Louisiana Term Reports,

OR

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THAT STATE.

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

Ils donnent les motifs de leur décision ; afin qu'on sache qu'on est soumis à l'empire de la loi, plutôt qu'à l'autorité de l'homme. Emérigon.

VOL. I.

BEING VOL. III. OF THIS REPORTER.

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1816.

CHRONOLOGICAL
TABLE OF CASES.

EASTERN DISTRICT. MARCH TERM, 1813.

Bermudez *vs.* Ibanez,	2
APRIL.	
Seguin *vs.* Debon,	6
Brooks' Syndics *vs.* Weyman,	9
General rule,	1
MAY.	
Brooks' Syndics *vs.* Weyman,	16
Fortier *vs.* Declouet,	17
Bermudez's Syndics *vs.* Ibanez & al.	17
Lanusse *vs.* Massicot & al.	40
Laverty *vs.* Duplessis,	42
General rule,	16
JUNE.	
Lebreton *vs.* Nouchet,	60
Rochelle & al. *vs.* Musson,	73
Sigur's Syndics *vs.* Brown,	91
Pizerot & al. *vs.* Meuillon's heirs,	97
General rule,	59
JULY.	
Allen *vs.* Guenon & al.	125
Duplantier *vs.* St. Pé,	127
St. Pé *vs.* Duplantier,	id.
Knight *vs.* Smith,	156
Bermudez' Syndics *vs.* Ibanez,	168

WESTERN DISTRICT. AUGUST TERM, 1813.

Agnes *vs.* Judice, 171

SEPTEMBER.

Agnes *vs.* Judice, 182

OCTOBER.

Cavelier and al. *vs.* Collins, 188

EASTERN DISTRICT. NOVEMBER TERM, 1813.

General rule, 193

DECEMBER.

Duplantier *vs.* Randolph, 194
Hellis' Syndics *vs.* Asselvo, 201
Williamson's Sys. *vs.* Phillips' Syndics, 205
Kenner and al. *vs.* Morgan, 209
Clark's Ex's. *vs.* Farrar, 212
Vaughan *vs.* Vaughan, 215
Fromentin and al. *vs.* Prieur, id.

JANUARY, 1814.

Rabassa and al. *vs.* Mayor, &c. 218
Longer and al. *vs.* Pigeau, 221
Durnford *vs.* Brooks' Syndics, 222

FEBRUARY.

Riley *vs.* Lynd, 228
Duncan and al.'s Syndics *vs.* Duncan, 230
Duplantier *vs.* Pigman, 236
Clark's Ex's. and al. *vs.* Farrar, 247
Menendez *vs.* Larionda's Syndics, 256
Lanusse *vs.* Massicot & al. 261
Durnford *vs.* Brooks' Syndics, 269
Brown *vs.* Kenner & al. 270

MARCH.

General rule, 280

APRIL.

Morse *vs.* Williamson & al.'s Syndics, 282
Meunier *vs.* Duperron 285

MAY.

Dufau & al. *vs.* Massicot & al. 289
Mayor &c. *vs.* Metzenger, 298

JUNE.

Ogden *vs.* Blackman, 305
Mayor &c. *vs.* Bermudez, 307
Harrod & al. *vs.* Lewis & al. 311
Merieult *vs.* Austin, 318
Harper *vs.* his Creditors, 322
Labatut *vs.* Puche, 325
Villeré & al. *vs.* Prognier, 326
Clark's exr's. *vs.* Cochran, 353
Morel *vs.* Misotiere's Syndics, 363
Smith & al. *vs.* Elliot & al. 367
St. Maxent's Syndics *vs.* Sigur, 371
Blake and al. *vs.* Morgan, 375
Fram *vs.* Allen, 381

JULY.

Ellenghaus & al's. Syndics *vs.* Gravier, 385
Pavie's heirs *vs.* Cenas, 387
Brand *vs.* Livaudais & al. 389
Cassou *vs.* Blanque, 390
Trimble's Syndics *vs.* N. O. Ins. Company, 394

WESTERN DISTRICT. AUGUST TERM, 1814.

Yocum *vs.* Roy, 397
Harrison *vs.* Mager and al. id.
Sinnot *vs.* Mulhollan & al. 398
Clark *vs.* Parham, 405
Vernot *vs.* Yocum, 406
Yocum *vs.* Roy, 409

Sennet *vs.* Sennet's legatees, 411
Reargan *vs.* Kitchen & al. 418
Taylor *vs.* Porter, 423

SEPTEMBER.

Brown & wife *vs.* Parish Judge, 424
Raper's heirs *vs.* Yocum, id.
O'Conner & al. *vs.* Barre, 446

OCTOBER.

Morgan's adr. *vs.* Whoories, 462
Cloutier *vs.* Lecomte, 481
Grafton *vs.* Fletcher, 486
Paillette & al. *vs.* Carr, *Public school, note*, 489
Martineau & al. *vs.* Carr & al. 497

EASTERN DISTRICT, DECEMBER TERM, 1814.

Beard *vs.* Poydras, 505
Villeré and al. *vs.* Brognier, 507

MARCH TERM, 1815.

Johnson *vs.* Duncan & al.'s Syndics, 530

MAY.

Blake and al. *vs.* Morgan, 559
Mizotiere's Syndics *vs.* Coignard, 561
Claiborne & al. *vs.* Debon & al. 565
Johnson *vs.* Duncan and al.'s Syndics, 570
Fowler's Syndics *vs.* Dupassau, 574
Brognier *vs.* Forstall, 577
Bourcier *vs.* Lanusse, 581
Fitzgerald *vs.* Phillips, 588
Hopkins *vs.* Peretz & al. 592
Mayor &c. *vs.* Clark, 596
Grieve's Syndics vs. Sagory, 599
Ellery *vs.* Gouverneur & al. 606
Brand *vs.* Livaudais & al. 608

Delany *vs.* Trouvé & al. 610

JUNE.

Bujac & al. *vs.* Mayhew, 613
Laverty *vs.* Gray & al. 617
Kemper *vs.* Smith, 622
Harang *vs.* Dauphin, 640
Krumbhaar *vs.* Ludeling, id.
Seghers' *vs.* Phillips' Syndics, 646
Michel *vs.* Aymé, 647
Abat *vs.* Doliole, 657
Bourcier *vs.* Lanusse, 661
Rogers *vs.* Beiller, 665
Mayor, &c. *vs.* Casteres, 673

JULY.

Mitchell *vs.* M'Millan, 677
Emmerson *vs.* Gray & al. 697
Menendez *vs.* Larionda's Syndics, 705
Police Jury *vs.* Mayor, &c. 710

WESTERN DISTRICT. AUGUST TERM, 1815.

Broussart *vs.* Trahan's heirs, 714
Lalande *vs.* Fontenau & al. 716
Bludworth *vs.* Sompeyrac, 718

SEPTEMBER.

Broussart *vs.* Trahan's heirs, 725
General rule, 724

U. STATES DISTRICT COURT, JULY 1813.

United States *vs.* Laverty & al. 733

ALPHABETICAL

TABLE OF CASES.

PAGE.

Abat *ads.* Dolliole, *Evidence*, 657
Agnes *vs.* Judice, *Mandamus, renewal of suit*, 171, 182
Allen *ads.* Fram, *Settled accounts*, 382
Allen *vs.* Guenon, *Pilotage*, 125
Asselvo *ads.* Hellis' Syndics, *Statement of facts*, 201
Austin *ads.* Merieult, *Referees, interest*, 318
Aymé *ads.* Michel, *Bill of exchange*, 647

Barré *ads.* O'Conner & al. *Paraphernal property*, 446
Beard *vs.* Poydras, *New evidence*, 505
Beiller *ads.* Rogers, *Special Administrator*, 665
Bermudez's S. *vs.* Ibanez, *Execution of decree*, 168
vs. *Superior Court*, 2
Bermudez's S. *vs.* Ibanez & al. *Stay of proc.* 17
Bermudez *ads.* Mayor & al. *Commons*, 307
Blackman *ads.* Ogden, *Criminal proceedings*, 303
Blanque *ads.* Cassou, *Tacit mortgage*, 390
Blake & al. *vs.* Morgan, *Freight*, 371, 559
Bludworth *vs.* Sompeyrac, *Citation, interest*, 719
Bourcier *vs.* Lanusse, *Wife's lien*, 581, 661
Brand *vs.* Livaudais & al. *Written Contract, Statement of facts*, 389, 608
Brognier *vs.* Forstal and wife, *Wife's lien*, 577
ads. Villeré & al. *Written Contract*, 326, 507

Brooks' Syndics *ads.* Durnford, *Sale*, 222, 264
vs. Weyman, *Venire, new trial*, 9, 16
Broussart *vs.* Trahan's heirs, *Continuance*, 714, 725
Brown *ads.* Sigur's Syndics, *Ceded property*, 91
Brown & wife *vs.* Parish Judge, *Dismissal of appeal*, 424
Brown *vs.* Kenner & al. *Mortgage*, 270
Bujac & al. *vs.* Mayhew, *Sale of a slave*, 613

Cassou *vs.* Blanque, *Tacit mortgage*, 390
Casteres *ads.* Mayor, &c. *Commons*, 673
Carr *ads.* Martineau & al. *Interrogatories*, 497
ads. Paillette & al. *Public school, note*, 489
Cavelier & al. *vs.* Collins' heirs *Evidence, interest*, 188
Cenas *vs.* Pavie's heirs, *Sheriff*, 387
Claiborne & al. *vs.* Debon & al. *Auctioneer's bond*, 565
Clark *ads.* Mayor, &c. *Warranty*, 596
Clark *vs.* Parham, *Frivolous appeal*, 405
Clark's Exr's. *vs.* Farrar, *Dismissal of appeal, power of executors*, 212, 247
vs. Cochran, *Signature denied*, 353
Cloutier *vs.* Lecomte, *Res judicata*, 481
Cochran *ads.* Clark's exr's. *Signature denied*, 353
Coignard *ads.* Mizotiere's Syndics, *Insolvency*, 561
Collins' heirs *ads.* Cavelier & al. *Interest, evid.* 188
Creditors *vs.* Harper, *Appeal*, 322

Dauphin *ads.* Harang, *Appeal*, 640
Debon *ads.* Seguin, *Work by the job*, 6
Debon & al. *ads.* Claiborne, *Auctioneer's bond*, 565
Declouet *ads.* Fortier, *Bail*, 17
Delany *vs.* Trouvé & al. *Privilege*, 610
Doliole & al. *vs.* Abat, *Evidence*, 657
Dufau & al. *vs.* Massicot & al. *Constitution*,

partition, 289
Duncan *vs.* Duncan & al's. Syndics, *Cession*, 230
Duncan & al's. Syndics *vs.* Duncan, *Id.* Id.
Duncan & al's. Syndics *ads.* Johnson, *Martial law, obligation of contract*, 530, 570
Dupassau *vs.* Fowler's Syndics, *Mortgaged property*, 574
Duperron *ads.* Meunier, *Joint liability*, 285
Duplantier *vs.* Pigman, *Interest*, 236
vs. Randolph, *Evidence*, 194
vs. St. Pé, *Interest*, 127
ads. St. Pé, *Id.* id.
Duplessis *ads.* Laverty, *Habeas corpus*, 42
Durnford *vs.* Brooks' Syndics, *Sale*, 222, 264

Ellery *vs.* Gouverneur & al. *Attorney's fees*, 606
Elienhaus & al's. Syndics *vs.* Gravier, *Sale*, 385
Elliot & al. *vs.* Smith & al. *Attachment*, 306
Emmerson *vs.* Gray & al. *Sequestration*, 704

Farrar *ads.* Clark's exect's. *Appeal*, 212, 247
Fletcher *ads.* Grafton, *Parol evidence*, 486
Fontenau & al. *ads.* Lalande, *Transfer of cause*, 716
Forstall and wife *vs.* Brognier, *Wife's lien*, 577
Fortier *vs.* Declouet, *Bail*, 17
Fromentin & al. *vs.* Prieur, *Dismissal of appeal*, 215
Fowler's Syndics *vs.* Dupassau, *Mortgage*, 574
Fram *vs.* Allen, *Settled account*, 382
Fitzgerald *vs.* Phillips, *Cession of goods*, 538

Gouverneur & al. *ads.* Ellery, *Attorney's fees*, 606
Grafton *vs.* Fletcher, *Parol evidence*, 486
Gray & al. *vs.* Laverty, *Juror*, 617
Gray & al. *ads.* Emmerson's Sys. *Sequestration*, 704

Gravier *ads.* Ellenghaus & al. Syndics, *Sale*, 383
Grieve's Syndics vs. Sagory, *Promissory note*, 599
Guenon, *ads.* Allen, *Pilotage*, 125
Harang *vs.* Dauphin, *Appeal*, 640
Harper *vs.* his Creditors, *Appeal*, 322
Harrison *vs.* Mager, *Dismissal of appeal*, 397
Harrod & al. *vs.* Lewis & al. *Freight, Arbitrament*, 311
Hellis' Syndics *vs.* Asselvo, *Statement of fact*, 201
Hopkins *ads.* Peretz & al. *Administrator*, 590

Ibanez *ads.* Bermudez, *Superior Court*, 2
ads. Bermudez's Syndics, *Stay of proc.* 17
ads. Bermudez, *Execution of decree*, 168

Johnson *vs.* Duncan & al.'s Syndics, *Martial law, Obligations of contract, Syndics*, 530, 570
Judice *ads.* Agnes, *Mandamus, renewal of a suit*, 171, 182

Kemper *vs.* Smith, *Partnership*, 622
Kenner & al. *vs.* Morgan, *Sheriff*, 209
Kenner & al. *ads.* Brown, *Mortgage*, 270
Kitchen & al. *ads.* Reargan, *Bond*, 418
Krumbhaar *vs.* Ludeling, *Bill of exchange*, 640
Knight *vs.* Smith, *Will*, 156

Labatut *vs.* Puche, *Jurisdiction*, 325
Lalande *vs.* Fontenau & al. *Transfer of causes*, 716
Lanusse *vs.* Bourcier, *Wife's lien*, 581, 661
Lanusse *vs.* Massicot & al. *Promissory note*, 40, 261
Larionda's Sys. *ads.* Menendez, *Bankruptcy*, 256, 705
Laverty *vs.* Duplessis, *Habeas Corpus*, 42
Laverty *vs.* Gray & al. *Juror*, 617

Laverty & al. *ads.* United States, *Citizenship*, 735
Lebreton *vs.* Nouchet & al. *Marriage abroad* 60
Lecomte *ads.* Cloutier, *Res Judicata*, 481
Lewis & al. *ads.* Harrod & al. *Freight, arbitrament*, 311
Livaudais & al. *ads.* Brand, *Written contract*, 389, 608
Longer & al. *vs.* Pigeau, *Statement of facts*, 221
Ludeling *ads.* Krumbhaar, *Bill of Exchange*, 640
Lynd *vs.* Riley, *Injunction*, 228

Mager *ads.* Harrison, *Dismissal of Appeal*, 397
Martineau & al. *vs.* Carr & al. *Interrogatories*, 497
Massicot & al. *ads.* Dufau & al. *Constitution partition*, 289
ads. Lanusse, *Note of hand*, 40, 261
Mayor &c. of N. O. *vs.* Casteres. *Commons*, 673
vs. Clark, *Warranty*, 596
vs. Bermudez, *Commons*, 307
vs. Metzenger, *Arbitrary grant*, 296, 647
ads. Police Jury, *Ferry*, 710
ads. Rabassa, *Tax*, 218
Mayhew *ads.* Bujac & al, *Sale of a slave*, 613
Menendez *vs.* Larionda's Syndics, *Ev.* 256, 705
Merieult *vs.* Austin, *Referees*, *Interest*, 318
Meuillon's heirs *vs.* Pizerot, *Prescription, renunciation*, 97
Metzenger *ads.* Mayor &c *Arbitrary grant*, 296, 647
Meunier *ads.* Duperron, *Joint liability*, 235
Michel *vs.* Aymé, *Bill of exchange*, 647
Mitchell vs. M'Millan, *Foreign bankruptcy*, 677
M'Millan *ads.* Mitchell, *Id.* *Id.* id.
Mizotiere's Syndics *vs.* Coignard, *Insolvency*, 561
ads. Morel, *Counsel fees*, 363

Morel *vs.* Misotiere's Syndics, *id.* id.
Morgan *ads.* Kenner & al. *Sheriff*, 209
ads. Blake & al. *Freight*, 371, 559
's adr. *ads.* Whoories, *Fieri facias*, 462
Morse *vs.* Williamson & al's. *Syndics fees*, 282
Muhollan & al. *vs.* Sinnet, *Amendment*, 398
Musson *ads.* Rochelle & al. *Evidence*, 73

New-Orleans Ins. Comp'y. *ads.* Trimble's Sys. *Inference*, 394
Nouchet *ads.* Lebreton, *Marriage abroad*, 60

O'Conner & al. *vs.* Barre, *Paraphernal property*, 464
Ogden *vs.* Blackman, *Criminal proceedings*, 305

Paillette & al. *vs.* Carr, *Public school, note*, 489
Pavie's heirs *vs.* Cenas, *Sheriff*, 387
Parish Judge *ads.* Brown and wife, *Dismissal of appeal*, 424
Parham *ads.* Clark, *Frivolous appeal*, 405
Peretz & al. *ads.* Hopkins, *Administrator*, 590
Phillips *ads.* Fitzgerald, *Cession of goods*, 588
Phillips' Syndics *ads.* Seghers, *Attorney's fees*, 646
ads. Williamson's, *Insolvent*, 205
Pigeau *ads.* Longer & al. *Statement of facts*, 221
Pigman *ads.* Duplantier, *Interest*, 236
Pizerot *ads.* Meuillon's heirs, *Prescription, renunciation*, 97
Porter *ads.* Taylor, *Statement of facts*, 423
Police Jury *vs.* Mayor, &c. *Ferry*, 710
Poydras *ads.* Beard, *New Evidence*, 505
Prieur *ads.* Fromentin & al. *Dismissal of Appeal*, 215
Puche *ads.* Labatut, *Jurisdiction*, 325

Rabassa *vs.* Mayor, &c. *Tax*, 218
Randolph *ads.* Duplantier, *Interest*, 236
Raper's heirs *vs.* Yocum, *Parol Evidence*, 424
Reargan *vs.* Kitchen & al. *Bond*, 418
Riley *ads.* Lynd, *Injunction*, 228
Rochelle & al. *vs.* Musson, *Evidence*, 73
Rogers *vs.* Beiller, *Special administrator*, 665
Roy *vs.* Yocum, *Statement of facts*, 397, 409

Sagory *ads.* Grieve's Syndics, *Promissory note*, 599
St. Maxent's Syndics *vs.* Sigur, *Spanish judgmt.* 371
St. Pe *vs.* Duplantier, *Interest*, 127
Sennet *vs.* Sennet, *Natural Children*, 411
Seghers' *vs.* Phillips's Syndics, *Attorney's fees*, 646
Seguin *vs.* Debon, *Work by the job*, 6
Sigur's Syndics *vs.* Brown, *Ceded property*, 91
Sigur *vs.* St. Maxent's Sys. *Spanish judgment*, 371
Sinnot *vs.* Mulhollan & al. *Amendment*, 398
Smith *vs.* Knight, *Will*, 156
ads. Kemper, *Partnership*, 622
Sompeyrac *ads.* Bludworth, *Citation, interest*, 719

Taylor *vs.* Porter, *Statement of facts*, 423
Trahan's heirs *ads.* Broussart, *Continuance*, 714, 725
Trimble's Syndics *vs.* N. O. Ins. Co. *Insurance*, 394
Trouvé & al. *ads.* Delany, *Privilege*, 610

United States *vs.* Laverty & al. *Citizenship*, 733

Vaughan *vs.* Vaughan, *Judge's charge*, 216
Vernot *vs.* Yocum, *Evidence*, 406
Villeré & al. *vs.* Brognier, *Written contract*, 326, 507

Weyman *vs.* Brooks' Syndics, *Venire, new trial*, 9, 16
Williamson & Patton's Syndics *ads.* Morse, *Fees*, 282
vs. Phillips' Sys. *Insolvent*, 205
Whoories *ads.* Morgan's ad'r, *Fieri facias*, 462

Yocum *ads.* Raper's heirs, *Parol Evidence*, 424
vs. Roy, *Statement of facts*, 205
ads. Vernot, *Evidence*, 406

General Rules, 1, 16, 49, 193, 280, 704

On the organisation of the state judiciary, according to the Constitution, the following gentlemen were appointed

Judges of the Supreme Court,

DOMINICK AUGUSTIN HALL,
GEORGE MATHEWS, and
PIERRE DERBIGNY.

FRANCOIS-XAVIER MARTIN, Attorney-General.

On the 3d of July, 1813, Judge Hall resigned his seat, having been appointed District Judge of the United States, for the Louisiana District; and on the 1st of February, 1815,

FRANCOIS-XAVIER MARTIN, was appointed in his stead, and

ETIENNE MAZUREAU, Attorney-General.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. MARCH TERM, 1813.

East. District. *March* 1813.

AT the opening of this term were read two commissions, bearing date of the 22d and 23d of February 1813, by which DOMINICK A. HALL and GEORGE MATHEWS, were appointed Judges of this Court, with certificates of their having taken the oaths required by the constitution and law—whereupon they took their seats.

The Court announced their determination not to decide on the examination of gentlemen desirous of licences to practice and plead, until the day after.

On the 9th day of March was read a commission, bearing date of the preceding day, by which PIERRE DERBIGNY was appointed a Judge of this Court, with a certificate of his having taken the oaths required by the constitution and law—whereupon he took his seat.

East. District. *March* 1813.

BERMUDEZ vs. IBANEZ.

BERMUDEZ vs IBANEZ.

BERMUDEZ vs. *IBANEZ.*

THE defendant in this case was ruled to shew cause, why an appeal should not be allowed from the judgment of the late Superior Court of the Territory of Orleans.

No appeal lies from a Judgment of the Superior Court of the late Territory.

By the Court. The question submitted to the decision of the Court in this case is, whether there exist, under the constitution of the State, a right of appeal to this Court, from the judgments rendered by the late Superior Court, since the 30th of April 1812, the date of the approbation of the constitution by Congress.

THE constitution, therefore, and the schedule annexed to it, are the instruments to be consulted for the understanding of this question.

BY the one it is provided art. 4, sect. 1, that "the judicial power shall be vested in a Supreme "Court and inferior Courts." Sect. 2, declares that "the Supreme Court shall have appellate "jurisdiction only, which jurisdiction shall extend "to all civil cases when the matter in dispute "shall exceed the sum of three hundred dollars." And sect. 4, that "the Legislature is authori-"sed to establish such Inferior Courts as may be "convenient to the administration of justice."

BY the other it is said: sect. 3, that "the "Governor, Secretary, and Judges, and all other "officers under the territorial government, shall "continue in the exercise of the duties of their

" respective departments, until they shall be su- " perseded under the authority of the constitu- " tion. "

THE first question which arises is, what is the schedule with respect to the constitution, or how far are the schedule and constitution connected?

THE representatives of the people of Louisiana assembled for the purpose of laying the foundation of a State government, the establishing of a permanent constitution, and the providing for a temporary government. As in representative government considerable time is necessary to effect a change, it became necessary, in order to avoid anarchy, to create a kind of intermediate government the duration of which expires when the permanent government is organized and goes into operation. These two governments are distinct and separate; they are to succeed, the one to the other; they cannot be blended in whole nor in part.

THIS being understood, it is next to be considered, how the judiciary power of that temporary government was regulated by the schedule.

THE convention, desirous of avoiding " the " inconveniences which might arise from the " change of government, " declared that " the " Governor, Secretary, and Judges, and all other " officers under the territorial government, should " continue in the exercise of the duties of their

East. District. *March* 1813.

BERMUDEZ vs. IBANEZ.

" respective departments, until they should be " superseded under the authority of the consti- " tution. "

THE intention of the convention, clearly manifested by the expressions of the schedule, was for a time to maintain the order of things which existed until then, " as if no change had taken place." The Superior Court of the late Territory of Orleans was vested with original and appellate jurisdiction ; such were the duties which it exercised, such were its powers. That, therefore, must be the jurisdiction in which it was continued; for it cannot be pretended that its judgments have become subject to an appeal, without admitting, that there has been an innovation and a change in that branch of the former government, that is to say, without admitting *that* which is expressly provided against by the schedule.

BUT it has been contended that the right of appeal to the Supreme Court being secured to the citizen since the day on which the constitution was approved by Congress, all the judgments rendered since that time must be subject to it. This appears to the Court to be a forced construction of the 2d sect. of the 4th art. The right of appeal, no doubt, is guaranteed by the constitution; but when was it to take effect? Which were the tribunals over whose decisions the Supreme Court was to exercise the appellate jurisdiction assigned to it by the constitution? Un-

doubtedly those Inferior Courts which the constitution directed to be established, and which composed, with it, the judiciary powers of the State. The Superior Court was no part of that system; it had no concern with it; its authority under the schedule was a continuation of its former jurisdiction; it was independent of the future authorities; and its judgments must stand as irrevocable as they were under the territorial government.

RULE DISMISSED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. APRIL TERM, 1813.

SEGUIN vs. *DEBON.*

East. District. *April* 1813.

SEGUIN vs. DEBON.

Carpenter repairing a ship for a fixed price, loses his materials and labour, if the ship be destroyed, before the work is finished.

By the Court. This is an appeal from the first judicial District. The facts are, that the appellee, Debon, placed in the hands of Seguin, the appellant, a ship carpenter, a vessel called the Buckskin, to be repaired. It was agreed between the parties, that the work should be done in twenty days, and to the satisfaction of the captain. Thirteen hundred dollars were to be paid by Debon, one half on the completion of the work, and the balance in ninety days. Seguin proceeded in the repairs, when on the 19th of August the vessel was entirely destroyed by a hurricane. The plaintiff states the value of the labour and materials furnished, to the period of the loss, to be six hundred and fifty dollars. The question for the de-

cision of the Court is, was the plaintiff entitled to recover? By the 3d book, ch. 3, sect. 3, art. 67, of the Civil Code, it is declared "that when the undertaker furnishes the materials for the work, if the work be destroyed, in whatever manner it may happen, previous to its being delivered to the owner, the loss shall be sustained by the undertaker, unless the proprietor be in default in not receiving it, though duly notified to do so.

IT has been contended that the provisions of the Code, extend only to a case where the whole thing was to be furnished by the workman, (which would be a contract of sale) and not to one like the present, where a certain thing was delivered to him, and he was to furnish only the labour and materials for repair. It is then said that any addition to the principal thing becomes a part of it, and if it perish in the hands of the workman, according to the maxim of the Civil Code, *res perit domino;* the undertaker must be paid for work and materials. Certainly this distinction has been drawn; but it is believed that the present article of the Code was intended to provide for both cases. And this is rendered the more probable by observing, that the work destroyed, and whose loss should be borne by the undertaker, is the work which is placed under the doctrine of *louage*, or letting and hiring; and not merely that whole or entire work which would be properly classed under the head of *vente*, or sale;

East. District. *April* 1813.

SEGUIN vs. DEBON.

the distinction is not found in the words of the law. The subject matter of the section, and to which all its provisions apply, is explained in the 65th article; it speaks of an undertaking of a building, or *work*, for a certain stipulated price. The contract before the Court is an entire and indivisible one, and is precisely such a one as is defined by the law.

BUT independently of the Civil Code, it is believed that the plaintiff below could not recover. It is stated by *Pothier*, that there is a great difference between a contract *aversione*, by the job, or entire, and a bargain with a workman that he shall receive so much by the foot or measure. In the first case, the undertaker cannot compel the owner to receive the work until it is finished; and until that time, it is at his risk. There can be no doubt if the work had been finished ready for delivery, the loss would have fallen on the owner; because it was his fault that it was not received—unless he could shew that it was not such work as had been agreed for.

VOET observes in his commentary on the 36th law of the 19th Book of the *Digest*, "*opus, quod aversione locatum est, donec approbetur, conductoris periculum est*"—that if a thing be in the hands of a workman to give it a new form for a certain price, if before it be finished, or if finished there be no delay on the part of the owner to receive it, and it be destroyed by fire, robbery,

or any other misfortune, without his fault, it seems equitable the owner should lose the thing he sent, and the workman his price.

UPON the whole the Court are of opinion that the judgment of the Court below be affirmed with costs.

SYNDICS OF BROOKS vs. *WEYMAN.*

A trial by jury cannot be had in the Supreme Court.

By the Court. This is a motion of the plaintiff for a *venire*, in order that the cause which has been tried by a jury below, should be re-tried by another jury in this Court. It is admitted that the power to issue the *venire*, is not expressly given by any of the judiciary laws. But it is contended, that, as the constitution has declared that this Court shall have appellate jurisdiction in all civil cases where the matter in dispute exceeds the value of three hundred dollars, this appellate power must be exercised here, in its greatest extent. In favor of the motion of the plaintiff we are referred to the practice of appeal in the late Territory of Orleans, where a re-examination of facts, by a second jury, was permitted. And hence it is inferred, that the makers of the constitution must have had this mode of exercising the appellate power, in contemplation, when they provided for the establishment of this Court.

IN answer it is said, that the appellate jurisdic-

East. District. *April* 1813.

SYNDICS OF BROOKS vs. WEYMAN.

tion must be regulated by law—that the Supreme Court of the United States will exercise it only as prescribed and limited by the several acts of Congress. To this it is replied, that the provision in the constitution of this State, is different from the one contained in that of the United States; it being declared in the latter instrument, that the appellate power shall be subject to such exceptions and regulations as Congress may prescribe. It is contended that the omission of these words in our State constitution, was intended to prevent the Legislature from any limitation of the appellate jurisdiction here.

To arrive at a correct decision of the question, it becomes necessary to ascertain clearly what is intended by appellate jurisdiction. A technical sense has been affixed to it, and it is generally used in reference to the practice of the civil law; but it is known to professional gentlemen, that even in countries whose jurisprudence is founded upon the imperial code, the appellate jurisdiction varies in the different States where it is exercised. Thus the Roman code prescribes one mode, the Spanish another, and the French a third. In England, appeals are conducted in a manner different from the countries of the Continent, and differently in its several Courts. In some countries, appeals go in all cases, whether criminal or civil; in others, in civil cases only. In the Courts of the United States there are no appeals in cri-

minal cases. An appeal in the New-England States, is not understood in the same sense as it is in the southern. Thus, we are informed by the celebrated author of the *Federalist*, that an appeal from one jury to another, is familiar both in language and practice, in New-England, and is a matter of course until there have been two verdicts on one side. This, he observes, shews the impropriety of a technical interpretation derived from the jurisdiction of a particular State. The expression, taken in the abstract, denotes nothing more than the power of one tribunal to review the proceedings of another, either as to law or fact, or both; the mode of doing it may depend on ancient custom, or legislative provision. In a new government, it must depend on the latter, and be with or without a jury, as may be judged advisable. When we recollect that the late Convention was composed partly of the old inhabitants of Louisiana, and partly of Americans from the U. States, we may readily conceive that they were all convinced of the necessity of a Supreme Court f review; but we can hardly imagine that there as any general understanding, or any precise ea of the manner in which that power was to be ercised; they have, therefore, only used the gen- l term, *appellate jurisdiction*; leaving it to the gislatures which should succeed, to prescribe : jurisdiction, within the meaning of the cons- ıtion, and to regulate the mode of proceeding.

East. District. *April* 1813.

SYNDICS OF BROOKS vs. WEYMAN.

THE only constitutional provision is, that it shall not be exercised in cases under three hundred dollars; and confines it, perhaps, (but which we do not decide) to civil cases: see *post*, *Laverty* vs. *Duplessis*. With respect to the argument drawn from the express declaration of the federal constitution, that the appellate power shall be subject to such regulations and exceptions, as shall be made by Congress, we do not perceive its force. It is the opinion of the Court, that the Legislature would possess the power without any such declaration.

THE organizing of Courts conformably to the provisions of the constitution, is believed by us to be a rightful exercise of legislative powers. We reserve to ourselves the authority to declare null any legislative act which shall be repugnant to the constitution; but it must be manifestly so, not susceptible of doubt. We find nothing in violation of the constitution in the acts regulating the appellate jurisdiction of this Court.

IF it be any advantage to the citizen to have th facts of his case reviewed and examined a secon time, the Inferior Court has ample means of afford ing it, if any good reason be assigned. Is it nc sufficient that after having the *facts* ascertaine below, that the *law* shall be settled above? Wh becomes of the boasted advantages of a Supren Court of appeal, if a jury is to be had in almc every case before it? It has been said that the gre

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. MAY TERM, 1813.

East. District *May* 1813.

THE Court now gave notice to the gentlemen of the bar, that hereafter they will expect to be furnished with a brief, or statement of the material points of the case from the counsel, on each side of a cause, at least one day, preceding that on which it is set for trial.

THE SYNDICS OF BROOKS, APPELLANTS,

vs.

W. & J. WEYMAN, APPELLEES.

SYNDICS OF BROOKS *vs.* WEYMAN

Refusal of a new trial no ground of appeal.

By the Court. A verdict was been rendered in the late Superior Court, and a motion there made for a new trial. In pursuance of the act organizing the Supreme and Inferior Courts of this State, the case was transferred to the first District Court; the motion was there argued and

BY the 18th sect., the cause may be remanded for a new trial, and instructions will accompany it, directing the inferior Judge in what manner to proceed. What can the citizen desire more than to have the facts of his case found by a jury, and any possible point of law that may arise during the trial, settled by the Supreme judiciary of the State?

THE Court are of opinion that their appellate jurisdiction extends to the adjudication of the law in final decisions and judgments in civil actions above the value of three hundred dollars. It is impossible now to pronounce what shall be considered a final decision—each case must depend upon its own circumstances. We are also of opinion that no re-examination of facts in this Court was contemplated by the Legislature, and consequently that this motion be overruled.

District. *il* 1813.

DICS OF ROOKS *vs.* YMAN.

appear upon the transcript, and the Supreme Court must pronounce upon the correctness of the judgment of the Inferior Court. So on a plea to the jurisdiction, or any other question of law which is sent up on the record.

By the 11th sect., if the Court below have erred in the law on a special verdict or statement of facts, they will be presented again to the Court above, and the law arising from those facts will be there decided.

There is no question of law which may arise during the trial of a cause, which may not be reviewed by this Court.

By the 17th sect. of the supplementary law it is declared, that whenever on a trial of any suit in any Inferior Court, the party or his counsel shall desire the opinion of the Court on any question of law arising in the course of the trial, it shall be the duty of the Court to give such opinion, and either party may except, and the exception shall be entered, and so much of the testimony shall be taken as may be necessary to a final understanding of such opinion and exception; and the same shall on appeal be sent up with the other proceedings in the case. Thus, should improper testimony be admitted, or proper testimony be rejected—or should the Judge below have erred in his charge to the jury, (which he is compelled to give on the request of either party) the mistakes of the Court below will be corrected by this tribunal.

benefit of a Supreme appellate Court, is to settle the law—to fix the great rules of property : but how, we ask, is this to be done, if it must depend on the caprice, ignorance, or information of a jury ? Much as every man must be convinced of the necessity of the appellate power, as contemplated by the constitution and the laws, the introduction of juries into the tribunals of the last resort, can have no other tendency than to render every thing unsettled. This, and whatever is calculated to give an *unrestrained* course to appeals, must be considered as a source of great mischief; the inhabitants of this country, so far from regarding it as a blessing, would justly consider it as a curse.

By a reference to the different clauses of the acts, it will be found that they extend to the citizen all the advantages which a well constituted Court of appellate jurisdiction is calculated to effect.

By the 10th sect. of the first law it is declared, that on the return of the proceedings into the Supreme Court, the adverse party may appear and deny any error in the judgment below, whereupon the Court shall proceed to hear the said appeal, on the pleadings and documents so transmitted. Here, there is a security for a decision of the Supreme Court, upon any question of law which may present itself on the record. Should there have been an issue of law below, it will

the new trial refused. The Court are of opinion, that the refusal to grant the new trial is no cause of appeal : that according to uniform practice, the judgment should be entered *nunc pro tunc*— that this Court having already decided, *Bermudez* vs. *Ibanez*, *ante*, 1. that no appeal lay from the Superior to the Supreme Court, the present appeal must be dismissed.

East. District. *May* 1813.

FORTIER vs. DECLOUET.

FORTIER vs. *DECLOUET.*

By the Court. The defendant was arrested and held to bail by the sheriff. An application was made to the Judge of the first judicial District to discharge him ; the Judge refused. An appeal, or something in the nature of it, from the refusal of the District Judge, is prayed for to this Court.—The Court are of opinion that this is not such a case as will support an appeal. The motion is therefore overruled.

No appeal lies from a motion to discharge bail.

SYNDICS OF BERMUDEZ vs. *IBANEZ & MILNE.*

BERMUDEZ, in January 1812, brought his action, in the Superior Court of the late Territory of Orleans, to compel Ibanez to convey to him, a lot of ground sold to him by Bermudez's agent. The following interlocutory decree was made : the Court is of opinion that the land mentioned in the petition was directed to be sold, by the plain-

Stay of proceedings suspends process before and after judgment.

Case 2. 3m 17 47 202

Trustee privileged on trust estate.

East District. *May* 1813.

SYNDICS OF BERMUDEZ *vs.* IBANEZ & MILNE.

Sale made by sheriff, after a stay, set aside.

tiff, without any fraudulent intention—that from the relation in which the defendant stood to the plaintiff and his wife (being her brother) by whose agency the sale was effected—from his avowed object in pressing the plaintiff to authorise his wife to sell—from the price given, and the subsequent declarations of the defendant, since the plaintiff's return, it appears that the purchase was made with a view to secure the defendant's claim, and it was the intention of the defendant, in the knowledge of the plaintiff's agent, at the time the sale was made, that on the defendant's being fully paid all his advances, he should sell the land for the benefit of the plaintiff or his family or reconvey it.—It is therefore ordered &c. that the defendant do file with the clerk a statement of his claim for all monies by him paid or advanced for the plaintiff, or his family—that the same be referred to three persons to be agreed upon by the parties, or named by the Court, and that on the plaintiff paying the sum reported to be due by him to the defendant, within sixty days, the defendant do reconvey the premises to him, and on failure of payment within sixty days, that the premises be sold to satisfy the defendant's claim and the balance be paid to the plaintiff.

THE referees, reported a balance in favor of Ibanez of six thousand and odd dollars, and Bermudez neglecting to pay, an execution was levied on the lot and it was for the third and last time

advertised for sale, on the 3d of February 1813, at one year's credit.

BEFORE this day, Bermudez presented his petition to the Superior Court stating his insolvency and annexed to it a schedule of his property, in which the lot was set down, as part of it. The Court declined granting any stay of proceedings, as the shedule presented no property on which the stay could operate, except the lot, which had been ordered to be sold. On this, Bermudez presented a similar petition to the City Court, from which he obtained a stay of proceedings and an order for the meeting of his creditors.

AT a meeting of the creditors, syndics were appointed and Bermudez made to them a *cessio bonorum*. The proceedings were homologated and an order of the City Court obtained enjoining the sheriff from proceeding to the sale of the lot.

THE syndics on the same day, January 30th 1813, brought suit against the sheriff and Ibanez, to recover possession of the lot. Process was served on the first of February, and the sheriff proceeded to the sale, on the day appointed, and Bermudez's brother, being the highest bidder, having bid $ 7000, the sheriff required of him to enter into bond with surety, according to law. He named a solvent person then absent, and the sheriff insisting on the surety being produced, the purchaser went in quest of one, but returned without any, and on the following day the lot was

East. District. *May* 1813.

SYNDICS OF BERMUDEZ *vs* IBANEZ & MILNE.

again put up and struck to Milne, for $ 7000, but no bill of sale was made out, in consequence of an opposition made by the syndics, who obtained an injunction from the City Court on the 9th of February.

ON the 5th of April the syndics filed a supplementary petition in the District Court, to which the record of the original suit was (after the change of government) removed, making Milne a party thereto, stating the sale and praying a rescission of it.

AT the trial it was proved that Bermudez's brother, the first purchaser of the lot, was worth upwards of seven thousand dollars and that the person he had offered as his surety was worth much more and would have been ready to sign the bond, had he been found. The District Court gave judgment for Ibanez and Milne, the defendants, and the syndics, the plaintiffs appealed.

Smith and *Ellery* for the appellees. This case presents itself under two principal points of view.

1. WHAT was the situation of the original parties, prior to the insolvency?

2. WHETHER any, and what change of relation was produced between the parties, by the subsequent act of Bermudez, convoking his creditors and the proceedings that then ensued so as to affect the rights of Ibanez, as settled by the judgment?

I. IT appears by the judgment in the original suit, that, prior to its institution, Ibanez had an absolute conveyance of the property in question.— that the purchase was made to secure the repayment of his advances—that he relied on it as his security and that he intended to reconvey, only on being fully paid—that he was in possession and had every apparent feature and quality of owner. Could Bermudez have then obtained possession without first refunding what was due? If he had then proclaimed himself insolvent, what could his syndics have done, more than to call upon the equitable jurisdiction of the Court below and address themselves to the conscience of the defendant, in order to establish the true state of the property; and thus arrive in time, just at the point at which Bermudez himself had arrived in obtaining judgment against Ibanez? They are not now at liberty to say they would have obtained a better judgment, it is the very foundation of their title, and is not to be gainsayed by them.

BUT the effort has been already made by Bermudez before insolvency, and he has succeeded against the pretentions of Ibanez to the utmost that can be done by him or by any who represent him. He has obtained a final decree of account, in the last resort, making a specific disposition of that property which was before under the absolute control of Ibanez: And what is

East. District. *May* 1813.

SYNDICS OF BERMUDEZ *vs.* IBANEZ & MILNE.

that specific disposition? Why, that Bermudez shall by entitled to have a reconveyance of the property provided he refunds within sixty days to the defendant the amount of his advances: otherwise that the property shall be sold by the sheriff and Bermudez receive the proceeds, after a deduction of the advances.

THIS is a judgment recovered by the insolvent, before insolvency, and against the defendant, Ibanez, limiting his former control over the property. Were not Bermudez and Ibanez, the original parties, indissolubly bound by it?

II. IT is an established principle of law that the creditors of an insolvent take his estate, subject to all the equities, which governed it in his hands, and also that all acts fairly made by the insolvent stand as well against his creditors as against himself. 1 *Cook's* B. L. 325. 1 *Vesey* 331. *Rowe vs. Dawson*, 2 *Vernon* 286 *Pope vs. Onslow*, 2 *Vesey*, 633, *Hinton vs. Hinton.* By the judgment in the suit between the original parties it appears that the plaintiff had conveyed the title and delivered the possession of the estate to the defendant, as a security for advances made and to be made by him. It appears also that the act had been *fairly done* and further that it was clearly the *intention of the parties* that the title should *not* be *reconveyed* and that possession should *not* be *redelivered* until Bermudez the

vendor should refund the amount of these advances, whatever they might be. Would not such an act then, upon the authorities that have been cited, stand against the creditors independently of the judgment: being an act fairly done, and on the faith of which the defendant advanced his money, and more especially as sustaining it could not operate any fraud or inconvenience to the creditors in general? For the title and the possession having been both long in the defendant, it could have obtained for the plaintiff no delusive credit. His others creditors could not have trusted to property that seemed to belong to another. The real question then, in the present case seems to be whether Bermudez, the plaintiff, in the original suit, can by declaring himself insolvent *defeat a judgment* from which there was no appeal. This is the naked meaning of the case.

THE judgment is that the estate be reconveyed to the plaintiff, provided he first refund to the defendant the amount of his advances. Otherwise that the estate be sold by the sheriff, and the balance only of the proceeds be delivered to him, after payment of the defendant's advances. The object of the present suit is to obtain a reconveyance, *without* first refunding the advances in question—to annul the sale of the sheriff *without* being obliged to receive the mere balance of the proceeds of the sale, equally in contravention of

East. District. *May* 1813.

SYNDICS OF BERMUDEZ *vs.* IBANEZ & MILNE.

the clear understanding of the original parties and of a final, irreversible judgment, enforcing the specific performance of the contract.

THE decree in question is not like an ordinary judgment, establishing a debt, a mere judicial mortgage against the insolvent's estate : *such* a judgment would be unaffected by a delivery of all the property, possessed or claimed by the insolvent, into the hands of the syndics, and might be equally well satisfied at the hands of the syndics and at the hands of the sheriff. But this decree, which is admitted to be a final judgment, of no less authority, than a judgment homologating the proceedings of creditors, cannot be complied with consistently with the success of the plaintiffs' demand, but must, in such event, be infringed. If this decree had been simply that the defendant reconvey to the plaintiff, provided he first refund to the defendant the sums he had advanced on the faith of that security, it would seem to be undeniable that the subsequent insolvency of the plaintiff could entitle his syndics to a reconveyance on no better terms—but the latter part of the judgment was intended to enforce a compliance with the first. Shall then the judgment be said to be unshaken, when the means which it prescribes for its own enforcement can be legally resisted ?

Turner, for the appellants. In examining the plaintiffs' claim three questions necessarily arise.

1. HAD Bermudez any right or interest in the lands, at the time of his insolvency and surrender of goods ?

2. Do the proceedings on his petition in the City Court suspend the proceedings on the order of sale of the District Court ?

3. INDEPENDENTLY of those proceedings, is the sale to Milne a valid one, under the act of assembly ?

I. IT is contended by the defendant, that Bermudez had no right to the lands, and could acquire none, but by payment of the money decreed to the defendant, within the time limited by the decree, and that not having done so, the estate became absolute in the defendant, before the insolvent exhibited his petition and schedule; and that therefore he ought not to have inserted the land in the schedule, and that the plaintiffs therefore can have no right to it.

THESE positions are not warranted either by the law, nor the decree, of the late Superior Court.

WE do not pretend to claim title under the decree; we contend that by the decree, it is established that Ibanez never had any other than a trust estate in the premises; he is a mere trustee for our use. But having made advances to Bermudez, he has a lien on the lands for the amount of his debt.

BY the Roman civil law, the *cestuique trust* is

East. District. *May* 1813.

SYNDICS OF BERMUDEZ vs. IBANEZ & MALNE.

considered as *the real owner of the lands.* And the Courts of equity have ever gone upon the same principle; and have always compelled the trustee to perform the trust, whether the trust was declared in the deed or not. 2 *Fonblanque*, 1, 8, 121 *Sanders' essay* 1, 6, 11.

IT is even a maxim of the civil law "that he who has the right of action for a thing, is considered the owner of the thing."

THIS is also the rule of common sense and of common practice. It never was heard of that a man might come into Court, with a suit, to acquire a right, to a thing which he was not before the owner of.

IF indeed a suit should be so commenced, and it should turn out, on the trial that the plaintiff had no right, he must be cast as a matter of course. And yet the defendant contends we had no right to the land, but such as was acquired by the decree, that our right then for the first time had its origin—a doctrine strange in jurisprudence, and contradicted by the decree itself.

IT is too manifest to admit of argument to the contrary that the land belonged to Bermudez, but was subject to the incumbrance of Ibanez's debt, as a mere mortgage or pledge.

HAD it been otherwise, the Court could never consistently with either the rules of law or equity have decreed the defendant to reconvey the title to Bermudez, on the payment of his debt.

IF we consider the land in the possession of the defendant as under mortgage for Bermudez's debt, the rights of Bermudez are just the same, as in the case of a trust estate.

THE mortgagor is considered as the real owner, and the mortgaged thing as a mere security for the debt, and the mortgagee as a trustee for the mortgagor. 2 *Fonblanque* 261. *Powell on mortg.*, 15 76.

IT is clear therefore that Bermudez had a property in the lands; but it is not material to the present inquiry, what that interest is worth, nor in what manner it existed: it is sufficient that he had an interest: that interest whatever it was, vested in the plaintiffs as syndics.

II. THE 2d. question is very easily disposed of.

HAVING, as I believe, shewn beyond the possibility of a legal doubt, that the property in the lands in controversy was vested in Bermudez, not by any appointment of the decree, but by his old and original title, acquired long before Ibanez had any claim upon it:

I will now attempt to shew that the order of sale of the late Superior Court was suspended by the surrender of the insolvent's property.

IT is declared in 4 *Febrero*, book 25—a consequence of such proceedings by an insolvent, that all judicial process against the insolvent, or against his property, are suspended.

East. District. *May* 1813

SYNDICS OF BERMUDEZ *vs.* IBANEZ & MILNE.

THIS was the existing law of the land before the compiling of our Civil Code—It was so acted on; it was the uniform practice of the country: and it has been recognized and solemnly decided, to be the law of the land in the case of *Elmes* vs. *Estevan* in the Superior Court. 1 *Martin*, 193.

BY the Civil Code 294 art. 172, it is provided that the surrender of property, "suspends all kinds of judicial process against the debtor."

THESE words are very general, and comprehend every thing denominated process.

PROCESS, by the strict and technical rules of the common law is divided in to original process, mesne process, and final or judicial process.—Thus we find that the words of this law emphatically apply to executions, as judicial process;—But the words need no aid of illustration, they are plain and comprehensive, and take in all kinds of process, issuing from a Court, whether original, mesne, or final process, and whether against the person of the debtor or against his property, generally or specially.

IT is also provided in the Civil Code 440, art. 6, that mortgage creditors are affected by the respite, in the like manner as the other creditors.

BUT the defendant again contends, that the order of sale, and proceedings of the sheriff to advertise and sell the land, are not judicial proceedings against the insolvent. Because, say

the counsel, it is a proceeding to enforce a decree made in a suit of *Bermudez* vs. *Ibanez*, by which he, as plaintiff, was to be benefited : that it is not a proceeding against the insolvent nor against his estate, but on his behalf and against the lands of Ibanez.

THIS objection is not even plausible—the proceedings in the suit shew that it was instituted to obtain a conveyance of the trust estate to the plaintiff—and that the suit was opposed by defendant upon the ground of his being a purchaser for a valuable consideration, and holding the land by complete title, made several years before. But the Court decreed in favour of the plaintiff—that it was only a trust estate, and must be reconveyed by the defendant. But as it appeared the defendant had made advances, which were to be considered as an incumbrance on the land, the Court treated the subject as a mortgage and ordered the plaintiff to pay the defendant's debt before the reconveyance of the lands, and in default of such payment by a given day, the land should be sold by the sheriff.—How sold? Why as the property of the debtor, most undoubtedly, and to satisfy his debt.—Moreover the excess of proceeds, after paying the defendant his debt, are ordered to be paid to the plaintiff. Why sell the land to satisfy the defendant's debt, and why pay the excess of proceeds to the plaintiff, if it was not his land? The decree is double—it looks

East. District. *May* 1813.

SYNDICS OF BERMUDEZ vs. IBANEZ & MILNE.

two ways—it requires duties to be performed by both plaintiff and defendant—it calls on the defendant to reconvey to the plaintiff—it also calls on the plaintiff to discharge the defendant's claim on it. As it regards the debt, it is a judgment against the debtor and the process is against him as in other cases of judgment on mortgage. It is therefore *quoad* the order of sale a judicial proceeding against the insolvent. It can be no other in law or reason.

III. THE surrender of the insolvent's property (and this very land amongst the rest) being made before the sheriff had carried into effect the order of sale, all further proceedings thereon were suspended by the rule of the City Court—nay the convocation of creditors was had, their proceedings before the notary homologated and notified to the sheriff before the sale. The sale therefore to Milne was contrary to law and ought to have been set aside by the District Court.

THE sale to Milne is irregular on another account. But as the plaintiffs' right appears so manifestly against the decree on the first point, it seems almost unnecessary to notice any other objections, in the cause. But as the property is of great value, if the sale to Milne, be confirmed, it will greatly injure the creditors, the Court will please to pardon me if I should trespass a little further on their time and patience.

East. District. *May* 1813.

SYNDICS OF BERMUDEZ vs. IBANEZ & MILNE.

BY the execution law the sheriff is required to sell at twelve months credit on "mortgage and security."

ACTS of 1808 page 48.

THIS law has two objects in view, viz, 1st to obtain the greatest price possible, and 2ly the security of the purchase money. The first and greatest, is the price—it is therefore important to extend the sphere of bidders to the greatest limit—the sale is to be by public auction—to be in the day time—and upon twelve months credit—this object so desirable for the benefit of both debtor and creditor, would in a great measure be defeated, by requiring the kind of security demanded by the sheriff in this instance. He requires *an endorsed note*—a thing unknown to the law, and justified only by the usage of merchants—an endorsed note is consequently a negociable note—it may be paid away in a course of trade and dealings—it may be deposited in the bank for collection—it may be discounted at bank—it then will be subject to all the rules and burthens of mercantile usage—it may be protested for non payment—the endorser will be immediately responsible—not as security, but as principal—he cannot claim the sale of the thing mortgaged—he cannot claim a discussion of the principal's effects. Many men therefore would not endorse who would join in a bond or note as security—many bidders might be able to give security, who

East. District. *May* 1813.

SYNDICS OF BERMUDEZ *vs.* IBANEZ & MILNE.

could not get an endorser—But this mortgage and security is *ex natura* an authentic act—made before a notary, or at least acknowledged before one—it is not to be given nor required by the sheriff, until he is ready to make a deed for the land sold; as he is required by the law to do—he could not require the security at the instant of the sale—he ought to appoint a time and place where the mortgage and security is to be given, and notify the purchaser of it—he has no right to require the mortgage and security until he is ready to make the conveyance—the law gives him one week to do this—*Laws* 1805, 180 246. If this course is observed by the sheriff, and I contend it is the only legal one—the bidder will have time to get his security—he will have time to go among his friends and find out such as are able and willing—if he should be disappointed in one, he may find another—but very few indeed, could do this on the ground, the instant the property is struck off to him, or even in the short space of half an hour.—The bidders therefore would be very limited, and none but rich speculators could come into the market—thus the wholesome provisions of the law would be defeated—the security, when given in the manner I contend for, could not be called on for payment until after the mortgaged thing was sold, and if it fell short of the debt; nor until the principal's effects are discussed and found also deficient.—By the statement of

the sheriff contained in the record, J. B. Bermudez was adjudged the highest bidder—and as he required of him terms, which by the law he could not do ; and as he again sold the property on the same day and upon terms unjustifiable, the sale is irregular and the District Court ought to have quashed it.

I trust therefore that, upon both these grounds, or one of them, the Court will think with me, that the decree, appealed form, ought to be reversed.

Ellery and *Smith*, in reply. The sale of the sheriff, under the judgment, is not a proceeding against the person or property of the insolvent. It is a sale under a judgment, in which the insolvent was plaintiff, and notwithstanding the condition, incorporated in it in favor of the defendant, it is no less a judgment in favor of the plaintiff—a judgment by which the previous absolute title of the defendant was converted into a privileged security only : and by which the plaintiff acquired a right to a reconveyance of the title on the fulfilment of a certain and definite condition, or, at all events, to the balance of the proceeds of the sale.

WITHOUT the benefit of that judgment, where would be the pretentions, of the insolvent or his syndics, against the apparent, absolute title and

East. District. *May* 1813.

SYNDICS OF BERMUDEZ vs. IBANEZ & MILNE.

the possession of the defendant, Ibanez? It is then a judgment in favor of the plaintiff, Bermudez, awarding him what he could not obtain without it, and therefore the execution of it is a proceeding *against* neither his person nor his property. The security of the defendant has been likened, in the course of the argument, by the counsel of the appellants, to a *mortgage*; but of a mortgaged property, both the title and possession remain, in the mortgagor, and, of course, on his insolvency pass to his creditors at large. The syndics would not be obliged to recur to a suit, in order to realize the estate, to convert it into money for the discharge of the debts. On the other hand, the mortgage creditor, having contented himself with a security, by which the title and possession of the property on which it was imposed, remained in the debtor, *prior to* his insolvency, could insist on nothing better, against the syndics, *after* that event. The security, in the present case, has no more resemblance to a mortgage, than the general one of being a security for a debt, and raised on real property.

IT has been likened in the next place to a *trust*. But, a trust estate, according to the English law; is created for the sole benefit of the *cestuy que trust*. The feoffee in trust, or trustee, holds it subject to the controul of the *cestuy que trust*, and is bound to reconvey at his pleasure. But, even in the case of a trust estate, the trustee, if

he have made advances, on the credit of the estate, or have since, *in any other way become a creditor* of the *cestuy que trust* shall hold possession of the premisses; not only against him, but also against his creditors, in case of his insolvency, until the full payment of whatever may be so due. *Lessee of Trazes & al.* vs. *Hallowell*, 1 *Binney* 126.

IT will not be contended that a pawnee can be compelled by the creditors of a bankrupt to surrender the pawn, without being first paid the money he has advanced upon it. But, in the present case, the defendant has, equally with the pawnee, *possession* of his security; and further that security is a realty, and is assured to him, by the solemnity of an absolute title.

IT is, however, not true, that the possession of all property whatsoever to which a party may have title, or in which he may have an interest, passes, on his insolvency to his creditors at large: and it may be laid down as a general rule that the possession of property, in which an insolvent, at the time of his insolvency, *had not the right of possession*, shall be recovered by his creditors, in no better terms that these which would have availed the insolvent himself.

WITH regard to the second ground, assumed by the counsel of the appellants, *viz.* that the sale of the sheriff is irregular, in as much as the

East. District. *May* 1813.

SYNDICS OF BERMUDEZ vs. IBANEZ & MILNE.

property was struck off to one bidder, when another was the real purchaser, it seems to be somewhat foreign to the cause.

To the parties in this suit, it would seem to be a question wholly immaterial whether the sheriff give a deed to one or the other of the bidders, provided he take care, in due time to produce the best price offered for the property, at the sale. If, however the sheriff had committed some irregularity, clearly vitiating the sale, the consequence that would follow must be, that he should sell again. If he had committed some error of form that might bring in question the title of the purchaser that could lie between that purchaser and the sheriff or some rival bidder. The sheriff's bill of sale must bind the property against all the world, except a rival bidder or a party claiming under another title.

By the Court. In this case, the respective rights of the original parties (Bermudez and Ibanez) to the lot of ground in dispute, have been settled by the decree of a Court from whose decisions there is no appeal.

THE determination of the present suit depends, therefore, on ascertaining which of the said parties was recognized by that decree, as the owner of the contested land.

IT appears that while F. X. Bermudez, once the undisputed proprietor of the lot in question,

was absent from this country, F. Ibanes, the brother of his wife, urged him to authorize her to sell that property; that Bermudez having sent the necessary authorization, Ibanez became the purchaser of the lot, apparently for a fixed price, but in reality for the purpose of securing an unliquidated claim of money which he had against Bermudez; that at the time of sale, it was understood between the contracting parties, that, when Ibanez should be reimbursed his advances, he would either re-convey the land to Bermudez, or sell it for the benefit of Bermudez and his family. It does further appear from the said decree, that the claim of money of Ibanez had remained unsettled, and was to be subsequently ascertained; finally, that on Bermudez paying, within a certain delay, the sum thus to be liquidated, the land was to be re-conveyed to him; otherwise to be sold for the payment of that sum, and the balance to go to Bermudez.

Posterior to that decree, the claim of Ibanez was settled by the referees to the sum of six thousand, six hundred and six dollars and seventy five cents; and on Bermudez' having failed to pay it within the fixed time, the sale of the land was decreed to be made by the sheriff. Previous, however, to the sale, Bermudez called a meeting of his creditors, and an order issued from a competent Court, staying all proceedings against him, notwithstanding which order, the sale was

East. District. May 1813.

SYNDICS OF BERMUDEZ vs. IBANEZ & MILNE.

executed. The present plaintiffs have prayed for a rescission of that sale, and from a decree of the Court of the first district, refusing to rescind it, they have claimed the appeal on which this Court have now to pronounce.

THE situation of the parties in this case is, indeed, a novel one. But however ambiguous their rights may appear at first, one point, at least, is very clear—and that is the non-existence of any real title in Ibanez. His right to the land was not even that which is acquired by purchase subject to redemption; for, in such case, the purchaser may become the absolute owner, in the event of the vendor's suffering the stipulated delay to elapse without redeeming, while here in defect of payment the property was to be sold. A property, which was to be sold to pay Ibanez' claim, surely could not be considered as his property: the idea is repugnant to common sense. A right to be paid out of the proceeds of a sale, far from bearing any resemblance to a right of property in the creditor, implies the very reverse; for it is a right to be exercised against the property of another.

IT being ascertained that Ibanez was not the owner of the land in dispute, it remains to enquire what kind of right he had on that land. His right was not that of a mortgagee, nor that of a purchaser under a claim of redemption; nor can it

strictly be called an *antichresis*. The object of the contract was to vest him with as ample a security as could be given. The nature, also, of the debt, part of which must have been created by advances made for the support of Bermudez' family, during his absence, entitles his claim still more to be recognized as a privileged one. And when the Court further consider that in cases of *antichresis*, to which this may in some degree be assimilated, the debtor cannot before full payment of the debt, claim the enjoyment of the immovable estate which he has given in pledge (Civil Code book 3d, tit. 18, art. 24) they feel disposed to secure to the defendant, Ibanez, the immediate payment of his debt, independent of any agreement of the other creditors of Bermudez.

UPON the whole, the Court are of opinion that Bermudez was, at the time of his failure, the true owner of the lot of land in contest; that the decree ordering a stay of proceedings against him, ought to have stopped the judicial sale of that land, and that the sale made in contravention to it was illegal and void. It is therefore ordered, that the said lot be surrendered to the syndics of the creditors of Bermudez, for the purpose of selling it within the usual delay of judicial sales, payable, to wit, the sum of six thousand, six hundred and six dollars and seventy five cents in cash, to satisfy the claim of Ibanez, and the remainder at such

East. District. *May* 1813.

LANUSSE *vs.* MASSICOT & AL.

credit as they may think proper to fix agreeably to the directions by them received from their constituents; unless the said syndics choose to satisfy the said sum to Ibanez. And it is further ordered that the parties shall pay their respective costs.

LANUSSE vs. *MASSICOT AND OTHERS.*

If there be a supplemental petition, & the judgment be on the original one, the suit will be remanded.

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By the Court. The first petition stated that the plaintiff was endorser of the notes in question—that afterwards he transferred them to Jones, who had brought suit for the recovery of the amount—that the defendants were jointly liable, and prayed that they should be decreed to pay *in solido* the amount of the judgment to be recovered against him. The defendants pleaded that they were not liable, until the plaintiff should have paid the amount of the notes. Afterwards, on the 17th of March, on motion of plaintiff's counsel, it was ordered by the Court, that he have leave to amend the pleadings by filing a supplemental petition, which was done; and the petition set forth that the plaintiff had paid the notes, and therefore prayed that the defendants might be condemned in principal, interest, and costs. The defendants answered, that at the time of bringing the action, the plaintiff was not the holder, and therefore the suit could not be maintained. On the 14th of April, it was decreed that the plaintiff had no property in the notes, and consequently no right of action.

THE Court are of opinion that the Judge below should either have refused the supplemental petition, and then have decided on the right to recover in guaranty; or having received it, to have determined the merits of the case on the original and supplemental petitions and answers: this has not been done. The *fact* on which the case was decided, was not as is stated in the judgment, nor did the defendants pretend that it was so. It was alledged in the supplemental petition, that Lanusse had paid Jones, and was then the actual holder; the defendants did not deny that, at the period of filing the supplemental petition, Lanusse was the holder; but answered that he was not the holder, at the time of commencing the suit. The Court, however, decreed that he had no property in the notes, and consequently could not support the action. We must believe that the Judge below did not act upon the supplemental petition and answer; and thinking, as the Court does, that in this he erred, it is ordered and decreed that the judgment below be reversed, and that the case be remanded to the District Court, with instructions to proceed to trial on the original and supplemental petitions and answers as one case.

East. District. *May* 1813.

LAVERTY *vs.* DUPLESSIS.

No appeal lies on proceedings on an *Habeas Corpus.*

LAVERTY vs. *DUPLESSIS.*

DUPLESSIS, Marshal of the United States for the Louisiana District, being ordered to remove aliens enemies, to a certain distance, in the inland parts of the State, arrested *Laverty*, a native of Ireland, (the United States being at war, with the king of the United kingdoms of Great-Britain and Ireland) who claimed the citizenship of the United States, under the decision of the late Superior Court of the Territory of Orleans, in *Desbois'* case, 2 *Martin* 185, and was accordingly discharged on a writ of *habeas corpus*, issued by the District Court of the first District. *Duplessis*, thought it his duty not to submit, without the determination of the Supreme Court, and prayed an appeal. The District Court refusing it, he moved for a *mandamus*, to the District Court to allow the appeal and send up the record.

THE case was argued by *Grymes*, attorney of the United States, and the most eminent counsel at the bar, during several days.

By the Court. This case, as it has been argued by desire of the Court, presents two questions for its consideration.

1. WHETHER any, and what criminal appellate jurisdiction is given? and

2. WHETHER under the constitution or laws,

this tribunal can exercise a general superintending jurisdiction over Inferior Courts ?

I. WITH respect to the first point, it is contended by some, that as the *whole* judicial power is vested in the Supreme and Inferior Courts, and the *appellate* jurisdiction is confided here, it necessarily follows that criminal appellate jurisdiction must be exercised by us.

LET us first examine the words of the constitution. It is declared that " the judicial power shall be vested in one Supreme, and Inferior Courts. The Supreme Court shall have appellate jurisdiction only, which jurisdiction shall extend to all civil cases when the matter in dispute shall exceed the value of three hundred dollars. "

IT has been said, in the course of the argument, that this State being, as to internal regulations, completely sovereign, she had a right to distribute the powers of government at her will—that a declaration in the constitution that the appellate power shall extend to *civil* cases, is no restriction on the Court to exercise it in *criminal*, and that nothing can be inferred from legislative silence ; that even had the Legislature attempted to prohibit its exercise, it would have been an unconstitutional act, and consequently void.

BEFORE we proceed further, it is important to ascertain, whether appellate jurisdiction be at all

East. District. *May* 1813.

LAVERTY vs. DUPLESSIS.

essential to the exercise of judicial power—whether it is absolutely necessary in criminal cases—and a sovereign State may not refuse it altogether, or establish it in some cases and deny it in others.

THESE questions may be answered by a resort to general principles, and by a reference to the practice of other countries—of our own and of our sister States.

THAT a sovereign State has a right to establish such a judicial system as it pleases, is a proposition that must be assented to by all. The sole restraint that we can imagine is, that in the distribution of its powers it shall not violate any of the great principles secured by the national compact; but the only imperious duty of the State, in this department, is to establish tribunals for the decision of disputes amongst individuals, and for the trial of offences against the social order. But whether this shall be done in one Court or in many, whether the first decision shall be final, whether there shall exist one appeal or more, or in what cases it may be granted, is not to be regulated by those whom the people may call to the important duty of framing a constitution.

THAT this was perfectly understood by the convention of this State, appears by restraining appeals in civil cases to sums above the value of three hundred dollars. That the erection of Courts of appeal has not been deemed important to the protection of life or liberty, is easily proved from

the practice of our own territory for nine years past, from the organization of the federal Courts of the United States, and of other states, particularly Kentucky.

THE words of the constitution of the United States, conferred on Congress as full power to establish appellate jurisdiction in criminal cases, as could possibly be granted. "The judicial power shall extend to *all cases in law or equity* arising under this constitution, the laws of the United States, or treaties made, or which shall be made under their authority—the Supreme Court shall possess appellate jurisdiction both as to law and fact, (except in cases of ambassadors and consuls) under such regulations as Congress shall prescribe." Laws were immediately passed defining offences and organizing the Courts. Have Congress passed any laws on the subject of criminal appellate jurisdiction? Have not their Courts, over and over again, refused to exercise it, because it was not given by Congress? Have not those Courts been in operation twenty years or more, and have not cases occurred which might remind Congress to establish such a jurisdiction, if they really thought it necessary? Have not two insurrections been suppressed, and many offenders tried for capital offences? We cannot have forgotten the case of Fries and of so many others, where it was said that the doctrine of treason was carried to its utmost extent, by a time-

East. District. *May* 1813.

LAVERTY vs. DUPLESSIS.

serving Judge, to promote his own ambitious views; and that this able and much calumniated magistrate was impeached, and acquitted by the good sense of the Senate? Do we not recollect the more recent case of Burr, where it was openly declared that the great and upright magistrate, who presides with so much usefulness and dignity on the Supreme bench of the United States, relaxed the law of treason to favor the escape of a powerful criminal? Have these cases passed unnoticed? No—they have not. The late President of the United States caused a special message to be sent to Congress, enclosing the testimony in the case of Burr, and called their attention to the defects of the law, or the administration of it. Yet after this solemn call, and after much deliberation, Congress have not discovered the want of a criminal appeal to be a defect in the system; and altho' their Courts have refused to exercise it, and it is in their power to confer it, they have not thought it essential to the security of life or liberty to establish any such jurisdiction. Let us proceed one step further, and we shall find, in one State at least, that the exercise of this power has been expressly forbidden to the Court of appeals.

BY the constitution of Kentucky it is declared, that the Court of appeals (except in cases otherwise directed by this constitution) shall have appellate jurisdiction only, "which shall be co-extensive with the State, under such restrictions

and regulations, not repugnant to the constitution, as may from time to time be prescribed by law." From these expressions it is clear that the Legislature of Kentucky might have vested in that Court a criminal appellate jurisdiction; but so far from doing so, they have declared that altho' a writ of error shall be demandable of right, yet it shall not issue in those cases which may be brought before and determined by the District Court, under the criminal jurisdiction of said Court, in which cases, "no certiorari, appeal, supersedeas, or writ of eror shall be allowed."

FROM the example, we must believe that many and weighty reasons presented themselves against the establishment of a criminal appeal—and may not many arguments be urged?

WHEN we reflect, also, that our criminal Code is perhaps the mildest in the world, and that our mode of trial gives every chance for innocence to vindicate itself; when from long experience we know that the general leaning of Courts and juries is in favor of the accused and the sacred regard which is always held for the rights secured to them by the constitution—when we reflect with what diffidence and scrupulosity criminal jurisdiction is exercised, and that the District Courts are presided by men of legal learning, and when we further consider the great advantages resulting to the community from the speedy infliction of punishment after the clear conviction

East. District. *May* 1813.

LAVERTY vs. DUPLESSIS.

of guilt—when we reflect on the difficulty of removing prisoners from the remote parts of the State, the danger of escape, and the thousand other embarrassments that present themselves in a croud; we are persuaded that the convention of Louisiana never intended to establish this as a Court of criminal appellate power.

THIS intention we think is clearly collected from the words of the constitution. "The Supreme Court shall have appellate jurisdiction only, which jurisdiction shall extend to civil cases when the matter in dispute shall exceed the value of three hundred dollars."

A general definition of the jurisdiction having been first given in these words—"the Supreme Court shall have appellate jurisdiction only," it may be said that all cases were included. If nothing further than an exclusion of civil cases under three hundred dollars was intended, the plain expression would have been—"which jurisdiction shall not extend to civil cases under three hundred dollars." But as the constitution stands, the first part of the section establishes the *kind* of jurisdiction—it shall be appellate only—the other speaks of its *extent*—it shall extend to all civil cases above the value of three hundred dollars: and the whole is evidently an affirmative description of the kind and extent of the jurisdiction. An affirmative description of the authority granted, must imply an exclusion of any

other authority. The maxim of law, *expressio unius est exclusio alterius*, applies with peculiar propriety to a case of this nature. Affirmative words are often, in their operation, negative of other objects than those affirmed. In the case cited at bar, *United States* vs. *Moore*, 3 *Cranch*, 69, it was contended in support of the jurisdiction of the Court, that, as criminal jurisdiction was exercised by the Courts of the United States, under the description of all cases in law and equity arising under the constitution and laws of the United States, and as the appellate jurisdiction of the Court was extended to all enumerated cases other than those which might be brought in originally, with such exceptions and regulations as Congress shall make, the Supreme Court possessed appellate jurisdiction, in criminal as well as civil cases, over the judgments of every Court, whose decisions it could review, unless there should be some exception or regulation made by Congress, which should circumscribe the jurisdiction conferred by the constitution.

THIS argument, says the Chief Justice, would be unanswerable, if the Supreme Court had been created by law, without describing its jurisdiction. So we say here, the argument of gentlemen would be conclusive, had there been no description of our appellate jurisdiction. But the constitution of Louisiana has done with respect to us, that which the acts of Congress had done with respect to the

East. District. May 1813.

LAVERTY vs. DUPLESSIS.

Supreme Court of the U. S., that is, it has given an affirmative description of our powers, and declares they shall extend to civil cases above the value of $ 300. The ground of refusal, stated by the Chief Justice, is that the jurisdiction of the Court has been described and an affirmative description of its powers must be understood as regulated under the constitution prohibiting the exercise of other powers than those described. Where then is the difference between those cases, but that in the one the regulation or description is made by the constitution itself, and in the other, it is by law, under it? Shall a constitutional description of jurisdiction have less efficacy than a legislative one? Shall there be one rule for the construction of a statute and another for the interpretation of a constitutional act?

THIS rule, it is acknowledged, must operate upon a part of this sentence. It is not pretended that the Supreme Court can exercise jurisdiction, as an appellate Court, in civil cases under the value of $ 300. In virtue of what rule is this taken for granted? By the rule, so familiar to every lawyer, that the affirmative declaration of the jurisdiction is an exclusion of any other. But, why shall we stop the operation of the rule here, and not suffer it to have its full force? If we admit its influence upon the amount of jurisdiction, we must admit it also upon its object and extent.

THE Chief Justice of the United States, in the

case of *Moore*, proceeds to observe that the appellate jurisdiction of the Supreme Court from the Circuit Courts is described affirmatively—no restrictive words are used : yet it has never been supposed that a decision of a Circuit Court could be reviewed, unless the matter in dispute should exceed $ 2000. There are no words in the act restraining the Supreme Court under that sum; their jurisdiction is limited by the legislative declaration that they may review the decisions of the Circuit Court, when the value in dispute exceeds the value of $ 2000.

A distinction has been attempted to be drawn between the Courts of the United States, and those of a sovereign State. In the one, it is said nothing can be exercised, but what is expressly given—in the other, every thing is retained and may be exercised in the most unrestrained and unbounded manner. This distinction is correct so for as it respects the several governments—the federal government possesses no power, nor can exercise any other, than that which is expressly granted by the federal constitution; but the moment that grant is made, its right to exercise it is as ample as that of any state in its sovereign capacity, and all the rules, applicable to the several acts regulating it, must be the same in both. There then can be no doubt of the power of the general government to exercise every sort of judicial power, under the constitution and laws of

East. District. *May* 1813.

LAVERTY vs. DUPLESSIS.

the United States, and its authority to distribute it to its different Courts, is as complete as that of any state sovereignty in the union. With these observations we shall dismiss this part of the subject. It is the unanimous opinion of the Court, that it cannot exercise any criminal appellate jurisdiction.

II. THE next question, for the consideration of the Court, is whether a general, superintending jurisdiction is given over the Inferior Courts ?

IT is contended in argument that this Court has two characters : 1st that of a Court of appeals, and 2ly of a great superintending tribunal over all Inferior Courts. It is then said that for the purpose of carrying into execution all those powers, the 17th clause of the judicial act has declared " that the Supreme Court shall have power to " make and issue all mandates necessary for the " exercise of its jurisdiction, over the inferior " tribunals, agreeably to the principles and ma- " xims of law. "

IN the consideration of this question, we must always keep in view, that the jurisdiction of this Court is appellate only. Chief Justice Marshall (in the case of *Bollman* and *Swartout*) very properly observes that Courts, which originate in the common law, possess a jurisdiction, which must be regulated, by their common law, until same statute shall change the established principles ;

but Courts, which are created by written law and whose jurisdiction is defined by written law cannot transcend that jurisdiction. This is not the language of the federal Courts only, the same principles prevail in the Courts of the several States. In the case of *Yates* vs. *the people*, reported in 6th *Johnston*—it is observed by Judge Thompson, that it was warmly pressed upon the Court to construct their powers so as to extend their supervising jurisdiction, but he says he has the fullest confidence that it will not be done so. Chief Justice Kent, speaking of the Court of appeal in New-York, remarks, " this Court is as much bound by law as any Court within the State : the idea that it has an undefined description in any case is wholly unfounded. The members take the same oath as is taken by other judicial officers, they are bound by the most solemn sanctions, legal, moral and religious, to seek after and declare the law. Whether it be defective or unpalatable is not to be made a question here. It is the business of the legislature to make and amend the law, and the duty of every Court to pronounce it, as they find it. " The appellate jurisdiction, to be exercised by this Court, must be judicially appellate, that is, it must be the revision and correction of a judicial decision, and, in this State, can only be exercised in cases above the value of three hundred dollars.

THE great and extensive powers possessed by the Court of King's Bench in England, of su-

East. District. May 1813.

LAVERTY vs. DUPLESSIS.

perintending the inferior tribunals and of issuing the great prerogative writ of *mandamus*, is the exercise of original jurisdiction and not appellate by writ of error or appeal. Blackstone declares it to be the peculiar duty of the King's Bench to superintend all inferior tribunals, and to inforce the due exercise of the judicial or ministerial powers which the crown or legislature may have invested them with, and this not only by restraining their excesses, but also by quickening their negligence and obviating their denial of justice. Does this Court possess any such authority ? From whence is it derived ? Is this a Court of common law with remnants of regal prerogatives about it ? Or is it a Court constituted the other day by a written instrument in which its powers are defined ? There is no analogy between our plain appellate Court of limited jurisdiction and the Court of King's Bench in England, with all its splendid attributes of regal sovereignty. That Court had original as well as appellate jurisdiction—it was an emanation from the King's prerogative : it had original jurisdiction in capital offences and misdemeanors of a public nature, tending to a breach of the peace, to oppression, or to any manner of misgovernment. It was the *custos morum* of the nation : it had supreme authority, the King being still presumed by law to sit there, as judge of the Court, tho' he judged by his judges, and the proceedings are supposed to be *coram nobis*, that is before the

King himself, for which all writs in that Court are so made returnable and not *coram justiciariis nostris*.

BUT, it is asked, what meaning is to be given to the words of the 17th clause "shall have power "to make and issue all mandates necessary for the "exercise of their jurisdiction over the Inferior "Courts?" The answer is a very plain one—by this section, the Court is enabled to inforce its appellate power over the District and City Courts; should they refuse to certify a record, or refuse to obey the sentence or decree of this Court, mandates will be necessary to compel obedience to our judgments.

BUT is there to be no superintending jurisdiction? Are petty magistrates to be permitted to exercise their village tyranny, unrestrained, and shall there be no power to keep them within bounds? District Courts are established throughout the State; legal characters preside, and it is declared by the 16th section "That the pro-"ceedings of the District Courts in civil and "criminal cases shall be governed by the acts of "the Territorial Legislature, regulating the pro-"ceedings of the late Superior Court, and they "shall have the same powers, when not inconsis-"tent with this act, which were granted to the "said Superior Court by said acts."

THE powers of that Court are believed to have been amply sufficient for the purposes proposed,

East. District. *May* 1813.

LAVERTY vs. DUPLESSIS.

and if not, the Legislature can easily confer them, but, were there a defect, it would be no reason for a Court of appellate authority to assume the exercise of original jurisdiction.

MUCH has been said about the supremacy of this Court : it is urged that the word supreme can signify nothing less than that this Court possesses a supreme power over all the others, and an unbounded authority to correct their conduct in every case. The Court, however, do not see in this expression any thing which would warrant the assumption of these extensive powers. This is indeed the *Supreme Court* of the State, but supreme only, in the exercise of the jurisdiction assigned to it by the constitution. In that jurisdiction there is no power above it. It is supreme—wherever that jurisdiction extends, it is supreme, but because this Court is called *supreme*, to pretend that its supremacy must of necessity extend to all cases is certainly an extraordinary idea. According to that mode of reasoning, the power of a Court, once established with the title of Supreme Court, could not be defined or limited : for if limited at all, it would cease to be a Supreme Court, yet no man has ever thought of contesting the right of the people to distribute the powers of government as they please and using that right they have confined the jurisdiction of this Court to certain cases. The highest Court of the U. States is called the *Supreme Court*, yet its powers

are defined and circumscribed and so are those of the Supreme Court of the several States.

To those who with the best intentions have made such animated appeals to the dignity and supremacy of this Court, we will observe, in the words of the Chief Justice of New-York, " that " this Court cannot possibly approve of the sug- " gestions of counsel, to encourage an enlarge- " ment of its authority, to vindicate to itself the " powers that the best Court of errors ought to " have and not to clip the rights of the citizen by " strict rules and technical standards—how can this " Court vindicate or assume to itself powers not " given to it by law ? " If such should be our conduct, there would be an end of all law and security within these walls. We should have no certain medium or standard of justice—the citizen would never know when he was safe or what were his rights. This Court would soon become terrible to the suitor and destructive of the established law of the land. In our opinion, no Court should be more scrupulously cautious than this of overleaping its constitutional and legal barriers, because it is a Court of final resort and no other Court can correct its abuses—such an unchecked tribunal would soon become the public terror, or perhaps the public scorn, if it once dreams of discretion or usurpation. Let authority be once assumed under pretence that it is impliedly granted, and liberty must soon make room for arbitrary power.

East. District. *May* 1813.

LAVERTY vs. DUPLESSIS.

UPON the whole, we are of opinion that this is not a case within the appellate jurisdiction of this Court, and the application must therefore be rejected.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. JUNE TERM, 1813.

GENERAL RULE.

East. District. *June* 1813.

It is ordered by the Court, that no person shall be examined, for the purpose of admission as a counsellor and attorney at law, unless, in addition to all other things required by law, he produce, to this Court, a certificate of his having been, in the office of some practising attorney, at least three years previous to any application made, to be admitted; except such as produce a licence given in any other State, or Territory of the Union, or such as have heretofore been admitted under the late territorial government.

East. District. *June* 1813.

LE BRETON vs. NOUCHET.

LE BRETON *vs.* NOUCHET.

A young couple, domiciliated in New-Orleans, running away to, and marrying at Natchez, will have their conjugal rights, according to the laws of their domicil

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THE plaintiff stated herself to be a widow, and the mother of Alexandrine Le Breton, deceased, and as such, her forced heir, and claiming her estate; that her said daughter, being only thirteen years of age, and having no domicil, but her mother's, fled therefrom, with the defendant, to Natchez, in the Mississippi Territory, where they were married, without the consent, and contrary to the will of the plaintiff—that no marriage settlement took place, and that, after a short stay, in Natchez, they returned to New-Orleans, where the defendant demanded, from the guardian of the said Alexandrine, her part of the estates of her father and grand-father, whereupon the defendant received $ 10,685, 59, on an express stipulation of the defendant, to hold the same, as the dote of the said Alexandrine, binding all his estate for the restoration of the said dote, on the dissolution of the community, or any other case provided by law—that during the community, the defendant acquired certain real property, in the City of New-Orleans and slaves—that the said Alexandrine died intestate, and without issue.

THE prayer was that the defendant be decreed to pay the plaintiff, the sum thus received, with interest since the death of said Alexandrine, together with one half of the property, he acquired during the community.

THE answer admitted the marriage, as stated

in the petition, and stated that, at the time, it was the intention of the defendant, and his wife, to remain in the Mississippi Territory, and not to return to that of Orleans—that the defendant came to New-Orleans, to receive his wife's property, accompanied by her, and was afterwards induced, by unforeseen circumstances, to give up the idea of settling in the Mississippi Territory, as he before intended—it admitted the receipt of the money, mentioned in the petition, and stated that, at the time, he did not know, neither did he discover, till after the death of his wife, that he was absolutely entitled, by law, to receive and retain the money, thus paid him, to his own exclusive use. That, at the time of his wife's death he had no property, but the houses and slaves mentioned in the petition, which were mortgaged, for the security of debts which he had been obliged to contract, during the marriage, for his and his wife's support.

He prayed that, if his claim to the whole of his wife's property was not allowed him, under the laws of the Mississippi Territory, under which the marriage was celebrated, he might be allowed the marital portion, under those of the State of Louisiana.

Evidence was introduced of the defendant's declarations, both before his departure for, and after his arrival, at Natchez, of his intention to settle

East. District. *June* 1813.

LE BRETON vs. NOUCHET.

in the Mississippi Territory. One of his brothers swore that, previous, to his leaving New-Orleans, he had told him, and his other brothers, he intended to stay at Natchez. Other persons deposed that letters, expressive of the same determination, had been received by them from Natchez, shortly after their dates.

THE judgment of the District Court was that the defendant pay to the plaintiff, the amount of the succession of his wife, reserving to himself, one fourth part thereof as his marital portion.

FROM this judgment the defendant appealed.

Livingston for the appellant. It is certainly true, as a general principle, that contracts must be interpreted and have their effects, according to the laws and customs of the place, in which they are made; and that the *lex loci*, in this respect, will be respected, in the tribunals of any other country, in which the parties may afterwards remove, or the contract is sought to be enforced. This is a principle of the law of nations, indeed of natural law, which is recognized every where. The contract of marriage never was excepted from the general rule; indeed the rule is universal.

IN Spain, by the laws of which this country is still peculiarly governed, this principle is so revered, that it has been thought unsafe to leave it to the authority of general laws, it has therefore

been consecrated by a special law of the country. *La costumbre de aquella tierra, do fizieron el casamiento, deue valer quanto en las dotes, en las arras, e en las ganancias que fizieron; e no la de aquel lugar, do se cambiaron,* 4 *part. tit.* 11, *l.* 24. The custom of the country, in which the marriage was celebrated, ought to regulate the dower, and other advantages of the parties and not the custom of the country to which they afterwards remove. See the commentary of Gregorio Lopez, on the text cited and *las leyes de Toro*, 626, n. 75.

THE Mississippi Territory, it is admitted, is regulated, in this respect, by the common law of England according to which "Those chattels, "which belonged formerly to the wife are by act "of law, vested in the husband, with the same "degree of property, and with the same powers, "as the wife, when sole, had over them." 3 *Comm.* 433.

LASTLY, the plaintiff is, at all events, entitled to retain one fourth of his deceased wife's estate, as his *quarte maritale*, or marital portion: she having died rich and leaving him in necessitous circumstance, and there being no children. *Civil Code* 334, *art.* 55.

Moreau for the appellee. The principle, invoked by the counsel of the appellant, that contracts,

East. District. *June* 1813.

LE BRETON vs. NOUCHET.

without the exception of that of marriage, must be regulated, interpreted and enforced, not according to the *lex fori*, but according to the *lex loci*, is true : but, it is equally incontestable that it is not applicable to cases, in which the intention of the parties to the contract, was that it should have its execution, in another country, that that in which they then were.

THIS is particularly applicable to the contract of marriage, and to the case now under the consideration of the Court. *Quando*, says, the commentator on the law of the *partida*, cited for the appellant, *maritus et uxor contrahunt matrimonium in certo loco, non animo ibi commorandi, sed recedendi in domicilium viri, seu uxoris, seu aliquid quod de novo vir constituit ; tunc inspicietur consuetudo loci, in quo se transferunt, & non consuetudo loci in quo matrimonium contraxerunt.* Here the parties intended, to transfer themselves, after the mariage *in domicilium uxoris*. It is, therefore, the law of that domicil, not that of the place in which the marriage was celebrated, that is to regulate their future rights.

IT happens every day, says *Huberus*, that men in Friezeland, natives and sojourners marry wives in Holland, whom they immediately bring into Friezeland. Now, if at the time of the marriage, they intended, immediately to settle in Friezeland, there will not be, in such a case, a commu-

nity of goods. Altho' they make no special contract, the law of Friezeland, and not that of Holland, shall govern : the latter, not the former, is the place of their contract. See farther *Brown's C. L.* 390. *Traité de la communauté* 16, *n.* 18.

In order, however, that we may avail ourselves of this reasoning, we are to shew that the intention of the parties, at the time of the contract, was to return to New-Orleans, the *domicilium uxoris.* Now a man's acts are better evidence of his intentions, than his words oral or written.

The evidence of the plaintiff's declarations, and that contained in his letters, ought to have been rejected as illegal. Even, if the Court see fit to consider it, they cannot yield their belief to what is thus asserted. It is improbable, that Natchez was the intended place of residence of the parties—no preparation appear to have been made there—nothing is shewn from which the least probable ground can result to suppose it—nothing shews Natchez, an eligible place—they appear to have had no acquaintance there—no property—the only apparent reason we see for their visiting that place, is the facility, it afforded to the consummation of their immediate wishes—as soon as these are gratified, no inducement existing to remain there the parties instantly return to New-Orleans—and there is not the least tittle of evidence from which it may be concluded that they ever thought of the City of Natchez.

East. District. *June* 1813.

LE BRETON vs. NOUCHET.

LASTLY, we must recover, for, whatever may have been the rights of the appellant : he must pay us, for, being of full age, and *sui juris*, he bound himself by a notarial act to reimburse.

By the Court. For the decision of this case, it is necessary to enquire :

FIRST, whether, according to the principles of the law of nations, the laws of the place, where a contract has been entered into, are to govern its effects every where ;

AND, secondly, whether the special provision of the Spanish statute, which directs, that the customs of the place, where a marriage has been contracted, shall govern the effects of such marriage, is applicable to the present case.

I. WITH respect to the law of nations, the principle, recognized by most writers, may be reduced to this ; that although no power is bound to give effect, within its own territory, to the laws of a foreign country, yet by the courtesy of nations, and from a consideration of the inconveniences, which would be the result of a contrary conduct, foreign laws are permitted to regulate contracts, made in foreign countries. But, in order that they may have such effect, it must, first, be ascertained that the parties really intended to be governed by those laws, and had not some other country in contemplation, at the time of

the contract. This being previously recognized, the government, within the bounds of which, such foreign laws claim admission, has next to consider, whether the enforcing of these laws will cause no prejudice, to its rights, or to the rights of its citizens.

LET us take the first exception, and apply it to this case. Did the parties really intend to be governed, by the laws of the Mississippi Territory, and had they not in contemplation, at the time of contracting marriage, their return to this country? If we were to judge, from their acts alone, there could be no hesitation, in saying that they went to Natchez, for the only purpose of contracting marriage, and intended to come back, as soon as it could conveniently be done. Their remaining at Natchez, only a few weeks, and that in a tavern, their return to New-Orleans not long after, and the continuation of their residence there, until the death of the wife, would amount to an irresistible proof that they had this country in contemplation, at the time of contracting their marriage. But, it is alleged that, however, evident their intention may appear, from these facts, the appellant had really taken the resolution, to settle at Natchez. Evidence has been furnished of his declarations, to that purpose, both before his departure, and after his arrival in the Mississippi Territory. One of his brothers has sworn, that, previous to his leaving New-Orleans, he told him, and his other

East. District. *June* 1813.

LE BRETON *vs.* NOUCHET.

brothers, that he intended to stay at Natchez; Other persons have deposed that letters, expressive of the determination of the appellant, to remain there, were by them received from him, shortly after their dates. Without questioning the propriety of the admission of such testimony the Court is satisfied, that it is insufficient, to counterbalance the weight of the facts, which disclose the real intention of the parties.

II. BUT, should their intention still remain a subject of doubt, we have next to consider, whether by permitting the laws of the Mississippi Territory to regulate this case, this government would not injure its own rights, or the rights of its citizens. For, a foreign law having no other force, than that which it derives from the consent of the government, within the bounds of which it claims to be admitted, that government must be supposed to retain the faculty of refusing such admission, whenever the foreign law interferes with its own regulations. A party to this marriage was one of those individuals, over whom our laws watch with particular care, and whom they have subjected to certain incapacities, for their own safety; she was a minor. Has she, by fleeing to another country, removed those incapacities? Her mother is a citizen of this State; herself was a girl of thirteen years, who had no other domicil than that of her mother. Did she not remain,

notwithstanding her flight to Natchez, under the authority of this government? Did not the protection of this government follow her, wherever she went? If so, this government cannot, without surrendering its rights, recognize the empire of laws, the effect of which would be, to render that protection inefficacious. But the laws of the Mississippi Territory, as stated by the parties, do not only interfere with our rights, but are at war with our regulations. By our laws, a minor, who marries, cannot give any part of his property, without the authorisation of those, whose consent is necessary, for the validity of the marriage. By the laws of the Mississippi Territory, all the personal estate of the wife (that would embrace, in this case, every thing which she had) is the property of the husband. Again, according to our laws, we cannot give away more, than a certain portion of our property, when we have forced heirs. But what our laws thus forbid, is permitted in the Mississippi Territory. And shall our citizens be deprived of their legitimate rights, by the laws of another government, upon our own soil? Shall the mother of Alexandrine Dussuau lose the inheritance of her deceased child, secured to her by our laws, because her daughter married at Natchez? Shall our own laws be reduced to silence within our own precincts, by the superior force of other laws? If such doctrine were maintainable, it would be unnecessary

East. District. *June* 1813.

LE BRETON vs. NOUCHET.

for us to legislate. In vain, would we endeavour to secure the persons and the property of our citizens. Nothing would be more easy, than to render our precautions useless, and our laws a dead letter. But the municipal law of the Mississippi Territory, which is relied upon by the appellant, is not the law, which would govern this case *even there*. The law of nations is law at Natchez as well as at New-Orleans, according to the principles of that law, " personal incapacities, commu- " nicated by the laws of any particular place, " accompany the person, wherever he goes. " Thus, he, who is excused the consequences " of contracts, for want of age, in his country, " cannot make binding contracts, in another. " Therefore, even if this case were pending, before a tribunal of the Mississippi Territory, it is to be supposed that they would recognize the incapacity, under which Alexandrine Dussuau was labouring, when she contracted marriage, and decide, that such marriage could not have the effect of giving to her husband, what she was forbidden to give. If that be sound doctrine, in any case, how much more so must it be in one of this nature : where the minor, almost a child, has, in all probability, been seduced into an escape from her mother's dwelling, and removed in haste, out of her reach ? We cannot, here, hesitate to believe, that the Courts of our neighbouring Territory, far from lending their assistance to this

infraction of our laws, would have enforced them, with becoming severity. For, if, when an appeal is made, to those general principles of natural justice, by which nations have tacitly agreed to govern themselves, in their intercourse with each other, while nations, entirely foreign to one another, feel bound to observe them, how much more sacred must they be, between governments, who though independent of each other, in matters of internal regulation, are associated, for the purposes of common defence, and common advantage, and are members of the same great body politic?

BUT, it is contended, that, altho' the law of nations should be found adverse to the pretentions of the appellant, yet, there exists, in the statute of this country, a special disposition imperatively declaring, that the custom of the place, where a marriage is contracted, shall regulate the effects of such marriage, wherever the parties may afterwards remove. There it indeed such a provision in the 25th law of the 11th title of the 4th partida; but the Court is of opinion, that it is not applicable to this case. That provision is evidently intended, to have effect only, within the dominions of Spain. Its objects was to settle the difficulties, which could arise in consequence of the diversity of customs, which prevailed in the different provinces of that kingdom. Were it not so,

East. District. *June* 1813.

LE BRETON vs. NOUGUET.

it would be at war with the 15th law of the 14th title of the 3d partida, which expressly forbids the Spanish tribunals to recognize any authority in the foreign laws cited before them, except as to controversies arising between foreigners, upon contracts by them made abroad. But, be that as it may, the law relied on is, as are all laws regulating contracts of any kind, intended only for those who can make contracts, and will never be made to bear upon individuals, who, by the law of that same country, are rendered incapable of contracting. Besides, it regulates only what concerns the *dote*, *arras* and *ganancias*, that is to say, the dower of the wife, the gift usually made by the husband to the wife, on account of the marriage, and the property acquired during the matrimony. This law, to be applicable at all, must relate to marriages, contracted in places where such customs prevail. As to a donation, or what amounts to a donation, of the wife's property to the husband, it has nothing to do with this provision.

If it were required to carry the enquiry any farther, it might also be found that this law is intended for cases, in which the marriage is contracted at the domicil of either, or both, of the parties; and the domicil is afterwards removed to some other place. But superabundant reasons having already been adduced for the rejection of

the pretentions of the appellant, the Court will now dismiss that part of the subject.

IT remains to consider whether the appellant is entitled to the marital portion, allowed to him by the judgment of the District Court. No question has been made, as to the validity of this marriage, and it being proved that the appellant, at the time of the death of his wife, had no property, the Court is bound to recognize his right to the marital portion. That right, once accrued, cannot have been invalidated by a subsequent change of situation : any reasoning, upon so plain a principle, is deemed unnecessary.

LET the judgment of the Court of the first District be affirmed with costs.

ROCHELLE & SHIFF vs. *MUSSON.*

THE petition stated that the defendant, and M'Kibben, being partners, gave the note on which the action is instituted, to the plaintiffs : that the partnership between the defendant and M'Kibben, being afterwards dissolved, the defendant remained charged with the liquidation of the debts—that neither party has paid, and both refuse to pay the note, which is payable and unpaid.

Witness testifying against his interest, good.

Witness declaring himself interested, required to say, how.

A part of the Judge's charge, on a point not called for, may be excepted to.

THE answer, after a general denial avers that no legal or valuable consideration was given for

East. District. *June* 1813.

ROCHELLE & SHIFF *vs.* MUSSON.

the note—that it was not signed by the defendant, and if it was by M'Kibben, he was without authority of signing for the firm, or of binding the defendant—that the plaintiffs have no interest in the note.

THE following facts were drawn from the plaintiffs by interrogatories—that they received the note from Dahmer; and never saw it till he gave it to them—that they received it in collection and were to apply the proceeds, in discharge of a debt due them by Kohm—the defendant Shiff saw in Dahmer's hands, when he gave him the note a check of the defendant, which he believes was the consideration of the note—that they have no interest in the note, except the means it affords them of being paid from Kohm.

AT the trial, five bills of exceptions were taken, to the opinion of the District Court.

1. THE defendant offered M'Kibben as a witness to prove the illegality of the consideration for which the note was given. This was opposed on the ground that the witness was one of the firm, whose signature was at the foot of the note. He did not pray to be excused: the Court, however, declared him an inadmissible witness.

2. THE defendant then offered Dahmer, for the same purpose, who at the plaintiffs' request was sworn, on his *voir dire*, and declared he had a

pecuniary interest in the event of the suit, as if it were to be determined against the defendant, he, the witness, would have to pay the amount of the note, or some part of it. The defendant now desired leave to question the witness, on the *nature* of the interest spoken of; this being objected to, the Court determined that the question was improper. Whereupon

3. THE defendant prayed the opinion of the Court, whether the witness was an admissible one, and the Court answered in the negative.

4. HE next offered Goodwin, for the same purpose, who, without any objection being made, was sworn in chief, and on the motion of the plaintiffs, as he was proceeding to give his testimony, on the *voir dire*, notwithstanding the opposition of the defendant. The witness declared it occurred to him he was liable for some counsel's fees, on the event of the defendant being cast.

ON this the Court held, that the witness, altho' sworn in chief, might, without the consent of the defendant, be sworn on the *voir dire*—that, after the answer he had given, he could not be questioned farther by the defendant, as to the nature of his interest—that the witness was inadmissible.

5. THE Judge in his charge told the Jury that "altho' it appeared by the record, that the plain-"tiffs had sworn they had never given any con-"sideration for the note, and that no part of the

East. District. June 1813.

ROCHELLE & SHIFF vs. MUSSON.

" amount, when recovered, would belong to them, " still they were entitled to recover. "

THERE was a verdict and judgment for the paintiffs, and the defendant appealed.

Depeyster for the appellant. I. The Court below erred in rejecting the testimony of M'Kibben. It is true he was a partner of the late firm, whose signature is to the note; but he has not been made a defendant in the present suit, and if there be now a verdict for the present defendant, the witness will not be able to avail himself of it. He is called in, to testify against his own interest. A witness cannot be rejected as an interested one, unless his be a direct interest. *Bart* vs. *Baker*, *Peake* 144. A party to a note may be examined as a witness. 3 *Mass. T. R.* 225, *Peake* 161. A person interested in the *question* on trial, but not in the event of a suit, is a good witness. 1 *Caines* 260. If a witness he competent to answer *any* question in the cause, he ought not to be rejected *generally*, *Peake* 148, 2 *Root* 132.

II. THE Court below erred, in refusing to allow us to examine Dahmer, so as to draw from him the peculiar nature of his alledged interest. Had we been permitted to avail ourselves of his answer, in this respect, we would have shewn that the interest he spoke of was imaginary and

voluntary. A witness on his *voir dire* may be asked further questions, than merely whether he has an interest or not in the suit. 4 *Mass. T. R.* 653. *Harding* 50. An imaginary interest will not enable a witness to withhold his testimony. 2 *Poth.* 310, *Peake* 163.

III. DAHMER was likewise a good witness. When sworn on his *voir dire*, he declared that whatever interest he had in the suit was in direct opposition to the defendant, by whom he was called. If the defendant obtained a verdict, the witness found himself under the obligation of paying the note, or a part of is amount. *His* name did not appear on the note.

IV. THE defendant was improperly deprived of the testimony of Goodwin. This witness was laid aside, because he declared that he would be liable for some counsel's fees, on the event of the plaintiffs' success. Had we been permitted to proceed farther in his examination, we would have been able to shew that it was, by his own voluntary act, that he lay under the liability of paying these fees, and therefore, that act of his could not divest the defendant of his previous right to the disclosure of the facts in the witness's knowledge.

A witness's liability to pay costs must be proven by other testimony, than his own declarations. 1 *Anton's N. P.* 7.

East. District. *June* 1813.

ROCHELLE & SHIFF vs. MUSSON.

