor, Norwood was not bound by the Spanish law, which alone governs this case, to settle up his accounts at the end of the year. Having then heard nothing of the heirs for more than three years after he had become executor, are his own heirs now to be rendered responsible for his good intentions in securing the loan made by Marshall to Garland, while it continued to produce an interest for the benefit of those unknown heirs? Were not the views of Norwood more than disinterested in this transaction? Were they not praise-worthy? Could he have possibly obtained the payment of the note when due, the money would have remained at his own disposal during this time, without producing any interest to the heirs. But

it is shewn, by the evidence, that Norwood acted for the best of the interest of the heirs, and without any negligence, up to the time of taking the mortgage; which brings us to the third reason urged by the counsel of the defendants, that Norwood took the mortgage in his own name. But, I think, I have already shewn, in my argument, that this could make no difference. The authority quoted on this point, can have no application to the present case. It would have been decisive in a contest on the nature of the contract between Garland and Norwood. But I cannot comprehend, in what way it shews, that Norwood made himself responsible thereby, to the heirs of Marshall. Surely a commission merchant never rendered himself responsible for the goods of his principal, because he had sold them as his own, and made out a bill of parcels accordingly.

The *onus probandi* in this case, lies upon the heirs of Marshall. It is for them to prove the negligence of Norwood, and establish, by uncontrovertible facts, his liability to their demand. Every presumption is in favour of Norwood, who has returned all the vouchers of the estate into the court of probates. See

East'n District. *Feb.* 1822.

NORWOOD'S EX.'S *vs.* DUNCAN & AL.

testimony of J. Nicholson. And with them the note of Garland; this alone discharged him from all responsibility, except fraud, relative to this debt due by Garland. See the authority quoted from *Curia Phillippica, Illustrada.* Fourteen years have elapsed since this pretended liability occurred. After such an unaccountable delay, this court will require very strong and satisfactory evidence to charge an executor, whose whole conduct has been acknowleged as meritorious in the highest degree.

A fairer case than the present, was never presented to the equity of a court: and I think, no rigid rule of law has been violated in such manner, as to charge the executors of Norwood, with the payment of a sum of money which would beggar his heirs.

PORTER, J. The first of these actions in the order they are above stated, was commenced by the heirs of Marshall against the executors of Charles Norwood, alleging that the said Norwood, was appointed executor of the late William Marshall, of Baton Rouge; that he took upon himself the duties of said trust, and that he had received large sums of money

in that capacity, which he had refused to account for, or pay over.

The defendants answered this demand, by a general denial, and an averment that the sum of $6000 was placed by their testator in the hands of A. L. Duncan, to answer any claim which the plaintiffs might have on it; that no suit had been commenced for this money, and that they are about to bring an action for it.

In pursuance to this intimation, the defendants in the case just stated, filed a petition, in which they stated, that on the 21st of December, 1816, Charles Norwood deposited the sum of $6000, in the hands of A. L. Duncan, for the purposes already mentioned.—That no such balance, as was alleged by the plaintiffs in the first action, was due the heirs of Marshall, and that consequently they were entitled in law, to demand and recover the money above mentioned.

To this the defendant answered. That he received the said sum of money, as attorney in fact, for the heirs of William Marshall, that there is a large sum due to them, that he was never able to procure a settlement with Norwood in his lifetime, nor with the plaintiffs, his executors, since his decease.

East'n District. *Feb.* 1822.

NORWOOD'S EX.'S *vs.* DUNCAN & AL.

By consent of parties, these cases have been consolidated. The statement of facts establishes, that there is a balance due by Norwood, to the heirs of Marshall, of $837 25 cents, and that the defendant Duncan had paid to Norwood, and for him, the sum of $1450; leaving a balance in his hands of $3712 75 cents.

It is in regard to this balance, or the greater part of it, that the dispute has arisen in this case, under the following circumstances:

On the death of Marshall, there was due, and owing to him by one William G. Garland, the sum of $2720, which debt was evidenced by an obligation drawn the 11th of November, 1803, payable one year after date, and bearing interest at the rate of ten per cent. Norwood suffered three years to elapse before he took any steps to recover or secure this demand; at the expiration of that time, he obtained a mortgage to assure the payment of this debt, and a large sum due to himself.—This obligation was taken in his own name, and not as executor.

Garland afterwards became insolvent, and it was discovered that a gross fraud had been committed on Norwood; that the negroes

hypothecated for this demand, had previously, under different names, been mortgaged to other persons.

The district judge decided, that the loss thus sustained, must be borne by the heirs of Marshall. From this decision they have appealed, and now insist that the executor, by not suing for the money, has made himself responsible for the sum due by Garland.

The executors of Norwood, on the other hand, allege, that if he had recovered the money, it would have been his duty to have lent it out on interest, and that he took every precaution to have the claim secured.

It was the duty of the executor, as soon as he had accepted this trust, to diligently fulfil the will of the testator. *Par.* 6, *tit.* 10, *l.* 6. And if no time was fixed, within one year at farthest, after his death. *Ibid.* In this case it is proved, that three elapsed before the executor took a single step to recover the money, or secure it for the heirs. This, in my opinion, was such negligence as makes him responsible for the loss that ultimately happened. Had he used the means which the law enabled him to do, years before Garland failed, there is every probability that

East'n District. *Feb.* 1822.

NORWOOD'S EX.'S *vs.* DUNCAN & AL.

the money would have been secured for the heirs. Nor can I see that he is at all excused by at last taking security that turned out to be of no value.

