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.

Quod ab omnibus, quod semper,
Quod ubique creditum est.
Vincent. Per.

VOL. IX.

BEING VOL. XI. OF THIS REPORTER.

New-Orleans:

PRINTED BY BENJAMIN LEVY & CO

42, Royal-street.

1822

CHRONOLOGICAL

TABLE OF CASES.

EASTERN DISTRICT, FEBRUARY TERM, 1822.*

Girod *vs.* Perroneau's heirs, ... 1
Delery *vs.* Mornet, ... 4
Chretien *vs.* Theard, ... 11

MARCH.

Weimprender's syndics *vs.* Weimprender & al. . 17
Prevosty *vs.* Nichols, ... 21
Vidal *vs.* Thompson, ... 23
Bryan & wife *vs.* Moore's heirs, ... 26
Shreve *vs.* his creditors, ... 30
Baldwin *vs.* Preston, ... 32
State *vs.* Orleans Navigation Company, . . 38
Robertson *vs.* Lucas, ... 187
Bradford *vs.* Wilson, ... 188
Nicholls *vs.* Roland, ... 190
Bethmont *vs.* Davis, ... 195
Barry *vs.* Louisiana Insurance Company, . . 202
Mager *vs.* Louisiana Insurance Company, . . 205
Dame *vs.* Gass, ... *id.*
Sanchez & wife *vs.* Gonzales, ... 207
Arnold *vs.* Bureau, ... 213

* Continued from the preceding volume.

APRIL.

Bradford's heirs *vs.* Brown, ... 217
Girod *vs.* Perroneau's heirs, ... 224
Day *vs.* Eastburn & al. 232
Ferrer *vs.* Bofil, ... 234
Ritchie & al. syndics *vs.* White & al. . . . 239
Marie Louise *vs.* Cauchoix, ... 243
Gray *vs.* Trafton, ... 246
Fortin *vs.* Randolph, ... 268
Hanna's syndics *vs.* Loring, ... 276
Millaudon *vs.* New-Orleans Water Company, . 278
Richards & al. *vs.* Louisiana Insurance Company, . 281
Jackson *vs.* Larche, ... 284
Harrod & al. *vs.* Norris' heirs, ... 297
Fleming *vs.* Conrad, ... 301
Aubry & wife *vs.* Folse & wife, . . . 306

MAY.

State *vs.* Orleans Navigation Company, . . 309
Ward *vs.* Brandt & al. syndics, ... 331
Carpentier *vs.* Harrod & al. 433
Etzberger *vs.* Menard, ... 434
Jenkins *vs.* Nelson's syndics, ... 437
Beebe *vs.* Armstrong, ... 440
Westover & al. *vs.* Aimé & wife, . . . 443
Daigre *vs.* Richard, ... 449
Canonge *vs.* Cauchoix, ... 452
Lombard *vs.* Guilliot & wife, ... 453
Norris' heirs *vs.* Ogden's executors, . . . 455
Lafarge *vs.* Morgan & al. 462
Preval *vs.* Moulon, ... 530
Montillet *vs.* Duncan, ... 534

State *vs.* Judge Pitot, ... 535
Penrice *vs.* Crothwaite & al. 537
Flogny *vs.* Adams, ... 547
Harrod & al. *vs.* Paxton, ... 549
Girod *vs.* Perroneau's heirs, ... 552
De Armas & wife *vs.* Hampton, ... *id.*
Croghan *vs.* Conrad, ... 555
Daunoy *vs.* Clyma & al. 557
Walsh *vs.* Collins, ... 558
Hennen *vs.* Munroe, ... 579
Millaudon *vs.* New-Orleans Insurance Company, . 602
Dufour *vs.* Camfranc, ... 607

JUNE.*

Johnson *vs.* Crocker, ... 617
Mayor, &c. *vs.* Gravier, ... 620
Barry *vs.* Louisiana Insurance Company, . . 630
Reano *vs.* Mager, ... 636
Vavasseur *vs.* Bayon, ... 639
Copelly *vs.* Deverges, ... 641
Dufour *vs.* Camfranc, ... 675
——— *vs.* Delacroix, ... 718
——— *vs.* Delacroix, ... 719
Duverney *vs.* Vinot, ... 722
Morris *vs.* Eves, ... 730

* Continued in next volume.

ALPHABETICAL.

TABLE OF CASES.

Adams *ads.* Flogny, *Judgment,* - - 547
Armstrong *ads.* Beebe, *Transfer,* - - 440
Arnold *vs.* Bureau, *Partnership,* - - 213
Aubry & wife *vs.* Folse & wife, *Adjudication,* 306
Aimé & wife *ads.* Westover & al. *Absentee,* - 443

Baldwin *vs.* Preston, *Attorney,* . - 32
Barry *vs.* Louisiana Insurance Company, *Remanding,* 202
——— *vs.* ——— *Barratry, evidence,* 630
Bayon *ads.* Vavasseur, *Pleading,* - - 639
Beebe *vs.* Armstrong, *Transfer,* - - 440
Bethmont *vs.* Davis, *Servant,* - - - 195
Bofil *ads.* Ferrer, *Testimony, executor,* - - 234
Bradford *vs.* Wilson, *Fraud,* - - - 188
Bradford's heirs *vs.* Brown, *Sale,* - - 217
Brandt & al. syndics *ads.* Ward - - - 331
Brown *ads.* Bradford's heirs, *Sale,* - - - 217
Bryan & wife *vs.* Moore's heirs, *Pleading, distribution,* 26
Bureau *ads.* Arnold, *Partnership,* - - 213

Camfranc *ads.* Dufour, *Alienation.* - - 607
——— *ads.* ——— *Sheriff's sale,* - - 675
Canonge *vs.* Cauchoix, *Notice,* - - - 452
Carpentier *vs.* Harrod & al., *Appeal,* - - 433
Cauchoix *ads.* Canonge, *Notice,* - - - 452

Cauchoix *ads.* Marie Louise, *Private act, parish judge,* 243
Chretien *vs.* Theard, *Rescission,* - - - 11
Clyma & al. *ads.* Daunoy, *Evidence, error,* - 557
Collins *ads.* Walsh, *Costs, rent,* - - 558
Copelly *vs.* Duverges, *Fraud, delivery,* - . 641
Conrad *ads.* Croghan, *Special mortgage,* - 555
——— *ads.* Fleming, *Return, petition, judgment by default,* - - - 301
Creditors *ads.* Shreve, *Insolvent,* - - 30
Crocker *ads.* Johnson, *Evidence,* - - - 617
Croghan *vs.* Conrad, *Special mortgage,* - - 555
Crothwaite & al. *ads.* Penrice, *Bail, appeal,* 537

Dame *vs.* Gass, *Appeal,* - - - 205
Daigre *vs.* Richard, *Evidence,* - - - 449
Davis *ads.* Bethmont, *Servant,* - - - 195
Daunoy *vs.* Clyma & al. *Evidence, error,* - - 557
Day *vs.* Eastburn & al. *Appeal,* - - - 232
De Armas & wife *vs.* Hampton, *Marriage contract,* 552
Delacroix *ads.* Dufour, *Evidence,* - - 718
——————— *Testimony,* - - - 719
Delery *vs.* Mornet, *Slave,* - - - - 4
Duverges *ads.* Copelly, *Fraud, delivery,* - - 641
Dufour *vs.* Camfranc, *Alienation,* - - 607
——— *vs.* ---------- *Sheriff's sale,* - - 675
——— *vs.* Delacroix, *Evidence,* - - 718
——— *vs.* ---------- *Testimony,* - - 719
Duverney *vs.* Vinot, *Extortion,* - - - 722
Duncan *ads.* Montillet, *Notice,* - - - 534

Eastburn & al. *ads.* Day, *Appeal,* - - - 232
Eves *ads.* Morris, *Insolvent, discharge,* - - 730
Etzberger *vs.* Menard, *Joint and several bond,* - 434

Ferrer *vs.* Bofil, *Testimony, executor,* - - 234
Fleming *vs.* Conrad, *Return, petition, judgment by default,* - - - - 301
Flogny *vs.* Adams, *Judgment,* - - - 547
Folse & wife *ads.* Aubry & wife, *Adjudication,* - 306
Fortin *vs.* Randolph, *Appeal,* - - - 268

Gass *ads.* Dame, *Appeal,* - - - 205
Girod *vs.* Perroneaus' heirs, *Certificate,* 1, 224, 552
Gonzales *ads.* Sanchez & wife, *New trial, possession,* 207
Gray *vs.* Trafton, *Attachment,* - - - 246
Gravier *ads.* Mayor, &c. *Corporation, appeal,* - 620
Guilliot & wife *ads.* Lombard, *Feme covert,* - 453

Hampton *ads.* De Armas & wife, *Marriage contract.* 552
Hanna's syndics, *vs.* Loring, *Attachment,* - 276
Harrod & al. *vs.* Norris' heirs, *Executor* - 297
——— *ads.* Carpentier, *Appeal,* - - 433
——— *vs.* Paxton, *Executor,* - - - 549
Hennen *vs.* Munroe, *Master of vessel,* - - 579

Jackson *vs.* Larche, *Injunction,* - - 284
Jenkins *vs.* Nelsons' syndics, *Building contract,* 437
Johnson *vs.* Crocker, *Evidence,* - - 617

Lafarge *vs.* Morgan & al., *Deposit,* - - 462
Larche *ads.* Jackson, *Injunction,* - - 284
Lombard *vs.* Guilliot & wife, *Feme covert,* - 453
Loring *ads.* Hanna's syndics, *Attachment,* - 276
Louisana Insurance company *ads.* Barry, *Remanding,* 202
——— *Evidence, barratry,* 630
——— Mager, *Testimony,* 205
——— Richard, *Remanding,* 281
Lucas *ads.* Robertson, *Remanding,* - - 187

Mager *vs.* Louisiana Insurance Company, *Testimony*, 205
——— *ads.* Reano, *Factor*, - - - 636
Marie Louise *vs.* Cauchoix, *Private act, parish judge*, 243
Mayor, &c. *vs.* Gravier, *Corporation, appeal*, - 620
Menard *ads.* Etzberger, *Joint and several bond*, 434
Millaudon *vs.* New-Orleans Insurance Co., *Barratry*, 602
——————————— Water Co., *Insolvent*, 278
Montillet *ads.* Duncan, *Notice*, - - 534
Morgan & al. *ads.* Lafarge, *Deposit*, - - 462
Moore's heirs *ads.* Bryan & wife, *Pleading, distribution*, - - - - - 26
Mornet *ads.* Delery, *Slave*, - - - 4
Morris *vs.* Eves, *Insolvent, discharge*, - - 730
Moulon *ads.* Preval, *Syndics*,, - - - 530
Munroe *ads.* Hennen, *Master of vessel*, - - 579

Nelson's syndics *ads.* Jenkins, *Building contract*, 437
New-Orleans Insurance Co. *ads.* Millaudon, *Barratry*, 602
——————— Water Company *ads.* Millaudon, *Insolvent*, - - - - - 278
Norris' heirs *ads.* Harrod & al., *Executor*, - 297
——————— *vs.* Ogden's executors, *Partnership*, 455
Nichols *vs.* Roland, *Bailment, slave*, - - 190
——— *ads.* Prevosty, *Evidence*, - - 21
Ogden's ex.'s *ads.* Norris' heirs, *Partnership*, - 455
Orleans Navigation Co. *ads.* State, *Scire facias*, 38, 309

Paxton *ads.* Harrod & al., *Executor*, - - 549
Penrice *vs.* Crothwaite & al., *Bail, appeal*, - 537
Perroneau's heirs *ads.* Girod, *Certificate*, 1, 224, 552
Pitot, Judge, *ads.* State, *Mandamus*, . - 535
Preston *ads.* Baldwin, *Attorney*, - - 32

Preval *vs.* Moulon, *Syndics*, - - - 530
Prevosty *vs.* Nichols, *Evidence*, - - - 21

Randolph *ads.* Fortin, *Appeal*, - - 268
Reano *vs.* Mager, *Factor*, - - - 636
Richard *ads.* Daigre, *Evidence*, - - 449
Richards *&* al. *vs.* Louisiana Insurance Company, *Remanding*, - - - 281
Ritchie *&* al. syndics *vs.* White *&* al., *Insolvent*, 239
Robertson *vs.* Lucas, *Remanding*, - - 187
Roland *ads.* Nichols, *Bailment, slave*, - 190

Sanchez *&* wife *vs.* Gonzales, *New trial, possession*, 207
State *vs.* Orleans Navigation Co., *Scire facias*, 38, 309
——— Pitot, Judge, *Mandamus*, - - 535
Shreve *vs.* his creditors, *Insolvent*, - - 30

Theard *ads.* Chretien, *Rescission*, - - 11
Thompson *ads.* Vidal, *Affidavit, lex loci, jury*, 23
Trafton *ads.* Gray, *Attachment*, - - 246

Vavasseur *vs.* Bayon, *Pleading*, - - 639
Vidal *vs.* Thompson, *Affidavit, lex loci, jury*, - 23
Vinot *ads.* Duverney, *Parish judge*, - - 722

Walsh *vs.* Collins, *Costs, rent*. - - - 558
Ward *vs.* Brandt *&* al. syndics, *Insolvent*, - 331
Weimprender's syndics *vs.* Weimprender *&* al., *Surrender*, - - - - 17
Westover *&* al. *vs.* Aimé & wife, *Absentee*, . 443
White & al. *ads.* Ritchie & al. syndics, *Insolvent*, 239
Wilson *ads.* Bradford, *Fraud*, - . - 188

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, FEBRUARY TERM, 1822.*

GIROD vs. *PERRONEAU'S HEIRS.*

APPEAL from the court of the first district.

PORTER, J. Judgment was rendered in this cause, on the 24th day of October, 1820; on the 15th of the same month, in the year 1821, the judge of the district court certified the record in the following manner—"that the foregoing record contains all the facts upon which the case was tried, in the first instance, as well as I now can say, except the record of the proceedings in the case of *Azaritto* vs. *Labiche*, which were, I believe, made a part." It is objected, that this certificate does not comply with the requisitions of the law on this subject.

If nearly a year after the trial of a cause, the judge certify, that the record contains all the facts upon which the trial was had, *as well as he can now say*, the certificate will not enable the supreme court to examine the case.

* Continued from the preceding volume.

East'n District. *Feb.* 1822.

GIROD *vs.* PERRONEAU'S HEIRS.

This court has held, in the case of *Kimbal* vs. *Franklin*, 5 *Martin*, 666, that under the act of 1817 (regulating the practice of our courts) when the matters on which the cause was tried, in the first instance, consisted of written documents; the judge might certify, at any time in his discretion, as long as his memory served him.

This case is clearly distinguishable from that just cited. The judge does not certify that the case was tried on written documents alone, and of course, we cannot judicially know that it was so tried. Again, he does not state, positively, the record contains all the facts. He goes no further than to declare, that as well as he now can say, it does contain them all.

It has been urged, that if he had given a certificate in the most positive terms, it would only have been to the best of his recollection. But in this position, I cannot agree with the counsel; if the judge took, as it is presumed he often does, notes of the documents offered on the trial, he could know as well six months after judgment, as before, on what evidence it was tried. The very language too, which the judge uses, shews that he doubted—the ex-

pressions are, "as well as I now can say,"— if he then is not sure it contains all the matters submitted to him, how can this court be certain of it?

However severely the decision may operate, I think we must dismiss the appeal. It does not appear that the cause was tried on written documents; and when it does not, the judge has no right to certify after judgment. If it was tried on written documents, the certificate is not positive, and the result must be the same. 9 *Martin*, 91. We have (as it was pressed we should) surely a wish, to make our judgments promote, and enforce justice between the parties litigating; but we must never lose sight of the limitation within which we can indulge that desire;—that they should be in obedience to law.

I think the appeal should be dismissed with costs.

MARTIN, J. I dissented from the opinion of the court in *Franklin* vs. *Kimbal & al.* I still think that it requires almost as perfect a recollection of the facts of a case, to certify that all the evidence appears on the record, as to state that evidence: and if the decision of

East'n District. *Feb.* 1822.

GIROD *vs.* PERRONEAU'S HEIRS.

that case is to be followed, it ought not to be extended to cases in which the judge qualifies his certificate, as in the present. The appeal ought to be dismissed.

MATHEWS, J. I am still so fully satisfied with the decision of the court, in the case cited, that I concur entirely in the opinion as delivered by judge Porter.

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

Cuvillier for the plaintiff, *Porter* for the defendants.

DELERY vs. *MORNET.*

It is no defence, in a suit on the part of the *Black Code*, which forbids the sale of spirituous liquors to slaves &c., that the defendant did not know the negro to be a slave.

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

PORTER, J. This action was instituted in virtue of the 24th section of the *Black Code*, (1 *Martin's Dig.* 622) which enacts that "intoxicating liquors shall not be sold to slaves, without a written permission from their master. and declares that any person violating that provision shall incur a penalty; and moreover, be answerable to the owner for

" all damages which the master may suffer in consequence thereof."

The petition alleges, that the defendant did, in violation of this law, sell to the slave Jasmin, spirituous liquors, that by the use of them he became intoxicated, and that in consequence of said intoxication, he was drowned.

The defendant denied that he was liable, by reason of the allegations in the petition, and concluded his answer, by putting the plaintiff on the strict proof of every thing necessary to support his action.

There was judgment against him, and he has appealed.

The defence has been presented to us in argument under the following divisions:—

1. That it is not proved that the illegal act complained of was done knowingly, by the defendant.

2. That the evidence does not prove that the slave became intoxicated at the house of the defendant, and in consequence of the spirituous liquors he drank there.

3. That the damages suffered by the master, must be the direct and immediate consequence of the intoxication of the slave, and that in the present instance, the evidence does not establish that fact.

East'n District. *Feb.* 1822.

DELERY *vs* MORNET.

I. The evidence proves clearly that the defendant sold liquor to the slave of the plaintiff, and this is sufficient to throw the burthen of proof on the defendant, that the act was done innocently. Were we to require that the master, in an action of this kind, should prove that the seller of liquor knew the individual to whom he sold it was a slave; we would require evidence, that from the nature of the transaction, it is impossible in many cases he could give, and defeat entirely the object of the statute. The general rule is, that the burthen of proof lies on the person who has to support his case by proof of a fact, of which he is supposed to be cognizant. *Phillip's Evidence, edit.* 1820, 150.

II. The principal witness swears, that he embarked at the market-house in a pirogue, with the slave Jasmin, and some other negroes; that they (the negroes) were sober when they set off, that when they came opposite the defendant's residence they put to shore, went into his house, purchased liquor, drank it, remained there a quarter of an hour, and that they began to quarrel and fight as soon as they re-embarked: that Jasmir was

drunk, and that a short time after he was drowned. This proof is satisfactory to my mind, as it appears to have been to that of the judge who tried the cause, that the intoxication of the slave proceeded from the liquors procured and drank at the defendant's shop.

The third and last point is the only one which has presented any difficulty. The defendant insists that the death of the slave was not the direct consequence of the intoxication, but resulted from the act of a third party threatening to flog him.

On this head the evidence is as follows :—

J. Soule, the witness who embarked in the pirogue with the slave Jasmin, swears, that after they left the shop of the defendant, and embarked on board the pirogue, the negroes began to quarrel, and finally to fight: that one of them fell twice into the river: that he (the deponent) finding his situation a dangerous one, called for help from a boat he saw at some distance, and that a Mr. Lartigue came to his assistance, and brought the pirogue to land. When they got on shore, Mr. Lartigue observed that he would give them a flogging, and then they would behave them-

East'n District. *Feb.* 1822.

DELERY *vs.* MORNET.

selves. On hearing this, Jasmin jumped into the river, the witness jumped after him, but was unable to save his life. Another of the negroes, who was also drunk, immediately endeavoured to drown himself, but was prevented.

Lartigue confirms this testimony, except that his declaration to the negroes was, that if they did not behave themselves he would correct them.

This evidence shews, in a most striking point of view, the consequences that result from violating a wise and salutary law, which is founded alike on a regard for the interests of the master and slave. And the judgment of this court can only enable the defendant to discharge one of the responsibilities which he has incurred by this transgression. The defence which he sets up, cannot, in my opinion, be sustained. The bad conduct of the negroes in the boat, was the result of his act: the necessity of approaching Lartigue was caused by it: and the justifiable threat of correction arose from the intoxication of the slaves, which we have already seen proceeded from a fault of the defendant.

The case cited from *Taunton's Reports* is not law here, and the reasons given by the judges, who decided it are not satisfactory. It appears very strange that a man should be excused from the consequences of illegally frightening the horse of a traveller, because the driver was not skilful; when it is clear there would not have existed a necessity for exercising skill, had it not been for the act of the defendant, and but for that act, no damage would have been sustained.

In the well known case of the throwing of a squib, which was picked up and thrown by two other persons before it committed the injury on the plaintiff, it was held that the first thrower was responsible—that the new direction and force flowed out of the first force, and was not a new trespass. So here the act of Lartigue directly flowed from the original fault of the defendant, was occasioned by it, and must be considered as making a part of it.

I think that the plaintiff has made out his case, under the law cited at the commencement of this opinion, and that the judgment of the parish court should be affirmed with costs.

East'n District. *Feb.* 1822.

DELERY *vs.* MORNET.

MARTIN, J. Nothing can be clearer than the position, that a person who, in this state, deals with a black man, exposes himself in case of his being a slave, to all the consequences which follow the dealing with a slave; the presumption being, that a black man is a slave; as by far the greatest proportion of persons of that colour are, in this state, held in slavery. There would be no possibility of punishing illegal acts relating to that species of property, if the knowlege of the actual slavery of the negro was essentially to be proven in the trespasser.

The liquor which intoxicated the slave, having been furnished him in the defendant's shop, he must be answerable for the consequences.

It is clear that the spirituous liquor which the plaintiff's slave obtained there, was the cause of his intoxication; as it appears in evidence, that he proceeded from the shop to the boat, and that a short time after he fell in the water and was drowned.

It appears to me, that the drowning was the immediate consequence of the supply of spirits procured in the defendant's shop, he must, of course, abide the consequence. I concur in judge Porter's opinion.

MATHEWS, J. I concur with my colleagues.

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

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

CHRETIEN vs. *THEARD.*

APPEAL from the court of the first district.

In an action to obtain rescission of the sale of a slave, commenced within six months from the time of discovering the defects, the plaintiff must prove at what time he obtained a knowlege of the redhibitory vices.

PORTER, J. This action was commenced to obtain rescission of the sale of a negro slave, called La Fortune, sold as a carpenter and joiner, for the price of $1500. It is alleged that he is neither; and in addition, afflicted with redhibitory defects of disposition, a drunkard, run-away and thief.

Prescription and a general denial are plead by the defendant.

The district court gave judgment against the plaintiff, and he has appealed.

The first question to be examined is that, which the exception, as to the time of commencing the action presents.

The slave was sold on the 3d April, 1819. This suit was commenced on the 14th February, 1820.

East'n District. *Feb.* 1822.

CHRETIEN *vs.* THEARD.

The plaintiff replied to the plea of prescription, plead by the defendant; that he brought his action within six months from the discovery of the vices and defects complained of in the petition.

It has been strongly contested between the parties in this cause, on whom the burthen of proof lies—the plaintiff insisting that he cannot be required to prove a negative, *viz.* that he did not know of the existence of the defect anterior to a particular time; while the defendant urges, that this plea of the appellant is an exception to the general rule, which requires the action to be brought within six months from the date of the sale, and that he who relies on an exception must establish it. *Partida* 3, *tit.* 14, *l.* 2.

I have given to this subject a good deal of consideration, and my opinion is with the defendant. By our *Civil Code*, 358, *art.* 75, it is sufficient for the seller of a slave afflicted with redhibitory defects, to oppose to the action, that it has not been commenced within six months from the sale. And on shewing this fact, the plaintiff will be barred, unless he does away the objection, by replying that he did not discover the vices or defects six

months before instituting suit. As he makes the averment, I think it is his duty to prove it. Certainly I do not wish to say that the buyer must give evidence he did not know of the defect before a certain time; because that would be requiring him to prove a negative, which is impossible. But I think he should establish, when the facts came to his knowledge, on which he relies to shew his right of setting aside the sale. And this he can do without difficulty; for the witnesses who prove the vices on the trial, can easily state when they communicated them to the plaintiff. If he has received the knowlege of what the witnesses knew, and would swear through other sources, he could bring forward those who gave him this information. The moment he does this, he brings himself within the exception, and if the vendor still insists the purchaser knew of the vice at an earlier period, the burthen of proof is then thrown on him; for the buyer can do nothing more than shew affirmatively that at a certain epoch he became acquainted with the fact—he cannot prove a negative, that he did not know it sooner.

The passage cited by the plaintiff from the *Curia Phillippica*, *Redhibitoria*, *n.* 26, is cer-

East'n District. *Feb.* 1822.

CHRETIEN *vs.* THEARD.

tainly very strong, but I cannot alone, on that authority, bring my mind to assent to the proposition, that it is the duty of the defendant to support by proof, what it behoves the plaintiff to allege.

If, in this case, the plaintiff had proved any circumstance, within the six months, respecting the theft, I should have held it sufficient to have thrown the burthen of proof on the defendant, as to his knowing it sooner. But on this point, the testimony is entirely defective. The slave was bought in April. There is evidence when the master returned to the Attakapas, but none as to the time the slave was sent there; of course, we have no means of ascertaining when he committed the theft, proved by one of the witnesses. All we know is, that it was after he reached his master's plantation.

In regard to the defect of the qualities of carpenter and joiner, the plaintiff has proved enough to shew that his action was commenced within the time required by law. But on the merits the evidence is so contradictory, that I do not feel myself authorised to come to a different conclusion in regard to it, from the district judge.

The judgment of the district court should be reversed, and, in my opinion, the justice of the case requires, that there should be judgment for the defendant, as in case of a non-suit, and that the plaintiff pay costs in both courts.

MARTIN, J. I cannot yield to the opinion of the author of the *Curia Phillippica.* The authorities which he cites, do not support his conclusion.

The defendant pleaded prescription, and the question is, who is to administer the proof of the period at which the knowlege of the redhibitory defects reached the vendee? I think we ought to require from the party who can give it. If he allege that he had it not at the time of sale, as it is clear that he had it at the time of the inception of the suit, it cannot be difficult for him, at least, to state at what intermediate period, and by what means the knowlege came to him. If he establishes any particular period—*stabit presumptio donec contrarium probetur.* If the adverse party does not shew knowlege at an earlier period, the prescription will be supported.

This repels the plaintiff's claim to rescis-

East'n District. *Feb.* 1822.

CHRETIEN *vs.* THEARD.

sion on the score of the slave being a thief; as to the other grounds I think the evidence is too weak.

The judgement ought to be reversed, and ours should be a judgment of non-suit.

MATHEWS, J. I am of the same 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, as in case of non-suit, and that the plaintiff pay costs in both courts.

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

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, MARCH TERM, 1822.

East'n District
March, 1822.

WEIMPRENDER'S SYNDICS vs. *WEIMPRENDER & AL.*

WEIMPRENDER'S SYNDICS *vs.* WEIMPRENDER & AL.

APPEAL from the court of the first district.

A forced surrender cannot be ordered, unless the party alleged to be a bankrupt, is made defendant and cited as in ordinary cases.

PORTER, J. To the petition in this case, the defendants have filed a special plea, denying the right of the plaintiffs to sue.

The plaintiffs allege, that they are the syndics of George Weimprender, and the proceedings had in the suit of St. Avid and others against said Weimprender, for a forced surrender, have been produced in evidence, to shew that they are such.

The first question to be ascertained from the evidence thus offered is, whether the person against whom those proceedings were had, has been legally declared a bankrupt; if he has not, the plaintiffs cannot be his syndics.

East'n District. *March*, 1822.

WEIMPRENDER'S SYNDICS *vs.* WEIMPRENDER & AL.

The petition is in the usual form, and prays that a forced surrender of the property of Weimprender's father may be decreed, for the benefit of his creditors. But it contains no demand that the insolvent may be made defendant, and cited. Nor does it appear that any citation was served on him.

We are of opinion that a forced surrender cannot be ordered, unless the party alleged to be a bankrupt, is made defendant, and cited as in ordinary civil actions. If this process is necessary in any case, and the law requires it in all others, we think it is of the first importance that it should not be dispensed with where a remedy of this kind is asked, which deprives a citizen of the possession of the whole of his property.

Such would be the determination of this court on general principles. But the law on this subject has furnished us with higher authority than any deductions of ours. According to a provision of the *Partida* 3, *tit.* 7, *ley.* 1, *in princ.* citation is the root and foundation of every suit. The Spanish authors say, it is required by natural as well as positive law, and is the basis on which every judgment must rest. *Curia Phillippica, p.* 1, *sec.* 12.

Citation, *n.* 1, 2. 2 *Febrero*, *p.* 2, *lib.* 3, *cap.* 1, *sec.* 3, *n.* 129, and that no authority, whether of the king or the law, can dispense with it, or render valid those proceedings which want it.

It was urged in argument, that this was a proceeding in *rem*. But no authority was produced in support of this position. To us it appears, that a petition against an insolvent, for a forced surrender, is a personal action to obtain his property. An action given to creditors, in consequence of certain facts being established in relation to the conduct of the person who owes them, or his capacity to meet his engagements. If the debtor then is deeply interested in the measures thus taken against him (as it must be admitted he is) if his reputation and his property may be both sacrificed by an improper exercise of the right vested in the creditor, surely every means of defence should be afforded for his protection, which are assured to him in any other case by the law and the constitution.

It was next urged, that this defect is cured, because it appears that the insolvent had notice of the proceedings. But this, in our opinion, is not sufficient. In an ordinary case

East'n District. *March*, 1822.

WEIMPRENDER'S SYNDICS *vs.* WEIMPRENDER & AL.

it would not cure want of citation, to shew that the defendant knew there was a suit pending against him. We had occasion to give this subject a very ample consideration in the case of *Dyson* vs. *Brandt & al.* 9 *Martin.* 497, and we there held, that appearing in court, pleading, and contesting the cause on other grounds than the want of citation, cured a similar defect to that which exists here. In the present case, the insolvent has not done any one of these acts.

Nor did the defendants acknowlege the authority of the present syndics, in the suit of *St. Avid & others* vs. *Weimprender.* In that case the provisional syndic seized a crop of sugar. A claim was filed on the part of M. G. and B. Weimprender, asserting the property to be theirs, and that Montegut had seized it, as belonging to their father. This was nothing more than a necessary averment, according to the truth of the case, and cannot be taken as an acknowlegement that any of the proceedings were legal.

The judgment of the district court should be annulled, avoided and reversed, and judgment, as in case of a non-suit, be given for the defendants, with costs in both courts.

East'n District, *March*, 1822.

WEIMPRENDER'S SYNDICS vs. WEIMPRENDER & AL.

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 defendants, as in case of non-suit, with costs in both courts.

Hennen and *Denis* for the plaintiffs, *Duncan* and *Eustis* for the defendants.

PREVOSTY vs. *NICHOLS.*

APPEAL from the court of the fourth district.

Where a defendant, in the course of the transaction on which the action is founded, has acted with the plaintiff as possessing a certain character, and acknowleged the title by virtue of which he sues, this is *prima facie* evidence that he is entitled to sue; and if he is not, the burthen of proof is then thrown on the defendant.

PORTER, J. This is an action to recover the value of services rendered as a physician. It is objected by the defendant, that the plaintiff has not produced a license authorising him to practise physic.

We are of opinion, that where a defendant, in the course of the transaction on which the action is founded, has acted with the plaintiff as possessing a certain character, and acknowleged the title by virtue of which he sues, this is *prima facie* evidence that he is

---

* MARTIN, J. did not sit in this case, having been of counsel in it.

East'n District. *March*, 1822.

PREVOSTY *vs.* NICHOLS.

entitled to sue; and if he is not, the burthen of proof is then thrown on the defendant.—*Phillip's Evidence*, 171, (edit. 1820.) In the present case, it is clearly established that the plaintiff was employed as a physician, and frequently admitted to be such by defendant, and his agents; we therefore think the objection taken to the defendant's right to maintain this action, has not been sustained.

On the merits, the testimony is contradictory. The weight of it is, perhaps, against the conclusions which the jury has drawn; but it does not so preponderate on that side as to permit us to disturb the verdict.

The judgment of the district court should be affirmed with costs.

MARTIN, J. I concur.

MATHEWS, J. I do also.

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

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

VIDAL vs. *THOMPSON.*

East'n District.
March, 1822.

VIDAL
vs.
THOMPSON.

APPEAL from the court of the fourth distrct.

MARTIN, J. delivered the opinion of the court.* This case is before the court on three bills of exceptions, to the opinion of the court.

1. In refusing to discharge the bail of the defendant, on the ground that the affidavit of the plaintiff, for the purpose of obtaining bail, was not annexed to the original, but to a supplemental petition.

The affidavit necessary to hold the defendant to bail, may be annexed to a supplemental as well as to an original petition

2. In directing the jury that the general principle of the law of nations, " that a person is considered, as having contracted, in that place in which he bound himself to pay, or perform his obligation, (as laid down in 2 *Huber. Pre.* 6, 1, *t.* 3) was repealed by the *Civil Code*, 4, *art.* 10."

Wherever the obligation be contracted, the performance must be according to the laws of the place where it is to take place.

3. In denying a new trial, on the defendant's affidavit, that the jury were not summoned legally; a circumstance which did not come to his knowlege till after the trial.

Objections to the legality of the summons of the jury, are too late after their verdict is recorded.

11m 23
47 523

I. We think the district court was correct in holding, that the affidavit necessary to hold

* PORTER, J. was absent through indisposition when this case was argued.

By a late act of the assembly, that which required the separate opinion of each judge, in every case, is repealed

East'n District. *March*, 1822.

VIDAL *vs.* THOMPSON.

the defendant to bail, may be annexed to a supplemental as well as to an original petition. The law has made no distinction; it suffices that it be filed with the petition. We have held, that interrogatories may be filed with a supplemental petition.

II. I do not see, that the part of the *Civil Code* quoted affects the principle cited by *Huberus*. He means to say, that wherever the obligation be contracted, the performance must be according to the laws of the place where it is to take place. For example, that the days of grace, allowed in certain places, are to be reckoned according to the laws and usages of the place, in which the bill is to be paid, not of the place where it is drawn.

The *Civil Code*, in the part quoted, provides only, that " the form and force of acts and written instruments depend on the laws and usages of the places where they are passed or executed."

We see nothing contradictory in the two propositions; both may well stand together. An instrument, as to its form and the formalities attending its execution, must be tested by the laws of the place where it is made; but the laws and usages of the place where the obli-

gation of which it is evidence, is to be fulfilled, must regulate the performance. A bill, drawn out of London, must be paid at the expiration of the days of grace, which the laws and usages of that place recognise, but need not have those stamps which are by law required on a bill drawn there.

We think the district court erred in this instance.

III. It was correct in disallowing the new trial, on the allegation that the jury were not properly drawn out. The objection came too late after the verdict was received and recorded.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the cause be remanded for trial, with directions to the judge not to charge the jury—that the principle, that a person is considered as having contracted in the place, in which he bound himself to pay or perform his obligation, is repealed by the part of the *Civil Code* quoted; and the costs of the appeal are to be paid by the plaintiff.

Duncan for plaintiff, *Delachaise* for defendant.

East'n District. *March*, 1822.

BRYAN & WIFE vs. MOORE'S HRS.

BRYAN & WIFE vs. *MOORE'S HEIRS.*

APPEAL from the court of the third district.

If a party mistate his right, in the petition, but offers evidence, which clearly establish it, and the opposite party does not object to the evidence, the error is cured.

MATHEWS, J. delivered the opinion of the court. This action was instituted in the court of probates of the parish of Feliciana, on the part of Mrs. Bryan, to obtain a partition of the estate of Moore, her former husband, of which she claims one half as heir. The capacity in which she may be entitled to any part of the property left by her former husband, at his decease, is clearly mistaken in the petition for partition. But, as the parties have proceeded in the investigation of their rights, with reference to the true capacity in which she ought to have alleged her claim, it is considered by this court, that it would be unjust now to dismiss the suit, especially as this exception has never been made in any stage of the pleadings, and as the mistake in the allegation may be waved or cured by the evidence in the case, according to the 10th *law* of the 17th *tit.* and 4th *book* of the *Novissima Recopilacion*, already recognised in the case of *Canfield & al.* vs. *M'Laughlin.*

Property within the state must be distributed, according to its laws, unless it be shewn that the court is bound to give effect to those of another county.

11 m. 26
16 1380

11 m. 26
49 189

The heirs of Moore being dissatisfied with the judgment of the court of probates, took the cause up by appeal to the district court.

wherein the judgment was reversed; and Bryan and wife being, in turn, dissatisfied with the judgment of the latter court, appealed.

To supply a statement of facts, we are by consent of parties, referred to the facts assumed by the judge of the probate court, in the opinion by him pronounced, and to the testimony of J. Gray, which comes up with the record. From these sources of information, we discover that Moore intermarried with the plaintiff in the Mississippi territory; that they both had, at the time of said marriage, property, consisting principally of slaves; that the husband had more than the wife; that they purchased a landed estate in the state of Louisiana, and removed to it; which they afterwards sold, and bought another; which was also sold; that Moore died out of this state; but that all the property, the half of which is now claimed by the appellees, as belonging to the community of acquets and gains, according to the provisions of our laws, is found within the jurisdiction of this state.

Every marriage, according to our laws, superinduces, of right, partnership, or community of acquets and gains. *Civil Code*, 336,

East'n District. *March*, 1822.

BRYAN & WIFE *vs.* MOORE'S HRS.

art. 63. And at the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possess, are presumed common acquets or gains, unless they satisfactorily prove which of said effects they brought in marriage, or have been given them separately, or they have respectively inherited. *Id. art.* 67.

The whole estate, of which a partition is claimed by the present suit, being within the jurisdiction of the state of Louisiana, must be distributed as directed by its laws, unless the evidence shew clearly that the court ought to give effect to the laws of some other state, and unless that law be proven, as foreign laws are required to be, and establishes rules different on the subject from the *lex fori*. There is not a fact established (except the marriage of Moore, and the plaintiff, having taken place in the Mississippi territory) which has the least tendency to impede a full operation of our laws on the case. But we are not able to perceive, in what manner this circumstance can change the situation of the parties, in relation to property acquired in this state, and found on the dissolution of the marriage, still under the control of its laws.

There is nothing in the evidence which proves, that any of the effects which were possessed by the husband and wife, are the separate property of either, as having been brought in marriage, or acquired by a particular title, which would exclude them from the community of gains. In a word, there is nothing in the whole case, which can take it from the government of the law of this state; according to which, it is evident, that the whole estate must be considered as common property of the husband and wife, and distributed accordingly.

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, with directions to the judge of probates to proceed to a partition of the estate, according to the laws of this state, and that the appellees pay the costs in the district court and the costs of this appeal.

Eustis and *Colt* for the plaintiffs. *Duncan* for the defendants.

East'n District.
March, 1822.

SHREVE
vs.
HIS CREDITORS

SHREVE vs. *HIS CREDITORS.*

APPEAL from the court of the first district.

The act of 1817 (relating to insolvents) does not deprive persons who have not a year's residence of any right which they had before.

MARTIN, J. delivered the opinion of the court. It does not appear that the act of 1817, deprives the applicant of any right which he had to avoid imprisonment by a surrender of his property. It is true, he is precluded from claiming any benefit of this act, by its 39th section; as he has not a year's residence in the state. But we cannot conclude, that from the sole declaration of the legislature (that persons, who have not resided one year in the state are not to enjoy the benefits of this act) they are to be considered as deprived of a right which another act gives them.

The act has no repealing clause. It provides in the first section, that every individual, not yet imprisoned for debt, may avoid imprisonment, by surrendering all his estate; provided the surrender be made *bona fide* and without fraud, agreeably to the formalities prescribed by this act.

The second section, and the following, detail the formalities which every one who shall wish to avail himself of the benefits of this act is to follow, and the nature of the

relief which a compliance with these formalities will give him a right to.

It is foreign to the question before us, whether a person, whose residence entitles him to avail himself of the benefit of the new act, is deprived by it from claiming the like benefit (or one of a similar nature) which the new act presents, if he had before, any other legal mode of acquiring it. But admitting, that as to such a person, the former law is repealed by implication, because the act of 1817, and the one which provided the like relief before, cannot stand together; it does not follow, that a person who, for want of residence, cannot avail himself of the new mode of relief, who is mentioned in the act, or the only part of it which declares this incapacity, is necessarily to be considered as bereft of the right which he had before to the former mode of relief, under another act.

Admitting that it is inconsistent, that persons who have the residence required, should avail themselves of the former act, and so it cannot stand with the latter as to them, which consequently repeals it; the same conclusion does not follow as to those, whose want of residence incapacitates them from availing

East'n District. *March*, 1822.

SHREVE *vs.* HIS CREDITORS

themselves of the new law, which, in our view of the question, cannot as to them, affect the old one.

If a statute declares, that larceny shall be punished by thirty or more lashes, and another be made, declaring that the punishment of larceny shall be five-and-twenty lashes, the former is repealed: for both cannot stand together; but if, by a clause of the latter, slaves are declared not to be within it, surely the former statute, though repealed as to free persons, will remain in force as to slaves.

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

Duncan for the plaintiff, *Livermore* for the defendants.

BALDWIN vs. *PRESTON.*

An attorney who undertakes to collect a debt out of the state, and makes his agent known, is not liable for any accident which happens in consequence of the agent's death.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiff charges, that in March, 1820, the defendant received from him a check on the bank of Kentucky, for collec-

tion; that he has collected its amount, and refuses to pay it over.

The defendant answered, that in March, 1820, he received from the plaintiff, a check of the bank of Orleans, on that of Kentucky, for six hundred dollars, for collection; that he advised the plaintiff, who authorised the money to be obtained from the bank of Orleans, that this could not be done; whereupon the defendant was requested to send the check to Kentucky for collection; that he therefore forwarded it to William Preston, a person of good character, to whom the defendant entrusted his own business, and who was named to, and approved by the plaintiff; that the defendant heard nothing from Wm. Preston for a considerable time, when said William wrote that sickness had hitherto prevented his attention to the collection of the check; that he was on his way to Virginia, would collect the money and deposit it in the bank at Frankfort, which was done; that the defendant sent his own check to Charles W. Taylor, to receive and forward the money; but as it was deposited in William Preston's name, the check was not paid: that said William is since dead, and the money

East'n District. *March*, 1822.

BALDWIN *vs.* PRESTON.

still remains in the bank at Frankfort; that the original check being payable in Kentucky bank notes, and such notes having been received and deposited by William Preston; the defendant, in order to stop the unfounded complaints of the plaintiff, contracted for notes of the bank of Kentucky, and offered to pay in such notes, or to procure them.

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

Fitzhugh, a witness for the defendant, deposed, that he believes the late William Preston received in March or April, 1820, for collection, the check mentioned in the petition: that the cashier of the bank of Kentucky told him, that such a check was handed into the bank by W. Preston, with directions to pay the amount to his or A. Gales' order. The witness knew William Preston; he bore a good character, and was trust-worthy. He was much indisposed, and unable to attend to business in the summer of 1820. The witness saw the entry on the books of the bank, relative to the check; the money is still there in deposit. William Preston went to Virginia, and the witness believes

he died in the winter of 1820 or 1821.— The witness has seen the defendant's letter and check, to Charles W. Taylor, who was directed to apply the proceeds to the payment of some land in Indiana. The cashier of the bank told witness, that the money was not paid to Taylor, because it was deposited in Wm. Preston's name. It is still in the bank. The bank of Kentucky stopped specie payment in January, 1820. If specie could be recovered from the bank of Kentucky, on the check, the witness believes it could on its notes. The money was still deposited in the bank on the first of this month.

Bingey deposed, that the plaintiff informed him he was desirous of being informed of the proper mode of collecting a check of the bank of Orleans, on that of Kentucky; and the witness recommended to him to employ the defendant, and the plaintiff afterwards informed him that he had done so, and the defendant had sent the check to William Preston, in Kentucky.

E. Allen deposed, that A. Gales, to whom the check, from the bank of Orleans, was originally payable, owed her about $400, and she was to be paid out of the proceeds of the

East'n District. *March*, 1822.

BALDWIN *vs.* PRESTON.

check; the plaintiff informed her, he had employed the defendant to collect the amount of the check, and that the defendant had sent it to Wm. Preston. The plaintiff lately told her the defendant offered to pay in Kentucky notes, which the witness declined receiving.

The cashier of the bank of Orleans deposed, that about a year ago, the defendant presented a check of that bank, on that of Kentucky, originally payable to A. Gales, then in the possession of the plaintiff. Payment was refused, as it had not been returned within a reasonable time, having been drawn 18 months before—about ten days before, the same check was presented by the plaintiff, who said payment had been refused in Kentucky, on the ground of a check of the same amount having been paid, but he believed the reason was, they did not wish to pay specie. The bank of Kentucky continued to pay specie for about a year after the check was drawn; but a few months before the plaintiff presented the check in New-Orleans, it was known there, that the bank of Kentucky had ceased to pay specie. With a great deal of trouble Kentucky notes might be disposed of at three per cent. discount.

The plaintiff admitted on record, that the check, in the petition was, on presentation, by William Preston, carried to his credit, and that the money is still in deposit there.

The plaintiff was aware that the defendant did not undertake to collect the amount of the note himself, and the agent, he employed for that purpose, was known to the plaintiff. Untoward circumstances, not within the control of the defendant, have prevented the money from coming into his hands. It is true, he made an unsuccessful attempt to obtain it, with the view of its being applied to his own concerns. This he might lawfully do, and the moment the money would have been in his agent's hands (Taylor's) he would have been accountable to the plaintiff. In this, however, he has failed, and it is admitted, that the money is still deposited in the Kentucky bank, as William Preston left it. Surely the defendant has been guilty of no latches, of no improper conduct, and the plaintiff ought not to recover.

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

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

East'n District.
March, 1822.

THE STATE
vs.
ORLEANS NAV. COMPANY.

THE STATE vs. *THE ORLEANS NAVIGATION COMPANY.*

APPEAL from the court of the first district.

See the judgment at a succeeding term.

Preston, for the state. The defendants appear to treat this cause with contempt. It seems as if they condescended to the formality of appearing here, only to see us condemned. I know the court will entertain a different disposition; a disposition to regard this suit as the serious complaint of a great many poor people, who in their hearts believe, that an exorbitant tax is exacted from them without the authority of law.

I must ask for the patience of the court, and think I have a right to expect it, because the case now to be decided, is one of no ordinary importance. The bayou St. John is the natural highway to market, of a cotton country, two hundred miles in length and breadth. It costs that country one-fourth as much to transport their cotton across lake Ponchartrain (a distance of thirty miles) as across the Atlantic. The cause is, the exorbitant tonnage duty exacted from the vessels of transportation.

The planters, within fifty miles of Madison-

ville, compelled by such an exaction, are beginning to send their cotton to Mobile.— I lately read, with astonishment, in a New-York paper, a report of the commerce of that city, with this country, during the last year. Sixteen thousand bales of cotton were reported to have been imported from Mobile, and but the same quantity from New-Orleans. Nearly as many vessels were advertised for that port as for this. But for the tonnage duty exacted by the Navigation Company, almost the whole of that cotton would have been sold here, those vessels would have been advertised for this port. To enrich about thirty individuals, our cotton merchants are sacrificed, the prosperity of our city is sacrificed, our sources of wealth are driven from their natural channels.

But for the tonnage-duty paid the Navigation Company, lake Ponchartrain would be covered with wealth and industry; it is now navigated but by a few schooners, the owners and commanders of which are condemned to poverty. I know a single schooner, of 30 tons, which paid the company fifteen hundred dollars the last year. A steam-boat was lately introduced on the lake, to the incalculable

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

convenience of the thousands who annually cross. She offered to compromise her tonnage duty with the company, at two thousand dollars a year; they refused, and she was driven from the lake. It seems as if the avarice of the company emulated the folly of him who killed his goose, that laid golden eggs, to get them all at once.

The distress in which the duty has involved a large portion of our citizens, on the other side of the lake, is incredible to those who have not seen it with their own eyes. All the profits of their labour, which ought to feed and clothe their children are swallowed up by the company.

There is not a man or woman in this city who is not tributary to the company. Our eggs and butter at breakfast, our meats at dinner are dearer, because there is not a vessel which transports them to market that is not taxed. Fire wood is but two dollars a cord on the bank at Madisonville, (almost within sight of this hall in a clear day) it is seven dollars at the basin.

If this state of things is sanctioned by law we must submit, we must shut our ears to the complaints which every breeze wafts from

the Floridas, Alabama and Mississippi, until legislative omnipotence affords relief. Such a state of things, no doubt, was intended by those who granted the charter, more perhaps for their own benefit than the public weal. But it often pleases a good God to confound those rulers who use power for their own emolument, and to protect the oppressed by the blindness of their oppressors. We will see if we may not thank God for such protection on the present occasion.

The object of the present proceeding is, to enquire into the constitutional validity of the charter of the Orleans Navigation Company. The company are required by the state, to shew by what authority they claim to be a corporation, and to exact tolls from the citizens of this state, and other persons navigating the waters of the bayou St. John and canal Carondelet. They answer that on the 4th day of March, 1804, an act was passed by the congress of the united states, entitled, "an act erecting Louisiana into two territories, and providing for the temporary government thereof;" that by virtue of the powers granted by the 4th section of said act, the governor and legislative council of the territory of Orleans

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

did, on the 3d day of July, 1805, enact a law, entitled, "an act for improving the navigation of the territory of Orleans," which act organised the company, and gave them the powers and privileges which they claim and exercise.

The first enquiry which this answer presents, is this, where did congress derive the power of "providing for the government of the Louisiana territory?" For, if congress have no power to govern the territories of the united states, their acts for the government thereof are null. In the first grade of territorial government (which is the government in question) the people of the territory are not represented in the congress which governs them. Congress provides for their government, not a legislature of their choice, but a governor and legislative council appointed by the president of the united states. The government is imposed on the governed, without their consent; there exists no relation between them and the government, but obedience on their part, and power on the part of the government. If congress possess this power, they derive it from the constitution of the united states, because they were created by that constitution.

In ascertaining whether the constitution of the united states has given the power in question to congress, it will assist us to reflect on the circumstances of the country prior to the formation of the constitution, and the character of the men who formed it; for the constitution was but the result of that character, applied to those circumstances. Our ancestors had just terminated the war of independence. The great object of that war, and which enveloped all other considerations, was to resist the pretention of Great Britain to govern us, as her colonies or territories, by laws imposed *without our* consent. Our bill of rights was the declaration of war. That instrument sanctified these principles, "that governments derive their just powers from the consent of the governed"—that "the right of representation, is inestimable to the people, and formidable to tyrants only;" it denounced, as an intolerable grievance, that "the government of Great Britain had imposed taxes upon us without our consent, and had declared itself invested with power to legislate for us, in all cases whatsoever." To combat these pretentions, to establish these rights, our ancestors struggled through a war of seven years, cha-

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

racterised on our side, by sufferings rarely experienced, even in revolutions. It almost literally covered the land with the blood of our fathers, and the tears of our mothers. At the close of that war, the selectest patriots who conducted it, assembled to form a constitution for the government of the people. Is it credible that they established, for the government of our colonies or territories, the very government which Great Britain had exercised over us as her colonies, the same tyranny *they* had combated, and to which they had, by their example, instructed men to die rather than submit? If it be found in the constitution, in words that cannot be mistaken, I must yield. But, at the same time, I would cynically regard all pretentions to patriotism as hypocrisy, and all men as equal tyrants, when they have equal power. And if the patriots of the revolution denounced the character of George the third, as *marked by every act which may define a tyrant;* I would denounce George Washington (God forgive the irreverence) in the same manner. But I will prove that the patriots who reared our conititution, did not engraft, on that tree of liberty, a germ of despotism.

I look in vain for any clause in the consti-

tution, authorising congress to "provide for the government of the territories of the united states." They are empowered to exercise legislative powers over a territory ten miles square, established as the seat of government, and over places purchased for forts, magazines, arsenals, dock-yards, and other needful buildings; but this is the constitutional extent of their legislative powers, except, on national subjects. The government of the territories is a *casus omissus* in the constitution. In the magnitude and multiplicity of their concerns, that subject did not occur to the convention. If they had formed a perfect constitution, providing for every case, they would have been gods and not men. They provided a mode of amending its imperfections, of which, the failure to provide for the government of our territories, is one.

The only clause in the constitution of the united states, which gives coloring to the exercise of the power in question, is in the following words, "congress shall have power to dispose of, and make all needful rules and regulations respecting the territory, or other property belonging to the united states." The terms and spirit of this clause, relate to pro-

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

perty alone, and not to people. Congress have power to dispose of what? Of people? No, but of territory. They are authorised to make all needful rules and regulations respecting the territory, *or* other property. The copulation of territory with other property, by the connective *or*, shews that property alone was meant by territory, and not people. If the convention had intended to grant to congress legislative powers over the people of the territories, they would have used the terms contained in the 16th power of congress, "to exercise exclusive legislative powers in all cases whatsoever," over the place selected as the seat of government. The use of such ample terms where legislative powers are granted, excludes the idea that they were intended to be granted where no such terms are used.

If the convention had intended to give congress the power to dispose of the life and fortune of a single citizen, they would have said so in unambiguous terms, they would not have left the subject doubtful with regard to all the people of all our territories. I am supported in my opinion, with regard to this clause of the constitution, by the construction of cotempora-

neous writers. *Federalist, v.* 1, 286. *Tucker's Blackstone, vol.* 1, *part* 1, *appendix*, 283.

Congress have power "to make all laws which shall be necessary and proper for carrying into execution the powers vested in the government of the united states." But, is a law providing for the government of the people of the territories of the united states, *necessary and proper* for carrying into execution the power "to dispose of and make all needful rules and regulations with regard to the territory, or other property of the united states?" No one can pretend it; they are different and unconnected subjects of legislation. The power granted by the constitution, is to administer and dispose of property; the power claimed and exercised by congress, is that of governing people in all the relations of social life. The one power has no relation to, or connexion with the other.

Is the power to govern the territories of the united states a necessary and proper incident of the power to make treaties? Then the president and senate of the united states should have governed Louisiana, and not congress. Is it a necessary and proper incident

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

of the power to declare war? But Louisiana was not acquired by conquest, and surely the exercise of the incidental power cannot exist, without the exercise of the power to which it is incident. Is it a power necessarily incidental to severeignty? But the sovereignty of congress is restricted; "the powers not delegated to the united states by the constitution, nor prohibited by it, to the states, are reserved to the states respectively, or, to the people." Now, in that constitution, no man, not determined to find it, can discover the delegation to the united states of power to provide for the internal government of the people of the territories of the united states. It is therefore reserved to the people.

The consequences of the decision, that congress have no power to govern the territories of the united states, will be pressed on the court as a strong argument against it. The argument *ab inconvenienti* can have no weight in a question strictly of constitutional law. The constitution must stand until every thing else falls. It is the anchor on which every man in America has cabled his life, his liberty, his fortune and his hopes, and woe be to him who parts a strand of the cable. But he,

who reflects, will see all the evil consequences in the exercise of that power. The case before the court is a signal example. A part of the people of our state are subjected to an exorbitant, interminable tax, to which they never consented by a representative in congress, because they had none, and which was not imposed by a local legislature of their choice, but by a governor and thirteen inhabitants of Louisiana, selected by the president of the united states; a tax, which must necessarily create a monied aristocracy of those who enjoy it, because they are allowed fifty per cent per annum, on their capital for ever; and as necessarily condemn the subjects of it, and their children's children, to plebian poverty.

If I am asked how are our territories to be governed, it is not material to my argument to answer the question; but the answer is obvious—by the will of the people—because "the power is reserved to the people." Nothing is easier, in the humblest state of society, than for the people to organize a republican government, appoint their legislative, judicial and executive officers, and in every respect exercise and submit to a government of the people. This is the only government consist-

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

ent with the principles of liberty, and the spirit of our constitution; its letter authorises no other. The exercise of government, over our territories, by the congress of the united states, is therefore an unconstitutional usurpation of power. The consequence is, that the acts of congress, in the exercise of that power, are unconstitutional and void. Under one of these acts, the defendants claim their existence as a corporation, and the privileges we contest. The act itself must fall, and with it the superstructure they have built upon it.

But if I am wrong, and the people of the united states have delegated to congress the power to govern the territories of the united states, I maintain, in the next place, that congress cannot delegate that power to a sublegislative body. The constitution of the united states declares, that "all legislative power shall be *vested* in a congress of the united states." This *vested power* cannot be transferred by congress. Legislative power, in its nature, is not transferable. The people have consented to obey laws enacted by their representatives alone, and not by any other body. The people have authorised congress to declare war: can congress, without their au-

thority, delegate this power to any other legislative body? Congress are impowered to impose taxes, to provide for calling out the militia of the united states; could congress delegate these powers to the governor and legislative council of the Michigan territory? And would the state of New York collect a tax, or the governors of the different states move their militia, under the authority of laws passed by the legislature of that territory? In the case of the heirs of the late governor Claiborne, against the police jury of the parish of Orleans, this court intimated their opinion, that legislative power could not be delegated. 7 *Mart. Rep.* 5, 6, 7. Many years ago it was contemplated to establish a local legislation for the district of Columbia, but the opinion that congress could not delegate the powers intrusted to them, prevailed, and the project was abandoned. 1 *Blackstone, vol.* 1, *p.* 277 & 8, *appendix.* In fact, it is a legal and political maxim, *delegatus non potest delegare.* Congress could not therefore delegate their powers to the governor and legislative council of the territory of Orleans, and the acts of that body, in the pretended exercise of such delegated powers, are nullities.

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

But, if I admit that congress had the powers in question, and could delegate them, at all events, those powers could be exercised only in conformity to the constitution of the united states, not in violation of it. By the 9th section of the company's charter, a tonnage duty of one dollar per ton is imposed upon every vessel passing in or out of the bayou St. John; and under this authority, the company exact a tonnage duty from the vessels of all the different states in the union, entering the port of the bayou St. John. But, says our constitution, "no preference shall be given by any regulation of commerce or revenue, to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another." *Const. U. S. art.* 1, *sec.* 9, *n.* 5. This article of the constitution expressly prohibits congress, and (a *fortiori*) those to whom congress delegate their powers, from imposing duties on the vessels of one state bound to the ports of another state; and from giving in any manner, a preference to the ports of one state over those of another. And yet, in direct opposition to this provision in the constitution, it is pretended, that congress possessed the power,

and have granted it, through a sublegislature, to the Navigation Company, to exact duties from vessels bound from the other states of the union to this state; and to give a preference to the port of the bayou St. John. over all other ports in the union, by imposing duties upon vessels entering it, which are not imposed upon vessels entering any other port in the union.

To avoid the force of the argument derived from this clause of the constitution, the defendants have exerted every effort to prove that the bayou St. John was not a navigable stream at the period of the organization of the Navigation Company; from whence they would conclude (to meet our argument) that the bayou St. John was not a port, and that vessels could not be bound to or from it at that period. The company are estopped by their charter, from maintaining that the bayou St. John was not a navigable stream at the time it was granted. For the very clause, authorising them to demand a tonnage duty provides. that they may demand it when they shall have improved the navigation of the bayou, so as to admit such and such vessels. That cannot be improved which does not exist. If no na-

East'n District. *March*, 1842.

THE STATE *vs.* ORLEANS NAV. COMPANY.

vigable stream existed there, one might be made, but could not be improved. And in fact, all their testimony tended to prove the melioration and improvement of that navigation, not its non-existence.

The only definition I can conceive of a navigable water, is that which is and may be used for navigation. The navigation may be difficult and interrupted, on account of winds, logs, or bars, but if the water be habitually used for navigation, it is a navigable water. Let us test the navigation of the bayou St. John, at and before the organization of the Navigation Company, by this definition. It is matter of history, that the first settlers of Louisiana entered the country through the bayou St. John, and the first settlements were made there. In 1699, Bienville came from Dauphin island to the bayou St. John, and as tradition says, eat his first dinner in Louisiana, on the island Bienville, so much spoken of in the testimony. The memory of Gillaume Benite serves him forty years ago, at which time small schooners navigated the bayou. At and before the epoch in question, (1805) all the witnesses concur, that from forty to fifty schooners navigated lake Ponchartrain;

they traded from the bayou St. John to Galvestown, Springfield, Tchefoncta, La Comba, Bonfaca, the bay of St. Louis, Mobile, Pensacola, and Apalachicola. From these places they brought to New-Orleans, wood, tar, pitch, lime, provisions, and other productions of the country, and received merchandise in return. Those vessels experienced more difficulty from the bar outside of the bayou, some distance in the body of the lake (certainly a navigable water) than in the bayou itself. The water on the bar, at ordinary tides, was about thirty inches deep; the passage was difficult, and large vessels were discharged and re-loaded in passing over. In high tides they sailed up to the bridge, with their cargoes on board, and even to the basin. Those tides are produced by the winds from one half of the horizon; and those winds prevail particularly in the fall, winter, and spring, when the navigation of the bayou is needed for commerce. The southern winds, which produce low tides, prevail in the summer, when the vessels are laid up for want of employment. Pierre Baum, with a schooner drawing three feet water, always unloaded at the basin. Vincent Rillieux's schooner, which

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

was still larger, sailed into the basin after the company had been organized, but before they had improved the canal. He is certain of the time, because he brought wood for the forts, under the orders of general Wilkinson. All the schooners trading on the lake, ordinarily moored at the bayou bridge, unloaded and received their cargoes there. Vessels were there constructed, repaired and fitted out for sea. They were sometimes indeed, detained for days at the bar in lake Ponchartrain, but ordinarily voyages were as regular then as at present. José Picheraca, a witness for the company, testifies, that the Spanish government fitted out a military expidition, in vessels, which sailed from the bridge. the Baron Carondelet ordered him, as a king's pilot, to bring a Spanish gun-boat into the bayou, which was done. The testimony then establishes incontestibly, the navigableness of the bayou St. John, at the period of the organization of the company. The imposition therefore, of a duty on the vessels of other states entering it, was and is, an open manifest violation of the article of the constitution of the united states, which I have quoted.

The bayou St. John was also a port of the

united states. It was expressly constituted such by act of congress, a year before the organization of the Navigation Company, see *Dig. Laws of the United States, vol. 3, p. 571.* The preference therefore given for or against this port, by the imposition of duties on vessels entering it, which are not imposed on vessels entering the ports of Boston, New-York or Philadelphia, is in direct opposition to the same article of the constitution of the united states.

Again, congress have power "to lay and collect taxes, duties, imposts, and excises;" but the very clause of the constitution which gives them that power, prescribes, that "all duties, imposts, and excises, shall be uniform throughout the united states." Under this article of the constitution, congress can impose a general, uniform duty on all vessels entering all the navigable waters and ports of the united states. But they are expressly prohibited from imposing a duty upon vessels entering one navigable stream, or port, which is not equally imposed upon all vessels, entering all other navigable streams or ports. The duty of tonnage imposed by the governor and legislative council of the territory of Orleans.

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

under the authority of congress, on vessels entering the bayou St. John, is not a uniform duty throughout the united states. It is imposed particularly and exclusively on vessels entering that bayou, and extends to vessels entering no other water of the united states. It is therefore an unconstitutional duty. In fact, it is of the very spirit of our government, that congress should act upon national subjects, and draw upon the purse of the nation, to effect the objects of their legislation. They cannot tax particular individuals, or sections of the country, for particular purposes.

I have so far contested the *authority of congress* to impose the tonnage duty in question. But, if congress possessed the power, and could delegate it to a sublegislature, the next question is, did congress delegate it to the governor and legislative council of the territory of Orleans? They delegated "legislative powers to said body, to extend to all rightful subjects of legislation; but no law was to be valid which was inconsistent with the constitution and laws of the united states; and the said body was expressly prohibited from exercising power over the primary disposal of the soil of the united states." *Vol.* 3.

Dig. Laws of the U. S. p. 604. Now I shall endeavour to shew that the powers granted by the governor and legislative council, to the Orleans Navigation Company, were not "right ful subjects of legislation;" that they were "inconsistent with the constitution and laws of the united states," and that, "*the soil of the united states* was *primarily disposed of*" to said company.

In granting their charter to the Orleans Navigation Company, the governor and legislative council of the territory of Orleans, so far as they disposed of the navigation of the bayou St. John, and the soil of the united states, did not legislate upon s rightful subject of legislation. On this part of the controversy, I maintain, that the bayou St. John was the public and common property of the united states, free for the use of all the citizens thereof; that the use of it could not be alienated by congress, and *a fortiori* could not by the territory of Orleans.

The bayou St. John is a navigable water of the united states, communicating with the sea. It is a fundamental law of all nations, with whose laws on the subject, I am acquainted, that navigable waters are the common property of the nation, and cannot be alienated

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

by the government. Our *Civil Code* declares, that "public things are those, the property of which belongs to a whole nation, and the use of which is allowed to all the members of the nation. Of this kind are navigable rivers, sea-ports, roads, harbours, highways, and beds of rivers, as long as the same is covered with water. Thence it follows, every man has a right freely to fish in the rivers, ports, roads, and harbours. The use of the shores of navigable rivers or creeks is public. Accordingly every one has a right freely to bring his ships to load there." *Civil Code*, *p.* 94, 96. The law of Spain, on this subject, may be learned from the 3 *Partida*, *tit.* 28, *lib.* 6. *Los rios e los puertos e los caminos publicos pertenecen a todos los omes comunal-mente, en tal manera que tambien pueden usar dellos los que son de otra tierra estraña como los que moran, e biuen en aquella tierra, do son.* The law is the same in France. I refer the court to an ordinance, *dés eaux et forets* 1669, *qui accorde au Roi la proprieté de toutes les fleuves et rivieres navigables.* An edict general of the kingdom, 1693, commences in these terms, *le droit de proprieté que nous avons sur tous les fleuves et rivieres navigablés etant incontestables.* See also *Poth. Traité du droit de proprieté*, *n.* 52,

and *Domat, liv.* 1, *tit.* 3, *sec.* 1, *n.* 5. The *Napoleon Code, sec.* 538, declares, *les fleuves et rivieres navigables ou flottables les rivages &c. sont consideres comme les dependances du domaine public.* By the law of England, navigable rivers are a prerogative of the king. See 1 *Black. Com.* 264. *Lord Hale*, in his tract *de portibus maris, chap.* 7, quotes, as English law, this passage from *Bracton, lib.* 1, *chap.* 12, *sec.* 6, *quod publica sunt omnia flumina et portus; ideoque jus piscandi omnibus commune est in portu et in fluminibus. Riparium etiam usus publicus est jure gentium sunt ipsius fluminis.* These are the very words in which the Roman law is laid down in *Justinian's Institutes, book* 2, *tit.* 1, *sec.* 2, 4. As to the manner in which this subject is regarded in the united states, I cannot quote abler and better authority than from the pen of Mr. Jefferson; "as to the bed of rivers," says he, "there can be no question, but that it belongs purely and simply to the sovereign as the representative and trustee of the nation. While it is occupied by the river, all laws, I believe, agree in giving it to the sovereign, not as his personal property, to become an object of revenue or of alienation; but to be kept open for the free use of all the indivi-

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

duals of the nation." See *Hall's Law Journal*, 58, 59. *Vattel* is an author who wrote for all nations. In a few words he developes the principles which govern this subject, which can be defended, and which are peculiarly applicable to the case before the court. "The nation," says he, "being the sole mistress of the property in its possession, may dispose of it as she thinks proper, alienate or lawfully mortgage it. The prince or the superior of the society, whatever he is, being naturally no more than the administrator, and not the proprietor of the state, his authority as sovereign, or head of the nation, does not of itself, give him a right to alienate or dispose of the public property. The general rule then is, that the superior cannot dispose of the public property, as to its substance. If the superior makes use of this property, the alienation he makes of it, will be invalid, and may, at any time, be revoked by his successor or by the nation." The author then admits, that the nation may authorise its sovereign to dispose of the public property strictly so called, but in the preceding paragraph marks a strong distinction between the public property of the nation, strictly so called, and

the public property for the common use of all the people thereof, and maintain, that the latter ought not to be alienated but under the most pressing exigency. *Vattel's Law of Nations*, *n.* 258.

I derive from the foregoing authorities, that the navigable water called the bayou St. John, was the public property of the united states. It was not only public property, but common for the use of all the people of the united states. The public property, strictly so called, consists of the national territory, which cannot be used but by appropriation, the public vessels, the contents of the public stores, magazines and arsenals. This property, the people of our nation have granted to congress the power of alienating. *Const. U. S. art.* 4, *sec.* 3, *n.* 2. The property common to all the citizens of the nation is different. This consists of navigable waters, ports, harbours, &c. the value of which consists in the common use of every body. Property of the latter description, the people have not authorised even congress to alienate. Could congress grant the river Mississippi to a company; sell the port of New-York or occlude the harbour of Boston? If congress could not, it will hardly be pre-

East'n District. *March*, 1822.

THE STATE vs. ORLEANS NAV. COMPANY.

tended, that the governor and legislative council of the territory of Orleans could.

It may be said, that the bayou St. John has not been alienated, but only a duty of one dollar per ton, imposed in favor of the company, on vessels entering it. If a duty of one dollar per ton can be laid, not in favor of the nation, but of a company, a like duty of fifty dollars per ton may, in principle, be equally imposed. Such a duty would be a complete alienation to the company, by excluding vessels from the bayou. The imposition of a duty of a dollar per ton, in favor of a company, is therefore so far the alienation of the use of the property, which property is valuable only for its use, and therefore so far a violation of principle. It is an invalid alienation, because of that which congress have no right to alienate. The free use of that bayou is therefore still in the nation. Congress may impose duties on that use, but those duties must be imposed in favor of the nation. This is what we require; we are sure that the nation will not demand fifty per cent. on the benefits she confers, but only an equivalent for them.

But whatever congress might do with re-

gard to the navigable water in question, the governor and legislative council of the territory of Orleans could not legislate upon the subject at all; because it did not belong to them, and the nation, to whom it belonged, had not confided to them the power of making regulations with regard to it. The strongest advocate of the constitutional powers of that body, will agree with me that it was provided, merely to supply the place of a state legislature, and could not rightfully legislate upon any subject, with respect to which, a state legislature could not. It was provided for the internal government of the territory. Congress never intended to give to that body, the right of legislating upon the great and general concerns confided to her by the nation. She retained the right of exercising her powers over those concerns, with regard to the territory of Orleans, in the same manner that she exercised them with regard to the different states in the union. Could the government of the territory have leased the public lands, rented the magazines, arsenals, and navy yards of the united states, or chartered their ships? If these, un-

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

der the grant of congress, would not have been regarded as rightful subjects of territorial legislation, how can we regard differently the alienation or incumbrance of the public waters of the united states.

The governor and legislative council of the territory of Orleans then, in making so important a regulation respecting the navigable water in question, as that of imposing a duty on the use of it, did not legislate upon a rightful subject of legislation. They transcended the powers granted them by congress. The consequence results, that the duty imposed by them is a nullity, and the exaction of it must be prohibited.

I have said that the governor and legislative council of the territory of Orleans, in imposing the tonnage duty in question, passed a law "inconsistent with the constitution and laws of the united states."

1. Their act in doing so was inconsistent with the provision of the constitution, which gives congress the power "to make all needful rules and regulations respecting the property belonging to the united states." *Con. U. S. art.* 4, *sec.* 3. I have shewn, by authorities, that the navigable water in question,

belongs to the people of the united states. They have confided to congress "the power to make all necessary rules and regulations respecting it." To rebut the idea of any binding exercise of that power, by the governor and legislative council of the territory of Orleans, it would have been sufficient to have shewn that the people of the united states, by their constitution, had not granted the power to that body. But when the people of the united states, the owners of the property, have not been silent on the subject, but have confided its regulation to another legislative body, it dissipates every shadow of pretence, for the exercise of that power, by a legislative body, in whom that confidence has not been placed.

2. The imposition of the duty in question, was inconsistent with the constitutional power of congress "to regulate commerce with foreign nations, and among the several states." *Const. U. S. art.* 1, *sec.* 8. It is a duty imposed on the vessels of foreign nations, upon the vessels of the several states entering a port of Louisiana. It is therefore strictly a regulation of commerce, imposed by a legislature, to whom the power

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

was not confided, and we ought to suppose, in opposition to the will of congress; because, the power being committed to them, they have not acted on the subject.

The exercise of power, to regulate commerce, by two distinct legislative bodies, must necessarily be inconsistent. *Ecce signum* in the case before the court. The governor and legislative council of the territory of Orleans, have made a regulation of commerce as unalterable, it is pretended, as the laws of the Medes and Persians; and yet the constitution informs us that congress can alter it, can regulate the subject just as she chooses, and when I open the laws of the united states, I shall shew, has not only altered, but abolished this pretended regulation. Even when the imposition of any duties are permitted to the states, the constitution has cautiously subjected the laws imposing those duties, to "the revision and control of congress." *Const. U. S. art.* 1, *sec.* 10.

3. The tonnage duty in question, is inconsistent with the clause in the constitution of the united states, which declares that "no state, without the consent of congress, shall lay any duty of tonnage." *art.* 1, *sec.* 10. The governor and legislative council of the terri-

tory of Orleans have laid a duty of tonnage, in the strictest sense, and have authorised the Navigation Company to collect it. They have declared, "that as soon as the company shall have improved the navigation of the bayou St. John, so as to admit, at low tides, vessels drawing three feet water, from lake Ponchartrain to the bridge, at the settlement of the bayou, then the president and directors of the company shall be entitled to have, ask, and receive, from every vessel passing in or out of said bayou, a sum not exceeding one dollar for every ton of the admeasured burthen of said vessel, and so in proportion for every boat, of a burthen of less than one ton." *sec.* 9, *of the charter.* The next section prescribes the mode of measuring, and ascertaining the tonnage of vessels passing through the bayou. A duty then has been laid upon vessels navigating the bayou St. John, by the governor and legislative council of the territory of Orleans. For reasons already urged, if that duty cannot be imposed by a state, it cannot be laid by a territory. On that subject, I may add, that the reason of the article of the constitution under consideration, applies as forcibly to territories as to states.

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

But, if the company should still attempt to shelter themselves under the letter of the constitution, and make a distinction between its application to states and territories, where, regarding its spirit, no distinction exists, the shift cannot avail them at this period. We are now a state, and no duty of tonnage can exist in the state of Louisiana, consistently with the constitution of the united states, without the consent of congress. The duty in question is a duty of tonnage. It is so described by the charter of the company. *sec.* 9 & 10. It is imposed on all vessels domestic and foreign. It is imposed for a public purpose, the improvement of a national navigation for external commerce. It differs from tolls upon roads, bridges, and canals; these are imposed for the internal commerce and convenience of the states. It is not a mere *quantum meruit*, because the company are allowed fifty per cent. on their capital, and the rest of the duty goes to the state treasury. I see no solid distinction between it and the ordinary duty of tonnage, imposed by congress, on vessels using the waters of the united states. It has been imposed without the consent of congress, pre-

viously or subsequently given. It will not be pretended that there has been an express consent on the part of congress. But I do contend, that the consent must be express, or the duty is not imposed according to law; and that, until the consent is expressly given, it is exacted without the authority of law. It is expressly required by the constitution. A state of inaction, where neither assent nor dissent is given, will not satisfy this express requisition, because, to the validity of the duty, a state of action, a consent given, is required. It might as well be pretended, that an act of the senate and house of representatives, would be binding, without the signature of the governor, or, that the consent of the governor might be implied, because he did not approve or disapprove the bill. As having a bearing on this point, I refer the court to 1 *Poth. Oblig. n.* 11, *Broguier* vs. *Villerè*. 3 *Martin*, 326 & 502, and the case of *Miltenberger* vs. *Cannon*. 10 *Martin*, 85.

The argument in opposition is this :—the governor of the territory was required by the act of congress, to report the acts of the governor and legislative council, to the president of the united states, to be laid be-

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

fore congress, which, if disapproved of by by congress, were to have no force. It is said this act was not disapproved of by congress, and therefore, it was approved, and is in force. This is a *non sequitur*.— If the governor and legislative council had passed an act to convert my property to your use, to ostracise ten citizens, or decimate the people of the state, these acts would not have had force, nor have been executed by the judges, although not disapproved by congress. It is true, that ordinary acts of legislation were to have force, if not disapproved, but not acts to the effect of which, the express consent of congress was essential, because expressly required by the constitution. If any state, at the present day, should impose a tonnage duty, would the judiciary enforce that duty until the consent of congress was expressed by an act of congress? Would they admit an implied approval and consent of congress because it was not disapproved? They would not, because they had sworn to support and enforce the article of the constitution which I have cited.

If we yield implicitly to the opinions of great judges, long expressed on points di-

rectly before them, we ought to give equal confidence to the opinions of great legislators, often reiterated on subjects peculiarly confided to them. The congress of the united states is the most enlightened legislative body in the world; this article of the constitution has been peculiarly confided to them, and they have acted upon it under the obligations of an oath. If I shew, by a great many acts of congress, that they have believed, ever since the adoption of the constitution, that the term *tonnage duty*, meant just such a duty as that before the court, and that such a duty could not be imposed but by the consent of congress, expressed by an act of congress, and that a great part of the states, particularly those in which the constitution of the united states has been most studied, and best understood, have entertained the same opinion; I think this court cannot fail to give to the article of the constitution under consideration, the same construction.

An act of congress, approved the 26th of April, 1816, declares "the assent of congress to an act of the general assembly of Virginia, entitled, an act to incorporate a company for

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

the purpose of improving the navigation of James river, from Warwick to Rocket's landing, passed the 22d of February of the same year." An act of congress, of the 11th of August, 1790 (the year after the adoption of our constitution) declares their consent to the acts of several states, levying duties on the tonnage of ships or vessels. Among others, to an act of the state of Rhode island, entitled, "an act to incorporate certain persons, by the name of the River Machine Company, in the town of Providence, and for other purposes therein mentioned," and an act of the state of Georgia, "for laying and appropriating a duty on tonnage, for the purpose of clearing the river Savannah, and removing the wrecks, and other obstructions therein." An act of congress, approved the 27th of March, 1798, grants the consent of congress to an act of the commonwealth of Massachusetts, entitled, "an act to incorporate Tobias Lord and others, for the purpose of keeping in repair, a pier at the mouth of Kennebunk river, and to grant them a duty to reimburse the expence of erecting the same." The act of 1799, concerning quarantine and health laws, contains this proviso, "that nothing

herein, shall enable any state to collect a duty of tonnage or impost without the consent of the congress of the united states thereto." An act of congress, of the 28th of February, 1806, declares, " the consent of congress to an act of the legislature of Pennsylvania, so far as to enable the said state to collect a duty of four cents per ton, on all vessels which shall clear out from the port of Philadelphia, for any foreign port or place whatever, to be expended in building piers in and otherwise improving the navigation of the river Delaware, agreeably to the intentions of said act." For the foregoing acts of congress, I refer the court to *Acts of Congress*, 1816, *p.* 77, *vol.* 2, *Dig. Laws of United States*, 181, *Vol.* 3, *ditto*, 35, 126, 7. *Vol.* 4, *ditto*, 8. And for similar acts to *vol.* 2, *Dig. Laws of United States*, 439, 191, 2, 258, 533. *Vol.* 3, *ditto*, 319, 474, 586, 423, 641. *Vol.* 4, *ditto*, 686, 10, 165, 235, 348, 524; and *Acts*, 1816, *p.* 133.

If congress had not believed their consent necessary in these cases, they would not have granted it; if the states had not deemed it essential, they would not have petitioned for it. Such is the construction which Washington, Adams, Jefferson, Madison, and the great and

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

good men associated with them in the government of the nation have, under oath, given to this clause in the constitution. It is too late for the defendants to expect a different construction from this enlightened tribunal.

But the company in their answer, plead several acts of congress, one of the 3d of July, 1807; another of the 18th of April, 1814; and another of the 16th of April, 1816, which they suppose supply the consent of congress required by the constitution. These acts grant certain lots of land to the Orleans Navigation Company, and nothing more. There is still another act which appropriates $25,000, to assist in completing the canal from the basin to the river. It has been argued with irresistable force, that these acts give no validity to the charter of the company, which it did not possess before. See *General Ripley's argument*, 7 *Martin*, 599, 600. But be that as it may, these acts surely do not affect the position I have taken. My position is, that the tonnage duty imposed in favour of the company, on vessels entering the bayou St. John, has never been consented to by congress, and therefore, that the exaction of it violates the constitution of the united states. It is answered, that

congress have given their consent to said tonnage duty, because they have given the Orleans Navigation Company land, and offered them money. The conclusion does not follow from the premises. The Orleans Navigation Company may be constitutionally organized, and possess a great many constitutional powers. But one power which it claims (that of exacting a duty from vessels entering the bayou St. John, a navigable water, belonging to the united states) is, without the consent of congress, unconstitutional and void. Still in the exercise of its constitutional powers, it commands the interests and the affections of the government. It purports to be a company "for improving the inland navigation of the territory." The great improvement in contemplation, is the connection of the lakes with the river by a canal. This is an object of immense public importance for the defence and commerce of the country. To effect it, congress granted to the company the land on which the canal is to be constructed, other lots, and offer them money. What is the effect of these grants? Merely, one would think, that the company had obtained from congress, gratuitously, a

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

valuable strip of land, in the rear of, and running through this city. This little grant was the whole subject matter before congress. Not a member in that body imagined that he was legislating upon any other subject than a small strip of public land, which it was represented, might be converted to public utility. But no, say the Navigation Company, we have circumvented congress. They thought they were granting us from their immense territories, a bagatelle of land, a mite from their treasury, because that was all we asked. But they have granted us what we did not petition for. By these acts, they have granted us, although they did not know it, their all important consent to the interminable exaction by us, of a high duty of tonnage on the vessels of a large portion of their fellow-citizens, sailing on a navigable water of the united states. Such are the preposterous pretentions and arguments by which the company support their right to an oppressive and ceaseless extortion. In those acts which I have cited to the court, in which congress have expressly given their consent to tonnage duties imposed by the states, they have cautiously limited the existence of their as-

sent to short periods; but here it is pretended, that by mere implication they have given it illimitably.

Congress, therefore, have neither expressly nor impliedly given their consent to the imposition and exaction of the duty of tonnage in question. But they have not been silent on the subject, they have prohibited its existence by two acts of congress, before its imposition, and three since. By an act of congress, of the 27th of March, 1804, about a year before the imposition of the tonnage duty in question, on vessels navigating a navigable water within the territory of the united states, south of the state of Tennessee; it was declared, "that all navigable rivers within the territory of the united states, south of the state of Tennessee, shall be deemed to be, and remain public highways." *Ingersol's Dig.* 505. By another act of congress, passed the 2d of March, 1805, and which must have been published in Louisiana, just about the time the governor and his "thirteen discreet inhabitants" were in divan, to impose the duty in question, (July 5th, 1805) it was declared, "that the inhabitants of the Orleans territory, shall be entitled to, and enjoy all

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

the rights, privileges, and advantages secured by the ordinance for the government of the territory of the united states, north-west of the river Ohio." 1 *Martin*, 170. What were those rights, privileges, and advantages? That "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying-places between the same," (that is, as applied to another territory, navigable waters generally) "shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the united states, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor." 1 *Martin*, 196. Congress thus sufficiently manifested their dissent from the imposition of the duty in question, by prohibiting it in anticipation; and the continuance of that dissent, must be presumed, until their express consent be given.

And I derive from the latter act of congress, a conclusive argument against the duty. It was the supreme law of the land, exempting the use of the bayou St. John from duty. But, the governor and legislative council of the territory, imposed the tonnage duty in question, on that use, in direct viola-

tion of the restriction of their powers, to pass no act "inconsistent with the constitution and laws of the united states."

Congress so far from giving their assent to this duty, have, since its imposition, passed *three acts* inconsistent with its exaction. By an act of the 10th of March, 1812, it is declared, that "all navigable rivers and waters, in the territories of Orleans and Louisiana, shall be, and forever remain, public highways." *Ing. Dig.* 523. By an act of the 20th of February, 1811, to enable people of the territory of Orleans, to form a constitution and state government, it is declared "that the river Mississippi, and the navigable rivers and waters leading into the same, or into the the gulph of Mexico, shall be common highways, and forever free, as well to the inhabitants of said state, as to other citizens of the united states, without any tax, duty, or toll therefor, imposed by the said state." *Dig. L. U. States vol.* 4, 329. By the act for the admission of Louisiana into the union, it is declared, "that it shall be taken as a condition, upon which, the said state is incorporated in the union, that the river Mississippi, and the navigable rivers and waters leading into the

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

same, and into the gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said state, as to the inhabitants of other states, and the territories of the united states, without any tax, duty, impost, or toll therefor, imposed by the said state, and that the above conditions shall be considered, deemed and taken, fundamental conditions and terms, upon which the said state is incorporated in the union." *Dig. L. U. States, vol.* 4, 402.

From the latter act, I derive, of all others, the most serious argument against the exaction of the tonnage duty in question. By it congress have declared (and our state, by its incorporation in the union, have agreed to the declaration) that they have never relinquished the sovereignty of the bayou St. John, nor consented to any duty of tonnage imposed on vessels using it; and that Louisiana is a state, only on the fundamental condition, that the said navigable water shall forever remain free to every body, without any duty imposed by the said state. If the duty in question, had been constitutionally imposed, if the charter of the company were perfectly unobjectionable, if no one could have said a word

against either, under the territorial government, this compact between congress and the state, and the people of Louisiana, put an end to that charter, so far as it imposed that duty. In doing this, congress, our state and people, may have acted with great injustice to the late territory of Orleans, and the Navigation Company incorporated by it. But the act is done, and cannot now be revoked. We cannot give up our state sovereignty, and we hold it only on condition that no person shall pay for using the bayou St. John. Those who are injured, can only petition our legislature and congress, for redress. This court holds its authority under the constitution and laws of the state of Louisiana; and has sworn to support them, and the constitution and laws of the united states. It is a fundamental law of the relation existing between these two powers, that the navigable water, called the bayou St. John, shall be free to the citizens of the united states, and of this state, without any tax, duty, impost, or toll. One of those powers, the state, under which you hold authority, now calls upon you to protect the citizens of this state, and all others, in the rights guaranteed to them by that

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

fundamental law. You must do it by the sacred solemnity of an oath.

This is the true exposition of our relation with the united states. Now for the quibbles of the company. It will be said, the compact guaranteed the citizens against a duty imposed by the *state*, but the duty of tonnage in question, was imposed by a *territory*. The answers are numerous; I will trouble the court with but one. I answer, that no laws exist in this state, but by authority of the state; none can be carried into effect but by officers appointed by the state. The territory of Orleans, its authority and laws, expired with the formation of our constitution. By a clause in that constitution, all laws in force in the territory, not inconsistent with the constitution, were retained in full effect. *sec.* 4, *Sched. Const.* If the duty exists, it was revived by this clause, and was therefore imposed by *the state*, not the *territory*. By this clause most of the laws of the territory were re-enacted, and put in force throughout the state of Louisiana. Some were not re-enacted but expired. Among these, was that part of the act organizing the Navigation Company, which imposed a duty on persons naviga-

ting the bayou St. John, at this period certainly a navigable stream. Because the act of congress, for the purpose of enabling us to form a constitution and state government, had required, as the basis of our constitution and state government, that the bayou should be a common highway, and forever free to the citizens of the united states, and others, without any tax, duty, impost, or toll therefor imposed by the state. Now the constitution, formed on this basis, could not revive and re-enact a law, exactly repugnant to it, a law imposing the duty prohibited.

