Louisiana Term Reports,

OR

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

BY FRANCOIS-XAVIER MARTIN,

ONE OF THE JUDGES OF SAID COURT.

Status enim reipublicæ maxime judicatis rebus continetur.

CICERO IN OR. PRO P. SULLA, 22.

VOL. II.

BEING VOL. IV. OF THIS REPORTER.

NEW-ORLEANS:

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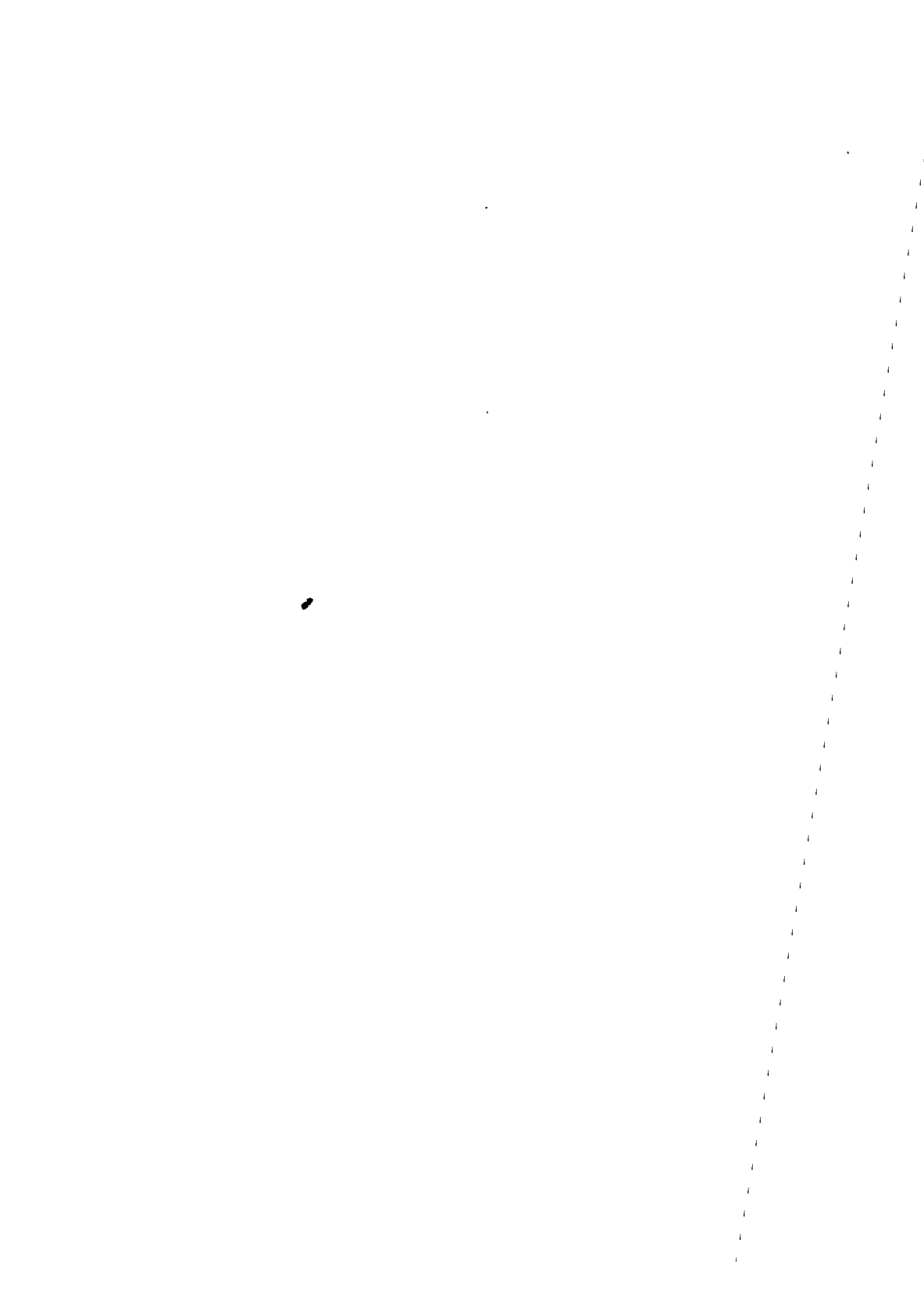

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During the period of the reports, in this volume, the following gentlemen were

Judges of the Supreme Court.

GEORGE MATHEWS,
PIERRE DERBIGNY, and
FRANCOIS-XAVIER MARTIN.

ETIENNE MAZUREAU, Attorney-General.

On the 8th of February 1817, ETIENNE MAZUREAU, having been appointed Secretary of State, resigned his office of Attorney-General, and

LOUIS MOREAU LISLET, was appointed in his stead.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, DECEMBER TERM, 1815.

East'n. District.
Dec. 1815.

FAGOT
vs.
DAVID.

FAGOT vs. *DAVID.*

No bill of exceptions lies to a final judment

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

This was a suit on a promissory note. On a final judgment being given for the plaintiff, the defendant filed a bill of exceptions and took an appeal.

The plaintiff and appellee contended that the supreme court could not examine the case, as there was no statement of facts, and the bill of exceptions had been taken to the opinion of the court on a final judgment.

MATHEWS, J. delivered the opinion of the court. In this case there is no statement of facts

East'n. District. *Dec.* 1815.

FAGOT *vs.* DAVID.

made and transmitted to this court, as required by law, nor any special verdict, and as no bill of exceptions was taken to any opinion of the judge in the court below, given during the progress of the trial, the exception which comes up with the record, being taken to a final judgment, is contrary to law and practice.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed, at the costs of the defendant and appellant.

Turner for the plaintiff. *Duncan* for the defendant. See *Bujac & al.* vs. *Mayhew*, 3 *Martin*, 613.

MAYOR &c. vs. *MAGNON.*

An injunction not to molest or trouble, does not prevent a suit to ascertain a right.

Land, not susceptible of alienation, cannot be acquired by prescription.

The Mayor &c. of New-Orleans, may sue for the removal of a nuisance.

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

MARTIN, J. delivered the opinion of the court. The petition states, that the defendant, in 1781, erected a shed, between the levee and the river, in the city of New-Orleans, in order to carry on some carpenter's work for the Spanish government, and established near it a deposit of timber. In the month of January of the following year, the cabildo ordered the shed, timber, &c. be-

tween the levee and the river, to be removed; but on the solicitation of the defendant, he was afterwards allowed to use his shed and the neighboring ground as a deposit of timber, on condition that he should cause no inconvenience to the public; whereupon, he erected other wooden edifices or sheds, and fenced in a large space of ground around them, to the prejudice of the public, and to the hindrance of the common use of the bank of the river in the centre of the front of the city.

That the city council, wishing to allow to the navy of the United States a sufficient space for the building and repairing of ships, and to extend this facility to ship builders, as far as public convenience would allow, authorised the officer commanding the naval forces of the United States in New-Orleans to fix the boundaries of the navy-yard of the United States, and those of a private yard to each of the ship-builders in the city—and this was accordingly done.

That the defendant, having manifested an intention to oppose the views of the city council in this respect, was ordered, by a resolution of that body of the 16th of November 1809, to confine himself within the limits allowed him by the commodore: and the officers of the police were ordered, in case of his obstinacy, to remove any

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timber or other materials which he might place beyond the said limits.

That, on this, the defendant obtained, from the superior court of the late territory, an injunction staying the execution of the resolution of the city council.

The petition averring, that the spot thus occupied by the defendant is public property, concludes with a prayer that he may be decreed to clear it.

The defendant resists the plaintiffs' suit, pleading the injunction obtained from the superior court in bar, averring that the suit in which it was obtained is still pending and undetermined.— He alleges that he has been in possession for upwards of thirty years, and claims the benefit of the prescription arising therefrom. He sets forth the confirmation of his title by the land commissioners of the United States, and concludes that the ground in question is private property. He denies that his establishment is a nuisance; and lastly, controverts the right of the plaintiff to complain of his encroachment, if really he did encroach.

The parish court having overruled the pleas relating to the injunction and the plaintiffs' right

to sue, the defendant took a bill of exceptions to the opinion of the court in this respect.

The cause was tried by a jury, who found for the plaintiffs, and there was judgment accordingly.

The defendant appealed.

The statement of facts made by the parish judge is as follows:

"Some time before the year 1781, the defendant obtained from the Spanish government the grant of a lot of ground in the city of New-Orleans, close to the levee, on which he built the house in which he now lives. Afterwards, and still before the year 1781, he built a shed, opposite to his house, on the bank of the river, outside of the levee, in order more easily to work on some vessels he was repairing for the Spanish government.

"In the year 1781, the cabildo of the city of New-Orleans ordered the shed to be pulled down, as obstructing the bank of the river; but soon after (on the 19th of January of that year) that body, on the defendant's petition praying that the shed which he had built in front of the river, to facilitate the work he was charged with, by order of the Intendant, might be suffered to remain, and that he might be allowed to keep near it some timber which was there for said

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work, without incommoding the public in any manner, considering the real necessity which existed, allowed the prayer of the petition, until the vessels and boats destined for the expedition against Pensacola should be dispatched and gone out of the port.

"Since that time the defendant remained in possession of the shed, and enclosed a great part of the bank of the river near it for a ship-yard.

"In the year 1809, the city council directed the Mayor to cause the shed on the levee to be pulled down, as obstructing the the bank of the river; but the defendant filed a petition in the superior court of the territory praying for relief, ond obtained from one of the judges an injunction *not to molest or in any manner trouble the petitioner in his enjoyment or possession,* which suit is as yet undetermined.

"In the same year, the city council desired the naval commander of the United States in the station to distribute the bank of the river among the ship carpenters of the city, in order to allow to each a spot sufficient for his work; and that officer having complied with the resolution of the council, the defendant refused to keep his timber within the limits allowed him; a part of it was thereupon seized and sold by order of the Mayor, and the defendant instituted a suit in

which he obtained a new injunction, and finally recovered damages to the amount of one hundred and fifty dollars.

"It was proven in this suit, by the surveyors and overseers of the city, that there are eighty feet between the levee and the river, at low water, in the place where the defendant has his ship-yard, which occupies one hundred and thirty-two feet along the levee, and sixty-four in depth between it and the river; that the yard is surrounded by a high fence, and is situated on a part of the bank of the river and the landing place of the port of New-Orleans, where ships are repaired; that they consider the shed and inclosure as an obstruction to the public use, to which the banks and landing places of navigable rivers are subject."

Annexed to the record is a certificate of the land commissioners of the United States, confirming the defendant's title to the ground between the levee and the first houses in front of the city; but, the board do not appear to have considered themselves at liberty to confirm the title to the ground between the levee and the river; which is the object of the present suit.

Annexed also is the record of the suit in the superior court, on which an injunction was obtained.

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It appears to this court, that the spot which the defendant inclosed is really a part of the common or public land, which is *out of commerce*, incapable of being alienated, and must ever be free to the inhabitants and strangers; that the defendant can have no right, claim or title thereto, except in common with the rest of the community.

But he resists the plaintiffs' suit: 1st. Because they are enjoined by the superior court *not to molest or in any manner trouble the petitioner* (the defendant) *in the enjoyment* or possession of the premises. 2d. Because he has possessed for thirty years and has acquired a right to the premises by prescription. 3d. Because the commissioners of the United States have confirmed his title. 4th. Because his establishment is not a nuisance. 5th. Because he has a right thereto under the permission of the cabildo. 6th. Because the present plaintiffs are without capacity to institute the present suit.

I. The injunction alluded to was not issued by the court on a final judgment, but by a judge at chambers *in limine litis*, on the *ex parte* application of the then plaintiff, now defendant. It was a conservatory measure, the sole object of which was to preserve matters *in statu quo* till

judgment. It does not affect the right of the present plaintiffs; it prevents only *voies de fait*, any *actual* disturbance by their sole act; to seek by legal means to ascertain and establish a contested right is no molestation or trouble.

The terms *molestation* and *trouble*, always convey the idea of some injustice; the parish judge was therefore correct in disregarding the defendant's allegation in this respect.

II. The premises not being susceptible of alienation, cannot be acquired by prescription which supposes a title fairly acquired, but not now susceptible of proof.

III. The commissioners of the United States did not confirm the title of the defendant to the ground in dispute.

IV. The defendant's establishment is a nuisance, because it obstructs the free use which the inhabitants and strangers have a right to make of the premises. The defendant's counsel contends that he, being a carpenter and necessarily engaged in the repair of ships, which cannot conveniently be effected any where, except on the very margin of the river, has a right to occupy there as much ground as is necessary for his workmen to work upon, for laying his

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necessary supply of timber, keeping his tools, &c. as a fisherman may fasten his bark to the trees growing there, and may use a spot to dry his net or sell his fish. This is true; but, as the fisherman could not justify the inclosure of a space of ground on the bank of the river, for the safety of his net when spread to be dried, nor the erection of a warehouse for the storage of his fish; the carpenter cannot justify the erection of a permanent shed or building for the safety of his tools, or the materials which he uses, nor to fence the ground for the protection of the timber which it may be his interest to accumulate. III *Part. tit.* 28 *l.* 6.

V. The permission of the cabildo, or the exemption granted by that body to the defendants from his immediate compliance with their order to clear up the premises was temporary, and had expired by his own limitation. If its duration had not been limited, it could only have given at best an estate on sufferance.

VI. The inhabitants of the city of New-Orleans were incorporated with a view to the better preservation and defence of their common rights. If the enjoyment of any of these be obstructed, individuals of the corporate body may in certain cases maintain an action, but these rights would

be easily invaded if the corporate body was not enabled to enforce them. It would ill suit the interest of any individual to incur the trouble and expense of vindicating the rights of the whole, by a suit in his private name.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs, to be paid by the defendant and appellant.

Moreau for the plaintiffs. *Mazureau* for the defendant.*

COX, surviving &c. vs. *RABAUD'S SYNDICS.*

CROSS appeals from the court of the parish and city of New-Orleans.

If the mortgagee receive a negotiable note for his debt, he cannot resort to his lien, without showing that he still holds the note unpaid.

If a debt, secured by a mortgage, be intermingled in an account, with simple debts of a greater amount, and a small balance due on the

MARTIN, J. delivered the opinion of the court. On the 29th of June, 1811, Cox (the plaintiff below, now the appellant and appellee) and Bartlett, were partners in trade, under the firm of Bartlett & Cox; and Cox was also the attorney in fact of Bartlett. The firm owned two undivided thirds of a rope-walk; the remaining third was the property of Hellen & Weders-

* DERBIGNY, J. did not join in this, nor the preceding opinion, having been prevented by indisposition from attending at the hearing.

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trand. Bartlett & Cox sold one of their thirds to Rabaud for $14,151, payable $5,000 down, $5,000 in one, and $4,151 in two years.

On the same day, the vendors and vendee came to an agreement, evidenced by a notarial act, by which the latter (in order to afford to the former the facility of obtaining the amount of the deferred instalments) bound himself to furnish, on request, his note or notes to the amount of $5,000, or any sum under, payable at 60 days, to the order of the vendors, to be discounted at the bank; and at the maturity of such note, or notes, to furnish another or others, of the same amount, to be discounted, in order to take up the first; and so on at the end of every 60th day, until the 29th of June, 1812, when the whole sum of $5,000 was to be paid. A like provision was made in respect to the last instalment.

whole, so that it does not appear whether the balance be part of the mortgage debt or of the simple ones, the creditor shall not be allowed to avail himself of his mortgage.

Rabaud took charge of the rope-walk, carrying on its affairs, for the benefit of all parties, until his death, which happened on the 15th of May, 1813.

Bartlett & Cox and Hellen & Wederstrand, respectively opened accounts with Rabaud.

The first item to the debit of Rabaud, in his account with Bartlett & Cox, is a sum of $14,151, the purchase money aforesaid, and credit is given him for the first payment, viz. $4,000 in cash

and $1,000 in a note; and farther, for a note of $5,000, the amount of the second payment, anticipated according to agreement: and on the 29th of June, 1812, credit was given him for a note of $4,151.

Rabaud, from this time till his death, supplied Bartlett & Cox with his notes according to the agreement, and also with other notes and drafts of his and other persons to a considerable amount, and Bartlett & Cox supplied him with provisions, yarns, money and other articles, for the use of the rope-walk, to the amount of upwards of $40,000.

After the death of Rabaud, the business of the walk was conducted as before, by his widow, until the first of January, 1814, when a balance of $6,873 85 was struck in favor of Bartlett & Cox.

The amount of the accommodation paper given by Rabaud was intermingled with the proceeds of other paper furnished by him, and the whole was indistinctly carried to his credit, and applied by Bartlett & Cox, in their account, to the discharge of the purchase money and of the supplies made to him in cash, provisions, yarns, &c. for the use of the rope-walk.

Rabaud's widow renounced to the community.

The present suit was instituted for the recov-

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ery of the aforesaid balance, with a privilege, lien or mortgage on Rabaud's part of the rope-walk. Judgment was obtaind for the whole sum, but the privilege, lien or mortgage, was confined to that of 4,151 dollars.

From this judgment, both parties have appealed; the plaintiff contending that the whole is a privileged debt; the defendants, that no part of it is so.

The amount is not contested.

During the trial below, the plaintiff produced ten notes of Mde. Rabaud, given for the use of the estate, protested and remaining in his hands; eight of which bear date of the latter part of the month of May, 1813, and amount together to the sum of 5,350 dollars; one of the 9th of June for 1,000 dollars, and one of the 16th of June for 550 dollars; all at 60 days; the aggregate amount 6,850 dollars.

The defendants, on their part, showed that the renewing notes, according to the agreement and the routine of bank business, as far as related to the note for 4,151 dollars, should have different dates; and they produced and spread on the record copies of sundry notes discounted in bank, subscribed by Rabaud, of dates and amounts corresponding with those of the origin-

al note. Some of these notes were endorsed by Bartlett & Cox. They also spread on the record copies of a number of checks of corresponding amounts and dates, with which they contended the accommodation paper was taken up.

On these facts, the only question for the solution of which this court is resorted to, is, whether the plaintiff's claim be in the whole or part a privileged one, or any thing more than a simple debt.

If we examine only the account current, which makes part of the statement of facts, it is clear that the plaintiff can have no benefit from his mortgage; for, striking a balance on the first of July, 1813, when the firm received a large payment, they are debtors, after being paid for the rope-walk, of the sum of $2239 02. The period, taken for striking this balance, is only two days after the last portion of the price of the rope-walk became due.

But, besides the deed of sale and the account current, there is another instrument which it is proper to look into. This is the notarial act by which a facility is secured to the plaintiff—the demand of Rabaud's notes for the two deferred instalments, in order to obtain money thereon by anticipation—and afterwards of other notes to

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renew the former ones from 60 to 60 days, as they became payable.

The effect, on the mortgage, of the facility, which it appears from the account current was thus afforded, by two notes received by the plaintiff (the first of 5,000 dollars, the other for 4,151 dollars) must be ascertained.

The notes certainly did not extinguish the mortgage; for, if either the original notes, or any of those subsequently given for the renewal of them, was unpaid at maturity in the hands of the plaintiff, he might resort to his mortgage. But this transaction, although it did not extinguish the mortgage, did certainly affect it. For, even if the plaintiff had on the day any of the instalments became payable, applied to a judge for an order of seizure, if the whole transaction was disclosed in the petition, he would have withholden his *fiat*, if the notes were not tacked to the petition, until they were satisfactorily accounted for: and if, for want of this information, the order of seizure had been obtained, its execution would have been suspended on the facts being properly suggested by the vendee.

The plaintiff could not have offered the absence of the notes from the possession of the maker, as evidence of their being unpaid and consequently no obstacle to his demand. For it

would not suffice for him to shew that the maker had not paid; he must have gone farther (as the notes were negociable) and have shewn that he was still holder of them.

We are, therefore, of opinion, that the plaintiff cannot avail himself of his mortgage, unless he shew that he still holds the original notes, or either of them, or any other clearly proven to be given for the renewal of the original.

With regard to the first sum of 5,000 dollars, which became due on the 29th of June, 1812, as no note of a date prior to the 13th of May, 1813, is offered, and as the statement of facts shews that the original note to be given for it, was not to be renewed after the first date, there cannot be any doubt of the correctness of the opinion of the parish court, who denied any right of mortgage or privilege thereon.

As to the second sum of 4,151 dollars, it appears that the original note for it, was given on the 29th of June, 1812; in the ordinary routine of bank business the paper became renewable on the 1st of September and 3d of November, of that year, and on the 5th of January, 9th of March, and 11th of May, 1813; after which, according to the agreement, it was not to be renewed, but paid. The defendants have shewn that

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on these days, notes of theirs, of the amount for which the original note was to be renewed, were negociated, some with, others without, the plaintiff's endorsement. This is not gainsayed.

But the plaintiff produces ten notes of Mde. Rabaud, given, it is admitted, for the benefit of the rope-walk. The first, in order of time, bears date of the 13th of May, 1813; its amount is 550 dollars, and the account current shews that on the day it became payable, the plaintiff owed to the estate a sum more than sufficient to balance it. The other nine notes have different dates, from the 14th of May to the 15th of July, and their aggregate amount is 6,850 dollars; but the individual sums are such that no number of notes can be selected, the total amount of which can correspond to the sum of 4,151 dollars, expressed in the original note, said to be represented by notes in the plaintiff's possession.

When it is considered that from the day of the sale to Rabaud, an account was kept open till the first of January, 1814, a period of about two years and a half, when a balance was struck, and appeared to be in favor of the plaintiff, of the sum of 6,373 dollars, including the ten notes amounting to 6,850 dollars, it will easily be believed that these ten notes represent that balance, within a trifle. When we notice, that within

that period, the parties dealt together to the amount of upwards of 60,000 dollars, including the 14,151 dollars, the price of the rope-walk, it will not be easy to believe, with the testimony (or rather presumption) before us, that the balance due to the plaintiff is the result of transactions exclusively relative to the price of the rope-walk, which bears an inconsiderable proportion to the rest: and if this balance is not exclusively the result of such transactions, we are without any rule by which it may be apportioned.

Neither will any one, with the least knowledge of the routine of bank business, easily apprehend how a note for 4,151 dollars, at 60 days, dated the 29th of June, 1812, was by successive renewals transferred into the ten notes produced, the dates and amounts of which bear no possible kind of relation to it.

The account of the renewal of the notes, as given by the defendants is much more probable, and the presumptive evidence arising from the paper which they spread on the record, and which the plaintiff was offered the opportunity of contradicting, would suffice to turn the scales against the latter, on which the *onus probandi* lies.

We cannot recognize these ten notes, or either of them, as representing that of 4,151 dollars.

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We conclude that the parish court erred in allowing any lien, right of mortgage, or privilege to the plaintiff; its judgment is therefore, annulled, avoided and reversed; and, proceeding to give such a judgment as the court below ought to have given, we order, adjudge and decree, that the plaintiff be collocated as a simple creditor of J. B. Rabaud's estate, for the sum of 6,873 dollars and 86 cents, and that he pay the costs of both appeals.

Porter and *Depeyster*, for the plaintiff; *Moreau* for the defendants.

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NORRIS vs. *MUMFORD.*

An order for the delivery of the thing sold is not a delivery of it.

The creditors of the vendor may attach the thing sold, if it has not been delivered.

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

The plaintiff brought his action to recover the value of sundry articles by him furnished for the ship Jane, of New-York, of which he alleges the defendant is owner.

The action being against an absent debtor, a writ of attachment issued and was levied on certain goods of the defendant, in the possession of Talcott & Bowers, who were summoned and interrogated as garnishees. From the answers to the interrogatories, it appeared that the garni-

shees held in storage a quantity of cotton, the property of the defendant, and a boat. The statement of facts shewed, that previous to the levying of the attachment, the defendant had made a sale of the cotton to John B. Lawrence and John D. Reese. This sale took place in New-York on the 28th or 29th of September, 1814, but was not known in New-Orleans till the attachment was levied on the cotton, on the 28th of October following, when the defendant had failed. On the 31st of May, 1815, the purchasers of the cotton filed their claim therefor, which was sustained and recognized as valid by the parish court.

The plaintiff appealed.

Hennen for the claimants. The delivery of the order of Mumford, directed to Talcott & Bowers, requesting them to deliver Mumford's cotton, in their hands, to Lawrence and Reese, the claimants, his vendees, was a delivery, which vested the property of the cotton. The property would have passed even without any delivery at all.

It is stated as a general principle of the common law of England (which is the law of the place in which the contract was made) that, as soon as the bargain is struck, the property of the goods is transferred to the vendee: and by a re-

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gular sale the property is absolutely vested in the vendee. 2 *Blacks. Comm.* 448. If I offer money for a thing, in a market or fair, and the seller agrees to take my offer, and whilst I am telling the money as fast as I can, he does sell the thing to another: or when I have bought it, we agree that he shall keep it till I go home to my house to fetch the money; in both these cases, especially in the first, the bargains are good, so that the seller may not afterwards sell them to another, and upon the payment or tender and refusal of the money agreed upon, I may take and recover the thing. *Shepperd's Touchst.* 225. If the vendor has transferred the property, according to the laws of New-York, where the contract was made, this court will respect *legem loci contractus.*

Porter for the plaintiff. The order to deliver was a means of obtaining a delivery only. It was an authority to demand and receive, not to take—an authority to take, when the thing sold is ponderous and present, has all the effects of an actual delivery; here the cotton was at the distance of upwards of five hundred leagues, and there was no authority to take it.—A delivery of the keys of a warehouse, which contains the goods sold, is a delivery, because it

is an evidence of an authority to take. So there was no delivery of the cotton.

The principle of the civil law, which must govern the present case, is perfectly at variance with that stated by the counsel of the claimants, to be that of the common law of England. The property remains in the vendor till delivery. *Inst.* 3. 24. 3. *Pothier, Vente, n.* 319. So that the creditors of the vendor have a right to attach it. *Id.* 320.

It is far from being clear that the common law of England differs from the civil, in this respect: on the contrary, it is believed that the principle, which is to direct the court in this case, is perfectly the same in both laws.

The English authorities cited by the counsel of the appellees, elucidate the rights of the parties to the contract of sale. Blackstone says that as soon as the bargain is struck, the property of the goods is transferred to the vendee—that by a regular sale, without a delivery, the property is absolutely vested in the vendee; yet not so absolutely, he tells us, that the vendee may take it, *invito alio*, till after payment, if no credit be stipulated. Shepperd says, that if the seller, who has agreed to my offer, whilst I am telling the money, as fast as I can, sells it to another, I may take and recover it on payment of

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the money. Here, two sales are spoken of, and delivery is not mentioned in either; then there cannot be any doubt of my right, and perhaps my right against the second vendee may result from his buying the thing after my agreement, whilst I am counting the money to the vendor as fast as I can, which presumes his knowledge of my right. In the other case, in which the vendor agrees, after the completion of the sale by our agreement, to keep the thing, my right may result from my being deemed in possession of a thing, which the vendor has agreed to keep, to hold for me. In neither case, however, does it appear, that Shepperd, any more than Blackstone, had in contemplation the rights of third persons. To cases between the parties, ought the principle of the common law invoked to be confined, in the same manner as that cited out of the Roman law, and *Pothier* is not to be extended to them. *Traditionibus, non nudis conventionibus dominia rerum transferuntur.* Between vendor and vendee, the property passes without delivery. Our civil code has an express provision to this effect: "The sale is considered to be perfect be-
"tween the parties, and the property is of right
"acquired to the purchaser, with regard to the
"seller, as soon as there exists an agreement for
"the object and for the price thereof, although

"said object has not yet been delivered, nor the "payment made." *Civil Code*, 346, *art.* 4. This article is a literal copy of the *Napoleon Code*, 1583.

MATHEWS, J. delivered the opinion of the court. The only question submitted by the counsel for the decision of this court, is whether the sale made in New-York by Mumford, the defendant, and the delivery of an order to the purchasers for the delivery of the cotton by his agents who were in possession of it, in this city, vest the property of the cotton in them—Whether the delivery of the order is to be considered and operate as a feigned delivery of the thing sold, and transfer to the purchasers the complete ownership of it, from the date of the order, to the exclusion of the claims of the defendant's creditors.

The necessity of a delivery to effect a complete transfer of the dominion and property of the thing sold, and the mode and effect of it, whether the delivery be real or feigned, have been so fully investigated in the case of *Durnford* vs. *Brooks' Syndics*—3 *Martin*, 222, heretofore determined in this court, that it is useless in the present case to enlarge on the subject. The situation of the parties, in the case under consideration, supports the claim of the appellant more strongly than the circumstances of the case

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alluded to did that of the *Syndics of Brooks*.—There the insolvent had personal possession of the goods, and had delivered part of them to the vendee. Here Mumford, at the time he made the sale of the cotton, had only possession of it by means of his agents, Talcott & Bowers, and therefore could make no real delivery, except by their intervention. The order to Talcott & Bowers, in the opinion of this court, is only evidence of the sale by Mumford, to the persons intervening and claiming the property, and does not amount to a transfer of the legal ownership and dominion of it, so as to prevent the creditors of the vendor from seizing and having it sold to satisfy their just claims, before actual delivery under the order.

We are of opinion that the judgment of the parish court was erroneous, in determining that the cotton, in the possession of the garnishees, is not subject to the attachment, and must be reversed; and it is therefore ordered, adjudged and decreed, that it be annulled, avoided and reversed. Proceeding to give such judgment here as ought to have been given in the court below, it is further ordered, adjudged and decreed, that the plaintiff and appellant recover from the defendant and appellee the sum of three hundred and twenty-three dollars and seventy-two cents,

with costs, to be raised by the sale of the property attached. *See Maurin* vs. *Martinez & al.* 5 *Martin, March* 1818.

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HARANG vs. *DAUPHIN.*

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

The sum claimed, not that recovered, ascertains the jurisdiction of the court.

The defendan's co-trespasser may be a witness for him

Duncan, for the defendant and appellant, read an affidavit, stating that the plaintiff, in his petition, demanded one thousand dollars for his damages, but had recovered a sum under three hundred dollars; that the parish judge erroneously concluded, that the jurisdiction of the supreme court was limited by the sum recovered and not by that claimed, and had refused to allow an appeal: whereupon, he prayed and obtained a rule to shew cause why a *mandamus* should not issue; on the service of which the judge allowed the appeal.

DERBIGNY, J. delivered the opinion of the court. The plaintiff and appellee, a planter of the parish of Orleans, being syndic of his district, and having as such in custody, in his field, some stray cattle, the defendant and appellant, his

* MARTIN, J. did not join in this opinion, having been of counsel in the case.

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neighbor, pulled down the fence which separates their plantations, went after some horses, which belonged to him, and drove them out of the appellee's field into his own.

Against this alleged trespass the plaintiff and appellee has laid a two-fold complaint, asserting that "it was committed not only in violation of his private property, but in contempt of the authority with which he was vested as syndic." He concludes with a prayer for damages, and has obtained judgment for one hundred dollars, from which the present appeal is brought.

The form of this action has been objected to, as blending together a demand for public, with one for private, reparation. It is certain that the trespass complained of cannot be viewed here, as the plaintiff represents it, as a violation of a private right and a contempt of public authority; the plaintiff cannot recover damages to his own use for such a contempt. The reparation in this particular is of a different nature than that due for a private injury. But, we cannot think that the allegation of the plaintiff, concerning the contempt of his authority, affects the action which he has a right to bring for a private reparation: his suit, therefore, can be maintained so far as it concerns his private interest.

The next object of our consideration, is a bill

of exceptions, taken by the defendant on the refusal of the parish judge, to admit as a witness a person who accompanied the defendant when he went into the plaintiffs' field after his horses. The judge, it appears, rejected that witness, as interested in the event of the suit. In this, we think he erred. It is a principle of our laws, that, even after a judgment has been given *in solidum*, against several persons who have committed a trespass together, if any one of them pays the whole sum recovered, he has no action against the others to compel them to contribute. 1 *Pothier, Oblig*, n. 282. Much less could the defendant here, who is sued alone, call on his co-trespasser to share the condemnation with him. That person is not interested in the event of the suit, and ought to have been admitted as a competent witness, however suspicious he may otherwise be, from his connection with the defendant in the alleged trespass.

It might be further observed, that if he had any interest in the suit, that interest was adverse to the defendant who called him; as the plaintiff who has recovered damages from one trespasser, cannot afterwards demand any from the other trespassers. VII *Partida*, 15, 15. The witness, in the case, was to be benefitted by a judgment against the defendant. *Duperron vs. Meunier*, 3 *Martin*, 285.

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It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the cause be remanded for trial to the parish court, with directions to the judge to admit Honoré Duplechin as a witnesss, if there be no other objection to his competency, than the one alluded to in the bill of exceptions filed by the appellant.

Moreau for the plaintiff; *Duncan* for the defendant.

SEGHERS vs. *VISINIER & AL.*

Syndics become personally liable by their own misconduct only.

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

MATHEWS, J. delivered the opinion of the court. The plaintiff and appellee brought this suit in the court below, to recover the sum of $458 on account of money expended in law charges for the benefit of the estate of John Philips, an insolvent debtor, and also for professional services rendered to the same, which he claims as being due and owing to him by the creditors of said Philips, and prays judgment against the defendants and appellants, personally and *in solidum*, because they, as syndics of the creditors

aforesaid, failed to comply with certain rules and orders made on them by the parish court.

These rules, the appellants, who were defendants in the inferior court, state in their answer, were obtained *ex parte*, and this appears to be true from the manner in which they are worded; being absolute in the first instance and obtained on motion of the appellee.

When a debtor surrenders his estate for the benefit of his creditors, they may cause to be appointed by the judge a curator, whose duty it is to take care of the estate; or they may appoint some one or more among themselves, under the name of syndics or assignees, to have the management of the said estate. *Code Civil* 84, *art.* 34.

After the cession of goods and appointment of a curator or syndics, as in the present case, it becomes their duty to collect the debts due to the insolvent, to administer his estate most advantageously for the mass of his creditors, and to pay them their credits according to their privilege, in pursuance of orders from a competent tribunal.

Like other curators, *ad bona*, they may on account of maladministration and waste, become personally liable to persons interested in having the estate legally and honestly managed. But in an action against them, like the present, which is instituted to recover the amount owing by

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the estate of the insolvent debtor or by the creditors of such estate for services rendered for its benefit, and make them responsible in their individual capacity, it is necessary that the plaintiff in his petition should clearly set forth the waste committed, and that it should be fully proven at the trial.

The only ground stated in the petition of the appellee (who was plaintiff in the parish court,) by which he attempts to charge the defendants personally, is a disobedience or a non-compliance with certain rules obtained against them, by him *ex parte*. By these rules they were required to file a tableau of distribution of the insolvent's estate, and to pay to the appellant the sum claimed by him, as a sum privileged above all others. The foundation of all errors and mistakes in the suit are to be discovered in this *ex parte* order of the judge, commanding the payment of Segher's claim, as a privileged credit, without giving the syndics, who represent the mass of the creditors, an opportunity of contesting this privilege in the regular manner of proceeding in such cases.— A tableau of distribution has been since filed by them, in which are exhibited credits to an exorbitant amount, of the same nature as the appellee's, besides taxed costs, which shew clearly the impropriety of allowing the payment of any

particular claim, before a distinct view can be had of all the claims against the estate of an insolvent.

The appellee has not in his petition set forth any waste committed by the appellants, other than what is to be implied from their disobedience to the judge's order of payment; that being founded in error cannot support the present action.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed: and it is further ordered, adjudged and decreed, that judgment be entered here for the appellants with costs to be taxed.

The plaintiff *in propriâ personâ*, ***Porter*** and ***Depeyster*** for the defendants.

MERCIER vs. *PACKWOOD.*

APPEAL from the court of the first district.

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

The petition stated that, in the year 1804, the plaintiff leased to Cuningham, for the space of two years, twelve feet of ground, fronting the river by sixty in depth, at the rate of $24 a month, that the lessee erected thereon a building, which in the year 1805, he sold to the defendant with

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the lease—that the defendant, by the sufferance of the plaintiff, continued in possession, and paid the rent till the first of April, 1815, when the plaintiff requested him to leave the premises, which he refused to do: that there are, at the inception of the suit, July 1st, 1815, seventy-two dollars due for rent, which he refuses to pay.—The petition concludes that the defendant be decreed to leave the ground and remove his building, and pay the rent now due, and that which will accrue till he quits the premises and pay further such damages as the jury may assess.

The answer denied all the allegations in the petition.

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

The statement of facts shewed that the lease was made to Cuningham, who sold it to the defendant, as stated in the petition, that the defendant let out and repaired the build ng at several times, and paid the rent till the first of April,—that immediately after the institution of the suit, he sent the rent due to the plaintiff, who referred him to his attorney, as the suit was depending—that the building on the lot is in a bad state, and it is feared that it will fall—that the plaintiff wants his ground to build thereon, and is thereby

kept out of the use of eighteen feet of ground, adjoining the twelve leased to Cuningham, now in the occupation of Devines, who originally rented them from the defendant, long before the institution of this suit, but holds them under Hennen, who, on the 26th of June 1813, purchased them from the defendant.

The court ordered the appeal to be dismissed, on motion of the defendant and appellee, because it did not appear that the matter in dispute exceeded the value of three hundred dollars.

Seghers for the plaintiff; *Hennen* for the defendant.

SHANNON vs. *BARNWELL & AL.*

APPEAL from the court of the first district.

The appeal will not be suffered to be dismissed, if it clearly appear to have been taken for delay.

The plaintiff sued for the recovery of a sum of three hundred dollars, loaned to the defendant, with interest, and recovered accordingly.

The defendant Barnwell appealed after the signing of the judgment, and took no measure to provide a statement of facts. The plaintiff moved to have the judgment affirmed with damages, under the 12th section of the act organizing the

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supreme court; and the defendant moved to dismiss his appeal.

Hennen for the appellant. A plaintiff may always dismiss his suit: the appellant is a plaintiff, and therefore, if he find it convenient, may dismiss his appeal.

The plaintiff and appellee is not entitled to damages. There were two defendants and one only appealed: the judgment might therefore have been executed on the defendant who did not appeal. Besides no appeal could be regularly had: the original demand did not exceed three hundred dollars. Interest and costs have indeed raised it above that sum. But, in ascertaining the jurisdiction of this court, interest and costs ought not to be counted; the act of 1813, *c.* 12, expressly excludes costs.

Depeyster for the appellee. If one of the defendants in this case by a frivolous appeal postponed the execution of a judgment fairly obtained against him, by an appeal made with no other view than to obtain a delay, he ought to be mulcted in damages; for independently of the injury which the appellee may sustain, in consequence of the insolvency of the other defendant, he is put to trouble and expence in attending to the appeal.

The interest which accrued on the money lent, at the inception of the suit, was equally due to the plaintiff as the principal, and made part of the matter in dispute, which exceeded the sum of $300, by the amount of the interest.

The defendant who has appealed cannot avert the consequences of his appeal by saying he had no right to appeal. This would be taking advantage of his own wrong.

Neither can he, for the same reason, avoid the penalty of the law by the dismissal of an appeal, to which it clearly appears he resorted for the sole purpose of delay. He could not have had any other advantage in contemplation. No statement of facts, special verdict, or bill of exceptions, comes up with the record. We are therefore entitled to an affirmance of the judgment with damages. *Fromentin & al.* vs. *Prieur* 3 *Martin*, 225. *Jennings* vs. *brig Perseverance*, 3 *Dallas*, 336.

MATHEWS, J. delivered the opinion of the court. The court ought not in any case to permit the appellant to dismiss his appeal, where it appears evident that such an act on his part will do an injury to the appellee, by depriving him of a right which can only be maintained and enforced by the appellate court. We have on several occasions dismissed appeals, which operates an

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affirmance of the judgment in the inferior courts, so far as to authorise executions on them. But this has never been done, when it did appear clearly that the appeal was taken for the sake of delay only. The difficulty is to ascertain this truth, where a full statement does not accompany the record; yet, if it is not attempted to be done, the provisions of the 12th section of the act cited, may in every instance be defeated by the appellant, who chuses to delay, not praying his appeal until after the time prescribed by law for making a statement of facts. This circumstance, which occurs in the present case, together with the presumptive correctness which attaches to every judgment of competent tribunals, until the contrary is shewn, is in our opinion sufficient to authorise the court to give force and efficacy to the law, by affirming the judgment with damages.

The appellant's counsel further contends that he has caused no delay to the appellee's recovery of his debt, because the sum or matter in contention is below the amount on which appeals are authorised. Without troubling ourselves to remark, that this objection comes with an ill grace from him who has obtained the appeal, it may be observed, that the record clearly shews that the matter in dispute, together with the interest, exceeds three hundred dollars.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with *five per centum* on the amount for damages, for the delay caused by the appeal.

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FAURIE vs. *MORIN'S SYNDICS* & *AL.*

APPEAL from the court of the first district.

A promise in consideration of the governor being prevailed on by the promisee to appoint the promisor to an office, is not binding.

This action was grounded on a written contract, the preamble of which sets forth that at the death of Joseph Faurie, the plaintiff's husband, "the protection of government granted to his widow, the usufruct of part of the office of a public auctioneer, which the deceased had filled, by a declaration that no person should be appointed thereto, who would not take the widow as a partner; and on the resignation of Bailly Blanchard, who had the office during thirty-one months, Morin obtained it on the same terms."

Morin afterwards binds himself with Debon, as his surety, to pay to the plaintiff, in lieu of part of the profits to which she had a right in the partnership, the sum of $1,200 *per annum*, in monthly payments. He further undertakes to refund to Bailly Blanchard the sum of $350, the residue of a sum by him paid to J. Pitot, his predecessor, for which he is to retain monthly

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$15 till payment. He further engages not to resign without giving the plaintiff three months notice: and it is provided, that on quitting the office, his successor shall refund to him such a part of the advances made to B. Blanchard as may remain unpaid.

The answer sets forth that the contract was obtained without any valid or legal consideration, and through misrepresentation and fraud; that the principal obligor, and his surety, were imposed upon by deceitful representations made by the plaintiff and the then governor of the territory of Orleans, that government had the right of granting away one half of the profits of the office of auctioneer, and so the obligation is illegal and void. It is further answered, that the commission thus obtained by Morin, is dated February 11th, 1811, and expired on the same day in 1812. The sum of $1,200 was by him paid to the plaintiff for that year, and so nothing is due to her.

The court of the first district gave judgment for the defendant, being of opinion that "the second appointment of Morin was not a continuance of his first commission, but placed him in the situation of a successor; so that any engagement of partnership or otherwise, made in rela-

tion to his office, must be construed to be only co-extensive with the commission held at the time, and Morin having complied with his contract, under the first commission, is no further liable."

From this judgment the plaintiff brought the present appeal.

As part of the statement of facts, the depositions of Pitot, Blanchard and Dubourg, come up with the record.

The first states, that after Faurie's death, having been concerned with him in the auction, he was appointed an auctioneer, and from motives of benevolence, allowed to the widow the share of the profits which her husband had in his life time. He promised her not to resign, except in favor of such a person as would extend the same advantage to her, and reimburse the advances which he had made to her. Accordingly, arrangements having been made with Blanchard, who had objections to have a partner, especially a woman, he agreed to pay her a stated sum yearly; on which, he was commissioned.

Blanchard deposes, that application was made to him by Pitot, as before stated, and knowing that the plaintiff had many friends, and was patronized by the governor, he conceived he would not be much the loser by giving her a fixed

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sum, and finally came to an engagement similar to that on which the present suit is brought.—Having concluded this, he was told to wait on the governor for his commission. He went and gave his name to that officer, who ordered his secretary to fill up a commission. On its being perfected, the deponent was sworn in and the commission handed to him. The governor now inquired whether the widow was to be his partner, and he answered by disclosing his bargain with her. He never had spoken to the governor till then. The commission was applied for by the plaintiff or her friends: and it was well known that the governor made it a *sine quâ non*, that the candidate should be presented by her.

Dubourg deposes that he waited on the plaintiff to the governor's to solicit Morin's commission, he believed it would not have been granted without the condition that the grantee should take the plaintiff as a partner. He knows the governor had told her to present a candidate and he would inquire into his capacity. He knows that Blanchard's commission was granted at the solicitation of the plaintiff, but cannot say that the governor knew of any bargain between Blanchard and her.

The statement of facts states that Morin's first commission bears date of February 11, 1811—

the second of February 12, 1812. He was two years in office, but gave no bond on the second commission. He paid Blanchard $353 22, on the 25th of February 1811, and to the plaintiff at sundry times $1445. The contract on which the suit is brought bears date February 13, 1811.

Morin made a cession of his goods to his creditors.

Turner for the defendant. The plaintiff in this case cannot recover: for the contract which is the ground of the action is not a valid one.

A valid contract is one which has a lawful purpose. *Civil Code* 260, *art.* 8. It is void if it be without a cause, or has a false or an unlawful one. *Id.* 264, *art.* 31. The cause is unlawful, when it is forbidden, when it is against moral conduct or contrary to public order. *Id. art.* 33.

The plaintiff then is bound to shew that the contract under which he claims has a lawful purpose. The averred purpose of this is the procuring a commission of auctioneer for Morin.—Now, this is an unlawful purpose; it is unlawful, against moral conduct, and against public order.

The rule of the common law is equally in point. Considerations against the rules of law.

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the policy of the law or the directions of a statute are void. *Mackarell* vs. *Todderick, Cro. Car.* 337, 353, 361 *Morris* vs. *Chapman, Thos. Jones,* 24 *Martin,* vs. *Blytheman, Yelverson,* 197, *Parsons* vs. *Thompson, H. Blackstone,* 322, *Garfort* vs. *Fearon, id.* 327, *Blackford* vs. *Preston,* 8 *T. R.* 89, *Nerot* vs. *Wallace,* 3 *T. R.* 22, *Smith* vs. *Bromley, Douglas,* 676, *Waynel* vs. *Reed,* 5 *T. R.* 599, *Vandike* vs. *Hewit,* 1 *East,* 98, *Boothe* vs. *Hodgson,* 6 *T. R.* 405, *Mitchel* vs. *Cockburn,* 2 *H. Bl.* 379, *Aubert* vs. *Mace,* 2 *Bos. & Pul.* 371.

Ex turpi causâ non oritur actio, Crisp vs. *Churchill, Selw. N. P.* 95 *Girardy* vs. *Richardson,* 1 *Esp. N. P. R.* 13, *Hoxard* vs. *Hodges, Selw. N. P.* 60.

The sole consideration of the promise in the present case is the exercise of the plaintiffs' influence with the governor.

In the case of *Rex* vs. *Pollman and others,* the defendants were indicted for a conspiracy to obtain money, by procuring from the Lords of the Treasury the appointment of a person to an office in the customs, and the court held that the offence charged in the indictment was clearly a misdemeanor: 2 *Campbell,* 331. In the case of *Norman* vs. *Cole,* which was brought to recover the sum of £30, deposited as a reward for

services to be rendered in procuring a pardon, the court held that the plaintiff should shew what means were to be used in order to procure it, and he was nonsuited. 3 *Esp. N. P. R.* and he was nonsuited.

In this case it is clear that what is claimed is in fact the price, the consideration money of a sale—the thing sold an auctioneer's commission. Now nothing was legally sold, for nothing can be the object of a contract of sale, but what is an object of commerce. *Code Civil* 264, *art.* 28.

The right, to which the plaintiff pretends, of being a partner, cannot have a legal existence. Authorised auctioneers alone can sell, and there cannot be more than three in the city of Orleans, 1805, *c.* 4. They are officers appointed by the executive under an act of the legislature—receive a commission—take an oath—give sureties and a bond to account quarter yearly on oath. Are not these some of the civil functions and engagements which the law declares women incapable of fulfilling? *Civil Code* 8. *art.* 1 & 2.

Partnership is a contract by which two or more persons agree to put something in common with a view to divide the benefit which they expect from the same. *Civil Code* 388, *art.* 1. Now what did she put in common?

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Admitting the legality of the contract, it ceased with the commission of Morin in February 1811, and the plaintiff is indebted to the latter for all she received above the sum of $1200, stipulated to be paid for the first year: every thing, above this, being paid through a mistake. There is no contract for it, it was received without a consideration. Morin is bound by no moral obligation to pay any thing farther.

Neither is Debon, the surety. For he may oppose to the plaintiff all the exceptions belonging to the principal, which are inherent to the nature of the debt. *Code Civil* 432, *art.* 21.

Livingston for the plaintiff. There cannot be any doubt that an auctioneer may have a partner. In fact, most of the auctioneers in this and every commercial city in the United States have. They require aid, and may as well pay for it by a participation in their emoluments, as by a fixed salary. Ministerial officers often have deputies, who are compensated for the services they render to their principal, by a portion of his fees: and what are these officers, but partners? May not judicial officers procure aid in the same manner? If a justice of the peace, to whom his inexperience or convenience may render the employment of a clerk useful, see fit to reward it by the allowance

of a part of his emoluments of office, is there any thing illegal in this? Yet, what are a sheriff's deputy and this justice's clerk, but partners in the profits of the offices of their principals? Notaries often do the like, and a woman able to write, as many often are, with sufficient neatness, accuracy and expedition, might doubtless demand from a notary who might have employed her (on a fixed portion of the emoluments of office) a merited compensation, as a partner in the profits of, though she might be incapable of holding the office. She might well allege, that the notary and herself had put in common, he his right of exercising the office of a notary, his skill and learning, and she her skill in penmanship, labour and industry, with a view, in the language of the Code, to divide the profits, which they expected from the same. Though this rarely, perhaps never does happen, it is not easy to shew any illegality in it.

But the appointment of an auctioneer, confers on him who receives it, rather a privilege than an office. Before the act establishing it, any one could sell at auction. The act created a monopoly or privilege, which was granted to a certain number of persons, in consideration of their engagement to pay into the treasury a sum equal to two and one half *per centum* on the amount

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of their sales. In offices, government pays the incumbent to perform his duties: here the incumbent pays government.

The partnership therefore mentioned in the pleadings, was a lawful one. The plaintiff put in the good will of the store of her former husband, the customers of which it was expected would be induced to employ the person who took her in partnership, in preference to any indifferent auctioneer. Many rich merchants took an interest in her helpless situation. Yielding to compassion and aiding a distressed family, was a consideration to which the governor might properly yield, if the person pointed out by the plaintiff was in every respect properly qualified.

If the partnership was a lawful one, of which no doubt can be entertained, if it appeared, after it had been entered into, inconvenient or disadvantageous to the parties, they were certainly at liberty to put an end to it, and substitute thereto the agreement which is the ground of the present suit. This was done, two days after Morin had obtained his commission,—this document bears date of the 11th, and the agreement of the 13th of February. This agreement, thus substituted to the partnership, was in the contemplation of the parties to be commensu-

rate in its duration with the intended partnership. So did the parties understand it.

MARTIN, J. delivered the opinion of the court. It appears to this court, that the promise of the defendant, Morin, cannot support the action. From the instrument itself, it is manifest that the only consideration on which it rests, is the illegal condition, on which it is stated that the office was obtained. This condition is contrary to sound policy. Offices are to be granted absolutely, without any condition. It is not in the power of the grantor to lessen the emoluments which the law has affixed to the discharge of official duties. It matters not to what use the share of emolument, thus carved out, is applied. The public will be ill served, if the circle, within which an officer is to be selected, is narrowed by a reduction of the legal emoluments. If these are withdrawn from the incumbent, he may be placed under the temptation of compensating himself by speculation, extortion and fraud.

The condition, under which the office was obtained, being illegal and void, it follows that the promise cannot support an action.

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

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L. & M. CRESSE vs. *MARIGNY.*

APPEAL from the court of the first district.

Children are not suable as heirs. til they accept the inheritance.

The petition stated that the plaintiffs are the owners of a slave, whom they inherited from their grandmother, and who was unlawfully detained by the defendant. The answer denied all the facts, and averred that the defendant purchased the slave at a public auction, from the proper officer.

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

The statement of facts shewed that the plaintiffs proved themselves to be the sole owners of the slave in question, having inherited him from their grandmother,—that he remained a considerable time before the death of Joseph Cresse, their father, in his possession,—that the plaintiffs being out of the state at the death of their father, the slave was inventoried as his property, by order of the court of probates, and afterwards sold with the rest of his estate, by the register of wills, and purchased by the defendant. By a copy of the record of the court of probates which accompanied the statement of facts, as part of it, it appeared that M. Cresse.

one of the plaintiffs, instituted a suit for her share of the estate of her grandmother, which had been administered by her father.

Moreau for the defendant. The plaintiffs are not entitled to recover from the defendant, who has acquired a good title. A sale by the register of wills, by order of the parish judge, is a judicial sale, by which the property passes. Not so a sale by the sheriff under an execution: for he has authority to take the goods of the defendant only, and if he takes those of a third person, he is a trespasser.

The law makes it the duty of the parish judge, on being informed of the death of a person, in the absence of his heir, to affix his seal on his effects, and afterwards sell them. *Civil Code*, 172, *art.* 124—128. The effects here spoken of, must be those which are apparently his—those found in his possession,—unclaimed by any other person. The judge has no criterion by which to regulate his conduct in this respect: if he finds property, over which the deceased acted as owner, he must sell it, though there be no positive proof of his ownership—no means of ascertaining whether that property be absolute or special only. When the property is thus put up to sale, the person to whom it is adjudged acquires a complete title thereto.

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The sale by a judicial adjudication of a piece of property, found among the estate of a deceased person, vests it in the purchaser: the owner when known is only entitled to the proceeds. *Pothier, Traité de Propriété, n.* 252. The goods of a third person sold among those of a bankrupt, pass likewise to the purchaser. *Ord. Bilb. b.* 16, *art.* 8. The adjudication of a stray destroys the right of the owner who has not claimed it before it was adjudged. *Pothier, Traité Propriété, n.* 16.

But if the property did not pass by the adjudication to the defendant, still the plaintiffs are not receivable to claim the slave from him,—at least without tendering the price: for the defendant is a creditor of the estate for the sum paid, and the plaintiffs are clearly his debtors thereof, unless they expressly renounce the inheritance of their father: and this, it is too late for one of them at least to do, for she has brought suit for part of his estate.

On the death of the father, the law casts the inheritance on his children, and destroys by confusion any right which they may have against his estate, unless they renounce the inheritance, or accept it with the benefit of an inventory. *Pothier on Obligations, n.* 605, 607. The person called by law to the inheritance is heir, as

soon as the ancestor dies, unless he renounces or accepts with the benefit of an inventory: and this renunciation is not to be *presumed;* it must be *formal, Civil Code,* 164, *art.* 88. If he do neither, he is liable at once. If he accept with the benefit of an inventory, no judgment can be had against him, if he has done no act of heirship during the delays which the law grants to him to make the inventory, or deliberate. *Id.* 166, *art.* 102.

Even in c ses, in which the father is not the debtor of his children, but is bound to indemnify their debtor, confusion does indirectly take place. They can no longer sue their debtor, having succeeded to the obligation of the father to indemnify him, *Pothier, Ob. n.* 611. This is in order to avoid circuity of actions. Here, the estate of the plaintiff's father, if they recover, will be bound to indemnify the defendant.

Hennen for the plaintiffs. The plaintiffs have shewn completely, that they had once the legal title to the slave, the object of the present suit: they cannot, therefore, be deprived of that title, but by their own act or that of the law.

It is not pretended that they have done any act, which would deprive them of their property. Has the law destroyed their title? Assured-

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ly not. The law is for the protection of rights: and, as a general rule declares that *id quod nostrum est, sine facto nostro ad alium transferri non potest. ff.* 50, 17, 11. The administration, which the law gives, is of the property of the deceased, not of that which may be found in his possession. It authorises the sale of his estate, and not that of third persons. Every article of the Civil Code, which treats on the subject, implies this.

Derbigny, J. delivered the opinion of the court. The appellant resists this claim of the appellees on two grounds. He alleges first, as a general principle, that judicial adjudications do, in some cases, transfer the property even of third persons, and that this is one of the cases to which the rule is applicable. In support of this position, he quoted the authority of Pothier, who in his *Traitè de la Propriete, n.* 76, 251, 152, asserts that even where the goods of a third person have been advertised for sale, if such a third person does not oppose the sale in due time, the right of property passes to the purchaser.

Without questioning the correctness of Pothier's assertion, it is obvious that a rule so widely swerving from the principles of natural law, must have been established by positive provision, and cannot extend beyond the country for which

it was made. By that provision a delay is fixed within which the third person, whose property is about to be sold, must come forward and oppose the sale. After that delay he forfeits his right, as a punishment for his neglect to obey the laws of his country. The necessity of quieting purchasers of property exposed to sale by order of government, may be pleaded in justification of such a disposition: but, nothing short of some such positive law among us could justify this court in recognizing a sale of this nature as capable of transferring the right of property.—Neither could the sale, in such case, be deemed valid and binding upon the real owner, unless it were shown that the necessary delay was allowed for him to come forward and oppose the sale, and that he neglected to do it. We find recognised, on the contrary, that after the judicial adjudication of property sold, as the property of a defendant, while it belonged to a third person, such a third person may recover his property by suit. *Cur. Phil. Remate. Febrero, Juicios, b.* 3. *sect.* 2.

The second ground of defence of the appellant is, that should the present sale be found not to have transferred any right of property to the buyer, yet the appellees ought not to recover, because they are the heirs of a person,

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among whose estate the property in dispute was sold, and as such bound to make that sale good to the purchaser. He further contends that confusion has taken place here in their persons, as being, at the same time, heirs and creditors of their father.

Without considering whether heirs, as they are obliged to guarantee the deeds of their ancestors, are likewise bound to make good the acts, which are done after their death, by those who dispose of their estates,—nor whether this case, in which the appellees appear, not as creditors of their father, but as owners of certain slaves, who remained in his custody till after his death, can be viewed as a case in which confusion has blended in the same person the characters of debtor and creditor, let us say at once, that there is no evidence that the appellees are or intended to be heirs of Joseph Cresse.

One of them was represented as having done an act of heirship, because she applied to the court of probates for her share of the inheritance of her grandmother, which had been administered by her father till his death. Nothing, in this application gives room even to presume, that she intended to accept the succession of her father. On the contrary, the caution with which she confines herself to the demand of her share

of her grandmother's estate, is an evidence of her intention not to meddle with the succession of her father. Both the appellees are then in the same situation: they have done no act of heirship, and are at liberty to accept or to renounce the inheritance of Joseph Cresse.

But, it is said that until they renounce in due form, they are to be considered so far as heirs, as to be deemed inadmissible in any demand incompatible with the character of heirs. It is not easy to conceive why it should be so. The principle is, that "until the acceptance or renunciation, the inheritance is to be considered as a fictitious being, representing in every "respect the deceased." In the meanwhile there is no heir, and we see no reason why the persons, who have a right to refuse to be heirs, should be considered as such before they have made known their intention, and should be deprived of the rights which they hold independently of their character of heirs.

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

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APPEAL from the second district.

He who takes the charge of a slave, without reward, is not liable for his fortuitous escape.

The petition stated that the plaintiff was owner of a mulatto slave, who ran away and was arrested and confined in the jail of the city of New-Orleans; that the defendant, a neighbour of the plaintiff, being occasionally in that city, took upon himself, of his own authority and upon his own responsibility, to take the mulatto out of jail (representing that he was charged by the plaintiff to do the same) for the purpose of bringing him to the plaintiff—and did actually start on his voyage to the plaintiff's residence with the said mulatto, but through negligence or otherwise suffered him to escape, whereby the plaintiff lost his slave and the defendant became liable to pay his value.

The general issue was pleaded.

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

The statement of facts was made by the judge, the parties not having been able to agree thereon. It informs us, that a witness deposed, that on the second day, after the defendant left New-Orleans, with the plaintiff's slave, the latter made his escape; that the defendant discovered

this at 6 o'clock, A. M., and at 7 ½ A. M. proceeded on his voyage, without remaining to make search for the slave; that the slave was not confined, but was suffered to walk on shore, whenever the boat stopped, and the nature of his disorder required him frequently to go out. At the time he was received by the defendant, he was quite indisposed, and continued so until he escaped: he fell down once or twice from a weakness occasioned by his sickness, the dysentery. The defendant is a physician, but did not give, to the knowledge of the witness, any medicine to the slave while on board, and took no more care to prevent his escape, than that of others on board: he having several.

Four depositions, taken before the trial, accompanied the statement of facts, as part of it.

Dulquhold deposed, that about one year ago, the defendant arrived at the deponent's house in New-Orleans from La Fourche, with a sealed letter from the plaintiff to one Bonnell, which, at the defendant's request, was carried to Bonnell's residence and left there: that, on the day the defendant returned, Bonnell brought the slave in dispute to the deponent's house, with the view, as he understood, that he might be taken home by the defendant: he was not

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confined by irons or otherwise and was sick with the flux.

Casseyn deposed, that the defendant took a runaway mulatto slave to carry him to the plaintiff, his master.

Bonnell deposed, he received a letter from the plaintiff, brought by the defendant, relating to the slave in dispute, requesting him to make inquiry from his former owner; that he informed the defendant that the slave was in jail, sick; that the defendant went to see him, at the request of the deponent, when he informed the deponent that the slave had a dysentery, that as he had a boat, if the deponent would deliver the slave to him, he would take him up to his master, to which the deponent assented: that on delivering the slave, the deponent informed the defendant the slave was a bad one, and would, if not properly attended to, make his escape: to which the defendant replied, that the deponent might rest satisfied, as the defendant had undertaken to deliver him safe to his master.

St. Cronau deposed, that he was in the boat with the defendant and the slave in dispute; the slave was ordered to work; he was so enfeebled by sickness that he fell down in going on board, and once into the water. He slept in the forepart of the boat. On the second day,

in the night, he ran away. The deponent was present when the slave was brought to Duquhold's, and never heard any conversation between Bonnell and the defendant, in which the former said he would be accountable.

Besides the statement of facts, there was a bill of exceptions taken to the opinion of the court, in the charge to the jury, asserting that the defendant was only bound to exercise ordinary attention towards the slave, and was only liable for gross neglect.

Denis for the plaintiff. As the defendant without any authority from the plaintiff, took the slave of the latter out of jail, he must be liable in damages for all the consequences of this unauthorised interference with his property.

But, admitting that the intention of the defendant, and the circumstances of the case authorised this interference, then, as a *negotiorum gestor*, he was bound to act, not only with good faith, but with all the care and attention which the business he undertook required, and he was answerable for his neglect, *si negotia absentis et ignorantis geras et culpam et dolum præstare debes, L.* 11, *ff. de neg. gest.* 2 *Pothier, Contrats de Bienf. n.* 46, 208. He certainly acted

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with great negligence, in taking the slave in his boat, without securing him by irons or with a rope, after he was informed of his disposition to run away, and had been warned that he would escape unless he was well secured: and after he discovered that, what he had thus been warned against, had happened, it was his duty, to have delayed his departure, till every effort to retake the slave had been used, and every probable hope of success had vanished.

Lastly, the defendant is bound to pay damages to the plaintiff on his special undertaking, evidenced by the deposition of Bonnell, whom he desired to be satisfied, as he had undertaken safely to deliver the slave to his master.

Morel for the defendant. The slave which is the subject of this action was taken by the defendant, at the plaintiff's request. It is in evidence that the defendant brought a letter from the plaintiff to Bonnell, in consequence of which the latter brought the slave to the defendant. It is true, Bonnell warned him the slave would make his escape, if not properly attended to, but it is not to be concluded that thereby the idea was intended to be conveyed that there was a necessity of confining him in irons, or otherwise. The contrary is to be implied from the conduct

of the person who gave this warning, since he took no precaution of this kind.

If the defendant be considered as a *negotiorum gestor*, he is not liable for the misfortune of the plaintiff. The slave was so weak that he could hardly stand and was often obliged to step aside, being ill of a flux—it is not unlikely that he rose in the night, and as he had done before, during the day, fell into the river. A witness deposed, that the defendant had other slaves on board and took the same care of all.

Whether the defendant acted as the agent, or the *negotiorum gestor*, of the plaintiff, is unnecessary to consider, for his liability is the same. When the *negotiorum gestor* has done his duty, he is not answerable for the fortuitous loss of the property of the absent person, for whom he acts. He is only liable, when the loss has happened through his negligence, his fault or his fraud. *Partida*, 5, 12, 30. *Negotiorum gerentes alienum casum fortuitum præstare non compelluntur*, *L.* 22. *Code de neg. gest.* The principle is the same with regard to the agent: *non amplius quam bonam fidem præstare oportet eum qui procurat*, *L.* 10, *ff.* 11.

But, it is said the defendant is bound on a

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contract or promise. He declared he had undertaken safely to deliver the slave to his master. The proof of this contract or promise is drawn from the deposition of Bonnell—this deposition cannot avail the plaintiff: more than $500 are claimed for the value of the slave, therefore, the convention or agreement, ought to be proved by two witnesses at least. *Civil Code,* 310, *art.* 213. If it was, we would ask, what was the consideration of this promise?

It is clear the defendant cannot be answerable, unless he has been guilty of some neglect. The disorder which afflicted the slave, when the plaintiff's friend delivered him to the defendant in New-Orleans, forbade his confinement in fetters of any kind. After he was missed, the defendant did not pursue his trip, according to the testimony, for about one hour and one half: a time sufficient to hear from him, if it had been possible.

MATHEWS, J. delivered the opinion of the court. The only question arising from this statement of facts is, whether the appellee has been guilty of such negligence in suffering the slave to escape, as to have made himself responsible to the owner in damages, under the rules of law governing quasi contracts.

According to the regulations of the Civil Code, the person who voluntarily takes upon himself to manage the business of another, whether it be undertaken with, or without the knowledge of the latter, contracts a tacit engagement to complete that which he has thus undertaken to do. "In managing the business "he is obliged to use all the care of a prudent "father of a family." *Civil Code*, 318, *art.* 8.

According to this rule, the *negotiorum gestor* is only bound to observe that ordinary diligence and care, which might be expected from a prudent master himself.

It is a practice almost universal among owners of slaves to chastise them corporally for the offence of running away, and when they are taken, until the infliction of this punishment, ordinary care and prudence requires that they should be well guarded or confined: but, surely it cannot be required of any one to exercise a species of care and diligence, in violation of the plainest dictates of humanity, or to require of an agent to do that which, if done by the principal, would fix on his character the stain of brutality. The taking the slave, diseased as he was, from the confined and unwholesome air of a prison, was certainly an act well intended on the part of Prevot, for the benefit of the master: and on

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his way up to the parish of Ascension, his state of sickness would not allow him to be confined. His subsequent escape is the misfortune of the owner, for which the agent, under all the circumstances of the case, ought not to be made responsible.

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

BAION vs. *MELLERE & AL.*

A bill of sale, for property, sold by a parish judge acting as sheriff, is good, altho' he therein takes the appellation of sheriff, instead of that of judge.

APPEAL from the second district.

The petition stated that the defendants forcibly took from the house of the plaintiff, a negro woman slave and her four children—that, in consequence of the violence and ill treatment of the defendants, the woman died, and the plaintiff has sustained great damage.

The defendants pleaded the general issue.

At the trial, the plaintiff offered in evidence of his title to the slaves mentioned, a bill of sale, signed *Bela Hubbard, sheriff of the parish of Assumption,* which the court refused to receive, being of opinion it ought to have been signed, *Bela Hubbard, judge of the parish of Assump-*

tion: whereupon the plaintiff excepted to the opinion of the court.

There was judgment for the defendants and the plaintiff appealed.

The case was heard in the supreme court on the bill of exceptions.

Esnault for the plaintiff. Bela Hubbard was judge of the parish of Assumption at the time he executed the bill of sale for the slaves in dispute, and *ex officio* sheriff of the parish: and it became his duty to execute the instrument in his latter capacity. It appears on the face of it, that the sale was made by virtue of an execution from the parish court of Assumption, in which he presided as judge, and the processes of which he was bound to execute as sheriff.

As the law stood at the time, the same officer was to command and to execute: he was to make and receive returns. Sometimes, when an execution was in his hands, ready to be executed, application was made to him, in his judicial capacity, shewing some real or pretended hardship or injustice in the case, and praying a provisional injunction against the execution of the writ. It then became the duty of the judge to forbid the sheriff to execute the writ. But the judge and the sheriff were the same person, in a natural capacity, and although strictly the

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same in an official capacity, still as the duties of the respective offices were distinct, the injunction, like all other writs issued from the judge to the sheriff. In the same manner, in the present case, when as a judge Bela Hubbard had rendered judgment, process of execution was to issue to, and be executed by himself, and this issuing of the execution was performed by himself, who was the judge, clerk and sheriff of his court. The direction of this was, like that of all others, *to the sheriff of the parish of Assumption*. It was regular that the execution and return of it should be made under the official appellation of sheriff, because it was under that appellation it was received. It is clear that the conduct of the parish judge in this instance was correct, and that the district court erred in refusing to receive the bill of sale, as evidence of the plaintiff's title.

Morel for the defendants. The act of 1807, 1, *s. 1st*, provides, that in lieu of judges of the county courts, of clerks, sheriffs, coroners and treasurers of the said counties, there shall be established a judge, in each parish of the territory, with civil, criminal and police jurisdiction. The 16th section provides, that the parish judges shall make all inventories, appraisements

and public sales of all property real and personal, within the limits of their respective parishes, except sales to be made, under executions issued from the superior court of the territory, and shall receive all wills, and make all matrimonial contracts, conveyances, and generally all instruments of writing, which may be made by notaries public.

The bill of sale offered is made for property, sold at public sale, under an execution issued from the parish court, and is embraced by the provisions of the above recited act: it ought therefore to have been made by the parish judge.

At that time the legislature had not yet made provision for the appointment of sheriffs in the different parishes, and there could not be such an officer as the sheriff of the parish of Assumption, although by the 10th section of the act referred to, the parish judge performed the duties of sheriff, it was in virtue of the office of judge. They were required to sell property seized under executions, issuing from their courts, but they were bound to pass all sales for real and personal property as judges and not as sheriffs; they could appoint constables, who acted as their deputies, and who could seize and sell property, under executions issued

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from their courts, but the judges were bound to give bills of sale and give them authenticity. They performed the duties of notaries public, but were required to sign all acts made in that capacity as judges. They performed the duties of clerks of their own courts, the duties of auctioneers, of coroners, of treasurers, &c. but signed all acts, made in these different capacities, as judges.

A conveyance, made at that time by a parish judge, for real property, sold under an execution from the parish courts, with the formalities required, became an authentic act, and in order to give authenticity to acts, it was required that each parish judge should provide himself with a seal. But an act signed by a sheriff, although recorded by the parish judge, without having been passed by or acknowledged before him, could not be considered as an authentic act.

If, however, all this reasoning should be erroneous, and this court should be of opinion that the bill of sale under consideration is properly signed, it ought to have been recorded by the clerk of the parish court and not by the judge.

To admit it in evidence, in this case, would in effect be declaring illegal and void a considerable part of the acts of parish judges for

several years. They have generally signed all acts and proceedings, made by virtue of their offices, either as sheriff, clerk, auctioneer, notary or coroner, as judges of their respective parishes.

Esnault, in reply. If the bill of sale was properly executed, there cannot be much difficulty as to the recording of it. It is clear that it was recorded: it is extended at full length on the proper book. It is not denied that it was recorded by Hubbard, and it does not appear that in doing so he used the appellation of clerk, or that of parish judge, and the copy, which was offered in evidence, was made out and certified by Hubbard, avowedly in the capacity of parish judge, and under his seal of office.

MARTIN. J. delivered the opinion of the court. This case comes up before us on a bill of exceptions to the opinion of the district court, in refusing to admit as evidence the copy of a bill of sale of a slave, for the recovery of the value of whom, the suit is brought.

It appears that the sale took place under an execution from the parish court, made by Bela Hubbard, parish judge. The deed is signed *B. Hubbard, sheriff*, and the copy is certified to

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have been taken from the record by *B. Hubbard, parish judge.*

By the act of 1807, *ch.* 1, *sect.* 1*st*, which was in force when the sale took place, it is provided that in lieu of judges, of the county court, sheriff's coroners, treasurers, &c. there shall be a judge &c. in each parish.

This officer was to act as judge, sheriff &c. where as a judge or a clerk, he issued an execution, he directed it, using the old form to the *sheriff* of the parish. He then executed and returned it,—acting thus, at times in a *judicial*, at others in a *ministerial* capacity, and it was natural to use alternately a judicial or ministerial *appellation.*

The deed of sale is not denied to have been made by the parish judge. The copy produced is certified to have been literally extracted from the record by *Bela Hubbard, parish judge*: the bill of sale appears thereby to be under the seal of office, *le sceau de mon etude.*

This court is of opinion that the district judge erred in refusing to admit the document in evidence.

It is therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the cause be remanded to be tried anew, with directions

to the district court to admit the said deed in evidence.

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PECHAUD vs. PEYTAVIN.

PECHAUD vs. *PEYTAVIN.*

APPEAL from the court of the second district.

The irregular act of an attorney may be binding on his constituent, by the implied ratification of the latter.

The plaintiff in his petition, stated that the late firm of Reynaud and Peytavin being indebted to him in the sum of $2056, Reynaud and Peytavin, juniors, made their promissory note for the said sum, as attornies in fact to the said firm, payable to the plaintiff, one year after date; that the defendant, surviving partner of the said firm, has assumed the management and administration of its affairs and is liable to pay that sum, which he refuses to pay.

The answer denies the execution of the note, and avers, that if it was executed, as stated in the petition, which is by no means admitted, the defendant is not indebted to the plaintiff for this, that the note was paid, and he further pleads that it was through error and mistake, that it was made for the sum therein specified.

There was a judgment for $1056, in favor of the plaintiff and the defendant appealed.

The statement of facts, which is made by the

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counsel of the parties, shews that the plaintiff introduced in evidence the note described in the petition: with a power of attorney given by the defendant to Reynaud and Peytavin, juniors, and one Lozon, to act jointly and severally in the sole case of the absence or death of one or two of them.

The defendant introduced, as a set off, two orders for $500 each, drawn by the plaintiff, on Reynaud and Peytavin juniors, with a letter from the plaintiff to them, advising them of his having drawn these orders.

Tricou, a witness introduced by the defendant, deposed that he had paid one of these orders, after it had been protested, out of his own monies, but that the defendant had reimbursed him.

The payment of the other order was also admitted.

Morel for the defendant. The judgment of the inferior court is erroneous and ought to be reversed. The firm of Reynaud and Peytavin had ceased to exist, at the time of the execution of the power of attorney, under which the note, upon which the present suit is brought was drawn. The defendant, therefore, could not constitute the persons, who appear to have signed the note, attornies of the firm. If Reynaud,

the defendant's partner, was still living, he ought to have joined in the power, which is of no validity without his concurrence.

If we look into this power, we find that the person, who executed it, appointed three individuals, Reynaud, Peytavin and Lozon, to act jointly for the firm—he granted the power of acting jointly to any two of them, in case of the death or absence of the third—lastly, to any one of the three the power of acting alone, in case of the death or absence of the two others.

Now, attornies bind their constituents, when they exercise their powers in the mode which they prescribed. The plaintiff must therefore shew that the note upon which the present suit is brought, was made by the persons who subscribed it, according to the authority which the defendant had vested them with. Reynaud and Peytavin subscribed it jointly: they could only do so, viz. without the concurrence of Lozon, in the case of his death or absence. It is therefore material for the plaintiff to shew his death or absence. We look in vain for any proof of this on the record: *de non apparentibus it non existentibus eadem est lex.* The court will conclude that neither of the two cases existed, and that therefore the subscribers of the note were without authority.

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Turner for the plaintiff. The point now raised does not arise from the pleadings. The authority of the subscribers to the note was not contested below. The defendant relied only on his plea of payment and error as to the *quantum*.

If the defendant's partner was dead, when he granted the power of attorney, then the affairs of the firm were absolutely under his control, and he could well appoint whom he pleased to manage them. If he lived, still the power given by Peytavin was valid. Each partner may do separately all the acts relating to the administration of the partnership's affairs. *Civ. Code*, 394, *art.* 35, 37. One partner may authorise a clerk to draw, endorse or accept bills. 1 *Dallas*, 269.

The note in suit, was in discharge of the plaintiff's claim: if the defendant had paid it, admitting the irregular execution of it, the payment would be a ratification of an irregular act, and could not have been reclaimed. Now a partial payment will have the same effect. He has claimed and received the benefit of the monies paid by his agent, in discharge of the note. He has thereby admitted his approbation of the conduct of Reynaud and Peytavin, juniors, and must be bound by it.

Mathews, J. delivered the opinion of the court. The plaintiff and appellee sued the defendant and appellant, as surviving partner of the firm of Reynaud and Peytavin, and grounded his action on a promissory note, given by two attornies in fact, acting under an authority granted by one of the partners, to three persons jointly, empowering them to act severally only in case of the death or absence of two or one of them. Judgment having been given for the plaintiff, the defendant appealed.

His counsel makes two principal objections to the correctness of the judgment of the district court. 1st. In partnerships, one partner cannot without the consent of the other grant a power or procuration, in matters relating to the general concerns and interest of the firm. 2nd. Admitting the power in the present case to have been well given by one of the partners, yet being a joint power to these individuals, neither two or one of the attornies could act, so as to bind the principals, unless in the cases provided for in the letter of attorney, viz. in the events of the death or absence of one or two of the attornies.

I. Admitting it to be true, that one partner cannot give power to an agent, so as to vest him with the authority of the firm, (which is

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by no means clear) yet this objection can never be made against the acts of the attorney, by the very individual who constituted him.

II. As to the second objection, it is clear from the manner in which the letter is worded, that the authority given to the three persons jointly was only to vest severally in one, or jointly in two, in case of the death or absence of two or one of them. Two only having acted, in the present instance, without there being any proof of the absence or death of the third, their act can only be binding on the principals, unless some act has since been done, which gives it validity.

The power of attorney shews that the person who granted it was willing to confide his business to the care and management of either of the persons authorised, on the happening of certain events, but that he preferred the joint skill of all. A majority have acted for him.

Among other pleas in his answer, he has pleaded payment, and it appears by the testimony of Tricou, that he refunded to this witness five hundred dollars, which had been paid by him in part discharge of the note given by Reynaud and Peytavin, juniors, his attornies: the subject of the present contestation.

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It is the opinion of this court, that this act, taken in consideration with all the circumstances of the case, shews that he has so far approved and sanctioned the conduct of his agents as to give full force and validity to the note against himself.

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

CLARK's EX'S vs. *MORGAN.*

If a sheriff wrongfully executes the process of a court, he may be sued therefore in another.

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

MARTIN, J. delivered the opinion of the court. The petition states that the plaintiffs having issued out writs of seizure and sale from the court of the first district, delivered them to the defendant, the sheriff, who returned that the "property seized, not having been sold for two-thirds of its appraised value, at the first or second auctions, was sold at the third and last to James Williams for $60,000 at twelve months credit with interest and security, which security is in a bond subscribed by Benjamin Farrar and Abner L. Duncan as sureties." That at the expiration of the year the plaintiffs applied to the sheriff

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and were informed that the money was still due, whereupon they required him to deliver them the mortgage and security required by law, but he only tendered them a paper purporting to be a bond, which by no means answers the letter or intent of the law, which they did not accept.

The petition avers the consequent liability of the sheriff to pay the money, and prays process against him from the parish court of New-Orleans.

The defendant put in a plea to the jurisdiction of the court, on the ground that the district court, from which the writs of seizure and sale issued, is alone competent to decide on the matter.

The parish court sustained the plea, and the plaintiffs excepted to the opinion of the court in this respect, and thereon appealed.

The court below did not give any reason for its opinion and we are unable to find a good one in support of it.

The defendant resides in the parish of Orleans, within which the district and parish courts have concurrent jurisdiction. If any attorney, clerk or sheriff in either of these courts does in any manner wrong a suitor, the injured party has a right to an action and is not compelled to re-

sort to the court in which was pending the suit, in which he alleges that the injury was done. Both courts are open to him: the choice is his.

The judgment of the parish court is erroneous, it is therefore ordered, adjudged and decreed, that it be annulled, avoided and reversed, and that the suit be remanded to the parish court with direction to the judge to proceed thereon, and it is further ordered that the defendant and appellant pay the costs of this appeal.

Seghers for the plaintiff; *Hennen* for the defendant. *See April term*, 1816.

CAUNE vs. *SIGORI*.

APPEAL from the court of the first district.

An agent, entitled to commission, is a good witness, for his principal.

The protest of a bill of exchange proves itself.

The action was brought on a protested bill of exchange, of which the defendant was the immediate endorser of the plaintiff. The latter had a verdict and judgment, and the former appealed.

There was no statement of facts, and the cause was heard above on two bills of exceptions.

At the trial, *Hennen*, the plaintiff's counsel, offered himself as a witness, to prove that the

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defendant had promised to pay the amount of the bill, on which the suit is brought. On which *Morel*, the defendant's counsel, required him to be sworn on the *voire dire*, which being done, he declared that there is no bargain or agreement of any kind between the plaintiff and himself—that if he obtain judgment and collect the money, he will charge five *per cent.* on the sum received, and if he do not recover, he will charge twenty-five dollars. The district court was of opinion that the witness should be sworn in chief: to this opinion the defendant's counsel excepted.

The plaintiff's counsel next offered in evidence two documents, purporting to be signed by an *huissier*, as legal protests of the bill of exchange, the reading of which was objected to, on the ground that the signature of the *huissier* and witnesses, formed no legal proof of their authenticity. The objection was overruled by the court, and the defendant's counsel excepted to the opinion of the court in this respect.

Morel for the defendant. The district court erred in admitting the plaintiff's attorney as a witness, whose compensation was to increase in proportion to the amount of the judgment to be recovered. A witness must not be interested,

directly or indirectly, in the cause. *Civil Code*, 312, *art.* 148.

The court erred likewise in receiving the documents offered as proof of the protest of the bill, the signature of the *huissier* does not carry with it any legal proof of their authenticity. Whatever faith may be given to a notarial act, clothed with the official signature and seal, no authenticity can attach to the mere signature of a person who states himself a *huissier*, and of two unknown individuals by whom he may cause himself to be attended. Admitting the authority of the *huissier* to make the protest, which, however we strongly deny, his signature and official capacity, ought to have been certified by the presiding judge of the tribunal to which he belongs, and his certificate ought to have been authenticated by the consul of the United States, in Nantes. It is impossible that the courts of the United States should be acquainted with the signatures and official capacities of persons who describe themselves as officers of a foreign government. Truth and credit will be given to the attestations of our consuls abroad, and it is their business to authenticate acts executed in the places of their residence.

Hennen for the plaintiff. It is the constant practice of courts to admit agents to be wit-

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nesses for their principals, in order to prove contracts made by them, on the part of the principal: and this is allowed from necessity or rather for the sake of trade and the common usage of business. *Mackay* vs. *Rhinelander and others.* 1 *Johns. cases,* 408. *Jones* vs. *Hake,* 2 *id.* 60. *Burlingham* vs. *Dayer,* 2 *Johns. Rep.* 189. *Ruan* vs. *Gardner,* 2. *Condy's Marsh.* 706. *b.* Thus a factor may prove a sale, though he is to receive a poundage on its amount (*Dixon* vs. *Cooper,* 3 *Wils.* 40. 1 *Atk.* 248.) or what he has bargained for, beyond a stated sum. *Benjamin* vs. *Porteus,* 2. *H. Bl.* 590. *R.* vs. *Phipps, Bull. N. P.* 289. And every person who makes a contract for another is an agent, within the meaning of this rule. 2 *H. Bl.* 591. *Phillips on Evidence,* 94.

The form of the protest of a bill of exchange is always conformable to the custom of the country where it is made. *Chitty on Bills, 4th ed.* 231. *Pothier, Contrat de change, no.* 155. *Pardessus, Lettres de change, no.* 351.

A protest, though by the custom of merchants it is indispensably necessary, and though it cannot be supplied by witnesses or oath of the party, or in any other way, is yet but mere matter of form; and to it all foreign courts give credit:

Chitty on bills, 228. The mere production of which, without shewing by whom it was made, will be sufficient. *Chitty on bills*, 108.

The protest in this case was made by a *huissier* and two witnesses as directed by the code de commerce, *art.* 173, *Pardessus, Lettres de change, no.* 354. It proves itself, and the defendant cannot require further evidence than its production with the bill.

DERBIGNY, J. delivered the opinion of the court. This is an action, by the holder of a bill of exchange against one of the endorsers. It comes up, to this court upon two bills of exceptions taken by the defendant.

By the first, it appears that the plaintiff's counsel having offered himself as a witness to prove that the defendant had promised to pay the amount of the bill, he was challenged as interested in the cause, and that, being examined on his *voire dire*, he declared that he had entered into no agreement with his client for his fees, but intended to change him a commission of five *per cent.* that is to say, thirty-one dollars if he should recover the money, or a fee of twenty-five dollars, in case of loss: from which it clearly results that he was to receive as much in case of loss as in case of success:

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the difference of six dollars being hardly a compensation for the further trouble, which the witness was to take, in the latter case, to collect the money after judgment.

The second bill of exceptions shews that the plaintiff having offered to produce in evidence a protest, purporting to be signed by a *huissier* and two witnesses, the defendant opposed the introduction of the evidence, on the ground that the "signatures of the *huissier* and witnesses formed no legal proof of their being authentic." From the manner in which the defendant's counsel argued on this exception, it appears that he meant by these expressions, first, that the signature of a *huissier* is not that which ought to appear on the protest of a bill of exchange, and secondly, that the signature which is affixed to the protest is not duly authenticated, because not certified by the consul of the United States.

The allegation that a *huissier* is not the officer who ought to protest a bill of exchange is not supported by law, the French code of commerce providing positively that such protest is to be made by a notary and two witnesses, or a *huissier* and the like number of witnesses.

As to the other objection. It is the practice of courts of the United States to receive in evi-

dence the protest of a bill of exchange, without requiring proof of the signature of the officer, who received it: and we see nothing in the laws of this state, which is repugnant to the admission of such practice among us, especially where the signature is not formally denied. The want of legalisation or certificate of the consul of the United States, supposing such a certificate to be evidence, (a point which from the decision of the supreme court of the United States, in *Church* vs. *Hubbard*, 2 *Cranch*, 187. is doubtful) was no reason why the document should have been rejected: because that omission could be supplied, if necessary, by other testimony.

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

*** There was no case determined during the month of January, 1816.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

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EASTERN DISTRICT, FEBRUARY TERM, 1816.

BARON *vs.* PHELAN.

BARON vs. *PHELAN.*

A creditor, who, to secure his debt, receives a bill of sale of slaves, in lieu of a mortgage, cannot take possession of them by his own act.

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

MATHEWS, J. delivered the opinion of the court. In this case, it appears by the statement of facts that the plaintiff and appellee was indebted to the defendant and appellant, in the sum of $3000, for the payment of which, he conveyed to him three negroes and also procured his wife to convey a fourth: it being understood by the parties that the sales and transfers of title thus made, should not convey the absolute property, but that the slaves should be holden as a security for the payment of the debt—that they remained in the possession of the appellee,

and the profit of their labour was applied to his use—that in the month of May, 1815, he called a meeting of his creditors, a majority of whom granted him a respite of two and three years,—that two of the negroes ran away from him and were taken up and put in jail by Phelan, who confined them, and the keeper of the jail refused to deliver them to the appellee, in consequence of the interference of the appellant. Under these circumstances, suit was commenced in the court below, by Baron, to recover possession of the slaves and damages for their detention. Judgment having been rendered in his favor, Phelan appealed.

The bills of sale in question from Baron and his wife to the appellant, taken in connection with the instrument of writing, by which he agrees that they were given to secure to him the payment of a debt due to him by the appellee, can be considered only as a mortgage or hypothecation of the property and consequently gave to the mortgagee no right to possess himself of them by his own act.

The judgment of the parish court is therefore clearly correct, so far as it goes to order a restitution of the negroes, and although the sum allowed to the plaintiff in damages, for the loss

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of the labour of the slaves, appears to be somewhat excessive, yet when we take in view that part of the statement of facts, which attributes to them skill in the particular manufacture in which they were employed by their master, and that they are worth two or three dollars a day each, there does not appear to exist such enormity or error in the damages assessed as to require the interference of this court.

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

Moreau for the plaintiff. *Hennen* for the defendant.

BAKER vs. *MONTGOMERY & AL.*

A bill from the quarter-master-general, on the secretary of the U. S. needs not to be protested for non-acceptance

A blank endorsement may be stricken out at the trial.

