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.

Miserable, indeed, must be the condition of that community, where the law is unsettled, and decisions upon the very points are disregarded, when they again come, directly or indirectly into discussion. In such a state of things, good men have nothing to hope, and bad men nothing to fear.

Washington, J.—U. S. vs. *Bright* & *al.*, 187.

VOL. X.

BEING VOL. XII. OF THIS REPORTER.

New-Orleans:

PRINTED BY BENJAMIN LEVY & CO.

42, Royal-Street.

1823.

CHRONOLOGICAL

TABLE OF CASES.

EASTERN DISTRICT, JUNE TERM, 1822.*

Hunter's syndics *vs.* Hunter & al. 1
Mayor *vs.* Hunter, ... 3
Hunter's syndics *vs.* Hunter, ... 5
Croghan *vs.* Conrad, ... 9
Macarty *vs.* Foucher, ... 11
Harrod & al. *vs.* Lafarge, ... 21
Blossman *vs.* his creditors, ... 28
Evans *vs.* Richardson, ... 30
Harper *vs.* Destrehan, ... 31
Hanna *vs.* his creditors, ... 32
Powers *vs.* Foucher, ... 70
Morgan *vs.* Robinson, ... 76
Denis *vs.* Veazey, ... 79
Flogny *vs.* Hatch & al., ... 82
Madeira & al. *vs.* Townsley & al. 84
Shuff *vs.* Cross, ... 89

JULY.

Duncan *vs.* Hampton, ... 92
M'Kenzie *vs.* Havard, ... 101

* Continued from the preceding volume.

Jarreau *vs.* Ludeling, ... 106
Varion's heirs *vs.* Rousant's syndics, . . . 112
Macarty *vs.* Foucher, ... 114
Planters' bank & al. *vs.* Lanusse & al. . . . 157

WESTERN DISTRICT, AUGUST.

Hill *vs.* Martin, ... 177
Bonin & al. *vs.* Eyssaline, ... 185
Vignaud *vs.* Tonnacourt's curator, . . . 229
Fusilier *vs.* Bonin & al. 235
Langlini & al. *vs.* Broussard, ... 242
Porter *vs.* Dugat, ... 245
Thompson *vs.* Chretien & al. 250
Knox *vs.* Haslett, curator, &c. 255
Moore's assignee *vs* King & al. 261
Fusilier *vs.* Hennen, ... 266

SEPTEMBER.

Curtis *vs.* Graham, ... 289
Yeiser *vs.* Smith, ... 292
Ferguson & al. *vs.* Martin, ... 295
Kemper *vs.* Armstrong & al. 296
Offut's heirs *vs.* Roberts & al. 300
Ferguson & al. *vs.* Bacon, ... 303
Butler *vs.* Despalir & al. 304
Albert *vs.* Davis, ... 305
Cavenagh *vs.* Crummin, ... 306
Kay & al. *vs.* Compton, ... 309
Meuillon *vs.* Overton, ... 311
Dean *vs.* Smith & al. 316

Holstein *vs.* Henderson, ... 319
Johnston *vs.* Sprigg, ... 328
Stephens *vs.* Smith, ... 333
Jackson & al. *vs.* Williams, ... 334
Muse *vs.* Rogers' heirs, ... 350
Coe & al. *vs.* Pannel & al. 355
Balio *vs.* Wilson, ... 358
Cox *vs.* Martin's heirs, ... 361
Surgat *vs.* Potter & al. 365
Muse *vs.* Rogers' heirs, ... 370
Mayes *vs.* Calvit, ... 373
Baldwin *vs.* Gordon & al. 378
Shewell *vs.* Stone, ... 386
Hinson & al. *vs.* Ogden & al., . . . 389
Hooter's heirs *vs.* Tippet, ... 390
Bullet *vs.* Serpentine, ... 393
Serpentine *vs.* Slocum, ... 395
Martin *vs.* Turnbull 395
Lafariere *vs.* Sanglair & al. 399
Le Blanc *vs.* Sanglair & al. 402
Skillman & wife *vs.* Lacey & al. 404
Bossier & al. *vs.* Vienne, ... 421
Elishe *vs.* Voorhies, ... 424
Innis *vs.* M'Crummin, ... 425
Mulanphy *vs.* Murray, ... 429
Sompeyrac *vs.* Cable, ... 431
Smith *vs.* Roberts & al. 432
Casson *vs.* Cureton, ... 435
Davis' heirs *vs.* Prevost's heirs, ... 445

EASTERN DISTRICT, DECEMBER.

Evans & al. *vs.* Gray & al. 475

Barry *vs.* Louisiana Insurance Company, . . 484
State *vs.* Judge Pitot, ... 485
State *vs.* Judge Esnault, ... 488
Wooters *vs.* Wilkinson, ... 491
Johnson *vs.* Turney & al. 492
Barry *vs.* Lousiana Insurance Company, . . 493
Fleckner *vs.* Nelder, ... 503
Horn *vs.* Montgomery, ... 505

JANUARY, 1823.

Evans & al. *vs.* Gray & al. 507
Moore & al. *vs.* Angiolette, ... 532
Trepagnier's heirs *vs.* Butler & al. . . . 534
Dresser *vs.* Cox, ... 536
Crouse *vs.* Duffield, ... 539
Trudeau & al. *vs.* Smith's syndics, . . . 543
Rousseau *vs.* Henderson & al. 635
Bouthemy *vs.* Dreux & al. 639
Evans & al. *vs.* Gray & al. 647
M'Guire *vs.* Amelung & al. 649
Guirot *vs.* her creditors, ... 654
Boyer & wife *vs.* Aubert & al. 655

FEBRUARY.

Nugent *vs.* Roland, ... 659
Hasluck *vs.* Salkeld & al. 663
Mayhew *vs.* M'Gee, ... 666
Boudreau *vs.* Boudreau, ... 667
Pepper *vs.* Peytavin, ... 671
Woodruff *vs.* Penny's bail, . . 676

Flower *vs.* Livingston, ... 681
Lazare's executor *vs.* Peytavin, ... 684
Grayson *vs.* Veeche, ... 688
Tilghman *vs.* Dias, ... 691
Tilghman *vs.* Dias, ... 699
Hoff *vs.* Baldwin, ... 699
Gray *vs.* Trafton & al. 702
Guilbert *vs.* De Verbois, ... 709
Andrews' heirs *vs.* Andrews' executors, . . 713

ALPHABETICAL

TABLE OF CASES.

Albert *vs.* Davis, *Evidence*, ... 305
Amelung & al. *ads.* M'Guire, *Dation en paiement*, 649
Andrews' heirs *vs.* Andrews' exs. *Will*, . . 713
Andrews' exs. *ads.* Andrews' heirs, *Will*, . . 713
Angiolette *ads.* Moore & al., *Appeal*, . . . 532
Armstrong & al. *ads.* Kemper, *Damages*, . . 296
Aubert & al. *ads.* Boyer & wife, *Misnomer*, . . 655

Bacon *ads.* Ferguson & al., *Appeal*, . . . 303
Baldwin *vs.* Gordon & al., *Surety*, . . . 378
——— *ads.* Hoff, *Bill of exchange*, . . . 699
Balio *vs.* Wilson, *Amending decree*, . . . 358
Barry *vs.* Louis. Ins. Company, *Continuance, evidence*, ... 484, 493
Blossman *vs.* his creditors, *Appeal*, . . . 28
Bonin & al. *vs.* Eyssaline, *Partition*, . . . 185
——— *ads.* Fusilier, *Promissory note*, . . 235
Bossier & al. *vs.* Vienne, *Collation*, . . . 421
Boudreau *vs.* Boudreau, *Prescription, evidence*, . 667
Bouthemy *vs.* Dreux & al., *Will*, . . . 639
Boyer & wife *vs.* Aubert & al., *Misnomer*, . . 655
Broussard *ads.* Langlini & wife, *Evidence*, . . 242
Bullet *vs.* Serpentine, *Interrogatory*, . . . 393

Butler *vs.* Despalir & al., *Assignment of errors*, . 304
—— & al. *ads.* Trepagniers' heirs, *Judicial proceedings*, ... 534

Cable *ads.* Sompeyrac, *Appeal*, ... 431
Calvit *ads.* Mayes, *Question of facts*, . . . 373
Casson *vs.* Cureton, *Execution*, ... 435
Cavenagh *vs.* Crummin, *Promise*, . . . 306
Chretien & al. *ads.* Thompson, *Execution*, . . 250
Coe & al. *vs.* Pannel & al., *Remanding*, . . 535
Conrad *ads.* Croghan, *Mortgage*, . . . 9
Compton *ads.* Kay & al., *Evidence*, . . . 309
Cox *vs.* Martin's heirs, *Classification*, . . . 361
—— *ads.* Dresser, *Appeal*, ... 536
Creditors *ads.* Blossman, *Appeal*, . . . 28
—————— Guirot, *Forced surrender*, . . 654
—————— Hanna, *Privilege*, . . . 32
Croghan *vs.* Conrad, *Mortgage*, ... 9
Crouse *vs.* Duffield, *Abatement, promissory note*, . 539
Cross *ads.* Shuff, *Exchange*, ... 89
Crummin *ads.* Cavenagh, *Promise*, . . . 306
Cureton *ads.* Casson, *Execution*, . . . 435
Curtis *vs.* Graham, *Evidence*, ... 289

Davis *ads.* Albert, *Evidence*, ... 305
Davis' heirs *vs.* Prevost's heirs, *Evidence*, . . 445
Dean *vs.* Smith & al., *Solidarity, interrogatory*, . 316
Denis *vs.* Veazey, *Surety*, ... 79
Despalir & al. *ads.* Butler, *Assignment of errors*, . 304
Destrehan *ads.* Harper, *Non-suit*, . . . 31
De Verbois *ads.* Guilbert, *Proof*, . . . 709

Dias *ads.* Tilghman, *Order of seizure,* . 691, 699
Dresser *vs.* Cox, *Appeal,* 536
Dreux *ads.* Bouthemy, *Will,* 639
Duffield *ads.* Crouse, *Abatement, promissory note,* 539
Dugat *ads.* Porter, *Award,* 245
Duncan *vs.* Hampton, *Transfer,* 92

Elishe *vs.* Voorhies, *Question of fact,* . . 424
Esnault, judge *ads.* the state, *Mandamus,* . . 488
Evans *vs.* Richardson, *Verdict,* 30
Evans & al. *vs.* Gray & al., *New trial, ded.* . .
pot. 475, 507, 647
Eyssaline *ads.* Bonin & al., *Partition,* . . . 185

Ferguson & al. *vs.* Bacon, *Appeal,* . . . 303
——— ——— Martin, *Appeal,* . . . 295
Fleckner *vs.* Nelder, *Will,* 503
Flogny *vs.* Hatch & al., *Demand,* . . . 82
Flower *vs.* Livingston, *Jury,* 681
Foucher *ads.* Macarty, *Prescription,* . . . 11, 114
——— *ads.* Powers, *Practice, prescription,* . 70
Fusilier *vs.* Bonin & al., *Promissory note,* . . 235
——— *vs.* Hennen, *Domicil,* 266

Gordon & al. *ads.* Baldwin, *Surety,* . . . 378
Guirot *vs.* her creditors, *Forced surrender,* . 654
Graham *ads.* Curtis, *Evidence,* 289
Gray & al. *vs.* Evans & al., *Ded. pot. new* . .
trial, ... 475, 507, 647
——— *vs.* Trafton & al., *Assignment,* . . . 702

Grayson *vs.* Veeche, *Attachment*, . . . 688
Guilbert *vs.* De Verbois, *Proof*, . . . 709

Hampton *ads.* Duncan, *Transfer*, . . . 92
Hanna *vs.* his creditors, *Privilege*, . . . 33
Harper *vs.* Destrehan, *Non-suit*, . . . 31
Harrod & al. *vs.* Lafarge, *Note, interest, new trial*, 9
Haslett *ads.* Knox, *Practice*, ... 255
Hasluck *vs.* Salkeld & al., *Attachment*, . . . 663
Hatch & al. *ads.* Flogny, *Demand*, . . . 82
Havard *ads.* M'Kenzie, *Judgment*, . . . 101
Hennen *ads.* Fusilier, *Domicil*, ... 266
Henderson *ads.* Holstein, *Land title*, . . . 319
——— *ads.* Rousseau, *Continuance*, . . 635
Hill *vs.* Martin, *Endorsee*, ... 177
Hinson & al. *vs.* Ogden & al., *Appeal*, . . . 389
Hoff *vs.* Baldwin, *Bill of exchange*, . . . 699
Holstein *vs.* Henderson, *Land title*, . . . 319
Hooters' heirs *vs.* Tippet, *Evidence*, . . . 390
Horn *vs.* Montgomery, *Appeal*, ... 505
Hunter's syndics *vs.* Hunter et al., *Surety*, . . 1, 5
——— *ads.* Mayor et al., *Evidence*, . . . 3

Innis *vs.* M'Crummin, *Sale per aversionem*, . . 425
Jackson & al. *vs.* Williams, *Sale, mortgage*, . . 334
Jarreau *vs.* Ludeling, *Interest, tutor*, . . . 106
Johnston *vs.* Sprigg, *Jury trial*, ... 328
Johnson *vs.* Turney & al., *Appeal*, . . . 492

Kay & al. *vs.* Crompton, *Evidence*, . . . 309
Kemper *vs.* Armstrong & al., *Damages*, . . 296

King & al. *ads.* Moore *&* al., *Redhibitory action*, . 261
Knox *vs.* Haslett, *Practice*, ... 255

Lacey *&* al. *ads.* Skillman *&* wife, *Evidence*, . 404
Lafarge *ads.* Harrod *&* al., *Note, interest, new trial*, 9
Lafariere *vs.* Sanglair *&* al., *Evidence*, . . . 399
Lafon's exs. *vs.* Riviere, *Appeal*, . . . 506
Langlini *&* wife *vs.* Broussard, *Evidence*, . . 242
Lanusse et al. *ads.* Planters bank et al., *Insolvent*, 157
Lazare's exr. *vs.* Peytavin, *Evidence*, . . . 684
Le Blanc *vs.* Sanglair et al., *Consideration*, . . 402
Livingston *ads.* Flower, *Jury*, ... 681
Louis. Ins. Comp. *ads.* Barry, *Evidence, continuance*, . . . , . . 484, 493
Ludeling *ads.* Jarreau, *Interest, tutor*, . - . 106

Macarty *vs.* Foucher, *Prescription*, . . 11, 114
M'Crummin *ads.* Innis, *Sale per aversionem*, . 425
M'Gee *ads.* Mayhew, *Surrender*, . . . 666
M'Guire *vs.* Amelung et al., *Dation en paiement*, . 649
M'Kenzie *vs.* Havard, *Judgment*, . . . 101
Madeira et al. *vs.* Townsley et al., *Agent*, . . 84
Mayes *vs.* Calvit, *Question of facts*, . . . 373
Mayor et al. *vs.* Hunter, *Evidence*, . . . 3
Mayhew *vs.* M'Gee, *Surrender*, ... 666
Martin *vs.* Turnbull, *Boundary*, . . . 395
——— heirs *vs.* Cox, *Classification*, . . . 361
——— *ads.* Ferguson et al., *Appeal*, . . . 295
——— *ads.* Hill, *Endorsee*, ... 177
Meuillon *vs.* Overton, *Question of fact*, . . 311
Montgomery *ads.* Horn, *Appeal*, . . . 505

Moore & al. *vs.* Angiolette, *Appeal*, . . . 532
Moore & al. *vs.* King et al., *Redhibitory action*, . 261
Morgan *vs.* Robinson, *Prescription*, . . . 76
Mulanphy *vs.* Murray, *Appeal*, ... 429
Murray *ads.* Mulanphy, *Appeal*, ... 429
Muse *vs.* Roger's heirs, *Proof*, *injunction*, . 350, 370

Nelder *ads.* Fleckner, *Will*, ... 503
Nugent *vs.* Roland, *Promissory note*, . . . 659

Offut's heirs *vs.* Roberts et al., *Verdict*, . . 300
Ogden et al. *ads.* Hinson et al., *Appeal*, . . 389
Overton *ads.* Meuillon, *Question of fact*, . . 311

Pannel et al. *ads.* Coe et al., *Remanding*, . . 535
Penny's bail *ads.* Woodruff, *Capias*, . . . 676
Peytavin *ads.* Lazare's executor, *Evidence*, . 684
Pitot, judge, *ads.* the state, *Mandamus*, . . 485
Planters' bank et al. *vs.* Lanusse & al. *Insolvent*, . 157
Porter *vs.* Dugat, *Award*, ... 245
Potter et al. *ads.* Surgat, *Agent*, *interest*, . . 365
Powers *vs.* Foucher, *Practice*, *prescription*, . 70
Prevost's heirs *ads.* Davis' heirs, *Evidence*, . 445

Richardson *ads.* Evans, *Verdict*, . . . 30
Riviere *ads.* Lafon's executors, *Appeal*, . . 506
Roberts et. al. *ads.* Offut's heirs, *Verdict*, . 300
——————— Smith, *Disturbance*, . . 432
Robinson *ads.* Morgan, *Prescription*, . . . 76
Roland *ads.* Nugent, *Promissory note*, . . 659

Rogers' heirs *ads.* Muse. *Proof, injunction,* 350, 370

R[illegible]nt's syndics *ads.* Varion's heirs, *Heirs,* . 112

Rousseau *vs.* Henderson, *Continuance,* . . 635

Salkeld et al. *ads.* Hasluck, *Attachment,* . . 663

Sanglair et al. *ads.* Lafariere, *Evidence,* . . 399

—— —— *ads.* Le Blanc, *Consideration,* . 402

Serpentine *vs* Slocum, *Appeal,* . . . 395

—— *ads.* Bullet, *Interrogatory,* . . 393

Shewell *vs.* Stone, *Attachment,* 386

Shuff *vs.* Cross, *Exchange,* - - - - 89

Skillman et wife *vs.* Lacey et al., *Evidence,* - - 404

Slocum *ads.* Serpentine, *Appeal,* - - - 395

Smith et al. *ads.* Dean, *Solidarity, interrogatory,* - 316

—— *ads.* Stephens, *Appeal,* - - - - 333

—— Yeiser, *Appeal,* - - - - 292

—— *vs.* Roberts et al., *Disturbance,* - - - 432

——'s syndic *ads.* Trudeau et al., *Privilege,* - 543

Sompeyrac *vs.* Cable, *Appeal,* - - - - 431

Sprigg *ads.* Johnson, *Jury trial,* - - - 328

Stephens *vs.* Smith, *Appeal,* - - - - 333

Surgat *vs.* Potter et al., *Agent, interest,* - - 365

State *vs.* judge Esnault, *Mandamus,* - - - 488

—— Pitot, *Mandamus,* - - - 485

Stone *ads.* Shewell, *Attachment,* - - - 386

Thompson *vs.* Chretien et al., *Execution,* - - 250

Tilghman *vs.* Dias, *Order of seizure.* - - 691, 699

Tippet *ads.* Hooter's heirs, *Evidence,* - - 390

Tonnacourt's curator *ads.* Vignaud, *Court of probates,* 229

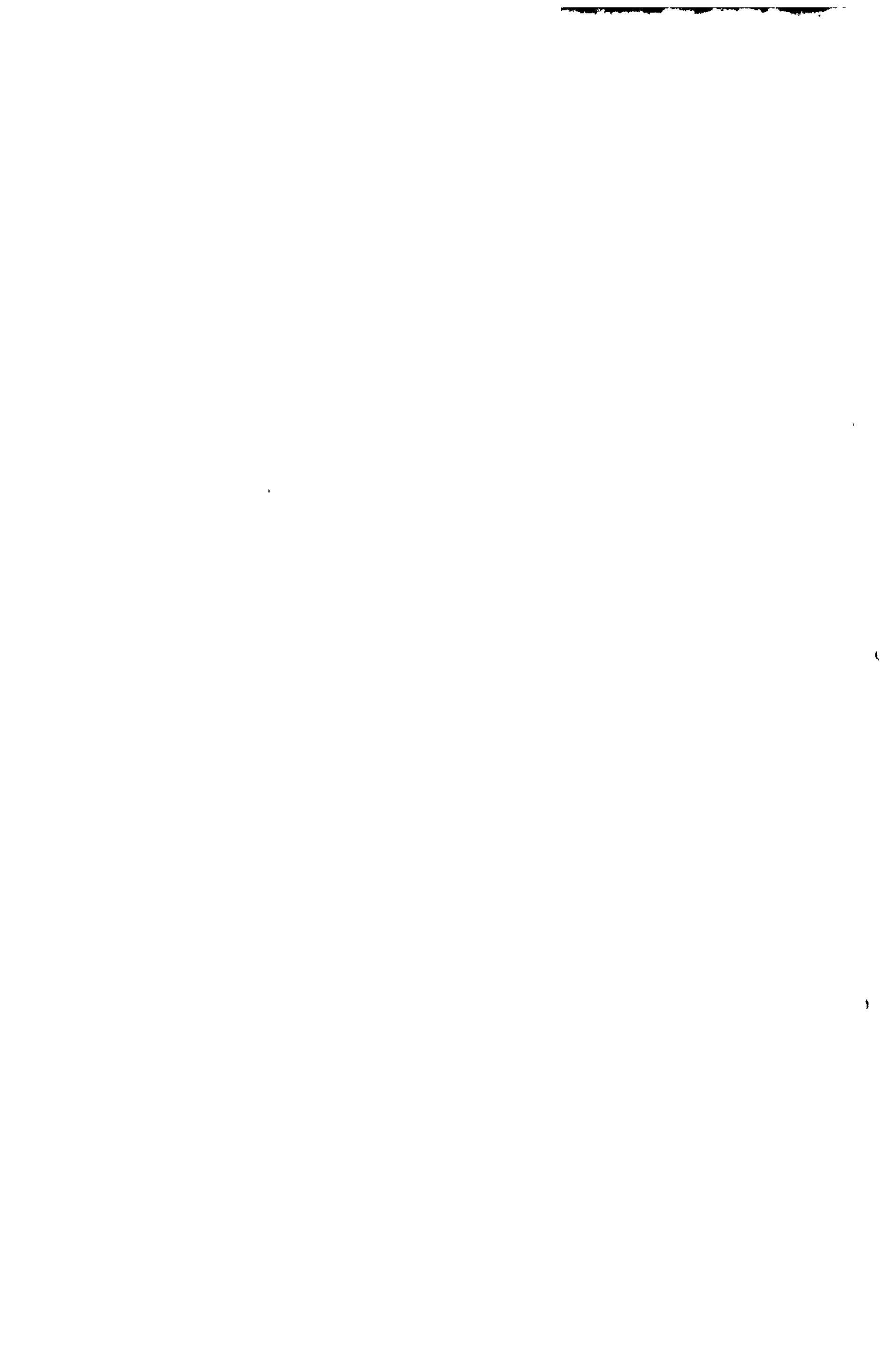
Townsley et al. *ads.* Madeira et al., *Agent,* - - 84

Trafton et al. *ads.* Gray, *Assignment,* - - 702
Trepagnier's heirs *vs.* Butler et al., *Judicial proceedings,* - - - - - - - 534
Trudeau et al. *vs.* Smith's syndics, *Privilege,* - 543
Turney et al. *ads.* Johnson, *Appeal,* - - - 492
Turnbull *ads.* Martin, *Boundary,* - - - 395

Varion's heirs *vs.* Rousant's syndics, *Heirs,* - 112
Veazey *ads.* Denis, *Surety,* - - - - 79
Veeche *ads.* Grayson, *Attachment,* - - - 688
Vienne *ads.* Bossier et al., *Collation,* - - - 421
Vignaud *vs.* Tonnacourt's curator, *Court of probates,* 229
Voorhies *ads.* Elishe, *Question of fact,* - - 424

Wilkinson *ads.* Wooters, *Appeal,* - - - 491
Williams *ads.* Jackson et al., *Sale, discussion,* - 334
Wilson *ads.* Balio, *Amending decree,* - - - 358
Woodruff *vs.* Penny's bail, *Capias,* - - - 676
Wooters *vs.* Wilkinson, *Appeal,* - - - - 491

Yeiser *vs.* Smith, *Appeal,* - - - - 292



CASES

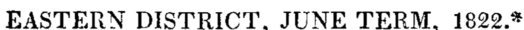
ARGUED AND DETERMINED

IN THE

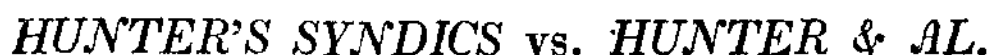
SUPREME COURT

OF THE

STATE OF LOUISIANA.



EASTERN DISTRICT, JUNE TERM, 1822.*



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

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

Service of a judgment on the surety, who bound himself for the forthcoming of a negro or his value, on the judgment, notwithstanding a demand does not work a forfeiture of the penalty, if the negro be within a reasonable time surrendered.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. In this case, the plaintiffs claim the penalty of a bond entered into by the defendants, with a condition to be void, if G. H. Hunter, one of the obligors, should have a certain negro (in relation to which the bond was made) or his value forthcoming, to answer any judgment which might be rendered in the district court, in a suit then pending, which had been brought by *Hunter's syndics* vs. *Hunter & Marshal*; wherein it was afterwards

* Continued from last volume.

East'n District. *June*, 1822.

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

decreed, that the negro Tom, mentioned in the plaintiffs' petition, should be delivered over to said plaintiff.

This judgment was rendered on the 7th of November, 1821, and the evidence, in the present case, shews that a copy of it was served on both the defendants, on the 17th of the same month. It does not appear that the negro was demanded from Hunter, or any other step taken against him, except giving notice of the judgment.

On notifying said judgment to Bennet, he shewed complete willingness to have it complied with; and the delay which succeeded in delivering over the slave to the sheriff, in discharge of the condition of the bond, seems to have arisen more from the want of perseverance in that affair, than from any want of promptitude on the part of the defendants to comply with the obligation.

When we add to this that no demand of the slave was ever made on Hunter, who had him in possession, it does appear to us that there has not been such delay by the defendants, in performing the condition of their bond, as to cause them to have incurred its penalty.

There is something apparently anomalous

in the jury having found a verdict of non-suit: but as the judgment of the judge *a quo*, is in accordance with our ideas of the justice of the case,

It is therefore ordered, adjudged and decreed, that said judgment be affirmed with costs. *Post*, 5.

Hoffman for the plaintiffs, *Hennen* for the defendants.

MAYOR, &c. vs. *HUNTER.*

If the son buy a lot for the father, who afterwards pays the annual rent, the consideration of the sale, and warrants the title of the son's vendee, these circumstances will not be conclusive evidence that the first sale was authorised or ratified, if it be shewn that the father ever refused to ratify it.

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

MATHEWS, J. delivered the opinion of the court. This is a suit in which the plaintiffs claim from the defendant, an annual rent, as stipulated on the sale of certain lots, said to have been purchased by the latter from them, through the agency of his son, G. H. Hunter. The answer denies the authority of the pretended agent, and alleges that the purchase thus made, was never ratified and confirmed by the defendant, as principal.—Judgment was rendered against him in the court below, and he appealed.

There is something apparently contradicto-

ry in the statement of facts. The parties admit that G. H. Hunter bought the lots for his father, and that the latter paid the rent for one or two years; but they state further that the father never did ratify the purchase thus made by his son. These lots were afterwards sold under the conditions, stipulated in the purchase from the corporation, by G. H. Hunter, to a third person; in which act of sale, G. Hunter, the father, appears to warrant the title of his son.

It is contended on the part of the plaintiffs, that this statement of the case shews a full acquiescence and tacit ratification of the purchase thus made for G. Hunter, sen., and that he is consequently bound to take the bargain with all its burthens, and should be decreed to pay the rent, as stipulated in the act of sale. The ratification and acknowlegement of acts done by one person for another, when the former has acted without previous authority, when they are not express, on mere legal presumptions, arising from the title, or some act of the principal, relating to the business transacted in his name; but not amounting to an express ratification.

In the present case, perhaps the conduct of

East'n District. *June*, 1822.

MAYOR, &c. *vs.* HUNTER.

the defendant has been such as to authorise this legal presumption of ratification of the contract. But opposed to this is the fact admitted, that he always refused to ratify the purchase made by his son; which destroys the presumption arising from the payment of rent and assistance at the sale of the lots made to Paulding, for *stabit presumptio donec contrarium probetur, &c.* We are of opinion that the parish court erred in condemning the appellant to pay the debt demanded by the appellees.

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

Moreau and *Hennen* for the plaintiffs, *Livermore* for the defendant.

HUNTER'S SYNDICS vs. *HUNTER*, *ante* 1.

Former judgment confirmed.

MATHEWS, J. delivered the opinion of the court. Having doubted the correctness of our opinion, and the judgment heretofore rendered in this case, we granted a rehearing, at

East'n District.
June, 1822.

HUNTER'S SYNDICS
vs.
HUNTER.

the request of the plaintiff, who is here appellant.

The sole question in the cause is, whether the bond, on which the action is founded, has been forfeited, so as to make the obligors liable for its penalty? The condition on which the obligation was to have been avoided, is to to have a certain negro (therein mentioned) or his value forthcoming, to answer any judgment that might be rendered in a case then pending in the district court, against one of the obligors, and another person. The decree of the court in that case was, that said negro should be delivered to the appellants, who were plaintiffs in the former case, as well as in this. They rely much for a change of our judgment, on the 35*th law of the* 11*th tit. Part.* 5; in which it is clearly laid down, that, where a man promises to give or to do any thing, under a certain penalty, and on a day fixed, the obligee has a right to claim either the penalty or the specific performance of the thing, at his option. When no day certain is fixed, the obligor, should it be required of him by the other party, at a proper time and place, and he refuse, when it was in his power to have fulfilled his promise: or if suf-

ficient time had elapsed for him to have performed it, had he so intended; from that time he will be bound to pay the penalty. It seems from this law, that a refusal to perform a promise, which has no time fixed for its fulfilment, when there is a demand to that effect, or an unreasonable delay in giving or doing the thing stipulated, will work a forfeiture of the penalty, under which such promise has been made.

The notice of the judgment was given to both the obligors on the same day, viz. 17th of November last. Bennet, from whom the fulfilment of the condition of the bond was demanded, did not refuse to comply; neither does it appear that Hunter refused. We have no doubt but that a tender or delivery of the negro to the sheriff, in discharge of the first judgment, if made in any reasonable time, and before suit actually commenced on the bond, would release the obligors. It does not appear that any request was made on Hunter to deliver the negro, or if it was, the time is not shewn. Bennet, on receiving notice of the judgment, and being required to cause a performance of the condition of his bond, offered at once to comply; but seems, on account of some cause not stated by the

East'n District.
June, 1822.

HUNTER'S SYNDICS
vs.
HUNTER.

witness, James, to have desired a little further time, which was not objected to. Before the service of citation in this suit, the negro was placed in the possession of the sheriff, and in the course of about eight or nine days from the notice of judgment. Neither of the obligors refused to comply with their promise, when required so to do; nor does the delay, which intervened between notice of the judgment and the delivery of the negro to the sheriff, appear to us, with all the circumstances of the case, to have been unreasonable. The reason of the law, which subjects promisors to the payment of the penalty under which they bind themselves, is want of intention to fulfil their engagements, evinced either by express refusal or by lapse of time. Now, in this case, the person on whom the demand was made, so far from refusing, agreed immediately to do or cause to be done, that which had been promised. Upon the whole, we are of opinion that the former judgment of the court ought not to be disturbed.

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

CROGHAN vs. CONRAD.

East'n District.
June, 1822.

CROGHAN
vs.
CONRAD.

Whether the holder of a note, secured by a special mortgage, having obtained judgment may levy it on any other property, than that specially mortgaged?

APPLICATION for a rehearing. 11 *Martin*, 555.

Denis, for the defendant. The court say that the counsel for the defendant relied on *Pothier on Mortgages*, when, in fact, *Pothier on Mortgages* was not even cited; but *Pothier on Obligations* was cited, but not exclusively relied on.

But the defendant relied principally on the *art.* 31, 458, of our *Civil Code*, which has been overlooked by the court, and which says:— "The special mortgage compels the creditor to come on and to cause to be sold the thing which is thus mortgaged to him, before he can come on the other property of his debtor: but that obligation is dispensed with, if it has been stipulated that the general mortgage should not derogate from the special, nor the special from the general."

In this case we see, by the act annexed to the record, that the mortgage is only a special one. What will become of the above article of our *code*, if the judgment, which this court has rendered, is confirmed? An execution must be issued in the ordinary way, and

East'n District.
June, 1822.

CROGHAN
vs.
CONRAD.

the law and the writ itself say, the moveable effects must be seized first.

Yet under the article of our *code*, above cited, I contracted that my land should be seized first.

It is said the plaintiff can control the execution on the *fi. fa.*; but the sheriff must be governed by the law, which imperatively commands him to seize the moveable effects first.

It is said if the plaintiff should have seized other things than the land, against the will of the defendant, he can obtain an injunction; but often times he cannot give security, and in fifteen days, contrary to his contract and contrary to the letter of our *Civil Code*, his moveable property is sold.

MARTIN, J. delivered the opinion of the court. The authority of *Pothier* must have the same weight, whatever may be the volume of his works, from which it is quoted.

It is true the *Civil Code* requires the special mortgagee to seize the property specially mortgaged, before he resorts to any other.

But when a creditor has its debt evidenced by a note of hand, and to the principal obligation resulting therefrom, adds the accessory

East'n District
June, 1822.

CROGHAN
vs.
CONRAD.

one of a special mortgage, he may, if he see fit, have an order of seizure, which must be directed against the property specially mortgaged.

Yet nothing prevents his forbearing to resort to his mortgage, and institute his action upon the note. He may, says *Febrero* and the author of the *Curia Phillipica*, after having done so, abandon his suit, and put his mortgage in force, and *vice versa*.

Whether, after having had judgment on the note, he may or not levy it on any property of the defendant, or must first resort to that especially mortgaged, is a question which we will examine when complaint will be made that it was erroneously determined in another court. It does not appear to us that there is any necessity of granting a rehearing.

MACARTY vs. *FOUCHER**.

Digging a canal and felling trees are not such acts of possession, as may be the basis of the prescription of thirty years.

12m 11
f120 787

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

The plaintiff states that he is the owner, *by lawful title*, of a plantation which formerly be-

* This opinion was delivered in April last; but a rehearing had been granted, when the cases of that term went to press.

East'n District
June, 1822.

MACARTY
vs.
FOUCHER.

longed to the late J. B. C. Lebreton, which extends so far as to include within its limits, a piece of land forty arpents in depth and ten arpents in width, beyond part of the defendant's plantation; that he is likewise owner of the said land by prescription, having occupied it by himself, or by those to whose title he has succeeded, upwards of thirty years, *animo dominii*; nevertheless, the defendant, pretending to be the true owner of the said tract, opposes him in the enjoyment thereof. He concludes that he may be maintained in the property and possession of said land, and the defendant forever enjoined from disturbing him therein.

The defendant pleaded the general issue, and the prescriptions of ten, twenty and thirty years.

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

The facts shewn by the evidence are—that, before the year 1757, L. C. Lebreton was owner of a plantation of thirty-two arpents of front on the Mississippi, with the depth of forty, about seven miles above the city of New-Orleans. There existed thereon a saw mill

near the lower boundary of said tract, or the upper one of the next plantation, which was that of J. Belair, having eighteen arpents of front and eighty in depth.

On the 6th of September, 1757, L. C. Lebreton obtained a grant of the whole depth between a continuation of his side lines, as far as another plantation, which he owned between the cypress swamps of the river, and those of the lake.

L. C. Lebreton's plantation is now that of the plaintiff. J. Belair's is now owned, for the greatest part by the defendant, and the premises in dispute are part of it.

In 1767, J. Belair died, and his plantation was sold in two lots, one of ten arpents, immediately below Lebreton's plantation, and the other of eight arpents, both with a depth of eighty. A. & H. Belair bought the former and J. B. C. Lebreton, son of L. C. Lebreton, the latter.

On the 11th of January, 1768, J. B. C. Lebreton, by a double exchange with De la Freniere and A. & H. Belair, obtained the upper lot of J. Belair's plantation in lieu of the lower, which he had bought.

On the 10th of April. 1770, J. B. C. Lebre-

East'n District.
June, 1822.

MACARTY
vs.
FOUCHER.

ton and his wife sold one-half of this lot to Belair. viz : ten arpents in front on the river, immediately below L. C. Lebreton's plantation, with the depth of forty arpents.

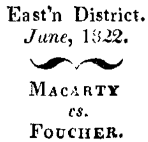
J. B. C. Lebreton died in the following year, (1771) leaving a widow and several minor children, one of whom was B. F. Lebreton. L. C. Lebreton, the father of J. B. C. died on the 10th of June, 1776..

The property of the estate of J. B. C. Lebreton was adjudged to his widow at its valuation, and was not sufficient to cover her claims.

On the 21st of January, 1781, the plantation first mentioned was adjudged to B. Macarty, the plaintiff's grand-father, from whom it passed to the plaintiff by descent and purchase.

The sale was provoked by B. Macarty, stiling himself tutor and curator *ad bona* of the persons and estates of the minors Lebretron, sons of J. B. C. Lebreton, and the premises to be sold, are described as the plantation left by said Lebreton, and in the adjudication, as the plantation of F. L. Lebreton. (This is evidently a clerical error, F. L. Lebreton being mentioned as present at the sale.) The extent of the premises are not spoken of.

East'n District.
June, 1822.



MACARTY
vs.
FOUCHER.

On the 13th of January, 1789, Villiers obtained from Gov. Miro, a grant of twenty-six arpents in depth, beyond the plantation which he had bought on the 10th of April, 1770, from J. B. C. Lebreton.

And on the next day sold to B. F. Lebreton a tract of seven arpents and three feet in front, with the depth of sixty-six arpents, bounded on the upper side by the plantation first mentioned, as the property of L. C. Lebreton and that of J. B. Macarty, the plaintiff's father, son of B. Macarty.

On the 15th of January, 1800, B. F. Lebreton having died insolvent, the land, which he had bought from Villiers, was sold at auction, and purchased by the defendant: it is described as having seven arpents in front with the ordinary depth.

On the 11th of February, 1806, D. Clarke and J. Garrick, syndics of B. F. Lebreton's creditors, declared before a notary public, that there had been an error in the sale of the 15th of January, 1800, in mentioning that the land was sold with the ordinary depth, and that in truth it was sold with the depth mentioned in the sale made by Villiers to their insolvent, on the 14th of January, 1789.

East'n District.
June, 1822.

MACARTY
vs.
FOUCHER.

B. Macarty, the plaintiff's grand-father, does not appear to us to have purchased the land in dispute, which was part of the land which J. B. C. Lebreton acquired by a double exchange, with La Freniere and Belair, and which he retained, when he sold the same land with the depth of forty arpents only to Villiers, on the 10th of April, 1770.

The tract, which was adjudged to the plaintiff's grand-father, is described as a riparious estate, with several edifices, and a sawing mill thereon, evidently that which was left by L. C. Lebreton, a part of which descended to the children of J. B. C. Lebreton, one of his sons, as representatives of their father, who in his life time had occupied it as a tenant, and occasionally drawn timber for the mill from the land, below that of his father's, (that now in dispute) As the land that was then sold made part of the estate of L. C. Lebreton, of which the minor children of J. B. C. Lebreton had only the portion which they took, as representatives of their father, it cannot be imagined that another tract (although contiguous) but which had immediately descended to them from their father, and which belonged wholly to them, was ex-

East'n District.
June, 1822.

MACARTY
vs
FOUCHER.

pressly sold as part, or tacitly passed as an accessory of the plantation of L. C. Lebreton, their grand-father, which was the avowed subject of the sale.

Two tracts of land, part of different estates, and the property of different sets of heirs, cannot easily be believed to have been sold in a lump for one parcel, so as to render it impossible to ascertain what part of the whole was to be accounted for to each set of heirs.

Neither can it be conceived how any part of the land of J. B. C. Lebreton's estate, can be passed as an accessory, in thesaleof a tract of land part of the estate of L. C. Lebreton.

We conclude that the plaintiff has shewn no litteral title to the land in dispute.

A canal was dug, timber was felled, by the plaintiff's grandfather and father, and by himself; but acts like these, as we noticed in the case of *Prevost's heirs* vs. *Johnson et al.*, are not sufficient to establish a title by prescription; the digging of a canal is the work of a short time, and is not a continued act of ownership; the felling of trees is considered a mere trespass; the tracks of carts are only evidence of trespasses of this kind. In the present case, there is evidence of both plain-

East'n District.
June, 1822.

MACARTY
vs.
FOUCHER.

tiff and defendant, and their predecessors, occasionally resorting to the land in dispute for wood. We are bound to say, that the plaintiff cannot recover under the prescription, *longissimi temporis*, nor under that of 10 and 20 years; for he has no colour of title.

He has however shewn a possession by enclosure of a slip of land of ninety-two feet in width, in its lower part, towards the swamp, at the place G H, in the plan cited; the lowermost enclosure of which runs on the outside of the ditch, and reaches the lower line of the plaintiff's plantation, at the point F. Of the land, within this enclosure, he has evidently possession, and he appears to have had it upwards of one year before the inception of the present suit: he must be maintained in this legal possession against the defendant, unless the latter can shew a title.

He contends that Governor Miro granted to Villiers on the 13th of January, 1789, twenty-six arpents in depth, or about two-thirds of the disputed land towards the river; that Villiers sold it to B. F. Lebreton, with a depth of sixty-six arpents, and that thus, on the adjudication, the premises disposed of, were erroneously stated to be sold with the

East'n District.
June, 1822.

MACARTY
vs.
FOUCHER

ordinary depth. *i. e.* 40 arpents only. The syndics about six years afterwards gave him their declaration before a notary that this was done through a mistake. and the land was intended to be sold with the same depth, as in the sale from Villiers to their insolvent, *i. e.* 66 arpents.

The adjudication, in which an error is stated to have been committed, was made by a notary public, at the time acting as auctioneer, in consequence of a judicial decree, to which were parties, the widow of B. F. Lebreton, the curator of his children by a first wife, that of those of the second wife, and the syndics of his creditors. We cannot conceive how it can be urged that a sale made with such formalities, and in which so many different persons were interested, and were made parties, was validly altered (and made to convey what did not pass by it, before the alteration) by the syndics of the creditors. It is very clear that the defendant did not, by the adjudication nor the amendment, acquire any right to the 26 arpents in depth, below the forty that appear thereby to have been adjudged to him.

Being thus without a literal title, he cannot invoke any prescription, but that *longissimi temporis.*

East'n District.
June, 1822.

MACARTY
vs.
FOUCHER.

As to the 26 arpents beyond the land described in the adjudication, he has no vendor whose possession he might invoke. He does not appear to have ever been on the disputed land, before his purchase of that contiguous thereto in 1800.

His counsel, with the aid of that of the plaintiff, have strenuously strove to shew us that the titles, set up by the respective parties, are unsupported by literal or parol evidence.

The plaintiff, however, by the removal of his fences, has taken actual possession of a narrow strip, to which that possession and time have given him the lowest title that may be had in land, the naked possession. This *scintilla juris* enables him to prevail over the defendant, who has not even a shadow of right on this slip of land.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the plaintiff be maintained in his possession of the triangular strip of land marked in the plan, by the letters F G and H; and that the defendant be ever enjoined from disturbing him therein, and that the petition be dismissed as to the remainder of the land. The costs to

be paid in the court below by the defendant, and in this by the plaintiff. *See July term.*

East'n District. *June*, 1822.

MACARTY *vs.* FOUCHER.

Moreau and *Mazureau* for the plaintiff, *Hennen*, *Livingston* and *Grymes* for the defendant.

HARROD & AL. vs. *LAFARGE.*

APPEAL from the court of the first district.

A new trial cannot be granted, because it does not appear, "on what the jury based their virdict."

Conventional interest cannot be proven by parol.

An usage to charge interest at ten per cent. cannot be regarded.

Notes avowedly made to a merchant, for the sole purpose of obtaining his endorsement, & by this means his responsibility, are as strictly mercantile paper as a bill of exchange, which subjects parties thereto to mercantile law.

MARTIN, J. delivered the opinion of the court. The plaintiffs claim $2978 40 cents, the balance of an account annexed to the petition.

The defendant pleaded the general issue, and that instead of his being indebted to them, as they allege, they owe him $2654 54 cents; for that they wrongfully shipped to Boston fifty-one hhds. of sugar, on which they occasioned him a loss to that amount.

The plaintiffs had a verdict for $1560, and the defendant prayed for a new trial, which was refused—there was judgment according to the verdict, and he appealed.

Michel deposed, that, in 1819, he had the superintendance of the defendant's plantation, and, in December, sent fifty hhds. of sugar therefrom to the plaintiffs: that there was a

East'n District. June, 1822.

HARROD & AL. vs. LAFARGE.

necessity of sending off so many hhds. on account of the want of room—moreover, the deponent was anxious of being, by this means, reimbursed of a sum of $1200, which he had, in the defendant's absence, advanced for the use of the plantation. The plaintiffs being unable to sell the sugar in New-Orleans, it being of an inferior quality, shipped it to Boston, in hopes of obtaining a better price.

The defendant returned on the last day of the year, and was in the city when the sugar was shipped, had knowlege of the shipment, and frequently expressed his satisfaction thereat, particularly at the time that he and the witness saw the sugar on the levee, about to be taken on board.

The witness received from the plaintiffs the above sum of $1200, and it is in his knowlege that they paid other sums to the defendant, part of the proceeds of the sugar.

The defendant's first note for $5000, given for the purchase of the plantation, and endorsed by the plaintiffs, was actually protested, when the sugar was sent to them.

The fifty hhds. were not weighed at the plantation, there being no scales there.

The rest of the crop was shipped to Phila-

delphia, by arrangement between the defendant and Morgan, Dorsey & Co.

The sugar sent to Boston, was shipped on the recommendation of the witness, who thought that port the best market.

The witness heard the defendant say he was to pay a commission to the plaintiffs for endorsing the notes he had given for the plantation. At the time of the defendant going to New-York, a part of the price, which was to be paid down, being unpaid, the defendant gave the witness a draft on New-York for it, *viz.* $1800, and said the plaintiffs would endorse it, if necessary; the witness finding it so, applied for and obtained their endorsement, and paid $18 therefor, which the defendant allowed him in his settlement.

On his cross-examination, the witness declared the plaintiffs required a letter from him, before they would ship the sugar. He firmly believes the sugar was not all shipped when the defendant returned from New-York, but he cannot positively swear it. He derives his information of the defendant being to pay the plaintiffs for their endorsement, from the following circumstance: On his being about to divide some of the notes given him by the

East'n District.
June, 1822.

HARROD & AL.
vs.
LAFARGE.

defendant, for the plantation, into smaller notes, the latter asked whether the endorsement could not be dispensed with, as it would save some money. He did not understand that any claim would be made by the defendant for the endorsement of the plaintiffs on the draft of $1800, and never knew it till he saw the account presented by the defendant. He contests this item. The defendant told him his crop amounted to 200 hhds. sugar.

Wyer deposed, that the plaintiffs made an arrangement with his house for the shipment of 176 hhds. sugar to Boston, on the 29th of December, 1819. On the 31st, the first advance of $4000 was made, and on the 6th of January, the balance, $6998, was paid, being six cents per pound on the shipments. It was made to W. B. Swett & Co., by the Mary-Ann. The advance was paid in bills on Boston, at sixty days, negociated through the branch bank of the U. States, at a discount of three per cent. The house of W. B. Swett & Co. was at the time a respectable one, and did extensive business, and the witness had for several years before considerable dealings with it. The witness at the time thought the whole shipment belonged to the plaintiffs; but

East'n District.
June, 1822.

HARROD & AL.
vs.
LAFARGE.

was afterwards told by the defendant that some of his sugar had been shipped to a friend of the witness in Boston. He did not express any disapprobation of the shipment.

Hughes, a clerk of the plaintiffs, deposed that he left the defendant's account at Foucher's counting house—that the next day the defendant called and expressed some dissatisfaction at the charge of commissions for endorsement, observing that if it was struck out he would settle the amount. He made no objection to the account of sales of the sugar. There were 121 hhds. belonging to Holliday, and 51 to the defendant in the shipment made to Boston.

Clague says that he is established as a merchant in New-Orleans, since 1811. and he considers two and a half per cent a fair commission for endorsing notes; his house never takes less. He would make no difference as to notes secured by mortgage.

The following documents came up with the record :—

A letter of the defendant to the plaintiffs, in which he acknowleged that they had, at his request, negotiated his drafts on N. York, for $17,000, and had paid him the proceeds:

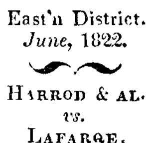
East'n District. *June*, 1822.

HARROD & AL. *vs.* LAFARGE.

also, that they had endorsed his notes for the payment of Mitchell's plantation for $108,500. and an assurance that, as a mark of his gratitude, the crop would be consigned to to them. Albin Mitchel's letters to the plaintiffs, advising the shipment of 51 hhds. of sugar, and the accounts of sales and the account current between the parties.

It does not appear to us that the judge *a quo* erred in refusing a new trial, on the ground that it cannot be known, "on what the jury based their verdict, nor what part of the plaintiffs' account has been allowed and what part rejected." We think with the plaintiffs' counsel, that it is neither necessary or usual to designate in the verdict, the particular items of an account, which the jury think supported by the evidence; it suffices that they ascertain the sum due.

We think, with the defendant's counsel, that a charge of interest at the rate of ten per cent. can only be allowed while supported by written proof. *Civ. Code*, 408, *art.* 32. The alleged usage of the merchants of paying and demanding interest at that rate, cannot be regarded; for it is contrary to an express law.—*Id.* This principle was recognised by this court in *Duplantier* vs. *St. Pe*, 3 *Martin*, 127.



The jury might well on the testimony before them, allow the commission claimed for endorsing the defendant's paper. They had evidence under his hand, that they had endorsed to a very considerable amount—evidence of the usual rate of such a commission—evidence of the defendant intending to pay such a commission, and if the sole testimony of the witness deposing to this purpose is insufficient, it was corroborated by a beginning of proof in writing—his letters stating the amount of his notes endorsed by the plaintiffs.

We are of opinion that notes, avowedly made to a merchant, for the sole purpose of obtaining his endorsment and by this means his responsibility, are as strictly mercantile paper as a bill of exchange, which subjects parties thereto to mercantile law, and that in this instance proof by a single witness was admissible.

We are of opinion, that there is no evidence of a legal engagement to consign the defendant's crop to the plaintiffs; the letter appears to us to convey nothing more than a declaration of the writer's intention—that there is no consideration to support a contract; the endorsement of the paper was a past

East'n District
June, 1822.

HARROD & AL.
vs.
LAFARGE.

transaction, which had the determinate compensation which the plaintiff seeks in the present suit. The consignment is expressly mentioned as a mark of gratitude; and gratitude is essentially voluntary.

Upon the whole, we are of opinion that the question was fairly before the jury, and the case supported by evidence of which they are the best judges. They have reduced the plaintiffs' demand to one half; a reduction considerably exceeding the commission charged on the crops. We cannot say that they erred—nor that the case was such a one in which it was the duty of the court to interfere by granting a new trial.

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

Morse for the plaintiffs, *Denis* for the defendant.

BLOSSMAN vs. *HIS CREDITORS.*

An appeal from an order, refusing to permit the plaintiff to make a voluntary surrender,

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

PORTER, J. delivered the opinion of the

will be dismissed, if the record shew that his creditors had obtained an order for a forced surrender, without shewing how far they had proceeded therein.

What is related in the opinion of the judge *a quo* cannot be received as evidence on the appeal.

court. The appeal is taken in this case from an order of the parish court, refusing to permit the plaintiff to make a voluntary surrender of his property. The reason assigned by the judge for his decision, was that a forced surrender had already been obtained by the defendants against the plaintiff. The correctness of this opinion depends on the length to which these proceedings had been carried before this application was made, as they may have gone so far as to render it impossible for the debtor to comply with the act, of which he claims the benefit.

Nothing in the record enables us to ascertain this fact so indispensable to a correct understanding of the case. The motion made by counsel is to set aside the order and proceedings had in the case of *Bickle & Hamblett* vs. *Blossman* for a forced surrender, without stating at what stage they had arrived; what is related in the opinion of the judge, it has already been decided. cannot be noticed as evidence of the facts. 3 *Martin*, 221. 11, *ibid.* 453. Were we to receive it as such, a strong case would be made against the plaintiff; for the judge does not state that procedings on the part of the creditors had been com-

East'n District.
June, 1822.

BLOSSMAN
vs.
HIS CREDITORS

menced against him; but that a forced surrender had been obtained.

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

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

EVANS vs. *RICHARDSON*.

The verdict of a jury cannot be disregarded, on an appeal, where it does not appear evidently erroneous.

APPEAL from the court of the first district.

MATTHEWS, J. delivered the opinion of the court. This is a suit brought to recover half the amount of profits on sales, of a certain quantity of cotton, which the plaintiff alleges in his petition, was shipped from New-Orleans to Liverpool on the joint account and risque of himself and the defendant, and there sold by the latter for their common benefit. The answer contains peremptory exceptions and the general issue. The cause was submitted to a special jury in the court below, who returned a verdict for the defendant; and judgment having been rendered thereon, the plaintiff appealed.

It appears, from the record of the case, that

the principal fact on which the plaintiff rests his claim, *viz.* the existence of the contract by which he attempts to support a joint interest with the defendant, in the cotton which was shipped and sold, as alleged in the petition, is negatived by the verdict of the jury. If the verdict be not contrary to evidence, it ought not to be disturbed. We have examined the testimony and do not believe the finding of the jury to be contrary thereto. Being satisfied with the decision of the cause on its merits, it is unnecessary to enquire into the exceptions to the action.

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

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

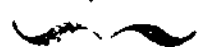
HARPER vs. *DESTREHAN.*

When the plaintiff does not make out his title, he ought to be non-suited.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The plaintiff, in his own right, that of his wife, and as guardian to certain minor children, residing in the state of Mississippi.

East'n District.
June, 1822.



HARPER
vs.
DESTREHAN.

claims a slave in possession of the defendant. The answer is a general denial. The evidence does not establish title to the property, and the petitioner cannot recover.

The judge *a quo* gave final judgment in favour of the defendant. We think this a case in which there should be one of non-suit. 7 *Martin*, 562, 566. 9 *ibid* 268, 533.

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 defendant as in case of a non-suit, and that he pay the costs in the court of the first instance, and the plaintiff those of appeal.

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

HANNA vs. *HIS CREDITORS.*

The landlord has a privilege on the goods in the store, and furniture in the house, for his rent.

But he must urge it within a fortnight after the removal.

A judgment

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

Seghers, for the syndics. Ten creditors have opposed the homologation of the tableau.

1. Samuel Packwood is on the tableau for the amount of his claim; but he contends that

East'n District. *June*, 1822.

HANNA *vs.* HIS CREDITORS

he is entitled to a privilege, as his claim is for the rent of the house in Bienville street, occupied by Hanna up to his failure. The question of privilege is submitted to the court.

2. Madame Papet is also on the tableau and claims likewise a privilege—the debt proceeding from house rent; but it is in evidence that Hanna left her house, in Customhouse street, fourteen months previous to his failure; the syndics therefore maintain that this opposition ought to be dismissed.

3. The tutrix of the heirs of Peter V. Ogden, claims $630, for store rent. It is in evidence that Hanna rented his store from P. V. Ogden, but there is no evidence as to what was due at his failure; M. Morgan deposing only what he heard from P. V. Ogden. The syndics however admit from the books of Hanna, that seven months were due; but at the same time they set forth from the same books a set-off of $253 48, for sundries furnished by Hanna to P. V. Ogden during that period; which leaves a balance in favor of the heirs of P. V. Ogden of $236 52; for which sum they have no objection to his being placed on the tableau as a privileged creditor; but they oppose any further claim of his.

not registered gives no privilege.

An attaching creditor loses his lien, in case of insolvency.

A plaintiff acquires no lien, by taking out a *fi fa* and countermanding its execution.

Nor by taking it out and forbearing to take an *alias*, on its return

A decree that a garnishee pay the plaintiff the funds of the defendant, is tantamount to a judgment.

A garnishee's admission of property in his hands, in his answers to interrogatories, is not a voluntary confession of judgment.

A judgment gives a lien, not on its being docketed, but on its being registered with the recorder of mortgages.

The certificate of the recorder of mort-

East'n District.
June, 1822.

HANNA
vs.
HIS CREDITORS

gages, is legal evidence.
A creditor may pursue his remedy, till a stay of proceedings arrests him.

4. B. Levy and Chs. Thomas, syndics, &c. claim $68 67½ as ordinary creditors, and $22 25 costs, as a privileged debt, by virtue of a judgment of the city court of appeals. The syndics contend, 1st, that the oponents ought to declare of what estate they are the syndics; and 2dly, that a detailed statement of the taxed costs must be produced. With these observations the matter is submitted to the court.

5. Kirk & Mercien claim $152 08, as ordinary creditors. The syndics do not contest the claim, as it appears to them a just debt, and they have no objection that it should be admitted.

6. James Ronaldson claims a privilege for the amount of the debt and costs. The debt is placed on the tableau as an ordinary one; the costs paid to the sheriff by the syndics. Therefore, the only question to be decided on this opposition, is whether the opponent is entitled to a privilege. He grounds this claim on his attachment, which was issued August 17th, 1820, the day previous to the stay of proceedings. The counsel for the syndics thinks it hardly necessary to refute the claim. At all events, he refers the court to 2 *Martin*.

East'n District.
June, 1822.

HANNA
vs.
HIS CREDITORS

89, and entertains no doubt but that this opposition will be dismissed.

7. Gilbert E. Russell & Co. are placed on the tableau as ordinary creditors. They claim a privilege grounded on a judgment, which they obtained against Hanna in the district court, and on a writ of *fi. fa.* issued thereon. By the record of their suit, it appears that the judgment was rendered December 1st, 1819, but that no execution ever issued, and that no other step was taken thereon. The syndics contend that Hanna was in failing circumstances previous to the date of said judgment, and moreover, that the mere judgment creates no lien on the property, and consequently no privilege. The syndics therefore maintain that this opposition must be dismissed, reserving to explain hereafter, what is to be understood by failing circumstances.

8. Lefort is likewise placed on the tableau as an ordinary creditor. He claims a privilege grounded, both on a judgment which he obtained in the district court and on a writ of *fi. fa.* issued thereon.

The syndics deny the privilege, on the ground that Hanna was already in failing cir-

East'n District.
June, 1822.

HANNA
vs.
HIS CREDITORS

cumstances at the time of, and previous to the date of the judgment, and that therefore, neither the judgment nor the writ of *fi. fa.* could work a lien on the insolvent's property to the prejudice of his other creditors. They contend, that had even the *fi. fa.* ever worked a lien, this lien was dissolved by the plaintiff's staying the execution and stopping there the proceedings. From the record, which is introduced in evidence, it appears that judgment was rendered April 17th, 1820; that a *fi. fa.* was issued the same day; that the execution was stayed by the plaintiff in the hands of the sheriff, who returned the writ April 7th, 1821, and that no other or further step was since taken in the cause.

The syndics, therefore, maintain that this opposition must likewise be dismissed. They rely on the following authorities: *Curia Phillipica, lib.* 2; *Comercio terrestre, cap.* 11; *Fallidos, p.* 406.

"No. 1. Insolvent are those merchants, brokers and bankers, or their agents, who fail or break at the time of their payment, credits or obligations and contracts."

"No. 2. Hence it follows that those are insolvent, who flee, or conceal their persons

by retiring into churches or other places, although they do not take away nor conceal any of their goods or books."

"No. 3. Hence it follows, likewise, that those are insolvent who break or fail in their credits or obligations, for want of property, though they neither take away nor conceal their property or persons; as also those who cannot entirely pay all their debts, and those who for their debts, are executed in their property by their creditors."

The No. 2 is explained by the 22d section of the *insolvent act* of 1817, *page* 136, which after having stated what persons shall be considered as fraudulent bankrupts, says:— "The same rule shall apply to any insolvent debtor, who shall abscond or absent himself from his usual place of residence, without leaving to his creditors any account of his affairs, and without having previously surrendered to them his property."

Nouveau Denisart, tom 8, *pages* 402 *et* 403, *verbo Faillite*:—No. 4. *Quoique le défaut de payement de quelques dettes, particulières ne soit pas un signe absolument certain de faillite, néanmoins, lorsqu'il est suivi du non payement des autres, dettes de*

East'n District.
June, 1822.

HANNA
vs.
HIS CREDITORS

la rupture du commerce, de la discontinuation de l'etat de banquier, ou autres circonstances, qui constatent la faillite, alors la faillite est ouverte du jour que le failli a commencé de cesser ses payemens. C'est d'apres ce principe que les consuls de Paris consultés en vertu d' un arret de la cour du 20 *Janvier*, 1755, *sur l'époque à laquelle il fallait fixer l'époque de la faillite du sieur Lay de Serisy, ont donné leur avis, le* 25 *Mars suivant, assistés de plusieurs banquiers et négocians, en ces termes. Estimons tous unanimement, qu' attendu la notorié-té de la cessation du dit Lay de Serisy, des le* 11 *Juin*, 1745, *et tout ce qui s'en est ensuivi, sans qu'il paraisse les avoir repris, la faillite du Sieur Lay de Serisy doit étré réputée et déclarée ouverte des le dit jour* 11 *Juin*, 1745, *date de la première de nos sentences obtenues ontre lui, et qui a été suivie de nombre d'autres sans interruption.*"

From these authorities it may be inferred what is understood by failing circumstances. I think it is a collection of uninterrupted circumstances preceding the failure, such as do leave no doubt, but that it must ensue ; and by the effect of which, the date of the failure is traced back to the beginning of these circumstances, or to the first obligation the insolvent failed to discharge; or in other words,

to the first protest or to the first judgment, which he suffered to go against him.

The evidence on file in this case brings it within each of the provisions of these authorities.

1. For ten or twelve months previous to his failure, Hanna was greatly embarrassed and his notes were frequently protested.

2. From the month of January, 1819, up to his failure, that is, to the stay of proceedings, eighteen law-suits were brought against him by his creditors, all for money due, exclusive of two more, *viz:* that of *John Day* vs. *Eastburne & Co.* in which he was sued as garnishee for money due by him to the defendants; and that of *Pierre Romain and others* for the forced surrender, on which the stay of proceedings was granted, on the 18th of August, 1820.

3. In thirteen of those suits judgment was rendered against Hanna; the first on the 7th of April, 1819, and so on successively to the 20th June, 1820; in the other suits, writs of attachment and sequestration were issued nearly all in August, 1820.

4. On six of the above judgments, execution issued, the first in August, 1819, and an

East'n District.
June, 1822.

HANNA
vs.
HIS CREDITORS

alias *fi. fa.* in November following; the other executions issued all successively in the months of April, May, June and August, 1820.

5. Under these circumstances Hanna absented himself from this state, on the 23d of July, 1820, without leaving to his creditors any account of his affairs, and without having previously surrendered to them his property.

These united signs of an impending failure followed by an actual one, evidently shew that Hanna was in failing circumstances long before the stay of proceedings, and that therefore the date of his failure is to be traced back to a time previous to the judgment of Lefort; if we take for our guide the first judgment, it will carry us back to the 7th of April, 1819; if the first execution, to August or November, of the same year; if the first protest, this took place at least, in or about the month of October of the same year.

It follows that the judgment obtained by Lefort on the 17th of April, 1820, was rendered, when, legally speaking, Hanna was in open failure, and is therefore void as to the other creditors, according to the provisions of the 17th section of the act of March 25, 1808. 2 *Martin's Digest*, 454, and the 24th section of the act of 1817, page 136.

East'n District.
June, 1822.

HANNA
vs.
HIS CREDITORS

9. Moses Duffy is put on the tableau as an ordinary creditor, for the full amount of his claim, it being the same identical one, as that of F. J. Sullivan of Philadelphia, whose agent he is; he maintains he is entitled to be paid by privilege, on the ground that he obtained three several judgments against the insolvent in the district court; the two first on the 7th, and the latter on the 20th of June, 1820, and sued out executions thereon on those respective days.

The syndics resist the privilege for the following reasons:—1st, That Hanna was already in failing circumstances, when those three judgments were rendered, and even before; 2dly, That supposing that the date of the failure could only be reckoned from the 23d of July, 1820, the day of his departure, or even from the 18th of August following, when the proceedings were stayed; yet the dates of these three judgments fall within the three months immediately preceding either of those two epochs, and come therefore within the provisions of the acts of 1808 and 1817, just quoted. According to these provisions the judgments, and of course the executions issued thereon, are void and can bestow no

East'n District.
June, 1822.

HANNA
vs.
HIS CREDITORS

privilege to the prejudice of the mass of the creditors.

It may be contended, that neither of those two acts apply to the case, as the one provides for debtors in actual custody, and the other for voluntary surrenders. To this I reply—1st, that this case, which was a forced surrender, has since become a voluntary one, having been consolidated with the latter, which was brought afterwards by Hanna himself; 2dly, that those provisions indiscriminately apply to any case of insolvency; this section of the act of 1808, having been taken by the supreme court as the basis of their dedision in the case of *Roussel* vs. the syndics of *Dukeylus*, 4, *Martin*, 212, though *Dukeylus'* failure was a case of voluntary surrender, and the act of 1817 was not yet enacted. In this case a mortgage was avoided, because it was made within three months of the failure. No difference is made in either of the acts between alienations of property, mortgages or judgments, which are all declared void, if they have taken place within the three months previous to the failure.

As to the other position I have taken, that Hanna was in failing circumstances previous

to the dates of those judgments, and that therefore the date of his failure is, legally speaking, anterior to the judgments themselves, I refer the court to what I have said on this subject and to the authorities quoted in support thereof, in the foregoing part of the argument, relating to Lefort.

10. John Day is placed on the tableau for the full amount of his claim, as an ordinary creditor. But he pretends that he is entitled to a privilege for the said amount, as well on the immoveables and slaves as on the moveables surrendered by the insolvent. This pretention he rests on the following grounds:

1. That he obtained a judgment against Hanna in the first district court, for the sum of $2836 55.

2. That the said judgment was duly docketted, and afterwards, *to wit:* on the 7th of June, 1820, duly recorded at the office of the recorder of mortgages in the parish of Orleans, and that in consequence of this docketting and recording, all the real property and slaves belonging to Hanna, within this state, were and are bound, and liable for the debt for which the said judgment was obtained.

3. That afterwards, *to wit:* on the 8th day

East'n District.
June, 1822.

HANNA
vs.
HIS CREDITORS

of August, 1820, he caused a writ of alias *fieri facias* to be issued on the said judgment, which writ was delivered to the sheriff on the same day, 8th of August; and that thereby all the personal property of Hanna was from that time bound and liable for the satisfaction of that judgment, into whose hands soever the property might come.

The syndics resist the privilege, and the better to establish their defence, they have introduced the transcript of the record of the cause in which the pretended judgment was obtained. They ground their defence on the following points:—

1. There is no judgment against Hanna.

2. If there be judgment against him, it is void.

3. The docketting the judgment creates no lien on the real property and slaves of the debtor.

4. There is no evidence that the judgment was recorded with the register of mortgages, and should it appear that it was recorded, it does not, nor ever did affect Hanna's real property or slaves.

5. The writ of alias *fieri facias* issued and delivered to the sheriff on the 8th of August,

East'n District.
June, 1822.

HANNA
vs.
HIS CREDITORS

1820, neither did nor could create a lien on the personal property of Hanna, to the prejudice of the mass of his creditors.

1st point, There is no judgment against Hanna.

From the record on file, it appears that this suit was instituted against James Eastburne & Co., and that Hanna was made garnishee; that judgment was rendered against the defendants, and that the garnishee was thereby ordered to pay over to the plaintiff the amount acknowleged to have been attached in his hands, in part satisfaction of this judgment.

The words of this judgment are plain; it goes against the defendants in favor of the plaintiff and goes no further. This court is certainly not prepared to construe it into a judgment against Hanna; nor is there any provision in our laws, under which such judgment could have been rendered. The act of March 20th, 1811, 1 *Martin's Digest*, 518 to 522, is the only one which provides for garnishees, and the 3d section of it points out the sole instance in which judgment may be rendered against them. Now, the case of Hanna did not come within the provisions of this section; for the record shews that he had

East'n District.
June, 1822.

HANNA
vs.
HIS CREDITORS

neither neglected nor refused to answer the interrogatories, propounded to him by the plaintiff. Nor can the latter shelter himself under the 5th section to maintain that his judgment goes against Hanna ; this section allows in no case judgment against the garnishee personally, but merely provides that after judgment has been obtained against the defendant, the goods, chattels, &c. which shall be made to appear in the possession of the garnishee, shall be adjudged accordingly, and shall be subject to execution. What else then is thereby provided, but that if there be judgment against the defendant, his goods, chattels, &c. in the hands of the garnishee, shall be adjudged and held subject to the execution on said judgment.

This is far from authorising a judgment against the garnishee personally ; nor did the district court fall into the error of rendering any against Hanna in this instance ; it is merely an order directed to him, as it would be to the sheriff, or any other depositary, to pay over to the plaintiff the amount attached in his hands, in part satisfaction of the judgment against the defendant. No sum is specified against Hanna, which would have been

indispensable in a judgment. I therefore maintain that there is none against him, nor was there any occasion for one ; for as I shall soon observe no part of the sum attached in his hands, was yet due at the time the judgment was rendered.

2d point. If there be judgment against Hanna, it is void.

1st. At the time it was rendered, Hanna was already in failing circumstances; he was greatly embarrassed in his affairs, and had, since two months and upwards, his notes frequently protested ; three judgments had already been rendered against him ; three others followed immediately, and six more at short intervals, whilst the protests were continuing, and the embarrassment increasing till they ended in the actual failure. These facts appear from the evidence in the cause ; for the inference therefrom to be drawn, the syndics rely on the following authorities : *Curia Phillipica, lib.* 2, *Comercio terrestre, cap.* 11, *Fallidos, p,* 406. *No.* 1, *No.* 2 *and No.* 3. *Nouveau Dénisart, tom.* 8, *pages* 403 *et* 402 *verbo Faillite.*

The No. 2, *Fallidos, Curia Phillipica,* is explained by the 22d section of the insolvent

East'n District.
June, 1822.

HANNA
vs.
HIS CREDITORS

act of 1817, page 136. From these authorities, it may be inferred, what is understood by failing circumstances. I think it is a collection of uninterrupted circumstances preceding the failure, such as to leave no doubt but that it must ensue; and by the effect of which, the date of the failure is traced back to the beginning of these circumstances, or to the first obligation the insolvent failed to discharge; or in other words, to the first protest, or to the first judgment which he suffered to go against him.

The evidence on file, in this case, brings it within each of the provisions of these authorities. It is true that Hanna had not yet, previous to the judgment, left the state of Louisiana, but it is in evidence by the depositions of two or more of the witnesses, that for two months and more previous to the 14th of December, 1819, he was daily protested.

2dly. Under these circumstances, Hanna confessed this judgment before the maturity of the debt. He owed nothing to Day, the plaintiff; James Eastburne & Co., the defendants, were his creditors. By the attachment Day became subrogated to their rights against Hanna; but this could not place him on a better footing than they were themselves.

We find that the sum, which he acknowleges to owe Eastburne, was payable in several instalments, whereof the first would be due on or about the first of March, 1820, when sixty days more were to be allowed for its payment; so that in fact it became due but on or about the first of May, and so on with the other instalments successively, up to the 27th of September, 1820, including always the sixty days.

On this confession of Hanna, has the judgment been rendered on the 24th of December, 1819. This fact, though denied by John Day, does no less appear on the face of the record of his suit, which is on file in this cause. Could it avail Day, and consequently James Eastburne & Co. to the prejudice of the mass of Hanna's creditors, this would amount to nothing less than indirectly granting the latter a privilege, which they would have been denied, had they sued Hanna in their own name ; for I see no difference in the contemplation of the failure between a confession of judgment made by the debtor before the debt falls due, with the view to give one creditor an undue preference over the others, and the discharge of a debt nor yet payable.

East'n District.
June, 1822.

HANNA
vs.
HIS CREDITORS

when the debtor has not wherewith to pay demands which falls daily due. The law reprobates and avoids both; for the former position, I refer the court to the two insolvent statutes of March 25, 1808, 2 *Martin's Digest* 454, and of 1817, 24th section, page 136. For the latter position to the opinion of the supreme court in the case of *Roussel* vs. the syndics of *Dukeylus*, 4 *Martin*, 240 and 241.

It may be contended that neither of those two insolvent statutes apply to the case, as the one provides for debtors in actual custody, and the other for voluntary surrenders. To this I reply—first, that this case, which was a forced surrender, has since become a voluntary one; having been consolidated with the latter, which was brought afterwards by Hanna himself; secondly, that those provisions indiscriminately apply to any case of insolvency. No difference is made in either of the acts between alienations of property, mortgages or judgments, which are all declared void, if they have taken place within the three months previous to the failure.

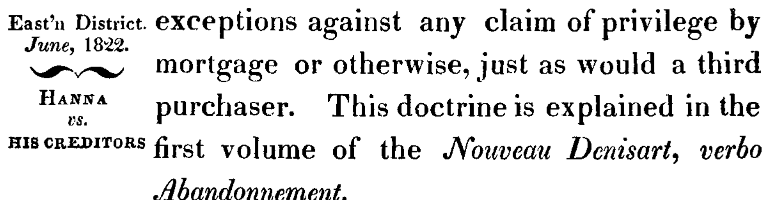
3d point. The docketting the judgment creates no lien on the real property and slaves of the debtor.

It is true that by the 13th section of the statute of 1805, 2 *Martin's Digest*, 164, it is provided that the docketting of a judgment shall bind the real property and slaves of the person against whom such judgment has been rendered; but I contend that this provision has been repealed by the *Civil Code*, which enacts, *page* 454 *art.* 14, that judicial mortgages cannot operate against a third person, except from the day of their being recorded in the office of the register of mortgages; and by the 7th section of the act of March 26th. 1813, 1 *Martin's Digest*, 702.

But it has been erroneously asserted that the syndics do but represent Hanna himself, and that his property cannot be considered as having passed into the hands of third purchasers.

The contrary doctrine, on which we rely, is grounded on the well known principle that the cession or surrender does not transfer the property of the insolvent's estate to his creditors, but that their syndics take possession thereof in the same manner as does the sheriff, when he seizes the defendant's property on a writ of execution, and that therefore, the creditors, by their syndics, preserve all their

East'n District. *June*, 1822.



HANNA *vs.* HIS CREDITORS

exceptions against any claim of privilege by mortgage or otherwise, just as would a third purchaser. This doctrine is explained in the first volume of the *Nouveau Denisart, verbo Abandonnement.*

4th point. There is no evidence that the judgment was recorded with the register of mortgages; and should it appear that it was recorded, it does not, nor ever did affect Hanna's real property or slaves.

The only evidence that has been introduced of the recording of the judgment with the register of mortgages, is a certificate of the said register, delivered on the 23d of November, 1821, and which has been filed by the opponent on the 22d of December following. From the inspection of this document, the court will perceive that it must be disregarded and can by no means be admitted as evidence in the cause. It is a general rule that a copy authenticated by a person appointed for that purpose is good evidence of the contents of the original. But where the officer is not intrusted to make out a copy, and has no more authority than any common person, the copy must be proved in the strict and regular mode. *Phillips' Evidence*, 292. This rule applies to

East'n District.
June, 1822.

HANNA
vs.
HIS CREDITORS

the recorder of mortgages, as to any other public officer; when he certifies the contents of his own records, his certificate may be good evidence; but not so when he certifies that which must appear from other records than his. Now, here he certifies that in a certain cause, depending in the district court, judgment has been rendered. It will certainly not be contended that the register of mortgages is the proper officer entrusted to certify the judgments of that court. On this point, he has no more authority than any common person, and his certificate therefore, as far as this, must be disregarded. Were his evidence admissible on this point, it should be given on oath; I maintain however that it is altogether inadmissible, as the judgments of a court of justice can only be certified by its clerk and under its seal.

The recorder, after having thus certified that such a judgment has been rendered, and after having further certified its contents, goes on and equally certifies that the above judgment has been registered. Now, if the first part of the certificate be void, it must be considered as being neither written nor introduced; and hence it follows that the latter part

East'n District.
June, 1822.

HANNA
vs.
HIS CREDITORS

certifies nothing as it relates to a judgment, which is not mentioned. Besides, I maintain that no certificate of this kind can be admitted to prove the recording of a judgment. A copy duly authenticated or certified by the register of mortgages under his hand and seal must be produced, of that part of his records, which contains the said registering. This he is authorised to certify but nothing else; his authority goes no farther.

I conclude that there is no evidence of the recording of any judgment against Hanna.

Should the court however be of opinion that the judgment was recorded on the 7th of June 1820, as it is contended by the opponent, I would then further maintain that this recording could not affect the real property or slaves of Hanna, but only those of the defendants, and this for the following reasons:

1. This judgment is not rendered against Hanna, as it has already been observed, but against the defendants.

2. This registering, if it could affect Hanna's property, was void from the beginning because it created a mortgage on the insolvent's property within the three months of failure.

5th point. The writ of *alias fi. fa.* issued and delivered to the sheriff on the 8th of August, 1820, neither did nor could create a lien on the personal property of Hanna, to the prejudice of the mass of his creditors.

The first writ of execution, or *fi fa.*, was issued in May, 1820, but on this the opponent does not rely; he is aware that it could not avail him. Scarcely were two of the instalments due, when the writ issued, the balance was not yet payable; and, notwithstanding, the whole was included in the execution; this, however, was stayed by the plaintiff, in the hands of the sheriff, as it appears from his return on record, and could therefore create no lien, nor does the opponent claim any under this first writ. But he asserts that by delivering, on the 8th of August, 1820, the second writ of *alias fi. fa.*, to the sheriff, all the personal property of Hanna became bound and liable for the satisfaction of this writ; and that by the seizure made afterwards by the sheriff, by virtue of said writ, of Hanna's said personal property, he the opponent obtained a lien and privilege on the same for the amount due on his judgment.

East'n District.
June, 1822.

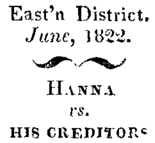
HANNA
vs.
HIS CREDITORS

This lien, this privilege the syndics resist, relying on the following grounds:—

1. The judgment, as it stands, is against the defendants, not against Hanna, and consequently no writ could issue against his personal property.

2. Admitting, for the sake of argument, that the judgment goes against Hanna, and that the execution thereon was rightfully issued on the 8th of August, 1820; yet the syndics maintain that the statute of 1805, providing that the delivery of such a writ to the sheriff, shall bind the personal property of the person against whom it is directed, and the Spanish law assuring to the seizing creditor a privilege on the property seized in execution, are both limited by the insolvent laws. They do by no means extend to cases of insolvency, which are governed by far different rules. *Roussel* vs. *Dukeylus' syndics*, 4 *Martin*, 238.

Besides a simple reference to the dates will make it appear how groundless are the pretentions of the opponent. He tells us that the writ was issued on the 8th of August, and that the seizure took place afterwards. Now, it is in evidence, that Hanna left the state on



the 23d of July, and that the stay of proceedings was issued on the 18th of August. I have shewn, by positive law, that this departure of Hanna opened the failure, and that it is at least to this epoch that it must be trâced. Therefore, in such a state of things, no lien, no privilege, could accrue to the prejudice of Hanna's creditors.

Were it possible that grounds so strong should be overlooked, one still stronger remains. Bloomfield, one of the witnesses, deposes, that Hanna's embarrassments were daily increasing; that for some weeks previous to the failure, he was kept up by the opponent, on paying one hundred dollars a week; that the deponent, who was Hanna's agent, since his departure, finding it impracticable to make up this weekly sum, requested the agents of the opponent to take possession of the store, which they did by sending the sheriff, who made the seizure. Hence, is it not clear that the writ was issued, and that the seizure took place at the instigation of the debtor, who being about to fail (were even any other epoch of the failure than the stay of proceedings disregarded) did openly collude

East'n District. Jun., 1822.

HANNA vs. HIS CREDITORS

with one of his creditors to give him an undue preference over the others?

Workman, for Day, one of the opposing creditors and appellant. The appellant obtained judgment against Eastburne, and against B. Hanna, as a garnishee in that suit, in the first district court.

That judgment was docketted on the 14th December, 1819.

It was registered at the mortgage office, 7th June 1820.

A writ of *fi. fa.* issued thereupon, 22d May, 1820.

A stay of execution having been granted to Hanna, an alias writ of *fi. fa.* was issued 8th August, 1820.

By virtue of this last writ, the sheriff seized and took possession of the goods of Hanna, on the day it issued. And on the 18th of the same month and year, while the sheriff was in possession of those goods, a petition, for a forced surrender, was presented by some of Hanna's creditors, and an order for a general meeting of the creditors, and a stay of proceedings was obtained.

From these facts, I contend that the judgment obtained against B. Hanna as garnishee.

East'n District. *June*, 1822.

HANNA *vs.* HIS CREDITORS

gives to the plaintiff and appellant a lien on all Hanna's real property and slaves, from the date of the docketting of that judgment, *viz* : the 14th December, 1819. This property is now subject to the same claims and privileges as if it had remained in the possession of Hanna. It did not cease to be Hanna's till it was sold by his syndics. They held it merely as his representatives. They cannot be considered as third parties. If they were so considered, they would not be bound by this judgment against Hanna, nor by any other judgment that could have been obtained against him. They might deny the debt, and drive the plaintiff to a new suit;—a consequence absurd in itself, and contrary to all the known provisions, and invariable practice of our insolvent laws.

Even in the hands of third possessors, this judgment would bind Hanna's real property, from the date of the registry. The counsel's remarks on the certificate of the register of mortgages, are refuted by an inspection of that document itself. It proves the registry indisputably. 1 *Martin's Digest*, 164.

It is also clear that the moveable property of Hanna was bound by the writ of *fi. fa.* at

East'n District.
June, 1822.

HANNA
vs
HIS CREDITORS

least from the 8th August, 1820 (the date of the second writ of execution) if not from the 22 of May preceding. 2 *Martin's Digest*, 168 and 9 *Martin*, 585.

In opposition to this claim, it is said, first, that there is no judgment against B. Hanna. The record of the original suit against Eastburne shews that the judgment, or order of the court is as precise, positive, and formal against Hanna, for the amount which he declared he owed to the defendant, as against that defendant himself, for the whole amount of the debt. It is difficult to conceive how any judgment could be given against a garnishee, in a more regular and legal manner than that rendered in this case against Hanna.

2. It is further said that no execution can be issued against the garnishee's property.—Then the whole proceedings of attachment would be a mere mockery of justice. If you can not make the garnishee pay what he acknowleges he owes to your debtor, it is quite idle to attach that debt in his hands. But our law is not so vain and nugatory. The legislature has provided by the 3d and 8th sections of the act of 1811, 1 *Mart. Dig.* 520, 522, that execution shall issue against

the garnishee. The Spanish law had the same provision. Execution might be had against moveable property, against immoveable property, and against *debts*, rights or actions. *Part.* 2, 27, 3. And when the execution was directed against the debts due to the defendant, the debtors were cited, as if the execution was against *them*; and proceedings might be taken against those debtors to compel them to pay what they owed to the defendant, if the defendant himself did not pay. *Febrero*, *p.* 2. *c.* 2. *no.* 170.

As our law now stands, no other mode of judicial compulsion could be adopted in our case but that by the writ of *fi. fa.* of which we have availed ourselves. The writ of *distringas*, which it is pretended would have been the proper one, is applicable only to compel the performance of any specific act, other than the payment of money. 2 *Mart. Dig.* 171. In the attachment laws which our assembly probably had in view, when our attachment statutes were passed, the writ of *fi. fa.* against the garnishee is allowed. *Sergeant's At. Laws*, 206.

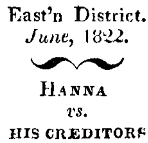
3. It is also objected that this judgment has been obtained by collusion with Hanna, to the injury of his other creditors. The very reverse is abundantly proved. It appears from the

East'n District.
June, 1822.

HANNA
vs.
HIS CREDITORS

record, that the garnishee Hanna took time to amend his answer to the interrogatories, and that in his amended answer he extends the periods for the payment of the sums due by him to the defendant. It will also be seen that the first writ of execution against him was stayed for some months, to give him time to make gradual payments, to continue his business and satisfy all his creditors. The whole of this business was manifestly transacted with good faith, lenity and indulgence on the part of the plaintiff—and with fair and honest intentions on the part of the garnishee.

4. The judgment, it is further urged, was obtained against Hanna, when he was in failing circumstances—*proximo á quebra*—about to fail. The evidence to shew that he was in such circumstances is extremely vague and unsatisfactory. It amounts to no more than this, that he frequently neglected or refused to pay his debts. The same thing might be proved every day against some of our opulent citizens—men who hold large and valuable property, ten times more than sufficient to pay all their debts, but who seldom or never do pay any of them, till compelled by judicial process. Far be it from me to cast any reproach



upon these worthy persons. Perhaps they deem it safest to have the payment of their debts made matter of record : or may be they are moved by the laudable desire of maintaining our useful profession in profitable practice—of keeping the learned judges in full study and occupation, and making their fellow citizens constantly know and feel the full value of the administration of justice.

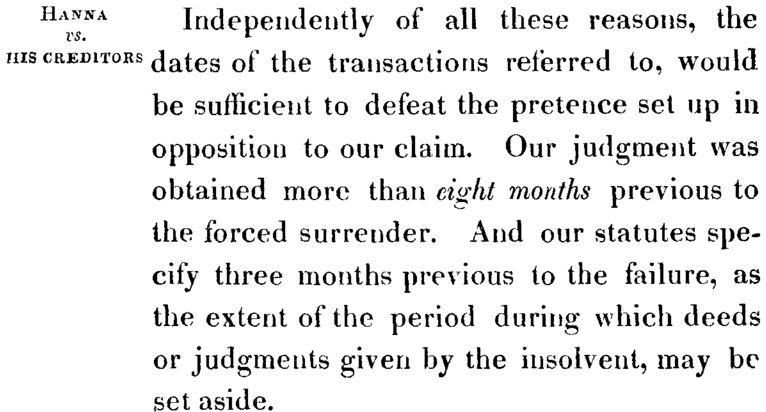
Whether Hanna was or was not in failing circumstances is quite immaterial. The judgment against him has been declared valid.—Had he made a payment on that judgment, at any time before his actual failure, it would have been likewise valid, and of course not subject to repetition by the syndics. Such a payment would have been at least equal to any *bona fide* payment he could make in the ordinary course of business.

To maintain that the lien secured to us by our writ of *fieri facias*, could be defeated by the subsequent petition of the creditors of our debtor, is to maintain that the law may be set aside or rendered nugatory by the mere act of individuals who might be interested to oppose its execution. The decision of this

East'n District.
June, 1822.

HANNA
vs.
HIS CREDITORS

court, to which I have already referred, sets this point at rest.



Independently of all these reasons, the dates of the transactions referred to, would be sufficient to defeat the pretence set up in opposition to our claim. Our judgment was obtained more than *eight months* previous to the forced surrender. And our statutes specify three months previous to the failure, as the extent of the period during which deeds or judgments given by the insolvent, may be set aside.

MARTIN, J. delivered the opinion of the court. This case comes before us on the appeal of John Day from the decision of the judge *a quo* in dismissing his opposition to the homologation of the tableau of distribution, made by syndics. As by his opposition this creditor contests the claims of the other creditors, it becomes necessary to examine them all.

1. The parish court was certainly correct in allowing Packwood, the insolvent's landlord a privilege on the goods, which the latter had seized to secure the rent due. *Civ. Code*, 468, *art.* 74.

2. Madame Papet's claim was rightfully repelled, as she suffered more than a fortnight

East'n District.
June, 1822.

HANNA
vs.
HIS CREDITORS

(the legal time) to elapse, after the furniture was removed from her house. *id.*

3. Ogden's heirs were properly allowed a privilege for the goods, in their store occupied by the insolvent, at the time of his failure.

4. Levy and Thomas were justly placed as ordinary creditors for the amount of the judgment, and as privileged ones for the costs, as their judgment was not registered. 1 *Martin's Digest*, 702.

5. Kirk & Mercein's claim does not appear to have been contested.

6. The attachment sued out by Ronaldson cannot avail him. We think with the superior of the late territory, that an attachment gives no lien in case of the defendant's failure. *Marr* vs. *Lartigue*, 2 *Martin*, 89.

7. The judge *a quo* was correct in concluding that the judgment of Gilbert Russel & Co. not having been registered, did not give them a privilege.

8. He did not err in denying a privilege to Lefort, who, in this respect, was in the same situation as the preceding creditor. The *fi. fa.* did not place Lefort in a better situation; for having countermanded the execution of it, and having forbore on its return to keep it

East'n Distiict. *June*, 1822.

HANNA *vs.* HIS CREDITORS

alive by issuing an *alias*, he cannot claim any advantage under it.

9. Duffy's situation does not materially differ from that of Lefort. The only difference is that the former did not countermand the execution of his *fi. fas.* But they were neither executed nor followed up by *alias'*.

10. Day's claim is resisted on the ground that there is no judgment against Hanna, and if there be it is void, and that the docketing of the judgment creates no lien ; that it was not recorded, and if it was it creates no lien : neither does the *fi. fa.*

I. It is true there was no original suit instituted by Day against Hanna; but in a suit brought by the former against *Eeastburn & al.* the latter was summoned and interrogated as a garnishee, and on his oath admitted he owed a certain sum to the defendants, which on the plaintiff recovering judgment he, Hanna, was directed to pay, as part of the sum recovered from the original defendants. Now a garnishee is a party to a suit: when he admits or it is proved, contradictorily with him, that he owes or has effects belonging to the said defendant, and when he is by the court directed to pay, the judgment is as com-

East'n District.
June, 1822.

HANNA
vs.
HIS CREDITORS

plete against him as against the said defendant. There cannot be any doubt that, if he be ordered to pay what he does not owe, he may appeal.

II. Hanna did not confess judgment. A confession of judgment is essentially a voluntary act. He did what he was compelled to do, and his compliance with the law, in declaring the truth, granted nothing which it was in his power to have withholden.

He had not at the time failed. Now, if his creditors considered it needless to apply for a suspension of legal proceedings against him, such proceedings might well, be continued or commenced against him; and if, before the suspension, they matured into a judgment. we do not see that the creditor can be deprived of the legal consequences of his diligence.

III. We think that the recording, not the docketing of the judgment, creates the lien.

IV. It is certainly true that the contents of an act, in the possession of an officer, while it exists, cannot be proven otherwise than by the production of the original, or his giving a copy of it. He cannot attest its contents or-

East'n District.
June, 1822.

HANNA
vs.
HIS CREDITORS

ally, nor by his certificate. A recorder of mortgages, who has recorded a judgment cannot certify its contents, nor perhaps its existence ; but he may certify that there is no record of any judgment or mortgage. Indeed, that is the way in which notaries now ascertain the absence of liens ; and when the recorder certifies that there is no lien but such and such mortgages, he by a negative pregnant, certifies that such mortgages are registered in his books. He might transcribe all the entries in his book against the property of an individual, and attest that this is all that is against him ; but the practice, which is sanctioned by long usage, is to certify that such and such mortgages are registered. We think this suffices without giving a formal transcript of the entries on his books, which could not be more satisfactory. We conclude that the certificate of the recorder of mortgages, shews, in this case, that Day's judgment was recorded.

The effect of the registry of a judgment against a garnishee, who is decreed to pay a sum of money, must have the like consequences as that of a judgment against a party called on to warrant or defend.

The registry, in this case, took place before any stay of proceedings granted.

V. *Leges vigilantibus, non dormientibus serviunt.* The creditors of the insolvent, who laid by, and forbore to exercise their respective rights individually or collectively, cannot defeat the right of him who, while legal proceedings were unstayed, began and continued his, unaided by the common debtor.

It appears to us the parish judge erred in refusing the opposition of this creditor.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court, as far as it relates to the creditors, Packwood, Papet, Ogden's heirs, Levy & Thomas, Kirk & Mecein, Ronaldson, Gilbert Russell & Co., Lefort, and Duffy, be affirmed; but as far as it relates to the opposition of John Day, be annulled, avoided, and reversed; and this court proceeding to render such a judgment, as might herein to have been given in the parish court,

It is ordered, adjudged and decreed, that John Day be placed on the tableau of distribution for the amount of his judgment against the insolvent, as a privileged creditor on the

East'n District. *June*, 1822.

HANNA *vs.* HIS CREDITORS

land and slaves, from the 7th of June, 1820; on the personal estate from the 8th of August, following; and that the syndics and appellees pay costs on this application in both courts.

POWERS vs. *FOUCHER*.

12m 70
108 285

He who affirms must prove unless the plea involves a negative.

In case prescription is pleaded to a right of passage, the party against whom it is offered, must give evidence of those acts, which will take his case out of it.

Particularly if his title commenced so far back as the year 1772, and there is no evidence of his having enjoyed the servitude claimed.

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

PORTER, J. delivered the opinion of the court. This action was commenced to obtain and secure the enjoyment of a servitude, which the petitioner avers he is entitled to, on a canal cut through land of the defendants. The title and incidents, connected with it, are minutely detailed in the petition. In the year 1750, one Claude Dubreuil, sen. was owner of a tract of land on the other side of the river, situated about three miles from the city. Desirous of procuring an easy communication with lands which he owned in the rear of this tract, he appropriated an arpent front for that purpose, and cut a canal through it, which he connected with a bayou, the waters of which fall into lake Barataria. The land he afterwards sold to his son; but, in the act of sale, he reserved the arpent front, by forty in depth. In

the year 1772, we find, after several sales, François Bouligny had become the owner of the plantation which Dubreuil, sen. had formerly sold to his son, and also of the other arpent through which the canal was dug; the heirs of Dubreuil, who now owned the land in the rear, having consented he should become so, on certain conditions. These conditions not being complied with, the heirs entered into a compromise, by which they agreed to receive a certain sum in money for the relinquishment of their right to the arpent front; but, with the express reservation, that they, as well as their representatives, should be allowed a free passage through the canal, and on both its banks, whenever they might find it convenient to go to their lands of Barataria; and the servitude should likewise be enjoyed by any person or persons to whom they should happen to sell the said lands. It is this contract that has given rise to the suit now before us. The plaintiff, by various *mesne* conveyances, from the heirs of Dubreuil, is the owner of one of those tracts of land at Barataria, and claims the servitude. The defendant holds the plantation once owned by Bouligny, and refuses it.

East'n District.
June, 1822.

POWERS
vs.
FOUCHER.