But again, the act of congress speaks of navigable waters "*leading* to the gulph of Mexico." An able advocate of the company, maintained strenuously (because he had no other resource) that the bayou St. John did not *lead into* lake Ponchartrain; but on the contrary, *made from it*, and of course, run up the Mississippi, to the place where we have ordinarily supposed it headed, (see the argument, 7 *Martin*, 623.) This almost equalled the imagination of a Virginia poet, who among other flights of fancy, sung:—

"*Up Shockoe hill the ships of burthen steer.*"

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

But even this resource did not meet the law; for as a road may lead up or down hill, to a given place, so the bayou St. John, whether it run up stream or down, might lead its navigator to the gulf of Mexico. The same advocate was not more at a loss here. The bayou St. John leads to lake Ponchartrain, the lake to the Rigolets, and the Rigolets to the gulf of Mexico; and therefore he is entitled to fifty per cent. per annum, on his capital, out of the pockets of poor people. *Quod erat demonstrandum.*

It has been suggested by the court, that if the Navigation Company acquired the right to exact the tonnage duty in question, they were protected in the enjoyment of that right, even against the power of congress, by the third article of our treaty with France, and which is sanctioned by the fourth and fifth articles of the amendments of our constitution. The treaty provides, that the inhabitants of the ceded territory shall be protected in the free enjoyment of their property, and those articles of our constitution generally, that the people shall be secure in their property, and that the same "shall not be taken for public use without just compensa-

tion." We are not claiming the vested property of the company. Let them keep that, and use it in the exercise of their constitutional powers. We are contesting their right to demand property, or which is the same thing, money from us. They pretend congress have granted them a right to demand a tonnage duty from us. If congress have, it is a right granted upon the intrinsic condition, that congress has the great power of rescinding it when they may think the public good requires it. "A corporation legally established, may be dissolved by an act of the legislature, if they deem it necessary or convenient to the public interest, in all cases in which the existence of said corporation is not warranted by treaties." *Civil Code*, 92, *art.* 22. This provision of the *Code* was but the ancient law of the land, and the exception in favor of corporations guaranteed by treaties, is not applicable to the corporation before the court, inasmuch as their charter was granted subsequently to the treaty mentioned. Even if a state be restrained by the constitution of the united states from dissolving a charter, congress are not. *Con. U. S. art.* 1, *sec.* 10, *n.* 1. The parliament of Great Bri-

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

tain possessed this power. 4 *Wheaton's Rep.* 643. They rescinded the charter of the East India Company. The measure was advocated by Burke, Fox and Sheridan; by the talents of that nation, and opposed by its wealth, which finally prevailed. Congress are as omnipotent here, with regard to subjects confided to them, as parliament in Great Britain. The company, therefore, possessed the right of demanding the toll in question, upon this legal condition, that it was defeasable at the will of congress. If the permission to demand the duty has ever been given, by the act admitting us into the union, it has been taken away. The permission to demand the tonnage duty in question, cannot, therefore, be considered property to which the treaty and amendments to the constitution are applicable. If it be so regarded, the argument is a two-edged sword; it cuts more in our favor than against us. If the right to demand a duty of those navigating the bayou, is such property as might be protected by the treaty and constitution, the pre-existing right of the inhabitants of the ceded territory, and the citizens of the united states, to navigate the bayou free of toll, was equally a property

which the treaty and constitution sanctified to them. The grant to the company of the right to demand toll from them for that navigation, was an invasion of that property, by taking it entirely from them. The toll is imposed on vessels of one ton burthen and less. The evidence shews, that the improvement of the bayou could be of no value to them, and even to much larger vessels. The property of the owners of them, therefore, has been "taken for public use, without just compensation."

The governor and legislative council of the territory of Orleans, were expressly prohibited by the act of congress, creating them, from "the primary disposal of the soil of the united states." The soil on which the canal Carondelet has been dug, from the bayou to the basin, belonged to the united states at the time the Navigation Company was organized. Several of the witnesses prove, that it was dug by the baron Carondelet, for a public highway. "The soil of a highway is public property." *Renthorp* vs. *Bourg.* 4 *Martin*, 97. The soil of the canal, therefore, belonged to the king of Spain, and the united states, as his successors, have only to establish his title, in order to shew title in themselves, un-

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

til a grant from them is produced. See *Moreau & Carleton's translation*, *Part.* 1*st vol.* 183. And also 4*th vol. Dig. L. U. S.* 112, 361. The company shew no grant from the united states, because they have none. They claim the soil of the canal, under their act of incorporation. But the governor and legislative council had no right to grant that soil to them. In doing so, they transcended their powers, and the grant is void. Indeed, if the governor and legislative council could have disposed of the soil of the united states, the company have not acquired a title to it in the mode pointed out by the legislature in the 7th section of their charter.

But the company contend, that the act under which they claim, was reported to congress, and was not disapproved. On the contrary, congress granted them other lots of land; their title to the soil in question is therefore clear. I answer, that congress sufficiently disapproved the act, by expressly prohibiting it. The reasoning of the company familiarly illustrated, would be laughed at. My neighbour grants Tom Stiles five hundred acres of land, which belong to me. I did not authorise him; on the contrary, I expressly

prohibited him from doing so, in the presence of Stiles. The grant is, however, reported to me; I say nothing: on the contrary, I afterwards give Stiles one hundred acres of land. What is the consequence? One would think simply, that Stiles was the proprietor of one hundred acres of land. O no, says Stiles, you knew what your neighbour did, you kept silence; nay, you afterwards gave me one hundred acres; you have therefore clearly given me also the five hundred acres. *Quid rides*, (I might say to any one of the company, for there is not one of them that would not laugh at such logic.)

Quid rides? mutato nomine, de te Fabula narratur.

It is then clear, that the soil on which the canal is dug remained in the united states. If the title were now litigated, between a grantee of the united states and the company, (and this is the test) there is not a judge in the world but would decide in favor of the grantee. The lands of the united states are conveyed by grants, in pursuance of acts of congress, expressly authorising them. The one party could shew a grant, the other could not. The canal Carondelet then, still be-

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

longs to the united states. The consequence is necessary, that all the citizens of the united states have a right of way through the canal, free of duty; because all the citizens of the united states have a free and common right of passage over the water, and unappropriated soil of the united states. No person has a right to hinder or incumber their passage, but by authority of congress. Congress have granted no such authority; on the contrary, they have prohibited the private appropriation of the public land and water, by many acts of congress.

But the company mantain, that the state has no right to question their title to the property, on the ground that it belongs to the united states. They are mistaken, we have this right. *The 3d law, 32d title, 3d Partidas*, declares, that any individual may forbid another from erecting new works on public places: *Para si començando algun ome a labrar algun edificio de nuevo en la plaça o en la calle o exido comunal de algun lugar, sin ortogamiento del Rey o del concejo en cuyo suelo lo fiziesse, estonce cado uno de aquel pueblo le puede vedar, que dexe de labrar en aquella labor.* The 9th law prescribes the proceedings before the judge, in

case he that is forbidden does not desist. The plaintiff, to succeed, must shew that the place is public, the defendant, that it is private. The plaintiff therefore, contests the defendant's title, on the ground that the title is in the public, the very case before the court. Now, if we may contest the right to erect the new works, to construct the canal, on the ground that the place is public, it is very clear, that we may, on the same ground, contest their right to demand toll of us, in consequence of the construction of those works. This is plain reason. We all have a right of passage over the land of the united states, while it remains public. If any one impede that right, may we not ask, have you a grant, is it private property, and no longer public? If I am charged to pay you twenty pounds when you are of age, if the money is demanded, may I not ask are you twenty-one?

The canal Carondelet is therefore a public highway of the united states, because it is proved by the witnesses, to have been a public highway of the king of Spain. It has never been legally alienated as to its substance or use. It is therefore free for the use of all the citizens of the united states, without any

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

toll. The state demands of this court to protect her citizens in the enjoyment of this use.

If the charter of the company was rightfully granted, we contend, on behalf of the state, that it has been forfeited by the nonfeasance of the company, in not completing the navigation from the bayou St. John to the Mississippi river. "A community or corporation, legally established, may be dissolved by the forfeiture of their charter, when the community or corporation abuses their privileges, or refuse to accomplish the conditions on which such privileges were granted, in which case, the corporation becomes null and void by the effect of the violation of the conditions of the act of incorporation. *Civ. Code*, 92, *art.* 22. An attentive perusal of the 9th section of the act organizing the company, will convince any person that it was the intention of the government, in granting the charter, to have the navigation completed from the bayou to the Mississippi. The canal from the bayou St. John to the river, is the only canal specially pointed out by the legislature. All other improvements, were, by the terms of the charter, left to the discretion of the company. It was optional with them to make the im-

provements or not, and the emoluments to be received were conditional. But with regard to this canal, the legislature declared, not *if*, but *when* the company shall have made such and such parts; and finally, "*when* the communication between the said navigation and the river Mississippi *shall be made complete*," they shall be entitled to proportional tolls. The legislature, therefore intended, that the work should be made complete, and the company, by accepting the charter, acceded to that intention.

The completion of the work by the company, was therefore a matter of compact between the parties. The government has an immense interest in the completion of the navigation. If it had been complete at the time of the late invasion, our gun-boats might have been saved, and the British army destroyed. The state has strictly a pecuniary interest. If the navigation were complete, the revenue from it would be greatly enhanced. The surplus, beyond fifty per cent. on the capital stock of the company, is reserved to the state. There is a compact then, that the work shall be completed by the company, and the government, who have granted immu-

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

nities to the company, on this condition, are and were, interested to the last degree, that it should be completed with the least possible delay. What time then shall be allowed for its complëtion, in as much as none has been specified in the contract? In the most ordinary contract, without a limitation, as to the time for performance, a reasonable time must be allowed, because that is the presumed intention of the parties. The same rule must be applied to the present case. If then, we shew that the company have had the means, since the year 1816, of finishing the work from the basin to the river, and have not yet commenced it, surely the court will think it now time that the state should receive back those powers and privileges, which were granted only in consideration of the advantages she expected from the completion of the work.

In 1816, the canal was completed to the basin. The company were not in debt, as their books, before the court, shew. They then commenced receiving tolls on vessels arriving at the basin, which have yielded them large dividends ever since. Those tolls alone would have enabled them to commence the canal from the basin to the river.

But that same year they sold lots, as the evidence shews, to the amount of $98,000; besides which, congress had appropriated $25,000 for the particular purpose of completing the canal. With these sums, they might before this time, have finished the canal, and yet, regardless of the spirit of their contract, of the interest of the united states, and of the state who have granted them a charter foolishly liberal, thoughtful only of their own pockets, they have not yet commenced the canal, which should have been finished. If ever a contract was annulled on the demand of one party, for non-performance by the other, the state is entitled to that relief, with regard to the contract before the court.

It will be urged, that the charter of the company has been acquiesced in seventeen years, by those who were interested to oppose it; that the national and state legislatures have passed many acts respecting it; that it has prosecuted and defended suits in our courts, without the constitutionality of its powers being questioned; that opposition to its powers, has not been made until the company have expended large sums of money for the public benefit, which it will loose if it be successful.

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

From these sources, an argument will be derived in favor of the powers of the company *communis error facit jus*, it will be said, and the case of *Rodgers* vs. *Beiller*. 3 *Martin's Rep.* 371, *Stewart* vs. *Laird*, 1 *Cranch*, 309, and *M'Cullough* vs. *the Bank of Maryland*, will be cited in support of the argument. It is an argument which has weight, and requires refutation, and the circumstances on which it is founded. explanation.

The people peculiarly interested to oppose the impositions of the company, have but very lately obtained a voice in our legislature. In 1812, they were annexed to the state. The war continued until 1815, during which time they brought but little cotton to market, because it was valueless. Since that period their complaints have been incessant and loud. And since the year 1816, when the sufferers brought their first crop to market, and began to complain, I recollect no act of congress, nor of the state legislature, respecting the company, but that before the court, which calls them to account. They have since appeared in two suits only, the one with *Delacroix*, in which they were compelled by this court to do that justice which they

refused, and to which every private company would have been compelled, and the suit with the schooner *Amelia*, in which their pretention to demand toll from her, was successfully resisted, and the constitutionality of the demand seriously questioned. The acts of congress, and of the state legislature, in favor of the company, previously to that period, were passed, because no person was interested to oppose them. If those who are substantially my clients on this occasion, had had that interest, they had no voice in the national or state legislature. In passing those acts, therefore, in favor of the company, the eagle eye of interest did not examine the detail of the charter. It imported to be a charter for the improvement of internal navigation. That was an object worthy of favor, and received it abundantly. But it was not particularly observed, that it was to be partially effected by the imposition of an unconstitutional duty.

The maxim on which this argument is founded, *communis error facit jus*, cannot be law in the sense in which it is applied. It is true, long usage on indifferent subjects, may grow into law, but error is always error, and a great

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

deal of error may do a great deal of wrong, but can never make right. That the company have exacted money, without the authority of law, seventeen years past, is no reason why they should continue to exact it seventeen years to come. They have exacted a tax seventeen years without law, because the voice of the poor they have oppressed, has not, until now, been heard by the drowsy justice of the country. It is time that justice should sleep no longer.

The alarm of the defendants, lest they should be ruined by the loss of the capital they have expended for the public good, is more sounded than felt. The great and generous state of Louisiana, has never suffered the services of a single individual to pass unrewarded. She will never. In the exercise of her generosity, she is prosecuting this suit for the protection of her weak citizens against the extortions of the strong. If the latter have "done the state some service," they may rely with unbounded confidence, on the same generosity, for ample remuneration.

Workman, for the defendants. This suit is brought in pursuance of a resolution of the general assembly, requiring the attorney-general, to issue out of the first district court, a *scire facias*, to ascertain—first; the constitutional validity of the charter of the Orleans Navigation Company; and secondly, whether the same, if constitutional, be not forfeited by reason of the nonfeasance and malfeasance, the illegal and oppressive actings and doings of the company.

This is a prosecution then, instituted at the command of the highest deputed authority in this commonwealth. It is entitled, therefore, to the most respectful, the most patient, the most solemn investigation. If the high party, plaintiff in the suit, had confined himself to directing an enquiry into the constitutional validity of the charter of my clients, I should have proceeded at once to the question at issue, without permitting myself to make any remarks on the motives or causes in which the suit had originated. But when this powerful prosecutor, not only orders, but undertakes to decide on the merits of the prosecution; when he adds to the weight of his authority, all the force of his reasoning powers

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

and his eloquence, we must be permitted, in our own defence, to examine freely the principles and arguments which he is pleased to employ, not to judge but to pre-judge our cause. For he does not, as the court will presently see, resolve that we shall be tried, until he has previously, and very positively proclaimed, that we ought to be condemned. This mode of proceeding, though extraordinary, is not original. It was used by the British parliament in 1794, when they declared, by resolutions of both houses, that certain persons, whom the government intended to try as traitors, were really guilty of treason. A British jury defeated the mistaken zeal of their parliament; and the judiciary of Louisiana will, I trust, with equal freedom and firmness, resist the erroneous doctrines and declarations of her legislature. There is another precedent for this practice, of much higher antiquity, though perhaps not quite so authentic. The reporter is Virgil, who tells us in language much better than we find in the writings of our lawyers, or even in those of our legislators, that one of the rulers of the infernal regions, first condemns and punishes

the accused, and afterwards grants them a hearing:—

Gnossius hæc Rhadamanthus habet durissima regna,
Castigatque auditque dolos.——

The character of my clients, as well as their interest, requires me to examine the legislative declarations in question. Lord Coke, indeed, assures us, that a corporation cannot be excommunicated, because it hath no soul; but though it cannot be damned in the next world, it may, by calumny, be rendered odious and infamous in this.

The resolutions, in obedience to which this suit has been brought, have the following preamble:—

1. "Whereas, doubts are entertained of the constitutional validity and obligation of a certain charter granted by the governor and council, to the Orleans Navigation Company, by an act, bearing date the 3d day of July, 1805;

2. "And whereas, numerous complaints of repeated violations of said charter, by said company, have, from time to time, been made by the good people of Louisiana, and others navigating the waters of lake Ponchartrain;

3. "And whereas, highly favoured mono-

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

polies and exclusive privileges are, in their nature, adverse to and incompatible with, the genius and spirit of a free people; tending, manifestly, in their oppressive operations, to the alienation of the affections of the citizens for their government; and whereas, it is expedient, and at all times desirable, that the people should distinctly understand their rights, as well as the nature and interest of corporate institutions, existing under the colour of legal authority."—

And then, the legislature proceed to authorise and require the attorney-general to issue out a *scire facias*, to ascertain the points stated at the opening of my argument.

As to the doubts mentioned in the first paragraph of the preamble, it is greatly to be regretted, that they did not occur to the legislature, nor to any of its enlightened members, nor to any of the persons interested in the navigation of the lakes and the bayou St. John, until sixteen years after our charter had been granted, and a sum of $375,000, had been expended by us, in rendering that bayou, and the canal of Carondelet navigable: no such doubts ever occurred to the former legislatures of this state, by whom some acts

in our favour were passed, nor to the congress of the united states, who have passed many acts recognising our institution, and even granting us their assistance; nor to our judiciary, by which several suits, for as well as against this corporation, have been decided. The supposed complainants, it is pretended, were unrepresented for many years in our legislature, and therefore could not make their hard case known. This apology will not avail them; for any person whatever might have contested the validity of our charter, whenever he might be sued, or his property seized, to pay the required tolls.

With respect to the numerous complaints of the violation of our charter, declared by the second paragraph of the preamble, to have been made against us, the record before this court, not only does not contain one word to justify, excuse or extenuate this part of the preamble, but it does contain full and unquestionable evidence, to prove that if any such complaints were ever made, they must have been unfounded. Notwithstanding all the zeal and diligence of the counsel by whom this prosecution has been so ably conducted, they could not produce a single witness to

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

accuse us of any malfeasance, of any one illegal or oppressive act. What can have become of all "the good people of Louisiana, and others navigating the lake Ponchartrain," by whom these numerous complaints against us have from time to time been made? Have they all concealed themselves in disguise, like the army of Prince Prettyman, in the rehearsal; or melted into thin air, like Prospero's spirits; or vanished all at once like the Wierd sisters on the blasted heath? Not one to be found to state his grievances against us; not one to support this strong and harsh assertion of his representatives!—On the contrary, it is shewn on this record, by irrefragable testimony, that far from abusing our privileges, we have exercised them with almost unprecedented disinterestedness and moderation; that we have never demanded much more than *one half* the amount of the tolls we were entitled to exact, even though our capital, actually paid down in cash and expended, was for many years altogether unproductive; and even now, has yielded on the whole, but little more than at the rate of five per cent. per annum; a dividend not half what is usually given by our

banking and insurance companies; and that the whole of the tolls, on a cargo of cotton, from fort St. John to the basin, would not amount to the one-third of one per cent. on the value of such a cargo, at the present prices.

All this will appear manifest on a view of the evidence produced by us at the trial of the cause in the court below. Paul Lamusse swears, that he knows that the whole stock of the company has been paid up, and also that the whole of the tolls received by the company, and their capital, has been expended on the amelioration of the navigation of the canal and bayou, and the proprietors of the stock remained some years without receiving a single cent of dividend on their shares.

Louis Blanc swears, that he knows that until the navigation company removed the obstructions at the mouth of the bayou, that in the winter as well as the spring, vessels frequently, when loaded with pitch and tar, and with cattle, were obliged to throw their cargoes over-board; that in 1804 and 1805, vessels of 20 tons could scarcely get in to the bayou bridge; and that since the establish-

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

ment of the company, he has seen three brigs, of 150 tons each, at the same place.

Louis Alard swears, that in the year 1800, the navigation of the bayou and the canal were much obstructed by sand bars, chicots, and various other impediments; that he has know a schooner to remain for three weeks aground on the sand bar, which was opposite to Marigny's canal; and has often seen other vessels aground on the other bars; that as to the bar at the mouth of the bayou, he has seen it often with very little water on it, and recollects a chalan belonging to his father, which was at that period employed in carrying shells, remaining eight days abandoned on the bar outside, aground, for want of water, although this chalan drew only from a foot to fourteen inches water; that in ordinary times of low water, there was about two feet to two feet and a half water on this bar; that the inhabitants on the other side of the lake learned from practice, to discover when the water was high or low on this bar, and sometimes remained a month at home, waiting for a rise of water on it; that when the water was very low, he has known a hunter's pirogue touch going over this bar; that a number of chalans

were then kept at fort St. John, for the purpose of unloading vessels, to enable them to cross this bar; that the expence (when every thing was cheaper than at present) for unloading a vessel of 20 tons, and putting the cargo into the chalans, to enable the vessel to cross the bar, would have been about $30, if the vessel was loaded with tar or pitch, or other articles of easy transport; that besides the inconvenience of unloading the vessels at the bar, the chalans were compelled on account of the several other bars inside, to take their loading up as far as the bayou bridge, by which means the cargoes of the vessels were often damaged in bad weather; that at the time of his arrival in this country from France, the canal Carondelet, although very recently finished, was even then so obstructed, that only very few of the smallest sort of vessels entered it, for fear of being left by the fall of the water, and not being able to get out; that at the time of the cession of this country to the united states, this canal was so much abandoned, that even in high water the number of vessels which entered it was so small, as hardly to be worth mentioning; that in general, the obstructions of the navigation

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

of the bayou were so numerous and so great, that he is convinced that at the above period the persons having occasion to transport goods or produce on it, would willingly have paid double the duties which are now exacted by the navigation company, to have the advantages which are enjoyed at present; that the whole of the trees which obstructed the navigation of the bayou, have been cleared out, except one or two, which, in very low water, still embarrass the navigation; that at present vessels of 40 to 45 tons, pass without any obstacle at low as well as at high water; that vessels of 150 tons have lately entered the bayou; that vessels of from 40 to 60 tons, from Pensacola, Havana, and from the different northern states, now arrive at the basin of the canal Carondelet; and that in the years 1811 and 1812, the navigation of the bayou St. John, was so much improved by the company, that chalans were no longer employed to unload vessels on entering or going out.

This testimony of Alard, is corroborated in every important particular, by that of Guillaume Benite. He swears, that there is as much difference between the present and the former state of the navigation of the bayou.

and of the canal, as between day and night; that at present he knows a vessel carrying 550 barrels, that enters the bayou without touching, and goes out also; and that formerly a vessel of any tolerable size, loaded with lime, could not approach the bar at the mouth of the bayou, without considerable danger.

Judge Pitot, who has been acquainted with the navigation in question for about twenty-five years past, testifies to the same effect as the preceding witnesses. He states, that he came to this country from Pensacola, by the way of the bayou St. John, in a small vessel of 18 tons; that on his arrival at the bayou, he was informed by the captain that he must pass the night there, unless he would go up to the bridge in a pirogue, which he did, and left the vessel out side; that at this time there was not more than ten or twelve inches water on the bar; that in the year 1796, there were two or three small schooners in the basin of the canal Carondelet, but it was so filled up that they remained there two or three years before they could get out; that the navigation of the canal had entirely ceased, except in extraordinary high water; that

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

as to the bayou, at the time of the establishment of the company, he knows, that besides the sand bars in the inside of the bayou, there were ten or twelve places where it was impossible to pass, except in high water, from the logs which obstructed the bayou; that vessels which formerly made one voyage a month, after the establishment of the company, made four voyages a month; that the canal Carondelet was dug by order of the baron Carondelet, for the public use, and no toll was paid by vessels entering it; that this canal was entirely useless two years after it was dug, and was almost filled up, witness having crossed it often when dry.

Joseph Rabassa confirms every thing already stated respecting the former, and the present state of the navigation of the bayou St. John, with which he has been well acquainted for twenty-three years past. He also swears, that at the time of the cession of this country to the united states, or about a year and a half after, the basin of the canal Carondelet was almost filled up, and also the canal itself, as far as the half moon; that when the roads are good, it would cost about ten dollars for cartage, to load a vessel of 20 tons burthen,

at the bayou bridge; (that is, as I understand it, to cart the cargo from this city to that bridge) that since the improvements made by the navigation company, the bayou is navigable for vessels drawing six feet water; and on the bar outside, there is always three feet and a half water, at the lowest water; that vessels drawing three feet water come up to the basin of the canal; and in high water, vessels drawing five feet, enter the canal; that vessels of the burthen of from 50 to 70 tons, trade to the bayou and basin from Havana, Pensacola, and the northern states; that there may be upwards of one hundred vessels employed in the trade on the bayou and the basin; that he knows that the improvements he describes in the navigation of the bayou and canal, are entirely owing to the works of the navigation company; that he has worked at these himself, and that when employed in depening the bar at the mouth of the bayou, and had got eight feet water on it, next day, by a strong north west wind, it would be diminished to three feet; and that previous to the cession of the country, the sail rigged vessels which anchored at the bayou St. John, might be from 20 to 30 in number.

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

J. H. Holland, the deputy-sheriff, swears, that he has been well acquainted with the navigation of the bayou and canal Carondelet since the year 1802; that he is satisfied, from the state in which the bayou and canal are now, compared with what they were formerly, that it would cost more to navigate them formerly, (that is to say, before the improvements made by the navigation company) than it would do at present, paying the tolls of the company; and this, besides the risk of lives. That he was once in a small vessel of only three or four tons, which grounded on the bar outside, and was shipwrecked, and one of the hands perished; that the charge of a load from the city to the bayou bridge, was generally from $1 25 cents to $1 50 cents; and in bad weather, they would charge a dollar for a single barrel; that vessels were sometimes detained a considerable time at the bridge, waiting for a cargo, on account of the badness of the roads. In all other respects J. Holland corroborates the testimony adduced on the part of the defendants, as I have already briefly and substantially set it forth.

Here we have made out a case of the most

liberal, disinterested and meritorious fulfilment of our duties to the public, even to our own great detriment; a case which has not, perhaps many precedents in this or any other country. We have removed all the bars and sand-banks, and cleared away all the obstructions to the navigation of the bayou St. John; we have dug a noble canal, in the place of the almost dry ditch, formerly miscalled the canal Carondelet, and scooped the deep and spacious basin, now crowded with the well-freighted vessels of various nations; we have added, at least, fifty per cent, on an average, to the value of a large portion of the real property of this city. And after having, in order the more speedily and completely to accomplish all those great objects of our institution, expended not only the whole of our capital, but even the whole of the tolls received by us for several years, and which might have been justly divided among the stock-holders;—After having, I say, been for so long a period without receiving one cent of dividend on our capital of $200,000; then, instead of indemnifying ourselves, which we might fairly have done, for the losses occasioned by our long self-denying ordinance, by

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

requiring the full tolls to which we were entitled, we contented, and do still content ourselves, with but a little more than one half that amount. We demand only one dollar and a quarter, instead of the two dollars per ton, which we are authorised to exact on vessels navigating from the mouth of the bayou to the basin in the city. Small craft pay but fifty cents per ton; while all ordinary fishing-boats are wholly exempted from toll.

All these facts and circumstances are now, and always have been matters of notoriety, particularly to the legislature, who annually appointed a committee of their members to enquire into our conduct and concerns. What then shall we say of those, who, without a shadow of evidence, or ground of suspicion, denounce us for malfeasance, for illegal and oppressive actings and doings, for repeated violations of our charter?—Of those, who having founded on their will, a judgment of condemnation against us, have recourse to their imagination for the facts requisite to support it? Let us be permitted to compare them, in one respect, at least, with that illustrious Grecian ruler, whom the poet characterises—

Fandi fictor Ulysses.

Though the counsel for the prosecution did not allege in their petition, any specific act of malfeasance against us, yet we gave them full liberty to offer to the court any species of evidence they could obtain, in support of any act of that kind which they might be able to discover. They did not attempt, because they could not fairly attempt, to fix any such act upon us. And when their zeal, talents and industry are considered, this circumstance amounts to a decisive proof of our innocence. Far from laying to our charge any illegal or oppressive doings, the learned gentlemen seem so well satisfied with what we have already done, that they only complain of us for not having done more; for not having continued our useful and excellent works, so as to connect the canal Carondelet with the river Mississippi.

The third paragraph of the preamble to these resolutions, assails us with all the force of metaphisico-economical philosophism, and populace-courting rhetoric. (I will not pervert or degrade the glorious epithet, *popular*, by applying it to the common place rhapsody of which I am about to speak.)—We are assured in the first place, that highly

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

favoured monopolies and exclusive privileges are in their nature adverse to, and incompatible with the genius and spirit of a free people. Now, as the privilege conferred upon us, of taking tolls to indemnify us for our expences, is necessarily an *exclusive* privilege, it follows of course, that it ought to be abolished: inasmuch as nothing which is in its nature adverse to the genius and spirit of a free people, should be suffered to exist in a free country. And thus a capital of $200,000 is forfeited, and many worthy families reduced to beggary by a syllogism.

It is extraordinary to hear such a condemnation of exclusive privileges, pronounced by a legislature, who have themselves granted many and important exclusive privileges, to enable several persons to establish ferries, build bridges, improve the inland navigation of the state, or effect other objects of public utility. I have counted no fewer than twelve of their acts (all passed in the same sessions that produced the resolutions against our unfortunate company) for granting privileges of this kind. And on examining our statute books, since the establishment of a republican government in this country, we find a

large portion of our municipal laws devoted to the same laudable purpose. Perhaps, in no state in the union, or on earth, does there exist, in proportion to its population, a greater number of privileged corporated bodies, than are at this day established in the state of Louisiana. What will become of all our institutions for the municipal government of our towns and cities, for the establishment of schools and colleges, for the formation or improvement of roads, bridges and navigable streams, for the support of the numerous temples of religion, and asylums of charity, and repositories of learning, which already sanctify or adorn our infant commonwealth, if the destructive doctrine of this resolution be carried into effect? What will become even of that excellent institution, the State Bank, which has the honour of numbering so many of our worthy legislators among the directors of its country branches, and the felicity no doubt of accommodating them with occasional loans? The privilege which that justly popular institution enjoys, of lending its funds at an interest of one half, or 50 per cent. more than any other bank in the state is permitted to take, subjects it to this legisla-

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

tive anathema, and requires its destruction, as "adverse to, and incompatible with the genius and spirit of a free people."

It is extraordinary, that any one should hold this doctrine, who looks round him, and views the numerous and wonderful public works which have been accomplished in the space of a few years, by our privileged corporate bodies. Observe only what has been done by the corporation of the city of New-Orleans; a body which holds, and very freely exercises, the high privileges of taxing its inhabitants. Were any one, who had only known this city under the Spanish government about twenty years since, to be suddenly transported to it now, the changes that would immediately strike his eye might seem the effect of enchantment. In place of a poor, small, straggling town, he would behold an extensive, opulent, and noble city. Instead of the dirty, dismal, impassible roads of former times, he would see spacious streets, clean, well-paved, and lighted with lamps fit to illuminate Armida's gardens.

Corporate bodies give cohesion, strength and harmony to the individual elements that compose a commonwealth. By their united

efforts, sustained and animated by the combined motives of public spirit and personal interest, can best be accomplished and preserved those stupendous works of public utility, too expensive to be undertaken by individuals, and requiring too constant a vigilance, and too minute an attention to matters of detail, to be well maintained by the agency of the government of a state. The exclusive privileges of such corporations as that which I now defend, are not only not adverse to, or incompatible with the genius and spirit of a free people, but the direct contrary is the fact. They form one of the peculiar characteristics by which the freest states are distinguished. They never have been known to exist, they could not exist, except in a free state. It is only in one or two nations of Europe, and in the united states of America, that they are found at all. Who, indeed, would be so improvident as to expend his fortune under an arbitrary government, in forming or improving a navigable stream, when he could have no security, nay, when he might be certain, that as soon as the tolls were worth receiving, the despot would seize upon them for his own use, or grant them

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

to some of the slaves who supported his tyranny? Let us suppose, what please God will never happen, that this country should be retroceded to the Spanish monarchy—that monarchy being such as it was twenty years ago—then, I maintain, that neither our privileges, nor those of any other useful corporation in the country, would survive the cession for twelve months. Some pretence would soon be found for confiscating our property; and our revenues, instead of being appropriated to promote agriculture or commerce, or to indemnify industry and enterprize, would be squandered away on some court pageant or debauchery. The truth is, that such useful and privileged bodies as ours, are, in their nature, absolutely incompatible with the genius and spirit of a tyrannical government. Exclusive privileges! Why, the state itself, and the whole fabric of its government, are founded upon them. The sovereignty of this commonwealth is exercised to the exclusion of more than nine-tenths of all its inhabitants. From the exercise of the lowest political privilege, *to wit*, the right of suffrage, the constitution excludes; first, the whole female sex; then all males under the age of

twenty-one years; next, all others who are not free white citizens of the united states; and lastly, all of these who have not resided one year in the county in which they offer to vote, and paid besides a state tax.—These exclusions leave about 7000 privileged voters, out of a population of 150,000 souls: and it is the opinion of our most sagacious and experienced politicians, that the basis of our democracy could not be much widened without endangering the state. This basis is as broad as that which supported the democracy of Athens, the most illustrious republic of the ancient world.

And now, let us be permitted to call our accusers before the great sovereign council of the enlightened, the highly privileged (the morally and politically privileged) electors of this commonwealth, to whom those accusers are immediately responsible, and ask them, was it just to denounce us to the public, as they have done, without a particle of proof to support their accusations; to assail us not merely by figures of speech, but by fictions of fact? Was it wise or expedient, was it even pardonable in them, to allow themselves, in their hostile zeal against one corporation.

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

to assert and proclaim, in a solemn manner, principles not only destructive of all the chartered institutions of the state, but utterly subversive of that very constitution which made them legislators, and which they are bound by their solemn oaths to support? Are they aware of the dreadful consequences which legislative denunciations of this kind are calculated to produce, and have frequently produced, not in remote ages and nations only, but in our own times, and among a people of the same race as that which constitutes a majority of our population?—If they cannot satisfactorily answer these questions on the day of *their* trial, the next general election, we must demand from the people a judgment of *ouster* against them.

They declare further, that highly favored monopolies and exclusive privileges, tend manifestly, in their oppressive operations, to the alienation of the affections of the citizens for their government. "By your fruits shall you be known," is a good maxim in politics as well as in morals. Let *us* then, and all the other privileged corporations of the state, be judged by this maxim. If, notwithstanding the great number of those bodies

that are established, and in constant operation here, the patriotism of our people be pure and ardent, this proposition of the preamble is as groundless as all the others, or we must be innocent of the oppressions laid to our charge. A few years ago, when our highly favored monopoly was still draining the purses of its proprietors, and most of our privileged corporate brethren were filling their own, this country was invaded by a veteran, and till then, victorious army, superior in number to the whole male population of the state, capable of bearing arms. The event was one calculated, together with the long blockade of the lakes and the river, to put the affections of the citizens for their government to a severe trial. What was the result? The noblest display of patriotism and courage on their part, and the utter defeat and discomfiture of the invader in a few weeks. I really doubt, whether the people could have better testified their attachment to their government and their country, even in the good old times when Louisiana was not afflicted with any of those odious and liberticide *exclusive privileges*, so eloquently denounced by the legislature; when there were no toll roads, no toll

East'n District. *March*, 1822.

THE STATE vs. ORLEANS NAV. COMPANY.

ferries, no toll bridges, no toll canals; no privileged banks, or steam-boat companies, or navigation companies, or library companies, or incorporated schools, academies or colleges, or protestant churches, or Poydras asylums, for the relief of the widow and the orphan; when there were no privileged electors of governors, senators, or representatives; no jurors selected exclusively from the class of respectable freeholders; when all the waters of the province were as free as its air, and the bayou St. John could be navigated without paying a maravedi,—by every canoe and pirogue that could crawl or be dragged over its numerous bars and sand banks.

Whatever the authors of the resolutions may be pleased to think of our affection for *them*, we will give them an unequivocal proof of our warm and rational attachment to the genuine principles of our republican government: We will convince them that we know enough, and what is more, that we feel enough, of the true spirit of a free people, not to shrink from making a fearless defence of our rights, and the rights of all other proprietors, corporate and individual, which this

prosecution may jeopardize, even though the highest authority in the state is our accuser.

But we do not now, nor did we in the court below, as it has appeared to the counsel, treat this cause with contempt. I have endeavoured, and will again endeavour to answer every one of his arguments and observations; though in doing this, it may not be possible to be always grave, or even serious. There are some sophistries so exceedingly ridiculous, that nothing but ridicule can expose their absurdity.

The counsel makes many assertions respecting the effects produced by the tolls of the navigation company, in involving a large portion of our citizens, on the other side of the lake, in distress, incredible to those who have not seen it with their own eyes;—in sacrificing our cotton merchants;—in driving our wealth from its natural channels, &c.; of which assertions the record does not furnish one word of proof. But that record, as well as our own certain knowlege, gives a direct contradiction to several of those assertions. The assertion, for instance, that the lake Ponchartrain "is now navigated but by a few schooners," is contradicted by almost all the wit-

East'n District.
March, 1822.

THE STATE
vs.
ORLEANS NAV.
COMPANY.

nesses. The pathetic complaint, "that our eggs and butter at breakfast, our meats at dinner are dearer, because, *there is not a vessel which transports them to market that is not taxed*," we all know to be unfounded. We all know, that the far greater number of the vessels which bring those good things to market, bring them by the Mississippi, and are not taxed at all; and those who are in the slightest degree acquainted with the principles of political economy, or the ordinary transactions of commerce, know that the price of the article which pays no tax, must always limit and keep down the price of the like article, which cannot be brought to market without paying a tax, whatever the amount of that tax may be. Nor is it by any means correct, that "the avarice of the company emulates the folly of him who killed his goose that laid golden eggs, to get them all at once." Without presuming to question the propriety of the simile by which the learned counsel compares his clients, "on the other side of the lake," to that silly animal, the *goose*, I would remark, that there is evidence here to prove that we are not so stupid as to kill that goose for her golden eggs. The accounts of the

company on record shew, that for two or three years past our tolls have been gradually improving; or to express myself conformably to the gentleman's ingenious metaphor, his geese lay more eggs for us now than ever they did. Their "loud and incessant" cackling has not in the least diminished their productiveness.

In answer to the demand made upon us, to shew by what authority we claim to be a corporate body, and to exact tolls from those navigating the bayou St. John, and the canal Carondelet, we rely on the act of congress passed on the 4th of March, 1804, providing, among other things, for the temporary government of the territory of Orleans; and on the charter of incorporation, granted to us on the 3d of July, 1805, by the legislature, which was established here, in virtue of that act. In opposition to this claim, the counsel insists:—

1st, That congress have no power to govern the territories of the united states, and their acts for the government thereof, are null: and 2d, That, if they even had that power, they could not delegate it to the governor and legislative council of the territory of Orleans, from whom we derive our charter.

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

Desperate an undertaking as it was, to maintain these doctrines, at this time of day, it was yet necessary for the counsel to make the attempt; for if the legislature of the late territory of Orleans was lawfully constituted, our charter is invulnerable.

The article of the constitution of the united states, giving power to congress to make all needful rules and regulations, respecting the territory, or other property, belonging to the united states, is decisive to overthrow this newly raised objection. The word, territory, like the word country, includes men as well as soil; and it is generally understood among us, in its most extensive sense. When we speak of the real property belonging to the united states, we most frequently call it the public land.—But independently of this article, the treaty-making power given to congress, together with the general power to make all laws which shall be necessary and proper for carrying into execution the powers of the government, would be amply sufficient to confer upon congress the authority to form governments for all those territories which the united states might acquire by treaty. To allow the federal government to obtain the cession of a territory or province, without

having any power to govern it afterwards, would be an absurdity which no men of common sense, still less the enlightened framers of our constitution, could commit. And if congress have power to form a government for such a territory or province, they must necessarily have the power to delegate suitable persons to carry that government into effect, in so far as they may not themselves be competent or perfectly qualified for that purpose. They may well and wisely legislate for the territory in which they hold their own sessions, but they could hardly do so for a province in South America, or an island in the East Indies.

The constitution does not expressly give to congress the power of establishing any bank or other corporation, yet it has been decided by the highest legislative and judicial authorities of the united states, that that power may be exercised when such an establishment is deemed by congress necessary and proper for carrying the powers of the federal government into execution. Let me quote, on this occasion, the words of our most able and celebrated judge:—"We admit, as all must admit, that the powers of the government

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature, that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate; let it be within the scope of the constitution; and all means which are appropriate; which are plainly adapted to that end; which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."—Again; "the propriety of this remark would seem to be generally acknowleged by the universal acquiescence in the construction which has been uniformly put on the third section of the fourth article of the constitution. The power to 'make all needful rules and regulations respecting the territory, or other property, belonging to the united states,' is not more comprehensive than the power to 'make all laws which shall be necessary and proper for carrying into execution' the powers of the government. Yet all admit the constitutionality of a territorial

government, which is a corporate body." From chief justice Marshall's opinion on the constitutionality of the bank of the united states. 4 *Wheaton's Rep.* 421, 422.

We see, at once, the pernicious tendency of this prosecution. It has been deemed proper, by the opening counsel, in order to support it, to maintain a doctrine which would abolish our civil and penal codes, our principal laws for regulating judicial proceedings, and all the corporations authorised previously to the establishment of our state government. All of these, if null in their origin, must be null and void still. If they were not laws in force in the territory, at the time of the adoption of the state constitution, they cannot come within the provision of the fourth section of the schedule; which provides, that all such laws shall continue and remain in full effect until repealed by the legislature. The counsel is really a keen sportsman in this forensic chase. Rather than fail to run down and kill his game, he is disposed to destroy his dogs, his horses, himself, and every thing around him.

Here I might quit this subject; but the learned gentleman has permitted himself to

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

make, in reference to it, some inconsiderate and highly incorrect remarks, which I cannot suffer to pass unnoticed. He represents the act of congress, providing a government for the territory of Orleans, as an unconstitutional usurpation of power; a tyranny, in short, like that which Great Britain formerly exercised over us. On this point, my opinion, and I trust that of every one in the community, is diametrically opposite to his. The conduct of the government of the united states towards this country, has been distinguished by wisdom, prudence, and the utmost purity and plenitude of good faith. A temporary government, the best, perhaps, which circumstances allowed, was formed at first, and that government was gradually liberalized and republicanized, in as short a period as the former condition of the people rendered possible, until the territory was finally established as a sovereign state of the union. Nor did the congress, even in this short interval of political protection and preparation, subject the commerce or the agriculture of the territory to any monopoly, disability or restriction. On the contrary, her ships, and all the valuable articles of her produce, were immediately entitled to the

privilege of being admitted, free of duty, into every port of the united states. Will the counsel venture to compare this liberal and generous policy with the policy of Great Britain, not merely towards the colonies she intended to oppress, but even towards the most favored of her acquired possessions? Will it be maintained, by any one of the slighest political experience, that a people, subjected for ages, to the rule of an absolute monarchy; a people consisting of various races and casts of men, can, without danger, be all at once invested with all the rights and privileges of democracy? The conduct of our general government towards Louisiana has, on the whole, been such as should induce every Spanish colony, situated as Louisiana was at the time of the cession, to desire most earnestly to be incorporated, like her, into our confederacy, as one of its free, independent and sovereign states.

It is contended, that if the governor and legislative council of the territory of Orleans, were constitutionally established, they were restrained in the exercise of their legislative powers, to rightful subjects of legislation; and that, in granting the charter now attacked,

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

they transcended those limits, and did not act on a rightful subject of legislation.

If, to improve the inland navigation of a country, be not a rightful subject of legislation, I know not what is one. I think it is among the fitest subjects upon which legislative wisdom and power can be employed.

Of all laws, the most important, perhaps, are those which secure the lives, the persons, the reputation, the civil and religious liberties, and the political power of the citizen; for those laws form the best foundation of his independence, and dignity, and enjoyments, as a *moral* being. In the second degree, I should place those laws which increase his *intellectual* pleasures, and promote his *intellectual* improvement; those laws which encourage literature and the liberal arts and sciences; those which favor the establishment of schools and colleges, libraries, theatres, and philosophical societies. The next in excellence, are the laws which administer to the *physical* wants and comforts of the people; those laws which advance agriculture or manufactures, or give life to commerce; those which provide for the formation of roads, bridges, canals, or any other means of internal improvement.

The law before you, belongs, in relation to its final objects, to the last class; but the means it contemplates for obtaining them, have such a connection with science, as entitles it to a higher rank. The art of inland navigation is, in fact, one of those by which free and enlightened nations are more particularly distinguished from those which are enslaved, or barbarous, or imperfectly civilized. What art more useful, more noble, more entitled to legislative encouragement, than that which enables man to drain the marsh, to fertilize the desert, to command the rocks to disappear, and the mountains to open, to facilitate the commercial intercourse, and multiply the means of subsistence and comfort of a whole community? The legislature of this territory were invited, by the state of the country itself, to the subject of inland navigation. Nature has done so much for us, in intersecting our almost level soil, with innumerable rivers and bayous, that we can easily improve her bounty. We have no rocks to blast, no mountains to perforate, no expensive locks to erect; we have only to clear away, deepen, extend, and unite the

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

channels of water communication already so abundantly provided for our convenience.

The legislature of the territory of Orleans, adopted the most equitable and most effectual means for making these improvements. They chartered a corporate body for that purpose, and authorised them. in order to indemnify themselves for the large sums necessary to be expended, to receive certain tolls, but not until certain specified improvements should have been made; when, for instance, they should have improved the navigation of the bayou St. John, so as to admit. at low tides, vessels drawing three feet water, from the lake Ponchartrain to the bayou bridge; then they might take from every vessel passing in or out of the said bayou, a toll not exceeding one dollar per ton, of her burthen; and when further improvements should permit, vessels drawing three feet water to pass from that bayou, by the canal Carondelet, to the basin, they should be entitled to an additional toll, not exceeding another dollar per ton. *Vid. sec.* 9 *of the act.* 3 *Martin's Dig.* 186. It was certainly more just to take this method of improving the navigation in question, than to effect it by imposing a general

tax upon the whole community. For, although all the citizens are benefited by every amelioration of this kind, yet all are not benefited in the same degree. Those who navigate any waters, and derive the immediate and principal profit from the commerce which they increase and facilitate, should bear the expence of improving the navigation of those waters. It would be as unreasonable to compel the citizens of Oppelousas and Ouachita to pay for clearing out the bayou St. John, and the canal Carondelet, as it would be to oblige the inhabitants of New-Orleans to build every new bridge that might be wanting in those counties. We have authorities, precedents and examples innumerable, to justify the legislature that granted this charter. The opinions of the most celebrated jurists, statesmen, and political economists; and the acts of those legislatures who best understood and most profoundly reverenced the true principles of republican legislation. I will refer the court to a few of these—to the laws of Maryland, (November, 1784) for improving the navigation of the Patowmack—to the laws of Virginia, for improving the navigation of James river, 1 *Virg. Rev. Code*, 440; and of

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

Willis river, 2 *Virg. Rev. Code*, *appendix*, *p.* 10; and of the river Slate; of the Rivanna, and of the Shenandoah, *p.* 22, same appendix; and for making the Dismal swamp canal, *p.* 27—to the laws of Pennsylvania, for improving the navigation of the Tulpehocan, 4 *Penn. Acts*, 88; of the Brandywine, *p.* 257; of the river Lihigh, 5 *Penn. Acts*, *p.* 280—and to the various laws of the state of New-York, for making those great canals which are already among the wonders of this new world. I will add the statutes of our own state, for improving the navigation of Fausse riviere, 2 *Mart. Dig.* 338, 342; and of the bayou La Fourche, *ib.* 358; and of the Amite and Iberville, 3 *Mart. Dig.* 150; and to the act to construct a basin to communicate from the Mississippi to Marigny's canal, *Acts of* 1819, *p.* 110.

The laws I have quoted are in most respects similar to our charter. They establish companies with a joint stock, and authorise them to take tolls as soon as they shall have performed certain works, or made improvements for navigation of a specified nature and extent. Several of those acts put limits to the profits to be derived from the tolls; some

of twenty per cent; others of twenty-five per cent. on the capital stock. Our charter limits our profits to fifty per cent., at the most; though it may be remarked, that in the charters given to our banking, insurance, and other corporate bodies, there is no limitation of dividends or profits whatever. This is the clause in our charter, not giving or allowing us a cent, but merely limiting and restricting our possible profits, which the opening counsel has the fairness and candor to represent as subjecting a part of our state "to an exorbitant, interminable tax;"—"a tax which must necessarily create a monied aristocracy of those who enjoy it, because they are allowed fifty per cent. per annum, on their capital, for ever." And yet he had before him the uncontroverted evidence, that the whole of the dividends received by the company since their establishment, amounted to not much more than five per cent. per annum, on that capital.

Of the laws referred to, the far greater number are for improving rivers and streams that were already navigable in some degree; and not merely for digging canals where none previously existed. The first is surely as rightful an object of legislation as the other.

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

It is quite as advantageous for the public, that large sea-vessels should be able to navigate where nothing but canoes and pirogues could before pass, as that boats should navigate where nothing but horses and carts could formerly travel.

The acts of all those legislatures enforced, acquiesced in, and approved of, ever since the establishment of our federal government, might, one would suppose, remove all doubts concerning the constitutional validity of our charter, even from the sceptical minds of the jurists of St. Helena and St. Tammany. It has been considered by our highest judicial authority, that even "a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which, the great principles of liberty are concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be

lightly disregarded." *Judge Marshall on the United States Bank question*, 4 *Wheat.* 401. Other highly respectable opinions to the same effect, may be found in 1 *Cranch*, 309; 4 *Wheat.* 624; and 3 *Martin's Rep.* 669.

The adverse party insists, that the bayou St. John was public property, free and common, as a *public highway*, for the use of all the people of the united states; and that, by this charter, it has been alienated in favor of the defendants, in violation of the constitution, and of all public right.—No such alienation or disposition of that stream, or of the use of it, has been made. It is still, and ever has been since the company has had the charge of improving it, a public highway, free for the use of all the citizens of the united states.

The counsel is greatly in error, in supposing that a canal, river, or road, ceases to be a public highway, free for the use of all, because a toll of indemnity is required from those who make use of it. All the inland navigations, whether of natural rivers improved, or of artificial canals formed, in pursuance of the laws I have before cited, are considered. and in most instances are expressly declared

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

to be, for ever public highways; as are all turnpike roads and toll bridges, which are made in pursuance of legislative acts. By the 10th section of the statute for clearing and improving the navigation of James river, 1 *Virg. Rev. Code, p.* 443, it is provided, that the said river, and the works to be erected thereon, when completed, shall for ever thereafter be esteemed and taken to be navigable as a public highway, free for the transportation of all goods, commodities, or produce whatsoever, on payment of the tolls imposed by this act. The 12th section of the act for opening and extending the navigation of the Shenandoah, 2 *Virg. Rev. Code, appendix, p.* 27, has a similar declaration in nearly the same words. Almost all the canal and turnpike, and toll bridge acts have clauses to the same effect. We see, then, that a *public highway*, free to all, is not contradistinguished from a *toll way*. The true meaning and intent of the expression, public highway, is to distinguish it from a *private way;* from ways, whether rivers, canals, or roads, which are private property; and from the use of which, the proprietor might exclude whom he pleased. Formerly, under the feudal regimen, many rivers, or portions

of rivers, belonged exclusively to individuals, who exercised in them the right of fishery, the right of making wiers and the like. Even at this time, in the united states, and this state of Louisiana, a man may have an exclusive property in the canal he digs on his own ground for his mill, or in the road or bridge he makes for his own use, on his own plantation. It was evidently to prevent any appropriation or exclusion of this kind, that the statutes already mentioned, contained the declaratory provisions to which I have referred.

And these statutes were ordained by the distinguished legislators of Virginia; a state always eminent for her legislation and jurisprudence; by men who cultivate, and successfully cultivate, during the greater part of their lives, the science of public law and political economy.—So conscious, indeed, are our Virginian brethren, of their superior political knowlege and talents, that it is said they are generously disposed to rule over every state in the union, as well as their own, and to relieve all their fellow-citizens from all the cares and anxieties of self-government.

From these considerations, and especially from these legislative precedents, we may

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

learn the true construction of the words used in the ordinance for the government of the north-western territory, and the other acts of congress, on which the learned counsel so confidently relies. When it is declared, "that the navigable waters leading into the Mississippi and the St. Lawrence, shall be *common highways, and for ever free*, as well to the inhabitants of the said territory, as to the citizens of the united states, &c. without any tax, impost or duty therefor." *Ordinance, art.* 4. 1 *Martin's Dig. p.* 196. "That all the navigable rivers and waters in the territories of Orleons and Louisiana, shall be and remain for ever *public highways*." *Act of March* 3, 1811. 1 *Martin's Dig. p.* 314. "That it shall be taken as a condition upon which the said state, Louisiana, is incorporated in the union, that the river Mississippi, and the navigable rivers and waters leading into the same, and into the gulf of Mexico, shall be *common highways*, and *for ever free*, &c. without any tax, duty, impost or toll therefor, imposed by the said *state*."—See the acts to enable the people of the territory of Orleans to form a constitution, &c. *sec.* 3, and the act for the admission of the state of Louisiana into the

union, &c., *sec.* 1. 4 *Bioren's Laws of the United States*, *p.* 329, 402—nothing more is intended than to declare, explicitly, that the waters in question shall be *public highways*, and not *private ways*, for the use of any particular person or persons exclusively. This is clearly proved by limiting the exclusion of all taxes, duties, imposts or tolls, to those which might be imposed by the said *state*. Never could it have been the intention of congress to prevent the new states from clearing, improving. and extending any of the navigable, or partly navigable waters, which God had given them, or from forming new channels of navigation: nor to prohibit them for ever from effecting those purposes by the most reasonable, the most effectual, and the most usual means; that is, by the agency of joint stock corporations, to be indemnified by tolls, paid by those who should profit by their labours. The grand object of the ordinance, and of all the laws in question, was to provide for the establishment of states, and permanent governments therein, and for their admission to a share in the federal councils, on *an equal footing with the original states*, at as early a period as might be consistent with the gene-

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

ral interest—See the last paragraph of the 3*d sec. of the Ordinance.* 1 *Martin's Dig.* 192. Could congress then have contemplated to deprive these new states of a means of internal improvement, prosperity and opulence, employed by every one of the old states, whose local situation and other circumstances, allowed them to avail themselves of its advantages? Congress never entertained such an invidious, illiberal disposition. We shall presently shew, with respect to our own particular company, that they have not only recognised, consented to, and approved of our charter, but have afforded us their generous aid in furtherance of our operations.

The bayou St. John, alienated! The bayou St. John not a public highway! Not free and open to all the citizens! Every one who will use his eyes, may be convinced of the contrary. That bayou, which, before the establishment of the Orleans Navigation Company, was an unsafe, obstructed, miserable channel, is now a great public highway for the vessels of all nations; and *we have made it so.* That bayou which was formerly shut up and occluded by bars and sand-banks, and innumerable other embarrassments, we have opened and

made free; really free for the use of all who choose to navigate its waters. Where one vessel could navigate it heretofore, a hundred, a thousand vessels may navigate it now. It is as free as it was possible for art to make it.—The navigation of that stream, of almost vital importance to our now populous city, can no longer be monopolized by the lime-boats and pirogues which formerly managed, though not without great risk and labour, to force their way through its shallow, encumbered channels. And this may be the real cause of the outcry set up by certain persons against our enterprizing, public spirited institution. They find that their wretched craft cannot maintain any competition with the fine, large, well-rigged, well-manned vessels, which we have enabled to sail from the lakes into the heart of the city. They cannot bear to see the bayou "ploughed by bolder prows than theirs;" and they know that if our company were destroyed, the navigation of that stream would soon be deteriorated to its pristine state, then they might again possess the same monopoly of it which they enjoyed in the good old times.

The learned counsel's notion of a public

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

highway, free to all the world, is like that of a certain worthy Hibernian, concerning a free port. On arriving with his ship at New-York, which he was assured was, like all the ports of the united states, a free port, he was utterly astonished to find that he was obliged to pay a tonnage duty on his vessel, impost duties on his goods, and wharfage besides for the liberty of landing them on the quay. After all this, he was not so much surprised when he went to the Fly-market, which he heard was a public market, free and open to every one, to learn that he could obtain nothing there without paying for it.

It is contended for the prosecutor, that if a duty of one dollar per ton can be laid on vessels navigating the bayou, in favor of our company, a like duty of fifty dollars per ton might, in principle, be equally imposed; and that such a duty would be a complete alienation of the bayou to the company, by excluding all vessels from it. The answer to this objection is obvious. Our own interest would be a security to the public, that whatever toll we might be authorised to exact, we should not impose one which would prevent vessels from navigating any of the waters we might

improve. Such an imposition would ruin ourselves. If we charge too much, our customers will quit the bayou for the Mississippi. When it is known, that we demand at present, tolls far below what we are permitted by our charter to require, how can it be fairly presumed, that we should exact more than we now do, although we were at liberty to charge fifty times the amount?

The counsel insists, that our charter, so far as it relates to the canal Carondelet, is void, because it grants to us a certain soil belonging to the united states; that, *to wit*, on which the canal Carondelet is dug; when, by the territorial constitution, the governor and legislative council were expressly prohibited from the primary disposal of any part of the soil of the united states.

It will be time enough for us to answer this charge when it is brought by the united states, the alleged owners of the soil in question. The soil of the canal Carondelet is, and will remain, what it was intended for, a public highway. If the united states ever had any claim to it they have fully and repeatedly authorised us to use it, as we now do, for a navigable canal, free to all who choose to navigate it.

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

It is further maintained, that the toll granted by the 9th section of our charter, is in violation of that article of the constitution of the united states, which declares, that the "congress shall have power to regulate commerce with foreign nations, and among the several states;" and of that article, which provides, that "all duties, imposts and excises, shall be uniform throughout the united states;" and of that article also, which ordains, that "no preference shall be given by any regulation of commerce or revenue, to the ports of one state over those of another; nor shall vessels bound to or from one state, be obliged to enter, clear, or pay duties in another." But it is clear, at the first view, that the provisions and restrictions of those clauses, are applicable, exclusively, to the exercise of the legislative powers conferred on congress. It never before was contended or supposed that any of those clauses could be so construed as to restrain a state from authorising toll canals, or any similar establishment, for the *bonâ fide* purpose of improving its agriculture or commerce.

There is yet one more objection to the constitutional validity of the 9th section of

our charter. It is alleged that the imposition of the tonnage duty, as it is called, which we are allowed to demand, is in violation of the provision of the 10th section of the first article of the federal constitution; that "no state shall, without the consent of congress, lay any duty of tonnage;" and it is asserted, that our charter has never received the consent of congress.

To investigate this objection thoroughly. let us first enquire whether the toll in question is really such a tonnage duty as the constitution contemplates? A duty is a tax or impost raised by a state for the use of its government. A toll, on the contrary, signifies a payment in towns, markets and fairs, for goods and cattle bought and sold. It is a reasonable sum of money due to the owner of the fair or market, upon sale of things tollable within the same. 2 *Inst.* 220. Tolls were granted to the corporation of the city of Carlisle, for all commercial goods passing in and out of the city, on horses, or in carts or waggons. 5 *East's Rep.* 2. Tolls may be claimed by grant or prescription, by a town, for such a number of beasts, or for every beast that goeth through their town; or over a bridge or ferry main-

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

tained at their cost; which is reasonable, though it be for passing through the king's highway, where every man may lawfully go, as it is for the ease of travellers that go that way. *Terms de ley*, 561, 562. This toll must be for a reasonable cause, which must be shewn, *viz.* that they are to repair or maintain a causeway, or a bridge, or such like. *Cro. Eliz.* 711. Of this last kind is the toll in question. It is granted to us for the just and reasonable cause of improving and maintaining the navigation of certain waters. It is allowed as an indemnity, or if you please, as a remuneration for monies laid out and services performed.—Again, the constitution says, "no *state* shall, without the consent of congress, lay any duty of tonnage." But our toll is not laid by any state, but by a corporation, authorised by a state legislature, or which amounts to the same, by a legislature, having for that purpose, the power of a state legislature. It is, in fact, authorised by the state, inasmuch as our state constitution provides, that "all laws now in force, in this territory, not inconsistent with this constitution, shall continue and remain in full effect until repealed by the legislature. *Schedule, sec.* 4. In this case, no

tax or duty, of any kind, is positively established by law, although a toll is permitted, eventually, to be established by our charter. The toll emanates from a corporate power. The corporation may authorise or not authorise it, and may select the purposes to which the proceeds are to be applied. This corporation is a being intended for local objects only; all its capacities were limited to the improvement of the inland navigation of our territory. Its ordinance, imposing a toll, is a bye law, and not a state law.—This distinction between a public law, authorising a corporation to raise money in a particular manner, and the bye law by which the corporation exercises the authority thus given to it, was taken and sustained in the remarkable case of *Cohens* vs. *the State of Virginia.* 6 *Wheat. Rep.* 445.

When the duty is laid and collected directly by the state itself, then, whatever may be the alleged purpose of such duty, it is right, perhaps, that the consent of congress should be obtained; otherwise state legislatures might raise a revenue of impost, disturb the harmony of our general commercial system, and thereby violate the constitution. under the

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

pretence of providing for some object of particular utility. It was this consideration, no doubt, which induced congress to declare, in the act of 1799, concerning quarantine and health laws, that nothing in that act should enable any state to collect a duty of tonnage or impost without the consent of the congress of the united states. And, through abundant caution, the consent of congress has been obtained, even to some of the state laws, which, without laying directly any tonnage duty, authorised particular corporations to impose tolls, to be regulated by the burthen or capacity of vessels. Well! if the toll claimed by us, can be considered such a tonnage duty as requires the consent of congress, we shall shew that their consent has been given to our charter, more frequently than to any other charter of the kind that was ever granted by any state in the union. Our company has had the consent of congress impliedly and expressly; nay more, it has had their approbation, their support, and their co-operation.

By the act of congress, establishing the legislature which granted our charter, it was provided, 1 *Martin's Dig.* 142, that the governor should publish throughout the terri-

tory, all the laws which should be made; and should, from time to time, report the same to the president of the united states, to be laid before congress; which laws, if disapproved by congress, should thenceforth be of no force. That the governor of the territory, and the president of the united states, performed the duties enjoined on them by this act, is not to be doubted. The law presumes, that public officers fulfil their duties, unless the contrary be shewn. But our charter has never been disapproved of by congress. They have, therefore, assented to it. I need not repeat the well-known maxim of our law, by which this doctrine of common sense is supported. To those who are at all acquainted with any system of law, or with the common business of life, the idea of an implied consent, is quite as familiar as that of an express consent. In many suits, far more important, and infinitely more agreeable than suits at law, it is well known, that consent is almost always given by silence. The constitutional article under examination, does not say, that no state shall, without the *express* consent of congress, lay any duty of tonnage. And this court well knows, that every article restricting the

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

power of a state must be construed as strictly as possible, in favor of the states, especially in a suit whose object is to annul a contract that has been unquestioned for sixteen years; and on the faith of which a number of our fellow-citizens have expended $200,000 of their property.

It is mere sophistry to ask if the governor and legislative council had passed an act to banish ten citizens, or decimate the people, whether such an act would be valid, although not disapproved by congress? With or without the consent of congress, such an act would be null and void. Our charter was, in its origin and object, a just and lawful act, which required nothing but the consent of congress (if it even required that) to give it full validity.

But the congress have not left us to imply their assent to our charter. By the 3d section of the act, respecting claims to land in the territories of Orleans and Louisiana, passed March 3, 1807, almost two years after the date of our charter, 1 *Martin's Dig.* 282, they confirm the claim of the corporation of the city of New-Orleans, to the commons adjacent to the said city, provided, "that the

corporation shall reserve for the purpose, and convey, gratuitously, for the public benefit, to the company authorised by the legislature of the territory of Orleans, as much of the said commons as shall be necessary to continue the canal of Carondelet from the present basin to the Mississippi," &c.

By an act passed on the 18th of April, 1814, 1 *Martin's Dig.* 360, the congress grant, vest in, and convey to the president and directors of the New-Orleans Navigation Company, and their successors, for the use and benefit of the said company for ever, all the right and claim of the united states, to a lot of ground therein described. And by another act, passed on the 16th of March, 1816, 1 *Martin's Dig.* 366, the congress confirm to, and vest in, the Navigation Company of New-Orleans, another lot of ground specified in that act.

The two last mentioned acts, be it observed, were passed subsequently to the act for the admission of the state of Louisiana into the union; and they completely confirm the construction I have given of the clause declaratory of the freedom of the navigable rivers and waters of the state: a clause on which

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

the counsel rely so much to invalidate our tolls. The congress, with that act of admission fresh in their memory, pass two acts recognising and granting aid to our company, which they well knew then took, and had long taken, tolls on the tonnage of vessels navigating the bayou St. John.

But the congress, it is said, have been circumvented in all they have done in our favor; in favor of "an oppressive and ceaseless extortion." What! were they kept in ignorance of our charter by the governor whom the president and senate of the united states had appointed? Were the rights of the good people of the state of Louisiana abandoned as a prey to those canal-cutting, bayou-clearing, sand-bank removing knaves and tyrants, by all our senators and representatives in congress? Were Mr. Poydras, Mr. Robertson, Mr. Brown, Mr. Fromentin, Mr. Butler, all guilty of this abominable neglect of duty? If so, it is strange indeed, that they should have since received so many additional proofs of the confidence of the great body of their fellow-citizens.

I do not deem it requisite to urge the argument used on a former occasion, by an advo-

cate of the company, drawn from the direction in which the bayou St. John leads, and from the situation of the lake into which it falls. Nor will I exercise the severity of criticism on that precious morsel of poetry which the counsel has quoted: it is altogether worthy of the logic it is introduced to adorn.

It can hardly be necessary to say much on the proposition attempted to be maintained, that congress have the power, under the constitution of the united states, of rescinding any charter, of taking away any right, of violating any contract, whenever they think the public good requires it.—The conservative purposes for which congress have been established; the solemnly declared objects of the constitution under which congress exercise their powers; the sacred principles of justice and good faith which that constitution recognizes from the beginning to the end: the very positive provisions of the additional articles of that constitution; the probity, the honor, the morals, the manners, the usages of the good and great people, for whom, and by whom, the general government, arising out of that constitution, is administered; all these

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

give at once a flat and indignant contradiction to that unworthy doctrine.

The parliament of England, says the learned counsel, rescinded the charter of the East India Company; and the measure was advocated by Burke, Fox and Sheridan. He is mistaken as to the first branch of his assertion. The attempt to destroy that charter was defeated in the house of lords, and the authors of the attempt were soon after driven out of office, by the justice of their country. There has been indeed, a period in the history of England, when the charters of many corporate bodies were overthrown, and that too under the colour of judicial proceedings. It was in the reign of Charles the II., one of the wickedest rulers by whom that nation was ever cursed.

No, sirs, congress has not annulled the charter, or violated, either intentionally or in fact, or authorised the violation of the solemn contract, or of any part of the solemn contract, made between the legislature and the Orleans Navigation Company, under the faith of which contract the members of that company have laid out so large a portion of their fortunes. If there were any thing in the

act for the admission of this state into the union, or in any other act of congress, prohibiting this state from improving its inland navigation, in the best and most usual mode, or from the exercise of any other right belonging to the original states, such a prohibition would itself be a violation of the constitution of the united states, and of that article of the treaty of cession (part of the supreme law of the land) which provides for the security of the property of the people of Louisiana, and their incorporation into the union, with the enjoyment of *all* the rights, advantages and immunities of citizens of the united states.

The attempt to wring from a single sentence of a law, a meaning destructive of good faith, justice and equity, and contrary to the repeatedly expressed intention of the legislator, is repelled by every sound principle and every approved precedent of jurisprudence. Even where the words of a statute do clearly import that something unjust may be done, the courts will conclude that this consequence was not foreseen by the legislator, unless his intention to permit the injustice be unequivocally expressed: without such an expression, it will not be presumed that any

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

construction can be agreeable to the intention of the legislature, the consequences of which are unreasonable. Thus, if an act of parliament gives a man power to try *all* causes that arise within his manor of Dale; yet, if a cause should arise there, in which he himself is party, the act is construed not to extend to that cause, because it is unreasonable that any man should determine his own quarrel. 8 *Rep.* 118. If congress, subsequently to their acts in favor of our company, had enacted (supposing they had the power so to enact) that all navigable rivers, waters and canals, should be free of all tolls whatsoever, whether imposed by the state or by a corporate body, then, on the principle I have just stated, the act should be construed, so as not to extend to the tolls of the Orleans Navigation Company; because it ought not to be presumed, that congress would violate a fair contract, which they had already legalised and confirmed; that they would annul a charter of public utility, and authorise a manifest injustice. This is a principle of universal law, drawn from the purest sources of moral philosophy.—" When an exception to the rule (or law) occurs, which the law-giver did not

foresee, this exception is admitted in equity, which thus supplies the defect of law, as the law-giver himself would do were he present in court, and as he would have done by amending his law, had he been aware of the exception." *Aristot. Ethic. ad. Nicom. lib.* 5, *c.* 10. *Gillie's trans.* 1*st vol. p.* 389.

The construction for which the opposite party contend, would be scouted even under the government of the worst tyrants that ever scourged the earth. It was an ordained maxim of the Roman emperors, that all their acts of favor and beneficence should be interpreted with the utmost extent and plenitude of liberality. *Beneficium imperatoris, quod á divinâ scilicet ejus indulgentiâ proficiscitur, quàm plenissimè interpretari debemus. Dig.* 1, 4, 3.

It is pretended that the consent of congress, however expressly it may have been given in our favor, cannot avail us, as it was not given previously to the passing of our charter.— But all the acts of congress, consenting to charters of this kind, or to state laws imposing tonnage duties, which the counsel has cited, or which I have met with, were passed subsequently to the charters or state laws, to which they related. Some of those acts of

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

assent bear date many years after the promulgation of the laws which they were intended to confirm. But even if this article of the constitution of the united states could be applied to our navigation company, in the unprecedented manner proposed, it would only operate to render unconstitutional those tolls which might have been received by us, previous to the time when congress first assented to our charter; that is, to the last day of the period, when having the power to disapprove of it, they did not disapprove of it. Now, as we received no tolls at all during that period. this new doctrine, however well meant, can do us no mischief.

To all these authorities in support of the lawfulness of our tolls, I shall add one more. as respectable as any I have already adduced—the authority of the present executive government of the united states. We have given in evidence, and placed on the record, the following letter from the quarter-master general's department:—

(COPY)

June, 23*d*, 1820.

Sir,—Your letter of the 19th ult., has been received and submitted with its inclosures to

the inspection of the secretary of war, who directs that both the canal and bayou fees (tolls) on the public transports be paid. The former must not be incurred hereafter, except when it becomes necessary that the schooners should ascend to the basin in order to load.

I am, sir, yours, &c.

(*Signed*) T. CROSS, A. D. M. G.

Capt. Thomas Hunt, New-Orleans.

This order was given some time after a suit had been brought, very inconsiderately and unsuccessfully, by the company, against a vessel of the united states, which they seized in order to obtain payment for tolls. But the justice of the general government would not suffer them to resent the illegal proceeding. Would the executive, distinguished always for their vigilant attention to economy in the expenditure of the public monies, have directed those tolls to be paid, under such circumstances, if they entertained any doubt of the right of the company to demand them?

The counsel, towards the conclusion of his speech, was kind enough, in a gracious, relenting mood, to say: "We are not claiming the vested property of the company. Let them

East'n District. *March*, 1822.

THE STATE vs. ORLEANS NAV. COMPANY.

keep aud use that in the exercise of their constitutional powers. We are contesting their right to demand property, or which is the same thing, money from us." Many thanks to the learned gentleman, for the intended favor!—he only means to take from us our *tolls*, our *revenues*, the *only interest* or return we can ever have, or expect to have, for our money, and then he will leave untouched our property; our *capital*, which is already laid out and expended for the public benefit, and *gone for ever!* His beneficent intention, in this respect, reminds me of the goodly project of a certain Scotch economist, for expunging the national debt of Great Britain.—Feeling, or pretending to feel, some qualms of conscience at a scheme of public robbery so extensive, ruinous and atrocious, this scrupulous enemy of exclusive rights and privileges proposed that "nathing but the *interest* of the debt should be abolished, and that the national creditors should be left at fu' leeberty to take a' their *vested capitol—whare'er they cou'd find it.*"

Lastly, it is contended by the prosecutor, that if the charter of the company was rightfully granted, it has been forfeited by the

nonfeasance of the company, in not completing the navigation from the bayou St. John to the Mississippi river.

An attentive perusal of the 9th section of the charter, on which this attack is founded, will satisfy the court, that whatever might be the intention, or wish, or purpose of the government in granting the charter, or of the company in accepting it, neither party has promised or stipulated to perform, or cause to be performed, the work which we are alleged to have neglected.

This section enacts, that as soon as we shall have improved the navigation of the bayou, so as to admit, at low tides, vessels drawing three feet water, from the lake to the bridge, we shall be entitled to receive a toll on every vessel passing in or out of the bayou, not exceeding one dollar per ton. That when farther improvement shall permit vessels drawing three feet water, to pass from the said bayou, by the canal Carondelet, to the basin, we shall be entitled to an additional toll, not exceeding one dollar per ton; that when the navigation shall be improved, so as to admit vessels drawing three feet water, from the lake, to any place within one hundred yards

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

of the Mississippi, we shall be allowed a farther toll, not exceeding one dollar per ton: and that when the communication between the said navigation and the Mississippi shall be made complete, every vessel passing from or into the said river, shall be liable to a toll. not exceeding five dollars for every foot of her draft.

What is the meaning of this language of the legislature? If you perform certain services, respecting this navigation, you shall be entitled to a certain reward: when farther services, to a still farther reward. There is no specific engagement, there is no engagement whatever on our part. There is no obligation or liability on the part of the public, until we shall have earned our reward, according to the terms their representatives thought proper to prescribe. This is wholly unlike the ordinary contracts to which it has been compared. In those contracts, each party makes a covenant, a binding promise. I engage to give, or to do so much for you, in consideration of which you engage to give, or to do so much for me; or *vice versâ*. In our case, the engagement is not positive, but hypothetical. We could break no covenant, for we made none. If we

do certain things, we shall enjoy certain privileges. Did the counsel ever know, or can he conceive, that an action for breach of covenant could be supported on such a convention, and against the party who makes no covenant whatever? Suppose the owner of a tract of land should stipulate with a woodcutter in these words—if you will clear one hundred acres of my land, of all the wood growing on it, I will pay you a thousand dollars; and when you clear another hundred acres in the same manner, you shall have a thousand dollars more.—If this person should clear only ninety-nine acres, he would not strictly be entitled to a cent. But if he cleared one hundred acres, would he not be entitled to his full one thousand dollars, though he should refuse to clear an acre more? Had we expended our whole capital without being able to get three feet water at low tides, on the whole extent of the navigation from the lake to the bayou bridge, we should not be entitled to demand any toll whatever. But, if with that capital, we had accomplished no more than the proposed improvement of that extent of the inland navigation, surely we should have been entitled to the indemnity expressly

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

stipulated for that specific service. If, afterwards, when urged to clear the canal Carondelet and the basin, we should plead our inability, the utmost that could be said to us by the public, would be—if you cannot perform this work, we will propose it to some one else. But to deprive us of the wages we have already earned, because it is not in our power to earn any more, would seem, in ordinary cases, an injustice too flagrant to be attempted or thought of.

The laws of all the states which have legislated on the subject of internal navigation, confirm the decision which the common sense and common honesty of mankind would pronounce on this accusation against us. Whenever it is intended, that the non-performance of a specified work or improvement, shall cause a forfeiture of any right or privilege granted, it is so declared expressly; so that if the advantages offered be not deemed equivalent to the risk to be incurred, the charter need not be accepted. In the 19th section of the act for improving the navigation of James river, 1 *Virg. Rev. Code*, 445, it is provided, that if the company shall not begin the intended work within one year, or shall not com-

plete the same within ten years, then all preference in their favor, as to the navigation and tolls in question, shall cease. In nearly all the inland navigation statutes, which I have already quoted, there are similar enactments: and a great many subsequent acts were passed, extending the periods at first limited, instead of rigorously insisting on the right of forfeiting the charters for nonfeasance. So much have these corporations been favored by the enlightened legislatures of the most distinguished states of our confederacy.

The words in the 9th section, " when the communication between the said navigation of the river Mississippi shall be made *complete*," mean nothing more than when the canal shall be extended to the Mississippi: the construction attempted to be given to those words, even if there were any positive stipulation on our part, could only be specious, if the *sole* purpose of the act had been to open a navigable communication between the bayou and that river. But the purpose of the act, as expressly declared in its first section, as well as by its title, was to " improve the inland navigation of the territory of Orleans." Therefore, according to the extraordinary in-

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

terpretation for which the learned counsel contend, we should be liable to forfeit our charter for nonfeasance, if any part of that territory which might be susceptible of the contemplated improvements, should remain unimproved. Our charter, in short, would not be secure, until we should make every possible improvement within the range assigned for our operations.

In support of his argument, the gentleman offers the 22d article, *p.* 92, of the *Civil Code*, which enacts, that a corporation may be dissolved—first, by an act of the legislature, if they deem it necessary or convenient to the public interest;—and secondly, by the forfeiture of their charter, when the corporation abuse their privileges, or refuse to accomplish the conditions on which such privileges were granted.

The first paragraph of this article can only be construed to extend to those corporations which are formed for internal government, municipal administration, or the like; not to those which embrace contracts with respect to property. 4 *Wheat. Rep.* 629. The last are protected by that article of the constitution, which forbids state legislatures to pass

any law impairing the obligation of contracts. But there is no question, at present, on this subject. We are only required to shew that our charter has not been forfeited by misfeasance or nonfeasance. On this last ground, it would be manifestly very hard to annul our charter and deprive us of our rights, for not performing what we are utterly unable to perform. But the counsel insist on it nevertheless. Like Shylock, they stand upon the law. Well then, rigorous prosecutors, take your pound of flesh, *if you can find it in the bond.* What is that condition, tell us, which we refuse to accomplish, and on which any privilege exercised or claimed by us has been granted? We claim the privilege of receiving tolls on vessels coming to the bayou bridge, or the basin; the conditions on which that privilege was granted, were, that we should improve the navigation of the bayou, and the canal Carondelet, to a certain specified extent: and we have completely fulfilled those conditions. When you can find in our charter, that the junction of the navigation already completed, with the Mississippi, is made a condition for exercising any right or privilege we have ever claimed, then, but not till then, demand such justice as Shylock would exact

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

The statement given by the counsel, of the means of the company for carrying on the navigation of the river, is calculated to make a very incorrect impression. He says, that we have sold lots to the amount of $98,000, besides which, congress had appropriated $25,000, for the purpose of completing the canal. The lots of which he speaks were purchased by us, as the evidence shews, from the charity hospital of this city, for $28,633 8 cents, (all charges included) the whole of which sum was actually paid down; and paid too, out of the monies which might have been justly shared as dividend. These lots were afterwards sold by us, not for cash paid down, but on census, as it is termed; that is, for an interest on the capital of the price, the purchaser having the option to pay that capital, or the interest of it, for ever. In this sale, the capital of the price amounted to $98,325, and the interest thereon, stipulated at the rate of 6 per cent., to $5899 50 cents per annum.

It is evident that the purchasers will always prefer, as they have hitherto preferred, paying the interest to paying the capital, so long as the market rate of interest here shall exceed 6 per cent.; and that will probably be

for ages to come. This annual interest, together with a considerable portion of the toll received, has been, and still is appropriated to making and maintaining the requisite improvements in the navigation. There are many men who would have appropriated the proceeds of so fortunate a speculation in a very different manner: who would have sold those lots,—whose value our improvements had so greatly enhanced—for ready money, and made a dividend of the nett profit, to indemnify themselves in part, for their former losses. But instead of taking this fair advantage of circumstances, the navigation company—those persons, who, according to the counsel, 'are thoughtful only of their own pockets'—reserve the whole gross amount in perpetuity, (without even deducting any thing to replace the purchase money which they had taken from the proper fund of dividends) to promote the public objects of the institution. Their generous and public spirited conduct in this respect will be better appreciated when it is known, that from the granting of their charter in 1805, to the year 1809, and from 1813 to 1818, a period of about nine years, they received no dividend, no interest

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

whatever on their capital: so great were the expenses of making and maintaining this navigation. There is scarcely a storm that does not occasion a heavy loss to the company. The repairs of the damage done to their works by the crevasse of Macarty's plantation, cost them no less than $23,774 86 cents.

Congress, it is true, did, by their act of Feb. 10th, 1809, 4 *Bioren*, 201, appropriate the sum of $25,000, to enable the president of the united states to cause the canal of Carondelet to be extended to the Mississippi, so as to admit an easy and safe passage to gun-boats, if he should be convinced that the same was practicable, and would conduce to the more effectual defence of this city. Not a dollar of this appropriation was ever received by the company; and no attempt was made to extend the navigation to the river; the president being probably well convinced of the utter inadequacy of the means offered to the end proposed. No evidence has been given of the probable cost of the contemplated work, but we may know what the legislature of this state thought of it, by referring to the act of March 6th, 1819, for the establishment

of a company for the purpose of digging and constructing a basin to communicate from the river Mississippi to Marigny's canal. For that *sole* purpose,—without having in view the making or extending of any navigable canal,—the general assembly deemed it necessary to allow the company to raise a capital of 200,000 dollars.

We are not only not bound, but we are virtually prohibited by our charter from extending the navigation of the bayou and canal Carondelet to the Mississippi. To effect what we have already accomplished, has required the whole of our capital, and a great part of what ought to have been our interest upon it; but we are not permitted to augment our capital, and without a further and very large capital, it is impossible for us to make the navigable communication in question.

There belongs to every speculation of this kind, much of the risk of a lottery. Many canal companies get blanks, and a few have obtained splendid prizes. In Great Britain, there are canal stocks which have yielded dividends of from thirty to fifty-eight per cent. per annum, and whose original shares have been sold at a profit of a thousand per cent.

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

See the *London Magazine* for 1820, *vol.* 1, *pp.* 119, 237, 365, 485, 725. Some of the canal companies in Virginia have, I understand, been highly fortunate. Our company's chance of profit was, for a long time, very slender and precarious. The experiment was new in this territory, and they had every difficulty to struggle with; high wages, inexperienced workmen, sand-bars formed by every gale of wind, in place of those that had been cleared away. At last, by dint of hard labour, patience, perseverance, and a generous spirit of enterprize, they perform their task, and begin to receive a little reward for it. Their prize is, indeed, a very small one; not yet equal to the first cost of the ticket. Their stock for one or two years past has sold at a loss of about fifteen per cent. And notwithstanding all this, they cannot escape envy, hatred and hostility. Notwithstanding all this, we are told by the counsel, that "if this state of things is sanctioned by law, we must submit, —until legislative omnipotence affords relief." I doubt the propriety, indeed I doubt the *morality* of attributing *omnipotence*—in the most mitigated sense which any idiom of language, any fiction of law, or any figure

of the boldest rhetoric would admit—to a legislative body, whose powers are so strictly limited as those of our legislature are, by the constitution of this state, and by the constitution of the united states; both of which we are all bound, by our solemn oaths, to support. If it were even our dreadful lot to live in one of those enslaved and debased nations, whose impious despots assume to be the vicegerents of the Almighty, I think, that when compelled to address our masters in the language of adoration, we should remind them, at the same time, that their omnipotence, like that of heaven, ought to be exercised conformably to that sacred and immutable justice, "whose seat is the bosom of God, whose voice is the harmony of the world."—The counsel proceeds to say, "such a state of things, no doubt, was intended by those who granted the charter, more perhaps for their own benefit than the public weal. But it often pleases a good God to confound those rulers who use power for their own emolument, and to protect the oppressed by the blindness of their oppressors." This is the first time, I believe, that the governor and the legislative council who granted our charter,

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

were ever accused or suspected of such corruption. I am the last person on earth disposed to eulogize the character of governor Claiborne; but I will venture to assert, that whether he acted right or wrong, no man ever acted less from the impulse of mercenary motives. And I think I can say as much for that legislative council, whose secretary I was during the whole period of their existence, and with whose measures and views I had the best opportunities of being thoroughly acquainted.

The gentleman asserts, that if the navigation from the bayou to the Mississippi had been complete at the time of the late invasion, our gun-boats would have been saved, and the British army destroyed. Is it possible! Then these gun-boats must have been captured in the basin, as they were endeavouring to save themselves, having retired from the enemy as far as our incomplete navigation would carry them. Yet I have always understood that they were taken, not in the basin, nor in the canal, nor in the bayou; no, nor in the lake Ponchartrain, but in the lake Borgne. I supposed, from no better information than Latour's history, and the official

accouut of captain Jones, the commander of the gun-boats, that they had been taken in the Malheureux island passage, on their way to the Petites Coquilles, or the Rigolets, where they had positive orders to "wait for the enemy, and sink him or be sunk themselves." *Latour's History*, *p.* 58, and *appendix*, *p.* 34, 133. The counsel might as well have imputed to the navigation company, the capture of the city of Washington, as the loss of those gun-boats. The accusations of the wolf against the lamb, in the fable, have truth and justice in them, compared with this charge against us.

Whatever doubt may be imagined respecting the constitutional validity of our charter, or of any of its provisions, none I presume, can exist, but that we have expended our capital on the improvement of this navigation *in good faith.* We acted under the sanction of several state laws, and several acts of congress; and in the presence, and until now, with the acquiescence of the public and their representatives, whose interest and duty it was to oppose our proceedings at once if they were illegal. Our law—the universal and immutable law of all civilized communities—secures to us the full value of the improvements made

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

by us under these circumstances, even if it could be held that our charter was invalid, in the whole or in part. Let it not be objected, that a state is a party which cannot be subject to any judgment of this court. That state appears in court as a voluntary suitor. To obtain justice, it must first do justice. A previous indemnity for the whole of our useful expenses, would therefore be the indispensible condition on which the state could be allowed, for itself, or for the citizens at large, to resume the rights which have been granted to the navigation company.

We are told on this subject, by the counsel, that we may rely with unbounded confidence, on the generosity of the state, for ample remuneration for our services:—On that same generosity, in the exercise of which (he adds, by way of encouragement) "she is prosecuting this suit for the protection of her weak citizens against the extortions of the strong."

We have no doubt whatever of the justice of the state, that is, of the great body of her citizens; but if her legislature should continue in the same disposition as when they passed their resolutions against us. it is not probable

they would pay much regard to any petition of ours. Would they not exclaim as we approached their bar to supplicate for remuneration, "begone, too highly favored monopolists! Avaunt, ye minions of exclusive privileges! The forfeiture of your $200,000 is but a just punishment for your nonfeasance and malfeasance; for your many illegal and oppressive actings and doings."—But however well disposed they might be towards us, we prefer to claim our rights from the justice, rather than to solicit them from the generosity of our country.

We are unwilling, if we can help it, to rely on the favor of any one; but we do rely, with unbounded confidence, on the privilege—that invaluable privilege which belongs *exclusively* to the members of a free state—of demanding our own, not as a boon, but as a birth-right.

On this cause may depend the fate of every corporation in this commonwealth. If such a charter as ours can be forfeited, if the hardly earned privileges it confers can be taken away, if the solemn contract made with us by the public, and religiously fulfilled on our part, can be violated, on the pretences that have been set forth against us, what

East'n District. *March*, 1822.

THE STATE *vs.* ORLEANS NAV. COMPANY.

corporate body can consider itself safe? To say nothing of the principles proclaimed in the legislative resolutions, which cut up and destroy radically all corporations whatever, not even excepting that great corporation, the government of the state; is there any corporate body existing which might not be accused, and perhaps with truth, of omissions far greater than that which has been unjustly laid to our charge, and strenuously urged as a cause for depriving us of our charter? Is there any bank, any canal company, any turnpike-road company, any ferry-company;—is there any religious, or political, or charitable, or learned, or commercial corporation which has accomplished, to the utmost extent, every purpose contemplated or intended by the legislature,—which has done all that it could possibly have done to promote all the objects of its institution?

If the Orleans Navigation Company, whose perseverance, disinterestedness, and self-denying public spirit have been proved on this trial, to an extent seldom found in any joint stock, or any other corporation, be not secure, then it will be time for every one who holds an interest in any such chartered body in this

state, to sell it out at any sacrifice: and it would be only fair in that case, to give the citizens of the other states, and foreigners also, full notice of the risk they would run by adventuring their funds on speculations, in which, even if all the unavoidable hazards and difficulties attending them should be overcome, there would, at last, be no security.

With these observations, I commit the cause of my clients to the justice of the court.

(See *Post.*)

ROBERTSON vs. *LUCAS.*

APPEAL from the court of the first district.

If the judge *a quo* tell the defendant, he has no need of introducing his evidence, as the plaintiff's case is not proven, the supreme court will remand the case, if they be of a different opinion.

PORTER, J. delivered the opinion of the court. On the trial of this cause, the judge *a quo* being of opinion that the plaintiff had not made out his case, informed the defendant's counsel, that it was not necessary for him to introduce any evidence, and gave judgment accordingly in his favor. We think, from an examination of the testimony, that justice cannot be done, without having this evidence before us. The cause must therefore be remanded for a new trial.

East'n District. *March*, 1822.

ROBERTSON *vs.* LUCAS.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, that this cause be remanded to be tried anew, and that the appellee pay the costs of this appeal.

Ripley for the plaintiff, *M'Caleb* for the defendant.

BRADFORD vs. *WILSON.*

Where fraud is put at issue and the supreme court think that the weight of evidence is against the verdict, they will remand the cause for a new trial.

The court has the power to decide differently from the jury, but it is one which, in cases of that description, is to be exercised with great caution.

APPEAL from the court of the third district.

PORTER, J. delivered the opinion of the court. This action was instituted on a promissory note, made by Lashley, of whose estate the defendant is curator. The defence set up was insanity, fraud, and want of consideration.

The cause was submitted to a jury, who found for the defendant.

The plaintiff did not apply for a new trial in the court below, but appealed, and asks to have the judgment reversed, as the verdict is contrary to evidence.

Judging alone from what appears on record, and without the advantages which were possessed by those who tried the cause in the

first instance, we are of opinion the weight of evidence is in favor of the plaintiff. In ordinary actions we might proceed on this opinion, to give final judgment; but cases of the nature of that now before us, where fraud is put at issue (like those where damages are to be assessed) fall so peculiarly within the province of a jury, and that body, from its constitution, and the manner investigation is carried on before it, is so much better qualified than this court, to arrive at a correct conclusion on the merits, that we feel great reluctance to decide contrary to their verdict.

As the cause now stands, we think the safest course we can adopt, and the one best calculated to attain the ends of justice, is to send the parties back to investigate their rights anew. If the jury, who already tried the case, have erred, from the motives ascribed to them by the plaintiff; if they have been guided by their passions, and forgot the solemn duty they had to perform, and the responsibility under which they discharged it, twelve other of our citizens can correct their error. On the contrary, should a second jury find as the first has done, and an appeal is again taken, we shall be better enabled to

East'n District. *March*, 1822.