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

MARTIN, J. delivered the opinion of the court. The defendants are sued as endorsers of a bill of exchange drawn in their favour, at ten days sight, by the quarter master general of the United States in New-Orleans, on the secretary of state, for the service of government. The bill was presented in due time, at the office of the

secretary, where the chief clerk wrote thereon "Presented, and will be paid whenever congress make the necessary appropriation—G. G." At the expiration of the ten days, and days of grace, the bill was protested for non-payment, and due notice given to the defendants.

The plaintiff was the immediate endorser of the defendants, and there were two blank and one special endorsements, which were stricken out at, or before the trial in the court below.

The defendants resisted the claim of the plaintiff on three grounds, 1. That, as the drawer, the quarter-master-general, could not be personally sued, having drawn the bill in his official capacity, they could not be liable as endorsers. 2. Because the plaintiff received a qualified acceptance, inconsistent with the tenor of the bill. 3. Because there was no protest for non-acceptance, nor notice given to the defendants of the want of an absolute acceptance.

The parish court overruled the first objection, but admitted the two last, and gave judgment for the defendants, whereupon the plaintiff appealed.

This court is of opinion the first plea was properly overruled, but that the parish court erred in giving judgment for the defendants on the other two.

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There was no necessity of any acceptance of the bill. "If a bill be drawn by a party on himself, it is accepted by the act of drawing: in such case, as there is no drawer, there cannot be a protest for non-acceptance." *Lovelass on bills*, 22.

"The general government," says the parish judge, in overruling the first plea, "is the principal of the quarter-master-general, and is as effectually obliged as if its chief itself drew, while the bearer of its power is not in the least obligated." He might have gone farther and have added "if the secretary of state had accepted the bill, the general government, being the principal of the secretary, would have been as effectually bound as if the chief himself had accepted, while the bearer of its power, the secretary, would not be in the least obligated by his acceptance."

We are therefore of opinion that there was no necessity of either a protest or any notice to the defendants, on account of what is erroneously supposed to be a qualified acceptance, varying from the contents of the bill.

It does not appear to the court that the plaintiff gave any assent to what was written by the clerk of the secretary of state, when the bill was presented in the office, not for acceptance,

but in order to obtain a date, from which the te, days after sight might be reckoned. The plaintiff notwithstanding presented the bill at maturity for payment. The clause did not vary the contract, the money drawn for was money of the United States, which all the parties to the bill must have known, could only be drawn in consequence of an appropriation made by law. *Const.* U. S. *art.* 1. *sect.* 9.

The bar has requested us to express our opinion on a part of that of the parish judge, which, if it pass uncontradicted, may have the most mischievous consequences. Since the establishment of banks, and indeed since that of commerce in this country, blank endorsements, on bills of exchange and promissory notes, have been the ordinary means of transferring these securities, and the superior courts have, since the establishment of the American government, universally permitted the plaintiff's counsel to strike, even at the trial, such blank endorsements as were in the way of his recovery. The parish court has erroneously taken it for granted that the ordinance of Bilbao afforded in this respect the only legal rule of action and that blank endorsements are illegal. It has often been held that the part of the ordinance to which the parish

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court referred is not in force here. *Pouts* vs *Duplantier*, 2 *Martin*, 328. The same point has often been ruled by the district court of the U. S. in this city. That court and the superior court of the territory allowed attornies to fill up or strike out blank endorsements, before the note passed to the jury.

It is ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the judgment of this court be entered for the plaintiff, for the amount of the bill, interest, damages and costs to be assessed by the clerk.

LOUISIANA BANK vs. *HAMPTON.*

The district court cannot amend its judgment, after it is signed and execution has issued, and if an appeal be brought on the judgment so amended, a statement of facts made after its original signature will not be legal.

CROSS appeals from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. Two appeals have been taken in this case, one by the plaintiffs, the other by the defendant. The reason of this appears to be that after judgment was rendered against the defendant, and execution had issued thereon, the judgment was amended in his favour, so that the plaintiffs being dissatisfied with the amended judgment, and having claimed an appeal

from it, the defendant then also begged to appeal from the original decision.

Whatever irregularity there may be in such a course of proceeding, the whole case is laid before this court and they will pronounce upon it undividedly.

The original judgment rendered in this case, being considered by the district judge as not absolutely and irrevocably final, he undertook to amend it, and permitted the parties to appeal, as if it had become final only from the time of the amendment. A statement of facts was therefore made posterior to that amendment, and the same proceedings took place as when an appeal is regularly prayed for.

But this court is of opinion, that after the judgment was signed and execution issued thereon, it was not in the power of the district judge to alter it: that no statement of facts having been made before the original judgment was signed, none could be made afterwards, and that these appeals not being accompanied with any regular statement of facts, special verdict, or any bill of exceptions, regularly taken during the course of the trial, must be dismissed.

It is therefore ordered, adjudged and decreed, that both these appeals be dismissed: each party paying his own costs.

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Turner for the plaintiffs. *Duncan* for the defendant.

See *post, May term,* the same case.

DUVERNIS HEIRS vs. *LAFON.*

A bill of exception to the final decision of the court is irregular.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. The circumstances of this case are similar to those, in the case of *Louisiana bank* vs. *Hampton,* (the preceding case) an exception is taken to the opinion of the district judge given on the final decision of the cause. The record contains no statement of facts nor any thing equivalent thereto.

It is therefore ordered that the appeal be dismissed at the costs of the appellant.

Grymes for the plaintiffs. *Hennen* for the defendant.

OLIVE vs. *GOUGIS.*

A new party made in the supreme court.

APPEAL from the fourth district.

While the cause was before the supreme court, the defendant died: this being suggested on the record, his representative Arnaud Lartigue was made a defendant in his stead.

Moreau for the plaintiff. *Esnault* for the defendant.

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RENTHORP & AL. vs. BOURG & UX.

RENTHORP & AL. vs. BOURG & UX.

APPEAL from the second district.

*** See a full statement of facts in the beginning of the opinion of the court.

The soil of a highway is public property, and cannot be recovered in an action between individuals.

Livingston for the plaintiffs. By the case, it appears that the legal title to the land, of which the premises are a part, was vested by grant of the crown, in those under whom the plaintiffs claim, and that their title was confirmed.

There is no reservation (either of a part of the property for the king, nor any servitude on it) *expressed* in the grant: and none can be *implied*, because such implication would be contrary to the tenor of the grant, which gives the *whole*, and no verbal proof shall be admitted against the tenor of a deed: *Civ. Code*, 310, *art.* 242, *a fortiori*, no *presumption*. *Civ. Code*, 314, *art.* 254.

If the public had neither an express or implied reservation of any part of the property, how did they acquire it?

I. It is said by the *use* the inhabitants had of a road, before the grant. But this could at most amount to a *servitude* of a right of way. Even supposing it sufficiently ancient to produce this

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effect, which it was not, it could never amount to a *presumption of the property* for the public; and if it did the king might dispose of it, as he has done by an unreserved grant to us. 3 *Cur. Ph. illust.* 41, *art.* 89, *Cœpola de servitutibus*, 271, 22, where the objection that it cannot, be disposed of, because it is *not in commerce:* is discussed, and it is shewn this restriction does not apply to the *sovereign* power of the state, but only to inferior corporations.

II. It is said the right was acquired by the act of the territorial legislature, directing a road to be laid out, and the proceedings of the commissioners under them.

Admitting the power of the legislature to deprive a citizen of his property, without compensation, have they done it?

The laws contain no such provision; at most they create a *right of way or servitude:* and the commissioners fixed the extent of it to sixty-two feet.

But they had no power to take away property. *Civ. Code*, 102, *art.* 2. 2 *Laws U. S.* 564. *Constitution U. S. Amendments, art* 7.

III. It is said that this is a public road and that, *ex vi termini*, it vests the soil in the public. But this is, in none of the laws, called by *that*

name, except in that of 11th March, 1809, which says the *borders of the canal* shall be considered as a public highway, and that the *proprietors* of lands bordering on it shall be compelled to keep it in repair, according to the *existing laws and regulations*. This puts the borders of the canal on the same footing with the banks of the rivers. Now admitting, always for the sake of argument, the right of the legislature to make any change in private property without compensation, let us see what are the rights the public have on the banks of rivers: merely a *servitude*, a right of *way*, *Part.* 3, 28, 6. 3 *Cur. Phil. illustrada*, 56, 116, *Inst.* 2, 1, 4; but the soil remains the property of the owner of the adjoining soil. 4 *Inst. de rer. div.* § *Riparum.*

The law shews the canal is a work of art and not a navigable stream; therefore, the right of the legislature to interfere with private property, by declaring the banks to be a public highway, may well be doubted.

The law 2d, 43d book, 8th title of the Dig. cited page 529 of the *Traité des servitudes*, which is quoted to shew that a public road must always be on the ground of the public, is a mere play upon words.

They say it is a public road, therefore, the ground must be public.

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I say the soil is private property, therefore though the public may have a right of way, the road, in your sense of the word, is not public.

The law last quoted, taken in connexion with the two following sections, *no.* 749, 750, in the same book, being *Dig.* 43, 82, *sect.* 22, 23, shews that they had at Rome highways called pretorian or consular ways, such as the Flamina, Appian, &c. which were built at vast expence by the public, and for which, probably, the soil was purchased by the public. These were then called properly *public ways:* as to the others, where the public had a right of way over the lands of individuals, they were sometimes called *public ways*, but they were improperly so called, *sect.* 23, if they were repaired at the expence of the proprietors of the adjoining lands. If then we take this Roman law, as the test of the way in question, it is not a public way. But the truth is, there is not in America, nor I believe in any part of modern Europe, any thing similar to the consular way of ancient Rome.

In England all highways are private property. *Roll. ab.* 392. 2. *Strange* 1004. 3 *Bac.* 492. In France, by a succession of edicts, proprietors of lands bordering on rivers are obliged to leave a space for a road over them. *Ord. May* 1520, *August* 1669. *Bordeaux memorial*, cited 5 *Amer. Law journal*, 169.

In the United States, the same doctrine prevails. 6 *Mass. Reports*, 154. 1 *Gould's Espinas. N. P.* 273. 2 *Johnson*, 359.

In Louisiana, the instructions, for the granting of lands, denote that the proprietors shall make the road, repair it, &c.

But what shews, in Louisiana, conclusively that the soil of the road is not public, is that the proprietor is obliged to furnish the way, even when the original road is wasted away, and the universal practice of changing the road whenever circumstances render it more convenient for him to do so; which he is always permitted to do, if the new way is equally proper for public use.

The conclusion, on this head, is that the high way remains the property of the owner of the original soil, subject to the servitude of a way. *Civ. Code*, 128, *art.* 13.

Admitting then this highway to be property leased out, the house situated thereon is our property. *Civ. Code*, 104, *art.* 10. We may bring an action for it.

The definition of the right of way is the same in the English that it is in the civil law. *Hub.* 152. *Civil Code*, 128, *art.* 12, 13. *Cooper's Justinian*, 88. 2 *Bl. Comm.* 20.

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The law being the same, the decisions in either country, though not authority, will have great weight. 3 *Bacon*, 494. 6 *Mass. Reports*, 454. 2 *Espinasse N. P. Gould's edit.* 2. 2 *Johnson*, 357. 6 *East*, 254. 2 *Strange*, 1004. 1 *Burr.* 143. All these cases shew clearly that the owner of adjoining land, as proprietor of the soil, has his action for any use that is made of the road, other than that of passage, and that this may be trespass or ejectment. The case last cited, 1 *Burr.* 143, is most strongly in point and bears also on another feature of the case. *viz.* the estoppel.

The premises were hired by the defendants from the plaintiffs, by a lease for three years, now expired. They cannot gainsay our title.

The defendants also claim the house as incident to the right of ferry.

They say that when a servitude is granted, every thing necessary to its use is also granted.

This is true, but it must be a strict necessity, and the incident must belong to the grantor of the servitude, or surely he cannot dispose of it.

Here the house is convenient for the ferry, but the ferry can exist without it, and the incident (the house and the soil on which it stands) did not belong to the public, who granted the

ferry; indeed it is very doubtful, whether, after giving the right of ferriage to the parish jury, by the first law, the legislature had any right to divest them of it, and give it to the defendants, by the second.

If you say, that because the public have a right to grant a ferry, they have a right to take my land to build a ferry house, because a ferry house is necessary for a ferry, you may also carry it still farther and take my furniture and provisions, because furniture and provisions are as necessary to a ferry house, as a ferry house is to a ferry; you may also take my boat, because a boat is more necessary to a ferry: but the truth is, government can give nothing but that which it has: here it had only the right or exclusive privilege of carrying for hire across the navigable water, which was its property.

A patentee of a patent drug might, by the same argument, force me to swallow and pay for his nostrum, because he has a patent to *sell*: and a purchaser is as absolutely necessary to be found, before he can enjoy his right, as a ferry-house is for a ferry.

A. Porter jr. of Attakapas for the defendants. There are three objections to this action, each of which will be found fatal to the plaintiffs' right of recovery.

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1. That the *locus in quo* is a highway, on which we are placed by legislative authority, to carry into effect a servitude which the public enjoy on it.

2. That the soil of the road, on which the ferry-house is built, belongs to the public.

3. That the plaintiffs (the appellants here), if they have a right, have mistaken their remedy, and cannot recover in their present action.

I. We are placed by the legislature for the purpose of keeping a public ferry on the great highway, from the Mississippi to the Attakapas, at the point where it is interrupted by the lakes, which divide the eastern and western sections of this state. The road was laid out twenty-six years ago—it is proved to be of vast importance to the intercourse of the inhabitants of these two sections of country. Ever since it was originally traced and opened, it has been used as a public highway; it runs along the banks of an outlet, or bayou, partly natural, partly artificial, called the canal of La Fourche—through which the waters of the Mississippi, in the spring floods, empty into lake Verret. At that season, the bayou is navigable.

These facts are all established, by the statement, sent up by the judge below, and prove suf-

ficiently the existence of the highway. In addition, however, the court is referred to the *American Law Journal, vol. 5. p. 15—190*, that all lands in Louisiana were granted, subject to the condition of a highway being laid out. No particular exemption has been shewn by the plaintiffs here, which takes them out of the general rule. On the contrary, there is an act of the late territorial legislature, 1809, *chap. 13, sect. 2*, expressly declaring the road to be a public highway.

The plaintiffs, however, complain that too much of their soil has been taken for a road: this objection is easily removed. It is proved that the highway here runs along the banks of the canal—that this canal is navigable. By law, the public have a right to a towing path along the banks of navigable waters. *Domat, vol. 2, liv. 2, tit. 8, sect. 2, art. 9. Act of the legislature, entitled, "An act for defining the organization of police juries", passed 25th March, 1813, set. 5.* This towing path was laid out here: the road then must commence at the edge of it, and not at the bank of the canal. But, if there was any error in laying out the road, the appellants should have opposed its opening, or appealed from the decision of the commissioners: their decree on the subject, like that of courts

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who have jurisdiction, is conclusive until set aside. 4 *Term Rep.* 258. 1 *Day*, 142—170. 1 *Johnson's cases*, 492. *Peake's evidence*, 93. *ib. appendix*. *Doe on demise Powell* vs. *Harcourt*, *p.* 76. 4 *Cranch*, 241—512. 1 *Hall's American Law Journal*, 148. 1 *Binney*, 299. 7 *T. R.* 525. 8 *ibid* 268. 6 *Johnson*, 84. On this public highway, the existence of which is incontestibly proved, we have been placed by the legislative authority, for the purpose of keeping a ferry. "*Acts of the territorial legislature*, 1811, *chap.* 3 & 11." The right of the sovereign authority to place us there, is as clear as the existence of the highway. "*Ferries*, says *Domat*, *vol.* 2. *liv.* 1. *tit.* 6. *sect.* 1. *art.* 8. *ibid. tit.* 8. *art.* 12 & 1 , *belong to the public.*" Since the first taking possession of this country, a variety of acts have been passed by our legislature, considering them as such. "*Acts of the legislative council*," 1805, *chap.* 34. "*Acts of territorial legislature*," 1807, *chap.* 18, *p.* 132. *ib.* 1811, *chap.* 13. "*Acts of State legislature*," 1813, *act to define the powers of police juries, passed 25th March*, § 5. Every individual who solicited and obtained land from the Spanish government, took it subject to this condition or servitude, if the sovereign authority should hereafter find it necessary for public utility to erect

one. But this case is still stronger against the appellants: when they solicited this land from the Spanish government, they knew that this ferry already existed there—knew that it belonged to the public—knew that the erection of a house was indispensable to the exercise of the public right. Soliciting the land then as a gift—obtaining it as such—taking it subject to this servitude, they took it under an implied consent, not only not to oppose it, but under an obligation to yield every thing necessary to give it full effect: and cannot now be permitted to resist the erection of a house, without which the public right would be useless and of no effect. *Domat, vol.* 1, *liv.* 3, *tit.* 12, *sect.* 5, *art.* 2.—*Digest, liv.* 8, *tit.* 1, *l.* 10.—*ibid. liv.* 8, *tit.* 3. *l.* 3. § 3.—*Ibid. liv.* 8, *tit.* 4, *l.* 11. § 1. *Civil Code, page* 14, *art.* 59, 60. 8 *Term Rep.* 50. *Co. Litt. vol.* 1, *sect.* 68. *lib.* 56.

If the appellants, by express grant, had yielded to the public the servitude of a ferry, the authorities above quoted, prove beyond doubt, that if a house was necessary to the exercise of that servitude, they could not oppose the erection of one. Where then is the difference when they receive a tract of land from the government subject to that burthen—and must not the rules of law that govern in the one case, equally apply in the other.

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II. The soil of the road belongs to the public. Considering the ferry as a servitude, and the highway merely as a right of passage, it has been shown the appellants cannot recover. It will be proved, that the soil of a public highway, belongs to the public; and consequently they may erect any buildings on it they please. The truth of this position will be established beyond doubt, by the authorities by which the question must be decided; and will enable this court to see how often crude and undigested ideas on this subject, as in many others, are hastily taken up—how little supported they are by those laws on which they pretend to rely—and how dangerous it is for this court, to suffer the fleeting influence of popular opinion, to have any weight on legal subjects.

There are four kinds of roads known and recognized by the Roman and Spanish law; these are, the *iter, actus, via & via publica.* The three first are merely servitudes: they are classed as such under that head in the Institutes—the Digest. *Institutes, lib.* 2, *tit.* 3. *Digest, lib.* 8, *tit.* 3, *l.* 1, 7, 12. They were private rights, acquired by title and prescription, and lost by non usage; *Digest, lib.* 7, *tit.* 1, *l.* 5. *Ibid. lib.* 8, *tit.* 1, *l.* 5. *Domat, vol.* 1. *liv.* 12, *tit.* 12, *sect.* 6, *art.* 13.

The public highway is never mentioned among that class of rights—the authors who professedly treat of every kind of servitude, never mention it as such—and the rules of law which apply to it, will be shown necessarily to exclude all idea of its being one. In the enumeration of things public, and *hors de commerce*, the Spanish writers state public roads as one of them. 3 *Partida, ley* 9. *tit.* 28. *ibid. ley* 23. *tit.* 32. 5 *Partida, tit.* 5. *ley* 15. They cannot be acquired by prescription, 3 *Partida, ley* 7. *tit.* 29. Services could be alienated, and were acquired and lost by prescription—public roads, we see cannot. There exists then no resemblance between the one and the other.

But we have still stronger authority to the point: *Traite des servitudes* 648, 649. It is there laid down in the most express terms, that the soil of the road belongs to the public.—Again in the *Digest, liv.* 48, *tit.* 8, *law* 2, § 21, it is said, "We call a public road that of which the soil belongs to the public. For the private differs from a public road in this, that in the private road, the soil is the property of the individual, and we have but the right of passage; *but the soil of the public highway belongs to the public.*" This leaves our adversaries no other resource, but to show that the road on which we

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are placed, is not a public highway. But we presume it will be in vain for them to endeavor to bring this court to a conclusion, that the great road which connects the eastern and western sections of the state, is not a public highway—if it is not, then there has never existed one in Louisiana.

III. But again—the party has mistaken his remedy. If the public highway is obstructed, recourse should have been had to the police jury, who exercise here the same jurisdiction which the ediles did at Rome, who by law could permit the erection of any buildings they chose, on public places, or demolish them as they thought fit. *Domat, vol.* 2, *liv.* 1, *tit.* 8, § 2, *art.* 1 & 15. *Digest, liv.* 43, *tit.* 8, *law* 2*nd.* § 17 & 25. *ibid law* 3, § 7. *ibid* 39. *tit.* 2, *law* 24. 3 *Partida, ley* 29. *tit.* 22. *Martin's Orleans Term Reports, vol.* 1. *p.* 186. The appellants have not shewn that they made any application to them, who have the jurisdiction of the police of roads; nor have they produced any law which proves a right in a private individual to bring trespass or ejectment for the highway.

The opposite counsel have read cases from the English books, and from the American reporters, to shew that the public have but a right

of passage, and that the adjoining proprietor can maintain ejectment for any appropriation of the soil. Such is undoubtedly the common law; but *it* is not the law of this country. Originally there were but four public highways in England. 3 *Bac. Ab. Amer. edit.* 494. 4 *Jacob's Law Dict. verbo Highway.* And all the other roads have been laid out by a writ *ad quod damnum,* where the public paid for a right of passage alone. Servitudes acquired in this way, have no resemblance to property acquired from the Spanish government, as a gift, when the sovereign in every instance annexed to it as a condition, that a public road should be laid out, or the grant be void. No subject can shew more strikingly the difference between the two systems, than the one now under consideration. The public do not even enjoy the right of a towing path, on the banks of a navigable river in England. 3 *Term Reports,* 253. In that case, the institutes of Justinian were quoted, to prove that the banks of rivers belonged alike to all mankind. The court said, civil law doctrines had no weight there on that question—under that declaration, what influence can be given to common law decisions, in the case now before the court.

It is said the principle of erecting houses on

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another man's land, without compensation, is unconstitutional. But this argument assumes for its support, a base which is denied, and which the authorities quoted prove to be incorrect. The appellants have never had a right to the soil of the highway—it was laid out ten years before the date of their title. Do they, or can they shew, that when the sovereign grants a tract of waste land on which a public highway exists, that the grant of the land, carries with it the highway? Until they do, they have no right to say their soil is taken from them. Grants of things public are never presumed. *Vattel's Law of Nations, liv. 2. chap. 14, § 217. 6 Johnson. 134. 2 Black. 346. Domat, vol. 1. liv. 1. tit. 1. § 2, art. 17.* The legislature seem to have been of opinion, that the highway was not acquired by the appellants, from the privilege they have ceded us, and this court must be fully satisfied that that act is unconstitutional, before they will declare it so. The power of declaring acts of the legislature void on this ground, is one to be exercised with great caution. The unconstitutionality must be evident: must be manifest: must be such that doubt does not exist on it. When it is not thus clear, decent respect for the other branch of the government, and a regard for the interests of

society, will deter the court, as it has forbid others, from exercising this its highest privilege. 6 *Cranch*, 128. 2 *American Law Journal*, 96. *ibid.* 255. 3 *Dall.* 399. 9 *Johnson*, 564.

This claim of the appellants, to wrest from the public their jurisdiction of regulating ferries, is unsupported by law—contrary to the uniform usage of Louisiana since its original settlement—totally opposed to public convenience, and the good order which ought to prevail in every well regulated society.

The decree of the court below ought to be confirmed.

Moreau on the same side. The original action of the appellants is a *possessory* action. The plaintiff in such an action must not necessarily be owner, but he must be *possessor*, in the sense of the law. *Pothier, Possession, n.* 114.

Here the appellants are neither owners nor *possessors, in that sense.*

They are not owners of the ground on which the house of the appellees stand, because that soil is public property.

The counsel of the appellants contends, that they have not ceased to be owners of that soil.

1. Because it is the bank of a navigable stream, of which the public had the use indeed,

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but the property of which remained in the owner of the adjacent land.

2. Because a highway is a servitude only, and the soil on which it is due, remains the property of the owner of the land, burdened with the servitude.

3. Because the appellants could only be deprived of the property in the soil, even in case of public utility, by just and previous compensation.

4. Because the appellees are estopped from resisting the appellants' claim, having received the possession of the premises from the appellants under a lease, now expired.

1. The premises, it is said, are not only a highway, but the bank of a navigable stream. It is true the banks of navigable rivers are considered as the property of the riparian owners, although the public have the use of them for certain purposes. *Institutes*, 2, 1. *Cooper*, 97, 5 *Pandectes Francaises*, 8, *n.* 8. *Partida*, 3, 28, 6, where it is said, "*although the limits of rivers belong, as to the property, to the owners of contiguous or adjacent estates, yet any one may use them, &c.*"

And we have a like provision. *Code Civil*, 97, *art.* 8.

Thus, even if the premises were not a high-way, but only the bank of a navigable stream, the appellants would not have any action to claim the house, which the appellees have built on it.

Dominguez, cited by the appellants, 3 *Cur. Phil. ill.* 57, *n.* 116, does not say that the riparian owner, can occupy a house, or other edifice, erected by a [illegible] the banks of a river, contiguous [illegible] only abate it himself, or cause himself to be [illegible] horised to do so by the judge.

Indeed no one can build, on the banks of a navigable river. *Partida*, 3, 28, 3. This prohibition extends itself to the riparian owner, as well as to any other individual. He cannot occupy any building erected there, neither can the person who erected it claim it as his own. It is to be abated: so says the law last cited.

It is incorrect to say, that the passage, which the people of the Attakapas have enjoyed over the soil, was only one of those uses, which the public has over the banks of navigable rivers.

As to these uses, see *Inst.* 2, 1, 4. *Cooper*, 68. *Partida*, 3, 28, 6. *Code Civil*, 97, *art.* 8.

Here besides the towing path, eight feet wide, along the water, there remain fifty-two feet for the passage or way used by travellers. It is in

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evidence, that for twenty-five or twenty-six years ago, consequently prior to the grant to O'Bryan, under whom the appellants claim, there existed in this place, a highway, which had been often repaired by the people of the Attakapas, and was so in 1811, under the directions of the legislature. It is notorious that the kings of France and Spain imposed on the grantees of vacant lands the obligation of furnishing a highway, *chemin royal, camino real.*

It is then a highway, not as the bank of a navigable river, that the inhabitants of the Attakapas have made use of the soil, on which the appellees' house stands.

It is a public way,—a public, not a private one.

It is a highway from its *nature.*

Three kinds of ways, says *Guyot,* were distinguished among the Romans. Public ways, which the Greeks called *royal, basilicon;* and the Romans *pretorian, consular or military.* These ways led to the sea, *a river,* a city or another military way. 2 *Encyc. Jurisp.* 579, *verbo chemin.* A part, of what is said by this author, as to this distinction, is found in *ff.* 43, 8, 2. § 21. *Delalaure on servitudes,* 529, *n.* 640.

Here it is in proof, that the way in question is the only one, leading from the Attakapas to the Mississippi, and consequently to New-Orleans. It is then from its nature a highway, or public way.

Let it not be said that it is a private way, for it has none of its characteristics.

Private ways, *privatæ viæ*, says Guyot, among the Romans, which were also called *agrariæ*, were those which led to certain estates. Finally, the ways, which they called *vicinales*, were also public ways, and led only from a village to another. 2 *Encyc. Jurisp.* 579, 580. *verbo chemin.*

This distinction is made more plain in *ff.* 43, 8, 2. § 28. *Delalaure on servitudes*, 589, *n.* 650. It will suffice to observe, *transeundo*, that, according to this description, the right of way which our statute speaks of, and classes among legal servitudes, must be understood, in regard to a private way, and not to a public or highway. *Code Civil*, 137. § 5.

The way, under consideration, is a public way, by its *destination*.

When the Spanish king granted the land, as part of which this is now claimed, it had been used as a highway for several years. If the king, who was the owner of the soil, permitted

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a highway to be made on it, the appellants, his grantees, must fail in their claim to the land over which it passes.

A private way, says *Domat*, becomes public by the mere possession of the public; and when once it has been made a public way, it is no longer the subject of prescription: this is settled by several texts of law, 1 *Collect. Jurisp.* 355, *verbâ chemin.*

The intention of the father of the family is equal to a title, with regard to perpetual and apparent services. *Civil Code*, 138, *art.* 55.

Will it be said, that the king, by granting the land, without speaking of the highway, has transferred the property of its soil, with that of the adjacent land, or that his silence has destroyed the effect of the destination which had been given to soil? The argument would not have plausibility.

As soon as a thing becomes public, it becomes inalienable, and *out of commerce.* It can no longer be the object of individual property, 1 *Domat, part.* 1, *liv. prel. tit.* 3. § 1, *l.* 2 & § 2, *l.* 1. *ibid. liv.* 1 *tit.* 1, § 5, *l.* 1. *Partida*, 5, 5, 15. 13 *Pand. Franc.* 6, *n.* 6. *Inst.* 3, 24, § 5. *Code Civil*, 265, *art.* 28, 349, *art.* 16.

For this reason every agreement about things out of commerce, is null. 1 *Domat. part.* 1,

liv. 1, *tit.* 1, § 5, *l.* 11. *Partida*, 5, 11, 20 & 22. *Code Civil*, 265, *art.* 28. Such things cannot be acquired by prescription. *Partida*, 3, 29, 7.

Much reliance is placed on the silence of the king of Spain or the governor of Louisiana, as to this way, in O'Bryan's grant. It is to be remarked, that this man had only an order of survey for his land. This evidence of an inchoate title, acompanied with possession and cultivation, enabled him to obtain a confirmation of his title, from the land commissioners of the United States. No doubt, if that title had ripened into a complete definitive grant, under the Spanish government, the grant would have contained the usual clause, that the grantee should furnish the road.

When an estate is sold, (and doubtless the principle is the same in the case of a donation) all the rights and charges of the estate, attend it in the hands of the vendee. If any charge hes been passed over in silence, the right of the creditor of it cannot be thereby affected. This silence has no other effect than to give an action for a compensation in damages to the vendee, against the vendor. The warranty in this case results from the contract of sale. *Pothier, contrat de vente*, 193, 201. Such would be the case

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if a vendor had omitted to apprise his vendee of a mortgage, or a servitude, with which the estate might be burdened. His silence could not affect the rights of the mortgagee, nor of the creditor of the servitude.

If the proprietor of two estates, between which there exists an apparent sign of servitude, sell one of those estates, and if the deed of sale be silent respecting the service, the same shall continue to exist actively and passively, in favor of, or upon the estate which has been sold. *Code Civil*, 140, *art.* 57.

In whatever manner the property of a house, &c. or any other estate, burdened with a servitude towards another estate, may be sold, it will remain burdened therewith towards the estate, or to the person to whom it was due. *Partida*, 3, 31, 8.

When the servitude is apparent, the vendor is not bound to declare it, and the vendee remains without any warranty, because he cannot be presumed to have been ignorant of it. 1 *Pothier, contrat de vente, n.* 199. Therefore, the appellants, or the grantee, under whom they claim, could not be ignorant of the existence of the highway: and the governor, had he issued a formal grant, would not have been bound to mention the road in it.

Farther, had not the road existed, the appellants could not complain of its being afterwards opened: as it is a matter of public notoriety, that all the grants in Louisiana were made under the reservation of a highway or royal road. 2 *Amer. Law Journal,* 301. 4 *id.* 533. If then, all the grants were made with this condition or reservation, it cannot properly be said that the property of the soil reserved for the highway passed to the grantee. The silence of the grantor, as to the particular spot on which the highway was to be placed, the faculty left to the grantee to fix it where he saw fit, did not alter the principle. For, if I sell you a tract of land, saving ten acres which I reserve to myself, I cannot be said to have transferred to you the property of the whole tract. I transfer it only, saving the ten acres: and although the part of the tract, on which these ten acres are to be taken, be not indicated in the grant, and I leave the spot to your choice, as soon as that choice is made, the ten acres are mine. I need no sale from you, because I am presumed never to have divested myself from the property of these ten acres reserved in the grant, although the part of the tract on which they are to be taken was not designated therein. When I sell you the half of an undivided tract of land, it

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is by the partition alone, that the particular half which is to belong to you is known. So, when a grant is made, with the reservation of a highway, the property of the premises is held to be transferred, saving the reserved highway, which remains in the grantor: and as soon as the grantee has yielded the highway, he ceases to have any kind of right or title thereto.

II. The proposition that, admitting the premises to be a highway, the public is without any property in the soil it covers, but is only the creditor of a servitude, a right of way over it, and that the owner of the land through which it passes continues *to be owner* of the soil and is only the debtor of the servitude: in other words, that highways do not belong to the sovereign or the public, who have the use of them only, is a proposition which messrs. Livingston and Duponceau have advanced in the affair of the Batture. 2 *Amer. Law Journal*, 416. 4 *id.* 533 *& seq.*

It is surprising that these gentlemen should have maintained that highways are not public property. The Roman, French and Spanish laws are in perfect concordance on this point.

Public things belong to the public. In this they differ from *common* things, which are for the use of all, but belong to nobody. 5 *Pand.*

Franc. 7, *n.* 8 & 9, *ff.* 41, 1, 14 & 42, 12, 1, § 2, 3 & 4. 1 *Brown's Civil Law*, 169, 171. 2 *Febrero, contratos, ch.* 7, § 2, *n.* 80. *Code Civil*, 95, *art.* 3 & 6.

Among public things, highways belong to the public. The soil of public ways belong to the public. *ff.* 43, 8, 2, § 21. *Delalaure des servitudes*, 529, *n.* 648.

Rivers, ports, highways, belong in common to all men, *los rios, los puertos e los caminos publicos pertenecen a todos los hombres communalmente. Partida* 3, 28, 6.

Duponceau, in his memorial, 2 *Amer. Law Journal*, 416, cites a passage from the French ordinance of 1669, in order to shew that, in France, the riparian owner, who furnishes a way, does not lose the property of the soil, and becomes debtor of the servitude only.

The ordinance says : *owners of estates, bordering on navigable rivers, ought to leave along the banks a space at least twenty four feet wide, for a royal road and towing path, without being allowed to plant trees, hedges or fences, nearer than thirty feet, on the side of which boats are drawn, and ten feet on the other, under the penalty of a fine of* 5000 *livres and the confiscation of the trees.*"

The riparian owners, says he, preserve their

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property in the soil of the road, since they may plant trees, at a certain distance from the banks of a navigable river, and the confiscation of them is pronounced in certain cases. The induction is not a clear one. The ordinance requires a road of twenty-four feet to be given, and forbids the planting of trees within a strip six feet wide, immediately binding on the road, on the side of which boats are drawn up, and on the opposite one, trees are forbidden to be planted within ten feet. This is not to say that the owner may plant trees in the road itself, but only that the road is to be ten feet wide on the side on which boats are not to be drawn, or that there is to be one road only, and that on the side on which they are drawn.

This construction is the more reasonable, that it is beyond a doubt, that in France highways belong to the king. 1 *Denisart*, 354, *verbo chemin*, *art.* 5.

A difference is attempted to be established between highways, that existed originally, and those that are to be furnished by individuals. These, it is pretended are a servitude only. It is not so: one of the particular characteristics of a servitude is, that it is due from an estate to an estate and not to a person. *Civil Code*, 127,

art. 1, 189, *art.* 49. *Partida* 3, 31, *l.* 1, 8 & 13. 2 *Febrero, contratos, ch.* 7, § 2, *n.* 91.

Servitudes being due to estates, and not to persons, it is easy conceived, why a way is classed among them. *Code Civil,* 137, *art.* 46. *Partida* 3, 31, 83. The reason is that a passage given to an estate, entirely encircled by others, is a right in favor of him who is the owner of it and those who succeed to the ownership. This cannot be said of a public way, which is due to the public or to a community. For this reason the property of the highway passes to the public, while that of the private way remains in him from whom the way is due. *Dig.* 43, 8, 2, § 21. *Delalaure des servitudes,* 589, *n.* 648.

The conversion of a private soil into a highway, deprives the owner of his property so far, that if he had sold it before, he would be *ipso facto* discharged from his obligation to deliver it.

When since the contract, says Pothier, the thing has ceased to be *in commerce* without the act or fault of the vendor, as when, by public authority, the field, which had been sold to me has been taken for a highway, the obligation of delivering the thing has ceased and is extinguished, and the vendor is only bound to subrogate the vendee to his right to receive from the

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king the indemnity, if he see fit to grant one. 2 *Pothier, Obligations, n.* 614. *id. Vente, n.* 59.

If the property of a highway does not pass to the public, how is it that it becomes imprescriptible?

There are several examples in the civil law of a private thing becoming public, in consequence of its having undergone some change, as where a river changes its course. *Inst.* 2, 1, § 23. *Cooper*, 75. *Partida* 3, 28, 31.

III. It is said the appellants cannot have lost the property of the soil of the highway, as they have not yet been indemnified therefor.

It is true that when the King of Spain took a thing, on the score of public utility, the law required that the owner of it should be indemnified. *Partida*, 3, 18, 31. But the principle was not applicable to the lands granted by him in Louisiana, which were never granted except under a condition that the grantee should furnish the soil necessary for a highway.

Donations are either absolute or conditional. The donee is bound to fulfil the charges and conditions imposed by the donor. 1 *Domat, part* 1, *liv.* 1, *tit.* 10, *sect.* 1, *l.* 10. Even, when these charges may be appreciated in money, the donee cannot claim any indemnification. 2 *Pothier, Vente, n.* 612—614.

IV. The plaintiffs say that the defendants with ill grace resist their claim, because the latter hold the premises, under a lease from the former, and in consequence of the possession taken under that lease, have built the house now in dispute.

The plaintiffs never have afforded to the defendants the possession of the soil on which the house stands: they had it not and could not have it.

The possession of public things cannot be acquired, because they are not susceptible of being possessed. *Pothier, Possession, n.* 37.

Then the possession of such things can in no way be transferred to an individual; therefore, even if the lease had mentioned the highway, it would not have passed under it, because conventions, by which *things out of commerce* are put *in commerce*, are void. 1 *Domat, part* 1, *liv.* 1, *sect.* 5, *l.* 11.

The inclusion of the highway in the lease would not authorise the plaintiffs to claim the house and farms, as tenants are not bound to leave the edifices which they have erected on the leased ground, but may carry them away, provided it may be done without injury to the soil. *Domat, supp. lois civ. ch.* 3, § 2, *l.* 5. They are then without the right of instituting

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a *possessory* action, and can only have that which the law gives to an individual who complains and shews that the highway is obstructed, in order to obtain the removal of the obstruction. *Dig.* 43, 7, 1. *Delalaure, servitudes,* 527, *n.* 636.

MARTIN, J. delivered the opinion of the court. The plaintiffs' demand to be put in possession of a tract of land, by them leased to the defendants, the lease having expired. Neither the plaintiffs' title, the lease or the expiration of it are denied, and the judge *a quo* has given judgment in their favor, excepting therefrom, "the public road of sixty-two feet in breadth along the left bank of the bayou or canal of La fourche, and a way of twelve feet on the right, which ought to remain open as a highway."

Of this judgment they complain, contending 1, That the soil excepted is not a public road or highway. 2, That still, as it passes over their land, they are yet owners of the soil and owe to the public a servitude or right of way only.

The statement of facts shews that the canal is navigable in high water, much used for the purpose of transportation in boats from the Mississippi, the sea-shore, &c. to the county of

Attakapas; that for facilitating the navigation, a road or way for towing boats was ordered by the police jury, on the 24th of July 1811, of twelve feet in breadth on each side of the canal, and that about twenty-five or twenty-six years ago, a road for passing to and from lake Verret had been opened by the inhabitants of the parish, and in the year following was greatly improved by those of the Attakapas and Opelousas; since which it has been constantly used as a public road for travellers, and for driving cattle from these two counties to the Mississippi and New-Orleans.

By the act of 1809, *ch.* 13, it is provided, that the borders of said canal shall be considered as a *public highway*, and that the proprietors of the land on the borders of the canal shall be compelled to make said road and to keep it in repair, according to the provisions of the existing laws and regulations.

In 1813, *ch.* 13, the legislature made an appropriation and appointed commissioners to improve this road, and the defendant, Bourg, was authorised to keep a ferry, at the mouth of the canal, where he erected a house, which stands on the part of the land excepted by the judgment, viz. in the road, which the commmis-

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sioners thus appointed had traced out, giving it a breadth of sixty-two feet.

On these facts, the plaintiffs' counsel contends, 1, that the premises, excepted from the judgment are not a highway or public road, as the legislature could not take away the right of the plaintiffs to any part of their land, *without compensation;* 2, that admitting the premises to be a highway, the soil is still the property of the plaintiffs, and the public has only a servitude, a right of way over it.

I. It is contended that the legislature could not establish this road, without first compensating the owner for the loss of the ground which it occupies.

On this point, we are referred to the seventh article of the amendments to the constitution of the United States, proposed by congress in 1789, the second article of the compacts, in the ordinance of congress in 1787, and the *Civil Code*, 102, *art.* 2.

1. The provisions of the constitution of the United States apply, with a few exceptions, to the federal government only. They do not bind state governments, except in cases in which they are referred to. The amendments cited were proposed by congress as a bill of rights guarding against encroachments from the fede-

ral government, "a number of states having, "at the time of their adopting the constitution, "expressed a desire, in order to prevent miscon- "struction or abuses of *its* powers that further "declaratory and restrictive clauses should be "added;" the avowed inducement of the propos- ers of the amendments was that "extending the "grounds of confidence in it (the constitution) "would best secure the beneficial ends of its in- "stitution." *Preamble to the Resolutions, 1 Graydon, xvi.*

This amendment provides that "private pro- "perty shall not be taken for public use, without "just compensation." We must understand it to mean property taken by the United States, or under some power claimed under their constitu- tion; for it was against the *misconstruction* of that instrument and the *abuses of its powers* that Congress intended to guard. See a deci- sion on this subject, *Territory vs. Hattick*, 2 *Martin* 87. The court there decided that the se- cond section of the third article of the constitution of the United States, which requires that the trial of all crimes, should be by jury, and the 6th article of the amendments, which demands the intervention of a jury also, related only to the exercise of the judicial powers *of the United States*. Congress appear to have entertained

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the same idea, when they required that there should be, in the constitution of this state, a clause securing to the citizens the trial by jury in all criminal cases. For, if the corresponding clause in the constitution of the United States extended to cases under state government, the precaution would have been useless.

This court is of opinion that the amendment of the constitution of the United States alluded to, does not prevent a state from taking the land necessary for her roads, without making a compensation therefor.

2. The ordinance of 1787 declares that, in a territorial government "should public exigencies make it necessary to the *common preservation* to take any person's property or to demand his particular services, full compensation shall be made therefor." The words *common preservation* imply, that congress had then in view those extraordinary cases, in time of war or danger, when the property or services of an individual become accidentally necessary to the preservation of the country, and the phraseology differs from the constitution of the United States, so as to repel the idea that instant or previous satisfaction should be made in every case. They impose on territorial governments, as is apprehended, the obligation of making, and invest the

sufferer with the right of demanding, compensation. It is far from being clear that this article would prevent the legislature from requiring the services of a citizen as a juror without previous compensation, or demand that, in every case, a previous compensation should precede the laying out of a road. In many cases, this must be particularly inconvenient. Till the road be actually laid out, the persons entitled to compensation nor the proportion in which it is due cannot be ascertained.

If the amendment to the constitution of the United States and the article of the ordinance opposed to the act of the legislature, avail the plaintiffs, it must be on the ground that the latter is unconstitutional and null. Now, this court will never declare an act of the legislature unconstitutional, unless the unconstitutionality be clear and apparent. In doubtful cases they will support the act.

It is clear the act does not violate the amendment, and it is very doubtful indeed, that it is in the least repugnant to the ordinance. We rather think it is not.

3. Lastly, the *Civil Code*, 102, *art.* 2, is presented to us as striking with nullity the act of 1789, which declares the premises to be a public road.

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"No one", says the code, "can be compelled to part with his property, unless by reason of public utility, and in consideration of an equitable and previous compensation."

This appears to this court as a rule of conduct to the officers of this state, not as derogating from or restraining the powers of subsequent legislatures. The general assembly of 1808, which enacted the civil code, was not a superior power to the general assembly of 1809; it was the same body: the code was passed during their first, the act during their second session. The act was posterior to the code. If, therefore, there be any thing contradictory in these instruments, the latter must so far abrogate the former.

Admitting that the clause in the first had the force of a constitutional injunction, it does not appear that it would have been violated. Twenty-five years ago, a road was opened by the inhabitants of the neighbourhood; the following year the people of the adjoining counties improve it; eighteen years after, in 1809, the legislature declare it shall be considered as a public road; in 1811, the police jury acts on it; in 1811, the legislature of the state make an appropriation for its improvements; its commissioners enlarge it. During all this time, the

owners of the land submitted to all this. Can we now say that they have been *compelled* to part with their property, without compensation, while they never expressed a belief that they were entitled to any?

They have no grant. One, from circumtances is presumed: but it must also be presumed to be such a one, as those which were generally given when their ownership began. The French and Spanish governments granted their land gratuitously, but a reservation was generally made for roads, often for fortifications, *Sigur* vs. *St. Maxent's Syndics*, 1 *Martin*, 231. During these two governments, there is no instance of any payment for land taken for public roads.

II. On the second point, the plaintiffs have introduced a number of authorities from the English jurists. 3 *Bac. Abr.* 494. 2 *Esp. N. P. Gould's ed.* 2. 6 *East.* 254, 2 *Strange*, 1004. 1 *Burrows*, 143. They have also cited American cases, 6 *Mass. T. R.* 454. *Johnson*, 357.

From these, it seems that in Great Britain, the owner of a tract of land, on which the highway passes, retains the property of the soil. But neither the common law, nor the statutes of

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Great Britain can afford us much light in this respect.

Let us therefore examine the question, according to the Roman, the French and the Spanish law, which must regulate the effect of a grant of land in Louisiana before possession was taken of the country by the Americans.

Viam publicam eam dicimus, cujus etiam solum publicum est. Non enim sicuti in privatâ viâ, ita est in publicâ, accipimus. Viæ privatæ solum alienum est: jus tantum eundi et agendi nobis competit: viæ autem publicæ solum publicum est. ff. 43, 8, 2. § 21.

Literally translated, we call a public road that of which *even the soil is public.* We do not take it to be in a public road as in a private one, the soil of which belongs to another, while we have only the right of walking or driving over it: the soil of a public road is public.

The contradistinction between a public and a private way, as to the ownership of the soil, is here apparent. Here the idea of the right of the public being only incorporeal, a mere right of way, is repelled, as well as the corresponding one of the soil being private property: which is said to be the case in private ways. And the distinction between these and public roads is made to consist in this, that in the latter the

right of passing over the surface and the ownership of the soil reside in the public.

In France, it is believed, a highway cannot be the subject of a sale or the possession of an individual. It is *hors de commerce.*

We cannot sell, says Pothier, things which from their nature are *out of commerce,* as a church, a church-yard, *a public square. Traité de Vente, n.* 10. Among corporeal things, there are some which are not susceptible of *possession,* as those which are *divini aut publici juris,* as *a public square. Traité de possession, n.* 37. Of the nature of a public square is *a street* or a highway, which is a street of the country. The highway and street are as much *publici juris* as the square.

Royal roads are those leading from a city to another. Public roads are those leading from a village to another. Although public roads be not called *royal,* yet they *belong* to the king. *Quoique les chemins publics ne soient pes appelés royaux, ils appartiennement cependant au roi. Denisart, verbo chemin.*

The ordinance of Louis XIV, in 1669, is relied on to shew that the soil of a highway, *chemin royal,* belongs to the owner of the soil over which it passes: this ordinance providing that

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owners of estates on navigable rivers are to leave a royal road, on each bank, at least twenty-four feet wide, without any tree, fence or hedge nearer than thirty feet, on the side of which boats are drawn, and ten feet on the other, under the penalty of a fine and the *confiscation of the trees.* Hence, it is considered that the sovereign could not consider the soil of the road as public property, as in such a case, it would have been absurd to denounce the confiscation of trees, which growing in the soil of the public were already public property. The clear part of the road was to be twenty-four feet on one side and ten on the other: between this space and that on which trees could be planted, without incurring confiscation, was on one side of the stream, a strip of ground six feet, on the other, a strip fourteen feet wide: and it is to trees, fences and hedges on these strips, that the confiscation spoken of extends.

We conclude that the part of the Roman law, which declares the soil of a highway to be public property appears to us to be in force in France, and was so in Louisiana, when the country passed under the dominion of Spain.

The laws of that monarchy do not appear to have wrought any change in this respect.

Los rios e los puertos e los caminos publicos pertenecen a todos los hombres communalmente, Partida 3, 28, 6. The rivers, ports and public roads belong to all men in common. After this declaration the legislator speaks of the *banks of rivers.* These, we are informed, are the property of the owners of riparian estates. *Las riberas de los rios son, quanto al senorio, de aquellos, cuyos son las heredades a que son ayuntudas.* He speaks of the use which all men may make of these banks. All men may use the banks of rivers. *Todo hombre puede usar de ellas, &c.* The property of the public on the *road* is here assimilated to that which it has on the *river,* not to that on the banks.

In the case of *Metzinger* vs. *the Mayor &c. of New-Orleans,* this court held that "roads and streets cannot be appropriated to private use." 3 *Martin,* 303. *Civil Code,* 94, *art.* 6.

The judgment of the district court, which excepts from the lands decreed to the plaintiffs so much of the premises as was declared to be a public road and highway, is in conformity to law, and it is therefore ordered, adjudged and decreed, that it be affirmed at the costs of the plaintiffs and appellants.

Livingston on a motion for a rehearing. The two points, decided by the court and presented

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as the basis of their judgment, were not much discussed on the hearing and are of such vital importance to the country, that it is confidently hoped they will be submitted to a closer examination, with the new lights that subsequent research may throw on the subject.

1. The first of these points is, that an act of the legislature of the late territory, taking private property for public use, without compensation, is valid and is not contrary to the ordinance nor the constitution of the United States.

2. That the soil as well as the use of the highway, in this state, belongs to the public.

I. The *origin, object and avowed end* of every government, is the preservation of the persons of its people and their property from violence. Without any *express* constitutional provision, therefore, every act that counteracts these objects must be unlawful. A partial surrender of personal liberty and of private property is, however, necessary to secure the residue, but the right to abridge either is only commensurate with *necessity*. Where this does not exist, the encroachment either on liberty or property is tyrannical: for example, the property of any citizen may be occupied in time of war, when necessary for public defence, and his personal

services may be required for the same cause, and that, without any *previous* compensation, because the exigency of the moment will not permit the delay necessary for selling and paying it. But in time of peace, when private property is required only as convenient for the public, it can never be justly taken without the owner's consent. When necessary, as in the case of public highways, it may be taken without such consent, but not without compensation; because, though a necessity may exist for the road, there can be no such necessity for denying compensation, *previous* if possible, but at any rate compensation; the social compact admitting of no temporary infringement of private right, farther than is absolutely necessary for its permanent preservation; the supreme power of a state cannot, therefore, destroy those rights it was stipulated to preserve.—It is true that in ill-organised governments, where the judicial power is blended with, or dependent on, the legislative, there is no remedy for acts contravening these principles: but if a state have a judiciary independent of legislative power, it would be the duty of such a judiciary to declare a law void which should direct private property unnecessarily and without compensation, to be taken for public use and that too, whether there was a writ-

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ten constitution or not: because no written constitution can have greater force than those immutable principles on which all political society is founded.

If our constitution therefore, contained no other feature than the separation of the judicial from the law-making power, it would be the duty of the former to keep the latter within its proper bounds, by declaring every act of unnecessary violation of private rights, to be void.— I acknowledge that in such a case, the violation must be open and apparent, to justify the interference: because the legislative may be better judges of the existence of the necessity than the judiciary; but, the difficulty of discriminating in doubtful cases can be no objection to the exercise of power under circumstances where no such doubt exists.

Thus the case would stand, if tested by the dictates of natural law: let us now examine the constitutional provision.

The law laying out this road, or rather only directing it to be laid out, passed in the year 1809, this country was then governed by the ordinance of 1787, as its constitution, with such changes and amendments as the present constitution of the United States, and the laws under it had produced.

This ordinance contains several articles of compact, between the original states and the people of the territory, which were to remain forever unalterable except by common consent. These articles generally go to secure the inhabitants in the enjoyment of their civil and political rights. Among them, we find the memorable provision that has been handed down to us unaltered for six centuries, and has been transferred by the descendants of Englishmen from Runnymede to the banks of the Mississippi; from the great charter of England to all the constitutions of her former colonies, the United States; "that no man shall be deprived of his liberties or property, but by the judgment of his peers or the law of the land." I need not inform this honourable court that these are *technical* as well as sacred words, and that the "*Law of the Land*" as used in these instruments does not mean the acts of ordinary legislation, because the provision would rather sanction than forbid acts of legislative oppression, but that it means a course of judicial proceeding according to the established forms of law. Immediately after this important clause (relating to the exceptions which might be created by public necessity) the compact goes on to provide for that case also, by declaring "that in case the public exigencies should

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make it necessary for the common preservation to take any person's property, or to demand his particular services, full compensation should be made for the same." Here then is every case specially provided for, according to the principles of natural law, which have been already laid down—You shall take no man's property unless it be forfeited according to law, except in case of urgent necessity, and then only on making compensation. Surely nothing can be more apparent than the bounds which are here set to the legislative power, to remove them in the slightest degree, to admit by a judicial decision that the legislature may take private property for public use or convenience, would surely be subversive not only of the constitutional compact, but of the great principles which it was meant to sanction and enforce. To suppose that the words for the "*common preservation*," which are used in this clause, meant to limit the obligation to compensation strictly to cases, in which there was an urgent necessity for taking the property or services, would, I most respectfully suggest, be saying that the ordinance intended to force the legislature to make compensation when they were justified by necessity in taking; but to leave them at liberty to compensate or not, where there was no necessity—that when they took my

property, because it was essential to the safety of the state, they should pay me its value, but when they chose to take it to suit their convenience, to indulge their caprice, to gratify their rapacity, they are under no such obligation. This would surely be a woeful sacrifice of the spirit of the constitution, to a very narrow construction of its letter, and that too in a point where of all others it ought to receive the most liberal interpretation, for the protection of liberty and property.

The 7th article of the amendments to the constitution of the United States, which provides, "that private property shall not be taken for public use, without just compensation", is supposed not to apply to the present case, because it could only mean property "taken for the United States, or in pursuance of some power *derived from the constitution* of the United States."—admitting this construction, which is probably the true one, the case in question comes within it. The legislature of the territory of Orleans, derived all its authority from the United States. The governor and one branch of the legislature were appointed by the president: all laws were subject to the revision of congress and the whole government, if we except one branch of the legislature, exhibited the perfect

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model of a subordinate body, under the complete control of congress. If the amendment, therefore, was intended to apply to powers "*derived* from the constitution of the United States," this case comes within it: nor, will it be any answer to this argument to say, that the ordinance of 1787 was made by the congress under the *confederation*, because, by the 4th article thereof, it is declared that the territories "shall remain a part of the confederation, *subject to the articles of confederation and to such alterations therein as shall be constitutionally made:* and in point of fact the territory of Orleans was attached to the Union, under the *constitution*, by virtue of the ordinance passed by the congress under the confederation.

Therefore the principles of natural law, the provisions of the ordinance, and the constitution of the United States, all equally forbid the taking of private property for public use, without compensation. If then the laws of the territory purport to deprive the plaintiff of his property without compensation, they must be unconstitutional and void: if they do not deprive him of it then it is his still, and he ought to recover. I agree perfectly to the maxims laid down by the court, that the unconstitutionality of an act, must be *clear and apparent before they can declare it*

void. This is in fact, saying no more than that they must be convinced that it is unconstitutional: No matter how that conviction is produced, whether it flashes on the mind intuitively on the first view of the law, or whether it is the result of patient investigation and long research, the moment that conclusion is formed by the understanding, then duty points out the path to the judge; while he doubts, it is certain he cannot decide, and no case can conscientiously be determined, until all doubts on the one side or the other are removed.

The quotation from the civil code was made, not to rely on it as a constitutional provision, but to enforce the principle of natural law, that has been referred to, by the authority of the legislature, and also as a law, which enforced the constitutional provision, by declaring that the compensation which it provided shall be made *previous* to the taking the property. On the time of making compensation the ordinance was silent, the law, therefore, had a right to supply the defect; and though a subsequent legislature might unquestionably have repealed this general provision, yet, undoubtedly, until it be expressly repealed, every particular case must be governed by it, unless the will of the legislature

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be specially declared that it shall not. For instance, if, in the case before the court, the legislature in appropriating the individual's property to the public use, had declared that it should be paid for a year *after* it was laid open, it might be forcibly inferred that the legislature intended to repeal in this instance the general provisions of the code—or, again if there were no constitutional objections and the legislature had declared in the law, that the property should be taken without compensation whatever, then the same inference might be drawn: but as there is nothing like either of these provisions, it may fairly be concluded that those contained in the code on this subject were not intended to be dispensed with. "*Leges posteriores priores contrarias abrogant.*" This is undoubtedly true as a general rule; but, Blackstone tells us "this "is to be understood only when the latter sta- "tute is couched in negative terms, or where its "matter is so clearly repugnant that it neces- "sarily implies a negative;" of which he gives several examples, 1 *Black.* 89. It is an established rule that all statutes *in pari materiâ* are to be taken together as if they were one law, *Dougl.* 30; and it is also held that if any thing contained in a subsequent statute be within the reason of a former statute it shall be taken to be

within the meaning of that statute. *Ld. Raym.* 1018, 4 *Rep.* 4, *Vernon's case.* Now apply these principles to the case. The first act declares (Code) that no private property shall be taken for public use, without a previous payment of its value; the subsequent act declares that the property shall be appropriated to public use, without saying any thing of the payment. Does this repeal the provision in the first act which requires previous payment? I think not:

1. Because there are no negative words.

2. Because the two statutes, being *in pari materiâ* and compatible with each other, must be taken together.

3. Because the latter case is completely in the reason and equity of the first: and

4. Because a statute shall not without express words be so construed as to carry with it consequences manifestly contrary to natural law. 1 *Black. Com.* 91.

Therefore, I conclude that if there were no constitutional bars, the two acts of the legislature (the code and the statute) must be taken together, and that the property could not vest in the public, without previous compensation to the owner. This last branch of my argument will be strengthened by the observation made by the court, but which had escaped me, that it was the

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same legislature which passed the code, that at the next session enacted the statute: and they could not respectfully be supposed so soon to have forgotten their own principles. A perusal of the several statutes on the subject will, I think, shew that none of them purport to deprive the party of his property.

The first law passed on the subject of the premises in question is of the 7th June, 1806. It gives to the inhabitants of the county of Attakapas, the exclusive right to make improvement to the canal. It directs a judge and jury to determine what improvements are necessary, and to fix a toll to be paid in proportion to the size of the boats. This law is silent as to the road, or even the banks of the canal, but it clearly shews it to be the work of industry, not a natural water course, and that therefore, neither the soil it covered, nor the banks which contained it could be public either as to use or property.

The second law passed 11th March, 1809; its first section takes away the toll that had been granted or rather suspends the right of exacting it, until the canal shall be finished.

But the second section declares that the borders of the said canal shall be "*considered as public highways*," and directs that the proprietors of land lying on its borders shall be com-

pelled to keep it in repair according to the provisions of the existing *laws* and *regulations*.— No width is assigned to the roads thus created on the borders of the canal; it is left to the existing laws and regulations, and was fixed as appears by the statement of facts, on the 24th July, 1811, at *twelve feet* on each side.

The third act is passed the 2d April, 1811, entitled "an act to *open* and *improve* certain roads." On the subject of the road in question it appropriates 500 dollars to improve *the road* of the canal of La Fourche to lake Verret. And the judge of the parish and two other persons are appointed commissioners "*to superintend the works of the said road.*" As to other roads mentioned in this act, such as

1. From Concordia to Alexandria.
2. From the mouth of Red river to Avoyelles.
3. From Baton-Rouge to Opeloussas.
4. Across the point of Plaquemine.
5. From Plaquemine to point La Hache.

In all these cases the appropriation is to *open and establish* a road. While in this case, and in that of the road across Manchae point, it is for the purpose solely of "IMPROVING" the road already existing.

The second section directs the commissioners to cause the roads "*to be traced out and open-*

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ed, and to report to the legislature the progress they shall have made."

These are all the laws on the subject in question: under the last act, the commissioners laid out a road of sixty-two feet wide on each side of the canal, comprehending every foot of arable land in the plaintiff's tract. Whether pursuant to the directions of the act, they made report to the legislature does not appear, and therefore cannot be presumed, but most certain it is, that the legislature did never pass any act approving what the commissioners had done.

Let us now review these acts with the view of discovering whether any of these evince a legislator's will, that the owner shall be deprived of the property in question.

The first (7th June, 1806) only disposes of the canal, so far as to give to certain persons the right of taking a toll: but it certainly excludes the idea of the canal, being a public watercourse, and of course of its banks being subject to a public servitude or right of way.

The second (11th March, 1809) suspends the right of toll; *until the canal shall be rendered navigable*, and declares, that its borders shall be considered as a *highway*, which the *neighbouring proprietors* shall keep in repair: the police jury fix the extent of this public high-

way to twelve feet. As far then, as the legislative will is shewn, it is only the *borders* of the canal, which I suppose means its banks, that are at all converted into a highway. And let it be observed that they do not refer to the "existing laws and regulations" for the extent which the paths are to have, but to the *keeping them in repair*, which it is declared must be "according to the provisions of such laws and regulations." Under this act then, it may well be doubted whether the police jury had a right to extend the width of the road to twelve feet. But what is clear, is that on no construction can it under this law be extended further.

The third act is the one most relied on, but there is not a syllable in it that either looks like a design in the legislature to deprive the plaintiff of his property, or to authorise the commissioners to enlarge the road; its phraseology is particular: In the places where a new road was to be laid out, as in the five instances cited, the appropriation is to *open and establish* a road—In the two cases, one of which is ours, where it already existed, it is to "*improve*" only. By what process of reasoning an appropriation of $500, to improve a road of twelve feet wide, can be changed into an act for taking away from the proprietor all the rest of his estate, I am at a loss to con-

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ceive. Even as to the other cases, mentioned in the act, where new roads were to be erected, nothing final is determined; the commissioners are to trace out the roads and then report to the legislature—For what purpose? Plainly that the legislature might act justly and constitutionally, that they might make further appropriations, if any were necessary, to indemnify the individual whose property was used—no such report was made, no further act was passed, therefore, even if the legislature intended to take the property (of which there is not the slightest evidence) the act is yet inchoate, and the individuals still enjoy their rights, admitting the legal power of the legislature to deprive them of it.

The use, that was made of this road twenty-five years ago by the inhabitants of the Attakapas, has been also relied on: but, surely no lawyer will say that such use took away the right of soil: at most, if it be a presumptive title at all, it is only a title to a servitude of way, and such a title is not at all incompatible with our action.—As little can the acquiescence of the parties be objected to shew as an argument that they were not "*compelled*" to part with their property; because they never did acquiesce. On the contrary, the plaintiffs leased the premises in question four years ago, and received rent for them all

that time, recovered it by *suit* as one of the judges may recollect, during the continuance of the lease, and as soon as the lease expired brought the present suit.

II. The second point to be considered is whether, supposing the premises to be situated in a highway legally laid out, the owner of the soil, through which it is laid out, cannot maintain this suit—in other words, whether the state owns the soil or only the use of the highway in this state?

This is a most interesting question for every proprietor in this state: should it be determined in the way the court at present incline to decide it, the most vexatious and oppressive consequences would follow.

The Roman law has been cited by the defendant, and seems to have had some influence with the court in deciding this question. Before we enter into the investigation, it may be proper to remark that the *consular* or *pretorian* or *public highways* of ancient Rome were constructed with such solidity as to remain, after the lapse of 2000 years, monuments which attest the grandeur of those masters of the world, and at an expence to which the feeble efforts of modern times on this subject bear no comparison. Such fabrications would naturally be placed on lands previously

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secured to the public by purchase or conquest, and when the Roman laws define a public way to be "*that of which the soil is public,*" they mean no more than to say that all their public ways were constructed on public ground; but, surely this cannot lead us to the conclusion that a way made on private ground becomes *ex vi termini* public property, both as to soil and the use.

Let us now examine the law; the text relied on is *D.* 53, 8, 3, *sect.* 24, *viam publicam eam dicimus cujus etiam solum publicum est, et non enim sicuti in privata via, ita est in publica accipimus, viæ privatæ solum alienum est; jus tantum eundi et agendi nobis competit. Viæ autum publicæ solum publicum est.*" Here the quotation ends, but the text proceeds in the same sentence to say "*relictum ad directum certis finibus latitudinis ab eo qui jus publicandi habuit, ut ea publicè iretur commearetur.*" This latter member of the sentence is important, not only because the sense is incomplete without it, but because it shews, what I contend for, that in constituting a public way at Rome, the property of the soil was transferred to the public *by him who had the right: "ab eo qui jus publicandi habuit.*"

We accordingly find that when a public highway was carried away by a flood, the neighbouring land might be appropriated for this pur-

pose, but only *when paid for by the public.*— "*Cum via publica, vel fluminis impet vel ruinâ, amissa est, vicinus proximus viam prestare debet.*" *D.* 8, 6, § 14, and Godfrey in his note on the passage says, *sed impensâ publicâ.* This is more expressly laid down in the following authority, "*Via vicinalis dicitur publica quando solum viæ vicinalis emitur a publico.*" *Dayoz Ind. juris civil, verbo via.*

These authorities shew that among the Romans, that was a public road, of which the soil was bought by the public and which was made at their expence: the following shews the converse of the proposition, that all roads laid out over private property, and made and repaired at the expence of individuals are private roads, by whatever name they may be called, that is to say, that the soil is private property though the use be public." "*Viae vicinales, quæ ex agris privatorum collatis facta sunt, quarum memoria non extat, viarum publicarum numero sunt; sed si extat, memoria quod sint factæ ex collatione vicinorum, sunt viæ vicinales privatae. Dayoz ut supra.* This is a striking authority, to shew the nature of the Roman public ways: if a road should have been made over private property, but it has continued so long that there is no memory of the fact, then

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it shall be deemed public. But if there is any remembrance of the time at which it was laid out, by the contribution of individuals, it is not then a public, but a vicinal way and the soil of course private property.

The same doctrine is most distinctly, more strongly laid down in the two articles immediately following in the same book.

The present law contains the same distinction. 5 *Pand. Franc.* 108, speaking of roads says, "*Touts ceux qui sont entretenus par le tresor public font partie du domaine. Les autres appartiennent á ceux qui sont chargés de les entretenir.*"

From a book of great authority and an adjudged case, which it cites, we have the point as far as depends on the French laws fully decided. 5 *Repertoire jurisprudence, p.* 367. *title Chemin,* says, *Lors qu'un chemin a ete abandonné et qu'il n'est plus d'aucun usage, le seigneur haut justicier* (the lord of the manor) *peut en disposer dans sa seigneurie. La table de marbre l'a ainsi decidé par un jugement en dernier ressort, dâté 2 Aout 1715, rendu en faveur du seigneur de Belleval en Champagne contre les habitants de cette terre; ce jugement a maintenu ce seigneur dans la proprieté et possession d'un chemin qui pour n'a-*

voir pas ete frequenté s'étoit couvert de broussailles."

It appears from the same book that frequent discussions took place in France to determine whether the *tree*, the fruit, &c. growing in the public highways belong to the lord of the manor or the inhabitants.

And these ended in decisions which are reported page 303, in favor of the lord of the manor; (probably because the farms were laid out after the road and were bounded by it,) whatever might have been the reason for deciding the property in favor of the lord of the manor, they clearly shew that the property of the *soil* was not in the king. Six or seven separate decisions on this point are cited in this book, all equally strong to this point and all relating to *public ways*.

Let us now approach nearer to the question, and having seen what was the nature of public roads in France, from whence this country was peopled, and by the Roman law, the foundation of that which now governs us; let us enquire whether the French settlers brought with them any particular law on this point, and what change was introduced by the cession to Spain.

The French grants, it is said, reserved a road which was called royal road. Many of them, sub-

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sequent to the year 1757, did so; for the four years prior to that period none of them contained the reservation, and beyond that we have lost the public records, but suppose them all to contain it. The reservation is first, of the timber for the royal navy, and the land necessary for fortifications and royal roads; does this reservation take the things excepted out of the grant, or, does it only allow the king to use them when he shall deem it necessary? I think clearly the latter—the wood, the land for the fortifications and for the road are all contained in the same clause, and therefore must all be tested by the same rule—if then this reserves the property of the things reserved, no individual would be allowed to cut a stick of timber, without infringing on the king's rights, because all proper for the navy was reserved—he could use no part of his land for fear of trespassing on that which the king reserves for his fortifications: if it be the king's exclusive property, by virtue of the reservation, he can have no right to use it in any manner; and therefore, until the king locates his fortifications, which perhaps he may never do, and his road, the grantee has no right to possess any part of it and his grant is defeated—whereas by looking to the spirit of the instrument we may adopt a construction that will give both parties

the full enjoyment of their respective rights without violating any principle. The reservations are clearly those of three distinct servitudes in the land granted—a right of cutting timber—of using the part necessary for fortifications and of way; on this construction, the grantee has the property of the whole, and may enjoy it in any way not incompatible with the servitudes; and the grantor may, at any interval, claim the use which he has reserved for the different purposes stated in the grant. If this reasoning be correct, let us try it by legal principles; at the moment of the grant, there is no doubt that all the land within the boundaries assigned becomes vested in the grantee, that is to say he has as much right to any one portion of it, as he has to any other. It is not like an undivided portion of the whole, because it has no determinate quantity and it does not grow into existence (particularly in the case of fortification,) until the necessity for it arises; where then, I say, during the interval, is the king's right, in what part of the premises? In what undivided proportion of them? But can any exclusive ownership in the soil exist, which can neither be located nor described either by a positive quantity or a relative proportion? I think not. Will it be said the estate vests by the mere location and appro-

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priation? This cannot be, if the whole of the tract was before vested in the grantee, because if it were it would require his assent to divest the property he had acquired; if we suppose the reservation to be, as it really is, of a servitude, an incorporeal hereditament, all these difficulties cease, because neither the property nor the possession of the grantee is any bar either to its existence or its exercise. Again, if the exclusive property of the soil vests in the king when the road is once opened or traced, two consequences follow: 1. That he has got all that he reserved,—2. That it must be his until he regrant it.—Now, though the breach of a law is certainly no proof that it does not exist, yet, universal and continued practice has always been admitted, especially in doubtful cases, as an argument to shew what the law is. Even further, when that practice is known to be originally erroneous, yet it acquires respectability from time, and *communis error facit jus* has been received as a maxim when the error has been slight and of long standing. Now, in this country, both the consequences, that must be drawn from supposing the soil of the road in the public, have been without a single exception violated in practice from the first settlement of the country.—Uniformly, when the soil of the road first located

has been washed away, which it frequently is, the proprietor furnishes a new way without compensation, which I have shewn he would not be obliged to do, if the soil were the king's, but, which he would be obliged to do, if it be as I suppose his own subject to a servitude. Uniformly when the first road has become inconvenient or useless, the proprietor, on opening a new one, appropriates the soil of the first to his own use, which he would not be permitted to do, if the soil belonged to the king, but which he would have a right to do, on the construction for which I contend. The consequences at this day of declaring all the soil that has been at different periods occupied as public roads, by the changes in the bed of the river, it appears to me, are sufficiently serious to be taken into the account.—Hundreds of houses, gardens and other improvements, on this construction, are now placed on land that belongs to the public, and, as they are not bound by any prescription, the occupants are always liable to be disturbed in their most valuable possessions.

Hitherto, we have considered the question as depending on French grants, and governed by French laws; this was done more to meet the general law on the subject laid down in the opinion of the court, than from any necessity in the

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present case, which arises on an inchoate *Spanish* grant, confirmed by the United States. None of the Spanish grants (at least none that I have seen) contain the reservation mentioned in the French. They refer to the ordinances that have been made on this subject by the king. The first is dated 15th Oct. 1754. The second by O'Ryley the 18th Feb. 1770. The third by Gayoso the 1st of Jan. 1708, and the last by the Intendant Moralles on the 7th July, 1799. The three first I have not been able to procure, but as our grant, or rather permission must have been under the authority of the last, and this last declares that it is only to enforce the former ones, there is the less necessity for referring to them. All relating to the subject are found in the following article:

Third Article.

After declaring that those who obtain concessions on the river, shall be held to make a levee the first year, it proceeds thus: "They shall be held moreover to make and preserve in repair the royal road, which must be at least thirty feet in width." Here certainly are no words of reservation at all, or if there are, they apply equally to the levee which has never been pretended. On the contrary, by shewing that the road is not only required to be made, but to be repaired

at private expence, they bring it within the definitions we have quoted of a private road.

In the 5th article, the levee, the road, the canal and bridges are all spoken of, in terms to shew that they equally belonged to the grantee, *sa* levee, *son chemin, ses canaux, ses ponts.*

The 9th article expressly acknowledges that the king renounces the possession of the ceded lands, in these terms: *Quoique le roi* renonce a la possession des terres *qui se vendent, distribuent ou concedent en son nom, les acquereurs doivent etre prévenus que sa majesté se réserve le droit de tirer des forets les bois qui pourront convenir pour l'usage de sa marine &c.* not a word here of the reservation of any part of the soil, but an acknowledgment that he renounced the possession of the whole, and only retained the right of servitude.

So far then as depends on the terms of the Spanish grant, under which the property is held, there is nothing to ground any argument on a reservation of the soil for the road, in favor of the crown. But on the contrary a duty created of furnishing the land and repairing the road, which duty is only compatible with the idea of a servitude in favor of the public, not of a right of soil.

But this case is stronger, because all the provisions I have stated, apply only to grants on

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the river, and this is a grant not on any water naturally navigable, which is an important distinctive feature in the case. Our grant also was imperfect before the cession of the country: no conditions were inserted in it and it is confirmed without any, so that the whole cause must rest on these two questions.

Has the legislature of the late territory taken the premises from the plaintiffs?

If they have, had they a constitutional right so to do?

These questions have already been discussed, and I will conclude this argument by some observations solely applicable to this case.

1. If the extention of sixty-two feet, be legally given to the public road, without compensation, the whole of the plaintiff's property is taken from him, for there is not another foot capable of cultivation on the tract, and he would be therefore not only obliged to give up the only valuable part of his land for a road, but to be at the expence of keeping that road in repair.

2. That as the defendants *hired* this property from us, they never can, consistent with any rule of law, set up any title adverse to us, they must restore us the possession: then if we encumber the public highway we are answerable on an indictment.

3. That, even if this be a highway, we are the persons who are obliged by law to repair and keep it in order; the residence of the defendant prevents us from performing this duty, therefore we, in our private name, have a right to bring this action, *vide Dig.* 43, *tit.* 8, and we have prayed for general relief.

4. That the house in question stands beyond the extent, laid out by the parish jury for the road, and the commissioners were not authorised to give it a greater extent, and if they were, their report has never been confirmed nor even made.

The English cases and those from the different parts of the United States, seem to be rejected by the court as totally inapplicable, but, if the right of the public to the road should have been proved to be a servitude only (as it is respectfully believed has been done) then those cases are extremely important, because they shew, that in a country, in which the police of public roads has been carried to a point of perfection, proverbial among modern nations, no inconvenience has resulted from the soil being considered as private property—that our sister States have suffered the same principle to remain unaltered: and finally, that if the law of the property be the same, the same consequen-

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ces as to the action ought to follow. The case cited from *Burrows* is one in all its features like the present, and if the law has been established, as I suppose, cannot but be extremely persuasive, although here it wants the force of authority.

REHEARING REFUSED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, MARCH TERM 1816.

East'n. District. *March* 1816.

TRICOU vs. BAYON.

Tricou vs. Bayon.

If leave be given to answer, so as not to delay the trial, a right to a trial by jury is not thereby to be understood to be given up, altho' to obtain it, the trial may be delayed.

APPEAL from the second district.

DERBIGNY, J. delivered the opinion of the court. This is a suit brought by a vendor to obtain the rescission of a sale, on account of the non-performance of the engagements entered into by the vendee.

The record comes up with a full statement of the facts, so as to enable this court to pronounce on the merits. But it is first alleged by the defendant and appellant, that he has been wrongfully deprived of a trial by jury, and that the case ought to be remanded to be thus tried. In support of this, he produces a bill of exceptions from which it appears that the appellant having first filed a plea in abatement, instead of a full an-

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answer, and the plea having been overruled, he obtained leave to answer on condition that his answer should not be such as to delay the trial of the cause—that he then filed an answer on the merits, and therein prayed for a trial by jury, but that the jury, who, according to the rules of the court of the second district, is impannelled at the beginning of each term, for the trial of all causes, having been dismissed previous to that application, the court would not suffer the cause to be continued until the next term, but urged the defendant into a trial, without the benefit of a jury.

Before examining the question arising on this bill of exceptions, viz. how far the district judge was correct in permitting the defendant to answer on the merits, after his plea in abatement had been overruled, and denying him, at the same time, the right of a trial by jury, this court thought it necessary to ascertain whether any and what advantage the appellant could derive from being sent back to be tried by a jury; for, if upon due consideration, it appeared that the decision of the case could receive no possible alteration from this different mode of trial, and that the facts, such as they are now spread before us, were to return invariably the same, we should have deemed it our duty

to have disregarded the exception of the appellant and to decide on the merits of the cause. This would have been undoubtedly the proper course, if the facts had been recognised and settled by the parties: but here the judge has himself found the facts, and made a statement of them, according to his own judgment. Would a jury, called upon to give a special verdict, inevitably have found the same facts. This is by no means certain. If, therefore, it was the right of a defendant to have his case tried by a jury, he must be allowed to enjoy it.

But, it is said that the appellant, by the manner in which he conducted his defence, has forfeited that right. In support of this position, the act regulating the practice of the then superior court of the territory, and now that of the district court of the state, is relied on as containing a provision, which virtually abolishes the practice of pleading in abatement, previous to the filing of the answer on the merits, because it requires the defendant to file his answer within a certain delay, and therein "to answer, without evasion, every material fact in the plaintiff's petition." It is hence inferred, that the defendant, aware of this and knowing that, by the rules of the courts of the second district, a jury was to be impannelled, in the

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TRICOU *vs.* BAYON.

beginning of the term for the trial of all causes, purposedly avoided to answer on the merits, in order that before his plea in abatement should be disposed of, the jury of the term might be dismissed, and that he then would by praying for a trial by jury, obtain a continuance of the cause until the next term. It is not very obvious that the defendant should wish for delay, in a case wherein his property was seized and placed in the custody of the sheriff: but, supposing that to have been its object, when he filed his plea in abatement, it does by no means follow, that he thereby forfeited his right to a trial by jury.

Dilatory pleas, by the laws of the late government of the country, were presented and disposed of, before the answer on the merits was filed. It is the opinion of this court, that the act above alluded to impliedly abolished that practice, by requiring the defendant to answer, within a certain delay, every material fact stated in the plaintiff's petition—and that from thence it became the duty of defendants to file, within that delay, their allegations on the merits of the case, and at the same time such exceptions as they might wish to avail themselves of. But, this had never been settled by any positive decision, and the district judge seems to have considered the plea as regularly filed, since he acted

upon it, heard it argued and decided on its merits. At any rate, the situation of the defendant, after the admission and disposal of his plea, could not be worse than if he had not answered at all. When no answer has been filed, within the fixed delay, it is discretionary with the judge to allow the defendant further time to file it: but, in the exercise of that discretion, he certainly can do nothing else than granting or refusing it: he can impose no conditions on the defendant that will deprive him of rights secured to him by law. If the judge thought that the plea of the defendant was no legal answer, he might, on the motion of the plaintiff, have granted a judgment by default, but when he permitted the defendant to answer on the merits, he assimilated him to a defendant, who has obtained further time, and who is during that further time, in the situation in which he was, before the delay fixed by law had expired.

Although this court is aware of the inconvenience and loss which must be the result of the delay, in a suit of this nature, the remanding of this cause to a trial by jury is inevitable.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the cause be remanded for a trial by jury.

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DURAND
vs.
HER HUSBAND.

DURAND vs. *HER HUSBAND.*

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

If the wife behaves outrageously to her husband, a separation from bed and board will not be granted to her on account of his ill treatment of her.

DERBIGNY, J. delivered the opinion of the court. The plaintiff and appellant brought this suit to obtain a separation of bed and board from her husband. The evidence shews that she received ill treatment from him, but that she had behaved in an outrageous manner to him. The law, which provides for a separation from bed and board in certain cases, is made for the relief of the oppressed party, not for interfering in quarrels where both parties commit reciprocal excesses and outrages.

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

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

POYDRAS vs *ROBILLARD.*

If the plaintiff's order of seizure and sale be rescinded improperly, he ought to have a statement of facts made, and cannot succeed in his appeal,

APPEAL from the fourth district.

MATHEWS, J. delivered the opinion of the court. This case comes up on an exception, taken by the counsel of the plaintiff and appellant to the opinion of the district court, by

which an order of seizure and sale, previously granted, on certain property of the defendant and appellee, mortgaged to the plaintiff by an act under a private signature, is rescinded and the suit dismissed.

upon a bill of exceptions to the opinion of the court in rescinding it.

The opinion of the court, thus given, amounts to a final judgment and decision of the cause, from which an appeal ought to have been taken, with a regular statement of facts, or something by which it might appear that the whole case is before this court: such as an agreement of counsel or certificate of the judge, that the record contains all the evidence and proceedings. As this does not appear, and as the exception is, in the opinion of the court, irregular, being one made to a final judgment, it is ordered that the appeal be dismissed, at the costs of the appellant.

Moreau for the plaintiff. *Esnault* for the defendant.

SYNDICS &c. vs. *MAYHEW.*

On a rule to shew cause, in favor of a police jury, for expences incurred in repairing the levee, if the defendant denies every thing charged, the

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

MATHEWS, J. delivered the opinion of the court. This is an action, commenced by the syndics of the third district of the parish of

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SYNDICS &c. *vs.* MAYHEW.

judge cannot proceed to judgment without a trial.

New-Orleans, in order to cause a plantation, the property of the defendant, to be seized and sold in a summary way, to satisfy and reimburse the police jury of said parish, for expences incurred by them, in repairing and mending the levees of said plantation, agreeably to the general police rules. To shew themselves entitled to this summary and extraordinary remedy, they cited the fourth paragraph of the seventeenth article of these rules. On this application, the judge of the court below issued an order against the defendant and appellant, by which he was required to pay the amount claimed, or shew cause why his property should not be seized and sold. After the service of this order, the appellant appeared in court, and made his defence, shewing for cause, against such a summary proceeding, a general denial of all the facts stated in the petition of the plaintiffs and appellees: but the judge, not considering the cause shewn good and sufficient, granted an order of seizure from which the present appeal is taken.

It appears by the statement of facts that, on making this order, no evidence was offered by either of the parties to the suit, and that the court, in the absence of both, proceeded to the final decision of the cause.

Under these circumstances of the case, we deem it unnecessary to go into any inquiry or investigation of the constitutionality or consistency of the police rules (above referred to) with the laws of the state.

On the citation to shew cause, the defendant having made a general denial of all the facts stated in the petition, we are of opinion that the claim of the plaintiff ought to have been established by legal evidence; and that the judge erred in deciding, without hearing the parties, and in not requiring such evidence.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be avoided annulled and reversed, and that the cause be remanded to be tried on the merits.

Moreau for the plaintiffs; *Porter & Depeyster* for the defendant.

BARKER vs. *CONNELLIN's SYNDICS.*

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

If an agent does at times business on his own account, and purchases goods, in his own name, his

Abram Barker, in his petition, stated himself to be the lawful owner of a quantity of cotton,

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shipped by Connellin to Jacob Barker, of New-York, on his account and risk, which he, Connellin, had purchased, as agent of the said Jacob Barker, who assigned it to the petitioner: that the cotton was attached by Jacob Barker, who discontinued his suit: that the defendants have possessed themselves of it and refuse to deliver it.

creditors will be entitled to them, unless the principal proves they were purchased on his own account.

The defendants pleaded the general issue and there was judgment for them: the plaintiff appealed.

The statement of facts shews that Connellin purchased the cotton from Samuel Elkins, and shipped it, on board of a vessel belonging to Jacob Barker of New-York: that the vendor instituted a suit, in which the cotton was seized, and in which Jacob Barker intervened, but the suit was discontinued: that the vendor instituted another suit, claiming a privilege on the cotton as vendor, in which the cotton was sequestrated and removed on shore, and a part of it was sold, by an order of court, to satisfy the sheriff for some disbursements made thereon, and the petitioner intervened, but the suit was discontinued, and Connellin having failed, the residue of the cotton was delivered by the sheriff to the defendants, who afterwards obtained

an order of court for the sale of some of the cotton, to pay charges of storage, &c. The present suit is brought to recover the residue, claimed by the petitioner, under an assignment from Jacob Barker. The defendants proved that Connellin, though an agent of Jacob Barker, did at times business on his own account, and in order to shew that the cotton in dispute was bought in his own right, they produced the oath of the vendor, now one of the syndics and defendants, and Connellin's own declaration, annexed to his schedule. No bill of lading was produced or proven to have been given; and it was proven that Talcott and Bowers were the agents of Jacob Barker, in New-Orleans.

Talcott, of the firm of Talcott & Bowers, deposed that the cotton was, as Connellin informed him, shipped for the account and risk of Jacob Barker, for whom he had purchased it, and on whom he had drawn bills for its amount, in favor of Elkin.—that he had knowledge of Connellin's concerns, and believes he did little, if any business at all, on his own account. He had been sent to New-Orleans, as the agent of Jacob Barker, whose affairs here consisted in the purchase of produce and the dispatch of vessels, of which he had several, at the time in

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New-Orleans: he was furnished with a considerable sum in post notes, and had authority to draw. The witness heard that Connellin's bills on Jacob Barker, for the purchase of the cotton, had been suffered to lie over, but he has since understood he had got over his difficulties, was fully able to pay his debts, and was about satisfying the holders.

Basset deposed that, shortly after the failure of Jacob Barker, he heard Connellin say that, although Barker owed him about $6000 for a balance of accounts, he would remain perfectly easy, as he had no fears of losing one cent of it.

Ellery for the plaintiff. Our case is fully proven. It is in evidence that the insolvent was our agent in New-Orleans for the purchase of produce. It is true it is shewn that, independently of this, he did at times some business on his own account, but the witness say little, if any, business was done by him in this way. To balance the presumption arising from this circumstance, we shew that the cotton was shipped in our vessel, that the payment of it was effected with our funds, by bills given to the vendor on ourselves or rather the person under whom we claim. These three circumstances, viz. the purchase of

the cotton by Jacob Barker's agent, the payment of it by bills drawn by the agent on the principal, under the authority with which he was clothed, and the shipment of it in Jacob Barker's vessel, lead to the conclusion that the cotton was bought on his account. Admitting that the proof is not absolutely conclusive, and that it might be shewn against it, that the insolvent bought the cotton for his own account, yet the circumstances raise a violent presumption, which will stand till the contrary be proven. *Stabit presumptio donec contrarium probetur.*

Morse for the defendants. There is no proof of the insolvent having acted as the agent of Jacob Barker, except in the deposition of Talcott, and this witness derives all his knowledge from his conversations with the insolvent. After failure the debtor cannot even acknowledge his signature on a note. In the case of *Menendez* vs. *Larionda's syndics*, 3 *Martin* 258, 705, this court held that on a contest as to the legitimacy of claims among 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. Fraud is always pre-

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sumed in case of bankruptcy. *Misotiere's syndics* vs. *Cognard, id.* 561. *Mitchell* vs. *McMillan, id.* 695.

It is true the statement of facts shews that the cotton was shipped, by the insolvent, on board of a vessel belonging to Jacob Barker; but it does not appear that it was even consigned to him, much less that it was shipped on his account and risk, a circumstance which, by the production of the bills of lading, might have been placed beyond a doubt. It is in evidence that the insolvent traded on his own account, and other circumstances in the statement shew that cotton was not purchased for the account of Jacob Barker.

If the declarations of the insolvent are to have any weight, in deciding the question, Basset's deposition shews that he made large advances or considerable shipments, on his account, to the person, under whom the cotton is now claimed.