A person shall not, by his own act, render himself an incompetent witness, when a party has acquired an interest in his testimony, as by laying a wager, *Peake* 164, 2 *Pothier* 308, *Buller's N. P.* 29.

V. LASTLY, the Court misdirected the Jury: the suit is in the name of Rochelle and Shiff, in their own right and not for the use of another: they swore that they never gave any consideration therefore, and that the note is the property of another person.

Ellery for the appellees. By the common law, the interest, which excludes a witness from the book, must be *direct*, not contingent or remote; it must be in the *event* of the suit, not in the *question* depending: and the Judges have leaned to receive the objection as going to the *credibility* rather than to the *competency* of the witness. But, by the *Civil Code*, 312, *art.* 28, a witness, who is interested *directly* or *indirectly* is incompetent. Keeping this in mind, let us approach the exceptions, which are all attempted to be supported, by principles drawn from the common law.

I. THE Court refused to admit M'Kibben, 1. because he was a partner of the appellant, at the time the promissory note was given, on which the suit is brought, and as such liable to contribute, and he had no release from the appellant.

2. HAD he had a release from the appellant still he could not be sworn, because his liability to the appellees continued. *Peake's evidence, Ed.* 1812, 147. *Peake N. P.* 179, *Root*, 998, *Tomkins* vs. *Beers.*

3. BY the *Civil Code*, 396, *art.* 1, partners are bound in *solido* to their creditors : when bound *in solido* each *totum et totaliter debet. Civil Code* 278, *art.* 103, *Pothier* on *obligations.*

4. M'KIBBEN, from the nature of the defence set up, had a *direct* interest. The action is brought upon a note of hand and the plea that it was given for an *illegal* consideration, to discharge a gaming debt and, therefore, void. If, therefore, judgment be given for the appellant, the note is invalidated and can never be recovered in a suit against M'Kibben, whose interest it is on that account to invalidate it.

5. No person can be called upon to invalidate a note by him signed. 2 *Johnson* 165, *Coleman* vs. *Wise.* Parole evidence is not admissible to explain or annul an act. *Civil Code* 310, *art.* 242.

II. DAHMER was rejected : but he was not an admissible witness, 1. because on his *voir dire* he declared he had an interest. It is true this interest was in favour of the party, objecting to his admission; but this circumstance does not alter the law, for the Civil Code makes no dis-

East. District. *June* 1813.

ROCHELLE & SHIFF vs. MUSSON.

tinction in regard to the *kind* of interest, which disqualifies a witness.

2. BECAUSE his testimony, if given, would have exposed him to a future inconveniency, and might have subjected him to a civil action or charged him with a debt, therefore, he was not compelled to testify. *Store* vs. *Whetmore*, *Kirby*, 203. *Star* vs. *Tary*, 2 *Root*, 528, *Peake's ev.* 167, 187. The Court, therefore, was right in protecting him from an examination, from a principle of justice, and in not exposing him to the temptation of committing perjury.

3. HE made no objection, it is said, to his being examined: neither was it necessary: for it was the duty of the Court to protect him, and the objection made by the counsel of the appellees superceded the necessity.

4. BECAUSE his answer might have subjected him to a criminal prosecution: he was called to prove the illegality of the consideration of the note, viz. that he, the witness, had taken it in payment of a gaming debt. If to this he answered in the negative, his testimony was of no use to the party producing him; if in the affirmative, he criminated himself.

5. BECAUSE his testimony, as a single witness, ought not to have been taken against the answers on oath of the appellees, to the interrogatories exhibited by the appellant in his answer. These, according to our statute, cannot be disproved,

except by the oaths of *two* credible witnesses, or that of one credible witness and strong corroborative circumstances. 1805 *ch.* 26, *sect.* 9. Now M'Kibben and Goodwin (as will be presently seen) being incompetent witnesses, left Dahmer as a *sole* witness, to impeach the oath of the appellees and there certainly was no corroborating circumstance.

III. It is objected that the appellant was not suffered to cross-examine Dahmer, upon the *voir dire*. 1. For the party to cross-examine a witness, when the adverse party puts him on the *voir dire*, is without precedent or necessity. At common law, the party requiring the witness to be examined on the *voir dire* is suffered to draw from him the nature of his interest; because, by that law, there is an interest which goes to the *credit* as well as the *competency*: but here that reason does not exist, as all interest in a witness goes directly to his *competency*.

2. A witness on the *voir dire* is the witness, strictly speaking, of neither party—but of the Court. He is not as yet sworn in the cause, but only *veritatem dicere*, well and truly to answer all such questions as shall be put to him by the Court.

3. By stating on which side his interest lay, the witness answered every pertinent question,

East. District. *June* 1813.

ROCHELLE & SHIFF vs. MUSSON.

that could be put to him, on a cross-examination upon the *voir dire*.

4. THE Court below ought to direct and control the examination and cross-examination of witnesses and this power ought not to be taken out of its hands.

IV. IT is objected as to Goodwin, that after having been sworn in chief, he was put on his *voir dire*—that he was not examined thereon—he was improperly rejected.

THE incompetency of a witness may be shewn *by proof*, prior to examination, by *voir dire* and by cross-examination, 4 *Burr.* 2256. Objections to the incompetency of a witness never come too late, *Swift's ev.* 109—111. 1 *Esp. Rep.* 37. *T. R.* 719, *Peake's ev.* 186, 1 *M'Nally* 146. swearing on the *voir dire* is only an act of supererogation.

2. THE second branch of the exception as to Goodwin, has been answered in regard to Dahmer.

3. THE witness was properly rejected, as he acknowledged his direct interest, against the appellees, in the event of the suit.

V. COMPLAINT is made that the Court below misdirected the Jury, in charging them to find for the appellees, tho' they had no beneficial interest in the suit. To this we answer, 1. that a bill of exception does not lie to the charge of an

Inferior Court : the remedy being, by a motion for a new trial. *Peake's ev.* 589, 2 *Caines, Graham* vs. *Cameron* 163. Here, there was no application to the Judge to charge the Jury on any particular point.

2. A legal title is sufficient to enable the appellees to recover, without any beneficial interest. The appellant gave the appellees this title by making the note in their favour.

Depeyster, in reply. IT is true, that no parole evidence can be received, to explain or annul an act. This is a rule both of the common and civil law. Yet, in every country, the consideration of a note, between maker and payee, may be inquired into : because this is a circumstance *dehors* the act—so is coverture, infancy : those are every day given in evidence, and the consequence is that the note is thereby annulled.

IT cannot be denied that the Civil Code does not distinguish as to the *kind* of interest which disqualifies a witness—but reason tells us that, that interest, which rather *prevents* than *induces* perjury, cannot be a legal impediment : for *cessante ratione, cessat & ipsa lex.*

WHEN the answer of the party to the suit is sought to be contradicted, two witnesses or one with corroborating circumstances are necessary—but this will not authorise the rejection of a witness—for the party seeking to disprove needs

East. District. *June* 1813.

ROCHELLE & SHIFF *vs.* MUSSON.

not introduce all his testimony at once : he may begin with one witness—if this stands alone, his testimony will be rejected, unless the party offering him shew, in some part of the evidence before the court or jury, some corroborating circumstance.

IT is the practice of all Courts, after a witness has sworn, on his *voir dire*, that he has an interest, to prosecute the inquiry, as to the nature of that interest, the manner in, and period at, which it arose—and when he swears that he is without any interest, he is as often examined on circumstances tending to shew his error or prevarication.

By the Court. This cause comes up on exceptions to certain opinions, given by the Judge of the District Court in the First District, on the trial below.

I. THE first exception is to the rejection of David M'Kibben, a witness offered by the defendant, in the suit before the District Court, to prove the illegality of the consideration of the note, on which the plaintiffs found their action. The suit is brought against Musson, as acting partner of the late firm of M'Kibben & Musson, on a negotiable paper, purporting to be a note of hand signed by M'Kibben & Musson. It has been determined by the Supreme Court of the State of New-York, in the case of *Coleman* vs.

Wise & al ; 2 *Johns.* 165, that a person whose name appears to a negotiable note, is not a competent witness to impeach the validity of the note: the same thing has been decided by the Court of King's Bench in England, in the case of *Shalton* vs. *Shilly* 1 *Term. R.* 296, and on the same principle, considering the signature of any person to a negotiable paper, as an affirmation that, to his knowledge, there is no legal objection to the recovery.

IT is admitted that the Courts of England, in the administration of justice, under the municipal laws of that government, have by their late decisions, restrained as much as possible the rules of evidence relative to the competency of witnesses; and now suffer circumstances, which may be presumed to create an improper bias on their minds, rather to affect their credibility than their competency. Perhaps, the common law, at this time, recognizes only one description of interest, which shall exclude a person from testifying, and that is a direct interest, to be immediately benefited or injured by the event of the suit. We think that, in this case, M'Kibben has a direct interest in its determination, which is to annul or establish the validity of a note subscribed by himself and on his own proper account; and, the most favourable construction of the rule, for the admissibility of testimony, must render him incompetent: he is interested in favour of the

East. District. June 1813.

ROCHELLE & SHIFF vs. MUSSON.

party by whom he is called to testify and the rule laid down in the Civil Code 112, *art.* 258, will exclude him whether his interest be direct or indirect. He is offered as a witness to give evidence relative to a partnership transaction, being one of the partners—in 3 *partida*, *tit.* 6, *law* 21, it is declared that one partner cannot be a witness for or against his copartner, in any thing appertaining to the partnership: the District Judge was therefore right, in repelling him.

II. and III. THE second exception is taken to the opinion of the District Judge rejecting George Dahmer, a witness offered by the defendant below for the same purpose for which M'Kibben was called—Dahmer it appears from the facts stated in the record was at the request of the plaintiff's counsel sworn on his *voir dire;* and a third exception is taken to the judge's opinion in not allowing him to be examined on said oath, so far as to ascertain in whose favour he is interested. In support of this opinion, it is contended by the counsel for the appellees, that our Civil Code having declared the rule, relative to the competency of witnesses, to extend to the exclusion of all persons interested, directly or indirectly in the cause, it is therefore, immaterial whether called on to testify, for or against their interest, they ought not to be admitted, and it is said the good policy of the regulation is evident

being to prevent the crime of perjury. That the legislature never intended this rule to affect the right of suitors, to require the testimony of persons against their own interest, is apparent from the privilege given by the act of the legislative council of the late territorial government and recognized by the Civil Code, reciprocally to examine on interrogatories, and obtain the answers of the parties themselves to any suit. If this regulation of the Civil Code does alter the general rule of the common law, so that the most indirect interest must destroy the competency of a witness, it may nevertheless be reconciled with the rule found in *Peake's* treatise on evidence that a person interested in a cause is an objectional witness, only when he comes to prove a fact consistent with his interest; for, if the testimony he is to give be contrary to his interest, he is then the best possible witness, that can be called, and no objections can be made to him. The competency of witnesses depends as much on the manner in which they are interested, as the interest itself, that is whether they are called on to support or destroy their interest, and therefore when a person is offered as a witness, and sworn on his *voir dire*, the examination ought to be suffered to ascertain, in favour of which party he is interested. But it appears from Dahmer's answer, that his interest (if any he has) is in favour of the plaintiffs below, having stated that if the suit

East. District. *June* 1813.

ROCHELLE & SHIFF vs. MUSSON.

was determined, in favour of the defendant, he would have to pay the amount or part of the amount of the note. He is clearly a competent witness, and the District Judge has erred in rejecting him. How far a witness may be bound to answer questions or testify to facts which may subject him to a criminal prosecution, or civil suit, is unnecessary to determine : these circumstances relate to the *manner of interrogating* him and not to his competency.

IV. A fourth exception is taken to the opinion of the Judge of the District Court : 1st. in allowing John Goodwin, a witness offered on the part of the defendant to be sworn on his *voir dire*, after having been sworn in chief : 2d, that when thus sworn, at the request of the plaintiffs, he refused to examine him sufficiently to ascertain in whose favour he was interested, and 3dly, that he rejected him as incompetent.

THERE are two principal modes of discovering the interest of a witness, 1st, proving it by other witnesses : 2dly, obtaining a knowledge of it from the witness himself and in this latter mode it is very immaterial whether it is done on an oath administered in chief, or on his *voir dire ;* consequently no error has been committed by the Judge in suffering the oath of *voir dire* to be taken, after having been sworn in chief.

BUT if the Court be correct in its reasoning, as to the necessity of shewing, in which of the parties' favour the witness may be interested, the Judge erred in not allowing Goodwin to be examined, so as to ascertain that fact: and as upon this circumstance depends his competency or incompetency, it is impossible to determine, whether he ought or ought not to have been admitted, for it does not appear sufficiently clear in whose favour he is interested; or at what period he became interested and by whose act.

V. THE 5th and last exception is to the opinion of the Judge, in directing the jury that Rochelle and Shiff, the plaintiffs, in the District Court, were entitled to recover, altho' they had admitted by their answer to the interrogatories put by the defendant, that they have given no consideration for the note and that the money, if recovered on it, would not belong to them, but that they would be bound to pay it over to a third person. In opposition to this exception, it is insisted by the counsel for the appellees, that exceptions will not lie to the charge of a Judge of an Inferior Court and that the only remedy left to the party dissatisfied is a motion for a new trial. Perhaps in England the proper remedy is a motion for a new trial, for there the correctness of the Judge's instructions to the Jury, at *nisi prius*, comes fairly before the Court in that way; but, in this State,

East. District. June 1813.

ROCHELLE & SHIFF vs. MUSSON.

if the question cannot come up on a bill of exceptions, the party would be without any other remedy, than the bare possibility of convincing the Judge below, that he had so far mistaken the law, as to give redress by a new trial. The act of the legislature authorises the parties to a suit, to require the opinion of the Judge of the Inferior Court, and if dissatisfied to except to such opinion; we can see no good reason why an erroneous opinion voluntarily given by a Judge should be placed on a footing different from one required: and it is settled in the Supreme Court of the United States that exceptions may be taken to a charge given by the Judge to a Jury even in cases, when the opinion of the Court has not been asked for by the party. The defendant below had, therefore, a right to except to the Judge's charge to the jury; but this Court is of opinion that there is no error, in the instructions which were given. The appellees have clearly a legal right to recover the money, arising from the act of the appellant, in making his note payable to them, and unless the consideration, on which it was given, can be shewn to be illegal and void, he must be bound to pay the money, agreeably to its tenor and effect; without regard to any equitable claim, existing between them and third persons. We are, therefor, unanimously, of opinion that the judgment of the District Court must be reversed and the cause be remanded, there to be again tried, with

instructions to the Judge to admit Dahmer to be sworn in chief as a witness; and to examine John Goodwin, on his *voir dire*, so as to ascertain in which of the parties' favour he is interested, what kind of interest he has, how and when he became interested.

SYNDICS OF SEGUR vs. *BROWN.*

A sale of property, by a person, who has ceded his goods, is not void, but voidable.

By the Court. This case comes before us on an appeal from a final judgment and order of the District Court of the first District, rendered in two several suits commenced, and orders of seizure obtained by the appellants, in the late Superior Court of the late Territory of Orleans. The important facts in the cause, relate to two plantations, possessed by Segur, previous to his failure and surrender of his property for the benefit of his creditors; one containing sixteen arpens front, purchased by him from Marigny and the other containing three arpens and one half front, purchased from Laronde and subject to a mortgage of 5,100 dollars. Segur, after the surrender of his property, it appears, sold the small tract to La Roche, by a private instrument; which sale his creditors did not consent to or oppose; afterwards, he sold, with the agreement and consent of the syndics of his creditors, the tract acquired from Marigny, to John B. Prevost, holding a

East. District. June 1813.

SYNDICS OF SEGUR vs. BROWN.

mortgage on it for the price. Prevost also purchased from La Roche the smaller tract; at the same time, hypothecating it to secure the payment of the purchase money, and still subject to Laronde's mortgage. This being the situation of the property, on the 21st of March 1807, Brown, the appellee, purchased from Prevost both tracts, subject to the incumbrances, stated in the act of sale, for the sum of 50,700 dollars, to which sale the syndics of Segur's creditors made themselves a party, accepting the agreement of Brown to pay them 18,000 dollars; 9,000 of which were paid by him, previous to his absconding from this country, which, together with other payments made, left a balance, in favour of the syndics of 7721 dollars, independent of interest, as appears by the statement of the referees, appointed by the late Superior Court; and after going through a long calculation of interest, at the rate of 6 per cent. they make the total amount due to the syndics 11,382 dollars.

I. THE first question, raised for the determination of the Court, relates to the right of the appellants to claim interest. There are three species of interest, known to our laws: bank interest at 6 per cent., conventional, and legal; the former cannot exceed 10 per cent. and the latter is fixed at 5, and is by law recoverable, in all cases of money due, from the date of the judicial de-

mand: it is also recoverable when no demand has been made, in cases where the debt is owing for things which, from their nature, may be supposed to produce revenue or fruits; and it is expressly laid down in Domat, on the Civil law, in *book* 3, *tit.* 5, *sect.* 1 *art.* 4, that the purchaser of a farm owes interest, on the price which has not been paid, agreeably to the terms of sale, altho' no demand has been made, and even should he receive less revenue from the land, than the interest of the price.

THE Judge of the District Court, we think, was right in rejecting the calculation of interest at 6 per cent., being founded on a private agreement, between Prevost and the appellants, to which Brown was no party; but there can be no doubt that interest ought to be calculated, at the rate of 5 per cent., on the balance due by Brown to them, which together with the principal ought to be paid, out of the proceeds of the sale of the plantation.

II. THE second, and most important question to be decided in this suit, is, whether the appellants are properly subrogated to the rights of Laronde, in the mortgage of 5,000 dollars on the small tract of 3 and 1-2 arpents front.

IT is contended, on the part of the appellee, 1. that the private sale, made by Segur to La Roche, is null and void, having been made after the

East. District. June 1813.

SYNDICS OF SEGUR vs. BROWN.

cession of his property; because he had no authority to sell, that being vested in the syndics of his creditors alone.

2. THAT the syndics, representing the rights of the creditors, and making themselves a party to the sale, from Prevost to Brown, in which both tracts of land are included, are bound to quiet the purchaser, in his possession of the plantation thus sold, for the sum stipulated in that sale, and consequently to free him from all previous incumbrances.

IT may be properly admitted that Segur, after the surrender of his property, to the use of his creditors, could not make a valid sale, or transfer of any part of it, without their consent. We are inclined to think that a sale, thus made, is not absolutely void, *ab initio;* but only such as may be avoided, and set aside, by the persons whose rights and interest may be injured by it; for by the Civil Code the surrender does not give the property to the creditors; it only gives them the right of selling it for their benefit, and receiving the income till sold.

BROWN'S claim to this portion of the land, purchased from Prevost, and the right of all claiming under him, are founded on the sale from Segur to La Roche; and, therefore, they cannot, on any principle, be allowed to consider it as void. The only persons, who had a right to have it an-

nulled, are the creditors of Segur, which so far from attempting, they have thought proper to remain silent on the subject, and, perhaps, would not now be permitted to make any objection, on account of their long acquiescence, and having been parties to acts transfering the property, under the authority of that sale, which must, therefore, be considered as good and valid. La Roche sold to Prevost the land, subject to Laronde's mortgage, and, to secure the payment to himself of the price, agreed on between them had it hypothecated for the sum of 7,000 dollars, of which $ 1900 had been paid, by Prevost : leaving the balance due, 5,100 dollars the amount of Laronde's mortgage. Since the sale to Brown, La Roche has paid to Laronde 2,500 dollars, on account of said mortgage, and was, by operation of law, subrogated for that amount to the rights of the mortgagee, being the purchaser of an immoveable property, and having employed the price of his purchase in paying a creditor, to whom the hereditament was mortgaged; and has since transfered his right, thus acquired, to the appellants, who have also paid, for the benefit of the creditors generally, the balance due on said mortgage and, by convention with Laronde, have been subrogated to his rights; so that, they are entitled to the whole amount, secured by that mortgage. Those rights have been acquired, since the sale to Brown by Prevost; consequently,

East. District. June. 1813.

SYNDICS OF SEGUR vs. BROWN.

no act of the appellants, in becoming a party to that instrument of sale and transfer, can invalidate them.

THE arguments of counsel, which would go to limit the syndics to the receipt of the sum alone, which the purchaser, Brown, agreed to pay must fail, because they could not, by any act of theirs, affect the rights and interests of third persons and such, were La Roche and Laronde, to whose rights they have since been subrogated, and are entitled to recover the amount of 5,000 dollars due on said mortgage with interest, as calculated by the referees; in their award returned to the late Superior Court; which together with the sum due on the mortgage of the tract sold by Segur, by the consent of his creditors, the Judge of the Court below ought to have ordered the Sheriff to pay to the appellants instead of the sum of 9,000 dollars. The judgment and order of the District Court must, therefore, be reversed; and we do order and decree that the Sheriff pay over to the appellants the sum of $ 17,688 17, with the costs of this appeal: and that the mortgage be cancelled and annulled.

PIZEROT & AL. vs. *MEUILLON'S HEIRS.*

East. District. *June* 1813.

PIZEROT & AL. vs. MEUILLON'S HEIRS.

MEUILLON married the plaintiffs' sister, in 1787 : five years after she died, without issue, leaving her husband. Her will contains a bequest of about twenty four hundred dollars, *to be paid* from her *share in the succession of her mother :* another to her husband of " the enjoyment of " her part in the succession of her mother, *during* " *his life*, and at his death to her heirs : " by another clause she " leaves to her husband, the " absolute disposition of the goods acquired in " community, viz. to give them to those of the " relations of the testatrix, as he shall believe to " have merited them, or to dispose of them, at " his will, otherwise, without being holden to " render any account. "

The time of prescription in a suit for a partition is thirty years.

Solemnities, required in testaments, are matters of strict law.

Commandants might receive acts, whatever the value of the property.

TEN months after her death, Meuillon executed an act before a notary, wherein he declared that " of his own free will and mere motion, he " renounced purely and simply, and in the best " form of law, all legacies, donations, dispositions " and all other advantages, generally whatever, " stipulated in his favour, by and in the last will " and testament of Madame Meuillon Pizerot, " his wife, which *legacies, donations, dispositions,* " *rights and other advantages generally what-* " *ever, for the friendship he has for the bro-* " *thers and sisters of his deceased wife, he aban-* " *dons to them, purely and simply.* To which

East. District. *June* 1813.

PIZEROT & AL. *vs.* MEUILLON'S HEIRS.

"end, he obliges himself to return to them the "two thousand dollars, which he has received "from her mother, as a part of her paternal "estate. This renunciation is declared to be made on condition, that the brothers shall pay the legacies; which they agreed to do. "Whereupon, "the said Meuillon declares the said testament "generally, in what ever regards him to be void "and of no effect, and that it is to be considered, "as far as it regards him, as if it had never been "made."

A short time after, he paid to the brothers the two thousand dollars, for which they gave him a notarial discharge.

MADAME Meuillon brought nothing into the marriage, at the time it was contracted, and nothing during its existence, but the two thousand dollars of her father's estate. Meuillon was rich: several negroes and other property were acquired during the marriage. At the death of Madame Meuillon, no inventory was made, nor any account stated or payment made of the matrimonial gains, or profits made during the marriage—to obtain these was the object of the present suit.

MEUILLON, before his marriage, owned a plantation and a number of slaves, which he had contracted to sell to Mather, who had been put in possession, and had sold about twenty of the slaves and made some payments: but afterwards,

finding it inconvenient to make the purchase, he surrendered the plantation and the negroes unsold. There was found among Meuillon's papers, after his death, a loose receipt, by which he acknowledged to have received a certain quantity of indigo, as the last payment of the plantation : but Mather admitted that the payments he had made were a trifling indemnification for the slaves he had sold and the use of the others and of the plantation.

DURING the marriage, Meuillon had acquired a number of negroes, which he had sold, on a credit to several of his relations, taking their notes therefore : and, at a period which could not be ascertained, he made an endorsement on said notes, declaring his intention that the debtors should be discharged, if he did not collect the amount of the notes, during his life.

HE had at the time of his marriage, a debt due to him by Mather and Strodder of $ 8,500, and he received in payment of it twenty six negroes, a number of whom he sold.

DURING the marriage, he purchased, among other property, several negroes and houses and lots, in New-Orleans, and after the death of his wife, he made large improvements on these and other lots, which he then purchased, and added to one of the latter a strip of ground eleven feet wide, from one of those purchased during the marriage.

East District. *June* 1813.

PIZEROT & AL. *vs.* MEUILLON'S HEIRS.

THE plaintiffs insisted 1. that all the estate, left by Meuillon, was to be considered as *acquest* or matrimonial gain and profit, unless the defendants shewed the contrary.

2. THAT Meuillon, having made no inventory, the community of goods was to be presumed to have continued till the time of his death.

3. OTHERWISE, they were entitled to one half of the acquets during the marriage, and the profits thereof since that time.

4. THAT the defendants were bound to account, for one half of the revenue of the plantation, disposed of to Mather, during the marriage; as well as one half of the amount of the notes of Meuillon's relations. The plaintiffs also claimed one half of the improvements, on the lots in New-Orleans, made since the death of Mad. Meuillon.

THE defendants 1. admitted the first proposition, but contended it must refer to the period of Mad. Meuillon's death.

2. THAT the community was then dissolved.

3. THAT no account was due, because there were no gains—because the will gave them to Meuillon, and *the instrument cited could not operate as a renunciation.*

THE decision of the Court of the first district being, in favour of the defendants, on the last

branch of the third proposition of the defendants, the plaintiffs appealed therefrom.

IN the course of the argument, the plea of prescription was opposed to the plaintiffs' claim of a division.

Livingston for the plaintiffs. I. No prescription will run, when there has been no division. *Pothier de la Comm. Part.* 3, *ch.* 11, *art.* 3, *n°.* 698. The prescription is 30 years. *Ahora* 389.

II. THE partnership is renewed when the partner, or the heirs suffer the business to be continued as before. 3 *Febrero.* 181 *ch.* 9, *s.* 1, *n.* 12.

A partnership is tacitly contracted in many cases. But whether a new partnership shall be presumed to have been contracted, or the old one continued or renewed, when, the husband or wife being dead, the survivor retains possession of the common property, is affirmatively answered by *Matienzo*, *Velasco*, *Escobar* and others. Yet it is most true that the partnership does not take place, *with the father*, who is presumed to have kept the property, as the lawful administrator, and having the usufruct of all the maternal and adventitious estate of the son, is not obliged to participate the gains. *Ant. Gomez*, *Var. Rep.* 594 *n.* 2.

IF after a dissolution of the marriage by the wife's death, the husband retains the common

East. District. June 1813.

PIZEROT & AL. vs. MEUILLON'S HEIRS.

estate, and make profit thereby, and a division be demanded by the emancipated children, one half of the profit made since the death of the wife shall be given them : the reason is that the husband during widowhood is supposed to remain in the same marriage. *Matienzo* treats this question at large. *Gloss.* n°. 1, *as.* 9, *and following.* In n°. 13, he says, the contrary opinion *seems* to have been supported by some : but in n°. 17 to 26, he decides the question by distinguishing different cases : and in almost every one he concludes that the community continues and that one half of the gains are given to the heirs of the wife. 2 *Azevedo*, 290, *l.* 5, *tit.* 9, *l.* 2, n°. 18.

THE heirs of the wife, whether lawful or instituted, *legitimos o extranos* shall be entitled to one half of the fruit, of the *gananciales, until the division*, if any of them were productive. 4 *Febrero*, 295, *l.* 1, *c.* 4, *s.* 4, n°. 86, 87, & 88.

IF the marriage be dissolved by the death of one of the parties, and the survivor retain the common property the subsequent gains are to be divided with the heirs of the deceased. 5 *Part. tit.* 10, *l.* 10, *in notis.* By the custom of Orleans, if no inventory is made, the community continues even with collateral heirs. *Pothier* 848 773. *Part.* 6, *ch.* 1, *sect.* 1, *art.* 3, n°. 773. A continuation of the community, not according to the Roman laws, prevails in different countries, as

Spain, &c. 2 *Voet*, 157. The husband or wife marrying again, without making partition with their first children, must communicate to them subsequent profits. *Siguenza de C.* 402, 110.

THUS it is clear the partnership was continued by the mere act of the law.

III. IT was farther continued by the act of Meuillon. He forbore making an inventory as it was his duty, if he had wished the dissolution of the community.

THE surviving husband or wife, administering the effects of the community, ought to make an inventory. *Ayora de partitionibus*, 10, *n°*. 9. *Ant. Gomez, Var. Resp.* 594 : *Martinez, Azevedo, Escobar.*

EVERY thing, which Meuillon's heirs do not prove to have been his, before marriage, must be considered as profit and be divided. The income of the estate shall be common, tho' it belong to husband and wife, in different proportions : but the inheritance itself shall be given to the one to whom it belongs. *Nueva Recop.* 732, *l.* 4. Every thing shall be presumed matrimonial gain and be divided, unless the contrary appears. 1. *Febrero de contratos* 203, *ch.* 1, *s.* 22, *n°*. 241. *Nueva Recop. l.* 5, *tit.* 9, *l.* 1, *Ant. Gomez, in leg. Tauri.*

THE children and heirs of the wife may proceed

East. District. June. 1813.

PIZEROT & AL. vs. MEUILLON'S HEIRS.

in rem for the one half of the *gananciales*, which the father may have sold, since the death of the wife : but only when his goods are not sufficient to pay the value. *Siguenza* 415, 149.

CROP growing, at the time of the decease, is to be divided : so the increase of cattle. *Gomez in leg. Tauri*, 623, 71.

THE children of a female slave, brought in as a marriage portion belong to the wife, if she was not valued. 4 *Partida, tit.* 11, *l.* 21.

THE increase of cattle are fruits, and belong to the usufructuary ; but it is said, not so of slaves : for *it would be absurd, that man, for whose use nature has provided all fruits, should be considered as fruit himself. Inst.* 1, *s.* 37 & *ff.* 22, *s.* 28. If there be, however, no other reason for the distinction, than this punning conceit, the conclusion is questionable : see *ff* 22, 1, 14 § 1, where a different doctrine is laid down. Devise in trust to restore the inheritance, *sine reditu :* held that the children, born after the devise, shall not pass. See, also *Ord. Roy. tit. de las gananciales.*

LASTLY, the plaintiffs are not barred from any right of theirs by the will, because

1. MEUILLON has renounced, every advantage therein made to him, in their favour.

2. INDEED, nothing was therein given him for

his own advantage, he was only made a trustee by the will; every thing given to him in it is a *fidei commissum*, which he was in justice and in honor bound to restore to the plaintiffs. They, not he, were the objects of the liberality of the testatrix. He understood the will so, and in discharge of the trust reposed on him, he executed the deed of renunciation.

3. IF it were otherwise, the will would not stand in the way of the plaintiffs. They would take the estate as *hæredes nati*. It does not appear to have been dictated in the presence of the witnesses: nor subscribed by the witnesses in that of the testatrix. Those formalities are required by law: and in the confection or execution of a will, whatever is required is matter of strict law, not to be dispensed with: and the non-performance of it imports the nullity of the instrument. This is a question of fact which it is not too late to examine. 1 *Febrero*, 173, 189, *Code Civil. Pandectes Françaises.*

Mazureau, for the defendants. I. By the death of Mad. Meuillon, the community was dissolved *ipso facto*. Such is the general principle *ff. de socio, l.* 59.

THE partnership is dissolved by the death of one of the partners: so that, in the beginning of it, we cannot stipulate that the heirs will succeed to it. 6 *Rodriguez* 811. 5 *part. tit.* 10 *l.* 1.

East. District. *June* 1813.

FIZEROT & AL. *vs.* MEUILLON'S HEIRS.

THIS principle is equally applicable to the conjugal partnership as to all other partnerships. The conjugal partnership, being a consequence of marriage, the marriage ceasing, must cease with it. It cannot extend farther; for being contracted for a determinate period (the duration of the marriage) it must end at the expiration of that period. 1 *Febrero de juicios, tit.* 1, *ch.* 4, *s.* 4, *n°.* 89.

II. THE will has put an end to all the effects of the community: nothing is left to the plaintiffs, in the community. Hence there was nothing to liquidate, no inventory to make.

HE alone, who has an account to give, is bound to make an inventory. 1. *Febrero de Juicios ch.* 1, *s.* 2, *tit.* 1, *n°.* 42. Meuillon having no child, even if he had an account to render, would not have been bound to make a formal inventory. *Febrero, loco citato n.* 100. *verbo pero por omitir, &c.* The want of an inventory does not, therefore, cause the community to continue.

IF there was no common property, in the hands of Meuillon—if every thing belonged to him under the will, or if he was thereby left free of disposing of every thing, without rendering any account, the will may well be said to have left nothing common, between him and the collateral heirs of his wife.

BUT the will is said to be void, all the witnesses

not having subscribed it, in presence of the testatrix. The contrary appears on the face of the instrument: it purports that it was subscribed by the testatrix and the witnesses, after having been read. *Febrero* holds that this suffices.

III. By his renunciation, Meuillon has contracted no other obligation, but that which is formally expressed. The renunciation could have no other effect, than that which it has had during his life. Supposing that the parties had the intention to renew the community and had expressly renewed it, the stipulation would have been iniquitous and void.

The renunciation took place ten months and four days after the death of the wife. Thus, at that time, the will and death of the wife had put an end to the community, it could not, therefore be *continued;* the continuation of a community being its uninterrupted duration. *Repert. de jurisp.*

No new one was intended to be contracted. Meuillon in this act, says he renounces all the advantages he has under the will. This manifests no intention of contracting a partnership. Did he and the plaintiffs contract any?

It is the intention of the parties that ought to direct us rather than the words they have used—*Code Civil* 271, *art.* 56. *Domat* 17, *s.* 2, *art.* 10—18 *art.* 13.

If the parties had intended to renew the com-

East. District. *June* 1813.

PIZÉROT & AL. *vs.* MEUILLON'S HEIRS.

munity, or to contract another partnership, would they not have mentioned it? Would the act have been silent? Had the plaintiffs imagined, that there existed a partnership between Meuillon and them, would they have suffered twenty years to elapse, without acting as partners? We find that as long as Meuillon lived, they never interfere, never ask even an account.

ON the contrary, on the 6th of January 1793, Meuillon publicly sells all his property: the plaintiffs are present, bid and purchase, as all other persons, without speaking of any right or pretention of theirs. Since the death of Meuillon, they have been present at the sale of his property, and again made a purchase of part of it, as other bidders, without disclosing any claim of theirs.

WHAT better proof can we have of their intention, at the time of the renunciation? It is this intention which we are seeking for. In every convention, the intention of the parties is rather to be attended to than their words. *ff. de verbor. sign. l.* 219. 18 *Rodriguez*, 366.

How can we presume that Meuillon intended to renew the community, or contract a partnership with the plaintiffs? The property was all his own: the plaintiffs were without any thing. We are told he was only a trustee; the property holden by a *fidei-commissum.*

THE disposition, in the will, has none of the characters of a *fidei-commissum* or trust. The

trustee may be compelled to dispose of the trust, according to the intention of the person who created it : Meuillon was authorised by the will to dispose of every thing, as he saw best, without being holden to render any account. Even if his intention had been to renew the partnership or contract a new one, I contend the convention would not have been a lawful one.

LET us attend to the following very important truths.

1. THE community had expired without leaving any gain or profit.

2. UNDER the will, Meuillon was at full liberty to dispose of the gains or profits, if there had been any, without being holden to render any account of them.

3. EVEN, without the will, Meuillon was master of every thing, since those pretended gains were not sufficient to cover his legal claim.

4. THE heirs of his wife, in whose favour he was renouncing, far from bringing any thing into the partnership, received from him two thousand dollars.

5. BEFORE, then, and since that period, Meuillon always managed the property alone.

Now in order to constitute a lawful partnership, it is requisite that every partner should furnish a part of the stock in cash, goods or industry. *Domat, b.* 1, *s.* 1, *art.* 1, *p.* 73, 3 *Febrero de escrituras* 165 *ch.* 9, *n.* 1, 166 *n.* 2.

East. District. *June* 1813.

PIZEROT & AL. *vs.* MEUILLON'S HEIRS.

MEUILLON furnished all the stock, all the industry, ran all risks.

LET us then conclude, that if Meuillon had really consented to the partnership, his agreement would have been illegal and void—binding neither in law, nor in equity—or rather let us conclude he never intended to contract a partnership with the plaintiffs.

IF the behaviour of the parties—the absence of a stipulation—their silence for twenty years—the situation of the old community, do not disprove the intention of contracting a partnership, these circumstances render the pretentions of the plaintiffs in this respect, at least *doubtful.* A doubt suffices for us. In *dubiis semper quod minimum est sequimur, ff. de oblig. & act. l.* 47, 16 *Rodriguez*, 113. *Domat*, 18 *art.* 15, *Code Civil* 271, *n.* 62, *ff. de verb. obl. l.* 38 § 18; 16 *Rodriguez* 148.

THIS principle is so extensive, that when every thing tending to restrain the obligation is not expressed, it is presumed to have been omitted. *ff. de verb. obl. l.* 99, 16 *Rodriguez* 193. *Quia stipulatori liberum fuit, verba late concipere.*

I conclude that by the renunciation Meuillon contracted no other obligation than that of paying the two thousand dollars mentioned therein.

IV. HAD Mad. Meuillon died intestate, the society not dissolved by her death, and had Meuil-

lon remained in possession of all the property, after her death, still there would be no continuation of the community.

THE law *del Fuero*, invoked by the plaintiffs and the only one which may be said to have any bearing on the present case, relates only to lawful *children* or issue; the plaintiffs are *brothers*, collateral heirs.

V. THE will is to decide this cause. It gives Meuillon power to dispose of the property, in favour of the heir of the testatrix, whom he may deem the most worthy, or in any other manner, without being held to give any account.

THIS disposition is either a legacy, in favour of Meuillon, or an authority to act as he pleases.

1. IF it be a legacy—he became by the death of the testatrix the absolute owner; because being in possession, he needed no delivery.

2. IF it be an authority: by accepting it, he has contracted the obligation of disposing of the property, to some person, besides himself.

THE plaintiffs contend that the acquets belong to them. Has Meuillon disposed of them in their favour? If he has, in what capacity has he done so; as owner under the legacy, or in execution of the authority given him? In either case, they are bound to produce an express title.

IF the disposition was made as legatee, a donation was necessary—where is it? In the renun-

East. District. June 1813.

PIZEROT & AL. vs. MEUILLON'S HEIRS.

ciation? None of the sacramental expressions are found there. It was requisite that he should formally declare that he *gave*: for he had both the title and the possession—because he was owner; and a donation is never presumed. If the clause of renunciation is pretended to be equipollent to a donation, it ought to be (*insinuated*) recorded, before the *Juez Mayor* and on failure, it is void. *Part.* 5, *tit.* 4, *l.* 9.

IF the disposition was made in execution of the authority given him, it ought to have been expressly stated he was acting under that authority, and not that he was renouncing an advantage—for the charge of executing a power is no advantage to the person, entrusted with it. Where is the proof then that he disposed of the property, in that manner? Not surely in the renunciation. If on the next day the plaintiffs had talked to him about the acquets, he would have answered "I have renounced, in your favour, all the advantages I had under the will of your sister—these do not include the *acquets*, which I am authorised to dispose of in the manner I shall think proper. This disposition has been made and you have nothing to do there with."

THE renunciation relates to the portion of Mad. Meuillon of the succession of her mother: this is evident from the precaution which has been taken to stipulate that all the legacies should be paid by the plaintiffs.

By the Court. * This is a case of great importance, both as to the amount of property in dispute, and the legal principles involved in its decision.

I. THE first question, that presents itself for the decision of the Court, is, whether the claim of the appellants is barred by a prescription of ten years.

SEVERAL authorities have been cited and, at first view, it would appear that some of them (particularly *Febrero*) support the doctrine contended for by the appellees; but, upon a close examination of the subject, it will be found, that thirty, not ten years, is the period of prescription in an action for the division of gains, or the partition of an estate.

IT is, indeed, said by *Febrero* that among persons of full age, after a lapse of ten years, a division of the inheritance shall be presumed; but it is clear, from his subsequent observations, that the claimants, upon whom the burthen of proof is thrown, are permitted to shew that no division was made. In this case, so far from its being pretended, that this has been done, the right of the appellants to partition, at any time, is denied. The Court are of opinion that even, could

* DERBIGNY, J. did not join in this opinion, having been of counsel in the cause.

East. District. *June* 1813.

PIZEROT & AL. vs. MEUILLON'S HEIRS.

the argument of prescription be attended to, at this stage of the cause, it would not avail the appellees.

II. THE will of Mad. Meuillon is the next subject, for the consideration of the Court. It is said by the appellants, that it does not appear, from the notary's certificate of the execution of the will, that it was dictated by the testatrix, in the presence of the witnesses. It has been very correctly observed, that all the solemnities required, in the execution of testaments, are matters of strict law, and ought to be observed. But the objection, to the validity of the will, comes with an ill grace indeed from the heirs of Mad. Meuillon, who twenty years ago, recognized its legality, in the most solemn manner, before the proper authority, and accepted from the husband of their sister a renunciation of considerable advantages, held under it. If there had existed any doubt, upon this subject, at that period, there can be no question that efforts would have been made to destroy it, by a regular suit, instituted for that purpose, and that would have been the proper time; but the Court are of opinion that, after the solemn act of the very parties appellant, and the long period that has elapsed (in the course of which some of the witnesses have died) it would be an act of great injustice to permit the validity of the will to be shaken. But, independently

of this serious objection, if we attend to the certificate of the notary, we shall find that all the essential requisites were complied with: he certifies that the testatrix declared, and dictated the will to him, and that it was made and signed by the testatrix, and the witnesses, after it was read; from which, it may fairly be inferred, that the four witnesses and the notary were all present during the dictation and execution.

III. ON the part of the appellees, it is contended that the renunciation of Mr. Meuillon was not executed, with all the solemnities, required by the then existing laws; and is consequently void. This instrument appears to have been made before Jacques Massicot, captain of militia, Commandant and Judge of the parish of St. Charles. It is said, that by the laws of the partidas, it is declared that all acts respecting property, above the value of 1500 maravedis d'oro, shall be executed before, and with the knowledge of the *Juez Mayor*, or superior Judge of the place; and this is construed to mean, before the Auditor or principal Judge of the colony.

WE can never believe that it was the intention of the monarchs of Spain, to require all that strictness in the execution of acts in their distant colonies, which was required in their populous European villages and towns, or that the inhabitants of their most remote Districts in this, or any

East. District. *June* 1813.

PIZEROT & AL. *vs.* MEUILLON'S HEIRS.

other of their colonies, should be compelled to execute instruments for the conveyance of property above the value of a certain amount, before the Auditor, or principal Judge of the Province. Even in Spain, they might be made in the presence of a Corregidor, Alcalde-Major or other principal officer. This country was laid out in Commandantcies, or Districts, and all acts within the District, were executed before the Commandant or Judge, and deposited with him. To require a strict compliance with a law, made seven or eight hundred years ago, before America was known, intended for a different region of the world, and a different state of things, and which would shake the titles of half the people of the country, would in our opinion be iniquitous and absurd. We believe the practice of the country to have been, as stated above. The Court are of opinion that the Judge of the District was sufficiently authorised, to receive the declaration of Meuillon, and that, consequently, the renunciation was executed with the necessary solemnities.

IV. THE next point, for the decision of the Court, is the true construction of this act of renunciation. It was passed on the 10th of November 1792. By the statement of facts it appears that Madame Meuillon, on the 31st. of December 1791, made her will and by the ninth clause, she gives the enjoyment of her part, coming from

the succession of her mother, to her husband, during his life, and at his death to her heirs. Meuillon had received in account 2,000 dollars, and more was in expectancy. By the 10th clause, Mad. Meuillon declares her intention, to leave to her husband the absolute disposition of the goods acquired in the community, that is to say, to "*give them to such of her relations, as he shall believe worthy, or to dispose of them, in any manner, without being held to an account.*" By this testament, Meuillon had a life estate, a usufruct of the succession of his wife, and the absolute disposition of the community of gains. He remained in possession, and did no act, for a considerable time, by which he evinced an intention to give, to the heirs of his wife, any part of the community. On the 10th of November, 1792, Meuillon by a written act declares, that of his own will he renounces all legacies, dispositions and all other advantages generally whatever, stipulated in his favour in the will of his wife: of which legacies, donations, dispositions and rights and all other advantages generally whatever, for the friendship, he bears her brothers and sisters he makes an abandonment, purely and simply: to which effect he agrees to pay back the 2000 dollars, he had received, under the express condition of their paying the legacies charged on the succession. The heirs accept the renunciation and promise to stand in the place of Meuillon. It

East. District. *June* 1813.

PIZEROT & AL. *vs.* MEUILLON'S HEIRS.

is contended by the appellees, that the renunciation relates solely to the property, which was to come from the inheritance of the wife, and not to any part of the property, acquired during the marriage: of this opinion was the Judge below, and from that Judgment is this appeal.

IT must be confessed that the conduct of the parties goes far to impress a belief that such was their understanding at the time—the long silence of the heirs of Mad. Meuillon, and the several purchases they made at the sale of Mr. Meuillon's estate are certainly strong circumstances to shew *their* opinion of the renunciation—this, however, is not conclusive. The Court must decide the rights of the litigants, by the instrument they have executed and the law arising from it. Courts will no doubt give such a construction to a deed, as will fulfil the intention of the parties, when that intention is evidently seen. General declarations will sometimes be restrained by subsequent particular limitations and dispositions; and attention must always be given to the principal object of the contract or agreement. So, in this instance, if, from any part of the instrument, it could be clearly ascertained that the object of the parties was merely the inheritance of Mad. Meuillon, we would restrain the general words of the renunciation, and confine it to that particular estate. But, is there any thing in the deed, restrictive of the general words? Mr. Meuillon

renounces all legacies, dispositions, donations, advantages and rights, stipulated in his favour by his wife's will. Was not the absolute disposition of the community, a stipulation, disposition, right or advantage under the will? If so, it is as clearly renounced, as is his claim to the usufruct or life-estate in the succession of his wife. The Court are of opinion, that the wife's share, in the community of acquets, was renounced to the heirs of Mad. Meuillon.

BUT, it is contended that the community continued for the benefit of the appellants to the death of Mr. Meuillon: and to this point, many authorities have been cited. Admitting some of the cases to have weight, there are circumstances, in this transaction, which take it completely out of the principles relied on. A community can only be said to continue, when a copartnership existed, and when no act has been done, evincing a determination to dissolve it, or when no circumstance occur amounting to a dissolution.

BUT, in this case, there never did exist a community, between Mr. Meuillon and the heirs of his wife. He succeeded to the rights of his wife, and enjoyed them for a considerable time—he was bound to no account, and therefore made no inventory; and if, by an act of liberality, he afterwards gave to the heirs of Mde. Meuillon what *he* was entitled to, under the will (that is

East. District. *June* 1813.

PIZEROT & AL. *vs.* MEUILLON'S HEIRS.

her share of the acquets *at the time of her death,*) it shall not be construed to work a penalty, and injury on himself, or be presumed that he meant to contract a partnership, with those who had never been associated with him, who had never lived with him, to whom he had already sufficiently exhibited marks of kindness, and who surely have no right now to claim from his heirs a moiety of the income of an estate, acquired by his exertions; in which the appellants had no participation.

THIS doctrine of the continuation of the community is founded in the *fuero real* of the kingdom of Spain. We think it would be easy to shew, from the authority of *Febrero*, *Azevedo* and others, that it is necessary to prove the *fuero real* to be in use and force, in the place, where the continuation of the community is contended for. *Febrero*, *de particiones*, *b.* 1, *chap.* 4, declares, "the continuation of the conjugal community exists in four cases: one of which is where by custom it has prevailed in a particular place; but it must have prevailed, without interruption, or by unquestionable use of the laws of *fuero;* and this usage must be proved by other partitions, or divisions, which have been made in those places; but if the usage of those laws be not conclusively proved, they have no effect, because, the laws of *fuero* ought to be respected, only when they are observed and used: as is ordained by the first law

of Toro. The laws of Toro (which were made and published in 1505, about 300 years after those of the *fuero real*) having expressly ordained, that they, who attempt to avail themselves of the laws, shall prove that they are in force, in the place where the continuation of the community is claimed. Nothing of that sort being offered here, no instance being shewn of the partition of an estate according to such principles, altho' thousands have been partitioned, the Court, upon this ground alone, would be authorised to reject it—but were they in force, we are of opinion they would have no application to the present case.

IN order to establish what was the share, to which Mad. Meuillon's heirs were entitled, it will be necessary to refer to some of the leading principles which prevail, on the subject of the community of gains. At the time of the dissolution of the marriage, all the effects, which the husband and wife possess are presumed common gains, unless they shew which of the effects, they brought in marriage, or have been given them separately, or they have respectively inherited. After having deducted the amount which the husband and wife have proved they brought into marriage or afterwards, and the debts which have been contracted during the marriage, the rest is considered the property of the partnership.

IT would have been sufficient for this Court,

East. District. *June* 1813.

PIZEROT & AL. vs. MEUILLON'S HEIRS.

to have reversed the judgment of the District Court, on the ground of the erroneous construction of the renunciation, and to have sent the case down with instructions to ascertain the amount of the community, at the death of Mad. Meuillon; but, anxious to cause justice to be done, in the shortest possible delay, we have been induced to express the opinion of the Court, on several points that have been mentioned in the course of the argument.

1. WITH respect to the plantation and negroes, possessed by Mr. Meuillon, before his marriage, and which afterwards went to Mather, it is the opinion of the Court, that the community cannot be credited for any part of the supposed profits, during the five years of marriage—this property had been acquired before, and Mr. Meuillon, by the laws of the country, had a right to make what disposition of it he pleased. We do not think, the production of a loose receipt (and that too found in the possession of Mr. Meuillon) by which he acknowledged to have received a certain quantity of indigo, as the last payment of the plantation, unaccompanied by other explanatory evidence, sufficient to overturn the solemn allegation of Meuillon himself in a Court of justice, and the answer of Mather confessing all the facts charged, as appears recorded in the proceedings of the late Superior Court.

It is there also acknowledged by Mather, that the small advances made, were but a triffling indemnification, for the slaves that he (Mather) had sold, and for the enjoyment of the rest for twenty two or twenty three years.

2. WITH respect to the notes given by the relations of Meuillon, for certain slaves sold to them, and which were acquired during the marriage, the Court are of opinion, that they ought to be considered, as part of the acquets or gains. It appears that Meuillon, at a period which cannot be ascertained, made an indorsement on the notes, declaring that, if they should not be paid during his life, the debtors should be discharged—there is no doubt that Meuillon might have made any disposition of the notes he pleased, during the marriage, provided it was not in fraud of his wife. At the death of the wife, the right of her heirs or legatees accrued, and these notes, being unpaid, at the dissolution of the community, by the death of the wife, and Meuillon having renounced all advantages under the will, the appellants are entitled to a moiety of the amount of the notes. Had he made this disposition of the notes, and the wife had survived, still she would have had her moiety of the amount; because, at the very instant of his death, her right would have been complete.

3. THE Court is further of opinion that the

East. District. *June* 1813.

PIZEROT & AL. *vs.* MEUILLON'S HEIRS.

amount of sales of the negroes, bought from Mather and Strother, should be brought into the community and that the amount, due by James Mather and Mather and Strother, be deducted from the total gains.

4. As to the lots and houses in New-Orleans, we are of opinion that the lots purchased, during the marriage, and all such items, as may be within the principles of this decision, be brought into the community, and accounted for in the partition of the estate, and that there be deducted therefrom the value of the buildings and improvements, made by Meuillon, subsequently to the dissolution of the marriage, and also the value of the lot of eleven feet adjoining those, purchased after the death of the wife.

IT is ordered and decreed that the judgment of the District Court be reversed with costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. JULY TERM, 1813.

ALLEN vs. *GUENON & AL.*

East. District. *July* 1813.

ALLEN vs. GUENON & AL.

Master and Wardens of N. O. not exclusively to collect pilot's fees.

THE plaintiff, a branch pilot, brought his suit to contest the right, which the Master and Wardens of the port of New-Orleans claimed of collecting, exclusively from the branch pilots, the pilotage due to the latter. He obtained judgment, in the Court of the first District, and the defendants appealed.

THE case was submitted to the Court, without any argument of counsel.

By the Court. The appellants, in this case, contend that they have an exclusive right, to collect the pilotage money, and account for it to the pilots: in other words, that the pilots can, in no case, receive that money, but through their hands.

East. District. *July* 1813.

ALLEN vs. GUBNON & AL.

Their authorisation to that effect, they find in the 9th. section of the act of the Legislative council, entitled "an act relative to the harbour Master Wardens and pilots of the port of New-Orleans." By that section, it is provided that "the Master "and Wardens shall be *empowered* to receive "all pilotage money, which shall become due, "to any pilot, and that they shall keep a separate "account with each pilot, of all monies received "to his use."

THE object of this provision, if the pretentions of the appellants were correct, would be the establishing of a kind of accounting office, to secure an uniform mode of collection, and prevent impositions, on the part of any individual pilot. If so, it ought to embrace every case. But this mode of collection cannot be carried into effect for the pilotage of wessels, going out to sea. Therefore, the law must have had something else in view. That its object was simply to secure to the pilots the collection of their money, where they could not collect it themselves, appears very plain. The expression "shall be *empowered* to *receive*" cannot be extended, so far as to signify that this power is to be exclusive. Every person has a right independent of any law, to receive what is due to him, and of course to employ whom pleases to receive it for him. Besides the mere perusal of the 10th. section of the said act, shews that it was perfectly understood, that

the pilots could collect themselves their pilotage money, the 9th. section being only intended, as a benefit to them, not as a charge.

LET the judgment of the District Court be affirmed with costs.

DUPLANTIER vs. *ST. PE'.*

ST. PE' vs. *DUPLANTIER.*

Conventional interest not allowed, without an actual agreement; nor legal, before a judicial demand.

THESE two consolidated cases came up, from the first District, on the following statement of facts.

IN the year 1805, the parties had some communication together, for the establishment of a sugar plantation, in partnership.

ST. PE' then owned a tract of land, on which one Roman had a mortgage, for about $ 7,000. On the 21st. of December 1805, he bought, for the account of the intended partnership, by a private instrument, from F. Mayronne, a plantation, with all the necessary buildings, mill &c. to make sugar, for $ 35,000, payable in several instalments; and on the following day, the articles of partnership were executed. It was to begin in March following and continue for five years.

ST. PE' furnished to the partnership a number of working hands, who were valued at $ 6,900,

East. District. July 1813.

DUPLANTIER vs. ST. PE'.

making his part of the stock $ 21,900, including $ 15,000 for which his plantation was brought into the partnership.

IN April 1807, the private sale of the plantation was the object of a notarial one.

ST. PE' vs. DUPLANTIER.

ON the 18th March 1807, St. Pé bought of John Gravier, a tract of land, on the partnership account, for $ 20,000. Altho' the sale purports to have been for ready money, yet part of the price was paid in notes, which were afterwards negociated to Thomas Durnford, and J. B. Nicolet, deceased, by the vendor.

ABOUT the month of March 1808, Duplantier presented to and obtained from St. Pé, the acceptance of an account of sundry advances by him made to the partnership.

IN 1807, Duplantier, purchased, for his own account, a tract of land near New-Orleans, from Mad. Delor, for $ 107,000. On which he paid down $ 23,000 in drafts on France. In the same year, he purchased a number of negroes for $ 12,000 from P. Lanusse, whom he paid in cotton.

IN 1811, the partnership having expired, Duplantier presented his account of advances made for the partnership, amounting to $ 105,715, and expressed a desire, as he perhaps had done before, to purchase the property of the partnership, and the parties being unable to settle their account, appointed arbitrators for that purpose.

THE arbitrators having appointed a time and place to meet the parties, St. Pé's counsel refused to attend.

IN September 1811, St. Pé, who had till then lived on the plantation of the partnership, left it, and Duplantier took possession of it and continued to occupy it, except the tract bought from Gravier, the whole of which, was seized and sold (for $ 14,000 to the son of Duplantier) to satisfy and pay to the vendor a balance of $ 3,160.

THE land, which St. Pé had brought into the partnership, was likewise seized and sold, at the suit of his mortgagee (Roman) for $ 12,500.

DUPLANTIER now instituted a suit against St. Pé for $ 105,715, the amount of his advances and St. Pé a cross suit, for $ 117,000, the value of the plantation, slaves and other property, which, he contended, Duplantier had verbally agreed to purchase.

THE suits were consolidated, and referred to judiciary arbitrators—before whom the parties admitted :

THAT the crops of sugar, received by Duplantier, amounted to $ 29,747.

AND the melasses, sold by St. Pé, on account of the partnership, to $ 1,236.

THAT there was still due the partnership a sum of $ 10,268.

THAT the advances, made by St. Pé, for the partnership, amounted to $ 3,697, 17.

East. District. July 1813.

DUPLANTIER vs. ST. PE'.

ST PE' vs. DUPLANTIER.

THAT Duplantier, besides his other advances had paid expences of the partnership to the amount of $ 1000.

LEAVING a balance due to Duplantier, by St. Pé of $ 37,571; 63, including a private debt, from St. Pé to Duplantier, excluding some interest claimed by Duplantier.

IN addition to these facts, the Court was referred to those stated, in the report of the judicial arbitrators.

THE arbitrators made the following report. Two questions are submitted to our decision. 1. Is Duplantier entitled to any interest, upon the payment and advances by him made, for the partnership, or St. Pé? 2. Is he to be considered as having kept, on his account, the property of the partnership, at the time of its dissolution? If so, at what price? If otherwise, how is that property to be disposed of?

To enable us to decide these two questions, without which the accounts of the parties cannot be liquidated, James Pitot has been introduced by Duplantier. He declares that, during the partnership, he had the management of the affairs of Duplantier, in the city, and frequently paid the drafts of both the parties, for the account of the partnership; and in May and June 1810, Duplantier borrowed money from Alain and Hop-

kins, to pay partnership debts—that Duplantier's affairs then did not permit him to make such advances, without taking money at interest—that the witness does not precisely know what particular debts of the partnership were so paid—that St. Pé frequently requested the witness to borrow money for the partnership—that during the absence of Duplantier, on the application of St. Pé, the witness borrowed from Villechaise $ 4,780, for which he gave his own note, which was afterwards taken up with Duplantier's money—that to his knowledge, the payments thus made by Duplantier, were one of the great causes of the embarrassment, in which his private affairs have been involved.

ON his cross-examination, this witness declared that, posterior to the contract of partnership, Duplantier bought Mad. Delor's plantation for $ 107,000, paying down $ 23,000—that about the same time, viz. in 1807, he made a speculation in negroes, for his own account, amounting to $ 12,000, and in 1811, in order to settle the affairs of the partnership and liquidate his own, he desired to take the partnership's plantation on his own account.

DUPLANTIER gave also in evidence, the contract of partnership, to shew that a plantation had, before its date, been purchased for the joint account of the parties: and from the account of the

East. District. *July* 1813.

DUPLANTIER *vs.* ST. PE'.

several payments, made by him for the partnership, he shewed that the price of that plantation, viz. $ 45,000, was paid by him.

ST. PE' *vs.* DUPLANTIER.

IT was admitted that, in June 1811, Duplantier took possession of the whole property of the partnership, altho' the said partnership was not then expired: and Mayronne deposed that St. Pé, who had the management of the affairs of the partnership, had left the plantation before Duplantier took possession of it—no one being in the house then.

ST. PE' recurred 1. to the account of Duplantier, from which it appears that at, or posterior to, the time of his borrowing money from Alain and Hopkins, no important payment was made by him, for the partnership: 2. To the contract of partnership, which contains the following clause. "The proceeds of the crops shall be employed in discharging the obligations, which we contracted with Mayronne and others, for the account of the society, and in case they should not be sufficient, each of us shall contribute *with all his means*, to effect such payments."

HE relied on another clause by which Duplantier "obliges himself besides to advance ten working slaves before the time of the *roulaison*: of the price of whom St. Pé shall not be bound to pay his half, until after the lands purchased are paid for."

HE likewise shewed another clause by which it is agreed that " St. Pé shall remain intrusted with the direction of all the work relative to the plantation, sugar house &c. and shall dispose of the *guildive*, saw mill, &c. as he shall judge most convenient for the partnership. "

HE introduced also an account settled between the parties in 1808, of the advances made by Duplantier, leaving a balance in favor of the latter of $ 50,808, 07; observing that no interest was charged.

HE then read seven letters addressed to him by Duplantier, dated Baton-Rouge, the 22d. and 28th. of January, 2d. and 11th. of February, 15th of April and 25th of December 1806 and 25th of May 1810.

IN the first, Duplantier tells him " I shall send to Zacharie a power to enable you to settle with Gravier, as soon as your health will permit. I wish it finished ? "

IN the second—" Do not lose sight of our neighbour Gravier : do not lose a single moment in purchasing the whole. Be persuaded it is a good bargain and we would not have more than we want. If misfortunes cease to persecute me, we shall soon put forces on it. We must work at our ease : and, with terms, we shall find no difficulty to pay. I intreat you to take care of yourself. It is a folly to kill one's self in a day.

East. District. July 1813.

DUPLANTIER vs. ST. PE'.

ST. PE' vs. DUPLANTIER.

Things never go so fast as our imaginations, or as one should wish : so do not hurt yourself by your too great activity : your wife, children and society have need of you. As to myself, I am not longer fit for any thing but advice : since you are to take all the trouble, you must take it in such a manner as to be able to support it. "

IN the third—" I have twenty brut negroes and two families to send to you. If you can dissolve with Descomines, I think we shall be able with the reinforcement I have at Mobile, to make our mills and other works go. "

IN the fourth—" I was going to speak to you about Gravier. I am glad that you have done with him. Do not lose time before you make him pass the deed of sale : and in case that should be delayed a little, let him give a private one. I shall take measures to let him have the cash, on my arrival into town. I should be sorry, if you did not make that purchase. "

IN the fifth—" I should be happy to see you and wish you could conclude with Gravier, if, at last he is ready. "

IN the sixth—" Do not lose sight of the bargain of Gravier, with little Durnford. See what is the true amount of the mortgage, given to him by Gravier : propose to him our note for it—if he does not accept, you must take means to have it extinguished, and procuring the

same. Consult Mr. Derbigny and Zacharie : it is absolutely neeessary to conclude that bargain."

IN the seventh—" I have learned with great regret, that you have not been able to come to any settlement with Pavie or the nephew of Nicolet. I do not know what we shall do : as to myself I have no resource left me. I cannot procure money to pay my private debts."

ST. PE' next introduced the depositions of Morier Fazende and Descomines, shewing that since the *roulaison* of 1810, Duplantier took and kept the possession and management of the partnership plantation. Morier Fazende states that he is well acquainted with the plantation, slaves, &c. and that the whole is worth $ 140,000, cash.

THAT of Boutté, stating that Duplantier told him that he kept the partnership plantation, on his own account.

THAT of Harang, stating that about March or April 1811, he was requested by St. Pé to make an appraisement of the partnership property, jointly with a person Duplantier should appoint. That, in consequence, he went on the plantation, examined the whole of it, as well as the greater part of the slaves—that shortly after he went with Mayronne, appointed to make the appraisement, on the part of Duplantier : but being on the spot, and unable to agree, Duplantier told them it was useless to take any more trouble, or to endeavour

East. District. July 1813.

DUPLANTIER vs. ST. PE'.

ST. PE' vs. DUPLANTIER.

to agree; because, if the appraisement exceeded the sum he intended to give for the property, he would not take it. The witness valued the property then, at $ 128,000, including interest, at one and two years credit, the terms he believed agreed upon, by the parties.

A notarial instrument, executed by the parties, on the 8th. of June, relating to the disposal of the partnership property was also offered, on the part of St. Pé, accompanied with oral testimony of Duplantier's refusal to abide by it, and of a new verbal agreement having then taken place. The counsel for Duplantier opposing this evidence as contrary to law and practice, we, the arbitrators were of opinion that St. Pé could not be allowed to prove by witnesses, what had been said by the parties, prior to, or after the said agreement—that he must, if he produce it, let it go for what it contains. Wherefore the evidence was withdrawn.

THEREUPON, Livaudais, Lanusse and Tricou were sworn as witnesses for St. Pé.

LIVAUDAIS deposed that some day, about June 1811, being fixed for the disposal of the partnership property, he went on the premises, but Duplantier produced no negroes or cattle; that the witness with Fortin, Pitot and Laronde, endeavoured to bring the parties to a final settle-

ment: and, as far as he believes it was agreed that Duplantier should take the whole property for $ 105 or 108,000; but no appraisement was made.

LANUSSE deposed that about one year ago, he was commissioned by Tricou to propose to Duplantier $ 110,000 for the plantation and 35 slaves: payable $ 25,000 in March then following, and the rest in five annual instalments—that Duplantier answered he wanted first to settle with St. Pé; that the proposed terms, if accepted, could not relieve him, as the delay he had obtained from his creditors would expire in December then following.

TRICOU deposed he had made the above offer, that St. Pé had consented, but the bargain failed, because, out of 35 negroes which he wanted to buy, Duplantier insisted on keeping five of the most valuable, such as the commander &c., substituting others of inferior value.

DUPLANTIER'S counsel contended he was entitled to interest, altho' there was no special agreement: for having been obliged to borrow money for the discharge of the partnership debts, it would be unjust to deprive him of the interest, which he claimed at the rate of 10 *per cent.* having paid that, and a higher rate to money lenders. That in a case like this, no positive contract was necessary, because the partnership having been benefited by

East. District. July 1813.

DUPLANTIER vs. ST. PE'.

ST. PE' vs. DUPLANTIER.

the advances he had made, it was natural he should be indemnified by his partner.

As to the question, whether Duplantier should be considered, as having taken the whole property on his own account, the counsel observed there was no evidence of any contract of that kind. Such a contract would be a contract of sale—there cannot be a contract of sale, without a price fixed upon.

ST. PE's counsel answered that interest can only be claimed, where there is a positive agreement, or where, from the acts of the parties it is evident that it was the intention of the parties it should be paid. Here it appears, from the accounts between the parties, that interest was never thought of.

As to the other question, they contended that Duplantier was in possession as owner not as administrator of the property: and must at all events be considered as such, since the proposition of Tricou.

THEY introduced by consent of, or at least without opposition from, the counsel of Duplantier, a notarial instrument, executed by the parties, on the 8th. of June 1811, whereby it was agreed that Duplantier should keep the plantation, slaves, cattle, &c. of the partnership, for the sum of

$ 108,000. and should cede to St. Pé. ten arpents in front at the rate of one thousand dollars the arpent, and eight of the slaves brought by St. Pé, into the partnership, and three of those brought by Duplantier, for the price at which they had been charged to the partnership : the accounts of the parties shall be settled as soon as possible, and if St. Pé falls in arrear, he shall pay Duplantier, in the above lands and slaves, or in cash—if Duplantier falls in arrear, he shall pay in his notes at one and two years, with the same interest, which St. Pé is paying.

I. ON this, we, the arbitrators are of opinion that there exists no particle of evidence that it was the intention of the parties, that interest should be paid. On the contrary, the articles of partnership and the account of advances, settled in 1808, shew that Duplantier had no such pretentions. We, therefore, think he is not entitled to any interest, on the sums by him paid for the partnership, nor on those advanced to St. Pé.

II. WE think that the instrument of the 8th. of June 1811, is binding on the parties, and that nothing said or done by them, since its date, could alter it; unless it was rescinded and the rescision reduced to writing.

WE are of opinion that from the date of said instrument, Duplantier wrongfully detained the

East. District. July 1813.

DUPLANTIER vs. ST PE'.

ST. PE' vs. DUPLANTIER.

possession of the land ceded to St. Pé, and of the three slaves, who were once his own.

THE agreement must have its complete execution. Duplantier cannot enjoy the profits of the property, and enrich himself, at the expence of his former partner. *Jure naturali equum est, neminem cum alterius detrimento locupletiorem fieri.* He ought, therefore, to allow interest, at five per cent., on the value of the land and of the three slaves from the above date.

WE also think that the credit which Duplantier is to have on his notes, of one and two years, to pay the balance due from him, ought to run from the date of the agreement. Had he not claimed interest, the accounts could have been settled without much difficulty. It is he, therefore, who has delayed the settlement and St. Pé ought not to suffer thereby.

DUPLANTIER owes to the partnership the price of the plantation and slaves $ 108,000, from which the amount of his advances $ 59,110, 41, being deducted, he remains debtor of $ 48,889, 59, to the partnership.

ONE half of this sum, $ 24,444, 79, he owes to St. Pé, on whom he has a private claim of $ 6,043, 65, leaving the balance due by him to that gentleman $ 18,401, 14.

ST. PE' is to receive the ten arpents of land for $ 10,000, the eleven negroes for $ 7,195, leaving a balance of $ 1,206, 14.

CALCULATING the interest, at 5 per cent. thereon and on the value of the plantation, and of the three slaves that were Duplantier's formerly:

WE adjudge that Duplantier shall deliver to St. Pé, the ten acres of land and three slaves aforesaid, and St. Pé shall retain the eight slaves by him formerly put into partnership, and Duplantier shall pay him $ 2,204, 33 viz. $ 1,540, 95 in cash and $ 663 37, in his note payable on the 8th. of June 1814.

THE District Court, on this report made the following decree.

THE arbitrators were correct, in admitting as evidence the contract between the parties of the 8th. of June 1811. It is not a project, but an absolute contract, and vests an unqualified right, in the parties, to the property reciprocally conveyed; leaving all other matters in difference subject to after liquidation. It properly forms the basis of their award.

BY the contract, it is stipulated that, if on a liquidation of the accounts, it turns out that St. Pé is in arrear to Duplantier, he shall pay in the lands and negroes ceded him, or in cash. But if Duplantier should be indebted, he shall give his notes payable in one and two years, with the same interest, which St. Pé himself pays. But whether any, and what interest St. Pé pays, is not shewn: it being conventional.

East. District. *July* 1813.

DUPLANTIER *vs.* ST. PE'.

ST. PE' *vs.* DUPLANTIER.

THE arbitrators have erred in allowing interest from the date of the contract of the 8th of June 1811. For by this contract, if Duplantier should be found indebted to St. Pé, upon a liquidation of the accounts, he was to give his notes, at one and two years, with the interest which St. Pé pays. This evidently relates to the time of liquidating the accounts, and not to the date of the contract. If Duplantier (as the arbitrators alledge) has prevented an amicable adjustment of the accounts, it was in the power of St. Pé, to compel a liquidation, by resorting, as he has done to a Court of justice, and he ought to recover interest, only from the time of the judicial demand, and on the amount, which may be finally liquidated and adjusted by the Court.

THE arbitrators also erred in allowing interest on the price of the ten acres of land, and the negroes mentioned, in their award: because by the contract St. Pé had a right to enter upon the land and take possession of the negroes, ceded to him by the contract; at least until the liquidation of their accounts: and then, in case he should be debtor, he had an option to pay in land, negroes or money. If Duplantier wrongfully kept him out of possession, his remedy was an action for damages, equivalent to the injury sustained.

THE rate of interest assumed cannot be the proper measure of damages for the wrongful de-

tention of the property. The arbitrators have gone out of the submission in making this allowance.

THIS being disallowed there remains a balance in favour of St. Pé of $ 1,206, 14, to be paid in two annual instalments, with interest to run from the judicial demand, which is adjudged and decreed to him with costs.

FROM this decree Duplantier appealed.

Duncan for the appellant. We have proved that we have frequently taken money, at interest, to pay the debts of the partnership, and that our situation did not allow us to make advances otherwise. We have paid for the greater part of the land, composing the joint stock of the partnership; we have put on it a much larger number of slaves, than we were bound to do. These lands and negroes have all produced great advantage to the partnership. Without them, no crop could be made. With what money have those lands and negroes been paid for? With that very money, which we have borrowed at very high interest. The enormous payments we have been obliged to make for the partnership, have been the cause of the embarrassment in our private affairs—It has compelled us to stop our payments, and to ask a respite from our creditors. How, in justice or equity, can the defendant refuse to indemnity for sacrifices, the advantage of which he has reaped?

East. District. *July* 1813.

DUPLANTIER vs. ST. PE'.

ST. PE' vs. DUPLANTIER.

WE cannot be considered, as having kept the property of the partnership on our account. Our articles of partnership provide that, at its dissolution, an appraisement of the partnership property on hand shall be made, and any of the parties shall be at liberty to take it as the appraised value. Has such an appraisement been made? It is in vain that it is alledged that since June 1811, we have been in possession of the joint property and that we have agreed to keep it, for a certain price. That price was never fixed, or agreed upon between us: then there was no sale of the defendant's share. We are in possession of the joint property, not as owner, but as administrator of it.

IT is true, under the articles of partnership, the defendant was to administer the common stock. But he had left the plantation and it was both our interest and duty to take care of it: and the defendant might, at any time, if he had seen fit, resume the possession of it.

IT is true, we declined the offer of Tricou. His terms of payment did not suit us. The credit he required was too long. Will it be said that we are, on that account, bound to keep the property he offered to purchase, on the same terms. No: we had a right to have it sold for cash.

Livingston for the appellee. No interest can be allowed by the appellee. We see him putting

into the partnership all the property he possesses. He is an industrious planter : his partner a rich one, good only, as he says himself, for advice. He is to be charged and he charges himself with all the trouble, and management of a sugar plantation, a saw mill and a *guildive*, where his partner resides, and is to reside, at the distance of forty leagues.

IT is stipulated by the parties, that the proceeds of the crops shall be employed in discharging the debts they have contracted with Mayronne and others, and in case they should not be sufficient, each is to contribute *with all his means* to effect the payments.

WHAT is the meaning of this last clause ? That the appellee shall pay part of their debts, in any other manner, than by the exercise of his industry ? Surely not : he had put every thing he possessed into the partnership. Altho' the appellant has used all his means, in the discharge of the above debts, he cannot claim any interest : because he has done no more than to perform one of the conditions, on which the partnership was formed.

WHAT are the principal advances of the appellant ? The price of Gravier and Mayronne's lands and of the negroes he has sent to the plantation. Did he not urge the purchase from Gravier ? Did he not, for several months and in several letters solicit to conclude that purchase ? Did he not,

East. District. *July* 1813.

DUPLANTIER vs. ST. PE'.

ST PE' vs. DUPLANTIER.

in a certain degree, compel St. Pé to it? Did he tell him, at the time, that if he should be obliged to pay the price, he would charge him with the interest? Had he manifested any intention of this kind, the appellee, who had already exhausted his resources, would never have consented to, would never have made the bargain.

As to the negroes, sent by the appellant to the plantation, above the number he was bound to furnish, the appellee was never consulted: and until the accounts were exhibited nothing shews that they had become the property of the partnership.

CAN the appellant demand any interest on the value of these slaves? Was it in his power thus to effect the total ruin of his partner? Both these questions must, or none of then can, be answered in the affirmative.

BUT he is not satisfied with claiming interest on the value of the slaves sent, above the number he was bound to supply: he charges it also on that of the latter, altho' the appellee had time to pay his half of their value, until the lands which had been bought were paid for.

THE money, borrowed from Alain and Hopkins does not appear to have been employed for the use of the partnership.

IT is contended the appellant ought to be al-

lowed interest, because his advances have deranged his affairs. Let us on this examine Pitot's deposition.

DUPLANTIER was shortly after the partnership began to furnish 1. $ 15,000 in cash 2. twenty negroes, 3. *all his means* to discharge the debts, contracted for the purchase of the lands of Gravier and Mayronne. He makes two very large purchases, on his own account: one of $ 107,000, the other of $ 15,000. On the first, he paid down $ 23,000. Those occasioned his difficulties, his embarrassment.

AN account was settled and signed by the parties, and altho' the appellant's advance amount to upwards of $ 50,000, nothing is said about interest. On the items of this account, surely none can be claimed.

AS to the other sums due to the appellant, is there any posterior agreement that ever authorised him to demand interest. If he altered his mind, after the settlement, and intended to make a charge for interest, ought it not to have apprized his partner of it?

THE appellant is in possession of the partnership plantation, as owner, not as administrator—at least, since the proposition made by Tricou. He informed Boutté he had taken the plantation, on his own account. He afterwards agreed to take it at $ 105 6r 108,000. Previous to, and ever

East. District. *July* 1813.

since that time he has been in constant and exclusive possession.

DUPLANTIER vs. ST. PE'.

IT is said he cannot have acquired the property of the appellee's share, without a contract of sale: and this contract cannot exist without a fixed price.

ST. PE' vs. DUPLANTIER.

AT the dissolution of a partnership the first thing, which is to be done is the division of the joint property, if possible: but may not one of the partners take any specific object, by abandoning another, or paying the value in cash or debts, and will he not then be in by partition.

ADMITTING that this was a contract of sale, which could not be completed, until the price was fixed: we have seen, any of the partners could take the whole common property, at an estimated price. Now can the deposition of Boutté leave any doubt that the appellant had availed himself of this faculty? And in the contract of sale does it not suffice that the price should be susceptible of being reduced to a certainty? *Id certum est, quod certum reddi potest.*

ADMITTING that he is not bound to keep the property at the price at which it shall be valued, can he dispense himself from indemnifying us from the injury sustained by his preventing the acceptance of the favorable terms offered by Tricou? He says the terms of payment were too distant: but Tricou depøses that the bargain did not fail on that account, but because the appellant

wanted to retain five of the most valuable slaves for himself.

Duncan, in reply. Interest is at all events due on the monies paid to Gravier and Mayronne. The sums due to these gentlemen were the prices of two tracts of land respectively purchased from them : the nature of these debts, the things sold producing fruits, rendered interest exigible, from the day of the sale, till that of perfect payment. The appellant having satisfied the vendors, has been *ipso facto* subrogated to the rights of the creditors. What he has to claim from the appellee is still in his hands the price of his debtor's part of the land, a debt which, *ex natura rei* and without any stipulation, carries interest. The appellant, being subrogated to the rights of the vendors, must exercise these rights entire; as they could claim interest, so can he. See Domat on this subject.

FINALLY, the respective rights and pretentions of the parties were submitted to referees, who after hearing the parties have reported that interest is due to Duplantier. Referees are special Judges, appointed under an act of the Legislature, to settle long, intricate accounts, as were those of the parties to this suit ; when, therefore, they have pronounced, the accounts must be considered as settled, unless some gross misconduct

East. District. July 1813.

DUPLANTIER vs. ST. PE'.

on their part should induce the Court to set their report aside, and refer the accounts to others. The Court, therefore, erred in disallowing the interest.

ST. PE' vs. DUPLANTIER.

By the Court. * This is an appeal, from the first judicial District. Cross actions had been instituted in the Superior Court of the late territory, which were afterwards consolidated and referred to arbitrators. A report was made, but it does not appear, that it was confirmed. Every thing that has been said, on the subject of the award had no application and is unnecessary to be noticed by the Court.

WE will not enter into a full statement of the case, as it sufficiently appears on the face of the record. A brief one of the principal facts will enable us to understand the points in dispute.

ON the 22d. of December, 1805, the appellant and appellee entered into articles of partnership for the purpose of establishing a sugar plantation near this city. St. Pé put into stock a tract of land of ten acres in front, a saw mill and negroes, amounting in all to the value of $ 21,900. Several slaves and money to a considerable amount were brought into the partnership by Duplantier. It was agreed that more land, adjoining the tract already mentioned, should be purchased and it was stipulated, that the proceeds of the *crops*

* DERBIGNY, J. did not join in this opinion, having been of counsel in the cause.

should be employed in discharging the engagement of the parties with Mayronne and others: and in case, they should not be sufficient, each of them should contribute all his means to effect the payments. St. Pé was charged with the superintendence of the plantation, and it was farther agreed that the partnership should continue for five years: at the expiration of which period, if the parties should not agree on the division of the common property, an estimate of it should be made, and either party who chose, should take it and be accountable to the other for one half of the amount of the valuation.

ON the 8th. of June 1811, an agreement was signed in the presence of three witnesses. By that instrument, it is covenanted that Duplantier should keep the plantation, and every thing appertaining to the establishment, at the price of $ 108,000. He transfers to St. Pé ten acres of land and seven slaves, in compensation of the part supposed to be due him, at the dissolution of the partnership. It was further agreed that the accounts of the parties should then be settled, as soon at possible, and if Duplantier should be indebted to St. Pé, he should pay the amount in his notes at one and two years with the same interest which St. Pé should pay.

IT is contended that this was a mere project of an agreement—that it was not solemnly en-

East. District. July 1813.

DUPLANTIER vs. ST PE'.

ST. PE' vs DUPLANTIER.

tered into by the parties, and if it was, that it has been since rescinded.

THIS is inferred 1. from the conduct of St. Pé, on the offer to Tricou and 2. on the circumstance that the agreement is not relied on by the appellee, in his petition to the Superior Court.

IT certainly appears that St. Pé was willing that a sale should be made to Tricou. No final settlement had taken place of the accounts of the parties. Duplantier had possession of every thing and seemed little disposed to come to any arrangement. Besides, the offer made by Tricou included the ten acres which Duplantier had contracted to cede to St. Pé, which together with the negroes were in compensation of what might appear to be due : it was essential then that he should be consulted and that his consent should be obtained to the sale.

UNDER these circumstances, it is not extraordinary, that St. Pé should have supposed that, if an advantageous sale could be made to Tricou, a speedier settlement might be brought about. No arrangement having taken place with Tricou, the parties were *in statu quo* before the proposal.

As to the other objection, nothing can be inferred from it advantageous to the appellant. The agreement is distinctly stated, in the petition and altho' the appellee claim more that he was entitled

to, the Court can see no reason for setting aside the contract.

WE are clearly of opinion, that the Judge below was correct in pronouncing that the contract vested a right in the parties to the property reciprocally conveyed, leaving all matters in difference, as to their accounts, subject to after liquidation.

AS to the question of interest, the Court is also of opinion that the Judge below was correct. There is certainly nothing said in the contract on this subject. It does not appear that it was the intention of the parties, that interest should be paid. St. Pé had put in his all, and on him devolved the whole burthen of managing the plantation. If the crops should not be sufficient to pay off the engagements of the partnership, all the means of the parties were pledged. St. Pé's means were exhausted, and it then became Duplantier's duty to use his, without any expectation of interest, but only to participate in the profits, which might arise from the use of these means.

BUT, it is said, he was compelled to borrow considerable sums of money, at an enormous interest. It does not appear that he was compelled to do so, for the purpose of carrying on the plantation. It is presumed that had he applied his funds solely to the sugar establishment, great profits

East. District. July 1813.

DUPLANTIER vs. ST. PE'.

ST. PE' vs. DUPLANTIER.

would have been made; but, we have it in evidence that he was engaged in other extensive speculations. These speculations were in all probability, the real cause of his being compelled to resort to the tribe of usurers: but for this his partner ought not to suffer. We are of opinion that the Court below was right in not making any allowance of interest, but what may have been included, in the account settled by the parties, making a balance in favour of Duplantier of $ 59,110.

BUT it is said, that at all events, interest must be allowed on the sums paid to Mayronne and Gravier—that Duplantier is subrogated to their rights and to this point is offered the authority of Domat.

To this, it is sufficient to answer that Duplantier was intimately acquainted with the situation of St. Pé: he knew exactly the extent of his means. The plantation of Mayronne is mentioned in the articles of co-partnership, and was in the contemplation of both parties: means of paying for it are pointed out. If the crops should not be sufficient, both parties were to come on with their funds: but, is it stipulated that he who advances, shall receive any interest from the other? Was it ever imagined by either? Certainly not.

BUT, interest must be paid, is it said, for Gravier's mortgage. Who urged St. Pé to make this purchase? Duplantier. Letter follows let-

ter, pressing him to close with Gravier. He writes " my means are abundant, if fortune fails to per- " secute me. Gravier's plantation must not escape " you. " Can we, for an instant, believe that it was ever contemplated that St. Pé was to pay interest? Upon this point, the Court have no doubt. The doctrine of subrogation has nothing to do with the case, and we are clearly of opinion that no interest is due.

IT is said the judgment of the Court below is erroneous, because it has not decreed a conveyance of the land and negroes.

ON this point, it is the opinion of this Court, that the agreement, of the 11th. of June, amounts to a partition of the estate. It was, before that period, holden jointly by the parties. The estate is severed by that act and each party holds his separate share, as partitioned by it.

WE are of opinion, that the District Court was right, in decreeing that whatever balance should remain in favour of St. Pé, after being put in possession of the land and negroes, should be paid in two yearly instalments, to run from the date of the judicial demand.

IT is ordered and decreed (errors appearing in the calculation) that this case be remanded to the District Court, with instructions to proceed to

East. District. July 1813.

KNIGHT vs. SMITH.

trial, for the purpose of ascertaining the amount according to the principles, established by this Court.

KNIGHT vs. *SMITH.*

The notary must write the will, with his own hand.

THE petitioner stated that John A. Smith, the defendant, had proven, and obtained letters testamentary on, an instrument purporting to be the last will of her deceased husband: whereupon, alledging the said instrument to be no will, being destitute of the formalities required by law, she prayed, that it might be set aside, and declared null and void. There was a verdict and judgment for the will, in the Parish Court of New-Orleans and an appeal was taken to the Superior Court of the late territory, and the record was removed, on the change of government, to the Court of the first District.

THE cause was there submitted to a Jury and at the trial, Narcissus Broutin, the notary before whom the will was executed, after producing the original, deposed that notes were first taken of the principal items of the will, by his clerk and in his presence: the notary not understanding the English language sufficiently well to write the will correctly, tho' sufficiently well to comprehend what was dictated. The notes, so taken, were extended on the notary's book, while he was

absent in an adjoining room, and the will was afterwards read by the notary to the testator, in the presence of three witnesses. The testator was then asked by the notary, in the presence of the witnesses, whether what had been read to him was his last will and testament and answered in the affirmative, and signed the same, in presence of the notary and the witnesses, who all signed, in presence of the testator, except one of the witnesses, who was then absent.

WHEREUPON, the counsel for the plaintiff required the Court, to charge the Jury and give its opinion that the will was null and void:

1. BECAUSE it had not been dictated to the notary, but to his clerk,

2. BECAUSE it was not written by the notary, but by his clerk,

3. BECAUSE it was first taken in notes, on a loose sheet, and afterwards extended on the notary's book,

4. BECAUSE it was not written in the very words, in which it was dictated,

5. BECAUSE one of the witnesses was not present at the time the will was dictated or written,

6. BECAUSE another, a fourth witness was not present, when the will was read and did not subscribe, till one year after.

THE Court, however, charged the Jury in fa-

East. District. July 1813.

KNIGHT vs. SMITH.

vour of the will and expressed the opinion that it was legally made, and the plaintiff's counsel took a bill of exceptions thereto.

THERE was a verdict and judgment accordingly, and an appeal was obtained to this Court.

THE record being brought up, *Hennen*, for the appellee, moved to dismiss the appeal, on the ground that it did not appear from any part of the proceedings, that the matter in dispute exceeded the sum of three hundred dollars.

Morel, for the appellant, moved for leave to file the appellant's affidavit, in order to supply the deficiency in the record.

THIS being allowed and done, the appellee took nothing by his motion.

Morel, for the plaintiff. All the solemnities, required by law, in the execution of testaments, are matters of strict law : and, the absence of any of them renders the instrument absolutely void. 1. *Febrero de escr.* 33. *Recopilacion l.* 2. *tit.* 4. *l.* 5. 1. *Domat* 333 *n°.* 22, *Code Civil* 233, *art.* 108. This principle has lately been recognized by this Court, *Pizerot & al*, vs. *Meuillon's heirs*, *ante* 114. In the execution of this will most the legal formalities have been omitted.

THE will has neither been dictated to, nor written by, the notary. Our statute requires that the will should be written *by the notary as it is dictated by the testator*, *Code Civil* 228, *art.* 92, that is to say, written word for word, from the very lips of the testator. Now it appears that the testator dictated to the clerk, that the notary having quitted the room, the notes which the clerk had so taken, were by him extended on the notary's book—so that, independently of the disregard of the formalities required by the law, which imperiously requires that the notary himself should write, instead of that paper, on which the words dropping from the mouth of the testator were received, and which, might be called his will, if it had been written by the notary, we have another instrument, extended, as we are told, by the clerk, out of the presence of the notary.

ONE of the witnesses was not present, at the time the will was dictated by the testator, and another was absent, when it was read to and subscribed by the testator. All the witnesses ought to see and hear the testator, 1 *Febrero de escr.* 18 *n°.* 6. *Code Civil* 92. According to the declaration of the notary, witnesses appear to have attended at the reading of the will to, at the signature of it by, the testator. The law, we have seen, requires they should be present, when he dictates his intentions. A will is void, tho' ap-

East. District. July. 1813.

KNIGHT vs. SMITH.

proved and signed by the testator, if it was obtained by suggestion, importunities, threats or besetting the testator. Persons *in extremis* may yield to those around them and be induced to gratify them. As a protection to their weakness and infirmity, the law denies its sanction to any instrument purporting to be a last will and testament, received by a notary public, unless he causes himself to be attended by witnesses at the time the testator imparts his intentions to him. It does not suffice that they should attend, at the signature of the will, (this is required to identify the paper) they must see and hear the testator speak and subscribe his will.

IN the present case, even the identify of the paper, is not proved by the legal number of witnesses : one of them appears to have been out of the way, when the will was executed.

LASTLY, this will must be set aside, because it clearly appears, from the very declaration of the notary, that it contains *more than was dictated*, by the testator. First, the clerk takes down, from the mouth of the testator, *notes of the principal items* of the will : afterwards these notes are extended, and a will is made out, composed, not doubt, of these and of such items as were, in the judgment of the clerk, less important, *not principal, but secondary.* The whole of the will does, not appear to have been dictated by the testator.

THE opinion, given by the District Judge, that the will was executed with all the formalities which the law requires, was, therefor, incorrect, and this Court is bound to reverse his judgment.

Hennen, for the defendant. The will was *dictated to, and written by, the notary*, in as ample and substantial manner, as the law requires.

THE testator dictated his intentions, the notary and clerk being in his presence and hearing. The notary, attending to hear the will dictated, cause and see it written, in the language of the code *as the testator dictated it*, and afterwards ascertained, that this was correctly done, by reading it over to him, in presence of the witnesses, who heard him declare the instrument his last will and testament.

THE notary's province in all this is purely ministerial. He is the mere instrument, by whose aid the will is effected. He is to be absolutely passive. He is to exercise no judgment, none even in the choice of the expressions. He is to write as the testator dictates, the particles *as* here denotes not the *time* but the *manner*. Now, there is not a clearer principle than *qui facit per alium, facit per se*. He who acts by another, acts himself. In every case, whatever; when a person, is to do a mere ministerial act, as to write or seal an instrument, he may cause it to be done by another, his fingers need not hold the pen, his hand needs not turn the skrew.

East. District. July 1813.

KNIGHT vs. SMITH.

THE difference between the nuncupative will by private act, and that by a public one, consists in the *receiving, and authenticating of the will:* this is a special trust, which must be *personally* executed. Like the taking of a deposition, which the Judge must himself cause to be sworn to and certify, tho' it may have been written, by his clerk.

THE *material items* viz. the *disposing* clauses were taken from the lips of the testator; afterwards those of style, the averment of his sanity, of his belief in a future state and the like, were added.

By the Court. This is a case, in which the Court has to pronounce on the validity of a will, which is said to be defective, in some of the formalities prescribed by law. Cases of this nature are always of importance, as they do not merely affect the interest of the parties to the suit, but are of general concern.

THE very ancient practice of bequeathing by will has been sanctioned by positive laws, in civilized countries: but, in order to prevent imposition and abuses, strict rules have been laid down, minutely and carefully defining the manner in which this right of bequeathing is to be exercised. At the same time, so anxious were Legislators to secure to individuals all possible means of disposing of their estate, in prospect of death, that they have established a variety of forms, providing for all contingencies among which the tes-

tator may select that which is for him of easier performance.

IN this country we may choose among these sorts of testaments. For those who can write, the olographic testament is commodious, safe, and unexpensive. For those who wish their will to remain secret until after their death, the mystic or sealed testament is provided. Those who cannot write or are unwilling to trust to their own capacity to make a testament, may resort to the nuncupative will : this latter sort is again divided into two : the nuncupative testament by public act, and the nuncupative testament under private signature. So that there is hardly any situation in life, where a person cannot make his last will according to one or other of the established forms.

BUT, if on the one hand, the law is on this subject abundantly provident, on the other, it requires a rigid observance of its rules : whatever may be the mode resorted to, *that* must be strictly complied with. For a testament being the *solemn* declaration of the testator's will, according to positive law, every formality required by law for the enacting of it, may be considered as a condition, without which the instrument is not complete. It is, therefore, on the compliance of these formalities alone, that the law is willing to recognize the testament as legal, and to suffer the established order of succession to yield to the will of the testator.

East. District. *July* 1813.

KNIGHT vs. SMITH.

LET us see whether, in this case, the requisite formalities have been observed. There are several objections to the validity of this will among which the most material appear to be 1. that the will was not written by the notary himself but by his clerk. 2. That one of the persons mentioned in the body of the instrument, as a witness to the will, was not present at the making of it.

I. WITH respect to the first, it has been contended by the appellee that what is written by the clerk of a notary ought to be considered as written by the notary himself: that the law which requires the notary to write the will, cannot mean that he is himself to hold the pen: that, according to universal custom, notaries employ clerks to write for them, and that what is thus written by these, under their order and inspection, is supposed to be written by themselves.

HOWEVER it may be, with respect to notarial acts in general, it certainly appears that something more than the usual attention of the notary is required in cases of testaments. If it be true that he may, on other occasions, employ the hand of his clerk to write for him, the law relative to the receiving of wills is and must have intended to be an express exception to that custom. If such had not been the object of the law there was no necessity of recommending to the notary to write the will. For, notarial acts, being those that are

made before a notary, reduced to writing by, or under his direction and rendered authentic by his signature, nothing more was necessary to render the nuncupative will a public notarial act than to provide that it should be received by the notary. Why then this further condition that it should be written by him.

IT is said that the words of a law are generally to be understood in their most known and usual signification, and that, according to this maxim when the law says that the notary shall write, it ought to be understood that he shall either write himself, or employ his clerk to write for him, as the custom prevails. But we think that this mode of interpretation would go farther and make this part of the law an utter nullity because it would leave the nuncupative will by public act, on the very same situation, in which it would have been without any such recommendation. If so dangerous a system of interpretation should obtain, few laws indeed would be able to resist its attacks. But the Court is not disposed to take such liberties with laws that are clear and significant, and is impressed with due respect for a maxim more applicable to this case than the other, viz. "That when a law is clear and free from ambiguity, the letter of it is not to be disregarded under pretext of pursuing its spirit." The law which makes it the duty of the notary to write the will is not only, clear in its expressions,

East. District July 1813.

KNIGHT vs. SMITH.

it is also clear in its object. The Legislature has been unwilling to trust any body else but the notary, with the sacred function of writing a will—a function which in unfaithful or negligent hands may be liable to abuse of the most serious and most dangerous nature. But, be that as it may, the law is such and must be obeyed. Should this be attended to with inconveniencies, the Court could not remedy it. It is, however, satisfactory to reflect that when no notary can be had, capable of writing, in the language of the testator, the will may be made before witnesses alone, so that no possible mischief can result from the strict observance of the law.

II. THE other material objection to the validity of the will is that P. S. Godefroy, one of the persons mentioned in the body of the instrument, as a witness, was not present when the will was dictated, nor when it was read.

THIS is certainly another serious imperfection of this will. For, altho', it seems that another witness was afterwards called in to supply the place of the absent one, it does not appear that this witness was at all present, at the dictating of the will, no does even the oral testimony, admitted to prove that he was present at the reading of it, agree with the letter of the instrument, which says that the will was read "in the presence of the above witnesses" that is to say Go-

defroy, Leroux and Magnol. Yet, according to the rules laid down in our code, which agrees in this respect with the Spanish law, the witnesses must be present, both at the receiving and at the reading of the will. They must, says *Febrero* " all at one and the same time hear the words " *from the mouth of the testator.* He is to de- " clare his will before them *verbally, clearly and* " *distinctly.*" Therefore, when two witnesses only have been present at the dictating of a will, when three were necessary, and when a third has been called in after the will was written, it cannot be said that the requisites of the law have been complied with. Neither can it be reconciled with the strictness of form required for the validity of testaments that one of the witnesses, named in the instrument as present, should have been absent, and another witness not at all mentioned should have been called to supply his place.

THE other objections raised against this will, tho' not without some weight, are not deemed of sufficient importance to be adverted to. But, we are of opinion, that a nuncupative will, by public act, must be in the hand writing of the notary himself, and that it must be dictated by the notary to the testator, in presence of the witnesses. Consequently, altho' there appears nothing in this case, but what is perfectly fair; the Court is bound to say, that his will is not valid in law.

East. District. *July* 1813.

SYNDICS OF BERMUDEZ vs. IBANEZ.

IT is therefore ordered, adjudged and decreed that the judgment of the District Court be reversed and that a *mandamus* issue to the Judge of the Court of probates, directing him to cancel and annul the letters testamentary granted on the will of John Browen, it being the opinion of the Court, that the said will is void. And it is further ordered that the costs be paid out of the estate of said Browen.

SYNDICS OF BERMUDEZ vs. *IBANEZ.*

If land be decreed to be conveyed, on payment of a sum, no rent is due till it be paid.

THE petition stated that the plaintiffs' insolvent was seized of a lot of nine acres of land, on the canal Carondelet, in the occupation of the defendant, that the defendant refuses to pay any rent, or surrender the lot, to the plaintiffs—the defendant pleaded the general issue, and there was judgment for him. The plaintiffs appealed.

THE statement of facts sets forth that the defendant had been in possession of the premises from the time of rendering the judgment, in a late territorial suit, on the ninth of June 1812, until the judgment rendered in this Court on the eighth day of May last, *ante* 2, 17, and the records of these judgments are annexed. Two witnesses deposed that the premises would rent for forty dollars per month.

By the Court. This suit is brought to recover rent for a certain lot of ground, on the Canal Carondelet, which the appellants state, in their petition to be unjustly withholden from them, by the appellee, and they claim a compensation for the use and occupation of said lot.

THIS property has been a subject of contestation, between the parties, in two actions already decided, one in the Superior Court of the late territory, in which a decree was made, that Ibanez, who possessed the premises, under a conveyance from Bermudez, should be bound to reconvey, on being paid a certain sum of money, found to be due to him from Bermudez, by the award of referees, and on failure of such payment the property was ordered to be sold, on conditions expressed in said decree : and it is from the date of this judgment, that the appellants claim damages for the detention of the property.

THIS Court is of opinion that Bermudez had no right to possess the lot, under the decree of the Court, except on complying with its order, on his part, which he has failed to do. The appellee has not yet received the money directed to be paid to him by the decree. The syndics can have no greater claim, than the person they represent : and, if Bermudez had no well founded pretentions to damages against the appellee, *they* can have none.

East. District. *July* 1813.

SYNDICS OF BERMUDEZ vs. IBANEZ.

IT is, therefore, ordered that the judgment of the District Court be affirmed with costs.

AT the close of this term, HALL, J. resigned his seat in this Court; having been appointed District Judge of the United States for the Louisiana District.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT. AUGUST TERM, 1813.

AGNES vs. *JUDICE.*

West. District. *August* 1813.

AGNES *vs.* JUDICE.

No appeal lies from an order, for the removal of a cause.

I. Baldwin moved for a rule to the Judge of the District Court of the fifth District, to shew cause why a *mandamus* should not issue, commanding him to allow an appeal, from a decision of said Court, removing this cause to the second District to be tried there.

THIS application arose from a decision made, under the second section of the act supplementary to the act to organise the Supreme Court of the State of Louisiana, and to establish Courts of inferior jurisdiction therein, which provides "that when "the Judge of any District Court shall have been "consulted, or employed as counsel, before his "appointment, to such office, in any suit,

West. District. *August* 1813.

AGNES *vs.* JUDICE.

" brought before him, it shall be lawful for either " party, to cause such suit to be transferred, be- " fore the *neighbouring District Court:* provided, " however, that the party wishing the exchange " shall claim such change in his petition, or " answer (as the case may be) and, in suits that " may have been brought previous to the appoint- " ment of the Judge, shall be claimed at the return " term, which shall be immediately transferred to " the most convenient neighbouring District, by " the clerk of the Court, and the expences, at- " tending such transfer, shall be paid by the party " claiming the same."

THE Judge, having been employed, as counsel for the defendant, an application was made by the plaintiff, to remove the cause to the next District for trial—after hearing the testimony taken, as to the most eligible District to send the cause to, the Court decided, that if should be transferred to the *second* District. From this decision the plaintiff prayed an appeal, alledging that the *second* was not the *most convenient neighbouring District.* The appeal was refused.

Baldwin in support of the rule.