BRADFORD *vs.* WILSON.

satisfy the law, and do that in the case which justice may demand. 10 *Martin*, 66.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; that this cause be remanded for a new trial, and that the defendant and appellee pay the costs of this appeal.

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

NICHOLLS vs. *ROLAND.*

A contract for the sale of a slave must be reduced to writing.

If a slave be delivered on trial, parol evidence may be received to shew under what circumstances.

In contracts which are reciprocally beneficial to both parties, the same care is exacted of the bailee which every prudent man takes of his own goods.

In an action for property thus delivered,

APPEAL from the court of the fourth district.

PORTER J. delivered the opinion of the court. It is alleged in the petition, that the defendant entered into a verbal contract with the plaintiff, to purchase from him a slave, which contract was to be confirmed in writing: that the defendant being in great want of the services of the negro to work on his house, begged the use of him, and promised that he should be returned on the next day, or the contract confirmed.

It is further alleged, that the slave has not been returned, and judgment is prayed for

his value, and for the damages sustained by his loss.

The defendant plead the general issue; the cause was submitted to a jury, who found a verdict against the plaintiff, and he has appealed.

and not returned, the burthen of proof as to the facts which excuse the failure to restore it, lies on the bailee.

Parol evidence alone, was introduced to support the allegations contained in the petition.

As our law has declared that the sale of slaves must be reduced to writing, that a verbal alienation of them is null, and that in case the existence of any covenant tending to dispose of them is disputed, parol evidence shall not be admitted to prove it; *Civil Code*, 310, *art.* 41; *Id.* 344, *art.* 2, all the testimony which goes to establish a contract for the purchase of the property mentioned in the petition, must be rejected.

Parol evidence however was legally introduced, to shew that the plaintiff delivered a slave to the defendant, and the circumstances under which that delivery took place. These circumstances, as we learn from the evidence, were—that the plaintiff and defendant had a conversation respecting the sale of a negro, and that he was delivered to the latter on trial.

East'n District. *March*, 1822.

NICHOLLS *vs.* ROLAND.

who employed him in a ferry boat, and did not return him. Why he was not returned, the testimony taken on the trial, does not inform us, whether he ran away, or was drowned, or was fraudulently disposed of by the appellee, or lost through his fault or negligence, is left to be ascertained by presumption, for nothing express, nothing positive has been proved in regard to it.

From the evidence, it appears the negro was delivered to defendant, under an agreement which authorises us to infer that it was as much the interest of the owner to place him in his possession, as it was that of the appellee to receive him. In contracts which are thus reciprocally beneficial to both parties, the same care is exacted of the bailee, which every prudent man takes of his own goods, and the party to whom the property is delivered, is answerable only for ordinary neglect. *Domat, liv.* 1, *tit.* 5, *sec.* 2, *art.* 4 & 6. *Pothier, Traité du pret a usage, n.* 97, *Dig. liv.* 13, *tit.* 6, *l.* 5. 18 & 19, *par.* 5, *tit.* 2, *l.* 2. The judge *a quo* charged the jury conformably to this doctrine, when he told them, if they were satisfied the defendant had used the slave as he did his own, and paid the same attention

to his preservation, they ought to find a verdict in his favor.

But the judge did not stop here, he went further, he informed the jury that it was the duty of the plaintiff to prove that the loss of the slave proceeded from the fault of the defendant. In this we think he erred. The owner of the slave was only obliged to prove he delivered him. The circumstances which were to excuse the failure to restore him, should have been established by the party who received the property on the condition of returning it. We are far from intending to say, that if the slave absconded, or was drowned, the bailee should have furnished positive proof of these facts. But it was his duty to give evidence which led to a fair and reasonable inference, that the loss of the property was not owing to any fault of his. It would be imposing a most intolerable hardship on the bailor, to require of him, not only to prove that he placed his slave in the hands of another, but also to furnish testimony why he could not get him back. We had occasion a few days since to recognize the general rule on this subject, in the case of *Delory* vs. *Mornet*, and we there held that the burthen

East'n District. *March*, 1822.

NICHOLLS vs. ROLAND.

of proof lies on the person who has to support his case, by proof of a fact, of which he is supposed the most cognizant. That principle applied here brings us at once to the conclusion, that the *onus probandi* lay on the defendant; because he must be presumed to have more knowlege of the slave's conduct, and what occurred to him while in his possession, than the plaintiff can be supposed to have.

The general rule of evidence is, that the point in issue should be proved by the party who asserts the affirmative. If any doubt could be raised on the application of that rule to this case, it is removed by recurring to the law which governs contracts of this kind.

Pothier in his treatise *des Cheptels*, *n.* 53, says, that if a question arises respecting the death of cattle, delivered on the conditions common to this contract, the burthen of proof lies not on the owner, but on the person who received the property.

So in his work *Du pret a usage*, he teaches the same doctrine; that it is the borrower, not the lender, who must establish by evidence the loss of the thing lent. *Pothier, Traité*

East'n District. *March*, 1822.

NICHOLLS *vs.* ROLAND.

Du pret a usage, *n.* 40, and in his Treatise on Obligations, *n.* 620, he presents the very question before us, and decides it, in conformity with the opinion we have just expressed.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the cause be remanded for a new trial, with directions to the district judge not to charge the jury, that "the plaintiff not having proved it was by the fault of the defendant the negro had disappeared, they ought to find for the defendant." The costs of appeal to be paid by the appellee.

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

BETHMONT vs. *DAVIS.*

A cook, hired for 18 months, may be dismissed at any time. If the master was bound to pay his passage back to France, at the end of his services, his representatives may recover the value of such a passage, though the cook died during the pendency of a suit

APPEAL from the court of the first district.

PORTER, J. The plaintiff, a resident of Paris, in the kingdom of France, contracted with the defendant to serve him eighteen months in the capacity of cook. He was to receive two thousand five hundred francs *per annum*, for his wages, and the defendant further agreed to pay his passage from Havre to

East'n District. *March*, 1822.

BETHMONT *vs.* DAVIS.

brought on the master's refusal to pay the passage money.

New-Orleans, and from New-Orleans back to Havre.

In pursuance of this contract the plaintiff came to Louisiana. After he had served the defendant for some months, a dispute arose between them, and he was discharged. This action is brought to recover the whole amount of his wages.

The judge *a quo* gave judgment that the plaintiff recover the sum of $257 25 cents, which amount he states to have decreed on the following grounds:—$107 25 cents for the period of actual service, and $150 to carry the plaintiff back to France.

It is admitted that Bethmont died after the inception of this suit, and before the rendering of judgment in the district court.

A good deal of evidence was taken to shew the conduct of the parties, and the causes which produced the dispute, that ended by the discharge of the plaintiff. But the view I have taken of the case renders it unnecessary to examine that evidence in detail.

Both plaintiff and defendant have appealed.

I think the judgment of the district court is erroneous in that part which allows $150 for

the passage back to France; because, in my opinion, that branch of the contract was personal to the plaintiff, and as by the act of God, it is now impossible for him to perform his part of it, the defendant cannot be compelled to a performance on his. It is true that damages were due by the defendant the moment he refused to comply with his agreement, but nothing on the record shews the amount of these damages, or what pecuniary loss the plaintiff suffered by remaining here, instead of returning to his native country. In the absence of proof as to the amount, we cannot give more than a nominal sum. To give $150 to his heirs, is carrying the contract into complete effect, which, in my opinion, cannot now be done.

As there is a difference of opinion among the members of the court on this point, I am anxious to state somewhat in detail the reasons which influence mine. I cannot agree with the plaintiff's counsel, that the promise to pay the passage back to France, bound the defendant for the sum necessary to effectuate that object, whether he returned or not. On the contrary, I think it was only due in case he should return. If I am right in this posi-

East'n District. *March*, 1822.

BETHMONT *vs.* DAVIS.

tion, we have then presented the ordinary case, where the payment of money depends on something to be performed by the other party to the contract. What is the principle of law which governs cases of this kind? This: that until that performance takes place the money is not due. What is the exception? That if the act to be done is personal, and the person who has a right to claim its execution prevents it, he shall not take advantage of his own wrong, and he is responsible in damages, if the party who had to perform this act dies during the pendency of the suit. This is the doctrine of *Pothier*, *Traité du louage*, *n.* 455.

The question then returns on my mind what damages are proved? How are we informed that the plaintiff was injured to the amount of $150, because his passage was not paid? How do we learn that if he had gone back he would have been benefited in that sum? Or what damage he sustained by remaining? There is not even any evidence how much it costs for a passage to France, I therefore think the district court erred in decreeing that the defendant should pay for it.

In respect to the other sum allowed by the judge, it does not appear to me any error has

been committed. Our *Code* declares, that a man is at liberty to dismiss a hired servant, attached to his person or family, without assigning any reason for it. This construction cannot be shaken by the argument so strongly enforced by the plaintiff's counsel; that in the present case the parties had contracted for a longer time. Because it is precisely for cases of this kind that we must presume the law to have been made. If the terms of the contract stated no period of service, the master would have the right to dismiss his servant without the authority of this provision in our *Code*.

I think that the judgment of the district court should be reversed, and that the plaintiff recover of the defendant the sum of $107 25 cents; that the plaintiff pay the costs in this court, and the defendant those of the court below.

MARTIN, J. I concur with every part of the opinion of judge Porter, except that which relates to the claim for a sum equal to the costs of the plaintiff's passage back to France.

The defendant has not stated in his answer that he tendered a passage on board of any vessel, to the plaintiff; on the contrary he

E. st'n District. *March*, 1822

BETHMONT *vs.* DAVIS.

has denied the plaintiff's right to such a passage. It appears therefore clear to me that the plaintiff had a right, immediately on bringing on his suit, to be compensated in damages for the failure of the defendant, to perform that part of the contract, which entitled the plaintiff to demand a passage to France. This right to damages, for this partial breech of the contract, certainly survives to his representatives.

Had the plaintiff, on the defendant's refusal to furnish him with a passage, embarked for France, he might have sued the defendant for the passage money he might have paid, and this would have been recoverable, even if the vessel which carried the plaintiff had sunk. If, unable to procure such a passage, the defendant had given up his expectations to return, he could have had an action to be compensated for this sacrifice. This action could certainly survive. Likely it is this very action that he has instituted. I think his death *pendente lite* has not put the defendant in a better situation.

The passage was a part of the price of the plaintiff's services.

I think the judgment ought to be affirmed.

MATHEWS, J. This action is founded on a contract, by which the plaintiff agreed to serve the defendant as a cook, for a certain time, stipulated between the parties in a written instrument. Before the expiration of the period of service, the cook was discharged by his employer; and proceedings took place, as have been stated by the junior judge of the court; with whom I agree in opinion in all things, except his construction of that clause in the contract which relates to the payment of the price of the passage of the plaintiff back to Havre. I think the obligations arising out of this contract were entirely reciprocal on the parties up to the period at which the services of Bethmont ceased, by the will of the defendant; and that from that moment, the only remaining obligation (necessary to a complete fulfilment of said contract) rested altogether on Davis. He had bound himself unconditionally to pay the passage of the plaintiff back to Havre, in France, at the expiration of the time of service as stipulated, which, in my opinion, created a positive obligation on his part, to pay so much money as would amount to the price of such passage; for it could not in any

East'n District. *March*, 1822.

BETHMONT *vs.* DAVIS.

manner concern the interest of the employer what disposition the servant might make of himself, after his services had ceased. Considered in this way, the contract must be extended to the representatives of the plaintiff, who are entitled to the full benefit of that stipulation which relates to the passage back to Havre, notwithstanding his death. I therefore concur with judge Martin, that the judgment of the district court should be affirmed with costs.

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

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

BARRY vs. *LOUISIANA INSURANCE COMPANY.*

If testimony be admitted, without being sworn to, and be contradictory, the supreme court will remand the case for a new trial.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. Reduced to a single question, as this case is, and that one of fact alone, the only difficulty in its decision arises from the contrariety and direct opposition of the testimony, which relates to the ownership of the ves-

sel on board of which the goods were shipped and insured. When a person who acts as master of a ship, is guilty of barratrous conduct, that is *prima facie* evidence of barratry, so as to entitle the assured to recover against the underwriters, without requiring negative proof that such captain was not the owner, or shewing who really was. The fact of his being owner must be established by the underwriters, in discharge of whom it is intended to operate. *Park on Insurance*, 127.

Opposed to this presumption of law, in the present case, we have it on record, as proven by one witness, that Brown, the master, purchased the vessel at a sale by the marshal. To rebut this testimony the plaintiff offers a copy of the ship's register, by which it appears, that on the oath of the master, Brown, the vessel was registered as the property of John Nicholson, the person who proves Brown to be the owner. Had Nicholson and Brown both been sworn in open court regularly, to testify in the cause, as to the real owner of the schooner, and had their testimony been thus contradictory, and nothing appeared to lessen the credibility of either, we should have concluded that the presumption in fa-

East'n District. *March*, 1822.

BARRY *vs.* LOUISIANA INSURANCE Co

vor of the captain not being owner ought to prevail, and that the assurers are liable on the policy. But Nicholson has never been sworn, and the registry of the vessel (if at all evidence of the ownership, is not the best) has perhaps been irregularly obtained; and consequently the oath, which is the foundation of it, is before us in such a questionable shape that little weight can be given to it for the purpose of proving property. These circumstances create such embarrassment in weighing the testimony, that we are of opinion that the case ought to be remanded for a new trial, believing from all which appears on the record, that justice requires this mode of proceeding.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, that this cause be remanded for a new trial, and that the appellee pay the costs of this appeal.

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

MAGER vs. *LOUISIANA INSURANCE COMPANY.*

East'n District. *March*, 1822.

MAGER *vs.* LOUISIANA INSURANCE Co

If testimony be admitted, without being sworn to, and be contradictory, the supreme court will remand the case for a new trial.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This case is similar in all its circumstances to that of *Barry* vs. *Louisiana Insurance Company* just decided, it must therefore receive a similar judgment.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, that the cause be remanded for a new trial, and that the appellee pay the costs of this appeal.

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

DAME vs. *GASS.*

11m 205 f124 1071

If it does not appear on the record that the matter in dispute exceeds $300, the appeal will be dismissed.

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

PORTER, J. delivered the opinion of the court. In this case two persons claim to be appointed curator of a vacant estate. The unsuccessful applicant has appealed from the judgment of the court, which refused to ap-

East'n District. *March*, 1822.

DAME *vs.* GASS.

point him, and granted letters of curatorship to his opponent.

The parties have argued the case on the merits. But on looking into the record we do not think we are authorised to go into them, for nothing is shewn which gives this court jurisdiction of the cause.

The petition of Dame states, that Smith has died *ab intestato*, that he has left some property behind him, and that he is a creditor for the sum of $175 32 cents.

The opposition of Gass says nothing of the estate left by the deceased, no inventory appears among the proceedings, nor does the evidence establish that the amount exceeds $300. We know nothing therefore of the sum in dispute, and as we are prohibited from examining any other causes but those which the constitution has assigned to us, we cannot look into this. 4 *Martin*, 33.

We are therefore of opinion that the appeal be dismissed with costs.

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

SANCHEZ & WIFE vs. *GONZALES.*

East'n District
March, 1822.

SANCHEZ & WIFE
vs.
GONZALES.

APPEAL from the court of the second district.

MATHEWS, J. delivered the opinion of the court. In this suit the plaintiffs claim title to a tract of land described in the petition, by right of succession in the wife, as sole heiress to Alonzo Romano, one of the colonists of that place, on the bayou La Fourche, formerly called Valenzuela. The defendant pleads title in himself, and prescription against any which might be adduced by the plaintiffs. The cause was submitted to a jury, on facts presented by both parties, and a special verdict returned. After the finding of the jury, the defendant moved in the district court for a new trial, which motion being over-ruled, and final judgment rendered on the verdict, he appealed.

The supreme court may relieve on the refusal of a new trial; but a very clear case must be made to induce it to do so.

An individual put in possession by the Spanish government, by metes and bounds of a part of the king's land, as his own, acquired such title, which, strengthened by long possession, must prevail.

The certificate of the land commissioners does not avail against claims of individuals.

The first question to be decided by this court is, whether the justice of the case requires that it should be remanded for a new trial?

The power given by law to the court of appeals, to order new trials in the courts of original jurisdiction, ought not to be consider-

East'n District. *March*, 1822.

SANCHEZ & WIFE vs. GONZALES.

ed as conferring a discretion without rules or limits; altho' the expressions by which it is allowed, appear to be extremely broad and comprehensive. In the present case, an application having been made to the court below for a new trial, we are referred to the grounds therein stated, to shew the error of the court in refusing it; and our attention is directed to the whole evidence in the case. It was decided by this court in the case of *Heerman* vs. *Livingston*, that when facts are submitted to juries for their finding, a refusal by the court to cause the testimony to be reduced to writing, is no ground of error, as in such cases the law does not require it. A special verdict, or facts found by a jury, being conclusive evidence to the court, it is most certainly the duty of the judge, before whom they are submitted and found, to see that nothing but proper evidence be admitted, and that the jury have not violated truth, as established by such evidence; but as the law has provided no means by which the whole of the evidence can be brought before the appellate court, the granting or refusing new trials must be left very much to the discretion of the inferior tribunals. We are unable to per-

ceive that it has been improperly exercised in this case by the judge *a quo*, and are of opinion that the cause ought not to be remanded.

In coming to a conclusion on the merits, it is not thought necessary to examine the facts found by the jury in detail. Advocates often, through zeal for the interest of their clients, submit facts which are not very material in applying the law to a case.

This being a petitory action, it is first necessary to enquire whether or not the plaintiffs have made out any legal title to the property in dispute, and if they have, it then becomes necessary to examine the title as set up by the defendant.

The plaintiffs and appellees have exhibited no written evidence of title from the Spanish government, to the person under whom the wife claims as heir. The facts found by the jury, as submitted on the part of the plaintiffs, shew, that a colony, as it is termed in the pleadings, was settled on the bayou La Fourche, by authority of the government of the country; that Alonzo Romano, the ancestor, was one of the colonists; that Laveau Trudeau, the king's surveyor, measured out to

East'n District. *March*, 1822.

SANCHEZ & WIFE *vs.* GONZALES.

each his parcel of land; that said surveyor put Alonzo Romano in possession of the land claimed in this suit; that the archives of Laveau Trudeau have been destroyed by fire; that Romano possessed the said land until his death, and during the space of sixteen years; the minority and heirship of his daughter, the plaintiff, are fully established. The first fact submitted by the defendant, relates also to the plaintiff's title, and finds it to be a concession by the Spanish government, and possession given by Laveau Trudeau.

From these facts, some reliance seems to be placed by the counsel of the appellees, on a title by prescription, in Romano, the ancestor. It is believed that we may safely assume, as a general rule of prescription, that the public domain is not subjected to it by any length of time. But from the expressions in several of the laws in the recopilacion of the Indies, it does appear, that the Spanish government has, in some degree, enacted an exception to the general rule. The 1st law of the 12th title of the 4th book, provides, that persons who have made their habitation upon, and cultivated lands for four years, shall have the right of disposing of them as their own

property. This law also fixes the quantity which may be assigned to each individual of any new settlement, according to his rank, &c. The 14th law of the same book and title, after the declaration of the right of the crown of Spain to the entire sovereignty and dominion of the Indies, indicates the sovereign will as to the disposition of the public lands, and requires that all possessors of land should exhibit titles, &c, and that those who shew good titles, or a just prescription, shall be protected therein, &c. The 18th law *id.* admits persons who have possessed for ten years, to compromise with the government for lands thus possessed.

The sovereign power of a state or kingdom, which holds public domain for the benefit of the whole community, is not restricted by forms as to the manner in which it may assign or lay out any part thereof to an individual in full dominion of property. It is true that this is generally done by written titles, emanating from competent authority, but we are of opinion that it will not be in violation of any principle of national law and equity, or of sound policy, to say that when a part of the public land is separated from the rest by metes and

East'n District. *March*, 1822.

SANCHEZ & WIFE *vs.* GONZALES.

bounds, and an individual is put in possession of it, as his own, he acquires title thereto: which is certainly much strengthened by a lapse of time, so long as that, during which it appears from the evidence, the father of the plaintiff possessed the tract of land in dispute. There can be no doubt of the title of the ancestor, having, in the present case, descended to his heir, and being of opinion that the former had a title, we conclude that the appellees have shewn a title in themselves.

It only remains to see if the defendant has produced evidence of a better title. In truth, the finding of the jury shews none of any description, except that which is attempted to be made out by prescription; but it is clear from all the circumstances of the case, taking into view the minority of the plaintiff, that the time necessary to prescribe without a colourable title has not elapsed. It is, moreover, the opinion of the court, that the apellant would not be bettered in relation to his title, by the certificate of confirmation of the land commissioners of the united states, were it admitted to make a part of the facts in the cause: 1st. because the certificate gives no right

against individual claims: and 2d, because it is believed Alonzo Romano acquired a title to the disputed premises in his life time, which descended to his heir, the present plaintiff.

The circumstance of fraud in the possession of the defendant, as found in the 6th fact submitted on his part, must defeat every pretention of title derived from that source, and destroy all just claims which he might otherwise have had for remuneration on account of improvements made by his industry on the land.

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

Workman & Porter for the plaintiffs, *Derbigny* for the defendant.

ARNOLD vs. *BUREAU.*

APPEAL from the court of the first district.

The signature of one of the partners, binds the firm, when he has no private interest.

MARTIN, J. delivered the opinion of the court. This case was before us in Dec. 1819, and was remanded for a new trial. 7 *Martin*, 292. There was a verdict and judgment as before, and the defendant appealed.

East'n District. *March*, 1822.

ARNOLD *vs.* BUREAU.

Price deposed, that after the defendant's failure, Packwood and Price purchased from Philibert, a claim against the defendant.

Philibert informed him that he had no other claim against the defendant, than that which he sold to Packwood & Price.

Price stated he received payment of Philibert's claim in a note of the defendant, endorsed by Deshon & Allen, for one-fourth of its amount, and discharged the defendant.

W. Montgomery deposed, that the plaintiff purchased a quantity of sugar from W. & J. Montgomery, in 1811, and endorsed and put in their hands the two notes of the defendant, on which the present suit is brought, to be collected, and the proceeds applied to the payment of the sugar. The notes were not paid at maturity, and the witness considering his firm as the plaintiff's agents, for the collection of the notes, did not cause them to be protested, and received the note, annexed to the answer, for one-fourth of the plaintiff's claim, and signed the defendant's concordat, with the rest of his creditors. He cannot recollect whether his firm held the two notes, in their own right or as the plaintiff's agents. He believes he gave the plaintiff a receipt

for them, and sold him the sugar for cash, and plaintiff being unable to pay, gave the witness these notes. He kept them a considerable time after May 1811, and the balance due was paid him by J. Touro, the plaintiff's agent. The witness wrote to the plaintiff, at Boston, his domicil, informing him of what his firm had done in the premises, which was not disapproved by the plaintiff. The defendant's note, annexed to the answer, for one-fourth of the two notes sued on, was taken in lieu of them and was paid at maturity.

The rest of the testimony, and the nature of pleadings in the first opinion of this court, are not repeated here.

The case was remanded to give the plaintiff the opportunity of proving that he paid the Montgomery's, and that there were creditors of the defendant residing in New-Orleans, who did not subscribe the concordat, or agreement between the defendant and his creditors.

He has shewn us that he paid the Montgomery's, but there is no evidence of there being creditors, who did not sign the agreement. W. Montgomery, one of the firm, who were the holders of the notes (on which the

East'n District. *March*, 1822

ARNOLD *vs.* BUREAU.

plaintiff's claim rests) signed, and the firm received the note for one-fourth, endorsed as proposed, in satisfaction of the amount of the two notes. If the firm were the owners of the note, the signature of one of them, who is not shewn to be a creditor in his private name, and the subsequent receipt of the note for the fourth, must conclude them.

If they were not the owners, the plaintiff then was; but as he resided in Boston, the absence of his signature is not evidence that there were creditors *residing in New-Orleans*, who did not sign; so that *quâcumque viâ datâ* the defendant is entitled to the benefit of his concordat.

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

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

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, APRIL TERM, 1822.

East'n District.
April, 1822.

BRADFORD'S HEIRS vs. *BROWN.*

BRADFORD'S HEIRS *vs.* BROWN.

APPEAL from the court of the third district.

MARTIN, J. delivered the opinion of the court.* The defendant called the heirs of Flowers, in warranty of a tract of land claimed by the plaintiffs, as part of their father's estate.

The warrantors support the title of the defendant, their vendee, on the following grounds:—

The premises are the one half of a tract of land, for which Bradford obtained a warrant of survey on the 2d of April 1796, and a certificate of survey on the 6th of August following. On the 21st of the same month, no grant having as yet issued, an agreement was

The assent of the vendee to an act of sale, may be proved by matter *aliunde.*

The vendee of an estate, cannot be disturbed on the score of lesion, in the sale by which his vendor acquired it; the sale is not, therefore void; and if the first vendor wishes to avail himself of the benefit of the law, he must bring suit to have the act set aside.

A party who has carried his pollicitation into effect, and

* MATHEWS, J. did not sit in this case, being interested.

East'n District. *April*, 1822

BRADFORD'S HEIRS *vs.* BROWN.

entered into between Bradford and Flowers, by which the former covenanted to convey to the latter, one half of the said land, as soon as the grant was obtained, on the payment of fees and charges attending the grant.

On the 6th of the following month (September) the grant issued.

On the 30th of January 1804, a survey of partition was made, and on the 7th of April following, Bradford made a conveyance of one half of the tract to Flowers, whose heirs, after his death, sold the premises to the defendant. There was a verdict and judgment for the defendant, and the plaintiffs appealed.

delivered what he had promised to give, cannot urge that the party who received it did not accept the offer.

Answers to interrogatories must be taken together; they cannot be divided.

Threats of legal process is not such a violence as will avoid an agreement.

1. Their counsel urges that the district judge erred in permitting the instrument, which is offered as evidence of the sale from Bradford to Flowers, to be read to the jury.

This intrument is an indenture, as ordinarily used in most of the states of the union, by which the land is conveyed under the hand and seal of the vendor. It bears date, as has been already observed, of the 7th of April 1804, and is not signed by the vendee.

On this head we are referred to *Part.* 5, 5, 6, *Just. inst.* 3, 24, *Cod. de fide inst.* 21, 4. *Civ. Code*, 344, *art.* 1 and 2. 1 *Poth. on oblig.* 10.

2. That, if this instrument be considered

as a deed of sale, it ought to be rescinded. on account of the lesion apparent on the face of it. The consideration or price therein expressed, being only one dollar: and if it be void as the evidence of a sale, it is equally so as that of a donation, as a price is mentioned as the consideration which moved the grantor. *Part.* 5, 5, 56. *Civ. Code*, 364, 109.

3. That the execution of the agreement, entered into by Bradford and Flowers, on the 21st of August 1796, cannot be required from the plaintiffs, on account of the uncertainty of the stipulated price; and as the agreement is not signed by Flowers, the obligee, and because there is no evidence of the payment of the fees and charges; the agreement being a mere pollicitation. 1 *Poth. obli.* 5.

4. That these two documents, the agreement and deed of sale, were obtained from Bradford by duress.

I. The *Partida* and the *Code* require only that the instrument of sale should be completed before the contract of sale has its binding force. The institutes require the signature *contrahentium.* This may be understood to refer to those who *contract some obligation:* when the price has been paid be-

East'n District. *April*, 1822.

BRADFORD'S HEIRS *vs.* BROWN.

forehand, the vendor is the only person who binds himself; who contracts the obligation—his signature is therefore requisite to bind him—the assent of the vendee, when he is admitted by the vendor to have paid the price, cannot be denied by the vendor, because if he is estopped by his deed from denying what he has solemnly admitted therein. This assent may be proved by matter *aliunde*, in the same manner as the assent of the donee under the Roman law, which, tho' essential to the perfection of the gift, need not appear by his subscription of the deed of gift, are might be made *per epistolam*. From the word ing of the deed it does not appear that the vendee was named therein as a party whose signature was expected.

It does not appear to me that the district judge erred in allowing the deed to be read.

II. The vendee of an estate cannot be disturbed on the score of lesion, in the sale, by which his vendor acquired it. The sale is not therefore void, and if the first vendor wishes to avail himself of the benefit of the law, he must bring suit to have the act set aside, giving his own vendee the option of paying the difference between the just price

and that which was paid. In the present case, the sale was preceded by an agreement or compromise, the effect and validity of which is about to be considered, which likely destroyed the plaintiff's claim on the score of lesion.

III. The price stated in the agreement of the 21st of August 1796, is not conclusive. *Id certum est quod certum reddi potest.* The fees and charges, attendant on the procuring of a grant of land, may, with great facility, be ascertained. The grantee who pays them, acquires by the very act of payment, the certainty of his disbursements.

The absence of Flowers' signature to it, might perhaps have availed Bradford, when he was called upon for the execution of the obligation he submitted to, but cannot avoid the performance of it. It surely cannot be urged by the party who has carried his pollicitation into effect, and gave what he had offered to give, that the party who received it did not accept the offer of it, when the thing had passed from the person who made the pollicitation, to him to whom it was made, and from him to a vendee.

IV. Abelard Bradford, one of the plaintiffs,

East'n District. *April*, 1822.

BRADFORD'S HEIRS *vs.* BROWN.

being called upon to acknowlege or deny his ancestor's signature to the deed of sale and agreement, on an interrogatory put to him, on the part of the defendant, admitted it; but added these documents were signed while his ancestor was in duress, and through the threats and menaces of A. Blanchard, and of the commandant and governor, Grandpré.

The appellee and defendant urged in the district court that the part of the answer which contains the allegation of duress ought to have been stricken out, not being called for by the interrogatory.

We are of opinion that the district court very properly refused to strike it out. He, who is called upon to answer whether a particular act was done, may declare such material circumstances as affect its essence or validity. Nothing is more of the essence of the execution of an act, than the freedom of the party executing it: and the ends of justice cannot be answered unless those who are called upon to administer it, be informed of any circumstance, which so materially affects an act as violence.

V. But the threats of Blanchard were only that in case Bradford did not convey to

Flowers part of the tract of land, which both parties were endeavouring to obtain from the Spanish government, a representation would be made to the governor-general. We see nothing illegal in this threat. The use of legal means, even the imprisonment of a debtor, by a lawful process, is not such a violence as will avoid an agreement which it may be said to coerce. The violence must be an illegal one.

That of Grandpré was of the same kind—he was a judicial magistrate, before whom a suit was pending between Bradford and Flowers, and if he threatened Bradford with imprisonment, by pointing to the guard at his door, we are bound to conclude he meant only to hint at a legitimate exertion of his powers.

Those facts, contradicting the answer of Abelard Bradford, appear by testimony and authentic documents. The jury, who have passed on the case, were satisfied, and that from the whole of this evidence, that there was no duress; and we see nothing that induces a doubt of the correctness of the conclusion which they have drawn.

It is therefore ordered, adjudged and de-

East'n District. *April*, 1822.

BRADFORD'S HEIRS *vs.* BROWN.

creed, that the judgment of the district court be affirmed with costs.

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

GIROD vs. *PERRONEAU'S HEIRS*, *ante* 1.

APPEAL from the court of the first district.

The time of certifying a record, when the case is tried on written documents alone, is not limited by law.

Livingston, on an application for a rehearing. By a decree of this court, in *Dromgoole* vs. *Gardner & al.* 10 *Martin*, 433, it was decided that a certificate, stating that the record contained a note of the evidence, was equivalent to the certificate, required by law, that it contained the evidence; this decision strongly supports the argument addressed to the court, that they will look rather to see that the essential parts of the law are complied with, rather than its mere forms; and that if a certificate that the record contains all the evidence according to the best of the judge's recollection, is, in fact, the same in substance with a general certificate, which, from the nature of things, must always imply such reservation; they will support it on the same principle which induced them to declare that a note of the evidence

was equivalent to the whole of the evidence. The judge's recollection might be inaccurate, so might the note, and if the one is considered as sufficient, it would seem that the other should be also.

If, however, this authority should not be deemed applicable, the petitioner respectfully prays that the decree may be so modified as to make it an order on the judge to amend the return, inasmuch as the petitioner will be entirely without remedy if the cause is dismissed; as the time for bringing a new appeal has elapsed, not from his fault, but from the inaccuracy of the judge below; which he states, and which the record of this court shews, has been his practice on other occasions.

Porter, contra. The attention of the appellees' counsel has been directed by the court to this question, (arising out of the right of the appellant for a rehearing) *to wit.* can this court so modify their judgment or decree, as to order the judge of the inferior court to amend his certificate, annexed to the record in this case, the time, within which an appeal can be prosecuted, having expired?

East'n District. *April*, 1822.

GIROD vs. PERRONEAU'S HEIRS.

It is humbly conceived, under these circumstances, that it would be incompetent to the judge below, voluntarily, at the solicitation of the appellant, to change his certificate on the record, in any manner whatever: because he would be estopped from so doing, the time for appealing having elapsed. If then he could not legally amend or change his certificate voluntarily, this court can certainly have no power to compel him to do an act, which, if done voluntarily, would be illegal. Suppose the record in this case presented no certificate of the judge below, it is asked, would it be competent for this court (the time for appealing having expired) to order him to make the necessary certificate? It is believed not, and the case of *Franklin* vs. *Kembal*, 5 *Martin*, 666, strongly supports this supposition.

If then an original certificate could not be legally given, it is humbly submitted, that an illegal original could not be so amended after an appeal had been laid, as to authorise this court to do that, which, from the original certificate, they could not do.

As to any hardship on the part of the appellant, if any, the court has nothing to do with it: the law alone must be their guide.

The law has pointed out the mode of having decisions of inferior tribunals reversed by this court, and if the appellee presents himself in a shape that this court cannot take notice of him, he alone is to blame.

But it may be said that this appeal was taken in time. But that does not change the position; that after the time for appealing has elapsed, the inferior court has no right to change the record by an amendment; and if not, then this court has no right to order the judge of the inferior court to do so. The petition of the appellant does not present a case suggesting a diminution of record, but wants something original, not appearing even on the record below.

Livingston, in reply. In the application for a rehearing, I suggested, as a reason why the decree should be modified, that the time for appealing having expired, we would be without relief. I learn from the defendant's answer that this is the very reason why I should have no relief, that is to say, that altho' the court might grant me that indulgence, in a case where I could obtain my object without it, by bringing a new appeal, yet when the

East'n District. *April*, 1822.

GIROD *vs.* PERRONEAU'S HEIRS.

indulgence is of consequence, it ought not to be granted. I confess I cannot see either the force or the justice of this reasoning. The office of a court of appeals is to correct the errors of inferior courts, where it can be done by their own decree, or to force the inferior judge to correct them when the superior tribunal cannot do it. The return of the judge cannot be corrected (if essentially erroneous) by the court of appeals, but they can oblige him to correct it; otherwise the right of appeal might be forever defeated by informal certificates and returns; for the party wishing to confirm an erroneous judgment, would have nothing to do but to get the judge to make two informal returns, and then in the course of proceeding, the two years have elapsed, and the judge is spared the mortification of seeing his errors exposed, and the party obtains the effect. It is asked, whether, if the judge had made no return, the court would direct him to make one after the time for appealing had expired? I presume there can be no doubt but this court would do so, and would be bound to do so, if the appeal had been entered in time, and that the want of relief if they did not do it, would be an ad-

ditional motive. This court has the power of issuing all mandates to carry its powers into effect. Now, if a judge make no return when he is ordered, or make such a one as the court cannot act upon, does he not defeat their power? And can it be doubted that they have the power to prevent this?

This court is also directed to decide according to the "right of the cause," without regarding the defects of form. Now, here we have been ruined by a judgment, which we are ready to shew to be manifestly unjust, and yet, because the judge chooses to qualify his certificate, by saying that it is made according to the best of his recollection, we are to lose our remedy.

Suppose, after the time for appealing should have expired, an appeal, regularly taken before, should be called, and it then be discovered that part of the record has been omitted to be served, would the court say with the counsel for the appellees, tho' we have on other occasions sent mandates to bring up the part of the record that is wanted, yet because you cannot in this case bring a new appeal, we will not grant you the usual relief. I have no fear that such principles

East'n District. *April*, 1822.

GIROD *vs.* PERRONEAU'S HEIRS.

could ever be adopted by this court in such case.

But does the present essentially differ fro it. If it do, I really cannot perceive whe the difference lies; the law is as imperativ that the whole record be sent up on the ap peal, as it is in directing that the judge sha certify; now a record with only half the pro ceedings is a faulty record; a return, in othe terms than those required by law, is a fault return,—but the one is every day ordered t be amended: why not the other?

There is this further reason in the presen case, that the judge below thinks, and many other persons think (erroneously according to the opinion of this court) that the return in this case, really is of the same import with that required by law, and that the words ex pressed are always implied in the phrase prescribed by the statute, an error, which tho not inexcusable, would be fatal to the inter ests of my client, if no opportunity be offered of correcting it.

PORTER, J. delivered the opinion of the court. In this case an application has been made for a rehearing, and we have been re-

quested to amend our former decree in such a manner, that instead of dismissing the appeal, we may remand the cause, for the judge to make out his certificate according to law.

The defendant has been heard in opposition to this application.

We think it should be granted. According to the decision in *Franklin* vs. *Kembal.* 5 *Martin*, 666, when the cause is tried on written documents alone, the judge may certify at any time as long as his memory permits him. If he can thus certify the present record, it will promote justice to remand it, to enable him to do so, as by these means we shall have it in our power to decide the cause on its merits.

The defendant has argued, that we are precluded from sending the case back, because two years have now elapsed: and that as the judge could not make out a certificate voluntarily, after this lapse of time, the court cannot direct him to do so. We are of a different opinion. Under the act of 1817, the judge may make out his certificate when he pleases. Whether the party can profit by it is quite a distinct question. The period, fixed by law for bringing up appeals, has no relation

East'n District. *April*, 1822.

GIROD *vs.* PERRONEAU'S HEIRS.

to the power conferred on the judge to certify the record; both are matters of positive law, and depend on the regulations particular to each.

Our former judgment must therefore be so modified that this record be remanded, with directions to the judge to certify it according to law, and that the appellant pay costs.

DAY vs. *EASTBURN & AL.*

No appeal can be allowed after two years have expired from the rendition of final judgment in the inferior court.

Whether the right of appealing from judgments by persons not parties to them, must be confined to those who had an interest inthe matter in dispute at the time judgment was rendered?—*Quere.*

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The house of Eastburn & Co. of New-York, being indebted to a certain John Day of that city, he commenced suit against them in this state, by an attachment, which was levied on credits and effects of said Eastburn & Co. in the hands of Benjamin Hanna. Judgment was obtained in this suit, and execution issued. Before the money was made on it, Hanna became insolvent, and further proceedings were stayed. The parish court finally directed the property to be sold, and the proceeds held subject to the privileges which the creditors might have had on the thing disposed of.

The syndics of Hanna subsequently filed a *tableau* of distribution. Day, the plaintiff in this action, opposed it, and insisted on being placed thereon as a privileged creditor, in consequence of the lien created by the execution levied on Hanna's property, as garnishee, in the present suit. To get clear of the privilege thus claimed, the syndics have taken this appeal, and now, as on behalf of the defendants, Eastburn & Co., assign errors on the face of the record, and pray that the judgment be reversed.

If it was necessary to examine the question, it would be perhaps found that the right of appealing from judgments by persons not parties to them, must be confined to those who had an interest in the matter in dispute, at the time judgment was rendered. It is unnecessary however to examine a point not free from difficulty, when the case can be decided on the simplest and surest of all grounds—the clear and positive provision of a statute.

Judgment was rendered on the 14th day of December, 1819; the petition of appeal and order granting it, are of date the 23d February, 1822.

East'n District. *April*, 1822.

DAY *vs.* EASTBURN&AL

An act of our legislature, *Martin's Dig.* 438, has provided that no appeal shall be allowed unless within two years after rendering or passing the judgment or decree complained of, and there is no saving, except for infants or persons insane.

This act contains negative expressions; it of course repeals former laws which are different from it. And were we to say that an appeal might be taken after two years had elapsed, when the statute says no appeal shall be allowed unless within that time, we would be enacting laws, not expounding them.

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

Seghers for plaintiff, *Workman* for defendants.

FERRER vs. *BOFIL.*

If the testimony of a witness contains direct and palpable contradiction, the supreme court will reject it altogether.

An executor cannot be allowed, in his settlement, the fee paid counsel to defend him

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

PORTER, J. delivered the opinion of the court. This appeal is taken from a decision of the court of probates, rejecting several charges in the account of the defendant, executor of the last will and testament of Sebastian Ferrer, deceased.

East'n District.
April, 1822.

FERRER
vs.
BOFIL.

Our attention is first called to a credit claimed by the executor of $2399 and 75 cents—a payment, as he alleges, made to one Boisdorée, for improvements and repairs on a house of the testator. In support of this charge he produces a receipt signed by Boisdorée, which literally translated, runs thus:—"I acknowlege to have received from Mr. Josh. Bofil, for account of Mr. Sebastian Ferrer, the sum of," &c. &c.

In opposition to this demand, the plaintiff and appellee offers the evidence of a free woman of colour, called Catherine, who proves that the money for which the receipt was taken, belonged to the testator. And he also urges many reasons why the claim should be rejected: the easy circumstances of Ferrer, which rendered it unnecessary to accept of advances of this kind: the great improbability that Bofil should pay for repairs on his house, and never call on him during his life for the money:—and lastly, presents an argument drawn from the language used in the instrument produced, urging that when a man pays money for another the receipt taken to evidence it, is worded differently, and in French runs thus—*Reçu des mains et deniers de.....pour compte de, &c. &c.*

against a suit brought by the heir to surrender the property, if that suit is not instituted until one year after the executor's appointment.

Nor for the fee paid in an action brought by the heir alleging fraud and afterwards discontinued.

Nor for a suit brought by the executor on an uncertain event, when it is not proved that it was a sound exercise of the discretion vested in him.

East'n District.
April, 1822.

FERRER
vs.
BOFIL.

The appellant replies, that the woman of colour was a slave, and incompetent, and if not incompetent, her evidence is so contradictory that no credit can be given to it. He shews that the repairs were necessary and useful—proves that he made the contract with Boisdorée, and paid him—exhibits the testament of Ferrer, and from the enumeration there made of his property, argues that he had not funds to pay the workmen; and finally insists, that, as at the time this receipt was given, he was instituted Ferrer's heir, it is not at all improbable that he should make advances for the improvement of property he imagined would be one day his own.

We wave the question as to the competence of Catherine, on the ground of her not having attained the age of thirty years when the act of emancipation was passed, it is one of too much importance to be settled where it is not necessary to a decision of the cause. Admitting that she was a legal witness, the objection goes strongly to her credit, even if her story was consistent. 10 *Johnson*, 132. The evidence however given by her contains contradictions so direct and palpable, that it is impossible we can put faith in her declations.

The testimony of this witness left out of view, the other matters pressed on us amount to nothing more than mere conjectures, which, in number and weight, appear to be pretty equally balanced. Recourse must therefore be had to the receipt itself, and in our opinion, the expressions used in it, (coupled with the testimony of Boisdorée, that he contracted with Bofil, and was paid by him) are sufficient to throw the burthen of proof on the heir, that the payment was made out of the funds of the ancestor.

We agree with the parish judge in opinion respecting all the other items of the account.

The charge of counsel's fee, for defending the executor against the suit of the heir, calling on him to surrender the property in his hands belonging to the succession, cannot be admitted. The action was not commenced until after a year had elapsed from the date of his appointment; his authority of course had expired. If the appellant felt any doubt as to the character of the person claiming the estate, he should have rendered his account to the court of probates, contradictorily with the attorney for the absent heirs, and surrendered the property to the curator appointed to receive it.

East'n District. *April*, 1822.

FERRER *vs.* BOFIL.

The suit brought, alleging fraud, and afterwards discontinued, cannot be distinguished from unfounded actions that are of every day's occurence in our courts, and that are abandoned as soon as caprice, or a want of evidence induces the plaintiff to pursue that course; whether the action complained of here was such a one as would furnish ground for damages, cannot be examined in this suit; nor can the expences incurred in it be set-off against the demand now made on the executor to surrender the property of the succession entrusted to his care.

The fee paid, for instituting suit to have the settlement between Ferrer and his former partner annulled, must also be rejected. When money is given by an executor, on a quite uncertain event, he should shew that the interests of the succession required it, or at least make out a strong case, to induce a belief they did; and that, under all circumstances, it was a sound exercise of the discretion vested in him. This he has not done. On the contrary, from what appears on record, there is every probability he could not have succeeded in the action commenced. He might well have waited to consult the heir, or his agent

before he took so important a step; more particularly as his authority of executor had expired at the time he made this disposition of the money entrusted to him.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be reversed, that the appellant, Bosil, do recover of the estate of Sebastian Ferrer, $1432 96 cents, with costs of this court and the court below.

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

RITCHIE & AL. SYNDICS vs. *WHITE & AL.*

APPEAL from the court of the first district.

A debtor ought not to cede goods of another, in his possession.

MATHEWS, J. delivered the opinion of the court. This action was commenced by the syndics to recover a certain quantity of merchandize, described in their petition, or its value, from the defendants, who received the goods in dispute from the insolvents, after an order had been made to stay proceedings against the latter, upon an application to surrender their property for the benefit of their creditors. It is stated in the petition, that these

East'n District. *April*, 1822

RITCHIE & AL. *vs.* WHITE & AL.

goods are subjected to special liens and privileges, on account of rent of the house in which they were stored, to the amount of four hundred dollars and upwards, and also for a large amount due to the united states, on custom-house bonds, &c.

The judgment of the district court being in favor of the plaintiffs, only for the amount claimed on account of rent, they appealed.

The evidence in the cause, and admissions of the parties, shew that the goods in question are not the property of the insolvents, but were held by them on consignment from the owners; for whom the defendants received and now hold them. This is literally true, in relation to all, except thirty-eight bags of pepper, which were bought by the bankrupts on account of the consignors, and paid for with the funds of the latter. These circumstances, it is believed, place this property on the same footing with the rest of the goods.

In case of failure and *cessio bonorum*, it is clearly the duty of the insolvent to surrender all his own goods: but to give up as his own, those of another person, which might be in his possession, at the time of such failure, would be illegal and dishonest.

In the present case, it appears that the insolvents delivered to the defendants, property which they held not as owners, but as agents for other persons: in so doing, we believe they acted legally and honestly; and the appellees ought not to be disturbed in their possession, unless it be shewn that some lien or privilege followed, and still attached to the goods (at the commencement of this suit) in the hands of these last possessors. This, in our opinion, the plaintiff and appellant has failed to do, and consequently has no good grounds of complaint against the judgment of the court *a quo*, which, as to him, ought to be affirmed.

But the appellees, in pursuance of a late act of the legislature, in answering to the appeal, have assigned errors, on which they rely to have judgment reversed *in toto*.

In relation to these errors, we are of opinion, that the syndic, in representing the mass of the creditors, represents each individual composing said mass, so far as concerns the property of the cedant, which he is bound to administer for the benefit of all who may be interested therein, whatever may be the different interests.

East'n District.
April, 1822.

RITCHIE & AL.
vs.
WHITE & AL.

The only question of any difficulty in the cause, (as suggested by the counsel for the plaintiff) relates to the claim of privilege made on behalf of the lessor of the insolvents, on all the goods found in the store which was leased, whether belonging to them or to other persons. When a house is let chiefly for a store or shop, the landlord or lessor may seize the goods found in it, to pay rent, and this his privilege follows them even after removal, provided he prove their identity, and urge his claim within a fortnight from the day of their removal. *Civ. Code*, 468, *art.* 74.

The pursuit of the goods of a third person to pay rent on a contract of lease, as provided for by law, is clearly a proceeding *in rem*, in which the lessee has no direct and immediate interest; therefore protection granted to him and his property, ought not to delay the lessor from seizing such goods whilst they remain in the leased premises; or if pursued in the hands of another person, within the time limited by law. As to this extraordinary privilege of landlords, it is believed that they are not represented by syndics, appointed to represent the mass of creditors in the management of insolvent estates; but that they

may and must for themselves, and in their own right pursue the property within the prescribed period, or lose the privilege. From this view of the case, it is believed that the judgment of the district court is erroneous.

It is therefore ordered, adjudged and decreed, that it be avoided, reversed and annulled, and that judgment be rendered for the defendants and appellees, with costs in both courts.

Hennen for plaintiffs, *Workman* for defendants.

MARIE LOUISE vs. *CAUCHOIX.*

A private act does not become authentic by its being recorded.
A parish judge has no authority to receive the acknowlegment of a deed.

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

MARTIN, J. delivered the opinion of the court.* The plaintiff stated herself to be the owner of a negro, according to a bill of sale annexed to the petition, whom the defendant unlawfully detains.

The defendant pleaded the general issue, and set up a title to the slave.

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

---

* PORTER, J. was absent during the trial from indisposition.

East'n District. *April*, 1822.

MARIE LOUISE *vs.* CAUCHOIX.

At the trial, the plaintiff offered in evidence a notarial sale of the slave, from Laconture to L'Eglise, dated Dec. 7, 1807, and a certified copy of a private act of sale from L'Eglise to herself, dated Jan. 4, 1808, acknowleged before the judge of the parish of Avoyelles, on the 17th of May following.

To the reading of this certified copy, the defendant's counsel objected, but his objection was over-ruled, whereupon he took a bill of exceptions.

It seems to us the parish judge erred. The act of sale from L'Eglise to the plaintiff was a private one, and when she recorded it in the office of the parish judge of Avoyelles, as she would have done in other parishes in the office of a notary public. She did not alter its character, tho' she gave it effect against third persons. It became a registered, or a recorded act, without becoming a record, which proves itself—without ceasing to be a private act.

It is true the act was acknowleged by L'Eglise before the parish judge of Avoyelles, who has certified his acknowlegment. But this acknowlegment is not subscribed by L'Eglise, nor was the judge who received it,

attended at the time by any witness. This act of acknowlegment, not being clothed with the signature of the vendor, nor of any witness, and containing no mention of his inability to sign, cannot be considered as a notarial act, and we do not know any law authorising a parish judge as such, to receive the acknowlegment of a grantor.

We conclude, the court *a quo* erred in admitting in evidence the copy of a private act, while there was no evidence of the genuineness of the original.

There were other objections taken to the act of sale, and as to its effects; but as these were grounded on and supported by quotations of the *Civil Code*, which was approved by the governor on the 31st of March, 1808, while L'Eglise's sale is of the 4th of January preceding, we think the judgment ought to be reversed, and the case remanded with directions to the judge, not to admit the copy certified by the judge of the parish of Avoyelles, as an authentic act, and that the costs of this appeal be borne by the plaintiff and appellee.

Ripley for plaintiff, *Seghers* for defendant.

East'n District.
April, 1822.

GRAY
vs.
TRAFTON.

GRAY vs. *TRAFTON.*

APPEAL from the court of the first district.

A judgment in a suit by attachment is evidence of the debt, in another suit brought in the same state.

Hawkins, for the plaintiff. On the 3d of Feb. 1820, the present plaintiff instituted a former suit against the present defendant. Both parties being non-residents.

The suit was founded on promissory notes, amounting together to $2013 35 cents, with interest thereon; and an attachment prayed and awarded; as is usual in similar cases, an attorney was appointed to defend the interests of the defendant.

The order of appointment was made on the 16th of February, 1820.

The counsel was allowed from February to July, to correspond with the defendant, and on the 13th of that month, filed an answer, disclaiming the property attached, and pleading general issue.

Upon the trial of the cause, the plaintiff obtained a judgment for the whole amount claimed, but owing to sundry claims interposed, and the wages paid the crew of the vessel attached, he only obtained a partial satisfaction of his judgment, leaving the ballance due, $900 34 cents, with interest.

For this balance the present attachment was sued out.

The same counsel was appointed to defend, and filed an answer, pleading to the merits of the case, and also alleging the money attached in the hands of the garnishee, to have been assigned to one Dillingham. The judgment and record in the former attachment being referred to, and made part of the present petition, it was offered in evidence by the plaintiff, and the reading of it was objected by the defendant's counsel, on the ground, that the former proceedings being *in rem*, could not be read in the present suit, although, for the same cause of action and between the same parties.

The cases relied on by the defendant's counsel in support of this objection, are— *Phelps* vs. *Holker*, 1 *Dal.* 261. *Bissell* vs. *Briggs*, 9 *Mass. Rep.* 462. *Pacoling* vs. *Bird's Ex'rs.* 13 *Johns. Rep.* 192. *Borden* vs. *Fitch*, 15 *Johns. Rep.* 121. *Astor* vs. *Winter.* 8 *Martin's Rep.* 205.

The cases from the common law reporters cannot, it is believed, support the objections made by the defendant's counsel. Neither of the cases occurred in the same state, between the same parties, and before the same tribu-

East'n District. *April*, 1822.

GRAY *vs.* TRAFTON.

nal, called on to give credence to its own records and proceedings, as is the case now under consideration. In the case from *Dallas*, the plaintiff had sued out an attachment in Massachusetts, which being levied upon one blanket, (the reputed property of the defendant) judgment was had, and the court of Pennsylvania was called on, not only to enforce that judgment, but to deem it conclusive between the parties.

The case from *Dallas* was decided before the adoption of the federal constitution, and consequently before the act of congress gave full faith and credit in one state to the records and judicial proceedings, had in another state. And the court did not, in that case, reject the record and proceedings from being read as evidence, but merely declared, that "it could not be considered as conclusive evidence of the debt." *M'Kean's Chief Just.* 1 *Dallas*, 264.

In the case from *Massachusett's Reports*, the court gave validity to the judgment previously obtained in New-Hampshire, and declared it not only evidence, but conclusive between the parties, if it should appear that the court originally rendering judgment, had jurisdiction of the cause.

Whether or not the court had jurisdiction of the cause in the case of *Gray* vs. *Trafton*, depends on the laws of Louisiana, giving the benefit of attachment against absent debtors, and the manner in which these laws have been inferred by the court.

Until the previous judgment in the court below be brought before the appellate court, they will not now question its validity, much less refuse the plaintiff the benefit of the judgment in support of this action.

It is stated in the same case from *Mass. Rep.* that proceeding, by attachment, against the goods of the defendant in one state, and judgment therein, would not be binding and conclusive in a personal action in another state, against the same defendant.

This position does not weaken the right of the plaintiff to recover in this action; or at all events, to read the record offered. It will be time enough to resist the doctrine laid down in the case last referred to, when Gray shall sue Trafton in another state, and rely on the judgment in attachment here, as conclusive evidence in the cause. The two cases from *Johnson's Reports* will be found of the same character of that already commented on, and

East'n District. *April*, 1822.

GRAY *vs.* TRAFTON.

are cases growing out of records from a sister state.

In the case from 13 *Johnson*, it appeared that the judgment recovered in Connecticut on attachment, and relied on as conclusive against the defendant in New-York, had been rendered upon supposed effects in the hands of the garnishee, but upon investigation, it was decided by a jury, that the garnishee had no funds.

It was effects, in the hands of the garnishee, which alone could give jurisdiction in that case; take away the effects and the jurisdiction of the court necessarily ceased.

In the case from 15 *Johnson*, in refusing to give force and effect to the judgment on attachment, offered in support of the action, chief justice Thompson expressly speaks of judgments from a sister state. 15 *Johns.* 143.

The case of *Astor* vs. *Winter*, referred to by defendant's counsel, has no application. The principle there settled being, that "if the suit is not sustained by the proceedings on the attachment, it is clear that no legal measures have been taken to compel the appearance of the defendant. The answer of the persons appointed by the court does

not cure the defect in the levy of the attachment. 8 *Martin*, 208.

No point is made in the case before the court, which questions the soundness of the principle laid down in *Martin*. If the attachment be wrongfully sued out or levied, the appearance by counsel will not remedy the error. No question has or can be made as to the legality of the proceedings in this case, nor that the attachment has been illegally levied.

If the propriety of rejecting the record as evidence altogether, or the validity of the judgment in the former case of *Gray* vs. *Trafton*, was to be tested alone by the common law books, the cases relied on by the defendant's counsel would be greatly weakened, if not destroyed, by subsequent decisions.

In *Croudson* vs. *Leonard*, 4 *Cranch*, 442, judge Washington says, " By the common law, the judgment of a foreign court is conclusive where the same matter comes again incidentally in question—*prima facie* evidence, where the party claiming the benefit of it calls on the courts of England to enforce it."

Since the adoption of the federal constitution, and the acts of congress on this subject, a

East'n District. *April*, 1822.

GRAY *vs.* TRAFTON.

judgment obtained in one state, shall have the same effect in another, as it would have in the state where it was obtained. *Mills* vs. *Durpee*, 7 *Cranch*, 481, 483. *Hampton* vs. *M'Curnell*, 3 *Wheaton*, 234.

If the judgment is conclusive where it is obtained, it is conclusive in every other state, district, or territory in the union. 7 *Cranch*, 481, 484.

The common law gives to judgments of the state courts the effect of *prima facie* evidence in the courts of the other states. But the constitution contemplates a power in congress to give conclusive effect to such judgments. 7 *Cranch*, same case.

Is not the original judgment obtained by *Gray* vs. *Trafton* conclusive, between the parties in the state of Louisiana?

If it is not, then the attachment law is a nullity.

If any property of Trafton could now be found within this state, could not Gray sue out his execution and levy for so much of his judgment as is still unsatisfied?

The insufficiency of effects in the hands of the garnishee, arising too from the intervention of third parties, cannot, it is presumed,

weaken the force of a judgment had upon the merits of the cause, and that too, after the counsel had corresponded with the defendant, and not only resisted the claim of the plaintiff, but so far as it was practicable, gave his efforts to promote the claims intervened by third persons.

But the plaintiff is relieved from further citations from the common law reporters, by the case of *Young* vs. *Black*; where it is decided, that the record of a former judgment may be given in evidence between the same parties, with parol proof that it was for the same cause of action, and the controversy having passed in *rem judicatam*, and the identity of the causes of action being established, the law will not suffer them to be again brought into question. 7 *Cranch*, 565, 567.

In the case now before the court, the plaintiff did not offer the record as conclusive evidence, though he might well have done so, but offered with it parol proof of the execution of notes, made part of the record the justness of the demand, and the ballance due on the judgment.

The supreme court of the united states have gone still further, and decreed that judgments

East'n District. *April*, 1822.

GRAY vs. TRAFTON.

or decrees may be introduced and read as evidence even against third persons, where the decree introduced is not as *per se*, binding on any rights or the other party, but an introductory fact, to a link in the chain of the party's title, who introduces it. *Barr* vs. *Gratz*, 4 *Wheat.* 214, 220.

This court has been governed by the same principles, and in the case of *Breedlove* vs. *Turner*, expressly recognizes the doctrine, that a record may be read in evidence even against third persons, where it is not introduced *per se*, as binding on the rights of the parties. 9 *Martin*, 377.

By reference to the petition in this case, it will be perceived by the court, that the plaintiff does not refer to and rely on the naked judgment formerly recovered against, but refers to and makes part of the petition in the record, and proceeding had, before the same court, in the former attachment. The notes upon which the original action was instituted, constituting a part of that record, and the proceedings had likewise, shewing how far the plaintiff's judgment had been satisfied by effects attached.

If the record, as offered, is not deemed con-

clusive evidence, so as to enable this court to order judgment to be entered in the court below for the balance that may appear to be due the plaintiff, it is believed this testimony cannot hesitate to reverse the judgment of the inferior court. The more especially as the record was not relied on by the plaintiff as in itself conclusive, but was presented coupled with the readiness to go into parol proof of the execution of the notes made part of record, the justice of the claim and the amount still due.

Even according to the rigid forms of common law pleading, this would have been permitted the plaintiff.

How much more readily will this court accord it?

In the case of *Gilly & al.* vs. *Henry*, this court drew the distinction which signalizes the civil law court in awarding justice, where it would be denied by the forms of pleading enforced by the common law courts.

The court there say, "in courts, in which the civil law prevails, the plaintiff does not produce his case in various forms; and evidence is admitted when it supports the allegation in substance." 8 *Martin*, 417.

East'n District. *April*, 1822.

GRAY *vs.* TRAFTON.

Under the sanction of this principle, with what propriety can the record, as offered in the court below, be deemed inadmissible evidence? No authority has been produced which would reject it. Can any reason be offered?

Can the defendant pretend, that the petition did not apprize him of the nature of the claim. All its merits had been once litigated, not by an appearance in mere form, but by pleas in avoidance and to the merits, after correspondence with the defendant, by the counsel appointed to defend. In the second suit, the same course is pursued—the same counsel appointed, who after months of correspondence, again appears and resists the plaintiff's demand; not upon the ground, that the debt is unjust, but that the effects attached had been previously assigned over to a third person.

In the first suit, the defendant was prompt in urging the claims of a third party. The merits of this claim was investigated by the court below, and found to strengthen, rather than weaken, the demand of the plaintiff.

In the second suit, the defendant is equally prompt, to pretend a tranfer of the monies

attached, that he might again aid a third person.

These facts are presented to the court, that they may see there is no ground to complain of surprise in the trial of the cause below.

The effect of confirming the decision of the court below, not only subjects the party to a non-suit, but will result in the total loss of his debt. To work an injury of this sort, this court must be fully satisfied that the forms of pleading, relied on to reject the record, are indispensable to our system of jurisprudence.

Carleton, for the defendant. The court below certainly did not err in refusing the record in the former case to be read in evidence in this.

To test the propriety of the opinion of the court, we have only to enquire, whether the judgment in the first attachment case, is evidence of a debt due from the defendant to the plaintiff: this, I apprehend, is our sole enquiry, for if it establish the existence of the debt, the defendant cannot hope to resist it; if not, the plaintiff must fail in his action.

The principles, established in the cases

East'n District. *April*, 1822.

GRAY vs. TRAFTON.

cited, shew most clearly, that such judgment is no evidence of a debt. In *Pawling* vs. *Birds Ex'rs.* 13 *Johns. Rep.* 206, the court say, "It is well settled, that a judgment in another state, founded on proceedings by attachment, against the goods of the defendant, he not being within the jurisdiction of such state, is not even *prima facie* evidence of a debt in our courts. It is regarded as a proceeding *in rem* merely. To consider it as a ground of action here *per se*, would be contrary to the first principles of justice. As a proceeding in *personâm*, the foreign court in such case had no jurisdiction." Again in *Phelps* vs. *Holker*, 1 *Dal. Rep.* 261, the court say, "The judgment obtained in the court of the state of Massachusetts, in a foreign attachment, between the same parties, is not conclusive evidence in the cause of the debt claimed by the plaintiff." In *Ribourne* vs. *Woodworth*, 5 *Johns. Rep.* 37, the court decided, that "The attachment of an article of his property could not bind him; it could only bind the goods attached as a proceeding *in rem*, and the judgment obtained by default, in pursuance of such attachment, cannot be a ground of action here against the defendant." The reason that

such judgment cannot be read as evidence in a second cause, is not that it was rendered in another state, but because it was no evidence of the debt; for if it was, it could, like all other judgments, be read in evidence under the provisions of the act of congress, against the defendant in the courts of any sister state, whether the action was brought *in rem* or *in personâm*; that such judgment should not be evidence of the debt, is certainly founded on the plainest principles of justice; the defendant when absent, not only resides out of the jurisdiction of the court where the suit is brought, but often in the remotest part of the world. On the institution of such suit our law provides—"That on the return of the writ, the court may proceed to hear and determine the claim of said petitioner; first, naming some proper person to defend said debtor, provided no attorney shall be retained by him, and on application of the person so defending, granting such delay, in order to procure an answer, and make out a defence as to the court may seem just." 7 *Martin's Dig. vol.* 1, 516. The attorney so appointed, may, or may not, apply for time to correspond with the absent defendant, and if he apply,

East'n District. *April*, 1822.

GRAY *vs* TRAFTON.

the court may fix such time as shall be deemed sufficient, at its discretion. The attorney may or may not, as he thinks fit, address a letter to the absent defendant; and if he determines so to do, he directs it to the place only where the plaintiff chooses to say he resides, he being himself, totally ignorant of the cause of action, as well as of the domicil of the party, whose interest he is made to espouse. If an answer should not be received within the time prescribed by the court, a judgment will be taken by default, or the attorney appointed, must answer without knowing any thing of the means of his client's defence. Such is indeed, what generally happens. If the residence of the defendant be not rightly stated, or if it be so, it may be changed, or he may have departed from it before the letter reached him. Thus it will appear, that in this state, and in every one where the law of attachment is known, judgments are rendered against absent persons without their having any knowlege of the existence of the suit. That a judgment thus obtained should be evidence of a debt against a defendant, or his property in another cause, would be the grossest injustice; it would be

condemning a man unheard, and spoiling him of his property by proceedings before a court, of whose existence he may have never heard.

In the cases cited, we are told that proceedings by attachment are regarded in the nature of a proceeding *in rem*, and in first *Dallas' Rep.* 264, it is said, "This is a proceeding *in rem*, and ought not certainly to be extended farther than the thing attached." We may then challenge plaintiff's counsel to produce a single instance, wherein a judgment obtained by process of attachment, or by any proceeding *in rem*, have ever been received as evidence of the debt in another suit, whether the latter be by attachment *in personâm* or *in rem*, and this for the plain reason before given, *to wit*, that a judgment so obtained is no evidence of a debt.

It is a known and established principle of law, that a judgment obtained by admiralty process *in rem*, ends with the thing attached, and cannot ever afterwards be read against the claimant of the thing seized, though he appear to defend the pledge. So in the cases cited from 13 *Johns.* it is said by the court, "That if the defendant had actually appeared in the suit against them, as absconding

East'n District. *April*, 1822.

GRAY *vs.* TRAFTON.

debtors, it would not, in my judgment, have altered the character of the record. Such appearance and defence must be deemed to have been made, merely to protect the pledge, which was the legitimate object of the proceeding."

The thing attached is often of so little value, that the party who may live at the distance of 5000 miles or more, declines defending it at all. It is sometimes, as appears from many reported cases, a pocket handkerchief, a blanket, or a credit to the amount of one dollar, where the sum claimed may be $10,000 or a larger amount. Can it, with any justice, be contended, that a judgment based upon such proceedings, shall ever afterwards remain as evidence of the debt thus claimed?

The second point can be disposed of without much difficulty. The plaintiff alleges in his petition, "That your petitioner, heretofore obtained in this honorable court, a judgment against a certain Mark Trafton, for the sum of $2013 35 cents, with interest thereon, at five per cent per annum, from the 3d of February, 1820, till paid, and costs." Here the judgment of the court is clearly made the foundation of the action. But that we

might have no doubt upon the subject, the plaintiff adds, "and which will more fully appear by reference to the records and proceedings had in this court, against said Trafton, and others, as garnishees, made part of this petition, and which will, in due time, be exhibited." What is it that will not more fully appear? The judgment previously alluded to; the relative *which* having reference to nothing else. In another part of his petition he says, "There is still due your petitioner, on said judgment, the sum of $900 35 cents." It cannot then be pretended, that the petition was calculated to advertise the defendant of any other grounds of action. than the judgment obtained in the first attachment suit.

It is gratuitously asserted by plaintiff's counsel, that the answer in this cause was filed, "after months for correspondence with the defendant." Had enquiry been made upon the subject in the court below, it would have been seen, that defendant's attorney had addressed him a note immediately after his appointment by the court, and that no answer had ever been received; and if indeed, any had been *in rem*, for defendant to set up any

East'n District. *April*, 1822.

GRAY *vs.* TRAFTON.

defence against the judgment in the first suit, if as plaintiff's counsel contends, it is conclusive evidence of the debt.

It will not escape the penetration of the court, that if the judgment in the first cause be *res judicata* between the parties, the institution of the present suit was not only expensive but oppressive, as the plaintiff might have seized the property attached in this case, and made his money, by *fieri facias*. Reasoning upon this hypothesis, I agree perfectly with plaintiff's counsel, and cannot but express some surprise that he did not resort to this mode of obtaining the sum claimed. But this was rather an adventurous course; not a precedent was to be found out of the many thousand attachment cases reported in this and the other states of the union. All the authorities conclusively shew, that the judgment extends no farther than the thing attached.

MARTIN, J. delivered the opinion of the court. The effect and force of the judgment obtained by the plaintiff, in his first suit, is to be ascertained by an examination of the act of the legislature, which introduced in this

state, or the then territory, proceedings by attachment, as they are now used. It is contended, they are merely proceedings *in rem*, the end of which is the condemnation and sale of the property attached.

Proceedings in *personâm* against an individual owing no kind of allegiance, to the sovereign in whose courts they are instituted, appear at first view, odious; and if the courtesy, that ought to prevail between independent nations, does not require the courts of any of them should assist in giving effect to the laws of another, to the injury of her own citizens, a court may feel considerable reluctance in giving effect to a judgment rendered against an individual, in the tribunals of a sovereign to whom he is an utter stranger, and in which he was not nor could be personally cited.

But when the legislator expressly declares his intention, that claims of individuals of other nations, whose property may be found in the country, should be examined and inforced in his courts, these cannot decline carrying the legislative will into effect, on the ground that it is unreasonable and unjust that a defendant should be bound by the de-

East'n District. *April*, 1822.

GRAY *vs.* TRAFTON.

cision of the court of a sovereign, to whom he is an utter stranger, whose dominions he never entered, and in a case of which he had no personal notice. In this country, the constitutionality of a law is the only ground on which a court of justice can refuse obedience.

Process of attachment is a legal mode of recovering a debt due from a person being about permanently and absolutely to move from the territory, before, in the common course of proceeding, judgment could be rendered, and execution issued against such a defendant; or from a person residing out of the territory, or departed therefrom, or who conceals himself, so that a citation cannot be served on him, so as to compel an answer to the plaintiff's petition. 1 *Martin's Dig.* 512, *n.* 6.

In the first case, that of a person being about to remove, it may be said that the only object of the proceedings, which the legislature had in view, was the security of the debt. In the last, that of a person concealing himself, an additional one was certainly contemplated, *viz.* to compel the defendant to answer; otherwise he would be permitted to avail himself of his own wrong: against such a defendant the proceedings must be consi-

dered as *in personam;* otherwise the will of the legislators will be defeated. And all the cases mentioned in the law are placed on the same footing—no distinction is made between a person residing out of the country and one concealing himself to avoid the service of the citation.

It is not always wrong, that a person who resides out of the state should be compelled to answer in his courts. If he came in, and after having created a debt here, withdraws without discharging it, nothing ought to prevent his answer being required by the attachment of any property he left behind. Be that as it may, the legislature having made no distinction in cases of attachment, between a person residing out of the state and one concealing himself to avoid the service of the citation, we cannot make any. The express terms of the law are clear and free from ambiguity; we cannot disregard the letter under the pretence of preserving its spirit. In practice, the courts of this country, in giving judgment in attachment cases, have never considered the proceedings *in rem*, giving judgment that the property attached be condemned and sold to satisfy the claims: but as

East'n District. *April*, 1822.

GRAY vs TRAFTON.

judgment *in personam*, having judgment that the plaintiff recover from the defendant, &c. Whatever may be urged in regard to a judgment rendered in another state, those of the courts of this state must be viewed here in the light in which the legislature has placed them.

Further, the judgment in this case was, that the plaintiff recover, &c. not that the property be condemned and sold, and it stands unreversed.

We conclude the judge *a quo* erred in refusing to admit the judgment offered in evidence.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and the case be remanded, with directions to the judge, to proceed to a new trial, and to admit the judgment offered in evidence. The costs of this appeal to be borne by the defendant and appellee.

11m 268
123 824

FORTIN vs. *RANDOLPH.*

No appeal lies from an order setting a judgment by default aside and continuing the cause.

APPEAL from the court of the third district. *Dumoulin*, for the plaintiff. This case is a kind of judicial anomaly. The appellant, who

was plaintiff in the inferior court, obtained there a judgment by default, which default is subsequently confirmed; yet notwithstanding that the record shews these facts in this case, by an unheardof and unauthorized proceeding, the plaintiff is frustrated of his judgment, and compelled to appeal for its enforcement. But here he is told he cannot appeal. This assertion he answers with a decision of this court, which shews that an appeal may lie in such a case, since, in a similar one, such an objection was made and over-ruled. 4 *Martin*, 314. Case of *Prampin* vs. *Andry*.

That the judgment by default was duly obtained; that it was subsequently duly confirmed, appears from the record. Randolph, the defendant, did not in the court below procure an order for further time to answer. He applied to have the judgment by default set aside, which the court refused. He excepted to this refusal of the court, and we find, that step by step he contested his ground. He can then complain of no surprize, and if the judgment was erroneous and illegal, as he contends his remedy was by appeal, and not by an application for a new trial. This last measure, which was the one he selected,

East'n District. *April*, 1822.

FORTIN vs. RANDOLPH.

was forbidden him by the law, since the delay of such an application had expired; thirteen judicial days having elapsed before he addressed himself to the court on this point. Had he applied in time to the inferior court for a new trial, and that had been refused him, he could have appealed from that refusal, as decided by the case of *Hatch* vs. *Gillit*, 8 *Martin*, 169. But instead of adopting any of the means of redress, (if he was entitled to any) as pointed out by him, or as shewn and directed by the principles laid down in the decisions of this court; he passes them by as idle nonsense, or perhaps rather from his conviction that they could afford him no redress, and creates a new and unauthorized proceeding, for which he obtains the sanction of the court below. I feel convinced, that from an inspection of the record, and a view of the law applicable to the facts therein contained, this court will do justice to the cause of my client. It would be a loss of time, and too great an intrusion on the patience of this court, to cite the familiar laws of practice by which such a case as the present must be governed. The authorities cited in support of the points we have made speak for themselves.

Preston, for the defendant. The judgment by default was obtained irregularly, inasmuch as at the time it was taken, an order of court was on file, allowing the defendant further time to answer. To this order, it is objected, that it was obtained without affidavit, or if an affidavit was made, it was filed in another suit as well as the order itself. Our statute does not require an affidavit to obtain from the court an order, allowing further time to answer. It is a matter entirely within the discretion of the court. The order may be granted on a mere suggestion. Whether the discretion of the court were properly or improperly exercised, cannot be questioned in this appeal; for the court having granted the order, allowing time to answer it; afterwards, if they had been of opinion, that the order was improperly granted, and had been disposed to rescind it, it ought to have been rescinded regularly, and the defendant restored to those advantages he enjoyed without the order: the advantage of filing an answer and defending his suit before a jury. Nor does the statute require that the affidavit and order should be filed in any particular suit, but that the defendant should "file it with the clerk." The

East'n District. *April*, 1822.

FORTIN *vs.* RANDOLPH.

defendant did all that was required of him by the statute, and surely mens' fortunes are not dependant on the circumstance of the clerk's filing a document in this or that particular bundle of papers. We have not yet yielded to such a regard to form and disregard of substance.

The judgment by default having been obtained irregularly, it ought to have been set aside on application. Here the appellant resorts to the miserable shift, that the affidavit in support of the application was not sworn to. It appears by the record, that the plaintiff had instituted two suits, one against the drawer and the other against the endorser of a note. The judgment by default was taken against the endorser, the present defendant. Both defendants made affidavit to set it aside, on the same piece of paper; the justice of the peace only signed his name to the bottom of the paper. By the strictest law, the justice of the peace authenticated every thing above his name. At all events, one of the affidavits was sufficiently attested, and being the affidavit not of the party to the suit, but of another person, I think was the best of the two. But the truth is, the statute requires no

affidavit; but only to shew good cause to set aside the judgment by default. And what better cause could be shewn to a judge, to set aside a judgment for want of an answer, than to shew him his own order, allowing time to answer. If, however, there was any informality in it, it was insignificant in the extreme, and our statute imperatively prohibits this court from noticing it. "No judgment shall be reversed for any defect or want of form." *Martin's Dig.* 444.

The judgment by default having been irregularly obtained, the pretended final judgment based upon it is a nullity. But there was no final judgment, and this appeal must be dismissed. The judge reflected better, and never signed it, but set it aside, and granted a continuance of the cause. It has been decided by this court, that that, which may become a judgment by the signature of the judge, is not so until signed. *Turpin* vs. *his creditors*, 9 *Martin*, 562. *Shaumburgh* vs. *Torry & al. syndics.* 10 *Martin*, 178 & 179. But it is contended by the appellant, that the judge ought to have signed the judgment in three days. If this was neglected, he ought to have demanded the signature of the judge in that

East'n District. *April*, 1822.

FORTIN vs RANDOLPH.

cause, and if it was refused, to have tendered his bill of exceptions. But, on whomsoever the blame must fall, surely the neglect of the judge to act cannot make that a judgment, to which the act of the judge is requisite.

With regard to the continuance of the cause, it has been so often decided, that an appeal cannot be taken from an interlocutory judgment, that it would be supererogation to say any thing on that point. It was rightly granted, and if not, it does not work an irreparable injury.

PORTER, J. delivered the opinion of the court. The defendant was sued as indorser on a promissory note, made by one Blunt, in payment of a tract purchased by him, from the plaintiff.

By the facts on record it appears, that a judgment by default was taken against defendant, which was afterwards made final. Before it was signed, application was made to the court to reconsider its former opinion; this was acceded to, and after argument, the judge directed that the judgment already given be set aside, and the cause stand continued. From this order or decision the

plaintiff has appealed, and alleges, on several grounds, that it is erroneous, and ought to be reversed.

The defendant and appellee meets the plaintiff, by averring that the decision is not such a one, as can be appealed from. To ascertain whether this objection is well taken, we must examine if it is a final judgment, or a decree of such a nature as will occasion a grievance irreparable to the party against whom it is given.

It is not a final judgment; for the cause is yet pending and stands continued. Nor do we consider that any final judgment has been given in this case. That which the court set aside was not one, for it had not the judge's signature, which is required by our law to make a judgment complete. 2 *Martin's Dig.* 164. 10 *Martin*, 178–9.

It does not work a grievance irreparable; it is quite different from the case of *Prampin* vs. *Andry*. 4 *Martin*, 314, to which we have been referred, and from all the other cases decided in this court upon that principle. Without referring to each particular decision, it will be found that those were cases where the judge *a quo* refused the parties a

East'n District. *April*, 1822.

FORTIN *vs.* RANDOLPH.

new trial or continuance; deprived them of the benefit of a judgment obtained; set aside some process or writ given in the preliminary stages of a suit, to secure the plaintiff's rights, or discharged the defendant out of custody, when arrested. If the judge erred in the instances just put, the party was without remedy, and the injury irreparable. Supposing a mistake in this case, no such consequence is perceived; the cause stands continued, the parties will have it tried, and it is presumed, as fairly, one term as another; mere delay cannot be regarded as an irreparable injury. 3 *Martin*, 171. 9 *id.* 494. 10 *id.* 444.

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

HANNA'S SYNDICS vs. *LORING.*

An attachment does not lie to compel the delivery of a specific thing.

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

PORTER, J. delivered the opinion of the court. This suit was commenced by attachment, to recover certain notes delivered by Hanna to the garnishees, agents for Loring,

defendant. It is the opinion of the court, that the plaintiffs have misconceived their remedy. Attachment is not given by our law to compel the delivery of a specific thing. In the present case, an action could have been brought directly against the person in whose hands the obligations were placed.

It is true, the petition states the plaintiffs demand in the alternative; the notes or the value of them. If we agreed with the counsel for appellee, that this averment authorized the attachment, then another difficulty presents itself. The citation, or rather the notice which the law has substituted in place of it, has not been served, according to the provision of the act of assembly on this subject, consequently the whole of the subsequent proceeding have been irregular, and the petition must be dismissed. 10 *Martin*, 472.

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 in both courts.

Seghers for plaintiff, *Maybin* for defendant.

East'n District. *April*, 1822.

MILLAUDON vs. *NEW-ORLEANS WATER COMPANY.*

MILLAUDON vs. NEW ORLEANS WATER COMP.

APPEAL from the court of the first district.

In case of insolvency, the vendor has a privilege on the proceeds of the moveable sold by him, which is in the debtor's possession at the time of failure, and has been disposed of by the syndics.

Experts cannot be appointed to examine property, in order to ascertain its value—nor to their report, legal evidence.

PORTER, J. delivered the opinion of the court. This appeal has been brought up by L. Millaudon, who complains that he was not placed on the tableau of distribution of the Orleans water-work company, as a privileged creditor.

He asserts, that he sold to that corporation a steam-engine, and that there is yet due him $2812 26 cents, the balance of the purchase money. The testimony taken, does no establish the sale so clearly as could be wished; we draw that conclusion from it however, because it is the most favourable to the appellees. If we adopted that for which they contend, we should be obliged to hold, that the engine itself was yet the property of the appellant.

This preference is claimed on two grounds.

That the engine having been incorporated with the buildings, has become immoveable property. *Civil Code*, 98, *art.* 20, 21. *Ib.* 470, *art.* 75, and that, as vendor, he has a right to be paid before other creditors.

That the object sold was moveable, and

that he has a privilege for the price so long as it remains in the debtor's possession.

The opinion formed by the court on the last point, renders an examination of the first unnecessary.

The law gives the vendor the right to be paid in preference, out of the proceeds of the moveable effects sold by him, while they remain in the debtor's possession. *Civil Code*, 470, *art.* 74, *n.* 5. This principle was recognized and enforced in the case of *Hobson & al.* vs. *Davidson syndics.* 8 *Martin*, 422.

Some difficulty was presented to our minds in examining this case, by the clause in our *Code* immediately following that which has been just quoted, as conferring this privilege. It would seem on a cursory examination, to have limited the creditor's right to a certain time, and on the condition, that the effects were found in the same state as when sold. A collation, however, of the French and English texts of the law, has satisfied us that this provision apply only in case suit is brought to get back the thing sold.

We are therefore of opinion, that the appellant has a privilege on the proceeds of the engine.

East'n District. *April*, 1822.

MILLAUDON *vs.* NEW ORLEANS WATER COMP.

The appellees, however, say this privilege should have been recorded. It was held in the case of *Lafin* vs. *Sadler*, 4 *Martin*, 470, that the statute of 1813, 1 *Martin's Dig.* 700, did not extend to the tacit lien possessed by workmen and others, who furnished materials for a building. This case does not appear to differ from that in principle, and as we are satisfied with the correctness of the opinion there pronounced, we must hold here, that it was not necessary for the vendor to record the sale of the moveables on which he claims a privilege.

We have been asked to receive the plea of prescription in this court. It is unnecessary to give an opinion, whether it is not too late to offer this exception, for as the cause must be remanded for further proof in certain points, the parties can have the benefit of this exception in the inferior court.

The appellant has not proved the amount due, nor the price for which the engine was sold. He made an attempt to establish the latter fact, by applying for experts, which the court refused him, and in our opinion correctly. He should have brought witnesses in the ordinary way to prove his case. Our law

has not made any provision for selecting persons to examine property situated as this was, nor for receiving their report as evidence.

It is ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; that this cause be remanded for a new trial, and that the appellant pay the costs of this appeal.

Seghers for the plaintiff, *Hennen*, *Livingston*, and *Morse* for the defendants.

RICHARDS & AL. vs. *LOUISIANA INSURANCE COMPANY.*

When the opinion of the supreme court does not coincide with that of a jury, on a question of fact, the case will be remanded, if the appellant moved for a new trial in the court *a quo*.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. The only question in this case, as to the liability of the insurers, arises from the state of the brig insured, at the time of its departure from the port of New-Orleans, on the intended voyage. It is a question entirely of fact, relating to the sea-worthiness of the vessel. The cause was submitted to a jury in the court below, who, on the testimony offered to them, found a verdict for the plaintiffs. There was a motion for a new trial, which

East'n District. *April*, 1822.

RICHARDS & AL. vs. LOUISIANA INSURANCE COMP

being over-ruled, and judgment rendered on the verdict; the defendants appealed. The whole of the testimony comes up in the record, which it is insisted on by the counsel for the appellants, establishes conclusively the total unfitness for sea of the brig, at the commencement of the voyage, and consequent discharge of the under-writers, caused by a breach of the implied warranty of sea-worthiness.

The facts of this case differ but little from those which were proven in that of *Trimble's syndics* vs. *New-Orleans Insurance Company*, heretofore decided in this court. 3 *Martin*, 394. In the present, as in the former case, we are of opinion, that sufficient matter is shewn on the part of the plaintiffs, to place the burthen of proof on the defendants, of the innavigable state of the vessel at the time of commencing its voyage. The only difference in the two cases, is an attempt in this, to shew by testimony, the opinions of witnesses who may be supposed to be skilled in such matters; the impossibility (from the nature of things) that a ship, so extensively rotten as the brig (the present subject of dispute) was found to be, on the survey and examination of the port

wardens of Charleston, S. C., could have been other than unseaworthy at the commencement of the voyage.

We have examined and weighed attentively, all the evidence, and are inclined to think, that it preponderates in favour of the defendants and appellants; but as the finding of the jury is opposed to our opinion of the testimony, and as it is the appropriate duty of juries (according to all systems of jurisprudence, when they assist in the trial of suits) to answer to questions of fact, we conclude, that this cause ought to be remanded for a new trial.

In coming to this conclusion, we feel less reluctance, on account of a motion to this effect having been made in the court *a quo;* as it does not derogate from the proper office of juries, to submit a cause to a second, when in the opinion of the judge, the first jury have mistaken or not strictly weighed the evidence. 9 *Martin*, 258.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled, and that the cause be remanded for a new trial, and that the appellees pay costs.

Morse for plaintiffs, *Duncan* for defendants.

East'n District.
April, 1822.

JACKSON
vs.
LARCHE.

JACKSON vs. *LARCHE.*

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This is an action of the first impression in this state, and the questions which arise out of it are of considerable importance to the parties and the public. We have given to it much consideration.

The defendant cannot plead in bar that the plaintiff brought a suit for the same cause of action, which he dismissed

Nor that other persons have sued him for the same trespass, and that these suits must be cumulated.

The petition avers, that the plaintiff is the owner and possessor of a certain lot of ground in this city; and that he had contracted with certain persons to erect thereon a large brick house, to be completed on the 20th day of November, 1820. That in pursuance of their contract, these persons laid the foundation, and proceeded to erect the building; when they were stopped from making further progress in the work, by an injunction obtained at the suit of the defendant, by reason of which the said house was not completed until a long time after, and the plaintiff suffered damages to the amount of three thousand five hundred dollars.

A court may permit counsel to reduce to form the answer of a jury to one of the questions submitted to them, and hand it for their consideration.

Although damages are not incurred beyond the costs, for bringing an action, in which one fails, yet he who resorts to extraordinary remedies, as an injunction, &c. must compensate his adversary, in case of failure

Damages may be given in such a case, beyond the penalty of the bond.

It is further averred, that the said injunction was obtained maliciously, and that it was afterwards dissolved. Judgment is prayed for the sum already mentioned.

To this petition the defendant pleaded several exceptions; the general issue; alleged title; and possession in herself; positively denied malice, and averred that the proceedings complained of were in pursuance of what she conceived her just rights.

For the better understanding of the case, it is necessary to state, that in the petition filed by the present defendant, in order to obtain the injunction, she declared, that Mitchell, who had commenced, and was about to continue, to erect a wall on her lot, was acting under the orders of Jackson, the present plaintiff, whom she stated to be then absent from the state. The injunction is asked against Mitchell alone; the damages are laid at five hundred dollars, and the bond with security, filed by her to answer for any injury the defendant Mitchell might sustain, is for that sum, and payable to him.

As soon as Jackson returned, he became a party to the suit, and contested it until final judgment.

The suit of the present defendant, as has been already intimated, complained of the damages suffered from the trespass, committed on her property; and judgment was asked

East'n District. *April*, 1822.

JACKSON *vs.* LARCHE.

for those damages, and an injunction to prevent a renewal of the trespass. The court decided, that she recover five dollars for the injury sustained; on the ground, that supposing the property to be in Jackson, he had illegally entered on it; but they decreed that the injunction should be dissolved.

Several objections have been made, which it is necessary to decide on, before we can reach the merits.

The first presented to us is, that the district judge did not give an opinion on certain peremptory exceptions made in defendant's answer; and that the cause must be remanded for his decision on them. In our opinion it is unnecessary to do so. A final judgment has been given, and that is sufficient to authorise us to examine all the matters which may appear on record. If the exceptions are valid, the appellant can have the benefit of them here. If they are not, she could derive no advantage from the decision of the inferior tribunal.

These exceptions are as follows:—

1. The defendant avers, that Jackson, in January, 1820, commenced an action in the parish court, for the same cause set forth in

the petition filed in this case, and that he afterwards discontinued it. We see nothing in this which prevents a recovery in the present suit; to make the former action a bar, she should have shewn, that it was yet pending, or had been prosecuted to judgment.

2. It is next pleaded that certain persons, *viz.* J. Mitchell, A. Lemoyne and J. Lambert, have instituted two suits in the parish court, claiming damages from the defendant, by reason of the injunction obtained in the suit against Mitchell. We think the present plaintiff cannot be affected by these proceedings: his injuries are not theirs, nor have they a right to vindicate them. A judgment has not the authority of the thing judged, unless it is between the same parties: *a fortiori*, the pendency of an action between others, cannot have the effect of suspending the exercise of legal rights in a third person.

3. It is insisted, that all these suits should be cumulated before the same tribunal and tried together. To this position we cannot assent. The law has given to two tribunals jurisdiction of this action; and the citizen has a right to the choice of either. We have no authority to deprive him of this right.