The appellant has called in warranty, Antoine Fouchér, sen. who appeared and vouched the syndics of Degruys, who in turn have cited the heirs of Bouligny.

The heirs of Bouligny appeared, and pleaded that they were called too late, as the trial had been already gone into; that Degruys had bought the land with a knowlege of the incumbrances, and under an express stipulation that he took it with its servitudes. They further denied the right set up by the plaintiff, and if it ever existed and averred it had been lost by prescription.

We have formed an opinion on the last exception, which renders it unnecessary to examine any other point in the cause.

Servitudes, such as that claimed here, were prescribed against, previous to the enactment of the *Civil Code*, by non-user, for twenty years. *Part.* 3, 31, 16.

In this case, the plea offered as an exception, necessarily implies that the plaintiff, for twenty years, had not used the canal, on which he now claims the right of passage—and a question, by no means free from difficulty, is presented for decision. It is to ascertain on

East'n District.
June, 1822.

POWERS
vs.
FOUCHER.

whom the burthen of proof is thrown of the fact necessary to maintain this exception.

The general rule is, that he who affirms should prove. *Part.* 3, *tit.* 14, *lib.* 1. *Phillips' Evidence, ed.* 1820, 149. 9 *Martin*, 48. *Ei incumbit probatio qui dicit non qui negat. Digest, l.* 22, *tit.* 3, *l.* 2. But to this there is the well known exception, that where the affirmative involves a negative, the burthen of proof is thrown on the opposite party, because a negative cannot be proved. *Part.* 3, *tit.* 14, *l.* 2. 2 *Gallison*, 500. 11 *Martin*, 6. 9 *Martin*, 48.

In the case now before us, we find the defendant averring that the plaintiff has forfeited his right by non usage; he would therefore at first appear to come within the rule which requires the party who alleges to support his allegation by proof. But, when we attempt to apply the doctrine to a servitude such as this, we find ourselves at once within the exception just stated. The defendant cannot make the proof; it involves a complete negative.

Hence, we are reduced to adopt one or other of the following alternatives: either we must say that the forfeiture, given by law, on neglecting to use servitudes like this, can, in no instance, be successfully urged by the par-

East'n District.
June, 1822.

POWERS
vs.
FOUCHER.

ty, where land is burthened with them; or we must refuse our assent to that doctrine which requires him to prove it. For, if we insist on his furnishing evidence of what his adversary did not do, it is the same thing as if we said he shall not have the right to oppose prescription, though the law expressly confers it on him.

We must give the law effect, if it be possible to do so, and there is no other way to accomplish this, but by requiring the plaintiff to furnish evidence of a fact, which if it did take place must be within his knowledge, and which of course he can easily prove. In the cases of *Delery* vs. *Mornet*, 11 *Martin*, 4, and that of *Nichols* vs. *Roland*, *ibid*, 190, we held that the burthen of proof lies on the party who has to support his case by proof of a fact of which he is supposed to be cognisant.

This point of prescription was not argued by the counsel for the defendant, it has been most elaborately discussed by that of the plaintiff, and the industry and research of the gentleman, has brought before the court one case (we can find no other) in which it was held by one of the parliaments in France, that where two communities claimed a right of

East'n District, *June*, 1822

POWERS *vs.* FOUCHER.

servitude, the party who opposed to the other the plea of non-usage, should be held to prove it. It is to be regretted that the report of the decision is not so full as could be wished.— As stated in *Merlin's repertoire de jurisprudence, vol.* 12, 588, 589, it certainly supports the doctrine for which the plaintiff contends.— But it is not of binding authority here, and tho' entitled to great respect, we cannot, where our opinion of the law is so directly opposite, yield our assent to the principles established by it.

As the title of the plaintiff therefore commenced so far back as the year 1772. And there is no evidence before the court of his having enjoyed this servitude for twenty years after, we must hold that it is forfeited by non-usage.

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

Moreau for the plaintiff. *Grymes* for the defendant.

East'n District.
June, 1822.

MORGAN
vs.
ROBINSON.

MORGAN vs. *ROBINSON.*

If the vendor be a transient person, and withdraws from the state, immediately after the sale, the vendee may bring his action for rescission, after the return of the vendor—though more than the time of prescription has elapsed since the sale.

APPEAL from the court of the first district.

MATTHEWS, J. delivered the opinion of the court.* This is a redhibitory action brought to rescind a contract of sale of certain slaves described in the plaintiff's petition. Fraud is also alleged against the seller. The defendant pleaded prescription to the suit and the general issue. Judgment was given for him in the court below, on his first plea and the plaintiff appealed.

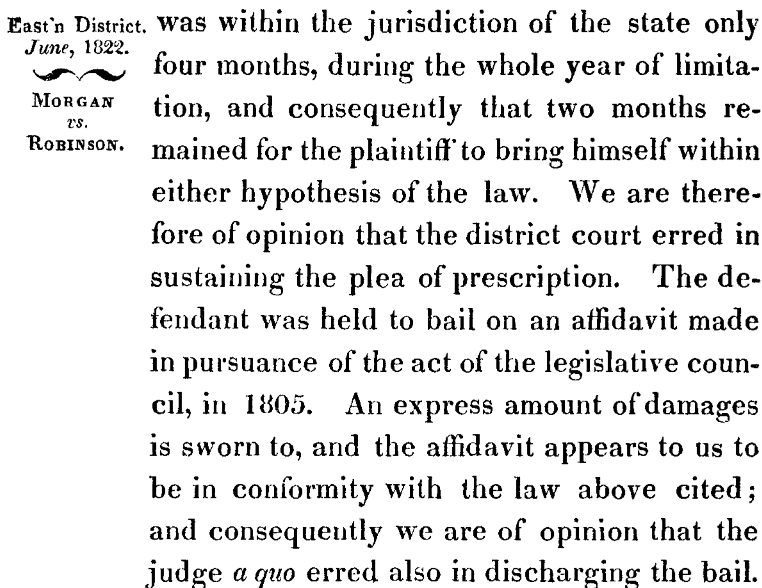
In support of this judgment the appellee relies on the limitation provided against this species of action by the *Civil Code*, 358, *art.* 75, wherein it is declared in positive terms, that whether the object of the suit be to cancel the contract, or to have the price reduced, it ought to be instituted within six months from the date of the sale at the farthest, or from the time that the defects or vices have been discovered; *provided*, that in this latter case not more than one year has elapsed from the time of sale, and after that term the buyer shall not be admitted to said action.

It is shewn by the evidence in the cause

* Martin, J. did not sit in this case, having considered the question arising therein, at a time when he had a deep interest in it.

that this suit was not commenced within the year from the date of the sale: but to obviate the bar to his action, as established by law, the plaintiff proves the absence of the defendant from the jurisdictional limits of the state for about eight months of the full year, which commenced with the sale, and expend a little more than one month previous to the institution of this suit.

He relies principally on the maxim, "*contra non valentem agere, non currit prescriptio:*" as adopted and recognized by the Spanish law, and being an axiom or first principle of natural law and justice, and therefore applicable to every system of jurisprudence, wherein the contrary is not expressly established by legislative power. In this view of the subject we agree with the counsel of the plaintiff, and, notwithstanding the express terms of limitation in our code, it is thought, that they ought not to be interpreted as to conflict with this universal maxim of justice. The time prescribed by law for commencing a redhibitory action, is six months from the date of the sale, or six months from the discovery of the defects and recovery of the things sold. In the present case, it is shewn that the defendant



was within the jurisdiction of the state only four months, during the whole year of limitation, and consequently that two months remained for the plaintiff to bring himself within either hypothesis of the law. We are therefore of opinion that the district court erred in sustaining the plea of prescription. The defendant was held to bail on an affidavit made in pursuance of the act of the legislative council, in 1805. An express amount of damages is sworn to, and the affidavit appears to us to be in conformity with the law above cited; and consequently we are of opinion that the judge *a quo* erred also in discharging the bail.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled, and that the bail bond be restored to its full force, &c. And it is further ordered, adjudged and decreed, that this cause be remanded to said district court to be there tried on its merits; as in the opinion of this court, sufficient matter does not appear on the record on which to decide the cause finally, among other deficiencies, there is no evidence to shew the comparative value of the slaves complained of in

this suit, with many others bought at the same time and in the same lot.

Hennen, for the plaintiff, and *Grymes*, for the defendant.

DENIS vs. *VEAZEY*.

An obligor on an appeal bond, is not entitled to the plea of discussion.

The surety, on an appeal bond, which is not successfully prosecuted, cannot contest the claim of the plaintiff, liquidated by the judgment, unless on a suggestion of collusion and fraud.

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

MATTHEWS, J. delivered the opinion of the court. This an action brought on an appeal bond, in which the plaintiff sues as attorney for the heirs of Tagan, and prays judgment against the defendant, as surety in said bond, for the amount of a judgment and costs rendered in the parish court against one Delachaux, from which he appealed, and died before any decision was made on the appeal. His heirs were cited to prosecute said appeal and having declined so to do, the present suit was instituted as above stated, and judgment given in the court below in favor of the plaintiffs from which the defendant appealed. He resists the payment of the sum adjudged against him on several grounds. 1. The want of authority in the attorney to sue, in the case in which the first judgment was obtained, and also in this. 2. He claims a division of the

East'n District.
June, 1822.

DENIS
vs.
VEAZEY.

debt as being only a joint obligation with Delachaux, the principal debtor. Lastly, he insists on the benefit of any error that might be shewn in the judgment against said Delachaux. at the suit of the present plaintiffs and appellees.

In support of the first ground of defence, much reliance seems to be placed on a decision of this court as reported in 10 *Martin*, 16, in the case of *Harrod & al.* vs. *Norris' heirs*, in which it was declared that a person appointed by the court of probates to represent absent heirs in the probate proceeding relative to an estate, could not be considered as representing their interests beyond the purposes for which the appointment was made. In the present case, the letters from the heirs of Tagan to the attorney, who commenced suit for them, ratify and confirm all the steps taken by him in the original action, and preclude the necessity of inquiring into his powers, as derived from the court of probates; but were it necessary to investigate the subject, it is believed that it could be easily shewn that the powers accorded to the attorney in this case differ widely from those granted in the case cited. Here he receives authority from the only tribunal capable of granting it, to sue for and recover

the money belonging to absent heirs for the purpose of having it deposited in the treasury of the state, as required by law; we are therefore, of opinion that the attorney shews sufficient authority to prosecute these actions.

We are also clearly of opinion, that from the nature of this obligation, the appellant is not entitled to division or discussion. In all judicial bonds or obligations, the surety has not the privilege of claiming a discussion of his principal's property. *See Civil Code*, 434, *art.* 29.

When one person becomes surety for another, that the latter will do a certain thing, or pay a certain sum of money. the surety is bound to the full extent of his principal, having the benefit of discusion as provided for by law in ordinary cases; but in judicial obligations, as this benefit is denied him, such obligations necessarily become joint and several, and neither admit of discussion nor division.

The last defence of the appellant seems to us to have been settled, in refusing the application, heretofore made in this court, on his part to prosecute the appeal for his principal in the appeal bond, after the heirs of the latter

East'n District. *June*, 1822.

DENIS *vs.* VEAZEY.

had refused to proceed, and after the appeal had been dismissed.

By the abandonment of the appeal on the part of Delachaux and his heirs, the appeal bond was forfeited, and the measure of damages to which the surety was subjected, is ascertained by the original judgment and costs, which he has no right to inquire into, unless on a suggestion and proof of fraud and combination to cheat him, between the parties to the suit, in which he has bound himself as surety on the appeal: as nothing of this sort is shewn in the present case, we conclude that the judgment of the judge *a quo* ought to be affirmed with costs.

Denis for the plaintiff, *Conrad* for the defendant.

FLOGNY vs. *HATCH & AL.*

A demand of a debt, due by the wife, may be made on her.

APPEAL from the court of the fourth district.

PORTER, J. delivered the opinion of the court. This action was commenced on a note made by Pamela Hatch, before her marriage with Sylvanus Hatch, and is brought against

East'n District.
June, 1822.

FLOGNY
vs.
HATCH & AL.

husband and wife, and Meriam, who was security. The signature of the parties, to the obligation, is proved, and the existence of the debt established beyond doubt. A question, as it respects costs, was agitated on the trial, and is the only one which the counsel for the appellant has thought necessary to discuss before us. He contends that a demand on the wife for payment, is not sufficient that it should also be made on the husband.

The act on this subject, 2 *Martin's Digest*, 196, provides that an amicable demand shall be made on the person of the debtor, either verbally or in writing. The only enquiry then, in the case before us, is who was debtor—husband or wife? The law has furnished the answer—husbands are not responsible for the debts of their wives, contracted before marriage, nor wives for those of their husbands; each must be acquitted out of their own personal and individual effects. *Civil Code*, 336, *art.* 65. The plaintiff has, therefore, strictly and literally complied with the requisitions of the statute, and we do not see any thing in the circumstance of its being necessary to cite the husband, to aid the wife in defending the suit, that at all affects the regularity of the proceedings.

East'n District.
June, 1822.

FLOGNY
vs.
HATCH & AL.

But we are of opinion that the judge of the district court erred in giving judgment against Sylvanus Hatch, as it is neither alleged nor proved that he bound himself to pay the debt, and we have already seen it must be satisfied out of the wife's effects. *Civil Code, loco citato.* As it respects Pamela, and the other defendant Meriam, we discover no error in the decision.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; that the plaintiff do recover, of Pamela Hatch, and N. Meriam, defendants, the sum of $984 50 cents, with interest from the judicial demand, and the costs in both courts—and it is further ordered, that execution shall not issue against the said N. Meriam until the property of the principal, Pamela Hatch, is discussed according to law.

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

MADEIRA & AL. vs. *TOWNSLEY & AL.*

The degree of diligence, equired of an agent, who receives

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the

East'n District.
June, 1822.

MADEIRA & AL
vs.
TOWNSLEY & AL.

compensation for the business he transacts, is that which a prudent man pays to his own affairs, what is called in law ordinary diligence.

court. The plaintiffs in this action had a claim on William Noble for $6323 15 cents, evidenced by his note of hand for that sum, and, in order to secure the payment of it, they forwarded directions to the defendants to attach the steam boat Paragon. In pursuance of those directions the boat was seized, on her arrival in this port, and after some time had elapsed. the appellees believing that the debt could be more speedily recovered by releasing the attachment, and taking other property, entered into an arrangement with the house of Noble & Wilkins, by which they agreed to receive 1500 bbls. of flour under the conditions expressed in the following agreement.

"Thomas F. Townsley & Co. agree to receive from Messrs. Noble & Miller, 1500 bbls. of flour, fresh, and to pass inspection as fine and superfine: the same to be deposited with T. F. Townsley & Co. for sale, and to be sold within sixty days from this date and on a credit not exceeding four months, in notes approved by the parties. Thomas F. Townsley & Co. to charge but one and one-fourth per cent commission on the sales."

"The above is given to secure the payment

East'n District. *June*, 1822.

MADEIRA & AL *vs.* TOWNSLEY & AL.

of William Noble's note sent for collection by G. A. & J. Madeira, amounting to $6323 15 cents, exclusive of interest, &c. In the event of the proceeds of the flour not covering the sums above stated, Messrs. Noble & Miller will immediately pay the balance to Thomas F. Townsley & Co. without defalcation."

Immediately after this arrangement was concluded, the defendants communicated it to the plaintiffs, and in a short time after received a letter, from the latter expressing their perfect satisfaction of the course they had pursued.

The flour was not sold within the sixty days, as specified in the agreement, and in consequence thereof this action has been instituted in which the plaintiffs allege, that the defendants, by keeping the property on hand, for a longer space of time than the period specified in the agreement, have discharged Noble & Wilkins from their engagement, and deprived the plaintiffs of all recourse on them. That this detention was an act, unjustifiable, exhibiting negligence and a want of that care and attention, which as agents they owed to the affairs of their principal; that by reason thereof, the flour was ultimately sacrificed at

East'n District, *June*, 1822.

MADEIRA & AL. *vs.* TOWNSLEY & AL.

$1 50 cents per bbl. when, if sold in due season, it would have brought from four to five. They therefore pray that they may have judgment for the difference in amount, between the sum produced by the sale of the flour and the note forwarded for collection.

The defendants pleaded the general issue, and there being judgment in their favor, the plaintiffs have appealed.

The degree of diligence which is required of an agent, who receives compensation for the business he transacts, is that which a prudent man pays to his own affairs, what is called in law, ordinary diligence, and which of course creates a responsibility for ordinary neglect. We find it stated it is true, in the *Curia Phillipica* that a factor is liable for *levissima culpa*, *Curia Phil. lib. Factores, cap.* 4, *no.* 40, but that expression, when used in the Spanish language, is expressly declared to mean that species of neglect we have just described "*Otrosi decimos que y a otra culpa a que dizen leuis, que es como pereza, o como negligencia. E otro y cha a que dizen levissima, que tanto quiere decir, como non auer ome aquella femencia en aliñar e guardar la cosa que otre ome de buen seso auria, si*

East'n District. *June*, 1822.

MADEIRA & AL *vs* TOWNSLEY & AL.

la ténuisse." *Part.* 7, *tit.* 33, *law* 11 : where a man does not use the same diligence in administering and taking care of a thing, which another man of good understanding would use, if it belonged to himself.

Agents, however, should pursue the instructions they receive, and like all others they must comply with their engagements, or be responsible for a violation of them. In the case before us, the appellees undertook to sell the flour within a limited time, and they have not done so. It follows, as a consequence, that if it was practicable to dispose of the property within the period agreed on, the plaintiffs have lost their recourse against Noble & Miller, and consequently the defendants must be responsible to them for all damages, which they have sustained by losing that recourse. This is the gist of the action, and on the correct solution of the question, presented by the evidence in relation to the possibility of making the sale, depend the rights of the parties now before us.

The testimony taken is voluminous and is spread over between thirty and forty pages of the record. It is impossible to abridge it, so as to convey truly the impression made by an

East'n District.
June, 1822.

MADEIRA
vs.
TOWNSLEY & AL.

attentive perusal of the whole, as given on trial. We have duly and deliberately weighed it, and are of opinion that it was out of the power of defendants to have disposed of the property within the limitation expressed in the contract; unless they had sent it to auction, which we think they were not authorised to do.

This point disposed of, it is established beyond doubt that their conduct afterwards was that of honest men, diligent in the discharge of their trust, and anxious to do every thing in their power to promote the interest of their principal. It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

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

SHUFF vs. *CROSS*.

APPEAL from the court of the first district.

If one give a quantity of pork and some money for the note of a third party, he has no recourse, on the note not being paid.

PORTER J. delivered the opinion of the court. The evidence clearly establishes that the contract entered into by the parties to this suit was one of " Exchange." which is de-

East'n District. *June*, 1822.

SHUFF *vs.* CROSS.

fined to be a transaction "where the contractors give to each other, one thing for an other, whatever it be, except money." *Civil Code*, 370, *art.* 1. In the case before us, the plaintiff and appellee gave fifty three barrels of pork, and a small sum in money, for a note of one William S. Brown, indorsed by Joseph Byrnes.

This obligation proving of no value, both maker and indorser having become insolvent, we are called on to decide whether the defendant must not pay for the property he received for it.

In the contract of exchange, each of the parties is individually considered as vendor and vendee. *Code*, 370, *art.* 8. What then are the obligations of him who disposes of an incorporeal right? Positive law has defined them;—"he who sells a debt, or an incorporeal right, warrants its existence at the time of the transfer." *Civil Code*, 368, *art.* 125. But he does not warrant the solvency of the debtor unless he has agreed so to do, *idem* 126, *Pothier*, *traite de vente*, *no.* 560, *Digest*, *Liv.* 21, *tit.* 2, *Loi* 74, *No.* 3. No such agreement is proved here, and the evidence has failed to establish fraud.

East'n District.
June, 1822.

SHUFF
vs.
CROSS.

The case of *Gordon & al. vs. Macarty*, 9 *Martin*, 268, was one where a debt already existed, and was therefore decided on principles of law, which have not any application to contract such as this.

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 defendant with costs in both courts.

McCaleb for the plaintiff, *Ripley* for the defendant.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JULY TERM, 1822.

DUNCAN
vs.
HAMPTON.

It is not too late to pray for the transfer of a cause after setting aside a judgment by default, if the judgment was improperly taken.

DUNCAN vs. *HAMPTON*.

APPEAL from the court of the first district.

PORTER J. I should have preferred taking no part in the decision of this case, as it has grown out of transactions involved in the suit of *De Armas* vs. *Hampton*, in which I was counsel, but a difference of opinion between my colleagues, has imposed on me the necessity of examining it.

The attorney for the defendant swears, and his affidavit stands uncontradicted, that he was surprised by the judgment by default, as at the time it was taken, there was an understanding between him and the plaintiff to argue the question of removal the first day the court was at leisure.

On this statement I agree in the conclusion which judge Mathews has come to, and for the reason given by him. I think that the error, if any of defendant, was caused by plaintiff, and that he cannot now take advantage of a mistake which was the consequence of his own act. It would be permitting him to profit by his own wrong.

It is therefore my opinion the judgment of the district court be affirmed with costs.

MARTIN J. Judgment by default was taken, in this suit, which was instituted by attachment. On the next day *Preston*, who had received from the sheriff a copy of the petition, and admitted that he was the defendant's attorney (and who had been also appointed by the court to defend him) obtained a rule that the plaintiff shew cause on the 30th of the same month, why the judgment by default should not be set aside. On which day the rule was enlarged till the 13th of April.

In the mean while, *viz.* on the 6th of April the parties were heard. and after argument, the judgment was set aside.

A petition was next presented, on which the suit was transferred to the court of the United

East'n District.
June, 1822.

DUNCAN
vs.
HAMPTON.

States for the Louisiana district, under the 12th section of the judiciary act of the United States. 2 *Laws U. S.* 61. The defendant appealed.

It is admitted that the petition to transfer comes *too late*, after an appearance entered; for the act of congress has fixed the time when the transfer is to be prayed for, *viz : at the time of entering the appearance.*

So that the sole question for determination is, had the defendant appeared before the 6th of April, when the petition was filed.

The record shews that *Preston* was appointed to defend the suit by the court, on the 26th day of March; that he had received from the sheriff on the 15th of March as attorney in fact of the defendant, a copy of the petition and attachment; that he had written authority to represent the defendant in court, but was expressly directed to require a transfer to the court of the U. States.

That on the 27th, he came into court, and as the attorney of the defendant, obtained a rule on the plaintiff to shew cause why the judgment should not be set aside.

That he attended on the 30th, the return day of his rule, when it was enlarged, and

East'n District.
July, 1822.

DUNCAN
vs.
HAMPTON.

after extended till the 13th, and in the mean while he attended again, *viz* : on the 16th, when he succeeded to have the judgement set aside.

In this state, the practice of a party or attorney formally entering an appearance, is unknown. The defendant or his attorney enters abruptly on the defence, by any step which he deems proper, without any previous appearance, and he continues to act till the final determination of the suit, without any other appearance.

It seem to me that any act of the defendant or of any attorney of the court, in his name, (while the attorney is not expressly disavowed) constitutes an appearance, and the record of such an act is the entry of his appearance.

Had *Preston*, in this case, filed an answer, the filing of it would have been the entering of the appearance of the defendant.

I cannot say that the application to have the judgment set aside is not likewise an appearance, entered for the defendant. Had the district court after argument declined to set the judgment by default aside, the judgment would have been final and regular. I cannot see on what ground a transfer could

East'n District.
July, 1822.

DUNCAN
vs.
HAMPTON.

then have been obtained. If it had been prayed for, the answer would have been that the application was too late. If it should be deemed too late in such case, it must be because the time of entering the appearance was past. If it was past, the fate of the application, for setting the judgment by default aside, cannot have brought it back.

It is said the appearance was for the purpose of obtaining the setting aside of the judgment by default, as a preliminary step to the transfer.

I think such a step was needless.—If the party had applied in time, his situation could not have been marred by any previous step of his adversary. On the arrival of the record in the court of the U. States, the judge there might strip the case of any illegal proceedings in the original court.

It is urged that Preston acted without authority; that his client had directed him to have the case transferred, and that any thing done by him, contrary to his instructions, or the directions of his client is void.

I think not. He is an attorney duly licensed; the record shews he was empowered by the court to act; none of his acts are disavow-

ed by the defendant. We must believe till the contrary be urged by some other person, than the attorney himself, that he did only what he had right to do.

It seems to me the time of the transfer had passed by, and the judge *a quo* erred in directing it; we ought to reverse his order, remand the case and direct him to proceed, thereon as if no petition for a transfer had been filed, and order the defendant and appellee to pay the cost of this appeal.

MATHEWS, J. This is an appeal taken from an order of the court below, to remove the cause to a court of the United States. As we are unanimously of opinion that the judgment rendered by the district court is a decision, from which an appeal ought to be sustained, it is unnecessary to investigate that part of the cause. But I do not think the appearance made by the defendant's attorney, for the sole purpose of having a judgment by default, (which had been improperly taken against him) set aside, is such an appearance, as to give jurisdiction to the state court, in exclusion of his client's right to have the cause removed to a court of the United States, as provided for by the act of congress.

East'n District.
July, 1822.

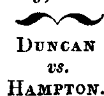
DUNCAN
vs.
HAMPTON.

A petition to have a suit transferred from a state court, to a court of the United States, may be considered to partake of the nature of a plea in abatement, or dilatory exception to the jurisdiction of the court, in which the action has been commenced; and a defendant ought not to be permitted to avail himself of it, after having done any act, acquiesing in, and acknowleging the jurisdiction of said court.

A judgment by default, in our courts, is always obtained on the failure of the defendant to appear and answer, and may be set aside on good cause being shewn; and if it should have been illegally taken, he will then be at liberty to plead to the action, as if none such had been rendered.

It is, perhaps true, that according to the act of congress, on the subject of removing suits from the state courts to those of the United States, the appearance of the defendant, and petition of transfer, ought to be simultaneous: but this must be understood of appearance to the action, for the general purpose of answering and pleading as circumstances may require. When any step has been taken in a cause, founded on the want of appear-

East'n District.
July, 1822.



DUNCAN
vs.
HAMPTON.

ance, as in the present case, and the defendant afterwards appears for the sole and avowed purpose of having such step retraced, I cannot perceive any good reason to determine that such an appearance should work a forfeiture of any of his rights and privileges, in relation to the ordinary defence of the suit; especially as the first step was illegal, being made contrary to express agreement between the parties.

It is agreed that the manner of defendants appearing in courts of the several states is variant. In ours, it is by coming in and filing an answer to the plaintiff's petition, or obtaining time to answer. According to the common law, appearance is when the defendant shews himself in court in person, or by his attorney, ready to answer to the action. 5 *Com. Digest*, *tit. Plead.* 286. But although the tenant or defendant be in court, and says that he will not appear, this is no appearance. *Same author*, 287. So, I should be disposed to believe, that when a defendant appeared, declaring his object in so doing, to be for one particular purpose alone, it ought not to be construed an appearance, to answer generally to the action—and acknowlege the jurisdiction of the court.

East'n District.
July, 1822.

DUNCAN
vs.
HAMPTON.

In judicial proceedings under the rules of the Spanish law, the first dilatory exception to be made, is that which declines the jurisdiction of the court: for if any other is first. put in, its jurisdiction is considered as admitted by the defendant; whenever the court is competent to adjudge the cause. But if a defendant appear before a court to litigate, saving his exceptions, he is not precluded by thus appearing from pleading any exception or dilatory plea. *Curia Phillipica*, *Dilationes*, *nos*. 7 & 8.

In the case now under consideration, it is shewn by the affidavit of the attorney for the defendant, that he stated, from the beginning, his object, in appearing in the state court, was to cause his client's suit to be removed into the proper court of the United States, and that the jndgment by default was taken on him by surprise, contrary to an express agreement between him and the plaintiff.

A judgment by default, obtained under such circumstances, must be viewed as null and void *ab initio*, and the appearance of the defendant's attorney for the sole purpose of having said nullity declared by the state court, in order that the cause might be trans-

ferred to the United States court, unincumbered with any judicial proceeding of the former, ought not to destroy his client's right and privilege to have the suit removed. If we add to all this, that the attorney was expressly required by his constituent, to remove any suit which might be comenced against him, to the court of the United States, I cannot perceive any error in the judgment of the judge, *a quo*.

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

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

M'KENZIE vs. *HAVARD*.

A judgment which contains no reference to any law, nor any of the reasons on which it is grounded, must be reversed.

The debt of a husband cannot be enforced against the widow, if she be not his heir or

APPEAL from the court of the eighth district.

MARTIN J. delivered the opinion of the court. The plaintiff stated that he obtained a judgment in the state of Mississippi against one Elijah Havard for $454 38½ cents, on which a *fi. fa.* issued and was returned, no property of the defendant being found, and

representative, and did not reside, during the marriage, in a state in which a community of goods exist.

Judgment, in other states, do not give any lien here, when their execution is not ordered by a judge of this.

afterwards the said Havard died; that the present defendant, widow of said Elijah, after his death, removed into this state, bringing with her a negro woman named Sal, for the express purpose of defrauding the plaintiff; that she has no fixed place of residence; that the negro woman Sal is the only part of Elijah Havard's estate known to the plaintiff, who believes that the defendant will so conceal herself and the said negro woman Sal, that, in the ordinary course of proceedings, no judgment can be obtained against her, as the legal representative of her husband. Whereupon he prayed for an attachment against the estate of the deceased, that the defendant he decreed to pay the plaintiff's claim, and that Noel Wells be cited as a garnishee.

The defendant pleaded the general issue, averring that the negro woman attached was her own property *bona fide* acquired by purchase in *her own* right, and is not liable to the debts of her husband; that she never attempted to conceal her, but she has possessed her openly and publicly for several years past, that the negro girl was brought into the state of Louisiana, in the summer of the year 1820, and has been detained in it by sickness.

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

The attorneys of the parties have certified that at the trial, David Havard was produced as a witness for the plaintiff, and objected to. He was sworn on his *voire dire*, and deposed that Elijah Havard, left no heir in the ascending or descending line, and the witness is his brother. The defendant's counsel prayed he might be set aside, as interested in the event of the suit, as one of the next of kin. The objection was overruled.

On his examination in chief he deposed that he sold the slave in the petition to his brother Elijah Havard, the defendant's husband, and executed a bill of sale.

It was admitted that in the state of Mississippi, there must be written evidence of the sale of a slave.

Elijah Havard died in the parish of St. Tammany, in this state.

Neither the plaintiff nor the defendant resides in this state.

No testamentary letter was exhibited.

The property attached had been in the possession of the defendant, for upwards of twelve months, before the inception of the

East'n Distiict. July, 1822.

M'Kenzie vs. Havard.

present suit, and was proven to have been seen in her possession in the state of Mississippi, as early as 1819. Her possession was open and public, and the plaintiff lived in the immediate neighbourhood.

J. W. Haymen deposed that his father wrote a bill of sale for Elijah Havard, and gave it to Noel Wells. He does not know for what purpose, nor what was the consideration.—At the time, he understood there was a law suit between the present plaintiff and E. Havard; he does not know that a judgment was obtained.

Elijah Havard and David Havard were at variance from the time of the execution of the bill of sale of the negro Sal.

To the best of the witness's knowledge, the money with which said negro was purchased, belonged to Rachel Havard, and was the produce of her care and industry.

The bill of sale, executed by Elijah Havard to Noel Wells, was such as conveyed a good title.

Wm. Powel deposed that after judgment was rendered, in favor of the present plaintiff against Elijah Havard, the latter said, in the presence of witness, that he would transfer

his property in such a way that the plaintiff could not recover any part of his judgment.

East'n District. *July*, 1822.

M'KENZIE *vs.* HAVARD.

At the time of the rendition of the judgment, E. Havard had a negro woman called Sal, and had her in possession some time after.

After judgment was obtained, the witness travelled with Elijah Havard to Justice Haymen's, where the said Havard told the witness, a transfer of all his property was to be made to Noel Wells, for the purpose of keeping the plaintiff from recovering the amount of his judgment.

The case has been submitted without any argument.

We are sorry to observe that the judgment does not contain a reference to any law, nor any of the reasons on which it is grounded.

This violation of the constitution imposes on us the obligation of reversing the judgment, and it is accordingly annulled, avoided and reversed, at the costs of the defendant and appellee.

Proceeding to examine the record, with the view of discovering what judgment the district judge ought to have pronounced, we cannot discern how the plaintiff's case can be supported.

East'n District.
July, 1822.

M'KENZIE
vs.
HAVARD.

If he has a claim against the estate of the defendant's late husband, he ought to enforce it against his heir or representative. Nothing authorises the defendant to settle it. There is no evidence that she is his heir or representative. If the slave belong really to the estate, as neither the judgment nor the *fi. fa.* issued in the state of Mississippi gives a lien which the courts of this state can recognise, *Civ. Code*, 454, *art.* 12, the plaintiff must establish his claim contradictorily with the heir, or a curator, if the estate be vacant. If the slave be not part of the estate, our courts cannot order her sale for the payment of the plaintiff's claim. If she be, the heir, to whom the title passed by the death of the ancestor, must be heard, before his property be acted upon.

It is therefore ordered, adjudged and decreed, that there be judgment for the defendant with costs in the district court.

Preston for the plaintiff.

Tutors are not bound to pay compound interest.

The provision of the law, that requires that the

JARREAU vs. *LUDELING.*

APPEAL from the court of the fourth district.

MARTIN, J. delivered the opinion of the

12m 106
45 145

tutor's account be rendered before the judge, is clearly introduced for the exclusive advantage of the minor. No other person can have any interest in it.

court. The plaintiff claims from his tutor, the balance of his estate, in the hands of the latter, whose creditors intervened to reduce this balance. There was judgment in the plaintiff's favor, and, imagining that less was allowed him than is really due, he appealed.

The district court charged the tutor with simple interest, on the funds in his hands. *Civ. Code*, 70, *art.* 71, while it is urged, he was chargeable with compound.

The plaintiff's counsel urges that monies received for the interest of the minor's funds, produces interest, in his tutor or curator's hands. *L.* 7, § 12, *ff. de adm. & per. tutor. l.* 58, *id.*

These authorities expressly establish, that when the tutor receives the interest due to the minor, he is bound to make the money, thus received, produce interest. And it is urged, that as the tutor is bound to make the interest, he thus receives, capital; so he ought to make the interest which becomes due from himself capital; and if he does not, he becomes chargeable in the same manner as if it had been done.

In order that we might reverse the judgment of the district court in this respect and de-

East'n District.
July, 1822.

JARREAU
vs.
LUDELING.

cree compound interest, it should be established that interest becomes payable yearly. It is true the yearly is the usual rate, but notwithstanding this, the law never allows, but universally reproves, compound interest. It is true, that after interest has actually accrued if the parties agree that it shall bear interest, this convention is legal; but then the interest which thus becomes capital, can only be made to produce simple interest, and the new interest will not become principal without a new convention.

Interest due may also be made to produce interest, *i. e.* simple interest, by a judicial demand.

A prospective convention that compound interest shall be allowed, or even that the interest which is to accrue shall bear simple interest, is, it is believed, still reprobated by law.

Thus in the case of *Bludworth* vs. *Sompeyrac*, 3 *Martin*, 719, the plaintiff having taken a note for $4663 65, to secure a loan of $3854, for two years, (the calculation being made by compounding the interest) at 10 per cent, we reversed the judgment of the district court, which had allowed this claim, and we reduced the compound to simple interest.

The tutor cannot, unless a special convention, authorises the demand, require the holders of the minor's capital to pay the interest yearly, or distinctly and apart, from the capital. Interest so virtually constitutes a part of the capital that it is not demandable after the recovery of the principal. *Faurie* vs. *Pitot*, 2 *Martin*, 83.

If the holders of the minor's funds cannot be compelled, without a special convention, to pay the interest distinctly from the capital, the same principle must regulate the obligation of the tutor.

The interest, which a judicial demand gives a rise to, is simple. The general principles of the law do not, as far as our recollection serves, tolerate the allowance of compound interest, in any case.

We conclude that no authority appears to sanction the plaintiff's claim for compound interest.

It is urged minors have a strong title to it on principle; otherwise a tutor may, during a long minority, derive immense profits from the possession of his minor's funds, while he imparts to him but a trifling part of them. This argument would have more force on the

East'n District.
July, 1822.

JARREAU
vs.
LUDELING.

floor of the legislature, when deliberating on the quantum of interest, which tutors must allow, and the mode of calculating it, than before a court whose province is confined to pronounce what interest the law has provided.

In this case, the law has said that the tutor is bound to pay to his ward an interest, at the rate of five per cent. per annum. *Civ. Code*, 70, *art.* 71. This interest, from the words used, we are bound to say is that which after a judicial demand, or a special agreement, or when the law in other cases allows interest of course, becomes due; which is always simple interest.

We think the district judge acted correctly in denying the demand for $2129 ; the witness by whom it was offered to be proven was interested, and no relase was tendered him.

He was not so in disallowing the claim for $4919, the proceeds of the crop made by the plaintiff's mother during her widowhood, sold afterwards by her second husband, which became payable after her death.

The errors of calculation pointed out in the items charged and admitted below, clearly amount to $8855 68 cents, and with the in-

terest and the reduction of 10 per cent. due the tutor for his administration, make together a sum of $13,691 67 cents.

The crop of cotton just spoken of and the interest thereon, make the sum of $7902 04 cents, which being added to the amount allowed by the district judge, entitle the plaintiff to recover $76,746 39 cents.

The intervening creditors of the tutor urge that the district judge erred in admitting in evidence, the account settled by the original parties to this suit.

The provision of the law, that requires that the tutor's account be rendered before the judge, is clearly introduced for the exclusive advantage of the minor. No other person can have any interest in it.

If the tutor has creditors who imagine that he colludes with the minor to remove his property from their reach, they are not prevented from shewing this, by the absence of an account rendered before the judge. Such an account, as it would be be made without their being called to contradict it, would not stand in their way; and we cannot see of what use it would be to them. Had it been rendered, it would be open to all their objections. In this, we do not think the judge erred.

East'n District.
July, 1822.

JARREAU
vs.
LUDELING.

Many arguments have been used by the creditors, to shew collusion; but the facts are not proved in such a manner, as to induce us to reverse the judgment and fix on the parties the imputation of fraud.

It is therefore ordered, adjudged and decreed that the judge of the district court be annulled, avoided and reversed, and that there be judgment for the plaintiff, for the sum of seventy-six thousand seven hundred and forty-six dollars thirty-nine cents, with interest from the judicial demand till paid.

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

VARION'S HEIRS vs. *ROUSANT'S SYNDICS.*

When heirs sue the representative of their ancestor, or their common tutor, the judgment ought not to be for the whole sum due to them collectively, but must ascertain that due to each.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiffs demand an account of the estate of their parents, which came to the hands of the defendants' insolvent, as the executor of the plaintiff''s father and their tutor. They had judgment for $5321, and the defendants appealed. The plaintiffs under

the late act of assembly complained, that the court *a quo* erred in making them too small an allowance, and on giving judgment for a whole sum to be paid to them jointly.

After a very minute examination of the evidence, we are not able to say that the court below erred in the amount due by the defendants: but there is certainly an error, in making a joint allowance, and causing the eldest heir to pay a proportion of the maintenance and education of the youngest.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the plaintiff *Francis*, recover from the defendants the sum of $1930, nineteen hundred and thirty dollars; the plaintiff *Mitchell*, $1486, fourteen hundred and eighty-six dollars; the plaintiff *Susan*, $1089, one thousand and eighty-nine dollars; and the plaintiff *Marian*, $819, eight hundred and nineteen dollars; in all, $5324, five thousand three hundred and twenty-four dollars; with costs in both courts.

Cuvillier for the plaintiffs; *Derbigny* for the defendants.

East'n District.
July, 1822.

MACARTY
vs.
FOUCHER.

Former judgment confirmed.

MACARTY vs. *FOUCHER*,—*ante* 21.

PORTER, J. A rehearing has been granted in the case on the application of the appellant, and he now contends that the *mortuaria*, or proceedings, connected with the inventory and sale of Le Breton's estate, must be taken together, and has argued that it clearly results from an examination of the whole of these documents, that the representatives of the deceased intended to sell, and that he contemplated buying the entire depth of sixty-six arpents.

I think that they may be looked into, and I agree, that if it should be found the adjudication, to the defendant refers to those proceedings for a description of the thing bought, that the whole may be taken and construed together.

On the death of Le Breton, application was made by some of his creditors, to the tribunal then established in this country, for the sale of his estate, and the liquidation of the debts due by the succession. Before the demand was finally acted on, Boré, tutor of the children, by the first marriage. petitioned, that the plantation with its appurtenances might

be sold, and an order to that effect was given and carried into execution.

An inventory had been previously made. In that instrument, this property is described as follows: "*las tierras de la havitacion de Don B. Breton tal que se halla e comporta, y conforme a los titulos que deven existir en el oficio de Don Pedro Pedesclaux*;" when cried on the plantation, it was designated as "*la habitacion de estos bienes y succession*," but no bidder being found to go as high as two thirds of the estimated price, the sale, on the petition of the parties interested, was adjourned to town. Here we find for the first time a particular description is given of the plantation, and it is stated, in the process verbal, to contain seven arpents front, with the ordinary depth.

It was put up at public sale three several times in the city before it was adjudged, a special act is made of the proceedings on each day. In the first it is stated, that the land was cried at auction, and that all present were called on to *mejorar*, advance on the bid of Florian, for a plantation of seven arpents front with the ordinary depth. The instrument which contains this description, is signed by the notary, by Le Breton D'Or-

East'n District.
July, 1822.

MACARTY
vs.
FOUCHER.

genoy, Deschapelles, attorney of the widow, Boré, curator of the children by the first marriage, Guinault, representative of those of the second, and by Daniel Clark one of the syndics.

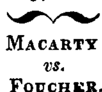
The second time it was cried, the same proceedings took place; it is again designated as a tract of land having the front and depth, already mentioned, and the act is signed by the same parties, and by the present defendant who on that day was a bidder.

The third and last time it was exposed, it is once more cried as a plantation of seven arpents front by forty deep, and is adjudicated as such to the appellant in this suit, who with the other persons already mentioned, sign the process, verbal of the adjudication, some days after he executed "*la fianza*" in which he declared that he entered into an obligation for the payment of a plantation purchased at the sale of Le Breton's estate, containing seven arpents in front *con la profundidad ordinaria.*

It is unnecessary to state any other of the proceedings, as the decision of the point before us, must turn on the effect of the instruments just referred to.

I take it to be incontrovertible that unless

East'n District,
July, 1822.



MACARTY
vs.
FOUCHER.

the vendors thought there were more than forty arpents in depth, and the buyer believed he was purchasing more, that there is no ground for permitting him to take any thing beyond it. And this position is not the least affected by an admission, which I readily make, that the order from the proper authority was to sell all Le Breton's property; if neither the heirs, nor their representatives were acquainted with the real extent of this property, and by mistake sold less; what remains is for them.

That the extent of the plantation (conceding the twenty-six arpents of wood land purchased in the rear to make a part of it) was not known to those who made the inventory, is apparent from the expressions used in describing it, neither front nor depth is given, but it is stated to be composed of lands according to the titles in a notary's office in New-Orleans. If the quantity which those titles gave a right to, had been known, we must presume the usual mode of stating that quantity would have been pursued, and that they would not have referred to papers in the custody of other persons, to ascertain the fact, if they had been acquainted with it themselves.

East'n District.
July, 1822.

MACARTY
vs.
FOUCHER.

To this strong testimony of the vendors not possessing an exact knowlege of the plantation owned by the deceased, we have still more positive evidence, that they did not understand it to have a depth of sixty-six arpents, when put up at auction in the city, the mode of designation first pursued of referring to the "*mortuaria*" is dropped. They explain what they conceive the "*habitacion*," to be composed of. In three several instruments of writing, executed at three different times, and signed by the representative of the widow, the tutors for the children, and the syndics of the creditors, it is declared to contain seven arpents in front with the ordinary depth, and to have been cried as such. It is difficult, it appears to me, now to conclude with the appellant, that these acts were not understood by the parties to them; that they did not read what they put their names to; every rule of evidence is opposed to the idea, and I do not think, that after such a lapse of time we are permitted to yield to conjecture, in opposition to express terms, and the presumptions created by a repeated use of them.

I am aware it may be said, these errors

East'n District.
July, 1822.

MACARTY
vs.
FOUCHER.

ought not to injure the buyer. This argument would be entitled to much consideration, if it appeared he had been led into error by the description given to him of the property ; nothing of that kind, however, is alleged, and as his pretensions rest in a great measure, not on what was done, but what was contemplated to be done, the enquiry into the opinion of the vendor as to the quantity then about to be sold, is highly important. Let us next see, what was that of the vendee himself?

He does not appear in this transaction, until the second time the property is exposed at public sale in New-Orleans, and in the instrument which records what took place on that day, it is stated, that the notary on crying it at auction, called for a " *mejora*," on a bid of Livaudais for a plantation of forty arpents deep, by a front of seven, and that Fouché did rise on that bid. This act the defendant signs. He also signs the act of adjudication on the next day, by which the property is described as having the extent just stated, and the obligation or " *fianza*," executed by him, some days after he declares that he had bought the plantation of Le Breton, having

East'n District.
July, 1822.

MACARTY
vs.
FOUCHER.

the front already mentioned with the ordinary depth.

I am of opinion that his understanding of what he bought, is as clearly manifested by these acts, as we have already ascertained the vendors, to have been, and I have in vain endeavoured to believe he would have signed these instruments, if he had known, or even imagined they gave him less than he purchased. The fair conclusion it appears to me from the whole proceedings is, that neither seller, nor buyer, knew the plantation to have sixty-six arpents in depth; and if the representatives of a deceased person mistake the real extent of his estate, and sell but a part, when they intend to sell the whole, I am unacquainted with the law, which gives the portion that remains to the purchaser.

When, says *Pothier*, the object of the contract is an "*universalité de choses*," it comprehends every thing which composes that "*universalité*," though the parties had no knowledge of it. But he adds this rule, suffers an exception "*lorsqu'il paroit au contraire que les parties n'ont entendu traiter que des choses contenues sous cette universalité qui etoient a leur connoissance, comme lorsqu'elles ont traite relativement*

a un inventaire". He gives as an example, where one man sells to another his right to all the moveables of a succession as contained in an inventory, and states that if there was any thing else, not comprised in that instrument of which the parties were ignorant, it would not pass under the contract. *Pothier, traité des Obligations, no.* 99. Had the inventory stated "all the lands of B. Le Breton, containing forty arpents in depth," and the sale been made in reference to that description, the particular quantity stated, would have controuled the general terms, "all the lands"—this is the very case put by the author. Instead of that we have "all the lands" inventoried, but no quantity given, and the sale is made of a certain number of arpents. If there is any difference in those cases, I am unable to perceive it.

It is a settled rule that instruments of writing should be so interpreted that every part of them, if possible, is to have effect. Admitting that the adjudication in this case, referred to the "*mortuaria*" were we to say that by the word "plantation" must be understood one of seven arpents front by sixty-six, those expressions which state it as having but forty

East'n District.
July, 1822.

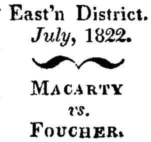
MACARTY
vs.
FOUCHER.

become useless; in the other alternative, the term plantation is not inconsistent with that which designates it as one of the ordinary depth. The latter construction should therefore be preferred.

It is proper, as there is a difference of opinion in the members of the court, to notice the several arguments by which the appellant's claim has been supported.

Many of them go to shew the original intention of the parties to sell the whole of the plantation. I have already observed that such, I believe, was their intention; but a knowlege of what they intended aids us but little in settling the rights of the parties before us, unless we can discover that they carried into effect what they had in view. The more material enquiry is, what did they sell, when the property was put up at auction and adjudicated.

Still less do I conceive it necessary to go into a severe inquiry, as to the causes which led to the error. It has been conceded there was a mistake made by the representatives of the deceased, as to the quantity of land, possessed by their ancestor, and I have already stated what in my opinion was the legal con-



East'n District.
July, 1822.

MACARTY
vs.
FOUCHER.

sequence of such a mistake. For no matter how great may have been the error, it does by no means follow that the defendant can have more than he bought; he may on that ground avoid the contract altogether, but he cannot substitute an other in its place. The true question here is this, does the title of the appellant give the land to him? Are the expressions, which in so many acts limit him to forty arpents, controuled by others that will enable him to take sixty-six?

He insists they are so controuled for several reasons, and principally because the plantation was appraised in reference to certain titles, cried at auction in reference to this appraisement: and bid for in the first instance in relation to those titles. Hence, he concludes, that as he raised on the bid of those persons who offered a price for the whole, this gives him a right to every thing they could have obtained, and that the more especially, because he went to two-thirds of the price at which the entire plantation was estimated.

In examining this argument in which consists the whole strength, or nearly so, of the appellant's case, the first thing to be considered

East'n District.
July, 1822.

MACARTY
vs.
FOUCHER.

is, whether the facts support it. I believe they do not. The ajudication does not give to Foucher all the lands mentioned in the "*mortuaria*," it does not state that there is sold to him every thing Clark bid for; it makes no reference to the inventory; nor to what Clark offered: it simply states that a tract of land with certain limits has been bought by him. The idea then that all the written proceedings, respecting Lebreton's estate, are to be taken as a deed of sale, and that the expressions in one part may be explained and controuled by those of another, does not appear to me correct. If the act, under which he holds, had referred to the inventory for a description, it would have presented a very different question: as it does not, I see no ground, for the position that they must be construed together.

But it is contended, Clark bid for all; Florian advanced on whatever Clark bid for; Livaudais raised on Florian's offer, therefore Foucher who was called on to "*mejorar*" the bid of Livaudais has a right to go back, and take whatever he could claim. I do not believe there is so entire and complete a privity between persons at public sales, as this ar-

gument implies. Were an auctioneer to present three slaves, and call on the bye-standers to advance on an offer just made for them, it would be going far I think, to hold that a person bidding on this annunciation, and having the property stricken off to him, could be compelled to receive two, because the person who preceded him had only bid for that number. The rule, if a true one, must bear this test.

The case of the appellant however, is not so strong as that just put, as the bid he was asked to raise on, was stated to have been for a certain quantity, which quantity corresponds exactly with that given at the time he first offered a price for the land, and that found in the act by which he finally acquired. To give this argument of the appellant, however, its due weight, it becomes necessary to examine attentively the facts. The inventory states no particular quantity. After Clark and Florian had went as high as they deemed prudent, on a description referring to another place for the extent and limits of the property, Livaudais presents himself, and on being called on with others to *mejorar* a bid of Florian, for a plantation of seven arpents front with

forty deep, we find that he does advance on it. The defendant, in this suit, on the next day, is asked if he will raise on the offer which Livaudais had made for a plantation having a front on the river, of seven arpents with forty in depth, and he agrees that he will. The first deviation therefore, from the original description commenced with Livaudais, and had he purchased, he might perhaps have complained (though with a bad grace) that he did not think he was buying according to the limits given to him, and that he intended to purchase the indeterminate quantity that Florian had bid for. But does the appellant stand in his place to correct the error into which he may have been betrayed?—Surely not;—for he does not advance on Livaudais' bid, leaving the quantity to be ascertained by referring to another act, but on Livaudais' bid for a plantation of forty arpents in depth. Can it be correct then to say, that he purchased in reference to Clark and Florian's bids for an unknown quantity, when the act tells he advanced on another man's bid for a certain quantity? I think not; and I am clearly satisfied that the appellant first offered to purchase on the description given to Livau-

East'n District.
July, 1822.

MACARTY
vs.
FOUCHER.

dais of what the plantation contained, not that found in the "*mortuaria*;" and that description corresponds exactly with the limits stated in the act of adjudication. But it is said, as the lands were not sold until the price offered amounted to two-thirds of the original appraisement, we must therefore presume it was intended to sell the whole. This is perhaps true ; but if they did not sell it all, the circumstance of two-thirds of the original appraisement being given for a part will not entitle the buyer to the whole : intention is of little importance if it was not carried into effect.

Great stress is laid on the possession of the original title, because the law has directed the auctioneer immediately after the sale, to deliver it to the purchaser. This is setting up presumptive evidence in opposition to direct proof, and in my opinion the positive testimony must prevail. The effect which this circumstance would have is much weakened by reflecting that if this title was placed in defendant's hands immediately after the sale, it would have at once informed him that he had purchased more than the ordinary depth ; and if so, he surely would not have signed an instrument afterwards by which he declared

East'n District.
July, 1822.

MACARTY
vs.
FOUCHER.

that he bought but that quantity,—nor would he have suffered six years to elapse before he intimated that there was error in the description of what he purchased.

There is no evidence before us that the parties to these acts did not understand Spanish, and if there were, the argument drawn from it would prove too much, for it would establish that neither vendor nor vendee knew what they were doing; consequently nothing could have been acquired on one side, or alienated on the other.

Nor, in my opinion, ought the cause to be decided, on the evidence of a witness that by the words "ordinary depth" were meant sixty-six arpents. This is contradicted by the grant under which the appellant claims, for it describes the twenty-six arpents as a second or extra depth; by the surveyor general in his plat of survey, who marks the first forty as "*la profundidad ordinaria*," and then designates the remainder by particular lines; by the appellant himself who did not believe the expressions ordinary depth, gave him this land, and applied to the syndics for another title; and lastly, by the universal meaning attached to these words, or their equivalent, in other lan-

East'n District.
July, 1822.

MACARTY
vs.
FOUCHER.

guages, under the three governments which have possessed Louisiana.

I do not think that by the word appurtenance a double depth passes, when the vendor declares he sells forty.

What then, in a few words, is the whole case? Property, as of an unknown quantity put up at sale and bid for as such, afterwards, and before adjudication described as having a known quantity, and purchased by a particular designation of its limits. Under these circumstances I feel constrained to say that there has not been sufficient evidence produced to enable us to reject the positive description given in the act by which the defendant acquired. Our former judgment should therefore remain undisturbed.

MARTIN, J. The defendant's counsel has been heard, on a suggestion that our former judgment erroneously considered him without title to the back tract of his plantation.

He has drawn our attention, which had been confined to the process verbal of the day of the final adjudication, to those of the preceding days, to the inventory, appraisement, petition and order of sale. He urges that the

East'n District. July, 1822.

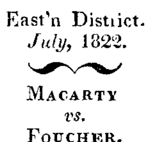
MACARTY vs. FOUCHER.

several process verbal of the auction with these documents, constitute but one record, his title; that where a part of a record is apparently variant from the rest; it is proper to rectify the variance, or the error by the other parts of the record, the concordance of which manifests their correctness; that an inaccurate description of the premises sold, in the *habendum & tenendum* of a deed, may and ought to be rectified by a different one in the other parts of it, in which uniformity and other circumstances place its accuracy beyond doubts.

The whole *mortuaria* of B. F. Le Breton, or proceedings for the inventorying, appraising and selling the estate he left behind, makes part of the record in the case before us.

The defendant's counsel urges, that from a close examination of this *mortuaria*, a conviction must inevitably result, that the officers who made the inventory of his estate, the appraisers, the relations and creditors of the deceased who provoked the sale; the magistrate who ordered it; the notary, or auctioneer who executed the order of sale; the different bidders, all were impressed with the idea that the whole plantation of the deceased

East'n District.
July, 1822.



MACARTY
vs.
FOUCHER.

was the thing inventoried, appraised, prayed for and ordered to be sold, bidden for, and lastly adjudged.

If we consider all the documents, inventory, appraisment, petition, order of sale, and the process verbal of the sale, on the days on which the bids of Clark and Florian were renewed, it is impossible to have the least doubt of the correctness of the proposition which the defendant's counsel endeavors to establish; and it is equally clear that if we consider only the process verbal of the days on which the bid of Livaudais and that of Foucher were made, the proposition will appear ungrounded.

I cannot entertain a doubt, that any part of a record, on which a manifest error is alleged to have crept, must be examined and compared, with a view to the detection and correction of the error, with the other parts of the document, and in giving effect to the whole, a judgment must be formed on a comparison of the parts. *Iniquum est nisi totâ lege inspectá, de unâ aliquá ejus particulâ judicare, vel respondere.* 8 *Co.* 117. *Incivile est nisi de totâ sententia inspectâ de aliquà parte judicare. Hobart,* 172. These quotations, though immediately

taken from books of the common law of England, evidently came there from the Roman, and the proposition they contain is almost self-evident.

The counsel for the defendant first calls our attention to the inventory and appraisement.

Las tierras de la habitacion, the lands of the plantation. For the situation, description and contents of this plantation, we are referred by the *mortuaria*, to the titles, which ought to be, *que deben existir*, in the office of P. Pedesclaux, notary public.

The copy of the titles, extracted from the minutes of that office, shews that the deceased purchased on the same day, by the same instrument, from the same persons, and for one price two tracts of land, which the defendant's counsel contends constituted the plantation; a riparious one of the depth of forty arpents, and a back one of the same width and of the depth of twenty-six arpents.

The counsel urges that the plantation sold was described as consisting of two tracts, because the vendor had acquired the premises by two titles, *viz*: the riparious by purchase, several years before, and the back tract, by

a grant from the Spanish government, on the day preceding the sale.

From the inspection of the inventory and appraisement, and of the titles of the deceased, to which the makers of the inventory refer us, I think the conviction is irresistible that they meant to inventory and appraise the whole plantation; and the plaintiff's counsel has not been able to point out a single circumstance giving rise to the belief or suspicion, that the parties were under an error and believed that the deceased owned the riparious tract only. The purchase had not been made so many years before, that its extent might have been forgotten—it was not a distant estate—Boré, the grand-father and tutor of the deceased's children, lived on the land contiguous thereto. The grant of the back tract was among the deceased's papers, and it will be seen by and by, was surrendered to the last bidder, the defendant, according to law, at the conclusion of the auction.

The counsel for the defendant next places under our eyes the petition of the relations and creditors of the deceased, to the judge, provoking the sale of the property of the estate, which the situation of the affairs of the de-

East'n District.
July, 1822.

MACARTY
vs.
FOUCHER

ceased imperiously demanded. In this document the applicants pray for the sale of the plantation, with every thing annexed or corresponding thereto, *de la havitacion, con todo a el annexo y correspondiente.* It is urged, and I think with considerable reason, that neither in the inventory and appraisement, in the petition, nor in the order of the judge who ordered the sale accordingly, nothing allows us to believe that the riparious tract alone was contemplated. Nothing shews that the parties were under an error.

In the process verbal of the first day of the auction, the premises offered for sale are described as the plantation of this estate and succession, *la havitacion de essos bienes y succession.* The counsel for the defendant urges, and I think with great reason, that these expressions clearly relate to the whole plantation, not to the riparious tract only; but the counsel of the plaintiff contends the parties were all in error, they were ignorant of the back tract of thirty-six arpents, being a part of the estate. Of this mistake, ignorance or error, the record affords not the least suspicion. On the contrary, the presence of the grant, among the papers of the deceased, in the possession of

his friends—their knowlege of the existence of the deceased's titles in the office of a notary residing near them, afford some kind of negative evidence.

On this day, Clark was the last and highest bidder, for $16,000; but this being less than the two-thirds of the valuation, no adjudication was made.

In the process verbal of the second day, the notary describes the premises offered for sale as the plantation of this *mortuaria*, *la havitacion de essa mortuaria*, and Clark's bid on the first day was raised by different bidders, and lastly by Florian, to $16,600; but this being still below two-thirds of the valuation no adjudication was made.

It is not easy to deny the assertion of the counsel for the defendant, that the record clearly shews that both, Clark and Florian, did bid for the whole plantation of the deceased. He urges that the premises sold were described in the process verbal of the first day, as the *havitacion de essos bienes y succession*, the plantation of the estate and succession, on that of the second, *la havitacion de essa mortuaria*, literally the plantation in this record of the proceedings had on the death

East'n District.
July, 1822.

MACARTY
vs.
FOUCHER.

of, &c. In the first part of the record, the lands of the plantation are inventoried and appraised, and reference is made to the act of sale, in the office of Pedesclaux, the notary. By the inspection of this document, we find that the deceased had purchased, as I have already observed, two tracts, a riparious and a back one, which constituted the plantation, inventoried, appraised, the sale of which had been provoked by his relations and creditors, ordered by the judge and therefore proceeded on by the notary.

In the process verbal of the third day of the auction, the notary describes the land as having the ordinary depth, *el fundo ordinario;* expressly informing the bye-standers that he was continuing the sale, which he had began by order of the judge, and calling on them to raise, *mejorar*, the last bid, *viz*: Florian's for $16,600; Livaudais on this day was the last and highest bidder, having offered $19,600. This sum being still less than two-thirds of the valuation, no adjudication was made.

In the process verbal of the third day, the premises were described as they are in the rest of the record, as having the ordinary depth. In the morning of that day, Fou-

East'n District.
July, 1822.

MACARTY
vs.
FOUCHER.

cher, the present defendant, raised Livaudais' bid to $20,000. A few dollars were lacking to reach the two-thirds of the valuation, and, in the afternoon, he raised his bid to $20,025, and the land was adjudicated to him.

The counsel for the defendant produces the original grant of governor Miro, to Villiers the vendor of the deceased, for the back tract of twenty six arpens in depth, which he alleges was delivered to him immediately after he executed his obligation for the price of the adjudication, according to the provisions of the Spanish law.

The counsel urges that the defendant, having been indulged with an extension of the day of payment, he did not take out his title till the payment was completed and having discovered the error, obtained, from the syndics of the deceased, a notarial act acknowledging that it was thro' mistake, that in the latter part of the *mortuaria*, the plantation was described as having the ordinary depth only.

It seems to me that the change made by the notary, in the description of the premises, in the latter part of the *mortuaria*, was a clerical error of that officer only. The judge had ordered the sale of the property inventoried and

East'n District.
July, 1822.

MACARTY
vs.
FOUCHER.

particularly of the plantation. The back tract made a part of this. It was inventoried and valued as a part of this. The idea that the relations and creditors of the deceased were ignorant of the deceased's right to the back tract is, in my opinion, repelled by the presence among the papers of the deceased of the original grant of gov. Miro to Villiers, surrendered to the deceased at the time of his purchase and by the judge to the defendant, after the adjudication. This back tract made *de facto* and *de jure* a part of the plantation, and the notarial act referred to by the appraisers, as existing in the office of Pedesclaux, furnishes complete legal evidence that this tract was inventoried and appraised, and its sale provoked by the relations and creditors of the deceased, ordered by the judge and commenced by the notary.

The variance in the description of the premises, which first appears in the process verbal of the third day of the auction, was introduced by the spontaneous act of the notary, and must be considered as a mere error. Nothing induces a belief that he had the intention of altering the thing sold—to put up in distinct lots, the two tracts which con-

stituted the plantation, the sale of which he had begun. This he could not well have done, without the consent of the parties. And in the very process verbal, far from announcing such an intention, he declares that he is continuing the auction already began and that the by-standers were invited to raise (*mejorar*) the bid of $16,600, made on the preceding day by Florian. The conclusion is irresistible that those who overbid, did bid for the very same thing, for which Florian had bid.

When, on the evening of the last day, the defendant raised the former bid to $20,000, the judge declared his inability to consent to an adjudication, as the plantation was valued at $30,050, and so the defendant's bid was less than two-thirds of the valuation. If we take the *mortuaria*, with a view to ascertain what quantity of land constituted the plantation which was valued at $30,050, of which the deceased's relations and creditors had solicited the sale, which the judge had ordered, we find by an inspection of the act of sale, to which the appraisers refer that the plantation consisted of two tracts, having together a depth of sixty-six arpens. If in the sequel the

East'n District. *July*, 1822.

MACARTY *vs.* FOUCHER.

mortuaria presents another description, we must inquire whether the variance was the authorised act of the parties, or whether it has not the character of a clerical error of the notary.

Nothing enables us to conclude that the variance resulted from the intention of the parties, that a different thing should be presented as the object of the sale, on the last days. The parties did not make any application, the judge did not order the sale of any thing but the plantation, according to the inventory and appraisement, and the notary expressly mentions in the preamble of his process verbal of the third day that he intends to proceed on the sale, and auction already commenced. If we then believe. as we necessarily must, that no alteration was intended by any of the parties, we must conclude that the change or alteration in the description was erroneous.

I consider the whole record of the *mortuaria*, as one entire deed, the title of the defendant. In the inventory or appraisement, which I consider as the preamble of the deed, the premises intended to be sold, are described in such ample manner, that it is im-

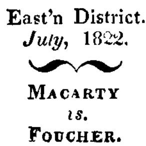
possible not to conclude that the whole plantation, composed of the two tracts, was the object inventoried and appraised.

It is, however, urged by the plaintiff's counsel, that the parties were ignorant of the extent of the plantation, and believed that it consisted of the riparious tract only.

This appears to me a gratuitous assertion. It is not to be reconciled with the circumstance that they knew that the deed, by which the deceased had acquired, was in the office of a particular notary, close by them,—that they were in possession of the grant of Gov. Miro to Villiers, the deceased's vendor, of the back tract, surrendered at the time of the sale. Bore, the curator of the deceased's heirs, by the first wife, (his daughter) owned and lived upon the adjoining tract.

The quantity of land, alluded to in the appraisement, was certain. *Id certum est quod certum reddi potest.* If absolute certainty be required in any thing, it is in a final judgment, and we have held that it is sufficiently certain, although the amount decreed be not mentioned therein, but appear only from the documents in the suit. *Dickins' executors* vs. *Bradford's heirs*, 4 *Martin*, 311. Here the quantity of land in-

East'n District. *July*, 1822.



MACARTY *vs.* FOUCHER.

ventoried and appraised, as constituting the whole plantation, is made certain beyond a doubt, by the reference which is made to the title in Pedesclaux's office.

If we believe that the quantity of land inventoried and appraised is certain and definite, we cannot entertain a doubt that the quantity, for the sale of which the order of the judge was solicited, is equally so : for the petition refers to the inventory and appraisement.

No doubt can be entertained that the judge ordered a certain and determinate quantity of land to be sold, *viz* : two tracts, inventoried and appraised.

Nor that the notary, by whose instrumentality the sale was made during the two first days of the auction, intended selling a certain and determinate quantity, *viz* : that which the judge had ordered him to sell ; that of which the sale had been petitioned for ; that which had been inventoried and appraised, and which by a reference made by the appraisers to the record of Pedesclaux, clearly and unequivocally appears to be that contained in both tracts.

Clark and Florian bid most certainly for those two tracts.

Notwithstanding all this, the counsel for the plaintiff says, we must conclude those who made the inventory, the appraisers, the relations, the creditors of the deceased, the notatary, were all under a mistake and firmly believed the plantation consisted of the riparious tract alone, and none of them knew there was a back tract, which had been purchased with the riparious one. Yet it is shewn the original grant of governor Miro to Villiers and wife, the vendors of the deceased, for this back tract, was among his papers, and is referred to in his act of sale.

The counsel for the plaintiff urges that the inventory and appraisement refer not to titles which certainly, but probably are, in the office of Pedesclaux : *que deven existir.* The literal translation of this expression in our language "which ought to exist," favors, I admit, the conclusion of the counsel.

Had the appraisers intended to represent the existence of the titles to the property they valued as probable only, not as certain, they would have said *que deben de existir*, instead of *que deben existir.*

Debe de ser, says *De la Hurta,* supposes the existence of a thing, which of itself appears

East'n District.
July, 1822.

MACARTY
vs.
FOUCHER.

doubtful. The scripture says so, and *debe ser creido*, we must believe it; because there can be no doubt. Others say so, it ought to be believed: *debe de ser creido*; because common opinion renders it probable—induces a belief that it is so. *Sinonimos Castellanos*, CXVIII, *debe ser*, *debe de ser*.

We are to presume that the makers of the inventory and appraisers, who acted under the obligation of an oath, did their duty. That they required correct information of the contents of the plantation: and that such information was given them.—That it was within the reach of the parties, we have the most conclusive evidence.

The counsel of the plaintiff discovers, what he terms conclusive evidence, of their ignorance of the contents of the plantation, in the absence of a description of it by a reference to the quantity of arpents in the front and depth.

Appraisers, almost universally, attend on the land to be valued: they preambulate it: the boundaries are pointed out to them. They are seldom, hardly ever, attended by a surveyor: the title deeds, not being necessary to the operation which they are called on to perform, are rarely produced to them. As the

East'n District.
July, 1822.

MACARTY
vs.
FOUCHER.

eye does not enable them minutely to ascertain the length of the lines, there is no necessity of their stating it, and it suffices that they should clearly designate what they value. This was, unambiguously done, in the present case, by a reference to the titles, in the notary's office.

If we admit, and I am unable to see how we can doubt it, that the appraisers valued what they inform us they did, the plantation of the deceased, according to the titles, &c. we must consider it as a matter of no moment, whether the relations and creditors had correct or incorect information, or any information at all, in regard to the extent of the plantation. They petitioned for the sale of the plantation, according to the inventory and appraisement, and it was ordered accordingly by the judge, whose decree is sufficiently certain : it refers, as to what is ordered to be sold, to the appraisement and the appraisement refers to the title. Here we have legal certainty, and there is not the least ground to imagine that any body erred.

The notary proceeded to carry the judge's order into execution; on the two first days of the sale, the proceedings are carried on with

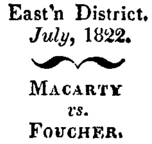
East'n District. *July*, 1822.

MACARTY *vs.* FOUCHER.

legal certainty; he describes what he is selling, by a reference to the antecedent part of the record. Clark and Florian bid accordingly.

On the third day a variance creeps into the record. What is its character? If it was not voluntary, it must have been erroneous. The notary, who made it, cannot be supposed to have intended to vary, to change the thing, which was the object of sale. Nothing induces a belief or suspicion that he did: every thing shews that he did not: indeed, he had not the power. If, by using a different expression, he varied, he changed the thing, while he had not the intention of doing so, he erred.

The counsel for the defendant urges that this was the case; and he presents the following circumstance, as the cause of the error:—Hitherto, the auction had taken place on the plantation: on the third day it was continued in the city, and the notary, being thus near Pedesclaux's office, imagined it correct to resort to the title of the deceased, in order to give the most accurate description of the plantation he was selling. Taking up Villiers' sale to the deceased, he took down the de-



scription of the riparious tract, given in the first page, the *recto*: and as this description finished the page, he stopped without turning the leaf. Thus, the description of the back tract, which immediately followed, in the beginning of the second page, the *verso*, escaped his notice.

There is considerable force in the observation of the counsel, that it is impossible to connect the conduct of the notary, in this particular, with that of the appraisers, a considerable time before, so as to conclude that the description, now given by the notary, is evidence of the ignorance of the appraisers of the true contents of the plantation.

I cannot receive it as such; and my mind remains impressed with the idea that the appraisers did not err—that they valued what they certified they did value—the whole plantation as described in the act of sale of Villiers; and, when I look over that document, I find the back tract included, as part of the plantation.

It is clear the relations and creditors petitioned for the sale of the whole property appraised, and I do not think that the subsequent proceedings could be declared less valid, on

East'n District.
July, 1822.

MACARTY
vs.
FOUCHER.

positive evidence, that the petitioners had not a correct idea of the contents of the plantation. They wished *the whole* sold, and it suffices, for the regularity of the sale, that the appraisers should appear to have known what they did value. They were not parties to the proceedings after the order of sale, and the expressions thereafter used in the description of the plantation, without their knowlege, cannot aid us in discovering what passed in their minds.

It is true the relations and creditors subscribed the process verbal of the last days; and the counsel for the plaintiff urges, that their signatures are evidence of their belief that the back tract was no part of the plantation. To this, the opposite counsel replies, that their signatures, at the foot of the process verbal of the preceeding days, are equally evidence of the contrary.

It is further urged that the proceedings of the *mortuaria*, like all judicial proceedings, were carried on in the Spanish language. That all the relations and creditors who subscribed (with the exception of an Irish gentleman) appear by their names to be French, and may well be presumed to have been ignorant of

the Spanish language. This objection, in my opinion goes too far—for it would avoid every act couched in any language but the vernacular one of a party. It cannot, however, be denied that when fraud, or error is suggested, it may have some weight.

Errors, in legal proceedings, ought not easily to be presumed.—Those who are conversant with those of the Spanish government, in Louisiana, know they were not rare. The counsel for the defendant has laid his finger on two important ones, besides the one which is the ground of the question that embarrasses us. In the sale of the estate of L. F. Lebreton, deceased, L. F. Lebreton himself is named as one of the relations, who assisted thereat, *ante* 14. At the conclusion of the sale, under consideration *Louis* Foucher is named as the vendee, while he was only surety for the defendant, his brother, *Pierre* Foucher.

It is clear that either the appraisers or the notary erred. Nothing, I say emphatically no thing, enables me to conclude the former did err. The latter was attempting to describe what he had been ordered to put up at auction, and he had been ordered to put up what

East'n District. *July*, 1822.

MACARTY *vs.* FOUCHER.

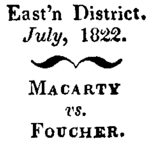
had been appraised. His description does not accord with what the appraisers describe, and as I cannot conclude that they erred, I must say the notary did.

I rather think that the signatures of the relations and creditors do not cure the notary's error. The sale was a judicial one—the judge was the principal party—they assisted at the sale to see, on the part of those whom they represented, that it was fairly carried on.

The judge himself was under no error, when according to the prayer of the applicants, he ordered the sale of the property appraised.

But, the counsel of the plaintiff urges that he afterwards approved the final adjudication, which was of the plantation "with the ordinary depth," an expression which effectually excludes the back tract.

The possession of the original grant of the back tract is presented to us, by the counsel, as conclusive evidence that the judge considered this tract as part of the plantation. But, the counsel for the plaintiff replies that the defendant did not shew when, where, or by whom this document was delivered to him. If the payor of a note present it, the legal



presumption is that he obtained it fairly, *i. e.* by paying its amount. When nothing unfair is shewn, *omnia recte presumuntur.*

In the present case, every thing tends to support the presumption. that the grant was delivered to the defendant by the parties, who had provoked the sale, under the direction of the judge, who had ordered it.

The Spanish law makes it the duty of the judge, by whose order a judicial sale (one ordered by a judge) is made, to cause the applicants to deposit the titles of the premises sold, *que incontinente ponga en el officio los titulos*, and when the vendee has complied with the terms of the sale, these titles are delivered him, with a copy of the process verbal of the sale : *se le entrega los titulos, con la escritura de venta. Febrero adicionado*, 2, 3, 2, § 5, *no.* 335.

Here, the relations and creditors of the deceased applied for the sale of the whole plantation, and every thing corresponding and appertaining thereto, according to the titles in the office of Pedesclaux. The judge directed such a sale and the notary evidently proceeded to the sale of the premises so ordered to be sold. Now, as the applicants do not appear to have altered their minds; as the

East'n District.
July, 1822.

MACARTY
vs.
FOUCHER.

judge rever modified his order, it was the duty of the former to deposit in the office of the judge, the titles to the whole premises, the sale of which they had provoked, *viz:* to both the riparious and the back tract—and the judge was bound to see that such a deposit was made. The vendee had also a right to require this, before he complied with the terms of the sale. After these terms were complied with, it was the bounden duty of the judge to have the titles thus deposited, in his office, surrendered to the vendee. Now, the defendant shews by the inventory, that the back tract made part of the plantation, the sale of which was petitioned for, ordered and begun—that he was the vendee, and he produces the original grant or title, to this tract. His counsel urges, and I think very properly, that these circumstances, in the absence of any proof (and in this case there is not even a suggestion) of his having obtained possession of the document unfairly, or at any other time, or manner, (or from any other person) that he received it, after having complied with the terms of the sale, from the judge, who had ordered the sale, as the only original part of the titles to the land sold,

which was in the possession of those who had applied for the sale. If this possession be not a legal presumption, the production of a note by the maker is no legal presumption of its having been surrendered to him by the payee, on the payment of its amount.

If we believe this, and I see no ground for disbelief, the conclusion is inevitable, that the land mentioned in the grant was intended by the judge to pass as part of the plantation.

The defendant, it is true, subscribed the process verbal of the last day of the sale, and the obligation for the payment; in these documents the purchased premises are described as having the ordinary depth.

His counsel urges, that notwithstanding this he may, if the error be proven, obtain its correction, by the antecedent parts of the *mortuaria.* If the error had been the reverse of what it is, and instead of diminishing the quantity of land had encreased it, could the vendee have resisted the amendment?

Beyond the back tract of twenty-six arpens, is another of fourteen, that once made part of the plantation, which we have formerly seen, while it belonged to Belair, had a depth

East'n District. July, 1822

MACARTY vs FOUCHER.

of eighty arpens.—*Ante* 13. Now, if the notary instead of using the expression "the ordinary depth," had used that of "the depth of eighty arpens," could Fouchér have claimed the last tract of fourteen arpens, and would not the court have said that it was proper to ascertain what the notary had been authorised to sell by the judge, what the relations and creditors had requested the judge to order the sale of—what had been inventoried and appraised—what was contained in the sale from Villiers, to which the appraisers had referred ?

In such a case, even if the deceased had been the owner of this last tract of fourteen arpens, having acquired it distinctly, or by another title than that to which the reference was made by the appraisers, his heirs might say they were ignorant of the existence of this tract, as part of the succession. There would not be the least room to believe that it was inventoried or appraised, and Foucher would certainly have been restrained to the quantity of land which, from the *mortuaria*, would appear to have been appraised and ordered to be sold.

Lastly, if additional evidence be required of Foucher's belief that he had acquired

the two tracts, we have, independently of the care which he took to secure the original grant of the back tract, the declaration of the syndics of the creditors of Lebreton, consigned in a notarial act, in which they declare that it is thro' mistake, that the words "with the ordinary depth," were inserted by the notary, in the process verbal of the two last days of the auction—that the sale of both tracts had been petitioned for, ordered, and in their belief, carried into effect. We have it also in the silence of the heirs, who, although they must all be of age, upwards of twenty years having elapsed since the sale, have never imagined that this back tract was not sold.

My mind more easily receives the idea that the error crept in the record, in the manner which the counsel for the defendant suggests, and passed unnoticed by the relations, the creditors, the judge and the defendant, than it can entertain a belief that the family, creditors and neighbors were ignorant of the extent of the plantation, while it was known that the act of sale, in which its extent was particularly stated, was in the office of a particular notary, residing within about six miles from it; while the original grant of Governor

East'n District.
July, 1822.

MACARTY
vs.
FOUCHER.

Miro, for the back tract was among the papers of the deceased.

Lastly, fraud is never to be presumed ; it must be proven, before a judge permits himself to believe it exists. Now, I cannot arrive at the conclusion, to which the argument of the plaintiff's counsel is calculated to lead me, unless I assume it as a fact (without the least tittle of evidence and even without suggestion) that a gross fruud was committed. The original grant of the back tract, in the possession of the defendant, is presented to us and is really a very strong evidence that this tract was adjudicated to him. This document made part of the papers of the deceased, and if it did not pass into the hands of the defendant, in the manner in which he alleges he received it, I must conclude he obtained it unfairly—fraudulently. The meanest individual has the right to expect that his judges should presume him honest till the contrary is made manifest. I ask, what evidence have I to doubt the correctness of Foucher's conduct ?

To conclude, it seems to me that the defendant's counsel by placing before us the proceedings which preceded the proces ver-

East'n District, *July*, 1822.

MACARTY *vs.* FOUCHER.

bal of the last days of the auction, has fully manifested that the notary committed a clerical error, which we are able to correct by a close examination of the anterior parts of the *mortuaria*, and which, in my humble opinion is placed beyond doubt by the production of the original grant.

I think therefore, that the judgment we hitherto pronounced in this case, ought to be set aside, and there ought to be judgment for the defendant, with costs of suit, in both courts.

MATHEWS, J. I concur in the opinion of judge Porter, for the reasons there expressed.

Moreau and *Mazureau* for the plaintiff, *Hennen*, *Grymes* and *Livingston*, for the defendant.

THE PLANTERS' BANK & *AL.* vs. *LANUSSE* & *AL.*

Mere proof that the insolvent admitted the debt, nor even his written acknowlegement, will not establish it against his estate.

Otherwise, if circumstances render it probable.

The wife of the insolvent may vote, altho' she has not renounced.

APPEAL from the court of the first district.—10 *Martin*, 690.

PORTER J. delivered the opinion of the court.* This case has again come before us, on an appeal from the judgment of the inferior court, confirming the appointment of syndics.

The first question presented is, that the

* MATHEWS, J. was prevented by indisposition, from attending.

East'n District. *July*, 1822.

PLANTERS' BANK & AL. *vs.* LANUSSE & AL.

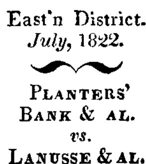
matters and things now in dispute have already been adjudicated on between the parties, and have acquired the authority of *res judicata.* The opinion, formed on the whole case, renders it unnecessary to examine this point.

The next error is, that the opposition to the votes, should have been made before they were received by the notary, and in support of this 10 *Martin*, 59, has been quoted. The same reason which prevents the plea just mentioned from being decided on, induces us to refrain from entering into this. It may not, however, be improper to remark that the opinion of the court there, was merely intended to express the effect which a want of opposition to a vote before the notary public, had, as to the regularity of voting at all, and left untouched the right which each had, to make opposition before the court and have the facts, which they might choose to put at issue, tried in due course of law.

That opposition has been made here; the parties were at issue in the district court, and went to trial on it; we shall, therefore proceed to examine the different claims presented.

It is laid down as law, by the Spanish writers, and it has been decided by this court.

East'n District.
July, 1822.



PLANTERS' BANK & AL.
vs.
LANUSSE & AL.

that in cases of insolvency, the acknowlegement of an instrument in writing, and confession of debt, on the part of an insolvent, is proof sufficient to establish the debt as against him, but not against the creditors ; for it is presumed to be fictitious, and made with a deliberate intention to elude these rights, and though it should appear by a note of hand, it does not prove its legitimacy; and for this reason he, who does not prove his debt by other means, ought not to be considered as a true and lawful creditor. *Febrero, juicio de concurso, lib.* 3, *cap.* 3, §1, *no.* 33. 3 *Martin*, 707.

From this principle, it results that all claims given at the meeting, in this case, to which opposition has been made, and which are proved only by the production of the insolvent's notes, and the oath of the creditors who hold them, must be rejected. Still less, can we admit claims that are established on weaker evidence ; such as those which the witnesses do not speak from their own knowlege, but from hearsay.

On the part of Chiapella, Labatut and Tricou as syndics, there voted the following persons to whom no objection has been made, or

East'n District.
July, 1822.

PLANTERS' BANK & AL.
vs.
LANUSSE & AL.

whose right is clearly established, *viz*: Macarty, Chiapella, Labatut, Guidel and Malus; the amount of their debts, when added together, is $120,115 76 cents.

In favor of Chabaud and Percy, there are the votes of Old & Co., Habine, Gros, Dennistoun, Hill & Co., and Townsley & Co., which are either admitted to be correct, or have been substantially established: their aggregate amount is $17,616$\frac{69}{100}$.

On the part of the syndics who had the majority, there were two claims against the insolvent's estate, on which Caisergues and Madame Lanüsse voted—they require a particular examination.

And first, as to that of Caisergues; he voted at the meeting for the sum of $24,520, declaring in his affirmation, that the debt due him was founded on fourteen notes endorsed by Lanusse, for the sum of $30,650, on which sum he had received from Tricou & fils, $6130. Before the trial was had on the opposition made, he surrendered to the persons last mentioned, all the notes on which he voted, and he was received as a witness to prove the amount due him, at the time the *concurso* took place before the notary. A bill of ex-

ceptions was taken to his testimony, but it has been abandoned before this court.

East'n District. *July*, 1822.

PLANTERS' BANK & AL. *vs.* LANUSSE & AL.

The notes produced in support of this claim were in number, nine. Six drawn by Tricou & fils, and endorsed by Lanusse for $14,000, three by Dutillet & Sagory to the order of Lanusse, for $9000, with his indorsement, together with protest made at the request of Caisergues.

We think this testimony is sufficient. The oath of the witness corresponds with the declaration he made when voting, that they were notes indorsed by Lanusse. There is a variance, it is true, between the description given by him of the papers delivered to Tricou, and those produced on trial, but that description is not stated in positive terms, nor can we believe him unworthy of credit. From the amount of the notes produced, there must be deducted $6130, which he states in his original declaration, he received on account of the obligations held by him. This leaves a balance due of $16,870, for which sum he is entitled to vote.

The next is the claim of the wife of the insolvent, which has been most obstinately disputed.

East'n District.
July, 1822.

PLANTERS' BANK & AL.
vs.
LANUSSE & AL.

She has attempted to establish it—by the last will and testament of her father—by the inventory of the property left at his decease—by an account current between her husband, and B. Macarty her brother, in their capacity of testamentary executors of her ancestor, J. B. Macarty—by sales between his heirs of different portions of the property descended to them—and by various deeds made by the executors aforesaid, in which they state the objects sold by them to have proceeded from the estate of her father.

To this it is objected.

1st. That she has not renounced the community of *acquests* and gains.—Second, that the books of her husband produced by her shew that only $45,000 were due, and that she must be bound by evidence which she has presented in support of her claim. Third, that the documents on which she relies are the acts of third persons and cannot affect or conclude those who were strangers to them, and that she cannot have the benefit of the whole price of the sale of the plantation and negroes to her brother, because it was in his possession and that of her husband for years before this transfer, and that no evidence has been offered to shew whether the great in-

crease which has taken place in its value has proceeded from a rise in the property, or from improvements made by the community. In support of the presumption that it results from the latter, they rely on an act introduced by Mrs. Lanusse, which establishes that thirty-four negroes were purchased by Lanusse and Macarty, during the partnership, and placed on the plantation.

I. The renunciation of the community. This point, made by one of the counsel for the opposing creditors, was not much insisted on by the others. It seems to us that the general principle of our law is, that the wife's property should not be made responsible for the husband's debts,—that the provision in the *Civil Code*, which requires her in case of his death to renounce within a certain time, is an exception to this principle—that it ought not to be extended beyond the case there put, and that the rule there contained in the 88th article, page 342 of the same work, which declares that in case of a separation of property she *may accept*, has a much stronger analogy to that now before us.

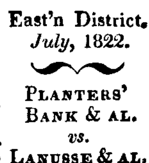
II. The introduction of the books of her husband, and whether the statement there

East'n District.
July, 1822.

PLANTERS' BANK & AL.
vs.
LANUSSE & AL.

made is conclusive of her rights? We think not. The general principle is as stated by the opposing creditors, but this case offers an exception to it. The account shews, that by an account regulated between the executors of her father, the sum of $45,000 was due to each of the heirs; which sum resulted in a great part from the sale of a plantation made by the executors to themselves. This evidence cannot, in our opinion, prove that sale, which from the nature of things, was impossible, and from positive regulations, illegal, 11 *Martin*, 292; the rule therefore relied on, must yield to the more imperative mandate of the law, which will not suffer a married woman to alienate her immoveable property without certain solemnities, among which is not enumerated, the introduction of testimony such as this, on the trial of a cause.

III. The most difficult question this claim presents is, whether she has made sufficient proof that any thing is due to her, and if any, how much. The property was paraphernal, and it is true that the husband is only responsible in case it come into his possession, and was enjoyed by him. *Civ. Code* 334, *art.* 61 *and* 62, *Febrero*, *juicio de concurso*, *lib.* 3, *cap.* 3, §1. *no.* 49, *par.* 4, *tit.* 11, *l.* 17.



We have already seen that the simple acknowlegement of the debtor, or his signature to a note is not sufficient to enable a creditor to vote. *Febrero*, in the number next succeeding that cited in support of this doctrine (*no.* 34,) states, that when with this confession concur "*otros adminiculos*," other circumstances, which destroy the presumption of fraud, this evidence will be sufficient to make the persons adducing it considered as real and *bona fide* creditors.

These expressions, "other circumstances," leave a painful latitude to those who have to decide such cases. As to the claim of the wife, however, we have authority a little more positive. The author just referred to enters considerably in detail, respecting the evidence which she must produce in the *concurso*, and he states in his 7th and 8th conclusion, that when the confession of the husband is "*adminiculada*" it is full proof of the delivery of her dower. He declares by this expression "*adminiculada*" to mean among other circumstances, that which arises from the quality and condition of husband and wife—the promise of dowry preceding the confession of it—the proof of payment of some part of what

East'n District.
July, 1822.

PLANTERS' BANK & AL.
vs.
LANUSSE & AL.

is stated in the act of acknowlegement—the finding among the property of the husband, immoveables which belonged to the wife. *Febrero, cinco juicios, lib.* 3, *cap.* 3, § 2 *no.* 159 *and* 160.

The instances here put, from which the verity of the husbands acknowlegement is presumed are not exactly presented in this case, but it offers others equally strong. The condition of the parties,—the inventory of the father's estate, which shews that he left a large property,—the acknowlegement of the executors that they received it,—various sales by authentic acts made by these executors, years before the failure of Lanusse could have been contemplated—the deed to Macarty for the plantation four years preceding the insolvent's application for a respite; all these are strong circumstances to support the truth of Lanusse's confession, made in a public act, that he received notes, and obligations, and real property in town to the amount of one hundred and thirty thousand dollars in payment for the one half of a plantation, the third of which was the property of his wife.

But it has been urged that in this act of sale there is an acknowlegement that Lanusse

East'n District.
July, 1822.

PLANTERS' BANK & AL.
vs.
LANUSSE & AL.

and his wife received the sum of fifteen thousand dollars, and it is contended, that there is no proof that any part of this was given to him. To this, it may at least be answered, that it is as strong evidence that he received the money as that she did. Taking it most strictly, it establishes that one half was received by each; $7500 by the husband in payment of that part of the plantation which belonged to the community, and the same sum by the wife for that portion which belonged to her;—and so we will consider it.

Lastly, it has been pressed on us that the thirty-four negroes put on the plantation must have augmented in the same proportion with the whole, and in this position we concur. Making this addition to the original cost, there must be deducted the sum of $16,660, which added to the $7500 already stated will leave a balance of $66,962$\frac{33}{000}$, for which she was legally entitled to vote. As to the objection that there may be still further deductions to make for other ameliorations of the husband, the same argument would destroy every other claim, as there may be also set-offs against them.

So that on the whole, we will have notes for

East'n District. July, 1822.

PLANTERS' BANK & AL. vs. LANUSSE & AL

Labatut, Chiapella and Tricou, to the amount of $\$203,832\frac{76}{000}$, and this gives them the majority, admitting the Planters' Bank to have proved their whole demand.

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

Seghers, on an application for a re-hearing.

In the enumeration of the votes in favour of Chabaud & Percy, the court has omitted that of I. & I. D. Forcade of Bordeaux, who voted for $5194 45 cents, by an attorney in fact, whose powers are on record. Their claim is founded on an account current, likewise on record. It is true that the claim is not supported by the deposition of the witness; but, independently of this deposition, the claim rests on the confession of the debtor and his signature to the account, with which concur other circumstances, which destroy the presumption of fraud. The document, no. 12, shews that this claim proceeds from the sale made by Lanusse of a whole cargo, consigned to him by Forcade, and in which he was interested for one-half, and Forcade for the other. This fact, it is believed, destroys every

presumption of fraud: it was not contested at the trial before this court, nor was there ever an objection raised, by any of the adverse counsel, against this claim.

The court has likewise omitted the vote of N. Cox, final syndic of Dutillet & Sagory, for a claim of $10,780. A similar vote was given for Messrs. Labatut and Lachiappella, by D. Bouligny, provisional syndic. Before the notary, and before the court below, both parties claimed the benefit of that vote; which, of course, implies the acknowlegement of the truth of the claim. There was nothing else at issue between them on this subject, than the authority of the voters: on this head we refer the court to our first argument and the document no. 10.

A small error of calculation has been made in adding together the claims of Old, $700; Habine, $13,491 75; Gros, 1617 66; Dennistoun, Hill & Co. $428 28; Townsley, $480—which make the aggregate sum of $16,717 69 cents, instead of $16,616 69. If to this we add the claim of the Planters' Bank, as it is admitted by the judgment of this court $179,084 05, and the two votes above men-

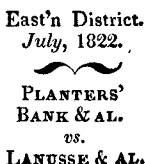
East'n District.
July, 1822.

PLANTERS' BANK & AL.
vs.
LANUSSE & AL.

tioned of Forcade and Cox, we will have a majority in favour of Chabaud & Percy.

According to the principle "that all votes given at the meeting to which opposition has been made, and which are proved alone by the production of the insolvent's notes, and the oath of the creditors who hold them, must be rejected," the vote of Caisergues could not be received. There is no evidence of any consideration having ever been paid for the notes produced in support of his claim; the signatures to those notes are not even proved. His own deposition is the only one introduced on this subject, and he is silent about those particulars. Nothing is adduced to destroy the legal presumption of fraud. It may, perhaps, be observed that this objection was not raised at the trial before this court; but the principle was first invoked by the adverse party, and it must, therefore, the more strictly apply to their own case and to every branch of it—at all events, the observation would only apply to the six notes, amounting together to $14,000, and the objection would remain in full force as to the three others, amounting to $9000, which would reduce his vote to $7870, instead of $16,870—for which this court has admitted it.

East'n District.
July, 1822.



PLANTERS' BANK & AL.
vs.
LANUSSE & AL.

An omission and some mistakes are thought to have taken place in settling the amount for which the vote of Made. Lanusse is admitted by the judgment.

1st. The court has omitted to deduct from her claim one-third of the $8000, which have been paid to, or rather less received from the heirs of Prevost, by the transaction, which is in evidence *sub littera*, *K*.

2d. The court has comprised in their calculation of this claim a sum of $500, which is alleged to be a present made to Made. Lanusse by her grand-mother, and whereof there is no evidence on record.

3d. In deducting $7500, for one-half of the $15,000, paid cash by B. Macarty, as stated in the act of sale to him by Mr. & Mrs. Lanusse, the court grounds this proportion on the part of the plantation which belonged to the community, and on that which belonged to the wife. In this it is thought there is error: one-third of the plantation descended to Made. Lanusse, from her father; one-sixth was bought, by Lanusse, from Edmond; thus their proportions were from two to one, and therefore their shares in the $15,000, must be $5000, for the community, and $10,000 for Mde. La-

East'n District. July, 1822.

PLANTERS' BANK & AL. *vs.* LANUSSE & AL.

nusse; which increases the deduction, of the sum of $2,500.

4th. By the same deed of sale, *sub littera I*, Mr. & Mrs. Lanusse acknowlege to have received, jointly, an additional sum of $25,000, in a house and its dependencies, situated in New-Orleans. This is clearly a *remploi* for so much; and as there is no evidence on record that the husband disposed of the house, his wife has no claim on him for her proportion in that amount; she must still be considered as the owner of the two-thirds of that house, and her claim must consequently be reduced in that proportion; that is, for the two-thirds of the $25,000, the price of the same.