IF appears, from the evidence taken in the Court below, in deciding on this order of removal, that the fifth District is more convenient than the second as to distance, the roads better, and the facilities of attendance by the parties much

greater in the former, than the latter district—these facts were incontestibly proved, not only by the evidence taken and filed with the petition, praying for the rule, but by a copy of a record also annexed to it—by which it would appear that several other causes, situated as this was in the Parish of St. Landry, were transferred to the fifth District and Parish of Rapides. The necessity and justice of this Court's interference is, therefore, obvious, and all that is necessary to shew to sustain the application made, is

1. THAT the decision is such a one as an appeal lies from :

2. THAT a *mandamus* is the proper remedy.

I. THE 11th. section of the act to organise the Supreme Court of the State of Louisiana, provides "that the final decisions and judgments, in civil actions, in any of the said District Courts, where the matter in dispute exceeds $ 300, may be examined, and reversed or affirmed in the Supreme Court." This clause provides for and gives an appeal from all decisions that are *final*, as to the Court where they are rendered, as well as to all those judgments that are *final*, as respects the cause which is the subject of examination. To construe it otherwise, would be to invest the Inferior Court with a power to nonsuit a plaintiff *ad infinitum*, from which decision no appeal could be had, as the judgment of nonsuit would not

West. District. *August* 1813.

AGNES vs. JUDICE.

be final in the cause. This judgment however was completely *final* in the Court of St. Landry—it put a termination to it *there*, which is sufficient to bring it, within the words of the act: but independently of this ground, the removal of this cause to an improper District, was in itself an act of dismissal, from which an appeal well lies. A party is not obliged to follow his cause to any other tribunal, but that which by the law he is compelled to do, to wit—*the most convenient neighbouring District;* and a decision, which transfers it to any other tribunal, is as much a dismissal of the suit, as a decree of the Court, expressly deciding so, would be. Were it otherwise it would be in the power of a Judge of an Inferior Court, as soon as a cause was commenced before him, to transfer it to the most extreme part of State, where the party could not follow it, except at an expense more ruinous to his interests, than his total failure in the pursuit of his demand.

THIS cause commenced in the western District, and, by the constitution and the law organising the Supreme Court, all causes commenced there should be decided in the appellate Court, sitting for the District in which they originated: the order of removal transfers this cause to be tried in the eastern District: and from the decision given, an appeal must be taken to the supreme appellate tribunal sitting for that section of the State. So that the cause is not only dis-

missed from the Court to which it belongs; but transferred from its natural and proper appellate jurisdiction.

II. IF the Court, adopting this reasoning, should think, that an appeal will lie from a decision, amounting to a dismissal of the cause, it will be easy to shew that a *mandamus* is the proper remedy to compel the Judge below to accord it—this writ, according to the practice in England and in the United States, is always that used to compel Inferior Courts to do any act, the nonperformance of which, creates an injury to the party claiming the benefit of it. See *Bacon's abridgment, vol. 4. (American edition)* 497, it is there defined "the established remedy, and every day made use "of to oblige Inferior Courts and magistrates to "do that justice, which they are in duty and by "virtue of their office obliged to do." If this then is a case, in which the Judge should have granted an appeal, his duty in according it was purely ministerial, and his failure to perform that duty, justifies this application, and demands the interference of this Court. He had in fact no more right, on the ground of judicial discretion, to refuse this appeal, than he would to reject a similar application on a judgment, rendered in his Court, for the sum of $ 2,000, on the pretext that the law had made his judgment final to that amount. *In all cases where the act of the Le-*

West. District. August 1813.

AGNES vs. JUDICE.

gislature gives an appeal, the duty of the Inferior Court in according it is purely ministerial. The judgment rendered here, it has already been shown is one, on which the party had right to obtain the re-examination of the Supreme Court, and the Judge having failed to accord the means for that re-examination the proper remedy is the writ now applied. 2 *Henning & Mumford*, 132 137 : 2 *Johnson*, 371 : 7 *ibid.* 549. It is therefore hoped that the rule may issue.

A. Porter against the rule.

IT is unnecessary to say any thing, as to the evidence taken to shew the impropriety of the original order of removal. That will come properly before the Court, if the appeal should be granted, and an examination of the merits gone into. At this stage of the proceedings, the only question is whether the rule to shew cause ought to issue or not. That it ought not, is endeavoured to be shewn, on the following grounds.

1. THIS Court has no power to direct a *mandamus*, the issuing of such a writ being an exercice of original, not appellate jurisdiction.

2. A *mandamus* never issues to compel an Inferior Court to pronounce a judicial decision, contrary to the opinion of the Court to whom it is addressed.

3. THE decision given here was not a final judgment, and by law no appeal lay from it.

I. THE second section of the fourth article of the constitution of this State, creating the Supreme Court, has provided that it shall have appellate jurisdiction only.

IF the granting of this application brings with it the exercise of original, not appellate, jurisdiction, it must of course be rejected.

APPELLATE judicial jurisdiction means, necessarily, the revision of causes commenced before some other tribunal and decided there. The re-examination of some matter, originating before some Inferior Court, on which judgment has been pronounced and brought to the highest Court for the discovery and correction of error. It may be safely laid down, as an axiom, that there can be no appellate jurisdiction exercised, if the cause has not been commenced, proceedings had on it, and judgment rendered in an Inferior Court—*Harding's* 509.

THE proceedings here will want, however, all those features, which mark and distinguish appellate, from original jurisdiction, they will be seen in truth to belong altogether to the latter.

So far from this being a revision, or re-examination, of a judgment, given in an Inferior Court, the proceedings will commence here. The rule to shew cause, why a *mandamus* should not be awarded, issues from this Court in the first instance. The party, on whom it is served, may come in and traverse it if he pleases. 4 *Bacon. A.*

West. District. August 1813.

AGNES vs. JUDICE.

Ed. 496 : 520, 3 *Blackstone* 110. Should issue be joined, the facts must be ascertained by a trial, as in a common case in the Inferior Court, *by a jury* or the Court, and on the allegations heard in this Court, *for the first time*, judgment must be pronounced. It is difficult to conceive what feature of original jurisdiction will be wanting here, or where any resemblance is traced in it to the exercise of appellate.

IN the Supreme Court of Kentucky, this question has been decided—under a clause in their constitution containing a similar expression to that which is to be found in our own—that tribunal has determined that the issuing of the writ of *mandamus* in any case, was an exercise of original, not appellate jurisdiction, and that such jurisdiction, being denied them by the constitution, they could not award one under any circumstance.

II. A *mandamus* never issues to compel a Judge of an Inferior Court to give a judgment, contrary to his opinion—this writ, when directed to inferior tribunals, will be always found to have issued under the idea of some default; as where a ministerial officer will not do his duty, or the Court refuses to pronounce judgment. 1 *Wilson* 281, 2 *Espinasse* 668. But never to direct that Court what judgment to give—in this case, the Judge has decided that in his opinion no appeal

should be granted: and this Court has no authority to direct him to give any other decision. In the case of the *United States* vs. *Judge Lawrence*, 3 *Dallas* 42, an application similar to this to compel the Judge there, contrary to his opinion, to grant a warrant to apprehend captain Barré, was unanimously refused, on the ground, that the Judge was in the exercise of a judicial authority, in deciding whether such a process should issue or not; and that, that Court had no power to direct him how to decide—in a more modern, and still more analogous case, *the commonwealth* vs. *the Judges of the common pleas of Philadelphia*, 3 *Binney* 273—a motion was made for a rule to shew cause, why a *mandamus* should not issue to the Judges of the common pleas, commanding them to *reinstate an appeal they had dismissed.* The application was refused on the same ground, that the Supreme Court of the United States in the case of Judge Lawrence determined not to interfere.

III. BUT should the Court decide that it possesses the power to issue a writ of *mandamus*, in any case, and to a Judge to do a judicial act, still the Judge below acted right in refusing the appeal, and this Court ought not to interfere—The 2d sect. of the act organising the Supreme Court &c. provides, " that the *final* decisions and judg- " ments in any of the District Courts may be

West. District. *August* 1813.

AGNES vs. JUDICE.

" re-examined and reversed or affirmed in the " Supreme Court." To make this judgment one from which an appeal ought to have been granted, it should have been shewn to have been a *final* one—so far from it, however, that on examination it appears to be nothing more than an interlocutory order; tranferring the cause to an other tribunal, *there* to be finally decided on. This order so far from making a *final* decision of the cause, decides nothing about it, leaves the merits untouched, and merely decides that another tribunal shall examine and pronounce on it. Whatever decision the Court to which it is transferred, may give, on a *final* hearing of the parties, an appeal will lie from it. So that if the Court should now support this motion, that an appeal may be taken, from an order like this, it will virtually decide that there may be two final decisions, in a cause, from which an appeal may be had.

Baldwin in reply:

IF this Court has not the power, to compel an appeal, in a case where the law gives one, it will be completely giving the Inferior Courts a superior and controuling power over the supreme tribunal of the State, and will cause its jurisdiction to be exercised at their discretion: a doctrine, so fraught with dangerous consequences, could not excite a moment's apprehension of being favourably viewed by the Court. The same ans-

wer suggested itself to the second objection, made by the opposite counsel, that the removing of that cause was a judicial act, and that the Judge below was the proper person to decide on the propriety of giving an appeal and not this Court—this reasoning, if carried into effect, will equally vest the jurisdiction of the supreme tribunal in the District Courts, and enable them to give or withhold jurisdiction, at pleasure.

As to the decision not being a final one—it was evident the act of the Legislature contemplated giving an appeal from the final decision of the Court, in which the cause is depending, as well as a final decision of the cause itself. But that independent of that—this cause was clearly dismissed, not removed in conformity to the act and that consequently an appeal ought to have been granted.

THE Court requested a further argument at next term.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT. SEPT. TERM, 1813.

AGNES vs. *JUDICE.*

West. District. *Sept.* 1813.

AGNES vs. JUDICE.

THE counsel, on each side, declined any further argument.

No appeal lies from an order, for the removal of a cause.

By the Court. This case was pending, before the Superior Court of the Territory of Orleans, in the fifth District, when the change from a territorial to a state goverment took place, in this country. Among other inconveniencies, attending the establishment of new tribunals, it was not improbable, that some of the Judges would be taken from the bar, and might consequently be called upon to decide cases, in which they had been formerly employed as counsel—to provide against that contingency; it was enacted that "when the Judge of any District Court shall

" have been consulted or employed as counsel, " before his appointment to such office, in any " suit, brought before him, it shall be lawful for " either party to cause such suit to be transferred " before the neighbouring District Court &c. "

THE Judge of the fifth District of the State being so situated, with respect to this case, application was made to have it removed, according to the above provision—he thought fit to send it before the Court of the second District; but the plaintiff alledging that this was not the " *most convenient neighbouring District* " within the meaning of the law, claimed an appeal from this order, and the Judge having refused to admit that appeal, he applies to this Court, for a *mandamus* to compel him to admit it.

AGAINST this the defendant contends principally, 1. that this Court has no right to issue any *mandamus*; 2. that this is not a decision from which any appeal can lie.

I. THE first ground relied upon, by the defendant—consists chiefly by in this—that this Court has been vested with an appellate jurisdiction only, and that a *mandamus*, being a writ of original jurisdiction, the Court has no right to issue it in any case.

WITHOUT examining whether the writ of *mandamus*, according to the principles of the English

West. District. *Sept.* 1813.

AGNES vs. JUDICE.

law, must in every case be considered as an act of original jurisdiction (a question which is by no means very plain) and without entering into an investigation of the numerous authorities which have been quoted, on both sides, the Court is satisfied of one broad principle, which is that the conferring of a function carries with it, all the powers necessary to exercise that function and that, therefore the constitution has not given to this Court an appellate jurisdiction, without the necessary authority to exercise that jurisdiction with effect. If this be correct reasoning, this tribunal must of course have the power to compel the others to send appeals before it —for otherwise, these absurd consequences would follow, that there would be no remedy, when the Judge of an Inferior Courts refused to grant an appeal, and stay execution, in the cases provided for by law, and that this Court would have a jurisdiction to be exercised at the pleasure of the others. The idea of Superior Court of appeal reduced to silence and nullity, whenever the Inferior Court would not think fit to give it permission to act, is so ridiculous that it is deemed useless to dwell at all upon that part of the subject.

AFTER having recognised that the authority is vested in the Court, we are next to enquire *how* it is to be exercised—upon this point we find that the Court, far from being shackled by form, is left in general words to use its discretion,

" the Supreme Court shall have power to make " and issue all mandates, necessary for the exer- " cise of their jurisdiction, over the inferior " tribunals, agreeably to the principles and max- " ims of law. " One single restriction (and a very unnecessary one) is made to wit: that the mandates be issued *according to the rules and maxims of law;* not indeed the rules and maxims of the common law of England, but the rules and maxims of the law of this State; according to which a Court of appeals within the line of its jurisdiction, could issue, under the name of *provisiones ordinarias*, all mandates necessary for the better administration of justice by its inferiors, whether to direct them *how* to proceed, to prohibit them from proceeding contrary to law, to compel them to admit an appeal and send up the record, or such like. As for the particular order for compelling the admission of the appeal, it would not issue in every case where an appeal was claimed, but only in those where it was recognized that an appeal ought to be granted, according to law.

THE name of *mandamus*, under which this is applied, does not alter the principle. The common law names in judicial proceedings have naturally been adopted in a practice which is carried on in the English language, but they ought to be considered rather as a translation of the names formerly used than as emanations from the En-

West. District. Sept. 1813.

AGNES vs. JUDICE.

glish jurisprudence—the words *mandamus*, *procedendo*, *certiorari*, *prohibition* &c. sometimes employed in our practice, may be good equivalents for *incitativa*, *evocacion*, *inhibicion*, &c. But their adoption as words can, by no rule of law, or common sense, be considered at having introduced the English practice itself. Therefore, without regard to the mere appellation, used by the appellant in this case, the Court would feel authorised to grant her the mandate which she sollicits, if this case should be one of those in which an appeal ought to have been admitted according to law.

II. UPON this point but little enquiry will be found necessary : for it has already been decided generally—that appeals to this Court can be claimed only from final decisions and judgments, conformably to the 11th. sec. of the " Act to organise the Supreme Court and to establish Courts of inferior jurisdiction, " and that, as to what is to be considered a final decision, each case must speak for itself. Therefore, in order to make this decision come within the purview of this general rule, it should be recognised that the order complained of is in the nature of a final decision. But it appears to this Court that far from bearing any resemblance to a final decision, this order is no decision at all. This case was pending in one District and has been ordered to be removed to

another. What is the amount of that order of removal? What are the judicial features which can be discovered in it? It has not altered the situation of the suit; for it is to be removed *in statu quo.* It has not decided any thing, for whatever questions it offers, remain untouched—this is a mere rule of Court, and if it really was the intention of the Legislature to give the direction of these removals to the Judge, not to the clerk as the wording of the law would seem to imply, we must say that they are acts which savour more of the ministerial, than of the judicial, functions. But in whatever light they be considered, they certainly appear to be such acts as the Court of appeals should not interfere in. The jurisdiction of this Court extends over all the State—wherever this case is tried, it will be in the power of the suitor, if dissatisfied with the judgment, to bring the cause before this Court; and in such case it must be sent to the District of appeal to which it originally belonged; so that no possible injury can result to the parties.

IT is, therefore, ordered that the rule be discharged.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT. OCTOBER TERM, 1813.

3m 188
105 710

CAVELIER & PETIT vs. *COLLINS.*

West. District. *October* 1813.

CAVELIER & PETIT *vs.* COLLINS.

By the Court. In this appeal, which is from a judgment rendered by the Judge of the fifth District, it is agreed by the counsel of the parties that the decision of the Judge below together with the documents accompanying the record, contain all the facts relating to this suit, and are taken and considered as a statement of facts.

Plaintiffs book no evidence. *Testis unus, testis nullus.*

THE action was originally brought for $ 614, 13, the amount of a note given by John Collins, the ancestor of the defendants, who represent him as heirs; and also for ten per cent. interest on that sum, from the time of its becoming due, until the recovery and payment of the debt. The amount of the note not having been contested, it is agreed that the judgment has been properly ren-

dered for the principal; but it is contended that the District Court has erred in not giving judgment for the interest, as claimed by the plaintiffs, in their petition, and from that part of the judgment they appeal.

IN reversing the decision of inferior tribunals, the great, and primary object, is to see that justice may be done; or that the law be not mistaken and violated. And it is certainly of little consequence, by what mode of reasoning the judge forms his opinion; provided that taken entire, it comports with the law, and due justice to the parties litigant. It is, therefore, useless in the present case, to scrutinise the principles on which the Judge below has come to the conclusion, and given the judgment complained of by the plaintiffs; if on other principles and reasons, it shall be found to be according to law.

THE counsel for the appellants insists, on two principal grounds for the recovery of the sum demanded.—1. Ten per cent, as by contract between Collins and them in his life time, 2. interest, as a reasonable compensation, for the risk and delay of payment.

I. To establish this claim to interest, under a contract at the rate of ten per cent, the only evidence offered is found in exhibits from the books of accounts of the appellants, and the deposition of one witness. We are of opinion the District

West. District. October 1813.

CAVELIER & PETIT vs. COLLINS.

Judge was right, in considering the books of accounts as no evidence in themselves; for they amount to nothing more than the declaration of the party, in his own favour, which unaccompanied by other circumstances is never received as proof of any fact.—Passing in silence the opinion of the Judge below, that to permit oral testimony to prove a convention to pay interest, on a sum of money secured by an instrument in writing, would be a violation of law, as authorising proof of an oral agreement, different from the written, let us examine, and see if the statement of facts offered evidence sufficient, of any covenant, contract, or agreement on the part of the deceased, John Collins, to pay the interest demanded by the plaintiffs in the original action, and now the appellants before the Court. The counsel insists, and we think with propriety, that this case must be governed and determined solely by the Spanish laws. A fundamental principle of the Roman law, which may be considered as the basis of the Spanish, as it relates to testimony, is, "*testis unus est testis nullus;*" and by the laws of Spain it will be found that in no case does one witness make full proof of any fact or contract, except in the case of the King or Prince acknowledging no superior, as stated in the *Curia Phillipica, page* 62, *tit. Pruebas, sec.* 23*d.* referring to a law of the *Partidas.* Considering then the extracts from the book of accounts, as no evidence;

the only proof that John Collins agreed to pay interest on the amount of the money sued for, is the testimony of Mrs. Collins, and that not to any positive agreement between the parties, but only to his acknowledgment and confession previous to his death. We have endeavoured to discover whether any distinction is made in the Spanish laws, with regard to the proof of confessions, and the proof of contracts themselves; and by the authority before cited in *page* 59, same title *sec.* 6, it will be found that two witnesses at least are required, to make proof of any extrajudicial confession. The agreement then to pay interest has not been proven, in such a manner as the Spanish law would require; and if their laws are to govern this case, the Judge was right in refusing to adjudge it to the plaintiffs.

BUT we are called to consider, how far the act of the Legislature, authorizing the proof of facts by one witness will bear on this case. The Court is not able to comprehend, why the mode of proof, authorised by that act, should form the rule of decision in contracts made under the Spanish government, in preference to the provisions of the Civil Code, which has subsequently emanated from the legislative authority of the country, is the latest law on the subject, and opposes the pretension of the appellants.

II. IN support of the second ground taken by

West. District. *October* 1813.

CAVELIER & PETIT *vs.* COLLINS.

the appellants' counsel, he relies on some expressions in *Febrero*, wherein it is stated that on account of danger, or rational fear of losing the principal debt, or where there is difficulty in recovering it, because the debtor or borrower is poor, or of bad faith, or very much in debt; in such cases the creditor may recover interest proportionably to the risk of losing—to be settled by the judgment of skilful persons: yet, says *Febrero*, some authors are of a different opinion. Admitting the doctrine to be sound law, the appellants have not brought themselves within either of the cases provided, for they have not shewn that the deceased, John Collins, was poor, that he owed many debts, or that he was of bad faith; unless we now determine that a delay of payment amounts to a proof of bad faith, which would go to give interest in all cases, from the period at which the debt became due, even when no agreement to that effect existed. This would be in opposition to the uniform decisions of the late Superior Court of the Orleans Territory, which we believe to be well founded in law.

LET the judgment of the District Court be affirmed, with costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. NOVEMB. TERM, 1813.

GENERAL RULE.

East. District. Nov. 1813.

THE first Monday of the Months of January, February, March, April, May, June, July, August, September, October and December, and the third Monday of November, shall be the general return days for all writs and processes issuing from this Court and for all appeals from the respective District and Parish Courts allowed by law: but, the Court may direct a writ to be made returnable on some other day, as the nature of the case may require.

*** Several cases were argued, but none determined during this term.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. DECEMB. TERM, 1813.

DUPLANTIER vs. *RANDOLPH.*

East. District. *Dec.* 1813.

DUPLANTIER vs. RANDOLPH.

THE plaintiff claimed payment of certain lots sold by him to the defendant.

THE defendant resisted the demand, on two grounds. 1. That at, and prior to, the execution of the deed of sale, a mortgage existed on the lots, as forming part of the fauxbourg St Mary, in favor of Madam Delor, of which he had no notice or knowledge, and which remained still unextinguished. 2. That the lots were sold agreeably to the plan of said fauxbourg, deposited by the plaintiff, in the office of a notary—and the said plan had been departed from, to the prejudice of the defendant, and the diminution of the value of the said lots.

Attorney in fact an admissible Witness.

THE defendant insisted on the following facts, which he submitted to the court, as proper to be ascertained by the jury.

1. THAT the lots were warranted, by the vendor, free from all legal incumbrances whatever.

2. THAT at, and prior to the execution of the deed of sale, a mortgage existed on the fauxbourg, of which these lots made a part, executed by the vendor in favor of Madam Delor, for $ 84,000, of which no notice was given to the defendant, and which remained uncancelled.

3. THAT the lots were sold, according to a plan of the said fauxbourg, deposited by the vendor, in the office of the notary, in whose office the deed was executed.

4. THAT by said plan, certain advantages were held forth to the purchasers, of which, from its inexecution in some parts, and violation in other, the defendant has been deprived, to the great diminution of the value of said lots and his prejudice.

5. THAT the plaintiff had notice and knowledge of the violation of said plan, and permitted and authorised the same.

THE District Court decided that none of the above facts, except the two last, were proper or necessary to be submitted to the jury, and accordingly the three first were striken out.

East. District. Dec. 1813.

To the opinion of the court, in this respect, the defendant's counsel excepted.

DUPLANTIER vs. RANDOLPH.

THE case being put to the jury the plaintiff introduced Pierre Foucher, as a witness, who being sworn on his *voir dire*, said that he was the agent and attorney in fact of Madam Delor, the vendor of the plaintiff, and that he had been also, so far the agent or attorney of the plaintiff, as to be authorised to receive the money due on the two lots in the petition, to be paid over to his said constituent, Madam Delor: but that the authority he derived from the plaintiff had ceased, prior to the institution of the present suit—that if judgment should be rendered for the plaintiff, the money thus recovered would come to his hands, as agent and attorney in fact of Madam Delor, and that on the payment of it over, he should consider himself entitled to charge a commission thereupon against the said Madam Delor, and should thereafter charge the same, or not, as he might see proper.

WHEREUPON, the defendant objected to the said Pierre Foucher being sworn in chief, but the objection was overruled and an exception taken thereupon to the opinion of the court in this respect.

THE defendant, in putting his case to the jury, stated the first ground of his defence as laid in his

petition and produced and read the mortgage granted by his vendor, the plaintiff, to Mad. Delor, and was endeavoring to shew to the jury, that he was not bound to pay the purchase money, until the extinguishment of the mortgage thus given by his vendor to Madam Delor, and also to shew and deduce a want of notice of said prior mortgage, when the court refused to permit the jury to be addressed upon either of said grounds, being of opinion that these matters appeared of record, and were not proper for the finding of the jury.

To this opinion the defendant excepted.

He next produced, and offered in evidence a petition, presented by the plaintiff, to the Superior Court of the late territory for the first district, praying a meeting of his creditors, with the schedule of his property thereto annexed, in order to prove thereby the failing circumstances of the plaintiff, and the risk the defendant was in, if he paid to him the two instalments due on the lots, before the extinguishment of the prior mortgage existing thereon.

The Court rejected the evidence, expressing its opinion that it was immaterial, as the plaintiff's insolvency could not affect the validity of the payment.

To this the defendant excepted.

East. District. Dec. 1813.

DUPLANTIER vs. RANDOLPH.

THERE was a verdict and judgment against the defendant, who appealed.

By the Court. This cause is to be decided on certain exceptions, taken to opinions delivered by the Judge of the first district, in the course of the trial, before him. The suit was originally instituted, by the appellee against the appellant, in the late court of the parish and city of New-Orleans, under the late territorial government, for the recovery of the price of certain lots, purchased by the appellant, who being dissatisfied with the judgment, appealed to the late Superior Court of the Territory of Orleans and on the change of government, the cause remained to be determined by the court of the first district.

THE first exception is to the decision of the judge below, in refusing to suffer the appellant to submit facts to be found by the jury; a right claimed under the sixth section of the act of the legislative council, regulating the practice of the late superior courts, which remains unrepealed and is still in force. It appears that all the requisitions of that law had been complied with by the party proposing to submit the facts to the jury, and that the Judge was rightly called upon, to determine whether they did, or did not, arise out of the pleadings.

We are of opinion, that the three first facts are as much within the pleadings, as the two last, and that they ought to have been allowed to go to the jury, either to have been found, separately and severally, as the law directs, for the purpose of enabling the court to render its judgment or decree, or, if the jury, as the law authorises them to do, choose to find a general verdict, determining the law and the facts, they ought to have been permitted to take them into consideration, as constituting the principal ground of the appellant's defence, and might have had great influence on their decision. It is certainly improper, in any case, to withhold from juries, called upon to determine disputes between suitors, any fact or circumstance, which may lawfully be allowed to them for examination and which may influence their verdict. This court is, therefore, of opinion that the district judge erred, in striking out the three first facts tendered by the appellant, or, which amounts to the same thing, in not suffering them to be argued on by his counsel and considered by the jury.

As to the second exception, to the opinion of the judge below, in admitting Foucher to be sworn and examined as a witness, we think it correct. It does not appear that he was interested in the event of the suit, in such a manner as to render him incompetent.

East. District. Dec. 1813.

DUPLANTIER vs. RANDOLPH.

THE third and last exception is to the opinion of the Judge, in not allowing the appellant to give in evidence to the jury a petition of the appellee to the Superior Court of the Territory of Orleans, praying a meeting of his creditors, intending thereby to prove that he was in failing circumstances. This court thinks that the district judge did not err, in rejecting this testimony; believing, as he did, that it is immaterial, as, until a final surrender and appointment of syndics, it could not affect the appellee's right to recover.

IN the present situation of the cause before us, we cannot regularly notice what may be the legal effect of the incumbrance, existing on the lots purchased by the appellant, and created by the mortgage of the appellee to Madam Delor, the original proprietor of the land, on which the faux-bourg is laid out; but the judge of the district having erred in not permitting the facts, as drawn up by the appellant to go to the jury, it is ordered by this court, that the cause be remanded to the said district court, there to be again tried, with directions to the Judge to allow said facts to be submitted to the jury for their consideration and finding.

SYNDICS OF HELLIS vs. *ASSELVO.*

East. District. *Dec.* 1813.

SYNDICS OF HELLIS *vs.* ASSELVO.

Statement of facts must be made, before judgment below.

3m 201 47 181

By the Court. This is an appeal from a judgment of the parish court of New-Orleans, rendered, on the 1st of August last, on a general verdict, found in favour of the defendant, the present appellee.

IT appears that when the record was sent up the statement of facts required by law was not annexed to it: but that, subsequently, viz. on the 24th of November, a statement of facts was made and signed by the parish judge.

IT has been alleged by the appellee that this statement of facts is inadmissible, because the act to organise the supreme court and to establish courts of inferior jurisdiction, requires such statement to be made before the judgment of the inferior court, and that this indispensable part of the proceedings being wanting, the appeal ought consequently to be dismissed. On the other hand, the appellant has contended that the words of the law are not so restrictive, but only require the statement to be made, at any time before the judgment of this court.

THIS being a question of general practice, very interesting to suitors, and the decision of which may have considerable influence, on the administration of justice, the court bestowed on it a most se-

East. District. Dec. 1813.

SYNDICS OF HELLIS vs. ASSELVO.

rious attention: but, if after the judgment which they are about to give, some of the inconveniences, attending the present mode of proceeding, still remain, the remedy must be sought somewhere else.

THERE appears, indeed, at first view to exist some ambiguity of phraseology in the eleventh section of the judicial act, which treats of this subject. But a closer examination of it, and a due regard for the principles on which it is predicated, will remove the doubts which have occured.

THE intention of the framers of our constitution, and of the legislators, who have organized the government, under it, has evidently been to vest this court, with such jurisdiction, as would enable it to revise causes, not in part, but in the whole. In order to do that, it was necessary that a complete record should in each case, come before it. This could be easily done, with respect to so much of the case, as was exhibited in writing, before the inferior court. The difficulty was to establish a convenient mode, of laying before the court of appeals, such parts of the evidence as had been received from the mouths of witnesses. In a country, where the trial by jury requires the witnesses to be produced personally in court, the recording of this testimony, for the use of the court of appeals, could be done only in

one of two ways. The first, and no doubt the safest, was to have all the testimony reduced to writing in open court; the other, to cause an abstract of the material facts of that testimony to be drawn. The legislature apprehensive, probably, of the infinite trouble and waste of time, which would attend the first of these two modes, gave the preference to the second, as of a more easy and expeditious performance. But, at the same time they provided, that the abstract of that testimony should be made, at any time before judgment. This recommendation is for some purpose. But what can that purpose be, unless to secure the recording of the facts, before the recollection of them can be lost? And how will that object be attained, if the statement of facts is made at any time before the judgment of the Supreme Court? Months, nay years, may elapse between the judgment of a case in the inferior court, and the revision of it in the court of appeals. Shall the fate of a cause, upon which will sometimes hang the whole fortune of the party, rest upon the frailty of human memory—upon the memory not of many, but of a solitary individual before whom continually passes a series of business, which must have the effect more or less to obliterate one another in succession? Would it be consistent with prudence and justice to trust any cause to the hazard of such recollection, when we all know that the mutilation of one single fact

East. District. Dec. 1813.

SYNDICS OF HELLIS vs. ASSELVO.

may ruin the best of claims. Surely not: and that is the evil, which the legislature has provided against, by ordering the facts to be recorded at any time, before the judgment of the inferior court.

AGAIN, suppose the Judge of the inferior court die, or resign, before the statement of facts is made, what is to become of the cause? Shall it be tried a new, after judgment, or shall the appeal be dismissed for want of that statement?

IN whatever light, the subject is considered, it is evident that the law requires the statement of facts to be made before the judgment of the inferior court, whilst every fact is fresh in the memory of the Judge and of the parties; while in case of doubt the witness may be had to explain his testimony, and while the same Judge, who heard the cause, occupies the bench of the court, where the judgment is given. The making of that statement before judgment may, indeed, be troublesome and inconvenient; but, certainly, much less than reducing to writing all the testimony, for which it is a substitute. Besides, the inconveniency is considerably lessened, by the facility which the law gives, of making the statement at any moment, before the signing of the judgment; at which time only the judgment can be considered as complete.

It is, upon the whole, the opinion of this court, that they cannot take cognizance of an appeal, unless the statement of facts is laid before them, or unless it may be made appear to them that the record contains all the facts of the case—that the statement ought to be made at any time before the judgment of the inferior court is actually signed, that a statement made subsequently, unless by consent of the parties, is inadmissible.

It is therefore ordered and decreed that the appeal be dismissed.

SYNDICS OF WILLIAMSON vs. *SYNDICS OF PHILLIPS.*

Syndics of an insolvent can only become creditors of the estate by paying the debts.

By the Court. This is an appeal from a final judgment, rendered in the court of the first district, and brought before this court, on a statement of facts, which is in substance as follows :

Phillips failed in 1808. Williamson and Johnson became his syndics. At the time of his bankruptcy, the bankrupt owed a large sum to the revenue of the U. States, on Custom-House bonds to which these two persons were sureties. The bankrupt, previous to his failure, had placed in the hands of Johnson, certain merchandize, to secure him and the said Williamson against the bonds, and also for the purpose of securing to Johnson

East. District. Dec. 1813.

SYNDICS OF WILLIAMSON vs. SYNDICS OF PHILLIPS.

the payment of certain debts, due to him, in his individual capacity. When the Custom-House bonds became due, and payment was about to be inforced, it appears that Johnson refused to permit the goods in his possession to meet it, unless Williamson would agree to secure him from any deficiency that might arise in paying off the bonds, and also satisfying Johnson's individual debt, by placing in his hands certain goods for this purpose. Johnson finally took up the Custom-House bonds (which were a priviledged debt) by raising money on his own credit, and it was afterwards allowed to him by Phillips' creditors. The merchandize which he held, belonging to the estate of the bankrupt, was sold, and the proceeds appropriated for the benefit of Phillips' creditors. And here, it is proper to remark that the account of sales exceeded the debt, due on the Custom-House bounds.

AFTERWARDS, Johnson sold the goods placed into his hands by Williamson, in payment for which there appears to be a deficiency, by bad debts. To receive the sum thus deficient the syndics of Williamson brought suit in the District Court for the first district, and obtained a judgment, which we think erroneous.

THE Judge below was wrong, in considering the deposit of goods, made by Williamson with Johnson, as a loan to Phillips' creditors. Being

both syndics for the same person, it is, by no means clear, that they could become separate and distinct contracting parties, in any thing which related to the administration of the bankrupt's estate. But, independently of this consideration, the very terms of the agreement between them, shew that it was intended solely for the benefit of Johnson, and that, only on a contingency which never did happen, viz. the insufficiency of the sale of Phillips' goods to meet the payment of the Custom-House bonds. For, as to Johnson's private debt, nothing appears in the statement of facts.

If then, the transaction cannot be considered, as a loan to Phillips' syndics, may it be viewed as an advance made by one of them, for the benefit of the estate? Syndics, appointed to an insolvent debtor, represent both him and his creditors: the debtor, to collect debts due to him, and the creditors to hold the estate of the insolvent for their benefit, to be distributed as the law requires. Perhaps, they may have it in their power to make advances for the debtor, but this could only be in discharging his debts. For, until these are paid, he cannot hold any thing, except to the use of his creditors. If, therefore, the syndics advance money or goods, for the benefit of an insolvent's estate, in paying his debts, perhaps the only effect the advance could have would be to subro-

East. District. Dec. 1813.

SYNDICS OF WILLIAMSON vs. SYNDICS OF PHILLIPS.

gate them to the rights of the creditor whom they had paid. In strict pursuance of law, the administrator of the estate of an insolvent debtor can pay nothing, except by order of court. There are certainly not maxims of laws, no principles of justice that will authorise the syndics of an insolvent debtor to throw their own goods into the mass of his estate, sell them on credit, take to themselves all the benefits of the good debts and make the estate responsible for the bad.

FROM the best view we are able to give to this subject, we are of opinion that Phillips' syndics, Johnson cannot be considered as having represented, and acted for, the estate in this transaction, but must be viewed as having acted in his own individual right and capacity. As an additional proof of the correctness of this opinion, we find that in October 1809, eighteen months after Phillips' bankruptcy, he applied by letter to Meeker, Williamson & Patton, to know how he should dispose of a part of the goods still remaining in his hands, and they, in their answer recommend to him, to do the best he could for all concerned: not in any manner disclaiming their right and control over them.

IT ordered that the judgment of the District Court be reversed and cancelled, and we do further order judgment to be entered for the defendants, the appellants, with costs of suit, both in this and the District Court.

KENNER & AL. vs. *MORGAN.*

East. District. *Dec.* 1813.

KENNER & AL. vs. MORGAN.

Sheriff seizing property, on which a third person has a lien, is not personnally liable.

By the Court. This was a suit brought by the appellees against the appellant, Sheriff of New Orleans, to recover from him the amount of certain advances made by the plaintiffs, for the account of the owner of certain goods, which had been consigned to them, but were seized, in their hands by the defendant, on a writ of attachment, issued by the court of the first district, at the suit of the supposed owner of said goods.

THE Plaintiffs have obtained a judgment against the said Sheriff *personnally*, for the amount by them claimed, and from that judgment the defendant has appealed to this court, alledging that he cannot be liable personnally, for the sum due to the plaintiffs, but ought to have been directed only to pay it to them, out of the proceeds of the goods, when sold.

THIS suit is not one of those which are brought against a Sheriff, for having seized property not belonging to the person sued. In such cases, the real owner, or some person in his name, comes forward and claims restitution of the specific property, or if it cannot be had, then of its full value, with such damages as may have accrued to him, in consequence of such wrong seizure. Here, no owner claims restitution. The property seized seems to have been conceded to belong

East. District. Dec. 1813.

KENNER & AL. vs. MORGAN.

to the person against whom the attachment was issued: for the consignees, instead of praying restitution, come forward, in their own name, not to recover the goods, nor their value, but the amount of their own account, against the owner of those goods.

How such a suit could be called a suit for a trespass, and be considered as sounding in damages, is not to be conceived. The petition does not support such an assertion. The consignees, indeed, were so far mistaken as to consider the Sheriff as personnally liable for the amount of their advances: but, at the same time, they shew that they have no pretentions to receive any thing else than that precise amount. The truth is that the plaintiffs ought not to have sued the Sheriff at all: but, simply to have intervened in the suit brought by the attaching creditor and there have asserted their privilege against him. The ranks of both debts would have been then fixed between the proper parties: the money for the satisfaction of both would have been made by the Sheriff: and the proceedings would have been regular.

THE form of the present action is certainly vicious, and should we be bound by strict rules of practice, the whole suit ought to be annulled; but, believing that the provisions of the law, which permit this court to attend only to the rights of the cause, may be extended to a case of this nature, and unwilling to put the parties to the

trouble and expense of another suit, whenever it can be avoided, we will take into consideration the merits of the cause, and endeavor to render such a decree as may render justice to all persons interested in it.

THE admission of the parties and the statement of facts establish sufficiently that the plaintiffs were advised by Moses Austin, that his son, Stephen A. Austin, was coming on with an adventure of shot to New-Orleans, and were requested by him to give to his said son any pecuniary assistance he should stand in need of. It further appears that the said shot was consigned to them, and that they did really advance to Stephen A. Austin, under the responsability of his father, the sum by them claimed. It is not disputed that they had a right to be reimbursed by privilege, out of the proceeds of the shot consigned to them, whether it belonged to Moses, or to Stephen A. Austin, for all monies advanced for the expenses of said adventure, and the finding of the jury, against the holder of the shot, amounts to an acknowledgment that the advances mentioned in the account of the appellees were all of that nature.

IT is, therefore, decreed that the judgment of the court of the first district, making the Sheriff of the Parish of New-Orleans personally liable to

East. District. *Dec.* 1813.

CLARK'S EXECUTORS vs. FARRAR.

the payment of the sum, awarded in favor of the appellees, be reversed: and this court, proceeding to render such a decree as the said court ought to have rendered, does order and adjudge, that the said sum be paid to the appellees, by the said Sheriff out of the proceeds of the shot by him seized in their hands: to which effect the said Sheriff shall sell so much of the said shot, as may satisfy the said claim. And inasmuch as the said appellees have mistaken their legal remedy, for obtaining the payment of their account, it is further ordered that they do pay the costs of this suit, as well in the inferior court as in this.

CLARK'S EXECUTORS vs. *FARRAR.*

If the appeal be dismissed, by consent, proceedings are to be had, as if no appeal had been taken.

By the Court. In this case the appeal having been dismissed, by consent of both parties, the appellees, the plaintiffs below, applied to the Judge of the District Court, praying that he should suffer the execution of his judgment to proceed, and the District Judge having refused so to do, a motion has been made in this court, for a rule on him to shew cause why a mandate should not issue ordering him to have his judgment executed.

IT appears that the difficulty, which has arisen, on this occasion, is owing to a difference of opinion, entertained by the parties, as to the effect of the dismissal of an appeal.

THE appellant contends that the only effect it may have is to give the appellees a right to put the appeal bond in suit; because the judgment of the inferior court, having been once extinguished by the appeal, cannot be revived, unless the Court of Appeals bring it to life again by an affirmance.

THE appellees, on the other hand, consider that the appeal only suspends the effect of the judgment—that the dismissal of the appeal removes the cause of suspension—and the judgment appealed from is thereby put in force again; and that, if the Judge of the inferior court refuse to have it executed, this court has power to compel him to issue execution.

THE first question to be inquired into, as being the ground work of the appellant's opposition in this case, is whether it be true that the appeal extinguishes the judgment of the inferior court. To resolve this, it is barely necessary to attend to the words of the law. The appeal itself, so far from extinguishing the judgment, does not even prevent its effect. The execution of the judgment may be going on, while this court is taking cognizance of the appeal. But, lest the interest of the party appealing should, in the meantime, be irretrievably injured, the law has granted to him the faculty of staying the execution of the judgment complained of, by giving to the appellee, within a certain time, security to answer for

East. District. Dec. 1813.

CLARK'S EXECUTORS vs. FARRAR.

the damages, which he may sustain in consequence of such a stay of execution. The effect of the judgment, then, is stopped till the fate of the appeal is known; but the judgment itself subsists until reversed. If affirmed, it continues to subsist. Affirming or reversing what is no more, would be nonsense.

As to the legal effect of the dismissal of an appeal generally, without either reversing or affirming the judgment, the court will not give any opinion on this occasion, but will confine itself to the examination of the present particular question, viz. The dismissal of an appeal by consent of the parties. Here, the dismissal, being the act of the parties, not of the court, and the sanction of the court being granted without any inquiry into the case, the order of dismissal cannot be considered as a judgment, in which any point of the cause has been decided. Such withdrawing of an appeal clearly amounts to no more, in this court, than suffering a nonsuit does amount to, in courts of original jurisdiction. The parties are replaced in the same situation, in which they were before any appeal had been claimed, and every thing ought to proceed, in the inferior court, as if no appeal was pending.

It is, therefore, ordered that a mandate do issue, directed to the Judge of the first district, informing him that the appeal, which had been

claimed, has been withdrawn, and requiring him to proceed, as if no appeal had been granted.

VAUGHAN vs. *VAUGHAN.*

Exception cannot be taken to the Judge's charge after verdict.

By the Court. The plaintiff, the present appellee, who sues for a separation of bed and board from her husband, has obtained a general verdict against him. That verdict must be conclusive, as to the existence of the facts, on which she rested her claim, unless the appellant has taken, in due time, the steps necessary to secure his right of shewing to this court that the verdict was illegally found.

THIS, he could have done, in this case, by excepting to the charge of the Judge, before the jury retired. It seems he attempted to do so, after the verdict was returned; but, according to the principles of general practice, it was then too late to tender any exception.

IT is, therefore, ordered that the judgment of the inferior court be affirmed with costs.

FROMENTIN & AL. vs. *PRIEUR.*

Appeal dismissed, and affirmance denied, when no statement of facts, &c come up.

By the Court. This is an appeal from a final judgment rendered in the cause in the court of the Parish of New-Orleans. The appellant has ne-

East. District. Dec. 1813.

FROMENTIN & AL. vs. PRIEUR

glected to comply with the requisites of the eleventh section of the act organising the Supreme Court, &c. which states that there shall be no reversal of any judgment of the District Courts for any error, unless it be on a special verdict, or on a statement of facts, agreed upon by the parties, or fixed by the court, if they disagree: none of which appear, in the present case.

No exceptions have been taken to the opinion of the Judge, in the court below, as authorised by the act supplementary to the act above cited.

THIS being the situation of the cause, the appellees insist on the affirmance of the judgment of the Parish Court with damages.

THE appellant claims to have his appeal dismissed, on account of the irregular manner in which it was brought up.

THIS Court, from what it has been able to learn from the record, as certified by the court below, does not consider this case as one of those in which damages ought to be granted, were they inclined to affirm the judgment rendered in this case below, and, as under these circumstances, a dismissal of the appeal will leave the appellees at liberty to proceed to execution and thereby recover as much as if the judgment was affirmed:

IT is ordered that the appeal be dismissed, at

the appellant's costs (reserving for future consideration the right of this court to affirm judgments on appeals brought before it, without the formalities prescribed by law) and that a mandate do issue to the Judge of the Parish Court, requiring him to proceed in this cause, as if no appeal had been granted, and that this order of dismissal be certified to him.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. JANUARY TERM, 1814.

East. District. *Jan.* 1814.

RABASSA & AL. vs. *MAYOR &c. OF NEW-ORLEANS.*

RABASSA & AL. vs. MAYOR &c. OF NEW-ORLEANS.

City tax, on rise of the Portcullis of the bayou bridge, illegal.

By the Court. This is an appeal from the court of the first district: a final judgment having been rendered there, in this suit, which was instituted in the Superior Court of the late Territory, in which an injunction had been obtained against the defendants, the present appellants, restraining them from the collection of a certain tax or toll, of two dollars, which they attempted to levy, in pursuance of an ordinance of the City Council, on all vessels for the passage of which it should be necessary to raise the portcullis, or drawbridge on bayou St. John, which had been

previously built by the Corporation of the City of New-Orleans, as permitted or required by an act of the Territorial Legislature.

IN the statement of facts made out by the counsel for both parties, it appears that there are many which do not relate to the points for our consideration; as we conceive, from the best reflection, which we have been able to give to the subject, that the only circumstance, in the cause, which requires the opinion or decision of the court, is the right or authority of the City Council to impose and collect the tax or duty complained of by the plaintiffs, the present appellees.

THE legislative power of the State or Territory, in creating inferior political bodies, such as the Corporation of the City of New-Orleans, may authorise them to exercise the power of taxation. But this must be done according to the provisions of the act of incorporation. And, as in the act of incorporation of the city of New-Orleans, the legislature has specified the objects liable to be taxed, and the extent to which the authority of the City Council exists, viz. to the levying taxes on real and personal property, within the limits of the city, they ought to be confined to these objects and limits alone; and as the objects of the taxation complained of by the appellees, are not embraced in the authority granted, the tax must be

East. District. Jan 1814

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considered as an oppressive and illegal one, against which they ought to be relieved.

THE counsel for the appellants, in the course of his argument, appeared almost to assent to the want of power in the corporation of the city to impose and collect the tax or toll, as attempted by this ordinance, on persons passing the portcullis; or at least urged the right very faintly: but insisted that this court might and ought so to modify the judgment of the court below, as to authorise the collection of the one dollar imposed by an act of the Territorial Legislature in 1808, which, in his opinion, does nothing more than to secure a right to this duty on vessels entering the bayou, as imposed by the Spanish Cabildo, under the Baron de Carondelet. But this court, as before expressed, is of opinion, that it is incorrect to examine any question in this cause, except the authority of the City Council to impose and collect the tax complained of. When they shall attempt to collect the dollar tax, on vessels entering the bayou, under the right granted by the Territorial Legislature, or any other right; it will be the proper time, to consider how far these claims are barred by the adjudication of the late Superior Court on that subject, and if not to investigate and determine their rights, on just and legal principles. *See Blanc & al.* vs. *Mayor &c.* 1 *Martin*, 120.

IT is ordered that the judgment of the District Court be affirmed, with costs.

LONGER & AL. vs. *PUGEAN.*

By the Court. This appeal is brought in such a form, as to make it impossible for the court to take cognizance of it. It is not accompanied with a statement of facts, nor does it appear, in any manner, whether or not the record contains all the facts.

The court cannot act on the information derived from facts stated in the opinion of the Judge.

IT is said that the ground of the appeal is simply that the Judge of the second district erred in refusing to admit oral testimony to prove that the appellant was in an error, as to the amount of the debt by him due to the appellees, when he consented to sign the deed of mortgage on which this suit is founded. But, if so, that ought to appear by a bill of exceptions to the opinion of the Judge, on that particular point.

THE appellant alledges that the judgment itself, with the reasoning on which the Judge has grounded it, is a sufficient exposition of the case.

WE think it is not, and that we cannot undertake to revise or affirm judgments, upon such information as happens to be inserted in an opinion. We must either be shewn that the whole case is before us, or, in cases brought up on excep-

East. District. Jan. 1814.

DURNFORD vs. SYNDICS OF BROOKS.

tions to the opinion of the Judge, that the requisites of the law have been complied with. When this is not satisfactorily done, we cannot take cognizance of the appeal.

DURNFORD vs. *SYNDICS OF BROOKS.*

Delivery only, in a contract of sale, transfers property so in a *dation en payement.*

By the Court. It appears from the statement of facts that Brooks, being indebted to the plaintiff below, now the appellee, in the sum of $5000, sold him, in part payment of that sum, a parcel of goods, some of which were removed by the appellee, and others left in Brooks' store—that Brooks failed a few days after the sale, and that the goods, left by the appellee in his store, were taken possession of by the defendants, now the appellants, as syndics of Brooks' creditors—that the appellee brought the present suit against them for those goods, or their value, and obtained a verdict and judgment, from which the present appeal has been taken.

THE appellants contend that this sale, not having been followed by the delivery of the goods, did not vest any property in the appellee, and could not affect the right of third persons. They also alledge that this was a sale, made in fraud of Brooks' creditors, and consequently a void transaction.

ON the part of the appellee, it is maintained that against the allegation of fraud the verdict of the jury ought to be conclusive: and, as to the delivery, altho' no actual removal of the goods did take place, yet, there was such a delivery of them as is sufficient, in the eye of the law, to vest the property in the vendee.

FIRST, as the question of delivery. The only facts, which appear from the statement is that Durnford, having on the 5th of June, 1811, bought from Brooks a parcel of goods, on payment of a certain debt, removed some of them and left some in Brooks' store, saying he would send for them in a few days.

THE delivery of moveable property, according to our laws, can take place in one of these ways: by an actual and real delivery of the goods themselves—by the delivery of the keys of the building, in which they are kept—or, by the mere consent of the parties, if the thing cannot be transported, at the time of the sale; or, if the purchaser had them in his possession, under another title.

IN this case, if there has been any delivery, it must have been an actual and real delivery. For, nothing appears in evidence as to any symbolical delivery, as delivery of keys, nor as to any delivery by consent of the parties, if the thing sold

East. District. Jan. 1814.

DURNFORD vs. SYNDICS OF BROOKS.

could not have been removed at the time of sale, *propter magnitudinem ponderis*, but for which there was no motive in this case, where the goods left were not more heavy, and perhaps less so, than those which were removed.

THE question of delivery is reduced, therefore, to this: Is the real delivery of some of these goods to be considered as a delivery of them all? If the thing sold did consist of one entire body, such as a stack of hay or a heap of corn, it would be questionable whether a delivery of part of that body be tantamount to a delivery of the whole. But here the goods sold are of different kinds, they consist of cloths, crapes, cambrics, and thread. Is the delivery of the cloth to operate as a delivery of the crape? It appears to this court that it cannot. The articles are, indeed, included in the same bill of parcels, but they are nevertheless distinct and separate objects. If in the same bill of sale a house and a slave had been included, would the delivery of the house be viewed as a delivery of the slave? Surely not. So, in this case the possession, taken by the purchaser, of a certain description of goods, cannot be made to extend to certain other goods, which remained in the store of the seller.

WE must, therefore, say that the goods, which are the object of this suit, have not been delivered to the purchaser.

It remains now to consider, what is the consequence of that want of delivery to the appellee. If the situation of Brooks was yet the same, as when he sold the goods to the appellee, the appellee would have against him, that kind of action known to the civil law, under the name of *actio ex empto.* He might sue him for the specific performance of his contract, or damages in defect thereof. But Brooks has failed: his property has been transferred to his creditors. Has the appellee, under such circumstances, retained any right to the goods, which he had bought? If we should consider the transaction as a real contract of sale, it is a principle of law, that this contract does not of itself transfer to the purchaser the property of the thing sold: such transfer is the effect of the delivery. *Traditionibus & usucapionibus dominia rerum, non nudis pactis, transferuntur. l.* 20 *C. de Pactis.* Hence it is, that when a thing has been sold, but not delivered, if it be afterwards sold and delivered to another person, such second purchaser, who has obtained the possession of the thing, becomes the owner of it. *Quando se venden unas mercaderias o cosas a dos, in diversos tiempos, es preferido en ellas, el que primero tomo la posesion de ellas, aunque sea postiero en la compra. Cur. Phi. lib.* 1. *C.* 12. *No.* 52. Hence it is also that the creditors of the seller may seize the thing, sold by their debtor before it is delivered, as

East. District. Jan. 1814.

DURNFORD vs. SYNDICS OF BROOKS.

Pothier lays it down. *Traité du Contrat de Vente Part.* 3. *Chap.* 1. *Art.* 2.

APPLYING these principles to the present case, we see that Brooks, before he delivered to the appellee, the goods, which he had sold him, consequently before the appellee had acquired the ownership of them, transferred all his property to his creditors; who took possession of it. Therefore, should the transaction which took place, between him and Durnford be considered as a real contract of sale, it would be worth questioning how far the situation of his creditors might be assimilated to that of a second purchaser, or to the case of creditors, seizing the property of their debtor, after its sale and before its delivery: it would be worth examining whether there be any substantial difference between possession given to creditors of the property of their debtor, by a judicial order in case of a cession, and an actual seizure of the debtor's goods, at their suit.

BUT this is not a naked contract of sale. It is a contract, by which one of the parties agrees to receive certain goods in payment, instead of money. It is that particular kind of contract, which Pothier distinguishes, under the name of *dation en payement*, which tho' bearing a great resemblance to the contract of sale, differs from it, in this material point, that delivery here is not

a mere consequence of the contract, but the very essence of it. The creditor, who had a right to receive money, and who agrees to receive goods in its stead, is certainly in the same situation, before the goods are delivered to him, as he was before the payment of the money. Delivery, here, is payment; until delivery, the condition of the parties remains the same; one is the creditor, the other the debtor. Human ingenuity would be at a loss to discover any change in their respective situations. If, therefore, while things are in that state, the debtor becomes insolvent, the goods, not yet delivered in payment, do certainly belong as much to the common stock, as the money found in the possession of the bankrupt.

THE opinion of the court being that the appellee has no right to the goods in contest, nor to their value, it becomes unnecessary to inquire into the other part of the subject, viz. the question of fraud.

IT is, therefore, ordered and decreed that the judgment of the district court be reversed and that judgment be entered for the appellants, with costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. FEBRUARY TERM, 1814.

East. District. *Feb.* 1814.

RILEY *vs.* LYND.

RILEY vs. *LYND.*

Appeal from an order, maintaining an injunction.

IN this case, Francis Riley, of whom the plaintiff, now the appellant, is executrix, had obtained in the court of the parish of New-Orleans, on the 31st of December 1811, a final judgment against the defendant, now the appellee, for the sum of $ 309. Posterior to that, viz on the 25th of January 1812, the parties entered into a compromise, in which they express that there is a *misunderstanding* in their accounts, and agree to have their disputes settled by two persons, named in the compromise. Upon a representation of the circumstance, the Judge of the parish court granted an injunction staying the execution of the aforesaid judgment, till further order. The compromise having never

been carried into effect, and one of the parties having since died, the appellant applied to the parish court to have the injunction dissolved. This was refused, and from the order maintaining the injunction this appeal has been claimed.

A previous question is raised by the appellee, as to the jurisdiction of this court. He contends that this is not a case of which we can take cognizance, in as much as the order complained of is not a final judgment.

THE law has, indeed, limited, the jurisdiction of this court to appeals from final decisions and judgments, and this court, in conformity thereto, has already refused to take cognizance of appeals from interlocutory decrees; but, at the same time they have declared that, as to what shall be considered as a final decision or judgment, each case must speak for itself. When an order, not strictly in the form of a final judgment, is, in its effect, tantamount to it, this court has and will exercise jurisdiction.

THAT this is such a case needs not be demonstrated. On the one hand, the judgment, rendered in favour of the appellant, is a dead letter, if the decree complained of is suffered to subsist. On the other, the appellant is barred from bringing any other action, for the same cause, against the appellee: for his case is already adjudged. No

East. District. Feb. 1814.

RILEY vs. LYNN.

decision can be more effectualy final. It is, therefore, a proper subject for the jurisdiction of this court; and

THIS court, being of opinion that the parish Judge has erred, in maintaining the injunction, the cause of which was extinct, do order and direct that the decision appealed from be reversed, and that the injunction, staying the execution of the judgment, obtained by the appellant against the appellee, be dissolved, with costs to be taxed against the appellee.

DUNCAN & JACKSON'S SYNDICS vs. *DUNCAN.*

Debtor making a cession, must deliver *all* his goods, and cannot say he has delivered enough to pay his debts.

By the Court. This is an action brought by the syndics of the creditors of a late commercial house, against one of the partners of the firm, to recover money by him embezzled, some time before the failure of the house.

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THE embezzlement has been proved, in the court below, and is not even attempted to be denied. The defendant, now the appellant, rests his defence upon a variety of other grounds, all of which may be reduced to two principal objections. One to the nature of the action, the other to the want of a cause of action in the plaintiffs.

I. THE objection to the nature of the action is this, that it is an action of fraud, and that the

plaintiffs, now the appellees, had no right to bring such an action, either in behalf of the creditors, because no fraud has been committed against them, or in behalf of the partner of the defendant, because no such action lies between partners.

IF this suit had been brought, in the form of an action of fraud, both to recover from the appellant the sum embezzled, and to have him punished for the fraud, as the appellees' counsel has alleged, it ought, indeed, to be dismissed, not from any want of right in the appellees, but because such actions are unknown to our law: and, because any attempt to introduce among us the multifariousness of Roman jurisprudence ought to be discountenanced, as tending to perplex the suitors and embarrass the administration of justice. But, that it is a suit simply for the recovery of money, does appear on the face of the petition. The fraud is, indeed, alleged; but only to establish the nature of the right to recover.

THE petition is such as the act formerly regulating the practice of the superior court, and now that of the district courts, require it to be. It states the cause of action and concludes with a prayer for relief, suited to the circumstances of the case. The action was, therefore, properly instituted, and the objection to its form is groundless.

II. THE other objection is to the want of

East. District. *Feb.* 1814.

DUNCAN & JACKSON'S SYNDICS *vs.* DUNCAN.

a cause of action in the plaintiffs. This is the point on which turns the whole defence, and with which are connected the different exceptions, taken in the course of the trial.

IN the plea are two allegations: one is that the estate surrendered was more than sufficient to pay the debts of the partnership—the other that the sums received by the syndics, since the surrender, exceed in amount the total amount of the debts.

1. AGAINST the first of these allegations, it is contended, that the person, who makes a cession of his goods, is bound to surrender them all: and that, should he retain any part of them, the syndics of his creditors have a right to compel him to give it up, although the property surrendered should appear to be more than sufficient to pay his debts.

THIS is certainly sound doctrine. The cession of goods must be a cession of *all* the goods moveable and immoveable, rights and credits of the debtor. It matters not, whether their proceeds may exceed eventually the amount of the debts. The whole property must be surrendered, to be administered and disposed of, according to law. The creditors, by their syndics, must be put in possession of the whole. They have a right to collect every portion of the estate, which they may come at. These are principles to be found every where, and which it would be ridiculous to support by quotations of authorities. In this case, there-

fore, whether the appellant be considered as retaining part of the estate of the partnership, or as one of the debtors of the partnership, for so much of its estate, as he has converted to his own use, the creditors have undoubtedly the right of calling on him for the amount.

2. BUT, it is said that, if the syndics had once that right, it has become extinct, now that they have received more than the amount necessary to pay all the debts.

SHOULD this be the fact, it would be proper to examine whether as soon as the syndics of the creditors of a bankrupt have collected money enough to pay all his debts, their right of possessing the estate ought to cease, or whether it ought to continue until the administration be completely closed and their accounts rendered. But, before entering into that investigation we must ascertain whether it be really true that the syndics of Duncan and Jackson have collected funds, sufficient to pay all the debts of the firm.

WITH a view to prove this, the appellant had put to the appellees certain interrogatories, which he complains have not been so completely answered, as to enable the court to discover the truth. He contends that, had those interrogatories been fully and categorically answered, he would have been able to shew that the appellees have really received more money than is necessary to pay every lawful

East. District *Feb.* 1814.

DUNCAN & JACKSON'S SYNDICS *vs.* DUNCAN.

creditor of the firm. In support of this assertion, he maintains that part of the monies by them collected, has been misapplied; that, instead of employing them to the satisfaction of the creditors, mentioned in the schedule, they have without any authority, applied them, to the payment of other debts, discovered since the surrender. But, it does appear to this court, notwithstanding the alleged insufficiency of the answer to the interrogatories, enough is exhibited to establish that the funds, as yet collected, fall short of the amount of debts, even as acknowledged in the bilan.

IT is not necessary here to inquire how much remains to be collected; for the property to be disposed of may perish, or the funds to be recovered may be lost, before they come to the hands of the syndics. What it is important to ascertain is how much they have actually received. Upon this, the answer of the appellees is precise. The account sworn to by them and the statement of facts shew that the monies hitherto collected amount to the sum of $ 38,390 : the debts, as mentioned in the bilan, are rated at $ 37,600 ; leaving a balance of $ 790. But the costs and expences alone, incurred since the surrender, have absorbed several thousand dollars. Therefore, independently of any payment to creditors, not mentioned in the bilan, there is an actual deficiency to pay the debts there recognised. Add to this, that the amount of debts and credits, as mentioned in the bilan, is by no

means definite—that it is merely guessed at, and therefore, left to be afterwards settled by the syndics—that the syndics, on a close examination of the affairs of the firm, have found additional debts, to the amount of $ 41,000, as appears from the deposition of their attorney in fact and of the clerk of the late firm of Duncan and Jackson; and it will be seen that the sums hitherto received fall far short of the real amount of debts. The syndics, indeed, have, of their authority, recognised debts, of which no special mention is made in the schedule, and they have also, without waiting for the decree of distribution, required by law, proceeded to make payments. This is irregular and they may be called to an account for it. If any of these debts were wrongfully paid, they are answerable to their constituents, the creditors. But this does not alter the case as to the evident insufficiency, no matter to what amount, of the monies hitherto collected.

THE administration of the syndics of Duncan and Jackson then is not at an end. They have more to pay, than they have actually received; and so long as that is the case, their right to collect the funds of the estate cannot be questioned.

IT is ordered that the judgment of the parish court be affirmed with costs.

East. District. *Feb.* 1814.

DUPLANTIER vs. PIGMAN.

DUPLANTIER vs. PIGMAN.

Purchaser, in danger of eviction, may withhold payment.

Interest due, on every instalment payable, when purchaser has possession of the land.

Hennen, for the plaintiff. This is an action brought on a mortgage, made in favour of the plaintiff, as vendor, by the defendant, as vendee, for the security of the purchase money, of six lots of ground, of which the defendant has been in possession *since the sale.*

THE purchase money, as secured in the sale and mortgage, with interest on each instalment as it became due, is claimed by the plaintiff and the payment resisted by the defendant, principally, because of an incumbrance, made on the lots by the plaintiff, in favour of Madam Delor, from whom he purchased. It is insisted that, until this mortgage be raised, the plaintiff has no right to demand the purchase money, and that, as the defendant has not been *in morâ*, no interest can be claimed. The existence of the mortgage, the defendant represents as an eviction, and a violation of the vendor's warranty.

To this, I answer that possession of the thing sold, given by the vendor to the vendee, with the title of ownership, is a fulfilment of the obligation of the vendor. *Le contrat de vente est un contrat, par lequel l'un des contractants, qui est le vendeur, s'oblige envers l'autre, de lui faire avoir librement, à titre de propriétaire, une chose, pour une somme d'argent, que l'autre contractant, qui*

est l'acheteur, s'oblige réciproquement de lui payer. Un vendeur qui vend une chose, dont il croit de bonne foi être le propriétaire, quoiqu'il ne le soit pas, ne s'oblige pas précisément à en transférer la propriété. Hactenus tenetur ut rem emptori liceat, non enim ut ejus faciat. Dig. 19 tit. 1, sect. 30, s. 1. Pothier, contrat de vente, art. prél. & 48.

POSSESSION as owner, with his title, the defendant acknowledges; neither deception, *suppressio veri*, nor want of good faith can be objected to the plaintiff; for, in his act of sale, to the defendant, he recites his own title, which discloses the mortgage, given by the plaintiff, to Madam Delor, his vendor. The defendant then, by this recital, had presumptive notice of this incumbrance, which is so violent that the court will not allow of its being controverted. *Powell Mortg.* 569, *Sugden's law of vend.* 492,499, 5 *Bacon* 65, 73 *and cases there cited.*

THE defendant now complains with ill grace of that, as a cause for non payment, which he knew when he contracted.

CAN he, with better founded pretentions, say that the mortgage amounts to an eviction? Until an action has been instituted on the mortgage, he cannot, with the least appearance of justice, pretend that he has suffered an eviction; or even that he is in danger of it. Strictly, the vendee

East. District. Fed. 1814.

DUPLANTIER vs. PIGNAN.

has no right to an action on the warranty of the vendor, until by the execution of a definitive judgment he has been dispossessed. *Non dicitur res evicta per solam sententiam, sed per ejus executionem. Evicta res emptori, non videtur, nisi ablata sit ei possessionem, undè notant solâ, sententiâ possessionem non amitti, sed ipsâ tantum executione. Gothofredi comm. in Dig.* 21 *tit.* 2, *l.* 57. *Pothier, contrat de vente, art.* 88.

SHOULD an action be instituted by Madam Delor, on her mortgage, the plaintiff has even then a right to insist on the payment of the purchase money by the defendant, on giving him security to save him harmless in the action. The plaintiff has done more, he has offered to obtain the cancelling of the mortgage, on payment of the purchase money. Should he fail in this, and be unable to secure the defendant, he has a right to insist on the deposit of the money in court. *Contrat de vente, art.* 278, 281. *Code Civil,* 361 *art.* 85.

THAT interest is due on the amount of the purchase from the expiration of every instalment, the authorities are very positive. *L'acheteur doit les intérêts du prix, non seulement avant qu'il ait été mis en demeure de payer, mais même pendant le procès sur la demande qui lui est faite par un tiers de délaisser, quoiqu'il ne soit pas obligé de payer à son vendeur qui ne lui offre pas de caution. Contrat de vente, art.* 284. *Dig.* 19, *tit.* 1, *l.* 13,

s. 20. *Domat*, *liv.* 3, *tit.* 5, *s.* 1, §. 4. 2 *Argou* 360, 391.

Turner, for the defendant. The judgment of the district court condemning the defendant, ought to be reversed, because it appears to be given contrary to the principles of law and equity and is erroneous on several grounds.

1. BECAUSE it is given for the whole of the purchased price of sundry lots of ground, sold by the plaintiff to the defendant with warranty against all incumbrance and which lots are incumbered by heavy mortgage debts by the plaintiff to Madam Delor:

2. BECAUSE the decree gives the plaintiff interest, on his debt, from the day stipulated for payment, when no interest was contracted for, and when it appears no payment of the principal could have been made with safety, and when the plaintiff had no right to demand the payment in consequence of the existing incumbrance:

3. BECAUSE the court decreed costs against the defendant; when it appears very manifest the plaintiff had not a right to coerce payment when he sued.

I. UPON the first point, it is clear that, by the general principles of equity, as well as by the express provisions of the civil code, no action can be maintained for the price of land, whilst the

East. District *Feb.* 1814.

DUPLANTIER vs. PIGMAN.

purchaser is in danger of losing it, by defect of title or by previous incumbrances unless the vendor shall give security to indemnify him against such incumbrances or defective title. And for the support of these principles we rely on these cases.—1 *Eq. Ca. Abr.* 27. *C.* 2.—1 *Domat b.* 1. *tit.* 2. *S.* 4. *art.* 11, and 67. *Civ. Code* 360. *art.* 85.

BUT he denies we are under the protection of that article of the code, because no suit has been instituted against us, on Madam Delor's mortgage. This objection is without force, the law does not mean suit, it means the right to sue, in court. Any one having a right to sue is deemed in law, to have an action. No one can with truth be said to have an action, who has no right to sue in court. This by consulting the definitions of an action, in books of authority, will appear manifest. *Cooper's Just.* 326. *Doct. Plac.* 26. *Co. Lit.* 285. *Wood's Inst.* 533.

A RELEASE of actions, is a release only of the right to sue in court for the recovery of the thing. So when it is said actions are forfeitable by war. *Am. Law Jour.* 57.

ACTIONS are real and personal: a real action by the civil law, is an action for a specific thing. *Cooper's Just.* 326, 7, *s.* 1, 7, 17 *and note* 640.

IT is the common course of a court of equity to enjoin the payment of the purchase money, until a title is made, or the incumbrance removed. When

any such exist and are discovered before payment of the price. This is done to prevent multiplicity of suits and possible loss. *Sug. law vend.* 345, 1 *Vez.* 88, 2 *Vez.* 354, 4 *Bro.* 394.

II. THE second objection results from the principles established by the cases and books already cited, which, indeed, may be all embraced in one sentence: "That he, who seeks equity, must first do equity." *Kaims' Princ. Eq.* 54. *Fras. Max.* 1.

THE defendant could not with propriety be said to be in default of paying, when the plaintiff is in default. The land is under incumbrance and the plaintiff has no right to compel payment, until he does one of two things, to wit. either remove the incumbrance or give security to indemnify against it: neither of which has he done. With what right then is he clothed, to demand the payment of interest: the defendant did not contract to pay it, neither is he in default. Moreover, the thing is barren, it bears no fruits, and there arises no equity from the enjoyment of possession. They were naked town lots, when bought. 1 *Domat*, 63 *art.* 6.

III. ON the third objection: the defendant ought not to pay costs, when it appears the plaintiff brought suit before he had done on his part all that was requisite to entitle himself to the debt. Had he done all he is bound to do, this suit would never

East. District. *Feb.* 1814.

DUPLANTIER *vs.* PIGMAN.

have had existence. It is not fair to impose costs on the defendant, when his defence is found to be just and legal, against the plaintiff's demand. Costs are in the discretion of the court, and in this case, the just exercise of that discretion is asked for, by the defendant, with confidence upon the principles before laid down.

By the Court. This suit was commenced by the appellee, as plaintiff, in the late city court, and from the decision of that court an appeal was taken to the superior court of the late Territory of Orleans, and the suit transferred to the district court of the first district; and from a final judgment there rendered, it is brought, by an appeal, before this court. The action is instituted on certain sales of lots made by the appellee, to the appellant, which are situated in the fauxbourg, and are part of the plantation purchased by Duplantier, the appellee, from Madam Delor Sarpy, and conveyed to him by a public act of sale, bearing date on the 16th of June 1807, by which the whole property is mortgaged, to secure the payment of the purchase money. The acts of sale from the appellee to the appellant, for the lots, bear date in August and November of the same year, and in them a mortgage is reserved on the property, in favor of the seller; the payment of the price was to have been made by instalments, the first of which was duly paid; and the pur-

chaser failing to pay the latter, the suit was commenced as above stated.

THE counsel for the appellant, who was defendant in the court below, contends that he is not bound to pay for the property in question, on two grounds.

1. ON account of the probability of being disturbed in his possession, and the danger of being evicted by Madam Delor Sarpy, the seller to Duplantier: as she holds a mortgage on the property, to secure the payment of the price, 80,000 dollars, of which a part appears yet to remain unpaid.

2. BECAUSE the seller, Duplantier, has altered the plan of his fauxbourg, so as to lessen the value of the lots purchased by the appellant, and this since the sale. And they further contend that they ought not to pay interest on the price, and that the judgment of the district court is erroneous in having allowed it, as is cannot legally be recoverred, until the purchaser shall be secured in his quiet possession; and that no interest ought to be paid, because the thing sold yields no fruits or profits.

I. As to the first ground of opposition made by the appellant, to the payment of the price, this court is of opinion, that he is well supported in it by the facts and the law applicable to the case.

East. District. *Feb.* 1814.

DUPLANTIER *vs.* PIGMAN.

There can be no doubt but that he is liable to be disturbed in his possession, and in danger of eviction, so long as Madam Delor's mortgage remains unsatisfied, which appears to be the case, and that to a very large amount: add to this the great danger of total loss in consequence of the probable insolvency of the seller; and it does not appear that any security has been offered, on his part, against these dangers to which the purchaser is so evidently exposed. The law is positive and explicit, that if the buyer discovers before payment that he is in danger of eviction, and makes this appear, he cannot be compelled to pay the price, till after he is secured in his possession. 1 *Domat*, *book* 1. *c.* 2 *sect.* 3, *art.* 11, in support of this rule is cited the digest.

THE second objection to payment made by the appellant, might possibly he good, so far as to diminish the price, or even extend to a rescision of the contract; but not being supported by such evidence as would enable the court to decide with any kind of certainty, and, indeed, having been almost abandoned by the counsel, in the argument of the cause, it is thought unnecessary to make any further observations on this point.

II. As it relates to the refusal to pay interest, it is unnecessary to enter into any lengthy discussion on that subject, as it has already been decided in this court, in the case of *Syndics of Segur*

vs. Brown, ante 93, that where the price is owing for land or any thing which, from its nature, may produce fruits or revenue, there interest is recoverable from the period at which the money became due, tho' no demand of payment has been made—whether the land be one acre, or an hundred, is immaterial. But, in the present case, it is contended that interest ought not to be recovered, because the buyer is not bound to pay the original debt, until he be secured in his possession; and this objection appeared to the court to have considerable weight; however, on examining the law, we find that it is the actual possession and enjoyment of the property, which gives the right to the seller to claim interest, and that, so long as the purchaser remains in possession, he is bound to pay it on the price, unless he offer the money to the seller, and consign it for his use, in case he refuses to receive it; it being considered unjust that the purchaser should, at the same time, enjoy both the price and the thing sold. In support of this doctrine *vide* 1 *Domat* 397, *book* 3, *c.* 5. 11 *Pothier con. de vent.* 294 *no.* 284 and the *Digest*, *book* 19, *law* 13 *c.* 20, 21.

FROM an examination of the record, it does appear that the judge and jury in the court below, intended to found their verdict and judgment, on the principles herein acknowledged as law, by this

East. District. *Feb.* 1814.

DUPLANTIER *vs.* PIGMAN.

court. But from the manifest uncertainty in the verdict, and as the district judge has not, in his judgment thereon, rendered it more explicit, it becomes the duty of this court to reverse and annul the judgment of the district court; and, proceeding to render such judgment in the case as ought there to have been given: it is ordered adjudged and decreed, (and we do hereby order, adjudge and decree) that the appellee, Duplantier, do recover from the appellant, Pigman, the sum of three thousand three hundred and thirty three dollars and thirty three cents, with interest at the rate of five per centum per an. on the amount of each instalment, from the period, at which it became due. But it is hereby provided, that the said appellee shall not be at liberty to take out execution, on this judgment, until he tenders a release of the mortgage, which Madam Delor Sarpy holds on the property purchased by him from her, so far as it relates to the lots, sold by him, the said appellee, to the appellant, or offers to him good and sufficient security, to be approved of by the district court of the first district, to save him harmless from all disturbances or evictions which may happen to him in his possession of said lots, by or on account of said mortgage, and that the appellee pay the costs of this appeal. And it is further ordered that this judgment be certified to the district court.

East. District.
Feb. 1814.

CLARK'S EXECUTORS & AL. vs. *FARRAR.*

CLARK'S EX. & AL. vs. FARRAR.

Suit maintained by two executors, altho' one only has qualified.

Instrument, annexed & made part of the petition by reference may be in French.

If vendor directs the price to be paid a third person, on default, he may sue without making this person a party.

Purchaser, in danger of eviction, may withhold payment.

3m 247
113 454

THIS is an action brought upon an instrument of writing, to have payment of part of the price of a plantation sold to the defendant, the appellant, by the Chevalier de la Croix and Daniel Clark, since deceased, represented by the two plaintiffs and appellees, R. Relf and B. Chew, his executors.

AN order of seizure having issued, as usual in such cases, the appellant opposed it, alleging he did not owe the full amount demanded, but had already paid to one of the appellees a sum of money, which ought to be admitted as a set off, for so much.

IN the course of the trial below, several incidents arose, which it is necessary to dispose of, before the merits of the case can be taken into consideration.

I. THE first of them is the objection of the defendant to the want of quality in R. Relf and B. Chew, to appear, as the executors of D. Clark.

THE facts, according to the evidence, produced by the plaintiffs and demurred to by the defendant, are that D. Clark did by his will appoint R. Relf and B. Chew his executors, but that R. Relf alone took letters testamentary. The defendant contends that one of the executors only having qualified, he alone, not both, does represent the es-

East. District. *Feb.* 1814.

CLARK'S EX. & AL. *vs.* FARRAR.

tate. Without considering how far letters testamentary are requisite to authorise an executor to act, and whether they add any thing to the power, which he derives from the will, it is certain that where a testator has not provided that his executors shall act jointly, and not singly, one of them may act alone, even altho' the other should also have accepted the trust. R. Relf, therefore, if he had appeared alone, would have been a lawful representation of the deceased. His appearing with Chew cannot vitiate the proceedings. For whether Chew has, or has not, the quality which he assumes, in either case, the estate is fully represented by one or by both.

II. ANOTHER incident, in this case, which produced one of the bills of exceptions that came up with the appeal, was the refusal of the district Judge to cause the instrument of sale and mortgage, presented by the plaintiffs to be translated into English and furnished to the defendant. It is insisted upon, by the defendant, that inasmuch as that instrument was annexed to the original petition, and prayed to be taken as part of it, it ought to have been filed in English, in compliance with the stipulation made by Congress and accepted by our convention, viz. that the judicial written proceedings, in this state, should be in that language.

IT appears, however, to this court that the docu-

ment alluded to, tho' prayed to be taken as part of the petition, is nothing but the evidence of the claim, annexed to the bill, and referred to for ampler information, and that it ought not to be considered as one of those judicial proceedings, which are required to be in English.

BESIDES, the defendant had waved all objections to the pretended irregularity, by pleading to the merits, and has thus shewn that he wanted not the translation of his own contract. The application was, therefore, unreasonable, and the district Judge did right to disregard it.

III. THE last incident was the suggestion made by the defendant to the district court, as to the propriety of making the widow Castillon a party plaintiff in this suit.

THAT request was founded upon the circumstance of that lady, being the person to whom, by the act of sale, the sum of money now claimed was made payable. The district court expressed its opinion that this was not necessary. It might have gone further and say that the application was irregular. For, either the plaintiffs have a right to recover, and then they are the proper parties, or they have no such right, and then their suit ought to be dismissed.

HAVING now disposed of the several incidental questions, which were raised in the course of the

East. District. *Feb.* 1814.

CLARK'S EX. & AL. *vs.* FARRAR.

trial in the district court, we now come to the merits of this cause. Have the appellees a right to recover? And if so, to what amount? The appellees are the sellers of a plantation, part of the price of which is now due and demanded. But, it is contended, that by a clause, inserted in the contract of sale, it was stipulated that the appellant should pay the sum, now sued for, to a third person, viz. the widow Castillon, that this lady is, therefore, the person by whom it is recoverable. There is, indeed, in the instrument alluded to, a clause by which it is said that this money shall be paid to the widow Castillon, at a certain fixed time, as a discharge of the debt due her by the sellers, and it follows that, had the purchaser complied with that clause, the payment would have been good against the sellers. But, if he has failed so to do, can he now insist on that mode of payment as a right? The price of the thing sold is the property of the seller. If he chuses to direct the purchaser to pay it over within a certain time to another person, not a party to the contract, he binds himself not to demand it of the purchaser, if he pay that other person, at the time appointed. But, if the purchaser neglect to make that payment, there can be no doubt, but the stipulation is at an end, and that the seller has the same right of calling upon him for the price, as if no such clause had ever existed.

BUT, it is said that the third person, in this

case, who was to receive the money, is a mortgage creditor, seller of this plantation to the appellees; and that inasmuch as she is the only person, who can give a release of that mortgage, the stipulation that the appellant should pay to her was a clause inserted in his favour and for his security. This circumstance, however, does not alter the case. For the purchaser has a right (and that independent of any stipulation) to require a release of, or security against, the mortgage with which the thing sold is incumbered; and he cannot be compelled to pay the price until the danger of eviction be removed. In this case, therefore, as in another lately decided in this court, *Duplantier vs. Pigman*, *ante* 236, whatever is due of the price of the plantation should not be levied by execution, until a release of the mortgage is tendered or security given.

IT remains to examine to what amount the appellees ought to recover—or, in other words, if the set-off, opposed to their demand ought to be allowed.

SUPPOSING the oral testimony introduced in this case to have been legal evidence, it amounts to this, that S. Henderson *understood* from the contracting parties that sundry expenses, made by the sellers on the plantation, while they possessed it, were to be reimbursed to them, over and above the purchase money; that an account, of those

East. District. Feb. 1814.

CLARK'S EX. & AL. vs. FARRAR.

expenses, amounting to $ 2041, 37, together with a sum of $ 1000, for interest, paid by Clark for forbearance of four months, for part of the price due, was presented to Kenner and Henderson, paying agents of the appellant, which account was objected to by the appellant's attorney in fact—that this account was, however, afterwards paid by Kenner and Henderson: but, *they do not recollect* whether the appellant instructed them to pay it: they only *presume*, that the payment would not have been made, unless it had been authorised. Taking out the fact of payment to Clark of $ 3041, 37, on which the witnesses speak positively, the whole of their testimony is only to their belief. They understood, they do not recollect: they presume, is all that they venture to say.

BUT, laying aside the consideration of the import of the testimony, there appears to have been, in this case, a wide deviation from the rules of evidence established by law. In a suit for the recovery of the price of a plantation, the conditions of the sale of which are expressed in a written contract, clothed with all the requisite formalities, oral testimony has been introduced for the purpose of shewing that, besides the price stipulated in the contract, a certain further sum was agreed to be paid, by way of reimbursement of expenses, made by the sellers on the plantation, while they possessed it. But the proceeds or result of these expenses were incorporated in the

thing sold: the whole was sold for the sum mentioned in the contract, and the district Judge erred in admitting evidence to shew that the price stipulated was greater than there it appears to be. Evidence received, which ought to have been rejected, must be considered as no evidence. Therefore, any thing in Kenner and Henderson's testimony, which has the tendency of adding to, or altering the written conditions of the contract of sale, is viewed, by this court, as if it had never been received. The only part of it which is legal evidence is the fact of their having paid to D. Clark, in behalf of the appellant, a sum of $ 3041, 37: that sum must be admitted as a set-off against the claim and must be deducted from the amount demanded.

IT is, therefore, adjudged and decreed that the judgment of the district court be reversed, and that judgment be entered for the appellees, for $ 15,196, 13, with legal interest, since the time, at which the sum here sued for became due; but that no execution shall be issued, for the purpose of carrying this judgment into effect, until a release of the mortgage on the plantation of the appellant, in favor of the widow Castillon, to the amount of the present demand, be filed in the office of the clerk of the first district, or until sufficient security, to be approved by the district Judge, be given: and it is further decreed that the costs of the appeal be paid by the appellees.

East. District. Feb. 1814.

CLARK'S EX. & AL. vs. FARRAR.

By the Court. The application of the appellees for a rehearing is founded on two grounds, neither of which appears to the court sufficient to support it.

I. THE appellees first allege that the court erred in declaring some part of the testimony, taken in this case, to have been improperly admitted, and recognising as legal, at the same time, some other part of the testimony. They observe that they know no rule of law, which authorises the defendant in a suit to prove, by parol evidence, that he has paid the plaintiff money, and which denies the plaintiff the right of proving also by parol, to what purpose that money was received.

THE court does not, indeed, believe that such an absurdity can be found in any rule of law. The plaintiffs, in this case, were at full liberty to prove, by parol evidence, that the money, by them received, was on account of some other transaction than the sale of the plantation: but the moment they attempted to apply it in that way, they violated the rule of evidence, which forbids the admission of parol evidence *against* or *beyond* the contents of a written contract. Therefore, such part of the oral testimony, as went to establish that some thing *beyond* the price, mentioned in the written contract, had been promised by the purchaser, was illegal evidence. The circumstance of its not having been objected to by the defendant's

counsel does not cure the defect. This court is bound to decide according to law, and to correct the errors found in the record, whether they be noticed by the parties or not. The consent or omission of parties cannot make that lawful, which is forbidden by law. If the testimony of a slave had been heard, without any objection on the part of the adverse party, would the court be obliged to make it the rule of their decision, because it might appear on the record, and in the statement of facts? The competency of the witnesses, say the appellees, is not questioned. No; they were competent to prove any fact, except such as were *against* or *beyond* the written contract; but, every person was incompetent to testify *against* or *beyond* that.

THIS is not as the appellees call it a mere *technical* objection. It is one of great import and much substance. Its object is to preserve inviolate one of the most sacred rules of our law: a rule which, in matters of public acts, is not made merely for the safety of the contracting parties, but also for that of third persons, whose safety may be affected by such acts.

II. THE other reason, for which the appellees solicit a rehearing, is not supported by facts. It appears, by the record, that the appellant had engaged to pay to a creditor of the appellees, Madam Castillon, the sum due, and that there exists

East. District. *Feb.* 1814.

CLARK'S EX. & AL. *vs.* FARRAR.

in her favour a mortgage on the plantation bought by the appellant. The appellant has alleged that this lady is the only person who can release that mortgage, and that he cannot therefore safely pay to the appellees. This is enough, therefore, to make it necessary for the court to require that he shall be secured against that mortgage, before execution can issue against him. The rule of judicial proceedings "that courts much decide *secundum allegata & probata*" is unnecessarily appealed to, on this occasion. The rehearing is refused.

MENENDEZ vs. *SYNDICS OF LARIONDA.*

Counsel, a witness for the client

The loss of an instrument being proved, oral testimony of its contents, good.

Insolvent nor his books, cannot be admitted to charge the estate.

By the Court. This cause comes up, on exceptions, taken by the appellant to various opinions given by the Judge below, on points of law, arising during the trial.

I. THE first is the decision of the Judge, in rejecting the attorney of the appellant as being incompetent to testify in behalf of his client; and refusing to admit other parol evidence to prove the existence of a note, on which the appellant founds his claim in this action, and its loss.

THE court is of opinion that the Judge of the parish court erred, in rejecting the attorney, on the ground of incompetency. For altho', perhaps, according to the principles of the Spanish law, the

attorney is rendered incompetent to give evidence, in favor of the party by whom he is employed, yet, we think, that this rule is impliedly repealed by the act of the Legislative Council, and the Civil Code, in which it is stated, on the subject of testimonial proof, 312 *art.* 249 (after mentioning several causes of incompetency) among other things, that the circumstance of a witness, being engaged in the actual service or salary of the parties, is not a sufficient cause to consider him as incompetent; but can only affect his credibility.

IN relation to the latter part of this exception, the Judge ought to have admitted competent witnesses to have been sworn, in order to ascertain how far such testimony may go to prove such circumstances, as will render legal the introduction of oral proof, in the suit: the creditor having lost his evidence in writing. Otherwise, it would be impossible for a party, who has been so infortunate as to lose an instrument, which served him as a literal proof, ever to recover, whatever may have been the accident by which the loss took place.

II. A second objection is taken to the opinion of the Judge below, in rejecting Larionda, the insolvent as a witness to prove that the note, about which the present contest has arisen, was in existence at the time of his failure; that it was given for a valuable consideration, and that it was not

East District. *Feb.* 1814.

MENENDEZ vs. SYNDICS OF LARIONDA.

paid, in consequence of an opposition made by the appellant, to the homologation of a tableau of distribution amongst the creditors, offered by the syndics.

IN support of this exception, decisions have been cited, from the courts of England, founded on the bankrupt laws of that country, which go to establish the principle that there the bankrupt is a competent witness to prove any fact, which may go to lessen the dividend of his estate among his creditors. The reason given, is that in such a case, he testifies against his own interest, because he is intitled to a certain *per cent.* on his estate, rated according to the amount which it is found capable of paying. In the laws of this country, relative to insolvents, we believe, no such principle is recognised; therefore, the reasons, upon which these decisions are bottomed, would here fail, were they strictly applicable as law, in any case arising in our country. But, it is clearly laid down in *Febrero, del Juicio de Concurso, no.* 33, that in a contest, as to the legitimacy of claims amongst creditors, the confession of the insolvent, or his acknowledgment of any instrument, makes no proof, except as to his liability to pay: but not against his creditors: because, it is considered as fraudulent. This court is, therefore, of opinion that the Judge was correct in his decision, by which the bankrupt was rejected as a witness, so far as his testimony would affect the appellees.

HERE, it is proper to observe, with regard to the fifth exception to the opinion of the court below, in rejecting the books of the insolvent, offered by the appellant in evidence, and which had been improperly withholden from the syndics, if they contain any thing concerning the estate of the bankrupt, not brought forward, in those which were delivered, that they cannot afford, from the circumstance attending them, any evidence less exceptionable than the acknowledgment or confessions of the insolvent himself. Consequently, the Judge acted right in refusing to let them go to the jury.

III. THE third exception is to the opinion of the Judge, in rejecting Peter Colson, as a witness offered on the part of the appellant, to prove that, since the appointment of the appellees, as syndics of Larionda, and previous to the institution of this suit, both parties appeared before him, and signed an acknowledgment or recognition of the note, the validity of which is now contested, as the note of the insolvent. It does not appear from any thing, contained in the record, what was the ground of the decision, made by the court below, in rejecting the witness. Yet, it seems by the tenor of the exception, that he was called to prove the contents or substance of some instrument, or acknowledgment of the parties, in writing. If so, the Judge erred in refusing to admit the testi-

East. District. Feb. 1814.

MENENDEZ vs. SYNDICS OF LARIONDA.

mony, unless the failure to produce the writing itself should not have been satisfactorily accounted for.

IV. As to the fourth exception, relative to the admission of Rodriguez, as a witness, it does not appear that he is, or has been, attorney for any of the parties litigant, in the present suit; but only acted as such for Larionda, the insolvent, at the time of his failure: and, if he was found in that capacity, the opinion given, on the first exception, shews him to be a competent witness and that the circumstance could only affect his credibility.

THE Judge having erred, in rejecting John R. Grymes, the attorney for the appellant:

IT is ordered and decreed that the judgment of the parish court be reversed and annulled and that the cause be remanded to the said court, there to be tried again, with directions to the Judge to admit him, the said Grymes, and any other competent witness, that may be offered to be sworn to prove all circumstances, relative to the existence and loss of said note, and to suffer such testimony to go to the jury.

LANUSSE vs. *MASSICOT & AL.*

East. District. *Feb.* 1814.

LANUSSE vs. MASSICOT & AL.

By the Court. This is the case of an endorser of two promissory notes, suing the preceding endorsers, to obtain the reimbursement of the amount of those notes, which he has been compelled to pay to the holder.

Prior endorser, cannot be called to defend the suit, Altho' no actual demand was made, on the maker, if *due diligence* has ben used, endorsers are liable.

THE defendants, now the appellees, resist the claim, on the ground, that no demand of payment was made of the maker of the notes.

THE point of law arising on this, viz. that where no demand of payment has been made of the maker of a note, the endorsers are not liable, is not disputed by the appellant; but he contends that a sufficient demand has been made; and he further asserts that, altho' no such demand should have taken place, yet, inasmuch as he has exercised against the appellees the action of guarantee, while the suit against him, by the holder, was pending, he has thereby preserved his right against them.

As to the *kind* of action of guarantee, to which the appellant has thought fit to resort, viz. that of calling his prior endorsers *to defend the suit* brought against him by the holder of the notes, and the effect of which, he contends, must be to make those endorsers liable at all events, whether a demand of payment has been made or not, it appears to this court a mode unknown to our laws. Nor is it to be found in any of the laws which

East. District. *Feb.* 1814.

LANUSSE *vs.* MASSICOT & AL.

they have been able to consult: not even in the French *Code de Commerce.* What is called there the action of guarantee, in matters of bills of exchange and promissory notes, is nothing but what is expressed in our own laws, viz, the right which an endorser has to be reimbursed by his prior endorsers. "The holder of a bill of exchange "protested for non payment," says the French Code, "may exercise his action of guarantee &c. "*The same faculty* belongs to any of the "endorsers with regard to the drawer, and any "of the endorsers that are before him." Is this faculty, that of calling the prior endorsers *to defend the suit*, which may be brought, against the party entitled to the action of guarantee? No: for the holder, who is sued by no body, has the same action. It is, therefore, nothing more than the right of calling upon the preceding endorsers to be paid and indemnified. It is a consequence of the principle that every party, by transfering a bill of exchange or note, by indorsement, is considered as warranting that it shall be paid, and binding himself to pay it, in case it should be dishonored. The ordinance of Bilbao, in different words, establishes the same principle, *chap.* 13, *art.* 22. "When any of the endorsers has paid the "amount of a bill of exchange, he has his "recourse against the prior endorsers: and may "exercise it against all, or any of them *in solidum*, "&c." Thus far our laws go; and thus do they

agree on this subject, with the general law of commerce, as understood in other countries. But, to suppose that when an endorser is sued by the holder of a note, he is not bound to defend himself, but has a right to call his prior endorsers *to defend him:* and that, should he be afterwards condemned for want of a defence, the prior endorsers will be liable, even tho' they should be able to prove their previous discharge, in consequence of a neglect to demand payment of the maker of the note, is a doctrine, which to this court appears to be as repugnant to the laws of reason, as it is to the positive laws of commercial countries, and which would produce in practice an endless source of litigation and confusion.

LET it be further observed that, in this particular case, even this kind of recourse has not been regularly exercised. The appellant has called his warrantors, when it was too late for them to undertake his defence. Judgment was rendered against him, at the suit of the holder of the notes, five days before the time allowed to the appellees to answer: and it is in vain to say that the delay, within which a new trial may be demanded was not elapsed. For new trials are granted only in cases provided by law, and are not to be relied on as a matter of course.

IF, therefore, the appellant had no other ground to go upon than this kind of warranty, we are of opinion that his action cannot be maintained.

East. District. *Feb.* 1814.

LANUSSE vs. MASSICOT & AL.

BUT there is another question, in this case, and a truly important one; has any demand of payment been made of the maker of these notes, and if no demand has been actually made of him personally, has any thing been done, which may be considered tantamount to a demand?

UPON this point, the facts are as follows: Charles Massicot had his domicil on a plantation, of which he was part owner, distant ten leagues from New-Orleans. About four months before the notes became due, that place was sold by the sheriff and he was turned out. He then went with his wife and children to his father in law's, a few miles up the coast and staid there. While there, he used to come to town, to the house of Plauché, his brother in law, to attend to his business. The time, which he spent in that house, on different occasions, was in all about two months. He also came, now and then, to the house of Eleonor Wiltz in the city, and stayed there about a day or two, attending to his business in the city. When the notes became due, the Notary Public went to demand payment first at Plauché's, then at Wiltz's, and, in both places, received for answer that Charles Massicot was at the plantation.

THE general principle of law is that a demand of payment must be made of the maker of a promissory note, in order to make the endorsers liable. But, there are circumstances in which that is not practicable: as when the maker has

removed from the place where the note was payable or where he has absconded. In such cases, it is sufficient for the holder to justify that he has used *due diligence* to get payment from the maker of the note. In the English writers, who, in commercial cases, are more full than any other, that principle is consecrated. In one case, among others, *Collins* vs. *Butler*, *Strange* 1087, the holder of a note thought that he had shewn enough by proving that the maker had shut up his store, before the note became due: but, the court was of opinion that he ought to have given in evidence that he enquired after the maker, or attempted to find him out.

LET us see whether this case may by classed among those, in which due diligence has been shewn, on the part of the holder. Charles Massicot had once a fixed place of residence: he was turned out of it four months before the notes became due. Where was his residence, during those four months? he had his wife and children at his father in law's in the country; but he spent two of those four months at his brother in law's in the city to attend to his business. To those who had any dealings with him, this must have been the spot, which they considered as his place of residence. It is highly probable that few of them, if any, ever enquired whether he had another. Both were temporary; in none was he at home.

East. District. *Feb.* 1814.

LANUSSE *vs.* MASSICOT & AL.

IT appears to this court that, after Charles Massicot had been turned out of his domicil, he had no absolute residence any where, and that for the purpose of *attending to his business*, Plauché's house was more the place of his residence, than any other—that, under such circumstances, the holder has shewn *due diligence*, in endeavours to find him out, and has done that which, according to law, is sufficient to make the endorsers liable.

WITH respect to the particular situation of Augustin Massicot, one of the endorsers, who lives at the distance of seven leagues from New-Orleans and alleges that he has received no notice of the protest, it appears to this court that the only practicable means of giving him notice have been used by the appellant.

WHEN the parties to a bill of exchange, or promissory note, live at a distance from the place, where it was payable, the general rule is that notice of the protest is sent to them by the next post. It is true, that in this country there exists a particular inconvenience, which is that the post does not pass every where. But, there is always for every inhabitant a place where he sends for his letters. The post-office at New-Orleans, for those who live no farther from the city than Augustin Massicot, is certainly the proper place of deposit for letters addressed to them. Should

the letters, thro' mistake, be sent out to some other office, more remote from the party entitled to notice, than the place where such notice is deposited, the fault can no more be attributed to the person giving the notice, than the mislaying or loss of it would be. All he has to do is to put it in the post-office. He is not to be answerable for what happens afterwards.

THE court is of opinion that in this country, as well as every where else, notice deposited in the post-office, for those who live at a distance, is all that can be required, and that any other manner of giving notice, if such could be devised, would not only be deviating from the established custom, but would create more difficulty and inconvenience, than can possibly arise from the observance of the general rule.

IT is adjudged and decreed that the judgment of the district court be reversed, and that judgment be entered for the appellant for the amount of the notes, with interest from the date of the judicial demand and costs.

APPLICATION for a re-hearing. *By the Court.* In the decision, given in this case, the court have recognised the principle that a demand of payment, from the maker of the note is necessary to render the endorsers liable.

East. District. *Feb.* 1814.

LANUSSE vs. MASSICOT & AL.

THIS demand must, either be made of the maker of the note personally, or at the place of his residence. But, in this particular instance, it has appeared to the court that the maker had no fixed place of residence any where, when the notes became due: and that the house in which he spent the half of his time *to attend to his business in the city*, was more to be considered as the place of his residence, *for such purposes*, than the plantation of his father in law, where his family had a temporary asylum. This case, therefore, depends on peculiar circumstances, different from those of any cases cited by the applicant, and the decision of the court does not disagree with the general principles there recognised.

ON the pretended want of notice, complained of by one of the endorsers, nothing new being advanced by the applicant, the court are still less disposed to grant a rehearing. The uniform and universal manner of giving notice, to endorsers living at a distance, is to put the notice in the post-office. If the person to whom it is addressed live nearer to that office than to any other, it ought to remain there until sent for. But, that is the business of the post-master: putting the notice into the box is all that the holder is bound to do. The rehearing is refused.

DURNFORD vs. *BROOKS' SYNDICS*, *ante* 222.

East. District. *Feb.* 1814.

DURNFORD *vs.* SYNDICS OF BROOKS.

Rehearing denied.

APPLICATION for a repearing. *By the Court.* In this case, the appellee, being dissatisfied with the judgment of the court, obtained a rule upon the appellant to shew cause, why a rehearing should not be allowed. The counsel has contended that the judgment of the court is against evidence and against law.

AGAINST evidence, because the court has pronounced the transaction, which took place between the parties to be a *dation en payement*, a giving in payment, while, in the statement of facts, it is called a purchase.

THE court, in forming their opinion, have not attended so much to the *name*, given by the parties to the transaction, as to the *nature* of the transaction itself. If the parties should state that one has *given* to another a piece of ground for a sum of money, the court would not call that a *gift*, *but a sale*. So here, the parties say that one, being creditor of the other, called on the debtor to demand *payment*; that the debtor, having no money to give, offered goods in *payment*, and that the creditor *purchased* the goods. This name of *purchase* does not alter the *nature* of the transaction, such as it appears on the exposition of the facts. The court, therefore, has called it a *dation en payement*,

East. District. *Feb.* 1814.

DURNFORD *vs.* SYNDICS OF BROOKS.

and has drawn a line of demarcation between this kind of contract and a naked contract of sale.

NOTHING having been said against that distinction, which can induce the court to change their opinion, and one of the reasons further adduced, to shew a constructive delivery of the goods claimed, having convinced them that any such delivery took place, the judgment must, therefore, stand unshaken on that ground, alone: and it is unnecessary to take into consideration the other arguments, which presuppose the existence of a real contract of sale. The rule must be discharged.

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BROWN vs. *KENNER & AL.*

Insolvent cannot mortgage his estate.

By the Court. Brown, the appellee in this case, brought suit in the district court of the first district, from whence this appeal is taken, to recover six thousand dollars which are stated, in his petition, to have been secured to him, by a transfer of a mortgage, which the late Geo. T. Phillips, the insolvent, had retained on certain property, by him sold to J. Polfrey. The mortgage purports to secure the payment of thirty thousand dollars, by instalments, as fixed by the contract of sale, between Phillips and Polfrey.

FROM the testimony, given in the court below,

all of which is reduced to writing and transmitted to this court, the following facts may be collected: that, previous to March eighteen hundred and eight, Phillips was indebted to Brown, in four thousand dollars, which was a mere personal credit; that Brown came from New-York, to the city of New-Orleans, for the purpose of securing this debt; Phillips, being unable to pay, expressed to one of the witnesses, who was his lawyer, a desire to secure the debt of four thousand dollars, and also two thousand which the creditor proposed lending him to support his credit, until the arrival of Woolsey, who was said, at that time, to be on the river, and was soon expected in New-Orleans, and from whom Phillips expected relief; but, on his arrival, he refused to advance any thing; his credit was at that time gone, and it appears from the testimony that it could not be retrieved, for a less sum than seventy or eighty thousand dollars, which he hoped to obtain from Woolsey, Mann and Bernard, and that without this aid he, Phillips, must fail.