DERBIGNY, J. delivered the opinion of the court. The plaintiff and appellant claims, as his property, a parcel of cotton, which the defendants and appellees took possession of, as syndics of Michael Connellin, an insolvent debtor.

It is admitted that Connellin bought this cotton from Samuel Elkins, one of the appellees: but, the appellant contends that Conellin purchased it, as agent of one Jacob Barker, under whom he claims.

It is in evidence that Connellin was the agent of Jacob Barker of New-York, and that on this occasion, he gave to the vendor, in payment of the cotton, his bills on the said Jacob. But it is also in evidence, that he did business sometimes in his own name and on his individual account. It does not appear that the vendor even knew that Connellin was the agent of Jacob Barker, much less that he intended to sell to him as agent, or, in other words, to sell to Jacob Barker through him. On the contrary, if we can listen to the contracting parties themselves, they have both declared that Connellin bought in his own name. The plaintiff's title to this cotton is not made out: he has raised a light presumption, but produced no proof. Upon that ground, his action must be dismissed, which precludes the necessity of assigning the reasons, why his claim was inadmissible also upon another ground, viz. that this cotton was not paid for.

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

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DOUBRERE
vs.
PAPIN.

DOUBRERE vs. *PAPIN.*

APPEAL from the first district.

If the defendant pleads the general issue, and that the plaintiff is his debtor, he cannot shew that the plaintiff agreed to receive the debt in Bordeaux, and made no demand there.

MARTIN, J. delivered the opinion of the court. The petition states that the defendant is indebted to the plaintiff for the proceeds of a parcel of peltry, by him consigned to the defendant—that the defendant has an unliquidated claim against the plaintiff, which the latter is willing to admit as a compensation or set off, as far as it is just.

The answer, after a general denial, concludes that, far from being indebted to the petitioner in the sum by him claimed, or any other sum whatsoever, the petitioner is, as the defendant expects to prove it, his debtor of a sum of $1200 for a balance of account.

To establish his claim, the plaintiff introduced three witnesses, who proved that the defendant wrote to a Mr. Bourgeois to pay to the plaintiff the proceeds of a remittance of peltry, but that the plaintiff agreed to receive payment in Bordeaux.

He next introduced a fourth witness, who deposed that he, the witness, agreed to pay the money in New-Orleans, as soon as his correspondent

received it in Bordeaux. He accordingly forwarded to that city a sealed letter from the plaintiff, but the witness's correspondent informed him he had not received any thing, nor could any thing be received.

The plaintiff after this offered in evidence the account of sales of the peltry, an account current signed by the defendant's attorney in fact, and a copy of the letter to Bourgeois, alluded to by the three first witnesses.

The court below considered "the reading of the letter as immaterial: forasmuch as it was proven that the proceeds of the peltry were to be paid for in Bordeaux."

To this opinion and rejection of the evidence, the plaintiff excepted.

There was finally a judgment for the defendant and the court gave as the reason of it "that, according to the terms of his agreement, with the defendant, the plaintiff ought *to demand* the proceeds of the peltry in Bordeaux, before he can have any recourse against the defendant here, and that, this not being done, he had no right of action."

From this judgment the plaintiff appealed and the case has been submitted to us without argument.

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I. As to the rejection of the evidence, we think the copy of the letter was properly rejected, as the original was not accounted for. The court was therein correct, but the reason given for the rejection is a bad one.

II. The court erred in giving judgment against the plaintiff. The debt, set forth in the petition, being absolutely denied, it became his duty to prove it, and he appears to have done so by the production of the account of sale of the peltry.

It is true, a circumstance, not in the least contradicting the allegations in the petition, nor the evidence resulting from the account of sales, was disclosed: viz—that the plaintiff had agreed to receive his money in Bordeaux. If the defendant can reap any benefit from this agreement, he ought to have pleaded it, with an averment that he was ready, and is still so, to pay the money in Bordeaux. But he pleaded the general issue, and answered further that far from being a debtor, he is a creditor to the plaintiff.

It is therefore clear from the defendant's own shewing, that he never was, nor is now, ready to pay the monies claimed in Bordeaux or any where else. It would have been idle in the plaintiff to have delayed his suit here, till evidence was obtained from Bordeaux of a fact obvious from the pleadings.

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The plaintiff's readiness to receive his debt is always presumed, and when it is not payable till on or after a demand, if any advantage be expected, from his want of readiness to receive, the defendant should allege his own readiness to pay.

The judgment of the court below is therefore annulled, avoided and reversed, and, as we are unable to ascertain the *quantum* of the claim, the cause is remanded for trial, with directions to the judge not to reject any legal evidence offered by the plaintiff, on the ground that he does not shew that he made a demand in Bordeaux, and it is ordered that the appellee pay the costs of this appeal.

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

BREED vs. *REPSHER & AL.*

APPEAL from the third district.

When process is ordered by the judge of an adjoining district, it will be presumed that the case was one in which he is authorised to act.

By appealing the appellant admits that the judgment is final.

The petition stated that the plaintiff and Chandler Lindsay gathered a quantity of tan bark, which they stacked and covered on the banks of the Tickfaw, and the petitioner contracted for the delivery of one hundred cords of it at ten dollars per cord, but the defendant violently and illegally took and carried away a considerable

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part of the said bark, and that the petitioner was apprehensive they would take the remainder. Besides a prayer for damages, a provisional sequestration was desired and was granted by the judge of the seventh district.

Besides the general issue the defendants pleaded that the plaintiff was not entitled to his action, as it appeared from his own shewing that the bark in question was, at the time of bringing the suit, and is still, the property of Chandler Lindsay as well as of the petitioner, and therefore the said Chandler ought to have been made a party.

The plaintiff recovered $350, and the defendants appealed.

The statement of facts, made by the district judge, shews that the plaintiff and Lindsay collected about eighty cords of bark, on the land adjoining that of Jacob Repsher, one of the defendants, deposited it on the bank of the river and covered it, so as to protect it from the weather. While they were gathering it, Jacob informed them they were trespassing on his land; and they agreed that a certain bayou, which was between their respective tracts, should be considered as their limits, and that the plaintiff and Lindsay should not gather bark on the side of the bayou next to Jacob's land. Ten or fifteen

trees had, before this agreement, been stripped by them on that side. Lindsay afterwards died, and the plaintiff purchased the part of the bark which belonged to his estate. The defendants came up the river in a schooner, which they commenced to load with the bark. The plaintiff came with his rifle to prevent them, the defendants seized him, took off the rifle and declared their determination to carry away the bark. On this, he procured a warrant, on which Jacob was arrested, and he told the constable, on his way to the justice, that one half of the bark had belonged to Chandler, now dead without heirs, and he thought he had as good a right to it, as any other person, particularly as the plaintiff and deceased had injured some of his fruit trees with their waggons. The defendants took away about fifty cords of bark, and in doing so exposed the remainder, and it was afterwards entirely spoiled. At this time bark was worth ten dollars a cord, in New-Orleans, and the plaintiff had contracted for 100 cords to be delivered there, at that price. The freight of the bark from the Tickfaw to New-Orleans was from four to five dollars a cord.

MARTIN, J. delivered the opinion of the court. The defendants allege, as grounds of reversal of

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the judgment given against them, 1. That a writ of sequestration was issued in this suit by the judge of the seventh district. 2. That the judgment was signed on the day on which it was rendered. 3. That Chandler Lindsay, a person who appears to have a joint interest with the plaintiff in the suit is not a party therein.

I. The third and seventh are adjoining districts, and as the judge of either may act in lieu of the other, in certain cases, we must presume that the writ issued in one of those cases: besides the writ of sequestration, not being the original process, no error on issuing it can affect a case tried on the merits.

II. The day on which judgment was signed, cannot be ascertained from the record, nor from the statement of facts. It was said, in the argument, that the judgment was given on the day on which the court adjourned, and must consequently have been signed on that day—but this does not appear. If it did, it would also appear that no advantage was thereby lost to the appellants, as they could not have moved for a new trial at the succeeding term. They were not prevented, by the supposed hurry of the judge, from obtaining a statement of facts, and by appealing, they have admitted the judg-

ment to be a final one; which it could not be, if not properly signed.

III. The petition states that the plaintiff and Chandler Lindsay, now dead, gathered together a quantity of bark, which is the object of the present suit, and the defendants, *well knowing it to be the property of the petitioner*, forcibly took it away. The statement of facts shews that the plaintiff had purchased Lindsay's share before this trespass was committed. This court is of opinion that the averment of property in the plaintiff sufficiently repelled the presumption of joint property arising from the joint gathering: it would therefore have been error to have made Lindsay or his representative a party in the suit.

The judgment of the district court is affirmed and as it does not appear that there was the least room for a hope of its reversal, we adjudge to the plaintiff seventeen dollars and fifty cents (being five per cent. on the judgment affirmed) as the compensation for the loss and injury he has sustained by the appeal, in addition to the interest and costs.

Turner for the plaintiff. *Carleton* for the defendants.

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GENERAL RULE.

It is ordered that, when a cause shall have been set down for hearing, if the appellant shall fail to attend by himself, or his counsel, the appeal shall be dismissed, unless the appellee shall appear and argue the case *ex parte*: and, if the appellee shall fail to attend, the appellant shall proceed to argue the case *ex parte*.

But the case shall be reinstated, if the party thus failing to attend shall, within ten days, shew that his absence was occasioned by some cause not within his control.

St. MAXENT'S vs. *AMPHOUX'S SYNDICS.*

APPEAL from the first district.

This being a suit for the lot, adjoining the one in the following suit, and the claim and defence being in both cases perfectly similar, one argument only was heard, and the same judgment was entered, in both.

Livingston for the plaintiffs. *Moreau* for the defendants.

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An act is full evidence as to every disposition of it, and as to whatever is therein expressed, by way of recital, when the recital has reference to the disposition.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiffs claim a lot of ground between the original limits of the city of New-Orleans and the line called Gayoso's line.

To establish their title, the first document introduced is the process verbal of the adjudication of a plantation, binding on the limits of the city, as part of the estate of M. Dubreuil, in pursuance of a decree of the superior council of the province of Louisiana, of the 4th of November, 1758. By this document it appears that, on the 17th of that month, the commissary of the council, and the king's attorney-general, caused a proclamation to be made, at the bar of the council, that they were about to proceed to the sale and adjudication, to the last and highest bidder, of the aforesaid plantation, "binding on one side on the limits of the city of New-Orleans, and on the other on the plantation of M. Amelot, having seven arpens and eighteen toises in front, with all the depth, as far as the limits of the bayou (St. John) and Gentilly, together with the main dwelling-house and other buildings, the saw-mill with four

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saws, a rice-mill adjoining, a sugar-mill, and brick-yard with two kilns, containing each 90,000 bricks, five large sheds, a negro camp and generally all the edifices and appurtenances, in the state in which they are." It is afterwards mentioned that, "whereas the most of these buildings are on ground which belongs to the king, which he has reserved to himself and is not comprised in the seven arpens and one half, we, the commissary and attorney-general, have caused it to be proclaimed that it shall be lawful for the king to take the said parcel of ground, belonging to him, whenever he may see fit, the purchaser carrying away the buildings thereon, and that the whole being several times well and truly explained came M. Villars, who bid 50,000 livres." The process verbal next states, that on the 1st of December of the same year, the premises were cried for the second time and Henry Dupaty bid 100,000 livres: and on the 11th of the same month, the premises were cried for the third time, and the plantation was described in the same manner, and notice was given of the king's right to the ground, on which part of the buildings stood, as on the first day, and M. D'Erneville bid 103,000. But, this not being esteemed the just value of the premises, they were cried up

for the fourth time, on the 18th of December of the same year, and the land was described again as formerly, and as the bids began to be received, M. Villars appeared and produced an order from M. De Rochemore, the intendant, requiring that a declaration of Villars, which had been presented to the commissary of the council, at the preceding meeting, and refused to be received, should be extrajudicially received, and mention of the former refusal made, where upon the declaration was entered on the process verbal. It purports that "in order to avert any reproach or contestation from the last bidder, he declares to us, so that we may notify it to present bidders and those who may hereafter attend, that the house which is now selling is situated, as well as all the buildings between it and the city, on the king's ground, that it was only in consideration of the late M. Dubreuil, his father, that the king consented that the said Dubreuil should occupy the two arpens and twelve toises on which the house and buildings stand, which two arpens and twelve toises remain, while they pass into other hands, liable to be resumed by the king, at the will of his administrators in Louisiana, allowing the purchaser the faculty of removing the buildings. 2. That the declarant reserves to himself sixty days from the acceptance of

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the adjudication to evacuate the premises. 3. Considering himself bound to attend to the interests of the minors, his nephews, whose subrogate tutor he is, the creditors and his own, he understands that the surety, to be given by the purchaser, &c. which conditions" says the process verbal, having been read and explained with an audible voice by the crier, proclamation was made that the plantation was sold, as it was described, payable one half in six months, &c. and M. Delachaise, being the last and highest bidder for the sum of 130,000 livres, the property was finally adjudicated to him: he binding himself to the payment of said sum, to remove all the buildings which stand on the king's land, &c."

About the year 1774, Delachaise died, and the premises were seized and sold, at the suit of the king of France's agent in Louisiana, and purchased by Mad. Gauvray de Mauleon: but the deed which she received is admitted to be lost.

On the 4th of October 1776, this lady sold the premises to Gilbert de St. Maxent, describing them as containing seven arpens and one half in front, bounded on one side by the stakes which served as a wall to the city, on the other by Amelot's land, the whole as she had bought

it, at the auction of Delachaise's property on the 22d of March, 1774.

On the 12th of August 1789, St. Maxent sold the premises to Laurent Sigur, mentioning the limits of the city, as the upper ones of the plantation.

In the year 1792, the Baron de Carondelet caused new fortifications to be thrown around the city, and for this purpose a part of the premises was taken, and Sigur instituted for the rescission of the sale a suit, which was in 1795 converted into a suit to cause himself to be maintained in his possession by the heirs of St. Maxent, who was now deceased, or to obtain damages for the part of the premises taken for the fortifications.

In the year 1797, Sigur instituted a suit to obtain from the Spanish government, an indemnification for the lands occupied by the Spanish fortifications, beyond the French, but the decree denied him any relief, saving, however, his remedy against the estate of St. Maxent.

In 1798, Sigur sold the premises to Marigny, describing them as the plantation, which he had bought from St. Maxent, with an exception of the land which had been taken from him, for the Spanish fortifications, and instituted a suit against the estate of St. Maxent, in which

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$ 25,557 were allowed him for the land, beyond that which had been sold to him by Mad. de Mauleon "which St. Maxent had no right to sell".

In 1811, Sigur instituted another suit, praying an additional indemnification for some land taken for the Spanish fortification, beyond the French, and recovered $ 3194. In consequence of these two recoveries, the plaintiffs contend they have reacquired their title to the premises thus taken illegally, as they allege, by the Spanish government.

The defendants claim under the corporation of the city of New-Orleans.

It is admitted that in the year 1760, the first fortifications were thrown around the city, commonly known under the name of the French fortifications.

Several witnesses deposed that, at the time of the first adjudication of the plantation to Delachaise, the mansion house stood between the city and the canal, on the ground afterwards resumed by government.

After the demolition of the French fortifications in 1780, St. Maxent took possession of the land as far as the city, with the knowledge of the Spanish governor, and erected thereon some buildings, which he rented out.

About the year 1797, an inquiry was instituted into the titles of adjacent owners, in order to ascertain the extent of the vacant lands, when the declaration of Dubreuil was accidentally discovered, and in pursuance thereto, Governor Gayoso ordered the line commonly called Gayoso's line to be drawn, at the distance of two arpens and twelve toises from the angle of the barrack.

It is admitted that the ground sued for is between that line and the city, and that the defendant has acquired the title of the corporation thereto.

The process verbal of the adjudication of Dubreuil's plantation to Delachaise, is the authentic act under which the plaintiffs claim their right to the plantation. It is consequently evidence against them, as to every disposition of the instrument, *i. e.* of what the parties had in view, and which was the object of the instrument. Farther, it is full evidence, as to whatever is therein expressed by way of recital, when the recital has reference to the disposition. 2 *Pothier Obl. nos.* 701, 702. *Civil Code*, 304, *art.* 219, 220.

Now the parties to this instrument had in view therein the sale of a plantation: their ob-

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ject was to give to future generations testimony that a sale had taken place, and to describe the thing sold. The land is said to be bounded on one side by Amelot's land, on the other by the limits of the city, and the extent of the front between these two points is said to be seven arpens and eighteen toises. But, on the first and second days of the sale, the commissary of the council and attorney-general, acting as vendors, recite that "most of the buildings are on ground which belongs to the king, which he had reserved to himself, and is not comprised in the seven arpens and eighteen toises," meaning in the ground sold: the ground sold being that described within the two given points, at the distance of seven arpens and eighteen toises from each other, deducting therefrom the king's ground. On the third day, Villars appeared and prayed among other things to have the land excepted from the sale, described by its mensuration, two arpens and twelve toises: the officers refusing so to do, this description is ordered by the intendant to be received and the plantation adjudicated accordingly. This description was one of the *dispositions* of the instrument; but, if it be only considered as expressed by way of recital, and as a clause to which the vendee expressed his assent, yet it is evidence as to

the exception of the ground from the sale, because it has reference to one of the dispositions of the instrument, and was necessary to be inserted, in order to ascertain, by a defalcation, what quantity of ground was the object of the sale, *i. e.* five arpens and six toises, fronting the river.

Certainly, the proceedings, under the Spanish and territorial governments, evidence that the tribunals, who passed on the claim of Sigur for indemnification, considered the subject in the same point of view as the district court, in the present case, and as we do: and the fact is corroborated by a number of witnesses.

It has been attempted to impress us with a belief that Villars's declaration ought not to be regarded, as he was a party interested—that, being a bidder, he had an interest in lessening the idea which others had of the extent, and consequently of the value, of the plantation. The only bid which he appears to have made is one of 50,000 livres, on the first day, which does not appear to be a bid on which he might have expected to have had the land struck to him, as on the third day the officers declined striking it off at $ 103,000, considering that sum as too much below its value. But the matter does not rest on this man's declaration: twice

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before had the king's right been proclaimed to the ground, on which the main building stood, and all between that and the city. Villars only fixed the extent to a determinate quantity of ground, two arpens and twelve toises. He could have no expectation of imposing on the bidders, as the matter was susceptible of being easily and instantly ascertained, and all the witnesses shew that the difference could not be great. The officers of the king of Spain have proceeded accordingly, and the correctness of their conduct has become the subject of investigation in suits to which the plaintiffs, or their principal were a party, and the court here pronounced that he had no right.

We conclude, from the documents and testimony before us, that the line drawn, under the orders of Gov. Gayoso in November 1798, at the distance of two arpens and twelve toises from the angle of the barracks, is the boundary between the plantation of the late Dubreuil, and the ground which belonged to the king when Delachaise purchased it.

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

Livingston for the plaintiffs. *Moreau* for the defendants.

GUILLOT vs. *DOSSAT.*

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A joint owner is bound to that care which prudent men ordinarily have of their property

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The parties were joint owners of a slave, the plaintiff for nineteen, the defendant for one twentieth. During the contest for the ownership of the slave, he was kept without any opposition, on the part of the plaintiff, by the defendant, who having finally been ordered by the court to deliver him to the sheriff, that a division might take place by a licitation, failed to produce him, and now being sued, resists the plaintiff's claim, on the ground that the slave ran away, without any fault on the part of the defendant. The plaintiff contends, that admitting this to be the case, the defendant did not take any step for the capture of the slave, as he was bound to do: neither did he apprise the plaintiff of the flight of the slave, that he might take the steps, which the defendant is alleged to have neglected. So the only question for the decision of this court is whether the quasi contract of *joint* ownership imposes the obligation of exercising ordinary diligence on the property, which is the object of it, or whether fraud alone renders the the joint owner liable?

The contract of partnership is the one which

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bears the greatest resemblance to the quasi contract of joint ownership. The actions *pro socio, familiæ erciscundæ, et communi dividundo* appear to be regulated by the same principles.

In the institutes, *lib.* 3. *tit.* 27. *de dolo & culpâ a socio præstandis,* we are informed that it had been a question whether a partner, like a depository, be accountable for fraud only, or for negligence also, and that the better opinion is that he is answerable for all damages which happen through his fault. *Prævalent tamen etiam culpæ nomine teneri eum.* We are next told that the utmost diligence *exactissimam diligentiam* is not required of him—that a partner is not liable for damages, if he has used the same care and diligence, in respect of the partnership's property, which he usually bestows on his own; and that whoever chooses a negligent man for his partner, must lay the blame on himself only, and impute his misfortune to his ill choice. *Cooper, Justit.* 283.

Here the conclusion seems to be at war with the premises; the principle with the commentary. The contracts of partnership and deposit are assimilated, yet they widely differ; the one is for the benefit of both parties, the other for that of one of them only. We are told the partner is liable for his *fraud* only, afterwards for his

fault also—his negligence, *culpæ i. e. desidiæ atque negligentiæ nomine.* Finally it is concluded that if he uses, with regard to the joint, the same diligence which he bestows on his separate, property, he is not liable: yet the absence of that diligence would constitute *fraud.*

The contract being useful to the partner, who holds the property, he ought to be bound to *carefulness*: not so the depository; for the deposit being only a charge to him, he ought to be bound to *honesty* only.

The digest *L. Contractus* 23, distinguishes two kinds of contracts. Those in which *fraud* alone gives room to repetition, *qui dolum dumtaxat recipiunt,* as that of *deposit*; the other, those which, besides good faith, require *diligence,* as that of partnership. *Contractus quidam dolum malum dumtaxat recipiunt, quidam et dolum et culpam. Dolum tantum depositum....societas* ET REI COMMUNIO *dolum et culpam recipiunt.*

In contracts and quasi contracts, which are for the reciprocal advantage of the parties, as those of sale, exchange, partnership and in the quasi contract of *ownership* that care is required, as to the thing which is the object of the contract or quasi contract, which prudent men usually bestow on their own. *In societate, dolus et culpa præstatur. ff. l.* 13. *tit.* 6, *l.* 5. § 2.

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The court concludes that a joint owner cannot discharge himself of his responsibility, in case of the loss of the thing, by shewing that he has bestowed on it the same care, which he bestows on his separate property: but is bound to shew that he took of it that care, which most men ordinarily take of their property. See *Pothier's observation generale &c. 2 Contrat de mariage, in finem.* This is the principle of the Roman and of the common law of England. *Jones on bailment.*

The statement of facts admits that the defendant uses his negroes well and takes good care of them: likewise that he used equally well and took the same care of the slave in question. This establishes the fact that the slave ran away, without any fault on the part of the defendant; but the plaintiff charges that the slave failed to be arrested and recovered by the utter neglect of the defendant.

The defendant does not shew that he took *any* step for the recovery of the slave, after he fled. It is true, he had the name of the slave registered with the clerk of the parish court, under a provision of an act of the legislature. *Martin's Digest, Black code n.* 26. This precaution would indeed have protected the owners,

against some liability, in case of theft committed by the runaway, but could not lead to his arrest. Towards this, it does not appear that the defendant made one single effort: neither did he, by warning the plaintiff, his joint owner, who was in the city, enable the latter to make any diligence. Most men ordinarily take some steps to procure the arrest of their runaway slaves. Some advertise them in the gazettes: others think that this step puts the slave on his guard, and refrain from advertising: but they seldom neglect to apprize constables, or other fit persons, of the flight and offer some reward to excite attention. It is true that there are cases in which all this becomes useless—as when the first news of the flight is that of the slave having sailed, in a vessel bound to some very distant or unknown port, or to a country from which runaway slaves cannot be recovered. But, these are extreme cases. Could the defendant shew any like circumstance, it would repel the claim of the plaintiff.

It is contended that the taking of the steps mentioned is not often susceptible of proof; as when the person employed to arrest runaways are themselves slaves and cannot testify. This surely is a difficulty, but orders in such cases might be given in presence, or through the channel of

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free persons. He, who is bound to do an act, must secure evidence of his performing it, otherwise *de non existentibus & non apparentibus eadem est lex.*

We think ourselves bound to say that the plaintiff ought to have recovered.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and this court doth order, adjudge and decree that the plaintiff do recover from the defendant the sum of seven hundred and sixty dollars, being the nineteen twentieths of that of eight hundred, which appears from the record to have been the agreed value of the slave, between the partners, with costs.

On motion of the defendant, and with the consent of the plaintiff, the judgment is amended, and it is further ordered, adjudged and decreed that the defendant shall be and remain the sole and absolute owner of the slave Dimanche, on the payment of the sum decreed.

Paillette for the plaintiff. *Seghers* the defendant.

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MORGAN vs. *M'GOWAN.*

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

An agreement for the exchange of slaves not signed by the parties, is invalid.

MATHEWS, J. delivered the opinion of the court. This suit was instituted in the court below, by the appellant, to recover the negro woman and her child, mentioned in the petition.

From the statement of facts, it appears that the parties were about to make an exchange of slaves, who to this effect were reciprocally delivered, and a notary public was instructed to make out two bills of sale, in conformity to the terms of the intended exchange; but, previous to the completion of the contract by the signature and acceptance of the bills of sale, the plaintiff and appellant discovered that the negro woman, whom he was to receive in exchange, was affected with a disease of the liver, which being considered as incurable by a physician, in whose skill and judgment he confided, he refused to complete the contract, and withheld his signature from the bills of sale, by which he was to transfer and accept a title to the slaves. At the same time, or shortly after, he requested the defendant and appellee to return to him his negro woman and child, and take back his own. This

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being refused, the present action was instituted, in which the parish court gave judgment for the defendant, whereupon the plaintiff appealed.

It appears from the statement of facts, that the slave, delivered by the defendant to the plaintiff, was not, during the time in which the latter had her in his possession, capable of working, but remained useless to him, until her death, after the institution of the suit.

Two questions are raised for the determination of this court. 1. Was the plaintiff and appellant, by virtue of this oral agreement, with the defendant, to exchange slaves and the mutual delivery of them, divested from his legal title to those which he thus delivered and now claims? If so, ought the contract to be rescinded, on account of the diseased state of the slave, which he received in exchange?

I. The contract, having for its object a transfer of the title in the slaves, is not complete and binding on the contracting parties, because it was not executed in the manner prescribed by law, which requires that sales of immoveable property or slaves shall be made by authentic act or under private signature; and it is further declared, that verbal sales of these things

shall be null, as well as to third persons, as between the parties, and the testimonial proof of them shall not be admitted. *Code Civil*, 344.

On these principles, the case of *Raper's heirs vs. Yocum* was decided, 3 *Martin* 443, and they are equally applicable to the contract of exchange as well as to that of sale. *Code Civil* 370, *art.* 8.

If, for want of the necessary formalities, the contract is null and void, even in relation to the parties themselves, the title to the slaves in question has not been changed by it, and the plaintiff and appellant still remains the legal owner of those, for the recovery of whom the present action is instituted.

II. This being the opinion of the court on the first question, it is unnecessary to consider the second.

The law then is in favor of the claim, and according to the facts in the case, it is equally supported by equity and justice.

The judgment of the parish court is erroneous *in toto*. It is therefore ordered, adjudged and decreed, that it be annulled, avoided and reversed; and it is further ordered, adjudged and decreed by this court, that the plaintiff and appellant do recover, from the defendant and appellee,

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the negro woman Polly and her child Mary Ann, mentioned in the petition and also damages, at the rate of one hundred dollars per annum, for the use and detention of them, to be calculated from the legal demand, until the period at which he shall again be possessed of them. *See post April term* 1816.

Ellery & Smith for the plaintiff, *Porter & Depeyster* for the defendant.

VICTOIRE vs *DUSSUAU.*

Parol evidence of an agreement, for the freedom of a slave, is inadmissible.

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

MATHEWS, J. delivered the opinion of the court. In the course of the trial of this cause, in the court below, the plaintiff, here the appellant, offered parol testimony to prove a contract between the defendant and appellee and herself, whereby the latter, who holds her in slavery, agreed to emancipate her on condition of obtaining the reimbursement of the price, which she had paid for her.

This testimony being rejected by the parish judge, a bill of exceptions was taken to his opinion, on which alone the case comes up before us.

The right of the plaintiff to maintain an action for her emancipation and freedom, on this contract, is unequivocally declared, 3 *Part.* 2, 8, and according to the general provisions of the Spanish law, such a contract may be supported on, and proven by, oral testimony. We are, however, of opinion that the latter laws are virtually repealed by the civil code.

Slaves are incapable of making any contract for themselves, except for their freedom—an exception to the general rule allowed in favour of liberty; and as, in this respect, they assume, in some degree, the standing and condition of free persons, the rules of law, which direct and govern the contracts of the latter, must be applicable to those of the former, where the object of the agreement is the same. Now, according to our civil code, every covenant tending to dispose by a gratuitous or incumbered title of any immoveable property must be reduced to writing, and in case the existence of such covenant should be disputed, no parol evidence shall be admitted to prove it. *Code Civil*, 310, *art.* 241. This principle we find recognised in the same authority, when it comes to treat of the transfer of title to immoveable property and slaves, by sale or exchange, *id.* 344, *art.* 2. It is therefore clear, that between free persons no

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valid or binding contract can be made, so as to alter the title to slaves, unless it be in writing: and, if we are correct in the position above taken, that the same rules must govern in covenants to which slaves are allowed to become parties, it is equally clear that parol evidence ought not to be admitted to establish the existence of the contract, on which the plaintiff and appellant founds her action: because it tends to dispose of a slave.

The judge of the parish court acted correctly in rejecting the parol evidence.

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

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

BERNARD & AL. vs. *CURTIS & AL.*

The principal and surety may be sued jointly.

APPEAL from the third district.

DERBIGNY, J. delivered the opinion of the court. Abel Curtis, one of the defendants and appellants, bought at the auction of the property left by Antonio Gras, a tract of land, part of a larger tract granted to the deceased by the

Spanish government. Richard Duval, the other defendant and appellant, became the surety in the purchase: the sale was expressed to be of "the title of the succession only, and without warranty." The price was to be paid in four annual instalments, and the recovery of three of these was the object of so many distinct suits, now consolidated by consent.

These suits were brought against the purchaser, and the surety jointly: and the surety having, in his answer to the two first suits, demanded the discussion of the property of his principal, it is necessary to dispose of this first obstacle to the recovery of the plaintiffs before we come to the defence on the merits.

It is alleged on the part of the surety, that he is not liable to be sued jointly with the principal debtor, and that on his plea or demand of a discussion, the suits ought to have abated, as to him.

The principle, in case of suits against sureties, is that the discussion of the principal debtor's property must be previously made, if the surety require it. Therefore, had the surety been first sued alone, it is clear that this request on his part (supposing it to be accompanied with the conditions annexed to it by law) would

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have compelled the plaintiff to resort to a separate action against the principal, and that he should not have been permitted to proceed against the surety, until an execution, being levied on the principal's property, should prove insufficient.

The case in which the surety is sued jointly with the principal, is not so much hinted at in the books within our reach: probably because such actions are ordinarily resorted to only in cases in which the surety bound himself *in solido*. Yet, as an action of the like kind (when the plaintiff, in one and the same suit, proceeds *personally* against his debtor and *in rem* against the holder of his pledge) is known to our law, *Febrero Cinco Juicios, lib. 3, ch. 4. sect. 2, n. 76,* we must infer that this mode of action is not illegal, and, if it be not attended with any unnecessary hardship or inconvenience to the surety, we see no reason why it should not be allowed.

The surety, who is bound secondarily and only in case the principal does not pay, secures to himself that advantage by the plea of discussion. What he is to pay is to be ascertained by the execution of the property of the principal. But, whether such previous execution take place in a suit against the principal alone or in one against both, justice is equally done to the sure-

ty. It may even be said that the mode of proceeding is rather advantageous to him, in saving costs, which he is eventually liable to lose.

We are therefore of opinion that the present actions can be maintained, against both defendants.

As to their defence on the merits, it is altogether frivolous. Curtis bought from the plaintiffs and appellees the title only, which the heirs of Gras had to the land in question, and this without any warranty. Yet the defendants allege, that third persons, holding a better title, have disturbed the purchaser in his possession. Having complained of that disturbance, they assert, at one breath, that the land has not been delivered. At the same time, so conscious do they seem to be of the futility of these allegations, that they have not even attempted to produce any evidence to support those, which it was their duty to prove.

It is ordered, adjudged and decreed, that the judgment of the district court be affirmed, with this modification, that the execution of it, against Duval, shall be suspended, until it shall be ascertained, by the execution and sale of the property of Curtis, the principal debtor, how much Duval may have to pay.

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Denis for the plaintiffs. *Moreau* for the defendants.

ROUSSEL vs. *DUKEYLUS' SYNDICS.*

A conveyance at the eve of a bankruptcy, the consideration of which was not paid, at the time, is void.

APPEAL from the court of the first district.

Livingston for the plaintiff. This suit is brought on a mortgage, by a notarial instrument, bearing date March 12, 1811,

1. To secure the payment of a quantity of indigo sold and delivered by Dukeylus to Roussel, amounting to - $ 1268 13
2. To secure Roussel against the indorsement of a note, dated March 2, 1811, for - - - - - 2347 00
3. As a like security for another indorsement on a note dated 6th of February, for - - - - - 2200 00
4. To secure him against such other indorsements, as he might give to Dukeylus, to the amount of 11000.

The plaintiff's object is to recover the amount of the following notes endorsed and taken up by him, after a regular protest, besides the three items aforesaid, which amount to - - - $ 5815 13

Note of 23d February, 1811,	386	00
—— 1st March, -	1600	00
—— 15th do. -	500	00
—— 20th April, -	1800	00
—— do. do. -	2000	00
Total,	$ 12101	13

All these notes were produced at the trial. and the plaintiff's right cannot be controverted: but it is said that the mortgage is void,

I. As respects the notes not enumerated in the mortgage, because a mortgage must be *express*. *Civil Code*, 452, *art.* 6. This article directs that the mortgage must be expressly stipulated and cannot be inferred. This relates to the *stipulation*, not the *object* of it. It does not say that the debt, intended to be secured, shall be particularly set forth, but that no act shall be taken as a mortgage, which is not clearly and unequivocally declared by the parties to be one. A mortgage is expressly defined to be a contract by which a person affects his property, or a part of it, to another, for the security of an engagement, *id.* 452, *art.* 1. By these general words, declaring that mortgages may be given as securities, not only for existing debts, but for every species of undertaking. To the same point is the *Digest* 13, 7, 9, § 1. *Non tantum autem ob pecuniam, sed ob aliam cau-*

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sam pignus dare potest: veluti si quis pignus alieni dederit, UT PRO SE FIDEJUBEAT. Of which law, the Spanish commentator Rodriguez gives the following exposition. *La prenda se puede dar, no solo en seguridad de la candidad que se debe, si no tambien por qualquiera otra especie de obligacion civil y natural, o so natural, civil o pretoria; asi como se dice que se puede dar fiador por qualquiera de las obligaciones expresadas.*

The mortgage, therefore, if valid in other views, is not rendered less so because the object was to secure against a debt, a responsibility that was not actually incurred. *On peut contracter une hypotheque pour un dette qui n'est contractée que sous une condition. Pothier des Hypotheques,* § 3. and he adds, *on peut constituer une hypotheque pour une dette qui n'est pas contractée, mais qu'on contractera.* But because this author subjoins that the mortgage, in that case, will not take effect until the debt is contracted, the defendant argues that, as all the notes fell due, and were paid by the plaintiff, after the insolvent's bankruptcy, the mortgage could not attach, as the negroes mortgaged were then the property of the creditors. This would perhaps apply, if the mortgage had been to secure a sum of money, to be advanced, at a

future period, and if the plaintiff was under *no necessity* to advance. The mortgage is to secure against indorsements, which he was bound to furnish. The moment then he *furnished the indorsements*, the mortgage attached. All the indorsements were *prior* to the bankruptcy: the money it is true was paid *after*, but the obligation to pay accrued before.

II. It is said that the $5815,13, specially set forth in the mortgage, cannot be secured thereby.

It is admitted that if, in the sale of the indigo, it had been stipulated that a mortgage should have been given, the security would have been good. Taking this as the true rule, let us see how the law and evidence stands. The sale of the indigo appears, by the testimony of Laignel, to have been made at the time the plaintiff was in town. He was in town, when he came to receive his mortgage, this is proved to have been in the beginning of March, the mortgage is dated the 12th of March: it was, therefore given at the time of sale.

But Laignel says a part of the indigo was paid for. If this be so, it does not prove that any part of the sum mentioned in the mortgage was paid. The quantity then mentioned is 1194 lbs. at 106.

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which makes $1268,13, the sum secured by the mortgage, for this object. So odious a fraud, as receiving the price and then inserting it in the mortgage, is not to be presumed on such slight evidence and sustained by a single witness, and an interested one, as he appears on the bilan as a creditor.

That the mortgage for the price of the indigo was stipulated for in the sale, may also be gathered from the circumstance that, no note, account acknowledged or other security, except the mortgage, appears to have been taken for the price, which was sufficiently important to have otherwise required it. As to the two notes, mentioned in the mortgage, it by no means follows, because they were dated a few days before it, that they were endorsed on the days of their respective dates. An endorsement is a transfer of the note, and must necessarily have been made after it was drawn. How long after? Of that, there is no positive evidence; but, on the other hand, there is no presumption that it was done on the day of the date of the notes. One of these bears date the second of March, but as Roussel was in town only a few days at the time he took the mortgage, it is most probable this note was endorsed during that period, and if so, at the time of the execution of

the deed. The other is dated the 26th of February, a few days earlier, and appears from the history of it in the mortgage, and the evidence, to have been endorsed in the country: and as Roussel came down in a few days, and the mortgage was executed, it may thereby be inferred, that the security was promised, when the indorsement was asked for, and that Roussel came down to have it properly executed and registered by a notary. The residence of one of the parties in the country, of the other in the city, the want of notaries and legal advice in the country, and the short time that elapsed between the dates of the notes, if we should take them for our guide, and the giving of the security, shew that it was contemplated when the indorsement was given.

But, if no agreement was made at the time of endorsing these two notes, that security should be given for them, is that security void? It is said to be, because the debtor was in failing circumstances. This rule is so extremely loose. that although I am aware that it has been sanctioned by this court, I presume I may be allowed to question it, and shew, first, the extreme inconvenience and injustice of establishing it: secondly, that the law of the land does not sanction it.

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Arguments *ab inconvenienti,* although in general bad against positive law, are daily used to shew that particular cases do not come within its spirit, and they are used with force, when the law is doubtful, which I think can be shewn here, even if I do not, as I hope establish positive law to the contrary. The rule, as contended for, is simply that any security given for a pre-existing debt is void, if made when the party was in insolvent circumstances, that is, when unable to pay all his debts: thereby making the validity of a security to depend on a subsequent investigation of the debtor's affairs, of which the creditor has no means to compel a disclosure. This must necessarily put a stop to mercantile credit, or so close it as to render it not worth having. No man will lend money, sell goods or endorse notes, without having his security, at the time he does the act, because, if this rule be established, he well knows that he cannot afterwards take a security, without incurring the risk of having it declared void, if the balance sheet of his debtor should at a future day be found to have been against him. All credit then, beyond the strict amount of its actual representative, in real property, will be destroyed, and one of the strongest nerves of commercial prosperity will be cut off. Thus, this will be one of the bad effects of the es-

tablishment of the rule on the general operations of commerce. Its particular application to each case will be attended with worse difficulties. Whether the debtor were solvent or not, at a particular period, is to be discovered by oral testimony, and will open a door to perjuries without number, and will put it in the power of the debtor to sacrifice his mortgage creditors to the mass and by a fraudulent arrangement of his accounts, and the concealment of part of his property, to invalidate the securities he had given. The difficulty alone, of fixing on the particular epoch of insolvency, must of itself be a strong objection to its being established, as a criterion for the validity of a security. Important and highly injurious consequences, on other questions, must necessarily follow from the establishment of this particular point. If a security be void for this implied fraud, then monies paid under it may be recovered. Thus, not to go out of the present case, it is proven, if the oral testimony can be relied on, that Dukeylus was insolvent two years ago, that one of his friends to whom he owed money, on receiving security, as well for the old debt as for his new engagements, made further advances or incurred other responsibilities, and was reimbursed out of the pledge he then received. All this, according to the doctrine con-

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tended for, might now be redemanded, and the person, who had settled his accounts two years since, might be forced to repay what he had received on the pledge, and come on with the other creditors for his dividend. Again, if the security given for an old debt, under failing circumstances, be fraudulent and void, would not a *payment*, made in like circumstances, be at least equally void, and a subject of repetition. What is the reason given for declaring the security void? Because it favours one creditor at the expence of the rest: but, if a security favours him, a payment certainly does so in a greater degree. Then a payment of one creditor, in preference to others, coming in the same reason with a security, ought at least to be equally void. If it be so, I pray the court to consider what endless confusion, what a series of claims, what eternity of suits, every failure will give rise to.

The ordinance of *Bilboa, ch.* 17, *b.* 23, declares that the *anticipated* payment of a debt *not yet due* is void. Admit this—there was no debt due from Dukeylus to Roussel, on account of the indorsements; nor was it certain that any would be due. But, from the moment Roussel indorsed Dukeylus's notes, though Dukeylus

did not owe him the amount of the note, yet he owed him an *indemnity:* and the very circumstance of Dukeylus's credit being shaken at that time strengthens the argument. If I am surety for one who becomes insolvent, I have a right to ask for indemnity before the debt is due. *Civ. Cod.* 430, *art.* 18. So, if I draw a bill and the drawer is insolvent, I may be forced to give security, although the bill be not due. Therefore, in this case there was no anticipated performance of an engagement. The thing demanded and given was *security*: that security was already due, though the money was not due and it might be demanded of Roussel.

The 5th *Partida*, 15, 9, is relied on: it declares payment to one debtor in preference to others, although the debtor be in failing circumstances, to be good, without making any distinction, whether the debt be due or not.

The ordinance of Bilboa, *ch.* 17, *b.* 53, is said to be decisive on this point. Before we examine its tenor let us inquire into its authority. I know that part of it is often quoted, and that the decisions of our courts have been grounded on some of its provisions.

It is no where extended to the colonies of Spain. It was made as a guide to the

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Prior and consulate of Bilbao, and by some subsequent edicts, extended to other commercial cities. It is cited by Spanish lawyers and judges of this country; but that does not give it the force of law. If it forms the law of the land, the whole must be law. Yet, what will the court say to the provision which gives a prompt execution on a bill of exchange without a summon? To that which declares an endorsement on a bill of exchange or note void, unless it be filled up and dated, &c. &c. The court cannot divide a statute. They cannot say this part is convenient and shall be executed, the other shall be dispensed with. This would be assuming legislative authority.

They may, indeed say "the provisions you refer to have never been practiced on, and therefore, we have right to suppose they are not laws: but the rule we have laid down has." Even this would be conceding all I ask, and would be referring for the authority of the rule—not to positive law, but to practice. I should say my arguments of inconvenience have great weight, because they are not opposed by positive law. I should further ask, Where is the practice which is referred to? Where is the case, prior to the decision of the court, which establishes the principle—a principle, which has only prac-

tice or reason for its basis, cannot surely rest on the decision which for the first time establishes it.

Let us now examine the provision of this ordinance. It is laid down very broadly, *art.* 53, that every instrument, made *en tiempo inabil*, at a time when the party is incompetent to make it, is *void*, and when it shall be presumed to have been made in fraud of creditors, is void: and it adds, as an example, when the party was *about to fail, proximo a quebra*, not when he was *in insolvent circumstances*, but *about to break*, that is in the language of English jurisprudence *in contemplation of bankruptcy;*— having that in view, knowing that all must be given up, and intending to put one creditor on a better footing than the others, *con fraude, dolo y malicia.*

The 5th *Partida*, 15, 7, which contains the only legitimate rule, as far as unaltered by subsequent statutes, because the Partidas were expressly extended to this country; this law and the note 9 require three things to annul an instrument granted as this on an *onerous* title: fraud on the part of the debtor, knowledge of this in the creditor, and loss to the others. The commentator observes, that it does not suffice to shew that the party knew there were other

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creditors. This law also requires, in order to annul the instrument, that it should have been made *after a judgment*, with a view to avoid execution, and that it be of *all* the effects of the debtor.

Now, if the ordinance of Bilbao be in force here, and it should be construed, as it seems to me it ought to, to refer to a *contemplation of bankruptcy*, then it cannot apply to us for ours, far from being an act in contemplation of bankruptcy, was an effort and a strong one to avoid it. It was a stipulation for farther advances, and as far as it purports to be a security for those already existing, these were of so recent a date, that without any violent presumption they might *all* be classed under the same head.

The *Curia Philippica illustrada, ch.* 11, *l.* 2, *no.* 26, says, that every thing is suspicious that has passed a little before failure, and that by a royal law "all contracts, made six months before failure are void" to this effect the 5 *Recop. de Cast. tit.* 19, *l.* 7, is quoted. This royal law contains no such provision. It declares that no merchant shall have the benefit of the insolvent laws, unless he be actually in prison, and not then, if within six months he has borrowed any money, bought any goods on credit, or drawn any bill of exchange. It will

be hardly contended that we ought to enforce this law in this country.

The 5th *Partida*, 15, 7, is also relied on to shew that the alienation of all a debtor's goods *in fraud of his creditors* is void. But this is no alienation, nor did it extend to *all* the property of the debtor, for even after all the depredations to which it was subject it sold for $18000. Neither was it an act in *fraud* of the creditors, for a valuable consideration was received, and thereby the stock of the debtor was increased or the number of his creditors lessened: neither was it *after* judgment or to avoid *execution*.

The doctrine laid down by this court in *Brown* vs. *Kenner & al.* 3 *Martin* 270, does not militate against this case.

1. Because the debts enumerated in the mortgage are not old debts, which the creditor had long been endeavouring to secure, but recent transactions sufficiently so to render it presumable to have been contemplated, as the creation of the debts, and the amount of which added to the mass of the estate.

2. Because the indorser was entitled to demand security, as soon as the want of solidity in the drawer became evident.

In order to avoid an inquiry into the circum-

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stances of the debtor at the time he granted the security, many commercial nations have fixed a certain period, before the failure, as the limit beyond which no valid conveyance or security can be made. Our own legislature has not been unmindful.

By the 17th section of the act of 1808, *ch.* 16, one of our insolvent laws, the debtor is excluded from the benefit of the act, "if it appears that he has, in contemplation of taking such benefit, at any time previous to his arrest, assigned or made over, any part of his estate or effects—or mortgaged his property or confessed judgment,—all such assignments (whether in trust or otherwise) mortgages or confessions of judgment, or giving an undue preference to any or more creditors, or exclusion of other creditors, are void to all intents and purposes." But, it is provided "that if, the debtor *at the time* of executing such assignment, mortgage, confession of judgment, the debtor shall have received *a bona fide* consideration, such assignment, &c. shall be held and considered as good and valid." If it be said that this act applies only to the case of an *imprisoned* debtor, I answer, that it never can be believed that the legislator may have intended to render the validity of a mortgage, dependent on the future

conduct of the mortgagor, beyond the control of the mortgagee—valid, if the debtor went to jail—invalid, if he avoided imprisonment by a cession of his goods or by his escape. That the attention of the legislator was not confined to the case of imprisoned debtors, appears from the title "an act for the relief of insolvent debtors, in actual custody, for establishing prison bounds for the public jail, and for other purposes." It contains general provisions not solely applicable to imprisoned debtors.

Moreau for the defendants. The mortgage of 23 slaves, given by the defendants' insolvent, bears date, March 12, 1811. Its object is to secure the payment of a quantity of indigo amounting to - - - $1268 13

An endorsement on a note of March 2, at 60 days, for - 2347 00

An endorsement of a note, said in the mortgage of the same date as the preceding one, and which really is, of the 26th of February, payable in June for 2200 00

An obligation to furnish future endorsements for 11,000 00

The plaintiff, by virtue of his mortgage, claims payment of the following sums, amounting to $10,833.

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1. A note of February 23, 1811, at four months, of - - - $386 00
2. Another of the 23, payable in June, - - - - - 2200 00
3. Another of March 2, at 60 days 2347 00
4. Another of the 10th payable in January 1812, - - 1600 00
5. Another of the 15th at 60 days, 500 00
6. Another of April 20, payable in August, - - - 1800 00
7. Another of same day, payable in September. - - - 2000 00

It is contended, that his is not an hypothecary claim. 1. That the mortgage does not cover any of the above claims. 2. That his mortgage is void.

I. The conventional mortgage must be express. *Civil Code* 453, *art.* 6. It ought expressly to mention the debt or engagement for which it is given: unless it be stipulated for all the debts due to the creditor. The price of the indigo, and the notes of the 23d of February and 2d of March, alone are expressed: the total amount of these is $5825 13. The notes of the 23d of February and 10th of March, amounting to $1986, must be excluded.

In vain will it be said that the note of the 10th of March ought to be covered by the mortgage,

under the pretence that it was endorsed after its date, and that of the mortgage. Blank endorsements are *prima facie* taken to be on the day on which the note bears date: and the presumption is not rebutted by any evidence. Galez, the broker, swears he discounted the note before the mortgage was given.

The debts mentioned in the mortgage, amounting to $5815 13, do not appear to have been contracted, under a stipulation that the creditor should be secured by mortgage; and if the debtor has secured him since, it was to the injury of his other creditors, as he was then in *failing* circumstances.

A payment made by a debtor, whose bankruptcy is not declared, is valid, if the debt was payable; but a payment by anticipation is liable to repetition however received *bonâ fide* by the creditor. 5 *Partida*, 15, 9. *Ord. Bilb. ch.* 17. *l.* 3.

The ordinance does not distinguish whether the anticipated payment be in cash or otherwise, or between *paying* a debt not yet payable, or *securing* it, when no security was stipulated for when it was contracted; neither of the notes mentioned in the mortgage, on the day of the insolvent's failure, April 29, 1811.

The claim for indigo, which we have neither

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the date nor time at which it became payable, is an evident fraud. Laignel swears Roussel told him it was paid, and the cash had been obtained for this purpose, by the discount of a note, at an exorbitant interest.

As to the endorsements posterior to the mortgage, the mortgage cannot avail, for it was given at a suspicious period, and is therefore void. This applies also to anterior endorsement.

II. From the beginning of March 1811, and before that time, it appears Dukeylus was in insolvent circumstances: this results from the testimony of Laignel, Leboucher, Petit, Blanchard and others. A mortgage granted on the 12th of that month, must be considered as of no avail. *Ord. Bilb. ch.* 67, *l.* 23 & 28.

Dominguez, author of remarks on the *Curia Philipica*, on *no.* 26, *lib.* 2. *ch.* 11. of *Commercio Terrestre*, says "Every act is suspicious which is done a short time before the failure." After stating several opinions as to what is considered a short time, he adds, but *jure regio* 'the time fixed in order that every contract, transaction, &c. done in fraud of creditors may be holden to be void, is six months:' he cites *Recop. de Cast. lib.* 5. *tit.* 19, *l.* 7. 1 *Illustracion a la Curia*, 333, *no.* 23.

By the 5th *Partida, tit.* 5, *l.* 7, it is provided, that an alienation made by a debtor of all his goods, in fraud of his creditors, may be avoided within the year. Here, indeed, the insolvent has not bound all his estate, because personal estate is not susceptible of being mortgaged, but he has thus bound every thing he could bind, viz: twenty-three slaves, as appears by his schedule: a very strong circumstance, from which fraud may be inferred.

In the case *Brown* vs. *Kenner & al.* 3 *Martin*, 274, this court took the distinction between an actual payment and a surety given for the debt. The plaintiff there was allowed $2000, which he had really paid, at the giving of the mortgage, but his claim for $4000 on account of what was then due him, was rejected. Here, Roussel paid nothing when he took the mortgage. It was given him to secure former claims and endorsements, and to secure further endorsements which he did not bind himself to give.

When, on the 15th of March and 20th of April, he endorsed these notes, he gave his signature, at a period when Dukeylus was a bankrupt, and known as such by the suits brought against him by Mad. Chabot and others, contrary to the solicitations of his wife, who told him Dukeylus was a broken man, and could not stand any longer.

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MARTIN, J. delivered the opinion of the court. The defendants contend that the mortgage on which this action is brought is void. 1. Because, contrary to a provision of the *Civil Code*, 453, *art.* 6. 2. Because, its object was to give the plaintiff an undue preference over the rest of the insolvent's creditors.

I. The article of the civil code stated, declares, "that there is no conventional mortgage, except that which is expressly stipulated, in the act or writing made by the parties: it is never understood, and is not inferred from the nature of the act."

On this, the defendants' counsel contends, that as the mortgage is to secure the plaintiff, among other things, against future endorsements, within a given time and no express sum is mentioned, the court must declare the mortgage null, at least as to those future endorsements. On this we are of opinion, that the objection cannot prevail. This is emphatically a mortgage expressly stipulated, and the amount of it, even in this part, is sufficiently express; *id certum ut quod certum reddi potest.*

II. The plaintiff's counsel repels the objection made to the part of the mortgage, which relates to the price of a parcel of indigo, and

the indorsement of two notes, anterior to the date of the mortgage, on the ground that the transactions by which he became a creditor, in this respect, took place so short a time before the mortgage, that the court must presume that this kind of security was contemplated when the debt was created.

1. The date of the sale of the indigo cannot be ascertained from any part of the case before us, and the idea, that it was effected with a view to a mortgage, seems to be repelled by the testimony of Laignel. This gentleman swears, that in February or March, 1811, the plaintiff came to town and was compelled to stay five or six days to receive part of what was due him for some indigo sold to Dukeylus, a payment which was effected by the discount of a note, at a high interest, as the plaintiff informed the defendant. We are without any evidence of the date of the sale of the indigo, or of the time at which it was payable. For any thing that appears, the sale and time of payment were both anterior to the date of the mortgage. The plaintiff does not appear to have any better title to a security, under the mortgage, for the endorsement of the notes of the 26th of February and 3d of March, anterior to the mortgage. When a creditor requires a court to allow him

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a privilege, he must prove his claim thereto: it does not suffice to shew circumstances which render it probable.

2. But it is further contended that, as to the two indorsements aforesaid, the plaintiff was a surety, and the debtor being in a state of bankruptcy, the plaintiff might, even before payment, demand an indemnification. *Civil Code*, 430, *art.* 18.

When a debtor has become a bankrupt, debts due by him, although not yet payable, give to the creditors of them the right of acting with those whose debts are payable. But, were the creditor, whose debt becomes as it were payable by the bankruptcy, to receive his payment, it would be an anticipated one—out of the course of business and subject to repetition for the benefit of the mass. If it were otherwise, there would be no use for the distinction in the books between a payment in due course of business, and one by anticipation: all the advantage intended to be given to the surety, in the part of the code cited, is to enable him to take as early measures for his indemnification as if the debt was already payable, and indeed as if he had paid it.

Whether a debtor, who is about to fail, may, by an anticipated payment, or a conveyance of

his property, defeat the intention of the law, which is that all his creditors may be equally satisfied out of his estate, is a question, which does not depend on the ordinance of Bilbao, although the parts of that ordinance, cited by the defendant's counsel, furnish a good illustration of the principle by which we are to be guided. The discharge of a debt not yet payable, when the debtor has not wherewith to pay demands, which, according to his undertaking, claim the preference, is so glaring an evidence of partiality, that a court would set it aside, considering that partial justice is partial injustice, even if the ordinance did not require it. So would they an instrument made in deceit and fraud.

It is believed that the ordinance of Bilbao was never enforced by the Spanish government, in Louisiana. We never heard of the appointment of a prior, consuls, or any of the officers whom it requires, and without whom many of its provisions cannot be carried into effect. It is a deposit of principles, consecrated by other laws, relating to commercial affairs, which are there brought together and illustrated, and, in some instances, modified and extended. American jurists use it as a manual, and the court

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has recognised the wisdom of some of its principles, but often rejected others as totally inapplicable to this country.

The 5th *Partida*, 15, 7, has been cited. It does not appear to us pregnant with all the evil consequences which the plaintiff's counsel discovers. We do not believe that the object of its framers was to avoid every transaction which takes place within the year preceding the failure. It is rather a statute of limitations, fixing the year after the discovery of the fraud, in an alienation, as the period within which suit should be brought to set it aside. Neither is the effect of this law confined to the case of a debtor against whom there is a judgment: such a case being mentioned, according to Lopez, *exempli gratiâ, ut evidentius dicatur constare de fraude.*

It remains for us to inquire whether the two notes of the 15th of March and 20th of April, the aggregate amount of which is $4300, and which were endorsed after the mortgage, represent a fair debt, for which the plaintiff is entitled to privilege under the mortgage.

Our insolvent law 1808, 16, reprobates all alienations of property, on contemplation of its benefit, made within three months, unless the debtor, *at the time of the alienation*, receives a *bona fide* consideration therefore, and in the

case of *Brown* vs. *Kenner & al.* 3 *Martin*, 270, this court set aside a conveyance as to part, and supported it for the amount of a sum of money actually received by the debtor at the time of its execution. The present mortgage was made within three months of the failure, and in the contemplation of it, as well on the part of the mortgagee as in that of the mortgagor. Nothing was received by the mortgagor at the time of the execution of the deed. It would be absurd to conclude that the instrument is valid, if the cession of goods, which was intended, was made *before*, and bad if *after*, arrest. The object of the mortgagor, in the knowledge of the mortgagee, was the removal of a number of slaves, the whole of the mortgagor's property which was susceptible of mortgage, out of the reach of the mass of his creditors, clearly to defeat the intention of the law. Unless, therefore, it appears that a *bona fide* consideration was received at the time, we must declare the mortgage null. The plaintiff's counsel contends that it ought to suffice that a consideration was received afterwards. But we consider that the mortgage was void at the time that it was made, and according to the words of the act—void according to the principles of sound policy. From its date, it covered a large portion of the insol-

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vent's estate, from the claim of his creditors, without being represented by any thing, not even by the plaintiff's obligation to endorse. If void at the time of its execution, no act of the person, for whose benefit it was intended, can make it good.

The district court acted correctly in setting the mortgage aside, and it is ordered, adjudged and decreed, that the judgment be affirmed with costs.

Livingston on a motion for a rehearing.

The objection made on the hearing to the testimony of Laignel, does not appear to have been taken into consideration by the court, because they rely on his testimony, to shew that Roussel knew Dukeylus was about to fail, and also as to the sale of the indigo.

Now Laignel is not a competent witness, and his interest appears on the face of the papers before the court, for he is a creditor of Dukeylus on his bilan, and there is no rule better established, than that interest whenever discovered shall disqualify. Take away this testimony, and a most material circumstance required by the law of 1808 to render the act invalid, is wanting, to wit: that it was done in *contemplation of taking the benefit of the insolvent law.* I pray the

serious attention of the court to this feature, because I firmly believe, the legislature intended to invalidate no other acts, than such as were done in the *intention of making a cession*, and giving in that case a preference, but that all acts, though they might ultimately give a preference, are not affected by the law.

Without the testimony of Laignel, there is not the slightest circumstance to shew either that Dukeylus intended to apply for relief under the insolvent law, or that Roussel knew it; and indeed *with* that testimony I think there is no such proof—every thing, on the contrary, indicates a desire of *going on*; he not only secured Dukeylus for what he already owed, but he secured further credits and advances. For what purpose? Surely not to enable him to take the benefit of the act, but to avoid it—I hope I may be excused in repeating that if the law of 1808 be taken as it is (and I think properly) by the court for the rule, then *actual insolvency* is not the test by which the validity of the act is to be tried, but the intent, the *contemplation of making a cession.*

To return to Laignel's testimony, his evidence, if not inadmissible, is most certainly incredible. As he states, it would appear that Roussel knowing Dukeylus' affairs to be desperate, not

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only took security for past responsibilities, for which he might have motives, but without any obligation so to do, undertook to endorse notes to the amount of $ 11000, and more than a month afterwards actually endorsed notes, to the amount of more than $ 4000, a fact utterly inconsistent with that knowledge, which he must have derived from the information of Laignel, had it really been given—for what possible advantage was Roussel to derive from the transaction as to the subseqnent notes, even supposing his mortgage given?

Laignel's testimony then, thus incompetent, or at least unsatifactory, and biassed by his interest, is the only circumstance to avoid the security as to the indigo, which, as it is not proved to have existed as a debt before, will not, I imagine, be *presumed* to be such an one, as it was not lawful to secure.

The court has totally overlooked the note for $1600 to Galez, dated 10th of March, two days only prior to the mortgage, which from that circumstance must certainly come within the provision of the law of 1808, a *bona fide* consideration then paid.

The court avoid the security as to the notes endorsed after the mortgage, by referring to the law of 1808, which they adopt as the true rule

of decision on this point. Now by this law two things are necessary to invalidate the security.

1. That it should be made in *contemplation* of the cession, which I think I have shewn was not the case here, but rather that it was made with intent to enable Dukeylus to avoid it; and I lay great stress on this argument, because I think the statute of 1808 has given the *rule* and the *only rule*: it has directed the courts as to what act shall be deemed void and what shall not. It has given a rule where, as I have shewn in my argument, there was none fixed by *legislative will*: (for the court agrees with me in thinking that the *Curia Philipica* has not the force of a law here) if the act of 1808 then, is our rule, we cannot go beyond, nor say that an act is void because the party was in "*insolvent circumstances*", when the statute directs only that it shall be void, if made within three months of the bankruptcy, and "*in contemplation of taking the benefit* of a cession of goods.

2. The statute provides, that even if made within three months, and in contemplation of taking the benefit of the act, the security shall *be considered and held as good and valid in the law, any thing contained in the statute notwithstanding, if the debtor at the time of execu-*

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ting the same shall have received a bonâ fide consideration."

There is our rule: we have nothing to do but to understand and apply it. It is simple and unequivocal—a *bonâ fide consideration* must have been received at the time of executing the security.

What is a *bona fide* consideration? Was it received in this case? Here are the two questions on which this branch of the argument turns.

1. The *bona fide* consideration here required, is nothing more than a '*good*,' a '*valuable*,' a '*legal*' consideration. The statute certainly does not mean to exclude a consideration from this definition, merely because it was given in contemplation of bankruptcy; for it says that, even in that case, if it be *bona fide*, the deed shall be good. Now, if no consideration given in contemplation of bankruptcy were *bona fide*, then this provision would be an absurdity and defeat itself. The term, therefore, in the sense used here, means that the consideration shall be *valuable*, *legal*, and that it shall be given without *deceit*: "*Bonæ fidei nihil magis congruit quam præstari id quod inter contrahentes actum est.*"

If the consideration then had been a forged

bond, or a note that Roussel knew to be bad, or if any other fraud had intervened to the prejudice of Dukeylus, it would not have been a *bona fide* consideration, and therefore would not have come under the proviso that it takes it out of the law—supposing this to be the proper definition of the words, let us now enquire whether such consideration was received at the time of executing the mortgager.

1. As to the price of the indigo; there is no doubt that this was a *valuable* and *legal* consideration.

2. The prior responsability incurred by endorsing the notes already in existence, was undoubtedly a *legal* and valuable consideration, and it *had been* received at the time of making the mortgage: for, I pray the court to consider the particular phraseology of this law.

It does not make it necessary, that, at the time of making the security, the debtor receive a *bona fide* consideration (as is quoted by the court) but that at the period he *shall have* received it: evidently intending to include all considerations, existing at the time, whether prior or contemporaneous.

3. The endorsement of the subsequent notes, however, puts, I think the whole transaction out of any risk, under this proviso, not only for the

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amount of those endorsements, but for the whole sum secured.

Admit for a moment that the two first considerations, the price of the indigo and the endorsement of the prior notes did not form a good consideration, then received, and I then ask whether the engagement to endorse these notes and the actual endorsement of them to a large amount, do not form such a consideration? A person owes me $3000, for which I have no security, and he offers, if I will endorse $3000 more, to give me security for the whole. This surely is a *good, a valuable and legal consideration*, and as I have shewn, this is all that the proviso of the law of 1808 requires. For I repeat that it never can be said that it is not *bona fide*, merely because done in contemplation of bankruptcy, when the proviso supposes that every case, and makes this an exception to it. I know that this reasoning is contrary to the decision in the case of *Brown* vs. *Kenner & al.* but in that case the court decided not to take the statute of 1808 as their guide, and they have acknowledged it in this.

If, however, the endorsement of the subsequent notes does not form a sufficient consideration for the security of the whole sum, it must, I most confidently hope, on consideration,

be decreed such for the amount of those notes : the court seem to consider the words of the law of 1808 *strictly*, and declare that the consideration having been paid, *after* the date of the mortgage, it cannot come within the proviso. Will the court excuse me if I remark that in the former part of the decision, this strictness is departed from, and the words "*shall have received*" are construed to mean *receives*, and that therefore I hope the same indulgence, if it should be required, will be afforded to this clause. For, surely, the court cannot determine that the legislature meant to make the security good, if the plaintiff had endorsed the notes at the time of executing the deed, but bad, because he endorsed them afterwards, in pursuance to a promise in the deed, that he should be secured if he should so endorse them. What difference, I respectfully ask, would it make to the conditions, except one greatly to their advantage, if Roussel, at the time of receiving the mortgage, had endorsed notes to the whole sum limited of 11,000 dollars. Was the stipulation in the mortgage that he should be secured for all the notes he might endorse, to the amount of $11,000, a legal one or not? No doubt can be entertained, after reading the authorities cited in the argument, that such a mortgage was legal

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(independent of the law of 1808) and surely nothing in that act makes it bad.

The court seem to consider, on this head, that Roussel was under no covenant to endorse: I think, a more close inspection of the mortgage will induce them to alter this opinion. The words are "*Enfin pour sureté des autres endossements ou cautionements que le Sieur Mattias Roussel pourra donner ou fournir pour le Sieur Dukeylus, jusqu'à concurrence d'une somme de onze mille piastres.*" Now if, after receiving this security, Roussel had refused to endorse for Dukeylus, it would, most unquestionably, have been deemed such a breach of faith, as vould have entitled Dukeylus to a suit. This is evident from the limitation of the sum to $11,000. Why was this introduced? Clearly for the purpose of shewing the sum for which Dukeylus might call for Roussel's endorsements. The words *pourra endosser, &c.* were not introduced to give Roussel the option of endorsing or not, but to shew that Dukeylus was bound for no more than he should actually endorse within the limited time. The consideration, therefore, was the promise to endorse: it was a *legal,* a *valuable* consideration; it was given at the time ef executing the security, and it was *bona fide,* for it has since been faithfully performed.

Moreau for the defendants. The plaintiff's counsel complains that attention was paid to the testimony of Laignel, who it is contended was an incompetent witness.

It is true that, in the court below, this witness was objected to, on the ground of his appearing, by the insolvent's bilan, one of his creditors. If the objection was to be insisted upon in this court, a bill of exceptions ought to have been taken to the opinion of the inferior court. An important fact would then have been spread upon the record, viz. that the witness, though once an interested one, was now completely disinterested, having transferred all his rights for a valuable consideration and without a warranty. The plaintiff's counsel yielded to the opinion of the inferior court, and the witness's deposition, taken in writing, is made a part of the statement of facts. It is therefore too late to object to his testimony in this court.

II. Without the testimony of this witness, the plaintiff's counsel contends there is no evidence, nothing from which this court may presume that Dukeylus intended to give an undue preference. Without this testimony, we contend this court would have presumed it. When a man, in failing circumstances, voluntarily transfers a part,

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and *a fortiori* the whole, of his property to one, in exclusion of the rest of his creditors, the law concludes that his intention was fraudulent—the legal presumption, resulting from this single circumstance, suffices to establish the fraud. Bankrupts are always snpposed to commit fraud. In this respect, presumptions and conjectures are looked upon as proofs. *Cur. Phil.* 408, *n.* 16.

Whether, in any particular case, a bill shall be considered as fraudulent, is a question on which (as it must always depend upon the circumstances of each case, separate or combined, from which the intent of the party is to be inferred) it is difficult to lay down any precise general rule. But besides the circumstances, which afford evidence of fraud generally in conveyances: such as *the deed being the voluntary act of the party*, the transaction being secret, the grantor continuing in possession, &c. those from which fraud, in relation to the object of the bankrupt laws, has most commonly been inferred, are principally the *extent* of the conveyance, its being made in *contemplation of bankruptcy*. *Cullen's B. L.* 43. 44.

These last expressions tally with those of our act of 1808, *in contemplation of taking the benefit of this act*, and relate, not only to the insolvent estate of the debtor at the time of the trans-

action, but also to the causes which may have led to it.

Therefore, though a trader be insolvent at the time of the conveyance, if the transaction could not be considered as a mere voluntary act, as when done to avoid compulsory process, the transaction will not be holden fraudulent; but otherwise if he appears to have acted upon no other motive than his own will and the desire of granting an undue preference. But on the other hand, if the party be insolvent, or become so soon after the conveyance, although it may defeat that equality among the creditors, to secure which is so great an object of the bankrupt laws, or though (in the language commonly used on the occasion) it may operate as a preference to a particular creditor; yet, if the conveyance be not the voluntary act of the party (as when it is given to deliver him from legal process, from the threats or apprehension of it, or even from the pressure or importunity of a creditor, without the threat or actual apprehension of an arrest) it cannot be said to be done with the intent to defraud creditors: the preference, as it is called, being only consequential, will not be held fraudulent or an act of bankruptcy. *Id.* 51, 52.

This is the reason on which the law does not only consider as good, but even authorises the

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payment by an insolvent of a debt actually due, on the very day of the failure. *Partida* 5, 15, 8. There certainly results a *preference* from this payment, but the law does not consider it as *undue*, because the payment may have been made from other motives, than the mere will of the debtor, and without any fraud on his part.

The mortgage of the plaintiff was executed on the 12th of March, 1811. The witnesses all agree that from the beginning of the year Dukeylus's credit was ruined—his notes were discounted at an exorbitant interest—his goods were sent to auction and sold below the cost: he was at a loss to take up even small notes, and threatened his endorsers to suffer them to be protested, and in the month of February, the general opinion of his friends was that he could not stand it any longer, and his failure was unavoidable.

The mortgage was the voluntary act of the insolvent: his notes, endorsed by the plaintiff, were not yet payable; he could not be acted upon by the pressure of his debts, nor the threat or dread of any compulsory measures on the part of any of his creditors.

The preference given was *undue* on account of the extent of the property conveyed. Twenty-three slaves were mentioned, their value about $ 15000, the whole of the insolvent's pro-

perty, susceptible of being mortgaged and the other property ceded, is of a value relatively insignificant.

III. It is true the act of 1808, regards as valid the assignment of property, made by an insolvent, when made *bona fide*: but it is expressly required that the consideration be actually paid, at the time of the execution of the assignment—that the consideration be *bona fide*.

Now can it be said that the consideration, given by the plaintiff, was actually received by Dukeylus, at the time of the contract? Could the creditors of the latter, by any possibility, be benefited, even accidentally, by that part of the mortgage which relates to endorsements previously given by the plaintiff, without any stipulation that he should be in any manner secured?

It is true that in all cases, which turn upon the fraudulent intent of the debtor, the following circumstances (tho' with respect to some of them it is impossible to draw any precise line) must always be considered as favourable, and according as the particular case turns upon one or several of them, taken together, will have more or less weight, in the general consideration—as,

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namely, when the party continues *in good credit*, and a bankruptcy does not take place till some time after the conveyance—where the transaction is beneficial to the generality of the creditors—where possession is given immediately. *Cullen's B. L.* 53, 54.

Dukeylus failed on the 29th of April 1811, about seven weeks after the date of the mortgage, and it is clear that his creditors, far from receiving any advantage, were materially injured, by the mortgage, as far as it relates to prior endorsements. Let us examine, whether the case is more favourable, in regard to the part of the mortgage, intended to secure the plaintiff in regard to future endorsements.

Can a vague and loose promise to endorse in future to the amount of $11,000—a promise not *express*, but which is contended clearly to result from the plaintiff's acceptance of the mortgage, in the words of the law, be a *bona fide* consideration, actually received at the time of the contract? What benefit could the creditors *possibly*, or did they *actually*, derive from this pretended promise?

Let it be admitted that the plaintiff did furnish endorsements for $4300—the last note, thus endorsed for $3800, was given *three* days before the failure. Is it clear that the amount of it,

increased the estate out of which the creditors are to be paid, or is not the presumption strong that this endorsement was for the renewal of a note, endorsed by the plaintiff? If this be not the case, where is the property represented by this note?

If property be purchased from a man in failing circumstances, not within the knowledge of the buyer, the latter, on proof of an actual payment, ought to be protected, especially if the proceeds of the sale are found in the mass of the debtor's estate, and the creditors are thereby benefited. On this ground, was the decision of the court in the case of *Kenner & al.* vs. *Brown*, 3 *Martin* 270. But in the present case the plaintiff has nothing similar to allege. As to the endorsement, prior to the mortgage, no consideration was received: the creditors derived no benefit. As to the subsequent endorsements, they could only tend to increase the mass of the debts, by affording to the insolvent the facility of raising money, by discounting notes to great disadvantage. The plaintiff does not appear to have been under any obligation, express or implied, to endorse. There are no words in the conveyance from which this obligation may be inferred. It speaks only of notes which he, the plaintiff, *may* endorse, *qu'il pourra endosser.*

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Finally, he complains that the court pass over, in silence, the note of $1600. It was quite useless to mention it, since the judgment declares the whole mortgage to be null and void. But we are to observe, that this note could neither be considered, as endorsed at the date of the mortgage, which that instrument was intended to cover, because those notes are therein detailed, nor as one endorsed *after* the mortgage, because it has an anterior date. It has been alleged that, tho' dated *before* the mortgage, it was endorsed *after* it. But this allegation is not supported by any part of the testimony, and is, on the contrary, discredited by that of Galez, who deposes that he procured the discount of it *before* the date of the mortgage, and he expressed his surprise to the plaintiff, when he discovered that it was not mentioned in the mortgage.

REHEARING REFUSED.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF LOUISIANA.

EASTERN DISTRICT, APRIL TERM 1816.

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Cox *vs.* Zeringue.

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COX vs. *ZERINGUE.*

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The defendant and appellant is sued as surety of one Charles Massicot, who, while enjoying the privilege of the bounds of the prison in New-Orleans, where he was confined under a *ca' sa'*, issued by the court of the first district, at the suit of the plaintiff and appellee, is said to have broke the bounds.

It appears that Massicot, while thus confined, applied to the court of the parish and city of New-Orleans, for relief under the act of the legislature of 1808 *ch.* 16, that the then and present plaintiffs had notice of the application, and Massicot obtained his final release.

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The plaintiff and appellee contends, 1. That the parish court had not jurisdiction in the case. 2. That if it had, its proceedings were irregular and void and could not affect the rights of the plaintiff, under a judgment of the district court.

I. When the law cited was enacted, the judiciary of the territory of Orleans was composed of a superior court, having original and appellate jurisdiction, and parish courts, having an original jurisdiction in all civil cases, subject to an appeal to the superior court. To that superior court, or to the court under the process of whom he was confined, the debtor could, at his option, apply. These courts no longer exist: but the original jurisdiction of the superior court is now vested in the present district courts, and also in the court of the parish and city of New-Orleans, as to civil cases, originating in that parish. The transfer of these powers is to be found in the acts organising and creating. In the act of 1813, *ch.* 12, § 16, it is provided that "the proceedings of district courts, in civil as well as in criminal cases, shall be governed by the acts of the territorial legislature, regulating the practice of the late superior court of the territory of New-Orleans, and that they shall have *the same powers*, when not incon-

sistent with this act, which were granted to the said superior court by the said acts." The civil duties heretofore exercised by the superior court of the territory, under the insolvent law, are certainly a part of the powers hereby transmitted to the district courts. Let us see now whether the court of the parish and city of New-Orleans partakes of those powers. In the act defining its jurisdiction, *sect.* 1. it is said that it "shall consist of one judge, learned in the law, who shall have and exercise within the said parish a jurisdiction concurrent with the court of the first district, in all cases originating in the said parish, and in the second section that "the mode of proceeding before the said court shall in all respects be similar to that presented for the district court: and an appeal from its decision shall be carried directly to the supreme court." Now, as it cannot be pretended that an application, by an insolvent, for relief, is not a civil case, we must acknowledge that the court of the parish and city of New-Orleans, possesses the powers heretofore granted in these matters to the superior court of the territory, and was therefore competent to take cognizance of Massicot's application.

II. But, it is said that the proceedings, in the present case, are irregular and therefore null and

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void. Whether regular or not, we are bound to consider them as a *res judicata*, between Massicot and the appellee. The latter had regular notice and was made a party to the proceedings. He could have opposed the demand of his debtor, and if dissatisfied with the decision of the parish judge, might have appealed to this court for redress. It is now too late for him to complain. Neither can he, at this time, shelter himself under the judgment of the district court: for it is a well known rule of our laws, that when an insolvent has made application to a court of justice for relief, all proceedings against him, not only in that tribunal, but in all others, are suspended; and that all his creditors are obliged to bring their claims in the court before which the case of bankruptcy is pending, there to have them liquidated and classed, and to receive their share of the property abandoned. However exclusive the authority of a judge over the causes submitted to his jurisdiction, the moment that a debtor sued before him applies for relief, against his creditors generally, to any other competent tribunal, that authority ceases; the proceedings, whether on mesne process or under execution, are suspended, and the creditor must take his remedy in that court, in which all the affairs of the bankrupt are to be liquidated.

Massicot having been released after a judgment rendered, in such a case, by a competent court, it follows that he cannot be considered as having broken the prison bounds, and that the appellant has not incurred the responsibility, which has been made the ground of the present suit.

It is ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and that judgment be entered for the appellant with costs.

Porter and *Dupeyster* for the plaintiff. *Paillette* for the defendant.

PIGEAU vs. *DUVERNAY.*

He who claims the estate of a natural child must prove his acknowledgment, by the baptismal registry, or a declaration, before a notary and two witnesses.

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

MARTIN J. delivered the opinion of the court. The plaintiff sues for the estate of his natural daughter, a free woman of color, who died intestate, without a mother or issue.

The defendant claims the estate in his own right, and that of other persons of color, as the natural brothers and sisters of the deceased.

He denies the paternity of the plaintiff, and

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contends that a natural father can only inherit the property of his *acknowledged* children, *Civ. Code* 156, *art.* 48; that illegitimate children can only pass into the class of acknowledged children by the acknowledgment of the parent, *in the registry of the birth or baptism*, or by a declaration *before a notary public*, in presence of two witnesses, *id.* 48, *art.* 25, neither of which formalities were fulfilled by the plaintiff.

The statement of facts refers us to the registry of baptism of the deceased, in which the plaintiff is mentioned as her natural father, and to a record of the court of probates, which shews that the plaintiff was, on the application of the deceased, appointed her curator *ad bona*, as her natural father.

From these facts the paternity of the plaintiff is sufficiently proven. But the estate in dispute must be disposed of according to the provisions of the civil code, by which "the estate of a natural child, dead without posterity, belongs to the father *who has acknowledged him.*" 156, *art.* 48. Hence proof of *paternity* does not suffice; the *acknowledgment* must have been proved.

The acknowledgment is required to be formal. The manner of making it is pointed out by law.

This formal or legal acknowledgment differs from the incontrovertible evidence of natural pa-

ternity, resulting from the *res judicata*. The latter gives right to alimony: the former to that and in some cases to the inheritance of the parent: in others to legitimation. The latter may be obtained, as to the mother, by the illegitimate children of every description, *Civil Code* 50, *art* 34, even by those born from an incestuous or adulterous connection, who are incapable of *legal* acknowledgment. *id.* 48. *art.* 26.

As the evidence, on which courts of justice are authorised to pronounce the natural parentage, *id.* 50, *art.* 31, is weaker than that which results from a formal acknowledgment, and is not always morally conclusive, the legal consequences of adjudged and acknowledged parentage are thus different.

From the baptismal registry the plaintiff can derive no proof; it could not make any against him. He did not subscribe it. It does not appear to have been done with his consent or knowledge. It is as to him *res inter alios acta*. It cannot vest or destroy any right in him.

The evidence resulting from the letters of curatorship, granted to him, by the court of probates at the child's instance, and accepted by him, establishes the parentage and upon it, he might perhaps have been compelled to furnish her alimony, in the same manner as if the pa-

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rentage was established by the decree of a court, in a suit to which he was a party. But this evidence would not have entitled the child to legitimation in case her parents could have, and had been, married after her birth, without a formal acknowledgment, either before, or by the contract of marriage itself. *Civil Code* 48, *art.* 21.

As the case does not offer any fact (from which an acknowledgment could have been inferred) prior to the passage of the civil code, we have not examined whether the law was different before; neither have we inquired whether the plaintiff being a white man, and the mother of the deceased a woman of colour, their issue could be the object of a legal acknowledgment. This became useless, since we are of opinion that there has been no such acknowledgment.

The parish court erred, in decreeing the estate to the plaintiff, and it is ordered, adjudged and decreed, that its judgment be annulled, avoided and reversed: and it is ordered, adjudged and decreed, that there be judgment for the defendant, with costs of suit in both courts.

Young for the plaintiff. *Seghers* for the defendant.

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CLARK's EX's vs. *MORGAN*, *ante* 79.

In sales of real property by the sheriff, on a credit, a deed of mortgage, signed by the vendee, is not necessary.

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

MARTIN, J. delivered the opinion of the court. The plaintiffs state that they delivered to the defendant, sheriff of the parish of New-Orleans, two writs of seizure and sale, on which he seized and sold a plantation, at one year's credit, and they requested him to deliver them the mortgage and security, which he was bound to take, on such a sale, according to the act of the legislature of the 25th of March, 1808, that he tendered to them a paper purporting to be a bond, but which they allege by no means answers the letter or intent of the act.

The defendant answers that he did duly and legally execute the two writs, put into his hands by the plaintiffs, that no exception was made by them to the manner in which the bond, mortgage and security were taken; but on the contrary, they sanctioned the mode, by exceptions to the solvency of the sureties—that the mortgage and security are taken according to law and the usage and practice, which has hitherto prevailed, and been universally acquiesced in.

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that the sureties were, and are still, solvent, that the deed of sale and mortgage were duly recorded, and the plaintiffs may, at all times, obtain certified copies thereof, and the defendant has ever been ready to deliver the bond, &c.

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

It is admitted that the plaintiffs have, since the present suit was instituted, received the whole money due to them, and the contest is only about the costs.

There was no deed of mortgage, executed by the vendees, but the sheriff gave them a bill of sale, reciting the writs of seizure and sale, the seizure and sale under them, and that the vendees became the purchasers of the property seized, at the third and last auction, at one year's credit, according to law: there was a reservation of the mortgage in case of non-payment. The deed was signed by the sheriff only, and not by the vendees. They gave their bond, the preamble of which recites the particulars of the sale, and refers to the act of the legislature, and expressly mentions the reservation of the mortgage.

Evidence was given that this mode of conveying land, sold at a sheriff's sale, universally prevails.

The plaintiffs contend, that the vendees ought to have been required by the sheriff to execute a deed of mortgage before a notary.

This court is of opinion that the verdict of the jury and the judgment thereon are correct. In sales, under an order of court, the sheriff is to convey, without the interference of a notary, and if the law imposes any condition to be fulfilled by the vendee, it is meet they should be expressed in the deed of conveyance, and as the estate transferred passes, without the signature of the vendee, by his acceptance of the deed, it must pass *cum onere*, when the law does not authorise an absolute conveyance. The acceptance, however, in this case, is fully evidenced by the bond, executed by the vendees, which recites the sheriff's sale and makes an express reservation of the mortgage.

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

Seghers, for the plaintiffs; *Hennen*, for the defendant.

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APPEAL from the fourth district.

Under the Spanish government, when the appeal did not suspend the execution, there was no necessity to procure the desertion of the appeal to be *pronounced* to give the judgment appealed from the authority of the thing judged.

The plaintiffs, as heirs of Margaret Cheval, brought the present suit for the recovery of a portion of her estate, alleged to be in the possession of the defendant, the universal legatee of her husband.

In the year 1750, Duval and Margaret Cheval intermarried, and by their marriage contract, made mutual donations, stipulating that the survivor should inherit all the estate of the other. This donation was recorded in 1768.

Margaret Cheval died in 1779, without issue: an inventory of her property was made by the commandant of Point Coupee, the parish of their domicil, and delivered to Duval, to be enjoyed by him as an usufruct during his life, under a belief that the marriage contract did not preclude her heirs.

Duval remained in possession till his death in 1783, without issue, leaving the defendant his universal legatee. An inventory of his property was made, and in conformity with the decision of the former commandant, who had declared Duval a mere usufructuary of his wife's

estate, the then commandant, with the acquiescence of Croizet, divided the estate, which had been possessed by Duval, into two parts, one of which was delivered to the defendant, and the other was distributed among the heirs of Margaret Cheval.

Thirteen years after Croizet being, as he supposed, better informed, and believing that Duval, under the marriage contract was entitled, as survivor, to the estate of his wife, in the fullest extent, brought his suit in the court of the Auditor in New-Orleans, for the recovery of the property, which had, under a misapprehension of his rights, been delivered to the heirs of Margaret Cheval.

In the year 1802, the Auditor gave his dictamen in favor of Croizet, which, by the approbation of Governor Salcedo, became a definitive sentence. An appeal was prayed and allowed to the island of Cuba, but without a suspensive effect. Consequently Croizet was put into possession.

The change of government prevented the prosecution of the appeal, in the island of Cuba, and the present plaintiffs brought the present suit as an original one.

There was judgment for the defendant, and

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the plaintiffs appealed. During the appeal he died, and his heirs were made parties.

Livingston for the plaintiffs. The donation, in the contract of marriage is null because it was not recorded in the time and place prescribed by the laws of France. *Ord. de Moulins, Declaration of May*, 1645. It was not recorded till eighteen years had expired, while it ought to have been so within four months after its date.

Duval, whatever may have been his right, has renounced it, by his acceptance of his wife's estate *as an usufructuary:* and this renunciation was afterwards confirmed by Croizet, who distributed to the heirs of Mrs. Duval their share of her estate.

Moreau for the defendants. The plaintiffs and appellants cannot be heard in their demand, 1. because it tends to destroy the authority of the thing judged: 2. because it is unjust and ungrounded.

I. Its object is the recovery of monies paid under a final judgment, rendered against them, by a Spanish tribunal in 1802. This is inadmissible, because the judgment has acquired the authority of the thing judged.

It is true, Louis Le Blanc, one of the present

plaintiffs and appellants, appealed within the legal time, but he never prosecuted his appeal, nor did he produce the certificate which the law required: the appeal was consequently deserted, and the judgment remains as fully in force as if no appeal had ever been prayed.

According to the Spanish law, the appeal which is not prosecuted by the citation of the appellee before the judge *ad quem* within the delay fixed by the judge, or, when he does not fix any, within the legal one, is considered as null. The judgment remains in full force and is afterward unappealable from. *Partida* 3 23, 23. *Recop. de Cast.* 4, 18, 2.

The only variance between the *Partida* and the *Recopilation* is, that the latter fixes the delay at forty days, while the former allowed two months.

Shall it be said that the appeal ought nevertheless to have its *devolutive* effect? No. The Spanish judge allowed this effect, on condition, as he expressed it, that the appellant should prosecute his appeal within forty days, warning the appellant, that if he did not produce a certificate of the citation of the appellee, within six months, the appeal should be considered as deserted.

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II. The appellants no longer contend, as before the Spanish tribunal, that the reciprocal donation, in the contract of marriage of Duval and his wife, ought to be reduced to the usufruct: confounding thus donations made at the time of the marriage, with the reciprocal donations, made during its duration—but they contend, first, that it is null, because it was not recorded in the time and place prescribed by the laws of France, under which the marriage took place: secondly, that if it be not null, Duval and his heirs have lost the right of availing themselves of it, by his acceptance of the succession of his wife, to be enjoyed *in usufruct only*, and by the assent of Croizet to the tradition of the property of Madame Duval to his heirs, and finally, by his long silence.

1. As to the objection that the donation was not recorded, we are to resort to the royal ordinances and not the custom of Paris, because, according to the opinion of celebrated French jurists, ordinances and declarations of the monarch are paramount to customs. 1 *Neron & Geroud, Recœuil des edits. &c.* 1.