This may be a hard case, but the law, in my opinion, is against the defendants, and it is our duty so to pronounce it. If a man undertakes an office of kindness, he must discharge the duty faithfully and prudently, otherwise he is responsible for the consequences. *Par.* 5, *tit.* 12, *l.* 20, 34.

I think, therefore, that the judgment of the district court ought to be annulled, avoided and reversed, and that ours should be, that the heirs of Marshall do recover of the defendant, A. L. Duncan, the sum of $3557 25 cents; that the executors of Norwood have judgment against him for the balance of the $6000 deposited in his hands, after deducting the amount of this judgment, in favour of said heirs, and the sum of $1450 paid to C. Norwood, in his lifetime, *viz.* for the sum of $992 75 cents; and that the executors of said Norwood pay costs in both courts.

MARTIN, J. The executor is bound to complete the execution of the will in the year which follows the testator's death, unless that

period be extended. This seems to impose the obligation to collect the debts; or, at all events, to institute suits within that time. For afterwards he cannot sue. In the present case, Norwood not only neglected prosecuting the debtor of the estate during the time of his executorship, but afterwards novated the debt, by joining it to another debt due to himself, and postponing the payment of the aggregate sum to a distant day, securing himself against the consequences of the delay, by taking a mortgage to himself, I think he made the debts his own, and concur in the opinion of my colleague.

MATHEWS, J. I concur likewise.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the heirs of Marshall do recover of the defendant, A. L. Duncan, the sum of $3557 25 cents; that the executor of Norwood have judgment against him for the balance of the $6000 deposited in his hands, after deducting the amount of this judgment, in favour of said heirs, and the sum of $1450 paid to C. Norwood, in his lifetime, *viz.* for the sum of $992

East'n District. *Feb.* 1822.

NORWOOD'S EX.'S *vs.* DUNCAN & AL.

75 cents, and that the executors of Norwood pay costs in both courts.

CHESNEAU'S HEIRS vs. *SADLER.*

The tutor cannot make a compromise respecting the immoveable property of the minor, without a judicial decree which sanctions it.

A contract for the property of persons under age, is absolutely null, if entered into without the formalities which the law prescribes.

When they sue for that property, it is not necessary they should shew they have been injured by the contract.

But if they approve expressly or tacitly of the alienation after they come of age, they cannot afterwards sue for the property.

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. The plaintiffs claim from the defendant a lot of ground, descended to them from their mother, and illegally alienated by their tutor.

The defendant asserts his right to it, under Goodwin, the step-father of the plaintiffs, to whom it was transferred by Girod, their tutor, with other property; in consequence of Goodwin's abandoning his right to a very considerable portion of the estate of his deceased wife, the plaintiff's mother.

He has called in his vendor, who, in turn, has cited Girod the tutor. There was judgment for defendant, and the plaintiffs appealed.

The counsel for the appellees urge, that the judgment is correct, as

1. The alienation was legal.

2. If any of the formalities required by *Par.* 6, 16, 18. had been omitted, the alienation

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would still be legal; as this is one of the cases in which they are not required.

3. The plaintiffs cannot prevail, without shewing they were injured.

4. The defendant has shewn they were benefited.

5. The alienation has been ratified by two of the plaintiffs.

I. The lot now sued for, three slaves and a house, were alienated on consideration of Goodwin's relinquishment of all claims and pretentions, which he might have on the estate of his deceased wife; such as gains, and other rights granted him by her will. This compromise was made by the tutor without any authorization. On the next day he applied to the judge of probates, for the convocation of a family meeting to deliberate on the affairs of the minors. This meeting approved the transaction, and directed the tutor to sell the rest of the property; but their proceedings were not presented to the judge for ratification.

This transfer is contended to be legal, because it was the result of a compromise, and not a sale; and it has been urged, that tutors do not require the authorization of the judge

East'n District. *Feb.* 1822.

CHESNEAU'S HEIRS vs. SADLER.

to enter into contracts of that description. *Feb.* 2, *lib.* 2, *c.* 1, *n.* 85. If we were to give the passage cited by the counsel from this author, the effect which he contends it should have, it appears to me we would destroy the whole policy of our law in relation to minors property. It would follow as a consequence, that the tutor could dispose of all the property of his pupil, without a meeting of the family, without the authority of justice, without any legal solemnities whatever. If he could do all this, the other provisions of the law for the safeguard and protection of persons of a tender age, would be useless, and the benevolence which dictated them completely defeated.

I have not been able to refer to the authorities relied on by *Febrero*. The law of the *Partidas*, 5, 5, 4, which is quoted, does not support the conclusion drawn from it. I apprehend the distinction taken by the plaintiffs' counsel is correct; that this power is to be restrained to moveables of inferior value. *Murillo*, *lib.* 1, *tit.* 36, *n.* 370.

I am more confirmed in this idea, because every book in our law which treats of the subject, lays down the general principle, that im-

moveable property of a minor cannot be alienated, even for indispensable causes, without the authorization of the judge. *Partidas*, 6, 16, 18. *id.* 5, 5, 4. *id.* 3, 18, 60. *Febrero*, 2, *lib.* 1, *cap.* 1, *sec.* 2, *n.* 85, *id. lib.* 3, *cap.* 3, *sec.* 1, *n.* 70. *Alienationem rei immobilis minoris, etiam evidenter ipsi utilem, non valere sine debita solemnitate et judicis decreto. Castillo, lib.* 4, *cap.* 61, *n.* 40, *et seq.* 8 *Martin*, 632.