5th. The court allows a deduction from her claim of $16,660, for her proportion in the thirty-four negroes put on the plantation by Lanusse, calculated on the price of the sale to B. Macarty. Here we must be permitted to urge again an argument set forth in our observations, and which seems to have been overlooked. The claim of one-third or two-sixths of Madame Lanusse on the plantation and slaves, does not extend further than to what descended to her from her ancestor. To prove in what it consisted, she brings forth the

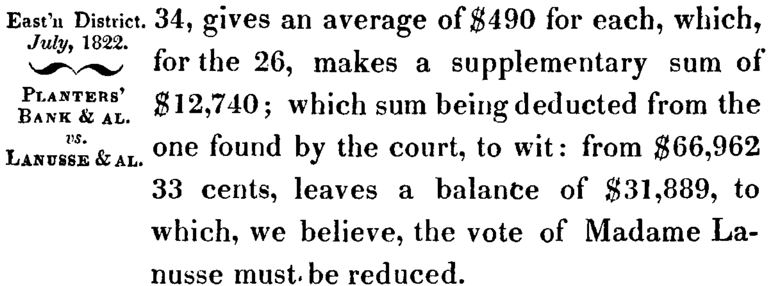
East'n District.
July, 1822.

PLANTERS' BANK & AL.
vs.
LANUSSE & AL.

inventory in which the slaves are designated by their names. It is in evidence, by her own documents, that many of them were sold and accounted for by the executors—many may have died between the date of the inventory and that of the sale to B. Macarty. The presumption is, that they have been replaced by the partnership of Lanusse & Macarty. Of this, it is true, we have no evidence, nor could we procure it, but we need none. The deed of sale to B. Macarty sufficiently evinces the fact. There 130 negroes are sold, and it is there stated that they descend partly from the father of Madame Lanusse, and come partly from purchases made by Lanusse and Macarty. It was then necessary to establish the number descending from the father, to compare their names with those of the inventory, and by this comparison it will be found that 70 only of that description remained at the time of the sale. Hence, it follows, that the 60 others belonged to the partnership of Lanusse & Macarty, and thus, that the court, in deducting the proportion of Madame Lanusse in the value of 34, made an omission of 26, in whose value she owes also her proportion. The sum of $16,660, allowed for the

East'n District. *July*, 1822.

Planters' Bank & al. *vs.* Lanusse & al.



34, gives an average of $490 for each, which, for the 26, makes a supplementary sum of $12,740; which sum being deducted from the one found by the court, to wit: from $66,962 33 cents, leaves a balance of $31,889, to which, we believe, the vote of Madame Lanusse must be reduced.

Porter J. delivered the opinion of the court. If we were to admit the claim of Fourcade, because it is supported by other circumstances, we would be obliged also to admit that of Tricou & sons, and others in favor of the appellees, which would make the balance against the appellants still larger.

The vote of the definitive syndic for Chabaud & Percy, cannot be received, because the provisional syndic voted for Labatut and Tricou. It is an admission between those parties as to the amount, but it certainly does not conclude other creditors.

The error in the addition of $107, does not vary the result as the majority was established by more than 7000 dollars.

The bill of exceptions taken in the court below to Caissergues' evidence, having been withdrawn, he was a good witness; especially

under the declaration made by him on oath, that he had no interest in the matter in dispute.

The proportion of madame Lanusse in the sum of 8000 dollars, which formed the subject of the compromise with the heirs of Prevost, entered into our calculation, and was deducted.

We did not take into view the donation from the grand-mother.

The construction put on the receipt was a strictly legal one; it was given by husband and wife, jointly; and if we even yielded to the construction of counsel, there would still be a majority for appellees.

The title to the house was made to the husband by the wife's consent; he accepted it, and thereby became accountable for the price.

We refer to the opinion for our understanding of the law on the question on whom the burthen of proof was thrown as to the improvements—if, in truth, any such were made. We do not think that it was the duty of the wife to furnish evidence of them. She satisfied the terms of the deed from herself and husband to Macarty, which states that the slaves descended partly from her father, and

East'n District. July, 1822.

PLANTERS' BANK & AL. *vs* LANUSSE & AL.

were partly purchased by Lanusse and her brother, when she produces a bill of sale of thirty-four negroes, put there during the partnership, and gives credit—if she had proved 20 more, the same objection could be still made—that there might be some more.

There is not any thing offered which was not considered; for we thought the equity of the case, with the appellants, and the appellees only prevailed from the strength of their legal rights.

The rehearing is refused.

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

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, AUGUST TERM, 1822.

West'n District.
August, 1822.

HILL
vs.
MARTIN.

HILL vs. *MARTIN*.

The endorsee of a promissory note, or bill of exchange, cannot write over a blank endorsement an obligation, which will discharge him from the necessity of due diligence in making demand and giving notice.

It is not sufficient to excuse want of notice—that the endorser was not injured by the neglect.

The endorsee who receives a note after it is due, is obliged to demand payment, and give notice within the

APPEAL from the court of the fifth district.

PORTER, J. delivered the opinion of the court. The plaintiff avers, that the defendant executed an obligation in his favour for $400, and transferred to him, by endorsement, two promissory notes of one John Woods for $200 each. The petition neither states a demand on Woods, his refusal to pay, or notice to the appellant; but, on the allegations just stated, prays judgment.

The answer, besides a general denial, contained the following pleas:—

West'n District.
August, 1822.

HILL
vs.
MARTIN.

same delay, as if the paper was negotiable.

That if the money had not been received from Woods, it was through the fault of the plaintiff.

That the notes were transferred as cash.

And that the negro slave received, in consideration of them, was afflicted with redhibitory defects.

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

The last ground of defence set up in the answer, was abandoned in argument; and it has been admitted, that the plaintiff is entitled to judgment on account of the obligation executed by the defendant.

From the statement of facts it appears, that one of the notes, made by Woods, was transpired six months after it became due, and that the term of payment of the other had not expired.

At the trial the plaintiff wrote over the endorsement, which was in blank, as follows:— "I will pay to Samuel Hill the amount of this note, if not paid when demanded by him, to whom I assign this note."

It was proved by the testimony of Mills, that the plaintiff left in his possession the two notes drawn by Woods, whom he notified of

the transfer, and that he should shortly call on him for the amount. That some time after, about the 22d or 23d of December, 1820, he demanded payment, which was refused; and that in the month of April, 1821, he notified the defendant of this demand and refusal. The notes had been transferred in June, 1820.

On these facts the plaintiff contends, the judgment of the court below should be confirmed. Because,

1. The endorsement on the back of the note shows a special obligation, which makes the appellant responsible.

2. There was not any laches either in making demand of payment, or in giving notice.

3. If there was, he has shown the defendant was not injured by it.

I. Conceding that the obligation, inserted over the name of the plaintiff, takes the case out of the general rule, and increases the responsibility which would have resulted from an endorsement in the common mode, it becomes necessary to ascertain if the appellee had a right to make it.

To show that he was authorized to do so, he has cited a decision given in one of our

West'n District.
August, 1822.

HILL
vs.
MARTIN.

sister states, where it was held, that on an assignment in blank, of paper not negotiable, it was lawful for the assignee to write over it an unconditional obligation in his favour for the amount specified in the instrument. 3 *Massachusetts Rep.* 274.

We are unable to gather from the report the principle on which this decision was made; and, at all events, we cannot consent to apply such a rule to the case now before us. Bills of exchange and promissory notes are governed by laws peculiar to themselves, which have grown out of the usages and customs of commercial nations. The negotiability of these instruments is highly conducive to the ease and increase of trade; and as the principles by which they are now regulated, eminently promote that end, it is of importance they should be strictly pursued. The endorser of an accepted bill of exchange, or promissory note, enters into a conditional contract that if the acceptor, or maker, does not comply with his obligation at the time promised by him, he will, on being duly notified according to law, discharge it—*Chitty on Bills* (*edit.* 1809) 312. This endorsement may be made in blank, and it is the most

usual mode. Admitting that the mere writing the name of the payee on the back, does not transfer his interest and property in the bill, (though the contrary has been decided in this court—4 *Martin*, 662, 9 *id.* 469)—that, by the law merchant, something more is necessary to make it complete, and may be inserted by the person into whose hands it shall come; that right to complete the endorsement cannot be construed to confer a power different from what the parties contemplated. It is an universal principle, that contracts must be presumed to be entered into with relation to the laws that govern them, in reference to their subject matters; and that they should be so construed, by courts of justice, as to carry into effect the views and intentions of the parties. *Chitty on Bills*, (*edit.* 1809) 77—*Civ. Code*, 270, *arts.* 56, 63.

Until the contrary is shown, we are bound, therefore, to presume, that the endorsement, in this case, was made in reference to the *lex mercatoria*, which authorizes the holder to fill up the endorsement by making it payable to himself—*Chitty on Bills*, (*edit.* 1809) 103. We can find no case, except that cited by counsel, which declares that the endorsement may be

West'n District. *August*, 1822.

HILL *vs.* MARTIN.

written out in such a manner, as to discharge the endorsee from the necessity of due diligence; and it would destroy all confidence in commercial transactions of this kind, if such a doctrine received our sanction.

II. and III. The plaintiffs read from *Chitty*, 151. to show that, when the endorser was not injured by want of notice, the laches to give it was cured. This rule is stated in a note to the edition of 1809, but it is not law. It is true, the drawer of a bill of exchange, who has no effects in the hands of the drawee, has not a right to require notice in case acceptance is refused. This, however, is an exception to the general principle, and it has been doubted if it should not be given even in such a case on non-payment. Be that as it may, it is very clear that the endorser of a promissory note is entitled to strict notice; it was so held by the supreme court of the United States, after a very full examination of all those cases which, at one time, seemed to have a tendency to introduce the doctrine, that, if the party was not prejudiced by want of notice, he could not require it. 4 *Cranch* 154,—2 *Phillips' Ev.* 37—3 *John. Ca.* 7.

In the case before us, the note negotiated in

West'n District.
August, 1822.

HILL
vs.
MARTIN.

June, which fell due on the 15th December following, was not demanded in payment until the 22d or 23d of that month, and the endorser was not notified before the month of April then ensuing. This, in our opinion, is not sufficient; the condition on which the endorser becomes liable is, that payment should be demanded in a reasonable time, and notice given of the refusal without delay. 11 *Martin*, 452.

As it respects the note, which was endorsed after it became due, we have come to the same conclusion. The transfer necessarily implied, that the plaintiff undertook to demand payment; and, if that payment was refused, to give notice to the defendant. That demand and notice must be within the period already fixed by law. If we were to relax the rule in this case, we must do it in others; and thus introduce uncertainty and confusion in a subject where it is highly advantageous to the public there should be neither. The act of endorsing a bill is similar to that of drawing— *Chitty on Bills*, 117; and the obligation thus created, the same. It is said in a late work of great authority on the subjects of which it treats, " that a note, when it has been endorsed

and transferred, is exactly similar to a bill of exchange; it is an order by the endorser on the maker to pay the endorsee, which is the very definition of a bill: the endorser is the drawer, the maker of the note the acceptor, and the endorsee the person to whom it is made payable"—2 *Phillips' Evidence*, 10, 17. The supreme courts of Connecticut, New-York, and the United States, have all recognised this analogy—2 *Conn.* 419—9 *Johnson*, 121—4 *Cranch*, 154. If the bill thus endorsed is due, it is equivalent to drawing at sight. The length of time that the funds are in the drawer's hands, (whether established by a note, of which the term of payment is expired, or by other evidence,) cannot affect the obligation which the endorsee contracts to give notice in case he is not paid.

Where a note was passed five years after it became due, it was held, that notice must be given as in an ordinary case; that the law merchant made no distinction; that it was equivalent to drawing a new bill—9 *Johnson*, 121; and so it has been decided in a similar case, 2 *Conn.* 419.

We think that there was such laches in the plaintiff holding this bill, from June to

West'n District.
August, 1822.

HILL
vs.
MARTIN.

the month of April following, as have discharged the defendant from the responsibility created by his endorsement.

If we were to consider the transaction as one not commercial, the plaintiff's claim would be still less supported; it would then be governed by that article in the code which provides, that he who sells and transfers a debt, warrants its existence, but does not guarantee the solvency of the debtor. *Civil Code*, 368. *art.* 126.

It is therefore ordered adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the plaintiff do recover of the defendant the sum of four hundred dollars, with interest at ten per cent. from the 26th June, 1820, until paid, with costs in the district court, and that the appellee pay the costs in this.

Brent for the plaintiff, *Baker* for the defendant.

BONIN & AL. vs. *EYSSALINE.*

12m 185
50 876
12m 185
113 1053

APPEAL from the court of the fifth district.

A. having discovered that B. had sold him land, to which

This was an action for the rescission of a

West'n District.
August, 1822.

BONIN & AL.
vs.
EYSSALINE.

he had no title, gave notice, he would not pay the price, and require a rescission. Before service of the citation on B., a family meeting, being of opinion that the land could not conveniently be divided, recommended the sale of it. At the auction which followed, B. purchased the land.

Held that, although it did not appear, that the heirs of age had provoked a division or a sale, B. was equally protected, as if the sale had been forced on the minors: the tutor having been a party to the proceedings, and that the sale was legal; and B. having acquired a good title before the service of the citation, might well resist the plaintiff's claim.

sale of a tract of land, on the ground that the vendor had sold the thing of another; that the sale was fraudulent; and that the land was dotal.

The defendant pleaded the general issue—that the plaintiff Bonin, immediately after the sale, took possession of the land sold, and still retains it, without ever having been disturbed: and he tendered security for any damages resulting from a legal eviction.

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

The facts of the case are, that in March, 1820, the defendant sold to the plaintiff, Bonin, a tract of land of 14$\frac{2}{3}$ arpens, in front on the Teche. In December, following, the plaintiffs having discovered, that they had purchased what did not belong to the vendor, gave public notice of their intention to procure the rescission of the sale, and the restitution of the notes given by Bonin, for the price, endorsed by the other plaintiff.

A few days after, a family meeting, composed of the friends of the minors Dumartrais, was called; and was of opinion, that a tract of land, mentioned in its proceedings, could not be conveniently divided, and that it therefore

was proper to sell it for cash, and to divide the price. The under tutor did not intervene, and on the next day, (*Dec.* 28,) the judge of probates homologated the proceedings: and on the 21st of March, the land was adjudged to the defendant for $6000.

At the time of the sale of the defendant to the plaintiff, Bonin, the 14⅔ arpens sold, were four undivided parts of a tract of 22 arpens, owned in equal parts by C. Gravenbert, the minors Dumartrais, in right of P. Gravenbert, their mother, and F. F. Gravenbert, the defendant's wife, as part of her dower.

Brent, for the plaintiffs.—I. The defendant sold the thing of another. The land made part of his wife's dower. Neither he nor she could sell it; neither could both jointly. *Civil Code*, 328, *art.* 36.

II. If the land sold was the property of another, the sale is null. We find what a sale is in *Civil Code*, 344, *id.* 236, *art.* 63, 260, *art.* 8, 262, *art.* 9, 264, *art.* 31, 33. *Pothier*, *Vente*, 6, 18, 42.

In sales good faith ought to exist, and the seller ought to retain nothing of the titles. 1 *Pothier*. 232 & 234. *Civ. Code*, 356, *art.* 66.

West'n District.
August, 1822.

BONIN & AL.
vs.
EYSSALINE.

If the purchaser discover that the property does not belong to the seller, he can have the sale rescinded. 1 *Pothier*, 239—*Civil Code*, 354, *art.* 59, 356, *art.* 62 & 63. The want of title is a redhibitory defect, for which the sale can be cancelled. *Civil Code*, 356, *art.* 65, 67 & 70. 12 *Pandectes Françoises*, 268. It is not necessary that an actual eviction should take place, a danger of being disturbed is sufficient. 3 *Martin*, 236, 235 & 336.

Neither the husband nor the wife can sell dotal land; and when the law prohibits any thing to be done, if it be, the act is null. *Civ. Code*, 4, *art.* 12. Consequently, the sale of dotal land by the husband is null. Such has been the interpretation given to an article in the Napoleon Code, precisely the same as the corresponding one of that in ours. *Nap. Code*, 1554 & 1560. 18 *Jurisp. Code Civ.* 169. And such is the doctrine laid down by *Domat*, 47, 48. *contract of sale*, *tit.* 11, *sect.* 8, *p.* 8.

In this state the law prohibits the sale of dower land, *Civil Code*, 328, *art.* 36, and no sale contrary to law is valid. *id.* 4, *art.* 12.

III. If the sale was null, or if it ought to be rescinded, the district court erred in giving judgment for the appellees.

If it was void, as to part, it must be avoided as to the whole. *Civ. Code*, 350, *art.* 60, 356, *art.* 65—72.

An actual eviction by suit is not necessary; *id.* 354, *art.* 50. The law requires a suit in ordinary cases, as the only mode of ascertaining whether the property belongs to a third person. It is to establish this fact; but in the present case it is not necessary, because the fact can be established in another and as certain a manner, *i. e.* by the proof of its being dotal.

If the suit be necessary in the present case, there is no person to bring it. The wife can sue after the death of her husband only; and before this the money might be squandered, and where could the plaintiffs have relief? *Civil Code*, 330, *art.* 30.

It is admitted, that if Eyssaline knew that the land belonged to his wife; the sale was fraudulent and ought to be rescinded. To prove this knowlege, it suffices to refer to the marriage contract, and to the subsequent proceedings, which he thought proper to refer to, in order to acquire a title. If he did not know that he had no title when he sold, why did he deem it necessary to take these steps?

West'n District. August, 1832.

BONIN & AL. vs. EYSSALINE.

It is enough for the plaintiffs to show, that when the defendant made the sale, the property was not his, and he knew it. This they have proven, as clearly as the nature of the case will admit.

The subsequent proceedings, to which the defendant resorted, are not binding on the plaintiffs, without their consent; nor are they according to law. They have derived no title from these proceedings, because Mrs. Eysaline was not a party to them; because there was no order from the judge, for the express sale of the property; because the family meeting was not composed of relations of the minors Dumartrais, but of strangers, while it is in evidence that their uncle was living, and could have been had; because, no valuation preceded the sale, as is required in all cases in which minors are concerned.

The extent of the defect of the defendant's title is perfectly immaterial. If he had no title to one half, and a good title to the other, the sale must be rescinded for the whole. For the plaintiff had no intention of purchasing one half of the land only.

Cuvillier, on the same side. The sale of the defendant to the plaintiff Bonin, is null.

We are not to inquire, whether the defendant sold, as the agents of the owners, and for their account, or in his own right. Had he sold as agent, it is clear that the ratification of the owners would have imposed on the vendees the obligation of performing their part of the contract. If he sold in his own right, the plaintiffs have a right to claim a rescission of the sale; for the sale of the thing of another is null. *Civ. Code*, 349, *art.* 18.—*Jur. Code Nap.* 191.

The adjudication made to the defendant, one year after his sale to the plaintiffs, is null.

After the plaintiffs had openly declared their intention to insist on the nullity of the sale, the defendant procured, what he terms, a family meeting, in which the under tutor did not intervene. The meeting determined, that the land which was held by the minors Dumartrais, C. Gravenbert, and the defendant's wife, should be sold for cash. It was sold to the defendant.

This sale, we say, is null: for it was not attended with the formalities which the law prescribes. The land of a minor (or that in which he is interested) can be sold judicially only. *Civ. Code*, 187, *art.* 166.

West'n District.
August, 1822.

BONIN & AL.
vs.
EYSSALINE.

When several persons, either of whom is a minor, have an undivided property in land, application for a division must be made to the court, who directs a valuation of the land. *Id.* 187, *art.* 167. In the present case, such valuation was not made. The interest of the minors is, therefore, unaffected by the adjudication.

The land was dotal, and the husband could not alter it, even with the consent of the wife. *Civ. Code*, 330, *art.* 40.

The sale to the plaintiffs is a fraudulent one; as the vendor knew he was selling what did not belong to him; as one half of the land is not worth any thing, and the vendor did not inform the vendee of this; as, if he really purchased the part of C. Gravenbert, he ought to have given his title to his vendee.

The defendant knew the land did not belong to him, because it was the property originally of his father-in-law, at whose death it descended, in three undivided parts, to his wife, C. Gravenbert, her brother, and the minors Dumartrais.

When one knowingly sells the thing of another, the vendee may demand the rescission of the sale, if he was ignorant of it. 12 *Pand. Fr.* 269. *Poth. Vente.*

The defendant sold fourteen arpens and two thirds of land, without apprising the vendee, that a part of it was of no value. Judice deposes, that the front of the tract is of value to the depth of six arpents in depth: at this distance, the swamp begins. The land, in the proceedings after the death of the vendor's father-in-law, was estimated at $2500 only, and he exacted of the plaintiff the sum of 8000.—The sale was, therefore, fraudulent; and in case of fraud, the rescission of the sale may be demanded before the vendee be disturbed.

Brownson, for the defendant. It is contended that the land sold in the present case, was the thing of another; and that the sale is therefore void—the defendant denies the fact. He contends, that one half of the tract was vested in him by marriage contract, and that the other half was acquired by sale from Gravenbert.

Formerly, mere estimation operated as a sale to the husband. 6 *Martin*, 659.

Since the adoption of the *Civil Code*, mere estimation does not transfer the property, unless accompanied by an express declaration to that effect. *Civ. Code*, 328, *art.* 34.

But in this case the dotal object is not the

West'n District. *August*, 1822.

Bonin & al. *vs.* Eyssaline.

property, but the *price*. The expression of the marriage contract is, that the property of the wife consists: "*en une somme de quatre mille neuf cent vingt une piastres, quatre vingt trois centimes,*" *&c.* "*etant en valeur d'esclaves, bestiaux, terres,*" *&c.* referring to an act of partition for a description of those objects. The law says, estimation does not transfer the property, "unless there be an express declaration." But does it say, that any express declaration is necessary, when the *price* is settled as dowry? If the object of the dowry is *property*, mere estimation furnishes no proof that the wife intended to make the husband responsible for the *price*, in case the *property* should perish or be lost.—But when the *price* itself is constituted as dowry, it is a pretty strong indication that the wife intended to secure its return, instead of the *property*. It shows, at all events, that the minds of the parties were fixed strongly on the *price*, and not so strongly on the *property*. It shows that the *price* is the principal object of attention and that the *property* is merely the accessary. What strengthens this construction is, that by a subsequent clause in the same contract a favourite slave with her child, the wife, it would seem, did not intend to transfer, are

constituted as a part of the dowry in the ordinary way, without any "express declaration."

In regard to the other moiety of the land sold, an objection has been started in this court to the evidence, which was furnished by the plaintiff himself, in the court below, of the title derived to Eyssaline from Charles Gravenbert. As I presume, a party cannot be permitted to object to his own evidence, it is unnecessary to enter into the question which the plaintiff now raises. To prove that the plaintiff himself introduced as evidence the document alluded to, I refer the court to the statement of facts, in the case of *Fusilier* vs. *Bonin & Chretien.*

The court will see, from the statement of facts, that the sale from Eyssaline to Bonin, took place on the 18th of March, 1820; that Bonin went immediately into possession, and that he has never yet been disturbed, by any adverse claim. It is pretended, however, that the defendant did not give him a title, to at least one half of the thing sold, and that the sale is, therefore, void. The *Civil Code* is cited, 348, *art.* 25, which says, that the sale of a thing belonging to another person is null. This is an abstract proposition, which it becomes neces-

West'n District. *August*, 1822.

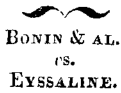
BONIN & AL. *vs.* EYSSALINE.

sary to examine. Does it mean, that the sale is so absolutely null, as to produce no effect between the parties? Or does it mean, that the sale is null as regards the owner of the thing? The former cannot, it appears to me, be its meaning, because it would be at variance with the rest of the article, which says, that "it may give rise to damages, when the buyer knew not that said thing belonged to another person." The article surely cannot mean to say, that the sale, though null with regard to the parties, may give rise to damages. This would be a contradiction in terms; because what is null absolutely, can produce no effect between those, in respect to whom it is null. I should suppose that the article means, that the sale is null in a certain sense, that is, so as not to operate a transfer of the property against the real owner; but that it is not null in a certain other sense, as respects the parties; but that between them it may give rise to damages. Such appears to have been the opinion of a commentator, on *art.* 1599, of the *Napoleon Code*, from which the article of our *Code* has been literally copied. I refer the court to a work entitled, "*Discussions of the Napoleon Code*," 3 *vol.* 452, *art.* 1598 & 1599; where the

following remark will be found. "*Au surplus, il resulte de l'article tel qu'il est énoncé maintenant que la vente de la chose d'autrui n'est nulle qu'en ce sens, qu'elle ne peut pas opérer la translation de propriété de la chose vendue, mais qu'elle est valable en ce sens qu'elle produit l'action de garantie.*"

It will, perhaps, be objected against the interpretation, that it was unnecessary for the legislature formally to declare, that the sale of the thing of another should not be binding against the real owner. That this principle is too plain, ever to have been doubted, and that legislation on the subject was unnecessary. In answer, I say, the subject was not so perfectly clear of doubt in the *Roman law.* I refer the court to the following text:—"*Si Presidi provinciœ probatum fuerit, Julianum nullo jure munitum, servos tuos scientibus vendidisse, restitueri tibi emptos servos jubebit. Quod si ignoraverint, et eorum facti sunt, pretium eorum Julianum tibi solvere jubebit.*" *Cod. lib.* 4, *tit.* 57, *l.* 1. Here we see a distinction was made. If the purchaser knew that the slaves did not belong to the vendor, he was bound to restore them to the owner. If he did not know that fact, and they had been delivered, the owner recovered the *price* from the vendor. Does not this strongly im-

West'n District. *August*, 1822.



BONIN & AL. *vs.* EYSSALINE.

ply, that the law would protect purchasers in good faith, though, the property sold did not belong to the vendor? And yet, this was not really the *Roman law*, as will be seen on consulting the following authorities. *ff.* 50, 17, 54. *Id.* 18, 1, 4, 5, 28 & 70.

The true doctrine of the *Roman law*, on the subject of sales, appears to have been, that the sale of the thing of another, was good between the parties, to the contract, unless the purchaser knew, at the time of the sale, that the thing did not belong to the vendor, in which case it was merely void, and the purchaser had no recourse on the warranty. Perhaps a disposition among the *Roman lawyers* to theorise and refine, may, at times, have betrayed them into a stiff and artificial manner of explaining those deep and solid principles of natural justice and equity, which they have been so successful in delevoping. Perhaps too, in some cases, we may be disposed to complain, without much reason, and in attempting to avoid *their* errors, we may run some risk of falling into others, still more dangerous. If we had fallen by accident, upon the proposition to be found in the *Roman law*, that " the sale of a thing of another is

West'n District.
August, 1822.

BONIN & AL.
vs.
EYSSALINE.

valid," without any of the accompanying explanations or restrictions, we should probably be struck with the injustice and absurdity of the principle. But when we come to learn, that the expression is only applied to the engagements arising between the parties, and not to the rights of him whose thing has been sold, we should probably view the subject in quite a different light. The same proposition, which might have appeared to us so objectionable in the abstract, when it comes to be explained in the correct, comprehensive, and satisfactory language of *Pothier*, loses all its obnoxious features, and we are immediately satisfied with the reason and justice of the principle. Thus, *le contrat de vente est un contrat par lequel l'un des contractans, qui est le vendeur, s'oblige envers l'autre, de lui faire avoir librement, à titre de propriétaire, une chose, pour le prix d'une certaine somme d'argent,"* &c. "*J'ai dit, de lui faire avoir à titre de propriétaire, ces termes qui repondent à ceux-ci, praestare emptori rem habere licere, renferment l'obligation de livrer la chose à l'acheteur et celle de le defendre, apres qu'elle lui a été livree, de tous troubles, par lesquels on l'empêcheroit de posséder la chose et de s'en porter pour le propriétaire; mais ils ne renferment pas l'obligation précise de lui en transfér-*

West'n District. *August*, 1822.

BONIN & AL. *vs.* EYSSALINE.

er la propriété: car un vendeur, qui vend une chose dont il se croit de bonne foi être le proprietaire, quoiqu'il ne le soit pas, ne s'oblige pas precisément à en transférer la propriété."—*Contrat de Vente*—preliminary article. Again—"*On peut vendre valablement non seulement sa propre chose, mais même la chose d'autrui, sans le consentement de celui qui en est le propriétaire. Il est vrai que celui qui vend la chose d'autrui ne peut pas, sans le consentement du propriétaire, transferer la propriété de cette chose qui ne lui appartient pas.*" "*Mais le contrat de vente ne consiste pas dans la translation de la propriété de la chose vendue; il suffit pour qu'il soit valable que le vendeur se soit valablement obligé de faire avoir à l'acheteur la chose vendue, et l'obligation qu'il en contracte, ne laisse pas d'être valable, quoiqu'il ne soit pas en son pouvoir de la remplir, par le refus que fait le propriétaire de la chose, de consentir à la vente.*" *Id. n.* 7.

The compilers of the *Napoleon Code* seem to have been dissatisfied with the abstract rule of the *Roman Law*, that "the sale of the thing of another is valid." They seem to have considered the theory absurd, and one which might lead to mistakes in its application. They wished to avoid the subtleties and nice distinctions which they imagined they perceived in the *Roman Law* on this subject, and to

West'n District.
August, 1822.

BONIN & AL.
vs
EYSSALINE.

adopt a legal phraseology which they considered more simple and natural. Prompted by these considerations, the *article* 1599 of the *Napoleon Code* was proposed at first as a project in a form somewhat different from that, which it possesses at present, was discussed in the council of state, and finally passed into a law in its present shape. We can collect from the whole discussion, which took place, that even under the ancient laws, it was believed that the sale of the thing of another was really null in regard to the owner of the thing—Yet, as there appeared to be some contradiction in some of the texts of these laws, and as the council were dissatisfied with the whole theory on the subject, thinking it gave rise to unnecessary and embarrassing subtleties and distinctions, it was thought that the article proposed would simplify the matter, and make it more intelligible, *Discussions of the Civil Code*, 2 *vol.* 457.

M. Tronchet, one of the council, observed, "*on a voulu également écarter les subtilités du droit Romain, car il est ridicule de vendre la chose d'autrui.*" Whether the council have attained the object of their wishes by the article in question, and whether they have not increased rather

West'n District. *August*, 1822.

BONIN & AL. *vs.* EYSSALINE.

than diminished the embarrassments which existed under the ancient laws, may well be doubted. However this may be, one thing I think is evident, which is, that in changing the theory, they did not intend to change the practical rules of the ancient laws. When those laws say, that the sale of the thing of another is valid, the expression is used, as I have before shown, in reference to the obligations between the parties. As between them the sale was considered valid, it followed as a consequence from the theory, that it gave rise to the obligations of warranty. It bound the vendor to delivery, and warranty. It compelled the vendee to pay the price, according to the stipulations contained in the contract. It was, indeed, the basis of all the obligations between the parties. There was, to be sure, one case in which the ancient system regarded the sale as null, even between the parties; and that was, when the purchaser knew that the thing sold did not belong to the vendor. The sale was then pronounced simply void, and, of course, could give rise to no action on the warranty.—The vendee might probably have recovered the price, alleging it to have been paid with-

West'n District. *August*, 1822.

BONIN & AL. *vs.* EYSSALINE.

out consideration, but would not have been entitled to damages.

Now let us consider the consequences of our own legislation. The *Napoleon* and our *Code* declare, that the sale of the thing of another is null. But they go on to provide that, notwithstanding this nullity, it may give rise to damages "when the buyer knew not that said thing belonged to another person." This is the same as if they had declared that, though null for one purpose, it is valid for another. It is null, in fact, in regard to the owner of the thing sold. It can have no possible effect upon his rights. He may bring suit against the purchaser, and the latter cannot avail himself of a sale from one having no right to sell. But in regard to the seller. the case is different. He has entered into certain obligations, which he must be bound by. Among the chief of these, are delivery and warranty.—*Civil Code*, 348, *art.* 21.—When our *Code* calls such sales null, it speaks in reference to the owner of the thing. When the *Roman law* calls them valid, the expression is used in reference to the parties. Our law, makes the vendor liable to damages in case of eviction. The *Roman law* did the same.

But then there is this difference, that in the *Roman law*, this right to damages was a theoretical consequence, resulting from the breach of a valid contract; whereas, in our *Code*, the contract is called null, but damages are expressly given by statutory provision, and without regard to theoretical consistency. Ours is the *Roman law*, without its theory. Like the *Roman law*, it takes away all right to damages when the vendee knew, that the thing sold did not belong to the vendor; and like it, probably it might in the last case, give an action to recover the price, as being paid without consideration. No change has, therefore, as I conceive, been produced by the adoption of the *Napoleon*, or our own *Code*, in regard to the practical effects of the contract of sale. I conceive, that these contracts still give rise to the same obligations between the parties, are to be carried into execution in the same way, are subject to the same limitations, and restrictions, as prevailed in the *Roman laws*, and are protected by the same sanctions. Indeed, how is it possible to call these contracts absolutely, and to all intents and purposes, null; speaking in reference to the parties, when they are yet, as they were

formerly, the basis of all the obligations between those parties? What does the vendee resort to for his recourse, in case of eviction? Is it not the warranty contained in the contract? How could he, with propriety, lay his case before a court, except by referring to this contract? What could he complain of? Is it not that the vendor, by the contract of sale, undertook to warrant him against eviction, and that in violation of this promise, he has suffered him to be evicted? And, I should be glad to know, how a man can be liable to damages, for not observing a contract which is null; that is, which is the same as if it did not exist? If the breach of a contract can produce damages, I should suppose it was sufficient proof that it could not be null; certainly, with regard to those against and in favour of whom it might produce damages. The contract may, with perfect propriety, be called null, in regard to the owner of the thing sold; because, in regard to him, it can produce no possible effects. But in respect to the parties, the case is widely different. The law does not, with regard to them, consider the contract of sale the same, as if it did not exist. The plaintiff himself must admit,

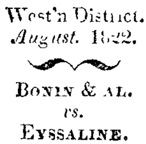
West'n District.
August, 1822.

BONIN & AL.
vs.
EYSSALINE.

that, as to the seller, it produces the obligations of delivery and warranty—*Civil Code*, 348, *art.* 24;—and as to the buyer, the obligation of paying the price—*Ibid.* 360, *art.* 82.—The law could not intend to say, that these obligations only exist, when the thing sold really belonged to the vendor; because, in that case, there never would be occasion for one of these obligations, that of warranty against eviction. The vendor warrants against *legal* evictions, not *illegal* ones; and if, at the time of the sale, he was the real owner of the thing sold, it is obvious there could be no *legal* eviction. The vendee being possessed of the vendor's title, and that being a good one, as would be the case if the vendor were the real owner at the time of the sale, it is plain that the vendee could never be evicted by a title *better* than his own; and consequently, could never be *legally* evicted. It is only when the vendor is not the real owner of the thing sold; and consequently, when he sells the thing of another, that there is any possible occasion for the obligation of warranty. It is only in *that very case*, and *in no other*, that the law has given rise to the obligation of warranty, and to an action for the breach of it.

I have dwelt somewhat at length upon this point, because the article 1599 of the *Napoleon Code* has produced a decision in one of the provincial courts of France, which is absolutely at variance with the ancient laws, and which is justified, or attempted to be justified, by a supposed change in the law, occasioned by that article. The case I allude to, is one decided by the appellate court of Rions, cited from a work, entitled 18 "*Jurisprudence du Code Civil*," 169. The decision took place in 1810, and the opinion of the inferior tribunal was reversed. It will be seen, however, that it was a case of the first impression; and that in the reasoning of the judges, there is no reference to authorities; no examination of the ancient laws. The editor, in a note at the head of the case, remarks, that there is another decision reported in the *15th vol. of the same work*, 139, "*qui est basée sur d'autres principes que ceux qui ont été adoptés dans l'espèce suivante, et qui nous paroissent préférables.*" As the *15th vol.* is not now within my reach, I am obliged to content myself with the above reference to it.—I do not deny that the opinion of the court of Rions supports the pretensions of the plaintiffs. But I will oppose to the au-

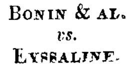
West'n District. *August.* 1822.



BONIN & AL. *vs.* EYSSALINE.

thority of that case, another reported in the 17*th vol. of the same work*, 437-8-9.—A suit was brought by the purchaser to annul a sale, made to him by a natural tutor, of real property belonging to his ward, and which had been sold by the tutor, without pursuing any of the formalities required by law for the validity of such sales. The cause having been decided against the plaintiff in the court below, an appeal was taken to the appellate court of Turin, where the judgment below was confirmed. It was contended in that case, as it is in this, that the vendor had sold the thing of another; that the sale was in contravention of the article 1599 of the *Napoleon Code*, and was therefore void. The court had occasion particularly to examine the ancient laws, to inquire how far those laws on the subject of sales had been altered by the *Napoleon Code*, and whether any radical change had been produced by it. Their opinion may pretty clearly be gathered from the following observation—*page* 439. "*Ce n'est pas apporter des limitations a l'article* 1599, *et moins encore le rendre illusoire, que de classifier le contrat dont il s'agit sous sa vraie nature et de le demontrer etranger à ces dispositions. mais c'est eviter d'étendre à*

West'n District.
August, 1822.

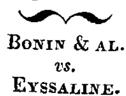


BONIN & AL.
vs.
EYSSALINE.

des contrats expressément permis et valables, une loi prohibitive uniquement dirigée à éliminer les fraudes et les abus, qui pouvaient naître de l'ambiguité et de la mauvaise interpretation de la loi Romaine."

It will perhaps be said, that the object in the contestation in the two cases was different—that the case of Turin relates to minors' property, and that of Rions to dotal. But what difference, I would ask, can that make? In the case of dotal property the nullity was claimed, not because the property was dotal, but because it did not belong to the vendor. It is true, the husband cannot in general sell dotal property; but it is equally true, that the tutor cannot sell the real property of the minor, though the judge may cause it to be sold on observing certain formalities. If then the tutor sells the real estate of his ward, what is it but to sell property which does not belong to him? Does the husband any thing more when he sells dotal property? It is said, the sale of dotal property is prohibited, except in certain cases and under certain circumstances, and that this prohibition imports nullity. So also is the sale of minors real property prohibited, except in certain cases, and under certain circumstances, and then is only permitted with

West'n District. *August*, 1822.



BONIN & AL. *vs.* EYSSALINE.

certain formalities. And does not this prohibition with regard to minor's property, equally import nullity? The truth is, the difference in these two decisions did not arise from any supposed contrariety in essential facts; they were both decided upon principles, which are general, and which have equal application to the one case as to the other; they are opposed to each other in spirit and in principle; they cannot be reconciled; they cannot stand together. If the court of Rions was right, the court of Turin was wrong. If, as a general principle, made *sacramental* by the *Napoleon* and our own code, the sale of a thing belonging to another person is null, *ipso facto*, *de plein droit*, as is contended in behalf of the plaintiffs, then the sale of *minor's* property by a tutor, not authorized, would be as void as the sale of *dotal* property by a husband not authorized. Yet this court has lately decided in the case of *Melançon's heirs* vs. *Duhamel* in conformity with the opinion given by the court of Turin, that the nullity of the sale, in regard to minor's property, is merely *relative*, and that it cannot be claimed by the purchaser.

The plaintiffs' counsel have quoted the *Pandectes Françoises*, 12 *vol.* 268. But this au-

West'n District.
August, 1822.

BONIN & AL.
vs.
EYSSALINE.

thority is merely the opinion, it may be, of a distinguished civilian, given, however, hastily in the progress of an extensive work, and without, as it appears, any particular examination of authorities.

It will not be contended by me, and I presume not by the counsel on the other side, that the opinions and decisions of foreign tribunals and jurists are binding authority upon this court. When, however, they relate to mere questions of customary law, and are uniform, they ought unquestionably to have some influence as mere *precedent* and *authority*. But the present is a question which relates to a written *Code*, recent in its origin, and of which this court is probably as able to give a construction as the provincial courts of France. This court will, no doubt, listen at all times with great respect to the opinions of eminent jurists; and, had the opinions and decisions quoted been uniform, they would certainly have been entitled to great weight. But being, as I have shown, contradictory, it is for the court to say which of them shall be followed. It is for this court to decide, whether a vendee, being put in possession of the thing sold to him, remaining undisturbed in that possession by any adverse

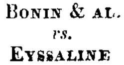
West'n District. *August*, 1822.

BONIN & AL. *vs.* EYSSALINE.

claim, can himself assert the nullity of the sale, on pretence that the vendor had no title.— This is altogether a new question in this country. The present is, I believe, the first suit which has depended for its success wholly upon the establishment of such a principle. In this view of it, the subject becomes important. By way of defence, want of title has been frequently urged as cause for demanding security, and for delaying payment until security should be given; but never for annulling the contract. Observe the progress of these pretensions—they commence with the well known principle recognised by this court, that the defendant may delay payment, when disturbed by a suit actually brought, until security shall be given. 7 *Martin*, 223. *Civ. Code*, 360, *art.* 85. *Poth. Contrat de Vente*, *n.* 282. *Dig. lib.* 18, *tit.* 6, *l.* 18 *s.* 1.

Pushing the principle a little farther, it is pretended, that security may be demanded, not only when the vendee is disturbed by a suit actually brought, but also when he has reasons to apprehend a future disturbance. And stretching the doctrine to its utmost limits, reasons for apprehending a future disturbance on account of a defect in the ven-

West'n District
August, 1822.



BONIN & AL.
vs.
EYSSALINE

dor's title, give a right not merely to demand security, for that had been offered in the present case, but to annul the sale. Nay, it is pretended that this nullity is so absolute, that it cannot be effaced even by the subsequent perfection of the title. And this is the point to which these pretensions have arrived in this suit.

The term "newfangled," could never be applied with more perfect propriety than to these pretensions; for they are, I believe, contrary to all the laws of all countries. They are certainly contrary to the *Roman law.* That law had said, as this court has, that security may be demanded when the vendee is disquieted by a suit actually brought. The expression is "*quæstione mota*," and I have the authority of this court for saying, that it means a "judicial investigation of title." That law had said in express terms, as I am persuaded this court will say, that the purchaser in possession cannot, until evicted, prosecute the vendor, on pretence that the thing sold did not belong to him. *Code, lib.* 8, *tit.* 45, *l.* 3.— The opinion of *Pothier* is to the same effect: "*Quand même l'acheteur découvriroit que le vendeur n'était pas propriétaire de la chose qu'il lui*

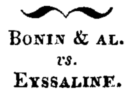
West'n District. *August*, 1822.

BONIN & AL. *vs.* EYSSALINE.

a vendue, et conséquement qu'il ne lui en a pas transfére la propriété, cet acheteur, tant qu'il ne sera inquiété dans sa possession, ne pourra pas pour cela pretendre que le vendeur n'a pas rempli son obligation." *Contrat de Vente*—preliminary article.

But the *ancient laws* are said to be repealed by the *Napoleon Code*, and the decision of the court of Rions is quoted as evidence of the repeal. If that court had referred to these laws, had compared them with the article 1599 of the *Napoleon Code*, had alleged a repugnance betwen them and this article, and from them had inferred the repeal, the decision would have been entitled to more consideration than it is. But instead of that, their opinion is built wholly upon the *Code*. We see nothing which indicates the least knowledge of the former laws. No inquiry is made into the motives which led to the adoption of the article in question. The principle assumed by the court, and which forms the basis of their reasoning, is, that the sale of the thing of another is absolutely void, even between the parties; and, therefore, the vendor in possession, though undisturbed, may assert its nullity, by original action. So far from expressly saying that these

West'n District. *August*, 1822.



BONIN & AL. *vs.* EYSSALINE.

ancient laws had been repealed by the *Code*, they do not appear to have known of their existence. And who can say what effect they might have produced upon that court, had they been quoted and considered? By the court of Turin, they were considered together, with the motives for adopting the article 1599, which were, says the court, "*à éliminer les fraudes et les abus qui pouvaient naître de l'ambiguité et de la mauvaise interpretation de la loi Romaine.*" Had the *Roman law* been free from ambiguity and well understood, there would have been no need of the article. It was intended to *correct*, not to *repeal* the *Roman law*. It would be a pernicious and absurd application of this *corrective* measure, to make it a pretence for introducing all the untried, but obvious evils of a new system; a system, too, not recommended by any very evident advantages, but attended with certain and inevitable mischiefs, such as bad faith promoted, litigation encouraged, and all those ruinous consequences, which cannot be enumerated, but which always result from sudden changes.

What shows, pretty conclusively to my mind, that the law does not contemplate a proceeding, such as is resorted to in this suit, is, that it

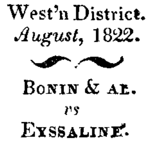
West'n District. August, 1822.

BONIN & AL. vs. EYSSALINE.

has provided no rules for it. Within what time are such actions prescribed? How long may the vendee possess before he loses the right of bringing such a suit? What damages, if any, is he entitled to? What is to be done with the rents and profits? No answer could, at present, be given to these questions, because the law would, as yet, have furnished no rules on the subject.

On the ancient plan, however, we have a complete system ready furnished with details extending to every possible exigency. Thus, when the vendor with no bad faith, sells the thing of another, and the vendee is put in possession, he has no recourse until evicted.—Prescription does not begin to run against the action on the warranty, except from eviction. Rules are given for regulating the damages. The rents and profits belong to the vendee until he has judicial notice of a better title.—As long, however, as possession is not given, the sale is considered so incomplete that the vendee is permitted to claim its nullity, if he discovers a defect in the title. *Code, lib.* 8, *tit.* 45, *lex.* 5.

Even after delivery, the vendee may, *before eviction*, assert the nullity of the sale, if he can



establish fraud in the vendor. But then the fraud must be *real*, not *constructive* merely. It must amount to what, in law, is called *malum dolum*. *Dig. lib.* 19, *tit.* 1, *lex* 30, *s.* 1.

If I mistake not, also prescription is acquired against these actions, founded upon fraud, in one year. It appears to me, that this court will require something more satisfactory, than what is to be found in the *Napoleon* or our *Code*, before they will consent to set aside the whole of this ancient system, as venerable for its antiquity as it is for the justice of its provisions.

The gentlemen urge, that they are within the provisions of the *ancient laws*, as they have alleged fraud in this case. I answer, that it must be *proved* also. Fraud, I admit, will vitiate any thing. But it is one thing to *allege*, and a quite *different* thing to *prove* it. It is true, the plaintiff has alleged it abundantly in his petition, but has not attempted to produce any proof in support of these allegations.— He seems to have supposed that this court, in violation of a known maxim of the law, will presume its existence, and that, too, in the face of evidence to the contrary.

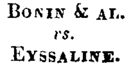
Dolum malum is thus defined, "*machinatio-*

West'n District.
August, 1822.

BONIN & AL.
vs.
EYSSALINE.

nem quandam alterius decipiendi causa, cum aliud simulatur et aliud agitur." *Dig. lib.* 4, *tit.* 3, *lex* 1, *s.* 2. Now I ask the court, if there is any thing in the conduct of the defendant in this case which comes within the above definition. Where is to be found any contrivance to cheat? The transaction took place in the neighbourhood where the plaintiff resides, where he has always resided. He knew the parties interested, and was acquainted with the land. He had always lived within a stone's throw of both. He knew perfectly well, that Eyssaline derived his title to the land, in part, from his wife. He supposed, as did Eyssaline, that this title authorized the sale. So far from there being any *machinationem decipiendi causa* on the part of the defendant, he did not so much as solicit the bargain. It was the plaintiff who sought it, and the evidence shows how strict the defendant was in adhering to his original terms, a point upon which he would have been much less punctilious had he been disposed to obtain, by dishonest means, the price of a thing to which he knew he had no right.

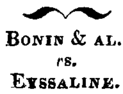
Once more, and I quit this branch of the subject. This case does not come within the



hypothesis stated by the plaintiff's counsel. One half of the thing sold, confessedly belonged to the defendant at the time of the sale. It was not, therefore, on any supposition, the sale of a thing wholly belonging to another person. But it is said, if the vendee loses part of the thing sold, owing to a defect in the title, he may cause the sale to be cancelled for the whole. *Civ. Code*, 354, *art.* 60. The answer is, that he has, as yet, lost no part of the thing sold to him. The law has only given this remedy in case the vendee shall be *evicted* of part; not merely in case he shall be in danger of eviction. And this furnishes an additional reason for believing, that the law never contemplated such an action as this ; otherwise it would have made some provision for it. The law has provided a remedy for a certain injury. That injury is uniformly described in the same way. It is called *eviction*, a term which relates to *possession*, not to *title* merely. It is reasonable to presume, therefore, that so long as that possession remains undisturbed there can be no occasion for the remedy.

It is contended by the defendant, that his title now being complete, the plaintiff has no longer any ground of complaint. In opposition to this matter of defence it is said, that

West'n District.
August, 1822.



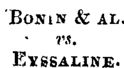
BONIN & AL.
vs.
EYSSALINE.

the proceedings of the meeting of the family are not legal, because the meeting was composed of *friends*, and not *relatives*. It is pretended, that the record shows that there were *relatives* which were not called. In reply, I say, that the process-verbal of the meeting states, that *friends* were called for the want of *relatives*; and that the court will not indulge presumptions against the record. I say also, that in point of fact there were not *relatives* within the parish in which the minors are domiciliated. But even if objections could be alleged against the validity of these proceedings, they cannot affect the sale to Eyssaline, as that sale was made by licitation, and for purposes of partition. It appears to have been ordered by the judge, on sufficient proof that the minors' interest in the land could not otherwise be separated from that of their co-proprietors; and in such case, a meeting of family is not necessary. 3 *Mart. Dig.* 134, *n.* 21.—Even dower property may be sold, situated as this was.—*Civil Code*, 330, *art.* 40.

It is said again, that there is no proof that this sale has ever been demanded by Eyssaline or his wife. But sufficient proof of that fact may be found in the process-verbal of the

sale, which recites, that it was made at the request, among others, of Madame Eyssaline, authorized by her husband, and also of Joseph Eyssaline; which process-verbal is signed at the bottom by both. The same fact is also stated in the process-verbal of the meeting of family, and forms one of the motives for recommending the sale in regard to the minors. Lastly, it is contended, that admitting the title now to be perfect, yet, as it was not so at the date of the sale, the plaintiff ought not to be compelled to keep the land. In this pretension the plaintiff has unconsciously betrayed the true motive for instituting this suit. It was done that he might not be compelled to keep the land. Had he appeared as a humble supplicant for justice, presenting a case of simplicity over-reached, and had he shown that he was still liable to lose the object of his purchase by a better outstanding title, he would certainly have been entitled to commisseration, if not to relief. But instead of that, he exhibits himself as an adventurer in a law suit, struggling to break loose from engagements, voluntarily and freely contracted, and with nothing to excuse him for his meditated bad faith. How perverse must be the disposition of that man, who complains against

West'n District. *August*, 1822.



BONIN & AL. *vs.* EYSSALINE.

the enforcing of a contract according to his own original intentions in entering into it. But the law is resorted to again, and the plaintiff seems to expect that it will aid, not in preventing a violation of the contract, but in promoting it. The famous case decided by the court of Rions is again triumphantly quoted upon me. I must confess that that extraordinary case goes the full length of supporting the plaintiff in his pretensions. In opposition, however, to the authority of that case, I refer the court to a work, entitled "*Le Droit Romaine*," 5 *vol.* 279. "*Si, avant que le contrat soit déclaré nul, le vendeur acquérait la chose qu'il a livrée, l'acheteur pourrait il encore le faire annuler? Je ne le crois pas. L'obligation du vendeur se trouve completement remplie. L'acheteur acquier la propriété, puisque le consentement des deux parties subsiste sur l'objet du contrat, et que celuici a reçu son entière exécution.* This opinion is in conformity with the *Roman law. ff.* 21–2, 57.

MATHEWS, J. delivered the opinion of the court.* This is an action for the rescission of the sale of a tract of land, on the ground that the vendor had sold the thing of another;

*PORTER, J. did not join in the opinion, having been of counsel in the cause.

West'n District. *August*, 1822.

BONIN & AL. *vs.* EYSSALINE.

that the sale was fraudulent; and that the property sold was dotal.

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

The important facts of the case are the following. In March, 1820, the defendant sold to the plaintiff Bonin, a tract of land of 14⅔ arpens, front on the Teche. In the month of December, of the same year, having discovered that he had purchased what did not belong to his vendor, he gave public notice of his intention to procure a rescission of the sale. and restitution of the notes given by him for the price, which were endorsed by the other plaintiff; and for this purpose commenced the present suit, on the 5th of November, 1821, as appears by service of the citation.

A few days after this public notice, but long previous to the institution of this action, a family meeting, composed of the friends of the minors Dumartrais, was called, and was of opinion, that a tract of land mentioned in its proceedings could not be conveniently partaken by division in kind; and that, therefore, it was proper to sell it for cash, and divide the price. The under tutor did not intervene. The judge of probates homologated

West'n District. *August*, 1822.

BONIN & AL. *vs.* EYSSALINE.

the proceedings, and the 21st of March, 1821, the land was adjudged to the plaintiff for 6000 dollars.

At the time of the sale, as above stated, the 14⅔ arpens sold were two undivided parts of a tract of 22 arpens, owned in equal portions by C. Gravenbert, the minors Dumartrais, in right of P. Gravenbert their mother, and T. F. Gravenbert, wife of the defendant, being a part of her dower.

It further appears by the evidence in the case, that C. Gravenbert sold his undivided third part of said 22 arpens to the defendant by act under private signature, previous to the sale made to the plaintiff of the two thirds by metes and bounds, as expressed in the deed of conveyance executed in pursuance of the latter sale.

From these facts it appears to us, that three principal questions of law arise in the cause.

1. Has a vendee of dotal property, sold by the husband whilst he remains in undisturbed possession, a right to claim a rescission of the sale and restitution of the price, on the ground of the contract being null, either absolutely or relatively, *i. e.* void or voidable?

West'n District.
August, 1822.

BONIN & AL.
vs
EYSSALINE.

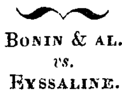
2. Was the sale, made in pursuance of the family meeting, such as to transfer the property to the defendant?

3. Can a husband who sells the dotal property of his wife, and afterwards acquires an absolute right to it, avail himself of such posterior right, in opposition to the vendee's claim, for a rescission of the contract of sale, when the complete title has been obtained previous to instituting suit for rescission?

In examining these questions, we will first consider the two last; for, should their solution be found favourable to the appellee, it will be unnecessary to answer the first.

Previous to the act of 1809, it was made the duty of tutors, under certain formalities prescribed by law, to proceed to the sale of the moveable and immoveable property of their wards. *Civil Code*, 68, *art.* 56. The law on this subject was altered in relation to uncultivated lands, &c. by the act above cited. *Martin's Digest*, *p.* 128. In the same act it is provided, that the previous rules there established, and also those of the *Code* "which prohibit the sale of the estate of minors in certain cases, or to authorize the sale only if it should amount to the estimated value of said estate.

West'n District. *August*, 1822.

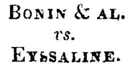


BONIN & AL. *vs.* EYSSALINE.

shall not be construed to affect such sales as are forced upon minors, or when minors have an estate in common with other persons who apply for a division of said estate, when such division cannot take place but by licitation, "&c.

In the case now under consideration, it is true that the partition of the property, common to the minors Dumatrais and their co-proprietors, does not, in the first instance, seem to have been solicited by the latter; but all parties interested, the minors by their father and natural tutor, and the others by themselves, appear to have acquiesced in the necessity of partition by licitation, as well as in all other proceedings by which the sale was made by the parish judge, as evidenced by their signatures to the process-verbal of said proceeding; which, in our opinion, is equivalent to an original expression of their wish to cause legal partition of the common property by petitioning the judge to that effect. We therefore conclude, that the sale was made in such manner as to transfer the property to the defendant, who became the purchaser. Part of the undivided property being dotal, did not exempt it from subjection to sale in the present case. *Civil Code*, 330, *art.* 40.

West'n District. *August*, 1822.



BONIN & AL. *vs.* EYSSALINE.

Before entering into any discussion of the third question, it is proper to observe, that we are of opinion that the evidence of the cause does not establish the fact of fraud or *dolum malum* against the appellee.

Decisions of *French tribunals*, and *dictums* of jurists are resorted to and relied on in support of both the affirmative and negative of this question. The case cited from the 18*th vol.* of the work, entitled "*Jurisprudence du Code Civil*," as decided by the court of Rions, establishes two principles much opposed to the pretensions of the defendant, viz. that the sale of dotal property is null, and that acquisition of title, subsequent to the institution of an action to rescind the sale, will not cure such nullity. Were we disposed to give full force to the principles recognised by this decision, as being rendered on articles of the *Napoleon Code* similar to those of our *Code*, invoked by the plaintiffs, but which we believe to be at least doubtful as to correctness, still there is a clear distinction in the present case from that cited. There it seems that suit had been commenced to annul the sale before the defendant acquired a good title to the property sold: here the title was acquired before suit

West'n District.
August, 1822.

BONIN & AL.
vs.
EYSSALINE.

commeneed. This circumstance places the appellee's cause in a situation more favourable to his pretensions than that of a seller in the case put by *Le Clercq*, in his work, entitled "*Droit Romain*," &c., in vol. 5, p. 279 ; wherein he supposes the case of the purchaser being ignorant that he bought the thing of another, which was delivered to him by the seller; and admits, that the buyer might have the contract declared null, on restoring the thing, &c. But if, before the contract be annulled by competent authority, the seller should acquire the thing which he had delivered, it is the opinion of the author, that the purchaser would then not have power to cause the sale to be annulled; because every obligation on the part of the vendor would be fufilled: the purchaser acquires the property in the thing sold as well as the possession ; and, consequently, the contract stands fully executed. The principle established by the latter part of the case as stated, we are inclined to think correct; evidently so, in a case where no action for rescission has been commenced.

Considering the sale made by the parish judge, in pursuance of the representation of the family meeting, with the consent of all the

co-proprietors, as good and translative of property; and that, by it, the appellee acquired a complete title to the land which he had sold to the appellant, before the institution of the present suit; we are of opinion, that there is no error in the judgment of the district court.

It is therefore ordered, adjudged and decreed, that it be affirmed with costs.

12m 229
117 608

VIGNAUD vs. *TONNACOURT'S CURATOR.*

The court of probates has exclusive jurisdiction of all claims against a vacant estate.

APPEAL from the court of the fifth district.

PORTER J. delivered the opinion of the court. This action was commenced in the district court to recover of the defendant, curator of a vacant estate, a sum of money alleged to be due by it. The defendant pleaded in abatement, that the court had not jurisdiction of the case; that the settlement of all matters appertaining to the estates of deceased persons, the liquidation of their accounts, and every other act relative to the same, belonged, in the first instance, to the

West'n District. *August*, 1822.

VIGNAUD *vs.* TONNACOURT'S CURATOR.

court of the parish where the case arose, viz. in the parish of St. Martins.

The act of 1813, (2 *Martin's Dig.* 188) which established the tribunal in which this action was commenced, confers on it jurisdiction "in all civil cases" that may arise in the parish where it sits. These expressions are sufficiently comprehensive to embrace that before us; and the jurisdiction must be maintained, unless at the time of passing the act the law refused an action in the ordinary way, to claims circumstanced like this; or unless the jurisdiction, if it did exist, has been since taken away.

The defendant has assumed the affirmative of both these positions.

In support of the first he has urged, that the administration of successions is reduced to a perfect system; the primary objects of which are, to secure to all an equal distribution, and to guard and protect the interests of minors; that if suits can be carried on before other tribunals than that where the succession must be regulated, that these objects will be defeated, and the estate unnecessarily burdened with costs.

As far as our knowledge of the practice

West'n District.
August, 1822.

VIGNAUD
vs.
TONNACOURT'S
CURATOR.

extends, we believe that it has been usual to bring suits such as this. This practice, contemporaneous with the establishment of the court, is somewhat against the plea, now for the first time presented, that it wants jurisdiction; as novelties should be distrusted in all subjects, and more particularly in law than any other. Still, if our inquiries bring us to the result that the action cannot be maintained, the usage under the statute ought not to affect our decision, as practice is never permitted to control the law, though, in doubtful cases, it may well serve to explain it.

By the provisions of the *Civil Code*, curators of vacant estates, and absent heirs, are forbidden to pay any debts due by the vacant estate, until three months after the death of the deceased, or after the same has become known for the purpose (as the law declares) of allowing sufficient time to the creditors to present their claims. By the same article, containing these regulations, the judge is authorized to extend the term for another period of three months, making in the whole six.—*Civ. Code*, 178, *art.* 136.

Within this time, during which the curator is forbid to pay, we think it manifest the cre-

West'n District. *August*, 1822.

VIGNAUD *vs.* TONNACOURT'S CURATOR.

ditors cannot be permitted to sue; for the former is not in fault, and judgment could not be given against him, without violating the express commands of the law.

The article next following that just cited provides, that even after this delay the curators of vacant estates, and absent heirs, shall not proceed to the payment of the debts of the estate until they have previously obtained the authorization of the parish judge by whom they have been appointed.

It would seem, then, that the law does not contemplate that separate suits should be brought to accelerate or enforce payment; for after judgment rendered, the curator cannot pay without an order of the court of probates. This necessity of obtaining the authority of another tribunal, before the decree of the district court can be carried into effect, furnishes a very strong argument against its jurisdiction; for we are not permitted to conclude that the legislature intended so vain a thing as to allow of an action at law, where the benefit of judgment could not be obtained:—make the decrees of a superior court subject to be controlled by an inferior one, and have the estate burdened with costs, and no useful object attained by it.

West'n District.
August, 1822.

VIGNAUD
vs.
TONNACOURT'S CURATOR.

If we were to adopt the other alternative, that it was contemplated suits might be brought, and that an advantage could be obtained by doing so, then all the creditors would be obliged to commence actions in order to be put on an equality; which would lead to the monstrous inconvenience, that the whole of the estate would have to be settled through suits at law.

In case of insolvency the consequences would be the same to the estate, and in addition to the injury done to all who had demands on it, such proceedings might completely destroy the rights of privileged creditors. Under these circumstances, the necessity of classification by one tribunal, which can take cognizance of all the claims, is imperious, and that tribunal our law designates to be the court of probates. *Civil Code*, 178, *art.* 137. *Febrero* puts such a case as that before us, as one which authorizes a *concurso* of creditors. *Febrero addic. p.* 2, *lib.* 3, *cap.* 3, § 2, *n.* 39.

It is true, the reasons are not so strong in favour of this course where there is enough to satisfy all the debts : yet, as the law has declared that the order of the judge of probates shall be necessary even in that case, we do

West'n District. *August*, 1822

VIGNAUD *vs.* TONN' COURT'S CURATOR.

not see how any court can give judgment that the curator shall pay without that order. And we therefore conclude, that the creditor should present his claim to that tribunal in which is vested the power to enforce its discharge.

We have not had any difficulty in coming to this conclusion, when the debt is acknowleged by the curator, and the only object of the suit is to obtain execution. We have had more, where the claim is disputed and the action is brought to establish its existence. But even in that hypothesis, the result must be the same. We have already seen, that in cases of this kind, the district court could not execute the judgment it might render. Consequently, the only object of a suit there. would be to ascertain the debt; and it appears to us, that jurisdiction for the purpose of inquiry alone is not vested in that tribunal. Indeed such a duty would seem inconsistent with the idea we attach to courts of justice, whose attribute is to examine rights for the purpose of enforcing them. As the law has vested the judge of probates with the power of ordering payment of the demands against the estate, or rejecting them, it has necessarily conferred on him the right of examining into their justice.

West'n District. *August*, 1822.

VIGNAUD *vs.* TONNACOURT'S CURATOR.

The course to be pursued, under the opinion just delivered, will advance, not retard the recovery of debts due by a vacant estate, as they can be more speedily liquidated. and the succession settled, when one court takes cognizance of all the claims presented.

In the case of *Donaldson* v. *Rust, curator of Alsop*, 6 *Martin*, 260, the objection to jurisdiction in any other tribunal but that of probates was taken; but as the exception does not appear to have been pleaded in the inferior court, no notice was taken of it in the opinion delivered. The district court, however, had clearly jurisdiction in that case; for the suit was not brought to obtain satisfaction of any demand against the estate, but to recover specific property belonging to the plaintiff, in the hands of the curator.

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

Brownson for plaintiff, *Brent* for defendant.

FUSILIER vs. *BONIN & AL.*

APPEAL from the court of the fifth district.

The endorsement of a note, is not restrained by its being

MARTIN, J. delivered the opinion of the

West'n District. *August*, 1822.

FUSILIER *vs.* BONIN & AL.

signed *ne varietur* by a notary.

court.* The defendants, sued on their promissory note, endorsed to the plaintiff before its maturity, pleaded that it was given for the price of a tract of land, which the plaintiff's endorser sold to them without his having any right to do so, and that the plaintiff had notice of this, as the note was signed *ne varietur* by the notary.

The plaintiff had judgment, and the defendants appealed.

This case is not easily distinguishable, as to the first objection, from that of *Hubbard & al.* vs. *Fulton's heirs*, 9 *Martin*, 87, in which we determined that "although the matter, pleaded in avoidance of the claim, would have affected it in the hands of the original payee, it could not do so in those of a fair endorsee."

The defendants' counsel has, however, endeavoured to distinguish it. He holds, that "the holder must have known that the consideration of the note was the land sold, and so took it, subject to the defence relating to the land; and from all the circumstances, the defendants' equitable defence must be let in."

He cites, in support of his position, the case

* PORTER, J. did not join in this opinion, having been of counsel in the case.

West'n District.
August, 1822.

Fusilier
vs.
Bonin & al.

of *Ayers* vs. *Hutchins & al.*, 4 *Mass. Rep.* 370, *Bigelow's Digest*, 501, in which the court held, that "if the endorsee of a negotiable note receive it under circumstances which might reasonably excite suspicion that the note is not good ; he ought, *before* he takes it, inquire into its validity ; and if he do not, he must take it subject to any legal defence which might be made to a recovery by the promisee."

We cheerfully recognise the exception, which this case makes to the general proposition, which was the basis of our decision in that quoted : and our only inquiry, in the present, must be whether the note or its transfer was attended with any circumstance that might *reasonably create suspicion.*

The counsel presents as one, the appearance of the words *ne varietur*, on the face of the note, with a date and the signature of a notary. We are unable to discover how the appearance of these words could *reasonably create suspicion.*

Generally they are written on instruments to ascertain their identity at a subsequent period. On promissory notes, like the present, they are of great use in facilitating the cancelling or raising a mortgage, given to se-

West'n District. *August*, 1822.

FUSILIER *vs.* BONIN & AL.

cure the payment of the sum mentioned in the note. They may serve in pointing out the notary, in whose office will be found the act which contains the evidence of the contract, in which the note originated.

The case determined in Massachusetts, on which the defendants' counsel relies, recognises the obligation of a person to whom a negotiable note is offered, to make any inquiry into its validity, to the only case in which circumstances reasonably create suspicion. The circulation of notes would be much checked and embarrassed, if it were believed to be the duty of any person, who receives one, to inquire into the fairness of the transaction in which it originated, wherever the signature of a subscribing witness or of a notary afforded the opportunity of doing so. Nothing, in our opinion, imposes the obligation of such an inquiry, but the knowlege of such circumstances as reasonably create suspicion.

In the present no such circumstance is alleged, except the notice conveyed on the face of the note.

The plaintiff, on receiving the note, was thereby informed it had been thought proper to identify it, and that he might be informed of

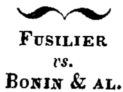
West'n District.
August, 1822.

FUSILIER
vs.
BONIN & AL.

the transaction in which it was given by examining the minutes of a given day, in a particular notary's office. Were we to say, that it was his duty in such a case to make the inquiry, we would likely be bound to say that the subscription of a witness to a note imposes the same obligation, since it generally affords the same facility. No one can contend that it does.

It is, however, urged that the vendees, in requiring the identification of his note, secured the right of resisting payment, on just grounds, even after a fair endorsement, as he thereby gave notice to all endorsees that the note was the consideration of the sale. In some instances the maker of a note mentions therein what he has received as the consideration of his promise, using the expression *value received in a horse*, a slave, or in merchandise, or the like. Yet, it never was contended that the circumstance of the endorsee being thereby apprized that the note was given to secure the payment of a horse, a slave, or goods, placed him in a different situation than if the note was, in the ordinary way, *for value received*; that he was bound to ascertain whether any redhibitory vice in the slave, &c. pro-

West'n District. *August*, 1822.



FUSILIER *vs.* BONIN & AL.

tected the maker. Now the knowlege that *land* was received as the consideration of the note, cannot vary the case. It creates no reasonable suspicion.

Had the plaintiff, before he took the note, called on the notary and examined the act which contains the evidence of the contract in which the note originated, he would have learned that it was given to secure the payment of the price of a tract of land, which the maker of the note had purchased from the person who offered to endorse it. This would have dispelled, rather than created suspicion.

It is true, the purchaser of a tract of land, who has given a negotiable note to secure the payment of its price, may resist the claim of his vendor, if he have been, in the mean while, evicted. But the very circumstance of his giving such a note, is evidence of his consent to forego this right, if the note be fairly endorsed away before maturity.

The purchaser of a horse, a slave, a ship, of goods, a borrower of money, are precisely in the same situation, as long as the claim remains in the hands of the vendee; they may oppose to it any fair means of defence. But if a negotiable note was given

and endorsed over before maturity, the claim of the endorsee cannot be resisted, on account of any circumstance of which he had no knowlege.

Since the establishment of banks in this state, vendors have often found, in the negotiable paper of vendees, a very easy and speedy mode of receiving the price of properperty sold on a credit. The latter, no doubt, found therein some diminution in the price, which would not have been yielded, if the former had not thereby been enabled to receive their money, before payment was effected by the latter.

In the present case, the notarial act particularly and formally states, that notes were given for the express purpose of enabling the plaintiff's endorser to anticipate the receipt of the purchase-money. This the vendor might fairly stipulate for, and the vendee, by acceding to the stipulation, forewent the right of resisting the claim of an endorsee, and retained only a claim against the vendor.

Nothing enables this court, and justice forbids, to place either of the parties in a different situation than that in which the contract he acceded to, places him.

West'n District. *August*, 1822.

FUSILIER *vs.* BONIN & AL.

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

Brownson for the plaintiff, *Brent* and *Cuvillier* for the defendants.

LANGLINI & WIFE vs. *BROUSSARD.*

A wife cannot alienate her paraphernal effects without the consent of her husband.

A variance between the allegation and proof must be taken advantage of on the trial.

12m 242 46 1380

12m 242 49 189

APPEAL from the court of the fifth district.

PORTER, J. delivered the opinion of the court. The petition avers, that the defendant, by force and arms, took possession of twenty five horned cattle, the property of the plaintiffs, and refuses to give them up.

The answer contains a general denial, and an averment, that the defendant, as agent for one Don Lewis Bouderau, received by the consent of the plaintiff, Madame Langlini, mother of the said Don Lewis, fourteen beeves, being the supposed portion coming to him in the undivided estate held between them.

The evidence establishes, that the defendant with the consent of the wife, took fourteen head of cattle, marked with her brand:

West'n District.
August, 1822.

LANGLINI & WIFE
vs.
BROUSSARD.

but that the husband, so far from assenting to the transaction, expressly forbid him to receive them. The cattle were marked with the brand of Mrs. Langlini's first husband.

There was judgment for one of the plaintiffs, Madame Langlini, and the defendant appealed.

The plaintiffs contend, that the judgment should be affirmed, because the testimony establishes the right of property; and they rely on the *Civil Code*, 334, *art.* 58, which provides, that the wife can neither alienate her paraphernal effects, or appear in a court of justice respecting the same, without the consent of her husband.

The defendant insists, that the beeves belonged to the minor heir and his mother in common, and that she had a right to alienate them without the husband's consent; that the petition states, the property to have belonged to both husband and wife; and that the evidence and judgment do not correspond with that allegation.

The position of the plaintiffs' counsel, that the husband's approbation is necessary to render valid an alienation of the wife's paraphernal effects, is correct, and fully supported

West'n District. *August*, 1822.

LANGLINI & WIFE *vs.* BROUSSARD.

by the authority relied on. The evidence, we think, brings the case within the law. The witnesses state, the cattle to belong to Mrs. Langlini, and that she used her deceased husband's mark. The testimony, on the part of the defendant, does not establish that the children by the first marriage, and their mother, held any property in common.

In regard to the variance between the allegations in the petition, and the proof given, we are of opinion, that this objection should have been made when the evidence was offered in the court below—*Flogny* vs. *Adams*, 11 *Martin*, 549. As it was not taken there, and the parties proceeded to investigate their rights with reference to the true capacity in which the plaintiff, who obtained judgment, should have stated her claim, the exception cannot be listened to at this stage of the proceedings—*Canfield* vs. *M. Laughlin*, 9 *Martin*, 303—*Bryan & Wife* vs. *Moore's heirs*, *ibid.* 26. *Larche* vs. *Jackson*, *ibid.* 284.

The counsel for the defendant endeavoured to distinguish this case from those cited, by showing, that here there were two plaintiffs, and judgment was only given in favour of one of them: in those already decided, it

West'n District.
August, 1822.

LANGLINI & WIFE
vs.
BROUSSARD.

was merely a different right from that alleged, established in the same person. We do not perceive that this circumstance makes any essential difference. It is every day's practice, that judgment is given in favour of one of several plaintiffs, and against the others if they fail in the proof necessary to support their case. In the present instance, as the husband was obligated to assist his wife in the prosecution of her claim, it was unnecessary to enter judgment of nonsuit against him, for his appearance was good for that purpose, though he was not able to establish a right in himself.

On the whole, we are all satisfied that the law authorizes, what the justice of the case requires, that the judgment of the district court be affirmed with costs.

Brent for plaintiffs, *Brownson* for defendant.

PORTER vs. *DUGAT.*

The time of the meeting of arbitrators may be shown by parole evidence.

Although all the arbitrators must be present,

APPEAL from the court of the fifth district.

MATHEWS, J. delivered the opinion of the court. In this case the parties having submitted, by a written argument of compromise,

when the award is given, their unanimity is not required by any law.

all matters in dispute between them arising out of the pleadings in the case, to the arbitration and final decision of certain persons, three in number, as named in the act of submission, and they having made their award and judgment in pursuance of the powers granted to them and returned the same to the district court, to be homologated and rendered executory; the plaintiff, by his counsel, excepted to said award, and assigned as reasons against its validity the following:—

1. That by the submission, the arbitrators were to meet and organize themselves to act on the third Monday in January, 1822, at the court-house in St. Martinsville; and by the award rendered, it appears that the said meeting and award was held and made on the 4th of February, 1822.

2. That it does not appear, that said award was given in presence of all the arbitrators, and that all the arbitrators gave judgment together.

3. That by said submission all of the arbitrators ought to have concurred in opinion, and that the award of two is not binding on the plaintiff, &c.

The district court overruled these objec-

tions to the award, confirmed and adopted it as the judgment of said court, &c., from which judgment the plaintiff appealed.

In the course of the trial in the court below, parole evidence was offered to show, that the arbitrators did meet on the day as directed in the act of submission; which being received, the plaintiff excepted to the opinion of the court by which it was admitted, on the ground of being contrary to written evidence, viz. the award and submission; the latter having pointed out the third Monday of January for the meeting of the arbitrators, and the former showing that they did not meet until the 4th of February following.

To come to a just conclusion on this bill of exceptions, it is necessary to ascertain whether or not arbitrators are bound to keep a record of all their proceedings, of every step taken by them in a cause previous to final award and judgment? We know of no law that requires such strictness of proceeding before judges appointed by the will of parties litigant, to settle their disputes and differences: and if arbitrators are not bound to keep a detailed written account of their meetings, adjournments, and all other proceedings

West'n District. *August*, 1822.

PORTER *vs.* DUGAT.

in a cause up to the final judgment, it is believed that no good reason exists for the rejection of proof of these circumstances by parole, whenever the situation of a suit requires it. We are therefore of opinion, that the district court was correct in admitting the testimony offered in the present case. It appears by this testimony, that not only the arbitrators met on the appointed day, but that the parties themselves were present, and on the same day substituted Muggah as an arbitrator in the place of Eastin, who was stated to be sick, as is shown by an additional article to the act of submission signed by said parties. The time limited within which the arbitrators were to have given their award and judgment, seems from the expressions in the submission, to have been the period of the meeting of the district court, subsequently holden for the parish of St. Martins ; with this requisition they have complied, and on the ground of the time in which the award was made, all objections cease.

As to the second ground of objection, it is true that where " several arbitrators are named by the compromise, they cannot give their award unless they all see the proceeding and

West'n District.
August, 1822.

PORTER
vs
DUGAT.

give judgment on it together; but it is not necessary that the award be signed by them all. *Code* 444, *art.* 29.

From the manner in which this provision of the *Code* is worded, it does not appear to us to have materially altered former laws on the subject of arbitration; no new principle is introduced, requiring unanimity amongst arbitrators, in order to render valid their decision. It suffices, that a majority concur, provided that all be present at the time of making their award. The fact that all were thus present, in the case now under consideration, is clearly established by testimony, to which no exception was taken, and to which, it is believed, that none could have been legally supported.

The reason of the law which requires the presence of all when a case is submitted to more than one arbitrator, is clear and sound, viz. that the arguments of the dissenting arbitrator might have produced a change in their award and judgment.

The view which we have taken of the two first exceptions to the award in the present case, containing in our opinion an answer and

West'n District. *August*, 1822.

PORTER *vs.* DUGAT.

refutation to the third, it is considered useless to further notice it.

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

Brent for plaintiff, *Brownson* for defendant.

PORTER, J. did not join in this opinion, having been of counsel in the cause.

THOMPSON vs. *CHRETIEN* & *AL.*

A judgment may be signed, after the expiration of three days, since it was pronounced.

The sheriff's return on an execution, need not state, that no personal property was to be found, to justify the seizure of slaves.

A creditor of the vendee may seize on a *fi. fa.* property sold by the latter, without any delivery.

Costs may be given, without having been prayed for, or a prayer for general relief.

APPEAL from the court of the fifth district.

MARTIN, J. delivered the opinion of the court. The plaintiff claims two negroes in the possession of the defendants. He obtained judgment, and they appealed.

Both parties admit the slaves to have been the property of John Thompson, and claim them under him.

The plaintiff shows, that on the 20th of Jan. 1816, Bell obtained a judgment against John Thompson, which was recorded in the office of the parish judge on the 14th of February following; and on the 5th of January, 1821, an execution issued, and was afterwards levied on the two slaves, who are the subjects of the present suit. They were purchased by

Bell at the sheriff's sale, and from Bell by the present plaintiff, on the 11th of May following.

John Thompson deposed, he remained in possession of these two slaves till they were seized on the above execution. The present plaintiff having brought slaves to sell into this state, he ordinarily leaves them with the witness, and permits him to work them. When he left the state last summer, he forbid the negroes being sold till his return, and told the witness, he might have them for what they cost.

Scott deposed, both the defendants told him they took possession of the negroes about the 21st of July, 1821. They sent him for them to John Thompson, who had them in possession and delivered them. He believes this was on the aforesaid day.

It was admitted that the plaintiff paid Bell the consideration money, as stated in the bill of sale, and that the slaves are in the possession of the defendants.

They claim these slaves under an instrument of writing, which they contend is a bill of sale, and which bears date of the 20th of October, 1820.

The counsel for the defendant urges, that

West'n District. *August*, 1822.

THOMPSON *vs.* CHRETIEN & AL.

the judgment appealed from is void, because it was not *signed* on the third day after it was pronounced, but several days after. 2 *Mart. Digest*, 164.

We are of opinion, that the object of the legislature, in the section quoted, was to afford to the party against whom a judgment is pronounced, a delay of three days, to state his objections thereto; and for this purpose, prohibited the judge to give effect to it by his signature, till the expiration of that delay. It did not intend to require the judge's signature on that day.

It is further urged, that the sheriff's return on the execution ought to have shown that no personal property was found; otherwise the presumption is, that personal property existed, and the seizure of slaves was illegal. *Martin's Digest*, *Loco citato*.

We know not any law, requiring that the sheriff's return should state this circumstance. The direction to that officer to seize personal property before slaves is, no doubt, intended for the benefit of the debtor; that species of property being more generally divisible and saleable. We do not mean, however, to say, that as the disposal of real property is often

West'n District. *August*, 1822.

THOMPSON *vs.* CHRETIEN & AL.

attended with considerable delay, the plaintiff may not insist also to have the benefit of the law in this respect; but, when neither he nor the defendants complain, we are clear in the opinion, that the objection cannot be made by any other person.

Bell acquired John Thompson's title to the slaves, by the seizure and sale made by the sheriff, under the execution,—*Civil Code*, 490, *art.* 1, and he conveyed them to the present plaintiff, by a notarial act, in which they are stated to have been *sold and delivered.*

The only question seems then to be: Had John Thompson the property of these slaves, at the time of the seizure? The defendants contend he had not, having transferred it to them. They offer no evidence of this, except in the document, which they call a bill of sale, and the plaintiff a mortgage.

As this case may be disposed of, without fixing the character of this instrument, by considering it in the light in which the defendants place it before us, we will do so.

A sale of these slaves gave the defendants the right of demanding the tradition or delivery of them: This delivery, alone, would vest the property in the defendants. This has

West'n District. *August*, 1822.

THOMPSON vs. CHRETIEN & AL.

been frequently determined in this court: for the first time, in the case of *Durnford* vs. *Brooke's Syndics*, 3 *Martin*, 222, 264: and since, in those of *Norris* vs. *Munford*, 4 *id* 20. *Ramsey* vs. *Stephenson*, 5 *id*. 23. *Fiske* vs. *Chandler*, *id*. 24, and *Randal* vs. *Moore*, 9 *id*. 403.

It appears that, after the alleged sale, the defendants permitted the slaves to remain in the possession of John Thompson, till they were seized by the sheriff, to satisfy a judgment obtained against him by one of his creditors.

No actual delivery took place; the deed does not state that the slaves were delivered, nor were they in the possession of the defendants before. *Civil Code*, 350. *art*. 28.

It is impossible to distinguish this case from that of *Pierce* vs. *Curtis & al.* 6 *Martin*, 418. See also that of *Copelly* vs. *Duverge*, 11 *Martin*, 674.

Lastly, the defendant says, that the district judge erred in allowing costs, as they were not prayed for in the petition. We are of opinion, that they may be given on a prayer for general relief, admitting that a demand of them be necessary.

It is therefore ordered, adjudged and de-

creed, that the judgment be affirmed with costs.

West'n District. *August*, 1822.

THOMPSON *vs* CHRETIEN & AL.

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

KNOX vs. *HASLETT*, *CURATOR*, *&c.*

APPEAL from the court of the fifth district.

The party holding the affirmative, is bound to clearly establish his case.

12m 255
108 285

PORTER, J. delivered the opinion of the court. The petitioner claims $\$729\frac{92}{100}$, due him by one Samuel M'Intire, deceased, of whose estate the defendant is curator; and he avers that \$550 of this sum was secured to him by mortgage.

The defendant pleaded the general issue; insanity in M'Intire; and that, at the time he executed the act of mortgage, a petition for his interdiction, provoked by the plaintiff in this suit, was pending before the parish court.

The pendency of an action, to establish the fact of insanity, although not acted on by the judge before the death of M'Intire, authorized the introduction of testimony to prove that, at the time he executed the instrument, he was notoriously insane, *Civil Code*, 80, *art.* 16. The only question, therefore, which the cause

West'n District.
August, 1822

KNOX
vs.
HASLETT,
CURATOR, &c.

presents, that offers the least difficulty, is one of fact—whether the testimony produced supports the plea of insanity?

The evidence which comes up with the record is in substance as follows:—

Bell swore, that at the time M'Intire executed the act, he was committing a great many extravagant acts which indicated that he was of an unsound state of mind; that the petition for interdiction was made out at the time deceased returned from the sea shore; that he never was sufficiently recovered, from that period until the time of his death, to be able to go abroad as usual; he appeared always deranged; sometimes so much so, as to leave his room and go naked to the house of plaintiff; at other times, he would talk as reasonably as he ever did; there were times when a stranger would have thought him in his right mind, but one whose suspicions were awakened would have thought otherwise; deceased always kept a quantity of liquors in his room.

Kirkby stated, that after M'Intire's return from the borders of the sea, he proposed to witness to purchase a house and that they agreed on the price, &c.; but observing a wildness in his looks, and that he talked about

West'n District. *August*, 1822.

KNOX *vs.* HASLETT, CURATOR, &c.

a block, or some trifling object, in comparison with that which formed the object of their bargain, witness was induced to believe his mind deranged, and on that account declined the contract. A day or two after, the deceased ran out into the street naked, apparently insensible of what he was doing; could not say, if the deceased's conduct arose from drinking or other causes.

King testified, that he saw the deceased the day he returned home; at first he spoke rationally, but in a few minutes burst into tears, and appeared entirely deranged: saw him at intervals of four or five days or a week: at every interview he would, during some part of the conversation, appear bewildered; did not observe the state of deceased's mind at the time he came before him, as parish judge, to acknowledge the mortgage; thinks it possible he might have had lucid intervals.

Ray deposed, that he saw the deceased two or three times after he came from the seashore; for a minute or two he would talk quite rationally, and then appear deranged.

The fact of M'Intire having boarded with the plaintiff, and that the latter was in the

West'n District.
August, 1822.

KNOX
vs.
HASLETT,
CURATOR, &c.

daily habit of visiting him during the period, spoken of by the witnesses, was established.

The defendant also introduced the petition of the plaintiff, addressed to the parish judge, dated the 25th November, 1818, wherein it is stated, that M'Intire is subject to "an habitual state of mental derangement, and totally incompetent to the management of his affairs."

On the part of the plaintiff, the following evidence was taken:—

Todd declared, that he did not see M'Intire for seven or eight days after his return from the sea-shore; that he could discover no marks of insanity in him, though it had been reported he was insane. Deceased appeared dejected, and in deep melancholy, which witness attributed to the deranged state of his affairs, and his bodily weakness. Thinks if an unjust claim had been presented, he would have discovered it. Witness was spoken to by plaintiff, if he knew of any manner in which his claim against M'Intire could be secured? he replied, he believed all his property, except some land in Concordia, was incumbered. Deceased showed great repugnance to execute the act of mortgage; consented to it finally through the solicitation of witness; ob-

West'n District.
August, 1822.

KNOX
vs.
HASLETT,
CURATOR, &c.

served no symptoms of his being deranged at the time he signed the instrument.

Irwin swore, that he purchased property from M'Intire after his return; appeared to witness perfectly in his right mind; believes he drank freely, but not so as to be intoxicated. Kirkby's contract for the house was twelve or fifteen days after the deponent had bought property from the deceased; and witness told Kirkby, he did not then think deceased in a situation to make a bargain.

Doctor Dixon stated, that he attended deceased in his last illness, but did not know him particularly until about twenty days before his death; found him sometimes quite rational, at others not so, but insane; thinks he was sometimes competent to do business, and at other times not; deceased was in the habit of drinking freely; witness attributed his insanity to his weak state of body, and the deranged state of his affairs; thinks drinking also contributed to it.

Wartel deposed, that when M'Intire returned, he had a wild appearance; but that witness paid him a sum of money afterwards, believing him capable of doing business; paid the money without calling witnesses.

West'n District.
August, 1822.

KNOX
vs.
HASLETT,
CURATOR, &c.

Thomson said he saw deceased after he reached home from his trip to the sea-shore, saw him frequently, was in the habit of visiting him as an acquaintance; he conversed rationally.

Simonds testified, that he lived in the same house with deceased during his last illness, saw him almost every day, never observed in him any marks of insanity, until he made the sale to Kirkby.

Bell called a second time, deposed, that the petition to have the deceased interdicted was abandoned. Why? he did not know.

Smoot swore, that he saw deceased after his return from the sea-shore, did not observe him to be insane, though worse than he went away.

On this proof, the district court gave judgment for the plaintiff, and we cannot say that it erred. The testimony, which is principally oral, is somewhat contradictory; and when it is so, the tribunal of the first instance, from the mode investigation is conducted before it, possesses so many advantages over this in the discovery of truth, that it is now settled, its decision, on a question of fact, will prevail in the supreme court, if not manifestly erroneous. *Rachel* vs. *St. Amand*, 8 *Martin*, 363. *Brown* vs. *Louisiana Bank*, *ibid.* 393. We apply this doc-

trine, with entire readiness, to the case before us: for the evidence renders the fact of insanity doubtful, and the decision of the judge below, against the party holding the affirmative, was in perfect conformity with that principle, which requires him, who avers, not to raise doubts, but to establish facts.

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

Brownson for plaintiff, *Brent*, *Lessassier* and *King*, for defendant.

MOORE'S ASSIGNEE vs. *KING & AL.*

The vendor's ignorance of a defect in the slave, does not protect him in the action *quanti minoris.*

If the vendee, in such a case, being sued for the price, answer that he is entitled to relief, and prays that the vendor may say, on oath, whether the defect complained of did not exist at the time of the

APPEAL from the court of the fifth district.

MARTIN, J. delivered the opinion of the court.* The plaintiff sues on an obligation of the defendants, assigned him by King.

The principal, in the obligation, pleaded it was not a negotiable one, denied having had notice of the assignment, and averred he had an equitable defence. He prayed, that the

*PORTER, J. did not join in the opinion, having been of counsel in the cause.

West'n District.
August, 1822.

MOORE'S ASSIGNEE
vs.
KING & AL.

sale, and makes no offer to return the slave; this, at least on the appeal, will be held sufficient notice of the defence, without an averment of the existence of the defect, and a prayer for a rescission of the sale, or diminution of the price.

assignor might be made a party to the suit, and compelled to answer, on oath, whether the sum mentioned in the obligation was not the price of a negro woman sold by the assignor to him? Whether the woman had not before, and at the time of the sale, a pendulous wen, on the inside of one of her thighs, which, at times, prevented her rendering any service at all; and whether this circumstance was disclosed at the time of the sale?

The assignor admitted, that she received the defendants' obligation as the price of a negro woman sold him, and assigned it to the plaintiff:—that the woman had, at the time of the sale, a mark on the inside of one of her thighs, which did not injure her, nor prevent her services at any time while she was owned by her; hence this circumstance was not disclosed to the vendee:—that she did not know of any pendulous wen, as stated in the answer; but only of the aforesaid mark, which, however, she never examined.

The jury found that the sum mentioned in the obligation was the price of the negro woman named in the answer, who had a pendulous wen, as there stated; which rendered her, at times, incapable of labour; a circumstance

which was not disclosed at or previous to the sale, and that, consequently, the plaintiff ought to suffer a diminution of $150 from the price.

The plaintiff had judgment accordingly, and appealed.

Dr. Elmor deposed, that about eighteen months after the sale he examined the woman, and found she had a pendulous wen, of the size of a duck's egg, attached by a short neck to the inside of her thigh, near the left *labia pudenda*. It was said, she was laid up in consequence of an injury the wen had received while she was crossing a fence. It was wounded and ulcerated; she was relieved. He thinks the wen must have been of ancient origin, as wens do not reach the size of this in less than one or two years. The woman must have had it from her infancy. From its appearance, when the witness saw it, it must have laid up the woman from eight to ten days, and the expense of her cure could not exceed ten dollars. It must ever be subject to injury, and must incommode her in walking. The witness thinks it ought to be amputated, which would not be attended with danger, would confine her for fifteen or twenty days, and would cost about thirty dollars. Were

West'n District. *August*, 1822.

MOORE'S ASSIGNEE *vs.* KING & AL.

not the witness a surgeon, he would not have given half of the price for her, on account of the wen; and as a surgeon, he thinks, he would estimate the diminution in the price, occasioned by it, at one hundred dollars.

Dr. Dixon, having heard Dr. Elmor give his evidence, deposed, his opinion was perfectly the same; except that, as an individual, he would think the diminution of the value of the slave, occasioned by the existence of the wen, at two hundred dollars.

Marshal, the defendant's overseer, deposed, the slave was smart and active. She was sick once or twice with the fever. He never discovered that she limped.

The plaintiff's counsel contends, that as it is not proved that the vendor had any knowlege of the existence of the wen, no diminution of the price ought to have been made.—*Civ. Code*, 360, *art.* 80.

The ignorance of the vendor protects him, indeed, against the redhibitory action: but it is that action, alone, of which the *Code* speaks, in the part quoted.

This ignorance will not avail in the action, *quanti minoris*. "If the seller was ignorant of the defect, then the buyer must keep the slave, and the seller restore so much of the price, as

the value is diminished by reason of the defect; and so we say, if the slave was affected with any hidden disease. *Part.* 5. 3, 64.

We do not think that there is any weight in the objection, that the answer does not expressly aver the existence of the wen, nor conclude with a prayer for the rescission of the sale, or a diminution of the price. The defendant expressly asserts, he is entitled to relief; and prays that the assignor may say, on oath, whether the slave was not afflicted with a wen, which rendered her services much less valuable. This, in our opinion, sufficed to give notice to the plaintiff, of the nature of the defence.

The defendant being sued for the price, and making no offer of returning the slave, the inference was obvious, that he expected a reduction of the price. Admitting, however, that the plaintiff might have taken advantage, at first, of the insufficiency of the answer, it is certainly too late on the appeal.

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

Brownson and *Lessassier* for the plaintiff. *Brent* and *King* for the defendants.

West'n District.
August, 1822.

FUSILIER
vs
HENNEN.

Whether the lessor of a defendant, who disclaims, may be brought in, when he is not domiciliated in the parish? *Quere.*

FUSILIER vs. *HENNEN.*

Appeal from the court of the fifth district.

Browuson, for the plaintiff. This suit was brought to recover a narrow strip of land, lying in the parish of St. Mary, consisting of about one arpent front. Dr. James Hennen, who was living on the land at the time the suit was brought, was originally sued. He disclaimed title; stated in his answer, that the land belonged to A. Hennen, of New-Orleans, and that he was in possession as his tenant. The district court ordered, that A. Hennen should be cited in to defend the title, which was done.

A. Hennen appeared in obedience to the citation, and, among other pleas, put in one to the jurisdiction of the district court, alleging that he habitually resided in New-Orleans, and that he could not be sued in the parish of St. Mary. The jurisdiction of the district court was, however, sustained, and in this the defendant contends there is error, which this court ought to correct.

This question is one of considerable importance, and deserves a more careful examination than perhaps I shall be able to give it.