It is true that the 58th article of the ordinance of Moulins required a record of donations *inter vivos* within four months from the date, in the district in which the property was situat-

ed and of the domicil of the parties, and pronounced the nullity in favor of the creditors and heirs of the donor, when this formality was neglected.

It is true also that the declaration of May 1645, extended the necessity of a record, in the places in which the pr perty was situated and of the domicil of the donor, to every kind of donation *inter vivos* without exception, within four months.

It is also true that the edict of December 1702, excepts, from this formality, donations in a direct line by contract of marriage, *i. e.* by one of the ascendants of either of the parties.

But the system was changed by the ordinance of 1731.

The 26th art. of this ordinance provides, that "when the record shall be made, within the delay (four months) even after the death of the donor or donee, the donation shall have its effect, from the day of its date, with regard to all kinds of persons: and it may be recorded, after the expiration of the delay, even after the death of the donee, provided the donor be still living, but in such a case, it shall only have effect from the date of the record." And this is observed in France, since the promulgation of this ordinance. *Pothier, Donations* 103, 107.

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Thus, the record of Duval's donation could regularly take place in 1768, since the donor and donee were still living.

As to the place, the record was regularly made at Pointe Coupee, for the ordinance of 1731 requires, only, that it should be made in the domicil of the donor and in the place in which the property is situated.

2. As to the alleged consent of Duval to accept his wife's estate, as an usufructuary only, from which his renunciation is inferred to his right of property: it is clear that he was under an error, and *non videtur qui errat consentire.*

3. As to the pretended renunciation of Croizet, inferred from his distribution of the estate of Mad. Cheval among his heirs, the same principle is equally applicable, and I will add a quotation from the digest. "If being sole heir, I believe you to be so in part, and I deliver to you a portion of the estate, it is clear you cannot acquire a title thereto by prescription, because you cannot prescribe against the heir, that which you hold as such, unless you hold it under some other cause or unless there has been some compromise about it." *ff* 41, 3, *de usurp. & usucap.*

Livingston, in reply. Our appeal was not deserted, and the judgment obtained in the

Spanish tribunal, by the present plaintiffs and appellants, has not passed in *rem judicatam.*

I. It does not appear that there was any citation to bring the case from the judge *â quo*, to the judge *ad quem.* There must be a citation of the party, before the appeal shall be deemed deserted. *1 Cur. Philip. 103. n. 7.*

II. A judgment, once appealed from, does not pass in *rem judicatam*, nor does execution issue thereon, until further proceedings take place.

Before a cause can pass in *cosa juzgada*, there must be a petition to that effect, after the instance. *1 Elizondo* 149.

After an appeal, the appellee, if he wishes to confirm his judgment, and take advantage of the appellant's not prosecuting his appeal, must apply either to the superior or inferior court, and in the superior court he is to obtain the process termed *ahexotaria* or *contra majora.* In the inferior court, he is to pray that the appellant be cited to shew within a certain time, what proceedings have taken on the appeal—if the appellant fails to appear, the appellee is to obtain a default, and insisting on his pretentions require that a delay be fixed for the appellant's answer, and on notification of this, if the appel-

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lant does not appear, the inferior court will decree the execution of its judgment, 3 *Febrero Cinco juicios, n.* 4, 88. Nothing of this having been done, the judgment is still open to examination.

DERBIGNY, J. delivered the opinion of the court. We are called upon to revise, in this case, a judgment rendered by the tribunal of the Spanish Governor, in 1802. To shew that we have the necessary powers for that purpose, the present plaintiffs aver that they appealed from that judgment in due time, and that the appeal was pending, when the United States took possession of the country. The fact, as it appears on the face of the Spanish record, is that the appeal was claimed in the legal delay, and admitted with the restriction that it should not suspend the execution. Six months were allowed to the appellant to shew that he had prosecuted the appeal; in default whereof, he was warned that it should be declared deserted.

When the Spanish dominion ceased in this country, not only six months, but nearly one year, had elapsed from the date of the decree allowing the appeal, and during that period, it does not appear that the appellant took any step towards the prosecution of the appeal.

Certain it is, he did not attempt to shew that he had taken any.

The Spanish government was succeeded by that of the United States, at the end of the year 1803, and in 1810 the present plaintiffs instituted the present suit, the object of which is to obtain the reversal of the judgment of the Spanish court. We must therefore ascertain whether the appeal from that judgment is still open, before we hear him on the merits.

Appeals according to the Spanish law, were to be prosecuted within forty days at furthest. It was incumbent on the appellant to present within that delay to the judge *â quo* the necessary certificate from the court of appeals. If owing to some legitimate impediment, he was prevented from making that application in due time, it was his duty to shew it. If he did neither, the judgment of the inferior court acquired the authority of the thing judged. *Recop. de Castil. lib. 5, tit. 18, l. 2.*

In cases, however, where the appeal had stayed the execution, it was required, in practice, that some step should be taken, on the part of the appellee, to cause the execution to go on. On his application to that effect, the appellant was summoned to produce the proceeding had on the appeal, and if he failed to produce them,

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the appeal was deemed deserted, and the execution went on. But, in cases in which the execution was not stopped by the appeal, it is obvious that no application on the part of the appellee was necessary, after the expiration of the delay, within which the appeal ought to have been prosecuted; for the appellee, who enjoyed the benefit of his judgment, had nothing further to ask. In such a case therefore the judgment of the inferior court, evidently acquired, by the operation of law, the authority of the thing judged; for, as the appellant, who had suffered the delay fixed by law to elapse, without making the necessary application, could no longer be heard, the suit was necessarily at an end.

There are indeed some Spanish authors, quoted in the *Curia Philippica, part.* 2, *sect.* 3, who are of opinion, that when application is made to a court of supreme jurisdiction, *jueces supremos*, in a case in which the appeal has not been prosecuted, within the time assigned to the appellant, such court ought nevertheless to take cognisance of the appeal, unless the time elapsed be very long. But, stretching this doctrine to the utmost extent, it will not reach a case like the present, where, after the expiration of the six months granted to the appellant, he suffered more than seven years, without mak-

ing any application to be relieved against the judgment of which he now complains, and, when at last he comes forward with his appeal, he does not even attempt to shew, as the law required, that he was prevented by some legitimate impediment to prosecute it sooner.

We are, therefore, of opinion that the suit could not be reversed: but, although we think that the district judge did err, when he considered the appeal as open and enquired into the merits of the case; yet as the result of his enquiry was a judgment for the defendant, his judgment must be affirmed.

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

LAS CAYGAS vs. *LARIONDA'S SYNDICS.*

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

The signature and official capacity of a notary, in a foreign country, may be proven by a witness.

MATHEWS, J. delivered the opinion of the court. The insolvent Larionda, the attorney in fact of Gregorio de la Caygas, sues in the name of his constituent, an inhabitant of the city of Trinidad, in the island of Cuba, and

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in the court below, to support his authority to sue, offered in evidence a power of attorney, purporting to have been executed before a notary public of that city. In the usual and legal manner of executing such instruments, in places belonging to the sovereignty of Spain, the original or protocole is registered in the office of the notary, whose duty it is to keep it and to give a certificate copy, known to the Spanish laws, under the appellation of *copia original*, which when faithfully transcribed and authenticated by him is considered as an original. The instrument offered by the plaintiff and appellant is of this kind, and is certified in the customary mode, under the notary's hand and *signo*, accompanied by a certificate of three persons, stating themselves to be of the cabildo of that city, attesting that he is a notary public, and that faith is and ought to be given to his certificates, as such: the seal of the college of the notaries of the Havanna is also affixed. In addition to this, the plaintiff offered to the parish court a witness, by whom he expected to prove the signature at the foot of the power of attorney, to be that of a notary public, whose handwriting was well known to the witness.

This witness being rejected, on the ground that the signature and official capacity of the no-

tary ought to have been proven, by the certificate of the American Consul in the island of Cuba, the plaintiff filed a bill of exceptions to the opinion of the parish court, on which alone the cause now stands before us.

According to the doctrine laid down by the supreme court of the United States, in the case of *Church* vs. *Hubbard*, 2 *Cranch.* 187, referred to by this court in the case of *Caune* vs. *Sagory*, *ante* 81, the opinion of the parish judge in rejecting the witness is not supported by his reasoning, as the instrument offered in evidence is clearly not one of those which could receive authenticity, by the certificate of one of the agents of our government. It therefore becomes our duty to enquire whether it can be maintained by any other reasoning or principle of law. In cases of protested bills of exchange, the certificate of a notary public authenticated by his seal of office, is received in the courts of the United States as full proof of the drawer's refusal to accept or pay the bill, and according to the commercial law of England, when a notary public resides in the place to which it is sent, no other evidence will be received of that fact, in a contest relating to a foreign bill. This is perhaps allowed for the benefit of commerce: as the de-

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lays necessary to obtain authenticity to the protest, under the great seal of the nation, may be considered as incompatible with the dispatch required, in aid of fair and profitable commerce. It might be farther remarked, that this evidence is never offered to prove the main fact in the case, which is always the signature of the drawer and endorsers. Whatever may be the reason for it, it is in such case an established rule of evidence: but, we believe it does not extend further.

In investigating the subject under consideration, some difficulty occurs, whether to consider the instrument in the nature of an original act of the party, or a copy taken from the record of such an act. It is in truth what is called by the Spanish jurists an original, known to the laws of Spain as a public act, carrying with it its own faith and credit, and making full proof in the tribunals of that country, which arises from the authenticity it receives from the signature of a known officer of government, appointed for the purpose of making out and receiving the acknowledgment of parties to such instruments, of attesting, registering and keeping the original and authenticating copies, when required. But the question for the determination of this court is, how such instruments are to be

considered, when transmitted to foreign countries. Are we, in the present case, bound to require other testimony of the truth and genuineness of the instrument under consideration, than that which it bears on its face?

For a solution of this question, it is necessary to resort to that general rule of evidence, which requires, in all cases, the best that the nature of each will admit. We are of opinion that the only thing necessary to give the certified copy of the power of attorney, the subject of the present contestation, the same credit in our courts of judicature, which it would have in those of Spain, is proof that the person who certifies it is a notary public of the place from whence it comes, and that the certificate attached to it is really his. This evidence might be had by a certificate, under the national seal, attesting that the person certifying the instrument is a notary public for Trinidad, by the king's appointment, and if the dispute had any relation to his right to fulfill the duties of the office claimed by him, it would be the best evidence admissible in the case. But for all other purposes, it appears to us that proof of his being a notary *de facto* is sufficient: this may be made by witnesses, as well as by a certificate under the national seal.

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Therefore, if the witness offered by the plaintiff knows and will prove the person who authenticates the power of attorney to be a notary public, in the city of Trinidad, and that from a knowledge of his handwriting it is he who certifies and signs it, he ought to be received to verify these facts: as this case does not come within the rule of the civil code, which requires a comparison of handwriting by exports.

Upon the whole, we are of opinion that the parish judge erred in rejecting the witness.

It is therefore ordered, adjudged and decreed that the judgment be annulled, avoided and reversed, and that the cause be remanded for trial with directions to the judge to admit the witness thus offered by the plaintiff.

Cauchoix for the plaintiff, *Morel* for the defendants.

See same case, *February term* 1817 and *January term* 1818.

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If there be a prayer for general relief, damages may be given beyond a specific sum prayed, if the petition shews that they are due

MATHEWS, J. delivered the opinion of the court. In this case a rehearing was granted to the appellee, on the sole allegation, that the court had exceeded in their decree, the amount of damages, claimed by the appellant, who was plaintiff below.

It becomes necessary to decide, 1. Whether a judgment can be legally given for more than is demanded by the plaintiff in any case? 2. Whether sufficient matter is not stated in the petition to authorise the judgment already given by this court?

As to the first question, we are of opinion, that no judgment can regularly exceed what is demanded by the plaintiff, notwithstanding the expression in the institutes. *See Febrero, de escrituras, part. 2, book 3, ch. 18, n. 12, 466.* But in the present case, it is the opinion of the court, that the petition of the plaintiff and appellant contains sufficient matter to support the judgment given.

He states the slave, the main subject of the dispute, to be worth ten dollars per month. It is true, that at the time of the commencement of the suit, he estimated the damages at one hundred and fifty dollars: yet, in the conclusion

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he prays for general relief. This coupled with his averment, that the services, of which he was unjustly deprived by the improper conduct of the defendant and appellee, and still continued to be till the period of giving judgment, are worth ten dollars per month, is equivalent to a continued claim of that amount, which the judgment does not exceed.

It is therefore ordered, adjudged and decreed, that the judgment already given in this case remain unaltered and valid.

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After a cession, the debtor, who does not obtain a release, is not suable till the property ceded be liquidated.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. In this case, which was already before us, 3 *Martin*, 588, and was remanded, we decided that after a cession of goods, a debtor, who has obtained no discharge from his creditors, may be sued by any of them when he has come to better fortune.

The language of the law 3, *tit.* 15, *part.* 5, cited in our first opinion is, that "the debtor, who has made a cession of his goods, cannot afterwards be sued, and is not obliged to answer any judicial demand of his creditors, un-

less he should have made such gains as to be able to pay all his debts or part of them." By the expression, "he is not obliged to answer," it must be understood, according to the commentator, that he has no other answer to make but to plead his cession. That law stands unrepealed by the provisions of our civil code, which only establish the principle, that "a debtor, after a cession of his goods, is still obliged to surrender whatever property he may become possessed of," but does not say in what manner he shall be bound to do so. *Civil Code*, 294, *art.* 172.

A suit like this is therefore lawful in it's nature, and we are satisfied of the correctness of the decree, by which we reversed the judgment of the district court, who had dismissed it upon the ground that, after a cession of goods, none of the creditors to whom it was made, can individually sue the common debtor. But the shape which this case has assumed, since it has been sent back, and the difficulties which have occurred during its trial, and given lieu to the exceptions on which it is again brought up, make it necessary to inquire farther on the principles by which actions of this kind ought to be governed, and lay down some general rules, which

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may serve as a basis to the decision of the points now submitted to our consideration.

After a cession of goods, the person of the debtor is exempt from arrest, but the property, which he may acquire, is still liable to the payment of his debts—such is the general principle. That he may be sued by his creditors, when he has come to better fortune, is provided by the law of the partidas cited. We have decided that any one of them may in such circumstances sue him, because, to interpret the law so as to require the concurrence of all, would be to make the right of some dependent on the will of others.

As to the amount of property, which the debtor must have acquired before he can be made liable to be thus sued, there exists, between the Spanish law and our civil code, some difference, which it is proper here to explain and settle before we proceed further.

According to the law of the partidas, above quoted, property, which the debtor has acquired since his cession, is not *all* liable for his debts, but only so much of it as exceeds the amount necessary for his support. The same principle is to be found in the Roman law. *ff. de Cess. bon. l.* 4, 5, & 6.

Our code having made no such a reservation, it becomes questionable whether the provision of

the Spanish law is still in force. We were, at first, inclined to think that it was, and expressed ourselves accordingly in the first opinion given in this case. That first impression had been corroborated by the reflection that the French text of the article of our code, which treats of this matter, is copied *verbatim* from the code Napoleon, and that this article in that code, according to French commentators, is taken from the Roman law, and ought to be understood with the reservation then understood in favor of the debtor. But, upon duly weighing the words made use of in our code, particularly in the English part of the text, we think ourselves bound to consider them as repealing the provision of the Spanish law, which secured to the debtor the advantage alluded to. "The debtor is obliged to surrender *whatever* property he may afterwards become possessed of." *Whatever property* certainly signifies *all* the property, *without exception*. The exception, which formerly existed, must be considered as done away, by this expression.

Another principle, in matter of cession of goods is, that the debtor is exonerated from his debts to the amount of the property surrendered. Hence it follows, that he can be sued only for the balance remaining due, after deduction

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of that amount, and that, pending the liquidation of the estate surrendered, and until the balance which he may still owe be ascertained, no suit ought to be brought against him.

Finally, in an action of this kind, the right of the creditor to sue, being created by the change which happens in the debtor's situation, his demand ought to be grounded on that fact. He should allege and prove it. For in vain is it said that such a proof may be found impossible, if the debtor conceals his newly acquired property. Whatever may be the inconvenience and difficulty of proving the fact, which gives the plaintiff a right of action, it certainly is his duty to establish it. The truth is, that the difficulty here would not be greater than that of proving any other kind of fraud: but should it be, it will be no reason to depart from the general rule. In this case, therefore, if the want of that allegation had not been cured by the answer of the defendant, who did himself put in issue the fact on which the right of the plaintiff to sue depended, we would have dismissed the action when it first came up before this court.

Let us now see, by an application of the principle above laid down, whether the district court erred in refusing the testimony which was offered by the defendant to prove 1, that no dis-

tribution of the proceeds of the property surrendered by him had been made: and 2, that, since his cession, he had not come to an estate more than sufficient for his support and that of his family.

I. With regard to the first of these two points, we have already premised that, in order to enable individual creditors to sue the common debtor, who has acquired property since the cession, the estate surrendered must be liquidated, so far as to ascertain the amount which each creditor is entitled to receive out of the property ceded. Thus, if the defendant had offered to prove that the estate surrendered was not liquidated, and that the balance due to the plaintiff was not ascertained, it is clear that his testimony ought to have been admitted, for the purpose of ascertaining whether a right of action had as yet accrued to the plaintiff. The evidence offered did not go that length: it tended only to shew that no distribution of the proceeds of the property had actually been made: but, as it partly went to establish there was or had been property, in the hands of the syndics, to be applied to the discharge of the debts of the defendant, we are of opinion that it ought to have been received, because it might have enabled the de-

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fendant to shew that the plaintiff had no longer a claim to the whole original debt, but only to so much as remained due after the liquidation of the estate surrendered.

II. On the second point, viz. the offer of evidence on the part of the defendant to support the allegation in his answer, that, since his cession, he has not come to an estate more than sufficient for his support and that of his family, we think that this plea of the defendant, admitting that he has acquired *some* property since that time, the testimony offered could not avail him and was properly rejected. As to the doctrine contended for by the plaintiff and appellee, that, in suits of this kind, no inquiry into the situation of the debtor is necessary, because the matter is finally to be ascertained, at the time of the execution, it is repugnant to the principles above recognised.

We cannot dismiss this subject without an expression of our regret that no positive rule of proceeding, in cases of this nature, should have been prescribed by law, and of our hope that this exposition of the principles by which we think they ought to be governed, may henceforward prove a sufficient guide in similar cases.

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It is ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that this cause be remanded, with instructions to the judge to admit any legal evidence, which the defendant may offer for the purpose of shewing that the plaintiff has no longer a claim to the whole original debt, demanded in this suit, but only to so much thereof as remains due after the surrender; and it is further ordered that the costs of this appeal be borne by the appellee.

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

See same case, *January Term* 1817.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n. District. *May* 1816.

EASTERN DISTRICT, MAY TERM 1816.

LOUISIANA BANK *vs.* HAMPTON.

LOUISIANA BANK vs. *HAMPTON*, *ante* 94.

APPEAL from the court of the first district.

On the dismissal of an appeal, no mandate can issue to the inferior court to execute its judgment.

DERBIGNY, J. delivered the opinion of the court. When this case was first before us, we decided that we could not exercise our jurisdiction, for the reasons adduced in the opinion then given, and we dismissed the appeals. Since that, an application has been made by one of the parties, who complains that the judge of the first district refused to issue execution on his judgment, and he has prayed for a *mandamus* to compel him to issue it.

With a view to promote the ends of justice, we ordered a writ to issue, informing the judge, that the appeals in these cases were dismissed, and requiring him to proceed, as if no appeal

had been granted, or shew cause why he did not. To this requisition the judge has made an answer, from which it appears that he considers this mandate as insufficient and he expects from this court some explicit order. It has therefore become unavoidable for this court now to declare, whether or not they have a right upon the dismissal of an appeal to issue any mandate to the inferior court.

Hitherto, on such occasions, a desire of facilitating the progress of suits had induced us to send to the inferior court, in the form of a mandate, an information that the appeal was dismissed, and that they could proceed as if no appeal had been claimed. It is obvious that such an information was more in the nature of an advice than in that of a command. A command supposes the authority, in the person commanding, to enforce obedience to his order. Here, if the inferior thought fit to disregard the recommendation of this court, what could be done? Could he be ordered peremptorily to execute his own judgment? No. For that judgment not being the judgment of this court, it had no control over it. This court possesses no general superintending power over the inferior courts. It could not, for example, direct other courts to proceed, in cases in which the matter

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in dispute is below three hundred dollars, or in suits wherein no appeal was claimed. Neither can it assume such a power in cases in which the appeal has been dismissed. For, where is the difference between a case not appealed from, and one in which the appeal has been annihilated? None certainly, as to what regards the want of authority, on the part of this court to interfere. A case, in which the appeal has been dismissed, because this court could not exercise jurisdiction over it, owing to some insufficiency or illegality in the proceedings, does not differ in this respect, from one in which the court declares that it has no jurisdiction at all. Both are as completely without its reach, as if they had never come up.

We are aware that the practice of the supreme court of the United States, in cases of this kind, is to send to the inferior court a *mandamus* directing them to proceed. But that court is by law authorised to issue writs of *mandamus* generally "in cases warranted by the principles and usages of law to any court appointed, or to persons holding offices under the authority of the United States." No power of this sort is given to this court. It cannot issue any other mandates than those which are necessary to the exercise of its appellate jurisdiction.

Disclaiming, therefore, any right to interfere any farther in suits in which the appeal is dismissed, we will henceforward forbear sending any instruction to the inferior courts as to the conduct which they are to pursue in such cases. Our sentiment on the effects of a dismissal, so far as it may influence their conduct is sufficiently made known by the recommendations, in force of mandates, which we have offered in such instances, and by the opinion we gave in the case of *Clark's Ex's* vs. *Farrar*, 3 *Martin*, 212, that the appeal does not extinguish the judgment of the inferior court: and that in cases in which the appeal is set aside, the parties are replaced in the same situation, in which they were before any appeal was claimed.

It is ordered that the conditional mandate be rescinded and annulled.

Turner for the plaintiffs. *Duncan* for the defendant.

TERRY vs. *PATTON AND WIFE.*

A judgment rendered in Baton-Rouge, by a Spanish tribunal, before the cession, is not a foreign judgment.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. The plaintiff and appellant brought this suit to recover a sum which he claims under a

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decree or judgment, rendered in his favor by a competent tribunal exercising jurisdiction over the district of Baton Rouge, whilst under the Spanish government. He recovered in the district court and the defendants appealed.

It is admitted, by the counsel of both parties, that the Spanish record (a copy of which is certified by the parish judge, who became the keeper of the public archives of that district after the change of government) contains all the material facts in the case, except one, which they added, and is, that the seizure or embargo of the two slaves mentioned in the proceedings, was raised by order of the Spanish judge.

This record does not exhibit a very correct and formal course of proceeding, in the Spanish tribunal. However, it shews, 1, that judgment was there rendered in favor of the appellee for the sum of one thousand and three dollars and three cents, against James Profit, executor of David Ross, deceased, the former husband of the appellant Mrs. Patton.

The fact of judgment having been thus rendered, appears from the uncontradicted allegation of the appellee, in his petition to the Spanish governor for the seizure and sale of the goods of the deceased, David Ross: 2, that on this application certain slaves were seized, but

were afterwards delivered up and released by the Spanish governor, as is shewn by the statement of facts.

The judgment of the Spanish tribunal liquidated and fixed the amount due to the plaintiff, and ought so far to be considered as conclusive between the parties, as it is a decision rendered by a competent authority of a place, which has since fallen within our jurisdiction. The grounds on which it was given cannot now be enquired into, not being a foreign judgment. It does not appear that it was appealed from or in any manner suspended or annulled. The ultimate failure of the party to have it executed is not sufficient to destroy its legal effect.

By the death of Profit, the executor, it became necessary to make new parties to the suit, a circumstance which required that the appellee should proceed in the ordinary way for obtaining judgment, as the situation of the parties could not well authorise the extraordinary and summary mode of proceeding immediately by way of execution. No attempt has been made on the part of the appellants to prove payment or satisfaction of the Spanish judgment.

In this view of the subject, there is no error discoverable in the decision of the district court.

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It is therefore ordered, adjudged and decreed, that its judgment be affirmed with cost.

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

See *post* 310, *Decker's Ex's.* vs. *Bradford's Heirs.*

WILLIAMS vs. *PEYTAVIN.*

The liability of a carrier does not begin till the goods are delivered him.

APPEAL from the second district.

DERBIGNY, J. delivered the opinion of the court. A verbal contract was entered into between the parties, whereby the defendant and appellant engaged to carry to New-Orleans, in his barge, a quantity of cotton belonging to the plaintiff and appellee. The agreement was that he should take it down immediately on the return of his barge, which was expected in a few days. Thirteen bales of the cotton were laying at the plantation of one Mad. Rose, who had sold them to the plaintiff. This parcel not having been received by the defendant and appellant, and having shortly after been destroyed by the breaking in of the river, the present suit is brought for the recovery of its value.

The substance of the testimony produced, to

shew a breach of the contract by the defendant, is that he did not send his barge to the landing of the vendor of the cotton, nor any written order for its delivery, but employed a person verbally, to go and request the vendor to cart the cotton to the bank of the river—a request which was not complied with.

The general rule, with regard to carriers, is that they are answerable for any damage or loss which may happen thro' their fault to the goods committed to their charge. "If the master, says Abbot, receive goods at the quay or beach or send his boat for them, *his responsibility commences with the receipt.*" After they have been received, should they perish on the shore before they are put on board, the carrier is answerable. *Etiamsi nondum sint res in navem receptæ, sed in littore perierint, quos semel recepit periculum ei pertinere, ff. l.* 3. *naut. caup.*

The principle is the same in the common law of England, *Strange* 690. To charge the defendant therefore as a carrier, according to the general rule, a delivery to him ought to have been proven; but the contrary being in evidence, if he is still liable for the loss of the cotton, it must be on account of some particular obligation *arising* out of his contract.

He had engaged to ship the cotton immediately

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on the return of his barge. Here the plaintiff holds him responsible, because he did not within the time agreed upon, send his barge to the landing of the vendor's plantation, and did not, either in person or by a written message, make application to the vendor to have the cotton removed. It does not appear that he had entered into any obligation to demand, in a formal manner, the delivery of the cotton from the person in whose custody it was: but, from the nature of his contract, he was bound to send some notice to that person, of his coming to take it.

It is by no means clear that if he had failed to give any advice of his coming, and had passed on without calling for the cotton, he would have been answerable for the loss of the cotton, in the care of another person. But it is in evidence, that he sent a message, requesting that the cotton should be carted to the levee, and that his message was not attended to. The circumstance of his not having been at the landing of the vendor, to take the cotton, is of no moment: for, he was not bound to go before he knew that the cotton was brought to the place, or at least that they were carting it there. He was, at the time, at the distance of twenty or twenty-five arpens below the landing, employed in taking on board of his barge other cotton of

the plaintiff. It even appears, from the deposition of one of the witnesses, that the appellant had already made an attempt to go to the landing of Madame Rose, but the passage to it being blocked up by floating timber, his hands had made vain efforts to reach it. It was natural that he should wait till he heard that the cotton was on its way to the levee, before he made any further trial. He certainly has done as much as can be required from a carrier.

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

Duncan for the plaintiff. *Davesac* for the defendant.

ENET vs. *HIS CREDITORS.*

4m 307
50 793
51 144

An appeal lies from a decree confirming the nomination of a syndic.

A majority *in amount* of the creditors is necessary for the appointment of a syndic.

Unless all the creditors agree the syndic must be chosen among them.

APPEAL from the fourth district.

DERBIGNY, J. delivered the opinion of the court. This is a case in which some of the creditors of a bankrupt have elected a syndic, in opposition to others, who contend that the election is illegal and void. From the decree confirming the nomination, an appeal is brought up by the opposing creditors.

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The first question which arises is, Whether this is a decision that could be appealed from?

The jurisdiction of this court is confined by law to the revision of final judgments and decisions. It has been so recognised in the case of *Brooks's Syndics* vs. *Weyman*, 3 *Martin*, 9. But this court has declared at the same time, that what is to be deemed a final decision must depend on the circumstances of each case. This amounts to a recognition of the principle, that an appeal lies from a decree which, though not final in the proceedings, is final as to the consequences, or in other words so far final, as to cause to the party an injury thereafter irreparable: as is expressed in *III. part.* 13, 23, and in the *Recopilacion de las leyes de Castilla* 4, 18, 3.

The decree here appealed from is not a final judgment in the proceedings: for such final judgment must be that which decides upon the rights of all parties concerned, by providing in what order and what proportion the debts shall be paid. We must therefore ascertain, whether this decree be one which causes to the appellants an irreparable injury.

The nomination of syndics, in cases of a cession of goods, vests such syndics with a right to take possession of the estate of the bankrupt,

to have it sold, to receive the proceeds and distribute them. For the faithful performance of this trust, they give no surety, because they are in fact the attornies of the creditors. Before any definitive judgment can be given in the case, the estate or the proceeds of it are at their entire disposal. If they dissipate or embezzle it, will an appeal from the definitive judgment afford any remedy? Clearly none. A decree then, the consequences of which may be such is certainly one of those decisions, which are considered in law as having the force of a final judgment.

Its correctness ought to be inquired into, while it is time to prevent the mischief. To say that this inquiry shall be made, when the final judgment comes before us, which signifies in other words, when the evil may have become remediless, would amount to a denial of justice.

In this case, it is contended that the nomination of the syndics is void on two grounds: 1, because made by creditors, whose united credits do not amount to a sum equal to what is due to the creditors who opposed the nomination: 2, because the person appointed is not one of the creditors of the estate.

I. On the first point, nothing is more positive than the authority of *Febrero* in his treatise *de*

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Juicios, lib. 3, *cap.* 3, *sect.* 1, *n.* 26, speaking of the nomination of the administrator of the estate, (here named syndic) he says that "it must be made by all the creditors or a majority of them *in amount*" and not in number.

II. On the second, the dispositions of our *Civil Code* 84, *art.* 34, are equally decisive. It is there provided that "when a debtor surrenders his estate for the benefit of his creditors, they may cause to be appointed by the judge a curator, whose duty it shall be to take care of such estate, or they may appoint some one or more *among them*, under the name of syndics or assigns, to have the management of said estate." The appellees contend that this faculty, given by law to the creditors, does not exclude the right, which they have, independently of any law, to choose whom they please to take care of their interest. That may be correct, when applied to a case in which all the creditors join in the nomination: but a nomination by a part must be made agreeably to law to bind those who do not concur in the appointment.

It is ordered, adjudged and decreed that the decree appealed from be avoided, annulled and reversed, and that a mandate issue to the district

judge commanding him to convoke, at such time and place as he may think fit, another meeting of the creditors of Joseph Enet, for the purpose of proceeding to the nomination of a syndic or syndics, according to the provisions of the law.

Moreau for the appellants. *Hiriart* for the appellees.

See *post June Term*, same case.

DECKER'S EX'S. vs. *BRADFORD'S HEIRS.*

4m 311 105 625
4m 311 116 881

APPEAL from the third district.

A judgment rendered in Baton Rouge, before the cession is not a foreign judgment.

A judgment is sufficiently certain, when the amount recovered clearly appears from the documents.

MARTIN, J. delivered the opinion of the court. This action is brought on a judgment obtained in the tribunal of the governor of Baton Rouge, before the Americans took possession of that part of the country. The defendants resist the claim of the plaintiffs on two grounds.

1. That the judgment must be considered as a foreign one, and the court of this state have the power, and it is their duty, to inquire into the grounds on which it was rendered, and if this court do so, it will appear that the judgmeut was improperly rendered.

2. That the judgment is null for uncertainty.

I. This court is of opinion that judgments, rendered in this country, before the Americans took

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possession of it, cannot be considered as foreign. They vested property, and the treaty of cession provides that the inhabitants of the ceded territory shall be protected in the free enjoyment of their *property*, &c. *art.* 3. Now, to divest the plaintiff, in such a case, of the property, *in action*, which he acquires by the judgment, would be a violation of the protection, which was here stipulated for; the judgment before us had passed *in rem judicatam;* under the former government; its character was fixed, and cannot admit of any alteration under the new.

II. If, however, it be not *certain*, the vice has not been cured by a change in the government.

The plaintiffs sued on an obligation for a specific sum, the price of a tract of land: the defendants were called upon to, and did, acknowledge it as the deed of their ancestor, but pleaded that one of the conditions of it to be performed by the plaintiffs' testator had been broken; and the judgment of the governor is that "the claim of the plaintiffs appearing proven and just, and the allegations of the defendants appearing unfounded, it is just the plaintiffs should recover the sum due." An alcalde is directed to compel the defendants to pay it with costs.

The defendants contend that the judgment being for *a sum due,* without any further specification, is null and void for uncertainty. But here, it is impossible that the sum intended to be awarded should be mistaken. A sum is claimed on an obligation; the obligation being acknowledged by the defendants and the plaintiffs' claim not being contested as to its amount, the sum intended to be awarded in the judgment must be that claimed in the petition, and acknowledged to be due in the acknowledged deed of the defendants' ancestor.

Farther, the judgment is perfectly *legal.* The laws of Spain invalidate judgments which do not express a certain sum, *cantidad cierta, a menos que se remitte a los autos, y en ellos conste. Febrero de Juicio ordinario, n.* 499.

The sum need not be expressed, if the judgment refers to the documents, *autos,* and thereby the amount appears, *de ellos conste.*

Here the judgment begins by informing us that by *the documents, it appears that the sum claimed is due. Appareciendo por los documentos . . . ser legitimamente Don D. Bradfort deudor de la suma reclamada.* It next declares the opposition of the defendant unfounded, and concludes that it is just he should pay the sum due,

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la suma debida, and requires the officer to cause it to be made.

Here is, therefore, a clear reference to the acts from which the sum is said to appear due. In examining the main document, the deed, which is the ground of the action, we find that the sum awarded appears thereby to be due.

The plaintiffs are clearly entitled to the benefit of their judgment, and the decree of the district court is affirmed with costs.

Livingston for the plaintiffs. *Turner* for the defendants. See *Terry* vs. *Patton & ux.* 301.

PRAMPIN vs. *ANDRY.*

An order quashing an execution is appealable from.

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

MARTIN, J. delivered the opinion of the court. The plaintiff had judgment against the defendant, and execution had issued thereon; six months after, the execution being unsatisfied, he obtained a rule on the plaintiff to shew cause "why the execution should not be quashed," and one week after the parish court gave judgment that the execution be laid aside, staid and quashed.

From this decision the plaintiff appealed, and the statement of facts shews, that no evidence was offered except that which results from the record.

The suit originated by a petition grounded on a notarial instrument, by which the defendant undertook to pay nine hundred dollars to the plaintiff, and mortgaged certain property therefor. The prayer of the petition was for judgment against the defendant and provisorily a seizure of the premises. The defendant came in and there was judgment against him. He prayed for a new trial, which after an argument was refused.

The order, decision or decree by which the parish court deprived the plaintiff of the right he had acquired, by the judgment and execution, being one, which, if improperly made, occasions a *grievance irreparable*, is one against which this court ought to relieve, and the case is a proper one for an appeal.

Nothing appearing from the record or statement of facts, which can justify the order complained of, it is ordered, adjudged and decreed that the parish court be directed to order the issuing of an execution to the sheriff of the same tenor and effect as the one staid and quashed,

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and that the appellee pay the costs of the appeal.

PRAMPIN *vs.* ANDRY.

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

ABAT vs. *DOLIOLLE.*

A statement of facts may consist of the detail of the evidence.

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

Altho' the supreme court think the inferior court ought to have charged the jury, as the appellant prayed, or granted him a new trial if the whole facts are before them, they will not remind the case.

MARTIN, J. delivered the opinion of the court. The plaintiff and appellee complains that the statement of facts, which comes up with the record, in this case, is *irregular*, inasmuch as it contains a detail of the testimony received below, or a statement of every fact, not only proven, but attempted to be so there.

The act which regulates the practice of the court, 1813, *ch.* 12, *sect.* 11, provides that "there shall be no reversal for any *error in fact*, unless it be on a *special verdict*, rendered in a district court, or on a statement of facts, *agreed upon by the parties*, or fixed by the court, if they disagree."

The meaning of the legislature is not easily to be ascertained. How can we reverse a judgment for an *error in fact*, when the facts are found by a special verdict, *agreed upon* by the

parties, or fixed by the court? The obvious inaccuracy of the expressions made use of by the legislature, in this section, occasioned much confusion on the establishment of this court; and in the third case that came before them, *Brooks's syndic* svs. *Weyman*, 3 *Martin* 13, the counsel with a view, it is believed, of ascertaining the opinion of this court, moved for a *venire*, in order to have the facts tried *de novo*. The motion was overruled and an opinion was expressed that *no re-examination of facts in this court*, was contemplated by the legislature.

On the authority of this decision, the counsel for the appellee in the present case, contends that a re-examination of facts must precede the application of the law, since the facts, upon which we are to pronounce, are neither *found* by a special verdict, *agreed upon* by the parties, nor *fixed* by the court below. The opinion of the court, in the case cited, must be understood to relate to a re-examination of the facts, in the manner in which it was asked, *by a jury*, or by the audition of oral testimony.

Two months after the decision there invoked, in the case of *Lebreton* vs. *Nouchet*, 3 *Martin* 68, the court entered into a very minute examination of the facts shewn in evidence, in the court below, and transmitted with the record—

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ABAT vs. DOMOLLE.

they attended to certain acts of one of the parties—to letters which he had written, and finally pronounced the result of the impressions made on their minds, and declare what is proven on one side, insufficient to counterbalance the weight of the facts which are opposed.

In the month following, they acted on a statement of facts, composed of the depositions of several witnesses, and in the opinion of the court considerable stress is laid on the conclusion which is to be drawn from the particular facts sworn to, in order to fix the one, upon which the question turns. *Duplantier* vs. *St. Pé, id.* 136.

In the first case that was tried in the western district, the decision of the judge *a quo* and the documents accompanying it (being admitted to contain all the facts in the cause) were taken and considered as a statement of facts, the testimony of one of the witnesses commented upon by the court, and an opinion expressed of the weight to which it is entitled to. *Cavelier & al.* vs. *Collins' heirs, id.* 188.

In *Duplantier* vs. *Pigman, id* 244, the court express the result of their examination of the evidence, and conclude that there cannot be any doubt that he, the defendant, is liable to eviction—that the mortgage appears to be unsatisfied,

and that to a very large amount, and set aside a general verdict.

In *Brown* vs. *Kenner & al. id.* 270, the court declare that from the testimony given below, all of which is transmitted, certain facts are to be collected.

Two depositions, with the cross examinations of the witnesses, were sent up and acted upon, in lieu of a statement of facts, in *Villere & al.* vs. *Brognier, id.* 326.

A number of other cases to this effect might be cited, and there are none, except the one first quoted, from which the opposite doctrine might be inferred.

Altho' the practice is now, for the first time, about to be settled, by an express decision, it appears that a statement of the facts, given in evidence in the court below, has universally been admitted in this, whether *agreed upon* by the parties, or fixed by the judge. This construction of the law has been that of counsel and district judges, ever since the establishment of our present judiciary system, throughout every part of the state, and has been contenanced by every judge who sat in this court. The objection which is now made to it has been patiently and maturely considered and we are of opinion that it cannot prevail.

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The intention of the legislature was to change the *old law*, under which a new trial always took place on appeal. The *evil* was that witnesses and jurors were required in the court above, and when the sessions of the court of appeals were confined to two places for the whole state, the labor and expence of attendance became insupportable. The *remedy* was a provision that the facts should be sent up from the court below with the record. This was to be effected by taking down the testimony of every witness in writing, by sending up an abstract of the evidence, or the final result of it. The legislator has left this to the option of the parties, their counsel, or the judge *a quo*. The words *statement of facts* are satisfied if the material facts, those on which the question turns, be set down: and they are equally so if every tittle of testimony be taken down and sent up. Neither is it easy to perceive any greater inconveniency in the latter than in the former mode of sending up the whole record, except that which arises from the labour and expence. We hear of clamours on the supposed violation of the right of trial by jury: but they, who thus declaim, may by little attention to the conduct of the cause, in the inferior court, secure every possible advantage which may result from a trial by jury.

The law has provided, 1805, *ch.* 26, *sect.* 6, that "all facts, intended to be submitted to the jury, shall be drawn up by the party intending to submit them." Now, if care be taken to present naked facts for the decision of the jury, a special finding may easily be obtained. Then no statement of facts will be necessary, the testimony of no witness, no piece of evidence is to be sent up.

If this be neglected by the counsel, and the judge below indulge the parties, by suffering the case to go to the jury without the formal submission of any issue, it is impossible for this court to declare the law, unless the evidence be previously weighed by the parties, their counsel, the judge below, or by this court. In such a case it is desirable that the parties or their counsel should do so. If they cannot concur in a result, and will candidly agree on a detail of all the evidence adduced and submit it to this court, who can complain? Will the judges of this court, could they legally, decline to yield their aid? If the animosity, too often attending litigation, prevent the parties from agreeing either on the details or the final result of the evidence introduced, the law has said a statement must be made by the judge who tried the cause, and this, whether the issue was tried by a jury or other-

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wise. Here again, if motives of delicacy prompt him to it, or if he judges it safest to transmit a detail of the evidence introduced, nothing appears to us to forbid it. If he deems it best to weigh and decide on the evidence, and send us the result of the impressions which his mind has received, he is at liberty so to do, and in neither case can this court compel or prevent him.

In cases in which the parties do not resort to a jury (and these are by far the most numerous) there can hardly be any doubt, that by constituting this court a court of appeals, the constitution intended that the errors of inferior courts on points of fact, as well as those on points of law, should be corrected by it. In cases in which a jury is called in below and a general verdict is found, whether the evidence be weighed and pronounced upon by this court or by the lower one, it is a court, not the jury who do so.

We are of opinion, that the practice which has hitherto prevailed, to send the whole evidence as a statement of facts, is not in the least repugnant to the act of the legislature, and that whether it be chosen by the bench, the parties, or their counsel, we are bound to act upon the facts or evidence thus transmitted.

The defendant is sued as indorser of a note,

which it is admitted was duly protested, and regular notice was given: but, the answer sets forth certain facts to avoid or arrest the claim of the plaintiff, viz. that the note in suit was, in the knowledge of the plaintiff, indorsed on the faith and security of a note of $ 6,800, which was deposited with Anthony Abat, the brother of the plaintiff; that the maker of the note in suit has failed, and that the large one, by which the defendant was secured in his indorsement, has been removed out of the reach of the defendant, and is kept out and concealed by persons with whom, it is alleged, the plaintiff colludes and connives: so that, if the defendant pays the note in suit, he will find himself by the act of the plaintiff, his agents, or persons over whom he exercises a control, or with whom he colludes, absolutely prevented and disabled from obtaining any benefit or advantage from the security, in contemplation of which he gave his indorsement.

On these facts, the defendant has built his hope that the court will protect him from the plaintiff's claim: at least so far, as to see that the defendant's money be not put into the plaintiff's hands till the note for $ 6,800 be produced or satisfactorily accounted for.

I. At the trial, in the parish court, the de-

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fendant offered in evidence a sketch of the insolvent's bilan, by which it appears, that this note was therein inserted as the property of the insolvent, and Antoine Abat, the plaintiff's brother, with whom it is alleged the plaintiff colludes, in whose hands the said note had been deposited, and who was employed in the discount of the one on which the present suit is brought, caused the entry of the said note to be striken out and erased. This piece of evidence being offered to go to the jury, as circumstantial proof of the allegation of the defendant, was rejected by the parish court, whereupon the defendant took a bill of exceptions.

II. Towards the conclusion of the trial, the defendant's counsel requested the parish judge to charge the jury, that, "if from the evidence, they believed that the defendant's endorsement was guaranteed by the note of $6,800, and the plaintiff was privy thereto, and that it was, in the manner charged, hindered from appearing on the bilan filed, they ought to find for the defendant." The parish judge declining to give such a charge, the defendant's counsel took a bill of exceptions thereon.

III. The jury brought the following verdict. "We, of the jury, find for the plaintiff the sum

mentioned in the petition: but the jury are of opinion, that the note of $6,800 shall be surrendered to the court to cover the note of L. Dussuau, for which it was by him given and signed."

The parish judge thereon gave *judgment for the plaintiff, without paying, however, any regard to the concluding part of the verdict, the same not being warranted by law.* Whereupon the defendant appealed.

He contends, that the parish judge erred, 1. in rejecting the sketch of the insolvent's bilan, 2. in refusing to give the charge prayed for, 3. in entering judgment for the plaintiff while it was his duty to have entered it for the defendant, or at least to have awarded a new trial.

I. The objection made to the opinion in rejecting the sketch of the bilan was considered by us in June last, 3 *Martin*, 659, and we still think, that the defendant did not offer such evidence of a connection between the plaintiff and Antoine Abat, as could authorise the production of the sketch as evidence against the plaintiff.

II. The judge ought to have charged the jury that if the facts alleged were proven, and they concluded that the note for $6,800 was kept out

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of sight by the agency, collusion or connivance of the plaintiff, they might either find for the defendant, or state the fact especially in their verdict—which would have been but a literal modification of what he was required to state to the jury.

III. It is very clear, that the jury took the law to be as the defendant's counsel had suggested it to be, and that they were of opinion, that the facts stated in the answer were sufficiently proven. For, that verdict is literally the judgment which the defendant's counsel insisted ought to have been given.

IV. The judgment of the parish court is therefore directly at variance with the verdict.

It is true, that if the jury find the whole issue and add matter impertinent thereto, the impertinent matter ought to be rejected and judgment given on the other part of the verdict. But, here matter of avoidance was pleaded, and was to be acted upon by the jury. First, they were to find the facts in the petition: they answer, we find for the plaintiff the sum in the petition with interest. From this, the court, by implication, rightly concluded that they found the facts, on which the plaintiff rested his claim, true. They next pass to the examination of the facts

alleged in the answer, on which the defendant expects to arrest and suspend the plaintiff's claim, until the note alleged to be withdrawn is returned: the jury thereon answer that the note ought to be surrendered to the court. The facts, alleged in the answer, being by induction as strongly found by the jury, the judge ought to have concluded, that the second or concluding part of the verdict was warranted by law, or that neither the one nor the other were so.

This case is a glaring instance of the difficulties in which courts involve themselves by suffering the looseness of practice which generally prevails. The law, which requires that issues should be made and submitted to the jury, is disregarded; and juries, without any legal clue, endeavour to extricate themselves from the perplexing situation in which they are placed: an important part of their verdict is rejected, as not being warranted by law. In the present case we think that the part of the verdict rejected by the court was warranted by law.

We have carefully examined the record and the statement of facts, with the view of ascertaining what judgment we might properly give. The defendant has insisted on having the facts of his case found by the jury; they appear to

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have been of opinion that they are as he has alleged them. Yet, in examining the record and statement of facts, we are not prepared to come to the same result. A jury have legal means of information not equally within the reach of a court. They know the character of the parties and the weight to which the testimony of each witness is entitled. Without any fault on his part, through the error of the judge below, he has been disabled from obtaining the effect of the verdict of the jury in his favor. Yet, however inclined we may be to afford him relief, we cannot avoid the unpleasing task of pronouncing on his case, upon the evidence spread before us. It is not alleged, nothing can justify the belief, that there is any evidence behind which might be favorable to him.

The plaintiff has substantiated his claim: his conscience has been probed, and the result is, that he must recover on the case made out, unless the defendant proves the alleged fraud. In this it appears to us he has not been successful.

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

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

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vs.
HIS CREDITORS.

RHENDORFF vs. *HIS CREDITORS.*

If an insolvent debtor's year's residence expires, after he has been confined thirty days, and he applies for the benefit of the law, within thirty days after the expiration of the year, he cannot be relieved.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The petitioner prayed for the benefit of the "act for the benefit of insolvent debtors in actual custody;" his application was refused on the ground that it was too late, having been made after the expiration of more than thirty days after his confinement. His application admits this, but avers that the year's residence, which is required, in order to entitle a prisoner to relief under this act, did not expire until after the lapse of the first thirty days after his confinement, and he offered evidence that, within thirty days after the year's residence was completed, the application was made.

The court below rejected the evidence, and to its opinion on this point, the bill of exceptions, on which this case comes up, was taken.

We are of opinion that the evidence was properly rejected. If the applicant had stated that, as soon as the year's residence was acquired, he made application, his case might have been apparently, and only apparently better, but he states that within thirty days, after the expiration of the year, he applied. This was not even

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doing every thing in his power to comply with the requisites of the law.

If, by his neglect, or by the provisions of the act, he be not able to bring himself within it; it is his misfortune.

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

Morse for the petitioner. *Depeyster* for the creditors.

TURNER vs. *RABB.*

If an order for cotton be given, on discharge of a debt, and the creditor delays presenting it thirty three days, the loss of it by fire will be his.

APPEAL from the third district.

This suit was brought on the following due bill, viz: "Due H. Turner, or order $412 18, value received, and for which payment I have given him my order on Canada Cason, at Farrar's gin, for 3435 lbs. baled cotton, which if paid is in full, if not, then this is valid. Nov. 11, 1809. S. Rabb."

Annexed to this was the order for the cotton, on which was written "I certify that this 14th day of December 1809, Mr. H. Turner, by his agent A. D. Wethers presented me with an order for ten bales cotton, which I cannot pay,

owing to the burning of Capt. Farrar's gin, in which said cotton was consumed by fire. Canada Cason."

The answer resisted the plaintiff's claim, on the ground that the order had been detained by the plaintiff for an unreasonable time, before its presentation, during which the cotton was accidentally destroyed.

Glasscock deposed that three or four weeks after Christmas, 1809, he was at Farrar's gin, and heard the defendant say to Canada Cason, that he had drawn on him an order for ten bales of cotton, in favor of the plaintiff, and heard Cason reply that the cotton was ready. There was about 600,000 lbs. of cotton in the seed, in the gin, when it was burned. The defendant had nine bales made up, and the witness lent him one weighing upwards of 300 lbs. He knows nothing of the weight of the nine bales. Three or four weeks after this conversation, the gin was burned.

The statement of facts consisted of the deposition of Glasscock, the note, order for the cotton and the certificate or declaration of Canada Cason the gin-keeper.

Turner for the plaintiff. The note is abso-

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lute for the debt, and the order operates as a defeasance. In all cases, the person, who expects to avail himself of the defeasance, must shew performance. The order is only an authority to receive the cotton, which, when received, is to operate a payment: but the note is no payment. This is proven by the giving of the note and the order, and by the recital of the order in the note.

The order was presented on the 14th of December, two weeks before Christmas, and the gin was burned before.

Cotton receipts, in the Mississippi territory, the place of the domicil of both parties, and in which the contract was entered into and was to be performed, are negociable, and according to law, when no day of payment is stipulated, are payable in four months from the date. *Dig. Miss. laws* 233. The order in the present case, contains no day of payment; the gin-keeper had therefore four months to pay it in. The plaintiff was not therefore in fault when he presented it thirty-three days after he received it. Glasscock's testimony cannot be depended upon; according to his account, the gin must have been burnt several days after the presentation of the order. It must have been burned on or about Christmas day.

There is no time for presenting a bill of ex-

change payable at sight or so many days after sight. 2 *H. Bl.* 565.

Bradford, for the defendant. Our case is not that of a cotton receipt. It is true that, in the Mississippi territory, when a gin-keeper gives a receipt for cotton delivered him in the seed, without expressing the time when he is to return it baled, the law gives him four months. But here the plaintiff received an order for the delivery of the cotton in bales, which the defendant, according to the testimony, had in the gin, lacking one bale, which he borrowed. From the moment of the delivery of this order, the defendant lost all right on the cotton, all control over it; he could take no measure for its preservation—between him and the plaintiff the property of it passed to the plaintiff—it was really a sale of so much cotton, the price of which was to be applied to the discharge of what the defendant owed to the plaintiff. The plaintiff was vendee, the price was already paid; he was therefore the owner of the cotton—it perished without any fault on the part of the vendor, and the rule is *res perit domino suo.*

The certificate of the gin-keeper, produced by the plaintiff, to throw the loss of the cotton upon the defendant, establishes the burning of the

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gin, prior to the presentation of the order. It shews that the conflagration alone prevented the plaintiff's receipt of the cotton. *Glasscock* swears we had it in the gin: and the plaintiff himself has placed on the record the declaration of the gin-keeper, that, owing to the conflagration, the cotton could not be delivered. The exact date of the order, the time of the delivery of it, does not appear; but it had been delivered, at the date of the note, the 11th of November: how long before, we cannot ascertain. Taking then the position the most favourable for the plaintiff, the application was delayed thirty-three days. For what purpose? The answer necessarily presents itself for the convenience of the plaintiff. Who is then to suffer? He who was the cause of the delay which has occasioned the loss: for the delay is the cause of the loss.

MARTIN, J. delivered the opinion of the court. The plaintiff sues on an instrument by which the defendant acknowledges a sum due to him or his order, and declares, that he has given in payment an order for a quantity of cotton, to be received at a gin in the Mississippi territory, which if paid is in full, otherwise the instrument to be valid for the sum stated.

The order is annexed to the petition with the

instrument. The first is without a date, the other has that of Nov. 11th. 1809.

The defendant alleges that the plaintiff is without a cause of action, because he neglected to present the order for payment, till the cotton was accidently destroyed by fire.

Glasscock, a witness introduced by the defendant, deposed, that the gin, at which the plaintiff was to receive the cotton, was burnt about Christmas 1809: the defendant had then there ten bales of cotton, one of which was lent him by the witness. This last bale weighed 300 lbs.: the witness knew nothing of the weight of the other bales.

On the back of the order is an endorsement of the gin-keeper, stating, the order had been produced to him on the 14th of December, 1809, and was not paid, the cotton having been burnt.

The district court gave judgment for the defendant and the plaintiff appealed.

His counsel shews, that by a law of the Mississippi territory, in which the contract under consideration was made, gin-keepers give receipts for seed cotton brought to their gins, that these receipts are negociable, and when no day of payment or delivery of baled cotton is therein mentioned, they become due four months after date. That in the present case, there being

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no receipt from the gin-keeper, he was not bound to deliver the bales till four months after delivery of the seed cotton, and these four months had not elapsed, when the cotton was burnt. So that the gin-keeper, by a call on him, could not have been put *in morâ*, nor was he compellable to deliver the cotton, therefore the plaintiff was guilty of no neglect, and consequently is not liable for the loss.

In looking on the order, we find it to be for *ten bales of my* (the defendant's) *cotton:* and it is in evidence, that the defendant had that quantity of bales in the gin-house. Whether these bales proceeded from seed cotton, sent thither to be ginned—whether he had a receipt, without a specific time of delivery—whether that time or the legal one was elapsed—or whether the bales had been purchased from the gin keeper, or any of his customers, does not appear. The law, therefore, of the Mississippi territory which is cited does not apply to the present case.

The order was *given*, and consequently *received* in *payment*. It must therefore have *prima facie* extinguished the debt, at least suspended it till the happening of the contingency mentioned, viz. the *non-payment* of it.

The defendant's obligation was reduced to

the warranty of the payment; the plaintiff submitted to the obligation of requiring it. If he had immediately applied, there is no doubt that the cotton would have been delivered. Its destruction results from the delay, and this court is only to examine whether the district court erred in determining that a delay of thirty three days was an unreasonable one. The record does not present any circumstance, that may take the present case, out of the general rule. It ought to have been shewn, if such was the case, that the distance of the gin, the inconveniency or difficulty of access thereto, the ordinary mode of doing business there, presented favourable features in the plaintiff's case. This has not been done.

The naked question is, therefore, when one has taken upon himself to receive goods, may he protract the risk of the former owner thirty three days; the judge below has thought that he could not, and it does not appear to us that he erred.

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

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LAMOTHE'S EX'R vs. DUFOUR & AL.

LAMOTHE'S EX'R *vs.* DUFOUR & AL.

APPEAL from the fourth district.

If the testator extends the time for settling his estate, beyond the year, if necessary, and the executor does not begin a suit till thirteen years after, the delay will not be justified by the extension of the time.

MATHEWS, J. delivered the opinion of the court. The plaintiff and appellant brought suit, as executor of Nicholas Lamothe, late of the city of New-Orleans, against the appellees to recover from them certain property claimed by him, in right of his testator. The action was commenced in 1812, before the superior court of the territory of Orleans, and remained to be tried, under the constitution and laws of the state, by the court from which this appeal is taken.

In the course of the trial in the court below, the plaintiff offered in evidence to support his right to sue, in his said capacity of executor, an authentic copy of the last will and testament of Lamothe, and also a judicial proceeding of governor Grandpre, dated at Baton Rouge, September 1799, establishing the death of Lamothe, with an inventory and other proceedings relating to the estate of the testator, at the instance of the plaintiff, his executor. The district court rejected the evidence, as insufficient to maintain the plaintiff's right to sue for and recover the property thus claimed by him, and ordered the suit to be dismissed. To the opinion of the

court, inrejecting the evidence, a bill of exceptions was regularly taken by his counsel, and on it alone the cause comes up to this court.

The case is submitted to us, without an argument, and it becomes our duty to determine the legal effects of the will in question, as to the powers therein granted to the executor. In the fourth section, the testator declares that he did not possess any other goods, than those which he held in partnership with his wife, and about which he was in litigation with certain persons, who had acquired the possession of them, in consequence of a testamentary disposition of his wife, and that the suit had for its principal end the annulling of his wife's testament, and establishing their matrimonial contract, which contained a clause of reciprocal donation: in the event of his death, he requires his executor to prosecute said suit to its end. In the fifth section he appoints the plaintiff and appellant his sole executor, and gives him power to settle all the affairs of his estate, and for this purpose extends the term of it, should it be necessary, beyond the year, within which, according to law, an executor is bound to complete the administration of his testator's estate.

The fourth section of the will limits the power of the executor to the prosecution and con-

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clusion of a suit, which the testator had commenced in his life time, and certainly ought not to be extended to the present action, as it clearly appears not to have been commenced before the year 1812, about thirteen years after the testator's death. It is therefore evident that the plaintiff and appellant derives no authority to commence and prosecute the present action under this part of the will.

To establish the legality and justice of the appellant's pretentions to institute and carry on this suit, we have been referred to Febrero's treatise on contracts and wills, in which it is laid down that executors "*tienen de termino para complir su encargo el que prefine el testador, ya sea mayor or menor que el legal: y se ninguno les senala, deben evacuar lo mas breve que pueden. Se non pueden concluir lo con tanta brevidad, les concede el derecho un ano contado desde el dia de su muerte.*" *vol* 1. *ch. n.* 254. The executors have the time, to complete their functions, which the testator has fixed to them, be it greater or less than the legal period: and if he has fixed none, they ought to complete them as early as possible, and if they cannot do it in so short a time, the law allows them one year from the death of the testator.

According to this authority, perhaps, the sixth

section of the will would have operated so as to extend the authority of the executor beyond the legal period of one year, for the purpose of carrying into effect the dispositions of the will, if he had commenced the execution of it in all its parts, immediately on the death of his testator. This he has not done: but on the contrary, he has delayed for the space of nearly thirteen years, to begin that which the law required him to complete within one. We are of opinion, that the power to commence and prosecute the present action was not continued and supported by this latter section of the will.

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

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

RION vs. *RION'S SYNDICS.*

A married woman has a privilege for her dotal property only.

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

DERBIGNY, J. delivered the opinion of the court. The husband of the plaintiff and appellant having made a surrender of his property to his creditors, she demands to be paid her matrimonial rights by privilege.

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In support of her claim, she produces her marriage contract, on the face of which it does appear, that she brought nothing at the time of her marriage, but gave power to her husband to collect any sum which might be, or become, due to her. It is in evidence, that in consequence of that authorisation, he received some years after a sum of money, which she now claims.

For her title to a privilege, the appellant relies principally on the custom of Bordeaux, where the marriage took place. There it is shewn married women have for the reinbursement of their dowry, *dot*, not only a mortgage on the real estate of their husbands, but a privilege upon all their property, whether real or personal. Thus, if the plaintiff had succeeded to shew that the rights which she claims are dotal, it would be worth inquiring how far the law of the place where the marriage was contracted, would affect the rights of creditors in this country, on personal property acquired here; and also whether the laws which prevailed here, when the plaintiff arrived in this country, and by which married women enjoyed a similar privilege on the estate of their husbands, would be applicable to her case. But, the rights of the plaintiff are evidently not of the dotal kind; the expressions of her marriage contract repel

interpretation in favor of her claim. The parties there explicitly declare that they possess nothing for the present to bring into marriage : *ne voir rien a se constituer pour le present.*

The subsequent clause by which she authorises her husband to collect her dues, even if there were not such negative expressions in the preceding, could never be construed as intended for a constitution of dowry. "In our district," says Salviat, on the jurisprudence of Bordeaux, "every thing is considered as dotal which is given to a woman, in consideration of her marriage, or to bear the charges of it, even when the constitution is not express, and neither the words *constitution* or *dot* are used. It is, however, needful that there should exist a contract, evidently shewing that a *dot* was given or promised : for in this district, no implied one is known. If there be no marriage contract, none of the property belonging to the wife is dotal, and if there be a contract, no property is dotal, except that which is thereby expressly destined to be dotal." *Jurisprudence du parlement de Bordeaux, verbo Dot.*

The rights of the plaintiff not being dotal, she can claim nothing more against the estate of her husband than a mortgage upon his real property. The parish judge, in recognising

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that mortgage and giving judgment in her favour for the amount claimed, has done her ample justice.

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

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

See same case, *February Term* 1817.

DENIS vs. *CORDEVIELLA.*

No appeal lies from the order of a court of probates, granting three months to the curator of a vacant estate to account, and directing that on his failure, his bond be put in suit.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The plaintiff and appellee is an attorney, appointed by the court of probates of the parish of Orleans, under the 4th section of the act concerning successions *ab intestato*, enacted in February 1809. The object of his appointment is to compel sundry curators of vacant estates, and among others the appellant to render an account of their administration, and to pay the amount in their hands into the treasury of the State.

In execution of that trust, the plaintiff and appellee has proceeded in the court of probates to

cite the appellant to render his account. The account has been rendered, and the judge of that court, by virtue of the powers to him given by the act above mentioned, has granted to the appellant a delay of six months to settle his account finally; providing at the same time, that if such a settlement should not take place before the expiration of that delay, the defendant's and appellant's bond should be put in suit.

From that decree, the defendant and appellant prayed an appeal to the district court, and the district court having dismissed his appeal, on the ground, that the decree complained of was not such a judgment as could be appealed from he has brought his case before us.

We can feel no hesitation in saying, that this was not a case for an appeal from the court of probates to the district court, nor from the district court to this. The only proceeding in the court of probates, from which the law has given an appeal, is the granting of letters of administration, now letters of curatorship. We do not think that any of its other acts is subject to be revised in the form of an appeal. The party dissatisfied with them has his remedy in a court of law.

In the present case, the appellant has no cause of complaint till his bond is put in suit. His

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present appeal is irregular and without object. It is therefore ordered, adjudged and decreed, that the judgment of the district court, dismissing the appeal from the court of probates, be affirmed with costs.

The plaintiff *in propriâ personâ*. *Livingston* for the defendant.

PINDER vs. *NATHAN & AL.*

Notice of the protest of a bill of exchange must be given within a reasonable time. What is a reasonable time is a question of fact.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The plaintiff and appellee is the holder of a bill of exchange, drawn here on Boston, to the order of the defendants and appellants who are partners in trade, and is endorsed by them. The bill was not accepted, and on its becoming payable was duly protested for non-payment.

The only question raised in this case is, whether due notice of non-acceptance, and protest for non-payment, was given to the defendants and appellants.

The facts are chiefly these: the bill was presented for acceptance on the 29th of November 1814, and a letter bearing date of the 2d of De-

cember following, informing Charles Pinder, the person who had remitted it, that it was not accepted, was received here by Andrew Milne, the agent of Pinder, on the 25th of the same month. On the next day, Milne informed one of the defendants of the non-acceptance of the bill. On the last day of the month, (December) the bill was protested for non-payment. The bill and protest were sent in a letter, dated New-York, January 7th, 1815, and in the usual course of the mail came to the hands of Milne, who received it on the evening of the 14th of February following, while stationed on military duty, at camp Villeré, and sent it to the city on the next day, to be communicated to the defendants. On the ensuing morning, it was presented to one of them, from whom payment was at the same time demanded.

From these facts, it is evident that the holder of this bill was guilty of no latches, in giving notice to the endorsers, either of the non-acceptance or non-payment. That of the non-acceptance was given within twenty seven days from the time of the refusal, as short a time as can be allowed between Boston and New-Orleans. The protest for non-acceptance was inclosed in a letter, bearing date seven days posterior to it: but that letter was written from

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New-York, and the necessary time to come from Boston to New-York must be deducted from these seven days; it came here in the usual course of the mail and was communicated as soon as could be under existing circumstances.

In the United States there does not and cannot exist any general rule, as to the time within which notice of protest ought to be given to the endorser of a bill of exchange. It must be given within a reasonable time, and what that reasonable time ought to be, is a question of fact which must depend upon the circumstances of each case. 1 *Dallas*, 254, 270, 2. *id.* 158, 192.

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

Depeyster for the plaintiff. *Duncan* for the appellants.

BEARD vs. *POYDRAS.*

'Although the party introduces a will emancipating her, she may give parol evidence of her being born, reputed, and acknowledged free.—

APPEAL from the fourth district.

This action was instituted for the recovery of a tract of land, in the possession of the defendant, devised to the plaintiff by Christopher Beard, her reputed father.

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The defendant, in his answer, claimed title to the premises under a deed from the heirs of B. Farrar, who, on his motion, were made parties to the suit as warrantors.

An amended answer was afterwards filed, stating, that at the date of C. Beard's will, and at his death, the plaintiff was a slave of B. Farrar, and therefore could not take any property under the will.

The *code noir* of Louis XV, was for a short time only in force in Louisiana.

At the trial, the plaintiff offered several witnesses, to prove, that she was born free, was so reputed, and had been acknowledged as such by Farrar before Beard's death. The district judge refused to receive their testimony, on the ground, that the plaintiff having introduced Farrar's will, and read the sixth clause of it, by which he bequeaths her freedom to her, had thereby destroyed the presumption of her free-birth: and that, if she had been emancipated at any subsequent period, her act of emancipation ought to be produced or accounted for. To the opinion of the court, in this respect, the plaintiff took a bill of exceptions.

There was finally judgment for her, and the defendant having failed to introduce any evidence against the warrantors, his suit against them was dismissed.

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The statement of facts, made by the district judge, is in the following words:

On the trial of this suit, the following facts appeared in evidence:

A certain Christopher Beard, made his last will and testament, on the 6th of March, 1789, in which is the following clause: "and further my will is, that my negroes shall be put on my land on Fausse Riviere to make tobacco, indigo, or whatever shall appear to my said executors to be most advantageous, and that, in the course of two or three years, if my friends should apply, my executors, if they think proper, may divide the estate between them, and a mulatto wench hereafter mentioned, but not until they know and are assured that they are my real heirs. It is also my will that some of my executors, or some other person whom they may appoint, may carry on my plantation, and that a little mulatto girl, named Venus, now on the plantation of B. Farrar, esq. receive a good education, and an equal dividend of my estate."

B. Farrar, E. Gallaudet and Robert Jones were appointed executors.

Beard died in 1789, and his will was regularly proved, but was accompanied by a decree or order as follows: "New-Orleans, May 26, 1809: Don Eistevan Miro, Brigadier-general,

&c. Having seen the acts, I declare that C. Beard ought to be declared, and he is hereby declared, to have died in part intestate, not having named any heir, for which reason his father or mother ought to inherit, and in case of there being neither father nor mother, then his nearest relation ought to inherit. I declare him also to have died partly testate, having named testamentary executors." The decree was signed by Miro, the then governor of Louisiana, with the approbation of the auditor.

Beard had fifteen negroes on the plantation of B. Farrar. Before as well after his death, Farrar had possession of his land, and the tract claimed by the plaintiff is now in the possession of the defendant, and is the same as is alleged to have been bought from Farrar's heirs by the defendant.

It was granted by the Spanish government to Beard in 1789.

In 1790, Farrar died, having made his will, the 6th clause or section of which is as follows: "I desire my executors to make free a mulatto girl, called Venus, a daughter of my negro woman Nancy, supposed to be a bastard child of C. Beard, deceased. I do give and bequeath to the said girl Venus six negroes, men and women, that is three of each, to be delivered when

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she arrives at the age of eighteen; but, if she dies before that age, and leaves no lawful issue, then the said negroes to return to my estate, as part thereof to all intents and purposes. And this further condition I also make, that is to say, that the above freedom and donation are in consideration of all and every claim whatever she may have to any estate left by said Beard; and I require my executors to take a proper discharge therefore, at the time of the delivery of said six negroes. I desire that said Venus be properly educated in the christian religion, and taught to read and write, and when of proper age, that she may be put to a mantua-maker and learn the business; and my executors to see that she is well used, and all this at the expense of my estate."

Venus, the plaintiff, was born about the year 1785, of the negro woman Nancy, a slave of B. Farrar, and reputed to be the daughter of C. Beard, tho' no proof was adduced of her having been acknowledged as such by him.

The land in question would rent for about 180 dollars a year.

An order was given by the plaintiff, on the executors of Farrar, in April 1801, in favour of one Mulzach, for a part of the legacy left her by Farrar, and produced at the trial, accepted

by the executors, as an evidence of her having commuted her rights, under the will of Beard, for the said legacy: but it was not proven that the said order had been paid.

The plaintiff is not named in the inventory of the slaves of Farrar. She has been considered as free since his death, and has lived as a free woman for upwards of ten years.

Livingston for the plaintiff. This case ought to be remanded, if the judgment is not affirmed, for the district judge erred in rejecting the witnesses, which were offered on the part of the plaintiff, to shew that she was born free. She is not a negro, but a person of mixed blood; the presumption is therefore that she is born free, and it was lawful for her, in aid of this legal presumption, to offer parol evidence of her free birth.

But, we contend that the judgment ought to be affirmed. It is in vain that it it is contended that the plaintiff had no other right to her freedom, but that which she derived from the acceptance of the legacy, entire and undivided, and from the performance of the condition, imposed on her by the testator. Freedom is so much favoured in law, that a conditional grant of it is always deemed absolute, and that the conditions, which testators add to the grant of

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freedom, are considered as if they had not been written.

If it be written: *when Titius shall arrive at the age of thirty, I wish that Stichus be free, and that my heir give him such a tract of land,* and Titius dies, before he reaches his thirtieth year, Stichus shall be free, but he shall not have the land; for it is only in favor of liberty that a fiction is admitted, by which, after Titius' death, a period of time is supposed to remain, at the expiration of which, the bequest is to have its effect, but as to the devise of the land, the condition, under which it was made, is deemed to have failed. *ff* 40, 4, 16.

Freedom cannot be given for a limited time, *eod. tit.* 33, as for ten years, and the commentator adds—What, if it be so given? The time will be rejected, as a senseless addition.

If it be written: let Stichus be free for ten years, the restriction is vain. *Additio temporis supervacua est, eod. tit.* 34.

The Emperors to Missenius Frontonus. Freedom being granted in the testament of a soldier, in the following words, *I will or order that* my slave *Stephen be free.* The slave will enjoy his freedom, as soon as the succession is accepted. Likewise the following expressions added, *provided, nevertheless, that he remain*

with my heir, till &c.: but if he refuse to stay, he shall be retained as a slave, shall not have the effect of revoking the freedom; and this will be the case also in the testaments of other persons, *eod. tit* 52.

When freedom is given under a condition, if it be not in the power of the slave to perform it, altho' he be not prevented by the heir, he ought to have his freedom, *eod. tit.* 55.

Moreau for the defendant. The district court did not err, and the witnesses were properly rejected. It is in evidence, from the will of Farrar, introduced by the plaintiff, that she was his slave, was born of a negro woman, his property, and that he bequeathed her freedom to her upon certain conditions: she claims it under it. It would be therefore, a departure in the pleadings, to allege and seek to prove that she was born free. How can she say that she was born free and emancipated?

If she was not born free, no parol evidence of her emancipation can be received. By the 50th article of the *Code Noir*, enacted by Louis XV, in 1724, and especially put in force by Governor O'Reilly, in 1769, it is expressly provided that emancipation can only be granted by a written instrument: an act *inter vivos* or *causâ mortis.*

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We contend that she is what is in the Roman law called a *statuliber*, and not a free woman. On this we are at issue.

A little closer examination of the title of the digest *de manumissis testamento*, commented upon by the plaintiff's counsel, would have convinced him that the general principle of the Roman law, in respect to conditional enfranchisements, is quite the reverse of what he argues it to be, and the laws which he has cited, are exceptions only to the general rule, which are not susceptible of extention.

Freedom may be given absolutely or conditionally, or to be enjoyed at a future day. When the slave is manumitted absolutely, he becomes free as soon as the succession is accepted; but if either a condition or time be added to the manumission, the condition must be performed or the time must elapse, before the freedom is enjoyed, *ff* 40, 4, 23, § 1, 3 *Pothier's Pand. Just.* 55. 14 *Rodriguez's dig.* 187.

According to the Spanish law, all legacies may be absolute or conditional, or at a future day, *Part.* 6, 9, 31. 1 *Febrero contratos, ch.* 1, *n* 46.

In legacies under a condition or at future day, the condition must be performed, or the day

must arrive before they have any effect. *Part.* 6, 9, 21. *Febrero id. n.* 47 48.

Slaves manumitted by will, under a condition, or on a future day, were called at Rome *statu liberi* until they acquired their freedom. *ff* 40, 8, 1. 14, *Rod. dig.* 287.

STATULIBER. By this word was designated the slave manumitted, under a condition, or at a future epoch; it came from *statuta libertas, conditio statutæ libertatis.* 1. 81 *ff de legatis* 2 *Dict. du Dig. n.* 1667.

Till the condition was performed or the day arrived, the *statuliber* was considered as a slave. No body is ignorant that the *statuliber* is in the interim the slave of the heir. *ff* 40, 7, 9. 14 *Rod. Dig.* 315.

Children born from a woman *statuliber*, are the slaves of the heir. 40, 7, 16. 14 *Rod. Dig.* 321, 322.

We read in the books of Gaius Cassius, that what is acquired by a *statuliber*, before the performance of the condition, added to the manumission, does not enter into the *peculium* which is bequeathed, unless the legacy be made for the time when he should be free. Yet it is to be observed that the *peculium* being susceptible of increase and decrease, the increase ought to make part of the legacy, *provided the heir has not*

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taken the peculium from the slave. *ff* 40, 7, 28, 14 *Rod. Dig.* 331.

The *statuliber* differs but little from any other slave, as to the actions which grow out of a tort, the gestion of an affair, or a contract, *ff* 40, 7, 29. 14 *Rod. Dig.* 331.

It is then correct to say that the plaintiff is as yet but a *statuliber*, and that she cannot lay any pretention to her freedom, till she performs the condition added by the testator to her manumission. After this, and not before, she will be entitled to her freedom, and to the legacy left her by Farrar, if she has not yet received it.

The *statuliber* can only become free by performing the condition added to his manumission, if it be possible, and no one prevents him from performing it. *ff* 40, 7, 3. 14 *Rod. Dig.* 300.

As to the possibilty of performing the condition, the Roman law speaks thus : he is not considered as *statuliber*, whose freedom is protracted to so distant a day, that he cannot live till then; or who is manumitted under a condition very difficult or almost impossible to be performed, so that he cannot hope to be free. As if I manumit my slave, on condition that he pays my heir one thousand times a given sum, or if I manumit him when he dies : for freedom thus given, according to Julianus, is without ef-

fect, because the testator had not really the intention of giving it. *ff* 40, 7, 4, § 1. 14 *Rod. Dig.* 308.

As to the slave being hindered from performing the condition, there are two kinds of hinderances which cause the condition to be considered as performed—the hinderance which proceeds from the heir, that which results from obstacles which it is not in the power of the *statuliber* to overcome.

If the heir prevents the performance of the condition, as for example, if he refuses to receive the sum which the *statuliber* tenders him, according to the will of the testator, it is beyond a doubt that the slave is free, because he is prevented by the heir from performing the condition. *ff* 40, 7, 3.

Every hinderance proceeding from the heir does not, however, cause the condition to be considered as performed with regard to the *statuliber*. It is requisite, in order that it may have this effect, that the object of the heir should have been to prevent him to obtain his freedom. *ff* 40, 7, 38. Thus, if the heir forbids the *statuliber* to work for any other person but him, desiring that he should serve him exclusively, in such a case, and the like, it will not be holden that he thereby hinders him to

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perform the condition imposed by the testator, that the slave should pay a given sum to the heir, because the slave is nevertheless bound to labour for the heir. 14 *Rod. Dig.* 338.

With regard to any personal hinderance, it is admitted, that if the *statuliber* does every thing in his power to perform the condition, and he cannot succeed, he is deemed to have performed it, and he becomes free.

When freedom is given under a condition, the decisions are, that if the slave is not in fault in not performing the condition, although he be not hindered by the heir, he shall have his freedom. *ff* 40, 4, 55. *id.* 40.

There is a similar disposition in the partidas. If a testator has ordered that his slave be emancipated, on condition that he perform certain services to another person, if the slave does every thing in his power, and be hindered by another, the bequest shall take effect, and the slave shall be manumitted, in the same manner as if he had performed the services. The reason is that the law has ever been favorable to liberty. We say that if the testator makes a legacy, under a condition which it is in the power of the legatee, and of some other individual to perform, if the condition be not performed, through the fault of the legatee, the legacy shall not be valid. *Part.* 6, 9, 22.

This is a valuable authority, and is decisive in the present case. For, it cannot be pretended that the heirs of Farrar put any obstacle to the performance of the condition imposed on the plaintiff by the testator, nor that she has been hindered from performing it.

The *partida* 6, 9, 31, contains the same disposition as the *ff* 40, 4, 16, cited by the plaintiff's counsel. Where freedom is bequeathed to take place on a given epoch, the law admits certain fictions in favour of freedom; but this cannot be extended to the case of freedom, granted on condition of doing or not doing some thing, to give a thing, to renounce a right: because positive laws decide, that the *statuliber* can only acquire his freedom by the performance of the condition, unless it be not in his power to perform it.

The plaintiff's counsel has cited *ff* 40, 4, 33 and 34. These authorities are not at all applicable to the present case. They relate to freedom bequeathed for a time. The plaintiff is not manumitted so. Freedom may be bequeathed to be enjoyed after a future day: *ff* 10, 4, 41, but it cannot be bequeathed for a time, so that the manumitted slave, at its expiration, may be held in slavery again, because he who was once free cannot be a slave again.

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Lastly, it is contended that conditions, added to the bequest of freedom, are to be considered as nullities, and *ff* 40, 4, 52 & 55 are relied on. How can this assertion be reconciled with the laws of this and the 7th title, which we have cited, which declare that the *statuliber* can only cease to be a slave, by the performance of the conditions, under which freedom has been granted to him?

It is known how rigorous the Romans were in regard to the forms of their actions, clauses and stipulations. If in a clause of a will, freedom was granted absolutely, and in another it was sought to be revoked, the latter was considered as not written. This was the case in the will of Missenius. Freedom was deemed to have been bequeathed absolutely, since the law cited states that the slave will acquire his freedom, as soon as the succession is accepted, which is, as has been shewn, the proper character of freedom bequeathed absolutely. The second clause was, according to our reasoning, considered less as the grant of freedom, than as a revocatory clause on a certain contingency: such a revocation could not be admitted, as it militated against the principle that he who was once free can never be reduced to slavery. It is thus that Rodriguez understands this part

of the digest. *Por la clausula primera de la ley, se concede la liberdad al siervo ; la qual no se revoca por lo clausula posterior.* 14 *Rod. Dig.* 213.

So, in a donation *inter vivos*, which ought to be irrevocable from its nature, every clause by which a donor would reserve to himself the right of disposing freely of the thing given, or to resume it, would be null, while he might legally impose conditions on the donee, without performing which, he could not have the benefit of the donation. 2 *Pothier Don. inter vivos, part* 7, *art.* 3.

DERBIGNY, J. delivered the opinion of the court.* The plaintiff and appellee, a mulatto woman, supposed to be the bastard child of Christopher Beard, deceased, claims a tract of land, now in the possession of the defendant and appellant, which she says was devised to her by her reputed father.

According to the statement of facts, which comes up with the record, it appears that the plaintiff was the slave of one Benjamin Farrar, at the time of Beard's death : but she alleges that, if certain witnesses whom she offered had been heard, she might have proven that she was

* MARTIN, J. did not join in this opinion, having been of counsel in the case.

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born free, was so reputed and had been acknowledged as such by Farrar, before the death of Beard. That evidence having been rejected, her counsel filed a bill of exceptions, upon which it is necessary to pronounce before we proceed further.

From the matter set forth in the bill of exceptions, it appears that before any attempt had been made on the part of the defendant to prove that she is a slave, she introduced in evidence the will of Benjamin Farrar, in which he orders his executors to emancipate her, and afterwards the testimony, which was rejected, in order to shew that she was born free and had been acknowledged as such by Farrar, in the life time of Beard. The district judge thought that by producing the will of Farrar, she had destroyed the presumption of her free birth, and had shewn that she relied on a title to freedom by emancipation, and being of opinion that freedom by emancipation could not be proven by witnesses, he rejected the witnesses proffered.

In both these positions we think that he was mistaken.

If the will of Farrar, produced by the plaintiff, contained nothing else with regard to her, than an expression of his intention, that she should be enfranchised, there would have been

some reason to suppose that she relied on it, as her title to freedom, and to consider her as stopped from attempting to prove that she was born free, or that she had been manumitted prior to that will; tho' it must be confessed this would have been to carry very far the doctrine of estoppel. But the sixth section of the will of Farrar, which the plaintiff read in evidence, contains other particulars concerning her. He there stipulated that her freedom, and the legacy which he leaves her, are in consideration of all and every claim whatever, which she may have to any estate left by Beard, and requires that, upon her arriving to the age of eighteen years, his executors shall take from her a proper discharge therefrom. Here then is another matter mentioned than the emancipation. The plaintiff well may have produced this document, to shew that Benjamin Farrar was himself aware that she had some claim upon the estate of Beard, which Farrar had appropriated to his own use. The mere reading of that clause, therefore, is no evidence that the plaintiff intended to use it as a title to freedom, and ought by no means to have operated as a barrier against the introduction of any proof, which might tend either to shew her free birth or her emancipation anterior to that will.

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The plaintiff has offered to evince two facts: first that she was born free, secondly that she was reputed free and acknowleged as such by Farrar, in the life time of Beard. On the admission of any proof of the first fact, the district judge was of opinion that she had herself destroyed the presumption of her free birth, and could not be permitted to establish it by evidence. But, we have already shewn that the introduction of the will of Farrar cannot be interpreted with that rigour. The plaintiff then could produce testimony that she was born free.

As to the other fact, viz. that she was acknowleged free by Farrar, in the life time of Beard, it is said, that as this must mean that she was then emancipated by him, no oral evidence could be admitted in support of that allegation, because emancipation must be proven by writing. It is not denied that, by the laws of Spain, slaves could be emancipated verbally, in presence of witnesses: but, it is said, that at the time referred to by the plaintiff, the French law, called the *code noir*, according to which none but written acts of emancipation were deemed valid, was in force in this country. To establish this, a proclamation is produced, issued by Don Alessandro de O'Reilly, of the 27th of August, 1769, whereby it is continued

in force. How far the Spanish officer, who took possession of Louisiana, was authorised to maintain the former laws or introduce the laws of Spain, is a subject on which vain inquiries have often been made here. It is probable he did not deposit among the archives of the province any copy of his instructions, or that, if he did, it has disappeared before the country was delivered to the government of the United States. We are therefore left to take it for granted that he did not act without authorisation. Admitting then that he had a discretionary power to preserve such of the existing laws as should be deemed fit, it appears that he thought proper on the 27th of August, 1769, that is to say, about a week after he had taken possession, to declare that the French *code noir* should continue in force. But that this was a measure resorted to on the spur of the moment, in the midst of the storm which then agitated the country, is evident from his subsequent conduct. We see him three months after, when tranquillity was restored, and when he could give the necessary attention to the business of legislation, publishing in the French language an extract from the whole body of the Spanish law, with references to the books in which they are contained, purporting to be intended for an elementary in-

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struction to the inhabitants of the province; meanwhile the knowledge of the Spanish language should diffuse itself and enable them to read the laws in their original idiom. This publication, followed from that moment by an uninterrupted observance of the Spanish law, has been received as an introduction of the Spanish code in all its parts, and must be considered as having repealed the laws formerly prevailing in Louisiana, whether they had continued in force by the tacit or express consent of government. The observation made by the counsel of the appellant that the French *code noir*, ordered by O'Reilly to continue in force, could co-exist with the Spanish laws afterwards published, because it contains certain regulations for which the Spanish laws have made no provision, is probably correct. When a law is not absolutely and generally repealed, such of its provisions as are not repugnant with the subsequent laws, do not cease to have effect. On the present question, was there no disposition in the laws of Spain concerning the enfranchisement of slaves, it might be just to pretend that the French *code noir* ought to be resorted to, but as the reverse is the case we must refuse to consult it.

The witnesses, offered by the plaintiff, ought therefore to have been heard, even upon the fact

of emancipation, supposing the testimony tendered such as the law 1, *tit.* 22, *part.* 4, does admit. Upon this point, it is true that the plaintiff has not been as explicit as it was her duty to have been: she ought to have shewn her readiness to prove such emancipation as is valid by that law, that is to say, an enfranchisement before five witnesses. The manner in which she tendered her proof, did not shew that, but rather raised a suspicion that she was not able to prove so much. Yet, as it did not exclude all probability that she may evince what the law requires, she ought to have been permitted to introduce her witnesses.

The plaintiff, notwithstanding the rejection of that evidence, had judgment in her favour in the inferior court, and did we agree with the district judge on the merits of the case, it would be unnecessary to send it back. But, being of opinion that as the case now stands, she ought not to recover, we are obliged to remand it.

It is adjudged, ordered and decreed, that the judgment of the district court be reversed, both as to the principal demand and as to the warranty, and that the case be remanded to the district court, with instructions to the judge to admit any legal evidence, which the plaintiff

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may offer in support of the allegations contained in her bill of exceptions.

RUST vs. *RANDOLPH.*

An appeal lies from a court of probates to the district court, and from thence to the supreme court, on the appointment of a curator to a vacant estate.

In such a case the court of probates ought to permit the opposite party to shew that the applicant is not domiciliated in the state and possesses no property in it—that the other claimant was an old friend of the deceased, &c. is a larger creditor, and a person of property and standing.

The district court ought to try the case *de novo*.

APPEAL from the court of the first district.

MATHEWS J. delivered the opinion of the court. This is a suit in which the right to the curatorship of the estate of Solomon Sterne, deceased, is claimed by both parties. It appears that the estate is *ab intestato*, and also such as is known to our laws by the denomination of a *vacant estate*, claimed by no person, as heir, or under any title. For its administration therefore, a curator ought to be regularly appointed.

The case comes before us on an appeal from the district court, to which an appeal was taken from the judge of probates of the parish of New-Orleans—the same party, the defendant, being appellant in both instances.

It is contended, on the part of the plaintiff and appellee, that this is such a case in which the district court had no jurisdiction, and to this and a bill of exceptions was taken to the opinion of that court, in sustaining the appeal—that this is not a case in which an appeal lies to this

court: lastly that the judgment of the district court, affirming that of the court of probates, is correct.

I. We are of opinion that the right of appeal to the district court from the court of probates, is clearly given by the act defining the jurisdiction of the court of the parish and city of New-Orleans, and that the district court was correct in taking jurisdiction of the cause, as it appears to be one of those in which an appeal was authorised by law from the court of probates to the late superior court.

II. It being admitted by the parties that the estate of the intestate exceeds the value of three hundred dollars, according to a just and rational construction of the constitution and laws from which this court derives its judicial powers, we do not doubt our right of entertaining jurisdiction of the present case.