I do not think therefore, the exception to the general rule has been sustained by the defendant. Indeed, we find other commentators expressly state, that the tutor cannot make a compromise respecting the immoveable property of the minor, without a judicial decree which sanctions it. *Castillo, lib.* 4, *cap.* 61, *n.* 31. As that decree was not given in this case, we must hold the arrangement between Goodwin and the tutor wanting in the formalities which the law requires.

But, it has been contended, that whether the property of a minor is disposed of, with or without the necessary legal solemnities, the contract cannot be set aside, unless it should appear that he has been injured by it, and that proof of this fact is a *sine qua non condition* to obtain restitution.

East'n District. *Feb.* 1822.

CHESNEAU'S HEIRS *vs.* SADLER.

This position has been ably supported.—The counsel principally relies on *Partidas*, 6, 19, 2 & 6, which declares, that he who sues for restitution should prove two things—that he was a minor at the time he entered into the contract, and that he had made it to his damage and injury.

The plaintiffs meet this by saying that the doctrine contended for by defendant, applies only to what is called *restitutio in integrum:* against acts valid in themselves, and has not any relation to the recovery of property alienated without the formalities which the law prescribes.

To this it is replied, that the law of the *Partidas* already referred to, speaks of a sale made by a minor himself, without the assistance of his tutor or curator; that nothing can be more contrary to the dispositions of the law than an act of that description, and that if in the case put, he must prove lesion, much more ought he to be required to prove the injury sustained when he attacks a contract such as this, at which a tutor assisted, and which had the sanction of a family meeting.

This is a concise summary of the arguments on this point.

However difficult it may be to adduce any good reason why different rules were established on this subject, there is no doubt that they exist.

The commentators on the laws of Spain, who treat on the rights of minors to obtain rescission of acts passed during minority, all recognise it. *Febrero* states, that the contracts of persons under age, contain the vice of nullity (*es nula ipso jure*) when the legal solemnities have not been observed, or even when observed, restitution can be had, if the minor suffers lesion, whether the contract is made by himself or under the authority of the tutor. *Febrero*, 2, *cap.* 3, *sec.* 1, *n.* 67 & 83.—In this opinion he is supported by *Castillo*, *Gomez*, *Murillo*, and a variety of other writers, whom they cite in support of the doctrine. *Castillo*, *lib.* 4, *cap.* 61, *n.* 40. *Gomez res.*, *cap.* 14, *n.* 11. *Murillo*, *liv.* 1, *tit.* 41, *n.* 395 & 399.

And on this principle, that the nullity in the one case is absolute, and that the contract must be shewn to be prejudicial in the other; it became necessary when it was *prima facie* good, that the minor should commence suit for restitution *in integrum*; when null on the face of it, by want of the legal solemnities, it

East'n District. *Feb.* 1822.

CHESNEAU'S HEIRS *vs.* SADLER.

was not necessary to resort to that remedy. *Febrero*, 2, *lib.* 3, *cap.* 3, *sec.* 1, *n.* 67, 71, 83.

The same distinction was known to the Roman law. *Dig. liv.* 4, *tit.* 4, *l.* 16, *n.* 3.

Having thus ascertained, that a contract for the property of persons under age, is absolutely null, if entered into without the formalities which the law prescribes; it follows as a consequence, that when they sue for that property, it is not necessary they should shew they have been injured by the contract, because, in truth, as to them, no contract has been made.

It has been pressed on us, that the case put in the *Partidas*, of a minor contracting without the authority of his tutor, being obliged to prove lesion, is a stronger instance of want of form than any other. But by the laws of Spain, a minor above puberty, and not of full age, could contract in his own name. *Par.* 3, *tit.* 18, *l.* 59. And the form of an oath is prescribed in this law, to render the agreement more binding. 8 *Martin*, 631.

I conclude, therefore, that the transfer from Girod, tutor of the plaintiffs, to Goodwin, was illegal and void.

An important question, as to the rights of

the parties in the suit, still remains. That is, whether the plaintiffs have done any act since they arrived at the age of majority which ratifies and confirms this alienation of their property.

For the better understanding of this point, it is necessary to state the facts somewhat in detail.

The plaintiffs' father died in the year 1803, and their mother in 1808. The year preceding her decease, she married Goodwin. During her widowhood she purchased the property now in dispute.

After her death, an inventory was made, and in it was included property purchased during the second marriage, and designated as follows:—"Thirty-six lots of ground, more or less, conformable to a sale made by Gravier to Goodwin."

The mother of the plaintiffs, by last will and testament, gave to her husband the usufruct of one-fifth of all the property owned by her at her death.

Difficulties arose between Girod, tutor of the minor children, and Goodwin, who claimed the usufruct of the property under the will already mentioned: and also a large sum

East'n District. *Feb.* 1822.

CHESNEAU'S HEIRS *vs.* SADLER.

for acquests and gains made during the marriage. This ended in a compromise, by which the tutor conveyed to the step-father the premises now claimed, and he relinquished all his rights on the succession of his late wife, and all his claim for the acquests and gains.

In the year 1812, Girod was removed from the tutorship, and rendered his account to Anfoux, husband of one of the plaintiffs. who was appointed to succeed him; in this account he debits the minors with the thirty-six lots in the Fauxbourg St. Mary. This account was disputed, and it was expressly alleged in the opposition filed, that Girod had no authority to enter into a compromise of the rights of the minors. The court, in giving judgment, reserved to the heirs their rights on this property.