THE appellee, with a knowledge that Phillips must fail, unless he obtained the relief above stated, lent him two thousand dollars, and on the eleventh of March eighteen hundred and eight, took the transfer of the mortgage, as heretofore mentioned, as a security for the payment of this sum, and also the four thousand dollars which Phillips owed him, on account of previous tran-

East. District. *Feb.* 1814.

BROWN vs. KENNER & AL.

sactions. Twenty days afterwards, viz. on the thirty first of the same month, Phillips failed, and ceded his property for the benefit of his creditors, whose syndics, in their management of the insolvent's estate, seem to have considered Brown's debt as one privileged by the transfer of the mortgage for that purpose; as in a sale made by them to Kenner and Henderson, of the same property, on part of which this mortgage existed, they stipulated that the whole sum of six thousand dollars should be paid by the purchasers to Brown; and in consequence of which, they have been sued with the syndics of Phillips, and judgment obtained against all, in the district court, for the whole amount claimed.

THE counsel for the appellants insist: 1. That this judgment ought to be reversed and annulled *in toto*, on the ground that the said transfer of mortgage, so far as it was intended to confer a privilege on the debt of the appellee, is a fraud on the other creditors of the said Geo. T. Phillips, and is therefore void, or such an instrument as by law must be considered null and of no effect; and that no benefit can accrue to the party claiming under it, but he must still remain a mere personal creditor. 2. They insist, that if the security is not fraudulent and void *in toto*, as it relates to other creditors, it must at least be considered so, as far as it relates to the four thousand dollars

which Phillips owed to Brown, previous to the transfer.

THE circumstances of this case require from the court a decision on a question, which will be general in its effects, and highly important to the commercial part of the community: that is how a trader, merchant, or any other person owing debts, who becames insolvent and is about to fail, can give a preference to some of his creditors, either by payment or security by mortgage or any other instrument by which the creditor merely personal, becomes privileged, in exclusion of others whose credits were of equal dignity?

As to the right which the debtor has to make payment to any creditor, who may demand it, or such as he chooses to pay, if this be done, at any time previous to his failure and actual cession of his property, and in the usual course of business, such payment, according to the laws of this country, cannot be revoked or annulled, unless by privileged creditors. In support of this principle see *Febrero del Juicio de Concurso, no.* 36, 5 *Partidas, s.* 15, *law* 9, *and* 1 *Domat.*

THE question whether all instruments, acts, and transactions made by a debtor about to fail, or in insolvent circumstances, which are not in the ordinary course of business, and are intended to give a preference to one or more creditors, in

East. District. *Feb.* 1814.

BROWN vs. KENNER & AL.

violation of those principles of law, which require that an equal distribution of the estate of an insolvent debtor should be made, amongst all his creditors, equally privileged in their claims, contains the whole difficulty found in the decision of this suit, and to which the court have principally directed their enquiries, in the investigation of this important subject.

ADMITTING that payments, made in the usual course of business, at any period prior to the actual surrender of his property, by the person failing, are to be considered as good and valid in law, altho' sufficient property should not remain to satisfy all his debts, the reason, why a different rule should prevail with respect to acts done, with a view to secure a payment to any particular creditor, does not, at first view, appear very evident; as the debtor seems to hold a dominion over his goods, as well as his money, until he cedes them for the benefit of his creditors. Yet this distinction, it is believed, is found in the laws which must govern the judgment to be given in this case. When money is paid to a fair creditor, in the usual course of trade, nothing attends the transaction, which can have any tendency to excite suspicions of fraud or injustice, on the part of either party; but in cases where, instead of payment, some security is offered, this very circumstance creates a violent presumption that the

debtor is not able to pay his debts, and that he is about to fail. When in this situation, all acts done by him, which are intended to effect an alteration in the privileges of some of his creditors, are to be considered as fraudulent and void as they relate to others, having claims of the same dignity. Decisions on the bankrupt laws of England have been cited, and also from the state of New-York on the bankrupt system of the United-States, which appears to be similar to that of England. From what we have been able to collect from these decisions, it seems that, according to a proper construction and application of those laws to cases arising under them, two things are necessary to annul an act done by the bankrupt, which gives a preference to some of his creditors to the injury of the rest. 1. That it must be voluntary on the part of the debtor; and 2. that it should have been done with a view to bankruptcy. The circumstance of insolvency alone is not held sufficient to invalidate the transactions of a debtor with any of his creditors. It is not for us to dispute the wisdom and correctness of those decisions, as given on the particular laws of the countries where they have been rendered; but these laws certainly differ from ours, in testing the conduct of the bankrupt, on the ground of its being voluntary, and with a view to some act of bankruptcy. The laws, which must govern the case before the court, fix the incapacity of the debtor to make any alteration in

East. District. *Feb.* 1814.

BROWN vs. KENNER & AL.

the situation of his creditors, by acts of security and preference, as much to the period of his being unable to pay his debts, as to the time of committing such acts as would by the bankrupt laws of England amount to acts of bankruptcy. Considering then the rules by which the courts of this state must be governed in contests of this nature, as Judges we have only to apply them in such manner as to promote the ends of justice to the greatest possible degree. The period of insolvency, or want of means in the debtor to pay all his debts, if evinced by a subsequent failure, and a cession of his property soon after follows, is certainly the most rational one, after which he should not be allowed to make any change in the state of his affairs, to the benefit of part of his creditors and injury of the others; because that is the time from which they ought to be entitled to share his estate according to the privilege of their claims then existing; and the only thing which can oppose a just exercise and application of this rule, is the difficulty which may occur in fixing with precision that period: and on this account every case must rest principally on the proofs and circumstances attending it, which must be submitted to the legal discretion of the Judges. In the present case we have no doubt, from the testimony exhibited, that Phillips was insolvent, and about to fail, at the time when the transfer of the mortgage was made to Brown; and this, within his

knowledge, and being intended in the event of such failure to give the appellee, Brown, an undue preference over other creditors, by creating a privilege on his debt, which before was only personal, as it relates to the four thousand dollars, part of the consideration for which said transfer was made; and as to that amount must be declared null and void. In support of what is here laid down see *Curia Philipica, chap.* 12, *Prelacion, no.* 4 *Ord. of Bilb. ch.* 17. *no.* 53, *and* 3 *Azev.* 452 *c.* 5, *t.* 20.

THE court has had some doubts whether this transaction ought not to be considered as totally void, both as to the two thousand dollars advanced at the time of making the transfer, and also the four thousand which were previously due and owing from Phillips to the appellee, taking it as one entire act which cannot be easily separated and distinguished: but, on mature consideration, we are of opinion that the circumstance of incorporating the two claims will not vitiate so much of the contract as was fair and legal, at the time of entering into it, which may be considered that relating to the money advanced at the period of taking the security; for surely this cannot be deemed prejudicial or fraudulent as it affects the interest of the creditors, being so much fairly advanced to the debtor, and consequently beneficial to all.

THE *Partidas* have been cited to shew that a

East. District. *Feb.* 1814.

BROWN vs. KENNER & AL.

limitation of one year bars the rights of judgment creditors to annul sales made by the debtor in fraud of their claims. Perhaps, actions which are to be commenced by creditors to annul fraudulent acts of their debtors, may be prescribed against by that lapse of time; but this cannot affect the privilege or right which the mass of creditors have to oppose, in a court of justice, the fraudulent pretensions of other creditors who may be prosecuting claims to the injury of all. The law cited is, therefore, not applicable to this suit. The circumstance of the syndics having, in the sale made to Kenner and Henderson, stipulated that the whole of Brown's claim should be paid by the purchasers, can give no additional force or validity to the transaction, by which his claim, that was only personal, was attempted to be made privileged; because syndics have no right to make any compromises, or do any act tending to alter the privileges of creditors; the contract must, therefore, rest on the legality and validity which originally belonged to it.

FROM a careful examination, and the best consideration which the court has been able to give the cause, it is of opinion that the judgment of the district court must be reversed; and it is, therefore, ordered, adjudged, and decreed that said judgment be reversed and annulled: and it is further adjudged and decreed that the appellee do recover from

the appellants two thousand dollars, the sum advanced by him to the late Geo. T. Phillips at the time of the transfer of said mortgage (without injury to his claim on the estate of him the said Phillips, as a personal creditor, for the four thousand dollars, making a part of the whole consideration [illegible]usand dollars, intended to be secured b[illegible]aid transfer of mortgage) and also interest at [illegible]rate of six per cent. per annum, from the eleventh of March eighteen hundred and eight, until paid. And it is further ordered that the appellee pay the costs of the appeal.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COU[illegible]

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. MARCH TERM, 1814.

GENERAL RULE.

East. District. *March* 1814.

REHEARINGS must be applied for by petition in writing, setting forth the cause or causes, for which the judgment or decree is supposed to be erroneous; with a citation of the authorities in support of them.

THE Court will consider the petition, without argument; and, if a rehearing be granted, direct it as to one or more points as the case, in their opinion, shall require it.

BUT no application for a rehearing will be received, after leave shall have been given to take out a copy of the judgment or decree.

East. District. *March* 1814.

THE Clerk of this Court shall not give out a copy of any judgment or decree, until eight days from the pronouncing the same, unless special leave be given by the court for that purpose.

*** SEVERAL cases were argued, but no opinion delivered, during this term.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. APRIL TERM, 1814.

MORSE vs. *WILLIAMSON AND PATTON'S SYNDICS.*

East. District. *April* 1814.

MORSE vs. SY. WMSON & PATTON.

Attornies' privilege upon tax fees, only.

By the Court. The only question submitted, in this case, for the opinion of the court, is whether attornies and counsellors at law are to be considered as privileged creditors, on the estate of insolvent debtors, for their fees: particularly such as they may charge, in addition to those authorised and established as properly taxable, and which by law make a part of the *law charges*, or *frais de justice.*

THE appellee, who was plaintiff in the court below, claims a priority or preference to other

creditors, not only for the tax fees of the suits, in which he appeared as attorney for the insolvents, but also for sums of money, which he has thought just to charge, on account of services rendered in said suits, above the fees properly taxable: and these charges, it is admitted, are reasonable and do not exceed what is usually charged by attornies and counsellors in this state.

In support of this claim to privilege, authorities have been cited from the Spanish law books, the *Partidas*, *Nueva Recopilacion* and *Febrero*. The two first, it is true, treat of matters relating to attornies or advocates, and amongst other things fix the greatest amount which they are authorised to charge for their professional services. But, there is no expression in them, tending to prove that they have any privilege for such charges or salary. The clause cited from *Febrero* is very confuse, containing in it and in a every small compass things relating to Judges, advocates and teachers of science, and on examining the authorities to which he refers they will be found not fully to support the doctrine laid down by him. We are, therefore, of opinion that if this cause was to be decided by these laws alone, the appellee has failed to shew any privilege, so far as relates to his demand beyond the tax fees. But all these laws, we conceive, to be virtually repealed and abrogated, in all cases where the same things

East. District. April 1814.

MORSE vs. SY. WMSON & PATTON.

have been provided for in a different manner, by the legislature of the late territory, or of the state.

THE case must, then, be determined principally on that clause of the Civil Code, which gives a privilege to law charges, as expressed in the French text, *frais de justice*. To ascertain the true meaning of these words is cited the *Encyclopédie Méthodique, verbo jurisprudence*. But the definition there given does not embrace the charges of the appellee, which exceed the legal fees regularly taxed, under the laws in such cases made and provided.

IT is true that, in the same book, after the definition of the term *frais de justice*, is also found the definition of the words *frais* and *salaires*: the former are said to be privileged, not so the latter.

No opposition having been made to the recovery of the whole amount of the plaintiff's claim in the parish court, the Judge did not err in rendering his judgment accordingly. But, he erred in determining the whole to be a privileged debt. The tax fees alone can be considered as such.

THE judgment of that court must, therefore, be reversed and we do order, adjudge and decree that the same be reversed and annulled: and, proceeding to give such judgment as ought to have been given by the court below, we adjudge to the

appellee the sum of $ 725, but that he shall be entitled to no privilege, except for $ 211, 25, the amount of the tax fees. *See Ellery* vs. *Syndics of Amelung*, 2 *Martin* 242, *Elmes* vs. *Syndics of Esteva*, *id.* 264.

MEUNIER vs. *DUPERRON.*

No repetition allowed to a wrongdoer.

THE plaintiff having, at the instigation of the defendant, arrested a free negro woman, and shipped her off, was prosecuted, found guilty, fined, imprisoned and condemned to heavy damages. Having suffered the imprisonment and paid the fine and damages, he brought the present action to compel the plaintiff to indemnify him, or pay his proportion of the money disbursed. To the petition the defendant demurred, and there was a judgment for him, from which the plaintiff appealed.

Turner, for the demurrer. Altho' a wrongdoer, who has paid the damages awarded to the injured party, he is without any action against those with whom he committed the trespass. He cannot have the action *pro socio*, nor the action *mandati*. *Nec enim ulla societas maleficiorum, l.* 1 § 14 *ff. Tut. & rat. Nec societas aut mandatum flagitiosæ rei ullas vires habet, l.* 35 § 2 *contr. empt. Rei turpis nullum mandatum est.* The party,

East. District. *April* 1814.

MEUNIER vs. DUPERRON.

having violated the law, cannot invoke its aid to compel his accomplices to bear their share of the burden. 1 *Bro. Civ. Law* 381, *Puffendorff, l. n. & n. b.* 3 *ch.* 7 § 7, *Collins* vs. *Blanton*, 2 *Wilson* 341, *Civil Code* 260, *art.* 8 *and* 264, *art.* 31, 33.

Moreau, contra. These strict principles of the Roman law are not denied: but they are not followed in our practice. "There is," says Pothier, "granted in this case to him who has paid the whole, an action against each of the co-debtors, to recover from him his part. See *Papon*, *liv.* 24, *t.* 12, *n.* 4. This action does not arise from the tort which they have committed together; *nemo enim ex delicto consequi potest actionem*: it arises from the payment which one of the debtors has made of a debt which he owed in common with his co-debtors, and from equity, which does not permit that his co-debtors should profit at his expence by the discharge of a debt for which they were as much bound as he. This is a kind of action *utilis negotiorum gestorum*, founded upon the same principles of equity on which is founded the action that is given in our jurisprudence to the surety who has paid, against his co-sureties." 1 *Traité des Obligations* 177, *no.* 282.

BUT, we need not invoke any authority. The plaintiff was perfectly innocent, the defendant represented the wench as his runaway slave, whom, as a Constable, the plaintiff was bound to arrest.

By the Court. The plaintiff and appellant complains that having, at the request of the appellee, arrested a person, whom the appellee pretended to be his slave, he was tried and condemned to a reparation in damages and five months' imprisonment. He contends that the misrepresentation of the appellee, being the only cause which led him to the commission of that act, which brought on him that sentence, the appellee is bound to reimburse him, by way of damages, the money which he has been compelled to pay to the party injured, and the fine and expences which he has incurred.

In support of that claim, he has invoked principles, the truth and soundness of which are incontrovertible; but, which appear to the court inapplicable to a case of this nature. It is law, indeed, that he, by whose fault any damage has been caused, is bound to repair it; and on this particular instance, if nothing more than a civil suit had been brought against the appellant, and a reparation in damages there awarded, in favor of the party injured, the appellant, on shewing that he acted in good faith, might, perhaps, have maintained an action against the person, by whose fraud or fault, he had been induced to commit the act.

But where the act done is unlawful, and the person who committed it, has been tried, found guilty and punished, he cannot throw on another

East District. April 1814.

MEUNIER vs. DUPERRON.

the burden of his sentence, under pretence that he was by him persuaded to commit the act: for such actions are denied by the laws. *Si Titius de damno vel de injuria facienda mandet tibi; licet enim pœnam ipsius facti nomine præstiteris non tamen ullam habes adversus Titium actionem. Inst. tit.* 27 § 7.

THE appellant himself admits this to be the law: but, he alleges the act was not unlawful on his part; because he executed it without any evil intention, under the belief that the person whom he arrested and shipped off was the slave of the appellee. This is contending in other words that he was innocent of the crime of which he has been found guilty. For, there is no crime, where there is no evil intention.

THE verdict of the jury, however, settles this question. It is evidence of the guilt of the appellant: the allegation that he acted in good faith cannot now be heard.

IT is ordered and decreed that the judgment of the district court be affirmed with costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. MAY TERM, 1814.

East. District. *May* 1814.

DUFAU & AL. *vs.* MASSICOT & AL.

DUFAU & AL. vs. *MASSICOT & AL.*

The provisions of the constitution did not extend to the temporary government established by the schedule.

When land is sold, for a partition, the rules relating to sales on a *fi' fa'*, do not necessarily apply.

By the Court. Charles B. Dufau, one of the appellants, and Charles Massicot and Louis Joseph Laurent Wiltz, the appellees, were joint owners of a sugar plantation, situated in the parish of Plaquemines. During the existence of their partnership, two suits were brought against them in the court of that parish, one by Dufau himself, one of the partners, for considerable advances by him made to the concern, and the other by P. F. Dubourg, an hypothecary creditor of the partnership to a large amount. While these suits were pending, Charles Massicot thought it necessary to bring an action, in the same court, against his copartners Dufau and Wiltz, soliciting a dissolu-

East. District. *May* 1814.

DUFAU & AL. vs. MASSICOT & AL.

tion of the partnership, and a sale of the joint property, for the purpose of paying the partnership's debts and finally liquidating the concern; at the same time praying a consolidation of his action with those of Dufau and Dubourg. To the dissolution of the partnership and consolidation of the suits all the parties interested gave their assent, and the court decreed accordingly the dissolution of the partnership and sale of the plantation, slaves and other dependencies, payable, to wit, in cash, the amount necessary to satisfy the debts then due, and the remainder at one and two years credit. From this judgment, Wiltz claimed an appeal, to the late superior court, but no security having been furnished by him, according to law, execution issued, and after a first adjudication which could not be carried into effect, the property of the partnership was, on a second exposure, finally struck off to Mansuy Pelletier, one of the appellants. Seven or eight months after the close of those proceedings, the present suit was brought by the appellees, in the court of the first district, praying that the sale made to Mansuy be declared illegal and void, and that they may be restored to the possession of the property sold. From the judgment which they there obtained in their favour, the present appeal has been claimed.

THE plaintiffs below, now the appellees, have raised a variety of objections against the validity

of the proceedings under which the sale of the property of their partnership was made to Mansuy Pelletier.

THE first of them, that on which is bottomed the judgment of the district court, is that the judgment of the parish court of Plaquemines, and the proceedings in execution of it, were written in the French language, at a time when, according to the provisions of our constitution, they ought to have been written in English.

THE judgment is dated the 20th May of 1812; the constitution which provides that all judicial proceedings in this state shall be in English, had been approved by Congress more than one month before; but admitting, it is said, that the provisions of the constitution could not be in force before the official information of that approbation reached us, yet that information having been received shortly after the judgment was rendered and before any execution had issued, the execution, at least, and the other proceedings under the judgment are void as having been written only in the French language.

IT has already been said by this court, *ante* 2, *Bermudez* vs. *Ibanez*, that the permanent government to be established under our constitution, and the temporary administration provided for by the schedule annexed to that constitution, were separate and unconnected. All the provisions of

East. District. *May* 1814.

DUFAU & AL. vs. MASSICOT & AL.

the constitution were applicable to the government to be organised under it, none of them to the temporary government. The express object of the schedule was to maintain the order of things then existing, "*as if no change had taken place*," until the permanent government could be organised. That organisation was not the work of a day, as some persons may have fancied. It was to take place by degrees: the legislature was first to be created; then the executive; then the judiciary. In each branch of the government the constitution could not go into operation before the late authorities were superceded by those of new creation. Any other construction of the constitution and schedule would make their dispositions contradictory and confuse. In this particular instance a Judge unacquainted with the English language was authorised by the schedule to continue his functions; yet how could he continue, if the constitution required him to render his judgments in a language unknown to him? Such are the absurdities into which we are led, when we lose sight of the plain sense of the constitution and schedule, which shows, that the provisions of the constitution were made for the government to be organised under it, and that in the mean time every thing was to go on as formerly.

THE other objections of the plaintiffs to the validity of the proceedings of the parish court of

Plaquemines in these suits are all grounded on the omission of some of the formalities prescribed by the act regulating the practice of the superior court in cases of execution upon judgments for the recovery of money. It is therefore necessary, before they are examined separately, to enquire whether those were the rules which ought to have been observed in this instance.

THE appellants contend that in these consolidated cases the principal suit is that in which the dissolution and liquidation of the partnership were demanded, agreed to and ordered; that this is an action of partition to which the others are only accessory. This appears, indeed, to be the true nature of these actions. The principal action, undoubtedly, is that in which a general liquidation of the interest of all parties is to take place. A sale of all the property of the partnership, for the double purpose of paying all the partnership's debts, and giving each partner his share of the net proceeds, though assimilated by the expressions of the judgment to a sale under execution, has more of the features of a *licitation* than of a sale of property seized. What makes it liable to be confounded with a forced sale is the opposition of some of the parties to the judgment and execution; but that opposition could not be against the sale itself, for after the dissolution of the partnership agreed to by all the parties, the partition was a matter of course, and none of them did ever pretend that it

East. District. *May* 1814.

DUFAU & AL. *vs.* MASSICOT & AL.

could be effected in any other manner than by a sale. The opposition then must have been against the terms of sale; but the Judge by fixing the terms of this sale did no more than what must be done whenever the parties to a partition cannot agree on the terms or manner of selling their joint property. He also attended to the rights of the creditors of the partnership who could not be compelled to wait. But still the principal action, in these consolidated suits, was that in which the dissolution and liquidation of the partnership, and of course the partition of the partnership's property, were to take place; and the rules of proceeding in cases of partition are those which were to be observed on this occasion. The practice, in such cases, is not very particularly defined. But it appears to us that all the necessary formalities have been fulfilled. Indeed, should the rules of proceeding prescribed, by the act regulating the practice of the superior court, have been of indispensable observance in this instance, it is by no means evident that they were violated.

THE want of a demand of payment in a case where the debtor himself consents to the sale of his property, for the satisfaction of his debts, cannot be seriously complained of.

THE second exposure of the property for sale, before the expiration of the delay prescribed in cases where no adjudication could take place the

first time, was no fault in a case where on a first exposure the property had been struck off to a bidder, who could not comply with the conditions of the adjudication.

THE only objection of any moment is that the umpire, instead of taking into consideration the appraisements already made, thought fit to give his own opinion without regard to them, and valued the property less than any of them had done. In this however he acted not against law: for in matters of partition *Febrero* lays it down as a principle (*See Juicios chap.* 1, *sect.* 3, *art.* 128,) that the umpire is not bound by the opinions of the preceding appraisers, but may follow his own judgment. He excepts only the case where the umpire has been appointed by the parties themselves; but whatever be his reasons for admitting that exception, they are foreign to the present question.

UPON the whole, this court do not see that any material irregularity has taken place in this case. Nor does it appear that injustice has been done to any of the parties. The appellees were under the pressure of two very heavy claims, when one of them offered and the other consented to the dissolution and liquidation of the partnership. That could not be done without selling their property, and selling it in such a manner as to satisfy the creditors who were threatening them with execu-

East. District. *May* 1814.

DUFAU & AL. vs MASSICOT & AL.

tions. The repeated offers which were made to them by the purchaser to let them have the property on the same, and even on more easy terms than those on which he bought it, and which were constantly rejected, though they could not influence the decision of this court on legal questions, go a great way to convince them that no injury has been done to the appellees, by the manner in which the proceedings were conducted.

IT is, therefore, adjudged and decreed that the judgment of the district court be reversed; and that judgment be entered for the appellants with costs.

MAYOR &c. OF N.-ORLEANS vs. *METZINGER.*

An arbitrary grant of public or common land, by a Spanish Governor is void and the court will set it aside.

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THE defendant, in the year 1795, had obtained from the Baron de Carondelet, then Governor of Louisiana, the grant of a lot of ground joining the levee, in front of the city of New-Orleans, on which he had built a house and which he had enclosed. The plaintiffs, considering this house and inclosure as a nuisance or obstruction to the highway, on part which they contented they incroached, brought the present suit, in order to compel the defendant to remove his improvements and abandon the ground.

IT was proved that the premises made part of the space of ground which had been left vacant in

the original plan of the city, between the river and the first row of houses fronting it: that the highway, all along and on both sides of the river, runs immediately by the levee; that, before the Baron's grant to the defendant, the space covered by it was used, as well as the whole ground between the river and the houses, as a part of the highway: that the improvements of the defendant had much narrowed the space, and made an elbow in the highway. The defendant rested his title on his grant, the long possession under it, and the confirmation of his right, by the commissioners of the United States.

THERE was a judgment in his favour in the district court, from which the plaintiffs appealed.

Moreau, for the plaintiffs. Highways and streets are in the class of things, which are common or public, 1 *Domat*, *part* 1, *liv. prél. tit.* 3, *sect.* 1, *liv.* 2; 3 *Partida*, *tit.* 28, *ley* 6 & 9. Public things are out of commerce, they cannot be alienated, nor consequently acquired by prescription. *Domat*, *loc. cit.* 3 *Partida*, *tit.* 29, *ley* 7, 5 *Partida*, *tit.* 5, *ley* 15. It is forbidden to build on a highway or street, and if it be done, however ancient may be the structure, no prescription can avail, the edifice must be pulled down, unless the corporation of the place chooses to take it on its own account. 3 *Partida*, *tit.* 22, *ley* 3 & 23.

East. District. *May* 1814.

MAYOR &c. of N.-ORLEANS vs. METZINGER.

WITH regard to the grant of the Spanish Governor to the defendant, it affords no pretence to occupy any part of the highway or street. If public things be out of commerce and cannot be the object of a sale, they cannot be that of a gift or grant, or in any manner become the property of an individual. The sovereign, in a regular government, may regulate the use of public things, but cannot dispose of them for any other object than that to which they are destined. Should he do so, he would be guilty of an abuse of his powers. *Vattel, liv.* 1, *chap.* 20, *no.* 146.

THE kings of Spain, were so conscious of their liability to be deceived, by persons who might obtain from them grants of public property, that a law was passed authorising resistance to their orders, in such cases. 3 *Partida, tit.* 18, *ley* 30. It provides that "should the king grant any "letters, detrimental to the rights of the corpora- "tion of any town or place, such first letters shall "not be obeyed: but those, to whom they may "be directed shall supplicate the king to dispense "them from obeying: but, if the king persists, the "execution of his orders must follow." The Cabildo of the city of New-Orleans, having in the year 1799, made representations to the king of Spain, on the grants, made by the governor within the commons of the city, and near the levee; and his Majesty having given no order

thereon, the grants of the governor ought to be considered as null and void, in the same manner as letters of the king would have been.

THE king had, at last, annulled all grants which he might have made to the injury of the corporation of any city, and renounced to the right of making any, forbidding any to be made by the Cabildos. *Ord. real. l.* 7, *tit.* 3, *l.* 2 & 3 ; *Recopilacion de Cast. l.* 7, *tit* 7, *l.* 1.

Ellery, for the defendant. The defendant's original title must be either defective or complete.

IF defective, still it is sufficiently legal and valid, to give him a fair and honest possession, and to entitle him to the prescription of ten years.

THE requisites of the prescription of ten years are that the estate be fairly and honestly acquired and by virtue of a just title ; *Civil Code* 486 488, *article* 67, *vide also Cooper's Justinian, lib.* 2, *tit.* 6, *p.* 95, 96 ; that claimants should have resided, in the country, that the possessor did not obtain possession by violence, has held it *animo domini*, *Civil Code* 482, *article* 38 ; that his possession has been continued, uninterrupted, peaceable, public, and unequivocal, *article* 38 ; has not been suspended by any natural or legal interruption, nor impaired by any acknowledgment of the possessor. *Civil Code* 484, *art.* 21, 52.

IT is not contended, on the part of the plaintiffs

East. District. *May* 1814.

MAYOR &c. OF N.-ORLEANS *vs.* METZINGER.

but that all these legal requisitions have been complied with, except

1st. THAT the defendant did not acquire the possession by a *just title*.

2. THAT, even if he had so acquired it, the prescription has been *legally interrupted* by the application made by the Cabildo to the Intendant, in 1799, and by him referred to the king of Spain.

I. THE defendant had such a title as is required by law; a *just title* is defined to be one, by virtue of which property may be transferred, though it may not, in reality, give a *right to the estate possessed*, *Civil Code* 488, *art.* 68, 1 *Domat*, 3 *l.* 7 *tit. s.* 4, *p.* 490, *translation*, *Cooper's Just.* 472 *note*.

II. IT is only a *legal interruption*, when the party possessor has been *cited* to *appear* before a *court of justice*, on account of the property or possession, *Civil Code* 489, *art.* 52.

THE burden of proof is also thrown by law upon the claimant, as the possessor is always supposed, by law, to have possessed fairly. *Civil Code* 488, *art.* 71. Again from 1799 when the application was made by the Cabildo, more than 10 years have elapsed since the defendant has been in possession of his lot. But, the defendant's title is complete

1. NEGATIVELY: as no title is produced, his possession puts the plaintiff to the necessity of producing his title. Where is his title-deed? Or plan of the city, where this lot is marked, as belonging to the city? If the record and titles of the city are lost or removed, three points are necessary to be proven, 1st. their prior existence, 2. their loss or removal, 3. what they contained: none of these points are proven or appear on the record.

2. POSITIVELY: from the production of the deed of concession from Baron de Carondelet in 1795, with the figurative plan and certificate of the surveyor, the signature of the Baron, the certificate of record and of confirmation of the land commissioners.

BUT, it is objected, 1. that the king of Spain could not alienate the commons of the city, and that this lot was included in the commons.

2. THAT general usage requires a right of way, next to the levee.

3. THAT public convenience equally requires it.

I. FROM 3 *part.* 18 *tit.* 30 *l.* it appears, that the king of Spain possessed the right of alienating even the commons, though, to complete the grants, he must signify his pleasure a second time. But in the interim, until his pleasure was known, was not the grantee always in possession? But this

East. District. *May* 1814.

MAYOR &c. OF N-ORLEANS vs. METZINGER.

lot never belonged to the city; never has been so proven; on the contrary, their own wtiness says, *it belonged to the king.*

II. GENERAL usage to the right of way is not proven: if so slight a presumption furnishes a legal title, what property is safe? This right of way comes under the class of *servitudes or services;* and they are acquired 1. by nature, 2. by grant, 3. by prescription; *Civil Code* 127, *art.* 3, *also* 2 *Martin* 10, 214, *Navigation Company* vs. *Mayor &c.;* 1. if by *nature*, must be by absolute necessity. 1 *Domat, liv.* 1, *tit* 12, *s.* 1. *p.* 207, *translation.* The levee is an *artificial* road, and does not create a *natural* necessity, 2. if by grant: the grant must be produced. 3. if by prescription: the prescription must be proven; a servitude by prescription ought to have existed from time immemorial, which is construed to be, at least, 100 years, 3 *part. liv.* 15, *p.* 415. This servitude also ought to have been specially pleaded; it is likewise at variance with their own title, upon which they rely.

III. PUBLIC convenience can never justify individual injury. Their act of incorporation has provided a remedy, if this lot was necessary or convenient to them. 1 *vol. Orl. laws p.* 68, 69, § 16. Public convenience, like state necessity, may justify any usurpation.

By the Court. In the year 1795, the Baron de Carondelet, then governor of Louisiana for the king of Spain, granted to Henry Metzinger, the appellee, a lot of ground, situated in the city of New-Orleans close to the levee. The grant is a complete one and has been recognised on the part of the United States by their commissioners.

BUT the appellants contend that the spot on which it is located is part of the public highway, and, therefore, could not have been lawfully granted for private use, even by the king himself.

THAT public places, such as roads and streets, cannot be appropriated to private use, is one of those principles of public law, which required not the support of much argument. Nor is there any doubt that if, by a stretch of arbitrary power, the preceding government had given away such places to individuals, such grants might be declared void.

BUT is this grant located in a street or on the public road? On this important question of fact, the evidence, produced by the appellant, is by no means satisfactory. They show that, according to general usage in this country, the public road in front of the river is close to the levee. But could there be no derogation from that usage? Was that usage observed within the city of New-Orleans? Does not the convenience of placing markets and other public places, as near the water

East. District. *May* 1814.

MAYOR &c. OF N.-ORLEANS vs. METZINGER.

as possible, as it is recommended by a law of the Indies (the 5th of the 7th title of the 4th book, vol. 2d.) make it necessary to deviate from such usages in cities?

GENERAL usage, however, is the only ground on which the appellants rest their pretension. No plan of the city has been exhibited to show that the lot of the appellee is located upon a place which had been reserved for public use: no testimony has been adduced to prove that this spot is part of the ground laid out for the public road. We are called upon to declare this grant void, merely because the general usage of the country is to place the road next to the levee.

WE do think, however, that to oust the grantee and possessor of this lot something more precise than this vague and uncertain evidence is necessary; and we do accordingly adjudge and decree that the judgment of the district court be affirmed with costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. JUNE TERM, 1814.

OGDEN vs. *BLACKMAN.*

The Supreme Court cannot correct errors in criminal proceedings.

By the Court. This is an appeal from a judgment rendered, in this cause, by the court of the first district, by which an injunction, previously granted by the Judge of that district, is dissolved and made null and void.

It is stated, by the appellant, who was plaintiff in the court below, in the petition, that a trial and condemnation of his slave was had before Thomas C. Nichols, a justice of the peace, assisted by three free-holders on a charge of larceny, according to an act of the territorial legislature, commonly called the Black Code, at the relation of the defendant, now the appellee. The petition further

East. District. June 1814.

OGDEN vs. BLACKMAN.

states that, by the sentence of said justice and free-holders, the plaintiff is deprived of his slave, who is confiscated to the use of the defendant; this is complained of as contrary to law, and the petition concludes with a prayer for an injunction and *certiorari*.

THE sentence of the Justice and free-holders does not support the allegations in the petition; but shews that the slave was sentenced to corporal punishment, and the master adjudged to pay five hundred dollars, without saying to whom, or for what purpose it should be paid.

THIS court is clearly of opinion, that the shape in which the case now comes before them, constitutes it evidently a criminal proceeding: and it has been already determined after a long and solemn argument, *ante* 42, *Laverty* vs. *Duplessis*, that our powers do not extend to the correction of errors, which may possibly happen in the courts of criminal jurisdiction of the state.

EVERY step taken, every proceeding in the suit, is directed against the Justice. It is not pretended that Blackman has ever had the negro in possession or exercised any act of ownership. Should he do so, he may be sued by the appellant. If he attempts to issue an execution on the vague judgment of the Justice of the Peace, the plaintiff can pray the district court for an injunction.

IN either of these ways, the case may come fairly before this court, as a civil suit; but, viewing it, as it now stands, as a proceeding entirely criminal, the court feels itself bound to dismiss the appeal.

LET the appeal be dismissed, without prejudice to either party, in any civil suit, which may arise out of the circumstances of the case.

MAYOR &c. OF N.-ORLEANS vs. *BERMUDEZ.*

The land near N.-O. granted as part of the royal demesne and commons, on a breach of the condition, is to be considered as part of the commons of the City.

By the Court. Francis Bermudez, represented in this case by the syndics of his creditors, obtained from the king of Spain in the year 1799, a grant of nine superficial *arpens* of land in a place called, in the grant, the commons of the city of New-Orleans. The grant was solicited for the express purpose of establishing thereon a manufactory for the bleaching of wax; and was given on condition that so soon as the grantee should employ it to any other use, it should return to its former state of royal demesne and commons; to which effect the Governor of Louisiana and the Cabildo of New-Orleans were empowered to compel the grantee to clear the premises and to leave them unoccupied and free. The grantee took possession of the land, and has retained it ever since.

IN July last the Mayor, Aldermen and Inhabi-

East. District. *June* 1814.

MAYOR &c. OF N.-ORLEANS *vs.* BERMUDEZ.

tants of New-Orleans brought the present suit against the syndics of Francis Bermudez, alledging that he had forfeited his grant, and praying he might be compelled to remove from that place, and to leave it free for the use of the inhabitants; or in case it should not be found that he had incurred such forfeiture, that he might at least be enjoined not to dispose of the land except for the purposes and under the conditions inserted in the grant.

THE Parish Court gave judgment in favor of the defendants as to the forfeiture, enjoining them at the same time to confine themselves within the bounds and conditions of the grant, and recognising the right of the corporation of New-Orleans to repossess themselves of the land, in case they should infringe those conditions. From that judgment the Mayor, Aldermen and Inhabitans have claimed the present appeal.

THE plaintiffs, in order to shew their right of action against the grantee of this lot, have thought fit to resort to a variety of proofs, the result of which is, at best, that a certain indefinite portion of land, in the neighbourhood of New-Orleans, was considered, first by the government of France and subsequently by that of Spain, as the commons of the city, of which commons, however, the sovereign seems to have retained the right of disposing, as he might otherwise thing fit.

BE that as it may, it is not necessary to decide in this case whether the inhabitants of the city of New-Orleans were possessed in their own right, or enjoyed precariously the possession of an indefinite and undescribed portion of land called the commons. The enquiry must be confined to the particular spot on which this grant was located. In the grant itself it is acknowledged that this spot is situated in the *commons* of the city of New-Orleans; it is further said there that if the grantee does not comply with the conditions imposed on him, the land shall return to its former state of *commons*. It is even recognised in that instrument that, in such case, the Cabildo together with the Governor have a right to compel the grantee to clear the premises and leave them free for public use. But the difficulty is that this land is also called *royal*, whereby it should seem that the king still retained his dominion over it.

HOWEVER contradictory these expressions may appear to be, the worst conclusion which can be drawn therefrom against the city of New-Orleans is that they had not that kind of possession which is the consequence of an absolute right of ownership. Yet, the sovereign having never thought fit to exercise any further right over these commons, and the claim of the city to them having been *recognised* and *confirmed* by the successor of that sovereign, the inhabitants of New-Orleans

East. District
June 1814.

MAYOR &c. OF N. ORLEANS *vs.* BERMUDEZ.

must be considered as having never ceased to be the rightful possessors of that land, and their even-tual right, to repossess themselves of a part there of granted on certain conditions and liable to forfeiture, cannot be questioned.

THE Mayor, Aldermen and Inhabitans of New-Orleans were, therefore, the proper parties to sue Francis Bermudez for the forfeiture of his grant.

BUT is this grant forfeited? Is it true that Bermudez has failed to comply with the conditions imposed on him? Upon this fact, the evidence does by no means support the allegation of the appellants. It appears that Francis Bermudez has kept constantly on his land a certain number of bee-hives: it is said fifty or sixty, and that he has continued bleaching wax to this very day. The grant does not specify what quantity of wax he shall be obliged to bleach. It is clear from the documents exhibited in the cause that the object of this establishment was not the paltry produce which it might yield; but that it was intended as an example to those who would attend to that branch of industry, so that wax might become an article of exportation in the commerce of Louisiana.

THUS far the condition of the grant has been fulfilled. But, it is said that the grant is forfeited, because the land has been employed to an other use; a building, intended for a rope-walk, having

been erected on that spot in the year 1810. Without examining whether the whole of this lot must serve exclusively to the manufactory of wax, it appears that nothing more than an attempt to establish a rope-walk ever took place, and that the project was abandoned before it was carried into effect.

THERE having been no breach of the conditions of Bermudez's grant, the action of the appellants must fail altogether: for their prayer for an injunction is both without motive and without object; without motive, for, so long as the grantee does not infringe the conditions of his grant, they have nothing to ask of him; without object, for an injunction to him not to infringe those conditions would add nothing to his obligations, and such a recommendation cannot be the subject of a judicial order.

THE judgment of the City-Court, though affirmed in substance, must therefore be reversed as to that injunction; and judgment entered for the appellees absolutely, with costs.

HARROD & AL. vs. *LEWIS & AL.*

If before a ship puts to sea, the voyage is put an end to, by a de-

By the Court. The appellants, plaintiffs in the Parish Court from whence this appeal is brought, instituted their action against the appellees to

East. District. June 1814.

HARROD & AL. vs. LEWIS & AL.

recover from them $ 557, 95 cents; their petition contains two counts, one to recover the sum of money above stated, as being the amount which the appellees are liable to pay to them on account of a general average on the ship Remittance of N-. York of which they state themselves to have been agents and consignees; the other to recover on a transaction, or compromise, made between the parties previous to the commencement of this suit.

Declaration of war and her load discharged the shipper is not liable for the expences of the ship.

Arbitrators must be sworn.

THE facts in the case relating to the appellants' claim against the appellees, for their proportion of a general contribution, are the following: "The ship was bound on a voyage from the port of New-Orleans to Liverpool, the appellees had shipped on board of her 300 bales of cotton. The vessel, on a certain day, not ascertained in the pleadings, proceeded on her voyage; but before she got out of the Mississippi, was turned back by the officers of the customs, in consequence of an embargo act passed by the legislature of the United States. Upon the expiration of that act she again proceeded on her said voyage; but was still in the Mississippi, when the declaration of war by the United States against Great-Britain, reached New-Orleans. On this occurrence, the appellees and other shippers of property, on board of said vessel, requested of the appellants, that the ship should be stopped from proceeding on her voyage and that she should return to New-Orleans,

in consequence of this request, the vessel was brought back and discharged her cargo."

ON these facts the first question for the decision of the court, is to determine whether or not, the appellees are bound to contribute to the payment of the expences incurred by the appellants on account of the vessel, as in cases of general average.

THIS leads us to enquire into the effects of an embargo or detention of a ship by the orders of a sovereign power, in cases like the present, and was there no other circumstance in this case, except the embargo, there would be no great difficulty in settling the point: it having been decided in several of the state courts of the United States that the expences occasioned by the detention of vessels, in consequence of embargo or orders of a sovereign power, are not to be brought into general average; and certainly this court cannot take for their guide, in cases such as the one now under discussion, other rules than the decisions of enlightened tribunals, belonging to the same sovereignty, unless they should be found to be in opposition to some absolute and positive law, according to the provisions of which it may conceive itself bound to administer justice.

THAT the expences, stated by the appellants in the present suit, do not form a subject of general

East. District. *June* 1814.

HARROD & AL. *vs.* LEWIS & AL.

contribution, when they arise out of an embargo, has been decided in the Supreme Court of the state of New-York, in the case of *Penny & al.* vs. *the New-York Insurance Company*, reported in 3 *Caines' New-York Term Reports*, 155. The same decision is to be found of the Supreme Court of Pennsylvania, in the case of *Jones* vs. *the Insurance Company of North America*, & *Kingston* vs. *Girard*, reported in 4 *Dallas*, 246 & 274. In the *Ordinance of Bilbao*, *chap.* 20, *no.* 18 & 19, two different rules are laid down, when the freight is adjusted and settled by the month, and the other when it is not: in the latter case, which is similar to the one before the court, the expences of the vessel occasioned by an embargo do not enter into gross average, but must be borne by the owners.

BUT so various and diversified are the transactions of men and occurrences of human life, that it is almost impossible to find two cases precisely alike. The ship, concerning which the present contest originates, was first stopped and detained in consequence of the embargo law; afterwards she was brought from the Balize to New-Orleans, the port in which she was laden, in consequence of the declaration of war, by the United States against Great-Britain, to one of the ports of which empire she was destined to sail. The return of the vessel, to the port from

whence she had cleared out, was effected, at the request of the shippers, and by the consent of the appellants and master. Had the ship been suffered to proceed on her voyage, to the port of the enemy, after the parties had received knowledge of the declaration of war, this would have been in violation of the general principle of the law of nations which interdicts all commercial intercourse between the citizens or subjects of states at war with each other; none can be lawfully carried on except by the special permission of the belligerent sovereigns. This state of war, happening after a contract has been made for carrying merchandise, and the port to which the ship was destined belonging to the sovereign or state against whom war has been declared by that from which she is about to sail, dissolves the contract, and the merchant must unlade his goods and the owners find other employment for their ship. This rule is laid down in *Abbost on shipping* 455, as clear and certain; if war takes place before the commencement of the voyage, the same author states it as probable that the same principle would apply to the same event, happening after the commencement and before the completion of the voyage, altho' a different rule is established in such cases by the French ordinance. On examining this ordinance it is found, to apply to vessels actually *en route*, on their voyage, and ought perhaps to be confined to cases, where they have actually gone

East. District. June 1814.

HARROD & AL. vs. LEWIS & AL.

without the jurisdictional limits of the country from whence they sailed.

In the present case the ship had not left the mouth of the river, she was not compelled by any force to return, but was brought back by the consent of all parties concerned in the transaction: which seems to amount to a dissolution of the contract by the act of the parties themselves or at least leaves the affairs of the ship to be governed by the same rules, which would have been binding in the case, had she been found by the declaration of war in the lading port. If so, the contract for conveying the property may be considered as having ceased, from the time the declaration of war was known.

In all occurrences, which produce in a nation general calamities and sufferings, without any criminality on the part of any particular individuals, it appears just, that each member of the society should bear that portion of them which may fall to his share. War, however just and necessary it may be, is properly considered as one of those evils which are for the most part general in their operation: and when it happens, every one must bear the inconveniences it brings upon him; the shipper suffers from losing the benefit of a market for his merchandise, the ship-owner, the profit arising from freight. In the case before the court it can-

not be admitted that the expences of the vessel which accrued previous to the embargo and declaration of war were laid out for the benefit of the shippers in any way whatever; but, as observed by the counsel for the appellees, entirely for things indispensably necessary to enable her to make the intended voyage, and ought not to be considered as coming within any of the rules, relating to general average. With regard to the item in the account annexed to the appellants' petition, relative to the repressing of the cotton, it can surely form no part of an estimate in a gross average, but one or other of the parties, shipper or owner, must sustain the whole expence, according to special agreement or the custom of this port.

THE appellants have no right to recover on the second count in the petition, as on account of a transaction or agreement between the parties; the evidence in the cause does not prove any agreement of this kind: but if they have any just pretentions to obtain judgment in their favor on this count, it must be as on a compromise, as called in the Civil Code, which is a submission to and award of arbitrators.

IN the Code, there are many general rules laid down on this subject. Two important ones among them are those, 1. the power of the arbitrators does not extend to things which are not included in the compromise, 2. they ought to be sworn. Now,

East. District. *June* 1814.

HARROD & AL. *vs.* LEWIS & AL.

in applying these rules to the present case, it appears that a general question was submitted to a committee of the Chamber of Commerce appointed by its President, and by their determination of this general question, it is contended that the appellees have been properly condemned to pay the debt claimed by the appellants. So far from this being binding on the appellees, it is seen that the cause of action, between the parties, has never been specifically submitted nor determined on by the arbitrators. They ought to have been sworn. They have not been. The court is of opinion that the appellees have no right to recover on either count in the petition, and does, therefore, order and decree that the judgment of the parish court for the parish and city of New-Orleans, in this case, be affirmed with costs.

MERIEULT vs. *AUSTIN.*

The return of referees is always submitted to the judgment of the Court.

Interest, on open account, from the judicial demand.

By the Court. The claim of the plaintiff and appellant, founded on an open account in which a balance is established against the appellee, was, by consent of parties, submitted to referees chosen by themselves. It is said, in the rule, that those referees are to examine all the matters in difference between the parties, and that their report shall be made the judgment of the court. The report being brought in, the appellant moved to have it

confirmed and made the judgment of the court; but its confirmation having been objected to by the appellee, the court thought fit to enquire into the merits of the case and to set aside part of the report.

THE appellant contends that the court had no right to enquire into the merits of this report, because this was not a mere reference of accounts by the court itself, as provided for by the 20th. section of the act regulating the practice of the late superior court, but a submission of the parties to have all their differences settled by referees of their own choice.

THERE are but two ways of obtaining the decision of differences; one is by applying to the constitutional judges; the other by submitting the difference to judges chosen by the parties themselves. For the manner of pursuing either of these two modes, provision is made by law. Parties are bound to follow the course of proceedings there established. If they choose to deviate from them, the constitutional authorities cannot lend them their assistance.

WHAT have the parties done in the present case? They have come before the court of the first district for a settlement of their dispute. But, pending the suit, they agreed to refer the examination of their case to persons of their own

East. District. *June* 1814.

MERIEULT -vs- AUSTIN

choice, whose report should be made the judgment of the court. The question then is; does this amount to a submission which took the case from the court to lay it before arbitrators? Or is it nothing more than a reference subject to the further approbation or disapprobation of the court? That it is not altogether such a reference as is provided for by the act regulating the practice of the late superior court is very certain; but it is equally true that it bears as little resemblance to the submission or compromise by which the parties agree to have their disputes settled by other persons than their constitutional judges.

WITHOUT adverting to the numerous differences which distinguish this case from a case of arbitration, it is sufficient to observe that here the referees derive their authority from the court, while arbitrators derive it from the parties; that referees are appointed to report to the court their opinion, while arbitrators are authorised to act as judges themselves and actually do pronounce judgment; that in the case of an arbitration the award is a complete and final decision, after which an application to a court of justice is resorted to for the only purpose of obtaining its assistance for the execution of the award; while in a case of reference, the confirmation of the report by the court is what makes it a judgment.

WHATEVER interpretation, therefore, the appel-

lant may give to the words of the rule of reference, by which it is said that the report shall be made the judgment of the Court, still it is a report, and cannot become a judgment, until the court is satisfied of its justice and correctness. Even in the countries where the practice of such references is customary, the judges preserve the right of withholding their approbation of the award, where error appears on the face of it.

THE District Judge, therefore, not only had a right to enquire into this report; but it was his duty to satisfy himself of its correctness, before he sanctioned it. He did so, and found it just to confirm it only in part. But it is said that on such part, as he thought fit to reject, he refused to hear the evidence which one of the parties offered to produce.

IN this he would have erred, had the evidence proposed been such as might have thrown some light on the matter. But it being relative to a question, often investigated by the courts of this country, to wit, whether, according to the custom of merchants here, interest may be allowed on open accounts, where the parties have made no convention to that effect, the District Court may well have refused to hear any thing further on the subject.

IT is also the opinion of this Court that, what-

East. District. *June* 1814.

MERIEULT vs. AUSTIN.

ever be that custom, interest upon running accounts cannot be allowed by courts of justice, except from the time of the judicial demand, where the understanding of the parties as to the payment of interest is not shewn.

IT is adjudged and decreed that the judgment of the district court be affirmed with costs.

HARPER vs. *HIS CREDITORS.*

Appeal lies from all conclusive decisions.

By the Court. This is an appeal, from the District Court for the first district, from a decision by which the court annulled an order, previously made in the suit, requiring a meeting of the creditors of the appellant. The order of reversal was obtained at the instance of James A. Brooks, one of the creditors, by means of a rule on the appellant to shew cause, &c.

THE counsel for Brooks contends that the decision, of the court below, is not such a one, as comes within the rule of the act organising the Supreme Court, which authorises appeals only from final judgments and decisions.

WE are of a different opinion. It is final and conclusive in the suit, and will go to deprive the appellant of a right or privilege which he claims,

under the laws of the country, unless this appeal be sustained.

As to the merits of the cause : it appears from the record, that the appellant filed his petition in the district court, praying an order for the meeting of his creditors, for the purpose of making to them a surrender of his property, called in our laws a voluntary surrender. But, before the meeting took place, in pursuance of the order of the court, it was reversed and annulled, in the manner above stated. It has been admitted, as a principle, and acted on by the courts of the late territory and those of the state at this time, and has not heretofore been contested, that in our laws, there are regulations to be found applicable to two kinds of debtors, such as are in actual custody, and such as are not : for the first class, provision has been made by an act of the late Territorial Legislature : the measures, necessary for the latter to pursue, are directed by the general laws of the state. It is allowed to be a principle of those laws that the honest and unfortunate debtor may make a voluntary surrender of his property to his creditors, which they are bound to accept, unless he has been guilty of fraud. The effect of such surrender is to secure his person from arrest ; but not to free him from the payment of any deficiency, arising from the property surrendered being inadequate to the

East. District. *June* 1814.

HARPER *vs.* CREDITORS.

full discharge of his debts, unless he is released by his creditors in the manner pointed out by law.

THE appellant states, in his petition, "that by reason of misfortunes and disappointments in business he is unable to pay his debts :" accompanying this petition, with a bilan, in the usual form, of debts and property. In the record, which comes up to this Court, nothing appears, contradictory to the statement of the appellee's petition, which attributes to misfortunes and disappointments his inability to pay his debts; and he must be presumed to be honest, until the contrary is proved in a legal manner. If a debtor acts so improperly, as to deprive himself of the benefit of laws made for the honest and unfortunate, it appears to the court, the most proper time, to establish such conduct against him, would be, after a meeting of his creditors : a majority of whom, according to certain rules established by law, is authorised to control and govern in all matters relating to the affairs of the insolvent. This may be done, by opposing the homologation of the proceedings on legal grounds, or by suggesting and proving frauds committed by him; and perhaps this suggestion and proof of dishonesty, on the part of the creditors, may be made by any one of them, even before the meeting; but in the present case nothing of this sort has been done.

IT is, therefore, ordered adjudged and decreed by this Court, that the decision of the District Court which annuls the first order made in the case, be reversed and annulled. That Brooks pay the costs, and that this judgment be certified to the District Court.

LABATUT vs. *PUCHE.*

The Supreme Court cannot control inferior courts, in matters depending on their sole discretion.

By the Court. This case comes up on a bill of exceptions, taken to the opinion of the Judge of the District Court for the first district, in refusing to grant a *venire* for a special Jury in the cause.

THIS Court is of opinion that it is a matter, entirely within the discretion of the Judge below, to grant, or not to do so, the process claimed by the plaintiff: and altho' we might and should probably differ from him in the construction given to the law, on account of which he refused it; yet it appears to us that it would be improper to give an opinion, in any case opposed to the decisions of the judges of the courts from which an appeal lies, in which we have not the power to enforce our judgment. This court cannot control the decisions of the judges of the inferior courts in matters depending solely on their discretion, and any reasoning or decision which we might give

East. District. *June* 1814.

LABATUT vs. PUCHE.

in opposition to theirs, rendered in such cases, would be vain and nugatory.

LET the motion for a mandate be over-ruled.

VILLERE & AL. vs. *BROGNIER.*

Where a contract is to be written, any party may recant, before it is signed by all.

3m 326 51 1729

3m 326 52 427

3m 326 106 311

3m 326 115 813

JACQUES VILLERE', Antoine Bienvenu, Antoine Carraby, Norbert Fortier, Daniel Clark, John Blanque, John Soulié, Denys Delaronde, Chalmet Delino and Bernard Marigny filed their petition in the Court of the First District, (in behalf of themselves and such other of the parties interested, therein named, as should make themselves parties to the suit) stating that, some time in the month of May 1812, P. Ambroise Cuvillier, being indebted to Brognier Declouet, in a large sum of money, for which he had given a mortgage and endorsed notes, applied to the petitioners severally and to Michel Fortier, Charles Jumonville Devilliers, J. R. Ducros the father, Pierre Sauvé, Louis Habine, Jean F. Pizerot, Jean Delasize, Michel Zeringue, the widow of Robert Avart, Bernard Bernoudy, René Trudeau, L. A. Harang and Joseph Montégut fils, and requested them to take an assignment of the mortgage and endorsed notes, and each of them to give to the said Brognier Declouet, his note for the sum of one thousand dollars: to which request

each of the petitioners severally said they would accede, provided the said several persons named in the said transaction would join them in the same and provided the assignment and conditions should be subsequently arranged to their satisfaction by the said Brognier Declouet: but the petitioners expresly alledged that they made no agreement whatever, with the said Brognier Declouet, and that they considered themselves as fully at liberty to execute or not to execute the arrangement proposed by the said Cuvillier, at any time before the signature of the act herein after mentioned.

THAT, in order to facilitate the execution of the said arrangement, and to prevent the trouble of collecting all the parties at the same time, at the Notary's office, the petitioners severally executed their separate promissory notes payable to the said Brognier Declouet for the sum of one thousand dollars, that is to say five hundred dollars, payable the first of April 1813, and 500 dollars payable the first of April 1814, and deposited the same in the hands of Michel de Armas, Notary Public, to be retained by him in deposit till the said proposed agreement should be carried into effect.

THAT, some time after, Michel de Armas drew an act which he entered on the records of his office, dated the 2d. day of June 1812, which was signed by the petitioners J. Soulié, J. Blanque, J. Villeré and Daniel Clark, by which,

East. District. *June* 1814.

VILLERE & AL. vs. BROGNIER.

Brognier Declouet transferred to the persons above named, a debt of twenty-seven thousand dollars, due him by P. A. Cuvillier, for the balance of the price of several parcels of land, being part of a plantation, which he had sold to the said Cuvillier, evidenced by five notes of five thousand four hundred dollars each, of the said P. A. Cuvillier, endorsed by Alexander St. Amand; the payment of which was further secured by a mortgage of the premises. One of which notes had been already duly protested and judgment obtained, against the maker and endorser, and execution levied on some real property of the endorser: at the same time the act transferred to the persons above named Brognier Declouet's right of mortgage on the land sold to Cuvillier.

THAT, after these signatures were affixed and before any other of the parties had signed, Brognier Declouet directed the Notary to make an alteration, written in the margin of the act, providing that if any of the notes of the persons above named, were not duly paid, Brognier Declouet would exercise, for the amount of such unpaid notes his right of mortgage on the premises, notwithstanding the cession.

THAT J. Blanque, J. Soulié and Daniel Clark, immediately on being apprised of the said alteration, went to the Notary's office, and struck out the signatures of their respective names, from the said act, and declared to the Notary that, since the

said Brognier Declouet had taken on himself to direct an alteration of the act, and had not signed the same, they broke off all negociation on the subject, and directed the said Notary not to deliver the said promissory notes to the said Brognier Declouet.

THAT, after they had thus expressed their intention not to accede to the propositions made to them by Cuvillier, Brognier Declouet procured another act to be entered on the records of the Notary, which he executed himself and which was also executed by Delasize, Montégut fils, the widow Avart, René Trudeau, Jumonville de Villiers, Michel Fortier and Son, R. J. Ducros and Pierre Sauvé, the making of which instrument was neither authorised, nor was the same accepted by the petitioners, and that as soon as they received notice of the said instrument being drawn, J. Blanque, Bernard Marigny and Antoine Caraby went to the said Notary's office and protested against the use of their respective names in the said instrument and requested the Notary to give notice of the said protest to the parties mentioned in the second instrument.

THE petition, averring that, notwithstanding the aforesaid circumstances, B. Declouet had prevailed on the Notary to surrender to him the notes placed in his hands, concluded with a prayer, that he might be decreed to restore to the petitioners their respective notes, or pay the amount thereof.

East. District. *June* 1814.

VILLERE & AL. *vs.* BROGNIER.

THE answer, after a general denial of all the facts in the petition, sets forth that the notes therein mentioned were placed in the hands of Michel de Armas, to be delivered to the defendant, on his procuring the release of a judgment had against Cuvillier and St. Amand, as far as related to the latter, and on his transferring to the said Villeré and others all his right to certain mortgaged premises, by which the payment of the sum stated to be due him by Cuvillier was secured, and on his delivering to the Notary, for the use of Villeré and others, certain notes of said Cuvillier: that accordingly he had procured the release of the judgment, executed the transfer and delivered Cuvillier's notes, whereby he had become entitled to, and did receive the plaintiffs' notes.

THERE was a verdict for the plaintiffs, on which a new trial had been ordered. But, by mutual consent the new trial was waved, judgment was entered according to the verdict, and the present appeal was taken by the defendant.

IT was agreed that the depositions of Pierre Desse and Michel de Armas should accompany the record, with the certificate of the release of the judgment, and be taken as a statement of facts.

THE deposition of Pierre Desse is as follows:

Pierre Desse maketh oath, that in December 1811, Brognier Declouet negociated to him a note of P. A. Cuvillier endorsed by Alexander St. Amand for $ 5400, payable on the 1st. of March 1812, which was protested at maturity. That deponent, having obtained judgment thereon against both maker and endorser, took out execution which was about to be put in force, when Cuvillier proposed the following terms to Brognier, viz, that he would pay him $ 22,000 in notes of several individuals payable to Brognier's order one half in April 1813 and the other in April 1814, on condition that Brognier should reduce his claim then existing against Cuvillier from $ 27,400, to $ 22,000, that Brognier should assign his said claim of $ 27,400 to the subscribers of the notes Cuvillier stipulated to give him : *Brognier reserving to himself his mortgage on the property he had sold to Cuvillier, in case of non payment of any of said notes.*

THAT Cuvillier having informed deponent that John Soulié was one of the makers of said notes and the syndic of the others, and would definitively conclude the bargain, deponent spoke to Soulié who informed him he might consider the matter as concluded and desired deponent to suspend his execution against Cuvillier and Saint Amand.

THAT a few days after deponent saw Soulié and they both agreed to go to the Notary (de Armas'

East. District. *June* 1814.

VILLERE & AL. vs. BROGNIER.

to have the assignment drawn and deposit the notes: which Soulié accordingly did, except a few that were wanting to complete the sum.

THAT Soulié required of him, the deponent, that he should leave with the Notary Cuvillier's note for $ 5400 endorsed by St. Amand and desired the Notary to deliver the notes he had left with him, to Brognier Declouet, as soon as he should have signed in favour of the makers of the notes an assignment of his claim against Cuvillier for $ 27,400 and deposited Cuvillier's notes completing that sum.

THAT *Cuvillier and Soulié pressed deponent to release his right of judicial mortgage on the land of St. Amand, which deponent did, on the assurance Soulié gave him that the matter was concluded, and that the payment of the note of which deponent was the bearer was secured by the deposit of the aforesaid notes.*

THAT deponent (hearing a few days after that Montégut son, one of the makers of the notes, had deposited with the Notary his own notes, completing the sum of $ 22,000) apprised Brognier Declouet, who went to deposit Cuvillier's notes and sign the assignment, that Brognier having read the act and perceiving that it did not contain an express clause reserving to him his lien on the property sold to Cuvillier, in case any of the notes he was to receive was not paid at maturity, sent for the deponent to explain this to the Notary, and

deponent then said, in presence of de Armas, he had requested the insertion of such a clause, according to Brognier's intentions; that B. Marigny, one of the subscribers of the notes, being present, observed there was nothing unjust in it: and then, without any thing more said or done, the Notary inserted the clause in the margin of the act, reserving to himself, as he said, the right of erasing it, if it did not suit the parties.

THE following facts were drawn from the deponent, on a cross-examination:

HE was empowered by Brognier Declouet to treat with Cuvillier, in regard to the claim; and treated with him, on the assurance Soulié gave him he might do so, as the greatest part of the notes of the assignees were already in Soulié's hands. He considered Cuvillier, as the principal and most interested, tho' not a contracting, party. He considered Soulié (as the representative of the makers of the notes proposed to Brognier Declouet, by Cuvillier) as the contracting party: Soulié having told him that he had been orally empowered by the assignees to treat for the purchase of the claim: he had not discussed the conditions with Soulié. He had been the holder of a note of $ 5400, drawn by Cuvillier to the order of St. Amant, payable on the 1st of March 1812: but declined to say categorically whether he was the owner of it when it became due, ad-

East. District. June 1814.

VILLERE & AL. vs. BROGNIER.

ding he was still the holder of it at the time. He could not recollect the precise time, when the notes were deposited with de Armas. He did not know who had given to de Armas a note of the conditions to be inserted in the notarial instrument; but he heard Cuvillier, Brognier Declouet and Soulié, in behalf of the assignees, giving directions on that subject: but he did not recollect whether the latter gave any directions till after the act was drawn out. He was desired by Brognier Declouet to attend to the preservation of his rights in the act. He considered Soulié to have the same powers from the assignees, as he himself had from Brognier Declouet: and imagined his own powers were sufficient to bind Brognier Declouet, who did not consider himself safe without the clause which was inserted, at his suggestion. He knows not to what person Brognier Declouet proposed the addition of this clause. He had frequent conversations with Soulié, in order to ascertain whether the subscription was filled.

THE deposition of Michel de Armas was as follows:

IN the latter end of the month of May, eighteen hundred and twelve, Peter Ambroise Cuvillier and Peter Desse came to my office, and the former delivered to me a rough-draught of an act by which Brognier Declouet stipulated as the assign-

or of a claim of twenty-seven thousand dollars due to him, by the said Cuvillier, in favour of twenty-two individuals therein named, who stipulated as assignees for the sum of twenty-two thousand dollars; each of said twenty two individuals giving two promissory notes of five hundred dollars each, the one payable on the first of April following, and the other on the first of April in the year eighteen hundred and fourteen: that the said Cuvillier having directed me to transcribe the said act on my notarial registry, I did it on the second of June following; that some days after J. Soulié, one of the assignees, and Pierre Desse came into my office and the former, after having read and signed the said act, delivered to me a part of the promissory notes drawn by the assignees, telling me that, after Cuvillier should have delivered to me the other notes, that the judicial mortgage registered against Cuvillier and St. Amand should have been raised, as to St. Amand, that Brognier Declouet should have lodged into my hands the notes of Cuvillier, endorsed by St. Amand, and signed the aforesaid act, I might deliver to him, the said Brognier Declouet, the notes of the twenty-two individuals above mentioned: and P. Desse delivered to me a note of five thousand and four hundred dollars, drawn by Cuvillier and endorsed by Mr. St. Amant; that afterwards J. Blanque, D. Clark and Villeré successively came into my office and after

East. District. *June* 1814.

VILLERE & AL. vs. BROGLER.

having read the above mentioned act signed the same; that Cuvillier came also, and delivered to me the complement of the said notes, except one of five hundred dollars which was to be drawn by Bernoudy, Cuvillier telling me that he was going to write for the same to Bernoudy, who was then absent from the city; that P. Desse, who acted as agent of Mr. Brognier Declouet in this transaction, often asked me whether all the notes had already been deposited in my hands: on my answering that there was still wanting one of five hundred dollars, P. Desse requested me to inform him, as soon as it should have been left with me, in order that Brognier Declouet should come and sign the said act and deliver those which he had in his power drawn by Cuvillier; that the latter came afterwards, and inquired whether Brognier Declouet had deposited the said notes in my hands, I answered negatively, observing that I thought Brognier Declouet would not do it, till the twenty-two thousand dollars of notes were totally in my power; that then Cuvillier told me it was a distrust out of season on the part of Brognier Declouet, and he went out, telling me that he was going to speak of it to P. Desse. On the same day, or one or two days after, P. Desse or Brognier Declouet, I do not recollect which of them, came to my office, and delivered me the notes drawn by Cuvillier; that things remained in that situation till the 24th of August

following, during which period Brognier Declouet inquired several times from me whether the twenty-two thousand dollars of notes were in my power, to which I answered in the negative and informed him that Cuvillier had told me that B. Bernoudy intending to oblige himself only for 500 dollars had forwarded his two notes of $ 250 each ; one payable on the 1st of April 1813, and the other on the 1st of April 1814.

THAT, on the 24th of August 1812, Brognier Declouet came to my office, and inquired whether J. Montégut had not been there, on my answering that he had not, Brognier Declouet informed me that J. Montégut had agreed to give his two notes amounting together to the sum of 500 dollars in order to complete the sum of 22,000 dollars : that very moment, J. Montégut came in, made and subscribed the said two notes and delivered them to me ; then B. Declouet asked me the act in order to sign it, and, after having read it, he observed to me that I had omitted to insert in it a condition, which had been agreed upon between Desse and Cuvillier, and which was that he, Brognier Declouet, intended to reserve a portion of the mortgage, corresponding to such of the notes, as should not be punctually paid, on their becoming due ; observing that though the twenty-two persons with whom he had to deal were extremely solid, events could happen, in the course of two years, which could

East. District. *June* 1814.

VILLERE & AL. vs. BROGNIER.

not be foreseen; that I answered to Brognier Declouet that I did not think that P. Desse had mentioned to me that condition, and that I had passed the act conformably to the rough-draught given to me by Cuvillier; then B. Declouet asked me whether there was no possibility of adding that condition to the act; to which I answered there was one, if all the parties should agree to it; and that was by making in the margin of the act a reference which should be signed by all the parties, and I advised Brognier Declouet to go and see J. Soulié or J. Blanque in order to agree on that reference; that Brognier Declouet, after telling me that he was going to try to see those gentlemen, went out of my office. That after about a quarter of an hour he came in again, telling me that he had not been able to see any of those gentlemen; that P. Desse who had come with B. Declouet endeavoured to make one remember that he had mentioned to me the condition aforesaid; and I told him, as was the real truth, that, if he did, I had entirely forgotten it; that I then told Brognier Declouet that I was going to make in the margin of the said act the reference above mentioned which would be signed by the assignees in case they should acquiesce to it and on the contrary should be erased to remain null; that Brognier Declouet looking at B. Marigny, one of the assignees who was in my office at that time, said that he did not think that

said reference would occasion the least difficulty, to which B. Marigny answered that he did not think it would; that I then made, in the margin of the said act, the said reference, and read it to Brognier Declouet, in presence of P. L. Morel, B. Marigny and Desse then present, after which all these gentlemen withdrew; that about ten minutes after, J. Blanque came into my office, asking for a copy which I had already given him some months ago and coming near the desk, on which my registry was still laying open at the place where the said act is written, "well," said he, "how far have we proceeded concerning this act?" And in the mean time as he seemed to read it over he stretched out his hand, took a pen, and, without informing me of his intention, blotted out his signature; that I told J. Blanque he was very wrong in doing what he had done, without asking me whether he had the right to do it; that when a party had signed an act he could not annul his signature but by a counter-declaration; that J. Blanque answered that he was master of his signature, as long as the other party had not signed and he retired; that having absented myself from my office, on my return, my brother, who is employed as a clerk in my office, informed me that D. Clark had also come and blotted out his signature; that a few minutes after, J. Blanque accompanied by J. Soulié came in, and the latter after disputing some time on his right to do the same as D. Clark and J. Blanque,

East. District. *June* 1814.

VILLERE & AL. *vs.* BROGNIER.

blotted out his signature ; that J. Blanque, wishing to do the same with J. Villeré's signature, I opposed it ; that these gentlemen having withdrawn, a little while after, J. Blanque and A. Caraby came to ask me for their promissory notes, that I answered them that I did not think I could deliver said notes to them, considering that a deposit had been made in my hands by each of the two parties and that it could only be by the consent of both parties that I could return to each party the notes which I had received from them ; that on the 26th of the same month of August, Brognier Declouet came to my office and on my informing him of all that had passed, he told me that, since the assignees objected to the above mentioned condition, which occasioned the said reference, he would give it over and he required me to transcribe the said act (leaving out the said condition, which I did and Brognier Declouet signed the act ; that then B. Declouet asked me for the notes of the assignees, as it had been agreed that they should be delivered to him as soon as he would have signed the act by which he divested himself of his property ; that I then begged Brognier Declouet to permit me to keep said notes in my power for a few days more till I had confered about this matter with some person learned in the law ; that two days after, A. Caraby, J. Blanque and B. Marigny came to my office and required me to receive their protest against the said act, which I did ; that the

act of the 26th of August was afterwards presented to several of the assignees, who after reading the same as well as the said protest and being by me informed of all that had happened, did sign the same without any hesitation; that about two months after Brognier Declouet came to my office and required that I should deliver to him the notes of the assignees, as being his property, by virtue of the said act, of the release P. Desse had entered of the judgment which had been obtained against Cuvillier and St. Amant, and of the deposit that he, Brognier Declouet, had made into my hands of the notes drawn by Cuvillier; that, being persuaded in my conscience that said notes were effectively his property, I did not hesitate to deliver them to him.

THE following facts were drawn from the deponent, on a cross-examination:

HE made the first draft of an act for the transfer of a claim of Brognier Declouet on Cuvillier, to Villeré and others. Cuvillier and Desse were the first persons who spoke to him about it, and the latter handed him a rough note of the terms of the cession. Brognier never read the act till the day on which the deposit of the notes was completed, when he came to sign it, which he did not do, alledging the omission of a clause which he had especially charged P. Desse to have inserted. The act was then signed by Blanque,

East. District. *June* 1814.

VILLERE & AL. *vs.* BROGNIER.

Soulié, Villeré and Clark ; and the signatures of Brognier Declouet, the other assignees, the Notary and witnesses were wanting for the perfection of the act. Brognier Declouet did not, of his own head *(de son chef)* cause any clause to be inserted in the act : but, noticing the omission alluded to, asked the deponent whether a new act would be necessary and was answered, that with the consent of all parties the clause might be added in the margin, by an *apostille*, which being signed by all would be as valid as if it was in the body of the act: whereupon the deponent drew the clause, on a separate piece of paper, and invited Brognier Declouet to see either Soulié or Blanque, who were considered as the agents of the assignees and communicate the clause to them and with their consent it should be inserted. Brognier Declouet effectively went out and returned, about one half of an hour after, saying he was unable to find either of the gentlemen, and as it was late, the business should be postponed till the next day, when the Notary, of his own accord, proposed to insert the clause, adding that if the gentlemen did not consent, it should be annulled: to which Brognier Decloued assented, but did not then, nor at any time after sign the act. Blanque never presented himself to the deponent as clothed with the powers of the assignees. Cuvillier and Desse, when giving directions for the draft of the act, did not shew to the deponent

any authority from the parties. Blanque, Soulié and Clark, after erasing their signatures, recommended to the deponent, not to part with the notes. Two days after, Brognier Declouet required the deponent to transcribe the act, without the clause in the margin, objected to by some of the assignees, which being done Brognier signed and required from the deponent the notes of the assignees, and was answered that the deponent, being ignorant whether they ought to be delivered, would take advice, and consider himself as holding the notes for Brognier Declouet, if the latter had really a right to them: after this he drew, at the request of some of the plaintiffs, the protest mentioned in the petition.

By the Court. The understanding of this case, which, at first sight, may appear intricate, depends altogether on a clear view of the principal facts, as they stand by themselves, when disengaged from the crowd of unimportant circumstances, with which they are attended.

AMBROISE CUVILLIER, being indebted to Brognier Declouet, one of the appellants, in a sum of $ 27,000 payable at one, two, three, four and five years, for the price, or the residue of the price, of some real estate, which he had bought from him, and finding himself unable to satisfy that debt as it became due, contrived to procure from

East. District June. 1814.

VILLERE & AL. vs. BROGNIER.

twenty-two individuals of his acquaintance, among whom were the appellees, a promise to pay Brognier, in their own individual notes. The understanding of the parties, so far as the intention of each may be conjectured from the acts and declarations of some of them, seems to have been that Brognier Declouet should transfer to these twenty-two persons all his rights and actions against Cuvillier, and that he should thereupon receive from them their own individual obligations at one and two years, to the amount of $ 22,000. This arrangement was negociated between Pierre Desse, agent of Brognier Declouet, and Ambroise Cuvillier. John Soulié, one of the twenty-two persons above mentioned, supposed by Desse to have power to act in the name of them all, had also some conversations with P. Desse upon the subject; but never entered into any discussion with him concerning the contemplated conditions of the contract. Those conditions were reduced to writing on the 2d of June 1812, by Michel de Armas, Notary Public, conformably to a sketch which Cuvillier gave him. The principal outlines of them are, that in consideration of the sum of $ 22,000, paid to Brognier Declouet by the twenty-two individuals therein named, in their own several promissory notes at one and two years, he transfers to them his claim against Cuvillier amounting to the sum of $ 27,000, as established in the bill of sale of part of his planta-

tion to said Cuvillier, that he delivers to them five notes of the said Cuvillier endorsed by Alexander St. Amant, each of the sum of $ 5,400, which had been consented by Cuvillier and St. Amant to facilitate the disposal of the aforesaid sum of $ 27,000 ; and that he subrogates them to all his rights, actions and mortgages against Cuvillier. Soulié, after having read the instrument, signed it, and delivered to the Notary some of the promissory notes which were to be the price of Brognier's transfer, telling the Notary that after Cuvillier should have brought him the remainder of the promissory notes, and after Brognier should have complied on his side with his engagements, by releasing a certain judicial mortgage obtained against St. Amant, on the first of the above mentioned endorsements, by delivering the notes subscribed by Cuvillier and endorsed by St. Amant, and by affixing his signature to the contract, he might then deliver him all the said promissory notes of the twenty-two assignees. Some time after Soulié had signed the contract, three more of the twenty-two parties came in and signed.

ALL the notes, however, being not yet placed in the hands of the Notary, Brognier did not then examine the stipulations of the instrument. In the mean time, one of the twenty-two parties having expressed that he would not bind himself for one thousand dollars, but only for five hundred, it became necessary to look out for a twenty-

East. District. *June* 1814.

VILLERE & AL. *vs* BROGNIER.

third subscriber, who would assume the payment of the remaining five hundred dollars, in order to fill up the sum of $ 22,000, originally agreed upon. This circumstance having caused some more delay, near three months elapsed from the day on which the instrument is dated, before the sum of $ 22,000 was completed. On the 24th of August, Joseph Montégut junr. became a party to the contract and delivered his notes for the $ 500 remaining. Brognier Declouet then took up the instrument, read it for the first time, and finding that it did not contain a clause, which he deemed important to his interest, to wit, a reserve of his mortgage on Cuvillier's purchase for so much of the $ 22,000 as might happen not to be paid on the notes becoming due, he refused to sign the act as it was, and signified his intention to have this clause inserted. The clause was afterwards added in the margin; and on discovering this alteration, and being informed of Brognier's refusal to sign the instrument, three of the four who had signed it, blotted out their signatures. Brognier finding then that he could not obtain the consent of the parties to the addition of this clause, caused the Notary to transcribe the instrument as it stood before this alteration, and signed it. Of the twenty-three other parties, eight only appear to have signed. Some time after, Brognier prevailed upon the Notary to surrender him the notes which had remained

deposited in his hands, and negociated some of them.

IN this state of things, the appellees instituted the present suit in the Court of the First District for the recovery of their notes or of their amount and obtained there the verdict and judgment from which this appeal has been claimed.

SUCH are the facts on which this Court has to decide, 1st. whether the contract intended by the parties was ever completed; and 2dly. whether, supposing the contract not to have been entirely completed, the parties could recede from their promise, at that stage of the agreement, under the peculiar circumstances attending this case.

UPON the first question, to wit, whether this contract was ever completed, the inquiry which naturally presents itself is, in what manner do we see that each of the twenty-two persons intending to be parties to this agreement did agree with Brognier on the conditions of the contemplated contract? This could be done only in one of two ways, eith · by giving their special power to some person to represent them, or by acquiescing one by one to those conditions. As to their having authorised any person to contract in their name, there is no evidence of it in any part of the record. The only act of theirs from which it

East. District. *June* 1814.

VILLERE & AL. *vs.* BROGNIER.

might be presumed, that they intended to authorise J. Soulié to act for them, is the delivery of some of the notes into his hands; but other notes were delivered to Cuvillier; was Soulié the agent of some, and Cuvillier the agent of the others? Besides, is the delivery of these notes an evidence of the intention of the parties as to the conditions on which they were to be given to Brognier? The declaration of Desse, as to the agency of Soulié, is not more satisfactory. Soulié told him that the other subscribers had authorised him verbally to treat of the purchase of Brognier's claim against Cuvillier. Is this assertion of Soulié sufficient evidence of the power given to him by the other subscribers? And if it should be, does it explain the extent of that power? Does it show that they had bound themselves to abide by what he should stipulate? Desse himself was so far from considering Soulié as the attorney in fact of the others, that he did not enter into any discussion with him touching the conditions of the contemplated contract.

IT is very plain that the twenty-two subscribers of the notes, though they may have employed Soulié to take the steps preparatory to the contract, reserved to themselves finally to agree or disagree to the conditions of it, when they should be reduced to writing and communicated to them. Of that there needs be no other evidence than that each of them was to put his signature to

the contract. But supposing Soulié to have been by them fully authorised to contract with Brognier in their name, it does by no means follow that the contract was ever completed between them and Brognier. The conditions of the contract were reduced to writing as understood by Cuvillier and Soulié; but when Brognier came to read them, he found that they were not the conditions to which he would assent; *he refused to sign them, and caused them to be altered.* The contract therefore was not complete: there was still a clause on which the parties had not agreed; and in that situation of things some of the parties having thought fit to recede, an end was certainly put to the contemplated agreement as to them. In vain did Brognier withdraw his demand afterwards, and yield to their own terms. If they were one moment at liberty to retract and did so, they were completely discharged, and no act of the other party could bind them again.

LET us add to this that should no such circumstance have taken place, still the parties might have recanted before signing, because it is a principle of our laws that where it has been agreed that the contract should be reduced to writing, until it is actually written and signed by all parties, either of them may recede. *Febrero de Contratos chap.* 7, *sect.* 1, *no.* 19, *See also Domat, book* 1*st tit.* 1, *sect.* 1, *art.* 15.

East. District. *June* 1814.

VILLERE & AL. *vs.* BROGNIER.

BUT, it is said, that in this case the appellees were not at liberty to recede, because the other contracting party had been induced to make sacrifices towards the performance of the contract on his part. In support of this, the appellant cited *Pothier's Contrat de Rente, chap.* 4, *art.* 1, *sect.* 3. Before examining whether any and what degree of analogy exists between this case and that supposed by Pothier, we ought first to ascertain whether it be true that the appellees have receded from a contract; and that brings us back to the question: was any contract entered into between Brognier and the appellants? For unless the terms of the contract were finally agreed upon, there can have been no such a thing as a retractation, a retractation supposing always a previous consent. But, admitting the conditions of the contract to have been agreed to on both sides, what were these conditions? Certainly those which were inserted in the original instrument, signed by some of the parties, and afterwards recognised by Brognier. His reserve of a mortgage on Cuvillier's property never can have been one of the conditions accepted by the *assignees of all his rights, actions and mortgages against Cuvillier*, for it is at war with the spirit and the letter of the whole transaction. *It shows itself to have been an after-thought, and proves that the recanting party was Brognier himself*, who after having agreed to transfer to the appellees and other

subscribers *all his rights* against Cuvillier, signified his intention to retain the most important of those rights, to wit, his mortgage on Cuvillier's estate. If, therefore, an opportunity was then offered to the appellees to withdraw from the intended contract, Brognier has none to blame but himself. The same may be said of the sacrifice which he made when he released the judgment obtained against St. Amand. If the conditions were not finally agreed upon, why was he so forward in executing what was not yet an obligation on his part? If on the contrary, the terms were accepted on both sides, they must have been those which were expressed in the instrument as originally reduced to writing, and then why did he, by his recantation, release the other parties from their engagement?

It may be further observed that the discharge of the judgment obtained against St. Amant upon one of the five notes bearing his endorsement does not appear to have been any part of the conditions of the contract, as understood by all the parties; it not only makes no part of the stipulations contained in the instrument; but is a departure from the obligation there agreed to by Brognier to deliver to the assignees the five notes subscribed by Cuvillier with the endorsement of St. Amant, completing the sum of $ 27,000 by him transferred.

East. District. *June* 1814.

VILLERE & AL. vs. BROGNIER.

FROM this view of the case it may be concluded, that the contract, intended to be entered into between the parties, was never completed; and supposing it to have been carried too far for any of the parties to retract without causing prejudice to the other, the first departure from it was the act of the appellant Brognier, not of the appellees.

THE promissory notes of the appellees, deposited in the hands of the Notary Public to await the consummation of the intended agreement, ought therefore to have been returned to the subscribers of them, when they signified their determination not to complete the contract. The surrender of these notes to Brognier, however innocent may have been the intentions of the depositary, was certainly improper, and the appellees ought not to suffer for it.

IT is, therefore, ordered and decreed that the judgment of the District Court be affirmed with costs.

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ON the application of the defendant, the Court granted a re-hearing. *See post, December term.*

East. District. *June* 1814.

CLARK'S EX. vs. COCHRAN.

Whenever a signature is formally disavowed, proof by experts must be resorted to.

The disavowal must be by the party, in writing.

Turner, for the plaintiffs. In this case, the District Court gave judgment for the defendant, upon the construction of the 226th article of the Civil Code, in page 306. The plaintiffs, believing this case formed an exception to that rule, appealed from that judgment. There is a bill of exceptions to that opinion shewing the facts. This suit is founded upon a transaction, which happened at Natchez, and none of the parties to the contract reside in this state. The defendant is sued as executor and heir of his brother, George Cochran, deceased, and also as being a partner of the firm of Cochran and Douglass who, it is alledged, received into their cotton gin, a certain quantity of cotton, to be gined for the tolls, and gave receipts therefore, as was at that time customary to do. Those receipts were transferred by endorsements, and came into the possession of the plaintiffs' testator, in the course of business. And the question to be decided in this Court is, which is the mode of proof required by law for these cotton-gin receipts. The plaintiffs offered proof, by witnesses, well acquainted with the hand-writing of each of the persons, whose names are on the papers. This is the only proof such a case is susceptible of: and is the mode practised in the courts of the country, where the papers were signed and endorsed. It is not usual to have a subscribing

East. District. *June* 1814.

CLARK'S EX. *vs.* COCHRAN.

witness to such papers. Nor is it at all necessary to any commercial instrument and to apply the rule of the 226th article of the Code, to such cases, would be to shut the courts of this state, against all suits to be prosecuted on bills, drawn or negociated out of the state. The rules of commerce require that no other proof should be demanded, in a controversy abroad, than what was sufficient in the place where the contract was made, to establish it. Moreover, the rules of evidence in commercial cases are not so strict as in others. Courts, relaxing the strict rules of law, accommodate the evidence to the usage and course of business.

THESE rules and these principles will be found in the practice of courts, and the opinions of elementary writers. The following are relied upon. *Kaims' Prin. Eq.* 563, 2 *Strange* 1127, 1 *Dall.* 16, 17, 2 *Johns. Cases* 369, 211, *Peake's Ev.* 50, 51, 58, 103 *note* (b.) *and the appendix* 52, 3. *Civ. Co.* 260, *art.* 7.

BUT, independently of these principles, the present case, is not one, in which the rule contended for by my adversary counsel applies. The words of the law are "a person against whom an act under private signature is produced is obliged formally to avow or disavow his signature." And in case he does disavow it, and there be no witness to prove it, "as having seen the obligation

signed" "the signature must be ascertained by two persons skilled" &c. In this case the defendant has not disavowed his signature, there is nothing in the answer, pointing to that fact. The answer contains a general denial only of "all and singular the facts" &c. But the avowal required by the law is confined to the verity of the signature and this disavowal is, in our practice, what the plea of *non est factum* is, in the common law courts. It should be direct and positive, not by any inference, nor argumentatively alledged. And the truth of the plea should be supported by the oath of the party. The fact of signing is one well known to the party, and he ought not to be allowed to deny it but upon his oath. If it be not his deed, he can safely swear it is not, and if he will not swear, he should not be permitted to demand the proof of it. The rule of law requiring proof by experts is confined to the single case of disavowal of the signature, and upon the rule *expressio unius est exclusio ulterius*, does not extend to or embrace the present case. Divested of the application of the rule about experts, the plaintiffs' cause was fully established, by legal proof and the judgment of the Court should have been for the plaintiffs. We contend, with a well grounded confidence in the soundness of the principles we have laid down, that the judgment of the District Court ought to be reversed. But whatever may be the decision in this cause, it is important

East. District. *June* 1814.

CLARK'S EX. *vs.* COCHRAN.

that some fixed rule of practice upon the subject should be established by this Court. *Misera est servitus ubi jus est vagum aut incognitum.*

Hennen, for the defendant. The decision of this case depends wholly upon the construction of our statute. When foreigners resort to our courts for aid, our rules of evidence and practice are not to be altered for their accommodation. Our courts, it is true, must in the construction of contracts follow *legem loci;* but the remedy for enforcing contracts must be conformable altogether to our own laws: so far is this principle recognized that the limitation of the country in which the action is brought, and not that in which the contract was made or the demand arose, is to be observed, 3 *Dall.* 373, *n.* 1, *Caines* 402, 3 *Johns. Rep.* 263, 2 *Mass. T. Rep.* 84, 4 *Wilson's Bacon's Abridg.* 472. What then is the formal disavowal required in this case by our statute? Must it be under oath? The plea of *non est factum*, at common law, need not be under oath: the disavowal of a private writing should not be more formal than the denial of a deed. And when the statute does not prescribe an oath, the court should not require it. These cotton receipts are the instruments on which the action is brought; with the proof of them it must stand or fall. The answer denies all the allegations of the petition; and consequently puts the plaintiffs to the proof of

every fact required to support their claim, such denial too is sufficient notice to the plaintiffs to produce the proof required by law.

THE expediency of this rule is impugned without reason. The report of experts is not conclusive; a jury may find contrary to it: it is no more than the opinion of witnesses swearing to their belief of the hand-writing of an individual from its resemblance to that image of it, formed in the mind by a previous inspection of it. Witnesses and experts both draw their conclusions from comparison.

THE comparison formed by experts, however, must be allowed to have the advantage in point of certainty; for the experts have an unvarying original, to which they can constantly refer for comparison, and are not perplexed with any reference to a mental image. The rule may operate with hardship in some cases, from the difficulty of procuring authentic signatures for comparison: but its certainty and safety will more than counterbalance that inconvenience.

By the Court. This suit was originally commenced by the deceased D. Clark, in his life-time, to which his executors have since his death become parties; the action is founded on certain receipts for cotton, said to have been delivered at a gin in the Mississippi Territory, belonging to a certain company or partnership, of

East. District. June 1814.

CLARK'S EX. vs. COCHRAN.

which the appellee is the surviving partner and heir and executor to one of the other partners. The receipts were given in the usual form for that article, when taken in to be cleaned by owners of gins, and, by the laws of the Mississippi Territory, are negociable, and have been regularly transferred to the testator of the appellants by endorsement. On the trial of the cause in the District Court for the First District, from whence this appeal is taken, the plaintiffs in the Court below, who are here the appellants, offered as testimony the depositions of certain persons residing in the Mississippi Territory, to prove the hand-writing of those who had signed the receipts, and also two competent witnesses to prove the same fact and the hand-writing of the persons who have endorsed them. This testimony was objected to on the part of the counsel for the appellee, who was defendant in the District Court, because it is not in conformity with that part of our Civil Code which requires, in certain cases of instruments under private signature, that they should be verified by experts, or persons having skill to judge of hand-writing; which objection was sustained by the Judge of the Court below, and on an exception to the opinion of the Judge, in supporting said objection and refusing to receive and hear the testimony offered by the appellants, the case comes before this Court.

THE only circumstance, in the cause, which requires the attention and examination of the Court is to give such a reasonable, just and legal construction to the provisions of the Civil Code, relative to this kind of proof, as may prevent them from being mischievous in their operation on the administration of justice, and for this purpose several questions have been submitted to the consideration of the gentlemen of the bar, some of whom have been polite enough to favour us with their researches and opinions, on this subject of general importance; and the matter is now before us after learned and able discussion.

THE first question to be decided is whether, or no, the rule of evidence laid down in the Civil Code for the verification of acts under private signature, is general in its operation, and shall extend to all kinds of private contracts in writing made between citizens of every profession and pursuit in life, so that this mode of proof must in all cases, when the party formally disavows his signature, be resorted to.

2. Is the person, against whom an act under private signature may be produced, obliged formally to avow or disavow his signature, or is a general denial by a defendant or his counsel of all the allegations in the petition of a plaintiff, who commences a suit on such an instrument, sufficient to compel him to resort to proof by experts?

East. District. *June* 1814.

CLARK'S EX. vs. COCHRAN.

3. WHEN a contract is made out of the jurisdictional limits of the state, are the laws and customs of the state or territory where it is made to govern, as to the kind of proof which may be admitted, if sued on in this state?

I. As to the first question, the Court is of opinion that every rule of evidence must be general in its operation on every description of citizens, unless exceptions are made by positive law; and that from the manner in which this rule is laid down, in the Civil Code, it is imperative; and in all cases where the disavowal is made, with sufficient formality, the mode of proof by experts, or men skilled to judge of hand-writing, must be resorted to in the first instance; but that the party offering this kind of testimony is not thereby precluded from producing any other legal evidence, which may be in his power, either in aid of, or to contradict the report of the experts.

II. IN relation to the second question, it is the opinion of the Court, that the person, against whom an action is brought on an act under private signature, must, before the plaintiff can be compelled to resort to proof by experts, formally and solemnly disavow his signature in writing, signed by himself with his own proper handwriting. This we think the safest construction to give to the word formally: for, unless the dis-

avowal is made in this way, it cannot be considered the formal act of the party; and the sense and spirit as well as the letter of the law will not be complied with. In the course of the argument, it was insisted on that this denial ought to be on oath: the Code does not positively require that it should, and we think that judicial oaths ought not be multiplied, without absolute necessity. From what has been said on this question it will result, that the plaintiff, when this formal denial is not made by the defendant, may, without the necessity of resorting in the first instance to prove his claim by experts, produce any other legal testimony, which may be in his power to give in the cause. The same rule ought to prevail in cases when the heirs, or assigns, do not declare that they are unacquainted with the signature of the person they represent.

III. In treating of the third and last question, it is proper to observe, that we believe it to be admitted as a principle, in all tribunals, that the *lex loci*, or law of the country where the contract is made ought to govern in suits commenced in any other country on such contracts; and it does appear by a law of the *Partidas* that this principle extends even to the proof of the contract, expressed in general terms, which might perhaps be applied to the mode of proving facts, as well as to the amount of evidence necessary to their

East. District. June 1814.

CLARK'S Ex. vs. COCHRAN.

verification. But it is unnecessary to determine this point absolutely, in the present case, because there is sufficiently found in the determination of the first and second questions, on which to decide against the opinion of the Judge of the District Court.

It does not appear that the receipts offered in evidence in the suit were signed by the party against whom the action is brought; but that he is sued in a double kind of capacity, both as surviving partner of a company which carried on the business of cleaning or gining cotton, in the Mississippi Territory, and as heir and executor of one of the partners, the late Geo. Cochran. This creates some confusion in the case, and is perhaps not very regular. As surviving partner, if he signed the receipts, he ought formally to have avowed or disavowed his signature: this he has not done. If he did not sign them, he was not bound to make this formal avowal, or disavowal, and in either case any legal evidence which has been usually admitted in similar cases by the tribunals of the country ought to have been admitted in this, without compelling the appellants to resort in the first instance to the proof by comparison of hand-writing.

If considered as heir and executor, he ought to have declared that he does not know the hand-writing or signature of him, whom he represents. It being our opinion that the Judge of the District

Court has erred, in rejecting all other testimony offered by the appellants in the course of the trial before him and requiring absolutely the proof by comparison of hand-writing, the judgment there rendered must be reversed.

East. District. June 1814.

CLARK'S Ex. vs. COCHRAN.

IT is, therefore, ordered and decreed that the same be reversed and annulled and that the cause be remanded to the District Court, there to be again tried, with instructions to the Judge to admit all legal testimony, and such as has been usually admitted in the tribunal of this country, without compelling the appellants to resort to proof by comparison of hand-writing, as prescribed by the Civil Code.

MOREL vs. *MISOTIERE'S SYNDICS.*

Ceding debtor's counsel fees to be paid by the Syndics.

PIERRE MISOTIERE, of whose creditors the appellants are the syndics, being in failing circumstances, applied to the appellee for advice, and employed him as counsel to make a voluntary cession of his goods. The appellee presented his petition and schedule, assisted at the meeting of the creditors, and rendered the other necessary services, until the property of Misotière was delivered to the appellants. To obtain a compensation for those services, the appellee instituted the present suit, demanding to be paid *by privilege*,

East. District. *June* 1814.

MOREL *vs.* MISOTIERE'S SYNDICS.

out of the funds in the hands of the syndics, and obtained a verdict and judgment to the amount of $ 400, to be paid as a *privileged* debt.

IT has been already decided by this Court in the case of *Morse* vs. *the Syndics of Williamson and Patton*, *ante* 282, that attorneys and counsellors are entitled to *no privilege*, for the payment of any compensation above the taxed fees, included in what is called *law charges*. The fate of this demand and of the judgment rendered on it, would therefore be settled by that decision, if we should attend to the form more than to the substance of the action.

THE question here ought not to have been whether the appellee has any privilege as one of the creditors of Misotière, but whether the services by him rendered *nominally* to Misotière, were not *in reality* services done to his estate and consequently to the creditors themselves.

WHEN a person is about to fail, he is considered as having no longer any right to dispose of his property; in that situation he is obliged to employ counsel without having it in his power to remunerate him. Must the services of that counsel remain unsatisfied? We think that wherever it does appear (and the contrary can hardly be supposed) that the directions and management of

the counsel have been such as to secure to the creditors every possible advantage under the existing circumstances, he ought to receive out of the common stock some compensation for such services: for they are in reality services done to the creditors themselves. What that compensation ought to be must depend on the importance of the services and the trouble which the counsel may have been at. It is the province of the Court, before whom the settlement of the bankrupt's estate is pending, to fix the *quantum* of that remuneration.

IN this case, it was proved that the services of the appellee were beneficial to the estate of the bankrupt, and the Court below was right in allowing him a compensation. The error committed by that Court was to consider this as a privileged claim against Misotière, while it really was a claim against the creditors.

IT is, therefore, adjudged and decreed that the judgment of the Parish Court so far as it grants to the appellee a privilege be reversed, and that judgment be entered in favour of said appellee for the sum of four hundred dollars to be paid him by the appellants out of the funds in their hands belonging to the mass of the creditors of said Misotière; and that the appellants pay costs.

East. District.
June 1814.

SMITH & AL. vs. *ELLIOT & AL.*

SMITH & AL. vs. ELLIOT & AL.

An attachment cannot be quashed on an inquiry into the merits.

THIS was a suit on a note of hand of the defendants, in which an attachment was obtained and executed on some property of theirs. On their motion the attachment was quashed and the suit dismissed.

To the opinion of the Court, in this respect, the plaintiffs took a bill of exceptions which is as follows.

BE it remembered that, on this fourth day of May in the year 1814, the defendants, by their counsel, moved to the Court dismiss the attachment issued in this case, and in support of the said motion, they proved by two witnesses the following facts to wit: that, at the time the note mentioned in the said plaintiff,' petition, was signed by Elliot and Brazeal, they were copartners in trade, residing and carrying on commerce at Gibson Port in the Mississippi Territory; that Elliot has ever since and still does reside there, that Brazeal moved off with his family from Gibson Port, about one year since, and it is generally reported and believed at Gibson Port, and it is believed by the said two witnesses that the said Brazeal then moved to the Parish of Natchitoches in the State of Louisiana, and that he has ever since and still does reside there and when he was so moving, he declared his intention to settle

himself at the Salt Works for the purpose of manufacturing salt. The defendants' counsel further produced in evidence in support of the said motion the note mentioned in the said plaintiffs' petition; upon this testimony the defendants, by their counsel, insisted that the said attachment ought to be dismissed and dissolved: whereupon the plaintiffs by their counsel required the opinion of the Court, upon the question of law whether upon this testimony the said attachment ought to be dismissed and dissolved; and the said Court did then and there give their opinion, upon the said question of law as follows to wit.

CONSIDERING that when parties residing out of the state make application for the protection and benefit of our laws, they cannot be allowed to take only such part of them as may answer their purpose, but that they are bound to conform themselves to their whole intent and provisoes, and in this case especially to our Civil Code upon the extinction of obligations *p.* 288, *tit.* 147.

THAT the petition for attachment is founded on a promissory note, to order, payable upon demand; and that though the plaintiffs and Elliot, one of the defendants, live yet and carry on business as they did at the time, in the same place of the Mississippi Territory where the said note was consented, and of course where payment of it was to be demanded, there is, nevertheless, no legal proof or evidence that such previous demand has

East. District. *June* 1814.

SMITH & AL. vs. ELLIOT & AL.

been made: that the debt cannot be considered as due before the demand specified in the promissory note, and therefore the attachment cannot reach it: that, from the whole, it might appear that it was made for the purpose of vexing and harrassing absent defendants, in making the tribunal of this state the subservient tools of the tricks, which the inhabitants of other states or territories would play upon each other; and in defeating thereby the rules and laws of a liberal and prosperous trade between them. Considering finally that the facts on which the attachment in this case was founded were not truly stated since it appears by testimony that one of the defendants Brazeal lives now and has continued to live in this state, for at least one year possessing considerable property. The Court, upon the whole, order and decree that the attachment in this case shall be dissolved.

AND the said plaintiffs being dissatisfied with the said opinion of the Court upon the said question of law did then and there except to the same and pray that this their bill of exceptions be signed, and it is signed accordingly.

By the Court. This is an appeal from the decision of the Parish Court of the Parish of New-Orleans, by which the Judge of that Court dismissed an attachment sued out agreeably to the provisions of an act of the Legislative Council of

the late Territory of Orleans, regulating the practice of the Superior Court.

THE dismissal took place after argument, on a rule to shew cause, why the attachment should not be quashed. In the act above cited, there are two modes pointed out, by which the defendant to an attachment may release the property attached: one by proving to the satisfaction of the Court or Judge, who issued such attachment, that the facts, on which the same was founded, were not truly stated: the other, by giving bond, to the sheriff with sufficient surety, to defend the suit and abide the judgment of the Court. It appears from the record sent up to this Court, and the opinion of the Judge, to which the plaintiffs in the Court below have excepted by their counsel, that the Judge has founded his decision on a belief, that the facts stated on the part of the appellants are not truly stated, or that they are not such as by law will authorise and support an attachment.

THE reasoning of the Judge in support of his decision (if in any situation of the cause it might be considered as sound and conclusive) would certainly have been more properly applied in giving judgment on the merits, than on the motion of the defendants' counsel to quash the attachment, nor do we consider the law cited by him more applicable to a decision on a motion of this nature.

East. District. *June* 1814.