III. The correctness of the judgment of the district court, in affirming that of the court of probates, must be tested by an examination of the judge's conduct in the course of the trial of the cause, as brought before us on the bill of exceptions, taken by the counsel of the defendant and appellant to the opinion by him given, in

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refusing to hear a witness offered to prove the following facts: 1. that the plaintiff had no domicil in the city, and had not resided therein three months prior to his application for letters of curatorship: 2. that he possessed no property within the parish: 3. that the defendant and appellant was an old and intimate friend of the deceased, who shortly before had expressed his wish that he should have the charge of his property, after his death: 4. that the defendant was a larger creditor than the plaintiff: 5. that he was the most discreet person to have been appointed curator, was a man of considerable property and standing, and his views, in applying for letters of curatorship, were to preserve the property for the heirs.

To determine whether the district court erred in rejecting the testimony thus offered, it is necessary previously to ascertain the nature and effect of an appeal from a court of probates to a district court, and also the legal weight and consequence which a proof of these facts ought to have on the respective rights of the parties.

An appeal from any of the late inferior tribunals to the territorial superior court, was always considered by the judges of that court, and we believe correctly, as bringing the case up for the purpose of trial *de novo*, in which the court was

bound to give judgment on a full hearing of all legal testimony in the case, as if in the first instance; and according to the act above cited, the right of appeal from a probate to a district court, is placed on the same footing and must be governed by the same principles, which prevailed in similar instances before the late superior court.

If all or any of the facts, which the defendant and appellant offered to prove, might and ought to have changed the opinion of the district court with regard to the judgment of the court of probates, the judge erred in rejecting the testimony.

The causes which disqualify persons from being appointed tutors to minors, and which are applicable to curators *ad bona*, are expressed in the civil code 66, *art.* 47, and it is true, as stated by the counsel of the plaintiff and appellee, that none of the disqualifications there detailed, are attempted to be proven against his client.

It is admitted that this is the case of a vacant estate, in which a curator ought to be appointed, and, as there is more than one applicant for the office, the judge of probates was bound to exercise his discretion in chusing between them. But in judicial proceedings, the discretion of a judge is legal, not arbitrary. We have before stated that

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the district court was bound to try the cause *de novo*, and consequently ought to have exercised a legal discretion, in deciding on the claims of the parties, after a full developement of all facts relating to them.

It is laid down in the civil code 14, *art.* 12, that in selecting curators to a vacant estate, the relations of the deceased are to be preferred to creditors, creditors to strangers and persons not interested in the succession, provided that the persons thus to be preferred, have the necessary qualifications.

We are clear that interest in the estate is the reason of the rule, by which the preference is established: and this reason, when a contest arises among creditors, if their qualifications are in all other respects equal, will extend the right to a preference to the creditor who holds the largest claim. We are therefore of opinion that the district court erred in refusing to admit the testimony offered by the defendant and appellant, by which he offered to prove himself a larger creditor than the plaintiff and appellee.

Altho' perhaps the circumstance of a person not being domiciliated in the state, would not exclude him from the office of curator *ab intestato*, claiming as a relation or creditors against

strangers or persons wholly uninterested in the succession, yet where two parties are contending for a preference, whose pretentions are in other respects nearly equal, it would be nothing more than an exercise of sound discretion in the judge, to prefer the citizen of the state who possesses property which is tacitly mortgaged for the faithful performance of his duties as curator, to strangers not possessing this additional qualification.

The intimacy which the defendant and appellant offered to prove to have subsisted betwen him and the deceased, and also the wish of the latter that he should in case of his death have the charge of his property, are circumstances, which alone would not even balance the pretentions of a *bona fide* creditor, but which combined, as they are in the present case, with other matters, more immediately affecting the rights of the parties, might have some weight in the decision of the cause, and therefore may be received in evidence, without any violation of its rules.

It is ordered that the judgment of the district court be annulled, avoided and reversed, and that the cause be there remanded, for a new trial, with directions to the judge to admit the defendant and appellant to the proof of the fact

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stated in his bill of exceptions, by any legal testimony in his power.

Livingston for the plaintiff, *Ellery & Smith* for the defendant.

THOMAS & AL. vs. ELKINS.

A debt of one of the partners cannot be set off against a demand of the firm

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

MARTIN, J. delivered the opinion of the court. The plaintiffs and appellants claim $1192 92, the amount of a quantity of goods, purchased by the defendant from their firm: the account, which is annexed to the petition, is made part of the statement of facts.

The defendant opposes to the plaintiffs' claim, an account against the firm, by which it appears, that he is a creditor of the firm for $93, 79. This account, annexed to the answer, is also made a part of the statement of facts.

The two principal items, in the defendant's account, the refusal to admit which occasioned the present suit, are a sum of $900 and one $300, charged as paid to the plaintiffs on the 14th of December, 1813. These payments, it is alleged, were effected by the delivery of two checks of

the defendant, to one of the plaintiffs, at a gaming table. The receipt of these two sums by one of the partners is not denied: but it is contended they were a loan to him, on his private account, for which the firm is not responsible.

The defendant insists that these two sums were a payment to the firm: that a payment to one of the individuals of a firm discharges the partnership debt, on which it was made—that the present one is not invalidated by the *place* in which it was effected, nor by any *use* made by the partner who received it.

The case was tried in the parish court of New-Orleans, where a jury found a verdict for the defendant. The plaintiffs prayed for a new trial, but the court refused it, on the ground that the payment was a correct one, and the plaintiffs are bound to allow it. From the judgment of the parish court, the plaintiffs brought the present appeal.

We are of opinion that the judgment is an erroneous one: the sums in dispute were improperly allowed as a payment.

From the defendant's own shewing, in the account annexed to the answer, the two checks

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were handed on the 14th of December, 1813, at a time when, it appears by the same account, there was nothing due from the defendant to the plaintiffs; and from the plaintiffs' account, $ 6 70 cents only appear to be due. The goods charged appear to have been purchased, for the most part on the 22d of the same month, so that the amount of the checks, delivered eight days before, was improperly considered as a *payment* of them. A payment is in its *nature*, though not in its *essence*, POSTERIOR to the debt.

It remains for us to enquire, whether we can consider the proceeds of the checks, in such a light, as to admit them in *compensation* of the debt. It clearly appears that the money was loaned: now, a loan to one of a firm does not bind the firm to repay, unless the money loaned be for the use of the firm. Nothing shews this to be the case here. The *place*, in which the loan was made, gives rise to a strong presumption, that its object was the sole accommodation of the one of the plaintiffs who received it. The debt must be viewed as his private debt. Now, it is clear that a *private* cannot be set off against a *joint* debt. *Smith* vs. *Duncan & al.* 1 *Martin*, 25.

Independently of these two sums, that of $ 480 was also paid after the creation of the

debt, resulting from the purchase of goods, in the same manner, viz. by a check handed at the gaming-table to the same partner: $400 of which appear to have been returned. If this transaction stood aloof from the other, we might incline to allow the $80, as a *payment*. But the transaction is so much akin to the former, that it must take its character from it. The defendant had before, at the same place, lent money to one of the partners, on his private account: now the subsequent supply afforded, was, in all its circumstances so similar, that it partakes too much of the nature of the former to be distinguished from it.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the plaintiffs do recover from the defendant the sum of eleven hundred and ninety-two dollars and ninety-two cents, with interest, at the rate of five per cent per year, from the date of the judicial demand, with costs.

Porter and *Depeyster* for the plaintiffs. *Grymes* for the defendant.

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JOHNSON
vs.
BOON'S HEIRS.

JOHNSON vs. *BOON'S HEIRS.*

APPEAL from the third district.

The heir cannot be sued until he accepts the inheritance. Property of the estate, cannot be proceeded against while there is neither heir nor curator.

MATHEWS, J. delivered the opinion of the court. This suit was instituted by the appellee to recover from the defendants, as heir of James Boon, deceased, debts of his estate. The claim is opposed on the ground that nothing was inherited by the defendants and appellants from James Boon.

The principal facts necessary to a correct decision, as they appear from the evidence and proceedings transmitted, are as follows. The appellants and defendants are the legitimate issue of the marriage of James Boon and Eunice his wife, which was contracted in North Carolina. At the time, she possessed in her own right, or afterwards acquired from her father or brother during the coverture, a female slave, named Jenny, who, with her increase, is now in the possession of the defendants. Boon, the father, had brought these slaves, with his family, from North Carolina to Georgia and Florida. At the time of his arrival in the latter place, it was under the Spanish government, and it continued

so, long afterwards; he always exercised ownership over the slaves, altho' he frequently declared that the property of them was not in himself, but in his children, who inherited them from their mother. In the year 1809, Courtland Smith (the husband of one of Boon's daughters, and who is joined with her, as a defendant in the present suit) was appointed curator to Boon's children, by a competent authority, and as such obtained possession of the slaves, (Boon being still living) claiming them for the minors, as their inheritance from their mother.

According to the provisions of our law, heirs, who accept an inheritance, are bound to pay the debts of the ancestor to the extent of their own property, if they take the estate without the benefit of an inventory: but, if the estate be legally inventoried, then only to the amount of the inheritance. To make the heir responsible for the debts of his ancestor, an acceptance of the inheritance is necessary, and it may be express or tacit. A succession is accepted expressly, when the heir assumes the quality of such, in some authentic or private instrument, or in some judicial proceeding. It is accepted tacitly, when some act is done from which the intention of being heir must necessarily be supposed. *Civil Code*

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162, *art.* 77, and in this respect the Spanish law accords with our code. It is useless to enter into any minute detail of the acts, which the law would construe into a tacit acceptance of a succession. None such appear to have been done by the appellants. They claim and pretend to hold the slaves, who form the main subject of dispute in the present case, on a right independent, separate and distinct from that of their ancestor, Boon. It is true that in the statement of facts, it is admitted that one of the witnesses deposed, that a bed, the property of the father, was taken by one of the children, without specifying which of them; a circumstance so vaguely related, as to be insufficient to fix on the appellants such an intermedling with the inheritance of their ancestor, as ought to burthen them with all the inconveniences and losses, which ought to result from a simple acceptation of it. We are of opinion that no person, as heir, can be considered liable to the payment of the debts of the ancestor, without accepting the inheritance. The appellants, from any thing that appears in the present case, have not accepted the succession of Boon, their father, and therefore ought not to be compelled to pay his debts; for altho' the property they possess, which, if it really belonged to him, in his life

time, ought to be subjected to the discharge of his engagements, yet, until it be represented by an heir or curator, no judgment can be regularly rendered against it.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed with costs; but, without prejudice to the plaintiff and appellee, in any future proceeding, which he may legally carry on against the estate of the said Boon.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n. District
June 1816.

EASTERN DISTRICT, JUNE TERM 1816.

ALLARD
vs.
GANUSHEAU.

ALLARD vs. *GANUSHEAU.*

The appeal must be dismissed when there is neither statement of facts, special verdict, &c

APPEAL from the first district.

The appeal in this case was dismissed, there being no statement of facts, bill of exceptions, or special verdict.

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

BROU vs. *HERMAN.*

The appeal must be dismissed when there is neither statement of facts, special verdict, &c.

APPEAL from the first district.

The appeal in this case was dismissed, there being no statement of facts, bill of exceptions, or special verdict.

Grymes for the plaintiff. *Carleton* for the defendant.

East'n. District.
June 1816.

FORSYTH & AL. vs. NASH.

FORSYTH & AL. vs. *NASH.*

A negro will be presumed free, tho' purchased as a slave, if the purchase was made in a country, in which slavery is not tolerated, unless it be shewn that he was before in one, in which it is.

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

MARTIN, J. delivered the opinion of the court. The plaintiffs in this case claim the defendant, a negro man, as their slave. It therefore behooves them to show slavery *in him* and property *in them.**

The evidence adduced for this purpose is: 1, a bill of sale by which the defendant was sold to them "to have and to hold the said negro man, and to dispose of him, as they shall think proper." This instrument, bearing date the 5th of September, 1803, was executed at Detroit, in the territory of Michigan, was there recorded, and is duly authenticated.

2. The deposition of David Delaunay, who swears he knows a Mr. Forsyth, at St. Louis, whose christian name he is ignorant of, but knows not the other plaintiff; that there was at Detroit, a mercantile house, under the firm of Kinsey & Forsyth, but he is ignorant whether Mr. Forsyth of St. Louis be one of that house; that he saw the defendant at Mr. Forsyth's in

* But see *Trudeau's ex's* vs. *Robinette*, January term 1817.

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FORSYTH & AL. *vs.* NASH.

St. Louis, but does not know to whom he belonged.

3. The deposition of Nicholas Girod, who swears that, while he was mayor of New-Orleans, the defendant was brought before him, and confessed he was a runaway and belonged to some person, the name of whom the witness does not recollect, who had promised him his freedom.

4. The deposition of A. B. Duchouquet, of St. Louis, who swore he never saw the defendant in the possession of the plaintiffs, because the plaintiffs lived at Peoria, in the Illinois territory; that the plaintiff, Forsyth, employed him in 1813, to stop the defendant; that he took him up in New-Orleans and brought him before the mayor, where he confessed he had ranaway from the plaintiffs, and did not like to return to them on account of a wife and children he had in New-Orleans.

5. The deposition of Pierre Le Vasseur, who knew the defendant in Peoria, in the Illinois territory, about ten years ago. He was known and reputed to be a slave; the witness knew him in the possession of Forsyth for four years. He ranaway from Peoria, about six years ago: the witness some time after met him at Maupertuis, in the Illinois territory, and the defendant

said he was ranaway from his master and was going to St. Louis.

On these facts the counsel contends that the slavery of the defendant and the property of the plaintiffs are fully proven.

I. The evidence of *slavery* resulting from the color of the defendant, *Adelle* vs. *Beauregard*, 1 *Martin* 183, from his declarations that he had a *master*, that he *belonged* to a man who had promised him his *freedom*, from his attempt to justify his unwillingness to return, by the circumstance of his having a wife and children in New-Orleans, thereby tacitly admitting the obligation he was under of returning to the plaintiffs.

II. The *property* of the plaintiffs is said to be proven by the bill of sale.

The defendant's counsel shews that in the territories of Michigan and the Illinois, the only places, except New-Orleans and St. Louis, which the defendant appears to have inhabited, *slavery does not exist;* that it is *forbidden by law*. The ordinance of congress of the year 1797, providing that "there shall be neither slavery nor involuntary servitude, in the said territory, otherwise than for the punishment of crimes, whereof the party shall have been convicted. Provided

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that any person *escaping into the same*, from whom labor or service is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her services as aforesaid."—Hence in the opinion of the counsel, a presumption arises that the defendant is free, which overweighs the contrary presumption which arises from the *color*.

It is further contended that as the bill of sale could convey no title, unless the defendant had been *duly convicted of a crime*, or in case he owed services in one of the original states, and *had escaped* into the Michigan territory, the plaintiffs are bound to bring the defendant within one of these two cases; that if the defendant was convicted of a crime, by which he became bound to involuntary services, the record of this conviction ought to be produced; so ought, in the other case, evidence of the duty of involuntary service, in one of the original states and of *escape into the territory*; that the apparent unlawfulness of the authority, exercised by the plaintiffs over the defendant, to which he may have submitted from his ignorance of his right or of the means of asserting it, is not repelled by his admission that he had a *master*, that he *belonged* to a person who had promised him his *freedom*.

For while it appears that the plaintiffs *de facto*, though not *de jure*, kept the defendant for a number of years in servitude, it cannot seem extraordinary that he should refer to them by the appellation of his *masters*, and the alleged promise of freedom may well be presumed to have been made to allure the defendant into submission. Neither is it said, can the admission of the defendant, that he *ranaway* be received as conclusive evidence of a legal obligation to stay: flight from unlawful servitude being more generally resorted to, than the bold assertion of freedom. Kept for a number of years, perhaps from his birth, in bondage, the spirit of the injured negro is said to have been borne down, by the influence which long exerted mastery creates.

We are of opinion, that as the case affords no evidence of any residence of the defendant, in any country in which slavery is lawful, this case must be determined by the laws of the country in which the defendant dwelt when he came to the hands of the plaintiffs—that the ordinance of 1787, having proclaimed that slavery should not exist there, unless under two exceptions; the plaintiff must bring the defendant under either of them, and having failed to do so, must have their claim rejected.

Whenever a plaintiff demands by suit, that a

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person whom he brings into court as a defendant, and thereby admits to be in possession of his freedom, should be declared to be his slave, he must strictly make out his case. In this, if in any, *actore non probante absolvitur reus.*

Here the plaintiffs have failed in a very essential point, proof of the alleged slavery of the defendant.

Their title can only have been lawful, at the time the bill of sale produced was made, on two grounds: the right of the vendor, or the liability of the object of the sale, must have been absolute or qualified. *Absolute,* viz. complete ownership and slavery, in the sole case of conviction of a crime by which freedom was *forfeited. Qualified,* viz. the right of reclaiming and conveying the defendant out of the territory into one of the original states, in which he owed involuntary servitude or labour. This qualified right could only exist in the case of the defendant's *escape.*

Now, it cannot be contended that this qualified right only was disposed of: that, which is the evident object of the sale, is the absolute right *to have and to hold during the natural life and to dispose as they please.* The conduct of the plaintiffs, towards the defendant, shews that it was this absolute right which they considered themselves as the purchasers of. This they un-

lawfully attempted to, and did successfully for a number of years, exercise, till the defendant sought his safety in flight. Their title to him, if it exists, must be grounded on his conviction of a crime. Now the evidence of this, is *a matter of record*: the paper must be produced or accounted for.

The parish court erred in sustaining the plaintiff's claim. Its judgment is therefore annulled, avoided and reversed, and this court doth order, adjudge and decree, that there be judgment for the defendant with costs.

Morse for the plaintiff; *Moreau* for the defendant.

LABRANCHE vs. *WATKINS*.

APPEAL from the second district.

A runaway slave cannot be sold by the sheriff till two years after the date of the advertisement. If the sheriff sells the runaway and instantly takes a bill of sale from his vendee, for the same price, the sale will be presumed a fictitious one.

MARTIN, J. delivered the opinion of the court. The plaintiff complains that the defendant detains his negro slave. The defendant answers, that the slave ranaway and was delivered to him as jailor, that he advertised and detained him during the time prescribed by law, and finally sold him, after having obtained the permission of the parish judge, that he has since

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bought the vendee's title to the slave, under which he now holds him.

The facts, as agreed upon by the counsel of the parties, are these:

The slave was brought to jail on the 29th of July 1813, and on the 16th of August, the defendant wrote to a person in New-Orleans to advertise the negro three times, according to practice. There is no other evidence of any compliance with the defendant's directions in this respect, except a newspaper, bearing date of the 3d of September, 1813, and the 29th of August 1815, the sale took place. There is not any date to the petition of the defendant for the judge's leave, nor to the judge's order thereon. The only fact stated in this petition is "that the negro had been confined as a runaway two years, completed on the 29th of July, 1815." The compliance with any requisites of the law is not alleged; it is not stated that the negro was not claimed. The slave was sold by the defendant to Henry Wyatt, who immediately afterwards, viz. on the same day, conveyed all his rights therein for the price at which it was sold to him. The plaintiff produced a notarial act of sale, as evidence of his title, which does not appear to have been questioned.

On the 20th of September, 1814, he sent his son to claim the negro, with a letter to the parish judge, complaining that from the defendant's neglect to advertise the negro, as the law requires, he had not till then any knowledge of his confinement. Eighty dollars were offered to the defendant for his charges; but he claimed one hundred and eighty.

On the acknowledgment of the defendant's deputy that the negro had been advertised in one paper only, the parish judge made an order for his delivery, on payment of two months' expenses and the fees of arrest; but the defendant refused to deliver the negro thereon.

It is admitted that the negro was sick, that at the time of the plaintiff's application the doctor's bill amounted to eight dollars, and afterwards rose to forty one; that he was not confined, worked out, and attended the defendant's deputy as a servant.

On these facts, the district court gave judgment that the plaintiff recover the negro from the defendant, and one hundred and eighty five dollars and twenty five cents for his damages; and the defendant appealed.

His counsel contends that the order of the parish judge binds the plaintiff at least until it be reversed, on an appeal; and that the merits

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of the case cannot be collaterally inquired into. He relies on the cases of *Sheldon vs. Rush & Bush*, 1 *Day* 170, and *Allen & al. vs. Hart*, *Kirby* 220.

In the first case, the court determined that the decree of a court of probates is *conclusive between the parties*, until disaffirmed or set aside on an appeal, in due course of law, and cannot be inquired into collaterally. In the second, the court held that the judgment of a county court declaring all the estate of the defendant forfeited, rendered on regular and legal process, and on due inquiry into the facts, by a court having jurisdiction of the case, should not be disregarded, although the court rendering it did not expressly state therein that the facts alleged were proven: this being strongly implied.

In the present case, the order of the parish judge cannot bind the plaintiff, for he was not a party thereto. He was not cited; neither does the case appear to be one in which the judge was authorised to act.

The 28th section of the first part of the black code provides that runaway slaves shall be advertised, in at least two newspapers, in French and English, during three months successively, and, after that time, once a month during the remainder of the year. They shall be employed

and kept at work for the county, by whom clothing, medicine, attendance and maintenance shall be found; but these expenses shall be discharged by the owner, when the negro cannot be usefully employed.

The next section provides that, if the owner do not reclaim the negro within two years from the date of the advertisement in the newspaper, in compliance with the preceding section, he shall be sold by the sheriff, with the permission of the judge, after *three* advertisements, for the payment of the charges, to be fixed by the judge.

Now the case under consideration does not appear, from the petition or order, to be one in which the sale could be ordered. The negro is stated to have been in jail two years: but the law allows only the sale of slaves who have been *unreclaimed* during two years, not after the arrest, but after the date of the first advertisement. The parish judge can only order the slaves advertised for one year, the case on paper does not shew that the negro was advertised at all.

Admitting even that the order justified the sale (which we clearly think it does not) the testimony on record shews that no legal sale has taken place. The defendant sold to himself—Wyatt lent his name.

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This fact results from the evidence spread on the record. A runaway negro is delivered to the jailor, who neglects advertising him according to law: the owner however hears of the capture of his slave, makes himself known, claims his property, tenders more than is due, yet the slave is withheld. The jailor obtains an order of sale, without any allegation or proof of the case being one in which the law authorises a sale: he sells the slave after *one* advertisement, while the law requires *three*, executes a deed of sale to a man, who instantly tranfers all his right to the jailor.

We are of opinion that the order of sale was rendered in a case, in which the judge who granted it, from the very proceedings, does not appear to have had any authority to exercise. It consequently must be viewed as a nullity.

The defendant, from the testimony in the case, made a fraudulent attempt to divest the plaintiff from his title in the slave. The damages allowed to the latter, do not appear to us too high.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs; and the appeal being a frivolous

one, that the plaintiff do further recover ten per cent. on the amount of the judgment.

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Livingston for the plaintiff; *Grymes* and *Duncan* for the defendant.

LEWIS vs. *FRAM.*

APPEAL from the first district.

The purchaser of land, under execution, cannot claim back the money paid and require the delivery of his obligation for the balance, paying the money into court, on the ground that there were anterior incumbrances.

DERBIGNY, J. delivered the opinion of the court. The appellant, plaintiff below, is the purchaser of a tract of land, sold by the sheriff by virtue of an execution, issued at the suit of the appellee. He has paid to the appellee part of the price, and the appellee holds his note or obligation for the balance. But as there exist some mortgages on that land, which the appellant thinks ought to be paid in preference to the appellee's judgment, he has brought this action to compel the appellee to refund the money by him received, and to give up the note which he holds, praying that his said obligation and the mortgage reserved in the sheriff's deed of sale be cancelled, upon his delivering into court the amount of the purchase money.

Before we examine into the merits of this action, it must be first ascertained whether or not

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the mortgages, which incumbered this property at the time of the purchase, were extinguished by the sheriff's sale; for should it be found that they have ceased to exist, the action would fall as ungrounded.

Pledges given to secure the payment of debts, are liable, as other rights, to be forfeited and lost in certain cases. In some countries, as in France for example, with a view to quiet the title of the purchaser, who buys real property at a judicial sale, certain solemnities have been established, which are intended as notice to all the world, that such a sale is about to be made, and which, when duly complied with, have the effect of extinguishing all incumbrances on the property sold. In Spain, the laws of which are ours, where not abrogated, the practice of giving general notice also prevails; but the neglect of the creditor to appear, when called only by publications, is not fatal to his interest.

Those alone, who have been called personally, are exposed to lose their pledge, if they don't come forward and assert their right, because they are then reputed in contumacy, and their silence is considered as a renunciation of their privilege. On this subject, see *Febrero de Juicios*, 6, 3, *ch.* 2, *sect.* 5, *n.* 340 & 341.

For the purpose then of quieting the purcha-

ser against the claims of privileged creditors, it was formerly the practice to communicate to them the proceedings had against the property encumbered. *(same author, book & chap. n. 337.)* The purchaser himself became a party so far as to see that they had due notice and sufficient time to appear; and then, and not until then, he deposited in the hands of the proper officer the purchase money, upon the tender of which the bill of sale was delivered him.

As to those who had been served with no notice, their lien on the property remained unimpaired. In equity, however, they were considered as bound to resort first, to the creditor who had received the proceeds of the sale, before they could disturb the purchaser.

The practice, in cases of execution, has been altered by statute, since the change of government; and the proceedings here related are now grown obsolete. But the principle, that the privilege of a creditor not duly called cannot be injured by a judicial sale, rests upon too solid ground, to be shaken by any change of practice or judicial proceedings. It is founded on that sacred maxim, that no one shall be condemned without being allowed an opportunity of defending himself.

There is then no doubt that the mortgage

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creditors, who appear not to have been made parties to the execution levied on the land bought by the appellant, have retained their liens on that property; and that the appellant is exposed to pay the amount of their claims.

We have now to examine whether the appellant may, under the existing circumstances, obtain the remedy which he prays for.

The appellant, as the highest bidder on this mortgaged property, might perhaps, before paying the purchase money, have required notice to be given to the mortgage creditors, in order to secure himself against their claims. That precaution used formerly to be taken; and if nothing in our present judiciary system is opposed to that practice, (which we do not decide) it is perhaps desirable that it should again prevail. But after payment made to the suing creditor, we think it would be too late for the purchaser to require that the mortgage creditors be called in. Far less then, can we recognise any right in the purchaser to pretend that the money by him paid be refunded and deposited in court to wait the demands of the privileged creditors. Such practice is unknown to our laws, and would be attended with evident injustice. The right of the suing creditor to receive the pro-

ceeds of the sale and to keep them so long as other creditors do not interfere and show a higher title, is incontestible: none but such creditors can dispute him that right. They may never do so. Why then should he be deprived of his due, before it is known whether any such demand will be made?

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The court are of opinion that the present action cannot be sustained; and they do adjudge and decree that the judgment of the district court be affirmed with costs.

Duncan for the plaintiff; *Livingston* for the defendant.

ENET vs. *HIS CREDITORS.*

APPEAL from the first district.

Privileged creditors are to vote for syndics.

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DERBIGNY, J. delivered the opinion of the court. By a decree of this court, of the 7th of May last, *ante* 307, this case was sent back to the court of the fourth district, with instructions to the judge to cause another meeting of the creditors of Joseph Enet, to be held for the purpose of proceeding to the nomination of another syndic or syndics, the first appointment having appeared to this court to be illegal. The meeting

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took place, and the present appellants were elected: but the district judge refused to confirm their election, on the ground that part of the creditors, viz. those who had mortgages, had been denied the right of voting.

The question then, whether privileged and hypothecary creditors are or not to participate in the election of syndics, is the principal, if not the only, subject of investigation here.

The parish judge, acting as a notary on the occasion, thought that creditors of that description are excluded from voting by the 20th article of the 17th chapter of the ordinance of Bilbao, which says that, in case there should arise any difficulty in the settlement of accounts and other incidents or acts, until the close of the proceedings, the minority shall abide by the will of the majority: but that creditors, having privileges by deed or otherwise above the simple creditors shall not be admitted to vote. This article, however, does not seem to embrace the election of the persons, who are to be entrusted with the management of the bankrupt's estate, and with the settlement of his affairs: provision being made for their nomination, in the 12th and 13th articles of the same chapter. Administrators of the estate, under the name of

depositaires, are to be chosen by the majority of the creditors, (speaking generally and without exceptions) then syndics commissioners are to be appointed to take charge of the books and papers, to ascertain the number and claims of the creditors, with the active debts of the bankrupt and liquidate the whole. Those are distinct trusts, unless it please the creditors to place them both in the same hands. After these nominations are provided for, we find in the 20th article, the disposition which gives to the simple creditors the exclusive right of debating among themselves, such difficulties as may occur in the settlement of accounts, and other incidents and acts. The reason of this is obvious: the privileged creditors, whose credits are liquidated, and who are to be paid at all events in full, have no interest in the adjustment of the other claims, nor in any measure which may be taken for the advantage of the ordinary creditors. But, it would have been strange indeed, had they been deprived of a participation in the choice of the persons, in whose hands that property is to be placed, out of which proceeds they expect to be paid. Be that as it may be, the ordinance of Bilbao, supposing it to have any binding force here in certain cases, is not the law which is to be consulted in matter of cession of goods.

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It is a part of the Spanish law-merchant, and is applicable only to traders. This is the case of a *cessio bonorum* by an individual not engaged in trade: it must be governed by the general rules provided for such cases.

Febrero, in the article quoted, when this cause first came before us, says that *all* the creditors or a majority of them in amount, not in number, are to make choice of the person to whom the administration of the estate is to be entrusted. The article of our code, quoted on the same occasion, gives to the creditors the right of naming syndics to have the management of the estate surrendered. The exclusion of the privileged creditors from a participation in that choice, is not so much as hinted at.

Another allegation of the appellants is, that one of the mortgage creditors, who complains that their v tes were refused, did not tender his, until after all the votes had been taken: but there is no evidence that the election was then closed. Besides, it appears that the determination of the notary, not to admit the votes of the hypothecary creditors had been made known, and that would be sufficient to excuse the creditor, even if he had admitted altogether the useless ceremony of tendering his vote.

The appellants have also made an attempt to

shew to this court, that since the judgment complained of, some of the creditors, in whose favour it was rendered, have thought fit to change sides, and are now willing to acquiesce in the nomination of the appellants as syndics. They even went so far as to establish, by calculation, what difference this would make in the result of all the votes. But this court could not, without assuming original jurisdiction, enquire into other circumstances than those which were laid before the judge, from whose decision an appeal was claimed. We must decide, and decide only, whether his judgment was or was not correct, at the time he pronounced it, not what it might have been, had the situation of the parties been different.

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

Moreau for the appellants; *Hiriart* for the appellees.

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CLAY'S SYNDICS vs. *KIRKLAND.*

APPEAL from the third district.

When a commission issues by consent, the want of an affidavit to the materiality of the

MARTIN, J. delivered the opinion of the court. The plaintiffs offered to read the deposition of

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the insolvent, taken on a rule of court made for the examination of witnesses, by consent, on interrogatories; which the defendant opposed.

testimony cannot be urged.

1. Because there was no evidence of the materiality of the testimony.

No law requires the service of interrogatories on the adverse party.

2. Because the commission issued before service, on the defendant, of the filing of interrogatories.

The acts of another attorney, than the one originally named on the record, are not invalid.

3. Because the notice aforesaid was signed by another attorney than the one on record.

A ceding debtor cannot be used as a witness by his syndics

4. Because the witness is an interested one: inasmuch as what may be recovered in the present suit will increase his estate, and on the contingency of it being more than sufficient to pay all his debts, a greater balance will accrue to him.

A witness who never saw the party write, but has frequently corresponded with him, may prove his handwriting.

5. Because the testimony was taken contrary to the letter and spirit of the statute.

The plaintiffs also offered in evidence a letter written by the defendant's wife, which the defendant objected to,

6. Because it was not written by her: the proof offered of her handwriting resulting from the testimony of a man, who swore he never saw her write, but had received many letters from her, and he believed the one offered to be in her handwriting.

7. Because the contents of the letter were not pertinent to the issue.

I. The affidavit, of the materiality of the testimony to be taken by commission, is required, in order to guard the party, against whom it is to be used, against the inconveniencies which may result from that mode of taking evidence; but when that party *consents* to the issuing of the commission, he waves the preliminary requisites introduced for his protection, 1805, 26, *sect.* 19.

II. There exists no law requiring that notice of the interrogatories to be put to the witnesses, should be served on the adverse party; nor even that these interrogatories should be filed within any particular time. The practice has been introduced by the attorneys, as a substitute for the notice of the time and place of taking the testimony. Perhaps the filing of interrogatories by the party, against whom the witness is to be examined, precludes him from requiring notice of the time and place, and when by consent the deposition is to be taken on interrogatories, notice of their being filed, affording the opportunity of having cross-interrogatories transmitted, dispenses with notice of time and place. But, in the present instance, the complaint is not that the

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notice of filing interrogatories was not given *at all*, or *too late* to afford the opportunity of sending cross-interrogatories, or of attending in proper time, but only that notice was not given *before* the commission issued. No complaint is made that the party had not notice of the time and place, and we must presume, as the contrary is not alleged, that such a notice was given.

III. The interrogatories being filed and notice given by an officer of the court, a sworn attorney, it is no objection that this was the first act of this person in the suit.

IV. Ceding debtors being entitled to the surplus of their estates, after the payment of their debts, the insolvent, John Clay, could not be used as a witness, by his syndics, till he had released his right to the surplus.

V. The fifth exception is taken in so general terms, that we cannot make it bear on any part of the record.

VI. The handwriting of the wife of the defendant was, in our opinion, sufficiently proven to authorise the plaintiffs to read the letter, if it could *at all* be admitted.

VII. The defendant, admitting impliedly, by

his objection to the proof of his wife's handwriting, that the letter, if true, was to be read to charge him; we consider the contents of it, being a request of supplies, as sufficiently pertinent.

We are of opinion that the fourth exception was a valid one, and that the judge erred in overruling it.

It is therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and the cause be remanded for a new trial, with direction to the judge not to admit the testimony of the ceding debtor, while the right to the surplus of the ceded property remains in him.

Hopkins for the plaintiff; *Bradford* for the defendant.

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An absent person, in whose favour a stipulation is made, may avail himself of it.

A partner entering into a contract, in the name of the firm, cannot be admitted to say that he was not authorised to make it.

Livingston for the defendant. A rehearing has been granted to us, and we are to confine our argument to two 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?

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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?

I. On the first question, in the terms in which it is stated, we may be permitted to remark, that the case can with difficulty be supposed to exist under any circumstances, and certainly cannot under those, in which this case is presented to the court.

In order to acquire a right in the property of another (except in the case of succession, forfeitures and cases in which the law alone operates) there must be a contract.

But a contract is the consent of *two* or *more* persons to form *between them* some engagement. 1 *Poth. Obl. n.* 3. The case supposed, in the first question, can at most only amount to a pollicitation, which is defined to be a promise which has not been accepted by him to whom it has been made, *Pollicitatio est solius offerentis promissum*: and according to Pothier, it "produces no obligation" and "he, who has made this promise, can retract, as long as it has not been accepted by him to whom it has been made." *Pothier on Obl. n.* 4. This doctrine is only

copied by Pothier from the Roman law, and is to be found in the *Dig. lib.* 50. *passim.*

The fifth law contains a case somewhat similar to the one under discussion. *Ex epistola quam muneris edendi gratia absens quis emisit, compelli eum ad editionem non posse.* And the Spanish law on this subject is declared by Rodriguez to be conformable to the Roman. The only cases, in which the pollicitation is declared to be binding, are when they are made to the community, and then only when they are in consideration of some dignity promised or conferred (in which case it would seem that it was no longer a pollicitation but a contract) and when they have caused some inconvenience or expence to the community by beginning to execute it.

The same principle is adopted in the English law, *vid.* 2 *Bl. Comm.* 30. And practising on this doctrine, their courts have determined that a bidder at an auction may retract his bid at any time before the article is struck off. 1 *Espinasse N. P.* 113, 47. 3 *Term R.* 148.

If we admit (and according to the authorities quoted I do not see how we can deny) that there is no contract before the offer or proposition is accepted, it seems to follow most conclusively that the party has a right to retract his offer, at any time before acceptance. If he has not, it

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must be because the party, to whom the offer is made, has acquired some right by this offer, but it has been shewn that such right can only be acquired by a contract, and that there is no contract without the assent of both parties, either express or implied, but the case supposes the assent of one party to be wanting, therefore there is no contract; therefore there is no vested interest; therefore the party had a right to retract.

The doubt expressed by the court seems to arise from conceiving that an interest can be created by contract, without an assent either expressed or implied of both parties, which it is respectfully supposed is a case that can never exist; however strongly expressed may be the offer, by whatever solemnities it may be clothed, it is but an offer, it is but a pollicitation, but a naked promise, which becomes binding only by the acceptance. The analogy is in nature. The female blossom of some plants is beautiful and has, to a cursory observer, every appearance of perfection; but alone it produces no fruit, the concurrence of the male stamen is necessary to give it force, vigour and stability.

The contract made between Duplantier and Kemper, if valid at all, was valid as a sale, it purports to convey a tract of land for a consi-

deration in money. If Smith acquired any interest by virtue of this transaction, it must be as vendee. Now let us examine whether any of the requisites to a sale can be discovered, as *applicable to him.* There must be a thing sold; a price agreed and the *consent* of the contracting parties. It would require no very subtle reasoning to shew hat neither the thing nor the price can be said to *exist,* in relation to a party who is ignorant of both. But dropping those, we will take only the third requisi e, the assent of the contracting parties, which Pothier says is "the very essence of the contract of sale, and consists in a *concurrence* of the *will* of the vendor to sell a certain thing, to the vendee at a certain price, and of that of the vendee to purchase the same thing at the same price." It will hardly be answered to this authority and to the inevitable deduction that must be drawn from it, that it only applies to the *contracting* parties, and that here Smith did not contract. I say this answer will hardly be given; because if Smith was not intended to be one of the parties to the contract, he can surely claim no interest under it: if he was intended to be one of the contracting parties, then his assent must be shewn, or the contract is void, and the other parties have a right to retract their offer as well

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in a contract of sale, as we have seen they have generally in other contracts. Pothier tells us that a sale may be made between persons who are absent, as well as those who are present, and that it may be made in the former case by *letters* or *messengers*. Let us consult this excellent civilian and see whether he does not throw some light on the case before us. "That the consent (he says) may be supposed to take place in this case, (a sale by letter) it is necessary that the will of the party, who has written to propose the sale, should be persevered in until his letter shall have reached the other, and that this other should *have declared that he accepted the bargain.*

This will shall be presumed to have been persevered in, *as long as the contrary does not appear.* But if I have written to a merchant in Leghorn to propose to him the purchase of merchandise at a certain price, and before my letter could reach him I write a second declining the bargain; or before that time I should die or lose my reason, in this case, although the Leghorn merchant, ignorant of my change of mind, of my death or insanity, should have answered that he accepted the bargain, yet no contract of sale shall be deemed to have taken place between us; because my will not having

been persevered in until the time that the merchant received my first letter and accepted my proposition, the *mutual consent or concurrence of two wills necessary to the contract of sale* was wanting."

Apply Pothier's supposed case to the one actually before the court. Duplantier and Kemper, we will suppose, both intended at the time of the private act, that Smith should have half of the land at the stipulated price, but, before Smith completed that act by his acceptance, they both change their minds and make a notarial sale conveying it to Kemper solely. Certainly if Pothier's reasoning (in which he is supported by the authorities he quotes) be correct, it puts an end to the question. The private act of sale given to Kemper was as much a nullity, as respected Smith, until his assent should intervene, as was the letter to the Leghorn merchant, until he answered it, and both had an equal right to retract until their assent were given. If we are not mistaken, this court have made a decision on this principle; even in the case of a notarial act, in the case of *Brognier Declouet* vs. *Blanque et al.* 3 *Martin*, 326. Several of the defendants had signed a notarial act, and before the acceptance of the plaintiff, or on his conditional acceptance, they erased their signatures, and

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they were held not to be bound, tho' the plaintiff afterwards agreed to accept, and actually signed unconditionally: this certainly could not have taken place, if an interest had vested in Declouet before his acceptance, by the signature of the defendants.

Again, if Smith had an *interest* before acceptance, he could not have had it gratuitously, he must have been under some corresponding obligation to pay the price, but it is absurd in terms to say, that he could contract an obligation without his assent to pay the price, therefore he could have no *interest* until he had by his assent contracted the obligation, and having no interest, Kemper and Duplantier, who were the only persons who had such interest, might dispose of it as they thought fit. It need hardly be remarked that the doctrine of implied *assent* cannot be at all applicable in this contract, which was an onerous one and made the purchasers liable to an action for the price.

I have in the beginning of the argument, stated successions and forfeitures, as exceptions to the rule, that no property can be acquired without assent, but the truth is they only exist as such by the common law. Ours is much more conformable to the dictates of reason, and does not, even in the case of the succession, give the pro-

perty of the deceased to his heirs, until they have expressed their consent to accept it. Confining myself to the simple question stated by the court, that alone has been the subject of discussion, and the case has been considered as if Smith had neither assented to, nor refused the bargain: but the evidence of his refusal is so extremely prominent, that I must suppose that the court directed the investigation in this form, more to throw light on the general principle, than to consider it as a question on which the determination of the court would depend: on this head I refer, first, to *Smith's letter, 18th August,* 1799, secondly, to

Duplantier's, Baker's & William's depositions.

II. We are to shew that no supposed motive of utility can enable one partner to bind the other beyond the *casus federis,* contained in the articles of copartnership.

Smith, in forming his partnership with Kemper, restricted it to the purchase of merchandise and the sale *for cash or convertible articles;* he never intended that, by this contract of copartnership his partner should be authorised, even where he thought it advantageous, to the concern, to deal in *lands.* Certainly the purchase

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of land is as much excluded from the terms of this contract, as the *sale* of them would be; if the one is to be effected for the benefit of the trade, the other is equally so: yet it will scarcely be supposed that if Kemper saw the means of making a great commercial speculation, he would have a right to sell Smith's landed property, in order to raise money to effect it. The object, therefore, to be attained by the act can never bring it within the contract, if it were not within the contemplation of the parties, at the time they formed the contract.

Whatever is clearly expressed in an instrument is said to be *according to its letter*. Whatever is not so clearly expressed, but which may fairly be presumed from the tenor of the whole to have been the *intent* of the parties, is said to be *within its spirit*. Whatever is not contained within the letter or the spirit of a contract, does not come within, and cannot be justified under, it.

In a copartnership for buying and selling merchandise, the right to purchase and sell the common stock is, according to the letter of the contract, and the right to hire a shop for the purpose of exposing the goods to sale, though not expressed, is within its spirit. Is it the same thing with respect to the *purchase* of a store? I think not: because it cannot fairly be presumed to have

been the intent of the parties, or to have been in their contemplation, at the time of making the contract: as real estate has been deemed more important than personal, most, perhaps all, codes of laws have prescribed greater solemnities for its conveyance; and in an instrument relating both to real and personal estate, the former would always be considered as the principal, the latter as the subordinate object; it is fair, therefore, to conclude, that if the parties had, in establishing a commercial house, contemplated a purchase of real estate, for the more convenient transaction of their business, that this important point would have been expressed. The numerous and obvious inconveniencies of suffering one partner to bind the other by contracts as to real estates, need not be dwelt upon, when we have this conclusive argument to use, that no contract for the purchase of land is valid unless made in writing by the party, or his attorney lawfully appointed. Now, as Smith did not make the contract himself, a power of attorney must be shewn in writing from him to Kemper, or Kemper's act cannot bind him, and of course can give him no interest. It must therefore, I think, be concluded that the power to purchase, even a *store* for the sale of the merchandise, is neither within the letter nor the spirit of the articles, and

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therefore cannot be justified by any motive of supposed utility.

But, when we reflect that the purchase in question was a large tract of land, more than a thousand times greater in extent than was necessary for the purpose of building a store, that it was made evidently for the purpose of speculation, and a speculation totally foreign to the object of their partnership; and that Smith himself has declared on record in his petition to the Spanish commandant that Kemper "*had no authority to purchase,*" there seems to be little doubt, reasoning on general principles, that, in this case, the purchase must be solely for Kemper's account; the doctrine, thus laid down in this argument, appears to be supported by the following authorities:

Dig. 17, 2, 82, Godfrey's note (no. 32.) *Extra societatem gesta, socios vel consortes non obligant sed ipsos tantum contrahentes.*

7 *Durnford & East*, 207.

1 *Dallas* 122, president Shippen sets aside a bond and confession of judgment executed by one partner for both, in the following terms: "There can be no doubt that in the course of trade, the act of one partner is the act of both. There is a virtual authority to that purpose, mutually given by entering into partnership; and

in every thing that relates to their *usual dealings*, each must be considered as the attorney of the other. But this principle *cannot be extended further, to embrace objects out of the course of trade.* It does not authorise one to execute a deed for the other: this does not result from their connection as partners; and there is not a single instance in the books which can countenance such an implication."

So in a similar case in New-York, 2 *Caines* 255, Judge Livingston says, "It is settled in England that one partner, in consequence of the general authorities derived from the articles of copartnership, cannot execute deeds for the other. Were it otherwise, they would be enabled to dispose of the real property of each other, and to create liens on it without end; this would render such connections more dangerous than they already are, if not discourage them altogether."

In 1 *Day's Rep.* this doctrine was extended to a policy of insurance by one partner in the name of both. A case certainly more analagous to mercantile transactions than the purchase of land.

Moreau for the plaintiff. The defendant's counsel contends that in order to acquire a right

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in the property of another (except in the case of succession or forfeiture, and cases in which the law alone operates) there must be a contract, which cannot be formed without the assent of all the parties, otherwise there is no contract, but a promise or a pollicitation, which produces no effect: and therefore till the plaintiff gave his assent to the purchase made in his name by the defendant, the sale was revocable, at the will of the latter or of the vendor.

The proposition is not perfectly correct. Property may be acquired not only by succession or contract, but also by the obligations resulting from the acts of a man, without any contract, as quasi contracts, torts and quasi torts, accession, occupation, prescription, judgment, &c. *Code Civil* 145.

It is true that a contract, or to speak more correctly, a convention, according to Pothier's definition is the consent, of two or more persons to create an argument. *Pothier on Obl. n.* 4. Consequently in sygnallamatic contracts, the consent of all the parties is required for the perfection of the contract. But it is otherwise in quasi contracts, especially in that of *negotiorum gestorum,* which are formed by the sole act of the *negotiorum gestor,* without the assent, or even the knowledge, of him whose affairs are

managed, *Civil Code* 319, *art.* 5. We are then closely to examine the various engagements resulting from the act of sale, entered into by Duplantier and the defendant, in the name of the partnership of Kemper & Co. We find in this act a contract, and a quasi contract. A contract of sale between Duplantier and Kemper & Co. and a quasi contract between the plaintiff and the defendant, considering the act as not binding on the firm.

This act contains a contract of sale between Duplantier and Kemper & Co. For the defendant purchases a tract of land in the name of the firm, for a price agreed upon. The act is evidence of the reciprocal assent of the parties, which is required in all sygnallamatic obligations. Duplantier agrees to sell to Kemper & Co. and the defendant under the signature of the partnership, agrees to pay the price agreed upon. The contract is then perfect between Duplantier and the defendant, and it was no longer in the power of Duplantier to destroy its effect, without a formal retrocession of the defendant, contracting in the same capacity; this did not take place. This act cannot then be considered as a mere pollicitation, a promise not yet accepted by the promisee, who is at liberty to reject it. There has been a sale by the ven-

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dor, accepted by the vendee. But the acceptance is said to be without effect, because the defendant could not bind the plaintiff, his partner, by a contract for the acquisition of land, under their articles of partnership. The insufficiency of the defendant's powers, may be opposed by the plaintiff, and not by the defendant. It often happens that an attorney exceeds his powers in purchasing, in the name of his constituent, a thing which he was not authorised to purchase; but it does not follow from hence that there is no sale, no reciprocal consent: if the constituent does not ratify the purchase, it will remain for the account of the attorney—but till the constituent manifest his intention, the right to accept the purchase is in him and cannot be affected, even by the concurrence of the wills of those who made the contract.

The act of sale between Duplantier and the defendant, supposing the latter not to have had sufficient powers to bind the partnership, contains a quasi contract of *negotiorum gestorum* between the plaintiff and the defendant, which precluded the latter from destroying, in his private name, the engagement which he had taken in the plaintiff's name, till he formally refused to ratify it.

When any attorney, says Pothier, has exceeded his powers, his conduct, in regard to

what is beyond those powers, forms between us a quasi contract of *negotiorum gestorum*. 2 *Contrats de bienfaisance, n.* 177.

Can the attorney, who has contracted, in the name of his constituent, for some thing beyond his powers, rescind by his own act the contract, before the constituent had time to ratify it? We think not.

Pothier informs us that this question was strongly debated in France, in regard to stipulations in a contract, in favour of third persons, not parties thereto, and remained undecided till the ordinance of substitutions.

According to the strict principles of law, adopted in France, one could not stipulate or enter into an engagement, in one's own name, but for one's self, and consequently when one stipulated a thing with another, for a third person, the convention was void. 1 *Pothier, Ob.* 54, 55. But what concerned a third party might be the mode or condition of a convention, altho' it could not be the object of it. So altho' nothing could be directly stipulated for a third person, the vendor might bind the vendee to do something for a third person. *id.* 71.

On this the following question arises: whether, having given you a thing, on condition that you should return it to a third person within a

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given time, or to give him something else, I might release you from your obligation, the third person not being a party to our bargain? Pothier says, the writers were divided on it, and does not disclose his own opinion. From the adoption of an affirmative answer, there would result no general rule, but a particular one only, confined to the case of a donation or liberality towards the third person, not a party to the contract. When I give you a thing, charging you to deliver another to a third person, two distinct donations occur: the one to you, which derives its perfection from your intervention and acceptance, the other in favour of the third party, which can only become perfect by his acceptance. Till he accept, his right is in suspense, and I may revoke what I have done in his favor, because the donor may revoke the donation while it remains unaccepted. *Pothier, Don. inter vivos, sec.* 2. *p.* 54.

These authorities, however, are not applicable to the present case. The defendant did not stipulate in his own name, but in that of the plaintiff, or of the firm of Kemper & Co. Supposing that his powers, as a partner, were not sufficiently extensive to bind the partnership, for the purchase of a tract of land, he was in the situation of an attorney, having done, in

the name of his constituent, an affair which exceeded his powers, or of a person who had taken on himself to purchase a thing for another, without his authority or knowledge. In either case the purchase would not be null, but subject to the ratification of the person for whom it was made. If the *negotiorum gestor* occasions any loss to him whose affairs he undertook to manage, in purchasing things, which the latter did not usually purchase, the loss will be his own; and we say, that on the contrary, if any profit result therefrom, it shall be for him whose affairs have been managed. *Part.* 5, 12, 33.

It is clear from this law, that he, whose affairs have been managed without his knowledge, acquires a right on the sale which has been made in his name, if it appears to him beneficial. How can this law be reconciled with the opinion of those who hold that a *negotiorum gestor* may annul a contract, which he has made, before it be ratified by him, on whose account it has been made. When I have purchased, in the name of a third person, without his authority or knowledge, the law raises between him and me a quasi contract of *negotiorum gestorum*, which binds me, in the same manner as if I had purchased with his authority. *Code Civil* 319, *art.* 5.

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If it cannot reasonably be pretended, that an attorney, who contracts in the name of his constituent and according to his power, cannot annul the contract without the assent of his constituent; how can the *negotiorum gestor,* who in this case is assimilated to the attorney, possess a right, which the latter has not?

In the case of a donation in favour of a third person, the donor may revoke the donation till it be accepted, for till then no right is acquired to the donee; but the case is a very different one. Duplantier did not sell to the defendant, but to Kemper & Co. or to the plaintiff and defendant. The property therefore passed to them, altho' the transmission of it might depend on the ratification of the plaintiff. Every day purchases are made for third persons subject to their ratification. Till then the purchase is conditional, but the right is no less acquired to the third person, to avail himself of the purchase.

The attorney who, in a contract, has overleaped the limits of his authority, cannot annul the contract without the consent of his constituent; nor the *negotiorum gestor,* without that of him, in whose affairs he has interfered. We have already seen that the act of the attorney, who had exceeded his powers, was assimilated to the quasi contract of *negotiorum gestorum.*

The constituent has the same right as he, whose affairs have been administered. He may take or refuse the bargain.

It is only in cases, says Pothier, in which the attorney confines himself within the limits of his powers, that the constituent may be supposed to contract thro' the intervention of his attorney, with those with whom the latter contracts, and that he becomes bound to them. If the attorney exceeds his powers, the constituent may disapprove the contracts he has made in his name and leave them for his account. 2 *Contrats de bienfaisance.*

The constituent has then, in such a case, the right of approving or disapproving the contract. This right results from its being made in his name, although without his authority. Who can then take from him a right which the law gives him? How then can it be said the attorney can? This cannot be answered in the affirmative without the support of a positive text of law—one will be looked for in vain. Pothier says, that the refusal of the constituent does not annul the contract, but that it remains for the account of the attorney.

The *Partida* 5, 5, 48, declares formally that when one has purchased a thing, in the name of a third person, the latter may take the bargain

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for himself, and the purchaser is bound to deliver him the thing and its fruits.

Gregorio Lopez, in his commentary upon this law, says that the right of the third person is grounded on the quasi contract of *negotiorum gestorum*. This author is relied upon to shew that until he ratifies the contract, it may be annulled by the person who made it. He says that when a *negotiorum gestor* purchases as such, the contract ought to be made in these words, "you sell to me such a thing for A. B. whose *negotiorum gestor* I am." That in such a case the sale is perfect, because that reciprocal consent which the contract of sale requires exists: but that if the sale is in these words, "you sell such a thing to A. B. who is absent, and whose attorney I am," then as the attorneyship does not exist, there is no consent, but that of the vendor; and the sale can only become perfect by the ratification of the vendee, if the vendor persist in the determination. Hence he concludes that he may till then revoke the sale, the consent of the parties in a sale being necessarily reciprocal, and simultaneous. But, he adds that, if the vendor has dealt as attorney of the absent party, whatever expressions may have been used, the vendor cannot revoke the sale.

Here it is to be noted that the sale has not

been made to Smith, an absent person, but to Kemper and Smith. It is true the defendant acted in the name of the firm: but it is admitted, that he was a partner. The contract was then perfect between the vendor and vendees, Duplantier and Kemper & Co: partners being supposed to have given each to the other reciprocally the power of administering their common affairs. *Code Civil*, 395, *art.* 37. A partner has *primâ facie*, especially with regard to third persons, the right of representing his co-partners. Among themselves they may inquire whether one of them has exceeded his powers, and refuse to ratify contracts which are foreign to their concerns, and who could not appear such to the persons with whom he dealt. The observations of Gregorio Lopez have no relation to the present case. The defendant did not take a bill of sale for the account of the plaintiff, calling himself his *negotiorum gestor*: neither to the plaintiff, calling himself his attorney. He purchased as a partner, for the account of the firm. If he acted within his powers, the bargain is binding on the firm; if he did not, the contract is not the less valid between the parties. Duplantier ought not to suffer from his confidence in the defendant, having made with him a contract, not evidently foreign to the

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affairs of the firm. If he exceeded his powers, it only follows that his copartner, the plaintiff, may accept or reject the bargain. In the latter case, it remains in full force for the account of the defendant.

But it is contended that the purchase, tho' made by the defendant for Kemper & Co. is for his sole account. *ff.* 18, 1. 64.

The law relied on is as follows: I purchase land for myself and Titius. Is the sale valid for the whole, or only for one half, or absolutely void? I answer, it is vain that Titius' name is mentioned; consequently the land is wholly acquired to the purchaser, who contracted.

The civil law did not admit any one to stipulate, or undertake any thing, except for himself, 1 *Pothier, Obl. n.* 53. One could not, therefore, stipulate for a third person, unless he acted in his name, and had power so to do, as attorney, partner or otherwise, and it was necessary to make an express mention of this. 1 *Pothier, Obl. n.* 54, 84. It is on this incapacity of stipulating for a third person that is grounded the law relied on. This is evident from Rodriguez's notes on this part of the digest.

Altho', when one stipulates a sum of money, as well for himself as for a stranger, the stipulation is valid for what he stipulates for himself,

it is said in the above law, that the person of Titius is vainly named, and that the sale is valid for the whole: and the reason of it is that the sale is indivisible, and cannot be valid for part and invalid for the rest. 6 *Rod. Dig.* 387.

L'Esparat says, 'If I purchase for myself and a third party, without authority from him, the sale is void as to him, and the whole belongs to me:' *l.* 64, above cited. Yet, as is observed by Pothier on this law,—*hoc non obtinet in omnibus conventionibus: in stipulationibus, cum stricti juris sint, si quis sibi et extraneo stipulet, stipulatio in partem dumtaxat valet, ut definit Pomponius in lege* 110, *de verb. ob.* 2 *Dict. du Dig.* 554, *n.* 68.

This is also what is supposed in the *Napoleon code, art.* 1119—1121. Where it is said, that one can only take an engagement or stipulate, in one's own name—except for one's self.

The maxim then that one cannot stipulate for a third person was the basis of the decision in the law cited, according to which, the purchase which I had made for Titius and myself was invalid as to him.

In the present case, the stipulation was a different one. The defendant did not purchase from Duplantier for the plaintiff and himself; the only case in which the law cited might be ap-

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plicable to the purchase. As a partner he bought for the firm of Kemper & Co. of which he was a member. He did not then stipulate for himself and a third party, having a distinct interest, and without any authority from him: but for the firm, in an affair, which he believed he had a right to conclude as a partner.

Farther the rigor of the Roman law, in this respect, admitted in France with a restriction, viz: 'That one cannot *generally* stipulate in one's own name for a third person,' is further relaxed by a formal law of the Partidas. The law 48, already cited, declares, *that if one purchases, in the name of another, the latter may ratify the contract and avail himself of it.* With such a formal text, in opposition to it, how can the principles of the Roman law be invoked, even in cases to which they would otherwise be applicable? How could one, able to avail himself of a bargain, absolutely made in his name and without his authority, be repelled if he were interested in the bargain for a part only?

We see daily the same thing bought by several persons, and when Pothier speaks of the right of him, for whom a contract was made without his authority, to ratify and avail himself of it, he makes no distinction on the different kinds of contracts, nor on the nature or quantity of the interest which he may have therein.

If I contract in the name of one, who has not authorised me, his ratification will cause him to be deemed to have contracted by my intervention: for the ratification is equivalent to a power. 1 *Pothier, Obl. n.* 75.

He in whose name a tract of land or part of it has been purchased, has the right of being considered by the vendor, in the same light as if he had purchased by an attorney. How can this right be reconciled with a faculty in the vendor to annul the sale, and in him who made the purchase to destroy the effect of the bargain, without the concurrence, and against the will of the person for whose account it was made?

But, a ratification is spoken of: Does any exist? Can a sale, with delivery of possession, be destroyed by a second sale, made by the vendor to a third person? The property in the land having once been transferred by Duplantier to Kemper & Co. the effect of this transfer could only be destroyed by a retrocession from Kemper & Co. to Duplantier, who might afterwards sell to the defendant alone, or to any other person. Nothing of the kind has taken place. Duplantier has made a second sale to the defendant, without destroying the first. A second sale may prevail over the first, made by the same vendor, when the first was not attended with a delivery,

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and the second is. But here the record shews that the firm were put in possession, since in January and December 1800, the defendant paid out of their funds, and as a charge to which they were liable to, the costs of the survey, as well as those of the improvements he made on the land. Besides it would be necessary to examine whether the second sale to Kemper & Co. be not a repetition or confirmation, rather than a revocation of the first. Although the act was under the private signatures of the parties, it was perfect, since real estate may as validly be sold in this manner, as by an authentic instrument, and the clause by which the parties agree to have an authentic deed of sale executed of the land which has been sold by a private deed, adds nothing to the validity of the sale, and has no object but to give it authenticity.

II. The second question proposed by the court is the only one which appears to demand their attention. For, if we prove beyond any doubt, that the sale by Duplantier to the defendant, in the name of Kemper & Co. was strictly binding on the firm, all other questions will become unimportant. If the defendant had the right of purchasing land for the firm, the sale made by Duplantier to the firm is perfect, hav-

ing had the assent of the vendor and vendee. It could consequen ly be avoided only by a retrocession, which did not take place.

It is a clear principle, in regard to all partnerships, and commercial ones are not excepted from it, that a partner binds his copartners, in all affairs which are not foreign to the partnership.

Partnership is contracted for every thing that may relate thereto. Therefore, if one of the partners contract a debt, private to himself and absolutely foreign to the partnership, it is not to be paid out of the partnership funds. 6 *Rod. Dig.* 337.

The signature of the firm does not bind the copartners, when it appears, from the nature of the contract, it does not relate to its affairs, as if I were to put the signature of the firm to the lease of a tract of land, my private property, which I had not put in the common stock. 1 *Pothier Obl.* 83.

If from the nature of the contract which I make with a copartner, the object of it appears not to concern the partnership, as improvements to his houses making no part of the partnership property, the signature of the firm apposed to the contract will not render it a partnership contract, while the object of it shews that it is not. *Pothier, notes a la suite du contrat de louage.*

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It is then less by any particular clause, in the articles of partnership, than by the nature of the contract, and its connexion with the affairs of the partnership, that we are to judge, (at least in regard to third persons) whether a partner could bind the firm, in his contracts for the partnership. For otherwise the interests of those who deal with a partner, under the signature of the firm, would often be in jeopardy. Partnership articles are generally kept secret: the production of them is seldom required; it would often be impossible: many partnership contracts being merely oral. It is then just that contracts made by a partner be regulated less by conventions known only to the copartners, than by the nature of the affair and its connexion with the interest of the partnership.

Is it then unusual for partners to purchase a dwelling-house, or ware-house for the use of the firm? Is it necessarily compelled to rent? Would the purchase in such a case be held foreign to the affairs of the partnership, and will it be required for its perfection that every individual of the firm should intervene? Surely not. The signature of the firm, apposed by one of the partners, binds all the partners.—provided the contract be not evidently foreign to the affairs of the partnership.

When Duplantier contracted with the defendant, he clearly saw that the purchase was not foreign to the affairs of Kemper & Co. who were exchanging goods for cotton in the seed, and to whom, consequently, a tract of land was useful for the erection of a gin and ware-houses. It was unimportant for him to know whether the articles of partners ip between the plaintiff and defendant, to which he had no access, contained any special clause in this respect. He received the signature of the firm, and it sufficed to him that the contract was not foreign to its affairs, in order to create the expectation that both parties should be bound thereby.

This being established, can it be contended with any hope of success, that tho' the plaintiff was bound by the signature of the firm to pay the price agreed upon, and though he actually paid it, the defendant may now claim the premises as his individual property, under the pretence that the partnership articles did not authorise him to purchase them. It would be the first time that a mandatory would plead that he had exceeded his powers.

It is to be remarked, that the partnership articles declare that, 'It's affairs shall consist in the sale and exchange of merchandise', but it does not interdict other affairs to the partners.

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DERBIGNY, J. delivered the opinion of the court. * I. In the discussion of the first question, the counsel for the plaintiff and appellee have appealed to principles of incontrovertible truth and soundness, but the application of which to the present case is by no means obvious, *viz.* that no offer or proposition, tending to a contract, can be binding on the person proposing, until the proposition be accepted; because there can exist no contract, without the concurrence and simultaneous will of the contracting parties.

To apply this principle to the present case, the counsel for the appellee have been reasoning throughout, as if Duplantier, the seller, on one side, and the appellants on the other were parties to this suit. The case of a merchant, proposing to another by letter to sell him merchandise, at a certain price, and withdrawing his proposition before acceptance, is quoted and relied on, as one which bears a strong resemblance to this. Duplantier must then be the person proposing, and Smith the person to whom the proposition is made. But does that agree with the fact? Is there in this case any feature which warrants the comparison? Surely not. And what are the facts here? Duplantier, the

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

proprietor of the land now in contest between the parties to this suit, made an absolute sale of that land to the partnership of Kemper & Smith. The contract was perfect and complete. The right of Duplantier on the land was conveyed away, never to return, unless by consent of the purchasers, say of Kemper at least, and through a regular reconveyance of the property. Duplantier then could not retract, and his subsequent attempt to sell again a property, which he had already transferred and delivered, is a nullity, unless, as we have heretofore said, it is taken as a confirmation of the first sale.

The question may, therefore, be reduced to this. Can the purchaser, who has bought for himself and an absent person, take the whole bargain for himself, before the absent person has refused to accept?

The strongest authority which can be found in favor of the affirmative, is the *Digest*, 18, 1, 64. *Fundus ille est mihi et Titio emptus. Quæro utrum in partem aut in totum venditio consistat, an nihil actum sit? Respondi, personam Titii supervacuo accipiendam (puto) ideoque totius fundi emptionem ad me pertinere.*

By the Roman law, no body could stipulate for a third person, without authorisation. *Inst.* 3, 20, *l. si quis.* Therefore, when a stipulation

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had been made by one for himself and another, if the stipulation was for a thing divisible, as a sum of money, the contract was valid for one half in favor of the party stipulating, and null as to the other moiety. In the case here presented, it is asked what will be the effect of the sale of an immoveable, thus made in favor of two persons, one of whom only stipulates, and it is decided, that the whole estate is acquired to the party stipulating, because, says Rodriguez, in his note upon that law, *the sale is indivisible, and cannot be valid for a part only, as is a stipulation for a sum of money.*

The question settled by this law is not therefore that which arises here: the right of Titius to accept or refuse is not the subject. The validity of the sale is made the question—is it valid in whole or in part, or is it a nullity? Perhaps, this question arose upon a pretension manifested by the vendor to take the property back.

But what will be the use of that law? It is not law in this country; the Spanish code in matters of stipulation in favor of third persons differs altogether from the Roman. By the precise disposition of the Partida 5, 5, 48, any person may buy for another, and the person, in whose favor the purchase is made, may avail himself of it, if he pleases.

Subsequent times have gone farther yet. By the *law* 3, *tit.* 8, *book* 3, *del ordinamiento*, the *recopilacion* 5, 16, 2, even pollicitations are made obligatory. *Hodie tamen, de jure regio bene queritur actio illi tertio, et sic corrigitur in hoc jus commune: ita disponit l.* 3, *tit.* 8, *lib. ordinament. imo quod magis est nedum precedit, quando quis stipuletur illi tertio absenti, sed etiam quando simpliciter et nudâ pollicitatione quis promittit absenti, ita aperte disponit prædicta lex. Ex qua bene nota quod hodie in nostro regno ex nuda pollicitatione oritur actio et corrigitur totus titulus de pollicitationibus.* 2 *Gomez*, 700. On which article the following comment is to be found in the additions to the same chapter: *de jure regio quemlibet alteri stipulari posse, et ex hujus modi, stipulationem directam actionem illi tertio acquiri, ut resolvit Gomez, docent Covarubias. Guthierez, Matienzo, Acevedo, Ceballos et alii communiter, no.* 3 *on the 7th law. tit.* 11, *part* 5. The general opinion of the Spanish jurists predicated upon the law 2, *tit.* 16, *book* 5, *of the Recopilacion de Castilla*, seems therefore to be conformable to that of Gomez: some of them going even so far as to say that, if the stipulation in favor of the absent has been made in a public instrument, it gives the right of an executory action, *jus exequendi*.—Sanchez alone is of the

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opinion that such a stipulation is of no effect before the acceptance of the absent, but even that opinion does not raise a doubt as to the validity of the stipulation; it only contends that the effect of it is not to take place before the acceptance. But, independently of any comment and of any disquisition, what can be more explicit than the law itself? *Obligado uno a otro por promision o contrato, u de otro modo, debe cumplir y no puede exceptionar ni que se hizo entre ausenti, ni que no hubo tal estipulacion, ni que no fue ante escribano publico, ni que la obligacion fue hecha a otra persona privada, en nombre de otros ausentes, pues que, constando que se obligo, la ha de cumplir.*

So much for the stipulations made in favor of a third person, unconnected with any right acquired by a contracting party present. But the subject immediately under our consideration, to wit, a stipulation made in favor of two persons, one of whom only is present, at the time of making the contract, is itself particularly mentioned by the same author, in the following article, in a manner that removes all doubts as to the validity of such stipulation in favor of both. *Dubium tantum est si quis stipuletur copulative sibi et tertio extraneo decem, an ista stipulatio et promissio valeat, de jure communi et jure regio, et in quo valeat? et*

breviter dico quod talis stipulatio et promissio intelligitur tantum facta in persona utriusque in solis decem, unde de jure communi valet in persona stipulatoris pro medietate, et sic quinque; in persona vero tertii extranei erit inutilis; respectu alterius medietatis sibi contingentis in aliis quinque, &c. Hodie tamen de jure regio valeret talis promissio in utriusque persona, per dict. leg. ord. quilibet poterit agere pro medietate, and in the additions to that number, *stipulantem copulative, sibi et extraneo, sibi tantum acquirere pro medietate, in alia vero inutilis eam esse stipulationem de jure communi, secus vero de jure regio, ut hic resolvitur comprobari facile potest, ex addictis numero precedenti.*

A right is there given by the Spanish law to the absent person in whose favor a stipulation is made, whether that stipulation be for his only benefit, or for the joint interest of him and another person, present at the time of stipulating. In the first case some authors are of opinion that the stipulation is of no effect, until it is accepted, tho' the general doctrine be that such acceptance is not necessary. But, in the other case, that in which the obligor has entered into a contract with one of the obligees, no question is made as to the validity of the contract in favor of both, and the necessity of an acceptance, on the part of the ab-

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sent person, for the purpose of giving the contract effect against the obligor is not even thought of.

As to the consequence of a refusal on the part of the absent person, with regard to the party who has undertaken to contract in the name of both, it is not a question to be examined in this case, because, for the reasons adduced in our first opinion, we do not think that any refusal has taken place on the part of the appellant.

Hitherto we have considered the appellee as a person entirely unconnected with the appellant, and having undertaken without any authorisation to make a purchase on the account of both. We have seen that, even if such was their relative situation, the contract entered into by the appellee would be valid, and would give to the appellant a right to one moiety of the property bought: but, when we consider that the parties were partners in trade, at the time this contract was entered into, not only the above principles apply to the case with additional force, but others come to their aid, which put the claim of the appellant in a still more favorable light.

Partners in trade for the purpose of transacting the business of their concern, are tacitly vested with the necessary power to bind the partnership, in all such contracts as are within the sphere of its commerce. Within these limits each partner is

considered as the attorney of the others, and whatever he does is obligatory on them. If he transgresses those boundaries, he places himself in the situation of an attorney, who exceeds his powers. But, are the acts of the attorney in such cases void *ab initio?* No: they may be made valid by the approbation of the constituent. The attorney, says our code, cannot go beyond the limits of his power; whatever he does in exceeding that power is null and void, with regard to the principal, *unless ratified by the latter. Code civil* 424, *art.* 24. That doctrine is the same which existed before. *Curia Phillipica, lib.* 1, *cap.* 4, *n.* 20. The appellant then has a right to ratify and accept the purchase of the land, which is the subject of this action, and the appellee cannot pretend that because he exceeded his powers in making it, the property belongs to him alone.

But, can the appellee be permitted to say that he exceeded his powers? Can he object to the validity of his own acts? Powers of attorney may be given by instruments under private signature, and even by letters. They are the title of the attorney against his constituent to prove, should it be denied, that he acted with due authority, and to make the constituent responsible for what he has done by his order. But the consti-

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tuent retains no voucher of his authorisation. If it should be permitted to the attorney, after having contracted in the name of his principal, to say, that he was not authorised, he might, should the bargain turn out an advantageous one, apply it to his own benefit. To that effect, it would be sufficient to conceal or destroy the evidence of his authorisation. So between partners (and be it understood, that we have seen nothing in this case that would justify any allusion to the parties). Independently of the powers derived under the articles of partnership, authorisation may be given by one to the other by letter or otherwise: and if the partner, thus authorised, should wish to enjoy alone the benefit of any advantageous transaction, made under such authorisation, nothing would be more easy for him than to secure it. Those reflections are made with the only view to shew how just is the rule which does not admit a party to contradict his own deed, a rule which applies here with particular force: for the act of the party imports the confession of a fact, the proof of which may be in his power alone. We are of opinion that the appellee, after having stipulated in his contract, in the name of the partnership, cannot be admitted to say that he was not authorised to that effect.

For those reasons, in addition to those already expressed in our first opinion, we should think that the judgment rendered in this case ought not to be disturbed: but, as it further appears to us, that, at the commencement of the suit before the Spanish governor of Baton-rouge, as mentioned in the proceedings in this case, the premises were in the hands of the appellee, as part of the partnership stock, and the proceedings in the said suit before the Spanish governor, whereby the appellee was dispossessed, appear irregular and illegal: it is ordered, adjudged and decreed, as the judge of the fourth district ought to have decreed, that the appellee be restored to the possession of the said tract of land, as described, and set forth in the proceedings in this case, to be held by him as part of the joint stock of the late partnership between him and the appellant, John Smith, until the final settlement and payment of the accounts of said partnership. And that a mandate do issue from this court to the court of the fourth district for the parish of Pointe Coupee desiring the said court forthwith to issue the proper writ to put the appellee in possession of the said tract of land accordingly.

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DUSSUAU'S SYNDICS *vs.* BREDEAUX.

DUSSUAU'S SYNDICS vs. *BREDEAUX.*

APPEAL from the court of the first district.

When the homologation of the proceedings of a meeting of the creditors of a bankrupt has passed *in rem judicatam* they cannot be objected to, on the ground that they are recorded in the French language.

DERBIGNY, J. delivered the opinion of the court. The plaintiffs and appellees, as syndics of L. Dussuau, a free man of color, claim as part of the estate surrendered, a female slave, whom they alledge is unjustly and without right detained by the defendant.

It is in proof that she was the property of their insolvent, at his surrender, but the defendant alleges on the one hand that the plaintiffs have no right to sue, because they are not the syndics of the creditors: their appointment as such appearing by proceedings, which are recorded in the French language and consequently null. On the other hand, he avers that he bought this slave at public auction, and has a legal title thereto. In support of this allegation he produces in evidence, the record of a former suit brought against him by the appellees, in which they set forth that he purchased from them, at public auction, in their capacity of syndics of Dussuau's creditors, the slave now in dispute, for the sum of $885, payable in March 1815, for which he was to give his note of hand, endorsed to the satisfaction of

the vendors; but that he took and retained possession of the slave without having complied with the conditions of the adjudication. His answer to this claim was a special disavowal that any such purchase had been made by him, and he appears to have obtained thereon a dismissal of the suit.

Being now called upon to surrender the slave he turns round and alleges that he is owner of her by virtue of a sale, made to him by the plaintiffs in their capacity of syndics, but being aware that such a claim would be disregarded, he previously pleads to the persons of the plaintiffs, alleging that they are not duly qualified to act as syndics of the creditors of the insolvent, because their appointment as such is recorded in the French language.

We incline, indeed to think that the acts of creditors convened by a court of justice are part of the judicial proceedings, the whole course of which forms what is known to the Spanish laws by the name of *Juicio de Concurso*, and as our constitution directs that all judicial proceedings should be recorded and conducted in English, we are disposed to believe that if the objection raised had come from a person who had no concern in, nor adhered to, the proceedings complained of, it would be our duty to declare they

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are not legal. But we do not find it necessary to decide the question absolutely in the present case. These proceedings, regular or not, have been approved by the judge, and are binding at least upon those who were parties to them and did not oppose their homologation, nor appeal from the decree pronouncing it. The defendant is a creditor of Louis Dussuau, as appears from his answer to the first demand brought against him by the plaintiffs. Nothing shews whether or not he was personally called to the meeting of the creditors, but he certainly had notice, through the publication made thro' the newspapers, and considering that he lived out of the jurisdiction of the court, before whom the proceedings of bankruptcy were pending, that ought to be deemed sufficient. *Febrero de Juicios, lib.* 3, *ch.* 3, *sect.* 1, *no.* 15 *at the end.* Besides his own conduct shews his acquiesence in the proceedings of the creditors. For in his answer to the first suit, far from contesting the plaintiff's right to sue, he pleads to the merits, and claims from them, in their capacity, the sum due him by the estate of the insolvent. The homologation of this nomination ought certainly to be considered as *res judicata* between him and the plaintiffs.

As to the nature of the title of the appellant, it consists in an adjudication to him made of the

slave in dispute by the judge of the parish of St. John the Baptist, acting as auctioneer. By the process verbal of that adjudication, which the defendant has offered in evidence and which we think ought to have been received, it appears that he did not sign that adjudication, and it further appears that it was a condition of the adjudication, that the purchasers should give their notes of hand, duly endorsed, and execute deeds of mortgage of the property sold; none of which requisites appear to have been complied with by the defendant.

The adjudication then standing alone, being the act of only one of the parties, no contract of sale can be said to have been completed between them. Hence the defendant being called upon to pay the price of this adjudication, denied having made the purchase, and succeeded in having the suit dismissed. His present attempt to keep possession of the slave, by virtue of the same title, which he then disclaimed cannot avail him.

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

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

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LECARPENTIER
vs
DELERY'S EX'R.

A person appointed, as an expert, to verify a signature, must decide on comparison of handwriting, & cannot receive and act upon information of the circumstances of the case.

LECARPENTIER vs, *DELERY'S EX'R.*

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

DERBIGNY, J. delivered the opinion of the court. This is an action brought against the endorser of a promissory note duly protested. The defendant having died since the beginning of the suit, the answer is filed by his executor, who refuses to recognise the signature of the endorser as that of his testator. Upon this refusal two skilful persons were appointed by the court (conformably to the civil code 306, *art.* 226) to compare that signature with others acknowledged to have been written by the testator and report thereon. They disagreed, and by consent of the parties, a third person was named to settle the difference: but that person not being able to ascertain by the mere comparison of handwriting whether or not the endorsement was in the handwriting of the testator, went about collecting other information on the circumstances of the case, and reported that being satisfied from that enquiry that the testator had really given the endorsement, he was convinced that the signature in dispute was really his.

To the admission of such a report the defendant objected, but his opposition being overruled he excepted to the opinion of the parish court and on the bill of exception he took we are now called upon to pronounce.

Nothing can be clearer than this point. The persons appointed to judge of a signature by a *comparison* from handwriting, is not a referee, to whom the examination of the case is entrusted. His task is confined by express law to the comparison, if he can judge thereby, he must report accordingly; if he cannot, he must declare it: any other inquiry for the purpose of aiding his judgment is evidently illegal and the report upon it inadmissible.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the cause be remanded with directions to the judge to try it anew and not to admit the report excepted to: and it is further ordered that the costs of this appeal be borne by the appellee.

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

See *same case*, *July term* 1816.

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RANDAL'S WIDOW & HEIRS vs. *BALDWIN & AL.*

RANDAL'S WIDOW & HEIRS vs. BALDWIN & AL

The estate of a deceased, in the hands of his widow & heirs, is bound by a judgment obtained against his administrator.

APPEAL from the second district.

MARTIN, J. delivered the opinion of the court. The plaintiffs and appellants instituted this suit to recover a tract of land, which they claim as the widow and heirs of Thomas Randal, deceased.

It appears from the judgment of the district court, which is admitted to contain all the material facts of the case, and is to be taken as part of the statement of facts, that the defendants and appellees claim title to, and hold the property in dispute under a sheriff's sale, made in virtue of an execution issued on a judgment obtained against Thomas Randal, in his life time, but not executed till after his death.

Perhaps all the proceedings on this judgment, from the issuing of it until the final sale of the property under the execution, were irregular. The land it seems was sold at one year's credit, and at the expiration of the time of payment, certain persons, as administrators of the estate of the deceased, brought suit against the purchasers, the defendants and appellees in the present suit.

In their answer to the first suit, they opposed the recovery of the price, by pleading a want of

title to the property, on account of certain irregularities in the judgment and execution against the deceased, Thomas Randal; and the present plaintiffs now insist on these irregularities, in order to entitle themselves to the recovery of the land, as having been illegally sold, and the consequent absence of title in the defendants and appellees.

The administrators of Thomas Randal's estate, now claimed according to their respective rights, by his widow and heirs, having been regularly appointed under the laws of the country, as they then existed, all acts legally performed by them in respect to the estate of the deceased, ought to be considered as valid and binding on his heirs. It was their duty to sue for and recover, if possible, all debts due to the estate, and to pay such debts as he owed. Accordingly suit was brought against the present defendants and appellees as above stated, and they having put in issue the tittle to the land claimed under a sheriff's sale, made by virtue of an execution which possibly issued illegally, a court of competent authority has decided in favor of the legality of the title by compelling the then and present defendants to pay the price. We are of opinion that the district court was correct in considering the first judgment as conclusive against the present

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plaintiffs and appellants, and as having the force and effect of a prior judgment, between the same parties, and on the same matter in dispute: for to this end the administrators fairly represented the persons who now claim the estate.

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

Duncan for the plaintiffs, *Turner* for the defendants.

BLANQUE vs. *PEYTAVIN & AL.*

APPEAL from the first district.

The sentence of a foreign court of admiralty is conclusive as to the national character of the ship.

DERBIGNY, J. delivered the opinion of the court.* The plaintiff and appellant, as owner of the brig James Rinker, of New-Orleans, and her cargo, condemned at Tortola in the year 1805, brought this action against the defendants and appellees, as underwriters, to recover the amount by them insured. They resist the claim on the ground that the property was not neutral, as warranted.

On that question, an important question first presents itself: whether the sentence of a foreign court of admiralty pronouncing the pro-

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

perty captured to be enemy's property is conclusive evidence of that fact.

This interesting question, after having been several times debated in the courts of the United States, was finally settled by the supreme national judiciary, who pronounced it to be law, that the sentence of a foreign court of admiralty is conclusive evidence of the fact. *Croudson* vs. *Leonard*, 4 *Cranch* 134.

It is contended by the defendants that this decision ought to be given not only in the courts of the United States, but also those of the particular states: because it is grounded on the law of nations, a law which reigns over the whole of the United States as one national body, and ought to be construed in the same manner throughout the union.

On the part of the plaintiff, it is maintained that the decision of the supreme court is not grounded on any of these general principles universally recognised by all nations, but on a rule adopted in England and proscribed in other countries; that as such it ought not to be considered as an adjudication of what the law of nations generally is on similar subjects, and that its authority ought to be confined to such of the states, the particular laws of which are not repugnant to the adoption of that rule. That there exists here

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positive laws which forbid its introduction, and that the decision of the supreme court of the United States cannot therefore be considered as binding in this instance.

It is obvious that the first question to be settled here is whether or not the doctrine established by the supreme court of the United States is conformable to the rules of that general system of national justice, which governs the conduct of all civilized nations towards each other. For, if we find it grounded on these principles, the consequence must inevitably follow that the authority of the decision ought to be the same over all the union.

The principle of the law of nations, with respect to foreign judgments generally, is that when they have been pronounced by a competent court, they ought not to be inquired into, but ought to be every where deemed conclusive between the parties. *Vattel b. 1, ch. 7, art. 84, Martens b. 3, ch. 3, sect. 20.*

To this rule a sovereign may refuse his assent, and in that case the foreign judgment is without force in his dominions. But, if such refusal has not taken place, the sovereign is supposed to have acquiesced in its observance. By an application of this rule to sentences of foreign courts of ad-

miralty, they are deemed conclusive against all the world, because by a fiction of law every body is supposed to have been made a party to a suit which is prosecuted *in rem*, and in which all persons interested are invited to appear as claimants.

The limitations and modifications, to which this doctrine is subject, are considerations foreign to the present inquiry. The only question here is whether the principle established by the supreme court of the United States, as to the conclusiveness of sentences of foreign courts of admiralty be derived from an application of the law of nations to these sentences: and as one can feel no hesitation to say that it has no other origin, enough is ascertained.

Of the extent or authority, which judgments of the supreme tribunal of the country, declaring the law of nations, ought to have, there can be hardly any doubt. Whatever be the jurisprudence of other governments, the United States, as a nation, can have but one rule of conduct towards the others. In that code of national rights, called the law of nations, each nation is considered as an individual: the United States are one, the particular states are nothing.

It has been argued that in France the law of nations on this particular subject is not in force:

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and as Spain is generally governed by the same system of laws which prevail in France, it has been inferred that in Spain also sentences of foreign courts of admiralty are deemed conclusive. We may go further and suppose that by the positive laws of Spain such sentences are considered as not existing: and yet this will not make the least alteration in the position here established. For whatever could be the understanding of the law of nations in Louisiana, while under the government of Spain, the moment it was annexed to the territory of the United Sates, it became a part of that body which forms the American nation, which can have but one scale to weigh the law of nations.

We deem it unnecessary to weigh the reasons on which the doctrine established by the supreme court of the United States is founded: after having said that we consider this decision as binding, we need only refer to it and pronounce in conformity thereto.

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

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

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GRAY & AL. vs. LAVERTY & AL.

GRAY & AL. vs. LAVERTY & AL.

A judgment referring to no law, & in which no reasons adduced, is null

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court.

The judgment of the district court is in the following words "it is ordered that judgment be entered in favor of the petitioners, for the sum of $635, 81, together with costs of suit to be taxed" no law is cited: no reason adduced: and the defendants argue that the judgment is unconstitutional and therefore a mere nullity.

The constitution, *sect.* 12, *art.* 4, has provided that "the judges of all courts within the state shall, *as often as it may be possible* so to do, IN *every* definitive judgment, refer to the particular law on which such judgment may have been rendered, and *in* ALL *cases* adduce the reasons on which their judgment is founded."

The appellees contend that it suffices to adduce reasons *orally* in giving judgment, that they need not be embodied in the judgment itself; and that, admitting this to be necessary, the omission is an error or fault of the judge, for which an innocent suitor is not to suffer.

The constitution requiring a reference *in every* definitive judgment to the particular law on which it is bottomed, it is clear that the refer-

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ence ought to make *part* of it: since it is to be IN *it*. If the judgment be written and the reference oral, the latter cannot be said to make part of, to be *in* the former. But, this reference is required *as often as it may be possible*, only. Now, when it is not made, those who are to pass on the conduct of the judge, in case he be prosecuted therefor, may make a *strict* inquiry, but a court from whom it is required to reverse a judgment, may fairly conclude, even when the particular law is obvious, that it was impossible to the judge to refer to it, on the score of his having been ignorant of it. So a good judgment rendered, according to the light of the judge's understanding, ought to be supported.

The reasons, however, are to be adduced in all cases: *ils devront dans tous les cas les motiver*. The ignorance of a particular law is possible, in a judge not bred to the profession: it may exist even in others: but it can never be presumed that a judgment was rendered without the judge knowing the *reasons*, which determined him.

It is said that the reference to the law is required to be in the judgment, but that the reasons are required to be adduced only, without saying that they shall be so *in* the judgment. We think the distinction cannot be admitted. If a doubt re-

mained; it would vanish on a reference to the French part of the constitution, which requires the judgment to be *motived, reasoned,* one which contains, adduces the motives or reasons.

We conclude that a judgment which does not contain any of the reasons which influenced the court rendering it, is unconstitutional. Need we add that whatever is unconstitutional is void? If a judgment be rendered, if a law be passed, in any other, than the legal, language—if an indictment does not conclude, *against the peace and and dignity of the state*—if a process be not in the name of the state, can they have any effect? Every power in our government is derived from the people; they delegated it by the constitution: and every provision that a particular mode shall be followed, in the execution of the power vested, is a qualification of that power, viz: that it shall not be exercised in any other manner.

The judgment before us being an unconstitutional one, must be annulled, avoided and reversed, and the cause is remanded to the district court, with directions to the judge to give judgment thereon, according to the constitution by referring therein, if possible, to the particular law

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on which it is grounded, and at all events to adduce the reason on which it is founded.

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

DUKEYLUS' SYNDICS vs. *DUMONTEL & AL.*

Syndics cannot prosecute a suit, till the proceedings of the creditors appointing them are homologated.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court* This is a case in which the syndics of the creditors of Dukeylus, a bankrupt, intervene in a suit commenced by Mary M. Dumontel against the syndic of Leboucher, another bankrupt. They claim a right to receive for the use of Dukeylus' creditors, whom they pretend to represent, a debt of four thousand dollars, which, it is contended on their part was fraudulently transferred by Dukeylus to Mary M. Dumontel, by procuring Leboucher to assume the payment of it to her, in violation of the just claims of said creditors.

Several bills of exceptions, taken by the counsel of Madame Dumontel, to opinions of the district court, given on points of law, in the course

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DERBIGNY, J. did not join in this opinion, being Leboucher's syndic.

of the trial of the cause, come up with the record and statement of facts, and are to be disposed of, before we examine the merits of the case.