In many, if not all countries, actions have been divided into local and transitory, and it appears to be a matter which concerns, in some measure, the public policy of nations, to settle what injuries, sustained in one country, shall receive redress in others. Actions concerning lands have, so far as my information extends, been uniformly regarded in all countries as local. In England, actions, real or mixed, as trespasses, *quare clausum fregit*, ejectment, waste, &c. must be laid in the very county in which the lands lie. *Bac. Ab. Actions local and transitory.*

We all know the fate of Mr. Livingston's suit against Mr. Jefferson, brought in Virginia, to recover damages for being dispossessed of the Batture. This suit too, it will be recollected, was brought in the circuit court of the United States. It was instituted within a particular district of that general jurisdiction, which includes within its limits the land on which the trespass was alleged to have been committed—and yet the court would not entertain jurisdiction. I might ask, whether a suit was ever brought in any court, in this or any other country, to recover possession of lands located beyond the jurisdiction of such

West'n District. *August*, 1822.

FUSILIER *vs.* HENNEN.

court? Actions, to recover possession of lands. must be necessarily and essentially local. The judgment, when obtained, operates *in rem*—and how vain and nugatory would it be to bring suit in a court which could not carry into effect its own judgment.

But the present, it will be said, is a different case. It will be urged, that executions from our district courts run into all parts of the state; and, therefore, that a judgment rendered in New-Orleans, may as well be carried into effect in the parish of St. Mary, as if it had been rendered in that parish. This may in fact be true. There are, however, other considerations, which have contributed to make these actions local, besides that of carrying into effect the judgments rendered in them. If a jury should be demanded, the policy of the law has generally been to take the jury from the neighbourhood in which the lands lie. The witnesses usually reside there, and it is often necessary to exhibit, by means of a survey, taken under the orders of the court, the localities and relative position of the object in contestation. All this is done with ease and convenience in a court sitting in the neighbourhood, but become tedious and

expensive operations, when ordered and controlled by a distant tribunal. The testimony too, when the suit is brought in a parish different from that in which the lands lie, would have to be taken principally by deposition, which is much inferior to *viva voce* evidence, given in open court; more particularly on questions of contested limits.

It will probably be argued, that it is the person, and not the subject matter in dispute, which regulates the jurisdiction of the court. And the acts of 1814, will, no doubt, be cited; which provides, that no person, having a permanent residence, shall be sued, in any civil action, in any other parish but that in which he shall habitually reside. 2 *Martin's Dig.* 204, *n.* 22.

If this suit had been directed, in the first instance, against Alfred Hennen, it should doubtless have been commenced in the city of New-Orleans, where he resides, and not in the parish of St. Mary. But it is difficult to conceive a case, in which that could have been necessary. If the land had been vacant, the plaintiff would, no doubt, have gone quietly into possession, and no suit would have been necessary. But, as he found the land occu-

West'n District. *August*, 1822.

FUSILIER *vs.* HENNEN.

pied, it was necessary to commence proceedings against him in possession. Suppose I admit, that it is the person, together with the place in which he resides, which regulates the jurisdiction of the court; I may then ask, what person? The defendant will probably tell me, that it is the person who claims to be the owner: but, I contend, that it is the person in possession. What is the injury complained of? It is the corporal possession and detention of the thing claimed. Who then is the immediate cause of the injury? Most certainly, the person in possession. And who but the author of this injury, ought the plaintiff to have attacked? If I find a person in possession of my property, to which I know he can have no right, am I to inquire what excuse he have to offer for withholding it from me? May I not attack him at once, and, through my legal remedy, compel him to relinquish that which belongs to me, and to which, I know, he can have no title? It will, perhaps, be said, that the possessor is often the innocent agent of another. But that is an affair between him and his principal, and we should be sure, when we consent to act as agents for another, that we do so in a lawful cause. The posses-

sor must justify himself under the right of his principal; and if the principal had no right, it is clear he could communicate none.—*Nemo plus juris ad alium transferre potest quam ipse haberet.*

There is besides another reason, arising from necessity, for pursuing against the person in possession, and that is, that a judgment against any other person would not be *res-judicata* against him, and could not authorize an execution to dispossess him. This necessity equally exists, whether the object of the suit be real or personal property, and whether the possessor holds the thing in his own right or in the name of another. In this suit, the plaintiff chiefly claims possession, and, as subsidiary to that, damages for depriving him of that possession. By whom can possession be given? Certainly by no one but the actual occupant. Any other person would be obliged to get possession from him, before he could transfer it to others. By action then the plaintiff has demanded possession, the thing which was due; and this possession is claimed of the only person who could be condemned to give it. Before the possession of the plaintiff can begin, the detention of the

West'n District. *August*, 1822.

FUSILIER *vs.* HENNEN.

previous possessor must be made to cease.— The judgment must necessarily have this double effect, or the remedy would be incomplete. Hence, the absolute necessity of bringing suit against the person in possession: and this course is not left to be inferred by reasoning from any vague phraseology in the law, but is pointed out in clear and explicit language. It is not directed once merely, but frequently. Thus—*In rem actio est, per quam rem nostram, quæ ab alio possidetur, petimus, et semper adversus eum est qui rem possidet. Dig. lib.* 44, *tit.* 7, *l.* 25.

In rem actio non contra venditorem, sed contra possidentem competit. Cod. lib. 3, *tit.* 19, *l.* 1.

It may be said that these laws contemplate the case of a person possessing in his own right, and are not applicable to those who possess in the name of another. The attention of the court is, therefore, particularly directed to the following law: *Si quis alterius nomine quolibet modo possidens immobilem rem litem ab aliquo per in rem actionem sustineat, &c.—Cod. lib.* 3, *tit.* 19, *l.* 2.

This law, of which the above is a part only, the court will perceive, on examining it, relates particularly to the case of those who

West'n District.
August, 1822.

FUSILIER
vs.
HENNEN.

possess in the name of another, no matter by what title, and directs the procceeding, which, under such circumstances, must be had. It requires, the tenant in possession to make known to the court the name of the person in whose right he possesses. It orders, that the court shall grant a certain delay, in order that this person may be informed of the suit—and for what purpose? Why so that, whether he lives in the same city, whether in the country, or in another province, he may appear, by himself or attorney, to defend the suit in the place where the lands lie. It further states, that if, being thus cited, he does not appear within the time fixed by the court, prescription shall be deemed to be interrupted from the time of commencing the suit against the possessor. It proceeds to direct, that the court shall cite him, and if he still neglects to appear, that the plaintiff, after a summary examination, shall be put in possession. Here we find a plan of proceedings regularly marked out, and which embraces within its provisions precisely the case now before the court. It will be found too, on examining the law succeeding the one just cited, that, apparently suspecting some disposition to wander from

West'n District. *August*, 1822.

FUSILIER *vs.* HENNEN.

these proceedings, it checks this propensity, and brings us back to them—*Actor rei forum sive in rem, sive in personam sit, actio sequitur, sed et in locis in quibus res propter quas contenditur, constitutæ sunt, jubemus in rem actionem adversus possidentem moveri.*—*Code, lib.* 3, *tit.* 19, *l.* 3.

The cautious precision of this last law is not a little remarkable. It begins by saying, that the plaintiff follows the tribunal of the defendant, whether the action be real or personal; and as if apprehensive that these general expressions might, by construction, be extended too far, it immediately imposed a limitation upon them. It commands, that real actions shall be brought, not only against the person in possession, but also in the place where the thing forming the object of the suit is situated; so that, even if it were possible to possess a thing in a place where it is not situated, a proposition which only requires to be stated to show its absurdity, still the suit must be brought in the place where it is situated. These laws have been adopted in Spain, and consequently form a part of the common law of this conntry. *Part.* 3, 2, 29. Are they repealed by the statute of 1814? It will not be pretended that there is any express repeal. The repeal

West'n District.
August, 1822.

FUSILIER
vs.
HENNEN.

may, however, be implied, if the new law contains provisions "contrary to or irreconcileable with those of the former law." *Civil Code*, 5, *art.* 24. But, I shall be greatly in error if any thing "contrary to or irreconcileable with former laws," can be deduced from the statute of 1814. What is this statute but a confirmation of the *Roman Law*, which had said that the plaintiff follows the tribunal of the defendant? And where is the inconsistency between that and another rule, that in real actions the person in possession must be sued? I can see none, nor do I believe that the defendant can show any.

If the person really in possession must be sued, it is evident that the suit must be brought in the place where the lands lie; because, that is the place in which he possesses. But the gentleman may say, that he possesses constructively in New-Orleans. I answer to that, that the possession spoken of means a real and not a constructive one; because it is the real possession which creates the injury; and there can be no constructive possession by one person, without a real possession by another. It is true, the real possession of the tenant is the constructive possession of the landlord; and

West'n District. *August*, 1822.

FUSILIER *vs.* HENNEN.

the law has, from an indulgent spirit, granted certain privileges to the latter, after the suit shall have been commenced against the former. But then it has left it optional with the landlord to avail himself of these privileges or not, as he may deem adviseable. The law will not permit him to lose even his constructive possession, which depends upon the real possession of his tenant, without giving him a fair opportunity for disputing the pretensions of him who seeks to deprive him of it. It therefore provides, that he shall be notified, and that reasonable time shall be allowed for him to appear and defend the suit. But this notice, which the law requires, cannot, it appears to me, be construed into a suit against the landlord. I consider it rather in the light of an extra privilege, accorded by the law on account of the interest he may have, to protect his own constructive possession, by maintaining the real possession of his tenant; a privilege, perhaps, indulged somewhat at the expense of rigorous justice on the part of him who brings the suit, but which is nevertheless wisely accorded to prevent greater injustice.

Let us suppose the proceeding changed, and that the suit, instead of being brought

West'n District.
August, 1822.

FUSILIER
vs.
HENNEN.

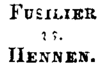
against the tenant, had been brought against the landlord, in the first instance. Did the gentleman ever hear of a tenant being cited in to defend the title of his landlord? This would be to reverse the natural order of things. The right of the tenant is subordinate to that of the landlord. The latter, therefore, cannot be assisted by the former; for, if the landlord had no right, it is clear the tenant can have none to strengthen it with. The consequence of such a proceeding would therefore be, either that the tenant must be turned out of possession by the bare effect of the judgment against the landlord, and consequently without giving him any opportunity to contest the propriety of that judgment, or that another suit would be subsequently necessary against the tenant. The first alternative would produce great injustice towards the tenant. Perhaps, if an opportunity were allowed, he might deny that he occupied as tenant—he might pretend, and possibly prove, that he possessed in his own right—he might even be able to exhibit a legal title in himself. How could it be known with necessary certainty, except by bringing suit against him, in what character or capacity he held?

The second alternative is attended with costs arising from multiplicity of actions, with unnecessary delay, besides many awkward incidental embarrassments, which could never grow out of the regular proceeding. I am certain that, unless the gentleman can show some pretty strong authority for his pretensions, the court cannot be disposed to adopt a proceeding which carries in its train such consequences.

Hennen, in propriâ personâ. The question presented for the consideration of the court is, that of jurisdiction. Was the defendant, Alfred Hennen, domiciliated in the parish of Orleans, liable to an action in the parish of St. Mary?

On the 27th August, 1817, the plaintiff filed a petition in the district court for the parish of St. Mary, against James Hennen, to recover the possession of a certain tract of land, situated in the last mentioned parish; of which he avers, that the said James Hennen is in possession, but of which he is the lawful owner. James Hennen disclaims any title to the tract of land; and avers, that he holds it only as the tenant of the present defendant,

West'n District.
August, 1822.



FUSILIER
vs.
HENNEN.

Alfred Hennen; who thereon is served with a copy of the original petition, by order of the court; and against him only, all subsequent proceedings are conducted; the original defendant having been considered as no longer a party.

A plea to the jurisdiction of the court is made by the defendant, with other pleas and exceptions: also, a general denial is put in to the action, which is in conformity with the practice of our district courts, as established by the statute, (2 *Mart. Dig.* 154, *n.* 5,) and expounded by the decisions of this court. 4 *Mart.* 172, *Tricou* vs. *Bayon*, and *Mart.* 711, *Rippey* vs. *Dromgoole*. *Curia Philip. Excep. Dilat. Nos.* 7 & 8, 12 *Mart.* 100. For, to use the words of the court, "a defendant is bound to include, in the same answer, all his means of defence;" and from the passing of the statute, "it became the duty of defendants to file their allegations on the merits of the cause; and, at the same time, such exceptions as they wish to avail themselves of." 4 *Martin*, 172. The judge of the district court, however, considered this manner of answering as inadmissible, and as a renunciation of the plea to the jurisdiction: and admitting the

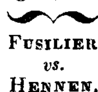
West'n District. *August*, 1822.

FUSILIER *vs.* HENNEN.

fact, that the defendant was domiciliated in the parish of Orleans, overruled all his pleas and exceptions, and went on to a decision of the merits of the cause.

The legislature of 1814, *Acts*, *page* 74, (2 *Mart. Dig.* 204, *n.* 22,) had enacted that, "no person or persons, having a permanent residence, shall be sued in any civil action in any other parish but in that wherein he, she, or they shall habitually reside, any law to the contrary notwithstanding." This was nothing more than a recognition of the ancient law of the land. "*Actor rei forum, sive in rem, sive in personam sit actio, sequitur.*" *Code*, 3, 19, 3; 6 *Febrero*, 13. *n.* 33–36. *Part.* 3, 2, 32, & *Part.* 3, 3, 4. But the plaintiff's counsel, admitting the authority of this law, wishes to bring the defendant within the case provided by the *Acts of* 1817, *page* 28, § 6. Unfortunately, however, for his argument, there is but one defendant interested in the present suit; for but one makes claim to the land re-vindicated, and he resides habitually in the parish of Orleans. In vain, therefore, is this section invoked, for it can have no application to the pleadings of the cause; which, to make it applicable, should show, that two or more defendants

West'n District.
August, 1822.



FUSILIER
vs.
HENNEN.

are intrusted in the land; and that one of them resides in the parish where the land is situated.

The plea then to the jurisdiction of the court, I consider as properly made, and as illegally overruled. The suit, therefore, should have been dismissed; and what the judge of the inferior court should have done, is now solicited from this honourable tribunal, that the defendant may have the full advantage of the laws which secured him from being sued out of his parish.

The wisdom, justice, and policy of the Roman maxim of jurisprudence, *actor rei sequitur forum*, has been perceived and admitted by legislators of almost every civilized country.

And where the defendant reserves his right of exceptions, though pleading to the merits, he might afterwards put in a plea to the jurisdiction of the court, (according to the *Spanish law, Curia Philip.* "*Excepciones Dilatorias,*" *nos.* 7 & 8, & 12. *Martin*, 100.) Thereby, always securing the defendant against the jurisdiction of a judge, who by law has none.

But the plaintiff may urge, that he instituted his suit against the person holding possession of the land; as directed by the *Partidas*, 3, 2,

West'n District. *August*, 1822.

FUSILIER *vs.* HENNEN.

29, extracted from the *Justinian Code*, 3, 19, 2. Had the plaintiff been ignorant of the owner of the land, or the person claiming it as such, his course would have been correct; in order that it might be declared on the record, whether the defendant sued was owner or not; and for no other purpose was the law established. The lessee of land, however, is not liable to any action; if sued, on naming his lessor, he is entitled to be dismissed, (*mis hors d'instance*;) and the party claiming the land, must proceed *de novo*, against the lessor. *Civ. Code*, 377, *art.* 25. (*Code Napoleon*, *n.* 1727—from which the 25*th art.* of the *Civil Code*, above cited, is literally copied.) *Pothier*, *Contrat de Louage*, *nos.* 90–91.—5 *Merlin*, *Répertoire de Jurisp.* 456, *verbo Garantie.*

Ce n'est pas contre un fermier ou locataire que procedent les actions des tiers qui prétendent le droit de propriété ou quelque autre droit dans l'heritage qui lui a été donné à ferme ou à loyer; mais contre le locateur de qui il les tient à loyer ou à ferme, et qui est le vrai possesseur de l'héritage: et si le locataire ou fermier est assigné par un tiers sur quelqu'une de ces actions, il n'est pas obligé de defendre ni par lui même, ni par un autre; il n'a pas même qualité pour le faire; il n'est obligé à autre chose qu'à

West'n District. *August*, 1822.

FUSILIER *vs.* HENNEN

indiquer au demandeur la personne de qui il tient l'héritage à loyer ou à ferme ; et sur cette indication, il doit être renvoyé de la demande, et le demandeur renvoyé à se pouvoir contre cette personne. Pothier, Contrat de Louage, no. 91.

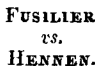
Quand un locataire ou fermier est appelé en justice par un tiers qui conclut contre lui à ce qu'il soit condamné à délaisser héritage dont il jouit, il suffit au locataire ou fermier d'indiquer à ce tiers le nom de son bailleur, afin qu'il se pourvoie contre lui. Jousse, sur l'article 1, *tit.* 8 *de l'ordonnance de* 1667.

Effectivement, Papon, liv. 11, *tit.* 4, *n.* 18, *et Robert, rerum Judicaturum, liv.* 4, *chap.* 9, *rapportent deux arrêts du parlement de Paris, des* 24 *Septembre,* 1563, *et* 26 *Septembre,* 1579, *qui ont jugé qu'un fermier assigné en délaissement d'un héritage, qu'il occupe en vertu de son bail, doit obtenir congé de la demande en déclinant le nom de son bailleur, et qu'il n'est pas obligé de le mettre en cause.*

Mais l'article 1727 *du Code Napoleon ne déroge-t-il pas à notre jurisprudence? Voici ses termes :* (literally the same with the *Civil Code.*)

Ces derniers termes, et doit être mis hors de cause s'il l'exige, en nommant le bailleur, présentent, comme l'on voit, une disposition parfaitement conforme aux arrêts cités. Mais cette disposition n'est-

West'n District. *August*, 1822.



FUSILIER *vs.* HENNEN.

elle pas contrariée par celle qui résulte des termes précédens, il doit appeler le bailleur en Garantie ?

Il faut convenir qu'à la première vue, ces deux dispositions paraissent s'éntre-détruire. Si le fermier doit être mis hors de cause, du moment qu'il nomme son bailleur, il ne peut pas étre tenu d'appeler son bailleur en Garantie ; et s'il est tenu d'appeler son bailleur en Garantie, il ne lui suffit pas de nommer son bailleur pour être mis hors de cause. Il faut donc chercher un moyen de concilier ces deux dispositions ; car on ne peut pas supposer qu'une antinomie aussi palpable soit èchappée au législateur dans un même article ; et ce moyen se présente de lui même, en distinguant ce à quoi est tenu le fermier envers son bailleur, d'avec ce à quoi il est tenu envers le demandeur en délaissement.

Le demandeur en délaissement à qui le fermier a décliné le nom de son bailleur, pourrait-il, à défaut de mise en cause de celui-ci, obtenir un jugement contre celui-là ? Non certainement. Le jugement par lequel le fermier serait condamné au délaissement en l'absence du bailleur, serait sans effet contre le bailleur lui-même. Le fermier ne nuit donc pas au demandeur en délaissement, par le défaut de mise en cause du bailleur ; et dès qu'il ne lui nuit pas, il est bien évident que le demandeur en délaissement n'a point d'action contre lui de ce chef.

Concoit-on d'ailleurs comment le demandeur en délaissement pourrait, en assignant le fermier, se soustraire à la règle générale qui l'oblige d'assigner le bailleur à personne ou à domicile? C'est donc envers le demandeur en délaissement que le fermier doit être mis hors de cause, s'il l'exige, en nommant le bailleur pour lequel il possède.

Mais si le fermier n'est tenu à l'egard du demandeur en délaissement, qu'à nommer son bailleur, il a un autre devoir à remplir envers son bailleur même: il doit lui dénoncer le trouble qu'il éprouve dans sa possession; il doit en prévenant toute surprise de la part du demandeur en délaissement, mettre son bailleur à portée de se defendre; et comme en cas d'éviction, son bailleur lui devra des dommages-intérêts, il doit l'appeler en Garantie.—5 *Merlin, Répertoire de Jurisprudence*, 456, *verbo Garantie*, *Paillet, Manuel de Droit*, 5*th ed. Code Nap. art.* 1727, quotes this extract from *Merlin* as the correct exposition of the article.—See *Pothier, Propriété, nos.* 297–298. *Pothier, Traité de l'Hypotheque*, 12*mo. ed.* 154, *chap.* 2, *sec.* 1, *art.* 1.

Even in cases of warranty on sales, where the object appears to be to entertain a suit against the warrantor, out of the jurisdiction of his domicil, the suit would be dismissed.—*Pothier, Procedure Civile, chap.* 2, *sec.* 6, *art.* 2, §3.

West'n District. *August*, 1822

FUSILIER *vs.* HENNEN.

So carefully does the law guard against every attempt to withdraw a defendant from the jurisdiction acquired by a domicil.

The *Partida*, 3, 2, 29, only provides for the case where the owner will not appear, and then grants the remedy of *asentamiento*; to make him answer, or contest the right of the plaintiff—See *Curia Philip. Contestacion*, *n.* 12. This law too must be considered as repealed by the article of the *Civil Code*, 377, *n.* 25.—See *Novissima Recop. lib.* 11, *t.* 5, and *Part.* 3. *tit.* 8.

* By the Spanish practice it was not necessary to cite the lessee—*Curia Philip.* "*Citacion*," *n.* 7. If not necessary, a suit against him could not, and would not give jurisdiction against his lessor.

A suit against the lessee does not even serve to interrupt prescription in favor of the lessor. *Pothier*, "*Prescription*," *n.* 52. It will be interrupted only from the date of the new suit instituted against the lessor.—*ib.* So completely irregular and useless is it, to institute a suit against the lessee instead of the lessor, the real possessor of the estate.

The only authorities produced by the counsel for the plaintiff, in support of the jurisdic-

West'n District.
August, 1822.

FUSILIER
vs.
HENNEN.

tion of the court, are drawn from the rescripts of Roman emperors, prescribing the rules of practice for the courts of justice in the different provinces of the empire. Now, the practice in those courts, can have no binding authority in the tribunals of Louisiana, when at variance with the statutes of her legislature. It is evident, from the authors on French jurisprudence which I have quoted, that the practice in the tribunals of France. is directly the reverse of that which was followed in those of Rome. The common law of France was introduced into Louisiana by the emigrants from that country, and remained in force until the country was taken possession of by Spain. Nothing opposed to the French law, has been shown from any author on the Spanish law; on the contrary, I have cited authorities to prove, that the jurisprudence of those two countries are in harmony. The statute of 1814 then, was only declaratory of the French and Spanish practice.

The distinction of local and transitory actions, is a creature of the *Common law*, and unknown in the *Roman civil law*. It is nugatory then for the plaintiff's counsel to found an argument on such distinction. Had Mr. Li-

West'n District.
August, 1822.

FUSILIER
vs.
HENNEN.

vingston, after having been dispossessed of his Batture by Mr. Jefferson, sued him for damages, in any country in Europe, governed by the civil law, he could have obtained a judgment, had there been no greater obstacle in his way than a plea to the jurisdiction of the court. So, should the plaintiff sue the defendant in the courts of his domicil, every redress which justice can yield, will easily be obtained, and carried into execution against him. The defendant is willing to meet the plaintiff there.

PORTER, J. declining to sit, on account of his having been of counsel in the cause, and MATHEWS, J. having some interest in the question, although both parties had entered on record their willingness to argue the case before him, from motives of delicacy, declined giving an opinion. The decision was postponed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, SEPTEMBER TERM, 1822.

West'n District.
Sept. 1822.

CURTIS
vs.
GRAHAM.

CURTIS vs. *GRAHAM.*

One co-trespasser may be witness for another

And when there are co-defendants, if there be slight evidence, or none against one, he may be sworn as a witness for the other.

A fortiori when he has been named as a party and not cited.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The plaintiff sued Thomas Graham & ——— Way, in an action of trespass—there was judgment against Graham, and he appealed.

The first question presented, is on a bill of exceptions taken to the refusal of the judge *a quo* to permit Way, one of the persons against whom suit was brought, to be sworn on the part of the defendant Graham.

The petition states, that the witness offered is a citizen of Natchitoches—and the record

West'n District. *Sept.* 1822.

CURTIS *vs.* GRAHAM.

does not show service of citation on him. It does not appear that any proceedings were had against him, nor indeed could any be legally had against him in the court where this action was commenced: for it was a personal one, and he could not be sued out of his parish.

There is no doctrine more clearly established than that one co-trespasser may be a witness for another. The books, which treat of evidence, all recognise it.—*Phillips' Ev.* 31; *Peake*, 159. It has been so decided in this state, on principles drawn from our own law. 4 *Martin*, 28. The objection goes to his credit, not to his competency.

It is also equally a well settled doctrine, that the circumstance of separate suits having been commenced against trespassers, does not affect the right which each one enjoys, to call for the testimony of the other. *Phillips' Ev.* 32; *Peake*, 159. And that where they are even co-defendants in the same suit, if there is slight evidence or none against one, he may be sworn as a witness for the others. *Peake*, 160; *Espinasse's Nisi Prius*, *A. E. vol.* 1. *p.* 2. *Phillips on Evidence*, 61–62. Where suit has been commenced against several, and (as

in this case) service has only been made on one, the rule is to admit, as witnesses, those who are not cited to appear as parties. 10 *Johnson*, 21. *Binney*, 316.

The books in which this doctrine is found, it is true, are not of authority here, but they are evidence what enlightened men think on these subjects, and as they are in strict conformity with common sense, and our own ideas of justice, and are opposed to (6 *Martin*, 670,) no principle of our law—we willingly adopt them. It would indeed be a most inconvenient doctrine, and one that might be used to work great injustice, were we to hold that the plaintiff could arbitrarily make the witnesses of defendant parties in the suit, and thus cause an injury inflicted on them, the means of working an injustice to others.

In the case before us, the witness offered was made defendant in the petition, but no process was ever served on him, as far as the record enables us to know that fact, and we cannot receive information of it from any other source: he was not, therefore, a party, and there was no legal ground for objecting to him as incompetent. Had he even been cited, the evidence against him was so slight,

West'n District.
Sept. 1822.

CURTIS
vs.
GRAHAM.

that he might well have been sworn to testify for the other defendant.

If we consider the case, as it turned out in evidence, one of contract, not of tort, there would be still less ground for holding the witness incompetent; for it appears, he entered on the premises as agent for Graham, and had no interest, as far as we can discern, either directly or indirectly in the matter at issue.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that this cause be remanded to the district court for a new trial, with directions to the judge not to reject Way as a witness, because he was included in the petition, and a party in the cause. It is further ordered, adjudged and decreed, that the plaintiff and appellee, pay the costs of this appeal.

Baldwin & Bullard for the plaintiff, *Thomas* for the defendant.

YEISER vs. *SMITH.*

If the appellant fails to bring up his case according to law, the appellee may have the

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The appellant, who was defendant in

West'n District.
Sept. 1822.

YEISER
vs.
SMITH.

judgment affirmed, with damages for the delay.

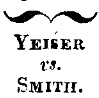
the court below, having failed to prosecute his appeal within one month, as prescribed by the act of the legislature, passed the 1st March, 1822, the record has been brought up by the appellee, who has prayed that the judgment of the inferior court should be affirmed with damages.

The only difficulty in acceding to the prayer of the appellee, is the manner in which the record is made up. There is neither statement of facts, special verdict, evidence taken down by the clerk, written document certified, or any thing equivalent thereto; and the question is presented, whether, in the absence of these, the judgment of the court below can be affirmed?

This question has already been before the court, in the case of *Clarke* vs. *Parham*, 3 *Martin*, 405; and it was there held, that where the appellant did not bring up the facts of the case, so as to enable the court to examine the record, and see whether there was error in the judgment complained of, that the judgment would be confirmed, and damages given for the delay.

The same point was again brought under consideration in *Shannon* vs. *Barnwell & others*,

West'n District.
Sept. 1822.



YEISER
vs.
SMITH.

4 *Martin*, 35, and received a similar decision. The opinion, there delivered, was sanctioned by that given in *Dussuau* & *als.* vs. *Dussuau* & *al.* 8 *Martin*, 164.

It would be sufficient to refer to these opinions, as settling our jurisprudence on this subject; but as a different view of it was taken in the case of *Stringer* vs. *Duncan* & *als.* 7 *Mart.* 359, we have examined the question *de novo*, and we are all satisfied, that the construction given to the act in the cases just cited, is the correct one; and that it is our duty to affirm the judgment of the inferior court with damages.

The act of the legislature organising this court, provided that suits in the district courts, where the matter in dispute exceeded $300, might be re-examined, reversed, or affirmed, here; but that there should be no reversal, for any error in fact, unless on a special verdict, statement of facts, &c.

By this law, a statement of facts is necessary, to authorize us to *reverse* a judgment. It is silent as to what will justify an affirmance of it; *expressio unius, est exclusio alterius*, and it seems a matter of course, that the judgment should be confirmed, when we are not au-

West'n District.
Sept. 1822.

YEISER
vs.
SMITH.

thorized to reverse. Where the appellant alleges error, but proves none.

For these reasons, and those expressed in the case of *Shannon* vs. *Barnwell and others*, 4 *Martin*, 35, we are of opinion, that the judgment of the district court be affirmed with costs, and ten per centum on the amount of said judgment, for delay.

Johnson for the plaintiff, *Baldwin* for the defedant.

FERGUSON & RICH vs. *ROBERT MARTIN.*

If the appeal is taken for delay, the judgment of the court below will be affirmed with damage.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The appellee has brought up this case under the late act of the legislature, and the same questions are presented which offered themselves in that of *Yeiser* vs. *Smith.* As the appellant, whose duty it was to have furnished a statement of the facts, to enable us to correct the error, if any, in the decree of the district court, has failed to do so; we must consider that he appealed, not to reverse the judgment below, but to procrastinate its execution.

West'n District.
Sept. 1822.

FERGUSON & KICH
vs.
MARTIN.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs, and ten per centum damages for the delay.

Oakley for the plaintiffs, *Thomas* for the defendant.

KEMPER vs. *ARMSTRONG & AL.*

If a suit be for damages, and for an injunction to quiet, &c. an appeal will lie, tho' less than $300 be claimed for damages, the land being of sufficient value.

Damages are due for the least wrongful entry.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The petition states, that the plaintiff being in the open and peaceable possession of a certain tract of land, which he had lately bought, the defendant Fristoe, sheriff of the parish, forcibly and unlawfully entered thereon, by the directions of the defendant Armstrong, and levied, on a part thereof, an execution, issued on a judgment obtained by said Armstrong against L. Martin, the plaintiff's vendor. The petition concluded with a prayer for an injunction and damages.

The defendants pleaded the general issue, and especially denied the alleged purchase of the land, and that the plaintiff sustained any damages.

West'n District.
Sept 1822.

KEMPER
vs.
ARMSTRONG & AL.

The plaintiff had judgment for six and a quarter cents and costs. The defendants appealed.

The plaintiff's counsel urges the appeal ought to be dismissed, because he claimed only $290 for his damages. We think, with the opposite counsel. that the matter in dispute was so much of the land as was levied upon to satisfy the judgment against Martin. which appears to be for $577 87½.

The judgment and execution in Armstrong's suit, and the deed of Martin to the plaintiff, make part of the statement of facts. There is also the deposition of Baldwin.

This witness swears the plaintiff told him, in November, 1821, the plantation on which he (the plaintiff) resided, was his father's; that he had purchased, and was improving it for him, as his agent—that he had no property except a negro woman in New-Orleans, for whom he gave an order to the witness, to whom he was indebted, but the witness could not obtain her.

The deed of sale is prior to the judgment. Martin expressly bargains, sells and delivers the land to the plaintiff. and warrants the title. The plaintiff promises to pay $12.000 for it.

West'n District.
Sept. 1822.

KEMPER
vs.
ARMSTRONG & AL.

in five years—paying yearly $500 for the interest. In case of failure in the punctual payment of the price, the land is to revert to the vendor.

The plaintiff has proven his title and possession by the deed, which expressly states a delivery, and the entry by the return on the execution—nominal damages are due for any, the least, wrongful entry. He has therefore made out his case.

The defendants urge, that the deed is one of lease, not of sale; that the $500 are a yearly rent, and the sale, if any, was not a serious one, for the plaintiff did not bind himself effectually to pay the price—as, by his failing to pay, the land was to revert, and, consequently, the sale was to be avoided, and he discharged from any obligation to pay the price—that Baldwin's testimony shows the plaintiff was not the owner of the land—that the conveyance was a fraudulent one, the object of the parties being only to protect the land from the effect of the judgment, which Armstrong was about to obtain against Martin.

The deed has been correctly considered as one of sale.—Martin bargains, sells and delivers a tract of land, and the plaintiff

promises to pay $12,000, as the consideration of the sale.

Nothing shows the contract to be one of lease. The $500 stipulated, in yearly payments, are expressly said to be the interest of the deferred price.

The clause próviding that the land would revert, if the price was not punctually paid, does not vitiate the contract. Indeed it is almost of the nature of the contract of sale. *Civ. Code*, 361, *art.* 86.—There is nothing illegal in it, and the law has made express provision for its execution.—*Id. art.* 88.

We cannot assent to the proposition of the defendants' counsel, who urges that it avoids the contract, relying on the provision of the law, that "every obligation is null, that has been contracted under a *potestative* condition, on the part of him who binds himself."—*Civil Code*, 272, *art.* 74.

This clause cannot be considered as containing one of the conditions, under which the vendee's obligation arises. It is a resolutory one only.—13 *Pand. Franc.* 20. It cannot avail him, for he could not invoke it without availing himself of his own wrong—*Pothier Vente. ff. de lege Contr.* 2 & 3—and he never

West'n District. Sept 1822.

KEMPER vs. ARMSTRONG & AL.

would fail to do so, if the thing sold happened to perish before the price became payable.

Baldwin's testimony cannot destroy the written evidence of the plaintiff's title, resulting from the deed.

Fraud is not alleged, and cannot be implied from the circumstance, that the sale had the effect of removing the land from the reach of a creditor, who was on the eve of obtaining judgment—the law has declared, when a creditor shall have a lien on his debtor's land, and the courts cannot anticipate the provision of the law. There is no evidence that the plaintiff knew his vendor owed any thing.

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

Johnson and *Scott* for the plaintiff, *Thomas* for the defendants.

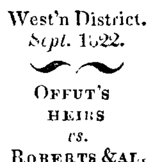
OFFUT'S HEIRS vs. *ROBERTS & AL.*

The verdict of a jury will be disregarded, if they find a fact of which there is not the least tittle of evidence.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiffs sued by their tutors

12m300
47 303



and curators, except one who sued with her husband, on the sale of sundry negroes, part of the estate of their father, sold by the parish judge, the price of whom was expressly made payable to Seth Lewis, testamentary executor; they alleged, that the latter had rendered his accounts and did not any longer act as executor—they brought, at different times, two suits for the recovery of the first and second instalments of the sale.

The defendants pleaded to the first suit the general issue, averring that the plaintiffs were not the children, or heirs of Offut; that the persons named as their tutors or curators, had not that capacity; that the plaintiff Ann was not the wife of J. Miramond, with whom she sued as his wife.

One of the defendants separately pleaded his minority, and the want of a curator.

The first suit not being tried, at the inception of the second, the defendants pleaded to the latter, the existence of redhibitory defects. The two cases were consolidated; there was a verdict establishing a redhibitory defect, which avoided the sale of one of the slaves, valued at $2000; the jury found for the defendant: as to the rest there was judg-

West'n District. *Sept.* 1822.

OFFUT'S HEIRS *vs.* ROBERTS & AL.

ment accordingly, and the plaintiffs appealed; and the defendants, under the late act of assembly, have prayed relief.

Whatever may be our reluctance in setting aside the verdict of a jury, we are bound to do so, where it is unsupported by any evidence in regard to some material fact.

Here the defendants pleaded the general issue, expressly denied that the plaintiffs were the heirs or children of the person whose estate is claimed, and that the persons who style themselves tutors and curators of the minors have those capacities.

By the statement of facts, the least tittle of evidence does not appear to have been produced to establish what was there denied, and was of vital importance to the success of the plaintiffs.

It is true, on the second suit, the like pleas were not made, and the defence was confined to redhibitory defects; but the two suits were consolidated, and we take the effect of the consolidation to be that the cases are to be considered as if the facts of both petitions were introduced in one or several counts, and those of the two answers put together in one.

On suits, thus consolidated, but one judg-

West'n District
Sept. 1822.

OFFUT'S HEIRS
vs.
ROBERTS & AL.

ment can be regularly given; and it appears to us, that in the present instance, the plaintiffs cannot recover, as they have failed to establish their right to any part of the deceased's estate.

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

Baldwin for the plaintiffs, *Thomas* for the defendants.

FERGUSON & AL. vs. *BACON.*

The appeal will be dismissed if there be a bill of exceptions to the final judgment, and no statement of facts.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. In this case there is a bill of exceptions to the final judgment of the district court, but no statement of facts.

No bill of exceptions lies to a final judgment. *Bujac & al.* vs. *Mayhew*, 3 *Martin*, 613.

It has been frequently decided, that the appellee may have the appeal dismissed when there is no special verdict, bill of exceptions, case argued, or statement of facts. *Harrison* vs. *Magee & al.*, 3 *Martin*, 397; *Taylor* vs. *Porter*, *id.* 423.

West'n District. *Sept.* 1822.

FERGUSON & AL. *vs.* BACON.

In this case the defendant and appellee has prayed to be dismissed.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed at the plaintiff and appellant's costs.

Baldwin for the plaintiffs, *Wilson* for the defendant.

BUTLER vs. DESPALIR & AL.

No judgment can be reversed on the mere assignment of errors, which might have been cured by evidence legally introduced.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The defendant has assigned errors appearing on the face of the record.

The first is, that the petition does not allege demand on the maker of the note. If the other allegation in the petition is true, that the defendant signed as surety and not as endorser, the transaction was not a commercial one, and demand was unnecessary.

The same answer may be given to the second error alleged, viz. want of notice.

The third and fourth are corollaries from the two already noticed, and require the same judgment.

Where the errors complained of are such

West'n District.
Sept. 1822.

BUTLER
vs.
DESPALIR &
AL.

as might have been cured by evidence legally given on the trial, we cannot reverse the judgment below on the mere assignment of these errors, because we do not know but such evidence was introduced. The rule on this subject is correctly stated in the case of *Daunoy* vs. *Clyma* & *al.*, 11 *Martin*, 557.

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

Thomas for the plaintiff, *Baldwin* for the defendant.

ALBERT vs. *DAVIS.*

APPEAL from the court of the sixth district.

Evidence introduced on the trial of a cause, cannot be assigned as error on the face of the record.

PORTER, J. delivered the opinion of the court. The defendant in this case assigns as error, on the face of the record, evidence introduced by himself on the trial of the cause.

Errors, in fact, can only be corrected in this tribunal, by bringing up all the evidence taken in the inferior court; and the appellant cannot make his neglect in doing so, a ground for relief in another shape.

We have doubted, whether it was not our

West'n District. *Sept.* 1822.

ALBERT *vs.* DAVIS.

duty to affirm the judgment of the court below with damages; but as the testimony on which the error is alleged appears, by answers to interrogatories, it is not clear but the defendant may have thought himself entitled to relief in this way.

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

Thomas for the plaintiff, *Bullard* for the defendant.

CAVENAGH vs. *CRUMMIN.*

A promise to deliver a sound and likely negro boy, aged, &c., which *is* valued at $1200, is discharged by the delivery of a sound and likely negro boy, aged, &c.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. Cavenagh, the plaintiff in the court below, and now appellee, instituted this suit on two intruments of writing, made in his favour by the defendant and appellant, on the 13th July, 1821. In one, he promises to deliver to the plaintiff, on or before the first day of June next, ensuing the date of said instruments, a sound and likely negro boy, aged between the years of twenty and twenty-five; which ne-

gro boy is valued at $1200. The other contains a promise to take up and pay off $800 of Cavenagh's paper, &c.

It is agreed, that the judgment of the district court is correct, so far as founded on the last of these instruments; which will, therefore, not be noticed.

The facts of the case, as they appear in the record, show that these promises were made to be fulfilled in payment of the price of a tract of land, purchased by the defendant from the plaintiff, being $2000. In the act of sale, the mode of payment is stipulated, and corresponds with the collateral promise; except, that the expression in the former is, (in relation to the negro) that he *is to be valued* at $1200; and in the latter, he *is valued* at that sum.

From the tenor of the act of sale, and promise to deliver the negro, taken together, we are clearly of opinion, that the price of $1200 was agreed on, and fixed by the parties to the contract, as the value of a negro, such as is described in said agreement. The expression, *to be valued,* when taken in conjunction with the words of promise, in the collateral instrument, clearly mean *to be received,* or counted at that price. The obligation of

West'n District. Sept. 1822.

CAVENAGH *vs.* CRUMMIN.

the promisor would be fully discharged by the delivery of a negro, corresponding with the description contained in the promise; and he insists, that he has fulfilled his engagement by a tender of such a one, made to the appellee, some time in the month of December last, and shortly previous to the final period limited in his contract.

To support this plea of tender, he relies, principally, on the act of 1821, entitled "an act concerning tenders of payment;" which, he contends, has repealed the rules on the subject of tenders of payment and consignment, as laid down in the *Civil Code*, 292.

We are of opinion with the counsel for the appellee, that the act of 1821 relates exclusively to cases where suit is actually commenced, and is intended by the legislature to operate principally on costs, or *fraix de justice;* but leaves the law as it formerly stood, in relation to the entire discharge of the debt or obligation. Indeed, the defendant has not, in the present case, brought himself within the rules prescribed by either of the laws, as his tender is not supported by the testimony of two witnesses.

It is, however, the opinion of the court, that

West'n District.
Sept. 1822.

CAVENAGH
vs.
CRUMMIN.

he has shown such willingness to fulfil his promise, according to its real meaning, by the offer which he made to deliver a certain negro of the description required by said promise, as appears from the testimony, that he ought not to be compelled to pay damages for the delay.

It would not have been necessary to examine the pretensions of the appellee, had he not claimed a reversal of the judgment, in his answer on the appeal.

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

Thomas for the plaintiff, *Oakley* for the defendant.

KAY & AL. vs. COMPTON.

Facts assumed or proven, in the judgment of the district court, and not otherwise proven, cannot be considered as established on the appeal.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. In this case the plaintiffs and appellees have resorted to the defendant for evidence to support their claim by interrogatories, as authorized by law. He swears, positively, that he is accountable only for $1000, on the con-

West'n District. Sept. 1822.

KAY & AL. vs. COMPTON.

tract entered into between him and the testator of the plaintiffs.

To rebut these answers, the testimony of one witness, and an account current between the deceased Baud, and Shipp, Kay & Co. is offered. The affidavit of the witness, which is received as evidence, is not absolutely contradictory to the answers of the defendant; and it does not appear from the evidence in the case, that Kay. who is here appellant, was a partner of the firm of Shipp, Kay & Co. Nor does it appear in any other way, except as assumed by the judge of the district court, that Kay made the entries in commercial books of said company, as exhibited in the account current. It has been often determined by this court, that the averment of facts, assumed by the inferior tribunals in giving judgments, will not be acknowledged by the appellate court, as established in pursuance of law.

After strict examination of the whole evidence in this cause, we are of opinion, that the answers of the defendant are not contradicted, as required by the act of 1805. It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided, and reversed; and proceeding here to give such judgment as ought there to have

been rendered, it is further ordered, adjudged and decreed, that the plaintiffs and appellees do recover from the defendant and appellant, the sum of three hundred and thirty-nine dollars and fifty-four cents, with legal interest; and that the appellees pay the costs of this appeal; and that the appellant pay costs in the court below.

Bullard for the plaintiffs, *Thomas* for the defendant.

MEUILLON vs. *OVERTON.*

APPEAL from the court of the sixth district.

This case turned on a question of fact, as to boundaries.

MATHEWS, J. delivered the opinion of the court. This suit is brought for the recovery of a section of land described in the petition; judgment being rendered for the defendant, the plaintiff appealed. She derives title from A. J. Renois, who claims by right of pre-emption, and actual purchase from the U. States, of a fractional section of land, containing about seventy-eight acres, as appears by the certificate of the register of the land-office of the south western district in this state. It is bounded, according to said certificate, on the lower side, or N. E., by land of Valentine; and on

West'n District. Sept. 1822

MEUILLON vs. OVERTON.

the S. W. or upper side, by the land of Constance Escofier. The defendant, who is in possession of part of the land claimed, attempts to support his right of property, and possession, by a title to one half arpent in front, with the ordinary depth, derived from the mother of the plaintiff's vendor through Valentine, whose land limits that of the plaintiff's below; as appears by the register's certificate. It appears also, from the evidence, that the defendant claims, under Valentine, other land besides the half arpen mentioned in his answer; and which, he asserts, adjoins a tract confirmed to John Archenard; the course of the side lines of which bear S. 28 E. The lower line of Madame Escofier's tract, which is called for in the certificate of preemption, and purchase issued to A. J. Renois, runs S. 31 E. The oral evidence, which relates to the course of the defendant's upper fence, and the length of time which it has continued in the same direction, (bearing now S. 28 E.) is contradictory, and can aid but little in determining the true course of the plaintiff's lower line.

It is to be lamented, in this case, that no official surveys have been made of the con-

West'n District.
Sept. 1822.

MEUILLON
vs.
OVERTON.

flicting claims. The just and proper limits of the land, sued for, depend on the courses that ought to be given to the lines of the adjacent tracts, called for in the certificate of the register, (viz.) that of Valentine Lessart below, and Madame Escofier above. It is established, uncontrovertibly, by the evidence, that the lower line of the upper tract, called for in said certificate, runs S. 31 due E.; and must on that side give the same direction to the side line of the plaintiff's land, as forming a common limit for the two tracts. There is no positive and express evidence contained in the record, which establishes the course of Valentine Lessart's upper boundary; on which depends the direction to be given to the half arpent sold to him by Madame Renois and her children, being a part of the land for which the plaintiff's vendor obtained title from the United States as above stated. In the absence of this express and positive proof, we must inquire, whether the evidence of the case exhibits facts, from which any strong legal presumption arises, by which our judgment should be directed, in the same manner as by express proof. For, on this circumstance, the decision of the cause greatly de-

West'n District. Sept. 1822.

MEUILLON vs. OVERTON.

pends; because, a well established limit for Valentine's claim must produce the same effect in direction to the lower line of the plaintiff's land, which is caused by the line of Madame Scofier, in relation to the upper limit.

The only evidence of title in Valentine Lessart, appearing on the record, is found in the register's certificate of pre-emption. and purchase, accorded to A. J. Renois, under whom the plaintiff claims, which limits his claim on the lower side, by land of said Valentine; and a sale or exchange of four arpents in front made by the latter with G. B. Curtis, under whom the defendant claims title.

From this evidence, accompanied with that which faces the upper limit of the land confirmed to John Archenard, now in the possession of the defendant, under regular transfer of title, it is evident that the land sold by Valentine to Curtis lies between that claimed in the present case, in virtue of the purchase by A. J. Renois and Archenard's claim, the side lines of which run S. 28 E., and being admitted to be a better title than that of Valentine. the course of the lower line of the latter claimant must be the same. But by ascertaining the direction of the lower limit, we

West'n District.
Sept. 1822.

MEUILLON
vs.
OVERTON.

arrive at no certainty as to what must be the course of the upper; for Madame Escofier's lower line, which directs the course of the upper line of Renois under whom the plaintiff claims, runs S. 31 E., and consequently his lower line ought to pursue the same course, unless the claim of Valentine gives it a different direction. No title is shown in the latter, except the uncertain recognitions above stated, which give no direction to the side lines of his claim; and consequently the line between him and the claim of the family Renois must be presumed to take the course of their upper line, which is directed by that of Mde. Escofier, being S. 31 E. The point of departure A. on plot E. no. 1, corresponding to the point C. on the plot no. 2, being agreed on as the commencement of the limit between the parties litigant, and no evident or legal presumption arising from fact contained in the record, appearing to this court, to give to the uncertain claim of Valentine Lessart the course of S. 28 E. on his upper limit; but on the contrary, believing the course of his upper line ought to be S. 31 E.; and that the half arpent purchased by him from the family Renois, and transferred in the sale and exchange to Curtis, must follow the same course: considering

West'n District. Sept. 1822.

MEUILLON vs. OVERTON.

also, that the quantity contained in Renois' pre-emption and purchase cannot otherwise be had, and even in this mode of locating is deficient, and being of opinion that his title is better than that of Valentine,

It is therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed ; and proceeding here to give such as, in our opinion, ought to have been rendered in the court below, it is further ordered, adjudged and decreed, that the plaintiff do recover from the defendant all the land which the latter possesses by runing his upper boundary, which begins on the bayou Rapides at the point A. and running such a course forty arpents deep, as will include between it and Madame Escofier's line, which runs S. 31 E., the quantity of eighty superficial arpents; and the appellee pay costs in both courts.

Thomas for plaintiff, *Bullard* and *Johnston* for the defendant.

DEAN, for the use of VINEYARD vs. *SMITH & AL.*

Solidarity is never presumed. A defendant, who proceeds to

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the

court. The defendants are sued on a note, payable to Dean, which the petition avers to be the property of Vineyard.

West'n District. *Sept.* 1822.

DEAN *vs.* SMITH & AL.

Smith pleaded commorancy in abatement.

Hubbard, the other defendant, the general issue; and that the consideration of the note was the price of two slaves sold by Dean; one of whom, had a redhibitory defect, &c.

trial, cannot afterwards demand that the suit be dismissed, because there is no legal evidence of the plaintiff's answer to his interrogatories being sworn to.

There was judgment against Smith for one half of the note, and the suit was dismissed as to Hubbard; certain interrogatories put by him to the plaintiff not being sufficiently answered.

The plaintiff and Smith appealed.

The fact of Smith's residence at Natchitoches does not appear to us clearly established, and we deem ourselves bound not to disturb the judgment against him, overruling his plea.

We think the court was correct in giving judgment for one half of the note only; as it did not expressly appear he bound himself solidarily, and solidarity is never presumed. *Slocum* vs. *Sibley*, 5 *Martin*, 682.

The plaintiff's answer to the other defendant's interrogatory purports to be sworn before G. Black, a justice of the peace for Hall

West'n District. Sept 1822.

DEAN vs. SMITH & AL.

county, Georgia, whose official capacity is attested by the clerk.

Hubbard's counsel urges, that the district court was correct in dismissing the suit, as there was no legal proof of the answer to the interrogatories having been sworn to, and it was the plaintiff's duty to produce the proof. He relies on the cases of *Gitzandener* vs. *Macarty*, 10 *Martin*, 70; *Curtis* vs. *Stickler & al.* 8 *id.* 212; and *Woolsey* vs. *Paulding*, 9 *id.* 280.

The defendant did not move to dismiss the suit under the the act of 1805. 2 *Martin's Digest*, 160, but went to trial on the merits. He thereby waived his right to move for a dismissal of the suit by making his election to proceed to trial. The court, therefore, erred in dismissing the suit.

It is therefore ordered, adjudged and decreed, that the judgment of the district court, as far as it relates to the defendant Smith, be affirmed with costs in both courts; and that, as far as it relates to the defendant Hubbard, it be annulled, avoided and reversed, and the cause remanded, with directions to the judge to proceed to trial.

Bullard for the plaintiff, *Thomas* for the defendant.

HOLSTEIN vs. *HENDERSON.*

West'n District. *Sept.* 1822.

HOLSTEIN *vs.* HENDERSON.

A title calling for objects on both sides of the bayou must be laid out in such a manner as to include each.

If no particular limits are given in a title, the land must be surveyed so as to interfere as little as possible with the rights of others.

Where a title calls for lands on the east or west side of a water-course, without specifying how much on each, it should be located so as to give an equal quantity on both.

Where a certain quantity of superficial arpents is granted on a part of a bayou, where, from the manner surrounding titles are surveyed, the quantity given cannot be obtained, unless by making the part of the water-course the side line of the survey, it may be done.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The petitioner states, that she is the mother and legal heir of Stephen Holstein, and that, as such, she is the legal owner and proprietor of a tract of land of ten arpents front, with the ordinary depth on the Bayou Cotile, bounded on the one side by lands formerly claimed by John Henderson, and now by Francis Henderson, and on the other by those of J. B. Vallery.

That she claims title to the premises in question by virtue of a *requette* of one Thomas Choate, dated in 1797, and actual settlement, improvement and cultivation by the said Choate for many years; a confirmation of the title, and a conveyance to her son Stephen Holstein, deceased.

The defendant denies the truth of these allegations, and pleads, that he owns the land sued for in pursuance of a title contained in the certificate of the commissioners of lands for the western district, in favour of John Henderson, under whom he holds; and that he, and those from whom he purchased, have

West'n District. *Sept.* 1822.

HOLSTEIN *vs.* HENDERSON.

An obligation in the alternative gives the debtor the choice; hence where A promised to pay B. $500, or convey him a tract of land, held that it was not such a title as would enable B. to plead prescription.

had quiet and uninterrupted possession of the property, in dispute, during more than ten consecutive years.

He also avers, that he has a right to the premises in consequence of a conveyance from Thomas Choate to John Henderson.

On this issue, evidence oral and written was taken in the inferior court; there was judgment against the plaintiff, and she has appealed.

As she must recover on the strength of her title, the first inquiry will be as to its validity.

She first presents us with a requette, dated in 1797, addressed to the intendant of Louisiana, in which her vendor asks for ten arpents of land in front, with the ordinary depth, situated below the land of Jean Baptiste Valery.

To this is added a certificate of the commandant, which we suppose intended to state that the land is vacant; but in the manner it is transcribed on the record, it is utterly unintelligible.

She next offers a report from the register of the land office, for this section of the state, in which it is mentioned, that Thos. Choate had filed a claim in that office for a tract of land of ten arpents front, by the ordinary depth,

West'n District.
Sept. 1822.

HOLSTEIN
vs.
HENDERSON.

bounded on the upper side by a tract of John Henderson, and it is certified that this claim was confirmed by an act of Congress, passed 29th April, 1816.

In support of this title, parol evidence was taken in the court below, to prove its location; and the length of time the plaintiff, and those under whom she claims, had been in possession, and cultivated the land for which it calls.

This evidence is somewhat contradictory as to the time Choate settled there. One witness, Bayon, places it after the time Henderson went to New-Orleans, which was in the year 1800 or 1801; but the testimony of two other witnesses, Walsh and Patterson, who speak more positively as to this circumstance than any others, fix it in the year 1804, and that Choate remained there for one or two years:—that when he went away he left one Birnie, who continued to hold it under him, until the year 1809, when it came into the possession of the present defendant.

The confirmation by the United States, vests a title in the plaintiff, but the circumstances attending the settlement, shows that it is nothing more than a naked right, and it is difficult to conceive any other claim which, if re-

West'n District.
Sept. 1822.

HOLSTEIN
vs.
HENDERSON.

cognised by the general government, would not possess as strong equity.

It becomes necessary to examine if the defendants is such a one:—

It consists of a certificate from the commissioners, appointed for the purpose of ascertaining the rights to land in the western district, dated in 1811, which states, that John Henderson is confirmed in his claim to 444$\frac{12}{100}$ arpents, founded on a settlement in the year 1800.

The parol testimony proves, that he was established on the premises in the year 1800 or 1801, that he was sent as a prisoner to New-Orleans, and being found innocent of the accusation against him, was sent back by the governor, and replaced on the land by the commandant of the post.

If it should turn out, in the investigation, that these titles call for the same land, it is our opinion that the plaintiff cannot recover; for they are not merely equal in dignity—that of the defendant is superior: it has possession under the former government, and some attempt, at least, is shown to comply with the laws under which the claimants lived; whilst, on the part of the plaintiff, neither settlement

West'n District.
Sept. 1822.

HOLSTEIN
vs.
HENDERSON.

or cultivation, before the change of government, is proved; and when Choate entered into possession, he was a trespasser and a violator of the laws of the United States.

But the plaintiff has contended, that admitting the correctness of these principles, she must still succeed, because her title calls for a different spot from that of the defendants.

This is the real difficulty in the case—its solution depends on the correctness of the location given to Henderson's title, and we have most sensibly felt, in the examination and decision of the case, the embarrassment created by the circumstance, that neither of the parties have produced any evidence that their lands have been yet surveyed or located, under the authority of the general government. We have doubted, indeed, whether it was not our duty to remand the case until this was done; and have only been prevented from doing so, by the reflection, that we were not permitted to refuse deciding on the rights of suitors before us, in the expectation of an event which is uncertain, and depends on the will of a third party.

It is not easy to convey to the mind, without a plat of survey, the particular situation of

West'n District. Sept. 1822.

HOLSTEIN vs. HENDERSON.

the land on which Choate and Henderson originally placed themselves. It may, in some degree, be understood, by stating that the bayou, on which both titles call to lie, makes, in that part of the country where the parties settled, a gradual and extensive bend, in the inner side of which, and on the lower end, is located a grant issued to Benjamin Grubb, which, running back forty arpents, meets the lines of a claim of one J. B. Vallery, which fronted in the upper part of the bend just described. The manner these two titles are located leaves a long and narrow strip of land between their side lines and the bayou Cotile, having a front of 37 arpents, and an irregular depth, and containing in the whole a superficies of $279\frac{73}{100}$ arpents.

On the lower part of this land, near to the line of Grubb and close to the bayou, Henderson cleared a field, and built a house on the opposite side. At the distance of from 20 to 24 arpents was Choate's settlement, and the question is, how should their titles be located?

The defendant insists, that the manner his has been confirmed by the United States, gives him a right to cover the whole of this land.

West'n District. *Sept.* 1822.

HOLSTEIN *vs.* HENDERSON.

The certificate, which it is contended authorizes this location, states that Henderson is confirmed in his claim to a tract of land containing $444\frac{12}{100}$ arpents, "to be laid out in such a manner as to include the habitation on the west side, and the field cultivated by him on the opposite side of the bayou."

It is true, as was urged in argument, there is no limitation here as to front. But neither is there any thing that allows an arbitrary location at the will of the claimant. We must, therefore, give it such limits as will satisfy the calls of the title, and interfere as little as possible with the rights of others.

It refers to objects on each side of the bayou, and, consequently, must be laid out on each; indeed the direction is imperative, that it shall include the house on the west side, and the field on the east. This is advancing one step, and with certainty—the rest is not quite so sure. But, in the silence of the title as to what quantity is to be given on the east, and what on the west, we think it should be so located as to give an equal portion to the claimant on both—no other mode will come so near satisfying the terms of the certificate. We apprehend too, that this manner of surveying is con-

West'n District. *Sept.* 1822.

HOLSTEIN *vs.* HENDERSON.

formable to general usage, and the practice under both the former and present governments, when the title called to lie on both sides of a water course.

It was contended by the appellant, that it must be surveyed, giving five arpents on the bayou, and running back forty; and that a location, which took in such an extensive front, was illegal. But the title does not call for so many arpents front and depth, and we are of opinion, that where a certain number of superficial arpents are granted on a part of a bayou where from the manner surrounding titles are surveyed, the quantity given cannot be satisfied but by taking land on the front—that there is neither law nor usage that prevents the claimants doing so.

Under this view of the rights of the defendant, there will remain within the limits of the tract of land already mentioned, $57\frac{67}{100}$ arpents of land, for which we conceive the plaintiff has exhibited title.

It remains to consider, if the defendant has acquired these 57 arpents by purchase or prescription—he contends he has done both.

The instrument which he has produced, as proving his purchase, is not an act transferring

West'n District.
Sept. 1822.

HOLSTEIN
vs.
HENDERSON.

the property; it is an obligation in the alternative, which might have been discharged by the money mentioned in it, and the debtor had the choice of doing so, or of giving the land. *Civil Code*, 276, *art.* 89–90. The circumstance of Choate holding, by himself and tenant, a considerable time after the time fixed in the instrument alluded to, is a proof that the intention of the parties did not differ from the construction which the law now requires us to give it.

This opinion, as to the nature of the act under which the defendant held, decides the plea of prescription; for if Choate had the right of coming forward at any moment and paying the money, Henderson did not own the soil. He did not possess with the will of a master, when he possessed at the will of another; he wanted, in respect to this thing, *opinionem quæsiti dominii*, which is the basis of the prescription of ten and twenty years. *Pothier, Traite de Prescription, no.* 90 ; *Digest*, 41, 4, 2, 2.

The defendant lastly contended, that the commissioner's certificate of the year 1811, with possession of the premises since 1809. give him a title to the premises by prescrip-

West'n District. Sept. 1822.

HOLSTEIN vs. HENDERSON.

tion. The correctness of this position depends on whether the title covered the land now claimed. We have already expressed our opinion, that it did not; and, holding without title, he could not acquire under 30 years.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the plaintiff do recover of the defendant, fifty-seven arpents $\frac{67}{100}$ of the land claimed in his petition, to be taken from the upper side of the tract of 279$\frac{73}{100}$ arpents, represented on the plat, beginning at the letter A on said survey, returned in the cause, and to be laid out so as to include the original settlement of Thos. Choate. It is further ordered, adjudged and decreed, that the defendant and appellee pay costs in both courts.

Thomas for the plaintiff, *Wilson* for the defendant.

JOHNSTON vs. *SPRIGG*.

A case which has been tried by a jury, will not be remanded for a new trial, when there

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The petition avers, that the defend-

West'n District. *Sept.* 1822.

JOHNSTON *vs.* SPRIGG.

is no contradiction in the testimony, and the decision depends on calculation alone.

ant employed the plaintiff as overseer for the year 1819, and that he was to be paid $600 for his services in case he made a good crop, and $500 at all events; that he did serve the defendant faithfully until about the month of September of the same year, when he was drove off without any good cause or provocation; and that by reason thereof, he is entitled to demand and receive the said sum of $600.

There is another count for work and labour, averring it to be worth the sum just stated.

The cause was submitted to a jury who found for the plaintiff $450, after deducting $23, a credit to which the defendant was entitled.

Our law has provided, that if a person, filling the situation of the plaintiff, has engaged his services for a certain time, and is turned away without a just ground of complaint, that he has a right to be paid for the whole period for which he has contracted. While, on the other hand, should he depart from his employer, before his engagement is closed, he loses all claim to wages. *Civil Code*, 382, *arts*. 59, 60

West'n District.
Sept. 1822.

JOHNSTON
vs.
SPRIGG.

In the case before us, the only proof of the causes which induced the appellee to quit the appellant's service, is derived from the confessions of the parties; and as the note taken of the testimony does not state by whom the witnesses were introduced, nor on whose examination their declarations were given in evidence, it is impossible to decide whether he was properly dismissed or not. The inquiry, however, is not very material, as it is shown the parties made a special contract, which takes the case out of the general rule.

Davis, who it appears by an affidavit for a continuance, was a witness for plaintiff, deposed, that he was called on by the parties to be present at a verbal contract between them; that the sum to be given, he did not recollect; that there was something extra in case a good crop was made, and that if they disagreed, Sprigg was to pay Johnston what his labour was worth.

The appellant acknowledged in open court on the trial, that the wages agreed on were $500; and that in case a good crop was made, and he was satisfied with it, he would pay $100 more; but the last sum he declared was optional with him.

West'n District.
Sept. 1822.

JOHNSTON
vs.
SPRIGG.

The testimony establishes, that thirty-three bales of cotton were made, but it does not inform us if this is a good crop for the number of hands employed.

It was proved, that Johnston entered into the service of the appellant early in the spring, and went off at the commencement of cotton picking. This is not a very accurate way of giving dates. Taking it to mean from the first of March to the first of September, will satisfy these expressions; and it agrees with the statement in the plaintiff's petition. This gives a period of six months, that the plaintiff served the defendant.

For these six months' service, the jury gave a verdict of $450, or rather for $473; as they expressly state they do so, after deducting $23 of a set off, proved by the appellant; and yet the defendant had only contracted to pay $500, if the appellee should serve him double that time. It is impossible to reconcile this finding with the evidence; and it is directly opposed to what we understand to be the justice of the case. The verdict would have been correct, if the wages had been $946 per annum.

We have great reluctance to disturb the

verdict of a jury; and in cases where damages were assessed, fraud put at issue, or the evidence was contradictory, instead of exercising the power of reversing their verdict where we differed in opinion, we have generally remanded the cause for a new trial; convinced that the ends of justice could be better attained by that course, than acting at once on the testimony sent up. 10 *Martin*, 66, 11 *ibid.* 190, 281, 686.

In the case now before us, which is one simply of contract, where the evidence is clear and presents no contradiction, and neither knowlege of witnesses or parties can assist in the investigation, this necessity does not exist. Credibility is not to be weighed, nor damages assessed; and the issue joined must be decided by applying the first rules of arithmetic to the evidence taken. We could not, therefore, be aided in our ultimate decision of the case by another verdict, and the ends of justice do not require we should remand it.

The plaintiff ought to recover $250 for six months' service, being the one-half of $500, to which he would have been entitled had he remained in the employment of the defendant the entire year. From it is to be deducted $23, which the latter proved as a set off.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that the plaintiff do recover of the defendant the sum of $227 with costs of the court in the first instance, and that the appellee pay those of the appeal.

Thomas for the plaintiff, *Wilson* for the defendant.

STEPHENS vs. SMITH.

If the appellant fails to bring up his case according to law, the appellee may have the judgment affirmed, with damages for the delay.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. This case cannot be distinguished from that of *Yeiser* vs. *Smith*, decided a few days since. The judgment of the district court must be affirmed with damages. *Ante*, 292.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs, and ten per centum damages for the delay occasioned by this appeal.

Thomas for the plaintiff, *Oakley* for the defendant.

West'n District.
Sept. 1822.

JACKSON & AL.
vs.
WILLIAMS.

A sale at auction of immoveable property is not perfected until the signature of the auctioneer is affixed to the process-verbal.

A third possessor, against whom an hypothecary action is prosecuted, may demand the discussion of the property of his debtor and sureties, but not of property in the hands of other third possessors.

When a debtor whose property is subject to a general or tacit mortgage has successively sold several objects of real property or slaves, the creditor must bring his action against the last purchaser, and ascend in succession to the first.

JACKSON & AL. vs. *WILLIAMS.*

APPEAL from the court of the sixth district.

Scott, for the plaintiffs. On the 7th June, 1819, the present plaintiffs obtained a judgment against L. H. Gardner for $1705 45, which was regularly recorded on the same month. A short time afterwards Gardner died, leaving a considerable property, but greatly involved. His widow continued in the possession of his estate, and on the 8th of December, 1819, the judgment was revived against her, as tutrix of her minor children, and an execution issued, on which the sum of $635 was made by the sale of property. The revival of judgment was not recorded. On the 29th and 30th of June, 1820, the whole estate was sold publicly by the parish judge, at the request of the widow. The estate was sold on a credit, till the 1st of April, 1821, and, before the debts became due, they were transferred by the widow to some of the creditors, in exclusion of others, and the present judgment remained unsatisfied.

The present suit is brought by the plaintiffs, praying an order of seizure to sell certain slaves in the possession of the defendant.

which belonged to Gardner at his death, and which were sold at the sale of his estate.

The plaintiffs contend, that their judgment operated as a general mortgage on the whole estate of Gardner, from the 7th June, 1819, the day on which it was rendered. That the sale, made by the parish judge, does not destroy it; and that they have a right to seize and sell any property that may be found in the hands of third persons, which belonged to the estate, in order to satisfy their judgment.

It cannot be denied, that the judgment created a judicial mortgage on Gardner's estate from the day of its rendition. The only inquiry there is, whether it has been destroyed by any subsequent proceedings.

And first, whether the sale by the parish judge destroyed it. It is clear that a sale made by the heir who succeeds to and accepts a succession, without the benefit of an inventory of property, subject to a mortgage, either general or special, does not destroy the right of a mortgagee to pursue the property in the hands of third persons, any more than a sale made by the deceased himself. Because, in that case, the heir steps into the place and stead of the ancestor, takes possession of the

West'n District
Sept. 1822.

JACKSON & AL.
vs.
WILLIAMS.

property as his own, and becomes individually liable and responsible for all the debts and engagements of the deceased, in the same manner as he himself was bound—and is not bound by any particular rules of administration. In this case the widow continued in possession of the whole property of the deceased, without observing the rules of law necessary to avail herself of the privilege of renouncing the community, and thereby making herself individually liable for all the debts and engagements of the deceased—and acted without observing the rules of administration. It appears to me then, that she does not differ from the heir accepting, purely and simply without the benefit of an inventory. She had no legal character in which she acted; she, in fact, converted the property to her own purposes. It is true, that the sale of the present property was made publicly by the parish judge; but it appears, as stated in the process-verbal, that it was made at the request of the widow, but whether in his capacity of judge of probates or auctioneer, does not appear. It is presumable it was made as auctioneer, because it is stated to have been made at the request of the widow, and not by

West'n District.
Sept. 1822.

JACKSON & AL.
vs.
WILLIAMS.

virtue of an order of the court of probates. It is precisely the same, then, as if the sale had been made by the widow at private sale. The case, I think, may be reduced to this simple proposition:—A man dies, leaving a large estate, subject to a general mortgage; his widow continues in possession of the property nearly twelve months, and finally applies to the parish judge and has the whole sold at public sale on a credit, and before the notes become due, she sells and transfers them at private sale. Does this destroy the right of the mortgage creditor to pursue the property in the hands of third persons? It appears to me it cannot.

The *Civil Code*, in treating of the rights of the mortgage creditor, against the property mortgaged, speaks generally of the right of seizing and selling it wherever it may be found, without any exception as to sales made at public auction, or by the court of probates; and points out a particular mode of proceeding, in such cases, called the action of mortgage—*see Civil Code, p.* 460 & 462. It gives the party the right to seize the property mortgaged, into whose hands soever it may pass, and points out a particular mode of proceeding, in order to sell

West'n District. Sept. 1822

JACKSON & AL. vs. WILLIAMS.

the same. It may be pursued in the hands of third persons; nor is there any exception as to the manner in which it may have come into their possession. It seems to contemplate that it should be sold only for the particular purpose of satisfying the mortgage; and until it is sold for such particular purpose, the mortgage can never be destroyed.

It is denied, that a sale made by the parish judge, in the regular course of administration, destroys the right of a mortgage creditor; but that he has a right to pursue the property into whose hands soever it may pass, until his debt is satisfied. The parish judge cannot sell property subject to mortgages on a credit; but it must be sold for cash, and the proceeds immediately paid in discharge of the mortgages; otherwise, according to the practice of our courts, the mortgage creditor is in no better situation, on the death of a person, than simple creditors.

The parish judge proceeds to sell the whole property of the deceased on a credit, and the collection of the money devolves on the heir or other representative, who disposes of it as he thinks proper, and the mortgage creditors are driven to a tedious recourse against them

and their securities as other creditors are. But in this case, it is evident that the widow did not proceed in a regular course of administration. The estate remained in her possession near twelve months before any application for a sale was made. The debts arising from the sale, before they they became due, were transferred, and of course no classification made of the debts. The whole estate has been dispersed, the debts transferred, the widow insolvent, and nothing left to satisfy the present plaintiffs. If there was other property, it was the duty of the defendant to point it out. It is said, in *Domat. vol.* 1, *p.* 386, *art.* 5, *book* 3, *t.* 2, *sec.* 1, that the sale made by the heir or executor of the property of the deceased, does not destroy the privilege or mortgage; but that the mortgage creditor has a right to pursue it in the hands of third persons, though the subject is not here fully treated of.

In the second place it is contended, that the revival of the judgment against the widow, as tutrix of her minor children, destroyed the judicial mortgage against Gardner, as it was not recorded as the law requires, and that it was a novation of the debt. This was a necessary

West'n District. *Sept.* 1822

JACKSON & AL. *vs.* WILLIAMS.

proceeding, in order to enable the plaintiffs to pursue their mortgage against the estate; and if it had been recorded it would not have created a mortgage against the widow, as it was revived against her as tutrix. It was only intended to operate against the property of the deceased, in her hands to be administered. The law provides, that no execution shall issue against the property of the deceased until it is revived against his legal representatives by the ordinary civil action, *Civil Code, p.* 490, *art.* 7; and the recording of this judgment could only have operated as an additional mortgage on the property of the widow. It cannot be a novation, or the mortgagee would be placed in a much worse situation by the revival (a proceeding which the law makes necessary) than he was before. His judgment would then operate as a mortgage only from the date of the revival. If neither the sale by the parish judge, nor the revival of judgment, has destroyed the original mortgage, it must still exist.

But the defendant contends, and the judge below seems to have adopted the doctrine, that we were bound to pursue the property last sold. In answer to this, we say, that this

West'n District.
Sept. 1822.

JACKSON & AL.
vs.
WILLIAMS.

property was sold on the last day of sale with other real property, and that the law does not make any distinction as to hours or minutes. In cases of mortgages, the law provides that all which are executed on the same day shall have equal dignity, although the notary shall have noted the hour. *Civil Code*, 470–79.

The same doctrine must apply in this case. A number of negroes were sold on the same day, among whom are those claimed by the plaintiffs; nor can it appear, that the slaves in question were sold first or last; the mere circumstance of their having been placed first on the process-verbal is no evidence that they were sold first. The parish judge proceeds to cry the property to the highest bidder, and after the sale closes, the parties are called in to sign the process-verbal, or to execute their notes and comply with the requisites of the sale; and it is mere accident which person is set first on the process-verbal. But in order to avail himself of this plea, the defendant should have complied with the rules of discussion in pointing out the property and tendering the necessary expenses, in order to carry it into effect; *Civil Code*, 462, *art.* 44.

It is urged also, by the defendant, that we

West'n District. *Sept.* 1822.

JACKSON & AL. *vs.* WILLIAMS.

should, at least, have divided our claim among all the purchasers on the last day of sale. The plea of division may be plead by a co-surety, in cases of suretyship, by virtue of the provisions of our code. But I know of no law to authorize us to apply that doctrine to the present case. The defendant is not in the situation of a surety; he is the holder of property liable to a general mortgage, and there is other property also equally liable. In this case the law provides, that the creditor shall first seize the property last sold, and so on up to the first sale, until his debt is satisfied; but there is no provision requiring him to apportion his debt among any set of purchasers.

This property was purchased by Mrs. Gardner, at the sale of Gardner's estate, and subsequently sold to Williams; consequently, it is the last property sold, which belonged to Gardner's estate. The sale made by the parish judge, was her own act; it was made at her instance, at her request. Ought she then to avail herself of her own wrong, and by purchasing the property in her individual right, destroy the mortgage? She cannot be said to be an innocent purchaser, because the act of sale, if illegal, was her own illegal act, and she apprized of it.

The property was sold, as belonging to the succession of L. H. Gardner, at the instance of the widow, tutrix of her minor children. It was the property of the minor children. How then could the widow purchase in her own right, who was acting as tutrix of her minor children? The law expressly prohibits tutors from purchasing the property of the minor. See *Civil Code*, 68, *art.* 51. The purchase made by her was void, and the private sale subsequently made to Williams, equally so. In this view of the case, the property is still clearly liable. The widow acted as natural tutrix of her minor children, an appointment which was confirmed to her by the parish judge. She procured a public sale of their property; and at that sale, became the purchaser of the property now in question. The act is one expressly prohibited by law, and of course void. The property remains in the same state as prior to the sale, and is still liable to this judicial mortgage.

If the heir take the property of the estate, without an inventory, he takes it subject to the same liens, that existed on it before the death of the ancestor; and his sale cannot affect them.

West'n District.
Sept. 1822

JACKSON & AL.
vs.
WILLIAMS.

The widow took the estate in her own wrong, *Domat.* 3, 5, 1, § 2; and her vendee has no better right than if he had purchased from the original debtor.

The sale of a court of probates, does not extinguish a mortgage. *Civil Code*, 460, *art.* 40. *Id.* 490, *art.* 5.

Admitting that it does, the sale in the present case appears to have been made by the parish judge, in his capacity of auctioneer.

It does not appear who was the last purchaser. The sale was an entire act, performed in one day. *Id.* 462, *art.* 60.

Thomas, for the defendant. The plaintiffs did not record the first judgment, but obtained a new one against the widow, which was a reversion of the former.

There was a family meeting convoked, in order to deliberate on the affairs of the estate, and it recommended the sale. The judge of probates presided at this meeting, and in consequence of its deliberation, and at the request of them all, proceeded to the sale. This was, therefore, a judicial sale. *Tregre* vs. *Tregre*, 6 *Martin*, 462. Act of 1817, *p.* 40, § 21.

MARTIN, J. delivered the opinion of the court. The plaintiffs state, that they had a judgment against Gardner, which was duly recorded; and on his death, duly revived against his widow, who was tutrix of his minor heirs, and had entered on the estate and disposed of it, without satisfying the said judgment. That the defendant has in his possession four slaves, whom he purchased from the said widow, and were part of the estate, and consequently liable to satisfy the judgment.

The defendant pleaded the general issue; that he held the slaves under a good title; that if the plaintiffs ever had a lien on them, they had lost it; that the slaves were sold by the court of probates, with the rest of the estate; that if the plaintiffs' lien exist still, they ought first to sue the widow and Casson, each of whom purchased one of the slaves of the estate, on whom the lien exists, as much as upon those of the defendant; that this lien, admitting its existence, operated as a tacit mortgage on the whole of the land and slaves of Gardner, and every part of it, and not exclusively on any part of it in the hands of a third party; which, if bound at all, is only concurrently so with

West'n District. Sept. 1822.

JACKSON & AL. vs. WILLIAMS.

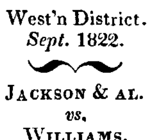
the rest, and the plaintiffs ought to have made all the purchasers parties.

The district court was of opinion, "that if the plaintiffs can recover against the purchasers of Gardner's estate (which it is unnecessary to decide) they ought to have brought their action against the last; or, if it be a fact that the sales must be considered as one sale, they should have proceeded against all; that he cannot favour one purchaser to the injury of the rest."

Judgment was accordingly given, "that the plaintiffs recover nothing in this suit; but, without any detriment to any claim, they may have for such portion as the defendant may be liable for by law, in case the property last sold should be insufficient, or in case he should be equally bound with the rest." They appealed.

The record shows, that the plaintiffs obtained judgment against Gardner, and had it duly recorded—that they procured a judgment against the widow, tutrix of the heirs, that it should be executed on the estate of the deceased in her hands.

The estate was sold at public auction by the parish judge, on the application of the widow, after the deliberation of a family meeting



had established the propriety of selling and the terms of sale. But nothing appears to have been done, by the court of probates, in regard to the sale.

The process-verbal of the sale shows, that the widow and Casson bought one negro each, at the auction, after those who are now in the defendant's hands had been stricken down, and the bidder and his surety had subscribed the process-verbal—which shows that the sale took place without any adjournment.

We are of opinion that the sale to the bidder, the defendant's vendor, was only inchoate, when the negroes were afterwards stricken down to the widow and Casson, and was only perfected by the subsequent signature of the auctioneer or parish judge.

A notarial act is complete only after the signature of the notary and witnesses, 1 *Pothier*, *Obligations*, 11 ; and *a sous seing prive* cannot seriously be said to be so, till subscribed by the vendor, or some other person duly authorized. In the present case, the whole sale is one entire act, which received its perfection by the signature of the parish judge at the conclusion of the sitting.

We, therefore, conclude that neither the wi-

West'n District.
Sept. 1822.

JACKSON & AL.
vs
WILLIAMS.

dow nor Casson were posterior purchasers to the defendant's vendor, though they were posterior bidders, and that he cannot complain that they were not sued before him.

The learned judge has not referred to the particular law, in virtue of which his judgment is rendered, and on the authority of which he holds, that if the sale must be considered as one entire act, the plaintiff should have proceeded against all the purchasers, and could not favour either of them to the injury of the others.

The mortgage is a *real* right; in its *nature indivisible.* It subsists *for the whole*, in *all* and *each of the things affected by it, and on every part of them*—and it follows the mortgaged property into whatever hands it may pass. *Civ. Code*, 452, *art.* 3.

A third possessor, against whom an hypothecary action is prosecuted, may well demand the discussion of the property of the debtor, and his sureties; but not that of other property (in the hands of other third possessors) mortgaged for the same debt.—2 *Pothier*, *Hypotheques*, *n.* 37.

Our own statute details the means which the third possessor has to stay or resist the hy-

West'n District. *Sept.* 1822.

JACKSON & AL. *vs* WILLIAMS.

pothecary action; and gives, among others, the plea that there is other property mortgaged for the same debt, within the possession of the *principal debtor. Civil Code*, 462. Nothing seems to authorize the conclusion which the district judge, in the hurry of trial, has drawn, that a third possessor may delay or resist the creditor's claim, on the ground that there is, in the hands of other third possessors, other property mortgaged for the same debt, when all the third possessors acquired by the same conveyance, *i. e.* by one entire act or deed of conveyance, simultaneously.

But where a debtor, whose property is subject to a general or tacit mortgage, has *successively* sold several objects of real property or slaves, the creditor must bring his action against the purchasers according to the order of their purchases, respectively; beginning at the last and ascending in succession to the oldest.—*Acts of* 1817, *p.* 40, § 29.

It appears to us, the plaintiffs were not bound to resort to the widow or Casson, before they resorted to the present defendant, nor to make any of the purchasers stated, parties to the present suit.

It is therefore ordered, adjudged and de-

West'n District. Sept. 1822.

JACKSON & AL. vs. WILLIAMS.

creed, that the judgment of the district court be annulled, avoided and reversed; that an order of seizure and sale issue against the slaves named in the petition, in the possession of the defendant, to satisfy the balance of the judgment obtained by the plaintiffs against Gardner, in his life time; and also the sum of ninety-nine dollars and one-half, the costs of the revival of the judgment against the heirs, with legal interest—and costs in both courts.

MUSE vs. *ROGERS' HEIRS.*

A receipt of the defendant, produced by the plaintiff is, in favour of the latter, a beginning of proof.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court.* The plaintiff claims $1000, which he alleges were due him by the defendant's ancestor, for services rendered as an attorney at law.

The defendants pleaded the general issue; and further, that if the plaintiff's services were worth any thing, he was paid $250 by their ancestor, as a full compensation—that the plaintiff was to have finished the business above alluded to in the petition, but he declin-

* PORTER, J. did not join in the opinion, having been of counsel in the cause.

West'n District.
Sept. 1822.

MUSE
vs.
ROGERS'
HEIRS.

ed the practice of the law before it was, and their ancestor was compelled to employ other persons at an enormous expense—that the plaintiff acted so negligently in the discharge of his duty to their ancestor, that he suffered great injury thereby.

There was judgment against the defendants for $750; but it was ordered that, that sum be credited to the plaintiff, on a judgment obtained by the defendants against him. The defendants appealed.

The statement of facts shows, that Kilgour deposed, that in 1816 he heard the defendants' ancestor say, he had employed the plaintiff to settle the estate of Phillips, and to change and novate all the debts of the estate, so that their ancestor might have the benefit of them in his own name; and he had agreed to pay a fee of $1000—that the plaintiff was active in effecting this—that the plaintiff had obtained his admission as heir to Phillips, or was concerned with those who did—that he had employed Wallace in this business, and was to pay him $1000—that Wallace had neglected it, and he would discharge him and employ the plaintiff, at the same price.

Murray proved, that the plaintiff laboured

West'n District.
Sept. 1822

MUSE
vs.
ROGERS'
HEIRS.

very hard in writing transfers of the debts due Phillips' estate to Rogers; that he employed the witness to defend Rogers in several suits, and gave him two notes for $100 each; one of which Muse subscribed for Rogers, and the other in his own name, as the witness believes.

The defendants proved, that the plaintiff quitted the practice in 1817, and removed to bayou Casson.

They offered in evidence, the plaintiff's receipt for $250—a deed of mortgage from them to Rogers—letters from the former to the latter—the record of a suit of theirs against the plaintiff, and one in which the heirs of Phillips recovered the estate from Rogers.

Baldwin deposed, that when he arrived at Rapides the plaintiff had novated the debts due Phillips, in favour of Rogers, and was laborious in discharge of his duty: this was previous to the institution of the suit of Phillips' heirs—that Porter was employed by Rogers to defend this suit, and received $500; and the plaintiff acted in concert with him in the suit.

The defendants proved, that they surrendered all the debts, hitherto due to Phillips.

which had been transferred to Rogers, to Phillips' heirs.

Murray added, he knew the plaintiff was employed by Rogers, but not on what terms—that the latter being dissatisfied with all persons concerned in the estate, and complaining very much, he determined to have nothing to do with him, and returned the two notes he had received from the plaintiff.

The plaintiff's receipt for $250, is in part of his fees as attorney at law, for services rendered and to be rendered from the time he was employed by Rogers until the business of Phillips' estate be finally settled, and received by him (Rogers) or the other heirs, whom he represents.

The deed of mortgage, alluded to in the statement of facts, shows that the plaintiff was indebted to the defendants' ancestor in a large sum, nineteen hundred and odd dollars; and the judgment that the defendants since recovered, for that of $830.

The letter from the plaintiff to the defendants' ancestor, shows the distressed situation of the former in money matters; but throws no light on the transaction which is the subject of the present suit.

West'n District. *Sept.* 1822.

MUSE *vs.* ROGERS' HEIRS.

The defendants contend, that the claim being for upwards of $500, cannot be proved by the testimony of a single witness—*Civil Code*, 341, *art.* 241—but the plaintiff urges, that he is within the exception of a subsequent article, *id. art.* 244; and that there is a beginning of proof in writing, in his receipt for $250, in part payment, produced by the defendant.

In this respect, the case is not distinguishable from that of *Lazare's executors* vs. *Peytavin*, 9 *Martin*, 566; and nothing has been said to render us dissatisfied with the decision there given.

This receipt expressly states, that the $250, acknowleged to have been received, were paid by Rogers in *part* satisfaction of services rendered and to be rendered, in relation to Phillips' estate. This is, therefore, a written proof that Rogers had employed the plaintiff in the affairs of that estate, and that the compensation he was to have was above $250.

Kelgour swears Rogers told him, he had promised $1000—the same sum had been agreed to be paid to Wallace, who had been discharged, when the plaintiff was employed in his stead.

Murray and Baldwin depose, the plaintiff was laboriously engaged in the affairs of the estate, and that Rogers had employed him.

The circumstance of the plaintiff being employed by Rogers, is proven by two witnesses, Kelgour and Murray, and his sedulous attention to the concerns of Rogers. The quantum is proved by one witness only, Kelgour. His is a detailed testimony, which has nothing suspicious, and its not at all at variance with that of other witnesses. The district judge gave it credit, and we see no reason to doubt it.

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

Scott for the plaintiff, *Johnston* for the defendant.

COE & AL. vs. *PANNEL & AL.*

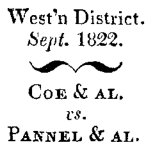
APPEAL from the court of the sixth district.

The supreme court will remand a cause to be tried *de novo*, when the justice of the case requires it.

MATHEWS, J. delivered the opinion of the court. In this case Harriet Pannel, widow of the late A. W. Pannel, renounced her right to the acquets of the marriage community, and claims

a privilege, on her husband's estate, to be reimbursed the amount of her paraphernal effects, disposed of and alienated by him during the marriage. His succession has been administered as vacant; and is, consequently, to be proceeded in according to the law, which lays down the rules by which the conduct of curators of this species of estates is to be directed. A curator of a vacant estate, cannot pay its debts without the authorization of the parish judge, by whom he has been appointed; and such authorization is necessary, even in case there is money enough in hands to discharge all claims on the estate; but should there not be sufficient property to satisfy all demands, it becomes the duty of the judge, to establish the rank in which the creditors shall recover their payment, according to their privileges and mortgages.

In the present case, the parish judge ordered payment to be made to H. Pannel, of 25,000 dollars, as a privileged debt on her husband's succession, for her hereditary and paraphernal property, sold and disposed of by him, during the marriage. From this decree the present appellees, who are admitted to be creditors of the deceased, prayed



and obtained an appeal to the district court; which reversed the decision of the parish judge, so far as it accorded a privilege for 19,800 dollars, part of the 25,000; and from this last judgment, Mrs. Pannel appealed.

The evidence of the case does not show, whether the estate of A. W. Pannel is sufficient to satisfy all demands against it; neither does the judgment of the parish judge contain a general classification of its debts, which is required in case of insufficiency; which renders doubtful the right of appeal, by the original appellants to the district court. But, as an order to pay with privilege, such as was granted to the present appellant, might have worked to them an irreparable injury, we are of opinion, that the appeal to the district was properly allowed; especially, as it gave a trial *de novo* in the higher court.

In examining the judgment of the district court, and the whole evidence in the cause, we are unable to discover on what principles of law, a distinction is made between the 6200 dollars, for which privilege is allowed, and the 19,800, for which it is denied. It appears to us, that if the claims of the appellant were supported by evidence. and all founded

West'n District.
Sept. 1822.

COE & AL.
vs.
PANNEL & AL.

on the same basis, or consideration, viz. the sale, alienation and appropriation of the funds arising from, and making a part of, the extra-dotal and paraphernal effects of the wife, the same rules of law must be applicable to all, as constituting the total amount claimed by the appellant.

But the evidence of her claim, for the price of the land in Arkansas, sold by the intestate, is so vague and unsatisfactory as to her title in said lands, that this court feel unwilling to pass finally on her rights; and believing that the justice of the case requires the cause to be remanded for a new trial,

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed, and annulled. And it is further ordered, that this cause be remanded to said court, for a new trial; and that the costs be paid out of the estate of A. W. Pannel.

Bullard for the plaintiffs, *Mills* and *Thomas* for the defendants.

BALIO vs. *WILSON, TUTRIX, &c.*

A district court cannot modify a former decree, at a succeeding

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the

West'n District.
Sept. 1822.

BALIO.
vs.
WILSON

term, unless a new trial was regularly granted.

court. This action is founded on a judgment or decree, heretofore rendered in the court below, by which a mortgage and confession of judgment, existing against J. H. Gordon, the former husband of the defendant, was declared executory against her as tutrix of her minor children; in which decree it is ordered, that all the estate of the deceased should be sold by the tutrix according to law, reserving to the plaintiffs the benefit of their privilege and mortgage on the proceeds of the sale of said mortgaged property, or so much thereof as may be sufficient to satisfy the same. The plaintiff alleges, that the former decree has not been complied with by the defendant, and prays immediate seizure and sale of the mortgaged premises. The answer of the defendant contains a general denial, and a special plea in bar of the first judgment, as above cited, and a compliance with all its commands so far as she was able legally to comply therewith.

The judgment and decree in the present case differs but little from that formerly rendered by the same court. The mortgaged premises are now directed to be sold by the

West'n District. *Sept.* 1822.

BALIO. *vs.* WILSON

judge of probates, for ready money, or so much thereof as will satisfy the plaintiff's claim, as founded on the former order, &c.

From this judgment the defendant appealed; and the plaintiff, in answering on the appeal, alleges error in those against them in not decreeing an immmediate seizure and sale of the mortgaged premises.

The first judgment is not appealed from; stands unreversed by competent authority; and is consequently *res judica* between the parties to the present suit, being the same who figured in the former action, and being a decision on the same subject matter. If it has injured the parties by illegally adjudicating on their rights, the remedy was by appeal, in which the merits might have been fairly tested. But it is the opinion of this court, that the district court has mistaken its powers in attempting, in the last decree, to change and modify its former judgment, after the expiration of the term in which it was rendered, unless on a new trial granted.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled; and that

judgment be rendered for the defendant and appellant, with costs in both courts.

Wilson for the plaintiff, *Thomas* for the defendant.

COX vs. *MARTIN'S HEIRS.*

A classification may be ordered, before payment by the beneficiary heir

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court.* This case is submitted to the court for decision, without argument; reference being made by the counsel of the parties to the arguments used in the case of *Maria C. Wilson, tutrix*, ads. *J. L. Balio*, in which judgment has just been pronounced. The difference between the two cases, will be best understood by a short statement of the commencement and proceedings in each.

In the case already adjudged, an action was instituted in the district court, against Mrs. Wilson, as tutrix of her minor children, to cause a judgment against their ancestor, confessed in a certain mortgage, as set forth by the plaintiff in the petition, to be revived and made executory against his heirs, in pur-

* PORTER, J. did not join in the opinion, having been of counsel in the cause.

West'n District. *Sept.* 1822.

COX *vs.* MARTIN'S HEIRS.

suance of the rule of the *Civil Code*, which forbids the seizure of the property of a widow in community, or of heirs, until after having caused to be declared executory against them the title executed by the husband, or the deceased—*p.* 490, *art.* 7.

In that suit judgment was rendered, from which no appeal was taken, but a subsequent suit instituted, in the same tribunal, to cause it to be executed, which proceeded to final judgment, was appealed from, and has been adjudged in the appellate court as seen in their decision.

In the case now under consideration, the appellant seeks to have a judgment, obtained against J. M. Martin during his life-time, made executory against his heirs, who are of full age, and have accepted his succession with the benefit of an inventory. In their answer they declare the estate, which they have thus accepted, to be insolvent, and pray that execution of the judgment, against their ancestor, should be stayed, until a classification of all the debts due by his estate should be made by the judge of probates of the parish of Rapides. The judgment, which is revived by the present suit, contains a decree, ordering the

West'n District.
Sept. 1822.

COX
vs.
MARTIN'S HEIRS.

seizure and sale of a certain tract of land therein mentioned, as being subject to the plaintiff's demand, by a tacit lien and purely such as the law accords to vendors. The district court having stayed execution, as prayed for by the defendants, the plaintiff appealed.

In cases of vacant estates we have had occasion, during the last term of the court in Opelousas, to express our opinion on the course of conduct to be pursued by curators, and the right of creditors to enforce payment of their debts; and should it appear, that beneficiary heirs are in a situation similar to curators of vacant estates, or that their legal functions are strongly analagous, we may safely refer to the reasoning in that case, as forming a just basis for a decision in the present.

A curator cannot pay the debts of the vacant succession, without the authorization of the judge of probates; and in case of insolvency, classification must be made.

On referring to the *Civil Code*, where it treats of heirs with the benefit of an inventory, it seems that they are placed nearly on the same footing with curators of vacant estates, in relation to the administration of their ancestors' successions.

West'n District.
Sept. 1822.

Cox
vs.
MARTIN'S
HEIRS.

In *p.* 168, *art.* 104, we find it laid down, that, although the heir who accepts with the benefit of an inventory, be really the lawful heir, and true successor of the deceased, the effect, however, of the benefit of an inventory, is to make him appear, in the eyes of the creditors and legatees of the succession, rather as the administrator of the estate, than as the true heir and proprietor of it. They may be required, under certain circumstances, to give security for the value of the property contained in the inventory; and in default thereof, compelled to deposite all sums of money, held on any title belonging to the succession, in Bank—*Ib. art.* 107. On opposition made by any creditor, they are prohibited from paying the debts of the succession, otherwise than in the order and manner settled by the judge. Same authority, *art.* 108.