SMITH & AL. vs. ELLIOT & AL.

THE counsel for the appellees insists, that the dismissal of an attachment is not such a final decision as contemplated by the law organising the Supreme Court, from which an appeal may be taken. In cases where the defendant makes his appearance to the suit and answers regularly to the plaintiff's petition, and the attachment should afterwards be dismissed for want of regularity or on account of proof to the satisfaction of the Court that the facts on which it was founded were falsely stated, perhaps the decisions of dismissal would not authorise an appeal, because the cause might still go on to final judgment on its merits; but this is by no means clear.

WE are of opinion that situated, as the present case was before the Parish Court, the decision made by the Judge of that Court must be considered so far final as to authorise an appeal from it; for the appellants will otherwise be without redress, as they cannot regularly and safely proceed farther in the Court below. *Harper* vs. *Creditors*, *ante* 522.

THERE can be no doubt of its being a general principle of law that partners are bound, jointly and severally, by their partnership contracts; and that they may be sued all in the same action, or separately.

IF citizens of a different state or territory are

allowed the privilege of suing their debtors in this state, who may have contracted obligations and who reside elsewhere in the usual course of proceedings, when found within our jurisdictional limits, which we believe cannot be contested, certainly no good reason can be alledged, why they should not enjoy the benefit of extraordinary privileges allowed to suitors, by laws, such as the one under which the present action is commenced.

THE appellees, as appears by the petition and affidavit annexed, reside without the limits of the state, so that the ordinary process of the courts cannot reach them : a circumstance, which in the case a citizen of this state would authorise an attachment against his property, and we are of opinion that the rule is applicable to persons in the situation of the appellants.

IT is, therefore, ordered, adjudged and decreed that the judgment of the Parish Court be reversed and annulled and that the cause be there placed in the same state and condition in which it was before the rendition of said judgment or decision.

ST. MAXENT'S SYNDIC vs. *SIGUR.*

Liquidation by a Spanish tribunal, conclusive.

THE defendant, in 1789, purchased from St. Maxent, by two separate deeds, a plantation near New-Orleans, for $ 72,000, and five negroes for $ 6000 : the sums payable at different periods.

East. District. *June* 1814.

S. MAXENT'S SYNDIC *vs.* SIGUR.

He paid the sum of $ 41,985, 75, without any declaration of his intention as to the debt on which he wished an imputation to be made.

No interest, before judicial demand, unless by convention or on sale of land.

AFTER the decease of St. Maxent, his widow and the syndics of his estate brought an action for a liquidation of what might remain due as the balance on these two debts. The Spanish Tribunal before whom the action was pending, by a decree of the 5th of April 1797, recognised, with the consent of all the parties, the payment of $ 41,985, 75, on the two debts, and referred the settlement of the balance to Carlos Ximenes, their clerk, who reported it to be $ 30014, 81.

AFTERWARDS the defendant obtained from the same tribunal and the Court of appeals two decrees, by which, a diminution of $ 28,751, 85, was allowed him on the price of the plantation sold to him by St. Maxent; on the ground that the vendor had, without any right, sold to him some ground which was covered by the fortifications.

THE plaintiff having brought the present suit in the Court of the First District of this state, obtained a judgment for the sum of $ 2170, 80, as the balance due him, with interest from the judicial demand.

FROM this judgment he appealed.

Duncan, for the plaintiff. The Court below erred in considering the liquidation made by Ximenes

as conclusive. It was only the report of a referee, which before it might have any effect must have been matured by a final decree.

INTEREST ought to have been allowed on the price of the negroes sold. Surely, the vendor cannot reasonably expect to enjoy their hire, nor the fruit of their labour, and keep the vendor out of all the advantages he ought justly to derive from the price, after he has parted with the thing. Slaves are as productive as land, and perhaps more so.

Lastly, the costs of the suit, in the Spanish Court, ought not to have been allowed as a credit.

Moreau, for the defendant. The District Court was correct, in taking for the basis of its judgment the liquidation of the Spanish Tribunal, which declare, in its decree of the 5th of April 1797, with the consent of the widow and creditors of the vendor, that the payments made by Sigur amount to $ 41,985, 75. The creditors must therefore be bound by this decree: as to them, it is *res judicata*.

THE deed of sale for the negroes stipulate for no interest: none is then due, till the judicial demand, nor perhaps from that period, for the sum was yet unliquidated. Slaves, are not considered, any more than cattle, horses or any other objects susceptible of being hired, as producing *per se* a revenue, altho' they do so by being hired out, or employed in agriculture or manufactures. While

East. District June 1814.

S. MAXENT'S SYNDIC vs. SIGUR.

land of itself produces timber and other objects of revenue.

By the Court. In this case the counsel for the appellant contends that the Judge below has erred, 1st. in considering the judgment of the Spanish Tribunal rendered on the 5th May 1797, by which the claims of the parties, were at that period liquidated, as a final determination of their differences, agreeably to the report of Ximenes, and on which an order of seisure was obtained for the balance.

2d. In refusing to allow interest on $ 6000, the price of certain slaves, purchased by the appellee.

3d. In allowing to Sigur, as a credit, the costs of the suit which he brought for an indemnity on account of a deficiency of the land, and in which he recovered $ 25,000 and upwards.

It being admitted that the judgment of the District Court is, in all other respects, correct; the points above stated are alone to be examined.

I. As to the first, we are of opinion that the Court below was right in considering the liquidation and judgment of the Spanish Tribunal conclusive between the parties, whether it be viewed as an absolute decision of that Court, or a compromise by the consent of those interested.

II. In relation to the second error, insisted on

by the appellant's counsel; it appears to this Court that interest can be claimed on debts due, only from the judicial demand, except by convention or agreement, or for immoveable property, such, by its nature, as land and houses; for land alone can strictly and literally be said to bear fruits.

East. District. June 1814.

S. MAXENT'S SYNDIC vs. SIGUR.

III. CONCERNING the third error attributed to the judgment of the District Court. We have no doubt of the correctness of the decision, in allowing to the appellee the costs of his suit for indemnity which were by him paid; he having prevailed in the cause.

UPON the whole, it is the opinion of this Court that the judgment of the District Court ought to be affirmed.

IT is, therefore, ordered that the same be affirmed with costs.

BLAKE & AL. vs. MORGAN.

By the Court. This appeal is brought before the Court, on a bill of exceptions to the opinion of the Judge of the First District, in his charge to the jury, who tried the cause in the Court below; and also on a statement of facts comprising the merits of the suit; which enables us to give a

Shipper must pay freight, if he prevents the delivery of the cargo to the consignee.

East. District. *June* 1814.

BLAKE & AL. vs. MORGAN.

judgment, without the necessity of remanding the cause to the District Court to be again tried; and consequently renders it unnecessary, to examine the opinion, expressed by the Judge in his charge to the jury.

THE appellants, who were plaintiffs in the Court below, commenced their action against the appellee to recover the amount of freight on 200 hogsheads of sugar, and other sums, as primage, general average, and demurage. It appears from the statement of facts that the appellee, on the 22d of January 1811, shipped on board a ship called the Margaret, of which the appellants state themselves to be owners, 200 hogsheads of sugar, to be carried from the port of New-Orleans to New-York, for account and risk of Messrs. H. & J. Fisher, merchants in that city, and that they were to pay freight on said sugar at the rate of 11 dollars per hogshead, with 5 per ct. primage as accustomed. The vessel sailed from the port of New-Orleans on the 12th of February, and on the same day, was driven on shore, at the English Turn, by unavoidable accidents, where she remained aground until the second day of March. While the ship was in this situation, Morgan, the appellee, obtained from a competent tribunal an order of sequestration, and by virtue of that order the sugar was forcibly taken from the vessel. In the petition on which the sequestration was allow-

ed, he claimed also to have the property restored to him on account of the failure of the persons to whom it had been sold, and was consigned.

THE counsel for the appellee oppose a recovery against him, in this action on three grounds. 1st. Because the appellants have not shewn themselves to be the owners of the ship. 2d. They have no just claim against Morgan the shipper: because from the terms of the bills of lading, they were to look to the consignees for payment of freight. And 3. that the only remedy left them in the present state of things is their lien on the property shipped.

I. As to the first objection; it is sufficient to observe that in no part of the pleadings, has it been denied, that the plaintiffs in the Court below, had a right to maintain this action; unless we are to consider the general denial of all facts contained in their petition, as embracing the circumstance of the want of proper parties to the suit; in the answer to the petition, the defendant prays not that the suit should be dismissed for want of proper parties, but that the facts should be enquired of by a special jury; by which he seems to have waved all objections to the appellants' authority to sue; and in the statement of facts it is admitted that they consigned this ship to their agent in the city of

East. District. *June* 1814.

BLAKE & AL. vs. MORGAN.

New-Orleans. It is too late now, to dispute their right of action.

II. In relation to the second objection, to the appellants' right to recover against the appellee in this action, there can be little doubt, that had the property been suffered to remain on board the vessel, and received by the consignees, they alone, from the stipulations in the bills of lading would have been bound to pay the freight. But pursuing a different course of conduct, the consignor, the party contracting for the transportation and freight of the sugar (which it seems he had sold to his consignees) arrests the property *in transitu*, prevents the vessel from regularly earning the freight on the goods, by carrying them to the place of destination, and consequently the delivery of them to the consignees, by which alone they could become liable to pay the freight. This conduct of the appellee has put it out of the power of the appellants ever to obtain payment from his consignees; for they being no party to the contract of affreightment could not be bound by it, except on the receipt of the property consigned; and he, having caused it to be stopped on its passage, and brought his action for restitution, must now be considered so far the owner, as to be bound to the payment of freight according to his contract. If liable to pay the freight, a question has been raised as to the extent of this liability. It is contended on the part of

the appellee that it should be only *pro rata itineris periculi*. This apportionment of freight generally takes place, when the ship by reason of any disaster goes into a port, short of the place of destination and is unable to prosecute and complete the voyage. In such a case the master may cause the goods to be conveyed, by hiring another ship, and thus entitle himself to his whole freight; but if he declines doing this, and the goods are received by the merchant, then he is paid in proportion to the voyage performed: and this is stated, by *Abbot*, in his *Treatise on Shipping* 336, to be according to a general rule of maritime law; but is certainly not applicable to the case before the Court, wherein the master has been prevented from carrying the property to the place of destination solely by the act of the shipper of the goods: claiming restitution of them &c. we must, therefore, resort to principles of law which govern cases similar to the present.

IT is laid down in the *Ordinance of Bilbao*, *ch.* 18, *p.* 155, *num.* 9, that the shipper may, after having laden the vessel, if he finds it convenient, annul the contract of affreightment and take out his goods, on paying the captain half freight: this is applicable to cases where the ship has not left the lading port. In the same *book and chap. page* 160, *num.* 23, it is stated that if a ship be stopped on her voyage, by a tempest, or other accident, and return to the port from which she

East. District. *June* 1814.

BLAKE & AL. *vs.* MORGAN.

has sailed (in a state fit for navigation) and the shippers desire to unload her, they may do so, on paying the captain his full freight. This principle we conceive to be in point for the case now to be adjudged. Morgan the shipper has caused the sugar to be taken out of the vessel and by thus acting has prevented the master from fulfilling his agreement: for it does appear that the ship was soon after her misfortune in a situation to prosecute the voyage.

III. IN treating of the third ground of objection, made by the appellee's counsel, it is only necessary to remark, that perhaps the appellants might have pursued the property, and supported their claim to compensation, out of the proceeds of it, by intervening in the suit commenced by Morgan against his consignees, but it was optional with them to take that course or the one they pursued. The case of *Kenner & al.* vs. *Morgan*, *ante* 209, has been cited in support of this objection. It is nothing like the present: here the action is brought against the party contracting: there it was against an officer who in the discharge of his duty had properly executed a process of the Court.

WE are of opinion that the appellee is bound to pay the full freight of the sugar, as claimed by the appellants; but nothing on account of general average demurrage, or primage: this last is a

compensation to the master for his particular care of the goods and ought not be recovered by the owners unless they had shewn that they have paid it to him. The circumstance of this vessel running aground is not such as to require a general contribution by shippers and owners. Demurage is never due except by express stipulation. In support these latter propositions, see *Abbott on Shipping*, 382 *and* 244.

IT is, therefore, ordered, adjudged and decreed that the judgment of the District Court be reversed and annulled, and proceeding to give such judgment as in our opinion ought then to have been rendered, it is further ordered, adjudged and decreed that the appellants do recover from the appellee $ 2200, with legal interest from the judicial demand and costs.

FRAM vs. *ALLEN.*

By the Court. This is an action brought upon an account current, unsettled between the parties. The plaintiff, here the appellee, claims a balance, and the appellant has pleaded the general issue. On the trial of the cause below, the appellant offered to prove that the plaintiff had omitted in the account sundry credits in his favour; but the

If suit be brought for the balance of an account, compensation need not be pleaded.

East. District. *June* 1814.

FRAM *vs.* ALLEN.

evidence was refused, on the ground that he had not pleaded compensation specially. Judgment was accordingly given, for the balance claimed by the appellee.

THE subject of enquiry here is not whether the plea of compensation can be considered as included in the general issue : for it is a positive rule of our judicial proceedings, that compensation must be pleaded specially. *Recop. de Cast. book* 4, *tit.* 5, *law* 1. The question is, whether this is a case in which compensation ought to have been pleaded at all.

IT is a well known principle, that compensation takes place only between debts which are both clear and liquidated. Let us see whether this principle is applicable here. Although debts, depending on accounts, are not considered in law as liquidated debts when the accounts may require a long discussion, *Pothier on Obligations, part.* 3, *chap.* 4, *no.* 592 : yet, if the plaintiff had claimed, from the defendant, the amount of his own account of goods furnished, there might have been some reason for considering the defendant as bound to oppose, by way of compensation or mutual demand, his own account of articles furnished to the plaintiff. But where, instead of demanding the price of the goods by him furnished, the plaintiff undertakes to oppose the defendant's

claim to his, in order to compare them together and establish a balance between the two; there it cannot be said that either of the claims are liquidated, for the very object of the suit is to obtain that liquidation. In such a case both accounts are put at issue, and any evidence tending to support or contradict the correctness of either ought to be admitted.

IF we follow this distinction through its consequences, we will find it still more striking. Where one party demands of an other the price of things, which he has sold him, if the defendant does not plead compensation, he may indeed be condemned for the whole; but he can afterwards recover, in his turn, the amount of his own claim. But, where a demand has been made of a balance of accounts between two parties, and judgment has been rendered for that balance, such judgment might be considered as a bar against any claim of either party up to that date; for it is in fact a liquidation of their respective accounts untill then. From which it would follow, that should the plea of compensation be deemed requisite in this case, instead of having the effect merely of compelling the party to resort to an other suit, it would put it out of his power ever to recover his due.

THE administration of justice cannot end in such consequences. When the interpretation of its rules leads to the destruction of a just right, we

East. District. *June* 1814.

FRAM vs. ALLEN.

may be sure that interpretation is wrong. The reason of the general rule that compensation must be pleaded specially is easily conceived; but the application of it to a case of this nature would produce injustice.

IT is, therefore, ordered and decreed that the judgment of the Court of the First District be reversed; and that the cause be remanded to that Court to be again tried, with instructions to the Judge to admit any legal evidence which the appellant may offer to prove the credits which he contends he is entitled to and which he says have been omitted in the account current presented by the appellee.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. JULY TERM, 1814.

SYNDICS OF ELLINGHAUS & AL. vs. *GRAVIER.*

A sale by ceding debtor is void.

By the Court. In the year 1809, Ellinghaus and Remy, who had been in a general partnership, finding themselves in failing circumstances, called a meeting of their creditors, and entered with them into an amicable arrangement, the principal clause of which was that they should, in the presence and with the consent of the syndics of their creditors, expose for sale so much of their property as would be sufficient to pay all their debts. The terms of sale were to be six and twelve months, and the proceeds were to be paid into the hands of the syndics. In the mean time, the debts were to bear an interest of ten per cent. from the time they had respectively become due.

East. District. *July* 1814.

ELLINGHAUS & AL'S. SYND. *vs.* GRAVIER.

ABOUT one month after that, Ellinghaus and Remy presented their *bilan* before the then Superior Court of the Territory of Orleans, and obtained a stay of proceedings against their persons and property. A meeting of their creditors was then called, under the authority of the Court, at which meeting the creditors agreed that the sale of the property of Ellinghaus and Remy should be effected according to the terms already fixed, and confirmed the nomination of the syndics already chosen. These proceedings were duly homologated; and the greater part of the property tendered in the *bilan* was sold. But before a final settlement of the affairs of Ellinghaus and Remy took place, Remy sold ten of the slaves mentioned in the schedule. Posterior to that sale a judgment of the Superior Court liquidated the balance due by Ellinghaus and Remy to their creditors at the sum of $ 6327, 42; and to obtain payment of that balance, the syndics have brought the present suit against the holder of those slaves.

WITHOUT taking into consideration the multiplicity of incidents, which have swelled the record of this case to its present enormous bulk, and particularly the different sales and transfers by which Remy and his agents have endeavoured to put the property in contest out of the reach of his creditors, there can be no doubt that a sale, made under the circumstances in which Remy was placed, is void

on two grounds ; void, as done by a person who had no right to sell ; and void, as done in fraud of the creditors. No reasoning is deemed necessary to shew either.

LET the judgment of the District Court be affirmed with costs.

PAVIE'S HEIRS vs. *CENAS.*

If sheriff dies before receiving the amount of a sale, on a *fieri facias*, his representatives cannot demand it.

By the Court. This is an action brought against the wife and executrix of a deceased sheriff, to obtain from her the amount of an execution, of which, at the time of her husband's death, the money was not recovered.

THE plaintiffs contend that the deed of sale of the property executed having been made in the name of the deceased, the action resulting therefrom has passed to his executrix and heirs. The defendant answers that such sales being made by a sheriff in his public capacity, she cannot exercise any action against the purchaser of the property thus sold, that she ought not to be liable for the proceeds. Judgment having been rendered against her in the Parish Court of New-Orleans, she has claimed the present appeal.

IT appears to this Court that in order to make the defendant liable in this case, one of two things

East. District. July 1814.

PAVIE'S HEIRS vs. CENAS.

ought to have been proved; either that the proceeds of this sale were paid into her hands since the death of her husband; or that it was through the neglect or misconduct of her husband, that the money was not collected before his death. But, on the contrary, it is recognised that the term of payment of the property executed and sold on this occasion was not yet elapsed, when the sheriff died; and it is not pretended that his widow has received the money since his death.

THIS is, therefore, one of those cases in which the acts begun by the former sheriff must be continued and terminated by his successor. Whether it was or was not expressed in the deed of sale by him made that the price was payable to him or to his successors in office is immaterial. He sold in his official capacity of sheriff; and the price which has not been paid to him is payable into the hands of his successor to be disposed of as the law may direct. The present sheriff is, therefore, the proper person to compel the purchaser of this property to pay. The appellant has no quality and no right to enforce that payment. She must, therefore, be discharged.

IT is ordered and decreed that the judgment of the Parish Court be reversed, and that judgment be entered for the appellant with costs.

BRAND vs. *LIVAUDAIS & AL.*

East. District. *July* 1814.

BRAND vs. LIVAUDAIS & AL.

It is always time to make the statement of facts, when the judgment is not actually signed.

By the Court. In this case a rule has been made on the Judge of the first Judicial District, to shew cause, why a mandate should not issue from this Court, requiring him to make a statement of facts, according to the terms of the act organising the Supreme Court, &c.

THE counsel for the defendant, who prayed the appeal, having considered the cause shewn insufficient, moves the Court to make the rule absolute: it appears that application was made to the Judge below to fix the statement of facts, before the judgment was actually signed; and agreeably to a decision heretofore rendered by this Court, in *Hellis' syndics vs. Asselvo, ante* 201, it was considered that a party, desiring an appeal from any of the inferior courts, may obtain from the Judge a statement of facts, at any time before the actual signing of the judgment. The right to appeal is positive, and clearly given by the constitution and laws of the state; it is limited to two years. The provisions of law, by which the manner of bringing up an appeal is prescribed, are only relative to this right. In the cause shewn by the Judge of the District Court, he states that his judgments are frequently not signed until after the lapse of time provided by law, and that in such cases the signature is affixed *nunc pro tunc*, but, by a fiction relates back to the period at which they

East. District. *July* 1814.

BRAND *vs.* LIVAUDAIS & AL.

ought to have been signed. As the law requires positively that judgments rendered by the inferior courts should be signed, we were of opinion in the case above cited, that, without this solemnity the judgment is not so complete, but that a statement of facts ought to be made by the Judge, if properly applyed for. Fictions of law are not tolerated by courts of justice, except to promote its ends, and secure the absolute rights of suitors.

IT is, therefore, ordered that the rule heretofore granted in this case be made absolute and that a mandate issue as requested.

CASSOU vs. *BLANQUE.*

Husband's property whether acquired before or during coverture, is bound for the wife's rights, altho' alienated before the dissolution of the marriage.

By the Court. The appellant is a married woman, separated of bed and board from her husband. She had brought in marriage a sum of money and two slaves, who, by the stipulations of the marriage contract, became the property of the husband. One of slaves, named Rosette, was by him sold; the other, named Cité, he exchanged for an other slave named Laguerre, whom he also sold. Rosette and Laguerre are now the property of the appellee. On them the appellant claims a lien, and she has accordingly instituted this suit against their present owner, demanding that they may be seized and sold to satisfy the

judgment which she has obtained against her husband for the restitution of her marriage portion.

The only question in this case is, whether the tacit mortgage which the wife has on the property of her husband, for the restitution of her dower, extends to the property which the husband may have alienated. The District Judge has conceived that this right of mortgage can be exercised only on such property as the husband may be possessed of, at the time of the dissolution of the community. In that, we think he has erred. The tacit mortgage of the wife, similar in this to all general mortgages, must indeed be exercised first against the debtor, if he has any property left. In such case it is not the intention of the law that the purchasers of his goods should be disturbed. But if, at the time of the dissolution of the community, the husband is insolvent, then the tacit mortgage of the wife attaches to the property which he has alienated.

If it were otherwise, what would signify the provision which secures the dower of the wife by a legal mortgage on her husband's estate? A lien, to be extinguished by the alienation of the property, would be no lien at all. The dower, which the law has taken care to secure, might be lost; and the wife, whom it protects, would be exposed to utter ruin. The faculty granted to the wife of petitioning for a separation of goods is a

East. District. July 1814.

CASSOU vs. BLANQUE.

resource provided for by law to enable her to rescue her dower when it is in danger; but should that be her only safeguard, it would prove in many cases a very impotent one; for the whole of the husband's property might be disposed of, before the wife could even suspect his intentions.

THE appellant is, therefore, well founded in her demand against the appellee, so far as it concerns the negro wench Rosette, who being tacitly mortgaged to the restitution of her dower, was sold by her husband.

WITH respect to the negro Laguerre, it has been objected that, instead of claiming her right of mortgage on him, the appellant ought to have exercised it against the possessor of Cité who, while mortgaged to her, was exchanged for Laguerre. It is true the appellant might have exercised her recourse against the possessor of Cité: but she was not obliged to do so. The property acquired during the community, of which the husband is the master, is as much liable to the tacit mortgage of the wife, as the separate estate of the husband. The appellant had, therefore, the same right against the purchaser of Laguerre, as she had against the possessor of Cité. Much has been said, as to the hardship which results against purchasers, from the exercise of this tacit mortgage of the wife on the property alienated by her husband. It is not the province of courts

of justice to enquire into the inconveniences of laws; if it were, it might be observed here that the hardship is not so great as it has been represented; for, there is hardly a citizen of this state who does not know that he must act with due caution when he buys immoveables or slaves from a married man.

The objection made that this marriage contract is not binding upon third persons, in as much as it was not recorded, according to a law enacted in 1813, is of no force. This suit was begun before that law was passed. Besides the object of such recording is to give notice of the contract; in this case the appellee had by the suit full notice of the claim of the appellant and the recording of the marriage contract as to him was perfectly useless.

It is, therefore, adjudged and decreed that the judgment of the District Court be reversed; and this Court proceeding to render such judgment as the Court below ought to have rendered, orders and decrees that the negro slaves Rosette and Laguerre be seized and sold to satisfy the judgment obtained by the appellant against her husband, and that the appellee pay costs.

East. District. *July* 1814.

TRIMBLE'S SYNDICS vs. *N. O. INSUR. CO.*

TRIMBLE'S S. vs. N-ORLEANS INSUR. CO.

By the Court. This appeal is brought before the Court on a statement of facts, and is taken from the verdict of a jury and final judgment rendered thereon, by the Court below.

Sea-unworthiness during the voyage will not entitle the insured to recover.

THE only question in the cause to determine, is, whether or not the ship, mentioned in the policy of insurance, on which the action is founded, was sea-worthy at the time she left New-Orleans, on the voyage injured.

FROM the statement of facts, no doubt can remain of the plaintiffs in the District Court having proven sufficient to make it necessary for the defendants, to shew by proof on their part that the vessel was innavigable, or not sea-worthy, at the period of her departure from the port of New-Orleans.

THIS they have attempted to do; but the only testimony produced by them is the report of persons who surveyed her in the Island of St. Thomas, where she was compelled to take refuge by stress of weather; and from their survey and report, it is evident that she was, at the time of its taking place, unfit for sea; and this, on account of defects which probably existed at the moment of her commencing the voyage insured. However, this circumstance was certainly not made out to the satisfaction of the jury, who tried

the cause in the Court below, or their verdict ought, according to principles of law, to have been given in favour of appellants; and admitting it to be the duty and within the power of this Court to re-examine and decide on matters of fact, which have been determined by the verdict of a jury (which is by no means clear) when considered in any other way than as they may be necessary to a just application of the principles of law in the correction of errors, or mistakes of it, by the inferior courts; were it the business of the Supreme Court to weigh the evidence produced in every cause which comes before it, in the case now under consideration, we might and should perhaps doubt much as to the truth of the particular fact, or circumstance, on which alone depends the just and legal decision of the suit, viz: the navigable or innavigable state of the ship, at the time of her departure from New-Orleans.

We have before us the testimony of several witnesses, which proves that she was fit for sea at that period; and this is opposed by nothing except the report of the persons who surveyed her in the Island of St. Thomas; it is true that the facts contained in that report, (and which by the consent of parties are to be considered as evidence in the case) are calculated to raise a violent presumption of the unsoundness of the ship at the commencement of the voyage: but they are not

East. District. July 1814.

TRIMBLE'S S. vs. N.-ORLEANS INSUR. CO.

by any additional evidence brought to bear on the date at which she sailed: This might have been done by witnesses skilled in the structure of vessels, and science of navigation, who could have stated the importance of the timbers found to be rotten, on the examination of the ship at St. Thomas: the probable progress of rottenness, in pieces of wood of any given dimensions, in a certain length of time, might have been ascertained by persons acquainted with such subjects. No testimony of this kind having been offered to explain the report, or apply it to the time of commencing the risque, the case cited by the counsel of the appellees, from *Cranch*, is strictly applicable to the present.

A variety of testimony, as it appears from the statement of facts, was offered to the jury who tried the cause in the Court below: we must presume that they weighed and discussed it as they ought to have done; and under the existing circumstances of this case taken altogether, we are of opinion that this verdict and the judgment rendered thereon ought not to be disturbed.

IT is, therefore, ordered and decreed that the judgment of the District Court be affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT. AUGUST TERM, 1814.

YOCUM vs. *ROY.*

MOTION to dismiss the appeal, on the ground that no statement of facts was made before the judgment below was signed, *Syndics of Hellis* vs. *Asselvo*, *ante* 201: but the appellant reading are affidavit, stating that the parties had agreed to accept a statement of facts, made by the District Judge, after judgment signed, nothing was taken by the motion. See *post.*

Statement of facts may, by consent, be made after judgment signed.

HARRISON vs. *MAGER & AL.*

THERE being no statement of facts, special verdict or bill of exceptions; the appeal was dismissed.

Appeal dismissed for want of a statement, &c.

West. District.
August 1814.

SINNET vs. *MULHOLLAN & AL.*

SINNET
vs.
MULHOLLAN
& AL.

If petition be amended by inserting the plaintiff's residence, no time to answer.

Porter, for the plaintiff. This case comes upon a bill of exceptions, which states that as the case was called up for trial in the Court below, the attorney for the plaintiff (the appellee here) moved to amend the petition by writing the residence of the petitioner, which it seems had been omitted in the original petition. On the granting of this amendment, the defendants moved for further time to answer, which was refused by the Court, and that refusal is the alledged error, which this Court is called on to correct.

IT will be shewn, that no error has been committed, or that if there was, it is not an error of that description, for which this court can reverse the judgment given in the District Court.

I. THE amendment raised for by the plaintiffs counsel was one of mere form—it neither altered the nature of the action, nor introduced new matters on the pleadings. *Every allegation in a petition, which, on a general denial being put in, does not require proof by the plaintiff is an allegation of form.* Now it has never been required of the plaintiff to prove his residence as alledged, in any court of this state, on either the general issue being pleaded alone, or combined with special pleas in avoidance. The delay, therefore, that was asked from him, only tended to embarass the administra-

tion of justice: time to answer was unnecessary, when nothing of the substance was in fact altered.

BUT, the refusal of the Court would not have been error even at common law, a system for more technical than ours. In the courts of England on an amendment to a declaration in matters of form no imparlance is granted and the plaintiff is not required even to pay costs. *Vide Field's Practice*, 653.

II. BUT again—If any error was committed it was in "a matter of form" and such an error cannot be the ground of reversal in this Court.

THE act of the State Legislature, 1813, *chap.* 18, *sec.* 13, enacts—"That no decreee or judgment of the inferior courts shall be reversed for want of form either in the judgment or proceedings." This does away all difficulty, in the question, as it will be impossible to shew that the amendment made here was at all connected with the merits of the question in dispute between the parties.

Baldwin, for the defendants. In this case the defendants in the District Court claimed and were entitled to time to answer over, upon the plaintiff's amending his petition.

IT is a general rule and one founded on reason and justice that when the plaintiff is permitted to amend, the defendant has a right to answer to the

West. District. *August* 1814.

SINNET *vs.* MULHOLLAN & AL.

amendment—as otherwise the plaintiff might intentionally omit some important allegation which after the defendant had answered he would insert by way of amendment and which the defendant would be prevented from repelling by any proof, as it would not be denied by the answer under the principle that the *allegata et probata* must keep even pace. It is also a rule equally well founded, that when one party appeals to the discretion of the court for a favor, the indulgence granted to him ought to be extended to his adversary—it ought to be reciprocal—short of this would be partiality.

THE amendment of the petition was material or not—if not material, why make it? If it was material (and the plaintiff by making it, admitted it to be) it was to add some statement without which he could not maintain his suit—and it was restricting the defendants in the right and privilege of denying that new allegation, so important to the plaintiff. It is true that the amendment only went to insert the plaintiff's place of residence and that the defendants had pleaded payment—but this did not alter their right to answer over, if any case would occur wherein a new answer could avail then under such a plea, because the Court in granting or refusing amendments are to act upon general principles and take into consideration such cases. Now it might have been true that the defendants gave similar notes to men of the same name—to one of which the plea of payment might

apply, but not to the other. Under our statute a technical mode of pleading is not observed and the defendants, according to the indulgent and rather loose mode of proceeding of the District Court, might, under this plea, have introduced evidence of fraud, want of consideration, set off, &c. and of which they were deprived by changing the plaintiff—and of which they could have availed themselves under the original petition.

THE defendants below by demuring to the petition could have arrested the plaintiff's proceeding, until it was amended—after which they would have been entitled as a matter of right to answer over—and though this was not the course pursued, as the defendants might, and no doubt did, consider it to their advantage to wave the demurer and plead to issue, yet as the plaintiff amended, the defendants ought to have had the same time to amend, or to put in a new answer, as they would have had upon a demurer sustained.

MOREOVER, how could the defendants know what the amendment was, until they had time to look at the petition as altered—which it appears, by the bill of exceptions returned with the record, was not granted, as the amendment was made when the case was called up for trial and no delay whatever was granted them? But these observations out of view, the appellants believe they may with safety rely upon the general and well esta-

West. District. *August* 1814.

SINNET *vs.* MULHOLLAN & AL.

blished rule that when the plaintiff is permitted to amend his petition, the same indulgence ought to be extended to the defendant and that the Court erred in refusing it. 1*st. session of the Legis. Council, chap.* 26. 1 *Tidd's Prac.* 153 4, 5, 6. 1 *Martin*, 205—*Aston vs. Morgan. Washington*, 365—*Cosley, executor of Loudon vs. Hill.* 1 *Johnston's Cases*, 248—*Holmes vs. Lansing.*

Porter, in reply. All the arguments respecting amendments, urged by the counsel on the other side, would be correct, and have an application here, if the amendment prayed for and accorded by the court had been a material one. The reasoning by which it is attempted to be shewn to have been so is founded on *remote possibilities*, which can never form the ground of a legal judgment. But the appellants here by their pleadings acknowledged the plaintiff's residence not to be material. To a petition, without any place being alledged as the domicil of Sinnet, they plead payment. What was that, but in fact saying that no matter where he lived, they had already paid him? This shews they were perfectly aware of the person, and destroys all the reasoning, "that there might be two persons of that name, that they might have given two notes, &c".

THE case from *Washington*, is one of a material amendment made, and that from *Johnson* on-

ly proves, that the Supreme Court of New-York, has established a different practice from the English. But the superior good sense of the latter is too obvious, to require any aid from argument.

ON the whole it is hoped the judgment of the Court below will be affirmed.

By the Court. This suit is brought by the appellee, upon a note of hand, subscribed in his favour by the appellants. The appellants have answered by pleading payment. At the time of the trial, the plantiff's counsel moved for leave to amend his petition, inserting the residence of the plaintiff; and the Court having granted it, the defendants moved for time to answer over. This being refused, on the ground that the amendment was immaterial and not such as required a new answer, the appellants excepted to that opinion, and on that exception the case is brought up before this Court.

IT is a general rule, and one certainly founded on principles of justice, that where permission is given to one of the parties to amend his pleadings the other has a right to answer over or reply. But the amendment must be such as may require a reply or answer. If it be insignificant and has nothing to do with the issue, if it be mere matter of form and leaves the case in the same situation

West. District. *August* 1814.

SINNET vs. MULHOLLAN & AL.

in which it was before, if it be evidently of such a nature that no additional allegation on the part of the other party can possibly arise from it, it would be worse than nugatory to make such an amendment the pretext of a delay in the trial of a cause.

IN this particular case, the amendment was not only immaterial, but it was with respect to the defendants no new matter. If the expression of the residence of the plaintiff is at all necessary, it must be to designate in such a manner as to enable the defendant the better to know the person who sues him. But here it is evident, from the manner in which the defendants did answer, that they knew the plaintiff well and wanted not any information about his residence to ascertain who he was.

UPON the whole, the application made in this case to obtain leave to answer over was entitled to no regard, and the District Judge did right in overruling it.

IT is, therefore, adjudged and decreed that the judgment of the District Court be affirmed with costs.

CLARK vs. *PARHAM.*

West. District. *August* 1814.

CLARK vs. PARHAM.

By the Court. This appeal comes up in such a shape before the Court, that we cannot cancel or reverse the judgment of the Court below.

THERE is no bill of exceptions to any opinion of the District Judge, statement of facts, no special verdict, nor any thing equivalent thereto. In cases thus situated we are precluded by law from reversing the judgment of the Inferior Court.

Judgment affirmed, with damages there being no statement, &c.

IT is the duty of this Court to give damages, not exceeding ten per cent, in cases where it appears the appeal was taken for the purpose of delay only. The present appears to us, on an examination of the record, to be one taken for that purpose alone: and, as it is the opinion of the Court that it has power in cases circumstanced like the present, either to dismiss the appeal or affirm the judgment of the Court below, although a reversal could not regularly take place;

IT is, therefore, ordered, adjudged and decreed that the judgment of the District Court, in this case be affirmed with costs, and that the appellee, the original plaintiff, do recover from the appellant in addition to all other costs and charges, eight per cent on the amount of the judgment rendered by the District Court, as damages adjudged by this Court.

West. District. *August* 1814.

VERNOT vs. YOCUM

VERNOT vs. *YOCUM.*

Testimony, by consent taken in lieu of a statement.

If a negro be staked on a race to be run, and a second race is run in lieu of the first, the negro is no longer in stake.

By the Court. This action was brought in the Court below by the appellee, to recover from the appellant a negro, mentioned in the proceedings, and appears by the petition, to be founded on a bill of sale, made by Yocum to Vernot. The instrument of sale, as it appears by the record, is an act under private signature, without any subscribing witness, but seems to have been proven by the oath of one witness on the trial, in the District Court.

A statement of facts not having been regularly made in the case, either by parties or the Judge before whom it was tried; and, as the testimony then given is submitted by consent for the consideration of this Court, it becomes our duty to examine the whole evidence as offered, to apply the law, and render judgment conformably thereto.

FROM a full view of the case, it is discovered to be founded on a contract known to our laws under the denomination of aleatory, and is of the species of gaming and betting: having its origin in a horse race. It appears from the testimony, that the parties to the suit agreed to run a race with horses, on the first day of March, 1813, for the sum of $2000, which was to have been staked on the day previous to running; that the race was

to have been run at a certain time the day of, which was passed before either of the parties insisted on carrying the contract into effect by running. It is in evidence that the agreement to run for $2000 was in writing, but was not produced on the trial in the Court below by either party; that the original race for $2000 was relinquished by the consent of the contracting parties, either in consequence of the time having elapsed or for some other cause not apparent; and that they agreed to run for $1000; about which the evidence is not entirely clear.

THE bill of sale for the negro, claimed by the appellee, was placed in the hands of Johnston, a witness in the cause, who held it, as a stake against another negro, and $ 200 held by him for Vernot, to be delivered as a forfeit by either party who should refuse to comply with his contract and fail to run the race. And here, were it necessary to the decision of the cause, it might be observed, that the bill of sale for the appellant's negro was obtained from the stake-holder, under false pretenses, and circumstances of deception which ought never to be encouraged.

FROM all the facts disclosed by the whole testimony, adduced in the case, it appears evident to the Court, that the negro in dispute was to be forfeited by the appellant, only on his failure and refusal to run the race for $ 2000; and he ought

West. District. August 1814.

VERNOT vs. YOCUM.

not to be made answerable in damages to the appellee, on account of his failing to run; as this seems to have arisen, from the mutual negligence of both parties, as neither required the performance of the contract, within the time limited by its stipulations. Thus the performance of the obligations created by their agreement having failed, as much by the conduct of the one party as the other, neither can claim any benefit resulting from it: on this subject there could not remain a shadow of doubt except, from the confusion introduced in the transaction, by the consent of the parties to run on the same day a race for $ 1000. This surely cannot be considered the same contract by which they stipulated to run for $ 2000 and as the latter that is, the contract or agreement to run for $ 2000 is the one which on failing to perform the forfeiture was to take place and must be considered in relation to this alone: for it is not to be presumed, nor is it to be collected from the evidence, that the same forfeiture was to accrue on failing to run for $ 1000, and as, before stated, this failure having taken place not by any neglect or improper conduct on the part of the appellant; we are of opinion that the appellee has no right to recover the negro claimed by him, and that the condition on which the sale was to have become valid having failed, it must be considered void and of no effect.

THE Court being of opinion, on this ground, that the judgment of the District Court is erroneous, it becomes unnecessary to examine the effects of the power given by Vernot to Cox, to settle the race and the acquittance given by Cox in virtue of said power.

IT is, therefore, ordered, adjudged and decreed, and we do order, adjudge and decree, that the judgment rendered by the Court below, in this cause, be reversed and annulled, and that judgment be here entered for the appellant with costs.

YOCUM vs. *ROY*, *ante* 397.

Party not allowed to stultify himself.

By the Court. This suit is brought by Yocum the appellee, who was plaintiff in the original action, to recover four hundred and fifty dollars, and is founded on an instrument of writing, which was verified in the Court below by one witness and a sort of confession of the appellant, in his answer to interrogatories put to him by the appellee, agreeably to the laws governing such cases. Roy, the defendant in the District Court, by his answer to the interrogatory of the plaintiff, states his belief of having signed the instrument of writing produced in support of the action; but he answers from information of others, as (in consequence of drunkenness, and stupidity from intoxication) he has

West. District. *August* 1814.

YOCUM vs. ROY.

no recollection of what passed at the time of executing said instrument. This part of his answer was rejected by the Judge of the District Court, as evidence in this case, not being directly responsive to the plaintiff's interrogatory. It is unnecessary here to determine on the manner in which, answers required to interrogatories put conformably to the act in such cases provided, are to be taken and received by courts of justice; whether they are to operate as well for, as against, the person making the answers, or must be viewed solely as proof against him: for in the case before the court the whole answer is doubtful, as the party endeavours to establish by it facts which, if we are to believe him, it was impossible for him to know; as he declares that he was without the power of knowing or perceiving and consequently not in a situation to will or consent and could not, therefore, legally bind himself. To admit such evidence as good, would be clearly a violation of that principle of law and common sense, which denies the right to all persons of stultifying themselves. Leaving then the evidence, attempted to be drawn from the defendant, wholly out of view, it appears that the agreement in writing was sufficiently proven by a witness who subscribed it with his mark, not being able to write his name and who from hearing it read in court, recognized it to be the same instrument which he had attested. If the appellant was really in a condition of mind,

which rendered him incapable of consenting to any contract, on full proof of this, perhaps he might have avoided the obligation arising out of such agreement. This might have been proven by those who were present at the time, and competent to prove his real state of mind. Nothing of this appears by such testimony. No attempt has been made on the part of the appellant to shew, that he has been cheated or defrauded, nor any want of consideration to support his contract. On a view of the whole case, we are of opinion that the judgment of the District Court must be affirmed; it is, therefore, ordered, adjudged and decreed that the same be affirmed with costs.

SENNET vs. *SENNET'S LEGATEES.*

Natural children can only inherit one half of the estate, when the father leaves brothers or sisters.

Porter, for the plaintiff. In this case it appears by the statement of facts that the appellees are the acknowledged natural children of Sennet, deceased, that their father by will has left them the whole of his estate, real and personal, having living at the time of his decease brothers and sisters. This distribution of his property the appellant, as one of the collateral heirs, conceived illegal and brought his suit in the Court below to have the will set aside, or that the bequest to these persons might be reduced to its legal amount. The District Judge, however, confirmed the testamentary dis-

West. District. *August* 1814.

SENNET *vs.* SENNET'S LEGATEES.

tribution, and it is to reverse the decree given by him that this appeal is taken.

THIS question must be decided by the positive regulations enacted by the legislature. And they are fortunately so clear on this subject, as to render a recurrence to any other code of laws unnecessary.

THE first provision, necessary to be cited in this case, is found in the *Civil Code*, 212, *art.* 21. It is there enacted that, where a man has no legitimate ascendants, or descendants, he may dispose of his property to its whole amount.

THE statute gives the power of disposal. But the law, without violating this privilege, has been anxious to prevent certain persons from being able to take under it, this will appear clear from citing other passages of the Code.

IT is declared, *page* 208, *art.* 4, that all persons may dispose or receive by donation *inter vivos* or *mortis causâ*, except such as the law has expressly declared incapable. In the chapter, which is entitled " of the capacity necessary for disposing and receiving donations *inter vivos* or *mortis causâ*" we find several classes of persons expressly prohibited, *v. g.* slaves, adulterine children, &c. and, natural children acknowledged are only permitted to take to a certain amount in a case like this one half of the property, *Civil Code*, 210, *art.* 14. These regulations do not in the smallest

degree clash with each other. The first says he may dispose, if he pleases of all his property: the latter only prohibits him from giving it to persons whom public policy requires to be excluded. If he steers clear of these individuals, he may still will all his estate away.

To construe the first article cited, as a power not only to give away all his property by testament, but also to give it to whom he pleases would enable a testator to bequeath to his slave all his estate, real and personal.

THE powers of the one to give, and the other to receive, are quite distinct in their nature: the restraining the rights of the latter, does not at all impair the privilege of the former.

IN this case it is hoped from the authorities cited that the court will be of opinion the decree of the District Court must be reversed, and the testamentary disposition reduced to the one half.

Brent, for the defendants. The decision of the Court below was in conformity with justice and in obedience to the laws of our state. In conformity with justice, because the testator gave his property to his *acknowledged children*, who had the first claim upon his care and the best natural right to what belonged to their father. In obedience to the laws, because none has been violated by the will of the testator, but on the contrary, he exercised a right given him by the laws which

West. District. *August* 1814.

SENNET *vs.* SENNET'S LEGATEES.

govern us, and which give to the defendants, appellees, the property left them by their father.

THERE are no provisions in the statutes of the state which take from the testator, in this case, the right *to will his property to the appellees, his acknowledged and natural children.* It is admitted that if the testator had legal descendants or ascendants he could not have exercised the right: but he has neither, and the statute of the state, *Civil Code*, 212, *art.* 21, declares that "where "there are no legitimate ascendants or descendants, "donations *inter vivos* and *mortis causâ*, may be "made *to the whole amount of the property of* "*the disposer.*" This provision of the statute, then gave the power to the testator to make his will as he did, without it had been *repealed* by some subsequent law, or *negatived* in such terms as to take away the power; neither of which has been done.

IT is insisted by the plaintiff and appellant that the power of the testator was restricted by the *Civil Code* 210, *art.* 14, which enacts that "when the natural father has not left legitimate children, or descendants, the natural child may receive from him" to a certain amount: this provision of the statute does not destroy in the testator the power to give the whole of his property to his natural children, which is subsequently secured to him by the *Civil Code, page* 212, *art.* 21. There is nothing in the clause

of the law upon which the appellant relies, which negatives the power given to dispose of the whole of his property. The words of the law are, *he may receive* to a certain amount. The law does not say that *he shall receive no more.* The two clauses of the law are not contradictory. The clause, upon which the appellant relies, declares that the testator *may leave to his natural children to a certain amount,* but does not say he shall not give more, this clause is formal, *Civil Code* 210, *art.* 14, and in the same work, 212, *art.* 21, written after the clause relied upon by the appellant, the said last mentioned provision in the law extends the power to a testator of willing *all his property to any person* whom he may think proper. This clause being the last mentioned in the statute, and not negatived by the clause relied on by the appellant, *is the law which now exists* and which gave the power to the testator to will all his property to the appellees. If one clause in a statute can negative another *positive clause in the same statute,* without being so expressed, by implication only, it is clear that the *art.* 21, *page* 212, under which the testator made his will, *negatived the clause* which had *been previously written* in *art.* 14, *page* 210. Taking the statute together, the power exercised by the testator was in obedience to the laws of the state. The Court below acted under those laws and did not err in the judgment rendered.

West. District. *August* 1814

SENNET vs SENNET'S LEGATEES.

UPON another ground, suppose the statute to be absurd, inexplicable or contradictory, the previous law of the land, the Spanish law clearly gave this power to the testator. Its books breathe no other principle. And if the statute should be considered by the court as contradictory or not sufficiently plain or explanatory, it is the previous existing law of the state, like the common law of England, unaltered by statute, which must govern and direct: and this is in favor of the appellees.

THIS will is also opposed upon the ground of *immorality*. It is not one of those contracts to be invalidated for the *immoral consideration*. The idea is as novel as ingenious, the law is so far from discountenancing, *for moral reasons*, the natural child from possessing the property of its natural father, that it expressly enacts and declares, *Civil Code* 154, *art.* 43, that natural children shall be called to the inheritance of their natural father, who has acknowledged them, when he has left no descendants nor ascendants, nor collaterals, nor wife, *to the exclusion of the state.*

IT is admitted, that the appellees were acknowledged natural children. Upon a full view of the case, the Court must confirm the proceedings had in the Court below.

By the Court. In this case it is admitted that J. B. Sennet, about whose inheritance the present contest arises, did bequeath to his natural

children all his property, although he had three legitimate brothers and a niece living at the time of his death.

BY the laws of our state a person, who leaves no legitimate descendants or ascendants, has indeed a right to bequeath the whole of his property and the deceased J. B. Sennet could exercise that right. But by the same laws it is provided *(Civil Code*, 210, *book* 3, *tit.* 2, *chap.* 2, *art.* 14,) that "when the natural father has not lest legiti- "mate children or descendants, the natural child "or children, acknowledged by him, may receive "from him by donation *inter vivos* or *mortis* "*causâ*, to the amount of the following proportions "to wit: of the third part of his property, "if he leaves no legitimate ascendants; of the "half, if he leaves legitimate brothers and sisters; "and of three fourths, if he leaves collaterals below "brothers and sisters; &c."

IT has been argued that these provisions would be contradictory, if the latter should be considered as prohibiting the testator from leaving to his natural children more than the part which the law says they may receive. But, it appears to the Court that the article fixing the portions, which natural children may receive from their father, in certain cases, does clearly and unequivocally establish that they shall receive nothing beyond that amount; and that this provision is not at variance with the general disposition which permits testa-

West. District. *August* 1814.

SENNET vs SENNET'S LEGATEES.

tors, who leave neither descendants nor ascendants, to bequeath all their property, but is only a modification of that general rule, in consequence of which, Sennet had a right to leave one half of his estate to his natural children, and the other half to whomsoever he should have pleased. Having not done so, but bequeathed the whole to his natural children, the legacy must be reduced to the amount limited by law; and his legitimate heirs must inherit the rest.

IT is, therefore, adjudged and decreed that the judgment of the District Court be reversed; and that judgment be entered for the appellant for one eighth part of the neat amount of the estate of the deceased J. B. Sennet, to wit, six hundred and ninety four dollars and twenty-five cents, with costs.

REAGAN vs. *KITCHEN & AL.*

The performance of either of the conditions of a bond, discharges the obligor.

Baldwin, for the defendants. From the record it appears that previous to the 24th of March 1812, Reagan sued out of the Parish Court of Concordia an attachment against R. Williams, one of the defendants. That the said attachment was levied on a negro man named Peter. That he was replevied by Williams and Kitchen, the other defendant, was his surety in the replevy bond.

That judgment was rendered on the attachment for the sum of $ 721, 13 1-2, besides interest and costs. That on the 21st of June 1812, an execution issued on the judgment and on the same day a return was made by the sheriff of "no property found in the Parish." On the 5th of August following, an *alias fieri facias* issued, and on the same day the negro replevied was seized by the sheriff, and on the 13th of October following was sold. But before the negro was seized, to wit. on the 1st of July in the same year Reagan sued out of the Parish Court of Concordia, an attachment against the present defendants, Kitchen and Williams, for the sum of $ 500, the penalty in the replevy bond and on the 9th of November 1813, judgment was rendered against them for that sum and costs of suit. These facts appear not only by the record, but also by the *statement of facts* filed and signed by the counsel on each side.

THERE are numerous objections to the mode of proceeding, in the Court below.

I. THE return of the sheriff on the last attachment (from the proceedings on which this appeal is taken) states that he seized a tract of land, without saying to whom it belonged, and does not say that he otherwise executed the writ, as the law requires.

II. IT does not appear that the Court appointed

West. District. *August* 1814.

REAGAN vs. KITCHEN & AL.

a person to defend Williams: consequently the judgment is void as to him.

III. THE last petition was filed before any demand was made of the negro replevied and before the then plaintiff had taken the proper legal steps to obtain him.

IV. THE replevy bond did not pursue the law, but contained conditions beyond its provisions and so far was void. The statute requires the condition to be "to defend such suit and to abide by the judgment of the Court." This bond does not stop here but goes on to require "that the obligors shall satisfy the judgment of the Court, or shall return the said negro man Peter when thereto they may be required, or it shall become necessary to have the same &c."

V. THE first execution was returned the same day it was received by the sheriff. He ought to have held it the three days mentioned in the statute or made a demand, upon which the negro might have been delivered.

VI. THE negro was seized and sold under the second execution, which discharged the replevy bond.

VII. AFTER the negro was received by the sheriff no action would lie upon the bond, and if suit was commenced before the delivering, from that moment the cause of action ceased.

VIII. SUIT was brought for the penalty of the bond, without its going in any part discharge

of the former judgment : whereas it ought to have been brought with reference to the former judgment and its amount received passed to its credit.

IX By the manner this judgment is rendered, the appellee has the full benefit of both judgments. *See Domat* 430, *art.* 15, 431, *art.* 18, — *Black. Com.* 303 4, *Curia Filippica b.* 2, *chap.* 2, *art.* 7, 8, *Washington* 119.

By the Court. This suit was instituted by Reagan in the Court below, on a bond, given to the sheriff of the Parish of Concordia, by R. Williams and the appellant in the penalty of $ 500, with a condition, that Williams should abide the judgment which might be rendered against him in the Parish Court, in a suit by attachment, there pending against him, or that he should deliver a certain negro therein named, when required, or it should become necessary.

THIS bond, as insisted on by defendant's counsel in the District Court, cannot strictly be considered as a bail bond, taken in conformity to the act of the Legislative Council in such cases made and provided, the sheriff having inserted a condition in it, not required by the statute ; by which it appears that the parties bound themselves to do one of two things, viz. to abide the judgment or deliver the slave, and the security must be discharged on the performance of either.

West. District. *August* 1814.

REAGAN vs KITCHEN & AL.

It is, perhaps, in this case unnecessary to enquire how far the sheriff is bound to give the three days notice on execution to defendants who reside out of the state, to pay the money, before he levies, or returns the execution; yet when it can be conveniently done, it would be proper, that some step should taken to effect it; or at least that the execution should not be returned before the expiration of the three days. The defendant in execution in the original suit of *Reagan* vs. *Williams*, not having been notified of the judgment and execution, the hasty return made of it on the same day on which it issued, are circumstances which do not strongly support a belief of fair and candid dealing on the part of the plaintiff in this transaction. But, independent of all these considerations, this Court is of opinion that the surrender of the negro, for the delivery of which the appellant bound himself, and the acceptance by the sheriff, being made previous to judgment rendered in the case, is sufficient to discharge him from any obligation, arising out of said instrument; the conditions being in the disjunctive, to abide the judgment or deliver the property. Otherwise the appellee will have a double remedy; and may recover twice on the same cause of action, viz. on the bond and by executing his original judgment, which would be unjust.

It is, therefore, ordered, adjudged and decreed

that the judgment of the District Court be annulled and reversed, and that there be judgment for the defendants with costs.

West. District. *August* 1814.

REAGAN vs. KITCHEN & AL.

TAYLOR vs. *PORTER.*

By the Court. In this case the appeal is not regularly brought up: there is no bill of exceptions, no statement of facts, no special verdict nor any thing equivalent thereto. But, as on the examination of the record, we are of opinion the case is not such a one, in which damages ought to be given, on account of the delay, it is ordered that the appeal be dismissed with costs. *Ante* 405.

Appeal dismissed for want of a statement, &c.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

West District. *September* 1814.

WESTERN DISTRICT. SEPT. TERM, 1814.

BROWN & WIFE vs. PARISH JUDGE &c.

BROWN & WIFE vs. *PARISH JUDGE, &c.*

Appeal dismissed the appellant not appearing.

THE appellant not appearing, either in person, or by attorney, the appeal was dismissed.

RAPER'S HEIRS vs. *YOCUM.*

No parol evidence of a promise to sell real property.

Case 2, 3m 424, 44 628

3m 424, 121 596

THE following statement of facts, was sent up by the District Judge. Blaize Lejeune was produced as a witness for the plaintiffs and being sworn deposed: that in July last, being in want of money he applied to the defendant to borrow; the defendant answered him that he had none, but that probably Raper had, as he had sold him a mulatto boy, which he then shewed to the witness. He asked the price, for which he had sold the boy

and Yocum replied that it was five hundred dollars, and said that he was going to take the boy to Raper, and should have done it sooner, but that the boy had been sick: that some days afterwards the witness saw the boy at Raper's house, and that his name was Bill.

JAMES ROY, a witness of the defendant, deposed: that in July last, one Benjamin Fields held Yocum's note for $ 550, and told Raper that if he would take up that note for him, he would let him have the boy; that Raper agreed to it, provided he liked the boy. That Yocum took, or sent, the boy to Raper on trial. That Raper, after trying the boy, was pleased with him and agreed to take him at five hundred dollars, and Yocum also agreed to let Raper have him for that price, and gave Fields his own note for fifty dollars, the surplus of the first note above the price of the boy, Fields being there present. That at the same time Raper gave Fields a horse by bill of sale, at $ 45, and paid him some money amounting together to fifty dollars, also an order on Mess. Louailliers for $ 100, and another on Mess. Toussaint and Marc, for one hundred dollars, that Raper, at the same time, gave to Fields his own note for twenty-three cows and calves, valued the witness thinks at ten dollars each, and had before furnished him with two beeves at ten dollars each. That Fields took all these notes and orders and left them and said that

West. District. *September* 1814.

RAPER'S HEIRS *vs.* YOCUM.

the note he held on Yocum was at the moment locked up so that he could not get it, it having been by him given to Mrs. Yocum, the defendant's mother to take care of for him and she had gone out, but he said he would go to her and be back in a little time with the note and went away. That the witness then, at the request of both parties, drew off a bill of sale of the boy from Yocum to Raper, which he read to them twice over and each of them then took and read it and approved of it. That Yocum then said he would sign it, but would not deliver it till he got up his note, that Fields would soon be back with it, when all would be completed, to which Raper agreed. That Yocum then signed the bill of sale but kept it. That Raper stayed till it was almost dark, waiting for Fields, but he did not return and Raper went away, without the bill of sale. That Mrs. Yocum lived at the place where they then were, but was gone abroad. That a few days afterwards the witness went with Yocum to Raper's, to get the business compromised as he expressed it, and when there, Yocum told Raper he must take the boy home, on which Raper said to him "don't take him, I'll buy him any how:" and Yocum thereupon left the boy at Raper's, that Fields was then at Yocum's. That he drew the bill of sale on the 2d of August. That he afterwards saw Yocum and Fields together, when they were talking something about a

note, that Fields has lived two years in Yocum's house, but is occasionally absent. That Raper had the boy on trial a month, or six weeks. The plaintiffs' counsel then shewed the order drawn by Raper on Toussaint which the witness identified.

BENJAMIN FIELDS, the person above spoken of was then called by the plaintiffs—who swore that he never received any property from Raper nor any bill of sale of him. That he did receive from him some cash for work done, but never any on any other account, nor any note for cows and calves, nor any beeves that he recollects, that he did get several things from Raper, but paid him for them in work. That he never received a note for fifty dollars from Yocum, that he recollects. That he did receive from Raper an order on Toussaint, but does not remember for what amount, nor what became of it, that he does not remember to have received any order from Raper, on Mess. Louailliers; that he once held Yocum's note for $ 550, some time before the 18 of August last and that it was given for a race on the Bayou Pierre, that he thinks he has lost the note for fifty dollars, which was given him by Yocum about the first of last August. That he still holds Yocum's note for $ 550 and has asked Yocum to pay it since last August, but he has not paid it, that he did once have this note in a trunk of old Yocum's, which was seldom locked and has had his papers there when it has been

West. District. *September* 1814.

RAPER'S HEIRS vs. YOCUM.

locked, that no one in particular kept the key of the trunk that he knows of, that he does not recollect being at Yocum's about the 2d of August last, nor does he know how to write and read but very little.

Baldwin, for the plaintiffs. The defendant complains of the decree of the District Court, ordering him to make and deliver a bill of sale for a slave, which he sold the ancestor of the plaintiffs, as prayed for in the petition.

THE question, presented for the consideration of the Court, is, whether parol evidence can be received of a sale of a slave, executed so far as the payment of the price, delivery of the property and signing the bill of sale, or whether our courts, under the existing laws can receive any parol evidence of such sale, the deed being destroyed.

IT will be attempted to be shewn, that such a sale is valid and that such testimony of its existence ought to be admitted.

PREVIOUS to the enacting of the Civil Code, writing was not necessary for the perfecting of a sale of any species of property *Inst. Justinian. lib.* 3, *tit.* 23, 24, *Febrero Libreria de Escribanos*, *cap.* 7, *sec.* 1, *art.* 19, *Dig. lib.* 19, *tit.* 1, *De actionibus empti et venditi* 55, *Code*, *lib.* 4, *tit.* 49, *idem* 17, 1 *Domat* 58.

IN the case under consideration, the price was agreed upon and paid, the slave delivered, and

the bill of sale signed, and afterwards destroyed by the seller. The suit in the District Court was not brought for the slave, for he was in the plaintiffs' possession, but to obtain from the defendant a bill of sale, to be made with the requisite solemnities. The District Court decreed that this should be done and it is of this that the appellant complains.

IT is anticipated that two objections will be made to the principle of the decree.

1. THAT the contract was by parol and therefore void, *Civil Code* 344, *art.* 2.

2. THAT the existence of the contract is disputed and no parol evidence can be admitted to prove it. *Civil Code* 310, *art.* 241.

I. THIS was not a verbal sale: it was written and signed, though the instrument was not delivered to the purchaser. Delivery is not required by the statute. It is enough that it is reduced to writing, and signed by the party selling. It is not required that it should be taken by the purchaser; nor is he obliged, if it was, to keep it: he may do so, and it is safest and most prudent that he should. The evidence of the sale does not rest alone on the statement made out, and sent up with the record, but also from an interrogatory put to and answered by the defendant. By which he was called upon to say "If he did not sign a

West. District. *September* 1814.

RAPER'S HEIRS vs YOCUM

"bill of sale for the said mulatto boy, Bill, con-"veying him to your petitioner; and if he did "not retain the said bill of sale from your peti-"tioner and what he the said Thomas has done "with the same?" To which he answered "That having made a bargain with Raper for the "boy Bill, he had made out and signed a bill of "sale of him, to be ready when Raper complied "with his part of the bargain. That Raper never "did perform his part of the bargain, therefore, "said Yocum did not deliver him said bill of "sale; and seeing some time afterwards that "it was not Raper's intention to comply with his "bargain, said Yocum destroyed said bill of sale." So much of the answer as goes to excuse the defendant ought not to be taken into consideration. The other part denies the fact sought to be disclosed by the plaintiffs. Now the question for discussion seems to be whether the title to the slave passed from Yocum; for if it did, before he can succeed in his defence, he must shew how he acquired a new one, as he cannot hold under that which he gave to another. What is a sale? The *Civil Code* 344, *art.* 1, defines it to be "an "agreement by which one gives a thing for a "price, in current money and the other gives the "price in order to have the thing itself."

THREE circumstances concur to the perfection of said contract to wit, the thing sold, the price and the consent.

Now it is clear that upon the agreement to sell the fixing and receiving the price, the delivery of the property and the signing of the bill of sale, he was no longer proprietor of the boy and he had no just pretence to claim him. It was immaterial then to Yocum, whether Raper ever received the sale or not, and as the title had passed from him, he could only acquire a new one by the same ceremony by which it was transferred. He, therefore, no longer owned the slave.

II. CAN these facts be held to be legally proven by parol, without producing the bill of sale?

No principle of law, or rule of proceeding, is better established or more uniformly adhered to than this one, that the best evidence which the nature of the case furnishes must be produced, and that, when produced, it must be admitted: no authorities need be refered to, to establish this rule. Yocum destroyed the bill of sale, so that it could not be produced by the plaintiffs. Under this rule, therefore, as well as under another one equally well established, that no one shall avail himself of his own wrong, evidence of the contents of the bill of sale and all the circumstances attending it ought to be received. If so, more than enough is proven by the statement than is sufficient to justify the District Court in rendering and this Court in confirming the decree. Even admitting that Fields did not deliver Yocum's note, there is

West District. *September* 1814.

RAPER'S HEIRS *vs.* YOCUM.

sufficient evidence to do away its effect, as to Raper, and to shew, if true, that it proceeded from a collusion between Fields and Yocum to defraud him. Though this is immaterial, as Raper fulfilled his part of the agreement by paying Fields the $ 500. It did not enter into the contract, that Raper should undertake that Fields should deliver Yocum's note.

ARGUING then, as if the weight of evidence is in favor of the appellees, is it such as can be admitted ?

THE doctrine in the *Civil Code*, *tit.* 6, *chap.* 1, does not apply to this case, as this was not a verbal sale.

IT comes under the 241 *art. page* 310. This article presents two questions. How are sales of immoveable property to be made. 2 How are they to be proven ? They are to be reduced to writing. This was reduced to writing and signed and, therefore, not a verbal sale. If the writing is lost, how are then its existence and contents to be proved ? The expressions in the latter part of the article are strong and if taken by themselves and unaccompanied by any other in the code, or incorrectly understood, might be the cause of the greatest injustice and destroy the right of the appellees. But these expressions are to be contrasted with, and explained by, others in the code, and in the statutes. These are abundant in favor of the appellees.

THE 1st. *sec.* of the 26 *chap.* of the 1st sess. of the Legislative Council has given the plaintiff in all cases the right of interrogating the defendant and to which he is bound to answer, provided the interrogatories do not tend to charge him with any crime or offence against any penal law. The *Code* 314 15, *sec.* 4, 5, has recognized and confirmed this right of the plaintiff and has made the answers of the defendant the best of testimony. This was the mode resorted to in the present case, and was one of the means by which the fact of the existence of the bill of sale was ascertained. The exclusion, therefore, of parol evidence by the said article must be taken at least with this exception of the mode of proof. But, it may be urged that the defendant's answer is as much a written evidence of the "existing" of the contract and a great foundation for a decree: admitting, however, that it may not be, still the other mode is open and adequate to the purpose of the appellees. Yocum confesses that the sale was written and signed by him, and afterwards destroyed, as is alleged, because Fields did not deliver the note and because Raper did not comply with his part of the contract. The question then is changed from a verbal sale, to an enquiry whether Yocum was justifiable in destroying the writing. Leave the question upon this ground and the strength of evidence is irresistible in favor of Raper.

BUT the doctrine of interrogatories is equally

West. District. *September* 1814.

RAPER'S HEIRS *vs.* YOCUM.

clear. The defendant is bound to answer, and the Court to proceed upon the testimony furnished by him, or in case of his refusal to answer to take the facts as admitted, and decree accordingly. Here the evidence was furnished; and will or can the Court reject it? An interrogatory may be put to avoid the effect of limitation and shall it not be admitted to prove the existing of a deed? Judicial confession is the best of proof. *Pothier on Obligation, part* 4, *chap.* 3, *sec.* 1, *Febrero*, 2 *Part, lib.* 3, *chap.* 1, *sec.* 7, *art.* 284. It may be remarked that the doctrine, concerning interrogatories, is on a subsequent page of the Code to the one first cited, which gives the construction of the statute in favor of the appellees.

IN addition to this, the *Civil Code* 312, *art.* 247, has provided for this case, by admitting parol evidence where the title is lost "through a fortuitous event, unforeseen accident, or overpowering force" and makes such a case an exception from the 241 *art. in page* 310. The appellees are protected by this exception. The force, here spoken of, is not such as is required by the common law of England to protect common carriers, viz. the act of God, or the king's enemies, because these terms are not known to our law and are not applicable to the subject, 2 *Esp. N. P. Gould's Edition* 245, 2 *Jurisprudence* 574, *Dig. l.* 48 *tit.* 6, *Id. l.* 7, *Code, lib.* 9, *tit.* 12, *Febrero Juicios. lib.* 8, *tit.* 1, *Civil Code* 384, 414, 16. The term

here used must be understood to mean such a force as could not be resisted in the manner in which it was applied. No matter in what form or shape it appears, no matter with what instrument, nor at what hour it is effected, if it was such as could not be resisted, it was overpowering force. A feeble man, or a child could burn or tear a deed, in the presence of the strongest individual, and yet it would be destroyed by an overpowering force, if it was not in his power to prevent it.

IF, however, the appellees should be considered not to come within the letter, they certainly come within the meaning of the exception. It is providing the means of proving the existence and contents of deeds by inferior testimony when the better is lost. The subject is proof to be admitted in courts of justice. Now, no man endued with common reason would contend that evidence was a subject of robbing or theft. It never has, and from its nature never can be considered property. It is the means of acquiring and holding of property, but not property itself. It must be considered then to mean by a fortuitous event and unforeseen accident, burning, mislaying, loss, &c. and by overpowering force a case like the present, where the seller, after receiving the price and completing the contract, should destroy the instrument, without the purchaser being able to prevent it.

BUT, how can the doctrine of force be made

West. District. *September* 1814.

RAPER'S HEIRS *vs.* YOCUM.

to apply here, as the seller himself destroyed the deed? And shall he be received to plead that the title was not destroyed by an overpowering force? And, therefore, the loss of it not to be justified by the appellees, the force which destroyed is not such as to entitle them to the benefit of parol evidence? Can the appellant urge this against his own act? This would be to let the owner of goods steal or rob them from the carrier and then present himself in court and say that the carrier was answerable because they were not taken by the king's enemies. The owner's default will excuse the carrier, 2 *Esp. N. P. Gould's Ed.* 247. But upon the principle here contended for by the appellant, the owner's destroying the goods by force leaves the carrier answerable for their full amount, and the salutary maxim, as old as jurisprudence itself, that no man shall avail himself of his own wrong, would no longer be in force.

IT is not thought necessary to call into the argument the decisions, in England and in the different states, upon the statutes of frauds and perjuries, as this contract is considered to be a complete performance.

THE consequences of a different application of this rule or a different interpretation of the law would be alarming. If no parol evidence is to be admitted to prove the existence of such contracts or to disclose such transactions, what a door

will it open, to frauds? As in the case now under discussion, a sale may be made and signed, the property delivered and the moment the money is received, the seller may with impunity seize with violence and destroy the instrument of conveyance: or if by accident the *bona fide* holder of real estate loses his written evidence of title, the former owner upon ascertaining the fact may institute a suit and according to this doctrine must recover: because there is no written proof.

IF the office of a Parish Judge should be burnt, all the sales of real property there deposited, of which copies had not been taken, would be null, because the written evidence would be lost, and is the Court disposed to introduce all these calamitous consequences by their decision?

Porter, for the defendant. In this case, the District Court has ordered the appellant, the defendant below, to make a conveyance for the negro claimed in the plaintiffs' petition. This decree has been rendered alone, on parol testimony and the answer of the appellant, to the interrogatory propounded to him by the appellees in the Court below. That judgment is conceived to be incorrect on two grounds.

1. BECAUSE the evidence introduced shews that the contract entered into between the parties was *on a condition;* which condition remains yet unperformed by the appellees.

West. District. *September* 1814.

RAPER'S HEIRS *vs.* YOCUM

2. THAT the parol evidence adduced to prove the contract, cannot under our laws be received, to establish a sale of this species of real property.

I. THE evidence proves that Yocum agreed to sell the negro to Raper, *on condition that he would take up a note, which Fields held of Yocum for* $ 550: to this Raper consented, if he liked the boy and Yocum sent him on trial. The parties it appears afterwards met to pass the necessary writings for the property. The bill of sale was drawn up and signed by the appellant who declared, *at the time of signing it*, that he would not deliver the boy to Raper until he received the note which Fields held of him, and for which he had stipulated to sell his negro. This note Raper, nor his representative, have never yet delivered to the appellant and until they do, they have no right to call on him to make a title. If Fields has deceived them it is not our act and the note, for which the negro was sold, is yet in force against Yocum.

THE weight of evidence supports the above summary. Le Jeune's testimony is consistent with Roy's: Yocum telling the former he had sold the boy, is fully explained by the latter witness, who says indeed that Yocum had sold him: but then he adds the condition, and that condition remains yet unperformed. Le Jeune seeing him in possession of Raper, was the possession of the boy on trial.

YOCUM's answer to the interrogatories supports the declaration of the witness, he says he made a bargain for the boy with Raper, and that he had made out a bill to be delivered, when Raper complied with his part of the bargain. This answer, combined with the declarations of the witnesses, is conclusive as to this fact, and shews clearly the sale to have been a conditional one. The plaintiffs' counsel says, however, that all the latter part of Yocum's answer to the interrogatories must be rejected. He cites no authority, to justify this Court in doing so, on the contrary it is plain the whole must be taken together.—*Civil Code* 316, *art.* 264, *Pothier on Obligations*, *part* 4, *chap.* 3, *sect.* 4, *art.* 2, *no.* 827, *Febrero Cinco Juicios*, *lib.* 3, *cap.* 1, § 7, *no.* 285, *Curia Philipica*, *vol.* 1, *p.* 2, § *no.* 3.

THE evidence then clearly establishing that the appellees have not complied with their part of the contract, the judgment of the Court below ought to be reversed.

II. ALL the evidence to establish the plaintiffs' title is by parol, and it is submitted with confidence that this species of proof cannot be received, in this country, to prove a sale of slaves.

THE *Civil Code* 344, *art.* 2, prescribes that the sale of slaves must be by public act or under private signature. That all verbal sale of them shall be null, and that no testimonial proof

West. District. *September* 1814

RAPER'S HEIRS *vs.* YOCUM.

of them shall be admitted. And again the same authority, *page* 310, *art.* 341, says, that whenever the existence of such a covenant is disputed, testimonial proof shall not be admitted. These provisions cannot be made any stronger by argument. However in the 4th. page of the same book, *art.* 13, it is declared, that in construing laws the letter must not be abandoned on pretence of pursuing the spirit.

THESE provisions are imperative on the Court, and conclusive in this cause. Particular cases of hardship may, and will, arise under all general regulations of this kind. But, it is better for society, (so at least our Legislature has thought) that these regulations should be rigidly preserved, than that courts, under a pretence of doing equity, should establish their discretion as the boundary of right, render the provisions of the law on this subject uncertain, and introduce those evils of perjury and fraud, which the supreme authority has seemed anxious to guard against.

IN England, several of their most eminent Judges have lately regretted (and expressed that regret in strong terms) that their courts of equity, by their decisions, had broken in upon statutes similar to ours, which, if rigidly followed would have had a most beneficial effect on society. 2 *Vesey jun.* 243, 3*d. Vesey* 486, 712.

IT is worthy of remark that the Spanish government in this country had a law of the same kind

in force, previous to the passage of our Code, which required all sales for real property to be in writing. Nay more, they were void if not passed before a Notary Public. *American Law Journal* 5. The necessity of such a provision no doubt was obvious to both governments who in this respect established similar regulations. The plaintiffs endeavour to escape from the force of the law cited from the Code, by a variety of arguments: some of them taking for a basis facts which are denied, and others, when the fact is clear, establishing principles which are incorrect, and it is hoped capable of being shewn so.

IT is said that the price was paid and the sale passed: but a reference to the evidence proves the contrary.

IT is said the sale was perfect by the act of signing and that the appellant by destroying it has laid a ground for the admission of parol testimony. But, here again the evidence is at war with the argument. By it we are informed that Yocum expressly declared he signed the bill of sale, on condition that he was not to deliver it until his note was given up. Would it not be strange if this could be held to be a completion of a sale, and would it not be still more strange, if this Court should by its opinion declare that if A. executes an act *sous seing privé*, which he declares he will retain in his hands, until he is paid for his property: that the moment it is written, no matter

West. District. September 1814

RAPER'S HEIRS vs. YOCUM.

under what condition, or no matter in what intention, it becomes without delivery a complete title to the vendee. The law is clearly opposed to this doctrine. *Febrero Libreria de Escribanos, cap.* 7, § 1, *no.* 19, *Curia Phillipica, Commercio terrestre, tit. Venta, lib.* 1, *cap.* 12, *no.* 42, *Pothier on Obligations, p.* 4, *cap.* 1, *art.* 2, § 1, *no.* 714, *Civil Code*, 272, *art.* 68, *ibid*, 344, *art.* 5.

IF then, there was no title executed to Raper all arguments respecting the loss of it are fallacious. A man must be in possession of a title before he can lose it.

THE answer to the interrogatories it is alleged takes the case out of the statute. That answer states, that the appellant "had made out a title to be delivered to Raper when he complied with his bargain." No court can decree a conveyance on that declaration: and the evidence, so far from contradicting, supports it.

By the Court. It is proved in this case, by oral evidence, that a contract was entered into, between Thomas Yocum, the defendant now appellant, and Henry Raper, the conditions of which were that if Raper would *take up* a certain note of $ 550, subscribed by the appellant in favor of a certain Benjamin Fields, he the appellant would sell him a mulatto boy. In consequence of this agreement it appears that Raper paid Fields in sundry articles the price agreed

upon between him and the appellant, to wit, $ 500, and that the amount of the note in Fields's hands being more than the purchase money, the appellant gave Raper his note for the balance. It further appears that the appellant had prepared a bill of sale of the mulatto boy and signed it; but that he never delivered it, alleging that Raper had not complied with his part of the contract, and that he has since destroyed that paper. Fields having not surrendered the note which Raper was to take up, Raper, who had paid the full price of the mulatto boy, brought the present suit to compel the appellant to make him a legal and complete title to that slave. As to the possession Raper seems to have had it since the bargain was entered into.

Two questions arise in this case; one of law, and that is, whether a verbal promise, to sell that kind of property for the alienation of which the laws require a written act, can ever be recognised and enforced by a court of justice; the other of fact, to wit, whether Raper had complied with his engagement, so far as to enable him to call upon the appellant for a performance of his.

I. THE language of the law (*Civil Code* 344, *art.* 2,) with respect to the sale of immoveables and slaves is: "all verbal sales of any of these "things shall be null, as well for third persons as

West. District. *September* 1814.

RAPER'S HEIRS *vs.* YOCUM.

"for the contracting parties themselves, and the "testimonial proof of it shall not be admitted." In the same chapter speaking of the promise to sell; "a promise to sell amounts to a sale, when there "exists a reciprocal consent of both parties as to "the thing and the price thereof; but to have its "effect, either between the contracting parties or "with regard to other persons, the promise to "sell must be vested with the same formalities as "are above prescribed in *art.* 2 and 3, concerning "sales, in all cases where the law directs that the "sale be committed to writing." *Civil Code* 346, *art.* 9.

NOTHING can be more positive than this prohibition of our laws, ever to recognise as valid a verbal sale or a verbal promise to sell an immoveable or a slave. Witnesses offered to prove such a contract cannot ever be heard. Yet we are called upon, in opposition to this provision, to listen to that testimonial proof, and to decide upon the merits of that verbal contract, under pretence that we may, in certain cases, soften the rigour of the law. But surely, if such power can be exercised by courts of justice, it never can go the length of declaring that lawful which the laws have said shall be illegal.

IN this case, however, it is alleged that the contract was not entirely verbal, because, according to the appellant's own confession, he had prepared a bill of sale, ready to be delivered to

the intended purchaser, as soon as he would fulfil the stipulated condition. But this paper was only the consideration to be given for the compliance of the other party with his engagement. It was not the instrument of the contract. That contract was never reduced to writing. We have it only from the mouth of the witnesses. They inform us that an agreement was entered into between the appellant and Raper, the conditions of which were that if Raper would take up a certain note of the appellant, the appellant would make him a bill of sale of a certain slave. Whether the appellant did or did not prepare that bill of sale ready for delivery, as the case might be, is not the question. The contract itself, which this court is called upon to enforce, was only verbal, and therefore not such as the laws can recognise.

II. FINDING ourselves under the necessity of reversing the judgment on that ground, it is hardly of any use to inquire into the other question, to wit, whether Raper complied with his engagement so far as to authorise him to call on the appellant for a performance of his. Yet upon this we cannot help observing that, however fair the conduct of Raper, and however suspicious that of the other party may appear, Raper has not executed that which he had engaged to do, to wit, taking up the note of the appellant. The

West. District. *September* 1814.

RAPER'S HEIRS *vs.* YOCUM.

case of the appellees is certainly a hard one; but their present suit to compel the appellant to the specific performance of his promise, must fail on this ground, as well as on the other.

IT is, therefore, adjudged and decreed that the judgment of the District Court be reversed, and that judgment be entered for the appellant with costs.

O'CONNOR & AL. vs. *BARRE.*

Wife's property, not brought in marriage or dowry, is paraphernal.

If a tutor sell the real property of his ward, the purchaser will be quieted by a possession of four years after the ward comes of age.

ON the 6th of January 1764, Jacques Courtableau obtained a requête from the commandant of the Parish of Opelousas for a tract of land of one hundred arpens of front, with the depth of eighty on one side of the Opelousas River and twenty arpens of front with the depth of forty on the other side, and the 21st of 1765, a concession issued for that quantity. On the grant are the following endorsements. "The said land was "bought, at the auction of Mrs. Courtableau, "by Mrs. Delamorandiere, to whom the present "act and concession will serve as a title. Opelou- "sas, 15th of October 1774. Le Chevalier "Declouet."

"FOR Madame Marcantell, to whom the said land properly belongs from this day and to her heirs and assigns. Opelousas, 19th of October 1774, Le Chevalier Declouet. Delamorandiere."

On the 20th of January 1780, the said tract of land was sold, at the sale of the estate of Mrs. Marcantell to Evan Mills; and after his death to wit, on the 4th of May 1782, it was inventoried as part of his estate: on the 5th of June 1783, the widow of Mills passed a sale for half of the tract and several negroes, to one Elliot, to whom the estate was indebted: on the 25th of June 1784, Elliot having received the sum due to him released the sale of the land. The widow married William Reed, shortly after Mills' death, and shortly after the marriage, the whole of the said tract of land was conveyed to the appellee by a deed of sale, made by the said Reed (with the consent of his wife as is stated in the deed) concluding in the usual form of notarial acts, *i. e.* that the parties appeared before him, the commandant of the post of Opelousas, and signed the same in the presence of the witnesses and of him the commandant. Which was signed by Reed and his wife and two witnesses, but not by the commandant.

Mills left four daughters to wit: Helen, born in 1775, married to Peter O'Connor; Manon, born in 1777, married to Dennis Lebrenge; Clarissa born in 1779, married to Ezra Bushnell, and an infant two months old. The three first were married before they arrived to the age of 25 years: the last died a minor.

In the year 1811, Peter O'Connor, Dennis

West District. September 1814.

O'Connor & al. vs. Barre.

Lebrenge, and Ezra Bushnell, in right of their wives instituted a suit against the appellant to recover the said tract of land, as the inheritance of their wives. The District Court decreed in favor of Lebrenge and Bushnell: but rejected the pretentions of O'Connor, on the plea of prescription: from which decree this appeal is taken.

Baldwin, for the plaintiffs. As this case has come up in the name of all the original plaintiffs I shall bring into view all their pretentions.

The tract of land, demanded by the plaintiffs and appellants, descended to them at the death of their father and it still belongs to them, as it has never been legally sold. The sale made to Elliot was void for several reasons; 1, there was no judicial sale of the estate, 2, the personal property was not first sold to pay the debts, 3, the sale was not authorized by the judicial authority.

The property of minors cannot be sold without judicial authority: and if otherwise sold the sale will be set aside: Real estate cannot be sold until the moveables are exhausted. *Partidas* 6, *tit.* 16, *Ley.* 18, 1 *Martinez* 123, *no.* 25, 1 *Brown's Civil Law* 136, *Domat*, *book* 4, *tit.* 6, *sec.* 2, *art.* 24, 25, 26, 27. Here the authority was not given.

The mother lost the right of tutorship, by her second marriage, and was bound to preserve for the children of the first marriage, the estate which descended from their deceased father. *Febrero*,

2 *part*, *book* 2, *chap.* 5, § 1, *no.* 3, *Custom of Paris* 2d *Vol.* 224, 6 *Jurisp.* 142, 3 *Domat*, *book* 5, § 2, 7 *Martinez* 128, *no.* 3, 1 *Parf. Not.* 383-4.

In addition to the foregoing objections to the legitimacy of the sale, the defendant and appellee has no color of title, by wirtue of the deed under which he claims, as it never was completed and never went into effect. It is drawn in the usual form of notarial acts, and in the conclusion is stated to be drawn and passed before the commandant: but his signature is not annexed, which destroys its validity, as it is conclusive evidence to prove that the parties had changed their intentions, and would not acknowledge their signatures. But it was not the mother who sold. It was Reed with her consent, 1 *Martinez* 150, *no.* 77, *Domat*, *book* 1, *tit.* 1, § 1, *art.* 15, *book* 3, *tit.* 6, § 2, *art.* 6, 1, *Jurisp.* 135, 6, — *Parf. Not.* 63-4-5.

If it should be contended that the mother of the appellant made the deed it would give it no validity, as it is not in due form and accompanied with the requisite solemnities, *Febrero* 1*st part. chap.* 4, § 4, *no.* 117.

Porter, for the defendant. This suit is brought for 8800 arpents of land, which the appellants claim at their property, in right of their deceased father, Evan Mills. A recurrence to the statement of facts shews that the property was a portion of

West. District. *September* 1814.

O'Connor & al. *vs* Barre.

the acquests and gains, acquired during the marriage of said Mills and his wife, under whom the appellee claim and from whom he purchased; one half of the land then was hers, at the dissolution of the marriage by the husband's death, and of this portion she had the right of disposal. 1 *Febrero lib.* 1, *cap.* 4, § 1, *no.* 1, *ibid. no.* 4, 6, 29 and 31.

And she did not lose, by her second marriage with Reed, the right of enjoying and disposing of these acquests and gains, 2 *Febrero*, *lib.* 2, *cap.* 5, § 2, *no.* 32, who cites, *Ley* 14 *de Toro*, which is *Ley* 6, *tit.* 9, *lib.* 5, *Recop.*

For her half of the land then, we have acquired an undoubted title, and the decree of the District Court adjudging it to us must be confirmed.

The remaining half 4400 arpents, the plaintiffs claim the three fourths of, as being heirs of Evan Mills, deceased, and the remaining fourth in right of their brother, who died a minor.

It is admitted that the mother lost her right of inheriting from her child, by her second marriage. But she remained in possession, and had a right to the usufruct of the estate during her life, 2 *Febrero cinco Juicios*, *lib.* 2, *cap.* 5, § 1, *no.* 7, *ibid. lib.* 2, *cap.* 5, § 2 *no.* 30.

To the claim we oppose prescription.

A *bona fide* possessor with a just title, acquires a perfect right to immoveable property in ten years, *Domat*, *vol.* 1, *book* 3, *tit.* 7, *sect.* 4, 4 *Febrero*, *lib.* 3, *cap.* 3, § 1, *no.* 105, *Cooper's Just. b.* 2, *tit.* 6.

And where the object claimed is a divisible one it runs against each heir for his portion. *Pothier vol.* 4, *page* 647, *no.* 149, 4 *Febrero cinco Juicios, lib.* 3, *cap.* 3, § 1, *no.* 95.

O'Connor's wife was more than thirty five years of age, when this action was commenced: being therefore ten years a major, without asserting her right, she and her husband are most clearly barred.

The wife of Le Berge had not passed the age of majority ten years, when the appellee was sued. But by the evidence introduced, it was established that she was ten years married antecedent to the bringing of the suit, and that this property was a part of her paraphernal effects: there being no contract of marriage between her and Le Berge, the husband. Prescription, which does not run against a wife for her dotal effects during coverture, does for her paraphernal. *Vide* 3 *Febrero, lib.* 3, *cap.* 2, § 4, *no.* 243.

And they are both equally prevented from now claiming their portion in the deceased brother's estate. It is true their mother had the usufruct in this property, during her life, if she had not alienated it. But from the moment of the alienation the right of usufruct was destroyed, the heirs had a right to demand the property, and not having done so in time, they cannot now recover, *Febrero cinco Juicios, lib.* 1, *cap.* 7, § 2, *no.* 44.

Le Berge and wife's claim fails from another

West. District. *September* 1814.

O'Connor & al. vs. Barre.

reason. After the death of Reed, the second husband, Le Berge entered into an arbitration with Jane Reed, the mother of his wife, for the rights of the latter in her father's estate, the arbitrators awarded him $ 147, and in the account, where this balance is struck, a credit is given for the amount received for the sale of the property now claimed. It is true, we cannot shew a submission in legal form &c. to this award.

But we prove clearly his assent to it by shewing that he received the balance ascertained to be coming to him, by the persons appointed to arbitrate the claim then set up. And it is certainly unjust to permit him after tacitly aquiescing in the sale, by receiving his part of the price, now to turn round and say that sale is invalid, and pray to have it set aside.

His authority to make this compromise and administer fully his wife's paraphernal effects is always presumed, when the wife does not make opposition, 1 *Febrero cinco Juicios*, *lib.* 1, *cap.* 3, § 1, *no.* 43 *and* 44.

Bushnel's right to the one third of the 4400 arpents is not disputed, the two other heirs cannot, it is hoped, recover for the reasons above stated.

But it is said that the sale made to us is such, that prescription cannot be pleaded on it and the arguments by which this objection is supported

are of such a nature as would require us to have a title in every way perfect. If we had a title of that kind there would be no occasion to plead prescription, and if the law only afforded protection in that way, to those whose title was complete in every shape, it is evident it would be entirely useless in its provisions: *they would not be under the necessity to resort to it.* Two things are necessary to enable a party in possession to plead prescription, good faith and a just title.

The first is always presumed, and the contrary has not been shewn in this case. *Domat, vol.* 1*st liv.* 3, *tit.* 7, *sect.* 4.

The just title consists, in buying from a person whom you have reason to believe has a good title. *Domat vol.* 1, *liv.* 3, *tit.* 7, *sect.* 4, *Pothier (quarto edition) vol.* 4, *pages* 587, 588, 614, 615, *nos.* 28, 29, 98, 99.

And as to the form of the act, a *sous seing privé* is a good title, when accompanied by possession, *Pothier vol.* 4, *page* 615, *no.* 99.

All these circumstances combine in this case and justify the plea the appellee has put in.

By the Court. A plantation of considerable value, which the appellee bought twenty-four years ago, and of which he has been in possession ever since, is the subject of the present contention.

The nature of the claim of the plaintiffs and

West. District. *September* 1814.

O'Connor & al. *vs* Barre.

appellants is as follows: that plantation was the common property of Evan Mills and Jane Élliot, father and mother of the plaintiff, now appellant, Helen, when Evan Mills died. Evan Mills left four children, one of whom died in her infancy. After his decease, Jane, his widow, undertook (it does not appears by what authority) to administer the estate, and kept possession of the whole. Some time afterwards, she married William Reed, who, with her consent, sold to the appellee the plantation now in contest, Jane Reed died about four years ago; and in 1811, the appellants and their coheirs brought the present suit, claiming as their property the plantation left by their father, and alienated without right by their mother and her husband. The judgment of the District Court declares the alienation valid as to Jane Reed's moiety, allows to each of the appellants' coheirs a share in the other undivided moiety, and rejects the claim of the appellants, as barred by prescription.

The principal points made by the appellants are:

1. That the sale is void altogether on two grounds, one of which is that the instrument purporting to be passed before the officer exercising the functions of Notary Public, is not signed by that officer; and the other, that the contract is not made with the solemnities necessary to bind a married woman.

2. That the undivided moiety of the plantation, being the property of minors, could not be alienated, even by their tutor, without the formalities prescribed by law.

3. That Jane Elliot, widow Mills, having lost the tutorship of her children by contracting a second marriage, had no right whatsoever to dispose of their property in any manner.

On the part of the appellee, the principal ground of defence is that the plaintiffs after they became of age, suffered the four years allowed by law to elapse without claiming against the sale made by their mother; and that the appellants particularly remained silent on that subject during more than ten years, in consequence of which their claim is now barred by prescription.

Various other questions of minor importance have been raised during the discussion of this case, which we will have occasion to notice, as we proceed in the investigation of the subject.

I. The first and most general allegation of the appellants, to wit, that the sale made by their mother is void *in toto*, can be soon disposed of. The half of the plantation in contest belonged to Jane Reed. It does not appear that she brought it in marriage as a dowry; therefore it must be considered as paraphernal property. The alienation of such property by the husband, with the

West. District. *September* 1814.

O'Connor & al. vs. Barre.

consent of the wife, was a lawful act. The instrument of sale, should it be thought defective in point of form as a public act, is certainly good as a private one, and is binding upon the parties and their heirs.

But if the sale in question is valid as to the moiety of the wife, the case is far different with respect to the other half of the plantation. An effort has been made to show that shortly after the death of Evan Mills, his widow acquired by purchase some part of that other moiety; for that having given in payment 4400 acres of that land to a creditor of the estate, who had a mortgage upon the whole, she afterwards paid him in some other manner, and he reconveyed to her the land which he had thus received. The pretended title, derived under such a transaction, cannot be the subject of a serious examination. The Court will, therefore, consider one half of the plantation bought by the apppellee as the property of the heirs of Mills, and proceed to enquire into the validity of its alienation.

A tutor has not the power of alienating the real estate of his pupil, except in the cases provided for by law, and then only with permission of the judge. If, contrary to this provision, he alienates it, the minor may, within four years after he has come of age, obtain restitution of his property, on proving that the alienation has been injurious

to him (*Partida* 6, *tit.* 19, *lib.* 2.) But when he has suffered the four years to elapse without claiming any restitution, his silence is considered as an approbation of the act of his tutor, and the purchaser of his property is quieted in his possession. In this case, therefore, if the plantation had been sold by the tutor of the heirs of Mills, there can be no doubt that, having left the purchaser of it in peaceable possession during more than four years, they could not now disturb him.

But the estate of these minors has been sold not by their tutor, but by a mother who had no longer any right to act as their tutrix. The law declares in express terms that so soon as the mother contracts another marriage, she loses the tutorship of her children. It has made it the duty of the judge immediately to appoint an other tutor over them; and for the preservation of their property while it remains in the hands of the mother, it has provided that the estate of her new husband as well as hers shall be tacitly mortgaged. Thus, although she keeps possession of the estate of her children, and is bound to take care of it until it is surrendered into the hands of the new tutor, yet from the moment she marries, she loses the tutorship *ipso facto*, and has no longer any right to act as tutrix. Any alienation, therefore, which she may afterwards make of the property of her children, is entitled to no more respect than it would be if made by a stranger; and the

West. District. *September* 1814.

O'Connor & al. *vs.* Barre.

silence of the minors, which, in case of sales made by their tutor, is considered as an approbation, can receive no such interpretation in favor of sales made by persons having no right whatsoever over them.

The only manner then in which the appellants may have forfeited their claim to a part of the plantation in contest is by having suffered the purchaser of it to remain in quiet possession a length of time sufficient to acquire a title by prescription.

This title is pleaded by the appellee; and it is not denied that the appellants have remained silent on the subject of their claim during more than ten years since Helen has come of age, and that both she and the appellee during that time lived in the same district.

But the appellants contend

1. That this is a prescription for which a just title and good faith are requisite, and that the appellee shews neither;

2. That the plantation in contest was an undivided property between the appellant Helen, and her younger sisters, and that the right by prescription having not been acquired against them, her own share has been thereby preserved.

The just title and good faith required by law in the person claiming means no more than that he came to the possession of the thing by virtue of

some licit contract, *por alguna derecha razon*, (as it is expressed in law 18th. *tit.* 29, *part'a* 23,) such as a sale, a donation, &c. into which he entered *bona fide*. That the present appellee acquired his possession by these means cannot be questioned. He bought this land from Reed and his wife as their property, and faithfully paid the full price of it. He comes forward with both a just title and good faith.

But, it is further objected that prescription could not take effect against the appellant, Helen, so long as it did not run against her minor coheirs and joint owners of this undivided plantation. Upon this point it appears to the Court that the principle has been misunderstood by the appellants. In order that the prescription which does not run against minors may be also suspended in favor of the co-interested who are of age; it is not enough that the property, to which they have a right, be undivided; their claim must be *indivisible*. "If "the claim, "says Pothier," has for its object some- "thing divisible *naturâ aut saltem intellectû*, as "if it is a claim for a certain estate, the time of the "prescription which does not run against the "minors for their part of the claim, does not cease "to run against those who are of age for their "parts."

It is, therefore, the opinion of this Court that the appellee has acquired a title by prescription to

West. District. *September* 1814.

O'Connor & al. *vs.* Barre.

the fourth part of the half of the plantation in contest, which was the share of the appellant Helen in that property as one of the heirs of Evan Mills.

But it is further contended by the appellants that of the four shares into which the estate of Mills was to be divided, the usufruct of one fell to Jane Reed by the death of one of her children; and that while she enjoyed that usufruct the appellants could not claim their share of that portion, wherefore their right to that at least cannot have been prescribed against. To this it is answered by the appellee that Jane Reed, by alienating the property of which she was only usufructuary, forfeited her usufruct, and that from thence the appellants had as good a right to claim that property as their own part of the inheritance of their father.

It is the opinion of the authors and particularly of *Febrero* that the mother does not, as other usufructuaries, forfeit her usufruct by alienating the property which she is bound to keep and preserve for her children, and that such alienation is valid during her life time and can be revoked only after her death. Admitting this to be law, the right of the appellants to claim against the alienation of this portion did not begin until about four years ago, and consequently is not barred by prescription.

THUS, although the judgment of the inferior court appears to us, in every other respect, strictly conformable to law, it must be reversed as to this particular point.

IT is, therefore, adjudged and decreed that the judgment of the District Court, rejecting *in toto* the claim of the appellants, be reversed; and that the appellants do recover one third part of the share of their deceased sister in the undivided moiety of the plantation in contest.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

West. District. *October* 1814.

WESTERN DISTRICT. OCTOBER TERM, 1814.

MORGAN'S AD'R. vs. WOORHIES.

MORGAN'S AD'R. vs. *WOORHIES.*

Debtor, on a *fi. fa.* may name the property to be taken: but not real, where there is personal, property. Tho' Sheriff take real, where there is personal, property, the creditor cannot disavow his act and demand the debt from him.

In this case the defendant, now the appellee, Sheriff of the Parish of St. Landry, received a writ of *fieri facias* to be executed against certain persons therein named, at the suit of the plaintiff, now the appellant. On the delivery of the writ he was directed by the attorney for the plaintiff to seize personal property in the first instance, if it could be found. If there existed none of that kind in his bailiwick, belonging to the debtor, then to levy on slaves. He was also particularly cautioned, not to execute the writ by seizing town lots at Opelousas church, or waste lands; and that if he did, he would be held responsible. Notwithstanding these directions he did seize town lots, and waste

lands; which were disposed of, at the third and last exposure, on a year's credit. The appellant refused to accept the bond taken by the appellee, for the payment of this property; and brought suit against him for the amount expressed in the writ, which had been delivered him for the execution. The persons against whom the writ issued, were admitted to own, within the Parish of St. Landry, personal property and slaves, sufficient by seizure to have satisfied the plaintiff's writ.

THE District Court decided in favour of the appellee generally.

Baldwin and *Porter*, for the plaintiff. The question to be decided, in this cause, is of vast importance to this section of the state. The decision to be given will determine, whether or not the collection of debts will not be abandoned here: for it is evident if the defendant is allowed choice of property, he can always furnish that description, which will only sell at a year's credit. At this sale, he buys it in himself, or employs some person to do it for him; and gives bond and security to pay the money in a year. This period expired, suit has to be brought on his obligation; which takes exactly the same course of the other, and terminates by a new bond being given. This circle, in which the plaintiff pursues his debtor, has no end; and at the expiration of four or five years, all he

West. District. *October* 1814.

MORGAN'S AD'R. *vs.* WOORHIES.

has acquired by the pursuit, is the paying of costs; which the officers *of justice* take special case to exact from him as he goes along.

THIS consequence of our legislative provisions, under the practice heretofore existing is not exaggerated; and, in the operation of our execution law, bad faith is protected, nay rewarded: confidence destroyed, and the example daily presented, of one man rioting in the enjoyment of another's property, without there existing any means of compelling him to pay for it.

IF this Court can afford any remedy for these evils, it will do it. Allowing the choice of property to be seized, will be some alleviation.

Two questions present themselves.

1. HAS the appellee (the defendant below) rendered himself liable to an action?

2. IF he has, what is the extent of that liability?

I. THE Sheriff in this case seems to have regarded the writ of execution, as altogether intended by law for the defendant's benefit; and made to enable him to elude the judgment of the court. The legal idea however attached to it is, that it is given to compel the person against whom it issues to comply with the judgment rendered against him. 2 *Bac. Abr. (American Edition)* 685. Lord Coke says, *Executio est fructus, finis et effectus legis. Co. Litt.* 289.

THE law proceeding on the idea, that the execution afforded the plaintiff is for his benefit, as well as to compel the defendant to do that, which by its judgment it says he ought to have done, gives to the former his choice of writs. 2 *Bac. Abr. (A. e.)* 718, 2 *Binney* 218, 3 *Jurisprudence (Encyclopédie Française)* 418-479, 7 *ibid.* 484, 463. If it enables him then, to select that species of writ, which he conceives best calculated to force the defendant to do him justice; it is fair to presume, that in the same spirit, it also allows him *(where a necessity exists to accomplish this purpose)* the choice of property: otherwise its provisions would be inconsistent, and its means inadequate to the end it has in view.

IT is true, we can cite no positive authority to this, but the reasoning on which the conclusion is drawn, seems equal in force to that of any express declaration on the subject. In our way of considering it, the law is made consistent throughout, and harmonious in its different provisions. Adopting the other construction, it is jarring and irregular; it gives the plaintiff every latitude in his means, until his object is nearly accomplished, and then defeats him; by allowing the defendant a selection, which is totally at war with the idea, on which the privilege of choice is in the first instance extended to the other.

WE admit there are some Spanish authorities

West. District. October 1814.

MORGAN'S Ad'R. vs. WOORHIES.

which say, the defendant shall have the choice: but the reason is obvious. There, the property must be sold for cash; and the officer goes on till he makes it. The plaintiff being allowed the selection in that country, would be useless, nay oppressive; as it must be a matter of indifference to him, what property is seized, when his money at all events must be immediately made: but here under our execution law, requiring property to be sold at a year's credit unless it brings two thirds of its appraised value, the first and second exposure, a quite different state of things presents itself. Giving the defendant the right of choosing the property to be sold, enables him to evade the judgment of the court, and to be the oppressor instead of the plaintiff.