The exception which it is proper to notice first is, that taken to the opinion of the court, given in favor of the right of Trouart and Paillette, syndics of Dukeylus, to intervene in the suit.

It is admitted that the proceedings had in the case of Dukeylus, against his creditors, were exhibited, and shew that the persons claiming to intervene were, in the first instance, provisional syndics of the estate of said Dukeylus—that afterwards, at a meeting of the creditors, syndics were nominated, whose nomination has never been approved or confirmed by a court of competent jurisdiction: the proceedings of the creditors having never been homologated. It being admitted, by the counsel of the intervening party, that the functions of their clients, as provisional syndics, ceased on the nomination by the creditors to the trust of permanent syndics, it is necessary to inquire into the rights, powers and duties of those who hold and exercise the former description of trust. The correctness or error of the opinion of the court below, on this point, is therefore to be determined by the solution of the following question: can syn-

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dics, nominated by the creditors, proceed as legal administrators of the estate of an insolvent debtor, before the approbation and confirmation of their nomination? When nominated by the creditors of an insolvent, in case of a *cessio bonorum*, syndics are, under another denomination, the *curatores*, in such cases known to the Spanish law, whose nomination on the part of the creditors must be approved and confirmed by a court or judge of competent authority. The nomination is good, if made by a majority of the creditors, in amount, though it should not be in number; the judge ought to approve and confirm it, if he considers the persons fit for the trust, and there has been no fraud or collusion in the business.

Until the approbation and confirmation of the judge, we discover no power conferred by law on the administrator, no duty required of him. But, after the confirmation, he is considered in the double capacity of depository and curator *ad bona*, and his powers and duties are fully laid down and described. The inconvenience which may result from the want of some person to administer on the estate of the bankrupt between the period of the cession and the legal appointment of syndics is strongly pressed on the court by the counsel of Dukeylus' syndics:

we do not perceive it, in the same dangerous light in which it appears to them: and, if we did, it is not for us to apply the remedy, as it appears to be a case unprovided for by law. Altho' the authority of syndics is principally created by the appointment of the creditors, for whose interest they are bound to act, and is somewhat analogous to that of an agent or attorney, yet, we are of opinion that it is incomplete and will not warrant them in prosecuting actions for the benefit of those by whom they are nominated, without the approbation and confirmation of a competent tribunal.

It is further insisted on, by the counsel of the intervening party, that their want of capacity to prosecute their suit, ought to have been especially pleaded by Madame Dumontel, and that she cannot legally avail herself of their want of authority under the general denial in her answer.

On this, it may be observed that the law regulating the practice of our courts, in civil cases, requires the defendant to answer every material facts, stated in the petition, without evasion. A plaintiff claiming the interference of a court of justice, either to ensure his rights, or redress his wrongs, must allege *and establish by legal*

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proof, all facts necessary to the support of his case, when they are denied by the defendant. It is a principle of law, that a person, who sues in right of another, is bound to shew his authority. The general denial, in the answer of Madame Dumontel, is sufficient to require of the appellees, to shew full power and authority to proceed in the suit, as syndics or administrators legally empowered. This they have not done. We are therefore of opinion that the district court erred in sustaining the petition of the intervening party: their appointment as syndics, not having been confirmed by a competent tribunal.

In consequence of which, it is ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the petition of the intervening party be dismissed with costs: and it is further ordered, that the cause be remanded, for trial between the original parties, with instructions not to allow the syndics of Dukeylus to intervene in the cause, before their appointment as syndics, shall be regularly approved and confirmed.

Moreau for the plaintiffs, *Depeyster* for the intervening party.

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WHITE & AL. vs. *HOLSTEN & AL.*

WHITE & AT. *vs.* HOLSTEN & AL.

A marriage, celebrated in North Carolina may be proved by parol evidence.

A witness testifying against his interest is not to be rejected.

Parol evidence ought not to be admitted to destroy a title to real property.

MATHEWS, J. delivered the opinion of the court. The plaintiffs and appellants claim certain property, in the possession of the defendants and appellees, as the inheritance of D. White, deceased, whose legitimate descendants and forced heirs they state themselves to be.

They are opposed on several grounds.

1. The legitimacy of the plaintiffs is denied.

2. The will of D. White is set up by which Sylvia Turnbull, Holsten's wife, is instituted sole heiress.

3. The property is claimed, under a title independent from D. White's will, as belonging to the said Sylvia.

In the course of the trial below, sundry exceptions were taken, on both sides, to opinions delivered on points of law.

I. The first was on the admission of parol evidence of the filiation of the plaintiffs. As their legitimacy depends on establishing the marriage of their mother with D. White, who is admitted to be their father, which is said to have taken place in North Carolina, we think that the district court was correct in permitting the plain

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tiffs to prove by parol evidence the fact of marriage, or such circumstances from the existence of which, it is legally presumed, according to the laws of North Carolina.

II. A second exception was taken by the defendants to the opinion of the district court in overruling a motion to dismiss the suit, on the ground, that admitting them to be legitimate children of D. White, they are not his only heirs, and consequently have no right to demand the whole inheritance. The principal object of the plaintiffs, in the suit, being to annul the will of the deceased, and to be allowed to partake of the succession, by establishing themselves his legitimate descendants, and such heirs of his as cannot agreeably to our laws be deprived of his inheritance, we are of opinion that the district court did not err in overruling the motion.

III. The exception taken by the plaintiffs' counsel to the opinion of the district court, in admitting the deposition of Mrs. Turnbull is certainly not well founded, on the ground taken, viz. that she purchased some of the slaves included in the inventory of D. White's estate: for if her testimony went to establish a title to them in any other person than the deceased or herself, it would be testifying against her own interest: a circum-

stance, which can never be opposed to the competency or credibility of a witness. But that part of her deposition, which has a tendency to prove a title in her deceased husband to any part of the property in dispute, is inadmissible, because she may be presumed to be entitled to one half of it, as belonging to the community of matrimonial acquets: she is therefore so far interested and consequently an incompetent witness.

The last exception is taken by the plaintiffs, to the admission of parol evidence of any other title to the property in dispute, in the appellees, except that which they derive from the will of White: 1. Because they have not alleged it in their answer. 2. Because they have accepted his estate, agreeably to an inventory made by order of a competent tribunal.

The answer contains a general denial of all the allegations in the petition. It asserts the validity of White's will, and the defendants state "they are justly and legally entitled to "the ownership and disposition of all the pro- "perty whereof he died possessed." If the will be considered as good and valid *in toto*, then the defendant Sylvia is entitled to all the property of the testator, being instituted his sole heiress, and the latter clause in the answer be-

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comes wholly useless in the defence. It ought therefore to be taken as a claim of title, distinct from that derived under the will. But, if it did appear clearly that Mrs. Holsten has accepted the property, as an inheritance from D. White, we are of opinion that she ought to be estopped from pleading or proving any title in herself, distinct or independent from his testament. This however, is not found to be her situation; the property was placed in the hands of her husband, on giving security to answer for it, according to what might be decided by the tribunal of the Spanish government, then exercising jurisdiction on that part of the state.

In this case, as in all others, the persons claiming the estate are bound to make good their title against the legal possessor, and in opposition, the latter has a right to set up and prove, by legal means, any title which may defeat the claim of the plaintiff. But, it is the opinion of this court, that no parol evidence ought to have been admitted to destroy the title of the testator to immoveable property and slaves, and altho' it may have been properly received, as it respects the mere personal property, yet, it appears to us so vague, undefined, and uncertain, as to weigh nothing against the continued pos-

session and exercise of ownership by White, during his life, even to the solemn act of attempting to dispose of all his property by will.

Let us now examine the only remaining questions: the legitimacy of the plaintiffs and appellants, and the validity of the will.

On the question of legitimacy, which is one of fact, there is some contrariety of evidence, yet we think that the balance is clearly in favor of the plaintiffs and appellants.

The will it appears was made and published with all the formalities required by law, and *quo âd* its form is good and valid. But, according to the laws of the place, where the testator died, having legitimate descendants, he could not dispose by testament of more than one fifth part of his property to their prejudice. Here, it may be remarked that the same rules in relation to heirship prevail in this state. So far then as the will under consideration pretends to dispose of more than one fifth of the estate of the testator, it is illegal and invalid. It therefore ought to be and is hereby declared null, and void, as to every disposition contained in relation to the *legitime* or four fifths of the testator's estate,

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of which he could not legally deprive his legitimate descendants and forced heirs: agreeably to these premises, the succession of D. White must be distributed in such a manner, as to give his legitimate descendants four fifths, and one fifth to the appellant Sylvia Holsten, being the disposable portion of the ancestor, which she rightfully holds under his will.

It is ordered, adjudged and decreed, that the judgment of the district court, be reversed and annulled, and it is further ordered, adjudged and decreed, that the defendants and appellees do account with, deliver and pay over to the appellants, Joseph White and Wm. White, their proportion of four fifths of the estate, both immoveable and moveable, of David White, their ancestor, as his forced heirs.

Livingston for the plaintiffs, *Robinson* for the defendants.

LAFON vs. *SADDLER.*

The tacit lien of a builder is not lost, by his neglect to record the contract for the building.

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

MARTIN, J. delivered the opinion of the Court. The petition states that the plaintiff, is a

creditor of J. Godwin, for $345, the balance of a sum due on a notarial contract for building a house—that he brought suit against Godwin, who, *pendente lite*, sold it to the defendant. The answer denies every thing, and avers that the defendant is a purchaser without notice. The facts stated in the petition being proven, there was a judgment for the plaintiff, and the defendant appealed.

The statement of facts admits the purchase and payment of the price by the defendant, that the tacit or legal mortgage of the plaintiff on the house, as the builder of it, was never recorded, as the act of 1813 ch. 49. is stated to require—that the defendant was not made a party to the suit, brought by the plaintiff against Godwin—That Godwin has failed, and that the sum claimed, is due to the plaintiff, for work done on the house.

The plaintiff's counsel contends, that his is a privilege or legal mortgage, which has its effect against those persons, without being stipulated for, *Civil code* 470, *art.* 75, and that the words of the act of 1813, do not extend to the destruction of liens, which, not arising from any written contract or stipulation, are not susceptible of being recorded. The expressions of the

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act are "*all liens, of any nature whatever,* HAVING *the effect of a legal mortgage, which shall not be recorded against the provisions of this act, shall be null and void.*" The title of the act, is for the recording of certain acts, therein mentioned, which shews that the intention of the legislature, was to compel creditors to give notice of their *acts,* not to alter the law, so as to destroy the lien of builders, &c. in cases in which a privilege or lien was not *expressly* stipulated. The plaintiff's lien, it is contended, arising before the passage of the act, could not be supposed to have been destroyed by the requisition of a formality, which could not be complied with.

The defendant's counsel replies, that the petition shews, that the plaintiff's claim is grounded on a notarial act, which was susceptible of being, and is admitted not to have been, recorded.—That contracts are the laws, that govern the parties.—That the tacit provisions of the law, always yield to the express stipulation of the party, whom the law intended to protect.

This court is of opinion, that the judgment given below is a correct one. The plaintiff hav-

ing built a house for Godwin, had *ipso facto* by law a tacit lien, or privilege to have it sold for his payment. His having reduced to writing the contract, which fixes the manner, in which the house was to be built, and the mode of payment, does not affect his right. If a man has a right to a thing by law, and under a contract, which does not modify his right, he will be allowed to avail himself of his stronger title, that which results from the law. If the heir has the estate which the law casts on him by descent, devised on him, he will be in, rather as heir, than as devisee. Here the petition alleges the plaintiff's privilege, as a builder, for work, materials, &c. bestowed on a house. The statement of facts, admits the nature and extent of the claim as set forth; the legal consequence must follow, that the debt is a privileged one on the house. There is no need of bringing the notarial instruments into action.

The act of 1813, had no other object, than to prevent the effect of *latent acts* or instruments—or to guard against the supposition or forgery of *acts*, by which the interests of third persons might be affected, not to destroy the *tacit* lien *which the law gives* to workmen and others, *ipso facto*, by the labour or materials which they bestow.

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If the contract before the notary, was necessary to the plaintiff's recovery, the present defendant, might perhaps have resisted its introduction: but it does not appear necessary. It is admitted, in the statement of facts, that the work was done by the plaintiff, on the house, as charged, and that the sum is justly due him by Godwin.—It requires the aid of no written instrument, to establish the consequent privilege, if it exist without any instrument: the defendant complain that no instrument was recorded.

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

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

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JULY TERM 1816.

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ESTEVE vs. *ROCHON.*
MONTREUIL vs. *JUMONVILLE,*
ROCHON vs. *MONTREUIL.*

ESTEVE *vs.* ROCHON.

ESTEVE *vs.* ROCHON.

If three causes be consolidated and afterwards distinct verdicts and judgments be given, the supreme court cannot consider them as consolidated.

If a party to a suit dies after the *contestatio, litis* the attorney may carry on the suit.

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

MARTIN, J. delivered the opinion of the court. The petition states that the plaintiff in 1784, bought, jointly with a sister of hers, from Fontenet, a lot of ground in the city of New-Orleans, at the corner of Ursuline and Burgundy streets, having a front of seventy feet on the first, and eighty eight feet on the last. The lot was bounded on both sides by other lots, the property of the

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vendor. The vendees divided it, and that half, which lies on Burgundy street alone, became the part of the plaintiff, who inclosed and improved it. In 1806, the defendant bought from Montreuil, who had succeeded to the rights of Fontenet, the lot on Burgundy street, adjacent to the plaintiff's property, and she or her vendor encroached on the plaintiff's ground, by erecting a frame on part of it.

In 1811, the plaintiff having caused her lot to be surveyed, and satisfied her-self that the defendant's fence was on her ground, pulled down a part of it, and a suit being brought against her, damages were obtained for this injury to the *possession* of the present defendant's property: whereupon the now plaintiff brought the present suit to assert her *title*, and recover the land encroached upon.

The defendant answers that she purchased the ground in dispute from Montreuil, against whom she reserves her right, and pleads the former suit in bar.

MONTREUIL vs. JUMONVILLE.

The plaintiff in this case sues the defendant on the warranty, in the sale of the lot by him sold to Rochon, the defendant being heir to the plaintiff's vendor.

The defendant denies all allegations, alleges that in no case can he be liable for more than one third of the injury: there being two other heirs of the vendor. Further that Rochon has possessed the ground in dispute during ten years, with a good title and pleads prescription.

There was a verdict in the first case in favor of the plaintiff for the ground in dispute, and one hundred dollars damages, with the expences attending the replacing the fence.

The same jury found a verdict for the plaintiffs in the two other cases.

In this stage of the suits, they were consolidated and the verdicts directed to be recorded.

On the motion of Rochon, a new trial was granted, and there was a verdict for the plaintiff, in the first case, and for the defendants in the two others. Judgments were entered according to the verdicts, and Rochon appealed from the judgment given against her in favor of Esteve.

The statement of facts, admits the purchase and division of the lot, as stated in Esteve's petition, and the inclosure of eighty eight feet four

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inches, part of which decayed down and part of which still subsists.

The sale of Montreuil to Rochon is also admitted, as well as the erection of a fence by the latter, at the distance of one or two feet from Esteve's original fence and within the land originally inclosed by Esteve, so that there is only eighty seven feet and four inches from the corner of Ursuline street to the fence erected by Rochon.

It is admitted that in the square in which the lots in question are situated, there is a deficiency of two feet and seven inches of ground along Burgundy street, and that Rochon had been put in possesion of the lot which she purchased.

Although a rule was made below, after the first verdicts that these three causes should be consolidated, yet in no part of the proceedings, except in the application for and grant of a new trial, have they been considered as consolidated, and there has been a distinct and separate verdict and judgment in each case. This court is bound to consider the cases as distinct and to examine and pass upon them separately, and as Rochon, the only appellant, has only expressed and could only express her dissatisfaction with the judgments rendered *against her*, in the cases of

Esteve and Montreuil, we think the judgment rendered in that of *Jumonville* vs. *Montreuil*, cannot be said to be before us.

Esteve having purchased jointly with her sister, from Rochon's vendor, eighty-eight feet four inches of ground, along Burgundy street, could not be legally reduced to eighty seven feet two inches by her vendor or his vendee.

The original judgment obtained by Rochon, against Esteve, which is now pleaded in bar, was only for the damage done to her fence, it does not pronounce on the *title* to the ground: the *possession* alone was considered therein.

The verdict and judgment, of the parish court, wrought no injury to the defendants, and the judgment is therefore affirmed with costs.

In the case of *Rochon* vs. *Montreuil*, it is admitted, in the statement of facts, that the defendant was dead, at the time the judgment was given, and this is alleged as an error, which will induce this court to set it aside. The death of either party, prior to judgment, is, according to the common law of England, a good cause of reversal. In that country, and it is believed in any of the United States, except this, the position is incontrovertible.

The Spanish law, however, has a different

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provision, which, as it is unrepealed by any act of our territorial or state legislature, affords to this court the only legitimate rule of conduct. When either party dies, after the *contestatio litis*, his attorney, shall prosecute it to judgment, *si muriesse el senor del pleyto, despues que fuesse commencado, por repuesta, non pierde per esso el personero su poderes . . . dere seguir el pleyto fasta que sea acabado, tambien como se fuesse bivo el que lo fesse personero. Partida* 3, 5, 23.

The facts stated, shew that Montreuil sold to, and put Rochon in possession of more ground than he could legally transfer, and that she has been evicted, the verdict and judgment of the parish court, ought therefore, to have been in favor of the plaintiff.

It is therefore ordered, adjudged and decreed, that it be annulled, avoided and reversed, and this court, proceeding to give such judgment as the court below ought to have given, does order, adjudge and decree, that the plaintiff do recover from the defendant, the sum of thirty dollars, the value of the ground, from which the plaintiff was evicted with costs.

Hennen for the appellant, *Moreau* for the appellee.

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LECARPENTIER vs. DELERY'S EX'R.

LECARPENTIER
vs.
DELERY'S EX'R.

If experts appointed to verify a signature disagree, and a third be appointed on the motion of a party, he cannot assign this as an error.

LECARPENTIER vs. *DELERY'S EX'R.*

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

DERBIGNY, J. delivered the opinion of the court. The case which was before us, *ante* 454, is one of those, in which the law has provided, that a signature not recognized, shall be verified by two persons, having skill to judge of hand writing. The two persons first appointed having disagreed, a third was named, on the application of the plaintiff, with consent of the defendants. The report of this umpire having been set aside, by order of this court, the plaintiff, on the return of the cause into the inferior court, moved to have another appointed: but the report of this last person being unfavorable to him, he objected to its confirmation, on the ground, that it was the report of an expert only, when the law provides, that two shall be appointed.

It is true, that the article of our civil code, which provides this mode of proof, in case of the denial of a signature, does not say that where the two experts disagree, a third person shall be named to act as an umpire. But, the necessity of appointing an umpire, in such a

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case, is undoubtedly the same, as in cases of referees or arbitrators. Should there be any doubt, however, as to the regularity of his nomination, when not confirmed, there can be no doubt, when it takes place at the request of the parties. Here, the party, applying to have this umpire named, is the plaintiff himself, who now objects to the legality of the report, on the ground that it is the report of an expert only. Such an objection on his part, is entitled to no regard.

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

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

*** There was not any case determined during the month of August.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, SEPTEMBER TERM 1816.

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BROUSSARD vs. *TRAHAN'S HEIRS.* *Vol.* 3, 725.

BROUSSARD *vs.* TRAHAN'S HEIRS.

If a district court improperly deny a continuance, relief may be had in the supreme court.

Brent, for the defendants. The affidavit on which a continuance was prayed by the defendants shews that they could not safely come to trial, on account of the absence of a record, which was material to their defence, and which notwithstanding every effort in their power, had been used, they had not been able to procure. Injustice was therefore done them, and the only remedy, which the law has provided for them, is the interposition of this court, in ordering a new trial. The power of awarding it is expressly given by the 18th section of the act of 1813, ch. 47: which authorises the supreme court, or any

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court to which an appeal is allowed to remand the cause to the inferior court, from which the appeal is made, for a new trial, *whenever it shall appear that justice requires it.*

The court is not fettered by any positive rule, but is left to the sound exercise of its discretion; if there be any rule of common law, any maxim of the civil law, any precedent in the practice of the former courts of this state, which militates against the exercise of the discretion of this court, the legislator has abrogated it.

Indeed as great an injury may be done to a suitor, by denying him a continuance and compelling him to go to trial, when, notwithstanding his utmost deligence, he has not been able to procure the testimony, by which he is to support his defence, as by giving a wrong judgment against him.

Whenever this court sees that the inferior one has, in any part of its proceedings, done an irreparable injury, *gravamen irreparabile,* to a suitor they will relieve him, whether this be in giving final judgment or an interlocutory one. It is true the party cannot appeal *de plano* from an interlocutory judgment; because by adventure, the final one may be in his favor, but it does not follow, from the circumstance, that he is to wait the final decision of his case in the inferior court,

that this court will shut their eyes, when he is able to point out a material error in any part of the proceedings.

It is true the English books of practice lay it down as an undoubted principle, that the denial of a continuance cannot be remedied by a writ of error: but this is a court of appeals not a court of error.

In the United States even this maxim of British jurisprudence is exploded, and the denial of a continuance may be assigned as an error on which the judgment will be reversed. 4 *Henning and Munford*, 156. 1 *Washington*.

Baldwin and *Porter*, for the plaintiff. The motion made by the appellants ought not to prevail; 1. Because, the granting, or refusing a continuance, depends on the discretion of the court below, and cannot be assigned as error here. 2. Because, if subject to re-examination in this court, no error was committed by the inferior tribunal.

This court which is appellate, and has by law powers vested in it to re-examine, and reverse or affirm, the decisions of the inferior courts of this state, must in the exercise of those powers, be guided by the statute, which regulates its practice.

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By the act passed the 10th of February 1813, regulating the practice of the supreme court; and establishing courts of inferior jurisdiction, sect. 11—this tribunal is authorised to re-examine, reverse, or affirm, *the final judgments* of any of the district courts, where there is a special verdict; or on a statement of facts made out by counsel, or the judge, who tried the cause.

By the act, supplementary to the act just mentioned, passed the 26th of March 1813, sect. 17: it is provided, that during the trial of a cause, the opinion of the court may be asked for, *on any matter of law*—that the party dissatisfied therewith, may except thereto; that the exception &c. shall be entered on the record, and sent up with the other proceedings in the cause.

From this statute, errors in fact are only examinable, after final judgment; and the erroneous opinion of the court, on *matters of law*, during the progress of the trial, can alone be the ground of a bill of exceptions.

This court then, must be satisfied that it was *on a matter of law*, the opinion of the court below was asked; and that there was error in that opinion, before they can remand the cause.

We contend it was not on a *matter of law*, the opinion of the court was demanded here; it was an indulgence that was prayed for, which

the tribunal, before whom the cause was pending, in its discretion, could accord or refuse, and in the granting or denying of which, no legal error could be consequently committed.

This will be made clear, from an examination of the law, on the subject.

Continuances, are *not a matter of right*, either in the crown, or the prisoner; *M'Nally (Byrn's edition,)* 454, *Foster's Crown Law*, 2. Civil and criminal cases, stand in this respect on the same footing, 3 *Burrows* 1513.

Continuances are usually granted on a general affidavit. But the courts of common pleas and king's bench, have different rules on the subject, 2 *Tidd* 708; and in a penal action, it will be refused altogether, *ibid, same p ge.*

Nor will it be granted, where the defence to be established is slavery. 1 *Bosanquet & Puller*, 454.

Nothing can be conceived more positive, than these authorities. If *it was a legal right*, the courts then could not grant it in one kind of action, and refuse it in another. They dare not make such a distinction, even in that country: nor would two such writers as M'Nally and Foster, be found to state expressly, that no such right existed.

The decisions in our own country, are equally

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as certain and imperative on this head, as those in England.

In 1 *Binney's Reports*, 226 *and* 2 *ibid.* 80 : 93, the supreme court of Pensylvania declares, that many things must be left to the discretion of inferior courts, among others, new trials, and the granting or refusing continuances;—and that the exercise of that discretion could not be reviewed there.

In 5 *Cranch, pages* 11 - 16 - 187 - 280, the same doctrine is laid down in strong terms — And in the same work, *vol.* 4 237. *and vol,* 6 217, the supreme court of the union, expressly decides, that the refusing to grant a continuance, cannot be alledged, as matter of error there— that it is a power, resting entirely in the discretion of the court, who tries the cause.

By the laws of Spain, the giving time to take testimony, depends on the will of the judge, *Curia Phillipica, p.* 1, *title Dilaciones*, and it no where appears, that an appeal lies from his refusal to accord it. *ibid.*

In our late superior court, a continuance was refused, though founded on a strong affidavit: because accompanied by suspicious circumstances, in the party who made it—1 *Martin*, 3.

In opposition to this strong current of authority, gathered from writers of the first eminence,

or collected from the decisions of courts of the highest grade, and most exalted wisdom; this tribunal is required on the authority of one solitary decision in Virginia, 4 *Henning and Munford*, 157, and on a fanciful distinction, between the powers of this, and other appellate courts, to establish *that* to be a legal right here, which appears with the above solitary exception, not to be such any where else.

It is said, this court is different from the courts from whence these decisions are drawn—that here, our appellate tribunal can reverse for errors in fact, and there they cannot take notice of any thing, which does not appear on the record. But a reference to our statute, already cited, answers this—and shews that on bills of exceptions, this court can examine only *errors in law*. Every book we open on the subject tells us a continuance is not a legal right; how then could the court below commit *an error in law* in refusing it?

Again, the court is told that by statute, this court has the power to remand a cause, whenever in their opinion, the justice of the case requires it. But this must be taken in the sense, that the word justice, is always used in statutes, to wit, when *legal justice* requires it,—when an injustice, contrary to law, has been commit-

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ted on one of the parties. To give any other construction, would enable this court in the arbitrary and uncertain ideas, which they might attach to the word *justice*, to dispense altogether with *law*; and reduce the citizens of the land, to enjoy their rights and properties, at the discretion of this tribunal.

Another argument is pressed:—great injustice it is said, may be done by inferior courts, in refusing a continuance, and shall there be no redress for it? If arguments of inconvenience are to overturn law and precedent, the weight of them be found on our side. Let this court only think, what a temptation they hold out to perjury,—that placed here, they never can have the means of judging, like the inferior court, of the conduct or credibility of the party who makes the affidavit; and it will be easily seen on which side the balance preponderates. The case from 1 *Martin* 108, illustrates this position. A new trial was moved for there, because the court refused to continue the cause on a strong affidavit. The judge rejected the application, stating that there were suspicious circumstances attending the party who made it, such as swearing he was sick, though his appearance in court contradicted the assertion. How could all this ever have been brought up before a court of appeals.

so as to have enabled them to judge of the credit due to the affidavit?

But if this court has the power to consider the refusing to grant a continuance, as error in law; still a correct decision was given below. The affidavit was defective in two essential requisites, that are ever required on applications of this kind; viz. the exercise of due diligence—and the probability of obtaining the testimony wanted. The district court of course did right, in rejecting the application.

MARTIN, J. delivered the opinion of the court. The defendants pray, that this cause may be remanded to the district court, under the 18th section of the act of 1813, ch. 47, which empowers this court to remand in all cases, in which it appears to them, that justice requires it: and in order to satisfy us, that justice does require it, their counsel alleges, that injustice was done below, by refusing him a continuance, in order to enable him to place before the court a piece of evidence, which was material to their defence, and which by accidents, without their control, after having used due diligence, they were disabled from obtaining early enough for the trial.

The plaintiff meets the defendants on the

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threshold, by alleging, that the granting, or denial of a continuance, is a matter to which no right can exist, it being entirely a matter of favour and discretion.—And that the discretion of the inferior court below is, in this respect, under no kind of control.

1. The first authority, to which our attention is drawn, is a *dictum* of Lord Kenyon, that in an action on a penal statute, the court of the king's bench, will not put off a trial for the plaintiff. 2 *Tidd's Practice*, 708.

2. Next is introduced the case of *Robinson vs. Smith*, 2 *Boss. and Pull.* 454. in which the plaintiff claiming wages as a seaman, in a voyage from the West Indies, the defendant prayed a continuance, on account of the absence of a witness by whom he expected to prove, that the plaintiff was his slave. But the court denied the continuance, saying, the defence was an odious one, to which the court would not give any assistance, and that if the defendant were to offer to put it on the record, they should not give him a day's delay.

3. Reference is made to 2 *M'Nally's P. C.* 659, where it is laid down, on the authority of *Foster* 2, that the postponing of a trial is not a matter of right, and the court, in its discretion, may refuse or admit the motion.

4. The decision of the court of K. B. in the case of *Rex* vs. *D'Eon*, is also introduced, in which Lord Mansfield observed, that men take such a latitude in swearing in the common form, that when suspicion arises from the nature of the question, or from contrary affidavits, the court will examine into the ground, on which the delay is asked, and have in criminal, as well as in civil cases, refused to put off a trial, notwithstanding an affidavit in the common form.

Leaving aside the abstract proposition, that a continuance is not a matter of right, the authorities cited go but a little way, to shew that the discretion of the court, who is asked a continuance, is the arbitrary discretion, subject to no control, which the plaintiff's counsel insists upon, and not the legal and sound discretion, the exercise of which is a matter of revision and control.

1. In the first case, we are informed, the court of king's bench grants no continuance *in favor of the plaintiff*, in a penal action. Admitting this, justice does not appear to require, that the denial should absolutely be a ground of relief, in another court; while the plaintiff may (with some expense indeed) avert the consequent evil, by submitting to a nonsuit.

2. The case, cited from the court of common

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pleas, shews only, that it is the practice of that court, (and the practice is the law of the court) to deny a continuance to a party who alleges the slavery of his opponent, and the court appears to have acted upon a known and previously fixed principle, by which its conduct was susceptible of being tested, rather than to have been guided by an arbitrary discretion, which knows no rule.

3. *M'Nally* informs us, that the postponing of a trial is not a matter of right, either when the application is made on the part of the prisoner, or on the part of the crown; he adds, for in either case the court, *in its discretion*, even tho' an affidavit be made, may refuse or grant it. Here we are informed, why the party's claim is not a matter of right, viz. because notwithstanding the affidavit, the court is not absolutely bound, but may *in its discretion* refuse or grant the continuance.

4. Lastly, in the case of *Rex* vs. *D'Eon*, we are informed by Lord Mansfield, of the cases in which the court will, in its discretion, withhold its consent, after the ordinary affidavit is produced, viz. when *suspicion arises from the nature* of the question, or from contrary affidavits, and the court, having examined into the ground on which the delay is asked, thinks it

just not to allow it, notwithstanding the affidavit.

Opinions of the supreme court of the U. S. have also been introduced. C. J. Marshall, in the case of *Woods & al.* vs. *Young*, 4 *Cranch*, 238, declared the impression of that court to be, that the refusal to continue a cause, cannot be assigned for error, asking whether the party had by law, a right to continue a cause in any case? Whether this was not merely a matter of *favor and discretion*? And in the case of *Mar. Ins. co.* vs. *Hogson*, the same court said, that on the refusal to continue a cause, the party could not be relieved by a *writ of error*. 6 *Cranch*, 206.

The refusal of relief, in these two cases, was obviously grounded on a technical reason: that the party could not be relieved *by a writ of error*.

A writ of error, says Blackstone, is brought to correct an error, appearing on the record: the reasons which, induce the court to deny or grant a continuance, are often matters *dehors*, out of the record. The discretion of the inferior court is principally regulated in such a case by particular circumstances, of which the record affords no trace.

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A decision of the superior court of the late Territory of Orleans, in the case of the *Territory* vs. *Nugent*, has been referred to. There the court denied the continuance to the defendant, on an affidavit which it admitted was sufficiently strong. But the case shews the particular and cogent circumstances, which satisfied the court, that delay was the main object of the applicant. 1 *Martin*, 108.

We find nothing in the above cases to warrant the position, that the discretion of the court, in granting a continuance, is an arbitrary discretion, the ill exercise of which is not to be remedied by appeal: they only shew that there is no remedy upon *a writ of error*.

In ordinary cases, depending in the superior courts of England, a trial takes place at *Nisi prius*, it is there that a motion for a continuance is made, and finally pronounced upon. The judge there exercises his discretion, but if he err in doing so—the party may be relieved on a motion for a new trial in the court, to which the *postea* is returned. "If" said Lord Mansfield, in refusing the continuance in the case of *Rex* vs. *D'Eon*, "it should appear upon "the case proved at the trial, that the defen- "dant was prejudiced by refusing this delay, "the court would set it right by granting a new

"trial." Here then is a check provided, a remedy in case the discretion be incorrectly exercised.

In Virginia, if the party thinks himself aggrieved, by the denial of a continuance, the law has provided a remedy. The manner in which the discretion of the judge, who overruled his motion, exercised his discretion, is an object of inquiry. The principle is recognised, that in granting or refusing a continuance, the court ought to exercise a *sound* discretion, and if a party be ruled into a trial, when it appears from the facts stated in the bill of exceptions, that he was entitled to a continuance, the judgment will be reversed, *even* on a writ of error.

In every case in which the law leaves any thing to the discretion of an officer or a court, a sound and legal discretion is understood, not an arbitrary one.

New trials are left to the discretion of a court, "It is" says C. J. Glynn, "in the discretion "of the court, in some cases to grant a new trial," but this must be a *judicial* and not an *arbitrary* discretion. *Sty.* 466. This declaration is the more important, that the case in which it was made, is said to be the first in which a new trial was granted, 3 *Morgan's essays*, 111.

Discretion, says Lord Cook, is discerning *per legem quid sit justum*. Discretion is a

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science and understanding of distinguishing and discerning, between falsehood and truth, and not to do according to arbitrary will, and private affection, *Rooke's case*, 5 Co. 100 a. See on this subject, what was said by Lord Mansfield, in the case of *Rex* vs. *Young & al.* 1 *Burrows*, 560-2.

In the state of Pennsylvania, the discretion of a judge of the circuit court, in granting a new trial, is subject to the revision of the supreme court on an appeal. *Byrd* vs. *Lessee of Darndall*, 2 *Binney*, 9.

In the state of New-York, the supreme court held that an adjournment of a sale, to a different place, is *a matter of discretion* with the constable, and the question must always be wether that discretion has been abused. Whereupon they inquired into the conduct of the constable in the exercise of his discretion. *Platt* vs. *Stone*, 5 *Johnson*, 317.

In the case of *Wanderville* vs. *Wilson*, 5 *Cranch*, 17, C. J. Marshall observed that permitting amendments is a *matter of discretion*, but added he did not mean to say that a court may in all cases permit or refuse amendment *without control.*

We conclude that nothing in the books cited by the plaintiff's counsel shews that the discretion

of the court in granting or refusing a continuance is any thing else than a legal, a judicial discretion, which is not examinable elsewere. altho' it is certainly shewn that, in England and the courts of the United States, there is no remedy, in such a case, by *a writ of error*.

Approaching, therefore, the case cleared from any obstable thrown in the way by decisions of English courts—or of the courts of the American states: we find it laid down as a maxim of Roman jurisprudence, which still prevails in Spain, that the judge *ad quem* will correct the errors of the judge *a quo*, even in interlocutory judgments or orders, whenever they occasion *gravamen irreparabile*—and the statute of this state (1813) authorises this court to remand the case, for *a new trial*, whenever justice appears to require it. On this part of the case, we have only to consider this abstract question: Can the improper denial of a continuance occasion, in the words of the Roman law, *irreparabile gravamen* to the party? And, in those of our statute: Will not justice sometimes require that a cause should be remanded, for a new trial, when the judge *a quo* denied a continuance?

This abstract question we declare ourselves unable to answer in the negative. We find it answered, in the affirmative, by able judges in

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England and in the United States, and we find no judge any where answering it in the negative: and we conclude that this court may, and ought to, inquire into the manner, in which the judge *a quo* exercised the discretion, committed to him, in allowing or refusing the continuance of a case, whenever the party appears thereby to suffer an irreparable injury.

In the present case, we are of opinion that the district judge exercised his discretion soundly and legally, and properly denied the continuance of the cause.

Years had elapsed since the inception of the suit, and the document, for the want of which the cause was sought to be continued, ought much earlier to have been looked for.

The motion to remand this cause must therefore be overruled.

PROVOST vs. *PROVOST & HENNEN.*

A sale of land, by a husband to his wife, to replace the value of real estate, part of her paraphernal property by him sold, is valid.

APPEAL from the court of the fifth district.

DERBIGNY, J. delivered the opinion of the court. The appellant, Alfred Hennen, who is a party intervening in a suit between Henrietta Provost, the appellee and her husband, is the purchaser of a tract of land, seized upon the said Joseph

Provost, and sold by the sheriff: which tract is claimed, by the appellee, by virtue of a previous public act of sale to her made by her husband, for replacing in part her *paraphernalia*, which had been by him disposed of and alienated.

The appellant alleges that this deed was not made *bona fide*, but with a view to defraud creditors and third persons: the appellee avers that it is a *bona fide* contract, and denies the fraud. The case stands before us on that issue.

Our civil code (*book* 3, *tit.* 6, *chap.* 2, *art.* 45.) authorizes the contract of sale, between husband and wife, in certain cases, one of which is, where the transfer is made by the husband, to the wife, for a legitimate cause: such as *replacing* her dotal or other effects alienated. The question here is whether this be such a contract.

The appellee has proved that she was possessed of *paraphernalia*, consisting in money, cattle and other effects, and two slaves, which with the exception of one slave, were disposed of by her husband, for his own use, previous to the sale on which she relies. It is unnecessary here to determine whether there can be any such thing, as *replacing* money and other moveable effects with real estate, and whether a sale like the present can ever take place in any other case, than those where real property or slaves,

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the title to which was in the wife, have been alienated, because there has been in this case that kind of alienation evidently contemplated by the law, to wit, the alienation of a slave whose title was in the wife. For the replacing of that property, the contract is assuredly legal; and as the value of that slave, at the time of his alienation, is proved to have been fully equal to the value which the property transferred to the appellee, by her husband, had at the time of such transfer, we must pronounce the transfer to be a valid contract.

It has been suggested that no delivery of the land in contest was made to the appellee; but this fact making no part of the issue, the appellee cannot suffer for having not offered to prove it.

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

Baldwin for the plaintiff, *Hennen, in propria personâ.*

SORREL vs. *ST. JULIEN.*

The party, to whom a new trial is improperly denied, may be relieved in the supreme court.

APPEAL from the Court of the fifth district.

MARTIN, J. delivered the opinion of the court. The appellant and defendant prays that the suit be remanded for a new trial, because the

judge below improperly denied him a new trial, on affidavit of new discovered evidence.

The plaintiff resists the application, 1. because he alleges, a new trial is within the discretion of the inferior court; and this cannot examine into the manner in which that discretion is exercised.

2. Because the discovery of new evidence is made to appear by the sole affidavit of the defendant.

3. Because the judge *a quo* properly exercised his discretion and no new trial ought to have been granted.

I. It is shown from a number of cases, that the supreme court of the United States holds that the denial of a new trial cannot be relieved *upon a writ of error*. *Henderson* vs. *Moore*, 5 *Cranch*, 11. *Ma. In. Co.* vs. *Bourg*, 187. *U. S.* vs. *Evans*, 280. If this was only a court of error, it might think itself bound by these authorities and deny relief. The causes of suspending judgments, after a verdict given by granting a new trial are matters, at present wholly *extrinsic* arising from something foreign to *dehors*, the record. 3 *Blackst. Comm.* 24. A writ of error is brought to remedy an error apparent on, within the record. *Id.* A tribunal constituted to correct

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errors in law, intrinsic errors, apparent on the record, may well reject an application to inquire into an error of fact; one *dehors* the record.—But this is a court of appeal, and one of its bounden duties is to remand "the cause to an inferior court, from which the appeal is made, whenever it shall appear that justice requires the same." *Act of March 26, 1813. sec. 18.*

We are told that new trials being in the discretion of the court, like continuances and amendments, the superior court cannot control the inferior court in the exercise of that discretion.

The nature of the discretion of the court below, in granting and denying continuances, has been particularly examined in the case of *Broussart* vs. *Trahan's heirs*, just determined in this court, and shewn to be not an arbitrary, but a sound, legal and judicial discretion, to be guided by a fixed principle and subject to the revision and controul of the superior court: that which is exercised on motions for a new trial is precisely the same.

In the case of *Brooks' sy.* vs. *Weyman*, this court said that *the* (not *a*) refusal, to grant a new trial was no cause of appeal, and we find the ground of this decision to be, that the judgment, entered in the district court, was *quasi* a judg-

ment of the superior court, from which an appeal did not lie. 3 *Martin*, 17.

In *Fortier* vs. *Declouet*, *id.* the court refused to revise the discretion of the district court, in declining to discharge him from his bail bond; probably the inconvenience complained of was not *irreparabile gravamen.*

So, whatever may have been said, in the case of *Labatut* vs. *Pueche*, *id.* 325, the refusal of a special *venire* could not work an irreparable injury: for on the appeal the judgment of this court would be the same, whether the suit was tried before a special or ordinary jury.

We conclude that this court will relieve on the improper denial of a new trial, when thereby the party sustains an irreparrable injury; and this perhaps will be confined to the sole case of new discovered or rejected evidence; when this evidence does not come up with the record. In most, if not all, other cases the injury will seldom be irreparable: as relief will generally be had, on an appeal, on the merits.

II. It is true the supreme court of the state of Vermont has holden, in the case of *Webber vs. Ives*, that it will not grant a motion for a new trial, for the recent discovery of new and material evidence, supported by the single affi-

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davit of the party: but the motion must be accompanied by the affidavit of the witness recently discovered, 1 *Tyler*, 443, and we have been referred to the cases of *Long* vs. *Weeder & al.* 1 *Johns.* 425, *Doe* vs. *Roe*, *id.* 404. *Dew* vs. *Dennison*, 5 *Johns.* 248. *Smith* vs. *Brush*, 8 *Johns.* 84. From which it appears, that several affidavits, in cases similar to the present, were introduced. From hence the inference is drawn that, that of the party is not sufficient. We, however, do not deem these authorities conclusive. The case of Vermont is not parallel to this, which is that of a *paper* said to be discovered. Would the court there have required the affidavit of the new discovered witnesses, if they had been at a great distance?

III. The new trial was asked on the alleged discovery of a paper, from which proof, of the payment of the debt to the plaintiff, was expected to be made. But the defendant had not pleaded *payment*. His only defence was (in answer to the plaintiff's petition) that he never assumed or promised to pay the sum claimed; that he owed no part of it; that the money claimed was paid by the plaintiff as a voluntary courtesy, without any expectation of its being reimbursed; that the advance stated was not made, and the debts of the defendant alleged

to have been paid by the plaintiff, were never paid by him, and are still claimed from the defendant, by his original creditors; that if the defendant made any promise the plaintiff, it was obtained by fraud or made thro' error; now, a plea of payment, had it been added, would have been inconsistent with the first part of the defence. But, as it was not made, the judge below rightly concluded that little attention was due to the allegation, on which the new trial was asked and rightfully denied it.

We are, therefore, of opinion that the motion to remand the cause ought to be overruled.

The case, being submitted to us on the merits, without any argument, we find the plaintiff's claim fully supported, by the evidence, and the defence not maintained. It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

REEVES vs. *KERSHAW.*

A constable selling land, under a justice's execution must advertise it in the same manner as the sheriff under an execution from a parish or district court.

APPEAL from the court of the fifth district.

MATHEWS, J. delivered the opinion of the court. This is a case in which the plaintiff and appellee brought suit against the appellant, for a tract of land, described in the petition.

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It appears from the statement of facts that both parties claim it, through one Patrick Johnson: the defendant by virtue of a constable's sale, made in pursuance of an execution, issued on a judgment, rendered by a justice of the peace against Johnson, at the suit of one Biggs; the plaintiff by a deed of sale, duly executed, whereby the land is conveyed to him by Johnson. The constable's sale being anterior to the execution of the deed of Johnson to the plaintiff, the only question in the case relates to the validity or invalidity of that sale.

The legality of the judgment and of the execution which issued on it is not questioned, but a violation of law is said to have taken place, in the manner of selling the land, after it was seized by the constable.

We do not find any rule laid down to regulate the conduct of constables, in sales made by them of immoveable property taken in execution. By the 23d section of the act of the legislative council, 1805, ch 29, for dividing the territory of Orleans into counties and to establish courts of inferior jurisdiction therein, an execution, issued by a justice of the peace, could only authorise constables to seize goods and chattels, or the moveable property of the defendant, which the might legally sell after giving nine days notice.

This restriction to the seizure of personal property alone, in cases within the jurisdiction of a justice of the peace, continued until the year 1810, when, by an act of the territorial legislature, bearing date of the 23d of March, the power to seize slaves and immoveable property, in default of moveable, was given. But the act is entirely silent as to the manner, in which the constable is to proceed, in selling immoveable property. The law authorising the seizure of such kind of property not having pointed out a rule for the conduct of constables, in making sale of it, we are of opinion that such officers ought to be governed, in these proceedings, by the general rules laid down for the conduct of sheriffs, who, in executing the process of higher tribunals, seize in execution the same species of property.—They are required to advertise before the first exposure to sale, if it be real property which is seized, thirty five days: if it be necessary to offer it for sale a second time, it must be advertised thirty days more: when exposed for sale a third time, an additional notice of a fortnight is required by law.

In the case of the constable's sale under consideration, it appears clearly that these legal requisites and formalities have not been fulfilled. We are therefore, of opinion that the district

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court was correct, in adjudging a sale, thus illegally and informally made, to be null and void.

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

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

BROUSSARD vs. *TRIHAN'S HEIRS*, *ante* 489.

Appeal dismissed for want of a statement of facts, &c.

In this case there being neither statement of facts, special verdict or case agreed, the appeal was dismissed.

Brent and *Parrot* for the plaintiff, *Porter* and *Baldwin* for the defendants.

*** There was not any case determined, during the months of October and November.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, DECEMBER TERM 1816.

East'n District. *Dec.* 1816.

HUNT vs. *NORRIS & AL.*

HUNT *vs* NORRIS & AL.

A shipper, sueing the master and owners of a vessel for goods lost thro' their neglect, may attach their property.

4m 517
11 405

4m 517
12 791

Appeal from the court of the first district.

The plaintiff and appellant brought this action against the master and owners of the steam boat Vesuvius, to recover the value of goods by him shipped on board of her, to be safely carried from New-Orleans to Natchez, which he alleged to have been lost and destroyed, by the negligence and improper conduct of the defendants.

On an affidavit that the defendants reside out of the state, the plaintiff prayed and obtained an attachment, which was levied on their goods, in pursuance of the acts of legislature of the years 1805 and 1807.

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On the motion of the defendants, the attachment was dissolved and the plaintiff appealed.

Livingston for the defendants. The district court was correct in dissolving the attachment. The action arose *ex delicto*. Damages only can therefore be recovered and the plaintiffs claim could only ripen into a debt, by their being assessed in an action.

The act of 1805, *c.* 26, § 12, authorises attachment, in those actions alone in which the recovery of a *debt* is sought. *Debt* is a technical word, descriptive of the claim of a determinate sum of money, due on an agreement or contract, 3 *Blackst. Comm.* 154. Here the claim is precarious, uncertain and unliquidated.

It is true that the act of 1807, *c.* 1, § 21, describes the defendant, in a suit to be commenced by attachment, by the appellation of *debtor*, but this act is confined to the practice of parish courts.

By the English law special bail would not be allowed in the present case: the plaintiff, even if he had right to sue for a claim arising *ex contractu*, having made his election, by a demand of damages for a *tort*.

Ellery, for the plaintiff. We contend, that the word *debt*, in our statutes of 1805, *c.* 26. and 1807, *c.* 1, is to be taken in its usual and popular

signification, extending to all cases *ex contractu*, where the demand can be ascertained by the oath of the plaintiff, not in the technical sense, required by the common law of England, to support the action of debt or that of *indebitatus assumpset*.

2. The present demand falls under this popular signification of the word debt, and entitles the plaintiff to the process of attachment.

1. The above interpretation of the word debt is a reasonable one: 1 because such a remedy as by attachment is necessary, and no good reason can be shown against it.

2. This mode of proceeding is less injurious than a demand of bail: and it is not to be supposed that the legislature intended to deny the one, where it allowed the other, and would protect the property of a debtor from attachment, where it subjected his person to arrest.

3. Otherwise a large class of cases, and those of frequent occurrences, would be wholly excluded from any remedy, without any good reason for the exclusion.

4. A narrower construction would render void that clause in the affidavit, required from the plaintiff, in order to hold the defendant to bail, viz. "that the plaintiff does not, as far as the

Eastern District. "deponent knows or believes, possess, within
December. "the territory, sufficient property, *if attached*, to
"satisfy the judgment the petitioner expects to
HUNT vs. NORRIS & AL. "obtain." 1805, *c.* 26, § 12, and 1807, *c.* 1, § 21. The above clause, an important ingredient, in the plaintiff's affidavit, and without which the defendant cannot be held to bail, inserted in both acts, distinctly and unanswerably shews that the property of the defendant must be first *attached*, before his person can be *arrested*, and if he possess that property, no order to hold him to bail can be obtained. An attachment then is evidently, by our statutes, meant to issue when the defendant *has* property, in *all* those cases, where he might, if he *has no* property, be held to bail, viz. "whenever a petition is filed for the "recovery of any *debt or damages, on note, "bond, contract, or open account, or for damages "for injury to or detention of property.*" 1805, *c.* 26, § 11, and 1807, *c.* 1, § 21. The consequences of a different construction, in cases like the present, would be always impunity to wealth and imprisonment to poverty. If the absconding or departing debtor have *property* to pay the debt, his *person* (according to our statutes) cannot be *arrested;* neither (according to the construction contended for by the defendant's counsel) can his *property* be *attached*. Therefore, under

these circumstances, if the debtor have *sufficient property* to pay his debts, he may carry it off with impunity and set his creditors at defiance: and he can only be *arrested* for his debts, where he is unable to pay them. That no evil consequence or abuse can result, from the process of attachment, is also evident, as the law requires that "the plaintiff shall, previously to his obtaining such attachment, give bond, with good freehold security, in double the sum sworn to, for the use of the absent debtor or his representatives, conditioned for the payment of all such damages, as the defendant in attachment shall have suffered, in case it shall appear that said attachment was wrongfully said out" 1807, *c.* 1, § 21, 1811, *c.* 8, § 2. The attached property may also be released, either by proving that the facts, on which the attachment was grounded, were not truly stated, or by giving to the sheriff a bond, with sufficient security, to defend the suit and abide by the judgment of the court. 1805, 27, § 12.

5. This construction seems to result from the collation and comparison of our different statutes, upon the subjects of bail and attachment, whence it appears that attachment is intended to be always allowed, where bail can be exacted.

We have four statutes, on the subject of bail

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and attachment: two in 1805, one in 1807, and one in 1811.

The first act of 1805, *c.* 26, declares in what cases *attachment* may issue, viz. "whenever a petition shall be presented for the recovery of a debt." The 12th section declares in what cases *bail* may be required, viz. "whenever a petition is filed for the recovery of any debt or damages on note, bond, contract, or open account; or for damages for injury to, or detention of, the property of the petitioner, &c."

The other act of 1805, *c.* 5, § 8, merely authorises the respective clerks, to receive the affidavits, and issue the process.

In the 21st section of the act of 1807, *ch.* 1, the 12th section of the act of 1805, *c.* 26, is copied *verbatim*, and followed by a *proviso*, "that in all cases where an attachment is prayed for, against a debtor absent from the territory, &c." as cited *ante*, *p.* 521.

The act of 1811, *c.* 8, § 2, directs, *inter alia*, the indemnity bond, in cases of attachments, to be filed with the petition.

It is to be remarked that, independently of the clause inserted, in the affidavit to hold to bail (which shews that an attachment must be resorted to, when there is sufficient property, instead of bail) by the act of 1805, (declaring in

what cases an attachment shall issue, viz. "whenever a petition shall issue for the recovery of *debt.*") the word *debt*, is used in the most indefinite sense, unaccompanied by any article, and that in the act of 1807, the words *absent debtors* are used.

In the act of 1807, *c.* 1, the process of bail, and that of attachment are provided for in the same section, the 21st. the latter *following* the former and being contained in the *proviso.* The word *debtor*, there introduced, evidently means a debtor, under some of the cases enumerated in the beginning of the section, viz. *debt, damages, or note, bond, contract, open account, or damages for injury done to, or detention of the property of the petitioner.*

This section is said to be applicable to the parish court only. It applies equally to the superior, as appears from the title and subject matter of the chapter—from the words *one of the judges of the said court,* in the beginning of the section: because, in the superior court alone was there a plurality of judges, and because the court last mentioned, and of course referred to, is the superior court.

It is true the indemnity bond is required to be filed in the *parish* court. This is an apparent oversight in the wording of the law, which was

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corrected by the act of 1811, *ch.* 8, § 2, which requires it, to be filed *with* the petition.

It is objected, that by the English law special bail *would not* be allowed, in the present case.

Special bail *would* be allowed; and is allowed in *all* cases in which the damages are not precarious, or to be assessed *ad libitum* by the jury. 3 *Blackst. comm.* 292: allowed in trover, 1 *Wilson*, 25 and 335, *Catlin* vs. *Catlin*, *Emmerson* vs. *Hawkins*, 2 *East*, 953, *Imlay* vs. *Ellison*, a case similar to the present, in which defendant was holden to special bail. The same practice and principles equally apply to the writ of *ne exeat regno*.

6. The statutes, under consideration, are remedial ones, and require a liberal and equitable construction.

There appears to be a perfect harmony between our law and that of England, in the construction of statutes. The words of a law are generally to be understood, in their *most known and usual* signification, without attending so much to the niceties of grammar rules as to their *general and particular* use. *Code civil*, 9, *art.* 14. Where the words are dubious, their meaning must be sought for, by examining the context, *art.* 16. Laws *in pari materia* must be construed with a reference to each o-

ther. *Id. art.* 16. The most universal and effectual way of discovering the true meaning of a law, when its expressions are dubious, is by considering the *reasons* and the *spirit* of it, or the cause, which induced the legislature to enact it. *Id.* 20. In civil matters, where there is no express law, the judge is bound to proceed and to decide according to equity. *Id. art.* 21. The judges cannot, in criminal matters, supply by construction, any thing omitted in the law, *id. art.* 22. See the common law principles, 1 *Blackst. comm.* 59, 62, *Bacon's Abr.* 1*st Amer. Edit. verbo Statutes*, 384, 425, 386. *Douglas*, 30 2 *Cranch*, 386, 381, 4 *Dallas*, 30.

It is the business of the judges so to construe the act, a remedial one, as to suppress the mischief and advance the remedy. 1 *Blackst. comm.* 87 *Sergeant's law of attachment*, 49. What was in our statutes of attachment, the *mischief* complained of, and the remedy to be applied?

7. The words *debt* and *debtor*, in our statutes, and in all civil law writers, are never used in a technical sense; but always in a general, enlarged signification. The debtor is liable for *damages* and interest. 1 *Pothier, Obligations, n.* 159. 160. The *debtor* is sometimes liable for damages and interest, altho' extrinsic. *Id.* 161.

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8. A like construction has been put upon similar acts of attachment in different states, by respectable judges. See the opinion of judge Washington, *Sergeant's law of attachment*, 43, 54.

The words *contracted and owing*, in the law of attachment of Pennsylvania, construed by the same judge to embrace all demands arising *ex contractu*, and the measure of damages such as the plaintiff may aver by affidavit. *Id.* 52; But not for demands which arise *ex delicto*, or where special bail would not be required. See also the construction of the law of attachment of Connecticut, the words of which are *absent or absconding debtors. Pollard & al vs. Dwight*, 4 *Cranch* 421.

II. The present claim is said not to arise *ex contractu*, but *ex delicto*, and by the English law must be declared upon *in tort*.

Our practice has nothing in common with the English practice, and is not to be judged by its rules. We are bound by our act to disclose the cause of action, and conclude with a prayer for relief adapted to the circumstances of the case. We know nothing of special pleading, or the different issues of the common law of England. But, supposing this to be a court of common law,

the action is well brought, not upon a tort; but the breach of a contract. A concurrent remedy exists against *bailees* and the party may declare in *assumpsit* upon the contract, or in case upon the tort.

The appellants argue that we have made our election and have declared in *tort*. We have declared in *assumpsit*. Our petition is almost literally copied, *mutatis mutandis*, from a declaration in assumpsit against the captain of a vessel. *Chitty*, 120.

The gist of our action is the breach of contract, the non-delivery, not the wilful destruction of our goods. Assumpsit lies against bailees for neglect. 1 *Chitty*, 92.

In *Dale* vs. *Hall*, an action against a shipmaster was held by Dennison, J. to be *ex contractu*, not *ex delicto*. 1 *Wilson*, 281.

Lastly, the damages are said to be precarious, there is no standard to measure them by, and they are unascertained and unliquidated.

The amount of damages is *ascertained*, by the oath of the party, and the case itself furnishes a certain measure, by which they can be *assessed* by the court, as well as safely sworn to by the plaintiff, viz. the price of the articles themselves, which is all that is claimed of the defendant. This produces equal certainty of the sum due, as

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the case in *Sergeant's law of attachment*, viz. the difference between the value of one kind of goods and another: as in the cases of *quantum meruit* or *quantum valebant*.

On the restricted construction, contended for, on the other side, what would become of the right of a party, suing on a protested bill of exchange, to demand against an absentee the amount of re-exchange, in addition to the amount of damages and interest fixed by law?

MATHEWS, J. delivered the opinion of the court. To ascertain whether the process of attachment be the just and lawful remedy, in cases like the present, we must resort to a fair and legal construction of the legislative acts, as being the principal foundation in our laws of such proceedings—In doing this, it is necessary to turn our attention more particularly, if not exclusively, to the act of 1805, which is the law from which our courts derive their authority to proceed against the property of non-residents. The statutes of 1807 and 1811 only require some additional steps to be taken by plaintiffs in attachment, without making any change in the principles of the first laws. It is now proper to remark that the statute, which is now about to be discussed, is among the earliest acts of le

gislation in this country, soon after it was acquired by the United States, and we believe was penned by persons, deriving their legal ideas from a knowlege of the English laws. A recurrence to general rules for the construction of laws, or the definition of legal terms, as found in common law authors, even if in any case it ought to be objected to, is fairly admissible for the present. These rules and definitions ought to be the same in every system of jurisprudence founded in common sense, and the common acceptation of words. Our statute of 1805 clearly and expressly authorises proceedings *in rem*, in cases of attachment, in a suit for the recovery of a debt due by a person residing out of the state. If we refer to authors on the common law of England to ascertain the legal acceptation of the word *debt*, in its most strict and technical meaning, it is perhaps limited to the idea of a determinate sum of money, due on an express agreement. 3 *Blacks.* 154. Yet, the action of debt is not confined to contracts for money alone. As expressed by the same writer, in the following page, "its form is sometimes in the *debet* and *detined*, and sometimes in the *detinet* "only, as in an action for goods, for a horse, &c." Also, in *Chitty on pleadings*, it is stated that an action of debt lies in the *debet* for goods, as

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on a contract to deliver a quantity of malt, &c. Thus we see that, according to the authorities, the action of debt in the *detinet* is a legal remedy, on an express agreement to deliver any specific property; and the person, who for a lawful consideration promises to deliver to another a quantity of goods, specified in the agreement, ought to be considered the *debtor* of the latter for the things promised, and then these things constitute a *debt*. Nothing can be more evident than the truth of this position, when the obligation arises on an express contract. Is it less true, or well founded, when the contract is implied? We think not. Obligations, arising from implication of law, are equally binding with those, created by an express agreement. Whether the obligation of a common carrier to indemnify a person, who has entrusted him with goods, which are lost by the negligence of the former, be one growing out of an express or implied contract may be doubted: but, admitting its origin to be from implication, the indemnity due is not less a debt. In 2 *Blacks.* 464, where the author treats of the action of debt, it is stated that in a bailment, "if the bailee loses or detains a sum of money bailed to "him, for a specific purpose, he becomes *indebted* to the bailor, upon the same numerical sum

"upon his implied contract." Here we see a debt may be created by implication, in a contract of bailment, when the thing bailed is *money*. In express contracts, we have seen that a promise to deliver *any property* or goods, specified in the agreement, makes the promisor *debtor* to the promisee for these goods; and the things promised constitute a *debt*. The obligations arising from implied contracts are equally binding on the obligor as those arising from express contracts; therefore, the bailee of goods who loses or detains them improperly, becomes *indebted* to the bailor for those goods. If this conclusion be correct (of which we have no doubt) then the case cited, from *Sergeant's law of attachment*, is completely applicable to the one now about to be decided. The words of the act of Pennsylvania, on which the decision alluded to is founded, do not embrace a greater variety of contracts than our act of 1805. It is true that there an express contract existed, in which the defendant in the attachment, bound himself to deliver teas of the first quality to be sold for the benefit of the plaintiff, in a market stipulated between the contracting parties, and if the teas should not prove of such a quality, he bound himself to make good the difference. On this agreement, the plaintiff having ascertained

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by his own oath the amount of the deficiency, the court supported the attachment. But we have already shewn, that no distinction ought to be made between an express and an implied contract, and do therefore conclude, that it may be properly and safely laid down as a general rule, that all obligations arising from contracts, either express or implied, either for the payment of money or the delivery of goods, create a *debt* on the part of the obligor, for which an attachment may issue, whenever the amount may be fairly ascertained by the oath of the obligor.

In this view of the subject, we deem it unnecessary to examine the reasoning of counsel drawn from the similarity betwixt bail as authorised by law and attachments.

If we turn to writers on the civil law, it is found that he is said to be a debtor, who owes reparation or damages for the non-performance of his contract. 1 *Pothier on Obligations, n.* 159.

The judge of the district court erred, we think, in considering the obligation of the defendants and appellees to indemnify the plaintiff and appellant for his loss, (if any exists) as arising *ex delicto* and not *ex contractu*; it is clearly one arising out of a contract of bailment, and which, in conformity with a proper acceptation of the word debt, authorises the plaintiff to

have his attachment against the property of the defendants.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the cause be sent back to be tried on the merits, and that the parties be replaced in the situation in which they were before the judgment of the district court, dissolving the plaintiff's attachment.

MAYOR &c. vs. *DAVIS.*

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

Tho' the appellant have no good ground to relief, if he appears to have been under an error, damages will not accompany the affirmance of the judgment.

MATHEWS, J. delivered the opinion of the court. The plaintiffs and appellants brought this suit for the rent of a house &c. described in the petition, according to a written contract, by which the defendant agreed to pay them rent at the rate of $2520, *per annum.* Judgment having been given for them, he appealed.

It appears by the statement of facts, that the appellant applied to the city council for a reduction of the sum, which he had bound himself to pay in his original contract, which was allowed him, for a fixed and determinate period, and that he had the benefit of this allowance.

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MAYOR &c. *vs.* DAVIS.

The judgment of the parish court does not exceed the sum due by the appellant in his original contract, and is therefore correct. The only question before us, is, whether damages ought not to be allowed to the appellees as on an appeal taken for the sake of delay only.—But, as the defendant seems to have been under some mistake, in relation to an allowance for some repairs, we are of opinion that the justice of the case requires only the affirmance of the judgment.

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

Moreau for the plaintiffs, *Esnault* for the defendant.

If goods be in the hand of an auctioneer, on which he has a lien, at the time when his office expires, and he afterwards sell them, under a new commission, his original sureties are not liable, if he fail to account for the proceeds of the sale.

CLAIBORNE vs. *DEBON & AL.*

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. This is an action brought, in the Governors name, against the sureties of an auctioneer.

The petition states that the party aggrieved has lately obtained a judgment against the auctioneer, for the amount of sundry goods de-

livered him to sell at auction, of which no account was ever rendered and the record of the suit is referred to. It is further stated that the defendants are the auctioneer's sureties, that he has failed and ceded his goods &c. so that the defendants are liable.

They have filed separate answers.

The first defendant denies the breach of any of the conditions of the auctioneer's bond—avers that, during the whole time in which they were his sureties, and at the conclusion of it, he was largely in advance to the real plaintiffs. He denies his liability for any errors in the balance, if any existed—alleges that the accounts between these plaintiffs and the auctioneer were regularly produced and settled during that time, and that it is only since his failure, that the present claim has been exhibited, and without the knowledge or privity of this defendant.

The other denies all the facts in the petition, and avers that the claim is now prescribed and lost.

At the trial, the execution of the bond by the defendants was admitted.

Referees were appointed, who reported that, at the conclusion of the period during which the defendants were the sureties of the auctioneer, he was in advance for the real plain-

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tiffs of the sum of $ 1797 43, and had in his hands goods of theirs, part of which has been accounted for; say to the value of 3094 dollars 82 cts. the rest unaccounted for being of the value of 2453 dollars; that deducting from the aggregate of these two sums, that of which he was in advance, there remained due to the plaintiffs 3750 dollars 4 cts. at the time of his failure.

On this report, the judge *à quo* gave judgment for the defendants, and the plaintiffs appealed.

By consent, the report is to be received as a statement of facts, as well as the record of the suit, in which judgment was obtained by those plaintiffs against the auctioneer.

This record shews that they sued him for the amount of sundry goods, sold by him, at different times for their account. Among the papers filed in this suit (which are also referred to) is an unsigned account, by which it appears that accounts of sales were rendered by him for a small parcel of goods, amounting together to about 123 dollars, as sold, since the expiration of the time during which the defendants were his sureties. The balance is stated as deficient in the account of sales rendered.

On these facts, the plaintiffs contend that the court below, being bound to proceed *super allegata*

et probata, erred in giving judgment for the defendants—that the suretiship was admitted—the receipt of goods from the plaintiffs, during the existence of the suretiship, and their remaining on hands unaccounted for at the expiration of it, fully establish the claim against the defendants, and it must prevail unless their principal has relieved them, by the return of the goods, or a disposal of them in such a manner, as may exonerate them.

Such a return or disposal is said not to be alleged.

The first part of the answer of the first defendant, which denies the breach of any condition in the bond, is not supported, it is contended, by any fact established, while the contrary appears.

2. The second part, alleging the advances made by the auctioneer, is admitted to diminish the claim, and both he and the defendants have had the benefit of it.

3. We are told that the denial of a liability for any error in the accounts needs not be attended to; nothing being claimed on that score.

4. It is asserted that the allegation, that the accounts between the parties were duly produc-

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ed and settled, during the existence of the suretiship, is not proven.

5. The plaintiffs see nothing of any avail in the averment of the defendants that they were not parties in, and had no notice of, the plaintiffs' suit against the auctioneer; as the amount of the claim is now adjusted with the defendants, and the suit against the auctioneer is brought to view, for the sole purpose of establishing the inability of the claimants to obtain any thing from their principal debtor.

Nothing, it is further contended, in the answer of the second defendant, can affect the claimants. The plea of the general issue being necessarily found against him and the allegation, that the right is prescribed and lost, senseless; the claim being at the inception of the present suit but three or four years old.

The defendants urge that the goods, which were in the auctioneer's hands, when their suretiship expired, were left with him as a lien for the advances he had made, and to be sold by him as an auctioneer, under a new commission, which he obtained without the defendants becoming his bondsmen—that consequently his failing to account for sales made of these goods; or withholding the proceeds of such sales cannot affect the defendants, but must be visited

on his new sureties (if any were given) or on him alone, if he gave none.

The effect of such a sale, it is replied by the plaintiffs, cannot be considered; for the sale was not *alleged*, nothing appears from the pleadings, and they deny that there is any evidence of it. That there is evidence of it, in the petition of the plaintiffs against their principal debtor, in which this claim is made for goods *sold* at different times; and as the statement of facts shews that the goods were *remaining on hand*, unsold at the conclusion of the period of the defendants' suretiship, the sale must necessarily have taken place *afterwards*, when the defendants might be answerable for the withholding of the goods, or any failure to deliver them back, but not for any waste, embezzlement or withholding of monies received on the sale of them; that tho' a sale, contrary to, or without the plaintiffs' order might be a tortious disposal of the goods, which might affect the defendants; they cannot now be liable, as the claimants, by suing for the proceeds of the sale, have impliedly admitted, that it was lawfully done for their account, and thus sanctioned it.

It appears to this court, that the goods of the real plaintiffs, left in the hands of the auctioneer, for the double purpose of securing the advan

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ces he had made, and of being sold by him, after the expiration of the time for which the defendants were his sureties, cannot be considered at the defendants' risk.

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

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

CROCKER vs. *WATKINS.*

If the property advertised for sale, on an execution, be not sold, it is to be advertised anew, as if it had not been advertised before.

APPEAL from the court of the second district.

DERBIGNY, J. delivered the opinion of the court. This is a suit for damages against a sheriff, who is said to have exposed property for sale, without having advertised the time and place of sale, in the manner prescribed by law, by reason whereof and other illegal practices, it is alleged, the property was sold for less than its value.

The material facts, as they appear from the statement, annexed to the record, are that the defendant and appellee, sheriff of the parish of Ascension, having seized several slaves, the property of the plaintiff and appellant, in ex-

ecution of a judgment obtained against him, advertised them for sale for the space of time required by law, viz. thirty five days, next preceding the day of sale; but, that on the day appointed, the slaves were not exposed to sale, on account of the defendant's absence, and his deputy postponed the sale for eight days, at the expiration of which the slaves were exposed and sold. It further appears that the slaves had been bought by the plaintiff and appellant, in 1812, at a credit of one and two years, for the sum of 4615 dollars (or thereabouts, some of them having been purchased jointly with others, not included in the seizure here mentioned) that they were appraised to the sum of 3650 dollars, and were sold for that of 2645 dollars.

The main question, arising in the case, is whether it be discretionary with the sheriff to postpone a sale for any time he chuses to fix, when, owing to some impediment, the sale could not take place on the day which had been appointed according to law.

The exercise of discretion, in the execution of legal acts, must either be permitted by some express provision of the law, or be authorised by the example of constant practice, acquiesced in for a length of time. But, according to the

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statute of the state, the property seized must be exposed for sale, *on the day fixed by law.* Nothing is said, as to what shall take place, if some unforeseen accident prevents the sheriff from fulfilling that duty: and as to the rules of practice, which existed here, before the promulgation of the statute (admitting that they be resorted to in cases of this nature) they are so widely different from our present mode of practice, that they afford but little or no information, as to the manner of acting in a case like this. It cannot be said, therefore, that a long established practice, authorised the defendant to exercise the discretion which he assumed.

What then shall be done, when some unforeseen obstacle prevents the sale from taking place on the day appointed? We think that, in such a case, the only regular way of proceeding is to begin anew, and advertise the sale again for the same space of time. Such was the practice in the Spanish tribunals, when the proclamations, *pregones,* had not been regularly made. 1 *Elizondo,* 13, *n.* 3. A practice nearly similar prevails in Virginia, when the property seized in execution remains unsold in the hands of the sheriff. 3 *Tucker's Blackst. ch.* 26, *sec.* 2, *in notis.*

The doctrine of discretion in the execution of

legal solemnities, cannot be supported on any ground, even that of necessity. The abuses, to which it would open a door, are too obvious to require any comment.

The remedy, to which theplaintiff has thought fit to resort in this instance, is an action of damages against the sheriff. To his demand it is objected, that, the postponement complained of was notified to the attorney in fact of the plaintiff, on the very day that it took place, and that on the day to which the sale was adjourned, the said attorney was present at, and did not object to the sale. 2. That the plaintiff has sustained no injury.

I. We do not think that, from the silence of the plaintiff and attorney in fact, or the plaintiff herself, it ought to be implied that she gave her consent to the postponement of the sale for eight days. The sheriff acted, not by virtue of any consent on her part, but from his own authority. Her silence may have been the effect of a persuasion that no objection could avail her, or that she had no right to interfere. At any rate, it would be giving to that silence a most extensive interpretation to consider it, as a positive acquiescence, and approbation of the sheriff's conduct.

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II. But, has she proved that she sustained any injury, and if any, to what amount?

On this question, the material evidence seems to be confined to this—That the slaves sold by the sheriff for 2645 dollars in 1816, had cost in 1812, 4,615 dollars, at one and two years; that they were appraised, previous to the judicial sale, at 3650 dollars; hat negroes were worth more in 1816 than in 1812; that two persons who had come to the sale, on the day first appointed, went home and were not informed of the time of the second sale, and that there were no more than eight or ten persons present then. One witness, who bought four of the slaves, swears that all but one were sold for their real value: another, who bid on each of them, swears that they were all sold for their real value. They all brought more than two thirds of the estimation.

It must be confessed that it is not easy from such evidence to assess the damages, which the plaintiff and appellant has sustained. If there was any scale by which that was to be ascertained, it was by the appraisement; but it is contradicted by the depositions of two witnesses, except so far as it relates to the value of the mulatto wench *Manon*, which one of them ad-

mits to be one hundred, or one hundred and fifty dollars more than the price at which she was sold. To that sum, therefore, the damages which are to be allowed to the plaintiff must be restricted

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It is ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and that the appellant do recover from the appellee the sum of one hundred and fifty dollars with costs.

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

BORE'S EX'R. vs. *QUIERRY'S EX'R.*

Appeal from the court of the first district.

The record of a former suit, between the parties, is evidence, altho' it was dismissed.

The plaintiff and appellant is the testamentary executor of Mary Bore, a free woman of colour, who is alleged to have been for a number of years in an universal partnership with one Quierry, the defendant and appellee's testator, and the object of his suit is the recovery of one half of the property left by Quierry.

The answer states that the plaintiff's testatrix, in her life time, far from pretending to

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have been in partnership with Quierry, acknowleged herself his servant; that she has been rewarded by a legacy of $ 1500; and that, finally, as she lived in public concubinage with the defendant's testator, her suit cannot be maintained.

During the trial, in the district court, the defendant offered in evidence, the record of two suits, instituted by the plaintiff's testatrix against the present defendant and appellee, for the purpose of shewing that she was the servant of his testator. The plaintiff objected to the introduction of these records in evidence, and being overruled took his bill of exceptions.

In support of his claim, the plaintiff introduced several witnesses, from the tenor of whose depositions, it appeared that about thirty years ago the plaintiff's testatrix went to live with the defendant's testator; she possessed, at that time, 400 dollars in cash and ten or twelve head of cattle, and both exerted their industry in common: he disposed of the proceeds of her property and was heard, at different times, to say that she and him were partners and one half of the property belonged to her.

But the witnesses state that she was his concubine: that, when she came to live with him,

he was settled on a tract of land which he owned, and he held property distinct from hers—that he gave her a receipt for the money which she brought, which he renewed ten or fifteen years afterwards and was seen so late as two years before his death; that she also held other property, in her own right, viz. a negro woman named Therese, whom he had bought and conveyed to her.

The records introduced as evidence by the defendant, and objected to by the plaintiff, were those of two suits instituted by the testatrix of the former against the latter to recover her wages, as a servant during all the time which she lived with his testator, and those of two female slaves of hers. The first suit was dismissed as premature, and the second was withdrawn, since his death by his executor, the present plaintiff, "in consequence of an agree-"ment between the parties, and whereby it was "understood, that, upon the discontinuance of "said suit, the defendant should pay to the "plaintiff a legacy of 1500 dollars, left to his "testatrix by his testator, which was accord-"ingly paid."

The defendant produced a witness, who declared that he was a neighbour and acquain-

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tance of Quierry, during twenty years, and knew nothing of the alleged partnership.

There was judgment for the defendaut.

Carleton for the plaintiff. It is a well established principle in law, that whenever a cause is dropped for want of prosecution, or goes off on any other point than its merits, the judgment rendered thereon, or the allegations of the parties in the pleadings, cannot be read in evidence, or converted to their prejudice in a subsequent suit. A party often suffers a nonsuit, or discontinues his cause, when he discovers the grounds he had taken were untenable. A client speaks and acts only through his attorney, who may misconceive the nature and form of his action. A client may himself state his case erroneously, or new matter may come to light after the suit is begun. Shall he nevertheless persevere in his error? May he not rather discontinue his cause and commence another, wherein the record of the first cannot be read in evidence? Such is known to be the practice in courts of justice in every country, and until now, it is believed no attempt was ever made to introduce in evidence the record in a cause which was never decided upon its merits. 4 *Bac. Abr.* 107. 3 *id.* 679. 1 *Chit. pleas and pl.* 195. *Har. ch. prac.* 254. *Peake's ev. note.*

These authorities which apply to the cases of nonsuit and dismissal, receive greater strength in discontinuances, where the party *volunt rily* abandons his cause. In a nonsuit, the law implies no such cause of action as the party alleged; in a discontinuance the party anticipates the law, and confesses his error himself. The same doctrine is also found in the Spanish laws.—There a party may retract a confession which he or his attorney may have erroneously made, even in the progress of the same cause, provided he shew his error, before final judgment. *Part.* 3, 13, 5 *and* 6, and in *Part.* 3, 12, 9, it is expressly said, that if a plaintiff withdraw his suit from court, after the defendant has answered, nothing alleged by such defendant can be raised against him in a subsequent suit, brought by the plaintiff for the same cause of action. Had the defendant therefore confessed the debt in the first suit he might deny it in the second: this rule, if it be a just one, will surely afford the same protection to the plaintiff.

The testatrix herself was unknown to her attornies. Her case was represented to them by her friend. They took such grounds in their petition as they thought would enable them to recover. She was probably never called the servant of Querry, but by her attornies, and the proof in

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the present case in which she is stiled "mistress" and "partner," shows how her attornies either misconceived her cause of action or were uninformed of its real nature.

If notwithstanding this view of the subject the court should still think the defendant might avail himself of the declaration of the plaintiff, in a former suit which was never tried, the plaintiff may undoubtedly avail himself of the declaration of the defendant. The court will not afford to one party a weapon of attack which it denies to the other in defence. If the testatrix called herself the servant of Quierry, the defendant denied it; which puts the matter at large. Nay, the defendant further declares that the testatrix lived in *community* of revenues with his testator, thus laying the foundation of the present action. If the court believe the defendant, they have only to give judgment for the plaintiff.

It is said the second suit was discontinued in order to receive the legacy of 1500 dolls. It is impossible to construe this into an abandonment of the claim set up by the plaintiff in the present suit. He knew the legacy was secure to him, and that he could enforce the payment of it unconditionally. The suit was discontinued solely with a view to institute one in the present form. The very object of the discontinuance

was to enforce, not to abandon the present claim, and without an express relinquishment of a right to so considerable real estate, the court can never imply one.

The contract of partnership and every material circumstance relating thereto, having taken place long before the adoption of the civil code in 1808, the Spanish and civil laws only can apply to this case. These laws recognize but two sorts of partnership, universal and particular. *Inst.* 3, 26, §. 1. *preamble*—*Part.* 3, 10, 3—*Cur. phil. com. ter. c.* 3, *nos.* 5. 6.

In the universal partnership all goods and effects, both present and future, become immediately the joint property of the contracting parties. *ff.* 17. 2. 1, § 1—*Cur. phil. com. ter. c.* 3. *nos.* 6, 7, and the authorities there cited.

If there be no express agreement about the profits, they are to be equally divided. *Inst.* 3. 26. § 1—*ff.* 17, 2, 7, §. 2—*Cur. phil. com. ter. c.* 3. *no.* 9—*Part.* 5, 10, 4, 7.

And this whether the acquisition be made in the joint names of the parties, or one of them only—*Cur. phil. com. ter. c.* 3. *no.* 7—*Poth. trait. de. soc. nos.* 32, 33, 35, 46.

And though an acquisition be made in the name of one of the parties, it is immediately delivered to the other by construction of law.

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ff. 17, 2, 2, *quia licet specialiter traditio non interveniat, tacite tamen creditur intervenire.* Also, *Part.* 3. 28, 47.

Again under the Spanish and Roman laws it was not necessary that the contract of partnership should be in writing. *Societatem coire et re, et verbis, et per nuncium posse nos, dubium non est. ff.* 17, 2, 4, 4. Under the Romans the social contract or partnership, needed no other solemnity, but the consent of the parties, without any writing at all, *Watson on part.* 4. Barbeyrac in his notes on Puffendorf, observes that "a partnership is contracted sometimes silently." The same doctrine is laid down in the partidas. *E facesse la compania con consentimiento, i con ortogamiento de los que quieren ser compaueros. Part,* 5, 10, 1. So in the *Cur. phil. com. ter. c.* 3. *no.* 1. *La compania se contrae expressamente por palabras, o tacita, o calladamente sin ellas, por hacer acto que la induzga, o por usar de ella, como si se huviere hecha, respecto de contraerse por el consentimiento de los que hacen.*

The testimony offered by the plaintiff is not weakened by one opposing fact. The only witness examined on the part of the defendant declares negatively, that he did not know of any partnership. It is therefore conceived that the

existence of the partnership is proved beyond dispute. It would be impossible to persuade the mind of the truth of any fact, if it doubted after such testimony. The witness are aged, respectable and personally known to the court. They could have had no interest in deceiving, as it is pretended they had.

Seghers, for the defendant. The district court did err in admitting as evidence the records of the two suits instituted by the plaintiff's testatrix. These two suits disclosed two facts, which cannot exist with that alleged in the petition, in the present case. The testatrix claimed charges for her labour and for that of her slaves; therefore, it is clear that in her judgment she had not placed her industry in a partnership with the defendant's testator; she also held her property separate from him, there was therefore no universal partnership, as is alleged in the petition.

The confession or acknowledgment of facts made by the parties, in their counsel and their pleadings, are evidence and must be admitted as *such in any action* against *them*. 2 *Pothier, Obl. n.* 797.

The evidence offered by the plaintiff does not support his claim. No part of it shews that the

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alleged universal partnership existed. It shews on the contrary that each party held property in his own right, and to his own use, independently of the other. If no universal partnership existed, the plaintiff cannot recover on a special one, because none such is alleged, and if any such was, we would yet seek in vain for a single tittle of evidence on the record, to support it.

Further, the evidence, offered by the plaintiff himself, establishes a fact which alone suffices to repel his claim, viz. the concubinage of his testatrix with the defendant's testator. Their union was an immoral one, and could not give rise to any action. *Partida* 5, 11, 28. *Code Civil*, 264. *art.* 33. And if the advantage which is claimed, viz. a participation in the defendant's testator's profit, was proven to have been actually promised, the court would see, in the engagement taken by the man, nothing else but an intention to cover a donation, on an universal title, to the woman, which the law reproves. *Code Civil*, 210 & 212, *art.* 10 & 17.

DERBIGNY, J. delivered the opinion of the court. It has been contended generally that the record of a suit, in which the plaintiff has been non-suited, cannot be produced against him, ei-

ther for the purpose of estopping him, or as evidence of facts by him acknowledged. East'n. District Dec 1816. BORE'S CR. vs QUIERRY'S EXR

We do not indeed believe that the doctrine of estoppel, as known to our laws, extends to the length which the defendant contends for. In order that a demand may operate as a bar against another, it must appear, that, by the first, all rights to the second have been waved. But, altho' it must be confessed, that it is not easy to reconcile a demand of wages as a servant, with a claim as a partner, the one does not of necessity exclude the other. Actions, contrary to one another, altho' they cannot be united in a libel, may be separately instituted *quando sunt talia jura, quæ non tolluntur electione*, says *Lopez, n.* 1. *Part.* 3, 10, 7.

But the plaintiff has not only contended that those records could not be introduced, in support of the defendant's plea in bar, he has also attempted to shew, that they could not be produced as evidence of facts acknowledged by his testatrix. To establish this point he has quoted from *Part.* 3, 22, 9. a passage which goes to say that after a defendant has obtained the dismissal of a suit, owing to the absence or neglect of the plaintiff, it shall not be permitted to the plaintiff thereafter to avail himself, in a new action, of any thing written in the first,

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because the defendant has been liberated of that by the judgment of dismissal. But, this provision, denying to the plaintiff the right of producing in such a case the pleadings of the first suit, is certainly not applicable to the defendant.

We do not presume that the plaintiff further intended to deny generally, that the acknowlegment of parties, by their attornies in the pleadings are evidence. "The confessions or "acknowledgments," says *Pothier*, "which the "parties make in several stages of a suit, by "their instruments of writing or pleas, may also "pass for a sort of judicial confession, when "the attorney has authority from his client to "make them, and he is presumed to have such "an authority as long as he is not disavowed." 2 *Pothier's Obl. n.* In *Gilbert's law of evidence, ch.* 3. *sect.* 3, it is said "the bill, in "chancery is evidence against the complainant, "for the allegations of every man's bill shall "be supposed to be true, nor shall it be pre-"ferred by the counsel or solicitor, without the "privity of the party, and therefore it is evidence "as to the confession or admission of the truth "of any fact by the party himself." In this particular instance, the soundness of that doctrine is manifest: for here is the disclosure of

an all-important fact, the proof of which was perhaps in the power of the plaintiff alone, to wit: her possessing two slaves in her own right, during all the time of her residence with Quierry.

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Upon the whole, we think that the records offered in evidence by the defendant, were properly admitted, so far as his object was to establish facts disclosed by the plaintiff.

We have, in support of the partnership, acknowledgments of Quierry, made, it is not said at what time, and in opposition to them his own acts, and the acknowledgment of Martha Bore. Independently of her own avowal, that she was only his servant, we have it in evidence from her own mouth, and that of one of her witnesses, that he possessed land in his own right, and she, two slaves in hers. An *universal* partnership between them is then out of question; and if there was a *particular* one, nothing shews in what it did exist.

We are therefore of opinion, that the plaintiff's claim is not supported by the evidence: this will preclude the necessity of inquiring here, how far these can exist in the state of any such thing as a partnership between a man and his concubine, particularly between a white man and a free woman of color, living together in

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concubinage, and how far such a contract may come within the provisions of the *Part.* 5, 11, 28, and the 33d *art.* of our *Code* 264, which declares void all contracts, the cause of which is contrary to good morals and public order.

It becomes also unnecessary to decide whether the plaintiff could bring this, or any other action, against the estate of Quierry, after having consented to withdraw the suit for wages, for the purpose of receiving the legacy left to his testatrix: altho' it may be proper to observe, we were inclined to view this agreement as a compromise intended to put an end to his claim.

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

GENERAL RULE.

December, 3, 1816.

It is ordered that candidates for admission to the bar, who have taken a degree in one of the incorporated seminaries in the United States, or their territories, may be examined. on shewing that they have studied two years under the direction of one of the attorneys duly admitted in this State.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JANUARY TERM 1817.

East'n. District.
Jan. 1817.

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FITZGERALD vs. *PHILIPS.*

APPEAL from the court of the first district.

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A ceding debtor, who has not obtained his discharge, is liable to a simple contract creditor, when it is clear that the privileg'd debts absorb all the ceded property —although the affairs of the estate be yet unliquidated.

If part of the property ceded be lost by the

MATHEWS, J. delivered the opinion of the court. * This case having been before this court in two instances previous to the present (*ante* 290, 3 *Martin*, 588.) and the principles on which the rights of creditors to sue an insolvent debtor, not released by them, and also the manner of proceeding having been settled by judgment heretofore given, it now only remains for us to apply these principles conformably to the facts in this cause.

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

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misconduct of the syndics, the debtor is entitled to a proportionate allowance from each creditor.

It is a suit brought by one of the creditors of an insolvent debtor, who surrendered his property for the benefit of his creditors, but never obtained a discharge from them, and is consequently liable to pay them, out of such funds as he may have acquired since his failure, any balance which may be found unsatisfied, after a liquidation of his estate by his syndics, and distribution according to law.

By the statement of facts, it appears that some of the property surrendered was lost after it came to the hands of the syndics of the creditors, viz: $600 by the failure of one of them, and $1,800 in consequence of the failure of an auctioneer, into whose hands property had been placed to be sold, and that great expences have been incurred in the management of the estate. It also appears from the testimony of one of the syndics, that nothing remains to be divided among the creditors by simple contract, after satisfying the privileged debts.

On these facts, the defendant and appellant opposes the claim of the plaintiff and appellee. 1, Inasmuch as it is not alleged that a liquidation of the insolvent's estate, and a distribution among his creditors have taken place: as until this happens, no creditor is authorised to sue for debts

contracted before the surrender. 2. Inasmuch as, if the plaintiff and appellee may maintain his suit, a deduction from his debt ought to be made, proportionate with the other creditors, according to the amount of losses, and expences accruing to the estate, since it has been in the possession of the syndics.