It is clear, from the evidence in this case, that opposition has been made to the payment of the plaintiff's debt by the heirs themselves, who claim to be privileged creditors to a large amount. There is, perhaps, no proof of insolvency, as alleged in the answer; but the opposition, as it appears, in the record of the heirs of *Martin* vs. *Thomas C. Scott*, is

West'n District. *Sept.* 1822.

COX *vs.* MARTIN'S HEIRS.

enough to require classification, before payment by the beneficiary heirs. All the arguments used against the correctness of the judgment of the district court, are drawn from inconvenience, a most fruitful source of reasoning in all cases of litigation, but which must yield to positive law.

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

Johnston for the plaintiff, *Thomas* for the defendant.

SURGAT vs. *POTTER & AL.*

If the principal sue for the pice of goods sold on credit, without authority in the agent to sell otherwise than for csah—the conduct of the latter is thereby approved and he discharged from responsibility.

Interest is generally due from the legal demand only.

APPEAL from the court of the seventh district.

MARTIN, J. delivered the opinion of the court. The petition stated, that the defendant Potter, as the plaintiff's agent, sold a negro woman and her two children for $1250, and appropriated the proceeds to his own use, and the defendants Lovells received from said Potter goods of the value of $1250, and in consideration thereof, agreed to pay the said sum to the plaintiff; and being after-

West'n District
Sept. 1822.

SURGAT
vs.
POTTER & AL.

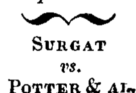
wards indulged with an extension of the time of payment, promised to pay interest therefor, at ten per cent. Process of attachment was prayed for and obtained.

The attorney, appointed by the court to represent the defendants Lovells, answered, that the attachment had improperly and illegally issued, and the proceedings thereon were not agreeable to law, and the attachment ought to be discharged; that the facts on which the attachment issued, did not exist at the time; that the person who made oath to these facts, was not and is not the plaintiff's agent, and they pleaded the general issue.

The defendant Potter alleged, that the attachment was illegally issued; he denied the allegations in the petition, and pleaded that, if he sold the slaves as the plaintiff's agent, he did not appropriate the proceeds to his own use, as, by the plaintiff's own showing, in his petition, he made provision for his payment; that he paid the plaintiff a sum of money, in part payment of the proceeds of the negroes, and is entitled to a commission of ten per cent.

The plaintiff had judgment for $1187 50, with interest from March, 1820. The defendants appealed.

West'n District.
Sept. 1822.



SURGAT
vs.
POTTER & AL.

The statement shows, that the plaintiff produced, at the trial, the defendant Potter's receipt, for a negro man and a negro woman and two children, to be sold for the plaintiff's account; Dutillet & Sagory's receipt, on the back, for the negro man; and letters from Potter to the plaintiff.

In the first, he informs him he has left the man with Sagory, being unable to sell him; that he had disposed of the plaintiff's woman in New-Orleans, for $1250, which he promised to account for in the spring.

In the second, he mentions the woman and children were disposed of at $1250, payable in goods, which he had sold at costs and charges, to the defendants Lovells, payable in March; that they desired the indulgence of a year's delay, which he had extended to them, knowing them to be good, they paying interest; that one of them would be down in a fortnight and would give their note to Dutillet & Sagory for the balance due the plaintiff.

Ayles deposed, he was the plaintiff's agent. Potter told him, he had sold the negro woman and children, of the plaintiff, to Canfield & Hill, for $1250 in merchandise, which he had sold, at costs and charges, to the Lovells, pay-

West'n District. *Sept.* 1822.

SURGAT *vs.* POTTER & AL.

able in March, 1820; and one of them assumed to the witness, as the agent of the plaintiff, the payment of the said sum as soon as convenient. He showed to him an entry in the books of the firm, by which they charged themselves with that sum, for the purchase of these goods, payable to the plaintiff—that the Lovells are merchants.

We pass over the objections to the attachment, as they are unsupported by evidence—on the contrary, it is in evidence, that Ayles who made the affidavit, was the plaintiff's agent.

Admitting that the defendant Potter made himself personally liable to the plaintiff, by selling for goods, by selling these goods, and by extending the period of credit—the plaintiff, by suing for the price of these goods and demanding the interest, stipulated as the consideration of the extension of the period of the credit, has approved and ratified what his agent, the defendant Potter, did. *Ratihabitio mandati comparatur. Dig.* 46, *tit.* 3, *l.* 12, 49, 58; *Idem.* 50, *tit.* 17, *l.* 152, *n.* 2.

The defendants Lovells have pleaded the general issue, *i. e.* denied that they did receive the goods from Potter, promising to

West'n District.
Sept. 1822.

SURGAT
vs.
POTTER & AL.

pay the price of them to the plaintiff, or to pay it with interest, on the day of payment being put off.

Now Ayles proves, that one of the firm assumed the payment of the price of the goods. There is not any evidence of the promise to pay interest, that may charge the Lovells—for neither the letters, nor the declarations of Potter, are legal evidence against them.

They owe only legal interest from the inception of the suit, and the judge erred in allowing it from March, 1820; he also erred in allowing $1187 50 to the plaintiff, while the sum due by the defendants Lovells, is clearly $1250; but as the difference to the prejudice of the plaintiff, in the capital $62 50, is less than the excess of interest allowed to the prejudice of the defendants, from March 20, 1820, to January, 1821, the date of the inception of the suit, we would, by rectifying these errors, amend in favour of the plaintiff a judgment of which he does not complain.

It is therefore ordered, adjudged and decreed, that the judgment of the district court, so far as it relates to the defendant Potter, be annulled, avoided and reversed; and that there be judgment in his favour, with costs of

West'n District. *Sept.* 1822

SURGAT *vs.* POTTER & AL.

suit in both courts—and that, as far as it regards the defendants Lovells, it be affirmed, with costs in both courts.

Bullard for the plaintiff, *Thomas* for the defendants.

MUSE vs. *ROGERS' HEIRS.*

A defendant may pray that the amount of a judgment which he has lately obtained against the plaintiff, may be deducted from that which the latter is about to obtain.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court.* The plaintiff states, that Rogers employed him, as an attorney, to procure the admission of him, and other claimants, as heirs to A. Phillips, deceased—and agreed to pay him for his services $1000—and the plaintiff laboured and exerted his utmost abilities for this purpose—and in the settlement of the estate, became responsible to the said Rogers for two notes, one of $2000, the other of $1988, and secured the payment by a mortgage; that afterwards, Rogers voluntarily employed A. Porter, as assistant counsel; that the plaintiff secured to Rogers from 18 to $20,000, as part of the deceased's es-

* PORTER, J. did not join in the opinion, having been of counsel in the cause.

tate; that, in the mean time, he retired from the bar, and employed W. Murray to finish the business, and gave him two notes for $100 each; that afterwards he paid to Rogers, by the agency of J. S. Johnson, $2280, by two notes, due him by R. Fenno, and $550, due by said Johnson—and Rogers gave credit on one of the notes of the plaintiff for $240, for part of the above fee of $1000, but omitted to credit it for the extent of the payment made by Johnson by $50; that Rogers then released the mortgage the plaintiff had given, and another was given to secure the payment of whatever balance should remain due by the plaintiff, on the two notes, without specifying any sum. As a manifest error had crept in the calculations made at the time Johnson made a payment to Rogers, the latter postponed the correction of it till the return of Johnson, who was then absent; but, in the mean while, Rogers died, and soon after his heirs sued the present plaintiff; and, without rectifying the manifest errors which have taken place, recovered judgment for the supposed balance of $830; but the court reserved the claim of the present plaintiff to the matters pleaded in his defence; that he accordingly instituted a suit for the

West'n District. *Sept.* 1822.

MUSE *vs.* ROGERS' HEIRS.

recovery of the said sum of $1000; that on a final settlement, a balance would clearly appear due to him. The petition concluded with a prayer, that the heirs might be enjoined from proceeding on their said judgment, till the whole matter was settled and adjusted. The injunction was granted.

The defendants pleaded the general issue, and prayed for a dissolution of the injunction.

Before the trial, the plaintiff, having obtained a judgment for $750 in the suit referred to in the petition, prayed the amount of it might be compensated, and the heirs perpetually enjoined from proceeding on their judgment, except for the balance.

A final decree was made, accordingly. The defendants appealed.

The statement of facts shows, that the plaintiff, at the trial, introduced the records of the suits alluded to in the petition.

As we have just affirmed the judgment, in which the plaintiff recovered $750, which was thereby directed to be compensated with and deducted from the judgment which the heirs had before recovered against him for $830, we cannot see any reason to disturb the judgment now before us.

It it therefore ordered, adjudged and decreed, that it be affirmed with costs.

Johnston for the plaintiff, *Scott* for the defendant.

MAYES vs. *CALVIT.*

This case turns on a question of fact.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court.* The plaintiff states, he is the legal owner, for life, of two slaves, whom he acquired by purchase from F. A. Bynum, to whom they were adjudged at the sale of the estate of A. & M. Martin, deceased; and was in quiet possession of them when the present defendant brought a suit against him, for the possession of these slaves, and obtained a writ of sequestration, on which he gave bond and security that they should not be removed; and the present defendant afterwards obtained a decree, for the possession of the slaves; and he, the present plaintiff, appealed and gave bond within the ten days. Notwithstanding which, and as the plaintiff believes,

* PORTER, J. did not join in the opinion, having been of counsel in the cause.

West'n District.
Sept. 1822.

MAYES
vs.
CALVIT.

through error, a copy of the decree was issued, and the sheriff accordingly delivered the possession of the slaves to the present defendant; whereupon, a writ of sequestration was prayed, and that the possession of the slaves might be restored.

The district judge granted an injunction, and directed the slaves to be restored, on bond and security being given. This was regularly done.

The defendants pleaded the general issue.

In an amended petition, by leave of the court, the plaintiff stated, that he is the life owner of two slaves, Isham and Grace, by purchase from F. A. Bynum, to whom they were adjudged at the sale of A. & M. Martin's estate; and that the defendant has taken possession of, and refused to deliver them; and the plaintiff prayed for their restoration and damages.

The defendant denied the plaintiff's right to the slaves, and that they ever made part of A. & M. Martin's estate; and averred, that he, the defendant, had been in possession of them for ten years, with title.

There was judgment for the plaintiff, decreeing that a writ of distringas issue. Both parties appealed.

The statements of facts shows, that the following documents were introduced at the trial:

A. Martin's inventory; sale of the estates of A. & M. Martin; Bynum's sale to the plaintiff, and the record of a suit, *Mayes* vs. *Calvit.*

Mulholland deposed, that in the winter of 1809 the defendant took the negroes to Natchez, from Mrs. Martin's plantation. He thinks, they came over with the other negroes of the estate; and he does not believe they were taken clandestinely. Mrs. Martin and J. Martin, in their life-times, claimed the negroes. They were brought into this state in 1814. They were in the defendant's possession, except when taken by the plaintiff.

Burgess deposed, that before the quarrel between the parties to the present suit, he heard the defendant say, the plaintiff had negroes in the crop; and afterwards he heard him say, that the plaintiff had taken his, the plaintiff's, negroes over the bayou, out of the crop.

Mulholland deposed, that he believes it probable that Mrs. Calvit brought over the negroes in 1813, during the winter. Grace is

West'n District. *Sept.* 1822.

MAYES *vs.* CALVIT.

about 17. His impression is, that a negro of the defendant, had her mother for a wife, and he gave a girl for the mother, without any child. This is from Mrs. Martin.

R. Martin deposed, that in 1809 the defendant came over to procure Sylva, the mother of Grace and Isham, by exchange. He was to return two children of the same size. He sent a girl in exchange for the mother, but not for the children. He has never sent any thing in return for the children. The negroes were taken away in the winter of 1809, and brought back in 1813 or 1814. He thinks, the negroes might have been demanded by Evertson; he was sent to do so, after the negroes were bought by the plaintiff from Bynum. He lived with the defendant, and attended to the crop. They had ten hands. The defendant had more negroes than the plaintiff. The negroes were always in the possession of the defendant, except when the plaintiff took them. All the negroes that were out, at the time of the sale, were brought home, except tho[illegible] It was thought the defendant would not giv[illegible] them up; and, therefore, he was not asked to do so.

F. A. Bynum deposed, that about the time

West'n District.
Sept. 1822.

MAYES
vs.
CALVIT.

he sold the negroes to the plaintiff, the defendant told the latter that, after that year, he would give possession of them. He understood they had made friends, and the plaintiff was to make a crop with the defendant, and a good one, as the condition of the negroes being given up. The plaintiff had two negroes, besides those the witness sold him.

Kilgour, a witness for the defendant, deposed, he knew the negroes in controversy since 1814, when Mrs. Calvit brought them over. He never knew the Martins to be in possession of them. The plaintiff had two negroes, and the defendant eight.

Scott deposed, that, at the time of the sale. the defendant loudly protested against it. At the time of making the inventory, they were described as in the defendant's possession.

The testimony shows, that the slaves were, in 1809, on Mrs. Martin's plantation, and that the defendant obtained possession of them, in the expectation of an exchange, which does not appear ever to have been effected, either by the delivery of the negroes he proposed to give, or by any act or deed of exchange, without which the property could not have passed to him.

West'n District.
Sept. 1822.

MAYES
vs.
CALVIT.

The documents show, they were inventoried as part of the property of Mrs. Martin; bought by F. A. Bynum, and by him sold to the plaintiff.

The defendant produces no title; he cannot avail himself of the plea of prescription. The testimony shows, he recognised the slaves as part of Mrs. Martin's property, since he took them from her plantation on the assurance he would give her others for them.

The district court has been of opinion, from these facts, that the plaintiff ought to recover; and we are unable to say it erred.

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

Bullard for the plaintiff, *Thomas* for the defendant.

BALDWIN vs. *GORDON & AL.*

Surety claiming discussion must point out property and furnish money sufficient to carry the discussion into effect.

A judgment directing all the

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. This action was instituted on an appeal bond, which contained the usual condition, that if the parties should prosecute their

appeal with effect, and pay or perform any judgment that might be rendered against them, &c., the obligation would be void, otherwise to remain in full force and effect.

The plaintiff avers, that this bond was given in consequence of a judgment he obtained at the May term of the district court, for the parish of Rapides, in the year 1820, against Maria C. Gordon, tutrix of her minor children, and Samuel L. Wells, *it solido*, for the sum of $550, with five per cent. interest until paid, and costs—which judgment, however, so far as it related to Maria C. Gordon, was to be levied of the estate of James H. Gordon, in the hands of the said Maria, to be administered.

He further avers, that the defendants failed to prosecute their appeal with effect, and that by reason of their neglect to do so, they and their security on the appeal bond, Smith Gordon, have become responsible to him, and are bound to pay the amount of said judgment, with costs.

There is further an allegation, that the tutrix has made herself responsible for the debts of her minor children.

To this petition Maria C. Gordon answered.

property of the principal debtor to be sold, and the amount distributed among his creditors, does not discharge the surety in an appeal bond.

Sureties are entitled to oppose all exceptions which are inherent to the debt, not those which are personal to the debtor.

The sheriff's return on a *fi. fa.* of the causes which prevented him making sale of the property seized, will be taken as true, if not disproved.

West'n District. *Sept.* 1822.

BALDWIN *vs.* GORDON & AL.

denying the allegations therein contained, and averring that she took the appeal in quality of tutrix of her minor children—that if the sheriff did not seize and sell the property of the succession, it was because, subsequently to the plaintiff's judgment obtained, a decree was rendered by the honourable court of the sixth district, ordering a sale of all the property of the succession, and suspending execution until the proceeds thereof should be due, which period had not arrived—and that it was not true that she had made herself personally responsible for the debts of the succession of James H. Gordon.

There is no answer appearing on the record from the defendant Wells.

Gordon, the surety upon the appeal bond, pleaded the general issue, discussion, benefit of all exceptions that the principal debtors were entitled to, and a judgment by the district court ordering a sale of the property of James H. Gordon, deceased, a classification of the debts due by his estate, and a suspension of all proceedings at law against it; which judgment, he avers, was the reason why the appeal was not prosecuted with effect.

The plaintiff introduced, in evidence, the

West'n District.
Sept. 1822.

BALDWIN
vs.
GORDON & AL.

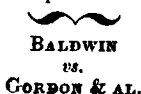
bond executed by the defendants—it is in the usual form, and dated on the 22d June, 1820.

Also, two executions—one dated the 9th January, 1821, on which the sheriff returned that he had seized a quantity of cotton, and advertised it for sale, but that he had been enjoined from selling it by an order of the district court—another, which had issued on the 16th July, of the same year, and on which the sheriff had endorsed, that he could not find any property of the defendants, except three tracts of land, which were so incumbered that it would be impossible to make any money of them, and that the plaintiff had refused to have them seized.

The judgment in the case of *Balio & others* vs. *Heirs of Gordon*, makes a part of the record; by this judgment, the tutrix is directed to sell all the property according to law, and the execution of the plaintiffs, in that suit, is suspended—but there is no order staying all proceedings against her, or ordering a meeting of creditors.

The petition of one of the defendants, praying an injunction against the execution issued on the original judgment obtained by the present plaintiff, was also introduced—it states,

West'n District.
Sept. 1822.



BALDWIN
vs.
GORDON & AL.

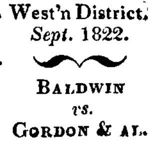
that the execution had issued irregularly; that she had sold a considerable part of the estate to pay the debts; that the claims were filed and classed by the parish judge, and directed to be paid in the legal order.

On this evidence, the judge *a quo* dismissed the plaintiff's petition, without prejudice to his future rights; and from the decree, so far as it regarded Gordon the surety, the plaintiff has appealed.

It is contended he cannot recover, because he has not discussed the property of the principal debtor.

In this case two executions have been returned unsatisfied, and admitting the defendant not to be concluded by these returns, and that he can still plead discussion, he has not, in this case, complied with the law which confers that privilege on him; for it is not sufficient to say that the debtor, for whom he bound himself, has property; he must point out in what that property consists, and where it is situated, and he must furnish money sufficient to carry the discussion into effect.—*Civil Code*, 430, *arts.* 8 & 9. *Herries* vs. *Canfield*, 9 *Martin*, 389.

It is next urged, that the surety is entitled



to all exceptions which the principal debtor could enjoy the benefit of—and these exceptions, in this case, are said to be:—

1. That the tutrix was not obliged to prosecute the appeal, in consequence of a judgment in the case of Balio and others against her.

2. That the property of the estate of J. H. Gordon has been sold by the court of probates, in pursuance of an order of the district court, and that she has been prevented from discharging this claim, as the terms of payment given on the sale of that property, are not yet expired.

I. The judgment in the case of *Balio & others* vs. *Heirs of Gordon*, cannot in any manner affect the rights which the plaintiff may have acquired in virtue of the bond executed to him. It was *res inter alios acta*—*Part.* 3, *tit.* 22, *l.* 20; 9 *Martin*, 376.

The principal debtors were not excused from carrying up this appeal by the decree in that case. Either the judgment obtained in the first instance against them, was correct, or it was not. If it was correct, they should not have appealed from it. If it was erroneous, they ought to have prosecuted their appeal

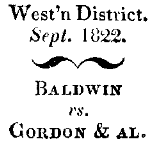
West'n District. *Sept.* 1822.

BALDWIN *vs.* GORDON & AL.

with effect. And if they failed to do so, they have not only revived that original judgment, but they have made themselves responsible on the new contract, by which they engaged they would reverse the judgment, or satisfy it.

But it is said, that by the order of the district court, the whole of the property belonging to the succession was directed to be sold, and therefore prosecuting the appeal was unnecessary.

This conclusion cannot receive our assent. It is true, the placing the property out of the reach of a creditor, who wished to seize upon it to the injury of others, may have been the object for which the defendants appealed. But the object which they had, in appealing, is a quite distinct question, from the rights acquired by the plaintiff under the contract formed by that step. And, although attaining the end they had in view, by a decree in another suit to which the plaintiff was not a party, may have answered their purpose, yet it does not discharge their bond; for the condition of it was not that they would obtain a decree of the district court, but that they would prosecute their appeal with success; and this brings us to the next and last question in the



cause, whether the principal debtor, being placed in a situation in which she cannot make payment, recourse can be had against the surety.

The surety is not entitled to every exception which the principal debtor may urge. He has a right to oppose all which are inherent to the debt, not those which are personal to the debtor. *Civil Code*, 432, *art.* 21. *Pothier* distinguishes them into *exceptiones in personam*, and *exceptiones in rem.* The latter, which go to the contract itself, such as fraud, violence or whatever entirely avoids the obligation, may be pleaded by the surety ; but the former, which are grounded on the insolvency or partial solvency of the debtor, or which result from a cession of his property, or are the consequence of his minority, cannot be opposed to the creditor. *Pothier on Obligations*, 380–381.

In the case before us, the objection that, since executing this bond, one of the principal debtors has obtained from a court of competent jurisdiction, an order directing a sale of all the property of the succession she represents, and by that means suspending the payment of debts due by it, cannot be distin-

West'n District. Sept. 1822.

BALDWIN vs. GORDON & AL.

guished from the case of partial solvency put by the author to whom we have referred.

It is unnecessary to examine the objection, that the plaintiff prevented the sheriff from levying on real estate of the defendants, for the same evidence which informs us of the fact, states that it was so incumbered no money could be made out of it.

We have not a doubt but the plaintiff ought to recover.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed—and it is further ordered, adjudged and decreed, that the plaintiff do recover of the defendant the sum of $578, with interest on $550 of said sum, from the 28th April, 1820, until paid; the costs of the court in the first instance, and those of this appeal.

Thomas for the plaintiff, *Bullard* for the defendant.

SHEWELL vs. *STONE.*

If by a rule of the district court, no exception will be heard against an attachment,

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. In this case there is no statement of

West'n District.
Sept. 1822.

SHEWELL
vs.
STONE.

facts, nor any thing equivalent thereto; but there are bills of exceptions.

The first is taken to the opinion of the court, permitting the defendant to move for a dissolution of the attachment, after he had gone into the trial.

The judge states, in the bill of exceptions, that his reason for hearing the motion, at that stage of the cause, and overruling the plaintiff's objection to the time of making it, was a rule of the court where the cause was tried, "which required all points should be contained in the answer, and that no objections to an attachment will be heard which are not set forth in the answer."

We have doubted, whether we could judicially take the existence of such a rule from a statement in the bill of exceptions; but, be that as it may, we are satisfied it was the duty of the party excepting to have furnished the facts, necessary for a perfect understanding of the opinion given. Our statute provides, that when a party excepts to an opinion of the court, so much of the testimony taken in the case, as may be necessary to a full understanding of such opinion, shall be taken and sent up with

except those contained in the answer, it is not too late to move for a dismissal, after the trial is gone into.

The defendant has a right to demand proof of the authority, of the agent who commenced suit againt him, and made affidavit to obtain process of attachment.

Bills of exceptions, are to points of law and what is contained in them, will not authorize the reversal of the judgment of an inferior tribunal for erroneous conclusions in matters of fact.

West'n District. *Sept.* 1822.

SHEWELL *vs.* STONE.

the other proceedings—*acts of* 1813, 202, *sect.* 17. This the plaintiff should have done, if he disputed the fact assumed in the exception signed. Taking it as correctly given, we think no error was committed in suffering the defendant, on the trial of the cause, to make a motion to dismiss.

The second is, to the opinion of the judge, requiring the plaintiff to prove the authority of the agent who made affidavit of the debt claimed in the petition.

The court decided correctly, in requiring the proof of agency ; as a man who is sued, even for a debt which he justly owes, has a right to ask if the proceedings are carried on by the authority of his creditor. Whether that proof was given or not we cannot say, as there is neither statement of facts, nor evidence brought up according to law ; and we cannot, on a bill of exceptions which is to a point of law, reverse a judgment of an inferior court, for erroneous decisions in matters of fact.

The same remarks naturally present themselves to the decision of the judge, in not suffering the cause to continue as a suit commenced by citation; for it appears, that the

authority of the attorneys was disputed on affidavit; and there is nothing by which we can learn that all the evidence, which was introduced to prove or disprove that fact, appears on record.

West'n District. *Sept.* 1822.

SHEWELL *vs.* STONE.

We think no error was committed, except in giving final judgment; it is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided, and reversed; that there be judgment, as in case of non-suit, against the plaintiff with costs in the inferior court, and that the defendant pay cost in this.

Wilson and *Mills* for the plaintiff, *Bullard* and *Thomas* for the defendant.

HINSON & AL. vs. *OGDEN & AL.*

APPEAL from the court of the sixth district.

If the appellee neglects to bring up the record, the judgment will be affirmed with damages.

PORTER, J. delivered the opinion of the court. This case presents the same features with several others decided this term. The appellees, in the failure of the appellants to prosecute their appeal in thirty days, have brought up the record, and have required

West'n District. Sept. 1822.

HINSON & AL. vs. OGDEN & AL.

that the judgment should be affirmed with damages. *Yeiser* vs. *Smith*, *ante* 392 ; *Ferguson & al.* vs. *Martin*, *id.* 295 ; *the same* vs. *Bacon*, *id.* 303 ; *Stephens* vs. *Smith*, *id.* 333.

We think, from an inspection of the record, that the appeal has been evidently taken for delay; and it is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs, and ten per cent. damages.

No counsel for the defendants, *Oakley* for the plaintiffs.

HOOTER'S HEIRS vs. *TIPPET.*

Collateral kindred, claiming as heirs, must establish the death of relations in the ascending line.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiffs, as heirs of Jacob Hooter, claimed land in the possession of the defendant. He denied, among other pleas, that they were such. There was judgment for the defendant, and they appealed.

They showed, that Jacob Hooter is dead, and that he left a brother, Philip Hooter, one of the plaintiffs; that the other plaintiffs are the deceased's nephews and nieces.

West'n District.
Sept. 1822.

HOOTER'S HEIRS
vs.
TIPPET.

There is no principle better established than that which requires that the party, who alleges, is bound to establish every positive fact which is necessary to support his allegation, if it be denied.

The plaintiffs allege, that they are heirs; they must, therefore, prove the death of their ancestor, and that they are his immediate kindred, entitled to the inheritance.

A son may allege he is the only son; and the fact that there is not any brother or sister of his, being a negative one, needs not to be proved by him. The grand-son must prove the death of his own father, the ancestor's son; for, by alleging he is the grand-son, he impliedly admits there was a nearer heir, at whose death alone he could succeed.

In the ascending line, the father may allege himself heir, and aver that his son had no issue; and this being a negative fact, he is not bound to prove.

But if the grand-father were to sue, he would be bound to prove the death of his own son, the father of the deceased; for, being an heir in the second degree of his line, he ought to show that the heirs in the first line, who once existed, are out of his way.

West'n District.
Sept. 1822.

HOOTER'S HEIRS
vs.
TIPPET.

Now the brothers, heirs in the collateral line, which is not called to the inheritance till after the descending and ascending, must allege there is no heir of the descending line; and this being a negative fact, is not to be proven. They must further aver, that there are no heirs of the ascending line; but, as every man has or had relations in the ascending line, those who claim, as collateral, must show that the relations, in the ascending line, have ceased to exist, by giving evidence of their death, or by showing that one hundred years have elapsed since the birth, in which case death is presumed. and not before.

In this case, no evidence is given that the father of Jacob Hooter is dead, or that one hundred years have elapsed since his birth; and the mother, and other ascending heirs, being unaccounted for, the heirship of the plaintiffs is not established.

The death of the plaintiff's father, says *Peake*, and of the plaintiff's mother, are next to be proven; and if there existed any other person in the pedigree, who stood before the lessor of the plaintiff, the latter should be prepared to show the death of such a person; for, by the general rules of law, he who asserts

West'n District. Sept. 1822.

HOOTER'S HEIRS *vs.* TIPPET.

the death of another, who was once living, must prove the death, whether the affirmative issue be that he is dead or living.—*Law of Evidence*, 419.

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 the case of non-suit, with costs in the district court; those in this, must be paid by the defendant.—*Sassman* vs. *Aymé & wife*, 9 *Martin*, 257.

Bullard and *Thomas* for the plaintiffs, *Wilson* for the defendant.

BULLET vs. *SERPENTINE.*

APPEAL from the court of the sixth district.

A party sued on a note, may be required to answer on oath, whether he did not subscribe, and the payee endorse it.

And on his refusal or failure, judgment will be given against him.

MARTIN, J. delivered the opinion of the court. The plaintiff sues as endorsee of the the defendant's note. He required the latter to answer on oath, whether the note was not subscribed by him, and endorsed by the payee. No answer being given to either of these interrogatories, and the general issue pleaded, there was judgment for the plaintiff, and the defendant appealed.

West'n District.
Sept. 1822.

BULLET
vs.
SERPENTINE.

His counsel urges, that the interrogatories were not such as he was bound to answer.

The *Civil Code* recognises one instance only in which the party may refuse to answer, *i. e.* when he might thereby arraign himself of a crime. *Civil Code*, 316, *art.* 261.

He may be dispensed, by the judge, from answering interrogatories which are impertinent, *i. e.* have no reference to the issue—*id. art.* 262.

The court was therefore correct in taking the two interrogatories as confessed; and in consequence of the proof, resulting from such presumed confession, giving judgment for the plaintiff—*id. art.* 261.

It is urged, the second interrogatory was as to a fact, not supposed to be in the knowlege of the defendant. If it was, he ought to have answered affirmatively or negatively. If it was not, he ought to have said so.

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

Thomas for the plaintiff, *Bullard* for the defendant.

SERPENTINE vs. *SLOCUM.*

APPEAL from the court of the sixth district.

If the defendant appeal, and there be no statement of facts, bill of exceptions, &c. the judgment will be affirmed with damages.

MARTIN, J. delivered the opinion of the court. The defendant appealed in this case: the record does not contain any statement of facts, bill of exceptions, case argued, or special verdict; and no error is assigned. It is hence clear, that the appellee contemplated no advantage in appealing, but the unrighteous one of delay.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs; and that the plaintiff recover 10 per cent. on the judgment for the unjust appeal, with costs in both courts.

Thomas for the plaintiff, *Bullard* for the defendant.

MARTIN vs. *TURNBULL.*

APPEAL from the court of the sixth district.

A right, supported by a requette, specifying a definite quantity of land, is of a higher dignity than that resulting from bare possession, which can only give a pretence of right to the extent actually enclosed.

MATHEWS, J. delivered the opinion of the court.* The evidence in this case exhibits a dispute, between the parties litigant, about the limits of their adjoining tracts of land. The

* PORTER, J. did not join in the opinion, having been of counsel in the cause.

West'n District.
Sept. 1822.

MARTIN
vs.
TURNBULL.

plaintiff claims under a certificate of the land commissioners, by which $756\frac{27}{100}$ superficial arpents of land are confirmed to Eleanor Biggs, on settlement right, to have such front on the bayou Robert as, with the depth of 40 arpents, will give the above quantity superficial. The title of the defendant is founded also on certificates of the commissioners, granted to A. Martin in pursuance of two requettes, one in favour of Gurnet for ten arpents front with the ordinary depth of forty, the other in favour of Dawd for five arpents front with the same depth, making together six hundred superficial arpents, having a front of fifteen on the bayou Robert.

In a decision of this court in the case of *Cureton* vs. *Turnbull*, referred to in argument and to be seen in 9 *Martin*, 37, the lower limit of the present defendant's land is fixéd and located only in one point on the bayou Robert, leaving the course of the side line to be determined by that of Dawd's upper limit, being common to his tract and that of E. Biggs, under whom the plaintiff claims as above stated.

The judgment of the district court quiets the defendant in his claim and possession of fifteen arpents front, to begin at a gully marked

on the plat filed in this cause with the letter D, and to run to the point B on said plat, thence to run back forty arpents on parallel lines on the course N. 88° 30' E., but allowed to the plaintiff damages for the deviation of a certain portion of his land, &c. From this judgment the plaintiff appealed.

In deciding this case, it is necessary to consider the original right and pretension of title set up for the grantees, under whom the present parties claim. That of E. Biggs is wholly indefinite, being what may be termed a simple settlement right. Those of Dawd and Gurnet are supported by requettes, which specify a certain and definite quantity of land; and in this respect are of greater dignity than a bare possession, which, without any colour of title, can only give a pretence of right to the extent of land actually enclosed and occupied. It is true that the laws of the United States did accord to settlers, under certain circumstances, a right to obtain a title to six hundred and forty acres, or a section of land; but a right thus granted can, on no principles of law or justice, be so construed as to interfere with the claims of other actual settlers, equally aided and protected by law, who exhibit

West'n District.
Sept. 1822.

MARTIN
vs.
TURNBULL.

evidence of a right or claim to a certain and definite quantity of land, which ought to be satisfied before a claim under simple settlement can take any thing.

According to this view of the subject we are of opinion, that the defendant has shown a better title to hold fifteen arpents in front by the ordinary depth, than the plaintiff has to recover his full quantity of six hundred and forty acres. But Dawd's requette calls for the land since confirmed to E. Biggs, as a limit above, which clearly admits that she had land there, but at the distance of five arpents above Gurnet's claim, for which it also calls below. Now, if there did exist any known and established limit between Dawd and Mrs. Biggs, this might, perhaps, control his claim to the definite quantity of five arpents in front; but there is no proof of any line having been run between their tracts of land, during the time which they occupied them. There is some vague and unsatisfactory evidence by witnesses, as to the point of limit on the bayou, which seems to have been disregarded by the court below, and from which we are unable to establish any point with sufficient certainty to diminish Dawd's front of five arpents: and are

West'n District.
Sept. 1822.

MARTIN
vs.
TURNBULL.

therefore of opinion, that the district court was correct in adjudging to the defendant the full front of fifteen arpents.

The next question is, as to the course which the side lines ought to run: this has been settled by the district court, and it conforms to the course of the plaintiff's upper line, as given by the public surveyor in surveying his claim. In relation to him, we can perceive no good reason to alter the direction as settled by the judgment below; and as the defendant did not appeal, and has not alleged errors in his answer on the appeal taken by the plaintiff,

It is ordered, adjudged and decreed, that the judgment of the district court be affirmed, and that the appellant pay the costs of this appeal.

Thomas for the plaintiff, *Wilson* for the defendant.

LAFARIERE vs. *SANGLAIR & AL.*

APPEAL from the court of the sixth district.

If the bill of sale state, that the *purchasers* gave *his* note for $1500, they may show that each

MARTIN, J. delivered the opinion of the court. The defendants, sued on a promissory

West'n District
Sept. 1822.

LAFARIERE
vs.
SANGLAIR & AL.

of them (there being two) gave a note for $750.

note, pleaded that the consideration of it was the price of a slave sold them by the plaintiff, and prayed a rescission of the sale on account of redhibitory defects.

There were two verdicts and judgment for them—and the plaintiff appealed.

The statement of facts shows, that the slave was proven to be addicted to robbery and running away, before the sale, and soon after it made his escape.

At the trial the defendants introduced the two witnesses to the note, who had also subscribed as such the act of sale, a notarial one, in order to establish the consideration of it, *i. e.* that it was given for part of the price of the slave.

This was objected to by the plaintiff's counsel, as the note was for $750, and the act of sale expressed that the price was $1500 to him *in hand paid*, by Sanglair & Germeuil, in *his* note of hand. The district court overruled the objection, and a bill of exceptions was taken.

The counsel urges that the court erred, as parol evidence was offered to disprove the contents of the act.

West'n District. Sept 1822.

LAFARIERE vs SANGLAIR & AL.

That of the defendants argue, that the act contains intrinsic evidence that the penman was unacquainted with the rules of grammar, and *mala grammatica non vitiat cartam*. It is stated, that the *defendants* gave *his* note; that, while it appears that he erred in the use of a pronoun, he may well have done so in putting the noun in the singular instead of the plural; that it is not impossible, that if a note of $1500 was given originally, two others of $750 may have been substituted thereto; that the pronoun *his*, implies the fact that *each* purchaser gave a note, in which case it should be for $750; that the act does not say that the defendants gave *their* note for $1500, but that they paid $1500 in *his* note of hand, which is not inconsistent with two notes of $750 being given.

We are of opinion, for these reasons, that the district judge did not err.

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

Thomas for the plaintiff, *Bullard* for the defendants.

West'n District. *Sept.* 1822.

LE BLANC *vs.* SANGLAIR & AL.

There is no difference between the *want* and the *failure* of consideration of a note. Either may be given in evidence against the payee or endorsee with notice.

LE BLANC vs. SANGLAIR & AL.

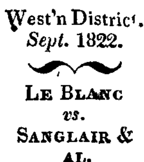
APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The defendants, sued on their promissory note payable to R. Prudhomme or bearer, pleaded it had been given for a consideration which had failed, viz. in payment of the price of a mulatto, who was addicted to redhibitory vices; that, as soon as they discovered this, they gave public notice of their intention not to pay it, &c. They required that the plaintiff should answer on oath, whether he did not know, that defendants had given notice the note would not be paid. The judge having directed that this interrogatory should be answered, the plaintiff did not answer it.

There was a verdict and judgment for the defendants; and the plaintiff appealed.

The testimony fully establishes, that the slave was, long before the sale, in the habit of running away, and soon after it, made his escape.

The plaintiff's counsel contends, that as the note was transferred to him, in payment of a debt, before its maturity, the defendants cannot avail themselves of the failure of the consideration against them.



The plaintiff having failed to answer the interrogatory, it must be taken for confessed. *Civil Code*, 316, *art.* 261. The jury were, therefore, correct in drawing the consequence, that the failure of the consideration destroyed his right; it was their province to determine the fact, that the plaintiff was sufficiently put on his guard, by the notice which his silence admitted.

There is no difference between a *want* and a *failure* of consideration. Each may be set up as a defence, not only against the original payee, but also against an endorsee, who took the note with a knowlege of an equitable circumstance entitling the maker to avail himself of the defence. 3 *Johns.* 124 & 465. 7 *id.* 26. 8 *id.* 20. 10 *id.* 198 & 231. 11 *id.* 50. 5 *Mass.* 299. 6 *id.* 457. *Chitty on Bills*, 84 *a.*

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

Thomas for the plaintiff, *Bullard* for the defendants.

West'n District. Sept. 1822

SKILLMAN & WIFE vs. LACEY & AL.

SKILLMAN & WIFE vs. LACEY & AL.

Evidence that a conveyance, which the act shows to be a sale, was not a sale, but a *dation en paiement*, is inadmissible.

Appeal from the court of the fifth district.

Brent, for the plaintiffs. The plaintiffs instituted this suit to obtain an order of seizure and sale of certain negroes, sold by M. L. Haynie, the first husband of Anne Sterling Skillman; one of them to the defendant Lacey—upon which negroes she alleges she had a privilege and mortgage for her dowry, and property brought by her in marriage, the amount of which was ascertained by a decree of this court.

The defendants alleged:

1. That Lacey purchased said negroes from the deceased, in payment of materials furnished for a sugar-house, and for money paid to workmen for labour on said house, and that said buildings were afterwards sold with the plantation, for the benefit of said Anne.

2. That the debtsdue to him, and for which the negroes were given, were of an higher and superior nature to the claim of the said Anne.

3. That Haynie, during the marriage, had disposed of lands and other property to a sufficient amount to satisfy said Anne's claim, and that she must first exercise her action of mortgage against said property.

West'n District.
Sept 1822.

SKILLMAN & WIFE
vs.
LACEY & AL.

The petitioners denied all this, and the court gave judgment for the defendants.

All the facts stated in the petition, as to Anne Sterling's claim and the judgments in her favour, are proven by the records, made a part of the statement of facts.

The widow had a mortgage upon all the property of her husband, for the amount of the property that he received for her, as a mortgage claim.—6 *Martin*, 14; *Civil Code*, 332, *art.* 53; *Id.* 334, *art.* 62; 3 *Martin*, 391.

The judgment of the court, in cases where the wife sues for separation, goes back to the day of filing the petition, and binds his property.—*Civil Code*, 342, *art.* 93.

I think I have shown to the court, that the petitioner's claim is a mortgage upon the husband's property, and that all his estate is bound from the date of his receiving the same; and also, that the institution of the suit for a separation, bound the property from the day of filing the petition. Having shown this, I will next refer the court to the time when Haynie acquired the negroes in dispute, and then to the date of his sale to Lacey.

It is proven that the marriage took place in 1811, and that in the year 1813 he owned the

West'n District. Sept. 1822

SKILLMAN & WIFE vs. LACEY & AL.

negroes in dispute; and by a recurrence to the records it will be seen, that they were bound for the estate received by Haynie.

It will also be seen, that the suit for separation was instituted the 3d November, 1814, and recorded so as to give notice in St. Mary, where the defendants lived, on the 16th of the same month—from which time the law *declares the same to be binding on all property.* By turning to the deeds, from Haynie to Lacey, the court will see that the negroes were not sold until the 29th December, 1814—after the institution of the suit.

According to every principle of law the negroes are liable to the plaintiff, and she had a lien upon them for the payment of her judgment—and I will next show to the court, that our proceedings have been regular.

The property (negroes) being in the possession of the defendants, the petitioner must produce a copy of judgment against Haynie, upon which the court will order said negroes to be sold, if the defendants do not prefer paying the judgment. *Civil Code,* 460.

The plaintiffs have done this, and the court must give her judgment—without the defendants have alleged matter in defence, which

West'n District.
Sept 1822.

SKILLMAN & WIFE
vs.
LACEY & AL.

takes the present case out of the rules of law, which generally govern. It will be no difficult task to show, that the defence set up is unfounded in *fact*, *law* and *matter*.

The defendants contend, that Lacey purchased the negroes with *materials furnished*, *&c.* for a sugar-house, and for money paid and advanced for workmen, upon said house.

In reply to this allegation of the defendants, I will observe that, even supposing the fact to be as stated by them, it does not affect the plaintiffs' lien upon the negroes; for, if Lacey did supply materials and advance money to workmen, to build the sugar-house, these things and acts might give lien upon the house, but certainly cannot destroy the plaintiff's previous lien upon the negroes. But the fact is the reverse. The authentic acts of sale prove, that the negroes were sold to Lacey for *cash*; it is so stated in them, and no subsequent acknowledgment of Haynie, after the suit commenced, to favour Lacey the defendant, could destroy or take away the previous claim and lien of the plaintiff; and what he told the witnesses, cannot prejudice the rights of the petitioner.—To prove the fact, that the sales were for *cash* and not *materials*, *&c.*, I refer

West'n District.
Sept. 1822.

SKILLMAN & WIFE
vs.
LACEY & AL.

the court to the deeds of sale, accompanying the statement of facts.

Nor can the parol testimony of the defendants, as to the *consideration* in the deeds, be received to contradict the positive statement of the consideration being *cash*, as stated in the written instrument.—*Civil Code*, 310, *art.* 242; 6 *Martin*, 668 & 428.

But, suppose that the *parol* evidence could contradict the *written sales*, the court will see, by referring to the testimony, that the account filed, for which Lacey says Haynie sold the negroes, was not *exclusively* for materials furnished, money advanced, &c. The account amounts to $1496 67, of which $526 are for sugar cane, hogs and corn—singular materials to build a sugar-house with! So that these items cannot be allowed to give any privilege. Now for the balance of account, which is $970 67, he charges about $306, for money advanced to workmen upon the sugar-house.

Mr. Lacey has failed to prove this advance. But if he had proved it, he cannot claim the privilege or lien which the workmen had, except they had specially subrogated him in all their rights. The transfer of their claim, or the money paid to them for it, would not be suffi-

West'n District.
Sept. 1822.

SKILLMAN & WIFE
vs
LACEY & AL.

cient. The subrogation must be special; there was none; and for their claims he takes no privilege.—*Civil Code*, 288, *art.* 149–152.

So much for the $306, which the defendant claims on account of workmen, and which deducted from the sum of $970, the balance due, after striking out the item for hogs, corn, &c. will leave only $664 in Lacey's account for materials furnished by him for the sugar-house, and for which he has no lien or privilege.

A privilege is a right which a creditor has over another creditor, whose claim or mortgage is older than the one who claims the privilege.—*Civil Code*, 468, *art.* 68; *Id.* 456, *art.* 29.

Privileged debts are only funeral charges, law charges, medical attendance during the sickness of which the patient died, salaries of persons who lent their services for the year, price of subsistence furnished to a debtor during last six months, &c. &c.—*Civil Code*, 468, *art.* 75.

Architects and other workmen, undertakers, &c., employed in working on the said buildings, have a privilege upon the same.—*Civil Code*, 70, *art.* 75.

But in no place can the learned counsel for the defendants show where those who sell materials, for instance plank, &c., have any lien.

West'n District. Sept. 1822.

SKILLMAN & WIFE vs. LACEY & AL.

In this case it is not proven that Lacey was the architect, undertaker, bricklayer or workman, upon the house; on the contrary, it appears that he was neither. I refer to the statement of facts. But should the court be of opinion that Lacey had a lien upon the house for the money paid by him to workmen, without any express subrogation, as well as for the materials sold by him—his claim is barred by prescription.--*Civil Code*, 488, *art.* 77.

The defendants state, that the debts due them were of an higher and superior nature to those of the plaintiff, Anne Sterling. To this I reply, that she has shown that they were not, and that in fact the defendant has *no lien whatever*—but if he has, that the lien is only upon a certain piece of property, and not upon the negroes in dispute, to the prejudice of the petitioner's mortgage upon them.—7 *Martin*, 400 & 632.

On the third ground, I refer the court to 3 *Martin*, 390.

Wilson for the defendants. M. L. Haynie was the proprietor of a sugar plantation in the county of Attackapas, but resided in Feliciana. The defendant, who was agent of Haynie, supplied various materials wanted for the

West'n District.
Sept. 1822.

SKILLMAN & WIFE
vs.
LACEY & AL.

building and repairing of the sugar-house, sustenance for the hands and cattle employed on the plantation; he expended money in payment of taxes due on it; he paid the workmen and labourers, and otherwise usefully disbursed sums on account of the establishment. M. L. Haynie conveyed to him three slaves, the consideration in the contract mentioned being a sum of money; but the defendant alleges, that the real consideration was the materials, &c. previously furnished, and the money previously laid out for the use and benefit of Haynie, whose acknowlegment to this effect is proved. The wife of Haynie brought suit against him for a separation of property, and the restoration of her paraphernal estate. Before any decree was rendered therein, the husband died. The widow, who afterwards married Andrew Skillman and who is the plaintiff in this case, was, under the decree of a competent court, classified as a privileged creditor of the estate of Haynie for paraphernal property to a certain amount. In the exercise of this lien, the plaintiff brought suit against Lacey and Borell (Lacey's vendee, who cites him in warranty) to obtain a sale of the three slaves, conveyed by Haynie, as pro-

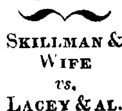
West'n District.
Sept. 1822

SKILLMAN & WIFE
vs.
LACEY & AL.

perty that was subject to her lien, and ought to be appropriated to the further satisfaction of her demand, which she alleged was not yet discharged. The plantation, already mentioned, had been seized and sold by the sheriff under an ordinary execution, at the suit of Mrs. Skillman, and was purchased by her at two-thirds of its appraised value, namely, for the sum of 4450 dollars. Soon afterwards it was sold, by her, for the price of 8000 dollars.

The defendant averring, that the plaintiff's demand is one of strict law, whilst the strongest equity pleads in his behalf, repels the demand on various grounds.

1. The estate of Haynie was not adequate to the discharge of the plaintiff's lien; and if it did not sell for such a sum as would discharge it, the failure is imputable to the irregular and illegal proceedings of the plaintiff. The estate of Haynie, being a vacant one, and the curator subject to the duties imposed on the tutors and curators of minors, neither the whole nor any part of the property could be sold for a price below its appraisement.—*Civ. Code*, 176, *art.* 135; *Id.* 70, *art.* 59. The plantation was sold, not at probate sale, but by



the sheriff under an ordinary execution, at the suit of the plaintiff, and she became the purchaser thereof, at two-thirds of the appraisement, or for the sum of 4450 dollars. There is no reason to think that the appraisement was incorrect, or that one made under the auspices of the probate judge would have been different. The plaintiff, therefore, acquired the plantation at one-third less than its value; that one-third would suffice for the payment of the plaintiff, being at least equal to any balance due to her, and she ought not to have recourse upon the property of the defendant. Moreover, until the estate of Haynie had been legally and entirely sold, no discussion of the property could take place, so as to ascertain whether any, and what balance, might be due to the plaintiff.

2. The defendant had a privilege on the buildings of the plantation of superior dignity to that of the plaintiff, whose demand is not for dotal but paraphernal estate—*Curia Phillipica*, 418, *l.* 25.

It is stated, in the argument of the opposite counsel, that if such a privilege existed, it is barred by prescription: but this exception, although a formal replication was filed to the

West'n District. *Sept.* 1822.

SKILLMAN & WIFE *vs.* LACEY & AL.

defence made, appears no where in the pleadings; and could it even avail, would not be admitted. But, in truth, the privilege of the defendant was extinguished by the conveyance of the slaves to him, that is, by an honest payment of the debt itself; and, if the plaintiff will take the slaves, she must admit our privilege to revive; which would give recourse against the buildings on the plantation, in the hands of the plaintiff's vendee, who would have an action of warranty against the plaintiff, a circuity of action not to be encouraged.

It is contended, that the defendant hath not proven the slaves to have been given in payment of his privileged claims; because the act conveying them, purports to be a sale or conveyance for a price in money, and that the parol evidence introduced to explain the real consideration, which was excepted to in the court below, cannot be admitted; and we are referred to *Civil Code,* 310, *art.* 242.

The testimony taken, does not go to contradict, to add to, take from, or in any wise to impair the obligation itself. A sale is complete by the agreement for a sum of money. although, in fact, something different from

money may be given; *non enim pretii numeratio sed conventio perficit emptionem*, *Contrat de Vente*, *p.* 16, *n.* 30.—What objection then can there be to offering parol evidence of a consideration, which, however different from money, does not alter, in any manner, the legal character of the contract itself; which, on the contrary, by establishing an admissible consideration, tends to establish the act itself. In 11 *Martin*, 620, it is decided, on the authority of *Pothier*, that the prohibition of parol evidence, against or beyond the contents of an act, does not extend to third persons. If the conveyance in question had been in reality a pure act of sale, but purporting to be a *dation en paiement* for materials, &c. furnished, the plaintiff would be permitted, by parol evidence, to explain the true nature of the transaction, in order to make her lien attach. May not the defendant then, in the opposite case, *in a contest with the plaintiff*, be indulged in such evidence, to protect a right recommended by the strongest equity?

It is argued on the part of the plaintiff, that even if parol testimony could legally be admitted to explain the real consideration given for the slaves, yet that it does not consist

West'n District. *Sept.* 1822.

SKILLMAN & WIFE *vs.* LACEY & AL.

exclusively of materials furnished, and other things, giving a privilege on the sugar-house; but if a part only were privileged, and the value of that part were not very disproportionate to the value of the slaves, the sale would be good—*Contrat de Vente, n.* 20.

3. But whether the claims, which the defendant once had against Haynie, were privileged or not—whether the money and materials, &c. furnished by him regarded the sugar-house alone, or the plantation generally, it is proved, that a sum amounting to 1313 dollars 67 cents, was beneficially expended by the defendant for the use of Haynie, whereby the plantation was greatly ameliorated; that thus ameliorated, it was purchased by the plaintiff for two-thirds of its value, and shortly afterwards sold by her for almost double the amount of the purchase money; and the defendant is sheltered from the rigorous operation of the plaintiff's tacit lien, by a liberal and enlarged principle of natural equity. It is inequitable that any one should enrich himself at the expense of another.—*Neminem æquum est cum alterius detrimento locupletari. Traité des Hypotheques, vol.* 1, 33.

If Lacey had been in possession of the

West'n District. Sept. 1822.

SKILLMAN & WIFE *vs.* LACEY & AL.

plantation, the plaintiff could not have deprived him thereof by virtue of her lien, without first reimbursing him the expenses incurred by him concerning it. The plaintiff having bought it *improved* by those expenses, on the credit of her lien, without having indemnified the defendant, ought not to pursue other property in his hands, under the same lien, without making reimbursement; especially, if that property had been given for the purpose of reimbursement.

4. Should the reasons given be of no avail, yet, the plaintiff cannot sustain the present action; because, having accepted the community of her late husband, she is precluded by the principle of warranty.—*Traité des Hypotheques, vol.* 1, *p.* 37.—The plaintiff hath accepted the community, because it does not appear that she ever renounced it, nor obtained any legal delay for deliberation. Renunciation must be made in the form prescribed by law, before a notary and two witnesses. *Civil Code,* 338, *art.* 76–84.

MARTIN, J. delivered the opinion of the court.* At the January term 1819, of this

* PORTER, J. did not join in the opinion, having been of counsel in the cause.

West'n District.
Sept. 1822.

SKILLMAN & WIFE
vs.
LACEY & AL.

court, Mrs. Skillman (then widow Haynie) recovered judgment against the curator of her former husband's estate, and was directed to be classed as a mortgage creditor. Her object, in the present suit, is to obtain a writ of seizure and sale of certain negroes, sold by her husband to Lacey, and one of them by the latter to Borell, the other defendant, who brought him in as his warrantor. 6 *Martin*, 41.

They resist the claim, on the score of there being other property of the estate in the hands of the curator, or the plaintiff herself: and they allege, that Haynie did not sell the negroes to Lacey, but gave them in payment for a debt, for which the latter had a privilege on a plantation of said Haynie, which has since been sold on an execution, at the plaintiff's suit, for $4450, being the two-thirds of the valuation, and which she afterwards sold for $8000, and on which Lacey claims a higher privilege than the plaintiffs.

There was judgment for the defendants, and the plaintiffs appealed.

Our attention is first called to a bill of exceptions, taken by their counsel, to the opinion of the district court, overruling his objections to the introduction of parol evidence, to show

that the negroes were not *sold*, but given in payment, in contradiction to the written proof which results from an act of sale.

If there were no writing, evidencing the manner in which Lacey acquired a title to these negroes, parol evidence could not be received, to establish what the defendants seek to prove, a *datio en solutum*, or *giving in payment*, i. e. a covenant, by which these slaves were given to Lacey in payment, or discharge of his privileged claim—*Civil Code*, 310, *art.* 241—the law imperiously requiring such a covenant to be reduced to writing, and forbidding, in case it be disputed, the admission of parol evidence to prove it.

But an act was here drawn to preserve the evidence of the conveyance of three slaves by Haynie to Lacey; and this appears thereby to be a contract of sale. Evidence that what the act shows to have been a sale, was not a sale, but a *dation en paiement*, is evidence against what is contained in the act; and the law has said, such evidence must be written, and parol evidence must not be received—*id. art.* 242.

The district judge, in our opinion, erred in admitting parol evidence to this effect.

We are bound, therefore, to disregard all

West'n District. Sept. 1822.

SKILLMAN & WIFE *vs.* LACEY & AL.

the parol evidence, thus illegally received; and the defendants are thereby deprived of any means of supporting their assertion, that the slaves were not sold, and that the plaintiffs are bound to respect their privilege.

The other ground of defence does not appear less unreasonable. There is no evidence of any estate of Haynie, to which the plaintiff is bound to resort, before she comes to the slaves mentioned in the petition. There has been no waste of the property of the estate, that can be imputed to her.

In the year 1816, it appears, she purchased at a sheriff's sale the plantation of her late husband, which had been seized to satisfy a judgment she had obtained. This judgment, not being appealed from, and indeed being no longer appealable from, must be considered as *res judicata*, and such as could be legally executed; it is not urged, that any of the formalities which the law prescribes were omitted.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that a writ of seizure and sale issue, as prayed for. The costs in both courts to be

paid by the defendants and appellees; and that the defendant Borell have his remedy against the defendant Lacey, if the slave by him purchased be taken and sold in pursuance of the writ of seizure and sale. and that he have his costs against Lacey, in both courts.

BOSSIER & *AL.* vs. *VIENNE*, CURATOR, & *AL.*

When a father sells property to his son at a very low price, the advantage thus conferred is subject to collation.

But the difference of price between what the son sells the property for, after a lapse of years, and that which he paid for it, will not be sufficient to establish that the father sold to him at a price below the real value.

12m421
48 1086

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The plaintiffs state, that they are heirs of the late Louis Gabriel Buard, and that no partition has ever taken place of his estate; that one of the co-heirs, Onezime Buard, received in his life-time, in advancement of his portion of his father's estate, one half of a plantation sold by him to J. J. Lambre for $6000, and that he ought to collate $3000 with the other heirs.

The defendants pleaded, among other things, that no part of the patrimony of the co-heirs was ever taken to increase the patrimony of Onezime.

The deed from John Louis Buard, the ancestor, to his son Onezime Buard, is dated on the 26th September. 1817; is in the usual

West'n District. *Sept.* 1822.

BOSSIER & AL. *vs.* VIENNE, CURATOR & AL.

form, and expresses to be made for the sum of $800, payable in two years.

The statement of facts establishes, that the father in his life-time made an equal distribution of his property among his children; that one of them died without issue, and that he inherited from him the plantation which forms the subject of this action.

It is also admitted, that two of his heirs do not join in the suit; that the estate of Onezime Buard is insolvent; that he never paid in his life-time the $800, which are stated in the act of sale already mentioned; and that he sold in 1820 the tract of land acquired from his father, together with a portion of his own, containing the same quantity, both forming one plantation, for the sum of $6000.

The *Civil Code* has provided, that "when a father has sold a thing to his son, at a very low price, the advantage thus conferred is subject to collation." *Civil Code*, 194–205.

One of the first questions which the cause presents is of fact: Was the property sold at a low price? Judging as we must do, from what appears on record, we cannot say that it was. There is no evidence to show its value, at the time of the first sale. Consequently, we have

West'n District.
Sept. 1822.

BOSSIER & AL.
vs.
VIENNE, CURATOR & AL.

no means of judging that it was disposed of for less than what it was worth. The price obtained for it two years and four months after, by the vendee, has been pressed on us as evidence of the father having sold it much below its value; but the fluctuation is, in the price of property, too great and frequent in this country, to enable us to draw so positive an inference from a fact, which, in relation to this point, is entirely equivocal.

The opinion just expressed renders it unnecessary to examine the other questions, raised in the cause. Unless the sale is set aside, and proved to have been collusive and feigned, the heir cannot call on the defendant to collate its value. They have only a right to recover the money which formed the consideration of it.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the plaintiffs do severally recover the sum of one hundred and sixty dollars, with legal interest from judicial demand, and costs in both courts. The said sum to be paid as a special

West'n District.
Sept. 1822.

BOSSIER & AL.
vs.
VIENNE, CURATOR & AL.

privilege, out of the proceeds of the land sold to J. J. Lambre.

Bullard for the plaintiffs, *Thomas* for the defendants.

ELISHE vs. *VOORHIES.*

The conclusion of the district court, in a matter of fact, will prevail, if the appellant does not show there is error in it.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The plaintiff, heir at law of Mark Elishe, sued the defendant, who is parish judge of Avoyelles, for having taken possession of the estate of her husband, and refusing to give it up, or render any satisfactory account of its situation. She also claimed from him $2200, the price of a tract of land which she had sold him.

He pleaded the general issue, and that he had faithfully accounted.

The case has been submitted without argument, and presents a question of fact only. We have carefully perused the testimony, and find nothing in it which shows that any error was committed by the court of the first instance. in the judgment rendered.

West'n District.
Sept. 1822.

ELISHE
vs.
VOORHIES.

It is therefore ordered, adjudged and decreed, that it be confirmed with costs.

Bullard for the plaintiff, *Wilson* for the defendant.

INNIS vs. *M'CRUMMIN*.

When property is sold by certain bounds, and *per aversionem*, if there be a surplus over the quantity mentioned, it passes to the vendee.

12m 125
46 670

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. Both parties in this case claim the premises, under a title originally issued to one Adam Huffman, for a tract of land of twenty arpents front, with the ordinary depth. At his death, a partition of the property, held in community with the widow, took place. By this division, ten arpents of land in front, with forty deep, being part of the above tract, were set aside to the widow; and the remainder, which fell to the portion of the heirs, and which is described in the act of adjudication as "the lower half of a tract whereon Mrs. Huffman now resides, containing ten arpents front, with the ordinary depth of forty," was sold at public auction, to Geo. B. Curtis, under whom the present defendant claims.

It being subsequently discovered, that the

West'n District.
Sept. 1822.

INNIS
vs.
M'CRUMMIN.

tract, originally granted to Huffman, contained more than twenty arpents in front, another sale was made by the court of probates, at the request of the *widow and heirs*, and the plaintiff became the purchaser of two arpents front, by forty deep, adjoining the lands of Kenneth M'Crummin.

The main, indeed the only question in this case, arises out of the conveyances to Cu[illegible]s, and to those claiming under him. It is contended by the defendant, that the expressions used in the sale, "the lower half of the tract on which Mrs. Huffman lives, containing ten arpents front, with the ordinary depth of forty," passed the half of that tract to the purchaser, though it may have contained much more.—While, on the other side it is urged, that the enumeration of the number of arpents shows what the parties understood it to contain—that the particular quantity given must control the description of one half; and it has been further pressed on us, that, admitting the original purchaser did buy the one-half, the present defendant has not acquired his right to that quantity.

The evidence establishes satisfactorily, that all the right which Curtis had in the property.

has been transferred to M'Crummin. It is only necessary, therefore, to examine the question presented by the original conveyance.

It was held by a majority of the court, in the case of *Fouchér* vs. *Macarty*, *ante* 114, that if heirs declare, they intend to sell all the lands of a plantation belonging to their ancestor, and from want of knowlege of the real quantity, describe that plantation to contain 40 arpents in depth, when in truth it had 66, that the intention to dispose of the whole was controlled by an enumeration of what that whole consists; more particularly, when the evidence was satisfactory that the purchaser had the same belief, with regard to the quantity contained in it.

It is impossible to distinguish this case from that; and we refer to the reasoning used, and the authorities there relied on, as the grounds of our decision in this. It is clear, that the heirs had no knowlege of the tract having more than the number of arpents specified in the original title. The land is inventoried as 800 arpents. On a partition, 10 by 40 is set aside as the widow's half; when appraised, it is stated to be of the superficies already mentioned; and Curtis's belief that he acquired

West'n District.
Sept. 1822.

INNIS
vs.
M'CRUMMIN.

no more, is clearly evidenced by the act of adjudication; for he did not purchase by any limits, but by a description of 10 arpents front, with the ordinary depth.

The counsel for the defendant read from *Pothier, traité de vente, n.* 254 & 255, to show that where land is sold *per aversionem*, if there is a surplus over the quantity given, that it belongs to the vendee. This is true, if the property sold is by certain bounds and limits, or is a distinct and separate object, as a field enclosed, or an island in a river; because it is presumed, that the object presented to view was that on which the parties formed their estimate; or if described by certain boundaries, that both vendor and purchaser had their attention more fixed on them than an enumeration of quantity. But a description of property, sold by the words "half of a tract of land," without any boundaries, is clearly not within the principle which forms the basis of the doctrine found in that writer; and, if immediately following such vague expressions, there are words giving a certain quantity, that quantity should control them.

The case put in the *Digest, liv.* 21. *tit.* 2. *liv.* 45. to which *Pothier* refers, is where the

West'n District.
Sept. 1822.

INNIS
vs.
M'CRUMMIN.

seller, in delivering a field said to contain 100 acres, shows to the buyer one *the boundaries of which include more.* In such case, the buyer acquires all that is delivered to him.

As to the line which the surveyor states he found at the depth of 38 arpents, there is no evidence how or when it was run there; or if it was ever consented to by the plaintiff, or those under whom he claims. It is contradicted by the survey of Trudeau, and by every instrument of writing, in virtue of which this land has passed from the grantee to the present defendant.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed—that the plaintiff do recover of the defendant, the land claimed in his petition, and represented in the plat of survey returned in the case, between K B C F, with costs in both courts.

Thomas for the plaintiff, *Wilson* for the defendant.

MULANPHY vs. *MURRAY.*

The defendant's signature at the foot of an

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the

West'n District. Sept. 1822.

MULANPHY vs. MURRAY.

appeal bond, is evidence that he appealed.

court. This case is brought up by the appellee, who insists, that the judgment of the court below should be affirmed with damages.

The record does not contain the petition of appeal; and it has been argued by the counsel who have appeared on behalf of the defendant, that all we can do is to dismiss the parties from this court.

The appellee contends, that a certificate of the clerk, that there was a petition which was taken out by the appellant, is sufficient evidence to establish the fact, on which an affirmance of the judgment below is demanded.

We do not think so; but we are of opinion, that as the transcript filed contains an appeal bond, the defendant, by signing that instrument, has furnished sufficient proof that he appealed.

As to the errors which have been assigned, it is sufficient to remark, that they do not appear on the face of the record; and if they did, we should be obliged to dismiss the appeal—we could not affirm the judgment with damages.

It is ordered, adjudged and decreed, that the judgment of the district court be affirmed

with costs, and 10 per centum damages on the amount of said judgment.

Thomas for the plaintiff, *Mills* for the defendant.

SOMPEYRAC vs. *CABLE.*

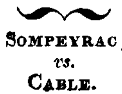
When the record is made up in so confused a manner, that the court cannot clearly see the facts of the case, and there appears four judgments, and one statement of facts only, no affirmance with damages can take place; but the appeal is to be dismissed.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. This is an appeal from a judgment rendered against the defendant, bail of one Walker. The transcript of record, filed in this court, is made out in a manner highly discreditable to the officer to whom that duty was entrusted. It presents such confusion, that it is difficult even to know whether we ought to dismiss the appeal.

There are four judgments, and one statement of facts; immediately after the judgment in the original case, which is at the end of the petition, there is, without any intermediate proceedings, a decision of the district judge, that a motion against the sureties is premature. Next comes a certificate without date, that the record contains all the evidence on which *this suit* was decided; and succeeding

West'n District. *Sept.* 1822.



SOMPEYRAC *vs.* CABLE.

this statement, without either petition or answer, we have a judgment dated June, 1821; and another, in December of the same year. The citations, notices, and answers, cover the remainder of the record, in the most confused manner; and we cannot tell, with certainty, which of the judgments was based on them.

We do not know but the statement of facts may refer to the last judgment—if it did, the case would not be one to be affirmed with damages. We dot know that it does refer to it; we are, therefore, not permitted to inquire into the correctness of that judgment. Amidst such confusion, to attempt to decide on the rights of the parties, might work great injustice. We can, therefore, do nothing but dismiss the appeal with costs.

Bullard for the plaintiff, *Mills* for the defendant.

SMITH vs. *ROBERTS & AL.*

If the buyer is disturbed in his possession by the suit of a third person, he may refuse payment, until the vendor gives security.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. This action is founded on two notes of hand, by which the defendants promised to pay to W. Vaughn, administrator of Seth Stafford.

West'n District.
Sept. 1822.

SMITH
vs.
ROBERTS & AL.

deceased, $1450. The notes are not drawn in negotiable form, but passed to the plaintiff by endorsement, in good faith, who holds them, subject to all legal and equitable objections to payment, which might be pleaded by the promisors, against the original payee. Payment is resisted on the ground of no consideration, or failure thereof, to support the promise. It appears, that the notes in question were given as the price of certain slaves, bought by the defendant Roberts, at a sale of the estate of the intestate Stafford; and that said slaves are now claimed from him, by virtue of a title alleged to be in third persons. who have actually commenced suit on their claim. The district court gave judgment for the defendants, from which the plaintiff appealed.

In the course of the trial below, several bills of exceptions were taken to the introduction of evidence which related to the title of the slaves in question; but, as that is a matter which can better be settled in a decision of the suit actually commenced for that purpose, it is deemed unnecessary now to consider those bills of exception.

We are clearly of opinion, that the facts

West'n District. *Sept.* 1822.

SMITH *vs.* ROBERTS & AL.

disclosed in evidence, are sufficient to authorize the defendants to withhold payment of their notes, unless they be amply secured against the probability of loss which they may suffer by eviction of the slaves, who constitute the consideration of their promise. But it is not just, that they should retain both the thing and the price.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled. And it is further ordered, adjudged and decreed, that the plaintiff do recover from the defendants the sum of $450, with legal interest from the judicial demand; and that execution shall be stayed, until said plaintiff give good and sufficient security, to the satisfaction of the district judge of the judicial district, to save the defendants harmless from the effects of any judgment, by which they may be deprived of their title and possession of the slaves mentioned in these proceedings, and which appear to be the consideration of the notes on which this action is founded; and that, in case of eviction as aforesaid, they will refund the price of said slaves, with interest and da-

mages. And it is further ordered, that the appellees pay the costs of this appeal.

Bullard & Thomas for the plaintiff, *Wilson* for the defendants.

CASSON vs. *CURETON*.

APPEAL from the court of the sixth district.

On a *fi. fa* against two, if it be returned that it was stayed, by order of the plaintiff, as to one of the defendants, no *ca. sa.* can issue against the other.

PORTER, J. This cause was argued last year, and there being a difference of opinion between the two judges then present, it has stood over for judgment until this term.

The facts of the case are so fully stated in the opinions which my brethren have prepared, that it is unnecessary for me to repeat them. The question presented for decision is, whether a joint execution, which has issued against two defendants, being returned *nulla bona* as to one, and "proceedings stayed by order of plaintiff" as to the other, a separate *capias* can issue against him whose property could not be found.

I think not. The act of 1809 directs, in the most positive terms, that no *capias ad satisfaciendum* shall issue, to imprison the body of any debtor, until due return by the sheriff. or

West'n District.
Sept. 1822.

CASSON
vs.
CURETON.

other officer of the writ of *fieri facias*, stating that sufficient property was not found to satisfy the same. Now, in this case, the writ of *fieri facias* was not returned, that property could not be found to satisfy it. Consequently, a *capias*, against the body of the debtor, issued improvidently.

But it has been contended, that on a judgment which is against two, execution may issue against each; and that if it may, plaintiff can legally direct the sheriff to make the money out of either, on a joint execution.

This idea can only be sustained on the ground that a writ need not follow the directions of the judgment. But nothing is clearer to my mind, than the position that it must strictly pursue it. The clerk has no authority to issue any other. If there is judgment against two, and he issues execution against one, he does not exercise a ministerial duty.

I have examined all the books on our own law, within my reach at this place, and I have been unable to find any which affords information on the point submitted to us. The rule is inflexible in that system from which the names of our writs are taken, that the form of the execution must invariably pursue the

West'n District.
Sept 1822.

CASSON
vs
CURETON.

judgment.—*Tidd's Practice*, 913. *Williams' notes on Saunders*, *vol.* 2, *f.* 72.

This is the safest course to adopt; for were we to take the other, then, on a joint judgment against several defendants, various writs of *fieri facias* might be issued at once, and at the same time *capias* be running against some of the defendants. This would be contrary to the practice, as I have understood it, and it appears to me, would lead to great confusion.

Again, if an execution can issue against one debtor, the converse of the position should be true, that if the judgment is in favour of several creditors, each one might take out execution in his own name; but this would seem contrary to what we said in *Dufour* vs. *Camfranc*, 11 *Martin*, 607.

For these reasons, and those contained in the opinion of judge Martin, I agree that there should be judgment, as in case of non-suit, for defendant.

MARTIN, J. The plaintiff brought an action against Bradley and Curtis, on which the present defendant became bail for Bradley. Judgment was had against Bradley and Curtis. and execution issued accordingly. The sheriff returned, that the proceedings against Cur-

West'n District. *Sept.* 1822.

CASSON *vs.* CURETON.

tis had been stayed ; that six head of cattle, the property of Bradley, had been seized and sold for $48, and no more of his property could be found. A *ca. sa.* next issued and was returned not found, and the plaintiff proceeded against the present defendant, as bail of Bradley. There was judgment for the plaintiff, and the defendant appealed.

His counsel urges, that the *ca. sa.* against Bradley was illegally taken, as the return of the execution did not show that the sheriff could not find any property to satisfy it, and as the *ca. sa.* on a judgment against two cannot be issued against one only.

The sheriff was commanded to seize the property of Bradley and Curtis. He was bound to comply with the directions of his writ, and could not obey the directions of the plaintiff, in any thing that rendered the situation of either party harder. He could not, of his own authority, have taken the slave of one of the defendants, while personal property of the other was at hand, without violating his duty and his oath—a violation which the plaintiff's order could not authorize.

It is true, the plaintiff may waive and delay the execution of a process which he has pla-

ced in a sheriff's hands—because its execution is a benefit or advantage which the law has provided for him exclusively, and he may consequently renounce it. But, though he may thus waive or delay the execution of his process, the *mode* of execution is not at his discretion or caprice; because, in this respect, the provisions of the law concern the rights of the defendant. This mode cannot, therefore, be varied without the consent of *both* parties.

It is true, in levying an execution against two, the sheriff may take the chattel of either; because, very likely, joint property is not to be found, and nothing makes it his duty to look for or seize it in preference to the private property of either. The plaintiff may certainly point out property liable to seizure; but the sheriff, who is bound to execute his office with impartiality, cannot be controlled by his directions as to the particular chattel to be seized. Who can say that a sheriff would be justifiable in refusing to levy on property, sufficient to satisfy the debt, which the defendant would present, as that which he could most conveniently spare, and levy on other which he could not spare without great distress to his family—because the plaintiff insisted on the latter property being taken?

West'n District. Sept. 1822

CASSON vs. CURETON.

If, when the law leaves a choice to the sheriff, he cannot be controlled nor be justified by the plaintiff's directions, may these authorize him to disregard the positive command of the writ? When the writ commands him to take the goods and chattels of A and B, and if he cannot find any, to take slaves; and if no slave, the land—may he (even with the plaintiff's directions) seize at once the land of B, when both slaves and personal property of A are in his view? I think not.

It is said, the plaintiff might have sued either of the defendants alone; so, after judgment, he may proceed against either, and take out his execution against one only. I believe that the clerk cannot model writs at the command of the parties; that he must pursue that which the law has provided, and our statute has provided one which follows the judgment. 1805, *c.* § 14.

The execution must agree with the judgment, and must be sued out in the joint names of all the plaintiffs or defendants, otherwise it will not warrant the judgment.—1 *Ld. Raym.* 244, *Penoyis* vs. *Brace*, *S. C.* 1 *Salk.* 319, 2 *Saunders*, 72, *k. in notis.*

This principle, though drawn from the

books of the common law of England, must be recognised as grounded on the soundest basis. The clerk is a mere ministerial officer; he has no authority but the judgment, to issue the writ which is to deprive a man of his property or liberty. He must, therefore, strictly and closely follow the judgment, which is the sole authority which warrants the execution.

I conclude, that, while it did not appear that no property of either the defendants could be found to satisfy the execution, issued against Bradley & Curtis, a *ca. sa.* could not legally issue; for the statute expressly provides, that no writ of *capias ad satisfaciendum* shall issue until after *due return*, by the sheriff or other officer of the writ of *fieri facias*, stating that sufficient property was not to be found to satisfy the judgment. 2 *Martin's Digest*, 1.

That if a *ca. sa.* could have legally issued, it ought to have followed the judgment and be directed against both defendants. A separate *ca. sa.* against one defendant, on a joint judgment against two, cannot be supported. 6 *T. R.* 525—*Comyns*, 129.

As, therefore, the *ca. sa.* issued intempestively and improperly against one of the defend-

West'n District. Sept. 1822.

CASSON vs. CURETON.

ants only, the proceedings against the bail were premature.

I think that the judgment of the district court ought to be annulled, avoided and reversed; and there should be judgment for the defendant, as in the case of a non-suit, with costs in both courts.

MATHEWS, J. This is an appeal from a judgment rendered against the defendant, on a bail bond. The original action was commenced by *Casson* vs. *Bradley & Curtis*, on an instrument of writing, in which the former bound himself as principal debtor, and the latter as surety. Bradley alone was held to bail, and Cureton became his bail. Judgment was obtained against both the original defendants, without any plea of discussion or other defence, on the part of the surety. On this judgment a *fieri facias* issued against them, which the plaintiff directed not to be executed on the property of the surety; and on a return of *nulla bona*, as to Bradley, a *ca. sa.* was issued against him, and being returned not found, judgment was obtained in the ordinary mode of proceeding, by motion against the bail, from which he appealed.

The judgment is said to be illegal and er-

West'n District.
Sept. 1822.

CASSON
vs.
CURETON.

roneous, because the *fi. fa.* was improperly executed by the sheriff; and secondly, there being a joint judgment, a separate *ca. sa.* could not legally issue against one of the defendants alone.

Before coming to any conclusion, on the correctness or error of the judgment against the bail, I lay down the following principles, which I consider as supported by law.

1. In all judgments rendered against two or more persons, by a competent tribunal, the persons against whom they are thus rendered, are thereby bound *in solidum.*

2. Executions on such judgments may issue against all, or any one of the persons thus condemned.

It is true, in the present case, the *fi. fa.* issued *vs.* both the defendants, but was only executed on one; or in other words, it was stayed, by instructions from the plaintiff, against the other. This, I think, he had a right to do; for, if in the first instance, the execution might lawfully have issued against one only, at the instance of the plaintiff, he might rightfully have directed its execution, even when issued against both, so as to prevent the taking of the property of one whom he meant to favour:

West'n District.
Sept. 1822.

CASSON
vs.
CURETON.

and certainly most equitably, as the person favoured was only surety in the original contract.

I am further of opinion, that the return of no property, found in relation to Bradley, authorized a separate *ca. sa.* against his body; and consequently on a return of "not to be found," his bail was chargeable with the debt, conformably to law.

The necessary formalities, required by the Spanish laws in the execution of judgments, differ so much from our present laws of practice on the same subject, that it appears to be difficult to find any principle established by the former, which might guide us clearly in our present inquiry. I therefore conclude, that the decision of this case must rest mainly on induction, to be made from the axioms above stated; the most imposing of which, and that too most relied on, is, that an obligation, created by judgment of a competent tribunal, against two or more is joint and several in its effects; and consequently may be considered in the light of several judgments. In this view of the subject, an execution issued against one of the persons condemned, or a severance of execution, would not conflict

with any rule requiring an execution to pursue the judgment, on which it may be founded; for the judgment debtors being several, as well as joint, execution may be taken out against either of the debtors. 2 *Bacon's Abr. verbo Execution, Wils. ed.* 725, wherein this doctrine is laid down, *in totidem verbis.*

Thomas for the plaintiff, *Bullard* for the defendant.

DAVIS' HEIRS vs. *PREVOST'S HEIRS.*

Whether the vendee can recover land, which the vendor, before the sale, has sworn to belong to the person in possession?

APPEAL from the court of the fifth district.

The petition stated that the plaintiffs are the just and legal owners of a tract of land of sixty arpents in front, on the western side of bayou Teche, with the depth of forty-two arpents; and they are prevented from enjoying the same by the defendants, who have entered and taken possession of the same, &c.

The defendants pleaded the general issue, the prescriptions of thirty years and ten years.

Macarty's heirs called in warranty, as vendors of the defendants, pleaded that the defendants have a good title to the land, which was purchased upwards of thirty years ago by

West'n District. Sept. 1822.

DAVIS' HEIRS vs. PREVOST'S HEIRS.

their ancestor from V. Lesassier; and the said Lesassier, their ancestor and themselves have possessed the same for upwards of thirty years—that the plaintiffs, and those under whom they claim, appear by the petition to have owned the premises for upwards of forty years, and never before asserted their title—that these warrantors, their ancestor and the defendants have possessed, with a good title, for upwards of ten years.

There was judgment for the defendants, and the plaintiffs appealed.

The statement of facts shows, that the plaintiffs produced the grants from the Spanish government to C. Dugat, J. B. Dugat and J. B. Labauve for twenty arpents in front each, with the depth of forty-two, and conveyances from the heirs of said grantees to the widow and heirs of De la Houssaie, and conveyances from the said widow and heirs to the plaintiffs' ancestor, which, it is agreed, composed a part of the statement of facts.

It is admitted that the several persons above mentioned are the heirs of those whose heirs they are represented, and the land in the grant is now occupied by the defendants and claimed by the plaintiffs.

The record of the suit of *Johnson & al.* vs. *Prevost's heirs*, 9 *Martin*, 128, is to be read in evidence.

The defendants offered a deed of exchange between the Dugats and Labauve with De la Houssaie, also an affidavit of the latter in the land office of the United States.

It is admitted that the land claimed by the warrantors' ancestor, at the *chicot noir*, and sold to the defendants, is the same as that mentioned in the plaintiffs, original grants.

The plaintiffs opposed the admission of De la Houssaie's affidavit, and their right of exception, is preserved to them.

Moreau, for the defendants. As we are in possession, and have been so, for upwards of a year before the inception of the suit, (March 15, 1819,) we must be maintained; unless the plaintiffs, by the production of a good title, prove themselves the real owners. *Civil Code*, 478, *art.* 24. *Domat*, 1, 3, 7 *sect.* 1. *n.* 15. *Recop. de Cast.* 4, 15, 3.

We have also pleaded the prescription of 10, 20, and 30 years.

As the plaintiffs seek to avail themselves of the same prescriptions, it is proper to notice the difference between the prescription

West'n District *Sept.* 1822.

DAVIS HEIRS *vs.* PREVOST'S HEIRS.

ad liberandum, which we invoke, and the prescription *ad acquirendum*, which the plaintiffs plead. 9 *Merlin*, *Repert. verbo Prescription*, 480. *Laperte*, 1 & 2. 1 *La sala*, 121, *n.* 10.

The prescription of actions was unknown to the Romans, under the *Institutes* and the *Digest.* It was introduced by the emperors. *Inst.* 4, 12. *in princ.* *ff.* 41, 2, & 3. 6 *Hulot*, 292, 319.

The first notice of prescription of actions is in the *Code* 2, *Clef des lois Rom.* 364. It appeared so just, that the emperor authorized it, even against the claims of the *fisc.* *Code* 37, 7, 3. 3 *Hulot*, 226–228.

Civil actions between individuals, are rescribed by 30 years, as well in cases in which an universality of things is claimed, as in special real actions.—*Id.* 7, 39, 3.

In Spain, every civil action is prescribed by the lapse of 30 years. *Part.* 3, 29, 21.

By a subsequent law, which *Ferrari* says, is the 3, 13, of the *ordinamiento real*, the prescription of real action was reduced to 20 years. 7 *Bibl. n.* 30, 295, *verbo Prescription.*

Lastly, in the *Recopilation de Castilla*, 4, 15, 6, which is only a repetition of the 63d law of *Toro*, actions merely personal are prescribed by 20 years; real ones by 30.

West'n District.
Sept. 1822.

DAVIS' HEIRS
vs.
PREVOST'S
HEIRS.

Such is the jurisprudence of Spain, in regard to the prescription of actions. Yet none of the laws cited, speak of the prescription of real actions; but the most esteemed Spanish writers teach, that it is regulated by the Roman law, and is of 30 years. *Code.* 7, 39, 3. 2 *Gomez*, 436, *in notis.* 1 *Derecho Real de España. Sala* 2, 2, *n.* 1. 7 & 8 *Ferrari's Bibl. verbo Prescription, n.* 30, 295.

The prescription of actions may be invoked in Spain, against any pecuniary claim, but not against that of any right to moveable or immoveable property.—*Ferrari, Loco citato.*

The present action is a demand of revindication of immoveable property, and is prescribed by thirty years. *Pothier, Propriete,* 2, 1, *in the preamble.* It is a real action. *Id.*

It suffices that we should show a possession of more than one year; unless a good title be produced by the plaintiffs. *Civil Code,* 478, *art.* 34.—A title prescribed against is not such.

Even if the 30 years, which had elapsed since those under whom the plaintiffs acquired their title, at the inception of the present suit, had not the effect of destroying their right, which they suffered to sleep for so

West'n District.
Sept. 1822.

DAVIS' HEIRS
vs.
PREVOST'S
HEIRS.

long a time, the defendants would have acquired the premises by their possession, with a just title for upwards of twenty years.

The just title is defined *Partida*, 3, 29, 18. *Civil Code*, 488, *art.* 68. *La Porte des Prescriptions*, *ch.* 3.

This just title the late J. B. Macarty acquired by the deed of sale, executed by Mad. Lessassier in 1780, and his heirs transmitted it to the defendants' ancestor, in 1809.

The defendants, being unable to produce Mad. Lessassier's deed, ought to be allowed to show what it contained by parol proof. They cannot be required to produce evidence of the *vis major*, which occasioned its loss; because this evidence is an innovation of the *Code Civil*, and a consequence of its requiring that the sale of immoveable property and slaves be written.—*Civil Code*, 344, *art.* 2, & 247, *art.* 12.—This was not required, by the laws then in force in Louisiana, when Macarty lost or mislaid the deed of Lessassier, executed in 1803. Sales of any kind of property might be oral—*Febrero, adicionado*, 1, 10, § 1, *n.* 19; *Part.* 3, 14, 8,—and when a sale was made in writing, it was with facility admitted to be proven by parol, in case of its loss.

West'n District.
Sept. 1822.

DAVIS' HEIRS
vs.
PREVOST'S
HEIRS.

It was required, that the loss of the instrument be alleged to have happened at a time when no suspicion attached; and that the writing should be of a nature to be lost, without any *vis major;* as one under private signature, a note of hand, which is often carried about one's person, and from one place to the other.

As to the allegation of the loss of Lessassier's act of sale, it appears by a petition of J. B. Macarty, to the intendant, as early as 1803; that he then stated its loss, and prayed that his right might be established by the list of taxes, in which he was charged as the owner of the land. He mentions, that the loss happened in Pedesclaux's office.

This petition does not form a complete legal proof of the loss of the paper; but it establishes the allegation of it, at a time not at all suspicious. The decree of the intendant, of the 16th of July, 1803, on this petition, shows that this petition is not a paper prepared for use in the present action. J. B. Macarty, at the time, could not suppose that the existence and contents of this act of sale could be contested by any but Lessassier's heirs. The recognitive title, which he acquired from Mad. Lessassier, put him perfectly at ease on this head.

West'n District.
Sept. 1822.

DAVIS' HEIRS
vs.
PREVOST'S
HEIRS.

It appears from Judice's deposition. 9 *Mart.* 128, that the act of sale was executed in the Attakapas; it is a matter of notoriety, that J. B. Macarty resided on his plantation, near New-Orleans; it is therefore probable, that he brought it to the city, and lodged it with the notary, for registry. Judice says, the sale was a public sale, and was executed before Declouet, the commandant. In this, the memory of the witness is incorrect. The archives of the office have been carefully searched, and no trace of such a sale can be discovered.

The declaration, under oath, of Mad. Lessassier, in her recognitive act, establishes the fact, that her husband's sale was a private one. The plaintiffs urge, that her declaration, being *ex parte*, makes no legal proof against them; yet, they require us to admit, as legal evidence, the allegations contained in the recognitive acts of the heirs of Dugat and Labauve, in the year 1817, relating to the existence and contents of a deed of exchange, alleged to have been executed thirty years before, between L. P. De la Houssaie and Dugat and Labauve.

It is not alleged, that the records or archives of the office of the Spanish commandant of

the Attakapas, were destroyed, nor any part of them lost: this circumstance must repel the allegation, that the sale of Lessassier to Macarty was a public one, executed before that officer; since no trace of it appears.

The defendants ought to be allowed to establish this sale by parol evidence.

1. Because they have proven by the testimony of Leblanc and Judice, that this act once existed, and was executed in 1780, or 1781. 9 *Martin*, 128.

2. Because they have shown by those of Frelot, Carlier, Decuir, Leblanc, and Berard, *Id.* 126–131, that the tract sold by Lessassier to Macarty, is in the place commonly called the Chicot noir; and had 80 arpents in front, with the ordinary depth on each side of the stream.

Were we to produce the sale from Lessassier to Macarty, it would be legal evidence of the sale, and of the contents of the tract. Were we to produce a declarative act, given by the vendor to the vendee, to supply the loss of the original, it would be legal evidence, if the sale was there especially and particularly related, as it is in Mad. Lessassier's deed.—*Civil Code*, 308. *art.* 237. *Pothier*,

West'n District. *Sept.* 1822.

DAVIS' HEIRS *vs.* PREVOST'S HEIRS.

Obligations, 742, 743.—This being admitted, the latter deed ought to have the same effect; because the recognition of a primordial title by the heir, has the same effect as that of the ancestor.—*Id.* 742 *ad finem.*

It is urged, that the lady's deed ought not to have any effect, because it is not there stated that her husband was dead; because she had no title or right to the premises; and she does not appear to have had any authority to act for the heirs of her husband.

The death of Lessassier sufficiently appears from the deed; for the grantor mentions, that she acts in the name of, and for his heirs—and *nemo est hæres viventis.*

As the widow, she might well confirm the sale of a tract of land, part of the community of goods, which had subsisted between her and her husband. We need not show, that it had been purchased during the marriage, because all the property, which either party possesses, are presumed common. *Recop. de Castille*, 5, 9, 1. *Civ. Code*, 336, *art.* 67. Judice's deposition, however, establishes the fact of the purchase during the marriage. It is there sworn, that Lessassier, his wife and the witness came together to the Attakapas, where Lessas-

sier bought the land at Chicot noir, which did not please his wife, and he sold it to Macarty. 9 *Martin*, 128.

The ratification of the sale by Mad. Lessassier is certainly good for the one-half which she had, as common in goods with her husband, in a tract of land purchased during the marriage. It may also avail for the other half, as she ratified in the name of the heirs of her husband. One may validly stipulate or promise for a third person, without any authority from him; and the convention is valid, if this third party ratify it.—*Code Civ.* 262, *art.* 20—*Domat*, 1, 1, 1, *sec.* 2, *n.* 6—*Pothier*, *Obligations*, *n.* 75. The silence of these heirs during so long a period, is presumptive evidence of their ratification. They alone could plead the nullity of the deed. Relative nullities, those which concern only a third party, do not render the instrument void, *ipso facto*: but only voidable, on the application of the party in whose favour the law introduced them.—8 *Merlin. Repert.* 60, *verbo Nullite*; *Melançon's heirs* vs. *Duhamel*, 10 *Martin*, 225.

J. B. Macarty did not rest satisfied with the civil or symbolic possession, resulting from his title, he took actual and corporeal possession. *Pothier*, *Possession*. 39, 41 & 55.

West'n District. Sept. 1822.

DAVIS' HEIRS *vs.* PREVOST'S HEIRS.

Bouté, Frelot, Decuir and Judice, declare that he made a settlement—9 *Martin*, 125–129.

The actual possession of Macarty during several years, has preserved the civil possession in him and his heirs, till the sale of the latter to the ancestor of the defendants, (*Pothier, Possession*, 55 & 56) who, it appears, took possession five or six years before the inception of the suit of his heirs against Johnson and another; *i. e.* in the beginning of 1810—9 *Martin*, 126 & 127.

Hence the defendants, and those under whom they claim, having possessed upwards of thirty years, under the sale of Lessassier, and the recognitive deed of his widow, repel the claim of the plaintiffs, by the prescription *longissimi temporis*.

It cannot be urged, that the defendants' ancestor did not take actual and corporeal possession of every part of the tract, on both sides of the stream by enclosures; for he was not an usurper, but a vendee in good faith, to whom the vendor willingly yielded the possession of the whole; and the deed of sale shows, with great precision, what was sold, and consequently taken possession of. *ff.* 41, 2, 3, § 1. 6 *Hulot*, 296; *Pothier, Possession*, *n.* 41.

It is not necessary to him who pleads prescription, to show that he, under whom he claims, was himself in possession. *Pothier* says, that the principle, that the taking possession of a part of an estate causes the possessor to acquire the possession of the whole, is applicable to him who takes possession of an estate which the former possessor consents to abandon. *Loco citato.* We must not conclude, from these expressions, that it is necessary that the former possessor be in the actual and corporeal possession—civil possession suffices.—*Pothier*, *Possession*, *n.* 6.

Lessassier had actual possession. Judice deposes, that he lived on it for upwards of two years, 9 *Martin.* 126; and he could yield possession to Macarty, his vendee. The possessor in good faith may avail himself of the prescription of 10, 20 or 30 years, although he should not have a good title. It suffices, that the former should possess during the requisite time. *Partida*, 3, 29, 18. *Code Civil*, 486, *art.* 67. It is true, that if the former possessor had a just title, the time he possessed may be added to the possession of his vendee. *Part.* 3, 29, 16. *Code Civil*, 484, *art.* 43.

The defendants, their ancestor and their

West'n District. Sept. 1822.

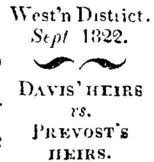
DAVIS' HEIRS *vs.* PREVOST'S HEIRS.

vendors have possessed under a just title for ten years. This suffices to repel the claim of the plaintiffs, as it is neither alleged nor shown, that either they, their ancestor, or De la Houssaie were absent from the state. *Part.* 3, 29, 18.

The deed of Mad. Lessassier must be considered as a just title. It is evident, that she consented that Macarty should remain in possession of the land, sold him by her husband; and this consent operated as a symbolic tradition, which rendered him an actual possessor, and enabled him to prescribe from the date of the deed. *Pothier*, *Possession*, *n.* 43; *Domaine*, 1, 2, § 4.

The plaintiffs have shown no title. It is not sufficient to show a grant to Dugat and Labauve: a transfer of it to De la Houssaie, under whom the plaintiffs claim, must be shown.

They contend, that De la Houssaie obtained the land by exchange; but the original deed, which is said to have been the evidence of this exchange, is not produced. The exchange, however, is said to be proven by recognitive titles, to which the deeds of the heirs of Dugat and Labauve, in which it is stated



that their ancestor, about thirty years before the dates of these deeds, had given the land, now claimed, in exchange to L. P. De la Houssaie, in exchange for another tract, on the spring of the large island of the Attakapas.

The plaintiffs are willing to admit the evidence of the sale of Lessassier to Macarty, resulting from the recognition of it in the deed of the vendor's widow, supported by her oath; because we are unable to prove the accident which occasioned its loss. Yet they wish us to dispense with the proof of the loss of the original deed of exchange.

We have proven, however, that the heirs of Dugat and Labauve were under an error when they stated they had a perfect knowlege of this exchange. A deed, executed by L. P. De la Houssaie, and by Charles and Jean Dugat and B. Labauve, in 1794, establishes the fact that the land, at the Spring in the Attakapas, was exchanged, not for a tract on the Teche at the Chicot noir, but for a tract on the Vermillion. The description of the land, in this deed, puts it beyond a doubt that it was the same tract which is now holden to have been exchanged for that at the Chicot noir.

West'n District. *Sept.* 1822

DAVIS' HEIRS *vs.* PREVOST'S HEIRS.

We further contend, that if the exchange be really such as the recognition of the heirs of Dugat and Labauve state, it was modified or altered by a subsequent one.