In the month of December, 1818, the plaintiffs made by public act, a partition of the property purchased by Goodwin during marriage. The minor being represented by a curator, and the others, who were of age, by their agents.

On these facts the defendant insists, that as the plaintiffs, who were of full age, have accepted and partaken among themselves, the

property which was relinquished by their step-father, as the consideration for the present lot; they have approved of this alienation, and cannot recover in this suit.

The law on this point, I understand to be, that if the minor, after he comes to the age of majority, expressly ratifies the alienation, or tacitly approves of it, either by suffering the time prescribed for him to commence his action to expire, or by doing acts in conformity with the transfer of his property, that he cannot afterwards claim it. *Febrero, p.* 2, *chap.* 3, *sec.* 1, *n.* 88, 90. Because, in the language of the law, *la voluntad que se deduce del acto, es mas poderosa, que la que consiste en palabras;* the intention which is inferred from the act, is more powerful than that which can be ascertained from words.

I have doubted whether these provisions were intended for cases where the nullity was absolute, but on examination, I am satisfied it applies as well to cases of that description, as to those when the act has been made in the mode prescribed by law, and the defect alleged is lesion. *Febrero, loco citato.*

The plaintiffs have not disputed the law, but insist, that the facts proved in this case,

East'n District. *Feb.* 1822.

CHESNEAU'S HEIRS vs. SADLER.

do not bring them within its provisions, because they had no knowlege, that the property partaken had been given up by Goodwin.

But I do not see how they can urge this with any success. The inventory states the property to be bought by Goodwin; so that the very instrument which informed them that they had any claim to this property, instructed them of the fact now contested. The sale from Gravier to their step-father, was passed before a notary, and remained in his office. The compromise was a public act; the proceedings had before the court of probates was matter of record. Under this proof, the plea of ignorance cannot be maintained.

They further contend, that the lots partaken by them were paid for by notes and obligations belonging to their mother; and that, therefore, they were her proper effects. But the authority referred to, does not support this position. It is only in the case where, during marriage, the proceeds arising from the sale of one immoveable, has been laid out in the purchase of another, that the object last acquired, is considered as belonging to the owner of that which was sold. *Febrero, par.* 2, *lib.* 1, *cap.* 4, *sec.* 1, *n.* 7.

On this point of tacit approbation, I think the whole question may be reduced to this;—could the plaintiffs have legally taken the property purchased by Goodwin during marriage, and divided it, unless they did so in virtue of the compromise entered into by their tutor? I think not. Therefore, in acting as owners of it, we must consider those who were of age, approved of the act by which their tutor acquired the property, and sanctioned the alienation of the lot claimed in the petition, which was given in its place.

As there is not sufficient evidence as to the value of the improvements, nor by whom, nor at what time they were put on the lot, I think the cause ought to be remanded, in order to obtain evidence on that point, and that the question, as to the rents and profits, remain open until those facts are established.

I conclude, therefore, that the judgment of the parish court should be annulled, avoided and reversed, and that the plaintiff, Antoine Chesneau, do recover of the defendant, the one-third of the lot claimed in the petition: and that this cause be remanded, with directions to the parish judge to permit the parties to proceed, in due course of law, to establish

East'n District. *Feb.* 1822.

CHESNEAU'S HEIRS *vs.* SADLER.

the value of the improvements made on the lot of ground sued for, and by whom they were placed there, and that the defendant and appellees pay the costs of this appeal.

MARTIN, J. I concur in this opinion.

MATHEWS, J. So do I.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court should be annulled, avoided and reversed, and that the plaintiffs, Antoine Chesneau, do recover of the defendant, the one-third of the lot claimed in the petition; and that this cause be remanded, with directions to the parish judge to permit the parties to proceed in due course of law, to establish the value of the improvements made on the lot of ground sued for, and by whom they were placed there, and that the defendant and appellees pay the costs of this appeal.

Seghers for the plaintiffs, *Derbigny* for the defendant.

*** The remaining cases of this Term will be continued in next volume.

INDEX

OF

PRINCIPAL MATTERS.

ALIENATION.

To set it aside, fraud in the alienor, knowlege in the alienee, and injury to a third party, must be shewn. *Kenney & al.* vs. *Dow.* . 577

AMENDMENT.

See ATTACHMENT, 2.

APPEAL.

1 It is not necessary that an appeal-bond should be signed by the appellant. *Doane* vs. *Farrow.* 74

2 When the evidence is not taken in open court, it cannot be used on the appeal, without a statement of facts. *Wiltz* vs. *Dufau & al.* 20

3 An appeal lies from the discharge of a rule on the sheriff, to shew cause why he does not release property attached. *Lecesne* vs. *Cottin.* 174

4 The appeal will not be dismissed, because the judge *a quo* has certified that the statement of facts contain a note of the evidence—the court will presume that he meant the evidence. *Dromgoole* vs. *Gardner's widow and heirs.* 433