East'n District. *April*, 1822.

JACKSON *vs.* LARCHE.

unless it is shewn that justice cannot be done to others without compelling him to resort to a different court. The passage quoted from *Febrero* has been examined. He puts a variety of cases in which actions should be cumulated. There is none of them that carry the doctrine so far as contended for here, except that which states, that where creditors are carrying on separate suits for distinct and independent claims against their debtor, they should all be cumulated before one judge. It is impossible we can yield assent to this doctrine, or enforce a similar practice here. For nearly eighteen years that courts have administered justice under our government, in this country, it has been the universal understanding, that the statutes creating them, gave to each citizen the right to have his claim examined, without clogging or embarrassing his suit, by forcing him to join with others; and we are of opinion, that such a practice would lead to great confusion, and in many instances work injustice. One example will suffice to prove this. If a creditor was on the eve of having his cause tried after it had been delayed for years; in case others sued his debtor, he must wait until their de-

mands were ripe for examination, before he could be permitted to have his enquired into.

In cases of insolvency, there exists an absolute necessity that such a course should be pursued; for the moment the failure is declared, all the creditors become at once plaintiffs and defendants, as it respects each other; they must, therefore, litigate in one suit; otherwise justice could not be administered.

There is still a bill of exceptions to be disposed of. The counsel for the plaintiff, before the jury retired, drew up the form of an answer to the thirteenth question of defendant. This was objected to, and the judge permitting it, a bill of exceptions was taken. We are unable to discover that any error was committed by the judge in this opinion, or that injustice was done in consequence of the counsel handing in the form of the finding, he contended the jury should pronounce. It could have had no influence on their opinion. In our sister states, we know it is a common practice for counsel to draw up, and put in legal form, special verdicts, and justice is promoted thereby. It is not perceived, that it will have a different effect here; nay, it is of obvious utility, where many circumstances are involved

East'n District. *April*, 1822.

JACKSON *vs* LARCHE.

in the question submitted. For juries may frequently, from want of experience in these matters, omit something of importance, which was proved in evidence, and by this means create a necessity for a new trial. If the defendant supposed, that the evidence would have justified a different conclusion, he was free to submit also a form agreeable to the views of it.

The most important question in the cause yet remains. The counsel for plaintiff states, that this action is brought on that clause in the *Code* found in *art.* 316, 320, which provides, that whoever injures another, through his fault, is bound to repair it. We agree with the advocate of the appellant, that this word fault must be taken in its legal sense. Many injuries may be suffered, which, considered in a moral point of view, well justify that imputation on the person who inflicts them, and for which no legal remedy exists. We must, therefore, recur to other provisions of the law, to ascertain whether the act complained of here, is that kind of fault for which an action can be maintained.

If the proceedings of the defendant, that are alleged to constitute the injury for

which redress is demanded here, had been those which belong to an ordinary suit at law, it would perhaps be found, if it was necessary to decide the question, that a failure to succeed, in an action of that kind, does not authorize a demand in damages. Courts of justice are open to every one, and it is of the first importance that the citizen who feels himself aggrieved, or who imagines that he is aggrieved, should find his way into them without difficulty. The law inflicts its punishment, if he makes a false claim, by mulcting him in the costs, and that is perhaps enough, without subjecting him to an investigation of his motives in another suit, where they may be mistaken, and must, from the nature of things, be always imperfectly understood. It is far better that twenty persons be troubled by vexatious suits, than that one oppressed or injured man should be deterred by the fear of future consequences, from making his wrongs known to the justice of his country, and having them redressed.

But the same regard for private right which makes it so important to preserve this privilege to the citizen, is opposed to the exercise of those summary remedies, which our law

East'n District. *April*, 1822.

JACKSON *vs.* LARCHE.

from necessity has given in some instances. They are in a great measure contrary to the spirit of our constitution, and can only be reconciled with it by the reflection, that the improper use of them is checked, by provision having been made, that if resorted to, in any other cases but those contemplated by law, redress is secured to the sufferer. In regard to the writ, which was the means of inflicting the injury complained of here, the legislature have clearly and distinctly marked their jealousy of it. *Acts of* 1817, *p.* 28, *sec.* 5.

As this case is governed by the statute just referred to, it is necessary to quote so much of it, as will enable the opinion of the court to be clearly understood. It declares—

"That no injunction shall be granted to deprive any person from the free disposal or use of his property in his actual possession, or to stay execution, &c. &c. unless the party who sues for it, gives security as in case of attachment, conditioned for the payment of all costs and damages to the defendant, in case such injunction should prove wrongfully obtained."

From this provision we conclude, that if the writ of injunction is wrongfully sued out, the party applying for it is responsible for all

the damages that ensue. The bond is required, as a means of securing this object.

In deciding the case now before us, we may be aided in the investigation, by supposing that the present suit was on a bond taken under the act cited. In such a case, we think the only proof necessary to enable the plaintiff to recover, would be the execution of the bond, and the dissolution of the injunction; for whether the writ is taken out in a case not contemplated by law, or procured by a false representation of facts, it is in the language of the statute, wrongfully obtained. Nor is there any thing harsh in this construction; when a just cause of action exists, the person who has a right to it, should sue in the ordinary way, and, if his claim be doubtful, he ought to wait for judgment, before he deprives a citizen of his property. If, however, he chooses to pursue a more energetic, but less cautious, mode of proceeding; if in his anxiety to do justice to himself, he does injustice to others, and abuses a privilege, given for his protection; it is right, as it is the law, that he should answer for the consequences.

No bond, however, was given to the plaintiff; and it is contended, that the defendant

East'n District. *April*, 1822.

JACKSON *vs.* LARCHE.

is only liable to an obligation taken in pursuance of the statute. We are of opinion, that this circumstance cannot affect the rights of the parties. The bond is required to secure to the law its effect; to prevent it being evaded. The giving or not giving security, cannot change or weaken the responsibility incurred by taking out the writ. Besides, if bond was not given, who is to suffer by the neglect? It would be most emphatically permitting the defendant to take advantage of her own wrong, if we allowed her to offer the violation of a law, as the means of avoiding an obligation, which would have been created by an observance of it.

In this case, the jury have found that the writ of injunction was sued out maliciously. This more than brings the defendant within the statute; and the judgment given on the verdict must be affirmed, unless the other means of defence which she has set up are tenable.

It is first alleged, that the suit commenced was against one Mitchell, not against the present plaintiff. But the petition states, that the building of which she complained, was about to be put up by the directions of Jack-

son, and that Mitchell was the undertaker. And it is the opinion of the court, that the defendant cannot be excused to the owner, because she thought fit to select another person for defendant.

It is next contended, that in giving bond to Mitchell, the requisitions of the law were complied with, and that no greater responsibility was incurred than for the sum therein expressed. In this position we cannot concur. We have already observed, that the bond was required as an additional security. Were we to agree in the construction which the appellant gives to the statute, it would have often a contrary effect. For, if the damages amounted to more, as in the case before us, than the penal sum expressed in the obligation, the plaintiff, who sued out the writ, would not be responsible for all damages, he would be liable but for a part, and a small part of them.

Should we even admit the appellant to be correct in this position, she does not bring herself within the act. It requires bond, as as in case of attachment; that is, double the amount sworn to. In the petition filed, the damages are stated to amount to $500: she swears, that she has been injured to that

East'n District. *April*, 1822.

JACKSON *vs.* LARCHE.

amount, and only gives an obligation in that sum.

It is still urged, that the plaintiff has not proved his right of possession or property as stated in the petition. This, however, is neither a petitory nor possessory action. It is one for wrongfully suing out a writ of injunction, and thus depriving the plaintiff of the enjoyment and use of his property. The court has already decided, that the injunction should be dissolved; every question therefore connected with the right of possession or right to the soil, so far as they were involved in the decision of that suit, or necessary to be established in this, are now *res judicata* between the parties, and cannot be again enquired into. Admitting the plaintiff had merely proved that the defendant prevented him from erecting a common wall; the injunction was wrongfully sued out, and a right of action accrued. It was correctly observed from the bar, that it might be important for the defendant to shew a right to the soil, in order to rebut the malice imputed to her, but that the plaintiff's title could not be disputed.

This opinion renders it unnecessary to examine several bills of exceptions taken to the evidence of title, introduced by the plaintiff.

East'n District. *April*, 1822.

JACKSON *vs.* LARCHE.

It has not escaped our attention, that as the plaintiff alleged a right of property in his petition, it might be urged that he should be held to prove, what he has thought material to aver. We have already said, in the case of *Canfield* vs. *M'Laughlin*, 9 *Martin*, 303, and in that of *Bryan & wife* vs. *heirs of Moore*, decided a few days since, that if the evidence substantially established the right of the plaintiff to recover, the court would give judgment in his favour, although the proof did not correspond with the allegations in the petition. Here the only objection is, that more was averred than was necessary.

We see nothing erroneous in the charge of the judge to the jury.

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

Livermore for plaintiff, *Hennen* for defendant.

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

11m 297
104 119
104 120

If one of the partners be executor, the partnership cannot buy property at the sale of the testator's estate

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

PORTER, J. delivered the opinion of the court. The house of Harrod & Ogdens, pur-

East'n District. *April*, 1822.

HARROD & AL. *vs.* NORRIS' HEIRS

chased at public sale, all the property left by the late Patrick Norris. G. M. Ogden, a partner of that firm, was one of the testamentary executors of the deceased, at the time the adjudication took place. The only question to be decided, arises out of these facts. The parish judge decided the sale was irregular and void, and the plaintiffs have appealed:—

The appellees refer us to the following law:

No man who is testamentary executor, or guardian of minors, nor any other man or woman, can purchase the property which they administer, and whether they purchase publicly or privately, the act is invalid, and, on proof being made of the fact the sale, must be set aside, &c. *Novissima Recopilacion*, *lib.* 10, *tit.* 12, *ley* 1.

The provision is imperative, and must be obeyed, if the facts bring the case within it. The evidence establishes that the property of the testator has been sold by auction, and that by that sale, the executor became owner of part of it. This would seem to bring the case clearly within the spirit, and almost within the letter, of the law.

The appellants however contend that it

does neither, because the purchase was made not by G. M. Ogden, the executor, but by Harrod & Ogdens. To this position we cannot assent. If the executor buys in his own name, it is not denied that the law considers the act as null. If he buys under that of another, it is still his purchase, and the same consequences must attend it, as no one is permitted to do indirectly, that which he is prohibited to do directly. If other persons in partnership join in the acquisition, that cannot change the nature of the transaction, or prevent us from seeing that he has acquired property, which the law says he shall not acquire. We cannot perceive any difference between his buying one-third of the stock in trade of Norris, in his own name, and acquiring the one-third, through a purchase made by a partnership of which he is a member. If the case was doubtful, we should be inclined to lean to this construction, for how useless would this salutary law be, if we held that nothing more was required to avoid its operation, than the insertion of another name, or the aid of another party.

The reason for introducing this principle into our jurisprudence is obvious, and its wis-

East'n District. *April*, 1822.

HARROD & AL. *vs.* NORRIS' HEIRS

dom manifest. It was to prevent men from being led into temptation; that they might not be placed in a situation where their private interests, and their duties to others were at variance; the law presuming that in such case, the latter would be sacrificed. That danger is just as great when an executor buys for himself and others, as when he makes the purchase in his own name. The character of the parties, in this case, cannot be permitted to have any influence on our judgment. The transaction may have been a correct one, nay advantageous to the estate of the deceased. But our *Code* has declared, (6, *art.* 19,) "That when to prevent the commission of a particular class of frauds, the law declares certain acts void, its provisions are not to be dispensed with, on the ground that the particular act in question, has been proved not to be fraudulent."

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

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

FLEMING vs. *CONRAD.*

East'n District. *April*, 1822.

FLEMING *vs.* CONRAD.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. This action is brought for the recovery of a tract of land; judgment by default was taken, for want of an answer, and was afterwards confirmed.

Neither the petition nor the citation need be in the French language.

But, copies must be served in the English and French.

If the sheriff's return shew that the petition and citation were served on the defendant, it will be presumed they were served as the law requires.

A judgment by default may be made final, even when the object of the suit is the recovery of land.

The plaintiff moved to have it set aside and to be allowed to file an answer.

1. Because the judgment was taken prematurely.

2. Because no judgment deciding on the property of land, can be taken without the appearance of the defendant.

The district court refused to set aside the judgment, or to allow the answer to be filed, and the plaintiff appealed.

His counsel urges as an error, apparent on the record, that the citation was not served on him, as the law requires, in the French and English languages.

The law provides, that the citation shall "together with the petition," be delivered to the sheriff of the county where the defendant or defendants reside, and shall be served, by delivering a copy of the petition and citation, in

East'n District. *April*, 1822.

FLEMING *vs* CONRAD.

the French and English languages, to the defendant, or leaving such copy, in case the defendant should be absent, at his usual place of residence, with some free member of the family, above the age of fourteen. 2 *Martin's Dig.* 150.

The sheriff's return is, "served petition and citation on the defendant, February 22d, 1821." The law does not appear to us to require that the petition should be filed, nor the citation drawn in both languages, nor that the copy of the petition delivered to the sheriff should be so; it only requires that the sheriff should deliver, to the defendant personally, or leave at his house, in case of his absence, a copy of these papers, in both languages.

The sheriff is required to endorse on the citation "the time and manner in which he executed the same."

All the information which is required from the sheriff, besides the time of service, is as to the mode or manner of service, *i. e.* in which of the two modes, that are pointed out by law, the service has been effected, as the defendant was present or absent: personally in the first case; on some free member of the family, in the second. When this information is given,

it seems useless to add that the service was effected by giving a copy as the law requires, for as there is no alternative in this part of the service, this must be implied; for otherwise the citation would not be served.

The defendant was served with the citation on the 22d of February, and the judgment by default was taken on the 8th of March, and it is sworn that he resided at the distance of at least 15 leagues from the city of New-Orleans.

"The day of appearance, when the defendant resides in New-Orleans, shall be the tenth day after the date of the service of such citation: and the day of appearance, when the defendant resides out of the city of New-Orleans, shall be delayed, in addition to the said ten days, one day for every four leagues of the distance of his place of residence from said city." *Id.* 152.

The tenth day after the date of the service was, in this case, the 4th of March. Had the defendant resided at the distance of twelve leagues from the city, he would have been entitled to a delay of three additional days, and the 7th of March would have been the day of appearance—the three additional

East'n District. *April*, 1822.

FLEMING *vs.* CONRAD.

leagues in the distance do not entitle him to any delay: so that the judgment, by default, was taken on the day following that of the appearance.—It was not therefore prematurely taken.

"If the defendant shall not appear on the day given in such citation, and file his answer, or file with the clerk an order from the judge, allowing such defendant further time for filing it, then the petitioner, or his counsel, may order judgment to be entered up against such defendant." *Id.*

Thus far the law is general, and judgment is to be taken by default for want of an answer, whether the object of the suit be the recovery of a tract of land, a chattel, or a debt.

The law proceeds, "If the court shall hold session three days after such a judgment, and no motion is made to set it aside, on shewing good cause, and to file an answer; or if such motion is made and over-ruled, then the said judgment shall be final, whenever the demand is liquidated by a note, bond, contract, or final judgment; and if the sum demanded be uncertain, the court shall proceed to hear testimony, assess the damages, and render final judgment for the sum so assessed." *Id.*

It is urged, that, in the present case, the judgment did not become final, because the demand was not liquidated by a note, bond, contract, or final judgment; neither was there a sum assessed by the court—*ergo*, as is the case in suits for the recovery of land, the judgment by default did not become final, under the act of the legislature cited.

Be it so—before the passage of the act cited, the principle was that the neglect or refusal to answer of the defendant, *contumacia*, was equivalent to a denial, *contestacio*. *Aunque no se conteste la demanda, negandola, ó confesandola expresamente el reo, por ser habido por confeso, habiendo contumacia en contestarla, como lo dice una ley de la Recopilacion, es habida por contestada, porque esta confesion ficta, ó fingida, induce contestacion. Cur. Phil. Juicio Civil Contestacion, n.* 2.

In the present case, after the judgment by default was taken, no motion being timely made to set it aside, the district court considered the evidence produced by the plaintiff, and after an inspection of the titles, being satisfied therewith, considering that the law was with the plaintiff, gave final judgment.

It is therefore ordered, adjudged and de-

East'n District. *April*, 1822.

FLEMING *vs.* CONRAD.

creed, that the appeal be dismissed with costs.

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

AUBRY & WIFE vs. *FOLSE & WIFE.*

Although a Spanish judgment stated that an adjudication formerly made, exists no longer, the party having neglected to comply with the terms, yet, if the court proceeds to order a compliance therewith, and issues execution accordingly, the party, after compliance, will have the benefit of the adjudication.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The petition states, that one Sanches was a partner of Mrs. Aubry's mother, and on her death took possession of all the partnership effects, and kept them while he lived, and died leaving his whole estate to the present Mrs. Folse; that she and her husband possessed themselves of all the partnership effects, and refused to account to, or make any partition with Mrs. Aubry, who is the sole heir to her mother.

The defendants, among other pleas, urge that all the partnership property was, at its dissolution, by the death of Mrs. Aubry's mother, adjudged to Sanches, by a competent tribunal, for the sum of $1321 37½ which he paid to the plaintiff Aubry, in right of his wife, who gave a receipt and acquittance therefor, renouncing all claims.

There was judgment for the defendants, and the plaintiffs appealed.

The appellees produce a decree of governor Salcedo, of the 8th of January, 1803, by which the alleged adjudication appears to have been made: but the appellants urge, that by a subsequent decree of the same tribunal, of the 16th of September, of the same year, the adjudication was declared null and void, Sanches having neglected to comply with the terms on which it had been made *por no sussistir la adjudicacion, mediante a Sanches no haver complido con las condiciones.*

Notwithstanding these strong expressions, we are of opinion, with the counsel of the appellees, that the adjudication was not annulled; attending more to what was done, than to what was said, by the Spanish tribunal; who directed *a dispacho* execution, to issue to the commandant of Sanches' parish, that he might be compelled to pay the price of the adjudication, by the seizure of his property, and the imprisonment of his person; that on this *dispacho* being communicated to him, by the commandant, with order to pay, he entered into arrangements, made partial payments, and finally paid the balance with interest and

East'n District. *April*, 1822.

AUBRY & WIFE vs. FOLSE & WIFE.

costs, as appears by Aubry's authentic receipt and discharge, executed before the commandant.

Surely the court who compelled him to pay the price of the adjudication, might say that before payment, the adjudication was of no avail, *no susistir*, but it could not mean that it should subsist, in order to authorise and compel the payment, while afterwards the thing adjudicated should not pass to the party.

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

Livingston for plaintiffs, *Moreau* for defendants.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, MAY TERM, 1822.

East'n District. *May*, 1822.

THE STATE vs. *NEW-ORLEANS NAVIGATION COMPANY.*

THE STATE *vs.* NEW ORLEANS NAV. COM.

The court having heard the plaintiffs' and defendants' counsel, at March term, *ante* 38, 187, gave time to the former to reply; which he afterwards declined.

Congress have power to govern the territories of the united states

And may establish territorial legislature.

The governor and legislative council of the Orleans territory had power to grant the charter of the New-Orleans Navigation Co.

The charter is not affected by any law of congress, anterior or posterior to its date

Louisiana is a member of the

MARTIN, J. delivered the opinion of the court. The attorney-general has sued out a writ of *scire facias*, to avoid the charter or act of incorporation of the defendants, on the ground that it is absolutely void, or that they have incurred a forfeiture of it by nonfeasance.

There was judgment in favor of the defendants, and the state appealed.

East'n District.
May, 1822.

THE STATE
vs.
NEW ORLEANS NAV. COM.

Her counsel denies the political existence of the legislative body, who granted the charter, and urges that it is inconsistent with the constitution and laws of the united states.

He boldly contests the power of congress to govern the territories, and contends that, admitting they possess, they can not delegate, it.

union, on a footing with the original states, and is not bound by any condition subsequent, annexed to her admission.

On this part of the case, it would perhaps suffice to repeat what we said a few years ago, when pressed to declare that the office of the special administrator had no legal existence.

"The governor construed his commission as extending to the exercise of legislative powers, in this and similar instances, in which he never was censured. The judiciary of the late territory sanctioned his conclusion, by sustaining suits and giving judgments, in several instances, in favor of that officer. Till the institution of the present suit, no doubt appears to have been harbored of the legality of the office. Many estates have been settled by the special administrator. It would be attended with monstrous consequences, if by declaring that the office never legally existed, this court were to annul the various transactions of the several incumbents who filled it."

"When, in the case of *Stewart* vs. *Laird*, 1 *Cranch*, 309, a judgment was sought to be reversed, on the ground that the judges of the supreme court of the united states had no power to sit as circuit judges, without having been appointed as such, (in other words, that they ought to have received distinct commissions for this purpose) that court thought it sufficient to observe that practice and acquiescence for a period of several years, commencing with the organization of the judicial system, afforded an irresistible answer, and had indeed fixed the construction; that it was a cotemporary interpretation of the most forcible nature, and this practical exposition was too strong and too obstinate to be shaken or controlled. They concluded the question was now at rest, and ought not to be disturbed." *Rogers* vs. *Beiller*, 3 *Martin*, 669.

A majority of the members of this court sat for years, as judges of the late territory. The very acceptance of their commissions, was a decision, on their part, that the offices had a legal existence. Had they been afterwards convinced of the illegality of their offices, they could only have declared it, by descending from their seats: for, if they were not legal

Dist'n District. May, 1822.

THE STATE, vs. NEW ORLEANS NAV. COM.

magistrates, they had no capacity to say so. It was their misfortune to be at several times called upon to exercise the most solemn and awful parts of their functions—to pronounce sentence of death. Can they harbor the idea of having done this without any legal authority?

Can the present court say that they have, for several years past, disposed of the fortunes of their fellow-citizens, according to the acts of a legislature, which never had a legitimate existence.

If any doubt could be entertained, it would certainly vanish on consideration of the part of the constitution of the united states, to which the counsel for the state has drawn our attention:—

"Congress have the power to dispose of and make all needful rules and regulations, with regard to the territory, or other property of the united states."

Now a very needful regulation, with regard to the land of the united states, considered as the subject of property, is to provide for its settlement.

The individuals who are to settle on it, must be designated, and when there must

have some kind of government given them. Otherwise, if any individual have a right to remove thither, and those thus assembled can establish a government of their own, independent of and uncontrolled by the authority of the united states—would not the acquiescence of the latter be an implied relinquishment of their title? Would not a state thus erected, be at liberty to decline being incorporated into the union?

The legislature of every state relieves itself from the burden of making, and the details of, particular laws, necessary or useful for the individual government of cities, towns, &c. by clothing aldermen, selectmen, trustees, commissioners, &c., under certain restrictions, with a portion of its authority. To congress, a relief of the kind, with regard to the territories of the united states, was essential. Nearly one fourth of the year was requisite for the expedition of the legislative concerns of the late territory of Orleans. It cannot be imagined that congress, a very numerous body, sitting at the distance of fifteen hundred miles, with one delegate only *from that* territory, could have performed the same labour in the

East'n District. *May*, 1822.

THE STATE *vs.* NEW ORLEANS NAV. COM.

same time: and when it is considered that there were half a dozen of territories, it will be seen that congress could not have legislated for these, even if they sat during the whole year, and bestowed their whole attention exclusively on the framing of laws for the territories.

We conclude that the power of making all needful rules and regulations, in regard to the territory of the united states, implies that of providing a government for those who inhabit it; and that, as in this respect, the constitution has imposed no restraint, congress well might establish such territorial, legislative, executive, and judicial departments, as to them appeared proper.

The grant of the defendants' charter appears to have been within the scope of the powers, vested by congress in the governor and legislative council of the territory of Orleans: for these were expressly extended to all rightful subjects of legislation.

The restriction which congress imposed was that the territorial laws be not inconsistent with the constitution and laws of the united states; that they lay no person under any re-

straint, disability or burden, on account of religion; that they do not dispose of the soil, tax the land of the united states, nor interfere with land claims.

The governor was directed to report the laws to the president of the united states, that they might be laid before that body, on whose disapprobation they were to cease having any validity.

We are next to enquire whether the charter violates any of these restrictions.

The counsel for the state, urges that it is inconsistent with the provisions of the 8th, 9th, and 10th sections of the first article of the constitution of the united states.

"All duties, imposts and excises shall be uniform throughout the united states." *Sec.* 8.

"Congress shall have power to regulate commerce with foreign nations." *Id.*

"Vessels, bound to and from one state, shall not be obliged to pay duties in another." *Sec.* 9.

"No state shall, without the consent of congress, lay any duties of tonnage." *Sec.* 10.

The duties, mentioned in the 8th section, are therein described to be those which are laid, "to pay the debts, and provide for the

East'n District. *May*, 1822.

THE STATE *vs.* NEW ORLEANS NAV. COM.

general welfare," to fill the public coffer; not retributions, like the toll permitted by the charter, to be received by individuals (on account of some improvement made by them, at their own costs) and paid by those who are benefited thereby.

As early as 1790, *i. e.* at the first congress, after the adoption of the federal constitution, that body gave its assents to—

A law of the state of Rhode Island, to incorporate certain persons, by the name of the River Machine Company.

A law of the state of Maryland, to appoint wardens of the port of Baltimore, and an act supplemental thereto.

A law of the state of Georgia, laying and appointing a duty of tonnage, for the purpose of clearing the river Savannah, and removing wrecks and other obstructions therein. 2 *L. U. S.* 181, 192, 258 and 532.

Neither of these laws are within our reach; but their titles shew that probably all (and certainly the last) were for laying a retribution of the same nature, as that established by the defendants' charter. Laws for the improvement of a water course, by means of a duty or toll, to be levied on vessels afterwards

using it. Yet neither of the legislatures of Rhode Island, Maryland or Georgia, nor that of the union, considered these laws as inconsistent with the constitution of the united states, because the duties laid, are not uniform throughout the united states, interfere with the exclusive power given to congress to regulate commerce, and are to be paid in one state, by vessels coming from another.

These state laws were continued, and the continuing laws assented to, in 1793, 1798, 1800 and 1808.

In 1798, congress gave their assent to a law of the state of Massachusetts, incorporating certain persons to keep in repair a pier at the mouth of Kennebunk river, and providing a duty for their reimbursement. 3 *L. U. S.* 35.

In 1802, congress assented to a law of the state of Virginia, relating to the navigation of Appamatox river. *Id.* 474. And in 1804, to a similar one, in regard to James river. *Id.* 586.

In 1804, to a law of the state of South-Carolina, authorising a duty of not more than six cents per ton, on all ships and vessels of the united states, returning to the port of Charleston from a foreign port. *Id.* 10. The act was revived in 1809.

East'n District. *May*, 1822.

THE STATE *vs.* NEW ORLEANS NAV. COM.

In 1805, a law of the state of Maryland was assented to, for the collection of a duty of one cent per ton, on all foreign vessels, coming into the port of Baltimore, to defray the expences of quarantine regulations. *Id.* 640.

In 1811, the same assent was given to a law of the state of Georgia, establishing the fees of the harbour-master of the port of Savannah. *Id.* 348. The act was revived in 1813.

These acts, to which our attention has been drawn, by the counsel for the state, are conclusive evidence of the early, deliberate and continued opinion of the national legislature, and of those of so many of the most important members of the union (Massachusetts, Rhode Island, Maryland, Virginia, South-Carolina and Georgia) that the navigation of water courses may be improved, and the necessary funds procured or reimbursed, by a duty raised on vessels navigating it, commensurate with the object, *with the assent of congress*, without violating any of the parts of the constitution of the united states.

But it is urged, that the duty which the defendants' charter authorises them to collect, has not been laid *with this assent.*

It does not necessarily follow, that because the constitution requires this assent to a state, it is essential to a territorial, law.

The state laws are passed without the agency, and are beyond the control of the government of the union. Those of the governor and legislative council were passed by an officer, and an assembly composed of members, appointed by the president of the united states, and ceased to be of any force as soon as it pleased congress to express this disapproval.

The ones were therefore to be presented for the assent of congress, before they went into operation; and this because, after they were in vigor, they were out of the control of congress. The others were not to be presented for the sanction of congress, by an explicit assent, but submitted to their consideration and silent acquiescence, which left to that body the free exercise of the right it had reserved, of annulling them at will.

But, let us view the case in the light in which the counsel for the state is pleased to present it to us; as if the assent of congress was equally necessary to the territorial, as to a state, law.

East'n District. *May*, 1822.

THE STATE *vs.* NEW ORLEANS NAV. COM.

The constitution does not require an *express* assent, and the counsel for the defendant urges, that as to their charter, an *implied* one is necessarily to be inferred.

This instrument bears date of July, 1805, a short time before the beginning of the first session of the ninth congress, during which it must, according to the provision cited, have been submitted to that body. The session ended without the disapprobation of the charter.

The silence of the national legislature was a manifestation of its will, that the act should provisorily continue in force.

The same congress, at its second session, on the 3d of March 1807, manifested, by procuring to the new corporation, the gratuitous conveyance of a requisite strip of land, their wish that it should continue its operation, by prolonging the canal, which they were improving, from its basin to the Mississippi; an object, which the succeeding congress appear to have had so much at heart, that they appropriated $25,000 towards the attainment of it.

In 1814, the fourteenth, and in 1816, the fifteenth congress gave the corporation new pledges of their countenance and favor, by the grant of a lot of land, in each of these years.

Repeated laws of congress, expressly adding to the means provided by the territorial legislature, for the completion of the object, for which the defendants were incorporated, may well be considered as an avowal that congress did not disapprove the law, which gave them a political existence.

The court *a quo* considered it so, and concluded that the charter had the implied assent of congress—a conclusion in which we readily concur.

It is further urged, that if the charter be not inconsistent with any part of the constitution of the united states, it is however so, with several acts of congress, *viz.* the acts of March 27th, 1804, and March 2d, 1805, anterior, and that of February 20th, and March 3d, 1811, and April 8th, 1812, posterior, to its date.

In the act of 1804, (quoted by the counsel for the state, *ante* 79) 3 *L. U. S.* 626, we have sought in vain for the provision which the counsel recites. We have, however, found it in an act of the 3d of March 1803, to which the act of 1804 is a supplement. *Id.* 553, *sec.* 17. It is there said, "that all navigable rivers, within the territory of the united states, south of the state of Tennessee, shall be deemed to

East'n District. *May*, 1822.

THE STATE *vs.* NEW ORLEANS NAV. COM.

be, and remain public highways." The date of the act being anterior to the treaty of cession, Louisiana made then no part of the territory of the united states; it is not therefore clear that the provision extends to it.

The act of 1805 extends, with some modifications, the *ordinance* of 1787, to the territory of Orleans. One of the provisions of this instrument is, "that all the navigable waters leading into the St. Lawrence and the Mississippi, and the carrying places between the same, shall be common highways, and for ever free, as well to the inhabitants of the territory, as the citizens of the united states, or those of any other state that may be admitted into the confederacy, without any impost, tax or duty therefor."

The counsel for the defendants has shewn that neither the character of a public highway, nor its freedom is incompatible with its subjection to some rule.

Freedom does not preclude the idea of subjection to law. Indeed it pre-supposes the existence of some legislative provision, the observance of which insures freedom to us, by securing the like observance from others.

The freedom of navigation, stipulated for

other citizens of the united states, is that which those who inhabit the territory enjoy.

As a public highway, the river may be freely navigated by either, up and down, for the conveyance, for hire, of persons and property. Not so across, at such points where ferries are established by law, nor within a certain distance above or below. The freedom, stipulated for by the ordinance, is not so absolute, as to be inconsistent with submission to ferriage laws, securing to the citizens residing within or without the territory, the convenience of finding, at suitable places, at all times, and for a fixed compensation, the means of crossing.

Nor with quarantine laws, which forbid the advance in the midst of the shipping, anchored before a city, of vessels having, or even suspected to have on board, persons labouring under a contagious disease, to the danger and terror of its inhabitants.

Nor with a submission to pilotage laws, which, compelling, or inducing a pilot to venture at a great distance from a dangerous coast, to afford his skilful aid to vessels, oblige a master, who declines his services, to make him some compensation for his labour and risk. 2 *Martin's Digest*, 408. *n.* 7.

East'n District. *May*, 1822.

THE STATE *vs.* NEW ORLEANS NAV. COM.

Nor with a submission to a law, which provides a compensation for the labour and expence, bestowed by an individual or corporation, on the improvement of the navigation of a water course, attended before with difficulty and danger, to be paid by those, who by such means navigate it with ease and safety.

But it is stated, the ordinance stipulated not only for the freedom of navigation, but also for an exemption from any *impost*, *tax*, *or duty* therefor.

These words, we think, must be confined to the idea which they commonly and ordinarily present to the mind; exactions to fill the public coffers, for the payment of the debt, and the promotion of the general welfare of the country; not to a retribution, provided to defray the expences of building bridges, erecting causeways, or removing obstructions in a water course, to be paid by such individuals only who enjoy the advantage, resulting from such labour and expense.

We conclude, that the district judge correctly declined to consider the charter of the defendants, as inconsistent with any of the acts of congress, passed before its date.

The first act, passed since the date of the

charter, which is said to be incompatible therewith, and consequently is held to repeal it, is that of the 20th of February, 1811.

Congress in this act, were pleased to impose as a condition *precedent*, of the admission of Louisiana into the union, that a clause should be inserted in an ordinance of the convention, which framed the state constitution, providing, "that the river Mississippi, and the navigable rivers and waters leading into the same, or into the gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said state, as to other citizens of the united states, without any tax, duty, impost, or toll therefor, imposed by the said state." 4 *L. U. S.* 329.

The next act, is that of the third of March following, by which congress directs, that all the navigable rivers and waters of the territory of Orleans, shall be, and forever remain public highways. *Id.* 361.

The last is that of April 8th, 1812, by which the provisions of the clause, the insertion of which had been proposed as a condition *precedent*, are made conditions subsequent—of the admission of the state into the union. *Id.* 402.

The admission of the state into the union,

East'n District. *May*, 1822.

THE STATE *vs* NEW ORLEANS NAV. COM.

as soon as possible, was a matter of right, secured by the treaty of cession. To it no condition, either precedent or subsequent, could be imposed by congress.

To an anticipated admission, that body could propose conditions precedent, which the people might accept or reject.

Thus, before the population of the intended state amounted to 60,000 free persons, the number, which, under the ordinance, entitled the people to admission as a state, congress thought fit to propose an anticipated admission, on certain conditions and restrictions, which were accepted, with some modification, by the convention.

For example, congress proposed that a constitution should be framed, "containing the fundamental principles of civil and *religious* liberty." One was framed containing *no* principle of religious liberty. The only part of it in which religion is noticed, is the 22d section of the 2d article, providing that no clergyman, priest or teacher, of any religious persuasion, society or sect, shall be eligible to the general assembly, or to any office of profit or trust; a *restriction* on, rather than a *recognition* of the principles of religious liberty.

Congress proposed that ALL *the records of the state, of every description*, should be preserved in the language in which the constitution of the united states is written. The provision was confined to the PUBLIC *records of the state.*

The proposed clause, in the ordinance of the convention, was absolutely neglected.*

---

* Since the delivery of this opinion, the reporter has been informed by Mr. Fromentin, who was one of the commissioners of the state, to carry the constitution to congress, that no ordinance of the convention was sent to that body. On an examination of the papers and journal of the convention, it appears that the form of an ordinance was reported by a committee, transcribed on the records, and the consideration of it postponed; but it is believed no ordinance was actually passed.

The copy from which the document, 1 *Martin's Dig.* 132, was printed, was furnished by the late governor Claiborne, as that of the ordinance; the original, in his opinion, having been sent to congress, with the constitution.

The form reported by the committee, was drafted on the copy of an act of congress, of February 20th, 1811, printed by the public printer, (Mr. Thierry) according to the directions of the general assembly, with the acts of the session. In the copy thus printed, the clause, which relates to the free navigation of the Mississippi, was accidentally omitted. The error crept into the Digest; the pamphlet acts, printed by the public printer, having been used by the printer of that work, by the directions of the person employed by the legislature to prepare it.

East'n District. *May*, 1822.

THE STATE *vs.* NEW ORLEANS NAV. COM.

The *absolute* acceptance of the propositions of congress, being refused, congress might have declined to receive the *qualified* one, and forborne for the moment, to admit the state into the union. This, they did not do.

They impliedly waved the absolute compliance with the proposed terms, relating to religious liberty, and the language of the records, by approving the constitution, and admitted the state into the union, with a proviso, that the former terms should be taken as a condition, upon which Louisiana was incorporated into the union.

In the treaty of cession, an *unconditional* incorporation was stipulated for. According to the ordinance, admission was promised, *on an equal footing with the original states.*

Now that the state is incorporated into the union, she must be so *on an equal footing*, free from any condition *subsequent*, to which the people did not agree.

She is not admitted on an equal footing with the state of New-York, if she must allow the free navigation of the Mississippi, to the citizens of that state, while her citizens are not allowed that of the Hudson; nor if they be, while she must give a parchment security, while the state of New-York gives none.

It cannot be said, that by putting the state government into operation, the people accepted the conditions *subsequent*, annexed by congress to the admission of the state. They were not called upon to consider them.

The president of the convention, who issued his proclamation for holding the elections, had no authority to accept any condition, and could not bind the people; neither could the officers, who presided at the elections. A single vote, in a parish, would have been sufficient to elect a senator or a representative. Had the people determined to decline puting the state government into operation, by refusing to elect members of the general assembly, they could not have effected their purpose, without an almost absolute unanimity.

We conclude, that neither the existence of the defendants, as a corporate body, nor any of their rights, under the charter, is affected by any act of congress, passed since its date.

It does not appear to us, that there has been any alienation of the soil, nor that the bayou has ceased to be a public highway.

The court *a quo* acted correctly in declin-

East'n District. *May*, 1822.

THE STATE *vs.* NEW ORLEANS NAV. COM.

ing to declare that the defendants' charter is null and void.

The defendants have shewn that the whole of their capital has been fairly expended in improving the navigation of the bayou, clearing the canal and basin.

There is no evidence before us of the probable expenses that would attend the continuing the canal from the basin to the Mississippi.

They cannot command one cent of the $25,000 appropriated by congress. This sum is placed at the entire disposal of the president of the united states.

The court *a quo* does not appear to us, to have erred in refusing to pronounce that the defendants' charter has been forfeited by nonfeasance.

It escaped its notice, that the state can never be condemned to pay costs in her own courts, and it erred in giving judgment for the defendants, *with* COSTS.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoid-

ed and reversed, and this court proceeding to give such a judgment, as, in their opinion, ought to have been given below,

It is ordered, adjudged and decreed, that there be judgment for the defendants.

WARD vs. *BRANDT & AL. SYNDICS.*

APPEAL from the court of the first district.

A partnership, "to do commission business as factors, in the city of New-Orleans," is not a particular partnership.

It is not necessary that the style of such partnership should contain the name of each partner.

The partners, in an ordinary commercial partnership, are bound *in solido*, and cannot prove or be paid their respective claims, until the partnership debts due to other creditors, are paid.

Debts other than those arising from consignment, may be proved on insolvency against a commission

Grayson, for the plaintiff. The petition of David L. Ward, the appellant, was originally preferred against J. Brandt & Co., composed of John Brandt and Henry Foster, of New-Orleans, and James Johnson and William Ward, of Kentucky, to recover the sum therein stated to be due from the latter to the former, with interest, damages and costs, according to accounts, made part of, and filed with the petition, signed with the name of J. Brandt & Co., by Henry Foster, who was thereunto authorised, and which accounts, on the 1st of September, 1820, for valuable considerations, were assigned to the plaintiff, and also what further sums might be due from J. Brandt & Co. to James Johnson, and Wards & Johnson.

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL SYNDICS.

The accounts made part of, and filed with the petition, are—

An account between James Johnson, creditor, and J. Brandt & Co. debtors, exhibiting a balance due from the latter to the former, on the 18th of April, 1820, of 43097 dollars 7 cents, subscribed J. Brandt & Co., by Henry Foster. At the foot of this account, a charge is made by J. Brandt & Co., against James Johnson, of 15080 dollars, for Rochelle & Shiff's notes, delivered to Robert J. Ward; leaving a balance due James Johnson of 28017 dollars 7 cents. There is an assignment of, and upon the account, and of what might be further due to David L. Ward, for value, dated 1st September, 1820, subscribed, "James Johnson."

An account between E. P. Johnson & Co. and J. Brandt & Co., shewing a balance in favour of the former, of 5131 dollars, 45 cents, on the 14th of May 1819; signed, "J. Brandt & Co., by Henry Foster." And at the foot of the account. is an assignment thereof, from E. P. Johnson & Co., to D. L. Ward, for value, dated the 1st September, 1820, subscribed, "E. P. Johnson & Co."

An account between William Ward, and

house in this city.

Private debts cannot be set off against partnership demands—hence where A, was partner of a commercial firm in Kentucky, & of one in New-Orleans, held, that in case of insolvency of the latter, the house in Kentucky, might prove its debt, although one of its partners was responsible to the creditors of that which had failed.

Persons sending property to be sold on commission, have not a privilege for the debt which arises from the goods being sold, in case the proceeds cannot be traced and identified, in the insolvent's hands.

The law gives a mortgage on the estates of those who intermeddle in the administration of absent per-

John Brandt & Co., shewing a balance due to Wm. Ward, on the 19th May, 1819, of 2680 dollars 50 cents, subscribed, "J. Brandt & Co., by Henry Foster." And at the foot of which account is an assignment thereof, for value, from William Ward, to David L. Ward, dated 1st September, and subscribed, "W. Ward."

And an account between Wards & Johnson, and John Brandt & Co., exhibiting a balance due the former, of 14287 dollars 45 cents, on the 14th June, 1819, subscribed, "J. Brandt & Co., by Henry Foster." And at the foot of the account, is an assignment of it, to David L. Ward, and of what might be further due, dated 1st September, 1820, signed, "James Johnson, Wm. Ward."

The answer of John Brandt and Henry Foster, objects: That John Brandt, Henry Foster, William Ward and James Johnson were partners, as commission merchants, in New-Orleans; that they obtained a respite of one, two and three years for the payment of their debts. That not more than one year had elapsed, and that two-thirds of their debts remained unpaid. And that since the exhibition of the state of their affairs, by which it appeared

sons property, not on those who administer it under authority from the proprietor.

Query—whether the absent persons, alluded to, are not those who are *declared absent*

In case of insolvency of the partnership, if two of the partners owe the firm; their debt passes with others to the creditors, and the other partners, who are solvent, have no right to be paid out of the debts, until all claims on the partnership are discharged.

A mortgage executed by two of the partners, after the acting partners had prayed for a respite, which was accorded, gives no preference to the mortgagee.

East'n District. *May*, 1822.

WARD vs. BRANDT & AL SYNDICS.

that the said James Johnson and William Ward, then co-partners, and from whom the plaintiff derived his claim upon the respondents, were creditors of J. Brandt & Co., for the amount claimed by the plaintiff, losses had been incurred by J. Brandt & Co.; whereby the balances claimed by the petitioner had been greatly reduced. And that the claim of the petitioner, as set forth in his petition, must be deferred until all the debts of J. Brandt & Co. should be paid.

The answer of the syndics objects:—That there is nothing due from J. Brandt & Co. to the petitioner.

That if any thing be due to him, it is due by assignments, made by James Johnson, Wards & Johnson and Edward P. Johnson & Co.; that the firm of Wards & Johnson is composed of James Johnson, William Ward and the petitioner, and that the firm of E. P. Johnson & Co. is composed of E. P. Johnson and Wm. Ward, and that Wm. Ward and James Johnson, were partners of J. Brandt & Co., and bound *in solido* for all the debts of the firm. And that Wm. Ward and James Johnson are indebted to the respondents, as

syndics, in a much larger sum of money than the amount demanded in the petition, *to wit.* 100,000 dollars, which they plead, in compensation against the demands of the petitioner, who, as they say, knew the facts so set forth at the time said transfers were made. And they further object, that if any thing be due to the petitioner, the same is due by two of the firm of J. Brandt & Co. only, and must be postponed to the debts due to the creditors of said firm; that the property surrendered, will not be sufficient to pay the creditors of said firm, and that said property is all partnership property. And for further answer, they deny all the allegations of the petition.

The plaintiff and syndics agreed upon certain facts, and prayed the opinion of the court upon the questions arising thereon, *to wit.*

1. That the late firm of J. Brandt & Co., was formed for the purpose of doing commission business, as factors in the city of New-Orleans, and was composed of John Brandt and Henry Foster, William Ward and James Johnson; that the business of said firm was transacted by John Brandt and Henry Foster, who resided in New-Orleans, whilst the said

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL SYNDICS.

William Ward and James Johnson, resided, as they did during the whole period of said partnership, in Kentucky.

2. That the said John Brandt and Henry Foster, in the name of said firm, on the 19th May, 1819, applied for a respite, and on the 28th of December, 1819, obtained the same, the first instalment to become due the 28th December, 1820, the record whereof, and all the proceedings relating thereto, are made part of the facts agreed, as aforesaid.

The said record contains a schedule of the debts acknowleged by J. Brandt & Co., to be due from them, at the time of their application for a respite, and which schedule, among the debts so acknowleged, shews to be due to William Ward, 2680 dollars 50 cents; E. P. Johnson & Co. 5131 dollars 45 cents; James Johnson, 35236 dollars 51 cents; Wards & Johnson, 18151 dollars 86 cents; Wards & Johnson, 1590 dollars, in all 62,790 dollars 32 cents; and to Lee White 512 dollars 50 cents.

3. That upon making application for said respite, the said partnership was dissolved, and shortly afterwards, *to wit*—on the day of May, in the year 1819, the dissolution aforesaid, was advertised in some newspaper printed in New-Orleans.

4. That at the times of applying for, and obtaining said respite, the said late firm was indebted to Lee White, in the sum of 512 dollars and 50 cents; to Edward P. Johnson & Co. in the sum of 5131 dollars and 45 cents; to William Ward, in the sum of 2680 dollars and 50 cents; to James Johnson, in the sum of 43,097 dollars and 7 cents; and to Wards & Johnson, in the sum of 14,287 dollars 45 cents, for the proceeds of consignments made by said creditors, respectively to said late firm; that the firm of E. P. Johnson & Co. consists of said Edward and William Ward, and that the firm of Wards & Johnson consisted of said David L. Ward, Wm. Ward and James Johnson; and upon settlement between the members of said latter firm, the said William Ward and James Johnson being found in arrear to said David L. Ward, the debt due to Wards & Johnson, as aforesaid, was adjudged to said David L. Ward, and assigned to him accordingly in consideration thereof.

5. That the said late firm of J. Brandt & Co. own real estate in the city of New-Orleans, and elsewhere, *to wit;* lands, lots and negroes.

6. That the said Henry Foster and John

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL SYNDICS.

Brandt own real estate, *to wit;* lands, lots and negroes.

7. That a parcel of land was sold in the city of New-Orleans, to Rochelle & Shiff, the property of the said John Brandt & Co. as aforesaid, for the sum of ; that the said James Johnson, received on account thereof, as follows, Rochelle & Shiff's notes, payable at 3, 4, 5 and 6 years from 22d April; one year for 4333 dollars 33 cents each, say 17,333 dollars 33 cents, deducting for interest 2253 dollars 33 cents, leaving the sum of fifteen thousand and eighty dollars, and for which said sum, the said John Brandt and Henry Foster, have given the said firm credit on the debt due to said James Johnson as aforesaid, leaving a balance of 28,017 dollars 7 cents.

8. That the agreement is not to preclude the said James Johnson, William Ward and Wards & Johnson from shewing further sums due to them, than as above, or to prejudice them, or said David L. Ward in the recovery thereof; the right of recovering, which, if any such there be, is nevertheless to be saved to them. Nor is it to preclude the syndics from shewing less to be due than above stated.

9. That the record of the proceedings in

the case of Robert Dyson and others, against John Brandt & Co. &c., be made part of the facts agreed.

That record shews, that James H. Shepherd, Peter L. Sloane and John B. Bernard, were on the day of in the year 1821, made syndics of J. Brandt & Co. and of J. Brandt and Henry Foster.

10. That the debts due to said William Ward, Wards & Johnson, E. P. Johnson & Co. and James Johnson were assigned by them respectively to said David L. Ward, on the 1st September, 1820, for valuable considerations, then given by said Ward, and that the debt due to said Lee White, has come to said Ward for a valuable consideration by assignment.

11. That on the 1st September, 1820, William Ward and James Johnson executed to David L. Ward, a mortgage, recorded in the office of the register of mortgages in this city, on the 29th December, 1820, which is made part of said facts agreed, and which mortgage is attached to a petition of said Ward in this court, against John Brandt, &c. to secure the payment of fifty-six thousand dollars, with interest, and which remains due and

East'n District. *May*, 1822.

WARD vs. BRANDT & AL. SYNDICS.

unpaid, and that the accounts or debts assigned to said David L. Ward, as above mentioned, remain due and unpaid.

12. That John Brandt and Henry Foster are, and were at the time of the respite aforesaid, indebted to the said late firm of John Brandt & Co., in a sum exceeding one hundred and forty thousand dollars, a part of which was laid out in lands, lots and negroes, in their separate names.

13. That the property surrendered by said John Brandt and Henry Foster; both partnership and private property, will be insufficient to pay the creditors of the late firm of John Brandt & Co.

14. That the plaintiff was conversant of the fact of John Brandt & Co. having obtained a respite.

15. That from the year 1815, 1816, or 1817, when the partnership was formed of John Brandt & Co., to the time of the advertisement of the dissolution before mentioned, the said William Ward and James Johnson, were well known in New-Orleans, to be partners of said firm.

16. The questions submitted to the court are :—

Whether the plaintiff is entitled to come in upon an equal footing with the creditors of John Brandt & Co., for a dividend upon all the above named debts assigned to him?

If not so entitled, upon what part of said debts he is entitled to a dividend?

Whether said plaintiff is entitled to any privilege, and out of what funds, and in what order his debts are to be paid; and whether said debts ought to be paid out of the private estate or estates of John Brandt and Henry Foster, or either of them?

17. The admissions, contained in the 4th article of said agreement of facts, are intended to operate no farther than to effect a settlement of the foregoing questions, and are no further to conclude the parties as to the amount of said debts.

The district court decided that the creditors of J. Brandt & Co. should be preferred upon the funds of the partnership, to the plaintiff, except that as to the sum of $5131 45 cents, for which, as assignee of E. P. Johnson, he should be paid rateably with the joint creditors of equal grade.

From this decision the plaintiff appealed.

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL SYNDICS.

1. His counsel insists that he is entitled upon the debts mentioned in his petition, and upon the debt assigned to him by Lee White, as stated in the agreement of facts aforesaid, to be paid out of the partnership fund of J. Brandt & Co. rateably with the creditors of said firm.

2. That if he be not so entitled upon the partnership funds, that he ought to be preferred to the partnership creditors upon the separate estate or estates of John Brandt and Henry Foster.

3. That the mortgage of the 1st Sept. 1820, from William Ward and James Johnson, to David L. Ward, and recorded in the office of register of mortgages in New-Orleans, on the 29th December, 1820, as stated in the 11th article of agreed facts, to secure to him the payment of 56,000 dollars, with interest, according to the note of that date, of William Ward, James Johnson and A. M. Johnson, entitles the appellant, as mortgagee of William Ward and James Johnson, to their interests or portions in the lands and estates mentioned in said mortgage, out of which to be paid, as then creditor, the said sum of 56,000 dollars, with interest: and that said interests or portions have not passed to the syndics aforesaid.

I. The counsel urges that a partner may be a creditor of the partnership for the sums he has disbursed, &c. *Civil Code*, 394. And, *a fortiori*, he may be a creditor of the partnership for monies received by it upon consignments made by him on his special and private account. Such were William Ward and James Johnson for the private accounts assigned by them respectively, to the appellant.—4th article facts agreed.

That William Ward and James Johnson are not bound, *in solido*, for the debts of J. Brandt & Co., and so may, as well as others, be creditors of the partnership.

Their co-partners, Brandt and Foster, were the administrators of the partnership, and resided in New-Orleans, whilst William Ward and James Johnson resided in a different place, namely, Kentucky—1st article of facts agreed. And therefore the latter are not bound by the agreements of the former.

The partnership of J. Brandt & Co. was not an ordinary commercial partnership; but was merely a partnership of industry and skill, to transact commission business, as factors, in New-Orleans—1st article of facts agreed.

But if the appellant be not entitled upon the partnership funds for all the debts stated

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

in his petition, he is at least so entitled as to the debts in the names of Wards and Johnson, and E. P. Johnson & Co.

The account in favor of Wards & Johnson, though nominally due to them, that is to William Ward, David L. Ward and James Johnson, was in fact wholly due to D. L. Ward.—4th article of facts agreed.

Wards and Johnson, and E. P. Johnson & Co. were separate and distinct firms from J. Brandt & Co. A firm is an unit, or *quasi* individual, and the firms of Wards and Johnson, and E. P. Johnson & Co. were no parties to and had no interest or concern in that of J. Brandt & Co.

II. If the debts of the petitioner are to be postponed to the partnership creditors, upon the partnership funds of J. Brandt & Co.; for that reason they are to be preferred upon the private estate of J. Brandt and Henry Foster, the debtor partners.

J. Brandt and Henry Foster own real estate, *to wit;* lands, lots and negroes.—6th article of facts agreed.

The late firm of J. Brandt & Co. owns real estate in the city of New-Orleans, and elsewhere, *to wit;* lands, lots and negroes.—5th article of facts agreed. And the appellant

insists, that the interests or portions of the respective partners therein, are not held by them in commercial partnership: that though the partnership of J. Brandt & Co., as stated in the first article of facts agreed, be deemed an ordinary commercial partnership; yet that their lands, lots and negroes, do not enter into or belong to that partnership; that their partnership therein is private, special and particular, and the portions of the respective partners belong to their private estates. 11 *Mass. Rep.* 469.

III. The appellant relies upon the mortgage from William Ward and James Johnson, of the 1st September, 1820:—

1. Because it was made upon a consideration then given.

It purports to convey their title to certain and any real estate of J. Brandt & Co. and the accounts or claims of James Johnson and William Ward against said firm, to pay a note of 56,000 dollars, of same date with the mortgage: and said accounts or claims were assigned to D. L. Ward, 1st September, 1820, for valuable considerations then given—10th article of facts agreed.

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

That the consideration then passed is no where questioned or contested by the syndics.

2. Though J. Brandt & Co. be bankrupt, yet Wm. Ward and James Johnson are not so: and they had full power to mortgage any of their estates, for considerations present or past.

Their portions of the lands, lots and negroes of J. Brandt & Co. did not pass under the judgment of *cessio bonorum*, against J. Brandt & Co. to their syndics. That cession included only the effects belonging to the partnership of J. Brandt & Co. as stated in the 1st article of facts agreed, and not to the effects of any other partnership, though in the same name.

On the part of the appellant, I contend he is a creditor of J. Brandt & Co., and as such to be paid in concurrence with the other creditors of the firm, out of the partnership effects.

The firm of J. Brandt & Co. was formed for the purpose of doing commission business, as factors, in the city of New-Orleans, and was composed of John Brandt and Henry Foster, William Ward and James Johnson. The business of the firm was transacted by John

Brandt and Henry Foster, who resided in New-Orleans, whilst William Ward and James Johnson, during the whole period of the partnership, resided in Kentucky—1st article of facts agreed.

A factor is an agent to buy and sell goods for others, for a certain allowance. 1 *Liv.* 68, *Lex. Mer. Am.* 388. He is not a merchant—merchants are those who buy things of others, with the intention of selling them again for the sake of the profits they thereby acquire.—2 *Partida*, 715, *tit.* 7. *l.* 1. A merchant buys and sells for himself: a factor for others—he is the agent of the merchant.

The partnership of J. Brandt & Co., to transact commission business as factors, was then a partnership to buy and sell for others, not for themselves.

The debts of a partnership must be limited by the nature and object of it. Those of a company of factors, can only arise upon monies or goods delivered to them to buy or sell for others. And if debts be contracted in the name of the company, by one or more of the partners, without special authority from the others, for purposes distinct from or beyond the intention of the partnership, they are not

East'n District. *May*, 1822.

WARD *vs* BRANDT & AL. SYNDICS.

in law the debts of the company, but of the contracting partners solely.

The debts claimed by the appellant, and originally in the names of Lee White, James Johnson, William Ward, Wards & Johnson, and E. P. Johnson & Co. accrued as and for the proceeds of consignments made by them respectively to John Brandt & Co.—4th article of facts agreed.

These are then the debts of the company of J. Brandt & Co. contracted within the scope and intention of the partnership.

All the business of the firm was transacted by John Brandt and Henry Foster, in New-Orleans—1st article of facts agreed. Their partnership with William Ward and James Johnson, residing in Kentucky, being for a limited object, gave them authority to bind them or the company so far and no further. It is therefore incumbent on those who prefer claims against the firm of J. Brandt & Co. to exhibit the nature of them, to shew how and for what they accrued, that it may appear whether the partnership be liable for them or not. In no instance has this been done, except by the appellant, and he is apparently the only legitimate creditor of the firm of J. Brandt & Co.

On the day of , in the year 1821, John Brandt & Co. and John Brandt and Henry Foster were declared bankrupt, and the appelees confirmed syndics for their creditors. *Vid.* the case of Robert Dyson and others, against them, made part of the facts agreed.

When a partnership is brankrupt, the joint estate is to be first applied to the joint debts, and after they are paid, the surplus, if any, to the separate debts; and, *vice versa*, as to the separate estate.—*Dig. Mod. Ch. C.* 54–90. 4 *Ves.* 840.

In bankruptcy, joint creditors cannot touch the separate estate, till the separate creditors are satisfied.—*Dig. Mod. Ch. C.* 57–122. 9 *Ves.* 124.

Separate creditors cannot take a dividend upon the joint estate rateably with the joint creditors: each estate is applicable to its own debts.—*Dig. Mod. Ch. C.* 69–169. 3 *Ves.* 240.

In bankruptcy, the usual directions are to apply the funds respectively, the joint to the joint debts, the separate to the separate debts, the surplus of each to the creditors remaining on the other. *Dig. Mod. Ch. C.* 69–90, 4 *Ves.* 240.

Upon proof of a joint debt, no dividend can

East'n District. *May*, 1822.

WARD vs. BRANDT & AL. SYNDICS.

be taken under a separate commission of bankruptcy, till the separate creditors have received 20s. in the pound.—*Dig. Mod. Ch. C.* 69–181, 4 *Ves.* 837, *Vid.* also, 1 *Atk.* 227, *Day's Dig.* 69, 5 *Cranch*, 289, 4 *Ves.* 840.

Thus each estate is answerable, in the first instance only, for its respective debts. The estate which has received the consideration, and been benefited or enriched by it, is, if possible, to pay the equivalent that has been promised for it. The creditors of neither estate, until it is exhausted, can apply to the other, and then only for the surplus, after the payment of the debts due by it.

The debts above claimed by the appellant of J. Brandt & Co., as factors, are therefore to be paid him in the first instance, out of the effects of the firm, in concurrence with other debts due by them, as factors, if any such there be; and if those effects be insufficient, the residue of his debts are to be paid, at least, out of the surplus of the separate estate of the partners, after the payment of their private debts. But I hope presently to shew, that these debts of the appellant are privileged upon the separate estates of John Brandt and Henry Foster, and to be paid prior to their separate creditors.

As to the debts preferred by the appellant, as assignee of William Ward and James Johnson, it is objected that they accrued to members of the firm of J. Brandt & Co., and that they can have no satisfaction out of the partnership funds, unless there be a surplus after the joint creditors are paid. If there be no joint creditor besides the appellant, this objection can be of no consequence. But the objection, however plausible in itself, is not well founded. It is true, that a partner can sustain no claim against the partnership for his portion of stock or profits, whilst the partnership subsists, or until the joint debts are paid. Each one's portion of stock has been taken from his private estate, and appropriated to the partnership. The firm is an individual, and is proprietor of the joint stock, and of the profits which it may make, upon the faith of which it is enabled to obtain credit, and to contract debts. But if a partner lends money to the firm, to be repaid with or without interest; or if he makes disbursements for the firm beyond his share; or if the firm, as his agent, collects his money, to remit to him, or receives it on deposit, to keep for him, or receives his goods to sell for him, and

East'n District. *May*, 1822.

WARD vs. BRANDT & AL. SYNDICS.

remit to him the proceeds, or receives his goods on deposit, or on pledge, the firm is his debtor for so much, and the debt so created belongs to his separate estate. I repeat it, this debt makes a part of his separate estate. I have shewn that the private estate is liable in the first instance to the payment of the debts due the separate creditors, and that the joint creditors can only touch the surplus, after they are paid. The partner must therefore be permitted to recover this debt of the partnership *pari passû*, with its other creditors, to enable him to pay his separate debts. When they are paid. if there be a surplus of separate estate, the joint creditors may go upon it. But it may be the only separate estate which the partner may possess, and the money or thing received of him by the partnership, may have been furnished him by his separate creditors, and the debt due for it, may now be the only source to which they can look for payment. The partnership fund has been enriched to the amount thereof, and in good faith, the firm therefor had engaged to pay what is now claimed by the partner for his separate creditors, and in consideration of which engage-

ment, credit was given to the firm by the partner. The money would not have been lent, the disbursements would not have been made, the goods would not have been pledged, deposited or consigned; but upon the expectation that the obligations thereby imposed upon the firm, would be fulfilled according to contract. The civil law expressly decides, that a partner may be a creditor of the partnership, for sums disbursed by him on partnership account. *Civil Code*, 392, *art.* 26. He may be a creditor of the partnership. He has then all the rights of a creditor, to demand his debt, sue for it, assign it over; in fine, to dispose of it in any way he may think proper, or as any creditor might do. Lord Hardwicke, the most distinguished of English chancellors, and who owed his greatness, in a high degree, to his knowlege of the civil law, decided, that a debt, due for money lent by one partner to the firm, ought to be considered as part of the separate estate of the partner; that a dividend should be allowed for it out of the partnership estate; and that the separate creditors of the partner were entitled to have as much as the dividend amounted to, together with the other sepa-

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

rate estate of the partner, applied in the first place, to the satisfaction of their separate debts. 1 *Atk.* 227. *Cooke*, 531, 532. This decision is exactly in conformity with the principles above proposed, and supported by numerous authorities. It is true, the contrary has been elsewhere determined. *Cooke*, 532. But where decisions are contradictory, the court will follow that which is supported by principle.

But whatever doubt may exist in the English law, as to the claim of a partner upon the partnership, in the event of its bankruptcy, for advances or disbursements, upon partnership account; there is none, as to the claim of a partner or partners of a firm, who are distinct traders on their own account, and in that capacity deal with, and become creditors of the aggregate firm. In such cases the decisions are numerous and invariable, that proof may be made of the debt against the firm, in case of its bankruptcy, in the same manner as if it had dealt with strangers. *Lex. Mer. Am.* 641. *Cooke, B. L.* 538. *Wats.* 286.

This principle was adopted in a case where the members composing the two firms, though nominally different, were in fact the same.

Simon and Abraham Field, as co-partners, carried on trade as woolstaplers, in Southwark, under the firm of Simon & Abraham Field. They also carried on trade as woolstaplers at Leeds, under the name of William Barker & Co. But Barker was a servant of the Fields, and received from them a salary of £100 a year, and was not interested in the profits or losses of either of the concerns. The concerns were kept totally distinct, and in all matters of trade and dealing between the two houses, regular debits and credits were given in their respective ledgers, and the same conduct in all respects observed, as if the proprietors of the two concerns had been different and distinct persons. A joint commission issued against Barker and the two Fields. At the time of the bankruptcy, the house of Barker & Co. was indebted to the house of Simon & Abraham Field in a considerable sum. The lord chancellor directed that the house of Simon & Abraham Field should receive from the effects of Wm. Barker & Co. a rateable dividend in proportion with their other creditors. That the effects possessed by each house should be considered as their distinct property, and the pro-

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

duce divided amongst the creditors of the respective houses, in the same manner as if the firms had consisted of different persons. 6 *Ves.* 747. This decision results from the just and obvious principle, that each estate should bear its own debts, and that the credits due to an estate make a part of it, whether they be owing from the same, to other, or the same persons.

Where partners are engaged individually in other concerns, if they are distinct, proof has been allowed in bankruptcy of debts, as between the different estates, but not if they are merely branches of the same concern. *Cooke*, *B. L.* 529. 11 *Ves.* 413. 1 *Rose*, 146.

A joint commission of bankruptcy issued against Metcalf & Jeyes, by the description of oilmen, insurance brokers, dealers and chapmen. Metcalf also carried on the trade of an oilman, &c., as a distinct concern, and became indebted in his distinct trade, to the firm of Metcalf & Jeyes, in the sum of £7144 9s. 1d. The lord chancellor decided that the partnership was entitled to a dividend for this debt, out of the separate estate, with the separate creditors; though he said it would have been otherwise, if the debt had accrued

for money received by the partner, on account of the partnership, to be laid out for the partnership, and not as carrying on a distinct trade. 11 *Ves.* 413. 6 *Ves.* 123, 743, 747.

In bankruptcy, among partners concerned also in other trades, the paper of one firm being given to the creditors of another, dividends were allowed out of both estates. *Dig. Mod. Ch. C.* 71–203. 8 *Ves.* 546.

On the principle of distinct interests, subsisting between the separate partnerships of the *same* firm, it is held that a transfer from one set of partners to the other, when fairly done, and on account of the several concern, is attended with the same consequences as if made to a third person. *Lex. Mer. Am.* 644. 1 *Bos.* and *Pul.* 539.

Where one partner carries on a distinct trade, and purchases goods of the firm, the other partner may, under his commission, prove a debt for goods sold to him by the firm. *Cooke*, 508.

The distinction which appears to run, though the latter English cases is, that one trade may prove against another, though represented by the same persons; but that one partner cannot prove against another, any claim he may

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

have upon partnership account, until the partnership debts are first paid.

Thus the solvent partner cannot prove against the estate of the bankrupt partner, the amount due to him on the partnership account, until he satisfy the partnership debts, or indemnify the bankrupt estate against them. *Cooke*, 537.

So if he bring money into the partnership beyond his share, and is a creditor on the partnership fund for so much, he cannot prove it in competition with the joint creditors.—*Cooke*, 532.

But the debts claimed by the appellant, as assignee of William Ward and of James Johnson, from John Brandt & Co., did not accrue to them, as for balances due to them on partnership account, or for advances or disbursements on partnership account, or monies brought into the partnership, beyond their shares. These debts arose, in distinct trades, carried on by James Johnson and Wm. Ward, respectively on their separate accounts. J. Brandt & Co. were factors, Wm. Ward and James Johnson were merchants or traders, and in that character consigned merchandize or produce to them to sell for the consignors,

on their separate accounts, and to remit to them the proceeds. Not to apply those proceeds to partnership purposes, and to carry the same to partnership account; but as agents to receive for, and pay over to William Ward and James Johnson, in their distinct trades, and upon their separate accounts.—Such was the expectation of William Ward and James Johnson, when they made their consignments, and such the obligation of J. Brandt & Co., when they received them. If it were otherwise, a partner carrying on a distinct trade, could not, and would never have any dealings with the aggregate firm.

The debts claimed by the appellant, as assignee of E. P. Johnson & Co., and in his own right, and as assignee of Wards & Johnson, arose also upon consignments made by the parties to J. Brandt & Co.—4th article of facts agreed. Wm. Ward was a partner in the firm of Edward P. Johnson & Co., and William Ward and James Johnson, in the firm of Wards & Johnson. The appellees admit, that the appellant is entitled to a dividend upon the estate of J. Brandt & Co. for one half of the former, and one third of the latter claim. As to the residue they make the ob-

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

jection before discussed, to the claims in the separate names of William Ward and James Johnson. That objection applies with still less reason to these claims. Edward P. Johnson, a member of the firm of Edward P. Johnson & Co., and David L. Ward, of the firm of Wards & Johnson, and were seized, *per my et per tout*, of the property consigned by their respective firms to J. Brandt & Co. *Wats.* 316. They certainly never contemplated that the property so consigned, or any part of it should be taken from their firms, and appropriated by, and to, and for the use of J. Brandt & Co., and be carried to the account of Wm. Ward and James Johnson with that firm. If Wm. Ward and James Johnson themselves, had been willing, they would have had no just right to make such misappropriation of the funds of Edward P. Johnson and Co., and Wards & Johnson, No partner has the moral right, without the consent of his co-partners, to apply to his own use, or turn from their proper course, the effects of the partnership. Moreover, William Ward and James Johnson, though partners, may have, in fact, no interest in the consignments made to Brandt & Co. by Edward P. Johnson & Co. and Wards & Johnson. "Each partner is to be allowed against

the other, every thing he has advanced or brought in as a partnership transaction, and to charge the other in account with what he has not brought in, or taken out more than he ought: and nothing is to be considered as his share, but his proportion of the residue on balance of the account." So an execution against one partner for his separate debt, does not put the other in a worse condition: for he must have all the allowances made him before the judgment creditor can have the share of the other applied to him. *Wat.* 316, 317. 5 *Cranch*, 289. Until a settlement of the accounts of Edward P. Johnson & Co., and Ward & Johnson, it cannot be known what, or that Wm. Ward and James Johnson have any interest in the effects of those firms. That settlement, however, has been made of the firm of Wards & Johnson, and William Ward and James Johnson were found indebted and in arrear to David L. Ward, and in consideration thereof, the debt due to the firm, from J. Ward & Co. was adjudged and assigned to him—4th article of facts agreed. That debt, therefore, though nominally due to Wards & Johnson, was in fact wholly due to the appellant, a stranger to the firm of J. Brandt & Co.

East'n District. *May*, 1822.

WARD vs. BRANDT & AL SYNDICS.

All the before mentioned debts were created by *consignments* made by the parties to John Brandt & Co. as their factors or agents.

The consignment to a factor does not vest in him the property, and his possession is only in the right of another, for the purpose of sale. What is thus received cannot be liable for his debts, and on his bankruptcy, the effects of his merchant, do not pass by his assignment. *Lex. Mer. Am.* 398. He can have no property in the goods, neither will they be affected by his bankruptcy. 1 *Liv.* 262.

The goods or produce consigned by James Johnson, Wm. Ward, Ed. P. Johnson & Co., and Wards & Johnson, to J. Brandt & Co. as their factors, did not vest in them the property. Their possession was only in the right of their consignors, for the purpose of sale. And the rights of the consignors could not be altered or affected by the bankruptcy of the consignees. If they have sold the goods and received the price, they have received that also, not as proprietors, but as agents for their principals, to whom it belongs, and not to them. *Lex. M. A.* 398. If one partner is an executor or trustee, and lends the trust fund to the trade, with the knowlege of the co-partner;

it is a debt which may be proved against the joint estate upon its bankruptcy. *Cooke*, 537. The reason is, the partnership has received the money, as trust money, and agreed to account for it as such. So factors who have received the goods or money of a co-partner, upon trust and confidence, and agreed to account accordingly, shall be bound to do so, and the debt thereby created, should be proveable by the partner, against the joint estate upon its bankruptcy.

It is moreover objected, that the claim of the appellant, under James Johnson and Wm. Ward, is not the claim of the separate creditors of insolvent partners; but of the assignee of solvent partners.

I cannot see the force of this objection. If, upon the bankruptcy of a partner, the debt due to him in his separate trade from the firm, may be assigned for the benefit of all his creditors; why may he not assign it before his bankruptcy, for the payment of a particular creditor, or for other purposes, upon a valuable consideration? The reason why upon his bankruptcy, his separate creditors are entitled to it, is, that it belongs not to the joint, but to his separate estate. And as it is his sepa-

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

rate property, and he is sole proprietor of it, he may consequently, before his bankruptcy, dispose of it in any manner he may think proper. If one partner carries on a distinct trade, and purchases goods of the firm, the other partner may, under his commission, prove a debt for goods sold to him by the firm. *Cooke*, 537. What does he prove? A debt due to the firm, a portion of which too, belongs to the partner against whom the proof is made, and from whose estate it is to be recovered. The equity of this claim is therefore something less than that of a partner carrying on a distinct trade, or of his assignee, against the firm. They are both, however, governed by the same principle; namely, that the debts due between distinct trades, are, in all respects, to be considered as due between strangers.

I contend also, that the debts claimed by the appellant before mentioned, being for the proceeds of consignments made by principals to their factors, are to be paid, not only out of the effects of J. Brandt & Co., in concurrence with other creditors of the same kind, but are privileged upon the separate estate of John Brandt and Henry Foster, the acting

partners, and to be paid prior to their other debts. *Vid.* 1 and 4 articles of facts agreed.

I have shewn, that if A consign goods to B, as his factor, to sell and receive the price for and on account of A, he remains proprietor. B, for these purposes, is merely the agent of A, and is in no sense or degree the owner of either the goods or price. So if B become bankrupt, A may reclaim his goods in the hands of B's assignees or syndics. 1 *Liv.* 263. Or if the goods were previously sold by B; if upon credit the debt belongs to A, and not to the assignees of B. 1 *Liv.* 266. And if the money were received by B, it is the money of A, and if it remain in the possession of B, distinguishable from his other monies, A may claim it of his assignees. *Liv.* 265, 266, 286. 1 *T. R.* 369. 5 *T. R.* 227. So far the claim of A is, that of the proprietor upon goods, or money which he finds in the possession of another. But suppose the goods of A have been sold by B, the factor, and that he has taken a bond or note for the price payable to himself. Or suppose having received the price, he has not set it apart; but has put the money in the same bag or bank with his own, or has converted it to his own use. What then? B had only a nak-

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL SYNDICS.

ed authority from A to receive the price of his goods, as his agent, and he had no right or title to that price. When received by him, he is only the possessor, whilst A is true proprietor. He can therefore do no act unauthorised by or without the consent of A, which shall legally prejudice him. So if B take a bond or note for the price, in his own name, A is entitled to receive the money, and not the assignees of B. 1 *Liv.* 275. Or if B have received the money, and laid it out in other goods, they are the property of A, and not of B's assignees. 1 *Liv.* 276, 278 to 287. But where B having received the price, has put the money into the same bag with his own, or has so misapplied it, that the misapplication cannot be traced to something in the possession of B, the rule of decision, according to the common, differs from the civil, law. The latter, however, is founded on that justice and good sense, to which all laws should conform; whilst the former in this, as in many other respects, too much cramped by technicality, does justice by halves, or as she may be assisted or required by some technical rule. So long as the money of A shall be kept by B, separate from his own money, and from it distinguishable as the identical money of A, the

common law is able to secure it to him. But from the moment that B shall confound it with his own money, or put both in the same bag or box, the common law, whilst she acknowleges the title of A, loses the power of giving it to him, though he shall be able to point to the very bag or box in which his money was put, and is now to be found. 1 *Liv.* 286. In the case of *Taylor and another, assignees of Walsh* vs. *Sir Thomas Plumer.* 3 *Maule & Selwyn*, 562.—Lord Ellenborough decided, that where "property, in its original state and form, is covered with a trust, in favor of the principal, no change of that state and form can divest it of such trust, or give the factor, or those who represent him in right, any other more valid claim in respect to it, than they respectively had before such change;" "that an abuse of trust could confer no rights on the party abusing it, nor on those who claim in privity with him." "That it made no difference in reason or law, into what other form different from the original, the change may have been made." "That the product of, or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty in which case, is a difficulty of fact and not of law." So if B has expended the money of A, and therewith purchased real or personal estate; if the property so bought cannot be traced and identified, the common law has no means of affording relief to A. Nor can she do so, if B has paid debts with the money of A, instead of his own; although by giving a preference to A upon the estate of B, his creditors would be in no worse condition, than if the misapplication had not been made. If the money of A, received by B, for the price of his goods, remains in his possession, whether it be kept separate from, or in the same bag with the money of B, can make no difference in reason or justice. One dollar or one guinea is no better than another, and whether A shall take the very pieces received for him, or others in lieu of them, can be of no conceivable consequence. If property has been bought by B, the factor, with the money of A, whether it be confounded with his other possessions, or may

be identified and distinguished from them, may create a formal, but can make no substantial difference. If the property can be traced, the thing itself should be given; but if not, and B has it, and will not or cannot designate it, or has changed it; how obvious and how natural to determine that A should, in lieu of his particular property, have a privilege upon the estate of B for the price. By this B and his creditors sustain no injury; if you do not take from them the very thing that did not belong to them, you take no more. And accordingly the civil law provides "in cases of insolvency, that he who has delivered property to his debtor, by any contract which does not transfer the property in it, remains the master, and is paid in preference to the other creditors." "And that the same privilege exists for the price, if the debtor should have alienated the object thus placed in his hands." *Clay* vs. *his creditors.* 9 *Martin*, 523. Clay's case was that of a pledge of negotiable paper, and where the pledgee had a special property or title in the thing pledged or delivered to him. This is the case of factors or agents, without property or title of any kind to the things received

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL SYNDICS.

by them, and is so much the stronger. A privilege is given upon the estate of a depository by the civil law, who receives no reward, to secure the return of the deposit. A factor receives a reward, and is therefore bound by a higher obligation than the depository. 2 *Part.* 638. *Law* 2. In the case of *Gilespie* vs. *the syndics of Peter Laidlaw & Co.*, in the court of the first judicial district, it appeared that Peter Laidlaw, attorney in fact for Gilespie, received for him a sum of money. "The court decided that when Laidlaw & Co. failed, they could cede to their creditors nothing more than their own estate: that the money paid to Laidlaw, as agent of the plaintiff, being the property of the plaintiff, could not be ceded to the creditors of Laidlaw & Co., that it was a sum certain, and it mattered not whether it was kept separate and distinct from, or commingled with the monies of Laidlaw & Co. That the agent possesses for his principal and not for himself: that the plaintiff could not be viewed in the light of a creditor of the estate of Laidlaw & Co. He claims that the syndics should hand over to him the identical sum which his agent received, and which he passed into the hands of the syndics, and never

made part of the insolvent's estate. The creditors cannot complain that there would be injustice in allowing this sum to be paid over to the plaintiff, because the estate of Laidlaw & Co. would be so much the richer than it ought to be, this never having formed a part of their estate." Judgment for the plaintiff *vs.* the syndics, for $1606 3 cents, with interest. *Livermore* counsel for syndics. No appeal. The reason upon which the privilege given by the civil law, in all these cases, is one and the same. It is, that where one man receives the money or property of another, upon confidence that he will restore or pay it over to him without appropriating or using it as his own; if the law were not to accord this privilege, she would be accessary to, and would sanction a wilful breach of good faith in the debtor, or oblige him to commit it, when, perhaps, he did not intend it. Most men, when they apply to their own use the property or money of others in their hands, do so with the intention and hope of replacing it. If this should be postponed by circumstances until a bankruptcy, the law, as a careful guardian, should step in and do for them what they ought and would have done of themselves, if

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

they could. It is the first duty of a factor when he has received the money of his principal, to pay it over, or remit it to him. He is not to appropriate it to his own use. He is not even to keep it: he is no depository for that purpose. But if he should keep it, or convert it to his own use, without the consent of his principal, the interests of commerce imperiously require that a privilege upon his estate should be sustained for it. That such should be the law of Louisiana is particularly desirable. The commerce of its city of New-Orleans is immense. In time it must surpass that of any other city on the globe. Its merchants, destitute of the necessary capital, are at present, unable to carry on this commerce upon their own account. They are the factors or agents of others, who reside at a distance, and by the insalubrity of the climate, are, perhaps, fated ever to remain so. As principals abroad cannot watch the motions of their factors here; or be present to demand their money as soon as received by them: to know that it is secured to them by a privilege upon the estates of their factors, in case of their bankruptcy, will give full credit to the latter, and by exciting confidence in the for-

mer, encourage them to commit their business to residents of the place, instead of sending supercargoes with their property, or special agents to dispose of it. By this the interests of both parties will be promoted, and what is of no less consequence, good faith from the one to the other will be insured. Privilege, as a security against the violation of good faith, in those who obtain the possession of the property or money of others, is a favourite principle of the civil law, whilst it is almost, if not altogether, a stranger to the common law. Among other instances, the civil law gives a mortgage on the property of those who, without being tutors or curators, have taken on themselves the administration of the property of minors, *persons* interdicted or *absent*, from the day when they made the first act of that administration. *Civ. Code*, 456, *art.* 20. A factor who sells property and receives money for a correspondent abroad, is one who takes upon himself the administration of the property of an *absent* person, and whom, as he cannot be present to secure himself, the law secures by a mortgage upon the factor's estate. The expressions of this article of the *Code* are clear and free from all ambiguity. The terms

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

are general and comprehensive, and include the case of a factor for a merchant abroad. And whatever may be its spirit, the letter is to be observed. For, when the law is clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. *Civ. Code*, 4. *art.* 13. The debts before mentioned arose upon consignments made by parties in Kentucky, to a house in New-Orleans, as their factors, who accepted and took upon themselves the administration, the sale and disposal of the property so consigned, the collection of the proceeds, and the remittance thereof to their absent principals. To secure to these principals a faithful administration of their property by their factors, the civil law grants them a mortgage upon the property of their agents from the day when they received the goods. In pursuance of the same spirit, the civil law provides, that " the territory, the different parishes, cities and other corporations, *companies of trade*, or navigation and all public establishments, have a legal mortgage on the property of their collectors, and other accountable persons, from the day when they entered into office, *en fonctions*. *Civil Code*, 456. *art.* 25.

Companies of trade have a mortgage upon the estates of their collectors, and other accountable persons. The factor to a mercantile company, or company of trade, is an accountable person. He is their agent; their collector is neither less or more. The money he may receive or collect for the mercantile company, to which he may be factor, is as little his as the money received by their collector is his, and he is guilty of the same bad faith in converting it to his own use. There is the same reason for granting a mortgage upon the estates of both, for the security of their principals. It is not easy to see why the law should give a mortgage upon the estate of the collector or factor of a mercantile company, and not of an individual. Nor is it so, if the reasoning before advanced, be correct.

The legal mortgage extends to *all* the debtor's estate, either present or to come, which may be lawfully mortgaged. *Civil Code*, 456. *art.* 28.

If, therefore, as contended, the debts due to the appellant from Brandt & Co. as factors, be privileged; if the law accords a mortgage for them, it extends to the separate estate of Brandt & Foster, the acting partners, as well

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

as to the partnership effects, and they are to be paid in preference to the debts of their other creditors.

So far the argument has proceeded upon the supposition that the partners in the firm of J. Brandt & Co. were bound *in solido*, a supposition, the correctness of which, I by no means admit. On the contrary, I insist they were not so bound, for reasons which will be better shewn by Mr. Livingston, counsel for the appellant.

If the appellant should not be entitled to be paid the whole of the debts before mentioned, out of the effects of J. Brandt & Co. in competition with the creditors of the partnership, because a portion of them accrued to persons who were members of the company, it will follow that he may go for such portion upon the separate estate of John Brandt and Henry Foster, the administering and debtor partners. *Vid.* 1 & 12 articles of facts agreed.

2dly. I claim that the appellant is a creditor of J. Brandt and Henry Foster, to be paid out of their separate estates.

The 12th article of agreed facts, shews that Brandt and Foster are, and were at the time of their respite, indebted to J. Brandt & Co.

in a sum exceeding $140,000. That firm was composed of four persons. It does not appear they were interested in unequal proportions, and we are, therefore, to take it for granted, their interests were equal. J. Brandt and H. Foster took from the joint stock $140.000; that is, from themselves $70,000, and the like amount from William Ward and James Johnson. Or rather, as the $140,000 are the balance against them, it follows they have taken out of the partnership stock all they put in, and $140,000 more: that amount, therefore, it would seem, is wholly taken from the co-partners, Ward & Johnson.

When Brandt and Foster withdrew this amount out of the partnership stock, they did not thereby create a debt for so much between themselves and the creditors of the partnership. As to that, there was no privity between the two. The creditors of the partnership have nothing to do with the balances or sums which may be due from the respective partners to the partnership. *Cooke*, 532. 534. *Lex. Mer. Am.* 640. They look to the existing state of the partnership effects. If that be deficient, they go upon the private estates of the partners, whether they be creditors or debtors.

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

Brandt & Foster, withdrawing $140,000 from the effects of J. Brandt & Co., thereby created a debt between themselves and co-partners, Ward & Johnson. They took the property of their co-partners, and whether with or without their consent, equity will suppose a promise, or raise an obligation, to account with them for it.

"Where one partner takes out more money from the partnership than his share amounted to, the other has a right to come upon the separate estate of that partner *pro tanto*." *Dig. Mod. Ch. C. tit. Bankrupt*, 63–84. 1 *Atk.* 223.

William Ward and James Johnson, or David L. Ward, their assignee, is then entitled to go, not upon the partnership effects, in competition with joint creditors, but upon the separate estates of John Brandt and Henry Foster, for the balance against them on the partnership account. For that balance they are to be preferred, upon the separate estate in concurrence, with the separate creditors. *Dig. Mod. Ch. C.* 57, 122, and the cases before cited upon this point.

In the third place—The mortgage made by an authentic act, and duly recorded, from Wil-

liam Ward and James Johnson, to David L. Ward, to secure to him the payment of $56,000, with interest, according to their note of that date, purports to convey to him—

All their estates in Louisiana.

All their rights, interests, titles, claims and demands in the estate owned, possessed, or claimed by J. Brandt & Co., and particularly certain lots of ground therein specified.

And their accounts or claims upon the firm. *Vid.* the mortgage and 11th art. of facts agreed.

The word estate includes, not only real, but personal and moveable property, rights and credits. "The word estate, in general, is applicable to any thing in which the riches or fortunes of individuals may consist." *Civ. Code*, 94, *art.* 1.

It is true, that moveables cannot be the subject of the conventional mortgage. "But they may be subject to a privilege when they are yet in the debtor's possession, or within a certain time limited by law, after they have been put out of his possession." *Civil Code*, 458, *art.* 37.

Whilst then the debtor retains the property in his moveables, he holds them subject to a privilege for his debts by mortgage. If he sell them, the privilege is destroyed.

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

But he may pawn them. "One may pawn every moveable, which is a subject of commerce." *Civil Code*, 446, *art.* 4.

"This privilege shall take place against *third persons*, only in case the pawn is proved by an act made either in a public form or under private signature; provided, that in this last case, it should be duly registered, in the office of a notary public, at a time not suspicious; provided, also, that whatever be the form of the act, it mentions the amount of the debt, as well as the species and nature of the thing given in pledge, or has a statement annexed thereto of its number, weight and measure." *Art.* 6.

The pawn, in this case, is made by an act in public form. It mentions the amount of the debt. It does not mention the species of the things given in pledge. Nor need it. That is required to distinguish the things pledged, from the other moveables of the debtor. Here all are pawned, and therefore, to distinguish would be superfluous. Moreover, this want of description can be objected only in a contest with the rights of *third persons*. Here no such right is interposed. No one pretends claim to the estate of Wm. Ward and James

Johnson, in opposition to the appellant. The syndics of J. Brandt & Co. have no right or title to the estate of J. Brandt & Co. They have only the power of selling it. "The surrender does not give the property to the creditors." *Civil Code*, 294, *art.* 171. The bankrupt still retains the title to it, and, therefore, notwithstanding the surrender, may make a sale not void, but avoidable only by those whose rights are injured by it. 3 *Martin*, 94.

The contest then is simply one between the pawnee and the pawnors; and the syndics can have no greater right than the bankrupt to whom they represent.

"The privilege, mentioned in the preceding article, is established with respect to incorporeal moveable things, as moveable credits, only by an authentic act, or by an act under private signature, recorded as aforesaid, and notified to the debtor of the credits given in pledge." *Civil Code*, 446, *art.* 7.

To give full effect to the pawn of a moveable credit, even as respects third persons, it is only necessary to have an authentic act. If the act be under private signature, it must be recorded and notified to the debtor.

Here the act relied on is authentic. More-

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

over, the notice required, as in the case of a private act, has been given by the suit brought by the appellant upon his mortgage. And if it were otherwise and necessary, it would always be open to him to give notice until a *third person* should be able to interpose a right.

But was it competent to William Ward and James Johnson to mortgage or pledge their interest in the partnership effects of J. Brandt & Co., without first paying the partnership debts?

It is said in one case that an assignment by a partner of joint property, to secure his separate debt, must be subject to the joint debts. *Cooke*, 529. But that case is without principle to support it, and there are cases the other way.

It is true, that if a partner assign his interest, it will be subject to the claim of his copartner against him on partnership account. And why? Because the partners are seized, *per my et tout*, and each is, therefore, to be allowed against the other any thing he has advanced or brought in as a partnership transaction, and to charge the other in account with what he has not brought in; or has taken out, more than he ought, and nothing is

to be considered his share, but his proportion of the residue upon balance of the accounts. *Cooke*, 528. The partner has a specific lien on the stock. *Cooke*, 528, 529. The assignees, therefore, under a commission of bankruptcy against one partner, will be tenants in common, of an undivided moiety, subject to all the rights of the other partner. *Cooke*, 529.

But the partnership creditors are not seized of the partnership effects, and have no lien thereon. In *ex parte Ruffin*, 6 *Ves.* 119. *Wats.* 265, the lord chancellor, speaking of partnership creditors, says, they have "clearly no lien whatsoever upon the partnership effects." All the partners, therefore, may sell, or mortgage, or pledge the whole, or any portion of their effects; or any one partner may do the same with his share; free from the claims of the joint creditors, since those claims attach no lien thereon.