Cessante causâ cessat effectus, is a maxim of universal law always received: here the cause not only ceases, but acts the other way. When the property must be sold for cash, to admit the plaintiff to select, would be permitting him to oppress. To allow the defendant to choose, under our laws, makes him the oppressor; and produces the very consequence, which induced the Spanish law to refuse it to the former.

THERE are many provisions of the Spanish law, relating to executions, repealed by the nature of our government, and the silent operation of our statutes, without any express declaration to that effect, such as the exemption from arrest of

various officers: among others, counsellors at law; and freedom from seizure of various articles. So here, we contend that the law, according the choice to the debtor, is repealed by an act of the Legislature, directing property to be sold at twelve months credit; because allowing him the selection, enables him almost in every case to elude the judgment of the court, and defeat the object at the execution entirely.

BUT should the court decide against us, as to the choice of the real property, it is clear at least, that the officer has rendered himself responsible, by not seizing the personal effects of the defendants. Our statutory provisions are so plain in regard to this, that a recourse to reasoning on the subject is unnecessary.

IN the act of the Legislative Council, it is provided *(page* 236, *sect.* 14,*)* that if the money for which the execution issues, is not paid in three days, the Sheriff shall cause the same to be made out of the personal estate, except slaves; if sufficient personal estate exclusive of slaves can be found therein. But if sufficient personal estate cannot be found, that then he cause the same to be made of the real estate and slaves.

BY this the Sheriff is positively directed to seize personal estate first; and only in default thereof to sell real estate or slaves. The words of the writ must be strictly pursued, 6 *Bac. Abr. (A. e.)* 168. Having disregarded both the law

West. District. *October* 1814.

MORGAN'S AD'R. *vs.* WOORHIES.

and his instructions, he has rendered himself liable to an action : and this leads to the second point ; namely, to what extent is he responsible ?

II. THIS will easily be ascertained, by considering, in what character the Sheriff acts when executing the process of the court, at the suit of an individual. Although a public officer, he is clearly the *agent* of the person who takes out the writ. The latter can in some instances increase, and in many diminish, the responsibility of the former, may stop him from acting, if he thinks it his interest so to do, may appoint a bailiff himself, and take all the consequences of his acts. 6 *Bac. Abr. (A. e.)* 157, 4 *Term Rep.* 119. He may delay by his commands the execution of the writ, may consent to bail which the officer refuses. Unless the Sheriff was considered the agent of the plaintiff, the law would not permit this controul to be exercised over him : nor would it give the former, as it does, a right of action against the latter for services rendered. 1 *Comyns on contracts* 6. 1 *Esp. Nisi prius G. E.* 26, *Salkeld* 332, 5 *Term. Rep.* 470, 1 *Caines* 192.

IN this instance, the agent has acted in direct opposition to the orders of the principal. The bond was taken without our consent, or as it is proved, against our express direction. We have a right then to disavow the act, and pursue him who acted illegally, and in defiance to our orders.

By his act, he has taken the place of the defendants, and we are entitled to obtain from him every thing we could have had of them.

WITHOUT citing a variety of authorities to this point, it is sufficient to refer to the great case of *Le Guen* vs. *Gouverneur and Kemble*, 1 *Johnson's cases* 436 *to* 524. The doctrine was elaborately examined there, and the right of the principal to pursue the agent, instead of those to whom the sale was made, is fully recognised; and the true measure of the damages adjudged to be, the amount for which the property was sold.

AGAIN, regarding him merely as a public officer, the law gives an action against him for illegal conduct: and the extent of his liability is distinguished, by the situation of the suit in which he acts improperly. If the plaintiff's demand is not ascertained by a judgment, the only remedy against the officer is *an action on the case;* in which he recovers the damage he proves he has sustained. *Espinasse's Rep.* 475, 1 *Day*, 128, 1 *Str.* 650, 1 *Johnson* 215.

BUT, if judgment is already given, and the plaintiff's demand against the defendant liquidated, the moment the officer act illegally he takes that judgment on himself; an *action of debt* can be brought, and he is responsible for the whole amount originally recovered from the defendant. 2 *Institutes* 382, 2 *Black. Rep.* 1048, 2 *Strange* 153-2 *H. Black.* 108, 2 *Term Rep.* 126.

West District. *October* 1814.

MORGAN'S AD'R. *vs.* WOORHIES.

THIS case is one where final judgment has been rendered; it comes then within the principle of the last mentioned authorities, and will doubtless receive a similar judgment.

Sutton, for the defendant. The plaintiff's counsel has in vain invoked British and French authorities, in order to ascertain the rights of a creditor, who has obtained a *fieri facias*, as well as the duties of the officer, who is to put the writ into execution.

THESE rights and these duties will be better defined by a true interpretation and construction of the statutes of our own country, under which the writ issues. Let us therefore inquire whether these statutes justify the pretentions of the plaintiff to the right of selecting that particular property, on which the *fieri facias* is to be executed. Why should it be given to him? *Cui bono?* All he has a right to is that the money be made. If the law has seen fit to direct certain proceedings, with regard to the sale of a certain species of property, and these proceedings are a little less speedy, in one case than in the other, he must submit in this as in all other cases to the will of the legislator. This will in no case vests any election or choice in the plaintiff. No good reason can be shewn why he should have any.

THE case is quite different, with regard to the debtor. He cannot well spare his bed, his tools,

his kitchen furniture, nor that portion of his household furniture, without which his family can have but a comfortless existence. The cow, that supplies necessary food, cannot be will spared nor certain provisions which cannot be laid in advantageously in every season of that year. It would be cruel, if the debtor has any other kind of property to offer for sale, to compel him to bring such under the hammer. Humanity, therefore, claims that if there be a choice, it should belong to the debtor. The Spanish law has several provisions for this purpose. *Curia Philipica, Juicio Executivo, verbo Execution.*

AUXILIARY to it, is the act of the Legislative Council. As land is sold with more difficulty and a greater sacrifice than personal property, and as land is here useless without slaves, it provides *in tenderness to the debtor*, that the Sheriff shall first take personal property. Can it be said that the caution it uses is to be tortured into a denial to the debtor of the right hitherto secured to him of naming the particular property he can best spare.

THE farmers in this state have seldom any other personal property, than the necessary household furniture, plantation tools and such animals as the labours of husbandry require. They have often a considerable property in land, often more that they can cultivate. This surplus is often the property the deprivation of which

West. District. *October* 1814.

MORGAN'S AD'R. *vs.* WOORHIES.

will occasion the less distress. The Spanish law, the basis of our jurisprudence, secures in such a case the choice of evils and we contend this boon is not taken away by the act of the Legislative Council.

WHEN the Sheriff comes to a debtor with an execution, the Spanish law cited makes it his duty to require that property may be designated to him for sale. If the debtor complies, the Sheriff neither takes or seizes any thing, but takes surety for the forthcoming of it on the day of sale, and its producing the money, *fianza de saneamiento.* If the debtor be obstinate, then and not till then, is the Sheriff to seize or take the property, and the sole object, of the part of the act of the Legislative Council cited by the plaintiff, is to point out the steps the Sheriff is to take. First he must seize personal property, next slaves and finally land.

IN the case before the Court, the debtors, under the Spanish law quoted, obeyed the Sheriff's call, and in doing so had a right to avail themselves of the benefit it holds out, to name what property they best could spare. The Sheriff could not seize any thing else the property pointed out being sufficient.

ADMITTING that the Sheriff erred in the construction of the law, what damages is he bound to pay ? The answer is, the damages which may legally be recovered from him who withholds

the money of another: the damages which the Sheriff would be bound to pay, had he made the money and applied it to his own use. "However "great," says Pothier, "may be the damages, which "the creditor sustains from the delay of payment "of the sum due, whether it proceeds from the "*negligence, fraud or obstinacy* of the debtor, he "can have *no other* compensation than the interest." 1 *Traité des Obligations*, 104 *no.* 150. This the Sheriff has secured to him.

IT is contended by the plaintiff's counsel that as the law "enables him to select that species of "writ, which he conceives best calculated to force "the defendant to do him justice, it is fair to "presume that, in the same spirit, it also allows "him, where the necessity exists to accomplish "his purpose, the choice of property." Let this reasoning be admitted to be perfectly correct and the consequence will be that, in Great Britain and such of these states, where the plaintiff may choose his writ, take out a *ca' sa'* or *fi. fa.* at his pleasure, the choice of precept carries with it the choice of property to be taken. Having conceded this, the learned counsel will not dispute that where there is no choice of writ, there ought to be no choice of property. Now, in Louisiana this choice does not exist: the plaintiff must in every case take out a *fi. fa.* and when the Sheriff returns *nulla bona*, then, and not till then, can the *ca' sa'* legally issue.

West. District. *October* 1814.

MORGAN'S AD'R. *vs.* WOORHIES.

LASTLY, the plaintiff ought not to recover because he has neglected to arrest, as he might if he had pleased, all proceedings on the execution before the sale. *Curia Philipica* 93, *title Execution, no.* 4.

By the Court. In this case, the plaintiff and appellant having obtained a judgment against several persons, as stated in his petition, caused execution to issue in the usual form prescribed by law. The writ was put into the hands of the defendant and appellee, who is Sheriff of the Parish of St. Landry and who, in addition to what is required of him in the process, was particularly instructed by the counsel of the plaintiff, to levy on the personal estates of the defendants and particularly not to take under the execution waste and uncultivated lands.

IT is admitted by the statement of facts that the defendant had sufficient personal property to satisfy the execution at the time it came into the hands of the Sheriff, but that contrary to what was required of him, by the express words of the writ, and in violation of the instruction of the plaintiff's counsel, he did seize waste land, with the exception of three town lots, sold at a year's credit.

THE present action is brought against the Sheriff to recover the whole amount of the judgment obtained by the appellant against the defendants in the original suit, on which the execution issued and was acted on as above stated.

IN the investigation of this cause, three principal questions occur.

1. WHEN a defendant in execution possesses a sufficient quantity of personal property to satisfy the judgment against him, is the Sheriff bound indispensably to seize such property, or may the defendant wave his privilege, if it may be so called, of having his personal estate sold and offer real property to be executed?

2. IN default of personal property, is it left to the choice of the defendant to point out what part of his real estate shall be seized, or can the plaintiff direct the manner of proceeding on the execution?

3. IF the Sheriff, as in the present case, neglects to pursue his duty by levying on the personal estate, as commanded by the writ, but seizes real property and proceeds on such seizure as required by law, to the final disposition of it on said writ without opposition, can he be made answerable in an action for the whole amount of the execution?

I. AS to the first point, there can be no doubt of the Sheriff being bound to seize the personal estate of the debtor. This is expressly required by law and is positively commanded by the writ. In opposition to this it is contended, that the reason of the law is founded on a respect to the situation of debtors and that its intention is to prevent an oppressive use of executions on defen-

West. District. October 1814.

MORGAN'S AD'R. vs. WOORHIES.

dants, or in other words that it is a rule made for their benefit and that on general principles of law, every one may wave privileges and dispense with regulations, intended solely for his advantage. This perhaps is true, but the exercise of such rights can only be tolerated by courts of justice, when in their operation, they do no injury to other persons; and, under the existing circumstances of our laws, it is clear that the plaintiff may be injured by a delay in the recovery of his debt, if the Sheriff should be bound to execute real estate, instead of personal, at the request of the defendant. The former species of property particularly land may and generally is sold on a year's credit in addition to the great delay necessarily created by law, in requiring real property to be advertised for a much longer time than personal.

THE rules of the Spanish law are conformable to the provisions of the act of the legislative council in requiring personal property to be first seized in execution, and real estate only to be executed in default of these, and in those laws we find it expressly stated, that altho' the defendant has the privilege of shewing the property, he cannot, having personal estate, point out real, for execution. *Curia Philipica* 11 *P. Juicio executivo, title Execution, no.* 3.

II. THE second question arising in this case seems to be settled by the same authority. In *no.* 1,

the author treating of the same subject, lays it down as a rule of law, generally understood that the debtor has to name the goods to be executed, and that, if he will not point out his property for execution it was considered by some authors that he should be arrested and compelled to do it, but the practice appears to be that the debtor should be required to name the property, and on his refusal so to do, or should he name an insufficient quantity, the creditor may point it out or the Sheriff seize at discretion. This manner of proceeding has nothing unreasonable in it and can do no injury to the creditor or plaintiff in execution, where the property is sold for ready money: for certainly to him, it is a matter of no consequence on the sale of what property he obtains payment of his debt, provided if is effected in a reasonable time. But it is said, and with truth, that under the existing laws of the state, and in the present situation of the country, the inhabitants holding vast quantities of waste and uncultivated land: which will not sell for ready money, to permit the defendant in execution to point out the property to be levied on amounts almost to a prohibition on the part of the plaintiff of ever being able to recover his debt: as this species of property will always be named by the debtor and by the sale of it the Sheriff will never be able to raise money. This certainly is a great evil, which has its origin in the act of our legislature requiring the sale of real

West. District. *October* 1814

MORGAN'S AD'R. *vs.* WOORHIES.

estate at a year's credit, in cases where it will not produce two thirds of its appraised value. It is however an evil, which in our opinion can only be remedied by legislative interference. There is nothing found in the laws, made by our legislature, which does repeal or destroy the operation of the former laws of the country on this subject. Unless we consider as such the inconveniences arising from the new and additional regulations, which would be to carry the doctrine of abrogation to length never heretofore heard of, and in violation of all legal constructions. On this head, it is therefore the opinion of this Court that the manner of proceeding on executions where it is not otherwise provided for by laws since enacted, must be according to the provisions of the former laws of the country, by which it seems that the defendant has the right or is bound to name the property to be executed, whether personal or real.

III. THE Sheriff is not answerable in the present suit for the whole amount of the judgment obtained against the defendant in the original action.

IT is a maxim of law that there can exist no wrong without a remedy : yet redress in damages ought in all cases to be proportioned to the injury sustained, unless in cases where they are given as an example to deter from similar conduct in future, which is really punishing men for their bad intentions.

THE Sheriff, in the case before the Court, has failed in the proper discharge of his duty by levying on real estate, while the defendant possessed sufficient personal property to satisfy the execution: and altho' there are circumstances which have a tendency to shew that his conduct has not proceeded from the best motives on his part, yet he may have conceived that the defendants in execution had a right to wave the laws requiring the seizure of personal estate, if to be had, and offer in its place real property; and can now only be made answerable in damages, to the plaintiff in execution for the injury which he has actually suffered. Nothing has been shewn to the Court by which the amount of damages may be fairly ascertained. It cannot be the sum recovered by the appellant against the defendant in his former suit; because he has had the full benefit of his execution by a levy on lands, which he has suffered to proceed, without any kind of opposition, to a sale and transfer as required by law. This we say he has permitted; because according to the Spanish laws on the subject he might have caused the execution, when he discovered the Sheriff proceeded irregularly and contrary to law, to be annulled and quashed on application to the District Court, and on a new execution the Sheriff would have been compelled to proceed legally. *Curia Philipica*, 93, *title Execution*, *no.* 4. And altho' by this law it does appear that the execution is null and

West. District. October 1814.

MORGAN'S AD'R. vs. WORRELL.

void, as having been executed contrary to its intent and form, yet as the Sheriff has been suffered to proceed on it, until third persons may have become interested by sales under it, the party would now be too late, to proceed in any way to have it annulled. Under the circumstances of this case the only injury which the appellant suffers by the conduct of the Sheriff is a greater delay in recovering the money on his execution and perhaps judgment might regularly be given in his favour for the interest of the money during the period of delay; but this would be allowing him to recover twice on the same cause of action, as this interest will be obtained, or ought to be, at the expiration of the year, the term of credit on which the property has been sold. Thus were we to given judgment for the whole amount of the judgment on which the execution issued, it would be according to the appellant a double remedy by enabling him to recover by means of the mortgage and security procured on the execution and also the same amount in damages against the Sheriff; this certainly cannot be just or legal. The appellant having neglected to arrest the illegal proceeding of the Sheriff on the execution and have it annulled and not having shewn any particular damage, occasioned by his conduct,

IT is ordered and adjudged that the judgment of the District Court be affirmed with costs.

CLOUTIER vs. *LECOMTE.*

West. District. *October* 1814.

CLOUTIER *vs.* LECOMTE.

Res judicata is when the same *thing* is demanded by the same *parties*, in the same *capacity* and for the same *cause.*

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By the Court. In the year 1810, Joseph Dupré, the step son of the plaintiff, now the appellee, died possessed of an estate, part of which he bequeathed to his brother of the half blood John B. Sévère Cloutier, son of the appellee, part to a mulatto woman named Adelaide, and the remainder to his natural children.

JOHN B. SEVERE CLOUTIER, by his father and curator *ad litem*, the present appellee, claimed against the will of his brother, and obtained in the Parish Court of Nachitoches a decree declaring null all the legacies, except that made to himself, and recognising him as the heir at law of his deceased brother. In the article concerning the legacy made to himself it was expressed that if he should die without issue, it would revert to the testator's nearest relation on his mother's side. The executor of that will was Ambroise Lecomte the present appellant.

JOHN B. SEVERE CLOUTIER having since died without posterity, his father, the present appellee, inherited all his estate, and brought this suit against the appellant, as executor of Joseph Dupré, demanding from him all the property which his son had inherited from said Dupré his brother, and which he alledged the appellant unduly detained from him. To this demand the defendant answers that he is ready to account to

West. District. October 1814.

CLOUTIER vs. LECOMTE.

the plaintiff for all sums of money or other property which is legally entitled to receive out of the succession of Joseph Dupré; but that he, the appellant, and Marie Lecomte Porter have a right, as the nearest of kin of the deceased Dupré, by his mother's side, to retain that portion of Dupré's estate, which, in case of the death of the son of the plaintiff without issue, was to revert to them.

THE matter in issue between the parties is therefore only this: is the defendant entitled to that portion of Dupré's estate?

THE plaintiff contends that this clause of Dupré's will is a substitution, and therefore void, according to the provisions of our Civil Code by which substitutions generally are abolished.

THE defendant alledges, 1. that this is a matter already settled in the Parish Court of Nachitoches, in the suit of John B. Sévère Cloutier, son of the appellee, against the present plaintiff, executor of the will of Joseph Dupré, where, it was adjudged by that court that the testament of Joseph Dupré was valid *in every respect*, except as to the legacies made to Adelaide and her children;

2. THAT the clause of that testament, which provides that, in case of J. B. S. Cloutier's death without issue, the property bequeathed him shall revert to his nearest of kin on his mother's side, is not a substitution, and therefore not void in law.

I. To this case, very simple in its origin, very clear in its facts, the judgment rendered by the Parish Court of Nachitoches in the first suit has given a most singular aspect. It seems to present the extraordinary spectacle of an heir at law and a legatee united in the same person, being as heir entitled to the whole estate of his predecessor, and as legatee to a portion of that same whole. That judgment, it is said, has settled the present contestation, because it recognises the validity of Dupré's will *in every respect*, except the legacies made to Adelaide and her children, and therefore sanctions the clause by which Dupré provided that the legacy by him left to his brother should, in case of his death without issue, revert to his nearest maternal relation.

WITHOUT examining what is the real substance of that judgment, and in what light the general tenor of it ought to be viewed, let us see if it can be considered as *res judicata* in the present case.

"THE authority of the thing judged," says our *Civil Code* 314, *art.* 252, "takes place only "with regard to what has formed the object of "the judgment. The thing demanded must be "the same; the demand must be founded on "the same cause, between the same parties, and "formed by them or against them in the same "quality."

IF we attempt to apply this rule to the present case, what do we see? Is the thing demanded

West. District. October 1814.

CLOUTIER vs LECOMTE.

the same? The general demand in both suits is the possession of the estate of Joseph Dupré: in that indeed they seem to be alike; but in the first, the legacies made to Adelaide and to the natural children of the testator were the thing demanded, for John B. S. Cloutier, could not demand that which no body denied to him, to wit, the legacy made to himself: while in the second, the sum of money first bequeathed to J. B. S. Cloutier, and in reversion to the defendant, is the object of contestation. Again, is the demand between the same parties and formed by them or against them in the same quality? The parties to the first suit were John B. S. Cloutier heir of Joseph Dupré, and Ambroise Lecomte, executor of Dupré's will, acting as such in defence of the rights of Adelaide and of the natural children of the testator. In this case, although the general principle be that heirs are to be considered as the same parties with their predecessors, it is not very clear that Alexis Cloutier, claiming a right which did not accrue until after the death of his son, is a party acting in the same quality; but laying that aside, the defendant Lecomte surely is not a party to the present suit in the same capacity in which he was a party to the first; for here he appears both as executor and as legatee under the will of Dupré, pretending to keep possession of the legacy made reversible to him. Finally, what formed the object of the judgment of the

Parish Court of Nachitoches? Was it any thing else than the legacies to Adelaide and to the natural children of the testator? Was there and could there be any thing else at issue between those parties? The legacy made to John B. S. Cloutier could not be a subject of contest between him and the executor of the will: he was to receive that part at all events as his absolute property. He had no interest, and, therefore, no right to put in issue the effect which the clause inserted in that article of the will was to have after his death; and the record, particularly the answer of the present appellant and the judgment of the Parish Court shew that none of the parties ever had the most remote idea of agitating that question. The object of that judgment, therefore, was not the matter now in dispute between the present parties; and that judgment, far from having here the authority of the thing judged, must be considered as having left untouched the very subject of the present contention.

II. As to the second question raised in this case, to wit, whether the clause of Dupré's will providing that if his brother dies without issue the legacy left to him shall go to the testator's nearest relation on the side of his mother, be a substitution, it is unnecessary to say any thing. That it is a substitution appears upon the face of it; reasoning upon this would be worse than nugatory.

West. District. October 1814.

CLOUTIER vs. LECOMTE.

IT is the opinion of this Court that Alexis Cloutier is entitled to the whole estate left by Joseph Dupré; and it is accordingly adjudged and decreed that the judgment of the District Court be affirmed: and in addition to it, it is farther adjudged and decreed that the appellant do give to the appellee a true and faithful account of his administration of the said estate, and deliver him all sums of money or other property belonging to the same.

GRAFTON vs. *FLETCHER.*

Parol evidence of a sale of land cannot be received tho' the vendee be in possession.

By the Court. Daniel Grafton, the appellee, brought this suit, in the Court of the seventh District, for a sum by him claimed as the price of a tract of land, which he averred to have sold to the defendant the present appellant. No written act of the alledged sale was exhibited, but the plaintiff offered testimonial proof of that contract and of the possession which the appellant had under it. To the introduction of such evidence the appellant objected, and his objection being overruled he excepted to the opinion of the judge. Upon this bill of exceptions the case is brought before this Court.

IT is alledged by the appellee

1. THAT the bill of exceptions was not tendered in due time, and is therefore entitled to no attention:

2. THAT supposing the bill of exceptions to be regularly entered, yet the admission of oral evidence in this instance was right, because the contract was in part performed; and that such a contract, after it has been partly carried into effect, is no longer within the purview of the law which declares null the verbal sale of an immoveable.

THE fact from which we are to deduce that the bill of exceptions was not tendered in open court at the trial, is that the instrument purporting to be a bill of exceptions contains matter which at that time could not be known, to wit, that an appeal had been claimed, and that a transcript of the depositions was, together with the bill of exceptions, sent to the Supreme Court. But, although this instrument evidently must have been written since the trial, it does by no means follow that a bill of exceptions was not tendered then.

THE judge may have put it afterwards in the form which it now bears; at least we are bound to presume so from the expressions which he uses, to wit, that "the counsel did then and there "(speaking of the trial) except to the opinion of "the court, and requested the court to sign and "seal this his bill of exceptions." This positive declaration of the judge is not to be counterbalanced by mere hints and presumptions: nothing but contrary proof could shake it.

West. District. *October* 1814.

GRAFTON vs. FLETCHER.

BUT the appellee contends that admitting the bill of exceptions to have been tendered in time, yet it will not avail the appellant, because the oral evidence objected to was rightfully received in this case.

THE general rule is that no verbal sale of immoveables or slaves shall be valid, and that no testimonial proof of such sales shall be heard. But, says the appellee, where there has been part performance of the contract, this law ought not to apply: it was not intended for such cases. Weak indeed would be the power of the laws, if their commands could be disobeyed under such pretences. If the sale of an immoveable cannot be proved by witnesses, neither can the performance; until the existence of the contract is ascertained. In this case, proving mere possession would have amounted to nothing; proving possession *under the sale* was the object. But if there was no proof of the sale, how could the witnesses prove possession *under it?*

WE, therefore, think that the District Judge erred in admitting such evidence, and we do accordingly adjudge and decree that the judgment of the District Court be reversed, and that the cause be remanded for a new trial to the said court, with instructions to the Judge not to admit oral evidence of the contract of sale which is the subject of this suit.

PAILLETTE & AL. vs. *CARR.*

West. District. *October* 1814.

PAILLETTE & AL. vs. CARR.

Baldwin, for the plaintiffs. This cause has been brought up upon a bill of exceptions which states

1. THAT the plaintiffs and appellees cannot maintain an action against the appellant, they being only a majority of the board of administrators of the public school, while a suit could only be brought by all of them jointly.

The majority of the administrators of a public school may sue, in their own names.

2. THAT the obligation on which the defendant is sued, being signed by him as Parish Judge, he is not liable as an individual.

Altho' the defendant added the words "Parish Judge" to his name, in signing a note he is personally suable.

I. THE prominent and material features of this case appear from the record to be these. The administrators of the public school, being authorised to draw from the treasury the sum of two thousand dollars, gave a draft to the appellant for that sum, to facilitate him in the payment of a sum which he owed to the treasury, for the arrearages of taxes that he had failed to transmit. Upon the receipt of this draft, he gave his note payable to the administrators of the public school, and signed it as Parish Judge. Suit was brought by the appellees in their names, stating themselves to be administrators. During the progress of the trial the exceptions were taken, but not being considered good by the District Court, judgment was rendered for the sum, after deducting some payment which had been made.

West. District. *October* 1814

PAILLETTE & AL. *vs.* CARR.

I SHALL confine myself to the points brought into view by the exceptions. As to the first then, is it well taken? I contend that it is not. To understand the question, or the correctness of the decision, it is necessary to call into review the different statutes authorising and establishing public seminaries. The first was passed in the 1st. session of the Legislative Council, *chap.* 30. This establishes the University, gives it the name of the "University of Orleans" incorporates it by that name and appoints the regents. The *chap.* 8 of the acts of the 2d session of the Legislative Council is a supplement to the above act, empowering the regents to fill vacancies. The 18th *chap.* of the acts of the 2d sess. of the 3d Legislature enlarges the power of the regents and directs them to appoint three administrators to each of the schools established in each county in the then territory. By the said act, it is made the duty of said administrators to superintend the schools under their direction and controul, to draw for the sum appropriated to purchase lots and buildings, &c. and authorises them to make such by-laws and ordinances as they may think fit for the government and discipline of their respective schools. This act enlarges and extends the first act of incorporation to the schools in the different counties and constitutes them an integral part of the first body corporate, vested with all the privileges, capacities and powers over the subjects committed to their

administration, in as full and perfect a manner as was given to the original institution, and consequently they can proceed in the discharge of their functions, in the same manner as the first body corporate can do.

WHAT then are powers of a body corporate with respect to the commencing and conducting suits at law? As it cannot appear in the persons of its members, it must appear by attorney, who can be appointed, by the laws of England and by the Civil Law, by a majority of its members, 1 *Black. Com.* 478, *Domat*, *book* 2, *tit.* 3, § 1. The appellees then, being a majority, had a right to appoint an attorney to institute and conduct the suit. The appellant cannot protect himself under the plea that he is one of the members. If he could, one member might controul the corporation and frustrate the object for which it was created, by obtaining and withholding the funds by means of which alone it is enabled to act, or by fraud or violence impede and stop its proceedings. For which conduct, by this privilege of exemption from suits contended for, he could protect himself with impunity from judicial punishment and from judicial process. Which ever members first seized the funds might hold them until his conscience prompted him to a surrender. But such conduct would be as contrary to law as to common reason and common honesty. A majority has a right to appoint an attorney and to direct

West. District. October 1814.

PAILLETTE & AL. vs. CARR.

suit to be brought even against one of its members.

Is this suit then well brought in the name of the appellees? They are stiled administrators of the school &c. It is the practice in the different states and in England to sue by the name of the corporation and the enumeration of the individual members would at best be inconvenient surplusage. But the 26th chap. of the acts of the 1st session of the Legislative Council requires that petitions should state the names of the parties, their *places of residence*, &c. It is true that the appellees might have been well designated by calling them the administrators of the school. But then an important circumstance would have been omitted, to wit, their residence. Now a corporation can have no residence because it is an artificial, invisible, intangible body and if the names of the appellees had not been stated with the place of their residence, they would under this requisite of the statute have failed in their suit, as an objection would well have laid to the sufficiency of the petition.

II. THE second objection will not require much discussion. The appellation of Parish Judge did not enter into the essence of the contract. It was an addition made to his name, not because he contracted in his official capacity and by virtue of his office, for it was a private individual transac-

tion ; but it may be presumed from a little vanity to have it spread upon the record that he bore that title.

THE judgment being correctly rendered for the sum due, another question presents itself for the consideration of this Court. The statute authorises this Court to assess damages to the appellees when an appeal is taken for the purpose of delay. No case has yet come under the cognizance of the Court that gives the appellees juster pretentions to expect a compensation for the delay occasioned by the appeal, beyond the legal interest. The whole of the appellant's conduct justifies a belief that he obtained the money from the appellees with a view, if not of appropriating it exclusively to himself, at least of retaining it until it should be forced from him by the last judicial process, and, when received, it ought in justice to be accompanied with ten per cent damages.

Wallis, for the defendant. The exceptions in this case are well taken. The administrators are to act jointly in every thing which concerns their administration : no one of them can act by himself. It is the body corporate that acts ; not the individuals. The body corporate is considered in law as one being, as one existence inseparable in its nature and incapable of division.

West District. *October* 1814.

PAILLETTE & AL. vs. CARR.

It must act entire or not at all. As well might an individual act against himself, as a corporation against any of its members. The limbs are not more closely attached to the natural body than the individual members are united to the body corporate. They enter into and form its essence. How then can they be separated?

THE authority cited do not militate against the principle contended for. They say that the act of the majority is the act of the whole. This is not disputed. But is it to be considered when acting against each other? If such was the case the authority who legislated upon the subject would have thrown out some hint from which it could have clearly been understood that such was the truth. Nothing however in their expressions will justify such a conclusion. Hence it is inferred that such is not the law. If it was, the most inconvenient consequences would result from its operation. If the minority became offensive to the majority, the latter would unite in a suit against them and with the assistance of the corporate funds carry on their legal prosecution without any expence to the individuals composing that majority. Or, if this did not answer their purpose they could proceed a little further and pass an act of expulsion. The majority of the members of this school may act, but it must be understood to be, in cases coming within their administration, not to sue or expel an offending

member. If either of them violates his duty so far as to lay himself liable to a suit, he ought to be expelled by a competent authority before the suit can be commenced.

THE other exception is equally strong in favor of the appellant. The nature of the obligation is to be observed in bringing suit. No man is bound beyond or differently from his contract. If the obligation is contracted as tutor or curator, the obligor is only bound in that capacity. If as an attorney in fact, he can only be personally liable by deviating from his authority, or failing to fulfil his undertaking. Here the appellant contracted as Parish Judge. It was accepted with that qualification and it can only be enforced with that addition.

IF the Court should be of opinion that the judgment below is correct, damages however ought not to be decreed, as the appellant had certainly good reason to believe that it is erroneous and the appeal was not taken for delay, but to correct the error.

By the Court. In all bodies corporate the majority must rule, and there is no doubt that two of the three administrators of this school had a right to sue in the name of the board. The only difficulty, if such it can be called, is that instead of bringing their action in the corporate name of the board of administrators, they have added their

West. District. October 1814.

PAILLETTE & AL. vs. CARR.

own individual names. But, this defect in the appellation of the suitors is a mere surplusage, and as such must be disregarded.

THE other objection of the defendant is still more unimportant. He thought fit to sign the note now in suit as Parish Judge; but whether he was Parish Judge or not, at the time he received the money, is a matter of no consequence. This was money lent him to answer his purposes: money which he applied to the discharge of his obligations, and which he promised to return. What has his official capacity to do with such a transaction?

VARIOUS other difficulties, not worthy of notice, have been raised by the appellant, which, together with those above adverted to, have led this Court to suspect that the object of the appellant, ever since the beginning of this suit, has been delay.

IN a case of this nature, where the deposit of public funds, destined for the most useful of purposes, has been unwarrantably detained; where the obligation to return them *at sight* has been eluded during such a length of time, it is just that we should allow to the plaintiffs not only the interest of the money, since the judicial demand, but also the full amount of the damages which the law permits to give.

IT is, therefore, adjudged and decreed that the judgment of the District Court be confirmed, and that in addition to the twelve hundred and fifty dollars therein awarded to the appellees, they do recover five per cent. interest from the day of the judicial demand, and ten per cent. damages, with costs.

MARTINEAU & AL. vs. *CARR & AL.*

The answer of a partner to interrogatories suffices, if not excepted to.

Murray, for the plaintiffs. This case is a simple one and requires but little argument on the part of the appellees, who were the plaintiffs below. From an examination of the record no error can be discovered and it is believed none exists. The seventh section of the 26th *chap.* of the acts of the Legislative Council is conclusive in this respect.

Baldwin, for the defendants. The only question for decision in this case is, whether the District Court did right in considering the separate answer of one of two partners as sufficient, to an interrogatory put to them both.

IT must be decided by the construction put upon the expressions contained in the act of the first session of the Legislative Council, *chap.* 26, § 7. It is there required that the defendant should distinctly answer &c. It does not speak in the plural. How are partners then to be considered

West. District. *October* 1814.

MARTINEAU & AL. *vs.* CARR & AL.

in their partnership transactions, or when they appear in Court as plaintiffs or defendants ? Are they to be considered as one or several individuals ? Are they to appear in the name of the firm, or in their real names ? It is true that one partner can bind all the others by his contract, but in a partnership debt or contract all the partners must sue or be sued : otherwise the suit cannot be maintained. 1 *Comyns on Cont.* 326. A partnership differs in this respect, from a body corporate. The latter is composed of natural persons, but in their corporate capacity their individuality is lost. It appears in contracts and in Courts by its corporate name, and is recognized by its attorney and by its seal. The former has no such attributes ; the members retain their individual character and are known by their real names, they must all appear as plaintiffs or defendants in petitions and answers. Interrogatories put by them must be in the name of all and when referred to them must be answered by all. It may often happen that any question proposed to the members of a firm will be answered differently by the different persons, according to their knowledge of the facts. One may be acquainted with circumstances and disclose what was desired to be known, of which the others may be totally ignorant. A person sued by a firm has a right to a full discovery of all the knowledge of all the members. Otherwise it would be in vain to interrogate, as the one

would answer whose information upon the subject was the most limited. As all the members then are obliged to answer to a petition filed against them all, *a fortiori* they are obliged to answer to a question put to them all.

IT is, however, said that the 10th section of the same act provides for the excepting to insufficient answers and that the answer of one partner is good unless excepted to. To this it may be replied, that it must be an answer within the spirit and meaning of the provision before an exception can be required. For example, the answer must be upon a oath, in due form, taken before some officer authorised to administer oaths or it is no answer ; it must be an answer to some fact or matter contained in the interrogatory, or it is no answer ; and it must be the answer of him who is interrogated on it or is no answer, and consequently need not and indeed cannot be excepted to. It is impossible to except to an answer that does not exist. As all the partners therefore are bound to appear and answer, if but one alone appears he cannot be received and the party interrogating will not be driven to exceptions. His proper remedy is to take the facts for confessed and pray for judgment. Here is nothing to except to, for there is no answer. It is not "*insufficient*," for it does not exist. The questions were put to Martineau and Landreau and they are answered by the former only.

West. District. *October* 1814.

MARTINEAU & AL. *vs.* CARR & AL.

THIS part of the statute is deemed to apply only where the answer is made with the requisite solemnity by the person or persons interrogated and having some application to the questions proposed, but is *evasive* or not *distinct;* and shewing, or giving reason to believe or exciting a suspicion that the whole truth is not disclosed.

WHENCE it is contended that the District Court erred in receiving the answer of one of the parties, and this Court ought to remand the cause with instructions to reject the answer, to take the interrogatory for confessed and give judgment accordingly.

BUT admitting that the answer is in the form required by the statute, yet it is only good as to the person whose answer it is. It cannot be good for another. It cannot protect Landreau. An attorney may appear for all the defendants named in the petition: though when interrogated they must answer in their proper persons. An attorney cannot swear for them, nor can they swear for each other. Each witness testifies according to his own knowledge, not from the knowledge of others. If two or more persons join in an obligation and are sued and interrogated, they must all answer and the answer of one will not avail the others. If there are several endorsers of a bill of exchange who are sued and interrogated; the answer of one will not serve the others. If two or more sign a negotiable note and are sued and

interrogated; the answer of one will not aid the others. In all these cases then as they are all required and bound to answer, those who do not are in default and the interrogatories will be taken for confessed and judgment entered against them who thus refuse. These cases are similar to the one before the Court. This is a mercantile transaction; and so are those as far as they extend, and as judgment must and would be given in the foregoing cases against those who neglected or refused to answer, so the Court here ought to have given judgment against Lindreau and the judgment ought to be reversed as to him.

Murray, in reply. It is true that partners must set out their names in petitions, but it is not true that all their names are required in answering. It is the usual practice to give the title of the suit at the head of the answer, and nothing more is required. It is however contended that when an interrogatory is put to two or more partners they are all bound to answer and that the answer of one alone ought not to be received. This is considered to be incorrect, one partner contracts for all the others in all transactions which concern the partnership and they are all bound. Each one is presumed to be acquainted with all the circumstances relating to their joint concerns: and it is natural and reasonable to suppose that where an interrogatory is referred to them, the full

West. District. *October* 1814.

MARTINEAU & AL. *vs.* CARR & AL.

and explicit answer of one contains the information of the whole, as it is presumable *that* one would answer who was best informed upon the subject. It is not important to enquire into the difference between a partnership and a body corporate as the cause does not turn upon the distinction. It must be decided upon the construction given to the statute first cited. A construction is attempted to be given to the statute which cannot be admitted. An effort has been made to shew a difference between an insufficient answer and a case like the present, where but one partner answers, which it is urged is to be considered as no answer. But it certainly is an answer and is to be taken as such until the contrary is shewn. It purports to be one and *primâ facie* is so, and if no objection is made to it, it must and will be received as such by the Court. There is a wide difference between this and no answer. In the latter case the Court would take notice of the want of one and would take the fact as admitted, though here they will consider it good until the defect is shewn.

How then must it be made to appear? The law is explicit. It must be by an exception and as the party did not resort to this plain and easy mode, he has waved the benefit of it, if any benefit could have been attained.

IT is next endeavoured to be shewn that judgment ought to have been given against Landreau as he did not answer, and to support the argument

recourse is had to the rules of evidence. But if the answer is presumed to be sufficient until the contrary is shewn, this attempt must fail, for the receiving of it does away the effect of that argument. It cannot be correct reasoning to say, that which is *primâ facie* good does not exist. The judgment is correctly entered by the Court below and ought to be affirmed.

By the Court. It appears from the documents transmitted that the appellees brought their action on a note regularly transferred to them as merchants trading under the firm of Martineau and Landreau, by J. J. Paillette, in whose favor it was made by the appellants. In an amended answer, Nancarrow, one of them, filed the interrogatories, the admission of the answers to which as evidence is made the basis of the exception to the opinion of the District Court. These interrogatories are put to Martineau and Landreau, the appellation by which they are known, as a commercial firm or society. Martineau, one of the partners, makes to them a full and complete answer expressing a perfect knowledge of the transaction. In suits where partners are concerned, the opposite party might perhaps require the separate answers of each individual composing the society. In such a case the answers of every member would be necessary; but when a firm is interrogated, as in the present case, we are inclined to think

West. District
October 1814.

MARTINEAU & AL *vs.* CARR & AL.

that an explicit and categorical answer of one partner is sufficient. No exceptions were made to the insufficiency of the answers in writing as required by law, previous to the trial of the cause. It is, therefore, ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

*** THERE was not any case determined during the month of November.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. DECEMBER TERM, 1814.

BEARD vs. *POYDRAS.*

No new evidence can be received in the supreme court.

By the Court. In this case, the defendant and appellant moves for leave to introduce some written evidence, which was not laid before the Court below and makes no part of the record sent up to this Court: and the question being one of general practice, the decision of which will rule in all other similar cases, the Court adjourned the trial of the cause on the merits, to examine this question at leisure.

It is true, as was alleged by the counsel for the appellant, that in the Spanish Courts of appeal new evidence, discovered since the judgment below, might be admitted; and had this Court

East. District
December 1814

BEARD
vs.
POYDRAS.

been organised on the same principles, or had the jurisdiction of it been left undescribed, we might, perhaps we ought, to admit the evidence now offered by the appellant. But the jurisdiction of this Court, and the manner of exercising it, are defined by law. The Legislature of the State has determined the mode in which causes shall be sent from the Inferior Courts to this. In the 10th section of the first judiciary act it is provided that the appeal be heard on the pleadings and documents transmitted from the Inferior Court. The 11th provides that the facts to be laid before this Court shall be established either in a special verdict or in a statement made by the parties or the judge.

EVIDENCE, therefore, coming up in any other manner is not admissible.

THE hardship which may result to the parties from being deprived of the benefit of such evidence, is not greater than that which they may suffer in the Inferior Court, when, after the expiration of the seven days within which a new trial can be asked, evidence happens to be discovered which it is no longer in their power to avail themselves of. These are inconveniencies, no doubt; but they are a consequence of the necessity of avoiding a much greater evil, the endless duration of suits.

THE motion is overruled.

VILLERE' & AL. vs. *BROGNIER*, *ante* 326.

East District.
December 1814.

VILLERE & AL. vs. BROGNIER.

Former judgment confirmed.

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Duncan, *Grymes* and *Martin*, for the defendant. The plaintiffs claim the notes, which are the object of this suit, because they "deposited "the same in the hands of Michel de Armas, "Notary Public, *to be retained by him in deposit* "*till the (said) agreement should be carried into* "*effect*, and they allege that the notes were *ille-* "*gally* taken by Brognier de Clouet from the office "of Michel de Armas."

THE answer denies these facts, the plaintiffs must prove them.

THEY, therefore, introduce the testimony of Michel de Armas. He does not prove the delivery of any note *by the plaintiffs* to be retained by him in deposit: but, that Soulié, one of the plaintiffs, delivered him "*a part* of the promissory notes "drawn by the assignees (the plaintiffs) telling "him that, after Cuvillier should have delivered "him the *other* notes, after the judicial mortgage "registered against Cuvillier and St. Amand "should have been raised, as to St. Amand, after "Brognier should have lodged into his hands the "notes drawn by Cuvillier and endorsed by St. "Amand, and signed a certain act, he might "deliver him the notes of the plaintiffs."

IF the agreement, mentioned in the petition, be not the one there detailed by Soulié, we have no evidence of any other; we must believe no other existed and the plaintiffs must fail.

East. District. December 1814.

VILLERE' & AL. vs. BROGNIER.

THE *other* notes were delivered by Cuvillier with the knowledge, and in pursuance, of the agreement, so made by Soulié.

IF the delivery made by Soulié and Cuvillier be nót the delivery of which the petition makes mention, then, no other delivery of notes being proved, the plaintiffs must fail.

IF that be the delivery of which the plaintiffs speak, then they made the delivery of the notes which they claim, *by the agency of Soulié and Cuvillier.*

IF they sent Soulié and Cuvillier to deliver the notes to the notary, without any *written* instructions, the notary was justifiable in receiving them, with such *oral* instructions as the agent gave and in pursuance of these instructions might validly contract towards Brognier the obligation of handing him over these notes, according to the directions of the plaintiffs' agents.

THE notary having contracted this obligation, it was his bounden duty to comply therewith; accordingly, as soon as the conditions under which he was directed to hand over the notes to Brognier were accomplished, he discharged an obligation for the non observance of which damages might have been recovered from him. If he could not legally withhold the notes, Brognier's receipt of them cannot be called, as it is in the petition, an *illegal* act.

BUT it is said there is no evidence of any *power* given by the plaintiffs, or any of them, to bind then *definitively:* they had reserved themselves the right of agreeing or disagreeing to what Soulié should do.

THE defendant contends that the plaintiffs had given some authority over the notes. The possession implies this, when it *does* not appear *tortious*. The circumstance, of their being made *payable to Brognier*, is evidence that they were intended to come to his hands; for, in those of no other, could they be of any use. If the act of the agent has been *incorrect* thro' misconduct or error, those who employed him must suffer therefore. If they recognize the delivery which Soulié and Cuvillier made of the notes to the notary, and desire to avail themselves of the rights it gives them on Brognier or the notary, they must allow the correspondent rights which Brognier and the notary acquired from the *mode*, the *conditions* of that delivery.

THE agent binds his principal, and the principal is presumed to have contracted by the agent, even when the agent exceeds his powers, provided that what is done *seems to be* within these powers. *Pothier, contrat de mandat, no.* 89, *Obligations, vol.* 1, *no.* 79. Now, in this case, Soulié's power *extending* to the lodging of the notes in the hands of de Armas or Brognier, or to the using them for the purpose of relieving Cuvillier, it *appeared to be* within those powers to dictate the purpose

East. District. *December* 1814.

VILLERE' & AL. *vs.* BROGNIER.

for which the delivery was made. If, in doing so, he exceeded his powers he bound his principal, at least the thing submitted to his controul. *Pothier, loco citato.* The delivery, since it is recognized, must have been for some purpose; he surely had some authority over the notes. He was surely empowered to make some contract or some arrangement therewith. If that contract or arrangement was, as the plaintiffs say, with a qualification, that the terms of it were to be communicated to them and wait their ratification, this is a circumstance, which may give them an action against him, but which does not prevent the thing placed under his controul, the subject of his agency, from being engaged by the conditions under which he effected a bailment of it.

IF I send my clerk with my note payable to A. for one thousand dollars to borrow money for one year and he agrees with A. on the terms, and receives $ 940 having allowed him, 6 per cent. I shall not be authorised to demand a rescission of the bargain on the ground that I wanted to have a gratuitous loan, or obtain money on a smaller discount, even if I *prove* that my clerk disregarded my orders. The mission and possession of the note are presumptive evidence of an authority to dispose of the note; if I allege I sent him only to make *preparatory arrangements* about the loan, shall I not be told that the delivery of the note repels the idea and presupposes that the note was

to be used, in the only way it could be, viz. by being delivered to the person to whose order it is made payable and to whom the messenger was sent therewith? I shall be bound by the act of my clerk, tho' he has exceeded his powers; because his act *appeared to be*, tho' it was not, within them.

IT suffices that what was done *seemed to be*, might be fairly believed to be, within the powers of the agent. Now, he who has power to make a a bailment, seems to, may be fairly believed to, have the power to declare the object of the bailment, and the terms on which it is made.

IN the present case, Soulié, being clearly authorised to make the bailment of the notes to de Armas, *seemed to be*, might fairly be believed to be, authorised to declare whether the notes were to be retained by de Armas, as is stated in the petition, or to declare, as he has done, that on Brognier's complying with certain conditions, they should be delivered to him.

HE has done the latter, whether thro' error or wilful departure from his principal's instructions is immaterial to the immediate bailee, de Armas, or the subsequent one, Brognier. The notes must be disposed of according to Soulié's directions and if any loss happen, it must be that of the plaintiffs, *in cujus potestatem fuit legem apertius dicere.*

BUT there is not any evidence that the plaintiffs

East. District. December 1814.

VILLERE' & AL. vs. BROGNIER.

gave Soulié any other directions than those within which he has confined himself. The assertion, in the petition, that their intention was that the notes should be retained by de Armas, till any other agreement, than the one made by Soulié should be complied with, is entirely unsupported by any proof.

BUT the Court says of this intention of the plaintiffs "there needs no other evidence than that "each of them was to put his signature to the "contract."

How does it appear that each of them was so to put his signature? By the instrument which Soulié and Cuvillier directed de Armas to couch on his notarial register. Now if this act of Soulié and Cuvillier be the evidence of any thing to be done by the plaintiffs, it must be because Soulié and Cuvillier were their agents *ad hoc*, that is to say, in defining the conditions on which Brognier was to have the notes. Whatever may be the presumption arising from the intended signatures of the appellees in favor of their not being bound that is to say, losing their right on the notes till they signed, that presumption must yield to the positive evidence of the contrary, arising from the stipulation that as soon as Brognier had fulfilled all his parts of the engagement the notary was to hand him the notes, without consulting any person, without waiting till they or any of them signed.

BUT, we are told that, admitting that the plaintiffs were bound by the act of their agent they had a right, which they have timely exercised, of dissolving their obligation.

THE Court have informed us that it is a principle of our law, that "*where it has been agreed* "*that the contract should be reduced to writing,* "*until it is actually written and signed by all the* "*parties any of them may recede.*" It is true this principle is broadly laid down in some elementary writers, but, if it be closely examined, we shall find that it is confined to *consential* contracts alone, and that this liberty of receding is neither of the essence nor of the nature of, but only an incident which may or may not attend, the contract. The party will not enjoy this liberty unless he has really stipulated for it.

Febrero and *Domat*, in that part of their works cited by the Court, refer to *L. contractus* 17, *Cod. de fide instr. Inst. tit. de contr. emp. Pothier*, commenting on this part of the Civil Law, says: "Although the mere assent of the parties "suffice for the perfection of consential contracts, "yet, if the parties, in a sale or hire or any other "kind of bargain, agree to have an instrument "respecting it made by a notary, *with a view* that "the bargain be not concluded and perfect till "the instrument shall have received its legal form "by the signature of the parties and the notary, "the bargain will not be complete until the nota-

East. District December 1814.

VILLERE' & AL. vs. BROGNIER.

"rial instrument shall become so: and the par-
"ties, tho' they did perfectly agree to the terms of
"the bargain, will be at liberty to recant, at any
"time before the notarial instrument is subscrib-
"ed. But, if in this case the instrument is requisite
"for the perfection of the contract, which of itself
"requires nothing but the consent of the parties,
"*it is because the contracting parties have re-*
"*quired it*, and because it is lawful for the par-
"ties to a contract to render their obligation de-
"pendent on what conditions they please. 1
"*Pothier on Obl. no.* 11."

Now, the author speaks of *consential* contracts only, not of *real contracts* which are performed by *delivery*. In this case, the contract on which the defendant claims and obtained the notes, that are the object of this suit, is a contract in *rem*, a *real* contract of *staking*, *a pledge*. Soulié and Cuvillier, who had been entrusted by the appellees and others with notes to the amount of $ 22000, or thereabouts, in order to obtain, by means of these notes, the release of an impending mortgage on St. Amand's lands and relief from Brognier's suit, deposited the said notes with a notary, there to remain as a stake or pledge in favour of the defendant and to be delivered to him upon his compliance with three conditions, to wit the surrender of Cuvillier's notes, the release of St. Amand's mortgage and his signing a deed of transfer of his rights on Cuvillier, to the makers of the

notes. This was a *real contract* (1 *Pothier on Obligations no.* 10) and as such was not subject to the liberty of receding, which may be stipulated for in consential contracts, but which, even in these, does not occur, without an express or tacit provision therefore. It is an executed, not an executory, contract on the part of the person depositing. By placing the thing in the hands of a third person, he discharges himself of every obligation, arising from the contract; and the rights of the party he contracts with can only be enforced against the *stake-holder* or third person. This principle is recognized, in the case of Williams *vs.* Cabarrus, determined in the Superior Court of North Carolina, *Martin's notes* 29. The plaintiff having made a race with one Dekeyser, each party deposited the sum bet in the hands of the defendant and the Court held that "an action "well lay against the stake-holder, by the party "that won the race, and none would be against "the losing party: because he had complied with "that article of the agreement which obliged him "to pay, staking the money with the defendant." Apply this principle to this case, Soulié and Cuvillier executed the agreement made with Desse, in behalf of the defendant, by depositing the notes in de Armas' hands: Brognier (thro' Desse) complied with part of his, by depositing Cuvillier's notes and releasing the mortgage and there remained nothing to be performed but signing

East. District. December 1814.

VILLERE' & AL. vs. BROGNIER.

the deed of transfer. As there was no time fixed for doing this, the defendant could not be complained of, for not doing it, unless he was put *in mora*; he never was, neither could he: he executed the deed within a very short interval after the completion of the notes to the amount of $ 22000.

IT is true no contract intervened between the plaintiffs and the defendant: none is pretended to have intervened. If a suit can be supported by them against the defendant, it must be founded not on *a contract*, but upon a *tort*. That tort is supposed to be the wrongful taking of the notes by the defendant. Now, the character of this taking must establish the right of either the plaintiffs or defendant to these notes. It is not denied that the latter took the notes, after complying with all the conditions upon which according to the agreement between him and the plaintiffs' agent they were to become his.

THE Court, however, is pleased to consider our right, if any exist, as arising on a contract of sale of our claim on Cuvillier, of which the notes of the plaintiffs were the price.

HERE, we admit the power of receding exists, if really the intention of the parties was that the perfection of the contract should depend from the Notarial act. Otherwise, it has been shewn this power does not exist. Now, we contend there is no evidence of any such intention. Even, if

there was, still the faculty of receding ceased, from the moment the rights of the defendant on St. Amand were released. The thing was no longer entire and the plaintiffs could not recede without doing a material injury to the defendant. This the law forbids.

"THE contract of annuity," says Pothier," not being perfect, as long as the money, which is the price of the annuity remains with the notary, it follows that he, who has furnished it, may alter his mind and resume it, as long as the thing is entire, and the party, who sells the annuity receives thereby no prejudice. He who resumes his cash is bound, in this case, to nothing else, but the payment of the charges or fees of the notary, or to reimburse them to the other party, if he has paid them.

"BUT if the thing be no longer entire, for example, if you have granted me an annuity, either by a notarial act, or one under your private signature, of one hundred pistoles a year, for the price of twenty thousand livres, which you promised to invest in a tract of land you were bargaining for, and I deposited the money in the hands of a third person, until this purchase was completed: altho' the money be not yet paid, and consequently the contract of annuity has not received its perfection, yet, if you have already bargained for the land, I shall be bound to deliver you the money, in order to enable you to

East. District. *December* 1814.

VILLERE' & AL. *vs.* BROGNIER.

pay for the land. This obligation does not arise properly out of the incipient contract, which intervened between us: as it did not mature into a perfect contract, it cannot *per se* produce any obligation. Mine arises from this rule of natural equity, *nemo potest mutare consilium in alterius injuriam. L* 76, § *de Reg. J.* Altho' the contract, which intervened between us, has not yet received its perfection, yet, as I have induced you to bargain for the land, equity forbids I should disable you from complying with it, by withholding the money, on which I induced you to rely.

"LIKEWISE, if, where I altered my mind and resumed my money, you had made no bargain, but have been at some expence towards one, I shall be bound to indemnify you." *Contrat de Rente* 73, 74, *no.* 65.

A more parallel case could not be adduced. Whatever might have been the plaintiffs' right of receding from their contract, after the defendant had foregone his claim on St. Amand's property, the plaintiffs could not without indemnifying him, refuse to carry their bargain into full effect.

SPEAKING of the sacrifice, thus made by the release of St. Amand, the Court asks, *ante* 351, "why was he, Desse or Brognier, so forward in "executing what was not yet an obligation on "his part?" Our answer is in the statement of

facts, *ante* 332, "Cuvillier and Soulié pressed the "release and it was executed, on the assurance that "Soulié gave, the matter was concluded and "payment was secured by the deposit of the "notes." We may emphatically say because the plaintiffs pressed us. For we have shewn Soulié was their agent. Yet, the judgment deprives us of the very note of Soulié himself, which he thus induced us to consider as part of the security, on which he solicited us to part with our right. The Court may say, in spite of the law produced, that he was not the plaintiffs' agent and could not bind them: but considerable ingenuity must be exercised, before, we do not say a good, but plausible ground may be shewn them, on which the Court may say that his note was not virtually pledged, and ought to be restored.

THE Court, in their judgment erroneously charge Brognier with having "refused to sign the act as "it was and signifying his *intention* to have the "clause inserted."

BROGNIER never did refuse to sign the act as it was, or to sign it in any manner. He never signified any *intention* to have any clause inserted. The party of the statement on record which corresponds with this part of that of the Court is to be found in the deposition of de Armas. See his deposition, *ante* 337, 338 and 339.

LET the Court observe that Brognier did not

East. District. *December* 1814

VILLERÉ & AL. vs. BROGNIER.

even give the reference the countenance of his signature or *paraphe*, without which the Court *knows* such a reference was a nullity: with it, it would have bound Brognier but no one else.

THE defendant has to complain that, while the Court casts an unfavourable shade on his conduct, unjustified by any thing in the record, it throws a favourable gloss on that of the appellees which is alike uncountenanced by any thing in the record.

THE Court attributes the recantation of three of the assignees to the information, which it says was given them of Brognier's refusal to sign. "On discovering this alteration (the reference in "the margin) and being *informed of Brognier's* "*refusal* to sign, three, of the four who had signed "it, blotted out their signatures."

IN no part of the record, is it stated that Brognier refused to sign, or that any person was informed of this *pretended* refusal. Blanque gives his reasons: he does not pretend that Brognier refused to sign, he only says that "*he was master* "*of his signature as long as the other party had* "*not signed.* Clarke gave no reason: Soulié disputes only, "on his right to do what Clarke and Blanque had done."

LET the Court correct their own statement by the record in these particulars and then ask themselves what part of it authorises them to say

"that Brognier by his *recantation* released the other "parties from their engagement?" Or that he either made or caused to be made any "*alteration*" or "*change*" in the act? No change or alteration was made in the act: a reference or *apostille* was inserted in the margin and the Court *cannot* be ignorant that this wrought no effect on the act, could have none till "paraphed" or signed by the notary and the parties. 1 *Ferriere Dict. Verbo Apostille.*

THE Court views the reserve of a mortgage on Cuvillier's estate, for such part of the notes as might not be paid, as *at war with the spirit and the letter of the whole transaction.* If I sell my land on credit, is a stipulation, that in case of non payment the sale shall be rescinded, incongruous? Does not the law supply such a clause? If the law could supply it for the whole, may it not be stipulated for a part?

THE Court sees no evidence of this stipulation. Desse swears, that Cuvillier proposed it, as one of the conditions of the transfer, and Soulié told him he might consider the matter as concluded, *ante* 331. It is true, he informs us, on his cross-examination, that the terms were not *discussed* with Soulié: they had been with Cuvillier.

THE release, granted to St. Amand, is considered by the Court, as a departure from the

East. District. December 1814.

VILLERE' & AL. vs. BROGNIER.

contract, by which Brognier engaged to transfer his claim to the plaintiffs. He engaged to transfer his claim against Cuvillier, and his mortgage on the land sold the latter and nothing else. See the plaintiffs' petition, *ante* 328. That St. Amand, Cuvillier's father in law, was to be relieved, clearly appears, from Desse's deposition, from Soulié's declaration to the notary, from Cuvillier's conduct, who gathered and deposited part of the notes, with the knowledge that the release was one of the conditions, on the performance of which they were to be handed over.

THE petition states that the appellees severally agreed to furnish their notes: there is nothing from which a joint contract could be implied and the right of every appellee must be examined distinctly and a part from the others; surely that of Soulié cannot in any point of view be recognised by the Court: he stipulated certainly for himself and he must be bound at all events.

IF it were admitted that Blanque and Clarke, the other individuals who *blotted* out their names, did actually recede and had a right to do so, does it follow

THAT Villeré, who never expressed any dissatisfaction or intention to complain, till long after Brognier had taken the notes, has any right to claim his? Brognier transferred him his rights: he had accepted the transfer previously, and never appears to have receded.

MARIGNY certainly cannot avail himself of Brognier having proposed a change in the deed, when he has answered it did not appear to him it could make the least difficulty.

WHAT evidence of the dissent of the others was there at the time Brognier subscribed the act?

By the Court. The Court, on the rehearing of this case, has given due attention to the arguments by which the counsel for the appellant endeavoured to support their objections to the judgment.

THE first ground on which they relied was, that J. Soulié, one of the appellees, if not expressly authorised to stipulate for his co-subscribers, was impliedly so. The only circumstance, however, from which such implied power could be deduced, is that Soulié was entrusted by some of the subscribers with their notes, which were to be the consideration or price to be paid to the appellant Brognier, on his complying with his part of the contract. But this Court is of opinion that, should Soulié have been the bearer of all the notes, instead of some of them, yet it would not from thence follow that he was authorised to deliver them up, before the parties had finally agreed to the conditions of the contemplated contract: because nothing would have a more

East. District. December 1814.

VILLERE' & AL. vs. BROGNIER.

dangerous tendency, than this doctrine of implied authorisation and because the right of acting for others and disposing of their property cannot be assumed, without an express and determinate power.

THE second objection of the appellants to the judgment of the Court is that the Court have overlooked several important matters of fact and particularly the stipulation, made by Soulié, that the notes by him deposited in the hands of the notary should remain there, as a surety for the amount of the judicial mortgage afterwards released by Desse. On this point it did not, nor does it now, appear to the Court that the appellees had at all contemplated that the release of the judgment obtained against St. Amant should be one of the conditions of the intended contract, but on the contrary, it is evident from the instrument drawn by the notary to which some of the appellees had affixed their signatures, that the very reverse was the understanding of the parties; for in that instrument, drafted conformably to the memorandum delivered by Cuvillier to that officer, it is positively expressed that upon one of the notes transferred by the appellant judgment had been obtained and execution issued against *Cuvillier and St. Amant.*

THE danger of the doctrine of implied authorisation above spoken of is here made manifest;

for the consent given by Soulié to the release of this judgment and execution in favor of St. Amand is at war with the conditions as reduced to writing and as recognised by some of the appellees. The Court, therefore, think that if the appellant Brognier suffers any prejudice in consequence of the release of the judgment obtained so by Desse against St. Amand, he has not to complain of any of the appellees, but Soulié.

THE appellant next observes that the clause, added in the margin of the notarial instrument, to wit, a reservation of Brognier's mortgage on Cuvillier's property, for so much of the notes as should happen not to be paid, was not an *after thought*, but made from the beginning a part of the stipulations agreed upon between Brognier's agent and J. Soulié. The Court have bestowed particular attention on the two depositions of that agent, the only witness who pretends to recollect any thing of that stipulation, and have found them so contradictory that they cannot give them much faith. In the first deposition, which is a recital, at one breath, of the whole transaction, he says indeed that after having treated with Cuvillier for the conditions of that contract, mentioning among others the reservation of mortgage, he had some conversation on the subject with Soulié who told him he might consider the business as concluded on the conditions above mentioned;

East. District. *December* 1814.

VILLERE' & AL. *vs.* BROGNIER.

but on being asked particularly whether he had *discussed* with Soulié the conditions of the contract, he answers categorically *that he did not.* Whatever sense may be attached by the appellants to the word *discussed*, as employed in this case, it conveys to the mind of the Court the idea that Desse there confesses not to have entered into any minute explanation with Soulié, as to the particular stipulations of the contract. And when it is considered that he afterwards went with Cuvillier to the notary's office, that there Cuvillier delivered to the notary the draught from which he was to make the instrument; and that neither in that draught nor in the instrument itself is to be found the clause of the reservation of mortgage, it may well be inferred that this clause was an after-thought, not perhaps as between Brognier and his agent, but as between Brognier and Desse and Soulié. Indeed Desse himself on being asked, whether Brognier had not signified his intention to have a clause added in the margin of the instrument, plainly answers, that Brognier not considering his rights sufficiently secured in that instrument proposed to add *a new clause* to it. Supposing, however, this clause to have been previously agreed upon between Desse and Soulié, the question recurs how does it appears that Soulié was authorised to consent to such reservation? Is it not on the contrary very evident that the appellees under-

stood very differently, when we see the instrument prepared by the notary and signed by some of them containing *an absolute and unconditional transfer* of Brognier's rights and mortgage on Cuvillier's property?

FINALLY, the appellant represents that although the principle of law be that where the parties have agreed to have the instrument of their contract reduced to writing before a notary, they have a right to recant before the instrument is closed and signed, yet that principle has its limitations, and that the present case is not one of those to which it be may applied. In order to shew this, they have endeavoured to assimilate this to a real contract and pretended that in cases of real contracts the delivery of the thing makes the contract complete, so that the right of the parties to recant before signature is not applicable to contracts of this kind, but only to contract called consensual, where nothing else than the consent of the parties is requisite to make them perfect. It would be idle here to examine whether the distinction insisted upon by the appellant be or be not correct, for the contract in the present case is a simple consensual contract, a naked contract of sale, in which the rights of Brognier against Cuvillier are the thing sold, and the notes of the appellees and others are the price. It instead of their notes, the appellees had deposited, in the hands

East. District. December 1814.

VILLERE' & AL vs. BROGNIER

of the notery, the money which was to be the price of the thing brought, would the vendor have had any right to take it, before the act should have been closed and made complete by the signatures of all the parties? Surely not and where is the difference? The Court has not been able to discover any.

UPON the whole, the Court is satisfied that the judgment rendered in this case, as it relates to the appellant Brognier, is founded in law and justice: but in as much as it appears that some of the notes claimed here, have been negociated in good faith and have become the property of third persons, the Court think it necessary to modify their decree so as to relieve the other appellants from any responsibility.

IT is, therefore, adjudged and decreed, that the appellant Brognier do restore to the appellees the several notes by them subscribed in his favour, or the amount of such of the said notes as it will not be in his power to surrender.

THE City of New-Orleans being besieged by a British army on the first Monday of January, 1815, the Court was not opened.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. FEBRUARY TERM, 1815. East. District. *February* 1815.

AT the opening of this term, a commission was read, bearing date of the first of January 1815, by which FRANÇOIS-XAVIER MARTIN, then Attorney-General of the State, was appointed a Judge of this Court, together with a certificate of his having taken the oaths required by the Constitution and law, whereupon he took his seat.

THE din of war prevented any business being done, during this term.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East. District. *March* 1815.

JOHNSON vs. DUNCAN & AL.'S SYNDICS.

EASTERN DISTRICT. MARCH TERM, 1815.

JOHNSON vs. *DUNCAN & AL.'S SYNDICS.*

Martial Law what? An act suspending legal proceedings during an actual invasion is not a law impairing the obligation of contracts.

MARTIN J. A motion that the Court might proceed in this case, has been resisted on two grounds:

1. THAT the city and its environs were by general orders of the officer, commanding the military district, put on the 15th of December last, *under strict Martial Law.*

2d. THAT by the 3d sec. of an act of assembly, approved on the 18th of December last, all proceedings in any civil case are suspended.

I. AT the close of the argument, on Monday last, we thought it our duty, lest the smallest delay should countenance the idea, that this Court entertain any doubt on the first ground, instantly

to declare *vivâ voce* (although the practice is to deliver our opinions in writing) that the exercise of an authority, vested by law in this Court, could not be suspended by any man.

In any other state but this, in the population of which are many individuals, who not being perfectly acquainted with their rights, may easily be imposed on, it could not be expected that the Judges of this Court should, in complying with the constitutional injunction *in all cases to adduce the reasons on which their judgment is founded*, take up much time to shew that this Court is bound utterly to disregard what is thus called *Martial Law;* if any thing be meant thereby, but the strict enforcing of the rules and articles for the government of the army of the United States, established by Congress or any act of that body relating to military matters, on all individuals belonging to the army or militia in the service of the United States. Yet, we are told that by this proclamation of Martial Law, the officer who issued it has conferred on himself, over all his fellow-citizens, within the space which he has described, a supreme and unlimited power, which being incompatible with the exercise of the functions of civil magistrates, necessarily suspends them.

This bold and novel assertion is said to be supported by the 9th section of the first article of the Constitution of the United States, in which

East. District. *March* 1815.

JOHNSON vs. DUNCAN & AL.'S SYNDICS.

are detailed the limitations of the power of the Legislature of the Union. It is there provided that *the privilege of the writ of Habeas Corpus shall not be suspended, unless, when in cases of invasion or rebellion, the public safety may require it.* We are told that the commander of the military district is the person who is to suspend the writ, and is to do so, whenever *in his judgment* the public safety appears to require it: that, as he may thus paralyse the arm of the justice of his country in the most important case, the protection of the personal liberty of the citizen, it follows that, as he who can do the *more* can do the *less*, he can also suspend all other functions of the civil magistrate, which he does by his proclamation of Martial Law.

THIS mode of reasoning varies *toto celo* from the decision of the Supreme Court of the United States, in the case of *Swartout and Bollman*, arrested in this city in 1806 by general Wilkinson. The Court there declared, that the Constitution had exclusively vested in Congress the right of suspending the privilege of the writ of *Habeas Corpus*, and that body was the sole judge of the necessity that called for the suspension. "If, at any time," said the Chief Justice, "the public safety shall require the suspension of the powers vested in the Courts of the United States by this act, (the *Habeas Corpus act,*) *it is for the Legislature to say so.* This question depends on politi-

cal considerations, on which the Legislature is to decide. Till the Legislature will be expressed, this Court can only see its duties, and must obey the law." 4 *Cranch* 101.

THE high authority of this decision seems however to be disregarded; and a contrary opinion is said to have been lately acted upon, to the distress and terror of the good people of this state: it is therefore meet to dispel the clouds which designing men endeavor to cast on this article of the Constitution, that the people should know that their rights, thus defined, are neither doubtful or insecure, but supported on the clearest principles of our laws.

APPROACHING, therefore, the question, as if I were without the above conclusive authority, I find it provided by the Constitution of this state that "no power of suspending the laws of this state shall be exercised, unless by the Legislature, or under its authority." The proclamation of Martial Law, therefore, if intended to suspend the functions of this Court or its members, is an attempt to exercise powers thus exclusively vested in the Legislature. I therefore cannot hesitate in saying that it is in this respect null and void. If, however, there be aught in the Constitution or laws of the United States that really authorises the commanding officer of a military district to suspend the laws of this state, as that Constitution

East District. *March* 1815.

JOHNSON vs. DUNCAN & AL.'S SYNDICS.

and these laws are paramount to those of the state, they must regulate the decision of this Court.

THIS leads me to the examination of the power of suspending the writ of *Habeas Corpus*, and that which it is said to include, of proclaiming Martial Law, as noticed in the Constitution of the United States. As in the whole article cited, no mention is made of the power of any other branch of government but the Legislative, it cannot be said that any of the limitations which it contains extend to any of the other branches. *Iniquum est perimi de pacto id de quo cogitatum non est.* If, therefore, this suspending power exist in the executive (under whose authority it has been endeavoured to exercise it) it exists without any limitation, then the president possesses without a limitation a power which the Legislature cannot exercise without a limitation. Thus he possesses a greater power *alone* than the house of representatives, the senate and himself *jointly*.

AGAIN, the power of repealing a law and that of suspending it (which is a partial repeal) are Legislative powers. For *eodem modo, quo quid constituitur, eodem modo destruitur.* As every Legislative power, that may be exercised under the Constitution of the United States, is exclusively vested in Congress, all others are retained by the people of the several states.

IN England, at the time of the invasion of the pretender, assisted by the forces of hostile nations,

the *Habeas Corpus* act was indeed suspended, but the executive did not thus of itself stretch its own authority, the precaution was deliberated upon and taken by the representatives of the people. *Delolme* 409. And there the power is safely lodged without the danger of its being abused. Parliament may repeal the law on which the safety of the people depends; but it is not their own caprices and arbitrary humours, but the caprices and arbitrary humours of other men which they will have gratified, when they shall have thus overthrown the columns of public liberty. *Id.* 275.

If it be said that the laws of war, being the laws of the United States, authorise the proclamation of Martial Law, I answer that in peace or in war no law can be enacted but by the Legislative power. In England, from whence the American jurist derives his principles in this respect, "Martial Law cannot be used without the authority of parliament," 5 *Comyns* 229. The authority of the monarch himself is insufficient. In the case of *Grant* vs. *Sir C. Gould, H. Hen. Bl.* 69, which was on a prohibition (applied for in the Court of Common Pleas) to the defendant as judge advocate of a Court Martial to prevent the execution of the sentence of that military tribunal, the counsel, who resisted the motion, said it was not to be disputed that Martial Law can only be exercised in England, so far as it is authorised by

East. District. *March* 1815.

JOHNSON vs. DUNCAN & AL's. SYNDICS.

the mutiny act and the articles of war, all which are established by parliament, or its authority, and the Court declared it totally inaccurate to state any other Martial Law, as having any place whatever within the realm of England. In that country, and in these states, by Martial Law is understood the jurisprudence of these cases, which are decided by military judges or Courts Martial. When Martial Law is established, and prevails in any country, said lord Loughborough, in the case cited, it is totally of a different nature from that which is inaccurately called Martial Law (because the decisions are by a Court Martial) but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, *which was contrary to the Constitution* and which has been for a century totally exploded. When Martial Law prevails, continues the judge, the authority under which it is exercised claims jurisdiction over all *military* persons in *all* circumstances: even their *debts* are subject to inquiry by military authority, every species of offence committed by any person *who appertains to the army* is tried, not by a civil judicature, but by the judicature of the corps or regiment to which he belongs.

THIS is Martial Law as defined by Hale and Blackstone, and which the Court declared not to exist in England. Yet, it is confined to *military* persons. Here it is contended, and the Court must

admit, if we sustain the objection, that it extends to *all* persons, that it dissolves for a while the government of the state.

YET, according to our laws, all military courts are under a constant subordination to the ordinary courts of law. Officers, who have abused their powers though only in regard to their own soldiers, are liable to prosecution in a Court of law, and compelled to make satisfaction. Even any flagrant abuse of authority by members of a Court Martial, when sitting to judge their own people, and determine in cases entirely of a military kind, makes them liable to the animadversion of the Civil Judge. *Deloime*, 447, *Jacob's Law Dict. Verbo Court Martial.* How preposterous then the idea that a military commander may, by his own authority, destroy the tribunal established by law as the asylum of those oppressed by military despotism!

II. IT is further contended that the 3d section of the act of assembly, approved on the 18th December last, suspends all proceedings in civil cases, until the 1st. of May next: but it is answered that this section is unconstitutional and void, in as much as it violates the Constitution of the United States, which provides that no state shall pass any law *impairing the obligations of contracts*, this laws delaying for upwards of four months the recovery of sums due on contracts.

East. District. *March* 1815.

JOHNSON vs. DUNCAN & AL.'S SYNDICS.

IT is no longer a question in the United States, whether unconstitutional acts of the Legislature be of any force and effect. This state is among those, the Constitution of which contains an express provision on this subject: "All laws contrary to this Constitution shall be null and void;" and this Court, in the case of the *syndics of Brooks* vs. *Weyman*, *ante* 12, determined it was their province to enquire into and pronounce upon the constitutionality of any law invoked before them. If therefore the section under consideration really impairs the obligations of contracts, we must declare it null and void.

THE obligation of contracts consists in the necessity under which a man finds himself to do, or refrain from doing some thing. This obligation exists generally both *in foro legis* and *in foro conscientiæ* tho' it does at times exist in one of these only. It is certainly of the first, that *in foro legis*, which the framers of the Constitution spoke, when they prohibited the passage of any law impairing the obligations of contracts. Now, a law absolutely recalling the power which the creditor enjoys of compelling his debtor *in foro legis* to perform the obligation of his contract, would be a law destroying the obligation of the contract *in foro legis*. Since a right, without a legal remedy, ceases to be a legal right? It would impair the obligation of the contract by destroying its legal obligation; in other words by reducing an

obligation both *in foro legis* and *in foro conscientiæ* to an obligation *in foro conscientiæ* only: a legal and moral right to a moral right only. The remedy *in foro legis*, constituting the legal right of the creditor, constitutes also its correlative, the legal duty or obligation of the debtor; and a law which reduces a legal to a moral obligation is one which *in foro legis* destroys the obligation. It appears therefore to me incorrect to say that the Legislature may effectually do, as to the *remedy* or effect of the obligation, that which it cannot do as to the right; and I conclude that a law destroying or impairing the remedy is as unconstitutional as one affecting the right in the same manner; for *in foro legis* the effects of both laws must be the same.

LIKEWISE a law procrastinating the remedy, generally speaking, destroys part of the right. He pays *less* who pays *later*. *Minus solvit qui serius solvit.* Neither is the procrastination properly compensated by the allowance of interest in the mean while. To many men, in many circumstances, there is a wide difference between one hundred dollars payable to-day and one hundred and six dollars payable in a twelvemonth, whatever may be the certainty that no disappointment will occur; and in many cases the delay is likely to be productive of considerable danger to the solvability of the debtor. Any indulgence therefore in point of time, afforded by the

East. District. *March* 1815.

JOHNSON *vs.* DUNCAN & AL.'S SYNDICS.

Legislature to the debtor, is a correlative injury to the creditor in the same *degree*, tho' of a different nature, as a correspondent indulgence by a proportionate reduction of the debt.

THAT such were the impressions of the framers of the Constitution will appear, if in expounding that instrument, we follow the rules laid down for the exposition of statutes: if we consider the old law, the mischief and the remedy.

THE charter of our Federal rights was framed not many years after the termination of the war which secured our independence. The disasters, attending the arduous conflict, had disabled many and honest individual from punctually discharging his obligations; and the Legislature of some of the states, more attentive to afford immediate and temporary relief, than a more remote and lasting one, by a sacred regard for good faith, and the consequent preservation of credit, passed laws, meliorating the condition of debtors to the *injury* and *ruin* of creditors. In one state, an emission of paper money, for the redemption of which, no day was fixed, nor any fund provided, was made a legal tender. In other words, an obligation to pay gold and silver, was impaired by being reduced to an obligation to pay irredeemable paper; else where a similar obligation was *impaired* by being reduced to an obligation to deliver a tract of pine barren land, or an instalment law was passed and an obligation to pay to day was *impaired* by

being reduced to an obligation to pay at several periods, at the distance of intervening years. Such was the *old law*. The consequent diminution of the fortunes of several individuals, the total ruin of others, and the indispensable concomitant the destruction of credit produced a stagnation of business, which considerably affected public and private prosperity, such was the *mischief*.

THE Fœderal compact provided that the Legislature of no state should retain the power of making any thing but gold and silver a tender in the discharge of debts, in order to avert in future the mischiefs resulting from laws impairing the obligation of a contract to pay gold and silver, by reducing it to an obligation to pay *paper*, *pine barren land*, or indeed, any thing but gold and silver. Yet the *remedy* was not commensurate with the evil; the healing process was therefore continued, in order to prevent the passage of laws impairing the obligation of a contract to pay to day by reducing it to an obligation to pay on a distant day or days, or indeed any attempt at a legislative interference between parties to a contract, by favouring either party to the injury of the other; and it was provided that no state should pass any law impairing the obligations of contracts. If the restriction from making any thing but gold and silver a tender in the payment of debts, had not preceded that from passing any law impairing the obligation of contracts, there might be some

East. District. *March* 1815.

JOHNSON *vs.* DUNCAN & AL.'S SYNDICS.

though very little, ground to say that the latter clause would have been satisfied by restraining the passage of laws authorising the payment of one thing instead of another.

I THEREFORE find no difficulty in concluding that an act of a state Legislature, the obvious object of which is to relieve debtors by postponing the recovery, and consequently the payment of debts, *impairs* the obligation of contracts, and as such is unconstitutional, and the Court is bound to disregard it, whatever may be the hard necessity which, in the opinion of those who exercise the legislative powers of the state, appeared to require that they should come to the aid of their suffering fellow-citizens *Fiat justitia, ruat coelum.*

THE people of the United States, assembled in Fœderal convention, have decreed that no state Legislature should exercise the right of thus stepping in between the parties to a contract, and the judges are bound by their oath of office to prevent the violation of the constitutional injunction.

IT does not, however, necessarily follow that an act called for by other circumstances, than the apparent necessity of relieving debtors, one of the consequences of which is nevertheless to work some delay in the prosecution of suits, and consequently to retard the recovery and payment of debts, must always be declared unconstitutional.

IN making a contract each party must know that his legal remedy must depend on the laws of the country in which he may institute his suit. That the *lex loci* as to his remedy, even in the states that compose the Fœderal union, is susceptible of *juridical improvement;* that the number of courts of original and appellate jurisdiction, the nature and extent of the respective jurisdiction of these, the number, time and duration of their sessions must from time to time, especially in new and growing settlements, be regulated by the Legislature, according to the wants and exigencies of the country.

IF, for example, the sessions of the District Courts, which in Louisiana are now held in each parish three times a year, were found too frequent, too inconvenient to jurors, witnesses and suitors, and too expensive to the state, no one can say that the Legislature could not enact that the sessions of these tribunals should be semiannual only.

IN most of the Parish Courts of this state, the trial by jury is not in use. Should the people of these parishes solicit the introduction of a jury in these courts, would the Constitution be violated by this improvement in our judicial system? In Pennsylvania and Louisiana, courts of equity, as contradistinguished from courts of law, are unknown. Should the people of these states, noticing the advantages resulting from the division

East. District. *March* 1815

JOHNSON vs DUNCAN & AL'S SYNDICS.

of law and equity proceedings in the neighbouring states, saw fit to try the experiment, is there aught in the Constitution of the United States that forbids their representatives in general assembly to accede to their wishes? Yet semiannual sessions of our District Courts, the introduction of the trial by jury, and the institution of courts of equity must lengthen the period between the inception of many a suit and its final determination, and consequently delay some plaintiffs. But as the laws introducing such alterations in the juridical system would be productive of advantages in which both parties to the contract might occasionally participate, they would not, it is presumed be considered as *impairing* the obligations of contracts.

AGAIN, in time of war, domestic commotion or epidemy, circumstances may imperiously demand, for a while, even a total suspension of judicial proceedings. A suspension which, in many cases, may be peculiarly beneficial to a plaintiff, who might be nonsuited, if the Court in which he may have instituted his suit were to proceed while his duty and that of his agents and the interest of the state called them to a distant part of the country. It would be dangerous in such times, and often impossible, to insist on the regular attendance of the officers of the Court, of jurors, witnesses and parties. No one would, in such cases, doubt the ability, nay, the obligation of the

Court to adjourn to the probable period of returning tranquillity. Can it be said that the interposition of the Legislature, if it happened to be in session, declaring the necessity of such an adjournment, and with a view to that order and regularity, which uniformity produces, fixing a day on which juridical business will be resumed throughout the state, would be an act *impairing* the obligations of contracts?

EVEN if that day was fixed by half a dozen of weeks beyond that, on which any of the courts of the state might conceive they might safely re-enter on the execution of their duties, would not such a court recognise some advantage in their forbearance from pressing business to the injury of such suitors, who entertaining a different opinion, and having no previous knowledge of the determination of the court, might stay aloof, in the fair persuasion that the happy period was not yet arrived?

I PRESUME that in any time obnoxious to the due administration of justice, it is the duty, and within the power, of the Legislature, to pass laws to avert or diminish the consequences of the general calamity; and a law called for by such circumstances, and fairly intended to meet the exigency of the day, could not be properly classed among those which impair the obligations of contracts, tho' one of its consequences would be some delay in the recovery of debts.

East. District. *March* 1815.

JOHNSON *vs.* DUNCAN & AL.'s SYNDICS.

TESTING, therefore, the section under consideration by the principles which I have thus endeavoured to lay down, I find it stated in the preamble that "the present crisis will oblige a great *number* of citizens to take up arms in the defence of the state and compel them to leave their private affairs in a state of abandonment, which may expose them to great distress, if the Legislature should not, by measures adopted to the circumstances, come to their relief." The 3d section next provides that "no civil suit or action shall be commenced, or prosecuted before any court of record, or any tribunal of the state, till the first of May next."

IN fact, at the time the act was approved, the enemy was fast approaching, and five days after made his appearance within five miles of the city of New-Orleans. Shortly, after the whole militia of the state was called *en masse* into service, and they were not discharged till the middle of March. During the most of this period the fate of the contest was doubtful.

IT was, therefore, advantageous to all parties that the administration of civil justice should be confined to cautionary steps, which were not suspended. This was beneficial to all parties. Plaintiffs were relieved from attendance upon the courts, and the same indulgence was granted to defendants.

THE object of this section of the act was, there-

fore, to prevent the ill administration of justice which must have been the consequence of keeping the courts open, while the presence of the enemy disallowed any other attempt but that of expelling him. Another object was to facilitate to every member and officer of the court, and to every individual of the community, the means of rendering himself as useful as he could in repelling the invading foe. From the moment the danger subsided, I mean from the discharge of the militia then called out *en masse*, about six weeks will elapse, a time barely sufficient for the return home of our fellow-citizens who dwell at the greatest distance from the spot which has been the theatre of the war. Violent diseases of the political, as well as of the natural, body are followed by a convalescence, during which, even ordinary exertions may be hurtful. It does not appear to me that the suspension was for a longer time than the courts themselves would have taken, if they had been left to the exercise of their own discretion, unaided by a legislative provision. I am not, therefore, prepared to say that the interference of the Legislature was any thing else than the exercise of legitimate authority. The suspension of civil proceedings, under some authority or other, for a short time, was a measure imperiously called for; it has been beneficial to plaintiffs as well as to defendants in several cases, and although it may create a little delay in the collection of debts, I do

East. District. *March* 1815.

JOHNSON vs. DUNCAN & AL.'s SYNDICS.

not find myself led by duty or inclination to consider the act as impairing the obligations of contracts, and I think it the duty of the Court to comply with the object, by enforcing the law.

DERBIGNY, J. On the first question, that which concerns the effect which the publication of the *Martial Law* has produced, with respect to the civil authorities, we might well have omitted giving a written opinion, now that the return of peace has re-established the empire of the laws ; but, having declared, on the day on which the discussion of this subject took place, that the powers vested in us by law could not be suspended by any but legislative authority, it is proper that we should give some explanation of the reasons on which that declaration was founded.

I WILL, therefore, examine how *Martial Law* ought to be understood among us, and how far it introduces an alteration in the ordinary course of government.

To have a correct idea of *Martial Law* in a free country, examples must not be sought in the arbitrary conduct of absolute governments. The monarch, who unites in his hands all the powers, may delegate to his generals an authority unbounded as his own. But in a republic where the constitution has fixed the extent and limits of every branch of government in time of war, as

well as of peace, there can exist nothing vague, uncertain or arbitrary in the exercise of any authority.

THE Constitution of the United States, in which every thing necessary to the general and individual security has been foreseen, does not provide, that in times of public danger, the executive power shall reign to the exclusion of all others. It does not trust into the hands of a dictator the reins of the government. The framers of that charter were too well aware of the hazards to which they would have exposed the fate of the republic by such a provision; and had they done it, the states would have rejected a constitution stained with a clause so threatening to their liberties. In the mean time, conscious of the necessity of removing all impediments to the exercise of the executive power, in cases of rebellion or invasion, they have permitted Congress to suspend the privilege of the writ of *Habeas Corpus* in those circumstances, if the public safety should require it. Thus far, and no farther, goes the Constitution. Congress, has not hitherto thought it necessary to authorize that suspension. Should the case ever happen, it is to be supposed that it would be accompanied with such restrictions, as would prevent any wanton abuse of power. "In England (says the author of a justly celebrated work on the Constitution of that country) at the time of the invasion of the pretender,

East. District. *March* 1815.

JOHNSON vs DUNCAN & al's SYNDICS.

assisted by the forces of hostile nations, the *Habeas Corpus* act was indeed suspended; but the executive power did not thus of itself stretch its own authority; the precaution was deliberated upon, and taken by the representatives of the people; and the detaining of individuals in consequence of the suspension of the act was limited to a fixed time. Notwithstanding the just fears of internal and hidden enemies, which the circumstances of the times might raise, the deviation from the former course of the law was carried no further than the single point we have mentioned. Persons detained by order of the government were to be dealt with in the same manner as those arrested at the suit of private individuals: the proceedings against them were to be carried on no otherwise than in a public place; they were to be tried by their peers, and have all the usual legal means of defence allowed to them, such as calling of witnesses, peremptory challenge of jurors, &c." and can it be asserted that while British subjects are thus secured against oppression in the worst of times, American citizens are left at the mercy of the will of an individual, who may, in certain cases, *the necessity of which is to be judged of by himself*, assume a supreme, overbearing, unbounded power! The idea is not only repugnant to the principles of any free government, but subversive of the very foundations of our own.

UNDER the constitution and laws of the United

States, the President has a right to call, or cause to be called into the service of the United States, even the whole militia of any part of the union, in case of invasion. This power, exercised here by his delegate, has placed all the citizens subject to militia duty under military authority and military law. *That* I conceive to be the extent of the *Martial Law*, beyond which, all is usurpation of power. In that state of things the course of judicial proceedings is certainly much shackled, but the judicial authority exists, and ought to be exercised whenever it is practicable. Even where circumstances have made it necessary to suspend the privilege of the writ of *Habeas Corpus*, and such suspension has been pronounced by the competent authority, there is no reason why the administration of justice generally should be stopped. For, because the citizens are deprived temporarily of the protection of the tribunals as to the safety of their persons, it does by no means follow that they cannot have recourse to them in all other cases.

THE proclamation of the *Martial Law*, therefore, cannot have had any other effect than that of placing under military authority all the citizens subject to militia service. It is in that sense alone that the vague expression of *Martial Law* ought to be understood among us. To give it any larger extent would be trampling upon the constitution and laws of our country.

East. District. *March* 1815.

JOHNSON vs DUNCAN & AL.'S SYNDICS.

BUT the counsel for the appellant, to support his assertion that in the circumstances then existing, the Court could not administer justice, went further and said, that the city of New-Orleans had become a camp, since it had pleased the General of the seventh military district to declare it so, and that within the precincts of a camp there can exist no other authority than that of the commanding officer. If the premises were true, the consequence would certainly follow. But the abuse of words cannot change the situation of things. A camp is a space of ground occupied by an army for their temporary habitation while, they keep the field. That space has limits: it does not extend beyond the ground actually occupied by the army. The camp of the American army during the invasion of our territory by the British, was placed at the distance of four miles below the city. During that time the city might be considered as a besieged place, having an entrenched camp in front. But the transformation of the city itself into a camp by the mere declaration of the General, is no more to be conceived, than would the transformation of a camp into a city by the same means.

IT is therefore our opinion that the authority of courts of justice has not been suspended *of right* by the proclamation of the *Martial Law*, nor by the declaration of the general of the seventh military district that the city of New-Orleans was a camp;

and we now repeat what we declared when the subject was discussed, "that the powers vested in us by law can be suspended by none but legislative authority."

IT now remains to examine whether we can proceed to hear the present motion on its merits, notwithstanding the act passed by the Legislature of this State on the 12th of December last, which provides among other things, that all judicial proceedings in civil matters be suspended until the 1st of May next.

THE appellees contend that this act is contrary to the Constitution of the United States, and to that of this state, inasmuch as it impairs the obligation of contracts, in opposition to positive prohibitions contained in both, against the enacting of such laws.

THE right which courts of justice have to refuse their co-operation to the execution of unconstitutional laws, is no longer a question. It results from the obligation contracted by the judges to support the constitution, the fundamental and supreme law of the state, which no authority can shake. This court has already had occasion to express that opinion in the case of the syndics of Edward Brooks vs. William Weyman, *ante* 12; but they have also there expressed their sense of the circumspection with which such a right ought to be exercised. It is only in cases where the incom-

East District. *March* 1815.

JOHNSON *vs.* DUNCAN & AL.'S SYNDICS.

patibility of the law with the constitution is evident that courts will go the length of declaring null an act which emanates from legislative authority. Let us see if the law of the 18th of December last bear that character.

DOES a law, which retards the epoch at which the creditor may sue his debtor, impair the obligation of the contract? Such is the present question.

"IT is to be regretted," says one of the Judges of the Supreme Court of the United States, "that words of less equivocal signification had not been adopted in that article of the constitution." I am of the same sentiment: for what is the import of that expression, "obligation of contracts?" Must it be understood only of the nature of the obligation contracted, or does it extend to the effects of the obligation? There are in a contract two sorts of obligations, one moral, the other legal; one by which the party binds himself *in foro conscientiæ;* the other by which he submits himself to be compelled *in foro legis.* Now this legal obligation, according to some opinions, is nothing else than the remedy which the law gives to one of the parties to compel the other to the performance of his obligation. Abstract subjects are liable to receive more than one interpretation. To me, the right, which the laws gives to one party to force the other to comply with his obligation, is a thing totally different from the obligation itself. Pothier

calls that one of the *effects* of the obligation, which is evidently correct. After the party bound has refused, or neglected to comply, that effect of the obligation commences. Now, is that effect of the obligation comprehended within the article of the Federal Constitution alluded to? If it should be, then all the laws by which the least alteration is introduced in the manner of enforcing the execution of contracts are contrary to that principle. Thus a Legislature could not lengthen the time within which the judicial seizures and judicial sales shall be made, nor retard or accelerate the course of suits, without impairing the obligation of the existing contracts. For where is the line of demarcation between the right of retarding one day, and that of retarding six months, the epoch when the creditor shall be paid? To me, it is no satisfactory explanation to say that such changes are lawful under the constitutional right which Legislatures have to alter and reform the judiciary system, for such alterations and reforms might be introduced with the necessary reservations not to affect existing contracts. It appears to me therefore indispensable, in order to avoid falling into inextricable difficulties and contradictions, that a line be drawn between the obligation and the remedy. The one emanates from the will of the parties; the other is regulated by the law. The law owes to the citizens the aid of its power to force, to the performance of his obligation, him who neglects or omits

East. District. *March* 1815.

JOHNSON *vs.* DUNCAN & AL'S SYNDICS.

to comply with it. A denial of that aid, or (what would be as bad in its consequences) the withholding of that aid during an unreasonable and unnecessary delay, would be contrary to the first principles of the social compact, according to which the government is bound to protect the citizens in the enjoyment of their property, and as such ought to be opposed by that department whose peculiar duty it is to maintain justice. But the manner in which the authority of enforcing the execution of contracts shall be exercised, and the proper time for exercising it, must be at the discretion of the Legislature, to undergo modifications according to circumstances. In the present occurrence, the Legislature of this state, seeing the very existence of the republic at stake, the enemy at our doors, and the whole population under arms, thought it necessary to suspend, during a reasonable time, the ordinary course of justice. That was doing no more than that would have resulted from the state of things. The administration of justice was already obstructed by the general call of the militia into service, which prevented almost all the citizens from attending to their business, rendered the convocations of juries impossible, and retained in the ranks of the army even the officers of the courts. In such a situation, if the Legislature had not decreed the suspension of judicial proceedings, that suspension would nevertheless have taken place.

The courts themselves would have been under the necessity of adjourning their sessions to more happy times. That, which the empire of the circumstances rendered inevitable, the Legislature has done. I do not think that they have thereby overleaped the constitutional boundaries of their power. Unexpected fortunate events have changed the face of things before the epoch assigned for resuming the usual course of judicial proceedings; but if the delay fixed by the Legislature in their discretion was not unreasonable, they have done nothing more than they had a right to do, and the law must be obeyed.

THE Court, therefore, direct that the motion of the appellees be overruled. See *post* 570.

THE doctrine established, in the first part of the opinion of the Court, in the above case, is corroborated by the decision of the District Court of the United States for the Louisiana District, in the case of *United States* vs. *Jackson*, in which the defendant, having acted in oposition to it, was fined $1000. In *Lamb's case*, Judge Bay, of South-Carolina, recognised the definition of Martial Law, given by this Court, expressing himself thus: "If by Martial Law is to be understood that dreadful system, the *law of arms*, which in former times was exercised by the King of England and his

East. District
March 1815

JOHNSON
vs.
DUNCAN
& AL.'S
SYNDICS.

Lieutenants when *his word was the law*, and his *will the power*, by which it was *exercised*, I have no hesitation in saying that such a monster could not exist in this land of liberty and freedom. The political atmosphere of America would destroy it in embryo. It was against such a tyrannical monster that we triumphed in our revolutionary conflict. Our fathers sealed the conquest by their blood, and their posterity will never permit it to tarnish our soil by its unhallowed feet, or harrow up the feelings of our gallant sons, by its ghastly appearance. All our civil institutions forbid it: and the manly hearts of our countrymen are steeled against it. But, if by this military code are to be understood the rules and regulations for the government of our men in arms, when marshalled in defence of our country's rights and honor, then I am bound to say, there is nothing unconstitutional in such a system." *Car. Law Rep.* 330.

*** There was not any business done, during the month of April.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. MAY TERM, 1815.

East. District. *May* 1815.

BLAKE & AL. vs. MORGAN.

BLAKE & AL. vs. *MORGAN*, *ante* 375.

Former judgment confirmed.

MATHEWS, J. delivered the opinion of the Court.* In this case, the Court having doubted the correctness of their judgment, have attentively considered the grounds of error, suggested by the counsel of the defendant and appellee, in his petition for a re-hearing; and after the most unbiassed review of the judgment, and careful examination of the facts in the cause, they can perceive no reason, in any respect, to alter their former opinion.

WE do not believe that there has been any mistake in point of fact, in considering Morgan as the

*MARTIN, J. did not join in this opinion, having been of counsel in the cause.

East District. *May* 1815.

BLAKE & AL. vs MORGAN.

shipper and owner of the sugar; that he was the shipper, there is not a shadow of doubt; and it does appear equally clear to us from the documents and evidence in the suit, that by his declarations and acts, he has made himself so far the owner, as to be liable on his contract of affreightment. In the suit instituted by him against the Fishers, praying a sequestration and restitution of the property, he explicitly declares himself the vendor, to his consignees who were the purchasers, and claims the right of having it restored to him on account of their bankruptcy: it is then certainly proper to consider him in the character which he has assumed, that of a seller stopping his goods in *transitû*, in consequence of the failure of his vendees and consignees: and in this point of view, it is wholly immaterial whether or not, he purchased the sugar, expressly for the Fishers by their order, provided it was done with his own funds or on his own credit, for in such cases, the agent is considered, in law, so far the owner and seller as to authorise him to stop the property, when the consignee becomes a bankrupt before delivery. If we are correct in this view of the facts, the error in law, attributed to the court, is at an end, as it rests solely on the ground of our having misconceived the fact.

THE objection to the judgment, made on account of not deducting the sum allowed by one of the juries, who tried the cause in the court below,

from the amount of freight due on the contract, is so fully explained and done away, in our opinion delivered on the first hearing of the suit, that we deem it unnecessary to add any thing more on that subject.

IN the petition for a re-hearing and in the course of argument, the difficulty in which the appellee will find himself situated, in obtaining a re-imbursement of the freight from his consignees, if compelled to pay it, has been much insisted on. We think, that in the present action, it is not our duty, and therefore we ought not to enquire into claims that may be made, or rights or obligations which may exist, between him and other persons who are not parties to this suit.

IT is, therefore, ordered, that the judgment, heretofore given in this cause, shall remain firm and valid in all respects, as if no re-hearing had been granted.

MISOTIERE'S SYNDICS vs. *COIGNARD.*

Fraud is presumed in a bankrupt.

MATHEWS, J. delivered the opinion of the Court. The appellees brought their action in the Parish and City Court of New-Orleans to recover a certain lot of ground, with its buildings and appurtenances mentioned in their petition, in the possession of the appellant, by virtue of a sale and de-

East. District. *May* 1815.

MISOTIERE'S SYNDICS *vs.* COIGNARD.

livery from Misotiere, who failed and took the benefit of the Insolvent Laws, three days after the execution of an act of sale of the property, made before a Notary Public, and about six months after one said to have been executed under private signature. They contend that these acts of sale are void, as having been made without legal consideration and with a view to defraud the just creditors of Misotiere, whom they represent. According to the rules of law, providing for the sale of immoveable property and slaves, no act under private signature is good against third persons, unless recorded as therein required. Had the appellant rested his title on the private sale alone, it would have become necessary to examine how far creditors of an insolvent debtor are to be considered as third persons, in relation to the principles of law which govern contracts for real property. But he seems to have abandoned any pretention of right under the private act, by having subsequently accepted the title given him by the notarial instrument; and by this alone his rights must be decided. It is clothed with all the formalities required by law, and is certainly good and valid unless it can be shewn to be null and void, on account of fraud in the transaction. The decision of this case will turn very much on the principles laid down in the case of *Brown* vs. *Kenner & al. ante* 270.

THE only distinction between them is that in the latter, a privilege claimed by Brown on a mortgage, made a short time previous to Phillips's bankruptcy was opposed by the syndics of his creditors, whereas in the suit now under discussion, the appellees claim restitution of property sold and delivered on account of fraud in the sale, and injury to the rightful creditors of the insolvent, Misotiere. In the course of the argument it was contended by the counsel for the appellant, that the verdict of the jury, is special and finds facts, in favour of the appellant, which ought to conclude this Court. We are of opinion that it must be viewed as a general verdict, finding both the law and the facts and that the correctness of the judgment rendered by the Court below is here to be tested by the rules of law.

IN the case of *Brown* vs. *Kenner & al. ante* 270, after full argument of counsel and much deliberation of the Court, it was decided that a debtor, about to fail and who is unable to pay all his debts, cannot under such circumstances legally do any act, which in its effects will alter the situation of his creditors as it respects the privilege of the claims on his estate. The situation of the parties now before us, requires us to determine whether or not a debtor who is unable to pay all his just debts, can, at the very time he is about to fail and take the benefit of the laws made for insolvents, in any way dispose of his property to the injury, and

East. District. *May* 1815.