5 No appeal lies from an order for a special jury. *Hawkins* vs. *Livingston.* . . . 443
6 A party who does not object to a judge's charge, cannot complain of it, on the appeal. *Bayon* vs. *Vavasseur.* 61
7 During the July term, no rehearing will be granted, unless the petition be filed with the clerk, within four days after judgment pronounced. *General rule.* 125
8 If any point not stated in the note be made at the hearing, the opposite counsel may demand four days to answer in writing. . . *id.*
9 The judge *a quo*, after the record comes up, cannot certify facts which make part of the statement. *Mitchel* vs. *Jewell.* . . 645
10 It is not his province to certify what transpires during the trial. *Same case.* . . . *id.*
11 Any admission, which it is important to preserve, must be put on the record. *Same case.* . . . . . *id.*
12 Damages allowed for a frivolous appeal. *Day* vs. *Bookter.* 201
13 When a question of limits depends on matters of fact, a verdict will not be disturbed, if it do not clearly appear contrary to the evidence. *Scott* vs. *Turnbull & al.* . . 335
14 Very strong grounds should be offered to induce the supreme court to disturb a verdict. *Dunn & wife* vs. *Duncan's heirs.* . . 671
15 When the proof is not conclusive, and the supreme court is to decide on which side it preponderates, it must draw such conclu-

sions as are best supported by the evidence produced. *Wooters vs. Thompson.* . 674

16 If, on an issue of fraud, the verdict appears contrary to evidence, the supreme court will remand the cause. *Bayon* vs. *Vavasseur.* 61

17 A paper permitted to be read in the court *a quo*, cannot be objected to on the appeal. *Brown* vs. *Compton.* . . . 425

18 When the evidence is contradictory before the jury, and evidence be admitted not very important in itself, but which may have had influence on their minds, the case will be remanded. *Gaillard* vs. *Anceline.* . 479

19 If evidence appears on the the record, which was not read below, it cannot be noticed on the appeal. *Kenney & al.* vs. *Dow.* . 577

APPRENTICE.

The master may correct him, but not in a wanton or cruel manner. *Mitchell* vs. *Armitage.* 38

ATTACHMENT.

1 A party who claims property attached, and has it delivered on bond, is not accountable for any money which he became bound to pay the defendant, and which he did pay, after executing the bond. *Canfield* vs. *M'Laughlin.* 48

2 A suit on an attachment bond, is not a continuation of the original one, so that the sheriff's return in the former, may be amended during

the pendency of the latter. *Hatton* vs. *Stillwell & al.* 91

3 The garnishee has a right to retain funds attached in his hands, though he did not expressly admit he had any—having neglected to answer. *Lecesne* vs. *Cottin.* . . . 174

4 The garnishee cannot contest the right of the plaintiff. *Hanna's syndics* vs. *Lawring* & *al.* 568

5 In cases of attachment, a prior judgment does not destroy the lien of an anterior seizure. *Carrol* vs. *M'Donogh.* . . . 609

6 The affidavit to obtain an attachment may be sworn to before the deputy clerk. *Kirkman* vs. *Wyer.* 126

7 The want of a citation, in the mode prescribed by law, is a fatal objection to proceeding by attachment. *Stockton* & *al.* vs. *Hasluck* & *al.* 472

See APPEAL, 3.

ATTORNEY.

1 If the attorney of the syndics of an insolvent's estate, stipulate for a fixed sum, he must sue on the contract, and cannot have judgment on a rule. *Seghers* vs. *Hanna's creditors.* 53

2 An attorney suspended for using indecorous language to the court. *Michel de Armas' case.* 123, 158

3 A licensed attorney cannot be called upon for his powers, as a matter of course. *Johnson & al.* vs. *Brandt & al.* . . 638

4 No particular form is required in a letter of at-

torney ; it is sufficient if the principal distinctly expresses his will. *Steer* vs. *Ward & al.* 679

AUCTIONEER.

If A. gives goods to B. to sell, and B. procures an auctioneer to do so, the latter is accountable to B. only. *Hewes* vs. *Lauve.* 21

AUTHORITY.

Payment of a note to a person who has not at the time possession of it, nor any authority to receive its amount, cannot avail ; although he afterwards receive it, with authority to collect its amount. *Welsh* vs. *Brown.* . 310

BAIL.

1 Judgment may be had against the bail, without the suit being formally set down. *Kirkman* vs. *Wyer.* 126

2 The assignment of the bail-bond need not be proved, when the general issue is not pleaded, nor the assignment denied. *Same case.* *id.*

3 There is no need of a prayer for bail in the petition. *Labarre* vs. *Durnford.* . 180

1 A bail-bond taken under the act of 1808, needs not be assigned by the sheriff. *Sompeyrac* vs. *Cable.* 361

5 One taken under the act of 1805, ch. 26, must. *Same case.* . . . . . *id.*

BILL OF EXCHANGE.

1 If the endorser be sued on the protest for non-

acceptance, in order to compel him to give security, and afterwards on the protest for non-payment, on judgment being obtained in the latter suit, the plaintiff cannot recover costs in the former. *Bolton & al.* vs. *Harrod & al.* 115

2 Reasonable notice to the endorser is a mixed question of law and fact. *Spencer* vs. *Stirling.* 88

3 Proof of notice to an endorser is essential to a recovery against him. *Johnson's ex.* vs. *Duncan & al. syndics.* . . . 706

BOND.

1 The sealing and formal delivery of it, is not required by law. *Labarre* vs. *Durnford.* 180

2 The surety on a twelve-months bond, is immediately liable, although the principal died since its execution. *Bynum* vs. *Jackson.* 424

See APPEAL, 1—BAIL, 2, 4 & 5.

BOUNDARY.

If a grant for land, on both sides of a stream, calls for the line of another tract, as its upper boundary, it does not essentially follow that such a line be the limit on both sides of the stream, when the contrary is shewn by proper evidence. *Meaux's heirs* vs. *Breaux.* 364

CONSTITUTIONAL LAW.