If one partner withdraw from a firm, and the partnership effects be made over to the other, who continues the trade, and against whom a commission of bankruptcy afterwards issues, all the effects of the old partnership found in specie amongst the property seized under the commission, vest absolutely in the assignees

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

of the new firm; and tho' there be outstanding debts of the former firm unsatisfied, these effects so found in specie, will not be considered as the joint estate of the former firm, either for the benefit of joint creditors, or the partner who has withdrawn. *Wats.* 264, 265. Not for the benefit of the partner, because he assigned his interest to the others. *Wats.* 267. Nor for the benefit of the joint creditors, because they had no lien. *Wats.* 266.

In *ex parte Fell*, 10 *Ves.* 374. *Wats.* 268. The case was—in March, 1803, one of three partners retired upon a covenant of the other two, in due time to discharge the partnership debts. The new firm was bankrupt in October, 1803. The petition of the retiring partner to have the specific stock and credits of the old partnership applied to the creditors of that partnership in preference, was dismissed.

Porter Shepherd and Richard Smith were partners, as linen drapers; dissolved their partnership, 5th Sept. 1803; published their dissolution the 25th Nov. 1803, and that all debts due from the partnership were to be paid by Shepherd, and on the 24th Dec. 1803, in less than two months after the dissolution,

a commission of bankruptcy issued against Shepherd. The assignees under the commission, possessed joint property of the bankrupt, and Smith. The joint creditors petitioned that the joint effects might be first applied to the joint debts. But the petition was dismissed, the lord chancellor being of opinion that the partner had a right to assign his interest; that the joint creditors had no lien or equity to prevent him, and that what before was joint had become separate property. *Wats.* 270.

Upon a question, whether assignees, under a joint commission, against two partners, taken out after the bankruptcy of both, could maintain an action of trover against a person in possession of goods under a sale or consignment, *bona fide*, for a valuable consideration, and without any mixture of fraud, from one of the partners, who had not then committed any act of bankruptcy himself, but after an act of bankruptcy committed by the other partner. The court held the action could not be maintained, because the act of the partner, who, at the time of the consignment, had not committed any act of bankruptcy, bound both; and also, because, supposing the consignment avoided as to a moiety, by the act of bank-

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

ruptcy of the other party, then it is an action of trover, by one tenant in common against another, which cannot be. *Cooke*, 529. *Cow.* 448. In that case Buller, counsel for the assignees of the bankrupts, contended that by the act of bankruptcy of Ridgate, the partnership between him and Barnes was immediately dissolved, and that the solvent partner had no longer a power over the whole: but each had his moiety only, to give or grant. *Cow.* 447. And lord Mansfield decided, that the utmost the plaintiffs could contend for, was that the act of Barnes did not bind the undivided moiety of Ridgate.

In that case the counsel admits, and the court decides, that after an act of bankruptcy by one partner, though followed by a joint commission against both, the other partner may dispose of his moiety of the effects: that it is his, to sell or grant, and that the assignees of the partnership, for the partnership creditors, cannot recover of his vendee.

In our case Wm. Ward and James Johnson, when they made the conveyance to appellant, of their interest in the partnership effects of J. Brandt & Co. had committed no act of bankruptcy, nor have they yet done so. They

had then at least the right of granting their proper interest, or portions therein, and they have granted no more. It is strange that this right should ever have been questioned. It is every day's practice, for one or more of partners to sell out their portions or interests in goods, and other partnership effects, independent of the claims of the joint creditors. This is more emphatically so by the civil law, according to which, a partner, whenever, and of whatever he pleases, of the effects of the firm, may take even the entire, and convert them, or purchase therewith other effects in his separate name, and which, though bought with the partnership means, will be separate, and not joint property, and consequently subject primarily to his separate debts. *Civil Code*, 396, *art.* 37.

The mortgage preferred by the appellant, is made by solvent persons, who have a right to mortgage, either upon a past or present consideration. It was, however, made upon a present consideration, and for such consideration, even insolvents upon the eve of bankruptcy, have the right to mortgage.

The parties to the mortgage, declare upon the face of it, that the debt of 56,000 dollars,

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

which it was given to secure, accrued by notes of that date. The agreement of facts between appellant and appellees, admits the mortgage as it is. It therefore admits all it contains, and that the debt of 56,000 dollars, accrued at the date of the mortgage, as therein stated. If the appellees designed to contradict the mortgage, to contend that the debt existed prior to that date, they should have qualified their admission, so as to have authorized them to make or require proof behind the mortgage. So far from doing so, they have no where contested or alleged that the fact is not as is assumed: they have no where apprized the plaintiff that they objected the consideration pre-existed the mortgage. But the court are to decide according to the facts agreed upon as they appear to them. A debt is shewn and agreed upon by the parties as far back as the date of the mortgage, and no farther. The court cannot go back; it cannot travel beyond the agreement of the parties, and suppose what does not appear, what is not even insinuated by the agreed facts, that the debt existed prior to the mortgage.

It does not appear expressly, what was the interest of the respective partners in the firm

of J. Brandt & Co. But as it does not appear that any one person of the firm was entitled to a larger portion than another, it is to be taken that their interests were all equal. The firm consisted of four persons, and William Ward and James Johnson, had therefore title to a moiety of the effects of the firm, of whatever they consisted, whether in possession or action. And their title to which they have conveyed to the appellant. Admit that a moiety of the personal effects or credits of J. Brandt & Co. did not pass to David L. Ward, by the mortgage from William Ward and James Johnson, or that he obtained thereby no privilege upon them; still it will remain that he is entitled to the real estate of William Ward and James Johnson, in Louisiana, or their interest in, or title to the real estate possessed or claimed by J. Brandt & Co., or in their name.

There can be no doubt as to the real estate of Ward & Johnson, and in their name; but it may not be so clear as to the real estate possessed by them, in the name of J. Brandt & Co.

That partnership was formed for the purpose of doing commission business in New-

East'n District. *May*, 1822.

WARD vs. BRANDT & AL. SYNDICS.

Orleans, as factors; and a factor is an agent who buys and sells goods for others, for a certain compensation, as before shewn. The effects of the firm, may consist of the stock, if any, brought into the partnership, or the proceeds of their industry. But the real estate purchased or claimed in the name of the firm, is foreign to the nature of it, and does not therefore make a part of the effects properly belonging to their partnership or factorage, and if purchased with the funds of the partnership, is a division thereof *pro tanto*. 11 *Mass. Rep.* 474.

The interest of each partner, therefore, in the real estate possessed in the name of J. Brandt & Co. belongs to his separate estate; is liable for the separate debts, and may be mortgaged to secure the payment of them.

The credit given upon James Johnson's account, for Rochelle & Shiff's notes, should be disallowed. The account was between James Johnson and J. Brandt & Co. as factors. The notes of Rochelle & Shiff resulted from the sale of an estate, that did not belong to the factorage partnership, and one half of which belonged to the separate estate of Wm. Ward and James Johnson. Brandt & Foster kept

more than their portions of the proceeds of sale; the parts of James Johnson and W. Ward, or a portion thereof, was given to James Johnson, who is liable to William Ward for his half thereof.

Livermore, for the defendants. The plaintiff claims as assignee of William Ward and James Johnson, two of the firm of John Brandt & Co., and contends that he is entitled to a dividend upon the partnership funds of said firm. The defendants say, that Ward & Johnson are bound *in solido*, for all the debts of John Brandt & Co., and can take nothing from the joint fund, until all the creditors of the partnership are paid. Although creditors of the firm, they are debtors of the other creditors represented by the syndics, and therefore can have no satisfaction until the joint creditors are paid. *Ex parte* Hunter, 1 *Atk.* 227, *ex parte* Russell, *ex parte* Parker, and *ex parte* Perie. *Cooke, B. L.* 532; *Pothier, de société. n.* 132, 173. A solvent partner cannot prove against the estate of a bankrupt co-partner, the amount of the balance due to him, unless he will satisfy the partnership debts. *Cooke, B. L.* 537. The equity of this rule is appa-

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

rent, and it would be absurd to say, that Johnson & Ward can appear as creditors of this estate as it is circumstanced, unless the plaintiffs' counsel can succeed in maintaining the ground he has taken, that the partners in Kentucky are not bound *in solido*, for the debts of John Brandt & Co.

In commercial partnerships, *en nom collectif*, the partners are bound *in solido*, for the debts of the partnership. *Civil Code*, 397, *art.* 41.— But, says the gentleman, the business of factors, or commission merchants, is not commercial: the factor is merely the agent of the merchant, and the business of the merchant is alone commercial. This notion has at least the merit of being novel; and I believe it is the first time that any person has seriously asserted that the business of agents, engaged in mercantile transactions, was not commercial. All the authors, who have treated of commercial law, have considered factors as a class of persons, whose powers and obligations were embraced in the subject of their discussion. I will refer to *Straccha*, *Ancaldus*, *Juan de Hevia*, *Casaregis* and *Beawes*. The French *ordonnance du commerce* of 1673, has prescribed rules concerning the responsibility

of partners in commercial partnerships, and their rules have been adopted in the *French Code du commerce*, and are the same as in our *Civil Code*. By the French law, a particular tribunal was appointed for deciding all commercial causes; and we find from the 12th title of that ordinance, *art.* 5, that factors were within their jurisdiction; and by the 3*d art.* of the same title, that this jurisdiction did not extend to disputes which were not commercial. See also the commentary of *Jousse*, in the introduction to this title. The compilers of the *French Codes* have also considered the business of factors as commercial, and have laid down the rules for their government in the *Code du commerce*, and not in the *Code Civil*. See *Code du commerce, liv.* 1, *tit.* 6, *art.* 91–102. In the commentary of *Mr. Delaporte*, it is said, *il y a des négocians qui ne font que la commission, c'est-à-dire tout leur commerce se borne à recevoir des marchandises pour les vendre au compte d'un autre. Plusieurs personnes peuvent s'associer, soit en nom collectif, soit en commandite, pour faire la commission. Dans ce cas, il faut suivre les règles établies pour les sociétés de commerce. Les commissionnaires sont de véritables négocians.* 19 *Pand. Franc.* 239. The

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

books of the common law, which have been so often cited in this cause, will also shew that the general lien, in favor of factors, was first established upon evidence of the custom of merchants, *Kruper* vs. *Wilcox*, *Ambl.* 252; and that all their negociations, rights and duties have been considered with reference to the law merchant.

If the court were to adopt the doctrine of the plaintiff's counsel, upon what would these articles of the *Code*, concerning commercial partnerships, operate? There is scarcely a general merchant in New-Orleans. The business is almost exclusively a business of factorage; in selling as agents the produce of the country, and in buying for the foreign merchant. It is said, that "the debts of a company of factors can only arise upon money or goods delivered to them, to buy or sell." That this is not true, will appear from a mere view of the nature of their business. The factors, who buy, may buy on credit; and the note given for the articles purchased is in the usual course of trade, and the vendor is a creditor of the company as much as any other person. So with the company of factors, whose business it is to sell. It is a part of

their business to make advances upon consignments before the goods are sold: and to effect this, they must have credit and endorsers. They have, therefore, a right to make use of the name of the firm, for the purpose of raising money, and debts contracted in this way are within the usual course of business. It is a great fallacy for the plaintiff to say, that he alone has shewn the nature and origin of his debt, and that he must be presumed to be the only real creditor of the firm. The other creditors have not shewn in what manner their debts arose; because it was not necessary until a tableau of distribution should be filed. They may then have an opportunity of establishing their claims, should they be disputed.

It is next contended, that the debt due to Johnson & Ward makes part of their separate estate, and that they must be entitled to recover this debt, in order to pay their separate creditors. To support this position, a great number of cases have been cited from the books of chancery in England. These cases are of no authority here. They arise under the English bankrupt laws, and refer us to the mode of dividing the estates, where all the

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL SYNDICS.

partners are bankrupt, and several commissions have issued. As these commissions issue under the same authority, and as the court of chancery has jurisdiction over all the parties, to do complete justice between them. rules have been established for apportioning the property among the joint creditors, and the creditors upon the separate estates. But the counsel shews no case where a solvent partner, or a partner residing out of the jurisdiction of the court of chancery, has been allowed a dividend to the prejudice of the joint creditors. On the contrary, the cases before cited shew that this cannot be done. And if the creditor cannot himself appear as a creditor of the joint estate, his assignee cannot. It is admitted on this record, that the several debts, upon which the plaintiff claims, were assigned to him on the 1st September, 1820, for a valuable consideration then paid. And this was done with full knowlege, on his part, that the firm of John Brandt & Co., in New-Orleans, had suspended payment. He can, therefore, have no greater rights than the persons who made the assignment. *Nemo plus juris in alium transferre potest quam ipse habet. D.* 50. 17. 54. The attempt now made is to

do that indirectly, and by means of an assignment, which Johnson & Ward could not do directly. They could not diminish the joint fund by appearing as creditors in their own names, but they strive to do it in the name of their assignee. But this assignee is subject to the same equity, and can claim nothing to which they were not entitled. But it is not contended that the debt due to Wards & Johnson, though nominally due to them, was, in fact, due to the plaintiff, having been assigned to him upon settlement. No private agreement of the parties can, however, alter the nature of this case; and for all that appears, Johnson & Ward are solvent and able to pay the plaintiff, without having recourse to this estate. This statement is also inconsistent with another part of the plaintiff's agreement, that these debts were assigned for a consideration then paid. The *Civil Code* has also been cited to shew that a partner may be a creditor of the partnership. There is no doubt of this amongst solvent partners. But where the partnership is insolvent, and the partners are bound *in solido*, this cannot be admitted.

All the doctrine of distinct trades turns up-

East'n District. *May*, 1822.

WARD vs. BRANDT & AL SYNDICS.

on the English bankrupt laws, the effect of which I have considered.

The plaintiff, moreover, contends, that he has a privilege upon the estate of John Brandt and Henry Foster. The consignments spoken of were made to John Brandt & Co., and the firm is debtor, and not the separate estate of the partners in New-Orleans. This privilege is attempted to be maintained upon the principles of the case of *Clay* vs. *his creditors*, decided in this court. The observations of the court must be taken with reference to the matter before it. That was a case of pledge. There can be no doubt, that in case of a deposit or pledge, the depositor or pawnor has a privilege; because the articles have not been delivered for the purpose of sale, the property remains in the original owner, and the depository or pawnee has been guilty of breach of trust in disposing of them. But this case is different. The goods were consigned to Brandt & Co. for the purpose of being sold. So long as they remained in specie, they were the property of the consignors and might have been taken by them. So, if they had been changed for specific property, or for notes which remained with the factors, these would

have been the property of the consignors. But in selling the goods, the factors have merely executed their trust; the property is gone, and the proceeds having come into their hands, they are merely debtors for the amount. The law has given no privilege in such case, and although the judge of the first district has done it, I cannot believe that this court will follow the example. From the circumstance of no appeal having been taken from the decision of the cases of *Gillespie* vs. *the syndics of Laidlaw*, and the *syndics of Walmar* vs. *Phillips*, it must not be inferred that the doctrines of the district judge were acquiesced in by me. Other circumstances prevented the appeal, which need not be stated here. The plaintiff's counsel is mistaken in supposing that the commerce of New-Orleans would be favoured by establishing such a privilege as is here contended for. On the contrary, it would destroy the credit of all commission merchants.

The last question respects the mortgage. At one time the plaintiff contends that John Brandt and Henry Foster had the sole management of the concerns of the partnership, and at another, that the Kentucky partners

East'n District. *May*, 1822.

WARD vs. BRANDT & AL. SYNDICS.

may mortgage the partnership property here. This mortgage may have an effect upon any of the mortgagor's separate property in Louisiana, but it does not concern the defendants. It can certainly have no effect upon the property of John Brandt and Henry Foster; and no authority has been shewn for Johnson and Ward to hypothecate the property of John Brandt & Co. I have shewn they could not sell their interest to the prejudice of the general creditors. An assignment by one partner of joint property, to secure his separate debt. must be subject to the joint debts. *Cooke, B. L.* 529. It is said that this mortgage was given for a present consideration. But this consideration does not appear to have been for the partnership, but for the said Johnson and Ward alone. And if Johnson & Ward were solvent, the firm was insolvent.

Livingston, in reply. From a recurrence to the facts, it will readily be perceived, that in order to decide upon the rights of the parties, the first inquiries will be—what was the nature of the partnership between J. Brandt and his associates, in the business carried on under the name of John Brandt & Co.? And

what were the obligations which resulted from it, as well of the partners towards each other, as of the whole towards those with whom they dealt?

The only evidence we have of the nature of the partnership, is contained in the first fact stated in these words—"the late firm of John Brandt & Co. was formed for the purpose of doing commission business, as factors, in the city of New-Orleans, and was composed of John Brandt and Henry Foster, William Ward and James Johnson; the business of the said firm was transacted by John Brandt and Henry Foster, who resided in New-Orleans, whilst the said William Ward and James Johnson resided, as they did, during the whole period of said partnership, in Kentucky."

What species of partnership is to be inferred from these facts? Let us first consult our statute law on this point. It first (*Civil Code*, 388, 390) divides partnership into universal and particular—this clearly comes under the latter division. By the tenor of the 12th, 13th and 14th sections, taken in connection it would appear that a subdivision was made of particular partnerships, into such as were commercial, and such as were made for other pur-

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

poses—the 12th, declaring that an association for a joint interest in a specified thing, and its profits was a particular partnership, and the 13th, extending the definition, so as to embrace a like agreement relative to a particular undertaking, the exercise of some trade (*metier*) or profession. These seem to exclude commercial partnerships, for the 14th article, and those which follow it, give us separate rules, as relating to them.

There are three kinds of commercial partnerships established, says the text: ordinary partnerships, (*la société en nom collectif*) corporate partnership, (*celle en commandite*) special partnerships, (*annonyme ou inconnue.*) Are there any others? It would seem not: for I believe it is a good rule of construction, that when a statute enumerates particularly the objects which it means to establish, that every thing not enumerated, is meant to be excluded. Let us then examine the definitions given by the same law, of each of these, and see whether we come within either.

1. The ordinary, (*société en nom collectif*) "this is entered into by two or more persons, respecting any commerce whatever, to carry on the said commerce, in the name of all the

partners;" the one under consideration, as I shall presently more fully shew, was not respecting any commerce; but if it were, it does not come within this definition, for it was not to be "carried on in the name of all the partners." This partnership also relates plainly to one having stock to be used in trade, for by the 16th article it is to consist of what each of the partners has put in the common stock.

2. The corporate partnership, (*société en commandite*) "is that in which one of the contracting parties carries on alone, and in his own name, the commerce for which the other contributes a certain sum, which belongs to the partnership under the condition of a certain share in the benefits or losses, without however his being liable to be answerable for losses beyond the amount brought by him into the partnership."

This article is not clearly expressed; does it mean that the corporate partnership is only such an one as is created by an agreement containing stipulations that the business shall be carried on in the name of one only, that a certain sum should be contributed, and that the unknown partner should be liable to that amount only? Or does it declare that such re-

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

striction of liability is the consequence attached by law to an agreement for carrying on trade in the name of one, by a fixed contribution of capital to be furnished by each? I should be inclined to adopt the first of these suppositions: but whether the one or the other is sanctioned by the court, the contract before them cannot come within the definition; because, as I hope to shew, it does not relate to commerce. But I confess, that if the partnership between Brandt and his associates, be considered as a commercial partnership, and to come within either of those definitions, contained in the *Code*, this is the only one in which it can find a place.

2. The special partnership (*société anonyme ou inconnue*) is the only one which remains to be examined. "It is that by which two or more persons do agree to become partners in a certain speculation, (*dans une certaine négociation*) to be made by one of the partners in his own name simply." No argument is necessary to shew that this relates to a particular operation of commerce. The purchase of a cargo, the making a single trading voyage, &c. with which the partnership began, and ends, and that therefore, the one under consideration bears no resemblance to it.

I infer therefore, that this partnership comes within neither of the divisions established for commercial partnerships by our law.

What then is its legal character? I answer, a particular partnership coming under the definition contained in the 13th article, for the exercise of a trade or profession. Not a commercial partnership. The object of this association was, by the statement of facts, "for the purpose of doing commission business as factors."

What is a factor? Is he a trader or a merchant? No, he is the agent of a merchant, he is no more a merchant than his book-keeper, or than the clerk of a lawyer is a counsellor. *Lex Mercatoria Americana*, 388. "A factor is a commercial agent, transacting the mercantile affairs of other men, in consideration of a fixed salary, or a certain commission." The same definition is given in *Livermore on Agency*, 68.

The English bankrupt laws which embraced within their purview:—"any merchant, or other person using or exercising the trade of merchandise, by way of bargaining, exchange, rechange, bartery, *chevisance*, or otherwise, in gross, or by retail, or seeking his or her trade.

East'n District. *May*, 1832.

WARD *vs.* BRANDT & AL SYNDICS.

or living by buying and selling," from the 13th of Elizabeth, to the 5th of George II, these expressions were not construed to include factors, or brokers, until they were included by name, in the last mentioned statute. *Cooke's bankrupt laws*, 48. *Ib.* statutes prefixed to 7th edition, 161, for the statute of Elizabeth. *Ib.* 64, for statute of George II.

Brokers and factors, then were not considered as merchants, or persons exercising "trade or merchandise, seeking their living by buying and selling." Then they were not engaged in commerce; for the trade of merchants, the business of buying and selling is commerce; then partnerships formed for factorship, are not commercial partnerships, but the one under consideration was made "for the purpose of doing commission business as factors." Therefore the one under consideration is not a commercial partnership.

If I have succeeded in shewing that this is not a commercial but a particular partnership, the next inquiry is, what are the obligations arising from it, as between the partners to each other, and as respects them collectively, and individually, as respects those with whom they deal? Our law surely is explicit,

and leaves no room for doubt or cavil: some of the obligations of the partners to each other will be hereafter applied, at present my object is to shew that in this particular partnership, the partners are not bound *in solido*: this is clearly expressed in the whole of the 2d section, *Civil Code*, 396–8; particularly by the 43d and 44th articles; and in the 45th, it is even provided, that even when the debt is contracted by one of such partners, in the name of the whole, and for their use, unless it be proved that he had special power so to do.

Having ascertained the nature of the partnership and its effects, we may consider the facts on which the controversy arises.

John Brandt and Henry Foster reside in New-Orleans, and carry on the whole of the business. James Johnson and William Ward make consignments to them of produce, their separate property, to be sold as their factors. The house of Wards & Johnson, consisting of David L. Ward, the plaintiff, James Johnson and William Ward, also make consignments of the same nature, and for the same purpose. The house of E. P. Johnson & Co. consisting of E. P. Johnson and William Ward, also make

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

consignments to the said John Brandt & Co. at New-Orleans, to be sold as their factors. That Brandt & Foster are indebted to the partnership in a large sum. Finally, Lee White also made such consignments, and for the same purposes.

All these consignments were received by John Brandt and Henry Foster, the two acting partners, who resided at New-Orleans.—And goods were sold, but the money never remitted, and all these demands are regularly vested by assignment in the plaintiff.

Brandt & Foster, in the name of the company of John Brandt & Co., and in their individual capacities, applied for a respite, under the laws of this state, which they obtained, and not complying with the terms of the respite, they were afterwards compelled to a forced surrender of their property. The partnership of John Brandt & Co. was dissolved, and public notice thereof given at the time the respite was applied for.

These are all the facts necessary for the determination of the first question, which is, whether the plaintiff in this cause is entitled to come in with the other creditors of the partnership, for all the sums assigned to him, as

aforesaid. The defendants contend, that for all those which were originally due to the partners of the house, he must be postponed until the other creditors are paid. To support this, he quotes *Cooke's Bankrupt Law*, 500, 503, *Hunter's case.* This case proves directly the reverse; for Hunter there having borrowed, or rather taken money belonging to his brother, and lent it to the partnership of which he was a member, the amount was considered as part of his separate estate, and was divided among his separate creditors, he, individually having also become bankrupt: it is true, *Cooke* says a contrary determination had taken place: he quotes in the margin several cases to prove this, but confesses he has not been able to obtain a note of any of the cases, except one.

The general principle of the English law is, that the joint fund pays the joint; the separate fund the separate debt: this is decided in so many cases, that it is unnecessary to refer to them, and consistently with the plain dictates of justice, there could be no other. . And yet the cases last quoted from *Cooke* seem to contradict this principle. If each estate pay its own debts, and if what is equally undeniable. one partner may, on account of a separate

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

trade, be a creditor of the joint estate, it seems to follow, that a solvent partner, or his assignees, if he be insolvent, may prove his debts against the joint fund. And then the cases quoted by *Cooke* are inconsistent with the general doctrine thus universally established. Yet, according to the principles of the English law, they may be reconciled. Where all partners are indiscriminately liable for the whole of the partnership debts, it is evident that no one partner can have any interest in the joint fund until all the debts of that fund are paid; therefore, the partner, tho' a creditor, being by the English law also a debtor, in consequence of his liability as a partner, the law operates a kind of compensation between the two debts, and will not allow him to receive the one until he pays the other. There may be some propriety in establishing this rule under the English law, if it be established. There is, however, some reason to doubt on this subject, even in England, as will appear from a consideration of the following cases. *Dig. Mod. Ch. C.* 71. 203. 8 *Ves.* 546. *Lex Mer. Am.* 641–2, from which it would seem to be established, that although a creditor partner, or his assignees, could not

prove against the joint fund, when his credit arose only from superior advances as partner; yet, that the law was decidedly different where the credit arose from a separate transaction, trading in his individual capacity with the house of which he was a member. But our debts arose in this way; therefore, in England we should, as the representative of the separate partner, be allowed to prove against the joint fund. This point being more fully discussed in the argument of Mr. Grayson, I refer the court to that. But in this country, and the case before the court, it seems to me useless to enquire whether such be the law in England or not, because here, I flatter myself, I have shewn that the species of partnership which was entered into between the partners, did not involve any responsibility on the part of any of the parties for acts of the others; in other words, that they were not bound *in solido.*

What renders this more striking, is the nature of the partnership.

It is for "carrying commission business as factors." It is a principle that no undertaking of a partner can bind the partnership, unless it be one contracted in the course of that bu-

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL SYNDICS.

siness, for which the partnership was formed. 2 *Cur. Ph. illustrada*, 55. (62) In a partnership formed between workmen for building houses, though the whole would be liable on a contract made by one for brick or lumber, surely they would not, if one of them chose to buy silk, laces, or perfumery. On this view of the law, who can be the creditors of a company of factors? Only those whose debts arise in the course of factorage business—those who have entrusted them with goods to sell, and to whom they have not accounted for the proceeds—those who have placed money in their hands to purchase, and for whom the purchase has not been made; these are, in the nature of things, the only creditors which a company of factors can have. Those who sell goods, or land, or slaves to the factors, are not creditors of the company as such, though they may be creditors of all who compose the company, if all of them make the purchase, or authorise one of their number to make it. In the present instance, it is admitted, that all the partners, except Brandt and Foster, resided in Kentucky, and had no agency in contracting the debts. On this head then I come to this conclusion:—That the

debts represented by the plaintiff, being admitted to have arisen from merchandize or produce sent to the company for sale, those debts are properly chargeable against the company's effects, and that the decree ought to direct that no other creditors of John Brandt & Co. be admitted in concurrence with them, but such as have debts arising in the same manner.

If the court admit this principle, there will then be no necessity for considering the next point I made, *viz.* that the creditors of a factor, or even of a merchant, who may also act as a factor, are entitled to a preference over other creditors, if the debts arise either from money deposited with the factor to purchase, or from the proceeds of goods sold on commission; it will be useless to consider this if none but creditors of this description be admitted to prove against the joint estate; because, being then the only creditors, they would, in that case, come in *pro rata*, and they would do the same if they were admitted as creditors privileged in equal degree. As it is, however, uncertain whether the view I have taken be the one which will concur with that to be taken by the court, I would refer them

East'n District. *May*, 1822.

WARD vs. BRANDT & AL. SYNDICS.

to the law cited in the case of *Durnford* vs. *Seghers' syndics*, and to their decision, as well as the law referred to, in the case of *Trimble* vs. *Clay's syndics*, where it appears that money or effects, which may be changed into money, placed in the hands of another, subject to the order of the proprietor, and even with permission to use them if no interest be paid, forms a special deposit, and gives the owner a privilege, immediately after the creditors, by hypothecation, but before those, by simple contract.

There seems to me great reason that this privilege should attach in cases of factorage: it is in itself a transaction of the most fiduciary nature, quite as much so as that of a regular deposit. No other credit is given to the factor than that of confidence in his integrity, not as in other cases, on his capacity to pay: the property either of the thing confided to him to sell, or of the proceeds, is never vested in him, and he is as much guilty of a crime in morality if he appropriate the one or the other to his own use, as he would be if he took it without the consent of the owner, out of his possession. This transaction, therefore, comes precisely within the definition given by the

Spanish law, and recognised by this court in the case above referred to. 9 *Martin*, 524.

I come now to consider, whether if the plaintiff be either excluded from coming in a creditor of John Brandt & Co., or if the funds of that estate be insufficient to pay him, he cannot come upon the separate estates of J. Brandt and Henry Foster, who are debtors to the firm of J. Brandt & Co., and who are also insolvent, and represented by the same syndics. If the court should be of opinion contrary to the argument sustained on this head, that all the members of this partnership are bound *in solido*, then there can be no doubt that the plaintiff must come in upon the separate estate of Brandt & Foster, after their joint fund is exhausted. But even if they should think, as I trust they will, that they are not liable *in solido*, still I think, from the circumstances of this case, the creditors of the joint fund of J. Brandt & Co. must come on the estates of John Brandt and Henry Foster.

1. It is stated in the fact, no. 12, that a part of this separate estate was paid for by the partnership fund.

2. John Brandt and Henry Foster were the

East'n District. *May*, 1822.

WARD vs. BRANDT & AL. SYNDICS.

only acting members of the firm, and it would hardly be permitted, that they should, by their own act, make themselves, in their private capacity, solvent, by appropriating the goods or money entrusted to the firm, while the firm was, by this very operation, rendered insolvent. Their case is different from that of the other partners: these last were not bound to the joint creditors farther than their interest in the stock, because they never made any special agreement to that effect with any of the creditors; and because, in this species of partnership, the law does not imply it. But with respect to John Brandt and Henry Foster, the case is different, because they did make a special agreement with the creditors; they acted, they contracted the debt, and they shall never be permitted to get rid of their personal responsibility; every one, therefore, who contracted with them, though in the name of the firm, has a right to come on them individually, if the funds of the partnership fail. I conclude then that the plaintiff, if he be not paid the full amount of his debt, out of the estate of J. Brandt & Co., has a right to a dividend from the particular estate of John Brandt and Henry Foster.

Another question arises out of the mortgage mentioned in the statement of facts. By the 5th fact, it appears that purchases were made of real estate in the city of New-Orleans, and by the 11th fact, that on the 1st September, 1820, William Ward and James Johnson executed to the plaintiff, a mortgage on the property, for securing a debt of 56,000 dollars. There can be, I believe, no good reason to doubt of the validity of this mortgage, and that it will attach on the one half, which is the interest of the mortgagors in the property.

The first inquiry is, what interest William Ward and James Johnson had in the property? If it was partnership stock, they, as partners, had a right to dispose of it, and their mortgage would burthen the whole of the property. But I do not think it can be so considered.

Land purchased by a person in the joint names of himself and another, although he be not authorized to make the purchase, (or what is the same thing, by a partner of a house established for other purposes, in the name of the firm) is taken on the joint account, and is the property of all the partners; each has his individual share, and it is held subject

East'n District. *May*, 1822.

WARD vs. BRANDT & AL. SYNDICS.

to all the rules which are established for real property: it is to be transferred, incumbered and bequeathed in the same manner as if it had been jointly acquired by the parties in any other manner; each owner may sell or incumber his share, independent of his associates. This doctrine is acknowleged in its fullest extent, by the decision in *Smith* vs. *Kemper*, 3 *Martin*, 626.

The court there say, "By the articles of co-partnership, the appellee had no right to buy real property for the firm, yet he did so; what is to be the consequence? It is not disputed, that when a man undertakes to buy a thing for another, without authority, the person for whom the purchase is made may avail himself of it." The same point is decided, 11 *Mass. Rep.* 474. Now here John Brandt and Henry Foster make a purchase of real property in the name of J. Brandt & Co., that is to say, for John Brandt, Henry Foster, William Ward and James Johnson. William Ward and James Johnson agree, in the language of this court above quoted, to "avail themselves of it." The act then is complete. they are the owners of one half of the real property; and, of course, have the right to dis-

pose of that interest; they exercise this right by mortgaging it for a just debt. By what train of reasoning can this transaction be avoided? Will it be said that the partners of the house at New-Orleans, having applied for a respite, as in the name of the firm, prior to the date of the mortgage, it is, therefore, void? If it should, I answer—

1. That William Ward and James Johnson did never apply for a respite, that they are still solvent, and ready to meet every legal engagement they have contracted; and that, therefore, they had a complete right to dispose, in what manner they pleased, of their joint interest in the real estate, which I have shewn, was not held as stock, but as property in common with the other persons composing the firm.

2. I answer, that John Brandt and Henry Foster could, from the nature of the business they carried on, contract no debt, but by appropriating monies or effects entrusted to them for the purpose of purchase or sale; that if they did contract other debts in the name of the firm, neither the joint stock of the firm, nor the other partners, individually, would be liable for them; and that, therefore, they could

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

not make the firm insolvent for the purpose of delaying the payment of such debts; and as it does not appear that any other debt besides those in the hands of the plaintiff, arose on such deposits of produce or money, there is no evidence that the firm is insolvent, although it may be unable to pay the debts illegally contracted in its name by John Brandt and Henry Foster.

3. I answer, that the mortgage was given more than three months before the petition for a forced surrender; and that, therefore, although my other reasons should be deemed insufficient, the mortgage must attach.

4. The mortgage was given for a consideration accruing at the time it was executed.

Another point necessary to be noticed in this case, is the place of residence of the parties. If they reside at different places, carrying on business in their separate names, they are not considered as partners, says our law, but mutually as principals and factors. 5 *Partida, tit.* 10. *l.* 4. *in notis* (3) *Si sint plures socii diversis locis exercentes, videntur invicem institutores et invicem praepositi.* 2 *Cur. Ph. illustrada*, 46. (29) "When two partners are in different places, the one cannot bind the other, unless for

the part which belongs to him in the company's stock, unless there be an agreement between them to that effect, or when one is specially appointed by the other. Thus, although the partnership were of a nature that would make the partners liable *in solido*, this circumstance would take away that liability."

We conclude then, that the plaintiff, in this cause, is entitled to a preference over the creditors by simple contract, and must come in *pro rata* with debts, if there be any, which arise from consignments.

That he is entitled first to exhaust this privilege on the joint estate, and to come in for the balance on the separate estates of John Brandt and Henry Foster.

That he is entitled to the proceeds of all the real estate contained in the mortgage, and of the personal estate mentioned therein as a pledge. And that he must come in for a dividend with the other creditors of the estate for all the balance due to Johnson and Ward, as creditor partners, independent of their credits arising from consignments.

PORTER, J. delivered the opinion of the court. This action ought, in strictness, to

East'n District. *May*, 1822.

WARD vs. BRANDT & AL. SYNDICS.

have been cumulated with the other proceedings in the bankruptcy of Brandt & Co., and J. Brandt and H. Foster; however, as it has been carried on to this stage, without the objection being taken, we have considered the different questions raised in it.

The first is, what species of partnership was entered into between William Ward and James Johnson, of Kentucky; and Henry Foster and John Brandt, of New-Orleans? Many of the other points urged in argument depend on the decision of this.

The articles of partnership state, that the aforesaid persons had associated, "for the purpose of doing commission business as factors, in the city of New-Orleans."

The plaintiff's counsel contend, that this is a particular partnership, coming under the definition contained in the 13th article of the *Civil Code*, 390, which declares, that where persons associate together for the exercise of some trade or profession, it is a particular partnership; in the French text, the words are, *quelque metier ou profession.*

The court must understand the expression, "to do commission business in New-Orleans, as factors," as it is to be presumed

the persons who entered into the contract did, when they used it. To enable us to do this, the first rule of construction is to endeavour to ascertain what was the common intention of the parties, rather than adhere to the literal sense of the terms. *Civil Code*, 270, *art.* 56.

Factors are those who are appointed to transact a particular business, in the name of an other, and not in their own. *Curia Philipica*, *Commercio terrestre*, *lib.* 1, *cap.* 4, *n.* 1.

Commission business is transacted in this city, not in the name of the principal, but in the name of the house to whom the property is transmitted for sale. They dispose of it as their own; take bills payable to themselves for the price; and when they purchase, it is they who state themselves buyers, not the house in Philadelphia, London or Paris, who may have commissioned them.

The different members of the sentence taken together, convince us that the intention of the parties was to establish a commission house in this city, of the ordinary kind. The expression, "as factors," does not prove any thing else was contemplated; for the meaning attached to the word factor, in com-

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL SYNDICS.

mon parlance, is quite consistent with the other terms of the sentence, as we understand them.

Our law defines merchants—those persons who buy and sell merchandize to make profit by it. *Curia Philipica, lib.* 1, *cap.* 1, *n.* 3.—Commission merchants, who have a house established in New-Orleans, and who live by buying and selling those objects, which form the commerce of this place, come almost within the letter of the definition just given.

The circumstance of the business not being carried on in the name of all the partners, is presented as an objection against considering it an "ordinary partnership." *Civil Code.* 390, *art.* 15.

We understand the expressions in our *Code*, to mean the name which is given to the firm by the consent and approbation of the partners; the commerce is then carried on in the name of all; and that it is not of the essence of a commercial partnership, that the name of each of the partners should be inserted in the style of the house. In the French text, the words used for ordinary partnership, are *la société en nom collectif.* The article next succeeding that quoted in support of this novel idea, says, the stock consists of what is

acquired in the partnership name, *au nom social;* and in page 396, *art.* 37, *n.* 5, we learn that contracts signed, "such a one & co." gives the property to the partnership, although the purchase may have been made out of the monies of one of the partners.

As the plaintiff claims, as assignee of several persons, we shall first examine the right acquired from two of the partners of the house of Brandt & Co.

In the latter character he avers:—

1. That he has a right to prove the debt due to the separate partners by the firm, and to be paid *pro rata* with the other creditors.

2. That he is the only person who has proved that his claim arose from consignments on commission business, and therefore the only one who should be paid.

3. That as assignee of the partnership in Kentucky, of E. P. Johnson & Co., and Wards & Johnson, he has a right to prove the debts contracted with them, although some of the partners of these houses were members of that of Brandt & Co.

4. That consigning goods to a factor, does not vest in him the property of these goods, and that the consignor has a right to be

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL SYNDICS.

paid in preference, even if the object has been alienated.

5. That the debt due to him is privileged on the estate of J. Brandt and H. Foster; because they were agents to collect monies for persons not living in Louisiana, and the law has given a mortgage on the estate of those who administer the property of the absent.

6. That he is a creditor of J. Brandt and Henry Foster; because, when partners appropriate partnership funds to their own use, they become debtors to the other partners, not to the creditors of the partnership. And lastly, that the partners in the house of Brandt & Co., who resided in Kentucky, executed a mortgage in his favor, hypothecating for the security of the debt due him, all the real estate owned by them in Louisiana.

I. If the plaintiff was correct in this position, it would lead to very inconvenient results, and produce a circuity of actions, which the law abhors. The partners in whose name this claim is sought to be enforced, are bound *in solido*, to the other creditors of Brandt & Co. for the debts of that partnership, and liable at any moment to be sued for them. We can-

not therefore perceive the justice or legality of permitting debtors to withdraw funds from their creditors or creditors agents, (for such the syndics are) unless they offer at the same time to discharge their debts. At the dissolution of a partnership, all debts due, must be paid before there is a division among the partners. *Curia Philipica*, *lib.* 3, *cap.* 3, *sec.* 46. 10 *Martin*, 435. The common law cases, quoted in argument, are quite opposed to the doctrine for which the appellant contends.

II. The claim to be paid on the ground that the present plaintiff is the only creditor who has proved that his debt arose from consignments, takes its rise from the idea which has here been already examined in the first part of the opinion:—*viz.* that this was a co-partnership of factors, in the limited sense in which that word may be understood. We have already seen that it must be considered as an ordinary commercial partnership, for the purpose of transacting commission business. The law, as cited from the *Curia Philipica illustrada*, *lib.* 3, *cap.* 3, *n.* 62, seems to have been modified by the provision contained in the *Civil Code*, *art.* 41, *n.* 4, which declares

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

that the partnership is bound by the debt, contracted in its name, even when that debt has not turned to its advantage; unless by the nature of the contract, it should appear that it had nothing to do with the affairs of the partnership. The question then is, have no other debts but those which arise from consignments relation to the affairs of the partnership? We are not prepared to say so. When it forms a part of the business of a house, such as this was, to buy and sell; when those sales are made in its own name; when the credits which it receives in payment, are taken payable to itself, and must frequently be negociated for the purposes of immediate remittance, or to meet the acceptance, come under for the consignors; when, in making purchases, it becomes necessary that it should be responsible in the first instance to the sellers: when all this, and much more, in the same way, must be done, to enable the house to carry on the business for which it was formed; it is to be presumed the partners knew that these means were necessary to the end they had in view: that they contemplated the exercise of them, and therefore, cannot now exclude all creditors, save those who forwarded goods to be sold on commission.

III. It is contended, that as assignee of the partnerships in Kentucky, of E. P. Johnson & Co., and Wards & Johnson, the appellant has a right to prove, and be paid the debt contracted with those houses, although some of their members were also partners in the house of J. Brandt & Co.; and in this position we concur. It has been already decided that the private debt of one partner cannot be set off against that due the partnership. 1 *Martin*, 25, 4 *ibid.* 378. Yet this is what is attempted to be done here. The firm of Brandt & Co. owes E. P. Johnson & Co., and they resist payment, because some of the partners of the latter owe the former, or rather are responsible for their debts.

IV. The appellant next insists, that he has a privilege on the estate of the insolvents, in preference to mere chirographary creditors, because placing merchandize in the hands of a factor, does not transfer to him the property in it, and that the same privilege which exists on the thing, attaches itself to the proceeds, if the object be sold. The court thinks otherwise. The delivery of property to a factor, to be disposed of, confers a right to sell it,

East'n Distri
May, 1822.ct.

WARD
vs.
BRANDT & AL.
SYNDICS.

of course a sale by him divests the proprietor of his title. The case of *Clay* vs. *his creditors*, 9 *Martin*, is not at all like that now before us. Pledging an object, neither alienates it, nor confers a power on the pawnee to do so, unless in default of payment. If sold otherwise, the law justly gives a privilege, for the owner is deprived of his property without his consent. In the case of *Clay* already cited, the court declared that when the property was in the hands of an insolvent, by virtue of a contract which did not transfer the owner's title to it, that there existed a privilege on the object, or if alienated, for its value. If the contract did transfer the title, that privilege was lost; and so we consider it, if the owner authorises an other to make the transfer, for then, in case the proceeds cannot be traced, the agent becomes personally indebted.

V. The absent persons spoken of in our *Code*, in whose favour the law gives a mortgage on the property of those who administer their estate, are perhaps those who are *declared absent*, not those who are reputed such. But if they were the latter, the plaintiff's pretentions are not much advanced by such a construction.

It is insisted we must take the letter of the law, *Code*, 456, *art.* 20, and not look at its spirit. Be it so:—the expressions in English are, they who not being tutors or curators, take on themselves the administration; in French, *ceux qui se sont immiscés.* These texts must be construed together, for the law was passed before the adoption of our constitution, and in both languages. 2 *Martin's Digest*, 98. So construed, there is not a doubt that the words used convey the idea, that the persons alluded to, are those, who without the consent of the proprietor, undertake to manage his estate: who intermeddle with it.

VI. By the statement of facts, it appears that J. Brandt and H. Foster, owed to J. Brandt & Co. a large sum of money. That debt, like every other due the partnership, passed to the creditors of the firm, in consequence of a forced surrender being ordered, and they, or their agents, have alone the right to receive it. The decisions cited on this point, were given in cases where both the partnership and separate partners had become bankrupts; they relate to the distribution of the estate, between the different creditors of each.

East'n District. *May*, 1822.

WARD *vs.* BRANDT & AL. SYNDICS.

and they have no application to an action like the present, where the partner who advances these pretentions, is solvent, and responsible for the partnership debts.

The last point presents no difficulty. The mortgage was executed in Kentucky, months after a respite had been accorded to the partnership here. A preference of this kind, could not be given by all the firm after that respite was applied for; it follows that it could not be accorded by a part of that firm,—otherwise each of the members, by acting individually, might alienate all the property of the partnership, although they could not do it collectively, which would be absurd. There is nothing in the argument that the partners in Kentucky were solvent: for though they might be so individually, yet as partners of Brandt & Co. they can not be considered such, and it was only in the latter character they had the right to meddle with, alienate, or grant an incumbrance on this property.

There appears no difficulty in regard to the debt due to Lee White, and by him assigned to the plaintiff.

According to the principles just laid down, the plaintiff is entitled to be paid equally with

the simple creditors of Brandt & Co., for the debt assigned him by Lee White, E. P. Johnson & Co., and Ward & Johnson, *viz.* for the sum of nineteen thousand nine hundred and thirty one dollars, forty cents, and the appellee should pay costs.

It is therefore ordered, adjudged and decreed, that the plaintiff be placed on the tableau of distribution of the late firm of John Brandt & Co., as simple creditor, for the sum of nineteen thousand nine hundred and thirty-one dollars, forty cents; and it is further ordered, that the appellee pay the costs of this appeal.

CARPENTIER vs. *HARROD & AL.*

APPEAL from the court of the first district.

The appeal will be dismissed, if the record be not brought up on the return day.

PORTER, J. delivered the opinion of the court. The appellee requires this appeal should be dismissed, because the petition, citation and transcript of the proceedings were not filed in this court, on the return day fixed by the judge of the inferior court.

The act regulating the mode of bringing up causes to this tribunal, directs (1 *Martin's*

East'n District. *May*, 1822.

CARPENTIER *vs.* HARROD & AL.

Digest, 442) that the appellant shall file the record on the return day. Consequently, without the consent of the opposite party, it cannot be done on any other.

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

Hennen for the plaintiff, *Grymes* for the defendants.

ETZBERGER vs. *MENARD.*

A person, who binds himself jointly and severally, is a principal, and cannot use the pleas which the law gives to sureties alone.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. This is an action on a bond for the prison bounds, given by one L. F. I. Lefort, whom the defendant joined as a surety.

11 m 434
44 397

He pleaded the general issue—that the bond is utterly void, and can produce no effect, as it was given without any consideration—that at the time of its execution, Lefort was in no legal custody, having been arrested on a *ca. sa.* issued against one Lafour, grounded on a judgment obtained by the then and present plaintiff, against one L. F. I. Lafour.

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

It is urged, that the defendant, being only a surety of Lefort, cannot be bound more strongly than his principal, and may avail himself of the same causes of nullity, and oppose the same exceptions. *Civil Code*, 432, *art* 2; that judgment could not have been obtained against *Lefort*, in the original suit, which was instituted against *Lafour*, against whom judgment was given, and the *ca. sa.* issued on which *Lefort* was arrested.

The record of the original suit, in which the bond was given, comes up with that of the present, and it appears that the then defendant was there designated by the name of *Lafour*.

The sheriff proved the execution of the bond.

His deputy deposed, that the person, who subscribed it with the present defendant, was the one who had been cited by the name of Lafour, in the original suit, and then declared that there was a mistake in the name, but did not deny his owing the debt—that the said Lefort is the person on whom the writs of *fi. fa.* and *ca. sa.*, in the original suit, were served, and he left the bounds immediately after executing the bond.

Henderson deposed, he called on the defendant in the original suit, *Etzberger* vs. *Lafour*,

East'n District. *May*, 1822.

ETZBERGER *vs.* MENARD.

before its institution—that he admitted the debt, urging only his inability to pay it. He saw the person he speaks of brought into court, on a writ of *habeas corpus*, in the said suit.

Vignaud, a witness for the defendant, deposed, he knows the person whose signature is above the present defendant's, in the bond sued on; the witness has often seen him write, and has corresponded with him; he always wrote his name L. F. I. Lefort, and was always so called.

Chabaud testified to the same purpose.

The defendant does not appear to us entitled to relief on the merits. He bound himself *jointly* and *severally* with the person arrested as defendant, in the original suit. He bound himself as a principal, and cannot avail himself of exceptions, which the law grants to sureties alone.

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

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

JENKINS vs. *NELSON'S SYNDICS.*

East'n District, *May*, 1822.

JENKINS *vs.* NELSON'S SYNDICS.

A building contract must be registered, according to the provisions of the act of 1813.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiff's claim of privilege, as a builder, is resisted on the ground that the contract on which it accrued was not registered in the office of the recorder of mortgages, until three months after its date.

There was judgment for him, and the syndics appealed.

The act of 1813, *c.* 29, 1 *Martin's Digest*, 704, requires that all liens of any nature whatever, having the effect of a legal mortgage, shall be recorded *within ten days.* That of February 18, 1817, provides, that in all cases exceeding $500, no architect, or any other workman, shall enjoy, with regard to a third party, any privilege, or legal mortgage, unless he shall have entered into a written contract, and the same shall have been recorded *within the time* prescribed by law.

The plaintiff's counsel urges that the contract, having been recorded under a judge's order, under the provisions of the statute, *Civil Code*, 453, *art.* 63, has effect against third

East'n District. *May*, 1822.

JENKINS *vs.* NELSON'S SYNDICS.

persons, from the day of the record: whilst the defendant's counsel urges that the act of 1817 requires that contracts of this kind be recorded under the act of 1813, *within ten days.*

In *Lafon* vs. *Sadler*, 1 *Martin*, 476, we held that the notarial act was only the evidence of a fact from which the plaintiff's privilege resulted; in the present case the writing is of the very essence of the appellee's.

Lafon having built Godwin's house, had *ipso facto*, by law, a tacit lien. His having reduced to writing the contract, which fixed the manner in which the house was to be built, and the payment effected, did not *create* his right. Having a lien by law, and made a contract which did not modify his right, he was allowed to avail himself of his stronger title, that which resulted from the law.

Here the plaintiff's lien is not independent from the writing; for the writing is of the very essence of it. On the writing, although no lien be mentioned therein, the law raises a lien, which the contract would not give (even if it was stipulated) without being reduced to writing.

Lafon's notarial act was not necessary to his recovery, therefore, Godwin could not re-

sist its introduction. Here the writing is essential to the plaintiff's recovery, and the defendant may resist its introduction, unless it has been recorded according to law.

The writing here is perfectly of the nature of most of those mentioned in the act of 1813. Securities furnished by tutors, persons employed in the service of the state, marriage contracts, judgments, awards: instruments in which no mortgage is stipulated for, but in which the law raises a tacit one.

The statute of 1817 is not evidence that the legislature, of that year, thought that the intention of that of 1813 had been mistaken in the case of *Lafon* vs. *Sadler*; but it shews that they discovered that the former act required to be amended. For they left the operation of the decision in that case in its full effect, on cases of building contracts, under the value of $500.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the rule taken on the defendants on the 8th of March last, to shew cause why the house should not be sold for cash (or so much there-

East'n District. *May*, 1822.

JENKINS *vs.* NELSON'S SYNDICS.

of as shall be necessary) to satisfy the plaintiff's claim, be discharged: and it is further ordered that the defendants pay costs in both courts.

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

BEEBE vs. *ARMSTRONG.*

A citizen of another state, praying for the removal of a suit to the court of the U. States, must shew that the plaintiff is a citizen of the state in which the suit is brought.

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

MARTIN, J. The plaintiff stating himself of the parish of New-Orleans, brought suit against the defendant, whom he stated to be of the state of Alabama. The latter, stating himself a citizen and inhabitant of that state, filed his petition for the removal of the suit into the court of the united states, for the district.

The plaintiff averred, that he was and always had been a citizen of the state of Massachusetts, and opposed the removal.

The suit was ordered to be removed, and he appealed.

His counsel urges, that the parish court erred, as it was no where stated that he is a

citizen of this state. 3 *Dallas*, 382, 4 *id.* 8, 2 *Cranch*, 126, 4 *id.* 46.—Farther, that the fact is not made to appear to the satisfaction of the court. 3 *Johnson's Reports*, 145, 3 *Day's cases*, 16, 194.

The act of congress (1789, *cap.* 20, *sec.* 12,) under which the removal was prayed, describes the suits in which such an application may be successfully made. Suits against aliens; suits, by a citizen of the state in which the suit is brought, against a citizen of another state.

The defendant avers himself to be a citizen of another state; *ergo*, the suit can be removed only on the ground of the plaintiff being a citizen of this.

The defendant does neither shew, nor even allege, that the plaintiff is such a citizen; but he contends, that this sufficiently appears from the plaintiff's petition, in which he is stated to be of the parish of New-Orleans.

This is the very case which was determined in the supreme court of the united states, in the case of *Bingham, plaintiff in error* vs. *Cabot & al.*, 3 *Dallas*, 382, cited by the plaintiff's counsel.

The parish court was left to infer, that the

East'n District. *May*, 1822.

BEEBE *vs.* ARMSTRONG.

plaintiff is a citizen of this state, from the sole circumstance of his having described himself as of the parish of New-Orleans.

This circumstance shews, that he is a resident, or inhabitant of that parish, and consequently of this state. The conclusion of the court could only be justified on the ground of citizenship being co-extensive with residency or inhabitancy. An alien does not become a citizen of, by a residence within, the united states; neither does a citizen of New-York acquire the citizenship of Louisiana, by a residence within this state. Either the alien or citizen of New-York, may reside in the parish of New-Orleans, and be correctly described as of that parish.

As nothing in the plaintiff's petition, or that of the defendant's, for a removal of the suit, shews that the former is a citizen of this state. and as this citizenship is a *sine qua non*, in the defendant's application, the parish court erred in directing the removal of the cause.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the suit be remanded, with directions to the judge, to proceed therein according to law, as

East'n District. *May*, 1822.

BEEBE *vs.* ARMSTRONG.

if no petition for a removal had been filed; and it is ordered that the defendant and appellee pay the costs of this appeal.

Hoffman for the plaintiff, *Grymes* for the defendant.

WESTOVER & AL. vs. AIME & WIFE.

APPEAL from the court of the first district.

When a person owning property in this state, does not appear at the place of his residence for five years, and has not been heard of, his presumtive heirs may cause themselves to be put in possession of the estate which belonged to him, and they enjoy a portion of the revenue.

Their right yields to the testamentary heir, and both to the claim of the husband and wife, who wish to continue the partnership. If heirs in dividing the property of their ancestor, held in common, pass an act of sale to each other, it will be regarded not as

PORTER, J. delivered the opinion of the court. This action is brought by Angelique Westover, wife of John Bredy, and by the children and heirs apparent of said John Bredy, *viz.* by Philip Bredy, by Marianne Bredy, and Rosalie Bredy, the two latter authorised by their husbands Auguste Daniel, and John Sassman.

They claim to be put in possession of a tract of land, belonging to their father, John Bredy, whom they state to have disappeared in the year 1805, without leaving any one charged with the management of his concerns.

And aver, that one Aimé and wife have illegally entered on, and taken possession of the premises, and though often requested, have refused to give them up.

East'n District. *May*, 1822.

WESTOVER & AL. *vs.* AIME & WIFE.

The defendants pleaded the general issue, prescription, collusion, and title through John Sassman, the husband of Rosalie Bredy, which title they assert he acquired from the other plaintiff's in this suit.

a sale, but as a partition.

The child who has approved of the partition since he came of age, cannot maintain an action on the ground that it was illegal.

Husband has authority without his wife, to proceed to the partition of the moveable part of a succession accrued to her.

The right of the presumptive heirs, to receive the revenues of his ancestor, who has disappeared, is a personal interest, and does not partake of the reality.

The facts of the case, so far as they are necessary to be stated, are those which follow—John Bredy disappeared in the year 1803. On the 15th of July, of that year, the commandant of the second German coast, in obedience to an order of the governor, Don Manuel Salcedo, made an inventory of his property, and placed it in the hands of his wife for safe keeping. The 16th September, 1805. A. Westover, Philip Bredy, and A. Daniel, and John Sassman, in right of their wives, Marianne Bredy, and Rosalie Bredy, petitioned the judge to order a sale of all the property belonging to the absentee. A sale was ordered in the usual form, the parties giving security. On the 18th October, the same persons came before the judge, and by public act partitioned the land now claimed. Two arpents in front, with the ordinary depth, were allotted to Sassman, husband of Rosalie Bredy, for the sum of $1500; three to Auguste Daniel, husband of Marianne, for the same

price; and the remaining two to Philip Bredy, for $950; the act was not signed by Sassman's wife, nor by Daniel's. In a little more than two years after the division, Sassman sold the portion received by him, to one Francois Rulle, in whose right the defendants now claim it.

Philip Bredy was of the age of majority in July 1807, Marianne in July 1809, and Rosalie in the same month of the year 1811.

The main question for our consideration is the effect of this act of partition. It is insisted by the defendants, that it amounts to an alienation of all right which the plaintiff's had in the premises.

It is replied that such is not its legal operation; that the act is null and void; that it is not binding on the wife, who, though she might have divided the land, had no right to sell it; that for the same reason it can have no effect against her children, and that as to them, it is null on another ground, they were minors, at the time it was made; and were not parties to the act.

When a person owning property in this state, does not appear at the place of his residence for five years, and has not been heard

East'n District. *May*, 1822.

WESTOVER & AL. vs. AIME & WIFE.

of, his presumptive heirs may cause themselves to be put in possession of the estate which belonged to him, and they enjoy a portion of the revenues on certain conditions.

Their right yields to the testamentary heirs, in case there are such, and both are postponed to the claim of the husband or wife, who may wish to continue the partnership, and have the benefit of the aquets and gains.—*Civil Code*, 16, *art.* 9, 11 *and* 13. But either wife or husband may have the community dissolved if they choose, and though the wife, in the first instance, desires to have it continued, she preserves the right of afterwards renouncing.

In the case now before us, there can be little doubt, that it was the intention of the wife of Bredy to dissolve the community. The question is, whether that intention has been so carried into effect, as to be binding. The wife and children, it is said, could not sell the absentee's property. This is true. But as the act contains evidence that they contemplated to sever their interests in the land now sued for, and as that act does divide it, and assign a portion to each, we must give the instrument effect, as far as the parties had le-

gally a right to act on the subject matter; *ut res magis valeat, quam pereat.* The court recognised this principle, and acted on it in the case of *Holmes* vs. *Patterson*, 5 *Martin*, 693. According to *Pothier*, if heirs pass an act in relation to property, held in common between them, and declare that the one has sold to the other; though by the terms used, there is no doubt but it is a contract of sale;—*néanmoins la jurisprudence a établi que nonobstant les termes de vente dans lesquels cet acte est concu, il ne devoit pas être considéré comme un contrat de vente, mais comme un acte tenant lieu de partage. Pothier, Traité de vente, n.* 643. The good sense of this doctrine is obvious, and its application to the case now before us complete.

The wife therefore cannot maintain an action for this property, nor can the son Philip, who has approved of the partition, since he came of age, by selling part of the land, and suffering ten years to elapse since the age of majority, without bringing suit.

The claims of the daughters, Marianne and Rosalie, have yet to be examined.

The right which they had as heirs apparent of their father, to enter into and enjoy a portion of the revenues or a portion of his es-

East'n District. *May*, 1822.

WESTOVER & AL. *vs.* AIME & WIFE.

tate, has been transferred by their husbands. It becomes, therefore, necessary to enquire if they had authority to do so. According to the case of *Tregre* vs. *Tregre*, 6 *Martin*, 665, the husband is authorised, without his wife, to proceed to the partition of the moveable part of a succession accrued to her, but not to that portion which is immovable. This part of the case then turns on ascertaining what species of property the wife had in that which was divided. It must be confessed, that it is somewhat anomalous, and that it is difficult to class it. To make it a deposit, as was contended, it must be shewn to be gratuitous. *Civil Code*, 410, *art.* 4, 9 *Martin*, 485. It is not a usufruct for the definition of that right,—is the enjoyment of a certain thing, the property of another, and drawing from the same, all profit, utility, and advantage, which it may produce. It is not a lease; for that is a contract by which one has the use of property for a certain rent to be paid. After as much reflection as we can bestow on the subject, we think it partakes more of the nature of a moveable, than an immovable. It is a right to receive money for a certain number of years, given by law, with a double object; to benefit the presumptive heir, and to compensate him for adminis-

East'n District. *May*, 1822.

WESTOVER & AL. *vs.* AIME & WIFE.

tering the estate of another. It can scarcely then be distinguished from interests which are certainly personal, money due for services, or rents and annuities. *Civil Code*, 100, *art.* 25.

Under this view of the subject, the judgment of the district court must be reversed, and ours be for the defendant, with costs.

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

Hennen for the plaintiffs, *Mazureau* for the defendants.

DAIGRE vs. *RICHARD.*

Parol evidence of the plaintiff's possession cannot be rejected on the ground that the survey, annexed to the record, did not appear to be made with the defendant's privity.

APPEAL from the court of the third district.

MARTIN, J. delivered the opinion of the court. The petition stated the plaintiff to be the true owner of a tract of land in the parish of Baton Rouge (bounded on one side by the land of the defendant, and on the other by that of Daigre, deceased) of 179 acres or more, having occupied and possessed it for thirty years and upwards, whereby he acquired a legal title

East'n District. *May*, 1822.

DAIGRE *vs.* RICHARD.

by prescription; that the defendant well knowing it, entered illegally, and forcibly, on fourteen and one half acres thereof, of which he retains possession, keeping out the plaintiff, cutting down trees, and doing other injury to the land. The petition concluded with a prayer that the plaintiff might be declared to be the legal owner, be restored to his possession, and recover damages.

The defendant pleaded the general issue, and that he (and not the plaintiff) was the legal and true owner of the premises.

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

The case is before us on a bill of exceptions, *viz.*:

"In this case, the plaintiff offered evidence to prove that he was in peaceable possession and occupation of the land, the subject of the present suit, for more than thirty years; and that it was forcibly taken possession of by the defendant, in January 1821. The court refused to hear this evidence, because it did not appear that the survey of said land, being the one annexed to the record, was made with notice to the defendant."

"To which opinion the plaintiff begs leave to except. *R. Lawes, D. J.*"

If the survey was made without the knowlege of the defendant, this was a good reason for refusing to admit it as evidence *per se.* If one was absolutely necessary in the case, it should have been ordered.

If the defendant had desired it, the plaintiff might have been ruled to describe the premises more particularly. The answer, however, shews that the defendant well knew the land claimed.

The evidence offered was relevant and material, and ought to have been heard.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and the case remanded, with directions to the judge to proceed to trial, and to allow the plaintiff to introduce the evidence stated in the bill of exceptions. The costs of the appeal to be borne by the defendant and appellee.

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

East'n District.
May, 1822.

CANONGE
vs.
CAUCHOIX.

CANONGE vs. *CAUCHOIX.*

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

Notice of non-payment must be given on the day which follows the protest.

MARTIN, J. delivered the opinion of the court. This is an action on a promissory note, protested on Saturday, the second of August, 1820—notice was given to the endorser, the defendant, on Tuesday the fifth. There was judgment for him, and the plaintiff appealed.

The parish court was correct in deciding, that, as the endorser resides in New-Orleans, he ought to have had notice on Monday the 4th, the day following the protest, the intervening Sunday being excluded. *Chitty on Bills*, 326, *Am. ed.* 241, *Smith* vs. *Mullet*, 2 *Camp.* 208.

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

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

LOMBARD vs. *GUILLIET & WIFE.*

East'n District.
May, 1822.

LOMBARD
vs.
GUILLIET & WIFE.

A party who is named in a notarial act, but whose signature is not thereto, is not bound thereby.

A wife is not bound by a note, on which the name of her husband is written above hers, where his signature is denied and not proved.

The supreme court cannot take as evidence what the court *a quo* states in the judgment

The wife is not bound by a note executed jointly with her husband.

APPEAL from the court of the third district.

MARTIN, J. delivered the opinion of the court. The plaintiff, stating that the defendants owe him $778 on a note, for the security of which the husband mortgaged a house and lot, part of the wife's dowry, which, by their marriage contract, he was authorised to sell and alienate, with her consent, prayed and obtained an order of seizure. His petition concluded with a prayer that the defendants might be cited, and that he might have such other relief as the case required.

The wife, being thereto authorised by the court, (by a curator *ad litem*, she being a minor) pleaded the general issue and nonage.

She admitted in her answer, that she signed the note; but averred she was not bound thereby, because she signed it without the authority of her husband; because she thereby appears to have bound herself in the same contract, with him: because it did not turn to her benefit; that she never consented to the mortgage given by her husband.

There was judgment against the husband, and for the wife, and the plaintiff was perpe-

East'n District. *May*, 1822.

LOMBARD *vs.* GUILLIET & WIFE.

tually enjoined from proceeding on the order of seizure. He appealed.

The wife's counsel have been heard *ex parte*.

The marriage contract authorises the husband to sell and alienate the house and lot, with the consent of the wife.

The mortgage deed states, that the wife was present, and declared that she consented thereto—but her signature does not appear to it—she denies that she consented to the mortgage, and there is no evidence of her doing so.

The district court was therefore correct in making the injunction perpetual.

We do not enquire into the correctness of the judgment against the husband, as he did not appeal, and did not appear in this court.

There is no evidence of the authorisation given by the husband to the wife—none results from the note, because it is not proven to have been subscribed by the husband. It is true his signing is alleged in the petition, but it is denied by the wife, who pleaded the general issue, yet admitted her own signature. The husband did not appear in the district

court, no judgment by default was taken against him—and although the judge states in his decree, that the plaintiff proved his demand against the husband, this does not appear from any other part of the record. *Longer & al.* vs. *Pigeau*, 3 *Martin*, 221.

The district court grounds its judgment on the absence of any proof that the note was given for the benefit of the wife. The decision, in this respect, is in conformity with ours in the case of *Durnford* vs. *Gross & wife*. 7 *Martin*, 489.

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

Davezac for the plaintiff, *Seghers* for the defendants.

NORRIS' HEIRS vs. *OGDEN'S EX.'S*

A partnership to carry on business as ironmongers, is not a special or corporate partnership.

In an ordinary partnership, dissolved by the death of one of

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

PORTER, J. delivered the opinion of the court. The petitioners aver that they are the heirs of Patrick Norris, deceased, who died in this

East'n District. *May*, 1822.

NORRIS' HEIRS *vs.* OGDEN'S EX'S.

city, leaving a large estate—that he made a last will and testament, appointing G. M. Ogden, Andrew Lockhart, and Rowland Craig, his executors, and that G. M. Ogden, acting in collusion with the house of Harrod & Ogdens, of which he is a partner, had the whole stock in trade of said Norris adjudged much below its real value to that firm, and that Peter V. Ogden, in whose name this purchase had been made, took possession of all the goods sold them, and collected the debts due the succession.

the partners, the heirs of the deceased partner have a right to participate with the survivors in the liquidation.

Therefore, if a suit is commenced by one of the partners to recover a debt due the partnership, the other partners have a right to intervene—*aliter* if they have a joint interest with the defendant.

Pleadings should not be argumentative or loaded with extraneous matter.

They further aver that Peter V. Ogden was a partner in the house of Harrod & Ogdens, that this sale was null and void, and they pray judgment for the value of the store and the monies collected.

Peter V. Ogden died since the transaction complained of, leaving his widow, Francoise Duplessis and G. M. Ogden his executors, who have answered this petition severally. The widow first pleaded the general issue, and that her husband had paid the heirs of Norris—the others, to the general denial, added that they had accounted to the house of Harrod & Ogdens, for the amount claimed, and concluded by averring that the executors

of Norris had duly accounted for all monies arising from the succession of P. Norris.

To these pleas the plaintiffs replied, that nothing demanded in the present petition made a part of the charges against the executors, in the court of probates, and that what was done there could not be pleaded in bar, unless it was approved of by the petitioners, or decreed in a suit to which they were parties.

The petition of intervention, the rejection of which has given rise to this appeal, is in the name of the surviving partners of the house of Harrod & Ogdens, and of the executors of the late Patrick Norris; it asserts that for several years previous to the day of the said house was in partnership with the late Patrick Norris, in a hardware store, for equal shares of profit and loss; that Norris died, leaving the persons already mentioned his executors; that they, Harrod & Ogdens, being greatly interested in the settlement of the partnership concerns, applied to the court before which this cause originated, to have their rights as partners ascertained; that they were recognised as such by a decree of that court, and supposing themselves duly authorised by that decree, they retained, by permission from the

East'n District. *May*, 1822.

NORRIS' HEIRS *vs.* OGDEN'S EX'S.

executors of Norris, the proceeds of the sale of the store; and that they have paid debts due by Norris, or rather by the partnership of Norris, Harrod & Ogdens, conducted under the name of Patrick Norris, to an amount equal to these proceeds.

That the petitioners well knew these premises, and that the whole had remained in possession of Harrod & Ogdens; yet they commenced an action in the court of probates against the executors, and forced them by this measure to make out an account in which they charged themselves with the proceeds arising from the sale of the effects of Norris; that the present demand is for the same sum, which the plaintiffs now contend, in a suit pending in the court of probates, is in the hands of Patrick Norris, but that the persons, really accountable, are Harrod & Ogdens. By reason of these premises, they request leave to be made parties, and pray that this action may be enjoined until a final settlement of the accounts of P. Norris' estate, and Harrod & Ogdens.

To this petition the plaintiffs filed several exceptions. That the petitioners in the bill of interpleader, *viz.* the representatives of P. V.

Ogden, were already defendants, and had answered in the action; and that they could not intervene, in a suit to which they were already parties, and had pleaded. That G. M. Ogden, who is at one and the same time, executor of P. V. Ogden, Patrick Norris, and partner in the house of Harrod & Ogdens, can protect the interest of that firm—finally, they deny any balance to be due Harrod & Ogdens, and conclude by alleging that the inventory made after Norris' death, was fraudulent.

The court cannot avoid noticing the manner this record is made up. The pleadings on the part of plaintiff are drawn in a very loose manner, argumentative, and full of irrelevant matter, which has no other effect but of increasing costs, and rendering it difficult to find the material facts. The notice now taken of this irregularity will, no doubt, prevent any thing of the same kind appearing hereafter.

The plaintiffs insist that this was a special, or corporate partnership, and that they have a right to settle its affairs. We do not think it either

Not special—that is, for one particular transaction—this was for business as ironmongers, and for an indefinite period of time.

East'n District. *May*, 1822.

NORRIS' HEIRS *vs.* OGDEN'S EX'S.

Not corporate—that is, where the dormant partner contributes only a certain sum, and by agreement, is to have a certain share in the profits and losses, without being answerable for the latter beyond the amount brought by him into partnership: but here we have not discovered that any such stipulation existed.

It appears to us an ordinary commercial partnership, dissolved by the death of one of the partners, in the liquidation of which his heirs have a right to participate with the surviving partners, and until a partition takes place, if one of the partners sues to recover a debt due the former firm, we have no doubt the others may be made parties for the assurance of their rights.

If the defendant, in this suit, did not represent the succession of one of the late partners in the house of Harrod & Ogdens, the petitioners would have a right to intervene. But it is expressly stated, that Peter V. Ogden was a partner in that house; consequently Harrod & Ogdens have an interest directly opposed to any judgment being rendered against the defendants. On the ordinary principles then, on which petitions of intervention are received, that now before us must be rejected.

A stranger to a suit cannot be received on record, to aid others in the defence of it. The prayer for an injunction, contained in this petition, is one which, on the facts stated, would have come with as much propriety from the defendants; but with what success, we do not say.

Why the executors of P. Norris wish to be made parties, we cannot discover. As plaintiffs, they have no right—as defendants, how can they be affected by what takes place between the plaintiffs and the succession of P. V. Ogden.

The court sees that the object of this suit, is to make P. V. Ogden's estate responsible in the first instance, to the heirs of Norris. The matters in defence to this demand, will come more regularly from the defendants, than from another party in the shape of a bill of interpleader.

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

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

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

LAFARGE vs. *MORGAN & AL.*

APPEAL from the court of the first district.

Conventional sequestrators, acting without compensation, are subject to the same obligations as depositories.

And, when it appears from the facts, in the cause, that they were agents for both parties, their duty was to hold the object placed in their care, until both consented it should be given up, or a court of justice decided which had the better right.

A person, who receives property to keep without reward, is responsible only for gross negligence in keeping it, or fraud in refusing to give it up.

Hence, where A received notes drawn by B, in favour of C, and by the terms of the contract, was to deliver them to the payee, when certain incum-

Hennen, for the defendants. On 26th March, 1821, the plaintiff sold to S. Packwood, a plantation in the parish of Plaquemine, " with the warranty (as the deed declares) of all debts, gifts, mortgages, evictions, alienations, & other incumbrances whatsoever." The certificate of the recorder of mortgages, however, produced at the time of sale, shews that the plantation was subject to an incumbrance in favor of Albin Michel and his wife, of $55,000; and to a general mortgage in favor of a judgment creditor, to the further amount of $1021 87 cents. The vendor declares in the deed, he had already paid $22,666 66⅔ cents, of the sum of $55,000, leaving due to Michel and his wife, only the sum of $32,333 33⅓ cents: and the other mortgage of $1021 87 cents, he obliges himself to cause " to be cancelled as soon as possible." Nothing is said relative to the cancelling of the mortgage of $55,000; nor on the subject of that part of it, which Lafarge declares, had been paid by him, to A. Michel and his wife, who were the vendors of the plantation to him.—

At the time of purchase of this plantation, (26th March, 1821,) by S. Packwood, there was pending, and now is pending, a suit instituted by John Lafarge, against A. Michel and his wife, for the purpose of obliging them to raise the mortgage of $55,000, reserved by them on this plantation, to the extent of $22,666 66⅔ cents, then paid as the vendor declares; the record of this suit was given in evidence at the trial, and now forms part of the statement of facts. The pendency of this suit was notice to S. Packwood, of the controversy between his vendor, and Albin Michel and his wife, relative to this mortgage on the plantation, now about to be purchased by him.— By law he was required to take notice of the suit. *Newland*, 506, 3 *Martin*, 393. And what the law required him to take notice of, he actually knew. Further, S. Packwood was bound to look at the conveyance of this plantation, made by Albin Michel and his wife, to the plaintiff; for in the deed made by the latter, reference thereto is had in express terms. Notice of the controversy between the plaintiff, and A. Michel and his wife, and of the contents of their deed to him, are brought home directly to S. Packwood. Under these

brances on the property, for which they were given, were raised; held that if B forbid A, to deliver them, A was not responsible in damages, though B might, in case he had not a sufficient reason

The certificate of the recorder of mortgages, is *prima facie* evidence of the truth of what is expressed in it.

It may be contradicted, but it is not sufficient to destroy its effect, to shew that it was recorded on irregular testimony.

Unless marriage contracts are recorded under the act of 1813, they do not affect third persons.

It is not necessary for the validity of a renunciation by a married woman at a sale of her property, that it should be done under oath.

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

circumstances, and with these facts, even the plaintiff himself did not require S. Packwood to part with the endorsed and negotiable notes which had been agreed upon, as the price of this plantation: "he agreed," to use his own words, "that he would deposit with the defendants a like sum in the said notes." For what purpose this deposit was made, the receipt of the defendants will shew. It is in the following words:—

"Received, New-Orleans, March 26, 1821, of J. Lafarge, the notes of S. Packwood, endorsed by G. Dorsey, to the amount of fifty-five thousand dollars. The same being part of the notes mentioned in the bill of sale, of a plantation sold by Lafarge, to S. Packwood; held until the mortgages on said plantation are raised by said Lafarge, and when the said mortgages are raised, the notes to be restored to Mr. Lafarge. But the notes to be returned in proportion as the mortgages are raised, so that no more in amount is to be retained, than remains of the mortgage uncancelled."

Five days after the date of this receipt, the defendants, the depositories, were required by the plaintiff, to deliver up to him $38,633 33⅓ cents, of these notes, which they

refused to do: and thereon he instituted against them this suit; averring that they had not performed the condition of the deposit, which they undertook when the said notes were deposited in their hands; and for the violation of the trust of deposit on their part, he avers he has suffered damages to the amount of $10,000, for which he claims a judgment; and at the same time, prays that the notes may be restored to him.

They answer, and confess, that the receipt was given by them, and that they hold the notes mentioned in it; but considering themselves as stakeholders, or depositories, both of J. Lafarge and S. Packwood, they cannot give up the notes until the plaintiff has complied with his agreement to cancel, and raise the mortgages on the plantation. And as S. Packwood had previously notified them not to hand over the notes, inasmuch as he considered the incumbrances as still existing on the plantation, they answer, that in discharge of their trust, as depositors, they cannot yield up the notes, but with his consent. They deny all the other allegations of the petition of J. Lafarge, and put him upon the strict, full and legal proof thereof. S. Packwood.

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

being made a party to the suit, by the answer of these defendants, avows that he gave the aforesaid notice to them; and avers that the mortgages existing on the plantation, at the time of purchase, still remain in full force; and therefore, that they are bound as depositories to return the notes, and that the plaintiff has not a right to demand them until all mortgages and incumbrances are raised.—Such is an abstract of the pleadings on which the parties went to trial; and the defendants having been condemned by the jury, in direct violation of the charge of the court, have appealed to this court for redress.—A statement of all the evidence given to the jury accompanies the record, and on it this court is called upon to pronounce.

As the plaintiff has chosen to resort to the defendants alone, without making S. Packwood a party to his action, it is requisite that the court should investigate attentively the character in which they stand in this transaction. They aver that they have no interest whatever in retaining the notes; and it clearly appears from the evidence, that it is a matter of total indifference, as far as regards them, into whose hands those notes may be

placed. They are not entitled to any commission or charge for their trouble or responsibility in keeping the notes; the undertaking, therefore, on their part, was gratuitous. The plaintiff in his petition, has repeatedly styled their undertaking a deposit. What was the nature and kind of this deposit, then becomes an important question, preliminary to every other enquiry. Our *Civil Code*, 411, considers deposits as of two general kinds: the deposit, properly so called, and the conventional and judicial sequestration. The present deposit, with the defendants, was the result of an agreement, as the plaintiff states in his petition; and was to serve as a security, that the mortgage of $55,000 should be cancelled. This agreement could have been made with no other person than the purchaser of the plantation, and this security must have been for his benefit alone. The defendants were not interested in the transaction, were mere stakeholders; or in the language of our *Civil Code*, they were conventional sequestrators. The two parties, then to this agreement of deposit, were the plaintiff, and S. Packwood, the purchaser of the plantation: and this, the plaintiff had agreed to do

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

in order to afford S. Packwood, his vendee, a security for quiet possession, and to comply with the general guarantee in his deed, against "all debts, gifts, mortgages, evictions, alienations, and other incumbrances whatsoever."

* Having then conclusively settled the relative situation of the contracting parties, as respects this deposit: the next inquiry will naturally be into *the nature and extent of the undertaking* assumed by the defendants, when, as depositories, or conventional sequestrators, they receipted for the notes. In the words of the receipt, the notes were to be *held until the mortgages on said plantation are raised*, "and when said mortgages are raised, the notes to be restored," but the notes to be returned "in proportion as the mortgages are raised." The notes then were not to be returned so long as mortgages to the amount of $55,000 should incumber the plantation, and not be raised; but whenever J. Lafarge should raise the mortgages then incumbering the plantation, below the amount of the notes deposited, then no more of the notes were to be retained than should be sufficient to serve as a security for the mortgages remaining to be raised: so that

if at any time it should appear that the plantation remained incumbered only with a mortgage of $30,000, then $25,000 of the notes should be given up to J. Lafarge; and so on, in proportion.

But who was to be the judge, or to decide when the mortgages had been raised, according to this agreement made by J. Lafarge with S. Packwood, for his security against the incumbrances which were known to exist at the time of purchase? Assuredly the depositories, the defendants, never intended to take such responsibility on themselves. Nor is there any thing to countenance the supposition that S. Packwood ever intended to trust to their judgment on a point of so much importance to himself; a point which might require a profound knowlege of the very intricate law of land titles in this state. But *there is evidence* before the court amply sufficient to shew that both parties contemplated a decision by a court of justice on the subject of the claim of Madame Michel on this plantation. For, at the time of purchase, such suit was pending. Evidently then, until S. Packwood should express his consent, the defendant could not, with propriety or justice, hand over

East'n District. *May*, 1822.

LAFARGE *vs* MORGAN & AL.

the deposit, or any part of it, to J. Lafarge. They have professed, on the record, their willingness to do so; but this, far from satisfying the plaintiff, is considered as a ground of complaint against them. But let us examine what duty the law imposed on these conventional sequestrators, when the vendor demanded the notes, and the purchaser notified them to retain them. It was then, I assert, their duty to refuse them: their duty to hold them as they have done: and I trust this court will support them in this course of conduct. In the case of a deposit, properly so called, where the depositor voluntarily, for his own benefit only, makes the deposit; and not as in the present instance, for the *security* of a third person, *in compliance with an agreement;* that is in the common deposit, no restoration can be required where there has been an attachment on the property, *or an opposition made on the owner. Civil Code*, 415, *art.* 25. Now here, prior to the institution of the suit, an attachment for $25,000 and upwards, was laid on these notes by a creditor residing in New-York: and moreover, an opposition was made by S. Packwood, to any disposal of them in favor of the plaintiff. But the obligation of the defendants, as conven-

tional sequestrators, was still more formal and express. The notes, by agreement of plaintiff, had been placed in their hands for the security of S. Packwood, and, therefore, they could not, in defiance of his opposition, deliver them to J. Lafarge, when the difference existing between the two parties interested remained undecided. The one contending that he had raised the mortgages; the other maintaining that they were yet in full force. *Civil Code*, 419, *art.* 40. *Ferrari's Bibliotheca*, *verbo* "*Depositum*," *n.* 4. *Partida*, 5, 3, 5. 1 *D'Espeisses*, 240, *n.* 29. *Pothier's Pandects*, 16, 3. *sec.* 3.

Without pursuing the defence further, I might rest the case of the defendants here. For, it appears that they have complied with their obligation, *in refusing to part with the deposit.* Whatever may be the claims and pretentions of the plaintiff, it is not against the defendants that they are to be urged. He mistook his action most eggregiously, when he attacked the depositories. Against S. Packwood, his real adversary, should he have instituted his suit, if he intended fairly to come at the merits of his claim.

Let us, however, suppose, for the sake of ar-

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

gument, that the plaintiff had satisfied S. Packwood, his vendee; that his plantation was unincumbered; that the defendants, without any excuse, had violated the contract of deposit, and refused to deliver up the notes; what, in such case, could have been the remedy of the plaintiff? To make the case stronger against the defendants, let it be granted that these notes, none of which are yet due, and some will not be due until several years, were money. Nothing more could be recovered than the amount of the notes, $55,000, with judicial interest, at the rate of 5 per cent. per annum, from the day of the institution of the suit. *Civil Code*, 41, *art.* 18. To the restitution of the capital only with interest, could the defendants be compelled; and in no case would they be responsible for any damages which the delay of payment might cause the depositor. But here the notes deposited, none of them yet due, are held by the defendants, ready to be produced whenever they can part with them without risk. They undertook a friendly office towards both parties; a gratuitous office which should never be the cause of damage to them, while acting with good faith. *Partida*, 5, 3, *in prœmio*. *Partida*, 5, 3.

10, *note of Lopez*, *n.* 3. *Officium suum non debet esse depositario damnosum.* But, using the utmost severity of the law against them, under the facts presented by the evidence, taken in the most unfavorable view, the defendants cannot be condemned to pay damages, and also to the restoration of the notes. Where the thing deposited produces fruits, both the deposit and the fruits are to be restored; where money has been deposited, interest and the capital shall be paid, but no damages. Only in case of the loss of the thing deposited, through gross negligence, can damages be claimed; and then only as a compensation for the value of the deposit. *Civil Code*, 415, *art.* 18. 1 *D'Espeisses* 232, *n.* 8. *Institutes Justin. lib.* 4, *tit.* 6, *liv.* 17, *with the gloss. Dig.* 16, 3, 1. *sec.* 1, 2 *and* 4. *Pothier's Pandects*, 16, 3, *n.* 51. But where the deposit is ready to be produced, and can be restored unimpaired, the depository can be condemned to the restitution only (*in simplum actio depositi datur contra depositarium*) with costs of the suit. This principle of law is fully established by the authorities last quoted: they were read and insisted upon at the trial of this cause, and the plaintiff's counsel was invited to confute the prin-

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

ciple, if in his power; or to produce a single authority, where the depository, in the voluntary deposit, when he confessed the deposit and had it ready to restore, could be condemned both to the payment of damages and the restoration of the deposit. *This he has not done*, after a month's leisure for the purpose. In fact, the principles of the Roman law, following professedly the law of nature, are too well established on this point; and it is in vain for the gentleman to attempt to shake them by ridicule, argument, or broad assertion. For fraud only is the depository answerable; on that ground only does the law give an action against him. And so far is this principle carried, that if the depository should deliver the thing deposited, into the keeping of a third person: and through the fraud of the latter, it should be lost, in such case the original depository would be discharged of all responsibility towards the depositor on ceding his action against the third person. *Digest*, 16, 3, 16, *with the gloss.* See also the translations of this text made by *Hulot* in French, and *Rodriguez* in Spanish. 1 *D'Espeisses*, 236, *n.* 28. From this latter view of the subject, it is evident no damages could be given against the defen-

dants, however great the amount of them might be proved on the part of the plaintiff. But in fact, he has not produced evidence of any damages; not a syllable is said on the point by a single witness. And if the court should be of opinion, contrary to the proposition advanced by me, that a depository is bound to restore the thing deposited unimpaired, and to pay damages likewise, nominal damages only could be decreed on the principle of the cases, in 10 *Martin*, 687, *and* 5 *Martin*, 193.

I have heretofore argued this cause, as if the defendants had no cause for their refusal to restore the notes; as if the notification given to them by S. Packwood, to retain them was without foundation. Should I not have already satisfied the court, that this action is unfounded, and the plaintiff mistaken in the remedy he is in search of; it will not be difficult, I trust, to make it evident, when the reasons of S. Packwood's notification are considered. In his answer, S. Packwood avers, that the mortgages existing on the plantation, at the time of purchase, have never been raised, and that the plantation still remains incumbered to an amount larger than $55,000.

East'n District. *May*, 1822.

LAFARGE *vs* MORGAN & AL.

and therefore insists that the notes should be retained in the keeping of the conventional sequestrators, until the incumbrances are raised. The plaintiff, on the other hand, avers, that the incumbrances then existing have been raised, and that the plantation is subject only to a mortgage of $16,366 66 cents, and he therefore prays that a sufficient amount of the notes being retained to serve as a security against this incumbrance, the balance may be restored to him with $10,000 damages and costs—as the plaintiff maintains an affirmative proposition, on him lies the burthen of proof. *Ei incumbit probatio qui dicit, non qui negat. D.* 22, 32. As vendor, the plaintiff must shew that he has complied with the warranty, under which he sold; and that the plantation is free from "all debts, gifts, mortgages, evictions, alienations, and other incumbrances whatsoever." *Exceptio contractus non impleti ex parte actoris non a reo ipsam proponente, probanda est, sed ab actore; ex contractu veluti impleto agente, implementum probari debet, et summa ratione. Totum enim actoris fundamentum in contractu ex parte sua impleto, consistit; necessario propterea implementum illud ab adversario negatum probare debet.*" *Ferrari's Bibliotheca, verbo*

"*Emptio*," *art.* 5, *n.* 66. *Tom.* 3, 244. It follows then as a corollary, that the plaintiff in this action must prove satisfactorily to the court, that S. Packwood, the purchaser of the plantation, is in no danger of eviction from any claim against it at the time of sale. And this, independently of any separate agreement for the deposit of notes, to serve as a security against the mortgage, which was known to the parties at the time of contract. So this court expressly decided, refusing to give the vendor of an estate judgment for the purchase money, while it appeared there was on it a mortgage, to the payment of which the purchaser might be exposed, though no suit on it had been instituted. 3 *Martin*, 236, *Duplantier* vs. *Pigman*, *ibid*, 247. *Clarke's executors* vs. *Farrar*. 5 *Martin*, 625. *Dreux's executors* vs. *Ducournau*. The authority of these three solemn and consentaneous decisions is attempted to be shaken by the *obiter dicta*, used in the course of the opinion delivered by judge Derbigny, in the case of *Fulton's heirs* vs. *Griswold*, 7 *Martin*, 223. The justness of the judgment rendered by the court, in this last case, cannot be questioned after an examination of the facts. But the reasoning of the

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

judge, against the opinion which *Domat* founds on a text of the Roman law, is inconclusive, and in opposition to three former adjudications of the court above cited, in which the judge himself had concurred, and against the English text of our *Civil Code*, 360, *art.* 85, as well as against the whole current of authorities, *Roman, French, and Spanish. Code Napoleon, n.* 1653, 13. *Pandectes Françaises*, 95. *Domat*, 1, 2, *sec.* 3, § 11. *ibid. sec.* 2, § 22, *note*, (*q.*); 1 *D'Espeisses*, 26, *n.* 1, *Tertio*; 1 *Automne*, 284, 2 *Automne*, 408. *Julien, Eléménts de jurisprudence*, 303, *n.* 16. *Digest, lib.* 18, *tit.* 6, *liv.* 18, *sec.* 1, *with Godefroy's note, n.* 31, *and the gloss thereon; Code, lib.* 8, *tit.* 45, *liv.* 24, *with Godefroy's comment and the gloss. Ferrari's Biblicotheca, verbo*, "*Evictio*," *n.* 60. *Castillo, lib.* 4, *cap.* 42, *n.* 72–76.