The proof of this fact results from the deed just mentioned, executed in 1794, which is inconsistent with the proposition that the tract which De la Houssaie gave in exchange, and which clearly appears to be the same which the heirs of Dugat and Labauve assert to have been so given about thirty years before the date of the deed, which contains their declaration, *i. e.* in 1787 or 1788, was still his property in 1794, when it is proven he exchanged it with the ancestors of these heirs for a tract on the Vermillion.

It results further from an affidavit made by De la Houssaie.

Macarty's heirs having, in 1814, applied for the confirmation of their title to the land at Chicot noir, which De la Houssaie is said to have received in exchange from Dugat and Labauve, De la Houssaie made oath "that he knew the land at Chicot noir, claimed by Macarty's heirs; he had considered it always, as all the neighbourhood did, as the property of the late J. B. Macarty."

This declaration of De la Houssaie is a formal denial of his having any right to the land, which must have the effect of destroying the proof that might otherwise result from the recognitive acts of the heirs of Dugat and Labauve, raising an insurmountable obstacle against any claim of his heirs through him.

It is true, this declaration is an extra judicial confession; but such confessions are most certainly irrefragable evidence, when made in the presence of him whose title is so acknowleged. Here the confession was made at the instance, and in the presence of Macarty's heirs, or their agents, who had brought De la Houssaie into the land office to make it, *Part.* 3, 11, 7—and such confession is valid against the heir of him who makes it—*Pothier on Obligations, n.* 63: for, if it destroy the right of the ancestor to the estate, it must equally affect that of the heir: otherwise the former would transfer a greater right than he himself had—*ff.* 50, 17, 54. If the heirs of De la Houssaie are bound by this confession of their ancestor, so must be the plaintiffs, to whom they transferred their rights.

The plaintiffs contend, they are not bound by any act in which De la Houssaie denied he

West'n District. *Sept.* 1822.

DAVIS HEIRS *vs.* PREVOST'S HEIRS.

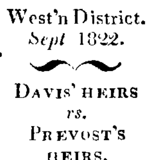
had any right on the land at Chicot noir, or by which he may have renounced such right; because the deeds executed to them. by his heirs, are authentic ones; and because they were ignorant of the existence of any act containing such a denial or renunciation.

The plaintiffs, by the conveyance which they have received from the heirs of De la Houssaie, are the successors of these heirs, by a particular title; and they succeed to all the rights of their vendors. The estate, in their hands, must be liable to every charge to which it was liable, before the conveyance in the hands of the vendors—1 *Merlin, Repertoire de Jurisprudence*, 53, *verbo Ayants cause;* 16 *Pandectes Francaises*, 1*st edition*, 147, *ff.* 14, 1, 20. *in princ.* 6 *Hulot*, 271.

Hence *Pothier* teaches us, that when we stipulate for ourselves, we do so for our heirs, and for those who may acquire the thing, which is the object of the stipulation—*Obligation*, *n.* 67 & 68.

Neither does the ignorance of the vendee, of the charges imposed on the thing sold, avail him. It only gives him an action against the vendor—*Pothier*, *Vente*. *n.* 86.

Indeed, since laws have been enacted, re-



quiring the inscriptions of certain privileges and mortgages, the vendor may avail himself of the neglect or omission of the provisions of these laws. But, cases like these, are exceptions to the general principle.

The authenticity of the deeds, by which the plaintiffs acquired, cannot relieve them from the burdens imposed on the thing sold; because neither a public nor a private act can affect the right of third parties, not privy thereto.

It will be, perhaps, urged, that this principle relates only to the acts imposing servitudes or charges of the like kind; not to an act, by which the owner might have modified or altered his title, or destroying it, by acknowleging that another was the true owner.

Had De la Houssaie entered with Macarty into a compromise, by which he would have acknowleged the title of the latter, or renounced his own—or if, in a suit between them, Macarty had put interrogatories to him, in answering which he would have acknowleged Macarty's title; or if, without such interrogatories, he had, in the pleadings, made admissions which destroyed his own title, can it be doubted that such a compromise,

such judicial answers, such admissions in the pleadings, could be successfully opposed to his vendee or that of his heirs, notwithstanding his allegation, that his deed of sale made no mention of such compromise, answer, or admission; and that the vendor had suffered him to remain ignorant of them.

The case would be the same, if the plaintiffs had purchased land, to which De la Houssaie or his heirs had suffered a title to be acquired by prescription, or of which he or they might have previously disposed by sale, exchange, or donation. This prescription, these deeds of sale, donation or exchange, would affect their title.

The vendee's title may not only be affected by the act of the vendor, anterior to the sale, but also by posterior ones. As if, after the sale and even the receipt of the price, the vendor was to sell and deliver the thing sold to the first vendee.—*Pothier on Obligations, n.* 151 & 152.

The admission of De la Houssaie and his recognition of Macarty's title to the land claimed, must necessarily affect the right which the plaintiffs have acquired from his heirs. The effect of these admissions and recognition, can be weakened by proof only.

West'n District.
Sept 1822.

DAVIS' HEIRS
vs.
PREVOST'S
HEIRS.

that they were made through error; and this error must be one of fact.—*Domat*. 1, 1, 18 § 1, *n*. 1, 2, 6–9, 11, 13–17. *Part*. 3, 13, 5. But the error must be proven by him who alleges it.—*ff*. 22, 3, 19. 3 *Hulot*, 352; *Part*. 3, 14, 2.

The plaintiffs ought then to have shown, that De la Houssaie was in an error, when in 1814 he declared, in the most solemn manner, that Macarty was the true owner of the land which they now claim; and consequently, admitted that he, De la Houssaie, had not any title thereto. This they did not attempt. Indeed, how can it be believed, that if De la Houssaie had been the owner of the premises, by virtue of an exchange in 1787 and 1788, with Dugat and Labauve, he could so far forget such an exchange, as to declare that Macarty was the owner of them? See the deposition of the chevalier De la Houssaie, 9 *Martin*, 129.

The plaintiffs cannot find a new title, in the recognitive and confirmative acts of the heirs of Dugat and Labauve, different from any that might have been given by De la Houssaie. These heirs have only confirmed an exchange which they believed to have existed, and have

West'n District. *Sept.* 1822

DAVIS' HEIRS *vs.* PREVOST'S HEIRS.

granted no new right to De la Houssaie's heirs.

What is contained in a recognitive act, beyond or differing from the primordial acts, cannot produce any effect.—*Civil Code*, 310, *art.* 315. *Pothier on Obligations*, *n.* 742–744.

Bullard, for the plaintiffs. The plaintiffs have shown a title of the highest dignity known to our laws, in those from whom they claim, to the land in controversy. There is no evidence in the record, that the original grantees divested themselves of title in their life time. Their heirs, who must have inherited the land under a mistaken idea, as it turns out, that their ancestors had exchanged it with De la Houssie, père, for a tract at the Grosse Isle, ratify and confirm that supposed exchange with the heirs of De la Houssaie. I say a mistaken idea, because it appears probable that the exchange alluded to, in the act of confirmation and ratification, was in fact of different tracts of land.

If such were the real state of the case, it is evident the heirs of the Dugats and Labauve were still owners of the land by inheritance, and it is important to inquire what is the effect of the act of confirmation and recognition

West'n District.
Sept. 1822.

DAVIS' HEIRS
vs.
PREVOST'S
HEIRS.

between them and the heirs of De la Houssaie? The defendants' counsel contends, that it is an act purely recognitive, and being founded in an error of fact, is null absolutely; that it can neither avail as a sale, because no price is mentioned; nor as a donation, because it is informal—and he cites *Pothier on Obligations, n.* 744.

It is true, a title merely recognitive is not presumed to create a new obligation, or convey a new interest. But the intention of the parties is to be sought in the whole context of the act. Besides recognising and confirming the supposed exchange between their ancestors. they go on in the following terms:—*et se font abandon reciproquement et pour toujours de tous droits, titres et pretensions sur la terre échangée.*

Now then, if the primitive title never existed. the heirs, in the full possession of their hereditary rights, abandon all their title and pretensions to the land in question, for and in consideration of the land at the Grosse Isle, which they acknowlege to have accepted in exchange—what more can be required to vest the title of the original grantees in the heirs of De la Houssaie?

But it is said, here is an error of fact; the

West'n District. Sept 1822.

DAVIS' HEIRS vs. PREVOST'S HEIRS.

whole is a nullity, because the primitive title, referred to, never existed. I reply, that even the heirs could not recover back the land on discovering such an error of fact, with the solemn abandonment of their rights and quit-claim of their title looking them in the face. They could not avail themselves of such an error in an act merely recognitive, and that the title vests in the heirs of De la Houssaie independently of the primitive title. Neither can a third person contest the title of the plaintiffs on the ground of error, so long as it remains unimpaired.

The heirs of De la Houssaie, therefore, acquired a title to the land in controversy, independently of any supposed conveyance to their ancestor; they acquired as persons capable of such acquisition, and not affected by any acts or declarations of their father, in his life-time, in relation to the property.

But it is further contended, that to make out a new title to the land under the act of recognition and abandonment, it is incumbent on the plaintiffs to prove what was the consideration paid. I had always supposed that such a question could arise only between the vendor and vendee, and that as to third per-

sons. if the act did not avail as a sale, it would as a donation. *5 Mart.* 693. *Holmes* vs. *Patterson.*

Can a third person attack a sale on the ground of *lesion*, and collaterally exercise a right for another, which he might be precluded from doing himself, by the lapse of time or other circumstances. These principles appear to me so manifestly contrary to the spirit of our jurisprudence, and unsupported by the authorities cited, so far as they can operate in this case, that I will not trouble the court any longer on the subject.

If the position I have assumed, and the construction I give to the contract between the heirs, be correct; if the heirs of the original grantees transferred to the heirs of De la Houssaie all the rights they held at the time, and it avails as a new title—what possible effect can the declaration of De la Houssaie, père, have in the decision of this case upon the question of title? To make the most of it possible, it only proves that he did not consider himself as the owner of the land; but surely it could not prevent his heirs from ever acquiring the land? It is probable he was not the owner. What does that prove? That the heirs of the Dugats and Labauve were still

West'n District.
Sept. 1822

DAVIS' HEIRS
vs
PREVOST'S
HEIRS.

owners of the land by inheritance—and the question returns—Have they parted with their title and pretensions to those under whom the plaintiffs hold?

But it is strongly urged by the adverse counsel, that the plaintiffs are barred by the prescription of 20 years. In order to avoid the necessity of proving, in this case, the unequivocal possession, by metes and bounds and enclosures, inch by inch, which this court has declared to be necessary, in order to sustain the plea of 30 years prescription without title, in the case of *Prevost's heirs* vs. *Singleton & Johnson*, 9 *Martin*, 129, the learned counsel endeavours to make a distinction between a *limitation of actions*, where the exception is made *liberandi causâ*, and the plea of prescription as a mode of acquiring title to the thing in controversy. It is contended that, by remaining silent during 30 years, or since the date of their grants to the inception of this suit, the plaintiffs have lost their right to sue any body who may happen to be upon the land; or, in other words, have forfeited the grants. This distinction, to the extent contended for, it appears to me, cannot be sustained. That the effect of the plea of prescription may be either

to release or liberate the party from the performance of an obligation, or to give him a valid title to the thing against the plaintiff, is freely admitted. But this difference exists only in the effects which result in different cases. In the one, the party may be said to have acquired an exemption from the performance of a pre-existing obligation—in the other, a right to the thing. Something more must be shown in such a case, as the one before the court. The parties must have been in such a situation, towards each other, as to render it possible to prosecute the right—*contra non valentem agere, non currit præscriptio.* While the land, for example in this case, was not in possession of the defendants, how could a suit have been instituted? Against whom? If there was no adverse possession, the civil possession of the plaintiffs, under their grants, rendered it idle to be asserting their rights against the whole world by perpetual claim. No man can be required to assert a right which is not disputed. There must be adverse pretensions between the parties during the whole time, limited to sue, whether the prescription be pleaded *liberandi* or *acquirendi causâ.* Prescription can only run from the

West'n District.
Sept. 1822.

DAVIS' HEIRS
vs
PREVOST'S
HEIRS.

time at which the right of action accrued, by the supposed invasion of an existing right. The authority cited from the *Roman Code* does not appear to me to support a different principle, and indeed it seems to result from the very definition of an action, that it cannot be prescribed till it attaches.

If we test the plea of the defendants, by these principles, which appear to me to be sound, what are the facts in the case in support of it? The Dugats and Labauve had titles in good form, each for twenty arpents front on the *east* side of the bayou Têche, at the place called Chicot noir, dated 1777. About 1781, Macarty made a small establishment on the *west* side of the bayou, in the neighbourhood, but not on the land covered by the plaintiffs' title, under which they were still to be considered as possessed civilly from their date. Hence, there was no infringement of the rights of the grantees—no disturbance of their possession, and no action accrued to them against Macarty. The establishment remained five or six years, and was finally abandoned. There is no evidence of his claiming any title to the land at that time. Was the civil possession of the gran-

West'n District. Sept. 1822.

DAVIS' HEIRS vs. PREVOST'S HEIRS.

tees interrupted by these acts of Macarty, on the other side of the Bayou? Nothing more is heard of his pretensions till 1810, at which time Prevost took possession, claiming under Macarty.

Although the defendants and appellees give to their plea of prescription, the modest name of a *limitation of the action of revindication, à l'effet de liberer*,—from what does it liberate them, if it should prevail? From the obligation of surrendering the land to the appellants? If so, what is the difference between it and the plea of prescription in any other case, in which the title to a particular thing is in dispute between the parties? If the plea be sustained, the defendants will remain in possession of the land, and the judgment of this court will be their title. Or, will the court, under such a plea, declare that the land has reverted to the domain? If the former, it turns out at last to be a case of ordinary prescription; and the court cannot arrive at the latter conclusion, until it is shown that the laws of the country create a forfeiture of grants of land, if the grantees cease corporeally to possess and occupy the land for the

West'n District. Sept. 1822.

DAVIS' HEIRS vs. PREVOST'S HEIRS.

space of thirty years, or that it amounts to a surrender of the grant.

I think it apparent then, that this plea of prescription cannot be distinguished from that contended for by the same party, in the case of *Prevost's heirs* vs. *Singleton* and *Johnston.*— That the opinion of the court will be the same, in both cases. It is most manifest, from the evidence in both cases, that Lessassier, and those claiming under him, have not possessed an inch of the land in controversy, for thirty consecutive years.

But the appellees catch at the ten years prescription, under the recognitive title between the widow of Lessassier and Macarty. Admitting that act to be a sufficient basis of the ten years prescription; that alone is not sufficient; there must be an adverse possession under it for ten years, which is not supported by the evidence. All the doctrine on this subject is so familiar to the court, that I should think it an idle waste of time to trouble them any longer on the subject.

PORTER, J. declining to aid in the decision of this case, as he had been of counsel in it, and there being some difference of opinion between the other judges, no judgment was given at this term.

*** There was not any case determined, in the months of October or November.

CASES

ARGUED AND DETERMINED

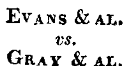
IN THE

SUPREME COURT

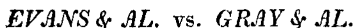
OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, DECEMBER TERM, 1822.



EVANS & AL.
vs.
GRAY & AL.



EVANS & AL. vs. *GRAY & AL.*

An affidavit for a commission to take testimony, should be positive, and name the witnesses.

But if the suit be by attachment, and the agent swears, it will suffice that he express his belief that the testimony can be procured.

The law *loci contractus* governs it, as to its nature and validity; that *loci fori* governs the remedy

Hence, though on a contract made in a country governed by the common law

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This action was commenced by attachment on the 20th day of March last, and on the 28th of the same month, an attorney was appointed to represent the absent debtor.

Sixty days were allowed to put in an answer, and, before the delay expired, it was filed. On the 4th of June, an agent of defendants made affidavit, that by a commission directed to Pitts burgh, Pennsylvania, and places within the state of Ohio, he expected and had every reason to believe. he could prove the several mat-

East'n District.
Dec. 1822.

EVANS & AL.
vs.
GRAY & AL.

the defendant can there be relieved by suit only; he may here by plea.

ters of defence, on which the defendants relied.

The district judge refused the commission, on the ground that the proof of such facts, as were alleged in the answer, formed no defence to the claim of the petitioner; and the execution of the note being admitted by the pleadings, he gave judgment against the defendants—from which decision they have appealed.

Another ground has been relied on in argument—namely: that the affidavit is not sufficiently positive, and does not disclose the names of the witnesses by whom the facts were expected to be proved. We shall first dispose of this objection.

It has been admitted, that there is not any rule in the district court on this subject. We must, therefore, resort to the general principles of law, that govern cases of this kind:—As an application for a commission, to take testimony in another state, must almost necessarily compel a postponement of the trial, we think the affidavit, on which it is demanded, should be as specific as that which is required to grant a continuance; otherwise, a party

seeking delay, could obtain indirectly what he could not succeed in directly. Were this then an ordinary case, where one of the parties had sworn to the necessity of obtaining testimony abroad, we should be inclined to think the oath defective, in not positively stating that such testimony existed, and the names of the witnesses who were to establish it; as a commission to seek for testimony (unless in cases particularly circumstanced) is never granted. The question then is, was this a case so circumstanced? We think so, and that it offers strong reasons for taking it out of the general rule. It has been commenced by attachment—the defendants are citizens of another state, and their defence must be conducted through agents, whose knowlege cannot be exact and positive on matters disclosed to them by their principal. To require, therefore, an affidavit, as if made by the party living within our jurisdiction, might amount to a denial of justice. The plaintiffs, who are citizens of Pennsylvania, cannot complain of this course; if they have selected a tribunal remote from the place where the original contract was entered into, they must take the consequence of waiting until that tribunal can bring the testimony from a distance.

East'n District. *Dec.* 1822.

EVANS & AL. *vs.* GRAY & AL.

They must bear with those delays that have been the result of their own choice, and created by their own act.

The point on which the district court refused the application, brings the whole case under consideration, in as full a manner as if it was presented on a general demurrer to the answer.

The suit is instituted on a promissory note, made in Lexington, Kentucky; and as the contract was entered into in a country governed by the common law, it has been conceded that it must be construed in relation to that system of jurisprudence.

The defence set up is an entire failure of consideration; that the note was given for a steam engine, which the plaintiffs had contracted to furnish of a quality equal to any on the river, but which was defective in every respect; that great exertions had been used to make it answer the purpose for which defendants bought it, and that after many trials made, and considerable expense incurred, it was found wholly inadequate and useless, and had been laid aside as of no value.

To this defence the plaintiffs object—that according to the common law, it is not the partial failure, but entire want of considera-

tion, which can be pleaded against an obligation. given as security of a contract; that if the article sold is of any value, the buyer is obliged to resort to his action of warranty, and cannot obtain relief by a deduction, in the suit where the purchase money is demanded.

Several authorities have been cited in support of this position, which have been looked into. On examining them, and other cases, it is easy to see that the rule is neither clearly, nor satisfactorily established, in the country where they were decided; and that they turn on distinctions that are not very obvious, nor yet very just. According to these decisions, if you buy property with warranty, which is afterwards discovered to be defective, you cannot plead a breach of the warranty as a defence, but are forced to bring a separate action against the vendor.—1 *Selwyn's Nisi Prius*, 689. 3 *Espinasse's Nisi Prius Cases*, 83. 4 *ibid.* 95.—If, however, the seller knew the defect to which the thing was subject, you can avail yourself of his bad faith in the suit where the price is demanded—2 *Taunton's Rep.* 3.—Now, why a breach of positive contract, should not form as a strong defence, as a breach of faith, is hard to perceive. Again, according to the

cases decided, if goods are bought at a *certain price*, which turn out to be of little or no value, and the purchaser is sued on the special contract, he must pay the whole sum agreed on, and is left to seek his redress against the person from whom he bought; though. perchance, he may have become bankrupt the day after he has recovered judgment. But, if sued on a *quantum meruit*, he may show that the objects purchased, were not worth near so much as the amount claimed—7 *East*, 479. 1 *Campbell*, 180.—Thus the rights of the defendant are made to depend, in a great measure, on the form of action which the plaintiff selects. These decisions present a strange anomaly on another point. If the purchaser of property pays part of the price, as in the case before us, and is afterwards sued for the balance, he can defend himself by showing there is nothing due, and that what he has paid is an equivalent for what he received; but if he has made no payment before suit is brought, he must pay the stipulated price, and take his remedy against the vendor.—7 *East*, 491, *in note*. 1 *Selwyn's Nisi Prius*, 691. In some of our sister states we find the rule established, with such limitations, as would let in the de-

East'n District.
Dec. 1822.

EVANS & AL.
vs.
GRAY & AL.

fence offered here.—13 *Johnson*, 302. 15 *ibid.* 230. 14 *Massachusetts*, 282. In Pennsylvania, where it is probable the contract for the engine was entered into, a failure of consideration may (under an act of assembly of that state) be pleaded to an action of this kind.—1 *Sergeant and Rawle*, 477. In Kentucky, where the note was executed, such defence appears admissible.—*Delany* vs. *Vaughan*, 3 *Bibb.* 379.

But this investigation is rather a matter of curiosity in the present case, than necessary to settle the rights of the parties; for it appears to the court, that even admitting the plaintiffs to have established the rule of law, for which they contend, a more material question would still remain open for inquiry; namely, whether they could avail themselves of it before our tribunals. It is a general principle, that contracts, made in a foreign country, are governed by the laws of that country in every thing which relates to expounding them; but that the manner in which they are enforced, the form of procedure, the mode of trial, and the nature of relief, must be in pursuance to the regulations existing in the jurisdiction where the debtor is sued.—*Morris* vs. *Eves*, 11 *Martin*, 751. Now, it has been most clearly

East'n District. *Dec.* 1822.

EVANS & AL. *vs.* GRAY & AL.

shown, that in countries governed by the common law, a purchaser of property for a valuable consideration, which is found to be of no value, is not without relief; that he is compensated to the whole extent of the injury sustained. This right, then, attaches to the contract and follows it wherever the parties are found. But the plaintiffs contend that, according to common law, the buyer cannot use it by way of defence, in an action for the purchase-money, but must resort to a separate suit. Conceding this position, it does not follow that we are obliged to do justice in the same manner. The mode of trial, and the relief extended, must pursue our regulations. If it became necessary in the investigation of the rights of suitors in our courts, to obtain the plaintiffs' answer to interrogatories, we could direct it at once in the ordinary action, though where the parties contracted recourse must be had to a court of equity by a bill praying for discovery. So if it were requisite to decree a specific performance, or put the plaintiff on conditions, it might be ordered in a suit at the instance of the defendant, although in the place where the engagement was entered into, chancery alone could

give relief—*Mitchell* vs. *Jewel*, 10 *Martin*, 662—*Lafarge* vs. *Morgan, Dorsey & Co.*, 11 *ibid.* 530—*Dufour* vs. *Delacroix*, 11 *ibid.* 718.

It only remains, therefore, to consider if the defence pleaded can be received according to the practice established for the administration of justice in our courts. On this point there is no difficulty. Our law, which is fortunately not much embarrassed by rules merely technical, does not permit a plaintiff to recover money which the defendant can the next day turn round and claim from him; it permits matters which diminish a demand, as well as those which destroy it, to be pleaded in defence—*Curia Phillipica, Peremptorias, p.* 1, § 15, *n.* 9; *Partida*, 3, 10, 5; *Febrero, p.* 2, *lib.* 3, *cap.* 1, § 6, *nos.* 224–226; *Le Blanc* vs. *Sanglair, ante*, 402; *Moore's assignee* vs. *King & al. ibid.* 261.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that this case be remanded, with directions to the district judge to permit the defendants to prove a failure of consideration of the note on which suit is brought: and it is further or-

East'n District. *Dec.* 1822.

EVANS & AL. *vs.* GRAY & AL.

dered, adjudged and decreed, that the appellees pay the costs of this appeal.

Livermore for the plaintiffs, *Maybin* for the defendants.

BARRY vs. *LOUISIANA INSURANCE COMPANY.*

Post, 493.

A cause will be continued, on account of the indisposition of the counsel, who intended to argue it, although there be another counsel engaged.

12m 484
47 710

APPEAL from the court of the first district.

Duncan, for the defendants, prayed for a continuance, on the ground that Workman, who was employed with him, and had undertaken to argue the case, was prevented by indisposition from attending.

This was opposed by *Livermore*, for the plaintiff, who insisted that the mover, who was employed by the defendants, was equally able to defend them, and that the cause turned on a single point, a very plain one.

The COURT observed, they could not inquire, on a motion for a continuance, how plain were the points on which a cause was to be determined; that, to do so, would consume often as much time as to try the cause; that when a counsel was really prevented by indisposition to attend, the client might suffer great injury if the cause was pressed in the absence of the

BARRY
vs.
LOUIS. INS. COMP.

one of his counsel, who had taken on himself the labouring oar.

The cause was continued and ordered to be put at the head of those which were to be set down for hearing on the following Monday.

THE STATE vs. *JUDGE PITOT.*

An appeal lies from an order revoking the appointment of an attorney of absent heirs

APPLICATION for a *mandamus.*

Seghers made oath that C. Andre, a free woman of colour, died in the city of New-Orleans, and G. Autheman, her executor, procured the probate of her will and letters testamentary, and possessed himself of her estate, amounting, according to the inventory, to $2090 99 cents, and the deponent, on the application of a creditor of the estate, was appointed to represent the absent heirs, and instituted a suit to have the will set aside—that the executor and legatees, whom he had caused to be cited for this purpose, instead of answering to his allegations, obtained a rule on him to show cause why his appointment should not be set aside, on the ground that the deceased had no relations, and consequently no legal heirs; which

East'n District. *Dec.* 1822.

THE STATE *vs.* JUDGE PITOT.

rule was soon after made absolute, and he decreed to pay costs; but before the rendition of the said decree, he filed a petition of appeal from the decree ordering the execution of the will; but the judge refused to allow the appeal—whereupon the deponent filed his petition of appeal from the decree by which his appointment was revoked and he ordered to pay costs, and the judge refused also to allow this second appeal.

On this affidavit, a rule was prayed for and obtained, on the judge of the court of probates of the city and parish of New-Orleans, to show cause why a *mandamus* should not issue, directing him to allow the two appeals.

He accordingly showed for cause, that he appointed the deponent to represent the deceased's absent heirs, under the belief that she might have such heirs; who, as in other cases, might be found and come and claim the estate: but that soon after, having more maturely considered the will, and been positively informed that the deceased was brought a great many years ago, when she was a child, from the coast of Guinea, as a slave—that neither her African name, nor the name of the tribe to which she belonged, could be ascer-

tained; and that (admitting what can never be expected to be proven) she left relations in her native country, who still remain there or have been transported; admitting also, that there are in this part of Africa, laws recognising a system of succession, by which they might inherit the deceased's estate, it would be impossible to find or discover them; so that it could not reasonably be pretended that there were absent heirs—the respondent, on motion, revoked the appointment.

That the appointment being thus revoked, Seghers was without authority or capacity to appeal.

MARTIN, J. delivered the opinion of the court. The facts detailed in the first part of the judge's return, may establish the correctness of the decisions complained of, and was the case before us, might induce us to affirm them. We are not, however, apprized of the nature of the information spoken of, and its legality and sufficiency are proper subjects of inquiry on the appeal.

If the belief or consciousness of the correctness of a judgment in the court who pronounced it, could justify the judge in refusing to allow an appeal from it. appeals would very

East'n District.
Dec. 1822.

THE STATE
vs.
JUDGE PITOT.

rarely be allowed; for, it is hoped, no judge ever gives a decision which he does not believe to be correct.

The affidavit, on which he grounded the rule, shows a legal appointment, which conferred certain rights on the absent heirs, to wit, the means of standing in judgment, and having their rights prosecuted. If facts have since been shown to the judge of probates, which authorized him to revoke the appointment and destroy these rights, we cannot refuse our aid to a party who seeks to show that the judge erred in receiving the evidence on which he acted—that this evidence is illegal or insufficient, and that an illogical conclusion was drawn therefrom.

We are therefore of opinion, that the rule be made absolute.

Seghers, for the plaintiff, *Denis* and *Mazureau* for the defendants.

THE STATE vs. *JUDGE ESNAULT.*

The supreme court has no general controlling power over other courts.

APPLICATION for a *mandamus*.

PORTER, J. delivered the opinion of the court. This is an application for a rule on

the judge of the fourth district, to show cause why a *mandamus* should not issue, commanding him to proceed in the trial of a cause pending in the parish of Pointe Coupee, wherein certain persons, called ——— Boyer and ——— Harrington, are plaintiffs, and Charles Morgan and others, are defendants. It is bottomed on an affidavit of James Mitchell, which states, that the cause already mentioned is pending in the court aforesaid—that at the November term last, it was called in its order for trial—that it was objected that one of the defendants being sheriff of the parish, the suit could not be tried without the presence of a coroner, and there not being any coroner within the parish, the judge refused to order the jury to be called, either by the sheriff, or some other fit person, and continued the cause.

We are clearly of opinion, that we have no right to direct such a writ; it is therefore unnecessary to put the parties to the trouble and expense of having the rule issued and returned. The legislature, it is true, has conferred on this court power to order all mandates necessary for the exercise of its jurisdiction over the inferior tribunals; but we do

East'n District. *Dec.* 1822.

THE STATE *vs.* JUDGE ESNAULT.

not consider this one where that necessity exists, or which at all affects our appellate jurisdiction. To support this application, it should have been shown, that when the cause will be tried below on its merits, the court will give an erroneous judgment, and one of the parties will appeal from it. This, of course, cannot be done, and we therefore should not interfere with a case, of which we may never have occasion to take cognisance.

Again,—mandates never issue even from courts possessing a general controlling jurisdiction to inferior tribunals, directing them what judgment to give. If they did, it is quite obvious they would be exercising the duties which the legislature had devolved on the court of the first instance. In addition to this objection, another consequence would result in the present case, not less illegal; namely, that if we issued a mandate to the judge, commanding him to try this cause by a jury summoned by another person than the coroner, the appeal which might afterwards be taken, would, as to this part of the proceedings, be from our own judgment, not from that of the inferior tribunal.

It has not escaped our attention, that under

East'n District.
Dec. 1822.

THE STATE
vs.
JUDGE ESNAULT.

this decision, it might be urged, that the inferior courts may deny the citizen justice by refusing to ever try his cause. If, which cannot be presumed, such an extreme case should arise, the remedy is with another branch of the government. We have no controlling powers given us over the other courts of the state; and however beneficial, the exercise of such authority might be to the public, we cannot assume it.

On the whole, we see nothing in the case to justify our interference: the injury is, that of delay alone; and we have already said *that* will not authorize an appeal—11 *Martin*, 268, *Fortin* vs. *Randolph*—and consequently cannot furnish ground for a mandamus to the court to proceed and try.

The plaintiffs should take nothing by their motion.

Mitchell, for the applicant.

WOOTERS vs. *WILKINSON*.

APPEAL from the court of the first district.

If there be no statement of facts, &c. the judgment may be affirmed with damages.

MARTIN, J. delivered the opinion of the court. This case comes up without any state-

East'n District.
Dec. 1822.

WOOTERS
vs.
WILKINSON.

ment of facts, special verdict, or bill of exceptions, the evidence was not recorded, no document was introduced; and we are unable to resist the application of the appellee, that the appeal be affirmed with costs and damages, for the unjust appeal.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs; and that the plaintiff and appellant recover damages at the rate of ten per cent. on the amount of this judgment.

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

JOHNSON vs. *TURNEY* & *AL.*

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court, in the same words as in the preceding case.

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

BARRY vs. *LOUISIANA INSURANCE COMPANY.*

Ante, 484.

East'n District.
Dec. 1822.

BARRY
vs.
LOUIS. INS.
COMP.

Declarations, when they form a part of the *res gestæ*, may be given in evidence.

The apparent or reputed owner is a good witness between the insurers and insured.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This case comes again before us on an appeal taken by the defendants. We have already twice remanded it on their prayer, 11 *Martin*, 202 *and* 630, and they ask us to do so again. The questions, which the record now present, grow out of decisions of the judge of the first instance, refusing to admit certain witnesses to testify, who were offered by the appellants.

The first was Carlile Pollock, the notary who drew the bill of sale of the schooner: he was presented to prove certain declarations of Brown the captain, in order to show that he, and not Nicholson, was the owner.

The second was Nicholson, the purchaser mentioned in the bill of sale. He was offered to prove, that the true intent and purpose of the bill of sale, by which he acquired the vessel, was to secure him as endorser of a promissory note; and that Brown, who sailed as captain, and was stated to be such in the policy of insurance, was in fact the true owner.

East'n District.
Dec. 1822.

BARRY
vs.
LOUIS. INS.
COMP.

I. We think the district judge did not err in rejecting the proof offered of Brown's declarations. There was no privity between him and the plaintiff. The latter neither claimed under nor through him; and if his statements can be given in evidence, it must be on a principle which would admit those of any other stranger.

But it appears to the court that there are solid objections against receiving such proof. Testimony, when it can be had on oath, is so much more entitled to consideration, than that which is given without its sanction; that the law never permits any other but from necessity—a necessity not founded upon a want of any other or better proof, in the particular case, as was contended for by counsel; for that argument would cut up by the root all the rules of evidence; but, because the injury done to society, by rejecting hearsay testimony, in cases of pedigree, filiation, ancient boundaries, &c., would be greater than that which can result from its admission. In the case now under consideration, the question whether Brown or Nicholson was owner, does not certainly come within any of the exceptions heretofore established, as authorizing a

West'n District.
Dec. 1822.

BARRY
vs.
LOUIS. INS.
COMP.

deviation from the general rule; and if we had the power to augment them, which we disclaim, we should hesitate before we added to them a simple case of contract, which is of recent occurrence, and susceptible of higher and better proof. That higher and better proof would have been the testimony of the person whose statements the appellants offered to prove by another witness. Brown himself could have given the best evidence, of which the case is susceptible.

Nor does the testimony, here offered, come within the principle which receives in evidence the declarations of the parties when they form a part of the *res gestæ.* For the witness was not a party to the public act, sought to be controlled by parol evidence, and the assertions of any other man in the community might as well be introduced to prove title in himself. This opinion is formed on the bill of exceptions, found in the record, which presents the question alone, whether Brown's declarations were evidence. If there were any particular circumstances which would have authorized their being proved, it was the duty of the party excepting, to have stated them. *Acts of* 1813, 202, *sect.* 17. *Shewell* vs. *Stone*.

West'n District. *Dec.* 1822.

BARRY *vs.* LOUIS. INS. COMP.

ante, 386. We do not say that an assertion of right to the property on the part of Brown, in the presence of Nicholson, might not be taken as an acknowlegment of the person holding title. It might then perhaps be received, not because the one asserted his claim, but because the other acquiesced in it.

II. The question as to the admissibility of Nicholson, has been already settled by the former decisions of the court, and his competence is a necessary result of the doctrine contained in the opinion delivered when this case was last before us, 11 *Martin*, 630, and that expressed in *Millaudon* vs. *Louisiana Insurance Company*, *ibid* 602. As we understand the *Law Merchant*, which prevails in this state, insurers may lawfully take on themselves the risk of barratry, on the part of the captain and mariners; and that if they do so, they have no recourse against the owners, because they are paid for the responsibility they incur. Hence, on a question arising between those who freight goods on board a vessel and the insurers, the reputed or apparent owner is a good witness: he stands quite indifferent between the parties; for whether he establishes the person who sailed as captain, to be proprie-

East'n District.
Dec. 1822.

BARRY
vs.
LOUIS. INS.
COMP.

tor or not, the result to him must be the same. If the freighters recover, he is not responsible, as the assurers warranted that the captain would not commit barratry. Should, on the contrary, the assured fail in their action, because the master was owner, then he has clearly no interest whatever in the transaction.

It has been contended, however, that the definition given by the court of barratry, is an erroneous one, and that we should adopt that which prevails on the continent of Europe.—Before entering on the consideration of the reasons which have been urged to us in support of this position, we think proper to remark, that if any law had been produced from that country whose legislation, where it has not been altered by that of our own, is still the rule of action in this state, we should readily adopt, and strictly obey it. None such has been produced to us; our own researches have been equally unsuccessful in furnishing us with any, and we must therefore look elsewhere for a guide.

To what laws the legislature referred, when in the *Civil Code* (260 *art.* 7) they declared, that the rules peculiar to commercial transactions, were established by the laws relating

East'n District.
Dec. 1822.

BARRY
vs.
LOUIS. INS.
COMP.

to commerce, has often been a subject of inquiry and discussion, which as yet has not received a satisfactory explanation; and which, until a further and more explicit declaration of their will, is perhaps not susceptible of any. Courts, however, cannot wait until the law is made clear; they must decide cases when they are presented, and in the absence of positive regulation which eases their labour, and diminishes their responsibility, they must resort to general principles; and drawing them from sources which they believe pure and sound, apply them in such a manner as will do justice between the parties, and in cases of this kind best promote the growth and extension of that commerce, which enriches our country and adorns it.

In commercial questions there is less difficulty in deciding, in the absence of statutory provisions, than any other which are presented. The *lex mercatoria* is nothing more than the usages and customs of trade, which the courts of justice in different countries have, from time to time, applied to cases before them, and which, in some states, have been reduced into codes and promulgated by legislative authority. The justly celebrated

East'n District.
Dec. 1822.

BARRY
vs.
LOUIS INS.
COMP.

ordinance of marine, of Louis XIV., we are informed by the commentators on it, was drawn from the usages and customs previously existing in Europe. *Valin, vol.* 1, 6 *pref. Emerigon, v.* 1, *pref.* 15. The *consulato del mare* was nothing more than a collection of the usages prevailing at the time it was compiled. *Consulat de la mer, par Bourcher, vol.* 1, 45; and *Blackstone* tells us, that the affairs of commerce are regulated by the law merchant, which all nations take notice of, 1 *Comm.*, 273. For the decision of this case, then, it is only necessary to ascertain, what is the law merchant of this state on the subject before us; and we are of opinion that, from the close and intimate connexion which exists between this port and those of the other cities in the union, from the circumstance that nearly all the vessels by which the trade of this place is carried on, belong to our sister states; and that the contract of assurance is principally entered into by their owners or their freighters, (purchasers of our produce, who are most generally from other parts of the union,) that the contract of assurance is understood here as it is in the other maritime cities of the United States. If there is error in this view of the subject, the

East'n District.
Dec 1822.

BARRY
vs.
LOUIS. INS.
COMP.

remedy must be sought with those in whom the coustitution has vested legislative authority. But it is not the first time that this tribunal has recognised the law merchant which prevails here, and given force to it.—*Baker* vs. *Montgomery & als.* 4 *Martin*, 92. *Pouts* vs. *Duplaulier*, 2 *Martin*, 328. 7 *id.* 462.

Were we to have recourse to the commercial usages of the continent of Europe, we should have great difficulty indeed. in ascertaining which to adopt; or whether, in truth, barratry could be insured against. In France, previous to the ordinance of Louis the 14th, insurers were responsible *ipso facto* for barratry. By the terms of that law, they were only made so when the offence was expressly mentioned in the policy. According to an ordinance of Phillip the 2d of Spain, made to regulate the commerce of the city of Antwerp, it is forbidden to insert the clause of warranty of good conduct in captain and mariners, under the penalty of nullity. The same usage prevails at Rotterdam, and at Cadiz. While, on the other hand, we find, that by the ordinance of Bilboa, barratry of the master and crew may be insured against. Such is also the custom of Hamburgh and Genoa, with

the exception, that at the last mentioned place, it is limited to acts not fraudulent. *Emerigon* gives us a list of several writers who entertain directly opposite opinions on this point, and they seem pretty equal in number and authority. Amidst such contradiction and confusion, which of these systems is this court to adopt ? We think, none of them ; and that the safest rule to follow is, that which is understood, and acted on, by the merchants and underwriters in this and other states of the union. *Emerigon, traité des assurances, vol.* 1, *ch.* 12, *sect.* 3, 366. *Valin, Commentaire sur l'ordonnance de la marine, vol.* 2. *lib.* 3. *tit.* 6, *art.* 28, *des assurances. Ordonansas de Bilboa, cap.* 22, *n.* 19. *Febrero addicionado,* 1 *appendix ad cap.* 10, § 5.

If we should even accede to the definition of barratry given by the counsel for the plaintiff, we do not believe the witness offered was incompetent, or that he was swearing away his liability, by proving the captain to be proprietor. *Emerigon* was principally relied on in support of this idea, and that passage was cited, where he states, that the owner of a ship cannot insure against the acts of the master; because, by a provision of the civil

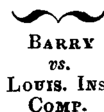
East'n District.
Dec. 1822.

BARRY
vs.
LOUIS. INS.
COMP.

law, *omnia facta magistri debet præstare, qui eum proposuit.* On which we would remark, that this opinion is in direct opposition to the express letter of the ordinance, *art.* 28, which declares, that insurers are not liable for injuries resulting from the fraud of the captain, *si par la police ils ne sont chargés de la baraterie de patron. Valin*, in his commentary on this article, doubts, or rather denies, the application of these expressions just cited from the Roman law, to the contract of assurance, and makes no exception to the right of the owner, to be insured, except when he commands the vessel himself. *Emerigon* too, in the subsequent part of that section, quoted by counsel, observes, that if the underwriters expressly mention that they warrant the good conduct of the captain, they will be responsible. This reduces the question to an inquiry into the meaning of the words used in the policy; and we all think, that an engagement to answer for the bad conduct of an agent, is as strong as a warranty that his conduct should be good.

Whichever way we consider the subject, therefore, whether according to the definition we give of barratry, or that insisted on by plaintiff, the witness should have been permitted to testify.

East'n District.
Dec 1822.



BARRY
vs.
LOUIS. INS.
COMP.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that this cause be remanded for a new trial, with directions to the district judge not to reject Nicholson as a witness; and it is further ordered, adjudged and decreed, that the appellee pay the costs of this appeal.

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

FLECKNER vs. *NELDER.*

It is sufficient for the validity of a nuncupative will, under private signature, that it be passed in the presence of three witnesses residing where the testament is received, or of four others.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The petitioner purchased of the defendant a plantation and slaves for $90,000, payable at several instalments. Some time after the sale, he imagined he had discovered a defect in the title of his vendor, and he, in consequence, instituted this action, in which he averred that he was threatened with a suit at law, and prayed that three of his notes which he had given in payment, and which were then deposited in the branch bank of the United States, should be enjoined, and

East'n District. *Dec.* 1822.

FLECKNER *vs.* NELDER.

their circulation prohibited, until his right to the property was made secure.

The defendant pleaded the general issue; there was judgment in his favor, and the plaintiff appealed.

According to the statements in the petition it appears, that the appellant is apprehensive of the claim of the heirs and legatees of Edward Pearce, deceased. To remove all disquiet on this head, the appellee has produced the last will and testament of Pearce, in which he has instituted the defendant his universal heir. On the validity of this instrument depends the right of the parties before us.

It is a nuncupative act, under private signature, executed in the country in the presence of five witnesses, most of whom were non-residents of the place where it was made. Three of them swear, that they were present when the will was executed, and that they do not think it was possible to procure more witnesses. The circumstances which they give as a reason of this belief, renders the fact quite probable, and in our opinion fully satisfies the provisions of the *Code*, 228–98, which declares that in the country it is sufficient for the validity of nuncupative acts, under private signa-

East'n District. *Dec.* 1822.

FLECKNER *vs.* NELDEN.

ture, if they are passed in the presence of three witnesses residing in the place where the testament is received, or of four residing out of it.

The judgment of the district court is therefore affirmed with costs.

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

HORN vs. *MONTGOMERY.*

APPEAL from the court of the first district.

If the record be filed, on the day after the return day, the appeal will be dismissed.

PORTER, J. delivered the opinion of the court. The appeal taken in this case has not been prosecuted according to law. It was made returnable on a day preceding that on which it has been filed. The direction of the statute is imperative, that the record shall be returned into this court on the day fixed by the judge of the first instance, 1 *Martin's Dig.* 442—*Carpentier* vs. *Harrod & al.* 11 *Martin*, 434.

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

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

East'n District.
Dec. 1822.

LAFON'S EX.
vs.
RIVIERE

The appeal will be dismissed, if the record be not brought on the return day.

LAFON'S EXECUTORS vs. *RIVIERE.*

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This case does not differ in any material circumstance from *Carpentier* vs. *Harrod & al.* The act of the legislature, regulating the manner in which appeals should be brought up, imperatively directs, that the record must be filed in this court on the return day, fixed by the judge before whom the cause is tried, 1 *Martin's Dig*. 442. The appellant has not complied with this direction, and the appeal must be dismissed. 11 *Martin*, 433.

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

Hennen for the plaintiffs, *Seghers* for the defendant.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JANUARY TERM, 1823.

EVANS & AL.
vs.
GRAY & AL.

EVANS & AL. vs. *GRAY & AL. ante*, 475.

Application for a rehearing.

Livermore, on an application for a rehearing. This action is brought to recover the balance due on a promissory note, made at Lexington, in the state of Kentucky, and which became due on the 12th day of July, 1820. On this note several payments have been made; the last, on the 5th day of January, 1821. The defendants allege, that this note was given in payment for a steam-engine—that the said engine was not made according to contract—that they have incurred great expense in their attempts to make it answer the purpose for which it was intended, and have finally laid it aside as useless. There is no allegation of

East'n District.
Jan. 1823.

EVANS & AL.
vs.
GRAY & AL.

fraud, nor do they pretend to have returned the engine to the plaintiffs, nor to have offered to return it.

To this defence, the plaintiffs object, that, according to the common law, the purchaser cannot refuse to pay the price of an article, while the contract continues open and not rescinded—that he must return, within a reasonable time, the thing sold; and that he cannot keep both the thing and the price. The plaintiffs also contend, that where a promissory note has been given as security of a contract, it cannot be avoided by showing a partial failure of the consideration. The plaintiffs' counsel considered these principles so clearly established at common law, that but little pains were taken on the argument. But as it appears to the court, that the rule is not clearly established, and that the cases turn on distinctions which are neither obvious nor just, he is bound to distrust his own opinion, and to investigate the subject more thoroughly. A careful examination of all the cases, has fully confirmed his first impression.

The first case is *Power* vs. *Wells*, *Cowp.* 818. This was an action for money had and received, brought to recover the sum of 21

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JANUARY TERM, 1823.

EVANS & AL.
vs.
GRAY & AL.

EVANS & AL. vs. *GRAY & AL.* *ante*, 475.

Application for a rehearing.

Livermore, on an application for a rehearing. This action is brought to recover the balance due on a promissory note, made at Lexington, in the state of Kentucky, and which became due on the 12th day of July, 1820. On this note several payments have been made; the last, on the 5th day of January, 1821. The defendants allege, that this note was given in payment for a steam-engine—that the said engine was not made according to contract—that they have incurred great expense in their attempts to make it answer the purpose for which it was intended, and have finally laid it aside as useless. There is no allegation of

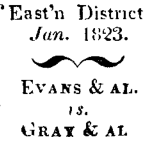
East'n District.
Jan. 1823.

EVANS & AL.
vs.
GRAY & AL.

fraud, nor do they pretend to have returned the engine to the plaintiffs, nor to have offered to return it.

To this defence, the plaintiffs object, that, according to the common law, the purchaser cannot refuse to pay the price of an article, while the contract continues open and not rescinded—that he must return, within a reasonable time, the thing sold; and that he cannot keep both the thing and the price. The plaintiffs also contend, that where a promissory note has been given as security of a contract, it cannot be avoided by showing a partial failure of the consideration. The plaintiffs' counsel considered these principles so clearly established at common law, that but little pains were taken on the argument. But as it appears to the court, that the rule is not clearly established, and that the cases turn on distinctions which are neither obvious nor just, he is bound to distrust his own opinion, and to investigate the subject more thoroughly. A careful examination of all the cases, has fully confirmed his first impression.

The first case is *Power* vs. *Wells*, *Cowp.* 818. This was an action for money had and received, brought to recover the sum of 21



pounds, the difference paid by the plaintiff upon the exchange of a mare of his for a horse of the defendant. The horse was warranted sound, but proved unsound. The defendant refused to take back the horse. The court of king's bench decided, that the warranty could not be tried in this form of action.

In *Weston* vs. *Downes*, *Dougl.* 23, it was again decided, that when the contract continued open, there must be a special action on the case.

In *Towers* vs. *Barrett*, 1 *T. R.* 133, the above cases were held to be clear law. In this case, *Buller*, J. said, that "the distinction between those cases where the contract is open, and where it is not so, is this; if the contract be rescinded, either as in this case, by the original terms of the contract, where no act remains to be done by the defendant himself, or by a subsequent assent by the defendant, the plaintiff is entitled to recover back his whole money; and then an action for money had and received will lie. But if the contract continue open, the plaintiff's demand is not for the whole sum, but for damages only arising out of that contract." In another case cited by *Buller*, J. he held, that if the plaintiff

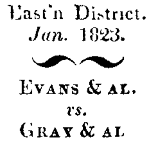
East'n District.
Jan. 1823.

EVANS & AL.
vs.
GRAY & AL.

would rescind the contract, he must do it in a reasonable time.

These cases were all decided while Lord *Mansfield* and Mr. Justice *Buller* were on the bench. They certainly establish this point, that a purchaser cannot keep the thing, and recover back the price. If he cannot recover back the money which he has paid, he cannot retain the price unpaid. For a claim for damages merely, though arising out of the same contract, will, at common law, furnish no defence to an action on the contract for the price. If the contract be not rescinded, it must be enforced. An action for damages is founded on the contract, and in affirmance of it; as is also an action for the price. Whereas, an action for money had and received supposes the contract to be rescinded, as does also a defence to the payment of the price.

The authority of these cases was fully recognised by the court of common pleas, in the case of *Lewis* vs. *Cosgrave*, 2 *Taunt.* 2. This was an action on a check given for the price of a horse, sold under a warranty of soundness. *Heath*, J. who tried the cause, was of opinion, that as the plaintiff had re-



East'n District.
Jan. 1823.

EVANS & AL.
vs.
GRAY & AL

fused to take back the horse, the contract was not rescinded; and that the defendant was bound to pay the amount of the check, and had his remedy by an action for the deceit. Afterwards, on a motion for a new trial, the judge observed, that on reviewing the evidence, there was clear proof that the plaintiff knew of the unsoundness of the horse, and the court held, that it was clearly a fraud, and made the rule absolute. In this case, it will be observed, that the plaintiff immediately offered to return the horse.

The distinction, between a simple non-performance and fraud, is certainly very well founded in the common law. In an action of covenant, where there are mutual and independent covenants, the non-performance by one party is no defence to the other. A covenant precedent may be pleaded in bar; but the non-performance by the plaintiff of a mutual and independent covenant cannot be pleaded in bar; and, in this case, the defendant is left to his cross action. But fraud in the plaintiff is a good bar. The rule is, that fraund vitiates all contracts, and no man can recover in a court of justice, upon a contract which he has obtained through his fraud; and

East'n District.
Jan. 1823.

Evans & al.
vs.
Gray & al.

any security taken upon such a contract may, in the hands of the party, be avoided. Where there is no fraud, however, and the contract is not rescinded, the non-performance by one party, in case of mutual and distinct covenants, is no excuse for the non-performance of the other. 3 *Lev.* 41, *Cole* vs. *Hallett; Cowp.* 56, *Howlet* vs. *Strickland; Dougl.* 690, *Kingston* vs. *Preston.* And fraud must always be alleged and proved, and is never presumed.

In *Hunt* vs. *Silk*, 5 *East*, 449, it was again decided by the court of king's bench, that where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo.* In that case, Lord *Ellenborough* said, that there "was an intermediate occupation, or part execution of the agreement, which was incapable of being rescinded. If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelve-month on the same account? The objection cannot be got rid of: the parties cannot be put *in statu quo.*"

The principles established in the foregoing cases are again recognised in *Payne* vs. *Whale*,

7 *East*, 274. In *Curtis* vs. *Hannay*, 3 *Esp. N. P. C.* 83, Lord *Eldon* held, that to enable the purchaser of a warranted article to resist the payment of the price, he must return the article immediately upon discovering the defect, and in as good a condition as when sold. The same was decided by *Lawrence* J. in *Grimaldi* vs. *White*, 4 *Esp. N. P. C.* 95. In this case the judge said, that a person, having received an article under a specific contract, must either abide by it, or rescind it *in toto* by returning the thing sold; but he cannot keep the article received under such a specific contract, and for a certain price, and pay for it at a less price than that charged by the contract.

The case of *King* vs. *Boston*, 7 *East*, 481 *n.*, has been referred to by the court as establishing a strange anomaly in the English law. This case was cited in *Basten* vs. *Butter*, as having been decided by Lord *Kenyon* at *nisi prius* in 1789. It is certainly impossible to reconcile this case with those decided by *Buller*, J. at *nisi prius*, cited also in *Basten* vs. *Butter*, or with the cases here before cited. Supposing the case to be correctly reported, it merely proves, that Lord *Kenyon* held a dif-

East'n District.
Jan. 1823.

EVANS & AL.
vs.
GRAY & AL.

ferent opinion from Lords *Mansfield*, *Eldon* and *Ellenborough;* and from the judges *Buller*, *Ashurst*, *Willes*, *Lawrence*, *Heath*, Sir *James Mansfield*, and others. And it is only the opinion of Lord *Kenyon* at *nisi prius*, and has less weight than if delivered after an argument at bar. It may be further observed upon this case, that it is merely a loose note, taken by a member of the bar, of a cause tried before a jury in 1789, and first published in 1806. The case is also contrary to *Duffitt* vs. *James*, cited 7 *East*, 480, decided by Lord *Kenyon*, in 1788. This was an action to recover the amount of a surgeon's bill, and Lord *Kenyon* permitted the defendant to give evidence of unskilful treatment of him by the plaintiff; taking the distinction where the demand was for skill, where the question might be, whether the plaintiff was entitled to any thing or nothing, and where the action was for goods sold and delivered, or for other certain thing of value, not depending on skill; and considering the case before him as a mixed one, where the demand was part for skill as well as for medicine. Here the learned judge evidently acquiesces in the decisions of the court of king's bench; and it can hardly

be supposed that, in the next year, he should, at *nisi prius*, have decided a cause in direct opposition to these decisions.

The cases of *Basten* vs. *Butter*, 7 *East*, 479, and of *Farnsworth* vs. *Garrard*, 1 *Campb.* 38, were of a nature similar to that last cited. These were actions for work and labour, and materials found. They are in their nature essentially different from the contract of sale. In the contract of sale, if the article be not according to contract, it may be returned and the sale rescinded, and the parties put *in statu quo*. But where work and labour have been expended, and materials consumed, or changed from their original shape, the contract is executed, or partially so, and the parties cannot be put *in statu quo*. And this is without any default in the party injured. The person, therefore, who employs the workmen, has not the power of doing what justice requires of a vendee. He has nothing to return. He has not the power of restoring things to their original situation; and, therefore, it is not required of him. It is immaterial, then, to the merits of this question to inquire, whether there be a difference, in an action for work and labour, between the defence to an

East'n District. *Jan.* 1823.

EVANS & AL. *vs.* GRAY & AL.

action upon a special contract for a certain price, and to an action on a *quantum meruit.* The better opinion seems to be, that there is a difference; and that, where a certain price has been stipulated, the plaintiff is not to be met with an objection, that the work has been badly performed. Whereas, on a *quantum meruit*, the plaintiff can recover only what he reasonably deserves to have; and if, through his fault, the defendant has derived no benefit, he can recover nothing. But it will not follow from this, that the rights of the defendant are made to depend, in a great measure, on the form of action which the plaintiff selects. Where there is a special contract for a fixed price, the party must sue on the special contract, and can recover nothing but the price agreed on. He can only sue on a *quantum meruit*, where there is no fixed price. So, on a sale of goods, if no price has been agreed on, the vendor may declare on a *quantum valebant;* but, where there is a contract for a certain price, he can sue for that alone.

In *Fisher* vs. *Samuda*, 1 *Campb.* 193, Lord *Ellenborough* held it to be the duty of the purchaser of any commodity, immediately on discovering that it was not according to order,

East'n District.
Jan. 1823.

Evans & al.
vs.
Gray & al.

and unfit for the purpose for which it was intended, to return it to the vendor, or give him notice to take it back. In that case, the plaintiff knew in July, that the beer was unfit to be exported; yet did not intimate this to the defendants before December. Under these circumstances, said Lord *Ellenborough*, the plaintiff must be considered as assenting to its being of good quality.

The plaintiffs rely upon these cases as establishing a principle which excludes this defence; and they believe, that if any rule be clearly and certainly established in the common law, that, for which they contend, is so established. If this be true, the parties to this suit have nothing to do with the reasonableness or equity of the rule. Their contract has been made in a country governed by the common law, and with reference to that law, and must be controlled by it. But is it possible, that this is merely a technical rule, and not founded in substantial justice? Can a purchaser be permitted, in justice, to retain the thing sold, and to refuse to pay for it? If the seller has not properly performed his part of the contract, whereby the purchaser is injured, there will be a claim for damages. *But*

damages cannot be set off. By the laws of this state, derived from Roman law, the price of an article may, in certain cases, be diminished, provided an action for that purpose be brought within a year. But the action *quanti minoris* is unknown to the common law. According to that law, where an article has been sold under a special contract for a fixed price, that price must be paid, or nothing, and the sale rescinded; and no court, either of law or equity, has power to change the terms of the contract, or substitute a new one for that which the parties have made.

It is now nearly three years since this note became due, and two years since the last payment. During all this time, the defendants have kept the engine, of whose defects they complain. They have given no notice to the plaintiffs of its deficiencies, nor have they offered to return it. During one year, by their own showing, they have used it; and if, as is alleged, they have since laid it aside as useless, the use may have been lost to them, but has been equally lost to the plaintiffs. The engine may not have been sufficient for the defendants' boat, and yet it might have been worth the full purchase money to the

plaintiffs. If, when the alleged defect was first discovered, it had been returned, the contract might have been rescinded, without damage to either party; but now, as observed by Lord *Ellenborough* in *Fisher* vs. *Samuda*, there has been a part execution; the parties cannot be put *in statu quo.* In that case, the judge considered the conduct of the plaintiff as amounting to an acquiescence in the performance of the contract on the part of the defendants. Certainly the facts, admitted by the defendants in this cause, present a much stronger case of acquiescence.

The other point made by the plaintiffs, turns upon the security. It is admitted, that between the original parties, the consideration may be inquired into; and that, if it should appear the note was given without consideration, or upon an illegal consideration, or upon a consideration which has wholly failed—it will be a good defence. The consideration may consist in either an advantage to the drawer, or a loss to the payee. In this case, the failure of consideration has been only partial, according to the case made by the answer and affidavit. It could only become total, by restoring the engine and rescinding

the contract. The defendants have had some use of it; and although it may have been laid aside, as of no further use to them, it might have been of value to the plaintiffs, if returned in due time. Will then a partial failure of consideration, be a defence to an action on the note?

Morgan vs. *Richardson*, 1 *Campb.* 40 *n.* was an action against the acceptor of a bill of exchange at the suit of the drawer, the bill being payable to his own order. The defence was, that the bill had been accepted for the price of some hams bought by the defendant from the plaintiffs, to be sent to the East Indies; and that the hams had turned out so very bad, that they were almost quite unmarketable. Lord *Ellenborough* held, that although where the consideration of a bill failed entirely, this will be a sufficient defence to an action upon it by the original party, it is no defence to such action, that the consideration fails partially; but that, under such circumstances, the giver of the bill must take his remedy by an action against the person to whom it is given. In *Fleming* vs. *Simpson*, 1 *Campb.* 40 *n.*, he decided the same point; and also, in *Tye* vs. *Gwynne*, 2 *Campb.* 346. In the case of *Green-*

leaf vs. *Cook*, 2 *Wheaton*, 13, the supreme court of the United States also decided, that a partial failure of consideration is no defence to an action on a promissory note. In this case, Ch. J. *Marshall* says, "without deciding whether, after receiving a deed, the defendant could avail himself of even a total failure of consideration, the court is of opinion, that to make it a good defence, in any case, the failure must be total. The prior mortgage of the premises, and the decree of foreclosure, do not produce a total failure of consideration. The equity of redemption may be worth something: this court cannot say how much; nor is the inquiry a proper one in a court of law, in an action on the note. If the defendant be entitled to any relief, it is not in this action."

It is said that the rules of the common law have been modified, or limited, by decisions of some of the state courts in the United States, in such manner as to let in the defence here made by the defendants. So far as these decisions are supported by legal arguments, they are entitled to respect; but they have no particular authority out of the states where they were decided. In the case of *Steigleman* vs.

East'n District. Jan. 1823.

EVANS & AL. *vs.* GRAY & AL.

Jeffries, 1 *Seargt. & Rawle*, 477, the supreme court of Pennsylvania admit that, by the common law, such a defence, as is here made, could not be supported; but they allow it under a statute of that state. Certainly, this statute can have no authority in Kentucky, where this note was drawn; and there is nothing in this record to justify the conclusion, that the contract for the steam engine was made in Pennsylvania. It is true, that three of the plaintiffs reside in Pennsylvania; but the contract, on which they sue, was made in Kentucky, and with reference to the laws of that state. If an act of assembly of Pennsylvania allows unliquidated damages to be set off to an action, it does not follow that the same can be done in Kentucky, where this contract was made; nor in Louisiana, where the suit is brought.

The strongest case cited, on the part of the defendants, is that of *Taft* vs. *the inhabitants of Montague*, 14 *Mass. Rep.* 282.—That case is, however, very distinguishable from this. That was on a contract for building a bridge in a particular manner, and for a certain price. The work was done unfaithfully, and the bridge was carried away by a freshet. The

court held, that the plaintiff could not recover. In delivering the opinion of the court, the judge distinguishes the case from that of *Everett* vs. *Gray*, 1 *Mass. Rep.* 101, which was on a contract of sale, where the goods had been accepted; whereas in this case there had been no acceptance. *Everett* vs. *Gray*, was an action brought to recover the price of 98 gunlocks. Defence, that they were worth nothing. Held, that as the defendant had accepted and retained the locks, he could not make this defence.

The two cases cited from the *New-York Reports*, *Beecker* vs. *Vrooman*, 13 *John.* 302, and *Sill* vs. *Rood*, 15 *John.* 230, were both cases of fraud. The first was an action on the contract—the second on two promissory notes. In the last case, the evidence offered was, that the notes were given in payment for a shearing machine, sold by the plaintiff to the defendant; that the plaintiff made certain representations with respect to the usefulness of the machine, which were utterly false and that known to him at the time, and that the machine was, in fact, worth nothing and totally useless. The court held, that the evidence ought to have been received, and said, that

East'n District. Jan. 1823.

EVANS & AL. vs. GRAY & AL.

"if the notes in question were procured upon such fraudulent representations, they were utterly void and without consideration, and there never was any cause of action." This, then, was not a case of partial failure of consideration, but of an original want of consideration, the notes having been fraudulently obtained.

The case of *Delany* vs. *Vaughan*, 3 *Bibb.* 379, decided by the court of appeals in Kentucky, was also a case of fraud. It was an action on a contract, to recover the price of a slave—and the defence was, fraud in the seller. The court say, expressly, that "to authorize a verdict in favour of the defendant, it was indispensable for him to establish a fraud, attendant with such circumstances as would make void the contract." This is, therefore, an authority for the plaintiffs in this cause, and not against them. In another case, reported in the same book, *Wallace* vs. *Barlow's administrators*, 3 *Bibb*, 168, the same court held, in an action of covenant, that a plea going to part of the consideration only, was bad.

These are all the common law cases which have been cited. None of them go the length of admitting this defence; for even *King* vs.

East'n District.
Jan. 1823.

EVANS & AL.
vs.
GRAY & AL.

Boston, was an action on the contract, and not on a bill or note; and it may be safely affirmed, that in a court of common law, the evidence here offered has never been admitted as a defence to an action such as this.

On the argument of this cause, it was conceded, that it must be determined according to the principles of the common law—such was the impression of the counsel for both parties; and no intimation to the contrary fell from the court. Undoubtedly, the rights of the parties arising out of their contract, the merits of the question, must be determined according to the laws of the country where the contract was made. Whether this contract be open or rescinded, must be ascertained by a reference to those laws; and we must look to the same laws to decide, whether either party may now, and under what circumstances, rescind the contract—whether the matter set forth in the defendants' answer, the non-performance by the plaintiffs, gives to the defendants any claim upon the plaintiffs; and whether that claim be for a certain sum, or for uncertain damages, must also be determined *secundum legem loci contractus.* The form of action, the nature of process, and the

East'n District. Jan. 1823.

EVANS & AL. *vs.* GRAY & AL.

rules of pleading, will be directed by the *lex fori*. In this case, the common law shows the claim of the defendants to be for uncertain damages; and if, by the laws of Louisiana, uncertain damages could be pleaded, by way of compensation, it might be done in this case. But the law only admits of compensation between debts equally liquidated, and not between a certain debt and uncertain damages. *Civil Code*, 298, *art.* 191. And there is no distinction, in favour of the case, where the claim for damages arises out of the same transaction as the certain debt. Can there be a doubt, that this is an attempt to set-off unliquidated damages? The contract was originally good; it was made upon a sufficient consideration; has not been rescinded; and the defendants cannot be allowed, at this time, to rescind it. They charge the plaintiffs with an imperfect performance of the contract, which was the consideration of this note; and, if the facts stated be true, they have a claim for damages; but neither by the common law nor by the civil law, can these damages be set-off. In the case of *Winchester vs. Hackley*, 2 *Cranch*, 342, the supreme court of the United States decided, that the defendant could not set-off a

claim for bad debts, made by the misconduct of the plaintiff in selling the defendant's goods as factor, the plaintiff not having guaranteed those debts; being of opinion, that such misconduct was proper to be inquired into in a suit for that purpose—and in that case the set-off arose out of the same transaction as the suit.

The cases cited from 10 *Martin*, 662. 11 *id.* 530, 721 & 751, are not denied. They relate to the process or form of proceeding. Whether a suit can be commenced by attachment, or by holding the defendant to bail, must be determined by the laws of the state where the action is brought. So interrogatories may be put to a party here, though it could only be done in other states, by filing a bill in chancery for a discovery. It is not pretended, that, in a suit brought here, upon a contract made in a common law state, the distinctions, between the jurisdiction of a court of common law and a court of chancery, are to be observed. If, in this case, the defendants could have been relieved in chancery in Kentucky, either by enjoining the judgment of the court of law, or in any other shape, they may be relieved here. That is, if they could have been re-

East'n District. *Jan.* 1823.

EVANS & AL. *vs.* GRAY & AL.

lieved against this suit. But the circumstance of their having a separate right of action against the plaintiffs, will not have the same effect—unless this proposition can be established, that if A sues B here, upon a note made in Kentucky, in consideration of the sale of 100 hogsheads of tobacco, B can defend himself against this suit, by showing, that in a distinct contract, made at another time, for the sale of a steam-boat, he has sustained damage through the default of A.

The cases of *Moore's Assignee* vs. *King & al. ante*, 262, and of *Le Blanc* vs. *Sanglair & al.*, *ante*, 402, were upon contracts made in this state, and turn upon principles peculiar to the civil law. The object of the redhibitory action is to rescind the sale, on account of some defect in the thing sold, and to recover back the price. The object of the action *quanti minoris* is to obtain a diminution of the price, the purchaser retaining the article. *Civil Code*, 356, *art.* 65, 66, 68, 70.—Either of these actions must be brought within six months from the time the defect has been discovered, and, at all events, within a year from the time of sale. The equity of these actions may be used as a defence to an ac-

tion for the price; and, upon this principle, the two last mentioned cases were decided. The defence was to the payment of the price; and, in the first action, a diminution was allowed, and, in the second, a total rescission of the sale. Neither of these actions are known to the common law. When there is a breach of contract, the vendor can only rescind the sale, by returning the article; but he can, in no case, as has been shown, retain the thing, and refuse to pay the price, or any part thereof. The defence, in the two cases in 12 *Martin*, did not turn upon matter of form, but upon the nature of the contract, as regulated by our laws. In one case, it was a defence to the whole action, showing a right to rescind the sale and a total failure of consideration. In the other case, showing a right to reduce the amount of the price sued for. In neither case, was it an attempt to set off damages.—Suppose, that either of these actions had been brought after the expiration of a year; could the defence have been sustained?

To prove that this defence may be made, these authorities have been cited; *Partida*, 3, *tit.* 10, *l.* 5. *Cur. Phil. p.* 1, § 15, and *Febrero*, *p.* 2, *lib.* 3, *c.* 1, § 6, *n.* 224–226. The *fifth* law of

East'n District. *Jan.* 1823.

EVANS & AL. *vs.* GRAY & AL.

the title of the *Partidas* mentioned, must have been quoted by mistake for the *fourth*; for, certainly, the fifth law has no bearing on this case. The fourth law of the tenth title of the third *Partida*, is the foundation of the doctrine quoted from the *Curia Phillippica* and *Febrero*. It is this part of the Spanish law which gives to the defendant the right of reconvention, which *Febrero* defines as follows: *La reconvencion es segunda convencion, mutua petition, ó nueva demanda que el reo pone al actor en vista de la que éste le puso, p.* 2, *l.* 3. *c.* 1. § 6. *n.* 223. In the same number *Febrero* says, *pero no se permite al reo excomulgado que reconvenga al actor, pues aunque puede comparecer en juicio para excepcionar y defenderse, no puede para intentar accion, qual es la reconvencion.* It seems, then, that this right is not in nature of an exception, or a defence, but of a cross action. Such seems to be the law. *Partida*, 3, 2, 32. *Partida*, 3, 10, 4. *Juan de Hevia* also says, that the plaintiff has nine days to make exceptions to this cross action. *Cur. Phil. p.* 1. § 15. *n.* 10, 11. This shows it to be an action; for peremptory exceptions are made to actions, and not to exceptions. The fact is, that this was a right, which the Spanish law gave to the defendant,

to bring a cross action against the plaintiff, before the judge who held cognizance of the principal cause, and to whose competency the plaintiff could not except; which cross action was to proceed *pari passu* with the principal case; and both were to be determined at the same time, either by one judgment, or by separate judgments, as the case might require. The cross action might arise out of any other transaction, than that which was the cause of the original suit; it might be, either for a specific debt, or for uncertain damages; and, in the cross action, a larger sum might be recovered, than in the principal action. *Febrero*, 2, *l.* 3, *c.* 1, § 6, *n.* 225, 226, 243.

Supposing this to be an action, the law requires that it be presented to the court by petition, and that the plaintiffs be cited to answer it. Neither has been done in this case; and the latter could not be done; because no citation could be served on the plaintiffs.—Nor is the right of action set forth with that certainty which the law requires. But, after all, is this law in force in *Louisiana?* The translators of the *Partidas* say, that it is not; and the committee, to whom the translation was referred by the legislature, say the same.

East'n District. *Jan.* 1823.

EVANS & AL. *vs.* GRAY & AL.

If it be a mode of discharging a contract, or a defence to an action on a contract, some provision on the subject would probably have been found in the *Civil Code*, provided it was intended the law should continue in force. If this law had been considered by the bench, or the bar, as in force, we should have found some trace of it in the reports. If it be in force, the act of the legislature, passed last session, on the subject of compensation, was wholly unnecessary; for, by this mode, the defendant might have recovered the excess of the debt due to him over that due to the plaintiff. And as this proceeding avoids all difficulty about unliquidated damages, it is singular, that recourse should not have been had to it, if it were believed it could be done.

[For the opinion of the court in the above cause, see *Post.*]

MOORE & AL. vs. *ANGIOLETTE.*

The opinion of the inferior court, on a question of fact, prevails in the supreme courts, unless manifestly erroneous.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This appeal is taken from a decision of the judge of the first instance refusing to

dissolve an attachment, which had been prayed for on the grounds that the facts stated in the petition were untrue.

Strong proof ought to be required, on a motion to dissolve an attachment.

The testimony, taken in the court below, to disprove the allegation of an intention to permanently remove from the state, comes up with the record, and has been perused by us. We agree in the conclusion of the district judge, whose decision, on questions of fact, always prevails in this court, unless manifestly erroneous. The evidence certainly renders the matter doubtful; but the court below judged soundly in requiring strong proof in a case of this kind; for, a mistake in dissolving, might cause the plaintiff to lose his debt, while an error on the other side could produce no injury, except compelling the defendant to bring an action on the bond, which the law has provided for his security, in case the attachment was illegally taken out.

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

Smith for the plaintiffs, *Seghers* for the defendant.

East'n District.
Jan. 1823.

TREPAGNIER'S HEIRS
vs.
BUTLER & AL.

Every thing in judicial proceedings, is presumed to have been correctly done.

TREPAGNIER'S HEIRS vs. *BUTLER & AL.*

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. In this case the plaintiffs claim title to the land described in their petition, as heirs to their father. They state, in an amendment to the pleadings, that he disappeared in the year 1799, and has not since been heard of. The right of the ancestor to the property in dispute, is not contested; as the defendants claim by virtue of title derived from him, through Mad. Trepagnier, the mother of the plaintiffs, to whom it is alleged to have been adjudicated by a competent tribunal of the Spanish government, while in the exercise of rightful sovereignty and jurisdiction over this country.

The first and most important inquiry, necessary to a just decision of the cause, relates to the conclusiveness of that adjudication, on the rights of the present contending parties. The manner in which it was made, and the evidence on which the proceeding of the Spanish tribunal were founded, do not fully appear, in consequence of the loss of the record, which contained that history. To sup-

ply these defects, testimonial proof has been resorted to; and it must be presumed, properly admitted, as no objection seems to have been made to its introduction. This proof establishes the fact of an adjudication of the property of the father of the plaintiffs to their mother; and if legally made, by competent authority, certainly transferred it in full title and dominion to her. But the legality of that decision cannot here be inquired into, without violating principles recognised by this court in the cases of *Aubry & wife* vs. *Folse & wife*, and *Dufour* vs. *Camfranc*, which were settled after much deliberation, and which we still believe to be correct and sound. See 11 *Martin*, 308 and 608.

As the judgment, by which Mad. Trepagnier acquired title to the property now in dispute, is not open to examination, the evidence on which it was based, is no more subject to review than the law. Every thing must be presumed to have been properly conducted, and that Trepagnier was, *quoad* the proceedings in that case dead in 1799.

The widow, who sold to the defendants, having acquired the property by the adjudication of the Spanish tribunal, and having re-

gularly transferred it to them, we are of opinion, that they hold under a valid title, and that there is no error in the judgment of the district court.

It is therefore ordered, adjudged and decreed, that said judgment be affirmed with costs.

Moreau for the plaintiffs, *Duncan* for the defendants.

DRESSER vs. *COX.*

An appeal from the grant of a new trial (before final judgment) is premature.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The defendant and appellee insists on the dismissal of the appeal, on the ground of its having been prematurely taken, (*i. e.* before the final judgment was given) on the award of a new trial, the district court having been of opinion, that the verdict was contrary to evidence, and the damages excessive.

The counsel for the plaintiff and appellant urges, that the action was grounded on a tort, and there had been two verdicts against the defendant, and that the plaintiff is without

remedy, unless this court interferes, and he will be driven to the necessity of dismissing his suit and instituting it in the parish court; that as this court has sustained appeals from *refusal* of a new trial, there cannot be any doubt of its authority, and consequent duty, of revising decisions by which a new trial is granted.

The case of a court so obstinately persisting in setting aside a verdict, as to drive suitors out of it, is, we trust, a barely possible one ;-but neither the constitution nor the laws have vested us with the power of remedying it.

It is true, the constitution has vested the supreme court with the power of revising judgments and decisions, in civil cases, of a certain value; but the legislature has given the appeal from *final* judgments only, and this court has declared it considered as such, not only the judgments which put an end to the suit, in the inferior court, but all others (given in the course of proceedings) that work an irreparable injury.

In a case, by attachment, the judgment which dissolves the attachment and loosens the property attached, is of the latter kind,

East'n District. *Jan.* 1823.

DRESSER *vs.* COX.

and the party injured may appeal from it, because it is important for him to prevent its being carried into immediate effect, in the only way which the law allows, *i. e.* by an appeal; for were he to wait for the conclusion of the suit, and then appeal, the property attached would no longer be susceptible of being made answerable to him, if the supreme court were of opinion that the inferior court erred in discharging it.

In all cases, in which the like irreparable injury does not result from any other than a final judgment, the party is bound to wait till the case has been completely acted upon by the inferior court; because, this court may give him complete relief, in the ordinary course of the suit, when the case comes up, and it is not unlikely that the final issue of the suit in the inferior court, as may render it unnecessary to pray an appeal.

So in the present case, if, as the appellant urges, the new trial was improperly awarded, and the error is remediable here, we may likely give relief, by giving that judgment which, in our opinion, the district court ought to have given as the first or any subsequent verdict.

The plaintiff, therefore, ought to have de-

layed his appeal in this case, till there was a final judgment.

If it be true, that the plaintiff needs the interference of a superior court to prevent injustice by the improper delay of the district court, to give final judgment, or by too easily awarding new trials, we cannot come to his aid, for this tribunal has not been erected into a court to quicken or direct the conduct of other judges.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed with costs, and the cause remanded with directions to the district court to proceed therein; the costs of the appeal to be borne by the plaintiff and appellant.

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

CROUSE vs. *DUFFIELD*.

APPEAL from the court of the first district.

A defendant, who does not plead in abatement, admits that his residence, and that of the plaintiff, is correctly sta-

MARTIN, J. delivered the opinion of the court. The plaintiff sues on a note of hand of the defendant, who pleaded the general is-

East'n District. *Jan.* 1823.

CROUSE *vs.* DUFFIELD.

sue. The note had the signature of Samuel Kinsway affixed thereto, as that of a subscribing witness.

Miller deposed, he knew Samuel Kinsway of Ohio, though slightly; he does not know that he is the person whose name appears on the note as a subscribing witness; he is unacquainted with his signature, or hand-writing.

Gilly deposed, he knew the defendant, and has seen his signature and hand-writing; but having been called on suddenly, without being apprized of the questions he was to answer, he does not feel disposed to declare, whether the signature on the note is that of the defendant; it does look very much like it; being spelt in the same way and with the same letters; it looks very much like the signature of the defendant, which he has seen, is spelt in the same manner; but he cannot swear to it.

Davidson deposed, the signature on the note resembles the defendant's hand-writing, which he has seen several times; he has never seen him write; he cannot positively swear it is the defendant's, but, to the best of his knowlege, he believes it is; he believes the defendant acknowleged he owed the money

ted in the petition

If a note does no state, the place in which it was given, the court may presume tha' it was given at the place in which the maker and payee reside.

A subscribing witness, to a note given out of the state, is presumed to be out of the jurisdiction of its courts.

sued for; and told him, that, if he was cast in the suit, Cuchery was to repay him: from his conversation with the defendant, he has no doubt that he owes the money; he knew Samuel Kinsway, but not his hand-writing, he resides in the state of Ohio.

Gordon deposed, he has compared the signature at the foot of the note, with that on an affidavit sworn before him by the defendant, and believes it is in his hand-writing.

Two witnesses, appointed as experts, reported, they had compared the signature at the foot of the note and that of the defendant to the bail-bond, and believes both to be written by the same person.

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

There are two bills of exceptions taken by the latter to the decision of the parish court, in overruling his objection to the introduction of witnesses, and the resort to experts to establish his signature—as, while there is a subscribing witness to the note, he ought to have been produced, or accounted for, before other evidence was resorted to.

Both parties are described, in the caption of the petition, to be resident in the state of

East'n District.
Jan. 1823.

CROUSE
vs.
DUFFIELD.

Ohio. The defendant has not pleaded in abatement, that either of them was incorrectly described. The residence of the parties is, by law, required to be stated in the petition. When the defendant does not plead in abatement, that the right place of residence of all the parties is not stated, he admits that each is a resident of the place stated. Taking it, therefore, for granted, that both parties reside in Ohio, the presumption is, that it is in that state the note was executed (no place being mentioned in the note); and the presumption is also, that the person, whose name appears as that of a subscribing witness, was there at the time, and nothing shows that he ever came within this state. We, therefore, conclude, that the plaintiff could not avail himself of the process of the court in which he sued, to procure the attendance of this witness. This circumstance authorized a resort to the proof by experts.

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

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

TRUDEAU & AL. vs *SMITH'S SYNDICS.*

Whether the vendor's privilege be lost, if the deed be not recorded in the parish in which the land lies.

APPEAL from the court of the first district.

Workman, for the plaintiffs. The petitioners, who are the heirs of the late Zenon Trudeau, brought this suit to obtain the payment of a debt due to them by the insolvent, as a part of the price for which they had sold their plantation to him, and for which they contend that they are entitled to the vendor's privilege on the thing sold. This claim was opposed by Morrison and Whitehead, on the ground that the vendors are not entitled to this privilege, inasmuch, as they have not recorded the act from which it arises, in the manner which it is said the law prescribes. The court below decided in our favour, and the opposing parties have appealed from that decision.

The plantation in question is situated in the parish of St. Charles. The deed of sale, by the petitioners to Smith, was passed on the eighth day of October, in the year of our Lord one thousand eight hundred and sixteen, before the judge of the parish of St. James: it was recorded, however, in the office of the judge of St. Charles, on the seventeenth day of March, in the year of our Lord one thou-

East'n District. Jan. 1823.

TRUDEAU & AL. vs. SMITH'S SYNDICS.

sand eight hundred and twenty-one; and in the office of the recorder of mortgages, in this city, on the twenty-sixth day of July following. Three instalments of the price, amounting to the sum of 75,000 dollars, were unpaid when Smith failed.

The privilege claimed in this case, is one of those considered by our laws, and by the general sentiment, as among the most sacred.

The right of the seller of immoveable property, to his lien upon it for the price unpaid, can hardly be taken away or impaired, without violating the principle of property itself. By the Roman lawyers it was held, that the property sold did not belong absolutely to the purchaser until the price was fully paid. However that matter may be among us, it is clear, from an attentive examination of our statutes, that the vendor's privilege, on the thing sold, is not one of those liens which requires to be recorded in order to be preserved.

It is maintained, in the first place, that the act of sale of this plantation, to Smith, can have no effect against the opposing creditors, who claim a preference under conventional and judicial mortgages; because it was not recorded in due time, according to the law of

the year one thousand eight hundred and ten, 3 *Martin's Dig.* 140. The seventh section of that statute declares, that "no notarial act, concerning immoveable property, shall have any effect against third persons, until the same shall have been recorded in the office of the judge of the parish where such immoveable property is situated." This law might have been invoked in favour of a *bona fide* third party, to whom the Trudeaus might have made a sale of the plantation, after they had sold it to Smith. But it can be of no use to our present antagonists, who claim as mortgagees of Smith. It is on the validity of the sale to him that their right, whatever it may be, to the proceeds of this property, depends: if the sale to Smith is invalid, as to them, Smith had no right whatever to mortgage the plantation in their favour.

The great error which pervades the whole argument on behalf of Morrison, lies in considering him as a *third party*. He is no third party, in the sense of the law. He claims under Smith, as a purchaser from Smith, or as Smith's heir might do: and he cannot therefore stand, with respect to the force and validity of his mortgage, in a better situation than

East'n District
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

Smith himself does or could do, with respect to the validity of his purchase.

The act of sale stipulates, that a portion of the price shall be paid down, and the remainder in four annual instalments; to secure which, the buyer consents to, and the seller reserves a mortgage and privilege on the estate.

Although the word mortgage is used in this, as in most other acts of the kind, it is evidently superfluous or even improper, unless the privileged mortgage be understood.

The mortgage, generally, is defined, by the *Code*, to be a contract by which a person affects the whole of his property, or only some part of it, in favour of another, for security of an engagement, but without divesting himself of the possession.

From this definition it follows, that a purchaser cannot grant a mortgage by the act of sale by which he acquires the property. Until that act is completed, the property does not belong to him. What is commonly called the vendor's mortgage in such cases, is really the right or the privilege, which is not granted by the purchaser, for as yet he has nothing in it to grant, but which is reserved by the seller with the purchaser's consent.

The *Civil Code*, 452, *art.* 4, divides mortgages, at first, into three classes, viz.—the conventional, the judicial, and the legal or tacit mortgage.—Afterwards, there is another classification of them, (*art.* 29)—into simple mortgage, and privileged mortgage. The simple mortgage includes the three sorts already specified. These three have this common character, that they give to the creditor no other preference of right, over his debtor's property, than that which the date of his title or of its recording affords to him; according to the rule, the first in time is paid first. But the fourth kind, the privileged mortgage, or, as it is otherwise called, the *privilege*, is that which derives from a privileged cause, which gives a preference over the creditors who have only a simple mortgage, though of a prior date. Such is the privilege of the vendor, *who has the preference over every other creditor* for his payment, on the real property he has sold—*Code, same art. last paragraph.* Between this last mentioned privilege, and the legal mortgage, there is another very important distinction, viz.—that the legal mortgage affects the whole of the debtor's immoveable property, while the vendor's privilege attaches only on the property

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

sold. No two liens are more distinct in their nature and character, than that lien which has the effect of a legal mortgage, and that which the vendor possesses for the security of the price of his property.

The *Code*, 454, *art.* 16–17, enumerates several cases, where the legal mortgage takes place; and declares, that there is no legal mortgage, but in the cases directed by the law. It declares also, *art.* 27, that the legal mortgage is not required to be recorded. And again, in the section on the registering of mortgages, *p.* 464, *art.* 54, it expressly ordains, that privileges on moveables as well as on immoveables, and legal mortgages, (always discriminating between privileges, and legal mortgages) have their effect against third persons, without any necessity of being recorded. But afterwards, in the year 1813, the general assembly thought fit to make a different regulation—so far as respected legal mortgages only. They passed an act requiring those mortgages to be recorded, and declaring that all liens of any any nature whatever, having the effect of a legal mortgage, which should not be recorded agreeably to the provisions of this act, should be utterly

null and void, except between the parties thereto.

This is the act principally relied upon to defeat our claim. But it is evident from what I have already stated, that our case is not comprehended in this provision. Ours is the privilege accorded to the vendor of immoveables on the estate sold, pursuant to the provision of the *Civil Code*, 470, *art.* 75. We contend, that we have a privilege, not a legal mortgage, on the property in question. Our lien, on the one hand, is prior to all mortgages, whatever might be their date. This characteristic of the vendor's lien is evidently from its nature, independent of any legal provision: for the purchaser could not mortgage it, until after he had acquired it.—And, by a wise provision of the *Code*, 452, *art.* 7, he could only then mortgage it, subject to the conditions on which his right on it depended. On the other hand, we do not pretend, that our lien has the extensive effects of a legal mortgage. It does not, as a legal mortgage would do, affect the *whole* of the debtor's immoveable property. We claim our privilege only on the property sold.—Our privilege then, or privileged mortgage.

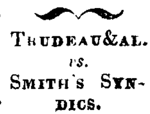
East'n District. Jan. 1823.

TRUDEAU & AL. *vs.* SMITH'S SYNDICS.

is not the same, nor has it by any means the same effects, as a legal mortgage; it comes not therefore within the provisions relied upon of the act of the year 1813.

This court cannot say, that our privilege ought to have been recorded as a lien having the effect of a legal mortgage, unless they are prepared to adjudge, that if it had been recorded, as that act prescribes, it would have affected the whole of the debtor's immoveable property.

I am well aware, that in the Spanish writers on the subject of mortgage and privilege, a good deal of vagueness and confusion may be found. The privilege is sometimes called a legal or tacit mortgage. But even in the Spanish law, the nature and effects of these different species of liens, are clearly pointed out and discriminated, although their names are confounded. In our *Civil Code*, the names as well us the things themselves are kept perfectly distinct. The privilege. or privileged mortgage as it is sometimes called, is separated from all the other three species of mortgages—the conventional, the judicial and legal—by a boundary which cannot be mistaken. In the *Napoleon Code*, from which the



best part of our *Civil Code* is taken, the privilege is always denominated by that single word. Our legislators have probably thought that it might be proper to use the words, privileges and privileged mortgages, in order to distinguish the privilege on moveable, from the privilege on immoveable property.

The supposed intentions of the legislature are appealed to. What, it is asked, could they mean by a legal mortgage, but a mortgage imposed or created by law? When the words of a statute are of clear and precise signification, those words alone are to be regarded. The words of the statute have an evident reference to the definitions and distinctions of the *Civil Code*; and, if it were necessary, it were easy to show why the legislature did not comprise the privilege along with the legal and judicial mortgage. The act enumerates most of the different species of contracts, judgments, decrees, &c., having the effect of those kinds of mortgages, and then includes, in one sweeping clause, all liens whatever having the effect of a legal mortgage. Would it have been right, would it have been possible, to require the registry of all privileges in like manner? of the privileges of funeral charges, law charges,

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

the charges for medical attendance and the like? But of all privileges, that of the vendor on the estate sold by him, for the price of it, seems the least to require being registered. It is a privilege which must appear manifest on the act of sale itself. If the seller acknowlege, in that act, that he has received the price, in the notary's presence—or out of it, with the proper renunciation of the exception *non numeratæ pecuniæ*—then there is an end of the vendor's privilege. If the price, or any part of it, appear due, then how can the privilege be unknown? Does any person of common prudence or understanding, purchase, or lend his money on the mortgage of property, without examining the title deeds? The privilege of a lawyer, a physician, a builder, may be hidden; but the privilege of a vendor can never be concealed from him who will take the trouble to make proper inquiries. You say, the deed to Smith was not registered in the proper office, and therefore you could not have cognizance of it. Why then did you lend your money, or accept of a security upon this plantation? It is not enough, as has been contended, to inquire what mortgages exist on an estate for which you are about to make a

contract. You must inquire whether the other party has any right to it, and how far he may lawfully dispose of it. Suppose our adversary, instead of taking a mortgage on, had purchased this estate, would such a purchase be held valid against the former vendor's privilege? If he examined the act of sale, he would have notice of the incumbrance. If he did not, he must take the property subject to all the risks arising from his own negligence and imprudence, if indeed something worse might not be imputable to one who would act in such a manner. Our citizens are already sufficiently addicted to hazardous speculations on property in this state. Let no undue encouragement be afforded to those speculations, in which fraud might act under the mask of carelessness.—I put an imaginary case, without designing to make any imputation in the present instance, in which, indeed, no fault appears beyond the imprudence of taking an insufficient security.

On behalf of the opposing party, claiming under a judicial mortgage, we are told that his case is particularly favourable. He obtained a judgment for a just debt. He saw that Smith had possession of a large estate—

East'n District. *Jan.* 1823.

TRUDEAU & AL. *vs.* SMITH'S SYNDICS.

he gave him credit on it, and had no business to inquire into his titles. And why did he do so? Why did he not first inquire whether the estate was paid for? Is there any thing better known among us, than that such estates are usually sold on a long credit; and that the seller has a privilege upon them for the price due?

This court has already decided some cases under the act of the year 1813, agreeably to the principles I have endeavoured to maintain. In *Lafon* vs. *Sadler*, it was held, that the builder's privilege on the house built, was not comprehended within the provisions of that statute, and was therefore valid, though it was not recorded. This judgment was rendered in June, 1816; and the legislature, at their next session, amended the act of the year 1813, by ordaining, that in all cases exceeding $500, no architect, &c. should enjoy, with regard to a third party, any privilege, unless he should have entered into a written contract, and recorded it within the time prescribed by law. In the various acts which have been passed upon this subject, the legislature never think of requiring a record of the vendor's privilege. If they ever intended

to require such a record, it must have occurred to them on several occasions—as when they were amending the *Civil Code*, by ordaining that legal mortgages should be recorded; and, on the subject of the builder's privilege, when they passed the law of the year 1817, occasioned probably by the decision in *Lafon* vs. *Sadler*. The legislature thought, no doubt, that it was useless to insist upon the registry of a privilege which could not be concealed from any one who acted with ordinary caution.

The principle of the decision of *Lafon* vs. *Sadler*, has been confirmed by this court in the cases of *Millaudon* vs. *New-Orleans Water Company*, 11 *Martin*, 278, and *Jenkins* vs. *Nelson's Syndics*, *ibid.* 437.

To this claim of the vendor's privilege, is opposed, first, an act in favour of Morrison, which is considered as a mortgage. It is drawn in the common law form, viz. a deed of sale, defeasible on the payment of money. It is dated the 23d June, 1819; acknowleged in the Fayette circuit court, the 22d day of the same month and year—(there is an error, perhaps a clerical one, in the date,) and recorded in the parish of St. Charles, the 15th day of May, 1820.

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

We maintain, that this deed is not valid as a mortgage, to affect immoveable property in this state. It is a principle of universal jurisprudence, that immoveable property can only be disposed of, agreeably to the laws of the state in which it is situated. Our code has made exceptions to this principle, in favour of certain wills and marriage-settlements; but not, I believe, in favour of any other contracts respecting real property. With regard to the contract of mortgage, our code is particularly rigid. It declares, *p.* 452, *art.* 6, that there is no conventional mortgage, except that which is expressly stipulated in the act of writing made between the parties; it is never understood, and is not inferred from the nature of the act. This provision, respecting the nature of the act, is as strict as that which declares that a mortgage, *verbally* stipulated, is not valid; and it would surely not be contended that a verbal mortgage, though it might be good in some other state, would bind real property in Louisiana. Our law has also ordained, *Acts of the year* 1817, 124, § 9, that no conventional mortgage shall be valid, unless the sum, for which the same shall have been given, be certain and explicit. Now, in this deed to Mor-

rison, we find that although a sum is mentioned, to secure which the act is given, yet the amount really to be secured is uncertain, depending on the event of a law-suit.

This court, it is true, has decided in the case of *Baron* vs. *Phelan*, 4 *Martin*, 88, that a bill of sale, taken in connexion with another instrument of writing, by which it appeared that the property was given to secure the payment of a debt, could be considered only as a mortgage of that property. If this decision should still appear compatible with the prohibitory provision of the code which I have just cited, it must be on the ground that agreements are to be construed according to the manifest intentions of the parties. But, on the very same ground, this mortgage must be held void, according to the act of 1817.

For, on examining with attention the condition of defeasance, it will be seen that the sum, for which this mortgage was really given, was not certain at the time of executing the deed; that although a certain sum was stated, yet that it was the true and manifest intention of the parties, that the amount of it should ultimately depend upon a contingent event. So that, whether the decision of the court be

East'n District. Jan. 1823.

TRUDEAU & AL. vs. SMITH'S SYNDICS.

for or against us on the first ground of exception, this act cannot be held valid as a mortgage, in this state.