I. As to the first of these objections, it appears, in the statement of facts, by the testimony of the syndics that, after paying privileged debts, nothing remains to be distributed among the creditors by simple contract. We have not been able to discover any thing, in the proofs and documents of the case, that may be set in opposition to the truth of this testimony: and, certainly, it would be unreasonable and absurd, to compel a creditor to wait for the final liquidation and distribution of an insolvent debtor's estate, when it clearly appears, that there remains nothing for him to expect. Under circumstances like these, the reason of the rule ceases: for its spirit must have been complied with, before such a result could have been ascertained.

II. How far the claim of the plaintiff and appellee ought to be reduced in consequence of losses and expences, which have accrued while the estate was in the hands of the syndics, is a

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question of some difficulty. The surrender of his property, by a debtor to his creditors, does not give it to his creditors. It only gives them the right of selling it for their benefit and receiving the income of it, in the meanwhile. *Civil Code* 294. *art.* 171. The debtor therefore remains the proprietor of his estate, so surrendered, until it be sold; and it is a general maxim that whatever perishes or is lost, is a loss to the owner: and every misfortune of this nature, happening between the surrender and sale, where there is no negligence, nor improper conduct on the part of the creditors or the syndics, must be borne by the debtor. As to losses, which accrue after the sale, and under a proper administration of the estate by the syndics, it is unnecessary, in the present case, to lay down any general rule. If they manage the estate improperly, or without due care or precaution, they or their constituents ought to bear the loss which may be incurred. In the case now under consideration, it appears that 1800 dollars have been lost, by the failure of an auctioneer to whose part of the property of the insolvent was intrusted for sale by the syndics. Now, if they had exercised ordinary prudence and discretion, how could the loss have happened? Auctioneers are bound by law to give sureties, who are an-

swerable for their acts. It does not, it is true, appear from the statement of facts, whether the person applied to by the syndics gave the security required by law: yet as the loss is explicitly admitted and consequently his failure, we must presume that he had not given sureties for his good conduct, for if he had, then the amount for which he was in default, might have been recovered from them, and no loss would have ensued. We are, therefore, of opinion that a deduction ought to be made from the claim of the appellee, on account of this loss, as well as that resulting from the insolvency of one of the syndics.

With regard to the expences incurred in the management of the estate, it does not sufficiently appear whether they were just and necessary or illegal and superfluous, consequently on this point no opinion can be given.

The district court having failed to allow the credit claimed by the appellant, on account of the loss of 1800 dollars, by the failure of the auctioneer, the judgment must be annulled, avoided and reversed, and this is accordingly ordered. And proceeding now to give such a judgment as in our opinion ought there to have been given: it is further ordered, adjudged and decreed that the plaintiff and appellee do re-

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cover from the defendant and appellant, the sum of 71 : dollars, with legal interest from the 9th of May 1814, until paid, with costs, but that he do pay those of the appeal.

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

STOCKDALE vs. *ESCAUT.*

Appeal from the court of the first district.

If a document be in the hands of a person, whose interest it is to conceal it, he needs not be summoned to produce it, and evidence of its contents will be received

An authority to sell a slave must be written.

DERBIGNY, J. delivered the opinion of this court. The defendant and appellee bought from Francis Hudson, an inhabitant of the Attakapas, a negro woman whom the plaintiff and appellant claims as his own. On the latter therefore does the burden of the proof lie. The evidence of the title to a slave must be written, unless due proof be made of the loss of the written evidence. None such is produced by the plaintiff; but he has endeavoured to establish by oral testimony, that he once had a private bill of sale of the slave in dispute, and that this instrument was in the possession of the vendor of the defendant and appellee. He also offered to procure another bill of sale of the person from whom he bought the slave: and for that

purpose he requested that a commission might issue to have that person examined: and as the refusal of this commission has been the subject of a bill of exceptions, which comes up with the record, we are first to dispose of the question arising thereon.

The reason given by the district judge in refusing the commission was, that the application was made too late, viz: after the expiration of the time, within which the rules of his court require commissions to be applied for. The judge also refused to sign the bill of exceptions considering that the sustaining or rejecting such applications was a matter of discretion, in the exercise of which he could not be ruled by the supreme court.

These two questions, the latter of which is certainly of some moment shall, however, remain undecided, it appearing on the face of the affidavit, made to support the application, that the document offered to be procured, could not, if obtained, be received in evidence to supply the loss of the original title. We do not deem any explanation necessary, and therefore pass to the merits of the case.

The first question is, whether the plaintiff has proven the loss of his written title, so far as to

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be entitled to supply its production by parol evidence. The expressions of the law on this subject are as follows: "in order that the judge may admit the deposition of one or two witnesses to supply the loss of the title, the fortuitous event, which occasioned the loss of the title, which formed the literal proof must be established. For, he who requires to be admitted to produce testimonial proof, and merely alleges that he has lost his title, without any fact appearing, or overpowering force, owing to which he has lost it, cannot be admitted to give testimonial proof that it existed." *Civil Code* 312, *art.* 24[illegible]. A fortuitous or overpowering force, owing to which the loss did happen, must then be first proven before oral testimony of the title can be received. In this case, no fortuitous event is alleged; proof has only been made that the written title of the plaintiff passed (it is not said how) into the possession of the defendant's vendor. If no more had been shewn, that certainly could not have been considered as a loss of the paper, far less as a loss by a fortuitous event or overpowering force: because, this vendor, for aught that appears, might have received the paper from the plaintiff himself. But, from all the evidence which is spread before us, we think it can be collected that the paper was ei-

ther taken or retained by the vendor of the appellee against the will of the appellant. The question therefore now is, whether this circumstance shall be considered as a loss of the paper to the plaintiff. Generally, when an important document is withheld by the adverse party, the party is to call on him to produce it. But the vendor of the appellee, altho' he appears to have volunteered his services in favour of the appellee, is not a party to this suit, and could not thus be called upon. He might indeed have been summoned as a witness, and served with a *subpoena duces tecum:* but this was a step, which the majority of the court, (MARTIN, J. *dissentiente*) think that the plaintiff and appellant was not bound to take, and to which he probably did not think proper to resort, considering the conduct which that vendor had pursued in the course of this transaction. The plaintiff then rests his proof of the loss of his title, on the circumstance of its having passed, without his consent, into the possession of the appellee's vendor, the very person against whose abuse of it, he now complains, and whose interest, it is by concealing that document to prevent him from shewing a title to the property which he claims. A majority of the court, think that such a proof amounts to a proof of loss by an overpowering

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force, and that were it not so, it would be impossible in cases of embezzlement of titles to make proof of ownership.

This point being settled, the next is attended with no difficulty, the verbal evidence produced by the plaintiff abundantly shewing that the plaintiff was the owner of the slave in dispute, when the defendant's vendor undertook to dispose of her.

But should this evidence of title in the plaintiff and appellant, though strong in itself be deemed imperfect, it is placed beyond doubt by the affidavit of Hudson, under whom the defendant and appellee claims. It is true that he does not appear to have been regularly cited to defend her title, yet she causes him to make an affidavit in her behalf, in which among other things he states the materiality of certain witnesses to prove that he was duly authorised by the plaintiff to sell the slaves mentioned in the petition: afterwards several commissions having issued to take the depositions of several witnesses residing out of the districts, we see the defendant interrogating them in every instance, as to the authority given by the plaintiff to Hudson to sell the slave here sued for: thus evidently shewing that she claims under him.

It remains now for us to decide whether Hudson was authorised by the plaintiff to make the sale relied on by the defendant. On the existence of any authorisation at all, the evidence is various; and, if it were necessary to ascertain the fact by close examination, it would probably be found that he had not even received a verbal authorisation to make that sale. But, however, that may be, it is certain that the plaintiff did not give him any written power for that purpose. Hence, it is contended by the plaintiff that a verbal order supposing one of them to have been given in this case, is insufficient to authorise the sale of any immoveable property or a slave..

The general rule, with regard to the sales of immoveable property or slaves is this: "Every "covenant tending to dispose by a gratuitous "or incumbered title of any immoveable pro- "property or slave, must be reduced to writing, "and in case the existence of such covenant "should be denied, no parol evidence should be "admitted to prove it. *Civil Code* 310, *art.* 241— The object of the law is evidently to place the title of the owners of an immoveable property or slave, beyond the reach of oral testimony. But that object might be defeated easily, if witnesses could be heard to shew that the owner of

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such property had verbally authorised another person to dispose of it. Therefore, altho' the law permits a power of attorney to be given even verbally, it provides that the testimonial proof of it shall be admitted only conformably to the title of contracts or conventional obligations in general. Clearly restraining that testimonial proof to cases where the contract, to be entered into, by virtue of such a power, is one of those which can be proven by oral evidence.

Some question has been raised by the defendant, as to the indentity of the slave by her bought from Hudson, and the slave here proved to be the property of the plaintiff. But, the general course of the pleadings, and particularly the production, by the defendant, of Allen's written message to Hudson, the testimony of Nathaniel Cox, who appears as a guarantee in the bill of sale made by Hudson to the plaintiff, and the affidavit of Hudson himself, establish that indentity beyond all doubts.

It is ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and that the appellant do recover from the appellee the negro woman Mary and her two children, claimed in the petition, with costs.

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

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DUNCAN vs. *CEVALLOS' EX'RS.*

Appeal from the court of the first district.

If a slave be described, in the bill of sale, as a *bon domestique, cocher et briquetier*, and he be proven to be a good servant, and a coachman and brickmaker, this will suffice

MARTIN, J. delivered the opinion of the court. The petition states that the plaintiff purchased from the defendants, a negro slave for nine hundred dollars, under the assurance they gave him, that he was a *good* domestic, *good* coachman, and *good* brickmaker, and possessed of the confidence of his former owner, whose executors they are—that there has been a gross fraud practised on him by the defendants—that the plaintiff, fully confiding in the assurance they gave him, signed the bill of sale, without reading it, not believing that any thing contained therein would have been inserted contrary to, or in opposition of the formal assurances given him, in relation to the qualities of the slave; in which he avers he was deceived. The petition next sets forth that the slave has made several attempts to runaway, and is by habit a drunkard and thief, and was in the said bad practices long before the sale, at least in the knowledge

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of one of the defendants. It concludes with a prayer for the rescision of the sale.

Urquhart, one of the defendants, being interrogated by the plaintiff, answers that he gave no assurances as to the virtues, vices or talents of of the slave, that he knew nothing of him, except that he called himself a coachman.

The bill of sale was introduced as evidence of the assurances stated in the petition. The defendants therein warrant the negro sold free from redhibitory *diseases only*, as well as of any lien, or mortgage, but not as to any redhibitory *vice*, declaring that they do not know the slave. In the description of him, he is stated to be 25 years of age, a *good* domestic, coachman and brickmaker: *bon domestique, cocher et briquetier.*

Four witnesses, introduced by the plaintiff, declared that the slave was, from the moment he was taken into the family of the plaintiff, that is, immediately after the sale, a worthless, idle, drunken fellow, and knew nothing of the business of a coachman.

A witness introduced by the defendants deposed that he knew the slave, who was the deceased's coachman and bore a good character.

Another, the deceased's overseer, deposed he knew the slave during a period of two years, while he belonged to the deceased, that he was at first employed as a brickmaker, was next the deceased's coachman, and afterwards the driver of his other slaves—that he was a very faithful servant, and had the confidence of his master, who was very severe to his slaves; that he saw the negro drunk but once, and he never attempted to run away, that the deceased gave 1800 dollars for him and his wife.

On this, the district judge gave judgment for the plaintiff, and the defendants appealed.

The statement of facts is composed of the bill of sale, and the depositions of the above witnesses, and the defendants' counsel has waved any objection to the want of an averment in the petition of the falsity of so much of the bill of sale, as relates to the slave being a good coachman.

He contends that they are not liable for any but physical or bodily defects, having declared that the warranty did not extend to moral ones, *vices*; and that the plaintiff has failed in the proof of the knowledge, in the defendants, of

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any circumstance which they were bound to disclose.

That the allegation that the slave was sold as a *good* domestic, *good* coachman and *good* brickmaker, is not supported by the proof offered; the bill of sale representing the slave as a *coachman*, not as a *good* coachman—that the defendants, knowing the slave to have been the deceased's coachman, might well describe him as a coachman—that in the phrase used, the adjective, according to the French language, governs only the substantive which it immediately precedes, and is not necessarily applicable to others in the phrase, *bon domestique, cocher et briquetier*—that, if it be doubtful whether the adjective is to be extended to the two last substantives, the construction must be in *favorem solutionis.*

That these witnesses prove that the slave was a good domestic, since he had been selected to oversee his fellow servants, had a good character, that he never attempted to run away, and was seen drunk but once in two years.

The plaintiff's counsel contends that he has proved that the slave was deficient in the quality, which induced him to purchase, that he knew nothing of the business of a coachman;

that he was not a *good* domestic, since four witness swear that he has been, ever since the purchase, *an idle, worthless* and *drunken fellow.*

This court is of opinion that the evidence, introduced by the defendants, repels all the allegations of fraud, made by the plaintiff, and supports the averment they made that the slave sold was a *good domestic*, a coachman and brickmaker; for we think, with their counsel, that the adjective *bon*, does not necessarily attach to any but the immediate substantive, *domestique*, and that if there be any doubt, the construction ought to be made so as to lessen rather than to increase the obligation. Perhaps a litteral translation, into the English language, might present a different idea: and the rule of the common law of England is in opposition to that which we are to follow. The common law says, *verba fortius accipiuntur contra proferentem:* the civil requires the construction to be *in favorem solutionis.*

Neither is the testimony of the defendants' witnesses much weaknened by that of those of the plaintiffs, though the latter be more numerous. These swear that the slave knew nothing of the business of a coachman, and is an idle, worthless and drunken fellow. He might con-

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ceal his skill from his dislike of a new master; a great indulgence might render him idle, and free access to liquors might induce him to drink to excess: and he consequently would appear idle, drunk and worthless. But this does not disprove what is sworn on the opposite side that *previous to the sale,* under a *severe master,* he was a faithful servant, bore a good character, and possessed the confidence of the deceased; circumstances which strongly justify the assertion of the defendants that he was a *good domestic.*— The depositions of the plaintiff's witnesses do not disprove what is sworn by those of the defendants, that the slave was a coachman and brick-maker.

It is therefore ordered, adjudged and decreed, that the judgment of the district court, be annulled, avoided and reversed, and that there be judgment for the defendants with costs.

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

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TRUDEAU'S EX'R. vs. *ROBINETTE.*

TRUDEAU'S EX'R. *vs.* ROBINETTE.

Appeal from the court of the first district.

A deed of emancipation of a slave, under the age of 30, is void

When the person, who claims the defendant, as a slave, has proven her slavery, she cannot contest his title.

MARTIN, J. delivered the opinion of the court. The plaintiff claims the defendant as a slave, stating her to be a mulatto woman born from a negro woman the slave of his testator: avers that she pretends to be free and is about to sail for the island of Cuba. Her answer denies every fact in the petition: judgment has been given for her, in the district court, and the plaintiff has appealed.

The case comes upon a statement of facts and a bill of exceptions.

The statement apprizes us that at the trial, before a jury, the plaintiff introduced a bill of sale from his testator to Gardette, and a reconveyance from Gardette: the first, of March 20th, 1809, the other of April 17th of the same year.

The defendant first introduced a letter of the plaintiff's testator of October 11, 1808, containing the following expressions: 'Robinette, a "child of my house having always acted in a man-"ner different from that of girls of her color, "I am happy that she finds the opportunity of

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"securing her happiness, especially at the eve "of the day, when her young mistress is under "the necessity of calling her back near her, or "of replacing her." The testator then offers her to Gardette for 1000 dollars.

2. A bill of sale of Robinette from James Mather, stiling himself attorney in fact of George Mather and Aurore, the wife of said George, one of the testator's daughters, of July 9, 1810, to A. Abat.

3. Another, from the latter to A. D. Tureau, of the 22d of December, of the same year.

4. One from the latter to the defendant's mother now, and then, a free negro woman, of Sept. 10, 1811.

5. A deed of emancipation of the defendant, dated July 21, 1812.

6. The record of a suit, instituted by George Mather and wife against Abat, for a part of the price of the defendant.

Gardette, a witness introduced by the defendant, deposed, that he had known her for ten years past—that she is the person he bought from the plaintiff's testator—that she always passed as the plaintiff's testator's slave, and he hired her as such; that he believes the testator knew of the sale of the defendant by Mather to Abat, because he was told so by the family.

and the bargain was made, at the house of one of the estator's daughters.

Lozano, another witness, introduced also by the defendant, deposed that the defendant had been in the enjoyment of her freedom for some years past—that Gardette, the other witness, lives with, and has three or four children by her.

The plaintiff proved that he had taken up and confined the defendant, but that she was liberated on an *habeas corpus*.

To the introduction of the deed of emancipation, as evidence, the plaintiff objected, it appearing illegal, on its face. The defendant was stated in it to be of the age of *twenty four*, a fact which was not denied, while the law forbids the emancipation of slaves under that of *thirty*. 1807, 18, *sect.* 2.

A bill of exceptions was taken to the opinion of the court overruling this objection, and in sealing it, the judge stated his reasons as follows: "I allowed the act of emancipation to go "to the jury for what it was worth, altho' *at* "*the time* I considered it immaterial to the real "issue of the case whether it was legally exe- "cuted or not. Trudeau was plaintiff, and I

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"charged the jury that if his testator had part-
"ed with his title to the defendant, he had no
"right to recover—that the validity of the act of
"emancipation was a question between the per-
"son who made it, or his creditors, and the de-
"fendant, and not to be tried in this cause,
"therefore not for their consideration."

We think the judge's view of the question, *at the time*, which out of the hurry of a trial. he would himself have considered erroneous, an incorrect one. If the evidence was immaterial to the issue, why admit it? We are of opinion that the document, had it been a lega lone, would have been a most material, a *sine quâ non*, piece of evidence. But we think it was illegal, null and void; the officer who received it having done so, in contempt, if he was not ignorant, of the law.

A slave, considered as an object of property, is *a thing*, and as such not entitled or capable to resist the exercise of ownership on him (as an *actor* in a suit, or on a writ of *habeas corpus*, nor as a defendant) on account of a want of title in the person who claims or uses him as his property. If he bring suit, or be sued on a claim of property on him, the issue can only be *liber vel non*. If he prove his freedom, no title

can exist in his opponent—till his freedom be proven, here is no person to stand in judgment with the claimant, who therefore could neither avail himself of, nor be concluded by, the judgment. *Civil Code* 40, *art.* 19. *Black Code*, 1816, 33, *sect.* 16.

Here the defendant clearly appears to have been a *slave*, and there is no evidence of *emancipation*. If the plaintiff has parted with his title to a known person, who is unwilling to incur the risk and expence of a trial, and does not insist on his right, the slave has no capacity to resist. If the owner be unknown, it is as if he did not exist. If he be known and absent, the court below might have appointed a person to interfere in his behalf.

Owners ought not to be subjected to support or exhibit their titles, contradictorily with their slaves. Whenever the issue *liber vel non* is found in their favour, the court must give judgment for them, without any inquiry into the title. As this inquiry would not avail them against other claimants, it would be wrong to prejudge, by trying the claim, the rights of others.

It is therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the

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plaintiff do recover the defendant Robinette, and that she return to him as his slave.

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

HAMPTON vs. *BRIG THADDEUS & AL.*

The owner of goods shipped, in New-York for New-Orleans, on deck, is not entitled to contribution, in case of jettison at sea.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiff's agent in New-York, shipped a number of copper sugar kettles, in the brig Thaddeus, which, according to his directions were put ON *deck*. During the voyage, the kettles were necessarily thrown overboard for the safety of the brig. He brought the present action against the owners of the brig and the cargo, in order to obtain their contribution to his loss.—The court below gave judgment for the defendants and he appealed.

The claim of the plaintiff is resisted on the ground that his goods not being UNDER *deck*, constituted no part of the cargo of the brig: for in all cases of jettison, where contribution is expected, the goods thrown overboard must have been stored UNDER *deck*, and no contribution

can be expected for those put ON *deck*. *Stevens on Average* 14, 59. 1. *Caines* 43, 3 *Johnson's cases in error* 178.

The plaintiff admits this principle, as part of the law of England and of the state of New-York: but he alleges that the law is otherwise in Spain, in Portugal and in New-Orleans—and that, as it was in New-Orleans that the kettles were to be delivered, and the contract to be *consummated*, the plaintiff's right must be tested by the laws of New-Orleans. To show what the law of Spain is in this particular, he relies on *Partida* 5, which establishes the general principle that in cases of jettison, the part of the *cargo* saved must contribute to indemnify the owners of the part jettisoned.

This is the principle which regulates cases of jettison in all commercial countries: but the defendants shew that in the state of New-York, if not every where, an exception is made thereto, and that goods ON *deck*, are not considered as *part of the cargo*, so as to be contributed for, in case it becomes necessary to throw them overboard during the voyage. This exception is recognised in England, and authors of that nation find it in the laws and ordinances of foreign nations. It is there recognized as part of the law

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merchant, not as resulting from any positive institution of the country, nor a local usage. In the United States, as the greatest part of the trade is carried on with that nation, courts of justice are apt to look for a correct interpretation of the law merchant in British books, tho' they do not disregard authorities from other countries.

The contract which took place between the parties was entered into in New-York. It was there that it was to begin and actually began to be executed—part of it was to be executed on the high seas, and part of it was to be executed in Louisiana. The parties to the contract were all subjects of the state of New-York, the laws therefore of that state ought alone to regulate the contract, and define the rights arising thereout, until the moment that the law of another country becomes the *lex loci*.

If the master of the brig refused or neglected to receive goods which he had contracted to carry to New-Orleans—if he was guilty of any latches in fitting out the brig for sea—if, after receiving goods, in his boats, they sustained any injury by the fault of his men—or were stolen before the brig left the port—if the merchant who contracted to furnish the load, refused or neglected to deliver it—the laws of New-York, could afford the only criterion to the court called

upon to decide between the parties, because both the contract and the cause of action arose in New-York. No other law can be resorted to, because no other law is the *lex loci*, either of the contract or of the cause of action. Here the cause of action, the fact which is alleged to have given rise to the obligation to contribute, arose *at sea*. Still the law of New-York is to afford the rule, because the contract was made in New-York—the law of Louisiana is neither the *lex loci* of the contract, nor of the fact, which is alleged as a cause of action.

If a man engaged to do or give something in any other place, than that of the contract, and the thing contracted for be either not given or done at all, or given or done in any manner other than that stipulated for, the law of the place where the thing was stipulated to be given or done is the *lex loci* of the fact, which gives rise to the obligation and must therefore regulate the rights and duties of the parties.

Here, the contract consists of several parts or obligations. On the part of the shipper, he is to furnish the goods to be shipped—on the receipt of them he is to pay, the freight. The master is to receive the goods—carry them across the sea—deliver them at the place of destination: in the mean while, he is to take due care of the

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goods—if they arrive at the port of destination, then every act to be performed there is to be regulated by the law of the place. If there be several places of delivery, the law of those several places respectively, while the vessel is there, must regulate the rights of the parties.

It does not appear to this court, that there is any error in the judgment, it is therefore ordered, adjudged and decreed, that it be affirmed at the costs of the plaintiff and appellant.

Duncan for the plaintiff, *Porter* and *Depeyster* for the defendants.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, FEBRUARY TERM 1817.

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Feb. 1817.

SIERRA vs. *SLORT.*

SIERRA
vs.
SLORT.

Appeal from the court of the first district.

MARTIN, J. delivered the opinion of the court. According to the statement of facts, the plaintiff, in the beginning of May, 1816, obtained a continuance of this cause, which had been regularly set down for trial, on the ground of the absence of a deposition, which he had sent for, to the Havanna, and a delay of one month was accorded to him to procure it.

On the 15th of June, the defendant prayed the court to proceed to the trial of the cause, which the plaintiff resisted.

1. Because he had not received any notice of trial.

In the court of the first district, no notice of trial is required.

Saturday is not a trial day there.

If a suit be continued and the party has a month to procure a deposition, the cause must be set down anew, after that time.

A judgment of dismissal ought to contain the reasons on which it is grounded.

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2. Because the day, Saturday, was not a trial day, according to the rules of the court.

3. Because the cause, having been set down and continued, could not now be tried, without having been set down for a particular week.

The court overruled all these objections, and the plaintiff being unprepared with testimony, the court gave judgment that the cause be dismissed: whereupon the plaintiff appealed.

I. We are of opinion that the district court did not err in overruling the first objection; viz. that the plaintiff had no notice of trial: the 12th article of the rules of that court, providing that "no notice of the trial of a cause shall be required to be given, but, that each party shall be bound to take notice from the trial lists and dockets."

II. The fourth article of the same rules provides, that Saturday shall be a motion day.

The seventh provides that the *first four* days of the week, shall be appropriated to the trial of causes, not Friday causes: and that every day of the week except Friday and *Saturday*, the causes on the trial list shall be called.

The district court, therefore, erred in overruling the second objection, viz. that the day, Sa-

turday, was not a trial day, according to the rules of the court

III It seems to us the cause had been continued *without a day*. The consequence of the allowance of one month to the plaintiff, to produce his deposition, does not appear to us to have had any other effect, but that of enabling him till the expiration of that time, to resist any application of the defendant to set down the cause for trial, if the deposition was not arrived—and perhaps also, of enabling the defendant to resist the plaintiff's application, after that period, to continue the cause on account of the absence of the deposition, unless accounted for, on any event subsequent to the first continuance. We do not think that the cause could be placed on any future trial list, without both parties being afforded the opportunity of shewing cause against its being set down for trial, under the 7th article of the rules of the district court. We are therefore of opinion, that the district court erred in overruling the third objection, viz. that the cause, having been set down and continued, could not be tried without its being once more set down for a particular week.

Lastly, the 12th section of the 4th article of

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the constitution makes it the duty of the judges, as often as it may be possible so to do, in every *definitive* judgment, to refer to the particular law in virtue of which said judgment may have been rendered, and *in all cases* to adduce the reasons on which *their* judgment is rendered.

Is this a definitive judgment? Does the above article of the constitution extend to such judgments as are not definitive?

There are two principal classes of judgments, final and interlocutory ones. 3 *Blackst. Comm.* 395, 1 *Pigeau*, 386. The present case cannot be classed among the last: it must have a place among the former. It is so far final, that it is appealable from: because otherwise, by constant dismissal, a party might be forever prevented from attaining his right in the inferior court, or having its error corrected in this.

No good reason can be given for dispensing with reasons in a judgment by which a cause is dismissed and the party denied the right of having his claim pronounced upon, which would not apply to a judgment on the merits. The motives which induced them to be required in the latter are more apparent, in the case of a judgment of dismissal.

In comparing the correspondent article in the French text of the constitution, with that in the

English, the apparent ambiguity in the latter vanishes. It is made the duty of all judges, *in all cases to adduce the reasons on which their judgment is founded.* Are all judgments, *final and interlocutory*, understood, or is the expression restricted to judgments before spoken of, definitive judgments? The judges are required, *dans les jugemens definitifs*, to refer to the law in virtue of which, *de tels jugemens seront rendus, et ils devront dans tous les cas les motiver:* the article clearly refers to definitive judgments. But, we think that a sound construction of this article requires that the word *definitive* be considered as synonimous with *final.*

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The district judge, therefore, erred in failing to adduce the reasons on which the judgment was founded; and

It is ordered, adjudged and decred that the judgment be annulled, avoided and reversed, and that the cause be remanded for trial, and that the costs of this appeal be borne by the defendant and appellee.

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

RION vs. *RION'S SYNDICS*, *ante* 341.

Former judgment confirmed.

In this case, the judgment of the parish

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RION *vs.* RION'S SYNDICS.

court was affirmed, at May term last: but on the application of the plaintiff and appellant a rehearing was granted.

Livingston for the plaintiff. The court seem to think that the estate, brought by the wife in this case, was not *dotal,* on account of the expression in the contract, *les futurs époux déclarent n'avoir quant a présent rien a se constituer.* This expression will however, I believe, be found on examination to relate chiefly, if not solely, to the husband, from what follows in the same sentence, as the reason for the declaration, viz. *le futur époux, ainsi que le citoyen Rion son père, ne jouissant d'aucun revenu*: without saying any thing of the future wife's want of funds. Then immediately follows a power from her to her husband, to collect the sums that might be due to her, giving him full powers to receive the money and sell her estate, to compound, &c. &c. *sans être tenu d'en faire emploi, ni donner caution*; she contenting herself, *de sa solvabilité et de la reconnaissance que le citoyen futur époux sera tenu de lui faire, des sommes qu'il recevra de son chef, sur tous ses biens présents et avenir, sur lesquels, à raison de ce, la citoyenne future épouse aura hypothèque a compter de ce jour.*—

These dispositions clearly shew that from the moment of the marriage, the husband was invested with the power to recover all the monies due to the wife, and to make use of the same, without investing them for her benefit, *sans etre tenu d'en faire emploi ni de donner caution*, and without being liable to give any other security than the receipt : *la reconnaissance que le citoyen futur époux sera tenu de donner.*

This whole transaction then brings the estate of the wife precisely within the definition of the word *dot; a sum of money brought by the wife into marriage, and paid to the husband, to support the matrimonial charges, for which his estate is liable after the dissolution of the marriage—quand meme* (according to the authority cited by the court) *la constitution ne serait pas expresse, qu'on n'aurait employé ni le terme de constitution, ni celui de dot.* It is necessary, however, says the same authority, that there should be a contract, from which it may evidently appear that a *dot* has been paid or promised : whatever may be the terms of such contract. Here there is a contract! And from this contract, it evidently appears that the wife's estate was to be paid to the husband in a manner, and for purposes not essentially different from a *dot*; and that he did actually

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receive and use it for such purposes. If the sums due, to Mrs. Rion, were not *paraphernal*: they must be *dotal*. But they were clearly not paraphernal: the essence of that kind of property is that the wife may have the exclusive management of it; but here by her contract she could not do this: suppose she had called on her husband, as soon as he had received it, to invest it for her use, he could reply that she was precluded by the contract, that he was impowered to receive it, *sans etre tenu d'en faire aucun emploi*, that she could not even ask security, and she had bound herself to be content with his simple *reconnaissance*.

The law, then, expressly discarding forms here, not requiring the technical words *dot* or *constitution* to be used, but looking only to the substance, there would be a constitution of dot, even if the word had not been used; but it is found in the contract. In the last page we find a covenant that if the husband dies first, the wife shall enjoy the estate and receive the profits, *jusqu'a ce qu'elle soit entierement remplie de ses droits dotaux et conventions matrimoniales*, Here then is a clear expression of the intent of the parties, even if it were doubtful before.

In support of the plaintiff's case, permit me to add that there is good authority for the posi-

tion, that according to the custom of Bordeaux, all the wife's property is dotal. *Bien que par la coutume tous les biens de la femme soient censes dotaux.* Same point, *coutume de Bordeaux* 242. *Dic. de jurisp. verbo dot. Il est de meme des biens paraphernaux que d'autres biens. Coutume de Bordeaux*, 203. This point perhaps might be illustrated by further authorities.

Another question that may arise, and one of importance is this, whether the wife is obliged to look to the real estate of her husband, which was mortgaged for her rights, when he has alienated it; when there is personal property belonging to his estate, on which there is no particular privilege, sufficient to pay her—one reason for this doubt arises from an authority in the *coutume de Bordeaux*, 202. Where it is said the wife must first *discuss* the estate of the husband, before she can recur to the real estate in the hands of a purchaser. Now to what purpose this discussion, unless she could be paid out of the estate?

Seghers for the defendants. The plaintiff claims the privilege of receiving the amount of her claim, in preference to the mass of her husband's creditors: she must therefore be held to

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a strict proof of the fact upon which this preference is to be obtained—it does not suffice to shew the probable existence of the fact, that there was a *dot* constituted.

In our humble opinion, the marriage contract shews, that there was no constitution of dot before marriage, and nothing shews that any was constituted afterwards. The parties expressly declare, that for the present they are without any property to be constituted as a dot. The reason as to the husband is alleged, because neither he nor his father have any revenue. It is true the contract is silent as to the reasons which induce the wife not to constitute any dot to herself. It is, however, clear that none was then constituted.

The plaintiff's counsel, however, contends that as the husband was authorised to collect the monies due to the wife, without giving any security, and without being compelled to lay out the money, in the purchase of a real estate, he was authorised *to make use of the same*, and therefore the said debts constituted a *dot*.

The *dot* does not include all the property of the wife; but only such as is constituted in dot, in the marriage contract, or during the marriage: the rest is paraphernal or adventitious. The circumstance of the wife suffering this kind of

property to be collected and managed by the husband does not alter its nature: and the right which she has to demand an account of it, and afterwards to receive the proceeds, differs widely from the right which the law gives her for the recovery of dotal property.

The circumstance of the husband being authorised to collect the wife's debts, and his exemption from any obligation to give surety, or invest the proceeds in real property, does not at all raise a presumption of any intention of the parties to make it dotal. Had such an intention existed, it would have been easy to make the constitution: for property in action may make part of a *dot* constituted. But the contract expressly says, that this property in action was not for the present to be constituted as a dot. Nothing shews that any posterior act has made it so.

DERBIGNY, J. delivered the opinion of the court. The object of this court, in granting a re-hearing in this cause was principally to give to the appellant an opportunity of objecting to a quotation from a French work, referred to by the court, tho' not introduced by either of the parties. At the same time, the claim being represented as of vast importance to the appellant,

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we consented to have another argument on the whole case.

It is therefore important to decide, whether the *coutume de Bordeaux* gives to married women a privilege on the estate of the husband for the reimbursement of the dowry, as the plaintiff contended and the defendant seemed to admit on the first hearing of this cause, or whether, as is now asserted no such privilege is enjoyed: altho' it may be proper to observe, that upon an inspection of the passage, quoted by the appellant from the *coutume de Bordeaux*, we are inclined to think that no such privilege existed there when the book was written: for the author expressly says, that the law *assiduis, C. Qui potior in pign.* (the very law which recognises such a privilege) does not prevail in the province.

The appellant has not thought proper to oppose the quotation made by the court from the *jurisprudence du parlement de Bordeaux*, but her counsel acknowledging it to be law in that country, has endeavored to shew that the general tenor of it is favorable to her cause. We see however, no reason for altering our first apprehension of that authority, and still think that the marriage contract of the appellant contains not what is thereby deemed equivalent to an express

constitution of dowry, viz. something from which it may appear that a dowry was brought, given or promised.

It is ordered, that the former judgment of the court remain undisturbed.

ENET vs. *HIS CREDITORS*, *ante* 307.

Appeal from the court of the fourth district.

Privileged creditors are entitled to vote for syndics.

DERBIGNY, J. delivered the opinion of the court. By a decree of this court of the 7th of May last, this cause was sent back to the court of the fourth district, with instructions to the judge, to cause another meeting of the creditors of Joseph Enet, to be held for the purpose of proceeding to the nomination of another syndic or syndics; the first appointment having appeared to this court illegal. This meeting took place, and the present appellants were elected: but the district judge refused to confirm their nomination, on the ground that part of the creditors, viz: those who had mortgages, had been denied the right of voting.

The question then whether hypothecary and privileged creditors are to participate in the election of syndics, is the principal, if not the only, subject of investigation here.

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The parish judge, acting as notary on this occasion, thought that the creditors of that description were excluded from voting by the 20th article of the 16th chapter of the ordinance of Bilbao, which says, 'that in case there should arise any difficulty in the settlement of accounts and other incidents, and acts, until the close of the proceedings, the minority shall abide by the will of the majority: but that creditors, having privilege by deed or otherwise, above simple creditors, shall not be allowed to vote. This article, however, does not seem to embrace the election of persons, who are to be entrusted with the management of the bankrupt's estate and settlement of his affairs: provision being made for that nomination in the 12th and 13th articles of the same chapter. Administrators of the estate, under the name of depositaries, are to be chosen by the majority of the creditors, speaking generally without exceptions. The syndics commissioners are to be appointed to take charge of the books and papers, and to ascertain the number and claims of the creditors, and the active debts of the bankrupt, and to liquidate the whole. Those are distinct trusts, unless it pleases the creditors to place them in the same hands. After these nominations are thus provided for, we find in the 20th arti-

ele, the disposition which gives to simple creditors the exclusive right of debating among themselves such difficulties as may occur in the settlement of accounts and other incidents and acts. The reason of this is obvious, the privileged creditors, whose claims are already liquidated, and who are to be paid, at all events, in full, have no interest in the adjustment of other claims, nor in any measure, which may be taken for the advantage of ordinary creditors: but it would have been strange indeed, had they been deprived of a participation in the choice of the persons in whose hands that property is to be placed, out of the proceeds of which they expect to be paid. Be that however as it may, the ordinance of Bilbao, supposing it to have any force here, in certain cases, is not the law which is to be consulted in matters of cession of goods. It is a part of the Spanish merchant law, and is applicable to traders only. This is a case of a *cessio bonorum*, by an individual not engaged in trade. It must be governed by the general rules. Febrero, in the article quoted when this case was first before us, says, that *all* the creditors, or a majority of them, in amount and not in number, are to make choice of the persons to whom the administration of the estate is to be trusted. The article of our code, quot-

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ed on the said occasion, gives to the creditors the right of naming syndics to have the management of the estate surrendered. The exclusion of the privileged creditors from a participation in that choice is not so much as hinted at.

Another allegation of the appellants is, that one of the mortgage creditors, who complained that their votes were refused, did not tender his, until the votes had been taken. But there is no evidence that the election was then closed. Besides, it appears that the determination of the notary, not to admit the votes of the hypothecary creditors, had been made known, and that would be sufficient to excuse this creditor, even if he had omitted altogether the useless ceremony of tendering his vote.

The appellants have also made an attempt to shew to this court, that, since the judgment complained of, some of the creditors, in whose favour it was rendered, have thought fit to change sides, and are now willing to acquiesce in the nomination of the appellants as syndics. They even went so far, as to endeavor to establish by calculation, what difference this would make in the result of all the votes. But, this court could not, without assuming original

jurisdiction, inquire into other circumstances than those which were laid before the judge, from whose decision an appeal has been claimed. We must decide, and decide only, whether his judgment was, or was not correct, at the time he pronounced it, not what it might have been, had the situation of the parties been different.

It is ordered, adjudged and decreed, that the judgment of the district court be affirmed at the appellants' costs.

Moreau for the appellants, *Hiriart* for the appellee.

ROBILLARD vs. *ROBILLARD.*

It appearing that the wife brought land to her husband, the judgment will not be reversed, because parol evidence was received to shew that it was brought *in marriage* It being hers whether she brought it so or otherwise

APPEAL from the court of the fourth district.

DERBIGNY, J. delivered the opinion of the court. In this suit, in which the plaintiff sought a separation of goods from her husband, Julien Poydras and Benjamin Poydras, creditors of the defendant, intervened for the purpose of contesting her claim against him.

The statement of facts shews that she brought in marriage two arpens of land, and that she has since inherited from her mother property to the

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amount of $1183. The intervening parties do not set up a higher claim, but only dispute the legality of certain oral evidence, offered by the plaintiff and appellee, to shew that she brought the land in question in marriage. The object of this opposition on their part is not very obvious: but, from the drift of the argument, it is conceived that they thought the testimony illegal, on the ground that no parol evidence ought to be received of the constitution of a dowry: there being no dowry, without a marriage contract.—This objection, however, is deemed frivolous, in the present case, because, whether the land found in her husband's possession be claimed as dotal or as paraphernal property, on a dissolution of the conjugal community, and the renunciation of the plaintiff and appellee to her share of the acquets, her claim to the thing is the same.

On the subject of the sum of money, which she inherited from her mother, and which is stated to have been received by her husband for her use, nothing has been heard that can affect her claim.

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

Benault for the plaintiff, *Moreau* for the defendants.

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LAS CAYGAS vs. LARIONDA'S SYNDICS.

LAS CAYGAS vs. LARIONDA'S SYNDICS, *ante* 283.

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

No appeal lies from the order of a court continuing the cause for four months before a final judgment.

MATHEWS, J. delivered the opinion of the court. In this case, the inferior court seems to be of opinion that the power of attorney, under which the suit is prosecuted, on the part of the plaintiff and appellant, is not sufficiently proven and authenticated, and orders that the amount of the claim made by him shall remain untouched for four months more, in the hands of the defendants, in order to give to the plaintiff the time and opportunity of having it authenticated, and orders the plaintiff and appellant to pay costs.

This certainly amounts to nothing more than an order for the continuance of the cause, for the space of four months, at the costs of the plaintiff: It is a mere interlocutory decree from which no appeal can lie.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed at the costs of the appellants.

Cauchois for the plaintiff, *Morel* for the defendants.

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LAVERTY
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ANDERSON.

LAVERTY vs. *ANDERSON.*

APPEAL from the court of the first district.

An appeal lies from the discharge of garnishee from his bond.

The condition of a garnishee's bond is complied with by his appearance and answer to interrogatories.

MARTIN, J. delivered the opinion of the court. This is an action commenced by attachment. The petition alleges that the defendant, an absent debtor, has fraudulently conveyed all his property to David Wood, and concludes with a prayer that the latter be summoned as a garnishee, and holden to give surety to answer interrogatories. Surety was accordingly given by Wood, and he appeared and answered interrogatories; whereupon, he moved to be discharged from his suretisnip. The plaintiff filed an affidavit, denying that the interrogatories were truly answered, prayed that the matter might be inquired into by a jury, and opposed the garnishee's discharge from his suretisnip. The district court discharged him, and the plaintiff, having filed a bill of exceptions to the opinion of the court, appealed.

The garnishee contends that this is not a proper case for an appeal, which lies only on the final judgment of the cause, and not on a collateral order or interlocutory judgment—that this is so far from being a final judgment in a cause,

that there is not even a cause begun—there is not even a defendant in court.

He insists that the discharge was irregular. Before the year 1811, it is said, garnishees could not be holden to bail. The 4th section, of the act then passed, authorises them to be holden by sufficient sureties to appear and answer interrogatories, in court or before some judge or justice of the peace, and it is contended that after the appearance and answer, the condition of the garnishee's bond being complied with, he is entitled to his discharge.

The plaintiff, however, replies that the condition of the bond is not fulfilled by an untrue answer—that the laws has given to plaintiffs a right to contest the truth of a garnishee's answer and to have the verdict of a jury thereon —that this would be a nugatory right, if the garnishee was permitted to escape before verdict.

We are of opinion that, unless further proceedings may be had in this court, the plaintiff in this case will inevitably lose his right against the garnishee, if he has any, and that the order of the district court is in this case so far *final*, that it may be appealed from.

But, we think that the district court did not err, in discharging the garnishee from the sure-

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tiship he had given. The condition of his bond, according to the act, is that the garnishee shall appear, at court or before some judge, or justice of the peace to make answers to interrogatories. His sureties do not undertake that the answers will be *true* ones. If they be not, the sureties are not answerable, either to the state or the plaintiff.

Whether on the appearance of the garnishee, when it appears, either from his own admission, the verdict of a jury or otherwise, that he has property and there is reasonable ground to fear, that he will runaway therewith, the court may not take measures for the forthcoming of the property, after judgment, is not a question now before us. For, in this case it does not appear that there was any specific application for this purpose and the order goes only to the discharge of the sureties.

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

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

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QUERRY'S EX. *vs.* FAUSSIER'S EX.

QUERRY'S EX'R vs. *FAUSSIER'S EX'RS.*

APPEAL from the court of the first district.

The time in which suits were prohibited to be bro'ght during the invasion is to be deducted from the year allowed to an executor to discharge his trust

MARTIN, J. delivered the opinion of the court. This action is brought on a notarial act duly executed by the defendant's testator. It is resisted on the plea that more than one year elapsed between the death of the testator of the plaintiff and the inception of the suit—on the general issue and a plea of payment.

To support the first plea, the defendants shew, from the record, that the plaintiff made a demand, on the 6th of May 1814, in his capacity of executor and that the suit originated on the 20th of June 1815: so that thirteen months and one half elapsed between this demand and the suit. How long the testator of the plaintiff was dead, before the executor made the demand, does not appear. However the year granted to the executor for the discharge of his trust, clearly elapsed between the demand and the inception of the suit.

The plaintiff shews that on the 16th of December 1814, viz. about seven months after the demand, which is the earliest period shewn after the death of his testator, according to the record,

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the legislature of this state passed a law for the suspension of all civil suits, and prohibiting the commencement of any, for one hundred and twenty days—that from the expiration of these one hundred and twenty days, until the 20th of June 1815, when the present suit was brought, about two months elapsed; so that these two months, added to the seven, which had elapsed, when the occlusion of the courts took place, make but nine months. since the earliest day shewn after the death of the testator until the inception of the suit, during which the testator might have acted on this part of his trust.

The other pleas being unsupported, the district court gave judgment for the plaintiff and the defendants appealed.

We are of opinion that the district court did not err. The plea of the general issue and payment are not supported by any evidence, and the debt appears from the notarial act—neither is the *fin de non recevoir* alleged: for the occlusion of the courts one hundred and twenty days, during the late invasion, deprived the plaintiff of the only mode which he had to compel the defendants to pay the debt, which they had refused to discharge, on the plaintiff's friendly

application. These one hundred and twenty days ought not to be reckoned as part of the time allowed to the executor: they would suspend the prescription, *contra non valentem agere non currit prescriptio.*

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

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

DUTILLET & AL. vs. *CHARDON.*

If property be leased at auction, the auctioneer is to be allowed for his trouble, on a *quantum meruit.*

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

MATHEWS, J. delivered the opinion of the court. The plaintiffs and appellees, as auctioneers, claim from the defendant $577 50, for services rendered in disposing of certain lots belonging to the state, agreeably to an act of the legislature, 1816, 31. Judgment having been given for the plaintiffs, he appealed.

It appears, by the account annexed to the petition, that the appellees claim this sum, as com-

Eastern District. mission on the real value of the property sold at auction, in conformity with an act of the legislative council, 1805, 4, to regulate sales at auction, on which they estimate the sale of the lots, as they call it, to $57,750.

DUPUY vs. CHARDON.

The act of the state legislature first mentioned, requires the property concerning which it was enacted, to be *let out* at public auction, to the highest bidder, for a term not exceeding twenty five years. That of the legislative council provides only for sales of property, and fixes positively the commission of auctioneers. On a proper construction of these laws depends, in a great measure, the soundness or error of the judgment of a parish court.

We are of opinion that the disposition made of the property was not a *sale*: it clearly amounts to nothing more than a *lease for years*: it cannot therefore bring the claim of the appellees within the provisions of the act of the legislative council. Believing the judgment of the parish court to be founded on this law, which does not embrace the present case, it is believed to be erroneous. The appellees have no right to recover the amount of commissions as for a *sale*, made by them in the capacity of auctioneers; and can only in justice claim such a sum, as may appear

to be due them on a *quantum meruerunt*, for services rendered to the appellant, in exposing the property to be leased.

It is, therefore, ordered, adjudged and decreed that the judgment of the parish court be annulled, avoided and reversed, and the case remanded to be tried on its merits, with directions to the judge to cause it to be considered as an action for payment and compensation for services rendered to the defendant, without reference to the commission allowed by law to auctioneers, on the amount of sales by them made; and it is further ordered that the appellees pay the costs of this appeal.

Morel for the plaintiffs, *Esnault* for the defendant.

BAUDIN vs. POLLOCK & AL.

Appeal from the court of the third district.

The original notarial act cannot be rejected when offered in evidence on the ground that the keeper ought not to have parted therewith.

MARTIN, J. delivered the opinion of the court. The plaintiff offered several original records from the office of a notary public, which were refused to be received in evidence, because they ought to have remained with the notary, and copies ought to have been produced.

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The plaintiff excepted to the opinion of the court: and judgment having been rendered against him, he appealed.

We are of opinion, on this bill of exceptions, that the court erred in rejecting these papers. Originals are better than, or at least as good evidence as, copies. It is not denied that these are true originals and there is not a suggestion of any erasure, or diminution of any part of them.

It is therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the cause be remanded with directions to the judge not to insist on *copies*, but to receive the *original papers* offered in evidence, unless some other proper objection be made thereto, and it is ordered that the appellee pay the cost of this appeal.

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

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, MARCH TERM 1817.

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MORGAN vs. *BELL.*

MORGAN vs. BELL.

A consignee may sue for injury done to the goods.

The misbehaviour of the counsel or of the jury must be taken advantage of, by a motion for a new trial.

The court cannot allow interest on the sum awarded in the verdict, which was before unliquidated.

APPEAL from the court of the first district.

The plaintiff, as consignee of certain goods, brought the present action, to recover damages for injury done to them, by the ill management of the master. There was a verdict, and judgment for him, and the defendant appealed.

There was no statement of facts, but the defendant assigned errors. 1. That the suit ought to have been brought by the owner of the goods and not by the consignee.

2. That the plaintiff's counsel handed to the jury a formula, by which the verdict was rendered: they filling upon blanks left for the sums.

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3. That interest was given on the damages found, from the date of the petition.

4. That the jury took an improper rule to ascertain the damages, viz. adding to the costs, at the port of shipment, the amount of insurance, freight, commission for the auctioneer and consignee, and deducting from the aggregate amount, the proceeds of the sale in this city.

Hennen for the plaintiff. This is an action to recover damages for the injury done to certain goods, consigned to the plaintiff, on board of the vessel commanded by the defendant: which injury the plaintiff alleges arose from the negligence and mismanagement of the defendant.

The general principle of law is, that *the master and owners are responsible for every injury that might have been prevented by human foresight or care. Abbott on ship.* 276, 259. 1 *Condey's Marshall,* 241, 2, 3. 6 *Johns. Rep.* 177. 2 *Brown's admirally law,* 144. 1 *Emerigon* 379, 377, 315. *Pothier's traite &c. charte-partie, no.* 31. *Domat, liv.* 1, *tit.* 4, *sect.* 8, *sect* 4, *and liv.* 2, *tit.* 8, *sect.* 4, § 1. *Justinian's Digest, lib.* 19, *tit.* 2, *lib.* 25. *and Godfrey's comment thereon.* 1 *Pothier's Pandects Justinian code* 539, *Roccus, nos.* 55, 69, 16.—

The jury, who were the proper judges of the fact, have by their verdict established the default of the defendant in this respect. But it is objected that the consignee of these goods has no right of action in his own name; particularly as the bill of lading states, that the goods were "*for J. Hennen.*" It is an established rule, that an action against a carrier for the loss of goods, must in general, be brought in the name of the consignee, and not of the consignor. 1 *Chitty on pleading*, 3, the law implying the contract by the carrier, to have been made with the consignee, in whom the property of the goods was vested by the delivery to the carrier; and though the bill of lading, in this case, shews that the consignee is only a trustee, yet as the delivery is to be made to him, and as he has a beneficial interest in the performance of the contract for his commission, he may well maintain the action in his own name, and hold the sum recovered as trustee for the real owner. 1 *Chitty on pleading*, 4, 5. 1 *Livermore's law of Principal and agent*, 215, 25. 2 *Ventris* 310.

As to the objection that the court has allowed interest on the amount of the verdict of the jury, from the day of the judicial demand; it is

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sufficient to answer that a sum certain and ascertained was sued for; such a specific sum as could support the attachment that has been put upon the property of the defendant; and that the jury have found in favour of the plaintiff, that precise sum: therefore according to our practice, interest was justly allowed by the court on that sum, for which the jury found the defendant was *in morâ*. *Just. digest, lib.* 22.—*tit.* 1, *l.* 35.

The other grounds taken by the defendant's counsel for averting this judgment are clearly not within the province of this court. They might have been good cause, if established, for a new trial, but at this period such objections are too late.

Livingston for the defendant. The bill of lading shews that the goods shipped on board of the defendant's vessel, were the property of *J. Hennen;* if any damage therefore happened to them by the negligence of the defendant, it is the owner only who is entitled to bring an action. On this principle, the assignee being considered as owner, has in general the right of action: but here the consignee appears from the bill of lading, to be merely a trustee; and therefore is not entitled to any action for damages done to the goods of the owner.

But independently of the objection to the form of action, the court below clearly erred in giving interest on the amount of damages found by the jury. The demand was unliquidated, until ascertained by verdict, and in all such cases no interest is ever allowed: for that would be to add to the verdict.

If the court is satisfied, from the inspection of the record, that the jury erred in their mode of calculating the damages, or that the formula of a verdict was handed them: surely then it is, not too late to remedy this injustice whenever discovered.

MARTIN, J. delivered the opinion of the court.

I. The consignee of goods has, in our opinion, such interest in them as authorises him to sue for them, if they be withheld in whole or in part, or if they be injured. In the latter case there is a failure on the delivery, according to the bill of lading.

II. We think that any misconduct of the counsel or of the jury, especially of the kind complained of, ought be taken advantage of by a motion for a new trial: otherwise, in a case like the present, it will be presumed that the formula was given with the knowlege and consent of the other party: the only evidence of the fact being

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the presence of the formula, among the papers of the suit, in the handwriting of the counsel.

III. We are of opinion that the court erred in allowing interest upon the sum awarded in damages by the jury, from the date of the petition.

IV. The rule said to have been taken by the jury to assess the damages, we could not consider as an improper one. If they believed that at the time goods imported into this country from England were worth costs and charges, they acted correctly, and nothing appears to induce us to think that the case required a resort to any other rule: but if it were otherwise the remedy was by a motion for a new trial.

It is ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed: and it is ordered that there be judgment for the plaintiff for the sum of 4261 dollars 91 cents, awarded by the jury and costs: and that the plaintiff and appellee pay the cost of this appeal.

East'n District, *March* 1817.

BAYON vs. MOLLERE & AL.

BAYON vs. *MOLLERE & AL.*

A fraudulent conveyance gives no title to a party to the fraud.

A witness who has been examined by one of the parties, may be re-examined by the other.

APPEAL from the court of the second district.

MATHEWS, J. delivered the opinion of the court. This case comes up on several bills of exceptions. The plaintiff and appellee claimed damages from the appellants for a trespass alleged to have been committed by them in forcibly taking and conveying away from the plantation of one Anthony Maxent, a negro woman and her children, the property of the plaintiff, and so ill treating the woman that she died.

The present appeal is taken from a second trial of the cause, which was before this court, on a former occasion, on a bill of exceptions to the opinion of the district court, in rejecting some evidence offered by the plaintiff: whereupon the cause was remanded with directions to admit the evidence, which has been accordingly done. *Ante* 66.

We find, in the record of the proceedings, on the second trial, bills of exceptions taken by the defendants and appellants to the opinion of the district court. 1. In denying them the privilege of amending their answer, in such a manner as specially to plead fraud in the plaintiff, so as to

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defeat his title to the slaves. 2. In refusing to admit written and oral testimony: to prove collusion and fraud in an agreement between the plaintiff and Maxent, by which the former obtained a title to the slaves. 3. In refusing to receive as evidence the deposition of Maxent, taken at the instance of the defendants, because the witness had been examined on a commission taken by the plaintiff.

I. As we are of opinion that the judge erred in rejecting the testimony offered by the defendant, on the general issue, it becomes unnecessary to notice the opinion, in refusing to allow the amendment.

II. The plaintiff, in his petition. alleges property in himself in the slaves, and force and injury in the defendants, whereby he lost his property: the answer denies both these principal allegations and it was necessary that they should be proven to authorise a recovery in damages.—The evidence of the title to the property in the plaintiff is a bill of sale made to him by a proper officer, who sold the slaves by virtue of an execution, in a suit of the plaintiff against Maxent, in whose possession the woman was at the time of the alleged trespass. In opposition to

this title and to resist the claim of damages, the defendants offered evidence below to prove that Maxent had purchased the slave from one of them: they also offered to shew by oral evidence that the whole transaction relating to the suit, judgment and execution between Maxent and Bayon, was feigned, fraudulent and done with the view of defeating the just claims and rights of creditors, of whom L. Mollere, sen. states himself to be one by judgment, and having a privilege on the property in dispute as vendor to Maxent. The plaintiff has no just claim to damages for the loss of the slave, to the full extent of his value, unless he makes out a clear title in himself. It is true that the sale and delivery to Maxent gives the complete ownership of the thing sold, which he might have passed to any other person, by a fair and honest sale, or a legal conveyance, subject however, to all liens on it arising from contracts or the operation of the law. But a feigned and fraudulent alienation of property can give no title to one who is a party to such fiction and fraud, against the rights of third persons. Yet, admitting the title of the plaintiff and appellee, under all the circumstances of the case to be good, as against the appellants, still the evidence offered by them in the district court might, in our opinion, have

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BARD vs. MOLLERE & AL.

been properly received in mitigation of damages and we think the judge erred in rejecting it.

III. We are also of opinion that there is error in the opinion in the district court, in refusing to suffer the deposition of Maxent, legally taken on the part of the appellants to be read in evidence to the jury. The circumstance of the witness having been previously examined in the cause, at the instance of the plaintiff and appellee, is not a good reason, why he should not have been again examined by the appellants, if no other legal impediment existed.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and that the cause be sent back to be tried anew, with directions to the court to admit oral or other legal evidence to prove the fiction and fraud, in the transaction between the plaintiff and appellee and Maxent, by virtue of which the former claims title to the slave the subjects of the present suit, and also, to admit the deposition of Maxent, taken on the part of the defendants and appellants, if it has been regularly received.

Morel for the plaintiff, *Esnault* for the defendants.

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March 1817.

MEEKER'S ASS. *vs.* WILLIAMSON & AL. SYNDICS.

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MEEKER'S ASSIGNEES vs. WILLIAMSON & AL. SYNDICS.

APPEAL from the court of the first district.

Whether the recourse of nullity against a final judgment, as it prevailed under the Spanish government, be still a part of the judiciary system of this state?

On the eve of bankruptcy, a debtor cannot convey to one of his creditors real property, in discharge of a claim for which the creditor has a lien thereon.

DERBIGNY, J. delivered the opinion of the court. The first step, in the investigation of this cause, is to ascertain the nature of the action.—The petition states that the plaintiffs, being owners of a certain house, agreed with Williamson, one of the bankrupts, whose rights are here represented by the defendants, that he should occupy it as their tenant; that Williamson, not having paid them any rent for it, was required to quit the premises, but refused so to do. It concludes by praying that Williamson may be decreed to deliver up the possession of the house and pay damages for the detention. The present defendants in their answer deny these facts and dispute the validity of the plaintiffs' title.

It is insisted by the plaintiffs that this is a possessory action, and that they have a right to be restored to their possession, independently of any inquiry into their title: but, as they have adduced no other proof of that possession, than a bill of sale of the premises to them, it is impossible to pronounce on the question of possession, with-

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MEEKER'S ASS. *vs.* WILLIAMSON & AL. SYNDICS.

out examining whether the bill of sale, be such as they could possess under.

In mere actions *recuperandæ possessionis* the fact of possession alone is at issue.—The plaintiff, proving that he was in possession, and ousted by violence, fraud or artifice, becomes entitled to recover possession at once: the other party, not being even permitted to say that the plaintiff has no title to the thing. But when the plaintiff puts at issue his *right* of possessing, as where he alleges that he is the owner, and presents his title, as the evidence of his possession, the *simple fact* of possessing is no longer the *only question*. The defendant is then allowed to dispute the validity of that title, and is maintained in the actual enjoyment of the premises, if the plaintiff fails to make his title good. *Greg. Lopez on Part.* 3, 2, 7, *and Gomez in leg. Tauri* 45, *n.* 118. .

But, it is alleged by the plaintiffs that the defendants have no character to dispute their title inasmuch as they are the representatives of the creditors of Williamson and Patton alone and not of Meeker, Williamson and Patton, in whom it is said the right of property, in the house in contest, was vested jointly, previous to the sale made to the plaintiffs. It is not easy

to understand, how the interests of Meeker, Williamson and Patton, can be distinguished here from those of Williamson and Patton: nor how the creditors mentioned on the schedule of Meeker, Williamson and Patton, can be considered as the creditors of Williamson and Patton alone. But, could that distinction be made, still the creditors of Williamson and Patton would be proper parties to plead fraud against the sale of property in which their insolvent debtor had an interest.

The validity of the sale by virtue of which the plaintiffs aver that they were in possession, is therefore the true question to be inquired into.

It is contended by the defendants that this sale is void on two grounds: 1. Because made in part payment of a judgment which is null. 2. Because intended to give an undue preference to a creditor, on the eve of bankruptcy.

I. The first objection, that of the nullity of the judgment, by which the claim of the plaintiffs has been settled, presents a question of vast importance, viz. whether the remedy granted by the Spanish laws, under the name of recourse of nullity, against final judgments, not appealed from, be still a part of our judiciary

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MEEKER'S ASS. *vs* WILLIAMSON & AL. SYNDICS.

system. Independently of the right of appeal, there existed, in Spanish tribunals, other remedies, among which was the recourse of nullity, which could be resorted to, when the judgment was manifestly against law, or egregiously unjust—that remedy was to be used in the court where judgment had been rendered, if no appeal had been claimed, or if the appeal contained the express reservation that the question of nullity should be decided below. Otherwise it went up before the appellate court, together with the appeal. The time within which this remedy could be applied for depended on the cause of the nullity. If the nullity was owing to a defect in the substantial part of the proceedings, such as a want of citation of the party, the time was thought by some to be unlimited: if to a defect of less magnitude, it was confined to sixty days: again, if it was not prayed for by action, but pleaded by way of exception, it was never too late, unless the exception relied on, could have been brought, under the shape of an action within the legal delay. We are inclined to believe that the law, which created our courts, defined their powers, prescribed the manner of proceeding before them, established their different degrees of jurisdiction and fixed their relative situation, have

impliedly abolished such of the former proceedings as do not fall within the course of our present mode of obtaining redress by suit, and that the recourse of nullity is one of these. The subject, however, admitting of doubt, and the judgment in this cause, not being dependent on the decision of this question, we think it best to leave it open for future investigation.

II. The question which now remains to be be determined, is one, to which much of the reasoning formerly used in the case of *Brown* vs. *Kenner & al.* 3 *Martin*, 270, may be applied. The striking features of both cases are the same. The difference lies in this—that in the present case, it is not a security given, at the time of a bankruptcy, to a favoured creditor, who had no privilege, but a complete transfer of property made in payment of a privileged debt. It is contended on the part of the purchaser that the law, which recognises as valid, the payments made at any time previous to the bankruptcy, is applicable to this case: but a line ought certainly to be drawn between those payments which the debtor has made, in the usual course of his business, and the transfer of his property to creditors whom he is unable to pay, in the manner agreed upon and understood by the parties. In

'n. District. the first case as was formerly observed, "no-
rch 1817 "hing attends the transaction, which can have
LD'S ASS. "any tendency to excite suspicions of fraud
US. AMSON & "and injustice:" in the latter it is the re-
NDICS. verse. A favoured creditor, aware of the insolvency of his debtor, conspires with him to appropriate to himself the property, which the law already considers as the stock of all the creditors: and, in fact, admit such a contract, at such a time, to be binding, what becomes of those wise and equitable provisions, which are intended to secure to creditors an equal share in the estate of the insolvent? It is indeed forbidden to the debtor to give an undue preference to a creditor by mortgaging his property to him on the eve of a bankruptcy; but that provision will be a mockery, if instead of mortgaging, he be permitted to transfer the property itself.

In this case, however, it is said that no undue preference has been given; the creditor was a privileged one: he had a judicial mortgage on the property in contest for a sum far exceeding its value.

There is no doubt that this circumstance gives a much fairer aspect to the transaction, than it would otherwise have had: but if it would be unlawful for the debtor about to fail,

to make any change in the state [illegible] is [illegible] to the advantage of part of his creditors and the injury of the others, why should he be allowed to make one the proprietor of his estate, who had only a lien on it? Why should he be permitted to remove his property out of the reach of his creditors, who may be the losers by the change? It can hardly be supposed, in this case, that the house would have brought more than the amount of the claim of the plaintiffs, but it might have sold for more than they gave for it. Perhaps there were also creditors with a higher privilege than theirs: at any rate, if they had appeared as mortgage creditors, instead of owners, their privilege might have been contested. But, it is not for this court to take any such circumstances into consideration: if the sale be illegal, we are bound to declare it so, and to leave the parties to examine their respective rights, against the estate of the bankrupts, according to the course prescribed in such case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be reversed, and that judgment be entered for the defendants and appellants, with costs.

Smith for the plaintiffs. *Livingston* for the defendants.

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AMORY & AL. vs. GRIEVE'S SYNDICS.

AMORY & AL. vs. GRIEVE'S SYNDICS.

If A employs B to purchase bills, and B procures them on his own credit from C, and delivers them to A, who credits him therewith: on the failure of B, C will have no action against A, if there be no fraud or collusion on his part.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. The plaintiffs and appellants claim a sum of money, mentioned in the petition, as creditors of the insolvent, for several bills of exchange sold or delivered to his use. The district court dismissed this suit and they appealed.

The facts of the case are to be ascertained by a statement made by the counsel, which refers to the deposition of a single witness, in whose deposition, from some cause not easily discoverable (perhaps from error in taking it down or copying it) expressions are to be found not easily reconcileable with each other.

It commences by stating that Grieve requested the house of F. and H. Amelung to purchase for him bills of exchange, on several houses in the northern states, and designated the house of the plaintiffs, as one of those who had such bills for sale In consequence of which F. and H. Amelung bought bills from the plaintiffs and from other houses also designated to them by Grieve, to whom they delivered the bills, and received from him paper, of which they dispos-

ed. There was a particular account of these transactions kept between Grieve and F. and H. Amelung, in which he was debited with the bills they delivered to him and credited with the paper which he give in payment. In another part of the deposition, it is stated that F. and H Amelung credited Grieve, with the paper which he delivered to him and debited him with those which they gave in payment of the bills.

This deposition being the principal and almost the only evidence in the cause, this court is bound to weigh it, and as far as possible to deduce the truth from it. From the whole of it taken together, we believe the facts are established that the bills were purchased by F. & H. Amelung, on their own account, and credited to Grieve at his request, on his promise to refund to them their advance.

The statement of the counsel further shews that amongst other paper given by F. & H. Amelung in payment to the plaintiffs for the bills were several notes on which Grieve was liable either as maker or indorser, and for which the plaintiffs have been allowed a dividend of his estate. It is also agreed that the bills then sold by the plaintiffs have been paid.

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AMORY & AL. vs GRIEVE'S SYNDICS.

On these facts, we conclude that no contract ever existed between the plaintiffs and Grieve. F. & H. Amelung did not represent him, in the purchase of the bills, but purchased them on their own account, and afterwards sold them to him, as they might have done to any other.

In the pleadings, no combination to defraud the plaintiffs is any where alleged against the parties concerned in this transaction. Payment from the estate of Grieve, as on a contract, is not strongly insisted on by the counsel of the plaintiffs, who rely more, for the support of their claim, on the broad principles of justice and equity, on account of the estate of the insolvent having been increased from the funds of their clients, who have received no retribution therefore. How far such general and indefinite principles of justice and equity could, in any case, be applied to in deciding on the contracts and negociations of men, is very doubtful: but we are clearly of opinion, that they can have no application in the present.

Grieve has either paid F. & H. Amelung, on his contract with them for the bills of exchange, or he is bound to do it, and his estate is still liable. Now, it appears to this court, that there is no principle of law, equity or jus-

tice that may authorise a decision in favor of the plaintiffs against the estate of Grieve, without any contract, whilst it may be liable on an express agreement between him and F. and H. Amelung to account to them for the same sum, which, for aught that appears on the record, may have been already paid to them. If all persons concerned in this transaction had been brought into court, and the whole subject completely developed, it is possible that the relief claimed by the plaintiffs and appellants might have been granted. As the case now stands, we are of opinion that the district court did not err.

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

Livingston for the plaintiffs, *Moreau* for the defendants.

JONES vs. *GALE'S CURATRIX.*

The signatures & official capacities of the Spanish governors in Louisiana are matter of public notoriety, and the court will officially take notice of them.

APPEAL from the court of the third district

MARTIN, J. delivered the opinion of the court. The plaintiff claims, under a judgment rendered under the Spanish government, the price of

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JONES *vs.* GALE'S CURA'X.

a slave of his sold to Gale, and it is averred that sufficient assets came to the hands of the defendant. The answer denies all the facts, as well as the existence of the record, and avers that the debt, if it ever existed, was destroyed by a novation: farther, that the petitioner's husband mortgaged the slave, to one M'Mucker, who now holds him, which is averred to be in the knowlege of the plaintiff and assets are denied.

On this there was a verdict for the plaintiff, for $329 principal, and $229 68. for interest. The defendant appealed.

The case comes up on a bill of exceptions and statement of facts.

The bill shews that, at the trial, the plaintiff offered in evidence a paper purporting to be the copy of a bill of sale, made by Charles de Grandpre governor of Baton-Rouge, signed Delassus, without its being otherwise authenticated than by being pinned to a paper called a record, in such a form, as records were kept by Spanish commandants, taken from the archives of the district of New-Feliciana, delivered to the convention and governor, by the Spanish authorities, and by the convention to the parish judge, now brought on a *subpœna duces tecum*—

that the defendant opposed the reading of the document, on the ground of its wanting certainty and authenticity as the authority of Delassus to make the copy did not appear—that, admitting his authority there was no evidence of his having made or subscribed the copy. The district court overruled these objections and the papers was read.

The statement of facts informs us that the death of Gale, and the appointment of the dedefendant as curatrix were admitted—that the plaintiff offered in evidence the copy of the bill of sale, spoken of in the bill of exceptions and the record of the suit, in the Spanish court.

This court is of opinion that the district judge did not err, in admitting as evidence the document brought up by the parish judge, taken from the records officially delivered to him by the late convention, to whom they had been surrendered by the officers of the Spanish government. The signatures of Grandpre and Delassus, successively governors of the district of Baton-Rouge, on instruments deposited in the archives, are of the public notoriety as well their official capacities. *Hayes* vs. *Berwick*, 2 *Martin*, 138. The records, altho' loosely kept are admitted to

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Joss vs. Gale's cura'x.

be as all the records, in the office from which they are brought, are to be found.

On the merits we are of opinion that the debt is sufficiently proven, that there is no evidence to support any part of the defence, and that the plaintiff is entitled to the judgment out of the estate of Gales. But the petition has averred, and the answer denied the existence of assets in the hands of the curatrix. This fact was one of the issues submitted to the jury and they found a general verdict for the plaintiff. There was no evidence before them from which the existence of assets could be inferred. The verdict was, in this respect, unsupported by evidence, and the judgment given thereon consequently erroneous.

It is therefore ordered, adjudged and decreed that the judgment be annulled, avoided and reversed, and this court proceeding to give such judgment as in their opinion ought to have been given in the district court, upon the statement, which comes up with the record: It is ordered adjudged and decreed that the plaintiff do recover the sum of $529 of principal and $229 68 of interest, out of the estate of the deceased and

costs in the district court, and that he pay the costs in this court.

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JONES vs. GALE'S CURATOR.

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

COOLEY vs. *LAWRENCE.*

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

If a man puts his name, on the back of a note not negociable, the presumption is that he meant there by to become surety for the payor.

In such a case, his liability does not depend on the fulfilment of the formalities by which the indorser of a negociable paper becomes liable and

The payor may recover from such a surety altho' he may have neglected to sue the principal debtor, or thro' negligence suffered some advantage to be lost, whereby the surety is placed in a worse situation.

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MATHEWS, J. delivered the opinion of this court. This case comes upon several bill of exceptions, and an agreement of counsel, by which the facts are to be ascertained. As the record contains sufficient matter to enable the court to give judgment on the merits, it is thought unnecessary to notice the bills of exceptions.

The defendant and appellee is sued as surety of J. Jarreau, who is a debtor to the plaintiff of $1318 25, the price of three negroes, purchased from him as appears by promissory notes, bearing date of the 17th and 20th of January 1806, for the purchase money, payable in March 1808.

When the contract was entered into the plaintiff, principal debtor and defendant resided in the parish of Pointe Coupee, but previous to the

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notes becoming due, viz. in August or September, 1805, Jarreau, the principal debtor, being about to remove out of the parish, the plaintiff requested some security for the payment of them, and the defendant, at the request of the debtor, indorsed his name on each of the notes. These indorsements being in blank, and not in the regular customary mode of transferring negociable paper among merchants, it became necessary to resort to other evidence, besides that contained in the written instruments, in order to discover what species of obligation the defendant intended to bring himself under to the payee.

The testimony of Petion, a witness in the cause, together with all the circumstances which attended the transaction, as exhibited in the record, shews clearly, that the indorsements made by the defendant and appellee were intended to secure the payment of the notes, when they should become due.

One of these notes not being drawn, in a negociable form, and the indorsement in all being irregular, we are of opinion, that the contract is not one of those which are to be governed by the rules and regulations peculiarly applicable to the transfer of bills of exchange and other negociable paper, which pass from an individual to another in a regular course of trade.

From the laws of France, as cited by the counsel of the defendant and appellee, it seems that an indorsement, similar to those now under consideration, would in that country, create a mercantile contract denominated an *aval*, which would be subject to the rules which govern cases of ordinary indorsements. But these laws cannot be applied to contracts made in this country, and it is agreed that no similar rule is to be found in our laws relating to commerce.

The defence of the appellee, so far as it is founded on the negligence of the plaintiff, in not having the notes protested for non-payment, and failure to give notice, as in regular mercantile transactions of this nature is not supported; because the obligations of the parties must be ascertained by the principle of law, which is given in ordinary cases of suretiship.

Jarreau, having already been prosecuted to insolvency, in an action commenced by the plaintiff no question can arise, with regard to the discussion of his property. The only one which can arise in the case is whether the surety ought to be exonerated from the payment of the note, in consequence of the creditor, not having prosecuted the principal debtor in a reasonable time, if by such a negligence, he has destroyed or lessened any of the rights or privileges, which

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the surety ought have been subrogated to, on being compelled to pay for the debtor.

The notes became due in March 1808, and it does not appear that the plaintiff sued Jarreau till 1811—an indulgence of three years. Believing, as we do from the evidence in the case, that the defendant in putting his name on the back of the notes, intended to contract towards the payee an ordinary obligation of suretiship, it is unnecessary to enquire what would be the effect of a delay on the part of the creditor to pursue the principal debtor, in a case where the surety contracts a special obligatien to pay for the debtor, if he should be unable to make payment. It is a general principle of law, that no person against his will can be compelled to sue another, and our code gives the surety the right of suing the principal debtor for indemnification, when the debt is due by the expiration of the term for which it had been contracted. *Civ. Code*, 130. *art.* 18. The surety, having this right of action in himself, cannot justly claim an exoneration from his obligation, as a consequence of the delay of the creditor to sue, unless this negligence on his part can be considered such a conduct on his part, as will amount to an act whereby the subrogation of his rights, mortgages and privileges, can no longer operate in fa-

vour of the surety. The question is reduced simply to this: is the defendant and appellee entitled to the benefit of the action *cedendarum actionum?* And perhaps, if he intended to take advantage of this, he ought to have entitled himself thereto by plea.

As this question appears to have been justly settled by Pothier, we think it proper here to introduce the author's own reasoning: "when the creditor has allowed some right of hypothecation on the goods of his debtor to be lost, either by omitting to oppose the adjudication of the property in favor of other persons, or by suffering persons purchasing without the charge of hypothecation, to acquire a liberation from it by a possession of ten or twenty years, can the co-debtors *in solido* and sureties oppose the exception *cedendarum actionum,* upon the ground that he has disabled himself from ceding to them his hypothecary action, which he has suffered to be lost, and upon which they had relied for recourse, in case they should be compelled to pay the whole? I do not think that they can; the exception *cedendarum actionum,* as it appears to me, ought not to be opposed to the creditor, unless by a positive act, on his part, he has rendered himself incapable of ceding his actions against one of the debtors by discharging his

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person or property, or unless by allowing a demand, which he has instituted to be dismissed, he has laid himself open to the suspicion of collusion. But a mere negligence on his part, in not interrupting the possession of purchasers, or in not opposing the adjudication to other creditors, ought not to subject him to the imputation: because he is only subjected to the cession of his actions, by a mere principle of equity, not having contracted any precise obligation to the other debtors and sureties to preserve them: it is sufficient that he act with good faith: that is, that he do nothing contrary to his obligation and he ought not to be answerable for mere negligence." 2, *Pothier on obligations, n.* 520 *in finem.*

From this authority, it is evident that mere negligence on the part of the creditor, will not exonerate the surety, altho' thereby some privilege be lost to the latter. It does not appear that Lawrence himself ever used any diligence either by suing the principal debtor for indemnification, as he might have legally done, or at any time requiring the creditor, on payment to transfer to him the rights, actions and previleges which he possessed.

We think the parish court erred, in consider-

ing the contract, on which this action is founded as one recognised by the laws of France, under the name of *aral*, and in applying the rules established for the government of such contracts, in that country, to the present case.

It is therefore ordered, adjudged and decreed that the judgment be annulled, avoided and reversed: and proceeding to give such a judgment as in our opinion the parish court ought to have given, it is ordered, adjudged and decreed that the plaintiff and appellant recover from the defendant and appellee the sum of $1348 24, with legal interest thereon, from the judicial demand and costs.

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

GALE vs. *DAVIS' HEIRS.*

When a couple remove from the country, in which they were married, their respective rights to the property which they acquire in the country to

APPEAL from the court of the third district.

DERBIGNY, J. delivered the opinion of the court. The present suit was first instituted by the plaintiff and appellee and her husband, to recover certain slaves, which they said, were part of the estate left by Sarah Nicholson, of

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whom she is heir in part. The demand was afterwards amended so as as to be made alternative, either for the whole property, or for so much of it as might be found to belong to the estate of Sarah Nicholson.

which they migrate, are to be regulated by its laws

The material facts in the case are the following:

Sarah Jones, the ancestor of the appellee, was married in North Carolina to James Nicholson, in the year 1769. She was then possessed of a negro slave, named Hannah. Nicholson and his wife emigrated shortly after, to the then British province of West Florida, where they remained until the year 1778, at which time they came to settle in the island of Orleans, within the Spanish dominions, where the wife died. At her death, an inventory of the joint estate of her and her husband was made by order of the Spanish government, at the request of the appellee's husband; but no partition took place between the surviving partner and the heirs of his wife. He was left in possession of the whole estate, and bound himself not to dispose of any part thereof, until the claims of the heirs of his wife should be established or rejected. A few years afterwards James Nicholson died, having by his will in-

stituted for his heirs the seven children of his brother Henry, and another nephew, in all eight heirs, among whom is Mary, widow Davis, one of the defendants. It appears that the estate of James Nicholson, including such part as might belong to the heirs of his wife, was divided by his own heirs, and that the slaves claimed in this suit fell to the share of Mary Davis. Of the six slaves mentioned in the petition, five, to wit: Jeffrey, Jeriah and her three children, are claimed as the offspring of Hannah.

The first question is whether Hannah the slave of Sarah Jones, continued to be her separate property after her marriage with James Nicholson? By the laws of North Carolina, where their marriage took place, the reverse must have been the case: there, the personal estate of the wife being vested in the husband, from the moment of the marriage, and slaves being considered as personal property. Hannah, instead of remaining the exclusive property of of Sarah Nicholson, passed under the dominion of her husband exclusively. In opposition to this, we have the repeated declarations of James Nicholson, who, before the death of his wife, frequently acknowleged in conversation that

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Hannah belonged to her. But a separate personal estate in the wife is a thing so foreign to the common law, that something more than Nicholson's acknowlegments was necessary to explain it. The claim therefore to Hannah and her progeniture, as the separate property of Sarah Nicholson, cannot be sustained. It seems, indeed, to have been relinquished, when upon a closer enquiry into the the rights of the plaintiff, it was thought prudent to amend the petition, so as to make it embrace a claim of part of the property, as acquired during the community of Nicholson and his wife.

Something has been said, on the part of the plaintiff, of a tacit mortgage, existing in her favour on the property which she claims. But that pretention, besides being incompatible with the present claim, is not founded in law. There exists no tacit mortgage in favour of the wife for the acquets and gains. *Curia Phil. tit. hypoteca, no.* 27.—and how could such a right exist? The title of the wife to one-half of the acquets and gains is that of an owner, not of a mortgagee: during the matrimony, that title is eventual; on its dissolution, it becomes complete on the property then existing. She has, by law, her choice betwen taking her share of the ac-

quets, and renouncing them: in the first case, she takes as owner; in the latter, all the acquets are left to the husband, and the wife then exercises her right of tacit mortgage for the recovery of her own particular property. But a claim of half the acquets by right of mortgage implies contradiction.

The demand therefore of the plaintiff, so far as it respects her share in the slaves here claimed, as part of the acquets and gains of which Sarah Nicholson may have died possessed, is the true subject of investigation in this case.

Sarah Nicholson married in a country to the laws of which no such thing is known as a community of acquets and gains between husband and wife. But though it was once a question, it seems now to be a settled principle, that when a married couple emigrate from the country where their marriage was contracted into another, the laws of which are different, the property, which they acquire in the place where they have moved, is governed by the laws of that place. *Huberus* cited in 3 *Dallas*, 370. *Greg. Lopez on part.* 4, 18, 21.

According to that rule, the community between Nicholson and his wife began in 1778,

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the epoch of their settlement within the Spanish dominions, and had lasted nineteen years when Sarah Nicholson died. Of the six negroes here claimed, Jeffrey was born and Dick was bought anterior to the community: Jeriah was born during it, and Jeriah's children after the death of the wife, as it appears from the inventory, where Jeriah is said to be eighteen years old, and where some of her children are mentioned On the two first the plaintiff has, of course, a claim; in Jeriah there is as little doubt that she has an undivided interest; but as to Jeriah's children, the question is involved in some difficulty.

The first thing to ascertain is whether the demand, as it stands, reaches those children. The petition, as we understand it, prays judgment for the specific property, or its value, or so much of it as the interest of the plaintiff therein may amount to, by virtue of the community which did exist between Nicholson and his wife until her death, the expressions are: "that the petitioner may have judgment for the said negroes or their value with damages of detention, as the petitioner may be in equity and justice entitled to the same respectively, or in the community as held by the said Sarah and James Nicholson at the time of her death in 1797."

Whatever interpretation may be given to this demand, it is clear that it is not intended to extend further than the epoch of Sarah Nicholson's death, and that it does not even suggest a continuation of the community after that time. There if the present demand was for her share in the com nunity generally up to that time, the plaintiff could recover nothing more than the acquets then accrued, because nothing can be allowed beyond the extent of the demand, *ultra petita*. But here the property acquired after the time limited by the demand is sued for as if it existed before that time. The plaintiff has mistaken the nature of her right; but the thing is demanded, and judgment may pass thereon. *See Feb. de Juicios, lib. 3, cap. 1, sect. 13, no. 476—Cur. philip. tit. Sentencia no. 6.*

A question of moment is now open for consideration. Does there exist in this country any such thing as a continuation of community between the heirs of the husband or wife, and the survivor, in certain cases: and is this such a case?

A continuation of the community generally, that is to say, an equal participation in the fruits produced by the estates, both of the hus-

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band and of the wife after the death of one of them, is said by the Spanish authors to take place in certain cases, between the survivor and the heirs of the deceased, if the survivor has remained in possession of the whole. Febrero, who has discussed the question at large, classes those cases under four heads:

The first is, when the parties contracting marriage have so stipulated it;

The second, when the parties live in a country where the law 6, tit. 4, book 3, of the Fuero Real, (the only one in the Spanish laws which speaks on that subject) is in actual use;

The third, when all the estate is composed of acquets and gains;

The fourth, when from a voluntary continuance in managing the estate in common, in living together at a common expence out of the common stock, and without settling accounts, the survivor and the heirs of the deceased, have evidenced an intention of remaining in partnership.

The present case does not seem to belong to any of those heads. No stipulation of the kind was ever made between the parties: the law of the Fuero Real above mentioned, is believed not to be in force in this country; the estate was not all composed of acquets and gains, for part of

the property inventoried belonged to the husband before the existence of the community; and as to the conduct of the parties, it shews the reverse of an intention to remain in partnership. No such thing, therefore, as a continuation of the community *generally* can have taken place here. But this case is one in which the survivor has kept possession of some property, one half of which belonged to the deceased. Has not the partnership subsisted as to that joint estate? Febrero answers in the affirmative, and his opinion is evidently founded on the soundest principles of justice. The moment that the husband or wife dies, the title to one half of the common property vests immediately in his or her heirs. They become joint owners of the whole together with the survivor. In that state of things, and until a division takes place, or until the title of the heirs is lost in some other way, which is believed not to have taken place here, it is difficult to conceive how the fruits of such property could be otherwise than common to both parties.

The children of Jeriah shall therefore be considered as the property of the joint owners of their mother; and this action as a demand for a division of the property.

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It is therefore, ordered, adjudged and decreed, that the judgment of the district court be reversed and annulled; and this court, proceeding to give such judgment as the said district court ought to have given, does adjudge, order and decree that the appellee shall recover one fourth part of the within mentioned slaves, to wit: Jeriah and her children Abraham, Nancy, and Judy; to which effect, if no partition in kind can be made amicably within two months, from the date hereof, they shall be sold at public sale, and one fourth of the proceeds shall be paid to the appellee; and it is further ordered that the appellee shall pay the costs of this appeal.

Moreau for the plaintiff. *Duncan* for the defendants.

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Errors in law, apparent on the record, may be assigned, altho' there be neither statement of facts, special verdict or bill of exceptions.

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

The attorney of absent heirs appointed by court of probates to represent the absent heirs

MATHEWS, J. delivered the opinion of the court. The plaintiff and appellee commenced this action, as attorney duly appointed by the

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of Opieces, deceased, against the defendant and appellant, who had been appointed curator of the estate, to enforce the payment into the treasury of the state of the sum of $2959 49, which had been determined, by the court of probates, to be due from the curator to the estate. A judgment was taken by default in the parish court, which was afterward made final.

the court of probates, may sue the curator of the estate, for a balance due by him without sueing him and his sureties on the bond.

He has brought up the record unaccompanied by any bill of exceptions, a statement of facts or any thing equivalent thereto, and the appellee moves to have the appeal dismissed.

In such an action the balance is to be paid to the attorney of absent heirs, but deposited in the state treasury

The appellant opposes the motion, attempting to shew errors apparent on the face of the record, which he alleges to be sufficient to authorise and require a reversal of the judgment.

It has been our practice to dismiss all appeals, where no statement of fact, special verdict or bill of exceptions comes up with the record unless in cases in which it appears evident that the appeal was taken for the sake of delay only, and justice required an affirmance of the judgment with damages.

The present is the first instance, in which an appellant has insisted on the right of making an assignment of errors in law, apparent on

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the record, unaided by a statement of facts, special verdict or bill of exceptions.

He claims this right under the 13th section of the act to organise the supreme court, 1813, which provides that "final judgments, in civil actions, in any of the district courts, where the matter in dispute exceeds three hundred dollars, exclusively of costs, shall be re-examined, reversed or affirmed in the supreme court; but there shall be no reversal for any error in fact, unless it be on a special verdict rendered in the district court, or on a statement of the facts agreed upon by the parties, or their counsel, or fixed by the court, if they disagree: which statement of facts may be made at any time before judgment, at the request of one of the parties."

The first part of this section expresses nothing more than is found in the constitution, which gives to this court appellate jurisdiction in civil cases, where the matter in dispute exceeds three hundred dollars. In the latter part the legislature seems to have intended to lay down a rule for the government of the court, in the exercise of its jurisdiction, very difficult to be understood, in consequence of the terms in which it is expressed. When the facts of a case are ascertained by a special verdict or a statement made by the parties, who it is supposed have the clear-

est knowlege of them, or by the judge, immediately after having them disclosed to him, according to the rules of evidence, it is really hard to conceive the possible existence of any error in fact: as, according to our ideas of judicial proceedings, a special verdict or such a statement are conclusive as to the correctness of the facts therein contained; and even should there be an error, this court has no means of correcting it. Perhaps it was the intention of the legislature, when they passed this part of the judiciary law, that all cases, brought before the supreme court by appeal, should come in such a manner as to enable the court to do complete justice between the parties, without the necessity of remanding them to the inferior tribunals: for we discover no provision for sending back to the courts of original jurisdiction, until after the passage of the supplementary law.