1 The constitution began to be binding on the people, and all the officers of government,

as soon as the state was admitted in the union. *Bouthemy & al.* vs. *Dreux & al.* 1

1 Thenceforth, judicial proceedings were to be preserved in the language in which the constitution of the united states is written. *Same case.* . . . . . *ib.*

See INSOLVENT, 5—MINOR, 4.

CONSTRUCTION.

If a clause be susceptible of two constructions, it ought to be taken in that in which it will have some effect, rather than in that in which it will have none. *M'Micken* vs. *Stewart.* 571

CONTRACT.

If A. deliver his boat to B., on his promise to pay two dollars a day, or $200, if she be lost, or he chooses to keep her, the last sum will discharge B.'s obligation at any time before, or on a demand. *Boniol & al.* vs. *Henaire & al.* . . . 357

COURT OF PROBATES.

1 Although the court of probates of the parish and city of New-Orleans, has ordered the execution of a will, any person interested in having it set aside, may bring suit in the district court. *Bouthemy & al.* vs. *Dreux & al.* 1

2 Before the act of 1820, the court of probates had power to decree the exhibition and filing of an executor's accounts, and a *distringas*

was not the proper writ of execution. *Casa novichi & al.* vs. *Debon & al.* . 11

CURATOR.

If one be appointed *ad bona* while all the heirs are present, although the appointment be illegal, he is answerable as their agent. *Ware & wife* vs. *Welsh's heirs.* . . 430

DEPOSITION.

1 A deposition must be reduced to writing by the deponent, the magistrate who receives it, or an indifferent person. *Key's curator* vs. *O'Daniel.* 441

2 It is inadmissible, in the hand-writing of the person who offers it, or of that of his attorney. *Same case.* . . . . *id.*

3 When a commission issues to any magistrate of a county or parish, the official capacity of the person who makes the return, must be shewn, although he subscribes himself a magistrate or justice. *M'Micken* vs. *Stewart.* 571

1 A plaintiff cannot read against two defendants, a deposition taken in a suit against two of them. *Hatton* vs. *Stillwell & al.* . . 91

DOWRY.

When it consists in a sum of money, once to be paid, interest is due from the judicial demand only. *Chamard* vs. *Sibley.* . . 396

EVIDENCE.

1 A defendant sued for giving a pass to the plaintiff's slave, whereby he effected his escape, may

give the freedom of the negro in evidence. *Brown* vs. *Compton*. . . . 425

2 He who alleges a fact must establish it fully; it does not suffice that he render it probable. *Turnbull* vs. *Martin*. . . . 419

3 An invoice accompanying a bill of lading, is not *per se* evidence of the quantity and value of the goods. *Watson & al.* vs. *Yates*. . 687

4 To authorise a party to give in evidence circumstances not immediately connected with the matter in dispute, they must be of such a nature as to produce a fair and reasonable presumption of the fact at issue. *Conrad* vs. *Louisiana bank*. . . . 709

5 A note, neither proven to have the signature of the cashier or president of the bank, or to have been acknowleged by them, cannot be laid before experts, as a piece of comparison. *Same case*. . . . *id.*

6 A witness may be examined, whether the engraving of a note be similar to that of those which are avowedly genuine. *Same case*. *id.*

7 Evidence of the nonage of the defendant, cannot be received, on a motion to discharge him from bail. *David* vs. *Sittig*. . . 607

8 A justice of the peace, after he is out of office, cannot certify proceedings theretofore had before him. *Gaillard* vs. *Anceline*. . 479

See APPEAL, 2—BAIL, 2 & 4—BILL OF EXCHANGE, 2 & 3—INSOLVENT, 17—PROMISSORY NOTE. 1.

EXCEPTION *de non num pec.*

The vendor may not avail himself of it after thirty days. *Lepretre & al.* vs. *Sibley.* . 302

EXECUTOR.

1 In an action for money had and received to his use as such, need not state himself executor. *Hunter* vs. *Postlethwaite.* . . . 456

2 If he does, the defendant cannot contest his capacity. *Same case.* . . . . *id.*

See COURT OF PROBATES, 2.

GARNISHEE.

A garnishee who swears that an illegal attachment has been taken out against him in another state, is not precluded by that declaration from having the proceeding suspended until the result of the first attachment is known. *Carrol* vs. *M'Donogh,* . . 609

See ATTACHMENT, 3 & 4.

INSOLVENT.

1 Creditors, who prove their debts at a meeting, need not renew their proof at a subsequent one. *Seghers* vs. *his creditors.* . . 54

2 A notary cannot certify any thing that happened at a meeting of creditors, otherwise than by a copy of his minutes. *Same case.* . . *id.*

3 With regard to a fact that does not there appear, he must swear. *Same case.* . . *id.*

4 A creditor who was present at a meeting, and did not object to any vote, cannot oppose the homologation of the proceedings, on the

ground, that proper powers were not produced. *Same case.* . . . *id.*

5 A judgment of homologation must, according to the constitution, contain the reasons on which it is grounded. *Same case.* . . *id.*

6 If a debtor cede his goods before judgment be signed, the syndics must be brought in. *Shamburgh* vs. *Torry & al. syndics.* . 178

7 A forced surrender cannot be obtained on the oath of the applicant alone. *Wikoff & al* vs. *Duncan's heirs.* . . . 667

8 An order for a stay of proceedings, and a call of creditors, make them all parties. *Same case.* *id.*

9 Any of them may come in and shew that he is injured by the proceedings. *Same case.* . *id*

10 A payment, out of the ordinary course of business, on the eve of bankruptcy, is void. *Ritchie & al. syndics* vs. *Sands & al. syndics.* . 704