As the counsel for the plaintiff have said nothing below controverting these authorities, it may be taken for granted, that whenever the vendee can establish the existence of outstanding incumbrances on the property which he has purchased, tending to shew that he may be troubled in his possession, the vendor cannot enforce the payment of the purchase money. To shew then the evidence of such danger shall be the object of my succeeding observations.

The first and prominent incumbrance existing on this plantation, is that of $55,000, which was created by the act of purchase by J. Lafarge in favor of A. Michel and his wife, (a copy of which sale and mortgage forms part of the statement of facts) and which was certified to be in full force at the time of purchase from the plaintiff, by S. Packwood. This same mortgage of $55,000, or any part of it, Mrs. A. Michel refused to cancel, raise or annul, though J. Lafarge alleged that he had paid a very considerable portion of it, and that A. Michel, her husband, had given his discharge therefor in his favor (see the suit instituted by *J. Lafarge* vs. *A. Michel and his wife*, on the 18th August, 1820, (*n.* 3484, *District Court*) forming a part of the statement of facts.) The counsel who now advocates the cause of the plaintiff, avers in his petition, that "without the signature of Madame Michel he cannot procure the discharge of the said mortgage." This suit was known to S. Packwood, when he purchased from the plaintiff: he had not only constructive notice of it, (*Newland on Contracts*, 506. 3 *Martin*, 393) but had read it and communicated it to his counsel, and that counsel thought, with the

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

counsel of Lafarge, that "without the signature of Madame Michel he could not procure the discharge of the said mortgage." That counsel, moreover, then considered, and now considers, the renunciation made by Madame Michel, as insufficient, and that it would require a very formal signature on her part to discharge the mortgage which she held on the plantation. But, all at once we find, without any explanation of the reasons, a different opinion is held by the plaintiff and his counsel: it is not thought necessary to obtain any decision on the suit then pending; the signature of Madame Michel is no longer requisite. A certificate can be obtained from a notary public (without any authority, by the by, on his part to grant it) that some one made a declaration (whether true or false) that he, and not Madame Michel and her husband, was the last holder of the notes, and as such had given a release of the mortgage. But will this court countenance such an attempt to entrap the purchaser as this? He looked for a real release and discharge of this mortgage from Madame Michel, as he had every inducement to believe would be obtained on the suit then pending; or otherwise, before he

could take the risk of purchasing this plantation on the simple guarantee of J. Lafarge. It is urged now seriously, in opposition to his former opinion, that Madame Michel has no claim of any kind whatever on this plantation: and he has really displayed much gallantry in defending Madame Michel from that odious conduct, which he considers the defendants would make her guilty of, if she should urge any such claim. I agree that Madame Michel is "a lady of the highest respectability;" but surely it would be no blemish on her fair character, to urge a legal right in a court of justice, for the purpose of reserving from the wreck of the fortune of her husband, now a bankrupt, a support for herself and children. If such conduct would be odious in the eyes of the counsel, in what terms will he express himself against her, for her conduct in refusing to join in the release made by her husband, of the incumbrance which Lafarge alleges he had paid? And above all, where will he find words to characterise the defence set up to the action instituted and now pending against her by Lafarge? I deem it almost necessary to apologise to the court for making an answer to such kind of objections:

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

for the *respectability* of suitors is not to be weighed in the balance of justice, but the legality of their pretentions. To this alone then will I confine myself. The plaintiff's counsel insists that it is incumbent on the defendants to shew conclusively the existence of the incumbrances: it has been shewn most conclusively, that at one time they did exist; and the plaintiff has attempted to shew that he has removed them. The removal of an incumbrance, or mortgage, presupposes its anterior existence; that then must be taken for granted on all sides. Now, for the proof of its removal. The plaintiff produces, not any certificate that the judgment creditor had been satisfied; not even the certificate of the recorder of mortgages, that the judicial mortgage had been cancelled. There is no evidence then of any kind that that incumbrance has been removed. But a certificate of the recorder of mortgages is produced in evidence, (not under seal) that the mortgage on the plantation in favor of A. Michel and his wife for $55,000, had been reduced to $16,366 66 cts. since the date of the sale to S. Packwood. Without cavilling at the irregularity of this certificate, it is admitted that it is *prima facie*

evidence of the removal of the incumbrance; but it is no more: and can be gone into, as well as shewn to have been given erroneously; or on insufficient evidence, &c. &c., as was solemnly settled by this court. 5 *Martin*, 625. *Dreux* vs. *Ducournau*. The defendant shews by the records of the recorder, on what authority he had given this certificate. It was solely on the certificate of a notary public, that a person had appeared before him and declared that he was the last holder of the notes which Lafarge had given for the purchase of the plantation from A. Michel and his wife; that the notes had been paid, and therefore, that he had released the mortgage. Now, in the first place, by what law is a certificate of a notary proof of any act passed before him? In the next place, could the register, or a court of justice, take, in any case, the certificate of a notary, instead of the copy of the act itself? Would this court, or any other court, notice the certificate of a notary, stating the contents, or purport of an act passed before him? No; nothing but a certified copy of the act itself would suffice; for the certificate of a judgment is not sufficient; a copy must be shewn.

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

2 *Martin*, 245. *Kershaw* vs. *Collins*. But this is not all: had copies of the acts been produced, what would they have proved? Not the actual payment of the incumbrance: the only evidence, or certainly the best evidence of it, should be in the hands of the plaintiff: the notes themselves which had been given and *paraphed* to identify them with the sale. These notes, if ever paid, should be in the hands of the plaintiff. But where are they? He does not produce them; and the only reason that can be assigned for it, is that in fact he has never paid them. The very point put in issue by the general denial and other part of the pleadings, was payment or not? On the plaintiff alleging it, was it, therefore, incumbent to prove it. But in this he has entirely failed, by not producing the notes themselves. Another question naturally arises, in the absence of these notes; *did A. Michel and his wife ever indorse or pass them away?* The plaintiff has proved that A. Michel and his wife did negotiate a part of the notes: but are they the notes which he alleges he has paid off? The attempt to shew that the incumbrance has been cancelled to a certain extent, is professedly made by virtue of

the act of the legislature of 1817, *page* 60, *sec.* 3. Without taking any of the various objections to the want of the fulfilment of the formalities of the act which might be made, such as *the memorandum of the circumstance* at the foot of each of the notes, not being complied with, *unless the notes had been negotiated*, as the 3d section requires, such cancelling would be of no avail, nor afford any security to a future purchaser. Had these notes been obtained illegally from A. Michel and his wife, no authority would be given to the holder of them to release the mortgage. All these objections, and many others which might be made, was I not afraid of appearing captious, and of tiring the patience of the court, should have been removed by the plaintiff; since, if his allegations are true relative to the payment of the notes, it was in his power.

But, independently of this incumbrance of $55,000, retained by the act of sale from A. Michel and his wife, to the plaintiff, which, I think, it has been shewn, has not been legally and duly cancelled, so as to authorise the court to support this action; there is another incumbrance on the plantation, that arising from the marriage contract of Madame Michel.

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

A copy of the marriage contract between Madame Michel and her husband, and evidence of the payment of her dot, to her husband, was produced. To destroy the effect of this, the plaintiff's counsel have taken two grounds; 1st, that the marriage contract can have no avail against third persons, because no proof has been given that it has been registered agreeably to the provisions of the act of 1813, (1 *Martin's Digest*, 700,) and 2d, because Madame Michel made a formal and effectual renunciation of all her rights against the plantation, when sold by herself and husband, to J. Lafarge. Let us examine these grounds in order. 1st, The marriage contract is null, says the plaintiff because no proof has been shewn that it has been recorded. According to the Spanish laws in force at the time the contract was made, (*A. D.* 1808,) Madame Michel has a tacit mortgage on all the estate of her husband, for the restitution of her dowry. *Part.* 5, 13, 23. And this extends not only to the property in his possession, but to that which he sold subsequently to the receipt of the dowry. 6 *Martin*, 688; 3 *Martin*, 390, *Casson* vs. *Blanque*. Such was the effect of the contract when passed. Could

any legislature subsequently, without violating the obligation of the contract, say that it should not have its former effect, unless one of the parties should record it? Plainly not: such law would be unconstitutional. But, 2d, it is said Madame Michel renounced those rights, by the act of sale. Let us see then, if that renunciation is in form and valid. I say it is not. It is a general renunciation, without reference to any particular law, which is bad. 1 *Martin*, 281: 2 *Colom*, 141. The renunciation, moreover, is not valid for want of the oath required by the Spanish law. 2 *Colom*, 141; *Seguenza*, 68, *n.* 13, *idem.* 69, *n.* 17, 2 *Febrero* (*edt.* 1818,) 97, *n.* 121. And it is not sufficient that the oath should be put in the act, but it must have been actually administered. 2 *Febrero*, 96, *n.* 120. And the notary should certify the fact. *Ibid.* As Madame Michel, also appeared in this act as surety for her husband, a special renunciation of the 61*st law of Toro*, was requisite for its validity. Since the Spanish law, when not repealed by the acts of our legislature, is in full force, the court is bound to pronounce that an act without these formalities is not valid. These requisites were not introduced from the canon

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

law; but are as much a part of the Spanish law, as any part of the *Partidas*. In every contract where married women are parties, correct notaries always complied with them, more particularly with the formality of the oath. I conclude then, that Madame Michel has never renounced, in due form of law, the tacit mortgage which she held on this plantation for her dotal rights. The marriage contract makes all the future estate of Madame Michel dotal; the property therefore, inherited from her father, since her marriage, and alienated in part to Lafarge was dotal, and not paraphernal property, as is stated in the act of sale. For the amount then of the money brought in marriage, $11,000, and for the amount of the property, alienated $15,000. Madame Michel can exercise her right of mortgage, on the estate purchased by the plaintiff, and now in the possession of S. Packwood. Or Madame Michel may demand a restoration of the specific dotal property alienated.

It is worthy of remark, that the plaintiff undertook to have the mortgages on this plantation cancelled, before he could demand $55,000 of the purchase money: it is for him

then clearly and satisfactorily to establish beyond doubt, that the incumbrances have been removed. It is for the plaintiff to shew the very notes which he alleges he has paid; to prove that they have been negociated, if he has paid them to any other persons than the mortgagees; and to give S. Packwood the evidence effectually to resist any demand which might be made by Madame Michel: with the evidence now on record, what defence could Packwood make against an action on the mortgage for $55,000, by A. Michel and his wife? For all that this court has seen, the notes, or a greater part of them, may yet be in the hands of Madame Michel and her husband: certainly, no proof of their payment has been made. Without the notes, and with nothing but the certificate of the notary in our hands, what kind of defence would Packwood make? None at all; judgment would be rendered against him in spite of all of the certificates spread on the record. And with the knowlege of the dotal rights of Madame Michel, brought home both to Lafarge and Packwood, what defence could be set up on the ground that the marriage contract was not recorded? Let the answer be

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

taken from the decision of this court, in the case of *Casson* vs. *Blanque*, 3 *Martin*, 390–3. Or if a decision should be given in the suit now pending, of *Lafarge* vs. *Michel and his wife*, in favour of the defendants, and recognising the right of Madame Michel, to claim on the mortgage of $55,000, what would be the situation of Packwood? A judgment in the present action would not shield him: for, though Packwood, in his answer, has called Madame Michel in to defend the suit, she has not thought proper to make any appearance; and no judgment by default could be taken against her, as has lately been contended, because a copy of the petition and citation, in the French language, has not been served on her; and because no judgment by default can be taken where the subject in controversy is laid.

Without insisting on the written agreement to cause the different mortgages on this plantation to be raised, the principles of law, heretofore quoted, shew that Packwood could not be compelled to pay the purchase money, if suit was now brought against him on the contract of sale. The danger of trouble and eviction is greater in the present instance,

than in that of *Duplantier* vs. *Pigman*, 3 *Martin*, 236. In that case, a small portion of a lot in the faubourg was sold, and the remainder of the estate was in the possession of Duplantier to satisfy the mortgage; here, the whole of the estate is alienated. Here too, we shew the actual insolvency of A. Michel, by making his *bilan*, filed subsequently to the institution of this suit, a part of the statement of facts.—After a fair consideration of all the facts attending this suit, can the court give assent to the assertion of the plaintiff's counsel, that an iniquitous scheme has been meditated against the vendor of this estate, to obtain possession of it, and at the same time to retain a large portion of the purchase money? The purchaser has already paid $50,000, on this estate; can it then be supposed that it could be any object to him to hinder the circulation of the notes for $55,000, not due for years yet? Or that the endorser, G. Dorsey, could have any interest in such a scheme? Is not the reverse of the picture drawn by the plaintiff's counsel, a true representation of the transaction? Is it not apparent that Lafarge wishes to get these notes without performing what the purchaser intended to oblige him to

East'n District. *May*, 1822.

LAFARGE vs MORGAN & AL.

do, before he would consent to give them up? If nothing more was to be done by the plaintiff than to get his friends to go before a notary, and make a declaration, and thereon obtain a certificate, which should raise the mortgages, why give security to the amount of $55.000, that it should be done? All this might have been accomplished in the course of a few hours. No; Lafarge wished to avoid a decision in the suit he had brought against Madame Michel and her husband, to raise the mortgage. He was then afraid of the judgment, which he knew would be pronounced on it; and therefore, down to the present day, he permits the suit to remain pending. J. Lafarge appears to be no novice in land speculations: on this record, we have proof, that he heretofore sold a large tract of land, in the state of New-York; and the purchaser has instituted an attachment suit against him, and actually attached to the amount of twenty-five thousand dollars, of the notes of Packwood, to indemnify him against a defect in the plaintiff's title. That suit too, is now pending, and forms a part of the statement of facts; (see the record of *Ruggles* vs. *Lafarge*, filed on the same day the present suit was instituted.)

One ground of damages alleged by Lafarge, is that he has been hindered from going to France, by the refusal to give up these notes; no evidence has been shewn that he has suffered any damage, in consequence of the disappointment. His former partner, at home, does not appear to have placed much confidence in his return, as on the record, we have an attachment against these notes by him, to the amount of about $8,000; (see the record of the suit, *W. D. Patterson* vs. *Lafarge.*) The institution of these two attachments was urged before the jury, as a consequence of the defendants' refusal to give up the notes. It has not been urged here, because this tribunal would perceive that the argument might be rather used against the plaintiff. To sum up the argument; the depositories are not liable in this suit, for damages; if any had been proved; all that could be obtained against them, would be the restoration of the notes; and the verdict of the jury, for damages could not authorise the court to form a decree, but barely to enter up judgment for the amount. The remedy has been mistaken by the plaintiff; Packwood, the real person interested, and for whose benefit and security the agreement

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

of deposit was made, should have been sued; but even now, ample reasons have been shewn by him why these notes should be retained in the hands of the conventional sequestrators, for his security against trouble and eviction, from the mortgages and claims existing against the plantation at the time of purchase; mortgages which have not been legally proved to be cancelled; claims which it is evident may be successfully urged, for aught that has yet appeared, and which at this moment are the subject of litigation. Should the matter appear merely doubtful, the defendants, who seek a shield from damages, should be absolved, rather than be exposed to a double loss. *In pari causa damno magis quam lucro consulendum.* But when the court weighs deliberately the testimony, the scales of justice, it is confidently believed, will not find the defendants wanting.

Livingston, for the plaintiff. The want of title appears only in the answer of Packwood; he says he directed the defendant, Morgan, to keep the notes, inasmuch as the mortgages have not been raised, *nor the title thereto rendered complete*; but as no other defect *in the title* has

been even suggested in argument, than the pretended incumbrances, I shall take notice of this defence, only to shew the pre-determination of the defendants in this cause, no matter on what unfounded pretence, to deprive the plaintiff of his property.

It is alleged that there were other incumbrances on the property besides those recited in the deed, and that the defendants were directed by Packwood not to deliver the notes until those incumbrances were removed.

On this subject it is worthy of remark, that this defence never occurred to the defendants at the time they chose to break their engagement, nor for a long time after. After the plaintiff had incurred considerable expense, and made great sacrifices to pay off the notes, he procured the certificate of the proper officer, and presented it to the defendants as evidence that he had complied with the condition on which he was to recover a large portion of the notes. To his utter astonishment. they refused to comply. To give more form and solemnity to the transaction, and to make them record their reasons for this extraordinary conduct, he sent his papers by a notary au-

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

thorised to recover his notes. The demand was made; and then, if ever we should expect to hear the true reason why they were detained, let us listen to it. They say "that the mortgages having been granted to Albin Michel and his wife, they were not satisfied with the releases granted by the holders of the notes, but required that the same should be released by Albin Michel and his wife, and that they would not give up possession of the notes in their obligation specified, or of any part of them, until the incumbrances granted by John Lafarge in his act of purchase of said plantation, should have been raised by Albin Michel and his wife." Here then we have the original and only ground for the refusal, not a word of any other incumbrance but that created by John Lafarge in his act of purchase; not a syllable of any objection but to the mode of cancelling the mortgage by the holders of the notes.

Even when the answer is filed, not a single other incumbrance is distinctly referred to. But the answer to the petition gradually enlarges the ground taken in the answer to the notary. That answer, we have seen, goes be-

yond the contract, by saying, that although the mortgage was cancelled by the holders of the notes, they would not give up those they held, until Michel and his wife had also cancelled it. In the answer to the petition they advance another step—the mortgages must be released to the satisfaction of Packwood, and he must authorise them to give them up.

It is not until the hearing, that after full reflection, we are informed, that neither the answer in the protest nor the answer on record, contains the true reasons of the refusal. It is not until then, that we hear of a tacit mortgage of Mrs. Albin Michel, for her dotal and paraphernal rights; and of the defendants' duty to retain the notes, until these and all other incumbrances, they may please to dream of, are released.

I ask the court to consider these circumstances, and determine whether this change of ground is not strong proof that they found untenable that which they had at first occupied. Whether truth can consist in such variety: It is proverbially single: error, on the contrary, is infinite. A single good reason is worth a dozen bad ones, and better than a

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

thousand of such as are inconsistent with each other.

The defendants, for a reason I shall state, wanted to keep the notes out of circulation: having no good reason at hand, they thought of a bad excuse for doing so, and wishing to strengthen it, every effort made it worse.

Let us return, however, to the ground which they thought of last, and on which they seem to place the greatest reliance, *viz.* that there are other incumbrances existing on the land besides those created by the plaintiff.

The incumbrance pretended, is that of Madame Michel. To support it, they shew that she had, on her marriage, property to the amount which she brought in dower, and some paraphernal property to the amount of

But is this enough? For aught that appears to the court, Madame Michel may, at this day, have all the property which she had at the day of her marriage, or at any time since; and this idea is strengthened by the circumstance that Madame Michel has been made a party to this suit, and has not either then, or at any other time, ever said that she had any such claim. The burthen here is on the defendant. He must shew that the incum-

brance exists: he must convince the court that if it exist, it is a justification for him. The wife has a mortgage, not for what she brought in marriage, but for that part of it which she loses by her husband's default. She cannot keep the property and the mortgage both. As she has never made any claim, as she is silent, even when judicially called on; the legal presumption is, that she has retained her property, or is satisfied to look to the rest of her husband's estate for what is wanting; and the truth is, that she has such security, and that we have furnished it; for, with the money we paid for the plantation, the property at the bayou was purchased, which is in Michel's *bilan.*

But whatever may have been the situation of the property, that lady had a better reason for waving her claims.—She had, by a solemn act, with a full knowlege of her rights, renounced them; and it appears to me, that the defendants are making a most unwarantable use of her name, when they employ it to screen themselves from the consequences of their breach of contract, by supposing that she could be guilty of entrapping the plaintiff into contract, under a feigned release, to receive

East'n District. *May*, 1822.

LAFARGE vs. MORGAN & AL.

his money, and then ruin him by an enforcement of her claims: they ought to have produced the clearest evidence, that she intended to do this, before a conduct so odious can be presumed, and on the part of a lady of the highest respectability.

The renunciation is attacked on the authority of *Beauregard* vs. *Piernas*, 1 *Martin*, 281; but no two cases can be more different; the court there determine, that from what was certified by the notary, it appeared that he was himself ignorant of the law which the wife was made to renounce. She only renounced all the laws of *Toro* in her favor, without shewing that she knew what particular advantage she renounced. Here I think there can be no doubt, from the attestation of the notary, that the wife was fully informed of all her rights, and deliberately renounced them.

I make no answer to the argument drawn from the canon law to shew the necessity of an oath to bind the renunciation.

Even this renunciation was not necessary, inasmuch as there was no lien, the mortgage having never been recorded.

But is it enough for the defendant to shew that a tacit mortgage once existed, and if he

do, must the plaintiff, at his peril, prove that it has been cancelled? I apprehend not. When a purchaser bargains for an estate, it is natural that he should make these inquiries, and satisfy himself as to every doubt in the title. But after he has purchased, if he wishes to avail himself in any way of an incumbrance he may discover, his situation is then changed; he must shew clearly, not only that it once did, but that it still does exist; otherwise, no seller would be safe; every buyer could, under this pretence, avoid the payment of the price; no property scarcely, even in this new country, has passed through less than ten or twelve hands, since the first grant.—The tacit mortgages of wives and minors, may be preserved by absences, and repeated occurrences of minority, for an hundred years; the purchaser then has nothing to do in order to avoid his payment, but to shew that some sixty or seventy years since, the great-grandmother of the vendor, and his minor wards of the grandfather had a tacit mortgage, and call on the seller to produce evidence that they have been cancelled; and all this, although before the purchase, he was perfectly apprised of every link in the title.

East'n District. *May*, 1822.

LAFARGE *vs* MORGAN & AL.

To look no further than the present case, it appears that this plantation was bought by Michel, from the syndics of John Blanque; his wife must have had claims; she is known to have brought her husband a large fortune. S. Packwood, therefore would be justified in putting Lafarge to a suit, and force him to prove judicially that Made. Blanque was paid, although that lady never made any claim; although Packwood was apprised of all the circumstances at the time of the sale.

Again, before Blanque, it belonged to John Gravier. I will not detain the court by detailing all the inquiries which this name, so well known in the temple of Themis, would give rise to. But I conclude, that even if we were contending with Packwood, which we are not, the court would say to him, if he used any such pretence to delay his payments—Sir, your defence is not just; you knew when you bought this property, that Madame Michel, Madame Blanque, and the wives of all the other proprietors, through whose hands it has passed, had once a tacit mortgage on the property; if you thought there was risk in buying land, at the uncertainty of the release of their claims, you should either have abstain-

ed from making the purchase, or have apprised Lafarge that you would not pay him till he produced evidence of the release; or at any rate, you should have returned the property if you were not satisfied with the title. You keep his plantation, you receive the profits, and you rètain the price; this is unjust, and looks like something worse, unless you prove that you are in real danger. Shew that one or both of these ladies claim something from the land. Shew that they have menaced with a suit, or at least that they have said, they have a claim. But you have done neither. You have shewn the very reverse; for you have judicially called on Madame Michel, and she has told you, by suffering a default, that you had no right to doubt her honor, or to injure her by the supposition, that she would gainsay her solemn renunciation.

Such, it appears to me, would be the language of the court to Packwood. But what will they say to the defendants, who are strangers to the contract of sale, and who must be judged by the terms of the agreement which they have entered into?

That agreement is precise. It is a receipt for the notes, and a promise to return them on

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

a certain condition. If that condition has been complied with, they are liable to our action; if it has not, then we have brought it without cause, and our complaint must be dismissed. The condition is, that "the notes are not to be returned until the mortgages on the said plantation, are raised by the said Lafarge," and when the mortgages are raised, the notes to be returned to Lafarge; but the notes to be returned in proportion as the mortgages are raised. So that no more in amount is to be retained, than remains of the mortgage uncancelled:—

The first inquiry is—what mortgage?—The defendant now says, (though I think that is shewn to be an after thought, and not like other second thoughts, the best) he now says, the tacit mortgage of Madame Michel; but as I trust we have shewn there is no such mortgage; this would be a sufficient answer.

The defendants' counsel says, that it was intended to include the mortgage of Madame Michel, by the general words of the receipt. Whatever may have been the intent of the gentleman who drew the instrument, I will undertake to prove to demonstration, that the instrument itself will not admit of this con-

struction, and that neither J. Lafarge nor G. Dorsey understood it so. In the deed to Packwood, two mortgages are mentioned; one of fifty-five thousand dollars, the other of one thousand dollars (a judicial mortgage) nothing is said about any guarantee against the $55,000 conventional mortgage; most probably because it was understood that Lafarge would deposit the notes to that amount. But, the judicial mortgage he promises (not to take up, but to warrant the purchaser against) and with this warranty he appears to be content.

After the sale the defendants receive precisely the amount of the conventional mortgage, $55,000, and promise to return them when the mortgages are raised by J. Lafarge. They are to be returned in proportion as the mortgages are raised: so that no more in amount is to be retained, than remains of the mortgage uncancelled. Now, from this phraseology, two things result, both incompatible with the idea that any other than the mortgages recited in the deed were intended; 1st, the mortgage intended in the receipt must be a mortgage that can be cancelled; consequently it must have been registered, or at least written—it can never apply to a tacit mortgage.

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

You may release such a mortgage; but, nothing that is not written can be cancelled.

Secondly—the mortgage intended by the receipt must be one equal in amount to 55,000 dollars; because it is stipulated that the notes, which amount exactly to that sum, are to be returned in proportion as the mortgages are raised; so that no more is to be retained than remains of the mortgage uncancelled. Now, tho', if this was intended of mortgages to the amount of 60,000 dollars, a proportion might be established between the notes returned and the monies paid on the mortgages; yet the remaining part of the obligation cannot apply to any other than the proven mortgage of 55,000 dollars. There must be no more retained than remains due, after the payment of part of the mortgage. This is possible, if they intended the mortgage of 55,000 dollars; it is impossible they meant any other: for instance, suppose Madame Michel's tacit mortgage to amount to 35,000 dollars; the mortgage recited in the deed to 55,000 dollars, here we have an aggregate of $90,000. Lafarge, in pursuance of the receipt, pays $30,000: the defendants must then deliver him notes to an amount equal to the proportion which his pay-

ment bears to $90,000, the whole sum due, that is to say, one-third. They must give him $18,333, which is the 3d of $55,000; but by the terms of the receipt, they are to retain the amount that remains of the mortgage uncancelled. But there remains of the mortgage cancelled on this construction, $60,000: therefore, out of $55,000, they are to give $18,333, and to retain $60,000. It is demonstrated. therefore, that by the terms of this agreement. the parties could have contemplated only the mortgage of 55,000 dollars. If it be objected that the plural "mortgages" are used, I answer, that the last time, it is used in the singular only; and that as there must be an inaccuracy in one or the other, because they cannot both agree, we may as well suppose the inaccuracy to have taken place in the first instance, as in the last.

Should it be further said, that there were actually two mortgages, I answer, that the judicial one for 1000 dollars is specially warranted against, which is not the case with the 55,000 dollars; and therefore, it would seem that no deposit was intended to secure the purchaser against that. In addition to this, we may reasonably suppose that the purchaser

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

would take a deposit of 55,000 dollars, and the seller's guarantee of 1000, for a sum of 56,000 dollars; but not that he would take that deposit for more than 80,000 dollars, without even an express guarantee for the surplus.

The plain, express, unequivocal meaning of the receipt is, that the mortgage to be cancelled was the mortgage of 55,000 dollars. Did the parties understand it differently? Not Lafarge most certainly; he could never have consented to suffer so large a sum to remain in the hands of the defendants, until he could perform the impossible task of cancelling mortgages which never existed, and of producing proof that all the wives of the different proprietors through whose hands the land had passed for the last century, had released their tacit mortgages. He never could have intended to put it in the power of the defendants to retain his property forever. For, that is their construction of the engagement. In their answer they say that they will keep them until the mortgage is released to the satisfaction of Packwood, and he shall authorise them to deliver them. Their engagement then is to be fulfilled, not when justice and their own

promise require, but when Packwood pleases. This answer is drawn by the counsel who drew the agreement, and we are to suppose must express his construction; but if he explained it to Lafarge, in this sense, before he took it, he must have been a mad man to deliver the notes—if he did not so explain it, neither Lafarge, nor any other man could imagine that it contained so different a contract from that which the plain meaning of its words expressed. Lafarge then, whose object it was in selling his property to get possession of the price, certainly never understood it, as the defendants' counsel now does. Did the defendants themselves understand it so? Most demonstrably not. First. because the plain import is different, and when another intent is alleged, the strongest circumstances must be shewn (even if the rules of law would admit such proof) to prove it; but here all circumstances are directly opposed to it. What answer do they give, when called on by the notary? One totally inconsistent with the construction now contended for. They formed their objection solely on the circumstance that the release of the mortgage was made by the holders of the notes, and

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

not by Michel and his wife, and say that they will not give up the notes, until (that is to say, that they will do it then) the mortgage granted by Lafarge, in his act of purchase, should have been raised by A. Michel and his wife. Is it possible more unequivocally to express a construction of the contract, more directly at war with that which their counsel makes them give in their answer, and with that which he makes for them on the trial; they will give up the notes, when Albin Michel and his wife shall cancel the mortgage given by Lafarge; and yet, in their construction, they were to keep them until all the tacit mortgages whatever, should be released, till Packwood should be satisfied! Till Packwood should authorise them! No, certainly not; your first objection is a very bad one; and I shall shew it to be a very frivolous one; a bare pretext to keep your own name from circulating on the notes;—your first, your only objection, was that the release was not executed by the mortgagee, although you acknowleged (and I pray the court to remark this) you acknowleged, though you now affect to doubt it, that the releases were executed by the holders of the notes. I refer for proof of this, to the answer to the notary.

You never thought of the tacit mortgage as a defence, until after you found the stranger would not submit to imposition—until you found an account was required of your conduct—and that a great commercial name could not keep you from a judicial investigation; then indeed professional talent was called to your aid, and its ingenuity furnished you with the two additional excuses; the necessity of Packwood's consent, and the tacit mortgages; but I repeat, and I think I may now do it without fear of contradiction, that the mortgage mentioned in the receipt, did not, by the terms of the instrument itself, extend beyond the mortgage made by Lafarge, to Michel and his wife, for the 55,000 dollars; and that such was explicitly the meaning of both parties to the contract.

If such be the case, we have only to enquire whether that mortgage has been cancelled, so as to leave only a few dollars still due.

Of this, we produced the highest evidence the nature of the case was susceptible of; the certificate of the register, stating that fact.—But it is said this certificate is founded on improper testimony, and that although the

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

register has certified that there is no mortgage beyond the sum specified, he was not warranted in doing so, until he had the release of the original mortgagee. Now, if we are to take the plain words of our statutes for our guide, it must follow not only that the mode we have adopted of procuring the release of the mortgage is valid, but also that it is the only legal mode of effecting it.

It appears by the sale, that the mortgage in question for 55,000 dollars, was for the securing the payment of that sum, for which promissory notes had been given and marked *ne varietur;* it appears that these promissory notes had been transferred by the mortgagee, and were in the hands of several holders.—Now, who does the defendant want to release the mortgage? Why, truly the mortgagee, a person who had no interest whatever in the debt. One who, if he had done it, would have been guilty of fraud. The moment he passed the notes, that moment the holder became subrogated to all his rights in the mortgage to the amount of the notes, and the mortgagee had no more right to cancel it, than a stranger. Equity would have inforced this, without any positive law; but our legislature wisely took

away any doubt on the subject, by passing the act of 4th February, 1817, by the 3d section of which it is enacted, that the bearers of promissory notes, secured by mortgage, may, on receiving payment, cancel the mortgage to the amount of the notes they hold.—In this case the notes having been passed, the holders of them appeared before the notary, and acknowleged satisfaction, of which the notary gave a certificate, and the register cancelled the mortgage. If any thing can be more strictly conformable to law, I have not the ingenuity to discover it. The case in 5 *Martin*, 625, *Dreux* vs. *Ducournau*, has been cited as supporting the defendants' argument: but nothing is more fatal to it; the certificate of the register was there declared not to be conclusive. Why? Because it was given on an order obtained in a suit to which the person really interested, was not a party, although the party apparently interested was. Now, in this case, the party really interested, the holders of the notes gave the release; and the defendants contend, that it ought to have been given by the person only apparently interested, *viz.* the mortgagee.

I make no further remark on the objections

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

to the form of the releases granted by the holders of the notes, than a reference to the *Civil Code*, 466, *art.* 64, by which it appears that all that is requisite for the cancelling of a mortgage, is "the consent of the parties concerned, or having the necessary capacity for that purpose;" now, here the holders were the only parties concerned, and the act gave them the necessary capacity.

The delivery of a copy of the act of release is not made necessary; that provision is made by another article, and applies to the deeds and mortgages.

But if there were any irregularity, by what possible reasoning could it be made to avail the defendants, unless they shew that the mortgage still subsists? But there is no such irregularity; they know the mortgage does not exist. They knew it when they refused to comply with their solemn engagement, and they are bound to pay us the damages we have incurred.

This is the last enquiry—and we were presented on the hearing with an assertion on this head, which I confess, made me smile. We were told that this was a deposit, and that the

depository was liable to no damage, in case he broke his contract: all that could be recovered was the thing deposited. We were not only told this gravely, but I was rebuked for a look of incredulity, with more politeness than I believe my involuntary expression of countenance deserved. We were assured, that strange as it might appear, such, notwithstanding, was the law, and witnesses from all countries, and of all ages, were called to confirm the assertion. *Accursius* and *Ferrari* from Italy; *Alfonso* the learned, and his commentator *Gregorio*, came like the knight and his squire, from Spain. *Pothier* and *D'Espeisses* poured out the treasures of their Gallic lore, and *Justinian*, with his sages from Byzantium, brought up the rear. Each gave his testimony in his own language, and considering the number of the witnesses, it must be confessed there was a marvellous coincidence in their evidence; they all, without exception, declared, that the depository was bound to restore the thing deposited when he should be called on; but, though I listened very attentively, I could hear none of them utter the legal heresy they were called to teach—that, though a man, who made an ordinary promise, should pay

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

damages for the breach of it, yet he who undertook the sacred trust of a depository, might violate it with impunity. A man entrusted with another's whole fortune, in promissory notes, or merchandize, or any other effects, (I think the gentleman did except money) might refuse to deliver it when called on; or when forced to a suit, he, the owner, can recover nothing but the deposit; and the faithless wretch who has deceived him is liable to no penalty, if I recollect right, for the reason is the same, not even to costs. Nay, further, that if the depository chooses to transfer the deposit to another of his own choosing, who loses or wastes it, all he can be called on for is to give the unfortunate owner a power to sue for his property. This last ingenious inference is drawn from the *Dig.* 16, 3, 16, and I think solely founded on too incorrect terms. The original is *eatenus eum teneri*, and this is certainly affirmation that he shall be liable so far; but there are no words of limitation to shew that he shall be held no further liable. The case I think supposes that the first depository had, by the terms of the deposit, a right to transfer it, and that he did it in good faith. But certainly, if trusting in a man's honesty, I

deposit my property with him, and he, with gross neglect, gives it to a man of no responsibility, he is as much liable as if he had been guilty of the conversion himself.

However the law be in this case (and I confess both *Hulot* and *Rodriguez* coincide in their translations, though the *gloss* of *Godfrey* does not agree with them) however, this may be, the law I think is clear from a view of the whole title of the *Digest* referred to by the defendants, that where there is no fraud, there the depository is bound only to restore the deposit, and not even that when it is lost. But wherever there is fraud, he is bound for damages; and that a refusal to deliver the deposit, is considered as fraud, if it be in the defendant's possession, particularly from the following law of that title, *Dig.* 16, 3, 13, *sec.* 1. *liv.* 1, *sec.* 15, 16, 20, 22.

But all this learning on the subject of deposits with which the defence is interlined, is perfectly inapplicable. This is not such a deposit as the authorities relate to; and if it were, he is bound to restore it, unless the person who claims an interest should have made an attachment, or a legal opposition to the delivery. *Civil Code*, 414. *art.* 25.

East'n District.
May, 1842.

LAFARGE
vs.
MORGAN & AL.

This is a special undertaking, by which the person making it must be bound. He has made his own law. He undertakes to deliver up the notes when a certain condition shall be performed. We have shewn clearly that this condition was performed; that we offered legal evidence of that; we made the demand, and apprised the party by a notarial demand, of the damages we should suffer if he delayed the delivery. He refused to comply, and by every rule of law he is liable to pay us those damages. The law on this subject is most clearly with us, and the evidence justifies the amount of damages. The cause was heard before a most respectable jury, chosen by the parties, and if the court think we are entitled to recover at all, they will not, I think, interfere with an assessment made by men every way qualified for the task, and who performed it after a full hearing.

PORTER, J. delivered the opinion of the court. The plaintiff sold on the 26th March, 1820, to Samuel Packwood, a plantation and slaves, for the sum of 110,000 dollars: 25,000 dollars of which was paid in cash, and for the

balance, notes were given, indorsed by Greenberry Dorsey. The act of sale contained; a warranty of all debts, gifts, mortgages, evictions, alienations, and other incumbrances whatever;—a declaration of the vendor, that according to the certificate of the register of mortgages, the land and twenty-nine of the negroes were hypothecated in favor of Albin Michel, for securing the sum of 55,000 dollars; and that he had paid 22,666 dollars 66 cents, in discharge of it. Mention is also made of another mortgage resulting from a judgment, for the sum of 1021 dollars 87 cents.

By an instrument of the same date with the deed of conveyance just stated, the defendants, Morgan, Dorsey & Co., acknowleged to have received of "J. Lafarge the notes of S. Packwood, indorsed by G. Dorsey, to the amount of 55,000 dollars, being part of the notes mentioned in the bill of sale of plantation, sold by Lafarge, to S. Packwood, held until the mortgages on said plantation are raised by said Lafarge, and when the said mortgages are raised, the notes to be returned to Lafarge. But the notes to be returned in proportion as the mortgages are raised, so

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

that no more in amount is to be retained than remains of the mortgage uncancelled."

On the 31st of the same month, the plaintiff presented to the defendants a certificate from the register of mortgages, dated that day, which stated that the mortgage granted by John Lafarge, to Albin Michel and Marguerite Cabaret, his wife, by an act passed 21st May, 1819, for the sum of 55,000 dollars was reduced to $16,366 66 cents; and demanded of them, that the notes placed in their hands, should be delivered up in the proportion that the mortgage had been diminished. To this application, they replied, "that they were not satisfied with the releases granted by the holders of the notes secured by said mortgage, but required that the same should be released by Michel and his wife, and that they would not give up possession of the notes or obligations until the incumbrances granted by Lafarge, in his act of purchase should be raised by those persons."

On the 10th of April following, this action was instituted in which the petitioner demands that the defendants be decreed to give up all the notes placed in their hands, except the sum of 16,366 dollars 66 cents; and that they

be condemned to pay him 10,000 dollars, the damages he has sustained by their breach of contract.

The defendants answered.—Admitting; the deposit for the purposes averred in the receipt: averring, that they were ready to hand over the notes whenever authorised by Packwood, and had always been willing to do so—that Packwood had instructed them there existed on the plantation divers mortgages, particularly one in favor of Albin Michel and his wife, and had forbidden them to deliver up the notes to the plaintiff.

That attachments had been levied on these notes; one at the suit of Samuel Ruggles for 25,000 dollars, and the other at that of William D. Patterson for 6,666 dollars, 66 cents; and they prayed that S. Packwood, and A. Michel and wife, should be made parties, and that if damages were awarded to the plaintiff, they should be condemned to pay them.

Albin Michel was cited, but did not appear. Packwood made himself a party to the proceedings, and averred that he had expressly directed Morgan, Dorsey & Co. not to give up the notes; that they were bound as sequestrators to hold them, until all the mortgages

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

were raised, and the title made valid, and complete in law; and he prayed that they might be decreed to retain them until the plantation and slaves were discharged from all incumbrances or liens whatever.

The cause was tried by a jury, who found for the plaintiff, damages 4,000 dollars. On this verdict, judgment was rendered that the petitioner recover of the defendants that sum, and that they return of the notes placed in their hands, the amount of 38,633 dollars 33 cents. The defendants have appealed.

The first question to be decided, is whether the appellants are responsible, and liable to pay damages for their refusal to give up the obligations when called on. The second is, should they now be decreed to restore them.

It is a matter, perhaps, of little importance in settling the rights of the parties in this action, whether the defendants are considered depositories strictly such, or conventional sequestrators, as with some slight exceptions, not necessary to be noticed in this case, acting in the latter capacity, without compensation, creates the same obligations, as the real contract of deposit.

If we consider them as sequestrators acting for both parties: for Packwood, who had a great interest to prevent these notes getting into circulation improperly: for Lafarge, to whom it was important that they should not be retained after the incumbrances were raised; their duties may be easily defined: they were obliged to hold the notes until both parties agreed to their delivery, or if they could not agree, until a court of justice decided they should be given up.

The whole circumstances of the transaction, as proved in evidence, induce us to regard the defendants as conventional sequestrators, and subject to the obligations just stated.

Should we, however, adopt the construction which the plaintiff contends for, that by the terms of the receipt the defendants undertook to return the notes and obligations on the happening of a certain event; and that in doing so they took on themselves the risk of judging whether it had in reality occurred or not, the circumstances, under which they entered into that engagement, must be considered in ascertaining what consequences follow if they committed an error in the interpretation of it. The contract was entirely gratuitous: nothing

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

of course will make them responsible, but gross negligence in keeping the property, or fraud in refusing to give it up. No proof of that kind has been made in the suit before us. It has not been shewn they had any interest in holding these notes, or that they acted in bad faith. By the words of the receipt they were to give up the obligations when the mortgages were cancelled. If they gave them up before they were cancelled, they violated their contract, and would have been responsible in damages to Packwood, for whose interest that condition was inserted. In what situation then (according to this doctrine) would these men, acting in good faith, have been placed? Without reward or compensation, made responsible in damages for mistaking the law, in a matter which the courts of justice to whom it is submitted, have found difficulty in settling, after much time has been taken for reflection, and the judges have had the assistance of able counsel to aid their deliberations. This never could have been the intention of the parties, and we are all clearly satisfied the law creates no such responsibility. In regard to Packwood, by whose directions the defendants acted, a different question

is presented, and there is no doubt, that if, without a justifiable cause, he prevented the plaintiff from the enjoyment and use of his property, he is responsible in damages for the injury inflicted.

The next question is, whether the plaintiff has a right to recover the amount of obligations sued for. The defendant, Packwood, insists that mortgages yet exist on the property, that they have not been discharged, and that he has a right that every incumbrance should be removed.

The opinion which the court has formed on the whole case, renders it unnecessary to examine a point much disputed, whether the terms of the receipt extended to all liens existing on the property, or merely those of which mention was made in the bill of sale.

The plaintiff, who alleges that the liens on this property have been cancelled or released, first presents us with a certificate from the register of mortgages, to establish the reduction of that in favor of Michel and wife. The defendants object that the recorder cancelled the mortgage on irregular and insufficient evidence, and that it still exists. Testimony, such as was introduced here, is not

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

sufficient to authorise us to say so. The certificate is admitted on all hands to be *prima facie* evidence of the fact stated in it. It is not conclusive: it may be contradicted. But to destroy the credit attached to it, the party who attacks its verity, must do more than offer proof which leaves that verity doubtful. He must shew it to be false: he must establish that the officer acted on evidence that was untrue, not merely on that which was irregular. The holders of the notes were authorised to raise the mortgages. To prove they did not, the appellant insists that copies of the acts would have been better proof to the recorder than certificates of the notary, of what these acts contained. This is, perhaps, true; but it does not falsify the certificate granted by the recorder, that the holders of the obligations had, in fact, raised the mortgages. And we do not see that there is any good cause for the apprehensions expressed, that Michel and his wife may, at some future time, shew these mortgages have not been released. The law makes the recorder responsible, if he errs from design, or from negligence; and if the party in this case dreaded, that this responsibility was not a sufficient guarantee, he should have

offered proof sufficient to authorise us to declare the certificate untrue. In the case of *Dreux* vs. *Ducourneau*, 5 *Martin*, 625, the decree of the parish court, which was the only foundation for the certificate of the register, was shewn to have been granted in a suit where the mortgagee was not a party.

The lien, proceeding from the dower, brought by Mrs. Albin Michel into marriage, is presented as an objection to the petitioner succeeding in this action.

By an act of the legislature, passed in the year 1813, 1 *Martin*, 700; all marriage contracts of this city, are directed to be recorded in the office of recorder of mortgages; and if not recorded agreeably to the provisions therein contained, it is declared, they shall be utterly null and void, to all intents and purposes, except between the parties thereto.

This law is said to be unconstitutional, in requiring acts made previous to its passage, to be recorded. No reason was offered in support of this position, and we have not been able to find any. It impairs not the obligation of a contract, it only prescribes a certain formality to give it effect. If the legislature could not regulate matters of this kind, they

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

could not control the forms of proceedings in our courts of justice, nor pass a law in relation to any thing which already had existence.

A good deal was said on inconveniences that must ensue if the provisions of this act were recognised, as applicable to contracts of marriage. But when the legislature clearly, and unequivocally express their will, it is not for this court to refuse to carry it into effect, because inconveniences may result from so doing. Considerations, such as these, we presume, were in the contemplation of the law-maker, estimated by him, and found not to be of sufficient weight to counterbalance the benefits that were otherwise to be derived from the enactment. Arguments *ab inconvenienti* are well worthy of attention, where the law is doubtful; when it is plain and explicit, our duty is confined to obey what is written, and to enforce it. In the case of *Cassou* vs. *Blanque*, suit had been brought and was pending, when the act was passed.

The renunciation of the wife before the notary, of all her claims on this property, appears to the court, to be binding on her. It follows almost literally the words of 58*th law*

of the 18th title, of the 3d Partida. And the officer, who executed the sale, was cautious in stating to her what right she abandoned.—*Febrero de Escribanos, cap.* 4, *sec.* 4, *n.* 121.

The oath, which the counsel contends, should have been added to it, is not required by this law, nor by any other, that our researches have furnished us with. *Febrero, part.* 2, *lib.* 1, *cap.* 3, *sec.* 1, *n.* 46. It was probably introduced into the Spanish jurisprudence from the canon law. It may have been found useful in deterring married women from violating agreements; but it is not seen how it could have given the contract a greater validity. We have no wish to multiply oaths in the transactions of society. The author just quoted says, though the wife may have sworn once she would not alienate her property, yet the second oath, when she does alienate, shall be binding.

In regard to the attachments levied on these notes, they of course must be released, before the defendants can be compelled to give them up.

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

East'n District. *May*, 1822.

LAFARGE *vs.* MORGAN & AL.

be annulled, avoided and reversed, and proceeding to give such judgment, as in our opinion ought to have been given; it is further adjudged and decreed, that the defendants deliver over to the plaintiff, the notes of S. Packwood, endorsed by Greenbury Dorsey, to the amount of 28,633 dollars 33 cents, as specified in the petition, as soon as the attachments on the same, in the hands of said defendants, at the suit of *Samuel Ruggles* vs. *John Lafarge*, and *William D. Patterson* vs. *John Lafarge* shall be dismissed: and that they pay the costs of this suit.

It is further ordered, that nothing contained in this decree, shall affect, or impair any right which the plaintiff may have to demand damages of S. Packwood, if any be due, for having prohibited the delivery of the notes deposited in the defendants' hands.

PREVAL vs. *MOULON.*

A syndic cannot sue his co-syndic for funds of the estate, in the hands of the latter.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. On the first argument of this case, the court having entertained, and expressed

doubts of the propriety and legality of an action, brought by a syndic of an insolvent, directly against his co-syndic, to recover the funds of the estate, which might be in the possession of the latter, the cause was reserved for further argument on this point.

It is admitted by the counsel for the plaintiff and appellant, that he has not been able to discover any positive rule of law on the subject. His arguments are founded on the inconvenience which would occur, in the administration of justice, from a doctrine contrary to that which he advocates; and an attempt is made to support them by analogy, to the situation of attornies in fact, in cases where a joint power is given to two or more, and to that of co-tutors, and co-executors, who are bound *in solido*, for the faithful discharge of the duties appertaining to their respective agencies. Of these analogies presented for our consideration, the most obvious is that of joint mandatories, or attornies.—Indeed, the difference of situation between such persons, as derive their authority to act for another, by a power immediately emanating from their constituent, and that of syndics, appointed by the creditors of an insol-

East'n District. *May*, 1822.

PREVAL *vs.* MOULON.

vent, to manage his estate, is scarcely discernible; except the commissions allowed to the latter, and their interest in the estate, of which they have the administration; being usually chosen from amongst the creditors.—When two or more persons are appointed to act for another, the concurrence of all is, perhaps, necessary to bind their constituent; unless the mandate constitutes them *in solidum*, but it is clear, that when they are not constituted in this manner, each is bound for his own administration, and for no more. *Curia Philipica*, *lib.* 1, *cap.* 4, *n.* 37.

We are unable to discover any thing in our laws on the subject of syndics, which makes them accountable *in solidum*, for the management of the insolvent's estate.—Their power (when more than one is appointed) is joint; their rights are equal, and the funds which arise from the sales of the property entrusted to their administration, may be held by one, or by all, according to their own private regulations; but no one of them is more entitled to receive, and keep the proceeds of the estate, than another. It is unnecessary to decide the question whether a syndic can legally become the purchaser of

any part of the estate, submitted to his control, with power to sell. But admitting that he can lawfully buy, the price, which is thus virtually in his possession, for the benefit of all the creditors, according to their privileges, may be retained by him, in opposition to any claim of his co-syndics: for *in pari casu potior est conditio possidentis.*

The acts of the legislature of 1817 have been cited to shew the duty of syndics. The same law, which points out their duties, gives a remedy against them for neglect or misconduct in the administration of an estate; but the remedy accorded, is entirely different from that which is sought in the present case. It belongs to the creditors to obtain it, not to any one of the syndics, by suit against his co-syndic.

It is the opinion of the court, that the plaintiff (although, perhaps actuated by the best motives) did mistake his authority in commencing this action; and as the toleration of suits by one syndic against another, who is equally empowered to manage the estate of an insolvent, might lead to results worse than absurd; and as the respective rights of the creditors in this case may be settled, either

East'n District. *May*, 1822.

PREVAL *vs.* MOULON.

by adjudgment for the final distribution of such estate, or by their proceeding in pursuance of the provisions of the act of 1817,

It is therefore ordered, adjudged and decreed, that the judgment of the district court be reversed and annulled, and that judgment be here entered for the defendant, as in case of non-suit.

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

MONTILLET vs. *DUNCAN*.

Strict proof is required of the authority given to a third person to receive notice, in behalf of an endorser.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The only question which this case presents, is the effect of notice of protest to the agent of the defendant.

The power produced does not confer, on the attorney in fact, authority to receive notices. It is true he was in the habit of doing so, and communicating them to his principal. But whether the latter considered these notices good, because they were always handed to him, or because he admitted the agent was appointed to receive them, is not clearly es-

tablished by the testimony. When a case is attempted to be taken out of the general rule, on this subject, a strict observance of which is so important to the commercial world, the testimony should leave no doubt of the fact on which the exception is claimed. Here, however, in addition to the obscurity in which the proof leaves the authority of the attorney in fact, it is shewn that about the middle of November, more than a month before the date of the protest, the defendant had returned to town, and reassumed the management of his own affairs.

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

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

THE STATE vs. *JUDGE PITOT.*

When an act of assembly directs that the judgment of a justice of the peace shall be executed notwithstanding an appeal, it cannot be suspended by an injunction.

APPLICATION for a *mandamus.*

PORTER, J. delivered the opinion of the court. By an act passed the 3d March, 1819, entitled an act respecting landlords and tenants, a

East'n District. *May*, 1822.

THE STATE *vs.* JUDGE PITOT.

summary mode is provided by plaint before a justice of the peace, to enable the former to be put in possession of the demised premises. And the 2d section declares that an appeal from the judgment thus rendered shall not suspend its execution.

D. Seghers had judgment rendered against him under this act, by Gallien Preval, a justice of the peace, in this city. In order to stay execution, he applied to the parish judge for an injunction, which was granted. On application made by the opposite party, it was dissolved. From this decree an appeal was prayed, which being refused, the plaintiff has taken a rule on the judge to shew cause why he did not grant it.

We have the return before us which that magistrate has made, and he states, among other things, that the injunction was erroneously prayed for, and accorded; because, by special law, the execution of the judgment before the justice of the peace could not be suspended.

The parish judge acted correctly in refusing the appeal; for, as the law already cited, has directed, that in every case of this kind the judgment of the justice must be executed,

East'n District. *May*, 1822.

THE STATE. *vs.* JUDGE PITOT.

and shall not be suspended by an appeal: it cannot be indirectly suspended by an injunction. This decision must not be understood to deprive the citizen of the protection of the court, in any case where an interlocutory judgment works a grievance irreparable; nor is it contemplated to lay down a rule that the facts can be taken from the judge's return, so as to conclude the rights of the party complaining; but here it has been admitted, that the judgment enjoined was under an act of the legislature, which prohibits any other court from interfering with the execution of that judgment.

It is therefore ordered, adjudged and decreed, that the rule be discharged, with costs.

Seghers for the state, *Denis* for the defendant.

PENRICE vs. *CROTHWAITE & AL.*

An order of bail will not be granted, on an affidavit, that the sum claimed is due to the affiant, as he believes. When the

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

M'Caleb, for the plaintiff. This cause comes up upon two bills of exceptions, taken by the

East'n District. *May*, 1822.

PENRICE *vs.* CROTHWAITE & AL.

appellant, to the opinion of the judge below; in discharging the bail upon the alleged insufficiency of the plaintiff's affidavit; and in refusing to the plaintiff permission to file a supplemental petition.

creditor makes the oath, it should be positive.

The refusal to receive a supplemental petition, is not a ground of appeal.

A suitor, who appeals from a part, cannot urge any other.

Our law, on the subject of bail, is evidently derived from the English practice. The formalities and requisites for holding to bail, are specially pointed out by statutes, both in England and this state. In England it is necessary in an affidavit to hold to bail, to set forth the cause of action, and the residence of the affiant. 1 *Tidd*, 154. And that the sum is £10, and upwards, &c. And, 12 *Geo.* I, *c.* 29, from the numerous decisions of the courts of Westminster-Hall, guided by the refined technicality of special pleading, the requisites under the English practice have been greatly increased, and it is now necessary to be particularly minute and careful in drawing up an affidavit, to hold to special bail. This refinement and technicality, under our liberal system of jurisprudence, has not as yet, and never will, it is hoped, be recognised by our laws, or insidiously introduced by our judges, whose great duty it is to look to the respective

rights of the parties litigant, founded as they may be, upon law and equity, and not to the manner and form in which they shall come.

The language of our statute is plain and simple. 1 *Martin's Digest*, 482. The plaintiff, in his petition, states the cause of his action to be "for money had and received;"—the amount "four hundred dollars." So there can be no difficulty in saying that the sum was ascertained and specific; the language of the affidavit is positive, as to the amount really due, to the amount of money really had and received. The qualified part of the affidavit (as he believes) plainly has reference to the antecedent words—justly indebted to him. Knowlege derived from moral certainty must include a belief; for we cannot be impressed with conviction of the truth of a thing without believing it; when, therefore, I say, in emphatic words, I know its truth; I but express that belief, which is founded on moral certainty. This is the character of that belief, with which the plaintiff, in this cause, was impressed at the time he made the affidavit annexed to his petition; he had no doubt that the defendants had received the money; he had no doubt that they had received four

East'n District. *May*, 1822.

PENRICE *vs.* CROTHWAITE & AL.

hundred dollars; he had no doubt, from a combination of facts, which had come to his knowlege, subsequent to the payment of the money to the defendants, by the agents of him, the plaintiff, that they (the defendants) had received the money wrongfully; that they had practiced upon him fraud and deception; that property, which they had sold him, was property in which they had no title; so in justice and in equity, he was morally certain, he was under a sincere conviction (for which he appealed to heaven) that the defendants were indebted to him; supported too, by these great and immutable principles, that no man shall receive something for nothing; and that he, who wrongfully receives my money, shall be bound to restore it to me. Our statutes permit the agent or attorney in fact, to make affidavits to hold to bail—their information must be of a derivative character, as communicated from the principal, and creates that kind of belief, as defined by Doctor Johnson, and which is quoted by the counsel of the appellees. If the law is then formed for the protection of the rights and interests of the creditor, giving him a pledge that the debtor shall be forthcoming to answer his de-

mand; if however, in giving this pledge or security to the plaintiff in action, it should previously require certain formalities, would it not be wofully inconsistent that more should be required in the one case than in the other? That it should be said, you shall require security from your debtor, upon making affidavit to certain things: if you swear yourself, be sure you swear positively; if you employ an agent, why, he may swear as loosely as he pleases. That the statute of Louisiana, for holding to bail, declares that the citizen shall be deprived of his liberty. No, rather say, that the treacherous scoundrel shall be obliged to give security, upon the unqualified positive oath of the man who swears for himself, but only requires the simple belief of his friend or agent. All that the law requires, is a reasonable ground, upon which to draw the inference of an existing debt, and it will accord its remedy. The consequence of such a technical nicety will leave the door for perjury open; and such a construction of the law, will force the creditor to secure his debt, to swear in positive language; let his honest conviction and belief be what it may. And in

East'n District. *May*, 1822.

PENNICE *vs.* CROTHWAITE & AL.

the language of Lord Mansfield, it would be using conscience, contrary to all conscience.

The application for the discharge was also too late, for the defendants had plead in abatement, and also the general issue. 1 *Tidd*, 164.

The counsel for the appellees seems to think that we have not a right now to go into the question embraced in the second bill of exceptions, because no exception was taken to the judge's opinion on that point. If such be the fact, then we are too bold to call it a bill of exceptions. Upon reference, however, to the record, it will be found (we believe) that we did take an exception to the judge's opinion. It will not be a sufficient ground to remand the cause, because we did not particularly state all the grounds of appeal.—If there appear sufficient upon the face of the record, to enable this court to decide, it will not send the cause back.

The defendants could derive no possible advantage from such a course, the costs would be increased, and delay occasioned.

The question certainly does not now come up for review, whether the original petition, filed by the plaintiff below, shews any cause

of action whatever. The defendants' counsel never attempted to dismiss us from court upon that ground. When the subject comes before the court (if it ever should) we will then endeavor to shew, that the original petition did contain a sufficient cause of action. The question now for the consideration of the court is, whether or not we should have been permitted to amend, by filing the supplemental petition, as exhibited upon the record. The object, as the court will perceive, was to detail more minutely the circumstances of time and place, and the manner in which the plaintiff's money had come into the possession of the defendants. To these amendments the defendants' counsel had no objection, but contended, a new cause of action was embraced in the supplemental petition. The judge below sustained the objection, and we are now compelled to come to the supreme court to accord to us the privilege under our liberal system of pleading, of amending our petition, by filing the supplement offered to the parish judge. The authority cited, we believe, will support us in the application. 1 *Martin*, 175. 2 *id.* 297. 2 *id.* 102. 3 *id.* 398.

East'n District. *May*, 1822.

PENRICE vs. CROTHWAITE & AL.

Watts, for the defendants. Swearing *to belief* is not a sufficient affidavit on which to hold a defendant to bail.

1 *Tidd*, 155. In point of form the affidavit should be direct and positive—that plaintiff has a subsisting cause of action—as the party making it *believes*, will not in general be sufficient.

Our statute is much more strict. 1 *Martin's Digest*, 482. *sec.* 10. Title Arrest—"In all actions," &c. the plaintiff, in action, on making affidavit of the amount really due of his debt or demand, &c.

He must swear to the amount, and that it is really due. Belief, says Johnson, is "credit given to something which we know not of ourselves, on account of the authority by which it is delivered."

The statute requires plaintiff should know it of himself. The plaintiff sues neither as curator, assignee, nor makes the affidavit as agent, in which cases he might be supposed not to know personally the amount, or whether it was really due. His petition states the transaction to have been between himself and the defendants. He ought, therefore, to have sworn to it directly and positively, as a thing

of his own knowlege. If he could not do so, it is not a case in which the law permits the party to be held to bail.

The appellant has no right to go into the question, whether the judge properly or improperly rejected his amendment or supplemental petition. He took no exception to the judge's opinion on that point. He has only alleged the discharge from bail as error in his petition of appeal. He cannot, therefore, now bring that point up for review.

If it is permitted to be brought up, it is to be observed :—

1st. That the original petition shews no cause of action whatever; for, to say that William paid James a sum of money, which James refuses to pay back to William, is no cause of action; for it is to be presumed William was indebted to James. Had the plaintiff alleged that he paid thro' fraud, duress, or mistake, he might have had grounds for a recovery; but as it stands on the declaration, there is no cause of action. If the amendment contains a cause of action, it is certainly a new one, as there is none in the original petition—but the rules of court do not permit a cause of action to be introduced in the shape of an amendment.

East'n District. *May*, 1822.

PENRICE *vs.* CROTHWAITE & AL.

More particularly in an action commenced with bail process. The court below was therefore right in refusing to permit the amendment. Had the plaintiff acquiesced in the decision discharging bail, he might then, with more propriety, have asked to amend—if this court confirm the decision of the court below as to bail, plaintiff might then apply to amend, and if a reasonable and proper amendment is refused, he has his redress. But all courts will be more strict in refusing amendments where a party is held to bail, than in a case where he is simply cited to appear.

PORTER, J. delivered the opinion of the court. The parish judge did not err when he decided that the affidavit to hold to bail in this cause was insufficient: swearing, that the defendant owes the affiant as he believes, is not that declaration which the law requires. It should be positive, when the creditor makes the oath.

We cannot go into the opinion of the court, on the refusal to receive a supplemental petition. It does not produce a grievance irreparable in this case, and, therefore, is not a decision from which an appeal lies, *ante*. 275.

If it was, the plaintiff could not have it examined now; for, by his petition, it appears he has appealed alone from the judgment discharging the defendant out of custody.

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

FLOGNY vs. *ADAMS.*

APPEAL from the court of the fourth district.

If a claim be made in one capacity, and proven to be due in another, the court will give judgment on the merits, if the adverse party makes no objection.

PORTER, J. delivered the opinion of the court. The plaintiff and appellant claimed in his petition, the sum of 364 dollars, by reason of a promissory note made to him by the defendant.

On the trial he produced a note payable to Pierre Flonion, for the amount mentioned. This note was not annexed to the petition, or made part of it by reference. The defendant objected, that it did not correspond with the allegation of the plaintiff, and the court being of that opinion, there was judgment of non-suit, from which this appeal has been taken.

We think the court below did not err—the

East'n District. *May*, 1822.

FLOGNY *vs.* ADAMS.

note produced, on the face of it contained a promise to an individual, by a different name than the plaintiff; if it was intended to establish by evidence, *dehors* the instrument, that they were the same persons; the petition ought to have stated the note in the words it was made, and averred the identity. The defendant would then have been informed of the nature of the demand made on him, and have been enabled to come forward with proof, if he had any, to resist it.

We have held in the cases of *Canfield* vs. *M'Laughlin*, 9 *Martin*, 303, *Bryan and wife* vs. *Moore's heirs*, 11 *ibid.* 26, and in *Larche* vs. *Jackson*, *ibid.* 284; that where the parties alleged rights in one capacity, and proved them in another, without objection in the inferior court, we would proceed to give judgment on the merits. These cases were decided in pursuance of a provision in the *Novissima Recopilacion*, 11, 16, 2; and upon the consideration that the principle of law which requires proof, and allegation to correspond, was made for the protection of the adversary, who might wave it if he chose.

Should, however, the objection be made when the testimony is offered, the law which

authorised these decisions, does not apply; and the equity on which they were founded vanishes. Another rule governs them; that which requires that there be no variance between the evidence and the demand. *Febrero, lib.* 3, *cap.* 1, *sec.* 7, *n.* 283, 8 *Martin*, 400.

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

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

HARROD & AL. vs. *PAXTON.*

Whether the word *executor*, in an endorsement is to be considered a one of description, or as indicating that the endorsement is made in right of the testator?

In remanding a case, when it does not clearly appear which of the claimants has a right to the money recovered, the supreme court will decree it to be paid into court

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The plaintiffs are holders of the bill of exchange, on which this suit is brought by endorsement from "G. M. Ogden, acting executor of P. Norris," to whom, and Rowland Craig, also executor of Norris, it had been transferred by the defendant.

The intervening party alleges, that Ogden endorsed the bill after his authority, as executor, had expired; that the indorsees had

East'n District. *May*, 1822.

HARROD & AL. vs. PAXTON.

knowlege of the fact—that the legal right to it is vested in the heirs of Norris, and that they (the interpleaders) have been recognised as such, by a decree of the court of probates.

There was judgment of non-suit in the court below—both plaintiff and heirs of Norris have appealed.

It is unnecessary to give any opinion whether the word executor, in the endorsement of this bill, must not be considered as one of description alone, or as indicating that the endorser acted in right of his testator; in either point of view, the plaintiffs could not succeed in shewing a right to the bill—in the first, because it wants the name of Craig; and in the second, because the transfer was made after the authority of the executor had expired. We think that judgment must be given in favor of the heirs of Norris, in whom the legal title is vested.

But the plaintiffs aver, that this bill belongs to a commercial concern, in which they were connected with the late P. Norris: that his estate owes them, and that they have a right to have the proceeds of this judgment. This is denied by the heirs, and there is no

evidence on record to enable us to decide between them. The money therefore must be paid into court, subject to the decree which may be given on the issue thus joined between the parties.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that the heirs of Norris, who have intervened, do recover of the defendant, the sum of three thousand dollars, with interest, from judicial demand and costs of suit; and it is further ordered, that this cause be remanded to the district court for proceedings on the issue, joined between the plaintiffs and the intervening party in this suit, and that until the same be decided, the money made on this judgment, shall be paid by the sheriff into the hands of the clerk of the district court, subject to a final judgment in the premises; and it is also ordered, that the appellee pay the costs of the proceedings heretofore had in the court below, and the costs of this appeal.

Grymes for the plaintiffs, *Seghers* for the intervening party, *Conrad* for the defendant.

East'n District. *May*, 1822.

GIROD *vs.* PERRONEAU'S HEIRS.

GIROD vs. *PERRONEAU'S HEIRS.*

APPEAL from the court of the first district.

If the judge cannot certify the record in positive terms, the appeal will be dismissed.

PORTER, J. delivered the opinion of the court. We remanded this cause a second time, on a suggestion that the judge might be able to amend his certificate; it now comes up with a declaration, that owing to the length of time that has intervened since the rendition of judgment, he cannot certify more positively than he has already done.

Having exhausted all the means given by law, to get the merits of the case before us, and failed, nothing remains for us to do but dismiss the appeal with costs.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed with costs. *Ante*, 1, 224.

Cuvillier for the plaintiff. *Porter* for the defendants.

DE ARMAS & WIFE vs. *HAMPTON.*

Property acquired by wife, for a valuable consideration, during marriage, may be sold by husband and wife.

Marriage con-

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. This case was before us in May, 1819, and July, 1820. 6 *Martin*, 567, 8 *Id.* 432. Since

that, the pleadings have been amended, new evidence introduced, and the same judgment having been given in the district court, the defendant has again appealed.

The new evidence does not appear to put the case in a very different point of view.

tract not recorded in pursuance of the act of 1813, has no effect against third parties.

The statement of facts now shews that the premises sold by the plaintiffs to the defendant, and the price of which they now claim, were purchased by Mrs. De Armas' first husband (J. W. Scott) before their marriage, and on his death, descended to their two sons.

That since her late marriage, the youngest of these sons died, and she inherited thereby one half of the premises; the other half of which has since been adjudged to her, at the price of the valuation.

This last half, being an acquisition for a valuable consideration, was the proper subject of a sale by the plaintiffs. But the defendant contends, that the district court improperly declined to consider the other half, which Mrs. De Armas obtained by inheritance, on the death of her younger son, as dotal, under the marriage contract—in this the opinion of the court is with him.

It is urged that the defendant has nothing

East'n District. *May*, 1822.

DE ARMAS & WIFE *vs.* HAMPTON.

to fear from the claim of Mrs. De Armas, under her marriage contract, in which all the real estate which might accrue to her by inheritance, during her marriage, was declared to be dotal, as this marriage contract was not recorded according to the provisions of the act of 1813. 1 *Martin's Digest*, 702. This circumstance, which was not noticed at the first hearing of this cause, in 1819, is now pressed on us. We lately considered the effect of it in the case of *Lafarge* vs. *Morgan & al.* and are of opinion that the neglect of recording the contract, prevents its effect against a third party.

It is not urged that the defendant had, at the time of the purchase, any knowlege that a part of the premises was dotal: this renders it useless to inquire whether a purchaser, with notice, may avail himself of the neglect to record. The circumstance of notice having reached him, after the price became payable. cannot affect a right fairly acquired.

For these reasons, it is ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.*

De Armas for the plaintiffs, *Preston* for the defendant.

PORTER, J. did not join in this opinion, having been of counsel in the cause.

CROGHAN vs. *CONRAD*.

East'n District
May, 1822.

CROGHAN
vs.
CONRAD.

APPEAL from the court of the first district.

A note, the payments of which is secured by a special mortgage, may be sued on, in the ordinary way.

MARTIN, J. delivered the opinion of the court. The defendant, being sued on a promissory note, pleaded the general issue, and that the plaintiff cannot maintain his present action.

The district court gave judgment for the defendant; the evidence shewing that she had given a special mortgage to secure the payment of the note. The plaintiff appealed.

The appellee relies on *Pothier des Hypotheques*, *n.* 155, where it is said that the creditor who has a notarial act, an executory title, *un titre executoire*, must resort to it, and cannot sue in the ordinary way, *par la voie de la demande.*

This writer cites no authority, and *Bernadi*, in his edition of Pothier's works, observes that this opinion appears to him a hazardous one.

In the present case, the defendant made a promissory note; the circumstance of her securing payment by a special mortgage, strengthens, does not weaken, the note; nor does it render it an authentic title.

In giving afterwards a mortgage, she entered into an accessary contract—one which fortifies, but does not mar the principal.

East'n District. *May*, 1822.

CROGHAN *vs.* CONRAD.

Proceedings by the *via executoria* are considered by *Febrero*, and the author of the *Curia Philipica*, as introduced for the benefit of the creditor—they consider the *via executiva*, and *via ordinaria*, as different, but not contrary means, given by law to the creditor, and they both think that even after resorting to the one, he may pursue the other, and afterwards return to the former.

Si el acreedor intenta primero la via executiva; y luego pasa á la ordinaria, podrá dexar ésta y continuar aquella, pagando al deudor las costas causadas hasta alli en la ordinaria: la razon es, porque aunque estas dos vias son diversas, no son contrarias. A mas de que la execucion esta introducida en su favor. 3 *Febrero*, 2, *sec.* 2, *n.* 115, *Curia Philipica*, *executoria*, *n.* 1, *sec.* 2.

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 *a quo*, it is ordered, adjudged and decreed, that the plaintiff recover from the defendant, the sum of twelve hundred and twenty-five dollars, with interest (as is ex-

pressed in the note) at the rate of ten per cent. from the 5th of May, 1821, till paid, with costs in both courts.

East'n District. *May*, 1822.

CROGHAN vs. CONRAD

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

DAUNOY vs. *CLYMA & AL.*

APPEAL from the court of the first district.

Proof cannot be received of the insanity of a vendor, whose interdiction was not provoked.

Nothing can be assigned as error appearing on the face of the record, but matter of law, which (without the adversary's consent) could not have been cured by other proceedings in the cause.

PORTER, J. delivered the opinion of the court. On the trial of this cause the plaintiff offered to introduce witnesses to prove that his ancestor was insane at the time of executing the deed of sale, under which the defendants, Johnson & Bradish claim; and that the insanity was notorious.

As no sentence of interdiction had been provoked, in the life time of the vendor, we are of opinion the judge did not err in rejecting the evidence offered. *Civil Code*, *art.* 16, 80. In *Marie* vs. *Avart's heirs*, 10 *Martin*, 27, this provision was held not to apply to donations *mortis causa*, or rather to be controled by another article of the same work, in relation to acts of that description. The applicability

East'n District. *May*, 1822.

DAUNOY *vs.* CLYMA & AL.

of the law, however, to contracts such as that before the court, was, however, not doubted in that case, nor is it doubted now.

The other matters alleged as a ground of reversal, cannot be examined. Nothing can be assigned as error appearing on the face of the record, but matters of law, which (without the adversary's consent) could not have been cured by other proceedings in the cause.

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

Cuvillier for the plaintiff, *Grymes* for the defendants.

WALSH vs. *COLLINS.*

Costs are incidental, and accessary to a judgment, and the jury cannot allow them to a defendant against whom a recovery is had.

The party, from whom land is recovered, ought to be charged for the use and occupation, from the day of the legal demand.

APPEAL from the court of the third district.

This suit was instituted to recover a tract of land, in the possession of the defendant, and $40 for the use and occupation.

The defendant pleaded the general issue, title in himself, and prescription.

There was a verdict and judgment in favor

of the plaintiff, for one half of the land; but he was condemned to pay costs. He appealed.

Watts, for the plaintiff. 1st. The verdict is contrary to evidence—the defendant's acquiescence in plaintiff's title being fully proved, so as to destroy defendant's equitable title.

2d. It is contrary to law in ordering plaintiff to pay costs.

3d. The verdict is defective in not adjudicating on the rent claimed by plaintiff.

I. It is evident from the probate sale of Adams' estate, that the whole tract was intended to be, and was sold. The description in the process verbal of that sale includes the whole. The testimony of Wheeler proves, that in the lifetime of Adams, and when Adams contracted to sell Wheeler this very land, the defendant acknowleged the right in the whole land to have passed to Adams, under the sheriff's sale. The defendant agreed to pay Wheeler $50 rent per annum, for the land, and did pay part of that rent according to Wheeler's testimony.

Creswell's testimony is, that defendant pro-

East'n District. *May*, 1822.

WALSH *vs.* COLLINS.

mised to pay plaintiff $40 per ann. rent, for the land, and this after the probate sale.

Austin's testimony is clear and positive, that on returning from the probate sale, the defendant admitted that he had no ownership in the land—that he expected plaintiff would let him have, in other words, sell him half the land.

Austin heard nothing of the claim at the sale, and he is a brother-in-law of the defendant. Defendant did not state his claim in his conversation with Austin, but acquiesced in the sale of the whole to the plaintiff. Austin states it as the general impression, that if defendant had bid for the land, plaintiff would not have bid against him; much less would plaintiff have bid at all, if he had heard of any claim of defendant's to the land.

It has been decided in equity, although I cannot lay my finger on the decision at present, that a party who, with his eyes open, stands by and permits his property to be sold, without claim or opposition, is accessary to the fraud, error or deception; is consenting to the sale, and never afterwards can impeach it; and surely no principle is more equitable. This land originally sold, at a long credit, for

$600—when worn out, is sold at sheriff's sale to Adams for $300—contracted to be sold by Adams to Wheeler for $350. Is it to be believed that Walsh would give $400 for half of it, or for a disputed title to the whole? The defendant consented to become tenant to Wheeler, and pays him rent—acquiesced in the sale made by the probate court to the plaintiff, and attorns to him as his landlord, by agreeing to pay him rent. The conclusion is, that defendant had either sold his right to his father, Robert Collins, against whom the execution sale was originally, or permitted the whole to be sold to pay his father's debt. At all events, his silence and acquiescence was such as to estop him from claiming any part of the land, and to extinguish his title to all of it. The jury ought, on the evidence, to have found a verdict for the plaintiff for the whole, and what they ought to have done, this court will do.

II. That part of the verdict which sentences plaintiff to pay costs, is clearly illegal.

Plaintiff demands a piece of land by description. Defendant denies his right to all of it. If, therefore, plaintiff recovers any part of the land, he is entitled to costs.

East'n District. *May*, 1822.

WALSH *vs.* COLLINS.

The verdict gives him one half of the land, therefore he is entitled to costs.

If defendant wanted to avoid this, he ought to have plead specially, admitted plaintiff's right to one half of the land, and expressed himself ready to make a partition; or if an amicable demand was made, on that demand he ought to have expressed his willingness to divide, or if no demand was made, he might have pleaded as above, and the amicable demand not being proved, he would have recovered costs.

In dower, at common law, if the defendant pleads *tous temps prist*, *viz.* ready to assign dower, the plaintiff recovers no costs, and defendant pays none, so here defendant might have admitted plaintiff's right to half the land, and plead "ready to divide," and costs could not equitably or legally have been awarded against him. *Humphrey* vs. *Phinney*, 2 *Johnson*, 484.

In suits in chancery for land, if the complainant recovers part of the land in controversy, he should, in general, recover full costs. *Hardin's Rep.* 1.

If a plaintiff sues for $5000, and a jury were to bring a verdict for plaintiff for $3,000, and add to it that defendant did not owe plaintiff

the other $2,000, would not the latter part of it be surplusage, and would not plaintiff be entitled to costs, and can the jury give them from him?

So here the verdict of the jury is exclusively for the plaintiff—the latter half is surplusage, and merely nugatory. "We, the jury, find for the plaintiff, one half of the land in question, and for the defendant the other:" would not the title to the whole of the land have been equally *res judicata*, if the latter member of this verdict had never existed.

The rights of plaintiff and defendant would have been the same as they are now, if the jury had found simply a verdict for the plaintiff for an undivided half of the land. In *Bolton & al.* vs. *Harrod & al.* 10 *Martin* 115, and *Nugent* vs. *Delhomme*, 2 *Martin*, 307, the court say, costs are incident to the judgment; of course they go to the party who gains the judgment, and who is that? Surely, the plaintiff; for he gains by it one half of that land of which the defendant denied him any part. The defendant gains nothing by the verdict—by it he loses half of what he claimed, and was in possession of. A jury have no right nor power to give costs—they are a part of the judgment of the court on the verdict. If the court af-

East'n District. *May*, 1822.

WALSH *vs.* COLLINS.

firm this part of the verdict and judgment, they will decide contrary to the above decision, for they will give costs to a party in whose favor no judgment was rendered.

III. The plaintiff claims rent for the land—$40 per ann. for the whole, having supposed himself owner of the whole. The verdict finds that plaintiff is owner of one half.

Plaintiff is, therefore, entitled at least to $20 per ann. for his half. It appears in evidence that defendant had agreed to give $50 per annum to Wheeler for the land; and also from Creswell's testimony, that $40 per ann. was a fair rent for the place.

Plaintiff became owner in January, 1817—he is, therefore, entitled to rent up to April, 1820, *viz*: 3–3 c. $20 per annum, is $65. The jury were bound to give a verdict for the rent, as it was demanded in the petition. If the court will not take upon themselves to say what the rent ought to be, they must send the cause back to have it ascertained by a jury. The court may decide on the amount of the rent. Had the jury given too much or too little, this court could have corrected their verdict, and the facts being all before the court, it can decide and draw the proper con-

clusion, and give a final judgment. It was done so in *Poeyfarre* vs. *Delor*, 7 *Martin*, 3.

I apprehend that I have made it clearly appear to the court that the defendant, by his acquiescence, his conduct and actions, has recognised the plaintiff's title, and is estopped from disputing it; and the verdict is contrary to evidence, in finding only half the land for the plaintiff; and that on the evidence, plaintiff is entitled to a judgment for the whole.

That on the second point, so much of the verdict as goes to make plaintiff pay costs, is illegal, and that the verdict ought to have given plaintiff costs against the defendant, inasmuch as the judgment is for the plaintiff.

And that on the third point, the cause must be sent back for the jury to find a verdict as to the rent, or the court may decide on the evidence before them.

Lobdel, for the defendant. The plaintiff has no right to a new trial, or a decree of this court in his favor. 1st. Because, from the testimony, the defendant is the owner of the two hundred acres of land, by an equitable title. 2d. Because, the defendant has acquired a legal title, by prescription. 3d. Be-

East'n District. May, 1822.

WISE vs. COLLINS.

cause, the lessor of the plaintiff, never had a right in more than one hundred acres of the land. 4th. Because the confessions or laches of the defendant, if any, did not take away from him a vested right.

I. The agreement entered into by Thomas Pollock, Robert Collins and Jacob Collins, states that Thomas Pollock is to give Robert Collins and Jacob Collins a *bona fide* deed for the two hundred acres of land, on the condition of the Collins' paying to him, in two payments, the sum of six hundred dollars, which was to be the full consideration therefor. 2d. The deposition of Mrs. Jane Percy, states, that she knows an agreement was made with Thomas Pollock, by Robert Collins, and Jacob Collins, for the two hundred acres of land, for which they were to pay Pollock, in the years 1809 and 1810. That captain Percy made the payment for Jacob Collins, to Pollock; that Robert Collins failed in making his payment, and that in consequence of such failure, Jacob Collins paid the residue, at the request of Robert Collins and Thomas Pollock; and that Robert Collins gave up his right to the agreement; and also agreed that Jacob Collins, should receive the

deed in his own name, and for his own benefit; in consequence of such payment, that Jacob Collins, the appellee, then lived on the land, and now lives on it. There is no testimony on the record, which contradicts the agreement, or the deposition of Mrs. Jane Percy. But the appellant's counsel excepted to their being received as evidence. The agreement being the evidence of the original equitable title from Thomas Pollock, from whom both the appellant and the appellee claim the land, was correctly received by the judge, to shew what interest they possessed, having the highest evidence the nature of the case would admit.

The deposition of Mrs. Percy, was taken by consent, and all waver of objection to the time, place, and manner; and as the appellant's counsel saw the interrogatories, and consented to propounding them, every direct answer to them, and the deposition itself, without any alteration, must be received; her personal appearance was expressly dispensed with—consent cures defect.

Although the sheriff's deed, and the extract of the process verbal, each express the conveyance of the two hundred acres of land, yet they derive their efficacy, if any, from

East'n District. *May*, 1822.

WALSH *vs.* COLLINS.

Robert Collins, who, it seems, from the testimony, parted with all the interest he possessed in the original agreement, on failure of his covenants, to Jacob Collins, the appellee.—On an examination of the testimony, which has any bearing on this point, it clearly appears that the appellee has acquired an equitable title to all the land, by the subsequent parol agreement of all the parties.

Parol evidence may be given to extend a written contract. 2 *Day's Cases*, 137, 3 *Johns. Rep.* 528.

Where a written agreement has been varied by parol, and there has been such a part performance of the parol variation, as would have procured it to be specifically executed, provided it had formed a part of the original agreement, the party will be admitted to give evidence of such subsequent unwritten variation. *Philip's Evidence*, 457.

It is a settled rule, that if a party sets up part performance, to take a parol agreement out of the statute of frauds, he must shew acts, unequivocally refering to, and resulting from that agreement, such as a party would not have done, unless on account of that very agreement, and with a direct view to its per-

formance, and the agreement set up must appear to be the same, with the one partly performed—there must be no equivocation or uncertainty in the case. 1 *Johns. Ch. Rep.* 131, 149 *and* 274, 15 *Mass. Rep.* 85, 3 *Martin's Rep.* 486. A debtor can no longer claim the benefit of the term of time, after he has failed in the performance; *Code*, 276, *art.* 88. An obligation *in solido* is not presumed, it must be expressly stipulated. *Civil Code*, 278, *art.* 102.

II. It appears from the deposition of Mrs. Percy, and other witnesses, that the appellee lived on the land previous to the contract or agreement, and has resided there ever since, even to this day. The first purchase was made in September, 1808, and the appellee has resided before that time, under the vendor, as tenant, and since that period, under a supposed good title, from Thomas Pollock, his vendor, making a period of rising ten years; although the vendor had not granted a deed of sale, yet he had promised to do so, on the fulfilment of the conditions—by this act the appellee acquired an equitable title to the land in question, and living on the land under

East'n District. *May*, 1822.

WALSH *vs.* COLLINS.

such title, for the period of ten years, clearly gives him a legal prescriptive title to it.

The doctrine of prescription is laid down in the *Civil Code*, 478, *art.* 67.

III. The agreement, and the testimony of Mrs. Percy, and some others, shew, that Robert Collins had originally an equal interest in one half of the land, with Jacob Collins, the appellee, which was subject to the performance of a certain condition, each being bound for the performance of his half; the most favoured construction, therefore, of the testimony produced in the court below, cannot give Robert Collins an original interest in more than one hundred acres of the land; the same testimony shews that Robert Collins did not fulfil his condition, and that the same was paid by Jacob Collins, the appellee. If this payment by the appellee, gave him no greater interest in the land, than can be inferred from the original agreement, and Robert Collins, notwithstanding his parol agreement, was the legal owner of one hundred acres of the land, his representatives did not receive by their purchases at the sheriff and probate sales, a title to more than one hundred acres;

and therefore, these deeds conveyed a greater quantity of land than the lessor possessed.— If the representative of Robert Collins, the appellant in this suit, and the plaintiff in the court below, insist upon the original bargain being paramount, and to receive the interest of his lessor in this land, let him pay to Jacob Collins, the appellee, the consideration paid to Pollock, for his half of the land. and the expenses and improvements thereon, since the possession of it by the appellee, and he might then, with some semblance of justice, make a judicial demand of one hundred acres, and truly state he was the representative of Robert Collins in so much. If he wishes equity, let him do equity. A purchaser at sheriff's sale, gets no better title than the defendant had. 3 *Martin*, 622. A judicial sale does not transfer the property of a third person. 9 *Martin*, 489.

The appellant will say he has a right to a reversal of the judgment of the court below, or to have the cause sent back to that court, in consequence of the jury awarding the costs against the appellant, where they found a verdict for him, for one hundred acres of the land; to this I answer, that the appellant set

East'n District. *May*, 1822.

WALSH *vs.* COLLINS.

up a claim to the two hundred acres of land by virtue of his purchase, and the acknowlegment of the appellee, and actually made a judicial demand for the two hundred acres, in which he failed in substantiating; he consequently failed in his action, and was justly chargeable with costs. Again, this claim to the two hundred acres, if good, was an equitable one, arising from the acknowlegments of the appellee, or his laches, and costs in all equitable suits, may be awarded against either party, or both, at discretion. An obligation *in solido*, is not presumed, it must be expressly stipulated. *Civil Code*, 278, *art.* 102.

IV. All the testimony on the subject of confessions and laches, is the testimony of Criswell, Amos Nebb and Wheeler.

Criswell states, that the appellee acknowleged himself the tenant of the appellant, and that he was to pay the appellant forty dollars per annum for the rent; he also swears, that the appellee was present at the probate sale, and did not forbid the sale of the land. Nebb and Wheeler state that the appellee confessed he would as soon the appellant would buy the land, as any other person, and did pay one of them part rent.

In opposition to this testimony, is the testimony of John Stirling, Jesse Robertson, and others, who state that the appellee did forbid the sale of the land, by the probate, and that his work had gone to pay for it. He is also proved to be a very ignorant and illiterate man, easy to be imposed on.

On a close examination of the testimony of Creswell, it will be perceived, that he is very reluctant to give evidence against the interest of the appellant, whose overseer the witness then was, and apparently was very anxious for the success of the appellant, as he is contradicted in one material point by others, and can give no satisfactory reason, for the extraordinary acknowlegments of the appellee—his testimony ought to be received with great caution—this contradiction and inconsistence will go far against the credit of the testimony, if not against the credibility.

The testimony of Amos Nebb was illegally received, and therefore, is no testimony, as he was objected to. He was the son-in-law of Elijah Adams, deceased, to whose succession the land was said to belong. He was the curator *ad bona*, and tutor to the minor children of Adams—he was entitled to an usufructuary

East'n District. *May*, 1822.

WALSH *vs.* COLLINS.

interest in his wife's share of that succession, as one of the heirs of Adams, and therefore, had a direct interest in the proceeds of the land sold to appellant. *Civil Code*, 164. *art.* 86. *Id.* 204, *art.* 240. *Id.* 312, *art.* 248.

Testimony of confessions, at best, is a suspicious kind of evidence, and the civil, as well as the common law, view them with great jealousy.

The acknowlegments or confessions of a party, as title to real property, though they may be good to support tenantry, or to satisfy doubts in cases of possession, yet are not to be received against written evidence of title. 5 *Johns. Rep.* 19.

Declarations of a party to a sale or transfer, and which go to take away a valid right, are not admissible evidence. 5 *Johns. Rep.* 412.

An obligation without a cause, or with a false or unlawful cause, can have no effect. *Civil Code*, 264. *art.* 31.

There is no testimony of the laches of the appellee, as the only sale he is proved to be present, of this land, he expressly forbids, and asserts his title.

From the testimony received, I think there can be no doubt of the correctness of the ver-

dict of the first jury—at all events, that the second jury gave the appellee no more than his just rights; and if there should be doubts of the appellee's title to the two hundred acres of land, there can be no grounds to disturb the verdict of the second jury, who were much better judges of the credibility of the testimony received from the witness, than this court can be.