The next opposition is on the part of Whitehead, who claims under a judgment duly recorded in the parish of St. Charles, May 17th, in the year 1821. Our deed of sale, the court will recollect, was recorded there on the 17th of March, of the same year. But it is objected, (and the fact is admitted by the attorney on record,) that this recording of ours, was made without any order of court. This circumstance can have no effect on the question of precedency of claims. If the law ever did intend that the vendor's privilege must be recorded, it is only, as the law itself declares, *Civil Code*, 464, *art.* 52, in order to protect the good faith of third persons, and to prevent fraud; and again, *1st Martin's Digest*, *p.* 704, the legislature declare, in the last section of the very act on which our opponents rely, that the formality of recording prescribed by this act, is required solely for the benefit and information of the public. If the parish judge has recorded the deed, without being duly authorized to do so, he and he alone is blameable. The deed

once recorded, none of the evils, against which it was the sole purpose of the law to provide, can be apprehended. But, I feel so confident on the principle ground of our defence against Morrison's claim, which will equally support us against the claim of Whitehead, that I do not suppose the court will feel it necessary to enter into any investigation of this last point.

Hennen, for the defendants. The questions now presented for the decision of the court, arise from the conflicting claims made by two creditors to the proceeds of a plantation, the property of I. K. Smith, an insolvent debtor: James Morrison, on the one part, claiming 15,000 dollars out of them, by virtue of *a mortgage, the first recorded in the parish where the land is situated;* and the heirs of Trudeau, on the other, asserting their right to the whole by *privilege as vendors.*

The facts of the case are few and undisputed; the law only, arising thereon, is the source of controversy.

On the 8th October, 1816, the heirs of Trudeau sold to the insolvent, by a deed of sale given before the parish judge of the parish of St. James, the tract of land situated in the parish of St. Charles; the proceeds of which

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

are now in litigation. By the deed a special mortgage was reserved in favour of the vendors on the premises; but it was not recorded in the parish of St. Charles (where the land is situated) until the 17th of March, 1821.

On the other hand, James Morrison urges, that he should be paid in priority to the heirs of Trudeau, the amount of his mortgage, which was duly executed in the state of Kentucky, in the common law form usual in that state, on the 23d of June, 1819; and recorded, by order of the judge of the district court, in the parish of St. Charles (where the land is situated) on the 15th May, 1820; nearly one year prior to the recording of the mortgage of the heirs of Trudeau.

Two instalments of the purchase-money, amounting to 50,000 dollars, had been paid by Smith previously to his failure; since which the heirs of Trudeau, by an order of seizure and sale, granted on the mortgage stipulated in the deed of sale, have caused to be sold by the sheriff, the plantation for $80,000; a sum barely sufficient to cover their demand: and have become themselves the purchasers and possessors of the plantation; which was the only property in the state that the syndic

if the insolvent has received for the payment of the just debts of his numerous creditors.

A judgment against the syndic has been obtained by Morrison, for the amount of his mortgage; which he insists should be paid by the syndic, out of the proceeds of the sale of the plantation, prior to the payment of any other creditor.

Such in substance are the facts, out of which the present controversy springs; the solution of which involves the decision of but a single point of law: *Does the vendor of real estate preserve his privilege thereon, for the purchase-money unpaid, if he neglects to record the deed, which creates his privilege, in the parish where the land is situated?* If this question is solved in the negative, as I maintain it should be, there will be no difficulty on any incidental question arising out of the cause.

The privilege of the vendor on real estate cannot exist under our laws, in any other way than by the deed of sale. For as lands can be conveyed by deed only, (*Civ. Code*, 311, *art.* 241,) it follows as a corollary that the privilege which is created by the contract of sale, cannot exist or be proven in any other way than by the contract itself. But we may ad-

East'n District. *Jan.* 1823.

TRUDE & AL. *vs.* SMITH'S SYNDICS.

vance a step further, and assert, that if on the face of the deed the privilege does not exist, the proof of it could not be drawn from other sources ; such as a counter-letter, &c. ; and if the vendor has acknowledged the payment of the purchase money, no privilege would exist for the payment of the notes &c., which may have been taken instead of money. These principles are fully established by various authorities ; *Domat, l.* 3, *tit.* 1. § 5, *n.* 4, in notis ; 1 *Persil, Régime Hypothécaire*, 158, 9. 10 *Merlin, Répertoire de Jurisprudence*, 29, *verbo Privilége de Créance*. It then may be safely asserted, that the privilege of a vendor of real estate, as the accessory of the contract of sale, derives as well its existence, as its force from the contract only, as far as third persons are concerned. The contract of sale may subsist in full force, while the privilege of the vendor may have been waived or destroyed. With these principles established, let us look at the positive provisions of the statutes of the state on the subject. The first act of the legislature, to which I will call the attention of the court, is that of 1810. 3 *Martin's Dig.* 138. By the fourth section of this act, " no instrument stipulating a mortgage shall have any

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

effect against third persons, except from the day on which the same shall have been recorded in the office of the judge of the parish where the hypothecated property is situated." The mortgage therefore of the heirs of Trudeau, which was stipulated in their favour by the insolvent, is clearly of no effect or validity against his creditors, who assuredly are third persons. And though the heirs, in their petition, have availed themselves of this mortgage to obtain thereon the order of sale of the plantation, under which they have re-entered into possession: so plain are the words of this section of the statute, that no claim by virtue of their mortgage has been urged: indeed, it appears to be abandoned.

It is the privilege of vendors, however, which their counsel insists has not been lost. Let us then examine that hold. The seventh section of that act, 3 *Martin's Digest*, 140, goes on to enact, that "no notarial act concerning immoveable property shall have any effect against third persons, until the same shall have been recorded in the office of the judge of the parish, where such immoveable property is situated." By this section it is evident, that between the

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

contracting parties notarial acts or deeds of sale, are to have full validity and effect; as to them they are good to all intents and purposes. But not so, as regards third persons. Now the privilege of the vendors of the plantation to the insolvent, as an accessory of the contract of sale, was good against him; but I insist that, from the plain words of the act, it can have no force against third persons. It is only by virtue of the notarial act of sale, that this privilege can be established or enforced, as I trust I have already shown. The heirs of Trudeau must resort to the notarial act of sale, as the only means of establishing their privilege; and against their vendee they had a right to use it; but against third persons, "it shall have no effect," whatever may have been its validity against the contracting party. The argument drawn from this section appears to me perfectly conclusive against the privilege asserted by the heirs of Trudeau against Morrison, a third party. The only answer attempted to be given by their counsel, to the conclusion which I have drawn from it, is that if this deed is not valid against third persons, then the sale itself to Smith is not valid; and he could not mortgage the estate to Morrison. But

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

this by no means follows. On the contrary, the deed of sale is valid so far as it conveyed the estate to our debtor. The statute does not make the act of no effect whatever; but only declares that it shall have no effect *against* third persons. The object of the statute was to protect and favour third persons; not to produce an effect *against* them, but to do something *for* them. It is not the sale, that Morrison wishes to set aside and annul: it is that privilege which the heirs of Trudeau say they are entitled to by the deed, for the payment of the balance of the purchase-money, he combats: it is that this privilege may have no effect *against* his mortgage duly recorded, that the statute is invoked; and this court will pronounce, I trust, that it shall not have any effect against him, as the statute directs. But it is said, that the great error of the counsel of Morrison is in considering him a third party. Certainly, there cannot be a greater error, than to consider Morrison as one of the parties to the deed; who alone by the provisions of the statute are to be bound by it. The statute protects all persons but parties; and whoever was not a party to the deed, must be

East'n District. Jan. 1823

TRUDEAU & AL. vs. SMITH'S SYNDICS.

considered as included under the denomination of "third persons."

The creditors, both of Trudeau and of Smith, have a right, as third persons, to urge the provisions of the statute, so far as the notarial act of sale might have any effect against them. The counsel of the heirs of Trudeau, admit that their creditors might do so; and I think it too plain, to need further argument, that the creditors of Smith have the same right; for both classes of such creditors must be considered, as regards the contracting parties, third persons.

The counsel for the plaintiffs, however, insists that all privileges and legal mortgages have their effect against third persons, without any necessity of being recorded, according to the provisions of the *Civil Code*, 465, *art.* 54. *If such was the law, it has been repealed.* First, by the act of 1810, already cited, so far as privileges are created or exist by notarial acts, which are to have no effect against third persons unless recorded; and, secondly, by the act of 1813, 1 *Martin's Dig.* 700, which begins by enacting that all securities; sales of lands, or slaves made by public officers; all marriage contracts; all final judgments and

awards, shall be recorded within ten days, &c. in the office of the parish judge of the parish where they are to effect lands or slaves; and concludes in the following words; "and all sureties, sales, contracts, judgments, sentences or decrees aforesaid, and *all liens* of any nature whatever, having the effect of a legal mortgage, which shall not be recorded agreeably to the provisions of this act, shall be utterly null and void to all intents and purposes, except between the parties thereto."

My reasons for maintaining that this part of the *Code* was in part repealed by the act of 1810, have already been given. If any doubt could remain with respect to the intentions of the legislative act of that year, the subsequent act of 1813 has most assuredly rendered the subject perfectly clear. Privileges and legal mortgages by the ancient laws of the country, existed to so great an extent as to render the purchase of real estate and slaves in a high degree hazardous; and against the secret privileges and tacit mortgages, which might exist thereon, no diligence or foresight could provide for the security of the purchaser against all molestation. The evils attendant on such a state of things had long been felt and de-

East'n District. Jan. 1823.

TRUDEAU & AL. vs. SMITH'S SYNDICS.

plored by the community; the act of 1810 remedied but a small portion of the evils existing; and in order to effectually and adequately put an end to them, the legislature enacted the statute of 1813, which requires *all liens* of any nature whatever, having the effect of a legal mortgage, to be recorded in order to give them any validity against third persons.

But the counsel for the plaintiffs contends, that the act of 1813, has not impaired their lien of vendors; and that such lien or privilege was not intended to be embraced by its provisions. His argument is founded on the definition of the word mortgage, found in our *Code*; and on the distinction which he thinks there is between a legal mortgage and the privilege of the vendor. That he has taken an erroneous view of this part of the subject, I propose next to show; and to satisfy the court that, as well by the act of 1813 as by that of 1810, the privilege of the vendor of real estate is lost, as regards third persons, if not recorded. The whole argument rests upon showing that the privilege of a vendor of real estate is something not included in the terms, "*a legal mortgage*;" for if such privilege is nothing in effect but a legal mortgage; *if it is a lien having*

the effect of a legal mortgage, the statute requires it to be recorded, to have any validity against third persons.

We are first referred to the definition of a mortgage in the *Civ. Code*, 453, *art.* 1. "The mortgage is a contract by which a person affects the whole of his property, or only some part of it, in favour of another, for security of an engagement, but without divesting himself of the possession thereof."

Nothing, certainly, can be more unfortunate than this definition. Instead of the definition of a *genus*, it gives that of a *species*; it is but the description of *a conventional mortgage*, when it should have included the other two species, *legal* and *judicial*. *Omnis difinitio in jure civili, periculosa est; rarum est enim, ut non subverti possit. Dig.* 50, 17, 202. Nothing, therefore, favourable to the argument of the counsel for the plaintiffs, can be deduced from such definition. Without regarding then this oversight in our legislators, let us examine into the division and classification which they have made of mortgages.

We are informed (*Civ. Code*, 653, *art.* 4) that there are three sorts of mortgages:

1. The conventional,

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

2. The judicial, and
3. The legal or tacit.

Again, it is stated (*idem*, 457, *art.* 29) that under another view, mortgages may be divided into,

1. The simple mortgage, and
2. The privileged mortgage.

But furthermore, we learn (*ibid. art.* 30) that mortgages may be divided into,

1. The general mortgage, and
2. The special mortgage.

Now it is evident that all mortgages, of every nature or sort whatsoever, must be either *general* or *special*; that is, must effect some one *particular or special* immoveable; or, *in general*, all the immoveables of the debtor. The terms *general* and *special*, therefore, include all sorts of mortgages.

It is equally evident, I think, and undeniable that every mortgage of whatsoever nature or sort, must be either a *simple* or a *privileged* mortgage. The four terms, therefore, *general*, *special*, *simple*, and *privileged*, are merely descriptive of the nature or effects of the different sorts of mortgages; which are three, the *conventional*, the *judicial*, and the *legal*. This distribution and division of mortgages is that

of *Domat*, *l.* 3, *tit.* 1. § 2, from whom it would seem the framers of the *Code* intended to borrow it. There are, then, but three sorts of mortgages known to our *Code*; and under some one of the three, every mortgage may be classed, whether it is *general* or *special*, *simple* or *privileged*; which words are solely intended to mark the qualities that may attach to them.

Now *the privileged mortgage*, or as it is otherwise called *the privilege of the vendor*, *Civ. Code*, 457, *art.* 29, cannot be ranked either among the conventional or the judicial mortgages.—There is but one other class of mortgages in which it can be placed; *the legal*: and to that it evidently belongs.

"A legal mortgage (according to the definition of our *Civ. Code*, 454, *art.* 15) is that which proceeds from the law, without any express covenant of the parties; but which is, notwithstanding, grounded on a tacit consent, which the law presumes to have been given by him on whose property it grants this mortgage; therefore it is also called, in law, a tacit mortgage." This definition is as correct a description of the privileged mortgage, or privilege of the vendor, as language can give. The *Code* then proceeds to give various examples of

East'n District.
Jan. 1823

TRUDEAU&AL.
vs.
SMITH'S SYNDICS.

the legal mortgage; but after enumerating many, cautions us against supposing that they are all. "To the divers sorts of legal mortgages mentioned in this title, must be added those which may have been omitted in the above enumeration, and which may have been established in other parts of the present *Code.*"

It is worthy, however, of very particular remark, that among the number of legal mortgages enumerated directly following the definition of a legal mortgage, the framers of the *Code*, 457, *art.* 23, have placed an example of the privilege of the vendor of real estate. "Co-heirs have a legal or tacit mortgage on the property which has been the object of partition, from the day of that partition, for the warranty of their respective portions, as well as for the returns of money on the shares." For, on consideration of the nature of the contract of the partition among co-heirs, it is certain, that in the partition of real estate, they are mutually vendors and vendees; and therefore this tacit or legal mortgage is to secure the vendor his purchase-money. Such is the view taken of this mortgage by the civil law writers. *Ferriere, Dictionnaire de Droit, verbo Soulte.* "*Soulte, est une somme qui se paye en*

forme de supplément par un des copartageans à l'autre, pour faire par ce moyen que leurs lots soient égaux. Ainsi souvent dans un partage un immeuble est mis dans un lot, à la charge que celui auquel il échoira, sera obligé de recompenser les autres copartageans en argent, pour rendre toutes les portions égales.

Ce terme vient de solvere *; car c'est une espece de solution ou de payement qui se fait aux autres copartageans de la portion qu'ils pouvaient avoir dans un immeuble.*

Pour ce qui est du privilége de la soulte de partage il est sur le total de l'héritage qui la doit ; et non pas sur une partie seulement."

9 *Merlin, Répertoire de Jurisprudence, verbo Partage,* 38 ; "*Les biens composant le lot de chaque copartageant, sont hypothéqués par hypothèque privilégiée, à toutes les obligations qui dérivent du Partage, telles que sont le retour en deniers ou rentes dont ce lot est chargé, l'obligation de garantie envers les cohéritiers auxquels sont échus les autres lots, les rapports des sommes données ou prêtées à quelqu'un des cohéritiers, et enfin toutes les prestations personnelles dont un héritier peut être tenu envers ses cohéritiers.*

"*Cette hypothèque privilégiée doit produire son effet dans le cas même où le Partage a été fait sous*

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

seing-privé." 10 *Merlin, Répertoire de Jurisprudence, verbo Privilége de Créance,* 13. "*Le cohéritier réclamant sur les immeubles de la succession, une soulte ou la valeur des biens dont il a été évincé, doit être considéré comme un vendeur d'une portion des biens qui devaient composer son lot; et qu'ainsi, son Privilége, à cet égard, se confond et s'identifie parfaitement avec celui du vendeur.*"

See also, 15 *Pandectes Francaises,* 183. 1 *Persil, Régime Hypothécaire,* 185. *Code Napoleon, n.* 2103, § 3.

But to return to the point which I have undertaken to establish; that the privilege of the vendor is included under the class of legal or tacit mortgages. This privilege is expressly termed a mortgage; *Civ. Code,* 457, *art.* 29; and the privilege of the vendor, used in the English text, is termed in the French, *l'hypothèque du vendeur.* In this point of view, the writers on jurisprudence have always regarded it; vain therefore is it for the counsel of the plaintiffs, to maintain that a privilege is something different from a mortgage. "*L'hypothèque, est un droit réel sur une chose appartenante au débiteur, qui tend à assurer l'exécution de l'obligation, au moyen de la préférence qu'elle attribue au créancier nanti de ce droit, sur les autres créanciers.*

La préférence a pour cause, ou la faveur due à la créance, ou la propriété, soit du contrat, soit de l'accomplissement des formes qui donnent à l'hypothèque son efficacité.

Cette différence dans les causes caractérise deux genres d'hypothèques, dont l'un conserve le nom d'hypothèque, et l'autre prend celui de Privilége.

Le Privilége n'est donc, à proprement parler, qu'une hypothèque priviligiée.

En effet, le Privilége est un droit accessoire à une créance, puisqu'il ne peut appartenir qu'a un crèancier. Le Privilége est un droit réel sur une chose et sur le prix provenant de la vente de cette même chose. Ce droit réel affecte la chose engagée, de manière qu'il la suit dans les mains de tout possesseur, du moins lorsqu'elle est immobilière.

Tous ces avantages sont communs à l'hypothèque et au Privilége : leur caractère distinctif consiste en ce que les hypothèques prennent leur rang de la priorité de l'inscription ou du titre, au lieu que le Privilége obtient la préférence sur toutes les créances hypothécaires, lors même que le titre serait postérieur en date." 10 *Merlin, Répertoire de Jurisprudence, verbo Privilége de Créance*, 7.

The counsel for the plaintiffs, it is true, acknowledges, that the privilege of the vendor is a mortgage : but maintains that it is not in-

cluded in the three sorts of mortgages, *conventional*, *judicial* and *legal*, into which the *Code* has divided all mortgages: and, in order to show that there must be *a fourth sort of mortgage*, he refers us to a definition, or quality, which he supposes will attach to all legal mortgages; *i. e.* that a legal or tacit mortgage affects all the estate of the debtor against whom it exists. But this is not true; certainly as it regards some of the tacit or legal mortgages mentioned by the *Code*, particularly as to that of co-heirs, *Civ. Code*, 457, *art.* 23, for the reasons already adduced by me, to prove that such legal or tacit mortgage is, in fact, nothing more than the privilege of the vendor of real estate. The argument then attempted to be drawn from this source by the counsel of the plaintiffs, must be considered as without foundation. And in contradiction to him, I may boldly assert, that the lien of the vendor of real estate and that of a co-heir, are not distinct in their nature and character, but perfectly analogous, if not identical; though the one is termed a privileged mortgage, and the other a tacit or legal mortgage.

All the distinctions and definitions by which it has been attempted to prove that there are

more than three sorts of mortgages known to our laws, having been shown to be unavailing; it must necessarily follow, that the title of mortgage created by an act of sale, must be ranked among legal or tacit mortgages.

To the instance already adduced from the *Civil Code*, of a vendor's privilege being termed a tacit or legal mortgage, another may be added from the Spanish law, which is still in full force; that of a minor on his real estate sold. 1 *Sala*, 385. *Part.* 5, 13, 25. Several other instances of what are termed in the *Civil Code*, *privileges*, or privileged mortgages, being denominated in the Spanish law, *tacit mortgages*, may be found in the *Curia Philipica*, 364, *Hypoteca*, *n.* 31, 32, 33 and 34. And in *Ferrari's Bibliotheca*, *verbo Hypotheca*, *n.* 1, 20.

It must appear then most satisfactorily, I apprehend, that the term *legal mortgage*, agreeably to the definition and use which is made of it in the *Civil Code*, and by the writers on the Spanish law, embraces mortgages which affect only a particular immoveable; and it should not be restricted to mortgages only, which affect the whole real estate.

We now, then, naturally arrive at the main part of the controversy. What mort-

East'n District. Jan. 1823.

TRUDEAU & AL. vs. SMITH'S SYNDICS.

gages did the legislature mean to include under "all liens of any nature whatever, having the effect of a legal mortgage?" Not those only specified in the title of the *Civil Code*, which treats of legal mortgages; for we are told, *Civ. Code*, 456, *art.* 26, that some may have been omitted in the numeration there made; and therefore, all which may have been established in other parts of the *Code* are to be added. But to these, we must add, such as existed and were established by the Spanish law; for they were never repealed. We then may safely assert, that all legal or tacit mortgages established in any part of the *Civil Code*, or known to the Spanish law, were in the view of the legislature; and that it was intended to make them all "utterly null and void to all intents and purposes, except between the parties thereto," if not recorded agreeably to the provisions of the act of 1813.

It is not barely *legal mortgages*, whether established by the *Civil Code*, or the Spanish *Jurisprudence*, that are declared to be null if not recorded; but *every* "*lien* of any nature whatever, *having the effect* of a legal mortgage." Legal mortgages, technically so termed, must be recorded; all liens also, which have the

same effect. The term *lien*, is familiar to the common law; and in its most usual acceptation signifies an obligation, tie, or claim annexed to, or attaching upon, any property; without satisfying which, such property cannot be demanded by its owner; *droit de retention.* In which acceptation of the word, the property is supposed to be in the possession of the creditor, holding it from the debtor, until the lien shall be discharged. In this sense, it is evident it was not intended to be used by our legislature, as the property to be affected is supposed to be in the possession of the debtor.

The lien of the vendor of land for the purchase-money, is well known to the common law; *Sugden's law of vendors, c.* xii. 7 *Wilson's Bac. Abridg.* 147. And has the same effect as our legal or tacit mortgage, so far, as regards the land sold; and corresponds precisely, with one of the legal or tacit mortgages specified in our *Civil Code*, 457, *art.* 23.

That the privilege of the vendor of real estate may properly be termed a lien, is apparent from the interpretation given to the term in the common law books. "*Lien*, is a word used in the law, of two significations; personal

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

lien, such as bond, covenant or contract; and real lien, as judgment, statute, recognisance, which oblige and affect the land. *Terms de Ley*"—*Jacob's law Dictionary, verbo Lien.* Such liens as these then, "which proceed from the law without any express covenant of the parties; but which is, notwithstanding, grounded on a tacit consent, which the law presumes to have been given by him, on whose property it grants this mortgage" (*Civ. Code*, 454, *art.* 15) or lien, were contemplated to be embraced by our legislature under the expressions, "all liens of any nature whatever, having the effect of a legal mortgage." Two cases, in which the vendors of real estate hold this mortgage, have been adduced by me; one from the *Civ. Code*, 457, *art.* 23, that of co-heirs; and one from the Spanish law, 1 *Sala*, 385, that of a minor, for the purchase-money of his real estate when sold.

From this view of the subject, I think it appears evident, that the legislature intended to make it imperative, on the vendor of real estate, to record the act which creates his privilege or lien, to render it valid against third persons.

A docket for the purpose of recording "*acts*

of sale, donations, judgments, *or other titles of mortgages*" has always been kept by the register of mortgages, both under the Spanish and American governments. See *Civil Code*, 467, *art.* 62. *Novisima Recopilacion*, *l.* 10, *tit.* 16, *Ll.* 1–3. And under both governments it was required that *creditors, who have a privilege* or a mortgage on immoveable property, should register their *titles* in the cases, and in the manner directed by law, in order to pursue their claim against the property in the hands of third persons. *Civil Code*, 460, *art.* 41. *Nov. Recopilacion*, *ibid.* All prudent and diligent persons, enregistered with the recorder the titles which gave them a privilege or a mortgage; particularly the vendors of real estate, as we may safely infer from the fact, that no such controversy as the present has heretofore arisen before our courts.

The interpretation which I have given to our statutes, in the above view of the vendor's privilege, brings back our jurisprudence to the same principles that existed under the Spanish law; which, in my opinion, should be considered as a corroborant argument, in favour of the intentions that I have maintained the legislature had in enacting the insti-

East'n District. *Jan.* 1823.

TRUDEAU & AL. *vs.* SMITH'S SYNDICS.

tutes of 1810 and 1813. As a general principle of the Spanish law, the vendor of real estate held *no lien* or *privilege* on it, when sold on credit, except where a mortgage was expressly reserved and duly recorded.

"*Si al fiado fue vendida la cosa, no se tiene en ella ni en su precio la prelacion del dominio por la deuda de su precio, despues de la tradicion, ó posesion, por transferirse por ella el dominio en el comprador, y mediante el derecho en sus acreedores, segun una ley de Partida, y unos textos del derecho civil, y lo tienen Bartulo, Baldo, Angelo, y Alexandro, y comunmente los Doctores. Y en duda, entregandose la cosa vendida al comprador, es visto haber fé de precio, ó ser al fiado, sino es que el vendedor pensase que luego se le habia de pagar, como lo dice Gregorio Lopez.*" *Curia Philipica*, 415, *Prelacion*, *n.* 8.— "If any thing has been sold on credit, the vendor has no privilege on it for the purchase-money, after a delivery of the possession; because thereby the dominion over the thing was transferred to the purchaser, and by law to his creditors; according to a law of the Partidas; several texts of the Roman civil law; the opinions of Bartulus, Baldus, Angelus, Alexander, and generally of the learned. The delivery of possession, in a doubtful case,

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

would be considered as proof of a sale on credit, unless it was understood that payment was to be made immediately." See *Part.* 3, 28, 46.* *Febrero, part* 2, *l.* 3, *c.* 3, § 2, *n.* 186, 7. *Salgado, in Labyrinth. Credit. part* 1, *c.* 14, *n.* 78. *Nov. Recop. l.* 10, 16, 1–3. *Pothier, Contrat de Vente, n.* 318, 322, 3.

How far the counsel of the plaintiffs is supported, in considering the privilege of the vendor of real estate of the most sacred character, may be easily inferred, after a consideration of the above cited authorities. No such privilege, as he contends for, was known to the laws of Spain or Rome; and if this novel privilege was introduced into our jurisprudence by the *Civil Code*, it was repealed by the statutes of 1810 and 1813. No one instance of enforcing such a privilege, can be produced from the records of our courts, and I trust there never will be.

I have disposed of the principal obstacle raised against the validity of Morrison's mort-

---

* This law has been considered as now in force by the two gentlemen, appointed by the legislature, to translate such parts of the Partidas as are law. I am happy to find my argument supported by their unbiassed judgment. Should the opinion of the court coincide with us, the controversy which has arisen in this cause, may be easily decided.

East'n District. *Jan* 1823.

TRUDEAU & AL. *vs.* SMITH'S SYNDICS.

gage. I will now briefly answer the minor objections, which have been made to it.

It is said, that no mortgage is expressly stipulated in the act of writing made between the parties; and that the sum for which the mortgage is supposed to be made, is not certain and explicit. From the proof, in the statement of facts which comes up with the record, it is shown that apt and legal words are used in the instrument for constituting a mortgage, agreeably to the manner of forming such contract in the state where it was made. The intentions of the parties is very manifest from the words which they have used: and they were no more bound to use any technical expressions and phrases, than they were to confine themselves to a particular language. The words of the English language, which the parties have used, admit of no doubt in the mind of any one acquainted with it, as to the meaning of the contract which they intended to form. Equally clear is the writing, in showing that a sum certain and explicit, was agreed upon as to the amount of the mortgage; which was stipulated to secure the payment of a promissory note of $15,000, given by Smith to Morrison, for which, when paid, Morrison was

to account for, in the manner stated in the contract.

In short, the contract is precisely such an one as has been recognised as valid by the decisions of this court: *Bacon* vs. *Phelan*, 4 *Mart.* 88. *Le Fevre* vs. *Boniquet's Syndics*, 5 *Mart.* 481: it was recorded before any other mortgage in the office of the parish judge, of the parish where the land is situated; and therefore, it should be paid, in priority to every other claim. out of the proceeds of the plantation of the insolvent.

Hawkins, for the claimant Morrison. On the 8th day of October, 1816, Trudeau conveyed to John Kelty Smith, the land and slaves, the proceeds of the sale of which, is involved in the present controversy.

The deed of sale was executed before the judge of the parish of St. James, the land and slaves sold and conveyed being situate in the parish of St. Charles.

The deed, from Trudeau to Smith, was not recorded in the parish where the property is situate until the 17th March, 1821, several years after its execution, and not then le-

East'n District. Jan. 1823.

TRUDEAU & AL. vs. SMITH'S SYNDICS.

gally admitted to record, wanting the order of the judge for that purpose.

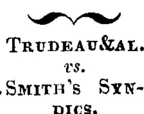
Upon examining this act of sale, it is found in the usual form, vesting complete title in the vendee Smith; and stipulating (as is uniformly done in Louisiana, where it is contemplated to give a lien on the property sold) on the face of the same deed, a mortgage on the estate in favour of the vendor Trudeau.

The purchase-money agreed to be paid by Smith, was $125,000, 25,000 in cash, and the residue in annual instalments of 25,000 dollars.

Two instalments ($50,000) were paid by Smith. In the month of March, 1821, Smith became insolvent, and failed to pay two of the remaining instalments.

After Smith's insolvency, but before the last instalment became due, Trudeau obtained an order of seizure and sale, under his mortgage stipulated in the deed to Smith; and at the sale, caused at his own instance, Trudeau became the purchaser at the price of $80,000, of the same plantation and same slaves, which he had sold Smith for $125,000.

Trudeau has refused to pay over any portion of the purchase-money, claiming to re-



tain the same in his hands, to the exclusion of all other creditors, upon the ground of his *privilege as vendor.*

James Morrison, one of the creditors of John K. Smith, has interposed a claim for $15,000, and interest for several years; and which he claims to be paid (out of the proceeds of the sale of Smith's plantation, so purchased by Trudeau,) as a creditor of the first rank. His claim is based on a *conventional mortgage* and judgment, relative to which the record exhibits the following facts.

More than two years previous to Smith's failure, Morrison having obtained a judgment against him in the state of Kentucky for upwards of $45,000, with the view to secure the payment of $15,000 of this judgment, Smith, on the 23d June, 1819, executed to Morrison the conventional mortgage made part of the record.

On the 15th May, 1820, Morrison's mortgage was duly recorded by order of the district judge in the parish of St. Charles, where the mortgage property is situate, it being on the same plantation and slaves sold by Trudeau to Smith.

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

Morrison also prosecuted his claim on this mortgage to judgment, against the syndic of the estate of John K. Smith, in New-Orleans. His mortgage was also recorded in the mortgage-office at New-Orleans, prior to its being recorded in the parish where the property is situate.

At the date of the mortgage executed by Smith to Morrison, the latter had obtained the judgment for $45,000, and which judgment was afterwards confirmed by the supreme court of the state of Kentucky, as appears by the decree of that tribunal, also made part of the record before this court.

At the date of the sale of Smith's plantation, when Trudeau became the purchaser, Morrison's was the only mortgage recorded in the parish where the property was situate, and was so certified by the recorder of mortgages for that parish.

Shall Trudeau retain the whole purchase-money bid by him for Smith's plantation and slaves, upon the ground of his *privilege as vendor?* Or, shall he be decreed to pay Morrison $15,000, with interest and costs, upon the ground that Morrison's conventional mort-

gage, recorded in the manner pointed out by law, secures priority of payment?

Pursuing the order marked out by the opposing counsel, I will examine, first, the nature of the vendor's privilege upon the real estate and slaves; and then the validity of the conventional mortgage relied on to support the claim of Morrison.

I. As to the nature and effect of the vendor's privilege. In Louisiana, as far back as precedent furnishes a guide, it has been customary where the vendor was disposed to retain a *lien* on the estate sold, in the same instrument, by which he passes the title, to stipulate a *mortgage* for the purchase-money remaining unpaid. This mode of proceeding is peculiar to ourselves. For in our sister states, the usage has been, first to pass by one instrument, title to the vendee; and then by a separated deed, executed by the vendee, mortgage and hypothecate the estate to the vendor.

The deed from Trudeau to Smith is such as was usual, and contains alike the clauses of *sale*, *enfeoffment* and *warranty* of title, vesting it fully and to every legal intent in Smith. Nor do the subsequent clauses of hypothecation in the same deed at all weaken

East'n District. *Jan.* 1823.

TRUDEAU & AL. *vs.* SMITH'S SYNDICS.

the validity of the the title vested in Smith. Accompanied, as it was, by delivery, it was as perfect as our laws could make it.

In treating of the property in the thing sold, it is declared, "If a man deliver a thing into the possession of one to whom he had sold it, and the buyer had not paid the price, nor given any security, or pledge, nor stipulated any term for payment, the property in the thing sold will not pass to the buyer, until he had *paid* the *price* therefor. But if he had given any *security* or *pledge* for the payment of the *price*—or had *stipulated* a *term* therefor, or if the seller had *trusted* to him for the payment of it—then the property in the thing will pass by *delivery*, notwithstanding the price *has not been paid*, and the purchaser will remain bound to pay for it thereafter."—*Partida*, 3, *tit.* 28, *l.* 46, *Moreau and Carlton's translation.*

Thus we find our laws recognising, in its fullest extent, the validity of the title passed from Trudeau to Smith.

If this law be sound, then Smith had the right to mortgage, sell, or dispose of this estate to third persons in any manner he thought proper. And the title by which he acquired this estate, is just such as are in daily use.

with which our citizens are most familiar, and the nature and effects of which they most distinctly comprehend.

No right or title can be vested in real estate or slaves, but by writing. *Civil Code*, 310, *art.* 241. No mortgage, verbally stipulated, is good, nor can one be created but by writing. *Civil Code*, 452, *art.* 5. These laws were known and familiar to the proprietors of estates, at the date of Trudeau's sale to Smith. They seem to have recognised the force of these principles, and hence, you find their deed of sale drawn in the usual form, vesting title in Smith, and "*hypothecating* and *mortgaging*" the estate sold for the purchase-money.

All these, however, say the able counsel of Trudeau, were acts of supererogation; that the hypothecary clauses, by which Trudeau obtained a *mortgage*, were nullities; and that neither the contracting parties, nor the judge drawing the notarial act, understood their *rights*, or their *duties*—nor did the vendor need the clauses of *mortgage* in his deed to Smith.

It is not surprising that this ground is taken, for, only let this deed from Trudeau to Smith be deemed, what the parties knew and stipu-

East'n District. Jan. 1823.

TRUDEAU & AL. vs. SMITH'S SYNDICS.

lated it was, a *deed* of conveyance, with *mortgage* upon the estate sold, to secure the purchase-money, and there is no longer any ground for controversy. For the counsel for Trudeau has had the candour to admit, that, if their deed be a *mortgage*, as relates to the vendor, his rights are gone; for he has failed to place his mortgage on the records of the parish, necessary to its validity, as regards third persons.

But let us deem the stipulations of *mortgage* in this deed, as mere surplusage; and then test it by the principles of law already quoted, will it support the doctrine of privilege contended for by Trudeau's counsel?

It has been already shown, by authority from the *Partida*, if the purchaser give any *security* or *pledge* for the payment of the price, or *stipulate* a *term* therefor, or if the seller *trusts* for the payment, then the *property* in the thing *passes* by *delivery*, notwithstanding the *price* has *not been paid*. Suppose the deed from Trudeau to Smith was an ordinary deed of conveyance, without stipulations of mortgage, and stating, "that for and in consideration of $125,000, secured to the vendor by the six promissory notes of the vendee, payable in

yearly instalments; would the vendor still have retained his lien, by way of privilege, against subsequent purchasers or mortgagees?

If this doctrine were to prevail, it not only prostrates the authority of the *Partida*, but involves an absurdity, in requiring of purchasers of property impossibilities.

To whom must subsequent purchasers look for information, as to whether the purchase-money, for an estate sold on credit, has been paid?

He can look alone to the possessor of the estate with whom he contracts; and if he be a corrupt man, by exhibiting feigned vouchers of payment, or collusion with *his vendor*, he may receive the full value of an estate from an innocent third purchaser, and then wrest the property from him, upon the ground that the original purchase-money had not been paid *the prior possessor* and *vendor.*

It was to prevent frauds like these, that our legislature have required, all liens to be recorded where the property is situate.

How often is it the case, that the original vendors of property, sold on credit, reside in foreign countries. Adopt the principles contended for by the opposite counsel, and no

East'n District. *Jan.* 1823.

TRUDEAU & AL. *vs.* SMITH'S SYNDICS.

man would be safe in purchasing property, once sold on credit, until he had pursued all former vendors, whatever be their distance or place of abode, to ascertain if they had been paid the purchase-money, stipulated for. It was to obviate evils like this, that our legislature have declared, that all liens, not recorded in due time where the property is situate, shall be void as to third persons.

Let us follow the opposite counsel back to the *Civil Code*, and it is not believed, he has there found for his client, a shelter free from difficulty, or one entirely satisfactory to his own vigilant and discriminating mind. He protests against the deed, of his client to Smith, having secured the benefit of a

1st. Conventional mortgage.

It is not pretended that it is a

2d. Judicial mortgage.

Nor will he permit it to be considered a

3d. Legal or tacit mortgage.

Our *Code* proceeds, under another view, to the divisions of *simple mortgage* and *privilege mortgage*, *general mortgage* and *special mortgage*; and the opposite counsel is equally unwilling to permit his clients' stipulations of mortgage in the deed to Smith, to give it the character

of either simple mortgage, privilege mortgage, special mortgage, or general mortgage.

For, although in one part of the argument he seems to consider the *privilege of the vendor*, and *privilege mortgage* as convertible, and they are, by the *Civil Code*, made one and the same thing; yet finally, he takes the only position which even furnishes argument, and declares, "*we contend that we have a privilege. Our lien on the land is prior to all mortgages, whatever be their date.*"

It was found necessary to take from this instrument (and this too in despite of its covenants) every feature which would give it the character of even a *privileged mortgage*; notwithstanding the *Code* (*p.* 456, *art.* 29,) says "the *privileged mortgage*, or as it is otherwise called, the *privilege*, is that which derives from a *privileged cause*, which gives a preference over the creditors who have only a simple mortgage, though of a prior date.

"Such is the privilege of the vendor, who has the preference over every other creditor, for his payment, on the real property he has sold."

Were we confined, in our views of this subject, to the *Civil Code* alone, it would be difficult to discover the ground of this solicitude

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

to take from the writing, on which the plaintiff relies to support his claim, even the character of a *privileged mortgage*. But the difficulty is removed, the moment we turn our attention to the statute of 1810, passed two years after the adoption of the *Code*, where it is declared—

"*No iustrument, stipulating a mortgage,* shall have *any effect against third persons*, except from the *day* on which the same shall have been *recorded* in the office of the judge of the parish, where the hypothecated property is situated." 3 *Martin's Dig.* 138, § 4.

It has not been contended, that the *privilege of the vendor* cannot be *stipulated* in the act of sale. On the contrary, the counsel for the plaintiff has acknowledged that, "*It is a privilege which must appear manifest on the act of sale itself. If the seller acknowledge, in the act, that he has received the price in the presence of the notary, or out of it, with the proper renunciation of the exception of* non numeratæ pecuniæ *then there is an end of the vendor's privilege.*"

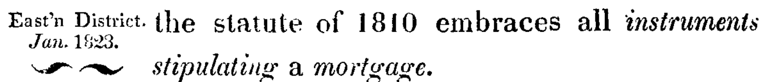
Let us strike out of the deed from Trudeau to Smith, all the stipulations of mortgage and hypothecation, or rather, to meet the views of the opposite counsel, let them be convert-

ed into mere *stipulations* of the vendor's *privilege*—the *privilege* of the vendor being declared by the *Civil Code* to be nothing more nor less than the *privilege mortgage;* and the subsequent statute (1810) having declared, that *no instrument* stipulating a *mortgage* shall have *any effect* against third persons, except from the day on which the same shall have been *recorded* in the office of the judge of the the parish where the hypothecated property is situated, it appears to my mind, that the counsel for Trudeau has but one possible alternative to escape the imperitive operation of this statute—and that is, by proving to the court, that a *privileged mortgage* is *no mortgage at all.*

We have shown by the provisions of our *Code*, that title to land and slaves cannot pass without *writing*—that no mortgage can be created but by *writing*—that the privilege of the *vendor* is nothing more nor less than the *privilege mortgage.*

Our adversary has shown, that the privilege of the vendor must be expressly *stipulated* on the face of the deed, or there is an end of the privilege. To stipulate it, gives it at once the character of a *privilege mortgage*, and then

East'n District. *Jan.* 1823.



TRUDEAU & AL. *vs.* SMITH'S SYNDICS.

the statute of 1810 embraces all *instruments stipulating* a *mortgage.*

It is in vain to say, that the legislature did not contemplate including the vendor's privilege, because the *Civil Code* was then before them, and they saw that this privilege was, in fact. the *privilege mortgage;* and it was one of the cases contemplated, and expressly embraced, by that act.

If any doubt remained, it would be removed by a subsequent section of the same statute, which declares, "No *notarial act*, concerning *immoveable property*, shall have any effect against *third persons*, until the same shall have been *recorded* in the office of the judge of the parish where the immoveable property is situated." 3 *Martin's Dig.* 140, § 7.

This little section imposes on the counsel of the plaintiff, not only the task of establishing the deed from Trudeau to Smith to contain no stipulations of *mortgage*, but he must also show, that it is not a *notarial act*, and that it does not concern *immoveable* property.

Upon this subject our legislative body were influenced by the dictates of common sense, and have exercised that soundness of judgment calculated to put down all

controversy, and to remove all doubt as regarded the recording of instruments affecting real estate. They saw the *Civil Code* crowded with privileges of various kinds—they saw too, perhaps, what the opposite counsel acknowledges to have existed, some confusion in the *Civil Code*, as to the several mortgages; and, after first speaking of all instruments stipulating a mortgage, they then engraft a section, declaring, "that no notarial act *concerning* immoveable property," &c. The word "concerning," here employed by the legislature, gained in comprehensiveness, though it lost in technicality; evidently intending, and actually embracing every description of writing which could, in any wise, affect real estate.

Were it not for the *seeming* importance which the plaintiffs have managed to give this cause, the counsel for Morrison might be permitted to rest the argument here, relying upon the positive provisions of a statute for protection of his rights. We are told, however, that this statute does not embrace *instruments* stipulating a *lien* or *privilege* in favour of the vendor.

This view of the subject might well have been anticipated, for nothing is more natural

to counsel, in a bad cause, than to *meet* the force of authority, by protesting against its applicability.

Let us see if the interests of our client will not find additional protection, from a second statute.

The value of all laws and systems, can alone be tested by their application to the practical operations of society.

However admirable our system, as regards *mortgages* and *privileges*, it was not only competent, but the duty of the legislative body, to prescribe the performance of certain duties to those claiming the benefit of *either*. They have done so; and in the construction of these statutes, we need only resort to the well established rules of interpretation, and inquire—What was the *evil* contemplated to be *remedied?* What was the new *duty* required to be *performed?*

Prior to the statute of 1810, the evil was, the door opened to fraud in keeping secreted from public inspection liens on real estate and slaves. Without altering the nature of the lien—without taking from it, its *full force* as between the *contracting parties*, the legislature simply imposed the duty of causing the

intsrument stipulating the lien to be recorded where the property was situated, to give it any validity as regards *third persons*: and they supposed, at the moment, they had gone far enough. But between the year 1810 and year 1813, new difficulties arose—new evils presented themselves. It was, in fact, only about that period that the abstract principles of the *Civil Code*, began to be tested by experience, and the adjudications of the supreme court.

What were the evils which the legislature of 1813 was called on to remedy? They arose in permitting a long list of liens, arising from legal or tacit *motgages* and *privileges*, (having their existence only in the private *contracts of the parties*, and the discharge of *duties* in the *administration* of estates, &c.) to operate upon property, to the prejudice of *third persons*, who had no knowledge of the existence of these *liens*.

No unbiassed mind can read this latter statute without, at once, coming to the conclusion, that the legislature contemplated to embrace, and, in fact, has embraced, every possible case in which real estate and slaves

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

can be affected by *liens* of any description whatever.

They first begin with a special enumeration of cases, and say—

1*st*. *All securities to be furnished by tutors.*

2*d*. *Administrators of estates,*

3*d*. *Curators,*

4*th*. *Executors,*

5*th*. *Guardians,*

6*th*. *Officers of the government,*

7*th*. *By persons employed in public service.*

8*th*. *All sales of slaves or lands by sheriffs,*

9*th*. *All marriage contracts,*

10*th*. *All final judgments,*

11*th*. *All awards confirmed by judgment,*

12*th*. *All marriage contracts made out of the state, where the parties move here to reside,* "*shall be recorded,*" *&c.*

Where lands or slaves are affected, the recording to be in the "*parish where they are situated.*"

"And all sureties, sales, contracts, judgments, sentences or decrees aforesaid, and all *liens of any nature whatever*, having the effect of a legal mortgage, which shall not be recorded agreeably to the provisions of this act, shall be utterly null and void, to all in-

tents and purposes, *except between the parties thereto*." 3 *Mart. Dig*. 700.

We are told, however, that this statute is a mere nullity—that it has no application—that the *liens* embraced by it, are liens having the *effect* of a *legal mortgage*, and that the plaintiffs' is no legal mortgage, but purely a *privilege*. And by way of *repealing* authority, we are carried back five years, to the following article in the *Civil Code*:—

"*Privileges* on moveables as well as immoveables, and *legal mortgages*, have their effect even against third persons, without any necessity of being recorded." *Code*, 464, *art*. 54.

There is but one way in which the plaintiffs' counsel can avoid the force of this statute, and that is, by establishing to the satisfaction of the court, that his *privilege* is no *lien*; for if his privilege be a lien, then, to use his own forcible language, the "rights of the vendor are gone."

It is not a very pleasant task to pursue a discussion into the mazes of technical refinement, but it must in this case be done, if from no other consideration, than that of respect to the talents so gravely employed in leading on the discussion.

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

There is a distinction between *liens* and *privileges*. All liens cannot be reduced to the head of privilege. But it is difficult to conceive of a privilege affecting real estate, that would not be considered a lien. Few words are employed, even by lawyers, so comprehensive in their nature, as that of *lien*. "It is a word used in *law* of two significations; personal lien, such as bond, covenant, or contract; and *real lien*, a judgment, statute, or recognisance, which affect the land." *Terms de ley.*

It signifies an *obligation*, *tie* or *claim*, annexed to, or *attaching upon* any property. *Jacob's Law Dict. tit. Lien.*

A lien then is produced by *bond*, *covenant* or *contract*, by *judgment*, *statute* or *recognisance.*

The costs of an attorney are a *lien* upon the deeds or papers in his hands, (and their liens naturally present themselves as the *first* in order.) The factor has a lien upon the goods in his hands, for any balance due him from his principal. The common carrier has a lien for his charges. In Louisiana, parish judges have a lien upon the estate in their hands, for all fees, charges, &c. It would occupy unnecessary time to enumerate all ou

specific liens. The whole list of mortgages and privileges, known to our law, are considered liens, and so treated in the *Code*.

In the very definition of mortgage, (*Code*, 452, *art.* 2,) they are spoken of as producing a *lien* on the things subjected to their operation.

That privileges are considered liens, the opposite counsel has relieved us from the necessity of supporting by any other than his own authority; for he has told us, in the commencement of his argument, "The right of the seller of immoveable property, to his *lien* upon it for the price unpaid, can hardly be taken away or impaired, without violating the principle of property itself."

And again, in the same page, he repeats, "The vendor's *privilege*, on the thing sold, is not one of those *liens* which requires to be recorded in order to be preserved."

Still keeping in view the true character of his privilege, he adds, "Our *lien*, on the one hand, is prior to all mortgages, whatever might be their date."

Had the learned counsel been a member of the legislative body, in the year 1813, he would, no doubt, have been called on to pen

East'n District. Jan. 1823.

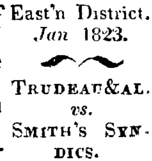
TRUDEAU & AL. vs. SMITH'S SYNDICS.

the statute before us; and unless the views he now takes of the nature of *privilege* and *lien* be altogether unsound, he would have employed the very language of the statute. And upon reviewing and scrutinizing his labour, he would have had abundant cause of self gratulation in the comprehensiveness of the terms employed; for he would have found no *lien* could escape their operation; no, not even a *privileged lien.*

But, we are again met by another argument, in which we are told, that the privilege of the vendor is not embraced in this statute; because, after the words "and all liens of any nature whatever," the legislature have added the words "*having the effect of a legal mortgage.*"

Now, although we have not urged that the *privilege* of the vendor is a *legal mortgage*, I think we may with great propriety urge, that the privilege of the vendor, is one of *those liens*, having the "*effect of a legal mortgage.*"

The *Civil Code, art.* 54, *p.* 464, before referred to, declares them to have precisely the same effect; which is, "that both privileges and legal mortgages have their *effect* against third persons, without being recorded."



The opposite counsel will not complain of this argument, because, if his lien has not the effect of a legal mortgage, it is not worth a straw. But we are urged to press the argument much farther, and to come to the conclusion, that because the legislature speak of "All liens, of any nature whatever, having the effect of a legal mortgage" they therefore mean, none but liens given by *legal mortgages*; and the plaintiffs' not being a *lien* by legal mortgage, but purely a *lien* by privilege; consequently, his lien is not embraced in the terms "all liens of any nature whatever."

I leave my adversary in the full enjoyment of the benefits likely to flow from such premises, and such conclusions.

We do not presume too much when we say, our client's rights find full protection in the letter, as well as the spirit of the laws, to which we have adverted.

The reason and policy of the law, and justice of the case, is also with us. No difficulty or confusion, could have arisen under the provisions of our *Civil Code*, but for the introduction of the 54th *art.* before referred to, giving effect to privileges and legal mort-

East'n District
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

gages against third persons, without requiring them to be recorded.

It was a provision, which found its way into the *Code* without reflection as to its consequences, and evidently in contravention of several previous provisions. My colleague must have satisfied the court, that it was too, in derogation of the laws which existed previous to the adoption of the *Code.*

In examining the provisions of the *Code.* as to the registry of mortgages, and several others, it was clearly the object of its framers, to require the recording of both privileges and mortgages, to affect the rights of third persons.

I need only cite a single article under the head "of the effects of mortgages against the third possessor," where it is declared, "That creditors, who have either a *privilege* or *mortgage* on immoveable property, or on slaves, may pursue their claim on them into whatever hands they may happen to pass, to be paid out of the proceeds in the order of collocation, agreeably to their *privileges* or *mortgages*, provided their titles have been *registered* in the cases and manner directed by law. *Code. p.* 460, *art.* 41.

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

Is not this duty of recording, so as to affect the rights of third persons, founded on the soundest policy? Has it not received the sanction of all states with whose jurisprudence we are conversant?

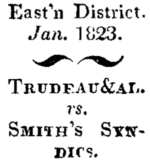
As to the evils arising from the doctrine for which we contend, there are none. The case now before the court is, perhaps, the only one that will arise; for, if any one has been so improvident as not to discharge a duty, so plainly pointed out by more than one statute, he has abundant security in now having his mortgages and liens *recorded where* the law directs. The importance of this case, therefore, is made to grow out of the wealth and influence of the family with whom we have to contend; and never had a litigant so little cause of complaint.

He sold a plantation to Smith for $125,000 —received fifty thousand dollars. In all probability, a considerable portion of the $45,000, advanced Smith by Morrison, was paid to Trudeau. When his subsequent instalments became due, that is, two of them, he seizes the estate; and under his own order of seizure and sale, becomes the purchaser—gets back

the same plantation and slaves for the balance of purchase money due him—and pockets $50,000, clear gain from Smith—a sum, sufficient in itself, to cause his bankruptcy; leaving Smith's other creditors without a cent. And yet, the sympathies of the court have been appealed to, on account of the hardness of the plaintiffs' case. The court is earnestly urged to violate the provisions of two statutes; and to do so, by giving an interpretation to the stipulations of mortgage, in the face of the deed to Smith, in direct opposition to the evident meaning of the parties.

If this instrument is no mortgage, how was it that Trudeau was so ready to seize and sell the estate, under the laws made for the benefit of mortgagees? It was a very good mortgage when he desired to sell the estate; and a still better one when it enabled him, by the amount of his own claim, to put down all opposition in bidding, and obtain the estate for the balance due him. But it becomes no mortgage at all, when he is asked to pay Morrison's debt, secured by mortgage; and that mortgage duly recorded, certified, and made known to Trudeau at the day of sale.

East'n District.
Jan. 1823.



TRUDEAU & AL. *vs.* SMITH'S SYNDICS.

But I do not impeach the sale. We only ask what the law will award; and that is, payment out of the proceeds of sale. Under what circumstances do we ask it?

Morrison finds Smith enjoying a large sugar estate; and he had then enjoyed it upwards of two years after the sale to him by Trudeau. Smith assures him that the estate is free from incumbrance. In fact, he stipulates on the face of the mortgage to Morrison, that the estate is free from all incumbrances whatever. Morrison receives the deed, forwards it to his agent at New-Orleans, who, upon examination in the general mortgage office of this city, finds no lien or mortgage on the estate, as Smith had covenanted; and there causes Morrison's mortgage to be recorded.

Finding, however, the law requiring his mortgage to be recorded in the parish where the land and negroes were, to make it valid as regards third persons, the records are there examined; no mortgage or lien in favour of Trudeau or any one else, is found; under a second order of a judge, Morrison's mortgage is again recorded; and he is now before this court, seeking only about one-fourth of the amount due him by Smith,

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

with no hope of ever obtaining a dollar should his claim be rejected.

I will say nothing as to the hardship of the case. Let it speak for itself. I will not weaken the force of the appeal.

Our attention has been called to the provision of the *Code* which declares:—

"They who have on the property which may be *duly mortgaged*, only a right either depending on a condition, or subject to be annulled or rescinded in certain cases, can only consent to a mortgage subject to the same conditions, or to the same rescission." *Code*, 452, *art.* 7.

If this principle be applicable to the covenants, creating a mortgage in Trudeau's deed, we have at hand a conclusive answer.

The law, for wise and good purposes, has declared, that if you sell your estate, and retain *liens* on it by conditions in your deed of sale, you shall give notice to the community, of the *conditions* on which you have sold your estate, by spreading your deeds on the records of the parish where your property lies. In other words, that you shall not be accessory to gross frauds, by giving an apparent wealth to your *vendee*, in the possession and enjoy-

ment of a large estate, and by which, at some distant day, you are, through the agency of *secret liens and conditions*, to ruin innocent and *bona fide* third purchasers. The very object of the law in requiring the recording of liens affecting real estates was, that subsequent purchasers and third persons might, by looking at the public offices of record, there see the *conditions* on which estates are held; and then the force of the principle, from the *Code* just cited, would have its full effect. The article to which our attention is called, speaks too of "property which may be *duly mortgaged*," and no property can be duly mortgaged as regards *third persons*, without being *duly recorded*.

Our adversary attaches a much more sacred character to his privilege, than the *Code* from whence he draws the doctrines that govern it. He speaks of it as being blended with the very principle of property itself.

We find several instances, where the privilege of the vendor is lost, even though the property remain in the hands of the vendee.

"When for want of moveables, the creditors who have a privilege (on real estate) demand to be paid out of the proceeds of the immoveables, in concurrence with the credi-

tors who also have a privilege on said immoveables, the payments must be made in the following order:—1st. *funeral charges;* 2d. *law charges;* 3d. *charges* respecting *medical* attendance, *physician*, *druggist*, &c.; 4th. the *salaries* of the persons who lent their services during the last year, or what is due on the current year; 5th. the *price of the subsistence* furnished to a *debtor*, and to his *family*, during the last *six months*, by traders in retail, as *bakers*, *butchers*, and the *like;* and during the last *year* by *tavern* keepers and *boarding houses*." *Code*, 468, *art.* 73, 470, *art.* 77.

And then comes the privileges of the creditors, mentioned in the 75th *art.* of the *Code*, same *page*—to wit, the *privilege* of the *vendor*.

Here you find a long list of claims, in some cases sufficient to exhaust the whole proceeds of sale of a plantation of inconsiderable value, actually preferred and paid, prior to the vendor of the same estate.

And why is this done? For the reason already urged, that the possession of the estate gives those who hold it a credit with society, which the law will not permit to be abused.

In treating of donations it is declared that,

"where there is a donation of property susceptible of *mortgage*, a transcript of the act containing the donation, must be made within the time directed for the transcript of mortgages, in a separate folio book, &c.

"The want of transcription, may be pleaded by all persons concerned; except those who were charged to cause the transcription, or their assigns, and the donor." *Code*, 222, *art.* 62–64.

In treating of the duties imposed on beneficiary heirs, who claim with the benefit of inventory, the law provides, that after the usual advertisements, if the heir pay even ordinary creditors, and there be an insufficiency of funds, *privileged* or *mortgaged* creditors, who have not presented their claims, lose the benefit of their liens; even though on the very estate sold, and out of which ordinary creditors have been paid. *Code*, *p.* 170, *art.* 113.

And why is this inroad made upon what our adversary would deem, the sacredness of his privilege? Simply because the law requires; that he who claims by privilege, should within a given time exhibit his lien, and cause it to be enforced, or let other creditors controvert

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

its legality; and having failed to do so, the law deems it a nullity. Is this law less binding? Is its reason, or the policy on which it is founded, less forcible, than the positive and repeated provisions of our statutes, requiring the recording of all notarial acts, mortgages, and liens affecting real estate, to give them validity against third persons?

By adverting to the decisions of our supreme court, they will be found to sustain the principles for which we contend.

The first, is that of *Lafon* vs. *Sadler*, 4. *Mart. p.* 476. There the lien supported was that of privilege, resting purely on the rights of the plaintiff as a builder. His lien was not created by writing. No writing was, in fact, necessary. The law created the lien when the work was performed; and the court very properly decide, that expressing the terms of the contract in writing, or by notarial act, could not strengthen the privilege which already existed. But the chain of reasoning evidently shows, that if the lien in that case (as in this) had been created by *writing*, and that not recorded as directed by law, the lien would have been void, as to third persons.

This case was decided by the court in

East'n District.
Jan 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

June, 1816. In the ensuing session we find that body again employed on this subject; and their principal object was to remedy the evil growing out of liens secured to builders of houses, ships, &c.; and they require, "That in all claims exceeding $500, no architect, undertaker, or other workman, shall enjoy with regard to a *third party*, any privilege or legal mortgage, on any immoveable property, ship, vessel, or water-craft, on account of any work, furniture, building or repairs; unless they shall have entered into a written contract, and which shall be recorded by the recorder of mortgages, parish judge," &c. *Sess. Acts*, 1817, 122, § 7.

Thus we find the legislature, from time to time, legislating with the express view of closing the door against the evils of which we complain.

If it was sound policy to give the world notice of liens on buildings and ships, where the sum demanded only amounted to $500, by causing the lien to be recorded; how much stronger the reason for requiring the vendor to record his lien, where it is not unusual to give long credits, and where estates are

East'n District.
Jan. 1823

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

frequently sold for sums amounting to princely fortunes?

They have so legislated, and by as many as three distinct statutory provisions, all made in relation to real estate and slaves; and passed since the adoption of the *Code.*

The section of the *act* of 1817, just referred to, shows most conclusively also, the intention of the legislature when speaking of *legal mortgages* and *privileges.*

They were evidently deemed one and the same, and hence the use of the words, "No architect, undertaker or other workman, shall enjoy with regard to a third party, any *privilege* or *legal mortgage* on any immoveable property without recording," &c.

The case of *Millaudon* vs. *New-Orleans Water Company*, (11 *Martin's Rep.* 278,) comes next in order. There the privilege was claimed on a moveable, to wit, an engine, and enforced upon a provision of the *Code*, in regard to moveables, but in no wise whatever affecting the case now before the court.

The next case is that of *Jenkin's* vs. *Wilson's Syndics*, where the court are called on to decide the rights of the builder claiming a privilege.

Not a *non-recorded* privilege; for the contract upon which his lien was founded had been recorded; and that too, by order of a judge. But the omission was, that it had not been recorded *within ten days.*

I cannot serve my client more essentially, than by using the strong illustration of his rights, furnished by this court in the case just referred to.

"In *Lafon* vs. *Sadler*, 4 *Martin*, 476, (say the court,) we held that the *notarial act* was only the evidence of a fact, from which the plaintiffs' privilege resulted; in the present case, the writing is of the very essence of the appellees."

"Lafon having built Goodwin's house, had *ipso facto*, by law a tacit *lien*, (and here too the supreme court deem *privilege*, just what the opposite counsel does, a *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.

East'n District.
Jan 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

"Here the plaintiffs' *lien*," (it is unfortunate for the plaintiff that the court go so often hand in hand with the legislature in the application of *lien*, to what the plaintiffs' counsel must have purely *privilege*, or his client will have nothing) "is not independent from the writing; for the *writing* is the very *essence* of it. Here the writing is essential to the plaintiffs' recovery, and the defendant may resist its introduction, *unless* it *has been recorded according to law*." *Jenkins* vs. *Wilson's Syndics*, 11 *Martin*, 436–7. And the court decreed the writing null, solely upon the ground that it was not recorded *within ten days*. What additional authority does Morrison's case require?

It has been admitted by the opposite counsel, that Trudeau's "*privilege must appear manifest upon the act of sale itself*." If this be correct, and no rational mind can question it, then it is "*created*" by the *act of sale;* and consequently, in the language of this court, "the plaintiffs' lien is not independent from the writing; for the writing is of the very essence of it."

The lien of the builder was a *privilege*. The lien of the vendor, say the counsel, is a

privilege. The statutes require both to be in *writing*—both to be *recorded.* Shall the failure to record, as the law prescribes, be fatal to one, and yet furnish protection to the other?

The second branch of the subject, the *nature and validity of Morrison's mortgage,* presents itself.

It is a mortgage executed in the state of Kentucky, familiar to the laws of that state; and its execution duly authenticated conformably to the act of congress. *Ingersol's Dig.* 77.

Neither the execution nor authentication of this instrument, however, have been controverted by the opposite counsel; but its effect is attempted to be shaken upon two grounds:

1st. That it is a conditional or defeasible sale and no mortgage.

2d. That it is uncertain as to the sum of money secured.

That it is purely a mortgage, the whole nature of the transaction, as well as the instrument itself, conclusively shows. It is in the usual common law form, except as to conditions of re-entry, grown into disuse by the interposition of courts of equity; furnishing on the one

hand, the equity of redemption; and on the other, the right of foreclosure by seizure and sale; both, features familiar to the laws of Louisiana. And we shall be aided on this subject by the fact, that there is no essential difference in the principles recognised by courts of equity in our sister states (as regards mortgages) and the courts of this state. The only difference is, that here the mortgagor remains in possession of the property mortgaged, whilst in other states, they not unfrequently surrender the use of the mortgaged property to the mortgagee, and especially when the security given is slender. President Pendleton has told us, that in Virginia, (where the system of jurisprudence is the same with that of Kentucky,) "In recurring to the nature and principles of mortgage, they were borrowed from the *Civil law*," 1 *Wash. Rep.* 19; and for the nature of this mortgage, see *Powel on Mortgages*, and the precedent there given.

There is a strong and marked distinction between a conditional or defeasible sale, and mortgage. In the former, an actual sale must take place; founded upon a consideration paid. (and this consideration must bear some proportion to the value of the estate

sold, to escape the imputation of fraud) coupled with *condition*, that if the money be not repaid on a given day, then the right to become *indefeasible*.

The mortgage, on the other hand, is a deed of conveyance, *for the security of money*, vesting the right and title in the mortgagee, but conditioned to be void upon the faithful payment of the money secured; and if the money be not paid, then the right of foreclosure attaches to the mortgagee, and the equity of redemption to the mortgagor.

In examining instruments of both description, whatever be the peculiar language employed in the contract, the essential and governing rule of interpretation is, *the real object of the contracting parties*. 1 *Call Rep*. 280–7. 2 *Call Rep*. 429. 1 *Hardin's Rep*. 6. And a mortgage has ever been considered in the nature of a "security for money." 1 *Bibb.Rep*. 528. The deed from Smith to Morrison, stipulates a mortgage, and must therefore be considered as a *security for money*.

In adhering to the rule, that the "true intention of the parties should govern such contracts," the courts of sister states, as well as this tribunal, have adjudged deeds of sale

East'n District. *Jan.* 1823.

TRUDEAU & AL. *vs.* SMITH'S SYNDICS.

without condition, and vesting complete title, to take the rank only of mortgage securities, and permitted the introduction of other testimony, to establish the object of the parties, in the execution of the writing. 1 *Wash. Rep. Ross* vs. *Norvell*, 14 ; *Barron* vs. *Philan.* 4 *Mart.* 88. Is there any thing in Morrison's mortgage bearing the semblance of sale, *defeasible* or *indefeasible ?* What, sell a large sugar estate and seventy slaves, purchased by Smith at the price of $125,000, to Morrison for the sum of $15,000 ! ! !

According to the authorities just quoted, if the instrument had not stipulated a mortgage but had purported to convey perfect title, this court would have decreed the title void, in favour of either Smith or his creditors, could it have been established by *other testimony*, that the *positive* sale was only intended as a *security*.

Shall Morrison be in a worse condition by having in good faith obtained, what was contemplated to be given, a mortgage, stipulating the same as a *security* for his debt ?

But how is our adversary to be benefitted by making this a defeasible deed ?

It will greatly oblige Morrison to have it so

East'n District
Jan 1823.

TRUDEAU&AL.
vs.
SMITH'S SYNDICS.

considered; for Smith having failed to pay the $15,000, on the day appointed, the deed lost its defeasible character, and the estate became completely *vested* in Morrison; and, as the opposite counsel insists on it, we pray of this court to decree us the restoration and enjoyment of our property.

As to the second objection, that Morrison's mortgage is not sufficiently certain, the argument is answered by an attentive perusal of the instrument itself.

The express sum secured is "fifteen thousand dollars;" it was not to be enlarged or diminished, nor was the sum secured in any way to depend on subsequent events. The subsequent stipulations in the mortgage, are altogether personal, as to Morrison. The $15,000 was to be paid on a given day; and if not paid, the benefit of a foreclosure, by order of seizure and sale, at once attached to Morrison. No covenant is introduced affecting this sum, or the *lien* given to secure its payment. And that the payment was to be enforced through the lien, if Smith did not pay at the day fixed, is strengthened by the subsequent stipulation, that Morrison was to *refund* any amount received from Smith, should

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

the surpreme court of Kentucky decree a less sum than the 15,000 dollars.

How could he refund unless he had first received? And it was to secure the *receipt*, that the mortgage was given.

If any doubt could be entertained on this subject, it is removed by authority from *Bibb's Reports*, as to what constitutes uncertainty in a mortgage; and by the testimony of judge Turner who deposes as to the validity and force of this mortgage, according to the laws where it was made. See 4 *Bibb's Reports*, 288.

Morrison's having obtained his judgment for $45,000 prior to his mortgage, produced certainty as to that sum. Nor was this certainly weakened by the confirmation of this judgment by the supreme court of Kentucky, and this too, prior to the pretended recording of Trudeau's mortgage.

It has, however, been urged to the court that, as regards real estate, our courts will not permit it to be affected in any other, than the manner pointed out by our own laws. Fortunately for our client, it is not at all necessary to controvert this position; the laws of this state, and those of Kentucky where the mortgage was executed, agreeing

in every essential, requisite to the validity and force of this mortgage.

There, mortgages cannot be created but by writing. Such is the law here. Nor can the mortgage have effect against third persons, unless duly executed and recorded as the law directs. Such is the law here. There, the intention of the parties, as to the nature of the instrument, is the governing rule of interpretation; such is the law here.

It will not be seriously contended, that parties, competant to contract, cannot execute a mortgage in a sister state on property in this. This would go to vacate all contracts made out of this state; for, what is this mortgage but a contract?

This court, as also the tribunals of justice throughout the union, are in the daily practice of enforcing contracts made out of the state, where their execution is decreed; and no principle is better established, than that they will be enforced as to their *nature* and *effect*, according to the laws of the state *where made*. 3 *Dallas*, 370. See *Lynch* vs. *Postlewaite*, 7 *Mart.* 70; 1 *Gallison*, 371; 7 *Martin*, 352; 1 *Peter's Rep.* 74; *Morris* vs. *Eve*, 11 *Martin*, 730.

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

All that this court, or any other governed by sound principles, can with propriety do, is, to take care that they do not enforce contracts, made *elsewhere*, in violation of the established rights of property, and to the prejudice of society *here*.

It could not be asked of us, for instance, to permit real estate to be affected other than as the laws of our country require. Nor, that we should exempt citizens of other states from the performance of any duty we think proper to prescribe, in order to give their contracts or liens force and validity as to property in Louisiana.

But this court have gone farther, in the case of *Whiston* vs. *Stodder & als. Syndics*, than we ask them to go. They decided in that case, that a lien attaching by the laws of a foreign country would follow property removed into this state, and be enforced here. 8 *Martin's Rep.* 135.

We only ask of the court to give Morrison's mortgage the force and effect that would be given to similar contracts by the laws *where made*, and they are precisely similar to our own. Nor do we rely alone on this principle for protection. Upon presenting Morrison's

lien for enforcement, we take upon ourselves the task of showing, and we have clearly established, 1st, that his lien is created by *writing*, and in the same manner authorized by the laws of this state; and secondly, that he has performed all the duties which our laws require, so as to give his lien full force and effect.

A decision in our favour preserves the sanctity of our laws, violates no principle of property, and in no wise prejudices the established rights of our citizens.

If the plaintiffs' lien has not the preference, to whom does censure attach? Where was the negligence which took away its priority? At his own door, in disobeying the positive injunctions of our own laws as to the duties enjoined, to give his lien validity, as regards third persons.

I will close this argument, on the part of Morrison, by calling the attention of the court to two provisions of our *Code*, which clearly show, our legislative body looked to the enforcement of mortgages from sister states.

In treating of mortgages and the several sorts, it is enacted, that "judgments rendered in the other states or territories of the United States, give a *mortgage* validity only from the

day, when their execution has been ordered by one of the judges of this territory.

"Conventional and judicial mortgages cannot operate against a third person, except from the day of their being entered in the office of the register of mortgages in the manner and form directed by the *Code*." *Code*, 454, *art.* 12, 14.

Workman, in reply. In the elaborate and ingenious arguments of the learned counsel, on the other side, I find nothing that can overthrow my clients' claim. A written instrument is unquestionably indispensable for the vendor's privilege on immoveable property; for without such an instrument, that species of property cannot be legally sold: but the counsel goes too far when he maintains, that the proof of the existence of the privilege cannot be drawn from any other source. If it appears conclusively from the deed itself, that the price has been fully paid, then indeed there can be no question about the privilege for that price. But if it is shown, that the payment has been made only by notes, then the privilege will exist for the amount of those notes, should they not be paid. This has been determined repeatedly, even in the case of the

less solemn privilege of the vendor of moveable property.

The important question, whether the mortgagee of Smith can be considered as a third party, in the legal sense, is slipped over, by the opposite counsel, very smoothly. He tells us, laconically and confidently, that whoever was not a party to the deed, must be considered under the denomination of a third person. Then the heirs, or the legatees, or the vendees of Smith, as well as his mortgagees, would be third parties: and he who has no title at all, or but an imperfect or conditional one, to an estate, may, nevertheless, transmit that estate by a good title to another. The idea of a *third party* does, *ex vi terminorum*, exclude the principal party, his representatives and *ayants-cause*, that is all those who claim immediately from or through him.

I am not surprised, that the gentleman finds the definition of mortgage in our *Civil Code* to be an unfortunate one. It is so, for his cause at least. From this definition, as the counsel himself understands it, our claim, whatever it may be, cannot be considered as a simple conventional mortgage; for the vendee had no right or property in the estate sold, until

East'n District.
Jan. 1823.

TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

he accepted of the sale of it. Neither, according to the definition (*C. C.* 454, *art.* 15) can our claim, as it is represented by the adverse party, be a legal mortgage; a legal mortgage being that which proceeds from the law, without any express covenant of the parties—and our claim being expressly covenanted for, and reserved by the parties themselves. What then can our claim be?—a privilege or privileged mortgage, and nothing else.

It is too late now for the parties to object, that we have proceeded on our privileged mortgage, as if it had been an ordinary conventional mortgage. In whatever manner the estate in question might have been sold, whether at our suit, or by the syndics of Smith, we should have been entitled to our privilege on the proceeds. But the counsel expressly state, that they do not wish to set aside the sale that has been made: neither do we.

Of the true meaning of the word *lien*, no doubt can be entertained. If the legislature had enacted, that all liens whatever, not duly recorded, should be null and void, &c. I presume, all privileges like ours would have been included in that enactment. If the legislature intended to do, what it is erroneously said they

have effectually done, they would have ordained, either that all liens whatever,—or all liens having the effect of a legal or privilege mortgage,—not recorded, &c. shall be null and void. But our legislature never did, and never intended to do any such thing. They could not do this without destroying all the privileges given on real property for funeral charges, law charges, charges for medical attendance, for salaries of persons hired, for subsistence. *et cetera*; privileges, most of which it would be impracticable to record in the manner the act prescribes for liens having the effect only of a legal mortgage. The construction, contended for, of the last part of the first section of the act of 1813, cannot be maintained without depriving all those entitled to the privileges above mentioned of their liens on the debtor's immoveable property.—But it is already well settled, that no such effects have been produced by that act. This court has so decided in the cases I have already cited; and the legislature have confirmed the principle of the decisions in those cases, by modifying, in the act of 1817, the law in respect to one particular kind of privilege, to wit, the builder's privilege, when his

East'n District.
Jan. 1823.

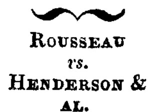
TRUDEAU & AL.
vs.
SMITH'S SYNDICS.

claim should exceed 500 dollars. The act of 1815 required the registry of all liens having the effect of a legal mortgage. The act of 1817 requires the registry of one, and only one species of lien, having the effect of a privilege mortgage. If the legislature, in 1817, intended to require the registry of any other kinds of privileges, or liens having the effect of a privilege mortgage, they would have expressly designated and enumerated them.— This provision for the record of one sort of privilege, or privileged mortgage, on immoveable property, is a decided exclusion of the legal necessity of recording any others. And thus, as one of the counsel very justly observes, we find the legislature, from time to time, legislating with the view of closing the door against the evils of concealed liens: yet at no time, though they have had many years to meditate on the subject, have they legislated in this manner respecting the vendor's, or the physician's, or the lawyer's privilege on the immoveable as well as on the moveable property of their debtors.

☞ The court took time to advise.

ROUSSEAU vs. *HENDERSON & AL.*

East'n District.
Jan. 1823.



ROUSSEAU
vs.
HENDERSON &
AL.

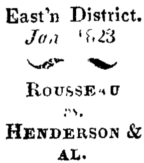
APPEAL from the court of the parish and city of New-Orleans.

After the trial has been gone into and evidence heard, it is too late to pray for a continuance.

A party without a title can avail himself of no prescription but that of thirty years.

PORTER, J. delivered the opinion of the court. The plaintiff avers, that she is the owner of a tract of land, situated on the right bank of the river, about four miles from New-Orleans, having a front of six arpents by the depth of forty, lying behind a plantation formerly belonging to Margaret Wiltz, in virtue of a grant to her ancestor by Don Bernard Galvez, dated 6th August, 1778; upon which, she states a certain George Henderson has entered, and pretending that he is proprietor, refuses to give her possession. She prays for his eviction from the premises; and to have damages for the illegal entry.

The defendant pleaded the general issue, and cited Stephen Henderson in warranty, who answered by calling in his vendors, S. Allain, V. Allain and A. Allain. They appeared; and vouched Constance Rochen and Fergus Duplantier, who prayed, that the persons from whom they purchased, the executors of B. Lafon, should be cited to defend the title.



The last mentioned parties appeared, and in addition to the general issue, pleaded prescription of ten, twenty and thirty years.

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

Three bills of exceptions were taken on the trial. Those of the plaintiff need not be examined, and that of the defendant presents no difficulty. It was to an opinion of the court, refusing a continuance after the trial had been gone into, and evidence heard; in which we entirely concur, and think the judge did not err in refusing the application.

The plaintiff produces a grant to her ancestor, Jacinto Panis, for the premises; the only questions then presented for our inquiry are. Have the defendants acquired that title? or, have they an adverse one, which is superior?

They insist they have both, and rely on a purchase from the plaintiff's ancestor and prescription.

The testimony establishes, that Jacinto Panis, the original grantee, intermarried with Margaret Wiltz, who owned the plantation of six arpents front and forty deep, between the tract granted, and the river: and it is on an act of sale of the said Wiltz and Panis of the 8th

of April, 1785, that the defendants principally rest their pretensions of having acquired the property by purchase.

But that document falls far short of establishing the fact for which they introduced it. It is in the usual form of public acts, where the husband assists his wife in the disposal of her immoveable property; and it states, that there is sold to Antonio Joseph Piguery, a plantation consisting of six arpents front, with the ordinary depth, situated a league from the city, it being the same which the vendors acquired by an act of retrocession from Don Pedro Daspy. We look in vain, to this instrument, for proof of the sale of the premises in dispute; the act says ordinary depth, which is forty arpents, and it required them to sell eighty, to include the tract of Panis. There is no proof, that the land he acquired from the Spanish governor ever made a part of madame Wiltz's plantation, and what puts the intentions of the parties beyond doubt is, that they declare they sell a tract which was retroceded to them by Daspy, and Daspy, as it is proved in evidence, held only six by forty. *Macarty* vs. *Foucher, ante*, 114. *Innis* vs. *M'Crummin, ib.* 425.

East'n District.
Jan. 1823.

ROUSSEAU
vs.
HENDERSON & AL.

Having thus ascertained, that the only act by which it is alleged the ancestor of the plaintiff alienated the property did not, in fact, divest him of his title, it is unnecessary to inquire into the conveyance of his vendees, who could not make a right to themselves, by inventorying the lands of others, and disposing of them.

On the plea of prescription, as the defendants are without title, nothing can avail them but that of thirty years, and the evidence negatives actual possession.

We express no opinion in respect to St. Pe, who, it appears, bought eighty arpents in depth—he is not a defendant.

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

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

BOUTHEMY vs. *DREUX & AL.*

East'n District.
Jan 1823.

BOUTHEMY
vs.
DREUX & AL.

A will may be proved by a single witness. A witness may contradict enunciations in a will.
The names of the witnesses need not be inserted in the body of a nuncupative will, under private signature.
Whether all the witnesses should sign at the same time.
Facts which depend on proof, should be alleged, that the adverse party may disprove them in the inferior court.
The presentation of a will to the witnesses needs not be *manual*.
The circumstance of a judgment being rendered on a petition written in French, does not make it *void*. *Quære* if *voidable?*

APPEAL from the court of the first district.

PORTER, J.* delivered the opinion of the court. This action is brought by the heirs of Pierre Bouthemy, deceased, to annul and set aside his last will and testament; or, in case it is declared valid, to have certain legacies granted by it avoided, and the executor compelled to render an account of his administration. The case has been already before us, and was remanded for further proceedings. 10 *Martin*, 1.

It has been tried on its merits. The district court gave judgment for the defendants, and the plaintiffs have appealed.

In this court, they have relied on the following grounds for the reversal of the judgment of that of the first instance :—

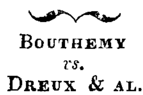
1. The legacy of the universality of his furniture, bequeathed by the testator to his concubine, is void. *Civil Code*, 210, *art.* 10, and 232, *art.* 115.

2. The will is void, not being clothed with

---

* MARTIN, J. did not join in this opinion, having some interest on the question.

East'n District. *Jan.* 1823.



BOUTHEMY *vs.* DREUX & AL.

the formalities required by law, to give it validity. *Civil Code*, 228, *art.* 96–232. *art.* 108.

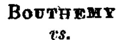
3. The proceedings had on the will, before the court of probates, are void, for not having been preserved, and conducted in the language in which the constitution of the United States is written. 1 *Martin's Dig.* 114. 2 *Martin's Rep.* 227, 10 *ib.* 1.

The first point has been abandoned in argument, and the conclusions which we have come to on the second, will render a decision of the last, unnecessary at this stage of the cause.

In support of his second ground, the counsel for the plaintiffs has contended: that the names of the witnesses should be inserted in the body of the testament; that the proof of its execution has been only made by one witness; that the testator did not *present* the will to the witnesses; that, admitting the court should be of opinion that he did, it was not to a sufficient number of them; and lastly, that the witnesses did not all sign at the same time.

The first of these positions, in the order necessary for an examination of the case on its merits, is that which objects to the proof by one witness of the will, and the facts connected

East'n District.
Jan. 1823.



BOUTHEMY
vs.
DREUX & AL.

with its execution. In support of it we are referred to the *Civil Code*, 310, *art.* 243–244; where it is said, it is provided, that the single testimony of a witness can only be received, to establish facts, when the value of the object does not exceed the sum of $500, or there is a commencement of proof in writing.

These provisions of our law do not extend to such a case as that before us. They expressly limit the incompetency of a single witness, to cases where the establishment of a covenant (*convention*) is made to depend on his testimony. Now a will is not a covenant.

The other grounds, on which it is contended the nullity of the testament must be decreed, will be better understood by stating the evidence received in respect to its execution.

The will is a nuncupative one, under private signature, and purports to be made in the presence of the witnesses. But according to a document introduced by the plaintiffs, it appears, that the witnesses in proving it before the court of probates declared, that it had been written out of their presence, and one of them added, that it was written at the solicitation and request of the testator, who certified it in presence of the witnesses

East'n District.
Jan. 1823.

BOUTHEMY
vs.
DREUX & AL.

and signed it, and declared that it was his last will.

On the trial it was proved, that the will was signed in the hand writing of the testator, and Le Cesne swore, that he was present when Bouthemy signed the instrument, and that the witness saw him affix his name thereto, and four other witnesses sign it; that he was in his bed, and that one Desbois, read over the will to the witness in his presence; that Bouthemy requested Desbois to read the testament to the witnesses, which he did, and that Bouthemy told the witnesses that it was his testament.

This testimony was excepted to; but the doctrine is well settled in this court, that witnesses to a will can be received to contradict enunciations contained in it. *Knight* vs. *Smith*, 3 *Mart.* 156. *Marie* vs. *Avarts' heirs.* 10 *ib.* 25.

To the validity of the instrument established by this proof, it is objected, that the names of the witnesses should be inserted in the testament, as well as written at the bottom of it. On referring to the *Code*, where the manner of making a nuncupative act, under private signature, is prescribed, we find certain acts necessary in order that it be valid, and a declaration that *no other formalities* are required.

East'n District.
Jan. 1823.

BOUTHEMY
vs.
DREUX & AL.

As inserting the names of the witnesses in the body of the act is not one of these formalities, we cannot say it should make one of them, for we are forbid to require any other but those which the law has enumerated. *Toullier, Droit Civil François*, 5, *l.* 3, *tit.* 2, *c.* 5, *n.* 480.

We give no opinion on the objection, that all the witnesses should have signed at the same time, for we think it comes too late. As it was a matter which depended on the proof that might be adduced, the plaintiffs should have alleged it in the court below, and given the defendants an opportunity to contradict it. From the course which the examination of the witnesses took, it appears, such a fact was not considered to be at issue; nor was it, by the pleadings. The original petition alleges two grounds of nullity, viz. that the testament was not written by the testator, nor by any other person from his dictation, in the presence of the witnesses; and that it was not presented by him with such a declaration as the law requires, when written out of their presence. The supplemental petition adds, that neither the names nor the domicil of the witnesses were mentioned in the will; and that the proceedings had before the court of probates,

East'n District.
Jan. 1823.

BOUTHEMY
vs.
DREUX & AL.

under it, were void, because they were not conducted in the language in which the constitution of the United States is written.

The great question in this case is, whether the will was presented by the testator to the witnesses, in such a manner as the law directs. The formalities which the legislature have prescribed, as guards against the frauds which men from feebleness of mind and body are exposed to in their last moments, are matters of strict law, and courts have been severe in exacting a rigid observance of them. We think, however, that a scrupulous attention to forms can be well reconciled with a decision which will give effect to the instrument now submitted.

For the validity of a nuncupative will, under private signature, it is sufficient if the testator, in the presence of five witnesses, presents the paper on which he has written his testament, or caused it to be written out of their presence, declaring to them that, that paper contains his last will; that he signs it, if he knows how or is able, and that the witnesses, or one of them, also put their names to it.—*Code* 228, *art.* 95.

In the case before us, it has been proved.

East'n District.
Jan 1823.

BOUTTEMY
vs.
DREUX & AL.

that the will was written by the direction of the testator, that it was read over to him, and that it was signed by him; but it is objected, he did not *present* the testament to the witnesses and *declare* it to be his. We do not understand the law to be, that these words are so material, and of such solemnity, that they cannot be supplied by others expressing the same ideas. Directing an instrument to be read over to witnesses, accompanied with the testator's assertion, that it was his last will and testament, (as, is in evidence, was done here) we think the same thing, as if he had *declared* it to be his. We are also of opinion, the will was *presented.* This word, in the sense in which it is used in the law, means, to exhibit to view, or notice, and is fully satisfied by the testator's requesting his will to be read over to the witnesses, and telling them it was his. We are unable to find any force in the argument, that the instrument should be delivered by the testator, with his own hand, to the witnesses; a ceremony which would often deprive the citizen of the power of making a will at all; as the instances are frequent where bodily weakness would render it impossible to do so, though the mind was sound and healthy. The

East'n District. *Jan.* 1823.

BOUTHEMY *vs.* DREUX & AL.

object of the legislature was, that the act should be transmitted from the testator to the witnesses, in their presence, in such a way as to make it evident, it emanated from him.—The court of cassation in France has held, in construing a law on the same subject, expressed in the same words as ours, that the presentation need not be manual, that the object of the law was to guard against a false testament being substituted in place of the real one, and that object was accomplished when the testator either presented it with his hands, or indicated it by gestures or signs. *Sirey*, 14, 458. 18 *ib.* 210.

On the last point made, that all the proceedings had under the decrees of the court of probates, are void, and that the whole estate must be given up with its rents and profits, we give no opinion. On examining the evidence, we find that the orders and judgments of the court are in the language in which the constitution of the United States is written; and we are far from being prepared to say, that the circumstance of their being rendered on petitions written in another language, will so affect them with nullity, as to render every thing done under them void—whether they

East'n District.
Jan. 1823.

BOUTHEMY
vs.
DREUX & AL.

can be contended to be any thing more than voidable. The effect, however, of the proceedings can with more propriety be decided on, when we know what they were. As there is a prayer for the executor to give an account of his administration, the law can be better applied to the various acts of it, when the evidence of them are before us, than by laying down, at this stage of the proceedings, any general rules, as to which of them may be good, and which of them invalid.

It is therefore ordered, adjudged and decreed, that the judgment of the district court, be annulled, avoided and reversed, and this cause be remanded with direction to the judge, to compel the executor to render an account of his administration according to law; and it is further ordered, that the appellees pay the costs of this appeal.

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

EVANS & AL. vs. *GRAY & AL.*—*ante* 507.

Former judgment undisturbed.

12m 647
47 955

APPEAL from the court of the first district.

MARTIN J. delivered the opinion of the court. We have considered the reasons of-

East'n District.
Jan. 1823.

EVANS & AL
vs.
GRAY & AL.

fered by the plaintiffs' counsel, in support of his application for a rehearing, with all the attention, which the earnestness with which he has pressed it and the pains he has taken, were calculated to excite.

It is not denied, on his part, that the facts set forth in the defendants' answer, if true, would entitle them to obtain a restoration of part of the price, by way of damages, in an action instituted by the plaintiffs, in the courts of Kentucky; but it is said, that they would unsuccessfully urge their claim for a diminution, by a plea to the plaintiffs' action for the price.

The reason is, that the action *quanti minoris* is unknown to the courts of those states, in which the common law of England affords the only legitimate rule of decision.

Courts of justice there, can rescind a contract of sale *in toto* only. Hence, in an action for the price, they cannot restrain their judgment to a partial recovery. Not so in this state, where the vendee is entitled to a reduction of the price, by the action *quanti minoris*. If he may be relieved *in toto*, by plea, when he insists on the rescission of the sale, and prays to be exempted from the payment of any part of the price, why should he not be

listened to when he restrains his plea to that part of the price, which the vendor would be compelled to return, if a suit was brought against him.

The rights of the parties in a contract of sale, will finally be adjusted in the same manner in Kentucky and Louisiana, although, in the latter state, the vendee may obtain by *plea* the relief which, in the former, can only be had by *action*. A difference exists only in the *mode* of relief; the *quantum* is perfectly the same.

M'GUIRE vs. *AMELUNG & AL.*

Parol evidence is good to establish possession of, though not to form title for real estate.

Giving a slave in payment of services, as a house keeper, is not a donation pure and simple, and the act conveying it need not be by public act.

A want of title in the vendor does not render void the act of sale, if he afterwards acquire the right of the true owner.

APPEAL from the court of the third district.

PORTER, J. delivered the opinion of the court. Amelung, sheriff of Baton Rouge, having several executions in his hands on judgments obtained against E. F. Hall, in order to satisfy the same, levied on a mulatto wench, who is claimed by the plaintiff in this suit as her property.

She exhibits a private act, attested by one witness, which was afterwards recorded in the office of the parish judge, at Baton Rouge. It is in the following words, viz.—

12m649
50 876

East'n District.
Jan. 1823.

M'GUIRE
vs.
AMELUNG &
AL.

"Know all men by these presents, that I, Elisha F. Hall, lieutenant of the 7th reg't U. S. infantry, at the fort of Baton Rouge, this 4th day of June, 1814, presented and gave unto Miss Mary Lucas M'Guire, of this place, a mulatto girl named Grace, about nine years, which girl I bought of col. Phillip Hickey, of this parish, in consequence of said Mary Lucas M'Guire's services as house-keeper, and, I do, by these presents, relinquish all my right and title for ever, of said mulatto girl, Grace, for her own use and benefit for ever.

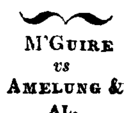
(Signed) E. F. HALL."

There was judgment against her in the district court, and she appealed.

The cause has been submitted without argument, and our attention, on perusing the record, is first arrested by bills of exceptions.

The first is to the refusal of the district judge to receive the instrument, just recited, as evidence of a sale. In this opinion we think he did not err, for, to constitute that contract, it is necessary, that a thing be given for a price in current money. *Civil Code*, 344, *art.* 1.

The second is to the opinion of the judge rejecting parol proof of ownership and possession, unless to establish that the plaintiff



had acquired the slave by inheritance; and in which opinion we concur, so far as it went to exclude any other evidence of title but that by writing, unless in the case of descent. As to possession, parol evidence was properly offered to establish it, and as it appears from the statement of facts, was indeed received.

The third bill of exceptions was taken to the decision of the judge refusing to permit the plaintiff to prove the value of the services, mentioned in the act already referred to, and we think correctly taken; for, unless the plaintiff was refused permission to give such proof, on the ground that, as the cause then stood, it was not necessary for her to make it, we are clear that there was error in rejecting the testimony offered.

The contract by which the plaintiff claims, is one of those which, though not forming the contract of sale, clearly resembles it, or rather, it is nothing else but a *dation en paiement*, which differs in few particulars from a sale. *Pothier* denominates an act, such as that now under consideration, *La donation rémunératoire*, and with his accustomed accuracy tells us: "*Lorsqu'une donation rémunératoire est faite pour récompense de services mercenaires appreciables a*

East'n District.
Jan. 1823.

M'GUIRE
vs.
AMELUNG &
AL.

prix d'argent, et pour lesquels celui qui les a rendus auroit action afin d'en obtenir la recompense : si la valeur des choses données n'excede pas celle des services, une telle donation quoique qualifiée du nom de donation par l'acte qui en a été passé, n'a de donation que le nom, et c'est une veritable dation en paiement." *Pothier, Traite de Vente,* 607. The act before us, is certainly quite distinct from that of a pure and simple donation, to which it was likened by the judge of the first instance, and he erred in holding it void, because it wanted the forms required by law to give validity to such contracts. It is one of mutual interest, not of beneficence. *Pothier on obligations, n.* 12.

If the case therefore required it, we would remand the cause, to give the plaintiff an opportunity of proving the consideration; but neither the pleadings, nor the evidence taken, renders it necessary to do so. Fraud is not alleged by the creditors in the answer; the only fact put at issue is title. No proof was given on trial, that the conveyance was made to defraud the defendants. On the contrary, the execution of the act under which the plaintiff claims, is established to have been six years before the property was levied on by the sheriff: and it is in evidence, that she, once

in this space of time, hired the slave out as her own, and that she was considered in the family, and acknowledged by Hall, to be the property of the petitioner.

As to the objection of want of title in Hall, at the time he made the conveyance, it is sufficient to remark, that admitting this objection could be made by any other than the purchaser, which we much doubt, still a want of title in the vendor does not make void a conveyance of property, if he afterwards acquire the right of the true owner. This question lately received our most serious consideration, and we see no reason to change the opinion expressed in the case of *Bonin* vs. *Eyssaline*, *ante*, 188.

It is therefore ordered, adjudged and decreed, that the judgment of the district court, be annulled, avoided and reversed, that the plaintiff do recover of the defendants the possession of the slave mentioned in the petition, and that the injunction granted by the district court be made perpetual, saving, however, to the defendants all the rights which the law gives them, in case the conveyance or sale to the plaintiff was made to defraud them.

East'n District.
Jan. 1823

M'GUIRE
vs
AMELUNG & AL.

And it is further ordered, adjudged and decreed, that the defendants pay costs in both courts.

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

GUIROT vs. *HER CREDITORS.*

A final conveyance cannot be decreed, without hearing the debtor.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The insolvent prayed for a meeting of her creditors, that they might deliberate on the state of her affairs, and grant her a respite of twelve, eighteen and twenty-four months.

The parish court ordered the meeting, at which the creditors present refused to grant the respite, appointed syndics and voted for a cession of the debtor's goods, and that the same be sold.

The parish court homologated the proceedings, so far as they regard the appointment of syndics, which it confirmed, and that they might proceed in the premises, ordered that the sheriff deliver to them all the property of the insolvent, seized or sequestered. She appealed.

Her counsel assigns as errors apparent on the record,

That she prayed for a respite only, and her creditors had no authority to proceed further, and direct a cession; and the judge erred in confirming the appointment of the syndics and directing the insolvent's property to be delivered them for sale.

The case has been submitted to us without any arguments.

The insolvent made no *voluntary* cession of her. goods; a *forced* one cannot be decreed without the debtor being heard. We held so in the case of *Weimprender's syndics* vs. *Weimprender* & *al.* 11 *Martin*, 18.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed.