MISOTIERE'S SYNDICS *vs.* COIGNARD.

in fraud of his creditors. In examining this subject the insolvent must be considered as a bankrupt, at the time he executed the sale of the lot to his brother the appellant: for according to the law respecting failures, as laid down in the *Curia Philipica*, "those persons, who are unable to pay all their debts entirely," are bankrupts.—Now, it is evident that Misotiere was not able to pay his debts at the time, when he made the transfer of the property in dispute, because three days after he surrendered all his property for the benefit of his creditors. Considered then as a bankrupt, fraud is to be presumed in all his acts, whereby he undertakes to divest himself of his property and put it out of the reach of his creditors, even in the payment of a just debt, to their prejudice, (same authority *Cha.* 9, *Fallidos*) unless it is made in the usual course of business. If it is right to presume fraud in the sale from Misotiere to his brother (and under all the circumstances attending it, we are of opinion that this must be presumed) it then becomes the duty of the appellant to rebut this presumption by shewing it to be a fair and *bona fide* transaction, as having paid for it a just and full price; this has not been done, the only consideration, proven in support of the sale, is a debt due from the bankrupt to him, which the law will not allow to be thus paid to the injury of other creditors. The act of sale is an instrument executed "*en tiempo inabil*," as having been done

at the very period of Misotiere's bankruptcy. East. District. *May* 1815.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs. CLAIBORNE vs. DEBON & AL.

CLAIBORNE vs. *DEBON & AL.*

A *bond* given by an Auctioneer, instead of a *recognizance*, is valid.

Mathews, J. delivered the opinion of the Court. This cause comes up on a bill of exceptions, taken to the opinion of the Judge of the first district, before whom it was tried, in which he refused to allow the plaintiff to give in evidence to the jury, the bond on which the action is founded; because it was not taken in conformity with an act of the Legislative Council of the late Territory of Orleans, entitled "An Act to regulate sales at auction," although acknowledged by the defendants to have been by them executed.

The 3d section of the act, requires that "an Auctioneer, before entering on the duties of his office, shall enter into a recognizance, to the government with two sufficient freeholders as sureties in the sum of seven thousand five hundred dollars each, conditioned for the faithful performance of his duty as Auctioneer, towards all persons who shall employ him as such, and also for the payment of duties on articles sold; and that he shall in all things conform himself to the directions of this

East. District. *May* 1815

CLAIBORNE vs DEBON & AL.

act;" which recognizance was to have been taken by one of the Judges of the late Territory and by him retained until the appointment of a Treasurer.

THE facts which are important to the decision of the case, and appearing in the record, are the following. 1st. that one Morin was regularly appointed Auctioneer for the city. 2d. that the appellees voluntarily entered into a bond or obligation, whereby they bound themselves under the penalty of seven thousand five hundred dollars, as sureties for the Auctioneer, "conditioned that he shall, well and truly observe and discharge the duties of his office, according to law." And 3d. that this bond was taken by the Treasurer of the Territory and not by one of the Judges.

IT is clear, from the manner in which this instrument was executed, that it is not a recognizance, according to the definition of the English law, from whence the term is borrowed and therefore it becomes unnecessary to notice the distinctions, made in the course of argument, by the counsel for the appellees between bonds and recognizances. And here also we may dismiss all the reasoning on comparisons drawn between office bonds and individual obligations, and amongst the former, those given for ease and favor and such as are not; as the instrument under consideration is evidently not one given for ease and favor. It is

equally evident, by comparing this bond, with the stipulations and conditions, required by the 3d section of the act just quoted, that it was not taken conformably thereto: it was not taken by a judge; the condition differs from that required by the statute and, therefore, were it to rest solely on the statutory provisions, must be considered void. The counsel for the appellant does not insist on its validity, as supported by the statute; but claims the benefit of the obligation imposed by it on the sureties, as being good and valid according to the general principles of law. Leaving then the act of the Legislative Council out of view, it becomes the duty of the Court to decide, whether or not, the bond is good and valid according to the general laws of the state; and this, altho' the only question in the cause, is hardly discoverable by the pleadings. The defendants in the Court below filed separate answers: one of them denies any breach of the covenant; the other after denying every thing contained in the plaintiff's petition, concludes by a plea of prescription: not a word as to the validity of the bond; and it is only when it comes to be offered in evidence to the jury that they oppose it on the ground, of not having been taken in pursuance of the statute, and on this principle it was rejected by the Judge.

THE arguments, offered by the counsel of the appellees, against the validity of the obligation,

East. District. May 1815

CLAIBORNE vs. DEBON & AL.

which have weighed most with the Court, are those drawn from the cases of the New-Jersey Constables, found in Pennington's reports; when it was determined, that bonds executed by them to the inhabitants of certain townships, were void because they did not pursue the provisions of a statute of that state, under color of which they were taken; but imposed severer conditions on the constables and their securities, than those required by the statute.

FROM the history of these cases, it appears that a Constable, according to the laws of that state, when elected by a township is bound to give security to the inhabitants for the faithful performance. In one of the cases cited, viz. that of *the inhabitants of Woolwich* vs. *Forest & al.* (wherein Judge Pennington seems to have differed from the rest of the court) by the tenor of his reasoning, he places the want of validity in the bond, more on the ground of the hard situation of the officer, under such circumstances (being a species of duress) than on the principle of its nullity, because it did not conform to the statute. In relation to the parties in the present suit, nothing of this hardship exists: the acceptance and exercise of the office of Auctioneer, by Morin, was entirely voluntary; the act of the appellees, in becoming his security was equally so; there is no stipulation or condition in the bond, harder than those required by the act of the Legislative Council; and, according to the

general principles of our laws, one person may bind himself under a penalty for another: for although no obligation is created by a promise, *pure de alio*, yet when in promising the act of another, one submits to pay a penalty or merely damages, in case of the inexecution of the promise, it is not to be doubted, that in this case, he did not understand *de alio tantum promittere*, but that he promised for himself, that he would procure the other to do or give the thing. Therefore Ulpian says: *si quis velit alienum factum promittere, pœnam vel quanti ea res est, potest promittere. L* 38 § 2 *ff. d. t. Pothier on Obligations, no.* 56. The appellees are clearly bound by their obligation thus voluntarily entered into, unless there is something illegal or contrary to good morals in the condition; which is not pretended by them. We are, therefore, of opinion that the bond is good and valid in law; as the act of the Legislative Council does not prohibit the taking a bond different from the one required by its provisions, or declare such to be void: and this opinion is fully supported by the decision in the case of *Morse* vs. *Hudson*, 5 *Mass. Term Reports*, 314.

IT is contended by the counsel for the appellees, that there are not proper parties to the suit. On this point, the Judge below has given no opinion and therefore it cannot be here examined. But, as we are of opinion that he erred, in considering

East. District. *May* 1815.

CLAIBORNE vs. DEBON & AL.

the bond void, because it was not taken in conformity to the provisions of the statute and on that account withholding it from the jury, the cause must be remanded.

IT is, therefore, ordered, adjudged and decreed that this cause be sent back to the District Court from whence it came, to be there tried over: and that the Judge be instructed, to admit as evidence the bond on which the action is founded.

JOHNSON vs. *DUNCAN & AL.'S SYNDCS*, *ante* 520.

If notes be placed in a creditor's hands, to secure him, without a written agreement, or one not properly registered, he will not keep them, against the others.

MATHEWS, J. delivered the opinion of the Court.* In this suit the appellant, who was plaintiff in the Court below, claims the re-imbursement of half the sum of $ 3250 77, on account of money paid by him in discharge of certain Custom-House bonds, wherein he and Duncan and Jackson were securities for M'Master and Adams. Had this payment been made by Johnson, out of his own funds, without relation to any other circumstance, except the impossibility of being refunded by M'Master and Adams, the principals in the bonds, there could be no doubt of his right to recover the sum thus advanced by him for the benefit of his co-securities, as they, on the failure of the principals to pay, were evidenly bound for

*MARTIN, J. did not join in this opinion, having been of counsel in the cause.

the payment of one half the sum secured by the bonds. But from the statement of the facts in the case, it appears, that there existed a variety of commercial transactions between Johnson and M'Master and Adams, in which he always has been and still continues to be their creditor to a large amount. Thus situated, they placed in his hands property and credits, to secure the payment of the sums owing to him in his separate and individual capacity; and should there be any thing more, than sufficient to satisfy these claims, collected, it was to have been applied to the discharge of said Custom-House bonds. Between the period at which Johnson received these securities and the time when he was obliged to satisfy the judgment, obtained on the bonds in the District Court of the United States, on account of the want of property in the hands of M'Master & Adams, he collected considerable sums on said securities, (which were principally notes due to the house of M'Master & Adams) but not sufficiently to satisfy his own individual claims. It has not been contended that there is any thing fraudulent in the agreement between Johnson and M'Master & Adams, as it was not done with a view to bankruptcy; and, therefore, he had a right to impute all the money collected to the payment of his separate and individual credits with them; and as to these sums they cannot now be taken into consideration. Let us then see how Johnson stands in relation to the

East. District. *May* 1815.

JOHNSON vs. DUNCAN & AL.'S SYNDICS.

notes and securities yet uncollected, at the time of issuing the executions on the judgment, obtained on the Custom-House bonds, and which, M'Master & Adams had no property to satisfy.

They must be considered as a pledge or pawn in his hands, intended to secure the payment of the debts owing to him by M'Master and Adams, and also such sums as he should be obliged to advance for them, on account of endorsements or in any other manner. But this pledge is without privilege to the holder, against third persons, because the contract by which he possesses it, was not made in public form nor has the private agreement been duly registered in the office of a Notary Public at a time not suspicious, as required by law. *Civil Code*, 446. Now, as Johnson holds these securities without privilege, whatever money may be collected on them, after the period at which M'Master and Adams became unable to pay their debts, ought to be appropriated to the discharge of them, according to their privileges, and he, being subrogated to the claim of the United States which is one of the highest privilege, as having paid it out of his own funds, will be entitled to retain the first money obtained on the securities which he holds. But, Duncan and Jackson, or their syndics, were equally liable to the United States, for the payment of the Custom-House bonds, with the appellant, and, therefore, the one half of what he advanced ought to be considered as having been

paid for their benefit, and they should be compelled to refund it; which will give them the privilege of being reimbursed in an equal ratio with Johnson, out of the first money arising from the securities in his hands; and the Court would have no hesitation in rendering judgment according to this view of the case, except that we find in the record that one of these securities is a note of Duncan and Jackson for 2317 dollars, which is acknowledged by the statement of facts to be good, and consequently may fairly be considered as so much money in the hands of the appellant, which must be imputed to the payment of the debt on the Custom-House bonds, and is in truth so much paid or refunded by M'Master and Adams. This sum, deducted from $ 3250 77, will leave a balance paid by Johnson, as stated in his petition of $ 933 77, the one half of which the appellees ought to be compelled to refund, being paid for their benefit. According to this view of the subject, the judgment of the District Court must be reversed, not on account of any error in the principles therein laid down, but because it does not go sufficiently far in settling the dispute between the parties and because it directs the sale of the notes and securities still in the hands of the appellant, which, as urged by his counsel, we do not think the best mode of testing their value. It is, therefore, ordered, decreed and adjudged that the judgment rendered in this cause

East. District. *May* 1815

JOHNSON vs. DUNCAN & AL.'S SYNDICS.

in the Court below, be reversed and annulled; and proceeding here to give such judgment as ought there to have been given, it is farther ordered, adjudged and decreed, and we do hereby order, adjudge and decree, that the appellant do recover from the appellees the sum of four hundred and sixty-six dollars, eighty-eight cents, and it is further ordered and decreed that he, the appellant, shall proceed in the collection of the notes and securities still remaining in his hands, and that whatever money he may recover, over and above the sum of $ 2317, which he will collect from the appellees on their note, and which he has a right to retain on account of advances made in payment of the aforesaid Custom-House bonds, shall be imputed to the payment of the balance due from M'Master and Adams on said bonds, being 933 dollars and 77 cents, which, after the payment and satisfaction of the judgment herein rendered, will be owing, in equal proportions to him the appellant and to the appellees, and that he shall account for it accordingly.

Mortgagor buying the premises, under a *fi. fa.* may retain part of his debt becoming afterwards payable, out of the purchase money.

FOWLER'S SYNDICS vs. *DUPASSAU.*

DUPASSAU in a former suit had obtained judgment against Fowler, for a balance of one of the instalments of the price of a plantation, which was taken in execution, sold and bought in by

Dupassau. The last instalment was not due at the time. The sale, under the execution was at one year's credit and Dupassau gave his bond to Fowler, for the balance of the purchase, after deducting his own judgment. At the expiration of the year, Fowler having failed, his syndics brought suit on the bond.

THE defendant insisted on his right to deduct out of its amount, that of an instalment due him by Fowler, and which had in the meanwhile become payable, and for which the premises were mortgaged to him, by the original sale to Fowler. The District Court having permitted him to do so, the plaintiff appealed.

DERBIGNY, J. delivered the opinion of the Court*. The only question in this case is whether a sale of all the right, title and interest of the debtor in the property sold, is a sale of his interest in the thing, exclusive of the mortgages which may exist on it; or in other words, if the price of such a sale, or any balance remaining on it after satisfaction of the debt on which the execution is levied, is to be paid to the debtor, clear of any mortgage, which may incumber the property.

WHEN the Sheriff puts up property for sale, he certainly sells it, as the owner would, subject to

*MARTIN, J. did not join in this opinion, having been of counsel in the cause.

East. District. *May* 1815.

FOWLER'S SYNDICS vs. DUPASSAU.

any incumbrance; but he sells for a fixed price the whole property. If that price is less than the amount of the incumbrances, the buyer is exposed to pay, besides the price, the balance which may be due to the mortgage creditors. But, a sale of a tract of land, for a sum of so much, can never be construed to mean a sale for that sum and the amount of the hypothecary debts besides. Such a sale cannot take place without express stipulations to that effect; and a public officer, executing a judicial sale, has no right to enter into conditions and stipulations. He must sell the property seized for a fixed sum, and not a fixed sum and something more.

HERE the officer has strictly pursued the directions of the law. The title which he has given is in the form prescribed. He has sold to the appellee the tract of land exposed for sale and has, in the words of the law, transferred to him all the right, title and interest of the debtor therein.

THE circumstance of the mortgage creditor having in this case bought the property himself, does not alter the nature of the contract. He has a right to retain the amount of his mortgage out of the price of the thing bought.

IT is, therefore, adjudged and decreed, that the Judgment of the District Court be affirmed.

BROGNIER vs. FORSTALL.

East District. *May* 1815.

BROGNIER vs. FORSTALL.

When the wife renounces the law of *Toro* it need not be shewn that the debt was contracted for her benefit.

Where she contracts jointly with her husband, the renunciation of her right, on the subject of the contract, is implied.

DÉRBIGNY, J. delivered the opinion of the Court*. In this case Celeste Delavillebeuve, the appellee, bound herself, jointly with her husband, Edward Forstall, to the payment of a debt, to secure which they mortgaged to the plaintiff and appellant certain slaves. On that mortgage, the appellant sued and obtained an order of seizure and sale. But the appellee resists his claim on two grounds: 1st. that her obligation has not been contracted in such a manner as to bind her; 2dly. that it has not destroyed the tacit mortgage which she had on her husband's property for the restitution of her dowry. She has accordingly instituted a suit to be separated of goods from her husband, and she now prays to be paid out of the proceeds of his property in preference to the appellant.

I. AGAINST the validity of the obligation by her entered into, the appellee alledges that although she has made a formal renunciation to the law of Toro, by which such obligations are declared void, unless it be proved that the debt has been converted to her benefit, yet, inasmuch as no such proof has been made, she is not bound. In support of this assertion, she quotes the authority of *Febrero*, who says that this proof is incumbent on the creditor, and that in defect of it he has seen it adjudged that the wife

*MARTIN, J. did not join in this opinion, having been of counsel in the cause.

East. District. May 1815.

BROGNIER vs. FORSTALL.

should receive her dowry, or at least one half of it.

It is certain that, by the Spanish laws, the wife is inhibited from becoming security for her husband, and that when she binds herself *in solido* with him, her obligation is to be void, unless it is proved that the debt contracted has been converted to her benefit. Yet, it is admitted in practice that by renouncing, with certain solemnities, the laws which contain those provisions, she may nevertheless bind herself. As to the manner of making such renunciation, it appears to be a question settled by the Spanish authors that the renunciation must be special, and so made as to shew that the wife understood the provisions of the law and the nature and extent of her renunciation. It is also a point settled, in the Spanish practical books, that it is useless to mention in the renunciation any other law than the 61st of *Toro*, which is the *9th tit. 3d. book 5th* of the *Recopilacion de Castilla*, as being the last enacted and the only one in force on this particular subject. The renunciation in this case is made according to these rules: and so far there is no difficulty. But, it is not so easy to reconcile the opinions of the authors as to the operation and consequences of such a renunciation. *Febrero* thinks that, after it has been made, it is yet necessary to prove that the debt was converted to the wife's benefit, before the obligation can be enforced against her. But should this doctrine be adopted, where is the use of the

renunciation? The 61st of *Toro* does not hinder the wife from contracting jointly with her husband; it does not say that such contract shall be void at all events. It recognises the validity of it, in case it should be proved that the debt contracted was converted to her benefit. Therefore, without any renunciation at all, the wife could contract, and the contract would be lawful, if this fact should be proved. The question now recurs: where is the use of the renunciation so much insisted on and so minutely defined in the practical books? We must either say that it is an iddle and ridiculous ceremony, or admit that its object, on the part of the renouncing party, is to dispense with the proof required by law and to bind herself absolutely. That this is the only reasonable interpretation which may be given to the renunciation is so obvious, that we deem it unnecessary to dwell any longer on this question.

II. THE other ground on which the appellee relies is that, although it should be recognised that her obligation is valid and her renunciation binding, yet inasmuch as she has not, in express words, renounced her tacit mortgage in favor of the appellant, that mortgage stands unimpaired.

THIS may be answered by asking: what has the appellee renounced? She had a lien on the property which she and her husband undertook to bind in favor of the appellant. Had it not been for

East. District. *May* 1815.

BROGNIER vs. FORSTALL.

that lien, there was no use for her joining her husband in the deed of mortgage. For the purpose then, and for the only purpose, of removing the obstacle which her rights threw in the way of the intended contract, she came forward and renounced the benefit of the law by which those rights were protected. And this, it is pretended, is not a renunciation of the rights themselves! We think, however, that a renunciation to the protection of a law, which secures a right, is a most express and a most solemn renunciation of that right. It may be further observed that this is not a case where a special renunciation of the mortgage is deemed necessary on the part of the wife. Such renunciation being only requisite, where the husband contracts singly, as in a sale which he alone has a right to make; for, as the wife does not there join her husband in the contract, the only way in which she can secure the purchaser is by renouncing her mortgage in his favor. It is for cases of this nature that the *58th law*, *tit.* 18, *part.* 3, establishes the manner in which that renunciation of the wife shall be expressed. But in contracts, where she binds herself jointly with her husband, and assumes, in every respect, the same responsibility towards the other party, the renunciation of her own right, upon the thing which she undertakes to pledge or alienate, is certainly included; else the obligation itself would be nothing.

THE objection raised by the appellee as to the validity of the mortgage, which she undertook, under the authorisation of her husband, to give on some of the slaves, supposing them to be her particular property, while they were the property of the community, cannot avail her, It could at most have been listened to, if it had come from her husband in due time; and might perhaps have been a cause for setting aside the proceedings by seizure, as to those particular slaves, before a final judgment on the merits, and when the question here is: who is entitled to the proceeds of the property sold, we must say that the joint creditor of the appellee and her husband shall receive it, whether it was the property of one or the other.

IT is, therefore, adjudged and decreed that the judgment of the District Court be reversed, and that judgment be entered for the appellant, for the full amount of his demand with costs.

BOURCIER vs. *LANUSSE.*

A contract of marriage, entered into here, cannot provide that the rights of the parties shall be according to the custom of Paris.

DERBIGNY, J. delivered the opinion of the Court*. The appellant, jointly with her husband Casimir Bourcier, sold to Paul Lanusse, one of the appellees, some real estate and some slaves,

*MARTIN, J. did not join in this opinion, the case having been argued and submitted to the Court, with that of *Brognier* vs. *Forstall* in which he had been of counsel.

East. District. *May* 1815.

BOURGIER vs LANUSSE

which, with the exception of one slave, were the property of the community. Against this sale she prays to be relieved, alledging that the instrument of sale was made without the solemnities required by law, and that she was prevailed upon to sign it, without being apprised of its contents, nor of the nature of the renunciations therein purporting to have been made.

Altho' the wife sells common property, jointly with her husband, if she renounces a law not applicable to the case, she will not be bound.

ON the part of the appellees, it is contended, 1. that to the alienation of the property of the community the appellant's consent was not necessary, inasmuch as by the custom of Paris, to which they have made a submission in their marriage contract, the husband has a right to dispose alone of the common property, as he pleases. 2. That supposing the Spanish laws to be those which ought to govern the effects of the marriage contract in this case, those laws do not, in case of sale of the common property, require any consent on the part of the wife to make such sales binding on her; and finally that the renunciations which by the Spanish laws were deemed necessary to bind the wife in those contracts where she was permitted to appear, must have ceased to be requisite since the promulgation of the Civil Code of this state, which recognises, without any restriction, that married women may enter into obligations, jointly with their husbands.

I. THE first question to be decided is whether the

custom of Paris is the law which ought to govern the effects of this marriage contract, because the parties have chosen to submit to it. Had strangers made such a submission in a foreign country subject to that law, there would be no doubt that it would continue here to regulate the effects of their contract. This is a principle not only adopted by the law of nations, but recognized among us by positive statute. But the parties, being in this country, entered into a contract, and stipulated that this contract should be governed by foreign laws. Had they a right to make such a stipulation? We already had occasion to say in a former case, that no power is bound to give effect, within its own territory, to the laws of a foreign country; and that a foreign law has no other force than that which it derives from the consent of the government within the bonds of which it claims admission. According to this principle the general laws of the country must govern every case but those which are permitted to be regulated by other laws. Is this such a case? Is it to be found any where in our laws that a contract entered into in this state may, if the parties please, be governed by the laws of a foreign country? So far from allowing any such thing, our laws, as they stood when this marriage took place, contain express probibitions to the contrary. In *Partidas 3d. tit.* 14, *law* 15, it is said: "If the laws or jurisprudence of an other "country, over which our authority does not

East. District. *May* 1815.

BOURCIER vs. LANUSSE.

"extend, should be appealed to, we order that in "our dominions they shall not be received as evi- "dence, except in disputes arising between indi- "viduals of such foreign country, *or contracts* "*made there.*"

OUR Civil Code has introduced some new dispositions in this respect concerning marriage contracts; but they extend no further than permitting the parties to stipulate that their contract shall be regulated by the laws of any state or territory *in the union*..

WE, therefore, think that the custom of Paris is not the law which ought to regulate the effects of the marriage contract in this case; and we will proceed to examine whether according to the laws of the land the appellant ought to be relieved against the sale made by her jointly with her husband.

II. IN order to understand the nature of the obligation here entered into by the appellant, and how far it may be binding on her, it is necessary to draw a distinction between those contracts to which the wife may be a party principal jointly with her husband, and those where she makes her appearance in the character of a third party, for the only purpose of expressing her consent.

BY the Spanish laws, independent of any change which is said to have been introduced in our Civil Code, the wife was inhibited from becoming security for her husband and when she

bound herself *in solido* with him, her obligation was to be void, unless it was proved that the debt contracted had turned to her benefit. It was however admitted in practice that by renouncing the benefit of those laws, she could nevertheless bind herself. In cases of this kind, provided the renunciation was made with the requisite solemnities, so as to make it appear that she knew the nature and extent of it and understood the provisions of the law, she became a party principal to the contract and partook with her husband in the engagement resulting therefrom. On the contrary, where the contract was one of those which the husband alone could make, such as a sale of his property or of the property of the community, the wife, if consenting to the sale and willing to secure the purchaser against her claims, appeared in the character of a third party for the purpose of renouncing her right on the property sold.

SHOULD the contract in this case appear in either of these forms, there would be no difficulty in applying the law to it. But this contract presents stranger features; it purports to be a sale of the common property made jointly, by the husband and the wife, and contains at the same time a renunciation on the part of the wife to a law which is applicable to cases of obligations contracted by the wife *in solido* with her husband; or in other words, the appellant appears as a party seller in a sale which her husband alone had a right to

East. District. *May* 1815

BOURCIER vs. LANUSSE.

make, and renounces the benefit of a law which has nothing to do with contracts of this kind.

How to apply the law to such a case is certainly no easy task. On the one hand we see, on the face of this contract, that the appellant had not that information which is absolutely requisite, that is to say, a clear idea of the nature of her rights and the extent of her renunciation ; for she does what she had no right to do, and renounces a law, which is not made for such a case. But, on the other hand, ought not her voluntary concurrence in the sale amount at least to a consent? And will not her engagement to secure the purchaser against all incumbrances be considered as including a renunciation of her own rights? The equity of the case is certainly in favor of the purchaser : but in matters of this kind we think we are bound by strict law. In consideration of the sort of tutelage in which married women are living, and to guard them, as much as possible, against compulsion in the disposal of their property, the laws have established certain rules, without an observance of which their acts are not valid. In the particular case now before us, that of a sale of the common property by the husband, the character in which the wife may appear and the manner in which she is to act are described by positive law. She must say : that she well knows the right which she had on the property sold by her husband, that she renounces that right, whether she

had it for reason of dowry, donation *propter nuptias* or other cause, and that she transfers it to the purchaser ; (see the above cited 58th *law*, *tit.* 18, *part.* 3.) Instead of this what has she done? She has assumed the character of a seller herself, and has renounced the benefit of a law which is foreign to this case. The first requisite for the validity of her obligation, to wit, her knowledge of her rights and of the nature of her renunciation is here evidently wanting: nay, her ignorance of them is stamped on the face of the obligation. No equitable construction can cure such a defect. The act, as to her, must be pronounced a nullity.

AFTER the distinction which has been drawn, it is unnecessary to observe that the innovations said to be introduced by the Civil Code in matters of obligations, contracted jointly by husband and wife, should such innovations really have taken place, would not affect this case.

IT is, therefore, adjudged and decreed that the judgment of the District Court be reversed, and that judgment be entered for the appellant for the amount of her marriage portion, to wit, four thousand dollars, and the slave named Laurette.

See *post*, *June Term*.

East. District.
May 1815.

FITZGERALD vs. PHILLIPS

FITZGERALD vs. *PHILLIPS.*

Ceding debtor, without a discharge, is suable.

DERBIGNY, J. delivered the opinion of the Court*. This is a suit instituted against a debtor, who has made a regular abandonment of his property to his creditors, and had the proceedings on the failure duly approved, but who obtained no discharge. The demand is made in the general form by one of the creditors in his particular name and for his particular benefit; and in answer to it the defendant pleads his surrender, and further alleges that he has not since then acquired property more than sufficient to support himself.

THIS suit having been dismissed by the District Judge as improper, the only question raised here for the consideration of the Court is, whether an action of this kind can be maintained.

IT is a well known consequence of the cession of goods that for such debts as were contracted before it and the creditors of which were duly called, it for ever liberates the person of the debtor from imprisonment; but that, if he has obtained no discharge, his future property, save what is necessary for his support is liable for the payment of those debts.

THE only difficulty, therefore, is as to the manner in which the creditors may come at that property.

*MARTIN, J. did not join in this opinion, having been of counsel in the cause.

A doubt was suggested whether the syndics, who had the management of the property surrendered, could not under the same authorisation, proceed against the debtor to compel him to surrender again; but, upon consideration, we think that the functions of the syndics cease with the administration of the property entrusted to their care, and as soon as their account is rendered and approved.

UPON the nature of the remedy, which the creditors have against their debtor in a case of this kind, our Code is silent. It simply says, "that "after the cession, the debtor is still obliged to "*surrender* whatever property he may become "possessed of." The Partidas on this subject (*law* 3, *tit.* 15, *part.* 5,) are somewhat more explicit, "The debtor, who has made a cession "of his goods is not thereafter obliged to answer "any judicial demand which may be brought "against him by those to whom he is indebted; "unless he should have made such gains as to "be able to pay all his debts, or a part of them." The practice, however, in such a case seems to be left undetermined; at least it is not to be found in any of the books which we have consulted. But it is obvious that, with the exception of the arrest of the debtor, the same steps must be taken and the same remedy sought, as where a forced surrender takes place for the first time.

East. District. *May* 1815.

FITZGERALD vs. PHILLIPS.

IN *Febrero de Juicios, book* 3, *chap.* 3, *sec.* 2, *no.* 39; we see that one of the cases in which a surrender is forced is when one of the creditors has sued out an execution against the debtor, and the others appear in order to oppose it, praying that he may not be paid in preference to them.

THE appellant, therefore, had a right to bring the present suit. If the other creditors think it worth their while, they may have the execution stopped, and the property divided among all.

IT is, therefore, adjudged and decreed, that the Judgment of the District Court be reversed, and that this suit be remanded to be tried on its merits.

See *post, March Term* 1816.

HOPKINS vs. *PERETZ & AL.*

There cannot be a *Curator and Administrator* of an estate, where several of the heirs are present and of age.

MARTIN, J. delivered the opinion of the Court. The petition states the plaintiff to be the *legal curator and administrator* of the estate of Jo. Mollere, dec. that there was exposed to sale, on the 5th of February 1812, for and on account of the succession, a tract of land, situated in the Parish of West-Baton Rouge, on the right bank of the Mississippi, bounded by the land of Madam Watts below, containing 800 arpents. That the defendant Peretz, became the purchaser, for the sum of $ 2100, and bound himself, a principal with the other defendant as surety, *in solido*, for the

payment of the purchase money, in three annual instalments, that the first instalment is due and unpaid.

THE letters of curatorship and administration, and process verbal of adjudication are annexed.

IT does not appear from the letters, whether the defendant died testate or intestate, whether his heirs are present or absent, of age or minors: but it is stated, in the preamble, that an assembly of the family of Mollere has recommended the appointment of the plaintiff, as *curator and administrator.* He is accordingly appointed: but it is no said whether he be curator of the *vacant estate* or of some *absent heir or heirs*: the date is the 3d *of February* 1812.

THE process verbal, states the exposition to sale and adjudication of the premises to the defendant Peretz, on the terms of the petition, and that he as principal, and the other defendant as surety, bound themselves *in solido* to pay the price *to* and *for the use of the estate.* It is subscribed by the defendants, two witnesses, and the Parish Judge.

THE deposition of the Parish Judge, comes up with the record, but it does not appear by which party it was introduced. He deposes that, being *Parish Judge and Auctioneer ex-officio,* he

East. District. *May* 1815.

HOPKINS vs. PERETZ & AL.

exposed the premises to sale, and that *several of the heirs* were *present*.

THE answer denies all allegations and states in avoidance certain facts, none of which appear to have been established.

THE District Court gave judgment for the plaintiff, and the defendants appealed.

IT has been contended in this Court, on the part of the defendants, that the judgment must be reversed; for, it is said, there was no sale, no vendor appearing to have intervened; none being named in the process verbal or act of sale, and no determinate tract of land being sold: that, intended to have been the object of the sale, not being sufficiently described. Farther, if there was a sale, the defendants' counsel says, the plaintiff cannot recover till he has discharged the obligation resulting from the contract, on the part of the vendor, by delivering the thing sold. He relies on *Civil Code* 261, 345, *art.* 8 and 2, 1 *Pothier on Oblig. no.* 42, *Traité de Vente* 326.

IT is material to ascertain the capacity in which the officer (by whose intervention the sale was effected) acted.

HE was Parish Judge and *ex-officio* Auctioneer.

IF he acted as Parish Judge, for he well might if the case was that of a *vacant estate*, (*Civil Code* 174, *art.* 127) then his, being a *judicial* sale, the

process verbal of adjudication is the only title the defendant could receive, accompanied perhaps with the prior proceedings. Then, the Judge was the *vendor*, and there has been a complete sale, evidenced by the signatures of the vendor, vendee and witnesses, officially taken and lodged among the records of the Court. In similar cases, either during the French or Spanish government, no delivery of possession seems ever to have been formally given : the process verbal being considered of the same validity as a notarial act of sale with a clause of *constitut* or *desaisine*. Thus, must we decree the sale a complete one, unless the presumption of a delivery was repelled by evidence of the vendor's refusal to give it, or the vendee's inability to enter. for we see nothing in the allegation of the want of certainty in the thing sold. It is described as Mollere's tract of land, of 800 acres, in the Parish of West-Baton Rouge, on the right side of the river, immediately above the tract of Madam Watts.

If the officer acted as an *Auctioneer* only, then the sale is as yet but an inchoate one. The instrument he has drawn is only a memorandum preserving the evidence and the terms of sale, without naming the owner of the land, for we cannot consider this memorandum, which appears to be the one, which it was the duty of the Auctioneer (by the 12th section of the act of 1805, ch. 4,

East. District. May 1815

HOPKINS vs. PEREIZ & AL.

"immediately after the sale to deliver to the pur-
"chaser, of the sale and purchase, designating the
"*object* and *day*, so that such purchaser may
"cause the same to be recorded, according to law)"
as dispensing with the designation, if it can be held to dispense with the intervention, of the vendor: it being of the essence of all contracts that there should be certain and *determinate parties*, as much as it is of the contract of sale, that there should be a certain and *determinate* thing, the object of it. The vendor must appear and execute an act of sale; then surely, before such an act at least, no delivery of possession, even *nudâ voluntate*, can be presumed.

FROM the record of the suit we are unable to conclude that the officer acted in his *judicial* capacity as a Parish Judge: for the case appears to be one, in which he could not legally act as such. He deposes himself, that several of the *heirs* were *present* at the sale, then the estate was not *vacant*. If some of the heirs were *absent*, a curator ought to have been appointed to them, who might have proceeded with the heirs *present*.

WHEN an officer has two capacities, he cannot be presumed to have acted in that in which his acts are illegal. We are therefore to conclude that he acted as *Auctioneer*: then the authority and consent of the persons employing him must be

shewn. Then his instrument or memorandum cannot be viewed as completing the sale.

BUT it does not appear, the plaintiff has not proved, that he has capacity to sue. He alledges himself to be the legal Curator and Administrator of the estate, but this must be made out by proof since the answer denies this allegation, with the others.

HE is not a party by name to the sale. If any thing be due to the estate, the *heirs* must receive it.

THE office of *Administrator* is unknown to our law. It appears some of the *heirs* at least are *present*, he cannot therefore be Curator to the *vacant* estate. He does not state himself to be Curator to any *absent* heirs, the existence of such heirs is not even suggested, it appears he was recommended by the assembly of family, as a proper person to be appointed *Curator and Administrator* to the estate. Judging in this case, from what most ordinarily happens, there were *minor* heirs and he was recommended as the person most proper to defend them. He ought then to have been appointed their tutor or guardian: then, if the minors were sole heirs, he might claim in their right, otherwise jointly with the heirs of age or the Curators of the absent ones. Then the record ought to state the names of the minors, that their right may

East. District. *May* 1815

HOPKINS *vs.* PERETZ & AL.

be discussed. But nothing of this has been done, and the record, on the contrary, disproves the plaintiff's capacity to sue.

THE judgment of the District Court must be reversed with costs.

MAYOR AND ALDERMEN &c. vs. *CLARK.*

Vendor does not warrant against a *tortious* disturbance.

MARTIN, J. delivered the opinion of the Court. The plaintiffs caused several lots to be put to auction, instructing the vendue master to give notice that the purchaser of each lot, on which there was part of a ditch should be bound to fill it up with the earth on both sides within thirty days. The deed of sale guaranteed the right of taking this earth, but as on some of the lots there was not a sufficient quantity of earth for the purpose, and on others more, the surplus earth on the latter might be used for the benefit of the former.

THE ditch intersected two lots purchased by the defendant, and by a plan of the premises, making part of the statement of facts, there appears to be a surplus of earth on the lot, adjoining that of the defendants, purchased by Joseph Tricou.

BY one of the clauses of the deed of sale the defendant acknowledged himself in due possession, the same "having been delivered to him, at the

"moment of the adjudication, renouncing in this "respect to the benefit of the laws relating to de- "livery of possession, and the delay which they "grant to shew that it was not given, in the same "manner, as if such delay was expired."

WITHIN the thirty days, the defendant began to take earth from Tricou's lot, but was prevented by him. On this, he called on the Mayor, who after viewing the premises, advised an application to the City Council, who, he said, would compel Tricou to forbear preventing the defendant. The Council directed their surveyor to make the necessary operations, in order to ascertain whether there was any surplus earth on Tricou's lot.

NOTHING more appears to have been done, by the defendant or Council: but the perpetual rent, which was the consideration of the sale of the lots to the defendant, being unpaid, the present suit was instituted for the recovery of the sum in arrear.

THE defendant contends he was not bound to pay, as the plaintiffs have not compelled Tricou to suffer him to take earth on his lot. The Court below expressed an opinion, unfavourable to the plaintiffs' recovery on the ground that "they had not "been able to secure to the defendant, the means "of improving his lots, in conformity to the contract "of sale: it being a point of law, that the obliga-

East. District. *May* 1815.

MAYOR &c *vs.* CLARK.

"tion of delivering the thing sold, includes the "accessories and, dependencies, designated and "specified in the act of sale."

THERE was a verdict and judgment for the defendant, on which the plaintiffs appealed.

THE defendant having acknowledged in the deed of sale, that possession was delivered to him at the moment of the adjudication, and having renounced the laws, under which he might have availed himself of the want of a delivery of possession, must be stopped now from denying that the possession was delivered him, and while he does not qualify the possession which he acknowledges to have received, we must understand an *absolute* possession of every thing that was to be delivered. He cannot, therefore, justify his failure to comply with the obligations his contract imposes on him, on the ground that the plaintiffs have not complied with the principal obligation of the vendor, the delivery of the thing.

IT is true the faculty of taking earth from certain lots is guaranteed, and if he be disturbed therein the plaintiffs must protect him: but this protection is only against *lawful* disturbances, the vendor does not warrant against *tortious* disturbances. Tricou does not claim any right under the plaintiffs, at variance with that which they have guaranteed to the defendant. He purchased at the

same sale, and if he rep ls the defendant, it is on the ground that in his judgment there is no surplus earth on his lot.

Now, after complying with the original obligation of the contract of sale, by delivering the thing sold, the vendor is entitled to the price, and if any succeeding event gives rise to new obligations, the vendee may be entitled to damages *pro tanto*. In the present case, even this does not appear, the judgment of the Court below must be reversed and there must be judgment for the plaintiffs for the arrearages due, with interest from the date of the petition.

GRIEVE'S SYNDICS vs. *SAGORY.*

Parol evidence may be received that a person not named as payee, in a bill of exchange, furnished the value and is interested therein.

MARTIN, J. delivered the opinion of the Court. The defendant purchased from the plaintiffs' insolvent bills of exchange to the amount of $3000, at par, payable down; but, paying one third in cash was accommodated with some delay for the two remaining thirds, giving his two notes and including in the account of the last, twenty-four dollars for interest. The bills were drawn payable to his correspondent in the Northern, were protested for non-acceptance and non-payment, and returned to the defendant, endorsed by the original payee, to his order, *value in account*. Due notice was given of the dishonor of the bill, but after the bankruptcy of the insolvent.

East. District. *May* 1815.

GRIEVE'S SYNDICS *vs.* SAGORY.

THE insolvent received payment of one of the notes, but the other was in his hands, untransferred and came to the possession of the plaintiffs, on their appointment as provisional syndics. The defendant, after notice of the dishonor of the bills, applied to the plaintiffs to have the remaining note returned, on the ground of the consideration for which it had been given having failed; and on their refusal instituted a suit therefor: this suit miscarried, it being holden that *provisional* syndics were not suable.

THE plaintiffs brought then the present suit, and the defendant resisted the payment, on the ground, on which he had demanded the return of his note. At the trial, he offered a witness to prove that he was interested in the purchase of the bills, but the Court would not permit him to be sworn, on the ground that no parol evidence could be received of that fact. Judgment was had against him and he appealed.

THE statement of facts shews that the defendant was placed on the insolvent's bilan, for the full amount of the bills and did receive two dividends thereon the first in June 1812, of 24 per cent. the other in April 1814, of 10 per cent. ratifying and confirming these two dividends.

THE defendant resists the plaintiffs' claim on the ground that the consideration, for which the note was given, has failed. It is clear that the note

being still in the hands of the original payee, or what is the same in those of his syndics, the consideration, for which it was given, may be enquired into, and if there appears to have been no consideration at all, an illegal one, or one which has failed, the defendant must be holden discharged from the payment of the note : And it is not denied that the note was given for the purchase of bills, which have since been dishonored, are still unpaid, and are now in the hands of the defendant. But the plaintiffs' counsel contends that, between the parties, the consideration has not failed.

THE circumstance of the bills not being drawn payable to the defendant, is presented to the Court as *conclusive*, or at least *primâ facie*, evidence, that the defendant did not purchase the bills as *principal* or for his own account, but as the agent or factor of the persons he caused to be named therein as payees—that, having funds of these persons to purchase the bills, and having occasion for part of these funds for his own affairs, he prevailed on the plaintiffs' insolvent to be satisfied with the third of the amount of the bills and to take the defendants' notes for the balance; virtually borrowing from the insolvent, two thousand dollars, the two thirds of the amount of the bills : thereby effecting by two payments *brevi manû*, or rather by no actual payment all, the purchase of the bills and the loan. That the defendant has

East District. May 1815.

GRIEVE'S SYNDICS vs SAGORY.

had the complete benefit of that loan, the bills having enabled him to dissolve his obligation to the payees, without any liability, on any event on his part, and if the plaintiffs are cast in this suit, he will make a clear profit of one thousand dollars. While, if the plaintiffs recover, he will sustain no loss in discharging the judgment of the Court.

PLACING the case on this footing, the Court is of opinion that the Judge below erred in rejecting the witness offered by the defendant. The bills are expressed *for value received*, but from nothing that appears on the face of them, while the *payment* was thus admitted, could it be ascertained by whose hands the money was paid. This, therefore, was to be made out by testimony *dehors* the bills, in the same manner as if one of the real parties to the bill was described under the words *& Co.* parol evidence should be admitted to shew who was the anonymous partner.

THE Court is of opinion that the circumstance alluded to by the plaintiffs' counsel is neither *conclusive*, nor *primâ facie*, evidence that the defendant was not a principal, but a mere factor or agent in the purchase of the bills.

CIRCUMSTANCES which are *conclusive* or *primâ facie* evidence of a fact are only those which *exclusively* attend it. Now, the circumstance under consideration is one which it is believed very often

of the title of the appellees, could then have been determined, on a view of all the facts and law appertaining to the case. But in attempting to shew title in himself, derived from the same person under whom they claim, the identity of the slave is acknowledged and also the right of Dufour; this much is admitted by the very offer of the testimony on his part, which was rejected by the Judge; unless this evidence is to be taken as relating to some other negro woman not in dispute between the parties: which would be absurd, because then it could have no application to the cause. Let us now see what this evidence is, which the Judge rejected. The first testimony offered by the appellant was intended to prove the sale of the negro woman in dispute, by an Auctioneer under an execution issued on a judgment obtained before a Justice of the Peace, by virtue of which she was seized by a Constable, as the property of one Parent. 2ly. He offered to prove a title in said Parent by an act of sale, under private signature, from Dufour to him, and also the loss of said instrument. And 3dly. the payment of the money to Parent, above what was necessary to satisfy the execution under which she was sold. It may be laid down as a general principle of law, that a purchaser, under a Sheriff's or Constable's sale, made in virtue of an execution, gets no better title to the property sold than was held by the defendant in execution; and consequently, the proof of the sale by the

attends purchases of bills, on the purchaser's own account.

IF I wish to remit 1000 dollars to my correspondent in Philadelphia, either to be employed on my own account, or to discharge a debt I owe him, and which I have no direction to remit in any particular manner, prudence will suggest the precaution, if I purchase a bill, to have it drawn payable to this correspondent and not to me. For I thus limit the possibility of a loss on my part to 1000 dollars, or whatever I may pay for the bill. While if it be drawn in my name, I will alike be liable to this risk, and in case my correspondent puts the bill afloat, I will in the event of his dishonor be again liable to pay the full amount with damages, and eventually interest, if I be unprepared to take the bill up, on its being presented. While it is considered that of all mercantile transactions, those relating to bills of exchange are those which require the most attention and precaution, the circumstance of having caused a bill to be drawn in the name of the person, in whose hands the money is finally intended to be placed, cannot be viewed as an evidence that the person remitting does not remit as *principal*, but acts as an *agent or factor*. It is not intended to deny that coupled with others, this circumstance might add to their weight and perhaps, at last, cause the

East. District. *May* 1815

GRIEVE'S SYNDICS vs. SAGORY.

scale to preponderate: but alone it is *the weak presumption, which moveth not at all.*

ON this ground, denying any weight to this circumstance, the plea of the defendant has its full force and must prevail.

IT is perhaps proper, incidentally to observe, though it is unnecessary to the determination of this cause, that even if it were admitted that the transaction is really, as the plaintiffs state it to have been, still it is far from being clear, that they ought to recover.

THE defendant, by the endorsement of the bills to him by the payees, has been subrogated to their right. Now, if the payees, being still the holders of the bills, had interfered and become parties to this suit, and demanded, on the case shewn by the plaintiffs, or instituted a suit, (making the present plaintiffs and defendants parties thereto) and prayed, that the plaintiffs should surrender the note to them and the defendant be decreed to pay the amount, or allow credit therefore, considering the transaction between the insolvent and these parties, in its true light, the purchase of bills for their account and the money due on the note as the consideration therefore, perhaps the claim could not have been resisted on the fictitious character given to the transaction, or supposition of a payment by one party and of his immediately re-

ceiving the money on a pretended loan. In such a case, there would perhaps be much force in the argument that these payments, said to be *brevi manû*, are *fictions*, which cannot be allowed to destroy the party's *real* right, on the *actual* transaction.

THE defendant is further said to be precluded from relief on his note, because he has set up a claim, been placed on the bilan and received dividends, as a creditor of the insolvent for the total amount of the bills; while he cannot be considered as entitled to relief, unless his claim as a creditor be reduced and extinguished *quoad* the amount of the note.

THIS renunciation is at most an *implied* one, which cannot stand with the express and forcible assertion of his insisting on its full rights, whatever they may be, first by his demand of the surrender of the note, his suit against the provisional syndics, which though informal and incorrect is nevertheless evidence, since it conveys notice, of the claim, and finally his plea in the present suit, equivalent to an actual suit, which he may be supposed of having failed to institute, on no other ground than of his having been anticipated by the plaintiffs. No fraud can be attributed to him, for in asserting his claim on the bills, he did not conceal that on the note, the admission of which must

East. District. *May* 1815.

GRIEVE'S SYNDICS *vs.* SAGORY.

have dissolved *pro tanto* his claim on the bills. While the parties could not agree on the adjustment of their rights, it was fair in either to pursue his own to the utmost. There was then no fraud and the express assertion must destroy the *implied* renunciation: *expressum facit cessare tacitum.*

THE payment *received* by the defendant, however, diminishes his claim to relief *pro tanto.*

THE judgment of the Parish Court must be reversed, and the same judgment must be entered as that of this Court, to be discharged by the cancelling and depositing into the office of the clerk of the Court below, for the use of the plaintiffs, within ten days, one of the bills amounting to one thousand dollars and the amount of the two dividends received by the defendant thereon, with interest on each dividend from the receipt of it; but the defendant having resisted the plaintiffs' claim, without tendering, or offering to allow the dividend now decreed to be refunded; must pay costs.

ELLERY vs. *GOUVERNEUR & AL.*

3m 606
4S 615

The fees of counsel, appointed to an absent debtor, must be fixed by the Court.

DERBIGNY, J. delivered the opinion of the Court. In a suit by attachment brought by the appellees, the present defendants, against Dawson and Lewis, the appellant, the present plaintiff, was

appointed by the Court counsel for the absent defendants. To obtain a compensation for his services he instituted the present action, praying that he may be paid, out of the proceeds of the property attached.

THERE is no doubt that in cases of attachment, where the defendant is absent, the property attached must be answerable for the payment of all costs and expences which are necessarily incurred in the prosecution of the suit, and that the plaintiff is to receive only the nett proceeds of the property sold, after payment of such costs and expences. A compensation to the counsel of the absent defendant, for his services, is certainly part of these necessary expences, and ought to be paid him out of the proceeds of the property. But in order to be entitled to such payment, the compensation must have been fixed according to law, that is to say, in the same suit and by the Judge. *Aut. accord. lib.* 2, *tit.* 23, *art.* 2.

HERE the services, instead of being taxed by the Judge, are valued by the counsel himself, and agreed to by the attaching creditor who has no interest to dispute them ; and they are made the ground of a sèparate action, while they ought to have been included in the costs of the original suit. Such an action cannot be maintained.

IT is adjudged and decreed that the judgment of the District Court be affirmed with costs.

East. District. *May* 1815.

BRAND vs. LIVAUDAIS & AL.

BRAND vs. LIVAUDAIS & AL.

When there is a written contract, a workman will be allowed to resort to it, although he had presented an account, claiming less than was stipulated.

MATHEWS, J. delivered the opinion of the Court. This suit was brought by Brand, the appellee, in the Court below to recover the amount due to him, on a contract made with the appellants, as members of the committee of administration for managing and overseeing the building of the Orleans play-house. This contract or agreement he prays to be considered as making a part of his petition, and also an account on which he claims a balance of $1000. The account is stated according to an admeasurement of the building, made at his instance, without any authorisation of the Court. After the commencement of the action he moved to have experts appointed, to measure the work; which was accordingly alone: and it is agreed that their report fixes the true extent of the walls of the house and all other work and labour done and performed by the appellee, under his agreement above mentioned. No difficulty could possibly arise in the decision of this cause, were it not for the confusion created by the appellee, in his petition; having founded his action, both on the contract and on his account thus stated; which differs in the estimation of the work from that laid down in the first article of the agreement. It appears from the facts in this case that the completion of the play-house, was arrested and stopped by accidents not within the control of either of the contracting parties; and that, if the con-

tract has been fully carried into effect, there is no blame imputable to Brand; and he is legally entitled to the benefit of all the stipulations it contains, so far as he has complied with the obligations created by it, on his part. By the 1st article (the only one on which any dispute has arisen) he binds himself to build the "walls of the house of country bricks, and to plaster them, wherever designated by Mr. Latour, and for every toise of thirty-six feet square French measure, and one and a half brick thick, he is to receive twenty-three dollars." Now, it is clear from this article that Brand is entitled to receive $23 per toise, for the walls contracted and plastered, in any manner designated by Latour; he would be entitled to no more should he have been required to plaster them entirely, and is equally entitled to this sum, if not required to plaster them in any part. But in his petition he put an account wherein he claims only $20 per toise for constructing the walls, and $3 for that part of them which he plastered; and the only question is whether the filing of this account deprives him of the benefit of his contract. To give it this effect, it must be considered as an explanation of an agreement which is doubtful, a new contract, or a relinquishment on the part of the appellee, under the old one. It cannot be considered as explanatory of that which is doubtful in the agreement; because the instrument is sufficiently explicit in itself; nor can it be viewed as a

East. District. *May* 1815.

BRAND vs LIVAUDAIS & AL.

new contract; for there is no consent of parties to it: and we do not think, that it amounts to such a relinquishment as ought to conclude him; because he demands more in his petition, than is given by the judgment of the District Court. The demand being for more than the verdict and judgment, renders it unnecessary for us to enquire how far a plaintiff, according to the principles of the Civil law, is entitled to recover more than he prays for in his petition when he proves himself entitled to it. Upon the whole, we are of opinion, that this cause ought to be decided by the notarial contract of the parties; and that according to its stipulations, the appellee, has not recovered too much.

IT is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

DELANY vs. *TROUVÉ & AL.*

Whether the wife has a priviledge for a debt due her, before the marriage, by her husband?

DERBIGNY, J. delivered the opinion of the Court. The plaintiff and appellant, after having been several years the concubine of P. Trouvé, one of the appellees, married him. *Two days before the marriage*, he subscribed in her favor, before two witnesses, an acknowledgment by which he declares himself to be her debtor in a sum of $2304, for wages earned by her, as his servant during twelve years. For that sum, the appellant

claims a legal mortgage on her husband's property, and pretends that she ought to be paid, in preference to Thomas Durnford the other appellee, out of the proceeds of a house which Trouvé sold him with a right of redemption. The only proof of her services is the acknowledgment above mentioned, and the deposition of one of the subscribing witnesses, who says that Trouvé told him he had taken the appellant upon wages, so that the sole source of the evidence of this fact is P. Trouvé.

THIS in itself would be enough to caution the Court against too easy an admission of this claim, so far as it may affect the interest of third persons. But there are circumstances here, so flagrantly suspicious, that they stamp fraud and collusion on the face of this transaction, and defeat the claim of the appellant, independently of any other consideration.

THE appellant, when first seen by the witness in the house of Trouvé, was by him mistaken for his wife: he found, however, that she was his concubine. After twelve years of such life, during which she had several children, Trouvé, on the eve of marrying her, signs an acknowledgment that he owes her full wages for all that time: no deduction: not a dollar ever paid her on account during these twelve years, though Trouvé was a man of considerable property. In the mean time she used to dress very neatly. Can this be believed? The witness himself, on whose sole tes-

East. District *May* 1815.

DELANY *vs.* TROUVE & AL.

timony the success of this action depends, did not venture, notwithstanding his evident partiality to the appellant, to go the whole length in support of her claim. He had indeed sworn at first that the paper, here relied on by the plaintiff, was made before her marriage; but on being cross-examined to that point, he does not dare to affirm the fact, but confesses that he cannot say whether it was signed before or after; such a deposition upon such a voucher must not be permitted to defeat the claim of a legitimate creditor.

THEREFORE, without examining here how far a woman, creditor of the man whom she afterwards marries, may be considered as having bro't the sum thus due to her, and whether for such a debt she is entitled to a mortgage on her husband's property, we say that in this case the proof of the existence of the debt does not deserve credit, so far as to affect the interest of third persons.

IT is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. JUNE TERM, 1815.

East. District. *June* 1815.

BUJAC & AL. *vs.* MAYHEW.

BUJAC & AL. vs. MAYHEW.

No bill of exception lies to a final judgment.

MATHEWS, J. delivered the opinion of the Court. The appellees, who were plaintiffs in the Court below, commenced suit to recover a negro woman mentioned in their petition, claiming title under a public act of sale from A. Dufour, executed before a Notary in the Parish of Baton Rouge, in the manner prescribed by law; stating, that she is in the possession of Mayhew, the appellant, and that he refused to deliver her to them on their request and demand.

THE defendant in the District Court answers generally, by denying all the facts contained in the petition. Thus resting his title on possession alone; which, if legal, is *primâ facie* evidence of a title.

East. District. *June* 1815.

BUJAC & AL. *vs.* MAYHEW.

THE manner in which this cause is brought up, is so informal, as to make it difficult to understand it. There is no regular appeal from the final judgment of the inferior court: no statement of facts in the record, nor any thing acknowledged by the parties to be an equivalent; but in the bill of exceptions the opinion of the Judge, on the evidence offered by the plaintiffs (not objected to by the defendant as improper) received by the Court and forming the basis of its final judgment is excepted to! If this bill of exceptions proved no farther, it could be considered in no other light than an exception to a final judgment, which, the Court would be thus called on to reverse or affirm; yet by law we can only affirm or reverse the final judgments of the inferior tribunals, on a statement of facts, something equivalent or special verdict of a jury. Exceptions cannot regularly be taken to a final judgment, the only remedy is an appeal in the form prescribed by law. By divesting the bill of exceptions of this informality, it remains properly an exception to the opinion of the Judge in refusing the testimony offered on the part of the defendant, and as such alone it must be examined. If the appellant intended to rest his defence on his possession of the property, and the weakness of the appellee's title, as not having been legally made out, he ought to have moved the Court for judgment. On a final judgment being rendered, either party might have appealed in due form, and the legality

East. District. *June* 1815.

BUJAC & AL. *vs.* MAYHEW.

Auctioneer, on the present case, would only shew the legality of the appellant's possession, which is not disputed: the suit of the appellees being not a possessory action, but one in which they are bound to make out their right and title to the property, against all persons. This part of the evidence is, therefore, useless and was properly rejected by the District Judge: it may be added that to complete this evidence, they ought to have produced the judgment on which the execution issued. The private act of sale from Dufour to Parent, which was never recorded agreeably to the provisions of the Code, cannot affect the interest of the appellees who claim under the same person, by an other act legally executed, unless it could be shewn that there is something fraudulent in the transaction on their part. This is not done, nor has it been pretended by the appellant that he is in possession of any such proof. This evidence was therefore with equal propriety rejected by the judge below. The third kind of evidence offered is so totally irrelevant to the case, that the District Judge certainly did not err in refusing it. Upon the whole, we are of opinion that the bill of exceptions to the opinion of the District Judge must be overruled and as the cause stands before this Court, solely on the exception taken to the Judge's opinion in rejecting testimony, the appeal must be dismissed.

IT is, therefore, ordered, that the appeal in this case be dismissed at the appellant's costs.

LAVERTY vs. *GRAY AND TAYLOR.*

East. District.
June 1815.

LAVERTY
vs.
GRAY & AL.

Juror, who has given an opinion, rejected, though he swears his mind is still open to conviction.

MARTIN, J. delivered the opinion of the Court. This case comes up, on a bill of exception, to the opinion of the Court of the first district, overruling the objection of the plaintiff's counsel, to the swearing of Ogden as a juror, on the ground that "he was *consulted as a friend* "(by Bell, the agent of the defendants) in the "transaction, previous to the suit being institut-"ed, and from the case, as it had been represent-"ed to him, by the said Bell, he had given his "opinion, founded on the evidence, as far as he "had heard it, that the transaction was a fair one, "and that the defendant was entitled to the pro-"perty in dispute." These facts, were disclosed by the juror, who added, that, "as he had heard "only one side of the question, his mind was still "open to conviction from law and evidence."

IT has been contended that the juror was properly sworn, because, as there was no evidence of the facts on which he was challenged, except what was contained in his declaration and he had sworn away the presumption of the existence of any bias on his mind, and as the whole declaration must be taken together, there remained nothing from which his incompetency might be presumed. He best knew the situation of his mind, it is said, and he swore it was *totally unbiassed.*

East. District. *June* 1815.

LAVERTY vs. GRAY & AL.

2. BECAUSE the opinion he gave was qualified: it being declared to be founded on the sole evidence laid before him.

3. BECAUSE the opinion he gave was not of the truth of the facts of the case, which it was the province of the jury, sworn in this case, to try, but on the law arising thereupon, in which the jury were sworn properly to be directed by the opinion of the Court.

4. BECAUSE the challenge, being *to the favour* and *not* a principal challenge, the competency of the juror was not to be tested by the Court, but pronounced upon by *triors*.

THE counsel has relied on the opinion of the circuit court of the U. S. for the Virginia district, in the case of the *U. S. vs. Burr*, on a motion to discharge Eggleston. This juror informed the Court that, "after having read the deposition of "General Eaton against the defendant, he felt his "mind so warm, that it would not be proper for "him to attend as a juror; that he spoke what he "felt in public companies, and these were his im-"pressions from what he had *then* read; but "what he had read *since* on the case had left him "so far relieved from prejudice, as not to be able "what to say." Being asked whether he had *now* an opinion formed? he answered that, "if no "other information should come to his view, it

"might be said that he had not." On this he was sworn. 1. *Burr's trial, Chap. ed.* 11 & 12.

WE are of opinion that the District Court erred in receiving the juror.

A challenge on account of a *suspicion of bias* is a challenge *proper affectum.* 3 *Comm.* 363. A legal *presumption of bias* arises when the juror has had a *previous knowledge* of the cause, by being one of the witnesses to the deed. *Co. Litt.* 157 *a*: or, if he have been *informed of*, or treated of, the matter: this is a *principal* challenge. The case, cited by the counsel, shews that the Court is to decide on the state of the juror's mind, according to *legal* presumption; maugre he swears, as Eggleston, that "it would not be proper for him to attend as a juror" or as Ogden, that his mind is still open.

THERE is nothing in the circumstance of the juror having qualified his opinion, by asserting it was founded only on the evidence laid before him; this being the natural presumption.

THE forming and disclosing an opinion on the question of law, which is to determine a transaction, is equally fatal to the competency of a juror, as on the facts. Where the juror had expressed his opinion on the *legality of a toll*, claimed in the suit, he was not suffered to be sworn. *Blake* vs. *Millspaugh*, 1 *Johns.* 316.

East. District. June 1815.

LAVERTY vs. GRAY & AL.

APPLYING these principles of law to the present case, Ogden ought not to have been received as a juror, because he had a *previous knowledge* of the case, had been *informed of*, and *treated* of the matter, that is spoken with about it by one of the parties; this, in the eye of the law, raising a presumption or suspicion of a bias, which ought to have excluded him. He could not restore himself to his competency to act as a juror, by his assurance on oath that he was still open to conviction. Few men are conscious of the influence of the prejudice which avowed opinions create. As it is the duty of every juror to soar above it, the law doubts not the intention of any juror to resist it. But, as men are liable to mistake *desires* for *opinions*, it does not allow the assurances which a juror gives of his opinion or belief (for he can only swear to this) that he is above all prejudice, for perhaps this is to be above human nature.

THE present case differs materially from that in Virginia. Eggleston declared that the reading of one paper had given rise in his mind to impressions very unfavorable to the defendants; he had published these sentiments, but, information, which he had afterwards received, had eradicated these impressions, so that he had no *opinion formed*, when he came to the book. Ogden had formed and published an opinion, which for any thing that appears on the record, induced the bringing of the suit, and as he had not heard any thing far-

ther on the subject, the presumption was that the opinion was unshaken, when he was called. It is true he owns that as he heard only one side of the question, his mind is still liable to conviction, from law and evidence; that he wishes, intends, and indeed expects it would be so, is that what the Court were bound to believe, without as well as with this assertion: yet it ought not to have been considered as destroying the legal presumption, which repelled him from the book.

THERE must ever be a natural propensity in a juror thus situated, to listen with complacency to arguments confirming the opinion he has given, while contrary ones, suggesting his fallibility, must give rise to opposite sensations. The counsel who best pleases, will best convince; the juror will be glad to find himself able to give a verdict that may confirm the opinion of his wisdom, in the person whom he advised; if the scales happen to vibrate a while his wish may fix them.

IT is ordered, adjudged and decreed that the judgment of the District Court be annulled and reversed and that the cause be remanded with directions to allow a new trial.

East District. *June* 1815.

KEMPER vs. SMITH.

KEMPER vs SMITH

If A buys land for B he cannot rescind the sale, without B's consent.

DERBIGNY, J. delivered the opinion of the Court.* From the value of the matter in dispute and the variety of questions raised for the consideration of the Court, this case has assumed more importance than it would otherwise have derived from any difficulty attending its decision.

WHILE the parties were partners in trade, the plaintiff bought a certain tract of land, first by an act under private signature in the name of the firm, and afterwards by a public act purporting in the body of it to be a purchase on his own private account, though signed by him in the name of the firm. A liquidation of the business of their concern being afterwards sued for, by the defendant before the Spanish Governor of Baton-Rouge, within whose district their commercial house was established, a course of proceedings was there had, during which the land in question was adjudicated for the appraised value to the defendant, now the appellant.

THE first question, therefore, to be disposed of is whether this adjudication ought to be considered as *res judicata*; and first, before any enquiry into its validity, whether the judgment rendered in that case is final or still open.

*MARTIN, J did not join in this opinion, having been of counsel in the cause.

THE history of that suit, which it must be confessed exhibits a strange scene, has nothing to do with the investigation of this point, and will be kept out of view until it is decided. Neither is it necessary for its decision to search into the Spanish judiciary system, in order to ascertain what was the judicial power of the Governor of Baton-Rouge. Whether Governor Grandpre's judicial authority was inherent to his office, or delegated to him by the Governor-General of Louisiana, who had by law a right to appoint delegates, is a matter of no consequence. It ought to be deemed sufficient that he exercised a jurisdiction under the eyes and controul of his superiors. We are bound to presume, where the contrary is not proved, that he acted with due authority.

ON the 20th of August, 1803, Governor Grandpre rendered his judgment confirming a report of referees, which after having charged the appellant with the full value of the land now in dispute, established a balance in his favor. This judgment was notified to the appellee on the 27th of the same month, and on the 30th he presented to governor Grandpre a petition, in which he complains of the award, and *begs leave to bring the whole case before the Superior Court sitting at New-Orleans.* Here then is an appeal in substance and in words, claimed within the legal delay: So that supposing this to have been a definitive

East. District. *June* 1815.

KEMPER *vs.* SMITH.

sentence, it is regularly appealed from. But, it was not a definitive sentence, from Governor Grandpre's own shewing: for to this petition to appeal he answers, that the appellant "having not "yet seen the final settlement of the accounts, "cannot say whether he is injured, and that if up- "on receiving communication of that final settle- "ment he discovers any error in it, he will be at "liberty to point them out, in order for the "Court to determine as justice may require."

THIS last decree amounting to a denial of the appeal at that time, the appellee, unwilling to proceed any further in that Court, came directly before the superior of Governor Grandpre with a memorial stating his grievances, and a decree ordering some of the documents annexed to his petition to be translated, shews that his complaint was admitted. Since then nothing appears to have been done in the suit, so that if Governor Grandpre's decree was not final as he himself seemed to consider it, the case remained opened in his Court; and if it was final, it remained open in the court of the Governor-General of Louisiana by virtue both of the petition of appeal, and of the application of the appellee there. In either case we must say that the decree of Governor Grandpre cannot be considered as having the force of the thing judged, and is consequently no bar to the appellee's claim.

THIS precludes the necessity of examining how far the Courts of this state may enquire into the validity of judgments in any other manner than that which is established by the laws organising those Courts; in other words, whether the Spanish system, according to which certain judgments not appealed from may be declared null and void, is yet in force in this country.

DISMISSING, therefore, that question, we now come to the merits of the case. Is the land here claimed the property of the appellee alone, or the joint property of him and his partner?

BY a private bill of sale dated September 29th 1799, the appellee bought the land in dispute for the account of the partnership in the absence of his partner. Under that title he took possession of the land and proceeded to improve it. But having received (it does not appear when) a letter from his partner, dated Cincinnatti, the 19th August of the same year, in which he told the appellee not to engage any land for him, the appellee, on the 25th of March 1800, caused the vendor of the land in question to make him a public act of sale of it in his separate and individual name. Upon this last act he claims title as the sole purchaser of the land.

IN support of this claim he alledges, that by the articles of the co-partnership, entered into between him and the appellant John Smith, no right

East. District
June 1815.

KEMPER
vs
SMITH.

was given him to purchase real property for the account of the firm ; that the purchase by him first made without authority could not vest any right in his partner, until he should accept it ; and that the appellant having signified his intention by letter not to acquire any land in that part of the country, before the purchase had taken place, he must be considered as having refused to ratify the bargain. To the aid of this letter, several witnesses were called, who deposed that the appellant, on his arrival in the district of Feliciana in April 1800, expressed his disapprobation of the purchase of the land in contest : some affirming he said he would have nothing to do with it, others that he spoke of the purchase as unnecessarily involving the partnership in debt.

THE first fact to be ascertained is whether by the articles of copartnership the appellee was authorised to purchase for the firm any other property than that which is usually received in payment of merchandize sold. A phrase in those articles has been tortured to make it signify that the appellee had such a right. It is this : " the " said merchandize shall be sold to the best ad- " vantage for cotton or *other commutable ar-* " *ticles*, or cash, as the acting partner may in his " judgment deem advantageous." The words commutable articles, it is said, must include every thing that may be the object of commerce, and of course real property as well as any other. But

stretching that expression to the full extent given it by the appellant, it would at best signify nothing more than that the appellee could receive lands in payment of merchandize, which is very different from that of buying lands *on credit*, *for cash*. The authority of the appellee, as derived from the articles of copartnership, was limited to the sale of the merchandize for cash, or cotton, or other commutable articles ; but when thus converted, he had no right to dispose of the proceeds to buy real property with them. The doctrine contended for by the appellant, that in a commercial partnership purchases made by one of the partners, under the signature of the firm, are binding on the others, may be very correct ; and yet it by no means follows that a partner has a right to bind the firm in every sort of acquisitions. In a commercial partnership all the mercantile transactions of one of the partners are binding on the others ; but it would be monstrous to make them answerable for any act out of the course of trade. A partner must be considered as vested by his copartners with certain powers, for certain purposes. If he travels out of those powers, his acts cannot be more binding on the others, than the acts of an attorney who exceeds his powers are obligatory on his constituents.

By the articles of copartnership, then, the appellee had no right to buy real property for the firm. Yet he did so : What is to be the conse-

East. District. *June* 1815

KEMPER vs. SMITH.

quence? It is not disputed that when a man undertakes to buy a thing for another without authorisation, the person for whom the purchase is made may avail himself of it; but it is said that such person does not thereby acquire any right before he accepts the purchase; and that in the mean time it is in the power of him, who has bought in the name of the other, to cause the contract to be cancelled. Of this particular question we have not found any express solution; but it does appear to us that the principles which regulate the conduct of the *negotiorum gestor* generally shew that he can have no such power. One of those principles is, that the person who has once undertaken the management of the business of another, is no longer at liberty to abandon it: *a fortiori* must it be said that, when he has done an act for the benefit of that other person, he shall not be at liberty to destroy it—(1 *Domat*, *book* 2, *tit.* 4, *sect.* 1, *art.* 1.) Again, when the *negotiorum gestor* has without necessity bought something for another, the risk is his and the profit is anothers. (*same sect. art.* 4.) The other then acquires a right: he from thence becomes entitled to the advantages resulting from the purchase, and the *negotiorum gestor*, who is not at liberty to abandon his interest, surely cannot by a contrary act deprive him of that benefit. But it is asserted that in this case the appellant, John Smith, refused to ratify the purchase. To prove

that, a letter is produced in which the appellant recommends to the appellee not to engage any land for him. That letter, however, which is dated about six weeks anterior to the purchase, cannot be considered as containing a refusal to ratify a bargain, which did not exist. After this recommendation he was still at liberty to accept or to refuse a purchase made in his name. The contract which the appellee had undertaken to make for the benefit of the appellant could not be destroyed by himself before the pleasure of the appellant was known touching that identical acquisition. So that supposing the letter here produced to contain the prohibition which the appellee contends for, still he ought to have waited for the answer of the appellant on that particular subject. But this letter is not what the appellee endeavours to make it. A recommendation not to engage any land for John Smith is not a prohibition to buy lands for the partnership. Taking the whole content of this letter, together with some passages in the letters of the appellee, there is every reason to believe that John Smith had previously manifested an intention to settle in the Bayou Sarah District, and had given his partner some instructions to that effect, which instructions he afterwards revoked in these words: "Don't absolute-
"ly engage any land for me in that country, as I
"wish to reconnoitre a little more generally through
"the country than I have."

East. District. *June* 1815

KEMPER *vs.* SMITH.

THIS letter, then, is by no means a sufficient voucher of John Smith's refusal to abide by the purchase of the land in dispute in the name of the partnership. As to the conversations which he had with other persons touching that acquisition, it cannot be seriously contended that they amount to a renunciation of his rights. Besides they have nothing to do with the motives which induced the appellee to cause a second sale to be made in his private name, for that was already done when those conversations took place.

ADMITTING, therefore, the purchase made by the appellee in the name of the partnership to be nothing more, with respect to the share of John Smith, than a purchase made by a person having no authority to buy, his right to accept it stood unimpaired, when the appellee undertook to destroy that sale.

BUT the appellee, although by the articles no power was given to him to acquire for the partnership other property than that which he was to receive in the course of his trade, cannot be deemed to have been entirely destitute of any authority to act as he has done. Independent of any written stipulations, a partner, like a proxy, may be considered as tacitly vested with a discretionary power to do all things necessary to enable him the better to carry on the business which he has to manage. If the partner is in the situation of a proxy with respect to his right to bind his partner

the following principle may be applied to him. "The attorney is himself bound by the contract "which he enters into as such, when the contract "is not made by order of his constituent, nor for "his utility; but if it is made by order of the con- "stituent, or *for his utility though without order*, "it binds him, and not the attorney." (*Curia Philip. tit. Factores, No.* 32.)

IN this case it is evident from the conduct and correspondence of the appellee that there existed between the parties some understanding as to the exercise of such discretionary power. The principal produce for which they could sell their goods was cotton; it was more profitable to buy it in the seed, hence the propriety of establishing a gin: hence the necessity of buying a place whereon to build it. The appellee bought on very moderate terms a tract of land advantageously situated, where a store could be kept and a gin be erected. He bought mules to work at the gin; he bought a slave for the service of the store, and actually improved the place with the funds of the partnership. Had he no power or authority to do all this? If that power and authority can be denied, surely it is not by him, whose conduct evidently shows that he considered himself as sufficiently authorised for those purposes.

UPON the whole we are of opinion, that under the private sale of the land in dispute in favor of

E st District. *June* 1815.

KEMPER vs. SMITH.

the partnership, J. Smith acquired a right to an undivided moiety of the land; that he has done no act by which he can be considered as having divested himself of that right; that the subsequent public act of sale of the same land could not destroy, and has not destroyed, that right; and that, as between the parti , it is a mere nullity, unless it is received as a confirmation of the private act.

IT is, therefore, adjudged and decreed that the judgment of the District Court be reversed, and that judgment be entered for the appellee for one undivided moiety of the land by him claimed.

Duncan and *Livingston* offered the following argument for a rehearing.

To shew that the plaintiff could legally cancel the contract of sale under private signature from Duplantier to R. Kemper & Co. and receive in return a sale of the land to himself individually, he begs leave to make the following points:

I. No man can contract for another, unless he be authorised so to do. Kemper and Smith were partners, but this contract of sale was out of the partnership concern, therefore there could be no authority thence for the contract, and no other authority is pretended; therefore, the act itself, so

far as related to Smith, was nugatory and void, and no right could accrue to any person whatever from it.

II. A MAN in contracting for another without obligation so to do, or any authority whatever from the other, cannot affect the interests of the other; nor can he bind himself thereby to the other, for it is a mere voluntary act, and *ex nudo pacto non oritur actio;* see *Powell on Contracts*, 338 *to* 343: *Pothier on Contracts*, 5, which if it were binding, might be revoked as long as it remained unaccepted.

III. THAT the defendant, Smith, could only avail himself of his purchase while the contract remained in existence: for he might make that *his contract* which was not *his previously*, but Kemper's; the plaintiff not having been obligated to purchase for Smith, incurring no obligation either to keep the contract opened for Smith's acceptance; having annulled it, Smith cannot then avail himself of it. His right is not destroyed, for he had none. Suppose a right, where was the remedy? Not against the vendor, for Smith was not bound, and there existed no contract between him and the vendor; not against the plaintiff, for he neither was bound in law nor conscience to buy for Smith, or to hold for him.

East. District. *June* 1815.

KEMPER *vs.* SMITH.

IV. THE plaintiff was therefore at full liberty to countermand what he had done without authority; while it was merely his act and before it was made the act of Smith; for the purchase being merely his voluntary act, he had the same controul in dissolving that he had in originating it. The act did not divest any, there was no, interest vested in Smith, for his contract was wanting, there being no assent. 1. *Powell on Contracts*, 8, *actus inceptus cujus perfectio pendit ex voluntate partium revocari potest;* see 1. *Fonb. in Equity*, 158, and a voluntary act, even if it was a gift (a stronger case than the present) is countermandable before acceptance or assent; 1 *Strange* 166.

V. BUT in this case, the dissent of Smith was fully expressed. Smith's letter to the plaintiff, dated 25th August, 1799, although the writer does not apply it to any particular purchase, is clearly applicable to all purchases. There is no peculiarity in the purchase of the land in question that could distinguish it. A caution beforehand not to buy, is a dissent to all purchases; and his reasons for dissenting existed for all, and applied equally for any; he wished to realize all the partnership's funds to make remittances to Philadelphia, to put the concern in such situation as to be closed, if he thought proper. Immediately on his arrival, he gives preparatory notice to dissolve, he expressly tells the plaintiff to make no further purchases from

Philadelphia of goods, he says the same thing of lands, and notwithstanding the idea entertained that this refers to separate lands it appears from a view of the whole subject to embrace all purchases.

1. FROM the design and spirit of the letter, which would controul any restricted meaning of words loosely used.

2. FROM Smith's own construction of this letter, as appears from the testimony of Col. Baker, of James Williams, and of J. H. Johnston.

3. FROM the plaintiff's construction of this letter at the time he received it, as appears by the testimony of James Williams, J. H. Johnston, Lilly and Duplantier.

4. FROM Duplantier's construction of this letter. It is, therefore, fair to understand this letter as all the parties did at or about the date of the transaction growing out of it. If it were doubtful whether the impressions this letter made on the plaintiff conveyed Smith's intentions respecting this purchase, Smith's frequent declaration of his dissent, in the presence of many witnesses, would remove that doubt and shew his mind fully on the subject. It will, therefore, follow from the testimony that the plaintiff in annulling the first purchase did so with the fair and honest motive of satisfying Smith. If he did consider himself authorised, previous to Smith's letter, his opinion was so far changed afterwards as to induce him to undo what he had done, to re-

East. District. *June* 1815.

KEMPER vs. SMITH.

move all causes of complaint, by taking the purchase on himself.

VI. BUT the plaintiff is viewed in the light of an agent; how he could be an agent for Smith, in the purchase of land for the partnership, is not conceived; he was then, if at all, an agent for the partnership, but the partnership did not extend to land purchases; his agency in the partnership is defined in the articles. As a partner he is a principal and no agent. *Watson on P.* 2. He is not constituted the agent of Smith, nor of Kemper & Co.; if he were the agent he would bind his principal, for if in the purchase he contracted as agent, it was not in his own name, but for Kemper & Co.; see *Pothier on Contracts* 334, "it is not he, the agent, that contracts, but his principal," and yet in this case his principal, (if any) was not bound, and therefore could not have contracted. Besides, if he were an agent to make the purchase, he was also an agent to annul it; for an agreement may be waved with the concurrence of the parties, *Powell Contracts*, 412 (and we may add) or their agents. A case is cited shewing that "no "person, who undertakes the management of the "business of another, can abandon it." Does this mean any thing more than that he who engages as an agent shall not neglect the business of the principal? or that a person who even voluntarily undertakes shall not occasion injury to the

person whose business he manages ? as in *Powell on Contracts*, 364 *to* 369, when injury, occasioned by neglect on an officious undertaking, makes the undertaker liable, and see the case of Coggs vs. Bernard, mentioned in Powell. Altho' I am prohibited from doing an injury, I am not compelled to do a service or benefit. This is the only case that can be brought to make the plaintiff an agent, yet it cannot apply, for 1st. he occasioned no injury : 2d. he did not undertake to manage Smith's business, nor the business of the partnership in any other manner than as a partner.

THE other case cited from Domat, is where "an agent has bought for another." This applies to a *constituted* agent. If his transactions are gainful, the benefit must result to his constituent ; if he act with a certain degree of imprudence, he must suffer for it. This cannot apply to a person who is under nō obligation to act for another.

VII. BUT although, as a partner, the plaintiff had no right to bind the firm, and of course none to affix its signature : although he be not the agent of Smith, nor of Kemper & Co. still it is contended that the plaintiff, as a partner might extend his powers as such by adding to them those of a proxy or attorney. If he had discretionary powers, they bound the partnership ; that

East. District. *June* 1815.

KEMPER vs. SMITH.

they do not is the opinion of the Court. If his powers only extend to binding himself they are not those of an attorney. If the other partner is bound by every act of his copartner which is "for his utility" then indeed one partner is agent for the other, not only in the partnership concern but universally, and provided the act is *at the time* advantageous, whatever subsequent events may occur to effect a change; the other is bound *nolens volens*: with such an absurdity growing out of this principle it cannot surely be applied to a partner.

VIII. THE law relating to the *negotiorum gestor*, is regulated by positive statute, *5th part.* 12, 26: it relates only to cases where there is some business in which the principal has an existing interest, and to the same effect is *Pothier*, 168; there must be an affair in which the principal is interested: the *negotiorum gestor* cannot *create one* for his principal without his knowledge, for this conclusive reason that by 5, *Partid. tit.* 12, *law* 20; the *negotiorum gestor* has an action against his principal for his disbursements and expences, if *bona fide* incurred. Now, it would be monstrous to make a man pay the price of the land, or the expense of conveying it, wherever an officious friend might think it for his interest to make a purchase for him.

IX. SUPPOSING Kemper to have a right to purchase for Smith, subject to his ratification, as the parties agreed that the sale should be completed before a notary, until this was done, he had a right to rescind the agreement, 5 p. 5, 6.

X. IF Kemper's purchase continued to the benefit of Smith, it could only be from the time of his ratification, because there was neither express nor implied authority, and in the intermediate time he had the same right to rescind that he had to purchase.

XI. IF a decree should be given in favor of Smith, for the one half, as the legal title is in Kemper, he ought not to be divested, but on a full and final settlement, and payment by Smith of all what he owes to Kemper on their partnership account.

THE Court allowed a re-hearing: but required counsel to confine their arguments to the following questions.

1. WHETHER a person, after having created an interest for another, can destroy that interest, before the other has signified his refusal to accept it ?

2. How far a partner may bind his firm in contracts which, though not contemplated by the articles of copartnership, are entered into for the utility of the firm and for the better management of its business ? *Postea, vol. 4.*

East. District. *June* 1815.

HARANG vs. DAUPHIN.

HARANG vs. *DAUPHIN.*

HARANG vs. DAUPHIN.

An appeal lies, tho' the sum recovered be under $300 when that sued for is above.

THE plaintiff had brought suit for a trespass on his land, praying that one thousand dollars be allowed him for the injury he had sustained; and obtained a verdict and judgment for $170, in the Court of the Parish and City of New-Orleans. The defendant prayed an appeal, which was denied him, on the ground that the sum recovered was under $300. On an affidavit of these facts *Duncan* moved for a *mandamus* to the Parish Judge commanding him to allow the appeal. The *mandamus* did issue, and the appeal was allowed. See the case, *vol.* 4.

KRUMBHAAR vs. *LUDELING.*

Drawer of a bill may shew he drew it as agent.

MATHEWS, J. delivered the opinion of the Court.* Suit was brought in the Court below by the appellant, on a bill of exchange drawn by the appellee in his favor, on F. & H. Amelung, which was accepted by them, payable at the Bank of the U. S. in Philadelphia; and was afterwards protested for non payment. The insufficiency of the protest and want of regularity in the notice to the drawer as required by law, have been insisted on by his counsel, before this Court, as exonerating him from any obligation to pay the bill. It does

*MARTIN, J. did not join in this opinion, having been of counsel in the cause.

not appear, from the record of the proceedings in the District Court, that any opposition on these grounds, was there made to Ludeling's liability on the bill of exchange; and from the evidence in the case, which we are compelled to examine and weigh in order to ascertain the facts (no statement having been made in pursuance of the act of the legislature) it is our opinion that in respect to these things, due diligence has been observed by Krumbhaar the holder and payee of the bill, and consequently the drawer cannot on this account be exonerated.

DURING the progress of the suit in the Court below, the parties, in conformity with the statute regulating the practice of our courts, have, on various occasions, resorted by interrogatories to each other for evidence, and the opinion of the District Judge, to regulate their answers, has in several instances been required, and when given, as often excepted to by the counsel in the cause. Although we do not consider these opinions and exceptions to be very important, in the decision of the case, yet it may be proper briefly, to observe that, in our opinion, the Judge has not erred in them.

AT the trial of this cause, several questions of law were made and offered by the counsel of the appellee, requiring the opinion of the District

East. District. *June* 1815.

KRUMBHAAR vs. LUDELING.

Court, which comprise the legal merits of this case. 1st. Whether a person, acting in the avowed character of agent, is liable personally? 2d. Can it be proved by parol or other evidence that the defendant (here the appellee) signed the bill of exchange as agent, when the agency does not appear on the bill; but the plaintiff had knowledge of his being such? 3d. There being a variance between the bill as stated in the petition and the bill produced in evidence, (viz.) the former being *for value received* and the latter for *value* as advised; is not the variance fatal?

I. THE first of these questions involves no difficulty; and has been properly solved by the Court below. "A person acting avowedly as agent, is not liable personally" for any act legally done in his capacity as such.

II. To decide on the second question it becomes necessary to enquire a little into the nature of contracts originating in bills of exchange (as laid down by the law merchant) which is said to be "a system of equity founded on the rules of equity; and governed in all its parts by plain justice and good faith." A bill of exchange forms a written contract, carrying with it evidence of the consideration on which it is founded and it is scarcely ever necessary, that a plaintiff in an action on it should prove that he gave a consideration; and in

no case is it open for the defendant to prove that he received no consideration, unless in an action, brought against him by the person, with whom he was immediately concerned in the negociation of the instrument. Thus between the drawer and acceptor, and the drawer and the payee, the want of consideration may be questioned.

A BILL of exchange, forming a written contract between the drawer and payee, which creates an obligation on the former, to pay the amount, provided the latter uses legal diligence to obtain payment from the person on whom it is drawn; and fails to get it, according to a general rule of evidence, no parol testimony can be admitted to prove any contract different, from that made by the bill itself. But this rule does not preclude enquiry into the consideration, as in the present case, between the drawer and payee.

THE attempt of Ludeling to shew that he acted merely as agent for the Amelungs, in drawing the bill on which this suit is commenced, can be considered properly in no other light, than an offer of evidence to shew a want of consideration, in the written agreement, and that for this reason he is not bound to fulfil any obligation, which might otherwise have resulted from it. There is no doubt of the personal liability of the drawer of a bill of exchange who signs it without expressing his agency, when it passes into the hands of third persons, having no knowledge of the circumstan-

East. District. June 1815

KRUMBHAAR vs LUDELING.

ces under which it was drawn ; and between whom and the drawer, the law will not allow the consideration to be enquired into. The appellee having signed, without expressing for whom he signs, is clearly liable on the face of it. But he is at liberty to shew a want of consideration, and any circumstances of fraud or violation of good faith on the part of the appellant, which may be sufficient to exonerate him from this apparent liability ; the suit against him, being brought by a person " with whom he was immediately concerned in the negociation of the instrument."

If then Ludeling shews that he was a mere agent for the Amelungs throughout the whole of this transaction, and that within the knowledge of Krumbhaar, the bill is not binding on him, because he is not a party to the contract and as it relates to him it is without consideration ; and the attempt, on the part of the appellee to enforce it, is a violation of that evident justice and good faith, which ought to direct and govern in all contracts.

III. As to the third question, it may be observed that the bill of exchange making a part of the plaintiff's petition, we are of opinion that the Judge of the District Court did not err in admitting it in evidence, as the admission of it does not violate the rule, which requires that the *allegata & probata* must agree.

IV. To the only question, now remaining in the cause, which is one of fact, the verdict of the jury answers so correctly that we deem it unnecessary to go into any analysis of the testimony, as the general tenor of the evidence completely supports it: for it cannot be doubted that Ludeling acted solely as agent in drawing the bill.

IT is, therefore, ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

Ellery and *Smith* for the plaintiff, *Duncan*, *Livingston* and *Robinson*, for the defendant.

AUTHORITIES cited *Chitty* 87, *Lex Merc* 620, 1 *Bos. & Pul.* 652. *Walwing vs. St. Quintin*, 2, *T. R.* 718, *Rogers vs. Stephens* 1 *Caines* 157. *Hoffman vs. Smith*, 7 *Mass. T. R.* 452, *Warden vs. Tucker* 1. *Pothier* 146, 157, 1 *T. R.* 408, *Buckerdike vs. Bollman. Max. Pock. Dict.* 27, 102, 103, *Chitty* 27. *Comyns on Contracts* 252, 253. 5 *East.* 148 *Appleton vs. Bisks*, *Comyn's Dig. verbo Attorney* C. 19. 1 *East.* 434, 2 *Id.* 142 3 *Esp. Rep.* 266. 1 *Pothier on Obligations* 55, 2 *Dallas* 223, *Peake's Ev. (Am. ed.)* 165.

East. District. *June* 1815.

SEGHERS vs. SYNDICS OF PHILLIPS.

SEGHERS vs SYNDICS OF PHILLIPS.

A suit against Syndics, on a rule of Court, fixing the attorney's compensation is not a Friday cause, in the Parish Court of Orleans.

MARTIN, J. delivered the opinion of the Court. The plaintiff states that by a rule of the Parish Court of New-Orleans, the syndics were ordered to pay him $458 for his expenditures and services, as attorney of the estate, liquidated by the Court; that they have funds in hand, and have neglected to file a tableau, or statement of the affairs of the estate, as they were ordered to do, by a rule of Court, whereby they have become personally liable.

THE answer contains a general denial and alleges that the orders of Court referred to are *ex parte*, irregular, illegal and void.

THE word *defence* not being endorsed on the answer, the plaintiff took judgment, as on a Friday cause, in presence of the defendants' counsel, who resisted it on the ground that the cause was not such as could be tried on a Friday, without giving notice.

CAUSES, thus called Friday causes, are defined in the rule of the Parish Court. "Causes on bills "of exchange, promissory notes or other com- "mercial instruments, or on balances of accounts "adjusted between creditor and debtor."

THIS Court is of opinion that the Court below erred in not sustaining the objection, made

East. District. June 1815.

SEGHERS vs. SYNDICS OF PHILLIPS.

by the defendants' counsel and in persisting to consider the present suit, as one of those defined in the rule, and that the defendants were improperly compelled to try the cause, without the regular notice.

THE rule must be confined to the cases detailed and cannot be perhaps extended to similar ones. But the case before us has no similarity, with any of those in the rules. These are cases in which the obligation of the defendant appears on the face of the instrument, which requires no proof except that of its genuineness. Here, the orders of Court give to the plaintiff no claim on the persons or private property of the defendants; they only settle his claim on the estate. His claim on the defendants must be made out by evidence *dehors* these orders, viz. that money sufficient to satisfy the plaintiff has come to the hands of the defendants.

THE judgment of the Court below must therefore be reversed, annulled and made void, and

IT is ordered, adjudged and decreed that the cause be remanded for trial below, with direction to try it as an ordinary cause.

MICHELL vs. *AYME.*

Indorsee must prove the hand of his indorsers.

THIS was an action against the acceptor of a bill of exchange. The plaintiff admitted that the

East. District. *June* 1815.

MICHELL vs AYME.

bill was his property before the acceptance and that the hand of the drawer was forged. The defendant resisted the payment, because a forged bill is nullity, and what is null can produce no effect. His acceptance, he contended, created no obligation, because it was given in the belief that the bill was a true one ; error vitiates every contract. He contended that the drawee could not derive any right from a bill absolutely null and void, and having none, could not transfer any. Lastly, he held the plaintiff could not recover, because the bill being his property before the acceptance, if he sustained a loss, he could not impute it to an error, into which he was led by the defendant.

THE authorities adduced in his defence, were from the Roman, the French, and the Spanish laws, which, he insisted are alone to regulate a contract entered into within the city of New-Orleans.

1. FROM the Roman law, were invoked the well known maxims, *nemo plus ad alium transferre potest quam ipse habet. Non debeo melius conditionis esse quam autor meus, a quo jus in me transit.* No one can transfer a greater right than he has.

Si quis indebitum ignorans solvit, per hanc actionem condicere potest. Dig. lib. 12, *tit. b. l.* 1. *s.* 1.

Quod indebitum per errorem solvitur aut ipsum aut tantumdem repetitur. Id. l. 7. Same principle, *Id. l.* 18. Whatever has been paid through error may be recovered.

2. FROM the French laws, *Domat* was cited, who says, that engagements contracted through error, or without consideration, or upon a false consideration, are null. 1 *Domat*, 126, *liv.* 1, *sect.* 1. *art.* 7.

THE same principle is also found in 1 *Pothier on Obligations.*

THE bearer, who has received the amount of a bill from the drawer, is bound to warrant the genuineness, *garantit la vérité*, of the endorsements and of the bill. *Jousse's Comm. on Ord.* 1673, 249. He who pays a bill, ought to know well the signature of the drawer, otherwise he runs the risk of paying twice; but, he will have his recourse on him who has improperly received the amount. *Id.* 360, 300.

THE defendant next shewed that, from a parere of the merchants of Lyons, given in 1777, it appears that the acceptance of a bill, the signature of which has been discovered to be forged, does not bind the acceptor to pay it. The bearer is obliged to submit to the radiation of the acceptance, and has his recourse against those who have given him the bill. Indeed, the acceptance can only relate to the signature of the drawer. If that be declared a forgery, the acceptance, of which it was

East. District
June 1815

MICHELL
vs
AYME.

the foundation, becomes void and gives no right to the bearer. Further, if the bill had been paid by the acceptor, the bearer would be bound to refund its amount: payment having been obtained on a false title. For it is in an incontestible principle that that which is false, can produce no effect. 1 *Ency. Jurisp.* 90, *Verbo Acceptance.*

THE bearer of a bill warrants the genuineness of it, and of all endorsements. If the drawer, deceived by the forgery of the drawer's signature, has paid it, when the forgery will be discover d, he will cause himself to be repaid by the person, who received the amount of it. Several arrests have decided this. *Masson & Leclerc's Instructions, &c.* 232, *ch.* 18.

3. THE same principle is also established by a Spanish authority. The bearer of a bill absolutely warrants the genuineness of the bill, and of all its endorsements: *es enteramente garante de la validacion de ella, y de todos sus endosos.* 3 *Febrero, add. part.* 1, 375, *n.* 52.

THE plaintiff relied entirely on English and American authorities.

1. THE English are, 1. *Wilkinson* vs. *Lutwitch* (in 1724.) The proof of an acceptance is a sufficient acknowledgment on the part of the acceptor, who must be supposed to know the hand writing of his correspondent. 1 *Strange*, 648,

but it was said the evidence would not be conclusive.

2. *Jenys* vs. *Fowler & al.* (in 1720.) The defendant offered to prove the bill to be a forgery, by calling persons who were acquainted with the hand of the drawer: but the Chief Justice would not admit this, from the danger to negociable notes, and he strongly inclined to think that even actual proof of forgery would not excuse the defendants against their own acceptance, which had given the bill a credit to the indorsee. 2 *Strange*, 946.

3. *Price* vs. *Neal.* If a forged bill be accepted and paid by the drawee, he shall not recover the money back. *Lord Mansfield* said it was incumbent on the plaintiff to be satisfied that the bill drawn upon him, was in the drawer's hand, before he accepted and paid it, but it was not incumbent on the defendant to inquire into it. 3 *Burr*, 1354. 1 *W. Blackst.* 390.

4. *Smith* vs. *Chester*, *Buller*, *J.* said—When a bill is presented for acceptance, the acceptor looks only to the hand-writing of the drawer, which he is afterwards precluded from disputing: and it is on that account that an acceptor is liable even though the bill be forged. *T. R.* 655.

5. *Master* vs. *Miller.* The same Judge quotes this doctrine, as having proceeded from an eminent and learned Judge in another place. "For half "a century there have been various cases, which

East. District. *June* 1815.

MICHELL *vs.* AYME.

"have left the question of forgery untouched. If "a bill be forged the acceptor is bound." 1 *T. R.* 335.

6. *Jourdan* vs. *Lashbrook* (in 1792) *Lord Kenyon* said, that when the drawer accepts a bill, he admits that the bill was signed by the person, by whom it professes to have been made. *Ashhurst J.* said, that bills of exchange are instruments meant, in their nature, for general circulation, and to pass from hand to hand, and every man who puts his name upon them, pledges his faith to the public that all circumstances appearing on the face of them are true. *Lawrence, J.* said an acceptor is only prevented controverting the hand-writing of the drawer, from the mischievous consequences of men giving credit by their acceptances, and then controverting that which must be supposed to be in their knowledge: and this applies to every fact which the acceptance admits. 3 *T. R.* 604.

7. WHEN a bill is drawn payable to a fictitious person, or order, it is in effect a bill payable to bearer, 3 *T. R.* 481.

8. IN the case of *the U. S.* vs. *the Bank of the U. S.* in the Circuit Court of the U. S. for the Pennsylvania District, in October 1800, before Patterson, J. and Peters, J. Ingersoll, for the defendant, admitted and stated that if a man accepts a forged bill, or draft, he is not only conscien-

tionsly, but legally bound to pay it ; and each of the Judges expressly declared their concurrence in the admission. 4 *Dallas* 235, *in notis.*

9. IN the case of *Levi* vs. *the Bank of the U. S.* in the Supreme Court of Pennsylvania, it was held that the Bank were bound to allow the amount of a forged check presented by the plaintiff and entered to his credit, in his cash book, in the usual form of a deposit of cash, *Id.* 234.

LASTLY. Elementary writers of merit advance the position, that forgery of the drawer's hand is no plea for the acceptor. *Chitty*, 355. *ch.* 4, *Kydd* 302, *ch.* 9.

MATHEWS, J. delivered the opinion of the Court.* The appellant brought suit in the late Superior Court of the Territory of Orleans on a bill of exchange, accepted by the appellee and which he suffered afterwards to be protested for non payment, having discovered it to be a forgery. Judgment was given in favor of Aymé the defendant, and present appellee, in that Court, and being amongst the last rendered before the change from the Territorial to the State Government, a new trial was granted, and the cause regularly transfered for trial to the District Court for the first Judicial District of the State ; and from a

*MARTIN, J did not join in this opinion, having been of counsel in the cause.

East. District June 1815.

MICHELL vs. AYME.

final judgment therein rendered in favor of the appellee this appeal is taken.

THE petition, or declaration, contains only one count and that, such as is customarily used in actions brought by an indorser against the acceptor of a bill of exchange. The answer of the appellee, who was defendant in the Court below, admits his acceptance, but contends that he is not bound to pay, because the bill is not genuine and true, but forged and false, the signatures of the drawers which appear affixed to it being counterfeited and forged. He denies also the signature of the indorser. To this answer the appellant, who was plaintiff in the Court below, demurred, and there being a joinder in demurrer on the part of the defendant, two questions of law were raised for the decision of the Inferior Court, and which must now be decided by this Court. 1st. Is the acceptor of a forged bill of exchange bound to pay it, to the holder, when it does not appear that he took it on the credit of the acceptance and when there is no proof that his situation in relation to it, has been altered by such acceptance? 2d. Can the indorser of a bill recover against the acceptor, without proving the hand writing of the indorsers?

As to the first of these questions, altho' the Court is inclined to think that it ought to be decided in the negative; yet as we have no doubt on the second, that at last a decision of it will carry

the cause in favor of the appellee and affirm the judgment of the District Court, it is deemed unnecessary to give any positive opinion on the legal effects of an acceptance, such as that on which the present action is founded. To determine on the second question it is necessary to examine, whether from the pleadings in the case, and according to the law and custom of merchants the appellant can recover? It is a rule with very few exceptions that an indorsee of a bill of exchange cannot recover against the acceptor, without shewing his right and authority by proving the hand writing of his indorsers. When the bill is indorsed in blank, it is sufficient to prove the signature of the first indorsee. But where there are several indorsements filled up to the order of a number of different persons, in an action against the acceptor perhaps it would be necessary to prove the signatures of all down to the holder. When a bill is made payable to bearer, in an action against the acceptor commonly the only proof necessary is that of the acceptance.

IT is admitted by the counsel for the appellant to be a general rule of the merchants, that in actions brought by indorsees, against the acceptors of bills of exchange, the hand writing of the payees, or indorsers must be proved, in order to warrant a recovery. But he insists that the case before the Court ought to be considered as one forming an exception to this general rule, because

East. District. *June* 1815.

MICHELL *vs* AYME.

(says he) the bill being forged the payee must be considered as a fictitious person, and then it stands on the footing of one made payable to bearer ? And if this be not true, that the acceptor having made his acceptance whilst all the endorsements were on the bill, no proof of them ought to be required from the holder.

CASES have been decided in the courts of England, and even some which were carried before the Supreme Court of that kingdom, wherein the principle has been established that bills of exchange drawn in favor of fictitious payees, may in some particular instances be considered in the light of those made payable to bearer, and thus form an exception to the general rule which requires proof of the endorsement. From the history of these cases, to enable the holder, of such a bill to recover against the acceptor, as on a bill payable to the bearer, it is necessary, that he should prove. 1. That the payee is fictitious, and 2. That the defendant knew this, at the time when he accepted the bill : or, 1. That the payee is fictitious and, 2. That the defendant had given a general authority to the drawer, &c. to draw bills upon him in the name of fictitious payees. *See Kidd on Bills, &c.* 268. The pleadings do not admit any facts, which bring the appellant's case within either of those exceptions to the general rule, nor can we perceive any other circumstance, attending the cause, which will entitle him to the

benefit of them or any other exception so as to cause the bill on which he founds his action to be considered as one payable to bearer. He can get no relief from the obligation imposed on him, to prove the hand writing of the indorsers, from the circumstance of the indorsements being on the bill at the time of the acceptance. For, altho' it is laid down as a general rule that the acceptor is bound to know the hand writing of his correspondent, the drawer; yet he is supposed to look no farther: and an indorsee who sues him is obliged to make out his right and authority to recover, in the same manner as if the bill had been indorsed after acceptance. *See* 1 *D. & E.* 650, *&c.*

BEING of opinion that the judgment of the District Court is right, and well founded in law and justice, it is not for us to enquire into the axioms and reasoning by which the Judge of that Court supports it.