In this view of the subject, we are inclined to believe that the section, under consideration, was intended for nothing more than to ascertain and fix the mode by which the facts arising from the evidence of the cause, in the inferior court, are to be made known to the supreme court on an appeal, whenever a knowlege of them is necessary to enable the latter to correct the errors

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of the former, whether they proceed from improper conclusions on facts or mistakes in law.

The right of the citizen to appeal from a judgment or decision of any inferior court of the state, by which he thinks himself exposed to suffer an irreparable injury, in all cases in which the matter in dispute exceeds three hundred dollars, is secured by the constitution and cannot be destroyed by any legislative act. It carries with it the power, and makes it the duty of the supreme court to correct the errors of inferior tribunals of the country. We are, therefore, of opinion that the appellant has a right in all cases of appeal to assign errors in law, apparent on the face of the record, even when the appeal is not accompanied by a special verdict, statement of facts or bill of exceptions, and it is our duty to examine and decide on such errors.

This suit having been commenced and prosecuted to judgment in the court below, and the appeal taken as above stated, the defendant and appellant contends, that there is error in the petition, in the proceedings and in the judgment of the parish court.

It is stated, that there are four causes of error in the petition. 1, The want of sufficient certainty in the description of the kind of curator

ship, which the defendant undertook. 2, That the plaintiff, in the parish court, has not sufficiently set forth the judgment on which his action is grounded. 3, That the prayer of the petition is ill, inasmuch as the plaintiff prays that the money be paid to him, while the law requires it to be paid into the treasury of the state. 4. That an attorney of absent heirs, appointed under the 4th section of the act Feb. 21st 1805, has no right to bring any suit, on the judgment of a court of probates, but is to sue the curator and his sureties on their bond: the expressions of the law being to this effect.

I. As to the two first causes of errors, we are of opinion that the kind of curatorship, exercised by the defendant, is sufficiently explicit, he being described as the curator of the estate of Opeius deceased, which must mean the estate of a person, not, in this respect, represented by heirs in the state, and consequently such an estate, as is known in our law by the appellation of a *vacant estate.*

II. The judgment of the court of probates, being merely the evidence in the suit, its not being set forth in the petition, is no cause of error.

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III. As the attorney, appointed by virtue of the act above alluded to, it is presumed, does not give security, it is not safe that the money should pass into his hands. But, in the present case, the petition clearly points out the object and end of the suit, which is, that the amount due should be paid into the treasury of the state; that part of the prayer, which requires it to be paid to the attorney, may be rejected as surplusage, and consequently erroneous in point of form, and might and ought thus to have been viewed by the parish court and accordingly been corrected in its judgment and decree.

IV. As stated by the counsel for the appellant in his assignment of the fourth error, the expression of the law is "for the purpose of prosecuting both the administrator and his sureties" Here we see a power given to proceed against both; but it seems to us not to follow as a necessary consequence, that the attorney is bound to pursue them in the same action on their bond. For what good or rational purpose? The primary obligation is on the part of the curator to do certain things, and if he can be made to do them, without resorting to his sureties, we can see no good reason why they should be unnecessarily molested. Perhaps this re-

lation would authorise a simultaneous prosecution against principal and sureties, without the necessity of a discussion of the property of the former, as in ordinary cases: but, we do not believe that there is any thing operative in it to this effect. In the petition then there is nothing substantially erroneous and we are not authorised to revise the judgments of inferior courts on account of formal defects.

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In relation to the error assigned in the proceedings of the court, it appears by comparing the date of the citation and judgment by default, that ten days had not elapsed, including the day of service, and excluding that on which the judgment was taken. This, altho' it may differ from the practice of courts of justice in some countries, is conformable to that of ours, and being not in violation of law, cannot be considered as erroneous.

Believing that the judgment of the district court is erroneous in decreeing the money to be paid to the attorney, who gives no security, instead of ordering it to be paid immediately into the treasury, it is useless to examine in any other cause of error in the judgment, as for this it must be annulled, avoided and reversed, which is accordingly ordered and decreed. And, pre-

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ceeding to give here such a judgment as in our opinion ought to have been given in the court below, it is ordered, adjudged and decreed that the appellant, who was defendant in the parish court, to pay over and deposit, into the treasury of the state, the sum of two thousand nine hundred and fifty nine dollars and forty cents, with legal interest thereon from the 15th of September, 1815, within three days after receiving notice from the sheriff to that effect, and in default thereof, it is further ordered, adjudged and decreed that the said sum be levied by the sheriff aforesaid, upon the property of the appellant and defendant to be by him immediately deposited in the treasury of the state, according to the law in such cases made and provided, and it is further ordered, that the appellee pay the costs of this appeal.

The plaintiff *in propriâ personâ*, ***Livingston*** for the defendant.

ALLARD vs. *GANUSHAU.*

The holder of a negociable note, endorsed in blank, may sue the maker.

When a judge

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

MATHEWS, J. delivered the opinion of the

court. In this case the defendant suffered judgment to be obtained by default against him, in the parish court, which being afterwards made final, he appealed.

ment has been taken by default, for want of an answer, it may be made final without assigning reasons.

The record comes up without any statement of facts, or bill of exceptions, but it shews that the action was brought on a negociable note, indorsed in blank by the original payee, and several other blank indorsements appear after the first.

The appellant assigns as errors apparent on the record. 1. That the plaintiff does not appear to have any right of action: the title in the instrument on which the suit is brought not being in him. 2. That the instrument contradicts one of the material allegations in the petition. 3. That no evidence appears to have been introduced to prove the signature of the defendant, nor any of the indorsements. 4. That the judge did not adduce the reason on which the definitive judgment is grounded.

Bills of exchange and promissory notes made payable to the bearer pass by simple delivery, and a *bona fide* holder is entitled to them in full and absolute property. Where they are drawn payable to order, in countries where blank indorsements are permitted and customary among

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merchants, the blank indorsement of the original payee assimilates them to those payable to bearer, so far as to be transferable by delivery, and vests the holder with a right of action against all the preceding parties. *Chitty on bills*, 116. *Swift's evidence*, 309, *Douglas* 611.

The appellee is the fair holder of a negociable paper, indorsed in blank, which according to the custom of merchants in the United States, gives him a right of action against all preceding indorsers: the first error assigned is therefore without foundation.

The holder of a note thus circumstanced has not only a right of action against all the preceding parties to it collectively, but also separately, and he may chuse among them whom he will sue, and therefore the second error assigned is not supported.

The third assignment of error relates altogether to the evidence in the case, and as that is no bill of exceptions nor statement of facts, we are bound to conclude that every thing was properly done.

With regard to the fourth and last error assigned, we are of opinion that notwithstanding the expressions of the constitution in that respect seems to embrace every case, it would be absurd to apply the rule there laid down to cases where

in judgment is obtained by default. The manner in which such a judgment is to be entered is pointed out by law, the act of the legislative council for regulating the practice of the late superior court in civil cases, 1805, *c.* 26, and, according to that law, if the court remains in session three days, after the judgment by default is taken and no motion be made to set the same aside, &c. then the said judgment shall be final, whenever the demand is liquidated by a note, &c. Now, by this law, it seems that no act of the court is required to render the judgment final whenever the sum is liquidated: it becomes so by the lapse of time. Surely, no reason can be required in support of a judgment in cases, wherein no activity or mental exertion is necessary on the part of the judge. From the tenor of the act alluded to, it appears evident that the legislature intended that in all cases of liquidated accounts or demands; when no answer is filed, the allegations in the petition should be taken *pro confessis*, and that the judgment rendered in consequence of the default of the defendant would become final, in consequence of his negligence and sufferance, without any agency of the court. But, in the present case, the parish court has declared the judgment to be final and fixed its amount: yet, as this act was unnecessary to

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give it the force and validity of a final judgment, it ought not to be allowed by any irregularity in the manner of doing it (supposing such really to exist) to destroy the force and efficacy of that, which would have been good and valid, without such an interference of the court. The failure of the defendant to answer is given in this case as the reason of the judgment by default; which would have become final by the mere operation of the law and requires no reasoning on the part of the court.

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

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

DELISLE vs. *GAINES.*

If the cause of action is stated to arise on the Bayou St. John, the defendant cannot succeed on the plea that it is not shewn to arise within the parish of New-Orleans.

An appeal will not be dis-

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

The plaintiff commenced this action, in order to compel the defendant to account for and pay one moiety of the profits made by navigating a schooner the property of the plaintiff, of which the defendant was master, upon a contract by

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which it was agreed, that the net proceeds of freight gained by the schooner should be equally divided between the owner and master.

The action was grounded on the original agreement between the parties. A promissory note given by the defendant to the plaintiff was given in evidence, which, as appeared by the record, had been regularly indorsed to one Alpuente. The indorsement, according to the evidence of the indorsee, was made for the sole purpose of enabling him to recover the amount of the note from the drawer, without any intention of transferring any interest to the indorsee, who being unable to collect any part of it, returned it to the plaintiff.

missed, because the authority of the person who signed it for the principal does not appear, on the record

If a note be indorsed over, and the indorsee not being able to recover its amount, return it to his endorser, the latter will recover on it, al tho' there be no re-endorsement

Hennen for the defendant. The first point to be disposed of this case is a plea to the jurisdiction of the court. The parish court, in which the suit was instituted, is a court of limited jurisdiction, as clearly appears from the act of the legislature by which it was constituted. *Laws* 1813, 115, now it is a principle well established that, *in courts of a limited jurisdiction, the cause must appear on the record to be within the jurisdiction.* 9 *Mod.* 95, *Lord. Conyusby's case. And the cause of action must be expressly alleged to have arisen within the jurisdiction of the court,*

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1 *Wash.* 81. Therefore, on the same principle, in actions brought in the circuit courts of the United States, which are courts of a limited jurisdiction, having cognizance only of some cases which are specially circumstanced, it is necessary to set forth on the record the facts or circumstances which give jurisdiction, and the omission of them will be error. 3 *Dall.* 382. *Bingham* vs. *Cabot*, 4 *Dall.* 7 *Turner* vs. *Enrille*. *Id.* 8, *Turner* vs. *Bank of North America*. *Id*, 13, *Mossman* vs. *Higginson*. 1 *Cran.* 343. *Abercrombie* vs. *Duplessis*. 2, *Cran.* 9, *Wood* vs. *Wagnon*. *Id.* 126, *Cashon* vs. *Van Noorden*, 4, *Cran.* 46, *Montrelet* vs. *Murray*. From these authorities which cannot be controverted, it clearly follows that the parish court had no jurisdiction on the case, as it is not alleged that the cause of action arose within its jurisdiction and the petition should consequently be dismissed.

The plaintiff has no right however to recover in this action, because he took a note for the amount of his claim and indorsed it over to a third person; and the bare possession of that note, without a re-indorsement of it to him cannot entitle him to recover on it.

The evidence moreover did not warrant the judge in giving judgment for the amount which he awarded.

Ellery for the plaintiff. There is enough alleged in the petition, to shew that the cause of action arose within the jurisdistion of the parish court; for it is stated that the contract was made at the Bayou of St. John, which is known to be within the jurisdiction of the parish court; and under the liberal practice of our courts, this will answer the objection of the defendant.

The indorsee of the note was certainly a competent witness to prove for what purpose the note was indorsed to him by the plaintiff. He is not produced to establish any interest in it in his own favour, but to destroy all right to it in himself; and therefore must be the best witness that could be produced for that purpose, as he testifies against his own interest.

In actions of this kind when the defendant is called upon to render an account of a partnership concern and neglects to do it; the court should always be liberal in their allowances against him: it is in his power to shew where there is any incorrectness and if he does not, every thing is to be presumed against him. The evidence however warranted the court below in the judgment rendered.

There was no legal bond given for costs, the surety executed the bond for himself and the prin-

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cipal and there is no evidence on the record of this authority.

MATHEWS, J. delivered the opinion of the court. Two questions are raised for the consideration and determination of this court. 1, Under the circumstances of this case, is a redelivery of the note to the original payee, without any regular transfer by a new indorsement, sufficient to authorise the plaintiff to use it in the parish court as evidence of his claim against the defendant? 2. Is the evidence in the cause sufficient to authorise the judgment of the court to the full amount for which it was rendered?

I. It is insisted by the counsel of the appellant, that as the parish court is from its organisation, a court of limited jurisdiction, it cannot regularly take cognisance of cases, unless where the plaintiff brings himself within its jurisdiction, by alleging the cause of action to be such as appears to have been contemplated by the act of the legislature, which created that court and fixed the extent of its judicial powers.

II. The appellee's counsel farther shews, that security has not been given for the appeal, as the law requires, and therefore it ought to be dismissed.

Before we proceed to the examination of the merits of this case, these two preliminary objections must be disposed of.

As to the jurisdiction of the court of the parish and city of New-Orleans, it is expressed in the act of 1813, made to define the jurisdiction of that court, "that it shall consist of one judge, learned in the law, who shall have and exercise, within the limits of said parish, a jurisdiction concurrent with that of the first district, in all civil cases originating with the said parish." According to this definition and grant of power, it might be doubted whether that court could properly take cognisance of any case unless something is alleged in the petition, by which the plaintiff shews the cause of action to have originated within the limits of the parish, a point not necessary to be settled in the present case. The contract is stated to have been made at the bayou St. John, a place known to be within the boundaries of the parish, which is in our opinion an allegation sufficiently setting forth the jurisdiction of the court, according to a fair construction of the law, allowing it to be necessary.

In relation to the security on the appeal, we are of opinion that the spirit and meaning of the law have been complied with.

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We now come to the two questions which relate to the merits of the cause.

As to the first, we answer briefly that as the plaintiff founds his action on the original contract, and his fair title to the note is supported by evidence, it was properly admitted as evidence of his claim.

In relation to the second, altho' the full amount adjudged to the plaintiff does not appear to be proven to have been received by the defendant, yet as it is shown that the schooner performed several voyages to the amount adjudged, not accounted for by the defendant, the acting partner, we do not think that the judgment of the parish court ought on that account to be disturbed.

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

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

CLAGUE & AL. vs. LEWIS & AL.

Appeal from the court of the first district.

When the creditors of a ceding debtor refuse to accept the cession, & allege fraud, he cannot dismiss his petition

MARTIN, J. delivered the opinion of the court. Lewis, a partner of Lee, in his absence, obtained a meeting of the creditors of the firm, to deliberate on its affairs. Previous to the meeting, some of the creditors suggested their apprehension of his withdrawing with the effects of the firm and held him to security: at the same time the court appointed provisional syndics.

At the meeting, he made a cession of the goods of the firm and prayed for his discharge. A great majority of the creditors, both in number and amount, refused to accept the cession and to grant a discharge.

He prayed for the homologation of the proceedings, and a great number of the creditors joined in a suggestion of fraud and opposed the homologation. A jury was empannelled to try the question of fraud: they could not agree and were discharged by consent. Lewis then prayed and had leave to discontinue his suit. The creditors, several weeks after, prayed for the reinstating of the suit, which the judge declined. They appealed from the judgment of discontinuance.

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The whole record is brought up and Lewis insists on his right to discontinue. His counsel relies on *Partida* 5, 15, 2. 4 *Febrero juicios*, 25. *ff de cessione bonorum* 42, 3. *Curia Philipica* 198, 19, *Partida* 6, 2 29.

The fifth partida provides that if a ceding creditor says that he wishes to recover his goods, before they are sold, and pay his creditors or contest their claims, *they are not to be sold and he is to be heard.*

This does not establish clearly any right in him to withdraw his suit and resume his goods: on the contrary it implies that the suit ought to be *continued*, since he is to be *heard*. The authority seems to provide for the *suspension of the sale*, till the judgment pronounces on his application, which consequently cannot be considered as a matter of absolute right.

Febrero says the ceding debtor may repent, pursue his rights against his creditors, liquidate their several claims and prevent the sale of his goods: but this, he says, is where the cause is *entire*; which is when the creditors *do not accept* and do not present themselves; but not after the contestation, if they oppose him, unless he pays them.

Qui bona cedit, ante rerum venditionem, utique bonis non caret; quare si paratus fuerit se

defendere, bona ejus non veneunt, say the pandects: *qui pœnitet bona cessisse, potest se defendere et consequi ne bona ejus veneant.*

The author of *Curia Philipica* tells us, like Febrero, that the ceding debtor may repent and pursue his actions: *provided the thing be entire,* and that the thing is entire, before the cession is accepted by the creditors and the concourse formed.

The sixth partida cited applies to the general right of plaintiffs to discontinue.

In procedings, on a cession of goods, it is not clear that the debtor, tho' he be considered as the petitioner is absolutely so and entitled to all the advantages of a plaintiff. He is but *quasi* a plaintiff. Febrero considers him as a defendant, *como reo que es aunque parece actor.*

Our legislature has provided that creditors may refuse a surrender in case of fraud. *Civil Code,* 294. *article* 71. The suggestion of fraud, on which this right is bottomed, must regularly be made *before,* since the object of it is to decline, *an acceptance.*

In this case there was a suggestion of fraud, and issue was joined *fraus vel non.* There was therefore a complete *contestatio litis.* The proceedings thereby passed out of that state of *entirety,* during which the debtor might repent and de-

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mand to be dismissed. If it were otherwise, he might for ever keep his creditors at bay. For when could the matter be brought to a close? After dismissing his application to be admitted to a cession, the debtor would renew it as soon as the creditors would press him; and where fraud was again suggested, would it not be the debtor's game to repent again? Then would not the creditors be compelled to relinquish the pursuit or submit to an acceptance and abandon the suggestion of fraud?

It is ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the suit be remanded, with directions to the judge to proceed to trial and judgment, and that the appellee pay costs.

Duncan for the plaintiffs, *Grymes* for the defendants.

GENERAL RULE.

When the appellant does not rely (wholly or in part) on a statement of facts, bill of exceptions or special verdict, but expects to shew error on the face of the record, he shall file an assignment of errors, within ten days after the record is brought up, otherwise the appeal will be dismissed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, APRIL TERM 1817.

East'n. District. *April* 1817.

DUNN vs. *BLUNT.*

DUNN vs. BLUNT.

A *dedimus potestatem* is not necessarily to be directed to a magistrate. When it is so directed, no proof is required of the commissioner being a magistrate.

Appeal from the court of the third district.

MATHEWS, J. delivered the opinion of the court. This case comes up on a bill of exceptions to an opinion of the district court, in refusing to admit as evidence the deposition of a witness, taken in execution of a commission, which had previously issued, from the court to William Ragan, said to be a justice of the quorum of the county of Wilkinson, in the Mississippi territory.

The reason for rejecting the deposition is that it was unaccompanied with the certificate of the governor, or any other proper authority, attesting that the said Wm. Ragan is a justice of the

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quorum, altho' the commission was directed to him as such.

We are of opinion that the district court erred, for two reasons. 1. Because it was not necessary that the commission should be directed to a justice of the quorum of the county or territory in which the witness was to be examined. 2. Because if it was, he is acknowleged as such by the commission. The act of our legislature, in 1813, with regard to the taking of depositions of witnesses, who reside out of the parish in which a suit is prosecuted, authorises a commission for that purpose to be directed to a magistrate or other person of the parish wherein the witness resides. It is the commission of the court, in which the suit is pending, that gives to the person, requested to execute the trust reposed in him, authority to examine the witness, and consequently the right of doing every thing necessary to a proper exercise of the power delegated. In this view of the subject, the circumstance of stating in the commission that the person to whom it was directed is a justice of the quorum, in the Mississippi territory, may be considered as surplusage.

But at all events, the court ought not to have

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required proof, of that which by its own act is admitted to be true.

It is, therefore ordered, adjudged and decreed that the cause be sent back to the district court, from which it came, to be again tried, with instructions to the said court to admit the said deposition of the witness Sellers, as evidence in the cause, if there be no other legal objection to it than what appears on the present bill of exceptions.

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

FLECKNER vs. *GRIEVE'S SYNDICS & AL.*

Appeal from the court of the first district.

The delivery of the title transfers the possession of real estate.

If a third person, unauthorised, accept a sale for the vendee, his subsequent ratification will have a retroactive effect.

The plaintiff and appellee demanded, as purchaser, under Samuel Corp, a certain lot of ground, situated, in the suburb St. Mary, adjoining the city of New-Orleans, which was attached by the defendants and appellants, as belonging to the said Corp.

The history of the transactions, which took place between the parties was briefly this.

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The lot in question was purchased, in 1803, by Samuel Corp, with the funds of the house of William Rowlet & Co. of London, of which he was then a partner. In 1806, he sold it, in conjunction with Rowlet, to Enoch Durand of London, for a sum of money, in which the partnership acknowleged themselves indebted to Durand. The sale was first made by indenture, bearing date of the 21st of July of that year, in London, where the parties then were: and subsequently by a notarial bill of sale, executed in December of the same year, in New-Orleans, where Corp was represented by his attorney in fact, George Pollock, and Enoch Durand by Thomas Elmes, acting voluntarily, in his behalf. On the 25th of August 1811, Durand conveyed the property to the present plaintiff, by a deed of lease and release, which was recorded in New-Orleans, on the 11th of March following, at the request of the plaintiff.

There was judgment for the plaintiff and the defendants appealed.

Livingston for the defendants. The plaintiff has not made out his chain of titles. There is a link deficient in it: for there is no conveyance from Corp to Durand; the latter having failed to ratify the acceptance of Elmes in his name, un-

ui after the failure of Grieve, in 1811. Nor was this conveyance accompanied by any possession. East'n. Dis rict Apr. 1817.

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II. The plaintiff never accepted the conveyance from Durand.

III. The whole transaction is feigned and tainted with fraud. The conveyance from Corp to Durand, was in fraud of the vendor's creditors. This is clearly inferred from the price, from the vendor remaining in possession and continuing to receive the rents after the sale. The conveyance was a feigned one: intended to cover an usurious loan of money, at ten per cent. which clearly appears from the rent reserved,

IV. The conveyance from Durand to the plaintiff was in fraud of the creditors of Corp, which is clearly inferred from the sum alleged as the consideration of the transfer, from the near relation in which the plaintiff stood to Rowlet, his inability to pay such a sum, and the circumstance that the plaintiff failed to make a demand of the rent in arrear in London, according to the terms of the lease.

Ellery, for the plaintiff. The necessity of a ratification of the acceptance of Elmes is not clear-

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ly seen. No law is cited or referred to, in order to demonstrate it. If a ratification be necessary, no particular form is prescribed; any act evincing an assent on the part of the vendee must be sufficient. He is the only party interested in making, or permitted to make, the objection. At what period soever made by him, the ratification must have a relation back to the period of acceptance. Here the acceptance of Durand, the vendee, appears by a variety of acts, by the execution of the articles of agreement between him and Corp, signed by both the parties, dated May 12, 1806, by the indenture tripartite, made in pursuance of these articles, between him, Rowlet and Corp, in which this property is conveyed, and the price and payment provided for, on the 21st of the following month, in pursuance of which the act of sale, from Corp to Durand, before P. Pedesclaux, was passed.

The absence of the signature from the indenture is conformable to the English practice, according to which the vendee never signs the deed of sale, nor the lessee the original lease.

The ratification of the acceptance further appears by the lease from Durand to Corp, on the 25th of November 1806, and his sale to the plaintiff on the first of August 1811; and generally by no act of Durand whatever, has the agency

of Elmes been called in doubt; while on the contrary every act of his shews his approval and ratification.

The delivery of the title deeds and the record of the sale in Pedesclaux's office, render a proof of possession unnecessary. The lease of the property by Durand to Corp is an act of ownership and possession, as a tenant always possesses for his landlord.

II. The acceptance by the plaintiff of the conveyance from Durand is evidenced by his record of his deed in Lynd's office, on the 11th of March 1812, by his demand of possession from the syndics, on his first arrival in 1811, and by the institution of a suit against them.

III. Fraud is alleged in the conveyances from Corp to Durand, and from Durand to the plaintiff. But who are the parties who charge this double fraud? Not Corp, who is barred by the judgment of the inferior court, from which he did not appeal, and who in his answer to the petition never tendered this issue, and who, in his answer on oath to our interrogatories, expressly negatives it. Are they the creditors of Rowlet and co. who sold this property, of Samuel Corp, making the firm of Rowlet and

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co. at New York, or of Corp individually? These persons as well as Corp individually were always solvent: it is not even pretended that they ever failed or were in discredit. Are they even the creditors of Corp, Ellis and Shaw, of which Corp was a member? Even the firm, if they failed (which has not been *legally* shewn) failed in New York, out of the limits of the state: they are not represented, in this state, and can never appear in this court, but as solvent persons. But, they are not the creditors of Corp, Ellis and Shaw, but of Grieve, said to be a creditor of Corp, Ellis and Shaw, the existence, amount and quality of whose debt still remain to be judicially shewn in a separate case of attachment now pending against Corp, Ellis and Shaw in the city court. Can creditors of creditors, in an endless succession come in and object fraud? Can one set of creditors put themselves at pleasure in the place of another set to make this plea, and then sink back to their own characters to avail themselves of it?

IV. The creditors of Grieve are said to have an interest in this suit. What interest can they have? Should they justify the opposition and even succeed in destroying our title, can they benefit by their success? Our title destroyed, in

whom will this property vest? Not in Corp, Ellis and Shaw to whom it never individually belonged; but in Rowlet and co. with whose funds it was originally purchased. It proceeded from the cargo of the Chesapeake, belonging to Rowlet and co. was bought in at the instance of George Pollock, their agent, to secure a debt due them by Watson, their former agent, and afterwards sold by them to pay a debt of theirs to Durand. The legal title was in Corp, but as an agent and member of this firm. The sales were all made before any of the present actors figured in the scene. The property was bought for Rowlet and co. in 1803, sold to Durand in 1806, before the arrival of Grieve in this country, in 1808, before he was a creditor of Corp, Ellis and Shaw, about the period of their failure, in 1810, before ever this firm was formed, during the existence of the firm of W. Rowlet and co. at London, and Samuel Corp at New York, between which firms and that of Corp, Ellis and Shaw, there never was any mercantile transaction whatever: the latter of which was not formed, during the continuance of the former.

At what period do these syndics of Grieve bring forward this charge of fraud? Not in their regular answer to this suit, in which they all

deny our title, but in a second answer filed on the very moment of trial, and yet they ask, why we did not under our commission (professedly taken out to prove the execution of our deeds and justify our title, put at issue by their answer) procure evidence to rebut the charge of fraud thus suddenly objected. Let us rather ask, why they did not on the contrary avail themselves of it to collect some proof, to justify this charge, which rests only in surmises, gratuitous suppositions and bold assertions.

With what view do they now impute this double fraud? Are they such as will bespeak a favourable hearing? Does not such an attempt, to secure this property to themselves, indicate an intended fraud upon the creditors of Corp, Ellis and Shaw, thus attempting themselves to practice the same kind of fraud which they so gratuitously and unjustifiably impute to us? Who are the parties against whom this charge of fraud is brought? It is attempted to be traced up to Durand, as its source: a man, by their own witnesses, proved to be highly affluent and respectable, unimpeached and unimpeachable, in every respect. But is Durand in court? Can he be stripped of his rights, as well as character, unheard and undefended? In this imputed fraud, Rowlet is made also to participate, but he is

also proved, by their own witnesses to be of the most respectable standing and in the highest credit. By the same fraud, the plaintiff is also to be polluted, against whom the severe investigation, both of private correspondence and confidential conversation, has produced nothing but encomiums upon his character and the confirmation of his title. Yet to believe this scheme and system of fraud, upon which every change has been rung, we must believe (without any visible or assignable motive) the collusive concert of all these parties, to which must be added the perjury of Corp, who has sworn to the truth of his answers to our interrogatories—of the plaintiff, who has sworn to the allegations in his petition and of the principal witnesses, who have testified in this cause. The grounds indeed, upon which these wild suggestions of fraud are sought to be sustained are almost undeserving enumeration or reply. Such as they are, let us look at them.

Exorbitancy of price. If true is it a proof of fraud or does it not on the contrary rather exclude the suspicion? Were the deeds feigned or fraudulent, would not the [redacted] have chosen a price better suited to the purposes? If a large price were received as a proof of fraud. every hard bargain, upon the failure of the vendor or vendee. would be brought into court to

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be set aside, upon the ground of fraud. But the price was not exorbitant, as appears by the testimony of Pollock, and Talcott, from the rent of $3000 received by Pollock, from that required by Grieve, about the time of his failure of $300 per month, from that paid by their witness, Banks, of from $80 to $100 per month for a single house, worth alone, according to his testimony 10,000 dollars. Is it remarkable then that Durand, a man of large property in England, where five per cent. is the highest rate of interest, should purchase real estate in this country, which yielded about ten per cent. and which Pollock informed him was worth 40,000? This more particularly when, as their witness, Urquhart, says the attention of foreigners was then turned to this country and real property bore a price above its intrinsic value.

The rent reserved, *L.*760 sterling, gives exactly ten per cent. it is said, upon the price paid. So would any rent reserved give a per-centage upon the price paid. Had the price been *L.*8000 sterling, then [illegible]ent would have given an interest of abo[illegible]t per cent. upon the price and might as [illegible]sibly be urged as a proof of an usurious loan.

It is objected that Corp continued to collect the rent, after the conveyance to Durand. Corp,

as the lessee, collected the rents from the tenants to enable him to pay the rent reserved to his lessor in London, according to the terms of his lease.

It is alleged without any proof of it that the plaintiff was not in a situation to pay for the property and was a relation of Rowlet. The testimony rather shews his ability.

Corp never pretended, nor was he reported, to be owner of the property, after the sale to Durand, but held it publicly as his tenant. It was always known and reported to belong not to Corp, but to some person in London. This circumstance cannot be brought forward by the defendants, syndics of Grieve, who was neither ignorant nor injured by it. He was conscious of the sale, and had been informed of it by Pollock.

Lastly, it is objected that the plaintiff failed at the expiration of the ten days in arrear to make a demand of rent in London, according to the terms of the lease.

This objection yields up at once every pretence of a feigned or fraudulent sale, or an illegal lease. The defendants must admit the validity of the instrument, by the conditions of which they wish to benefit. A demand of rent in London, was unnecessary on account of the re-

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knowleged inability of Corp, to pay since February 1811. *Lex neminem cogit ad vana seu impossibilia.* It was waved by an agreement made with the syndics of Grieve, by which they are to hold subject to the decision of this court, not the rent reserved in the lease, but such rents as they shall receive from the subtenants: by which they discharge themselves altogether of the reserved rent. The necessity of a demand in London is then completely waved, since the syndics do not reside in London, but in New-Orleans, and the rent, by agreement, now to be received is no longer a semi-annual payment, according to the lease, but a payment only to be made on the successful termination of this suit, and no longer of a fixed demandable sum of *L.*335 sterling, (according to the lease) but the uncertain amount of rents collected and to be collected by the syndics of the subtenants.

By the English law, under which this loan was made, since 4 Geo. 2, the landlord, upon the non-payment of rent for half a year, can serve a declaration in ejectment, without any formal demand of rent in arrear, 3 *Co. inst* 202, *a, n.* 88, 15 *East* 206, 8 *id.* 341, 365.

As the lease has onerous conditions, the assignees of Corp (if he had been shewn to be insolvent and represented, in this court) were

not obliged to receive it, and must do some act, expressly manifesting their acceptance, it not passing by the general assignment. Suppose for a moment that the syndics of Grieve were the assignees of Corp, then they have, or have not accepted the lease. If they have not, they cannot claim the benefit of any of its acts provisions. If they have, the agreement above cited with the plaintiff waves the necessity of a demand in London. But they are not the assignees of Corp, and the judgment against Corp, in the lower court, without appeal, bars the syndics of Grieve.

The whole term in the lease is now expired, and even if we had no right to re-enter upon the premises by virtue of the clause of re-entry in the lease, upon the expiration of the lease, the possession reverts to us, upon the decision of the court in favour of our title.

DERBIGNY, J. delivered the opinion of the court. Against the validity of these alienations a variety of objections have been raised.

The first in order is that the sale, by Corp to Durand, had not been completed and the property not yet transferred, when the appellants seized the lot as the property of Corp.

The next is, that supposing the sale to have been complete, in point of form, it is void, 1

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as covering an usurious contract of loan: 2. as intended to defraud the vendor's creditors.

The last is that should the sale be decreed valid, in form and substance, the plaintiff ought not to have possession of the premises, because the property is held under a lease.

I. The first, and by far the most important, objection presents the following difficulty. The contract of sale, entered into at London, between Corp and Derand, being for real estate situated in this country, could not affect the rights of third persons here, unless recorded in some notary's office, as required by our laws.—Until then, it must have been considered as having no more force, in this state, than a private bill of sale. The instrument, executed in London, was never recorded here, and therefore never acquired any binding force against the citizen of this state. One of the contracting parties, however, wishing to remove any difficulty, which might occur on that account, caused another instrument of sale of the premises to be executed in this country. But, that sale is objected to as incomplete, because the purchaser who was represented therein solely by a person, who volunteered his services, on that occasion, did not ratify and approve the acceptance made in his

name, until the vendor had become insolvent, and also because he never was put in possession.

Before we examine what must have have been the effect of this second bill of sale, we must refer back the first, and see what was the situation of the parties. An act, which we shall consider as a private one, had been passed between them, by which the property had been conveyed to Durand. He had accepted it and was bound. The contract, as between vendor and vendee, was complete: but, in order to make it binding on other persons, something more was necessary. The instrument was to be recorded, or some public act was to be passed here. Now, such a public act has been passed, by which the public has been notified that Corp divested himself of the property in question and transferred it to Enoch Durand, of London, in whose name Thomas Elmes accepted the conveyance. The instrument is undoubtedly such as ought to have effect against third persons, and tho' Durand might (which we doubt) have a right to decline ratifying it, yet from the moment it was passed, third persons were bound by it, in the case of Durand's subsequent ratification.

But, it is said that Durand never had possession of the premises, under that act. It is law

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that the delivery of the title is sufficient to transfer the possession of real property. *Part.* 3, 30, 8. *Cur. Phil. Venta, n.* 51. In a country, in which the original title remains deposited, in the office of a notary, such a delivery must be considered as made, when the deed of transfer is there lodged. Then, if Durand, in person or by attorney, had signed the instrument made out, there would be no question as to the delivery of possession having followed, or rather accompanied, the deed. Does it make any difference that instead of an authorised attorney, a voluntary agent accepted the transfer in his name? We think not. The right, accrued to Durand by that acceptance, was certainly the same, whatever might be his subsequent determination.

II. But admitting the sale to be complete in point of form, it is said to be void. 1. as covering a usurious loan: 2, as intended to defraud the venders creditors.

On the first ground, however, supposing that the appellants have a right to set up such a plea, nothing can be shewn than can induce us to view the transaction in that light. Mere conjectures and inferences are not sufficient to shake a contract apparently valid: neither have we heard in support of the second objection, any sufficient

reason to make us consider the contract as fraudulent. It does not appear that when the sale took place, there were any creditors that could be defrauded by it. For several years after, the vendor remained in affluent circumstances, and if any reverse of fortune has befallen him since, the creditors, who lose thereby, have no right to complain of the alienation. The appellants particularly, as representing a creditor, who was the vendor's agent in this country, and as such well informed of his business, and who became his creditor since the sale in question, are in a still more unfavorable situation to set up such a claim.

The title to this property being now fixed in Durand, and nothing having been shewn, which can invalidate the sale by him made to the plaintiff, there seems to remain nothing to do, but to decree possession.

But a difficulty of a singular nature is finally set up by the appellants. They pretend to remain in possession, under Durand, by virtue of the lease which the plaintiff has alleged, against Samuel Corp. In order to avail themselves of such a title, is was expected that they should at least attempt to shew, how that lease passed to them. So far however from that being the case, the question is not even at issue between the present parties: the character of the appellants,

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being that of creditors, who have seized the premises, *as the property of Corp*, and who, in their answer in this suit, deny that Enoch Durand or the plaintiff had any title to them.

It is ordered, 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, MAY TERM, 1817.

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May 1817.

DEGLANE
vs
HIS CREDITORS

DEGLANE vs. *HIS CREDITORS.*

Appeal from the court of the first district.

If a debtor does not make a cession of his goods, at the meeting of his creditors, the order for staying proceedings may be rescinded.

MATHEWS, J. delivered the opinion of the court. This is an appeal from the decision of the court below, whereby the usual order, in cases of the surrender of property, by an insolvent debtor, for staying proceedings against the applicant, was rescinded and set aside: whereon he appealed.

It appears from the record and statement of facts, agreed upon by the counsel of the parties, that the appellant filed his petition, in the ordinary form, praying for a meeting of his creditors, but that on account of some real or supposed irregularity in the proceedings, at the time appoint-

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DEGLANE *vs.* HIS CREDITORS.

ed for the meeting, no surrender was made by the debtor. Sometime after, a supplemental petition was filed by him, praying for another meeting of his creditors, within the usual delay, at which he did not attend, either in person or by attorney; and no cession of goods was tendered before the notary.

Under these circumstances of the case the correctness of the decision of the district court cannot be doubted. Although creditors cannot refuse a surrender, made according to the forms of law, unless in case of fraud on the part of the debtor, yet, the rule can only apply in cases where a cession of goods has been regularly tendered to them, after they have been called together, at the instance of the debtor.

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

Duncan for the plaintiff. *Porter* for the defendants.

GIROD vs. MAYOR &c.

Altho' the mayor's salary may not be reduced, during the service of the incumbent

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiff claims three thousand dollars for

the balance of a year's salary, as mayor of the city of New-Orleans. He obtained judgment and the defendants appealed.

he may agree to receive less, or that a part of it may be applied to other purposes, and his receipt for a less sum for his salary will bind him.

The facts, disclosed by the record, are these:

The plaintiff having been elected mayor on the 5th of October 1812, took the oaths of office, and his salary was fixed at four thousand dollars a year. He addressed the city council, expressing his intention to deal with others, as liberally as he was dealt with—desiring that one half of his salary might be applied to the payment of the mayor's clerk, and one thousand dollars of the balance to that of two additional commissaries of police, who were accordingly appointed.

On the 5th of October, 1814, he was re-elected: nothing was said as to the continuance of the allowance to the clerk and commissaries of police: but an ordinance was passed by the city council reducing the mayor's salary to one thousand dollars a year. It did not acquire any apparent legal effect by the signature of the mayor or otherwise, but the allowances to the clerk and commissaries of police were continued.

On the 5th of April, 1815, the plaintiff received from the city treasurer five hundred dollars, which he expressed to be, *for the two quarters salary, ending on that day.*

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On the 5th of July, two hundred and fifty dollars were paid him, and he stated them to be *for the quarter ending on that day.*

On the 5th of September he received two hundred and fifty dollars, which he stated to be *for the quarter, to end on the 5th of October,* then following.

On or before that day he resigned his office.

The plaintiff's counsel contends that the ordinance of the city council would not have been valid, even with the mayor's signature—as the act of the general assembly, for the amendment of the act of incorporation of the city, forbids the reduction of the mayor's salary during the period of service of the incumbent, 1813, 6, *s.* 7.—that the plaintiff had, to the salary of four thousand dollars, an undoubted right, which was not affected by the allowance, made by the city council to the mayor's clerk or commissaries: which during the last year of his mayoralty, the period for which the balance of salary is claimed, was made without any authorisation on his part—that the proposition which he made, on that score, on his first election would not have been binding on any of their citizens elected in his place, and therefore cannot bind him on his re-election—that the one thousand dollars, which he received, can only reduce his salary *pro tanto.*

The defendants' counsel cannot insist on the validity of the ordinance: they would do it in vain, if it was cloathed with the mayor's approbation—but they contend that although the salary of an incumbent mayor cannot be reduced, nothing compels him to receive the whole or even any part of it: nothing prevents him to give a receipt for it, even without receiving one single cent—or to release it—that the release may be *express*, by a positive act, or *implied*, resulting from any act evidencing his intention to abandon it, wholly or partially—that, in the present case, *pars pro toto* was received, as in the opinion of the counsel, clearly appears from the plaintiff's receipts. Farther, that altho' the plaintiff, on his re-election, was not bound to consent to the continuance of the allowances to the clerk of the mayor and to the two commissaries of police, out of his salary: yet his silence either evidences his consent or is a *suppressio veri*; a fraud on the defendants: since it induced them to continue two officers taken in the employ of the city, at the instance of the plaintiff, on his assurance that their services, tending principally to his ease and convenience, would occasion no expence to its coffers.

The plaintiff's counsel reply that a receipt of

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a part for the whole, being a donation, must be fully proved, and cannot be assumed on a mere presumption.

The court cannot assent to this last proposition. The maxim is *nemo* FACILE *presumitur donare*. "The abandonment, *remise*, of a debt," says Pothier, "may be made by a tacit agreement, resulting from certain facts, which cause it to be *presumed*." 2 *Traité des obl. n.* 572. He gives us an instance of such presumption, drawn from the law *Procula*.

Procula had received a large sum of money to be handed to her brother. After his death, she pleaded that he had abandoned the debt to her. There was no other evidence of the abandonment, except that which resulted from three circumstances, which Papinian held to suffice: *consanguinitas, rationes sæpius putatæ, diuturnitas temporis* consanguinity, accounts often settled and length of time.

This court, being of opinion that the defendants may shew, by presumptive evidence, that the plaintiff reduced his claim to the sum of one thousand dollars, which he received in discharge of his salary, the decision of the case now rests on the simple question of fact, viz. do the facts in the case sufficiently prove this sum of one thousand dollars, to be a *pars pro toto*, which with the allowance of two thousand dollars, to

the clerk and commissaries) was by him received in full of his salary during the last year of his mayoralty? If this question be solved in the affirmative, the surplus was abandoned and the defendants may repel his claim thereto by the exception in the *C. 2, s. 1, ff. de part. Videtur inter nos convenisse ne peteres.* Then was the relation of debtors and creditor dissolved, and no alteration of the plaintiff's mind can cause it to revive.

Taking the three circumstances, stated the law *Procula*, as affording a sufficient presumption of an abandonment—let us examine whether those relied upon by the defendants are less weighty.

I. Consanguinity. Here this circumstance (one of the parties being an artificial person) cannot exist. But a relation between them occurs, which the Roman law considered in this point of view, as equipollent to consanguinity. The Romans, says Pothier, considered pollicitation as obligatory, when made by a citizen to his city, when he had a just cause, *puta* in consideration of some municipal magistracy given him *ob honorem*, or when he had begun to put it into execution. *L. 1, s. 1, & 2, ff. de Pollicit Tr. des ob. n. 4*

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11. Accounts often settled. Thrice did the plaintiff make his demand on the coffers of the city expressly stating it, without any notice of what is now contended by the plaintiff's counsel.

On the 5th of April, 1815, two quarters of the plaintiff's salary were due, amounting, according to the present calculation of his counsel, to two thousand dollars. If, as the opposite counsel suggest, the plaintiff had yielded his assent to the wishes of the city council (that he should receive his salary at the rate of $1000 a year,) conveyed in the ordinance which passed that body, five hundred dollars only were due: this last sum did he receive, and his receipt states it to be for his salary during the six months *ending on that day*. Nothing was said, as to the one thousand five hundred dollars, which on that day were due him, if he meant not to yield his assent to the reduction. If his mind had not been made up on the subject, if he meant to retain the right of insisting on something more, would not the receipt have been *on account of*, or *in payment of a part of my salary, &c.*?

On the 5th of July, when, according to one hypothesis two thousand five hundred dollars were due him, and according to the other two hundred and fifty dollars only, the other sum is received and expressed to be for the mayor's salary *for the quarter ending on that day*. The

two sums now received made that of seven hundred and fifty dollars. According to the plaintiff's counsel, two hundred and fifty dollars were still due on the *first* quarter, receipts were in the treasury for the *two first* quarters and the plaintiff now signed a receipt for the *third;* while it is held that the fourth part of the first quarter's salary and the whole of the second and third were yet due.

On the 5th of September, two hundred and fifty dollars were received by the plaintiff: this sum added to the two others made one thousand, the amount of the first quarter's salary, reckoning as his counsel now does. Receipts, it has been observed, were signed for the first, second and third quarters. The last quarter had not become payable, yet the receipt purports that this sum of two hundred and fifty dollars is for the quarter, *which is to end on the 5th of October following.* This was avowedly a payment in anticipation, an indulgence which the plaintiff's convenience required. Yet where was the need of it, if (as his counsel suggests it) the officer did not consider the preceding receipts, *in full* for his salary, as barring him from any claim on the part of the salary thus abandoned.

Is it common, does it generally happen that an officer who receives only one quarter of his sala-

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ry, gives receipts for the three first quarters of the year and for the last in advance? It is impossible to answer that question in the affirmative. The conclusion appears to us irresistible that the last sum of $250, paid to the plaintiff in August, was not received in part payment of his salary during any of the preceding quarters: but that it was, as he expressed it, for the last quarter not yet expired, and in anticipation. The treasurer would have been startled at the proposition of making a payment, out of the course of business, in anticipation of the last quarter's salary of an officer, not fully paid for the first, and who had already signed receipts for the first, second and third quarters, without receiving any thing for the second and third.

III. In the case cited out of the digest, *length of time* is presented as one of the circumstances, inducing the presumption of the abandonment of the debt. *Diuturnitas temporis.*

The statement of facts shews that soon after the last payment, the plaintiff resigned his office. His petition is the first evidence of any claim on his part, and bears date of the 13th of Nov. 1816, thirteen months after. This length of time does not perhaps satisfy the expression, *diuturnitas temporis* of the digest, but there are other circumstances which did not occur in the case

cited, where no disposition to liberality appeared, except that resulting from consanguinity. In the one under consideration, the plaintiff, on his first coming to office, alive to the sense of gratitude which his promotion inspired, (and which the Roman law considered as so reasonable a ground for liberality, that it rendered a *politicitation* arising from it obligatory) that he at once reduced his salary to one half. If the penury of public resources, or any other consideration, induced a belief in the council that its first magistrates would at their suggestion, reduce his expectations still more, and we find him doing, while in office, every thing, which consistently with his duty he could do, evidencing a disposition to concur in their wishes, from whence is a presumption to arise that his former liberality had yielded to the determination of concealing his designs under ambiguous expressions, in his receipts, in order to secure to himself the means, one year after his resignation, to draw out of the coffers of the city, a sum which he induced the council to believe it was his intention to leave there?

We think that the plaintiff's determination to accept the $1000, he received during the last year of his mayoralty, instead of the 4000 dolls. to which he was entitled, is clearly to be presumed. It is useless to examine his right to the

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2000 dollars paid to the clerk and commissaries of police.

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

Mazureau for the plaintiff. *Morcau* for the defendants.

DUCOURNAU vs. *MARIGNY*.

Appeal from the court of the first district.

The reservation of *un* PASAGE *de treinta pies, para los efectos que* [illegible] *sean convenientes y imprescindibles*, in a Spanish deed, is a reservation not of a right of way, but of the soil itself.

DERBIGNY, J. delivered the opinion of the court. Laurent Sigur had bought from Gilbert St. Maxent, for the sum of seventy two thousand dollars, a tract of land extending from the river Mississippi to the Bayou St. John, on which was a saw-mill and a canal emptying into that bayou. In 1797, he sold to F. Riano, for [illegible] thousand dollars, the least valuable part of that land; and six months afterwards he sold to the defendant's ancestor all that he had not conveyed to Riano. In the deed to Riano, Sigur had made the following reservation: "*reservan-*

dome un pasage de trienta pies de les dos bordos del enunciado canal, para los efectos que me sean convenientes y importantes, en caso de necesidad, con toda la profundidad de el:" reserving to myself "a passage of thirty feet on both sides of the said canal, for the purposes which may be convenient and important to me, in case of necessity, with all the depth of it;" the plaintiff, here the appellee, contends that the reservation is only that of a right of passage, along the canal within the space of thirty feet. The defendant and appellant insists upon its being a reservation of the soil itself. A correct interpretation of this clause is the first step in the decision of the case.

It must be premised that the plaintiff does not dispute to the defendant the property of the canal, but only that of the thirty feet reserved on each side of it.

The word *pasage*, used in the deed, has created the ambiguity which gave rise to this suit. Yet it is not so much the word itself, as the manner in which it is placed, that has made the phrase a subject of dubious meaning: for had it been said that the vendor reserved thirty feet for a passage, no room would have been left to doubt that he reserved the soil itself, per-

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haps under an obligation not to use it for any thing else than a passage or road: a promise surely of some importance to the purchaser of a tract of land bordering on a water course. Instead however of a reservation of thirty feet for a passage, we have here a reservation of a passage of thirty feet. Does this mean only a right of passage over thirty feet? If we weigh the expression of the clause, in the language in which the contract is written, we see that *pasage* in Spanish signifies the act of passing, or the place over which we pass, but never the right of passing. There are three sorts of rights of way known to the Spanish laws, each of which has its particular name. The right to pass on foot is called *senda:* the right to pass on horseback, *carrera:* that of passing with carriages is named *via.* They are the equivalents of the latin words *iter, actus* and *via.* These are not mere technical expressions: they are descriptive of the right. But the word *pasage* alone does not mean any right of way at all; and when described to be thirty feet wide and to run on both sides of the canal, it evidently means something more. Let us see if the other parts of the clause will not explain this.

The vendor owned a saw mill, the canal of

which ran through his lands down to the bayou St. John. On selling part of these lands, he reserved a passage of thirty feet *on both sides* of the canal, and the canal itself in all its length, "*un pasage de trienta pies de los dos bordos del enunciado canal, con toda la profundidad de el.*" Can it be supposed that he meant to reserve not a foot of ground on the edge of the canal; that he gave up the right of widening it, if necessary; that he kept the bed of the canal to himself, and left the bank of it to another; or, if that bank is to be considered as part of the canal, how far shall it extend? Where is the line which is to divide that bank from the land of the neighboring owner? Is it not evident, that the limit of the thirty feet was intended to be the dividing line between the two proprietors. If that be not the true intent of the reservation, what can be the meaning of these other words, "*para los efectos que ne sean convenientes y importantes in caso de necesidad?*"—A right of way can never be more nor less than the right of passing by on foot, on horseback, or at most with carts and carriages. What then can be these important purposes for which the reservation is made? Something more is certainly intended to be secured thereby than the mere right of passing. The owner of the canal might find

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it *convenient* or *necessary* to widen it; he might apply the canal to some more *important* use; he might find it his interest to establish a public road along it; in short, he wished to be at liberty to do with it, as further circumstances might require; he therefore reserved a passage of thirty feet *on each side* of it, for the purposes which might be *convenient* and *important* to him. Does that sound as a simple reservation of a right to pass? We think not.

Should there, however, remain any doubt as to the true sense of this clause, we must next examine whether the subsequent agreement, which took place between the parties, has not removed the uncertainty, if any existed, as to the nature of the reservation.

By the sale to Riano, it had been agreed that the property sold should be surveyed, and that boundaries should be planted to separate the respective lands of the parties. That operation was performed, the 28th of March 1800, in presence of Peter Marigny, the defendant's ancestor, and of Anthony St. Maxent and Francis Rocheblave, the then acknowleged proprietors of Riano's tract. By that survey it was found that the limits of that tract, on the S. E. side of the Gentilly road, could not be run, as far as they were de-

signated in the sale, part of the land described being the property of other more ancient owners. The survey was therefore suspended until the interested parties should agree among themselves as to what should be done. According to the description, given in the sale, however confuse it may be in other respects, the whole of Riano's land on the S. E. side of the road was to be situated on the left side of the canal; all the land on the right side was consequently part of the tract sold to P. Marigny, who had bought from Sigur all that had not been sold to Riano. In that state of things an agreement, recorded by the surveyor in his process verbal, signed by all the parties, was entered into, according to which a line crossing the canal at right angles was run through the land, lying on the right side, so as to make up the deficiency in Riano's tract out of Marigny's purchase. At the same time and in the same *proces verbal*, P. Marigny stipulates a reservation in these words: "*bien entendido que el susdicho Pedro de Marigny se reserva los treinta a pies de los dos bordos del canal.*" "It being well understood that P. Marigny reserves to himself *the* thirty feet on both sides of the canal." This reservation of *the* thirty feet, whether it applies only to the part then abandoned or to the whole, is equally expressive of the inten-

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tion of the parties, and of their understanding of the reservation made by Sigur. It is no longer called a passage of thirty feet, but *the thirty feet.* Thirty feet of what! Thirty feet of passage? the construction would be ridiculous. No: they are the thirty feet of ground, reserved by the vendor, for a passage.

The declaration of the parties would be sufficient, if made voluntarily and gratuitously; but from the circumstances of the case, we see that it was given for a consideration. The agreement recorded in the *proces verbal* is clearly, though not expressly, a compromise by which the parties with a view to remove the difficulty which might have arisen from some ambiguity in their titles, have made to one another mutual concessions.—In vain is it said that this agreement is not such an act as the laws require for the conveyance of real property. The property of the thirty feet was not here conveyed to Marigny, but recognized by the other parties to be in him. The agreement does not contain a conveyance, but yields a doubtful pretention to the party who has the best claim. It has put the question at rest in the same manner as if judgment had passed thereupon: *Non minorem auctoritatem transactionum quam rerum judicatarum esse, recta ratione placuit. l.* 20. *C. de trans.*

As a confirmation of this, we might mention the subsequent conduct of the parties, in carrying the contract into effect in conformity with the above interpretation, as the record shews; but enough being found in the written instruments to pronounce in favor of the defendant, we will avoid entering uselessly into the investigation of any question relative to the admissibility of the oral evidence produced.

It is ordered, adjudged and decreed that the judgment of the district court be reversed, and that judgment be entered for the defendant, with costs.

Turner for the plaintiff. *Moreau* for the defendants.

DELACROIX vs. *BOISBLANC*.

A tutor by nature, removing out of the state, retains the tutorship

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

DERBIGNY, J. delivered the opinion of the court. The defendant and appellee being about *permanently* to remove from this state, with her minor children and the best part of her fortune, an

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application was made by the plaintiff and appellant, as under-tutor of those children, to obtain from her an account of her administration, and to cause another tutor to be appointed in her stead, as provided for by our civil code, *book 1st. tit.* 8. *chap.* 1. *sect.* 9. *art.* 69 and 70.

The account has been rendered, and so far there was no resistance on her part; but she refused to surrender the tutorship of her children, alleging that tutors by nature are not subject to the dispositions of the above quoted law.

The question if it be one, may be reduced to this: can the law appealed to by the applicant embrace cases where a parent leaving the state takes his children along with him?—That all men have a right to expatriate, at least when by such removal they cause no prejudice to the community of which they were members, is not questionable in a free country:—that a natural tutor expatriating has a right to take his children with him is still less disputable. How then could the law, providing for the nomination of another tutor, be carried into effect in such a case? A tutor is appointed principally over the person of the minor; but here the minors are gone. He is to take care of them in the manner prescribed by our laws: but they are beyond the reach of

those laws.—It is clear that the provision alluded to is made for cases where the tutor alone is going away, or where he can be prevented from taking his ward out of the state. This would take place, we presume where any other tutor than a parent would be about absenting himself. Such a tutor, being merely the creature of the law, would probably not be at liberty to carry his ward where that law does not extend. The nomination of another tutor is then obviously necessary. But, when the ward himself is removed where our laws can no longer protect him, there must be an end to the interference of our courts in his behalf.

The same reasoning applies to the curatorship of one of these minors; his absence from the state must be attended with the same consequences.

We are upon the whole, of opinion that this case is not within the purview of the law referred to. But as the present application was made by the appellant evidently with no other view than to promote the interest of the minors, we think he ought not be burthened with the cost.

It is adjudged and decreed that the appeal be dismissed, and that the costs be paid by the

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appellee or her representative, out of the funds in her hands belonging to her minor children.

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

FORTIER vs. *M'DONOGH.*

Individuals summoned to work on the levee of delinquent planters are to be paid out of the treasury of the parish and have no action against him.

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

The petition stated, that plaintiff made certain works on the defendants' levee, who having been notified to make certain repairs thereto, in conformity with the regulations of the police jury, neglected and refused to follow the directions of the syndic, in the delay prescribed by the said regulations, whereby the plaintiff became entitled to demand of the defendant $372, the value of said work.—For this he had obtained judgment in the parish court, and the defendant has appealed.

The original answer denied the plaintiff's right to an action, pleads the general issue and an amended one sat forth that the sum, claimed

by the plaintiff, had been paid him out of the treasury of the parish.

Turner for the defendant. This case, will be found by the court, to be one of easy decision; but

It contains many errors, and is attempted to be supported by principles so novel, in the law of actions, that we must consider it under several aspects.

1. We will consider it as a civil action, for the recovery of a private right. And on so doing, we shall shew the action, to be misconceived, and ill founded.

2. We shall consider it as an action ostensibly by an individual, but in reality, one commenced by the police jury, for the recovery of a duty, which is claimed by the parish, of a delinquent. And in so doing we shall find it equally misconceived and ill founded.

I. By recurring to the law of actions, we shall find that there must be a right, in the plaintiff, to recover some thing, arising either *ex contractu*, or *ex delicto*. 1 *Chitty's Pleadings*, 1, 2, 3. *Cowp. Inst.* 126, 7, § 1.

Cases arising *ex contractu*, are those of express contracts, and those of *implied* contracts,

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or *quasi* contracts. *Domat, pub. law, lib.* 4, *tit.* 1, § 12.

Cases arising *ex delicto*, are those which depend on some injury, done to, or sustained by, the plaintiff, in his person, character, or property, arising by some wrong done by the defendant, or by some omission to perform a duty. Causing damages to the plaintiff.

In every case, the plaintiff must shew, in his petition, such a cause, as will intitle him, to recover of the defendant, if his facts are true. *Acts of* 1805, *pa.* 210.

For unless his case, as by himself stated, be sufficient; he cannot supply it by evidence; by the rule that the proofs, much accord to the allegation.—

No such cause is here stated by the plaintiff. he founds his right of action, upon some alleged police rules and some labour done by him, in pursuance thereof. Here we are presented with several considerations, as

1. Are there any such police rules?

2. Has there been the work done?

3. Was the work necessary, and has it been undertaken according to the laws of police?

All these things, must not only fully appear, on the petition, but they must appear to be lawful in themselves.

1. The general police rules, as made and promulgated, under date of the 6th July 1815, give no such prices, ordain the performance of no such duty, nor do they afford any such action as the present.

What then? Are there are other police rules? There are none shewn.—

There is indeed an extraordinary proceeding, of some members of the police jury, convened contrary to law, consisting of less than a lawful quorum: and which are not rules of police, but a special decree, affecting a single person, without his being a party thereto, or even having any knowlege of such proceedings; a proceeding wholly illegal.

By the act of 1813, the jury of police must be composed of a majority of the members elected, who are twelve in number; and at least one third of the justices of the peace, *in commission in the parish*, and they shall meet on the first Monday in every year, at the seat of justice.

As a tribunal, created by a special law, for special purposes, and with limited and special powers; those who claim rights, or performance of duties, under the rules or ordinances of such a special tribunal, must shew themselves intitled by the very letter of the law.

By comparing these police rules, with the

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acts of the legislature, creating them, and defining their duties and powers, they will be found to be illegal and void. But admitting, for sake of argument, that they are valid, then there is no right given to the plaintiff, to institute this action.

His claims are against the parish treasury, and that treasury are provided with a certain and special remedy for the reimbursement of such sums as they lawfully pay for the wilful neglect of the proprietor.

2. This work could only be done, in consequence of an undertaking by the job, as is provided by the act of assembly of 1807, or by day labour by order of the parish judge, in case of default of the proprietor, after notification.—These are the only legal modes.

If it was done by contract, at a letting by the job, then the plaintiff should so have stated it; but not having stated it, we cannot presume it, and especially as the contrary is stated by him in his petition.

If it was done by day's labour, it should have been so stated, and the price per day is one dollar, affixed by the same law of 1807. But the petition states, not that fact, but the contrary: it goes for work done by the cubic toise, under certain pretended rules.

Therefore no work has been done for the defendant by the plaintiff, in pursuance of any contract by the job, or by day-labour, by order of the judge, nor in the obedience of any law of the state.

3. The works must be necessary ones, to wit, such as the defendant was legally bound to perform, and which he had neglected.

It appears not that the works were necessary, it is not even so alleged; what right therefore has the plaintiff to work on the defendant's land; and then to come for pay, if he does not shew he has done a necessary work for him, and one he was bound to do for himself? It is not only not shewn to be a work, the defendant was bound to make, but by the proof, it is fully shewn, that it was not necessary, nor was the defendant bound by any law to make it.

II. There is nothing more certain, in the law of actions, than this; that he who claims as plaintiff, must have the legal title or the equitable right to enjoy the thing sued for. *Hardin's Rep.* 561 *to* 564.

Nor can any person, or body corporate, authorise another to sue in a different name without transferring the title by legal form to such person, or by his having an equitable right to

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the enjoyment of the thing, the naked title whereof is in another. 2 *Bay's Rep.* 519, *Cir. Co.* 88, *art.* 6.

Let us therefore examine if the parish have either the legal title to recover of the defendant the sum sued for, or

Have they the equitable right to the enjoyment of the thing, the legal title whereof is in the plaintiff?

1st. If the work done, or pretended to have been done by the plaintiff, and thirty others, was a work done for the parish, and by virtue of any legal authority, then their claim was upon the parish, for payment. And the legal right and title was vested by law in the parish to sue in the most summary way for the reimbursement. 1807, *pa*, 132, 15.

The planter ordered to do a work under the police laws, and failing to comply, necessarily submits himself to the rigour of the law.

In such case the work which he has neglected to perform, must be done by the parish and at the costs of the parish equally portioned among the inhabitants. 1807, *pa.* 132, §. 2.

Those employed by the parish trust not to the credit of any single person. They trust only the parish with whom the contract is made.

They cannot be compelled by the existing

laws to resort to the private fortune of any one, for the price of the work, and it would be unjust to compel them to do so.

There is no privity of contract, nor any privity of interest between the defaulting planter, and the undertakers for the parish.

We must never forget that the duty devolves on the parish, to do the work, upon the default of the planter. And they may cause it to be done by the job, or by day's labour, 1807, *pa.* 131, § 4.

And whether in the one mode or in the other, the workmen have their demand for payment, only on the parish—They have no right to sue the defaulting planter.—Because another remedy is given.

In this case, it is contended for the parish, that they have paid the plaintiff, and have not any right to sue but in his name. But

According to my interpretation of the law, his name cannot be used for divers reasons, as

1. Because a special remedy is given to the parish by the act of assembly to make by laws, and to enforce obedience from them, to make contracts, in certain subjects and to enforce the performance of them. 1807, *pa.* 132. 1813, *pa.* 156. *Abr. of corporation police rules of* 1815.

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2. But to deny them the right of proceeding in the manner pointed out by law, for the reimbursement of the expenses, in such cases, would be to deny the power of providing for the redress of evils by the police, in cases of disobedience of individuals, and of making contracts for public works.—A principle inadmissible.

3. Because they have only a special power to do certain things, and in a certain way, and as such, they cannot do more, nor in a different manner: they have power neither to make, nor to receive assignments of obligations; they have no power to make contracts but in relation to the subjects of police. 1807, 1809, and 1813.—*before quoted.—Civ. Co. 4. art.* 13, 2 *Bay* 180 *to* 182, *Cowper* 29. *Hardin* 94. 4 *Bac. Abr.* 661. *ca.* 6.—1 *Cranch* 71, *the whole case.* 2 *Cranch* 127.

Therefore the supposed agreement by them, made with the plaintiff, and all other of the planters, whom they say worked on the defendant's levee, to institute and prosecute separate suits against the defendants for the use and benefit of the parish, is one not authorised by law.

Neither could the plaintiff maintain such an action without authority of the parish, nor with it. He had it not and they could not give it.

As well might the corporation of the bank,

attempt to maintain a suit in the name of its cashier, for a corporate right. 1 *Bac. Ab.* 504, 5, 6, 7. *letter D. and E.*—2 *Cranch* 127.—

As well might the corporation of the city use the name of its treasurer, or of any one of the parishioners, in suits for corporate rights, as for the parish to make use of the name of the plaintiff to enforce obedience to a parish duty. 1 *Bl. Com.* 475.

2dly. The parish have not only the equitable right to enjoy, but also the legal title to enforce the reimbursement of the sum expended on contracts legally made, to meet the public exigency in case of default on the part of the individual bound by law to make a work prescribed.

When therefore the legal title and equitable right meet in the same person, there is nothing in any one else to found an action upon. *Harain* 561, *&c. Bay* 519.—

"An action" says Justinian, "is nothing more than the right of suing in a court of justice for our lawful demands." *lib.* 4. *tit.* 6. *Co. Lit.* 285. *a.*

By this rule the plaintiff, Fortier, not having originally the right to demand of the defendant the payment of the work by him done in pursuance of orders from the parish judge, could not maintain any action in court for it.

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But it is contended his name is used by the parish to sue for their use, and the common case of an action in the name of the payee of a note, for the use and benefit of a purchaser of the note, is introduced as an authority for this.

Before any example can be received as an authority, its similitude in fact and in principle must be admitted, let this be examined.

In the case of the note, the payee had the legal title to the action, and might exercise it for whose benefit he pleased, or he might transfer it to whom he pleased, in full right.

But if he had not the legal title to the thing, I should be obliged to my adversary to inform me by what law he maintains an action in his own name, for the use and benefit of another? *See the cases before quoted.*

Here the parish endeavour to derive title to the proceeds, from the plaintiff, whereas the defendant is a creditor of the parish, and sues to recover a debt due to the parish, if due to any one, that he may enable the parish to pay him the sum they owe him!!

Thus to maintain this action, in the name of Fortier, are the parish driven to the miserable shift and pretence of placing him in their own stead, to sue for a right due to themselves, under the false pretext, that it was due to him, and

that they have acquired a derivative right from him.

And this is done too in the face of a law, giving to them a specific and summary remedy to reimburse themselves, not for the part of the sum by them laid out, but for the whole expenditure occasioned by the defendant's delinquency.

It is deemed sufficient to defeat this action that we shew, there never was or could be any privity between the plaintiff and defendant, for the rights by him demanded, without resorting to the inconveniency and burden, as well to the parish as to the defendant, of deviating from the rule prescribed in the special laws, in relation to this subject.

But as the defendant deems it extremely vexatious to be obliged to defend himself in court against twelve suits, instituted against him in this manner, it is my duty to lay the whole matter fully before the court.

If we admit, for the sake of argument, that the defendant is indebted to the parish, for disbursements made by his delinquency, in a sum of several thousand dollars, it is but a sum in gross, and is the ground of one action only.

How therefore is it to be maintained, on what principle of law, equity or justice, that this one demand shall be split and divided into twelve

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suits, or as many more as there were persons called to the work?

In the common case of an account made up of several items, created at several times, there can be but one action for the whole.—No man would be allowed to proceed in a separate action, for each separate item in his account: such an attempt would be viewed with indignation by the court. In such a case, as the one supposed, the court would order the actions to be consolidated: the court would order the plaintiff to pay costs in all but one of them.

But what would be done with a man who, having such an account, should set forth as many different plaintiffs, to sue as many different suits, as there were different items in the account? The court would be struck with amazement at such an abuse of the judicial process. The actions would all be dismissed. The plaintiff condemned in the costs, and subjected to a prosecution for baratry.

Such therefore has been the conduct of those who have the management of the police of this parish, under the pretence of having disbursed in payments to twelve inhabitants the sum of $3438,50, which the defendant should reimburse to the parish treasury, if the payments had been justly made for his delinquency.

The parish officers, instead of proceeding by the means prescribed to them, in the law, for the reimbursement of that sum, have caused twelve suits to be instituted by the persons, to whom the money has been paid, or was payable, for the recovery thereof, for the use of the parish and the reimbursement to the treasury of the said sum.

Can such a proceeding be sanctioned by any impartial tribunal? Are there any principles of law or equity to support such a measure? Shall we not therefore resent it with indignation as vexatious and oppressive to the defendant? But again. The defendant may have a just cause to resist the claim of the parish.

We have no means to prevent the parish officers from employing what workmen and paying them what prices they please. But, when we are called upon for the reimbursement, we have a right to resist the demand, unless it is such as is sanctioned by law.

Nothing is more evident than this principle, that no man nor set of men, whether corporate or incorporate, can take from me with impunity my property, but by the law of the land, or the judgment of the courts.

Therefore when the parish, as well as when an individual, shall make a demand on me, for

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the performance of some labour, or for the payment of a sum of money, I have the right of saying to him your demand is not a lawful one, and I will not pay, nor perform until I am heard in a due course of justice. And shall I be deprived of this right, by any evasion or artifice of the demandant? or shall I be so burdened with the multiplication of suits, by a third person, as to be compelled to submission, without the power of resistence, or shall I be compelled to make my defence twelve times over, and under all the disadvantages of meeting a masked enemy? Shall I be compelled to meet my adversary, not directly and face to face, where my defensive arms would strike home upon him, but through one put in advance, acting the puppet's part of an ostensible person, but in reality only as a shield or mask to cover, and conceal the juggler behind the scene.

Moreau, for the plaintiff. The regulation of the police jury could not destroy the right of action, which the plaintiff had against the defendant, for the payment of the work done to the defendant's levee, nor compel him to wait for this payment out of the parish treasury.

The legislature itself could not have enacted a similar law, and if it had been enacted, it would have been unconstitutional.

No one can be compelled to yield his property even for the public use, without a just and previous compensation. *Const. U. S. art. 7 of the amendments. Civil code 103, art. 1.*

Can it be said that the compensation would be just and previous, if the parish could force a planter to perform the work of another and wait for his payment, till it could be obtained out of the parish treasury; which is often for several months empty. It is clear that such a disposition would be as unconstitutional, as one by which my slaves should be taken from me to work for another, to be paid on a particular day, or when he could have funds to pay for their work. The police jury ordering that planters who might work on the levees of others, should be paid out of the parish treasury, has only given them an additional surety, without intending to destroy the direct right of action against him whose work they might be ordered to do. Thus every day a man binds himself to pay the debt of another, and his obligation is only an accessary to the principal one, which it strengthens, but does not impair or destroy, unless on account of a special stipulation. 2 *Pothier on obligations*, 559.

II. The plaintiff indeed cites the regulation of the 6th of July 1815, in his petition—but with

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the only view to shew that planters are bound by it to send their slaves, on the demand of the judge, to work on the levees of their delinquent neighbours. Having then been required to work on that of the defendant, and having worked accordingly, there results from this very work an action for compensation against the plaintiff. The present one is not grounded on this regulation which allows two dollars per day for each slave; for he claims three dollars per cubic toise, under that of the 3d of September following.

III. The act of April 6, 1804, §. 4. provides indeed that the judge shall compel delinquents to pay the works done to their levees, even by the seizure of their property: but it would be absurd to pretend, that on such a case he could proceed *ex officio*, without a previous demand of the party interested.

The law requires in every action three distinct persons, *actor, reus et judex*. Every action is to begin by a petition containing the names and residences of the parties, the ground of action and certain detail of time and place, 1805, *c.* 26.

This is admitted, but it is pretended that the rigour of these forms may have been dispensed with by the legislature in certain cases, and it has been dispensed with in this, by ordering the

judge to compel payment—a form of proceeding said to be not more extraordinary than the recovery of certain fines, which is obtained on a rule to shew cause.

The act of the 6th of April 1817, provides simply that the judge shall compel payment, but not that he will prosecute: which would be absurd. The legislature had it in view, in this act to give exclusive cognizance to the parish court, and the judge could only compel payment in the ordinary way by judgment and execution. This is the construction which the supreme court put on this act, in the case of *Syndics &c.* vs. *Mayhew*, *ante* 175, in which the parish judge had granted an order of seizure *de plano*. Yet in that case a petition had been presented, and there were *actor, reus et judex*.

Further, the 7th article of the amendments to the constitution of the U. States, requires that in every civil suit, above twenty dollars, the facts should be tried by a jury. How could then a jury have passed on a case in which no issue was joined?

In prosecutions for a fine, no petition in general is required, the question being merely whether the law had been contravened. Yet, in such a case, there is always a party plaintiff, at whose instance the judge grants the rule to shew cause.

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Fines are decreed to the state, the city or an informer, who may stand in court, and it is on their application, that proceedings are had. The judge never proceeds *ex officio*. In the present case, as the parish is not incorporated, if the judge acts, he must be plaintiff himself.

The object of this suit, is not a fine, but a claim grounded on several distinct facts, which ought to be alleged in a petition and tried by a jury, if either of the parties desire it. The plaintiff had to prove that he had been called upon, that he had wrought on the defendant's levee, the extent and value of the work he had performed.

IV. The payment, received from the parish treasury since the inception of the present suit, has not destroyed his claim against the plaintiff, if as has been shewn it really existed. He brought his suit on the 12th of June last and on the 27th of the following month he received his payment. Till then, he had proceeded regularly and is entitled to his costs.

He has at all events a right to proceed to judgment for the benefit of the parish. There is no inconveniency that when a third party pays the sum due to the plaintiff, he should use his name to obtain his reimbursement, especially

w' en he payment was not made, with the view of discharging the debtor, and was accompanied by a subrogation of the rights of the creditor.

One, says the law, may pay the debt of another without authority from him, and even without his knowledge. *Code Civil* 287, *art.* 136. 2 *Pothier on obligations, n.* 463.

In order that the payment may operate the extinction of the debt, and consequently of the action, it is necessary that he who makes it, should pay in the name, and for the discharge of the debtor. *Ib.*

But when the payment is made by a third person, in his own name, and with subrogation of the rights of the creditor, neither the debt nor the action are thereby extinguished, and both continue in the person of the payor and assignee. For this payment is reputed to be less an act of liberation than a purchase of the rights of the creditor for the sum paid him. *Ib.* 522.

It is true the parish has paid the plaintiff, but not with a view of discharging the defendant, as appears by the receipt taken by its treasurer. The debt continues to exist in favour of the parish, who has succeeded to the rights of the plaintiff.

The parish is subrogated to the rights of the plaintiff.

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Subrogation is conventional or legal. When it is conventional, it must be express and made at the time of payment; but when it is legal, it operates tacitly and by the sole effect of the law. *Code civil* 288, 290. *art.* 149, 150.

The parish, being bound by the regulation of the police jury, to pay for delinquent planters, is of right subrogated to the rights of those who perf rmed the works neglected by the delinquents; as soon as it pays them. *Code civil* 190, *art.* 51. *n.* 3.—Being thus subrogated to the plaintiff's rights, it may lawfully continue in his name, the suit which he had commenced.

A subrogation is rightly assimilated to a cession of rights and actions and produces the same effects. And it is in every day's practice, in the cession of litigious rights, where the assignor has already instituted a suit, that the assignee uses the assignor's name to obtain the recovery of the debt till judgment. It is not easy to see how this can be disadvantageous to the debtor: the law has however provided that, if he can shew that the transfer of the claim has been made for a less sum than the nominal one, he may obtain his discharge by the payment of the sum paid by the assignee. 2 *Pothier, contrat de vente, n.* 596.

I conclude that the parish can legally prosecute the suit, in the name of its assignor.

On the merits, it is contended, that the police jury could not alter by a special regulation on the 30th of September 1815, what had been generally provided by that of the 15th of July.

It is true that generally equal laws must be made for every part of the community. There are, however, special cases in which this principle must be deviated from. When a short time ago the waters of the Mississippi made their way through a huge *crevasse* in the levee, a few miles above New-Orleans, and threatened the city with destruction, no one complained that immediate regulations were resorted to; because those that had been provided were insufficient to avert the impending evil. Such was the case when the police jury passed the special regulation complained of. During the preceding summer, a crevasse in the plaintiff's levee had inundated the land around his plantation and destroyed the crops of his neighbors. His levee has a length of thirty arpens, and was to be made entirely anew. He had been ordered, as early as the 9th of August, to put two hundred negroes on his levee, as a less number could not have completed the work required, before the month of November, the period at which the regulations required it to be completed: and in the latter part of September the work was so little advanced, that a

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requisition of every working hand in the district became necessary to the completion of the work, while every planter had need of all his hands either to repair his own levee, or attend his crop.

In these circumstances, the police jury, on the 30th of September, 181 , desirous, as the preamble to their resolution expresses it, "to facilitate the planters whose slaves were to be put in requisition for this levee, and render it less burthensome to the owners" and the present defendant, ordered that three dollars per cubit toise should be paid, instead of two dollars per day as fixed by the 15th article of the resolution of the 15th of July. This alteration, in the mode of payment, far from being detrimental, was advantageous to the defendant. The police jury had considered, that if any negroes were put in requisition, at the usual price of two dollars per day, women or old men would have been sent, and that the completion of the work would be furthered, and the interest of the defendant promoted by this alteration of the mode of payment. Vanesse, a surveyor, and one of the witnesses who have been examined, deposes that a stout negro can complete a cubit toise of levee per day, only when the levee is but three feet high, and the dirt is at hand; and only two thirds of a toise when it is higher and the dirt

distant, which was generally the fact in the present case.

The plaintiff contends that this regulation of the police jury is not legal, or obligatory on him, because the proceedings do not shew that two-thirds of the justices of the peace of the parish were present, as required by the act of the 25th of March, 1813.

The minute books of the police jury shew, that the title of justice of the peace is only given at the first meeting of the jury, in 1815, and not repeated afterwards; but it is apparent there were three justices present out of the five in the parish: as to the justices for the city, as they are exclusively appointed for it, it is clear that their presence cannot be expected.

Lastly, the plaintiff contends that the work which he was ordered to perform was unnecessary: and in support of this assertion, he has produced the testimony of three gentlemen.

But, who are the competent judges of the necessity of the work on levees? The police jury, and not the courts of justice. In what confusion would we not be in, if this was not the case? The legislature has given to police juries the right of making regulations in this respect, which have the force of a law. The 8th and 9th articles of the regulations of the 8th of July, 1815,

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have determined the dimensions of levees, and leave the annual repairs which they may require to be ascertained by the syndic of the district, assisted by two planters of the neighborhood; and the 10th article authorises the syndic to determine the number of hands which the planter is to set at work on his levee.

All these formalities have been performed, in regard to the plaintiff, in the present case. His representations to the police jury have been listened to with patience, they have insisted on the work directed by the syndic being peformed. What weight has against this the opinion of his three witnesses, one of them his overseer, in opposition to the result of the deliberations of the jury?

MARTIN, J. delivered the opinion of the court. The 15th article of the regulations of the police jury provides that where a planter shall neglect to make the requisite repairs to his levee, on notice from the syndic, that officer will cause them to be done by slaves, put in requisition by the officer in his district, whom the judge will order to be paid out of the parish treasury, on the syndic's detailed account, and will condemn the delinquent to refund the amount.

The defendant contends that his obligation to pay for the work done, does not arise *ex contractd* but has for its origin *the law*, and the same law which imposes the obligation (if any) has fixed the particular *mode* in which he is to become liable: not on the claim of the owners of any number of slaves employed by the syndics, without any knowlege in the plaintiff of their respective rights, which would subject him to a multitude of vexatious suits, but has postponed his liability, till an account made up by the officer who superintended the labour, shall have been presented to the investigation of the parish judge and received his approbation, and protects the delinquent till after his *refusal to pay*, which implies a demand by notice of a specific sum for the whole amount due for the work. This regulation of the police jury, does not leave to the owners of the slaves put in requisition by the syndic, the right of an immediate and distinct suit against the delinquent planter. It appears to us a very convenient regulation, but if its inconveniency was equally apparent, we would answer *ita scripta est lex*. It is true the situation of the parish treasury may occasion some delay, but the planters who composed the police jury probably considered that no one could complain of this, as if the circumstance of an empty

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treasury, bore occasionally hard on a number of owners of slaves, called out on a sudden emergency, the disadvantage is not equal to that of a planter, harrassed by simultaneous and numerous suits, for claims the correctness of which he could not test with facility.

It is true, in the present case, the work was performed on a specific order of the police jury called *ad hoc* by the judge, who directed payment by the cubic toise, instead of the work by the day, as in ordinary cases: and the legality of the call and subsequent order has been questioned. Admitting the legality of both, as no mode of payment by the defendant was pointed out, he certainly had the benefit of any general regulations made *in pari materia*, not expressly or necessarily repealed by the latter.

The plaintiff was so sensible of this, that we find he finally sought and obtained his payment in the legal way.

This court is of opinion that he mistook, and the parish judge erred in sustaining his action, the judgment is therefore avoided, annulled and reversed, and it is ordered, adjudged and decreed that there be judgment for the defendant, with costs of suit in both courts.

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PRACTICE.

1 Where process is ordered by the judge of an adjoining district, the presumption is, that the case was one in which he was authorised to act. *Breed* vs. *Repsher & al.* 187

2 If the defendant pleads the general issue, and that the plaintiff is his debtor, he cannot shew that the plaintiff agreed to receive his debt in Bordeaux and made no demand there. *Doubrere* vs. *Papin.* 184

3 On a rule to shew cause, in favor of a police jury, for expenses on a levee, if the defendant denies every thing charged, the judge cannot proceed to judgment, without a trial. *Syndics etc.* vs. *Mayhew.* 175

4 If leave be given to answer, so as not to delay the trial, a right to a trial by jury is not thereby given up, although to obtain it the trial may be delayed. *Tricou* vs. *Bayon.* 169

5 In the court of the first district, no notice of trial is necessary. *Sierra* vs. *Slort.* 587

6 Saturday is not a trial day there. *Same case.* *id.*

7 If a suit be continued, and the party have a month to procure a deposition, the cause must be set down a-new, after that time. *Same case.* *id.*

8 If a party dies after the *contestatio litis*, the attorney may carry on the suit. *Rochon* vs. *Montreuil*. 485

9 A *dedimus potestatem* is not necessarily to be directed to a magistrate. *Dunn* vs. *Blunt*. 677

10 When it is so directed, no proof is necessary of the commissioner being a magistrate. *Same case*. *id.*

11 In the court of the parish and city of New-Orleans, if the cause of action be stated to have arisen at Bayou St. John, this will suffice. *Delisle* vs. *Gaines*. 666

12 A judgment of dismissal ought to contain the reasons on which it is grounded. *Sierra* vs. *Slort*. 587

13 Whether the recourse of nullity against final judgments, as it prevailed under the Spanish government, be still a part of the judiciary system of the state? *Meeker's ass.* vs. *Williamson et al. syndics*. 625

14 The misbehaviour of the counsel or jury must be taken advantage of, by a motion for a new trial. *Morgan* vs. *Bell*. 615

15 A judgment by default may be made final, without assigning reasons therein. *Allard* vs. *Ganusheau*. 662

16 If there be a prayer for general relief, damages may be given beyond the specific sum claimed, if the petition shews that they are due. *Morgan* vs. *M'Gowan*. 289

17 An injunction not to molest or trouble, does not prevent a suit to ascertain a right. *Mayor &c.* vs. *Magnon*. 9

18 A sheriff, who wrongfully executes the process of a court, may be sued in another. *Clark's ex'rs.* vs. *Morgan.* 79

19 Where a cause is set down for hearing, and one of the counsel does not attend, it may be heard *ex parte*, or dismissed. *General rule.* 192

20 But it may be reinstated, on good cause shewn. *id.*

21 When an insolvent applies to a court for relief, all suits depending against him in other courts are suspended, and his creditors must be proceeded, in that court. *Cox* vs. *Zeringue.* 261

22 When a commission issues, by consent, the affidavit of the materiality of the testimony is useless. *Clay's syndics* vs. *Kirkland.* 405

23 No law requires the service of a copy of the interrogatories. *Same case.* *id.*

24 A ceding debtor, who has obtained no discharge, is suable by the simple contract creditors, where it appears that the privileged creditors, absorb all the estate, even before its liquidation. *Fitzgerald* vs. *Philips.* 559

25 A ceding debtor has his remedy against his creditors, if the syndics waste the property ceded. *Same case.* *id.*

26 A graduate, of an incorporated American seminary, will be entitled to examination for a licence to practice law, after two years' study under an attorney. *General rule.* 558

27 Interest not allowed on a sum awarded by the verdict, which was before unliquidated. *Morgan* vs. *Bell.* 615

28 The acts of another attorney, than the one on record, are not invalid. *Clay's syndics* vs. *Kirkland.* 405

PRESCRIPTION.

Land not susceptible of alienation, cannot be acquired by. *Mayor etc.* vs. *Magnon.* 2

PRISON BOUNDS.

A person there confined, under judgment from the district court, may be discharged by the parish court. *Cox* vs. *Zeringue.* 261

PROTEST.

The protest of a bill of exchange proves itself. *Caune* vs. *Sagory.* 81

PROMISSORY NOTE.

1 The holder of a negociable note, endorsed in blank, may sue thereon. *Allard* vs. *Ganusheau.* 662

2 If one puts his name on the back of a note, not negociable, the presumption is, that he meant to become surety for the signer. *Cooley* vs. *Lawrence.* 639

3 His liability does not depend on the fulfilment of the formalities required by the liability of an endorser. *Same case.* *id.*

4 The payee may recover from such a surety, although he has neglected to sue the principal, or through delay may have suffered some advantage to be lost, whereby the surety is placed in a worse situation. *Same case.* *id.*

5 If an endorser receive back a note from his endorsee, he may recover from the payor without a re-endorsement. *Delisle* vs. *Gaines.* 666

RESIDENCE.

If the year of residence of an insolvent debtor expire after he has been confined thirty days, and he applies for the benefit of the insolvent law thirty days after, he cannot be released. *Rhendorff* vs. *his creditors.* 329

SALE.

1 If a slave be sold as *bon domestique, cocher et brisetier*, and he be proved to be a good servant and a coachman and brick-maker, this will suffice. *Duncan* vs. *Cevallo's heirs.* 571

2 A runaway slave cannot be sold by the sheriff till three years after the date of the advertisement. *La Branche* vs. *Watkins.* 391

3 If a sheriff sell a runaway, and instantly take a bill of sale from the vendee for the same price, the sale will be presumed fictitious. *Same case.* *id.*

4 An order for the delivery of the thing sold is not a delivery of it. *Norris* vs. *Mumford.* 20

5 The creditor of the vendor may attach the thing sold before delivery. *Same case.* *id.*

6 In a sale by the sheriff of real property on credit, a deed of mortgage, signed by the vendee, is not necessary. *Clark's ex'rs.* vs. *Morgan.* 269

SLAVE.

1 A negro will be presumed free, though purchased as a slave, in a country in which slavery is not tolerated, unless he be proven to have been before in one in which it is. *Forsyth & al.* vs. *Nash.* 385

2 When the person who claims the defendant as a slave has proven his slavery, he cannot contest the plaintiff's title. *Trudeau's ex'rs.* vs. *Robinette.* 577

3 The deed of emancipation of a slave, under thirty years of age, is void. *Same case.* *id.*

STIPULATION.

Avails an absent, in whose favor it is made. *Smith* vs. *Kemper.* 409

SURETIES.

1 Those of an auctioneer are not liable, if goods in his hands, and on which he had a lien, on the termination of his office, are afterwards sold under a new commission, and he fail to account for the proceeds. *Claiborne* vs. *Debon & al.* 534

2 A joint suit may be brought against the principal and surety. *Bernard & al.* vs. *Curtis & al.* 214

TUTOR,

By nature, retains the tutorship when he removes out of the state with his ward. *Lacroix* vs. *Boisblanc.* 715

VACANT ESTATE.

1 He who opposes a curator's appointment, may shew the applicant is not domiciliated, and possesses no property in the state; and that he is a resident, possesses property in the state, is a large creditor of the estate, and was an old friend of the deceased. *Rust* vs. *Randolph.* 370

2 An appeal lies to the district court, and thence to the supreme court, on the appointment of a curator. *Same case.* *id.*

3 On such an appeal, the district court ought to try the cause *de novo*. *Same case*. 370
4 The curator may be sued without his sureties being joined. *Denis* vs. *Cordeviella*. 654
5 The money recovered from him is not to be paid to the attorney of the absent heirs, but into the treasury. *Same case*. *id.*

WITNESS.

1 The defendant's co-trespasser may be a witness for him. *Harang* vs. *Dauphin*. 27
2 An agent, entitled to a commission, may be a witness for his principal. *Caune* vs. *Sagory*. 81
3 A witness testifying against his interest, is not to be rejected. *White & al.* vs. *Holsten & al.* 471
4 A witness, whose deposition has been taken by one of the parties, may be examined by the other. *Bayon* vs. *Mollere* & *al.* 621
5 One who never saw the party write, but has frequently received letters from him, may prove his hand-writing. *Clay's syndics* vs. *Kirkland*. 405
6 The ceding debtor cannot be used as a witness by his syndics. *Same case*. *id.*