MATHEWS, J. delivered the opinion of the court. The appellant insists on a reversal of the judgment of the court *a quo*, on three grounds. 1. Because the verdict is contrary to evidence. 2. Contrary to law in ordering plaintiff to pay costs. 3. It is defective in not adjudicating on the rent claimed.

The evidence in the case, traces the title to the disputed premises, back to one Pollock, who transferred his right to R. & J. Collins; the quantity of land being 200 acres. The whole tract was sold by the sheriff of Feliciana, to satisfy a judgment against R. Collins alone; and under this last title, derived thro' one Adams, who was the purchaser at sheriff's sale, the plaintiff now claims. It is evident that the sale under execution, convey-

East'n District. *May*, 1822.

WALSH *vs.* COLLINS.

ed no more than the title of R. Collins, which seems to have been to an undivided moiety of the whole tract of 200 acres, and to this alone the appellant has acquired a title; and was at the institution of this suit, a joint tenant, or tenant in common with the defendant; unless by some act or acquiescence on the part of the latter, he has obtained a title to the whole tract of land. It is not pretended that the appellee has done any act which amounts to a divestment of his right to one half of the property; but that according to principles of equity and natural justice, he has forfeited his right and title by remaining silent, and not giving notice to the plaintiff of his claim, at the time the latter purchased the whole tract, at a public sale, of the succession of Adams, who held by sheriff's deed, executed by virtue of a *fieri facias* against R. Collins alone, as already stated. What effect such conduct might have on a title to immovable property, according to our laws, it is useless, in the present case, to enquire; as from the testimony, the jury may well have negatived the fact of such having been the conduct of the defendant in this case.

The suit being for the whole tract of land.

and the plaintiff having recovered one half, full costs ought to have been adjudged to him, unless the defendant had in his answer shewn a willingness to have the property divided, and partake in the manner provided for by law, in cases of tenancy in common. This he has not done, but denies all right in the plaintiff. Decreeing costs, in the administration of justice, does not appertain to the province of jurors; they are incidental and accessary to the judgment of the court, fixed and ascertained by law, and ought generally to be adjudged in favor of suitors who are successful in their claims. We are, therefore, of opinion, that the verdict and judgment of the court below, are erroneous in adjudging costs to the defendant.

As to the rent claimed, it is shewn by testimony not contradicted, that the defendant agreed to pay forty dollars for one year's use of the whole plantation, if he should be obliged to pay rent. But according to the verdict and judgment of the court below, the plaintiff is a rightful proprietor of only one half. The rent ought, therefore, be reduced in proportion to his interest in the property, which will fix it at twenty dollars per annum.

East'n District. *May*, 1822.

WALSH vs. COLLINS.

A question then arises as to the time for which rent ought to be paid. In the petition forty dollars are claimed for one year, and also an indefinite sum as compensation for the use of the land. The annual value being established, it remains to ascertain the period from which it ought to commence; and this, in our opinion, must be the date of the judicial demand, as the defendant may have been a possessor in good faith, until that time, of the whole tract of land. It appears by the record, that a citation was served on January 15, 1818, and final judgment rendered in April, 1820; consequently the plaintiff is entitled to rent for the space of two years and three months. which amounts to forty-five dollars.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled; and proceeding here to give such judgment as in our opinion ought there to have been given; it is further ordered, adjudged and decreed, that the plaintiff and appellant do recover from the defendant one half of the tract of land in dispute, agreeably to the verdict of the jury. and the report of the experts who

were appointed by order of the court below, to divide the land between the parties litigant. It is also further ordered, adjudged and decreed, that said plaintiff and appellant do recover the sum of forty-five dollars for rent of said plantation, and costs in both courts.

HENNEN vs. *MUNROE.*

APPEAL from the court of the first district.

The master of a vessel is liable for *levissima culpa.*

The master of a packet between Pensacola and New-Orleans, not drawing more than five feet water, is not bound to take a pilot.

The plaintiff *in propriâ personâ.* The plaintiff, on the 18th October, 1821, shipped at Pensacola, on board of the sloop Herald, commanded by the defendant, three boxes of books, in good order and well conditioned, to be delivered in New-Orleans. The sloop sailed on her voyage towards dusk of the same day; and about 9 o'clock that night, there being no pilot on board, while sailing out of the bay, the defendant placed one of the passengers, J. B. Forster, at the helm, that he might go forward to view the land; being unable to discern it, owing to the darkness of the night, returned to the helm, and requested him to go forward for that purpose. The vessel had already approached so near the land, that

East'n District. *May*, 1822.

HENNEN *vs.* MUNROE.

while the passenger was looking out forward, but unable to direct the defendant at the helm, he himself, from the quarter deck, discovered his danger; ordered the peak to be struck; but before his orders were obeyed, and the course of the vessel could be changed, she ran ashore on the Caulker's shoal near the Barrancas, at the entrance of the bay of Pensacola. In order to lighten the sloop for the purpose of getting her off, the defendant judged proper to discharge part of her cargo, among which he included, without the consent of the plaintiff, two out of his three boxes of books, weighing about 200 lbs. each: they were carried on to the beach, about 200 yards from the vessel, and put one on billets of wood, the other on some of the cargo, and about ten yards beyond high water mark; instead of placing them on high land, where they could never be reached even by the spray of the sea, in case of a storm.

Five days after the cargo had been landed, it blew hard and the surf beat up against some of the goods: by which it is supposed, for there is no positive evidence on the subject, that the two boxes of books were damaged. The sloop, however, got off, without any damage;

proceeded to New-Orleans; where the boxes were surveyed in the store of B. Levy, by the port-wardens, who finding the books in two of them damaged by salt water, ordered a sale thereof at public auction in due form of law: which being done, a loss accrued amounting to $629 63: for the reimbursement of which sum the present suit has been instituted by the plaintiff, who alleges that the damage happened from the carelessness and culpability of the defendant.

The judge below, to whom this cause was submitted on the evidence now on record, considered that the defendant, as a common carrier, was bound only to take ordinary care of the goods intrusted to him, and that he could not be charged for the damage, which, by a slight degree of negligence, had been caused to the books, as he conceived, from the beating of the spray, on the rising of the storm, and therefore, gave judgment for the defendant.

That the court erred in the principle of law, on which the case was decided; and has drawn an incorrect conclusion from the evidence, is what the plaintiff now calls upon this court to determine, and which he will endeavour to shew most conclusively.

East'n District. *May*, 1822.

HENNEN *vs.* MUNROE.

It may be premised that the rule of decision in this case, is not to be taken from any statutory provision of this state, but must be drawn from that branch of the law of nations usually termed *Lex Mercatoria*, which is recognised in all commercial states, and is to be collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of. 4 *Blac. Comm.* 67. 1 *Blac. Comm.* 273. 1 *Marshall on Insur.* 19.—*Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac : sed et omnes gentes, et omni tempore, eademque lex obtinebit.* Let us then investigate among the writings of approved authors, what is the degree of care and diligence required from masters of vessels ; for what faults and omissions they are responsible, and in what way they can excuse themselves for damage done to goods committed to their charge.

The Spanish writers inform us that the master of a vessel is responsible for damages, whenever he has not discharged the functions of his employment with due diligence. The slightest fault committed by him, or the omission of that which the most diligent in his art, with the most exact diligence, could perform,

render him culpable, and put to his charge every damage arising therefrom. *Finalmente se tenga por regla ser a cargo del maestre los daños que sucedieren por su culpa,—no haciendo lo que es á su cargo con la diligencia debida. Sobre lo qual es obligado de la culpa levisima, no haciendo lo que el diligentisimo en este arte hace, par la exactisima vigilencia, y diligencia, que en el se require, como lo dicen algunos autores, y en particular Sylvestre, Gregorio Lopex, y Straca, por un texto.—Curia Philipica, Comercio Naval, lib.* 3, *cap.* 12, *Daños, n.* 30, 509. *Exercitor qui recepit, tenetur de levissima culpa*, says *Gregorio Lopez, gloss.* 9 *&* 10. *Part.* 5, 8, 26. See also 3 *Curia Philipica, Ilustrada*, 314; where we are informed what is understood by the words just quoted.—*Levissima culpa es la negligencia de aquello que los diligentissimos suelen alvidar.* The text of the Roman law referred to in the Curia, is found *ff.* 19, 2, 25, 7, and is as follows:—*Qui columnam transportandam conduxit, si ea dum tollitur aut portatur, aut reponitur, fracta sit, ita id periculum præstat, si qua ipsius eorumque, quorum opera uteretur, culpa acciderit: culpa autem abest, si omnia facta sunt, quæ diligentissimus quisque observaturus fuisset. Idem scilicet intelligemus, & si dolia vel tiguum transportandam aliquis conduxerit. Idemque etiam*

East'n District. *May*, 1822.

HENNEN *vs.* MUNROE.

ad cœteras res transferri potest. In France the same doctrine is established: *Le capitaine est un mandataire â gage, qui rèpond de la faute très légère. Si le capitaine n'a pas prévu ce qu'il aurait dû prévoir, il est en faute. Il est en faute, s'il a failli par ignorance de son art. Le capitaine est tenu de tous les dommages qui arrivent à la marchandise par sa faute; car il doit rendre la marchandise telle qu'il l'a reçu. à moins que le dommage ne procede d'un accident qu'on n'a pu ni prevoir, ni empêcher.* 1 *Emerigon*, 373, 377.

C'est au maître du navire que sont confiées les marchandises qui y sont chargées; c'est donc à lui à en répondre, sauf les accidents maritimes non procedans de son fait ou de sa faute, ou de ses gens. Il est tenu de toute faute procedant de son fait ou de sa negligence, même de la faute appellèe très lègére; de maniere qu'il n'y a que le cas fortuit qui puisse l'excuser. Et c'est a lui a prover le cas fortuit. 1 *Valin*, 394. What is to be understood by *le cas fortuit*, is most luminously expressed by *Emerigon: On appelle cas fortuit*, says he, *les evenements que la prudence humaine ne saurait prèvoir. Fortuitos casus nullum humanum concilium providere potest. Lib.* 2, *sec.* 7, *ff. de admin. rer. ad civil, Liv.* 6. *C. de pignor act.*

On appelle force majeure, vis major, celle à la

quelle on ne peut résister: cui resisti non potest. L. 15, *sec.* 2, *ff. locati. L.* 25, *sec.* 6, *ff. eod.*

Ces deux points se confondent. On entend par cas fortuit une force majeure qu'on ne peut prèvoir, et á laquelle on ne peut pas rèsister, & cui prœcaveri non potest. Cujas, sur la Rubrique du code, de locato. Casarégis, disc. 23, *n.* 38. *Straccha, gl.* 22.

Il suit de cette définition que tout cas qu'on a pu prévoir et eviter, n'est pas fortuit. Ubi autem diligentissimus prœcavisset et providisset, non dicitur proprie casus fortuitus. Santerna, part. 3. *n.* 65.

Il y a une grande différence á faire entre cas fortuit, et cas imprévu. La perte, qui arrive par l'imprudence ou l'impéritie du captaine, est imprévue, mais elle n'est pas fortuite: improvisus casus dicitur qui solet imprudentibus contingere. Santerna, d. loce.

En un mot, on ne met dans la cathégorie des cas fortuits que ceux qui arrivent malgré toute la prudence humaine; quod fato contingit, et cuivis patrifamilias, quamvis diligentissimo possit contingere. L. 11, *sec.* 5, *ff. de minorib.* 1 *Emerigon*, 358.

These principles of *Valin* and *Emerigon*, two of the most illustrious writers on commercial subjects, who have flourished in any age,

East'n District. *May*, 1822.

HENNEN *vs.* MUNROE.

have been consecrated in France, by the *Code de Commerce*, *art.* 221 *and* 230.

Tout capitaine, maitre ou patron, chargé de la conduite d'un navire on autre bâtiment, est garant de ses fautes, même legères, dans l'exercice de ses fontions.

La responsabilité du capitaine ne cesse que par la preuve d'obstacles de force majeure.

The Italian, and other writers, maintain the same doctrines, as we are informed, 3 *Curia Philipica, Illustrada*, 314; *Casaregis assegura que el maestre esta obligado por qualquiera culpa, sea lata, leve, o levissima.* See *Casaregis, Disc.* 19, *n.* 31, 34, *Disc.* 23, *n.* 60, 63, *and Disc.* 122.— *Stypman, Part.* 4, *tit.* 15, *n.* 322, 556, says expressly, *Venit in hanc actionem ex contractu magistri navis, non solum dolus et culpa levis, sed etiam levissima: solum casus fortuitus excipitur.*— The English and American jurisprudence on this point is well settled, and must be familiar to the court.

Abbott, Part. 3, *ch.* 3, *n.* 9, states, that the master must, during the voyage, take all possible care of the cargo; by the general principle of the law, the master is held responsible for every injury that might have been prevented by human foresight or care; and

that he is responsible for goods injured in consequence of the ship sailing, in fair weather, against a rock or shallow, known to expert mariners. *Marshall on Insurance*, 241, states, that it is the policy of the law to hold the master responsible for all loss or damage that may happen to the goods committed to his charge, whether it arise from the negligence, ignorance, or wilful misconduct of himself or his mariners, or any on board the ship. As soon therefore as goods are put on board, they are in the master's charge, and he is bound to deliver them, again in the same state in which they were shipped; and he, as well as the owners, is answerable for all loss or damage they may sustain, unless it proceed from an inherent defect in the article, or from some accident or misfortune, which could not be foreseen or prevented. In the American edition of *Jacobson's laws of the sea, at p.* 88, the editor, in a note, has given a summary of the law as held in the united states. "The courts in this country have always considered masters of vessels liable, as common carriers, in respect to foreign as well as internal voyages. In an action against a master or owners for loss or injury to goods, the enquiry

East'n District. *May*, 1822.

HENNEN *vs.* MUNROE.

is not whether the injury proceeded from the default or neglect of the master, but whether this injury has resulted from any of those causes which form exceptions to their liability; for if it has not resulted from such causes, whether it be owing to the master's neglect, or not, is of no importance; neglect or default will be presumed.

In a suit for indemnification against this species of neglect, it is enough to prove the article in good order when delivered to the defendant, and that it was otherwise, when received from him: and it is said, evidence of care on the part of the defendant, ought not to be admitted." *Lex Merc. Am.* 178.

In a case decided by the supreme court of the state of New-York, 10 *Johns. Rep.*, *Elliott* vs. *Rossell*, the whole doctrine of the law on this subject, is ably discussed by the chief justice, Kent; and after an investigation of much learning and research, is luminously expounded, and authoritatively settled—from the argument of this profound judge, I will make a few extracts.—"It has long been settled, says he, that a common carrier warrants the safe delivery of goods, in all but the excepted cases of the act of God, and public

enemies; and there is no distinction between a carrier by land, and a carrier by water.— Masters and owners of vessels are liable as common carriers, on the high seas, as well as in port; in short, it must be regarded as a settled point in the English law, that masters and owners of vessels are liable in port, and at sea, and abroad, to the whole extent of inland carriers. The marine law is essentially the same, and holds an equally strict control over the master; and upon the same principle of public policy, a master of a vessel, or common carrier, by the almost universal law of nations, as well as by the common law of England, is chargeable for all losses not arising from inevitable accident. If, therefore, according to *Roccus*, a theft be committed on board, the master is answerable, like an innkeeper, though the loss happen without his fault. So if the ship strike on a shoal, unless it be by the violence of winds or storms, he is liable, because he did not provide against an accident which a careful navigator would have foreseen. So he is liable if he does not conduct the voyage with a due regard to the circumstances of the ship, time and place, and the practice of skilful navigators. *Roccus, n.*

East'n District. *May*, 1822.

HENNEN vs. MUNROE.

40, 55, 56. *Emerigon*, *tom.* 1, 373, 377, says. it is so difficult to discover the faults of a master of a vessel, that he is responsible for every slight negligence. He is in fault, if he has not foreseen what he ought to have foreseen, with due diligence. In short, he says the master, in consequence of his compensation, is answerable for all damage which the cargo receives, unless it proceeds from an accident which he could not foresee or prevent. *Valin* declares expressly, *tom.* 1, 394, that nothing but the *cas fortuit*, will excuse the master of a ship from responsibility for a loss.—The rule applies, in the *French Code*, equally to carriers by land, and by water. We must, therefore conclude, that there is nothing peculiar on this subject, in what is termed, in English law, the custom of the realm; for the marine law lays down the rule against carriers with essentially the same strictness or severity of sanction.

The civil law, the source, in this instance, of the marine law, was equally guarded, and placed masters of vessels, and inn-keepers under the same responsibility. They were held liable, under an edict of the prætor, for every loss happening without their fault, that

did not happen *damno fatali;* or, as Voet expresses it in his Commentaries, *exceptio est sola, quod damno fatali aut vi majore, veluti naufragio aut piratarum injuria, perisse constat;* and he says, that, except as to the penalty, the rigour of the rule continues to this day, in the Dutch jurisprudence. *Dig.* 4, 9, *sec.* 1, *and* 3. *Dig.* 47, 5, *sec.* 1 *and* 3, *Voet's Commentaries, h. t.* The reason given in the civil law, for the rule is, that it was necessary to confide largely in the honesty of these people, and to give great opportunities to commit frauds which it would be impossible to trace. And this strict rule has no doubt been as generally adopted, and as widely diffused, as the Roman law. *Erskine* (*Institutes*, 452, *pl.* 28, 29,) says, that the edict of the prætor is, with some variations, adopted into the law of Scotland. Indeed, we find the rule stated in precisely the same terms, in the ancient usages of a country, into which we do not know that the Roman law ever penetrated. "If a load be damaged by a carrier's fault, whatever is lost, he shall be compelled to make good, unless this injury happen by the act of God, or of the king, and whatever does not so happen, denotes a fault." *Colebrooke's Digest of Hindu law, vol.* 2. 372. 374.

East'n District. *May*, 1822.

HENNEN *vs.* MUNROE.

The courts in this country have always considered masters of vessels liable as common carriers, in respect to foreign, as well as internal voyages. In *M'Clure* vs. *Hammond*, 1 *Bay's Rep.* 99, the defendant undertook to bring a quantity of tobacco for the plaintiff, from Augusta, in Georgia, to Charleston, and the vessel was driven ashore on the coast, during the voyage; and as the loss did not appear to have arisen from inevitable accident, he was held liable as a common carrier.

These authorities which might have been extended much further, establish conclusively, I presume, the principle of law which I advanced, in opposition to the rule of decision assumed by the judge *a quo*, in his judgment, that the master of a vessel is bound to take ordinary care only of the goods entrusted to him.

Let us now examine the facts of this case, and from an analysis of them, draw that conclusion which will be in conformity with the law just laid down.

1. The defendant sailed from the port at dusk, and proceeding down the bay, during a very dark night, when the land could not be discerned, without a pilot, attempting to put

to sea: having overrun his reckoning, the vessel grounded on the Caulker's shoal. All this was imprudent, not to say more; in such a state of things a careful captain would have cast anchor until morning, and then he could have proceeded to sea without risk.

2. The defendant transported the goods of the plaintiff, without his consent, from the vessel on to the beach; and there placed them at only a distance of ten yards from high water mark. The weight of the two boxes did not exceed 400 lbs., and could not have hindered the vessel from floating off the shoal, when lightened by taking out such part of the cargo as was not liable to damage. The defendant was informed when these boxes were put on board, that they contained books, and should therefore have taken such care of them as would secure them from water. The box left on board of the sloop was not injured; the other two would not have experienced any damage, had they remained with that part of the cargo which was not moved.

3. When the defendant took upon himself to select the two boxes of books, knowing their contents, he should have provided effectually against every damage which might be

East'n District. *May*, 1822.

HENNEN *vs.* MUNROE.

caused to them by the surf of the sea; every measure should have been taken which human foresight could suggest for their preservation. They should not have been left so near the edge of the sea, on the beach; but removed to high land, during the five days which intervened from the time they were landed, until the surf beat up about them.

Conceding to the defendant that he was without culpability in attempting to go out to sea during a very dark night, without a pilot, and that the vessel grounded through an error of reckoning on his part; how can he excuse himself for the want of foresight; the imprudence in placing books so near the edge of the sea; which he knew was so liable to be agitated and raised by storms? But has the defendant, on whom the burthen of proof lies, shewn by what means the books were damaged? That the damage which they did experience, could not have been prevented by any human foresight? Has the defendant, in a word, brought himself within the exceptions which will excuse common carriers for a damage done to the goods committed to their charge? I think this court will answer in the negative, and render a judgment against the

defendant for the reimbursement of the loss experienced by the plaintiff.

Eustis, for the defendant. This is a hard action against a person to whom no fraud or negligence can be imputed. I ask the opposite counsel to put his finger on any part of the record which proves the defendant's negligence. No fault has been committed: nothing left undone which the most careful master would have thought of.

The plaintiff accompanied his goods; they were under his immediate care.

The packet set sail in the afternoon. Neither the plaintiff, nor any other passenger, made the smallest objection to her going to sea at that time. American captains do not, like the Spanish, take in their sail at night, and go to prayers. It is proven that it blew fresh, by one witness, and said by others, that the defendant overran his reckoning. The navigation is difficult. There was no particular necessity of taking a pilot. The ordinance of the port of Pensacola, relative to pilotage, requires only vessels of a larger draft than that of the defendant, to take a pilot.

The defendant acted prudently in sending

East'n District. *May*, 1822.

HENNEN *vs.* MUNROE.

the plaintiff's goods ashore. He would have been liable if he had suffered them to remain on board, when he had time to land them, and they had perished.

It blew a hard gale when the goods were placed on the beach, and the presumption was, that the waves had reached the highest point.

We have shewn a *force majeure*, a tempest—he cannot shew more.

Spanish law has nothing to do with this case. It is to be governed by our own laws. Although the contract was made in Pensacola, it was to be executed by the delivery of the goods in this city. The essence of the contract was their delivery. The packet belonged to New-Orleans. Both parties were inhabitants of New-Orleans. In a matter of doubt, these circumstances must have weight. The parties must not be presumed to have contracted with reference to the laws of Pensacola. Suppose five per cent primage to be allowed by these, could they have been recovered here?

I quote 1 *Johns.* 93, to shew that a note made in France, payable here, is good without a stamp; our courts not noticing the revenue laws of other countries. What was the

essence of the contract? Payment in America. Here it was the delivery of goods in Louisiana. Let the gentleman distinguish that case, if he can, from this.

In 4 *Johns.* 289, is a case to the same point. This is the general law on the subject.

The cases of 7 *Martin*, 213, and 4 *id.* 582, can be easily disposed of. The court never has had the point directly before it. In the first, the reason why the court gave the privilege was, that delivery was not of the essence of the contract of sale. The other was a case of jettison; the obligation of the party arose from a contingency; the throwing out of the goods at sea. There was no contract on that subject, and when the question arose, what law should govern, the court held that it could not be supposed that citizens of New-York had the laws of Louisiana in contemplation. If that contract had been to be executed in Louisiana, the decision would have been as I contend for, and the opinion of the court supports my conclusion.

In *Hampton* vs. *brig Thaddeus*, the court decided rightly; because the point was not made and no law was proven.

East'n District. *May*, 1822.

HENNEN *vs.* MUNROE.

MARTIN, J. delivered the opinion of the court. We agree with the plaintiff, that the master of a ship is liable for *levissima culpa*. So that the question before us is only one of fact: was the defendant guilty of any neglect or fault?

The plaintiff urges that he was, 1. In sailing from the port at dusk, and proceeding down the bay, during a dark night, without a pilot.

2. In transporting the goods on shore, without the plaintiff's consent, and placing them on the beach, at a short distance from the water.

3. In selecting the boxes, which contained the books, to be landed, and suffering them to remain long on the beach.

I. The evidence shews that the defendant "attempted to go out of the bay, the evening of his departure from the town of Pensacola." The inference is strong, that he sailed in the day time. Nothing on the record enables us to ascertain the distance between the anchorage before the town, and the entrance of the bay. We are unable to cross-examine the witness, in order to discover whether the

place was a proper one to cast anchor in; whether the extreme darkness of the night, and freshness of the wind, which are presented as the cause of the vessel getting aground, did not come on suddenly.

The evidence before us shews, that although the entrance of the Barrancas be difficult, "vessels that commonly ply between New-Orleans and Pensacola, are not in the habit of employing pilots, either in coming in, or going out of Pensacola bay—that after two or three trips, captains are as capable of safely conducting their vessels, as any pilot, provided they be of a small draft, say, five or six feet;" that the defendant's vessel is a regular packet, plying between New-Orleans and Pensacola, and captain Munroe, in the deponent's knowlege, has been several times the same voyage; and the regulations of the port of Pensacola, do not require a pilot to be taken by vessels drawing not more than five feet water.

Jacobson holds, that coasting vessels are not bound to take pilots. *Sea Laws.*

II. The landing of the cargo, appears to have been a measure of necessity; we do not

East'n District. *May*, 1822.

HENNEN *vs.* MUNROE.

know that the defendant was bound to consult the plaintiff, who, however, does not shew that he made any objection.

The testimony does not warrant the conclusion, which is endeavoured to be pressed on us, that the goods were carelessly left at too short a distance from high water mark.—The evidence is, that "it blew hard, and rained the whole time they were engaged in landing the cargo, and after." The manner in which the security of the cargo was provided for, is minutely detailed, and shews considerable care. It is sworn that "captain Munroe worked constantly, and made use of every possible exertion to get the sloop off, and took as much care of the cargo, while on shore, and disposed of it as judiciously as any man could have done." It is shewn that extreme difficulty was experienced, in landing and bringing back the cargo on board, owing to heavy winds and a high sea.

From all this, we are bound to infer, that the plaintiff's boxes were put at such a distance from high water mark, as the hurry the crew were in, permitted. It appears the spot they were placed in, proved a safe one during the storm, which prevailed while they

were brought ashore, and they were engaged during a second, and more violent storm, which no evidence enables us to say, could have been foreseen.

III. We are unable to discover that the violence of the storm left the defendant at liberty to make any selection, as to the part of the cargo which was first to be carried on shore; and the testimony shews, that "the crew were kept constantly at work, in endeavouring to get the vessel off"; which precludes the idea, that any part of the cargo was unnecessarily left ashore, while it could have been safely brought back on board.

When it is considered that the plaintiff was on board, with a very near relation, by affinity, who had had the care of the books in Pensacola, and had himself delivered them to the defendant—that this person has been examined as a witness, it may be concluded that no circumstance which may avail the plaintiff has been omitted to be proven. Yet the case enables the defendant to shew that he did what could be expected from him.

We believe the captain took a proper care of the goods, after the vessel got aground.

East'n District. *May*, 1822.

HENNEN *vs* MUNROE.

The only doubt with us has been, whether the coming out of the bay at night was justifiable. It is shewn that vessels, drawing not more than five feet, are not bound to take a pilot; and although it is said, that in extreme freshes, vessels drawing nine feet come into the canal Carondelet, the presumption is, that a packet plying between Pensacola and New-Orleans, is of such a draft as will enable her to come in the ordinary height of water, which does not exceed six feet; so the captain, not being bound to take a pilot, was only bound to use the same care as a pilot, and is only chargeable as a pilot would be, in the present case.

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

MILLAUDON vs. *NEW-ORLEANS INSURANCE COMPANY.*

The presence of the owner is not conclusive evidence of his assent to any act, which is alleged to constitute barratry.

When proof is once given of

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

PORTER, J. delivered the opinion of the court. The petitioner avers, that he made advances for the outfit of the brig Two Cathe-

rines; that for his reimbursement, François Ducoing, then the owner of the said brig, assigned and transferred to him, the freight to be earned on a voyage which she was about to make from New-Orleans to the port of Havre de Grace, in France; and that said Ducoing caused said freight to be insured at the office of the New-Orleans Insurance Company, to the amount of one thousand dollars, and duly assigned to him the policy.

any act which amounts to barratry, the *onus* of establishing every fact that goes to excuse it, is thrown on the insurer.

He further avers, that the said brig did sail on the voyage mentioned in the policy of insurance, and that the freight to be earned was totally lost by one of the perils insured against, *viz.* by the barratry of the master and mariners.

The defendants pleaded the general issue. There was judgment against them, and they appealed.

Among other facts agreed upon between the parties, it is material to state those which follow:—

The vessel was cleared at the custom house on the 11th October, 1817, by John Ducoing, the brother of the insured captain. The insurance was executed the same day. François

East'n District. *May*, 1822.

MILLAUDON *vs.* NEW ORLEANS INS. CO.

Ducoing, the owner, on 13th of that month,* transferred and set over all his right, title and interest, in the brig Two Catherines, to one Raymond Espagnol, and on the same day assigned his interest in the policy to the plaintiff.

The vessel sailed with Raymond Espagnol, who continued on board during the whole voyage, on which the barratry is charged to have been committed. Her loss, together with that of the cargo and freight, was occasioned by the fraud of the captain and crew running away with, and disposing of brig and cargo, in fraud of the shippers and owners.

The question presented is, whether on the admission just stated, that the loss was occasioned by the fraud of the captain and mariners running away with the vessel, the circumstance of the owner being on board, does not so change the offence as to preclude us from considering it an act of barratry?

Barratry is defined by *Marshal*, an act committed by the master or mariners, for an un-

* This is the date of the assignment according to the agreed case—the indorsement on the policy is of the following day: the 14th.

lawful and fraudulent purpose, contrary to their duty to the owners, and whereby the owners sustain an injury. 2 *Marshal*, 515.

The chief justice of Pennsylvania, in a very able opinion, after reviewing all the cases on the subject, states it to be any trick, cheat, or fraud practised by the captain, to the prejudice of the owners—any crime committed to their prejudice by the captain. 2 *Marshal*, 534, *in notis*.

There is danger in trusting to general definitions, because there is great difficulty in compressing into a single sentence, or explaining by a few words, the various circumstances which constitute an offence, or confer a right, or in designating exactly before hand, what cases come within the general rules established for the administration of justice. It is possible therefore, that neither, or both those quoted, convey accurately the idea attached to the word barratry; but on one point there is no doubt; if the act complained of, was committed with the consent of the owner, it cannot be considered as constituting that offence.

That consent, it has been argued, is proved here, because the owner was on board. This

East'n District. *May*, 1822.

MILLAUDON vs. NEW ORLEANS INS. CO.

does not appear to us, by any means, so necessary an inference, as to deprive the plaintiff of that right to recover, which the other facts in the case clearly establish. In examining cases of this description, we must always keep in mind, that when proof is once given of any act which amounts to barratry, the *onus* of establishing every fact that goes to excuse it, is thrown on the insurer. 2 *Marshal*, 531. The evidence which discharges, must at least be as strong as that which creates the liability. Here the circumstances that make out a case of barratry, are fully admitted, and the consent of the owner, which is to do away the effect of these circumstances, is left to be inferred: or at best, is proved by nothing more than presumptive evidence—this is not sufficient. A deviation, amounting to barratry, might frequently be committed during a voyage, without the knowlege of the owner, though on board, if he did not possess nautical skill; and it is quite possible that the master and mariners, may have run-away with the ship against his wish. Such cases we know have happened, and we do not know this is not one of the same kind.

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

East'n District. *May*, 1822.

MILLAUDON *vs.* NEW ORLEANS INS. CO.

Grymes for the plaintiff, *Workman* for the defendants.

11 NS 607
12 " 260

DUFOUR vs. *CAMFRANC.**

APPEAL from the court of the first district.

The validity of a sentence, rendered by a court of competent jurisdiction, cannot be enquired into collatterally.

The decree which such a tribunal renders directly on the point reviewed, is as a plea, a bar, or evidence, conclusive between the same parties, or those claiming under them, for the same thing.

A forced alienation results from a sale made at the time, and in the manner prescribed by law, in virtue of an execution issuing on a judgment already rendered by a court of competent jurisdiction. If a sale is made where these re-

PORTER, J. delivered the opinion of the court. This case has been already before the court, and was remanded in order that further proof might be had of a fact deemed material to a correct decision of the matters in dispute—the former proceedings are fully reported. 8 *Martin*, 235.

To the title alleged and proved by the plaintiff, the defendant pleads, that he is the owner of the slaves sued for; that he purchased them at a sheriff's sale made in virtue of an execution issuing from a court of competent jurisdiction, in pursuance of a judgment

* This case was decided at April term last; but the judgment was not printed with those of that term, because it was suspended by an order for a rehearing. See *Post*, June term.

East'n District. *May*, 1822.

DUFOUR *vs.* CAMFRANC.

rendered against the heirs of one Victor Dufour; and that the plaintiff is one of those heirs.

It is replied, that the judgment, under which the defendant claims, was null and void, by reason of the defendant not being cited, and because other proceedings were omitted which are necessary to render it valid; that supposing it to be regular, the writ of *fieri facias* did not pursue it—that the deed offered by defendant shews that the sale was in virtue of an execution reciting another, and different judgment, which judgment is not produced.

The first question then presented for our decision, is the regularity of the judgment in virtue of which it is stated the property was sold.

We are of opinion that the validity of a sentence, rendered by a court of competent jurisdiction, cannot be enquired into collatterally, as is attempted here. The decree which such a tribunal renders, directly on the point reviewed, is as a plea, a bar, or evidence, conclusive between the same parties, or those claiming under them, for the same thing. The errors complained of, were questions for the decision of the court which tried the cause,

quisites are wanting, the purchaser does not acquire the "right, title and interest" which the debtor had in the thing sold.

Laws which deprive men of their property, without their consent, should be strictly pursued.

When an alienation of property is not expressed in the instrument, it must clearly result from the act

If proceeds arising from property irregularly sold at sheriff's sale, have been applied to the payment of the owner's debts, he cannot recover the property until he repays the purchaser the amount.

and we have no authority in a case arising between the same parties, to examine how they were decided, unless regularly brought before us by an appeal, or by an action of nullity, if that remedy still exists. An act of the legislature has limited the period for bringing up causes to this court, and the Spanish jurisprudence requires, that where judgments are sought to be annulled, by an action, expressly given for that purpose, suit must be brought within a certain time. Now, if the party, instead of attacking the judgment. should be permitted, after the delays are expired, to sue for the object acquired under it. it is evident the regulations just alluded to, would be completely evaded. And it would be strange if the plaintiff could, in any case. successfully allege nullity in the replication. when an averment of the same kind would not be listened to in the petition.

The regularity of the proceedings, therefore, in the cases of *Turgeau*, and *Camfranc* vs. *the heirs of Dufour*, up to the time of rendering judgment, cannot be enquired into in this case.

But the measures taken under that judgment, to obtain the benefit of it, present an entirely different question. The authority of

East'n District. *May*, 1822.

DUFOUR *vs.* CAMFRANC.

a judicial decree does not prevent us from examining their correctness. And the plaintiff, on establishing that he, or his ancestor, once owned the slaves claimed, has a right to obtain judgment for them; unless the possessor shews, either a title by prescription, the owner's consent to transfer them, or a forced alienation, which stands in place of that consent.

A forced alienation results from a sale made at the time, and in the manner prescribed by law, in virtue of an execution issuing on a judgment already rendered by a court of competent jurisdiction. If a sale is made where these requisites are wanting, the purchaser does not acquire the "right, title and interest" which the debtor had in the thing sold. *Curia Philipica, P.* 2, *Remate, n.* 27. *Febrero, cinco juicios, lib.* 3. *cap.* 2, *sec.* 5. *n.* 352 & 357. 4 *Martin*, 573. Has such an alienation taken place in the case now before us?

The defendant insists that it has, and produces in evidence, a conveyance made to him by the former sheriff of the first superior court district, of the late territory of Orleans, in which it is recited, that by virtue of *a fieri facias*, issued at the suit of J. B. Camfranc and

others, against the heirs of Victor Dufour, he had sold the slaves claimed in the present action. No such judgment, however, being produced as that of *Camfranc and others* vs. *the heirs of Dufour*, we must hold that none exists, and that the sheriff, in making the sale, acted without authority.

The appellee's counsel have, however, strenuously contended, that it is evident the sheriff meant the suits of *Camfranc* vs. *Dufour* and *Turgeau* vs. *Dufour*. But we cannot so understand it, for he has not said so, and we are not permitted to supply by intendment, what is wanting in an instrument of this kind. Much less can we say that the sheriff, in this case, sold under executions issuing in several suits, when he explicitly states, that it was in virtue of *a fieri facias*, at the suit of J. B. Camfranc and others. Laws which deprive men of their property, without their consent, should be strictly pursued by those who seek the benefit of them. 4 *Wheaton*, 77. The act of our legislature requires that the judgment on which execution issues should be recited in the deed of sale given by the sheriff. 2 *Martin's Dig.* 336. That has not been done here; the consequence is, that the buyer has not a conveyance in

East'n District. *May*, 1822.

DUFOUR *vs.* CAMFRANC.

pursuance of the law under which he purchased, and is, therefore, without title.

It is urged that the plaintiff has ratified this sale. This point received the serious consideration of the court on the former hearing. Before the particular instrument, which is said to contain the ratification, is considered, it is necessary to state the following facts:—

The brother of the present plaintiff, D. Victor Dufour, died in St. Jago-de-Cuba. On his death, Laroque Turgeau took charge of his property, and in conjunction with one Carlier D'Outremer, brought the slaves claimed in the petition, to Louisiana. Shortly after their arrival here, they were attached at the suit of J. B. Camfranc, and of Laroque Turgeau, and judgment was given in both cases, for the plaintiffs; execution issued, and as it appears from the sheriff's return, a certain sum of money was made on each.

Laroque Turgeau died in Jamaica. D'Outremer, as his attorney in fact, had received the monies recovered in the suit against the heirs of Dufour. The plaintiff is heir, as well of Turgeau as Dufour. On arriving in this country he commenced the present action, and some time after bringing suit, being em-

barrassed in his affairs, he applied to D'Outremer for the monies held by him, as agent for Turgeau, and on executing a receipt, was paid over the sum of $1560. Whether he received this money as heir of Laroque Turgeau, does not appear by the receipt, and is not expressly proved by the other evidence in the cause; but from all the facts of the case, there is a strong presumption, that he did receive it in that character.

As soon as the present action was commenced, the defendant obtained an injunction, by which Carlier D'Outremer was inhibited from making any disposition of the sum he had received as agent for Turgeau.

The particular expressions of the receipt require to be stated. It acknowleges $1560 to be paid, and that the money belongs to the succession of Laroque Turgeau, and also contains an engagement, that by reason of certain injunctions having issued, enjoining D'Outremer from paying the money, one at the suit of Camfranc, and the other on the demand of one Lafitte, the amount received shall be returned, in case the said injunctions should be made perpetual.

Under these circumstances. the defendant

East'n District. *May*, 1822.

DUFOUR *vs.* CAMFRANC.

insists that the plaintiff cannot recover the property sold.

This position, it is believed, cannot be maintained. The plaintiff's right must be destroyed by some act which renounces his title, or conveys it to another. When it is attempted to shew this, by an instrument which does not express such an intention, common sense as well as law, requires that it should clearly result from the act. Had the appellant, as heir of Turgeau received unconditionally the money from D'Outremer, it might perhaps have been argued that he intended to abandon all right he had to the slaves, which he was then suing for. But when, in the very receipt he alludes to the injunction issued, in consequence of his suit against Camfranc, and promises to pay the money back if that injunction be confirmed, or in other words, in case he succeeds in the present action; it surely cannot be urged he intended to renounce a claim, the ultimate recognition of which is made a condition of his repaying the amount received. Sufficient weight was perhaps not attached to this promise, to return the money when the case was formerly before the court.

On the whole. we are of opinion that the

defendant has not shewn a legal title to the property sued for.

Another question still presents itself. It has been proved that the proceeds arising from the sale of the slaves were applied to the discharge of the judgment debts of the plaintiff, and the court is of opinion that he cannot recover in this suit, until he repay that money. This is the doctrine expressly laid down by *Febrero*, *lib.* 3, *cap.* 2, *sec.* 5, *n.* 357. And we readily adopt it; for nothing could be more unjust than to permit a debtor to recover back his property, because the sale was irregular, and yet allow him to profit by that irregular sale, to discharge his debts.

It is unnecessary to notice particularly the bills of exceptions taken on the trial, as the opinion now expressed, meets and answers the questions of law raised by them.

After the cause has been litigated for such a length of time, it is to be regretted that we cannot now make a final disposition of it.—But it has not been proved what the services of the slaves were worth, and it is necessary to ascertain that fact, to enable us to decree what sum shall be paid by the plaintiff; the case must therefore be remanded for a new

East'n District. *May*, 1822.

DUFOUR vs. CAMFRANC.

trial on this point alone, and the appellee pay the costs of this appeal.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; that this cause be remanded for a new trial, with directions to the judge to ascertain what the services of the slaves were worth, and that the appellee pay the costs of this appeal.

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

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JUNE TERM, 1822.

East'n District.
June, 1822.

JOHNSON vs. *CROCKER.*

JOHNSON
vs.
CROCKER.

Proof that the defendant had a horse of the plaintiff's for sale, does not support a charge that he purchased it, and is debtor of the price.

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

MARTIN, J. delivered the opinion of the court. This is an action for money lent, and money received to plaintiff's use, and for the price of a horse, sold by the plaintiff to the defendant.

On the plea of the general issue, there was judgment for the former, and the latter appealed.

The facts in evidence are, that Wooters gave the plaintiff a note for about $350, that defendant called for payment (alleging his pos-

East'n District. *June*, 1822.

JOHNSON *vs.* CROCKER.

session of the note, and his authority to receive its amount) before the maturity of the note—that at maturity, it was paid in bank.

That defendant was in the habit of obtaining money from Hepburn, on a deposit of notes—and Hepburn collected a note of Dunlap & Wooters for $356, through the Branch Bank of United States, and about the time, paid $300 to the defendant.

That the defendant said he had a horse of the plaintiff's for sale—had agreed to sell him for $280, and afterwards refused delivering him, unless for $300.

A letter of the defendant was produced. dated a short time after all this, in which he acknowleges the benefit he has had from the money of the plaintiff, in his hands; excuses himself from having neglected to send him a gig, and promises to pay on demand.

The plaintiff's demand for money lent is $30, for money had and received $356, for the price of the horse $120. He gives credit for $95, and claims a balance of $400 odd dollars.

The parish judge concluded there was no proof of the loan, but that there was of the other items.

The declaration of the defendant, that he had the note given by Wooters to the plaintiff, the circumstances of his having received from Hepburn, a sum of nearly the same amount, of Hepburn being in the habit of advancing him cash on deposit of notes, and Hepburn having collected $356 on a note of Dunlap & Wooters, would not perhaps suffice to charge the defendant with the amount of this note.

But one of the letters admits the benefit derived by the defendant, from the use of the plaintiff's money left in his hands, and apologises for not sending him a gig. This induces a belief that a larger sum than that of $30, charged as loaned, is referred to; and the presumption which the parish judge has drawn, that the proceeds of the note, *viz.* $356, were alluded to, is not perhaps, the light presumption which moveth not at all.—We are not able to say that he erred in his conclusion, that there is evidence that the defendant in this way received $356 of the plaintiff's money.

We think he was correct in concluding, that the claim of $30, for money lent, is unsupported.

We do not see that the circumstance of

East'n District. *June*, 1822.

JOHNSON *vs.* CROCKER.

the defendant having once had a horse of the plaintiff's for sale, is evidence that he purchased it, and promised to pay $120, or any other price therefor.

Deducting from the $356, the amount of the note, the $95 for which the plaintiff gives credit, the balance due him is $261.

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 plaintiff, for the sum of $261, with costs in the court *a quo*; those in this to be borne by him.

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

MAYOR, &c. OF NEW-ORLEANS, vs. *GRAVIER*.

Any inhabitant has the right to forbid the erection of houses, or other edifices, on public places.

And in a suit already commenced by the corporation of a city, he may in-

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

PORTER, J. delivered the opinion of the court. The petition states that the suburb of St. Mary forms a part of, and is included within the limits of the city of New-Orleans; that it

was established in or about the year 1789, by the late Bertrand Gravier, then owner of the plantation on which it has been founded; who, in the year 1795, enlarged the first plan by the addition of several streets, and a public square, as appears from several plats of survey, drawn by Laveau Trudeau, surveyor general of Louisiana, under the Spanish government.

It further avers, that Gravier sold, with reference to these plans, all the lots surrounding the square. Yet, that one John Gravier, who stiles himself heir to the aforesaid Bertrand, has entered into possession of this property, which, by the act of the former proprietor, was destined for public use.—An abatement of works which he has made there is prayed for, and an injunction against any other being erected.

The defendant, in his answer, denied generally the above allegations.

After the cause had been for some time at issue, Thomas Harman filed a petition of intervention, in which he stated that he was the owner of three lots situated in Camp street, fronting on the square already mentioned, and that he held them in virtue of several mesne

tervene & urge his private right to strengthen that set up by the public.

By the former laws of this country, only one year was allowed after the filing of the papers in the appelate tribunal, to prosecute the appeal to judgment.

And after the expiration of that time, if the appellant did not prove that he was prevented from doing so by some cause beyond his control, the judgment of the inferior tribunal acquired the authority of *res judicata*.

When the appeal did not suspend execution, it was not necessary to cite the party in the inferior court, to shew cause why its judgment should not be confirmed.

East'n District. *June*, 1822.

MAYOR, &c. OF NEW ORLEANS vs. GRAVIER.

conveyances from John Baptiste Sarpy, who purchased them, together with seventy-one others, from the late Bertrand Gravier, in 1795.

He also alleged, that on the 2d day of May, 1798, the present defendant, John Gravier, presumed so far as to encroach and raise buildings on the public square laid off by his brother, whereupon a suit took place between the said Gravier and J. B. Sarpy, which terminated in two judgments, rendered by the Spanish tribunal, of date the 17th July and 17th Nov., 1798, which judgments ordered the present defendant to leave the ground free for public use, and directed the demolition of the buildings placed there by him. That said judgments have since acquired the authority of the "thing judged," and have that force and effect between the parties thereto, their heirs and assigns: that, confiding in their force and validity, he made the purchases aforesaid, and he, therefore, prayed for leave to intervene, and that he might have permission to shew that the said property should remain open for the public.

To this petition of intervention, Gravier pleaded, that Harman, by his own shewing,

could not be made a party to the suit, and that the facts alleged by him were untrue.

It becomes necessary to examine, before we proceed further in the investigation of the cause, if this exception to the prayer of the intervening party, to be heard, is well taken.

The defendant urges, that as the mayor, aldermen, and inhabitants, are already parties to this suit, Harman, an inhabitant of the city, cannot join in the proceedings for the purpose of enforcing public rights; and if his claim is a private one, it must be presented in a distinct action.

According to the first and third laws of the 22d title of the 3d *Partida*, any individual may forbid the erection of a house, or other edifice, in public places. The necessary consequence of giving this right, is, that the person who makes the prohibition, shall be allowed to apply to a court of justice to aid him in the maintenance of it. It will save expense and delay to permit the party now before the court to do this in the present suit, and as he merely urges his private right to aid the public in the maintenance of theirs, and asks judgment for the same thing, his appearing in the cause creates no confusion.

East'n District.
June, 1822.

MAYOR, &c. OF NEW ORLEANS vs. GRAVIER.

Should we yield to the reasoning of the appellant, that the corporation represents all the inhabitants of the city, and, therefore, no individual of that city can be heard; we do not see that it would make any difference in the result. For if they represent all the inhabitants, then they can avail themselves of the rights of each of them, so far as they strengthen and support the public claim.

This point disposed of, we approach the merits of the controversy between the parties in this suit.

The plaintiffs and Harman, who has intervened, insist they should obtain the judgment of this court in their favor.

1. Because the right of the defendant to the premises have been adjudicated on in the suit with Sarpy, and that the matters now in dispute, have passed into the authority of *res judicata.*

2. Because Bertrand Gravier, the ancestor of the defendant, transferred the property now sued for, to the public.

I. It is not disputed between the parties, but there was a suit in respect to the same thing, on the same demand; but it is insisted by the defendant, that he appealed from the de-

cision of the Spanish tribunal, and that his rights are not concluded by the judgment rendered.

A decree was given against the appellant on the 17th of July, 1798, directing that the square, already spoken of, should be left free for the public use, and that the works erected on it should be demolished. From this decree an appeal was taken on the 19th. The 16th Nov. a second judgment was given, that Gravier should take away all the edifices erected on this property. Some delay occurring in the execution of this order, we find that on the 17th of December, the tribunal which had rendered these judgments, declares that the former sentence had the authority of the thing judged, and therefore, directs its execution.

The appeal was taken from the first judgment within three days; on the 15th November the papers were filed in an office in Havana, and the 11th of February, 1799, Gravier presented to the tribunal in this city, his certificate of *mejora*—that he had filed the necessary papers of appeal in that city. It is objected to the regularity of these proceedings, that only forty days were allowed by law for the party cast to file the record in the appel-

East'n District. *June*, 1822.

MAYOR, &c. OF NEW ORLEANS *vs.* GRAVIER.

late court; *Novissima Recop. lib.* 11, *tit.* 20, *l.* 2: that only one year was allowed to obtain a decision on it; *Idem*, *l.* 5. *Curia Philipica*, *p.* 5. *tit. mejora*, *n.* 10, and that in default of complying with these regulations, the appeal must be considered as deserted, and the judgment conclusive and binding on the parties thereto.

To this it has been replied, that the period of forty days was the term fixed in old Spain before the discovery of this continent, and that the same regulations could not apply to her possessions in America, where, from the vast distance between them, it was impossible to comply with such a regulation, and that in regard to finishing the cause in one year, that also was, in many instances, utterly impossible, as the appellate tribunal might, from the multiplicity of affairs before it, or from other causes, be unable to examine the case within that time.

It was much debated whether the law, giving forty days to file the necessary papers in the superior tribunal, governed this case. We deem it unnecessary to enter into the question on the reasoning offered, as we find an express authority regulating the mode by which appeals were to be carried from this province.

The regulations on this subject, prescribed by the Spanish government, on taking possession of Louisiana, after directing the manner in which the record shall be made up, go on to declare—that the papers must be presented to the superior tribunal within the delay fixed; which shall be according to the distance from this province, to that where the court of appeals holds its sessions. That this delay shall begin to run from the day the first registered ship leaves this port, for that where the superior tribunal is established; that the judge shall direct the record to be sent by that ship, and if the appellant does not establish that, within the delay given, he has prosecuted his appeal, or that there was a lawful impediment which prevented him doing so, he shall lose the benefit of his appeal, and execution will issue at the first requisition of the opposite party. *O'Reilly's Instructions*, *p.* 18 and 19.

As the appellant has not proved that this law has been complied with, we know of no other that can govern the case, save that cited from the *Recopilacion*, and consequently we must hold the appeal deserted, and the sentence of the inferior court confirmed. *Curia Philipica*, *p.* 5. *Mejora*, *n.* 1.

East'n District. *June*, 1822.

MAYOR, &c. OF NEW ORLEANS *vs.* GRAVIER.

Were we to admit that the circumstance of presenting the papers to the superior tribunal, and the receiving of them there, cures this irregularity, another objection must be got over, before we can consider the proceedings in that suit open for examination.

We have seen by the laws of Spain, that appeals were required to be prosecuted in one year to final judgment, unless the party was prevented by some cause beyond his control. It is said, that in many instances it must be impossible to comply with this regulation. We admit the correctness of the observation; but then it is the duty of the appellant to prove those facts which put it out of his power to comply with it. *Curia Philipica, Mejora, n.* 1 *and* 10. This has not been done here, and after a lapse of nearly twenty years, every presumption is opposed to the exercise of due diligence on his part.

The defendant however insists, that the moment the superior tribunal was seized of the cause, the decision of the judge *a quo* could not pass into the authority of the thing judged, and was without any effect until confirmed by the court of appeals. In support of this position, he has cited *Febrero, cinco juicios, lib.* 3,

cap. 1, *sec.* 13, *n.* 490 *and* 491. This author does state the law to be such. Yet we find it expressly laid down in the *Curia Philipica*, *Mejora*, *n.* 1 *and* 10, that if the appeal is not prosecuted within one year, it shall be considered as abandoned, and the sentence of the inferior tribunal confirmed. To reconcile these authors, we must understand the former to speak of the effect which the appeal had within the limitation prescribed by law, for it to be acted on.

As the appeal in this cause did not suspend execution, it was unnecessary to cite the party in the inferior court, to shew cause why he had not prosecuted it. The case of *Croizet* vs. *Le Blanc & al.*, 4 *Martin*, 272, is an express authority on this point, and it is unnecessary to enter again into a question settled by that decision.

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

Moreau for the plaintiffs, *Derbigny* for the defendant.

East'n District. *June*, 1822.

BARRY vs. LOUISIANA INSURANCE COMPANY.

BARRY *vs.* LOUISIANA INS. COMPANY.

APPEAL from the court of the first district.

The prohibition of receiving parol evidence against or beyond the contents of a written instrument, only extends to the parties—third persons are not affected thereby.

Barratry cannot be committed by a master who has the equitable title in the vessel.

PORTER, J. delivered the opinion of the court. The plaintiff states that he caused to be made a policy of insurance, which was subscribed by the Louisiana Insurance Company, and by which they engaged, for a certain premium, to insure the sum of $900 upon merchandize, laden on board the schooner Brutus, whereof one Brown was master, upon a voyage from New-Orleans to Neuvitas.—That goods were shipped in which he, the petitioner was interested to the amount mentioned in the policy, that the schooner sailed on her intended voyage, and that the property put on board was lost by the fraud and barratry of the captain.

The defendants pleaded the general issue, the judge *a quo* decided against them, and they have appealed.

When this cause first came before us, the evidence was so unsatisfactory that we remanded it for a new trial, it is now brought up with such additional testimony as the parties have been enabled to produce. *Ante*, 202.

The defence set up is, that the master, Brown, was owner of the vessel, and that consequently barratry could not have been committed by him.

In support of this defence, we had at first the testimony of Nicholson, in whose name the schooner was registered—that Brown purchased her at a sale by the marshal—and that he (Nicholson) had no interest in said schooner, having paid for her to accomodate Brown, who never reimbursed him for the price.

Brown, in obtaining the register, made oath that the vessel belonged to Nicholson—and consequently, the register issued in the name of the latter.

The plaintiff, on the second trial, produced a bill of sale by public act, from one Etienne Debon, to John Nicholson, in which it is stated, that in consideration of a note of $900, made by Wm. Brown to the order of, and endorsed by the vendee, he had sold and conveyed to him all his right, title and interest in the schooner, mentioned in the policy. To do away the effect of this instrument, the defendant offered to prove, by parol evidence, that the conveyance was made by Nicholson, to secure him for his endorsement. The judge

East'n District. *June*, 1822.

BARRY *vs* LOUISIANA INS. COMPANY.

refused to receive the testimony, and a bill of exceptions brings before the court the correctness of the opinion which rejected it.

Had the opinion of the judge below been given in a case where the parties to a public act attempted to enlarge, or explain, or contradict it by parol evidence, we should not hesitate to express our concurrence with him, but the question now before us, is, whether third persons can be affected by an instrument, at the execution of which they did not in any way assist, which they did not sign, and to which they were neither parties nor privies.

There is no plainer rule of common sense, nor do we believe there is any more universally recognised maxim of law, than that the acts of one man cannot bind another, unless he consents they should. If it were otherwise, our property, our lives, and our liberty, would be at the mercy of the most depraved members of the community.

We frequently, however, enter into contracts, by which our rights are made to depend on acts to be done, or that may have been performed by third persons; in such cases, these acts affect and control us, when

established by legal proof. But the declarations of those persons, that these acts have been executed, cannot be conclusive proof; they are at best but *prima facie* evidence.

Pothier, whom we always consult with advantage, tells us, that an authentic act proves against a third person, *rem ipsam*, that is to say, that the transaction which it includes has intervened. *Pothier*, *Traité*, *des Ob.* 704.

It might at first blush appear that the author intended to lay it down as a principle, that the act thus produced is conclusive, but in a subsequent part of the same treatise, *n.* 766, he observes, that the prohibition of parol evidence against or beyond the contents of an act, extends only to the parties to it; it does not affect third persons.

Evans, in his appendix, states, that this doctrine of *Pothier* is so connected with the essential demands of justice, that it may be stated as an invariable rule of law. *Evans' Pothier*, 223.

In our sister states they act on the same principle, and hold it as a general rule, that parties and privies are estopped from contradicting a written agreement by parol proof; but the rule does not extend to strangers, who

East'n District. *June*, 1822.

BARRY *vs.* LOUISIANA INS. COMPANY.

have an interest in investigating, and knowing the real truth of the case. 10 *Johns.* 230.

And our own law, has embodied and consecrated the same maxim. *Febrero, p.* 2, *lib.* 2, *cap.* 2, *sec.* 1, *n.* 25. *Idem, lib.* 3, *cap.* 3, *sec.* 2, *n.* 141.

A coincidence so general, proves the truth and utility of the doctrine, and it is our duty to apply it to this case, and all others of a similar nature, which may be presented for decision.

Proceeding to do so, we hold the authentic act offered here, evidence that such an instrument was passed between Nicholson and Brown—that fact cannot be contradicted by the defendants. But further, they are not bound by it. The reality of the transaction, the truth of the different averments made in the deed; whether it was a real sale, or one, the object of which was alone to give Nicholson a security for his indorsement; all these matters are open to the defendants, because they never consented to this act, by which it is said the contrary is established. 18 *Johns.* 173. 2 *Ald. and Barn.* 136.

The case of *Chabot* vs. *Blanc*, 5 *Martin*, 354, would appear, unless examined with some at-

tention, opposed to this decision; but that was an action concerning real estate, and there the right of the parties to contradict, or rather destroy an act to which they were not parties, was controled by another principle of our law, which prohibits the reception of parol evidence, to create, or take away a title for immoveable property that commenced by writing. The case of *Richards & Spicer* vs. *Lewis & al.*, 7 *Martin*, 221, turned on the want of allegation in the pleadings.

The cause must therefore be remanded to obtain the testimony offered.

It may perhaps be the means of saving costs to the parties, for us to state, that at the close of the argument, and for some days after, we were of opinion, that as Brown did not pay for the schooner, Nicholson was to be considered as owner, and that he remained so until the vessel was run-away with.—Under this idea, the plaintiff would have been entitled to recover, even taking as true every thing which the defendants offered to prove. After a most attentive consideration of the case, and a close examination as well of the authorities cited, as some others we have been enabled to look into: that opinion has chang-

East'n District. *June*, 1822.

BARRY vs. LOUISIANA INS. COMPANY.

ed. We believe that the original character of the transaction (supposing it to be such as is represented by the appellee) was not altered by the subsequent failure of the master to comply with his engagement; that whether the vessel perished or not, he still remained debtor to Nicholson, and that this is a case in which the title is fairly tested by the application of the maxim *res perit domino.*

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided and reversed, this cause be remanded for a new trial, and that the appellee pay the cost of this appeal.

Livermore for the plaintiff, *Duncan* for the defendants.

REANO vs. *MAGER.*

The liability of a factor, who sells goods on credit, depends much on the prevailing custom; and of this the jury are the best judges.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This is an action in which the plaintiff claims from the defendant, indemnification to the amount of the value or price of a certain quantity of coffee, which was received by him, to sell as factor or agent, for the former.

The grounds of liability alleged in the petition are, that the factor had no instructions at all to sell on credit, but that if he had, he sold to one J. Bostwick, who was then in very bad credit, and shortly after failed; and that he, the said factor, after having obtained an order for sequestering the coffee, afterwards suffered the same to remain in the hands of the said Bostwick. The answer of the defendant is a general denial of all the allegations in the plaintiff's petition. The cause was submitted to a special jury in the court below, who found a verdict for the defendant, from which it is to be inferred that they negatived all the material facts alleged in the petition. Judgment was rendered on the verdict, and the plaintiff appealed.

He seems to have been so far satisfied with the finding of the jury, in relation to the facts of the cause, as not to have moved in the court *a quo* for a new trial. It is true that this court, in cases of general verdicts, has the power to correct errors both of law and fact. But according to the current of its decisions, and more particularly in latter cases, much reluctance has been shewn, and properly shewn, to

East'n District. *June*, 1822.

REANO *vs.* MAGER.

interfere with the appropriate duty of juries in the administration of justice, *viz:* the solution of questions of fact.

It would, perhaps, notwithstanding this just reverence for the verdict of a jury, in relation to matters of fact, be our duty, according to the present organization of our judicial system, to interfere whenever it should be made appear that a total disregard to truth, as established by legal evidence, has occurred in the conduct of these judges of facts. From an attentive examination of the evidence in the case now under consideration, we are of opinion that the jury have not erred in their verdict as to the facts. In other words, that they may have come to the conclusions therein expressed, on a fair examination of the testimony.

The liability of the factor for having sold the property of his constituent on credit, instead of requiring prompt payment, depends much on the prevailing custom of this class of merchants in the place where the sale was effected. The special jury, to whom the cause was submitted, was composed principally of commission merchants; men, who must, from their occupation, be most capable of settling the usage which prevails in such cases. Their

verdict establishes the fact, that the defendant did not deviate from the usual course pursued in this species of business.

It is true, that in the English courts of justice, former decisions are opposed to the right of factors to sell on credit. But at the present day, it is almost the universal usage for them thus to sell. See *Livermore on Agency*. 125.

We are therefore of opinion, that the judgment of the district court should be affirmed with costs, which is accordingly ordered.

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

VAVASSEUR vs. *BAYON*.

APPEAL from the court of the second district.

The defendant cannot amend by withdrawing an answer which contained an admission, & pleading the general issue.
Inconsistent pleas cannot be received.

PORTER, J. delivered the opinion of the court. This was an action alleging fraud and deceit in the sale of a slave.

The defendant pleaded that he had not concealed the defects in the property.

After the cause had stood at issue on these pleadings, for two years, and had been once

11 m 639
45 795

East'n District. *June*, 1822.

VAVASSEUR *vs.* BAYON.

remanded from this court for a new trial. the appellant moved to amend his answer: first, by striking out the plea originally filed by him, and substituting in its place, the general issue: and secondly, by adding the general issue to the plea. The court refused permission to do so, and he excepted. There was judgment against him and he appealed.

There is no doubt of the general principle that amendments will be allowed at almost any stage of the cause, when they tend to the advancement of justice. But we doubt much if that offered here comes within the rule. The court below certainly did not possess the right of depriving one party of the confession of another which was on record, any more than it could have refused him the benefit of it, in case it had been extra judicial. If made through mistake, the proper time to have corrected the error, would have been on the trial.

As to filing the general issue with the plea, it could not have been of any use to the defendant. The confession would still have remained in force. We have already said in the case of *Nagel* vs. *Minot*, 8 *Martin*, 488, that a party cannot be permitted to plead the ge-

neral denial, and pleas that are inconsistent with it, and that if he did, the former would be disregarded.

We agree with the district judge on the merits, and therefore order, adjudge and decree, that his judgment be affirmed with costs.

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

COPELLY vs. *DEVERGES.*

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

An act cannot be attacked as fraudulent after the vendor has paid all his debts.

To avail himself of a feigned delivery against a posterior, real one, the party must bring himself strictly within the law that sanctions his claim.

The mere execution of a notarial sale, does not dispense with the delivery.

This was an action instituted by the plaintiff and appellant, for the revindication of a certain lot of ground, and the buildings thereon, which he claims by virtue of a certain donation made to him of the same, by one named Augustin Bony, deceased, his god-father, on the 24th December, 1787; who, on the same day, had purchased the same from Joseph Copelly, the natural father of the appellant. Deverges, the original defendant, plead that he was proprietor and possessor of the property in dispute, by a deed of sale, execu-

East'n District. *June*, 1822.

COPELLY *vs.* DEVERGES.

ted in his favor, from Joseph Defaucheur, a free man of colour, bearing date the whom he called in warranty. Defaucheur appeared and plead that the sale from Copelly to Bony, was fraudulent and simulated, and that it was null for want of delivery against the defendant, to whom alone a tradition of the premises had been made, and also that the claim of the plaintiff and appellant was barred by the prescription of thirty years; and that the donation, under which he claimed, was null and void, for want of insinuation and acceptance. The parish court having rendered judgment in favor of the defendant, the plaintiff appealed.

Hennen, for the plaintiff. The plaintiff claims a lot of ground described in his petition, by virtue of a donation made on the 24th of December, 1787, by Bony to him, then an infant, 18 months old. The defendant now in possession of the lot, avers that the donation is void; 1st, because no acceptance, 2d. nor delivery was made thereof.

I. The defendant's counsel cited the treatise of *Pothier on donations inter vivos*, *sec.* 2, *art.* 1. to shew that (by the laws of France) an ac-

ceptance was absolutely requisite to the validity of a donation. It is admitted that such is the law of France; but with the law of that country this court has nothing to do. The citation is however, of some value, as we learn from it, that by the law of nature, the rule is otherwise. *La solemnite d'acceptation est l'expression qui doit être faite par l'acte de donation de l'acceptation du donataire. Cette expression est une pure solemnité requise pur nos lois, & qui ne le serait pas si les donations eussent été laissées dans le pur droit naturel, suivant lequel l'acceptation, quoique non exprimée, quoique tacite ou designée de quelque maniere que ce fût, aurait été valable. Pothier, Traité des donations, entre vifs.* 12*mo. edit.* 1776, 52. Such is the opinion also of *Antoine Fabre*, in his *Chiliad of the errors of the practioners, Decade*, 48, *Error* 3, *n.* 3.

In *Ferrari's Bibliotheca, Donatio, art.* 1 *n.* 22, 26; we learn, from the opinion of various authors therein detailed, that the law of Spain requires no formal acceptance of the donation; that the silence of the donee will be considered as an acceptance; and that unless it appears that the donation has been rejected, it will be considered as accepted.

East'n District. *June*, 1822.

COPELLY *vs.* DEVERGES.

II. That a delivery of the thing is not necessary to make the donation perfect, is well established amongst the Spanish law writers. *Castillo*, *lib.* 3, *cap.* 10, *n.* 53, 56, says, *Hodie donatio statim ut perfecta est, perpetua fit, et irrevocabilis, nec amplius donantem penitere potest.*— And to the same effect *Gomez Resolutiones*, *vol.* 2, *cap.* 4, *de donatione*, *n.* 3, *in fine*. *Febrero*, (1 *vol.* 303. *edit*, 1819, *cap.* 5, *n.* 4,) has expressed the whole doctrine on these two points in the clearest and most satisfactory manner; and to him I refer the court, in support of the principles advanced.

The law on these two points being established, there can be no difficulty on the facts.

On the 24th December, 1787, the donation was made in the usual form; the plaintiff's mother, then his natural tutrix, by whom alone he could accept and take possession, lived in the house and continued to do so until 1817, when she died. From 1805, until 1817, she paid taxes for the property; which establishes her exclusive possession of the lot during that time. 9 *Martin*, 177. For the space then of about 30 years, the donor had not possessed this property, and until the present hour, he

nor his heirs make no claim for it. Assuredly then this donation must be considered as valid, so far as regards the donor.

But the whole was simulated, says the defendant's counsel; fraudulent and void. And where is the proof of this? When Joseph Copelly, the father of the plaintiff, sold this property by a notarial act, in legal and strict form, renouncing every exception, and acknowleging a delivery of the lot to Bony; he was solvent and continued so for 12 years, until July, 1799, when he obtained a respite of five years, and then paid off his debts. No creditor has been defrauded; nor does any even complain of it. But Joseph Copelly. the father, who sold in 1787, continued to live on the property until his death. Yes; but he never claimed it as his property. On the contrary, when in difficulty with his creditors, 12 years after the sale of it by him, and when one of his creditors urged a concealment of a part of his estate, no claims were made against this lot. J. Copelly himself, on his bilan of 1799, to the truth of which he solemnly added his oath, made no mention of it. No one witness has been produced to shew any claim set up by him during all this

East'n District. *June*, 1822.

COPELLY vs. DEVERGES.

time, nearly 30 years, to this property; and his own most solemn assertion under oath, has not been contradicted by any evidence. If to this is added, that the plaintiff lived on this lot more than ten years, and there held his blacksmith's shop, exercising his trade, without opposition from any one, can a doubt be entertained of the fairness and reality, either of the sale, or of the donation? Or of the acceptance and possession of the lot by the plaintiff?

A conclusion in favor of the plaintiff's demand, must be drawn from the facts of the case, unless the court will fix upon his father the crime of wilful and corrupt perjury. To avoid affixing this stigma upon the plaintiff's ancestor, all that is required, is to ratify notarial acts of more than 30 years standing.—Ten years have been considered as time enough to bar all actions for the rescission of conventions; *Civil Code*, 303, *art.* 204. This court then cannot favourably regard attempts to annul acts of 30 years date.

The criticisms made by the counsel on *Part.* 3, 30, 8, are sufficiently answered by the authorities which have been quoted, to shew that a delivery is not necessary. The *Novi-*

sima Recop. lib. 10, 11, by the opinions of all the Spanish writers, has made a most important change on the subject of contracts; and the very authors, quoted by the counsel, are against him.

Dumoulin, for the defendant. The appellant says he is entitled to a judgment in his favor, because he has shewn a complete title to the premises.

Admitting even this principle which I deny, I contend that his client has no right to the premises, because he has not shewn any legal title.

He pleads on a donation, which has two vices. 1. The want of insinuation; that this is fatal, may be easily seen by referring to *Febrero addicionado*, *vol.* 1, 332 *and* 343.

2. The want of acceptation, for this *vide Febrero*, *ad. vol.* 1, 332, *Paz*, *consultas varias Classe*, 11, *con.* 1, *n.* 5, 149, and the institutions *du Droit Belgique*, *par George de Ghewiet*, *vol.* 1, 267, *art.* 4, 5, *et seq.* I cite this work, because the author deduces the necessity of an acceptation of a donation, from it having been in that country, determined that donations were contracts, or *pacts*, which they are con-

East'n District. *June*, 1822.

COPELLY *vs.* DEVERGES.

sidered, by the Roman laws, and consequently must be accepted, and ratified to be valid; *vide Lecons du Droit Civil, vol.* 2, 40, *et seq.* I also cite this work, because it affords a good commentary on the laws of Spain, as that country was long under its dominion.

Other defects might be shewn in this donation, but the above are sufficient to destroy its validity; since it is a known and fixed principle of our law, that donations are always to be construed and judged by the rules of strict law, and are vitiated by a want of any of the formalities or qualities which the law requires they should have, and be accompanied with.

But, not only is the title of the appellant thus defective and vicious: suppose it for a moment valid, it cannot avail him in this case against a third possessor. He, the appellant claims from a man who never was in possession of the lot, or rather half lot of ground in question. This results from the proof on file in this case, which shews the deed of sale to Augustin Bony, to have been fraudulent and simulated; but I may be told, that though Bony never was in actual corporal possession of the half lot in dispute, yet, that by law, *to*

wit, the 8th law, *tit.* 30, *part.* 3, he is to be considered in possession, by virtue of the deed. But this court has already decided in respect of this law, that delivery of title is not sufficient, against third persons; and in looking over the record of the case of *Pierce* vs. *Curtis*, on file in this court, I feel I can confidently invoke the favor of the court for my client. In that case, the judge, who gave judgment, said, that though the delivery of slaves is considered as made, when such delivery is made to result from the deed of sale, yet that such constructive delivery did not appear from the words of the sale in that case; yet, what were the words in that deed? They were as follows—grant, bargain and sell, assign, transfer, and set over; with besides, a clause of mortgage on the slave for the security of the payment of the price, which mortgage is subsequently released by a deed of acquittance and release. I need not observe to the court, that in countries under the empire of the civil law, and where a simple delivery of the title was not sufficient to presume a delivery, yet a clause of mortgage always had such force as to carry with it the presumption of delivery; yet in the case

East'n District. *June*, 1822.

COPELLY *vs.* DEVERGES.

of *Pierce* vs. *Curtis*, notwithstanding these strong points, the judge who gave the opinion, always favoring the equity of a case, declared that constructive delivery could not be presumed from the words of the act of sale. and besides, that there was evidence that the slave always remained in the possession of the vendor; compare this case with the one actually before the court. Is there any clause in the deed of sale from Copelly to Bony, from which a constructive delivery can be drawn? There is no mortgage reserved, no clause of *constitut*, no acknowlegment of being put in possession, on the part of the vendee, Bony; there is no delivery made in any other way as pointed out in the *5th law of the* 30 *tit. part.* 3, where it is said, among other things, that two things are necessary to acquire possession of a property, such as the one in dispute—do either of these result from the deed of sale, signed by Bony? Or is there in fact any thing from which a feigned delivery can be presumed. See on this point *Pothier, contrat de vente, vol.* 1, 327, *n.* 313, *and n.* 321, where he expressly treats this question, whether a feigned delivery should have the same effect as a real one, in relation to third persons; he sets

out with saying, that there is a difference of opinion, and states, that while one set of learned men decide in the negative; another class, among whom he particularly cites *Guy Pape*, decide for the affirmative; this last opinion *Pothier* thinks most reasonable. As it seems to be against me, allow me to call the attention of the court to the kind of feigned delivery, which *Guy Pape* thinks sufficient: It is said, that the *tradition feinte qui resulte de la clause de retention d'usufruit, ou de la clause de retention de la chose a titre de ferme ou loyer, ou meme par la simple clause de constitut, &c.* The definition of feigned delivery, given by *Pothier* in *n.* 313, above cited, shews that this was the kind of feigned delivery he meant; that justice forbids that it should be such a kind of delivery, as is made to result from the simple delivery of the title, as you have already decided in the above named case of *Pierce* vs. *Curtis*, where the delivery was nothing more than in this case; a simple declaration of alienation to the vendee. I have thus far only argued on what results from the literal proof on file in this case; since the adverse counsel seems to ground some hope on the testimony to which I thought he could not decently ap-

East'n District. *June*, 1822.

COPELLY *vs.* DEVERGES.

peal, let us see what it developes;—the adverse counsel contends, that Copelly, the father, did not continue in possession of the house in dispute, after the sale and donation, but that it was the mother of the appellant; that is the concubine, the *menagere* of Copelly. Can such an allegation be decently or respectfully made? I am sure it cannot be successfully contended. It is proved that Copelly, the father, always remained in possession; that he never ceased to be in actual corporal possession: all the witnesses, with the exception of one or two colored ones, declare that the house and half lot were always reputed his. In fact, the testimonial proof duly considered, shews the entire and true features of the case; it shews the sale to Bony to have been fraudulent and simulated: which is the more confirmed by the pretended donation to a bastard, which would seem to confer on a concubine a title to property, which she wished to preserve for the man, to whose coarse voluptuousness she ministered. This court will not surely, in such a case, give a favorable construction to the possession of a concubine. It is to be remarked that not one single witness has ever said that the house and half

lot were reputed to belong to the appellant, but one (who is the only one) who alleges that it was said to belong to his mother, and never mentions the name of the appellant; the appellant himself never possessed: he is since fourteen years back, of the age of majority, and never until the year 1819, pretended any right to the house and half lot, although long after, and before his majority, he was driven from it by his natural father. As to the payment of taxes, the appellant can draw nothing in his favor from that; as his mother never paid taxes, as his tutrix; but always as proprietor of the house and half lot, which we have shewn that we did, since the moment that we purchased the place.

I now come to an argument which I believe the court will deem of sufficient authority to decide this case; I draw it from the law of the *Partidas*, *to wit*, *the law 50th. tit. 5, part. 5*, which says, that if a thing be sold to two persons, and has come to the possession of the second purchaser, that second is to be preferred. I say with respect, and with confidence, that this law decides the question; because, even giving to the appellant the full benefit of that law of the *Partidas* above cited.

East'n District. *June*, 1822.

COPELLY *vs.* DEVERGES.

which says that delivery of the titles works a delivery of the thing; yet, when I consider how the equity of this court has chastened that law, and when I look and reflect on the words of the law of the *5th Partida*, as well in the original as in the translation, made by direction of our legislature, I feel, I repeat, some confidence in appealing to it. In the translation, it is as I have above quoted: if the second purchaser come to the possession of the thing, and has paid the price, it will belong to him, and not to the first. The words of the original are, *si el posterior comprador possesse a la tenencia, e a la possession, e pagasse el precio, que el la deve aver, e no el primero.* The court will observe, that the legislator does not content himself with the word possession, but prefixes to it the word *tenencia;* which means the real corporal act of holding, as may be seen, by appealing to the best dictionaries of the Spanish language. And to whom is this *posterior comprador* preferred? To one who actually possessed; not simply to an imaginary possessor, but to one who *posea a la tenencia de la cosa e pago el precio*, as is stated in the law referred to. It never could have become so difficult, so *vexata questio* as it is, if

the mere giving a title or deed of sale, was construed to work a delivery, to the injury of third persons; such a construction would be the greatest protection and cover to frauds, of all descriptions, and this court in giving its opinion in the case of *Pierce* vs. *Curtis*, fully felt the force of it. If the mere delivery of a deed of sale, was a full and complete delivery, in regard to third possessors, would *Gregorio Lopez*, in commenting on this very law, of the *5th Partida*, with the knowlege which he must have had of the previous law of the *3d Partida*, giving such virtue to a mere delivery of title, have said, *Quid si utrique tradita fuit possessio, neque constaret cui primo fuit tradita?* Since the dates of the deeds of sale would always decide the question, and the only enquiry would be, who bought first by a public deed, when he would be preferred. Taking the opinion of those who deem a delivery by title sufficient, they decide in favor of my client: since every one of them, from *Guy Pape*, above cited, to the present day, requires something besides the mere fact of alienation; they all require some clause, as that of *constitut*, or some other similar, such as giving of *usufruct*, or hiring to the vendor, or he acknowleging that

East'n District. *June*, 1822.

COPELLY *vs.* DEVERGES.

he possessed for, and in the name of the vendee; see even the much relied on authority of *Gomez*, who, in speaking and delivering his various opinions on this subject, always speaks of *traditio per actum fictum;* and in writing on this subject, uses these words, *quia in emptorem, cui est facta traditio, translatum est dominium, et plenum jus rei mediante titulo et traditione. Gomez, var. resol. cap.* 2, *n.* 20. even in that part of that number where he seems in favor of the appellant, he uses the words *facta traditio per actum fictum: alteri vero per actum verum;* meaning that in relation to third persons, delivery must be made by some of the modes signified in the 6*th law*, *tit.* 30, *part.* 3; for it is only between the original parties, that the mere delivery of title, which the 8*th law* of the same *tit. and part.* says is sufficient, can equitably be said to have effect; for this I appeal to every commentator, and for an apposite authority on the case, I beg leave to refer the court to the above mentioned work, on *Belgick law*, *vol.* 2, *p.* 33, *art.* 13, and same *vol.* 25 *and* 26, *art.* 20, which expressly says, that he who is first actually in possession, is to be preferred to an anterior purchaser, to one who was first *adherité*. to him who had the first patent; *vide* also *Siguenza de Clausulis, fol.* 86, *cap.* 14.

But I rely on the authority of *Gomez* himself, when I consider the facts of this case as developed by the testimony on record. In the same work of his above cited, and in the following page, he supposes our case, and decides it in our favor; he says, that the second sale, made in good faith, is to be preferred to a prior one, which was fraudulent; he goes further, and says, it is to be preferred, although it was characterised by fraud, or at least, that it is the opinion of those who do not join him thus far, that at least the goods or property of the seller must be discussed, before recourse is had to the second purchaser. That we are purchasers in good faith, cannot be denied; that the sale to Bony was fraudulent and simulated, strongly results from the evidence.

Suppose, however, that this court should nevertheless feel some doubts in this cause, these very doubts are as many arguments in favor of my client; on the strength of legal maxims, I invoke them in his behalf. In civil as well as in criminal suits, the cause of the defendant is most favorable; in cases of doubt, he, who is in possession, ought to be maintained. *Melior est conditio possidentis et rei quam actoris; erit potior possidentis conditio. In pari*

East'n District. *June*, 1822.

COPELLY *vs.* DEVERGES.

delicto, vel causa, potior est conditio possidentis. Melior causa sit posidentis, quam petentis. The learned *Paz* considered these maxims of such force, that in a case of liberty, he decided in favor of slavery. *Vide, Var. Con. Classe*, 1 *consult*, 40, *n.* 243.

Moreau, on the same side. The question before the court, is, whether a feigned tradition of an object sold or given, is operated by the simple fact of the passing or execution of the deed, by which the alienation of the object is intended to be made, or is it also requisite that the deed be delivered to the transferee.

The manner in which the 8*th law*, 30 *tit.* of the 3*d Partida*, has been translated into English, may have given rise to the idea that the simple execution of the deed of alienation operates a feigned delivery, without being accompanied by a real tradition of the title. But if we carefully examine the original, and the translation, we will be fully convinced that besides making a new act, it must be delivered to the transferee, in order to operate a delivery, such as is contended for. In effect, the words in the original are, *o faziendo otra de*

nuevo e dando gela. And in the translation they are rendered, and makes, and delivers to him a new one. Hence we must be convinced that this law requires evidently two things in order for the transferee to acquire lawful possession, 1st. the execution of the deed of alienation in his favor; and 2d, the delivery of the title to him.

This delivery of the deed is absolutely necessary to operate a fictive tradition. It may be considered the symbol and characteristic, as when a person gives possession of a field or tenement to him who acquires it, by pointing to it, so that he may see it, although he does not really enter upon it.

The making of a new title, is not therefore sufficient. This title must besides be delivered to him who acquires, and this evidently results from *Gregorio Lopez's* Latin translation of the same law. *Per traditionem literæ emptionis vel donationis rei, vel faciendo literam emptori, vel donatorio acquiritur possessio, literam recipienti.*

It then results from this translation of *Gregorio Lopez*, that a fictive tradition can be had in two ways, 1st, when the transferor delivers to the transferee, the titles by which

East'n District. *June*, 1822.

COPELLY vs. DEVERGES.

he, himself, holds the thing; and 2d, in executing a new deed of alienation, and delivering it to the alienee.

But it is evident that in order to operate a feigned tradition in this second manner, two things are necessary to concur in doing it, 1st, that the alienor execute a deed of alienation; and 2d, that he deliver this instrument to the alienee.

This is what we find clearly explained by *Antonio Gomez*, in his commentaries on the 17*th and* 44*th laws of Toro*, which laws being posterior to those of the *Partidas*, ought to serve us, we may presume, in coming to the right understanding.

In the text of the 17*th law of Toro*, *vol.* 2, 102, *of Gomez*, the question is treated of a donation, which a father or other ascendant may make to his descendant, to the prejudice of others, whither by donation *inter vivos*, or by act of last will and testament; and it is there stated, that if the donation is made *inter vivos*, and if possession is given of the thing, or the deed delivered in presence of a notary, *o le overa entregado ante escrivano la escritura d'ella*, a donation thus made shall be irrevocable.

In the 44 *th law of Toro, vol.* 2, 131, the subject of *majorats* is treated of, and it is stated that a father may revoke such of these *majorats* which he may have constituted in favor of any of his children, unless he should have done so by an act *inter vivos*, by which he should have given him possession of the objects composing the *majorat*, or should have delivered the deed in presence of the notary. *O l'oviere entregado la escritura d'ello anté escrivano.* We see that the legislator, in both these cases, uses the same expressions, in relation to the delivery of the title or deed of donation.

We must suppose that by the expressions, *entregado la escritura d'ello anté escrivano*, the legislator meant not that the feigned or symbolic delivery could be effected by the simple act of the execution of the deed of donation in presence of the notary, if this manifestation of his will is not accompanied by the actual tradition made by the donor, to the donee of the title of donation. In fact, the manner in which *Gomez* reasons on this subject, as to the delivery of the title in the presence of the notary, leaves no doubt on this subject, that it is indispensible in order to effect a feigned delivery of the object given.

East'n District. *June*, 1822.

COPELLY *vs.* DEVERGES.

Here then is the manner in which *Gomez* expresses himself; he asks if possession is given by the delivery of the old or the new deed, to the donee. *An requiratur*, says he, *traditio instrumenti novi vel antiqui, ut transeat possessio*, *Gomez*, *vol.* 2, 233, in the summary, at the head of his commentary, on the *45th law of Toro*, *n.* 57:—The following is the way in which *Gomez* answers the above question. First, as to the fictive tradition which may be effected by the delivery, which the vendor or donor makes to the vendee or donee, of the ancient titles by which he possessed himself the thing alienated, *Gomez* says, *item adde quod ista conclusio et doctrina quæ habet quod per traditionem instrumenti transit possessio ipsius rei, debet intelligi quando traditum instrumentum in quo continetur quo vel titulus, mediante quo tradens habuit illam rem, &c. Gomez, vol.* 2, 264, *n.* 57. No doubt then but that the delivery by the vendor or donor, to the vendee or donee, of the titles by virtue of which he himself possesses the thing alienated, operates a feigned delivery of that thing, which we find is in conformity to the first part of the *8th law*, 30 *tit.* of the 3*d Partida*, which declares that a feigned delivery is effected by the delivery of the titles.

by virtue of which the donor possessed the thing *apoderandole de las cartas par que la ello ovo.*

But it must be here observed, that in order to operate the feigned tradition by the first of these means, it is necessary that the title of the donor be really delivered to the donee; that that delivery, agreeable to the 17th and 44*th laws of Toro*, be made in presence of the notary, and, what is a natural consequence, this delivery must be verified by the notary in his deed; because it cannot be supposed that proof can be made of a fictive tradition, which consists in facts or expressions purely symbolical: as when a vendor makes a delivery agreeable to the 29*th art.* 350, of our *Code*, either by the delivery of the titles, if there are any, or of the keys, if it is an enclosed place, or in giving to the purchaser a view of the thing, or in consenting that he should possess for him, unless all these things are expressly mentioned, in the deed of alienation.

Let us now return to *Gomez*, and see how he explains the second manner in which a symbolic or fictive delivery is made. Is it by the delivery of the new title, which the alienor makes to the alienee at the time of executing the deed? We perceive in reading this

East'n District. *June*, 1822.

COPELLY vs. DEVERGES.

same passage, in *n.* 57, that anciently some authors contended that the delivery of the new title of alienation was not sufficient for a feigned delivery, unless it was accompanied by that of the old titles, by virtue of which, the alienor himself possessed the thing by him alienated; but that these doubts were removed by the new laws, which had corrected this old doctrine, and that at present it is sufficient to deliver the new title—*Gomez*, on this subject, expresses himself in the following terms. *Hodié tamen aperté istud corrigitur, per leges nostri regni, imo quod sufficiat traditio instrumenti novi presenti alienationis; ita probat et determinat, l.* 8, *tit.* 30, *part.* 3.

But nevertheless, in agreeing with *Gomez*, that agreeably to the said law, 8*th*, *tit.* 30, *part.* 3, the simple delivery of the new deed of alienation is sufficient to operate the fictive delivery of the thing, it is clear that this word delivery, *traditio instrumenti*, cannot be understood as to mean the simple execution of the new deed, for besides that, the Latin words of *traditio instrumenti* can admit of no doubt; it will be granted, that if a delivery took place by the simple fact of the execution of the deed, and by the consent of the parties, the

whole system of feigned and real traditions would vanish, and third possessors would in consequence be deprived of any recourse which they might be warranted to exercise on the thing alienated in the interval between the execution of the deed, and the real or feigned delivery of the thing, and we must here observe, that *Gomez* in all his observations in his commentaries on the 17*th and* 44*th laws of Toro*, considers that the principles of feigned delivery which regulate donations, should likewise apply to sales, and that one should not be more favorably viewed than the other.

If the fact of the tradition, or delivery of the deed of alienation, could for a moment have been confounded with the passing of the deed itself, that must arise from the difference which exists between our usages, and those which subsisted when the laws of the *Partidas* and of *Toro*, which require this delivery were passed. Nowadays the parties go before a notary, who takes notes and makes the original, and often does not deliver a copy, unless he is required. On the contrary, under the Spanish government, and particularly at the period of the promulgation of the *Partidas*, the notaries held a book of notes, in

East'n District. *June*, 1822.

COPELLY *vs.* DEVERGES.

which they entered a memorandum of the conventions agreed on between the parties. It was from these notes that they drew out the true original or exemplification of the deed, which was always delivered to the party by whom it was held as the original, and the deed thus delivered was so truly the original, that in case of its being lost or destroyed, it was necessary to the judge, for his authorization to the notary, to draw out another original, which supplied the place of the first, and which was taken from the notes which the notary had preserved. The 10*th*, 11*th and* 12*th laws of the* 19 *tit.* 3*d Partida*, contain several enactments on this subject.

It is then easy to understand what the laws of the *Partidas* understood by this delivery. of the deed of alienation, and until this delivery was made, there was, in reality, but a symbolic tradition. We must then conclude, that the donation made to the plaintiff and appellant, by virtue of a deed of which the notary alone possessed the original, could not operate a feigned delivery in his favor, unless the notary should have expressly stated that a copy thereof was delivered to him.