11 The act of 1817, directing the proceedings to be pursued in cases of voluntary surrender, does not govern those which are forced. *Planters' bank & al.* vs. *Lanusse & al.* . 690

12 Syndics must be appointed by the majority of creditors in amount, and if the claim of those offering to vote is disputed, it must be proved, as in ordinary cases, by legal evidence. *Same case.* . . . . *id.*

13 Claims of creditors may be investigated previous to the appointment of syndics. *Same case.* . . . . . *id.*

14 In cases of forced surrender, all the creditors are at once plaintiffs and defendants. *Same case.* . *id*

15 When the amount due to a creditor is disputed, the party opposing it has a right to demand a jury for the trial of the facts at issue. *Same case.* . . . . . *id.*

16 An endorser, who has not paid his endorsee, cannot be permitted to vote at the deliberation of the creditors for syndics. *Same case.* . . . . *id.*

17 The oath of an agent, whose knowlege of the amount due to his principal is derivative, is not legal evidence of the debt. *Same case.* *id.*

18 The regulations provided in case of respite have not any application to voluntary and forced surrenders. *Chiapella* vs. *Lanusse's syndics.* 448

19 The delay created in liquidating the affairs of a bankrupt, does not violate the constitution of the united states. *Same case.* . . *id.*

20 Provisional syndics do not possess the faculty of demanding or resisting payment. *Same case,* . . . . . *id.*

21 If the property of a bankrupt is sold without the formalities prescribed by law, it still remains a property of the estate. *Crum & al.* vs. *Laidlaw & al. syndics.* . . . 468

22 A judgment rendered, but not signed at the time the debtor make a *cessio bonorum*, confers no privilege over other creditors. *Torry & al. syndics* vs. *Shamburgh.* . 23

See ATTORNEY, 1—MORTGAGE, RESPITE, SALE, 5.

INTERROGATORIES.

1 The capacity and signature of a justice of the

peace, to the *jurat* of an answer to interrogatories, is not to be certified, as the record of a court, under the act of congress. *Gitzandener* vs. *Macarty*. . . 70

2 If the defendant do not move to dismiss the suit, for the want of an answer to his interrogatories, he cannot assign it as an error.

LAND.

1 A plat and survey never returned to the proper office does not bind third persons. *Baldwin* vs. *Stafford & al.* . . . 416

2 If there are two titles of equal dignity for the same tract of land, that which is anterior in date will prevail. *Calvit* vs. *Innis*. . 287

See BOUNDARY, MINOR, 1 & 2.

LEASE.

If the lessor, during the lease, divide the house, and underlet one half of it, and after the termination of the lease, the lessor receive one half of the rent from each party, he cannot afterwards charge his original lessee with the whole. *Waters* vs. *Banks*. . 94

LIEN.

On the the failure of the debtor, the creditors cannot resort to property on which they have a lien, till they have discussed the proceeds of the property which was sold, in the hands of the syndics. *Crum & al.* vs. *Laidlow & al. syndics*. . . 466

MARRIAGE.

1 When there is no contract of marriage, the child of a slave belonging to the wife is paraphernal. *Frederic* vs. *Frederic*. . . 188
2 Married persons cannot, during the marriage, make to each other, by an act *inter vivos* or *mortis causa*, any mutual or reciprocal donation. *Same case*. . . . *id.*
3 The widow has a right to mourning dresses out of the succession of her husband. *Same case*. *id.*
4 She has no right to interest on paraphernal property during the year of mourning. *Same case*. . . . . *id.*

MINOR.

1 The formalities which the law has prescribed for the sale of a minor's land, are introduced for his exclusive advantage. *Melançon's heirs* vs. *Duhamel*. . . . 225
2 The purchaser cannot successfully allege the want of them. *Same case*. . . *id.*
3 He cannot resist the payment of the purchase money, on the ground that the inventory and other proceedings preceding the sale, are in the French language. *Same case*. . *id.*
4 The process verbal of the sale of a minor's land, by the parish judge, is valid, although it be reduced to writing in the French language. *Same case*. . . . *id.*

See EVIDENCE, 7—PRESCRIPTION, 3.

MORTGAGE.

A stay of proceedings does not prevent the re-

cord of a mortgage. *Torry & al. syndics* vs. *Shamburgh.* 23

NEW TRIAL.

1 A new trial would not be granted on the late discovery of evidence, to be obtained from the adverse party. *Muirhead* vs. *M'Micken.* 83

2 Whether a party who has not pleaded a release, can have a new trial, on his affidavit, that he has since the trial discovered the means of proving it? *Smith* vs. *Crawford.* . 81

NOTARIAL ACTS.

1 A Spanish notarial instrument, attested by three notaries of the district, and the constitutional alcade, accompanied with the certificate of the American consul, may be received in evidence, or proof of the notary's signature. *Ferrers* vs. *Bosel.* . . . 35

2 A notarial act is not complete till it be signed by all the parties. *Mitenberger* vs. *Cannon.* 85

3 It may be impeached by the subscribing witnesses. *Marie* vs. *Avart's heirs.* . . 25

PARTNERSHIP.

1 A partner has no action against his co-partner, for any sum paid for the partnership, nor any funds placed in it, until a final settlement takes place, and then for the balance only, which appeared due. *Drumgoole* vs. *Gardner's widow and heirs.* . . . 433

2 If a partner sets up an adverse claim, the other may obtain a sequestration. *Johnson & al.* vs. *Brandt & al.* 634

3 If, in a commercial partnership, it be provided, that real estate may be purchased, for the convienency of carrying on trade, and one of the partners purchase upwards of 20,000 arpens, the purchase will not bind the other. *Brookes' syndics* vs. *Hamilton*. . . 285

PRACTICE.