IT is, therefore, ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs, &c.

ABAT vs. *DOLIOLE.*

When the event of a suit is only to determine to whom a debtor is to pay, he may be a witness.

MARTIN, J. delivered the opinion of the Court. The defendant, who is sued as indorser, alledges that a note of $6,800 was placed in the hands of

East District. *June* 1815.

ABAT *vs.* DOLIOLE.

the plaintiff's brother, as a security for his indorsement of the note, on which the suit is brought, of another note indorsed by the defendant also, and of some other notes, indorsed by other persons; that all this was in the plaintiff's knowledge and by him communicated to the defendant.

THAT the maker of the note has since failed, and previous to his failure, means were taken by the plaintiff's brother to withdraw the large note, so as to deprive the defendant of the security it afforded him.

THAT the plaintiff and his said brother are brokers and concerned in this transaction, and that it is by a connivance between them or the real owner of the note in suit (whom the defendant alledges to be some other person than the plaintiff) that he is thus deprived of his security.

ON this, the defendant builds his hope of relief; expecting that the Court will interfere so as to prevent a recovery, or at least the payment of the money over to the plaintiff (if he appears to have connived as is above stated) until the note of $6,800 shall be forthcoming so as to afford the defendant the hope of being thereby secured, as he alledges he ought to.

To establish this connivance he has offered the production of the original, and amended bilan of the maker of the note, stating the amendment was

made by the plaintiff's brother. These papers the Court below refused to admit, and the defendant has thereon taken a bill of exceptions.

WE think the Court below properly rejected the papers. As the plaintiff had no agency in the confection or alteration of these papers, they could not be read in evidence against him. The defendant should have shewn that some other than a *blood* relation subsisted between the plaintiff and his brother. The circumstance that the latter held in deposit a note, which was in some manner to secure the payment of that on which the present suit is brought, affording not the least spark of evidence or presumption of a connexion between the two brothers, from which it may be inferred that the act of one of them binds the other.

THE defendant next offered the maker of the note as a witness for the same purpose, but the Court rejected him also, as he had no release from his creditors and notwithstanding his *cessio bonorum*, was still bound to pay the note. The defendant excepted to the opinion of the Court.

THE witness was certainly an improper witness to prove the payment or extinguishment of the debt arising on the note, and was properly rejected as to that. But he might give evidence of any fact by which the right of the plaintiff or his indorsee might be affected. For the success of either party left the witness in the same obligation to pay the

East. District. June 1815.

ABAT vs. DOLIOLE.

note ; it being indifferent to him, whether the plaintiff continued, or the defendant became, his creditor.

As the answer alledges a fraud committed by attempting an illegal payment or extinguishment evidently made at a time, when the maker of the note could not effectually change the situation of his affairs, it appears the object of the defendant was rather to shew the fraud, than to establish a payment or extinguishment which could have no effect. But the Court was correct in rejecting him for the same reason as induced the rejection of the papers.

THE defendant farther excepts to the opinion of the Court below, in overruling his exceptions to the plaintiff's answers to his interrogatories.

To the latter branches of the first and third interrogatories there is not any answer, and that to the first branch of the third is very insufficient.

WE think the Court erred in overruling the exceptions of the defendant, in this respect.

THE judgment of the Court below must therefore be and is annulled, reversed and made void and the cause remanded, with directions to sustain the defendant's exceptions to the first and third interrogatories, and to require the plaintiff to put further and more sufficient answers.

BOURCIER vs. *LANUSSE*, *ante* 581.

East. District.
June 1815.

BOURCIER
vs.
LANUSSE.

Former judgment amended.

Moreau, for the defendant. The question submitted to the Court in this case was whether Madam Bourcier, who sold jointly with her husband several slaves and other property held in common by them, to Paul Lanusse, may cause the sale to be rescinded, on the hypothecary action which she has against the estate of her husband, for the reimbursement of her dowry.

I. THE marriage contract, though it was executed in Louisiana, ought to be regulated by the custom of Paris, to which the parties expressly subjected themselves.

1. GENERALLY the effects of all contracts are settled by the laws and usages of the places where they are executed. *Civil Code* 5, *art.* 10. *Partida* 3, *tit.* 14, *law* 15. *Huberus, translation* 3 *Dallas* 371.

2. BUT this rule receives a limitation, when the parties contemplated another country, than that where the contract was executed. *Huberus ibid* 3. *Dallas* 374.

3. IN marriage contracts the parties are at liberty to make such agreement as they please, even contrary to the laws and usages of the place where they are : provided the said agreement be not repugnant to good morals. *Civil Code* 322, *art.* 1. *Partida* 4, *tit.* 11, *law* 24. *Pothier on cont-*

East. District. June 1815.

BOURCIER vs. LANUSSE.

munity of goods between husband and wife in the preamble of the work, 1 *and* 2 *French Pandectes* 222 *to* 224.

4. PARTIES may even subject their marriage contract to the laws of another country different in its custom, from that where the contract is executed. *Civil Code* 232, 233, *art.* 2, 3, 4. *Pothier, Community of goods, no.* 282, 285 *and* 286, *p.* 335, 338 *and* 339. *French Pandectes* 283 *to* 286. 3 *Discussion on the French Civil Code*, 36 *to* 39.

5. THE Spanish laws are not repugnant to that liberty. *Partida* 4, *tit.* 11, *law* 24.

II. BY the custom of Paris, the wife, who sells some property jointly with her husband, is deemed thereby to have renounced *ipso facto* to her right of mortgage on the thing sold, and she could not afterwards attack the sale, under the pretence that her husband had left no property to reimburse her dowry. *Jousse in his commentaries on the Custom of Paris. See his notes on the* 232 *art. of that Custom. vol.* 2, *p.* 52 *and* 53. *French Pandectes, num.* 159 *and* 163, *p.* 193, 194, 199 *and* 200.

III. BY the Spanish laws the express renunciation of the wife, to her right of mortgage, was only required when a sale was made by the husband of

his own private property or of the dotal property or paraphernalia of his wife.

NOT a word of the sale of the property held in common. Not a word of the sale that was made by the wife jointly with her husband. 1 *Febrero Juicios, book* 1*st chap.* 3, § 1, *number* 40, 41, 46 *and* 48, *p.* 197, 200 *and* 201. 2 *Febrero Contratos, chap.* 4, § 4, *num.* 12, *p.* 114.

BUT by the Civil Code the Spanish law was in some degree altered.

THE wife cannot alienate her private property, but with the consent or authority of her husband. *Civil Code*, 29, *art.* 39.

THE wife may sell her paraphernalia with the authority of her husband: in such sale, what would be the necessity of a renunciation on the part of the wife? *Civil Code*, 335, *art.* 58.

THE wife could not bind herself jointly with her husband by the Spanish law, except as far as she had been benefited thereby. By the civil law it seems that the wife now may, since the Civil Code grants her a mortgage for her indemnity with respect to those obligations. *Civil Code* 333, *art.* 53, *num.* 3. 2 *Febrero Contratos, number* 114, *p.* 105.

IV. SUPPOSING the renunciation be necessary, Madam Bourcier, must act against the purchaser or possessor of the plantation sold by her husband

East. District
June 1815.

BOURCIER
vs.
LANUSSE.

during the marriage, since she has not consented to that sale.

V. AT any rate Mad. Bourcier is bound to act at first against a sale made by her husband, of a plantation, during marriage to which she gave no assent.

VI. ACCORDING to *Febrero*, the renunciation of the wife in case of the sale, even of a dotal estate, must be made in the same form as in cases in which she bound herself as surety for her husband, or *in solido* with him. 1 *Febrero Juicios, ch.* 3, § 1, *p.* 392. *Contratos, ch.* 4, § 4, *num.* 115 & 117.

Livingston, for the plaintiff, declined any argument.

By the Court. The former judgment requires but a small alteration : and the Court amend it,

IT is further ordered, adjudged and decreed, that the real property and slaves, bought by the defendant, from the plaintiff's husband, be sold to make the sum of four thousand dollars due to her, with legal interest since the date of the judicial demand and costs of suit : legal notice being given to third possessors, if any there be.

ROGERS vs. *BEILLER*.

East. District. *June* 1815.

ROGERS vs. BEILLER.

THE plaintiff brought suit as special administrator and the defendant denied the legal existence of such an officer.

The office of special administrator is legal and is not abolished.

Morse, for the plaintiff. It is unnecessary to enquire whether the office of special administrator existed under the French and Spanish governments, before the occupation of this country by the United States. Yet, if it existed, the Governor-General and Intendant had the power of filling it, and this power passed undoubtedly to the person who made the ordinance. Admitting that the power did not exist, still it was the duty of the United States to provide for the preservation of the rights of absent heirs and in discharge of that duty, the ordinance was issued.

BY the act of congress, passed to enable the President of the United States to take possession of this country, it is provided that all the military, civil and judicial powers exercised by the officers of the Spanish government shall be exercised in such a manner, and shall be vested in such person or persons, as the President of the United States shall direct.

IN pursuance of this act, the President of the United States issued a commission to the then Governor of the Mississippi Territory, authorising him to execute within the ceded territories,

East. District. *June* 1815.

ROGERS vs. BEILLER.

all the powers and authorities exercised by the Governor and Intendant thereof, except that of laying new taxes and granting land.

VESTED with such powers, this officer, within a few days after his arrival, passed ordinances for licencing retail dealers; for incorporating the Bank of Louisiana, the ordinance under consideration and one for establishing a court for the trial of causes. These acts of authority, no doubt, met the eye of the government of the U. States and were neither disapproved nor disowned. The office, therefore, had once a legal existence, and

IT never was abolished. It is true the Civil Code, 172, authorises Parish Judges to appoint curators to vacant estates; it is a fixed principle of law that no office can be abolished by implication, neither can a statute while it can stand with that which apparently repeals it. The Court will sustain two offices, if they can possibly stand together, 6 *Bacon*, 373. A repeal by implication shall not be allowed: acts seemingly repugnant shall, if possible stand.

THE office of the special administrator, and that of a curator to a vacant estate are distinct, and the powers of the one quite different from those of the other. The special administrator is restricted, he can only interfere with the estates of transient persons, who have resided less than two years within the city of New-Orleans: his powers ex-

pire on the appointment of an administrator, and since the Civil Code on that of a curator : he has nothing to do with real property. His office has been recognised by the legislature, since the promulgation of the Civil Code, 1809, *ch.* 4, *sec.* 5, and suits have been brought since and sustained in the Superior Court of the late territory.

Depeyster, for the defendant. The act of congress of the 31st of October 1803, was the one under which the Governor was acting, when he issued the ordinance, under consideration. This instrument bears date of the 7th of September following, and although at that time the act of the 26th of March had passed, yet by the last clause of it the former act had been continued till the 1st of October following. So, it is from the first act that the authority is to be derived.

THIS act speaks of the military, civil and judicial powers exercised by the officers of the existing government. These powers were to be vested and exercised in such a manner as the President should direct. His commission requires his grantee to exercise his powers *according to law*. Those, therefore, who support this ordinance ought to shew us the law of Spain, under which the officer who issued it was authorised to act.

HIS were the power of a Governor and Intendant. The first officer in the Spanish colonies is

East. District. June 1815.

ROGERS vs. BEILLER.

the military chief, he presides in the Cabildo, in the body in which was vested the power of making local regulations. He was vested with judicial authority both appellate and original; he had power of granting vacant land, though this was at time shared with the Intendant and it is believed lately was the province of the latter.

IT is true the history of the country, under the domination of Spain, affords glaring instances of the exercise of supreme, nay despotic power, by the Governor-General. The abolition of the sovereign council which existed, under the French government by O'Reilly, the erection of the Cabildo, and the promulgation of part of the Spanish laws by the same officer, evince that he had other than executive powers. But, in the preamble of the instruments, by which these acts of authority were announced, reference is made to special powers granted by the King, from which it clearly appears that the ordinary functions of a Governor did not extend to them.

LASTLY, if the office had ever a legal existence it was abrogated by the Civil Code which transmits all the powers of the special administrator to other hands. *Civil Code*, 172.

MARTIN, J. delivered the opinion of the Court. Two questions present themselves for the decision of this Court.

1. DID the office of special administrator, claimed by the plaintiff ever exist?

2. IF it did, was it afterwards abrogated by any subsequent law?

I. IT is said it never existed for offices cannot be created in any other manner than by law, and the person, who issued the ordinance creating this, had no legislative power.

IT is not easy for us to determine what were the legitimate powers of a Governor-General and Intendant of the Spanish province of Louisiana. It is clear, that some of the persons who filled that office exercised legislative power. The extent of the authority of that officer was certainly often enlarged by instructions from the crown and the limits of it which perhaps were never accurately defined in practice, cannot at the present time be with facility discerned. The President of the U. S. seems to have believed that the commission he granted to the then Governor of the Mississippi Territory, vesting him with the powers of Governor-General and Intendant of Louisiana, clothed the grantee with some legislative authority, since he excepted the right of taxation from the grant. The grantee, issuing the ordinance creating the office, construed his commission as extending to the exercise of legislative authority in this and some other instances, in which he was not censured; the Superior Court of the late territory si-

East. District. *June* 1815.

ROGERS vs. BEILLER.

lently sanctioned his conduct by sustaining suits and giving judgments in favor of the officer and the legislature, as late as in 1809, imposed certain duties on him. Till the institution of the present suit, during the whole territorial government, no doubt appears to have been entertained of the constitutional and legal existence of the office. Many estates, some of great value, have been settled by the special administrator. It would be attended with monstrous inconveniencies, if by declaring that the office never legally excited the Court was to annul all the transactions of the various incumbents who have filled it.

WHEN in the case of *Stuart vs. Laird*, 1 *Cranch* 309, a judgment was sought to be reversed, on the ground that the Judges of the Supreme Court of the U. States had no right to sit as circuit judges, not being appointed as such: or in other words that they ought to have distinct commissions for that purpose; that Court thought it sufficient to observe that practice and acquiescence for a period of several years, commencing with the organisation of the judicial system, afforded an irresistible answer, and had indeed fixed the construction; that it was a cotemporary interpretation of the most forcible nature, and this practical exposition was too strong and too obstinate, to be shaken or controlled, they concluded that the question was now at rest and ought not now to be disturbed. Here practice has fixed the proper construction of

the powers of the officer who issued the ordinance; the judicial and legislative authorities of the late government have sanctioned the construction. *Optima legum interpres consuetudo.* If it was an erroneous one, it is the case to say *communis error facit jus.* It began with the organisation of the American government here; the question is to be considered now as at rest, and ought not to be disturbed.

II. THE power and duty of the officer were confined to the estates of persons dying in the city of New-Orleans, without having a residence of two years, leaving neither lineal relations, nor collateral ones of the first degree, nor husband or wife.

SOME months after the creation of the office, courts of probates making a general provision for the administration of the property of intestates, were established by the legislative council in 1805. This was never held to interfere with the duties of the special administrator, whose office it was to secure the property till the appointment of an administrator.

IN 1808, the Civil Code was published. This act purports to be a digest of the law, theretofore in force; a declaratory act. The person, who, according to it is to attend to the estate of an intestate, in the absence of the next of kin is called a curator. The expression of the civil law corres-

East. District. June 1815.

ROGERS vs BEILLER.

ponding to that of the English or American law; *administrator*.

WE conclude that neither the act of the legislative council, nor the Civil Code have repealed the ordinance under consideration.

A general provision does not repeal a particular one by *implication*. If a particular thing be given or limited in the preceding part of a statute, this shall not be altered or taken away by subsequent *general* words of the same statute. 6 *Bacon's Abr.* 231, *verbo Statute. Stanton* vs. *Univ. of Oxford*, 1 *Jones*, 26. In this case, the provision was not in the same statute, but it was in one *in pari materiâ* and all such are to be taken as if they were *one*. *Douglas*, 30.

UNLESS the ordinance cannot exist with the Civil Code, it must be holden unrepealed. Now, the duties it imposes are not more at war with the provisions of the Civil Code, than with the act of the legislative council. We conclude it is not repealed.

THE judgment of the District Court must therefore be annulled and reversed, and the cause must be remanded thither with directions to proceed to the trial.

MAYOR &c. OF NEW-ORLEANS vs. *CASTERES.*

East. District. June 1815.

MAYOR &c. OF N. ORLEANS vs. CASTERES.

The city of New-Orleans derive no title from Congress to land as part of the commons

MATHEWS, J. delivered the opinion of the Court. The plaintiffs and appellees, in this suit, claim title to a certain lot of ground situated on the Bayou Road, as being a part of the commons of the city, to which their claim has been recognized and confirmed by an act of congress, entitled an act, &c. 8 *Laws U. S.* 303.

FROM the tenor of the petition it appears to be a petitory action, in which to entitle them to recover, they must shew a right and title in themselves, not only against the appellant but all other persons; in other words they must gain by the strength of their own title and not by the weakness of their adversary.

THE difficulties under which the Corporation labours, in ascertaining their right, and particularly the extent of their claim to the commons of the city, we have heretofore had occasion to witness.

THE U. States, by the act of congress above alluded to, have clearly recognized the title of the city to commons adjacent to it and within 600 yards from its fortifications, and confirmed said title, under a proviso which it is not here necessary to notice. Whether this act be viewed as making an original grant and concession, or as a confirmation of an ancient right and claim, by which the United States have relinquished all pretensions, to the property therein mentioned, and

East. District. *June* 1815.

MAYOR &c. OF N-ORLEANS *vs.* CASTERES.

vested a complete title in the city; it appears to us that a fair construction of it will confirm the claim of the Corporation, under it, to such lands alone adjacent to the city, as were commons at the time of passing the act and had been previously such, and that any right, title or claim which the United States may have to real property within the limits from the fortifications, prescribed by the act, other than the commons, does not by this grant, or recognition and confirmation, pass to the city.

As the appellees claim under this act of congress, it now becomes necessary to examine whether there is any thing in the evidence or statement of facts, which shews the lot, the subject of the present contest, to be of that description of property, embraced by the words and meaning of the law. At the time of passing the act cited, was it land belonging to the domain of the United States, subject to the right of commons of the city of New-Orleans, or was it held by the general government as a property separate and distinct from those commons? It is evident, from the facts in the cause that the lot of ground to which the city corporation claims title, in the present suit, and of which they pray to be maintained in their possession and property, did not at the time, when Louisiana was ceded to the United States, nor at the period when the act of congress was passed, make a part of the commons of the city. On the contrary it is stated expressly, to be a

part of a plantation belonging, first to Mde. Delavillier, who sold it to Mde. de Morant, this last to Moreau, who sold it to Nemengues ; from whom it was taken, in the year 1792 by the Baron de Carondelet, for the use of the fortifications, on giving him an indemnification.

Now as the lot was not a part of the commons at the time of passing the act of congress, under which the appellees claim, they have derived no title from it. They have made out no satisfactory title in any other way and consequenty have no right to recover.

It is, therefore, ordered, adjudged and decreed that the judgment of the Parish Court be reversed and annulled ; and this Court proceeding here to give such judgment as ought there to have been given, do further order and decree that judgment be rendered for the appellant, with costs of suit.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East District. *July* 1815.

MITCHEL vs M'MILLAN.

EASTERN DISTRICT. JULY TERM, 1815.

MITCHEL vs. *M'MILLAN.*

Foreign proceedings in bankruptcy, no protection against debts contracted here

MARTIN, J. delivered the opinion of the Court. The petition states the defendant to be indebted to the plaintiff for the balance of an account current, between the parties, which is annexed.

THE answer admits the debt stated, but avers that on the days of the dates of the first and last items of the account and during the whole intermediate time, the defendant was a copartner in trade, with James Sloan, of Liverpool, in Great Britain, and established at Charleston, S. C. as a branch of the house of Sloane & M'Millan, of Liverpool, as the plaintiff at the time well knew; and that afterwards, viz. about nine months after

the date of the last item, in said account current, the partnership still subsisting, a commission of bankruptcy was awarded, according to the laws of England, against the defendant as, a merchant, shop-keeper and dealer, in Liverpool aforesaid, and sixty days after the issuing of said commission, he obtained his discharge or certificate in due form.

THE plaintiff demurred, and the defendant having joined in demurrer, the District Court gave judgment for the defendant and the plaintiff appealed.

THE question for the solution of this Court is this:

IS a certificate of bankruptcy, duly obtained in England, where, it is admitted, it works a complete discharge of antecedent debts, a bar to a suit brought in this State, by a person residing in the United States, and for a debt contracted there before the bankruptcy?

THE affirmative is supported on the ground, that the laws of commerce are a branch of the laws of nations; commerce being carried on amongst mankind for their common benefit: hence wherever the property of an insolvent debtor may be found, it becomes, it is said, the common pledge of all his creditors, whether natives

East. District. *July* 1815.

MITCHEL vs. M'MILLAN.

or aliens: amidst the wreck of his fortune, all his creditors must fare alike; bankruptcies, therefore, and consequently all questions concerning the condition of the bankrupt are to be determined by the laws and customs of the country, where the bankruptcy was *declared*: the legal forms of that country alone are to be pursued and exclusively adopted, and all the creditors must submit to all the conditions prescribed by the *lex loci*, in the same manner, as all the creditors of a succession are bound to the magistracy of the place where it is *opened*. The discharge which ensues is said to be legal, irrevocable and entire, and to preserve these characteristics, even in foreign countries, with respect to creditors who reside there. A maxim of the laws of nations is invoked, according to which, all judgments and acts of the civil power, altho' emanating from a foreign authority, are to be respected and binding in every country; states owing this deference respectively to each other as to the laws which they have made in their own territories, and as to the application which they have made of them to individuals living under their dominion: neither reason nor political convenience permitting that a man, who is absolved in one place, should be reputed guilty in another, nor that a debtor, liberated by the laws and the tribunals of the place, where he had his domicil, should again remain a debtor, and liable to process if he should happen to remove to ano-

ther place, thereafter. *Cooper's B. L. App.* 29, 32.

SUCH are said to be the leading principles of the laws of France, on the subject of bankruptcy. They were recognized by the Supreme Court of Pennsylvania, in the case of Millar *vs.* Hall, in 1788, 1 *Dallas*, 228. "It is true, says C. J. M'Kean," "though the laws of a particular country have *in* "*themselves* no extraterritorial force, no coercive "operation, yet by the consent of nations, they "acquire an influence and obligation, and in many "instances become conclusive throughout the "world. Acts of pardon, marriage and divorce "made in one country are received as binding in all "countries." He held that the insolvent law of a neighbouring state should enjoy that weight, in the courts of Pennsylvania, which it naturally derived from general conveniency, expediency, justice and humanity; "for mutual conveniency," added he, "policy, the consent of nations and the "general principles of justice form a code which "prevades all nations and must be every where "acknowledged and pursued."

LIVINGSTON, J. in the case of *Van Raup* vs. *Arsdale*, 3 *Caines* 154, expressed his *private* opinion (though he concurred with an opposite *judicial* one) that a *cessio bonorum*, under the laws of a State in which the debtor had his *permanent* re-

East. District. *July* 1815.

MITCHEL *vs.* M'MILLAN.

sidence ought to operate as his discharge, from his creditors in every part of the world.

THIS subject is, however considered, in a very different and quite opposite point of view in the courts of Great Britain, in a case, which is said to have settled the law on this question, *Smith* vs. *Buckanan & al.* 1 *East*, 10 : the Court of King's Bench there holding that a discharge in Maryland was no exoneration from a British debt contracted prior to the bankruptcy. Lord Kenyon saying " it is impossible to assert that a con- " tract made in one country is to be governed by " the laws of another. It might as well be con- " tended that if the State of Maryland had enacted " that no debts due from its own subjects, to the " subjects of England, should be paid, the plain- " tiff should have been bound by it. This is the " case of a contract lawfully made by a subject, " in this country, which he applies to a court " here to inforce : and the only answer is, that a " law has been made in a foreign country, to dis- " charge these defendants from their debts, on " condition of their having relinquished all their " property to their creditors. But, how is that " an answer to a subject of this country, suing " on a lawful contract made here ? How can it " be pretended that he is bound by a condition to " which he has given no assent, either express or " implied ?

IT is not easy to arrive at a clear understanding of this branch of the law, without a close examination of the manner in which it has been expounded by courts of justice abroad and in these states. And as the certificate in the present suit was obtained in Great Britain, it will be peculiarly useful to examine what is the effect of a discharge under the bankrupt laws in that country.

IT seems that it once was a point admitted (and the idea does not appear to have as yet been exploded) that the bankrupt laws of Great Britain had no effect out of the isle. Lord Talbot and Lord Mansfield were of this opinion : a certificate, under a commission in England will not bar a debt contracted in the British West Indies, where there are separate laws and judicatures, *Waring* vs. *Knight*, *Cook's B. L.* 373. *Id.* 522, *Beawes's Lex. Merc.* 543. It has been determined in a case from Virginia, that the English bankrupt laws do not extend to the plantations. *Cleve* vs. *Mills*, *Cook's B. L.* 370, and in *James & al.* vs. *Allen*, 1 *Dallas* 188, Ch. J. Shippen said " the bankrupt laws of England were never " supposed to extend here (Pennsylvania) so as " to exempt the persons of bankrupts from being " arrested."

IN 1779, Lord Mansfield held that if a bankrupt has money due to him *out of England*, as in St. Kitts or Gibraltar, the bankrupt laws so far

East. District. *July* 1815.

MITCHEL vs M'MILLAN.

vest the debts due him, in his assignees, that the debtors in these places shall not turn them round by saying they are accountable to the bankrupt: but, if before the bankruptcy the money be *bona fide* attached in those places, the asssignees shall not recover the debt.

TOWARDS the middle of the last century (1744) in the case *ex parte Burton*, 1 *Atkins* 255, which was that of a debt contracted before the debtor's *cessio bonorum*, in Holland, Lord Hardwicke observed that the cession, in the country in which it was made, discharged the person, but not the future property of the debtor. This has been considered as implying the opinion of the Chancellor to be, that if it had discharged the future property also, the decision would have been a different one, and consequently the bankrupt law of Holland would have been taken as the guide of the court. This reasoning is far from being conclusive.

IN the case of *Ballantine* vs. *Golding*, in , cited in *Cook's B. L.* Lord Mansfield is said to have holden as a general principle that "where "there is a discharge by the law in one country it "will be a discharge in another." But, as in weighing the decision of courts, we much rather attend to what is *done*, than to what is *said*, we cannot conclude that his lordship admitted this principle *lato sensu*: for this is quite inconsistent with his decision, in the case of *Waring* vs.

Knight, already cited, in which he held a discharge in England not to be any in the West Indies. In considering the facts of this case *(Ballantine* vs. *Golding)* we find all that it was necessary, and therefore all that it was intended, to decide, is that a discharge in the country where the debtor resides, *contracts the debt* and is discharged, is a discharge elsewhere. Golding resided, contracted the debt and was discharged in Ireland. In the case of *Quin* vs. *Keefe*, 2 *H. Bl.* 553, the court noticed the difference between a certificate granted out of the country, in which the debt was created and one granted in that country, and refused relief on a motion to discharge the bail: it appeared that the debt had been contracted in England and the certificate obtained in Ireland: and the same consideration likely induced the judgment of the court in the case of *Smith* vs. *Buckanan & al.* already cited, in which the debt was contracted in England and the certificate obtained in Maryland.

FROM a view of the English authorities it follows that the tribunals of that country, do not allow the discharge of a bankrupt, obtained abroad, to bar a debt created in England towards a British subject.

WE cannot find that there ever was a decision of the Supreme Court of the United States on the question under consideration. It was twice sent

East. District. *July* 1815.

MITCHEL vs M'MILLAN.

up for final determination, in that tribunal. In the one case, the cause went off on another ground *Emery* vs. *Greenwood*, 3 *Dallas* 369 : in the other, the Court was of opinion that the question was informally presented. *Dewhart* vs. *Coulthaid*, *id.* 409.

IN the Circuit Courts of the United States, it appears to have been thrice determined. In Massachusetts District, in *Emery* vs. *Greenwood*, 3 *Dallas* 369, the parties were both citizens of that district, and the debt had been contracted there : the defendant afterwards removed his domicil to Philadelphia, where he obtained a legal discharge : being afterwards occasionally in Boston, he was sued for the old debt and pleaded his Pennsylvania discharge : the Court, presided by Iredell, J. circumscribed the operation of the discharge to the State, in which it was given. A different decision is said to have taken place in the Rhode-Island district, the Court being presided by Wilson, J. *id. in notis* In the Pennsylvania district, the Court presided by Washington, J. supported the opinion of Iredell, J. saying that a defendant claiming a discharge under a certificate of bankruptcy, obtained in a foreign country, should shew that the debt was created there. *Green* vs. *Sarmiento:* there is not any report of this case : it is cited from *Cooper's Justinian*, 623.

IN the State of Massachusetts, a discharge, under the insolvent laws of another State, has often been holden to afford no protection against a prior debt contracted in the former State. In the case of *Proctor* vs. *Moore*, 1 *Mass. T. R.* 198, the defendant having his domicil in Connecticut, being occasionally in Massachusetts, gave his note to the plaintiff, and returning home was afterwards discharged by the legislature of Connecticut. Being now sued in Massachusetts, he sought to avail himself of the discharge, but the Court held his plea bad, as it did not shew that the contract was made, and the plaintiff resided, in Connecticut, for unless he was an inhabitant of Connecticut, at the time of the contract, the proceedings of the legislature could not bind him : which the Court added they had repeatedly decided.

THE question has met with the same determination in the State of New-York. In the case of *Smith* vs. *Smith*, 2 *Johnson*, 235, the defendant, an inhabitant of Rhode-Island, being on a visit, in Massachusetts, had given his note to the plaintiff, and returning home had taken the benefit of the insolvent laws of Rhode-Island. He was sued in New-York, and the Court held that the discharge could be no bar, out of the State of Rhode-Island. The student will notice this as a much stronger case than any that have been cited. Hitherto we have seen courts protecting their own citizens or

East. District July 1815.

MITCHEL vs. M'MILLAN.

persons trading or residing in the State, against discharges obtained abroad; here is a court exclusively confining the operation of bankrupt laws to the country in which they were enacted: even when the creditors did not give credit, or resided in the State.

IN the case of *Van Raugh* vs. *Arsdale*, 3 *Caines* 154, the Court said "the insolvent laws of "another State, cannot take away the rights of a "citizen of this State to sue here, upon a contract "made here, and which is binding by our laws."

THE first adjudication that is recorded, as having taken place in Pennsylvania, on the subject under consideration, is to be found in the case of *James & al.* vs. *Allen*, Chief Justice Shippen, declared it to be the opinion of the Court, that insolvent laws had never been considered as binding, out of the State, that made them. 1 *Dallas* 191.

SHORTLY after, was decided the case of *Millar* vs. *Hall*, 1 *Dallas* 128, cited in the beginning of this opinion. The defendant resided in Baltimore and was discharged from his debts, under the laws of Maryland. He had received the money, which was the ground of the debt, in Baltimore, but the agreement, under which he had received it took place in Pennsylvania, where the plaintiff had his domicil, and where the suit was brought, and it was holden that his certificate protected him.

This decision is apparently at variance with that given in the preceding one, but only apparently so. The law of Maryland according to the first, is not binding out of that State: in the latter case, the decision is that the law of Maryland is binding upon the debt created there, and justly destroys it, *eodem modo quo construitur, destruitur.* It arose and was dissolved under one law, and being dissolved by the law under which it was created, it must be recognised every where else as rightfully dissolved. It is true, in delivering the opinion of the Court, C. J. M'Kean used á different, but not an opposite or contrary reasoning. But in the decisions of courts we should rather attend to what is *done* by the Court, than to what is *said* by the organ, through which this judgment is conveyed.

In the case of *Thompson* vs. *Young*, 1 *Dallas* 294, and *Donaldson* vs. *Chamberlain*, 2 *Dallas* 100, the defendants being residents of Maryland, and having taken the benefit of the insolvent laws of that State, where protected by the courts of Pennsylvania. In the first case the debt was created in Maryland, as appears from the report and we conjecture that this was the case in the other, as the Court grounded their decision on the authority of *Millar* vs. *Hall*, from which it is probable the case was a parallel one.

In the case of *Haines* vs. *Mandeville*, 2 *Dallas* 256, both parties were British, and the debt creat-

East. District
July 1815.

MITCHEL
vs.
M'MILLAN.

ed and the certificate obtained, in the common country and the defendant was protected by the courts of Pennsylvania ; and under similar circumstances, the parties being French, the defendant was likewise protected in that State, in the case of *Leclerq* vs. *Rouchette*, cited 1 *Dallas* 256.

FROM a review of these American cases, and they are all those to which we have been able to recur, it appears that relief has ever been extended to bankrupts, who had been discharged in the country in which the debt was created, no instance occur in which it was denied. In one case only, *Proctor* vs. *Moore*, the Court appears to have expected, as an additional requisite, that the plaintiff should also have at the time of the contract his domicil, in the country in which the debt was created.

COMPARING the American with British cases, we find no difference in the general conclusion, except in some early decisions, holding the bankrupt laws not to extend to the West-Indies or the American provinces. The courts in England, have, however, so far taken notice of the bankrupt laws of other countries, as to consider the assignment of bankrupts' effects in other countries, altho' in fact made *in invitum*, and consequently allow assignees, deriving their titles under foreign ordinances, to sue in England, for debts due to their bankrupts' estates, *Hunt* vs. *Potts*, 4 *T. R.* 182,

192. We find it no where adjudged, that a certificate obtained out of the country, where the debt was created, afforded any protection out of the country in which the discharge was obtained. In Terrasson's case, on which Mr. Duponceau has favoured the American jurists with the opinion of learned counsel in Paris, we are not satisfied from the statement of facts, that the lawyers consulted intended that what they said should be construed to extend to debts contracted out of Pennsylvania; although it must be admitted that the general way in which they argue leads to that conclusion. *Cooper's B. L. App.*

WE cannot find that in any case, either in England or the United States, persons not domiciliated in the country, in which the certificate was obtained, were bound by the discharge, when the debt was not contracted there. The authority of no adjudged case would support us in solving the question under consideration in the affirmative.

LET us now examine the question according to the ideas of the Civil or the Roman law writers.

THEY all admit, that all business and transactions in court and out of court, whether testamentary or other conveyance or acts, which are regularly done, according to the laws of the place in which they take place, are valid, also in other

East. District *July* 1815.

MITCHEL *vs.* M'MILLAN.

countries, even where a different law prevails and where had they been so transacted they would not have been valid.

THIS principle, however, must be admitted with some caution.

IN testamentary cases, it is also true that the laws of the country where the succession is opened will be binding throughout the world i. e. that if the executor, administrator or curator, dispose of the assets according to the law of the country, he will be protected, even from the claims of creditors residing abroad. But this is only an elucidation of the principle we have deduced from the British and American cases, viz. that the *lex loci* of the contract must regulate it throughout the world. If A. contracts with B. in London and B. dies in Paris, where C. proves the will and has letters testamentary, A's. claim rests on an express contract with B. in London and an implied one with C. in Paris; for C. in taking up the execution of the will and possessing himself with the estate of A. became bound to pay his debts, according to the laws of France: on which the law raises an implied promise to each creditor to pay him what is due to him, according to the *lex loci* of both places respectively; but the mode of payment, the order of precedence, the time, must be regulated in all cases according to the *lex loci* of the country in which letters testamentary are granted.

IN the same manner would be regulated the rights of the creditors of a bankrupt, *against* the syndics, assignees or trustees of the estate. For the obligation of the syndics, &c. which is the correlative of the *rights* of each creditor, is produced by the implied contract, resulting from the acceptance of the office or trust. In considering therefore the original claim of each creditor on the debtor, the law of the place where the contract took place must be the rule; but in considering the mode of payment, the precedence, the proportion and time of payment, the law of the place where the bankruptcy was opened must prevail, because it is the *lex loci*, the law of the place where the syndics, &c. contracted the obligation to manage the estate.

PROCEEDINGS in cases of bankruptcies may well be likened to proceedings on successions. Bankruptcies being successions in cases of commercial or civil death; but the resemblance stops there, the consequences as to the person or future property of the bankrupt or debtor cannot be explained by any thing in the case of a succession, which is that in which the original debtor has ceased to exist both civilly and naturally.

THAT the law of the country where the debt was created must govern the case in the country where the discharge was obtained cannot be denied. The moral obligation becomes a legal one, that is, receives its binding force in *foro legis* from the

East. District July 1815.

MITCHEL vs M'MILLAN.

lex loci, which *eodem modo quo construitur eodem modo destruitur*. The *lex loci* is then that which the parties considered as that which was to enforce the obligation of the contract; it is one to which they gave their assent, they must take it for better and for worse.

BUT to consider the law of the domicil of the debtor, to be changed at his pleasure, as that which is to govern the case, from the circumstance that the bankruptcy was declared there, and thus to allow one party to chuse the law by which the rights of his creditors are to be regulated, would be manifestly unjust. The debtor might seek some remote corner of the world where one tenth of his creditors, and perhaps one single creditor, might dictate the terms of the discharge. Hence, whatever may have been said, *arguendo*, by any judge or counsel, we find no case in which a judge decided that the law of the place, where the bankruptcy was declared, is to be regarded out of it, when that country was not at the same time, that in which the debt was contracted, or the joint domicil of both parties, or when the creditor was not an actual party to the proceedings.

IN most countries, the bankrupt law is meant to protect the honest, but unfortunate debtor, in the acquisition of future property for his own benefit. Humanity would seem to claim that the laws of all commercial countries should be ancil-

lary to each other and that the benign intention of the laws of the country, in which a certificate of discharge is obtained, should not be defeated by the tribunals of other countries in which the person or future property of a discharged bankrupt may afterwards happen to be found. But creditors have also rights, which humanity cannot disregard and which legislatures and courts of justice must protect.

IF it were possible that an universal code of commerce could be devised, by which the proceedings, which precede the issuing of a certificate of bankruptcy, should be so regulated as to allow to present and absent creditors an equal opportunity of having their claims attended to and to contest the pretentions of the debtor to his discharge, then could it be with propriety contended that proceedings in case of bankruptcy ought to have the same effect throughout the world, and equally bind the most distant as the next door creditor. But, alas! very little reflexion must bring the conviction that this is an Utopian scheme. Commerce now embraces the four parts of the world: How is notice to be conveyed to merchants scattered over the surface of the globe? What length of time must elapse, if the opportunity is afforded, as justice requires, to each creditor to establish his right, take notice of, contest and disprove the allegations of the debtor? Will not the necessary delay defeat the object in view?

East. District July 1815.

MITCHEL vs. M'MILLAN.

How many creditors must prefer the abandonment of their rights, rather than incur the trouble, vexation and expense attending the assertion of them! If an universal legislature is required to frame this universal law, how are we sure that any thing short of an universal judiciary will prevent partiality in the execution of it?

BUT, it is asked, shall the unfortunate debtor be ever without relief, shall he pine and languish in misery as long as he lives? The claim of misfortune to ease its burden on the shoulders even of the fortunate must be sparingly enforced. Humanity can require no more for the bankrupt, than that, in the country in which he has asserted his claim to relief, and against those to whom he has afforded an opportunity to contest it, his person and future property should be protected. Perhaps it is inexpedient that this protection should extend to a wider circle. It will, in most cases, afford to the exertions of honest industry a scope ample enough to insure to the honest debtor and his family, a decent support. If the means of launching into more extensive speculations are lost to him, his misfortune will, in some degree, compensate the damage his creditors have sustained, as his example will restrain others from rash enterprises.

UNTIL now, we have considered all bankrupts as persons merely unfortunate, not tainted with fraud, nor chargeable with any indiscretion.

The law, however, presumes fraud in all cases of bankruptcy. That of Spain has a particular provision on this respect. *Menendez* vs. *Larionda's Syndics*, *post* 705.

THAT of France for along time subjected persons, who ceded their goods to their creditors, to ignominy; in some provinces they were compelled to wear a green cap. Fraud being legally presumed in a bankrupt, the greater part of insolvent are fraudulent debtors: out of those free from fraud, the greater number is perhaps chargeable with rashness and indiscretion. While the law, therefore, cannot extend its benign influence to both creditors and debtors, we cannot wonder that it should deny it to those among whom the fraudulent, the rash, and the indiscreet constitute a majority.

FROM the best consideration we are able to give to the question under examination we must solve it in the negative, and declare our opinion that a certificate of bankruptcy obtained abroad cannot protect in this State the person or future property of the debtor, against a claim of a citizen of the U. States, for a debt contracted in the U. States.

THIS abstract proposition extends itself with more force to the present case, as the certificate was obtained in England, where the tribunals avowedly deny to bankrupts, discharged in other countries, any protection against the claims of

East. District. July 1815.

MITCHEL vs. M'MILLAN.

British creditors, for debts contracted in Great Britain. For, from this circumstance, we must conclude, that the law being thus settled there, little care is taken in proceedings on a bankruptcy to protect the interest of absent creditors. Indeed, in the present case evidence is spread on the record that the proceedings ripened into a discharge in the short space of sixty days; a time too short for American creditors to have received notice and attended.

A CIRCUMSTANCE has been noticed by the Court, from which the defendant meant to place his case in a different point of view, than the one in which the Court think they must consider it. It is stated that the defendant, at the time of the contract, and in the knowledge of the plaintiff, was a partner of Sloane of Liverpool, and kept a branch of the house of Sloane & M'Millan, in Charleston, S. C. from which the inference is intended to be drawn that the debt was created with a British house, and, therefore, with a reference to British laws. In other words, that the defendant, at the time the debt was created, had his domicil in Liverpool, when he kept a trading house in Charleston, S. C. and that as the certificate was obtained in the country in which the debtor had a domicil when he contracted the debt, the debt must be dissolved by the effect of the certificate. The partners of a mercantile house have each his

respective domicil, where they respectively dwell. Otherwise a man might have his domicil where he never sat his foot. But, admitting the domicil of the defendant to have been in Liverpool, still he must fail according to the decisions in *Proctor* vs. *Moore* and *Smith* vs. *Smith*.

THE District Court, in the judgment of this Court, erred in sustaining the defendant's plea: its judgment must, therefore, be reversed and annulled,

AND this Court, for the reasons aforesaid, doth adjudge and decree that the plaintiff do recover the sum acknowledged by the defendant to be due and claimed in the petition, with interest from the date of the first process and costs.

EMMERSON vs. *GRAY & TAYLOR.*

If A. buys goods for B., giving his own note, and draws on B., who pays the draft, the goods cannot, on the failure of A., be arrested in the hands of another agent of B.

MARTIN, J. delivered the opinion of the Court. This suit originated by a writ of sequestration obtained by Emmerson on thirty-two bales of cotton, by him sold to J. F. Gray and Jno. Taylor, of New-Orleans, on a credit of sixty days, for which he took their note: they having failed about nine days after the sale.

GRAY and TAYLOR, of Philadelphia, intervened claiming the cotton as their property; their claim being resisted by Emmerson, the issue was tried

East. District. July 1815.

EMMERSON vs GRAY & al.

by a jury and there was a verdict and judgment for Emmerson. Gray and Taylor appealed.

THE statement of facts, after admitting the sale and failure as above stated, sets forth:

THAT one of the firm of Gray and Taylor came to New-Orleans, some time before the purchase of the cotton, and having determined to put a stop to the unlimited drafts of J. F. Gray and Jno. Taylor on Gray & Taylor, resolved not to accept any of them, beyond the amount of any quantity of produce which J. F. Gray and J. Taylor should place in the hands of an agent of Gray and Taylor; accordingly Bell, a person who had been a clerk of J. F. Gray and J. Taylor for about two years before, was so at the time and continued so till their failure, was chosen for this purpose. He received from Gray and Taylor the keys of two ware-houses, which were rented by J. F. Gray and J. Taylor and by them underlet to Gray and Taylor, and was informed that J. F. Gray and J. Taylor were to buy a quantity of cotton for the account of Gray and Taylor, which they were directed to lodge in Bell's hands. Orders were given to Bell to place all such cottons in the ware-houses aforesaid, giving a receipt therefore to J. F. Gray and J. Taylor and ship it, and when the ware-houses were emptied to return the keys to J. F. Gray and J. Taylor, and either draw on Gray and Taylor

for the rent, or desire J. F. Gray and J. Taylor to debit Gray and Taylor for it.

Soon after this J. F. Gray and J. Taylor delivered to Bell a parcel of cotton (other than that which is the subject of the present suit) took his receipt as agent of Gray and Taylor, and drew a bill for the amount on Gray and Taylor. The bill reaching the drawees by mail, before Bell's receipt, acknowledging he was in possession of the cotton, they refused to accept; but the receipt arriving next mail, the bill was accepted and paid at maturity.

The thirty-two bales, now in dispute, were next purchased by J. F. Gray and J. Taylor, from Emmerson, on a credit of 60 days and their note given accordingly, they then placed eighteen of these bales in the hands of Bell, for the account of Gray and Taylor, taking his receipt therefore, made a draft on Gray and Taylor, which they used in their own affairs, and which reaching the drawees, after the receipt of Bell, was duly honored.

J. F. Gray and J. Taylor, were in failing circumstances for about three years before their failure, which was not occasioned by any loss, within that time. Bell had access to their letters, books and papers. To his knowledge, his agency for Gray and Taylor was not known in New-Orleans out of the house of J. F. Gray and J. Taylor: but Gray and Taylor had not requested that it might be kept secret.

East. District.
July 1815.

EMMERSON
vs.
GRAY & AL.

J. F. GRAY and J. TAYLOR, during the agency of Bell, bought other produce for Gray and Taylor, but nothing purchased during that time, went to the discharge of any debt due by J. F. Gray and J. Taylor to Gray and Taylor. These transactions being kept perfectly distinct from all others.

THERE was some produce of J. F. Gray and J. Taylor in the ware-houses by them underlet to Gray and Taylor.

J. F. GRAY and J. TAYLOR failing, before the note given to Emmerson for the cotton became due, he sequestered the cotton, exercising his *droit de suite*.

GRAY and TAYLOR intervened claiming it as their property, denying the right of Emmerson to arrest it, as it was no longer in the possession of his vendee, and as they had acquired a fair title thereto by receiving a delivery of and paying for it.

THE only question for the determination of this Court is whether the transaction on the part of Gray and Taylor be attended with fraud, as the property sequestered had actually passed out of the possession of the vendees.

EMMERSON'S counsel believe they discover it in the double capacity of Bell, in this transaction. He was at the same time the clerk of J. F. Gray and J. Taylor and the agent of Gray and Taylor.

WE are of opinion that this circumstance may be sufficient to awake our suspicion and to excite our enquiry; but when we compare it with those which precede, attend and follow, it does not appear that it ought to have any influence on our decision.

WE notice the absence (as far as the facts stated go) of any circumstance from which any collusion between J. F. and J. Taylor and Gray and Taylor might be inferred. That the real object of Gray and Taylor in appointing Bell their agent was to remove the produce for which they were to pay, from the control of J. F. Gray and J. Taylor, is manifested by their refusal to honor their bill, while the evidence of the delivery of the cotton remains behind, and the ready honor they do the bill as soon as the evidence is received. Hence the appointment of Bell, as an agent of Gray and Taylor, appears to us a correct transaction.

LET us now examine the transaction which has given rise to the present dispute.

WE have seen that when the partner of Gray and Taylor was here, he mentioned to Bell his directions to J. F. Gray and J. Taylor; we now see the latter accordingly make a purchase; when that is done in the words of the statement of facts "they (the bales) were weighed" placed in the deponent's (Bell's) hands, and by him "stored." He gave his receipt, engaging to hold and deliver

East. District. July. 1815.

EMMERSON vs. GRAY & AL.

them to the order of Gray and Taylor. Seeing this receipt, the latter accept a bill and finally pay for the cotton.

WE see nothing that authorises us to call this a fraudulent purchase.

THE counsel of Emmerson contends that admitting the fairness of the purchase, still he has his *droit de suite*, because the cotton lies still in the possession of his vendees.

IN the possession of the vendees, 1. because J. F. Gray and J. Taylor pay rent to the proprietors of the ware-houses in which the cotton is found.

2. BECAUSE it is under their control, being under that of their clerk.

3. BECAUSE the cotton being bought of him for the account of Gray and Taylor, they are his vendees.

I. ALTHOUGH the underletting of the ware-houses of J. F. Gray and J. Taylor was not publicly known, it does not appear that there was any intention to keep it concealed: and the cotton being stored in their ware-houses is not a circumstance that may have tended to deceive Emmerson. Since it was previous to his parting with the cotton. If Gray and Taylor have voluntarily, and with the view to induce persons to trust J. F. Gray and J. Taylor, filled ware-houses, apparently occupied by the latter, with produce and

thereby aided them in obtaining a credit; which they otherwise could not have had, those who may thereby be injured may offer this circumstance, as a reason why they should be paid out of these goods, with a success of which we are not now to decide. But Emmerson may not say that this circumstance produced any injury to him, the cause cannot be posterior to the effect.

II. IT does not follow that was is under the control of the clerk is necessarily under that of his employers. The conduct of Gray and Taylor manifests their opinion that produce in the hands of Bell was safer than in those of J. F. Gray and J. Taylor, for they refuse to pay for cotton till they hear of its passage from the hands of the latter into those of the former.

III. ALTHOUGH the cotton was purchased for Gray and Taylor, they were not the vendees of Emmerson; J. F. Gray and J. Taylor did not bind them by the contract. Emmerson took the notes of J. F. Gray and J. Taylor; the liability of Gray and Taylor was never to begin till after their agent had actually produce in his hands: and then they were to accept and pay drafts to the amount.

UPON the whole, no fraud, in our opinion, can be attributed to Gray and Taylor from any circumstance before us. If they lessened the stock

East District. July 1815.

EMMERSON vs. GRAY & AL.

from which the creditors of J. F. Gray and Jno. Taylor were to be paid by withdrawing from it the cotton, they increased it by accepting and paying drafts to the amount of its value. This transaction was not disadvantageous to the mass of creditors.

IF by this transaction they have furnished to J. F. Gray and J. Taylor the means of destroying the lien of Emmerson on the cotton; they have enabled them to do what was lawful to be done; what Emmerson does not appear to have cared to prevent. What without the aid of Gray and Taylor, might have likely been effected without difficulty.

J. F. GRAY and J. TAYLOR are not even charged with having embezzled the proceeds of the bill; the counsel of Emmerson, in argument, advances it went to satisfy more pressing creditors.

WERE we to give judgment against Gray and Taylor, the estate of J. F. Gray and J. Taylor would be enriched by the value of the cotton to the detriment of Gray and Taylor. *Neminem oportet cum alterius detrimento locupletari.*

IF Emmerson does suffer; he suffers because he has *trusted*, he is the victim of his confidence, Gray and Taylor gave no credit; they therefore ought not to lose.

THE judgment of the District Court is, therefore, annulled and reversed, and this Court orders and decrees that the appellants Gray and Taylor recover the eighteen bales of cotton, found in the hands of Bell their agent, and that the appellee deliver the same, and pay all costs.

MENENDEZ vs. *LARIONDA'S SYNDICS.*

The creditor of a bankrupt, on a note, may establish his claim by other proof than that of the consideration given for it.

MATHEWS, J. delivered the opinion of the Court. In this case the appellant, opposes the homologation of a tableau of distribution, offered by the appellees, as syndics of the estate of Larionda, an insolvent debtor, because they refuse to place him on said tableau, as a creditor of the insolvent for the amount of $ 2,132 which he claims on a promissory note given by said Larionda.

ON the bilan of the insolvent, he is placed amongst the creditors, by receipts and accounts, for the same sum, which he claims by a note of hand. This circumstance amounts to nothing more than a confession, on the part of Larionda, that he owed to him the sum thus stated, at the time of his failure, but does not, legally, preclude the mass of the creditors from contesting the fairness and legitimacy of his claim. This they have done in the present case by the answer of the Syndics, to the opposition made by the appellant as above stated; in which they declare the

East. District. *July* 1815.

MENENDEZ vs. LARIONDA'S SYNDICS.

promissory note, offered as evidence of the debt due to him by the insolvent, to be fraudulent and fictitious, and that the appellee never gave any consideration for it.

IT is unnecessary here to notice the circumstance of the note being lost, and the numerous exceptions heretofore taken in the cause, to the opinion of the Judge of the inferior court in relation to the evidence necessary, to establish its existence and amount; by the decision of this Court the cause was remanded for further trial, *ante* 256. On this trial, it appears from the record, that the counsel for the appellant relying on the evidence which he had offered to the jury, the counsel for the appellees moved the Court to instruct the jury that it was incumbent on the appellant in the Court below to prove the consideration of the note mentioned, before he could recover thereon against the Syndics, and the Judge having given an opinion to the jury as required, this opinion is excepted to by the counsel for the appellant, and on this exception alone the case comes before this Court.

THERE is no statement of facts; and the record contains nothing by which it appears, what was the amount of the testimony given by the appellant. Yet we are required to decide on the correctness or incorrectness of the opinion deli-

vered by the Judge below, to the jury, as if the note had been fully proven and substantiated. Let us then consider the case, as if the note had never been lost, and was fully proven to have been given by the insolvent.

In cases of insolvency and *cessio bonorum*, it is lawful for the creditors to dispute amongst themselves not only the preference in the payment of their credits, but also the legitimacy of their claims; and when the latter occurs, the acknowledgment of an instrument in writing, and confession of a debt on the part of the insolvent is proof sufficient to establish the debt as against him but not against the rest of the creditors, for it is presumed to be fictitious and false, and made with a deliberate intention, to elude their right. And although it should appear by a note of hand, it does not prove its legitimacy, because of the facility with which it may be antidated, to the prejudice of other creditors: and for this reason *he who does not prove his credit by other means*, ought not to be considered amongst the true and lawful creditors; much less can any confession of the insolvent, after the cession of his property, affect the interest of his creditors, for then he is not at liberty to confess debts or acknowledge writings under private signature [*See Febrero del Juicio de Concurso, no.* 33.] The same principles are laid down in the *Curia Philipica, Tit. Conocimiento,* 111. *no.* 9. In this last author it

East. District. *July* 1815.

MENENDEZ vs. LARIONDA'S SYNDICS.

is also recognized as a principle of law that in all cases of failures fraud is to be presumed. [*See lib.* 2. *Comercio Terest.* 11. *Falidos no.* 16.

FROM these authorities, we deem it correct to lay down the following, as legal axioms; 1st. in all cases of bankruptcy fraud is to be presumed on the part of the bankrupt; and 2d. when the truth and legality of the claim of any creditor of the bankrupt or insolvent is disputed by the other creditors, the confession of the debt by him or his acknowledgment of any instrument under his private signature, is not sufficient to establish the truth and justice of such claim against the other creditors; but on the contrary, he is bound to support the fairness and validity of his credit in some other way, or by some additional proof.

WE will consider the present case as one in which the mass of the creditors of Larionda, a bankrupt, are contending against the truth and legality of the claim of the appellant, as a creditor of the said Larionda. To support this claim or credit he gives in evidence a note of hand of the insolvent. This is not sufficient against the other creditors to prove its legality and justice; he must give faith to it by some other or additional means. In what other way he is bound to make out his claim or what other proofs ought to suffice in such a case, we do not find sufficiently laid down in any author. It certainly is just and reasonable to allow a person thus situated to do

away the presumption of fraud which goes to destroy his credit, by any legal evidence in his power, which might convince the minds of a court or jury of the fairness and justice of his claim; such as proving the consideration for which the note was given, as required by the Judge of the Court below in the present case, or it might be in his power to shew that the note was given at a period when no suspicion of fraud could possibly attach to the transaction, by proving the real time when it was given, without respect to the date it purports to bear on the face of it.

It is urged by the counsel for the appellant that a decision in this case, requiring proof of the consideration of the note, the subject of dispute between the present parties, will tend to establish the very inconvenient doctrine of requiring holders of promissory notes, in all cases, to prove their validity by shewing the considerations, for which they were obtained. As to this, it is sufficient to observe, that any principle, which may be herein settled, will be applicable only to cases similar in their circumstances.

As it appears, from the opinion of the Parish Judge and exception to it, that the appellant was required absolutely to prove the consideration of the note, and not offered the alternative of proving any other circumstance, which might have been sufficient to convince the minds of the court and jury, of the truth and legality of his claim: such,

East. District. July 1815.

MENENDEZ vs. LARIONDA'S SYNDIC'S.

for example, as shewing the note to have been executed at a time which ought to destroy all presumptions of fraud in the transaction : and as it is the opinion of this Court that the Judge below erred in confining the appellant to the proof of the consideration of the note alone,

IT is, therefore, ordered, adjudged and decreed, that the judgment rendered in the inferior Court be reversed and annulled. And it is further ordered, &c. that the cause be sent back to the Parish Court to be there again tried, with instructions to the Judge to admit the appellant to the legal proof of any circumstance, which may shew the truth and justice of his claim against the appellees.

POLICE JURY OF N. ORLEANS vs. *MAYOR, &c.*

The jury of police of the parish, and the city council of New-Orleans have both the right of establishing a ferry across the Mississippi, before the city.

DERBIGNY, J. delivered the opinion of the Court. In this case the Jury of Police of New-Orleans complain of having been disturbed by the Corporation of the city, in the enjoyment of a right which they exercised under the laws of the state of causing a public ferry to be kept at the place called the powder-house, opposite to the city, and pray to be quieted in that enjoyment. The Corporation, without denying the fact, assert that they are authorised by law to oppose the establishment and landing of a ferry under the autho-

rity of the plaintiffs, within the limits of the city.

THE question then is, not whether both parties have a right to establish ferries within their respective limits: but simply whether the appellants can prevent the appellees from continuing to cause a ferry to be kept opposite to the city.

BY a law enacted in 1805, provision was made for the establishment of ferries in the different counties of the territory; and to that effect the county judge was authorised to grant *as many* licenses as he should in his discretion think fit. At the same time, it was provided that when any water, over which a ferry should be erected, should divide two counties, the license obtained in either should be sufficient to enable the licensed person to transport persons or goods to and from either side of such water. And to secure to such licensed persons the profit arising from the establishment of such ferries, it was further provided that, within the distance of one league from them, no other individual should be suffered to transport, for profit or hire, goods or persons across the waters over which they should be kept. When the territory was afterwards divided into parishes, instead of counties, those regulations of course became applicable to the parishes.

UNDER that law, and ever since then, the parish of New-Orleans caused a ferry to be kept at the place commonly called the powder-house; and

East. District. *July* 1815.

POLICE JURY OF N. O. v. MAYOR, &c.

until the year 1813, enjoyed that right without disturbance.

AT the beginning of that year a law was enacted entitled "an act further defining the organisation, authority and functions of police juries," by which the establishment of ferries, heretofore left to the parish judge, was made a part of the functions of those juries; and as by one of the provisions of that act, the city of New-Orleans was severed from the rest of the parish, *quoad* the administration therein attributed to the police juries, and directed to exercise within its limits the functions committed to those juries, the appellees seem from thence to have taken it for granted that they alone had a right to establish ferries to cross the river opposite to the city, and by their interference prevented the parish jury of New-Orleans from farming out to the highest bidder the powder-house ferry.

IN that opposition we think they were not supported by the law. According to the spirit and even to the latter of the act of 1805, each parish administration may establish within its limits *as many ferries as they please*; and the ferrymen thus established have a right to transport goods and persons to and from both sides of the water, whether the opposite side belongs to an other parish or not; and that they must also have of course the right of a free landing on such opposite shore needs hardly be noticed.

THE parish of New-Orleans and the city certainly stand here in the same relation as two parishes divided by a river. Each has the same rights; and each is equally bound not to disturb the other in the exercise of those rights.

IT is, therefore, adjudged and decreed that the judgment of the District Court be affirmed with costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

West. District. *August* 1815.

WESTERN DISTRICT, AUGUST TERM, 1815.*

BROUSSART vs. TRAHAN'S HEIRS.

BROUSSART vs. *TRAHAN'S HEIRS.*

If counsel take an exception and offer to draw a bill; but the judge insists on doing it himself, and neglects it, the Court will order it to be drawn and sent up.

MARTIN, J. delivered the opinion of the Court. At the trial of this cause below the counsel for the defendants, now the appellants, took several exceptions to the opinion delivered by the Court, and was proceeding to draw a bill of these exceptions when it was suggested by the Court, and not objected to on either side, that the Court should strictly note each objection with its opinion thereon, and that such objections or exceptions with said opinion should go up and make part of the record; and the counsel mentioning he had rather draw the bill, the Court insisted on drawing it.

* DERBIGNY, J. was prevented by indisposition from attending the Western District, this year.

The counsel, after the adjournment, pressed the Judge to draw the paper he had promised to prepare, but without effect.

ON this statement, which is not contradicted by the opposite counsel, this Court is moved for a *mandamus* to the Judge directing him to draw and transmit the opinion and objections aforesaid.

THIS motion is resisted on the ground that the counsel ought to have drawn out his bill of exceptions, notwithstanding what was said by the Court.

THIS Court is of opinion that, it would have been vain to draw out the bill of exceptions, as the Judge declared his refusal to seal it. That where a Judge refuses to seal a bill of exceptions, the practice is to issue a *mandamus* to seal it, if it be truly stated; that the party ought not to suffer from the conduct of a person he could not control.

IT is, therefore, ordered, that a *mandamus* issue commanding the District Judge to draw up and transmit under his seal to this Court, a note of the opinion by him given and excepted to by the defendant's counsel, or shew cause why he does not.

See post, 725.

West. District. *August* 1815.

LALANDE vs. FONTENAU & AL.

LALANDE *vs.* FONTENAU & AL.

Causes that were sent out for trial in a neighbouring district, before the act of 1814 are to be sent back.

MARTIN, J. delivered the opinion of the Court. This action was instituted in the late Superior Court of the late Territory and on the change of government transferred to the Parish of Natchitoches. It remained there till the 6th of April 1814, when the appellees, the defendants, obtained an order to have it transferred to the Parish of St. Landry in the neighbouring district, the District Judge at Natchitoches having been of counsel therein, under the 2d section of the act supplementary &c. approved the 26th of March, 1812.

THE plaintiff before the trial, moved the District Court of the Parish of St. Landry, to send back the record to the Parish of Natchitoches for trial, as by law, in the opinion of the plaintiff's counsel, it was bound to do, but the court thinking differently, an exception was taken, on which this Court is now to pronounce: the cause having been tried below and judgment given against the plaintiff, who has appealed.

THE appellant relies on the act to prevent persons being sued, &c. approved on the 7th of March 1814, the first section of which provides that no person having a permanent residence shall be sued out of his parish; while the second section repeals the section of the act of the 26th of March 1813, under which the District Judge of Natchitoches ordered the transfer of the cause, and

directs that when the District Judge shall have been of counsel, the cause instead of being tranferred, shall be tried by the Judge of one of the neighbouring districts, who shall attend for that purpose. The counsel contends that the latter act having been approved by the Governor thirty days before the motion made, in Natchitoches, to remove the suit, ought to have been the rule of action: while the counsel for the appellees contends that the acts of our legislature are not immediately in force, on being approved by the governor, that they must be promulgated, that three days after the promulgation they are in force, at the seat of government and in the other parish, after the expiration of a number of days proportioned to their distance.

ON this point the Court is of opinion with the counsel of the appellees, and as in this case there is evidence that the acts of 1814, were not printed till the 11th of June, the act of 1813, was still in force on the 6th of April, when the transfer was ordered.

BUT the counsel for the appellant urges that on the moment that the act of 1814 came into operation, the act of 1813 ceased to have any force and effect, and the Court of the Parish of St. Landry was without any authority to try the cause, the latter act pointing out a different place of trial, a different mode of proceedings, any thing in the former act notwithstanding.

West. District. *August* 1815.

LALANDE vs. PONTENAU & AL.

THE counsel of the appellees contends, that the second section of the act of 1813 was not repealed by the act of 1814, which speaks only of the *seventh* section of that of 1813.

THIS Court is of opinion, as the seventh section of the act of 1813 treats of juries only, and no ways relates to any provision of the act of 1814, the counsel of the appellant is correct in rejecting from the sentence "any thing in *the seventh section of* the act supplementary, &c." the words *the seventh section of*, which are manifestly a clerical error and insignificant. We think that the sound construction of the act of 1813, required that the inconveniency of trying causes theretofore removed out of the parish, in which they originated, should instantly cease and that any of the parties to these suits was, as soon as the act came in operation, entitled to demand the return of the record to the original parish; the legislature recognises this retransfer as a *consequence* of the *express* repeal of the section under which the transfer had been made: this Court, deeming that the same section was *impliedly* repealed by the act of 1813, must likewise recognize the return of the record as the consequence of this repeal. The consequences of an *implied* repeal being the same as those of an *express* one.

West. District. *August* 1815.

LALANDE *vs.* FONTENAU & AL.

THIS Court is of opinion that the District Court erred, in proceeding to the trial of the cause, and it is, therefore, ordered, adjudged and decreed that the judgment be annulled and reversed, and that the cause be remanded with directions to the District Court, to cause it to be transferred to the Parish of Natchitoches.

BLUDWORTH vs. *SOMPEYRAC.*

A citation needs not be headed "the State of Louisiana."

Compound interest, at 10 per cent. disallowed.

THE District Court had overruled the objection of the defendant to the citation, which was not headed with the words "the State of Louisiana," contrary to the provision in the 6th section of the 4th article of the constitution which provides that the style of all process shall be "the State of Louisiana."

THE suit was on a note for a sum of $4,663, 35, given to secure the payment of $3,854, in two years: which allowed interest at the rate of 10 1-2 per cent. contrary to law, *Civil Code* 408, *art.* 32. The calculation was made by compounding the interest, at the rate of 10 per cent a year.

THESE were the only points before the Court.

MATHEWS, J. delivered the opinion of the Court. This cause comes up on a bill of exceptions, and statement of the case by the Judge of the District Court; by which it appears that

West. District. *August* 1815

BLUDWORTH vs. SOMPEYRAC.

the record contains all the evidence given by the parties on the trial in the Court below.

THE exception, taken to the opinion of the District Judge, is that whereby he ruled the defendant, to answer the plaintiff's petition or suffer judgment by default on a citation which does not contain the words " State of Louisiana."

IT is contended by the counsel for the appellant, that the citation, issued in conformity with the act of the legislative council of the late Territory of Orleans, summoning the defendant to appear and comply with the prayer of the plantiff's petition or file his answer, is a process within the meaning of that section of the constitution which requires the style of all process to be " the State of Louisiana :" and that the Judge of the District Court erred in compelling him to answer to the merits of the suit on a process not having the style directed by the constitution.

IT is true that the citations, authorised by the act above refered to, partake of the nature of legal process ; but according to their form and the purposes for which they have been enacted by law, do not possess those imperative qualities which belong to the writs usually issuing from courts of justice, to their ministerial officers, and requiring them peremptorily, by the authority of government, to do certain acts which appertain to their offices.

A CITATION by our laws, is directed to the defendant requiring him to do certain things which it is optional with him to do, or not to do, may either comply with the prayer of the petition, or file his answer, or he may [illegible]; and by this neglect, is only subject to the [illegible] of a judgment by default. The sheriff who by law is bound to serve on him a copy of the petition and citation, is not authorised to arrest his person or take any measures to compel his appearance in court by virtue of this process, but it is the mere legal instrument by which information is to be conveyed to him, that certain proceedings have been commenced against him in some court of the State, by an individual claiming redress.

PROCESS is generally directed to some officer of the government, commanding him to do certain acts, which by law he is bound to perform. Instances are rare in which it can, or ought, to be directed to a private individual of the community; and those in cases of offences immediately against the public order and tranquility of the State, as in the cases of *Habeas Corpus*, *&c.*

UPON the whole, we are of opinion that a fair construction of this section of the constitution relied on by the appellant, makes it applicable, to those cases only, wherein writs and process had, properly under the late government, the style of

West. District. *August* 1815.

BLUDWORTH vs. SOMPEYRAC.

the Territory of Orleans, and that this must now be changed into that of the State of Louisiana; and as the citation in the present case, is not embraced by the true spirit and meaning of the constitution or intention of the convention, we do not think that the Judge below erred in the opinion given by him to which this exception was taken.

As to the merits of this case, considering it as st stands, on the record, which is certified by the Judge of the Distriet Court to contain all the evidence in the cause; altho' many points were made by the counsel of the appellant, we deem it unnecessary to notice any; except that which relates to the consideration of the note on which the appellee founds his action.

IT is clear from the evidence that this note was given for the forbearance of the appellee to enforce the payment of $ 3,854, or in other words for interest on that sum for the term of two years, which the appellant owed to him *in solido* with other persons. Now by the laws of the State, conventional interest cannot exceed 10 per cent per an.; and by those laws compound interest cannot be received.

BY calculating interest on the above sum at the rate of 10 per cent per an. in two years, it is found to amount to $ 770 80, which is the true and legal consideration for which it is given. And the District Court having erred in giving judgment

for the sum of $809, 35, a part of which sum is made by compounding, or giving interest on interest,

IT is, therefore, ordered, adjudged and decreed, that the judgment of said District Court be reversed and annulled: and proceeding here to give such judgment as ought to have given in the Court below: it is, further ordered, adjudged and decreed that the appellee do recover from the appellant the sum of $ 770 80,* with interest thereon at the rate of 5 per cent. per an. from the judicial demand until paid, and that the appellee pay the costs of this appeal.

* The principal had been paid.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

West District. Sept. a. d. 1815.

WESTERN DISTRICT. SEPTEMB. TERM, 1815.

GENERAL RULE.

It is ordered that, after the present year, the terms of this Court shall begin, in the Western District,

On the last day of August, in every year, but when that will be a Sunday, on the preceding day;

On the second Monday of September, and

On the first day of October; but when that will be a Sunday, on the following day.

BROUSSART vs. *TRAHAN'S HEIRS*, *ante* 714.

West. District. *September* 1815.

BROUSSART vs. TRAHAN'S HEIRS.

Whether a bill of exceptions lies to the opinion of the District Court, in a motion to continue a cause?

THE District Judge having, in pursuance with the order of this Court, transmitted the bill of exceptions, a motion was made on the part of the defendants to remand the cause.

Brent, for the defendants. The cause ought to be remanded 1. Because injustice has been done to us in refusing to continue upon the affidavit filed and the letter of the district clerk of N. Orleans, and it being the first time at which the defendants were cited. 1 *Martin* 144 *and* 134.

THE record shews the application to continue to have been made at the first time the present defendants were cited to appear.

A REFUSAL to continue, good cause of error. 4 *Henning & Munford* 156, 157.

AN application to continue is made to the *discretion* of the Court, and is made upon the *same principles* and *similar* to an application to *amend the pleadings*, a refusal to grant which can be assigned for *error*. The report of cases shew that an improper exercise of discretion is cause of error. 1 *Henning & Munford* 27, 4 *id.* 156, 1 *Washington* 313, 318.

SUPPOSING the former decisions of other states and countries were in opposition to this doctrine, which they are not, the statute of this state gives the power to the Supreme Court, when material

West District September 1815.

BROUSSART vs. TRAHAN'S HEIRS.

injustice has been done. Should the Court be of opinion that the present appellants sustained an injury by *the refusal to continue*, to enable them to procure important testimony ; they can and ought to remand and see that justice shall be done. 1813, *c.* 47, *sect.* 18.

2. As no jury was prayed for by the petitioner or defendants, and as the defendants opposed the cause being tried by a jury, as *none was prayed for as the law directs*, the Judge erred in ordering the cause to be tried by a jury. 1805, *c.* 26, *sect.* 4, 5 *and* 6.

THE district courts are governed in their proceedings by the "acts regulating the practice of late superior courts 1813, *ch.* 12, *sect.* 16."

3. NO statement of facts to be submitted to the jury was drawn up, as the law directs, 1805, *ch.* 26, *sect.* 5 *and* 6.

4. JURIES, in this State, can only try causes where *statements* are made out and submitted according to the statute, and where such statements are not made they have no power to decide : and this cause was ordered to trial without statement, 1805, *ch.* 26, *sect.* 5 & 6.

5. THE Judge erred in ordering the cause to trial by a jury, without the notice required by law and to which the defendants were entitled, where a cause is to be tried by jury, 1805, *ch.* 26, *sect.* 5.

Baldwin & Porter, for the plaintiff. The application to remand the cause is made on two grounds.

1. THAT injustice was done in not granting a continuance.

2. THAT a jury trial was given in opposition to law, and without pursuing the formalities prescribed by the statute.

THE first ground is resisted by the plaintiff for two reasons.

I. THE continuance or not continuance of a cause is a matter of indulgence, not of right and consequently cannot be assigned for error in this Court, which can only take notice of errors *in law* on a bill of exceptions.

IN many cases the Court will grant a continuance, in other they refuse it altogether : such as a penal action, or where the defence is slavery, and from this it is inferred that it is not a *legal right*, or else all parties before the Court would have the same right to demand it ; again the same book, the same page, says that the Court of Common Pl as and Court of King's Bench have different rules on the subject, which proves it also to be a point or matter of practice there altogether, which the Court may alter and change at pleasure. 2 *Tidd*, 708.

West. District. *September* 1815.

BROUSSART vs TRAHAN'S HEIRS.

IN actions of a peculiar kind, the Court will refuse it altogether. *Bosanquet & Puller*, 454.

A CONTINUANCE is not a matter of right, either in or behalf of the crown, or the prisoner; if this is law in a criminal case, it ought *a fortiori* to be the same in a civil one: but Lord Mansfield in D'Eon's case expressly states that civil and criminal cases stand on the same footing, as it respects continuances. From this we conclude, that this Court can only examine the proceedings of the inferior tribunals on bills of exceptions for errors committed in their decisions on the *rights*, *the legal rights* of the parties; the continuance is not a matter of right: consequently not a subject of revision here. *M'Nally*, *P. C.* 454.

THIS authority is supposed to be conclusive. The Supreme Court of the U. States have laid it down expressly that it cannot be assigned for error: that a continuance is mere matter of favour and discretion, and that, that Court could not look into it. 4 *Cranch*, 237.

THE principal authorities cited by the opposite side were D'Eon's case from Burrows, and the cases cited from Virginia; as to the first it does not touch any of the authorities we have cited; it was a trial at bar when the whole Court were present on a motion for continuance. Lord Mansfield delivered a long opinion in which a great deal was said on points not necessary to the

decision of the cause ; but he no where says, that if the Court refuse it, that refusal can be assigned for error on the record, on the contrary he says the court would correct it by a new trial ; that is of course the Court where the cause is depending.

THE Virginia cases are in direct opposition, with M'Nally, Foster, the Court of Common Pleas in England, and the Supreme Court of the United States. It is presumed there must be something in the statutory provisions of that state, which has justified their courts going so far ; this we cannot say positively : the weight of authority and of reason, however, is on our side : *this tho', we can say positively*, that in no other state in the Union have similar decisions to those reported in Virginia taken place, nor in England. We are willing to abandon the cause, if a single case can be cited from the English decisions which will shew that such a refusal was ever assigned on the record as a matter of error. The case from Bosanquet & Puller indeed proves it was never thought of there ; the motion was made by serjeant Shepherd, as able a lawyer as was then at the bar in that country, the decision of the Court, refusing him time to get his testimony, ruined his defence : yet from the report it does not appear he ever attempted assigning it for error on the record.

West. District. *September* 1815.

BROUSSART vs. TRAHAN'S HEIRS.

SUPPOSING it, however, examinable here, it is confidently expected that from the affidavits made and the reasons urged by us on the argument, this Court will be of opinion that the Court below did right in refusing the continuance.

II. THE second point is recited on the ground that the provisions made for the trial by jury were intended for a different system. That they have been impliedly repealed by the change of the judiciary, that the provisions then made for the request of a jury are now unnecessary ; that many of its provisions are totally impossible to be reduced to practice under the present arrangement of our courts. The statute establishing the Superior Court was cited to shew this, it was also cited to shew that the *Court*, by the section immediately preceding that which regulates the mode in which the *parties* shall ask for it, has a right to call in a jury to decide such points as it may submit to them ; our construction of the statute we also fortified by the universal and invariable practice since the late Superior Court went circuit ; which practice was never complained of or objected to by the bar ; the two day time for drawing up the points was merely given for the convenience of the Court ; the party by statute had no right to interfere in it, or even see the points submitted by his adversary. The Court could wave it, if it thought proper so to do.

BUT we contend at all events, that if these were errors, they were errors in form, not substance ; that they went merely to the mode of examination of the case, and not to an incorrect decision of it on the merits. Is there any reason to presume that the jury would have given a different decision on Friday from what they did on Tuesday ? Certainly not. The case of *Sompeyrac* vs. *Bludworth* decided at last term, is relied on by us as a positive authority, that even on a case brought up by bill of exceptions, the Court would not send it back for re-examination for errors committed in form ; the statute too says the same thing.

AS to the continuance again, one idea was forgot under that head, which we respectfully think conclusive, viz. if this continuance had been improperly granted, could the plaintiff have assigned it for error, and if his witnesses had died, could this Court have it sent back to be tried on the testimony that was present at the term when the continuance was improperly granted, certainly not ; and is it possible that a defendant can stand before a Court and have more privileges on the same application than the plaintiff ?

☞ THE bench not being full, and the case being new and important, a desire was intimated by the Court, not to decide on it, without the aid

West District. *September* 1815.

of the absent Judge and the counsel consenting thereto, the cause was continued.

*** THERE was no case determined during the months of October and November.

☞ *The following important case is admitted in this collection, tho' out of its original place, on account of the interest it has excited.*

District Court U. S. *July* 1813.

U. STATES vs. LAVERTY & AL.

UNITED STATES vs. *LAVERTY & AL.*

Inhabitants of the Territory of Orleans, became citizens of Louisiana and of the U. States by the admission of Louisiana into the Union.

By the Court. These persons have been arrested by a warrant, issued by me, on an affidavit made by the Marshal, that he believes them to be *alien enemies* who have neglected or refused to obey the notification of the government respecting them. They deny that they are alien enemies, and insist that as they were *bona-fide* inhabitants of the Territory of Orleans, at the time of its admission into the Union, they became citizens of Louisiana and consequently citizens of the U. States.

IT is well known that some of these persons have been discharged by one of the Judges of the State, but as the Marshal and many others are seriously impressed with a belief that they are not citizens, but aliens, it has been deemed proper to obtain the opinion of the Judge of the United States.

IT is contended by the attorney of the United States, that Congress alone have the power to pass laws on the subject of the naturalization of foreign-

District Court U. S. July 1813.

U. STATES vs. LAVERTY & AL.

ers, and that by the constitution it is declared that the rule for their admission must be uniform. On the other hand, it is said that congress have the power to admit new states into the Union; that this power is not inconsistent with nor repugnant to the other; that the first rule well applies where individual application is made for admission, but is not restrictive of the other power to admit at once great bodies of men, or new states into the Federal Union.

THE power to admit new states is expressly given by the 3d section of the 4th article of the constitution. It has been frequently exercised, and on the 30th of April, 1812, Louisiana was admitted into the Union, upon the same footing with the original states.

IN what manner has this power been exercised with respect to other states? On the 30th of April 1802, the inhabitants of the eastern division of the territory N. W. of Ohio were authorised to form for themselves a constitution and state government; this was done and they were afterwards admitted into the Union; previous to their admission the people of that country were governed by what is commonly termed the Ohio ordinance; that the population consisted partly of citizens of the United States and partly of foreigners may be collected from the provisions of that instrument for their government; that a great body of aliens resided among them is known to

many. It is declared that possessing a freehold of fifty acres of land, having been a citizen of one of the states, and being resident in the district, or the like freehold and two years residence, shall be necessary to qualify a man as an elector. Here there are too descriptions of persons, 1st. citizens of the U. States with a freehold and actual residence, and, 2d. persons not citizens, with a freehold and two years residence; were they not all equally inhabitants? and in the act of admission is there any distinction made? The inhabitants then who were authorised to form a state government for themselves, must have been all the real inhabitants of the country, citizens or foreigners, and after the admission of the state into the union, must have equally participated in all its advantages, because, if a party only were entitled to its benefit all the inhabitants had not formed a government for themselves. Can we, for an instant, believe that a wise, just and liberal government, like that of the United States, would invite any portion of people who were enjoying self government in a considerable degree, to place themselves in a situation where they would be entirely deprived of it?

I CAN have no doubt that all the inhabitants of the State of Ohio were admitted citizens of that state by their admission into the union.

LET us then examine and discover (if possible) any difference between the case of that state and

District Court U. S. July 1813.

U. STATES vs. LAVERTY & AL.

of this. Louisiana, it is said, was admitted under the treaty of Paris, by which it is stipulated that the inhabitants shall be incorporated into the union of the United States and admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States. It is then contended by some, that the word inhabitants used in the act of February 1811, applies solely to those who were inhabitants in 1803.

On the 11th February 1811, congress passed an act "enabling the people of the Territory of Orleans to form a state government." It commences by declaring that the "inhabitants" of all that part of the country ceded under the name of Louisiana shall be authorized to form for themselves a state government: it then goes on and describes two classes of inhabitants; 1st. citizens of the United States, and all persons having in other respect the legal qualifications to vote for representatives in the general assembly. Those qualifications are the same as those of Ohio; two years residence and a freehold for those who are not citizens. We here find no distinction between the old inhabitant and the new, the man who has been here two years and has fifty acres of land, let him be citizen or alien, is authorized to join in making a constitution for all the inhabitants of Louisiana. The law then, evidently, does not

mean merely "the inhabitants at the date of the treaty" and it will be found that the only question in this case is, whether congress had a right to include any others than citizens in their act of admission, I have already shewn that they have exercised this right heretofore, that in the case of the state of Ohio it was not disputed, and it does not become us at this time to question it.

I SHALL now consider some of the arguments that have been urged by the district attorney and his colleague. Although an attempt was made to distinguish between the two classes of inhabitants (not originally citizens of the United States) yet, in truth, their arguments go as well to exclude the first as the last class. It is contended that the only mode by which an alien can be naturalized is, by a compliance with the uniform rule. That this is the only constitutional mode; that the expression in the treaty "that the inhabitant shall be admitted according to the principles of the constitution" means, according to the uniform rule required by the constitution. If so, the Creoles of Louisiana are not citizens yet, for not one of them has complied with that law; but one of the gentlemen has observed, here is a treaty, and treaties are paramount. I can never subscribe to the doctrine that treaties can do away any part of constitution; I will go as far as any one in supporting and observing them in any thing not re-

District Court U. S. July 1813. U. STATES vs. LAVERTY & AL.

pugnant to it. If then the uniform system be the only constitutional one, any other must be unconstitutional, and though introduced by treaty, is void. If this were the only constitutional mode, I should tremble for the fate of the Louisianians; but fortunately for them and for others, it is not the only one. The expression under the treaty is, that they shall be admitted according to the principles of the constitution, that is, with the consent of congress, which shall be obtained as soon as possible, and it has been since given. By this construction every part is reconciled, and if congress in their liberality included others who have since settled in the country, they had a right to do so.

It is said that the law respecting alien enemies, declares, that they shall all be apprehended unless actually naturalized, and it is contended that the only actual naturalization is by the uniform rule. This does not follow: if it did there is scarcely a Creole who in case of a war with France or Spain would not be subject to its penalties, for none of them have complied with it. The government has a right, by treaty, or by the admission of a new state to naturalize, and such naturalization is equal to the other. Let us suppose, what is honestly believed by many, that altho' the form of government changed, yet the political character of individuals remained the same, let us ask who

would compose the state? For (as the learned gentleman at the bar observed) the state does not consist of land, water and trees; it is composed of men, women and children. Some say the old Louisianians and the few citizens of the U. States who have settled since the treaty; no, say others, the old Louisianians have not been admitted according to the *uniform rule*, and they have nothing to do with it, and as to the new comers, not citizens, they are out of the question. The uniform rule would unquestionably place the original citizens of the the U. States in a more important situation, it would give them all the power of the country. But the government of the United States intended otherwise; they called upon the actual *inhabitants* of the country to form a government for themselves; they promised them if they should not disapprove of it, that all of them should enjoy its advantages and be members of it; who those inhabitants were will be a subject of strict enquiry. It has been observed that it will be almost impossible to fix any certain rule on this subject; but it appears to me there will be no difficulty. An inhabitant is one whose domicil is here and settled here with an intention to become a citizen of the country; I conclude in agreeing with the judges of the late superior and state courts, that by the several acts of congress and the admission of the State of Louisiana into the union, all the *bona fide* inhabitants

District Court U. S. *July* 1813.

U. STATES *vs.* LAVERTY & AL.

became citizens of this state. *Desbois' case*, 2 *Martin* 185.

PRISONERS DISCHARGED.

*** IN pursuance of this decision, a considerable number of persons, born in the dominions of the King of the United Kingdoms of Great Britain and Ireland, who had resided in Louisiana, under the Territorial government, ceased to be considered by the Marshal as British subjects, and as liable to the restrictions imposed on alien enemies.

INDEX

OF

PRINCIPAL MATTERS.

PAGE.

ACCOUNT.

If the suit be for the balance of an account, compensation needs not be pleaded. *Fram* vs. *Allen*. 381

ADMINISTRATOR, SPECIAL.

Office of, legal and unrepealed. *Rogers* vs. *Beiller*. 665

AMENDMENT.

On an amendment of the petition, by inserting the place of residence of the plaintiff, the defendant is not entitled to time to answer over. *Sinnet* vs. *Mulhollan & al.* 398

ANSWER.

The answer of one partner, to interrogatories suffices, if not excepted to. *Martineau & al.* vs. *Carr & al.* 497

APPEAL.

1 Does not lie from a judgment of the Superior Court of the Territory of Orleans. *Bermudez* vs. *Ibanez*. 2

2 Nor, from an order to remove a suit. *Agnes* vs. *Judice*. 182

3 Nor, on the refusal to grant a new trial, *Brooks' Syndics* vs. *Weyman*. 16
4 Nor, from a motion to discharge bail. *Fortier* vs. *Brognier*. 17
5 Nor, on criminal proceedings. *Ogden* vs. *Blackman*. 305
6 Nor, on the refusal of a special jury. *Labatut* vs. *Puche*. 325
7 Lies, tho' the sum recovered be less than $ 300. *Harang* vs. *Dauphin*. 640
8 On the reversal of an order for the meeting of creditors. *Harper* vs. *his Creditors*. 322
9 No new evidence can be received on it, tho' discovered since the appeal. *Beard* vs. *Poydras*. 505
10 Cannot be heard on the information resulting from facts related in the opinion of the Court below. *Longer & al.* vs. *Pigeau*. 221
11 No trial by jury can be bad on it. *Brooks' Syndics* vs. *Weyman*. 9
12 Dismissed, there being no statement of facts special verdict, or bill of exceptions. *Harrison* vs. *Mager & al.* 397
Same point. *Taylor* vs. *Porter*. 423
13 Affirmance denied, when no statement of facts came up with the record. *Fromentin & al.* vs. *Prieur*. 215
14 Granted, and damages given for the frivolous appeal. *Clark* vs. *Parham*. 405
15 Dismissed when the statement of facts was not made before judgment below. *Hellis' Syndics* vs. *Asselvo*. 201
16 But, it may be made at any time before

judgment be actually signed. *Brand* vs. *Livaudais & al.* 389

17 Yet, by consent, it may be made after. *Tocum* vs. *Roy.* 397

18 Or the court will receive the evidence as given below, if the parties agree thereon, *Vernot* vs. *Tocum.* 406

19 If the appellant does not appear, the appeal will be dismissed. *Brown* vs. *Parish Judge.* 424

20 On the dismissal of an appeal by consent, proceedings are to be had below, as if no appeal had been taken. *Clark's ex's.* vs. *Farrar.* 212

21 Whether it lies from the refusal of a continuance? *Broussart* vs. *Trahan's heirs.* 725

ARBITRATOR.

He must be sworn. *Harrod & al.* vs. *Lewis & al.* 311

ATTACHMENT.

Cannot be quashed, on an inquiry into the merits. *Smith & al.* vs. *Elliot & al.* 367

ATTORNEY.

1 Appointed to an absent debtor, by the Court must have his fees fixed by the Court, and cannot be paid on a *quantum meruit*, out of the property attached. *Ellery* vs. *Gouverneur & al.* 605

2 Suit for his fees is not a Friday cause, in the Court of the Parish and City of New-Orleans. *Segher's* vs. *Phillips' Syndics.* 646

3 Has his privilege for taxed fees and costs only. *Morse* vs. *Williamson & al.'s Syds.* 282
4 Employed by a ceding creditor, to be paid by his syndics. *Morel* vs. *Mizotiere's Syndics.* 363
5 No person admitted as an attorney, unless he studied three years in the office of a practising one. *General Rule.* 59
6 The Court does not pronounce on a person examined for a licence, until the day after. *General rule.* 1

AUCTIONEER.

Giving bond, in lieu of a recognizance, bound thereby. *Claiborne* vs. *Debon & al.* 565

BANKRUPTCY.

1 Certificate obtained in England does not bar the suit of an American, for a debt contracted in the U. States. *Mitchell* vs. *M'Millan.* 676
2 Fraud is presumed in cases of bankruptcy. *Misotiere's Syndics* vs. *Coignard.* 561
Same point. *Menendez* vs. *Larionda's Syds.* 708
Same point. *Mitchell* vs. *M'Millan.* 695
3 Bankrupt, nor his books cannot be admitted to change his estate. *Menendez* vs. *Larionda's Syndics.* 256
4 If the claim of one of the creditors on a note be resisted by the syndics, he must prove it: but he cannot be holden to the proof of the consideration of it. *Id.* 705

BILL OF EXCHANGE.

1 The drawer of a bill may shew that, in the knowledge of the original payee, who still

holds it, he drew it as agent, altho' the agency does not appear on the face. *Krumbhaar* vs. *Ludeling*. 640

2 Indorser of a, cannot prevail without proving the hand of his indorsers. *Michel* vs. *Aymé*. 647

BILL OF EXCEPTIONS.

1 Does not lie to a Judge's charge, after verdict. *Vaughan* vs. *Vaughan's ex's*. 215

2 If the Judge refuse to sign one, a *mandamus* will issue. *Broussart* vs. *Trahan's heirs*. 714

3 Lies on a Judge's charge on a point not called for. *Rochelle & al.* vs. *Musson*. 78

4 Also to the opinion of the Judge, refusing to submit facts within the pleadings to a jury. *Duplantier* vs. *Randolph*. 199

5 Does not lie to a final judgment. *Bujac & al.* vs. *Mayhew*. 613

BOND.

With disjunctive conditions, satisfied by a compliance with either. *Reagan* vs. *Kitchen & al.* 418

CESSION OF GOODS.

1 Sale of ceded property, by the debtor is voidable, not void. *Sigur's Syndics* vs. *Brown*. 91

2 Debtor must give up all his property, and cannot say he has delivered enough to his debts. *Duncan & al.'s Syndics* vs. *Duncan*. 230

3 Ceding debtor, without a discharge, suable. *Fitzgerald* vs. *Phillips*. 388

4 Stays proceeding, before and after judgment. *Bermudez' Syndics* vs. *Ibanez & al.* 17
5 Payment, in the usual course of business before failure, valid. *Kenner & al.* vs. *Brown.* 278
6 Syndics can only become creditors of the estate, by paying debts. *Williamson* vs. *Phillips' Syndics.* 205

CITATION.

Needs not be in the name of the State. *Bludworth* vs. *Sompeyrac.* 719

CITIZENSHIP, U. S.

Bona fide inhabitants of the territory acquired it, by its admission into the union. *U. States* vs. *Laverty & al.* 733

CONTRIBUTION.

Cannot be sued for, by a joint trespasser. *Duperron* vs. *Meunier.* 285

CONSTITUTION.

1 Does not extend to the temporary government. *Dufau & al.* vs. *Massicot & al.* 289
2 That, and the permanent government, distinct and separate. *Bermudez* vs. *Ibanez.* 6
3 Not violated by an act, suspending legal proceedings during an invasion. *Johnson* vs. *Duncan & al.'s Syndics.* 530

CURATOR.

Or administrator of an estate cannot be appointed where several of the heirs are present and of age. *Hopkins* vs. *Peretz & al.* 590

EVIDENCE.

1 Parol evidence of a sale of land inadmis-

sible, tho' the vendee be in possession. *Grafton* vs. *Fletcher.* 486
2 So, of a promise to sell real estate. *Raper's heirs* vs. *Yocum.* 424
3 Plaintiff's books no evidence for him. *Cavelier* vs. *Collins.* 188
4 *Testis unus, testis nullus.* id.
5 Neither the insolvent nor his books, can be admitted to charge the ceded estate. *Menendez* vs. *Larionda's Syndics.* 257
6 When the event of a suit is to determine to whom the debtor has to pay, he may be a witness. *Abat* vs. *Doliole.* 657
7 Attorney in fact, and at law, admissible witnesses. *Duplantier* vs. *Randolph* and *Menendez* vs. *Larionda's Syndics.* 194, 257
8 So, one testifying against his interest. *Rochelle & al.* vs. *Musson.* 73
9 Witness declaring himself interested required to say how. id.
10 Where a signature is formally disavowed, proof by experts must be resorted to. *Clark's ex's.* vs. *Cochran.* 358

EXECUTOR.

Two of them may maintain a suit, although one only has qualified. *Clark's ex's. & al.* vs. *Farrar.* 247

FERRY.

The City and Police Jury have both the right of establishing one, before New-Orleans. *Police Jury* vs. *Mayor, &c.* 710

FREIGHT.

1 Shipper preventing the delivery of goods to

consignee to pay. *Blake & al.* vs. *Morgan.* 375, 559

2 If before the ship puts to sea, the voyage be put an end to by a declaration of war, and she be unloaded, the shipper is not liable. *Harrod & al.* vs. *Lewis & al.* 311

GRANT.

Arbitrary one of a Spanish governor, may be set aside. *Mayor &c.* vs. *Metzinger.* 296

HABEAS CORPUS.

Appeal does not lie from proceedings on a writ of. *Laverty* vs. *Duplessis.* 42

INJUNCTION.

Appeal lies from an order maintaining it. *Riley* vs. *Lynd.* 228

INSURANCE.

Sea-worthiness during the voyage, will not entitle the insured to recover. *Trimble's Syndics* vs. *N. O. Insurance Company.* 394

INTEREST.

1 On an open account, from the judicial demand. *Merieult* vs. *Austin.* 318

2 Compound. at 10 per cent. disallowed. *Budworth vs. Sompeyrac.* 719

3 Due on every instalment, when vendee has possession of the land. *Duplantier* vs. *Pigman.* 236

4 Conventional, not allowed without an actual agreement, nor judicial before a judicial demand. *St. Pé* vs. *Duplantier.* 127

LAWS OF *TORO.*

On a renunciation of the, it is unnecessary to shew that the contract turned to the

benefit of the wife. *Brognier* vs. *Forstal.* 577

MARRIAGE.

1 Contract of, entered into here, cannot provide that the rights of the parties shall be according to the custom of Paris. *Bourcier* vs. *Lanusse.* 581

2 Altho' celebrated abroad, the rights of the parties will be according to the law of their domicil. *Le Breton* vs. *Nouchet.* 60

MARTIAL LAW.

What? *Johnson* vs. *Duncan & al.'s Syns.* 530

MORTGAGE.

1 Husband's property, whether acquired before or during the marriage, is tacitly bound for the wife's rights, tho' alienated before the dissolution of the marriage. *Cassou* vs. *Blanque.* 390

2 But, when she contracts with him, the renunciation of her right on the subject of the contract, is implied. *Brognier* vs. *Forstall.* 577

3 Whether she has a privilege for a debt due her from him, while sole? *Delany* vs. *Trouvé & al.* 610

4 If an insolvent mortgage his estate for a prior debt and for money borrowed at the time, the mortgage will be valid for the money thus received. *Brown* vs. *Kenner & al.* 270

5 Mortgagee, buying premisses under a *fieri facias* may retain part of his debt, becoming afterwards payable. *Fowler's Syndics* vs. *Dupassau.* 574

6 Altho' husband and wife sell common property, the wife will not be bound, if she renounces a law not applicable to the case. *Bourcier* vs. *Lanusse.* 582

NATURAL CHILDREN.

Can receive one half of the estate only, when the father leaves brothers or sisters. *Sennet* vs. *Sennet's legatees.* 417

NEW-ORLEANS.

1 The city of, derives no title from Congress to land not part of the Commons. *Mayor, &c.* vs. *Casteres.* 673

2 Land near it, granted as part of the royal demesne and commons, on breach of the condition, to be considered as part of the commons. *Same* vs. *Bermudez.* 307

3 The tax of the City Council, on the raising of the portcullis of the bayou bridge, is illegal. *Same* vs. *Rabassa.* 218

PARAPHERNAL.

Wife's estate, not brought in marriage, is Paraphernal. *O'Conner & al.* vs. *Barré.* 446

PILOTAGE.

No exclusive right to collect it, in master and wardens of N. O. *Allen* vs. *Guenon & al.* 125

PLEDGE.

Contract of, must be authentic or registered. *Johnson* vs. *Duncan & al.'s Syndics.* 572

PRACTICE.

1 Counsel to furnish a brief, at least one day before the hearing. *General rule.* 16

2 Return days of the Supreme Court. *General rules.* 193, 724

3 Causes sent for trial out of the district before 1814, to be sent back. *Lalande* vs. *Fontenau & al.* 716
4 Instrument tacked to the petition need not be in English. *Clark's ex's.* vs. *Farrar.* 247
5 Party not allowed to stultify himself. *Yocum* vs. *Roy.* 409
6 Rehearing how applied for. *General rule.* 280
7 Signature need not be disowned on oath, but must be in writing. *Clark's ex's.* vs. *Cochran.* 353
8 Juror who formed and declared his opinion rejected, tho' he swears his mind is still open to conviction. *Laverty* vs. *Gray & al.* 617

PRESCRIPTION.

1 Tutor selling property, purchaser quieted four years after he ward comes of age. *O'Conner & al.* vs. *Barré.* 446
2 In a suit for partition is thirty years. *Pizerot & al.* vs. *Meuillon's heirs.* 97

PROMISSORY NOTE.

1 Prior endorser cannot be called in, to defend the suit. *Lanusse* vs. *Massicot & al.* 261
2 Altho' no actual demand was made, if due diligence was used, endorsers are liable. id.
3 Consideration of it may be inquired into, while it is in the hands of the payee. *Grieve's Syndics* vs. *Sagory.* 599
4 Party personally suable, tho' he signed it as Parish Judge. *Paillette & al.* vs. *Carr.* 489

PUBLIC SCHOOL.

Administrators of a, may sue in their own names. *Paillette & al.* vs. *Carr.* 489

RACE.

If a negro be staked on a race, and a second is run in lieu of it, the negro is not bound. *Vernot* vs. *Tocum.* 406

RES JUDICATA.

What is? *Cloutier* vs. *Lecomte.* 481

SALE.

1 If A. buys land for B. he cannot rescind the sale, without his consent. *Kemper* vs. *Smith.* 622
2 Without delivery does not transfer the property. *Durnford* vs. *Brooks' Syndics.* 222
3 Purchaser at a Sheriff's sale gets no better title than the defendant had. *Bujac & al.* vs. *Mayhew.* 615
4 Same point. *Fowler's Syndics* vs. *Dupassau.* 577
5 Act of, unrecorded, does not affect rights of third persons claiming under the vendor. id.
6 Purchaser of land, liable to eviction may withhold payment. *Duplantier* vs. *Pigman.* 236
Same point. *Clark's ex's.* vs. *Farrar.* 247
7 If land be decreed to be conveyed, on payment of a sum, no rent is due in the mean while. *Bermudez's Syndics* vs. *Ibanez.*
8 If A. buys goods for B., on his own note and drawn, on B. who pays the draft, they cannot on A.'s failure be arrested in B.'s hands. *Emmerson* vs. *Gray & al.* 697
9 If vendor directs payment to a third person he may sue without him. *Clark's ex's.* vs. *Farrar.* id.

SHERIFF.

1 If he dies, before receiving the proceeds of

a sale, on a *fieri facias*, his representative cannot receive it. *Pavie's heirs* vs. *Cenas*. 387

2 Must take the property pointed out on a *fieri facias*, but not real, when there is personal. *Morgan's adr's.* vs. *Vhoories*. 162

3 If he take real, when there is personal property, and plaintiff does not object, his act cannot afterwards be disowned, and be charged with the debt. id.

4 Seizing property on which a third person has a lien, not suable as a trespasser. *Kenner & al.* vs. *Morgan*. 209

TRUSTEE.

Privileged on the trust estate. *Bermudez' Syndics* vs. *Ibanez & al.* 17

WARRANTY.

Does not extend to tortious disturbance. *Mayor, &c.* vs. *Clark*. 596

WILL.

1 Must be written by the notary himself. *Knight* vs. *Smith*. 158

2 Formalities required in a, are matters of strict law. *Pizerot & al.* vs. *Maillon's heirs*. 97

WORK BY THE JOB.

Materials and labour lost, if the thing be destroyed, before the work is completed. *Seguin* vs. *Debon*.

WRITTEN CONTRACT.

1 May be receded from, as long as parties have not subscribed it. *Villeré & al.* vs. *Brognier*. 326

2 May be resorted to, though an account claiming less was presented. *Brand* vs. *Livaudais & al*, 608