MATHEWS, J. delivered the opinion of the court. In this case, the plaintiff sues to recover a house and lot described in his petition. The written evidences of his title, are, a deed of sale from Copelly, his reputed father, to one Bony, and a deed of gift from the latter to him; both executed before a notary public, on the 24th of December, 1787. The defendant, who has possession of the disputed premises, sets up a title derived from the same original proprietor, Copelly, sen., who sold. conveyed and delivered the same to one Defaucheur, by authentic act, executed on the 6th of September, 1817, who, on the 18th of May, 1818, sold to the defendant by a similar act of sale. Other evidence in the cause, supported by written documents and oral testimony, shews that Copelly the elder, under whom both parties to this suit claim title, was, in the year 1794, in embarrassed circumstances, and that he filed his bilan, in which no claim is made to the property, the subject of the present contest; that he and a free negro woman, called Rose Grondil, the mother of the plaintiff, and concubine of his father, remained in possession of said house and lot, either both together, or one of them. up to the year

East'n District. *June*, 1822.

COPELLY vs. DEVERGES.

1817, the date of the sale to Defaucheur; that during this period, Copelly, the father, improved the lot by buildings and repairs, for which he paid out of his own funds. Rose paid taxes on the property, as her own, for several years; and the plaintiff occupied and used a small house thereon as a blacksmith shop, during some time. It is agreed that Copelly, sen., paid off and discharged all his debts.

Judgment being for the defendant in the court below, the plaintiff appealed.

He claims a reversal of said judgment, and that the property sued for should be here adjudged to him; relying on the validity and strength of his title, his own possession, and that of his mother. In support of the judgment of the court *a quo*, the appellee assumes three principal grounds of defence: 1. That the acts, both of sale to Bony, and donation to the appellant, are feigned, simulated and fraudulent. 2. That they did not convey the property, and transfer it in full dominion, for want of delivery to the first vendee, and also for want of acceptance and delivery under the act of donation. 3. That the plaintiff's action is barred by the prescription of 30 years, &c.

The possession of Copelly, sen., appears not

to have been entire and exclusive, during the whole time which elapsed from the date of the sale and donation in 1787, until the last sale in 1817. Rose Grondil, the mother of the plaintiff, lived in the house, and paid taxes for it as her own. Copelly, jun., also occupied a blacksmith shop on the lot. At the period of commencing this action, in February, 1819, it appears that he was about 32 or 33 years old. When he acquired title by donation, it is stated in the act, that he was of the age of 18 months. Prescription could not affect his rights during his minority, unless it be that of the longest time, which begins to operate on the claim of minors, only after they have arrived at the age of puberty, (admitting that it can in any case affect them.) On this view of the subject, we are of opinion that the plaintiff's action is not barred by prescription.

To shew that the sale to Bony, and the donation from him to the appellant, are feigned. simulated and fraudulent, no evidence is offered except the record of the proceedings which took place in 1794, on a charge of fraud against Copelly, sen., in relation to his conduct as an insolvent debtor: and the cir-

East'n District. *June*, 1822.

COPELLY *vs.* DEVERGES.

cumstance of his still remaining in possession of the property, after said sale and donation. Whatever might be our opinion as to the nullity of these deeds, on the ground of simulation and fraud between the plaintiff and creditors of Copelly; between the parties to the present contest, it is believed that no legal evidence has been adduced, sufficient to destroy their validity, on account of these alleged defects. As to fraud, there certainly is no foundation for it, after admitting that the vendor has paid all his debts.

Having thus disposed of prescription and simulation; we must take into consideration the questions which relate to acceptance and delivery; believing that on a just interpretation of the Spanish laws on these subjects, depend the claims and rights of the parties litigant.

In examining these questions, it is proper to commence with that which relates to the defect of title, said to have originated in the want of delivery of the property, under the sale of Copelly to Bony, the donor of the plaintiff.

The law 50th, of *tit.* 5, *Part.* 5, on this subject, seems to be so clear, in giving a pre-

ference *in rem*, to the last of two purchasers of the same thing, to whom it has been delivered, as to leave neither doubt nor difficulty in the case, but lead directly to a conclusion favourable to the pretentions of the defendant. Opposed to this the appellant insists: 1st. That Copelly, sen., did not continue to possess the property in dispute, as owner, up to the time of sale to Defaucheur; and that the real and *bona fide* possessor was Rose Grondel, representing her son a minor, who claims under the act of donation, from Bony the first purchaser; to whom at least a feigned tradition had been made according to the law 8th, *tit.* 30, *Part.* 3, wherein it is stated, that "when one man gives another an estate, &c.," and delivers to him the title he already has, or makes and delivers to him a new one, the donee will acquire possession of the thing, though it had not been delivered to him corporally. As to the first ground assumed by the appellant, its solidity depends entirely on the effect which ought to be given to the act of sale to Bony. If it operated a feigned delivery, then the dominion of the property passed from the vendor to him, and the former no longer possess-

East'n District. *June*, 1822.

COPELLY *vs.* DEVERGES.

ed as owner, and could not give a valid title to the subsequent buyer, by sale accompanied with real tradition. The law, on which this feigned delivery is attempted to be based, seems, when taken in its full extent, to be somewhat inconsistent with the law first cited, relating to sales of the same thing, made to two persons, which gives a preference to the last purchaser, who has obtained possession. If the new title referred to in the former law be considered the act of sale, or donation by which the transfer of the property is made from the owner to the purchaser or donee; it would lead to this result, that in all cases of sale or donation, made and executed in writing, no delivery of the thing intended to be conveyed, would be necessary; the possession of the title, or act of sale being equivalent to actual and corporal possession; and would thus destroy the whole doctrine of law on the subject of tradition and dominion of property. The inconsistency would be less; if according to some of the doctors of the civil law, this feigned mode of acquiring possession, should be restricted to the delivery of the written instruments of the original right and title of the proprietor: or as suggested

by others, the expression in the law 8*th*, *tit.* 30, *Part.* 3, *o faciendo otra de nuevo* should be understood of a new title substituted for the old, which had been lost or destroyed. However, a contrary opinion seems to be holden by *Gomez*, in his commentary on the 45*th law of Toro*, *n.* 56 *and* 57.

It is perhaps true that a feigned delivery to a first purchaser gives him a preference over a second, to whom real tradition may have been made. See *Gomez*, *var. resol. tit. de evictione et venditione.*

Without attempting to reconcile and settle the differences between these doctors, we believe it may be safely laid down as a principle of self-evidence, that a person who claims the benefit of a fictitious act of tradition, in opposition to a real one, must bring himself completely within the law which sanctions such fictions.

It is necessary that the title should be delivered, whether new or old. In the present case there is no evidence that the act of sale to Bony was ever delivered to him, unless it be considered, that being executed before a notary public, is equivalent to delivering an act under private signature. The law makes

East'n District. *June*, 1822.

COPELLY *vs.* DEVERGES.

no distinction, and we ought not: a *copia original* (as termed by the Spanish law) could have been easily obtained, and delivered in presence of the notary. We are therefore of opinion that the house and lot now in dispute, were never, either by act real or fictitious, delivered to Bony; that he never had possession of them, and consequently could have given none to Rose Grondel, the mother, or to the plaintiff, under his act of donation. We conclude, that Copelly possessed the premises in dispute, in virtue of his original title, until the period at which he sold to the warrantor of the defendant, who seems to have had possession under said sale, and to have sold and delivered to the appellee.

This view of the cause renders it unnecessary to investigate any matter which relates to the question of acceptance under an act of donation, according to the Spanish law.

Before concluding, it may not be improper to advert to a note in the translation of the *Partidas*, by *Moreau & Carleton*, on the law relating to the delivery of titles. This note refers to the case of *Pierce* vs. *Curtis*, in which the translators seem to consider the decision as contrary to the text. That case was decid-

ed on rules of the *Code*, which establish the mode of fictitious delivery, by expressions to be used in the instrument of sale. Here, as in the present case, and as it should be in all similar cases, the fiction was limited to the strict words of the law.

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

DUFOUR vs. *CAMFRANC*. *Ante*, 607.

Moreau, on an application for a rehearing. The court considers the conveyance which the legislature directs the sheriff to deliver to the purchaser of property sold under a *fi. fa.* as so essential to the validity of the sale, that the smallest clerical error, in the description of the judgment, is fatal. That such a sale is of no effect, without the sheriff's conveyance, and so the property of the thing seized is not immediately and really transferred to the purchaser by the solemn adjudication made by the sheriff.

Immoveable property, at a sheriff's sale, does not pass by the adjudication: his deed is essential.

Parol evidence cannot establish the sale.

An heir, who has accepted, with the benefit of an inventory, is entitled to the possession and administration of the estate.

If there be other heirs, their rights will be noticed, when they appear.

In sales of lands or slaves, by individuals, it is true the written conveyance is essential

A possessor in good faith, does not owe fruits, till after

East'n District. *June*, 1822.

DUFOUR *vs.* CAMFRANC.

to the transfer of the property. But this is the result of an express derogation, introduced, *Civ. Code*, 344, *art.* 2, to the general rule. *Id.* 346, *art.* 4.

a judicial demand

A just title is that which is of a nature to transfer the property. So that, if it be not transferred, it is owing to a want of right in the grantor.

A purchaser at a sheriff's sale, by a defective title, owes fruits from the judicial demand.

Forced sales, under a *fi. fa.* were not in the contemplation of the legislator, when this exception was enacted; for he has expressly provided that they shall be made with the formalities particularly prescribed therefor. *Id.* 490, *art.* 1, 2, *and* 3. And it is expressly provided, that the seizure, or forced sale of a debtor's goods, transfers the property of them to the vendee. We humbly insist that this is effected by the mere adjudication.

This was the case under the Spanish law. *Part.* 5, 5, 52.

The adjudication, at a public auction, ought to be considered as forming an efficacious and indefeasible contract, which cannot be retracted. Consequently, the last bidder may be compelled to pay the amount of his bid, even by the imprisonment of his person.—*Curia Philipica, Remate, sec.* 22, *n.* 26.

There cannot be any doubt, that in sales by auctioneers, in this state, property passes by the mere act of adjudication; especially when it is attended with delivery. It operates a

complete contract between the owner, by whose directions the sale is made to the vendee. It imposes on the one the obligation of delivery and warranting the thing sold; on the other, that of paying the price. These respective obligations do not result from the certificate, which the auctioneer is directed to deliver to the vendee, who may, even before he receives this document, transfer his right.

The act of January 15, 1805, makes it the duty of the auctioneer, immediately after the sale, to deliver to the vendee a memorandum of the sale and purchase, designating the object and day; so that such purchaser may cause the same to be registered according to law. 1 *Martin's Digest*, 551.

It cannot, certainly be concluded, that this memorandum is so much of the essence of the sale, that the want of its delivery, or any error in the description of the thing sold, or the dates, should avoid the adjudication; and that the vendee may not establish the sale by other proof, nor be allowed to shew, and procure the correction of any error in the memorandum.

The intention of the legislator was to pro-

East'n District. *June*, 1822.

DUFOUR *vs.* CAMFRANC.

cure to the last bidder authentic proof of the adjudication; not to deprive him of the faculty of establishing the sale, by other than the written proof required in private sales of land or slaves.

A close attention to the section of the act of the legislature, which requires sheriffs to deliver to purchaser, under a *fi. fa.* a conveyance of which it prescribes the form, will shew it couched in the same imperative terms, as that which relates to the memorandum to be delivered by the auctioneer. The only difference is, that in cases of sales under a *fi. fa.* the conveyance is directed to be recorded, and a certificate of this record, endorsed on the original, which, after these formalities, may be received as evidence, in every court of the state. 2 *Martin's Digest*, 335.

It is evident that this conveyance is not intended by the legislator, as an essential and indispensible requisite to the validity of the sheriff's sale. He intended only to establish a rule of evidence, and enable purchasers to prove the sale, by other than testimonial proof, always precarious and liable to perish. Had he intended to confine such purchasers to written proof, he would have said, as in the

case of sales by individuals of land and slaves, that testimonial proof shall not be received. Provision is indeed made for the admission in evidence of the original conveyance of the sheriff, with the endorsement of the certificate of its record thereon; but it is not said that other legal proof of the adjudication is to be rejected.

Legal proof cannot be presumed to be excluded; but in this case, the words of the legislator manifest his intention of giving a new manner of proving, without taking away any; for, he says the sheriff's conveyance is to be received as legal evidence; assimilating this mode of proof to other modes existing before, which are not, from any expression used, taken away.

The act forbids the record of the sheriff's conveyance, if there be any erasure or interlineation, not noticed before the execution of the conveyance. If this document be the only legal evidence of the adjudication, a purchaser will be totally disabled from establishing the adjudication, under the construction adopted by the court, if there be any erasure or interlineation, not noted before the execution of the conveyance; even when able

East'n District. *June*, 1822.

DUFOUR *vs.* CAMFRANC.

to shew by irrefragable, and even written and authentic evidence, that such erasures or interlineations were actually made, before the execution of the conveyance, and in order to render it conformable to the real terms and conditions of the sale, which had at first been mistated. A construction equally opposed to the letter and the spirit of the law.

If the sheriff's conveyance was the sole legal evidence of the adjudication, it would follow that the purchaser might be deprived of his right, by the death of the officer, before the execution of the deed.

Let it not be said that without the sheriff's written conveyance, there is no adjudication, no sale, no expropriation. This would be to confound the formalities which ought to precede, with those which ought to follow it, in order to preserve the evidence of it.

The first are matter of rigor, their absence or insufficiency prevents the adjudication taking place.

It is true, if a sheriff sell a debtor's goods, without the previous advertisements, which the law requires, he transfers not the property of the latter: but it cannot be concluded from the requisition of the legislature, that the sheriff

should execute a conveyance, that the want of it occasions the nullity of the adjudication.

Perhaps the common law of England has adopted the principle, that every formality which a statute requires ought to be rigorously fulfilled; but it is repealed by the civil law.

The latter distinguishes whether the statute has used imperative or prohibitive words.—In the latter case nullity ensues, although not pronounced. Not so, in the other case, unless the nullity be pronounced, or the formality be of the substance of the instrument. *Civil Code*, 4, *art.* 12, 1 *Jurispr. du Code Civ.* 66, 67; *L.* 1, 14, 5.

The law which requires the sheriff's conveyance, in a sale under a *fi. fa.*, containing no negative words, the absence or irregularity of such a conveyance does not occasion the nullity of the adjudication. The legislator has not pronounced it, as he did, in case of sales by individuals, of land or slaves: and the conveyance is not of the substance of the adjudication. It cannot be urged from the circumstance of the act containing the form of the conveyance, that the legislator intended to make this form a matter of substance. One of the titles of the 3*d Partida* is full of

East'n District. *June*, 1822.

DUFOUR *vs.* CAMFRANC.

forms of acts, prepared by legislative authority. Yet, it never was contended that any other form could not be used, provided it contained what is of the essence of the contract; as in an act of sale, the enunciation of the thing sold, the price, and the consent of the parties.

If, therefore, the delivery of a conveyance or memorandum, be not an indispensable requisite of an adjudication: if it add nothing to its force or validity; if the adjudication be *per se*, an efficacious and irrevocable contract, creating obligations between the parties, and transferring property; if it cannot be retracted; if the conveyance or memorandum be useful only to the proof of the adjudication; which is independent therefrom; if the adjudication be susceptible to be proved by other legal evidence, in case a fortuitous event prevents the execution of the conveyance or the delivery of the memorandum, as the death of the sheriff or auctioneer, or if the conveyance, on account of erasure, or alteration properly made, but not timely noticed, afford no legal proof of the adjudication; this court will likely be induced to conclude that if an error has crept in thro' misinformation of

the authority under which the sheriff acted, this circumstance will not be so fatal as to absolutely destroy the party's right, and prevent him to establish, if he can, by the record, that a valid adjudication took place.

The authority of the sheriff, to sell a debtor's property, may appear, not only in the conveyance which he gives to the vendee; but in the *fi. fa.* on which he made the seizure, and his return thereon.

Hence, the title of the defendant to the slaves of V. Dufour, sold by the sheriff, is incontestibly proven. The possession which he has received, and the sheriff's receipt for the price, put it beyond doubt that the sale was made to the defendant. The sheriff's authority to seize and sell appears from the two writs of *fi. fa.* which are spread on the record, and his return on the back of these writs.

The court, states that the sheriff, according to the enunciative part of his conveyance, had no authority to sell.

This may be strictly correct, in relation to the *fi. fa.* in the case of *Laroque Turgeau* vs. *Dufour's heirs*, which is not recited in the conveyance. But the case is otherwise as to the

East'n District. *June*, 1822.

DUFOUR *vs.* CAMFRANC.

one in *Camfranc* vs. *Dufour*, which is there recited.

The defendant cannot imagine that the statute is necessarily to be construed with so much rigor, that the words, *and others*, added to the title of the suit recited, must be considered as avoiding the seizure and sale.

Should it be objected that the sale of the slaves of the heirs of Dufour, being made and adjuged *in globo*, it is impossible to distinguish those who have been sold at the present defendant's instance, from those who were sold, at that of *Laroque Turgeau*—we answer that the sheriff's return on the respective *fi. fas.* will clear the doubt.

The attention of the court is particularly solicited to two parts of its decree, which, it is imagined, it will, on examination, deem to require some correction.

1. The court has decreed the slaves to be delivered to Dufour Delonguerue; while it is apprehended they ought to be restored to the sheriff. who had attached them.

2. The decree has adjudged the slaves to this gentleman, as heir of V. Dufour; while the plaintiff admits that he is so for one half of the estate only; the other half belonging to the minors Lafitte.

The judgments obtained by the present defendant, and by Laroque Turgeau, being recognised as valid by the decree, the seizure and sale under them, are alone avoided, and things ought to be replaced in the situation they were in, when those judgments were rendered. At that time, the slaves, since sold to the defendant, were not in the possession of Dufour's heirs, but in that of the sheriff, who had attached them, at the inception of the suits, in which these judgments were rendered.

No law authorises the delivery to a co-heir of the portion of another, who has not renounced the succession.

The heir, who has accepted part of a succession, acquires *jure accretionis*, without any act of his own, the share of a co-heir who renounces. *ff.* 29, 2, 53, *sec.* 1.

Pothier likewise thinks that the *jus accretionis* can only take place in case of the renunciation of a co-heir. *Traité des succesions*, 228, 229, *sec.* 4.

Livingston, for the plaintiff. I deem it unnecessary to discuss any of the questions raised by the learned gentleman. but shall con-

East'n District. *June*, 1822.

DUFOUR *vs.* CAMFRANC.

fine myself to the only point yet open in the cause—at what time should the defendant commence to pay hire for the slaves, purchased by him?

The defendant purchased in the year 1810, certain slaves, at a sheriff's sale, and received a conveyance which the court have decided to be one that could not pass any property. They have therefore directed the slaves to be restored, but have reserved for further discussion, the question, whether he shall be accountable for the wages of the slaves, and if at all, from what time.

The plaintiff contends, and as he believes, on principles which cannot be controverted, that the wages are recoverable from the moment the defendant came into possession.

1. The slaves were the property of the plaintiff; he has never been divested of that property, either by his own act, or by the operation of law; they have then never ceased to be his: but from the time of the sale, to this day, the defendant has received the proceeds of their labour. The proceeds of the labour of a slave belong to his master; therefore the defendant has received our property, and is bound by every principle of law and equity

to restore it. But, although these principles are acknowleged as generally true, yet it is said they are restrained in this state, by positive law, and that a possessor *bona fide* cannot be forced to restore the proceeds of the labour of slaves, although they never belonged to him. Any provision of law operating such unjust effects must be strictly construed. No law, permitting one to enrich himself at the expence of another, without his assent, can or ought to be favored; if courts carry it beyond the letter of the law, it appears to me, that they legislate, and I should say, that their legislation is neither legal nor wise. Nothing seems more incontestable than that—no one has a right to the use of my property, unless by my consent or the operation of law; if positive statutes have in certain cases contravened this principle, even tho' we should not acknowlege its justice or wisdom, we must submit; although I cannot myself see why a legislature should be permitted to give to another the use of my property, without my consent, when they are restricted from depriving me of the benefits I may derive from a contract; the one is no more my property, my right, than the other. Without raising any

East'n District. *June*, 1822.

DUFOUR *vs.* CAMFRANC.

constitutional question, let us see what the law is on the subject:—

How far has this exception been carried? I do not mean by the courts; they have clearly no right to create or extend it, but by the legislature. The only expression of their will that is relied upon, is in the *Civ. Code*, 102. They begin by an unequivocal affirmance of the principle I contend for. "All that is produced by a thing, whether moveable or immoveable, belongs to the owner of that thing." "The produce of the thing does not belong to the simple possessor, and must be returned with the thing to the owner, who claims the same, except in case of the detainer having possessed it *bona fide*." The *bona fide* possessor then is the only one not bound to restore the fruits. Who is the *bona fide* possessor? The next article gives us the answer. "The *bona fide* possessor is he who has possessed as owner, in virtue of a transferable title of the property, (*titre translatif de propriété ;*) but erroneous and defective, whose defects, however, he was ignorant of." Let us apply this definition to the facts in this case:

1. As to the nature of the title under which the possession was held in the English part

of the text, it is inaccurately, almost unintelligibly expressed, it must be a transferable title, meaning probably such a title as would, if the person who made it, had the property vested in him, have been sufficient to transfer the property; to give any other construction to the words, would render the expression, *translatif de proprieté*, totally inoperative; because if a conveyance so erroneous and defective, as not to pass the property, were to make him a *bona fide* possessor, merely because he was ignorant of the vice of the conveyance, then there would be no use in the terms *translatif de proprieté*; whether it were in its form sufficient to transfer the property or not, would then be immaterial; the only enquiry would be, was the party ignorant of the defects? If he were, he would be a *bona fide* possessor, and entitled to the profits; but the law has used these words, they must therefore have their effect; and if the conveyance is not in form, such as would transfer the property, the holder under it, is not by the terms of this definition, a *bona fide* holder. Now, the conveyance in question has been determined by the court to be one, by which no property could pass, and they determined this upon no other

East'n District. *June*, 1822.

DUFOUR *vs.* CAMFRANC.

evidence than that which the defendant had before him at the time he purchased: therefore we come to this double conclusion. First, that this is not a title *translatif de proprieté*.—Second, that he was not ignorant of its defects. Yet, both of these must unite; for if the title be not *translatif de proprieté*, it cannot protect him, whether he knew the vices or not, and even if it were *translatif de proprieté*, if he knew the defects, it will not protect him.

As these are the material points in the case, perhaps it may be proper to develope both of them somewhat further—

On these points, every thing I could say has been strongly expressed in the opinion given by this court, in the judgment now under consideration, and I refer to all that part of it which considers the validity of the sale as conclusive, both by its reasoning, and the authorities it cites, to shew that this is not an act which could transfer the property. The judgment and execution are as necessary as the sheriff's deed to transfer the property, but here there was neither judgment nor execution; how then could the property be transferred, when two out of three of the requisites were wanting. An attempt is made

to apply to this case, the doctrine relative to deeds which are good in their form, and which would transfer property, if the grantor had a title. But the cases are widely different; the purchaser here knew that the property did not belong to the sheriff; the deed itself purports that it conveys the property of the heirs of V. Dufour, not the property of the sheriff; the purchaser knew that the sheriff could only sell when he had an execution, and where there was a judgment to warrant it; he ought therefore to have satisfied himself as to these points; the one was attended with no difficulty, the other with very little; if there were an execution, it must have been in the sheriff's hands, nothing easier then than to shew it; if the defendant did not choose to make use of this most ordinary diligence, can he make use of his own gross neglect to excuse his want of knowlege? But ignorance is not enough, if he had reason to doubt, *dubitatio et ignorantia in omnibus nocet, etiam in singulis. D.* 41, 4, 6, *in notis, n.* 42. He must be presumed to have known the law, by which the only authority which a sheriff could have, was an execution: common sense must have taught it him, and if he knew it, he ought to have enquired for the

East'n District. *June*, 1822.

DUFOUR *vs.* CAMFRANC.

execution; and if he had, it would have been found that there was none to warrant the sale. But suppose him so ignorant as not to know that an execution was necessary, he could not have read the deed without learning it; for it is there set forth as the authority of the sheriff; if he was still so stupid as not to perceive this, it will not avail him. *Juris error nulli prodest.* If I purchase from a minor, believing him to be of age, I am in good faith, because this is an error of fact; but if I know him to be a minor, but believe that a minor can convey, I am in bad faith, and cannot prosecute under such a sale, *quia juris error nulli prodest. D.* 41, 4, 2, *sec.* 15.

It has been said, that in this case there was an error in fact, not in law; that there is an execution, and a judgment recited, and that Camfranc might have believed that they existed as they were recited—to this I answer—

1. By repeating that voluntary ignorance shall not protect him; that common prudence required of him to ask for the sheriff's authority, which if he had, it could have been produced in a moment; suppose A should pretend that he is the attorney in fact of B, and as such, should convey B's lands to C, who

should take the conveyance without asking to see the power? Can it be doubted that this would not be a title *translatif de proprieté*, if B had never given any power at all? If a power had been produced, and it should prove to be forged, the case might be different; because here would be a just reason to believe that the party had a right to convey; it is not enough to believe it; but the belief must have a just foundation.

2. I answer, that Camfranc did know, and could not but know, that there was neither judgment nor execution to warrant the sale. The deed recites, that it was made in "a suit of J. B. Camfranc and others, against the heirs of L. V. Dufour;" now as he was J. B. Camfranc, he could not but know that he had never obtained any such judgment, or issued any such execution; he was not then mistaken in the fact; his mistake, if any (but certainly he has shewn none) was in the operation of the law which required the true recital of the judgment and execution; but that, as we have seen, shall not avail him.

The *bona fides*, required to retain fruits, is the same as that required to prescribe; the species of title is the same: yet in those cases,

East'n District. *June*, 1822.

DUFOUR *vs.* CAMFRANC.

although the circumstances of the case preclude any idea of an actual design to defraud, yet, because the ignorance proceeded from an error of law, because it was such as might have been removed by common caution, the courts have uniformly declared that conveyances having legal defects were not such as transferred the property, and could be no foundation for prescription, although the party may have believed them to be good.

In the case of *Francoise* vs. *Delaronde*, there was not the slightest suspicion that the defendant had not acted with perfect good faith; he believed the order of the judge sufficient, but he was mistaken; and the court declared that the conveyance could not be a foundation for prescription; indeed it appears to me, that having once determined that it is not a title by which property can be transferred, the court has no other power; that the consequence is declared by the law, and must inevitably follow, that it can neither support prescription, nor be a reason for retaining the fruits.

This consequence appears to me inevitable; the law declares that the fruits shall be restored in all cases, except those where the possessor holds under a title by which pro-

perty may be transferred; the court say that this is not such a title, therefore the defendant does not come within the exception, and of course, falls under the provision of the general rule which requires that he should restore the fruits. Of what use is it then to enquire what have been the decisions of courts, the opinions of jurists, in other countries? Whatever they may be, or may have been, if our law be clear, we but bewilder ourselves in the search after uncertain rules, when we have one to recur to that is clear, and is the only one that has any authority to guide us.

Yet, even that search would produce a result very different from that which is imagined; let us see to what it will lead us.

Carlivallio, tit. 3, *Des.* 2, 4, 7, first goes into the enquiry, whether property sold in execution, under either of the following circumstances, is to be restored, *viz.*

1. Under an execution not formally nor legally issued, either because the due order in taking the property has not been pursued, or that a solemnity of the sale at auction, or of the citation,* has been omitted.

* By citation, here is meant the citation to be present at the sale, not the citation to appear at the commencement of the suit.

East'n District. *June*, 1822.

DUFOUR *vs.* CAMFRANC.

2. When it has been struck off to the creditor, at a low price, with enormous lesion, or below one half of the just price.

3. When the plaintiff has procured the property to be struck off to himself, by the intervention of a third person.

Restitution, in these cases, he says, may be obtained, either on an appeal or by suit for the recovery of the property; and he says, in this case, the judges must decide that the debtor pay within a certain period to be fixed, the debt and costs and interest, and that the creditor restore the goods sold with the fruits. *Atque etiamsi confirmant sententiam executionis nihilominus jubere, ut si intra terminum arbitrarium ab eis statutum, debitor solverit debitum creditori, cum expensis et interesse, creditor restituet debitori bona vendita, cum fructibus.* And for this he cites these Spanish jurists, *Parladorio*, *Rodriguez* and *Volano*.

It seems impossible to produce an authority more applicable to the present case, and where the result is so precisely that which is contended for by the plaintiff; this it will be observed, is the course of proceeding, where relief is sought by appeal. Altho' the reason appears to be the same, yet as my author, in

his order of treating them, divides cases of appeal from suits for restitution, such as the present, we will follow him through the other case; it is found in the succeeding numbers, 8 and 9.

As to the second question, he says we must pronounce that the same thing must take place if the debtor should sue before an inferior tribunal for the restoration of property seized in excution, and irregularly or illegally sold to the creditor. But whether restitution of the goods is to be made with the fruits, or not, doctors differ; some deny it altogether, because this restitution appears to be given *ex gratia*, under our law; this reason fails, for nothing is done *ex gratia*, but by right under a positive law; a court may annex conditions to a favor, but can add none to a law; but, in a restitution which is made *ex gratia*, the fruits are not included; others, as positively affirm, that the restitution ought to be made with the fruits, as well because the fruits are implied in the words restitution, as because the creditor suffers no loss, when his debt is paid to him with interest; therefore he ought not to profit by another's loss; others finally distinguish thus: either, first, the execution is void

East'n District. *June*, 1822.

DUFOUR *vs.* CAMPRANC.

on account of the omission of some form, and then, the whole debt being paid to the creditor, with interest, the property must be restored to the debtor, with the fruits. The same rule would apply, if there was any ill faith in the creditor, or a suspicion of fraud. Or, secondly, the execution is defective in justice, because the goods of the debtor were sold at an inadequate price, all the other forms being observed, and in that case the creditor shall enjoy the fruits, and the debtor recover the property without accounting for them.— Apply either of these opinions to the present case, and it will be found whether we consult express law or authority from opinion, that the plaintiff is as much entitled to the wages as to the negroes themselves.

In France, a natural child, whose tutrix received the fruits of the whole estate, under the sentence of a court of justice, when by law, she was entitled only to one half, was ordered to account for the fruits. 7 *Sirey. Part.* 2, 972. *Heritiers Lee* vs. *Eglie.*

I conclude by one argument, which I think, must be conclusive, even if we had no positive law on the subject. It grows out of the nature of the property. All that we have been

considering until now, relates to real property, which does not perish by the use. But the subject of our present enquiry is negroes, all of them have grown old in the service of the defendant; it is more than twelve years since he possessed them; more than the common calculation of the life of man; some of them have actually died, others are maimed, and all are lessened more than one half in value from age; if the risk of mortality and accident is ours, surely the wages, which are the only compensation for it, must be ours also. Suppose the negroes had all died during the pendency of the suit, we must still have paid the debt and interest, and would have received nothing.

If he who runs the risk of loss should also reap the advantage of any occasional gain, from the same cause, it would seem that no doubt ought to exist in the present case.— Why ought we to suffer the loss of the negroes who are dead? Because the thing perishes for the owner; *res perit domino.*— Why ought we to receive the fruits? Because the same law declares that the fruits belong to the owner.

There is an evident distinction also between the case of a re-entry under a claim *a*

East'n District. *June*, 1822.

DUFOUR *vs.* CAMFRANC.

remére, which is put by the defendant's counsel. There the party was put in possession by the owner, was suffered to remain so by his consent, the title was one *translatif de proprieté*, and therefore the fruits might justly be retained by the possessor; the same observations may be made as to the restitution for lesion; yet in that case even there appears, by the authorities he cites, to have been a great diversity of opinion.

But in our case every thing is different, there was no conveyance by the owner, no consent, no title that could transfer property. Indeed, *Pothier* gives the reason in the case of the *vente a remére*, which shews it to be entirely inapplicable to our case. *C'est une suite du principe établi, que le reméré n'opérant la résolution du contrat de vente que pour l'avenir, tout ce qui est provenu de la chose vendue jusqu'au réméré doit appartenir au vendeur!! Poth. contrat de vente, n.* 405.

Pothier is also quoted to show that an error of law shall also protect against the restitution of fruits; but the case put in the Roman law, in the first place, is not our law. Secondly, it does not apply to the case if it were; because it is the case of a testament, the invalidity of which appears to have depended on

the fact; and thirdly, *Pothier* himself, in the same treatise, most fully and explicitly declares, that a *bona fide* holder is obliged to restore all the fruits, by which he has been made richer. *Vide Pothier Traité du droit de proprieté, n.* 423, 425, 430, 432, *&c.*

Moreau, in reply. We have nothing to do with the imperfections of the translation of the *Code*—the French text, in which it is known that work was drawn up, leaves no doubt.

Le possesseur de bonne foi est celui qui a possédè comme proprietaire, en vertu d'un titre translatif de proprieté, mais erroné ou vicieux et dont il ignorait le vice, &c.

In the English text the error and the vice of the title are confounded together by the conjunction *and*, which makes it read thus—"in virtue of a transferable title of property, but erroneous and defective." Whereas, by the French text, whether the title contains error *or* any other vice, the good faith of the possessor cannot be attacked, if he was ignorant of it.

Nothing more is required to destroy the argument that the transferable title must be perfect in its form. The just title, required as a basis for prescription, is one in its nature susceptible of alienating the property, such as

East'n District. *June*, 1822.

DUFOUR *vs.* CAMFRANC.

sale, donation, or exchange, &c. This is the clear deduction from the 18*th law of the* 3*d Partida, tit.* 29.

"We therefore say, that if one person receive of another an immoveable thing, in good faith, either by purchase or exchange, or as a donation or a legacy, or by any just title, and keep possession of it during ten years, &c. such person will acquire the thing by prescription."

It is then by the nature of the title, and not its goodness, that we judge of the good faith of the possessor.

If, on the contrary, the possessor holds as lessee or usufructary, he can never acquire by prescription. *Part.* 3, *tit.* 30, *l.* 4 *&* 5.

We must thus understand the *Civil Code*, *art.* 7, 102. It speaks of a title in virtue of which he who is in possession believes himself proprietor, although he is not so in reality. If we construe it to mean a title exempt from every species of error or vice, there would be a contradiction in the other part of it, which supposes a defective one, and yet declares the possessor one of good faith, provided he was ignorant of the defects.

The question now before you depends on knowing if the vice in this title was one of

which the defendant might have been ignorant. Both the ancient and modern laws have made a great distinction between the cases of acquiring by prescription, or merely retaining the fruits.

In the Roman law the defect in title prevented prescription from running, but it must be such a defect that the possessor could not reasonably presume to be ignorant of, or of which he might easily have informed himself. *Domat, liv.* 3, *tit.* 7, *sec.* 4, *n.* 13.

Our *Code* goes farther, and declares, *que le titre nul par defaut de forme, ve peut servir de base a la prescription de dix et vingt ans. Code*, 488, *art.* 70.

It might therefore be said if Camfranc pleaded prescription in virtue of an adjudication, which the court has pronounced null, the defect of form must have been known by him. But, to enjoy the fruits, is the same rigorous doctrine in force? Surely not.

Thus *Ulpien* decides, that at Rome an error of law was not a good cause to prevent him who entered on a succession of which he believed himself heir, from making the fruits his own.

It is said the edict of *Adrien*, from which

East'n District
June, 1822.

DUFOUR
vs.
CAMFRANC.

Ulpien takes this doctrine, was not in force in Spain. But *Rodriguez* in his translation of the digest, *lib.* 5, *vol.* 3, *tit.* 3, 146, does not say so. The civil law is considered as the common law of Spain. It is the same in France, and we see *Pothier* citing this passage of *Ulpien* and recognizing it as a principle of general jurisprudence.

A law of the *Partidas* too has sanctioned it. *Part.* 3, *tit.* 28, *l.* 39, and allows the fruits to the possessor in good faith, without requiring from him any other title. In neither the Roman nor Spanish law was title necessary; ignorance, either of fact or law, enabled the party in possession to make the fruits his own. Such also was the jurisprudence in France. *Pothier*, *Domaine de propriété*, *n.* 395.

The only place in which a question is made in the Spanish law, of the title of him who claims fruits, is the *Partida*, 3, 28, 40; it enumerates several circumstances, in consequence of which the possessor will be considered of bad faith. The first is, where a person has sold his property in fraud of his creditors. The second, where he has disposed of it through fear or violence. The third, where the thing has been acquired contrary to the provisions of law.

The third case is stated to be where the purchaser buys at a forced sale. without observing the formalities prescribed to render it valid; but it is not every informality that will thus vitiate; it is where the adjudication has been made in secret.

In translating this law, an error has been committed, and though part of the blame may attach to me, still it is true that there is a mistake, and it is my duty to shew it.

It is thus given, "the third, where any thing is ordered to be sold by an officer of the court, and a purchaser buys it, without observing the formalities prescribed in such sales, &c."

According to this translation, all kinds of irregularities would be sufficient to make the purchaser one of bad faith, and prevent him from claiming fruits—but what says the original.

El tercero es quando alguno comprasse encubiertamente alguna cosa, de aquellas que mandasse vender el official de nuestra corte, contra la costumbre que deue ser guardada en venderlas.

This does not speak of him who buys, omitting certain forms, but of him who buys secretly, clandestinely.

East'n District. *June*, 1822.

DUFOUR *vs.* CAMFRANC.

But our *Civil Code* has terminated all difficulties, in declaring that he who has a title of a nature to transfer the property, makes the fruits his own.

The whole question then turns on ascertaining if the vendee was ignorant of the defects in his title—of this there is no doubt, the act on the face of it was regular, the purchaser knew not a word of English; the question whether the property did not pass by adjudication, was at that time unsettled; it is admitted to have been one not very clear. Can the defendant then be responsible, for not knowing what learned advocates might well have doubted of, and wise judges have found it necessary to pause on?

PORTER, J. delivered the opinion of the court. The circumstance of this case having been once remanded, with the intimation of an opinion on one of the principal points, rather different from that lately expressed by the court, joined to the earnestness with which an application for a rehearing has been pressed on us, has induced a very patient and particular attention to all the arguments offered by defendant's counsel. After attentively

weighing every thing advanced, we are obliged to refuse the application.

On the first point, it is insisted that the deed of sale by the sheriff is not of the essence of the contract; that the adjudication transfers the property; that the deed is only the evidence of this transfer.

Admitting this position to be correct, it by no means follows that other evidence than the deed can be received of the adjudication. A contract is complete, in the definition given by the *Civil Code*, when there is the consent of the parties—the capacity to contract, a determinate object, forming the matter of an engagement, and a lawful purpose; yet, suppose all these in the purchase of a slave or a plantation; could the agreement be enforced unless there was evidence of it in writing?

But it is said that the exclusion of parol proof does not extend to sales made by authority of justice.

To this there are several answers.

Our law has provided, that all sales of immoveable property, shall be made by authentic act, or under private signature; and that all verbal sales of any of these things shall be

East'n District. *June*, 1822.

DUFOUR *vs.* CAMFRANC.

null, as well for third persons, as for the contracting parties.

A sheriff selling land or slaves to a buyer, who pays the price agreed upon by the adjudication, is within the letter of the provision quoted.—And the contract thus formed, is within its spirit.

For the policy of our law, would be entirely defeated, if parol proof could be received to establish sheriff's sales of immoveable property; and our jurisprudence would be strangely inconsistent, if it had provided, that when land is claimed in virtue of the owner's consent, the demand should be rejected unless that consent was proved by written evidence, but if asked for, by the alienation which stands in place of consent, that it might be proved by parol.

The act of the legislative council, which prescribes the formalities to be pursued, when property is sold on execution, supports the construction we put on it; for it requires a written conveyance, only in case land or slaves are sold. It intended then to make a difference between them and moveables, and to preserve the distinction which runs through our whole law on this subject.

It is proper to observe, that this is not new doctrine in this court, as far back as June term, 1820, in the case of *Durnford* vs. *Degruys & al. syndics*, it was stated "the property in the land sold by the sheriff, has never been determined to pass by the sheriff's return. The law requires the sheriff to make out, and deliver a deed of sale to the buyer, and this is the period at which the property passes." 8 *Martin*, 222.

When therefore, the thing disposed of is immoveable, written evidence of the purchase must be produced.

Nay, more, such written evidence as is prescribed by statute.

This results from the principles already established by the opinion of the court in this case, and is supported by the authorities drawn from the Spanish law, which are there referred to; property can only be claimed from him, who was once proprietor, by his consent shewn that an other person should have it—lapse of time, from which that consent is presumed, or a forced alienation.—Now, if asked under the latter mode, it must be shewn that the alienation has been made in the manner prescribed by the authority

East'n District. *June*, 1822.

DUFOUR vs. CAMFRANC.

which compels it; otherwise the purchaser may have a conveyance, but he has not one under the law, and that alone can stand in place of the proprietor's consent. The act already referred to, directs the sheriff to give a title in a particular form, and is so jealous of any other being introduced, that it prohibits the deed being recorded, or read in evidence, if there are any material interlineation or alteration therein, which shall not have been noted before signing.

All laws, which deprive the citizen of his property, against his wish, must be strictly pursued by those who claim the benefit of them.

There is great error in imagining that the court is influenced by any common law idea, in coming to this conclusion. It is a fact familiar to every one acquainted with that jurisprudence, that the purchasers at sheriff's sales, under a judgment of a court governed by it, take the property, without being in any way responsible for previous irregularities—all that they are required to look to, is that there is a judgment. A strange anomaly it is in that system—and one which we would not, if we had the power, wish to introduce here.

The second point made, is, that the court should have ordered these slaves back into the hands of the sheriff, because they were once attached in two suits, one at the demand of the present defendant, and the other at the suit of Laroque Turgeau.

We understood this to be an action in which the plaintiff claimed slaves descended to him from his ancestor. The defendant pleaded title to the property, in virtue of sales made under judgments rendered against the plaintiff and his co-heirs. This title, we thought, was not made out, and we decided that there be judgment for the petitioner; but we added, as the law required us to do, that as the purchaser's money had been applied to the discharge of the plaintiff's debts, he must reimburse the buyer, before he could take the thing sold. In coming to this conclusion, we considered Camfranc as purchaser at sheriff's sale, and in that character alone, and so expressed it. The rights which he had in virtue of his former judgment, were not in any respect affected by the decree rendered, any more than those of Laroque Turgeau, or his heirs. The only question considered and decided, was the legal title between owner and

East'n District. *June*, 1822.

DUFOUR *vs.* CAMFRANC.

purchaser, and the circumstance of Camfranc being plaintiff in a suit, under which it did not appear he had bought, could not in any way affect our determination.

Nor do we see that his rights require we should make such an order, if we had the power. It is not necessary to give effect to a *fieri facias*, that the slaves should be in the sheriff's hands when it issues.

The error into which the counsel has fallen arises from a misconception of the opinion already rendered. In his supplemental argument, he states, that the court having maintained the judgments, in the cases of *Camfranc* vs. *Dufour*, and *Turgeau* vs. *Dufour*, but annulled the sales, made in consequence of these judgments, ought to restore every thing to the same state. The court has not annulled the sales made in consequence of those judgments. It considered there was not legal evidence of the sheriff having sold the slaves sued for, under any judgment, as he recited one in his deed, which the purchaser would not, or could not produce.

On the last point, that judgment cannot be given for all this property, because there are other heirs who may yet accept, we have not

had any difficulty. The heir, who is now before the court, until the succession is liquidated, has a right to take the whole estate; we know not but it may be all required to pay the debts of the ancestor. As he has accepted with the benefit of an inventory, he is entitled in the first instance to the possession and administration of the deceased's property. *Civil Code*, 108, *art.* 104.

We directed the cause to be remanded, in order to obtain evidence what the hire of the slaves amounted to. It has since been suggested to us, that the parties could terminate the litigation between them, if they had the opinion of the court whether any hire is due, and for how long.

To aid them in this intention, we have attentively listened to their arguments, and we have formed a conclusion on the authorities cited, and the reasons urged in support of them.

The question appears to us, to lie in a very narrow compass. The elementary doctrine is, that a possessor in good faith does not owe fruits until after judicial demand. *Domat*, *liv.* 3, *tit.* 7, *sec.* 3, *art.* 5. *Civil Code*, 102, *art.* 6 *and* 7. And that good faith is ordinarily tested by enquiring whether the defect in the

East'n District. *June*, 1822.

DUFOUR *vs.* CAMFRANC.

title (if it is one of a nature to transfer the property) proceeds from a vice in the form, or a want of right in the person who conveyed; in other words, if it is an error in fact, or an error in law, under which the purchaser holds the object claimed.

It has been urged on the part of the plaintiff, that the defect existing here was of the latter kind, and he has relied on the case of *Francoise* vs. *De Laronde*, 8 *Martin*, 619, as a positive authority in support of this position. We cannot agree with the counsel, and we believe a fair distinction exists, and can be shewn between that case and the one now presented for decision.

The article cited from the *Code*, 103, *art.* 7, is nearly the same with that found in *page* 488, *art.* 68, which defines the just title, that is the basis of ten years prescription, *longi temporis*. The authorities which apply to the one, will illustrate the other.

Pothier tells us that a just title is that which is of a nature to transfer the property; so that when it is not transferred, it is a defect of right in the person who makes it, and not a defect in the title, in consequence of which the tradition is made, *Pothier*, *Traité de prescrip-*

tion, *n.* 57—he adds in the same treatise, *n.* 85, that a title void in itself, will prevent him in whose favor it was executed, from pleading prescription; and our *Code* says, when the title is null from a defect in form, the party cannot prescribe under it. *Civil Code*, 488, *art.* 70.

Let us apply this doctrine to the case before us.

The title presented here is perfect as it respects form; it pursues the very words of the statute; the defect is a want of right or authority in the sheriff to make such a conveyance, not a defect in the manner he made it. As nothing, therefore, appears on the face of the deed which is defective, the knowlege of want of right, in the person who sold, is not brought home to the vendee, and his error was one of fact, not of law. It is difficult to see where is the difference between this case and an ordinary one of sale, where the purchaser acquires, from a person who has no title, by a regularly executed act, before a notary public; in such case the buyer acquires none, but he has that good faith which enables him to plead prescription.

The plaintiff has assimilated this to a con-

East'n District. *June*, 1822.

DUFOUR vs. CAMFRANC.

tract, entered into with a person who acts as attorney in fact for another. In such a case it is said, if the agent had no authority, the buyer would be in bad faith; if he had one which was forged, the purchaser would be a *bona fide* possessor. We acknowlege the analogy so far as to admit that the sheriff acted here as an agent, but we cannot see any distinction in the cases put, and we think there would be as great an obligation in the vendee, to examine the verity of the written power, as there would be for him to enquire into the truth of the assertion of the seller, that he possessed one. We believe that in both hypotheses it would be an error of fact; one which the law would not consider of such a nature, as to prevent the party from pleading prescription. The rule is, that when the opinion of the possessor, who holds an object under a title of sale, has a just ground, though in fact there is no sale, the opinion is equal to title, *Pothier, Traité de prescription, n.* 96. *Digest, lib.* 41, *tit.* 4, *l.* 11. *Idem, l.* 2, *n.* 16. *Bonæ fidei emptor esse videtur, qui ignoravit eam rem alienam esse; aut putavit eum qui vendidit, jus vendendi habere. Digest, lib.* 50, *tit.* 16, *l.* 109. From every thing which appears in proof in the case, now be-

fore us, we have no difficulty in concluding that the purchaser honestly believed he had a good title, and had a just reason for that belief.

But it is said that in the suit of *Francoise* vs. *De Laronde*, it was held that the purchaser was responsible for the irregularities, which had taken place in the sale of minor's property. It was so held, and correctly; because, by *the* 60*th law of the* 3*d Partida*, *tit.* 18, the order of the judge, authorising the sale, the length of time it was advertised, and the fact of it being at auction, must be all expressly mentioned in the deed, in order that the purchaser may know what he buys. In that case the sale was not made in the form prescribed by law, and the buyer was justly told that he must be presumed to know defects which appeared on the face of the instrument by which he held the property.

It results from this view of the subject, that the appellee must pay hire for the slaves, from the date of filing the petition, and that the plaintiff owes judicial interest on the money paid by defendant; on the sum of four thousand and forty dollars for the same length of time—the former judgment, remanding the cause, to ascertain the value of the services of the slaves, does not require any alteration.

East'n District.
June, 1822.

DUFOUR
vs.
DELACROIX.

DUUFOUR vs. *DELACROIX.*

APPEAL from the court of the first district.

Parol evidence may be received of the death of of a person where it does not appear any record was made of it.

PORTER, J. delivered the opinion of the court. This case is similar, in most of its circumstances, to that of the same plaintiff against Camfranc, *ante*, 607. The appellant proves title to the slaves, and the defendant offers a deed from the sheriff containing the same defect as that pleaded in the other suit. Our judgment must therefore be, that the plaintiff has shewn the better title.

There is one question, however, presented by this record, which did not arise in the other case. A bill of exceptions is taken to the opinion of the judge *a quo*, admitting parol evidence to prove the death of Auguste Dufour. The objection was made on the ground that it was not the best evidence the case was susceptible of. To sustain this exception, the defendant should shew that every man's death is recorded, or the evidence of it reduced to writing.

The testimony taken in the case yet before us, between the same parties, which is referred to and made part of the statement of facts in this, does not enable us to ascertain what

value we ought to affix to the services of the slaves here claimed; the cause must, therefore, be remanded for a new trial, for evidence on that head, and the appellee pay the costs of this appeal.

It is therefore ordered, adjudged and decred, that the judgment of the district court be annulled, avoided and reversed—that the cause be remanded for a new trial, to ascertain the value of the services of the slaves, and that the appellee pay the costs of this appeal.

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

DUFOUR vs. *DELACROIX.*

APPEAL from the court of the first district.

When testimony is contradictory, it is the duty of the court to reconcile it, if possible.

PORTER, J. delivered the opinion of the court. This case involves the same points as that of the present plaintiff *vs.* Camfranc already decided. The title is established in the appellee, and the appellant claims under a sheriff's deed, which recites a judgment that has not been produced, and which we must, consequently hold, does not exist; *de non apparentibus et de non existentibus eadem est lex.*

East'n District. *June*, 1822.

DUFOUR *vs.* DELACROIX.

The question as to the length of time for which hire of the slaves should be allowed, has also been settled in the case just referred to. The defendant owes from the commencement of the suit until the present time; and the interest must be deducted for the same period.

As testimony has been taken to shew how much the labour of the negroes, who form the object of this action, was worth, we are enabled to make a final disposition of the cause.

Four witnesses were examined. The two first who were called on behalf of plaintiff, swore that the value of the slaves' services were $16 per month. The others on behalf of defendant, deposed that they might be worth from $120 to $150 per annum.

It is our duty to reconcile this evidence, if possible. To do so, we must understand the two first witnesses, as swearing to the price of hire for a single month, which we know is always estimated higher than when employment is secured by an engagement for one year.

The two others affix a sum between $120 and $150 per annum, rather, however, conveying the idea that the latter is nearer the

real value. We shall, therefore, allow $140 a year. From this sum must be deducted taxes and clothing: there is no evidence before us, as to the value of these items; but we suppose a proper sum would be $12 per annum.

In the case before us, the price of the slave was $750; interest for four years and nine months, at five per cent, added to this, makes the sum of $918 12 cents, from which is to be deducted the hire for the same space of time, $608; so that there will remain a balance of $310 12 cents, on the payment of which, to the defendant, the slave claimed in the petition must be delivered up.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the defendant do, on the payment or tender by the plaintiff, of the sum of three hundred and ten dollars, twelve cents, deliver to him the slave Scapin, claimed in the petition; that the appellee pay the costs in this court, and the appellant those in the inferior court.

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

East'n District.
June, 1822.

DUVERNEY
vs.
VINOT.

DUVERNEY vs. *VINOT.*

A parish judge, charged with the settlement of an estate, cannot receive a reward for professional, or other services rendered therein.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiff seeks to recover nine hundred dollars, which she alleges the defendant extorted from her, for his services, as parish judge, in the settlement of the estate of her deceased husband.

The defendant pleaded the general issue, and that for his services as parish judge, relating to the estate of the deceased, he charged and received his legal fees only; and that the excess was voluntarily paid as a compensation for other services, rendered by him as agent, and attorney in fact of the plaintiff, out of his parish, *viz.* in the city of New-Orleans. That, at the time she made him an allowance for these services, he told her they were judicial acts, and whatever she gave therefor was not required, but received as a voluntary compensation.

Bachemin deposed, that on the day of the inventory, he was on the gallery, near a window, thro' which he saw the plaintiff and defendant, in an adjacent room, and heard the former tell the latter, she wished him to do all

her business, not only as judge in the parish, but as her agent in New-Orleans, and she would give him $900. The defendant replied, that was much more than he would be entitled to, as judge; that his legal fees would not probably amount to more than $300, and he asked no more. She answered, she would give him $600 more, provided he would attend to all her business, as she would not meddle with them any longer.

Sometime after the sale, the witness told the plaintiff she had given too much to the defendant; she observed she thought not, as he was a friend of the family, had rendered many services, for which he had not received any thing, and might render more.

On his cross-examination, the witness declared he was married to the defendant's half sister. He did not know, nor heard of any other gift made to the defendant by any inhabitant of the parish, for similar services. He cannot tell whether the plaintiff can read or write; she appeared very much afraid of lawyers: there is none dwelling in the parish. C. Camel was present at the inventory, but in another room, at the time of the conversation related.

East'n District. *June*, 1822.

DUVERNEY *vs.* VINOT.

Saucier said that three days after the sale of the estate, dining with the plaintiff at the defendant's, she told the latter she had given him $600 to settle all her affairs, and that every body was not so generous. He answered, that if she had any regret there was nothing done, and her affairs would be equally attended to, for what the law allows. She replied, she regreted nothing; he had informed her his fees would amount to $300 only; but, as he was to attend to all her affairs, in and out of the parish, and New-Orleans, she gave him $600; she knew he was a friend of the deceased.

The witness knew the defendant attended to the plaintiff's business in the city, and went thither several times, even when in a state of convalescence. In January, 1821, the witness carried a letter from him to her, which was read to the latter, by her daughter, and had been read to him by the former. She told him to say to the defendant, that there were evil talkers, and it was not true she had complained of him. She observed, that if the weather had been good, she would have gone to the defendant's to tell him this. She appeared anxious to explain the matter to the witness.

He knows, that after the sale, and before this conversation, she paid frequent and friendly visits at the defendant's, and slept there several times, with other persons of her family.

On his cross-examination, he added, the plaintiff never, in his presence, complained of the defendant; but he heard she said ill things of him about a month ago. He did not know that she had made a declaration against the defendant, which had been handed to the attorney-general, at the time he delivered her his letter. He does not know how the defendant learnt that she had complained of him. In reading his letter for the plaintiff, he observed to the witness, that he heard she complained of him, and had written to her about it.

Camel deposed, he was one of the appraisers of the property of the estate. At the close of the inventory, the plaintiff asked the defendant, how much he would charge for finishing all the affairs of the estate; he begged her not to make herself uneasy about it; he had been a friend of her husband's and the family, and his charge would be $900. She answered, he did not appear to treat her favourably, and he asked more than he was en-

East'n District. *June*, 1822.

DUVERNEY *vs.* VINOT.

titled to. He observed, that if she took a lawyer, she would have to pay his fee as well as his own; she replied, that if she must pay this sum, she would do it. Bachemin was then on the gallery, on which the windows of the parlour open, near the place in which the plaintiff and defendant sat. Chesnu was in the parlour.

Chesnu deposed, he was present at the inventory, at the close of which, the plaintiff asked the defendant, what would be his charge for finishing all the affairs. He answered she well knew he had been a friend of her husband and the family, and she need not be uneasy about this. She insisted on being informed of the amount of his charges, and he said $900. On her observing he asked more than he was entitled to, he replied that she would fare worse, if she took a lawyer, as she would have two sets of fees to pay; she added that if she must pay that sum she would give it.

The witness was in the parlour, Camel was near the door; Bachemin on the gallery, near a brother of the deceased: another brother, and Latour were also there.

Masson deposed, the plaintiff came to him

in New-Orleans, to receive five dollars, lent him by her husband. He asked her who had charge of the affairs of the estate, she named the defendant: adding she had given him $900; he had told her his fees would not amount to more than three hundred dollars; but the additional $600 were for settling her affairs in the city, and out of the parish, as she wished not to be troubled with them, nor to have any thing to do with lawyers. She had preferred the defendant, as he had been a friend of her husband's.

The following is a translation of the defendant's receipt, annexed to the petition. "Received of Mrs. Widow Duverney, according to our conditions, for my costs, pains and cares, relative to the estate of her husband, nine hundred dollars, *viz.* $154 50 cents, which have been paid and adjudged, the 22d of July, 1820, at the sale made in this parish, and $745 50 cents, which she has paid me. Parish of Plaquemines, August 20th, 1820. M. Vinot, Judge."

The plaintiff obtained a verdict for $800, and judgment was accordingly given; the judge declaring himself satisfied with the verdict: but before the judgment was signed,

East'n District. *June*, 1822.

DUVERNEY *vs.* VINOT.

the parties agreed that the verdict be set aside, the defendant withdrawing his call for a jury, and the cause was submitted to the court.

The district judge was of opinion, that as regards the charge of $300 for fees of office, there was a gross misrepresentation on the part of the defendant; for, it is impossible he could have been ignorant of the precise amount of his lawful fees. He, therefore, gave judgment against the defendant for $175 80 cents, the difference between the amount of fees according to law, $124 80 cents, and the sum of $300, represented to the plaintiff, by the defendant, as the probable extent of his claim as judge, with interest from the judicial demand.

He did not see any thing illegal or improper in the rest of the transaction.

The defendant appealed, and the plaintiff complains of the judgment, as withholding relief from her.

We think the decision of the district court correct, on the first part of the case, *viz.* the charge for fees.

It seems to us it was not equally correct, as to the charge of $600. It appears from

the testimony, that the plaintiff was induced to give that sum to avoid the payment of lawyers' fees; the services which such fees compensate, cannot legally be rendered by the judge. We have no evidence of the nature of the services rendered by the defendant, out of his parish. He is not known on record as an attorney at law. If he attended as an attorney, under a special power, in any suit, out of his parish, he might have shewn it. The plaintiff being left as a widow, to settle the estate of her husband, if she needed professional aid, is to be presumed to need it in her parish, or about the concerns of the estate.

Now, it is clear that a parish judge, charged with the settlement of an estate, cannot give professional aid therein.

Hence, the plaintiff, who, from the testimony, appears to have been induced to make an allowance, compensating professional services, either paid for such as were not rendered at all, or could not be properly rendered by the person who was thus rewarded.

We think that the sum of $124 80 cents, the legal amount of the office fees, is the

East'n District. *June*, 1822.

DUVERNEY *vs.* VINOT.

only part of the sum received, which the defendant appears to be fairly entitled to retain.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled and reversed, and that the plaintiff recover from the defendant, the sum of seven hundred and seventy five dollars and twenty cents, with interest from the judicial demand; saving and reserving to him, his right against the present plaintiff, for compensation, if any be due for services, not inconsistent with his office: and it is further ordered, that the defendant pay costs in both courts.

Hennen for plaintiff, *Davezac* for defendant.

MORRIS vs. *EVES.*

APPEAL from the court of the first district.

Contracts made in a foreign country are governed by the laws of that country, in expounding them. But the remedies by which they are enforced, must pursue the forms, and be controled by the regulations of the country

PORTER, J. delivered the opinion of the court. This action was commenced on a promissory note, drawn at Philadelphia, by the defendant; who has pleaded that he was not indebted, and that on the 22d of June, 1818, he executed a deed of assignment to trustees, for the benefit of his creditors, and was regu-

larly discharged, under an act of the state of Pennsylvania, for the relief of insolvent debtors.

He has further averred, that at the date of the alleged contract, and ever after, until the time he took the benefit of the insolvent act already mentioned, both he and the plaintiff were inhabitants of Philadelphia, and citizens of Pennsylvania.

The certificate of discharge regularly authenticated, was produced on the trial; there was judgment for the plaintiff, and the defendant appealed. The only question, which the case presents, is the effect of this discharge in our state. By the terms of the certificate, the debtor is released from confinement, and his person protected against future arrest for all debts contracted by him previous to that time.

A contract made in a foreign country is governed by the laws of that country, in every thing which relates to the mode of construing it; the meaning to be attached to the expressions, by which the parties may have engaged themselves, and the nature and validity of that engagement, *Emerigon, Traité des assurances, chap.* 4, *sec.* 8. *Digest, lib.* 21. *tit.* 2. But it is clear that the remedy, by which it is

where the suit is brought

Hence a discharge in a sister state, which liberates the person of the debtor, but leaves the contract in force, does not protect him from imprisonment here.

The maxim *actor sequitur forum rei* is a part of the public law, or law of nations.

East'n District. *June*, 1822.

MORRIS *vs.* EVES.

enforced, should be sought according to the laws of the place where the party is pursued; that the form of procedure, the mode of trial, and the nature of the relief accorded, must be in pursuance to the regulations existing in the country where the debtor is sued. This is the rule in all civilized nations; the maxim *actor sequitur forum rei* is a part of the *jus gentium*; *du droit des gens. D'Aguesseau, tom.* 5. *p.* 53. *Vatel, liv.* 2, *chap.* 8, *sec.* 103. *Emerigon, loco citato.*

Our enquiry, therefore, is narrowed to a single point; does the manner in which a judgment is carried into execution, make a part of the contract, or is it the remedy given to enforce it? To state this proposition, is almost to answer it; and we do not think it presents any difficulty, or is susceptible of a serious doubt. *Huberus* states, that in the execution of a sentence given abroad, the law of the place, in which execution is asked, must govern; not the law of the place where the judgment is given. *Huberus*, 6. 1, *tit.* 3, *p.* 26. 3 *Dallas*, 374, *in note.* And lord Kames, a lawyer of distinguished learning, who professedly wrote on the civil law, after noticing the maxim, *actor sequitur forum rei*, observes; whence

it follows that the form of the action, the method of procedure, and the manner of execution must be all regulated by the law of the country where the action is brought. *Kames on Equity*, *book* 3, *chap.* 8, *sec.* 4. *p.* 560, *Edinburgh ed.* 1800

It is a necessary consequence of these principles, that what is done in an other country, respecting that remedy, cannot controul the proceedings of the tribunal where the party is sued. Other governments may modify their writs of execution, as they please; may abolish imprisonment for debts of any kind; or refuse it where the debtor is in such circumstances as the defendant now before us was placed. But so long as the contract exists, we must follow our own mode of doing justice, not that which it has pleased other states to adopt. This principle is acted on by other courts. In New-York they hold that a discharge from imprisonment, in the place where the contract was entered into, will not prevent the debtor from being arrested, when he comes into a different and independent jurisdiction. 11 *Johns.* 194. 2 *Idem*, 198. 14 *Idem*, 346. It is true, in the state where this note was made, a contrary doctrine seems to

East'n District. *June*, 1822.

MORRIS vs. EVES.

have crept into their jurisprudence; but the reasons given for its introduction, are not satisfactory to us, and they cannot be reconciled with the general principles of law, which govern cases of this description.

It has been argued that as both plaintiff and defendant were citizens of the same state, they must be presumed to have contracted in relation to those laws. Conceding this; all that they can be understood to have agreed on was, that in Pennsylvania the debtor might be discharged from imprisonment. When causes are required to be decided on the ground that the parties understood what the law was, and, as it were, incorporated it in their contract, 16 *Johns.* 233; they must be presumed to have known its limitations also, and have inserted them too in their agreement.

It was urged that it appeared from the record of the proceedings in Philadelphia, that the plaintiff was a party to that action, and, consequently, the judgment discharging the defendant from imprisonment, forms *rem judicatam.* It has the authority of the thing judged so far as it acted on the rights of the parties, and the question as to the imprisonment of the appellant in that state, is conclud-

ed by the judgment there given. But nothing more is decided by it.

Finally, it was said, before the decisions of the highest tribunal in the union had declared the insolvent laws of the several states unconstitutional, we should have held a discharge in a sister state binding on us here; and it was asked what reason could exist, why we would not recognise it, so far as it is admitted to be within the limits of the constitution? To this there is a satisfactory reply. The discharges, held by the supreme court of the united states as void, dissolved the contract, and that now before us leaves it in full force. In the case first put, we should probably have held, between citizens of the same state, that as the obligation was destroyed by the same law which created it, it must be recognised every where else as annulled. But here the proceedings merely discharge the person. So that this point, and in truth, every other raised in argument, depends on the main question in the cause; does the want of a remedy to enforce a contract in one country deprive the creditor of the benefit of that which is given him in another? We are all clearly satisfied it does not.

East'n District. *June*, 1822.

MORRIS *vs* EVES.

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

Maybin for the plaintiff, *Hennen* and *Smith* for the defendant.*

---

* The remaining cases of this term will be continued in next volume.

INDEX

OF

PRINCIPAL MATTERS.

ABSENTEE.

1 When a person, who owns property in the state, does not appear, at the place of his residence for five years, and has not been heard of, his presumptive heirs may cause themselves to be put in possession of his estate, and enjoy a portion of the revenue. *Westover & al.* vs. *Aimé & wife.* . . 443

2 Their right yields to that of the testamentary heir, and those of both, to that of the husband or wife. *Same case.* . . *id.*

3 The law gives a mortgage on the estate of those who intermeddle with the administration of absent persons' property. *Ward* vs. *Brandt & al. syndics.* . . . 331

4 Not on the estates of those who administer under authority from the proprietor. *Same case.* . . . . *id.*

5 Whether the absent persons here alluded to, are not those who are declared absent? *Same case.* . . . . . *id.*

ADJUDICATION.

1 Altho' a Spanish judgment state that an adjudica-

tion formerly made, exists no longer, its terms not having been complied with, if the court proceed to order a compliance, and issue execution for the purpose, the party, after a compliance, will have the benefit of the adjudication. *Aubry & wife* vs. *Folse & wife*. 306

2 Immoveable property, at a sheriff's sale, does not pass by the adjudication: his deed is essential. *Dufour* vs. *Camfranc*. . . 675

3 Parol evidence cannot establish the sale. *Same case*. *id*.

ALIENATION.

1 A forced alienation results from a sale made at the time, and in the manner prescribed by law, by virtue of a *fi. fa.* issued on a judgment. *Dufour* vs. *Camfranc*. . 607

2 In a sale, in which any of these requisites is wanting, the purchaser does not acquire the right and title of the debtor. *Same case*. *id*.

3 If the proceeds of such a sale are applied to the debts of the owner, he cannot have the property sold, without paying the amount. *Same case*. . . . . *id*.

4 When an alienation of property is not expressed in the instrument, it must clearly result from it. *Same case*. . . . *id*.

APPEAL.

1 If, nearly a year after the trial of a cause, the judge certify that the record contains all the facts on which the trial was had, as well as he can now say, the certificate will not

enable the supreme court to examine the fact. *Girod* vs *Perroneau's heirs.* . 1

2 If testimony be admitted without being sworn to, and be contradictory, the supreme court will remand the cause. *Barry* vs. *Louisiana Insurance Company.* . . . 202

3 Same point. *Mager* vs. *Louisiana Insurance Co.* 205

4 When fraud is put at issue, and the supreme court think that the weight of the evidence is against the verdict, they will remand the cause. *Bradford* vs. *Wilson.* . 188

5 It has the power to decide differently from the jury, but it exercises it, in cases of that description, with great caution. *Same case.* *id.*

6 If it does not appear on the record, that the matter exceeds $300, the appeal will be dismissed. *Dame* vs. *Gass.* . 205

7 The supreme court may relieve, on the refusal of a new trial. *Sanchez & wife* vs. *Gonzales.* 207

8 But a very clear case must be made, to induce it to do so. *Same case.* . . *id.*

9 The time of certifying a record, where the case is tried on written documents alone, is not limited by law. *Girod* vs. *Perroneau's heirs.* 224

10 No appeal can be allowed, after two years have expired from the rendition of the final judgment. *Day* vs. *Eastburn & al.* . 232

11 Whether the right of appeal, by persons not parties to the judgment, be confined to those who had an interest in the matter in dispute, at the time of the judgment? *Same case.* *id.*

12 No appeal lies from an order, setting aside a judgment by default, and continuing the cause. *Fortin* vs. *Randolph*. . 268

13 If the testimony of a witness, contain palpable and direct contradiction, the supreme court will reject it altogether. *Ferrer* vs. *Bofil*. 234

14 When the opinion of the supreme court does not coincide with that of the jury, on a question of fact, the cause will be remanded, if the appellant prayed for a new trial in the district court. *Richards & al.* vs. *Louisiana Insurance Company*. . . . 281

15 The appeal will be dismissed, if the record be not brought up on the return day. *Carpentier* vs. *Harrod & al*. . . . 433

16 The refusal to receive a supplemental petition is not a ground of appeal. *Penrice* vs. *Crothwaite & al*. 537

17 A suitor who appeals from a part of a judgment cannot urge any other. *Same case*. . *id.*

18 In remanding a case, when it does not clearly appear, which of several claimants has a right to the money recovered, the supreme court will direct it to be paid into the district court. *Harrod & al.* vs. *Paxton*. . 549

19 If the judge cannot certify the record in positive terms, the appeal will be dismissed. *Girod* vs. *Perroneau's heirs*. . . 552

20 Nothing can be assigned, as error apparent on the record, but matter of law, which without the adversary's consent, could not be cured by other proceedings in the cause. *Daunoy* vs. *Clyma & al*. . . . 557

21 By the former laws of this country, one year only was allowed, after the record brought up, to prosecute the appeal to judgment. *Mayor, &c.* vs. *Gravier.* . . 620

22 When the appeal did not suspend the execution, citation was necessary to shew cause why the judgment should not be confirmed. *Same case.* . . . . . *id.*

23 After the expiration of the year, if the appellant did not shew good cause, the judgment passed *in rem judicatam. Same case.* *id.*

24 The supreme court cannot take as evidence, what the judge *a quo* states in his judgment. *Lombart* vs. *Guilliot & wife.* . . 453

25 Mere delay, in the decision of a cause, cannot be considered as an irreparable grievance, which authorises an appeal. *Fortin* vs. *Randolph.* 268

26 The cases hitherto decided, as working such a grievance, are those in which a new trial, or continuance is denied, depriving the plaintiff of the benefit of a judgment, setting aside some process obtained in the preliminary stages of a cause to secure the plaintiff's right, or discharging the defendant out of custody. *Same case.* . . . *id.*

27 The supreme court, interferes with reluctance, when the issue is one of fact, and the case has been tried by a jury. *Reano* vs. *Mager.* 636

See INJUNCTION.

ATTACHMENT.

1 A judgment, in a suit by attachment, is evidence of the debt, in another suit, brought in the same state. *Gray* vs. *Trafton*. . 246

2 An attachment does not lie to compel the delivery of a specific thing. *Hanna's syndics* vs. *Loring*. 276

ATTORNEY.

An attorney who undertakes to collect a debt out of the state, and makes his agent known, is not liable for an accident that happens in consequence of the agent's death. *Baldwin* vs. *Preston*. 32

See EXECUTOR.

BAIL.

1 An order of bail will not be granted on an affidavit that the sum claimed is due, as the affiant believes. *Penrice* vs. *Crothwaite* & *al*. . 537

2 When the creditor makes the oath it should be positive. *Same case*. . . . *id*.

3 The affidavit to hold to bail may be annexed to a supplemental, as well as original petition. *Vidal* vs. *Thompson*. . . . 23

BAILMENT.

1 Conventional sequestrators, acting without compensation are subject to the same obligations as depositories. *Lafarge* vs. *Morgan & al*. 462

2 When it appears that they were acting for both parties, their duty is to hold the property, till both parties agreed, or a court should order that it be given up. *Same case*. . *id*.

3 A person keeping property, without reward, is responsible for gross neglect or fraud, only. *Same case.* 462

4 So where A received notes of B, in favour of C, to be delivered to the payee, when certain incumbrances were raised, held that on B forbidding to deliver them, the latter was not responsible for damages. *Same case.* . . . . . *id.*

5 The master of a vessel is liable for *levissima culpa.* *Hennen* vs. *Munroe.* . . 579

6 In contracts, which are beneficial to both parties, the bailee is to take that care, which every prudent man takes of his own goods. *Nichols* vs. *Roland.* . . . 190

7 In an action on such a bailment, the facts, which excuse the failure to return, must be proved by the bailee. *Same case.* . . *id.*

BARRATRY.

1 The presence of the owner is not conclusive evidence of his assent to any act, which is alleged to constitute barratry. *Millaudon* vs. *New-Orleans Insurance Company.* . 602

2 When proof is given of an act which constitutes barratry, the *onus* of establishing any fact excusing it, is thrown on the insurer.—*Same case.* . . . . *id.*

3 Barratry cannot be committed by a master, who has the equitable title of the vessel. *Barry* vs. *Louisiana Insurance Company.* . 630

4 It is any kind of cheat or fraud committed by the

master or mariners, to the prejudice of the owner. *Millaudon* vs. *New-Orleans Insurance Company.* . . . 602

CONGRESS.

See TERRITORY.

CONTRACT.

1 Wherever a contract be made, the performance must be according to the laws where it is to take place. *Vidal* vs. *Thompson.* . 23

2 A contract for the sale of a slave, must be reduced to writing. *Nichols* vs. *Roland.* 190

3 But, if a slave be delivered on trial, parol evidence may be received to shew under what circumstances. *Same case.* . . *id.*

4 Threat of legal process is not such a violence as will avoid a contract. *Bradford's heirs* vs. *Brown.* 217

5 A party who has carried his pollicitation into effect, and delivered the thing, cannot object that his offer was not accepted. *Same case.* *id.*

6 A building contract must be registered, according to the provision of the act of 1817. *Jenkins* vs. *Nelson's syndics.* . . 437

7 One is not bound by a notarial contract, which he did not subscribe. *Lombard* vs. *Guilliot & wife.* 453

8 Marriage contracts, not recorded under the act of 1813, do not affect third persons. *Lafarge* vs. *Morgan & al.* . . . 462

9 Same point. *De Armas & wife* vs. *Hampton.* 552

See ALIENATION—PRACTICE, 9—SERVANT, 2.

10 Contracts, made in a foreign country, are governed by the laws of that country, in expounding them. *Morris* vs. *Eves*. . . 730
11 But the remedies by which they are enforced, must pursue the forms, and be controled by the regulations of the country in which suit is brought. *Same case*. . . *id.*
12 Hence, a discharge in a sister state, which liberates the person of the debtor, but leaves the contract in force, does not protect him from imprisonment here. *Same case*. . *id.*
13 The maxim, *actor sequitur forum rei*, is a part of the public law, or law of nations. *Same case*. . . . . *id*

CORPORATION.

1 Any inhabitant has the right to forbid the erection of houses, or other edifices, on public places. *Mayor, &c.* vs. *Gravier*. . 620
2 And in a suit already commenced by the corporation, he may intervene, and use his private right to strengthen that of the public. *Same case*. . . . . *id.*

COSTS.

Costs are accessary to a judgment, and the jury cannot allow them to a defendant, against whom a recovery is had. *Walsh* vs. *Collins*. . 558

CUMULATION.

See PRACTICE, 3.

DEED.

1 A parish jndge has no authority to receive the acknowlegement of one. *Marie Louise* vs. *Cauchoix.* 243

2 A private act does not become authentic, by being recorded. *Same case.* . . . *id.*

See FRAUD—HUSBAND & WIFE, 3—PARTITION.

DELIVERY.

1 To avail himself of a feigned delivery against a previous real one, the party must strictly bring himself within the law, which sanctions the claim. *Copelly* vs. *Duverges.* . 641

2 The mere execution of a notarial act of sale does not dispense with the delivery. *Same case.* *id.*

DISTRIBUTION.

Property, within the state, must be distributed, according to her laws, unless the court be bound to give effect to any other. *Bryan & wife* vs. *Moore's heirs.* . . 2(

EVIDENCE.

1 If a party mistake his right, but offer evidence, which clearly establishes it, and the opposite party do not oppose its introduction, the error is cured. *Bryan & wife* vs. *Moore's heirs.* *id*

2 Experts cannot be appointed to value property, nor is their report legal evidence. *Millaudon* vs. *New-Orleans Water Company.* 27

3 Parol evidence of the plaintiff's possession cannot be rejected on the ground that a survey annexed to the record does not appear to be made with the defendant's privity. *Daigre* vs. *Richard.* . . . 449

1 The certificate of the recorder of mortgages is *prima facie* evidence of the truth of what it contains. *Lafarge* vs. *Morgan* & *al.* . 462

5 It may be contradicted; but it is not sufficient to shew that the recorder acted on irregular evidence. *Same case.* . . *id.*

6 Proof that the defendant had a horse of the plaintiffs' for sale, does not support a charge that he purchased it, and is debtor of the price. *Johnson* vs. *Crocker.* . . 617

7 The prohibition of receiving parol evidence against or beyond the contract of an act, extends only to parties. Third persons are not affected thereby. *Barry* vs. *Louisiana Insurance Company.* . . . 630

8 When a party, in the transaction, on which the action is founded, has acted with the other, as possessing a certain capacity, and acknowleged that in which he sues, this is *prima facie* evidence of such a capacity. *Prevosty* vs. *Nichols.* . . - 21

9 And this circumstance throws the burden of the proof on the party objecting. *Same case.* *id.*

10 Parol evidence may be received of the death of a person where it does not appear any record was made of it. *Dufour* vs. *Delacroix.* 718

11 When testimony is contradictory, it is the duty of the court to reconcile it, if possible.— *Dufour* vs. *Delacroix.* - - - - 719

12 If the judge *a quo* tell the defendant he has no need of introducing his evidence, as the plaintiff's case is not proven, the supreme

court will remand the case. *Robertson* vs. *Lucas.* - - - - - - - 187

See ADJUDICATION, 3—APPEAL, 2, 3, 13 & 24—ATTACHMENT, 1—BAIL, 1 & 2----BAILMENT, 7---BARRATRY, 1 & 2---- CONTRACT, 2 & 3—PRACTICE, 13—PROMISSORY NOTE, 2—SALE, 5.

EXECUTION.

See ALIENATION.

EXECUTOR.

1 An executor cannot be allowed the fee paid counsel to defend him, in a suit brought by the heir, after the expiration of the year, to obtain a surrender of the property. *Ferrer* vs. *Bofil.* 234

2 Nor for the fee paid in an action brought by the heir, alleging fraud and afterwards discontinued. *Same case.* . . . *id.*

3 Nor in a suit brought by the executor on an uncertain event, where it is not proven that he exercised a sound discretion. *Same case.* *id.*

4 If one of the partners be executor, the firm cannot purchase part of the estate. *Harrod & al.* vs. *Norris' heirs.* . . 297

5 Whether the word executor, in an endorsement, is to be considered as one of description merely, or as indicating that the party acted in right of the testator. *Harrod & al.* vs. *Paxton.* 549

See PARTNER.

FACTOR.

1 The liability of a factor who sells on credit, depends much on the prevailing custom. *Reano* vs. *Magre*. . . . 636
2 And of this the jury is the best judge. *Same point*. . . . . *id.*

FRAUD.

An act cannot be attacked as fraudulent, after the the vendor has paid all his debts. *Copelly* vs. *Duverges*. 641

See APPEAL, 4—BAILMENT, 3.

HEIR.

1 An heir, who has accepted, with the benefit of an inventory, is entitled to the possession and administration of the estate. *Dufour* vs. *Camfranc*. 675
2 If there be other heirs, their rights will be noticed, when they appear. *Same case*. . *id.*

See PARTITION.

HUSBAND AND WIFE.

1 A wife is not bound by a note, in which the name of her husband is written above hers, when her signature is denied and not proven. *Lombard* vs. *Guilliot & wife*. . . 453
2 Nor by a note executed jointly with him. *Same case*. . . . . *id.*
3 It is not necessary that her renunciation, at a sale of her property, should be upon oath. *Same case*. . . . . *id.*
4 Property acquired by her. for a valuable consi-

deration, may be sold by him or her. *De Armas & wife* vs. *Hampton*. . . 552

5 He may proceed without her to the partition of the moveable property of a succession accrued to her. *Westover & al.* vs. *Aimé & wife*. 443

INJUNCTION.

1 When the law declares that the judgment of a justice shall be executed, notwithstanding the appeal, the execution of it cannot be enjoined. *State* vs. *Judge Pitot*. . . 535

2 He who resorts to an extraordinary remedy, as an injunction, &c. must, in case of failure, compensate his adversary in damages. *Jackson* vs. *Larche*. . . . 284

3 He may be decreed to do so, beyond the penalty of the bond. *Same case*. . . *id.*

INSOLVENT.

1 A forced surrender cannot be ordered, unless the party alleged to be insolvent, be made a defendant. *Weimprender's syndics* vs. *Weimprender & al.* . . . 17

2 The act of 1817, does not deprive insolvents, who have not a year's residence, of any right which they had before. *Shreve* vs. *his creditors*. 30

3 An insolvent ought not to cede the goods of another, in his possession. *Ritchie & al. syndics* vs. *White & al.* . . . 239

4 The vendor has a privilege on proceeds of the goods in the vendee's possession, at the

time of the failure, and sold by the syndics. *Millaudon* vs. *New-Orleans Water Company.* 278

5 If the firm be insolvent, and two of the partners owe it, their debt passes to its other creditors. *Ward* vs. *Brandt & al. syndics.* 331

6 The other partners who are solvent, cannot be paid until all the debts of the firm are satisfied. *Same case.* . . . *id.*

7 A suit for a forced surrender is not a proceeding *in rem*. *Weimprender's syndics* vs. *Weimprender & al.* 17

8 A syndic cannot sue his co-syndics for funds of the estate in the hands of the latter. *Preval* vs. *Moulon.* 530

See LANDLORD, 4—PARTNER, 7 & 8.

INSURANCE.

See BARRATRY.

JURY.

Objections to the legality of the *venire* are too late after the verdict is recorded. *Vidal* vs. *Thompson.* 23

See APPEAL, 4, 5 & 14—FACTOR, 2—PRACTICE, 4.

LAND.

1 An individual put in possession by the Spanish government, under metes and bounds, of a part of the king's land, acquired such a title, which, strengthened by long possession, must prevail. *Sanchez & wife* vs. *Gonzales.* 207

2 The certificate of land commissioners does not avail against individuals. *Same case.* . *id.*

3 The party from whom land is recovered, ought to be charged for the use and occupation from the day of legal demand. *Walsh* vs. *Collins.* 558

1 A just title is that which is of a nature to transfer the property. So, that, if it be not transferred, it is owing to a want of right in the grantor. *Dufour* vs. *Camfranc.* . . 675

5 A possessor in good faith, does not owe fruits, till after a judicial demand. *Same case.* *id.*

6 A purchaser at a sheriff's sale, by a defective title, owes fruits from the judicial demand. *Same case.* . . . . . *id.*

See EVIDENCE, 3—5.

LANDLORD.

1 He has a privilege on all the goods in the store, and he may follow them, if removed. *Ritchie & al. syndics* vs. *White & al.* . . 239

2 But he must urge his claim within a fortnight after the removal. *Same case.* . . *id*

3 The exercise of this privilege, on the goods of a third person, is clearly a proceeding *in rem.* *Same case.* . . . . *id.*

4 The syndics of the lessee do not represent the landlord so as to avail themselves of this privilege. *Same case.* . . . *id.*

LAWS

Which deprive men of their property, without their consent, should be strictly pursued. *Dufour* vs. *Camfranc.* . 607

LOUISIANA,

The state of, is on an equal footing with the original states, and not bound by any condition subsequent, annexed to her admission. *State* vs. *Orleans Navigation Company.* . . 309

MINOR.

The child who has approved of the partition, since he came of age, cannot maintain an action on account of its illegality. *Westover & al.* vs. *Aimé & wife.* 443

MORTGAGE.

See ABSENTEE, 3 & 4---EVIDENCE, 4 & 5---PARTNER, 9---PROMISSORY NOTE, 3.

ORLEANS NAVIGATION COMPANY.

1 Their charter is not unconstitutional. *State* vs. *Orleans Navigation Company.* . . 309

2 Nor affected by any act of congress. *Same case.* *id.*

PARISH JUDGE.

A parish judge charged with the settlement of an estate, cannot receive a reward for professional services rendered therein. *Duverges* vs. *Vinot.* - 729

See DEED, 1.

PARTITION.

If heirs, in dividing the estate, execute a reciprocal deed of sale, it will be considered as one of partition. *Westover & al.* vs. *Aimé & wife.* 443

See HUSBAND & WIFE, 5----MINOR.

PARTNER.

1 The signature of one binds the firm, in affairs which are not privately his own. *Arnold* vs. *Bureau*. 213

2 A partnership to do commission business, is not a particular partnership. *Ward* vs. *Brandt* & *al. syndics*. 331

3 It is unnecessary that the firm should contain the names of all the partners. *Same case*. . *id.*

4 In an ordinary commercial partnership, the members are bound *in solido*. *Same case*. . *id.*

5 Hence, they cannot receive what may individually be due to them by the firm, until the common creditors be all paid. *Same case*. . *id.*

6 Private debts cannot be set off against a partnership debt. *Same case*. . . . *id.*

7 Debts not arising from a consignment may, in case of insolvency, be proven against a commission house. *Same case*. . . *id.*

8 Persons, sending property to be sold on commission, have no privilege as to the proceeds, unless traced and identified in the insolvent's hands. *Same case*. . . . *id.*

9 A mortgage executed by two members of a firm, after the acting one had obtained a respite, is of no avail. *Same case*. . . *id.*

10 A partnership to carry on business as ironmongers, is not a special or corporate partnership. *Norris' heirs* vs. *Ogden's executors*. 453

11. In an ordinary partnership, dissolved by the death of one of its members, his heirs have a right to participate with the others in the liquidation. *Same case*. . . *id.*

12 If a suit be commenced by one of the firm, for a partnership debt, the others may intervene. *Same case.* 455
13 *Aliter*, as to one having a joint interest with the defendant. *Same case.* . . . *id.*

See EXECUTOR, 4----INSOLVENT, 5 & 6.

POLLICITATION.

See CONTRACT, 5.

PRACTICE.

1 Answers to interrogatories, must be taken together, they cannot be divided. *Bradford's heirs* vs. *Brown.* . . . 217
2 The defendant cannot plead in bar that the plaintiff brought a suit for the same cause of action, which he dismissed. *Jackson* vs. *Larche,* 284
3 Nor that other persons have sued him for the same trespass, and that the suits must be cumulated. *Same case.* . . *id.*
4 The court may permit counsel to reduce to form the answer of a jury, on an issue submitted, and hand it to them for their consideration. *Same case.* . . . . *id.*
5 Neither the petition nor the citation needs be in the French language. *Fleming* vs. *Conrad.* 301
6 But copies must be served in that and the English languages. *Same case.* . . *id.*
7 If the return shew that copies of the petition and citation, were served on the defendant, it will be presumed they were so, as the law requires. *Same case.* . . . *id*
8 A judgment by default may be made final, even

when the object of the suit is the recovery of land. *Same case.* . . . 301

9 One who binds himself jointly and severally is a principal; and cannot avail himself of the pleas which the law gives to a surety alone. *Etzberger* vs. *Menard.* . . 434

10 Pleadings should not be argumentative, nor loaded with extraneous matter. *Norris' heirs* vs. *Ogden's executors.* . . . 455

11 If a claim be made in one capacity and proven in another, and no objection be made, judgment will be given on the merits. *Flogny* vs. *Adams.* 547

12 The validity of the sentence of a court of competent jurisdiction, cannot be inquired into collaterally. *Dufour* vs. *Camfranc.* . 607

13 It is on a plea in bar, conclusive evidence, between the parties, or those claiming under them. *Same case.* . . . *id.*

14 The defendant cannot amend, by withdrawing an answer which contains an admission, and pleading the general issue. *Vavasseur* vs. *Bayon.* 639

15 Inconsistent pleas cannot be received. *Same case.* *id.*

16 Appearing, pleading and contesting the suit on other ground, that the want of a citation cures the want of it. *Weimprender's syndics* vs. *Weimprender & al.* . . . 17

See CORPORATION, 2—COSTS—LANDLORD, 8.

PRIVILEGE.

See ABSENTEE, 3 & 5—CONTRACT, 6, 8 & 9—INSOLVENT, 4—LANDLORD.

PROMISSORY NOTE.

1 Notice of non-payment, must be given on the day which follows the protest. *Canonge* vs. *Cauchoix*. - - - - 452

2 A strict proof is required of the authority of a third person to receive notice in behalf of endorsee. *Montillet* vs. *Duncan*. . 534

3 A note, the payment of which is secured by a special mortgage, may be sued upon in the ordinary way. *Croghan* vs. *Conrad*. - 555

See HUSBAND & WIFE, 1 & 2.

SALE.

1 The assent of the vendee to an act of sale may be proven by matter *aliunde*. *Bradford's heirs* vs. *Brown*, - - - - 217

2 He cannot be disturbed on account of lesion, in the sale by which his vendor acquired the land. *Same case*. - - - *id.*

3 The first sale is not therefore void. *Same case* *id.*

4 If the vendor wishes to avoid it, he must bring suit. *Same case*, - - - *id.*

5 Proof cannot be received of the insanity of a vendor, whose interdiction was not provoked. *Daunoy* vs. *Clyma & al.* - - 557

See ADJUDICATION—ALIENATION---SLAVE, 2.

SERVANT.

1 A cook hired for eighteen months, may be dismissed at any time. *Bethmont* vs. *Davis*, 195

2 If the master was bound to pay his passage back to France, his heir may receive the price of the passage, though the cook died pending a suit brought therefor. *Same case*, - *id.*