1 A replication admits any new fact set forth in the answer in avoidance of the claim, which it does not deny. *Lewis* vs. *Peytavin*. . 36

2 An assignee may sue in his own name. *Sedwell's assignee* vs. *Moore*. . . . 117

3 If the plea of the general issue be followed by an averment, that the defendant has a better title than the plaintiff, the averment does not control the plea. *Murray* vs. *Boissier*. 293

4 A party who, in order to procure the attendance of a witness, occasions some delay, which might have been avoided by taking his deposition, is not guilty of such laches as prevent his obtaining a continuance. *Lee* vs. *Andrews & al*. 682

5 When the propriety of granting a continuance to a defendant is doubtful, it should be granted. *Same case*. . . . . *id.*

See BAIL, 1 & 2—BILL OF EXCHANGE, RESPITE.

PRESCRIPTION.

1 A party who relies on prescription, must plead it. *Dunbar* vs. *Nichols*. . . . 104

2 The court cannot supply the plea. *Same case*. *id.*

3 The prescription of ten years does not run against a minor. *Calvit* vs. *Innis*. . 287
4 In order that the possessor may unite the possession of his predecessor to his own, it must have been in good faith. *Innis* vs. *Miller & al.* 289
5 It must be continued and uninterrupted. *Same case.* . . . . . *id.*
6 It must be that which he had at the time of the tradition. *Same case.* . . . *id.*

PRISON.

1 The plaintiff may sue the surety on a prison bounds bond, without the principal. *Wood & al.* vs. *Fitz.* 196
2 Even before judgment against the latter. *Same case.* . . . . . *id.*
3 The condition of the bond need not be literally that on the statute. *Same case.* . . *id.*
4 The party cannot object, he was in custody when he signed the bond. *Same case.* . . *id.*
5 The allowance to a debtor, in prison, needs not be made before arrest. *Same case.* *id.*
6 Whether a prisoner in the bounds, may demand it? *Quære.* *Same case.* . . . *id.*

PROMISSORY NOTE.

1 An endorsor may prove an alteration made after the endorsement. *Shamburgh* vs. *Commagere & al.* 18
2 The maker of a note is to be called on at his domicil. *Same case.* . . . *id.*
3 When the maker of a note, dated in New-Or-

leans, resides out of the state, it is sufficient to demand payment at the place where it purports to have been expected. *Hepburn* vs. *Toledano*. 643

See AUTHORITY.

RAPIDES.

1 The limits of the post of Rapides have never been correctly defined by any act of the Spanish government. *Baldwin* vs. *Stafford & al.* 416

2 They must be taken as recognised *de facto* by the officers of Spain, and of the late territory. *Same case.* . . . . . *id.*

RENUNCIATION.

Although the heirs renounce that inheritance, a creditor cannot, without letters of curatorship, obtain an injunction to stay a sale, under a *fi. fa.* issued on a judgment against the executor. *Vienne* vs. *Boissier.* . 359

RESPITE.

When a respite is granted, the stay of proceedings which precedes it, cannot operate as a bar to an action for the breach of the conditions on which the respite was granted. *Ward* vs. *Brandt & al.* 641

SALE.

1 Warranty is of the nature, not of the essence, of the contract of sale. *Bayon* vs. *Vavasseur.* 61

2 If the disease was curable in its origin, though

incurable at the time of the sale, the case is a redhibitory one. *St. Rome* vs. *Poré.* 30

3 If a sheriff sell a run-away slave, without fulfilling the formalities which the law requires, and the slave be recovered from the vendee, the latter may recover damages. *Fleming & ux.* vs. *Lockart.* . . . 305

4 In such a suit, notice of the former need not be proved to have been given him; but he may shew any fact, which his vendee might have availed himself of, in the former suit. *Same case.* . . . . *id.*

5 A vendor cannot have an order of seizure, after the failure of the vendee; but must be paid by the syndics. *Chiapella* vs. *Lanusse's syndics.* 448

See EXCEPTION.

SALVAGE.

The *quantum* of salvage is left to the discretion of the court *a quo*, and the supreme court will not disturb the judgment, when it does not appear that the discretion was improperly exercised. *Chauveau* vs. *Walden.* 100

SEQUESTRATION.

A writ of sequestration is not the proper remedy to compel the appearance of an absent debtor. *Stockton & al.* vs. *Hasluck & al.* . 472

TESTAMENT.

The heir may avail himself of the testator's insanity, although his interdiction was not provoked. *Marie* vs. *Avart's heirs.* 25

WAGES.

1 One who, on his father's death, takes home a destitute younger brother, and occupies him on his farm, is not necessarily bound to pay him wages. *Smith* vs. *Smith.* . . 400

2 Circumstances may however entitle the latter to them. *Same case.* . . . *id.*

WITNESS.

1 A father-in-law is not incapacitated from being a witness. *Bernard & al.* vs. *Vignaud.* . 482

2 It is no objection to the reading of an instrument, that the witness, who proves the party's handwriting (his mother's) was young at the time, that she has been dead long ago, and that he does not well read handwriting. *Wyche* vs. *Wyche.* . . . 402

3 It is the duty of a party objecting to the introduction of a witness, on the ground that he has an interest in the cause, to state what is the nature of that interest. *Bernard & al.* vs. *Vignaud.* . . . 633