Seghers and *Cauchoix* for the plaintiff, *Morse* for the defendants.

BOYER & WIFE vs. *AUBERT & AL.*

A mistake in a name, by the omission of a letter, can only be taken advantage of, by a plea in abatement.

APPEAL from the court of the second district.

PORTER, J. delivered the opinion of the court. This case is brought up by the ap-

East'n District. Jan. 1823.

BOYER & WIFE vs. AUBERT & AL.

pellees, who pray that the judgment of the court below should be affirmed, and with damages. There is no difficulty in acceding to the first part of the prayer; the only question is, as to the second.

The suit was instituted on a promissory note. The petition is in the name of Derie Boyer and Celeste Barras, his wife, and states, that the defendants made their note, which is annexed to the petition, and makes a part of it, by which they promised to pay unto Desiré Boyer the sum claimed.

The note, when produced on the trial, appeared to be made payable to Desiré Boyer, at least it is so written in the copy transcribed on the record, filed in this court. But in the bill of exceptions taken to its introduction, it is stated, that the plaintiffs having offered a note payable to *Derié* Boyer, the defendants opposed its being read in evidence, because it did not support the petition.

There was judgment for the plaintiffs, and the defendants moved for a new trial, on the ground, that the note which had been proved, was payable to Desiré Boyer, a statement in direct contradiction to that contained in the bill of exceptions, which declares that the

East'n District.
Jan. 1823.

BOYER & WIFE
vs.
AUBERT & AL.

note was executed in favour of *Derie* Boyer. The judge, in refusing this application, acts upon the idea that it is payable to *Derie*, but says it is sufficiently described in the body of the petition.

It is somewhat difficult to imagine how so much confusion could be created on a matter which must have been extremely simple in itself. The allegations, made in moving for a new trial, are in direct opposition to those contained in the bill of exceptions. As the party, therefore, who might claim the benefit of them, contradicts himself, we shall alone consider the statement contained in the petition, and the expressions used in the note; and see whether there is such a variance between them as gave the defendants just and reasonable grounds to appeal from the judgment of the district court.

The note, as set out in the petition, corresponds exactly with that produced on the trial; the *allegata* and *probata* concur, and the defendant was apprized on what suit was brought, and protected against another demand for the same cause of action. The only ground then for the defence, was a mistake in regard to a letter in the name of the plaintiff; and it is

East'n District.
Jan. 1823.

BOYER & WIFE
vs.
AUBERT & AL.

clear, that such an error cannot be taken advantage of on the general issue; it must be pleaded in abatement. *Curia Phillipica*, 1, § 13, *n.* 1. *Febrero*, 2, *l.* 3, *c.* 1, § 4. *n.* 176. *Partida* 3, 3, 9.

The judgment bears interest at ten per cent. and we think it sufficient to affirm it with damages at five per cent.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with five per cent. damages.

Workman for the plaintiffs, —— for the defendants.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, FEBRUARY TERM, 1823.

NUGENT vs. *ROLAND.*

A promissory note, in which the sum is stated in figures, is valid.

APPEAL from the court of the fourth district.

MARTIN, J. delivered the opinion of the court. The plaintiff claims $760 for the board of the defendant, and for part of his enclosures and out houses, occupied by the defendant's horses, gig and goods; and two dollars and forty cents, for coffee and candles. He gave credit for $28, for six demijohns of wine, leaving a balance in his favour of $734 40 cts.

The defendant pleaded the pendency of a suit, for the same cause of action, in the parish court; that he was not liable to pay the sum claimed, nor any part thereof; that the plain-

East'n District. *Feb.* 1823.

NUGENT *vs.* ROLAND.

tiff owed him $900 for money lent, goods sold, and $200 92 cents on a note of hand; and urged that the claim in the petition, if it ever existed, was thereby more than compensated, and he prayed judgment for the balance.

The jury gave a verdict and the court judgment, to the defendant, for $53 and costs. The plaintiff appealed.

Poydras deposed, that in December, 1821, he was requested by the plaintiff to settle a claim which the latter had against the defendant, who, on being spoken to declined attending thereto at the moment, for want of time, as he could not then draw an account which he had to offer in compensation; that a week after, the witness went to the defendant, who presented his account, and the witness settled the plaintiff's claim for eighteen months board, at $200 a year, the price which the plaintiff charged, and found a balance of $190 against the defendant, who offered his note at three or six months. He afterwards gave to the plaintiff a barrel of wine valued at $20, as part payment, which reduced the balance to $170. He, at the time, mentioned his having a note of the plaintiff's, which had been mislaid. He did not give any note to the plaintiff, who

East'n District.
Feb. 1823.

NUGENT
vs.
ROLAND.

would not take one at so long a period, but offered a gig in payment. He afterwards showed the witness a due bill of the plaintiff's in the following words and figures, "I owe Mr. L. Rolland $200 92. July 22d, 1820. H. P. Nugent."

The plaintiff asked a witness whether he was in the habit of giving notes, in which the sum was stated in figures; but the court thought the question improper.

Other witnesses were heard, as to the price of board in the place, and mentioned several prices.

The plaintiff's counsel urges, that a note, in which the sum to be paid is stated in figures, is void; and that the court erred in receiving that mentioned in the answer, as evidence.

To establish his proposition, the counsel shows that a promissory note is held by law to be of equal validity, and entitled to the same faith and credit, with acts passed before a notary public; and he hence concludes that, as notaries must write out in full all their words, without abbreviations, and shall not otherwise express the name of a person, of a place, nor a sum of money, or any thing else, otherwise the act to be void, notes of

East'n District.
Feb. 1823.

NUGENT
vs.
ROLAND.

hand are void in which the name of either party, the place or the sum is otherwise expressed than by *words* written out in full.

Neither the premises nor the conclusion can be granted.

The notarial act is an *authentic*, the promissory note a *private* one. The first a *matter of record*, the other a *matter in pays.*

The first, must be executed in the presence of *two* witnesses; the other does *not* require the presence of *any.*

The verb *to express*, in our opinion, may properly be used to denote the designation of a sum of money, either in words *or* in figures.

Of this, the counsel for the plaintiff furnishes us with examples. *Beawes* recommends, that the sum be distinctly *expressed*, both in words and *figures.* The *Recopilacion* requires, that notaries should not *express* sums of money, *otherwise than by words.*

In what a situation would we place our banks, were we to decide that the strict rules to which notarial acts are subject, extend to bills and notes. In the latter, the names of the parties are very seldom indeed written out at full length. The first name is generally abbreviated—the words, value received—long

East'n District.
Feb 1823.

NUGENT
vs.
ROLAND.

names of cities, such as Philadelphia, Nouvelle Orleans, &c. are frequently so. A considerable portion of the paper in circulation would, by the decision which is pressed on us, be avoided.

It is certainly very unsafe, and may be said improper, to state the sum to be paid in a bill or note in figures; but no law avoids a bill or note on that account, and authorizes us to allow a person, who gives such a bill or note, to avail himself of his own wrong and get rid of his obligation.

We are of opinon, the district judge did not err in refusing to prevent the document produced to go to the jury, on the ground that the sum was there stated in figures.

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

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

HASLUCK vs. *SALKELD & AL.*

If a vessel, on board of which property is shipped, is detained by irregular attachment sued out against it, the freighter is not

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The petitioners state, that they placed notes, of different individuals, in the hands of

East'n District.
Feb. 1823.

HASLUCK
vs.
SALKELD & AL.

responsible to the owner of the vessel for the delay. His remedy, if any, is against the attaching creditor.

the defendants for collection, and that there is a balance due on the amount received by them of $500, which they refuse to pay over.

This claim is contested on the ground that the plaintiffs once shipped on board of a vessel called the Ajax, belonging to George Lloyd, acting partner in the house of Salkeld, Lloyd & Co. a quantity of tobacco, which, after it was on board, was attached by sundry persons having claims against the plaintiffs, by reason whereof the vessel was detained for a long space of time, and injury sustained to a greater amount than that now demanded of the defendants.

The plaintiffs insist, that these attachments were illegally sued out, and were afterwards abandoned by the parties at whose prayer they issued. The district court, however, gave judgment against them, and they have appealed.

The evidence shows, that in the case of Stockton, Allen & Co. against the appellants, the tobacco which had been attached on board the Ajax, was released by the plaintiff; and that Patterson and Philpot, at whose suit it had also been seized, discontinued their action.

East'n District.
Feb. 1823.

HASLUCK
vs.
SALKELD & AL.

The cause has been submitted without argument; and after a very attentive consideration, we are unable to find any satisfactory ground for affirming the judgment of the court of the first instance. The proceedings had in the suits, which occasioned delay in the departure of one of the vessels of the defendants, certainly exclude the idea of any fault on the part of the plaintiffs; and if, as it appears to us was the case, their property was illegally or without sufficient cause seized, it is enough that they should bear that injury without being made answerable for the damage which third persons may have sustained by it. If any person is responsible, it is him who sued the attachment and did not prosecute it with effect.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that the plaintiffs do recover of the defendants the sum of five hundred dollars. with interest from the judicial demand, and costs of suit.

Hennen for the plaintiff, *Grymes* for the defendants.

East'n District.
Feb. 1823.

MAYHEW
vs.
M'GEE.

After proceedings commenced for a forced surrender, suit cannot be carried on by a single creditor.

12m 666
50 624

MAYHEW vs. *M'GEE.*

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

PORTER, J. delivered the opinion of the court. The petitioner claims of the defendant $955 10 cents, who, admitting the justice of the greater part of the demand, pleads that proceedings are pending against him, at the suit of his creditors, for a forced surrender.

We think the objection a good one. It has already been settled by this court in the case of *Chiapella* vs. *Lanusse's Syndics*, 10 *Martin*, 448, that in case of a forced surrender, one of the creditors could not carry on legal proceedings, in a distinct suit, against the insolvent for the recovery of his debt. To permit it, would indeed defeat one of the important objects of our laws on this subject, which is to secure a legal distribution of the bankrupt's estate to all who have demands against it.

The judgment of the parish court is affirmed with costs.

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

BOUDREAU vs. *BOUDREAU.*

East'n District.
Feb. 1823.

BOUDREAU
vs.
BOUDREAU.

Prescription cannot be pleaded in the supreme court.

Parol evidence, though not admissible as to title, is so as to possession.

APPEAL from the court of the second district.

MATHEWS, J. delivered the opinion of the court. This is a petitory action, brought to recover a certain tract of land described in the plaintiff's petition, and in support of his claim he offers in evidence a title in due form, derived from one Lambert Bellardin, dated in February, 1805. To this title the defendant opposes one derived from the same vendor, made in May, 1810. The petition also contains a prayer for the annual rents and profits of said land. Judgment was rendered in the court below, in favour of the plaintiff, both for the recovery of the property, and damages for the use and occupation by the defendant, as being a possessor in bad faith; from which the latter appealed.

Several bills of exceptions were taken by the appellant, to opinions of the district court, given in the course of the trial. These exceptions have not been much insisted on in argument before this court; and, as we believe from the pleadings, as they appear on the record, that the opinions excepted to were correct, they may be dismissed without

East'n District. *Feb.* 1823.

BOUDREAU *vs.* BOUDREAU.

further comment. The title alleged and proven on the part of the plaintiff, is clearly the best, being evidence of a sale to him anterior to that made to the defendant, and was accompanied by tradition of the thing sold.

But an attempt is made to show title in the appellant, by a prescription of ten years; which was not pleaded in the court below. The plea of prescription is offered to this court, as being authorized by law. It is true, there are expressions in our laws which permit prescription to be pleaded in a cause, even on an appeal. Those rules were made for courts of appeal which try a suit *de novo;* and might well receive new pleas, because they could have new evidence on them. By the constitution this is a court of *appeal only.* The legislature, in organizing it, have established rules, the whole tenor of which shows their intention to be, that its powers should be exercised almost exclusively in the correction of errors committed by the inferior tribunals of the state, and such alone as appear of record, transmitted to the supreme court as prescribed by law.

When the whole cause is legally sent up, the evils of which the parties complain can be

remedied; by affirming judgments with damages; by reversing them and giving such judgment, as ought to have been given in the lower courts, or by remanding causes for new trials when justice requires that mode of proceeding. We are clearly of opinion, that neither the constitution of the state, nor the acts of the legislature under it, organizing the court of appeals, and establishing rules of procedure therein—will authorize us to admit new pleas, or new evidence in any suit: and consequently the law, which heretofore permitted such pleas and evidence on an appeal, is virtually repealed and abrogated by the state constitution and subsequent acts of the legislature; their provisions being clearly contrary and repugnant to the former law.—The plea of prescription, here offered, must therefore be rejected. Even had it been regularly pleaded in the court below, we doubt much, any good effect from it to the defendant's side of the cause.

The plaintiff having shown the best title to the land in dispute, is clearly entitled to recover it: and so far as the judgment of the district court goes to establish his right of property, it is, in our opinion, correct. But we

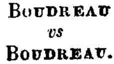
East'n District.
Feb. 1823.

BOUDREAU
vs
BOUDREAU.

cannot agree with that court, to adjudge damages against the defendant as a knavish possessor. The definition in the *Code* of this kind of possessor, is clear and explicit, viz. he who possesses as master, knowing that he has no title, or that his title is vicious and defective. Now, so far from the evidence, in the present case, establishing the existence of any such knowlege in the appellant, it shows quite the contrary; 1st. the prior purchaser gave up the property to the original owner, who remained in possession of it for nearly three years, before he sold and conveyed to the defendant, to whom he delivered it; 2d. this latter has remained in undisturbed possession under a title, translative of property, for nearly ten years: from which, the inevitable conclusion is drawn, that he was an honest possessor, up to the judicial demand, and consequently no damages ought to be adjudged against him beyond that period. In this view of the case it is seen, that we do not admit the oral evidence to influence the written documents of title, as they relate to the right of property, but confine them entirely to that of possession.

It is therefore ordered, adjudged and de-

creed, that the judgment of the district court, be avoided, reversed and annulled; and proceeding here to render such judgment as ought there to have been rendered, it is ordered, adjudged and decreed, that the plaintiff and appellee, do recover from the defendant and appellant, the land in dispute, and damages for its use and occupation, at the rate of one hundred and twenty-five dollars, from the judicial demand, and that is from the 28th day of May, 1820, until the property shall be delivered up to the plaintiff; reserving to the defendant his right of action, if any he have, for the improvements made by him on said land, during his occupancy: costs of this appeal to be borne by the appellee.



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

PEPPER vs. *PEYTAVIN*.

If he who bind himself to deliver sugar, fail to do so on the day fixed, the creditor may demand damages in money.

A note payable in sugar is not negotiable.

APPEAL from the court of the second district.

Moreau, for the defendant. The district court erred in condemning the defendant and appellant to pay a sum of money, without saving his right to pay in sugar, according to his

East'n District. *Feb.* 1823.

PEPPER *vs.* PEYTAVIN.

contract; and in refusing to require the plaintiff to give security to indemnify the debtor, in case the note, which the former alleged to be lost, should have been transferred.

Will it be said that the defendant lost the faculty of discharging his obligation, by the delivery of sugar, as he either refused or neglected to comply with his engagement on the day of payment? It is in evidence, that he did every thing in his power to comply with his promise. Langhorne, the agent and witness of the plaintiff, deposes, that he was prevented from taking the sugar, the steam-boat in which he was having passed the defendant's plantation, during the night, and the master having refused to stop; and the sheriff has declared, that when he served the citation on the defendant, the latter told him, the sugar was ready when Langhorne passed by, and he regretted he could not stop.

Neither can it be urged, that this faculty was lost by the defendant refusing to pay, and compelling the plaintiff to sue. While the latter alleged the loss of the note, the former had the right of withholding payment, till he was indemnified.

The district court has been of opinion, that

East'n District.
Feb. 1823.

PEPPER
vs.
PEYTAVIN.

the note not being payable in money, was not negotiable. This is the first time we heard it said that a note payable to order, in sugar or cotton. Notes cease to be negotiable at their maturity and after protest. The present was not payable on any fixed day; was exigible immediately.

The holder of a bill, who alleges its loss, is bound to indemnify the payor. *Pothier, Change,* 131.

Workman, in reply. The debtor in this case is liable for all the damages resulting from the non-performance of his obligation: in other words, he ought to indemnify the creditor, not only from the loss which the non-performance of the obligation has occasioned him, but also, for the gain of which it has deprived him. The English courts have decided, 2 *East*, 211, that the proper damages upon an agreement for the transfer of stock, was the *highest price*, which it had been at since the time when the agreement ought to have been performed. A much higher scale of compensation is allowed by the *Code*, which we consider as the common law of this state, in civil concerns. In the law of the *Code, de sententiis*

East'n District. Feb. 1823.

PEPPER vs. PEYTAVIN.

quæ pro eo quod interest proferuntur, (*lib.* 7, *tit.* 47.) *Justinian* ordains, that in all cases where the nature and quality of the thing are certain and determinate, as in sales, &c. the damages and interests may not exceed double the value of the thing, which forms the object of the contract. A. Peytavin, then, may think himself highly favoured by the judgment from which he has hazarded this appeal; a judgment which gives the injured party the very lowest rate of damages which could have been awarded in such a case; that is, the price of the article, fixed by the parties themselves, at the time when the obligation to deliver it ought to have been performed.

The note being payable in sugar, was not negotiable, and the defendant cannot require to be indemnified. It is an *essential* quality to the validity of a promissory note, as such, that it be payable in *money*. *Chitty on bills*, 54. A note payable in goods, is not negotiable, 2 *Mass. Rep.* 524.

MARTIN, J. delivered the opinion of the court. The plaintiff states, that he sold a quantity of flour, amounting to $717 50 cents, payable in sugar, at the rate of seven and a

half cents the pound—that the defendant gave him his obligation therefor, which, before the payment of it or any part thereof, was fortuitously lost or stolen—that the said obligation was not transferred.

The defendant pleaded the general issue.

There was judgment against him, and he appealed.

His counsel urges, that the judgment ought to have reserved to the defendant the faculty of paying *in sugar*, and ordered the plaintiff to give security, to indemnify the defendant.

The defendant has not urged, that he was ready to pay in sugar, according to his promise, but has denied, that he made the obligation on which he is sued. Under this plea he cannot contend he was always, and is still ready to deliver sugar. His obligation has therefore been, by his own act, turned into one to pay damages for the neglect to perform the original one, if the plaintiff demand those damages, *i. e.* the value of the sugar, at the time and place of delivery. The creditor of an obligation payable in produce, may on the failure of the debtor, provide himself with produce of the same kind at the market price, and require a sum equal to the purchase as

East'n District.
Feb. 1823.

PEPPER
vs.
PEYTAVIN.

damages. As such a purchase is a matter in which the defendant is without interest, damages may be demanded without its being made.

The obligation to deliver the sugar was not such a negotiable paper, which might render the debtor liable to its assignee, without notice—as a promissory note for money, or a bill of exchange. The safety of the defendant does not require any security: for admitting that the obligation was assigned, the assignment would be completed by the notice given to the debtor. This is not pretended to have been done; and were it done, the defendant would be protected by the *merger* of his obligation in the judgment obtained on it.

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

Workman for the plaintiff, *Moreau* and *Dumoulin* for the defendant.

WOODRUFF vs. *PENNY'S BAIL.*

A *ca. sa.* must be returnable in no less than 60, nor more than 90 days.

APPEAL from the court of the first district.

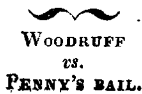
MARTIN, J. delivered the opinion of the court. A *capias ad satisfaciendum* issued against

Penny on the 26th of November last, returnable on the third Monday of December following, and was returned *non est inventus.*

The bail being notified, surrendered the principal in open court. The plaintiff's counsel objected to the surrender, as being too late, after the return of the *ca. sa.*; but the court was of opinion "that the *capias*, under the act of 1817, should have been made returnable in no less than sixty nor more than ninety days, and could not be legally returned *non est inventus*, in less than sixty days from the day it issued," and ordered the principal in the custody of the sheriff, and the bail-bond to be cancelled.

The plaintiff appealed.

Gordon deposed, he is and has been clerk of the court of the first district, since its organization, and was clerk of the superior court of the late territory from the year 1809 till the formation of the state courts; that during the time he has been in office, it has been the practice both in the superior and district courts to make writs of *capias ad satisfaciendum* returnable in 15, 20, or 30 days from the date, at the option of the plaintiff. Before his appointment as clerk of the su-



perior court, there was no execution docket kept. Since, one has been always kept in each court, a reference to which, shows the period at which each writ of *capias* was made returnable.

Holland, the deputy sheriff, deposed, he took the principal in pursuance of the court's order, and informed the plaintiff's attorney he would not detain him unless a sum was advanced for his subsistence and the fees. The attorney at first declined, but soon after consented to make the advance for one week, and tendered a $10 note; but the witness not being able to produce the change, the attorney promised to pay in the morning; the principal was then committed, and on the following day was admitted to the bounds. The plaintiff's attorney declined making any advance or having any thing to do with the prisoner.

It is admitted the plaintiff resides in St. Francisville.

The plaintiff and appellant's counsel urges, that the district court erred as the bail was fixed, under the act of 1821, p. 58; that the *capias* was made returnable according to the long established practice of the district court, which has become a rule and mode of proceeding, which could be changed only by law

or a rule of court; that the act of 1817, cited by the district court, relates to writs of *fieri facias only;* that if no fixed practice exists, with regard to the writs of *capias ad satisfaciendum*, it should be governed by the English common law, from which it came, according to which the bail in this case is fixed.

We are of opinion, that the writs of *ca. sa.* are included in the word *execution*, used in the act of 1817. The word is comprehensive enough to include them, and there is no good reason to conclude that the legislature should fix the day of return of the *fi. fa.* and leave that of the *ca. sa.* at the caprice or worst views of the plaintiff. This idea is strengthened by the consideration that the bail is fixed with the debt, and cannot surrender his principal after the return-day of the *ca. sa.* (1821, p. 58.) Now, if the plaintiff is to be the judge of the length of time, during which the bail may exercise his legal right of surrendering, will he not always direct this return to be within the shortest period possible? If the clerk of the first district thinks he may make a *ca. sa.* returnable in a fortnight, if the plaintiff insists on it, may not that of the second think himself justifiable in accommodating a plaintiff

with a *ca. sa.* returnable in ten or a less number of days?

That construction, which leaves the bail so much at the mercy of the plaintiff, is not to be favoured.

It is true, the act of 1817, after fixing the return day of executions, defines the sheriff's duty in making the money out of the goods seized, and the manner in which this money is to be paid by him, without giving any directions as to the mode in which a *ca. sa.* is to be executed and returned. The answer to this objection is, that there is but one mode of executing a *ca. sa. i. e.* by seizing and imprisoning the debtor. No difficulty in making the return, which can only be, that the defendant was not found, or that he was imprisoned.

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

FLOWER vs. *LIVINGSTON.*

East'n District.
Feb. 1823.

FLOWER
vs.
LIVINGSTON.

Forty-eight jurors must be returned to each term of the parish court of N. Orleans.

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

PORTER, J. delivered the opinion of the court. This is an action on a promissory note. in which the defendant pleaded the general issue, and prayed for a jury.

The only question which the case presents, is the correctness of the opinion of the court of the first instance, on a challenge to the array.

The defendant objected to the jury, because it appeared, the sheriff had only returned twenty-four persons to serve as jurors, when, by law, the panel should have contained forty-eight.

By an act of the legislature of date the 26th March, 1813, it is provided, that the formalities required by the statute of the territory, which prescribes the mode of summoning grand and petit juries, should be pursued in selecting juries for the district and parish courts. 2 *Martin's Digest*, 198–200. That act provides, that eighteen persons shall be drawn to serve as jurors for the parish courts, whenever they shall be required; and forty-

East'n District.
Feb. '23

FLOWER
vs.
LIVINGSTON.

eight shall be selected to serve as grand and petty jurors at each session of the superior court.

It is important in the inquiry, which this case presents, to ascertain which of these modes the legislature referred to, when they directed the formalities used under the territorial government, to be pursued in obtaining juries for the parish courts: to that which prescribes eighteen jurors to be summoned, or that which directs forty-eight.

It is against the conclusion, that the latter number was meant, that no grand jurors are necessary in the parish courts, and therefore it would seem a vain thing to summon persons to serve as such. Too much weight, however, cannot be given to this argument, for we find the legislature in the year 1810, directing a list to be formed in order that persons might be drawn from it, to serve *as grand jurors in the parish courts*, at a time when it is notorious these tribunals had not criminal jurisdiction, requiring the aid of such a body. *Acts of the territorial legislature, March* 16, 1810, § 1.

It is equally as difficult to believe, that the number provided for the parish court, under the territorial government, was in the contemplation of the legislature, for the whole pro-

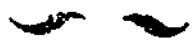
FLOWER
vs.
LIVINGSTON.

visions in the act are directed to provide a jury for the district court, in which eighteen would not have been a sufficient number. The selection, too, is directed to be made in the manner pointed out by that part of the former law, under which forty-eight were drawn; and the exception, at the close of the section already quoted, that juries might be summoned for three parishes alone, in the state, without making any distinction in the manner these jurors were to be procured, rather strengthens than weakens the conclusion, that only one mode was contemplated for both courts.

But whatever may be the sound construction of this act in relation to the parishes of St. Tammany and St. Helena, in regard to that of New-Orleans, there cannot well be a question; for the statute establishing the city court directs, "that the mode of proceeding before the same, shall be *in all respects* similar to that prescribed for the district court." The modes of proceeding would not be the same, if the same number of jurors were not selected for each.

On the whole, we think that the true construction of the statute is, that forty-eight jurors must be summoned at each term of the

East'n District
Feb 1823.



FLOWER
vs.
LIVINGSTON.

court, where this cause was tried, and we therefore conclude, that the challenge to the array was well taken.

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

Christy for the plaintiff, the defendant in *propriâ personâ.*

LAZARE'S EXECUTOR vs. *PEYTAVIN.*

Complaints cannot be made that a special verdict was obtained without legal evidence, by a party who did not pray the judge to charge the jury in his favor, nor for a nonsuit or a new trial.

Parol evidence cannot be received to explain a letter, in which there is no ambiguity.

If improper evidence was suffered to go to the jury and it appears they dis-

APPEAL from the court of the second district.

MARTIN, J. delivered the opinion of the court. This case was remanded from this court in April, 1821. 9 *Martin*, 566.

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

His counsel urges, that the judgment was pronounced on a special verdict. grounded on the testimony of one single witness, while the contract, which was thus proven, exceeded in value the sum of $500.

Admitting this, the defendant's counsel, at

LAZARE'S EX.
vs.
PEYTAVIN.

[illegible] the case will not be remanded by the supreme court.

the close of the plaintiff's testimony in the district court, ought to have moved for a non-suit, or requested the court to charge the jury that there was no legal proof before them—or have moved for a new trial, on the ground that the verdict was unsupported by legal evidence.

A special verdict is conclusive to us as to the facts; and the absence of legal evidence cannot be offered to us, to induce us to set it aside; because nothing compels parties to record all the evidence they offer, and the absence of evidence on the record is no proof that none was offered. There is no statement of facts.

Our attention is arrested on a bill of exceptions.

The defendant, at the trial, offered in evidence a letter of the plaintiff's testator, which was read. The plaintiff's counsel then introduced a witness to explain the meaning of part of this letter—by showing what idea the writer meant to convey. The defendant's counsel objected to the witness being examined, as the part of the letter, intended to be explained, was void of ambiguity. The court overruled this objection, and a bill of exceptions was taken. *Civ. Code*, 310, *art.* 242.

East'n District.
Feb 1823

LAZARE'S EX.
vs
PEYTAVIN.

The part of the letter referred to in the bill of exceptions is in the following words:—"As to the $250, which you have paid for me: when I requested you to do so, I thought your situation allowed such an advance. The truth is, I intended to return them, but I thought I should not be called on to do it, because I did not anticipate the unfortunate events which have since befallen you. If I cannot repay the whole, I'll pay a part. Sell my bale of cotton, while you wait for the rest."

The witness deposed, he was present when the letter was written, and was consulted by the writer as to the terms in which it was to be couched. From the conversation which then took place, he thinks the writer meant to say to the defendant, that, inasmuch as the latter had been unfortunate in trade, he would not only refrain from asking him what was due, but would return the money he had borrowed. The witness told the writer, he ought not to use such language, and advised him not to write that way; that these expressions might lead to difficulty between him and the defendant, and milder ones would be more

proper; that they might be considered as an entering into a settlement of accounts. The writer persisted and the witness left him.

It is true the *Code* speaks only, in the part cited, of *acts*—but the principle is applicable to all *writings.* *Contra fidem* SCRIPTI *testis non adhibitur.* It would be monstrous to allow a party to convey an idea, in a letter, and after the effect which the communication of the idea was intended to operate, to turn round and pray to be permitted to show that he did not mean to convey the idea which the expressions used purported.

We think that the court erred in admitting parol evidence to explain a letter, in which there is no ambiguity. But we have carefully examined the evidence, which, in this case, is spread on the record, having been taken down in open court. From this it appears that the jury allowed the defendant every claim of which he offered evidence, and particularly that which the letter was introduced to support—and they did not permit the parol testimony excepted to, to weaken the evidence contained in the letter: It is therefore clear, that the defendant was not injured by the illegal introduction of the parol evidence

East'n District. Jan 1823.

LAZARE'S EX. vs. PEYTAVIN.

The case of *Johnson* vs. *Duncan's syndics*, 8 *Martin*, 158, is not unlike this.

The plaintiff and appellee has prayed us to correct an error of calculation, in which the district court fell in from the amount of the judgment, on the facts found by the jury. The wages of the deceased for 20 months, at $800 a year, amount to $1333 33. The jury found he paid $100 for the defendant, in all $1433 33; deduct from this the sum which the jury found to have been paid by the defendant $407—the balance due is $1026 33.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that there be judgment for the plaintiff for one thousand and twenty-six dollars thirty-three cents, with costs in both courts.

Workman for the plaintiff, *Moreau & Dumoulin*, for the defendant.

GRAYSON vs. *VEECHE*.

A party may attach the amount of a judgment recovered against himself.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. This is a suit by attachment, in which

the plaintiff caused the amount of a judgment lately recovered against himself, by the present defendant, to be attached.

The latter obtained a dissolution of the attachment, the district court being of opinion "that no attachment can be sued out by a person, indebted to another, for an alleged debt due him, attaching a debt due by himself, in his own hands, and making himself a garnishee." The plaintiff appealed.

According to our act of assembly, effects or credits (*effets ou creances*) of absent debtors may be attached, 1 *Martin's Dig.* 520, *n.* 6.— Hence, if a debt due by such debtor, may not be attached *by the person who owes it*, it must be, because he comes under some exception to the general rule. The district judge has not cited, nor does the appellee's counsel refer us to, any.

In *Graighle* vs. *Notnagel & al.* 1 *Peters*, 245. *Washington*, J. who delivered the opinion of the court, said, that a defendant may attach the money due by him to the plaintiff, in his own hands, and plead the pendency of the attachment to the action against him.

Sergeant, in his law of attachment, 72, shows,

that in England a party may attach money which he himself owes.

So, if A. recover a debt against B., the latter may attach, in his own hands for, so much as is due him by A. 1 *Rolle's Abridg.* 554.

Our act of assembly authorizes universally the attachment of a debtor's *credits*, and the case cited from *Peters* shows, that this, in Pennsylvania, may be done, even after suit was brought to recover the money afterwards attached; that from *Rolle* shows, that the English courts hold that even a recovery does not prevent the attachment.

Judge *Washington* examines the question on general principles; he does not rely on any particular provision in Pennsylvania, but shows, that there is not the least impropriety or incongruity in a man attaching a debt which he himself owes. His reasoning appears to us conclusive.

We do not see that any distinction may be made, under the general words of our act of assembly. It authorizes the attachment of the debtor's credits, without distinguishing those which are in the hands of a person who has a claim against himself, on which an attachment may issue. *Ubi lex non distinguit nec*

non distinguere debemus. We think the district judge erred.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the case remanded with directions to the judge to proceed in the case, as if the attachment had not been dissolved; the costs of this appeal to be borne by the defendant and appellee.

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

12m 691
121 752

TILGHMAN vs. *DIAS.*

An order of seizure and sale can issue on an authentic act written in the French language.

An acknowlegment of the debt and mortgage in a public act, amounts to confession of judgment.

APPEAL from the court of the second district.

PORTER, J. delivered the opinion of the court. The plaintiff purchased of the defendant a tract of land, and in the act of sale gave a special mortgage on the premises, and an obligation to pay the price at certain periods.

The money not being paid as the instalments fell due, the vendor applied for an order of seizure and sale of the property mortgaged. This order was granted by the district judge, and afterwards enjoined on the

East'n District.
Feb. 1823.

TILGHMAN
vs.
DIAS.

application of the present plaintiff, who in his prayer for the injunction relied principally on two grounds; first, that the act was written in the French language, and second, that it did not amount to a confession of judgment.

On a hearing of the cause the injunction was dissolved, and the plaintiff appealed.

The case as it stands before us, offers but two questions for consideration; they are, however, of considerable importance.

The first is, whether an order of seizure and sale can issue on an authentic act written in the French language.

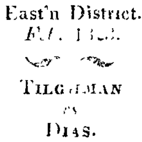
The second is, whether the act must not contain something more than an acknowledgment of the debt, and a mortgage for its security. Whether it must not contain also a confession of judgment.

I. The constitution, in the 15th section of the 6th article, has provided, that the public records of the state, and the judicial and written legislative proceedings of the same, shall be preserved and conducted in the language in which is written the constitution of the United States. The inquiry in respect to the instrument which has given rise to the

questions agitated in this case, will be best conducted by considering if this be one of the public records of the state? or if not, is it a judicial proceeding?

The act of congress, which enabled the people of the late territory of Orleans to form a constitution and state government, prescribed a condition which, had it been accepted as proposed, would have raised a very serious question, whether any instrument of writing could be made a matter of record in this state, unless it was done so in the language in which the constitution of the United States is written. Its words were, "that the records of every description shall be conducted in the language," &c. The convention, however, declined acceding to the proposition, and forwarded a constitution in which they provided, not that the records *of every description*, but that *the public records of the state* should be preserved in that language. Congress admitted us with this modification. *Martin's Digest, vol.* 1, 114, 212, 222; *Bioren's laws U. States*, 4, 402.

These expressions "public records *of the state*" we understand to mean all acts done by her in her political and sovereign capacity.



the memorials of which it is necessary to preserve. Records of the transactions of private individuals, although directed to be enregistered in particular offices, do not make a part of the public records of the state as such; they form no portion of her proceedings in that character; they are records *in* the state, not *of* it.

This construction is strengthened when we compare the proposition made by congress, with that which the people of Louisiana returned to that body in lieu of it, and which was accepted. In place of records of every description, they proposed, the public records of the state should be preserved in the language in which is written the constitution of the United States. The change of phraseology on this matter, when that proposed by congress was implicitly and literally pursued in regard to legislative and judicial proceedings marks clearly their intention then, and furnishes us now with a safe guide in interpreting the language by which they sought to give that intention effect.

The knowlege of this intention is aided by recurring to the sense in which these expressions were understood at the time the constitution was formed by the members of

the convention, whose vernacular language was French, and many of whom were well acquainted with English. In the instrument drawn up in the former language, and which was signed by all the individuals composing that body, the corresponding terms, to "public records of the state," are "*les archives de cet etat*," words which certainly do not convey the idea of the record of the transactions of two individuals in a notary's office.

On the next question, whether this is a judicial proceeding, we think there is as little difficulty as that just decided. Nothing can be considered a judicial proceeding, at which a judge does not preside, or which is not done by his order, either express or implied. The act of sale and mortgage, passed before the notary, was a voluntary act of the parties executed before a person possessing no judicial authority. It is not a judgment of itself: for no clerk or other ministerial officer could issue execution on it as in the case of judgments in our courts. It is the evidence furnished by the party to obtain judgment: evidence which the judge must examine to ascertain if a debt is due, on which he must decide, and on which he in fact renders judg-

East'n District. Feb. 1823.

TILGHMAN vs. DIAS.

ment when he accedes to the prayer of the vendor, that the vendee be compelled to execute his argreement. Under our law, to be sure, this judgment is carried one step further than in that of the *via ordinaria*; for it directs what species of execution shall issue, but it is still not less a judgment on that account. This position we think will appear incontrovertible when we examine the second point made in the cause, namely, whether it is necessary that a public act, which authorizes an order of seizure and sale, should contain a confession of judgment.

II. A difference of opinion and practice has prevailed in this state since the enactment of our *Civil Code*, on this subject; and the writers on the Spanish law are by no means uniform in the opinions which they express in respect to it. We have given to the question very considerable attention.

The *Code* provides, that if the title of the mortgagee amount to a confession of judgment (*emporte execution parée*) he may, on making oath that the debt is due, obtain an order for the immediate seizure of the property mortgaged. *Civil Code*, 460, *art.* 40.

If the law just quoted had went further

East'n District.
Feb. 1823.

TILGHMAN
vs.
DIAS.

than it does, and declared in express terms what species of act amounted to a confession of judgment, it would still have left the ancient laws in force and vigour; for in saying that on a title of that kind execution may issue, it uses no negative expressions, and it would not be inconsistent with the affirmative terms, in which this proposition is announced, that it should also issue on others. *De Armas' case*, 10 *Martin*, 158.

But the provision cited does not go so far. It leaves us to inquire from some other of our laws, what "amounts to a confession of judgment," what kind of instrument it is which will *emporte execution parée.*

The writers on Spanish jurisprudence, as has been already observed, hold different opinions on this point. Some of them insisting, that an instrument, which will authorize an order of seizure and sale, must contain what they call *la clausula guarentigia*, which is conferring power on the judges to execute the engagement expressed in it, in the same manner as if it had received the definite sentence of the judge, or passed into the authority of *cosa juzgada*, *Frebrero*, *p.* 1, *cap.* 4, § 4 *n.* 88. Others state, that it sufficient if the act is

East'n District. *Feb.* 1823.

TILGHMAN *vs.* DIAS.

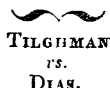
a public one, and that it is not necessary that the clause first mentioned should be inserted in it. The weight of authority appears to us decidedly in favour of the latter opinion, and that opinion is conformable to the 1st law of the 28th title of the *novissima recopilacion, book 11th, Febrero p. 2, lib. 3, cap. 2, § 1, n. 28. Curia Phillipica, p. 2, § 7, instrumento n. 1. Gomez comment, in leg. Taur. 64. Sala de derecho, vol. 2, 3, 15. Villadiego instruc. pol. cap. 2, 7, p. 32. Parladoria, rerum quot. lib. 2, part, 1. cap. fin. § 11, 5 & 6. Curia Phillipica, illustrado, vol. 1, part 2, § 7, n. 1.* The concurrence of this court with the doctrine which these authors teach, has already been expressed in the case of *Day* vs. *Fristoe, 7 Martin,* 239.

On the whole, we think the order of seizure and sale properly issued in this case, and we do therefore order, adjudge and decree, that the judgment of the district court, dissolving the injunction, be affirmed with costs.

Livermore for the plaintiff, *Moreau* and *Dumoulin* for the defendant.

TILGHMAN vs. *DIAS.*

East'n District. *Feb.* 1823.



TILGHMAN *vs.* DIAS.

APPEAL from the court of the second district.

The same points were determined in this, as in the preceding case.

PORTER, J. delivered the opinion of the court. This case presents the same questions with that just decided, and is between the same parties. For the reasons which induced this court to affirm the judgment of the district court in that case, it is ordered, adjudged and decreed, that the judgment of the court below be affirmed with costs.

Livermore for the plaintiff, *Moreau and Dumoulin* for the defendant.

HOFF vs. *BALDWIN.*

APPEAL from the court of the first district.

The oath of a notary, that he protested the draft, and that he was generally in the habit of giving notices on all protested notes and bills, and presumes that he gave notice to the defendant, as he was requested to be very particular about it; and that his habit was to put notices into the

PORTER, J. delivered the opinion of the court. This is an action brought against the defendant, as drawer of a bill of exchange on Samuel T. Beale, Bardstown, Kentucky. Seeveral grounds of defence are set up in the answer, and among others—that no notice was given of the dishonour of the bill. The district judge being of that opinion, gave judg-

East'n District.
Feb. 1823.

HOFF
vs.
BALDWIN.

post offices, to be sent off by the first mail, but having a great deal of protesting to do that summer, he has no distinct recollection about notifying the defendant, is no sufficient proof of notice.

ment against the plaintiff, from which judgment this appeal is taken.

The evidence, which it has been contended establishes the notice, is contained in the deposition of a notary public, residing in the place where the bill was made payable and protested. He swears, that he protested the draft, and that he was generally in the habit of giving notices on all protested notes and bills, and presumes that he gave notice to the defendant, as he was requested to be very particular about it. In regard to the time he sent it off, he declares that his habit was to put notices into the post-office, to be sent off by the first mail, but having a great deal of protesting to do that summer, he has no distinct recollection about notifying the present defendant.

Notice of protest, of bills of exchange, is matter of strict law, and a failure to give it is fatal to the right of recovery, in cases where it is required by the *lex mercatoria.* In that now before us, we agree with the district judge, that the proof of the defendant having received notice, is not sufficiently established, and for the same reason which he gives. The witness merely states, that it was his *general*

East'n District.
Feb. 1823.

HOFF
vs.
BALDWIN.

habit, and that, from that habit, he presumes he did not neglect putting notice in the post-office. The expression *general habit*, negatives the idea that the witness was able to state it was his *invariable* one ; and when he can only venture to say, that a presumption is raised in his mind from his common practice, we cannot say that presumption establishes a fact to ours. *Chitty on bills*, (*ed.* 1821) 522. In the case cited from *Johnson*, the witness swore he had not a doubt but that he gave notice.

On the point as to the time when he put it in the office, the evidence is still weaker, for though he states, he was accustomed to do it regularly, he mentions that, having a great deal of protesting to do that summer, he has no distinct recollection about notifying the present defendant.

The plaintiff insists, this case should be taken out of the general rule, on the ground that it has been proved, the drawee was a partner in the commercial house of the drawers. *Phillips on Ev.* 2, 36. The bill is drawn by Joshua Baldwin & Co. in favour of Neill & Davis, on Samuel T. Beale. The evidence relied on to establish that Beale, the drawee, is a partner in the house of Baldwin & Co. is contained in the

East'n District. *Feb.* 1823.

HOFF *vs.* BALDWIN.

deposition of a witness, who in answer to an interrogatory, if he is acquainted with the parties to the suit, as well as the parties to the bill annexed, answers, that he is acquainted with Joshua Baldwin, Samuel T. Beale and Wilson L. Davis and Gordon Neill, the two last compose the firm of Neill and Davis. This proof does not enable the court to learn who are the partners in the house of Baldwin & Co.; whether the four persons just named make the firm, or if any of those persons compose it, which of them. There would be as much reason to say, that Baldwin and Davis formed the partnership of Baldwin & Co., as that Baldwin and the payee and drawee all be-belonged to that house.

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

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

12m 702
112 714

GRAY vs. *TRAFTON & AL.*

No particular form and specific instrument in writing is required in the assignment or

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This is a suit commenced by attachment.

East'n District.
Feb. 1823.

GRAY
vs.
TAFTON & AL.

transfer of debts. It may as well be done by an order on the debtor to pay a third person, as by giving up the evidence of the debt.

in which a counsellor and attorney who had collected, by due course of law, money for the defendants, is made garnishee. It appears by his answer, that the funds of the defendants came into his hands only one day before the levy of the attachment; that he claims for himself, and G. Eustis, his former partner in the practice of the law, a right to retain two hundred dollars of said money, as a compensation for professional services; that the balance he holds subject to the order of Mark Trafton; and that he is informed and believes, that said sum had been (long since) assigned to one Dellingham, &c. The evidence in support of the claim of this assignee, who has intervened in the present case, establishes the following facts:—1 that certain notes were placed in the hands of Eustis and Livermore, for collection, at the request of the defendants; that Dellingham, who it appears, handed the notes to the attorneys, was authorized to assign two hundred dollars arising from said collection to a third person, which was done, and the assignment of that sum finally ensued to the benefit of one Phelps who has also intervened in the present case; and that an order, in favour of the claimant

East'n District. *Feb.* 1823.

GRAY *vs.* TAFTON & AL.

Dellingham, was drawn by the defendants on G. Eustis, for the balance of the money which might be obtained from the collection of said notes, after deducting the previous assignment of two hundred dollars, which order was verbally accepted by the latter, the amount to be paid on condition of the money coming into his hands; which never happened; but was received by his partner Livermore, as appears by his answer, and with a knowlege of the previous assignment by Trafton to Dillingham.

On these facts the district court gave judgment in favour of the claimants, from which the plaintiff appealed.

Two bills of exceptions were taken by the plaintiff in the course of the trial of the cause in the court below; one to the introduction in evidence of the order from Trafton to Eustis, as not being a legal mode of cession or assignment of a debt, and another to the proof of said order by parol testimony. As to the first, it is believed that no particular form, and specific instrument in writing is required in the assignment or transfer of debts. It may as well be done by an order on the debtor to pay a third person, as by giving the title or

East'n District. *Feb.* 1823.

GRAY *vs.* TRAFTON & AL.

evidence of the debt; and as to the objection to proving the order by parol, it is sufficient to observe, that we believe it to be the uniform and established practice, to make proof in this manner in all commercial transactions, which relate to bills of exchange, orders, or notes of hand; by proving the hand-writing of the parties concerned in uttering them.

But the appellant insists on a preference being given to his attachment, over the rights set up by the claimants, on the ground that no legal notice had been given to the debtor, of the assignment and transfer of the debt, previous to the service of the writ; and that such notice has not been given. His counsel rely on the provisions of the *Civil Code*, made in relation to the assignment and transfer of debts. 368, *art.* 122. According to this article of our *Code;* the transferor is only possessed as it regards third persons, after notice has been given to the debtor, of the transfer having taken place. The transferor may, however, become possessed by the acceptance of the transfer, by the debtor, in an authentic act.—By this law it is clear, that after proper notice to the debtor of a transfer of his debt, the transferor is possessed of the original credi-

East'n District. *Feb.* 1823.

GRAY *vs.* TRAFTON & AL.

tor's rights, against said debtor, and also against third persons, provided there be no fraud in the transfer. The corresponding word in the French text of the *Code*, to the word notice in the English, is *signification*, which the plaintiff's counsel asserts to be technical in its effects, and must be served on the debtor in a particular manner; that is, by the ministry of an officer.

In support of this doctrine, we are referred to the 1690th article of the *Code Napoleon*, which is verbatim the 122d of our *Code* above cited. It does appear, from other authorities on the laws of France, to which we are also referred, that in the administration of justice, according to the usages of that kingdom, signification must be made of a transfer of debts by officers whose peculiar duty it is to give such notice. But in the state of Louisiana such formality cannot be required, because there are no ministerial officers of justice, who can be compelled to perform services of that kind. And therefore no such technical force can be given to the word notice, or signification, as does perhaps prevail in France.

No evidence of a higher or more authentic nature ought to be required, to establish the

East'n District.
Feb. 1823.

GRAY
vs.
TRAFTON & AL.

fact of notice to a debtor, of the transfer of his debt, than would be sufficient to prove any other fact, in support of the claim of a suitor, and which must be done in conformity to the rules of evidence, as fixed by our jurisprudence.

An acceptance of the transfer by the debtor, in an authentic act, gives possession of the debt to the transferor. Now, because the expression *authentic act*, is used in the *Code*, the plaintiff's counsel would infer that any other mode of acceptance would not produce the same effect, considering the expression of this mode as excluding all others. We are of a different opinion. Notice to a debtor appears to be required by law, to prevent an improper payment after the debt has been transferred, and protect and secure the rights of the transferor. An agreement by the debtor, to pay to the transferor, is such an acceptance of the transfer by the former, as necessarily involves notice, and consequently, secures the rights of the latter against all persons.

In the present case, the evidence fully establishes the fact, that Trafton's attorneys agreed to pay to the claimants, the amount by him ordered, when the money should be col-

East'n District.
Feb. 1823.

GRAY
vs.
TRAFTON & AL.

lected, which did not take place until long after the date and acceptance of his order.—The attorneys were, therefore, debtors only conditionally, viz.—in the event of recovering the money of their client. The latter was free to direct its appropriation in anticipation of collection; and the persons to whom payment was ordered, after acceptatance by his agents. held a vested right in the debt, subject however to the condition of said acceptance.

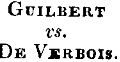
From that period Trafton's attorneys, thus charged with the collection, may be considered as trustees for the claimants, who had a vested interest; and consequently, the funds thus transferred were not subject to the plaintiff's attachment. See 4 *Dallas' Reports*, 281.

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

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

GUILBERT vs. *DE VERBOIS.*

East'n District. *Feb.* 1823.



GUILBERT *vs.* DE VERBOIS.

If the plaintiff offers no proof of the damages alleged, judgment may be given generally for the defendant.

So, if the parties allege titles, without averring a conflict, there may be judgment for the defendant.

APPEAL from the court of the fourth district.

PORTER, J. delivered the opinion of the court. For a correct understanding of this case, it is necessary to state with accuracy the pleadings; and the finding of the jury on the facts, submitted to them.

The plaintiff avers, that he is the true and lawful possessor, and proprietor, of a tract of land situated in the parish of Iberville, on the left bank of the river Mississippi, bounded on the upper side by land of Abner L. Duncan, and having a front of ten arpents with the ordinary depth.

That on the first day of January, 1809, and on several other days, and several other times between that day and the first day of September, 1817, Francis De Verbois and Dominique De Verbois, both of the parish of Iberville, entered on the land of the petitioner and then and there cut down trees growing thereon, to the value of $500, and carried them away; and that they still continue to commit trespasses of the same kind.

The petition concludes by a prayer, that the defendants may be condemned to pay the

East'n District. *Feb.* 1823.

GUILBERT *vs.* DE VERBOIS.

sum of $500, and that they be enjoined from any further waste on the premises.

To this petition the defendants answered by pleading the general issue:—title in themselves to 36 arpents of land in front on the left bank of the Mississippi, by virtue of a purchase made in the year 1807, and continued possession from that time.

They also opposed the plea of prescription, and prayed that the vendors might be cited in warranty.

On these pleadings, the following facts were found by the jury, on those submitted by the respective parties.

On behalf of the plaintiff, they found that Walker Gilbert purchased from Jacques De Villiers on the 30th day of May, 1808, *the land mentioned in the petition*, of ten arpents in front by forty in depth; but that he did not receive possession of it. That Villiers' title consisted of an order of survey, dated the 3d October, 1796, which had been since confirmed by the commissioners of the land office of the eastern district, viz. in the month of January, 1812.

On the part of the defendants, they found that they (the defendants) have been in pos-

session of the tract of 36 arpents, that they purchased it from Mayronne and Degruise, and that the ten arpents front form no part of it; that the title has been confirmed by the board of commissioners of the land office, and that the defendants have had possession since the year 1800. That Jacques De Villiers was the overseer of Mayronne and Degruise, on the tract of 36 arpents, but not on the ten arpents in litigation.

On this verdict, the district judge being of of opinion that the defendants had acquired a right to the premises by prescription gave judgment in their favour against the plaintiff for costs of suit, and the latter has appealed; and insists that it appears by the pleadings, the title was not put at issue, and therefore the judge erred in giving judgment against him in relation to it.

Two questions arise out of the proceedings in the district court, the one in regard to the damages alleged to be sustained by the trespasses committed on the property of the plaintiff; the other respecting the titles which the parties have set up.

The former so far from being established does not appear to have been even submitted

East'n District. Feb. 1823.

GUILBERT vs DE VERBOIS.

by the plaintiff to the jury. On this point then, the district court certainly did not err in giving judgment for the defendants.

On the latter, the counsel for the plaintiff is correct in saying, that by the petition and answer it does not appear the parties were at issue on the question of title, although they may have intended it. The plaintiff avers, that he owns ten arpents of land in front, and the defendants say that they are proprietors of 36; both of which assertions may be true, but must be considered wholly unimportant, unless the title call for the same land. This the parties have not told us they do; and if they do not, we cannot examine them. We cannot assist parties in ascertaining their rights to property, unless these rights conflict with those of others; we cannot notice their abstract pretensions.

This fact, however, of the titles not interfering, does not rest on the pleadings alone. The inquiry was gone into on the trial, and the jury found it as both parties had asserted. The third fact submitted by the defendants was in the following words:—"The defendants purchased a tract of land of 36 arpents from Mayronne and Degruise on the 28th December, 1807, of which the ten arpents in dis-

pute are a part." To which the jury replied "yes; the defendants have purchased the tract of 36 arpents; the tract of ten arpents does not make a part of it." On this finding, we are also of opinion, the court did not err in giving judgment for the defendants with costs.

It is therefore ordered, adjudged and decreed, that that judgment be affirmed with costs.

Hennen for the plaintiff, *De Armas* for the defendants.

HEIRS OF ANDREWS vs. *EXECUTORS OF ANDREWS.*

The attestation of subscribing witnesses does not mar an olographic will.

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

Workman, for the defendants. The validity of the testament of the late A. Andrews, is the sole point in dispute in this case. If it be not good as a nuncupative testament, as it is attested by no more than three witnesses, instead of the number which the law requires, it certainly has all the requisites to constitute a valid olographic testament. It is entirely written, signed and dated with the testator's hand; and the law subjects this will to no

East'n District.
Feb. 1823.

ANDREWS' HEIRS
vs.
ANDREWS' EXS.

other formality. It is true, that the *Code* defines the olographic testament to be "that which is made and written by the testator himself, *without the presence of any witness. Civil Code*, 230, *art.* 103.

The true coustruction of this sentence seems to me to be, that the presence of any witness is *not indispensably necessary* to the validity of such a will. The subsequent paragraph of this article, declares that the olographic will is subject to no other form but that of being entirely written, signed and dated, with the testator's hand. And this would control and repeal the first paragraph of the article, if their provisions were considered to be contradictory. Besides, the will in question may have been *made* and *written* by the testator himself, *without the presence of any witness*, although some witnesses should have afterwards signed it. The contrary does not appear, and is not to be presumed gratuitously.

The formalities prescribed for giving validity to testaments, are intended to secure their genuineness, and prevent forgery and perjury. The olographic form is allowed not for the sake of *secrecy*, (for the olographic will may be either *open* or sealed) but to facilitate

East'n District.
Feb. 1823.

ANDREWS' HEIRS
vs.
ANDREWS' EX'S

to those who can write, the means of disposing of their property after their death. The presence of one or more witnesses, at the writing or signing of such a will, cannot defeat or counteract any of the objects of these laws.

It would, on the contrary, be an additional security against forgery and falsehood.

It is evident, then, that the signatures of Vance, Moore, and Legendre to the present will must be considered as only surplusage; a something more than the law required, but which should not invalidate a will, good in all other respects, any more than the signatures of ten or twenty witnesses would render void a testament to which only five or seven witnesses were requisite.

This court have already recognized and enforced, the principles on which my reasoning is founded, in the case of *Broutin and others* vs. *Vassant*, 5 *Martin*, 169.

They decided in that suit, that *superscription* is not an essential requisite of a sealed olographic will; under the law which provides, that when this will is sealed, it needs no other superscription than this, or words equivalent, "This is my olographic will." If a formality which the law specifies, and seems almost to

East'n District.
Feb. 1823.

ANDNEWS' HEIRS
vs.
ANDREWS'EXS.

require, may be thus dispensed with, a formality beyond what is required, ought not surely to invalidate a will, which is acknowleged to be in no way defective.

The provisions of our *Civil Code* respecting the olographic will, are evidently taken from the *Code Napoleon.* But the French tribunals, rigorous as they always are in their construction of the laws prescribing the formalities of testaments, have never held that an olographic will, made with all the forms which the law requires, could be vitiated for containing something, or any thing more. On the contrary, they have decided that, *Les mots surchargés, dans un testament olographe, n'en operent la nullité ni totale, ni partielle.* Also, *Un testament ecrit, daté, et signé par le testateur, vaut comme olographe, alors même qu'on a manifesté l'intention de le faire revetir de la forme mystique.* Again, *Un testament entierement ecrit, daté et signé de la main du testateur, peut valoir comme olographe, quoique, on ait observé à son egard, mais d'une maniere vicieuse, quelques formalités, prescrites pour le testament mystique.* This last case is ours, changing the mystique into the nuncupative testament. See *Paillet, Manuel de droit Francais,* 342; 10 *Sirey,* 289; 14 *same work,* 217. *Journal du Palais, t.* 44, *p.* 1.

East'n District.
Feb. 1823.

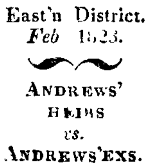
ANDREWS' HEIRS
vs.
ANDREWS'EXS.

The reasons of the dispositions of the law, on which these decisions are founded, are very evident. The will itself must be wholly written by the testator; for, if written by the hand of another, it might not be done with fidelity and exactness. It must be signed by him also; because, a will written but not signed by him, could only be considered as a draught, or project of a will. This signature alone, gives confirmation and validity to the act. And lastly, the date is indispensable; for without it, if several olographic wills were presented, it might be impossible to determine which was the last, and consequently, the valid one.

A question has been raised respecting the manner of proving this will.

The law requires in general, that when an instrument is executed in the presence of witnesses, it must be proved by one or more of them, if living. But this rule is dispensed with, as to nuncupative wills, by the 159*th art.* of the *Civil Code*, *p.* 244; which provides, that if none of the persons who were present at the said acts, are living *near the place*, but all are absent or deceased, it will be sufficient for the proof of said testaments, if two credi-

East'n District. Feb 1823.



ANDREWS' HEIRS vs. ANDREWS' EXS.

table persons make a declaration on oath, that they recognize the signatures of the different persons who have signed the will, or superscription. And the next article directs, that olographic testaments must be proved by two creditable persons, who must attest that they recognize the will as being written, dated and signed, in the testator's hand writing. These provisions remove all difficully as to the proof of the will now in question. It has been proved as well as made, in every respect as the law requires.

Duncan, for the plaintiffs. The testament of Arthur Andrews cannot be brought within either of the three classes provided for by our laws, and such has been the strictness required, that even the want of any of the formalities prescribed, for the one or other of these classes, would be sufficient to render the will void; that these formalities are conditions, without which the instrument is not complete.—*Knight* vs. *Smith*, 3 *Martin*, 163.

The instrument under consideration cannot be classed with the nuncupative or mystic testament, but may, as Mr. Workman argues, be regarded as a good olographic will, pos-

East'n District.
Feb 1823.

ANDREWS' HEIRS
vs.
ANDREWS' EXS.

sessing, as he conceives, all the essential requisites of that class, being entirely written, dated, and signed with the testator's hand. I think the counsel has confounded some of the formalities of that description of testament, with the essentials; or rather has overlooked an essential requisite, that it should be made and written " without the presence of any witness" is an essential, without which, it can neither be defined, classed or proved as an olographic testament. Independent, indeed, of the attestation, it may possess all the forms requisite for that description of will, but when witnesses are called to attest its execution, it, from that moment, ceases to be olographic.

The argument that the presence of one or more witnesses, at the writing or signing, would furnish additional security against forgery and falsehood, is, at first view, strong and imposing; but, upon closer examination, I think it will be found more plausible than solid. To dispense with witnesses or the attestation generally required, you must find the case or exception to that rule; when entirely written, signed and dated, without the presence of any witness, is, I apprehend, the case, and the only one known to our laws, in which

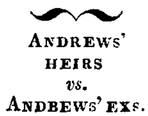
East'n District. *Feb.* 1823.

ANDREWS' HEIRS *vs.* ANDREWS' EXS.

a testament would be declared to be valid, without the aid and presence of the precise number and character of witnesses required by law; and let it be recollected, that we are not prermitted to determine, or called upon to say, whether it would be better or worse, gives more or less security, to have a few witnesses at hand; if any, the law has determined the number.

I cannot agree with Mr. Workman, in rejecting or considering the subscribing witnesses as surplusage. In the case of *Broutin & al.* vs. *Vassant*, 5 *Martin*, 159, this court decided, that the superscription was neither of the form or essence prescribed for olographic testaments; and therefore considered it as surplusage. Although that class of testaments is subject to no other form, but that of being entirely written, signed, and dated with the testator's hand; yet, some of those forms may certainly be regarded as essentials, which we are no more at liberty to dispense with than we should be warranted in making substance yield to form. To make it olographic must it not be *entirely*, *wholly*, all written by the testator? In *Merlin's Repertoire*, 13, 747, we have the answer, and it is so happily in point.

East'n District.
Feb. 1823.



ANDREWS' HEIRS
vs.
ANDREWS' EXS.

that to transcribe entire, will, I am sure, be excusable. *Il a été rendu, au parlement de Flandre, un arrêt qui juge quelque chose de semblable. Le sieur Goulart, après avoir fait en Hainaut un testament olographe, avait appelé deux témoins pour certifier sa signature ; et dans la crainte qu'on n'altérât ses dispositions, il en avait signé et paraphé toutes les pages conjointement avec ses deux témoins. Après sa mort il s'éleva une contestation sur ce testament. Les Héritiers le soutenait nul, par le mélange de formes étrangères à la nature des testamens olographes, et il fut déclaré tel, de toutes voix, par arrêt du* 28 *Janvier*, 1766, *au rapport de M. de Sars de Curgies, à la premiere chambre, après partage dans la troisième.* But it is said, we can strike out that which in other countries is considered the most important part of the instrument, its *attestation*, and thereby meet the literal signification of the word olographic; but if that rude operation can be tolerated, how shall we get rid of another essential, and one, let it be recollected, which cannot be found in the French law, either as it stood before or after the publication of the *Code*, from which we have copied, that it should be written *hors la presence d'aucun temoins.* If without, or rather out of the presence, cannot be made to mean

East'n District, Feb. 1823.

ANDREWS' HEIRS vs. ANDREWS' EXS.

in the *presence* of witnesses: if that expression is clear and free from ambiguity, how can this honourable court under the maxim adopted for their government, in the case of *Knight* vs. *Smith*, 3 *Martin*, 165, consider the attestation as surplusage? Why require that the testator should be alone, that he should write *hors la presence d'aucun temoin?* Perhaps, that in the performance of so solemn an act, he should not be embarrassed or interrupted by the presence of any person—that he should be uninfluenced in the disposition of his estate by the suggestions of an artful or officious friend; and, if any such motive could have influenced the legislature, must not the presence of acting, attesting witnesses take the instrument out of the spirit as well as the letter of the law, which authorizes the disposition of estates by olographic testaments? "But when the law is clear and free from all ambiguity, the letter is not to be disregarded under the pretext of pursuing the spirit." *Civil Code*, 4.

If probate can be taken of the will, its execution must be proved by the subscribing witnesses, if to be found within this state. To dispense with such proof, would be to lose

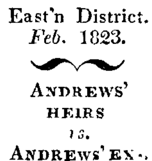
sight of the first and best rule of evidence, "that the best evidence which the nature of the case will admit of, must be produced," and open a wide door to the very mischief which the opposite counsel admits the law intended to provide against. Forgery in our day is in reality reduced to a science; the art of imitating hand-writing has of late been brought to such perfection, that within the observation of the opposite counsel, as well as my own, whole pages have been so closely imitated as to deceive the most intimate friends of the person upon whom the fraud was attempted; and is it in such times, that we are so to relax the rule of law as to take the fallacious proof by comparison of hand-writing, instead of resorting to those who can make the proof perfect? My mind answers no; and if rightly answered, the character of the will is ascertained. The moment you are obliged to call upon the subscribing witnesses it will cease to be an olographic will, and not having a sufficient number of witnesses, must be rejected as a nuncupative testament. *Denizart* mentions a case in which the operation of *striking out* was also proposed, the testament being partly olographic, and partly before a notary; but the tes-

East'n District. Feb. 1823.

ANDREWS' HEIRS *vs.* ANDREWS' EXS.

tament was declared void. *Merlin's Repertoire*, 13, 747.

Workman, in reply. The literal signification of the word olographic, does not exclude, as the adverse party suppose, the idea of an attestation to an instrument. The olographic act is one written entirely in the the hand-writing of the maker of that act, whether it be witnessed or not. The decision quoted from *Merlin*, can have no authority in this case; because, it is founded on a law anterior to that of the *Code Napoleon*, from which ours is borrowed—on a law too (the ordonnance of 1735) which does not contain the important clause, *et n'est assujetti à aucune autre forme.* Besides, this antiquated judgment of a provincial tribunal is diametrically opposite to those of the high court of cassation, which have been already cited. It is difficult to conceive why the editors of our version of the French *Civil Code* have thrust in the variation of *without the presence of any witnesses.* But whatever may be its meaning or importance, it is evidently repealed, as I have before stated, by the succeeding paragraph of the article in which it is contained.



If the attestation to this will be, as I think it is, of mere surplusage, then the will is admitted to be proved as the law directs: And even, according to the rule of jurisprudence insisted upon by the adverse counsel, our proof is still complete; for it has been made, as the court will see from the admission on record, by two of the attesting witnesses themselves.

The objection cannot be maintained, that witnesses were not necessary or proper in such a will. Witnesses are not necessary to a promissory note, or a receipt. But it never was supposed, that such an instrument would be vitiated by being attested. It could only be requisite that the attesting witness should prove the instrument. And this is all that can be required of us, in the present case, admitting that the exception to the rule of evidence, in favour of nuncupative wills, *Civil Code*, 244, *art.* 159, does not extend to olographic wills, to which the signatures of witnesses might be unnecessarily affixed.

PORTER, J. delivered the opinion of the court. This appeal has been taken from a decision of the court of probates, relative to

East'n District.
Feb. 1823.

ANDREWS' HEIRS
vs.
ANDREWS' EXS.

the last will and testament of Arthur Andrews deceased. The judge, conceiving the instrument presented to him to be clothed with all necessary requisites to render it valid as an olographic will, admitted it to probate. The heirs appealed.

The paper produced as the testament of the deceased, is proved to have been written, signed, and dated by him. At the foot, however, three persons have affixed their names, "as witnesses present."

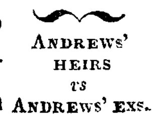
The appellants contend, that the writing of the will in presence of three witnesses, together with their signatures, render it void as an olographic testament. The appellees insist, that the names of the witnesses are only surplusage.

"The olographic will or codicil is that which is made and written by the testator himself without the presence of any witness."

"An olographic testament or codicil shall not be valid, unless it be entirely written, signed, and dated with the testator's hand. It is subject to no other form." *Civil Code*, 230. *art.* 103.

The counsel for the heirs has relied much

East'n District.
Feb. 1823.



ANDREWS' HEIRS
vs
ANDREWS' EXS.

on the expressions "written out of the presence of witnesses," as a reason why this will, written in their presence, cannot be an olographic one. We think that the legislature, in making use of this expression, intended to mark the distinction between wills of this description and those to which witnesses are indispensable. There is no other construction will give effect to the last clause of this article, which states that this kind of instrument is subject to no other form than being written, signed and dated, in the hand-writing of the testator.

The most serious question which the cause presents is, whether the signatures of the witnesses do not render void an act which the law requires the testator to write entirely in his own hand.

We have been referred, by the counsel of both parties, to decisions rendered by tribunals in France on a law expressed in nearly the same words as our own. In those cited by appellees, the wills were mystic ones, and it clearly entered into the consideration on which they were decided, that the act of superscription on the envelope, and the testa-

East'n District. *Feb.* 1823.

ANDREWS' HEIRS *vs.* ANDREWS' EXS.

ment itself, were two distinct and separate acts. That relied on by the appellants, was a case where the testator called to his assistance two witnesses; but where they not only signed the will at the bottom, but affixed their names with that of the testator on each page. Making every allowance, however, for the difference in the facts, it is impossible to reconcile them. The former were held good, because an act, complete itself in one character, was not vitiated by an abundant caution in endeavouring to give it validity in another. It is not easy to see why the same reason did not govern the latter, which was held null, because there was a mixture of forms, foreign to an olographic testament. This decision, however, was by a provincial parliament; the others, by the court of cassation.

Leaving them however aside, and considering the point as if it was now presented for the first time, we are of opinion that this will is valid as an olographic one. The great principle which governs courts in cases of this kind is, to give effect, if possible, to the intention of the parties. Where the legislature has pointed out a particular form, in which that intention must be expressed, the operation of

this principle is of course limited; but the instrument is not destroyed, it still remains; and if it is good in one form, though not in another, it must be enforced in that in which it may have effect: for, it is still the act of the party, and the particular regulation does not interfere with the general principle just spoken of. Hence, the maxim common to all systems of jurisprudence with which we are acquainted, *ut res magis valeat quam pereat. Dig.* 31, *tit.* 5, *l.* 13. Hence, the provision of our *Code*, that an act which is not valid as an authentic act, through defect of form, avails as a private writing, if it is signed by the parties. *Code*, 304, 218. And hence, the principle contained in the *Romon law*, which has a still more direct application to the case before us; that when a person intends to make a will under a particular law, and fails through defect of form, he does not, for that reason, deprive himself of the advantage of having it declared valid, if it is good under any other form by which he is privileged to make it. It is this law which furnishes the principal ground of the opinion given by *Merlin* in his *questions de droit*, *vol.* 5, 222. See also *Domat*,

East'n District.
Feb. 1823.

ANDREWS' HEIRS
vs.
ANDREWS' EXS.

liv. 3, *tit.* 1, § 5, *note to art.* 19. *Broutin* vs. *Vassant*, 5 *Martin*, 169.

The will here is entirely written, signed and dated with the hand of the testator; there is no writing in the *body* of the testament by any other person. *Toullier*, *Droit Civil Francais*, *liv.* 3, *tit.* 2, 357. The witnesses sign at the bottom, and their signatures make no part of it.

We are therefore of opinion, that the judgment of the parish court be affirmed with costs.

*** There were a few cases determined at this term. which are not printed, as petitions for a rehearing had been presented when this sheet was put to press.

INDEX

OF

PRINCIPAL MATTERS.

ABATEMENT.

See PRACTICE, 10.

AGENT.

1 The degree of diligence, which is required of an agent, who receives a compensation, is that which a prudent man pays to his own affairs, and which is called, in law, ordinary diligence. *Madeira* & *al.* vs. *Townsley* & *al.* 84

2 If the principal sue for the price of goods sold on a credit, without authority in the agent, the conduct of the latter is thereby approved, and he discharged from responsibility. *Surgat* vs. *Potter* & *al.* - - - 365

3 The defendant has a right to demand, proof of the authority of the agent, who commenced the suit and made the necessary oath to procure the attachment. *Shewell* vs. *Stone.* - 387

See PRACTICE, 4.

AMENDMENT.

A district judge cannot amend or modify a former decree, at a succeeding term, unless a new trial was granted. *Balio* vs. *Wilson.* - 358

APPEAL.

1 An appeal from an order to permit the plaintiff to make a voluntary surrender, will be dismissed, if the record show that his creditors had obtained an order for a forced one, without showing how far they had proceeded therein. *Blossman* vs. *his creditors.* - 28

2 What is related, in the opinion of the judge *a quo*, cannot be received as evidence on the appeal. *Same case.* - - - 29

3 If the appellant fail to bring up the record, the appellee may have the judgment affirmed with damages. *Yeiser* vs. *Smith.* - - 292

4 The appeal will be dismissed, if there be a bill of exceptions to the final judgment, and no statement of facts. *Ferguson* & *al.* vs. *Bacon.* 303

5 No judgment can be reversed on the mere assignment of errors, which might have been cured by evidence legally introduced. *Butler* vs. *Despalir* & *al.* - - - 304

6 Evidence introduced on the trial, cannot be assigned as error apparent on the face of the record. *Albert* vs. *Davis.* - - 305

7 Facts assumed as proven, in the judgment appealed from, cannot be considered as proven, by the supreme court. *Kay* & *al.* vs. *Compton.* - - - - 309

8 A cause, which was tried by a jury, will not be remanded for a new trial, when there is no contradiction in the testimony and its decision depends on calculation alone. *Johnston* vs. *Sprigg.* - - - - 328

9 The supreme court will remand a cause for a new trial when justice requires it. *Coe & al.* vs. *Pannel & al.* - - - 355

10 A judgment, directing all the property of the debtor to be sold, and the proceeds distributed among his creditors, does not discharge the security in the appeal bond. *Baldwin* vs. *Gordon & al.* - - 378

11 If the appeal be taken for delay only, the judgment will be affirmed with damages. *Ferguson & al.* vs. *Martin.* - - - 295

12 The conclusion of the district court will prevail, in a matter of fact, if the appellant does not show that there is manifest error in it. *Elishe* vs. *Voorhies.* - - - 424

13 Same point. *Moore & al.* vs. *Angiolette.* - 532

14 The defendant's signature, at the foot of the appeal bond, is evidence that he appealed. *Mulanphy* vs. *Murray.* - - - 429

15 When the record was made up in so confused a manner, that the facts could not be clearly seen, and there appeared four judgments and one statement of facts only, the appeal was dismissed, and no affirmance with damages could take place. *Sompeyrac* vs. *Cable.* 431

16 An appeal lies from the revoking of the appointment of an attorney to absent heirs. *State* vs. *Judge Pitot.* - - - - - 485

17 The supreme court has no general controlling power over other tribunals. *State* vs. *Judge Esnault.* - - - - - 488

18 If there be no statement of facts, the judgment

may be affirmed with damages. *Wooters* vs. *Wilkinson*. - - - - - 491

19 Same point. *Johnson* vs. *Turney & al.* - 492

20 An appeal from the grant of a new trial (before final judgment) is premature. *Dresser* vs. *Cox*. - - - - - - 536

21 Facts which depend on proof should be alleged, that the adverse party may disprove them in the inferior court. *Bouthemy* vs. *Dreux & al.* - - - - - - 639

22 Prescription cannot be pleaded in the supreme court. *Boudreau* vs. *Boudreau*. - - 667

23 The verdict of a jury cannot be disregarded, in the supreme court, when it does not appear manifestly erroneous. *Evans* vs. *Richardson*. 30

24 An obligor on an appeal bond, is not entitled to the benefit of the plea of discussion. *Denis* vs. *Veazey*. - - - - - 79

25 The surety on an appeal bond, which is not successfully prosecuted, cannot contest the plaintiff's claim, liquidated by the judgment, unless on a suggestion of collusion or fraud. *Same case*. - - - *id.*

26 A judgment which contains no reference to any law, nor any of the reasons on which it is grounded, must be reversed. *M'Kenzie* vs. *Havard*. - - - - - - 101

27 If a suit be for damages, and an injunction to quiet, &c., an appeal will lie though less than $300 be claimed for damages, the land being of sufficient value. *Kemper* vs. *Armstrong & al.* - - - - - - 296

28 If the record be filed, on the day after that of the return, the appeal will be dismissed. *Horn* vs. *Montgomery.* - - - 505

29 Same point. *Lafon's exs.* vs. *Riviere.* - 506

30 If the appellant fail to bring up his case, according to law, the appellee may have the judgment affirmed with damages. *Stephens* vs. *Smith.* - - - - 333

31 Same point. *Hinson* & *al.* vs. *Ogden* & *al.* - 389

32 If the defendant appeal, and there be no statement of facts, bill of exceptions, &c., the judgment will be affirmed with damages. *Serpentine* vs. *Slocum* - - - 395

See EVIDENCE, 6 & 7.

ASSIGNMENT.

1 No particular form or specific instrument is required in the assignment of debts. *Gray* vs. *Trafton* & *al.* - - - - 702

2 It may as well be done by an order on the debtor, to pay to the assignee, as by giving up the evidence of the debt. *Same case.* - 703

ATTACHMENT.

1 An attaching creditor loses his lien, in case of insolvency. *Hanna* vs. *his creditors.* - 33

2 A decree, that a garnishee pay to the plaintiff what he owes to the defendant, is tantamount to a judgment. *Same case.* - - *id.*

3 A garnishee's admission of funds in his hands, is not a voluntary confession of judgment. *Same case.* - - - - - *id.*

4 If by a rule of the district court, no exception will be heard against the attachment, except those contained in the answer, it is not too late to move for a dismissal, after the trial is gone into. *Shewell* vs. *Stone*. - - 386

5 One may attach in his own hands, the amount of a judgment which has been recovered against one's self. *Grayson* vs. *Veeche*. - 688

6 If a vessel, on board of which property is shipped, be detained by an irregular attachment, the owner of them is not responsible to her owner for the delay. *Hasluck* vs. *Salkeld* & *al*. - - - - - 663

7 The remedy of the owner is against the attaching creditor. *Same case*. - - - 664

See AGENT 3.—PRACTICE, 4.

AUCTION.

A sale by auction of real property, is not perfected until the signature of the auctioneer be affixed to the process-verbal. *Jackson* & *al*. vs. *Williams*. - - - - 331

AWARD.

1 The time of the meeting of arbitrators may be shown by parol evidence. *Porter* vs. *Dugat*. 245

2 Although all the arbitrators must be present when the award is given, their unanimity is not necessary. *Same case*. - - *id*.

BILL OF EXCHANGE.

1 The oath of a notary, that he protested the draft,

and that he was generally in the habit of giving notices on all protested notes and bills, and presumes that he gave notice to the defendant, as he was requested to be very particular about it; and that his habit was to put notices into the post-offices to be sent off by the first mail, but having a great deal of protesting to do that summer, he has no distinct recollection about notifying the defendant, is no sufficient proof of notice. *Hoff* vs. *Baldwin*. - - - 699

2 The endorsee cannot write over a blank endorsement, an obligation, which will discharge him, from the burden of a demand or notice. *Hill* vs. *Martin*. - - - 177

3 The endorsee, who receives a bill after it is due, is bound to demand payment and give notice within the same delay, as if he had received before maturity. *Same case*. - - *id.*

4 It is not sufficient to excuse want of notice, that the endorsee was not injured by the neglect. *Same case*. - - - - *id.*

See Consideration.

CAPIAS.

See Execution, 3 & 4.

CERTIFICATE.

That of the recorder of mortgages is legal evidence. *Hanna* vs. *his creditors*. - - 33

CLASSIFICATION.

A classification may be ordered before payment

by a beneficiary heir. *Cox* vs. *Martin's heirs* - - - - - - 361

COLLATION.

1 When a father sells property to one of his children at a very low price, the advantage conferred is subject to collation. *Bossier* & *al.* vs. *Vienne*. 421

2 But the difference of price, between what the vendee sells the property for, after a lapse of years and the time he paid for it, will not suffice to establish the fact, that the sale was below the real value. *Same case*. . 421

CONTINUANCE.

1 After the trial has been gone into and evidence heard, it is too late to pray for a continuance. *Rousseau* vs. *Henderson* & *al.* - - 635

2 A cause will be continued on account of the indisposition of the counsel who intended to argue it, although there be another counsel engaged. *Barry* vs. *Louis. Ins. Company*. 484

CONTRACT.

1 The law *loci contractus* governs it, as to its nature and validity. *Evans et al.* vs. *Gray et al.* 475

2 That *loci fori*, as to the remedy. *Same case*. *id*

3 Hence, though in a contract made in a state, governed by the common law, relief may be had by suit only, it may be here by plea. *Same case*. - - - - *id*.

CONSIDERATION.

There is no difference between the *want* and the *failure* of the consideration of a note; either may be given in evidence against the original payee or an endorsee with notice. *Le Blanc* vs. *Sanglair & al.* . . . 402

COSTS.

May be given without being demanded, or without a prayer for general relief. *Thompson* vs. *Chretien et al.* - - - - 250

COURT OF PROBATES.

It has exclusive jurisdiction of all suits against vacant estates. *Vignaud* vs. *Tonnacourt's curator.* - 229

DAMAGES.

Are due for the least wrongful entry. *Kemper* vs. *Armstrong* & *al.* - - - - 296

See APPEAL, 11, 15, 18.

DATION EN PAIEMENT.

1 It differs from a sale, and resembles much the *donation remuneratoire.* *M'Guire* vs. *Amelung* & *al.* - - - - - 649

2 Evidence that a conveyance, which the act shows to be a sale, was a *dation en paiement* is inadmissible. *Skillman* & *wife* vs. *Lacey* & *al.* 404

DEMAND.

A demand of a debt, due by the wife, may be done on her. *Flogny* vs. *Hatch* & *al.* - - 82

DED. POTEST.

See PRACTICE, 3 & 4.

DISTURBANCE.

If the vendee be disturbed in his possession, by the suit of a third person, he may withhold payment, till the vendor gives security. *Smith* vs. *Roberts* & *al.* - - - 432

DOMICIL.

Whether the lessor of a defendant who disclaims, may be brought in, out of the parish of his domicil? *Fusilier* vs. *Hennen.* - - 266

EVIDENCE.

1 If the son bought a lot for the father, who afterwards pays the annual rent (the consideration of the sale) and warrants the title of the son's vendee, these circumstances will not be conclusive evidence, that the first sale was authorized or ratified, if it be shown that the father ever refused to ratify it. *Mayor* vs. *Hunter.* - - - - - 3

2 Collateral kinsmen claiming as heirs, must establish the death of relations in the ascending line. *Hooter's heirs* vs. *Tippet.* - - 390

3 If the bill of sale state that the *purchaser* gave *his* note for $1500, they may show that each (there being two) gave a note for $750. *Lafariere* vs. *Sanglair et al.* - - 399

4 Declarations, when parts *rerum gestorum* may be

received in evidence. *Barry* vs. *Louis. Ins. Company*, - - - - 493

5 Parol evidence cannot be received to explain the meaning of the writer, in a letter in which there is no ambiguity. *Lazare's ex'r.* vs. *Peytavin.* - - - - - 684

6 If improper evidence be suffered to go to the jury, and it manifestly appear they disregarded it, the supreme court will not remand the case on that account. *Same case.* - - *id.*

7 Complaint cannot successfully be made that a special verdict was obtained without legal evidence, by a party who neither asked for a charge to the jury, a non-suit, nor a new trial. *Same case.* - - - - *id*

8 A receipt of the defendants, produced by the plaintiff, is in favour of the former, a beginning of proof. *Muse* vs. *Roger's heirs.* - 350

See Appeal, 2, 6, 7, 14—Dation en paiement—2.

EXECUTION.

1 The return on an execution need not state that personal property could not be found to justify the seizure of slaves. *Thompson* vs. *Chretien et al.* - - - - 250

2 A creditor of the vendee may sell property under an execution, before a delivery to the vendor. *Same case.* - - - *id.*

3 On a *fi. fa.* against two, returned stayed as to one by order of the plaintiff and no property of the other found, a *ca. sa.* cannot issue against the latter. *Casson* vs. *Cureton* - 435

4 A *ca. sa.* or a *fi. fa.* must be returnable in no less than 60 nor more than 90 days. *Woodruff* vs. *Penny's bail.* - - - - 676

6 The sheriff's return of the causes that prevented the sale of the goods seized, will be taken as true, if not disproved. *Baldwin* vs. *Gordon et al.* - - - - - 379

EXCHANGE.

If one give a quantity of pork and some money for the note of a third person, the former has no recourse on the note not being paid. *Shuff* vs. *Cross.* - - - - 89

HEIRS.

When they sue the representative of their ancestor, or their common tutor, judgment ought not to be for the whole sum due them collectively, but must ascertain that due to each. *Varion's heirs* vs. *Rousant's syndics.* - 112

See EVIDENCE, 2.

HUSBAND AND WIFE.

A wife cannot alienate her paraphernal estate, without the husband's consent. *Langlini & wife* vs *Broussard.* - - - 242

INJUNCTION.

A defendant may pray that the plaintiff may be enjoined on his judgment, and that it be deducted from a larger one, which the former

is about to obtain against the latter. *Muse* vs. *Rogers' heirs.* - - - 370

INSOLVENT.

1 Mere proof that the insolvent admitted the debt, nor even his written acknowledgement, will not establish it against his estate. *Planters' bank* & *al.* vs. *Lanusse et al.* - - 157
2 Otherwise, if circumstances render it probable. *Same case.* - - - - *id.*
3 The wife of the insolvent may vote, although she has not renounced. *Same case.* - - *id.*
4 A forced surrender cannot be ordered, without hearing the debtor. *Guirot* vs. *her creditors.* 654
5 After proceedings commenced for a forced surrender, proceedings cannot be carried on by a single creditor. *Mayhew* vs. *M'Gee.* - 666
6 A creditor may pursue his remedy, till a stay of proceedings arrest him. *Hanna* vs. *his creditors.* - - - - - - 34
See Appeal, 1 & 10.

INTEREST.

1 Conventional interest cannot be proven by parol. *Harrod et al.* vs. *Lafarge.* - - 21
2 An usage to charge interest at the rate of ten per cent. cannot be regarded. *Same case.* - *id.*
3 Tutors are not to pay compound interest. *Jarreau* vs. *Ludeling.* - - - 106
4 Interest is generally due from the judicial demand only. *Surgat* vs. *Potter et al.* - - 365

INTERROGATORIES.

1 A defendant who proceeds to trial, cannot afterwards demand a dismissal of the suit, because there is no legal evidence of the plaintiff's answer, to his interrogatories, being sworn to. *Dean* vs. *Smith et al.* - - 316

2 A defendant, sued on a note, may be required to answer on oath, whether he did not subscribe and the payee endorse it. *Bullet* vs. *Serpentine.* - - - - 393

JURY.

Forty-eight jurors must be returned to each term of the parish of New-Orleans. *Flower* vs. *Livingston.* - - - - 681

LAND.

1 A title calling for objects on both sides of a stream, must be laid out so as to include them all. *Holstein* vs. *Henderson.* - - - 319

2 If no particular limits be given, the land must be surveyed so as to interfere as little as possible with the rights of others. *Same case.* *id.*

3 Where lands are called for on each side of a stream, without specifying how much on each side, the survey is to be made so as to give an equal quantity on each. *Same case.* *id*

4 Where a certain quantity of superficial arpents is granted on a part of a stream, where, from the manner surrounding titles are surveyed, the quantity given cannot be obtained

unless by making the stream the side line of the survey, it may be done. *Same case.* - id

5 A. having discovered B. had sold him land to which he had no title, gave notice he would not pay, but require a rescission. Before service of the citation on B. a family meeting recommended a sale, at which he bought. *Held* that he was protected, although it did not appear the heirs of age had provoked a licitation, and that having now a title he could resist his claim. *Bonin et al.* vs. *Eyssaline.* - - - - - 185

6 A right, supported by a requette, specifying a definite quantity of land is of a higher dignity than that resulting from mere possession, which can give a right to the extent, actually enclosed. *Martin* vs. *Turnbull.* - - 395

LANDLORD.

1 The landlord has a privilege on the goods in the store and furniture in the house. *Hanna* vs. *his creditors.* - - - - 32

2 But he must exercise it within a fortnight from the removal. *Same case.* - - id.

LIEN.

1 A judgment not registered gives no lien. *Hanna* vs. *his creditors.* - - - 32

2 A creditor acquires none by issuing a *fi. fa.*, if he countermand its execution. *Same case.* id.

3 Nor, if he neglects to take out an *alias*. *Same case.* 32

4 A judgment gives no lien on its being docketted. *Same case.* . . . . . *id.*

5 Judgments, in other states, give no lien here, till their execution be ordered by a judge of this. *M'Kenzie* vs. *Havard.* . . . 102

MORTGAGE.

1 Whether the holder of a note, secured by a special mortgage, having obtained a judgment, may levy on other property than that especially mortgaged. *Croghan* vs. *Conrad.* . 9

2 A third possessor, against whom an hypothecary action is prosecuted, may demand the discussion of the debtor's property and that of his sureties, but not of property in the hands of other third possessors. *Jackson et al.* vs. *Williams.* 334

3 When a debtor, whose property is subject to a general or tacit mortgage, has successively sold several objects of real property or slaves, the creditor must bring his action against the last purchaser, and ascend in succession to the first. *Same case.* . . *id.*

4 An acknowlegment of the debt and mortgage in a public act, amounts to a confession of judgment. *Tilghman* vs. *Dias.* . . 701

See CERTIFICATE—PRACTICE, 7.

NEW TRIAL.

1 A new trial cannot be granted, because it does not

appear on what the jury based their verdict. *Harrod et al.* vs. *Lafarge.* . . . 21

See APPEAL, 20.

NON-SUIT.

1 When a plaintiff does not make out his case, he ought to be non-suited. *Harper* vs. *Destrehan.* 31

PRACTICE.

1 He who affirms must prove, unless the plea involves a negative. *Powers* vs. *Foucher.* . 70

2 Same point. *Knox* vs. *Haslet's curator.* - 255

3 An affidavit for a commission to take testimony should be positive, and name the witnesses. *Evans et al.* vs. *Gray et al.* . . . 475

4 But if the suit be by attachment and the agent swear, it will suffice, that he express his belief that the testimony can be procured. *Same case.* . . . . . *id.*

5 Every thing in judicial proceedings, is presumed to have been correctly done. *Trepagnier's heirs* vs. *Butler et al.* . . . 53

6 A mistake in a name, by the omission of a letter, can only be taken advantage of by a plea on abatement. *Boyer et wife* vs. *Aubert et al.* 655

7 An order of seizure and sale may issue on an authentic act, written in the French language. *Tilghman* vs. *Dias.* . . . 691

8 It is not too late to pray to transfer a cause, after setting aside a judgment by default, if it was improperly taken. *Duncan* vs. *Hampton.* 92

9 A variance between the allegations and proof must be taken advantage of on the trial. *Langlini* & *wife* vs. *Broussard*. . . 242

10 A defendant, who does not plead in abatement, admits the residence of the parties is correctly stated in the petition. *Crouse* vs. *Duffield*. 539

11 If the plaintiff offers no proof of the damages alleged, judgment may be given generally for the defendant. *Guilbert* vs. *De Verbois*. 709

12 So, if the parties allege titles, without averring a conflict, there may be judgment for the defendant. *Same case*. . . . *id.*

PRESCRIPTION.

1 Digging a canal and felling trees are not such acts of possession, as may be the basis of the prescription of thirty years. *Macarty* vs. *Foucher*. 11

2 In case prescription be pleaded to a right of passage, the party, against whom it is offered, must give evidence of such acts, as will take the case out of it. *Powers* vs. *Foucher*. 70

3 Particularly if his title commenced so far back as 1772, and there be no evidence of the enjoyment of the servitude. *Same case*. . *id.*

4 If the vendor be a transient person and withdraw from the state, immediately after the sale the vendee may bring his action for the rescission of the sale, on the return of the former; although more than the time of prescription has elapsed. *Morgan* vs. *Robinson*. . 76

5 An obligation in the alternative gives the debtor the choice, hence, when A. promised to pay $500 to B., or convey a tract of land to him, held this was not such a title as could enable the latter to prescribe. *Holstein* vs. *Henderson*. 320

See APPEAL, 22.

PRIVILEGE.

Whether the vendor's privilege be lost, if the deed be not recorded, in the parish in which the land lies. *Trudeau et al.* vs. *Smith's syndics*. 543

See LANDLORD—LIEN.

PROMISE.

1 A promise to deliver a sound and likely negro, &c., valued at 1200 dollars, is discharged by the delivery of a sound and likely negro, &c. *Cavenah* vs. *Crummin*. . . 306

2 If he who promise to deliver sugar, on a given day, fail to do so the creditor may demand money. *Pepper* vs. *Peytavin*. . . 671

PROMISSORY NOTE.

1 A note in which the sum is stated in figures is valid. *Nugent* vs. *Poland*. . . 659

2 The endorsement of a note is not restrained by its being signed *ne varietur*, by a notary. *Fusilier* vs. *Bonin et al*. . . . 237

3 If a note does not state the place in which it was given, the court may presume that it was

given at the place in which the maker and payee reside. *Crouse* vs. *Duffield*. . 540

4 A subscribing witness, to a note given out of the state, is presumed to be out of the jurisdiction of its courts. *Same case*. . . *id*.

See MORTGAGE, 1.

SALE.

1 The vendor's ignorance of a defect in the slave, does not protect him in the action *quanti minoris*. *Moore's assignee* vs. *King* & *al*. 261

2 If the vendee, in such a case, being sued for the price, answer that he is entitled to relief, and prays that the vendor may say on oath, whether the defect did not exist at the sale, this, at least, in the appeal will be held sufficient notice. *Same case*. . . . *id*.

3 When property is sold *per aversionem*, if there be a surplus after the quantity mentioned, it passes to the vendee. *Innis* vs. *M'Crummin*. 425

4 Whether the vendee can recover land, which the vendor before the sale, swore belonged to the person in possession. *Davis' heirs* vs. *Prevost's heirs*. 445

See LIEN 4—PRESCRIPTION 4.

SOLIDARITY

Is never presumed. *Dean* vs. *Smith* & *al*. . 316

SURETY.

1 Service of a judgment on the surety, who bound himself for the forthcoming of a negro or his

value, on the judgment, notwithstanding a demand, does not work a forfeiture of the penalty, if the negro be surrendered within a reasonable time. *Hunter's syndics* vs. *Hunter & al.* 1, 5

2 A surety claiming discussion, must point out property, and furnish money to carry it into effect. *Baldwin* vs. *Gordon* & *al.* . . 378

3 Sureties are entitled to oppose all exceptions, which are inherent to the debt, not those which are personal to the debtor. *Same case.* *id.*

See MORTGAGE, 2.

TUTOR.

1 The provision of the law, which requires that the tutor's account be rendered before the judge, is clearly introduced for the exclusive advantage of the minor. *Jarreau* vs. *Ludeling.* 106

2 No other person can have any interest in it. *Same case.* . . . . . . *id.*

See INTEREST, 3.

WILL.

1 It is sufficient for the validity of a nuncupative will under private signature, that it be passed in the presence of three witnesses, residing where the testament is received, or of four others. *Fleckner* vs. *Nelder.* . 503

2 A will may be proven by a single witness. *Bouthemy* vs. *Dreux* & *al.* . . . 639

3 A witness may contradict enunciations in a will. *Same case.* . . . . *id.*

4 The names of the witnesses need not be inserted in the body of a nuncupative will, under private signature. *Same case.* . . *id.*

5 Whether all the witnesses should sign at the same time. *Same case.* . . . . *id.*

6 The presentation of the will to the witnesses needs not be *manual.* *Same case.* . . *id.*

7 The attestation of subscribing witnesses does not mar an olographic will. *Andrews' heirs* vs. *his executors.* 713

WITNESS.

1 The apparent or reputed owner, is a good witness between the insurer and insured. *Barry* vs. *Louisiana Insurance Company.* . 493

2 A co-trespasser may be witness for another. *Curtis* vs. *Graham.* 289

3 When there are co-defendants, if there be slight or no evidence against one, he may be sworn as a witness for the other. *Same case..* . *id.*

4 *A fortiori*, when he has not been cited. *Same case.* *id*

See Promissory note, 3 & 4—Will.

THE END